

SPORTS AND ESPORTS AS CONDUITS FOR GAMBLING: THE LEGAL REGULATION OF GAMBLING ADVERTISING IN AUSTRALIA

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Australians are some of the highest consumers of gambling products in the world and, per capita, their resultant losses may also be among the highest. This article considers the Australian legal regulatory landscapes that govern both sports (including Esports) gambling and, specifically, the advertising of sports gambling products. Although gambling in Australia is highly regulated, this article reveals significant gaps that create opportunities for gambling service providers to target consumers of sport (especially young people) to market their products and further embed gambling into sports culture. Ultimately, the article offers policy-based legal reforms to curb the enticement of young people into gambling. These reforms include introducing legislation banning the advertisement of gambling service providers: (1) on public roads, public transport and near schools; (2) after 8:30pm during breaks in live broadcast sporting events; (3) during highlights, replays or on-demand sporting events (including via internet streaming); and (4), via signage (including electronic signage), branding, or promotion as part of sponsoring a sporting event, club, or venue. In the light of the June 2023 Senate Committee Report on online gambling, the possibility of more wide-ranging reforms, including a ban on all advertisements of online gambling on sport, may even be achievable. That particular reform is one that we would support.

I INTRODUCTION

Gambling, and the advertising of gambling, is ubiquitous in Australian society.¹ Australians are some of the highest consumers of gambling products in the world and, per capita, their resultant losses may also be among the highest.² The

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¹ Noting that three-quarters of Australian children aged 8–16 consider that betting on sport is ‘normal’: Hannah Pitt et al, “‘It’s Just Everywhere!’ Children and Parents Discuss the Marketing of Sports Wagering in Australia” (2016) 40(5) *Australian and New Zealand Journal of Public Health* 483.

² Lenny Roth, *Gambling: An Update* (Research Paper No 1, Parliamentary Research Service, Parliament of New South Wales, March 2020) 2, citing Stephen Letts, ‘Chart of the Day: Are Australians the World’s Biggest Gambling Losers? You Can Bet on it’, ABC News (online, 20

availability of gambling products via digital platforms, including mobile phones, has meant both greater access to, and popularity of, gambling, especially among young people.³ Young people are being targeted as consumers of online (or ‘interactive’) gambling,⁴ and the attraction to sports betting (or ‘wagering’)⁵ has grown significantly. For example, between 2015 and 2018, participation among the Australian population in sports betting, excluding racing, grew from 3.3 to 4.6 per cent.⁶ As an overall percentage of gambling expenditure, betting on sports, including racing, is the fastest growing form of gambling.⁷ The focus of much recent marketing of gambling products is on sports betting and, importantly, the association between sport (including the watching of sport) and betting continues to grow.⁸

Gambling — including the psychology of gambling, addiction, and its social harms — is widely researched. There is some evidence that such harms may arise even from low to moderate levels of gambling.⁹ There is, however, relatively little

November 2018) <<https://www.abc.net.au/news/2018-11-20/australians-worlds-biggest-gambling-losers/104955666>>. Australians’ losses were USD958 per capita in 2017, compared with next highest, Hong Kong, at USD768. Interestingly, the UK, which has a reputation as a gambling culture, had only USD346 losses per person.

³ In Australia, see, eg, Emily G Deans et al, ‘The Influence of Marketing on the Sports Betting Attitudes and Consumption Behaviours of Young Men: Implications for Harm Reduction and Prevention Strategies’ (2017) 14(1) *Harm Reduction Journal* 5; Megan Freund et al, ‘The Prevalence and Correlates of Gambling in Australian Secondary Schools’ (2022) 38(4) *Journal of Gambling Studies* 1173, 1175. In the UK, see, eg, Darragh McGee, ‘On the Normalisation of Online Sports Gambling Among Young Adult Men in the UK: A Public Health Perspective’ (2020) 184(15) *Public Health* 89–94. Due to the absence of reliable statistics, it is difficult to precisely quantify such increases.

⁴ See, eg, Evaristo Barrera-Algarín and María Josefa Vázquez-Fernández, ‘The Rise of Online Sports Betting, Its Fallout, and the Onset of a New Profile in Gambling Disorder: Young People’ (2021) 39(3) *Journal of Addictive Diseases*. This study noted two key factors in this trend: the ‘boom in advertising’ and ease of access via digital technologies.

⁵ We use the terms interchangeably. Section 4 of the *Interactive Gambling Act 2001* (Cth) (‘IGA’), discussed further below, defines ‘bet’ to include wagering, and defines ‘wagering service’ as ‘gambling services’, encompassed by paras (a) and (b) of the definition of the latter term, both paras of which themselves refer to ‘bets’. In short, neither ‘betting’ nor ‘wagering’ are defined except by reference to each other.

⁶ Australian Institute of Health and Welfare, ‘Gambling in Australia’, *Australian Institute of Health and Welfare* (Web Page, 16 September 2021) <<https://www.aihw.gov.au/reports/australias-welfare/gambling>>. This is despite slight decreases in participation in all forms of gambling. In Victoria, sports betting losses rose by around 50 per cent in five years to 2018–19, though off a low base. According to internal figures from Sportsbet, a major gambling service company, sports gambling revenue was up to \$8.4 billion in 2022, a doubling in five years: see Matthew Elmas, ‘Push to Outlaw Betting Ads as Big Players Take Billions from Punters’, *New Daily* (online, 27 March 2023) <<https://thenewdaily.com.au/finance/finance-news/2023/03/27/gambling-sportsbet-tab/>>.

⁷ See Queensland Government Statistician’s Office, Queensland Treasury, ‘Australian Gambling Statistics, 37th edition, 1994–95 to 2019–20’ (19 December 2022) 267. In the 20 years between 2000–01 and 2019–20, sports betting expenditure as a percentage of overall gambling expenditure rose from 12.8 per cent to 21.5 per cent. These figures include racing, a long-established focus of wagering. It must be noted, however, that these figures are stated to be ‘incomplete’. Gaming machines are still the most pervasive form of gambling.

⁸ The perception of the predominance of sports-betting advertisements may also be enhanced by the fact that there are significant restrictions on advertising gaming machines (as noted at n 81 below).

⁹ Deans et al (n 3) 2, citing Matthew Browne et al, *Assessing Gambling-Related Harm in Victoria: A Public Health Perspective* (Report, April 2016). Noting that, annually, approximately 400,000 Australians experience, or are at moderate risk of experiencing, gambling-related harm.

academic writing focussed on the laws regulating gambling, especially in Australia.¹⁰ This article considers the Australian legal regulatory landscapes that govern both sports gambling and the advertising of sports gambling products. The focus is on sports betting (including Esports) — a smaller subset of gambling in Australia, which is dominated by gaming machines ('poker' machines or 'pokies'). The reason for this focus on sports gambling as opposed to gambling more generally is fourfold. As is explained further below, first, sports betting has significant appeal to young people and its online availability makes it readily accessible, including to minors. Secondly, the problem of sports being used as conduits for introducing gambling to new markets has been widely acknowledged. Thirdly, the link between sports and gambling has the potential to exacerbate gambling harms. And fourthly, the 2018 regulations curbing gambling advertising,¹¹ particularly during live sports events, have failed to counter the marketing and growth of sports betting and the increasing association of sport with gambling on its outcomes.¹² We outline these regulations in Part IV C of this article.

The gambling industry is highly regulated and there are substantial limitations on when and how gambling products can be marketed. There are, however, significant gaps in those limitations, which allow gambling service providers to target consumers of sport to market their products and further embed gambling into sports culture. This article proposes reforms to minimise the impact of gambling, especially on young people. We note the difficulty of achieving any reforms against industry resistance to further regulation. In 2018, Hancock, Ralph and Martino claimed that, as in other harm producing industries such as tobacco,

[t]he influence of powerful vested interests over policy processes [in the gambling industry] has posed barriers to the implementation of harm prevention public policies in industries known for potential harms.¹³

This article is both timely and topical as, in June 2023, while this article was under review, the findings from a Federal Parliamentary Inquiry into online gambling

¹⁰ One exception, which provides an excellent overview of the Australian regulatory landscape, is Jamie Nettleton, Shanna Protic Dib and Brodie Campbell, 'Australia' in Carl Rohsler (ed), *The Gambling Law Review* (Law Business Research, 6th ed, 2021) 63 ('Australia'). See also Kristy Eulenstein, 'Legal Consciousness and The Australian "Interactive Gambling Act" — The Success of Expert Bureaucrats in Transnational Networks' [2018] 24 *Australian International Law Journal* 155. Gambling law appears to be a much more significant focus of academic writing in the United States: see, eg, I Nelson Rose and Martin D Owens Jr, *Internet Gaming Law* (Mary Ann Liebert, 2nd ed, 2009).

¹¹ These took the form of changes to commercial television and radio industry codes, and amendments contained in the *Communications Legislation Amendment (Online Content Services and Other Measures) Act 2018* (Cth) relating to notes 30–31.

¹² See, eg, Freund et al (n 3) and text to notes 30–31.

¹³ Linda Hancock, Natalie Ralph and Florentine Petronella Martino, 'Applying Corporate Political Activity (CPA) Analysis to Australian Gambling Industry Submissions against Regulation of Television Sports Betting Advertising' (2018) 13(10) *PLoS ONE* 1–21, 2. This study considers gambling industry resistance to advertising reforms prior to the 2018 reforms: see below Part IV.

and its impacts on those who experience gambling harm were released.¹⁴ The Inquiry received 161 submissions from a wide range of stakeholders, and the final report, *You Win Some, You Lose More* (the ‘2023 Senate Committee Online Gambling Report’) makes 31 recommendations targeting online gambling (and simulated gambling among children), including a ban on all forms advertising for online gambling.¹⁵

This article undertakes a close inspection of the specific rules within the overall regulatory framework that govern the promotion and marketing of gambling products, highlighting significant gaps. It engages with the wider debate about the adverse impact of all forms of gambling on Australian society and resistance by industry to gambling law reforms,¹⁶ as well as specific concerns that have been raised about sports betting and the close relationship between the gambling industry and sporting bodies.¹⁷

The article proceeds as follows. First, it provides background to the increasing use of online platforms to gamble, the links between sports and sports gambling, and the growing participation in gambling, especially by young people. It then provides an overview of the general regulatory scheme that governs gambling in Australia, before focusing on the specific rules that govern the promotion and marketing of gambling products. Although the legal regulations seem, on their face, strict, gambling products, particularly sports wagering, have been able to forge strong links with popular sports. The article then considers reform options, including banning sports sponsorship by gambling operators or advertising on sports grounds, and banning all advertising (as was achieved in relation to the tobacco industry), while noting the pervasive political and economic clout of gambling industries and their resistance to reforms. (Such bans in relation to gambling are not unprecedented; for example, in 2019, Italy

¹⁴ Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *You Win Some, You Lose Some: Online Gambling and Its Impacts on Those Experiencing Gambling Harm* (Report, June 2023) (‘2023 Senate Committee Online Gambling Report’).

¹⁵ *Ibid* 6.99 [5.148]–[5.145]. Stakeholders who made submissions included academics, the Australian Football League, state governments, Responsible Wagering Australia, Australian Psychological Society, Australian Banking Association, Australian Medical Association, Sportsbet, and Tabcorp.

¹⁶ For example, poker machine reform was a major issue in the 2023 New South Wales state election: see, eg, Jennifer Hewett, ‘Perrottet Takes on the Pokies Lobby — but There’s a Catch’, *Australian Financial Review* (online, 6 February 2023 <<https://www.afr.com/companies/games-and-wagering/perrottet-takes-on-the-pokies-lobby-but-there-s-a-catch-20230206-p5ci9a?>>).

¹⁷ See, eg, Elias Clure, ‘Is the AFL Too Reliant on Its Partnerships with Sports Betting Companies?’, 7.30 (ABC News, 6 March 2023) <<https://www.abc.net.au/news/2023-03-06/is-the-afl-too-reliant-on-its-partnerships-with/102060624>> (‘7.30 Report’). See also Henry Belot, ‘AFL to Stick with Gambling Ads Despite More Than 75 per cent of Fans Supporting Bans’, *The Guardian Australia* (online, 16 March 2023) <<https://www.theguardian.com/australia-news/2023/mar/16/afl-to-stick-with-gambling-ads-despite-more-than-75-of-fans-supporting-bans>> (‘AFL’); Henry Belot, ‘Australian TV Broadcasters Claim More Gambling Ad Restrictions Could Cut Free Sport Coverage’, *The Guardian Australia* (online, 10 February 2023) <<https://www.theguardian.com/australia-news/2023/feb/10/australian-tv-broadcasters-claim-more-gambling-ad-restrictions-could-cut-free-sport-coverage>> (‘Australian TV broadcasters’).

imposed a blanket ban on domestic gambling advertising.)¹⁸ The article concludes by suggesting specific reforms to curb the harms caused by sports gambling through the advertisement of gambling service providers.

II BACKGROUND

A Sports, Gambling and Advertising

There is evidence that the accessibility of gambling services via digital platforms and their widespread advertising have led to rapid increases in both the popularity and volume of sports betting. Although gambling has long been a highly regulated industry,¹⁹ as McGee observes (in a United Kingdom study), the “gamblification” of sport has given rise to a global industry promoting gambling as a knowledge-based, risk-free leisure activity.²⁰

In Australia, it has been argued that ‘sports betting has become closely aligned with young men’s sports fan rituals’, and studies have highlighted ‘the role that marketing strategies may play in stimulating the risky consumption of sports betting products’.²¹ A consequence of these various marketing techniques is that the socialisation of gambling as a normal part of sport is ubiquitous and is leading to more gambling disorders manifesting among consumers, especially young people. Sports gambling is considered a ‘gateway for gambling-related harms’, and, as McGee notes, sports betting via digital platforms (mobile phone apps predominantly) has, among young men, become a normalised aspect of being a sports fan.²²

Research shows that most young people engage in some form of gambling before the age of 18,²³ that gambling participation among young people is

¹⁸ See Vincenzo Giuffré, ‘Do’s and Don’ts on the Italian Gambling Advertising Ban in Legal Design Style’ *GamingTechLaw* (Web Page, 17 February 2022) <<https://www.gamingtechlaw.com/2022/02/italian-gambling-advertising-ban-legal-design/>>.

¹⁹ The problem, as Craig has noted, is that ‘one of society’s most tightly regulated activities, gambling, intersects with its least regulated communications medium, the Internet’: Aaron Craig, ‘Gambling on the Internet’ [1998] (Spring) *Computer Law Review and Technology Journal* 61, 61.

²⁰ McGee (n 3) 89.

²¹ Deans et al (n 3) 2 (citations omitted).

²² McGee (n 3) 92. One study has shown that the rate of online problem gambling is up to three times higher than it is for other types of gambling: Nerilee Hing et al, *Interactive Gambling* (Report, March 2014) 280. On the risk factors for gambling problems associated with different forms of gambling, see Nerilee Hing et al, ‘Risk Factors for Gambling Problems on Online Electronic Gaming Machines, Race Betting and Sports Betting’ (2017) 8 *Frontiers in Psychology* 779.

²³ For a useful overview of recent research citing a number of Australian and overseas studies, see Samantha L Thomas et al, ‘Young People’s Awareness of the Timing and Placement of Gambling Advertising on Traditional and Social Media Platforms: A Study of 11–16-year-olds in Australia’ (2018) 15(1) *Harm Reduction Journal* 51, 2 (‘Young People’s Awareness’). For a study suggesting that the range of under 18s who have ever gambled is lower (31 per cent), see Freund et al (n 3).

dramatically increasing (at least in the United Kingdom),²⁴ and that the percentages of those under age 25 in Australia who could be classified as ‘problem’ or as ‘at-risk’ gamblers are alarmingly high (5 per cent and 16 per cent respectively).²⁵

A 2017 study of the impact of sports gambling marketing on young Australian men revealed that advertising for sports betting was perceived to be everywhere, including during live sports broadcasts, sporting programmes, previews and panel discussion shows.²⁶ The study also highlighted the use of inducements to encourage the opening of new accounts or by means of ‘bonuses’ for betting as encouraging riskier behaviour.²⁷ The sponsorship of specific sporting clubs was also viewed by participants as integrating gambling into the sport itself. The study concluded that:

For the young men in our study, the emotional investment in the game, and the ways in which they ‘consume sport’, for the most part, now included betting on the match. In aligning gambling with culturally valued entities, and pushing numerous incentivisation strategies through ubiquitous marketing channels, the gambling industry is influencing not only individuals’ gambling risk perception but also the level to which they engage in gambling.²⁸

We note that, at this stage, while the 2017 study was concerned with gambling by young men, there is evidence that women are also a growing market for online gambling.²⁹

Since the 2017 study, Australian Commonwealth law has banned gambling advertisements promoting ‘live’ betting odds and commentators discussing odds during most live sporting broadcasts. Commonwealth law also prohibits some types of inducements, specifically bonuses to open new accounts. However, generic advertising during breaks in live sporting broadcasts, along with other marketing techniques, such as sponsorships and advertising at venues and on venue infrastructure, continue to play a significant role in the ubiquity of the marketing of gambling products.³⁰ A study of Australian secondary students has

²⁴ Thomas et al, ‘Young People’s Awareness’ (n 23) 2, citing UK Gambling Commission, *Gambling Participation in 2016: Behaviour, Awareness and Attitudes* (Annual Report, February 2017).

²⁵ Thomas et al, ‘Young People’s Awareness’ (n 23), citing Nola Purdie et al, *Gambling Research Australia, Gambling and Young People in Australia* (Report, August 2011). Thomas et al note another study that found that 60 per cent of young people wanted to try gambling, including 35 per cent sports betting.

²⁶ Deans et al (n 3) 5–6.

²⁷ *Ibid* 7.

²⁸ *Ibid* 10. On the normalisation of sports betting, including risky betting, via marketing techniques in Britain and Spain, see Hibai Lopez-Gonzalez, Frederic Guerrero-Solé and Mark D Griffiths, ‘A Content Analysis of How “Normal” Sports Betting Behaviour is Represented in Gambling Advertising’ (2018) 26(3) *Addiction Research & Theory* 238.

²⁹ See Simone McCarthy et al, ‘Women’s Gambling Behaviour, Product Preferences, and Perceptions of Product Harm: Differences by Age and Gambling Risk Status’ (2018) 15(1) *Harm Reduction Journal* 22.

³⁰ See the discussion Part V below. Thomas et al, ‘Young People’s Awareness’ (n 23) conducted their research after these changes and their study of 11–16-year-old basketball fans found widespread awareness of gambling promotion through various media.

shown that seeing a greater number of gambling advertisements is a factor that increases the likelihood of their gambling and the risk of problem gambling.³¹

The sponsorship of sports bodies or clubs by gambling companies is another concern. The 2023 *Senate Committee Online Gambling Report* noted that the Australian Football League ('AFL') and the National Rugby League ('NRL') are both 'significantly leveraged by gambling interests and that a loss of gambling revenue would affect their operations'.³² Indeed, the recommendation in the Report that there be a comprehensive ban on all forms of advertisement is to be introduced in four phases, over three years, to allow sporting organisations (as well as commercial television and radio) to find alternative revenue.³³

Sponsoring sports bodies is a particularly effective way in which gambling companies can positively influence consumers, especially children. It can create or reinforce a child's association between their favoured sports or clubs and socially detrimental products and brands, such as alcohol and junk food, and, indeed, gambling products. 'Unhealthy commodity' products or brands, as Bestman et al describe them, become 'normalised as part of everyday life' as sponsorship is treated less sceptically by consumers than other forms of marketing.³⁴

Another means of product promotion is 'affiliate marketing', whereby third-party companies or individuals are financially rewarded for directing custom towards a specific product or brand. Such embedded marketing techniques may be particularly influential on users of social media as they may not be identified as 'advertising'. For example, social media 'tipsters' giving sporting tips may not disclose that they have a relationship with gambling companies.³⁵ We note further below some legal provisions that, in part, regulate such techniques by Australian advertisers and gambling service providers, but we are not aware of any Australian studies as to the use of such techniques.

Similarly, outside of Australia, social media (such as X, formerly Twitter) is increasingly being used as a platform for gambling advertising. For example, a UK study showed that many such advertisements do not comply with legal regulatory requirements (such as not targeting children).³⁶ The same study also found that Esports gambling advertising was 'markedly different' to that of traditional

³¹ Freund et al (n 3) 1187–8.

³² Evidence to Senate Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 4 April 2023, 30–1, 33 (Gillon McLachlan, AFL); 32 (Andrew Abdo, NRL).

³³ 2023 *Senate Committee Online Gambling Report* (n 14) 120–7.

³⁴ Amy Bestman et al, 'Children's Implicit Recall of Junk Food, Alcohol and Gambling Sponsorship in Australian Sport' (2015) 15(1) *BMC Public Health* 1022, 1029.

³⁵ See, eg, Scott Houghton, Mark Moss and Emma Casey, 'Affiliate Marketing of Sports Betting — A Cause for Concern?' (2020) 20(2) *International Gambling Studies* 240. The authors stress (at 243) the need for further research on how gamblers respond to affiliates that may be promoting expert advice, whilst simultaneously being rewarded for directing gamblers to providers.

³⁶ See Raffaello Rossi et al, "'Get a £10 Free Bet Every Week!' — Gambling Advertising on Twitter: Volume, Content, Followers, Engagement, and Regulatory Compliance' (2021) 40(4) *Journal of Public Health & Marketing* 487.

sports and had a particularly strong appeal to children. It should be noted, however, that, in Australia, direct marketing of gambling via email, text messages, and the like, is not generally lawful without the consent of the customer (see further below).³⁷ But again, there is limited research on the ‘nature and extent’ of gambling advertising on social media platforms in Australia.³⁸ This lack of research includes the extent of gambling advertising by overseas operators offering illegal gambling services.

B Esports, ‘Crypto Casinos’ and a ‘Gambling Boom’

In July 2021, WIRED magazine published an article in which it claimed (among other things) that ‘Twitch’, a livestreaming gaming service was, at that time, ‘in the middle of a gambling boom’, with gamblers playing in ‘crypto casinos’ by purchasing digital currencies such as Bitcoin and Ethereum. Crucially, the article exposed the practice of online cryptocurrency casinos sponsoring top US streamers to play in online casinos via Twitch.³⁹ For example, it was reported that ‘Trainwrecks’, a gaming streamer with 1.5 million followers, would livestream his play in an online cryptocurrency casino, ‘Stake.com’, to audiences of 25,000 viewers. One of the issues was that the Stake.com was unlicensed (in the US), and so players would need to innovate to overcome any denial of access to the website by US authorities, such as using a VPN (virtual private network), or physically relocating to a country where the practice was legal.

Chief among the concerns raised in the 2021 WIRED article was access to livestreams by young people and, relatedly, the disparate approaches or policies of livestreaming services to ensuring compliance with gambling laws. It was highlighted that Twitch’s competitors, ‘YouTube’ and ‘Facebook Gaming’, prohibited the streaming of online gambling sites that have not been previously reviewed. Further, the article suggested that Twitch did not have an age limit on, for example, ‘slots’. The very purpose of age limits on some games (such as ‘slots’) was, of course, to prevent young people viewing the livestreaming of gambling-related content.

Undeniably, the promotion of online gambling to young audiences is concerning, particularly in the light of a wealth of research identifying the social

³⁷ See, eg, *Betting and Racing Act 1998* (NSW) s 33HA; *Wagering Act 1998* (Qld) s 228D; *Interactive Gambling (Player Protection) Act 1998* (Qld) s 166D.

³⁸ See Thomas et al, ‘Young People’s Awareness’ (n 23) 2–3. However, the authors also reported that 55 per cent of the youth interviewed in the study recalled seeing gambling advertising on social media platforms: at 9.

³⁹ Cecilia D’Anastasio, ‘Twitch Streamers Rake in Millions With a Shady Crypto Gambling Boom’, *Wired* (Web Page, 13 July 2021) <<https://www.wired.com/story/twitch-streamers-crypto-gambling-boom/>>. On a different aspect of streaming, see Brett Abarbanel and Mark R Johnson, ‘Gambling Engagement Mechanisms in Twitch Live Streaming’ (2020) 20(3) *International Gambling Studies* 393. The authors argue that many features of streaming incorporate mechanisms that could constitute gambling and therefore be subject to gambling regulation.

harms caused by gambling. The use of electronic banking or cryptocurrencies — intangibles — may detach a player from the full appreciation of the value of their stake or bet, ever increasing a sense of ‘safety’ in the face of real losses. Concerned that simulated gambling in interactive gaming can normalise gambling, the 2023 *Senate Committee Online Gambling Report* recommended improvements to age-based guidance for parents regarding interactive gaming.⁴⁰ As part of this, the Senate Committee recommended that a consistent National Classification (age-rating) Scheme be applied across Google Play, Apple App, and Steam stores.⁴¹

III GAMBLING LAWS IN AUSTRALIA: OVERVIEW

A *What is Gambling?*

There is considerable case law on the definition of gambling and yet the meaning of the term remains unsettled.⁴² For current purposes, we simply adopt a basic definition, consistent with case law, that gambling involves ‘the staking of money or other valuable consideration ... on the outcome of an event determined in whole, or in part, by chance and with the objective of winning a prize.’⁴³ There are more specific definitions adopted in statutes for legislative purposes, without necessarily defining the overarching concept of gambling (so that common law definitions still hold sway). For example, the definition of a ‘gambling service game’ under s 4 of the *Interactive Gambling Act 2001* (Cth) (‘IGA’), which Act is discussed further below, requires that a game is played for money ‘or anything else of value’.

The basic definition of gambling (above) does not resolve difficult questions at the penumbra, such as, for example, whether ‘loot boxes’ in electronic games constitute gambling.⁴⁴ Loot boxes are virtual items purchased by players during some electronic games. The boxes are purchased with money or other consideration (such as cryptocurrencies, game tokens etc) without the player knowing the precise prizes contained in the loot boxes. As such, the purchase is

⁴⁰ Hancock, Ralph and Martino 13) 146.

⁴¹ See 2023 *Senate Committee Online Gambling Report* (n 14), Recommendations 27, 28, and 29.

⁴² See, eg, in the United States context, ch 1 and ch 2 of Rose and Owens (n 10). One classic definition is found in *Carlill v Carbolic Smoke Ball Company* [1892] 2 QB 484, 490–1 (Hawkins J). See also the Sackar J’s detailed discussion: *Lottoland Australia Pty Ltd v Australian Communications and Media Authority* [2019] NSWSC 1041, [87]–[106] (Sackar J) (‘*Lottoland Australia*’).

⁴³ Nettleton, Dib and Campbell ‘Australia’ (n 10) 63. The term is not defined in the *Interactive Gambling Act 2001* (Cth) (‘IGA’), which defines ‘gambling services’ inclusively by reference to a variety of other concepts that are not themselves further defined, such as ‘bets’. A ‘bet’ is merely defined as including a wager: s 4 (definition of ‘bet’).

⁴⁴ For an Australian perspective, see Jamie Nettleton, Joseph Abi-Hanna and Aleksandra Pasternacki, ‘Loot Boxes in Australia: Gaming or Gambling?’ (2020) 42(1) *Bulletin (Law Society of South Australia)* 18; Arvind Dixit and Robert Ceglia, ‘What’s in the Box? Overseas Developments Bring the Regulation of Loot Boxes into Focus’ (2021) 23(9) *Internet Law Bulletin* 175.

based on chance (or mixed chance and skill). It is not clear, however, whether the prizes offered by loot boxes can be monetised (that is, whether they are something of ‘value’).⁴⁵ If they are not, they do not fall within the scope of the IGA.

Indeed, following a Parliamentary Inquiry in 2018,⁴⁶ the Australian Government did not to regulate loot boxes as gambling.⁴⁷ This is despite the fact that loot boxes share considerable similarities with gaming machines (both electronic gaming machines (‘EGMs’) and physical), with usually no skill involved, and the ‘prizes’ being randomly generated and often accompanied by ‘psychological’ mechanisms intended to encourage such purchases.⁴⁸ The use of loot boxes has been associated with higher risks of both gambling activity and gambling-type problems in young people, including minors.⁴⁹ Interestingly, in 2022, Cartwright and Hyde argued for the regulation of loot boxes from a consumer law perspective, on the basis that they involve unfair commercial practices.⁵⁰ In some overseas jurisdictions (eg, Japan, United States, and China), recent responses to loot boxes have included the implementation of transparent odds.⁵¹

Equally problematic are the definitions of more precise concepts used in gambling legislation, such as distinctions between online games (which are prohibited under the IGA) and betting on an ‘event’ (which can legally be provided online in Australia as wagering that is ‘excluded’ from prohibition if provided by a licensed operator). As an example, in *Lottoland Australia Pty Ltd v Australian Communications and Media Authority*,⁵² Sackar J held that gambling in ‘Lotto’ pools, where the winning numbers were generated by reference to financial market indices, was not a ‘game’ and, therefore, not a ‘prohibited interactive gambling services’ within the meaning of s 5 of the IGA. Rather, due to the way in which the ‘Lotto’ was constructed, the player was betting on an ‘event’, and this

⁴⁵ Dixit and Ceglia (n 44) 176.

⁴⁶ Environment and Communications References Committee, Parliament of Australia, *Gaming Micro-Transactions for Chance-Based Items* (Report, November 2018).

⁴⁷ See Australian Government, *Response to the Senate Environment and Communications References Committee Report: Gaming Micro-Transactions for Chance-Based Items* (March 2019), which notes that research on the topic is still in its infancy: at 4.

⁴⁸ Dixit and Ceglia (n 44) 177.

⁴⁹ See, eg, Heather Wardle and David Zendle, ‘Loot Boxes, Gambling, and Problem Gambling Among Young People: Results from a Cross-Sectional Online Survey’ (2021) 24(4) *Cyberpsychology, Behaviour, and Social Networking* 267.

⁵⁰ Peter Cartwright and Richard Hyde, ‘Virtual Coercion and the Vulnerable Consumer: “Loot Boxes” as Aggressive Commercial Practices’ (2022) 42(4) *Legal Studies* 555.

⁵¹ See Department of Infrastructure, Transport, Regional Development, Communications and the Arts Submission No 104.1 to Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *You Win Some, You Lose Some: Online Gambling and Its Impacts on Those Experiencing Gambling Harm* (June 2023). See also Leon Y Xiao, Submission No 127.2.

⁵² *Lottoland Australia* (n 42) 1041 (Sackar J).

was, therefore, permitted as an ‘excluded wagering service’ within the meaning of s 8A of the IGA.⁵³

B *State and Territory Regulation*

The regulation of gambling services and operators in Australia is by means of State, Territory, and Commonwealth legislation. The web of regulation is complex and confusing. To give one example, in Queensland alone, there are seven extensive statutes regulating various forms of gambling (plus a further five statutes in relation to specific casino licence agreements), seven detailed regulations promulgated under those statutes, five sets of legally binding gaming rules and several service-specific Codes of Practice.⁵⁴ Many of these regulations contain similar provisions albeit applying in different contexts. This complexity of regulation makes it impossible to provide anything other than a snapshot of the relevant laws.

The *licensing* of gambling services providers — that is, the granting of licences to sell gambling products or to operate gambling premises — is controlled by state or territory governments. Once a licence is obtained to conduct gambling online or digitally by an operator, that licensee can operate throughout Australia.⁵⁵ Gambling *on premises*, including in casinos, is regulated by state or territory laws. The purchase of scratch lotteries and lotteries, the playing of physical gaming (poker or slot) machines, and casino-type games such as roulette and cards (eg, blackjack) are types of gambling activities that are still widely carried out on premises. However, on-premises gambling is of decreasing relevance in the context of sports betting and is not further considered in this article for this reason.⁵⁶

⁵³ That decision included consideration of amendments made immediately prior to the case by sch 1 of the *Interactive Gambling Amendment (Lottery Betting) Act 2018* (Cth): see *Lottoland Australia* (n 42) [78]–[80], [121]. The amendments prohibit betting on the outcomes of lotteries. The Northern Territory Government subsequently sought to alter the conditions of Lottoland’s licence to effectively shut down that part of their business: see *Lottoland (Australia) Pty Ltd v Minister for Racing, Gaming and Licensing* [2020] NTSC 65, granting an interlocutory injunction against the Minister’s actions. As at 30 August 2023, Lottoland was still offering those services (other than to South Australian residents): see <https://www.lottoland.com.au/>.

⁵⁴ For the full list, see Office of Liquor and Gaming Regulation, ‘OLGR Laws and Policies’ (Web Page, 27 July 2023) <<https://www.justice.qld.gov.au/about-us/services/liquor-gaming/laws-policies>>. The *Casino Gaming Rule* and *Wagering Rule 2010* are 366 and 224 pages long respectively. Similarly, New South Wales has eight statutes regulating gambling (excluding the *Gaming Machine Tax Act 2001* (NSW)) as well as numerous regulations and rules.

⁵⁵ See, eg, *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418 (‘*Betfair*’), on which see IV A below.

⁵⁶ Importantly, on-premise gambling products are not readily accessible by underage users, whereas online gambling products are.

C Commonwealth Legislation

In 2001, the Commonwealth, relying on its telecommunication powers,⁵⁷ enacted the *IGA* to regulate the provision of online and digital gambling products and services to Australian consumers (described in the legislation as ‘interactive’ gambling services). Further significant reforms to the *IGA* came into effect in 2017–18, including changes to increase the effectiveness of enforcement measures against overseas operators.⁵⁸

The *IGA* prohibits certain types of interactive gambling services altogether (such as gambling games) and it is an offence to provide such services to Australian customers (s 15). The approach of the *IGA* is to define ‘prohibited interactive gambling services’ as including all gambling services provided in the course of business via digital and electronic platforms (s 5(1)(b)) unless such a service is an ‘excluded gambling service’ (s 5(3)). An ‘excluded gambling service’ under the *IGA*, such as wagering (s 8A) and lotteries (s 8D), can be sold online or digitally, but only by an operator licensed under state or territory laws. Importantly, online betting on games of luck, such as gaming machine and casino-type games,⁵⁹ and instant online scratch lotteries, are prohibited and cannot be legally offered to Australian consumers (except, of course, free games, where no money or other consideration is gambled by the user).⁶⁰

Section 15 of the *IGA* makes it a criminal offence (subs (1)) to intentionally provide a prohibited interactive gambling service which has an ‘Australian-customer link’ (an Australian-customer link is established if a customer of the service is physically present in Australia).⁶¹ The offence is punishable by up to 5,000 penalty units (equivalent to \$1.375M in 2023).⁶² Further, s 15 makes the provision of a prohibited service with an Australian-customer link unlawful and subject to a civil penalty of 7,500 penalty units (equivalent of more than \$2.06M in 2023) (subs (2A)) and, contrastingly, does not require proof of intention (to provide the service). The latter civil penalty regime was introduced as part of the 2017 reforms to the *IGA* to enhance compliance (especially against overseas

⁵⁷ *Australian Constitution* s 51(v).

⁵⁸ For the background to those reforms, and their effectiveness, see generally Eulenstein (n 10). The key features of the reform package are set out at 161–2. See also Explanatory Memorandum, Interactive Gambling Amendment Bill 2016 (Cth).

⁵⁹ There is a limited exception in the *IGA* under which such games may be provided digitally on equipment made available at a particular place (i.e., physical premises) by a licensed service provider: *IGA* (n 43) s 8B.

⁶⁰ Inherent in all definitions of gambling is that the player must give consideration (something of value) to participate in the chance to win. See, eg, *IGA* (n 43) s 4 (definition of ‘gambling service’ para (e)). The *IGA* includes ‘bets’ under ‘gaming service’ without defining it, however. So, we suggest that it is lawful to create an ‘app’ which allows a user to play ‘pokies’ via their mobile phone, so long as the app does not require the user to pay to play.

⁶¹ See *IGA* (n 43) s 8.

⁶² Currently, a penalty unit is \$275: see *Crimes Act 1914* (Cth) pt 1A s 4AA(1); Attorney-General, *Notice of Indexation of the Penalty Unit Amount* (14 May 2020).

operators).⁶³ There will be no infringement of either subs (1) or subs (2A) if the person providing the service did not know, and ‘could not, with reasonable diligence, have ascertained’, that the service had Australian customers (subs 3).⁶⁴

Section 15AA establishes a similar regime of criminal offences and civil penalties for the provision of permitted gambling services without a licence. The ss 15 and 15AA criminal prohibitions and civil penalties apply both to licensed Australian and overseas providers of gambling products.

Of note, prior to the Commonwealth legislation, Queensland passed the *Interactive Gambling (Player Protection) Act 1998* (Qld).⁶⁵ In theory, the Queensland Act contemplates the licensing of operators to provide online gambling in casino-type games and EGMs (as well as other interactive gambling).⁶⁶ Since such games are prohibited under the *IGA* (Cth), that legislation takes precedence. Consequently, such games cannot be licensed to operate in Queensland either.⁶⁷ The Queensland legislation governs the licensing of operators providing other types of gambling services that can be legally provided under the *IGA*. It also has provisions dealing with advertising that replicate provisions in other Queensland legislation. Given its limited operation, the *Interactive Gambling (Player Protection) Act 1998* (Qld) will not be given any further treatment, although it highlights the complexity of the regulatory landscape of gambling in Australia.

D The Problem of Overseas Products and Their Marketing

Importantly, although interactive casino-type games are not the focus of this article, under the *IGA*, the use of prohibited gambling services by Australian users is not illegal (meaning, a person in Australia playing a prohibited electronic gambling game (eg, online slots) commits no offence). This fact is exploited by unlicensed operators or overseas licensed operators that may even target Australian audiences.⁶⁸

Despite attempts to strengthen enforcement and increase penalties against overseas product providers through the *Interactive Gambling Amendment Act 2017* (Cth), bans have proved problematic. The Australian Communication and Media Authority (‘ACMA’), which, alongside the Federal Police, enforces the *IGA*, can ask

⁶³ See *Interactive Gambling Amendment Act 2017* (Cth); Explanatory Memorandum, *Interactive Gambling Amendment Bill 2016* (Cth).

⁶⁴ The *IGA* sets out factors relevant to determining whether reasonable diligence could have ascertained an Australian link: see *IGA* (n 43) s 15A(4).

⁶⁵ Very similar legislation was also passed in the ACT: *Interactive Gambling Act 1998* (ACT). See also *Gambling Regulation Act 2003* (Vic).

⁶⁶ *Interactive Gambling (Player Protection) Act 1998* (Qld) s 4, 6.

⁶⁷ See, eg, ‘Interactive Gambling Licensing’, *Business Queensland* (Web Page) <<https://www.business.qld.gov.au/industries/hospitality-tourism-sport/liquor-gaming/gaming/interactive-gambling-licensing>>.

⁶⁸ See, eg, ‘Online Poker Australia. Best Gaming Sites for Beginner or Pro Players in Australia to Play Online Poker in 2023’, *Professional RakeBack* (Web Page) <<https://professionalrakeback.com/online-poker-australia>>. This site includes advice as to how to circumvent ISP blocks.

Australian ISP providers to block overseas gambling websites, and currently nearly 700 such sites are on the banned list.⁶⁹ Nonetheless, such bans can be easily circumvented.⁷⁰ New sites are constantly coming online, and access to such sites is readily available via phone apps that can be downloaded from mobile phone app stores. Both access to and use of such overseas and (under Australian law, at least) unregulated gambling websites may be an increasing problem, including the use of such online gambling games by minors, with recent studies suggesting a significant percentage of Australian gamblers access offshore gambling sites.⁷¹

Those who gamble using offshore sites are significantly more likely to be at moderate risk of developing gambling problems or of being problem gamblers, than domestic gamblers.⁷² Moreover, those who use offshore sites do so despite having concerns about the risks associated with such use (lack of consumer protection, unfairness, financial risk etc).⁷³ Indeed, there are clear warnings of these risks from Government regulators such as ACMA.⁷⁴ As noted above, the fact that the use of such services by Australian customers is not illegal is exploited by service providers deliberately targeting Australian audiences.

That said, in Australia, the increase in the availability in recent years of licensed (and subject to Australian regulation) online gambling providers, including the legalisation of online sports and race-betting services in a competitive market, has led to a substantial overall decline in the use of offshore gambling services,⁷⁵ — a trend that appears consistent with other jurisdictions.⁷⁶ Yet, there are difficulties in quantifying the offshore gambling market. A 2015

⁶⁹ This is up from around 400 a year ago. The current list of blocked gambling websites can be found on the Australian Communications and Media Authority ('ACMA') website: 'Blocked Gambling Websites', ACMA (Web Page, 26 July 2023) <<https://www.acma.gov.au/blocked-gambling-websites>>.

⁷⁰ For example, the authors tried to access two of the websites, picked at random, and although one was blocked, another redirected the search to another live online gambling site. See also *Professional RakeBack* (n 68).

⁷¹ See, eg, Sally M Gainsbury et al, 'Consumer Engagement with and Perceptions of Offshore Online Gambling Sites' (2017) 20(8) *New Media & Society* 2990 ('Consumer Engagement'). Importantly, this study predates 2018 amendments to the IGA that sought to enhance compliance by offshore websites. Cf Maria E Bellringer and Nick Garrett, 'Risk Factors for Increased Online Gambling during COVID-19 Lockdowns in New Zealand: A Longitudinal Study' (2021) 18(24) *International Journal of Environmental Research and Public Health* 12946 ('Factors'). This is a recent New Zealand study which noted that the use of (illegal) offshore gambling sites increased somewhat during Covid lockdowns in 2020–1, but that the percentage of gamblers gambling on offshore sites was still relatively low. The study in question did not include youth gamblers, however, since the participants were all 18 years and above in 2012. Anecdotally, one of the authors is aware of a number of examples of high school students gambling online on sports and on electronic gaming machines and casino-type games. See also Freund et al (n 3).

⁷² Gainsbury et al, 'Consumer Engagement' (n 71) 3003.

⁷³ Ibid 3006. For further on some of those risks, see Sally M Gainsbury, Brett Abarbanel and Alex Blaszczynski, 'Factors Influencing Internet Gamblers' Use of Offshore Online Gambling Sites: Policy Implications' (2018) 11(2) *Policy and Internet* 235, 238, 247 ('Factors').

⁷⁴ See 'Protect Yourself from Illegal Gambling Operators', ACMA (Web Page, 24 January 2022) <<https://www.acma.gov.au/protect-yourself-illegal-gambling-operators>>.

⁷⁵ Gainsbury, Abarbanel and Blaszczynski 'Factors' (n 73) 238.

⁷⁶ See *ibid*, the authors noting, however, the difficulty in quantifying the size of the offshore gambling market. Further, most survey respondents in the study were, in fact, offshore gamblers.

government review cited two vastly different estimates as to the money gambled by Australians on sports wagering (excluding EGMs and casino-type games) with overseas providers: nearly \$64 million according to one report and \$400 million according to another.⁷⁷

Reforms introduced in 2017 to the IGA to enhance compliance with Australian laws against overseas operators appear to have had some success. ACMA has used networks with overseas regulators, which has led to some overseas *licensed* operators from either withdrawing their services from Australian customers or seeking Australian licences to provide permitted services in Australia.⁷⁸ Such actions, however, may merely increase the market share of less scrupulous offshore operators (eg, ones that are unlicensed, or that are licensed in countries with lax regulatory regimes), particularly ones operating in the sphere of EGMs and casino-type games, given that these cannot be legally provided in Australia even with a license. It is likely that the offshore market for gambling products that are not legally available in Australia will increase.

Nonetheless, in the context of sports betting, gambling services to Australian consumers are still predominantly provided by licensed and regulated operators, although Australian gamblers are also clearly using offshore providers for sports betting and betting on racing etc.⁷⁹ And, most importantly, in relation to such offshore gambling providers, the domestic regulatory regimes will not be readily enforceable against offshore providers of gambling products. This means that the restrictions noted below — for example, on the types of inducements that can be legally offered, or on the direct marketing of services, as well as the regulation of advertising standards, and the placement and target audience etc, of the advertising and marketing of products — will prove ineffective against such operators. The 2023 *Senate Committee Online Gambling Report* considered the problem of illegal offshore gambling and recommended better resources to both quickly and effectively block offshore gambling websites, blocking bank transactions to known illegal operators (with the cooperation of Australian banks), and stronger sanctions for illegal operators.⁸⁰

We turn now to the crux of the article — that is, the specific laws and regulations that govern the advertising of gambling in Australia.

⁷⁷ Barry O'Farrell, Department of Social Services, Parliament of Australia, *Review of Illegal Offshore Wagering* (Report, 18 December 2015) 19.

⁷⁸ See Eulenstein (n 10) 166–7, who also discusses the ineffectiveness of the IGA in enforcing restrictions against overseas operators prior to those reforms.

⁷⁹ Gainsbury et al, 'Consumer Engagement' (n 71) 2996.

⁸⁰ See (n 14) 2.152.

IV GAMBLING ADVERTISING LAWS IN AUSTRALIA

A Overview

The law governing the *advertising* of gambling is also a complex mix of state, territory, and Commonwealth laws, as well as industry self-regulation. Specific state laws, for example, prohibit any advertising of unauthorised gambling products,⁸¹ prohibit the advertising of specific gambling products such as gaming machines,⁸² or both. Other State laws are generic in setting standards for advertising and some provisions reflect already existing consumer laws. For example, s 210 of the *Wagering Act 1998* (Qld) requires that the advertising of wagering is not ‘indecent, offensive, false or misleading’.⁸³ Some states and territories also have codes of practice that include rules on advertising. That said, those rules tend to be quite generic and largely replicate consumer laws and legislation similar to the above mentioned s 210 of the *Wagering Act 1998* (Qld), such as precluding false or misleading advertising — generally, or specifically — in relation to betting odds and the chances of winning.⁸⁴ Other code provisions prohibit advertisements targeting minors, for example.⁸⁵ These codes are of limited impact on advertising during sports, which is the subject of the Commonwealth regulations considered in this Part.

Some States ban gambling advertising at specific locations and venues. In Victoria, for example, the advertisement of gambling is banned on public transport, public roads, and near schools.⁸⁶ Certainly, as will be seen below, such laws could have a significant impact in the context of sport if they extended to sports venues, which are not presently subject to restrictions.

For our purposes, as most advertising for sports (including Esports) betting products occurs while broadcasting (free-to-air and subscription television and radio), or by means of the internet or digitally, it is therefore largely subject to Commonwealth regulation. To the extent that State and Territory laws regulating gambling advertising are inconsistent with Commonwealth legislation (generally

⁸¹ See, eg, *Gambling Regulation Act 2003* (Vic) s 2.2.8; *Gaming and Wagering Commission Act 1988* (WA) s 43A.

⁸² See, eg, *Gambling Regulation Act 2003* (Vic) ch 3 pt 5 div 4.

⁸³ The same prohibition is duplicated in Queensland: *Gaming Machine Act 1991* (Qld) s 229. See also *Betting and Racing Act 1998* (NSW) s 33H(2)(c); *Gaming and Wagering Commission Regulation 1988* (WA) reg 43(2)(c).

⁸⁴ See, eg, Department of Industry, Tourism and Trade (NT), ‘NT Code of Practice for Responsible Gambling 2022’ (2022) 10, Practice 8; Department of Justice and Attorney-General (Qld), ‘Queensland Responsible Gambling: Code of Practice’ (2015) 6–7, Practice 6; Attorney-General’s Department (SA), ‘Authorised Betting Operations Gambling Code of Practice’ (2021) [9]–[26].

⁸⁵ Specific manuals under some of these codes, targeted at particular gambling sectors, add little to these restrictions, generally only restating the generic practices for specific actors and contexts. See, eg, Department of Industry, Tourism and Trade (NT), ‘NT Code of Practice for Responsible Gambling Online 2019’ (2019) 14–15, Practice 8; Department of Justice and Attorney-General (Qld), ‘Queensland Responsible Gambling Resource Manual: Racing’ 19–21 [6.1]–[6.13], Practice 6.

⁸⁶ *Gambling Regulation Act 2003* (Vic) s 4.7.1.

they would not be so, as they typically operate in tandem with those laws),⁸⁷ Commonwealth laws prevail.

Previously, the capacity to offer (and, therefore, advertise) gambling services in a state was significantly restricted by state and territory laws, thereby limiting competition in the market by interstate operators. For example, a Queensland licensed operator could not operate in New South Wales. The effect of these laws was to preserve state-based monopolies. However, they were struck down by the High Court's 2008 decision in *Betfair Pty Limited v Western Australia* ('*Betfair*'),⁸⁸ as the prohibitions infringed the constitutional guarantee of 'absolutely' free interstate trade, commerce and intercourse under s 92 of the *Australian Constitution*. The *Betfair* decision opened the market to multiple providers licensed in other states or territories.⁸⁹ The sudden increase in licensed operators competing against each other led to a surge in advertising across multiple media platforms, including during broadcasts of sporting events. At the time (circa 2008), there were no Commonwealth restrictions on gambling promotions during sports broadcasts.

B '*Publishing*' vs '*Broadcasting*'

Under part 7A of the IGA, it is an offence to advertise any 'designated interactive gambling service' (as defined in s 61BA IGA) which, in essence, is comprised of either any prohibited gambling services, or any regulated gambling services being offered by an unlicensed service provider (s15AA IGA). Part 7A is, however, both lengthy and detailed, and there are numerous exceptions and qualifications to the general prohibition on advertising-prohibited gambling services. Crucially, part 7A draws a distinction between *publishing* an advertisement, which is defined very widely in s 61CA, but which meaning excludes *broadcasting* (delivering television and radio programs to receivers) and *datacasting* (s 61CB). Broadcasting does not include programs delivered via internet streaming (visual or audio),⁹⁰ and, so, such programs would therefore fall under the broad definition of publication.⁹¹

⁸⁷ See, eg, *Betting and Racing Act 1998* (NSW) s 30(3). Under the Act, it is an offence to provide access to unlicensed wagering operations or information about such operations via the internet, online communications or subscription television. Such a state offence is clearly consistent with offences under the IGA. See also s 29 of the NSW Act.

⁸⁸ *Betfair* (n 55). See also *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 for challenges to certain requirements in New South Wales's licensing regime.

⁸⁹ The decision led to legislative changes in states and territories, having to include licence holders from other states and territories as being authorised to provide, and advertise, gambling services in the jurisdiction. See, eg, *Gaming and Wagering Commission Act 1987* (WA) s 43A(3)(da).

⁹⁰ *Ibid* s 61AA. This section makes the definition consistent with the definition of broadcasting under the *Broadcasting Services Act 1992* (Cth). See Revised Explanatory Memorandum, Interactive Gambling Bill 2001 (Cth) 68 ('IGA Explanatory Memorandum') for commentary on IGA s 61AA.

⁹¹ IGA Explanatory Memorandum (n 90) 73 for commentary on IGA s 61CA.

The purpose of these two categories is ‘to avoid overlap between publishing, and broadcasting or datacasting, which are addressed separately in Part 7A’.⁹²

What, then, is the reason for this separate treatment? There are two distinct classes of offences set out for both the (1) publication, and (2) broadcasting of designated (ie, prohibited gambling services, or unlicensed services) interactive gambling service advertisements, under ss 61EA and 61DA respectively. While the basic penalty schemes for both classes of offence are the same, the reason for the distinction derives from the exceptions to the prohibitions against advertising through the different mediums, that is, what is excused conduct. For our purposes, the most important of these excuses is the *publication* of promotions of gambling services, where no reward is given for the promotion, in broader circumstances than where gambling services are promoted during a *broadcast* for no reward.

In relation to publication, s 61EE of the IGA is relevant here:

Publication by person not receiving any benefit permitted

- (1) A person may publish a designated interactive gambling service advertisement if:
 - (a) the publication is not in the course of the provision of designated interactive gambling services; and
 - (b) the person publishes the advertisement on the person's own initiative; and
 - (c) the person does not receive any direct or indirect benefit (whether financial or not) for publishing the advertisement.

This provision captures, for example, product placements such as a publisher wearing clothing advertising a gambling service provider. Similarly, it would cover circumstances where a publisher lists providers via a search engine.⁹³ To take another example, if a video gamer streaming an Egame were to promote a prohibited (‘designated’) gambling service or service provider while streaming, this would not infringe the IGA provided that the streamer was not receiving a financial or other benefit for the ‘plug’, and provided they were not ‘put up’ to it. Of course, if the gambling service is permitted in Australia and is one provided by a licensed operator, then advertising by means of ‘product placement’ or promos during, say, a live-stream or on a posted video, is legal, even if for reward, and the promotor would not necessarily need to disclose the arrangement, subject to laws on misleading or deceptive conduct (or other advertising standards).⁹⁴

⁹² See *ibid* for commentary on IGA s 61CB.

⁹³ See *ibid* 79–80 for commentary on IGA s 61EE.

⁹⁴ In some circumstances, a failure to disclose a financial relationship with an advertiser could amount to misleading or deceptive conduct under *Australian Consumer Law: Competition and*

For *broadcasting*, however, s 61DB allows the broadcasting of a designated advertisement without reward, but only where such broadcast occurs ‘as an accidental or incidental accompaniment to the broadcasting or datacasting of other matter’ (s 61DB(1)(a)). As with publication, there must be no direct or indirect benefit received for the advertisement. For example, a news reporter may interview a person who is wearing a shirt emblazoned with the logo of a gambling service provider without infringing advertising prohibitions. Similarly, the IGA Explanatory Memorandum provides that:

For example, this would permit the broadcast of an international sporting event at an overseas venue where an interactive gambling service advertisement might be permitted. If, however, the broadcaster receives some benefit for the interactive gambling service advertisement, additional to the benefit arising from broadcasting the sporting event, the interactive gambling service advertisement would not be permitted under this clause.⁹⁵

A video uploaded on the internet can therefore actively promote designated (prohibited) advertisements, provided that the promotion is not for reward, whereas a broadcast cannot; the latter must be accidental or incidental.

Further regulations that impact on the advertising of gambling services that are permitted under the IGA (ie, advertisements for services offered by licensed gambling operators) are found in other legislation and regulations. The most important regulations are the product of significant reforms that commenced in 2018.

C *Latest Reforms*

Prior to 2018, there was increasing community concern about the impact of advertising gambling products during sporting events. The saturation of such advertising was leading to the ‘inherent’ association of sport with gambling and the normalisation of gambling as part of sport, particularly among adolescents.⁹⁶ Those perceptions no doubt underpinned community pressure for reform,⁹⁷ such

Consumer Act 2010 (Cth) sch 2 s 18. Further, the Australian Association of National Advertisers’ (‘AANA’) ‘Code of Ethics’ requires that ‘advertising be clearly distinguishable as such’: AANA, ‘Code of Ethics’ (February 2021) 3 [2.7]. These standards are only subject to self-regulation. However, Ad Standards, the body responsible for enforcement, commissioned a detailed report on distinguishing advertising, including by social media influencers: see Colmar Brunton, *Community Perception of Clearly Distinguishable Advertising* (Report, December 2018).

⁹⁵ IGA Explanatory Memorandum (n 90) 75 for commentary on IGA s 61DB.

⁹⁶ Hannah Pitt, Samantha L Thomas and Amy Bestman, ‘Initiation, Influence, and Impact: Adolescents and Parents Discuss the Marketing of Gambling Products During Australian Sporting Matches’ (2016) 16(1) *BMC Public Health* 967, 5.

⁹⁷ See, eg, James Willoughby, ‘The “Sinister and Dangerous Activity” Concerning Star AFL Players’, *The New Daily* (online, 14 February 2017) <<https://thenewdaily.com.au/sport/sport-focus/2017/02/14/gambling-ads-sport/>>; Greg Baum, ‘For Harry Taylor and Easton Wood, All Bets are Off’, *The Sydney Morning Herald* (online, 14 February 2017) <<http://www.smh.com.au/sport/for-harry-taylor-and-easton-wood-all-bets-are-off-20170214-guctdz.html>>.

that significant changes to laws governing the advertising of gambling during sports broadcasts were passed and commenced operation in 2018. First, new industry codes applying to commercial television and radio, subscription services and SBS were approved by ACMA, banning gambling advertisements on *television and radio* during the broadcast of live sports (but not during breaks after 8:30pm) Those new codes commenced operation in 2018.⁹⁸ Alongside those changes, amendments were made to the *Broadcasting Services Act 1992* (Cth) and other legislation enabling ACMA to similarly regulate *online* content service providers *streaming* live sport.⁹⁹ These similar rules took effect from September 2018 and are contained in the *Broadcasting Services (Online Content Service Provider Rules) 2018* ('OCSP Rules').¹⁰⁰ Such restrictions on the advertising of gambling during live sport were previously opposed by the gambling industry when submitting to a 2013 Parliamentary Inquiry.¹⁰¹

The rules contained in registered industry codes under s 125A *Broadcasting Services Act 1992* (Cth) and in the *OCSP Rules* are detailed and the definitions adopted setting up the frameworks for the regulations are complex. To simplify (considerably), the specific rules on advertising relevantly are that:

- between 8:30pm and 5:00am, no advertisements for gambling products or promotion of 'live' odds on that event are allowed during a sporting event (including Esports events) and no promotion of odds is allowed during breaks in the event (although gambling adverts are allowed during breaks, including for odds on other events),¹⁰²
- betting odds cannot be promoted by sports commentators (or gambling industry representatives) both 30 minutes before and after a sporting

⁹⁸ J Chandra, *Communications Law and Policy in Australia, Broadcasting Commentary, Schedule 8, Gambling Advertising During Broadcast and Online Coverage of Live Sport* (LexisNexis, December 2021), 'Commentary on Schedule 8' precis.

⁹⁹ The rules in relation to advertising during internet streaming of sport were authorised under s 216E and Schedule 8 of the *Broadcasting Services Act 1992* (Cth) as inserted by *Communications Legislation Amendment (Online Content Services and Other Measures) Act 2018* (Cth) ss 21–2.

¹⁰⁰ See Chandra (n 98) for an overview of sch 8, which is the enabling framework allowing ACMA to make relevant rules and enforce them.

¹⁰¹ See submissions by the gambling industry to the Parliamentary Joint Select Committee on Gambling Reform, *Fifth Report: Inquiry into the Advertising and Promotion of Gambling Services in Sport*. (Report, June 2013) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/gamblingreform/completedinquires/2010-13/gamblingsport/report/index which Committee had recommended against restricting advertising during sport. See Hancock, Ralph and Martino (n 13) for analysis of the strategies adopted by the gambling industry in its submissions. It should be noted, however, that some gambling operators have taken a more socially responsible approach in relation to the marketing of gambling products to which, for example, children may be exposed. See Rob Harris, 'Tabcorp Calls for Fresh Crackdown on TV Gambling Advertising', *Sydney Morning Herald* (online, 9 September 2021) <<https://www.smh.com.au/politics/federal/tabcorp-calls-for-fresh-crackdown-on-tv-gambling-advertising-20210909-p58q7v.html>>.

¹⁰² See 'Gambling Ads During Live Sport on Broadcast TV and Radio', ACMA (Web Page, 15 October 2021) <<https://www.acma.gov.au/gambling-ads-during-live-sport-broadcast-tv-and-radio>>.

event commences ends;¹⁰³ however, adverts promoting gambling can be run immediately both prior to the start and after the conclusion of sporting events;

- where advertising of gambling services or odds occurs through industry representatives (during permitted times and programming) there are also regulations requiring the clear identification of industry representatives and restrictions on the location from which they can broadcast; and
- between 5:00am and 8:30pm, no adverts are allowed starting from five minutes before and ending five minutes after the event (and therefore, of course, not during breaks and play).¹⁰⁴

The ban on live betting odds during sports broadcasts and breaks (and in the 30 minutes prior to a game),¹⁰⁵ combined with laws that prevent *online* betting (but not telephone betting) during games,¹⁰⁶ are aimed at limiting the encouragement of impulsive gambling in the heat of the sporting moment. Critically, however, adverts for gambling services generally are *not* prohibited during breaks in-play, as well as before and after play, which are, presumably, highly lucrative for broadcasters and, indirectly, sporting organisations.¹⁰⁷

These rules also apply to livestreaming of sporting events via the internet; however, for some less popular sports, odds for other games or sports events that have not yet commenced may be promoted during breaks in play between 8:30pm and 5:00am.¹⁰⁸ Further, if the livestream is of an overseas sporting event, these rules do not apply to adverts not targeted to Australian audiences. Nor do these rules apply to horse or dog racing,¹⁰⁹ which have long been recognised as sports carried out almost exclusively to generate gambling revenue. There are additional rules that apply to Children's programs, but these rules do not specifically concern sports.¹¹⁰

¹⁰³ See *ibid.*

¹⁰⁴ See *ibid.*

¹⁰⁵ In relation to adverts during breaks in play, the rules are more detailed and restrictive than simply stating that adverts are allowed during breaks in play between 8:30pm and 5:00am. See, eg, *Broadcasting Services (Online Content Service Provider Rules) 2018* (Cth) rr 14–15 ('OCSP Rules'), which covers internet streaming; ACMA, 'Commercial Television Industry Code of Practice 2015' (2015) 32–42, which covers commercial television broadcasters.

¹⁰⁶ See below n 112 and accompanying text.

¹⁰⁷ See, eg, 7.30 Report (n 17) which points out that the AFL receives 10 cents for every bet on AFL games from Sportsbet, its official betting partner. Further, broadcast deals are the main source of revenue for the AFL, but gambling advertisements are a significant source of revenue for the broadcasters who have paid large sums for broadcasting rights. The report gives a figure of \$287 million in gambling advertising revenue in a year, a significant proportion of which were adverts placed during football matches.

¹⁰⁸ See *OCSP Rules* (n 105) r 14(3).

¹⁰⁹ See, eg, *ibid* r 8.

¹¹⁰ See 'Gambling Ads During Children's Programs', ACMA (Web Page, 21 October 2020) <<https://www.acma.gov.au/gambling-ads-during-childrens-programs>>.

Of note, in New South Wales, there is a blanket ban on the broadcasting of advertisements during sporting events, which prohibits any advertisements during a ‘sporting fixture’ (but excluding both horse and dog racing from this prohibition).¹¹¹ It remains unclear (and, indeed, unchallenged) as to whether such a broad ban is inconsistent with Commonwealth law.

These rules restricting when gambling advertising can be broadcast during live sports were also supported by amendments made to the IGA by the *Interactive Gambling Amendment Act 2017* (Cth). The amendments prohibit *online* live betting on a sporting event while it is ‘in-play’. However, live in-play telephone betting is allowed during the event under s 8E and s 5(3)(a). Telephone betting is therefore a regulated and excluded gambling service (ie, it is permitted), whereas in-play betting is prohibited.¹¹²

D Inducements

To regulate questionable marketing approaches, the Commonwealth, states, and territories, as part of the 2018 *National Consumer Protection Framework for Online Wagering: Baseline Study*,¹¹³ agreed to ban online gambling providers offering inducements (such as credits, vouchers or reward) to both new customers and existing customers who refer new customers. Such inducements were previously banned in some jurisdictions, but the framework ensures a national minimum standard.¹¹⁴ However, there are disparate approaches to banning other types of inducements. In New South Wales, for example, the ban on inducements to open new accounts is accompanied by a general prohibition under the *Betting and Racing Act 1998* (NSW) on advertising any inducements to gamble, or to gamble more frequently, even if offered to existing account holders.¹¹⁵ Regulators tend to take a broad view as to what constitutes an inducement.¹¹⁶ These prohibitions

¹¹¹ See *Betting and Racing Act 1998* (NSW) s 33I; subs (6) defines ‘sporting fixture’ as not applying to a ‘race’ as defined in s 4 (definition of “race” means a greyhound race, harness race or horse race’). See also *Totalizator Act 1997* (NSW) s 80A.

¹¹² IGA (n 43) s 8A(3)(b), 10B.

¹¹³ Rebecca Jenkinson et al, Australian Institute of Family Studies, *National Consumer Protection Framework for Online Wagering: Baseline Study* (Final Report, June 2019). See also the detailed policy statement for the report, which sets out the respective responsibilities of state and territory, and Commonwealth, governments in implementing the Framework: Department of Social Services (Cth), *National Consumer Protection Framework for Online Wagering – National Policy Statement* (Final Report, 30 November 2018). The Framework also provides for the disallowing of operators from imposing turnover requirements that must be met before existing customers can withdraw winnings obtained using complimentary betting credits or vouchers. See, eg, *Wagering Act 1998* (Qld) s 228C.

¹¹⁴ See, eg, *Betting and Racing Act 1998* (NSW) s 33JA, 33GA; *Wagering Act 1998* (Qld) s 228B (and *Interactive Gambling (Player Protection) Act 1998* (Qld) s 166B); the more restrictive WA legislation is noted below.

¹¹⁵ See *Betting and Racing Act 1998* (NSW) s 33H(2)(h) prohibiting advertisements of inducement. Similarly, see also *Totalizator Act 1997* (NSW) s 80(2)(h).

¹¹⁶ See Liquor and Gaming NSW, *Gambling and Advertising Inducements* (GL 4015) 7–8 (‘NSW Guidelines Inducements’).

exist even where the advertisement states that the inducement excludes New South Wales residents.¹¹⁷ It is worth noting that it remains unclear the extent to which these prohibitions are enforced. The prohibition on advertising inducements does not apply, however, to inducements communicated *directly* to existing account holders (s 33GA(3) definition of inducements).

In Western Australia, under the *Gaming and Wagering Commission Regulation 1988* (WA) reg 43(2)(e) and (f), the restrictions go further: even advertising inducements to existing account holders is unlawful unless the account holders have consented to the sending of such inducements (s 43(5));¹¹⁸ consequently, bonus bet offers that are commonly offered by gambling service providers (nationally) will exclude WA residents. These restrictions on advertising inducements in Western Australia and New South Wales do not apply to advertisements shown on what are predominantly (both dog and horse) racing dedicated services, though the prohibition of inducements to open new accounts applies even in the racing context.¹¹⁹

In 2015, gambling inducements were the subject of consumer protection litigation by the ACCC against potentially misleading promotions in *ACCC v Hillside (Australia New Media) Pty Ltd t/as Bet365*.¹²⁰ In that case, Bet365 was found to have engaged in misleading or deceptive conduct in promoting up to \$200 worth of ‘free bets’ to new customers, without adequately making them aware of the conditions (including that if one were to win a bet using the \$200 credit, one could not immediately withdraw the subsequent winnings).

Encouragingly, we note that the 2023 Senate Committee Online Gambling Report recommends that the Australian Government, without delay, prohibit all online gambling inducements and inducement advertising.¹²¹

E Self-Regulatory Industry Standards

Apart from statutory regulations that limit the advertising of gambling, specifically, of sport (as set out above), there are also self-regulatory industry standards contained in the Australian Association of National Advertisers (‘AANA’) ‘Wagering Advertising & Marketing Communication Code’ (‘Wagering

¹¹⁷ *Betting and Racing Act 1998* (NSW) s 33GA(2).

¹¹⁸ The offering of inducements, as opposed to the advertising of such offers, are also specifically prohibited: see *Gaming and Wagering Commission Regulations 1988* (WA) s 43(7)–(8), which contains exceptions for existing customers.

¹¹⁹ NSW Guidelines Inducements (n 116) 5–6. In Western Australia, the Gaming and Racing Commission has stated that it will not enforce s 43 of the *Gaming and Wagering Commission Regulation 1988* for adverts ‘published on platforms that exclusively provide racing content’. See ‘Gambling Advertising and Inducements’, *Gaming and Wagering Commission of Western Australia* (Web Page, 25 May 2023) <<https://www.dlgsc.wa.gov.au/department/publications/publication/gambling-advertising-and-inducements>>. This is despite the absence, seemingly, of any clear legislative basis for this exception in the Regulations.

¹²⁰ *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd* [2015] FCA1007.

¹²¹ See *Senate Committee Online Gambling Report* (n 14) xxiii [4.142], xxv [5.148]–[5.150].

Code'). The object of the *Wagering Code* 'is to ensure that advertisers and marketers develop and maintain a high sense of social responsibility in advertising and marketing wagering products in Australia'.¹²² The *Wagering Code* applies to sporting events (including Esports) as well as horse and dog racing. Complaints that advertisements may breach these advertising standards can be made to the Ad Standards Community Panel.

The *Wagering Code* contain nine principles governing gambling adverts, of which the most relevant for our purposes are that advertising and marketing communication of wagering/gambling products must not:

- be directed primarily to minors (s 2.1);
- depict minors (unless in an incidental role not implying that they will engage in wagering activities) (s 2.2);
- depict a person aged 18–24 years old engaged in wagering activities (s 2.3);
- state or imply a promise of winning (s 2.5);
- portray, condone or encourage excessive participation in wagering activities (s 2.8); or
- portray, condone or encourage peer pressure to wager (s 2.9).

In some states, breaches of some of these standards are offences under state law: for example, in NSW, conduct amounting to breaches of Standards 2.2 and 2.5 of the Code are offences under the *Betting and Racing Act 1998*, paras 33H(2)(b) and (d) respectively.¹²³

Importantly, sports sponsorship does not breach Standard 2.1 (must not be directed primarily to minors), even if the sport or team is one that is popular with children. Further, shows or programmes that provide information about the likelihood of an outcome of a sporting event do not qualify as advertising or marketing communication, nor as necessarily implying a 'promise' of winning (2.5). This is so even if such information inherently carries with it the weight of expertise and, further, may be combined with advertisements (during the shows or intermissions) that provide betting odds for the sporting contest in question. For example, if a sports commentator states that Team A has a very good chance to upset the more favoured Team B, then an advertisement in the break telling viewers Team A is paying \$2.50 for the win would not infringe that standard. Similarly, it is unlikely that 2.9 of the Code (must not portray, condone, or

¹²² See AANA, *Wagering Code* (1 July 2016).

¹²³ Similarly, see *Totalizator Act 1997* (NSW) s 80(2); *Gaming and Wagering Commission Regulation 1988* (WA) reg 43(2)(b), (d). See also reg 42(2)(h), which makes publishing adverts that breach certain Codes of Practice an offence under Western Australian law.

encourage peer pressure to wager) would be breached, we suggest, merely by adverts that portray gambling as a social, fun activity carried out with friends.¹²⁴

Finally, the all-pervasive nature of gambling products for nearly all popular sports, and the widespread advertising and visibility of those products across multi-media platforms, does not breach 2.8 of the Code (portray, condone, or encourage excessive participation in wagering activities). This is so even if the impact of such campaigns and the increasing social saturation of gambling information, products, and indirect and direct sporting links, have been demonstrated in the studies noted in the Background section of this article to have those very impacts.

V GAPS IN THE LAW: WHAT IS PERMITTED?

The restrictions on advertising outlined above certainly put significant limits on when gambling operators can promote their product. Nonetheless, there are considerable gaps that can be exploited to market gambling to viewers of sport. This section outlines some of the main ways in which the promotion of gambling products via sport continues in Australia.

First, the regulations outlined above allow advertising after 8:30pm during breaks in live sports broadcasting (although not the promotion of odds for that sporting event). If one of the aims of advertising restrictions is to protect minors from exposure to gambling promotion while watching live sport, the 8:30pm cut off assumes that younger viewers will not generally be watching after that time. That assumption is questionable. As one Australian study found, 83 per cent of 11–16-year-olds continue to watch sport after 8:30pm (especially if a game has started earlier), and nearly half of these viewers recalled seeing gambling advertising after that time.¹²⁵ It should also be noted that it is possible, at any time, to advertise gambling products prior to the commencement of live sport broadcasts, including during pre-game previews, commentary, and the like, and during other programming (not directed at children).¹²⁶ There are no limits on the saturation coverage of such adverts.¹²⁷

Secondly, current restrictions on live sport do not apply to subscription television channels with a 'low audience share'. Those channels can broadcast gambling adverts even between 5:00am and 8:30pm during sports broadcasts.¹²⁸

¹²⁴ See, eg, Sportsbets 'Bet with Mates' advertising campaign, available at [Adsoftheworld.com](https://www.adsoftheworld.com/campaigns/bet-with-mates), *Sportsbet: Bet With Mates* (Web Page) <<https://www.adsoftheworld.com/campaigns/bet-with-mates>>.

¹²⁵ Thomas et al, 'Young People's Awareness' (n 23), 8–9.

¹²⁶ See 'Gambling Ads During Live Sport on Broadcast TV and Radio' (n 102).

¹²⁷ Thomas et al, 'Young People's Awareness' (n 23) 3.

¹²⁸ See ACMA, 'Subscription Broadcast Television Codes of Practice 2013' (2013) 17 [10]–[11] <<https://www.acma.gov.au/publications/2019-10/rules/subscription-broadcast-television-codes-practice-2013#:~:text=This%20Code%20for%20subscription%20television,nature%20of%20programs%20being%20provided>>. Certain exclusions apply for 'Listed events'. 'Low Audience Share Channel' is defined in the appendix: at 19 (20).

Thirdly, the restrictions do not apply to replays or highlights of major sporting events. Young people often source their content online and may not be watching live sport, especially if it is only available through paid subscription services. For example, a 2018 Australian Video Viewing Report found that online viewing was increasingly popular (Australians played an average 347 million minutes of broadcasters' online content weekly in Q4 2017), especially catch-up or on-demand viewing (an average of 258 minutes weekly).¹²⁹

Fourthly, one important exception to the restrictions on advertising relates to sports sponsorship deals, such as the display of logos on jerseys and at sports grounds. For example, under s 18(3) of the *OCSF Rules*, the rules are not infringed by a sports streaming provider:

where the reference to gambling promotional content occurs as part of live coverage of the sporting event, and consists of the name of the sporting venue, or of a player's or official's uniform, or of advertising signage, such as a field barrier, big screen or scoreboard, at the venue of the sporting event, and the provider does not receive any direct or indirect benefit (whether financial or not) for providing the gambling promotional content, in addition to any direct or indirect benefit that the provider receives for providing the live coverage of the sporting event.¹³⁰

This is significant. Particularly through the strategic placement of adverts at sports grounds, which are visible during a live broadcast (and replays), there is no limit on how often and how easily viewers can see brand names promoting specific gambling providers even if they do not specifically promote gambling on specific events or odds.

Fifthly, the regulation of advertising during live sports is not relevant to the content of sports governing bodies' or clubs' websites. Such content, including previews, tipping, and post-game analysis, may include advertising, and references to licensed gambling providers, gambling promotions and the like. Sponsorship of the governing sports body itself means that adverts for specific gambling products or specific providers may be closely associated with the sport. For example, in 2020, the AFL renewed its commercial relationship with BetEasy (now merged with and absorbed by Sportsbet) as its wagering partner until 2025.¹³¹ Sportsbet advertisements regularly appear prior to tipping and analysis video content on the AFL website. Further, the AFL website, in its fixtures of upcoming matches, includes betting odds for the teams, and clicking on those odds will take the users directly to the Sportsbet AFL-odds page. Such agreements are both directly and indirectly financially lucrative for sporting organisations such as the AFL.¹³²

¹²⁹ Doug Peiffer et al, *Australian Video Viewing Report: Quarter 4 2017* (Report, 2018).

¹³⁰ See *OCSF Rules* (n 105) s 18(3).

¹³¹ Anthony Colangelo, 'AFL Signs New Five-Year Deal with Betting Company', *The Age* (online, 1 February 2020) <<https://www.theage.com.au/sport/afl/afl-signs-new-five-year-deal-with-betting-company-20200131-p53wki.html>>.

¹³² See, eg, '7.30 Report' (n 17).

Sixthly, given the dearth of academic research on the matter, it is not clear to what extent Esports and internet gaming are used for gambling product placement or promotions, for example, by streamers during games. There ought to be a heightened concern regarding the infiltration of gambling (and the promotion of gambling) in the Esport world, and greater safeguards for minors. Alongside these concerns is, seemingly, a lack of transparency among streamers who are sponsored to gamble online.

The last major issue, previously canvassed, is that the existing restrictions under Australian law — which, in theory, apply to overseas providers and products if they are accessible to Australian clients — cannot be readily enforced against overseas service providers. As expounded earlier, this issue carries with it several legal (and jurisdictional) complexities which are deserving of a separate article.

VI POSSIBLE REFORMS

A Barriers to Reform

Having identified the gaps in existing regulations, we now consider reforms. Any reform agenda, aimed at minimising the social harm of gambling, faces considerable hurdles. In their first-of-its-kind study in Australia, Hancock, Ralph and Martino applied a Corporate Political Activity ('CPA') analysis to the tactics used by the gambling industry to resist advertising reforms in submissions to the 2013 Parliamentary Committee Inquiry on advertising and sport.¹³³ Those industry efforts were, at the time, successful,¹³⁴ albeit ultimately insufficient to resist ongoing community calls for action that later culminated in the significant reforms discussed in Part IV C above.

Research has demonstrated the effectiveness of the way in which the tobacco, alcohol, and processed food industries resisted regulation by using strategies to shape government policy.¹³⁵ Hancock et al used the taxonomy developed by Savell et al,¹³⁶ to describe the tobacco industries' strategies to oppose increased government regulation and applied this taxonomy to gambling industry submissions to the 2013 Inquiry. Significantly, Hancock, Ralph and Martino concluded that the gambling industry used all of the strategies identified

¹³³ See Hancock, Ralph and Martino (n 13).

¹³⁴ See Parliamentary Joint Select Committee on Gambling Reform, Parliament of Australia, *The Advertising and Promotion of Gambling Services in Sport* (Report, June 2013). The report only recommended minor changes: see Recommendations ix–x.

¹³⁵ See Hancock, Ralph and Martino (n 13) 5.

¹³⁶ Emily Savell, Anna B Gilmore and Gary Fooks, 'How Does the Tobacco Industry Attempt to Influence Marketing Regulations? A Systematic Review' (2014) 9(2) *PLoS ONE* e87389.

by Savel, Gilmore and Fooks, as well as others, to resist regulation. Those strategies were used

to ward off government regulatory reform and to protect their vested interests in maintaining the status quo, in this case, industry self-monitoring of sports betting advertising during sporting event broadcasting.¹³⁷

Hancock, Ralph and Martino's study highlights the difficulties faced by the community and policymakers when seeking to regulate powerful industries that use their political influence and financial clout to resist changes to laws that impact their profitability.¹³⁸ Since the implementation of the 2018 reforms, the sports gambling industry has continued to grow, and community concerns about the links between sport and gambling continue unabated. However, further reform may well prove difficult to achieve for the reasons identified by Hancock, Ralph and Martino.

B Suggested Reforms

In Australia, the 2018 reforms were designed to respond to community concerns about gambling advertising and its leveraging of sport by restricting the advertising of gambling products during live sports broadcasts, among other measures. This article (and, indeed, the 2023 *Senate Committee Online Gambling Report*)¹³⁹ has doubted the adequacy of those responses. After research on the exposure of young people to gambling advertising, Thomas et al conclude:

Young people are heavily exposed to gambling advertising and promotion across a wide range of media platforms, including social media, and at all times. The current regulatory systems fail to protect them from gambling promotions through sport and celebrity associations, and offer loopholes that enable such forms of promotion to thrive. Young people themselves are aware and critical of the ubiquity, intent and impact of gambling promotion ... [and] believe that more should be done to protect them from ... promotion which normalises gambling behaviour from early ages.¹⁴⁰

We agree with those conclusions. The most radical reform, of course, would simply be to impose a blanket ban on all promotion of gambling products. Some community-based organisations have called for an end to all gambling

¹³⁷ Hancock, Ralph and Martino (n 13) 11.

¹³⁸ Ibid 8, 10, 14. Interestingly, one tactic, under the broader strategy of providing financial incentives against regulation, which Hancock et al were not able to assess, was whether gifts or other financial inducements to policy makers were used, since these were obviously not disclosed in submissions. Coincidentally, a recent newspaper report has identified such conduct and the potential risk of policy makers being conflicted. See Henry Belot, 'Gambling Industry's Dozens of Free Event Tickets to Federal MPs Raise Fears of Potential Conflicts of Interest', *The Guardian Australia* (online, 9 March 2023) <<https://www.theguardian.com/australia-news/2023/mar/09/gambling-industrys-dozens-of-free-event-tickets-to-federal-mps-raise-fears-of-potential-conflicts-of-interest>>.

¹³⁹ 2023 *Senate Committee Online Gambling Report* (n 14) iv, 110 [5.63]-[5.64].

¹⁴⁰ Thomas et al, 'Young People's Awareness' (n 23) 10.

advertising,¹⁴¹ and more recently, at least, those calls have gained traction.¹⁴² We may be getting to the same point of increasing public support that culminated in the ban on all marketing of tobacco products because of public health concerns. As previously mentioned, such a blanket ban on domestic gambling advertising across all platforms, including bans on club sponsorships, product placements, and promotions by influencers, has been in place in Italy since January 2019,¹⁴³ with bans of television adverts now also in place in Belgium and Spain.¹⁴⁴ The Italian laws have been subject to ongoing criticism by major sporting bodies in Italy such as the Italian Football Federation ('FIGC'), citing loss of revenue by sporting associations as a major consequence.¹⁴⁵ Calls to restrict gambling advertising have also been resisted in the United Kingdom for the same reason.¹⁴⁶ To be sure, a blanket ban would have financial consequences for sporting bodies throughout Australia, although perhaps not as significant as those for Italian football, which was highly exposed financially because of extensive gambling revenues prior to the ban. But such costs must be weighed against the benefits, both economic and health-related, which flow from reducing gambling harms. Sensibly, perhaps, the *2023 Senate Committee Online Gambling Report* has recommended that a blanket ban be introduced in phases and over a three-year period. Notably, exceptions to this ban will include dedicated racing channels and programming (from which we infer the entirety of, for example, Melbourne Cup Day coverage).¹⁴⁷ The interesting political question is how strongly and effectively the various stakeholders will push back against this recommendation and whether the political will exists to move in that direction in the teeth of such pushback.

While a blanket ban may not be in immediate reach, therefore, we argue that, at the very least, more modest measures should be implemented (many of which align with recommendations from the *2023 Senate Committee Online Gambling Report*).

A starting point for such increased regulation should focus on the gaps, identified above. Perhaps the most significant gap is that gambling services can be advertised, after 8:30pm, during breaks in sporting contests. Although *live* odds for the game being currently broadcast or streamed cannot be shown, adverts promoting sports gambling in general can, including odds for other games being played later. Such adverts are ubiquitous and, indirectly, promote

¹⁴¹ See, eg, Alliance for Gambling Reform, End Gambling Ads (Web Page) <<https://www.agr.org.au/endgamblingads>>.

¹⁴² See, eg, Elmas (n 6).

¹⁴³ See Giuffr , (n 18).

¹⁴⁴ See Elmas (n 6).

¹⁴⁵ See, eg, Ted Orme-Clay, 'FIGC: Italian Ad Ban "Bringing Sports Sector to its Knees"' *Insider Sport* (Web Page, 2 August 2021) <<https://insidersport.com/2021/08/02/figc-italian-ad-ban-bringing-sports-sector-to-its-knees/>>.

¹⁴⁶ See Thomas et al, 'Young People's Awareness' (n 23) 3.

¹⁴⁷ *2023 Senate Committee online gambling Report* (n 14) iv, xxv, 127 [5.148]–[5.150].

links between watching sport and gambling on sport (even if not gambling on the specific game in play). We would suggest that, at a minimum, all gambling promotions should be banned immediately before, during, and immediately after, live sports broadcasts, including during breaks and after 8:30pm. This ought to apply to live broadcasts, highlights, replays and catch-up or on-demand viewing (including via the Internet). We concede that such a ban is not likely to be feasible for the racing industry, given that it is almost entirely dependent on gambling revenue and its sole focus is on *gambling* entertainment.

The association of sport with gambling is also promoted by the linkage of gambling products with sporting organisations and sporting venues. It seems rather futile to ban advertising during live sports broadcasts when electronic signage on the broadcasting venue can be seen during a live broadcast or featuring on players' clothing. Such promotions are inevitable while sponsorship of sports, venues or clubs by gambling service providers is allowed,¹⁴⁸ as such sponsorship is never done for purely altruistic reasons. And the lure of money is difficult to resist by sports organisations, which are therefore themselves invested in allowing such promotions to continue. Again, possible solutions to this are easy enough to state. For example, advertising on sport grounds could be banned, as could the display of gambling brands on sporting clubs' and players' merchandise that are visible during sporting contests.¹⁴⁹ Those are simple starting measures that both could and should be adopted. However, it is difficult to see how such further restrictions — breaking the nexus between sport and gambling — might be achieved while professional sporting organisations are themselves financially invested in gambling promotion. As already noted, the close links between sports organisations, such as the AFL, and the gambling industry, and the significant revenue that flows from those relationships, means that sporting codes have no financial interest in supporting such reforms and, indeed, would argue that any restrictions on sponsorship would significantly impact the commercial viability of professional sports.¹⁵⁰ Finally, uniform legislation ought to be enacted similar to that currently in force in Victoria, which bans the advertisement of gambling on public transport, public roads, and near schools.¹⁵¹

This short list of suggested reforms above would not necessarily solve all of the many social costs of gambling harms, especially in vulnerable communities. A far broader range of issues would need to be addressed to achieve those goals, including addressing new challenges such as illegal EGMs and casino-type games. Rather, the reforms that we suggest are a preliminary step towards inoculating sport from being associated with sports gambling. The benefits of professional

¹⁴⁸ Some clubs are starting to take a socially conscious stance on the issue, such as Geelong Football Club, which has stopped displaying gambling adverts and signage at its stadium, and six Victorian AFL clubs, which no longer have 'Poker' machines at their club venues. See '7.30 Report' (n 17) at 4:35.

¹⁴⁹ See 2023 *Senate Committee Online Gambling Report* (n 14) xxv [5.148]–[5.150].

¹⁵⁰ See Belot, 'AFL' (n 17); Belot 'Australian TV Broadcasters' (n 17).

¹⁵¹ *Gambling Regulation Act 2003* (Vic) s 4.7.1.

sport, as entertainment but also as promoting health, fitness, and community participation in sport, means that it is important that children and young people can enjoy sport without being excessively exposed to the promotion of gambling. Betting ought not to be inextricably linked to the enjoyment of sport. As a society, we have long recognised the perversity of using sport to promote harmful tobacco products, and it is time we did the same for gambling. The *2023 Senate Committee Online Gambling Report* should be praised for capturing this sense of urgency and adopting a holistic approach to combatting gambling harms.

VII CONCLUSION

It is uncontroversial to say that the laws on gambling would benefit from greater simplification and uniformity in approach. Encouragingly, there are strong indicators that both a comprehensive national strategy and regulatory framework could soon exist in Australia, with recommendations that there be a single Australian minister responsible for the reduction of harm caused by online gambling.¹⁵²

The existing complexity of state and Commonwealth regulation of gambling makes it difficult to have a clear overview of the rules governing gambling products and their promotion. The focus of this article, however, has been on the regulation of interactive gambling, and of the advertising of gambling, especially to children and young people. Again, both state and Commonwealth laws apply in this sphere. The rules are found in a complex intersection of Commonwealth, state and territory legislation, regulations, industry codes and codes of practice that often overlap in their sphere of operation. Untangling this web is not an easy task. That said, rules on broadcasting and the internet, including on advertising in those spaces, are largely the province of Commonwealth law and, where inconsistent state and territory laws apply, any Commonwealth legislation would override such laws.

This article has highlighted the ongoing links between sports and gambling services. It has demonstrated that, despite many restrictions on how and when gambling services can be advertised, there are still many opportunities for gambling to be promoted through sports. Those opportunities are effectively exploited by the gambling industries.

We anticipate a seismic shift in Australian policies, regulation, and strategy in the light of the *2023 Senate Committee Online Gambling Report*. A close examination of that Report and, indeed, the 31 recommendations contained within it, is the basis of further research. For example, one far-reaching proposal flagged in the Report is to impose on online wagering service providers a customer duty of care.¹⁵³

¹⁵² See *2023 Senate Committee Online Gambling Report* (n 14) xix [2.132]–[2.134], [2.136].

¹⁵³ *Ibid* xxiii [4.145]–[4.148].

Further reforms are urgently needed to protect people, especially those who are young or vulnerable (or both), from being saturated by media that portrays sports as being linked to gambling on the outcomes of those sports. The profitability of gambling industries, however, means that they will continue to use their financial and political influence to resist further reforms. This axiom poses serious challenges for policymakers.