



Australian  
Competition &  
Consumer  
Commission

# Draft Determination and Interim Authorisation

Application for authorisation

lodged by

W.A.T.A.B Agents' Association Incorporated

in respect of

collective bargaining and dispute resolution  
on behalf of its members with  
Racing and Wagering Western Australia

Date: 26 November 2014

Authorisation number: A91463

Commissioners: Sims  
Rickard  
Schaper  
Cifuentes  
Court  
Featherston  
Walker

## Summary

The ACCC proposes to grant authorisation for ten years to the W.A.T.A.B Agents' Association Incorporated (the Association). The proposed authorisation would allow the Association to collectively negotiate the terms and conditions of service, on behalf of current and future members with Racing and Wagering Western Australia (RWWA), and to participate in dispute resolution processes between RWWA and agents.

The proposed authorisation would extend to the Association and its members engaging in the proposed conduct with any other entity that may hold the licence to conduct off-course totalisator operations for the purpose of section 4 of the *Racing and Wagering Western Australia Act 2003* during the period of authorisation.

The ACCC has also granted interim authorisation to allow the Association to commence negotiations with RWWA. The interim authorisation will remain in place until the date the ACCC's final determination comes into effect, or until the ACCC decides to revoke interim authorisation.

### Next steps

The ACCC will seek submissions in relation to this draft determination and interim authorisation before making its final decision. The Association and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

## The application

1. On 29 October 2014, W.A.T.A.B Agents' Association Incorporated (the Association) on behalf of present and future members lodged application A91463 with the ACCC under subsections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the CCA).
2. The Association is seeking authorisation for ten years to collectively bargain with Racing and Wagering Western Australia (RWWA), or any entity which holds the licence to conduct off-course totalisator operations for the purpose of section 4 of the *Racing and Wagering Western Australia Act 2003*:
  - a. in relation to the terms and conditions of the provision of services by Association members to RWWA, and
  - b. to represent members in the process for resolving disputes (as referred to the Disputes Review Committee) between RWWA and an agent or agents.  
(the proposed conduct)
3. The Association advises that a negotiating committee will represent members in discussions with RWWA and that members will be kept informed through regular updates. The Association proposes convening a special general meeting to allow members to consider the collectively negotiated proposal.

4. Participation by member agents in the proposed collective bargaining arrangements is voluntary. Further, authorisation has not been sought for any collective boycott.
5. The Association has requested interim authorisation to enable its members to commence negotiations with RWWA while the ACCC considers the substantive application.

## Background

6. In 2003, RWWA, a body corporate constituted under section 4 of the *Racing and Wagering Western Australia Act 2003* (RWWA Act), assumed the responsibilities of the Totalisator Board pursuant to the *Racing and Gaming Amendment and Repeal Act 2003*. RWWA conducts totalisator wagering on Australian and international racing, fixed odds wagering on a range of sporting events, and fixed odds wagering on racing events.
7. RWWA provides a variety of wagering services through a network of 326 agencies – made up of 89 off-course full service TAB agencies, 106 PubTAB agencies and 131 self-service PubTAB Agencies.<sup>1</sup> Of the full service agencies, 6 are directly operated by RWWA.
8. The Association is a not for profit association incorporated in October 1963 and registered under the *Associations Incorporation Act 1987* in Western Australia. The aim of the Association is to “protect, guard, foster and promote the interests of its members”, and to “facilitate in co-operation with RWWA the administration of the RWWA Act in a manner equally satisfactory to the Western Australian Government, the public and the members”.
9. Members of the Association are off-course TAB agencies appointed by RWWA under section 30 of the RWWA Act to carry out certain services and functions in connection with the conduct of a TAB Totalisator agency.
10. The Association has as its membership 83 out of the 89 Service Level 1 (SL1)<sup>2</sup> agencies in Western Australia.<sup>3</sup> Of these 83 members, 68 are currently operating under a 2006 Assignable Business Licence<sup>4</sup> (ABL Agreement) which is due to expire on 31 August 2016.
11. In May 2014 the Western Australian Government announced that it was reviewing the State’s continuing ownership of a range of assets, including the TAB operated by RWWA.<sup>5</sup>

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<sup>1</sup> 2014 RWWA Annual Report, <http://www.rwwa.com.au/home/annual-reports.html>, updated data provided 13 November 2014.

<sup>2</sup> SL1 Agencies are those in which the TAB business is the sole provision of services – in contrast to SL2 agencies or Pub Tabs where alcohol sales and entertainment are primary avenues of business in conjunction with the provision of TAB services. RWWA also offers SL3 agencies, which offer self-service betting terminals for use by consumers (often placed within hotels).

<sup>3</sup> The remaining 6 SL1 agencies are RWWA owned or managed agencies and not in private ownership.

<sup>4</sup> These agents acquired the licence by paying a sum of money to the Totalisator Agency Board (pre 2003) or to RWWA (post 2003) or through an on market sale and assignment from another agent.

<sup>5</sup> *Securing Our Economic Future - State Budget 2014-15: Responding to changing economic circumstances*, 8 May 2014.

## Previous authorisations

12. The ACCC has previously granted a number of authorisations involving collective bargaining by TAB agents with the relevant state totalisator, including RWWA.
13. On 30 June 2005, the ACCC granted authorisation A90952 to the WA TAB Agents Association until 30 June 2011 to:
  - a. allow the Association, on behalf of its members, to negotiate the terms and conditions of contracts for the provision of services by members to RWWA, including the negotiation of any extension, variation or renewal of those services under option terms if applicable, and
  - b. for an agreement between members of the Association under which the Association may act on their behalf in disputes between those members and RWWA.
14. The ACCC understands that collective negotiations between the Association and RWWA have not occurred since the previous authorisation expired in 2011.

## Consultation

15. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. The ACCC sought submissions from interested parties potentially affected by the application, including from the Department of Racing Gaming and Liquor (WA), Racing and Wagering Western Australia and the Association's members. The ACCC received submissions from two Association members, and RWWA. There were no concerns raised with the proposed conduct.
16. Copies of public submissions may be obtained from the ACCC's website: [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

## ACCC evaluation

17. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests<sup>6</sup> contained in the *Competition and Consumer Act 2010* (the CCA). In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the likely detriment to the public, including the detriment constituted by any lessening of competition that would be likely to result.
18. In its evaluation of the application the ACCC has taken into account:
  - a. the application and submissions received from interested parties;

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<http://www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=8295>

<sup>6</sup> Subsections 90(5A) and 90(6). The relevant tests are set out in Attachment A.

- b. information available to the ACCC from consideration of previous matters<sup>7</sup>;
- c. the likely future without the proposed conduct for which authorisation is sought.<sup>8</sup> The ACCC considers that, absent the proposed conduct, RWWA is likely to offer agents standard form contracts, with limited scope for input into the terms and conditions by individual agents. As noted by the Association this may be in similar terms to the current ABL Agreement;
- d. the relevant areas of competition likely to be affected by the proposed conduct. The ACCC does not consider that it is necessary to precisely identify the relevant areas of competition in assessing the application. The ACCC considers that the relevant area of competition likely to be affected is the supply of wagering services to consumers and the supply of distribution services to RWWA. The ACCC notes that a number of parties participate in these areas of competition, including RWWA and PubTABs;
- e. the ten year period for which authorisation has been sought; and
- f. that no collective boycott activity is proposed and participation in the bargaining group is voluntary.

## Public benefit

19. Public benefit is not defined in the CCA. However, 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>9</sup>

20. The Association submits that the proposed conduct has previously, and will continue to deliver public benefits, by allowing agents to more effectively influence the development of the terms and conditions of agreements entered into between agents and RWWA. The Association also considers that, absent the arrangements, agents may not be sufficiently skilled to ensure a fair and reasonable outcome in the settlement of disputes. The Association submits that the 2005 authorisation resulted in cost savings for members, including those costs associated with obtaining legal advice.

21. The ACCC considers that the proposed conduct is likely to result in public benefits, from:

- a. **Transaction cost savings:** The collective bargaining conduct is likely to result in public benefits from transaction cost savings (including legal and expert advisor costs) for agents and RWWA by allowing them to address common contractual issues in a more streamlined and effective manner.

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<sup>7</sup> See for example *A91430 TAB Agents Association of New South Wales*, 13 August 2014.

<sup>8</sup> For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

<sup>9</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

- b. **Improved input into contracts:** The ACCC accepts that when negotiating with large suppliers, small businesses can be at a disadvantage, in terms of the resources and experience of negotiating in complex commercial environments. One way in which a small business can seek to redress such disadvantage is to bargain collectively. Collective bargaining may allow for more effective negotiation, where the negotiating parties have a greater opportunity to identify and achieve business efficiencies that better reflect the circumstances of Association members and RWWA. For example on common issues relating to commissions, service standards and required equipment. Collective bargaining is also likely to enable members of the bargaining group to become better informed of relevant market conditions, which is likely to improve their input into contractual negotiations with RWWA to achieve more efficient contracts.

22. The ACCC accepts that the participation of the Association in the dispute resolution process between RWWA and its agents, may lead to transaction cost savings when dealing with common issues. Further, the assistance of the Association, even where only one agent is involved, may also result in efficiencies particularly where such resolutions can be used to avoid similar disputes arising within the broader group of agents.

## Public detriment

23. Public detriment is also not defined in the CCA but the Tribunal has given the concept a wide ambit, including:

...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>10</sup>

24. The Association considers that the arrangement will not result in any detriment to the public. The ACCC notes that no information has been provided by interested parties to suggest that the authorisation previously granted by the ACCC (A90952) has had an anticompetitive effect.

25. The ACCC considers that the proposed collective bargaining is likely to result in little if any public detriment, since:

- a. in the absence of collective bargaining the level of competition between agents for the provision of wagering services to RWWA is likely to be low due to RWWA offering standard form contracts where there is limited variability. The terms and conditions negotiated are likely to be constrained to some degree by the presence of PubTAB agents which are outside the bargaining group.

Furthermore, at the retail level RWWA and PubTAB agents among others will continue to provide wagering services to consumers in competition with Association members.

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<sup>10</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- b. participation in the collective bargaining is voluntary for the Association's members who can opt out of the collective negotiation process at any time and deal with RWWA individually, and
  - c. there is no proposed boycott activity. RWWA is able to decide whether it wishes to continue to negotiate with the Association on behalf of agents.
26. The ACCC considers that the proposed dispute resolution process is likely to result in minimal public detriment, since:
- a. it is a voluntary arrangement, and as such any participation by the Association would only occur with the agreement of both the affected agent(s) and RWWA, and
  - b. any dispute resolution process will be consistent with the contractual terms and conditions between the Association's members and RWWA.

27. Although the Association currently represents all privately owned full service TAB agencies, the ACCC does not consider that membership of the Association is a barrier to entry for new RWWA agents. In particular, non - member agents will have access to the standard form agreements, and may have the potential to benefit from the standard terms and conditions collectively negotiated by the Association.

## **Balance of public benefit and detriment**

28. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public resulting from the proposed conduct would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.

29. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

## **Future parties**

30. In light of the announcement by the Western Australian Government that it may privatise relevant assets, the Association is seeking authorisation to enable it to collectively negotiate and participate in dispute resolution with RWWA or any entity which holds the licence to conduct off-course totaliser operations for the purposes of section 4 of the *Racing and Wagering Western Australia Act 2003*.

31. The ACCC is proposing to grant authorisation to allow the Association and its current and future members to engage in collective bargaining and the resolution of disputes with such entity should the TAB be privatised by the Western Australian Government. In proposing such authorisation the ACCC has had regard to the voluntary nature of the proposed arrangements and the scope for competition outside of the bargaining group to act as a constraint.

## Length of authorisation

32. The Association was authorised in 2005 to engage in similar collective bargaining conduct with RWWA. This authorisation expired in June 2011. In its current application the Association is seeking authorisation for ten years. The Association submits that the previous arrangements resulted in public benefit, primarily through cost savings and improved input into contractual terms, without any offsetting public detriment. RWWA does not object to the current authorisation sought.
33. Given the ACCC's conclusion on the balance of public benefits and public detriments and that no concerns have been raised in relation to the previously authorised arrangements, the ACCC is proposing to grant authorisation for ten years.

## Draft determination

### The application

34. On 29 October 2014, W.A.T.A.B Agents' Association Incorporated (the Association) on behalf of present and future members lodged application A91463 with the ACCC under subsection 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the CCA).
35. The Association is seeking authorisation on behalf of its current and future members to collectively bargain, which may result in its members making or giving effect to cartel provisions, or to make or give effect to contracts, arrangements or understandings which could have the purpose or effect of substantially lessening competition.
36. Particularly, the Association and its members are seeking authorisation to collectively bargain with Racing and Wagering Western Australia (RWWA), or any entity which holds the licence to conduct off-course totalisator operations for the purpose of section 4 of the *Racing and Wagering Western Australia Act 2003*,
- a. in relation to the terms and conditions of the provision of services by Association members to RWWA, and
  - b. represent members in the process for resolving disputes (as referred to the Disputes Review Committee) between RWWA and an agent or agents
- (proposed conduct).

### Conduct authorised

37. For the reasons outlined in this draft determination, the ACCC is satisfied that the tests in sections 90(5A) and 90(6) of the CCA are met. Accordingly, the ACCC proposes to grant authorisation for the proposed conduct.



38. The ACCC proposes to grant authorisation for a period of ten years.
39. Under section 88(10) of the CCA, the ACCC proposes to extend the authorisation to future members of the Association.
40. The proposed authorisation does not extend to collective boycott activity. For clarity, the ACCC notes that the authorisation granted does not extend to matters relating to the appointment of new RWWA agents or contracts to which the Association's members are not a party.
41. This draft determination is made on 26 November 2014.

## **Interim authorisation**

42. At the time of lodging the application, the Association sought interim authorisation to enable its members to commence negotiations with RWWA while the ACCC considers the substantive application.
43. When considering any request for interim authorisation, the ACCC considers a range of factors, including harm to the applicant and other parties if interim authorisation is or is not granted, possible benefit and detriment to the public, the urgency of the matter and whether the market would be able to return to substantially its pre-interim state if the ACCC should later deny authorisation.
44. The ACCC considers that it is appropriate to grant interim authorisation at this time as:
  - a. interim authorisation is limited to commencing the negotiations with RWWA;
  - b. interested parties did not raise any objections with the ACCC; and
  - c. the ACCC currently considers that the proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public, including the detriment constituted by any lessening of competition resulting from the conduct.
45. The ACCC grants interim authorisation under section 91(2) of the CCA to enable the Association and its members to commence collective bargaining with RWWA in relation to the terms and conditions of the provision of services by Association members to RWWA. The ACCC also grants interim authorisation to enable the Association to represent members in the process for resolving disputes (as referred to the Disputes Review Committee) between RWWA and an agent or agents.
46. This interim authorisation does not extend to the Association or its members entering into contracts with RWWA.
47. Interim authorisation commences on 26 November 2014 and remains in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## Further submissions

48. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the CCA.

## **Attachment A - Summary of relevant statutory tests**

**Subsections 90(5A)** provides that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision would result, or be likely to result, in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to.

**Subsections 90(6)** states that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to.