
Betfair submission to
Australian Competition and
Consumer Commission
Application for authorisation of
arrangements between
Tabcorp Holdings Limited, Sky Channel
Pty Ltd and ThoroughVision Pty Ltd

Betfair Pty Ltd

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1 Executive summary

Betfair Pty Limited (**Betfair**) has been invited to make a submission in relation to the applications for authorisation A91031 and A91032 lodged on 15 February 2007 by Tabcorp Holdings Limited (**Tabcorp**), Sky Channel Pty Ltd (**Sky**), and ThoroughVision Pty Ltd (**TVN**).

Sky is a wholly owned subsidiary of Tabcorp. In this submission, these parties are referred to jointly as the **Tabcorp entities**.

1.1 Proposed Arrangements

The Tabcorp entities and TVN have sought authorisation under section 88 of the *Trade Practices Act 1974* (Cth) (**TPA**) for certain parts of a Memorandum of Understanding dated 1 February 2007 between the Tabcorp entities and TVN (**MOU**) and certain other arrangements made under this MOU (**Proposed Arrangements**).

The Tabcorp entities and TVN have not made public a copy of the MOU. Rather, they have prepared a summary of the arrangements between the parties in a submission to the Commission dated 15 February 2007 (**Submission**), which has been redacted prior to publication, and a summary of the MOU at Annexure A to the Submission.

Authorisation has been sought in application A91031 (for conduct that may breach s 45 of the TPA) for the following arrangements:

- Schedules 1 to 7 of the MOU and certain arrangements made under clause 2.3 of the MOU.

Authorisation has been sought in application A91032 (for conduct that may constitute exclusive dealing) for the following arrangements:

- Clause 1 of schedule 2 and clause 1 of schedule 3 of the MOU and certain arrangements made under clause 2.3 of the MOU.

The contents of these particular provisions are not clear from the Submission. It is difficult to comment on the trade practices implications of the arrangements for which authorisation is sought in circumstances where the applicants have only provided summaries of those arrangements. Betfair considers that the parties should make public a full copy of the MOU and any arrangements proposed to be made under the MOU to allow interested parties to make informed comments about their terms. Publication of a summary of arrangements rather than their provisions is an inadequate substitute when fully informed market inquiries are sought.

Betfair would like the opportunity to supplement this submission if the Commission requires the parties to make public the relevant terms of the agreements set out above.

1.2 Trade Practices issues and remedies

Based on the Submission, Betfair considers that the Proposed Arrangements arrangements:

- contain exclusionary provisions as defined by section 4D in breach of section 45 of the TPA;
- have the purpose and effect of substantially lessening competition in the national market in which totalisators, bookmakers and betting exchanges supply wagering

services to members of the public who wish to place wagers (**National Wagering Market**), and in the market in which Sky and TVN bid against each other for thoroughbred race broadcasting rights (**Thoroughbred Racing Product Market**) in breach of sections 45 and/or 47 of the TPA; and

- do not have sufficient demonstrable public benefits (as compared to 'private' benefits restricted to the parties).

It is not possible to analyse which of these sections of the TPA are breached without reviewing how the Proposed Arrangements have been structured. However, regardless of which of these sections are relevantly applied to the Proposed Arrangements, Betfair submits that a substantial purpose, and the likely effect of the Proposed Arrangements, is to hinder the ability of wagering services providers (such as Betfair) other than totalisators from competing in the National Wagering Market.

Betfair submits that the Commission should refuse to grant authorisation, or only grant authorisation subject to conditions which would ameliorate these anticompetitive effects.

This is an appropriate matter for the Commission to impose conditions under section 91(3) on any authorisation granted to the parties and/or for the parties to offer undertakings to the Commission under section 87B of the TPA.

A necessary precondition for authorisation will be access arrangements which allow competitive wagering service providers which offer wagering on thoroughbred racing events to have access to the broadcasting platforms owned by the vertically integrated Tabcorp entities.

In particular, these access arrangements (whether proffered by the parties as enforceable undertakings, or imposed by the Commission as conditions on authorisation) should contain the following elements:

- (i) all competing wagering service providers are to have open access to Tabcorp's broadcasting platforms for appropriate commercial fees;
- (ii) Tabcorp is not to prevent or hinder its competitors from advertising on race courses in accordance with legal requirements, provided commercial agreements can be negotiated with the relevant rights holders; and
- (iii) Tabcorp is to refrain from influencing media outlets which it owns or with which it has commercial arrangements to give no, or only negative, editorial coverage of competing wagering service providers.

In addition to this access regime, certain amendments to the Proposed Arrangements are necessary to ameliorate other discrete anticompetitive effects. Appropriate conditions under section 91(3) would provide that:

- (a) the exclusionary provisions summarised in paragraphs 4.8 and 4.9 of the Submission are deleted from the Proposed Arrangements (the Wagering information condition and the Third party audio condition);
- (b) Tabcorp entities are not to prevent, hinder or obscure third party promotion by wagering service providers contained in any TVN broadcast, whether physical or virtual and whether embedded in the telecast (eg television advertisement) or incidental to it (eg on-course advertising). This includes insertion of odds and other wagering information and extends to the incorporation of parts of the TVN product in the Sky telecast;

- (c) TVN is not required to broadcast wagering information of wagering operators controlled by Tabcorp, and is not prevented from broadcasting wagering information of other wagering service providers;
- (d) the visual coverage provided by the Tabcorp entities to TVN is not to be subject to a restriction that only audio provided by the Tabcorp entities may be broadcast in conjunction with it, and TVN and other entities are to be free to add or substitute their own audio;
- (e) Tabcorp entities are to provide a clean feed of the Tabcorp entities' visual coverage to TVN and to any third party to whom TVN sells vision rights;
- (f) Tabcorp entities are not to insert virtual advertising (including odds) into coverage provided to TVN without TVN's approval;
- (g) the licences obtained by Sky from TVN to broadcast TVN shareholder races, Darwin Turf Club and Alice Springs Turf Club races and any other thoroughbred races to which TVN held rights as at 15 May 2006 be expressly non-exclusive;
- (h) Tabcorp entities are not to prevent, hinder or obscure third party promotion by wagering service providers contained in any Sky Channel broadcast, whether physical or virtual and whether embedded in the telecast (eg television advertisement) or incidental to it (eg on-course advertising). This includes insertion of odds and other wagering information.

This submission focuses on the market for the supply of wagering services, but Betfair notes that the Proposed Arrangements may also have the purpose and/or effect of substantially lessening competition in other relevant markets.

2 About Betfair

Betfair was incorporated on 16 July 2004 as a joint venture between The Sporting Exchange Limited group of companies (**TSEL**) and the Publishing and Broadcasting Limited group of companies (**PBL**) to conduct a betting exchange in Australia.

TSEL was founded in August 1999 and began operating a betting exchange under the Betfair brand in the United Kingdom in June 2000. In February 2005, all operational aspects of the business were transferred to a wholly owned subsidiary, Betfair Limited (**Betfair UK**).

The Betfair joint venture between TSEL and PBL came into operation on 7 February 2006, when Betfair became licensed by the Tasmanian Gaming Commission to conduct a betting exchange in accordance with the *Gaming Control Act 1993* (Tas). From this date, bets through the Betfair betting exchange on events conducted in Australia and certain overseas events have been taken by Betfair under its Tasmanian gaming licence.

Betfair derives its revenue by charging a commission to winning customers – levied on their net winning position on a particular market. Betfair does not operate retail premises at which bets may be placed (as with a TAB) and nor does it have an on-course presence in the same way as the totalisators or traditional bookmakers; its services are exclusively provided via the internet and telephone. Betfair's betting exchange provides a platform for the placing of bets by individuals who form a view as to the likelihood of a particular outcome occurring – for example, whether or not a horse will win a race or whether or not a football team will win a particular match. Bets from these individuals are matched with bets from others who have an opposing view of the likelihood of a particular outcome occurring.

A betting exchange is similar to a stock exchange except that, rather than trading in stocks, individuals are trading in fixed odds wagers, generally relating to sports or racing events. The role of Betfair as a betting exchange operator is to provide a regulated, structured and safe environment for online and telephone betting.

3 National Wagering Market

The Tabcorp entities and TVN acknowledge that one of the relevant markets for analysis of the applications for authorisation is the market in which wagering services are provided.¹ In addition, they note that wagering services in Australia are provided by a number of competing wagering service providers including totalisators, bookmakers and betting exchanges.²

The issue of wagering markets was considered by the Commission in its assessment of the proposed merger of Tabcorp and UNiTAB Limited. In its public competition assessment, the Commission noted that there appeared to be a conscious decision by totalisators in different States and territories not to compete aggressively with each other.³ Nevertheless, the Commission recognised that bookmakers, and particularly corporate bookmakers offering online wagering services, compete with totalisators for punters, and that betting exchanges potentially may become more significant players in the sector.⁴

Betfair considers that there is a National Wagering Market. Annexure A to this submission contains Betfair's submissions on the appropriate market definition.

Betfair considers that the National Wagering Market is one of the relevant markets within which the Proposed Arrangements should be analysed. However, even if the Commission is not satisfied that a National Wagering Market exists, and considers that there are separate State and Territory based wagering markets, the Proposed Arrangements would still have the purpose and likely effect of substantially lessening competition between totalisators and other wagering service providers in each of these State and Territory based markets.

Another relevant market is that identified by the Commission when it refused informal clearance to the proposed joint venture between the Tabcorp entities and TVN, namely, the market in which Sky and TVN bid against each other for thoroughbred racing broadcast rights (Thoroughbred Racing Product Market).⁵

This submission focuses on the National Wagering Market, but will also make reference to the Thoroughbred Racing Product Market.

4 Purpose and effect of Proposed Arrangements

An express and implied commercial purpose of the Tabcorp entities in entering into the Proposed Arrangements is to impede competition in the National Wagering Market by

¹ Submission at [9.14]

² Submission at [8.6], [8.8] and footnote 15

³ ACCC Public Competition Assessment "Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited" 16 November 2006 at [45]-[46]

⁴ ACCC Public Competition Assessment "Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited" 16 November 2006 at [47]

⁵ ACCC public register "*ThoroughVision and Sky Group – proposed joint venture*"; M2006/308.

limiting the ability of wagering service providers who are not totalisators to compete with Tabcorp. The Proposed Arrangements as they currently stand are also likely to have this effect.

4.1 Purpose of Tabcorp is clear from summary documents

The summary of the MOU at Annexure A to the Submission notes that on 15 May 2006 Tabcorp, Sky, TVN and TVN's shareholders entered into a binding Heads of Agreement and Term Sheet. A summary of this Heads of Agreement is set out at Attachment A to this submission.⁶

The Heads of Agreement contained Interim Arrangements, which came into force immediately, and Long Term Arrangements which would only come into force if clearance was obtained from the Commission. The Commission refused to grant informal clearance to the Long Term Arrangements because:⁷

- the proposed joint venture arrangements would have substantially lessened Sky's and TVN's incentives to bid against each other for thoroughbred racing broadcast rights; and
- other competition issues were also noted relating to some specific clauses of the arrangements.

The Long Term Arrangements set out certain explicit purposes for the joint venture. These were as follows:

"(1) The general principles of the deal are that:

- (A) Wagering revenue for Tabcorp and the racing industry is to be maximised;*
- (B) The objective of the Sky Wagering Channel is to maximise wagering revenue for the Tabcorp Group and its coverage strategy is intended to be designed accordingly; and*
- (C) The objective of the TVN Thoroughbred Channel is to foster interest in thoroughbred horse racing through the operation of the TVN Thoroughbred Channel."*

Many of the provisions of the Long Term Arrangements set out in the summary of the Heads of Agreement appear to be substantially the same as the Long Term Arrangements set out in the summary of the MOU for which authorisation is sought.

The summary of the MOU no longer makes explicit reference to the "general principles of the deal" extracted above. However, it is clear from the terms of the Submission by the Tabcorp entities and TVN that the rationale for the Proposed Arrangements has not changed.

In particular, Betfair notes the following:

⁶ This summary was circulated by the Commission to interested parties on 28 June 2006 in relation to the proposed joint venture between the Tabcorp entities and TVN.

⁷ ACCC public register "*ThoroughVision and Sky Group – proposed joint venture*", M2006/308.

- (a) The primary rationale for the Proposed Arrangements from the perspective of the Tabcorp entities is that they will acquire *“the ability to provide ‘wall to wall’ racing from a single source that Tabcorp and the other TABs demand in order to drive wagering”*.⁸
- (b) Tabcorp recognises that this is essentially a private benefit, but claims that the additional revenues it receives as a result of the Proposed Arrangements will ‘trickle down’ to the racing industry as a result of Tabcorp’s obligations to return a proportion of its revenues to racing industry bodies. The parties state:⁹ *“An increase in wagering revenues is clearly a benefit to Tabcorp and other totalizators. However, as wagering revenues are also the principle source of funding for the Australian racing industry, an increase in wagering revenues is also a significant public benefit”*.
- (c) The parties recognise that betting exchanges, oncourse bookmakers and corporate bookmakers participate in the Australian wagering industry,¹⁰ but the parties do not make any reference to the contributions to the Australian racing industry made by these other wagering service providers. These issues are considered in more detail in section 5.2 below.
- (d) The parties state that following the Interim Arrangements, *“Sky returned to its pre-dispute position of providing comprehensive ‘wall to wall’ coverage of racing (including Sydney and Victorian thoroughbred races) on its channel with the express aim of maximising wagering revenue”*.¹¹

4.2 Future with and without authorisation

The parties claim that the future with authorisation will end “split vision” by allowing Sky Channel to become a consolidated wagering channel broadcasting “wall to wall” racing from a single source.

TVN would not focus on punters, but rather on thoroughbred racing enthusiasts, and would focus on expanding interest in thoroughbred racing generally. For example, TVN would focus on discussion programs such as the Breeding Show, Turf History, Rising Stars, etc listed at [11.27] of the Submission.

The future without authorisation would see both Sky Channel and TVN offering live racing broadcasts which appealed to punters. A key difference in the future without authorisation is that it is far more likely that competitive wagering service providers would be able to negotiate access to thoroughbred broadcasting by TVN (for example by including content about their services) than they would if they were forced to seek access from the Tabcorp entities.

A significant competition concern attaching to authorisation of the Proposed Arrangements is that it would create a monopoly thoroughbred punter’s channel which broadcasts live all key events that are attractive to punters. The reason why this is of particular concern is that this channel is wholly owned and operated by a single wagering service provider, Tabcorp.

⁸ Submission at [5.1(a)]

⁹ Submission at [5.3]

¹⁰ Submission at [8.6] and [8.8]

¹¹ Submission at [8.71]

In the absence of sufficient safeguards, in the form of an effective access regime to the broadcasting platforms offered by Tabcorp in the future with authorisation, there is likely to be a substantial lessening of competition in the National Wagering Market. This lessening of competition would not be outweighed by any of the public benefits claimed by the parties.

4.3 Why is Tabcorp concerned to exclude Betfair from Sky and TVN broadcasts?

Tabcorp has strong vertical integration into the distribution of racing products in the form of a vertically integrated television channel and radio broadcasting channels. As noted above, Sky is a wholly owned subsidiary of Tabcorp. Tabcorp owns radio station 2KY and funds radio station Sport 927, the NSW and Victorian radio stations dedicated solely to the racing industry. Tabcorp also distributes form guides through leading national newspapers such as the Daily Telegraph and the Herald Sun.

Through its control of these distribution channels Tabcorp exerts control, amongst other things, over advertising by other wagering service providers, editorial comment about other wagering service providers and comparison of odds as between wagering service providers.

Distribution channels owned or controlled by Tabcorp have been reluctant to give any publicity to a wagering service provider which competes with the wagering and sports betting services offered by the totalisators. **[Restriction of publication of part claimed]**

Tabcorp is an experienced operator that has found a very effective way of reaching punters is to supply its odds in conjunction with vision of races. The parties note that turnover on racing events can be increased by approximately 40-60% if races are televised and are broadcast in clubs, pubs, TAB agencies and into the home via Pay TV.¹²

At present, Sky Channel racing telecasts display odds from the three Australian totalisator pools:

- **SuperTAB:** a pool covering totalisator wagering in Victoria, Western Australia, Tasmania and the ACT, operated by Tabcorp pursuant to contractual arrangements with each of Racing and Wagering Western Australia, TOTE Tasmania Pty Ltd and ACTTAB Ltd.
- **TAB:** a pool covering totalisator wagering in New South Wales, operated by TAB Limited, a wholly owned subsidiary of Tabcorp.
- **UNiTAB:** a pool covering totalisator wagering in Queensland, South Australia and the Northern Territory, operated by UNiTAB Limited.

The primary benefit to punters of having odds displayed on a racing telecast is that they are better placed to decide whether to bet on a race and, if so, with what wagering service provider and on what terms. The benefit to Tabcorp in excluding competing wagering service providers from advertising their odds on the racing telecast is that punters are then not able to decide which wagering service provider offers them the best value on a particular selection. The effect of such exclusion is that punters have no, or inadequate, means of knowing what alternatives exist to the products offered by Tabcorp and UNiTAB.

¹² Submission at [8.45]

Odds available with Betfair are generally higher than those available with totalisators because Betfair's usual commission of between 2 and 5 per cent of winning bets is substantially lower than Tabcorp's average commission of around 16 per cent.

One important public benefit of the access regime sought by Betfair is that it provides the opportunity for punters to be able to compare odds available with different wagering service providers during race broadcasts and select those odds which provide the best value for their wagering dollar.

4.4 Wagering content – competitive advantages to Tabcorp

The primary position of Betfair is that a necessary precondition to authorisation of the Proposed Arrangements is an effective access regime to Tabcorp's broadcasting platforms.

In addition, specific parts of the Proposed Arrangements are also likely to have anti-competitive effects. This section analyses those provision and proposes other conditions which should be imposed.

The parties claim that the MOU does not contain any provisions relevant to advertising, and that TVN and Sky will continue to sell advertising on their respective channels.¹³ However, there are several key parts of the submission which suggest that Tabcorp will have the ability to significantly influence the content of TVN programming, with adverse effects on other wagering service providers. Similarly, the exclusive nature of the licence granted by TVN to Sky will consolidate Tabcorp's power in the National Wagering Market and have a detrimental impact on other wagering service providers.

(a) Wagering information

A key part of the Submission, which is not adequately explained, deals with the broadcast by TVN of wagering information provided by Tabcorp. At [4.9] of the Submission the parties state:

“Wagering operators controlled by Tabcorp must provide to TVN any Tabcorp group wagering information required by TVN for broadcast on the TVN Channel. Tabcorp is also required to provide to TVN certain wagering information relating to international races.” (Wagering information condition)

What is not explained is what wagering information is “required” by TVN. Based on the previous Heads of Agreement between the parties, it appears that what is contemplated by this clause is that Tabcorp be responsible for fulfilling any requirements that TVN may have for wagering information, to the exclusion of wagering information provided by other wagering service providers.

Betfair notes that the paragraph (15)(B) of the summary of the Heads of Agreement provided that TVN would be prevented from displaying (on any media on which TVN shareholder races are shown) wagering information other than national TAB odds or Australian Price Network fluctuations. This previously proposed prohibition would have had significant implications for competitive wagering service providers, other than totalisators, disseminating their wagering information with thoroughbred races.

¹³ Submission at [4.1]

Depending on the definition of “wagering information” contemplated by the parties in the present Wagering information condition, it could extend to visual display of bookmaker or betting exchange odds with race broadcasts, description of bookmaker or betting exchange odds on audio accompanying race broadcasts, or even incidental display of advertising of competing wagering service providers on hoardings at a TVN shareholder racecourse.

Any agreement between the Tabcorp entities and TVN should expressly provide that TVN is not precluded from broadcasting wagering information from wagering service providers other than Tabcorp. Appropriate conditions to authorisation are set out in more detail in section 7 below.

(b) “Third party” audio

The non-exclusive licence granted by Sky to TVN to broadcast certain premium thoroughbred race meetings provides that TVN may not broadcast any visual coverage of these races with TVN or “third party generated” audio (**Third party audio condition**).

Such a provision has the effect of preventing TVN from acquiring (or generating itself) audio to accompany race broadcasts. It could reasonably be anticipated that the audio provided by Sky, accompanying these race broadcasts, would contain only wagering content relating to Tabcorp and its related entities and would exclude any positive editorial or other content about competitive wagering service providers.

Given that TVN’s executive producer is to determine the content or “look” (graphics, logos, wagering overlays, sets or wardrobe) of the TVN Channel,¹⁴ there seems to be no reason why the Tabcorp entities should determine the content of the audio accompanying race broadcasts.

Any agreement between the Tabcorp entities and TVN should expressly provide that TVN is not precluded from generating its own audio or acquiring third party generated audio, for broadcast with visual coverage of races acquired under licence from Sky. Appropriate conditions to authorisation are set out in more detail in section 7 below.

4.5 Exclusivity of licence to Sky

Paragraph 4.12 of the Submission provides:

“Without limiting TVN’s rights to broadcast the coverage on the TVN Channel, TVN grants Sky an exclusive licence to broadcast and sub-licence to pay TV operators the audio-visual coverage of TVN shareholder races, Darwin Turf Club and Alice Springs Turf Club races and any other thoroughbred races to which TVN held the rights as at 15 May 2006.”

Similarly, paragraph 4.19 of the Submission provides:

“Without limiting TVN’s rights to broadcast the coverage on the TVN Channel, TVN grants Sky an exclusive licence to broadcast live on subscription television services into commercial outlets the audio-visual coverage of TVN shareholder races, Darwin Turf Club and Alice Springs Turf Club races and any other thoroughbred races to which TVN held the rights as at 15 May 2006.”

¹⁴ Submission at [4.33]. Betfair notes that there is nothing in this paragraph which suggests that TVN’s executive producer may determine the content of wagering *information* on the TVN Channel.

(together the **Exclusivity conditions**)

The races over which it is proposed that TVN grant the Tabcorp entities exclusivity are commercially very important to wagering service providers. As noted by the parties, although the TVN races accounted for approximately 10% of all racing vision (by number of races), they accounted for approximately 35% of Tabcorp's revenue prior to "split vision".¹⁵

It appears that there are certain "excluded events" and "other excluded events" which are not subject to this blanket exclusivity and which TVN and race clubs will be able to offer to free to air commercial television stations.¹⁶ The Submission does not identify which events these are.

The parties claim that there is no anti-competitive detriment from allowing Sky exclusive rights to broadcast certain key races because TVN or another licensee could supply the TVN Channel, therefore Tabcorp will not be in the position of being able to withhold access to TVN vision.¹⁷

However, this analysis ignores the fact that:

- Sky is responsible for the production of the TVN Channel;¹⁸
- the only way in which certain premium TVN races can be broadcast, other than on Sky Channel, is for a Pay TV distributor to distribute the entire TVN Channel; and
- the Proposed Arrangements lock out free to air TV from broadcasting TVN races other than undefined "excluded events" and "other excluded events".

When discussing the public benefits of provisions in the Proposed Arrangements which allow for limited promotion of Category 2 races on free to air television,¹⁹ the parties note that:²⁰

"since free to air television is free for viewers and tends to be accessed by a broader range and number of people than pay TV, screening Category 2 races on free to air television will enhance the individual event's profile by exposing the event to a broader audience"

and:

"wagering will also be likely to increase since the race is broadcast to a greater number of people."

Both of these reasons are equally applicable to other races for which rights are sought to be provided to Sky exclusively. That is, allowing them to also be broadcast on free to air television, for example, would increase the number of potential viewers, enhance the event's profile and encourage wagering on those events.

¹⁵ Submission at [8.61]

¹⁶ Submission at [4.14] and [4.21]

¹⁷ Submission at [10.10]

¹⁸ Submission at [4.29]

¹⁹ Submission at [4.35]

²⁰ Submission at [11.42]

None of the public benefits claimed in section 11 of the Submission require that these rights be granted exclusively to Sky. In particular the end to “split vision” requires only that Sky is able to licence vision from TVN on appropriate terms, not that it obtain exclusive rights to this vision. The key public benefit claimed by the parties, of increasing wagering turnover, can only be further promoted by removing limits on the ability of free to air broadcasters to access broadcasting rights.

[Restriction of publication of part claimed]

5 Claimed public benefits

The Tabcorp entities rely heavily on the benefits said to accrue to the Australian racing industry as a result of the increase in totalisator betting with Tabcorp. However, it is clear that the primary beneficiaries of the Proposed Arrangements will be the Tabcorp entities, and that the claimed benefits for the Australian racing industry are merely subsidiary.

The key public benefit claimed by the Tabcorp entities actually amounts to a private benefit to Tabcorp’s turnover.

The conditions which Betfair submits should attach to the Proposed Arrangements would ameliorate the competition concerns with the arrangements, without affecting the public benefits claimed by the parties. At the same time, removing the anticompetitive effects of the Proposed Arrangements is likely to have an additional public benefit because continued vigorous competition by non-totalisator wagering service providers, such as Betfair, in the National Wagering Market will maintain the significant contributions from those wagering service providers to the Australian racing industry.

5.1 Increase in Tabcorp revenue

Tabcorp has set out the private detriments it claims to have suffered as a result of what has been described as “split vision”. In particular, Tabcorp notes that its wagering turnover in NSW was 3.6% lower during the “split vision” period (4 May 2005 to 16 May 2006) than in the corresponding period the previous year. However, it acknowledges that part of this decline may have been the result of a smoking ban which was imposed on NSW pubs and clubs on 1 July 2005. Tabcorp acknowledges that its wagering turnover in Victoria increased by 0.8% compared with the corresponding period in the previous year, although it claims that the historical trend and Tabcorp’s forecast earnings were for a higher level of growth.²¹

The impact of “split vision” does not appear to be as consistently negative as the parties seek to establish.

In Tasmania, smoking bans commenced from 1 January 2006 which was half way through the period of the “split vision” dispute. For the first half of the 2005/06 financial year, TOTE Tasmania reported that its totalisator performed “exceptionally well” despite the “split vision” issue, with retail outlet sales up 9.1% and hotel outlet sales up 7.8% as of 31 December 2005.²² TOTE Tasmania reports that the introduction of smoking bans into Tasmanian hospitality venues was “immediate and severe”. By year end, the gains in retail outlets had reduced to 5.1% and hotel outlets to just 2.8%. This meant that retail outlets evidenced only minor gains for the second half of the financial year, while hotel

²¹ Submission at [11.6]-[11.24]

²² TOTE Tasmania Annual Report 2005/06 p 42

outlets performed much worse compared to the last 6 months of 2004/05. These figures demonstrate that the impact of smoking bans was much more significant for totalisator revenues in Tasmania than the “split vision” dispute, and suggest that Tabcorp’s decrease in revenue in NSW over the 2005/06 year may have been more the result of NSW smoking bans than the contemporaneous “split vision” issue.

The parties assert that “wagering turnover decreased during the period of split vision” and point to statistics taken from the Australian Racing Fact Book published by the Australian Racing Board.²³ These statistics demonstrate that totalisator wagering turnover on thoroughbred races across Australia in fact increased by \$28.75 million, or 0.3% from 2004/05 to 2005/06.²⁴

The States and Territories in which the local totalisators reported increased revenue on thoroughbred racing in 2005/06 over the previous year were:

Western Australia:	9.77%
Northern Territory:	9.31%
ACT:	7.81%
Tasmania:	5.91%
Queensland:	1.89%
Victoria:	0.34%

In each of these States and Territories, funding received by the racing industry from totalisators, to the extent that they were based on the turnover of those totalisators, could be expected to have increased by a similar proportion. Given the centrality of this public benefit argument to the Submission, it is remarkable that the impact of the likely funding growth to the racing industry in these jurisdictions is not analysed.²⁵

Betfair does not dispute that contractual arrangements between the Tabcorp entities and TVN which provide for “[t]he return of all racing to Sky Channel”²⁶ will have a positive impact on Tabcorp’s revenues. However, the Proposed Arrangements as presently summarised suggest that the anticompetitive detriment in the National Wagering Market will not be outweighed by any increased public benefit.

5.2 Contribution by other wagering service providers to the Australian racing industry

The Submission ignores the fact that other wagering service providers make significant contribution to the Australian racing industry. The anticompetitive effects of the Proposed Arrangements in the National Wagering Market is likely to have the result that the potential benefits to the Australian racing industry from non-totalisator wagering service providers will be reduced.

Betfair is licensed by the Tasmanian Gaming Commission to conduct a betting exchange in accordance with the *Gaming Control Act 1993* (Tas). Since obtaining its licence on 7 February 2006, Betfair has contributed to the funding of the Australian racing industry through significant tax and product levy payments made in Tasmania and through sponsorship agreements, for example with race clubs.

²³ Submission at [8.66(a)]

²⁴ Australian Racing Fact Book 2004/05 p 64 and Australian Racing Fact Book 2005/06 p 60.

²⁵ For example at [8.66(b)] of the Submission

²⁶ Submission at [7.2]

Betfair's contribution to the Australian racing industry has been assessed and recognised by Racing Victoria Limited (**RVL**), the controlling body for thoroughbred racing in Victoria. In granting Betfair statutory approval to publish Victorian thoroughbred race fields, RVL assessed Betfair's economic contributions to the racing industry in respect of its coverage of Victorian thoroughbred races was at least equivalent to RVL's stated "target" levels.

In addition, licensed corporate bookmakers contribute to wagering revenue in the racing industry.

5.3 Effect of conditions on claimed public benefits

The public benefits claimed by the Tabcorp entities and TVN will not be reduced and may be enhanced by the conditions which Betfair submits should attach to the Proposed Arrangements.

The following public benefits are said to arise:

- (a) Increased output and improved quality of services as a result of Sky and TVN granting each other access to each others' rights. This benefit can be achieved without these grants being exclusive and locking up a significant proportion of premium thoroughbred races with one vertically integrated race broadcaster and totalisator.
- (b) Increased wagering turnover leading to increased funding for racing. As noted above, this claimed public benefit is in reality a private benefit of increased turnover for Tabcorp (and other totalisators with which Tabcorp has commercial arrangements, for example those totalisators which are part of the SuperTAB pool). The conditions proposed by Betfair would ensure that there was not a substantial lessening of competition in the National Wagering Market and preserve funding for the racing industry obtained from other wagering service providers including Betfair.
- (c) Cost savings by TVN allowing it to develop "innovative new programs". Cost savings to TVN, even if these are accepted by the Commission as being public benefits, will not be affected by the conditions proposed by Betfair.
- (d) Production efficiencies. Production efficiencies for TVN, even if these are accepted by the Commission as being public benefits, will not be affected by the conditions proposed by Betfair.
- (e) Decreased transaction costs for pubs and clubs who can choose to just receive Sky Channel. This benefit can be achieved without the grant of rights to Sky being exclusive, and locking up a significant proportion of premium thoroughbred races with one vertically integrated race broadcaster and totalisator. These cost efficiencies to pubs and clubs will also not be affected by the other conditions proposed by Betfair.
- (f) Promotion of the Australian racing industry. As noted above, removal of the exclusive nature of the licences sought by Sky would allow even greater promotion of the Australian racing industry, through broadcasts being available outside of Tabcorp controlled channels.

6 Relevant provisions of the TPA

The following sections set out in outline potential breaches of the TPA, based on the summary of the arrangements provided by the parties.

Betfair would like the opportunity to supplement this submission if the Commission requires the parties to make public the relevant terms of the agreements.

6.1 Creation of monopoly wagering channel – substantial lessening of competition

The key complaint from Betfair is that the Proposed Arrangements which are aimed at creating a single source “wall to wall” thoroughbred wagering channel operated by Tabcorp will substantially lessen competition in the National Wagering Market.

The financial reasons given by Tabcorp for consolidation of this wagering channel demonstrate its key value to wagering service providers offering wagering on thoroughbred racing.

The only ways in which to prevent or ameliorate this lessening of competition are either to refuse to authorise the Proposed Arrangements, or to require Tabcorp to implement an effective access to its broadcasting platforms by competitive wagering service providers.

The following sections set out other issues arising out of the specific provisions of the Proposed Arrangements.

6.2 Wagering information condition – exclusionary provision

It appears from the summary provided of the Wagering information condition that it would constitute an exclusionary provision pursuant to section 4D, and therefore be prohibited under section 45 of the TPA.

Section 45(2)(a)(i) and (b)(i) of the TPA prohibits, broadly, the making or giving effect to agreements that contain an exclusionary provision. Exclusionary provisions are defined as a provision of a contract, arrangement or understanding:

- (a) between parties, any two of whom are competitors;
- (b) which has the purpose of preventing, restricting or limiting the supply or acquisition of goods or services;
- (c) from particular persons or classes of persons.

Sky Channel and TVN are competitors in:

- the acquisition of thoroughbred racing broadcast rights in Australia;
- the supply of thoroughbred racing broadcast rights to pay television channels, pay television distributors and free to air television;
- the supply of race broadcasting channels to pubs, clubs and pay television providers; and
- the supply of services to wagering service providers (but for the Proposed Arrangements) to allow wagering service providers to display information, such as odds, on Sky Channel or TVN broadcasts.

The purpose of the Proposed Arrangements, including the Wagering information condition, is to maximise Tabcorp’s revenue. It appears that Wagering information condition in particular has the purpose of preventing TVN from acquiring wagering information from particular classes of persons, being corporate bookmakers and betting exchanges.

As a result, the Wagering information condition appears to be an exclusionary provision.

6.3 Wagering information condition – substantial lessening of competition

In addition, it appears that the Wagering information condition has the purpose of substantially lessening competition in the National Wagering Market and is likely to have that effect.

Section 45(2)(a)(ii) and (b)(ii) of the TPA prohibits, broadly, the making of or giving effect to agreements which have the purpose, effect or likely effect of substantially lessening competition.²⁷

Section 47(2) of the TPA provides that a corporation engages in the practice of exclusive dealing where it supplies goods on the condition that the acquirer will not, or will not except to a limited extent, acquire goods of a particular kind or description from a competitor of the supplier. Exclusive dealing is prohibited where it has the purpose, effect, or likely effect of substantially lessening competition in any market in which the corporation engaging in the conduct supplies or acquires goods or services.

Depending on how the Wagering information condition is framed, it may be a breach of either section 45 or 47 of the TPA.

It appears that the Tabcorp entities are proposing to supply TVN with visual coverage of certain races and accompanying Tabcorp wagering information, on condition that TVN not acquire wagering information from a competitor of Tabcorp. Such conduct would significantly hinder the ability of Betfair and other wagering service providers to compete against Tabcorp in the National Wagering Market. This would result in a substantial lessening of competition in the National Wagering Market in breach of either section 45 or 47 of the TPA.

Betfair recognises that due to the operation of sections 45(6) the Proposed Arrangements will be tested under one, but not both, of sections 45 or 47. Without knowing the structure of the Proposed Arrangements it is not possible to know which section is applicable. However, as each of these sections prohibits agreements with the purpose and/or likely effect of substantially lessening competition, it not necessary to determine which of these sections is relevant.

6.4 Third party audio condition – exclusionary provision

It appears likely that the Third party audio condition constitutes an exclusionary provision pursuant to section 4D, and therefore be prohibited under section 45 of the TPA.

As noted above, Sky Channel and TVN are competitors in the acquisition of thoroughbred racing broadcast rights in Australia. The express prohibition on obtaining third party audio rights also suggests that (absent the Proposed Arrangements) Sky Channel and TVN would be competitors in the acquisition of audio accompanying thoroughbred race broadcasts.

The purpose of the Proposed Arrangements, including the Third party audio condition, is to maximise Tabcorp's revenue. It appears that Third party audio condition in particular has the purpose of preventing TVN from acquiring audio from persons likely to include

²⁷ Lessening competition includes preventing or hindering competition (section 4G). Competition is defined in section 45(3) to include competition in any market in which one of the parties to the agreement supplies or acquires goods or services.

wagering information or positive editorial comment about corporate bookmakers and betting exchanges.

6.5 Third party audio condition – substantial lessening of competition

In addition, it appears that the Third party audio condition has the purpose of substantially lessening competition in the National Wagering Market and is likely to have that effect.

It appears that the Tabcorp entities are proposing to supply TVN with visual coverage of certain races and accompanying audio produced by the Tabcorp entities, on condition that TVN not replace this audio with audio created itself or sourced from a third party.

As noted above, it could reasonably be anticipated that the audio provided by Sky, accompanying these race broadcasts, would contain only wagering content relating to Tabcorp and its related entities and would exclude any positive editorial or other content about competitive wagering service providers.

As a result, the Third party audio condition would hinder the ability of Betfair and other wagering service providers to compete against Tabcorp in the National Wagering Market by removing the prospect of any positive editorial comment about their wagering operations. This would result in a substantial lessening of competition in the National Wagering Market in breach of either section 45 or 47 of the TPA.

6.6 Exclusivity conditions – exclusionary provision

It appears that the Exclusivity conditions also amount to exclusionary provisions.

As noted above, Sky Channel and TVN are competitors in the supply of thoroughbred racing broadcast rights to pay television channels, pay television distributors and free to air television. It is clear from the licence agreements that they supply these rights to each other. It is also clear from the Submission that they supply these rights to free to air television.

The Exclusivity conditions have the purpose of preventing TVN from supplying certain content to a narrowly defined class of persons, being free to air commercial television stations.

These conditions are not necessary for the Tabcorp entities to acquire “wall to wall” coverage of races and appear to be directed at lessening competition in the Thoroughbred Racing Product Market previously identified by the Commission in its analysis of the proposed joint venture between the Tabcorp entities and TVN.

6.7 Exclusivity conditions – substantial lessening of competition

It appears that the Exclusivity conditions have the purpose of substantially lessening competition in the Thoroughbred Racing Product Market and are likely to have that effect in breach of either section 45 or 47 of the TPA.

It may also be that the Exclusivity conditions have the purpose or effect of substantially lessening competition in the National Wagering Market by limiting the potential broadcasting platforms not controlled by the Tabcorp entities which would be able to include content from competitive wagering service providers. As noted above, the parties have recognised that free to air broadcasting of races is likely to increase the level of wagering. The converse must also be true: excluding free to air broadcasters from accessing certain key racing content will prevent or hinder an increase in wagering in the National Wagering Market.

As noted above, the end to “split vision” requires only that Sky is able to licence vision from TVN on appropriate terms, not that it obtain exclusive rights to this vision. The key public benefit claimed by the parties, of increasing wagering turnover, can only be further promoted by removing limits on the ability of free to air broadcasters to access broadcasting rights.

7 Appropriate preconditions to authorisation

Betfair considers that this is an appropriate matter for the Commission to impose conditions under section 91(3) on any authorisation granted to the parties and/or for the parties to offer undertakings to the Commission under section 87B of the TPA.

Betfair notes that these proposed conditions would significantly address the anti-competitive detriments identified in this submission and, in some circumstances, would enhance the public benefits of the Proposed Arrangements. In the absence of these conditions, Betfair submits that the claimed public benefits would not outweigh the public detriment caused by the likely lessening of competition in the National Wagering Market and the Thoroughbred Racing Product Market and that in such circumstances the Proposed Arrangements should not be authorised.

7.1 Access regime to Tabcorp’s broadcasting platforms

Betfair submits that, at the least, the Commission should require Tabcorp, as a precondition of authorisation, to implement access arrangements to allow wagering service providers other than totalisators to utilise Tabcorp’s broadcasting platforms. Betfair considers that this regime could be implemented either through enforceable undertakings proffered by the parties, or through conditions on authorisation imposed by the Commission.

The access arrangements should contain the following elements:

- (i) All competing wagering service providers are to have open access to Tabcorp’s broadcasting platforms for appropriate commercial fees.

In this context, competitive wagering service providers will include any wagering service provider which is licensed by a State or Territory to offer wagering on thoroughbred racing.

Access should be granted to the consolidated Sky Channel, to Radio 2KY and to any other broadcasting platforms later acquired by Tabcorp.

Access will include at the least, the ability of wagering service providers to include wagering information (such as available odds) at the time races are broadcast, and the ability to include other content including editorial content, discussion and commentary about their services consistent with local regulatory requirements.

The terms of access should be subject to commercial negotiation between the wagering service providers and Tabcorp or, failing agreement between the parties, commercial arbitration.

- (ii) Tabcorp is not to prevent or hinder its competitors from advertising on race courses in accordance with legal requirements, provided commercial agreements can be negotiated with the relevant rights holders.

This condition is linked to condition (h) below. Namely, Tabcorp entities are not to prevent, hinder or obscure third party promotion by wagering service providers contained in any Sky Channel broadcast, whether physical or virtual and whether embedded in the telecast (eg television advertisement) or incidental to it (eg on-course advertising). This includes insertion of odds and other wagering information.

- (iii) Tabcorp is to refrain from influencing media outlets which it owns or with which it has commercial arrangements to give no, or only negative, editorial coverage of competing wagering service providers.

Betfair would be happy to discuss an appropriate structure for this access regime in more detail with the Commission.

The imposing of an effective access regime is the minimum required to ensure that the authorisation test is met. Other conditions of authorisation dealing with specific aspects of the proposed arrangements are set out below.

7.2 Tabcorp entities not to hinder third party promotion contained in a TVN broadcast

All provisions of the Proposed Arrangements that restrict TVN's ability to enter into agreements with third parties for the display of wagering information or the acquisition of audio accompanying races other than that provided by the Tabcorp entities should be deleted.

Appropriate conditions under section 91(3) would provide that:

- (a) the exclusionary provisions summarised in paragraphs 4.8 and 4.9 of the Submission are deleted from the Proposed Arrangements (the Wagering information condition and the Third party audio condition);
- (b) Tabcorp entities are not to prevent, hinder or obscure third party promotion by wagering service providers contained in any TVN broadcast, whether physical or virtual and whether embedded in the telecast (eg television advertisement) or incidental to it (eg on-course advertising). This includes insertion of odds and other wagering information and extends to the incorporation of parts of the TVN product in the Sky telecast;
- (c) TVN is not required to broadcast wagering information of wagering operators controlled by Tabcorp, and is not prevented from broadcasting wagering information of other wagering service providers;
- (d) the visual coverage provided by the Tabcorp entities to TVN is not to be subject to a restriction that only audio provided by the Tabcorp entities may be broadcast in conjunction with it, and TVN and other entities are to be free to add or substitute their own audio.

7.3 Clean feeds to TVN

Appropriate conditions under section 91(3) would provide that:

- (e) Tabcorp entities are to provide a clean feed of the Tabcorp entities' visual coverage to TVN and to any third party to whom TVN sells vision rights;
- (f) Tabcorp entities are not to insert virtual advertising (including odds) into coverage provided to TVN without TVN's approval;

These proposed conditions are consistent with paragraph [4.33] of the Submission which provides that TVN's executive producer determines the content or "look" (graphics, logos, wagering overlays, sets or wardrobe) of the TVN Channel and no changes can occur without prior approval of TVN.

7.4 No exclusivity to Sky over TVN broadcasts

Appropriate conditions under section 91(3) would provide that:

- (g) the licences obtained by Sky from TVN to broadcast TVN shareholder races, Darwin Turf Club and Alice Springs Turf Club races and any other thoroughbred races to which TVN held rights as at 15 May 2006 be expressly non-exclusive.

7.5 Tabcorp entities not to hinder third party promotion contained in a Sky Channel broadcast

As referred to above, the vertical integration of the Tabcorp entities makes it very difficult for non-totalisator wagering service providers to compete in the National Wagering Market.

Appropriate conditions under section 91(3) would provide that:

- (h) Tabcorp entities are not to prevent, hinder or obscure third party promotion by wagering service providers contained in any Sky Channel broadcast, whether physical or virtual and whether embedded in the telecast (eg television advertisement) or incidental to it (eg on-course advertising). This includes insertion of odds and other wagering information;

8 Conclusion

The Proposed Arrangements would remove the only alternative thoroughbred racing platform to the vertically integrated Tabcorp business. The future with authorisation will see Tabcorp operate both monopoly off-course totalisator businesses in Victoria and New South Wales as well as the only television and radio broadcasts aimed at punters.

The commercial reasons that Tabcorp has emphasised in support of a "wall to wall" thoroughbred racing channel, namely that it will increase Tabcorp turnover, also demonstrate that without sufficient access to this channel (and other Tabcorp broadcasting platforms) there will be a substantial lessening of competition in the National Wagering Market.

Unless appropriate access arrangements are made a precondition of authorisation, competitive wagering service providers will be locked out of providing wagering information to punters along with live broadcasts of key thoroughbred races.

The future without authorisation provides the possibility for competitive wagering service providers to negotiate commercial arrangements with TVN to access broadcasts of thoroughbred races to which TVN has or acquires rights.

Betfair submits that the Commission should either refuse authorisation, or impose the conditions set out in section 7 above.

Annexure A – National Wagering Market

Betfair considers that the relevant market within which the Proposed Arrangements should be analysed is the national market in which totalisators, bookmakers and betting exchanges supply wagering services (whether pari-mutuel, fixed odds or other types of wagering services) to members of the public who wish to place wagers (**National Wagering Market**).

National Wagering Market – product dimension

Betfair submits that the relevant product dimension of the National Wagering Market includes both pari-mutuel and fixed odds wagering, and both on-course and off-course wagering. Betfair is competing for the “wagering dollar” and this dollar can currently be spent with totalisators, fixed odds bookmakers (both on-course and off-course) and betting exchanges throughout Australia.

Support for a single product market in which totalisators, bookmakers and betting exchanges supply all types of betting services both on-course and off-course to members of the public can be found in the decision by the UK Monopolies and Mergers Commission (**MMC**) in relation to a proposed merger between the Ladbroke and Coral betting agencies. Ladbroke was, at the time, the largest firm in the UK off-course betting industry; Coral was the third largest in the industry. The main overlap between the two entities was in the provision of off-course betting (distinguished from other forms of gaming activity).

The MMC found, in respect of the product dimension of market definition, that the betting industry comprised part of the leisure sector, which included other forms of gambling. Betting, however, was best understood as a separate activity and as a separate market, because the terms on which betting was undertaken were not closely constrained by other forms of gambling or other leisure activities.

The MMC found that there were four areas of betting, each of which might be considered a separate segment of one unified market: two types of fixed odds betting (in licensed betting offices and on race courses and greyhound tracks) and telephone and pool betting.²⁸ Internet betting had no real presence the time of the report, although telephone betting could equally have been referred to as “remote gambling”, a term which today includes internet betting.

By analogous reasoning, Betfair submits that there is a product market in which totalisators supply on-course and off-course services to members of the Australian public who wish to place bets. Within this market, totalisators compete with licensed bookmakers and betting exchanges.

National Wagering Market – geographic dimension

Despite the existence of State and Territory based wagering licences, Betfair submits that the geographic extent of the market in which wagering services are provided is national.

²⁸ Ladbroke Group PLC and the Coral Betting Business: A Report on the Merger Situation, Presented to Parliament by the Secretary of State for Trade and Industry in September 1998, Para 2.63 and chapter 4 generally.

The Commission has considered the services provided by totalisators to the public in a number of contexts and has acknowledged that the geographic extent of the market is broader than the jurisdiction in which the relevant totalisator operates.

In considering TAB Queensland's acquisition of the South Australian TAB the Commission decided that the relevant markets were national, rather than State based²⁹ and "*The ACCC took into account the availability of phone and internet betting with other TABs*".³⁰ In contrast, in its 18 December 2003 decision not to oppose the merger of Tabcorp and TAB, the Commission defined the relevant markets as being State based. The Commission noted that there was limited cross border competition between totalisators as a result of the significant level of State based regulation.

Betfair notes that, when offering sports betting products, all totalisators in Australia currently use the *TAB Sportsbet* brand. Totalisators also offer fixed odds wagering on some thoroughbred horse races, which allows them to offer the same type of product as bookmakers.

The Australian racing industry was sufficiently concerned about revenue sources from wagering being under threat due to the value of cross-border betting in 2002 that it resulted in a cross-border betting task force being established. This is evidence of the existence of a national market, and in particular of the competition between totalisators, bookmakers and betting exchanges.³¹ In this report it was noted that the "*level of growth in cross-border racing betting with bookmakers had led to concerns on the part of the national racing industry that its critical revenue sources from wagering are under threat*".³² The report goes on to say:³³

"Internet sites of the Northern Territory corporate bookmakers suggests that over 95% of their turnover on Australian racing is conducted outside the Northern Territory. A parallel situation exists with respect to ACT corporate bookmakers fielding on racing."

This remains the case. In the Explanatory Notes to the 2005 Australian Gambling Statistics, it is stated, in relation to the Northern Territory:³⁴

"A significantly greater proportion of the Territory's gambling business came from overseas and interstate compared with other jurisdictions."

Corporate bookmakers consider themselves part of a National Wagering Market, competing with all betting operators who provide betting service on Australian racing and sports.³⁵

Tabcorp has recognised that the wagering industry is becoming less State based, and that it faces increased competition from interstate and offshore wagering entities.³⁶

²⁹ The Commission decided that the relevant markets were for totalisator wagering services and for totalisator and fixed odds sports betting services in Australia. ACCC merger register, "TAB Queensland's proposed acquisition of the South Australian TAB", 14 September 2001.

³⁰ "TAB Queensland's proposed acquisition of the South Australian TAB", 14 September 2001, ACCC mergers register.

³¹ Report of the Cross-Border Betting Task Force, Conference of Australasian Racing Ministers, 1 November 2002, p. ii.

³² Report of the Cross-Border Betting Task Force, Conference of Australasian Racing Ministers, 1 November 2002, p. ii.

³³ Report of the Cross-Border Betting Task Force, Conference of Australasian Racing Ministers, 1 November 2002, p. ii.

³⁴ Australian Gambling Statistics 2005, p. 27

³⁵ Submission to the Australian Competition and Consumer Commission by the Association of Australian Bookmaking Companies Inc in support of its application for authorisation, dated 29 March 2006

Tabcorp referred to the need for a national approach to the regulation of sports betting, due to the existence of a national market, in its April 2006 submission to the Victorian government's review of the regulatory framework for sports betting, stating:³⁷

"Sports gambling is currently provided to Australians via a complex national and international marketplace, with the Internet (currently 50% of total betting) enabling 'cross-border' trade between operators and customers."

And:³⁸

"Within Australia, Tabcorp and its TAB Sportsbet partners are competing with an expanding number of licensed bookmakers who are able to offer the same betting products as the TABs via (more economical) telephone and internet service."

Acknowledgement by bookmakers and totalisators that they compete with each other for interstate telephone and internet business supports the view that there is a National Wagering Market.

Tabcorp also clearly perceives Betfair as a competitive threat in the Australian wagering market, stating:³⁹

"The UK Company Betfair is a further competitor [i.e. in addition to bookmakers], with its market access being further enhanced via the recent awarding of an Australian license to the company by the Tasmanian Government. Tabcorp believes that Betfair and betting exchanges in general are likely to attract significant customer support in the Australian marketplace as a consequence of their "low margin" pricing capability enhanced by their minimal taxation and product and product fee contribution frameworks."

Regardless of whether the Commission considers that there is a National Wagering Market or separate State and Territory wagering markets, it is clear that totalisators (with significant market power) are competing with other wagering service providers, namely, bookmakers and betting exchanges.

³⁶ Tabcorp's submission to the 2006 Victorian wagering industry review, sections 6.2.1 and 7.3

³⁷ Tabcorp submission to the Department of Justice (Victoria) review titled "Sports Betting: A new regulatory framework?", April 2006, p 2

³⁸ Tabcorp submission to the Department of Justice (Victoria) review titled "Sports Betting: A new regulatory framework?", April 2006, p 10

³⁹ Tabcorp submission to the Department of Justice (Victoria) review titled "Sports Betting: A new regulatory framework?", April 2006, p 11