

# Application for Authorisation

Lodged by

TAB Agents' Association of New South Wales  
(on its own behalf and on behalf of its members)

In respect of

Collective bargaining by TAB Agents' Association (NSW) on behalf of its  
members with TAB Limited.

Date: 28 April 2004

Commissioners:

Samuel  
Sylvan  
McNeill  
Martin

Authorisation no. A90885

Public Register no. C2003/1165

## **Executive summary**

### **The Application**

On 9 September 2003, the TAB Agents' Association of New South Wales ("the Association") lodged application for authorisation A90885 ("the Application") with the Australian Competition and Consumer Commission ("the Commission").

### **The authorisation process**

A key objective of the Trade Practices Act 1974 ("the Act") is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The Act, however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an 'authorisation'.

Broadly, the Commission may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The Commission conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation.

### **The proposed arrangements**

The Association seeks authorisation on behalf of its members, for an agreement between its members, for it to collectively bargain with TAB Limited in relation to the terms and conditions of the provision of services by members to TAB Limited.

Generally speaking, 'collective negotiation' describes arrangements where a number of businesses form a group to engage in collective negotiations on the terms of trade (including price) with a supplier or acquirer of goods or services. Absent authorisation, collective negotiation amongst competitors is likely to raise concerns under the competition provisions of the Act.

The Association is also seeking authorisation for an agreement between its members under which it would act on behalf of members where a dispute arises between those members and TAB Limited.

### **Assessment of public benefit and anti-competitive detriment**

The Commission considers the anti-competitive detriment generated by the proposed arrangements to be negligible. In particular, the Commission does not consider that the proposed arrangements will affect the price of wagering services provided to the public given that the prices are already regulated by government legislation. Further, the Commission does not consider that the proposed arrangements will reduce competition between TAB agents on service levels to consumers as the proposed arrangements do not

restrict TAB agents' ability to compete on service levels to any greater extent than the current standard form agreement which TAB Limited offers to its agents.

The Commission does not consider that the proposed arrangements detrimentally effect competition between agents and potential agents to acquire contracts from TAB Limited or between agents and hotels and clubs for the supply of wagering services from TAB Limited. Again, the Commission does not consider that the proposed arrangements restrict TAB agents' ability to compete in these areas any more than the current standard form agreements.

The Commission considers that the proposed arrangements will result in some public benefit. In particular, the Commission considers that in these circumstances, providing TAB agents with some competitive parity in negotiations with TAB Limited and the opportunity for greater input into contract terms and conditions will result in some public benefit.

The Commission also considers that TAB agents are likely to pass on, at least, some of the benefits of any more favourable deal negotiated with TAB Limited as a result of bargaining collectively, in the form of improvements in the level of service provided by TAB agents to consumers.

### **Determination**

Following consideration of the arguments advanced by the Applicant and interested parties, the Commission concludes that the public benefits likely to result from the arrangements will outweigh the anti-competitive detriment. Accordingly, the Commission grants authorisation to application A90885 for a period of five years.

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# 1 Introduction

- 1.1. The Australian Competition and Consumer Commission (“the Commission”) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (“the Act”). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. The Act, however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an ‘authorisation’.
- 1.3. Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.4. The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.5. Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.6. The Act requires that the Commission then issue a draft determination in writing proposing either to grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account any submissions received from interested parties. The Commission’s draft determination in respect of this application is summarised in paragraphs 2.31 to 2.37 of this determination.
- 1.7. This document is a determination in relation to application for authorisation A90885 lodged with the Commission by the TAB Agents’ Association of New South Wales (“the Association” or “the Applicant”).
- 1.8. Once a draft determination is released, the applicant or any interested party may request that the Commission hold a conference. A conference is generally called by a party dissatisfied with the Commission’s decision and provides interested parties with the opportunity to put oral submissions to the Commission in response to a draft determination. The Commission will also invite interested parties to lodge written submissions on the draft.
- 1.9. The Commission then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination.

## 2 The Application

### The Application

- 2.1. On 9 September 2003 the Applicant lodged an application for authorisation (A90885) with the Commission.
- 2.2. The Application was made under section 88(1) of the Act for an authorisation under that subsection:
  - (a) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
  - (b) to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.<sup>1</sup>
- 2.3. The Association seeks authorisation on behalf of its members, for an agreement between its members, for it to collectively bargain with TAB Limited in relation to the terms and conditions of the provision of services by members to TAB Limited, and also for an agreement between its members under which it would act on behalf of members where a dispute arises between those members and TAB Limited. The period of authorisation sought is 7 years.
- 2.4. Initially the application (i.e. the Form B on which the application was lodged, as required by the Act) was silent on whether the Association sought authorisation to participate in the process of resolving disputes between more than one TAB agent and TAB Limited. However, the Applicant's supporting submission clearly states its intention that authorisation was sought for the Association to participate in the dispute resolution process. The Commission's public consultation was conducted on the basis that this was the case, and several interested parties commented on this aspect of the authorisation application.
- 2.5. On 10 March 2004, the Association lodged an amended application, in the form of an amended Form B, which clarified that it was also seeking authorisation to participate in the resolution of disputes between more than one TAB agent and TAB Limited.

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<sup>1</sup> The application has also been considered as an application under the *Competition Code* of New South Wales.

- 2.6. The Applicant's supporting submission, lodged with its application on 9 September 2003, described the conduct sought to be authorised, with respect to the Association's involvement in the resolution of disputes, as the Association participating in the process for resolving disputes under a proposed Dispute Resolution Agreement. This agreement is discussed in greater detail at paragraphs 2.24 – 2.26. However, the application as amended on 10 March 2004 seeks authorisation for the Association to participate in the process for the resolution of disputes irrespective of whether such disputes are resolved in accordance with the Dispute Resolution Agreement. The Commission has assessed the application on this basis.
- 2.7. The Commission has also considered the application as an application for the Association to collectively negotiate on behalf of its members with any entity which is TAB Limited's successor to the off-course totalizator licence in NSW as a result of either of the proposed mergers between TAB Limited and TABCORP Holdings Limited or UNiTAB Limited.
- 2.8. The Applicant advised the Commission by letter dated 6 February 2004 that it was seeking authorisation on this basis.
- 2.9. The Commission notes that TAB Limited is currently the subject of a takeover bid by either TABCORP Holdings Limited or UNiTAB Limited. As at the date of this determination, no announcement had been made as to which company has made a successful takeover offer.
- 2.10. The Association provided a supporting submission in respect of its application for authorisation. This submission was prepared by Clayton Utz Lawyers on behalf of the Association.

## **The Applicant**

- 2.11. The Association is a registered union of employers under the *Industrial Relations Act 1996* (NSW). The Association has as its members 258 agents who have been appointed by TAB Limited as its agents for the purposes of the *Totalizator Act 1997* ("Totalizator Act"). The Association submits that this figure represents approximately 98% of all TAB agents.<sup>2</sup>
- 2.12. The Association describes itself as being formed for the purpose of serving as a non-industrial organisation, promoting the interests of its members and liaising with TAB Limited.

## **Current Arrangements**

- 2.13. TAB agents are appointed under contractual arrangements between TAB Limited and the individual agents to conduct wagering services on behalf of

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<sup>2</sup> TAB Agents Association of NSW submission 9 September 2003 at paragraph 2.

TAB Limited. There are approximately 317 shopfronts in NSW which are depicted as TAB outlets and run by TAB agents.<sup>3</sup>

- 2.14. By way of background, the Association refers to the three current forms of contractual arrangements between TAB Limited and TAB agents, these being:
- The Standard Fixed Term Deed (“Fixed Term Deed”);
  - The Standard Two-Year Roll Over Deed (“Roll Over Deed”); and
  - The “New” Agency Agreement (“New Agreement”).

#### *Fixed Term Deed*

- 2.15 The Fixed Term Deed was offered to TAB agents for a fixed period varying between one and five years. One of the primary factors in determining the period for which the Fixed Term Deed was made with an agent was the agent’s performance which was determined on the basis of an annual review conducted by TAB Limited.

#### *Roll Over Deed*

- 2.16 The Roll Over Deed, which contains terms similar to the Fixed Term Deed, operated for an initial period of two years and was then automatically ‘rolled over’ for succeeding period of two years unless:
- (a) a fresh deed was executed between the parties;
  - (b) the deed was terminated pursuant to the operation of the deed; or
  - (c) the deed was ‘determined’ by TAB Limited providing the agent with one months’ notice in writing of the ‘determination’ and the reasons why the deed was not automatically renewed or why it would not continue in operation for a further two year period.

#### *The New Agreement*

- 2.17 The Association submits that in about May 2002, TAB Limited sent to all agents the first version of the New Agreement which it was intended would supersede all existing agreements once they had expired.
- 2.18 The New Agreement operates for a fixed period to September 2004 or September 2006. While the New Agreement contains some terms from the Fixed Term and Roll Over deeds, it also contains a number of new terms, including:

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<sup>3</sup> Some agents operate more than one shop front.

- (a) TAB agents must not carry on any other business venture during the term of the agreement in conflict with the core business of TAB Limited;
- (b) the TAB agent is to use the telephone services of a carrier nominated by TAB Limited;
- (c) restraints on the activities of a TAB agent upon the termination of agency arrangements; and
- (d) new arrangements in relation to the termination of the agreement.

2.19 The Association claims that a further arrangement was proposed by TAB Limited which it describes as a 'month-to-month' arrangement which is offered in circumstances where a TAB agent's existing contractual arrangement, either a Fixed Term Deed or Roll Over Deed, expires, is determined or not renewed by TAB Limited and the TAB agent determines that he or she does not wish to execute the New Agreement.

2.20 In these circumstances, a TAB agent can continue to operate the agency on the same terms and conditions that existed at the time that the Fixed Term Deed or Roll Over Deed ceased to formally operate, save that the arrangements between TAB Limited and the agent can be terminated on the provision of 1 month's notice.

## **The Proposed Arrangements**

### *Collective bargaining*

2.21 The Association seeks authorisation on behalf of its members, for an agreement between its members, for it to collectively bargain with TAB Limited in relation to the terms and conditions of the contract pursuant to which members of the Association are:

- appointed as agents of TAB Limited (for the purposes of section 12 of the *Totalizator Act 1997*) including the negotiation of any extension or renewal of such contracts;
- appointed as agents for outlets additional to those in respect of which the agents primary appointment has been made, including the negotiation of any extensions or renewals of those contracts or arrangements.

2.22 While the arrangements would be voluntary, the Applicant submits that it anticipates that negotiations would be conducted on behalf of one bargaining group (namely all members of the Association who do not choose to opt out), and the terms and conditions negotiated would apply equally to:

- those individuals seeking appointment as a TAB agent;

- those agents seeking renewal of their existing contractual arrangements, irrespective of when those arrangements expire; and
  - those agents seeking appointment as agents of additional agencies and the renewal of those additional contractual arrangements.
- 2.23 The Association states that no member of the Association would be compelled to have the Association negotiate on its behalf, as members would be free to opt out of the proposed arrangements and negotiate with TAB Limited individually.
- 2.24 The Association also seeks authorisation on its own behalf to allow it to participate in the process for resolving disputes between TAB Limited and more than one agent. The Association proposes that disputes be handled in accordance with a Dispute Resolution Agreement (“DRA”).
- 2.25 The DRA proposed by the Applicant is identical to that which was previously agreed between the Association and TAB Limited and included in Fixed Term and Roll Over Deeds. The Commission understands that the DRA was developed as a result of an agreement between the Association and TAB Limited to implement a procedure for the resolution of disputes in order to settle court proceedings at the time. The New Agreement contains a dispute resolution procedure, however, this procedure was not developed by an agreement between the parties. Rather, it was implemented by TAB Limited following concerns by the Association that the New Agreement did not provide any recourse to disputes.
- 2.26 The DRA proposed by the Association essentially provides:
- a set procedure would be followed to resolve disputes falling within the scope of the DRA, which would enable disputes to be resolved at an early stage by way of initial discussions between the parties to the dispute, or where a dispute cannot be resolved by these means, by proceeding to more formal discussions or arbitration where necessary;
  - arbitration relates only to disputes of a certain kind, for example, in relation to remuneration, interpretation or enforcement of the agency deed or the term of the renewal of a deed relating to any agent, to conditions associated with closing agencies, the disciplining of agents under the terms of the Agency Deed and mandatory changes to the core hours of operation;
  - where a dispute is referred to representative councils or panels in order to resolve it, the council or panel be made up of representatives from all parties to ensure even representation;
  - disputes involving more than one TAB agent may be resolved collectively; and

- in the event that a dispute is referred to an arbitrator, the decision, determination or award of the arbitrator will be final and binding on the parties.

2.27 As noted at paragraph 2.6, the Commission has considered the Application as an application for the Association to participate in the process for resolving disputes between TAB Limited and more than one TAB agent. The Commission notes that the Association also proposes that disputes be dealt with in accordance with the DRA. Ultimately, the manner in which any dispute involving more than one agent would be resolved is a matter for the parties. This is discussed in greater detail in Section 12.

#### *Term of authorisation*

2.28 The Association seeks authorisation for a period of 7 years. The Association believes that this would provide sufficient time for the Association to be involved in the negotiations for any new arrangements between TAB Limited and TAB agents who are on existing arrangements. The Association also believes this will provide sufficient time for it to be involved in the resolution of any disputes which may arise under the existing arrangements over the course of their term and leading up to their expiry.

#### *Parties to the proposed arrangements*

2.29 The parties to the proposed arrangements are present and future members of the Association. Pursuant to subsection 88(10) and 88(13) of the Act, the authorisation application applies to any collective bargaining group of Association members, present or future, represented by the Association, that wish to engage in the proposed arrangements.

2.30 Participation by Association members in collective negotiations is voluntary and members will reserve the right to negotiate and enter into individual contracts with TAB Limited should they wish to do so.

#### **Draft Determination**

2.31 On 24 March 2004, the Commission released a draft determination proposing to authorise the proposed arrangements. The Commission considered the anti-competitive detriment generated by the proposed arrangements to be negligible. In particular, the Commission did not consider that the proposed arrangements would affect the price of wagering services provided to the public given that the prices are already regulated by government legislation.

2.32 Further, the Commission did not consider that the proposed arrangements would reduce competition between TAB agents on service levels to consumers as the proposed arrangements do not restrict TAB agents' ability to compete on service levels to any greater extent than the current standard form agreement which TAB Limited offers to its agents.

- 2.33 The Commission did not consider that the proposed arrangements would detrimentally effect competition between agents and potential agents to acquire contracts from TAB Limited or between agents and hotels and clubs for the supply of wagering services from TAB Limited. Again, the Commission did not consider that the proposed arrangements restrict TAB agents' ability to compete in these areas any more than the current standard form agreements.
- 2.34 The Commission considered that the proposed arrangements would result in some public benefit. In particular, the Commission considered that in these circumstances, providing TAB agents with some competitive parity in negotiations with TAB Limited and the opportunity for greater input into contract terms and conditions will result in some public benefit.
- 2.35 The Commission also considered that TAB agents would be likely to pass on, at least, some of the benefits of any more favourable deal negotiated with TAB Limited as a result of bargaining collectively, in the form of improvements in the level of service provided by TAB agents to consumers.
- 2.36 The Commission concluded that the public benefits likely to result from the arrangements would outweigh the anti-competitive detriment. Accordingly, the Commission proposed, subject to any request for a pre-decision conference, to grant authorisation in relation to the application for a period of five years.
- 2.37 No interested party requested that the Commission hold a pre-decision conference in relation to the draft determination. One interested party, TAB Limited, provided the Commission with a written submission in response to the draft determination.

### 3 Chronology of assessment of the application

<b>Date</b>	<b>Action</b>
9 September 2003	Application lodged.
22 September 2003	Letters sent to interested parties inviting submissions in relation to the application.
24 October 2003	Interested party submissions close.
7 November 2003	Interested party submissions forwarded to the Applicant for comment.
14 November 2003	Submission received from TAB Limited.
21 November 2003	TAB Limited submission forwarded to the Applicant for comment.
5 December 2003	Applicant's response to submissions due.
9 December 2003	Applicant's response to submissions provided to the Commission.
6 February 2004	Applicant advises the Commission it intends the application extend to cover any successor to TAB Limited should any proposed mergers proceed.
10 March 2004	Amended Application lodged by the Association.
24 March 2004	Draft Determination issued.
16 April 2004	Submissions on the draft determination close.
28 April 2004	Determination issued.

## 4 Background to industry

### TAB Limited<sup>4</sup>

- 4.1. TAB Limited was established in 1964 as the Totalizator Agency Board, a NSW statutory authority constituted under the *Totalizator (Off-Course Betting) Act 1964 (NSW)*, to conduct off-course totalizator wagering in NSW.
- 4.2. In 1997, the NSW Government announced its intention to privatise the Totalizator Agency Board.
- 4.3. On 25 February 1998, the Totalizator Agency Board was corporatised and became TAB Limited, a company registered under Corporations Law, in accordance with the *Totalizator Agency Board Privatisation Act 1997 (NSW)*.
- 4.4. TAB Limited was privatised by way of public float and was listed on the Australian Stock Exchange in June 1998.
- 4.5. TAB Limited is Australia's largest wagering organisation. It conducts:
  - (a) totalizator wagering on Australian and international racing and on the National Rugby League competition;
  - (b) fixed odds wagering on a range of sporting events including rugby league, cricket, soccer, rugby union, golf, tennis, boxing, Australian rules football, motor sports and basketball; and
  - (c) fixed odds wagering on major racing events.<sup>5</sup>
- 4.6. As at 10 November 2003, TAB Limited has 261 agents operating 317 TAB Limited retail agencies across New South Wales. TAB agents transact business on behalf of TAB Limited for which the agents receive a fixed management fee and commission based on turnover. TAB agents are one form of distribution used by TAB Limited to distribute its wagering services to consumers.
- 4.7. TAB Limited also distributes its services via its own on-course wagering facilities, hotels and registered clubs (using PubTAB and ClubTAB facilities respectively), and by its own telephone and internet wagering facilities.
- 4.8. The Commission has previously considered an application for authorisation by the Australian Hotels Association (NSW) for it to collectively bargain

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<sup>4</sup> Except where otherwise noted much of the information in this section is taken from the TAB Submission 14 November 2003 and the AHA (NSW) Determination A90837.

<sup>5</sup> TAB Agents' Association of New South Wales submission 8 September 2003 at para 7.

with TAB Limited (see paragraph 4.27). In its consideration of that application (hereafter referred to as the AHA (NSW) Determination), the Commission discussed gambling activities, forms of wagering, and the regulation of off-course wagering in New South Wales.<sup>6</sup> These issues are also relevant to the present application for authorisation and are reproduced below.

## **Wagering and gaming**

- 4.9. Gambling activities are categorised as either wagering or gaming.
- 4.10. Wagering involves betting on the outcome of live events, primarily racing (thoroughbred, harness and greyhound racing) and sporting events. Wagering is divided into totalizator wagering and fixed-odds wagering.
- 4.11. Other forms of gambling are ‘gaming’. The principal forms of gaming in Australia are the operation of gaming/poker machines, casinos, lotteries, lotto and keno.

## **Totalizators**

- 4.12. A totalizator is one form of wagering, the other being fixed-odds betting (also known as ‘bookmaking’).
- 4.13. Wagering through totalizators is in the form of a ‘unit’ wager (a unit being a multiple of 50c or \$1, depending on the jurisdiction). The operator deducts a percentage of the total units wagered and the remainder is returned as winnings to players in multiples of the unit wagered. Unlike totalisators, bookmakers offer ‘win’ and ‘place’ bets at fixed odds. A gambler can wager any amount above a set minimum and will receive the bookmaker’s odds at the time of making the wager. Those odds stand, irrespective of whether the bookmaker alters the odds at a later time.<sup>7</sup>
- 4.14. Totalizators are the main form of wagering in Australia, comprising approximately 96 per cent of wagering turnover in the year ended 2000-01. Approximately 94.2 per cent of totalizator wagering turnover is ‘off-course’ betting (that is, the customer is not present at a racecourse when placing the bet).
- 4.15. In each State or Territory there is one operator, licensed or otherwise, authorised to conduct off-course wagering. These operators are authorised to conduct totalizator wagering, although in many States legislation has recently allowed them to expand into fixed-odds wagering.

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<sup>6</sup> A copy of the Commission’s determination in relation to application for authorisation A90837 is available on the Commission’s website at [www.accc.gov.au](http://www.accc.gov.au).

<sup>7</sup> *Australia’s Gambling Industries Inquiry Report – Productivity Commission Report #10 – 26 November 1999 at Box 2,3 at page 2.7.*

- 4.16. Each off-course wagering operator was originally established as a statutory authority of the relevant State or Territory and known as the Totalizator Agency Board. However in recent years a number of State and Territory Governments have corporatised and/or privatised the off-course wagering operators. The following table sets out the status of the off-course wagering operator in each state:

Table 4.1 Off-course wagering operators in Australia

State	Status of off-course wagering operator
NSW	TAB Limited – a listed public company
Victoria	TABCORP Holdings Limited – a listed public company
Queensland	UNiTAB Limited – a listed public company
Western Australia	Government Authority
South Australia	SA TAB Pty Ltd (Wholly owned subsidiary of UNiTAB Limited)
Tasmania	Government Authority
ACT	Government Authority
Northern Territory	NT TAB Pty Ltd (Wholly owned subsidiary of UNiTAB Limited)

- 4.17. The off-course wagering operators can accept off-course wagers from people within the State (through outlets in the relevant State or Territory as well as by telephone or internet) and from people interstate and overseas (through telephone or internet accessed wagering accounts).
- 4.18. In a totalizator (also known as ‘pari mutuel’ betting) the final odds are not calculated until after the close of betting on the relevant event. All of the bets (eg win, place, and trifecta) are consolidated or ‘pooled’ into a totalizator pool. The totalizator operator deducts from the totalizator pool a pre-determined percentage of the totalizator pool, which is referred to as the ‘commission rate’ or ‘take out rate’, as the operator’s commission. The payout to ticket holders on the successful outcome (‘the dividend’) is calculated by dividing that pool by the number of ‘units’ bet on that outcome.
- 4.19. The pari mutuel system is such that an operator cannot lose – as the takeout is extracted from the pool before payouts are made. In NSW, TAB Limited is limited to an overall takeout rate not exceeding 16 per cent, and a specific takeout rate on any one betting form not exceeding 25 per cent. The remainder of the totalizator pool is referred to as the ‘dividend pool’ and is available for distribution to customers who have placed bets on the totalizator.

- 4.20. Given the nature of the pari mutuel system, agencies of a TAB cannot compete on price, but may compete on the non-price characteristics of products, which may translate into a closer price/quality trade-off resulting in greater demand side substitution over the longer term.<sup>8</sup> That is, if agencies compete on non-price factors in order to attract greater custom, this may result in spill off effects whereby attracting customers on non-price factors enables the agency to gain a larger turnover, resulting in higher income (through more commission) and regular, sustained custom.

## **Regulation of off-course wagering in NSW**

### *Totalizator Act 1997 (NSW)*

- 4.21. Off-course wagering in NSW is governed by the *Totalizator Act 1997* (NSW) (the Totalizator Act) which commenced on 6 March 1998. Inter alia, the Totalizator Act provides that only the holder of a licence under the Totalizator Act may conduct a totalizator in NSW. This restriction however does not prevent interstate and international wagering operators receiving bets from people in NSW through telephone or internet accessed wagering accounts.
- 4.22. TAB Limited has been granted an off-course totalizator licence in consideration of a licence fee of \$303 million and an on-course totalizator licence in consideration of a licence fee of \$5 million. Both licences have a term of 99 years.
- 4.23. No other totalizator licence may be issued under the Totalizator Act until March 2013 (other than TAB Limited's totalizator licences and the on-course licences granted to racing clubs) unless TAB Limited's licences are cancelled or surrendered.
- 4.24. Any holder of a totalizator licence (other than racing clubs in respect of their on-course totalizator licence) must have and give effect to commercial agreements with an entity nominated by certain major racing clubs as the 'racing industry' for the purpose of the licence. This, in effect, prevents NSW licensed totalizator operators 'free riding' on the racing industry. TAB Limited has entered into the 'Racing Distribution Agreement' with NSW Racing Pty Limited ('NSW Racing'), the NSW Thoroughbred Racing Board, Harness Racing New South Wales and the Greyhound Racing Authority. The Racing Distribution Agreement commenced on 6 March 1998.
- 4.25. TAB Limited's wagering distribution network comprises:
- (a) Agencies;

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<sup>8</sup> Network Economics Consulting Group (2002), Economic Report prepared on behalf of Tab Limited and SKY Channel Pty Ltd.

- (b) PubTAB/ClubTAB;
- (c) Telephone betting (PhoneTAB);
- (d) Internet betting (RaceTAB and SportsTAB); and
- (e) “on course” facilities.

4.26. As at 30 June 2002, TAB Limited had a total of 1930 wagering outlets throughout NSW, comprising 336 agencies, 990 PubTABs and 604 ClubTABs. TAB Limited states that 47 per cent of these outlets are located outside the Sydney metropolitan area.

#### **Australian Hotels Association (New South Wales)**

4.27. The Australian Hotels Association (NSW) (AHA (NSW)) applied for authorisation on behalf of its hotel members to collectively bargain in dealings with TAB Limited in relation to the provision of totalisator (wagering) services (PubTAB) and in dealings with SKY Channel Pty Limited (‘SKY Channel’) in relation to the provision of racing broadcast services to AHA (NSW) members (A90837).

4.28. The AHA (NSW) initially sought authorisation to collectively boycott TAB Limited and SKY Channel if negotiations broke down. Following the Commission’s draft determination in relation to the application, the AHA (NSW) advised the Commission that it no longer sought authorisation to engage in collective boycott activity.

4.29. On 27 June 2003, the Commission granted authorisation to the AHA (NSW) application. In coming to its view that the authorisation should be granted, the Commission considered that there was likely to be a benefit to the public associated with the proposed arrangements as a result of:

- improved dialogue between the AHA (NSW) (and its members) and TAB Limited and SKY Channel as a result of collective negotiation and the implementation of a dispute resolution process which was likely to, in turn, minimise any inefficiencies associated with the existing contractual terms and conditions (including potential inefficiencies in commission and pricing structures); and
- any pass through of gains made by hotels in the form of lower prices to consumers (albeit the Commission considered that these were likely to be low).

4.30. In relation to any anti-competitive detriment, the Commission was of the view that where collective negotiation arrangements are introduced absent collective boycott activity and with restrictions such as those that were proposed by AHA (NSW), including that AHA (NSW) members would refrain from sharing information obtained as part of the collective negotiation process, or about the outcome of such a process, with any

bargaining groups in other states or territories, there would exist low anti-competitive detriment.

- 4.31 The Association, in providing arguments in support of its current Application, has relied heavily on arguments put forth by the AHA (NSW) and comments made by the Commission in the AHA (NSW) Determination.
- 4.32 Where relevant, the Commission has also referred to comments made by it in the AHA (NSW) Determination and considers many of the issues raised in the current application for authorisation are similar in nature and effect to the issues arising in that determination.

## **5 Statutory test**

- 5.1. Application A90885 was made under sub-section 88(1) of the Act to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the Act.
- 5.2. In assessing an application made under sub-section 88(1) of the Act to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the Act, the relevant test that the Association must satisfy for authorisation to be granted is outlined in sub-sections 90(6) and 90(7) of the Act.
- 5.3. Under section 90(6) of the Act, the Commission may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
  - the contract, arrangement or understanding would be likely to result in a benefit to the public; and
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.4. Under section 90(7) of the Act, the Commission may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
  - the contract, arrangement or understanding would be likely to result in a benefit to the public; and
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.5. In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements or conduct and the public benefits arising from the arrangements or conduct, weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation.
- 5.6. If this is not the case, the Commission may refuse authorisation or, alternatively, the Commission may grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the anti-competitive detriment.
- 5.7. Section 88(10) of the Act provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.

- 5.8. Section 88(13) of the Act provides that an application for authorisation for specific arrangements may be expressed to be made also in relation to other arrangements that will be in similar terms. The Commission may grant a single authorisation in relation to all such arrangements.
- 5.9. In this instance, as well as seeking authorisation for itself and its members, the Association has also expressed its application so as to apply in relation to future parties to the proposed arrangements and in relation to other arrangements that will be in similar terms.

## **6 Summary of the Applicant's submission**

- 6.1. The conduct for which authorisation is sought is described in paragraph 2.3.
- 6.2. The TAB Agents' Association of NSW submission in support of its application is summarised below.

### **Market Assessment**

- 6.3. The Applicant states in its submission that it does not consider it necessary for a detailed and precise market analysis to be conducted in order to assess its application as it is sufficient to identify the relevant areas of competition.
- 6.4. The Applicant identified these areas as:
  - (a) the market for the provision of wagering services to the public;
  - (b) competition between (TAB) agents for appointment as agents by TAB Limited, whether in respect of an initial agency or additional agencies.
- 6.5. The Applicant claims that competition in these areas is limited because:
  - (a) statutory and contractual arrangements preclude price competition between TAB agents; and
  - (b) given the terms of the agency arrangements between TAB agents and TAB Limited, there is very little, if any, scope for differentiation between services offered by agents.

### **Application of the future with-and-without test**

- 6.6. In assessing applications for authorisation the Commission applies the future with and without test which considers the likely situation if authorisation is granted with that if authorisation is not granted. This test is described in greater detail at paragraphs 10.1 and 10.2.
- 6.7. The Applicant submits that the situation without authorisation is likely to be that all agents will be compelled to enter into arrangements with TAB Limited in the form currently put forth by TAB Limited in the New Arrangement, with no recourse to a dispute resolution mechanism such as that proposed by the Association in its application (i.e. the DRA). The Applicant submits that this will result in matters being litigated which could have been resolved by arbitration.
- 6.8. The Applicant believes that the likely situation with authorisation is that the Association and its members are more likely to influence the terms and conditions contained within contracts between members and TAB Limited than they would be without authorisation. The Applicant contends that this results in benefits to the public.

## **Public benefits**

- 6.9. In its submission, the Applicant identifies a number of public benefits which it argues will arise from collective negotiation by TAB agents with TAB Limited. The Applicant submits that these public benefits are likely to outweigh any anti-competitive detriment associated with the arrangements.
- 6.10. In summary, the following public benefits were claimed by the Applicant:
- (a) a significant reduction in the risk of unconscionable conduct by TAB Limited;
  - (b) efficiency gains through increased productivity gains and an increase in quality of service;
  - (c) improved industrial relations;
  - (d) introduction of an effective dispute resolution process;
  - (e) lower transactions costs, such as those associated with independent legal and financial advice; and
  - (f) benefits to Association members which will flow on to the community.
- 6.11. The public benefits claimed by the Applicant are discussed in more detail in Section 12 of this determination.

## **Anti-competitive detriment**

- 6.12. The Applicant submits that there is likely to be minimal, if any, anticompetitive detriment arising from the proposed arrangements as there is limited, if any, competition between TAB agents, and their respective agencies, for the provision of wagering services to customers. Specifically, the Applicant claims that TAB agents can not compete on price, and that there is little, if any, scope for differentiation between services offered.
- 6.13. In support of this position, the Applicant suggests a similarity between the arrangements as proposed by the Association and those authorised by the Commission in respect of the application by the AHA (NSW). Specifically, the Applicant argues that the proposed arrangements will result in minimal, if any, anticompetitive detriment because:
- (a) the nature of the agency appointment and the terms of the deed or agreement to which they are appointed is such that there is extremely limited scope for the TAB agents to compete with one another on the basis of price or any aspect of the service offered, given the extent to which TAB Limited controls these;
  - (b) the amount of commission which TAB Limited may deduct for itself from sales to the public is fixed by legislation;
  - (c) participation in the proposed arrangements by Association members would be voluntary; and

- (d) membership to the Association is voluntary, and in particular, no Association member would be required to enter into any arrangement negotiated by the Association on behalf of its members.

## **7 Summary of TAB Limited submission**

- 7.1. TAB Limited made a submission to the Commission on 14 November 2003.
- 7.2. In summary, TAB Limited does not agree with the Applicant's submissions relating to:
- (a) the level of competition between agents;
  - (b) the relevant counterfactual; or
  - (c) the public benefit claims made by the Applicant.
- 7.3. TAB Limited opposes the granting of authorisation to the Association to collectively negotiate with it on behalf of its members unless such negotiation is on a wholly voluntary basis (that is, where neither TAB Limited nor any individual agent is compelled to participate). TAB Limited did not support the granting of authorisation for the Association to participate in the process for resolving disputes under the proposed DRA between TAB Limited and more than one TAB agent.

### **Market Assessment**

- 7.4. TAB Limited submits that TAB agents and hotels and clubs (which have PubTAB and ClubTAB facilities) are all agents of TAB Limited in respect of the retail supply of wagering services to consumers.
- 7.5. TAB Limited considers that TAB agents and potential agents compete with each other for appointment or reappointment as an agent of TAB Limited. TAB agents are permitted to operate more than one agency and as such agents may be in competition with each other for additional agencies. TAB Limited further states that TAB agents and potential agents also compete with hotels and clubs for appointment or re-appointment as an agent of, and supplier of distribution services to, TAB Limited.
- 7.6. In support of its contention that competition exists between the various forms of distribution of TAB Limited's wagering services, TAB Limited submits that between 1998 and 2003, agencies' share of turnover declined from 50.8% to 38.4%, while hotels' and clubs' shares of turnover increased from 16% to 22.8% and 12.3% to 14.5% respectively.
- 7.7. In respect of telephone and internet wagering, TAB Limited submits that this has also risen from 11.1% to 18.2% over the same period, and that it sees all forms of distribution as substitutable and is able to move resources between the various forms of distribution to distribute its services by the most efficient means.
- 7.8. TAB Limited refers to an NECG Report previously considered in the AHA (NSW) Determination entitled *Economic Report prepared on behalf of Tab*

*Limited and SKY Channel Pty Ltd*, regarding substitutability which suggested that if a customer was unhappy with the level of service at an agency, that customer will either forgo consumption, use another distribution channel or use another agency, demonstrating the substitutability between agents, and between agents and other distribution channels.

- 7.9. TAB Limited states that it determines the geographic location of a particular agency, and that agencies are located sufficiently near each other to be likely to be in competition with each other. Further, TAB Limited encourages competition between its agents by way of incentive schemes and agent achievement awards both of which are formalised and incorporated into the New Agreement.
- 7.10. TAB Limited rejects the Applicant's claims that the relationship between TAB Limited and its agents is one of principal and agent, and that therefore there is very little, if any, competition between agents. TAB Limited submits that while it ensures that certain minimum standards are maintained by TAB agents, it otherwise provides agents with discretion in the manner in which they provide wagering services. For example, TAB Limited submits that as agents are free to choose staffing levels; form guides; visual displays; level of marketing; customer facilities; extended trading hours; and customer competitions and promotions, agents compete with each other in relation to these aspects of the provision of wagering services.

### **Future with-or-without test**

- 7.11. In responding to the Applicant's claims as to the relevant counterfactual, and summarised at paragraph 6.7, TAB Limited submits that there is currently competition between agents for appointment as TAB agents, and that at least this level of competition should be included in the relevant counterfactual.
- 7.12. TAB Limited also submits that the relevant counterfactual includes that TAB Limited will continue to consult with the Applicant and TAB agents as a group, as it has done in the past and as evidenced by its approach with the New Agreement.
- 7.13. In response to the Applicant's submission on the variation of agency arrangements, TAB Limited submits that it has already agreed to a variation of the New Agreement with an agent in relation to core hours and states that it will consider all requests to vary the terms of the New Agreement on their individual merits.

### **Public Benefits**

- 7.14. TAB Limited responded to each public benefit claim made by the Applicant.
- 7.15. In respect of the Applicant's submission that collective negotiation would significantly reduce the risk of unconscionable conduct, TAB Limited

submits that there is no evidence of unconscionable conduct that could lead to an investigation or court proceedings. TAB Limited further submits that such allegations can be dealt with in accordance with the Act, and where relevant circumstances warrant, by the Commission. TAB Limited also notes the availability of recourse to the unfair contracts jurisdiction in the Industrial Relations Commission of NSW in Court Session (the NSW Industrial Relations Commission).

- 7.16 The Applicant's second public benefit claim is efficiency and productivity gains resulting from a consultative approach to negotiations. TAB Limited submits that the Applicant has not substantiated this public benefit and needs to identify the incremental gains in efficiency and productivity that result from the conduct sought to be authorised.
- 7.17 The Applicant claims that the proposed arrangements would promote industrial harmony which results in benefits to the public. TAB Limited states that it supports the resolution of disputes by conciliatory means and believes that the resolution of disputes by arbitration will not necessarily increase industrial harmony, and may actually decrease industrial harmony. TAB Limited cites the Commission's statement in the AHA (NSW) Determination that "the most effective dispute resolution process is one which is developed in consultation with all parties involved in the bargaining process and is ultimately implemented with the support of those parties".<sup>9</sup>
- 7.18 TAB Limited adds that the Association does not appear to recognise that only a very small proportion of disputes are not already referable to arbitration, and does not link this small proportion of disputes to the achievement of any public benefit.
- 7.19 The Applicant's fourth public benefit claim relates to lower transaction costs. TAB Limited submits that the DRA relies on arbitration to finally resolve all disputes. TAB Limited concedes that in some instances this may lower transaction costs. However, TAB Limited adds that in other instances, disputes that could have been conciliated successfully might never go to arbitration and higher costs might be incurred.
- 7.20 The final public benefit claimed by the Applicant relates to benefits to Association members and flow on benefits to the community. TAB Limited submits that it values the role played by the Association, and that in the absence of any authorisation it will continue to consult with the Association, as it has in the past. TAB Limited adds that it does not see the existence of the Association as dependent on the authorisation application, evidenced by the role the Association has played since its inception, without authorisation.

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<sup>9</sup> Australian Hotels Association (NSW) A90837 at paragraph 11.28.

## **Anti-competitive detriment**

- 7.21. TAB Limited submits that, as discussed by the Commission in its AHA (NSW) Determination, the anti-competitive effects of collective bargaining arrangements (constituted by lost efficiencies) would be limited if four features were present:
- (a) the current levels of competition is low;
  - (b) participation is voluntary;
  - (c) there are restrictions on coverage, composition and representation of bargaining groups; and
  - (d) collective boycott activity is not permitted.
- 7.22. TAB Limited submits that two of these features are not present in the Associations application. That is:
- there is currently healthy competition between agents; and
  - there are no restrictions on the coverage, composition and representation of bargaining groups.
- 7.23. Beyond the above general comments, TAB Limited made no submission regarding the potential anti-competitive detriment flowing specifically from the proposed arrangements.
- 7.24. In relation to the period for which authorisation is sought, TAB Limited opposes a term longer than 3 years on the basis that no agent has an agreement that has its fixed term expire any later than September 2006. TAB Limited states that if authorisation is granted, then it should be granted only until the time that the last of the agreements expires, i.e. the latter part of 2006.

## **Submission on the Draft Determination**

- 7.25. On 16 April 2004, TAB Limited made a submission to the Commission in response to the draft determination.
- 7.26. The submission concentrated on noting the effects of the draft determination, in particular that the Commission was essentially stating that disputes arising between TAB agents and TAB Limited could be resolved by means other than the DRA. TAB Limited also noted that the draft determination stated that the parties could seek to develop a process for resolving disputes.
- 7.27. In addition to commenting on the effects of the draft determination, TAB Limited suggested changes to certain paragraphs, including a reference the

Commission used in relation to the type of service offered by TAB agents. Such comments have been incorporated into this determination.

- 7.28. The Commission also notes TAB Limited's claim, as expressed in its submission in response to the draft determination, that it was not provided an opportunity to comment on the amended application lodged by the Applicant on 10 March 2004 prior to the draft determination being issued. It should be noted that, as with all non confidential submissions, the amendment to the application was placed on the public register for interested parties to examine. In any event, the Commission did not consider the amendments made by the Applicants to the arrangements for which authorisation was sought, as described in paragraphs 2.5 and 2.6 of this determination, materially changed the nature of the arrangements sought to be authorised. Therefore, the Commission did not consider it necessary to engage in a further round of active public consultation in relation to these amendments prior to issuing a draft determination.
- 7.29. Further, the Commission sees the draft determination as being the primary opportunity for useful comment, as it explains the Commission's preliminary thinking on the application in light of submissions made to it. Interested parties were therefore provided with a substantial opportunity to comment on issues raised in the draft determination, including the amendments made to the application. The Commission notes that TAB Limited did not seek a pre-decision conference to discuss the amendments to the application, or any other concerns.

## **8 Summary of other submissions**

- 8.1. The Commission sought submissions from a wide range of interested parties. In total, three submissions were received. The submission by TAB Limited is discussed in Section 7. The other submissions received by the Commission are summarised below.
- 8.2. Copies of all submissions received are available on the Commission's Public Register.

### **Australian Hotels Association (NSW)**

- 8.3. Spier Consulting on behalf of the AHA (NSW) provided a submission strongly supporting the TAB Agents' application for authorisation and submitted that the Association's application is a natural complement to the AHA (NSW) authorisation, granted on 27 June 2003 (see paragraphs 4.27 to 4.32).
- 8.4. The AHA (NSW) submits that since its authorisation was granted, it has not been able to agree with TAB/SKY on any regime or process for collective negotiation. While the AHA (NSW) considers that it is too early to judge the outcome of the collective negotiation regime, it considers that the first indications are not encouraging and that to date, TAB Limited has not shown any intent to discuss or agree on any changes to existing procedures.
- 8.5. The AHA (NSW) adds that the hostility demonstrated by TAB Limited, such as refusing to acknowledge the authorisation, ignoring representation requests and not making any effort to consider a dispute resolution process, shows how important it is for the TAB agents' authorisation to complement that which was granted to the AHA (NSW).

### **TABCORP Holdings Limited**

- 8.6. TABCORP Holdings Limited ('TABCORP') holds the licenses to conduct wagering and gaming in Victoria.
- 8.7. TABCORP provided a submission opposing the granting of authorisation.
- 8.8. TABCORP in particular disagreed with the Applicants claims regarding the limited scope for agents to compete with one another, suggesting that while TAB Limited (like itself) controls the basic product offering, there is much scope for individual agents to offer differentiated customer experiences through service levels, facilities, promotions and the offering of other products services around the fringe of the core product.
- 8.9. TABCORP contends that the claims of risk of unconscionable conduct are over-stated and that such conduct could be remedied with recourse to the Act.

- 8.10. In regard to lower transaction costs, TABCORP submits that economies of scale can be achieved by agents pooling their resources to seek legal advice on the affect of the New Agreement without needing to enter into the collective negotiations as proposed.
- 8.11. TABCORP claims that the Applicant does not demonstrate that the arrangements proposed would generate benefits that flow on to the community. It claims that in fact the opposite would occur if agents seek to improve their profitability through collective negotiation rather than by offering the best possible customer service.
- 8.12. In conclusion, TABCORP submits that the public benefits outlined by the Applicant are spurious and that the effect of the arrangements would have on competition are understated. Further, the benefits flowing to the community from the current exceptional levels of service provided by agents has not been recognised by the Association.

#### **Submissions following the Draft Determination**

- 8.13. The Commission did not receive any substantive submissions from interested parties following the release of the draft determination. In addition, none of the interested parties, nor the Applicant, sought a pre-decision conference to discuss the draft determination.

## **9 Commission assessment - Markets**

- 9.1. The Commission's evaluation is in accordance with the statutory test outlined in Section 5 of this determination. As required by the test, it is necessary for the Commission to assess and weigh the likely public benefits and detriments flowing from the proposed arrangements.
- 9.2. Defining the markets affected by arrangements proposed for authorisation assists in assessing public benefit and public detriment from any lessening of competition from the arrangements. However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets, as it may be apparent that a net public benefit will or will not arise regardless of this definition.
- 9.3. In this matter, the Commission is of the view that it is not necessary to comprehensively define the relevant markets. In this respect, it is the Commission's view that its assessment will not be overly affected by the possible variations in precise market definition.
- 9.4. In considering this application the Commission has identified two areas of competition, being those associated with:
  - the supply of wagering services to consumers – that is, competition between agents, hotels and clubs and internet and telephone betting services in the provision of services to consumers;
  - the supply of distribution services to TAB Limited – that is, competition between TAB agents and hotels and clubs (with PubTAB and ClubTAB facilities) in relation to the supply of wagering distribution services to TAB Limited.
- 9.5. In its draft determination the Commission stated that, given relevant legislative restrictions, as discussed in paragraphs 4.18-4.20 and 4.21-4.24, the Commission considers the geographic boundary of each of these areas of competition to be, at its broadest, the state of New South Wales. Whether the geographical boundaries of these areas of competition are, in some instances, narrower than State wide is discussed in greater detail below.
- 9.6. In its submission in response to the draft determination, TAB Limited submitted that as telephone and internet betting services can be supplied from anywhere in Australia or overseas, the market for the supply of wagering services to New South Wales consumers should not be regarded as restricted to New South Wales.
- 9.7. In this respect, the Commission accepts that these forms of wagering services can be supplied from outside of New South Wales, which may mean the geographic boundaries of the market for the provision of these services is broader than that defined by the Commission in its draft determination. However, as noted above, the Commission does not consider that its

assessment of the proposed arrangements would be overly affected by possible variation in the precise geographical boundaries of this market.

### **Supply of wagering services to consumers**

- 9.8. The Applicant identified a key area of competition relevant to its application as that for the provision of wagering services to the public.
- 9.9. The Applicant argues that there is limited competition between TAB agents as a result of a number of factors, including restrictions on their ability to compete on price. The Applicant considers that, to a limited extent, TAB agents do compete with hotels and clubs in the provision of wagering services to consumers, but that this competition is limited by the fact that these other outlets provide wagering services as an adjunct to the primary goods and services they provide.
- 9.10. TAB Limited claims that it sees all forms of distribution (i.e. agents, hotels and clubs, and possibly internet and telephone betting) as being substitutable and it will move resources between the various forms of distribution channels to distribute its services by the most efficient means.
- 9.11. In its submission, TAB Limited referred to an NECG report (discussed at paragraph 7.8) which concluded that if a customer was unhappy with the level of service at a TAB agency, the customer would either forgo consumption, use another distribution channel or use another agency, demonstrating the substitutability between TAB agents, and between TAB agents and other suppliers of wagering services.
- 9.12. The Commission considers that it is not entirely clear as to whether there is a high degree of substitutability between the different means of wagering (i.e. between TAB agents, clubs and hotels, and telephone and internet betting) and other gambling products. However, the Commission notes that the Productivity Commission has recognised that, in the past, gambling products have not been highly substitutable, but that gambling products have converged over time and are becoming more substitutable.<sup>10</sup> This is supported by figures provided by TAB Limited which, with specific respect to wagering services, indicate agencies share of wagering services turnover in the last 5 years has declined significantly as a result of significantly increasing turnover to clubs and hotels and to telephone and internet wagering respectively (see paragraph 7.6). This would suggest that consumers consider various forms of wagering distribution to be substitutable.
- 9.13. The Commission also notes the findings of the NECG report (see paragraph 4.20) that agencies cannot compete on price, but may compete on the non-

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<sup>10</sup> Productivity Commission (1999), *Australia's Gambling Industries: Inquiry Report*.

price characteristics. That report noted that if agencies compete on non-price factors in order to attract greater custom, this enables the agency to gain a larger turnover, resulting in higher income (through more commission) and regular, sustained custom.

- 9.14. On the information available, it would appear that each individual TAB agent competes in the market for the provision of totalizator services to consumers with those TAB agents within reasonably close geographical proximity.
- 9.15. The Commission is also of the view that TAB agents compete with hotels and clubs with PubTAB and ClubTAB facilities in reasonably close geographical proximity, and with telephone and internet wagering services in the provision of wagering services to consumers.
- 9.16. The Commission accepts that while TAB Limited designates the geographic location of each TAB agency, which may reduce to some extent the level of competition between those agents not in reasonably close geographic proximity to each other, competition does exist between TAB agents, clubs and hotels with ClubTAB and PubTAB facilities, and telephone and internet wagering services, to the extent that consumers may 'shop around' in selecting an agent in order to satisfy their needs on non-price factors, such as proximity to work/home and additional services offered by an agent.
- 9.17. The Commission considers it is also important to note that regardless of how broadly or narrowly the market is defined there can be no price competition between TAB agents, and clubs and hotels with ClubTAB and PubTAB facilities.
- 9.18. With respect to gambling products more broadly, the Commission considers, based on the information available to it, that there is likely to be some competition between wagering service providers and other providers of gambling services. However, the Commission is not able to draw any conclusions, based on the information available to it, regarding the degree of substitutability of wagering and other gambling services.

#### **Supply of distribution services to TAB Limited**

- 9.19. The Commission notes that there are essentially two areas of competition in the market for the supply of distribution services to TAB Limited. Firstly, competition for appointment to supply distribution services to TAB Limited in the first instance, and secondly, competition between appointed suppliers in the actual provision of distribution services.
- 9.20. TAB Limited submits that TAB agents, hotels and clubs (which have PubTAB and ClubTAB facilities) are all agents of TAB Limited in respect of the retail supply of wagering services to consumers. In this respect, it submits that TAB agents, to at least some extent, compete with hotels and clubs in the supply of distribution services to TAB Limited.

- 9.21. The Applicant states that as the level of competition between TAB agents on one hand and hotels and clubs on the other for appointment as agents of TAB Limited is low, and that it is similarly low between TAB agents, hotels and clubs in the provision of distribution services to TAB Limited.
- 9.22. With respect to competition to be appointed as a supplier of distribution services in the first instance, the Commission notes that TAB agents essentially compete amongst themselves, and with other potential agents. Existing and potential agents then compete for the right to operate that agency. New TAB agents are appointed as vacancies occur in the agency network. TAB Limited calls for expressions of interest from people wishing to manage the vacant agency. The expressions of interest are evaluated by TAB Limited based on certain criteria and the most suitable applicant will be selected.<sup>11</sup> In essence, TAB Limited makes the initial decision as to when and where it will establish a new agency.
- 9.23. There may be some, limited, scope for competition between TAB agents and other suppliers of distribution services in so far as in making a decision on where and when to establish a new agency TAB Limited will take account of whether an agency is the most appropriate form of distribution channel in the circumstances. That is to say, a decision to establish a new agency will be affected by the presence of, and efficiency of, other agencies and PubTAB and ClubTAB facilities in the area, the potential for future PubTAB and ClubTAB facilities in the area, and which combination of distribution channels best suits TAB Limited. In this respect, the Commission notes TAB Limited's submission that it sees all forms of distribution as being substitutable and it will move resources between the various forms of distribution channels to distribute its services by the most efficient means.
- 9.24. With respect to competition between appointed suppliers in the actual provision of distribution services, again, the Commission notes TAB Limited's submission that it sees all forms of distribution as being substitutable. From the service suppliers perspective, providing wagering services to consumers and supplying distribution services to TAB Limited are two sides of a single transaction. In competing to supply wagering services to consumers, suppliers, be they TAB agents, hotels or clubs, are in effect competing for the turnover based commission paid by TAB Limited in respect of distributing wagering services on its behalf.

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<sup>11</sup> TAB Limited, [TAB Agency Info](#), page 4.

## **10 Commission assessment – The future with or without**

- 10.1. The Commission uses the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the arrangements proposed to be authorised.<sup>12</sup>
- 10.2. Under this test, the Commission compares the public benefit and anti-competitive detriment generated by the arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the Commission to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is often referred to as the counterfactual.

### **The future situation without the proposed arrangements (the counterfactual)**

- 10.3. The Applicant submits that absent the proposed collective bargaining arrangements, the position likely to occur is that all TAB agents will be compelled to enter into arrangements with TAB Limited on the terms and conditions of the current New Agreement.
- 10.4. The Commission notes that information provided by TAB Limited appears to suggest that the New Agreement has arisen, at least to some extent, from negotiations between the TAB agents, the Association and TAB Limited which have occurred in previous years.
- 10.5. TAB Limited has submitted that it consults with the Association and TAB agents as a group in developing agreements and that it considers each request from an individual TAB agent to vary the terms of an agreement on its merits.
- 10.6. The Commission notes that the Applicant may have concerns (absent of authorisation) regarding its ability to have input into TAB agents contract negotiations. These concerns relate to the competition provisions of the Act which prohibit, for example, persons in competition with each other engaging a common representative to specifically negotiate provisions in contracts that may have an anti-competitive purpose or effect (e.g. a common fee).
- 10.7. It is common for small businesses to have a common industry representative body to facilitate exchange of information and discussion of issues common to participants in the industry. The Commission supports such representations, particularly in respect of small businesses, when, for example, this is likely to lead to better informed markets.

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<sup>12</sup> See, for example, *Re Australasian Performing Rights Association* (1999) ATPR ¶41-701.

- 10.8. The Commission considers that, up to a certain point in the negotiation process, the Association contributing to the relationship between its members and TAB Limited does not necessarily give rise to concerns about possible contraventions of the Act. Indeed, an industry association such as the TAB Agents' Association can represent and assist its members in matters such as ensuring its members have access to appropriate legal and/or financial services, or even making representations to major suppliers in relation to issues of concern to members, without the need for authorisation.
- 10.9. The Commission considers that the most likely situation without the proposed arrangements is the current situation, namely, the continued offering of largely standard form contracts by TAB Limited to TAB agents, with limited input from the Association on terms and conditions from time to time. Specifically, the situation in the short term is likely to be that TAB agents will enter into arrangements with TAB Limited on the terms and conditions of the current New Agreement with limited scope for individual agents to request variations to the terms of the New Agreement.<sup>13</sup>
- 10.10. With respect to dispute resolution mechanisms, again, the Commission considers that the likely situation without the proposed arrangements is that the existing dispute resolution process will continue to be employed. The Commission notes that the Association and TAB Limited have presented different views as to the effectiveness and scope of the existing dispute resolution processes. This is discussed in greater detail at paragraph 12.32.

### **The future situation under the proposed arrangements**

- 10.11. In identifying the likely situation under the proposed arrangements the Commission is mindful of the evidence provided to it which suggests that negotiations of some type between the Association and TAB Limited have been on-going for some time.
- 10.12. However, as discussed above, the scope of any such negotiation would, absent of authorisation, necessarily be fairly limited to ensure that any such negotiation does not raise concerns under the Act.
- 10.13. The Association has submitted that the likely situation with authorisation is that it and its members will be more likely to influence the terms and conditions contained within contracts between its members and TAB Limited. TAB Limited submits that any assessment of the likely situation with authorisation should include consideration of the consultation which already occurs between it and the Association.

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<sup>13</sup> The Commission is only aware of one such request in relation to the New Agreement which has been accepted by TAB Limited. The Commission is not aware if any such requests have been denied by TAB Limited.

- 10.14. The Application for authorisation concerns two related forms of agreements. The first (collective negotiation) seeks authorisation for competing TAB agents to collectively negotiate (through the Association) terms and conditions with TAB Limited. The second (a dispute resolution agreement) is essentially a sub set of the first agreement whereby the Association would act on behalf of members involved in disputes with TAB Limited. This arrangement may only raise concerns under the Act where there was an arrangement between TAB agents that the Association act on their behalf in disputes with TAB Limited.
- 10.15. The Commission notes that there is some similarity between the present arrangements and those sought to be authorised. Both involve the Association providing some degree of input into what is essentially a standard form contract offered by TAB Limited to its agents. However, the application for authorisation is for conduct significantly different to that which currently occurs. Specifically, the Association seeks authorisation on behalf of its members, for an agreement between its members, for it to:
- collectively negotiate on behalf of its members with TAB Limited, potentially all terms and conditions (including price) of the provision of services by its members to TAB Limited; and
  - participate in the process for resolving disputes between TAB Limited and TAB agents.
- 10.16. The Commission considers that the most likely situation if the proposed arrangements are authorised is one where TAB agents, through the Association, will have greater input, or at least seek to have such input, into the terms and conditions of what are currently essentially standard form contracts between TAB Limited and TAB agents. While contracts between TAB Limited and TAB agents are likely to continue to be essentially standard form contracts if the Association negotiates on behalf of its members,<sup>14</sup> the terms and conditions of these contracts may vary, possibly significantly, as a result of TAB agents negotiating collectively through the Association compared to the current situation where contracts are essentially offered to individual TAB agents on a take it or leave it basis.
- 10.17. With respect to dispute resolution mechanisms, again, the Commission considers that the likely situation if the proposed arrangements are authorised is that the Association will be able to provide greater input, and assistance to TAB agents who may be involved in a dispute with TAB Limited.

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<sup>14</sup> The Commission would expect that the same or a similar, limited, scope for individual agents to negotiate variations on the standard form agreement with TAB Limited as is currently available to remain.

## **11 Commission assessment - Effect on competition**

- 11.1. As discussed in Section 5, the Commission must assess the extent to which the proposed arrangements give rise to detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.

### **The Applicant's submissions as to anti-competitive effect**

- 11.2. The Applicant notes the Commission's view in the AHA (NSW) Determination that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies is likely to be limited where the following features are present:
- (a) the current levels of competition are low;
  - (b) there is voluntary participation in the arrangements;
  - (c) there are restrictions on the coverage, composition and representation of bargaining groups; and
  - (d) there is no boycott activity.

### **TAB Limited's submission as to anti-competitive effect**

- 11.3. TAB Limited also referred to the above four features and stated that in respect of the current application, only two of the four features are present.
- 11.4. TAB Limited submits that there is healthy competition between TAB agents and that the proposed arrangements do not seek to limit the coverage, composition and representation of bargaining groups.

### **Commission assessment of anti-competitive effect**

- 11.5. With respect to the four features noted directly above, which the Commission has identified in the past as limiting any anti-competitive effect of collective bargaining arrangements, as they relate to the proposed arrangements, the Commission notes the following:
- The current level of competition between those parties seeking to collectively negotiate, with respect to those matters on which they are seeking to collectively negotiate, is very low. That is to say, agents are currently offered what is effectively a standard contract with very limited capacity for individual agents to vary the terms of the agreement. Consequently, competition between agents on the terms and conditions of services supplied to TAB Limited is limited. To the extent that there is scope for individual agents to vary the terms of such agreements, it is not proposed that this scope be removed or reduced under the proposed agreements.

- The proposed arrangements are voluntary. Neither TAB Limited or any individual TAB agent would be compelled to participate in the proposed arrangements.
- The coverage, composition and representation of the bargaining group is somewhat restricted. The Commission notes TAB Limited assertions that it sees all forms of distribution (i.e. agents, hotels and clubs, and possibly internet and telephone betting) as being substitutable and that it moves resources between the various forms of distribution channels to distribute its services by the most efficient means. The Commission also notes that only 38% of distribution of wagering services is through TAB agents, with the remainder being through hotels, clubs, and internet and telephone betting. Consequently, based on current figures, the composition of the proposed bargaining group is limited to, at a maximum, 38% of off-course wagering distribution services in NSW.
- It is not proposed that any collective boycott activity occur.

*Effect on competition in the relevant markets*

11.6. As noted in Section 9, in considering the current application the Commission has identified two areas of competition, being those associated with:

- the supply of wagering services to consumers – that is, competition between agents, hotels and clubs and internet and telephone betting services in the provision of services to consumers;
- the supply of distribution services to TAB Limited – that is, competition between TAB agents and hotels and clubs (with PubTAB and ClubTAB facilities) in relation to the supply of wagering distribution services to TAB Limited.

11.7. The Commission’s views on the effect on competition of the proposed arrangements in each of these areas of competition are discussed below.

*Supply of distribution services to TAB Limited*

11.8. With respect to the market for the supply of distribution services to TAB Limited, the Commission notes that authorisation is not sought to collectively bargain for the right to acquire these services. Rather, authorisation is sought to collectively negotiate the (generally standard) terms on which the right to supply such services will be acquired by all agents.

11.9. The Commission notes that the rights to supply these services, and the terms on which they will be supplied, are already subject to standard terms, generally determined by TAB Limited. While the proposed arrangements may result in a move from one set of standard terms to another, they are unlikely to reduce competition between agents on negotiating those terms,

and as such competition is already extremely limited. The Commission would expect that the same or a similar, limited, scope for individual agents to negotiate variations on the standard form agreement with TAB Limited as is currently available to remain. Therefore, the only likely consequence of the proposed arrangements in this context is that TAB agents may, by negotiating collectively, be able to negotiate more favourable (common, standard) terms than they are currently offered.

- 11.10. Consequently, the Commission does not consider that the proposed arrangements detrimentally affect the level of competition between agents and potential agents to acquire contracts from TAB Limited or competition between TAB agents, hotels and clubs for the ongoing supply of distribution services. Agents will still compete to acquire contracts offered by TAB Limited on standard terms. They will also continue to compete amongst themselves, and with hotels and clubs, and internet and telephone wagering services for the ongoing supply of distribution services to TAB Limited. If anything, if agents are collectively able to negotiate more favourable terms than they currently enjoy, this is likely to increase competition for these contracts as they would be more attractive to all agents.

*Supply of wagering services to consumers*

- 11.11. A major feature of most collectively negotiated agreements is an agreement as to the (generally common across the bargaining group) price to be paid to the group. Arrangements that have the purpose or likely effect of fixing, controlling or maintaining the price of goods supplied or acquired are deemed by the Act to substantially lessen competition.<sup>15</sup> Generally, collective negotiation arrangements that set the terms (including price) on which services are acquired or provided are likely to lessen competition relative to a situation where the acquirers or providers individually negotiate their own terms.
- 11.12. The Commission is of the view that even where collective negotiation arrangements are undertaken in dealings with parties with a substantial degree of market power, there still exists the potential for the arrangements to have some anti-competitive effect. Specifically, where such negotiations result in a fee increase this may result in upwards pressure on retail prices.
- 11.13. The Commission has accepted in the past that where collective negotiation results in an increased price being paid to the bargaining group, where there is capacity for any such increase to be passed on in the form of higher prices to consumers, this could constitute an anti-competitive detriment.
- 11.14. However, the Commission notes that in this instance, there is no price competition between suppliers of wagering services to the public. As discussed at paragraph 4.19, government legislation regulates returns to

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<sup>15</sup> Section 45A of the Act.

consumers.<sup>16</sup> Consequently, assuming agents were, through bargaining collectively, able to negotiate a higher price from TAB Limited than they currently receive, any such increase would not be reflected in the price paid by consumers for these services. Rather, the cost of any increase in the price paid to agents would be borne by TAB Limited.

- 11.15. However, the possible anti-competitive effects of agreements as to price are not limited to the potential for such agreements to be reflected in higher prices to consumers. Where the cost of any increase in price the collective bargaining group is able to negotiate is borne by the other party to the negotiations, this may result in possible resource allocation inefficiencies. That is, suppliers, when faced with artificially lower returns, may choose to direct their resources elsewhere to some extent.
- 11.16. There is no specific evidence in this instance that, presuming TAB agents were able to negotiate a higher commission than they currently receive through bargaining collectively, this would result in TAB redirecting resources to, for example its PubTAB and ClubTAB operations at the expense of TAB agents. However, the Commission acknowledges that any fee increase as a result of collective bargaining would be a distortion of the current market determined fee. This could potentially have some effect on resource allocation by TAB Limited.
- 11.17. While the Commission considers that the anti-competitive detriment generated by any capacity for TAB agents to negotiate a common (presumably higher) commission with TAB Limited as a result of the proposed arrangements is limited, collective negotiation that sets other terms on which services are acquired are generally also likely to lessen competition relative to a situation where the members of the bargaining group individually negotiate their own terms (to the extent they can and do).
- 11.18. For example, were TAB agents able to negotiate a collective agreement on standard terms this may limit the opportunity for TAB agents to differentiate their agencies and compete on elements such as standards of service provided to customers resulting in a reduction in service levels compared to what they might otherwise be. In economic jargon, the quality adjusted price to consumers of the service would rise. However, as noted above, TAB agents are already engaged on standard terms, generally determined by TAB Limited.
- 11.19. The Commission notes TAB Limited's submission that while it ensures that certain minimum standards are maintained by TAB agents, it otherwise provides agents with discretion in the manner in which they provide wagering services. For example, TAB Limited submits that as agents are free to choose staffing levels; form guides; visual displays; level of marketing; customer facilities; extended trading hours; and customer competitions and

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<sup>16</sup> I.e. TAB Limited's 'take out rate' is capped.

promotions, agents compete with each other in relation to these aspects of the provision of wagering services.

- 11.20. While the proposed arrangements may result in a move from one set of standard terms to another they are unlikely to reduce competition between agents on the standard of service provided to the community. To the extent that standard form agreements do limit competition on service standards, such limits are already in place in the form of the current standard form agreement. To the extent that there is, as TAB Limited submits, competition between agents in the manner in which they provide wagering services under the current agreement, moving from one set of standard terms to another, is unlikely, in itself, to impact significantly on such competition.
- 11.21. In addition, the Commission notes that TAB agents compete with both clubs and hotels and, to a lesser extent, internet and telephone betting services, in the provision of wagering services to the public. This is likely to constrain agents ability to reduce service standards. To the extent that such service standards might be reduced, consumers are free to, and presumably would, chose to avail themselves of the services of other wagering services distributors.<sup>17</sup> The extent to which the proposed arrangements may actually increase service standards is discussed at paragraphs 12.19 – 12.29.
- 11.22. Consequently, the Commission considers the likely anti-competitive detriment generated by the proposed arrangements, with respect to both price and quality of wagering services offered to consumers, is extremely limited and very likely negligible.

### **Conclusion on the anti-competitive effect of proposed arrangements**

- 11.23. For the reasons outlined above, the Commission considers the anti-competitive detriment generated by the proposed arrangements to be negligible. In particular, the Commission does not consider that the proposed arrangements will affect the price of wagering services provided to the public given that the prices are already regulated by government legislation. Further, the Commission does not consider that the proposed arrangements will reduce competition between TAB agents on service levels to consumers as the proposed arrangements do not restrict TAB agents' ability to compete on service levels to any greater extent than the current standard form agreement which TAB Limited offers to its agents.
- 11.24. The Commission does not consider that the proposed arrangements detrimentally effect competition between agents and potential agents to acquire contracts from TAB Limited or between agents and hotels and clubs for the supply of wagering services from TAB Limited. Again, the

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<sup>17</sup> Whether the proposed arrangements might, given this competitive constraint, actually improve TAB agents services standards in discussed in Section 12.

Commission does not consider that the proposed arrangements restrict TAB agents' ability to compete in these areas any more than the current standard form agreements.

## **12 Commission assessment - Public benefits**

- 12.1. In order to grant authorisation, the Commission must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.
- 12.2. There must also be a nexus between the claimed public benefits and the arrangements for which authorisation is sought. In other words, the benefit must flow from the proposed arrangements.
- 12.3. The Commission's view on each of the public benefits which may flow from the proposed arrangements is discussed below.

### **Improved bargaining power for TAB agents**

- 12.4. Arguments based on increasing bargaining power essentially relate to a change in the power relativities of the parties to the proposed agreement. An increase in bargaining power, raised in the authorisation context, typically involves one party attempting to improve its bargaining position relative to another, for example through a collective arrangement such as that proposed here.
- 12.5. The Commission does not focus on whether a mere change in the amount of bargaining power is, in itself, a public benefit. Rather, the Commission will focus on the likely outcomes resulting from the change in bargaining position flowing from the proposed arrangement for which authorisation is sought. It is these likely outcomes which are essential to the net public benefit test.
- 12.6. The Commission recognises that there are a combination of factors which result in TAB agents having very little bargaining power compared with TAB Limited. For example, TAB Limited is the monopoly supplier of the service which TAB agents acquire, that is, the right to supply wagering services to consumers. Consequently, TAB agents are compelled to either accept the terms and conditions of supply offered by TAB Limited, or, cease to operate as suppliers of wagering services to the public. In contrast, TAB Limited has other distribution channels through which it sells the right to supply wagering services to the public, specifically, clubs and hotels as well as its own internet and telephone betting services. The Commission notes that only approximately 38% of all wagering services to the public are supplied through TAB agents, and that this figure is trending downwards. TAB agents' weak bargaining position relative to that of TAB Limited is exacerbated by the fact that wagering services to consumers is the only product TAB agents supply. Consequently, failure to reach an agreement on satisfactory terms with TAB Limited would mean that not only would agents cease to supply wagering services to the public, they would cease to operate as businesses altogether.

- 12.7. In addition, TAB Limited is a large, well resourced business with significant commercial and negotiating expertise. In contrast, TAB agents are, in general, small businesses without the resources or expertise to engage in effective negotiation with businesses with the size and negotiating experience of TAB Limited.
- 12.8. The inevitable consequence of such an imbalance in bargaining positions is, generally speaking, the offering by the monopoly supplier of standard form contracts, on terms dictated by, and likely to be to the advantage of, the party offering the contract. That is not to say that the other party will always be at a disadvantage as a result, but rather that, as with any commercial arrangement, the monopoly supplier offering the contract will seek to secure the most favourable deal for itself. Such contracts would generally be offered on a ‘take it or leave it’ basis, with limited if any scope by the acquirer to have input into the terms of the contract. The Commission considers this an accurate summation of the current situation with respect to agreements entered into between TAB Limited and TAB agents.
- 12.9. As noted above, one way in which small businesses can seek to redress such a bargaining power imbalance is to bargain collectively. By bargaining collectively, small businesses may be able to achieve competitive parity with the big business and realise, what they would consider to be, more appropriate commercial outcomes, through, for instance, greater opportunity for input into contracts.
- 12.10. The Commission notes that there has been much debate recently about whether redressing a bargaining imbalance between large and small businesses constitutes a public benefit. For example, the Federal Government recently commissioned a review of some key provisions of the Act (the Dawson Review). Specifically, the Dawson Committee was directed to review the operation of the competition and authorisation provisions of the Act to determine whether they, amongst other things:
- provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power.<sup>18</sup>
- 12.11. The report of the Dawson Committee noted that:
- Collective bargaining at one level may lessen competition but, at another level, provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business.<sup>19</sup>
- 12.12. The Dawson Committee went on to recommend that a collective bargaining notification scheme be introduced to afford small businesses a speedier and simpler means than the current authorisation process for obtaining immunity

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<sup>18</sup> *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

<sup>19</sup> *Ibid*, page 115.

from the Act to collectively negotiate with big business. The Commission notes that while the necessary legislative amendment to enact this recommendation has yet to be finalised, the Dawson Committee's propositions and recommendations with respect to collective bargaining by small businesses with large businesses were supported by both the Federal Government and Federal Opposition.

- 12.13. Similarly, the recently concluded Senate Economic References Committee report into the effectiveness of the Act in protecting small businesses endorsed the Dawson Committee's view that in some circumstances it may be in the public interest to enable small businesses to negotiate more effectively with big business.<sup>20</sup> Again, the Senate Committee's view on this issue was unanimously supported by participating Senators' from all sides of Parliament.
- 12.14. It appears that the weight of public opinion, and in particular, the conviction of all sides of Parliament, to the extent one can draw this inference from responses to the Dawson review and from the Senate Committee report, is that provided that the degree of bargaining power conferred is not excessive, in certain circumstances enabling small businesses to negotiate more effectively with larger businesses through collective negotiation may, in itself, constitute a public benefit.
- 12.15. In this respect, the Commission notes the comments of the Australian Competition Tribunal in the QCMA case:
- "[I]t is clear that it could be possible to argue in some cases that a benefit to the members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable."*<sup>21</sup>
- 12.16. The Commission considers that, given its conclusion that the anti-competitive detriment generated by these proposed arrangements is extremely limited, and the inherently weak bargaining position of TAB agents relative to TAB Limited as discussed above, this is one such instance.
- 12.17. In the current circumstances, the Commission accepts that the unequal bargaining power that exists between TAB agents and TAB Limited, the extensive use of standard form contracts and the infrequency of negotiations with individual TAB agents to vary terms of standard contracts does give rise to some barriers to effective input into contractual terms and conditions.

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<sup>20</sup> The Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Businesses*, March 2004, p58.

<sup>21</sup> *Queensland Co-operative Milling Association Ltd. (QCMA) and Defiance Holdings Ltd* (1976), ATPR 40-012, at 17,743.

- 12.18. The Commission also accept that the proposed collective bargaining arrangements would provide a greater opportunity for TAB agents, through their association, to achieve some competitive parity in negotiations with TAB Limited and realise, what they would consider to be, more appropriate commercial outcomes, through, for instances, having greater input into contracts, which, in light of the above discussion, the Commission considers, does generate a public benefit.

### **Improved quality of service**

- 12.19. As noted in Section 11, the Commission does not considers that if TAB agents were able to negotiate higher commission rates for TAB Limited these fees increases would be passed on to consumers in the form of higher prices. Rather, the Commission considers that this would merely result in a wealth transfer from one group to the other, i.e. from TAB Limited to TAB agents.
- 12.20. The Commission notes that in this instance, the wealth transfer would be from a monopoly supplier of the market to provide wagering distribution services to businesses operating in a competitive market for the supply of wagering services to the public. In effect, revenue generated by TAB agents would be increased at the expense of TAB Limited.
- 12.21. Given the competitive market in which TAB agents operate, it would be expected that, at least some of, the benefits of any increase in commission rates and management fees as a result of collective bargaining would be passed on to consumers. TAB Limited in contrast, operates as a regulated monopoly. As such, the same competitive pressure for it to pass on to consumers any monopoly rents it is able to extract as a consequence of this position does not exist.
- 12.22. The Commission notes that as a result of regulatory constraints there is no price competition between TAB agents, and clubs and hotels with ClubTAB and PubTAB facilities. Consequently, the standard economic argument that a cost saving, or in this instance an increase in revenue, to a supplier of services in a competitive market is likely, through the competitive process, be competed away in the form of lower prices to consumers, does not apply.
- 12.23. However, as noted in Section 11, TAB agents do compete, both amongst themselves, and with other forms of wagering distribution, on service levels.
- 12.24. TAB Limited submits that as agents are free to choose staffing levels; form guides; visual displays; level of marketing; customer facilities; extended trading hours; and customer competitions and promotions, agents compete with each other in relation to these aspects of the provision of wagering services.
- 12.25. In addition, the Commission notes that TAB agents compete with both clubs and hotels and, to a lesser extent, internet and telephone betting services, in

the provision of wagering services to the public. The Commission notes that TAB agents' share of this market has declined steadily over the past five years. Given that agents, and the other providers of these services, do not compete on price, this decline in market share is presumably a result of a combination of factors including:

- The increased prevalence in the market of other forms of service providers;
- A reduction in the relative quality of service offered by agents compared to other providers,<sup>22</sup> and
- Shifts in consumer preferences in favour of other forms of wagering services.

12.26. With respect to the third of these factors, it appears that consumer preferences are moving away from the traditional betting shop wagering experience offered by TAB agents towards the convenience of internet and telephone wagering and the provision of wagering services as part of a bundled package with alcohol service and other hotel and club amenities. However, it may also be that part of the decline in TAB agents' market share is explained by other forms of distribution of wagering services attracting new customers into the industry or encouraging existing customers to wager more frequently or in larger volumes.

12.27. In any event, it would appear that the attractiveness to consumers of traditional betting shop wagering, relative to other forms of wagering is declining. As would be the case in any competitive market, it would be expected that additional revenue accruing to TAB agents, from whatever source, would, at least to some extent, be dedicated to improving their competitiveness relative to other providers of wagering services to the community. In this instance, given the restrictions on price competition, by improving that element of the provision of wagering services on which they are able to compete, standards of service.

12.28. In effect, to the extent that TAB agents are able to negotiate higher commission rates or management fees through increasing their bargaining power this would result in a wealth transfer from TAB Limited to TAB agents, and ultimately through the competitive market process, from TAB agents through to consumers in terms of improved quality of service. The effect would be a decrease in the quality adjusted price of wagering services to consumers, which the Commission considers constitutes a public benefit.

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<sup>22</sup> This is not necessarily to suggest that there has been a decline in the absolute standard of services offered by TAB agents, but rather that the levels of service offered by other distributors has improved relative to TAB agents.

- 12.29. However, as discussed in greater detail in Section 13, the extent to which TAB agents may be able to negotiate more favourable terms for themselves by collectively bargaining with TAB Limited is questionable. Consequently, while the benefits of any increase in commission rates or management fees to TAB agents as a result of collectively bargaining are, at least in part, likely to be passed on to consumers, in the form of improved levels of service, the Commission considers that the quantum of any increase in commission rates or managements fees is likely to be limited. The public benefit, in the form of improved service levels, flowing from the proposed arrangements are therefore likely to be similarly limited.

### **Reduced Risk of Unconscionable Conduct**

- 12.30. The Applicant submits that under the terms of the New Agreement, TAB Limited can unilaterally amend the ‘Manual’ provided to agents, which includes any communications manual, operation manual, or any other manual or other instructions issued by TAB Limited to TAB agents.
- 12.31. The Applicant claims that the ability for TAB Limited to unilaterally amend various manuals may have serious repercussions to the profitability of an agent’s business.
- 12.32. In its first submission, the Applicant states that the dispute resolution procedure initially offered to TAB agents as part of the New Agreement did not provide sufficient redress for aggrieved agents. The Applicant adds that absent a dispute resolution mechanism in the New Agreement which is binding on both parties, an agent would have no ability to address any potential issues arising from TAB Limited’s unilateral right to affect an agent’s business. In a supplementary submission, the Applicant notes that TAB Limited had implemented an alternative dispute resolution clause in its New Agreement and had sent this variation to each agent for his or her consent.
- 12.33. The Applicant claims that the combination of the ability to make unilateral amendments, the lack of strong dispute resolution clauses and the New Agreement itself increases TAB Limited’s ability to engage in unconscionable conduct.
- 12.34. It may be argued that collective negotiation will strengthen the bargaining power of the Association’s members and may increase their input into the contracts negotiated with TAB Limited, thus reducing the likelihood of harsh, unfair or unconscionable contractual terms and producing an outcome more likely to be in the interests of the parties themselves and the public.
- 12.35. However, in assessing whether a benefit flows from the proposed arrangements in the form of reducing the risk of unconscionable conduct is not an easy process. There are provisions in the Act which prohibit

unconscionable conduct and provide remedies where a corporation is found to have breached these provisions.

- 12.36. While the failure to negotiate on the part of a business with significant bargaining power may well be relevant in considering claims of unconscionable conduct, the circumstances of any one matter needs to be considered on a case-by-case basis.
- 12.37. The Commission has not been provided with any evidence to suggest that the New Agreement has arisen as a result of unconscionable dealings by TAB Limited. Nor has the Commission been provided with any evidence to suggest that TAB Limited has acted unconscionably in the past when dealing with either the Association or its members.
- 12.38. The Commission considers that any public benefit claim to the effect that collective negotiation would reduce the risk of unconscionable conduct is difficult to substantiate in the absence of any evidence to the contrary. However, this is not to say that there does not exist public benefits flowing from greater agent input into contractual terms and conditions.

### **Efficiency gains**

- 12.39. The Applicant submits that collective negotiation is likely to lead to contractual arrangements being included or altered based upon efficiency and productivity improvements within agencies and TAB Limited. It was further submitted that there has been a history of efficiency and productivity gains where a consultative approach has been used. The Applicant contends that these efficiency and productivity gains will not occur in the future absent authorisation because TAB Limited has indicated (by its actions) that it will no longer adopt a collaborative approach.
- 12.40. The Commission has previously stated that where applicants can demonstrate that:
- there currently exists a barrier to their effective input into contractual terms and conditions;
  - collective negotiation arrangements could remove some of those barriers; and
  - that the resulting input into contractual terms and conditions could lead to increased efficiencies,

the Commission may accept such efficiency benefits to be public benefits flowing from the proposed collective negotiation arrangements.

- 12.41. In the present circumstances, there is evidence that unequal bargaining power exists between agents and TAB Limited, that there is extensive use of standard form contracts, and some reluctance on the part of TAB Limited to

negotiate with individual agents all of which result in some barriers to effective input into contractual terms and conditions.

- 12.42. The Commission accepts that collective negotiation agreements may provide a greater opportunity for TAB agents, through the Association, to provide input into those contractual terms and conditions. To the extent that this would occur, the Commission considers that some benefits are likely to flow from the arrangements.
- 12.43. However, the Commission does not accept that absent of the proposed arrangements the efficiency and productivity gains which have been achieved in the past will not be available. To the extent that efficiency and productivity gains have been achieved in the past, it would be in TAB Limited's commercial interest to ensure that future contracts, even where the terms of those contracts are determined unilaterally, provide for such efficiency and productivity gains to continue to be realised.
- 12.44. In any event, the Commission notes that the efficiency and productivity gains referred to in the Applicant's submission are all factors which one could expect an industry association, such as the Association, to facilitate the arrangement of, or engage in, a consultative approach with a body such as TAB Limited about, without the need for authorisation. Again, given it is in TAB Limited's commercial interest to do so, the Commission would expect such an approach to continue into the future, with respect to the identification of future potential productivity and efficiency gains, absent of authorisation.

### **Industrial harmony**

- 12.45. The Applicant submits that, as an industry association, it does, from time to time, need to concern itself with industrial issues arising between its members and TAB Limited, which may involve seeking recourse from the Industrial Relations Commission. The Applicant added that during the life of the original Dispute Resolution Agreement (1996 to June 2002) the Association and its members did not have to resort to the Industrial Relations Commission to resolve any dispute. The Applicant noted however that since 2002 the involvement of the Industrial Relations Commission been necessary on two occasions.<sup>23</sup>
- 12.46. It was also noted that approximately 16 disputes arose over the period 1996 to 2002, all of which were resolved at varying stages in the dispute resolution process under the DRA.
- 12.47. Under the New Agreement, a dispute resolution procedure does exist, however, both TAB Limited and the Association have differing views as to the effectiveness of this dispute resolution process.

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<sup>23</sup> The Association did not provide the Commission with any information as to why these two matters were before the Industrial Relations Committee.

- 12.48. The Applicant claims that if the proposed arrangements are authorised, and the DRA reintroduced, members of the Association will be less likely to need to have recourse to the Industrial Relations Commission in order to resolve disputes that may arise between TAB agents and TAB Limited.
- 12.49. TAB Limited agrees that a conciliatory approach is preferred, but does not consider that the proposed DRA will necessarily increase industrial harmony. TAB Limited considers that in addressing the public benefit claims made by the Association regarding dispute resolution processes, the Association has failed to consider the amended dispute resolution clause in the New Agreement.
- 12.50. The Association acknowledged that the New Agreement contains a dispute resolution clause but considers there are serious deficiencies in the dispute resolution clause in the New Agreement because it only allows matters in relation to the interpretation and enforcement of express terms of the New Agreement be referred to arbitration.
- 12.51. The Commission notes that the dispute resolution clause contained in the New Agreement enables parties, if dissatisfied with the outcome of any attempt to resolve a dispute by facilitative means, to seek to resolve the dispute by whatever means possible.
- 12.52. Generally, the Commission is of the view that the most effective dispute resolution process is one which is developed in consultation with all parties involved in the bargaining process and is ultimately implemented with the support of all parties.
- 12.53. However, the Commission considers that given the lack of information concerning industrial problems, and given that the New Agreement does contain a dispute resolution mechanism which enables parties to have recourse to other means should the current dispute resolution process break down, it is difficult to conclude that the proposed arrangements would result in public benefits in the form of industrial harmony as claimed by the Applicant.
- 12.54. However, the Commission does consider that having the Association participate in the process of resolving disputes on behalf of its members is likely, for reasons analogous to those discussed above in relation to the Commission's assessment of the public benefits of improving bargaining power of TAB agents, to result in greater competitive parity in the process for resolving disputes between TAB agents and TAB Limited and greater input by TAB agents into both, the development of any alternative dispute resolution process, and in to the terms and conditions on which any actual dispute between TAB Limited and TAB agents is resolved. The Commission considers that this constitutes a public benefit.

- 12.55. In this respect, the Commission notes that, if collective bargaining was authorised, it would be open to the parties to develop a dispute resolution process which could form a condition of any negotiated agreement, taking into account what each party hopes to achieve by such a process. Such a process could take a form similar to that in the New Agreement, similar to that contained in the DRA, or something altogether different again.

### **Lower transaction costs**

- 12.56. The Applicant submits that if the conduct is authorised, members of the Association will benefit from transaction cost savings in relation to costs associated with, for example, obtaining legal and financial advice when entering into an agreement with TAB Limited, as members will no longer need to negotiate with TAB Limited on an individual basis.
- 12.57. The Commission notes that the only example of potential transaction cost savings provided related to potential savings where a member pursued legal action in order to resolve a dispute. The Commission did not receive any evidence of the current expenditure of the Association's members on professional advice sought in relation to establishing, renewing or cancelling a contract with TAB Limited.
- 12.58. In this respect, the Applicant claims that transaction cost savings may be realised through the proposed DRA through lower legal costs arising in respect of any dispute and from the lower likelihood that disputes will not need to be resolved by way of litigation in the first instance.
- 12.59. TABCORP claims that economies can be achieved in agents pooling their resources to seek legal advice on the effect of the New Agreement without needing to enter into the arrangements proposed by the Association.
- 12.60. TAB Limited claims that the proposed DRA relies on arbitration to finally resolve all disputes. TAB Limited notes that in some cases disputes that could have been conciliated successfully might, under the DRA, go to arbitration and higher costs might be incurred. TAB Limited added that in their opinion, it is not possible to say that transaction costs are necessarily lower under the dispute resolution process proposed by the Association.
- 12.61. The Commission considers that transaction cost savings can represent a real resource saving by reducing the cost of supply and potentially reducing the cost to consumers.
- 12.62. It remains difficult for the Commission to conclude that a move from standard form agreements (as per the New Agreement) imposed after consultations with the Association, to a collectively negotiated arrangement would result in transaction cost savings. This is not to say that such a saving could not or would not be realised, but that the Applicant simply has not been able to demonstrate this.

### **Benefits to Agents' Association members and flow on benefits to the community**

- 12.63. The Applicant claims that the principal reason for its existence is to deal with TAB Limited on behalf of its members. The Applicant states that if the proposed conduct is not authorised, the effect will be that the Association's continued need for existence will be in severe jeopardy, with membership numbers falling, less members paying higher fees, and the benefits provided by the Association to members being lost, having flow on effects to the general community itself.
- 12.64. The Applicant claims that the benefits lost to members would include benefits such as negotiating award payments for staff with the union and collecting superannuation contributions for agents and their staff.
- 12.65. The Applicant maintains that if these benefits are lost, an agent's costs will increase, the agents will seek to lower the only operation cost they can, labour. The Applicant claims that the public benefit associated in providing employment to the local community would be lost.
- 12.66. Essentially, the Applicant argues that if the proposed arrangements are not authorised, its existence will be jeopardised, which will have flow on effects for TAB agents and the community generally.
- 12.67. The Commission considers that industry associations, such as the TAB Agents' Association, can play a valuable role in facilitate the exchange of information and discussing issues of common concerns to participants in an industry. As noted in Section 10, up to a certain point in the negotiation process, the Association contributing to the relationship between its members and TAB Limited does not necessarily give rise to concerns about possible contraventions of the Act. Indeed, an industry association such as the Association can represent and assist its members in matters such as ensuring its members have access to appropriate legal and/or financial services, or even making representations to major suppliers in relation to issues of concern to members, without the need for authorisation.
- 12.68. As concluded in Section 10, the Commission considers that if authorisation is not granted, the Association is likely to continue to play this role. Therefore, the Commission does not consider that, absent of authorisation, any public benefits flowing from the Association's current activities in acting on behalf of its members would be lost.

### **Conclusion on public benefits of the proposed arrangements**

- 12.69. For the reasons outlined above, the Commission considers that the proposed arrangements will result in some public benefit. In particular, the Commission considers that in these circumstances, providing TAB agents with some competitive parity in negotiations with TAB Limited and the

opportunity for greater input into contract terms and conditions will result in some public benefit.

- 12.70. The Commission also considers that TAB agents are likely to pass on, at least some of, the benefits of any more favourable deal negotiated with TAB Limited as a result of bargaining collectively, in the form of improvements in the level of service provided by TAB agents to consumers.

## **13 Balance of public benefits & anti-competitive detriments**

- 13.1. The Commission considers the anti-competitive detriment generated by the proposed arrangements to be negligible. In particular, the Commission does not consider that the proposed arrangements will affect the price of wagering services provided to the public given that the prices are already regulated by government legislation. Further, the Commission does not consider that the proposed arrangements will reduce competition between TAB agents on service levels to consumers as the proposed arrangements do not restrict TAB agents' ability to compete on service levels to any greater extent than the current standard form agreement which TAB Limited offers to its agents.
- 13.2. The Commission does not consider that the proposed arrangements detrimentally effect competition between agents and potential agents to acquire contracts from TAB Limited or between agents and hotels and clubs for the supply of wagering services from TAB Limited. Again, the Commission does not consider that the proposed arrangements restrict TAB agents' ability to compete in these areas any more than the current standard form agreements.
- 13.3. The Commission considers that the proposed arrangements will result in some public benefit. In particular, the Commission considers that in these circumstances, providing TAB agents with some competitive parity in negotiations with TAB Limited and the opportunity for greater input into contract terms and conditions will result in some public benefit.
- 13.4. The Commission also considers that TAB agents are likely to pass on, at least, some of the benefits of any more favourable deal negotiated with TAB Limited as a result of bargaining collectively, in the form of improvements in the level of service provided by TAB agents to consumers.
- 13.5. Consequently, following consideration of the arguments advanced by the Applicant and interested parties, the Commission concludes that the public benefits likely to result from the arrangements will outweigh the anti-competitive detriment.
- 13.6. The Commission proposes to grant authorisation subject to a five-year time limit. In general, authorising arrangements for a limited time period allows the Commission, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is made actually eventuate in practice and the appropriateness of the authorisation in the current market environment.
- 13.7. The Commission notes that the Applicant has sought authorisation for a period of 7 years, which, it submits, will provide sufficient time for the Association to be involved in the negotiation of any new arrangements between TAB Limited and TAB agents who are on existing arrangements.

- 13.8. The Commission notes that, according to the Association, most TAB agents have been reluctant to enter into the New Agreement proposed by TAB Limited and are therefore, in the case of those whose existing Fixed Term Deed or Roll Over Deed has expired, currently operating a 'month to month' arrangement with TAB Limited. The Commission also notes that the New Agreements currently being offered by TAB Limited have terms expiring in either September 2004 or September 2006. Fixed Term and Roll Over Deeds have traditionally been offered for periods of between 1 and 5 years.
- 13.9. The Commission therefore considers that a period of 5 years provides sufficient time for the Association to be involved in the negotiation of any new arrangements with TAB Limited. Further, based on current industry standards regarding the terms of any agreement entered into, a period of 5 years would also be likely to provide sufficient time for the Association to be involved in the negotiation of a subsequent agreement at the expiration of any initially negotiated agreement.
- 13.10. It is open to the Association to reapply for authorisation at the expiration of this authorisation. In the event that an application for reauthorisation is received by the Commission, whether reauthorisation should be granted will be considered based on the circumstances at that time.
- 13.11. In addition, the Commission may review the authorisation, prior to the expiry of the authorisation, if there has been a material change of circumstance since the authorisation was granted.

## **14 Determination**

### **The Application**

- 14.1. On 9 September 2003 the Applicant lodged an application for authorisation (A90885) with the Commission. This application was subsequently amended on 10 March 2004 to clarify the conduct for which authorisation is sought.
- 14.2. The application, as amended, was made under section 88(1) of the Act for an authorisation under that subsection:
- (a) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
  - (b) to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 14.3. Specifically, the Association seeks authorisation on behalf of its members, for an agreement between its members, for it to collectively bargain with TAB Limited in relation to the terms and conditions of the provision of services by members to TAB Limited, and also for an agreement between its members under which it would act on behalf of members where a dispute arises between those members and TAB Limited.
- 14.4. As noted in paragraph 2.7, the Commission has also considered the application as an application for the Association to collectively negotiate on behalf of its members with any entity which is TAB Limited's successor to the off-course totalizator licence in NSW as a result of either of the proposed mergers between TAB Limited and TABCORP Holdings Limited or UNiTAB Limited.
- 14.5. The arrangements for which authorisation is sought are detailed in Section 2 of this determination.

### **Statutory test**

- 14.6. For the reasons outlined in this determination, the Commission is satisfied that in all the circumstances the making of the contracts and the giving effect to the provisions of the arrangements for which authorisation is sought under subsection 88 (1) of the Act:
- (a) would be likely to result in a benefit to the public; and

- (b) that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

### **Conduct authorised**

- 14.7. Accordingly, the Commission grants authorisation to A90885 for a period of five years from the date this determination comes into effect.

### **The effective date of determination**

- 14.8. This decision is subject to any application to the Australian Competition Tribunal for its review.
- 14.9. This determination is made on 28 April 2004. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 19 May 2004. If an application is made to the Tribunal, the determination will come into force:
  - (a) where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
  - (b) where the application is withdrawn – on the day on which the application is withdrawn.