



Australian
Competition &
Consumer
Commission

Draft Notice

in respect of a notification lodged by

Australian Baseball Federation Inc

for its merchandise licensing program

Date: 16 June 2006

Notification no. N90853

Public Register no. C2001/391

Commissioners: Samuel
Sylvan
King
McNeill
Smith

1. Introduction

- 1.1 The Australian Competition and Consumer Commission (ACCC) is the Australian Government 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 Section 47 of the Act prohibits conduct known as exclusive dealing. Broadly, exclusive dealing involves one trader imposing restrictions on another's freedom to choose with whom, in what, or where it deals.
- 1.3 A common form of exclusive dealing is third line forcing. Third line forcing involves the supply of goods or services on condition that the purchaser also acquires goods or services from a third party. Subsections 47(6) and 47(7) prohibit third line forcing per se, meaning that a breach of the Act can be established regardless of the effect on competition.
- 1.4 Businesses may obtain immunity for conduct that might risk breaching the third line forcing provisions of the Act by lodging a 'notification' with the ACCC in accordance with subsection 93(1). Legal immunity conferred by a third line forcing notification commences 14 days after the notification is validly lodged.
- 1.5 The ACCC may revoke a third line forcing notification if it is satisfied that the likely benefit to the public from the conduct will not outweigh the likely detriment to the public from the conduct. Revoking a notification removes the immunity conferred by the lodging of the notification.
- 1.6 Prior to issuing a notice to revoke a notification, the ACCC must issue a draft notice setting out its reasons and providing an opportunity for the notifying party and other interested parties to request a conference in relation to the draft notice.
- 1.7 This is a draft notice proposing to revoke notification N90853 lodged by the Australian Baseball Federation Inc (ABF).

2. The notification

- 2.1 Notification N90853 was lodged by the ABF on 20 March 2001 for third line forcing conduct associated with a merchandise licensing program (the Licensing Program).¹
- 2.2 The ABF is a national baseball body, which supplies services to state and territory baseball associations, regional associations, clubs and players

¹ The ABF also described a preferred supplier program in notification N90853. As there is no requirement that players and clubs use equipment from 'preferred suppliers', the conduct is not third line forcing conduct and therefore does not receive immunity under the notification process.

including affiliation, registration, management, marketing, insurance, player development and administration. All states and territories except Tasmania have an ABF affiliated association. Within each state and territory, baseball clubs enter competitions managed by a regional association. The ABF submits in 2004-05 there were 10,097 registered senior baseball players and 11,190 registered junior players.²

- 2.3 The Licensing Program covers traditional uniform pants, tops, jackets and caps and competition baseballs. Under the Licensing Program, players must wear uniform components and use baseballs bearing the Australian Baseball logo in all games and competitions under the control of the ABF or its members.³ The uniform components and baseballs with the requisite logos are only available from suppliers that have entered into a licence agreement with the ABF trading as Baseball Australia Licensing and Merchandising Enterprise (BALME).
- 2.4 The ABF advises that some of its junior baseball programs, for example tee-ball, are not included in the Licensing Program.⁴ The ABF submits there were 6483 registered tee-ball players in 2004-05.⁵
- 2.5 The notified conduct may be described as follows:

The ABF will provide services to state and territory baseball associations, regional associations, clubs and players on condition that they acquire uniforms and baseballs from licensed third party suppliers.

3. Background

Baseball funding

- 3.1 The Licensing Program was developed following a review of the strategic direction of baseball in Australia conducted by Susan Baker-Finch, an ex-member of the Australian Sports Commission, in 1998.⁶ One of the recommendations of the review was to seek ways to reduce baseball's reliance on government funding.
- 3.2 The financial projections in *Baseball Australia 'The Future is Together'* showed the largest expected source of income for the ABF was Australian Sports Commission grants totalling \$1,505,000.⁷ Grants from the Australian Olympic Commission were expected to be \$85,500, income from capitation and insurance fees \$532,000, members fees \$162,350 and income from sponsorship \$270,000. It was anticipated the Licensing Program would raise \$40,000.⁸

² ABF, Submission to the ACCC, 14 March 2006, Attachment 3.

³ ABF, Submission in support of notification, 20 March 2001, Attachment 2.

⁴ *ibid.*, p. 3.

⁵ ABF, Submission to the ACCC, 14 March 2006, Attachment 3.

⁶ Baseball Victoria, Submission to the ACCC, 10 April 2001, p. 1.

⁷ ABF, *Baseball Australia Costed Operating Plan 2005/06, Section 3*, available via the ABF's website <www.baseball.com.au>, introduced February 2005, p. 3/86.

⁸ *ibid.*

- 3.3 The ABF transfers funds to its member state and territory associations in accordance with its National Royalty Policy. To qualify for these distributions, each state or territory association must sign a *National Royalty Policy State/Territory Association Compliance Agreement*. The agreement requires state and territory associations to (among other things) take all necessary action and cooperate fully with the ABF to assist and support attainment of 100 per cent club and regional association compliance with the Licensing Program.
- 3.4 The ABF submits the total pool available for distribution to state and territory associations in 2005-06 is \$100,000. Of this amount, the ABF indicates \$44,000 is directly attributable to the Licensing Program.⁹

Implementation of the Licensing Program

- 3.5 The ABF's Licensing Program was implemented on 1 April 2001. At that time, the ABF appointed Baseball Victoria, trading as BALME, to manage the program. The ABF submits that Baseball Victoria was selected because it had successfully operated a similar state-based licensing program. The ABF agreed to pay Baseball Victoria \$40,000 per year to administer the Licensing Program.¹⁰
- 3.6 The ABF assumed managerial responsibility of BALME and the Licensing Program on 1 January 2005.¹¹ The ABF submits this shift was intended to minimise the administration costs of the Licensing Program and maximise the return to state and territory associations.¹²
- 3.7 The ABF submits there was initial resistance to the Licensing Program because one state member (Baseball Victoria) was implementing and policing it, and because it was difficult to explain the concept of the Licensing Program to participants at the grass roots level.¹³ The ABF submits the Licensing Program has been developed and at least 90 per cent compliance has now been achieved by Baseball Victoria, ACT Baseball, Baseball QLD, Baseball SA and Baseball NT.¹⁴ The ABF also submits it expects a statement attesting to 90 per cent compliance from Baseball WA.¹⁵
- 3.8 However, Baseball NSW, which oversees 48 per cent of registered baseball players in Australia,¹⁶ could not attest to 90 per cent compliance as at

⁹ ABF, Submission to the ACCC, 14 March 2006, p. 5.

¹⁰ ABF, Letter to Baseball Victoria, 31 March 2001, viewed 7 February 2006, <<http://www.baseball.com.au/site/baseball/abf/downloads/aa/2003/Mar2001.htm>>, p. 6. The agreement stated that the amount would be increased annually by the average yearly Consumer Price Index for the City of Melbourne as published by the Commonwealth statistician but that the fee would not be lower than for the previous year.

¹¹ ABF, Submission to the ACCC, 18 January 2006, p. 1.

¹² *ibid.*

¹³ ABF, Submission to the ACCC, 14 March 2006, p. 2.

¹⁴ Baseball Victoria, Submission to the ACCC, 10 March 2006, p. 1; ABF, Submission to the ACCC, 14 March 2006, p. 9.

¹⁵ ABF, Submission to the ACCC, 14 March 2006, p. 9. The statement had not been received by the ABF as at 10 March 2006.

¹⁶ ABF, Submission to the ACCC, 14 March 2006, Attachment 2.

10 March 2006.¹⁷ The ABF submits that implementing the Licensing Program has been particularly difficult in New South Wales because previous Baseball NSW administrations actively campaigned against the program.¹⁸

- 3.9 The ABF expects compliance with the Licensing Program to increase as state and territory associations have been informed that 2006 will see a significant emphasis on compliance by the ABF.¹⁹ The ABF advises that it has recently contacted state and territory associations in respect of the appointment of local 'compliance officers' to review compliance at a local level.²⁰
- 3.10 The ABF submits penalties for non-compliance may include the following:
- Players: ineligible for state teams; ineligible to be included in Intensive Training Centre Programs; and deregistration.
 - Clubs: unable to gain points in competition games; ineligible to compete in post season play; financial penalties such as removal of discounts for the National Insurance Scheme; members ineligible for any representative teams; and disaffiliation from association.
 - Associations: members ineligible for inter-association representative games; members ineligible for state and national representation; financial penalties such as removal of discounts for the National Insurance Scheme; and disaffiliation from state or territory association.
 - States: members ineligible to play in National Championships; members ineligible to join National Intensive Training Centre Programs; financial penalties such as removal of discounts for the National Insurance Scheme; and withdrawal of National Royalty Policy distributions.²¹

Licensed suppliers

- 3.11 Suppliers may become licensed suppliers by entering into a licence agreement with the ABF trading as BALME. Under the agreement, the licensee commits to making royalty payments to the ABF. The ABF distributes Australian Baseball logos to licensees, and the licensees ensure the logo appears on licensed commodities as required under the licence agreement.²² Both manufacturers and distributors may become licensed suppliers.
- 3.12 At the Licensing Program's inception, the cost of a licence to supply uniforms nationally was the greater of \$6000 and 7.5 per cent of sales. A national licence to supply baseballs was the greater of \$5000 and 5 per cent of sales. As a result of low levels of compliance, the ABF submits some of the original licensees became disenchanted with the value of the program and

¹⁷ *ibid.*, p. 9.

¹⁸ ABF, Submission to the ACCC, 28 April 2006, p. 8.

¹⁹ *ibid.*, p. 4.

²⁰ *ibid.*, pp. 1 and 2.

²¹ *ibid.*, Attachment 1.

²² ABF, Submission to the ACCC 14 March 2006, p. 3.

exited it.²³ In response, the ABF amended the licence fee structure. Licensed suppliers now pay to the ABF a royalty of 7.5 per cent on sales of licensed uniform components and 5 per cent on sales of licensed baseballs.²⁴ Royalty payments are made quarterly in arrears.²⁵

3.13 The ABF submits there is no limit on the number of licensees. The ABF website lists 32 licensed uniform suppliers (of which two supply only pants and one supplies only caps) and 10 licensed baseballs suppliers.²⁶ The ABF submits that the list includes suppliers that compete for business around the country.²⁷ As well as being sourced from licensees directly, licensed products may be acquired from other retailers.

3.14 The ACCC understands that baseball clubs typically make bulk orders for their players from licensed suppliers.

Financial history of the Licensing Program

Revenue raised

3.15 The revenue raised by the Licensing Program to 30 June 2005 is summarised in Table 1.

Table 1 Revenue raised by the Licensing Program

Year	2001-02*	2002-03	2003-04	2004-05
Revenue (\$)	72,000	57,583	54,013	52,242

* 1 April 2001 to 30 June 2002.

3.16 In the six months to 31 December 2005, the Licensing Program raised \$27,667, giving total revenue of approximately \$263,505 between the program's inception and 31 December 2005.

3.17 As noted, the ABF expects increased compliance with the Licensing Program and it submits this, combined with the increase in the number of licensees, will increase revenue raised by the Licensing Program.²⁸

Costs incurred

3.18 The most significant cost of the Licensing Program to date has been the management fees of \$40,000 per year paid to Baseball Victoria between 2001-02 and 2003-04, and a fee of \$25,000 paid to Baseball Victoria for the six months to 31 December 2004. Other major costs identified by the ABF

²³ ABF, Submission to the ACCC, 18 January 2006, p. 1.

²⁴ ABF trading as BALME and Licensee, Licence Agreement, 1 June 2006-30 June 2009, available from the ABF website, <www.baseball.com.au>, clause 3.2 and Part 8 of the Schedule.

²⁵ *ibid.*

²⁶ ABF Directory, Licensed Merchandised Suppliers, last updated 23 March 2006, available from the ABF website, <www.baseball.com.au>.

²⁷ ABF, Submissions to the ACCC, 14 March 2006, p. 7 and 28 April 2006, p. 9.

²⁸ ABF, Submission to the ACCC, 28 April 2006, p. 6.

include \$23,640 for the production of logos in 2001 and \$17,822 written off as bad debt (largely due to business failures).²⁹

- 3.19 In the first 12 months of the program being administered by the ABF, expenses for the period amounted to \$7206.³⁰ The ABF submits this included \$4135 for the production of logos.
- 3.20 The ABF estimates the annual cost of the Licensing Program, now that it administers it, is \$6600.³¹ It submits this comprises the 'hard' costs of the logos (\$5000), travel to meet with constituents and licensees (\$1000), bank fees (\$100) and miscellaneous costs (\$500).
- 3.21 The ABF submits that other administration costs will be absorbed by it until such time as total revenue achieved from the Licensing Program exceeds \$80,000.³² The ABF notes this arrangement is 'as described in the original agreement signed with Baseball Victoria'. However, the first schedule to that agreement stated that if *net* income reaches \$80,000, around 20 per cent of this will go to the ABF. The schedule also stated that the ABF would receive the first \$15,000 of the net amount over \$100,000 and the manager of the program (at the time Baseball Victoria) would receive approximately 15 per cent. It is not clear how this schedule is to apply.

Distribution of funds

- 3.22 The ABF submits that of the funds raised by the Licensing Program to date, \$17,000 was transferred to state and territory associations in 2003-04 and \$50,000 was transferred in 2006, after the ABF assumed responsibility for the program.³³
- 3.23 The ABF considers that the changes made to the operation of the Licensing Program will significantly improve future returns to member associations.³⁴

Previous reviews of the notification

- 3.24 Since the notification was lodged with the ACCC, numerous parties have expressed concern regarding the notified conduct.
- 3.25 As a result of complaints in relation to the cost of licensed commodities and the failure of the Licensing Program to return funds to baseball at the grass roots level, the notification has been reviewed four times.
- 3.26 The notification was initially allowed to stand on 9 November 2001 as:
- the licence fees charged did not appear excessive
 - there was no limit on the number of suppliers that could take up a licence

²⁹ *ibid.*, p. 5.

³⁰ ABF, Submissions to the ACCC, 18 January 2006 Attachment 1 and 14 March 2006, Attachment 1.

³¹ ABF, Submission to the ACCC, 28 April 2006, p. 6.

³² *ibid.*

³³ *ibid.*, p. 5.

³⁴ ABF, Submission to the ACCC, 14 March 2006, p. 7.

- the costs of the program would be limited through the supply of interim logos
 - it appeared benefits would arise from the distribution of proceeds to state and territory associations.
- 3.27 The ACCC decided not to take any further action following a review in 2002-03 for the same reasons as outlined in 2001. However, the ACCC requested that the ABF provide financial information relating to the Licensing Program for the 2002-03 financial year.³⁵
- 3.28 Following the supply of the information requested, the ACCC conducted a third review of the notification, requesting submissions from interested parties. On 26 May 2004, the ACCC decided not to take any further action in respect of the notification, accepting that the administrative costs involved in establishing the program were likely to be greater than those incurred on an ongoing basis.³⁶ The ACCC concluded that the revenue generated by the Licensing Program was likely to increase, and accordingly the distribution of funds to state and territory associations was likely to increase. Again, the ACCC requested the provision of details of the revenue raised and funds distributed in the 2004-05 financial year to satisfy itself that sufficient benefits to the public were being generated by the Licensing Program.
- 3.29 The ABF provided the requested information on 18 August 2005 and 18 January 2006. It was not clear from the information initially provided whether the likely benefit from the conduct would outweigh the likely detriment. On this basis, the ACCC wrote to a range of interested parties, including suppliers and baseball clubs, regional associations and state and territory associations.

4. Statutory test

- 4.1 Subsection 93(3A) of the Act provides that the ACCC may give notice removing immunity for conduct described in subsections 47(6) and 47(7) if it is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment to the public from the conduct or proposed conduct.
- 4.2 Before revoking the immunity obtained by a third line forcing notification, the ACCC must issue a draft notice of its intention (subsection 93A(1)) and give the applicant and interested parties the opportunity to respond and to call a conference in relation to the draft notice (subsection 93A(2)).

5. Submissions received

- 5.1 In response to its most recent request for submissions, the ACCC received one submission in support of the notified conduct from Baseball Victoria. Baseball SA also provided an oral submission to the effect that it is happy for the Licensing Program to continue. Submissions opposing the notified

³⁵ ACCC, Letter to the ABF, 14 October 2002, p. 2.

³⁶ ACCC, Letter to the ABF, 26 May 2004, p. 1.

conduct were received from three New South Wales based parties: the Pacific Coast Baseball League (PCBL); Hills Junior Baseball Association (HJBA); and an unlicensed supplier, Kay's Custom Sportswear (KCS).

- 5.2 The views of the ABF and interested parties are outlined where relevant in section 6 of this draft notice. Copies of all public submissions and correspondence between the ABF and the ACCC relating to this review of notification N90853 are available on the ACCC's website <www.accc.gov.au>, by following the links to 'Public registers', 'Authorisations and notifications registers' and 'Exclusive dealing notifications register'.

6. ACCC assessment

Public detriment

- 6.1 Public detriment from licensing programs, such as the ABF's Licensing Program, results from:
- (a) the royalty payments made by licensed suppliers;
 - (b) any dead weight loss associated with reduced competition as a result of restrictions on supply; and
 - (c) any administration costs, whether borne by the scheme or absorbed by other bodies.

Royalty payments

- 6.2 As noted, licensed suppliers pay a royalty to the ABF to participate in the Licensing Program.
- 6.3 The Licensing Program royalties are a direct cost to licensed baseball and baseball uniform suppliers. KCS submits this cost would need to be passed onto consumers.³⁷ The ACCC considers the effect of royalty payments is that either the cost will be fully reflected in the prices of licensed goods, or the cost will be reflected in part in the prices of licensed goods and the licensee will absorb the remainder. If a licensee absorbs its royalty payments, this may be reflected in other areas of the licensee's business.
- 6.4 In either case, the ACCC considers that the entire amount of royalty payments made by licensed suppliers (7.5 per cent on sales of uniforms and 5 per cent on sales of baseballs) is likely to constitute a detriment to the public.
- 6.5 The ABF submits that the possibility of public detriment from the Licensing Program has been decreased by the removal of up-front licence fees and the shift to a percentage of sales approach to calculating royalties.³⁸

³⁷ KCS, Submission to the ACCC, 9 March 2006, p. 1.

³⁸ ABF, Submissions to the ACCC, 14 March 2006, p. 8 and 28 April 2006, p. 9.

- 6.6 While this may be the case, the ACCC remains of the view that the royalty payments are a cost arising from the program. They are a cost to suppliers, ultimately reflected in the prices and/or quality of their goods and services.

Reduced competition

- 6.7 The Licensing Program places a restriction on the suppliers from which baseball associations, clubs and players may choose to acquire competition uniforms and baseballs. Restrictions on choice invariably lessen competition and create inefficiencies, ultimately resulting in higher costs to consumers and a dead weight loss to society.
- 6.8 The extent to which the Licensing Program lessens competition will be affected by the structure of the program.
- 6.9 The PCBL submits that the Licensing Program does not generate any detriment in respect of the supply of uniforms because many suppliers are not licensed, and those who are also supply unlicensed uniforms at an ex-licence cost at the request of clubs.³⁹
- 6.10 However, the ACCC notes this practice is unlikely to continue, which may alter the PCBL's position. Under the new licence agreement offered by the ABF (1 June 2006 to 30 June 2009):
- The Licensee shall not manufacture, sell, use, provide advertise or distribute any House Merchandise to ABF affiliate States, Associations or Clubs, without the prior written approval of the BALME which approval shall not be unreasonably withheld and the licensee shall not allow or create a market for house merchandise in opposition to any market for the Licensed Commodities.⁴⁰
- 6.11 'House merchandise' is defined to mean commodities of the same or similar quality and having the same or similar function and purposes as the licensed commodity.⁴¹ These clauses mean that clubs may no longer be able to purchase un-licensed uniforms at lower prices. The ACCC notes that the licence agreements do not form part of the notified conduct and therefore do not receive immunity under the notification process.
- 6.12 The ABF submits that the possibility of detriment to the public from the Licensing Program is decreased because there are no up-front fees and no restrictions on the number of licensees.⁴²
- 6.13 The ACCC agrees that these features significantly lessen the anti-competitive effect of the program.
- 6.14 Nevertheless, the ACCC considers that the costs of entering into and complying with a licence agreement may constitute a barrier to entry which results in fewer suppliers of baseball goods than might otherwise be the case.

³⁹ PCBL, Submission to the ACCC, 7 March 2006, p. 3.

⁴⁰ ABF trading as BALME and Licensee, Licence Agreement, 1 June 2006-30 June 2009, available from the ABF website, <www.baseball.com.au>, clause 10.3.

⁴¹ *ibid.*, clause 1(b).

⁴² ABF, Submission to the ACCC, 14 March 2006, p. 9.

Where potential suppliers choose not to supply goods because of the Licensing Program, competition is reduced, causing prices to be higher, quality to be lower and/or service to be poorer than in the situation without the Licensing Program.

Administration costs

- 6.15 In addition to the royalty payments and the effect on competition, the ABF's Licensing Program imposes administrative costs on the ABF, state and territory associations, regional associations and clubs.
- 6.16 The Licensing Program incurred significant direct administrative costs in its early years of operation. Between 2001-02 and 2003-04, Baseball Victoria was paid \$40,000 per year in management fees. In the six months to 31 December 2004, it was paid \$25,000.
- 6.17 As noted in section 3 of this draft notice, the Licensing Program also gave rise to other significant costs including the initial cost of Australian Baseball logos (\$23,640) and bad debt write offs (\$17,822).
- 6.18 The ABF submits it intends to reduce the administration costs of the Licensing Program. As noted, the ABF estimates the 'hard' costs of the program will amount to approximately \$6600 per year. The annual management fee of \$40,000 paid to Baseball Victoria in the past, however, raises the question whether the Licensing Program can be administered for the \$6600 claimed the ABF. In this respect, the ABF advises it will absorb additional administration costs. However, whether the costs are paid for directly by the program or absorbed by the ABF, they are costs of the program to be taken into account. The funds used to administer the program might otherwise be used by the ABF to develop the sport of baseball or make payments to state and territory associations. The ACCC considers the entire cost of administering the Licensing Program to be a public detriment that must be weighed against any public benefits flowing from the program.
- 6.19 The ABF submits that costs other than the 'hard' costs of administering the program will be absorbed by the ABF 'until such time as total revenue achieved from the Program exceeds \$80,000, as described in the original agreement signed with Baseball Victoria.'⁴³ However, as noted, the first schedule to this agreement states that should *net* income reach \$80,000, approximately 20 per cent of this is to go to the ABF and that the ABF will receive the first \$15,000 of the net amount over \$100,000. If this occurs, the ACCC notes it will further reduce the funds available for distribution to state and territory associations.
- 6.20 HJBA submits that the Licensing Program also generates a detriment in the form of compliance costs to state and territory baseball associations and

⁴³ ABF, Submission to the ACCC, 28 April 2006, p. 6.

clubs.⁴⁴ The ACCC accepts this and notes that as clubs and associations respond to ABF calls for greater compliance, these costs will increase.

- 6.21 The ACCC also considers that the Licensing Program imposes a small cost on licensees in addition to royalty payments. For example, the administration costs associated with entering into and complying with the licence agreement.

Public benefits

- 6.22 The public benefits claimed by the ABF are:
- (a) benefits associated with the distribution of revenue to state and territory associations; and
 - (b) benefits associated with developing a united, ‘whole of sport’ image for baseball in Australia.

Distributions to state and territory associations

- 6.23 The ABF submits that the Licensing Program provides a benefit to the public as it generates returns for the ABF and its member state and territory associations outside of the direct levy on membership, that is, outside of association and ABF registration.⁴⁵ The ABF highlights reduced dependence on government funding as being of continuing importance, especially as baseball lost its place in the 2012 Olympics. This, the ABF submits, may result in decreased funding for high performance players by the Australian Olympic Committee, and possibly the Australian Sports Commission.⁴⁶ The ABF submits that strong performance at the elite level is important for maintaining profile in the sporting community.
- 6.24 Interested party submissions to the ACCC argue that fund transfers to date have been insufficient.⁴⁷ The ABF submits that the return of funds to state and territory associations is expected to increase now that the ABF has assumed managerial responsibility for the Licensing Program.⁴⁸
- 6.25 The ACCC accepts there may be a benefit from the Licensing Program in the form of transfers to state and territory baseball associations, which may in turn increase participation in the sport, fostering community fitness and recreation. The ACCC acknowledges that although the Licensing Program has not delivered high returns to state and territory associations to date, it recognises that the transfer of \$50,000 in early 2006 indicates some improvement in the capacity of the program to make these returns.
- 6.26 The ACCC also accepts that there may be a small benefit in the form of revenue that is retained by the ABF and used to develop the sport.

⁴⁴ HJBA, Submission to the ACCC, 23 March 2006, pp. 1 and 2.

⁴⁵ ABF, Submission in support of notification, 20 March 2001, p. 4.

⁴⁶ ABF, Submission to the ACCC, 14 March 2006, p. 3.

⁴⁷ PCBL, Submission to the ACCC, 7 March 2006, pp. 2 and 3; KCS, Submission to the ACCC, 9 March 2006, p. 1; and HJBA, Submission to the ACCC, 23 March 2006, p. 6.

⁴⁸ ABF, Submission to the ACCC, 14 March 2006, p. 7.

- 6.27 These benefits may increase in line with the increase in compliance with the Licensing Program.
- 6.28 As discussed below, however, these benefits are offset to the extent that the costs of administering the program erode the funds available for distribution.

‘Whole of sport’ approach

- 6.29 The ABF submits that the Licensing Program will deliver benefits as it provides the opportunity to look at other national programs and demonstrates the ability of baseball to operate on a national basis.⁴⁹ The ABF considers that the Licensing Program provides an identity for marketing and sponsorship opportunities and that a ‘whole of sport’ sponsor, Financial Wealth, was secured as a direct result of the Licensing Program.⁵⁰ The ABF submits that some of these sponsorship funds are transferred to state and territory associations in accordance with the National Royalty Policy.⁵¹
- 6.30 The ACCC considers that the ABF projects a ‘whole of sport’ image through a number of means. These include the development of an ABF website and online player registration system.⁵² The ABF submits that the website provides a significant point of communication and information for local participants.⁵³ The ABF also sends E-News, a monthly electronic newsletter, to members.⁵⁴
- 6.31 The ACCC has not received any evidence to support and is not satisfied that a benefit to the public from a sense of increased unity in Australian baseball is directly attributable to the Licensing Program.

Balance of public benefits and detriments

- 6.32 The ACCC considers the ABF’s Licensing Program results in detriment to the public comprising:
- (a) the royalty payments made by licensed suppliers;
 - (b) any dead weight loss associated with the reduced competition as a result of restrictions on supply; and
 - (c) any administration costs, whether borne by the scheme or absorbed by other bodies.
- 6.33 Regarding public benefits, the ACCC considers that the Licensing Program is likely to result in the ABF providing funding to state and territory baseball associations. The ACCC notes that now the ABF has assumed responsibility for the program, more significant transfers to state and territory associations

⁴⁹ ABF, Submission in support of notification, 20 March 2001, p. 4 and Submission to the ACCC, 14 March 2006, p. 7.

⁵⁰ ABF, Submission to the ACCC, 28 April 2006, pp. 8 and 9 and Submission to the ACCC 14 March 2006, p. 2.

⁵¹ *ibid.*

⁵² ABF, Submission to the ACCC, 14 March 2006, p. 6.

⁵³ *ibid.*

⁵⁴ *ibid.*, p. 5.

can be expected. The ACCC considers such transfers to be a benefit in their own right.

- 6.34 The ACCC is also satisfied that the transfers to state and territory baseball associations may result in a small benefit to the public to the extent that the payments assist in the development of baseball in Australia and increase community fitness and recreation. The ACCC notes this benefit will be reduced as costs are incurred in using the funds at the state association and possibly regional association and club levels.
- 6.35 However, irrespective of whether the Licensing Program operates exactly as envisaged by the ABF, the ACCC notes that the Licensing Program will necessarily return less to state and territory associations than is raised by it. The difference will be at least equal to the 'hard' administration costs claimed by the ABF (estimated by the ABF to be \$6600), and potentially more, having regard to the higher costs claimed by the ABF to date and the ABF's acknowledgement that it intends to absorb additional administration costs.
- 6.36 While well intentioned, the ABF's Licensing Program has not delivered the intended benefits and on the information provided to the ACCC, it seems unlikely to do so in the future. The ABF's Licensing Program, however, has come at a cost to the sport and its participants. On balance, the ACCC considers that the likely benefits to the public from the notified conduct will not outweigh the likely detriment.
- 6.37 This draft notice does not indicate that the ACCC considers all such programs are likely to generate a net public detriment. Revenue raising schemes that do not impose comparatively high administration, enforcement and compliance costs and that simultaneously generate clear benefits to the public may be in the public interest.

7. Draft notice

- 7.1 For the reasons outlined in this draft notice, the ACCC is satisfied that the likely benefit to the public from the ABF's Licensing Program will not outweigh the likely detriment to the public.
- 7.2 Accordingly, the ACCC proposes to issue a notice under section 93(3A) of the Act to revoke the immunity afforded by notification N90853. Such a notice would remove the immunity provided by the notification 31 days after the date it is issued.
- 7.3 The ACCC will now seek further submissions from interested parties. In addition, the ABF or any interested party may request that the ACCC hold a conference in relation to this draft notice, in accordance with section 93A of the Act.