Federal Labor, Green and Independent politicians have recently called for a blanket ban on sports-embedded gambling advertising (SEGA), and the Prime Minister has announced that such advertising would be banned during live sporting telecasts before 8.30pm. A considerable body of research establishes the adverse public health impacts of such gambling. The decision of the Australian High Court in Betfair Pty Ltd v Western Australia (2008) 234 CLR 418 paved the way, however, for an expansive online Australian sports-betting market for both interstate operators and internationally located gambling companies. The combination of widespread internet access and smart phone usage has resulted in an environment where placing a bet is more likely to occur in the home in front of children, hence the concern about its "normalisation". Elite sports people have made public pronouncements that SEGA is now excessive, inconsistent with blanket prohibitions on gambling by elite sports people and damaging to public health. This column critically examines the regulatory landscape governing the advertisement, sponsorship and promotion of SEGA within Australian sport and why the current Bills on this topic do not go far enough.

INTRODUCTION: RECENT SEGA BILLS INADEQUATE

“Do we think the normalisation of gambling – particularly to kids – is acceptable?”¹ The 2016 Western Bulldogs premiership captain Easton Wood thus took to Twitter in February 2016 to voice his disgust at the hypocrisy within the Australian Football League (AFL) in regards to accepting money for gambling advertising during AFL telecasts,² while enforcing compulsory educational sessions highlighting the dangerous activity and consequential risks of gambling for all AFL players. Such comments have re-ignited public debate surrounding the adverse public health consequences of sports-embedded gambling advertising (SEGA) and the current inadequate legislative landscape in this area in Australia. The gambling industry claims the current regulatory landscape adequately addresses the issue by the means of various industry-regulated codes.³

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Sports-embedded promotion in this context is defined as “any means of inserting bands and sponsor reference into entertainment vehicles”, which may include “product or brand placement, sponsorship and celebrity entertainment”.\(^4\) Here the relevant “entertainment vehicle” is Australian sport, specifically within national sports leagues, such as the AFL, the National Football League (NRL) and the Cricket Australia fixture, all of which are constantly bombarded with SEGA. For the purposes of this column, the term “SEGA” covers product placement, sponsorship and endorsement, covering live odds, and typical advertisements aired during a sports game.

Measures to minimise the public health effects of SEGA have been introduced in the *Interactive Gambling Amendment (Sports Betting Reform) Bill 2015* (Cth) (IGA 2015) and the *Interactive Gambling Amendment Bill 2016* (Cth) (IGA 2016).\(^5\) Under cl 61GO of the IGA 2015, wagering service advertisements would be unable to be broadcast during G classified television programs or television programs consisting of sporting events. The stated aim of this provision is to “minimise the exposure of children to sports betting advertising”.\(^6\) The IGA 2016 seeks to clarify the law concerning illegal offshore gambling and strengthening enforcement regimes under the *Interactive Gambling Act 2001* (Cth) (IGA 2001).\(^7\)

The wagering company CrownBet stated in its submission on IGA 2015:

There exists a considerable level of concern within the Australian community regarding the level of gambling and wagering advertising – particularly that advertising which is associated with sport and that which is readily viewable by minors. Given the current climate, CrownBet acknowledges there is a need for a reduction in the volume and a review of the content of wagering advertising to ensure that Australian licensed and regulated wagering operators are undertaking socially responsible wagering advertising.\(^8\)

Yet, the gambling company Ladbrokes in its submission on IGA 2015 stated:

Ladbrokes complies with the FreeTV Code, which prevents:

- advertising during G programs between 6.00-8.30am and 4.00-7.00pm
- advertising during children’s programming between 5.00am-8.30pm
- advertising live odds during a sporting event.

Ladbrokes does not support the move to a more restrictive requirement that prevents advertising during any G program and during all sporting events. As demonstrated in section 4 of this submission, there is no established causal link between wagering advertising and problem gambling.\(^9\)

Further, Free TV’s submission on IGA 2015, stated:

Audiences for sporting events are overwhelmingly made up of adults. Child audiences for sport are traditionally low, and remain so as the media landscape continues to fragment and shift. Where children are viewing sporting events, the vast majority are co-viewing with adults. Free TV does not support the Bill. The current restrictions provide appropriate community safeguards.\(^10\)

Such industry opposition suggests that this raft of legislative reforms is likely to go the way of those in 2013. In 2013, Tom Waterhouse and his company, TomWaterhouse.com (now owned by British corporate bookmaker William Hill) entered into a $10 million sponsorship contract with the


\(^7\) Explanatory Memorandum, *Interactive Gambling Amendment Bill 2016* (Cth) 1, 6.


Nine Network for the telecast of the NRL. At the beginning of the 2013 NRL season, Waterhouse promotions were practically unavoidable for those who either watched the matches on TV or attended the matches, angering supporters.

Tom Waterhouse’s self-promotion overstepped the line when he joined NRL experts on the Channel 9 panel and began steering the conversation away from football towards gambling odds concerning not only football, but horseracing at Randwick. In response to public criticism, then Prime Minister Julia Gillard in May 2013 threatened to legislate a complete ban against live odds, including references to updates during a sporting event of the odds for a particular outcome relating to the event, unless Australian commercial TV broadcasters amended their codes of practice to address political and public concerns. Gillard emphasised, “[f]rom the moment the players step onto the field to the moment that they leave the field, there will be no live odds. I want kids to know their maths but not learn it watching live sports.” Further, she called for the prohibition of “all promotions of odds by gambling companies and commentators … during the broadcast of live sports matches”. However, a loophole allowing gambling advertising during sports programs failed to be addressed (discussed further below).

At the same time, the Broadcasting Services Amendment (Advertising for Sports Betting) Bill 2013 (Cth) was introduced to amend the Broadcasting Services Act 1992 (Cth) to prevent any gambling advertisement prior to 9pm. That aspect of the Bill was met with strong opposition by the commercial radio and television industries, as it was likely to have an immediate detrimental effect on sponsorship and advertising revenue. These components were rejected by the Commonwealth Government after recommendation by the Joint Select Committee on Gambling Reform (JSCOGR). In fact, gambling advertisements increased more than 250% after the prohibition on live betting odds, as they were replaced by other means of gambling advertising, such as permitted signage and generic advertisements. In May 2017, Prime Minister Malcolm Turnbull announced that despite opposition from the AFL, NRL and Cricket Australia on revenue grounds, the government intended to proceed with plans to ban betting advertising during live sporting telecasts (except horse racing) before 8.30pm and from five minutes before and after the game, to be balanced by a reduction in free-to-air licence fees. Time will tell whether gambling industry lobbyists will again defeat such valuable reforms.

**EXISTING SEGA-RELATED LEGISLATION IN AUSTRALIA**

Under s 51(v) of the Australian Constitution, the Commonwealth has power to make laws with respect to postal, telegraphic, telephonic and other like services. This power enables the Commonwealth to pass laws with respect to wagering. Federally, online wagering is regulated by the IGA 2001, 2001.

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12 *The Big Gamble*, n 11.
13 *The Big Gamble*, n 11.
18 Broadcasting Services Amendment (Advertising for Sports Betting) Bill 2013 (Cth); Nettleton, n 17, 2.
prohibiting the supply of interactive gambling services to persons present in Australia.\textsuperscript{22} The prohibition of interactive gambling services through this Act creates a blanket ban over online gambling, but an exemption is provided for sports betting.\textsuperscript{23} Under s 51(v), the Commonwealth Government undoubtedly has the power to pass legislation to prohibit the broadcast of gambling advertisements. There is uncertainty, however, as to whether the Commonwealth can validly legislate a prohibition of gambling advertisement in print media as a specific head of power relating to publishing does not exist.

The IGA 2001 was enacted to limit the growth of online betting, given the emergence of internet services and to “minimise the scope for problem gambling among Australians”.\textsuperscript{24} In particular, the Explanatory Memorandum focused on taking reasonable precautions to ensure Australian children do not have access to gambling at home, or are not exposed to parental behaviour likely to “encourage children to learn and rehearse gambling activities”.\textsuperscript{25} Such good legislative intentions were undermined because, as mentioned above, the IGA 2001 provided an exception for sports betting services.

State and Territory legislation governs licensing requirements for gambling operators, both online and customer facing.\textsuperscript{26} Each State and Territory Act is similarly drafted, requiring any gambling operator seeking to provide and/or promote products or services to state residents to obtain a wagering licence.\textsuperscript{27} Prior to 2008, online wagering operators could only be licensed to operate in one state.

State and Territory legislation stipulates bookmakers must be granted approval by the relevant sporting body to use “race fields information”.\textsuperscript{28} This means if a corporate bookmaker such as bet365 wishes to provide a wagering service for its punters on the AFL, it would require approval from the AFL. A condition of granting such approval is that a product fee must be paid by the bookmaker to the sporting body, often a percentage of the wagering operator’s turnover based on revenue made through gambling on AFL (ie a proportion of gross revenue). Legislation in Victoria and New South Wales goes further, requiring betting companies and sporting organisations to have an integrity agreement as well as a product fee arrangement.\textsuperscript{29} An integrity agreement creates an obligation for corporate bookmakers to report suspicious transactions to the relevant sporting body, and provide that sporting body with the relevant information and transactions concerning the suspected customer upon request.\textsuperscript{30}

State governments deal with the public health and economic consequences stemming from gambling. Gambling can result in large debts, which may lead to mental health problems, substance abuse, bankruptcy and in some instances homelessness.\textsuperscript{31} Furthermore, consequences of gambling are not limited only to the gambler; problem gambling can lead to crime, the breakdown of relationships and domestic violence.\textsuperscript{32} In response, some State governments are introducing reforms in attempt to combat the issue. South Australia, for example, prohibits live odds being broadcast during sporting events, including during breaks and unlike other Australian States, perimeter signage is not...

\textsuperscript{22}Interactive Gambling Act 2001 (Cth) ss 5, 8.
\textsuperscript{23}Interactive Gambling Act 2001 (Cth) ss 5, 8A, 8A(2)(a)-(b).
\textsuperscript{24}Explanatory Memorandum, Interactive Gambling Bill 2001 (Cth).
\textsuperscript{25}Explanatory Memorandum, Interactive Gambling Bill 2001 (Cth).
\textsuperscript{26}Gambling Regulation Act 2003 (Vic) ss 4.3A.1-4.3A.8; Betting and Racing Act 1998 (NSW) s 16.
\textsuperscript{27}Gambling Regulation Act 2003 (Vic) s 3.4.46; Betting and Racing Act 1998 (NSW) s 16.
\textsuperscript{28}Nettleton, n 17; Betting and Racing Act 1998 (NSW) ss 32A-33F.
\textsuperscript{29}Gambling Regulation Act 2003 (Vic) s 4.5.23; Betting and Racing Act 1998 (NSW) s 18C.
\textsuperscript{30}Gambling Regulation Act 2003 (Vic) s 4.5.23; Betting and Racing Act 1998 (NSW) s 18C.
\textsuperscript{32}Ogle, n 31.
The Victorian Government has proposed reforms to ban sports betting advertisement on public transport and in close proximity to schools.34

**FLOODGATES OPEN WITH HIGH COURT BETFAIR DECISION**

In 2008, the growth in Australian sports betting in emergent national and international gambling markets was facilitated by a High Court decision.35 A majority of the High Court ruled that Western Australian (WA) legislation prohibiting interstate bookmakers from advertising in WA was contrary to s 92 of the Constitution (freedom of interstate trade).36 Corporate betting operators, both domestic and international, are predominantly licensed in the Northern Territory (NT), where favourable tax regimes and relaxed licensing conditions exist.37 Prior to the landmark High Court case, New South Wales (NSW) and Victorian law prohibited interstate betting operators from advertising in their respective State unless the betting operator held a licence in that State.38 Betfair, a Tasmanian-licensed betting exchange,39 successfully argued against the WA Government’s amendments to the *Betting Control Act 1954* (WA), which made it an offence to bet by means of a betting exchange, and to use West Australian races field information for business purposes without the approval of the West Australian Minister for Racing and Gambling.40 Betfair had previously been denied approval of use of race field information41 and therefore argued it was at a competitive disadvantage to existing WA gambling operators.

The majority of the High Court applied the “discriminatory protectionism” test42 to find the amendments were contrary to s 92 of the Constitution and therefore invalid. Under this test, a law is discriminatory if “the law on its face subjects that trade or commerce to a disability or disadvantage or if the factual operation of the law produces such a result”, bestowing an advantage on “intrastate trade and commerce of the same kind”.43 Yet if a law is found to have been “necessary or appropriate and adapted” to a non-protectionist purpose, burdens on interstate trade are “incidental and not disproportionate to their achievement” and therefore avoid offending s 92.44

The discrimination in this case was between different but competing methods of betting, betting exchanges and other forms of wagering (bookmakers and totalisators), confirming the subject matter in contention is not required to be identical but capable of competing.45 As punters were likely to place bets either with a traditional bookmaker, a TAB or a betting exchange, but were unlikely to do so using all three methods at the same time, the methods were considered to be competing. The WA

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55 N Hing, P Vitartas and M Lamont, “Promotion of Gambling and Live Betting Odds During Televised Sport: Influences on Gambling Participation and Problem Gambling” (Research Report, Southern Cross University, La Trobe University, 13 February 2014) 5.


57 *Racing and Betting Act 1983* (NT) s 24.

58 Hing, Vitartas and Lamont, n 35, 6; Nettleton, n 17; *Betting and Racing Act 1998* (NSW) ss 4, 18C.

59 Licence granted under Div 5 of Pt 4A of the *Gaming Control Act 1993* (Tas).

60 The amendments were inserted into the *Betting Control Act 1954* (WA) by *Betting and Racing Legislation Amendment Act 2006* (WA) ss 24(1aa), 27D(1).

61 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, [74].


65 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, [122]; Oreb, n 44, 609.
legislation was therefore held to have a competitive disadvantage on Betfair in comparison to existing operators in WA.\footnote{Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [122].} Denying Betfair access to race fields information in WA under s 27D(1) of the \textit{Betting Control Act} was also held to be discriminatory and protectionist as a competitive advantage was again conferred on WA operators.\footnote{Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [118].} WA was unable to provide an acceptable justification for the amendments, which sought to prohibit betting exchanges as they “make no contribution to the racing industry” and “threaten the integrity of the industry” by enabling punters to bet on losing.\footnote{Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [106].} There was insufficient information to prove a lack of integrity on Betfair’s part, with the High Court majority noting that Betfair was prepared to return a financial contribution to WA equivalent to those made by WA gambling operators.\footnote{Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [107].} Furthermore, the majority held the amendments as having an illegitimate purpose,\footnote{Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [32].} by operating to protect WA revenue. The Betfair decision resulted in the removal of these prohibitions on constitutional grounds, allowing interstate bookmakers freedom of advertising across State borders.

The High Court’s decision opened the floodgates to the Australian sports wagering market with the arrival of international betting companies such as Betfair, Bet365, Betstar, Centrebet, Ladbrokes, Sportingbet, IASbet, Sportsbet, William Hill and Unibet. As there is little product differentiation and minimal price elasticity in the sports betting market, promotion of services offered by such companies is paramount.\footnote{Hing, Vitartas and Lamont, n 35, 7; Nettleton, n 17.} The entrance of these international companies has facilitated the proliferation of sports betting promotions, predominantly embedded into live and televised sport in Australia.\footnote{Racing and Betting Act 1993 (NT) ss 24, 106.} The companies commonly choose to be licensed in the NT, as it has the most preferable licensing conditions and the lowest tax regime among the States and Territories.\footnote{C Livingstone, “South Australia’s Gambling Tax Highlights the Regulatory Mess of Online Betting”, \textit{The Conversation} (10 February 2017) <https://theconversation.com/south-australias-gambling-tax-highlights-the-regulatory-mess-of-online-betting-72495>; Department of Treasury and Finance (SA), “State Budget 2016/17: State Government to Introduce Place of Consumption Tax for Betting Companies Offering Services in SA” (News Release, 23 June 2016).} Taxes earned from wagering dramatically decreased after Betfair in 2008 in all Australian jurisdictions other than the Northern Territory.\footnote{Free TV, \textit{Code of Practice – Commercial Television Industry} (1 December 2015) <http://www.freetv.com.au/content_common/pg-code-of-practice-seo>.}

### SEGA-Related Industry Self-Regulation and Codes

Broadcasting Codes regulate when and what content can be broadcast on Australian television and radio. Under s 123 of the \textit{Broadcasting Services Act 1992} (Cth), codes of practice may be developed by a group representing a particular section of the broadcasting industry. In the free commercial television industry that body is Free TV. Free TV’s \textit{Commercial Television Industry Code of Practice} was introduced in 2010 and subsequently updated in 2015.\footnote{Free TV, \textit{Code of Practice – Commercial Television Industry} (1 December 2015) <http://www.freetv.com.au/content_common/pg-code-of-practice-seo>.} The Australian Communication and Media Authority regulates the Code. Similar Codes exist for pay television; they are grouped together in the Australian Subscription Television and Radio Association’s (ASTRA) \textit{Codes of Practice 2013 – Subscription Broadcast Television}.\footnote{Australian Subscription Television & Radio Association, \textit{Codes of Practice 2013 – Subscription Broadcast Television} (2013) s 6.6 <https://www.astra.org.au/advocacy/codes-of-practice>.}

The Free TV Code prohibits gambling and betting commercials from being broadcast in any program classified as G or lower between 6am and 8.30am and between 4pm and 7pm, as well as

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\footnote{Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [122].}
\footnote{Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [118].}
\footnote{Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [106].}
\footnote{Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [107].}
\footnote{Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [32].}
\footnote{Hing, Vitartas and Lamont, n 35, 7; Nettleton, n 17.}
during any program broadcast between 5am and 8.30pm that is principally directed to children.\textsuperscript{57} However, a loophole permits such advertising during commercial broadcasts in a news, current affairs or sporting program.\textsuperscript{58} Although the Free TV Code and the ASTRA Codes were updated to prohibit the promotion of odds during live sporting matches, as called for by Gillard in 2013,\textsuperscript{59} the loophole means that viewers, including children, are still exposed to gambling advertisements during these timeslots.

The Association of Australian National Advertisers (AANA) also imposes conditions on SEGA in the AANA Wagering Advertising and Marketing Communication Code, with efforts made to ensure a high sense of social responsibility within the industry.\textsuperscript{60} The Code creates a prohibition on creating wagering advertisements directly targeting and/or depicting children or young adults (18-24) engaging in gambling.\textsuperscript{61}

There are no codes in place with sporting organisations, such as the AFL and NRL, to govern the ethics of sponsorship deals concerning wagering companies.\textsuperscript{62} Nevertheless, six AFL teams have signed the Victoria Responsible Gambling Foundation’s “Responsible Gambling Charter”.\textsuperscript{63} As signatories to the Charter, teams are obliged to keep gambling from social and fundraising activities in which young persons are involved. Furthermore, they pledge not to enter into sponsorship deals with sports betting companies to which under 18s would be exposed. Despite amendments to these Codes, with the exception of the Gambling Codes in South Australia,\textsuperscript{64} all other Codes permit the advertising of wagering services during family television viewing hours if it is during the broadcast of sport, news and current affairs.

\textbf{ONGOING PUBLIC HEALTH PROBLEMS WITH SEGA}

Australians are the world’s biggest gamblers, according to an analysis by The Economist, losing more per person than any other nation – an average of $1,292 per person in 2016.\textsuperscript{65} Gambling has the potential to facilitate devastating health and social effects similar to those generated by the abuse of tobacco and alcohol.\textsuperscript{66} Problem gamblers (those who develop gambling addictions) are likely to suffer harm as a consequence of significant financial loss, which in turn may lead to psychological harm, such as depression, self-harm and anxiety.\textsuperscript{67} Consequential to these stress-related health issues, problem gamblers are likely to encounter periods of unemployment, further fuelling financial hardship.\textsuperscript{68} Additionally, problem gambling affects immediate family and friends, leading to the

\textsuperscript{57} Free TV, n 55, s 6.5.1.
\textsuperscript{58} Free TV, n 55, s 6.5.3.
\textsuperscript{59} Fox, n 16.
\textsuperscript{60} Australian Association of National Advertisers, n 3.
\textsuperscript{61} Australian Association of National Advertisers, n 3, s 2.3.
\textsuperscript{64} South Australia, n 33, s 24; Free TV, n 55, s 6.5.
\textsuperscript{67} Australian Psychological Society Public Interest Team, “Gambling Related Harm” (Position Statement, Australian Psychological Society, 2012) 3.
\textsuperscript{68} Australian Psychological Society Public Interest Team, n 67.
breakdown of relationships and financial difficulties for family members.\(^6^9\) The wider community is also affected; a heavier burden is placed on health services and self-funded community organisations such as Gamblers Anonymous Australia\(^7^0\) to divert scarce resources to problems stemming from gambling.\(^7^1\) The current level of publicity afforded to sports betting within Australian sport is not only detracting from the enjoyment of sport itself by responsible families exposed to it, but is also raising serious public health concerns as to why sending such a deleterious message to children is being condoned by senior sporting administrators and executives.

SEGA is arguably attempting to embed into Australian sporting culture a socially destructive pathology. The worship of professional sporting athletes and their victories is engrained within Australian society from a young age. Gambling corporations leverage their campaigns off this culture; encouraging young people to buy into the myth of gambling as a sport, so they too can have a taste of team victory. Furthermore, gambling is often marketed on the premise that, like sport, it is a game of skill, which it is not. Furthermore, SEGA acts to appeal to its young male target market through alignment of gambling with masculinity, team loyalty and sporting knowledge.\(^7^2\) Despite gambling’s addictive nature and consequential public health association with alcohol and tobacco, sports betting operators continue to market their products or services as benign and capable of being used “responsibly” by all who come in contact with it (presumably including children watching gambling advertisements on sports telecasts). Embedding gambling into Australian sporting culture acts to promote a message that gambling, like sport, is healthy, fun and harmless to Australian youths.\(^7^3\)

The AFL and NRL are sporting organisations most sought after by gambling companies for sponsorship deals.\(^7^4\) In a 2013 review, the JSCOGR reported that the telecast of AFL games was one of the top three television programs watched by children under 14; such telecasts were often more popular than children’s programs.\(^7^5\) Furthermore, approximately 50,000 children watched a Friday night NRL match.\(^7^6\)

As professional athletes are commonly role models for children, they can strongly influence children’s opinions of gambling and other adult products.\(^7^7\) SEGA can be viewed as grooming the next generation of problem gamblers.\(^7^8\) Tolerance of gambling by sporting stars acts to “gamblify” sport.\(^7^9\) Further, as commercial relationships between grass roots sporting organisations and betting companies continue to intensify, sports wagering may become “normalised” in the earliest stages of children’s sport, increasing long term the prevalence of problem gambling.\(^8^0\)

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\(^6^9\) Australian Psychological Society Public Interest Team, n 67.
\(^7^0\) Gamblers Anonymous Australia <http://gaaustralia.org.au>.
\(^7^1\) Australian Psychological Society Public Interest Team, n 67, 3.
\(^7^3\) Hing, Vitartas and Lamont, n 35, 13.
\(^7^4\) Australian Broadcasting Corporation, “TV’s Gambling Addiction”, Media Watch, 10 October 2016 (Paul Barry).
\(^7^6\) Parliamentary Joint Select Committee on Gambling Reform, n 75, 12.
\(^7^8\) Wood, n 1; Parliamentary Joint Select Committee on Gambling Reform, n 75, 8.
\(^7^9\) Hing, Vitartas and Lamont, n 35, 13.
\(^8^0\) Hing, Vitartas and Lamont, n 35, 12; Christopher Hunt, Submission No 2 to the Joint Select Committee on Gambling Reform, Parliament of Australia, Inquiry into the Advertising and Promotion of Gambling Services in Sport (2013) 3.
In 2016, a study by Deakin University’s Professor Samantha Thomas and colleagues confirmed a significant number of children were able to recall sports wagering brands as a result of their exposure to gambling advertisements and promotions in sport.81 Such evidence is cause for great alarm, as children are more inclined to be influenced by advertising, especially when it is disguised or embedded into sport, such as in commentary,82 and are less able to distinguish between the sports match and the persuasive intent of the embedded promotion. Young audiences are also unable to readily avoid exposure when advertisements optimising gambling brand recall are built into the sporting game play, or even when there are frequent commercial breaks after goals.83 Discussion of betting odds frequents social competition amongst young adult males,84 a group at high risk for developing gambling problems.85

**Nature of Australian Sports-Betting Market**

Modern technology has made gambling from home easier. Instead of wagering at a sports venue, off-course venues such as the TAB (Tabcorp) or over the phone, punters can use the internet on their smart phone to place a bet.86 Real-time information is able to be displayed to a global audience and transactions are able to be instantly facilitated to consumers regardless of their location.87 In particular, “betting exchanges” over the internet operate to facilitate an online customer’s betting as to whether a particular event will or will not occur in a selected sports event.88 The betting exchange operator acts as an intermediary, facilitating the transaction between consumers so inherently has no risk in the transaction, and is able to derive an income by charging a commission on transactions.89 This is in contrast to traditional bookmakers, whereby the consumer will bet against the bookmaker and therefore the bookmaker has direct risk in the transaction. The combination of widespread internet access and smart phone usage has resulted in an environment where placing a bet is more likely to occur in the home in front of children, hence the concern about betting being “normalised”. The internet, as a platform for wagering, is a key contributor to the proliferation of sports betting in Australia.90

Sports wagering companies have established million dollar commercial agreements with both Australian broadcasters and sporting organisations.91 State legislation governing online wagering requires bookmakers to obtain approval by relevant sporting governing body in order to use “race fields information”, the information relating to racing and sporting events held in that jurisdiction.92 For example, if a corporate bookmaker such as bet365 wishes to provide a wagering service for punters to gamble on outcomes in the AFL, it would require approval from the AFL itself. A condition is that a product fee must be paid by the bookmaker to the sporting body, often a percentage of the wagering operator’s turnover based on revenue made through AFL wagering (ie a proportion of gross revenue). Yet, for the sporting bodies themselves, the product fee only accounts for a small percentage

81 Pitt et al, n 77, 484.
82 Hing, Vitartas and Lamont, n 35, 13.
83 Hing, Vitartas and Lamont, n 35, 13.
84 Hing, Vitartas and Lamont, n 35, 15; Thomas et al, n 72.
85 Hing, Vitartas and Lamont, n 35, 15.
86 Hing, Vitartas and Lamont, n 35, 4.
87 Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [8].
88 Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [8].
89 Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [8].
90 Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, [8].
91 Stensholt, n 2.
92 Nettleton, n 17; Betting and Racing Act 1998 (NSW) ss 33, 33A.
of revenue earned from wagering. 93 Sporting organisations and teams generate a significant proportion of revenue through sponsorship deals with wagering companies. 94

Gambling revenue appears to be a critical factor in the plans for peak sporting bodies such as the AFL, NRL, and Cricket Australia to remain financially viable. As a result, Australia is experiencing a "gamblification" of sport. Wagering companies are entering into commercial arrangements with sporting codes, stadiums, scoreboard operators, broadcasters and individual clubs. 95 Corporate bookmakers seek to have their brand aligned with reputable sporting organisations, such as the AFL or the NRL. The services offered by wagering companies are almost undistinguishable therefore it is critical to achieve greater brand awareness in the marketplace, such as through sports sponsorship, which provides an opportunity for the wagering brand to be aligned with a healthy and positive activity for the public. 96

Online bookmakers now have a solid customer base, courtesy of their capacity to market outside their jurisdiction (unlike terrestrial bookmakers, who need a licence in each jurisdiction within which they operate). The prospect of licensing online casino-style gambling over the next few years increases public health concerns. 97

LESSONS FROM SEGA-RELATED REGULATION IN ILLUSTRATIVE JURISDICTIONS

In the United Kingdom, prior to the Gambling Act 2005 (UK), only gambling concerning football pools, the National Lottery and bingo premises were permitted to be broadcast. The Act allowed for sports betting, online casinos and poker. 98 This resulted in an increase in gambling advertisements on TV from 90,000 in 2005 to 1.4 million in 2014, leading to the public calling on the government to act. 99 Gambling advertising is currently regulated through the interaction of many Acts and industry codes which insufficiently address the public’s concern for the children and vulnerable. The Gambling Act, the Gambling (Licensing and Advertising) Act 2014 (UK), the UK Code of Broadcast Advertising (BCAP), the UK Code of Non-broadcast Advertising (CAP) (guided by the Advertising Standards Authority (ASA)) and industry self-regulated codes (under the supervision of the Gambling Commission and OfCom (the independent communications regulator in the United Kingdom)) interact to make up the regulatory landscape governing gambling advertising in the United Kingdom.

Preventing “children and other vulnerable persons from being exploited or harmed by gambling” is a manifest objective of the regulatory landscape in Britain. 100 The broadcast of gambling advertisements should not contain youth themes or other features potentially attractive to adolescents, and are unable to be televised prior to the watershed time of 9pm. 101 An exception is made, however, for the advertising of sports betting during the broadcast of sporting events given “the direct relationship between the two, it would be unreasonable to prevent the advertising of betting...”

93 J Nettleton and J Azzi, “So You Want an Australian Online Wagering License? This Is What You Need to Know” (Focus Paper, Addisons, Sydney, December 2014); Betting and Racing Act 1998 (NSW) s 33A.
94 Australian Broadcasting Corporation, n 74.
95 Pitt et al, n 77.
100 Gambling Act 2005 (UK) s 1(c).
101 Remote Gambling Association (UK), Gambling Industry Code for Socially Responsible Advertising (2nd ed, August 2015) s 31; Committees of Advertising Practice (UK), The UK Code of Broadcast Advertising (The BCAP Code) (1 September 2010) ss 17.3–17.4.
opportunities”. The industry code mandates a “responsible gambling” message at the conclusion of every gambling advertisement. However, this fact may further contribute to the normalisation of gambling.

In Ireland, the Betting (Amendment) Act 2015 extends the licensing regime to remote betting operators, bookmakers and exchanges. As is the case in Australia and the United Kingdom, no limit exists as to the quantity of betting licences available. There are no provisions governing the broadcast and publishing of the advertisement of gambling. Instead, an independent statutory organisation, the Broadcasting Commission of Ireland, addresses gambling advertising and sponsorship standards in its General Commercial Communications Code. The Code does not permit the “direct encouragement to gamble”, but permits communications concerning the service provider and a factual description of services. Similarly, a Code issued by the industry body the Advertising Standards Authority for Ireland devotes a section to the advertisement of gambling, which stipulates an advertisement cannot, for example, depict persons under 18 or suggest gambling is a means of solving financial or personal problems. In Ireland, there is no prohibition of gambling advertisements being broadcast during specified time slots, but under the General Scheme of the Gambling Control Bill 2013, the relevant minister would have the power to make orders regarding the times gambling is broadcast. It would also prohibit gambling licence holders from sponsoring individuals or teams of under 18s, or individuals or groups predominantly appealing to those below the age of 18 years.

In the United States, the Unlawful Internet Gambling Enforcement Act 2006 prohibits online gambling by forbidding financial institutions from facilitating the transfer of money to online sports betting companies, while land-based sports betting is prohibited under the Professional and Amateur Sports Prohibition Act 1992 in all states except Nevada, Delaware, Montana and Oregon. This strict stance on gambling, in comparison to the rest of the western world, has been a result of not wanting to create another avenue for money laundering. In addition, the “Big 4” professional sports leagues (National Football League, National Hockey League, National Basketball Association and Major League Baseball) are strictly opposed to any legalisation of sports betting in America, a fascinating view given the amount of sponsorship revenue it brings sporting organisations in jurisdictions such as Australia, the United Kingdom and Ireland.

102 Remote Gambling Association (UK), n 101, s 32.
103 Remote Gambling Association (UK), n 101, s 36.
106 Broadcasting Authority of Ireland, General Commercial Communications Code (Ireland) (1 June 2017) s 20.4.
107 Advertising Standards Authority for Ireland, Code of Standards for Advertising and Marketing Communications in Ireland (7th ed, 1 March 2016) s 10.
108 Advertising Standards Authority for Ireland, n 107, ss 10.12-10.18.
109 General Scheme of the Gambling Control Bill 2013 (Ireland) cl 72(4).
110 General Scheme of the Gambling Control Bill 2013 (Ireland) cl 74(3), (4).
113 Reiche, n 112, 300.
114 Reiche, n 112, 300.
In March 2003, the Caribbean nation Antigua and Barbuda brought a dispute before the World Trade Organization (WTO), whereby Antigua argued that the then restrictive online gambling laws in the United States were contrary to the General Agreement on Trade in Services (GATS). As such, the cumulative effect of the United States laws was to constrain the ability of Antiguan gambling operators to provide gambling services to the United States market. In particular, Antigua argued that the United States was not meeting its specific commitment to the cross-border supply of gambling and betting services, as classified under sub-sector 10D – “Other Recreational Services, Excluding Sporting” – of the Services Sectoral Classification List. The WTO panel ruled against the United States, finding that the then United States legislation did not apply consistently to all operators as it did in fact allow for some operators to accept online wagers.

In Sweden, gambling licences are restricted to non-profit organisations, the horse racing industry and Swedish state monopoly Svenka Spel, which holds the only licence for sports betting within the state. The regulatory landscape in Sweden is peculiar in comparison to what appears to be common practice of industry codes amongst other European Union members. The advertisement and promotion of gambling services in Sweden without a licence is explicitly prohibited by Swedish legislation, while Swedish consumers are not prohibited from participating in online gambling operated by international corporations. There has been increasing pressure on Sweden to follow other European states through allowing infinite gambling licences, and/or freedom of advertising from gambling operators who are licensed in other European Union states. Sweden’s gambling laws have been held to be contrary to Art 56 of the Treaty on the Functioning of the European Union, which safeguards the free movement of services within the Union. Member states are only able to restrict the gambling options of citizens if they are able to demonstrate that restrictions are proportionate and objectively justifiable to minimise public health obligations. The public health purpose will be undermined if state-based gambling operators engage in intensive promotional campaigns. The marketing budget of Svenka Spel has increased recently, indicating the latter is true, and therefore Sweden’s current gambling regulatory system has been referred to the Court of Justice of the European Union.

**Tobacco Legislation as a Model for Australian SEGA Law Reform**

Lessons as to an effective regulatory approach against SEGA may be drawn from efforts to curb other addictive consumption in Australia, specifically tobacco. In the 1980s, tobacco sponsorship of sport and its subsequent advertising, like gambling, was identified as an element of considerable influence on the consumption of tobacco in Australia. The prohibition of tobacco advertising played an important role in shifting the public’s perception (no more endorsement of tobacco by sport) around tobacco, and consequently decreasing levels of consumption in Australia. The tobacco prohibition

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117 See United States of America – Schedule of Specific Commitments, GATS/SC90 (15 April 1994).
121 Charif, n 120, 10.
122 Charif, n 120, 10.
123 Charif, n 120, 10.
124 Charif, n 120, 10.
model has the ability to effectively deal with the public health implications of gambling. Negative health consequences stemming from gambling has been well documented, yet the link between gambling advertisements and sports betting consumption has not.

Tobacco advertising in Australia was governed by a mixture of State, Territory and industry regulation and by the tobacco industry’s voluntary advertising codes, as well the advertising industry’s code.\textsuperscript{126} This system failed to address the public’s concern to children’s frequent exposure to tobacco while viewing sport. Progressively, tobacco advertisement was eliminated not only from sport, but from all broadcasts and publications. Prior to nationwide prohibition of tobacco advertising, tobacco was one of the most prominent sponsors of sport, comprising almost 30% of sport sponsorship.\textsuperscript{127} Given extensive research confirming exposure to tobacco advertising had contributed to the uptake and consumption of tobacco, the Commonwealth, States and Territories sought to legislate against it.\textsuperscript{128}

First, the Commonwealth Government amended the \textit{Broadcasting Act 1942 (Cth)} in 1976 to introduce a prohibition on the broadcasting, on radio and on television, of advertisements for tobacco products, except as an accidental or incidental accompaniment to other matter.\textsuperscript{129} Yet this amendment proved to be insufficient as tobacco corporations were able to use the exception to continue to advertise and sponsor major sporting events.\textsuperscript{130} There was a proliferation of perimeter signage which consequentially resulted in tobacco products remaining prominent in television coverage of events.\textsuperscript{131} Second, States and Territories enacted legislation in the late 1980s and early 1990s imposing restrictions on tobacco advertisement and sponsorship, primarily concerning billboards and revenue signage.\textsuperscript{132} At the same time, the Commonwealth Government imposed a ban on print media advertising of tobacco under the \textit{Smoking and Tobacco Products Advertisements (Prohibition) Act 1989 (Cth)}. Third, the \textit{Tobacco Advertising Prohibition Act 1992 (Cth)} imposed a nationwide ban on the advertising on tobacco products.\textsuperscript{133}

Federal anti-SEGA legislation could similarly prohibit the broadcast or publication, knowingly or recklessly, of gambling advertisements, with compliance being made a requirement of a broadcaster’s licence under the \textit{Broadcasting Services Act 1992 (Cth)}. Key players in the online platform of the Australian sports gambling market are subsidiaries of British and Irish corporations, hence s 51(xx) of the Australian Constitution could be relied upon as a constitutional basis for such legislation.\textsuperscript{134} Legislative drafting could mirror the definition of “regulated corporation” in the \textit{Tobacco Advertising Prohibition Act 1992 (Cth)}.\textsuperscript{135}

Like the United States, Australia has also made a commitment under sub-sector 10D for the cross-border supply of gambling and betting services.\textsuperscript{136} Therefore to avoid contravening GATS obligations and facing a similar WTO dispute as that between the United States and Antigua, Australia would need to ensure any legislation prohibiting or restricting gambling advertising and promotion applied uniformly to all operators, whether domestic or international. Such restrictions could be argued to be necessary to promote moral goals and public health benefits, and to avoid contravening other obligations. For example, current gambling promotional practices in sports broadcasts could be

\begin{itemize}
\item \textsuperscript{126} Furlong, n 125, 159.
\item \textsuperscript{127} Furlong, n 125, 162.
\item \textsuperscript{128} Furlong, n 125, 162.
\item \textsuperscript{129} Furlong, n 125, 163.
\item \textsuperscript{130} Furlong, n 125, 164.
\item \textsuperscript{131} Furlong, n 125, 164.
\item \textsuperscript{132} Furlong, n 125, 164.
\item \textsuperscript{133} Tobacco Advertising Prohibition Act 1992 (Cth) ss 13, 15.
\item \textsuperscript{134} Furlong, n 125, 168.
\item \textsuperscript{135} Tobacco Advertising Prohibition Act 1992 (Cth) s 8.
\item \textsuperscript{136} See Australia – Schedule of Specific Commitments, GATS/SC/6 (15 April 1994).
\end{itemize}
argued to be contrary to Australia’s obligations under the United Nations Convention on the Rights of the Child, in particular Art 6 (ensuring children live a full life), Art 36 (protecting children from any activities that could harm their development) and Art 17 (ensuring children have access to reliable information from the media, and that broadcasters do not promote material that could harm children).

**CONCLUSION**

In summary, the Commonwealth Government should enact federal legislation prohibiting the embedding of advertising and promotion of gambling in Australian sport. Long term, Australia should support a World Health Organization Convention on Gambling Control (modelled on its Framework Convention on Tobacco Control) which should incorporate specific prohibitions on SEGA.

With a SEGA ban, it is likely widespread sponsorship of sporting organisation would cease and hence sporting organisations would be adversely financially impacted. Decreased financial support for sporting organisations has the potential to result in decreased spending on non-revenue generating endeavours such as community programs, which may include children’s and women’s leagues. While the absence of gambling sponsorship revenue provides the opportunity for other private enterprises to step up and fill the void, it is unlikely they would be able to provide the same level of funding.

Possible strategies for minimising the impact of decreased gambling advertisement revenue for sporting organisations include specific lotteries and community sports imposts on multinational corporations that pay little tax in Australia to facilitate increased government funding for those local sporting initiatives directly adding to the health of the public. Funds that enable this also could be collected from a federal tax similar to the South Australian Government’s wagering tax of 15% on the net wagering revenue of betting companies offering services to South Australian consumers. A federal point of consumption tax for online sports gambling could provide revenue for State and Territory governments to deal with the negative effects of gambling and fund other public health initiatives in their State or Territory. The tax could operate similar to the Goods and Services Tax, with revenue collected by the Commonwealth Government, and then distributed to State and Territory governments according to their level of sports gambling consumption.

Consequential to the High Court decision in Betfair, online wagering companies are predominantly licensed in the Northern Territory, where there are the most favourable licensing conditions and lowest taxes. This has resulted in a considerable loss of gambling tax revenue for jurisdictions with more stringent licensing and tax regimes. A federal point-of-consumption tax would deter gambling operators from cherry picking favourable licensing regimes and would likely decrease the spending on gambling promotion campaigns of multinational corporations. It is to be hoped that in time, as scientific evidence of its detrimental public health impact accumulates, gambling will go the way of tobacco smoking, no longer encouraged in the media and the subject of medical and community education programs focused on its elimination.

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