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Date: Tue, 1 Jul 2008 11:13:01 +1000

Gentlemen , attach is a paper I have written attempting to anlts the implications of the NSW race fields legislation which I would like to talk abut at our board meeting .

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## NSW Racing Legislation

### Issue

This paper is additional to the agenda item 2.3 which is concerned about the governance of NSW Racing . This paper was prompted by a conversation I had with Bob Bentley where he indicated serious concerns about the NSW Race Fields legislation and I said that I did not understand its intent and how it worked . I have since sought to work through the logic of it and hence this paper which sets out my interpretation of it . I have also arranged to meet up with Peter V'Landys next Monday for two purposes , to confirm or adjust my understanding of it and , second , to see if Peter is aware of its implications.

### Current Situation

Since the privatisation of TABs the situation in each Australian jurisdiction , TABs have been the prime source of funding each jurisdiction's racing industry with the funding in the form of a product and program fee set at a given % of wagering turnover . The exact formula and the % differs between TABs but is normally in the range of 4% to 6% .

The TABs operating in each jurisdiction are as follows :

Jurisdiction	TAB	Term of Licence
NSW	Tabcorp	Exclusivity expires in 2019 and licence in 2097
Victoria	Tabcorp	Exclusivity and licence expire in 2012
Queensland	UNITAB/Tatts	Exclusivity expires in 2014 and licence in 2098
South Australia	UNITAB/Tatts	Exclusivity expires in 2016 and licence in 2100
Western Australia	WATAB	Perpetual licence
Tasmania	TOTE Tasmania	Perpetual licence
Northern Territory	UNITAB/Tatts	Exclusivity and licence expire in 2015
ACT	ACTTAB	Exclusivity expires in 2016 and licence is perpetual

In effect the TAB in each jurisdiction is charged a % fee for all the wagering turnover of that TAB in that jurisdiction , regardless of the origin of the product and program . Thus in the case of Queensland , the fee is set on wagering turnover by Queensland residents on UNITAB on all Australian and overseas racing . Thus Racing NSW and Racing Victoria do not get a fee for any Queensland resident wagering on NSW and Victorian racing and conversely QR does not get a fee for NSW and Victorian residents wagering on Queensland races . This arrangement is what has been termed the Gentlemen's Agreement .

The UNITAB agreement with Queensland states that the fee paid to QR covers turnover on all racing product by Queensland residents , regardless of the location of the racing and that in the event that any jurisdiction seeks to impose a fee on their racing product then UNITAB will net off that fee against the fee payable to QR . It is understood that this provision is in the Victorian product and program agreement with Tabcorp but may not be in the NSW product and program agreement with NSW TAB (now Tabcorp) .

## NSW Legislation

The NSW Government has recently announced the passage of legislation, the Racing Legislation Amendment Act 2006 (copy attached). There is also apparently supporting regulations, called the Racing Administration Amendment (publication of Race Fields) Regulation 2008 which has not been made public as yet.

The purpose of the legislation and regulations is to allow each of the NSW control bodies to impose a fee on the use of NSW racing for wagering purposes. The specific stated purpose is to impose a fee on wagering providers who are presently free riding, these being Betfair and NT based corporate bookmakers. This is certainly the interpretation that the Minister has placed on it. If that was its only purpose and impact then no one could really object. However it does appear to have a much wider impact.

The legislation works by requiring any entity who accesses NSW race information to register with the relevant NSW control body. The control body in turn can establish conditions for accessing the race information, including imposing a fee. While not covered in the legislation it would appear that NSW control bodies intend to impose a fee of 1.5% of wagering turnover on NSW racing on wagering providers. In assessing the impact of the legislation it is necessary to distinguish initial impacts and second and subsequent round effects as entities react to the legislation. Set out below is my assessment of the impacts, assuming that the legislation is legally valid, which it may not be.

The first round effects are as follows:

- All entities using NSW race information for wagering purposes would register with the NSW racing control bodies and would be required to pay a fee of 1/5% of turnover on NSW races, regardless of the location of the punter.
- Assumed that Tabcorp will have its current requirement to pay a 4% or 5% fee to NSW racing on turnover of Tabcorp in NSW by NSW residents removed. This is an assumption and is based on two considerations – the fact that Tabcorp has publicly supported the legislation and, second, that it is likely to be unconstitutional to discriminate between race wagering entities in respect to the fee.
- In Victoria, Tabcorp will deduct from its payment to Racing Victoria 1.5% of wagering turnover by Victorian residents on NSW races.
- Similarly, in Queensland, Northern Territory and South Australia, UNITAB will deduct from its fee payable to the racing control body in each of those jurisdictions 1.5% of wagering turnover on NSW racing by residents in Queensland, Northern Territory and South Australia, respectively. Similar impacts will occur in Tasmania and Western Australia.

In the event that Queensland and Victorian racing control bodies seek and achieve similar legislation, then Tabcorp(NSW) will have imposed on it a fee of 1.5% of turnover of NSW residents on interstate races. The difference here is that, as I understand the situation, Tabcorp is not able to pass on this cost to NSW racing as a pass through is not provided for in the product and program agreement between NSW racing and NSW TAB (which Tabcorp acquired).

The initial, first round financial impact is a financial benefit to NSW racing and Tabcorp at the expense of racing in all other jurisdictions. The impact after the second round will depend in part on whether a racing jurisdiction is a net importer or exporter of race wagering turnover. This means, for example, in the case of Queensland, the issue is whether the wagering turnover of Queensland residents on non Queensland races is greater (net importer) or less (net exporter) than the wagering turnover of non Queensland residents on Queensland racing. Victoria is a large net exporter and Queensland is in a broadly balanced position while NSW, South Australia, Western Australia, Northern Territory and Tasmania are net importers and they in principle will be net losers. However in the case of NSW racing, the fact that Tabcorp cannot pass on fees charged to it for non NSW residents wagering on NSW race products, means that the net cost is absorbed by Tabcorp, not NSW racing.

## Assessment

There would appear to be two impacts of the NSW legislation and any consequent similar legislation passed in other jurisdictions .

The first impact is the financial one as outlined above with Victoria ,NSW and ,marginally ,Queensland winners and all other racing industries being big losers .It is not clear whether Tabcorp is a net winner of loser . In principle it is possible , with access to the data , to quantify these financial impacts . There will be a subsidiary net benefit to all jurisdictions to the extent that the 1.6% fee is paid by wagering operators who at present pay no fee . However it is not possible to quantify this impact .

The second and even more significant impact is a behavioural change which the legislation is likely to cause . At present each jurisdiction's racing industry is paid on the basis of wagering turnover of their residents on the national racing program . Hence each jurisdiction has an incentive to ensure that the highest quality races are programmed regardless of where they are located . It is conceded that at times various racing jurisdictions act parochially but that is at least offset by financial incentives which are linked to a quality national program . However if there is a change to how racing jurisdictions being rewarded , with their payment now based on the wagering turnover on their product , this will see a much more parochial industry and over time a decline in the quality of the national racing product as each jurisdiction seeks to promote its program at the expense of other jurisdictions . In effect the financial incentives will reinforce not offset the natural level of parochialism. It is also likely that given Tabcorp's ownership of Sky Channel , there will be inducements offered to Tabcorp to have Sky program certain races at the expense of others .

## Issues to Clarify

In meeting with Peter ,I will seek to determine if my assessment is correct and whether Peter is aware of the flow through implications .In addition I will seek to ascertain the following :

1. whether Tabcorp(NSW) will have its current 4% fee on NSW TAB turnover replaced with the 1.5% fee on turnover on NSW races
2. how will the stated prime purpose of the legislation , stated to be to impose a fee on free riders , work in the case of corporate book makers and Betfair operating on phone and internet wagering which does not require the wagering entity to access racing information .
3. is there intended to be uniform 1.5% fee
4. ability of NSW to impose its fee on interstate wagering entities
5. implications of the break down of the Gentlemen's agreement

## Conclusion

A provisional conclusion is that while the legislation may have a modest benefit of charging a fee to wagering operators who are currently free riders , the negative impact on the way racing is paid will have major windfall financial impacts , both positive and negative , and will break down the Gentlemen's Agreement with negative consequences for the quality of the national racing program .

# Racing Legislation Amendment Act 2006

## Note:

The Act is to be repealed by sec 4 (1) of this Act on the day following the day on which all of the provisions of this Act have commenced.

## Long Title

An Act to amend the *Racing Administration Act 1998* with respect to the publication of race fields; to remove certain inoperative provisions of the *Greyhound and Harness Racing Administration Act 2004* and the *Thoroughbred Racing Act 1996*; and for other purposes.

## 1 Name of Act

This Act is the *Racing Legislation Amendment Act 2006*.

## 2 Commencement

(1) This Act commences on a day or days to be appointed by proclamation, except as provided by this section.

(2) Schedule 1.1 and 1.3 commence on the date of assent to this Act.

## 3 Amendment of Acts

The Acts specified in Schedule 1 are amended as set out in that Schedule.

## 4 Repeal of Act

(1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.

(2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

## Schedule 1 Amendment of Acts

(Section 3)

### 1.1 – (Repealed)

### 1.2 – Racing Administration Act 1998 No 114

#### [1] Part 4, Division 1, heading

Insert before section 27:

Division 1Â Interpretation  
Interpretation

#### [2] Section 27 Definitions

Insert in alphabetical order:

"NSW race field" means information that identifies, or is capable of identifying, the names or numbers of the horses or dogs:

(a) that have been nominated for, or that will otherwise take part in, an intended race to be held at any race meeting on a licensed racecourse in New South Wales, or

(b) that have been scratched or withdrawn from an intended race to be held at any race meeting on a licensed racecourse in New South Wales.

"race field publication approval" means an approval granted under section

33A. "relevant racing control body" means:

- (a) in relation to horse racing other than harness racing--Racing New South Wales, and
- (b) in relation to harness racing--Harness Racing New South Wales, and
- (c) in relation to greyhound racing--Greyhound Racing New South Wales.

"working day" means any day that is not a Saturday, Sunday or public holiday.

**[3] Part 4, Division 2, heading**

Insert before section 29:

Division 2Â General offences  
General offences

**[4] Part 4, Division 3**

Omit section 33. Insert instead:

**Division 3 – Publication of NSW race fields**

33 Publication of NSW race fields restricted A person must not, whether in New South Wales or elsewhere, publish a NSW race field unless the person:

- (a) is authorised to do so by a race field publication approval and complies with the conditions (if any) to which the approval is subject, or
- (b) is authorised to do so by or under the regulations.

Maximum penalty:

- (a) in the case of a corporation--500 penalty units, and
- (b) in any other case:
  - (i) for a first offence--50 penalty units or imprisonment for 12 months (or both), and
  - (ii) for a second or subsequent offence--100 penalty units or imprisonment for 2 years (or both).

33A Relevant racing control body may grant race field publication approvals

- (1) The relevant racing control body in relation to an intended race (or class of races) to be held at any race meeting on a licensed racecourse in New South Wales may grant approval to a person to publish a NSW race field (a "**race field publication approval**") in respect of that race or class of races if the person has made an application for that approval under this Division.
- (2) A relevant racing control body may (but need not) impose any of the following kinds of conditions on a race field publication approval that it grants:
  - (a) a condition that the holder of the approval pay a fee or a series of fees of an amount or amounts and in the manner specified in the approval (being a fee or fees imposed in accordance with any requirements prescribed by the regulations),
  - (b) such other conditions as may be specified in the approval (being conditions of a kind that are prescribed as permissible conditions by the regulations).
- (3) Any fee that is payable under a race field publication approval is a debt due to the relevant racing control body that granted the approval and is recoverable as such in a court of competent jurisdiction.
- (4) A relevant racing control body that grants a race field publication approval may, by written notice to the holder of the approval, cancel or vary the terms of the approval on any grounds prescribed by the regulations.
- (5) If a relevant racing control body cancels or varies a race field publication approval, the body must provide the holder of the approval with written reasons indicating why the approval was cancelled or varied (as the case may be).

33B Applications for race field publication approvals

- (1) A person who wishes to publish a NSW race field may apply to the relevant racing control body in relation to the intended race (or class of races) to which the field relates for a race field publication approval in respect of the race or class of

racers.

(2) An application for a race field publication approval (an "**approval application**") must be:

- (a) made in the manner and in the time as may be prescribed by the regulations, and
- (b) accompanied by such information as may be prescribed by the regulations.

(3) In determining an approval application, the relevant racing control body to which the application is made must:

- (a) consult with each racing club that intends to conduct the race or class of races in respect of which the approval is sought, and
- (b) take into account such criteria in relation to the determination of the application (if any) as may be prescribed by the regulations.

(4) Without limiting subsection (3) (b), any criteria that are prescribed by the regulations for the purposes of that paragraph may specify:

- (a) the kinds of matters that may or must be taken into account in determining an approval application, and
- (b) the kinds of matters that must not be taken into account in determining an approval application.

(5) If a relevant racing control body to which an approval application is made determines that a race field publication approval should not be granted to the applicant (or should be granted subject to any condition imposed under section 33A (2)), the body must provide the applicant with written reasons indicating why the application was rejected or the conditions were imposed (as the case may be).

### 33C Authorisations for section 51 of the Trade Practices Act 1974 of the Commonwealth

(1) The following are specifically authorised by this Act for the purposes of the *Trade Practices Act 1974* of the Commonwealth and the *Competition Code of New South Wales*:

(a) any agreement entered into between:

(i) 2 or more relevant racing control bodies in relation to the appointment of an agent to collect, or the collection by such an agent or any of the relevant racing control bodies of, fees that are payable to those bodies under race field publication approvals granted by them, or

(ii) one or more relevant racing control bodies and any corresponding body of another State or Territory in relation to the appointment of an agent to collect, or the collection by such an agent or any of the relevant racing control bodies of, fees that are payable to those bodies in relation to publication of race fields,

(b) the conduct of those bodies and any agent in negotiating and entering into any such agreement,

(c) the conduct of those bodies and any agent in performing any such agreement.

(2) Anything authorised to be done by this section is authorised only to the extent to which it would otherwise contravene Part IV of the *Trade Practices Act 1974* of the Commonwealth or the *Competition Code of New South Wales*.

(3) In this section: "**agreement**" includes a contract, arrangement or understanding.

### 33D Appeals to Minister

(1) A person may appeal to the Minister against any of the following decisions of a relevant racing control body:

(a) a decision of the body to reject an application by the person for a race



field publication approval,

(b) a decision of the body to impose a condition under section 33A (2) (other than a condition relating to the payment of a fee or series of fees) on a race field publication approval,

(c) a decision of the body to cancel a race field publication approval held by the person,

(d) a decision of the body to vary any term of a race field publication approval held by the person (other than a term relating to the payment of a fee or series of fees).

(2) An appellant must give notice to the following person and body of the grounds of the appellant's appeal in the form and manner approved by the Minister from time to time:

(a) the Minister,

(b) the relevant racing control body that made the decision appealed against.

(3) The relevant racing control body that made the decision appealed against is to be the respondent in the appeal.

(4) A notice under subsection (2) must be given within 20 working days (or within such longer period as the Minister may allow) after the date on which the appellant was notified of the decision of the relevant racing control body that is being appealed.

(5) In determining an appeal, the Minister may appoint a person that the Minister considers has suitable qualifications to act as an arbitrator (the "**arbitrator**") to furnish a report to the Minister with respect to the appeal containing:

(a) a recommendation as to whether the appeal should, in the opinion of the arbitrator, be dismissed or allowed either unconditionally or subject to such conditions as may be specified in the report, and

(b) the reasons for the recommendation.

(6) The unsuccessful party to an appeal is to pay the costs of any arbitrator appointed by the Minister under subsection (5).

(7) The Minister, after considering any report that is furnished to the Minister under subsection (5), may:

(a) dismiss the appeal, or

(b) allow the appeal either unconditionally or subject to such conditions as the Minister thinks proper to impose, or

(c) if the appeal is against the imposition of conditions, refuse to approve the application for a race field publication approval from the determination of which the appeal has been made, or

(d) return the report to the arbitrator concerned and request further consideration of the report.

As the decision of the Minister in an appeal under this section is a decision that is reviewable by the Administrative Decisions Tribunal under section 33E, section 48 of the *Administrative Decisions Tribunal Act 1997* requires the Minister to give the appellant and respondent in the appeal written notice of the decision on the appeal. Division 2 of Part 2 of Chapter 5 of that Act enables the appellant and respondent to request written reasons for the Minister's decision.

(8) The decision of the Minister under subsection (7) (other than a decision under subsection (7) (d)) has effect as if it were a decision of the relevant racing control body from whose decision the appeal is made.

### 33E Review by Administrative Decisions Tribunal of Minister's decision on appeal

(1) The appellant or respondent in an appeal under section 33D may apply to the Administrative Decisions Tribunal for a review of the decision of the Minister in the appeal.

(2) Section 53 (Internal reviews) of the *Administrative Decisions Tribunal Act*

1997 does not apply to a decision of the Minister in an appeal under section 33D.  
33F Effect of race field publication approval limited For the avoidance of doubt, the granting of a race field publication approval does not operate to authorise the holder of the approval to do (or omit to do) anything in relation to a race to be held at any race meeting on a licensed racecourse in New South Wales other than to publish the NSW race field to which the approval relates in accordance with the terms of the approval.

**[5] Section 36C**

Insert after section 36B:

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**36C Giving of notices and other documents**

(1) For the purposes of this Act, a notice or other document may be given to a person (or a notice or other document may be served on a person):

(a) in the case of a natural person:

- (i) by delivering it to the person personally, or
- (ii) by sending it by post to the address specified by the person for the giving or service of documents or, if no such address is specified, the residential or business address of the person last known to the person giving or serving the document, or
- (iii) by sending it by facsimile transmission to the facsimile number of the person, or

(b) in the case of a body corporate:

- (i) by leaving it with a person apparently of or above the age of 16 years at, or by sending it by post to, the head office, a registered office or a principal office of the body corporate or to an address specified by the body corporate for the giving or service of documents, or
- (ii) by sending it by facsimile transmission to the facsimile number of the body corporate.

(2) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on a person in any other manner.

**[6] Schedule 1 Savings and transitional provisions**

Insert at the end of clause 1 (1):

the *Racing Legislation Amendment Act 2006*

**[7] Schedule 1, Part 5**

Insert after Part 4:

**Part 5 – Provisions consequent on enactment of Racing Legislation Amendment Act 2006**

9 Definition In this Part: "**amending Act**" means the *Racing Legislation Amendment Act 2006*.

10 Previous offences under section 33 may be taken into account in determining penalties

(1) Section 33 (as substituted by the amending Act) applies to acts or omissions that occur on or after the day on which the provision of the amending Act that substitutes the section commences.

(2) However, an offence against section 33 (as in force at any time before its substitution by the amending Act) may be taken into account in deciding whether an offence against section 33 (as substituted by the amending Act) is a second or subsequent offence against the substituted section for the purposes of determining

the penalty for the offence.

### 1.3 – (Repealed)

#### Historical notes

The following abbreviations are used in the Historical notes:

Am	amended	No	number	Schs	Schedules
Cl	clause	p	page	Sec	section
ClI	clauses	pp	pages	Secs	sections
Div	Division	Reg	Regulation	Subdiv	Subdivision
Divs	Divisions	Regs	Regulations	Subdivs	Subdivisions
GG	Government Gazette	Rep	repealed	Subst	substituted
Ins	inserted	Sch	Schedule		

Table of amending instruments *Racing Legislation Amendment Act 2006 No 91*. Second reading speech made: Legislative Assembly, 20.10.2006; Legislative Council, 14.11.2006. Assented to 21.11.2006. Date of commencement, except Sch 1.1 and 1.3: not in force; date of commencement of Sch 1.1 and 1.3, assent, sec 2 (2). This Act has been amended as follows:

2007	No 27	<i>Statute Law (Miscellaneous Provisions) Act 2007</i> . Assented to 4.7.2007. Date of commencement of Sch 5, assent, sec 2 (1).
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#### Table of amendments

Sch 1	Am 2007 No 27, Sch 5.
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