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

Betfair Pty Ltd

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1 Executive summary

Betfair Pty Limited (**Betfair**) makes this submission in response to the Draft Determination of the Commission which proposes to grant authorisation, subject to a condition, to the arrangements the subject of the applications for authorisation A91031 and A91032 lodged on 15 February 2007 by Tabcorp Holdings Limited (**Tabcorp**), Sky Channel Pty Ltd (**Sky**), and ThoroughVision Pty Ltd (**TVN**).

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

Betfair provided a submission to the Commission on 20 March 2007. Betfair submitted that a necessary precondition for authorisation will be access arrangements which allow competitive wagering service providers that offer wagering on thoroughbred racing events to have access to the broadcasting platforms owned by the vertically integrated Tabcorp entities.

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

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

This submission deals with the reasons given by the Commission, in its draft determination, as to why it does not currently consider that it is necessary for the Tabcorp entities to implement access arrangements in the terms sought. In particular, the Commission stated at paragraph 6.187:

"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."

In Betfair's view, these factors do not address the anti-competitive effect identified by Betfair in consolidating all premium thoroughbred racing in one channel controlled by Tabcorp. In particular:

- (a) Betfair agrees that with or without authorisation wagering service providers would be required to negotiate with the Tabcorp entities to access their broadcasting platforms. However with authorisation:
 - (i) the competitive advantage of the Tabcorp entities over other wagering service providers, through the control by Tabcorp of consolidated racing vision, would be strengthened; and

- (ii) pubs, clubs and individuals interested in wagering would be more likely to only choose to subscribe to, or view, the racing channel controlled by the Tabcorp entities to the exclusion of TVN.

In the absence of appropriate access arrangements for other wagering service providers, there would be a lessening of competition in the National Wagering Market (defined in Betfair's previous submission). It is insufficient to point to the requirement of wagering service providers to currently negotiate with Sky for access to its broadcasting platform if the effect of authorisation is to structurally enhance the market power of the Tabcorp entities and provide them with the ability to foreclose access to the channel that punters want to watch.

- (b) Betfair notes that there are no provisions in the MOU which restrict or limit Tabcorp's ability to deal with other wagering service providers. However, Betfair is not concerned about the Tabcorp entities being contractually bound by TVN not to deal with competitive wagering service providers. Rather, Betfair is concerned that in the context of an agreement between the only two broadcasters of racing vision to create a single "punter's channel" controlled by one totalisator, which consolidates all premium thoroughbred races in a form attractive to punters, that totalisator will have a greater incentive to refuse access to competitive wagering service providers, and such competitive wagering service providers will not have any other choice of viable competitive racing vision alternatives.

Betfair expands on some of these points briefly below.

2 Corrections

Betfair notes a number of minor issues in the draft Determination which may require correction:

- Paragraph 2.30 of the draft Determination notes that sports other than racing "do not receive funding or product fees from wagering operators who conduct betting on the event". We note that, as well as providing funding to the Australian racing industry through taxes, product levy payments and sponsorship, Betfair has been at the forefront of agreeing product fee payments with Australian sporting bodies. In particular, Betfair has entered into product fee arrangements with the Australian Football League, Cricket Australia, the PGA Australasian Tour and the National Rugby League.
- Paragraph 6.137 of the draft Determination makes reference to "Betfair outlets". We note that Betfair does not operate retail outlets.

3 Consolidation of thoroughbred race broadcasting

The application and the draft Determination make numerous references to MOU having the effect of ending "split vision". In essence, this involves the creation of a single consolidated "punter's channel" which is able to broadcast all premium thoroughbred races in Australia (along with harness racing and greyhound racing).

TVN may provide some coverage of thoroughbred races in the future with the MOU, but not in a "wall to wall" format attractive to punters. Rather, TVN has indicated that it will broadcast a large range of programs aimed at thoroughbred racing enthusiasts, rather than punters. For example, TVN has said that it will invest in programs such as Meet the Press, Breeding Show, Have your Say, Turf History, Rising Stars, Race Day Preview and Trackside.

We note that the present situation, and likely counterfactual, is as follows:

- (a) TVN has broadcasting rights for races held by Victorian thoroughbred racing clubs, the Australian Jockey Club, the Sydney Turf Club and rights to Darwin races;¹ and
- (b) Sky has broadcasting rights to all Australian thoroughbred racing except for those rights owned by TVN.²

Although the TVN races account for only about 10% of racing vision by content, they are the most valuable races from a wagering perspective. Tabcorp has noted that approximately 35% of its wagering turnover comes from this 10% of races.³

Betfair acknowledges that there may be a benefit to venues providing wagering services to punters in subscribing to only one “punter’s channel” rather than two, and there may also be a benefit to punters in having a single channel to go to for all racing vision. However, concentrating “wall to wall” racing vision in one channel under the control of a single wagering service provider raises competition issues as a result of the increased potential for that wagering service provider to foreclose access to its competitors.

4 Increase in competitive advantage of Tabcorp

The Commission has noted that, given the vertical integration of Tabcorp and Sky, there is potential for Tabcorp to use its ownership of Sky Channel to affect the ability of wagering service providers to compete with Tabcorp.⁴ That is, Tabcorp is able to leverage its ownership of Sky to increase its competitive advantage over other wagering service providers.

The importance of racing vision to all wagering service providers has also been highlighted by the Commission:⁵

“Media coverage of racing 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. ...

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.”

The Commission has further noted that Tabcorp’s ownership of Sky provides Tabcorp with a competitive advantage relative to other wagering service providers including any new Victorian wagering licensee.⁶

In response to concerns expressed by the Commission, the parties have recognised the competitive detriment that would be suffered by a new Victorian off-course totalisator if it

¹ Draft Determination at [2.37]-[2.39]

² Draft Determination at [6.12]

³ Draft Determination at [2.45]

⁴ Draft Determination at [6.28]

⁵ Draft Determination at [2.32]-[2.33]

⁶ Draft Determination at [6.183]

was not able to have “access to racing vision”.⁷ As a result, they have included provisions in the MOU which provide that such a new totalisator must be offered the opportunity to distribute the racing and wagering channel which includes coverage of Victorian and Sydney metropolitan thoroughbred racing. The MOU provides for arbitration of the appropriate licence fee in the absence of agreement.

These provisions constitute a clear acknowledgement that access to racing vision is necessary to the commercial viability of a new off-course totalisator. Congruent issues arise in relation to:

- (a) a new Victorian totalisator’s access to the racing and wagering channel (in particular, its ability to distribute this channel to pubs and clubs); and
- (b) Betfair’s access to the racing and wagering channel (in particular Betfair’s ability to include wagering content in such broadcasts).

Given the central importance of racing vision to the commercial operation of *all* wagering service providers offering betting on races, there seems to be no reason why wagering service providers other than the Victorian totalisator should not also have an appropriate access regime.

⁷ Draft Determination at [6.87], [6.91], [6.94], [6.97], [6.183].