



Australian  
Competition &  
Consumer  
Commission

# Determination

## Application for authorisation A91007

lodged by

the Coalition of Major Professional Sports

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

Date: 13 December 2006

Commissioners

Authorisation no. A91007  
File no. C2006/1315

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# Executive Summary

The ACCC grants authorisation to the Coalition of Major Professional Sports until 28 February 2009

## **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 negotiations 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.

## **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 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.

### *Anti-competitive detriment*

The ACCC considers that the proposed collective bargaining arrangements have the potential to inhibit an apparent growing level of competition between COMPS members to supply information to sports betting operators and may also lead to market distortions. Depending on the outcome of the negotiations, they may also result in increased costs for sports betting operators which they are then likely to pass on to consumers.

However, 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 arrangements to reduce economic efficiency. The absence of opposition from sports betting operators is telling in this respect.

### *Public benefits*

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. The ACCC also considers that the revised collective negotiation structure may provide scope for some transaction cost savings, as supported by some sports betting operators. However, the ACCC considers that any such benefits would be reduced by the diverse nature of the parties.

### **Determination**

The ACCC is satisfied that the public benefits likely to result from the collective bargaining arrangements would outweigh the potential anti-competitive detriments of those arrangements.

Accordingly, the ACCC grants authorisation to the application until 28 February 2009, at which time it will reassess the merits of the proposal, should COMPS wish to continue the collective bargaining arrangements.

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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.

## **The application for authorisation**

- 1.10 This document is the final 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 negotiations with a number of specified sports betting operators. 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.

## **Draft determination**

- 1.16 On 20 September 2006, the ACCC issued a draft determination proposing to deny authorisation to the proposed collective bargaining arrangements. A conference was not held following the draft determination.

## **Interim authorisation**

- 1.17 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.
- 1.18 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.

## 2. Background

### The Applicants

2.1 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 Australasia<sup>1</sup>*

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 Australia<sup>2</sup>*

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 League<sup>3</sup>*

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.

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<sup>1</sup> <http://www.pga.org.au/>

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

<sup>3</sup> <http://www.nrl.com/>

- 2.7 The NRL's main role is to market its premiership 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 also organises and promotes representative matches such as the State of Origin and Australian internationals.

#### ***The Australian Rugby Union<sup>4</sup>***

- 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 provincial competition 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 Australia<sup>5</sup>***

- 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 Australia<sup>6</sup>***

- 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.

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<sup>4</sup> <http://www.rugby.com.au>

<sup>5</sup> <http://www.cricket.com.au/>

<sup>6</sup> <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 wagering<sup>7</sup> and fixed odds betting<sup>8</sup> 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.<sup>9</sup>
- 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%<sup>10</sup> in NSW during the past financial compared to an overall net operating revenue growth of 3.4% for wagering.<sup>11</sup>

### ***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.<sup>12</sup>
- 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%<sup>13</sup> to \$78.9 million.<sup>14</sup>
- 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...

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<sup>7</sup> 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.

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

<sup>9</sup> Tabcorp Concise Annual Report 2005, pg 53

<sup>10</sup> Ibid, pg 10

<sup>11</sup> Ibid, pg 9

<sup>12</sup> UNiTAB Concise Annual Report 2005,

<sup>13</sup> Ibid, pg 2

<sup>14</sup> Ibid, pg 10

and is expected that this product range will deliver double digit growth into the foreseeable future.<sup>15</sup>

### ***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.<sup>16</sup>

### ***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%.<sup>17</sup>

### ***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, AABC claims that its members represent about 3% of total national betting expenditure and approximately 8% of racing and sports betting expenditure.<sup>18</sup>
- 2.27 On 19 July 2006, the AABC was granted authorisation to engage in collective bargaining with a number of organisations including COMPS (A30243).

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<sup>15</sup> Ibid, pg 10

<sup>16</sup> ACTTAB 2005 Annual Report, pg 15

<sup>17</sup> Tote Tasmania 2005 Annual Report

<sup>18</sup> AABC application for authorisation – Supporting submission, pg 3

## The Australian gambling industry

2.28 According to the *Australian Gambling Statistics 2006*<sup>19</sup>, the total gambling turnover from all forms of legalised gambling in Australia for 2004-2005 was \$142 billion. Of this, gaming<sup>20</sup> accounted for \$125 billion, racing<sup>21</sup> 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) <sup>22</sup>	
	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
<b>Total</b>	<b>\$953.7</b>	<b>\$1706.8</b>

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<sup>19</sup> Produced by the Queensland government's Office of Economic and Statistical Research.

<sup>20</sup> Includes lottery, casinos and gaming machines.

<sup>21</sup> This includes thoroughbreds, greyhounds and harness racing.

<sup>22</sup> 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. 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 territories have far greater regulation and controls.
- 2.32 State and territory regulations 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 sport's 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 The Victorian government has since released an exposure draft of the proposed legislation. This is discussed further at paragraph 5.20.
- 2.35 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***

- 2.36 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.'<sup>23</sup>
- 2.37 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.<sup>24</sup>

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<sup>23</sup> Betfair media release dated 26 October 2005.

<sup>24</sup> 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 ACTTAB, Betfair, Centrebet, CentreRacing, Betchoice.com, International All Sports, Racing and Wagering WA, Sportingbet, Sports Acumen, Sportsbet, Tab Ltd, Thoroughbred Racing SA and Tote Tasmania as those sports betting operators with whom it intends collective bargaining. In addition, COMPS stated that its application is intended to allow for collective negotiations with future parties.

- 3.4 COMPS states 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 member's 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, COMPS claim that should the ACCC determine that such substitutability does not exist, there is sufficient incentive, regardless of price, to offer wagering markets on each Australian sports code. Therefore, 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 party 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.

- 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.

### **Submissions received in response to the draft determination**

#### ***COMPS***

- 3.23 COMPS provided a submission in response to the ACCC's draft determination on 10 November 2006. In this submission, COMPS raised arguments as to why the anti-competitive detriment associated with the proposed arrangements is likely to be low. COMPS also alluded to the outcomes that it is seeking from the collective bargaining process (such as enhanced promotion and development of sport, measures for data integrity and an industry code of conduct) and submitted that these were likely to generate a benefit to the public. COMPS also noted that it believes that the ACCC's consideration of the relevant market was too narrow. The ACCC will discuss these issues in further detail in its assessment of the application.
- 3.24 In addition, COMPS submitted an amended collective negotiation scheme, which differs from what was initially applied for. Under the amended scheme, COMPS will be represented at the negotiations by a sub-committee. COMPS submits that there would be no need for this sub-committee to involve all of its members. COMPS notes that this negotiating sub-committee will achieve far greater economic efficiencies than conducting a series of negotiations on the part of every COMPS member with every sports betting operator.
- 3.25 COMPS noted that it will appoint a single legal firm to advise and assist its members in relation to any legal issues that need to be addressed during the course of the negotiating process. It also noted that, in order to ensure that no single member of COMPS secures an unfair advantage over any other member, the membership of the negotiating sub-committee will rotate among all COMPS members. Members that do not agree with the outcome negotiated by the sub-committee will not be bound by it, and may voluntarily opt out of the scheme.
- 3.26 COMPS has also proposed the introduction of an independent body, funded by the members of COMPS, charged with the duty of integrity management and administration of the scheme across all sports. COMPS submits that this will allow for a number of public benefits, including offering a single point of contact to the sports betting operators and COMPS members for all matters relating to sports betting, and acting as a clearing house for the collection and distribution of sports betting revenue.

#### ***AABC***

- 3.27 AABC lodged a submission supporting COMPS' application for authorisation. AABC submits that it supports COMPS' objective of promoting information and data integrity, including a role in defining acceptable bet types, and of seeking a fair return from the proceeds of betting.

- 3.28 AABC submits that there may be some cost incurred where collective negotiations allow less influential sports to leverage of more influential sports. AABC notes that this cost will be acceptable where the more influential sports are not unfairly aggressive in their fee demands.
- 3.29 AABC submits that this cost will be offset by the benefit to sports betting operators of negotiating with a single body, rather than negotiating individually with every sport (potentially in each state or territory).
- 3.30 AABC also submits that a benefit will arise from having COMPS deal with integrity matters. AABC submits that smaller sports are not geared to the receipt and handling of sensitive betting information, and COMPS will allow the formation of a dedicated and properly structured body to undertake this task. AABC also notes that, while it is possible for this body to be formed independently of this authorisation process, there are benefits in establishing a single organisation to deal with all aspects of the arrangement including the negotiation of the fee.
- 3.31 AABC also submits that, despite the diverse nature of the sports involved, their interests and objectives in this area are quite focused and similar.

## 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, and weigh 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.<sup>25</sup>
- 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.<sup>26</sup>

### *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.

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<sup>25</sup> *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42677  
Recently followed in *Qantas Airways Limited* [2004] ACompT 9, 16 May 2005

<sup>26</sup> *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 submits 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, there is sufficient incentive, regardless of price, to offer wagering markets on each Australian sports code. Therefore, 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 The ACCC noted in its draft determination that, based on the information before it, it was uncertain as to whether this product was 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 COMPS submits that the ACCC's consideration of the relevant market in its draft determination is too narrow, and that consumers are likely to substitute between sports betting and betting on the races. COMPS submits that its members compete with

providers of racing information and data and that the likelihood of a substantial lessening of competition from the collective bargaining arrangements in a broader product market is more remote. COMPS also submits that future advancements in technology may lead to a single market for gaming, racing and sports betting.

- 5.10 Conversely, AABC argue that the market is more narrow than that considered by the ACCC, being that consumers will not substitute their betting between different sports as readily considered in the draft determination. AABC submitted that there is little competition between the sports for fielding by bookmakers, and that bookmakers choose sports in order to attract discrete sets of clients.
- 5.11 The ACCC accepts that some substitution between sports betting and racing may take place by consumers.
- 5.12 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’.
- 5.13 The ACCC does however consider that while 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.

#### *The ACCC’s view*

- 5.14 The ACCC considers that the area of competition most relevant to its assessment is that which occurs between providers of sports related information and data to sports betting operators for the purposes of betting. The ACCC notes that consumers may, to some extent, substitute between the different sports, and between sports betting and betting on other events such as thoroughbred racing.

#### *Downstream effect*

- 5.15 The ACCC considers that the proposed arrangements may also have an impact on the returns to sports betting operators, which may 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)**

- 5.16 In weighing up the public benefit and anti-competitive detriment generated by the proposed collective bargaining arrangements, the ACCC applies the ‘future with-and-without test’ established by the Tribunal.

- 5.17 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’.
- 5.18 The ACCC notes that the arrangements 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.
- 5.19 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.
- 5.20 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. For example, on 17 October 2006, the Victorian government issued an exposure draft of proposed amendments to the *Gambling Regulation Act 2003* (the Gambling Act). The proposed changes will mandate negotiations between betting agencies and approved sports controlling bodies over the fee paid for the use of the controlling body’s sporting information. The amendment will also make it an offence to use a sport for betting purposes without reaching an agreement with the sport’s controlling body. In essence, the proposed Gambling Act would mandate that betting agencies pay the controlling bodies where they offer betting on sports taking place within Victoria.
- 5.21 COMPS has made a number of claims as to the manner in which individual negotiations are likely to take place under this counterfactual. The ACCC considers that it is more appropriate to consider these matters in the assessment chapters that follow.

## **6 ACCC assessment – Anti-competitive detriment**

- 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.*<sup>27</sup>

- 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 sports betting operators do not currently 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 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.'<sup>28</sup>

- 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.<sup>29</sup>

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

<sup>28</sup> Betfair media release dated 26 October 2005.

<sup>29</sup> Tabcorp media release dated 26 October 2005.

- 6.16 Also, 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. As noted above, the Victorian government released an exposure draft of the proposed legislation on 17 October 2006.
- 6.17 However, COMPS submits that, while Betfair has been willing to negotiate contracts with individual sports for the supply of information, it believes that the same willingness does not prevail amongst the dozens of other sports betting operations in Australia. COMPS also notes that the Tabcorp sponsorship arrangement is not directed towards the provision of sports related data, but to the licensing of AFL club logos.
- 6.18 In spite of this submission, the ACCC still considers that the developments, particularly the proposed Victorian legislation, make it more likely than in the past that sporting organisations will seek to negotiate payment for the use of their intellectual property and, accordingly, compete with other sporting organisations in this area.
- 6.19 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.
- 6.20 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.
- 6.21 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*

- 6.22 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.
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- 6.23 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.
- 6.24 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.
- 6.25 In response to this, COMPS submits that the revised negotiation arrangements will prevent its more influential members from driving its objectives, by working on a system of rotating representation on the COMPS sub-committee. COMPS submits that this will ensure that the negotiated outcomes are fair and representative of all members' interests.
- 6.26 However, the ACCC notes that the issue of leveraging outlined above relates to less influential members of COMPS potentially gaining a higher fee than they would have otherwise received (by virtue of being tied to sports with more negotiating clout) rather than a consideration of the equity. The ACCC notes that this would represent a market distortion of the proposed collective bargaining arrangements, and a potential public detriment.
- 6.27 As a result, the ACCC considers that the size and nature of the group may raise some competition concerns.

*Conclusion – Reduced economic efficiencies*

- 6.28 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.
- 6.29 However, the ACCC does consider that the proposed arrangements have the potential to 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**

- 6.30 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.

- 6.31 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.
- 6.32 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**

- 6.33 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.
- 6.34 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**

- 6.35 Overall, for the reasons outlined above, the ACCC is of the view that COMPS' proposed collective bargaining arrangements have the potential to generate some anti-competitive 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 has made a number of claims as to the potential public benefits of the proposed collective bargaining arrangements. In particular, COMPS has noted that its members are not for profit bodies that have been established for the promotion and development of their various sports. In this regard, COMPS has noted that any benefits gained by its members from the proposed arrangements will be passed on to the community by allowing its members to invest more in the development of their respective sports.
- 7.4 COMPS has also noted that the proposed arrangements will allow it to establish a code of conduct and integrity measures for sports related information used for the purposes of betting. It will also allow COMPS to establish an independent body as a single point of contact for the administration of any integrity measures, and for the collection and re-distribution of fees.
- 7.5 Further to this, both COMPS and AABC submit that having a single point of contact for negotiation will benefit sports betting operators by reducing the resources used in negotiating the terms and conditions of any fee.
- 7.6 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**

- 7.7 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.
- 7.8 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.

- 7.9 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.
- 7.10 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).
- 7.11 However, the ACCC considers that in respect of the proposed negotiations with sports betting operators, some 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 the less influential COMPS members into product fee negotiations and this may result in some public benefit.
- 7.12 In its draft determination, the ACCC considered it likely that there would be some disparity in the matters negotiated by each member. The ACCC noted that the greater this disparity, the lower the likely benefit of joint negotiations, and that 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.
- 7.13 As noted earlier, AABC has lodged a submission noting that, despite the diverse nature of the sports involved, their interests and objectives in relation to the proposed arrangements are quite focused and similar.
- 7.14 The ACCC also noted within its draft determination that there are many activities that COMPS, as the industry's representative body, could engage in that would be unlikely to require authorisation. These ranged from advising 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.
- 7.15 However, COMPS has argued that it is unlikely that individual members, faced with the prospect of individual negotiations on fees and other commercial terms, will have capacity or inclination to conduct a separate collective negotiation restricted to an industry code of conduct, industry wide security and data integrity measures. COMPS argues that it is similarly unrealistic to expect sports betting operators to conduct separate collective negotiations with the sports on such matters.

- 7.16 In addition, COMPS submits that, as the creation of an industry code of conduct may limit the supply of services in certain circumstances, the conduct may be at risk of contravening the TPA by way of the prohibition of exclusionary provisions.
- 7.17 However, the ACCC notes that, to the extent that conduct entered into under the proposed arrangements includes exclusionary provisions, they will not be protected from the operation of the TPA by virtue of the authorisation of this application. The ACCC also considers that, as COMPS members appear to place considerable weight on the development of these processes, it is likely that they would pursue them, even if they were involved in individual negotiations on other contractual issues.
- 7.18 Overall, the ACCC concludes that the proposed arrangements may lead to some improvements in the level of input into contracts by COMPS members. While the ACCC does not consider that this is likely to be significant for COMPS' more influential members, it may allow less influential members to obtain contractual terms that would not otherwise have been available to them.

### **Dispute resolution**

- 7.19 COMPS claim that authorisation will provide for a better resolution mechanism for disputes between its members and sports betting operators.
- 7.20 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.
- 7.21 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 cost savings**

- 7.22 There are transaction costs associated with trade. Transaction costs may however be lower in negotiating a collective bargaining agreement involving a single negotiating process relative to a situation where negotiation occurs with many smaller businesses.
- 7.23 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.

- 7.24 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.
- 7.25 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.
- 7.26 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.
- 7.27 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.
- 7.28 In its original application, COMPS had proposed a system of collective bargaining that involved negotiations between the sports betting operator and a committee made up of representatives of each member of COMPS. Decisions made by COMPS were proposed to be made by consensus of the COMPS representatives. The ACCC was concerned that this situation would not lead to any significant transaction cost savings when compared to the counterfactual.
- 7.29 Since the draft determination, COMPS has amended its proposed negotiating structure. COMPS now propose to grant authority to a sub-committee, made up of a number of its members (and changed on a rotational basis) to negotiate on behalf of the members. COMPS also proposes to engage a single legal advisor to advise the group on issues relating to the negotiation.
- 7.30 The ACCC considers that the proposed structure is likely to reduce the inefficiencies inherent in the previously proposed system and considers that the amended arrangements may lead to transaction cost savings.
- 7.31 Consequently, the ACCC considers that the amended negotiating structure is likely to improve the potential for the proposed collective bargaining arrangements to generate transaction cost savings. However, the ACCC considers that these may be limited where further individual negotiations are made necessary by the diverse nature of the group.

- 7.32 In its post draft determination submission, COMPS noted that it intends to establish a single body for the administration of integrity related matters and collection of fees and distribution. COMPS submits that providing a single point of contact to sports betting operators and the sports themselves for these matters is likely to generate significant efficiencies.
- 7.33 AABC has also noted that it considers there to be cost savings involved in sports betting operators having to negotiate with a single body, rather than each different sport individually, and possibly in each state or territory. AABC has also noted that it considers that the savings gained from this are likely to offset any costs associated with the leveraging issues discussed in the previous chapter.
- 7.34 In this instance, the ACCC accepts that some cost savings are likely to accrue to sports betting agencies from being able to negotiate with fewer bodies.

### **Benefits to the community**

- 7.35 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.
- 7.36 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.
- 7.37 Upon issuing its draft determination, the ACCC considered that COMPS had only provided it 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. The ACCC also noted that COMPS had only supplied it with limited information with regards to the expected returns to its members or how and to whom any of those returns would be allocated.
- 7.38 Since the draft determination, COMPS has addressed these issues in a further submission. COMPS submits that it intends to establish an independent body to administer any code of conduct and also to administer the collection and re-distribution of funds obtained from the sports betting operators.
- 7.39 COMPS has also provided information on how each of its members generally supports the development of their respective sports, through organisation of competitions and national coordination of state and territory bodies, which goes

some way towards clarifying how any monies gained by COMPS members under the proposed arrangements may be used.

- 7.40 As discussed above, the ACCC considers that the proposed arrangements may lead to some transaction cost savings. This is likely to include savings made by sports betting operators.

#### **Conclusion on public benefits**

- 7.41 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. The ACCC also considers that the revised collective negotiation structure may provide scope for some transaction cost savings for COMPS and sports betting operators. Overall, however, the ACCC considers that any such benefits would be reduced by the diverse nature of the parties.

## 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.

### *Anti-competitive detriment*

- 8.2 The ACCC considers that the proposed collective bargaining arrangements have the potential to inhibit an apparent growing level of competition between COMPS members to supply information to sports betting operators and may also lead to market distortions. Depending on the outcome of the negotiations, they may also result in increased costs for sports betting operators which they are then likely to pass on to consumers.
- 8.3 However, 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. The absence of opposition from sports betting operators is telling in this respect.
- 8.4 Overall, therefore, the ACCC is of the view that COMPS' proposed collective bargaining arrangements have the potential 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. The ACCC also considers that the revised collective negotiation structure may provide scope for some transaction cost savings.
- 8.6 However, the ACCC considers that any such benefits would be reduced by the diverse nature of the parties.

### *Balance of benefits and detriments*

- 8.7 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed collective bargaining arrangements are likely to result in a public benefit that will outweigh any public detriment.

8.8 In the context of applying the net public benefit test at section 90(8)<sup>30</sup> of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>31</sup>

8.9 On balance, the ACCC considers the public benefit is likely to outweigh the public detriment.

8.10 However, the ACCC considers that the balance between benefit and detriment is close. In this instance, the ACCC considers it appropriate to grant authorisation for a limited time period. Granting for a limited time period allows the ACCC to review the arrangements in light of their practical effectiveness and any change of circumstances that may occur (such as the introduction of new legislation).

8.11 Therefore the ACCC will grant authorisation to the proposed arrangements until 28 February 2009.

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<sup>30</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>31</sup> Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

## 9 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 determination, the ACCC is 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 grants authorisation to the application until 28 February 2009.

### What is authorised

- 9.6 Authorisation is granted to allow collective bargaining between COMPS members and sports betting operators over the use of sporting information for wagering purposes.

### What isn't authorised

- 9.7 This authorisation does not cover:
- any resulting code of conduct or

- collective negotiations with persons other than sports betting operators or others that use sports data for the purpose of facilitating sports betting.

**Date authorisation comes into effect**

9.8 This determination is made on 13 December 2006. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 4 January 2007. If an application for review is made to the Tribunal, the determination will come into effect:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review, or
- where the application is withdrawn – on the day on which the application is withdrawn.