QUEENSLAND RACING

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Race Fields Legislation and the 'Gentlemen's Agreement'

PURPOSE:
The purpose of this paper is to determine an approach to take to the next Australian Racing Board (ARB) meeting on August 14, 2008.

BACKGROUND AND ISSUES:
Various States, namely New South Wales (NSW), Victoria, Western Australia and South Australia have either enacted or drafted legislation that is referred to as Racing Fields Legislation. The purpose of this legislation is to outlaw unauthorised use of racing information for wagering purposes and, second, to obtain an economic return on the use of that information.

NSW is the most recent State to enact such information and this legislation, unlike the previous legislation does impact on the racing industries of other states, and in particular, on what has been termed the 'Gentlemen's Agreement'. This issue has been listed for discussion at the ARB meeting on August 14, 2008. This paper has been prepared to set out the factual position and to identify the key issues.

Since the privatisation of the TABs, the Australian racing industries have been funded in the main by a Product and Program Agreement entered into by the racing industry of each jurisdiction and the TAB that has a licence to operate in that jurisdiction. These agreements are referred to as Product and Program Agreements or Product Supply Agreements and do vary in their financial terms between the States. The Racing Victoria Limited (RVL) agreement with TABCORP is based on a 25% interest in the wagering and gaming profits of TABCORP, though with the recent loss by TABCORP of its gaming licence from 2010 there will be a need to restructure it. The Racing NSW agreement is in contrast based on a set percentage of race wagering turnovers, while the agreement between UNiTAB in Queensland, South Australia and the Northern Territory is based on a set percentage of gross wagering revenue (39% in the case of the 3 codes in Queensland).

Each TAB pays a combined fee to the racing industry of the jurisdiction in which it operates and that payment is then divided up and passed to each racing code according to the terms set out in an Inter Code Agreement.

QUEENSLAND RACING

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/Tattersall's	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/Tattersall's	Exclusivity and licence expire in 2015
Australian Capital Territory	ACTTAB	Exclusivity expires in 2016 and licence is perpetual

The effect of these arrangements in effect the TAB in each jurisdiction is charged a % fee for the entire wagering turnover undertaken by 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 through UNiTAB on all Australian and overseas racing. Thus, for example, at present, Racing NSW and RVL do not get a fee for any Queensland resident wagering on NSW and Victorian racing and conversely QRL 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'. It is an agreement that each racing industry can contract for the delivery of all Australian racing product to its TAB and the other racing industries will not seek a fee for their racing product from that TAB and vice versa .

The terms of the Product and Program Agreements between each Principal Racing Authority and its TAB differ in various ways. For example the UNiTAB agreement with QRL states that the fee paid to QRL covers turnover on all racing product by Queensland residents, regardless of the location of the racing and in the event that any other jurisdiction seeks to impose a fee on their racing product then UNiTAB will net off that fee against the fee payable to Product Co and hence QRL. There are similar provisions in certain parts of the other TAB agreements. However, in the case of Racing NSW there is no provision by

which TABCORP can pass through a fee incurred in accessing other States racing product. In addition, in respect to NSW and Victoria, there is a provision in the Racing Distribution Agreement (RDA), which covers each of them and TABCORP that states that neither can charge the other State for their racing product.

In the last few years there has been growing leakage of wagering revenue away from the TABs and licensed on track bookmakers to both corporate bookmakers located in the Northern Territory and to Betfair. The Northern Territory arrangement involves attractive tax rates for corporate bookmakers who do not make a contribution to funding racing. The leakage was first through phone betting but has accelerated with the use of the internet. These bookmakers have the added advantage that they can operate 24/7. It is estimated that turnover of Northern Territory bookmakers on race wagering has reached about $3B per annum, nearly all of that involving wagering by non Northern Territory punters on non Northern Territory races. After having a market share of race wagering of almost 100%, today the offcourse TABs have about 68% and oncourse about 5%, while oncourse bookmakers have 8% and offcourse bookmakers have 19%. The loss of 20% of turnover from the TABs represents a major loss of revenue by all TABs and racing industries. In addition, overseas race wagering operators access Australian racing to provide both wagering to overseas punters as well as to Australian punters.

Over a number of years the Australasian Conference of Racing Ministers considered the issue of leakage of wagering away from the TABs and hence the racing industries and various officers' working parties were established to report on the issues. In 2005, the ARB made a submission to the Conference seeking Australia wide Race Fields Legislation. What flowed from this was not Australia wide legislation, but a request from each racing control body to its jurisdictional government to enact Legislation. Four State Governments did this – Victoria, NSW, Western Australia and South Australia, with the first three States enacting the legislation while South Australia tabled it but did not enact it. In addition, each of the three States that enacted legislation has amended it subsequently in various ways.

Victoria amended its omnibus *Gambling Regulation Act* in 2005 and in 2007. The 2005 amendment made it an offence for unauthorised publication and use of race field's information by wagering service providers. The 2007 amendment provided for a racing control body to impose conditions for any approval to use race fields, including charging a fee. The legislation also provided for an avenue for independent review of any decision made by the control body, though the actual payment of fees could not be appealed. It is understood that RVL has applied the provisions of the *Act* to seek payments from wagering service providers using Victorian race fields, but has taken to date the decision not to apply it to TABs, on the basis that they already make a substantial financial contribution.

Western Australia enacted legislation in 2006, amending the *Betting Control Act*. The amendments did three things:

- made the establishment of a betting exchange an offence;
- made it an offence to bet with a betting exchange; and
- made it an offence to publish WA race field's information without approval.

To date, it is believed, Western Australia has not sought to apply charges for field information.

Also in 2006, South Australia released a draft of a bill which had the same provisions as the Western Australian legislation.

NSW enacted Race Fields Legislation in 2006 but did not pass necessary regulations until 2007 and Racing NSW has only now sought to apply its provisions. The form of this legislation, given it is the most recent and contentious, is discussed further in the section below.

While the Queensland Government was approached to enact race field's legislation, it has chosen not to do so. The opposition did table a race field's bill, but the Government refused to support it. The Chairman has now written to the Treasurer to obtain his support for Race Fields Legislation.

In March 2008, the High Court found in favour of Betfair, in a constitutional challenge launched by Betfair against provisions of the Western Australian legislation. The court found that the provisions banning betting exchanges and betting on betting exchanges were in conflict with section 92 of the Constitution, which requires free trade within the Commonwealth of Australia . However, the court did not consider the provision relating to race fields.

NSW Legislation

The NSW Government, at the behest of each of the NSW Racing Control Bodies, has passed legislation, namely the *Racing Legislation Amendment Act 2006* and the *Racing Administration Amendment Regulation 2008* (publication of race fields). Both can be sourced from www.racingnsw.com.au. The express purpose of the legislation, as stated both by the Minister for Racing and Racing NSW, is the requirement all race wagering operators, regardless of location, to pay a fee for use of the racing product for wagering purposes. The legislation covers the three racing codes.

The legislation works by requiring any entity that 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. It is intended to impose a uniform fee of 1.5% on wagering turnover on NSW racing by wagering providers with an

exemption from the fee for wagering operators with less than $5M per annum turnover. This fee is in addition to the current fee, which in the case of NSW is 4.7% on TABCORP wagering turnover. While TABCORP (NSW) is legally required to pay the 1.5% fee for its turnover on NSW wagering, this is netted off against the 4.7% fee.

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 an assessment of the impacts, assuming that the legislation is legally valid.

The first round effects are as follows:

- All entities using NSW race information for wagering purposes would be required to register with the NSW Racing Control Bodies and those with turnover above $5M per annum would be required to pay a fee of 1.5% of turnover on NSW races, regardless of the location of the punter.
- TABCORP (NSW) will continue to pay its 4.7% on all its wagering turnover and the 1.5% fee on its turnover on NSW races is set off against the 4.7% fee.
- Under a pre existing RDA covering TABCORP and NSW and Victorian racing, there is no charge for racing between the two States. Thus NSW cannot get an export credit for Victorian wagering on NSW races and Victoria cannot charge NSW for Victorian wagering on NSW races. Under this set off arrangement NSW is the winner and Victoria the loser given the flow of wagering between the two States.
- Under the agreement between UNiTAB and the Queensland racing codes, any charge levied by other States for their racing product gets offset against the payment to the racing industries. Thus in the case of Queensland, TABCORP (NSW) will charge UNiTAB for Queensland wagering on NSW races which is netted against the fee payable to QRL. Thus the net effect is that the charge levied by NSW racing for race wagering by interstate punters is passed through to the racing industries in the other States, subject to the specific provisions in each agreement.

While the NSW legislation takes effect from September 1, NSW will provide rebates until December to provide in effect a transitional period if other jurisdictions wish to implement legislation by then. If all jurisdictions put in place similar legislation then the situation changes as each racing industry imposes a charge on the interstate wagering on its product. In effect each State still levies its current fee in the same way and then receives export credits for interstate wagering on its product and pays import charges for wagering by its residents on the wagering product of

other States. Under normal circumstances, just considering TAB wagering NSW, together with Western Australia, Tasmania and the Northern Territory should be net losers and Victoria, Queensland and South Australia net winners, given that the first group are net importers an the second group are net exporters. However, NSW appears to be shielded from the full impact by two factors:

- the RDA with Victoria saves NSW the net cost of interstate wagering between NSW and Victoria; and
- the agreement with TABCORP (NSW) means that TABCORP absorbs the import charges from other States for TABCORP (NSW) wagering on their products .

Neither of the above two factors is a cost to Queensland or other states, being borne by Victoria and TABCORP, respectively. In addition to the impact on existing TAB wagering fees, there is the impact of the legislation in expanding the coverage of product fees to include all non TAB wagering at a 1.5% rate. In-principle all jurisdictions could be winners depending on the size and the distribution of non TAB wagering that is captured. However, it is highly unlikely that much of this wagering is on Tasmanian, Northern Territory or Western Australian racing so the position for these jurisdictions should remain negative.

Racing NSW has access to data that has enabled to make some broad assessments of the financial impacts once legislation is in place in all jurisdictions and allowing for additional non-TAB revenue. Their assessment is as follows:

- NSW, Victoria and Queensland are large winners. Victoria and Queensland, because they are net exporters and benefit from tapping non-TAB wagering on their product. While NSW is a winner, despite being a net importer, due to the two factors listed above plus the revenue from non-TAB wagering on its product. On NSW's calculations, if Queensland was to introduce similar legislation, it would achieve a positive financial outcome at a wagering rate set at or above 1.2%, excluding any consideration of non-TAB wagering. The addition of non-TAB wagering would provide a significant net benefit to Queensland. Racing NSW assesses the net benefit to Queensland at between $15M to $20M per annum.
- South Australia is a modest winner being a net exporter.
- Western Australia, Tasmania and the Northern Territory are big losers, as they are large net importers and do not pick up much non-TAB wagering.

The NSW intention is to also charge overseas wagering entities for the product they use. Where overseas wagering entities use the product for

wagering, by their overseas clients, a 1.5% fee will apply. However, it is proposed to seek to use the *Commonwealth's Interactive Gambling Act* to preclude such transactions where they currently take wagering from Australian clients on Australian racing. The *Act* can preclude, under regulations, Australian banks from dealing with offshore wagering operators that are not suitably licensed or approved to operate in Australia.

In order to provide greater clarity on the working of the NSW legislation both now with NSW alone and then when other jurisdictions have similar legislation a worked numeric example is provided at Attachment A.

Key Issues

There are a number of issues raised by the NSW Race Fields Legislation and the more general matter of protecting and achieving a suitable economic return for the racing industry from the use of race fields.

1. **Ensuring a reasonable contribution from all wagering entities**

The first issue is to ensure that an appropriate return is paid by all users of race field information. To the extent that there are free riders such as corporate bookmakers and Betfair, it means first, that it is an uneven playing field penalising those that pay a fee relative to those that do not and, second, it results in a leakage of revenue away from the racing industry. Accordingly, we need to be clear that we support the principle of the Race Fields Legislation and any concerns that we express relate to specific aspects of legislation, not to its broad purpose.

2. **Impact on the 'Gentlemen's Agreement'**

The NSW legislation does represent a move away from the 'Gentlemen's Agreement', in the sense that an element of revenue is now tied specifically to the program of an individual State. The previous approach had the merit that all jurisdictions remuneration was tied to the wagering of their residents on a national program, and therefore, in theory, each had an incentive to achieve the best possible national program. While the NSW approach does introduce an element of the PRA revenue tied to wagering on its program, the national component of revenue still remains the dominant component. NSW has advised that their current product and program fee is about $160M. The new component is estimated to produce about $25M. While this is significant, it is modest relative to the core component of the revenue.

However, the legislation certainly marks a move away from the 'Gentlemen's Agreement', which could gather momentum over time.

3. Relative impact on each PRA

Clearly the application of the NSW approach does have a differential impact across PRAs. There would appear to be some justice in the negative impact on Tasmania and the Northern Territory in view of the Governments of those two jurisdictions contributing substantially to the current problems of the racing industry. The case of Western Australia appears somewhat different. While it has been well treated financially in the past relative to its contribution to the racing product, it does operate in a time zone that assists the overall national program. Hence, there may be a case to seek to mitigate to some degree the impact on Western Australia (but not full mitigation).

It should be noted that NSW racing would normally be a loser in any move away from the 'Gentlemen's Agreement', given that NSW is a substantial net importer of race wagering product. What reverses this situation is the combination of a no charge agreement between NSW and Victoria, as well as the provision in the agreement with TABCORP that does not allow TABCORP to pass on any charges it incurs in NSW residents betting on races in other jurisdictions.

4. Effectiveness and Legality of the approach

The point has been made that the corporate bookmakers and other wagering operators, at whom the legislation is directed, operate on the basis of phone and internet transactions, and hence, do not publish or use a racing program. NSW legal advice is that any reference to any part of the racing material is captured by the legislation. In this regard any transaction will have to cite a horse number, a race number and racing event that is sufficient to trigger the provisions of the legislation.

NSW has indicated that the legislation, while it has no limitation on its applicability, has a weakness, in that, it does not have enforcement provisions. They are seeking to rectify this significant omission as a priority.

5. Relation to Racing Information Services Australia (RISA) fees

RISA charges wagering operators for formatted racing material. This charge is in addition to the Product and Program Fee levied by each PRA. The Product and Program fee is a

fee for the right to wager. The RISA fee is a charge for the provision of racing information in a particular format. The NSW legislation should have no impact on the RISA arrangements, though there is a suspicion that Racing NSW will seek to exclude from RISA agreements with wagering operators. It should be noted that both Racing NSW and Thoroughbred Racing South Australia Limited are requiring that RISA only enter into monthly renewed agreements with wagering bodies.

6. Broadcast rights

A separate but related issue is the case of broadcast rights. There is a need for an alignment between the agreed national racing program and coverage by Sky Channel (SKY) and ThoroughVisioN (TVN). At present, in each State, other than Victoria, the racing clubs enter into contracts with SKY and TVN. In NSW, under its new governance legislation, it has the negative right that clubs must secure its approval to deal in broadcast rights, but it does not have the positive power to deal in those rights itself. A specific concern with the approach, adopted by NSW, is that it would be in its economic interest to influence SKY to more favourably cover NSW racing at the expense of racing in other States.

OPTIONS:

Possible options are as follows:

- all jurisdictions agree on following a common approach;
- the common approach maintains the integrity of the 'Gentlemen's Agreement' and while applying the requirement to seek authorisation for use of race fields to all parties, only applies charges to those wagering service providers that are currently free riding;
- agree to full alignment between the agreed national race program and the broadcast program;
- confirm that RISA will be the sole vehicle to exploit the commercially the racing material of the racing information; and/or
- establish a working group to assess how to bring broadcast rights under RISA .

FINANCIAL IMPACT:

Not applicable.

LEGAL IMPLICATIONS:

Not applicable.

STAFF IMPLICATIONS:

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Not applicable.

OTHER STAKEHOLDER IMPACTS:
Not applicable.

COMMUNICATION STRATEGY:
Not applicable.

DECISION REQUIRED:
This paper has been submitted for the information of the Board, and to determine an approach to take to the ARB meeting.

MR MICHAEL LAMBERT
Board Director

MR MALCOLM TUTTLE
Chief Operations Manager

Actioning Officer: