



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation A91007

lodged by

the Coalition of Major Professional Sports

*in relation to:
collective negotiations with sports betting operators*

Date: 20 September 2006

Commissioners

Samuel
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Smith

Authorisation no. A91007

File no. C2006/1315

Executive Summary

The Australia Competition and Consumer Commission proposes denying the Coalition of Major Professional Sports application for authorisation to collectively negotiate with licensed sports betting operators.

The application

On 12 July 2006, the Coalition of Major Professional Sports (COMPS), which is made up of six major Australian sporting bodies, lodged application for authorisation A91007 with the Australia Competition and Consumer Commission (ACCC).

Essentially, COMPS has sought authorisation to allow it to, on behalf of its members, enter into collective bargaining negotiation with licensed sports betting operators. COMPS states that it intends negotiating a 'fair share' of revenues taken by sports betting operators from gaming and wagering activities which are reliant on its members sports.

COMPS has sought authorisation for a period of five years and also sought interim authorisation.

The authorisation process

A key objective of the *Trade Practices Act 1974* (the TPA) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

Assessment of the anti-competitive detriment and public benefit

In order to grant authorisation to the conduct proposed in COMPS application for authorisation, the ACCC must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the proposed arrangements.

Anticompetitive detriments

In relation to the potential anticompetitive effect of the proposed collective bargaining arrangements, the ACCC is of the view that the voluntary nature of the arrangements and the absence of boycott activity would be likely to lessen the potential for the arrangement to reduce economic efficiency.

However, the ACCC does consider that the proposed arrangements may, to some extent, inhibit an apparent growing level of competition between COMPS members to supply information to sports betting operators. In addition, the ACCC considers that the proposed arrangements may result in increased costs for sports betting operators which they are then likely to pass on to consumers.

Public benefits

In relation to the potential public benefits of the arrangements, the ACCC is of the view that the proposed collective bargaining arrangements may generate some public benefits from allowing COMPS members to have greater input in contract negotiations.

However, the ACCC considers that any such benefits would be diminished by the diverse nature of the parties and the proposed method by which they intend to conduct the collective negotiations.

Draft determination

For the reasons outlined in this draft determination, the ACCC cannot be satisfied that the public benefits likely to result from COMPS collective bargaining arrangements would outweigh the potential anti-competitive detriments of those arrangements and therefore proposes denying COMPS application for authorisation.

The ACCC considers it important to note however that as the industry's representative body, there are many activities, aside from negotiating product fees, that COMPS could engage in which would be unlikely to require authorisation.

The ACCC considers that this may range from COMPS advising its members on factors they may wish to consider in their negotiations with sports betting operators, to potentially developing an industry code or framework in conjunction with sports betting operators which deals with issues such as integrity of data, corruption and cheating.

Further submissions

The ACCC is now seeking further submissions from interested parties. In addition, COMPS or any interested party may request the ACCC to hold a pre-determination conference pursuant to section 90A of the TPA.

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1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2. The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3. Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The authorisation process

- 1.4. The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny an application for authorisation.
- 1.5. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.6. The ACCC then issues a written draft determination proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.7. Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.
- 1.8. The ACCC then reconsiders the application taking into account the comments made at the conference and any further submissions received. Should the public benefit outweigh the public detriment, the ACCC may issue a final determination granting authorisation. If not, the ACCC may issue a final determination denying authorisation.
- 1.9. However, in some cases it may be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

COMPS' application for authorisation

- 1.10 This document is the draft determination in relation to authorisation application A91007 lodged with the ACCC on 12 July 2006 by the Coalition of Major Professional Sports (COMPS).
- 1.11 COMPS is made up of representatives from six major Australian sporting bodies comprising: Cricket Australia, the National Rugby League, Australian Rugby Union, the Football Federation of Australia, Tennis Australia and the PGA Tour of Australasia.
- 1.12 COMPS has sought authorisation to, on behalf of its members, enter into collective bargaining negotiation with a number of specified sports betting operators that are listed in its application and at Attachment A of this draft determination. COMPS has also sought to allow it to enter negotiations with unspecified future parties.
- 1.13 Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions with a supplier or a customer (the counterparty). Collective bargaining arrangements will ordinarily raise concerns under the competition provisions of the TPA as they involve agreements between competitors, often in relation to pricing.
- 1.14 The authorisation process in the TPA, however, allows businesses to obtain protection for such arrangements where it can be demonstrated that the public benefits flowing from an arrangement will outweigh the anti-competitive detriments.
- 1.15 COMPS have sought authorisation for a period of five years.

COMPS' application for interim authorisation

- 1.16 In addition to its substantive application, COMPS also sought interim authorisation to allow it to begin engaging in the proposed conduct while the ACCC considered and evaluated the merits of its substantive application.
- 1.17 On 9 August 2006, the ACCC denied COMPS application for interim authorisation on the basis that COMPS had not demonstrated that interim authorisation was urgently needed. The ACCC did however state that it would revisit the issue of interim authorisation in its draft determination.
- 1.18 The ACCC's re-assessment of COMPS application for interim authorisation is in section 9 of this draft determination.

2. Background

The Applicants

- 2.1 As mentioned, COMPS is a coalition of peak national sporting organisations each of which has different functions depending on their particular sports requirements. Generally however their roles include organising and promoting their main domestic competitions in addition to their national teams and any competitions they may participate in. COMPS is comprised of the following six members.

The PGA Tour of Australasia¹

- 2.2 Founded in 1911, the PGA Tour of Australasia Limited's (the PGA) membership is comprised of Australian professional golfers ranging from tournament, club and teaching professionals. At present the PGA has approximately 1600 full members and 130 tournament professionals.
- 2.3 A major part of the PGA's function is to run training, educational and accreditation programs such as the PGA Academy of Golf which provides a trainee (apprentice) program and the PGA International Golf Institute which designs and delivers a variety of golf education requirements.
- 2.4 In addition to representing individual players, the PGA also organises a number of major golfing events including: the Holden Scramble; the Von Nida Tour; the Cadbury Schweppes Australian PGA Championship and; the Cadbury Schweppes Club Professional Championship.

Lawn Tennis Association of Australia²

- 2.5 The Lawn Tennis Association of Australia Ltd (Tennis Australia) was originally formed in 1904 and is the governing body of tennis within Australia. Along with promoting tennis at a junior and grassroots level, Tennis Australia is also responsible for staging major international tournaments such as the: Australian Open; Davis Cup and the Federation Cup.

The National Rugby League³

- 2.6 The National Rugby League (NRL) is the premier rugby league competition in Australia. At present, the NRL consists of fifteen teams – nine of which are based in New South Wales, two are from Queensland and there are one each from Victoria, New Zealand and the Australian Capital Territory.
- 2.7 The NRL's main role is to market its premierships competition on behalf of the fifteen clubs along with organising the competition draw, finals matches and the grand final. In association with the Australian Rugby League, the NRL

¹ <http://www.pga.org.au/>

² <http://www.tennisaustralia.com.au/pages/default.aspx?id=4>

³ <http://www.nrl.com/>

also organises and promotes representative matches such as the State of Origin and Australian internationals.

The Australian Rugby Union⁴

- 2.8 The Australian Rugby Football Union began in the 1940's and in 1997 changed its name to the Australian Rugby Union Ltd (the ARU).
- 2.9 The ARU claims that the participation rate for rugby union has nearly doubled in the last ten years with approximately 176,000 players signed-up in 2005. In addition, the ARU claim that sponsorship now exceeds \$20 million annually and that record ratings were recorded for the Super 12 and Test Rugby along with record crowds during the 2005 season.
- 2.10 The ARU's primary role is to develop and promote Australia's representative teams which include the Wallabies and the provincial teams in the Super 14 competition.

Cricket Australia⁵

- 2.11 The first central administrative body for cricket in Australia was established in 1892 when delegates from the state associations of New South Wales, South Australia and Victoria established the Australasian Cricket Council. This administrative body, which now includes all the states, adopted its current name, Cricket Australia, in 2003.
- 2.12 Cricket Australia is responsible for, amongst other things, organizing and promoting domestic interstate games such as the Pura Cup and one day domestic games along with internationals such as Tests. Cricket Australia is also introducing a domestic Twenty20 tournament for the 2006-2007 summer.

Football Federation of Australia⁶

- 2.13 Football Federation Australia (FFA) is the governing body for football in Australia but is also part of the international governing body for football, the Fédération Internationale de Football Association (FIFA). The FFA is responsible for governing the game in Australia along with ensuring that it continues to grow and develop.
- 2.14 The FFA aims to achieve these objectives by, amongst other things, developing, preparing and promoting the Australian national team and its games along with managing and growing the newly formed National Football Competition.

⁴ <http://www.rugby.com.au>

⁵ <http://www.cricket.com.au/>

⁶ <http://www.footballaustralia.com.au/>

The potential counterparties

- 2.15 COMPS is seeking authorisation to enter into collective bargaining negotiations with a number of sports betting operators (or counterparties). Broadly, these organisations are involved to differing extents in the gaming and wagering industry a part of which involves taking bets on some or all of the sports represented by COMPS members.

Tabcorp Holdings Limited

- 2.16 Tabcorp Holdings Limited (Tabcorp) is a publicly listed company which, amongst other things, holds the licences to provide off-course and on-course totalisator wagering⁷ and fixed odds betting⁸ services in Victoria and New South Wales. Tabcorp's total revenues in the 2004-2005 financial year from all its businesses was approximately \$3.7 billion with its wagering businesses (racing, sports betting) contributing approximately \$1.3 billion.⁹
- 2.17 While the amount of revenue generated by Tabcorp's sports betting activities alone is not clear, according to Tabcorp's annual report those revenues did increase by 17% in Victoria and 9.6%¹⁰ in NSW during the past financial compared to an overall net operating revenue growth of 3.4% for wagering.¹¹

UNiTAB Limited

- 2.18 UNiTAB Limited (UNiTAB) is a publicly listed company which, amongst other things, holds licences to provide off-course and on-course totalisator wagering and fixed odds betting services in Queensland, South Australia and the Northern Territory. UNiTAB's total revenues in the 2004-2005 financial year from all its businesses was approximately \$557 million with its wagering businesses (racing, sports betting) contributing approximately \$471 million.¹²
- 2.19 Again UNiTAB's revenue from sports betting alone is unclear, however, according to its annual report its overall wagering business grew by approximately 5% for the 2004-2005 financial year, whereas its fixed odds betting (which consists mostly of sports betting) grew by 23%¹³ to \$78.9 million.¹⁴
- 2.20 The report states that '(fixed odds betting) continues to fulfil its promise. It has the capacity to offer more betting options to a wider cross section of the community... and is expected that this product range will deliver double digit growth into the foreseeable future.'¹⁵

⁷ A system of wagering whereby all bets of a particular type are pooled and then shared amongst the winners at the conclusion of the event.

⁸ A system of wagering whereby the bettors odds are fixed at the time of placing the bet.

⁹ Tabcorp Concise Annual Report 2005, pg 53

¹⁰ Ibid, pg 10

¹¹ Ibid, pg 9

¹² UNiTAB Concise Annual Report 2005,

¹³ Ibid, pg 2

¹⁴ Ibid, pg 10

¹⁵ Ibid, pg 10

ACTTAB Limited

- 2.21 ACTTAB Limited (ACTTAB) has the exclusive right to conduct or provide totalisator betting services for races, sporting events and sports betting events held inside or outside the Australian Capital Territory.
- 2.22 According to its 2004-2005 annual report, ACTTAB's total turnover for the year was \$164 million. This comprised revenues from racing (\$157 million), Keno (\$2.6 million) and trackside (\$0.08 million). Sports betting contributed the remaining \$4 million which was an increase of 9.56% on the previous year compared to 4.2% for racing.¹⁶

TOTE Tasmania Pty Ltd

- 2.23 TOTE Tasmania Pty Ltd (TOTE Tasmania) was established in 1999 with its principal activities being totalisator and fixed-odd wagering and the administration of thoroughbred, harness and greyhound racing in Tasmania.
- 2.24 Tote Tasmania operates a variety of totalisator and fixed odds wagering products which are delivered through a variety of sales channels including retail, telephone and online. According to its 2004-2005 annual report, Tote Tasmania's total turnover for the year increased by 5.1% from the previous year with its sports betting revenues increasing by 18%.¹⁷

The Association of Australian Bookmaking Companies

- 2.25 The Association of Australian Bookmaking Companies (AABC) comprises all of the principal Australian corporate bookmakers including: International All Sports Limited; Sportingbet Australia Pty Ltd; Centrebet Pty Limited; Multibet Pty Limited; Sports Acumen Pty Limited and Sportsbet Pty Limited.
- 2.26 Whilst no specific figures are available in relation to the revenues generated from sports betting by these organisations, the AABC's claims that its members represent about 3 per cent of total national betting expenditure and approximately 8 per cent of racing and sports betting expenditure.¹⁸
- 2.27 It is relevant to note that on 19 July 2006, the AABC was granted authorisation to engage in collective bargaining with a number of organisations including COMPS.

¹⁶ ACTTAB 2005 Annual Report, pg 15

¹⁷ Tote Tasmania 2005 Annual Report

¹⁸ AABC application for authorisation – Supporting submission, pg 3

The Australian gambling industry

2.28 According to the *Australian Gambling Statistics 2006*¹⁹, the total gambling turnover from all forms of legalised gambling in Australia for 2004-2005 was \$142 billion. Of this, gaming²⁰ accounted for \$125 billion, racing²¹ for \$15.6 billion, and sports betting \$1.7.

Sports betting in Australia

2.29 Official wagering on sports' betting, which generally involves trying to predict the outcome of a sporting event, is relatively new in Australia with authorised sports betting only beginning in 1985.

2.30 However, since 1994 when Tabcorp was first granted its licence to accept sports bets, there has been significant growth in the sports betting sector of the gambling industry along with the number of organisations licensed to take bets on sporting competitions. The following Table illustrates the increase in sports betting on a state-by-state basis from 2000 to 2005:

	Sports betting turnover (millions)²²	
	2000-2001	2004-2005
New South Wales	\$53	\$400
Victoria	\$193	\$262
Queensland	\$17	\$48
South Australia	\$6	\$24
Western Australia	\$19	\$41
Tasmania	\$1.7	\$4.8
ACT	\$325	\$264
Northern Territory	\$339	\$663
Total	\$953.7	\$1706.8

¹⁹ Produced by the Queensland government's Office of Economic and Statistical Research.

²⁰ Includes lottery, casinos and gaming machines.

²¹ This includes thoroughbreds, greyhounds and harness racing.

²² Office of Economic and Statistical Research (Queensland) - Australian Gambling Statistics 2006

Gambling regulations in Australia

- 2.31 Gambling policy and legislation in Australia has traditionally been the role of the states and territories rather than the Commonwealth. As such, at a national level the legislation governing the regulation, supervision and control of gambling activities is limited to the *Interactive Gambling Act 2001* whereas the states and territory have far greater regulation and controls.
- 2.32 The state and territory regulation control every aspect of the Australian gambling industry from public lotteries and art unions, to casinos, gaming machines and in some states two-up. However, there is currently no legislative requirement that any sports betting operator return any revenue from the wagering that takes place on sporting competitions to the sporting organisations.

Proposed Victorian legislation

- 2.33 Recently the Victorian government proposed an overhaul of the regulatory regime that currently applies to sports betting. Essentially, under its proposed model, the Victorian government would require sports betting operators to obtain approval from a sports designated ‘controlling body’ before it could offer wagers on that sport. The Victorian government states that it is envisaged that the sporting organisations recognised as a ‘controlling body’ would be able to negotiate an agreement (fee) with wagering service providers.
- 2.34 A number of other states and territories have also expressed interest in implementing a similar regime although it is understood that they are likely to await the outcome of Victoria’s review before proceeding.

Recent developments in the Australian sports betting industry

- 2.35 In October 2005, Betfair announced that it had reached an agreement with the AFL that would, amongst other things, see it pay a percentage of its gross revenues on AFL markets to the AFL. In making this announcement, Betfair also stated that its ‘willingness to enter into commercial agreements with sporting bodies is not limited to the AFL. Discussions are progressing with many of the other major professional sports in Australia.’²³
- 2.36 In the same month, the AFL also entered into a sponsorship agreement with Tabcorp which included a consideration for the use by Tabcorp of the AFL’s intellectual property such as the sports information and data it produces.²⁴

²³ Betfair media release dated 26 October 2005.

²⁴ Tabcorp media release dated 26 October 2005.

3 COMPS application and interested party submissions

- 3.1 A summary of COMPS application and supporting submissions is provided below. A full version is available from the ACCC's public register and its website.

COMPS application for authorisation

- 3.2 On 12 July 2006, COMPS lodged application for authorisation A91007 with the ACCC. The proposed conduct is described in the following terms:

The conduct for which authorisation is sought is the negotiation by COMPS with **sports betting operators** of terms and conditions or arrangements under which such sports betting operators would be entitled to offer and accept wagers on events played under the auspices of the Applicants (COMPS).

- 3.3 COMPS identified those sports betting operators with whom it intends collective bargaining. The names of those sports betting operators are listed at Attachment A of this draft determination. In addition, COMPS stated that its application is intended to allow for negotiations with future parties.
- 3.4 COMPS state that it is anticipated that any agreement stemming from the collective negotiations with sports betting operators will outline the roles and responsibilities of each party with respect to (among other things):
- the payment of a "product fee" by licensed sports betting operators to the sports
 - use of intellectual property
 - information sharing arrangements and
 - mandated consultation for contingency types offered by licensed operators.
- 3.5 COMPS' states that it is essentially seeking a 'fair share' of revenues taken by sports betting operators from gaming and wagering activities which are reliant on its members sports.
- 3.6 COMPS submits that this principle is recognised both within the Australian racing industry and the broader sporting industry internationally, and has a sound commercial basis, that being, the creator or author of a product should be fairly remunerated for its usage.

Public benefits claimed by COMPS

- 3.7 COMPS states that the following public benefits will arise from the proposed collective bargaining arrangements.

Improved bargaining power

- 3.8 COMPS claim that, individually, its members are currently in a weak bargaining position compared with the sports betting operators in respect of negotiating a fair 'product fee'. COMPS claim that this is partially a result of sports betting operators not previously having had to pay for access to the information.

- 3.9 COMPS claim that bargaining collectively will provide its members with greater input into their relationship with the relevant sports betting operators which will result in better outcomes for all the parties.

Transaction cost and efficiency savings

- 3.10 COMPS state that collective bargaining will result in transaction cost savings through pooling of resources. COMPS claim such savings have already begun to accrue through the formation of a central committee to discuss issues with relevant parties and by engaging common external consultants and advisors.
- 3.11 COMPS claim that the arrangements will also provide a common point of contact for the sports betting operators which will lead to more efficient negotiations.

Sound working relationship

- 3.12 COMPS claim that authorisation will allow its members to better maintain the integrity of their product through a better working relationship with sports betting operators.

Dispute resolution mechanism

- 3.13 COMPS claim that authorisation will provide for a better resolution mechanism for disputes between its members and sports betting operators.

Benefits for the wider community

- 3.14 COMPS states that allowing its members to bargain collectively will also contribute to: the ongoing development of sport at a grass roots and amateur level; increasing Australia's profile in the international community through publicity generated by the sports and; ensuring quality, competitive sporting bodies that are focused on the ongoing promotion and development of their sports.

COMPS market definition

- 3.15 COMPS submit that the extensive media coverage of international sporting events and the ability of consumers to follow most of these events in real time on the internet, make it inappropriate to construct a market on the basis of domestic Australian sports.
- 3.16 COMPS argue that, whilst sports betting operators would prefer to offer bets on all available sporting product, given sufficient price incentive, sports betting operators would use an international sport over a competing domestic product. Consequently, COMPS claim that the relevant market is likely to be the international sports market for supply of information and data.
- 3.17 Alternatively, however, COMPS claim that should the ACCC determine that such substitutability does not exist, and that there is sufficient incentive, regardless of price, to offer wagering markets on each Australian sports, then the individual sports would have a monopoly over their own particular market. COMPS argue that if this were the case, and each sport was a separate monopoly, authorising the collective bargaining arrangements would have no effect on competition within that market.

Effects on competition claimed by COMPS

- 3.18 In relation to potential anticompetitive effects, COMPS submit that as there is currently very little (if any) competition between its members and sports betting operators, and the proposed conduct will not involve any form of exclusionary conduct, the proposed collective bargaining arrangements are likely to have little to no effect on competition.

Interested party submissions

- 3.19 The ACCC sought submissions from a wide range of interested parties and received responses from the following parties. Complete copies of all submissions are available on the ACCC's public register and on its website.
- Racing Gaming and Licensing – Northern Territory government
 - Association of Australian Bookmaking Companies
 - Government of South Australia – Office for Recreation and Sport
 - Department of Racing Gaming and Liquor – Western Australian government
 - Tabcorp Holdings Ltd
 - Unitab Ltd
 - Department of Sport and Recreation – Western Australian government
 - Local Government, Planning, Sport and Recreation – Queensland Government
 - Acttab Ltd
 - Australian Sports Commission
 - Office of Gaming and Racing – Victorian Government
 - Sports and Recreation Tasmania
- 3.20 No interested parties opposed COMPS application for authorisation with many supporting its attempt to negotiate a share of gambling revenues. A number of interested parties did however provide comments regarding the application.
- 3.21 Queensland's *Local Government, Planning, Sport and Recreation* department states that as state-based teams and individuals also contribute to the production of sporting intellectual property, they should also be entitled to a share of any revenue obtained by COMPS members. This issue is considered by the ACCC in its assessment of the public benefit of the proposed arrangements.
- 3.22 Tabcorp initially opposed COMPS application for interim authorisation but has subsequently advised that it has no objection to either COMPS application for interim or substantive authorisation.

4 Statutory provisions

- 4.1 Application A91007 was made by COMPS pursuant to sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA.
- 4.2 The relevant test that COMPS must satisfy for authorisation to be granted is outlined in sub-section 90(6) of the TPA.
- 4.3 In short, in deciding whether it should grant authorisation, the ACCC must examine the anti-competitive aspects of the proposed arrangements and its public benefits, weighing the two to determine which is greater. Should the public benefits outweigh the anti-competitive aspects, the ACCC may grant authorisation.
- 4.4 Public benefit is not defined by the TPA. However, the Australian Competition Tribunal (the Tribunal) has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.²⁵

- 4.5 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.²⁶

Application of the test

- 4.6 Whilst the Tribunal has, in the past, stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition, it has also stated that:

... [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.

- 4.7 Consequently, when applying the test at sub-section 90(6) of the TPA, the ACCC can take most, if not all, public detriment likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

²⁵ *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42677
The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9,
16 May 2005

²⁶ *ibid* at 42683

5 ACCC assessment – Markets and counterfactual

- 5.1 The first step in assessing the public benefits and anti-competitive detriments of the proposed arrangements is to consider the features of the market(s) which are most relevant to the arrangements.
- 5.2 COMPS submit that advancements in technology such as the internet and televised sports coverage has led to the development of a sporting environment in which international sports are substitutable for domestic (Australian) sports. Consequently, COMPS argues the relevant market is the international sports market for supply of information and data.
- 5.3 However, COMPS claim that should the ACCC determine that such substitutability does not exist, and that there is sufficient incentive, regardless of price, to offer wagering markets on each Australian sports, then the individual sports would have a monopoly over their own particular market.
- 5.4 The issue of the relevant market(s) and market features has not been specifically addressed by other interested parties.

ACCC assessment - Relevant market(s)

- 5.5 The ACCC is of the view that it is unnecessary to conduct a detailed analysis of potential markets. However, the ACCC does consider that providing a broad outline of possible market parameters and features will establish an appropriate framework within which it can assess the potential benefits and detriments of the proposed arrangements.

Sports related data and information

- 5.6 The ACCC considers that the main area of competition (or potential competition) which is likely to be affected by the proposed collective bargaining arrangements is the competition between COMPS members to provide their services to sports betting operators.
- 5.7 In relation to this area of competition, the ACCC is satisfied with COMPS assessment of the potential product dimension of that market. That is, the ACCC considers that the relevant product is likely to be sports related data and information provided by COMPS members to sports betting operators.
- 5.8 However, based on the information before it, the ACCC is uncertain as to whether this product is likely to be substitutable with other products such as racing (thoroughbred, harness and greyhounds) data and information or whether it would be limited to just sports related information.
- 5.9 In respect of the geographic dimension of the market, the ACCC does not consider that international sports are likely to be as substitutable for Australian sports as COMPS have suggested. The ACCC considers that Australian-based sports betting operators are likely to consider that sports run by COMPS members, such as cricket and rugby league, are fundamental to their sports betting businesses and therefore would be considered by them as being a ‘must have’.

- 5.10 The ACCC does however consider that whilst there may not currently be a high level of substitutability between Australian-based sports and international sports, there is likely to be a degree of substitutability between some, if not all, individual Australian sports.
- 5.11 Therefore for the purposes of its current assessment, the ACCC considers that the broad parameters of the area of competition are likely to extend to include at least the supply of sports related data and information which is produced by sports based within Australia.

Downstream effect

- 5.12 The ACCC considers that the proposed arrangements may also have an impact on the returns to sports betting operators which may in turn affect returns to the sports betting public. The ACCC considers that to the extent this does occur, the arrangements are likely to have an effect on the downstream wagering and gaming industry and, in particular, the sports betting segment of that industry.

The future with-and-without test (the counterfactual)

- 5.13 In weighing up the public benefit and anti-competitive detriment generated by the proposed arrangements for which authorisation has been sought the ACCC applies the ‘future with-and-without test’ established by the Tribunal.
- 5.14 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as ‘the counterfactual’.
- 5.15 The ACCC notes that the arrangement for which COMPS has sought authorisation are at risk of breaching the TPA. Given this risk, the ACCC considers it unlikely that collective negotiations would take place in the absence of authorisation.
- 5.16 The ACCC considers therefore that the most likely counterfactual is a situation whereby each COMPS member will seek to negotiate appropriate terms and conditions with the sports betting operators on an individual basis.
- 5.17 The ACCC notes however that it is possible that some form of legislation may be introduced in Victoria, and possibly other states and territories, in the future. The ACCC understands that while the final form of the legislation has not yet been determined, it may include a requirement that sports betting operators obtain permission from sporting bodies (such as COMPS members) before they can offer bets on their sports.

6 ACCC assessment – Anti-competitive detriments

- 6.1 In order to grant authorisation to the conduct proposed by COMPS, the ACCC must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the proposed arrangements.
- 6.2 In general terms, collective agreements to negotiate terms and conditions for independent businesses covered by that agreement are likely to lessen competition relative to a situation where each business individually negotiates its own terms and conditions. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 6.3 In assessing the potential detriment of the proposed collective bargaining arrangements, the ACCC has considered the following three possible anti-competitive effects which are likely to occur in the primary area of competition:
- reduced economic efficiencies
 - increased potential for collective activity beyond that authorised
 - effect on competitors outside the collective bargaining arrangement.
- 6.4 The ACCC has also considered the potential flow-on effect of the collective bargaining arrangements into downstream markets.

Reduced economic efficiencies

- 6.5 In its past consideration of collective bargaining arrangements the ACCC has accepted that where collective bargaining results in reduced competition between participants on issues such as price and terms of supply, anti-competitive detriment could arise. This detriment, among other things, may be in the form of increased prices to consumers and/or reductions in innovation.
- 6.6 However the ACCC has also identified that the anti-competitive effects of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the following four features are present.

Voluntary participation in the collective bargaining arrangements

- 6.7 The ACCC is of the view that voluntary participation for all parties is an important feature of any collective bargaining arrangements. In this instance, the ACCC notes that the proposed arrangements are voluntary.
- 6.8 In this respect, the ACCC notes that COMPS members may opt out of the proposed collective bargaining process at any time and negotiate individually with sports betting operators. The counterparties may also choose not to participate in collective negotiations with COMPS.

No boycott activity

- 6.9 In a recent decision in relation to a collective boycott authorisation the Tribunal stated:

*The seriousness of the potential consequences of authorising the use of collective boycotts is beyond doubt: they can result in substantial commercial damage not only to the direct target(s) of them but also to the other upstream and downstream businesses and their employees. Consumers might suffer disruption to market supplies and possibly at least temporary price increases.*²⁷

- 6.10 The ACCC notes that COMPS has not applied for authorisation to engage in collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.

Current and prospective level of negotiations between the parties

- 6.11 COMPS submit that there is currently very little (if any) competition between its members to supply information and data to sports betting operators. COMPS claim that this is because currently sports betting operators do not have to pay for the information and therefore there is no need to negotiate, or pay, for its supply.
- 6.12 The ACCC does, to a certain extent, accept COMPS submission that there has, in the past, been little capacity for its members to compete to supply sports data and information to sports betting operators. The ACCC acknowledges that the primary reasons for this have been that the information is, for the most part, freely available for sports betting operators to access and there is no specific regulation controlling its use for betting purposes.
- 6.13 The ACCC notes however that there have been a number of developments in the past 12 months which indicate that this situation may be changing.
- 6.14 Firstly, in October 2005 Betfair announced that it had reached an agreement with the AFL that would, amongst other things, see it pay a percentage of its gross revenues on AFL markets to the AFL. In making this announcement, Betfair also stated that its 'willingness to enter into commercial agreements with sporting bodies is not limited to the AFL. Discussions are progressing with many of the other major professional sports in Australia.'²⁸
- 6.15 In the same month, the AFL also entered into a sponsorship agreement with Tabcorp which included a consideration for the use by Tabcorp of the AFL's intellectual property such as the sports information and data it produces.²⁹

²⁷ *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT 2, at para 381

²⁸ Betfair media release dated 26 October 2005.

²⁹ Tabcorp media release dated 26 October 2005.

- 6.16 Secondly, in March 2006 the Victorian government released a sports betting discussion paper in which it raised the possibility of introducing legislation which would be likely to require sports betting operators to obtain the permission of sporting organisations before they can take bets on their sports.
- 6.17 In light of these developments the ACCC considers that COMPS application must be considered in an environment in which it is more likely than in the past that sporting organisations will receive some form of payment for the use of their intellectual property.
- 6.18 Consequently, while the ACCC considers that the level of competition between individual COMPS members to supply information to sports betting operators may, in the past, have been low, it does not accept that this would necessarily be the case in the future.
- 6.19 Rather, the ACCC considers that, in the absence of authorisation and in an environment in which payments to sporting bodies are more common, the level of competition between COMPS members to supply such information is likely to increase.
- 6.20 As a result, the ACCC considers that by reducing the potential for individual negotiations by COMPS' members with sports betting operators, the proposed collective bargaining arrangements may have the effect of reducing competition.

Size/composition of bargaining groups

- 6.21 The ACCC considers that where the size of bargaining groups is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers outside the group.
- 6.22 The ACCC considers that significant anti-competitive detriment could flow from an industry wide collective bargaining arrangement as it has the potential to result in substantial competitive distortions and consequent inefficiencies. In this respect, the ACCC notes that, aside from the AFL, the COMPS collective bargaining group includes many of the major professional sporting organisations in Australia.
- 6.23 The ACCC notes the disparity in potential bargaining power of COMPS members. Some are more likely to be influential in negotiations than others given the greater proportion of betting in their sports. In these circumstances collective negotiations can allow less influential sports to leverage off more influential sports resulting in market distortions.
- 6.24 As a result, the ACCC considers that the size and nature of the group may raise some competition concerns.

Conclusion – Reduced economic efficiencies

- 6.25 On balance, the ACCC considers that the voluntary nature of the arrangements and the absence of boycott activity are likely to lessen the potential for the proposed arrangement to reduce economic efficiency.
- 6.26 However, the ACCC does consider that the proposed arrangements may inhibit an apparent growing level of competition between COMPS members to supply information to sports betting operators and result in distortions in the market.

Increased potential for collective activity beyond that authorised

- 6.27 In considering collective bargaining arrangements in the past, the ACCC has noted concern that the arrangements may increase the potential for collusive anti-competitive conduct. Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The ACCC has been concerned that in this environment, there may be an increased likelihood of anti-competitive conduct (beyond that which is authorised) occurring.
- 6.28 The ACCC notes that the likelihood of collusive activity beyond that authorised is reduced where participants are made aware of their obligations under the TPA and where the arrangements are not industry wide.
- 6.29 In respect of the COMPS application, the ACCC considers that there is no information to suggest that any conduct that may raise concerns under the TPA, other than that for which authorisation is sought, is intended to be discussed by the parties to the application.

Effect on competition outside the collective bargaining arrangement

- 6.30 As noted in its consideration of the relevant market(s), the ACCC considers that the proposed arrangements may have an impact on downstream participants in the gambling industry and in particular on those participants that offer sports betting.
- 6.31 The ACCC considers that the proposed arrangements may potentially generate a detriment in this area by increasing the cost to participants of obtaining sports data and information which will, depending on the size of the organisation and their reliance on sports betting, influence the return they are able to offer their customers.

Conclusion on anti-competitive detriment

- 6.32 Overall, for the reasons outlined above, the ACCC is of the view that COMPS' proposed collective bargaining arrangements are likely to generate some anticompetitive detriments.

7 ACCC assessment – Public benefits

- 7.1 In order to grant authorisation to the proposed arrangements, the ACCC must be satisfied that the arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by a lessening of competition arising from the arrangements.
- 7.2 As noted earlier for a public benefit to be given weight in the ACCC's authorisation assessment, it must be demonstrated that the benefit would not arise, or would not arise to the same extent, if the arrangements were not authorised (i.e. in the counterfactual).
- 7.3 COMPS submit that the proposed collective bargaining arrangement will result in a number of public benefits which are outlined in section 3 of this draft determination.
- 7.4 However, for the purposes of its assessment the ACCC proposes to consider the COMPS submission within the context of the following public benefits:

Increased input into contracts

- 7.5 As mentioned, COMPS claim that, individually, its members are currently in a weak bargaining position compared with the sports betting operators in respect of negotiating a fair 'product fee'. COMPS claim that bargaining collectively will provide its members with greater input into their relationship with the relevant sports betting operators which will result in better outcomes for all the parties.
- 7.6 The ACCC considers that collective bargaining arrangements, such as the arrangements proposed by COMPS, do have the potential to result in benefits to the public by facilitating improvements in the level of input parties have into their contractual negotiations.
- 7.7 This improved input is a feature of increasing the bargaining power of the members of the collective by allowing them to aggregate their influence in the negotiation; improving the individual's access to information and resources; and providing a mechanism through which productive contractual discussions between the collective and the counterparty can be achieved.
- 7.8 In this instance, the ACCC notes that individually many of the participants in the proposed collective bargaining arrangements, such as Cricket Australia and the National Rugby League, are likely to have significant bargaining power with respect to many aspects of their businesses (e.g. the negotiation of broadcast rights).
- 7.9 However, the ACCC considers that in respect of the proposed negotiations with sports betting operators, the individual COMPS members are likely to be in a comparatively weaker bargaining position. As a consequence, the ACCC considers that the proposed collective bargaining arrangements may improve the level of input of COMPS members into product fee negotiations and this may result in some public benefit.

- 7.10 However, as mentioned above, it seems that there is likely to be some disparity in the matters negotiated by each member. The greater this disparity, the lower the likely benefit of joint negotiations. Significant disparity can actually lead to detriment as the group adds support to issues that may only be relevant to a single or few parties.
- 7.11 In looking at the counterfactual, the ACCC considers it important to note that as the industry's representative body, there are many activities, aside from negotiating product fees, that COMPS could engage in which would be unlikely to require authorisation.
- 7.12 The ACCC considers that this may range from COMPS advising its members on factors they may wish to consider in their negotiations with sports betting operators, to potentially developing an industry code or framework in conjunction with sports betting operators which deals with issues such as integrity of data, corruption and cheating.

Dispute resolution

- 7.13 COMPS claim that authorisation will provide for a better resolution mechanism for disputes between its members and sports betting operators.
- 7.14 As a general principle the ACCC considers that an appropriate dispute resolution process can offer an effective and often more efficient mechanism through which commercial disagreements can be resolved. However, the ACCC considers that such an effective dispute resolution process is likely to be one which is developed in consultation with all parties involved in the bargaining process.
- 7.15 In this respect, the ACCC considers that an effective dispute resolution process is likely to result from more effective input into contract negotiations the benefits of which were discussed previously.

Transaction costs savings

- 7.16 Generally, there are transaction costs associated with using the market as a mechanism for trade. Transaction costs are however likely to be lower in negotiating a collective bargaining agreement involving a single negotiating process relative to a situation where negotiation occurs with many smaller businesses.
- 7.17 Transaction costs can also be lower even where a standard form contract would otherwise be in place. This is because the collective bargaining arrangements can allow the group to reduce duplication of legal and other professional fees. Consequently, the ACCC considers that to the extent that these transaction costs savings do arise they are likely to constitute a public benefit.

- 7.18 In this instance, COMPS submits that authorisation is likely to result in transaction cost savings through pooling of resources. COMPS claim such savings have already begun to accrue through the formation of a central committee to discuss issues with relevant parties, by engaging common external consultants and advisors and by providing a central point of contact for sports betting operators.
- 7.19 While the ACCC usually accepts that some level of transaction cost savings are likely to arise from most authorised collective bargaining arrangements, the accepted size of those potential savings depends, amongst other things, on the characteristics and features of each individual set of proposed arrangements.
- 7.20 For example, where the collective bargaining group supply very similar products or services (i.e. milk, chicken growing services) the potential scope of the negotiations are likely to be narrower than if the parties supply a wide-range of products requiring broader and more complex negotiations. In addition, costs are likely to be lower where the collective bargaining group elects an individual or committee to negotiate on its behalf rather than comprising a representative from each of its member businesses.
- 7.21 In this instance, the ACCC understands that COMPS has been established to act as a single point of contact for its members and this may provide some administration and professional costs savings. However, while COMPS has not specifically outlined the manner in which collective bargaining will occur, its application does state that:
- Each Applicant (COMPS member) has appointed an employee as its nominee to:
- (a) represent COMPS' informal collective negotiations with sports betting operators; and/or
- (b) liaise directly with other COMPS nominees to develop strategy and policy around such collective negotiations.
- All COMPS decisions are made by consensus with each Applicant nominee enjoying equal status (no chairperson).
- 7.22 Based on this proposed collective negotiation process, the ACCC considers that any potential transaction costs savings are likely to be low. The ACCC considers that this is, in part, due to the diverse nature of the products and services offered by COMPS members and also because the proposal requires a representative from each sporting organisation be present during the negotiations.
- 7.23 The ACCC considers that although there is nothing to prevent COMPS from conducting its negotiations in this manner (were they to be authorised to do so), such a collective bargaining process is unlikely to generate additional cost savings beyond those which would be achieved in the counterfactual. This is because each member of COMPS will still meet with each separate sports betting operator to negotiate their own contractual terms and conditions, as they would in the counterfactual, with the only exception being that the other members of COMPS would also be present.

7.24 In relation to transaction cost savings, therefore, the ACCC considers that there may be some small administrative savings generated by the proposed collective bargaining arrangements. However, the ACCC considers that the proposed method of collective negotiations and the diverse nature of the parties, is likely to diminish, if not eliminate, any potential transaction cost savings.

Benefits to the community

7.25 COMPS submit that the proposed collective bargaining arrangements will assist in producing quality, competitive sporting bodies that are focused on the ongoing promotion and development of their sports. COMPS submit that this will assist in maximizing the coverage, both internationally and domestically, and the participation and development, of their sports resulting in a public benefit to the wider community.

7.26 Generally, the ACCC considers that promoting and developing sport at a grass roots level in Australia which leads to a healthier and more active community would be likely to constitute a public benefit. In addition, the ACCC considers that promoting Australia's professional sports internationally which directly (COMPS members) or indirectly (tourism) results in additional revenue for Australian businesses is also likely to constitute a public benefit.

7.27 However, COMPS has only provided the ACCC with limited information as to how collective bargaining with sports betting companies will actually contribute to achieving either of these outcomes when compared to the counterfactual. Further, COMPS have only supplied the ACCC with limited information with regards to the expected returns to its members or how and to whom any of those returns would be allocated.

7.28 Indeed the issue of how any additional funds would be allocated was raised by Queensland's *Local Government, Planning, Sport and Recreation* department which argues that as state-based teams and individuals also contribute to the production of sporting intellectual property, they should also be entitled to a share of any revenue obtained by COMPS members.

7.29 Whilst it is not the ACCC's responsibility to determine how COMPS members allocate their funds, given the current lack of details in relation to such matters, it is difficult for the ACCC to attribute much weight to this claimed public benefit.

Conclusion on public benefits

7.30 The ACCC is of the view that the proposed collective bargaining arrangements may generate some public benefits from allowing COMPS members to have greater input in contract negotiations. Overall, however, the ACCC considers that any such benefits would be diminished by the diverse nature of the parties and the proposed method by which they intend to conduct the collective negotiations.

8 The balance of the benefits and detriments

- 8.1 In order to grant authorisation to the conduct proposed in COMPS application for authorisation, the ACCC must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the proposed arrangements.

Anticompetitive detriments

- 8.2 In relation to the potential anticompetitive effect of the proposed collective bargaining arrangements, the ACCC is of the view that the voluntary nature of the arrangements and the absence of boycott activity would be likely to lessen the potential for the arrangement to reduce economic efficiency.
- 8.3 However, the ACCC does consider that the proposed arrangements may, to some extent, inhibit an apparent growing level of competition between COMPS members to supply information to sports betting operators and may also lead to market distortions. In addition, the ACCC considers that the proposed arrangements may result in increased costs for sports betting operators which they are then likely to pass on to consumers.
- 8.4 Overall, therefore, the ACCC is of the view that COMPS' proposed collective bargaining arrangements are likely to generate some anticompetitive detriments.

Public benefits

- 8.5 In relation to the potential public benefits of the arrangements, the ACCC is of the view that the proposed collective bargaining arrangements may generate some public benefits from allowing COMPS members to have greater input in contract negotiations.
- 8.6 However, the ACCC considers that any such benefits would be diminished by the diverse nature of the parties and the proposed method by which they intend to conduct the collective negotiations.

Balance of benefits and detriments

- 8.7 Overall, the ACCC cannot be satisfied that the public benefits likely to result from COMPS collective bargaining arrangements would outweigh the potential anti-competitive detriments of those arrangements.
- 8.8 The ACCC considers it important to note however that as the industry's representative body, there are many activities, aside from negotiating product fees, that COMPS could engage in which would be unlikely to require authorisation.
- 8.9 This may range from advising its members on factors they may wish to consider in their negotiations with sports betting operators to potentially developing an industry code or framework in conjunction with sports betting operators which deals with issues such as corruption and cheating.

9 The draft determination

The Application

- 9.1 On 12 July 2006, the Coalition of Major Professional Sports (COMPS) lodged an application for authorisation A91007 to allow it to collectively bargain with current and future licensed sports betting operators. COMPS sought authorisation for a period of five years.
- 9.2 COMPS application was made pursuant to section 88(1) of the TPA for an authorisation under that subsection:
- (a) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA and
 - (b) to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 9.3 COMPS state that it is anticipated that any agreement stemming from the collective negotiations with sports betting operators will outline the roles and responsibilities of each party with respect to (among other things):
- the payment of a “product fee” by licensed sports betting operators to the sports
 - use of intellectual property
 - information sharing arrangements and
 - mandated consultation for contingency types offered by licensed operators.

The statutory test

- 9.4 For the reasons outlined in this draft determination, the ACCC is not satisfied that the public benefits likely to result from the collective bargaining arrangements would outweigh the potential anti-competitive detriments of those arrangements.
- 9.5 Accordingly, the ACCC proposes denying the application.

Interim authorisation

- 9.6 The ACCC’s decision to deny interim authorisation remains unchanged.

Further submissions

- 9.7 The ACCC is now seeking further submissions from interested parties. In addition, COMPS or any interested party may request the ACCC to hold a pre-determination conference pursuant to section 90A of the TPA.

Attachment A

ACTTAB

Centrebet

Colin Tidy's Betchoice.com

Racing and Wagering WA

Sports Acumen Pty Ltd

Tab Limited

Betfair Pty Limited

CentreRacing

International All Sports - AusTOTE

Sportingbet Australia Pty Ltd

Sportsbet Pty Ltd

Thoroughbred Racing SA Limited

Tote Tasmania