



**Address to the
Racing and Sports Betting Forum**

RACING, SPORTS BETTING AND THE ACCC

by

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Introduction

Australians have developed a reputation for having a propensity to enjoy a flutter on sporting events from time to time, and figures from the Australian Bureau of Statistics show sports betting continues to be extremely popular.

But some of the bets being placed recently have been substantial indeed, and haven't been coming from casual visitors to the track or TAB.

Australia's economy has experienced a flurry of merger activity, with large players staking significant funds to buy into or buy out competitors in a range of sectors including in the media, transport, and energy industries.

The racing and sports betting sector has not been immune from this trend, and there have been significant moves over recent years, with more likely to follow, if current activity levels are anything to go by.

While changes happening in racing and betting have the most obvious implications on those involved, there are developments in a number of other related sectors currently underway that are also likely to have an impact and therefore be of interest.

Changes to the country's media laws are likely to affect the way Australians access sports betting live broadcast services; technology is presenting both challenges and opportunities for incumbent players; and changes to laws affecting small business and mergers should also have an effect on the sector, particularly in the way groups of smaller players can seek to collectively negotiate with larger suppliers of services.

The scourge of fraudsters attempting to dip into the attractive pool of legitimate racing revenue also continues to be a concern, and the ACCC and all regulators are keeping a keen eye on ensuring Australian sports betting users and legitimate businesses are protected from such illegal conduct.

Today I'd like to start off by explaining the role of the ACCC and the Trade Practices Act in these type of issues. I will then take a look at some recent regulatory developments and movements in the industry and the way they are likely to impact on those here today.

Role of the ACCC

The ACCC has seven fulltime commissioners who oversee an independent authority with almost 600 staff decentralised in state capitals. Being on the ground in the regions ensures closer contact with business and consumers and other agencies.

The background of Commissioners vary with a range of legal, economic, business and technical skills. Sitting as a Commission we make all major decisions but we don't formally manage staff - operating like a Board. Consideration of issues and decision making occurs through a Committee structure – which provides a transparent and rigorous process.

The ACCC administers the Trade Practices Act, and our key areas of responsibility under the Act are:

- anti competitive conduct
- misleading and deceptive conduct
- safety net of unconscionable conduct

Characteristics of the Commission's functions are:

- complaints driven - proactive as patterns emerge
- strong investigation, evidence gathering and enforcement powers with litigation conducted through the Federal Court
- emphasis on compliance and avoidance of problems using information and education to assist avoiding problems
- importance of codes of conduct to enhance compliance framework

The ACCC also has the capacity to agree to authorisation of "anti competitive conduct" where net public benefit outweighs the detriment. This provides the applicants with immunity from any form of prosecution.

The competition context of sports betting

This sector presents complexities from a competition point of view. There has been a traditional relationship between the racing industry, the wagering industry, broadcasters and state and territory governments. While the wagering industry has been largely privatised, strong regulatory and revenue raising arrangements apply to all aspects of wagering and the relationships within the sector. This is less so with respect to other sports but they are increasingly being drawn into the formal wageringsystem.

The highly regulated nature of wagering markets in many cases limits competition between some participants. In particular, exclusive totalisator licences are allocated in each State and Territory. Further legislation prevents totalisators from advertising interstate. The ACCC understands that the level of cross-border wagering remains low, despite significant increases in internet and phone betting in recent years (which might have been expected to facilitate more interstate betting).

Currently, State and Territory Governments have allocated exclusive licences to operate parimutuel wagering businesses within their jurisdiction. For example, in Victoria, Tabcorp's exclusive licence expires in 2012. From 2012, the Victorian Government might allocate another exclusive licence or more than one licence. In Queensland, Unitab's licence expires in 2100 but ceases to be exclusive from 2014. Consequently, the Queensland Government could allocate a second parimutuel wagering licence from 2014.

While existing regulatory arrangements in each state appear to limit the ability of totalisators to compete with each other, this may change in the future.

Of the other suppliers of wagering services in Australia it is public knowledge that a new entrant Betfair (which has a different betting exchange model) made allegations of anti competitive conduct by various participants in the Australian racing industry.

At the time of the complaint in 2005 Betfair was attempting to obtain a licence to operate in one or more Australian States or Territories. I cannot discuss the detail of these allegations as the ACCC does not generally comment on matters it may have investigated unless it leads to specific enforcement action. The Commission notes however that earlier this year Betfair was granted a license by the Tasmanian government to operate as a betting exchange.

Merger trends

As I stated at the outset, it has been a busy time for the market in terms of mergers, and as the Government regulator responsible for vetting them to ensure preservation of the public interest, the ACCC has also had a busy year.

During the 05/06 financial year we saw a 44 percent increase in the number of mergers considered by the Commission, and it is a trend that shows no sign of slowing down. By December 8 we had already considered 213 matters for the current financial year.

Clearly the amount of liquidity in the market and the strength of the economy are contributing to this trend, but there also appears to be a growing understanding and acceptance of the ACCC's informal merger clearance system. The ACCC has also been more proactive in checking out mergers between parties which do not approach us to seek clearance.

The ACCC has been more active in working with merger parties to accept enforceable undertakings to deal with anti-competitive aspects of mergers that would otherwise present minimal risk of competition concerns. Industry has recognised the potential of offering such undertakings to the regulator, and while we continue to work through some fine-tuning of this process, on the whole it is proving to be a successful, less confrontational method of dealing with competition concerns resulting from mergers.

TABCORP/ UNiTAB

In the area of racing and gambling one of the most significant developments this year coming as part of the wider increase in merger activity was the proposed Tabcorp acquisition of UNiTAB.

In early August, after conducting assessments and considering feedback from industry players, the ACCC released a statement of issues outlining concerns with Tabcorp's proposed acquisition of UNiTAB.

In all merger proposals the ACCC's role is to protect competition in any market, and ensure there is no substantial lessening of competition. This is spelled out in Section 50 of the Trade Practices Act.

Our statement of issues outlined a number of concerns and called for further feedback from the market regarding the proposed merger. I should emphasise that a statement of issues is not a final decision.

Essentially, the ACCC's primary concerns related to a potential reduction in competition in the national wagering market between the largest operator, Tabcorp, and the second largest, UNiTAB.

Tabcorp was the holder of exclusive totalisator wagering licences in Victoria and NSW. UNiTAB on the other side held exclusive totalisator licences in Queensland, South Australia and the Northern Territory.

Tabcorp's wagering licence for Victoria expires in 2012, while the licence for NSW expires in 2013. The ACCC was of the view that if the proposed merger did not go ahead, UNiTAB and Tabcorp could well be competing with each other for those licences once they became available. Allowing the acquisition to go ahead may have removed that potential competition.

Also, during its assessment the ACCC formed the view that there was a competitive national market for the right of TABs to combine their totalisator pools.

At the time of carrying out the assessment the TABs of Western Australia, Tasmania and the ACT combined their pools with Tabcorp's Victorian totalisator pool. The various TABs did this to reduce the volatility in odds, and paid Tabcorp a fee for this service.

By allowing the proposed acquisition to go ahead, the only alternative supplier of these services, UNiTAB, would have been removed from the market. This had the potential to significantly affect new entrants to wagering markets.

As a result, on 16 August 2006 the ACCC announced it would oppose the acquisition.

Tabcorp offered a series of section 87b undertakings to try and address some of those concerns. However, the ACCC felt the concerns were essentially structural, that is they would have reduced the number of major totalisator pools in Australia from two to one. The undertakings being offered by Tabcorp were essentially behavioural and related to promises to take certain commercial action to alleviate the ACCC's concerns.

The Commission around the same time announced that that the proposed joint venture between Sky racing (owned by Tabcorp) and TVN (owned by the Victorian racing industry and Sydney race clubs) would raise competition concerns. Since then it is understood Sky and TVN have been negotiating a revised arrangement.

Recent collective bargaining authorisations

In July the ACCC granted authorisation for bookmakers, through the Association of Australian Bookmaking Companies, to collectively negotiate information access fees with racing and sporting bodies as well as to publish and use race field information. That authorisation was granted until August 2011.

In June the ACCC also authorised the Queensland and Brisbane Turf Clubs to conduct a joint venture deed to carry out upgrades, capital works and other joint activities within the Brisbane racing district.

A number of Australian Hotels Association state and territory divisions were also authorised in March to collectively bargain over the provision of wagering and broadcasting services.

In September the ACCC issued a draft decision proposing to deny an application from the Coalition of Major Professional Sports to collectively negotiate with licensed sports betting operators including Tabcorp, Betfair and members of the Association of Australian Bookmaking Companies.

In its application, COMPS had sought authorisation for it to be allowed to collectively negotiate product fees for sports betting operators.

COMPS members, which include Cricket Australia and the National Rugby League, claimed the sports betting operators were using information generated by their sports but we not paying for the service.

In its draft decision the ACCC opted to reject the application on the basis that while it did not oppose the sports trying to obtain a payment for their product, it appeared unlikely to the ACCC that they would have been able to collectively achieve any better outcome than had they negotiated individually. Most of the individual sports had shown in the past their ability to negotiate constructively with betting agencies on their own.

We have received a number of submissions from industry in response to that draft decision, and the ACCC is currently considering those submissions before making its final decision on the matter.

It is important to add, however, that there are matters the group can discuss with the sports betting agencies without needing authorisation from the ACCC. For example, it may be possible for COMPS members to put in place guidelines that assist in ensuring the integrity of data used and avoidance or detection of irregularities.

Changes to merger and collective bargaining laws

As you may be aware, there has been some shake-up in the country's merger laws recently that affects many industries. Importantly, these changes may have some implications for the racing and betting sector.

The main feature is a change to the merger clearance processes. Previously, we had what was known as an informal clearance system, whereby merger parties were free to approach the ACCC to seek confidential feedback on a proposed merger, however they were under no obligation to approach the Commission. The ACCC was also able to investigate any mergers of interest, regardless of whether the parties had approached us. This system still exists, but we now also have a voluntary formal merger clearance system that operates in parallel to the ACCC's informal merger review process.

This is a more rigid system than the informal route, which I might add is still open to merger parties. Under the formal system, parties can apply directly to the Australian Competition Tribunal for merger authorisation, which will make a decision within three months, or six months for complex merger matters. The ACCC has been given an increased presence at the Tribunal under these changes, and can make direct representations on merger matters.

But probably of most interest to the audience here today will be changes to the collective bargaining notification scheme.

The Commission has had a number of racing industry related applications for authorisation in recent times, with the majority relating to collective bargaining.

The collective bargaining notification scheme

Which brings me back to the recent legislative changes and how they affect collective bargaining. This will be of particular interest to those in the audience today who are likely to be taking part in these sorts of negotiations from the supplier side of the fence.

From early next year, the ACCC will administer a small business collective bargaining notification regime. After a number of years in gestation, Parliament has passed a package of reforms including a new process to provide protection in relation to collective bargaining arrangements.

The notification process is likely to provide small businesses with a more timely and simplified process. The main streamlining features of the arrangements are that notifications will provide automatic immunity in 28 days in the absence of ACCC concerns and we expect a significantly lower fee than currently applies to authorisations.

For those bodies such as suppliers of racing and betting services, it will mean a clearer, more transparent process when dealing with collectives of businesses. It should be remembered that collective bargaining offers potential benefits to all parties, not only those doing the bargaining as a group.

Those on the other side of the negotiations, namely the businesses negotiating as a group such as sporting organisations, broadcasters and entertainment providers, the benefits may include synergies of dealing as

group, rather than having the increased paperwork and cost of each business negotiating individually, where concerns and priorities of a number of businesses may in fact be very similar.

I don't want to give the impression that the ACCC is in some way advocating that collective bargaining should be pursued by all parties, but under certain circumstances it does make sense not only for the individuals, but also the suppliers they are negotiating with. Generally, the ACCC will look more favourably on arrangements that have the blessing of both sides of the negotiations when considering applications.

Implications of an evolving media sector

Perhaps not as directly related but no less significant for the racing and gaming industry is the pending changes to Australia's media ownership laws.

In March the Government released a discussion paper into relaxing cross-media ownership restrictions, and since that time those changes have been passed by the Parliament, and we expect them to come into effect some time in 2007.

The changes will make it possible for one owner to control two of the three media platforms of print, television or radio in any one market, as long as there remains a minimum of four owner 'voices' in regional areas and five voices in the cities. Any mergers would still have to pass the test of Section 50 of the Trade Practices Act, which the ACCC administers, which prevents mergers that represent a substantial lessening of competition.

These changes have implications for the way consumers access racing and other sporting content, and how that content is made available to them.

Even though the changes have yet to come into effect, we have already seen significant movement among the major media players. The owners of both the Nine and Seven networks have entered significant financing ownership arrangements with overseas investment bodies, and just last week the majority owner of the Ten network, CanWest, announced to the stock exchange that it may be looking to sell out of Ten and pursue other Australian media opportunities thrown up by the media law changes.

There has of course been some movement on the radio and print front as well, including significant purchases by News Ltd in Fairfax, by Channel Seven in West Australian News and last week's announcement that Fairfax and Rural Press are to merge. It appears likely we will be looking at a very different media landscape in 12 months' time when the changes are expected to be in place, and our mergers team is bracing for another busy year.

Through its role as the competition regulator, the ACCC will have a central role in assessing mergers that occur in the media sector, and will have to consider very carefully the impact on consumers, that is, the viewing public, and how the offerings they receive may be impacted.

With all this activity, and expectation of more to come, the ACCC is already being asked how it will ensure media mergers do not leave the public with less choice of services, rather than more.

With the rise of the internet and cross-over between the different media platforms, clearly the way we assess the impact on competition is changing.

The ACCC has to consider the market for content, advertising and audiences, not just ownership as we have tended to focus on in the past.

Sport and racing, like movies, is generally regarded as premium content – something viewers may be prepared to pay extra for and generally of a much higher value to advertisers because of the number of eyeballs it attracts.

Taking pay TV as an example, such content is widely considered to drive demand for pay TV services and strengthen any pay TV offering. The Productivity Commission has stated that the key drivers of a high volume pay TV business are recent release movies and premium local sport. Similarly, the 2003 European Commission decision accepting the merger between two Italian pay TV operators, Telepiu Spa and Steam Spa, noted that premium content such as blockbuster movies and football are what drive subscriptions to pay TV.¹

Then moving beyond traditional Pay TV – the strong uptake of broadband services in Australia is giving rise to the introduction of new on-demand and pay-per-view content services such as short video clips to 3G mobiles; Video-on-Demand movies delivered via broadband; and rudimentary IPTV services. There are already a number of suppliers of these alternative services operating in Australia, including Telstra, Anytime, Reeltime and Hutchison.

For these emerging services, it is perhaps too early to judge what will be compelling content. However, there is no doubt that content rights will be crucial to the success of any ventures using these new technologies.

I'll reiterate that exclusive agreements for the supply of content already exist and are not necessarily anti-competitive.

Having said that, the TPA recognises that exclusive contracts have the potential to be anti-competitive. Section 45 of the Act prohibits companies from entering any arrangements that result in a substantial lessening of competition. Section 47 of the Act is even more explicit: exclusive dealing that causes a substantial lessening of competition is illegal.

What is primarily of concern in this area is the locking up of content, shutting out certain players from competing in the market for the broadcasting of sports and racing coverage, and large or dominant players abusing their market power by boycotting certain racing or services in order to squeeze out competition or extract a lopsided deal from those who have little option other than to capitulate under the weight of a market heavyweight.

The new media laws and the potential changes to ownership have the potential to create more choice and more competitive services for racing and betting fans. There is also a potential for existing dominant players to exert an even greater influence over these new services, which could lead to less choice rather than more for consumers. The ACCC would want to ensure that traditional incumbents cannot inhibit the emergence of new players or

¹ Emerging market structures in the communications industry report, p. 80.

products by using their existing market power to tie up access to compelling content.

New information technologies

But it is not just betting and sporting content as we know it at the moment that is exercising our minds. Technology is presenting a number of new frontiers for providers of these services.

Much of this is centred round internet services that provide a ready conduit for both viewing of sports and remote wagering.

Apart from the internet, the Government also announced an auction of two new digital broadcast licences reserved for new types of content designed to complement, rather than directly compete with, existing broadcasting and digital services.

We still do not have a clear idea of how the Channel A and Channel B licenses, as they are known at the moment, will be used, but they do present some interesting opportunities, as well as potential competition issues.

I'll talk mostly about Channel B, as it appears to throw up the majority of potential issues for the ACCC and is generating the majority of interest from potential bidders and commentary from the market.

Channel B is likely to be used for broadcasting television type content to mobile phones or other portable devices. Potentially, it may become an important platform for betting and racing services, in addition to those already offered via the internet, satellite, SMS and traditional radio and television broadcasts.

Channel B has the potential to offer dozens of new content channels. However with possibly one owner of a licence, there does exist the potential for some content providers to be locked out of the spectrum.

The ACCC would be concerned at any regime that had the potential to lock out new entrants, restrict competition or otherwise limit the offerings to customers.

To prevent this, potential bidders for the new licences may have to pass an assessment of Section 50 of the TPA before being allowed to bid.

Amendments to the Radiocommunications Act may require potential bidders for the Channel B licence to provide acceptable access undertakings.

We are still settling the details of how we will go about managing the competition issues surrounding the auction of the new licences. It should also be noted that The Australian Communications and Media Authority will be conducting the auction.

Racing software scams

One final issue I'd like to briefly touch on is the number of complaints the ACCC continues to receive in relation to scammers extracting large sums of money from punters through the marketing of race betting software and tipping schemes.

These fraudsters are a blight on the legitimate industry, and threaten the viability and the reputation of law-abiding operators.

Unfortunately, some of the reports we receive are heart-breaking, and it's often only after the damage is done that many victims learn they have been ripped off.

The ACCC has received 265 complaints about race betting software and schemes since July 2005, with victims reporting losing between \$4000 and \$35,000.

Our research suggests that those behind the scams often change names to avoid detection, and in some cases to sting the same victim numerous times under a different guise. Telemarketing and high-pressure sales techniques seem to be the distribution method of choice, but scammers are also heavy users of letterbox drops or newspaper advertisements, usually in the business opportunities section of the classifieds.

The Australian Securities and Investments Commission has taken an interest in a number of these cases as well, and the ACCC has successfully shut down and prosecuted several operators, but education remains our greatest defence.

The ACCC continues to work closely with fair trading offices around the country to shut down as many of these schemes as possible where they emerge.

Conclusion

Competition and the evolution of the racing and sports betting industry in Australia continues to present challenges both for regulators, but also the industry as a whole.

Merger activity across the economy is affecting the way many businesses, including those in the racing and betting sector, will look in future years.

New technologies and changes to legislation are also continuing to open up new markets which the regulator will be keeping a close eye on to ensure they remain open, competitive and beneficial to the Australian public as a whole.

As we have already heard from Tabcorp this morning, and I'm sure we'll hear repeated throughout the conference, the nature of wagering, the technology we use to do it and the way we keep it fair for all will continue to evolve.

For my part on behalf of the ACCC, I look forward to ensuring we keep the goalposts where they should be so that we can all continue to enjoy racing and sports betting in Australia as it grows and matures.

Thank you.

