



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation

lodged by

**Sky Channel Pty Limited, Tabcorp Holdings Limited and
ThoroughVision Pty Limited**

in respect of a

Memorandum of Understanding

Date: 3 May 2007

Authorisation no.: A91031 & A91032

Public Register no.: C2007/557

Commissioners: Samuel
Sylvan
King
Martin
McNeill
Smith

Summary

The ACCC proposes to grant authorisation, subject to a condition, to the Memorandum of Understanding between Tabcorp, Sky and TVN which sets out the commercial terms for the sharing of thoroughbred racing broadcasting content until 31 December 2012. Authorisation is granted, specifically to Schedules 1 to 7 (excluding Schedule 5) and any arrangements made under clause 2.3 of the Memorandum of Understanding.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

The applications for authorisation

On 15 February 2007, Tabcorp Holdings Limited (Tabcorp), Sky Channel Pty Ltd (Sky), and ThoroughVision Pty Ltd (TVN) (collectively referred to as ‘the applicants’) lodged applications for authorisation A91031 and A91032 with the ACCC.

The applicants are seeking authorisation for a Memorandum of Understanding (MOU) signed on 1 February 2007. In particular, authorisation is sought for Schedules 1 to 7 of the MOU, and any arrangements made under clause 2.3 of the MOU. Broadly, the MOU sets out the commercial terms between Sky and TVN for the sharing of thoroughbred racing broadcasting content. The MOU provides for the end of split vision and the end of litigation between the applicants.

Background

Prior to the existence of the TVN Channel, Sky was the principal broadcaster of Australian racing. Sky held rights to practically all thoroughbred racing in Australia (as well as harness and greyhound racing). After the formation of TVN in 2002, there were a number of disputes between TVN and Sky about who had rights to show the different thoroughbred racing events – this is known as the split vision dispute and is the subject of various litigation between TVN and Sky concerning thoroughbred broadcasting rights.

The split vision dispute led to a decrease in wagering revenue, punter confusion, increased costs to pubs and clubs and a reduction in funding to the racing industry as a whole.

To resolve the split vision dispute the applicants entered into the MOU which enables them to share thoroughbred racing content, such that Sky and TVN will be able to provide two channels with expanded thoroughbred racing content.

Public detriment

The ACCC considers that the MOU will raise competition issues in respect of:

- the supply of race broadcasting services to commercial venues such as pubs and clubs and
- the acquisition of future broadcasting rights from the thoroughbred racing clubs.

The ACCC is concerned about the potential for Tabcorp/Sky to distribute the Sky and TVN Channels as a bundled product to commercial venues with wagering facilities, without at least offering the Sky Channel separately to these venues.

The ACCC considers that the MOU will have a competitive impact on the incentives of Sky and TVN to bid for future broadcasting rights from thoroughbred racing clubs. This is because the MOU provides that the unsuccessful bidder will still be able to access audio-visual content of races under a sub-license and therefore may not bid for them as aggressively than without the MOU.

That being said, the ACCC acknowledges that there are commercial incentives to be the primary license holder after 30 December 2012 when the MOU expires. To some degree such incentives may counter the competitive impact resulting from content sharing under the MOU.

The ACCC considers that the MOU does not raise any significant competition concerns in the distribution of race broadcasting services to television providers or the provision of wagering services.

Public benefit

The ACCC is satisfied that the MOU is likely to result in public benefit from:

- the resolution of the split vision dispute which led to a decrease in wagering revenue, punter confusion, increased costs to pubs and clubs, and a reduction in funding to the racing industry as a whole
- increased production efficiencies to both Sky and TVN
- improved output, quality of broadcasting services and innovation by TVN and Sky and
- reduced transaction costs to pubs, clubs and other commercial venues with Sky's non-exclusive distribution right of TVN.

Balance of public benefit and detriment

Overall, the ACCC is satisfied that the public benefits arising from the MOU will outweigh the public detriments, provided that Tabcorp/Sky do not bundle the Sky and TVN Channels without at least offering the Sky Channel separately to commercial venues with wagering facilities.

To ensure that the public benefits generated by the MOU outweigh the public detriments the ACCC proposes to grant authorisation subject to the following condition:

- Should Tabcorp/Sky decide to supply the Sky and TVN Channels as a bundled product to commercial venues with wagering facilities, Tabcorp/Sky must at least offer the Sky Channel separately to such venues.

Length of authorisation

The ACCC proposes to grant authorisation, subject to a condition, for the term of the MOU, which is until 31 December 2012.

The next steps

The ACCC will now seek further submissions from the applicants and interested parties in relation to this draft determination prior to making a final decision. The applicants and interested parties may also request that a conference be held to make oral submissions on the draft determination.

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List of abbreviations

AABC	Association of Australian Bookmaking Companies Inc
ACCC	Australian Competition and Consumer Commission
Act	<i>Trade Practices Act 1974</i>
ACTTAB	ACTTAB Limited
AHA	Australian Hotels Association
AJC	Australian Jockey Club
AHRC	Australian Harness Racing Council Inc
APHRC	Albion Park Harness Racing Club
Betfair	Betfair Pty Limited
CRV	Country Racing Victoria
GRV	Greyhound Racing Victoria
HRV	Harness Racing Victoria
MOU	Memorandum of Understanding
MRC	Melbourne Racing Club
MVRC	Moonee Valley Racing Club
Optus	Singtel Optus Pty Limited
QRL	Queensland Racing Limited
RVL	Racing Victoria Limited
RWWA	Racing and Wagering Western Australia
Sky	Sky Channel Pty Ltd
Sportscolour	Sportscolour Pty Ltd
STC	Sydney Turf Club
Tabcorp	Tabcorp Holdings Limited
TVN	ThoroughVision Pty Limited
UNiTAB	UNiTAB Limited
VRC	Victorian Racing Club

1. Introduction

Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 However the Act allows the ACCC to grant immunity from legal action for conduct that might otherwise raise concern under the competition provisions of the Act (in certain circumstances). One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in such conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

The application for authorisation

- 1.8 On 15 February 2007, Tabcorp Holdings Limited (Tabcorp), Sky Channel Pty Ltd (Sky), and ThoroughVision Pty Ltd (TVN) (collectively referred to as ‘the applicants’) lodged applications for authorisation A91031 and A91032 with the ACCC.
- 1.9 The applicants are seeking authorisation for a Memorandum of Understanding (MOU) signed on 1 February 2007. In particular, authorisation is sought for Schedules 1 to 7 of the MOU, and any arrangements made under clause 2.3 of the MOU. Broadly, the MOU sets out the commercial terms between Sky and TVN for the sharing of thoroughbred racing broadcasting content. The commencement of the MOU is dependent on the ACCC granting authorisation.

1.10 The applicants seek authorisation for the period of the MOU which is until 31 December 2012.

Chronology

1.11 Table 1.1 provides a chronology of significant dates in the consideration of these applications.

Table 1.1: Chronology of application for authorisation A91031 & A91032

DATE	ACTION
15 February 2007	Application for authorisation lodged with the ACCC.
19 February 2007	Lodgement of public version of supporting submission with the ACCC.
13 March 2007	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
4 April 2007	Submission received from the applicants in response to interested party submissions.
3 May 2007	Draft determination issued.

2. Background to the application

The applicants¹

Tabcorp

- 2.1 Tabcorp is a gaming and wagering company.
- 2.2 Tabcorp holds the exclusive license under the *Gambling Regulation Act 2003 (Vic)* to conduct off-course parimutuel² wagering in Victoria for thoroughbred, harness and greyhound racing until August 2012.
- 2.3 Tabcorp also has a license to conduct on-course parimutuel wagering in Victoria and also offers parimutuel and fixed odds betting on sporting and other events.
- 2.4 In 2004, Tabcorp acquired the NSW-based company Tab Ltd. Tab Ltd holds the exclusive license under the *Totalizator Act 1997 (NSW)* to conduct off-course parimutuel wagering in NSW and is also licensed to conduct on-course parimutuel wagering. Tab Ltd also provides on-course parimutuel wagering to a limited number of Queensland races.
- 2.5 The Tabcorp Group owns Star City Casino in Sydney and three casinos in Queensland (following a merger with Jupiters Limited). Tabcorp also has gaming operations in Victoria under the Tabaret brand and Keno operations in New South Wales, Queensland and Victoria.

Sky

- 2.6 Sky is a wholly owned subsidiary of Tab Ltd. It is a television broadcaster that telecasts thoroughbred, harness and greyhound racing seven days a week to approximately 4500 commercial outlets such as hotels, clubs and TAB outlets throughout Australia.
- 2.7 Sky commenced broadcasting to commercial premises in 1986. Since its commencement, Sky has moved from broadcasting a variety of sporting and entertainment programs which included both racing and non-racing content, to primarily broadcasting racing content.
- 2.8 Sky broadcasts its racing content with ‘wall-to-wall’ coverage. Sky works with the industry and TABs so that race meetings are scheduled so when a particular race ends Sky Channel can cut to another race which is about to begin at another venue and so on. Sky Channel presents its content in this format to optimise wagering turnover.
- 2.9 Sky currently holds the exclusive broadcasting rights for the majority of thoroughbred, greyhound and harness race meetings held in Australia. In particular, Sky acquires the right to use video picture of racing and other sports content from clubs or other entities,

¹ Information outlined in this chapter was largely obtained from the applicants’ supporting submission dated 15 February 2007.

² Parimutuel wagering is a system of betting, as on horseraces, in which those who bet on the winners divide the bets or stakes, less a percentage for the management, taxes, etc. (Macquarie Dictionary website: www.macquariedictionary.com.au)

and packages such content to produce television channels and data feeds for transmission via a number of means. Sky primarily broadcasts domestic races, however, it also imports international races which are generally scheduled for broadcasting during off-peak times. Sky also provides vision from Australian racing to customers in the United Kingdom, the USA, Canada, New Zealand, Sri Lanka, Asia and the Middle East.

- 2.10 Since 1998, Sky Channel has been broadcast via the Foxtel, Optus and Austar pay television platforms, reaching 1.6 million viewers. Sky Channel is supplied to Foxtel, Optus and Austar by means of separate commercial arrangements between each of the pay television operators and Sky Channel. Sky Channel is available to subscribers through the basic tier of Austar, Foxtel and Optus services.³ No additional fee is charged to subscribers to access Sky Channel.
- 2.11 In 2001, Sky acquired radio station 2KY, which provides radio broadcasts of race meetings in NSW.
- 2.12 In addition to the broadcast of races, Sky produces a number of magazine and other information-type programs, which have a racing focus. Sky also broadcasts other sporting events from time to time, primarily pay per view boxing matches.

TVN

- 2.13 TVN is a sports rights management company specialising in broadcasting thoroughbred racing. TVN's stated objective is to enhance the presentation of thoroughbred racing vision for the enjoyment of race fans and viewers.
- 2.14 TVN is designed to be a channel for the thoroughbred racing industry as a whole. In addition to race footage, TVN showcases additional footage relating to breeders, owners, jockeys and trainers, racing fashion and information on racing clubs. It provides this footage through extended live coverage and review programs.
- 2.15 In 2002, the Victorian thoroughbred racing clubs⁴ formed TVN to collectively negotiate with Sky the terms and conditions on which Sky would broadcast TVN races. The race clubs formed TVN to provide premium race footage which Sky could not broadcast due to its wall-to-wall format.
- 2.16 TVN is owned by the following thoroughbred racing clubs:
- Australian Jockey Club 25%
 - Sydney Turf Club 25%
 - Victorian Racing Club 12.5%
 - Melbourne Racing Club 12.5%
 - Moonee Valley Racing Club 12.5%

³ Sky Channel website: www.skychannel.com.au/company/skyracing.php

⁴ Victorian Racing Club (VRC), Melbourne Racing Club (MRC), Moonee Valley Racing Club (MVRC) and Country Racing Victoria (CRV).

- Country Racing Victoria 12.5%
- 2.17 TVN holds the exclusive broadcasting rights for all thoroughbred race meetings held in Victoria and the Northern Territory, and has entered into agreements to act as an agent for the Australian Jockey Club (AJC) and the Sydney Turf Club (STC).
- 2.18 The TVN Channel is available to more than 3200 pubs/clubs and TAB agencies in NSW, Victoria, ACT, Tasmania and some agencies in Queensland, South Australia and Northern Territory.
- 2.19 In February 2007, TVN entered into an agreement with Channel Nine to have 13 race meetings and more than 70 premier races broadcast free-to-air in conjunction with TVN. Channel Nine's racing coverage began on 24 February 2007.⁵
- 2.20 TVN is also available to consumers through Foxtel digital and Austar Digital pay television services.⁶ TVN also provides on-demand broadcast of moving and still racing footage to mobile phones and to the internet, broadcasts live and archival racing footage to BigPond broadband subscribers, and sells archival racing footage.

Racing, wagering and media

- 2.21 The racing industry is comprised of three codes – thoroughbred, greyhound and harness. The structures of the three codes of racing are broadly similar:
- in each code, activities in each State and Territory are governed by statutory bodies, known as Principal Racing Authorities, which control the regulation, functions and commercial activities of the codes
 - in turn, a national administrative body exercises oversight responsibilities in relation to these statutory bodies. The national bodies are the Australian Racing Board Limited (thoroughbred), Greyhounds Australasia (greyhound) and the Australian Harness Racing Council (harness) and
 - together, these organisations assist in the governance of racing clubs which conduct racing in the respective code, for the benefit of participants and stakeholders in the industry.
- 2.22 There are approximately 379 thoroughbred racing clubs, 126 harness racing clubs and 93 greyhound racing clubs in Australia.
- 2.23 The racing organisations are non-profit. All their income is used to provide racing product, through the provision of race facilities, infrastructure and services, and the payment of prize money, which in turn is used to pay owners, jockeys, trainers, drivers, farriers, and stable hands as well as for investments in training and veterinary services.
- 2.24 The vast majority of funding for the racing industry is provided as a result of wagering on the races staged by the race clubs.

⁵ B Cormick, 'Carnival just starting as Nine makes return', *The Australian*, 16 February 2007.

⁶ TVN website: www.tvn.com.au.

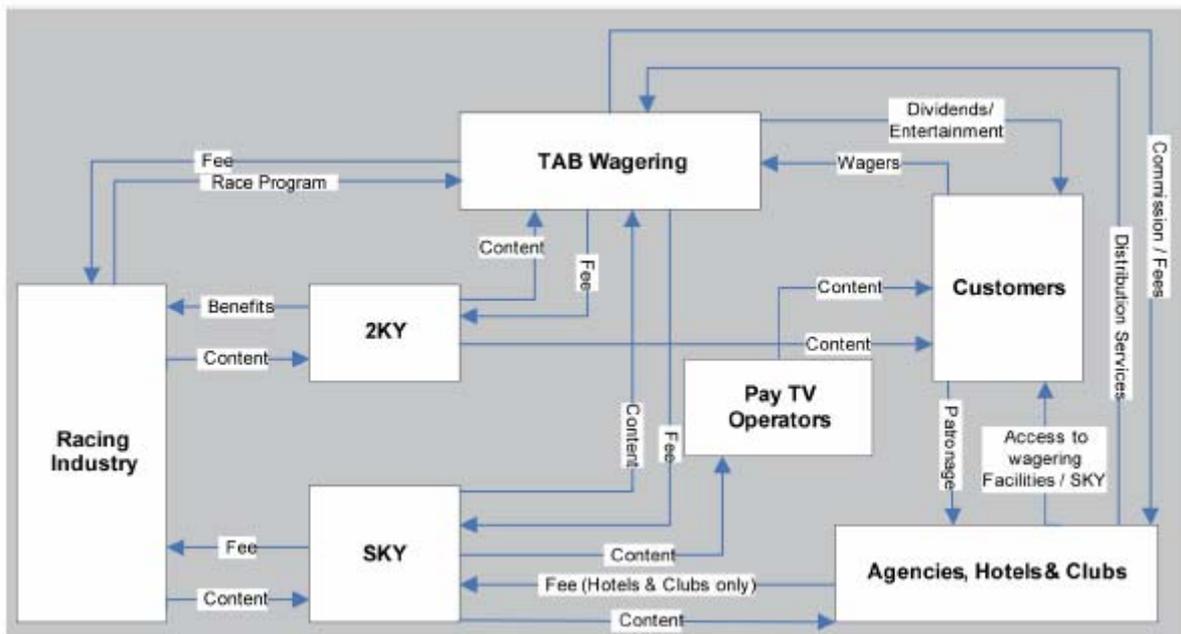
- 2.25 Wagering is a form of gambling. It involves betting on the outcome of live events. Wagering in Australia has been traditionally divided into parimutuel and fixed odds wagering.
- 2.26 Totalisators are the main form of wagering in Australia, comprising approximately 78% of wagering turnover in the year ended 30 June 2006. Approximately 94% of totalisator wagering turnover is 'off-course' betting.
- 2.27 In each State or Territory there is one operator licensed to conduct off-course parimutuel wagering. These operators are licensed to conduct parimutuel wagering and, subject to certain restrictions, to conduct fixed-odds wagering on racing. A condition of these exclusive licenses is that a proportion of wagering turnover is returned to the local racing industry. The first license to expire is Tabcorp's Victorian license in 2012. Wagering licenses in other States become non-exclusive between 2013 and 2016.
- 2.28 In addition to totalisators who offer parimutuel wagering services, on-course bookmakers and betting exchanges are licensed to take wagers on sporting events, including racing.
- 2.29 The relationship between the racing industry and the totalisators is inter-dependant. The racing industry supplies the product on which totalisators conduct betting, and the totalisators provide the vast majority of funding for the racing industry.
- 2.30 The applicants submit that the relationship between racing and wagering differs from the relationship between wagering operators and other sporting events. This is largely because other sporting events receive funding through ticket sales, sponsorship, media rights and do not receive funding or product fees from wagering operators who conduct betting on the event.
- 2.31 In respect of the year ended 30 June 2006, Tabcorp paid over \$503.4 million by way of fees to the NSW and Victorian racing industries.⁷ Product and program fees paid to Queensland Racing by UNiTAB Limited (UNiTAB) were approximately \$119.4 million for the same year.⁸
- 2.32 Media coverage of racing events information is essential for the operation of a wagering service as it provides customers with access to accurate and timely racing information, and to live audio and visual coverage of races. Media coverage may take several forms including television, radio, newspaper and internet.
- 2.33 Wagering operators rely on customers having access to live coverage of races as customers are more likely to wager on a race that they can watch. Tabcorp estimates that turnover on racing events can be increased by approximately 40-60% if races are televised and are broadcast live in clubs, pubs, TAB agencies and into the home via pay television.
- 2.34 In order to facilitate race coverage through the media, the racing and wagering industries have invested to increase the availability of racing events on which their customers can bet.

⁷ Tabcorp Concise Annual Report 2006, pp 7, 9, 12.

⁸ Queensland Racing Annual report 06, p 34.

2.35 The inter-dependence of racing, media and wagering operators is illustrated in Figure 2.1 in respect of Sky Channel:

Figure 2.1: Inter-dependence of racing, media and wagering operators



Source: Tabcorp, Sky and TVN submission dated 15 February 2007, p 23.

The ‘split vision’ dispute

- 2.36 Prior to the existence of the TVN Channel, Sky was the principal broadcaster of Australian racing. Sky held rights to practically all thoroughbred racing in Australia (as well as harness and greyhound racing), having negotiated for such rights with the individual race clubs, directly or indirectly.
- 2.37 After the formation of TVN in 2002, TVN acquired the broadcasting rights of the Victorian thoroughbred racing clubs (see paragraph 2.15). From May 2002 until May 2005, Sky broadcast these Victorian races pursuant to an agreement with TVN.
- 2.38 In March 2004, the AJC and the STC each made offers to Sky for the acquisition of their rights. Sky did not accept the offers made by the AJC and STC. Subsequently, TVN entered into an agreement with the AJC and STC to manage the rights of their races.
- 2.39 In 2004 and 2005, Sky and TVN held discussions to jointly develop a thoroughbred only channel to operate in addition to the Sky Channel. However, Sky and TVN could not settle the commercial terms of the arrangements. Following a failure to reach agreement, the TVN clubs created their own thoroughbred channel, which began broadcasting in May 2005. Shortly after, TVN was successful in acquiring the broadcasting rights to Darwin races.
- 2.40 As a result, broadcasting of thoroughbred racing was split between the two channels. TVN began broadcasting AJC, STC, Darwin and Victorian races on the TVN Channel to commercial subscribers, and on Foxtel’s digital service to residential subscribers. Sky Channel broadcast all other Australian thoroughbred racing and all

non-thoroughbred racing to its commercial subscribers and via the Foxtel, Optus and Austar pay television services to its residential subscribers. This meant that pubs and clubs, and residential subscribers, wanting complete coverage of thoroughbred racing, were required to acquire both the TVN and Sky Channels. This has become known as ‘split vision’ of thoroughbred racing content.

- 2.41 Against this background, various disputes became the subject of litigation between TVN and Sky. The litigation has been stayed pending the implementation of the MOU.
- 2.42 The applicants submit that the split vision dispute affected wagering revenue, pubs and clubs and the racing industry as a whole. The consequences of the split vision dispute are outlined below.

Wagering Revenue

- 2.43 The applicants submit that the effect of split vision was severe on wagering turnover, with turnover in NSW declining by approximately \$177 million in the 12 months prior to April 2006.
- 2.44 The applicants submit that wagering revenue dropped as a result of punters becoming frustrated with the arrangements for viewing thoroughbred races and consequently led to them betting less. Punters were required to switch between the two channels for different races. The applicants state that this was inconvenient and confusing and it was difficult for punters to monitor when to change channels. It also meant that punters had to rely on their betting venue subscribing to both channels for them to view all thoroughbred races.
- 2.45 The applicants submit that whilst Sky retained over 90% of racing vision content, TVN was the only source of vision for a significant proportion of premium thoroughbred racing vision. Approximately 35% of Tabcorp’s wagering turnover comes from TVN races. Sky was also restricted by not being able to broadcast ‘at the barrier’ shots for races shown on TVN. This more than any other factor prompts last minute bets.

Pubs and Clubs

- 2.46 The applicants submit that patronage to pubs and clubs was threatened by split vision. Regular punters were confused by split vision and began to spend less time at the pubs and clubs. The applicants state that for those pubs and clubs which were also TAB agencies, split vision threatened commissions.
- 2.47 The applicants also note that costs increased for pubs and clubs. Pubs and clubs were required to enter into contracts with both Sky and TVN if they wished to have coverage of the full range of races for their patrons. Many venues were required to install additional television screens to accommodate for the screening of the second channel.

Racing Industry

- 2.48 The applicants submit that as a result of the reduction in wagering turnover, funding to the racing industry decreased. All codes of racing were impacted which affected the ability of the racing bodies to meet their funding requirements. For example, the NSW

thoroughbred racing industry lost over \$6.2 million in product fees.⁹ In South Australia, thoroughbred racing lost in excess of \$1.5 million in revenue for the period of the dispute.¹⁰ The applicants submit that total payments by Tabcorp to the racing industry for the financial year ending June 2006 were more than \$30 million less than budgeted.

- 2.49 The applicants submit that country racing was also significantly affected by the split vision dispute. During the dispute, TVN races were not shown on the Austar network and as a result, interest in country racing dropped along with a decrease in wagering turnover and therefore funding for country racing.
- 2.50 The applicants note that harness and greyhound racing also experienced a loss in funding because of the impact the split vision dispute had on wagering revenue. The loss to Harness Racing Victoria (HRV) was estimated as being in excess of \$2 million.¹¹ Greyhound Racing SA estimated that the decline in turnover as a result of split vision resulted in a loss of approximately \$324 000.¹²

Interim arrangements ending the split vision

- 2.51 On 15 May 2006, Tabcorp, Sky and TVN entered into interim arrangements which resolved the immediate split vision dispute. Under the interim arrangements:
- TVN, AJC and STC agreed to make coverage of Sydney and Victorian thoroughbred races available to Sky for the broadcast on its existing services to pubs, clubs, TAB outlets, on-course and pay television to residential premises
 - Sky agreed to make coverage of premium non-TVN thoroughbred races available to TVN for broadcast on its existing TVN Channel service (subject to consultation with, and where necessary consent from, the race clubs that have licensed Sky the right to broadcast coverage of their races)
 - Sky agreed to waive its rights to require exclusivity from relevant pay television providers and
 - the applicants agreed to a stay of all litigation between them (and the discontinuance and full release of litigation upon the MOU coming into effect).

Request for informal clearance from ACCC

- 2.52 On 19 June 2006, TVN and Sky lodged a proposed joint venture arrangement with the ACCC seeking informal clearance of the arrangements. The proposed joint venture provided for the sharing of thoroughbred broadcasting rights between Tabcorp, Sky and TVN.
- 2.53 While the proposed joint venture arrangement was similar to the MOU the subject of these applications for authorisation, there are differences. These differences are further discussed under the following sections in the draft determination:

⁹ RacingNSW Annual report 2006, p 2.

¹⁰ Thoroughbred Racing SA Annual Report, pp 1, 4.

¹¹ Harness Racing Victoria Annual Report 2006, pp 3, 12.

¹² Greyhound Racing SA Annual Report 2006, pp 9, 16.

- competition between TVN and Sky for the acquisition of broadcasting rights from thoroughbred racing clubs (see paragraphs 6.49-6.51)
- effect on future wagering licensees in Victoria (see paragraphs 6.87-6.102) and
- wagering information and content shown on TVN and Sky Channels (see paragraphs 6.110-6.118).

2.54 On 15 August 2006, the ACCC announced that it would not provide informal clearance of the joint venture arrangements. The ACCC concluded that the proposed joint venture arrangements would have lessened Sky and TVN's incentives to bid against each other for thoroughbred racing broadcast rights. Given that Sky and TVN were the only two acquirers of such rights in Australia, this was likely to result in a lessening of competition in the relevant market.

2.55 The ACCC also noted other competition issues relating to some specific clauses of the arrangements.

3. The application for authorisation

- 3.1 Tabcorp, Sky and TVN seek authorisation for the MOU which broadly sets out the commercial terms between the parties, for sharing thoroughbred racing content. Specifically, authorisation is sought for Schedules 1 to 7 of the MOU and any arrangements made under clause 2.3 of the MOU.
- 3.2 The provisions under the MOU potentially raise concerns under the competition provisions of the Act. Consequently, the applicants have lodged the application for authorisation with the ACCC.
- 3.3 The applicants submit that the rationale for entering into the MOU is primarily for the need to have complete racing vision available on each channel. Specifically:
- from a Tabcorp perspective, the arrangements will restore to Sky the ability to provide ‘wall-to-wall’ racing from a single source that Tabcorp and the other TABs demand in order to complement wagering
 - for TVN, the arrangements will allow the further development of a premium thoroughbred racing channel designed to promote thoroughbred horse racing and the thoroughbred racing industry as a whole and
 - for both parties, the arrangements will bring an end to expensive and uncertain litigation and ensure that Sky and TVN customers and stakeholders will enjoy the benefits which the applicants submit will arise from the agreement.
- 3.4 The key provisions of the MOU for which authorisation is sought are summarised below.

Schedule 1 – Sky Channel to grant a sub-license to TVN

- 3.5 Under the MOU Sky will grant TVN a non-exclusive license to broadcast on the TVN Channel certain non-TVN shareholder premium thoroughbred race meetings from the rights which Sky holds, subject to Sky’s consultation and with, where necessary, the approval of the relevant race clubs.
- 3.6 Sky must use its reasonable endeavours to secure the right to sub-license the audio-visual coverage to TVN.
- 3.7 The license does not permit TVN to broadcast any visual coverage of Sky provided races in conjunction with either TVN or third party generated audio, so long as the audio provided by Sky is of an appropriate quality.
- 3.8 Tabcorp must provide to TVN any wagering information required by TVN for broadcast on the TVN Channel, including wagering information on international races.
- 3.9 Sky acquires the option to place up to two hours of approved content on the TVN Channel per day at certain times of the day. Approved content is:
- not coverage of harness racing or greyhound racing
 - not content which might offend the sensibilities of viewers and

- not content which TVN, acting reasonably, considers might adversely impact on a material basis the branding of TVN or thoroughbred racing.
- 3.10 TVN owns the TVN Channel, the TVN brand and TVN shareholder race and non-race footage, and TVN shareholder archival material. Sky owns the intellectual property rights in the Sky magazine shows. TVN does not own non-TVN shareholder archival material.

Schedule 2 – TVN to grant a pay television license to Sky

- 3.11 Without limiting TVN's rights to broadcast the coverage on the TVN Channel, TVN will grant Sky an exclusive license to broadcast and sub-license to pay television 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 rights as at 15 May 2006. Sky will pay rights fees to TVN for the grant of the license.
- 3.12 In order to allow TVN full access to the Foxtel, Optus and Austar pay television platforms, Sky waives its exclusivity in relation to access to those platforms.
- 3.13 TVN and individual race clubs are not restricted from negotiating exclusive deals with free-to-air commercial television stations to broadcast live certain excluded events, and non-exclusive deals for certain other excluded events deals.
- 3.14 The license does not permit Sky to broadcast any visual coverage of TVN races in conjunction with either Sky or third party generated audio, so long as the audio provided by TVN is of a reasonable quality.
- 3.15 TVN may license to Sky on a non-exclusive basis rights acquired by TVN after 16 May 2006 (New Rights). The parties will negotiate a price for the license and upon failure to reach agreement within 21 days, Sky can request the price to be determined by a valuer (Expert) in accordance with the following process:
- (a) The Expert is to be appointed by agreement between Sky and TVN, or in default of agreement within 15 business days of a request by Sky to have an Expert appointed, Sky may request the President of the Institute of Chartered Accountants in Australia to appoint the Expert
 - (b) Sky and TVN may both make submissions and provide relevant information and material to the Expert
 - (c) In relation to domestic premium thoroughbred racing, the determination of the Expert must be in writing and provided to the parties within 30 business days of the appointment of the Expert, and will be final and binding
 - (d) In relation to international premium thoroughbred racing, the determination of the Expert must be in writing and provided to the parties within 30 business days of the appointment of the Expert. The determination will be final and binding on the parties if Sky confirms it wishes to acquire the New Rights at the fee determined by the Expert
 - (e) TVN must use reasonable efforts to secure the right to sub-license any New Rights to Sky. TVN has no obligation to pay additional license fees or costs unless reimbursed by Sky.

- 3.16 TVN must use its best endeavours to ensure that Sky has the right to broadcast racing information concerning TVN shareholder races and other races included in the coverage licensed to Sky at no cost. TVN must also ensure that each TVN shareholder will provide that Sky is granted non-exclusive race track access rights to its race tracks for quality control purposes.

Schedule 3 – TVN to grant a commercial license to Sky

- 3.17 Without limiting TVN's rights to broadcast on the TVN Channel, TVN will grant Sky an exclusive license 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 held by TVN as at 15 May 2006.
- 3.18 The terms upon which this exclusive license is granted to Sky are the same as the provisions outlined in Schedule 2 (see paragraphs 3.11-3.16)

Schedule 4 – Distribution of the TVN Channel

- 3.19 Tabcorp will be granted a non-exclusive right to distribute (and to sub-license any other Tabcorp company to distribute) the TVN Channel to certain hotels, clubs, other commercial outlets with a liquor license, other commercial outlets with a wagering facility and racecourses. Tabcorp may retain all associated revenues from distributing the TVN Channel other than advertising revenues. Tabcorp is required to pay distribution rights fees to TVN.
- 3.20 Sky agrees to provide Sky Channel and TVN Channel to the physical betting rings at which totalisators can be accessed and administration offices on TVN shareholder racecourses, other public areas of TVN shareholder racecourses and on-course clubs owned by TVN shareholders.
- 3.21 An fee is payable in relation to the provision of Sky Channel on TVN shareholder racecourses to corporate bookmaker headquarters or betting auditoriums used primarily by wagering operators other than licensed totalisator operators.

Schedule 5

- 3.22 Schedule 5 of the MOU will not be used by the applicants.

Schedule 6 – Production of the TVN Channel

- 3.23 Sky agrees to produce the TVN Channel for TVN in accordance with agreed production requirements. Sky will provide the facilities, infrastructure and staff for the production of the TVN Channel. Sky will cover the cost of production for the TVN Channel up to a specified amount. TVN is required to cover any additional costs incurred.
- 3.24 TVN is responsible for paying third party service providers and suppliers used to produce and broadcast the TVN Channel for raw race feed coverage. TVN is also responsible for employing and paying for the cost of its talent for the production of the TVN Channel.

- 3.25 TVN's executive producer will determine the content or 'look' of the TVN Channel. TVN is responsible for sourcing all advertising for the TVN Channel and retains associated gross advertising revenues.
- 3.26 Sky will provide facilities for the preparation and production of TVN's existing magazine programs. Production of these programs will be paid for by TVN.

Schedule 7 - Free-to-air promotion

- 3.27 Tabcorp will pay TVN a commission fee for certain additional 'Category 2' races sold to, and screened live by, a main free-to-air television station where those races were not shown on free-to-air television in the 12 months prior to the MOU.
- 3.28 Category 2 races include Australia Cup Day, Ascot Vale Stakes Day, Turnbull Stakes Day, Caulfield Cup Day, Caulfield Guineas Day, Thousand Guineas Day, Blue Diamond Stakes Day, Sandown Classic Day, Cox Plate Day, Golden Slipper Day, AJC Derby Day, AJC Metropolitan Day, AJC Sydney Cup Day, AJC Oaks Day, AJC Doncaster Day, AJC Epsom Day, Manikato Stakes Day, Australia Stakes Day, Rosehill Guineas Day, Coolmore Classic Day and Golden Rose Day.

Other relevant provisions of the MOU

Archival Material

- 3.29 Where Sky has the rights to do so and subject to consultation with the relevant clubs, Sky will grant TVN a license to broadcast non-TVN premium Australian thoroughbred race archival material on the TVN Channel.
- 3.30 In consideration of a once-off license fee paid by Sky to TVN, Sky is granted the right to use TVN shareholder racecourse feed archival material:
- on pay television, and in connection with any magazine show or advertisement broadcast on pay television and
 - on subscription television services into commercial outlets, and in connection with any magazine show or advertisement broadcast on Sky Channel.

Obligation of Sky to third party Victorian wagering licensee¹³

- 3.31 Within 30 days of the date on which the Government of Victoria announces the identity of a third party Victorian licensee (that is a licensee who is not Tabcorp or a related entity), Sky must offer to supply the Commercial Channel to the third party Victorian licensee for the period between 16 August 2012 and 31 December 2012 on reasonable commercial terms. The Commercial Channel is the racing and wagering channel distributed by Sky to commercial venues which includes coverage of Victorian and Sydney metropolitan thoroughbred racing.

¹³ The Victorian Government is currently reviewing Victoria's wagering license structure. Tabcorp's exclusive wagering license expires on 15 August 2012. The term of the MOU extends beyond the date of Tabcorp's exclusive license. The MOU expires on 31 December 2012.

- 3.32 If the third party Victorian licensee wishes to enter into an agreement with Sky for the distribution of the Commercial Channel, Sky must negotiate in good faith with the third party to reach agreement on the license fee.
- 3.33 If agreement on the license fee cannot be reached by 1 January 2012, the decision is referred to an independent expert. All costs incurred by an independent expert will be shared equally between Sky and the third party Victorian licensee.
- 3.34 For the period of 16 August 2012 to 31 December 2012, Sky must not refuse to supply the Commercial Channel to any hotels, clubs, other commercial outlets with a liquor license, other commercial outlets with wagering facilities and racecourses within Victoria, for the reason that the operator has entered into an agreement with the third party Victorian licensee.

Settlement of proceedings

- 3.35 Upon the execution of the MOU, the applicants agreed to a continued stay of all outstanding claims in the proceedings until 31 January 2008 should the ACCC not grant authorisation.¹⁴

Commencement of the MOU

- 3.36 The provisions of the MOU are dependent upon the ACCC granting authorisation. Certain aspects of the MOU are effective immediately ('Interim Arrangements') with the remainder of the arrangements becoming binding 30 days after the grant of authorisation by the ACCC, if granted.

¹⁴ The applicants are currently parties to Federal Court Proceedings No 1235 of 2005, 545 of 2005 and Victorian Supreme Court Proceedings No 2133 of 2005.

4. Submissions received by the ACCC

- 4.1 The applicants provided an initial supporting submission with its application for authorisation and have since provided a number of separate confidential submissions.
- 4.2 The ACCC sought submissions from around 80 interested parties, including various turf clubs and racing clubs, hotels and clubs, wagering associations, betting agencies and government agencies. The ACCC received public submissions from:
- SingTel Optus Pty Limited
 - ACTTAB Limited
 - Queensland Racing Limited
 - Racing and Wagering Western Australia
 - UNiTAB Limited
 - Greyhound Racing Victoria
 - Sportscolour Pty Ltd
 - Association of Australian Bookmaking Companies Inc
 - Australian Hotels Association
 - Foxtel
 - Australian Harness Racing Council Inc
 - NSW Office of Liquor, Gaming and Racing
 - Australian Punters' Association
 - Racing Victoria Limited
 - Albion Park Harness Racing Club
 - Queensland Harness Racing
 - Harness Racing Victoria
 - Betfair Pty Limited
 - Racing NSW
- 4.3 The views of the applicants and interested parties are outlined in the ACCC's consideration of the MOU in Chapter 6 of this draft determination. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.
- 4.4 While concerns were raised by some interested parties, with the exception of Betfair no party objected to the proposed MOU.

5. The net public benefit test

- 5.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

Application A91031

- 5.2 The applicants lodged application for authorisation A91031 under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 5.3 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application A91032

- 5.4 The applicants lodged application A91032 under section 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing. The relevant test for this application is found in section 90(8) of the Act.
- 5.5 Section 90(8) states that the ACCC shall not authorise the proposed exclusive dealing conduct unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.

Application of the tests

- 5.6 There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).
- 5.7 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.¹⁵
- 5.8 However, the Tribunal has previously stated that regarding the test under section 90(6):

¹⁵ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] AcompT9 at paragraph 67.

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.¹⁶

- 5.9 Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 5.10 Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7).

Definition of public benefit and public detriment

- 5.11 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹⁷

- 5.12 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹⁸

Future with-and-without test

- 5.13 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.¹⁹
- 5.14 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

¹⁶ Re Association of Consulting Engineers, Australia (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

¹⁷ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

¹⁸ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

¹⁹ Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

Length of authorisation

5.15 The ACCC can grant authorisation for a limited period of time.²⁰

Conditions

5.16 The Act also allows the ACCC to grant authorisation subject to conditions which the ACCC considers necessary in order to satisfy the net public benefit test.²¹

Future and other parties

5.17 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future²² and
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.²³

²⁰ Section 91(1).

²¹ Section 91(3).

²² Section 88(10).

²³ Section 88(6).

6. ACCC evaluation

- 6.1 The ACCC's evaluation of the MOU is in accordance with the net public benefit test outlined in Chapter 5 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the MOU.

The market

- 6.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 6.3 The applicants submit that it is not necessary for the assessment of the MOU that the ACCC comprehensively defines the relevant markets. Further, the applicants submit that market definition is relevant to litigation which is currently stayed pending the ACCC's decision on the authorisation applications. Therefore the applicants advise that they do not propose to advance specific definitions of the market as to do so might prejudice their respective positions in the litigation proceedings should they resume. The parties, however, identified a number of possible upstream and downstream markets which might be considered, namely:
- sports rights
 - racing rights
 - thoroughbred racing rights
 - sports channels
 - racing channels
 - residential pay television
 - wagering and
 - pubs/clubs services.
- 6.4 The applicants consider that within any range of arguable product markets, the assessment of benefits and detriments arising from the MOU will not be affected.
- 6.5 In assessing the specific provisions of the MOU for which authorisation is sought, the ACCC agrees with the applicants that it is not necessary in this matter to fully define the market, save for identifying the features that are likely to be relevant to its assessment. In assessing the MOU the ACCC has identified the following areas of competition as being relevant to its assessment:
- the acquisition of broadcasting rights from thoroughbred racing clubs
 - the supply of thoroughbred race broadcasting services and
 - the provision of wagering services.

The acquisition of broadcasting rights from thoroughbred racing clubs

- 6.6 Sky and TVN are acquirers or potential acquirers of broadcasting rights from racing clubs in Australia. While Sky acquires content from harness and greyhound racing clubs in addition to thoroughbred racing clubs, TVN is owned by thoroughbred racing clubs, and was created specifically to screen and promote thoroughbred racing only. The ACCC considers that TVN is therefore unlikely to seek to acquire broadcasting rights from non-thoroughbred racing clubs.
- 6.7 The ACCC notes that the MOU only relates to the sharing of thoroughbred broadcasting rights between TVN and Sky.
- 6.8 The ACCC considers that while some substitutability may exist between demand for broadcast rights of thoroughbred racing and other racing rights, they are not perfect substitutes.
- 6.9 For the purpose of assessing the MOU, the ACCC therefore considers that the relevant area of competition likely to be affected by the MOU is the acquisition of broadcasting rights from thoroughbred racing clubs.
- 6.10 Sky and TVN pay license fees to thoroughbred racing clubs in exchange for the exclusive license to broadcast a club's races over a specified number of years.
- 6.11 TVN, through its shareholder racing clubs, has the broadcasting rights to the Victorian and Sydney metropolitan races. TVN also has the broadcasting rights to all Northern Territory race meetings.
- 6.12 Sky currently has broadcasting rights to all Australian thoroughbred racing except for those rights owned by TVN. Sky also has broadcasting rights for some international racing shown in the United Kingdom, Hong Kong, South Africa, Japan and New Zealand.
- 6.13 There are a number of different broadcasting rights which thoroughbred racing clubs can license. These include:
- Traditional rights – this includes the right to exploit thoroughbred vision on television services. Television services include subscription television services provided to commercial outlets such as pubs and clubs and television services provided by pay television operators.
 - New media rights – this is the right to exploit thoroughbred racing vision on new media such as third generation (3G) mobile networks and the internet.²⁴
 - International rights – this is the right to exploit vision of domestic races by selling it to international customers.²⁵
- 6.14 The ACCC understands that thoroughbred racing clubs have tended to sell broadcasting rights for their racing content in a single integrated bundle.²⁶

²⁴ Submission provided by Thoroughvision Pty Ltd, Tabcorp Holdings Limited and Sky Channel Pty Ltd dated 15 February 2007, p 33.

²⁵ Ibid at p 34.

- 6.15 The ACCC notes that the MOU only relates to traditional rights acquired by TVN and Sky. That is, new media rights and international rights are specifically excluded.²⁷
- 6.16 The ACCC notes that there is also limited coverage of thoroughbred racing on free-to-air television. For example, Channel 7 and Channel 9 currently have rights to show a small number of major race meetings, in conjunction with TVN and Sky. However, the extent to which free-to-air broadcasters compete with TVN and Sky for the acquisition of rights from thoroughbred racing clubs is questionable. Except for a limited period, thoroughbred racing is not a regular or significant part of general sporting entertainment covered by free-to-air networks.

The supply of race broadcasting services

- 6.17 Sky and TVN both provide race broadcasting services to hotels, clubs, TABs and pay television providers. The ability to supply race broadcasting services results from the license agreements Sky and TVN have entered into with the individual racing clubs. As noted above, while free-to-air television providers obtain non-exclusive rights to a limited number of major race meetings per year they are not regular providers of race broadcasting services.
- 6.18 Both the TVN and Sky Channels show race meetings and thoroughbred magazine shows designed to provide information to punters and racing enthusiasts on a daily basis. As noted, the TVN Channel only depicts thoroughbred racing while Sky Channel provides content covering the three codes – thoroughbred racing, harness racing and greyhound racing.
- 6.19 Pubs, clubs and TABs make up a substantial segment of consumers of race broadcasting services. Such venues traditionally offer wagering facilities, and it is generally accepted that access to live racing vision together with wagering opportunities stimulates the demand for wagering services (see paragraphs 2.33-2.35).
- 6.20 Tabcorp supplies TAB kiosks or Easy Bet Terminals on condition that the agent venue will acquire broadcasting services from Sky.²⁸ Therefore, pubs/clubs or other commercial venues which acquire wagering facilities from Tabcorp are also required to obtain Sky Channel.
- 6.21 Prior to the Interim Arrangements implemented by the applicants in May 2006 (ie during the split vision dispute), pubs and clubs entered into agreements with both Sky and TVN if they wanted access to an Australian-wide suite of thoroughbred races.
- 6.22 The other significant group of customers who acquire broadcasting services from Sky and TVN are pay television providers and, in turn, pay television subscribers.
- 6.23 In regards to pay television, Foxtel submit that the relevant market to assess the MOU in is the television entertainment market. Foxtel states that this market includes a range of competitors who acquire and supply content including other subscription television operators, commercial and national television broadcasters and providers of video and

²⁶ Submission provided by Thoroughvision Pty Ltd, Tabcorp Holdings Limited and Sky Channel Pty Ltd dated 15 February 2007, p 34.

²⁷ However, the MOU does relate to the import of international thoroughbred races.

²⁸ Tabcorp Manager Pty Ltd lodged the exclusive dealing notification N90786 on 2 May 2000.

DVD retail sales and rentals. For the purposes of this application, the ACCC has focused its assessment on the provision of thoroughbred racing broadcast services. Given the inter-relationship with wagering and the MOU's focus on thoroughbred racing, the extent to which other racing content, let alone other types of broadcasting content, will constrain the impact of the MOU is highly questionable.

- 6.24 Sky Channel is available on the basic package provided by Foxtel, Optus and Austar at no additional cost.
- 6.25 Prior to the applicants entering into the MOU, TVN was only available on the Foxtel digital pay television network. Subscribers to Foxtel digital wanting to access the TVN Channel were required to contact TVN directly and were charged an additional fee of \$12 per year.
- 6.26 Under the MOU, Sky will release Foxtel and Optus from its exclusivity obligations. As a result the TVN Channel has recently become available to all Foxtel subscribers who subscribe to the My Sports tier channel at no additional charge.²⁹ The \$12 annual subscription fee no longer applies. Foxtel advised that the TVN Channel will also be incorporated into the Optus package, as Foxtel will supply Optus with the channel under the terms of the Foxtel Optus Content Supply Agreement.³⁰ The arrangements that TVN has entered into with Foxtel are subject to the ACCC granting authorisation to the MOU.
- 6.27 TVN is available on the Austar digital network. Subscribers to Austar wanting to access the TVN Channel contact Austar directly. The TVN Channel is available for an additional fee of \$1 per month.³¹

The provision of wagering services

- 6.28 TVN and Sky do not provide wagering services. However, the ACCC notes that given the vertical integration of Tabcorp and Sky, there is potential for Tabcorp to use its ownership of the Sky Channel to affect the ability of wagering service providers that compete with Tabcorp.
- 6.29 Betfair Pty Limited (Betfair) considers that the MOU should be assessed in the national wagering market in which totalisators, bookmakers and betting exchanges compete to supply wagering services.
- 6.30 The ACCC has previously considered the issue of market definition in respect of wagering services in its assessment of the proposed acquisition of UNiTAB by Tabcorp in 2006. As part of that assessment the ACCC recognised that bookmakers, particularly corporate bookmakers offering online wagering services, are likely to compete with totalisators for punters.³² The ACCC also noted that betting exchanges potentially may become more significant players in wagering.

²⁹ TVN/Foxtel Media Release dated 13 March 2007. TVN became available at no additional charge from 15 March 2007 to subscribers of the My Sports Tier, and to subscribers who received the pre-May 2006 basic package.

³⁰ Foxtel submission dated 14 March 2007.

³¹ Austar website, <http://www.austar.com.au/experience/options.asp>

³² Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, Public Competition Assessment, 16 November 2006.

The counterfactual

- 6.31 As noted in Chapter 5, in order to identify and measure the public benefit and public detriment generated by the conduct, the ACCC applies the ‘future with-and-without test’.
- 6.32 The applicants submit that the counterfactual involves a return to litigation and, necessarily, split vision which will have direct consequences for wagering and funding to the racing industry. The consequences of split vision are outlined in paragraphs 2.43-2.50. The applicants state that the ongoing litigation would be costly and take considerable time to complete. The applicants also note that the outcome of the litigation is uncertain.
- 6.33 TVN and Tabcorp/Sky also provided separate confidential submissions regarding the counterfactual that provides further information to support these claims.
- 6.34 Given that the applicants have sought authorisation in respect of the MOU to cover conduct that would otherwise breach the Act – exclusive dealing and arrangements that substantially lessen competition – the ACCC considers the applicants would be unlikely to give effect to the MOU in the absence of authorisation. In this regard, the ACCC notes the long term arrangements under the MOU are subject to a condition precedent that the ACCC grants authorisation.
- 6.35 Submissions received from interested parties generally agree that the future without authorisation of the MOU is likely to see a return to split vision with the negative consequences on turnover and revenue streams for all racing codes. See for example submissions by Racing and Wagering Western Australia (RWWA), Sportscolour Pty Ltd (Sportscolour), Australian Harness Racing Council Inc (AHRC), Harness Racing Victoria (HRV), Queensland Harness Racing and Albion Park Harness Racing Club (APHRC).
- 6.36 AHRC further submit a repeat of split vision could lead to greater punter and commercial venue disillusionment.
- 6.37 The ACCC accepts the views of the applicants and interested parties that without authorisation it is likely that there would be a return to split vision and the litigation between Tabcorp/Sky and TVN would continue.
- 6.38 The ACCC notes the submission by Betfair that a future without authorisation will still see the Sky and TVN Channels offering live racing broadcasts which appeal to punters. Betfair submit that a key difference in the future without authorisation is that it would be more likely that competitive wagering service providers would be able to negotiate access to thoroughbred broadcasting with TVN, for example to include content about their services, than if they were forced to seek access from Tabcorp/Sky.
- 6.39 The ACCC considers that one possibility if authorisation is not granted, is that TVN may find it difficult to continue to operate, particularly in the face of the significant costs and uncertainty of litigation.
- 6.40 Accordingly, the ACCC considers the situation without authorisation is:
- at best, the return to split vision or

- at worst, the possibility that TVN may find it difficult to continue to operate.

Public detriment

- 6.41 The applicants submit that the MOU will generate minimal or no anti-competitive detriment as:
- TVN and Sky will compete for the acquisition of future thoroughbred rights
 - while TVN is providing an exclusive license to Sky to broadcast live on pay television and subscription services, TVN vision will continue to be available through the TVN Channel
 - the distribution arrangements under the MOU are non-exclusive and no conditions are imposed on Tabcorp in respect of the distribution of the TVN Channel
 - the term of the MOU ensures that content is shared through the Melbourne Spring Racing Carnival in 2012 and should a second Victorian licensee be announced, Sky will offer to supply a racing and wagering channel (not being the TVN Channel) to that licensee.
- 6.42 An assessment of the public detriment generated by the MOU follows.

Competition between TVN and Sky for the acquisition of broadcasting rights from thoroughbred racing clubs

- 6.43 The MOU provides that Sky will grant TVN a non-exclusive license to broadcast on the TVN Channel certain non-TVN shareholder thoroughbred race meetings from the rights which Sky holds (including rights Sky acquires during the term of the MOU). TVN will pay rights fees to Sky for the grant of this license.
- 6.44 TVN will grant Sky an exclusive license to broadcast on pay television and subscription television services into commercial outlets the audio-visual coverage of TVN shareholder races, Darwin Turf Club races, Alice Springs Turf Club races and any other thoroughbred races to which TVN held the rights as at 15 May 2006. Sky also pays rights fees to TVN for the grant of these licenses.
- 6.45 The MOU also provides for TVN to license to Sky, on a non-exclusive basis, rights acquired by TVN after 15 May 2006. If Sky and TVN fail to reach agreement on the license fee, a valuer will be appointed to determine the value of the license (see paragraph 3.15).
- 6.46 The ACCC has considered whether the agreements to license rights to each other under the MOU would lessen the incentives for TVN or Sky to compete for future broadcasting rights. That is, would TVN or Sky have incentives to bid for future thoroughbred broadcasting rights when they can obtain such rights through the sub-license agreements under the MOU.
- 6.47 The applicants submit that the MOU will not decrease the incentives for TVN or Sky to compete for the acquisition of future broadcasting rights which come up for renewal during the term of the MOU. The applicants submit that TVN and Sky have significant incentives to acquire these rights directly as head licensee, rather than relying on sub-

licensing rights under the MOU. Submissions by the applicants indicate that the incentives to bid for future rights arise from:

- Commercial benefits from being the head licensee – During the term of the MOU there are a range of commercial benefits which accrue to the head licensee which are not available to the sub-licensee. In particular, the rights by way of a sub-license are limited for use on the TVN Channel and Sky Channel and cannot be used more broadly. For example sub-licenses do not include new media rights and international rights.

The applicants submit that holding the rights to exploit thoroughbred racing vision on new media and international platforms will be important in the future.

The applicants noted that there is a concerted attempt in the Australian wagering industry to export wagering on Australian thoroughbred racing to overseas jurisdictions. The vision of these races is a necessary component of this export. Australian wagering operators also seek to import coverage of foreign races for wagering by Australian customers. The applicants note that it is a feature of license arrangements with overseas jurisdictions that there be a reciprocal license of Australian vision.

The applicants also note that there are economies of scope in holding traditional, new media and international rights as a result of being able to utilise a single production process for the delivery of vision over all platforms. If these rights were held separately, each owner would need to incur costs of producing the vision.

Further, Sky advises that the retention and acquisition of racing rights is an important ongoing component of its business. Sky states that this not only includes the acquisition of media rights, but a broader relationship with the race clubs which maximises the exposure of racing vision. Sky states that its rights retention strategy is a key business objective for 2007 and beyond.

- Need to secure rights post 2012 – The applicants submit that all of the broadcasting rights for thoroughbred racing which become available during the term of the MOU will be subject to contracts which expire after the termination of the MOU in December 2012. Therefore only the head licensee will be able to broadcast the relevant races after that date.

TVN advised that its objective is to acquire thoroughbred racing rights as they come up for renewal. TVN submits that being the owner of thoroughbred racing rights after December 2012 would allow TVN to move towards being a stand alone thoroughbred racing channel with an attractive range of races to offer customers.

Tabcorp/Sky submit that post 2012, being the owner of thoroughbred racing rights will minimise the extent of the split vision re-occurring. This incentive is significant given the negative impact experienced by Tabcorp on wagering turnover during the split vision dispute.

- 6.48 The ACCC understands that not all thoroughbred broadcasting rights come up for renewal during the term of the MOU. The applicants submit that the thoroughbred broadcasting rights which come up for renewal during the term of the MOU include South Australia and Queensland.

- 6.49 The ACCC has previously considered whether the proposed joint venture arrangement between Sky and TVN would lessen competition for the acquisition of broadcasting rights from thoroughbred racing clubs (see paragraphs 2.52-2.55). The ACCC concluded that the proposed joint venture arrangement would have lessened Sky's and TVN's incentives to bid against each other for the thoroughbred racing broadcast rights and did not give an informal clearance for the arrangement through the ACCC's informal clearance process.
- 6.50 It is relevant to note that under the proposed joint venture arrangement previously considered by the ACCC, if TVN acquired any rights previously held by Sky, then TVN had to make those rights available to Sky on a non-exclusive basis. TVN was required to charge Sky a license fee for these rights which did not exceed the fee currently paid by Sky for those rights. This clause significantly reduced any incentive Sky and TVN had to acquire new thoroughbred racing rights.
- 6.51 The MOU for which authorisation is now sought does not include this clause and accordingly reduces the ACCC's concerns.
- 6.52 The ACCC considers that there will still be a competitive impact on the incentives to bid for future broadcasting rights from thoroughbred racing clubs. This is because the MOU provides that the unsuccessful bidder will still be able to access audio-visual content of those races under a sub-license and therefore may not bid as aggressively.
- 6.53 That being said the ACCC notes that commercial incentives will remain to be the primary license holder.
- 6.54 The ACCC notes that after 31 December 2012, only the primary licensee will be able to broadcast the relevant races. Once the MOU expires, there will be no obligation on Sky or TVN to share the thoroughbred racing rights they own (indeed such an agreement may raise issues under the Trade Practices Act which is why the applicants have sought authorisation). The ACCC notes that both TVN and Tabcorp/Sky have stated that their objective is to acquire future thoroughbred racing rights as they come up for renewal and that acquiring these rights is important for their respective businesses. The parties have separately provided confidential information that demonstrates the commercial incentives.
- 6.55 The ACCC also accepts that holding the rights to exploit new media and/or international rights would allow Sky and TVN to expand their respective businesses. In particular, the ACCC notes that the applicants state that the acquisition of new media rights is important for expanding the uptake of the TVN and Sky Channels on new technology platforms such as mobile phones and the internet. TVN also noted that the use of new technology is important in attracting the interest of younger adults in horse racing. The exclusion of new media rights and international rights from the scope of the sub-licenses under the MOU creates an incentive for Sky and TVN to bid as the primary license holder of broadcasting rights from thoroughbred racing clubs.
- 6.56 While the ACCC considers that these commercial incentives remain for TVN and Sky to compete for future rights in respect of certain racing clubs, the ACCC notes that TVN's incentive may not be equal between all racing clubs. The ACCC notes that the format and structure of TVN is such that its focus is on promoting premium thoroughbred racing and as a consequence it may not wish to acquire rights from all

thoroughbred racing clubs in Australia. However, TVN's incentives remain the same with or without the MOU.

- 6.57 For the reasons identified above, the ACCC considers that the provisions providing for the sharing of content between the two principal acquirers of thoroughbred racing rights will lessen incentives to compete for future rights. However, this lessening of competition will be mitigated by the ongoing incentives to acquire rights for new media and international broadcasting and for acquiring broadcasting rights beyond the term of the MOU.
- 6.58 Further, having regard to the alternate counterfactual of a market where TVN may find it difficult to operate, the ACCC considers that the retained competition with the MOU is greater than if TVN did not operate.

Supply of race broadcasting services

Distribution of the TVN and Sky Channels

- 6.59 Under the MOU, Tabcorp is granted a non-exclusive right to distribute the TVN Channel to certain hotels, clubs, other commercial outlets with a liquor license or other commercial outlets with a wagering facility and racecourses. Tabcorp will retain all associated revenues from distributing the TVN Channel (other than advertising revenues). Tabcorp pays distribution rights fees to TVN.
- 6.60 The applicants submit that these distribution arrangements will not result in any anti-competitive detriment because the:
- distribution rights are non-exclusive. TVN is able to distribute the TVN Channel and has the right to appoint another distributor of the TVN Channel and
 - MOU does not impose any conditions on Tabcorp in respect of the distribution of the TVN Channel.

Distribution to commercial venues with a liquor license (Pubs and Clubs)

- 6.61 During the split vision dispute, pubs and clubs that wished to provide their patrons with access to audio-visual coverage of the complete range of thoroughbred racing acquired both the TVN and Sky Channels. Due to the sharing of content provided by the MOU pubs and clubs are able to acquire Sky Channel from Tabcorp to access the complete range of thoroughbred races in the wall-to-wall racing format. Alternatively or in addition, pubs and clubs may acquire the TVN Channel from TVN, Tabcorp, or another distributor appointed by TVN, to provide patrons with the extended thoroughbred race coverage format (albeit of more limited racing events than on Sky Channel).
- 6.62 Venues with wagering facilities receive commissions based on how much is wagered at their venue. Given the relationship between wagering turnover and live broadcasting of race events it could be expected that pubs and clubs will decide whether to acquire either one or both channels, and from whom, based on such factors as whether the venue provides wagering facilities, the nature of the patrons it attracts and price.
- 6.63 A number of harness racing clubs (APHRC, Queensland Harness Racing, HRV and AHRC) have raised concerns that the pricing of Sky Channel must remain reasonable. The harness clubs submit that if there is upward pressure on the pricing of Sky Channel

to pubs and clubs, it could possibly lead to pubs and clubs limiting the opening hours of their TAB facility or even cancelling the service in their venue. Such a decision would have financial implications to the racing industry including harness racing.

- 6.64 The MOU does not specify the price at which the Sky and TVN Channels are to be distributed to pubs and clubs, and it does not outline how the price of the channels should be determined by the applicants. In particular, the ACCC notes the price at which Tabcorp sets for its distribution of the Sky and TVN Channels will be determined independently of TVN.
- 6.65 The ACCC also notes that TVN has stated publicly that pubs and clubs with wagering facilities will pay no more than what they currently pay for Sky Channel, should pubs and clubs wish to show both Sky and TVN Channels.³³
- 6.66 During split vision, Sky reduced the price of Sky Channel to pubs and clubs by 18% because it was unable to broadcast the AJC, STC and Victorian thoroughbred race meetings.³⁴
- 6.67 Under split vision (or for that matter the first mentioned counterfactual), Sky appeared constrained in its pricing decisions to some extent by the alternative offered by TVN. This constraint should continue to exist under the MOU. In contrast, under the alternative counterfactual, this competitive constraint would be removed should TVN find it difficult to continue to operate.
- 6.68 The exception to this assessment is the increased capacity for Sky to leverage off its channels together with the provision of wagering facilities to force the supply of the TVN Channel through Sky.
- 6.69 For example, should Sky supply the Sky Channel to commercial venues with wagering facilities on condition that the venue also acquire the TVN Channel from it, this may significantly increase costs to such venues. It also has the ability to lessen competition between Sky and TVN for the distribution of the TVN Channel.
- 6.70 This concern is heightened having regard to Tabcorp's current requirement that venues with Tab Kiosks and Easy Bet Terminals acquire Sky Channel. Any additional requirement that these wagering outlets also acquire TVN through Sky would be of great concern.
- 6.71 The ACCC notes that a decision by Tabcorp/Sky to bundle the TVN and Sky Channels, but to also offer at least the Sky Channel separately would allow pubs and clubs to choose, on the normal commercial basis of service, quality and price, which broadcasting services to acquire and from whom according to their needs and preferences of their patrons.
- 6.72 Consequently, the ACCC considers that significant public detriment could flow should Tabcorp only supply the Sky and TVN Channels as a bundled package to commercial venues with wagering facilities, without also providing the option for the Sky Channel to be purchased separately.

³³ ACCC file note of meeting between ACCC and TVN representatives on 8 March 2007.

³⁴ Tabcorp media release 10 May 2005 - http://www.tabcorp.com.au/news_mediarel_detail.aspx?view=159.

Distribution of race broadcasting channels to television providers

Pay television

- 6.73 The MOU provides that Sky will release Foxtel and Optus from their exclusivity obligations to Sky so that TVN has access to these platforms. The MOU also enables the TVN Channel to be broadcast on the Austar network.
- 6.74 The MOU therefore provides TVN with access to the major pay television providers of Foxtel, Optus and Austar and their respective subscription audiences. Previously, TVN was only available on Foxtel digital for an additional \$1 per month purchased directly from TVN (see paragraph 6.25).
- 6.75 The applicants state that by allowing TVN to access the Foxtel, Optus and Austar pay television networks the TVN Channel, and therefore thoroughbred racing, is exposed to a wider audience. For example, Foxtel advise that it has access to over 1.29 million homes (more than 70% of Australian homes) either directly or by services provided on a wholesale basis by other providers such as Optus. A benefit to TVN of being able to access a wider audience is that it is better able to compete for advertising dollars. Under the MOU responsibility for advertising and the revenues it generates is not shared or agreed between the applicants.
- 6.76 The Australian Punters' Association notes that the MOU does not provide for exclusivity arrangements to be waived for future pay television providers which may enter the market.
- 6.77 The ACCC notes that in addition to the major pay television providers there are a number of niche pay television providers such as Selectv, Neighbourhood Cable and TransACT. The ACCC notes that of these, currently only Sky Channel is available on Neighbourhood Cable. The ACCC notes that the terms of the MOU do not prevent or limit TVN or Sky from reaching content supply agreements with future or current niche pay television providers.
- 6.78 The ACCC considers that any exclusive agreement which Sky has or decides to enter into in the future with a niche pay television provider is unlikely to:
- preclude residential customers from gaining access to either the Sky or TVN Channels, given that the MOU will enable both channels to be available on the major pay television networks and
 - significantly impact TVN's ability to promote the TVN Channel to domestic pay television subscribers, given that the TVN Channel will be available on the major pay television networks.
- 6.79 As a result, the ACCC considers that the exclusion of niche or future pay television providers from the provisions of the MOU are unlikely to raise significant competition concerns in the distribution of race broadcasting services to pay television providers.

Free-to-air

- 6.80 Under the MOU, TVN and individual race clubs are able to negotiate exclusive deals with free-to-air commercial television stations to broadcast live certain excluded events

and non-exclusive deals with free-to-air commercial television stations to broadcast live certain other excluded events.

- 6.81 RacingNSW is concerned that the exclusive deals negotiated by TVN with free-to-air providers would have the effect of precluding TVN and Sky from also broadcasting the event live. RacingNSW submit that restricting the event to a live free-to-air broadcast is likely to reduce the level of wagering investment in racing and for the industry.
- 6.82 In response to RacingNSW concerns, the applicants advised that there are only a small number of racing days for which TVN may seek to negotiate exclusive arrangements with free-to-air providers. The applicants note that Sky is able to broadcast live these events on the Sky Channel it provides to commercial venues – that is pubs and clubs. The applicants also note that the majority of TVN shareholder races will be available on Sky Channel to both domestic pay television and commercial subscribers.
- 6.83 The ACCC notes that without authorisation, Sky would not be able to broadcast TVN races on Sky Channel. The ACCC also notes that under the MOU there are only a small number of races which TVN may seek to negotiate exclusive arrangements with free-to-air providers and that all of TVN's races will be available on the Sky Channel provided to pubs and clubs and that the majority of races will be on the Sky Channel provided to pay television subscribers. As a result, the ACCC considers that the provisions of the MOU which allow TVN and individual race clubs to negotiate exclusive deals with free-to-air providers are unlikely to result in any public detriment.
- 6.84 Betfair submit that resolving the split vision dispute does not require that the licenses TVN grant to Sky to be exclusive. Betfair submit that the applicants' claim that the exclusive nature of the licenses will not result in any anti-competitive detriment ignores the fact that the proposed arrangements lock out free-to-air providers from broadcasting TVN races other than defined excluded racing events.
- 6.85 The ACCC notes that the aim of Tabcorp is to maximise wagering on thoroughbred racing and TVN's aim is to promote interest in thoroughbred racing. Therefore, both parties have an incentive to ensure that thoroughbred racing is promoted to its maximum potential.
- 6.86 The MOU provides that racing clubs and TVN are able to negotiate deals with free-to-air providers to show certain thoroughbred racing events. The ACCC notes that free-to-air providers are not major acquirers of broadcasting rights for thoroughbred racing events, because they generally only show the major thoroughbred racing events at limited times during the year, for example the Melbourne Cup. Consequently, the ACCC does not consider that the MOU will affect the ability of free-to-air providers to distribute thoroughbred racing content.

The provision of wagering services

Effect on future wagering licensee(s) in Victoria

- 6.87 The MOU imposes an obligation on Sky to provide a third party Victorian wagering licensee (if relevant) with access to racing vision (see paragraphs 3.31-3.34).
- 6.88 Tabcorp currently holds an exclusive license to conduct wagering in Victoria. This license expires in August 2012. The MOU expires on 31 December 2012.

- 6.89 The applicants state that the commercial reason for the MOU expiring in December is so that Tabcorp and Sky can ensure that they have access to the Melbourne Spring Racing Carnival in 2012. Tabcorp and Sky note that this assumes that Tabcorp's license is renewed either on an exclusive or non-exclusive basis. The applicants submit that no anti-competitive detriment arises from the term of the MOU.
- 6.90 The ACCC notes that the Victorian Government is currently undertaking a review of Victorian wagering license arrangements. It is expected that an announcement will be made in 2007 as to what the post-2012 wagering license structure will be, including whether there will be a second wagering licensee in Victoria. Following this announcement it is expected that the Victorian Government will undertake a tender process to award the new license(s). The ACCC expects that the process of awarding the wagering license(s) and the announcement of who will hold the license(s) will occur well before Tabcorp's license expires in August 2012. In particular, the ACCC considers that an announcement is likely to be made well before August 2012 to give any new wagering licensee(s) the ability to establish its business arrangements and work through any transitional issues.
- 6.91 In order to address the ACCC's concern (expressed during the informal clearance process, see paragraphs 2.52-2.55), the applicants advised that the MOU provides that any replacement or co-existing wagering licensee that may enter the market in August 2012 is not denied access to thoroughbred racing vision.
- 6.92 The ACCC notes that under the MOU, Sky must offer to supply the racing and wagering channel (not being the TVN Channel) to any new wagering licensee within 30 days of the date on which the Victorian Government announces the identity of the licensee.
- 6.93 RVL is concerned that the term of the MOU does not provide a level playing field at the time the Victorian wagering license is to be re-tendered. RVL submits that the potential third party Victorian licensee is faced with having to negotiate an agreement for the supply of racing vision with their competitor, that is Tabcorp.
- 6.94 RVL further submits that the provisions in the MOU which place an obligation on Sky to provide the wagering channel to a new Victorian licensee are not enforceable and do not provide satisfactory assurance that should a second Victorian licensee be announced it will have access to the racing channel for the period between 16 August 2012 and 31 December 2012. The Australian Punters' Association expressed a similar concern as to whether Tabcorp would comply with the provisions outlined in the MOU should a third party Victorian licensee be announced.
- 6.95 RVL submits that:
- the term of the MOU should be made to be simultaneous with the expiry date of Tabcorp's current exclusive license to conduct wagering in Victoria or
 - in the alternative, that the provisions in the MOU relating to a third party Victorian licensee are provided as enforceable undertakings to the ACCC under section 87B of the Act.
- 6.96 As noted the ACCC considers that a possible counterfactual is one where TVN may find it difficult to operate. If this was the case, Sky would again become the sole holder of all thoroughbred broadcasting racing rights.

- 6.97 Under this counterfactual, Tabcorp, through Sky, would be in a strong position to influence a new licensee's access to racing coverage. Under the MOU, any new licensee may take comfort from Sky's commitment to commence supply of the racing vision, along with the continued presence of TVN as an ongoing (although not perfect) alternative.
- 6.98 Under a split vision counterfactual, a new entrant would still need to obtain racing vision from Sky and TVN as it would under the MOU. However, unlike the situation under the MOU, it could not take comfort from the commitment made by Sky to supply racing vision.
- 6.99 The ACCC notes the concerns raised by RVL about the enforceability of these provisions of the MOU by a new Victorian wagering licensee. The ACCC considers that given Sky has made a public commitment to provide a racing and wagering channel to a new third party Victorian wagering licensee it intends to do so.
- 6.100 If, however, there were concerns that Tabcorp or Sky has not complied with these terms of the MOU they are likely to arise well before August 2012. The ACCC notes that if such concerns did arise it would provide grounds for the ACCC to review and/or revoke the authorisation under section 91B or 91C of the Act.
- 6.101 The ACCC notes that the provisions of the MOU do not oblige Sky to display on the Sky Channel the wagering odds of any new Victorian wagering licensee. However, as noted previously, any new Victorian wagering licensee would need to negotiate with Sky about the placement of its odds on the Sky Channel with or without the MOU.
- 6.102 At least with the MOU, both Sky and TVN would exist to provide both the Sky and TVN Channels. Consequently, any new Victorian licensee would presumably be able to negotiate with TVN for the placement of its odds on the TVN Channel without the vertical integration issues.

The provision of Sky and TVN Channels to non-totalisator wagering operators

- 6.103 Under the MOU Sky is to provide the Sky and TVN Channels to the physical betting rings at which totalisators can be accessed and to certain other on-course areas on TVN shareholder racecourses. A fee is payable by corporate bookmaker headquarters or betting auditoriums used primarily by wagering operators other than licensed totalisators for the provision of Sky Channel on TVN shareholder racecourses.
- 6.104 The Association of Australian Bookmaking Companies Inc (AABC) stated that there is no justification for the imposition of the fee. The AABC submit that Sky is taking the opportunity to advance the commercial wagering interests of Tabcorp.
- 6.105 The ACCC understands that betting auditoriums usually offer bookmaker and totalisator wagering services on non-race days from a site located on a licensed racecourse. Most States and Territories allow betting auditoriums to be conducted on race courses.
- 6.106 Tabcorp/Sky advised that the reference to corporate bookmaker headquarters in the MOU refers to on-course bookmakers who establish their administrative office on a race course. The fee is not relevant to on-course bookmakers who take bets on racing events being held at TVN race courses on a race day. In these circumstances on-course bookmakers do not need access to thoroughbred racing vision to facilitate wagering as:

- punters are at the course to see the racing event or
 - on-course bookmakers are taking bets in public areas of the race course where the Sky and TVN Channels are already provided.
- 6.107 Further, large corporate bookmakers (such as Centrebet and Sportsbet) are not affected by these provisions in the MOU as they are not licensed to provide on-course wagering facilities. Such operators conduct wagering off-course via telephone and internet betting.
- 6.108 The ACCC accepts that these provisions of the MOU may facilitate the ability of Sky to advance the commercial wagering interest of Tabcorp. However, the ACCC considers that there are only a small number of bookmakers who are likely to be affected by these provisions – that is those bookmakers who provide wagering services at a betting auditorium or at headquarters located at a TVN shareholder race course.
- 6.109 Further, the ACCC notes that Sky will supply the Sky Channel (for a fee) to these bookmakers. The ACCC has no information to suggest that the fees which will be charged by Sky to other wagering service providers to access the Sky Channel will be prohibitive.

Wagering information and content shown on TVN and Sky Channels

- 6.110 The MOU provides that 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.
- 6.111 The AABC note that the MOU continues the advertising advantages enjoyed by totalisators, by requiring that wagering operators controlled by Tabcorp must provide wagering information to TVN.
- 6.112 Betfair notes that under the proposed joint venture arrangements previously considered by the ACCC, TVN was 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. Betfair notes that this proposed provision would have had significant implications for wagering service providers, other than totalisators, disseminating their wagering information for thoroughbred races. Betfair submits that the MOU should provide that TVN is not precluded from broadcasting wagering information from competing wagering service providers.
- 6.113 Betfair submit that depending on the definition of ‘wagering information’ in the MOU the term could extend to the visual display of bookmakers 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 race course.
- 6.114 The Australian Punters’ Association also expressed concern that the MOU would allow Tabcorp to determine what content is shown on TVN. This may result in Tabcorp placing content on TVN which is not of showcase racing quality, but will be more aimed at increasing revenue for Tabcorp.

- 6.115 RacingNSW also noted that the MOU should not affect the scope and content of pre-race vision and information and should not constrain either TVN or Sky from presenting relevant information direct from the race track.
- 6.116 The ACCC notes that unlike the proposed joint venture arrangement considered by the ACCC as part of its informal clearance process, there are no provisions in the MOU which prevent TVN from displaying wagering odds from other wagering operators. The ACCC also notes that TVN retains responsibility for sourcing all advertising for the TVN Channel. Should such restrictions be imposed, the ACCC may review the authorisation.
- 6.117 The ACCC also notes that while Sky will produce the TVN Channel, TVN will still have control over the content and look of the TVN Channel and that no changes can be made without prior approval of TVN. In addition Sky may only place Approved Content on TVN (see paragraph 3.9). There are no provisions in the MOU which restrict the racing content which Sky and TVN can broadcast on their respective channels.
- 6.118 However, as noted by the applicants there are state-based legislative restrictions which limit Betfair from advertising on the Sky and TVN Channels. Most States and Territories prohibit the promotion of wagering services by wagering operators that have not been licensed in that State or Territory. These prohibitions extend to physical advertising and also to the publication of advertisements over the internet or through other electronic means. Any restrictions on what TVN can accept as advertisements on its channel arise from the existing legislative restrictions and not the MOU.

Third party audio

- 6.119 The non-exclusive license granted by Sky to TVN to broadcast non-TVN races provides that TVN is not permitted to broadcast any visual coverage of non-TVN races in conjunction with either TVN or third party generated audio, provided that the visual coverage is made available to TVN in conjunction with audio of an appropriate quality.
- 6.120 Similarly, the exclusive licenses granted by TVN to Sky do not permit Sky to broadcast any visual coverage of TVN races in conjunction with either Sky or third party audio, provided that visual coverage is made available to Sky in conjunction with audio of appropriate quality.
- 6.121 The applicants submit that these provisions ensure that the integrity of the vision and audio product which are being licensed from Sky to TVN, and from TVN to Sky, is maintained.
- 6.122 Betfair submits that the third party audio provisions prevent TVN from acquiring (or generating itself) audio to accompany race visual broadcasts provided by Sky. Betfair submit that it could be anticipated that the audio provided by Sky accompanying the visual race broadcasts, would contain only wagering content relating to Tabcorp and its related entities and would exclude any editorial or other content about other wagering providers.
- 6.123 Betfair state that the MOU between Tabcorp and TVN should provide that TVN is not precluded from generating its own audio or acquiring third party audio for broadcast with visual races acquired from Sky.

- 6.124 The ACCC notes that the provisions under the MOU which relate to third party audio apply to both TVN and Sky. That is, for TVN races provided by TVN to Sky, Sky is not permitted to use third party audio and similarly, for non-TVN races provided by Sky, TVN is not permitted to use third party audio.
- 6.125 The ACCC considers that it is a commercial decision for Sky and TVN to decide what audio should accompany the thoroughbred races they broadcast and what information should be included in the audio. The ACCC considers that it is not unreasonable for each channel to want to use their own audio on the races in which they hold the license for broadcasting rights.
- 6.126 The ACCC also notes that the MOU does not place restrictions on what type of information either TVN or Sky can include in the audio to accompany the races they broadcast. Further, as noted previously, the MOU provides that TVN will retain control over the content and look of the TVN Channel and no changes are to be made without prior approval of TVN.
- 6.127 The ACCC considers that the provisions in the MOU which relate to the audio to accompany the thoroughbred races Sky and TVN hold rights to, are unlikely to raise significant competition concerns.

Public benefit

- 6.128 The applicants submit the MOU will deliver numerous public benefits, including:
- the end of split vision
 - production efficiencies leading to a more efficient allocation of resources
 - increased output, improved quality of services and innovation and
 - reduction in transaction costs
- 6.129 The ACCC's assessment of the public benefits claimed by the applicants and interested parties follows.

End of split vision

- 6.130 The applicants submit that the MOU will bring an to end to split vision and the negative effects it had on wagering revenue, the disruption it caused to pubs and clubs, the confusion and inconvenience experienced by punters and the detrimental effect it had on the racing industry as a whole (see paragraphs 2.43-2.50).
- 6.131 The majority of interested parties³⁵ agreed that split vision had a negative impact on the racing industry, wagering revenue and punters, and as a result support the MOU

³⁵ ACTTAB Limited submission dated 22 February 2007, RWWA submission dated 9 March 2007, Sportscolor submission dated 13 March 2007, AABC submission dated 13 March 2007, Foxtel submission dated 14 March 2007, AHRC submission dated 13 March 2007, NSW Liquor, Gaming and Racing submission dated 16 March 2007, AHA submission dated 13 March 2007, Queensland Harness Racing submission dated 14 March 2007, APHRC submission dated 19 March 2007, RVL submission dated 13 March 2007, HRV submission dated 19 March 2007 and RacingNSW submission dated 12 March 2007.

because it will bring an end to split vision. In particular, interested parties stated that split vision resulted in:

- a decline in wagering revenues for the three codes of racing and a decline in attendance at race meetings³⁶
- pubs, clubs, and pay television customers, requiring subscriptions to both the Sky and TVN Channels in order to access a complete racing line up³⁷ and
- a decline in punter support of thoroughbred racing and creation of punter disillusionment.³⁸

6.132 Alternatively, Betfair submit that the negative effects of split vision were not as severe as stated by the applicants. Betfair submit that part of the downfall in wagering revenue can be attributed to the smoking bans in pubs and clubs imposed in certain jurisdictions. Betfair submits that the smoking bans, rather than split vision, caused more of the downfall in wagering than the applicants acknowledge.

6.133 The ACCC accepts that split vision had a negative effect on the racing industry and accepts that a number of groups were affected, as noted by the applicants and interested parties.

6.134 The ACCC considers that the implementation of the MOU will bring a resolution to the split vision dispute which will have positive effects in the following areas:

- there will be improved funding to all three codes of racing due to avoiding reduction in wagering which is likely to result from sharing content
- punters will be more satisfied and their interest in the sport will be better maintained
- pubs and clubs will no longer be required to subscribe to the two channels to access all thoroughbred racing vision, and will have the option to acquire one or both of the channels and
- funding will be restored to all three codes of racing.

6.135 The ACCC therefore considers that the implementation of the MOU is likely to result in a public benefit.

Production efficiencies leading to a more efficient allocation of resources

6.136 The applicants submit that the MOU will generate production efficiencies for Tabcorp/Sky and TVN by providing for the outsourcing of the production of the TVN Channel to Sky. The applicants state that the outsourcing of production to Sky will enable both Sky and TVN to reallocate resources in order to reduce the net cost of both channels while improving the quality and range of products they offer.

³⁶ AHRC submission dated 13 March 2007.

³⁷ Foxtel submission dated 14 March 2007.

³⁸ AHRC submission dated 13 March 2007.

- 6.137 TVN and Sky currently operate separate production facilities in respect of their channels. The ACCC understands that Sportscolour, a television production firm, captures and generates the vision at race events for both TVN and Sky. Depending on the relevant license agreements, the vision from Sportscolour's outside broadcast vans is distributed on-course to the racing club's closed circuit television system; to either Sky Channel or TVN for inclusion into their programming; to free-to-air television networks when required; and to Betfair outlets.
- 6.138 Once the vision is received in their respective studios, TVN and Sky add interviews, odds, data etc which is then separately distributed to the various pay television providers, TAB outlets, pubs and clubs and international venues.
- 6.139 The MOU provides that:
- Sky will absorb the TVN Channel production costs up to a predetermined amount with TVN paying costs beyond this amount
 - Sky will provide its facilities, resources and staff for use in the production of the TVN Channel
 - TVN will pay for certain third party service providers and suppliers
 - TVN will maintain control over the content and look of the TVN Channel
 - service standards must, at a minimum, be equivalent to those employed by Sky in the production of the Sky Channel and
 - TVN may terminate by providing six months written notice to Sky.
- 6.140 The applicants advise that a significant proportion of Sky's assets (both in terms of production equipment and staff) are presently under-utilised. The MOU will result in Sky producing more without any corresponding increase in its own costs as it will be able to cover a portion of the cost of the production of the TVN Channel using its existing building, equipment and staff.
- 6.141 The applicants also advise that as Sky is currently a more efficient producer of the TVN Channel, TVN will achieve significant cost savings.³⁹
- 6.142 RVL and RWWA generally supported the efficiency claims made by the applicants. For example, RWWA submit that the MOU will result in a reduction in operating costs through production efficiencies for vision suppliers and also a reduction in inefficient activities. RVL was of the view that the outsourcing of the TVN Channel to Sky may allow for increased range and quality across a number of products that may be offered by TVN and Sky.
- 6.143 The ACCC accepts that as a result of outsourcing the production of the TVN Channel to Sky, TVN will experience significant cost savings. The ACCC also accepts that the MOU will result in production efficiencies as Tabcorp/Sky will be able to produce the TVN Channel using under-utilised resources.

³⁹ The applicants provided confidential information detailing the amount of cost savings likely to result.

- 6.144 In considering public benefits - particularly cost savings from increases in productive efficiency from conduct proposed for authorisation - the ACCC applies a public benefit standard when determining the weight to be given to those savings. That is, the ACCC will consider how much weight society considers should be attached to a public benefit. Of particular interest will be the number and identity of the proposed beneficiaries.
- 6.145 The benefits from improvements in production efficiencies are discussed at paragraphs 6.159-6.167.

Increased output, improved quality of services and innovation

- 6.146 The applicants submit that the MOU will result in increased output and improved quality of services which will benefit punters and thoroughbred racing enthusiasts.
- 6.147 The applicants submit that the MOU will enable the creation of two channels through the sharing of thoroughbred racing content which will be more aligned to the interests of customers. Sky through its channel will be able to focus on showing all codes of racing from all over Australia, with the purpose of promoting wagering, using its wall-to-wall format. This will satisfy punters who wish to wager on the three codes of racing including premium thoroughbred races. In contrast, TVN will be able to use its channel to showcase premium quality races from all States and Territories, giving it a more attractive range and better quality races, which will satisfy thoroughbred racing enthusiasts.
- 6.148 RVL, RWWA and Sportscolour note that the MOU will enable the provision of two channels which show thoroughbred racing vision in different formats. They note that this will provide customers with greater choice and is likely to promote wagering revenue and interest in thoroughbred racing.
- 6.149 The ACCC accepts that the MOU will enable Sky and TVN to improve their services. Sky and TVN will be able to provide two channels with expanded thoroughbred racing content. Given the different formats of the Sky and TVN channels, consumers (including pubs, clubs and pay television subscribers) will be able to choose which channel suits their particular interest.
- 6.150 RVL and RWWA also consider there is a benefit in the Sky and TVN Channels being available via a number of distribution methods such as pay television, free-to-air television and subscription satellite television services to pubs and clubs.
- 6.151 The applicants submit that under the MOU, TVN will receive a commission from Tabcorp for each additional Category 2⁴⁰ race shown live on free-to-air television. The applicants submit that the additional free-to-air coverage enhances the individual event's profile by exposing the event to a broader audience, which promotes greater wagering and improves attendance at the event.

⁴⁰ Category 2 races include Australia Cup Day, Ascot Vale Stakes Day, Turnbull Stakes Day, Caulfield Cup Day, Caulfield Guineas Day, Thousand Guineas Day, Blue Diamond Stakes Day, Sandown Classic Day, Cox Plate Day, Golden Slipper Day, Golden Slipper Day, AJC Derby Day, AJC Metropolitan Day, AJC Sydney Cup Day, AJC Oaks Day, AJC Doncaster Day, AJC Epsom Day, Manikato Stakes Day, Australia Stakes Day, Rosehill Guineas Day, Coolmore Classic Day and Golden Rose Day.

- 6.152 The ACCC accepts that additional agreements made with free-to-air providers to show certain thoroughbred racing events will provide greater access to customers and promote thoroughbred racing to a wider audience.
- 6.153 The ACCC notes that under the MOU, Sky will waive its exclusivity over the Foxtel and Optus pay television platforms. The MOU also enables the TVN Channel to be broadcast on the Austar network. As a result, the MOU enables TVN to negotiate with the main pay television providers to show its channel on these platforms. Foxtel noted that the availability of the TVN Channel on the Foxtel and Optus pay television platforms will give TVN access to over 1.29 million subscribers. The ACCC accepts that the MOU will result in improved services to pay television subscribers of Foxtel, Optus and Austar as they will be able to access both the Sky and TVN Channels.
- 6.154 APHRC, Queensland Harness Racing and HRV submit that they have an exclusive agreement with Sky to broadcast their harness race meetings on Sky Channel. These harness racing clubs are concerned that the MOU may result in only thoroughbred races being shown on pay television networks or alternatively less coverage of harness racing by Sky. They submit that this would have severe impact on harness racing clubs resulting from less exposure and less revenue to the harness racing industry.
- 6.155 The ACCC notes the concerns raised by greyhound and harness racing clubs regarding the potential for the MOU to affect the amount of air time Sky gives to showing greyhound and harness racing events. However, the ACCC considers that the races and the timeslots Sky gives to those racing events it shows on Sky Channel is a commercial decision for Sky and the relevant clubs. The MOU does not specify how Sky is to show racing content on the Sky Channel. Further, the ACCC notes that given that the aim of Sky Channel is to maximise wagering revenue, it is not in Tabcorp/Sky's interest to reduce the exposure of any racing code on its channel.
- 6.156 The applicants submit that regional areas will benefit from improved coverage of thoroughbred races. The applicants advise that Sky Channel tends to only show country races with limited commentary, keeping in line with its wall-to-wall format. The applicants submit that the sharing of content will give TVN the opportunity to broadcast country races from all over Australia.
- 6.157 The applicants consider that any regional race broadcast on TVN will benefit from the exposure, given the additional material the TVN Channel presents, including additional commentary and interviews with local owners and jockeys. The applicants consider that it will generate interest in these regional areas with the effect of increasing wagering turnover for those country races. As a result, the applicants claim that benefits will flow to the regional racing clubs in the form of funding and other indirect benefits such as increased employment and tourism.
- 6.158 The ACCC accepts that the MOU will provide greater opportunity to show both metropolitan and regional thoroughbred racing through the sharing of thoroughbred racing rights between TVN and Sky. However, the ACCC does not consider that the benefits to regional areas as claimed by the applicants are likely to result, as the MOU does not provide that country races in particular will be promoted more on the TVN or Sky Channel. The ACCC notes that TVN is likely to only show premium thoroughbred regional races.

- 6.159 The applicants also submit that the MOU creates scope for improved innovation and quality of the Sky and TVN Channels. The applicants submit that as a result of achieving production efficiencies, both Sky and TVN will achieve cost savings which can be used for the development of their channels.
- 6.160 In particular, TVN submit that the significant savings⁴¹ it will achieve will be reallocated to create new programs for the benefit of punters and thoroughbred enthusiasts. Such programs include:
- Meet the Press
 - Breeding Show
 - Have your Say
 - Turf History
 - Rising Stars
 - Race Day Preview and
 - Trackside.
- 6.161 TVN submit that these programs will begin to air from March 2007. TVN notes that it is also considering developing:
- pace record line in thoroughbred racing
 - virtual advertising and
 - enhanced coverage of racing through the use of additional cameras and new technology.
- 6.162 Sky submits that the implementation of the MOU allows Sky to give additional focus on the content and coverage of its channel. Sky submits it endeavours to deliver increased quality and quantity of race meeting content and wagering information, such as:
- increased import of quality international races from countries such as Hong Kong, South Africa and France
 - introduction of improved betting ‘infotainment’ segments and
 - launching new sports programs such as ‘Sportsbet Fever’.
- 6.163 RVL notes that the cost savings achieved through the outsourcing of the production of the TVN Channel can be utilised in program innovation on the TVN Channel.
- 6.164 RWWA notes that the MOU will deliver improved capacity for innovation in delivery of vision.

⁴¹ The applicants provided confidential information detailing the amount of cost savings likely to result.

- 6.165 The ACCC accepts that Sky and TVN will experience cost savings as a result of Sky producing the TVN Channel which will allow TVN to develop racing shows and products in order to stimulate the interests of racing enthusiasts and to improve the quality of the TVN Channel.
- 6.166 The ACCC considers that as a result of the MOU and the end of split vision, both Sky and TVN have greater opportunity to innovate their respective channels. As a result, the ACCC considers that some public benefit is likely to arise.
- 6.167 Overall, the ACCC considers that the MOU is likely to result in improved output, improved quality of race broadcasting services and improved innovation and therefore is likely to result in a public benefit. The ACCC also accepts that improvements in output and quality of race broadcasting services will assist in promoting the racing industry.

Reduction in transaction costs

- 6.168 The applicants submit that the MOU will result in a decrease in transaction costs for those pubs, clubs and other commercial venues with wagering facilities that wish to deal only with Sky to receive wagering vision.
- 6.169 The applicants submit that under split vision, commercial venues were required to contract with both Sky and TVN in order to deliver a complete package of thoroughbred race broadcasting as demanded by patrons. The MOU grants Sky a non-exclusive right to distribute the TVN Channel to pubs, clubs and other commercial venues. The applicants submit that as a result of Sky's ability to distribute the TVN Channel, pubs, clubs and other commercial venues will benefit from transaction savings by having the option to deal only with Sky for the distribution of both channels.
- 6.170 ACTTAB Limited submit that under split vision, sub-agencies in pubs and clubs in the ACT were required to negotiate individual agreements with TVN and these venues found the costs prohibitive.
- 6.171 The ACCC accepts that there may be some reduction in transaction costs if a pub, club or other commercial venue with wagering facilities chooses to deal with only Sky for access to both the Sky and TVN Channels. However, the ACCC considers that any reduction in cost savings to pubs and clubs may be eroded if Sky decides to offer the Sky and TVN Channels only as a bundled product at a higher price (see paragraphs 6.67-6.72).

Balance of public benefit and detriment

- 6.172 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the MOU is likely to result in a public benefit that will outweigh any public detriment.
- 6.173 In the context of applying the net public benefit test at section 90(8)⁴² of the Act, the Tribunal commented that:

⁴² The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁴³

- 6.174 The ACCC considers that the MOU is likely to result in public benefit from:
- the resolution of the split vision dispute which led to a decrease in wagering revenue, punter confusion, increased costs to pubs and clubs, and a reduction in funding to the racing industry as a whole
 - increased production efficiencies to both Sky and TVN
 - improved output, quality of broadcasting services and innovation by TVN and Sky and
 - reduced transaction costs to pubs, clubs and other commercial venues with Sky's non-exclusive distribution right of TVN.
- 6.175 While the MOU is likely to result in public benefit, the ACCC considers the MOU will raise competition issues in respect of:
- the supply of race broadcasting services to commercial venues such as pubs and clubs and
 - the acquisition of future broadcasting rights from the thoroughbred racing clubs.
- 6.176 The ACCC is concerned about the potential for Tabcorp/Sky to distribute the Sky and TVN Channels as a bundled product to commercial venues with wagering facilities, without at least offering the Sky Channel separately to these venues.
- 6.177 The combined effect of Tabcorp offering the Sky and TVN Channels as a bundle, in conjunction with Tabcorp's existing requirement that venues with TAB Kiosks and Easy Bet Terminals acquire Sky Channel could result in commercial venues paying a higher price for race broadcasting services, because they would be forced to acquire both channels.
- 6.178 Such bundling may also inhibit the ability of TVN to distribute the TVN Channel to commercial venues with wagering facilities, given the requirement that venues with wagering facilities from Tabcorp must also acquire Sky Channel. Venues would be prevented from acquiring the TVN Channel directly from TVN if it was forced as part of bundle with Sky Channel.
- 6.179 The ACCC considers that it is important that commercial venues with wagering facilities have a choice of whether to acquire both the Sky and TVN Channels.
- 6.180 The ACCC considers that the MOU will have a competitive impact on the incentives of Sky and TVN to bid for future broadcasting rights from thoroughbred racing clubs. This is because the MOU provides that the unsuccessful bidder will still be able to access audio-visual content of races under a sub-license and therefore may not bid for them as aggressively than without the MOU.

⁴³ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

- 6.181 That being said, the ACCC acknowledges that there are commercial incentives to be the primary license holder after 30 December 2012 when the MOU expires. To some degree such incentives may counter the competitive impact resulting from content sharing under the MOU.
- 6.182 The ACCC considers that the MOU does not raise any significant competition concerns in the distribution of race broadcasting services to television providers or the provision of wagering services.
- 6.183 The ACCC notes that Tabcorp's ownership of Sky Channel provides Tabcorp with a competitive advantage relative to other wagering providers including any new Victorian wagering licensee (if one is appointed). However, the ACCC notes that the MOU includes provisions which oblige Tabcorp/Sky to provide a third party Victorian wagering licensee with access to racing vision.
- 6.184 The ACCC also notes that any new third party Victorian wagering licensee would need to negotiate with Sky to obtain thoroughbred racing vision with or without the MOU and at least with the MOU, both Sky and TVN would exist to provide the Sky and TVN Channels.
- 6.185 Further, any advertising restrictions which limit betting exchanges from advertising on Sky or TVN exist with or without the MOU.
- 6.186 The Act allows the ACCC to grant authorisation subject to conditions.⁴⁴ Generally, the ACCC may impose conditions to ensure that the net public benefit test is met or continues to be met over the proposed period of authorisation.
- 6.187 Betfair submits that the ACCC should impose a condition that requires Tabcorp to implement access arrangements to allow wagering service providers other than totalisators to utilise Tabcorp's broadcasting platforms. The ACCC notes that with or without authorisation, other wagering service providers would be required to negotiate with Sky to access Sky's broadcasting platforms. Further, the ACCC notes that there are no provisions in the MOU which restrict or limit Tabcorp's ability to deal with other wagering service providers. Accordingly, the ACCC does not consider that such a condition is necessary.
- 6.188 Betfair submits that the ACCC should impose a condition that prevents TVN granting exclusive licenses to Sky to broadcast TVN shareholder races. As noted at paragraphs 6.84-6.86 the ACCC does not consider that the exclusive licenses granted by TVN to Sky under the MOU raise any significant competition concerns. The ACCC notes that while TVN is granting exclusive licenses to Sky to broadcast live on pay television and subscription services, TVN vision will continue to be available through the TVN Channel.
- 6.189 Betfair also submits that the ACCC should impose a number of conditions which would provide that TVN is not restricted from displaying wagering information from other providers, ensures that TVN maintains control over the look and content of the TVN Channel, and that there are no restrictions on using third party audio to accompany race vision.

⁴⁴ Section 91(3).

- 6.190 The ACCC notes that there are no provisions in the MOU which prevent TVN from displaying wagering odds from other wagering operators (see paragraph 6.116). Further, the MOU provides that TVN is to maintain control over the look and content on the TVN Channel and no changes can be made without prior approval from TVN (see paragraph 3.25). The ACCC also notes that the provisions under the MOU which relate to third party audio apply to both TVN and Sky and that the MOU does not place restrictions on what type of information either TVN or Sky can include in the audio to accompany the races they broadcast (see paragraphs 6.119 - 6.127). Accordingly, the ACCC does not consider it necessary to impose these conditions.
- 6.191 Overall, the ACCC is satisfied that the public benefits arising from the MOU will outweigh the public detriments, provided that Tabcorp/Sky do not bundle the Sky and TVN Channels without at least offering the Sky Channel separately to commercial venues with wagering facilities.
- 6.192 To ensure that the public benefits generated by the MOU outweigh the public detriments the ACCC proposes to grant authorisation subject to the following condition:
- Should Tabcorp/Sky decide to supply the Sky and TVN Channels as a bundled product to commercial venues with wagering facilities, Tabcorp/Sky must at least offer the Sky Channel separately to such venues.

Length of authorisation

- 6.193 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in light of any changed circumstances.
- 6.194 The ACCC notes that the MOU will expire on 31 December 2012. The applicants stated that the commercial reasons for the MOU expiring in December 2012, is to ensure that Tabcorp and Sky have access to the Melbourne Spring Racing Carnival in 2012.
- 6.195 RVL raised concerns about the term of the MOU and how it may affect the ability of any new Victorian wagering licensee to access racing vision from Sky (see paragraphs 6.93 - 6.95). As discussed at paragraphs 6.99 - 6.100 the ACCC is satisfied that sufficient safeguards exist should concerns arise that Tabcorp/Sky has not complied with the provisions of the MOU which relate to providing vision to a new wagering licensee in Victoria.
- 6.196 As such, the ACCC proposes to grant authorisation to the MOU until 31 December 2012.

7. Draft determination

The application

- 7.1 On 15 February 2007 Tabcorp Holdings Limited, Sky Channel Pty Ltd, and ThoroughVision Pty Ltd (collectively referred to as ‘the applicants’) lodged applications for authorisation A91031 and A91032 with the Australian Competition and Consumer Commission (the ACCC).
- 7.2 Application A91031 was made under subsection 88(1) of the *Trade Practices Act 1974* (Act) to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 7.3 Application A91032 was made under subsection 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing.
- 7.4 The applicants seek authorisation for a Memorandum of Understanding (MOU) which broadly outlines the commercial terms for the sharing of thoroughbred racing content between the Sky and TVN Channels. In particular, authorisation is sought for Schedules 1 to 7 of the MOU and any arrangements made under clause 2.3 of the MOU.

The net public benefit test

- 7.5 For the reasons outlined in Chapter 6 of this draft determination, and subject to the condition below:
- the ACCC considers that in all the circumstances the arrangements for which authorisation is sought under A91031 are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements and
 - the ACCC is satisfied that the arrangements for which authorisation is sought under A91032 are likely to result in such a benefit to the public that the arrangements should be allowed to take place.
- 7.6 The ACCC therefore **proposes to grant** authorisation to applications A91031 and A91032 **on condition that** :
- Should Tabcorp/Sky decide to supply the Sky and TVN Channels as a bundled product to commercial venues with wagering facilities, Tabcorp/Sky must at least offer the Sky Channel separately to such venues.

Conduct for which the ACCC proposes to grant authorisation

- 7.7 The ACCC proposes to grant authorisation to the applicants for Schedules 1 to 7, excluding Schedule 5, and any arrangements made under clause 2.3 of the MOU until 31 December 2012.

7.8 Further, the proposed authorisation is in respect of the MOU as it stands at the time authorisation is granted. Any changes to the MOU during the term of the proposed authorisation would not be covered by the proposed authorisation.

7.9 This draft determination is made on 3 May 2007.

Further submissions

7.10 The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.