



Australian
Competition &
Consumer
Commission

Notice

in respect of a notification lodged by

Racing and Wagering Western Australia

Date:

20 December 2007

Notification no. N93093

Public Register no. C2007/1618

Commissioners: Samuel
King
Martin
Smith
Willett

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 Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. Section 47 of the Act, in certain circumstances, prohibits conduct known as exclusive dealing. Generally speaking, exclusive dealing involves one business trading with another person and imposing restrictions on the other's freedom to choose with whom, or in what, it deals.
- 1.3. Sub-sections 47(6) and 47(7) of the Act specifically prohibit conduct known as 'third line forcing', which involves the supply of goods or services on condition that the customer also acquires goods or services from a third party. Third line forcing conduct is a *per se* provision, meaning that it amounts to a contravention of the Act regardless of its effect on competition.
- 1.4. Businesses may obtain protection in relation to conduct that might be at risk of breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the ACCC. Once lodged, protection for the notified conduct commences automatically, or in the case of third line forcing, after 14 days.
- 1.5. The ACCC may revoke a third line forcing notification if it is satisfied that the likely benefit to the public from the conduct will not outweigh the likely detriment to the public from the conduct. Revoking a notification prevents or removes the immunity conferred by the lodgement of the notification.
- 1.6. Prior to issuing a notice to revoke a notification, the ACCC must issue a draft notice setting out its reasons for proposing to revoke the notification.
- 1.7. Once a draft notice is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft notice. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft notice.
- 1.8. The ACCC then reconsiders the notification, taking into account the comments made at the conference (if one is requested) and any further submissions received. The ACCC may issue a final notice revoking the third line forcing notification where it is satisfied that the public benefits from the conduct do not outweigh the public detriments.

The conduct

- 1.9. Notification N93093 was lodged by Racing and Wagering Western Australia (RWVA) on 16 August 2007 in relation to conduct that may be in breach of sub-sections 47(6) and 47(7) of the Act.
- 1.10. The conduct the subject of the notification is the offer by RWVA of a licence to conduct thoroughbred horse training activities in Western Australia on condition that the thoroughbred horse trainer obtains workers compensation insurance from a nominated insurer. The nominated insurer is yet to be determined.
- 1.11. RWVA advises that there are currently 681 licensed thoroughbred horse trainers in Western Australia.
- 1.12. RWVA has indicated that it will conduct a tender process to select the nominated insurer. RWVA, in conjunction with its insurance broker Jardine Lloyd Thompson, has been gathering information to present to all workers compensation insurers who are interested in providing cover.
- 1.13. RWVA proposes to finalise the selection of the nominated insurer by 31 December 2007. The scheme will be implemented within three months of the nominated insurer being selected, and will become effective from 1 July 2008.
- 1.14. RWVA anticipates that, under its scheme, the workers compensation insurance policy will be renewable on an annual basis. However, the successful insurer will be offered retention of the policy for three years, provided that they maintain competitive terms. RWVA has indicated that a complete marketing of the policy to all available insurers is expected to be conducted prior to the expiry of the third year.
- 1.15. RWVA has advised that there will be transition arrangements for horse trainers with existing insurance policies if the notification is allowed to stand. In particular, RWVA and Jardine Lloyd Thompson will assist trainers to have their current policies cancelled and to obtain pro rata refunds for the unused portion of the policy. The proposed date of cancellation is 30 June 2008, meaning that most existing policies will run their full course (or something close to that).
- 1.16. RWVA has indicated that it will not receive a fee or a rebate from any insurer or broker in relation to providing the cover. The proposal will be funded by RWVA through the wagering side of its business.

Chronology

1.17. Table 1.1 provides a chronology of significant dates in the consideration of this matter.

Table 1.1: Chronology of significant dates regarding notification N93093

DATE	ACTION
16 August 2007	RWWA lodges notification N93093 with the ACCC.
20 August 2007	ACCC requests information from RWWA.
22 August 2007	RWWA responds to information request.
22 August 2007	ACCC requests information from RWWA.
24 August 2007	RWWA responds to information request.
29 August 2007	Draft notice issued.
11 October 2007	Pre-decision conference convened.
21 October 2007	Deadline for submissions following the pre-decision conference.
5 November 2007	Extended deadline for submissions following the pre-decision conference.
20 December 2007	Final notice issued.

2. Background

RWWA

- 2.1. RWWA is established as a corporate body under the *Racing and Wagering Western Australia Act 2003* (WA) (the RWWA Act). It is not an agent of the Crown and is not part of the public sector.
- 2.2. RWWA is the controlling authority for thoroughbred, harness and greyhound racing in Western Australia. It also has responsibility for the conduct of off-course betting in Western Australia.
- 2.3. Paragraph 35(1)(i) of the RWWA Act provides that one of RWWA's functions is 'to endeavour to ensure that racing industry issues such as insurance ... are carried out in an appropriate and adequate manner'.
- 2.4. RWWA submits that it therefore has a statutory responsibility to ensure that adequate workers compensation insurance is available for horse trainers in the most efficient and cost effective form.
- 2.5. Horse trainers in Western Australia must be licensed by RWWA to conduct training activities in the racing industry.
- 2.6. Sub-section 42(4) of the RWWA Act provides that RWWA may issue a licence subject to such conditions as it determines. RWWA has previously required horse trainers, as a condition of being granted a licence, to hold workers compensation insurance for employees. RWWA does not currently impose this condition on licensees.

Workers compensation insurance

- 2.7. WorkCover WA administers the *Workers Compensation and Injury Management Act 1981* (WA) (the Workers Compensation Act).
- 2.8. Section 160 of the Workers Compensation Act requires employers to obtain workers compensation insurance in respect of their employees. Currently, thoroughbred horse trainers in Western Australia arrange their own workers compensation insurance.
- 2.9. Employers in Western Australia can obtain workers compensation insurance from any of the insurers approved by the Minister to underwrite workers compensation insurance.¹
- 2.10. The insurance companies currently approved by the Minister to underwrite workers compensation insurance in Western Australia are set out in Table 2.1.

¹ WorkCover WA website - <http://www.workcover.wa.gov.au/Employers/Workers+compensation+insurance/How+do+I+take+out+workers+compensation+insurance.htm>

Table 2.1 – List of insurance companies approved by the Minister²

ALLIANZ AUSTRALIA INSURANCE LTD
CATHOLIC CHURCH INSURANCES LTD
GIO GENERAL LTD
GUILD INSURANCE LTD
INSURANCE AUST. LTD T/AS CGU WORKERS COMPENSATION
INSURANCE COMMISSION OF WA
QBE INSURANCE AUSTRALIA LTD
VERO INSURANCE LTD T/AS VERO WORKERS COMPENSATION
WESFARMERS FEDERATION INSURANCE LTD
ZURICH AUSTRALIAN INSURANCE LTD

- 2.11. RWWA has advised that, following the acquisition of Promina by Suncorp, the workers compensation insurance businesses of GIO and Vero will be merged, which means that there will be five main workers compensation underwriters in Western Australia, excluding niche providers. At the pre-decision conference, Jardine Lloyd Thompson indicated that of these five providers, three tend not to provide cover to thoroughbred horse trainers due to the lack of available data for the industry (eg. on claims performance).
- 2.12. Recommended premium rates for workers compensation insurance are reviewed and published annually by WorkCover WA.³ Depending upon the risk profile (ie. previous claims experience and the extent of the risk associated with a particular industry), insurers may discount the recommended premium rates by any amount, or surcharge up to a maximum of 75 per cent of the recommended premium rate for individual employers. With approval from WorkCover WA, approved insurers may surcharge beyond 75 per cent of the recommended premium rate, depending upon the claims experience and risk associated with the operation of an employer's business.
- 2.13. WorkCover WA's website advises that workers compensation legislation in Western Australia encourages a degree of self-responsibility, and encourages employers to obtain alternative quotes when taking out cover or renewing policies.⁴

The NSW Scheme

- 2.14. RWWA has advised the ACCC that it based its proposal on the compulsory workers compensation insurance scheme operated by Racing NSW.
- 2.15. As in Western Australia, it is a legislative requirement that employers in NSW obtain workers compensation insurance. The Rules of Racing of NSW contain an

² WorkCover WA website -
<<http://www.workcover.wa.gov.au/Service+Providers/Insurers/List+of+Approved+Insurers.htm>>

³ WorkCover WA website -
<<http://www.workcover.wa.gov.au/Employers/Workers+compensation+insurance/How+do+I+take+out+workers+compensation+insurance.htm>>

⁴ Ibid.

additional requirement that employers in the industry must have a workers compensation policy with Racing NSW, except with the approval of the Board.

- 2.16. Racing NSW is licensed by WorkCover NSW to operate as a specialised insurance fund. As the fund is managed by Racing NSW, the same third line forcing issues which exist with RWWA's proposal, and which necessitated the lodgement of notification N93093, may not apply in NSW.

3. Statutory test

- 3.1 Section 93 of the Act provides that a corporation that engages or proposes to engage in conduct of a kind referred to in sub-sections 47(6) and 47(7) may give a notice to the ACCC, as prescribed, setting out particulars of the conduct or proposed conduct.
- 3.2 Under sub-section 93(3A), if a corporation has notified the ACCC of conduct or proposed conduct of the type described in sub-sections 47(6) or 47(7) and the ACCC is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment to the public from the conduct or proposed conduct, the ACCC may, through the process described in paragraphs 1.5 - 1.8 of this notice, give the corporation a written notice stating that the ACCC is so satisfied. The effect of the ACCC's notice is to remove the immunity conferred by the notification.
- 3.3 Before revoking the immunity conferred by a notification, the ACCC must issue a draft notice of its intention (sub-section 93A(1)). The ACCC must also give the notifying party and interested parties the opportunity to respond to the draft notice and to call a conference in relation to the draft notice (sub-section 93A(2)).

4. Draft notice and pre-decision conference

- 4.1. On 29 August 2007, the ACCC issued a draft notice proposing to revoke notification N93093. On the information available at the time, the ACCC was satisfied that the likely benefit to the public from the notified conduct would not outweigh the likely detriment to the public from the conduct.
- 4.2. In issuing the draft notice, the ACCC sought comments and further information from RWWA and interested parties.
- 4.3. On 11 October 2007, the ACCC convened a pre-decision conference in Perth to discuss the ACCC's draft notice. The conference was requested by RWWA, and provided an opportunity for RWWA and interested parties to meet with the ACCC to discuss the operation and effect of the notified conduct and the ACCC's draft notice.
- 4.4. Copies of the draft notice and the record of discussions at the pre-decision conference are available from the ACCC's website (www.accc.gov.au). The issues discussed at the conference are included in the discussion in Chapters 5 - 7 of this notice.

5. Submissions by RWWA

- 5.1. RWWA provided a number of submissions to the ACCC in support of its notification and also responded to requests for further information from the ACCC.
- 5.2. RWWA submits that the conduct will result in public benefits from:
- reduced premiums through the volume discounts that RWWA will be able to negotiate with one insurer;
 - the development of better knowledge by the insurer of the work done by horse trainers and employees which will result in better and more efficient outcomes when claims are made; and
 - assurance that all employees of licensed horse trainers will be adequately covered for workers compensation insurance.
- 5.3. RWWA submits that the notified conduct will not result in any public detriments for horse trainers in Western Australia. RWWA submits that the insurance arrangements the subject of the notification are an insignificant proportion of the total insurance market.

Reduced premiums

- 5.4. The primary public benefit argument put forward by RWWA in support of notification N93093 is that it will result in lower workers compensation insurance premiums for thoroughbred horse trainers in Western Australia.
- 5.5. According to RWWA, it has received requests from thoroughbred trainers to look at the issue of workers compensation insurance because many trainers believe they are being disadvantaged by high premiums.
- 5.6. Currently, the insurance premiums paid by trainers are based on wage declarations made by the trainers. RWWA submits that some trainers ‘under declare’ and therefore pay a lower premium, while others simply fail to take out a policy altogether. As a consequence, the premium pool is smaller, and those trainers who accurately declare the wages they pay to employees end up paying higher premiums than they otherwise would if all trainers took out adequate insurance.
- 5.7. Jardine Lloyd Thompson (RWWA’s insurance broker) submits that insurance premiums are also high because only two of the five primary insurers offer workers compensation insurance to horse trainers in Western Australia.
- 5.8. In RWWA’s view, a compulsory workers compensation insurance scheme involving one approved insurer is the best mechanism by which to reduce the premiums paid by trainers. RWWA submits that, by requiring trainers to obtain insurance from a single nominated insurer, it will be able to negotiate volume discounts with the nominated insurer, thereby reducing the premiums paid by individual trainers. RWWA submits that if trainers are able to choose their own insurer, then the premium pool for any one insurer would not be large enough to justify significant discounts.

- 5.9. The problem of ‘under declaring’ will be specifically addressed under RWWA’s proposed scheme. Under the scheme, the size of the insurance premiums will be based on a fair, objective measure – the number of horses that each trainer starts in races or trials in a given period – rather than relying on wage declarations from trainers. Specifically, the premiums will be made up of the following three components:
- A base premium – a flat fee payable each year at the time of licence renewal irrespective of stable size and claims history;
 - An activity premium – a fee per start for all trials and races; and
 - An adjusted premium – based on claims experience.
- 5.10. RWWA’s model for setting premiums assumes that the higher the number of starts, the higher the number of workers employed by the trainer. It is based on the workers compensation insurance scheme operated by Racing NSW, which RWWA submits is very effective.
- 5.11. Jardine Lloyd Thompson anticipates that a compulsory scheme which makes use of centralised data and results in an adequate premium pool will lead to a reduction in the size of premiums.
- 5.12. In its draft notice, the ACCC asked for additional information regarding the level of discount which may be achieved in relation to workers compensation insurance premiums under RWWA’s proposal. In response, RWWA indicated that, while it is difficult to be specific about the level of discount, it believes that a collective premium pool will be more attractive to an underwriter than single placements. RWWA expects the discount to be between 15% and 25% in the first full year. Jardine Lloyd Thompson has made a similar estimate of the expected discount based on the NSW system and as a result of addressing the current problems caused by a small pool.
- 5.13. RWWA submits that any trainer currently enjoying the benefit of a discounted premium will not be prejudiced by RWWA’s proposal, as the discount is expected to be maintained (and potentially increased) under the proposal. RWWA submits that overall costs across the industry will be reduced under the proposed scheme, which will be reflected in the premiums to be paid by all participants.
- 5.14. In its draft notice, the ACCC questioned whether any discount which RWWA negotiates with the nominated insurer will be maintained over the proposed three year contract period. In response, RWWA has advised that the policy will be annually renewable, but the successful underwriter will be offered retention of the policy for three years, provided that they maintain competitive terms. In order to determine whether the successful underwriter is maintaining competitive terms, one other insurer will be invited to submit terms for the second and third years.
- 5.15. In the draft notice, the ACCC also queried whether a competitive tender conducted every three years will ensure competitive premiums. In response, RWWA indicated that it has been advised that insurers compete vigorously for major workers compensation business. RWWA expects that the premium volume generated by its

proposal will make it attractive to a number of underwriters, who will therefore offer competitive terms.

Improved industry knowledge by the insurer

- 5.16. RWWA submits that the proposed conduct will result in the development of better knowledge by the insurer of the work done by horse trainers and employees, which will result in better and more efficient outcomes when claims are made.
- 5.17. The ACCC sought more information from RWWA as to how the notified conduct will improve industry knowledge and deliver better and more efficient outcomes.
- 5.18. In response, RWWA has advised that a primary aspect of the proposed scheme is the introduction of a risk management programme designed to lower the incidence, and limit the severity, of claims. The risk management programme will consist of an Industry Risk Management Code of Practice, setting out minimum standards for occupational health and safety, and model guidelines in Injury and Rehabilitation Management, setting out minimum standards to be followed in the event that an employee is injured.
- 5.19. The nominated insurer will be expected to develop an intimate knowledge of the industry and to provide input into the risk management programme. Racing industry participants and relevant government authorities will also take part in the development of the programme.

Adequate coverage for industry

- 5.20. As noted above, there is a concern within the industry that some trainers are not taking out adequate workers compensation insurance.
- 5.21. RWWA has advised that many trainers do not take out adequate workers compensation insurance because they are not fully aware of their obligations under the Workers Compensation Act.
- 5.22. RWWA submits that the proposed conduct will ensure that all employees of licensed horse trainers will be adequately covered by workers compensation insurance.
- 5.23. In its draft notice, the ACCC stated that it was not satisfied that the notified conduct is the only way of ensuring that horse trainers take out adequate coverage. In particular, the ACCC noted that it is a legislative requirement for all employers to obtain workers compensation insurance, and that RWWA previously required horse trainers to hold insurance as a condition of the trainer's licence. The ACCC suggested that this requirement could be enforced simply by requiring horse trainers to provide evidence of a workers compensation policy annually as a condition of the licence granted by RWWA.
- 5.24. In response, RWWA has argued that by requiring trainers to obtain their workers compensation insurance from a single insurer, this will provide greater certainty that the insurance cover is adequate. Furthermore, RWWA argues that setting premiums based on the number of starts (rather than on wage declarations) is independent, fair

and accurate, and is important for ensuring that adequate cover is in place throughout the industry. In RWWA's opinion, setting premiums based on the number of starts is only possible using its proposed scheme.

- 5.25. In response to the ACCC's suggestion that trainers be required to provide a copy of their workers compensation insurance policy at the time of obtaining a licence, RWWA submitted that the production of documentary evidence would not address the problem of 'under declaring'.
- 5.26. RWWA acknowledges that it could be left up to individual trainers to comply with their legal obligation to take out adequate workers compensation insurance. However, RWWA considers that its proposed scheme is the most effective way of ensuring that all trainers are adequately insured.

6. Submissions by interested parties

- 6.1 Following the release of the draft notice, the ACCC received written and oral submissions from a number of interested parties in relation to the notification. All public submissions are available on the ACCC's website.
- 6.2 A summary of the issues raised by interested parties is provided below.

Horse trainers

Western Australian Racing Trainers' Association (WARTA)

- 6.3 WARTA agrees with RWWA's submission that many trainers in Western Australia do not obtain appropriate workers compensation insurance.
- 6.4 According to WARTA, many trainers stopped obtaining workers compensation insurance when RWWA stopped requiring insurance as a condition of obtaining a licence. This is so despite the fact that workers compensation insurance is mandatory for all employers under the Workers Compensation Act.
- 6.5 WARTA estimates that approximately half of the trainers in Western Australia are not complying fully with the workers compensation requirement, either by under declaring wages or not obtaining insurance at all. Consequently, trainers who are fully complying with their obligations are being disadvantaged by high premiums.
- 6.6 WARTA submits that the compulsory insurance scheme operating in NSW is very effective and will shortly be joined by ACT trainers. As noted above, the NSW scheme involves payment of an upfront fee for every trainer, plus a fee per start for a given period. Because this system relies on objective data, it cannot be undermined by employers wishing to pay a lower premium.

Mr Paddy Rock

- 6.7 Mr Rock supports RWWA's notification. He submits that some horse trainers have not been honest in making declarations about their staff members for the purposes of obtaining workers compensation insurance. These trainers have been paying lower premiums, while honest trainers have been faced with higher costs.
- 6.8 Mr Rock considers that RWWA's proposed method of calculating premiums is fair and cannot be undermined by dishonest trainers.

Mr John Zucal

- 6.9 Mr Zucal opposes the notification and agrees with the concerns raised by the ACCC in its draft notice. Mr Zucal submits that he should have the right to choose his workers compensation insurance provider.
- 6.10 Mr Zucal agrees that it should be compulsory for trainers to obtain insurance as a condition of the RWWA licence. However, he does not believe that he should be forced to use a nominated provider. Mr Zucal submits that if trainers establish a

relationship with a broker or insurer, then the trainers are able to obtain competitive quotes regarding their premiums.

- 6.11 Mr Zucal disputes the claim that many trainers do not have adequate workers compensation insurance, arguing that no figures have been put forward in support of this statement.
- 6.12 Mr Zucal has also expressed concern regarding RWWA's inability to guarantee that trainers will be better off under the proposal.
- 6.13 Mr Zucal considers that RWWA should educate the industry regarding insurance matters. He also submits that if RWWA's scheme provides a good product, then it should be made available on a voluntary basis.

Mr Eddie Philp

- 6.14 Mr Philp advised the ACCC that he did not have any difficulty obtaining workers compensation insurance when he worked as a horse trainer. He obtained insurance from SGIO and was required to provide details of who he employed, how many hours they worked and the wages they were paid.
- 6.15 Mr Philp considers that the notified conduct may give rise to a public benefit if the insurance policy provided by the nominated insurer covers track workers. Track workers were not covered by Mr Philp's policy because they were employed on an *ad hoc* basis.

Mr Keith Goodall

- 6.16 Mr Goodall submits that the proposed conduct will restrict his freedom of choice, reduce competition, increase costs and lock him in to an insurance policy for three years.
- 6.17 Mr Goodall does not consider that RWWA's proposal will provide any advantage for trainers.

Insurers

Suncorp/GIO

- 6.18 Suncorp/GIO believes that RWWA can implement compulsory measures to ensure that trainers provide a current workers compensation certificate without restricting the insurer providing the cover. This is done successfully in other industries such as the building industry.
- 6.19 Suncorp/GIO considers that healthy competition in the workers compensation insurance industry promotes better claims outcomes leading to reduced premiums.
- 6.20 According to Suncorp/GIO, premiums are rated on a risk basis to ensure that better performing clients are not penalised on their premium by the claims experience of poorer performers. Suncorp/GIO considers that a compulsory uniform policy may

not encourage better behaviour of poorer performers, and may lead to deterioration in claims experience for this industry group as a whole.

CGU Workers Compensation (CGU)

- 6.21 CGU is a licensed provider of workers compensation insurance in WA. Based on its share of the WA workers compensation market, CGU estimates that it covers about 25% of the trainers in WA.
- 6.22 CGU supports RWWA's proposed conduct. It expects that if all trainers in WA are required to take out a policy, this will result in an increase in the premium pool available to pay claims and, over time, should result in a reduction in the average rate applied to trainers.
- 6.23 CGU considers that the average premium rate under the notified conduct will depend upon the claims experience of the arrangement over time. Once a premium pool is established that reflects exposure to risk, the premium rates can be adjusted in line with claims costs. CGU expects that this can be achieved in the second year of the scheme's operation.
- 6.24 CGU has indicated that the workers compensation market in WA is very competitive and a number of insurers may be interested in competing to be the nominated provider.

The regulator

WorkCover WA

- 6.25 WorkCover WA submits that trainers should have the right to choose a workers compensation insurance provider based on their individual insurance needs. Furthermore, WorkCover WA considers that the requirement to obtain insurance through a nominated insurer may disadvantage a number of trainers who have already negotiated competitive insurance packages through a preferred insurer and established a productive business relationship.
- 6.26 WorkCover WA submits that if RWWA enters into an arrangement with a selected insurer, then participation in the arrangement should remain optional for trainers. WorkCover WA considers that if the arrangement delivers lower premiums and a more efficient and effective claims management service, then it is likely that trainers will embrace the scheme and agree to participate.
- 6.27 WorkCover WA submits that the premium rate for the industry reflects the inherent risks associated with horse training, rather than inefficiencies in the market. Furthermore, WorkCover WA argues that most trainers are likely to have workers compensation policies, although these policies may be the minimum policies available.
- 6.28 WorkCover WA accepts that the proposed formula to calculate the premium under RWWA's proposal is linked to the compulsory nature of the scheme. WorkCover WA has advised that it is a novel approach to setting premiums and WorkCover WA would have to look at it in more detail, although it would not necessarily raise issues under the Workers Compensation Act.

7. ACCC Assessment

- 7.1. In examining the benefits and detriments flowing from the notified conduct, the ACCC has considered all of the information provided by RWWA and interested parties both in written submissions and during the pre-decision conference.

The relevant market

- 7.2. Defining the markets affected by the notified conduct may assist in assessing the public benefits and detriments flowing from the arrangement. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of this definition.
- 7.3. RWWA submits that the relevant market is the national market for the provision of workers compensation insurance. RWWA submits that there are five main workers compensation underwriters in Australia, excluding niche providers (see paragraph 2.11 and table 2.1).
- 7.4. In addition to the provision of workers compensation insurance, the ACCC considers that the provision of thoroughbred horse training services in Western Australia is also relevant to its assessment of the notified conduct. Horse trainers supervise the preparation of horses for racing, provide advice and consult with owners, and instruct stable staff and jockeys. Employees of trainers include track work riders, stable hands and strappers.

Public benefits

Reduced premiums

- 7.5. As discussed in Chapter 5 of this notice, RWWA submits that the primary beneficial reason for the proposed conduct is to ensure overall lower insurance premiums for horse trainers.
- 7.6. RWWA and Jardine Lloyd Thompson anticipate that premiums will be reduced as a result of RWWA's ability to negotiate volume discounts with the nominated insurer together with the use of centralised data and the establishment and maintenance of an adequate premium pool.
- 7.7. RWWA and Jardine Lloyd Thompson anticipate that the level of the discount under the proposed scheme will be between 15% and 25%, although neither party has provided specific evidence to support these estimates. The ACCC notes that any discount will ultimately depend upon what can be agreed with the insurance provider.
- 7.8. The ACCC accepts that the notified conduct may have the potential to offer low cost insurance for thoroughbred horse trainers. In this regard, the ACCC notes that the notification is supported by the Western Australian Racing Trainers' Association, who indicated that some of its members are concerned about the size of the premiums currently being paid by trainers.

- 7.9. On the other hand, a number of individual trainers have advised the ACCC that they are currently able to obtain competitively priced insurance premiums by seeking quotes from different providers and by bundling their insurance requirements with a single provider. These trainers value their ability to shop around for an insurance provider, and have benefited from obtaining competing quotes from a number of different providers.
- 7.10. The ACCC notes RWWA's argument that trainers currently benefiting from discounted premiums will not be worse off under the proposed scheme. However, the ACCC considers that trainers who have negotiated lower premiums by shopping around and/or bundling their insurance needs may potentially face higher premiums under RWWA's proposal, particularly if they currently obtain the minimum policy. In any event, removing the ability of horse trainers to choose their own insurance provider is, of itself, a significant detriment in the ACCC's view (discussed in more detail in paragraphs 7.30 - 7.35).
- 7.11. The ACCC also notes that preventing horse trainers from choosing their own workers compensation insurance provider will eliminate competition between insurers for the term of the insurance policy, which may mean that any discount negotiated by RWWA will be eroded over the longer term.
- 7.12. In response to these concerns, RWWA has indicated that in order to maintain competitively priced premiums, the insurance policy will be renewable on an annual basis. The nominated insurer will be offered retention of the policy for three years, but only if the insurer maintains competitive terms, and the policy will be subject to a full competitive tender every three years. RWWA anticipates that a number of insurers will be interested in becoming the nominated insurer due to the volume of premiums which they will receive under the scheme.
- 7.13. While these factors may go some way towards maintaining competitive tension in the provision of workers compensation insurance to horse trainers, the ACCC remains concerned about the compulsory nature of the scheme.
- 7.14. The ACCC notes that many industry bodies negotiate discounts on insurance products with a nominated provider for the benefit of industry participants, particularly where the insurance is a legislative requirement. However, for the most part, industry participants are able to choose whether or not to take part in the scheme. This maintains a degree of competition in the provision of insurance products, and allows individuals to shop around and choose an insurer based on factors such as price and quality.
- 7.15. The ACCC considers that if RWWA enters into an arrangement with a single insurer which offers competitively priced insurance premiums, then trainers are likely to participate in the scheme on a voluntary basis. This may generate sufficient volumes for the purposes of negotiating a discount, while still giving trainers the freedom to choose their own insurance provider.

Improved industry knowledge by the insurer

- 7.16. RWWA submits that the proposed conduct will result in the development of better knowledge by the nominated insurer regarding the work done by horse trainers and employees, which will result in better and more efficient outcomes when claims are made. In particular, RWWA has indicated that the nominated insurer will be expected to develop an intimate knowledge of the industry and to provide input into a risk management programme to be developed in conjunction with RWWA and relevant government authorities.
- 7.17. By way of an example, RWWA has indicated that the compulsory workers compensation scheme operated by Racing NSW incorporates risk management strategies and provides assistance to injured workers so that they are able to return to work.
- 7.18. The ACCC accepts that the development of a risk management programme will deliver a benefit to horse trainers and to the workers compensation insurance industry by helping to reduce the number and severity of workers compensation insurance claims. However, the ACCC is not persuaded that the development of a risk management programme is necessarily linked to the implementation of a compulsory scheme which requires trainers to purchase insurance from a single insurance provider, particularly given that the nominated insurer may change over time.
- 7.19. The ACCC considers that even without the notified conduct, RWWA will be able to work with one (or more) insurance provider(s) and government authorities in order to develop a risk management programme for horse trainers and their employees.

Adequate coverage for industry

- 7.20. RWWA submits that the proposed conduct will ensure that all employees of licensed horse trainers are adequately covered for workers compensation insurance.
- 7.21. The ACCC understands that there is a concern in the industry that some trainers are not taking out adequate levels of workers compensation insurance. According to a number of interested parties, the industry operates as a cash economy with many people engaged on a casual basis. There also appears to be confusion among some trainers as to whom they should regard as their employees. As a result, some trainers 'under declare' the wages they pay to their employees, and many trainers simply take out the minimum policy for approximately \$200. This leads to an inadequate premium pool which may not be able to cover claims when they arise.
- 7.22. As outlined in paragraph 5.9, RWWA's proposed scheme is designed to avoid the problem of under declaring by setting premiums according to an objective and easily verifiable measure – the number of 'starts' each trainer has in a year (plus a minimum base fee).
- 7.23. The ACCC accepts that by setting premiums according to objective and verifiable data, and requiring all trainers to obtain insurance from a single insurer, the notified

conduct will help to ensure that all trainers in Western Australia have adequate workers compensation insurance.

- 7.24. The ACCC also accepts RWWA's submission that requiring trainers to provide evidence of a current workers compensation insurance policy when they obtain or renew their licence will not address the problem of under declaring.
- 7.25. Having said this, the ACCC notes that adequate insurance coverage is a requirement with or without the notified conduct. As discussed above, all employers (including horse trainers) are required to obtain workers compensation insurance under the Workers Compensation Act.
- 7.26. WorkCover WA is responsible for regulating and administering the Workers Compensation Act in Western Australia. One of its roles is to monitor compliance with the Act to ensure that employers are insured for workers compensation to their full liability.
- 7.27. The ACCC understands that, prior to notification N93093 being lodged, WorkCover WA had not been formally advised of the concerns which the notification is trying to address. WorkCover WA has indicated that, having become aware of these concerns, it may require insurance providers to conduct an audit of policy holders to ensure that appropriate levels of insurance are being obtained. Alternatively, WorkCover WA may conduct an audit in order to determine whether the Workers Compensation Act is being complied with.
- 7.28. The ACCC considers that increased monitoring by WorkCover WA may help to ensure compliance with the Workers Compensation Act, particularly if trainers are aware of WorkCover WA's increased involvement in this area.
- 7.29. Similarly, increased auditing by the insurance providers (who bear the ultimate risk) would also help to ensure compliance with the Workers Compensation Act.

Public detriments

- 7.30. In general, the type of third line forcing conduct proposed by RWWA can be quite restrictive in that it requires not only the forced purchase of a second product but also nominates a single provider from whom parties must acquire that product.
- 7.31. The detriment is increased by the fact that without obtaining workers compensation insurance from the nominated provider, horse trainers will not be granted a licence by RWWA and will not, therefore, be able to operate as a horse trainer in Western Australia.
- 7.32. Although the requirement to obtain workers compensation insurance is mandated by legislation, the third line forcing conduct proposed by RWWA removes the choice of insurance provider and the ability for trainers to shop around for the premium and benefits package that suits them best. The ACCC notes that the relevant legislation specifically provides employers with a choice of approved insurance providers and the general advice of WorkCover WA (as the regulator) is to encourage employers to obtain alternative quotes when taking out or renewing their policy.

- 7.33. A consequence of nominating a single provider from which to obtain insurance is also that the incentives to offer competitive premiums and benefits may be reduced not only for the nominated provider but also for other insurance providers that wish to compete for the supply of workers compensation insurance to horse trainers.
- 7.34. The ACCC notes that RWWA proposes to renew the policy on an annual basis, and to subject the policy to a full, competitive tender every three years. This may lessen the detriment from nominating one provider, particularly if all five (general) insurance providers compete in order to become the nominated insurer. There are, of course, less anti-competitive ways to achieve the benefits which RWWA's conduct is designed to deliver. For example, the Australian Trainers' Association operates a voluntary public liability insurance scheme for horse trainers. The ACCC understands that such industry schemes can achieve large coverage of participants because they are attractive and offer competitive premiums, but do not prevent trainers from obtaining insurance from other providers.
- 7.35. Based on the information available, the ACCC considers that the notified conduct has the potential to result in significant public detriment by removing the ability of trainers to choose their own workers compensation insurance provider and to bundle their insurance needs together. This view is shared by a number of interested parties, including horse trainers, Suncorp/GIO and WorkCover WA.

Conclusion on public benefits and detriments

- 7.36. RWWA has lodged notification N93093 in order to address a number of perceived problems relating to workers compensation insurance in the thoroughbred horse training industry, namely, high insurance premiums, the absence of a risk management programme and inadequate coverage.
- 7.37. By requiring horse trainers to obtain workers compensation insurance from one nominated insurer, RWWA hopes to reduce the size of the workers compensation insurance premiums paid by horse trainers, to facilitate the development of a risk management program for the horse training industry, and to ensure that all trainers are adequately covered.
- 7.38. The ACCC considers that RWWA should be commended for attempting to address the problems which it has identified. Furthermore, the ACCC accepts that the notified conduct has the potential to reduce premiums, to facilitate the development of a risk management program and to ensure that trainers have adequate cover (at least initially).
- 7.39. However, the ACCC is concerned that the notified conduct will give rise to a significant public detriment by preventing horse trainers in Western Australia from shopping around and choosing the workers compensation insurance provider that best suits their needs.
- 7.40. This detriment is increased by the fact that horse trainers who do not obtain workers compensation insurance from the nominated provider will not be able to operate in Western Australia as they will be refused a licence from RWWA.

- 7.41. The ACCC also notes that the notified conduct will eliminate competition between insurance providers for the life of the insurance policy, which may reduce the incentive for insurers to offer competitive premiums to employers.
- 7.42. On balance, the ACCC is satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the conduct.
- 7.43. The ACCC notes that the benefits which RWWA's proposal is designed to deliver may be achieved in other ways which do not involve the significant anti-competitive detriment associated with the notified conduct.
- 7.44. The ACCC considers that RWWA may be able to develop a workers compensation insurance scheme with a single insurer which operates on a voluntary basis. If the scheme offers competitively priced insurance premiums, then trainers are likely to participate in the scheme even if they are not obliged to do so. This may generate sufficient volumes for the purposes of negotiating a discount, while still giving trainers the freedom to choose their own insurance provider. A voluntary scheme is also less likely to raise concerns under the Act.
- 7.45. Similarly, the ACCC does not consider that the development of a risk management program is dependent upon the implementation of the notified conduct. The ACCC considers that even without the notified conduct, RWWA will be able work with one (or more) insurance provider(s) and government authorities in order to develop a risk management programme for horse trainers and their employees.
- 7.46. The ACCC notes that obtaining adequate workers compensation is a legal requirement for all employers. If there are concerns that the law is not being adhered to, then it is the role of WorkCover WA to enforce the law. The ACCC would strongly encourage RWWA to formally approach WorkCover WA with its concerns regarding workers compensation insurance as it relates to the thoroughbred horse training industry in Western Australia. The ACCC considers that increased monitoring by WorkCover WA (and also by the insurance providers themselves) may help to ensure that all trainers have an appropriate level of workers compensation insurance.

8. Notice

- 8.1. For the reasons outlined in this notice, the ACCC is satisfied that the likely benefit to the public from notification N93093 will not outweigh the likely detriment to the public from the notified conduct.
- 8.2. Accordingly, the ACCC gives notice under subsection 93(3A) of the *Trade Practices Act 1974* (the Act) in respect of notification N93093.
- 8.3. Notification N93093 has not, and will not, come into force because the ACCC issued a draft notice in respect of the notification during the prescribed 14 day period, and has now issued a final notice revoking the notification.