

# TOOMEY MANING & CO BARRISTERS and SOLICITORS

Your Ref:

Our Ref: TAS-9331-070001-CDG:CDG

20 December 2007

The General Manager  
Adjudication Branch  
Australian Competition  
and Consumer Commission  
GPO Box 3131  
CANBERRA ACT 2601

By facsimile: (02) 6243 1211

Dear Mr Gregson,

Tabcorp Manager Pty Ltd applications for authorisation  
A91065, A91066 & A91067 - interested party consultation

I refer to your letter of 8 November 2007 to my client, Tasmanian Racing Club Inc ("the Tasmanian Racing Club"), in respect of the application ("the Application") of Tabcorp Manager Pty Ltd ("Tabcorp Manager") for Australian Competition and Consumer Commission ("ACCC") approval, including interim approval, of Tabcorp Manager's 2007 SuperTAB Pooling Agreement ("the Agreement") with TOTE Tasmania Pty Ltd ("TOTE Tasmania").

Notwithstanding that the deadline stated in your letter has passed, it is my understanding that you have agreed to consider any comments and submissions made by the Tasmanian Racing Club in respect of the Application which it makes prior to 21 December 2007.

My client's submissions in respect of the Agreement, in so far as Tabcorp Manager seeks ACCC approval pursuant to the Application, are set out in the remainder of this letter. In making these submissions, my client has restricted its comments to the authorisations sought by Tabcorp Manager and not any other matters (of which the Tasmanian Racing Club has no knowledge) which may constitute breaches of the *Trade Practices Act 1974* (Cth) and which would require authorisation from the ACCC.

## Relevant Parties

### Tasmanian Racing Club Inc

The Tasmanian Racing Club is a body corporate incorporated on 20 November 1986 pursuant to the *Associations Incorporation Act 1964* (Tas). The Tasmanian Racing Club's principal activity,

PATRICK C. TOOMEY  
M Bus Admin (Inv Fin), BA (Env Des), LLB

Senior Associates:  
CURTIS F. BROWNE BEc, LLB (Hons)  
LEONARD C. FERNANDEZ, LLB

Associates: ANGIE L. SOMANN-CRAWFORD BA, LLB  
ANDREW BUCKLEY LLB  
CHRISTOPHER GROVES BA, LLB (Hons)

- 30 Davey Street,  
HOBART, TASMANIA 7000
- G.P.O. Box 1453,  
HOBART, TASMANIA 7001
- DX 107, HOBART
- E-mail: Toomey.Maning@  
bigpond.com
- Tel: (03) 6224 9911
- Fax: (03) 6224 9966

TOOMEY MANING & CO BARRISTERS and SOLICITORS

pursuant to its application for incorporation, is the promotion and encouragement of horse racing in Tasmania,<sup>1</sup> an activity it primarily pursues as the owner of Hobart's Elwick Racecourse which is a registered racecourse at which it is permitted to hold race meetings.<sup>2</sup>

Pursuant to a complex series of agreements, Elwick Racecourse is leased by the Tasmanian Racing Club to TOTE Tasmania. Pursuant to that series of agreements, the Tasmanian Racing Club continues to sub-lease, licence, control and/or operate some areas of, and services at, the Elwick Racecourse, in particular catering services.

The Tasmanian Racing Club nominates two persons who sit on the Tasmanian Thoroughbred Racing Council,<sup>3</sup> which is itself constituted as a body corporate under the *Racing Regulation Act 2004* (Tas) and which is responsible for, *inter alia*, the *Tasmanian Rules of Racing*, representing the Tasmanian racing industry nationally, developing and administering race meeting guidelines, and race nominations, acceptances, handicapping and programming.<sup>4</sup>

For the 2006-2007 financial year, the Tasmanian Racing Club obtained 22% of its income from the fees which TOTE Tasmania is obliged to pay to it pursuant to the *TOTE Tasmania (Racing Regulation) Act 2004* (Tas) and the *Gaming Control Act 1993* (Tas). A further 22% of the Tasmanian Racing Club's income for that financial year was obtained from the catering services it provides at Elwick Racecourse, while most of the Tasmanian Racing Club's remaining income was derived from race meetings (including broadcast licence fees and bookmaker fees).<sup>5</sup>

The Tasmanian Racing Club is not licensed by TOTE Tasmania, nor has it sought a licence, to operate on-course totalizator betting as permitted pursuant to s. 57U of the *Racing (Totalizator Betting) Act 1954* (Tas).

TOTE Tasmania

Subject to the matters raised below, the Tasmanian Racing Club accepts the general profile of TOTE Tasmania which is set out in the Application.

TOTE Tasmania was formed by the Minister for Racing pursuant to s. 6 of the *TOTE Tasmania Act 2000* (Tas). The principal objectives of TOTE Tasmania are set out in s. 7 of the *TOTE Tasmania Act 2000* (Tas) and include the promotion of Tasmanian racing within Tasmania and nationally (an objective it shares with the Tasmanian Racing Club), and to encourage wagering on Tasmanian racing and to attract sponsorship income.

TOTE Tasmania allots the race days of the Tasmanian Racing Club by which the totalizer is to be used.<sup>6</sup> TOTE Tasmania pays a product fee to, *inter alia*, the Tasmanian Racing Club,<sup>7</sup> and is also

<sup>1</sup> Association Extract of the Tasmanian Racing Club dated 27 March 2003 – Annexure "A".

<sup>2</sup> *Racing Regulation Act 2004* (Tas), ss. 36 and 37.

<sup>3</sup> *Racing Regulation Act 2004* (Tas), s. 14(1).

<sup>4</sup> *Racing Regulation Act 2004* (Tas), s. 11.

<sup>5</sup> Tasmanian Racing Club Inc Annual Report 2007 – Annexure "B", p. 10.

<sup>6</sup> *TOTE Tasmania (Racing Regulation) Act 2004* (Tas), s. 7(1).

<sup>7</sup> *TOTE Tasmania (Racing Regulation) Act 2004* (Tas), s. 10.

required to set aside a portion of its net earnings for expenditure intended to be used for the benefit of the Tasmanian racing industry.<sup>8</sup>

Tabcorp Manager Pty Ltd

The Tasmanian Racing Club accepts the general profile of Tabcorp Manager which is set out in the Application.

Sky Channel Pty Ltd

Sky Channel is an Australian proprietary company and which is part of the Tabcorp group, the ultimate holding company of which is Tabcorp Holdings Ltd.<sup>9</sup> Tabcorp Holdings Ltd is also the holding company of Tabcorp Manager.<sup>10</sup>

Sky Channel Pty Ltd operates Sky Channel, which telecasts racing (including thoroughbred racing) events as the holder of exclusive broadcasting rights granted in respect of the majority of Australian racing content<sup>11</sup> (including, relevantly, Tasmanian thoroughbred racing content held at Elwick Racecourse), and some content sourced from ThoroughVision Pty Ltd.<sup>12</sup> Sky Channel is distributed in Tasmania by TOTE Tasmania.<sup>13</sup>

Sky Channel's competitor, ThoroughVision,<sup>14</sup> does not hold broadcasting rights in respect of Tasmanian thoroughbred racing content,<sup>15</sup> and it is the Tasmanian Racing Club's experience and understanding that ThoroughVision broadcasts have only minimal availability in Tasmania, both inside and outside of TOTE Tasmania outlets.

**Further Background**

The Tasmanian Racing Club does not disagree with the profile of the Australian racing and wagering industries outlined by Tabcorp Manager in the Application.<sup>16</sup>

The Tasmanian Racing Club respectfully adopts the relevant findings and comments made by the ACCC in its determination as to Applications for Authorisation No. A91031 & A91032 dated 4 July 2007.

In particular, the Tasmanian Racing Club agrees with the ACCC that, in the Tasmanian Racing Club's experience and observations, wagering on racing events is intimately linked with the

---

<sup>8</sup> *TOTE Tasmania (Racing Regulation) Act 2004* (Tas), s. 11.  
<sup>9</sup> ASIC historical company extract of Sky Channel Pty Ltd – Annexure "C", p. 7.  
<sup>10</sup> The Application: Form A – Exclusionary Provisions: Application for Authorisation, p. 1.  
<sup>11</sup> ACCC Determination – Applications for Authorisation No. A91031 & A91032 dated 4 July 2007, pp. 3-4.  
<sup>12</sup> ACCC Determination – Applications for Authorisation No. A91031 & A91032 dated 4 July 2007.  
<sup>13</sup> The Application: Submission to the Australian Competition and Consumer Commission of Tabcorp dated 6 November 2007, p. 8.  
<sup>14</sup> Operated by ThoroughVision Pty Ltd: ACCC Determination – Applications for Authorisation No. A91031 & A91032 dated 4 July 2007, pp. 405.  
<sup>15</sup> ACCC Determination – Applications for Authorisation No. A91031 & A91032 dated 4 July 2007, p. 5.  
<sup>16</sup> Submission to the Australian Competition and Consumer Commission of Tabcorp dated 6 November 2007, pp. 821.

availability of broadcast racing content, which (particularly in Tasmania) is provided by Sky Channel.<sup>17</sup>

It is apparent that the vertical integration of Tabcorp Manager and Sky Channel gives Tabcorp Manager the potential to use the Tabcorp group's ownership of Sky Channel to further Tabcorp Manager's own interests to the detriment of other entities,<sup>18</sup> with the specific mix of racing on Sky Channel being dependent on, *inter alia*, the preferences of viewers/punters which are tied to wagering levels.<sup>19</sup> Ultimately the content of Sky Channel is a commercial decision for Sky Channel Pty Ltd,<sup>20</sup> assessed in line with the Tabcorp group corporate structure.

It is the experience of the Tasmanian Racing Club, given Sky Channel is broadcast at its Elwick Racecourse, that consumer interest in events staged by the Tasmanian Racing Club is directly linked to Sky Channel coverage.

Sky Channel coverage of Tasmanian racing events, including those staged by the Tasmanian Racing Club, is also critical to the promotion of Tasmanian racing both within Tasmania and nationally. Without Sky Channel coverage, Tasmanian racing attracts only minimal interest outside the small number of historically popular events such as the Hobart Cup and Tasmanian Derby.

During 2002 the Tasmanian racing industry, including the Tasmanian Racing Club, underwent a significant shift in focus when its primary weekly race meetings were moved from Saturday to Sunday, a move which in large part was due to Sky Channel broadcasting concerns and opportunities.

The Tasmanian Racing Club experienced a tumultuous shift from Saturday to Sunday racing, the club taking some time to re-establish consumer interest in racing events following the shift, and experiencing a downturn in income (together with significant administrative burdens) as a result of the shift which was principally engineered by TOTE Tasmania and Sky Channel.

**The Application**

While it is concerned with the lack of public benefit (as distinct from corporate gain) promoted by the Application, the Tasmanian Racing Club is generally content, subject to one proposed condition discussed below, that the Application be granted in the event that Tabcorp Manager satisfies the ACCC that, in pursuant to the relevant tests as to public interest set out in the *Trade Practices Act 1974* (Cth), the authorisations sought by the Application should be given

In particular it is the Tasmanian Racing Club's understanding that the Agreement (which appears to be of a type permitted by s. 57F of the *Racing Regulation Act 2004* (Tas)) does not reduce the

<sup>17</sup> ACCC Determination – Applications for Authorisation No. A91031 & A91032 dated 4 July 2007, p. 7.

<sup>18</sup> ACCC Determination – Applications for Authorisation No. A91031 & A91032 dated 4 July 2007, p. 25.

<sup>19</sup> ACCC Determination – Applications for Authorisation No. A91031 & A91032 dated 4 July 2007, p. 44.

<sup>20</sup> ACCC Determination – Applications for Authorisation No. A91031 & A91032 dated 4 July 2007, p. 44.



commissions ordinarily payable to TOTE Tasmania<sup>21</sup> (and which are in turn used to pay fees to Tasmanian racing clubs such as the Tasmanian Racing Club pursuant to the *TOTE Tasmania (Racing Regulation) Act 2004* (Tas)), such that any immediate funding difficulties will be encountered by either TOTE Tasmania or the Tasmanian Racing Club.

If this understanding is incorrect the Tasmanian Racing Club wishes to consider the reduced commissions which are payable to TOTE Tasmania as a result of the Agreement (particularly in so far as they may differ from the 1998 Agreement entered into between Tabcorp Manager and TOTE Tasmania) to determine whether or not any negative impact is likely to occur as a result of that reduction.

The Relevance of the Nationalisation of Wagering on Tasmanian Race Product

The increasing nationalisation and internationalisation of wagering is likely to result in a broad increase in wagering on races staged by Tasmanian clubs such as the Tasmanian Racing Club. This increase in wagering is, in turn, likely to result in increased wagering revenue related to Tasmanian racing product but which will accrue to persons and entities situated outside Tasmania. The Tasmanian Racing Club is economically dependent upon the income it receives from TOTE Tasmania.<sup>22</sup>

Given clubs such as the Tasmanian Racing Club are dependent particularly on state-level funding, the existence of nationally wider wagering returns related to Tasmanian race product is unlikely to see any direct benefit flowing to the Tasmanian Racing Club as the provider of those services, however the Tasmanian Racing Club realises that this matter is one which the ACCC is effectively unable to address by reference to the Application, given the funding of racing clubs by wagering operators is a statutory initiative.

Clause 8.1 of the Agreement

The Tasmanian Racing Club agrees with Tabcorp Manager that s. 45 of the *Trade Practices Act 1974* (Cth) does not apply in respect of clause 8.1 of the Agreement pursuant to s. 45(6) of the *Trade Practices Act 1974* (Cth).

The Tasmanian Racing Club submits that clause 8.1 of the Agreement can be characterised as a provision requiring exclusive dealing<sup>23</sup> between TOTE Tasmania and Tabcorp Manager and which would, without ACCC authorisation, contravene s. 47 of the *Trade Practices Act 1974* (Cth).

While Tabcorp Manager is correct to state that "*TOTE Tasmania remains free to pool with other totalisators*",<sup>24</sup> this statement ignores the national competitive environment in which Tabcorp Manager and TOTE Tasmania, as totalizator betting operators, operate.<sup>25</sup> That competitive

<sup>21</sup> *Racing Regulation Act 2004* (Tas), s. 57M.

<sup>22</sup> Tasmanian Racing Club Inc Annual Report 20007 – Annexure "B", p. 15.

<sup>23</sup> As defined by s. 47(2) of the *Trade Practices Act 1974* (Cth).

<sup>24</sup> The Application: Submission to the Australian Competition and Consumer Commission of Tabcorp dated 6 November 2007, p. 28.

<sup>25</sup> As set out in the Application: Submission to the Australian Competition and Consumer Commission of Tabcorp dated 6 November 2007, pp. 12-14.

environment is restricted to a small number of off-course totalizators, each of which is the sole off-course totalizator permitted to operate in a particular state or territory, and the majority of which are already participants in the SuperTAB Pool.

The ACCC has previously held, correctly in the Tasmanian Racing Club's submission, that the introduction of another pari-mutuel wagering pool in Australia is highly unlikely in the short-term.<sup>26</sup>

Whether or not clause 8.1 of the Agreement will substantially lessen competition in the relevant markets, being:<sup>27</sup>

- (a) the supply of pari-mutuel wagering pools in Australia; and
- (b) pari-mutuel wagering offered to consumers in each Australian state (with cross-border wagering remaining at low levels)<sup>28</sup> and nationally,

is a matter which the Tasmanian Racing Club is unable to adequately address given the sparsity of the submissions made in the Application.

Clause 8.1 of the Agreement has the potential (although the Tasmanian Racing Club is unsure given the matter is not addressed in the Application) to inhibit the wagering services which TOTE Tasmania, potentially unable to pool or combine betting transactions it may wish to, will offer to punters.

The Tasmanian Racing Club submits that in respect of clause 8.1 of the Agreement, in so far as Tabcorp Manager and TOTE Tasmania seek ACCC authorisation, those parties should be required by the ACCC to adequately address any effect that clause will have on the relevant markets as defined above.

Clause 2.1(b)

The Tasmanian Racing Club disagrees with the submission made in the Application that the provision of race fields approvals does not constitute a 'service' for the purposes of s. 47(6) of the *Trade Practices Act 1974* (Cth). 'Service' is defined by s. 4 of the *Trade Practices Act 1974* (Cth), a definition which covers the race fields approvals outlined in the Application.

The public benefit to arise from TOTE Tasmania being required to obtain the necessary race fields approvals is again not sufficiently articulated in the Application, however the Tasmanian Racing Club believes that the dissemination of Victorian race fields information as permitted by the necessary race fields approvals and the fact that the Agreement is conditional upon TOTE Tasmania obtaining those approvals, are matters which are unlikely to cause any public detriment.

Given that:

- (a) TOTE Tasmania has required the necessary race fields approvals; and

<sup>26</sup> ACCC Public Competition Assessment, Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, paras. [22]-[26].

<sup>27</sup> The Tasmanian Racing Club adopts the market observations made by the ACCC in its Public Competition Assessment. Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited.

<sup>28</sup> ACCC Public Competition Assessment, Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, paras. [33], [34] and [45].

(b) TOTE Tasmania is required to have obtained those race fields approvals to offer wagering on Victorian racing product, regardless of whether or not it enters into the Agreement, the Tasmanian Racing Club has no further submissions in respect of this clause.

Clause 5.6

Clause 5.6 raises two matters requiring submissions by the Tasmanian Racing Club.

Competition

The submission made in the Application that TOTE Tasmania and Tabcorp Manager are not actual or likely competitors, and that accordingly any agreement to restrict totalizator wagering products to consumers pursuant to the Tabcorp Betting Rules does not contravene s. 45(2) of the *Trade Practices Act 1974* (Cth), is unsustainable.

While the level of cross-border totalizator wagering is currently low,<sup>29</sup> there are no significant impediments to increased cross-border competition between totalizators.<sup>30</sup> The increased proliferation of new media, in particular internet access (whether via computer, mobile telephone or other medium), is highly likely to lead to an increase in cross-border wagering.

Tabcorp Manager and TOTE Tasmania currently compete for the cross-border wagering market, and will be competing in the future for an even greater market in this respect. They are clearly actual or likely competitors in this respect.

It follows that in so far as the Tabcorp Betting Rules restrict the supply of wagering products to consumers, clause 5.6 of the Agreement contains an exclusionary provision<sup>31</sup> in respect of which Tabcorp Manager is seeking ACCC authorisation.

Given the absence of submissions made by the Application in this respect, the Tasmanian Racing Club submits that the ACCC should require Tabcorp Manager to adequately address the admitted exclusionary provisions contained in the Tabcorp Betting Rules which the Agreement requires TOTE Tasmania to observe.

It may be that the Tabcorp Betting Rules, in so far as they contain exclusionary provisions, only enforce statutory requirements or are otherwise objectionable, however this is not addressed in the Application and nor is it otherwise apparent from the Application (the relevant annexures to which, including the Tabcorp Betting Rules, have not been provided to the Tasmanian Racing Club).

Net Pool Pricing

Tabcorp Manager has not addressed why gross pool pricing, rather than net pool pricing, is a

<sup>29</sup> ACCC Public Competition Assessment, Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, paras. [33], [34] and [45].

<sup>30</sup> ACCC Public Competition Assessment, Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, paras. [45] and [46].

<sup>31</sup> *Trade Practices Act 1974* (Cth), ss. 45(2) and 4D.

matter of public interest. The expense associated with Tabcorp Manager being required to move to net pool pricing is, without further information from Tabcorp Manager, not a matter which should cause the ACCC concern. Similarly Tabcorp Manager's tax concessions, and the impact upon those of net pool pricing, are a matter for Tabcorp Manager and not the ACCC.

The Tasmanian Racing Club submits that Tabcorp Manager should be required by the ACCC to address the relevant public benefit and detriment in respect of gross pool pricing as compared to net pool pricing.

The Tasmanian Racing Club, given the lack of information contained in the Application, is unable to currently make further submissions in respect of this portion of the Tabcorp Betting Rules.

The Tasmanian Racing Club is also unable to determine if the Tabcorp Betting Rules, which have not been provided to it, raise further issues with which it should be concerned. It submits that consideration should be given by the ACCC to determining whether or not the restriction on publication of the Tabcorp Betting Rules is appropriate in the circumstances.

#### Clause 5.1

The Tasmanian Racing Club's principal concern with the Agreement, in so far as authorisation is sought pursuant to the Application, is with clause 5.1 of the Agreement.

This clause provides that the pooling services proposed to be supplied by Tabcorp Manager to TOTE Tasmania are conditional upon TOTE Tasmania transmitting to Tabcorp Manager "*all investments on the specified bet types received by TOTE Tasmania on nominated Tabcorp Events*".<sup>32</sup>

Those 'Tabcorp Events' which are nominated for the purpose of the Agreement are not disclosed in the Application,<sup>33</sup> which states only that such nomination has previously occurred, and confusingly provides that "*Tabcorp (Manager) operates in the ordinary course of business*",<sup>34</sup> the relevance of which is unclear.

As outlined above, the inter-relationship of Tabcorp Manager and Sky Channel effectively means that Tabcorp Manager's wagering requirements influence or dictate Sky Channel content. This in turn affects consumer interest in, and wagering on, racing product which is not broadcast by Sky Channel. The income of the Tasmanian Racing Club, and the profile of the Tasmanian racing industry,<sup>35</sup> can be significantly reduced by a lack of Sky Channel coverage of Tasmanian racing product.

<sup>32</sup> The Application: 2007 Agreement Summary, p. 3 (emphasis added).

<sup>33</sup> Unless forming part of the Application on which restriction of publication has been claimed and afforded.

<sup>34</sup> The Application: 2007 Agreement Summary, p. 3. That part of the Application comprising the Submission to the Australian Competition and Consumer Commission of Tabcorp dated 6 November 2007 does not further explain the 'Tabcorp Events' which are relevant to the Agreement or which have been nominated.

<sup>35</sup> The promotion of which is an objective of TOTE Tasmania pursuant to s. 7 of the *TOTE Tasmania Act 2000* (Tas).



That TOTE Tasmania allots the race days in respect of which the totalizator is to operate in respect of Tasmanian racing events introduces an additional market circumstances which, if Sky Channel coverage is reduced, has the potential to affect the Tasmanian Racing Club.

Accordingly, the Tasmanian Racing Club is concerned that the ability of Tabcorp Manager to nominate 'Tabcorp Events' for which wagering will be pooled with TOTE Tasmania, which events Tabcorp Manager is unwilling to disclose, will mean that racing events which are not nominated by Tabcorp Manager for the purposes of the Agreement (the number of which may be significant) will be excluded from Sky Channel coverage. This in turn has the potential to work a significant decline in the income and profile of Tasmanian racing and the Tasmanian Racing Club.

The Factual and the Counterfactual

The Application (as provided to the Tasmanian Racing Club with matters restricted from publication) does not adequately disclose the content or operation of the '1998 Agreement' between Tabcorp Manager and TOTE Tasmania which is referred to.

However the Tasmanian Racing Club is generally content with the coverage of Tasmanian racing by Sky Channel which has occurred in the commercial climate brought about by the 1998 Agreement. As set out in the Application, the counterfactual scenario (should the Agreement not be authorised as requested by the Application) is that the 1998 Agreement between TOTE Tasmania and Tabcorp Manager will continue.


By contrast, if the Agreement were to come into affect with the result that Tabcorp Manager could selectively nominate Tasmanian racing which would in turn be the content provided by Sky Channel, a lack of Sky Channel coverage of remaining Tasmanian racing product would:

- (a) result in reduced consumer interest in Tasmanian racing;
- (b) in turn result in reduced wagering on Tasmanian racing on which the Tasmanian Racing Club is reliant for income;
- (c) negatively impact the profile of Tasmanian racing which the Tasmanian Racing Club and TOTE Tasmania are dedicated to promoting and encouraging.

The public detriment arising in this factual scenario is, at worst, the decline of the Tasmanian Racing Club and other Tasmanian racing clubs and, resultantly, the Tasmanian racing industry. At best, the public detriment incurred in this factual scenario is a decrease in consumer interest and public participation in Tasmanian racing and Tasmanian racing events.

The ACCC is aware of the significant and detrimental effects such declines can have on businesses and consumers which rely upon the racing industry.<sup>36</sup>

A further factual possibility is that TOTE Tasmania and Sky Channel will again look to shift the primary day of the week on which Tasmanian racing events regularly occur. While the Tasmanian Racing Club has successfully adapted to staging regular Sunday racing events, it

 <sup>36</sup> ACCC Determination -- Applications for Authorisation No. A91031 & A91032 dated 4 July 2007.

would not be able to adapt to staging its regular events on a weekday, which would attract only limited consumer interest.

TOTE Tasmania and Sky Channel's ability to effectively dictate when primary race meetings will occur, by controlling the operation of the totalizator and broadcast coverage respectively, remains of concern for the Tasmanian Racing Club.

The factual and counterfactual analysis undertaken by Tabcorp Manager as part of the Application<sup>37</sup> does not sufficiently identify the differences between the Agreement and the parties' 1998 Agreement, and does not sufficiently identify the public benefits which will accrue as a result of the Agreement being authorised, as compared to the public benefits (if any) which already accrue as a result of the 1998 Agreement.

#### Further Action Required and Conditions Upon Approval

First, the Tasmanian Racing Club submits that Tabcorp Manager should be requested by the ACCC to reveal what Tasmanian racing events it has nominated as 'Tabcorp Events' for the purposes of clause 5.1 of the Agreement.

If the nominated 'Tabcorp Events' are effectively the same as those which result in TOTE Tasmania and Tabcorp Manager pooling wagers for the purpose of their 1998 Agreement, the Tasmanian Racing Club is unlikely to press its concern regarding the nominated 'Tabcorp Events', however the Tasmanian Racing Club wishes to satisfy itself that Tabcorp Manager's nominations for the purposes of the Agreement meet its concerns.

Second, and in the event that the Tasmanian Racing Club remains concerned about the nominated 'Tabcorp Events' (as it is currently), the Tasmanian Racing Club submits that the ACCC should impose as a condition upon both interim and final authorisation (if any) granted in respect of the Agreement that:

- (a) Tabcorp Manager be required to nominate as 'Tabcorp Events' for the purposes of clause 5.1 of the Agreement a number of Tasmanian racing events equal to or more than the number of racing events for which wagering is pooled with TOTE Tasmania pursuant to the 1998 Agreement between the parties; and/or
- (b) an undertaking be given by Sky Channel Pty Ltd that it maintain current levels of broadcast coverage of Tasmanian racing product; and/or
- (c) undertakings be given by TOTE Tasmania that, for the life of the Agreement:
  - (i) it continue to operate the totalizator in respect of the race meetings on which the totalizator is currently operated, unless agreed to by the Tasmanian Racing Club and other relevant Tasmanian racing clubs; and/or
  - (ii) it not seek to alter, directly or indirectly, the staging of Tasmania's primary weekly racing events currently held on Sundays by, *inter alia*, the Tasmanian Racing Club.

<sup>37</sup> Which the Tasmanian Racing Club must assess with publication of parts of the Application being restricted including, importantly, a comparison of the Agreement with the 1998 Agreement purported to be undertaken by Tabcorp at pp. 45-46 of Submission to the Australian Competition and Consumer Commission of Tabcorp dated 6 November 2007.

**TOOMEY MANING & CO** BARRISTERS and SOLICITORS

The Tasmanian Racing Club is cognisant of the fact that Sky Channel Pty Ltd is not a party to the Agreement, however this is no impediment to the ACCC imposing a condition such as that suggested at (b) above.<sup>38</sup>

**Further Submissions**

The Tasmanian Racing Club is otherwise generally supportive of the Agreement, assuming that the proposed pooling of wagering will increase wagering (and, accordingly, consumer interest) in Tasmanian racing as suggested by the Application.

The Tasmanian Racing Club is also hopeful that the pooling implemented by the Agreement, which effectively incorporates TOTE Tasmania further into a pooling arrangement involving totalizators in other Australian states, will further increase the profile of Tasmanian racing nationally.

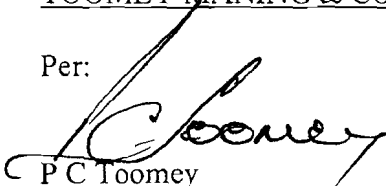
Subject to the concerns and submissions raised above, the Tasmanian Racing Club's position is that it:

- (a) otherwise has no significant concerns with the Agreement as disclosed by the Application;
- (b) wishes to be invited to make further submissions in the event that Tabcorp Manager addresses potential shortcomings in the Application as identified above; and
- (c) respectfully requests the ACCC to consider imposing a condition, or requesting further information, as detailed above under the heading 'Further Action Required and Conditions Upon Approval'.

Please contact me if you require any further information from the Tasmanian Racing Club in respect of the Application or the Agreement. My client also wishes to be kept informed of the progress of the Application and any authorisation which is made by the ACCC.

Yours faithfully,  
TOOMEY MANING & CO

Per:

  
P C Toomey

Encl.

<sup>38</sup> Re Application by Medicines Australia Inc [2007] ACompT 4.