



Australian
Competition &
Consumer
Commission

Notice

revoking the notification lodged by

Australian Baseball Federation Inc

for third line forcing conduct associated with its
merchandise licensing program

Date: 1 September 2006

Notification no. N90853

Public Register no.
C2001/391

Commissioners: Samuel
King
Martin
McNeill
Smith
Willett

Executive summary

The ACCC has decided to revoke notification N90853 lodged by the Australian Baseball Federation Inc. The notification ceases to be in force on 1 April 2007.
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The notification

The Australian Baseball Federation Inc (ABF) lodged notification N90853 on 20 March 2001 for third line forcing conduct associated with its merchandise licensing program (the Licensing Program).

Under the Licensing Program, the ABF provides a range of services to state and territory baseball associations, regional associations, clubs and players on condition that they acquire certain uniform components and baseballs from licensed third party suppliers.

The ACCC has reviewed the notification on four occasions.

The ACCC issued a draft notice proposing to revoke the ABF's notification on 16 June 2006.

ACCC assessment

The ACCC recognises that there is a benefit to the public in the form of direct transfers of funds from the ABF to the state and territory baseball associations. The ACCC also accepts that there is further benefit to the extent these funds assist in the development of baseball in Australia and increase community fitness and recreation.

However, these benefits must be weighed against detriment to the public from reduced competition between suppliers, the cost of administering the Licensing Program and other administration costs flowing from the program. While there is no limit on the number of licensees, the ACCC is concerned that the existence of the Licensing Program constitutes a barrier to entry which reduces competition in the national wholesale markets for baseballs, baseball caps and traditional baseball uniforms.

On balance, the ACCC considers that the likely benefits to the public from the notified conduct will not outweigh the likely detriment to the public.

The ACCC does not object to sporting organisations seeking to raise revenue or project a whole of sport image through licensing programs and/or the use of logos. However, the ACCC is concerned with this arrangement because it forces players (including players at a more junior level), clubs and associations to acquire products from third party suppliers, thereby restricting consumer choice as to the price and quality of products they purchase.

The ACCC considers it appropriate to allow the ABF a transition period during which it may develop and implement alternative arrangements to the existing merchandise licensing program. Therefore, the notification will remain in force until after the next summer baseball season.

Notice

The ACCC issues this notice under section 93(3A) of the *Trade Practices Act 1974* to revoke the immunity afforded by notification N90853. The notification giving the ABF immunity from legal action under the Trade Practices Act ceases to be in force on **1 April 2007**.

1. Introduction

- 1.1 The Australian Competition and Consumer Commission (ACCC) is the independent statutory authority 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 The ACCC issued a draft notice on 16 June 2006 (the Draft Notice) proposing to revoke notification N90853 lodged by the Australian Baseball Federation Inc (the ABF). A conference in respect of the Draft Notice was held on 24 July 2006 (the Pre-decision Conference).
- 1.8 This is a notice, issued under section 93(3A) of the Act, revoking notification N90853 lodged by the ABF. The document sets out the ACCC's reasons for giving notice as required by section 93(3B) of the Act.

2. The notification

- 2.1 Notification N90853 was lodged on 20 March 2001 for third line forcing conduct associated with the ABF's merchandise licensing program (the Licensing Program).¹
- 2.2 The ABF is a national baseball body, which provides services to state and territory baseball associations, regional associations, clubs and players including affiliation, registration, management, marketing, insurance, player development, advice on legal issues and administration.
- 2.3 All states and territories except Tasmania have an ABF affiliated association. Within each state and territory, regional associations manage competitions which are entered into by local baseball clubs. The ABF submitted that in 2004-05 there were 10,097 registered senior baseball players and 11,190 registered junior players.²
- 2.4 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 program covers traditional uniform pants, tops, jackets and caps and competition baseballs. Licensed goods with the requisite logo are only available from suppliers that have entered into a licence agreement with the ABF trading as Baseball Australia Licensing and Merchandising Enterprise (BALME).
- 2.5 The ABF advised that some of its junior baseball programs, for example T-ball, are not subject to the Licensing Program.⁴ The ABF submitted that there were 6,483 registered T-ball players in 2004-05.⁵ T-ball players are under 8 years old in New South Wales, Victoria, Queensland, the Australian Capital Territory and the Northern Territory, under 10 years old in South Australia and under 13 years old in Western Australia.⁶
- 2.6 Playing tops are also excluded from the Licensing Program in ABF sanctioned masters events.⁷ That is, the ABF requires only licensed pants, caps and warm up jackets to be worn by players. The ABF submitted that the annual masters tournaments attract around 600 participants.⁸ Further, the ABF noted that not all masters tournaments choose to be sanctioned by the ABF. For example, the Alice Springs Masters, which attracts more than 220 players, has not sought ABF approval.⁹

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

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 ABF, Submission to the ACCC, 11 August 2006, p. 7.

⁷ ABF form, undated, provided by PCBL at the Pre-decision Conference, Pre-decision Conference Record, 24 July 2006, Attachment 2.

⁸ ABF, Submission to the ACCC, 24 July 2006, p. 2.

⁹ ABF, Submission to the ACCC, 11 August 2006, p. 5.

- 2.7 The notified conduct may be described as follows:

The ABF provides 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.

- 2.8 The Draft Notice proposing to revoke notification N90853 was issued by the ACCC on 16 June 2006.

3. Submissions received

Submissions received prior to the Draft Notice

- 3.1 In response to its request for submissions in February 2006, 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 program were received from three New South Wales based parties: the Pacific Coast Baseball League (PCBL); Hills Junior Baseball Association; and an unlicensed supplier, Kay's Custom Sportswear.

Submissions received following the Draft Notice

- 3.2 In response to the Draft Notice, the ABF forwarded to the ACCC letters in support of the ABF's Licensing Program from each of the state and territory associations, four licensed suppliers (Fielders Choice, Greenfly Pty Ltd, Sportswear Queensland and Hat Trick Enterprises) and the Upwey Ferntree Gully Baseball Club.¹⁰ Baseball Victoria and Baseball WA lodged their submissions in support of the Licensing Program with the ACCC directly.
- 3.3 Submissions in support of the program were also received from the licensed supplier Addlon Trading Co Pty Ltd (representing EASTON Baseball USA), the Waverley Baseball Club and the Sandringham Baseball Club.
- 3.4 The New South Wales Junior Baseball League lodged two submissions in support of the ACCC's Draft Notice.¹¹
- 3.5 Hills Junior Baseball Association made two further submissions to the ACCC following the Draft Notice. The first submission indicated that two facts underpinning its initial submission had changed; Baseball NSW received a substantial payment from the ABF and the ABF advised it will not charge administration costs against the revenue generated by the Licensing Program until the returns are significant. In its second submission, Hills Junior Baseball Association stated that it has not changed its position in relation to the Licensing

¹⁰ The submission from the Upwey Ferntree Gully Baseball Club has been excluded from the public register because it was sent to the ACCC by the ABF and the club has not consented to its submission being placed on the public register.

¹¹ The submission from the New South Wales Junior Baseball League dated 3 March 2006 was written in response to the ACCC's request for submissions dated 14 February 2006. However, the submission was not received by the ACCC until 11 July 2006 and therefore was not referred to in the Draft Notice.

Program but will not to engage in any further public action to challenge the ABF.¹²

- 3.6 The Australian Sports Commission, while not commenting on the ABF's Licensing Program specifically, noted general support for sporting bodies seeking to raise revenue and conduct their business with a national view.
- 3.7 The ABF requested that the ACCC hold a conference in relation to the Draft Notice. The Pre-decision Conference was held on 24 July 2006 and was attended by the ABF and the PCBL. Oral submissions made at the conference are summarised in the ACCC's Pre-decision Conference Minutes.
- 3.8 The ABF provided a written submission at the Pre-decision Conference, together with a letter in support of the Licensing Program from the Williamstown Baseball Club. The ABF lodged two further submissions addressing issues raised at the Pre-decision Conference and subsequent interested party submissions.
- 3.9 The PCBL provided two submissions in support of the ACCC's Draft Notice following the Pre-decision Conference. The second of these attached letters in support of the Draft Notice from the Ryde Hornsby Baseball League and the North Ryde R.S.L. Baseball Club. The Ryde Hornsby Baseball League also forwarded its submission to the ACCC directly.

Content of submissions received

- 3.10 The views of the ABF and interested parties are outlined where relevant in sections 4 and 7 of this notice. Copies of all public submissions, as well as the Pre-decision Conference Minutes and correspondence relating to this review of notification N90853, are available at the ACCC website <www.accc.gov.au> by following the links 'Public registers', 'Authorisations and notifications registers' and 'Exclusive dealing notifications register'.

4. Background

Baseball funding

- 4.1 The Licensing Program was developed following a review of the strategic direction of baseball in Australia conducted in 1998 by Susan Baker-Finch, an ex-member of the Australian Sports Commission.¹³ One of the recommendations of the review was that the ABF seek ways to reduce the reliance of baseball on government funding.
- 4.2 The ABF submitted that the costs of administering a third tier national sport have increased significantly over the last few years, in particular due to increased insurance and ground rental costs and the costs of the providing advice on a range of legal issues such as child protection, privacy, discrimination and risk management assistance.¹⁴ Further, the ABF stated that much of the government

¹² Hills Junior Baseball Association Inc, Submission to the ACCC, 6 July 2006, p. 1; Submission to the ACCC, 2 August 2006, p. 1.

¹³ Baseball Victoria, Submission to the ACCC, 10 April 2001, p. 1.

¹⁴ ABF, Submission to the ACCC, 24 July 2006, p. 1.

funding it receives is earmarked for specific elite development programs and volunteers are becoming more difficult to recruit.¹⁵ The ABF submitted that it is well recognised that ‘the environment for sport sponsorship has deteriorated significantly post the 2000 Olympics’.¹⁶

- 4.3 The financial projections in *Baseball Australia ‘The Future is Together’* showed the largest expected source of income for the ABF in 2005-06 was Australian Sports Commission grants totalling \$1,505,000.¹⁷ Income from capitation and insurance fees was expected to be \$532,000, sponsorship \$270,000, members fees \$162,350 and grants from the Australian Olympic Commission \$80,000.¹⁸ It was anticipated that the Licensing Program would raise \$40,000 for the year (1.17 per cent of the ABF’s total projected income).¹⁹
- 4.4 The ABF transfers funds to the 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.
- 4.5 The ABF submitted that the total pool available for distribution to state and territory associations in 2005-06 was \$100,000. Of this amount, the ABF indicated that \$44,000 was directly attributable to the Licensing Program.²⁰ While \$42,000 of the pool was tied to the state and territory associations achieving agreed benchmarks (including 90 per cent compliance with the Licensing Program), the remaining \$58,000 was to be distributed in proportion to the percentage of players each association had in the national database.²¹ The ABF submitted that New South Wales had the most players with 48 per cent, Victoria had 16 percent, Queensland had 13 per cent, South Australia had 10 per cent, the Australian Capital Territory had 3 per cent and the Northern Territory had 1 per cent of registered players.²²
- 4.6 The ABF submitted that the Licensing Program is expected to provide a greater amount for distribution to state and territory associations next year.²³

Implementation of the Licensing Program

- 4.7 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 agreed to pay Baseball Victoria \$40,000 per year to administer the

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ ABF, *Baseball Australia Costed Operating Plan 2005/06, Section 3*, available at the ABF website <www.baseball.com.au>, introduced February 2005, p. 3/86.

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ ABF, Submission to the ACCC, 14 March 2006, p. 5.

²¹ *ibid.*, Attachment 2.

²² *ibid.*

²³ ABF, Submission to the ACCC, 24 July 2006, p. 2.

- Licensing Program.²⁴ The ABF submitted that Baseball Victoria was selected, and the amount of the management fee negotiated, in light of Baseball Victoria's own successful program.²⁵
- 4.8 The ABF assumed managerial responsibility of BALME and the Licensing Program on 1 January 2005.²⁶ The ABF submitted that this change in management was intended to minimise the administration costs of the Licensing Program and maximise the return to state and territory associations.²⁷
- 4.9 The ABF submitted that it has a nominated marketing employee who, among other duties, runs the Licensing Program and implements administrative improvements.²⁸ The ABF noted that this person is employed using funds from the 'whole of sport' sponsor, Financial Wealth.²⁹
- 4.10 The ABF submitted that 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.³⁰ The ABF submitted that at least 90 per cent compliance with the Licensing Program has now been achieved by Baseball Victoria, the ACT Baseball Association, Baseball QLD, Baseball SA and Baseball NT.³¹ The ABF also submitted that it expects a statement attesting to 90 per cent compliance from Baseball WA.³²
- 4.11 However, Baseball NSW, which oversees 45 per cent of registered baseball players in Australia,³³ could not attest to 90 per cent compliance with the Licensing Program as at 10 March 2006.³⁴ The ABF submitted that there have been particular problems with compliance in New South Wales because previous Baseball NSW administrations actively campaigned against the Licensing Program.³⁵

²⁴ 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.

²⁵ ABF, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 5; Submission to the ACCC, 18 January 2006, p. 1.

²⁶ ABF, Submission to the ACCC, 18 January 2006, p. 1.

²⁷ *ibid.*

²⁸ ABF, Submission to the ACCC, 24 July 2006, p. 5; Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 5.

²⁹ *ibid.*

³⁰ ABF, Submission to the ACCC, 14 March 2006, p. 2.

³¹ Baseball Victoria, Submission to the ACCC, 10 March 2006, p. 1; ABF, Submission to the ACCC, 14 March 2006, p. 9.

³² ABF, Submission to the ACCC, 14 March 2006, p. 9. The statement had not been received by the ABF as at 10 March 2006.

³³ ABF, Submission to the ACCC, 14 March 2006, Attachment 2.

³⁴ Baseball NSW, AGM 2006, 63rd Annual Report for the year ended 31 March 2006, p. 50, viewed 11 August 2006, <www.nsw.baseball.com.au>.

³⁵ ABF, Submission to the ACCC, 28 April 2006, p. 8.

- 4.12 The ABF expects compliance with the Licensing Program to increase.³⁶ The ABF advised that it has appointed ‘compliance officers’ to review compliance at a local level and has informed state and territory associations that 2006 will see a significant emphasis on compliance.³⁷ The ABF submitted that the compliance officers are generally employees of the ABF or ABF members and will check compliance with the Licensing Program as part of their other baseball related duties.³⁸
- 4.13 In response to the Draft Notice, licensed supplier Fielders Choice observed that customer support for the Licensing Program is ‘at an all time high’ and that customers consider they should purchase licensed products where possible.³⁹
- 4.14 The ABF submitted that penalties for non-compliance with the Licensing Program 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.⁴⁰
- 4.15 The ABF submitted that penalties will only be applied after two infraction notices have been given, and the non-complying member has been allowed an opportunity to rectify the problem.⁴¹ The ABF stated that it was not aware of any instances of points being deducted from, or fines being imposed on, clubs for non-compliance with the Licensing Program.⁴²

Licensed suppliers

- 4.16 Manufacturers or distributors of baseballs and/or baseball uniforms 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 that the logo appears on licensed commodities as required under

³⁶ *ibid.*, p. 4.

³⁷ ABF, Submissions to the ACCC, 28 April 2006, pp. 1, 2 and 4; 24 July 2006, p. 9.

³⁸ ABF, Submission to the ACCC, 24 July 2006, p. 9.

³⁹ Fielders Choice, Letter to the ABF, 2 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

⁴⁰ ABF, Submission to the ACCC, 28 April 2006, Attachment 1.

⁴¹ *ibid.*

⁴² ABF, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 9.

the licence agreement.⁴³ The ABF submitted that there is no (and will be no) limit on the number of licensees.⁴⁴

- 4.17 At the Licensing Program's inception, a licence to supply uniforms nationally costed the greater of \$6,000 and 7.5 per cent of sales. A national licence to supply baseballs costed the greater of \$5,000 and 5 per cent of sales. As a result of low levels of compliance, the ABF submitted that some of the original licensees became disenchanted with the value of the program and exited it.⁴⁵ 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.⁴⁶ Royalty payments are made quarterly in arrears.⁴⁷
- 4.18 The ABF submitted that there are now 37 licensed suppliers.⁴⁸ The ABF website lists 33 licensed uniform suppliers (of which two supply only pants and one supplies only caps) and 10 licensed baseball suppliers.⁴⁹ The ABF submitted that the list includes suppliers that compete for business around the country.⁵⁰ As well as being sourced from licensees directly, licensed products may be acquired from other retailers.
- 4.19 The ACCC understands that baseball clubs typically make bulk uniform orders for their players from licensed suppliers. Licensed supplier Addlon Trading Co indicated that tops used for competition commonly remain property of the club and are replaced on average every three years or so.⁵¹

Financial history of the Licensing Program

Revenue raised

- 4.20 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.

Source: ABF, Submissions to the ACCC: 26 August 2006, p. 2; 6 August 2003, p. 4; 18 January 2006, Attachments 1 and 2; and 28 April 2006, p. 4

⁴³ ABF, Submission to the ACCC, 14 March 2006, p. 3.

⁴⁴ ABF, Submission to the ACCC, 24 July 2006, p. 3.

⁴⁵ ABF, Submission to the ACCC, 18 January 2006, p. 1.

⁴⁶ ABF trading as BALME and Licensee, Licence Agreement, 1 June 2006-30 June 2009, available at the ABF website, <www.baseball.com.au>, clause 3.2 and Part 8 of the Schedule.

⁴⁷ *ibid.*

⁴⁸ ABF, Submission to the ACCC, 24 July 2006, p. 3.

⁴⁹ ABF Directory, Licensed Merchandised Suppliers, last updated 17 July 2006, available at the ABF website, <www.baseball.com.au>.

⁵⁰ ABF, Submissions to the ACCC, 14 March 2006, p. 7; 28 April 2006, p. 9; 24 July 2006, p. 5; 11 August 2006, p. 1; and 22 August 2006, p. 2.

⁵¹ Addlon Trading Co Pty Ltd, Submission to the ACCC, 6 July 2006, p. 2.

- 4.21 In the six months to 31 December 2005, the Licensing Program raised \$27,667,⁵² resulting in a total revenue of approximately \$263,505 from the program's inception to 31 December 2005. The ABF expects increased compliance with the Licensing Program to increase revenue raised by the Licensing Program.⁵³ The ABF indicated that the increase will mainly arise from New South Wales, where compliance has gained prominence.⁵⁴

Costs incurred

- 4.22 The most significant cost of the Licensing Program to date has been the management fee of \$40,000 per year paid to Baseball Victoria between 2001-02 and 2003-04, and the fee of \$25,000 paid to Baseball Victoria for the six months to 31 December 2004. Other major costs to date identified by the ABF include \$23,640 for the production of logos in 2001 and \$17,822 written off as bad debt (largely due to business failures).⁵⁵
- 4.23 The ABF estimated that the annual 'hard' costs of administering the Licensing Program will amount to \$6,600.⁵⁶ This comprises the cost of the logos (\$5,000), travel to meet with constituents and licensees (\$1,000), bank fees (\$100) and miscellaneous costs (\$500).
- 4.24 In the first 12 months of the program being administered by the ABF rather than Baseball Victoria, expenses for the period amounted to \$7,206.⁵⁷ The ABF submitted that this included \$4,135 for the production of logos.
- 4.25 The ABF clarified at the Pre-decision Conference that other administration costs will be absorbed by it, until net income from the Licensing Program reaches \$80,000.⁵⁸ The ABF estimated the costs it absorbs amount to \$20,000 per annum,⁵⁹ taking the estimated annual cost of the Licensing Program to \$26,600.

Distribution of funds

- 4.26 The ABF submitted that \$62,000 has been transferred to state and territory associations as a result of the Licensing Program to date.⁶⁰ Of this, \$44,000 was distributed in 2006, after the ABF assumed responsibility for the program.⁶¹
- 4.27 The ABF indicated that the changes made to the operation of the Licensing Program will improve future returns to member associations.⁶²

⁵² ABF, Submission to the ACCC, 14 March 2006, Attachment 1.

⁵³ ABF, Submission to the ACCC, 28 April 2006, p. 6.

⁵⁴ ABF, Submission to the ACCC, 24 July 2006, p. 2.

⁵⁵ ABF, Submission to the ACCC, 28 April 2006, p. 5.

⁵⁶ ABF, Submissions to the ACCC: 26 August 2002, p. 3; and 28 April 2006, p. 6.

⁵⁷ ABF, Submissions to the ACCC, 18 January 2006 Attachment 1 and 14 March 2006, Attachment 1.

⁵⁸ ABF, Submission to the ACCC, 24 July 2006, p. 6; Oral submission to the ACCC, Pre-decision Conference Minutes, 24 July 2006, p. 6.

⁵⁹ ABF, Oral submission to the ACCC, Pre-decision Conference Minutes, 24 July 2006, p. 5.

⁶⁰ ABF, Submission to the ACCC, 24 July 2006, p. 2. This is slightly less than the \$67,000 reported by the ABF in its submission to the ACCC of 28 April 2006 (p. 13).

⁶¹ *ibid.*, p. 5.

⁶² ABF, Submissions to the ACCC, 14 March 2006, p. 7; and 24 July 2006, p. 5.

Participation in baseball

4.28 Table 2 shows the number of players registered with the ABF between 1997-98 and 2005-06.

Table 2 ABF registered players

Year	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006*
Senior	18,234	18,004	16,670	14,713	14,234	12,845	10,020	10,097	9,000
Junior	21,057	19,771	18,010	15,501	13,818	13,699	9,647	11,190	12,000
T-ball	9,090	8,741	8,951	7,285	6,793	6,818	4,887	6,483	8,000
Total	48,381	46,516	43,631	37,499	34,845	33,362	24,554	27,770	29,000

* Includes an estimate for winter. The ABF used online registration from 2005.

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

4.29 Table 2 shows that the total number of ABF registered players declined significantly (by around 40 per cent) between 1997-98 and 2005-06.

4.30 The number of senior players fell consistently over the period except for a slight increase in 2004-05. Similarly, the number of junior players declined over the period with increases in 2004-05 and 2005-06. While the number of registered T-ball players also decreased over the period, this decline seems to have been less dramatic, and the number of players increased from the previous year in four instances.

5. Previous reviews of the notification

5.1 Over 20 parties have raised concerns regarding the ABF's Licensing Program with the ACCC from the program's inception to date. Two of these parties now support the program and have lodged submissions with the ACCC to this effect.⁶³

5.2 As a result of complaints regarding the cost of licensed commodities and the failure of the Licensing Program to return funds to baseball at the grass roots level, notification N90853 has been reviewed by the ACCC on four occasions.

5.3 A decision not to revoke the ABF's notification was initially made on 9 November 2001 because:

- the licence fees charged did not appear excessive
- there was no limit on the number of suppliers that could take up a licence
- 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.

⁶³ ABF, Submission to the ACCC, 7 July 2006, p. 1.

- 5.4 The ACCC decided not to take any further action following a review in 2002-03 for the same reasons as outlined in 2001. However, to satisfy itself that sufficient benefit to the public was being generated by the Licensing Program, the ACCC requested that the ABF provide it with financial information relating to the program for the 2002-03 financial year.⁶⁴
- 5.5 Following the supply of the information, 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 administration costs involved in establishing the program were likely to be greater than those incurred on an ongoing basis.⁶⁵ 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.
- 5.6 The ABF provided the requested information on 18 August 2005 and 18 January 2006. It was not clear from the information initially provided that 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 and commenced a fourth review of the notification.

6. Statutory test

- 6.1 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) (referred to as ‘third line forcing’) 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.
- 6.2 Public benefit is not defined by the Act. 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.⁶⁶
- 6.3 Similarly, public detriment is not defined in the Act but the Tribunal has given the concept a wide ambit. It has stated that 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.⁶⁷

⁶⁴ ACCC, Letter to the ABF, 14 October 2002, p. 2.

⁶⁵ ACCC, Letter to the ABF, 26 May 2004, p. 1.

⁶⁶ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677. The Tribunal recently followed this in *Qantas Airways Limited* [2004] ACompT 9.

⁶⁷ *ibid.*, at 42683.

- 6.4 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)).

7. ACCC assessment

The relevant markets

- 7.1 Generally, the first step in assessing the public benefit and public detriment from notified conduct is to consider the relevant market or markets in which that conduct occurs. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of the defined market.
- 7.2 The ACCC did not explicitly define a market in the Draft Notice. The assumption implicit in the notice was that the specific market definition adopted did not affect the analysis.
- 7.3 Following the Draft Notice, the ABF submitted that uniform manufacturers and distributors source uniforms for a whole range of sports and can switch to producing or importing gear for other sports.⁶⁸ That is, the ABF indicated that the relevant market in respect of uniforms is broader than just the supply of baseball uniforms.
- 7.4 In contrast, the New South Wales Junior Baseball League commented that the supply of baseball uniforms ‘was always a specialised market’.⁶⁹
- 7.5 Regarding baseballs, the ABF submitted that it might be ‘slightly different in terms of market’.⁷⁰
- 7.6 The ACCC considers that the relevant product markets in this case are the three wholesale markets for baseballs, baseball caps and traditional baseball uniforms. While baseballs appear to be a specialised product, baseball caps are likely to be readily available from a range of suppliers. Although in terms of other uniform components, the product market may be broader to include the market for sports and recreational uniforms, the ACCC has not received sufficient evidence in this regard. Further, the ACCC does not consider that the assessment in this notice will be overly affected by the possible variations in market definition.
- 7.7 From interested party submissions, it seems likely that the relevant geographic delineation of the wholesale markets for baseballs, baseball caps and traditional baseball uniforms is national.

⁶⁸ ABF, Submission to the ACCC, 24 July 2006, p. 9.

⁶⁹ New South Wales Junior Baseball League, Submission to the ACCC, 3 March 2006, received 11 July 2006, p. 1.

⁷⁰ ABF, Submission to the ACCC, 24 July 2006, p. 9.

Counterfactual

- 7.8 In order to identify and measure the public benefit and public detriment generated by the notified conduct, the ACCC applies the ‘future-with-and-without test’. This involves identifying a counterfactual; that is, the ACCC makes a judgement as to what, on the information and evidence before it, is the most likely situation in the absence of the immunity accorded by the notification.
- 7.9 The ACCC then compares the public benefit and public detriment arising in future if the notification is not revoked with the public benefit and detriment arising under the counterfactual.
- 7.10 Implicit in the ACCC’s Draft Notice was the counterfactual that the ABF would not enforce the Licensing Program.
- 7.11 Following the Draft Notice, the ABF stated that it is committed to ensuring that Australian Baseball logos appear on uniforms.⁷¹ The ABF submitted that alternative ways of creating a common identity might include selling badges, which would need to be applied to all uniforms or the ABF supplying all uniforms, for example through a uniform shop.⁷² The ABF submitted that there would be costs involved in attaching logos to uniforms in the absence of the Licensing Program. In addition, the ABF noted that if the second approach were adopted, it would be a costly and inefficient exercise and the ABF would be unlikely to deal with a range of suppliers as broad as that of the Licensing Program.⁷³
- 7.12 However, the PCBL submitted that affixing Australian Baseball logos to uniforms would not involve any additional costs as logos from sponsors, club names and mottos are already being affixed to uniforms at the club level.⁷⁴ The New South Wales Junior Baseball League also submitted that its members have stated they would be prepared to attach any patches that the ABF supplied.⁷⁵ The North Ryde R.S.L. Baseball Club submitted that it prefers the option of players attaching logos themselves.⁷⁶ The Ryde Hornsby Baseball League submitted that logos could be mandated and provided at a much lower cost than through the Licensing Program.⁷⁷
- 7.13 At the conference in relation to the Draft Notice, the ABF stated that it considers a standardised marketing program is essential for the sport.⁷⁸
- 7.14 Given the statements of the ABF, the ACCC considers that if the notification was revoked (which would remove immunity from legal action for third line forcing conduct associated with the Licensing Program), an alternative means of attaching logos to uniforms is likely to be established by the ABF, along with an alternative

⁷¹ *ibid.*, p. 4.

⁷² *ibid.*.

⁷³ *ibid.*

⁷⁴ PCBL, Submission to the ACCC, 10 August 2006, p. 2.

⁷⁵ New South Wales Junior Baseball League, Submission to the ACCC, 7 July 2006, p. 1.

⁷⁶ North Ryde R.S.L. Baseball Club, Letter to the PCBL, 11 August 2006, provided as an attachment to the PCBL Submission, 10 August 2006.

⁷⁷ Ryde Hornsby Baseball League, Submission to the ACCC, 10 August 2006, p. 1.

⁷⁸ ABF, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 7.

national program. The ACCC considers that the ABF is likely to require associations, clubs or players to ensure that Australian Baseball logos are attached in accordance with set rules. The ABF may charge for the logos but the costs of attaching logos do not appear to be large, as clubs and/or players might attach the logos in the same way that they currently attach other patches.

- 7.15 In respect of a national program, it is not clear how the ABF will proceed. What is apparent, however, is that the ABF will seek to develop a business plan that indicates unity in the sport to potential sponsors. Any such program is likely to incur some costs.
- 7.16 It would be open to the ABF, for example, to continue a licensing arrangement for suppliers of badged merchandise without requiring that consumers acquire products from these suppliers. The ACCC notes that the Act does not prevent arrangements where consumers still have the choice whether to acquire from licensed or other suppliers.

Public detriment

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

Royalty payments

- 7.18 As noted, licensed suppliers pay a royalty to the ABF to participate in the Licensing Program. These payments are a direct cost to licensed baseball and baseball uniform suppliers.

Submissions prior to the Draft Notice

- 7.19 Kay's Custom Sportswear submitted that the royalty costs would need to be passed onto consumers.⁷⁹
- 7.20 The ABF submitted that the possibility of public detriment from the Licensing Program has been decreased by the removal of upfront licence fees and the shift to a percentage of sales approach in calculating royalties.⁸⁰

Draft Notice and submissions following the Draft Notice

- 7.21 In its Draft Notice, the ACCC considered that the royalty payments will either be fully reflected in the prices of licensed goods, or will be reflected in part in the prices of licensed goods and the licensee will absorb the remainder. If a licensee

⁷⁹ Kay's Custom Sportswear, Submission to the ACCC, 9 March 2006, p. 1.

⁸⁰ ABF, Submissions to the ACCC, 14 March 2006, p. 8 and 28 April 2006, p. 9.

absorbs royalty payments, this may be reflected in other areas of the licensee's business.

- 7.22 In either case, the ACCC considered 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) constitutes a likely detriment to the public as they are ultimately reflected in the suppliers' prices and/or quality of goods and services.
- 7.23 Following the Draft Notice, Sportswear Queensland submitted that the fees on a playing top, pants and playing cap is about \$7 to \$8 for the three items.⁸¹ It indicated that customers do not object to this amount.
- 7.24 At the Pre-decision Conference, the ABF stated that it did not consider the ACCC had taken into account the value that licensees receive from the arrangement, namely the value of advertising.⁸² To the extent that licensed suppliers receive a benefit from the Licensing Program in the form of advertising, this is addressed in the 'Public benefit' section below.
- 7.25 In its Draft Notice, the ACCC considered that royalty payments and reduced competition are expected to harm consumers either through lower quality and/or higher prices of licensed products.
- 7.26 The ABF argued in response to the Draft Notice that it is difficult to see how consumers are damaged by the Licensing Program in the circumstances.⁸³ It stated that there is no evidence that the program has had any impact on the quality of goods or services as suggested by the Draft Notice and that consumers 'at worst pay some additional amount on purchasing a uniform'.⁸⁴
- 7.27 Clause 8.1 of the standard licence agreement states that 'The Licensee warrants that the Licensed Commodities will be of good quality, design, material and workmanship and will be suitable for their intended purpose'. Clause 8.3 prescribes BALME the right to withdraw its approval of licensed commodities in the event of a products quality ceasing to be acceptable to BALME.
- 7.28 The ACCC does not have any evidence of other quality control measures being taken by the ABF or BALME in respect of licensed products. Addlon Trading Co commented that licensees have not been closely scrutinised regarding the specification of products sold under the licensing program to date.⁸⁵ It suggested the program would be a useful tool for ensuring products met International Baseball Rules standards.⁸⁶

⁸¹ Sportswear Queensland, Letter to the ABF, 10 July 2006, p. 1, provided as an attachment to ABF Submission, 10 July 2006.

⁸² ABF, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 6; Submission to the ACCC, 24 July 2006, p. 8.

⁸³ ABF, Submission to the ACCC, 24 July 2006, p. 4.

⁸⁴ *ibid.*, pp. 4 and 8.

⁸⁵ Addlon Trading Co Pty Ltd, Submission to the ACCC, 6 July 2006, p. 4.

⁸⁶ *ibid.*

- 7.29 Baseball Victoria and the Waverley Baseball Club cited quality control of baseball equipment and service as a benefit of the Licensing Program.⁸⁷
- 7.30 The Sandringham Baseball Club submitted that it has noticed, as a result of increased competition between licensed suppliers, an improved level of quality in the products supplied over recent years.⁸⁸ Similarly, the ACT Baseball Association noted that the program has increased competition and resulted in more durable products being delivered to the sport.⁸⁹ This, it argued, has meant a more professional ‘on field’ product, which attracts more participants to the game.⁹⁰
- 7.31 Regarding the price of baseball uniforms, the Waverley Baseball Club suggested that ‘price controls’ have in many cases resulted in reductions in price.⁹¹ The ACT Baseball Association also submitted that increased competition between suppliers has resulted in cheaper products.⁹²
- 7.32 The ABF submitted in response to the Draft Notice that there is no certainty royalty payments are passed on in full to consumers. The ABF estimated at the Pre-decision Conference that there is an increase of between \$1 and \$2 per uniform as a result of the Licensing Program.⁹³
- 7.33 Addlon Trading Co submitted that as a new competitor offering baseball pants, it has been forced to absorb the 7.5 per cent royalty.⁹⁴ Fielders Choice indicated that the price of baseball uniforms is unaffected by the Licensing Program and noted that prices have remained at the same level since 2002.⁹⁵
- 7.34 Sportswear Queensland submitted that it had not increased uniform prices until recently.⁹⁶
- 7.35 Through his connection with Baseball Victoria, Les Flower, Secretary of Williamstown Baseball Club submitted that the cost of state uniforms has decreased from approximately \$80 per playing top to \$57, with an increase in quality of garments at the same time.⁹⁷

⁸⁷ Baseball Victoria, Submission to the ACCC, 5 July 2006, p. 1 and Waverley Baseball Club Inc, Submission to the ACCC, 12 July 2006, p. 1.

⁸⁸ Sandringham Baseball Club Inc, Submission to the ACCC, 10 July 2006, p. 1.

⁸⁹ ACT Baseball Association, Letter to the ABF, undated, p. 1, provided as an attachment to ABF Submission to the ACCC, 10 July 2006.

⁹⁰ *ibid.*

⁹¹ Waverley Baseball Club Inc, Submission to the ACCC, 12 July 2006, p. 1.

⁹² ACT Baseball Association, Letter to the ABF, undated, p. 1, provided as an attachment to ABF Submission to the ACCC, 10 July 2006.

⁹³ ABF, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 10.

⁹⁴ Addlon Trading Co Pty Ltd, Submission to the ACCC, 6 July 2006, pp. 1-2.

⁹⁵ Fielders Choice, Letter to the ABF, 2 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

⁹⁶ Sportswear Queensland, Letter to the ACCC, 10 July 2006, p. 2, provided as an attachment to ABF Submission to the ACCC, 10 July 2006.

⁹⁷ Williamstown Baseball Club Inc, Letter to the ABF, 20 July 2006, provided to the ACCC by the ABF at the Pre-decision Conference, 24 July 2006.

- 7.36 The Ryde Hornsby Baseball League submitted that its brief attempts to source clothing from unlicensed suppliers resulted in quoted price reductions of up to 30 per cent.⁹⁸
- 7.37 The New South Wales Junior Baseball League commented that the cost of the Licensing Program is disproportionately high for junior players because, as a result of wear and tear and growth, they need uniforms more often.⁹⁹ The New South Wales Junior Baseball League noted that this impact is compounded if multiple sets of uniforms required because they play at more than one level of competition in the same season.¹⁰⁰
- 7.38 Regarding the price of baseballs, the ABF noted that these had been kept down.¹⁰¹
- 7.39 Fielders Choice submitted that the price of baseballs has fallen.¹⁰²
- 7.40 Addlon Trading Co, which submitted it is the largest supplier of baseball equipment in to the Australian market with 20 per cent of the baseballs sold under the Licensing Program, stated that baseball prices have not increased as a result of the Licensing Program.¹⁰³
- 7.41 Similarly, the PCBL submitted that the price of baseballs has been relatively stable at around \$9.¹⁰⁴ It submitted, however, that any decrease in cost is not due to the Licensing Program but due to improvements in the exchange rate.¹⁰⁵

ACCC assessment

- 7.42 The ACCC remains of the view that the entire amount of royalty incurred by licensed suppliers (7.5 per cent on sales of uniforms and 5 per cent on sales of baseballs), whether ultimately borne by suppliers or consumers, constitutes a detriment to the public.
- 7.43 Regarding the Licensing Program's effect on the quality and price of goods, the ACCC is required to compare the quality and price of the licensed goods in future under the Licensing Program with the quality and price of goods in future if the ABF's notification is revoked. That is, there does not need to be evidence of a decline in product quality since the program's inception or an increase in the price of licensed goods for the Licensing Program to have resulted in public detriment.
- 7.44 The ACCC maintains that under the Licensing Program at least part of the royalty payments made by licensees will be passed onto consumers, most likely through higher prices than would otherwise be the case. The ACCC notes that the ABF estimated that consumers pay an additional \$1 to \$2 per uniform as a result of the

⁹⁸ Ryde Hornsby Baseball League, Submission to the ACCC, 11 August 2006, p. 1.

⁹⁹ New South Wales Junior Baseball League, Submission to the ACCC, 3 March 2006, received 11 July 2006, p. 1.

¹⁰⁰ *ibid.*

¹⁰¹ ABF, Submission to the ACCC, 24 July 2006, p. 9.

¹⁰² Fielders Choice, Letter to the ABF, 2 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

¹⁰³ Addlon Trading Co Pty Ltd, Submission to the ACCC, 6 July 2006, pp. 1-2.

¹⁰⁴ PCBL, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 9.

¹⁰⁵ PCBL, Submission to the ACCC, 10 August 2006, p. 3.

program.¹⁰⁶ In addition, Sportswear Queensland submitted that the fees for a playing top, pants and playing cap equates to \$7 to \$8 for the three items.¹⁰⁷

- 7.45 The ACCC has not received evidence that the quality of merchandise has been reduced by the program. However, the choice facing clubs and players as to the quality of uniforms and baseballs is restricted under the program, resulting in detriment to the public. The ACCC notes that the Licensing Program applies not only to senior levels but also to more junior players of the sport, for example players as young nine years of age.
- 7.46 Finally, the ACCC notes that if the ABF's third line forcing notification is revoked, this does not prevent state and territory associations, regional associations or clubs from conducting tender processes to ensure low prices and high quality of products.

Reduced competition

- 7.47 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.
- 7.48 The extent to which the Licensing Program lessens competition will be affected by the structure of the program.

Submission prior to the Draft Notice

- 7.49 The PCBL submitted 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.¹⁰⁸
- 7.50 The ABF submitted that the possibility of detriment to the public from the Licensing Program is decreased because there are no upfront fees and no restrictions on the number of licensees.¹⁰⁹

Draft Notice and submissions following the Draft Notice

- 7.51 The ACCC stated that the practice of licensed suppliers supplying unlicensed uniforms is unlikely to continue because 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

¹⁰⁶ ABF, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 10.

¹⁰⁷ Sportswear Queensland, Letter to the ABF, 10 July 2006, p. 1, provided as an attachment to ABF Submission, 10 July 2006.

¹⁰⁸ PCBL, Submission to the ACCC, 7 March 2006, p. 3.

¹⁰⁹ ABF, Submission to the ACCC, 14 March 2006, p. 9.

and the licensee shall not allow or create a market for house merchandise in opposition to any market for the Licensed Commodities.¹¹⁰

- 7.52 '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.¹¹¹ The ACCC noted that these clauses mean clubs may no longer be able to purchase unlicensed uniforms at discounted prices. The licence agreement does not form part of the notified conduct and therefore does not receive immunity under the notification process.
- 7.53 In response to the Draft Notice, the ABF submitted that while licensed suppliers are restricted from supplying house merchandise, the new licence agreement also states that the ABF will not reasonably withhold permission to supply house merchandise.¹¹²
- 7.54 The ACCC agreed in the Draft Notice that the fee structure of the Licensing Program and the fact that there are no limits on the number of licensed suppliers significantly lessens the anti-competitive effect of the program.
- 7.55 Nevertheless, the ACCC considered 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. 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.
- 7.56 The submissions in respect of the price and quality of goods under the Licensing Program, and the ACCC's assessment of these submissions, are set out above and are not repeated here.
- 7.57 A number of submissions made to the ACCC indicated that the Licensing Program 'increased competition' through advertising. These submissions are discussed and assessed in the 'Public benefit' section below.

ACCC assessment

- 7.58 The ACCC notes that the licence agreement in effect precludes the supply of house merchandise for uses that would contravene the Licensing Program.
- 7.59 The test for assessing the level of public detriment from reduced competition is to compare the level of competition with and without the immunity afforded by the notification. The ACCC continues to take the view that the existence of a licence agreement may constitute a barrier to entry which results in fewer suppliers of baseball goods (and therefore lower competition) than might otherwise be the case. Without the Licensing Program, clubs and/or associations calling for tenders across Australia would be able to include even more suppliers in their process.

¹¹⁰ ABF trading as BALME and Licensee, Licence Agreement, 1 June 2006-30 June 2009, available at the ABF website, <www.baseball.com.au>, clause 10.3.

¹¹¹ *ibid.*, clause 1(b).

¹¹² ABF, Submission to the ACCC, 24 July 2006, p. 8.

- 7.60 The ACCC notes that the location of baseball and uniform suppliers affects the level of detriment from reduced competition only to the extent that transportation costs impact upon the cost of the goods.
- 7.61 The ACCC does not consider that online suppliers or retailers importing goods will constrain licensed suppliers if they are not licensed by the ABF to supply goods under the Licensing Program. If these suppliers do not pay the ABF royalties, they are limited to competing in respect of products and competitions not covered by the Licensing Program.

Administration and compliance costs

- 7.62 In addition to giving rise to royalty payments and reducing competition, the ABF's Licensing Program imposes administration and compliance costs on the ABF, state and territory associations, regional associations and clubs.
- 7.63 The ABF incurred significant direct administrative costs in respect of the Licensing Program 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, Baseball Victoria was paid \$25,000.
- 7.64 As noted in section 4 of this 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).

Submissions prior to the Draft Notice

- 7.65 The ABF submitted that it intends to reduce the administration costs of the Licensing Program. As noted, the ABF estimated the 'hard' costs of the program to be approximately \$6,600 per year.
- 7.66 The ABF submitted prior to the Draft Notice that costs other than the 'hard' costs of administering the program are to 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.'¹¹³
- 7.67 Hills Junior Baseball Association submitted that the Licensing Program also generates a detriment in the form of compliance costs to state and territory baseball associations and clubs.¹¹⁴

Draft Notice and submissions following the Draft Notice

Costs incurred by the ABF

- 7.68 In its Draft Notice, the ACCC stated that whether the administration and compliance costs of the Licensing Program are paid for directly by the program or absorbed by the ABF, these are costs of the program to be taken into account. The funds might otherwise be used by the ABF to develop the sport of baseball or make payments to state and territory associations. The ACCC considered the

¹¹³ ABF, Submission to the ACCC, 28 April 2006, p. 6.

¹¹⁴ HJBA, Submission to the ACCC, 23 March 2006, pp. 1 and 2.

entire cost of administering the Licensing Program to be a public detriment that must be weighed against any public benefits flowing from the program.

- 7.69 The ACCC noted the ambiguous description of when the ABF would take funds raised by the Licensing Program to administer it. If this were to occur, the ACCC noted it would further reduce the funds available for distribution to state and territory associations.
- 7.70 The ABF clarified that it would absorb all costs over and above the 'hard' costs of administering the Licensing Program until such time as the net income of the program is \$80,000; after this point, the ABF will take the next \$15,000. Once net income reaches \$100,000, the ABF submitted it will receive 15 per cent of funds raised.¹¹⁵ As noted, the ABF estimated that it currently absorbs \$20,000 per year.¹¹⁶

Costs incurred by state and territory associations and clubs

- 7.71 In the Draft Notice, the ACCC accepted that there is detriment in the form of compliance costs to state and territory associations and noted that as they respond to ABF calls for greater compliance, these costs will increase.
- 7.72 In response, the ABF submitted that compliance checks at the grass roots level are not expected to be time consuming and will be conducted by officials in the same way that checks at grass roots level in other sports occur.¹¹⁷ Addlon Trading Co also submitted that the cost of checking for compliance is not significant if, for example, umpires check for logos at the start of a game.
- 7.73 The PCBL submitted following the Pre-decision Conference that its Executive Committee would not direct its umpires to assume this role.¹¹⁸

Costs incurred by licensees

- 7.74 In its Draft Notice, the ACCC considered that the Licensing Program imposes a small cost on licensees in addition to royalty payments. This included the administration costs associated with entering into and complying with the licence agreement.
- 7.75 In response to the Draft Notice, a number of licensed suppliers indicated that the Licensing Program does not impose significant administration costs on them. Fielders Choice stated that licensee reporting is 'very simple and takes only a few minutes on a quarterly basis'.¹¹⁹ Similarly, Sportswear Queensland submitted that the Licensing Program is 'very, very easy to administer and hassle free'.¹²⁰

¹¹⁵ ABF, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 6; Submission to the ACCC, 24 July 2006, p. 6.

¹¹⁶ ABF, Oral submission to the ACCC, Pre-decision Conference Minutes, 24 July 2006, p. 5.

¹¹⁷ ABF, Submission to the ACCC, 24 July 2006, p. 5.

¹¹⁸ PCBL, Submission to the ACCC, 10 August 2006, p. 3.

¹¹⁹ Fielders Choice, Letter to the Australian Baseball Federation, 2 July 2006, p. 1, provided as an attachment to ABF letter to the ACCC, 7 July 2006.

¹²⁰ Sportswear Queensland, Letter to the ABF, 10 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 10 July 2006.

Addlon Trading Co stated that administration of the licence agreement is simple, and not difficult or time consuming.¹²¹

- 7.76 Addlon Trading Co noted that the ABF has shown a clear intention to engage with licensees and has consulted with it on how the program could best be run and improved.¹²² Hat Trick Enterprises also noted that its experience with the ABF has been ‘positive’.¹²³

Other costs

- 7.77 The ABF submitted that if the Licensing Program is dismantled, the costs of establishing the Licensing Program (approximately \$200,000) will be ‘thrown away’.¹²⁴

ACCC assessment

Costs incurred by the ABF

- 7.78 The ABF submitted that the annual cost of administering the Licensing Program is \$26,600; this is a potential public detriment from the Licensing Program. The ACCC notes that if net income raised by the Licensing Program reaches the point where the ABF is taking more than \$26,600, this detriment will increase.
- 7.79 Some of the detriment from the costs of administering the Licensing Program may be reduced to the extent that costs will be incurred in administering an alternative program. In addition, the ABF submitted it would continue to require the wearing of ‘badged’ merchandise in some competitions. As a result, certain costs associated with the production of logos (estimated by the ABF to be \$5,000 per annum) and any enforcement of the wearing of logos will be incurred by the ABF regardless of whether the Licensing Program continues in its current form.

Costs incurred by state and territory associations and clubs

- 7.80 Based on further submissions received following the Draft Notice, the ACCC accepts that the costs to clubs and associations of ensuring compliance with the Licensing Program are not as high as envisaged in the Draft Notice. It seems likely that checks will be conducted by ABF or state and territory associations and/or baseball umpires as a matter of routine.
- 7.81 Further, if the ABF continues to require players to wear and use ‘badged’ merchandise, these compliance costs would continue to be borne by the baseball community. The costs incurred by state and territory associations in enforcing uniform components and baseballs are badged would be incurred regardless.

¹²¹ Addlon Trading Co Pty Ltd, Submission to the ACCC, 6 July 2006, p. 4.

¹²² *ibid.*

¹²³ Hat Trick Enterprises, Letter to the ABF, 20 June 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 10 July 2006.

¹²⁴ ABF, Submission to the ACCC, 24 July 2006, p. 3.

Costs incurred by licensees

- 7.82 The ACCC accepts licensed supplier submissions that the Licensing Program does not give rise to significant administration costs. However, without the Licensing Program suppliers would not incur such costs. Therefore, the ACCC maintains that a small detriment will accrue as a result of the Licensing Program, to be weighed against any benefit to licensees from the program.

Other costs

- 7.83 The ACCC does not accept the argument that if the Licensing Program were abandoned now, the costs of establishing it would be ‘thrown away’. If it is found the Licensing Program delivers a net detriment, this ‘cost’ would be eroded over time.

Public benefit

- 7.84 The public benefits claimed by the ABF include the:
- (a) benefit associated with the distribution of revenue to state and territory associations;
 - (b) benefit associated with developing a united, ‘whole of sport’ image for baseball in Australia; and
 - (c) benefit to suppliers through advertising and other promotional opportunities.

Distributions to state and territory associations

Submissions prior to the Draft Notice

- 7.85 The ABF submitted 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, in addition to association and ABF registration.¹²⁵ The ABF highlighted the reduced dependence on government funding as being of continuing importance, especially as baseball lost its place in the 2012 Olympics. This, the ABF submitted, may result in decreased funding for high performance players by the Australian Olympic Committee, and possibly the Australian Sports Commission.¹²⁶ The ABF submitted that strong performance at the elite level is important for maintaining profile in the sporting community.
- 7.86 Interested party submissions to the ACCC prior to the Draft Notice argued that fund transfers to date have been insufficient.¹²⁷ The ABF submitted 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.¹²⁸

¹²⁵ ABF, Submission in support of notification, 20 March 2001, p. 4.

¹²⁶ ABF, Submission to the ACCC, 14 March 2006, p. 3; Submission to the ACCC, 24 July 2006, p. 1.

¹²⁷ 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.

¹²⁸ ABF, Submission to the ACCC, 14 March 2006, p. 7.

Draft Notice and submissions following the Draft Notice

- 7.87 The ACCC accepted that 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 acknowledged that although the Licensing Program has not delivered high returns to state and territory associations to date, the transfer of \$44,000 in early 2006 indicated some improvement in the capacity of the program to make these returns.
- 7.88 The ACCC also accepted that there may be a small benefit in the form of revenue that is retained by the ABF and used to develop the sport.
- 7.89 The ACCC recognised that these benefits would be likely to increase in line with the increase in compliance with the Licensing Program.
- 7.90 In response to the Draft Notice, the ABF submitted that baseball cannot fill the revenue gap which exists in sport at grass roots level through gate receipts or media payments and that the only alternative is for the user to pay.¹²⁹ The ABF does not consider that increasing registration fees is a sustainable approach to raising revenue.¹³⁰
- 7.91 The Australian Sports Commission submitted that it ‘encourages Australian sporting organisations to identify appropriate new revenue sources, given the inherent financial challenges that they face’.¹³¹
- 7.92 The ACT Baseball Association stated that the Licensing Program provides revenue, which has meant that more Australians can afford to participate and stay active in a sport they enjoy.¹³²
- 7.93 Similarly, the Waverley Baseball Club submitted that the funds the Licensing Program raises reduce the cost of services provided to clubs by the ABF.¹³³
- 7.94 Baseball NSW stated that the national royalty program has enabled it to provide financial support to almost 50 clubs in the promotion of its TryBaseball recruitment initiative.¹³⁴ The Baseball NSW website indicates that this initiative involves Baseball NSW has provided to local clubs 10,000 flyers for distribution, giveaways and \$10 reduction in capitation fees for Under 7 registrations.¹³⁵

¹²⁹ ABF, Submission to the ACCC, 24 July 2006, p. 1.

¹³⁰ ABF, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 3.

¹³¹ Australian Sports Commission, Letter to the ABF, 6 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

¹³² ACT Baseball Association, Letter to the ABF, undated, provided as an attachment to ABF Submission to the ACCC, 10 July 2006.

¹³³ Waverley Baseball Club Inc, Submission to the ACCC, 12 July 2006, p. 1.

¹³⁴ Baseball NSW, Letter to the ABF, 3 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

¹³⁵ Baseball NSW website, viewed 14 August 2006, <www.nsw.baseball.com.au>.

7.95 Baseball WA also stated that the financial benefits generated by the Licensing Program assisted it to provide grass roots development via the employment of ‘Development Officers’.¹³⁶

7.96 Baseball SA stated that the payments made by the ABF to states are a vital component of planning for future activities.¹³⁷

ACCC assessment

7.97 The ACCC continues to accept that there may be 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 recognises such benefit would be likely to increase in line with increased compliance with the program. In this regard, the ACCC notes that \$31,840 was transferred to Baseball NSW in accordance with the National Royalty Policy in July 2006 (though not all of the transfer can be attributed to the Licensing Program).¹³⁸

7.98 The benefit as a result of the notified conduct, however, is offset to the extent that the administration costs of the program erode the funds available for distribution. These costs will be at least equal to the hard costs of \$6,600 claimed by the ABF and more if revenue raised by the program reaches \$80,000 per annum.

7.99 The ACCC also notes that revenue might be raised through other mechanisms should the notification be revoked. These mechanisms may include, but are not limited to, revenue from an alternative national program. For instance, as noted the ABF may continue to raise funds through a supplier licensing arrangement that does not require players, clubs or associations to acquire licensed goods from third party suppliers.

‘Whole of sport’ approach

Submissions prior to the Draft Notice

7.100 The ABF submitted that the Licensing Program delivers public benefit as it provides the opportunity to look at other national programs and demonstrates the ability of baseball to operate on a national basis.¹³⁹ The ABF considered 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.¹⁴⁰

¹³⁶ Baseball WA, Letter RE—Changes to Licensing Program, 5 July 2006, attached to ABF Submission to the ACCC, 7 July 2006.

¹³⁷ Baseball SA, Letter to the ABF, 27 June 2006, p. 1, attached to ABF Submission to the ACCC, 7 July 2006.

¹³⁸ Baseball NSW, Letter to the ABF, 3 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

¹³⁹ ABF, Submission in support of notification, 20 March 2001, p. 4 and Submission to the ACCC, 14 March 2006, p. 7.

¹⁴⁰ ABF, Submission to the ACCC, 28 April 2006, pp. 8 and 9 and Submission to the ACCC 14 March 2006, p. 2.

- 7.101 The sponsorship deal is valued at \$250,000.¹⁴¹ The ABF submitted that some of the sponsorship fund is transferred to state and territory associations in accordance with the National Royalty Policy.¹⁴²

Draft Notice and submissions following the Draft Notice

- 7.102 The ACCC noted that the ABF projects a ‘whole of sport’ image through a number of means. The Draft Notice stated these included the development of an ABF website and online player registration system.¹⁴³ The ACCC noted that the website provides a significant point of communication and information for local participants, and that the ABF sends E-News, a monthly electronic newsletter, to members.¹⁴⁴
- 7.103 The ACCC considered that it had not received sufficient evidence to support the statement that a benefit to the public from a sense of increased unity in Australian baseball is directly attributable to the Licensing Program.
- 7.104 In response to the Draft Notice, the ABF reiterated that the Licensing Program creates an attractive environment for sponsors and stated that it is impossible to project a whole of sport image from a website.¹⁴⁵
- 7.105 In its written submission provided at the Pre-decision Conference, the ABF drew the connection between badging and a common identity, which it submitted sponsors consider an essential part of marketing.¹⁴⁶ The ABF submitted that players ‘walking around in their uniforms, project an impression by wearing a badge on their uniform which shows connection to a bigger whole – the Australian sport of baseball.’¹⁴⁷
- 7.106 At the Pre-decision Conference, however, the ABF appeared to consider the actual existence of the Licensing Program to be of public benefit.¹⁴⁸ The ABF stated that it does not see the wearing of the Australian Baseball logo as constituting the whole of sport approach, but the fact that each state and territory association has joined a national licensing program.¹⁴⁹
- 7.107 In its submission following the Pre-decision Conference, the ABF submitted that ‘the logos and Licensing Program reflect a “whole of sport” approach to running the game of baseball in Australia.’¹⁵⁰

¹⁴¹ ABF, Oral submission to the ACCC, Pre-decision Conference Minutes, 24 July 2006, p. 10.

¹⁴² ABF, Submission to the ACCC, 28 April 2006, pp. 8 and 9 and Submission to the ACCC 14 March 2006, p. 2.

¹⁴³ ABF, Submission to the ACCC, 14 March 2006, p. 6.

¹⁴⁴ *ibid.*, pp. 5 and 6.

¹⁴⁵ ABF, Submission to the ACCC, 24 July 2006, pp. 3 and 10.

¹⁴⁶ *ibid.*, pp. 4 and 10.

¹⁴⁷ *ibid.*, p. 10.

¹⁴⁸ ABF, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 7.

¹⁴⁹ *ibid.*

¹⁵⁰ ABF, Submission to the ACCC, 22 August 2006, p. 2.

- 7.108 Other indicia of unity in baseball cited by the ABF at the conference were the national registration database and a baseball card that provides certain benefits to registered players.¹⁵¹ The ABF also noted that between 1989 and 1999 there was a national baseball league, which overtly projected this image.¹⁵²
- 7.109 In response to the Draft Notice, the Australian Sports Commission noted that it encourages sporting organisations to ‘conduct their respective sports nationally in a unified manner, subject to compliance with all relevant laws.’¹⁵³
- 7.110 Other submissions received by the ACCC following the Draft Notice revealed considerable support for the notion that the existence of the Licensing Program demonstrated unity.
- 7.111 Baseball Victoria and the Waverley Baseball Club considered that the Licensing Program provided ‘evidence that the sport is united and well managed’ and allowed the sport to ‘indicate to potential sponsors that the sport has an influence on its direct market’.¹⁵⁴
- 7.112 Baseball NT submitted that the ‘whole of sport’ approach raises the profile of the ABF and provided a national identity through ‘branding’ and merchandising, which it considered directly resulted in the current sponsorship agreement and will assist in attracting future sponsorship.¹⁵⁵
- 7.113 Baseball NSW submitted that the Licensing Program ‘provides uniformity in player apparel and would also allow the opportunity for supporters to acquire branded merchandise and promote their club loyalty and awareness’.¹⁵⁶
- 7.114 Les Flower of the Williamstown Baseball Club stated that Baseball Victoria has entered into a sponsorship relationship.¹⁵⁷ Baseball NSW also noted that its ‘TryBaseball’ program receives additional support from other sponsors including the Major League Baseball International and EASTON.¹⁵⁸
- 7.115 The PCBL, however, submitted that unity is the result of good administration.¹⁵⁹
- 7.116 The New South Wales Junior Baseball League submitted that it supports the unified picture that the ABF wishes to project with its loyalty card.¹⁶⁰ It stated that the ABF allocates \$3 per head from membership funds to the project.

¹⁵¹ ABF, Oral submission to the ACCC, Pre-decision Conference Record, 24 July 2006, p. 7.

¹⁵² *ibid.*, p. 2.

¹⁵³ ASC, Letter to the ABF, 6 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

¹⁵⁴ Baseball Victoria, Submission to the ACCC, 5 July 2006, p. 1; Waverley Baseball Club, Submission to the ACCC, 12 July 2006, p. 1.

¹⁵⁵ Baseball NT Inc, Letter to the ACCC, 3 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

¹⁵⁶ Baseball NSW, Letter to the ABF, 3 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

¹⁵⁷ Williamstown Baseball Club Inc, Letter to the ABF, 20 July 2006, p. 1, provided to the ACCC by the ABF at the Pre-decision Conference, 24 July 2006.

¹⁵⁸ Baseball NSW, Letter to the ABF, 3 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

¹⁵⁹ PCBL, Submission to the ACCC, 10 August 2006, p. 2.

ACCC assessment

- 7.117 The ACCC supports efforts to project a unified image of baseball in order to attract sponsorship for the sport. However, the ACCC does not consider that the existence of the Licensing Program in itself indicates unity of baseball. A whole range of activities may be used by the ABF to demonstrate the whole of sport approach and secure sponsorship.
- 7.118 While, the ACCC acknowledges that the ABF website may not have the impact it was accorded in the Draft Notice, other indicia exist, including the ABF loyalty card and the states and territory associations signing the *National Royalty Policy State/Territory Association Compliance Agreement*. Further, the ABF has stated that it would develop a new national program in the place of the Licensing Program and continue to require Australian Baseball logos if the notification was revoked.
- 7.119 In addition, the likely announcement of an Australian national baseball league later this year will ‘overtly project’ unity in baseball, as the ABF claimed was the case between 1989 and 1999.

Benefit to suppliers

- 7.120 In response to the Draft Notice, the ABF, Baseball NT and licensed suppliers highlighted advertising and other promotion benefits to licensees from the Licensing Program.¹⁶¹ The ABF also noted that unlicensed suppliers benefit from the Licensing Program as they will sell more unlicensed product as participation in the sport continues.¹⁶²
- 7.121 Sportswear Queensland submitted that it has experienced an increase in business over the past few years, including from interstate customers, which it stated ‘may be due to the fact that a list of [sic] Licensees is available on the ABF website’.¹⁶³
- 7.122 Greenfly submitted that the Licensing Program has given it brand exposure, and allowed it to save on advertising expenditure by promoting its products on the ABF website.¹⁶⁴ It submitted that the Licensing Program has enabled it to compete with larger suppliers.¹⁶⁵ Greenfly also considered that the Australian Baseball logo conveys a message to consumers that its products, while not backed by the ABF, can ‘at least be considered to be a reliable brand’.¹⁶⁶

¹⁶⁰ New South Wales Junior Baseball League, Submission to the ACCC, 7 July 2006, p. 1.

¹⁶¹ Baseball NT Inc, Letter to the ACCC, 3 July 2006, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

¹⁶² ABF, Submission to the ACCC, 24 July 2006, p. 2.

¹⁶³ Sportswear Queensland, Letter to the ABF, 10 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 10 July 2006.

¹⁶⁴ Greenfly Pty Ltd, Letter to the ABF, 4 July 2006, p. 1, provided as an attachment to ABF Submission to the ACCC, 7 July 2006.

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*, p. 2.

- 7.123 Addlon Trading Co noted the advertising it receives on the ABF website and stated that it is offered promotional opportunities with ABF initiatives when they arise.¹⁶⁷
- 7.124 Customers of the licensed suppliers also reported benefit from the Licensing Program in the form of greater awareness of the suppliers of baseballs and baseball uniforms.
- 7.125 The Williamstown Baseball Club indicated that the Licensing Program has raised its awareness of the number of suppliers of baseballs and baseball uniforms.¹⁶⁸
- 7.126 Baseball Victoria, the ACT Baseball Association, as well as the Sandringham and Waverley Baseball Clubs reported increased competition and choice of suppliers of baseball uniforms and equipment as a result of the Licensing Program.¹⁶⁹ Baseball Victoria noted in particular that it is able to conduct tender processes for state and other uniforms to secure better prices for players.¹⁷⁰

ACCC assessment

- 7.127 The ACCC accepts that there is a benefit to suppliers from increased exposure to consumers. However, the ACCC does not consider this benefit to be exclusive to the Licensing Program. The ACCC considers that the ABF would be in a position to offer these services, perhaps for a fee, without forcing consumers to acquire goods from third party suppliers.

Balance of public benefits and detriments

- 7.128 The ACCC considers that 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 reduced competition as a result of restrictions on supply; and
 - (c) any administration costs, whether borne by the scheme or absorbed by other bodies.
- 7.129 Of particular concern to the ACCC is the effect of reduced competition on the licensed products. Reduced competition restricts the choice for consumers in price, quality and service.
- 7.130 The ACCC considers that the Licensing Program is likely to result in benefit through the ABF providing funding to state and territory baseball associations. Now that the ABF has assumed responsibility for the program, more significant

¹⁶⁷ *ibid.*, p. 3.

¹⁶⁸ Williamstown Baseball Club, Letter to the ABF, 20 July 2006, p. 1, provided to the ACCC at the Pre-decision Conference, 24 July 2006.

¹⁶⁹ Baseball Victoria, Submission to the ACCC, 5 July 2006, p. 1; ACT Baseball Association, Letter to the ABF, undated, p. 1, provided as an attachment to ABF Submission to the ACCC, 10 July 2006; Waverley Baseball Club Inc, Submission to the ACCC, 12 July 2006, p. 1; and Sandringham Baseball Club Inc, Submission to the ACCC, 10 July 2006, p. 1.

¹⁷⁰ Baseball Victoria, Submission to the ACCC, 5 July 2006, p. 1.

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

- 7.131 However, irrespective of whether the Licensing Program operates exactly as envisaged by the ABF, the Licensing Program will necessarily return less to state and territory associations than the amount raised (the corresponding detriment). The distributions will be equal to total revenue from royalties less the 'hard' costs claimed by the ABF, estimated to be \$6,600. As revenue increases, the difference between the amount raised and the amount distributed may be as great as 15 per cent of revenue.
- 7.132 The ACCC does not consider that the Licensing Program delivers benefit through projecting a whole of sport image or providing advertising and promotional opportunities to participating suppliers.
- 7.133 The ACCC accepts there is a small benefit from the Licensing Program to the extent that the transfers to state and territory baseball associations assist in the development of baseball in Australia and increase community fitness and recreation.
- 7.134 However, this benefit must be weighed against the detriment of: the costs absorbed by the ABF (over and above those costs that would be incurred in pursuit of an alternative national program); any other administration costs associated with the Licensing Program (over and above those costs that would be incurred in attaching Australian Baseball logos through another means); and the restriction of consumer choice in terms of price, quality and service.
- 7.135 On balance, the ACCC considers that the likely benefit to the public from the notified conduct will not outweigh the likely detriment.
- 7.136 The ACCC does not object to sporting organisations seeking to raise revenue or project a whole of sport image through licensing programs and/or the use of logos. However, the ACCC's primary concern with this arrangement is that it forces players, clubs and associations to acquire products from third party suppliers, thereby restricting consumer choice in terms of price, quality and service.
- 7.137 This notice is not an indication that the ACCC considers all such programs likely to generate a net public detriment. Revenue raising schemes that do not impose comparatively high costs in the form of reduced competition, restricted consumer choice and administration costs and that simultaneously generate clear benefits to the public, may be in the public interest.
- 7.138 The ACCC considers it appropriate to allow the ABF a transition period during which it may develop and implement alternative arrangements to the existing merchandise licensing program. Therefore, the notification will remain in force until after the next summer baseball season.

8. Notice

- 8.1 For the reasons outlined in this 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.
- 8.2 Accordingly, the ACCC issues this notice under section 93(3A) of the Act to revoke the immunity afforded by notification N90853. The notification giving the ABF immunity from legal action under the Act ceases to be in force on **1 April 2007.**