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Mr Peter Hoult
Chairman
Tasmanian Gaming Commission
c/- Department of Treasury and Finance
GPO Box 1374
Hobart TAS 7001

Dear Mr Hoult

Responsible Gambling Mandatory Code of Practice for Tasmania

Free TV Australia represents all of Australia's commercial free-to-air television broadcasters. Free TV welcomes the opportunity to comment on the Tasmanian Gaming Commission's proposed Responsible Gambling Mandatory Code of Practice for Tasmania (the Code).

Free TV supports the Tasmanian Gaming Commission's aim of reducing harms caused by problem gambling. However, Free TV is highly concerned with some of the provisions of the proposed Code with respect to advertising. In particular, Free TV does not support:

- the proposed ban on gambling advertising between 6am and 9pm, which is far in excess of national standards and which will not apply to all media platforms;
- the narrow exceptions to this ban, which are also out of line with national standards and impractical to apply;
- the overly broad definition of 'advertising' which would apply the Code's requirements to non-advertising material;
- the imposition of a strict requirement for the inclusion of responsible gambling messages in all advertisements, without consideration of appropriateness to the medium;
- vague and uncertain provisions which will be difficult to apply in practice;
- any proposal that different regulatory requirements should apply to advertisements in the online and offline environments; and
- any application of audit requirements to broadcasters.

Existing regulation

Appropriate regulation of advertising is of vital importance to commercial free-to-air broadcasters and we take very seriously our responsibility to meet community expectations in this area.

Australia currently has an extensive and highly complex regime of regulatory instruments, both government and industry based, designed to protect audiences from inappropriate marketing

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and advertisements on commercial free-to-air television. As well as the Responsible Gambling Codes (or equivalents) of each of the States and Territories, gambling advertisements are subject to legislative regulation under a large number of State and Territory Gaming Control Acts (and equivalents) and the Federal *Interactive Gambling Act 2001*. As the Code discussion paper notes, all advertisements are also subject to the national Code of Ethics developed by the Australian Association of National Advertisers, which imposes requirements such as accuracy, honesty and compliance with all relevant laws.

However, the most significant regulation of gambling advertising on television takes place at the national level under the Commercial Television Industry Code of Practice. Provision 6.14 of the Commercial Television Industry Code, which is mandatory for all commercial free-to-air television broadcasters, prohibits the broadcast of advertisements relating to gambling during 'G' classified programming zones. This means that such advertisements cannot be played on the network's primary channels between 6.00am – 8.30am and 4.00pm – 7.00pm weekdays and between 6.00am - 8.30am and 4.00pm - 7.30pm on weekends. The Commercial Television Industry Code also provides exceptions to this ban, allowing advertising for Government lotteries etc to be broadcast and allowing gambling advertising to be broadcast during news, current affairs and sporting programs.

The Commercial Television Industry Code is accountable to the community through in-built mechanisms for review and community consultation, and a legislative requirement that the Codes of Practice must provide adequate community safeguards. Members of the community have the ability to issue complaints under the Commercial Television Industry Code, with investigations carried out and enforced by the Australian Communication and Media Authority. Penalties for breach of the Commercial Television Industry Code can include fines, enforceable undertakings, the imposition of additional licence conditions, and the revocation of licences.

The Productivity Commission report

In its recent *Gambling* report¹ the Productivity Commission supported the existing national system for regulation of gambling advertising. Significantly, the Commission found that there was insufficient evidence to justify extending the times in which the broadcast of gambling advertisements is banned. The Commission found that "the case – based on existing evidence and judgment – that advertising per se (not just inappropriate content) causes harm to minors is too weak to invoke the precautionary principle in favour of far reaching changes to the current restrictions."² Furthermore, the Commission concluded that:

More sweeping changes to limit advertising that *could* reach children [as opposed to advertising targeting children or during children's programming] would have to make a case:

¹ Productivity Commission (2010) *Gambling*, <http://www.pc.gov.au/projects/inquiry/gambling-2009/report>

² Productivity Commission at 8.29

- that there were genuine risks of harm from incidental exposure (as compared with exposure to inappropriate material, where the case for regulation is strong). That case does not appear to be supported by much evidence
- for stricter regulation based on community norms, but the desirability of this should be left in the political arena.³ [emphasis theirs]

6am-9pm advertising ban

The draft Code's move to ban all gambling advertising between 6am and 9pm is unprecedented, out of line with the equivalent codes in other States and Territories and the recommendations of the Productivity Commission, and not supported by evidence. It is unclear why Tasmania has chosen to introduce this extended ban on gambling advertising, as the Productivity Commission specifically recommended against such a step and the majority of other jurisdictions currently rely on the national standards set by the Commercial Television Industry Code. While South Australia does prescribe its own time periods in which gambling advertisements may not be broadcast, these periods are short and in general align with the current national standard (ie are limited to 4pm to 7:30pm weekdays).

As the Productivity Commission points out, an extension such as that proposed by the Tasmanian Code effectively amounts to an "almost universal bar" on television advertising of gambling.⁴ The extent of this proposed prohibition seems disproportionate considering the lack of explanation or evidence provided in support of it. As the discussion paper acknowledges, gambling is a legal activity enjoyed by many Tasmanians. What is effectively a total ban on advertisements for such an activity should not be instituted without empirical evidence of the need for such regulation and its efficacy in addressing a material harm. Neither we nor the Productivity Commission have identified such evidence.

There is also little evidence of community dissatisfaction with the existing standards. Free TV received comments on gambling advertising from only five people out of more than 1500 submissions during the last review of the Commercial Television Industry Code of Practice. Meanwhile, during 2009 only 1.51% of the 3796 complaints made to the Advertising Standards Bureau related to gambling advertising.⁵

Inconsistencies in regulation between different States and Territories presents a particular problem for television, as programming and content decisions are most frequently made at the national level. It raises compliance and enforcement costs, and increases the chance of inadvertent breach as broadcasters attempt to comply with conflicting regulation across jurisdiction boundaries. This is particularly the case for Tasmania, as it is serviced by regional broadcasters Southern Cross and WIN. These broadcasters rely on broadcast streams supplied through affiliate agreements with Seven, Nine and Ten, and often will not have the ability, or will find it disproportionately burdensome, to edit or remove references to gambling

³ Productivity Commission at K.14

⁴ Productivity Commission at K.14

⁵ See Advertising Standards Bureau, 2009 Complaints, at <http://www.adstandards.com.au/storage/55eb81b8b615d57e0ab73ce5b2f33ed8.Stats2009Graphs%20-%20finalx.pdf>

which appear in national programming, particularly with respect to live events. Even the slight discrepancy between South Australia's standards and those that apply to the rest of the country already creates problems for regional broadcasters. For this reason, it is most appropriate for television broadcasting regulation to be undertaken primarily at a national level, and it is important that discrepancies between States and Territories be minimised.

Most concerning is the fact that the draft Code does not apply the proposed advertising limits equally to all media services but rather singles out a specific group of market players – the commercial free-to-air broadcasters – for this extra level of restriction, without extending it to competitors such as pay television, the Special Broadcasting Service (SBS), or equivalent services in the online environment.

It is not clear why commercial free-to-air broadcasters should be subject to this particular requirement while other advertising-supported broadcasters would not. All other provisions of the Code apply equally across all media platforms, as is the norm for equivalent codes in other States and Territories. This approach follows the Productivity Commission's recommendation that regulation should focus on ensuring appropriate content in all advertisements, without singling out particular platforms for restrictions.⁶

Commercial free-to-air broadcasters rely exclusively on advertising to support their services, while other services such as pay television and the SBS do not. Experience shows that if advertising is restricted on one platform it merely redistributes to other, less regulated media. Not only is this inequitable, it also makes such regulatory measures less effective as it does not prevent the advertisement from being played, but merely changes its location. Any regulatory action must therefore take a consistent approach across all media platforms, and not unfairly single out particular players. Regulation which only applies to select platforms has a disproportionate regulatory impact on those subject to the tighter restrictions, disadvantaging them in the marketplace without achieving the goal of limiting viewers' exposure to the content.

Sport and news exceptions

The proposed 6am-9pm ban on television advertising is particularly problematic and out of line with national standards with respect to the circumstances in which it will allow gambling advertising to appear as an exception to this general ban.

The Tasmanian proposal does not incorporate the exception for news and current affairs programming included in the national code. Due to the broad definition of 'advertising' included in the Code (see further below) it seems likely that this would prevent reporting on or even reference to gambling in a news and current affairs context before 9pm.

The proposed Code also waters-down the sporting event exception included in the national standards by only permitting gambling advertising to be 'referred to' during sporting events. It is not clear that such a narrow exception would permit the broadcast of incidental advertisements over which the broadcaster has no control, such as the display of sponsorship

⁶ Productivity Commission at 8.23

logos on uniforms and in the background of sporting events. This would make it impossible for broadcasters to show sporting events with gambling sponsors in Tasmania before 9pm at night. Examples of only a few sporting events which currently have gambling sponsors include the Australian Football League (Betfair, TAB Sportsbet), the National Rugby League (TAB Sportsbet, Keno), the Australian Open (Betfair) and the Melbourne Cup (Tabcorp). Removing background advertisements from broadcast material (eg by 'fuzzing' them out) is not possible, particularly for live events, as it can take up to several weeks for a single event and is extremely costly.

Definition of 'advertising'

As is foreshadowed above, the current definition of advertising is overly broad and would apply the Code requirements to a large amount of material for which they are clearly not intended. The definition of "advertising" makes reference to "all communication activities" and "other materials designed to inform the public" and would appear to capture, among other things:

- news and current affairs stories dealing with gambling activities;
- reference to gambling activities (such as a Melbourne Cup sweeps) in other programs; and
- reference to gambling in drama programs, for example as part of a storyline about a character with gambling problems.

Free TV recommends that the Tasmanian Code definition be amended in relation to broadcasting to align with the national standard provided by 5.4.1 of the Commercial Television Industry Code, which refers to "any advertising for a product, service, belief or course of action. . . for which a licensee receives payment or other valuable consideration." The Commission may also want to consider similar amendments, for instance, for newspapers.

Responsible gambling messages

Free TV is also concerned with the proposed strict requirement to provide responsible gambling messages with all advertisements. While Free TV is not opposed to including such messages where appropriate, it will be impractical in many situations for broadcasters to ensure that such messages are included, such as where incidental advertising appears in the background of sporting events. For this reason, other jurisdictions have limited the circumstances in which this requirement will apply. For example, the equivalent provision in the Queensland Responsible Gambling Code of Conduct is drafted as follows:

6.13 where appropriate, positive responsible gambling messages are incorporated in advertising and promotion.

Free TV proposes that a similar caveat be included in the Tasmanian Code. Furthermore, Free TV requests clarification of the manner in which the TGC will specify the size and form of the gambling message. On the information provided in the discussion paper it is not clear whether these additional requirements will be spelt out in the Code itself or in guidelines provided by

the Commission. Free TV would oppose any mechanism that increased the complexity of the regulatory environment for those attempting to comply.

Uncertain provisions

Free TV is further concerned that a number of the proposed Code provisions are very broadly worded, difficult to apply in practice, and likely to add uncertainty to an already complex area of regulation.

For example, it is difficult to determine how the requirements that advertisements 'not challenge or dare a person to play' and 'focus on entertainment rather than winning' would be applied in practice. While Free TV recognises the aim behind these provisions, their current very broad wording does not provide sufficient guidance as to their meaning to enable advertisers to ensure in advance that advertisements will satisfy the requirements. This will inevitably lead to inadvertent breaches by parties who are attempting to do the right thing.

Similarly, Free TV is concerned that the use of phrases such as 'prevailing community standards,' without clarification as to what these standards might refer, creates a vague and uncertain provision that will be difficult to apply or enforce. While the AANA Code contains the same phrase, it is qualified in that case as referencing 'prevailing community standards on health and safety'.

Single Code

Free TV would also like to respond to the TGC's question as to whether one Code should apply to all relevant prescribed licence holders, or whether the Code should be divided across platforms eg for terrestrial gambling and online gambling. Please note that this comment focuses exclusively on the issue of advertising regulation.

As is foreshadowed above, Free TV is opposed to the application of different regulatory standards for advertisements on different mediums. In 2010 a range of entertainment and information technologies compete for viewers' attention. As well as the traditional media of free-to-air television, radio, newspapers and magazines, consumers now have access to the internet, pay TV, IPTV, DVDs, computer games, digital media players and mobile phones. Children and young people in particular increasingly avail themselves of a wide range of alternative media sources that are at this stage effectively unregulated.

As media and communication technologies develop, viewers will increasingly be unaware of the platform from which the content they are accessing originates. People will seamlessly access internet content on their televisions and broadcast content on their computers and telephones. In this converged media environment, content regulations which apply differently to different platforms will create confusion, making it unclear what rules apply in particular circumstances. Such complexities only serve to decrease the effectiveness of regulation by increasing the likelihood of loopholes and discrepancies and allowing material which is banned on one platform to be shifted to another, without limiting the public's exposure.

Compliance audit

Free TV notes that the proposed compliance audit will be undertaken by 'prescribed licence holders'. We presume that this means relevant licensees under the Tasmanian *Gaming Control Act 1993*, and hence would not apply to broadcasters. Broadcasters are already subject to a range of significant and costly reporting requirements with respect to the national regulatory regime maintained by the Australian Communication and Media Authority. Furthermore, as the content of advertisements is determined by advertisers, and not broadcasters, it is more appropriate for those commissioning the advertising to be required to demonstrate compliance in this area.

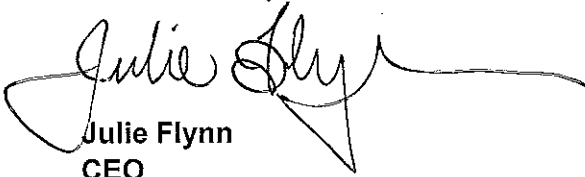
Recommendations

In line with the above comments, Free TV submits that:

- the proposed measure banning advertising between 6am and 9pm on commercial free-to-air services be removed as not proportionate to the evidence of harm, impractically broad in its application and unfairly targeted at select players in the market;
- the current definition of 'advertising' be amended to align with the Commercial Television Industry Code of Practice definition;
- the requirement to provide responsible gambling messages with all advertising be made subject to an 'appropriateness' test, similar to that incorporated into the equivalent provision in Queensland;
- the vague and broad language in the Code be clarified or removed;
- a single code apply to advertising across all mediums;
- the Code be amended to clarify that administrative compliance measures apply only to licensed gambling organisations, not to broadcasters; and
- the Code be kept as simple as possible and largely consistent with the regulatory framework in other States and Territories.

Thank you again for the opportunity to provide comment on the proposed Code. Please contact me if you would like any further input or require clarification.

Yours sincerely



Julie Flynn
CEO