



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Association of Australian Bookmaking Companies

*in relation to collective bargaining
on behalf of members with racing control bodies and
sporting organisations*

Date: 7 June 2006

Commissioners:

Samuel
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Authorisation no. A30243
Public register no. C2006/612

Executive Summary

The Australian Competition and Consumer Commission (ACCC) has considered the Association of Australian Bookmaking Companies' Inc. (AABC) application for authorisation and the information provided by the AABC and interested parties.

The ACCC is proposing to grant authorisation to the AABC's application for a period of 5 years.

The ACCC is now seeking submissions from the AABC and interested parties on its draft determination. Any submissions received will be taken into account by the ACCC in making its final assessment of the application for authorisation.

The application

AABC is seeking authorisation to collectively bargain with

- Australian State and Territory racing control bodies and/or other rights owners with a view to obtaining approval for the members of the AABC to publish and use race field information and similar rights and
- National, State and Territory sporting organisations and/or other right owners to obtain approval to publish and use information relating to that sport.

AABC has also sought authorisation to permit it to participate in the resolution of disputes which may arise between its members and the racing control bodies/sporting organisations.

The authorisation process

A key objective of the *Trade Practices Act 1974* (the TPA) 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 TPA, however, allows the ACCC 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 ACCC for what is known as an 'authorisation'.

Broadly, the ACCC 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.

Assessment of public benefit and anti-competitive detriment

The ACCC considers that the proposed collective bargaining arrangement is not likely to result in significant public detriment. In reaching this conclusion the ACCC notes

- participation in the proposed negotiations is voluntary for all parties;

- the scope of the group, in terms of competitors in the wagering services market, is constrained; and
- the arrangement does not provide for collective boycott activity.

Moreover the ACCC notes that the proposed collective bargaining arrangement does not seek to limit the ability of participants to compete in the wagering services market.

The ACCC considers that the proposed collective bargaining arrangement is likely to result in benefits to the public by

- increasing the input of the AABC's members into their contractual discussions, albeit not to a significant extent;
- providing for potential improvements in dispute resolution mechanisms; and
- giving rise to transaction costs savings for both the AABC's members and the counterparties with whom they propose to negotiate.

Based upon the information provided to it to date, the ACCC considers that the public benefits likely to result from the proposed collective bargaining arrangement are likely to outweigh the potential anti-competitive detriment of the arrangement. The ACCC is accordingly proposing to grant authorisation to the AABC.

Interim authorisation

On 26 April 2006, the ACCC granted partial interim authorisation for the AABC to commence collective negotiations with Racing Victoria Limited, Harness Racing Victoria and Greyhound Racing Victoria.

Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until a decision to revoke interim authorisation is made.

Proposed decision

The ACCC is proposing to grant authorisation to the AABC's application for a period of 5 years.

The ACCC is now seeking further submissions from interested parties. In addition, the AABC or any interested party may request the ACCC to hold a pre-determination conference pursuant to section 90A of the TPA.

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Introduction

- 1.1 The Australian Competition and Consumer Commission (ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act (1974)* (TPA). A key objective of the TPA 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 TPA, however, allows the ACCC 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 ACCC for what is known as an 'authorisation'.
- 1.3 Broadly, the ACCC 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 ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 The ACCC then issues 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 ACCC will take into account any submissions received from interested parties.
- 1.6 Once a draft determination is released the applicant, or any interested party, may request that the ACCC hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment the ACCC may grant authorisation. If not, the authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefits and decrease the detriment.

- 1.8 This document is the draft determination in relation to authorisation application A30243 lodged with the ACCC on 30 March 2006 by the Association of Australian Bookmaking Companies Inc. (AABC) on behalf of its members. By way of overview the AABC is seeking authorisation to collectively bargain on behalf of its members with:
- Australian State and Territory racing control bodies and/or other rights owners with a view to obtaining approval for the members of the AABC to publish and use race field information and similar rights and
 - National, State and Territory sporting organisations and/or other right owners to obtain approval to publish and use information relating to that sport.
- 1.9 Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions with a supplier or a customer (the counterparty).
- 1.10 Collective bargaining arrangements will ordinarily raise concerns under the competition provisions of the TPA as they involve agreements between competitors, often in relation to pricing.
- 1.11 The authorisation process in the TPA, however, allows businesses to obtain protection for such arrangements where it can be demonstrated that the public benefits flowing from an arrangement will outweigh the anti-competitive detriments.
- 1.12 AABC has also sought authorisation to permit it to participate (on behalf of its members) in the resolution of disputes which may arise between its members and the racing control bodies/sporting organisations.
- 1.13 Attachment A contains a (non exhaustive) list of:
- racing control bodies; and
 - sporting organisations (collectively referred to as the Coalition of Major Professional Sports (COMPS))
- with whom the AABC has indicated that it would seek to collectively bargain.

Interim authorisation

- 1.14 The ACCC also has the power to grant interim authorisation, at the time the application is lodged or at a later stage. Interim authorisation protects the arrangements for which authorisation is sought from legal action under the TPA while the ACCC considers and evaluates the merits of the application.
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- 1.15 On 26 April 2006 the ACCC decided to grant interim authorisation to allow AABC to commence negotiations with Racing Victoria Limited (RVL), Harness Racing Victoria (HRV) and Greyhound Racing Victoria (GRV).

- 1.16 In assessing the request for interim authorisation the ACCC noted that the arrangements for which interim authorisation has been sought are limited in nature and importantly did not extend to entering into collectively negotiated agreements at this time.
- 1.17 The ACCC decided not to grant interim authorisation at that time to allow AABC to commence negotiations with sporting organisations. On balance the ACCC considered it appropriate to reconsider AABC's request for interim authorisation to commence negotiations with sporting organisations at the time of issuing its draft determination in this matter.

Industry background

Gaming and wagering

- 2.1 Gambling activities are categorised as either gaming or wagering.
- 2.2 Gaming refers to gambling activities where random chance determines the outcome. The principal forms of gaming in Australia are gaming/poker machines, casinos, lotteries and keno.
- 2.3 Wagering involves betting on the outcome of live events, primarily racing (thoroughbred, harness and greyhound racing) and sporting events. Wagering is divided into totalisator wagering and fixed-odds wagering.

Totalisator wagering: a system of betting on races in which the winning bettors share the total amount bet, minus a percentage for the operators of the system. Totalisators are the main form of wagering in Australia and the majority of totalisator wagering turnover is 'off-course' betting (bets placed by customers who are not present at the racecourse). There is one totaliser operator in each state and territory authorised to conduct off-course wagering. These operators are authorised to conduct totalisator wagering, although in many states, legislation has recently allowed operators to expand into fixed-odds wagering.

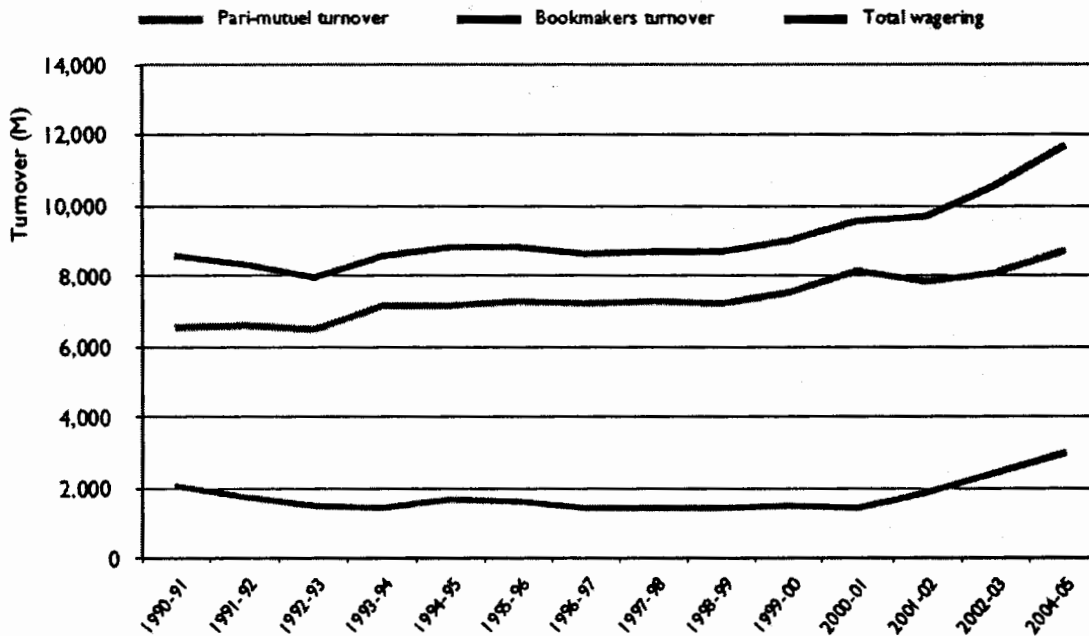
Fixed-odds wagering: also known as 'bookmaking' is a system of betting on races in which the bookmaker or the totalisator sets the prices or "odds" of the event.

Racing

- 2.4 Selected information on the racing industry in Australia as it relates to the AABC's application is provided below.
- 2.5 More than 70% of the racing industry's total revenue is derived from wagering revenue¹. The distribution channels for wagering on racing include:
- on course bookmakers
 - on course totalisator
 - TAB stand alone outlets
 - TAB in hotels and clubs (PubTab or ClubTab)
 - telephone betting
 - telephone to internet
 - stand alone internet

¹ *Changes in Wagering Within the Racing Industry*, Final Report, May 2005, p.40., Commissioned by the Victorian Gambling Research Panel, prepared by South Australian Centre for Economic Studies, Swinburne Institute for Social Research and University of Western Sydney.

2.6 According to the Australian Racing Board², 37.48% of totalisier wagering on thoroughbred horse racing in Australia occurs in New South Wales; 27.58% in Victoria; 16.49% in Queensland; 7.88% in Western Australia; and 5.72% in South Australia. The Northern Territory, Tasmania and the Australian Capital Territory make up a little under 5% of total totalisier wagering on thoroughbred horse racing. Off-course bookmaking comprises approximately 1.6% of total wagering in Australia on thoroughbred horse racing - of this 61.55% occurs in the Northern Territory.



Thoroughbred wagering turnover 1990-91 to 2004-05, Australian Racing Board³

2.7 Of total wagering on racing in Australia approximately 70% of all wagers are placed on thoroughbred racing. Harness and greyhound racing on average comprise approximately 30% of all wagering on racing in Australia. Of all wagers accepted on harness and greyhound racing approximately 7% are accepted by bookmakers based in the Northern Territory.⁴

Recent developments in the regulation of racing and wagering in Australia

Racing and Gambling Acts (Amendment) Act 2005 (Vic)

2.8 The Victorian Government passed the *Racing and Gambling Acts (Amendment) Act 2005* to prevent a wagering service provider from publishing or otherwise making available a race field without the approval of the appropriate controlling body. This effectively allows racing control bodies to extract fees from bookmakers wishing to use the race field data.

² Australian Racing Fact Book 2004-2005; Australian Racing Board; December 2005; at page 54

³ Australian Racing Fact Book 2004-2005; Australian Racing Board; December 2005 at page 58

⁴ Australian Racing Fact Book 2004-2005; Australian Racing Board; December 2005; at page 69

Draft Lottery and Gaming (Betting Exchange and Race Fields) Amendment Bill 2005 (South Australia)

2.9 The draft *Lottery and Gaming (Betting Exchange and Race Fields) Amendment Bill 2005 (SA)*, proposes to prevent the publication of South Australian race field information, unless the person is acting in accordance with an approval given by the appropriate racing control body. Should the legislation pass it will effectively allow racing control bodies to extract fees from bookmakers wishing to use the race field data.

*Sports betting in Australia*⁵

- 2.10 Sports betting involves predicting sports results by making a wager on the outcome of a sporting event. Official wagering on sporting competitions is relatively new in comparison to racing. The former Victorian state-owned TAB was authorised to begin conducting sports betting in 1985. Tabcorp was given an authorisation to accept wagers on approved sporting competitions when it was granted the wagering licence in 1994.⁶
- 2.11 Since 1994 there has been significant growth in the sports betting market in Victoria, with increasing public awareness of the wagering products and the increased availability of products through integration with Tabcorp's traditional agencies and PubTAB's. In Victoria, the real expenditure on sports betting has increased from \$2.8 million in 1994-95 to \$36.2 million in 2003-04.⁷
- 2.12 Real expenditure on sports betting has also been increasing in the other states and territories, with the Northern Territory recording the highest expenditure figures. Real expenditure has grown in the Northern Territory from \$3.4 million in 1994 – 95 to \$62.7 million in 2003-04. In New South Wales, real expenditure has increased from \$7.1 million in 1994-95 to \$37.1 million in 2003-04. In Queensland, real expenditure has increased from \$0.8 million in 1995-96 to \$6.5 million in 2003-04 and in Western Australia, it has increased from \$0.5 million in 1994-95 to \$4.2 million in 2003-04.⁸
- 2.13 Currently, in Victoria there is no legislative requirement that Tabcorp or bookmakers be authorised by the controlling bodies of sport to use sports data or that they return any revenue from the betting that takes place on sporting competitions to the sporting organisations. As a result the COMPS has sought legislative protection from the Victorian Government for major sports.⁹
- 2.14 Under the COMPS proposal national sporting organisation would control aspects of sports betting including the publication of sports data such as

⁵ Much of this information is taken from the Victorian Government discussion paper *Sports Betting: A New Regulatory Framework?*, March 2006.

⁶ *ibid*

⁷ *ibid*

⁸ *ibid*

⁹ *ibid*

fixtures, statistics, individuals or teams by ensuring that a written agreement is in place between the sporting organisation and the wagering service provider.

The counterparty's and competitors

- 2.15 The information provided in this section has been taken from a number of internet sources, including the websites of counterparties.

Tabcorp Holdings Ltd

- 2.16 In Australia Tabcorp manages brands including the Star City and Jupiters casinos, TAB, Tabaret, Keno and TAB Sportsbet. Tabcorp holds the exclusive off-course totalisator licence for Victoria and in 2004 it completed its acquisition of the New South Wales totaliser Tab Limited. As at 1 December 2005 Tabcorp offered totalisator and fixed odds betting in 566 retail outlets in Victoria and 2,095 in NSW as well as on-course, internet and phone betting.

Unitab

- 2.17 Unitab offers totalisator and fixed odds betting services through the following businesses:
- TAB Queensland
 - SA TAB
 - NT TAB
 - RadioTAB
 - Telebet
 - TABOnline (Netbet)
 - MaxGaming

Tote Tasmania Pty Ltd (Tote)

- 2.18 Tote is established under the *TOTE Tasmania Act 2000*. Its principal activities are totalisator and fixed-odd wagering and the administration of thoroughbred, harness and greyhound racing.
- 2.19 Tote operates a variety of totalisator and fixed odds wagering products under the brand of 'The TOTE'. TOTE's operations are delivered through a variety of sales channels including retail, telephone and online. TOTE is a member of the SuperTAB pool for pari-mutuel sales and utilises the national TAB Sportsbet product for its fixed odd sporting bets. TOTE also provides ~~Trackside - a simulated racing game to complement its pari-mutuel and fixed odds wagering products.~~

Racing and Wagering Western Australia (RWWA)

- 2.20 RWWA is established under the *Racing and Wagering Western Australian Act 2003*. It is the controlling authority for thoroughbred, harness and greyhound

racing in Western Australia and also has responsibility for the conduct of off-course TAB wagering.

Gaming and Wagering Commission (WA)

- 2.21 Pursuant to the provisions of the *Gaming and Wagering Commission Act 1987*, the Gaming and Wagering Commission administers the law relating to gaming in Western Australia.

Racing Victoria Limited (RVL)

- 2.22 In December 2001 RVL was registered as a public company limited by guarantee under the *Corporations Act 2001*. At this time RVL assumed, from the Victoria Racing Club, the functions and responsibilities as the Principal Racing Authority governing thoroughbred racing in Victoria.
- 2.23 RVL was established with the support of the Victorian thoroughbred racing clubs, racing industry bodies and the State Government to provide independent governance of thoroughbred racing in Victoria. RVL acts as a representative of the Victorian Thoroughbred Industry and is responsible for the marketing of Victorian thoroughbred racing.

Greyhound Racing Victoria (GRV)

- 2.24 GRV is the body responsible for promoting the sport and controlling the industry. It is responsible for the conduct of greyhound racing, the registration of individuals involved with the industry including their behaviour with the care and management of greyhounds and premises as well as the registration of the animals.

Harness Racing Victoria

- 2.25 Harness Racing Victoria is responsible for the regulation and promotion of harness racing in Victoria.

Racing NSW

- 2.26 Racing NSW, established under the *Thoroughbred Racing Act 1996*, is the regulating body for thoroughbred racing in New South Wales. The functions of Racing NSW include controlling, supervising and regulating horse racing in New South Wales.

Greyhound and Harness Racing Regulatory Authority (NSW)

- 2.27 The Greyhound and Harness Racing Regulatory Authority (NSW), is the amalgamation of the former Greyhound Racing Authority and the Harness Racing Authority, and commenced operations on 1 October 2004. The Authority is responsible for the control and regulation functions of the two former regulatory authorities.

Queensland Racing

2.28 Queensland Racing is the peak controlling body for the thoroughbred racing industry in Queensland. It coordinates, manages, and regulates the industry through a number of functions including:

- administration of the rules of racing;
- enforcement of standards of safety and integrity;
- licensing industry participants;
- registering race clubs and monitoring their activities;
- racecourse development and capital works;
- research and promotional activities;
- administration of industry funding and commercial agreements; and
- representing the Queensland Racing Industry on the peak national body, the Australian Racing Board, and its Sub-committees.

Queensland Harness Racing Board

2.29 The Queensland Harness Racing Board is constituted under the *Racing Act (Qld) 2002*. The Board is responsible for the control and general supervision of harness racing throughout Queensland. The function of the Board is to manage the code of harness racing in Queensland.

Greyhound Racing Authority Queensland

2.30 The Greyhound Racing Authority Queensland is authorised under the *Racing Act (Qld) 2002* to manage greyhound racing in Queensland. This role involves developing operational policies for the industry covering matters such as the determination of race dates, and the granting of licenses to clubs and other venues.

Thoroughbred Racing South Australia Ltd

2.31 Thoroughbred Racing SA. Ltd is the umbrella body for thoroughbred racing in South Australia. The South Australian Racing Clubs Council represents the interests of both provincial and country clubs throughout South Australia.

2.32 The strategic plan of Thoroughbred Racing SA focuses on increasing returns to owners so that future investors re-invigorate and help grow the industry participation base. Thoroughbred Racing SA. Ltd on behalf of the industry oversees resources, revenues and assets to maximize the long-term returns delivered to the industry and its participants.

Greyhound Racing South Australia Limited (GRSA)

2.33 GRSA was established to promote the sport of greyhound racing and ensure its financial sustainability for the benefit of all South Australians. GRSA is the controlling body for greyhound racing in South Australia. The role of GRSA

is to establish, adopt and enforce both the South Australian and Australian rules of racing to allow the sport to be effectively conducted in South Australia.

Harness Racing South Australia

- 2.34 Harness Racing South Australia is responsible for setting the strategic direction of the harness racing industry in South Australia. This role includes determining race dates across a number of facilities in South Australia and the management of dealings with SATAB and Sky Channel on behalf of the industry. In South Australia returns to the industry from on-course TAB wagering are provided directly to the relevant club for reinvestment at club level, returns to the industry from off-course wagering are provided to Harness Racing South Australia and are invested into the broader industry. In terms of market share, harness racing comprises approximately 15% of the South Australian racing industry (thoroughbreds approximately 71%, greyhounds approximately 14%).

Racing Services Tasmania

- 2.35 Racing Services Tasmania is a division of the Tasmanian Department of Infrastructure, Energy and Resources. Racing Services Tasmania is responsible for stewardship, registration, licensing, integrity controls and bookmaker activities covering all three codes of racing in Tasmania - thoroughbred, harness and greyhound racing.

ACT Racing Club Inc

- 2.36 The principal activity of the ACT Racing Club is to promote the development of thoroughbred horse racing within the Australian Capital Territory (ACT).

Canberra Greyhound Racing Club Inc

- 2.37 The Canberra Greyhound Racing Club Inc is the controlling authority for Greyhound Racing in the ACT.

Canberra Harness Racing Club Inc

- 2.38 The Canberra Harness Racing Club is the controlling body for harness racing in the ACT. Harness racing in the ACT receives the majority of its income from ACTTAB. In terms of market share, harness racing in the ACT comprises approximately 11% of the racing industry (thoroughbreds approximately 78%, greyhounds just under 12%).

Northern Territory Racing Commission

- 2.39 The Racing Commission has responsibility for the Northern Territory (NT) Racing Industry. It is a body corporate established in accordance with the *Racing and Betting Act (NT)*.

Australian Racing Board

- 2.40 The Australian Racing Board (ARB) was established in June, 1998. The precursors to the ARB were the Australian Conference of Principal Racing Clubs and the National Office of Australian Racing.
- 2.41 Its members are the Principal Racing Authorities that supervise and control thoroughbred racing in each State and Territory.
- 2.42 Under its Constitution ARB is established to make, change and administer the Australian Rules of Racing and to otherwise do all things whatsoever that the Board considers to be conducive to developing, encouraging, promoting or managing the Australian thoroughbred racing industry.

Racing Information Services Australia Pty Ltd (RISA)

- 2.43 RISA is an independent, not for profit, special purpose company set up with the co-operation of the ARB and the Principal Racing Authorities in Australia. Incorporated on 20th August 2003, RISA is recognised under the Australian Rules of Racing as the only official recorder of results and horse performance records for races run in Australia.
- 2.44 RISA's primary aims are to reduce racing administration costs by developing 'one process and one system' for the Australian thoroughbred racing industry and to protect and market the industry's data intellectual property.

Australian Football League (AFL)

- 2.45 The first recorded game of Australian football was held in 1858, the Victorian Football League was not established until 1896. The Victorian Football League was renamed the Australian Football League in 1990. According to its mission statement, the AFL exists to:
- manage the national competition to ensure it is the most successful national elite sports competition for the benefit of our key stakeholders – our AFL clubs, players and the public;
 - promote high levels of player participation in well-managed programs down to the grassroots level;
 - promote public interest in the game by building the strongest consumer brand position in Australian sport;
 - attract and develop the most talented athletes and sports administrators; and
 - foster good citizenship, both on and off the playing field.

Basketball Australia

- 2.46 Basketball Australia is the governing and controlling body for the sport of basketball in Australia – overseeing the sport at all levels, from the grass roots to national teams and national leagues. Formed in 1939 (as the Australian Basketball Federation) the organisation was constituted in 1946. Basketball Australia became a member of International Basketball Federation in 1949 and

was incorporated in 1982. Basketball Australia is not-for-profit and is funded through membership, sponsorship, fund raising and government grants.

Coalition of Major Professional Sports (COMPS)

- 2.46 COMPS is a coalition of peak national sporting organisations comprising of Cricket Australia; the Football Federation of Australia; National Rugby League; PGA Tour of Australasia; Australian Rugby Union; and Tennis Australia.

Cricket Australia

- 2.47 Cricket Australia is the custodian of cricket in Australia. It is made up of six member associations:

- Cricket New South Wales;
- Queensland Cricket;
- South Australian Cricket Association;
- Tasmanian Cricket Association;
- Cricket Victoria; and
- Western Australian Cricket Association.

The Australian Capital Territory Cricket Association and the Northern Territory Cricket Association are non-member associations.

Football Federation Australia Limited

- 2.48 The Football Federation Australia Limited (FFA) is the governing body for football (soccer) in Australia. The membership of FFA includes the governing bodies of soccer from each state in Australia. Each of these governing bodies has a commitment to comply with the FFA constitution, applicable statutes, by-laws and regulations and is responsible for the game within their respective geographic regions.

National Rugby League Limited

- 2.49 The National Rugby League (NRL) was formed in 1998 under a partnership arrangement between the Australian Rugby League and News Ltd to administer the national rugby league competition. A Partnership Executive Committee, consisting of three representatives from News Ltd and three representatives of the ARL administers the agreement between the ARL and News Ltd and decides major financial issues. The Partnership Executive Committee in turn commissions the NRL Board to administer the national competition.
- 2.50 The NRL markets the Telstra Premiership on behalf of member clubs, organises the competition draw, finals matches and the grand final. In

association with the Australian Rugby League, NRL staff also promote the representative matches, World Sevens and Australian internationals.

PGA Tour of Australasia

- 2.51 PGA Tour Australasia was incorporated in 1982 and is responsible for a range of functions including the management and marketing of the professional golf tournaments which comprise the PGA Tour of Australasia.

Australian Rugby Union

- 2.52 While rugby union began in Australia in 1864, administration of the sport was not formally taken over by the (now) New South Wales and Queensland Rugby Unions until 1883. The inaugural meeting of the Australian Rugby Football Union was held on November 25th 1949 with delegates from New South Wales, Queensland, South Australia, Western Australia, Tasmania and Victoria. The Australian Capital Territory became a member in 1972 and the Northern Territory an associate member in 1978. In 1985 the Australian Rugby Football Union was incorporated as a company and in 1997, it became the Australian Rugby Union Ltd.

Lawn Tennis Association of Australia Limited (Tennis Australia)

2.53 Tennis Australia is the governing body of tennis within Australia, linking to member associations throughout the country. Tennis Australia promotes and facilitates participation in tennis at all levels, and conducts national and international tournaments, including the Davis Cup, the Fed Cup and the Australian Open.

The application and supporting submission

- 3.1 An overview of AABC's application and supporting submissions is provided below, full copies are available from the ACCC's public register or the ACCC website.

The proposed collective bargaining arrangement

- 3.2 The AABC has sought authorisation to permit:
- the negotiation by AABC, on behalf of its members, of the terms and conditions of an agreement between controlling bodies of race fields and the members of AABC, to enable approval to be granted for the members of AABC to use the race field information, including the negotiation of any extension, variation or renewal if applicable;
 - the participation by AABC in any dispute resolution mechanism in relation to disputes between controlling bodies of race fields and the members of AABC with regards to the use of race field information;
 - the negotiation by AABC, on behalf of its members, with sports organisations, peak state and territory sporting bodies and/or their representatives, where required or considered necessary, of terms and conditions or arrangements under which members of AABC would be entitled to conduct business; and
 - the participation by AABC in any dispute resolution mechanism in relation to disputes between members of the AABC and sports organisations and peak state and territory sporting bodies.

Submission on the anti-competitive effect

- 3.3 The AABC has submitted that the national wagering market is dominated by the TAB's giving them a strong bargaining position. According to AABC in 2003-2004 the TABs held approximately 94.7% of Australia's total racing expenditure. The remaining 5-6% is held by on and off-course bookmakers. AABC's members are located in the Australian Capital Territory and the Northern Territory and comprise approximately 1.7% of total Australian racing expenditure.
- 3.4 The AABC submits that the proposed collective bargaining arrangement will not adversely affect the level of competition in the national wagering market as:
- the level of competition in the market is the direct function of decisions made by the racing control bodies and Governments. Authorisation would permit AABC members to have better input into that decision making process, and help redress the bargaining imbalance
 - members are in an unequal bargaining position when dealing individually with each controlling body. This would be addressed to a degree, if

authorisation were granted to allow AABC to negotiate with the controlling bodies on behalf of its members; and

- the proposed collective bargaining arrangement will not involve any form of exclusionary conduct (otherwise known as collective boycotts).

Submissions on the public benefit

3.5 The AABC submits that the proposed collective bargaining arrangement would result in a range of public benefits including:

- efficiency gains through having a single point of contact for the racing and sports wagering industry sector, enabling more meaningful and efficient discussions on issues that arise;
- maintenance of a sound working relationship between AABC, its members, Australian State and Territory Racing controlling bodies and National, and State and Territory sports organisations;
- improved bargaining power for its members;
- participation in any dispute resolution mechanism in relation to disputes between controlling bodies of race fields and the members of AABC with regards to the use of race field information;
- lower transaction costs for customers of the members of AABC; and
- continued viability of corporate bookmakers, without which the level of competition in the national wagering market would diminish.

Interim authorisation

3.6 As noted at paragraphs 1.14 to 1.17, the AABC has also requested interim authorisation for the proposed collective bargaining arrangement, as it would like to commence collective negotiations with:

- RVL;
- HRV;
- GRV; and
- COMPS.

3.7 A partial grant of interim authorisation was made by the ACCC on 26 April 2006.

The collective bargaining group

3.8 The AABC is an association incorporated under the laws of Victoria. It was ~~formed to represent the interests of Australian corporate bookmakers, to~~ provide a forum for discussions on matters of mutual interest and to provide a vehicle by which corporate bookmakers may discuss with Governments and other regulatory authorities any issues of interest affecting them. Membership is open to any company holding a bookmaking licence or permit issued by an Australian State or Territory, and which supports the objectives of AABC.

- 3.9 AABC submit that the membership constitutes all of the principal Australian corporate bookmakers, who together represent about 8 per cent of total national turnover on racing and sports betting, and some 3 per cent of total betting expenditure.
- 3.10 The membership of the AABC as at 31 January 2006:
- International All Sports Limited
 - Sportingbet Australia Pty Ltd
 - Centrebet Pty Limited
 - Multibet Pty Limited
 - Sports Acumen Pty Limited
 - Sportsbet Pty Limited
- 3.11 The AABC notes that its members are competitors with respect to the provision of wagering services to consumers. The AABC submits that this will not be changed by the proposed collective bargaining arrangement.

Submissions received in relation to the application

- 4.1 The ACCC sought submissions from a wide range of interested parties and those received are summarised below. Complete copies of all submissions are available on the ACCC's public register and on its website.

Racing Victoria Limited

- 4.2 Racing Victoria Limited (RVL) has expressed strong concern that the AABC's proposed arrangements are unclear. In particular it considers there is a significant degree of uncertainty in respect of the intended scope of the application. RVL is further concerned that the arrangements could include conduct which is not appropriate to be authorised.
- 4.3 RVL also queries the dispute resolution mechanisms proposed by AABC and notes that it would be inappropriate to allow "collective bargaining" of any issue that relates to the integrity or probity relating to a particular bookmaker. RVL further considers that it would not be appropriate for the AABC to collectively bargain where RVL had a dispute with a single corporate bookmaker pursuant to RVL's supervisory and regulatory functions.

Racing Gaming and Licensing Division of the Northern Territory Treasury

- 4.4 The Racing Gaming and Licensing Division of the Northern Territory Treasury (RGL) submit that they support AABC's application for authorisation as the public benefit arguments in respect of the proposed arrangement appear to outweigh the minimal competitive detriment which is likely to be caused.
- 4.5 RGL submits that the likely detriment of the proposed arrangement is likely to be minimised by :
- AABC members will not be forced to participate in the proposed arrangements;
 - AABC members will be fully informed of the implication of the proposed arrangements and their obligations under the TPA;
 - AABC members will continue, if they so choose, to be in a position to negotiate directly with the various bodies, organisations and owners to publish and use certain information;
 - the collective bargaining process will not include collective boycott activity or price fixing;
 - the observance of statutory and other regulatory conditions.

Office of Liquor, Gaming and Racing (NSW)

- 4.6 The Office of Liquor, Gaming and Racing (NSW) notes that there is currently no equivalent legislation in New South Wales to that of the Victorian *Racing and Gambling Acts (Amendment) Act 2005*. The Office has expressed concern that the collective bargaining arrangements may be inconsistent with the consultation process which may be adopted by the NSW Government. In particular the Office noted that as AABC represents only a small number of bookmakers, consultation under the legislation (and not collective bargaining) is more likely to be engaged in with the NSW Bookmakers Co-operative and its national affiliate body the Australian Bookmakers Association.

Government of South Australia, Office for Racing

- 4.7 The Government of South Australia, Office for Racing notes that it has no objection to the AABC application to collectively bargain with the racing and sporting control bodies.

Racing NSW

- 4.8 Racing NSW notes that equivalent legislation has not been adopted in New South Wales and that in this environment it finds it difficult to comment on the application for authorisation. Racing NSW has however noted that its preference is for it to continue to liaise with the NSW Bookmakers Co-Operative Ltd rather than the AABC.

N.S.W Bookmakers' Co-Operative Ltd.

- 4.9 The N.S.W. Bookmakers Co-Operative Ltd has noted that it has no objection to AABC's application for authorisation.

Australian Sports Commission

- 4.10 The Australian Sports Commission (ASC) has noted that it does not have a mandate to represent the interests of any particular individual or group of national sporting organisations in matters such as those proposed in AABC's application.
- 4.11 However ASC supports the rights of major sporting organisations to protect the usage of their intellectual property. The ASC has submitted that with the heavy dependence of most sports in this country on funding from the Australian Government, other sources of revenue to support the development of sport are to be encouraged.
- 4.12 The ASC has also noted that it will monitor the developments in this matter, particularly from the aspect of possible implications for other sports not represented by COMPS.

TOTE Tasmania

- 4.13 TOTE Tasmania opposes the grant of both interim and substantive authorisation, noting that in its view the collective arrangements would result in significant anti-competitive detriment by increasing the bargaining power of the dominant players in the wagering market.
- 4.14 In particular, TOTE Tasmania submits that the position of the AABC can be compared with the Australian TAB's, where six companies currently conduct totalisator betting in Australia. TOTE Tasmania submit that given the commercial activities of these companies and their collective dominance in the totalisator betting market it would be inconceivable that these six companies would be permitted to form a collective bargaining group similar to the AABC to negotiate with racing and sporting control bodies.

Greyhound Racing Victoria

- 4.15 Greyhound Racing Victoria has noted that under its current arrangements approval for race field data is granted on a case by case basis. It noted that it has not otherwise sought to address the merits of the AABC's application at this time.

Queensland Racing

- 4.16 Queensland Racing submits that it has no objection to AABC's application for authorisation and that it has no objection to the AABC participating in the resolution of disputes which may arise between its members and the racing control bodies/sporting organisations.

AABC's response to the interested party submissions

Racing NSW and NSW Office of Liquor, Gaming and Racing

- 4.17 In response to the submissions of Racing NSW and the NSW Office of Liquor, Gaming and Racing the AABC submits that its members are not members of and are not represented by the NSW Bookmakers Cooperative Ltd or the Australian Bookmakers Association.
- 4.18 The AABC notes that it represents the interests of Australian corporate bookmakers, who often conduct business by means of the Internet. Members of the AABC have customers throughout Australia and wish to ensure compliance with all applicable legislation. Should the NSW Government introduce similar legislation to that of the Victorian race field legislation, members of the AABC will not be represented by the NSW Bookmakers Co-operative Ltd or the Australian Bookmakers Association.
- 4.19 The AABC's rules do not require members to collectively bargain and all parties would be free to negotiate individually without the AABC's involvement should they so choose.

Racing Victoria Limited

- 4.20 In relation to RVL's concerns regarding AABC's proposed role in the resolution of disputes the AABC submits that a dispute between RVL and an individual member over agreed "supervisory and regulatory functions" would be a matter for those parties. The AABC's notes that its interest would however be to ensure that the member is afforded due process.
- 4.21 If any dispute has general implications for its members in connection with the interpretation of any policies or agreement for the use of race field information the AABC would seek negotiation of future terms in accordance with the proposed collective bargaining arrangements.

TOTE Tasmania Pty Ltd

- 4.22 In response to TOTE Tasmania's comments, the AABC submits the following:
- the TAB's enjoy a little less than 90% of the national wagering market, with the remainder divided between corporate bookmakers, on-course bookmakers and betting exchanges.
 - in 2003-2004 TAB's held approximately 94.7% of the total Australian racing expenditure. AABC's members comprised approximately 1.7% of the total Australian racing expenditure.
 - the TAB's have a dominant position in the national wagering market by virtue of competing both on and off course and being able to offer both totaliser betting and fixed odds betting.
 - the TAB's have a strong bargaining position when dealing with controlling bodies by virtue of their dominance in the national wagering market and their existing financial arrangements with the racing industry.
 - a recent policy issued by RVL indicates that TAB's will be treated more favourably than other applicants (including the AABC's members) in demonstrating economic contributions to the Victorian racing industry.

The AABC submits that its members do not enjoy the same market position as TABs as submitted by TOTE.

- 4.23 The AABC further submits that it is not seeking a blanket decision or any common agreement as a result of collective negotiations, but rather to negotiate the general terms within which the individual applications are to be assessed concerning any agreement between the controlling bodies and members of the AABC.
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- 4.24 The AABC submits that it is not seeking "to secure a market advantage over other market participant" in the national wagering market as asserted by TOTE Tasmania. The AABC submits that it seeks to promote a more open and competitive wagering market and that it has sought authorisation to help redress the bargaining imbalance in the national wagering market.

Statutory provisions

- 5.1 Application A30243 was made by the AABC under sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA. Application A30243 is also expressed to be made on behalf of all current and future members of the AABC.
- 5.2 The relevant test that the AABC must satisfy for authorisation to be granted is outlined in sub-section 90(6) of the TPA.
- 5.3 In short, in deciding whether it should grant authorisation, the ACCC must examine the anti-competitive aspects of the proposed arrangements and its public benefits, weighing the two to determine which is greater. Should the public benefits outweigh the anti-competitive aspects, the ACCC may grant authorisation.
- 5.4 Public benefit is not defined by the TPA. However, the Australian Competition Tribunal (the Tribunal) has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹⁰
- 5.5 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹¹

Application of the test

- 5.6 There is some variation in the language of the authorisation tests under the TPA, particularly between the tests in sections 90(6) and 90(8).
- 5.7 The Tribunal has found that the tests are not precisely the same. In particular the Tribunal considered that the test under section 90(6) was limited to a consideration of those detriments arising from a lessening of competition but that the test under section 90(8) was not so limited.
- 5.8 However, the Tribunal has previously stated that with respect to the test under section 90(6).

¹⁰ *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42677
The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9,
16 May 2005

¹¹ *ibid* at 42683

... [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.

- 5.9 Consequently, when applying either test, the ACCC can take most, if not all, public detriment likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

The relevant market and the counterfactual

The relevant market

- 6.1 The first step in assessing the public benefits and anti-competitive detriments of the proposed arrangements is to consider the features of the market(s) which are most relevant to the arrangements.
- 6.2 AABC has submitted that the markets are the national wagering market and the supply of racing/sporting information.
- 6.3 TOTE Tasmania in its submission, has identified two separate markets - the totalisator betting market and the wagering market. TOTE Tasmania has submitted that authorisation would cause significant anti-competitive detriment by increasing the bargaining power of the dominant players in the wagering market. TOTE Tasmania submits that the position of the AABC can be compared with the Australian TAB's, where six companies currently conduct totalisator betting in Australia.
- 6.4 However in response to TOTE Tasmania's submission the AABC have submitted that:
- the TAB's enjoy a little less than 90% of the national wagering market, with the remainder divided between corporate bookmakers, on-course bookmakers and betting exchanges.
 - in 2003-2004 TAB's held approximately 94.7% of the total Australian racing expenditure. AABC's members comprised approximately 1.7% of the total Australian racing expenditure.
 - the TAB's have a dominant position in the national wagering market by virtue of competing both on and off course and being able to offer both totaliser betting and fixed odds betting.
 - the TAB's have a strong bargaining position when dealing with controlling bodies by virtue of their dominance in the national wagering market and their existing financial arrangements with the racing industry.
- The AABC submits that its members do not enjoy the same market position as the TAB's.
- 6.5 The issue of the relevant market(s) and its features has not been specifically addressed by other interested parties.
- 6.6 Wagering is one of a range of gambling opportunities available to consumers (including lotteries, poker machines and casinos). To some extent, all of these gambling products compete with each other. In this respect a report by the Productivity Commission has recognised that gambling products are becoming more substitutable.¹²

¹² Productivity Commission (1999), *Australia's Gambling Industries: Inquiry Report*.

- 6.7 While noting increasing levels of demand side substitutability the ACCC considers that for the purposes of its assessment of the AABC's application it is appropriate to confine its considerations to those areas of competition relevant to the provision of wagering services to consumers. It should be noted that if a broader gambling market were to be considered the level of competitive detriment is likely to be lower.
- 6.8 To the extent that the arrangements facilitate an increase in the direct economic contributions made by AABC members to the provision of racing and sporting competitions, the arrangements are also likely to have an affect on these downstream areas of competition.

The future with-and-without test (the counterfactual)

- 6.9 In weighing up the public benefit and anti-competitive detriment generated by proposed arrangements for which authorisation has been sought the ACCC applies the 'future with-and-without test' established by the Tribunal.
- 6.10 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as 'the counterfactual'.
- 6.11 The ACCC applies the 'future with-and-without test' to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.
- 6.12 The AABC submit that in the absence of authorisation its members will be required to negotiate on a company-by-company basis with each controlling body. The AABC considers that it is likely to have limited input into these negotiations.
- 6.13 The AABC further submits that, based on different negotiating strengths of members, different contractual and approval outcomes are likely and that this will result in inequitable treatment of its members. The AABC submits that this will flow on to the quality and choice of services provided to consumers by its members.
- 6.14 The AABC also submits that in the event higher fees are imposed on members by the racing or sports bodies or other parties, this may result in more bookmakers leaving the industry, thereby further limiting choice offered to consumers.
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- 6.15 The ACCC notes that the arrangement for which authorisation is sought is at risk of breaching the TPA. Given this risk, the ACCC considers it unlikely that collective negotiations would take place in the absence of authorisation.
- 6.16 The ACCC accepts that the most likely counterfactual is a situation whereby each individual bookmaker will be required to negotiate appropriate terms and

conditions with the racing and sporting control bodies on an individual basis. Given the market position of certain counterparties it is likely that standard form contracts, offered on a take it or leave it basis, may develop. The AABC's role in this process is likely to be significantly more limited than if authorisation were to be granted.

The ACCC's assessment

The anti-competitive detriment

- 7.1 Section 88 of the TPA allows the ACCC to grant immunity from legal action for parties to engage in certain anti-competitive conduct which may include collective bargaining.
- 7.2 When assessing whether or not to grant such immunity, the ACCC must, amongst other things, assess the extent to which the collective bargaining arrangements give rise to anti-competitive detriments. Specifically, the ACCC must assess the detriment to the public constituted by any lessening of competition flowing from the collective bargaining arrangements.
- 7.3 In general terms, collective agreements to negotiate terms and conditions for independent businesses covered by that agreement are likely to lessen competition relative to a situation where each business individually negotiates its own terms and conditions. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 7.4 In assessing the potential detriment of the proposed collective bargaining arrangements, the ACCC has considered the following three possible anti-competitive effects which are likely to occur in the primary area of competition:
- reduced economic efficiencies
 - increased potential for collective activity beyond that authorised
 - effect on competitors outside the collective bargaining arrangement.
- 7.5 The ACCC will then consider the potential flow-on effect of the collective bargaining arrangements into downstream markets.

Reduced economic efficiencies

- 7.6 In its past consideration of collective bargaining arrangements the ACCC has accepted that where collective bargaining results in reduced competition between members on issues such as price and terms of supply anti-competitive detriment could arise. This detriment may be in the form of increased prices to consumers or reductions in innovation.
- 7.7 The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the following four features are present:
- the current level of negotiations between individual members of the AABC and the proposed counterparties on the matters that they seek to negotiate is low;
 - participation in the collective bargaining arrangements is voluntary;

- there are restrictions on the coverage and composition of the bargaining group;
- there is no boycott activity.

These four features as they relate to the AABC's collective bargaining proposal are discussed below.

Current level of negotiations between individual members of the AABC and the counterparties

- 7.8 The AABC has submitted that absent authorisation its members will be required to negotiate with controlling bodies on an individual basis. It further submits that the level of competition in the wagering services market is a direct function of decisions made by controlling bodies and Governments. It considers that authorisation, if granted, would permit AABC members to have greater input into decisions that affect them and would also address the current imbalance in bargaining power.
- 7.9 The ACCC notes that the subject matter of the proposed collective bargaining arrangements, being the negotiation of the payment of a product fee, is a relatively recent development in the wagering sector. It further notes that the product fee is only supported by a legislative framework in respect of the racing industry in Victoria.
- 7.10 The ACCC accepts that there is a strong commercial incentive for bookmakers to successfully negotiate sustainable fees - particularly in respect of 'core' products. While the AABC has nominated a broad range of counterparties with whom it proposes to negotiate there is likely to be a range of relationship necessity between these parties. In other words, it is likely that for some AABC members the successful negotiation of a core product's fee with a particular counterparty will be of significant importance to the successful operation of their business. It is may also be open for these counterparties to introduce standard form, take it or leave it contracts.
- 7.11 On balance the ACCC does not consider that significant detriment is likely to arise. In this respect the ACCC notes that for those counterparties providing core products standard form contracts, involving potentially low levels of negotiation, may develop in the absence of authorisation. While it is somewhat less clear what effect the arrangements may have on negotiations in respect of non-core products, given their comparative commercial significance, it is possible that the level of negotiation will be low.

Voluntary participation in the collective bargaining arrangements

- 7.12 The proposed collective bargaining arrangements are voluntary. AABC members may opt out of the collective bargaining process at any time and negotiate individually with the relevant racing or sporting control bodies. The counterparties may also choose not to participate in collective negotiations with the AABC.

- 7.13 In this respect the ACCC notes that should counterparties become concerned that the proposed collective negotiations are touching upon matters which are inappropriate for collective discussion it would be open for them to exit the discussion.
- 7.14 AABC's application for authorisation is expressed so as to apply to any future AABC members, providing new bookmakers with the opportunity to participate in the collective bargaining arrangement should they choose. Accordingly it does not appear that the arrangements are likely to increase barriers to entry.

Size/composition of bargaining groups

- 7.15 The ACCC considers that where the size of bargaining groups is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers outside the group.
- 7.16 The ACCC considers that significant anti-competitive detriment could flow from an industry wide collective bargaining arrangement as it has the potential to result in substantial distortion of the market for wagering services and consequent inefficiencies.
- 7.17 The AABC submit that collective negotiations will be conducted by the AABC on behalf of its members. The membership of AABC constitutes all of the principal Australian corporate bookmakers which AABC submit represent approximately 8% of the total national turnover on racing and sports betting, and some 3% of total betting expenditure.
- 7.18 On balance the ACCC does not consider that the scope of the proposed collective bargaining group is likely to lead to significant market distortions.

Boycott activity

- 7.19 In its recent decision of *VFF Chicken Meat Growers' Boycott Authorisation* the Tribunal has stated in part:

*The seriousness of the potential consequences of authorising the use of collective boycotts is beyond doubt: they can result in substantial commercial damage not only to the direct target(s) of them but also to the other upstream and downstream businesses and their employees. Consumers might suffer disruption to market supplies and possibly at least temporary price increases.*¹³

- 7.20 The ACCC notes that the AABC has not applied for authorisation to engage in collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.

¹³ *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT 2, at para 381

Conclusion – reduced economic efficiencies

- 7.21 On balance the ACCC considers that any potential reduced economic efficiency which may result from the collective bargaining arrangements is likely to be mitigated by the low level of individual negotiation absent the arrangement; the voluntary nature of the arrangement; the relative size of the bargaining group in the relevant market; and the fact that boycott activity will not be engaged in.

Increased potential for collective activity beyond that authorised

- 7.22 In considering collective bargaining arrangements in the past, the ACCC has noted concern that the arrangements may increase the potential for collusive anti-competitive conduct. Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The ACCC has been concerned that in this environment, there may be an increased likelihood of anti-competitive conduct (beyond that which is authorised) occurring.
- 7.23 The ACCC notes that the likelihood of collusive activity beyond that authorised is reduced where participants are made aware of their obligations under the TPA and where the arrangements are not industry wide.
- 7.24 In respect of the AABC's application, the ACCC considers that there is no information to suggest that any conduct that may raise concerns under the TPA, other than that for which authorisation is sought, is intended to be discussed by the parties to the application.

Effect on competition outside the collective bargaining arrangement

- 7.25 AABC has submitted that its members are competitors in providing wagering services to consumers and that this will not change should authorisation be granted to AABC.
- 7.26 The ACCC considers that competition outside the bargaining group, in particular in the market for the provision of wagering services, is unlikely to be significantly affected by the proposed arrangement. Importantly the relatively narrow nature of the matters for collective discussion will limit any detrimental affects which may otherwise have arisen in the downstream market.
- 7.27 The ACCC also notes that while the collective bargaining group comprises a small component of the wagering services market, its members are nonetheless considered to act as a competitive constraint upon larger market participants. ~~The ACCC does not consider that the proposed collective bargaining arrangements will adversely affect the competitive incentives of the individual participants.~~

Public benefits

- 7.28 In order to grant authorisation to the proposed arrangements, the ACCC must be satisfied that the arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by a lessening of competition arising from the arrangements.
- 7.29 As noted earlier for a public benefit to be given weight in the ACCC's authorisation assessment, it must be demonstrated that the benefit would not arise, or would not arise to the same extent, if the arrangements were not authorised.
- 7.30 The AABC submits that the proposed collective bargaining arrangement will result in the following public benefits:
- efficiency gains through having a single point of contact for the racing and sports wagering industry sector;
 - maintenance of a sound working relationship between AABC, its members, Australian State and Territory Racing controlling bodies and National, and State and Territory sports organisations;
 - improved bargaining power;
 - participation in any dispute resolution mechanism in relation to disputes between controlling bodies of race fields and the members of AABC with regards to the use of race field information;
 - lower transaction costs for customers of the members of AABC; and
 - continued viability of corporate bookmakers.
- 7.31 For the purposes of its assessment the ACCC proposes to consider the AABC's submission within the context of the following public benefits:
- increased input into contracts;
 - dispute resolution; and
 - transaction costs savings.

Increased input into contracts

- 7.32 The AABC submits that authorisation will permit its members to have better input into the decision-making process of racing controlling bodies, sports organisation and other relevant parties. The AABC considers that with authorisation its members will have more input into the negotiation process, ~~seeking a fee arrangement which is sustainable for bookmakers and the racing industry, thereby ensuring a continuing competitive and efficient market.~~ The AABC further submits that a competitive and efficient wagering market which allows the long term viability of efficient corporate bookmakers will ensure that a variety of betting operators remains in the market.

- 7.33 AABC submit that the efficiency gains through having a single point of contact for the racing and sports wagering industry sector will enable more meaningful and efficient discussions of the issues that arise.
- 7.34 The AABC also submits that authorisation will help redress the bargaining imbalance between the different industry players.
- 7.35 The ACCC considers that collective bargaining arrangements, such as the arrangements proposed by the AABC, can result in benefits to the public by facilitating improvements in the level of input parties have into their contractual negotiations.
- 7.36 This improved input is a feature of increasing the bargaining power of the members of the collective by allowing them to aggregate their influence in the negotiation; improving the individual's access to information and resources; and providing a mechanism through which productive contractual discussions between the collective and the counterparty can be achieved.
- 7.37 The ACCC considers that the collective bargaining arrangements proposed by the AABC are likely to improve the input of corporate bookmakers into product fee negotiations and are likely to improve the information and resources available to them. While the ACCC does not consider that improvements in input and information and resources are, in the circumstances, likely to be as significant as in other collective bargaining proposals, it does consider that efficiency gains are likely to be achieved by both corporate bookmakers and the counterparties. Accordingly, the ACCC considers that the AABC arrangements are likely to give rise to public benefits.

Dispute resolution

- 7.38 As part of the proposed collective negotiation arrangement, the AABC proposes to implement a dispute resolution process. Under this process AABC proposes to participate in the resolution of disputes between controlling bodies of race fields and sports organisations and the members of AABC regarding the use of race field and sports information.
- 7.39 AABC submits that equitable treatment between members in the event of disputes will assist in the speedy resolution of disputes, minimising disruptions to the services offered to consumers.
- 7.40 As a general principle the ACCC considers that an effective dispute resolution process is likely to be one which is developed in consultation with all parties involved in the bargaining process and is ultimately implemented with the support of all parties. In this respect, the ACCC notes that, if collective bargaining was authorised, it would be open to the parties to develop a dispute resolution process, taking into account what each party hopes to achieve by such a process.

- 7.41 Any ongoing role of the AABC in dispute resolution would be a matter for the parties to determine. Such a role would *only* override existing arrangements for dispute resolution if provided for in contracts negotiated between the parties. The ACCC would further note that, should the AABC's participation be provided for by the contracts between the parties, corporate bookmakers should be free to elect whether or not the AABC's participation in their dispute with the counterparty is required. The ACCC also notes that in some circumstances participation by the AABC would not necessarily require authorisation (e.g. if it did not involve collective representation of corporate bookmakers).
- 7.42 To the extent that the proposed arrangements allow for the development of an effective dispute resolution process, in a consultative and inclusive manner, the ACCC considers that they are likely to generate some public benefits. Appropriate dispute resolution process offer an effective and often more efficient mechanism through which commercial disagreements can be resolved.

Transaction costs savings

- 7.42 The AABC has submitted that authorisation is likely to result in lower transaction costs to members. In this respect it notes that negotiating contracts individually with racing bodies will involve duplication of legal and financial advice and other fees to both members and the racing bodies. By lowering transaction costs, the collective bargaining arrangements are likely to result in improved services for consumers.
- 7.43 Generally, there are transaction costs associated with using the market as a mechanism for trade. Transaction costs are however likely to be lower in negotiating a collective bargaining agreement involving a single negotiating process relative to a situation where negotiation occurs with many smaller businesses. Transaction costs are also likely to be lower even where a standard form contract would otherwise be in place. This is because the collective bargaining arrangements will allow the group to reduce duplication of legal and other professional fees. Consequently, the ACCC considers that to the extent that these transaction costs savings do arise they are likely to constitute a public benefit.
- 7.44 Given the competitive pressures faced by the AABC's members, the ACCC considers that at least a portion of these cost savings are likely to be passed on to consumers.

Balance of public benefit and public detriment

- 7.45 The ACCC considers that the proposed collective bargaining arrangement is not likely to result in significant public detriment. In reaching this conclusion the ACCC notes
- participation in the proposed negotiations is voluntary for all parties;

- the scope of the group, in terms of competitors in the wagering services market, is constrained; and
 - the arrangement does not provide for collective boycott activity.
- 7.46 Moreover the ACCC notes that the proposed collective bargaining arrangement does not seek to limit the ability of participants to compete in the wagering services market.
- 7.47 The ACCC considers that the proposed collective bargaining arrangement is likely to result in benefits to the public by
- increasing the input of the AABC's members into their contractual discussions, albeit not to a significant extent;
 - providing for potential improvements in dispute resolution mechanisms; and
 - giving rise to transaction costs savings for both the AABC's members and the counterparties with whom they propose to negotiate.
- 7.49 Based upon the information provided to it to date, the ACCC considers that the public benefits likely to result from the proposed collective bargaining arrangement are likely to outweigh the potential anti-competitive detriment of the arrangement. The ACCC is accordingly proposing to grant authorisation to the AABC.

Period of authorisation

- 7.50 In its application, AABC has requested that authorisation be granted for a period of seven years. AABC has not, to date, provided submissions supporting the period for which it has sought authorisation.
- 7.51 On balance the ACCC considers that a shorter period of authorisation would be appropriate. In general, authorising arrangements for a limited time period allows the ACCC, 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. On this basis the ACCC is proposing to grant authorisation to the AABC's arrangements for a period of five years.

Parties to the authorisation

- 7.52 The AABC has sought authorisation, on behalf of its current members and future members, to collectively bargain with a range of counterparties. While the AABC has provided an indicative list of likely counterparties it has not exhaustively identified the parties with whom it may propose to negotiate.
- 7.53 The ACCC is concerned that an authorisation which does not define counterparties with whom negotiations are to occur may give rise to significant uncertainties. In order to address this concern the ACCC is proposing to grant authorisation only in respect of those counterparties which have been identified by the AABC. The ACCC notes that section 91C of the

TPA provides a mechanism by which the scope of the authorisation may be extended to future counterparties if appropriate.

The draft determination

The application

- 8.1 On 30 March 2006, the Association of Australian Bookmaking Companies Inc (AABC) on behalf of its current and future members, lodged application for authorisation A30243 with the Australian Competition and Consumer Commission (ACCC).
- 8.2 The application was made pursuant to section 88(1) of the Trade Practices Act (TPA) for an authorisation under that sub-section:
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or may have the likely effect, of substantially lessening competition within the meaning of section 45 of the TPA and
 - to give effect to a provision of a contract, arrangement or understanding where the provision has, or may have the effect of substantially lessening competition within the meaning of section 45 of the TPA.
- 8.3 The AABC has sought authorisation to permit:
- the negotiation by AABC, on behalf of its members, of the terms and conditions of an agreement between controlling bodies of race fields and the members of AABC, to enable approval to be granted for the members of AABC to use the race field information, including the negotiation of any extension, variation or renewal if applicable;
 - the participation by AABC in any dispute resolution mechanism in relation to disputes between controlling bodies of race fields and the members of AABC with regards to the use of race field information;
 - the negotiation by AABC, on behalf of its members, with sports organisations, peak state and territory sporting bodies and/or their representatives, where required or considered necessary, of terms and conditions or arrangements under which members of AABC would be entitled to conduct business free of risk of claim or prosecution being made by that or another party; and
 - the participation by AABC in any dispute resolution mechanism in relation to disputes between members of the AABC and sports organisations and peak state and territory sporting bodies.

Statutory test

- 8.4 For the reasons outlined in this draft determination, the ACCC is satisfied that the making of and giving effect to the collective bargaining arrangements between the AABC and its members for which authorisation has been sought:
-
- would be likely to result in a benefit to the public; and
 - this benefit would be likely to outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.

Conduct authorised

- 8.5 The ACCC proposes to grant authorisation to permit the AABC, on behalf of its current and future members, to collectively bargain with:
- Australian State and Territory racing control bodies and/or other rights owners with a view to obtaining approval for the members of the AABC to publish and use race field information and similar rights; and
 - National, State and Territory sporting organisations and/or other right owners to obtain approval to publish and use information relating to that sport.
- 8.6 The counterparties in respect of whom the collective bargaining arrangements are proposed to apply are set out at Attachment A to this draft determination.
- 8.7 The nature of the collective bargaining arrangements that might ultimately be entered into are a matter for negotiation between the AABC, its members and right owners. Pursuant to this, the AABC, its members and right owners may choose to make provision for the participation of the AABC in disputes between its members and right owners relating to the publication and use of racing and sporting information.
- 8.8 The ACCC proposes, subject to any submissions received from interested parties and the AABC in relation to this draft determination, to grant authorisation to the proposed arrangements for a period of **5 years**.

Conduct not authorised

- 8.9 Nothing in this draft determination permits the making of any contract, arrangement or understanding containing an exclusionary provision as defined in section 4D of the TPA (otherwise known as a collective boycott).
- 8.10 Further, unless otherwise authorised, nothing in this draft determination permits the collective bargaining amongst the counterparties to the proposed arrangements.
- 8.11 The ACCC considers that to the extent that the AABC, its members or any other party to whom immunity is provided by the proposed authorisation, act outside of the authorised arrangements they will not have protection from the TPA in so doing.

Interim authorisation

- 8.12 On 26 April 2006, the ACCC granted interim authorisation to allow the AABC to commence negotiations with Racing Victoria Limited, Greyhound Racing Victoria and Harness Racing Victoria.
- 8.13 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until a decision to revoke interim authorisation is made.

Further submissions

- 8.14 The ACCC is now seeking further submissions from interested parties. In addition, the AABC or any interested party may request the ACCC to hold a pre-determination conference pursuant to section 90A of the TPA.

Attachment A

Racing Control Bodies

Racing NSW
Greyhound and Harness Racing Regulatory Authority

Racing Victoria Limited
Harness racing Victoria
Greyhound Racing Victoria

Queensland Racing
Queensland Harness Racing Board
Greyhound Racing Authority

Thoroughbred Racing SA Limited
Greyhound Racing SA Limited
Harness Racing SA

Racing and Wagering Western Australia
Gaming and Wagering Commission

Racing Services Tasmania

ACT Racing Club
Canberra Greyhound Racing Club Inc
Canberra Harness racing Club Inc

NT Racing Commission

Australian Racing Board

Racing Information Services Australia

Sporting Organisations

Cricket Australia
Football Federation Australia
National Rugby League
Australian Rugby Union
Tennis Australia
PGA Tour of Australasia
Australian Football League
Basketball Australia