



Australian
Competition &
Consumer
Commission

Draft Notice

in respect of a notification lodged by

Racing and Wagering Western Australia

Date: 29 August 2007

Notification no. N93093

Public Register no. C2007/1618

Commissioners:

**Samuel
Sylvan
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, 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 lodging 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. This document is a draft notice in respect of notification N93093 lodged by Racing and Wagering Western Australia.
- 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.

Conduct

- 1.9. Notification N93093 was lodged by Racing and Wagering Western Australia (RWWA) on 16 August 2007 in relation to conduct that may be in breach of sections 47(6) and 47(7) of the Act.
- 1.10. The conduct the subject of the notification is the offer by RWWA 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. RWWA advise that there are currently 681 licensed thoroughbred horse trainers in Western Australia.
- 1.12. RWWA advise that it will conduct a tender process to select the nominated insurer. Currently RWWA, in conjunction with its insurance broker Jardine Lloyd Thompson, is gathering information to present to all workers compensation insurers who are interested in providing cover.
- 1.13. RWWA propose to finalise the selection of the nominated insurer by 31 December 2007. The scheme will be implemented within 3 months of the nominated insurer being selected, and will become effective from 1 July 2008.
- 1.14. RWWA propose to offer the successful tenderer a 3 year term before the cover is put to tender again.
- 1.15. RWWA has advised that there will be transition arrangements for horse trainers with existing insurance policies if the notification is allowed to stand. In particular, RWWA 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. RWWA advise that it will not receive a fee or a rebate from any insurer or broker in relation to providing the cover.
- 1.17. Below is a chronology of significant dates in this matter.

| 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. |

2. Background

RWWA

- 2.1. RWWA is established as a corporate body under the *Racing and Wagering Western Australia Act (WA) (2003)* (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 function is "to endeavour to ensure that racing industry issues such as insurance ... are carried out in an appropriate and adequate manner".
- 2.4. RWWA submit that it therefore has a statutory responsibility to ensure that adequate workers compensation insurance for horse trainers is available 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. Paragraph 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.

Workers compensation insurance

- 2.7. WorkCover WA administers the *Workers Compensation and Injury Management Act 1981 (WA)* (Workers Compensation Act).
- 2.8. Section 160 of the Workers Compensation Act requires employers to obtain workers compensation insurance. 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 RWWA advise that following the acquisition of Promina by Suncorp, the workers compensation businesses of GIO and Vero will be merged, which means that there are 5 main workers compensation underwriters in Western Australia excluding niche providers.
- 2.10. The insurance companies 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. Recommended premium rates for workers compensation are reviewed and published annually by WorkCover WA.³ Depending upon the risk profile (i.e. previous claims experience and the extent of risk associated with the 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, dependent upon the claims experience and risk associated with the operation of an employer's business.
- 2.12. 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

3. Statutory test

- 3.1 Section 93 of the Act provides that a corporation that engages or proposes to engaged in conduct of a kind referred to in subsection 47 (6) and (7) may give to the ACCC notice, as prescribed, setting out particulars of the conduct or proposed conduct.
- 3.2 Under section 93(3A), if a corporation has notified the ACCC of conduct or proposed conduct of the type described in subsection 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 draft notice, give the corporation a written notice stating that the ACCC is so satisfied.

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.

4. Submissions received by the ACCC

- 4.1. RWWA provided a supporting submission with the notification, outlining the public benefits it believes flow from the notified conduct. RWWA also responded to requests for information from the ACCC. RWWA submit 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.
- 4.2. RWWA submit that the notified conduct will result in no public detriments to horse trainers in Western Australia. RWWA submit that the insurance arrangements (the subject of the notification) are an insignificant proportion of the total insurance market.
- 4.3. Copies of RWWA's supporting submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and Authorisations Public Registers' links.
- 4.4. The ACCC has not conducted formal market inquiries with interested parties. The ACCC seeks comment from both RWWA and interested parties on the issues raised in this draft notice to assist the ACCC decide whether or not a final notice revoking the notification lodged by RWWA should be issued.

5. ACCC Assessment

- 5.1. In examining the benefits and detriments flowing from the notified conduct, the ACCC has considered all of the information provided by RWWA.

The relevant market

- 5.2. Defining the markets affected by the arrangement which has been notified assists in assessing public benefits and detriment 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.
- 5.3. RWWA submit that the relevant market is the national market for the provision of workers compensation insurance. RWWA submits that there are 5 main workers compensation underwriters in Australia excluding niche providers (see paragraph 2.9 and table 2.1).
- 5.4. 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 trackwork riders, stable hands and strappers.

Public benefits

Reduced premiums

- 5.5. RWWA submit that the primary beneficial reason for the proposed conduct is to ensure overall lower insurance premiums for horse trainers.
- 5.6. RWWA advise that it undertook a review of the insurance needs and practices of the racing industry in Western Australia in 2005. The review recommended the establishment of a compulsory uniform workers compensation policy for all trainers.
- 5.7. RWWA submit that due to the potential dangers involved with dealing with horses, the premiums for workers compensation insurance to which some trainers have been exposed have been very high. As a result RWWA understands that some trainers have neglected to take out workers compensation insurance.
- 5.8. RWWA advised that the Western Australia Racing Trainers' Association had requested RWWA to seek uniform cover for its members on the basis that the current cost of workers compensation insurance is too high.
- 5.9. RWWA submit that an insurance underwriter's ability to discount premiums is controlled by volume: the larger the premium pool, the greater the potential discount. If trainers choose their own insurers, the premium pool is distributed amongst a range of insurers and it is unlikely that the premium pool for any one insurer would be large enough to justify a significant discount on premiums.
- 5.10. The ACCC understands that there is support among thoroughbred trainers for the proposed conduct and in particular for arrangements that deliver reduced premiums, although the ACCC would need to make broader market enquiries to confirm this.
- 5.11. The ACCC considers the requirement to obtain workers compensation insurance from a nominated provider has the potential to result in reduced premiums which may also encourage all trainers to take out appropriate cover. Again this would need to be confirmed through broader market enquiries.
- 5.12. In any event the ACCC is concerned that by eliminating a trainer's choice and therefore competition between insurance providers, any discount RWWA may be able to negotiate will be eroded over the longer term.
- 5.13. 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 legislated requirement. For the most part however, whether participants take up the discount and choose to insure with the nominated provider is a voluntary decision. This maintains a degree of competition

in the provision of insurance products and allows individuals to shop around and choose on factors such as price and quality.

- 5.14. Having identified concern over the elimination of competition, the ACCC notes that RWWA's proposal to re-tender for every 3 years may retain some competitive tension.
- 5.15. To consider this issue further the ACCC requests information on:
- What, if any, level of discount may be achieved under RWWA's proposal?
 - Whether any discount RWWA negotiates with the insurer can be maintained over the proposed 3 year contract period?
 - To what extent will a competitive tender conducted every 3 years ensure competitive premiums?
 - What are the costs involved in conducting a tender process to select the nominated insurer? Who will pay for the costs of the tender process?
 - Is there a risk that premiums for some horse trainers may actually increase because horse trainers are being pooled into one large risk pool?
 - Is the proposed arrangement consistent with the WorkCover WA pricing arrangements which allow insurers to provide a discount or surcharge from recommended rates based on an employer's individual risk profile?

Improved industry knowledge by insurer

- 5.16. RWWA submit that the proposed conduct will result in the development of better knowledge by the nominated 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 is concerned that by nominating only one insurance provider horse trainers will not be able to switch their business if they are not satisfied with the level of service or price they are being provided.
- 5.18. Based on the information available, the ACCC is unable to form a view on the public benefit claim made by RWWA at this point in time. To consider this public benefit the ACCC requests the following information:
- Which insurance providers do horse trainers in Western Australia currently obtain workers compensation insurance from?
 - Could RWWA provide further information on its claims of better and more efficient outcomes resulting from the proposed conduct? (see paragraph 5.16).

Adequate coverage for industry

- 5.19. RWWA submit that the proposed conduct will ensure that all employees of licensed horse trainers will be adequately covered for workers compensation insurance.
- 5.20. The ACCC understands that there is a concern in the industry that some trainers are not taking out workers compensation insurance.
- 5.21. Based on the information available, the ACCC is not satisfied that requiring horse trainers to obtain workers compensation insurance from a nominated provider is the only way of ensuring that horse trainers take out adequate coverage. In particular, the ACCC notes that it is currently a legislative requirement for all employers to obtain workers compensation insurance. The ACCC understands that RWWA has required horse trainers to hold workers compensation insurance as a condition of a trainer's licence. The ACCC notes 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.
- 5.22. To consider this issue further the ACCC requests information on:
- How will the requirement to obtain workers compensation insurance from one nominated provider ensure that horse trainers take out adequate coverage?
 - Are there other methods to ensure that horse trainers have adequate workers compensation insurance?
 - Could RWWA simply require horse trainers to provide a copy of their workers compensation policy to ensure horse trainers have adequate insurance?

Public detriments

Removes the ability of horse trainers to choose an insurer

- 5.23. In general, this type of third line forcing conduct 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.
- 5.24. The detriment is increased by the fact that without obtaining workers compensation insurance from the nominated provider, horse trainers will not be granted a license by RWWA and will not therefore be able to operate as a horse trainer in Western Australia.
- 5.25. 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.
- 5.26. 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.

- 5.27. The ACCC notes that RWWA proposes to put the cover up for tender every 3 years and this may lessen the detriment from nominating one provider. However, as noted there are less anti-competitive ways to achieve the benefits of cheaper premiums. 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.
- 5.28. Based on the information available the ACCC considers that the conduct has the potential to result in significant public detriment. The ACCC seeks information on the following:
- How will RWWA ensure that the nominated insurer will provide a competitive premium for the 3 year term?
 - Why is it necessary that RWWA's scheme be compulsory for horse trainers in Western Australia?

Conclusion on public benefits and detriments

- 5.29. The type of third line forcing conduct proposed by RWWA prevents horse trainers in Western Australia from shopping around and choosing the workers compensation insurance provider that best suits their needs and results in public detriment. This detriment is increased by the fact that horse trainers that 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.
- 5.30. While the ACCC accepts that RWWA has the potential to negotiate volume discount with a nominated insurer, the ACCC is concerned that by eliminating competition between insurance providers, any discount RWWA may be able to negotiate will be eroded over the longer term. In any case, the ACCC is not convinced that any such discounts could not be achieved by voluntary arrangements, thus avoiding the anti-competitive detriment associated with these arrangements.
- 5.31. Based on the information available, the ACCC has been unable to form a view as to whether improved industry knowledge by the insurer will result in a public benefit.
- 5.32. The ACCC is not satisfied that by requiring horse trainers to obtain workers compensation insurance from one provider is the only way to ensure that horse trainers take out adequate coverage.
- 5.33. On balance, based on the information currently available, the ACCC is not satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public.

6. Draft notice

- 6.1. On the basis of the information currently before it, 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.
- 6.2. Accordingly, the ACCC gives notice under section 93A of the Act that it proposes to issue a notice under section 93(3A) of the Act in respect of notification N93093. In accordance with section 93(7A)(b) notification N93093 has not come into force because the ACCC has issued a draft notice during the prescribed 14 day period. Notification N93093 will only come into effect should the ACCC decide not to issue a final notice revoking notification N93093.

Next steps

- 6.3. RWWA or any interested party may request that the ACCC hold a conference in relation the draft notice in accordance with section 93A of the Act. Should RWWA or any interested party wish the ACCC to hold a conference in relation to the draft notice, they must notify the ACCC in writing by close of business **14 September 2007**.
- 6.4. The ACCC seeks comment from both RWWA and interested parties on the issues raised in this draft notice to assist the ACCC decide whether or not a final notice should be issued revoking the notification lodged by RWWA. Written submissions should be provided to the ACCC by **21 September 2007**. In providing comments on the draft notice the ACCC is particularly seeking further information on:
- What, if any, level of discount may be achieved under RWWA's proposal?
 - Whether any discount RWWA negotiates with the insurer can be maintained over the proposed 3 year contract period?
 - To what extent will a competitive tender conducted every 3 years ensure competitive premiums?
 - What are the costs involved in conducting a tender process to select the nominated insurer? Who will pay for the costs of the tender process?
 - Is there a risk that premiums for some horse trainers may actually increase because horse trainers are being pooled into one large risk pool?
 - Is the proposed arrangement consistent with the WorkCover WA pricing arrangements which allow insurers to provide a discount or surcharge from recommended rates based on an employer's individual risk profile?
 - Which insurance providers do horse trainers in Western Australia currently obtain workers compensation insurance from?

- Could RWWA provide further information on its claims of better and more efficient outcomes resulting from the proposed conduct? (see paragraph 5.16).
- How will the requirement to obtain workers compensation insurance from one nominated provider ensure that horse trainers take out adequate coverage?
- Are there other methods to ensure that horse trainers have adequate workers compensation insurance?
- Could RWWA simply require horse trainers to provide a copy of their workers compensation policy to ensure horse trainers have adequate insurance?
- Why is it necessary that RWWA's scheme be compulsory for horse trainers in Western Australia?