

Addisons FocusPapers

Race Fields Legislation - Will the New South Wales Legislation withstand a Constitutional Challenge?

Introduction

NSW race fields legislation¹ came into force on 1 July 2008. The offence provisions contained in the legislation come into effect on 1 September 2008.

Section 33 of the Racing Administration Act provides that no person must, in New South Wales or elsewhere, publish an NSW race field unless that person is:

- authorised to do so by a race field publication approval and complies with the conditions to which the approval is subject; or
- otherwise authorised under the Regulation.²

A NSW race field is any information that identifies, or is capable of identifying, the names or numbers of horses or dogs relating to a race licensed in NSW.

What Publications are Authorised?

The Regulation provides that the following publications³ are authorised:

- a publication for a not-for-profit social purpose;
- a publication by an Australian racing control body where the publication is for the internal administrative or regulatory purposes of that body;
- a publication by any of the above bodies for the purposes of its race meetings; and
- a publication by a “public news media body”⁴ in accordance with a contract with the relevant racing control body⁵ (or an agent that manages its media rights);

¹ Racing Legislation Amendment Act 2006

² Racing Administration Amendment (Publication of Race fields) Regulation 2008.

³ Publication is defined broadly and includes dissemination or communication by written or electronic means (e.g. over the Internet, by radio, TV or in newspapers)

- a publication authorised by the Minister on the recommendation of a racing control body.

Unless the publication falls within one of the above authorisations, it will be prohibited unless the relevant publication is the subject of a race field publication approval.

What is Required for a Race Field Publication Approval?

The Regulation sets out the information which must be contained in an application for a race field publication approval. Also, it indicates the conditions that may be applied by the relevant racing control body in connection with any approval. Of particular note is the ability of the racing control body to impose fees.

These fees fall into three categories:

- a fee to cover the costs for assessing the application;
- a fee relating to the publication in Australia of a race field made in the course of the wagering operations of a licensed wagering operator, which fee must not exceed 1.5%⁶ of the wagering turnover relating to the relevant race; and
- in respect of any other publication of the race fields, a fee determined by the relevant racing control body.

“Wagering turnover” is defined to mean, in respect of any race or class of races, “the total amount of wagers made on the backers side of wagering transactions made in connection with that race or class of races”. This suggests that there will not be any double taxation in respect of bets made with a bookmaker, so that an additional fee is not paid by that bookmaker in laying off any bets to offset the risk associated with bets that are accepted.⁷ However, it is unclear how this will be applied in the context of a betting exchange.

It should be noted that the Regulation appears to contemplate a fee being paid by parties who publish race fields that are not wagering operators – this is a clear distinction from the legislation in both Victoria and Western Australia.

The legislation provides that appeals in respect of approvals (save in respect of fees) can be made to the Minister.

Is the NSW Race Fields Legislation Constitutional?

There has been extensive commentary that part of the delay that has occurred in the enactment of the Regulation has been due to the consideration by NSW of the outcome of the

⁴ This term is not defined.

⁵ A racing control body is Racing NSW, Harness Racing NSW or Greyhound Racing NSW.

⁶ Racing NSW has issued an Information Sheet which indicates that, subject to a turnover threshold of \$5million annually being met, a fee equal to 1.5% is payable. The Information Sheet issued by Greyhound Racing NSW is not so definitive.

⁷ The Information Sheet issued by Racing NSW indicates that a credit will be given to wagering operators (through a reduction in the assessable wagering turnover) where a bet back is made with another wagering operator who has obtained a race field publication approval and who pays fees in the relevant year.

Betfair case⁸ (see our Focus Paper dated 27 March 2008 entitled *Internet Regulation – End of Cross-Border Restrictions on Gambling Activities?*). In essence, the Betfair case has the effect that any cross-border restrictions that impact on the conduct of business activities over the Internet which protect locally licensed betting operators may not be enforceable. This risk will be enhanced if the relevant restrictions are discriminatory and are not reasonably appropriate to the issues being addressed.

Care has been taken in framing the Regulation to ensure that, on its face, it treats equally all wagering operators, wherever they are licensed in Australia. In particular, paragraph 20(d) makes it clear that the relevant racing control body, when considering an application for a race field publication approval, must not take into account whether the applicant is licensed in NSW, as against any other Australian state or territory.

But questions still remain. Historically, a different tax or levy rate has been set for totalisators compared to fixed odds betting, reflecting the different risk profiles of a no risk betting operation, such as a totalisator, compared to bookmakers who can lose in respect of betting transactions relating to a race. It could be argued that an approach which imposes the same fee, of up to 1.5%, for all categories of betting providers is inherently discriminatory as it reflects a relative discount for totalisators.

At this stage, it is premature to express a view as to whether the NSW race fields legislation is constitutionally valid. Whether the NSW race fields legislation will withstand successfully a constitutional challenge will very much depend on the manner in which the race field publication approval procedure is applied in practice. Any form of discrimination, whether in respect of the approval or refusal of the grant of the race field publication approval, including the level of fees or other conditions relating to the approval, between NSW licensees and a licensee that is a wagering operator based in another state or territory, will be relevant in determining whether the level of discrimination required exists⁹.

Other Issues

Another issue likely to be the subject of legal scrutiny is the considerable power which has been conferred under the NSW race fields legislation on the NSW racing control bodies.

Although the procedures that may be exercised by those bodies are delineated in the Regulation, considerable care will need to be taken by those bodies to ensure that their decisions are not subject to legal challenge. For example, as Racing Victoria Limited has found in the exercise of its powers under the Victorian race fields legislation, decisions may be subject to challenge on various grounds including on the basis that the relevant grounds upon which the decision is based is beyond its power, is exercised unfairly and/or is exercised in a manner contrary to the Trade Practices Act and other applicable legislation.

⁸ Betfair Pty Ltd & Anor v State of Western Australia (2008) HCA 11

⁹ One issue not clear under the NSW legislation is whether any recognition will be given to betting taxes paid by a wagering operator in respect of NSW races. Again, if consideration is given to taxes payable by licensees in one Australian jurisdiction (i.e. NSW) to a greater extent than the taxes payable by licensees in other jurisdictions, then the relevant level of discrimination may exist.



Addisons FocusPapers

As at the date of this Focus Paper, Information Sheets have been issued by Racing NSW and Greyhound Racing NSW which indicate the manner in which each of those bodies will receive and consider applications for race field publication approval. Further information concerning these procedures is likely to be released by each of the racing control bodies soon.

As the legislation will come into force fully on 1 September 2008, applicants should review these procedures and ensure that applications for approval are completed and provided to the relevant racing control body well before that date. It will be of interest whether each racing control body has in place sufficient procedures (and personnel) to review and determine in a timely manner the considerable number of applications likely to be filed.

For more information, please contact:

Jamie Nettleton, Partner

Telephone: +61 2 8915 1030

Facsimile: +61 2 8916 2030

Email: jamie.nettleton@addisonslawyers.com.au

© ADDISONS 2008. No part of this document may in any form or by any means be reproduced, stored in a retrieval system or transmitted without prior written consent. This document is for general information only and cannot be relied upon as legal advice.