Not so SPORTING

Sporting Associations, businesses that supply sporting goods or services and professional sports teams have no special exemption from Australia's competition laws, and they need to ensure that any restrictions placed on members, players and officials don't fall foul of the rules in the *Trade Practices Act 1974* (the Act).

These rules, prohibiting anti-competitive conduct, are based on the worldwide experience that competition tends to produce choice, efficiency and, ultimately, prosperity. Employment arrangements and activities which do not occur in trade or commerce can fall outside the Act's coverage, but the starting point is that most conduct is in the running to be subject to the rules.

One such rule is the prohibition on exclusive dealing, which is the practice of one business trading with another on conditions that restrict the second business's ability to choose with whom, what or where it deals.

Depending on the form of exclusive dealing, it is at times prohibited outright and at other times prohibited when it substantially lessens competition.

But so-called 'bundling' and 'tying' arrangements may also produce benefits. For this reason, the Act also provides a mechanism where parties can notify the ACCC of conduct or arrangements that might otherwise raise competition concerns. The ACCC then assesses whether the conduct should be allowed in the public interest.

Sport holds a special place in many Australians' hearts. Sport involves the pursuit of some admirable goals—participation, fair competition and attaining high standards. The ACCC recently had to weigh up these issues—participation, competition and standards—in assessing whether membership and participation restrictions proposed by the Australian Ice Hockey Federation should be allowed under the Act.

Forced to choose between sanctioned and non-sanctioned leagues, players and officials would have less opportunity to play and otherwise participate in the sport.

The federation, also known as Ice Hockey Australia, notified the ACCC in 2009 that it proposed to expel or suspend any member who had participated or was participating in non-Ice Hockey Australia sanctioned ice hockey leagues or games. This proposal was to apply to players, coaches and officials, including referees. The Ice Hockey Australia application was made in reaction to the unaffiliated competitions run in recent years, particularly in New South Wales in summer.

Ice Hockey Australia submitted to the ACCC that having the power to effectively discourage players from participating in competitions not approved by Ice Hockey Australia would result in:

- economies of scale in providing 'ice hockey services'
- adequate risk management practices and lower insurance premiums
- the ability to discipline players effectively
- satisfaction of International Ice Hockey Federation requirements.

Once Ice Hockey Australia had notified the ACCC of its proposal, the exclusive dealing conduct was protected from court action. For this particular type of dealing, the ACCC can revoke this protection if it is satisfied the conduct is likely to substantially lessen competition and its benefits would not outweigh the detriments from the lessening of competition.

To make a determination on the proposed exclusive dealing of Ice Hockey Australia, the ACCC had to compare the pros and cons of the proposed rule with the likely alternative of no such restriction.

In December 2009, the ACCC released a 'draft' notice outlining possible concerns about the proposal and invited submissions from the public. Individuals and organisations, including government sports agencies, state ice hockey associations and ice rink operators, made submissions. The issues were discussed at a conference convened by ACCC Deputy Chairman Peter Kell.

In March this year, the ACCC decided to revoke the protection of the notification, concluding Ice Hockey Australia's conduct was likely to substantially lessen competition by:

- imposing a barrier to the establishment and expansion of rival ice hockey leagues
- reducing the competitive viability of existing rival leagues.

Forced to choose between sanctioned and non-sanctioned leagues, players and officials would have less opportunity to play and otherwise participate in the sport. The ACCC concluded that the proposal might also lessen competition in the market for hiring out rinks.

The ACCC concluded there might be some efficiency benefits in having one body administer health and safety guidelines but this did not outweigh the competition problems. The ACCC decided that the proposed rule was not necessary for Ice Hockey Australia to continue to govern ice hockey at the national level.

The Ice Hockey Australia matter is certainly not the first time competition law and sporting competitions have met head to head in Australia—one of the most notable incidents was Federal Court of Australia action in the

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[Not so sporting continued]

mid-1990s over the creation of the Super League rugby competition—and it will most certainly not be the last.

Speedracing

The ACCC has this year also revoked notifications relating to car-racing speedways, under which track operators had sought to stop drivers from accessing tracks unless they had obtained a licence from a nominated third party, the National Association of Speedway Racing (NASR).

Broadly, the Act prohibits a particular form of exclusive dealing called third-line forcing. A corporation is prohibited from supplying its goods or services on the condition that the buyer also buys other goods or services from a particular third party. A court can find that this conduct—unlike other exclusive dealing—has breached the Act without a party having to show it has lessened competition. The ACCC receives hundreds of notifications of such third-line forcing conduct each year and, after assessing them, generally takes no further action.

In the case of the speedways, the ACCC was concerned about the effect the conduct would have on other speedway associations that issue licences in competition with NASR, reducing their attractiveness and ability to expand membership.

The ACCC accepted that there might be benefits in having a national set of safety and related racing standards but the licensing restrictions for track access did not achieve this. The ACCC similarly accepted that there may be some benefit in having a single controlling body to represent the broad interests of the sport. Such a body could develop minimum safety and related racing standards to be met by licensing bodies and recognised by tracks.

Sporting bodies must be aware that any conditions they impose that restrict someone's ability to choose with whom, in what or where they deal could in many circumstances raise concerns under the Act.

For example, a voluntary industry code could be developed, establishing minimum objective standards on health, safety and competitor conduct. Such a code could allow alternative speedway licensing associations to demonstrate that they comply with the minimum standards and could provide tracks with an effective risk-management process.

In May this year the ACCC revoked notifications from Brisbane International Speedway, Murray Bridge Speedway and Premier Speedway Club Warrnambool. In assessing these notifications, the ACCC had to again balance such issues as fair competition, participation and standards—and it decided that the restrictions fell short of the line.

At the same time, the ACCC issued a draft notice expressing the preliminary view that it should also revoke notifications from Perth Motorplex and Avalon Raceway. It has since been considering submissions in response.

Parties can appeal to the Australian Competition Tribunal, which is independent of the ACCC, against ACCC decisions to revoke a notification.

Sporting bodies must be aware that any conditions they impose that restrict someone's ability to choose with whom, in what or where they deal could in many circumstances raise concerns under the Act. More information is available on the ACCC's website www.accc.gov.au/ForBusinesses, under the 'Dealing with other businesses' heading.