

[RESTRICTION OF PART OF PUBLICATION CLAIMED]

19 October 2007

**Tabcorp Holdings Limited
Submission to the
Australian Competition and
Consumer Commission:
Harness Racing Victoria
Exclusive Dealing
Notification N93059**

19 October 2007

Freehills

MLC Centre Martin Place Sydney NSW 2000 Australia
GPO Box 4227 Sydney NSW 2001 Australia

Sydney Melbourne Perth Brisbane Singapore

Telephone +61 2 9225 5000 Facsimile +61 2 9322 4000
www.freehills.com DX 361 Sydney

Correspondent offices in Hanoi Ho Chi Minh City Jakarta

1 Introduction

This submission is provided by Tabcorp Holdings Limited (**Tabcorp**) to the Australian Competition and Consumer Commission (**ACCC**) in response to a letter from the ACCC to Tabcorp's CEO, Mr Funke Kupper, dated 6 September 2007 (**ACCC's Letter**), which attached a Draft Notice dated 6 September 2007 (**Draft Notice**) in respect of a notification lodged by Harness Racing Victoria (**HRV**).

This is Tabcorp's first written submission to the ACCC in relation to the notification lodged by HRV (**HRV Notification**). Tabcorp was not consulted by HRV in respect of the preparation of the HRV Notification, nor was it aware until it received the ACCC's Letter that the HRV Notification had been lodged. Further, Tabcorp had no knowledge of, and was not consulted by HRV in relation to, the Race Field Approval Agreements referred to in the HRV Notification (**Race Fields Approval Agreements**) or the proposal by HRV to provide rebates to selected bookmakers on bet-backs made by those bookmakers with Tabcorp.

This submission provides:

- an outline of the HRV proposal;
- background information on Tabcorp and its operations;
- information on the Victorian Race Fields legislation;
- Tabcorp's comments on the HRV Notification. Tabcorp does not support the HRV Notification as currently formulated. However, it outlines an approach that it considers will address the concerns of the ACCC, while also meeting the objectives of the Victorian Race Fields legislation and allowing HRV to satisfy its statutory obligation to promote harness racing in Victoria;
- a list of some of the important factual and other errors in the submissions provided to the ACCC by interested parties, some of which are reflected in the Draft Notice; and
- Tabcorp's responses to the specific questions raised by the ACCC in the Draft Notice.

2 HRV proposal

HRV is proposing to enter into Race Fields Approval Agreements with a number of specified bookmakers who wish to use race fields information for Victorian harness racing and to accept bets on Victorian harness racing.¹

Under the Race Fields Approval Agreements, HRV will:

¹ The specified bookmakers with whom HRV is proposing to enter Race Fields Approval Agreements are Centrebet Racing Pty Ltd, CentreRacing, International All Sports Limited, Sportingbet Australia Pty Ltd, Sportsbet Pty Ltd and Sports Acumen Pty Ltd. See Draft Notice, paragraphs 1.10 - 1.12.

- grant approval for the bookmaker to publish race field information on the bookmaker's website and in internal office materials to enable the bookmaker to accept bets in relation to Victorian harness racing; and
- supply race field information to the bookmaker.

In order to be granted approval to publish race field data, the bookmaker will be required to:

- meet the integrity standards required by HRV, including the requirement to hold an interstate or international wagering or bookmaking licence;² and
- pay a fee to HRV (**Fee**).

Tabcorp understands that the Fee is for the grant of approval to publish or otherwise make available a race field, and not for the supply of the race field information itself (although this is not clear from the HRV Notification).

HRV is not the only supplier of race field data for Victorian harness racing and Tabcorp understands that the acquisition of race field data by the bookmaker from HRV (as opposed to a competing supplier) is not a condition of the grant of approval to publish the data.

Under the Race Fields Approval Agreements, HRV will offer a rebate on the Fee otherwise payable in a particular month equal to 1% of the value of all bet-backs or layoffs placed by the bookmaker with Tabcorp on any harness racing in Australia in a particular calendar month, capped at the amount of the Fee otherwise payable by the bookmaker in that month (**Rebate**).³

HRV notified two aspects of its proposed conduct:

- (1) the granting of approval to use race field data on condition that the bookmakers hold an interstate or international wagering licence; and
- (2) the payment of the Rebate, calculated by reference to the value of bet-backs, on condition that the bookmaker places the bet with Tabcorp.

Tabcorp understands that the ACCC is not concerned with the requirement that the bookmakers be licensed, and this aspect of the HRV proposal is not discussed further in this submission.

3 Industry operations

3.1 Tabcorp

(a) Tabcorp business operations

Tabcorp is an Australian company with interests in gaming and wagering.

It has wagering operations in Victoria and New South Wales, which are operated under separate licences for each State and have separate and distinct wagering pools. In each State, Tabcorp operates its businesses in accordance with arrangements it has entered into with the relevant racing authorities in that State.

Victorian operations

² Draft Notice, paragraph 1.13.

³ HRV Submission dated 10 July 2007, p 3.

Tabcorp holds the exclusive licence under the Gambling Regulation Act 2003 (Vic) (**GRA**) to provide off-course totalisator wagering services in Victoria for thoroughbred, harness and greyhound racing until 2012. It does so through:

- approximately 605 retail outlets throughout Victoria, of which 95 are agencies, and 510 are licensed venues comprising hotels, clubs, and kiosks (smaller outlets, some of which are in hotels and clubs); and
- 132,470 telephone/internet accounts. These accounts are operated by 128,919 account holder's (some of whom have more than one account).⁴

Tabcorp also has a licence to conduct on-course totalisators in Victoria and further offers totalisator and fixed odds betting on sporting and other events.

Tabcorp's Victorian wagering business is conducted through a joint venture agreement between Tabcorp Participant Pty Ltd (a wholly-owned subsidiary of Tabcorp) and VicRacing Pty Ltd, a company established by the Victorian racing industry. Under the joint venture arrangements, Tabcorp is required to pay **[RESTRICTION OF PART OF PUBLICATION CLAIMED]** of its total profit from gaming and wagering to VicRacing.

Tabcorp is also party to a Racing Program Agreement and a Product Supply Agreement (collectively, the **Products Agreements**) under which the major Victorian racing bodies have undertaken to provide Tabcorp with certain services and information in return for a Product Fee of **[RESTRICTION OF PART OF PUBLICATION CLAIMED]** of revenue and a Marketing Fee which effectively equates to **[RESTRICTION OF PART OF PUBLICATION CLAIMED]** of off-course revenue. This is in addition to the **[RESTRICTION OF PART OF PUBLICATION CLAIMED]** profit share.

NSW operations

In 2004, Tabcorp acquired by takeover the NSW-based publicly listed company Tab Limited. Tab Limited is now a wholly owned subsidiary of Tabcorp. It holds a licence under the Totalisator Act 1997 (NSW) to provide off-course totalisator wagering services in New South Wales for thoroughbred, harness and greyhound racing until 2097, with an exclusivity period until June 2013. Tab Limited also has a licence to conduct on-course totalisators in New South Wales and offers totalisator and fixed odds betting on sporting and other events. Tab Limited's other businesses are the Sky Channel television service and a NSW radio broadcast service, namely 2KY1017, which specialises in race broadcasts.

Tab Limited is party to a Racing Distribution Agreement, under which it pays to the New South Wales Racing Industry a Product Fee of **[RESTRICTION OF PART OF PUBLICATION CLAIMED]** on net wagering revenue, and a Wagering Incentive Fee of **[RESTRICTION OF PART OF PUBLICATION CLAIMED]** of wagering profits.

Other Tabcorp Group activities

In addition, the Tabcorp Group conducts:

- gaming operations in Victoria under the Tabaret brand;
- casino and hospitality operations at the Star City Casino in NSW and Jupiters Casino's Queensland;
- Keno operations in venues across Queensland, NSW and Victoria (with the Victorian keno operations being operated jointly with Tattersall's under licence);
- a sports bookmaking service provided to UNITAB, TOTE Tasmania, ACTTAB and RWWA; and
- Trackside – a virtual racing game distributed in Victoria.

(b) Alternative forms of betting

⁴ All figures are current as at October 2007.

Wagering on racing in Australia has traditionally been characterised by two alternative forms of betting:

- pari-mutuel or totalisator betting (the exclusive domain of TABs); and
- fixed odds betting.

(1) Pari-mutuel or totalisator betting

In pari-mutuel betting, the final odds are not calculated until after the close of betting on the relevant event. All the bets are consolidated or 'pooled' into a totalisator pool. The totalisator operator deducts from the totalisator pool a predetermined percentage of the totalisator pool (referred to as the 'commission rate' or 'take out rate') as the operator's commission. The remainder of the totalisator pool, after the deduction of the operator's commission, is referred to as the 'dividend pool' and is available for distribution to the winning customers who placed bets on the totalisator. Customers are therefore betting against each other, rather than against the operator of the totalisator. The pool is divided by the number of units of the successful outcome(s) to arrive at a 'dividend' – the basis upon which the dividend pool is divided pro rata amongst the holders of winning tickets.

(2) Fixed odds wagering

In contrast to pari-mutuel betting, in fixed odds betting the customer is informed of the odds at the time the bet is placed and the odds accepted by the customer on that bet do not change regardless of developments or betting patterns after his or her bet was placed. In fixed odds wagering, the operator's revenue depends on the outcome of the event, the management of the book of bets, and the extent to which the risk is bet-back or laid off (ie bets are placed with another wagering operator so as to spread the risk of the loss).

An alternative to both fixed odds and pari-mutuel betting is "TOTE-odds" bookmaker betting. This is where a bookmaker accepts bets, not at a predetermined price about an outcome, but rather on the basis of the payout being related to the dividend of one or more totalisators (TABs) (for example, the totalisator dividend plus a margin). Tabcorp understands that most corporate bookmakers operating out of the Northern Territory offer only a TOTE-odds product in Victorian harness racing. In offering this TOTE-odds product, corporate bookmakers are free riding directly on expenditure by the TABs (and the broader racing industry) (ie costs of pricing, form, vision and audio etc). Further, these corporate bookmakers do not provide the benefits to the race wagering market generally regarded as resulting from the co-existence of traditional on-course bookmaker (fixed) odds and totalisator betting (where the punter is able to arbitrage between bookmaker odds and the totalisator). In the case of TAB-odds bookmaker betting, the payouts offered by the corporate bookmaker are merely a function of the TAB dividends.⁵ The corporate bookmakers are able to offer this product without incurring any of the costs associated with operating and running a totalisator. They also do not incur the costs associated with generating their own fixed odds by "framing a market", assessing the contingencies and risks, and balancing a book.

For a description of traditional on-course bookmakers and corporate bookmakers see section 3.2(b)(2) below.

3.2 Contribution to the Australian Racing Industry

(a) Dependence on racing industry

⁵ Betting Task Force Report, p 92.

State racing bodies and totalisators have a mutually dependent relationship because the totalisators are dependent on the racing bodies to produce a quality racing product to drive wagering, and the racing bodies receive product fees and a share of totalisator revenue, which enables them to provide a more attractive racing product. Because the racing industry supplies the product that is necessary for TABs and bookmakers to operate, the industry's controlling bodies are able to exercise a measure of control over the entities that provide wagering services. Indeed, the activities of the TAB in each State and Territory are limited by the arrangements with the racing industry in that jurisdiction, which require the relevant TAB to return a significant portion of its revenue to the industry. Also, traditional on-course bookmakers in both NSW and Victoria make some contribution to the racing industry. For example, in Victoria, in the 2006 financial year, traditional oncourse bookmakers revenue was approximately \$525 million (which is made up, in equal shares, of both oncourse bets and via telephone bets). These bookmakers paid a 1% levy on turnover to the Victorian racing clubs only and no tax was payable to the Victorian government.

In Victoria, for example, Tabcorp is required under the terms of its joint venture arrangement with VicRacing Pty Ltd to make payments to the Victorian Racing Industry as discussed in section 3.1(a) above. The main purposes and activities of the joint venture include organisation, conduct, promotion and development of totalisator betting in Victoria on thoroughbred, harness and greyhound racing.

In addition, Tabcorp is a party to the Products Agreements, under which the major Victorian racing bodies have undertaken to provide Tabcorp with certain services and information, including an annual program of race meetings in Victorian and information to conduct totalisator wagering in Victoria. Fees are payable to Racing Products Victoria for services pursuant to the Products Agreements.

In total, the Victorian Racing Industry received the sum of [RESTRICTION OF PART OF PUBLICATION CLAIMED] from Tabcorp in the financial year ending 30 June 2007. Tabcorp also pays a wagering tax of 19.11% of its revenue to the Victorian Government.

(b) Competition from bookmakers

Bookmakers can generally be divided into two categories: Traditional on-course bookmakers and corporate bookmakers. Bookmakers conduct fixed odds betting on racing and other sports and other hybrid types of betting (eg "TOTE-odds" betting).

Bookmakers are regulated to some extent by the various racing bodies in each State and Territory. There is no statutory limit to the number of bookmakers licences issued.

(1) Traditional on-course bookmakers

Generally, traditional bookmakers are located on-course (that is, at the racecourse). However, some may now offer telephone and internet accounts. Fixed odds betting is the principal product offered by these bookmakers and they generally "frame a market".

Traditional on-course bookmakers share of wagering turnover has been in decline over recent decades and they now constitute only approximately 6% of the NSW and Victorian racing wagering market. Traditional on-course bookmakers do however make an economic contribution to the racing industry.

(2) Corporate bookmakers

The advent of electronic wagering, by telephone and particularly the Internet, has seen the rapid growth of large corporate bookmakers, with significant competitive advantages over TABs. Bookmakers have the same reliance on the racing industry as the totalisators. However, they do not (or do not to any significant extent) contribute financially to the racing industry. In this sense, corporate bookmakers 'free ride' on the racing industry, including the substantial investment of totalisators.

For example, corporate bookmakers (most of whom are licensed in the Northern Territory (and to a lesser extent the ACT)) enjoy a number of advantages when competing with TABs, including lower overhead costs (ie corporate bookmakers do not maintain the same retail distribution infrastructure), lower required contributions to the racing industry and government, and significant tax advantages. Corporate bookmakers licensed in the Northern Territory pay a turnover tax of 0.33% of turnover on racing product. In the past, they have paid no product fees or any other economic contribution to the racing industries in Victoria on whose products they operate. In contrast, Tabcorp pays product fees of [RESTRICTION OF PART OF PUBLICATION CLAIMED] of revenue in Victoria to the Victorian Racing Industry and [RESTRICTION OF PART OF PUBLICATION CLAIMED] of revenue in New South Wales (through Tab Limited) to the New South Wales Racing Industry (in addition to its profit share arrangements in each State).

In addition, corporate bookmakers are not required to contribute to information services provided to the public, although customers who use bookmakers use these services. In contrast, in Victoria, Tabcorp and the Racing Industry (including HRV) make significant payments to the costs of distributing the racing product to consumers via newspaper form guides, racing radio station Sport 927, and vision on pay television. Tab Limited makes a similar contribution to information services provided to the public in New South Wales.

4 Relevant Legislation

4.1 Gambling Regulation Act 2003 (Vic)

The HRV Notification relates to the exercise by HRV of its statutory powers under section 2.5.16A of the Gambling Regulation Act 2003 (Vic) (**GRA**).

Section 2.5.16A(1) states:

"A wagering service provider must not, in Victoria or elsewhere, publish or otherwise make available a race field in the course of business without the approval of the appropriate controlling body."

Section 83F of the Racing Act 1985 relevantly provides that the 'controlling body' in the case of harness racing is Harness Racing Victoria.⁶

"Race field" is defined in the GRA as:

"any information that identifies, or is capable of identifying, the names or numbers of horses or greyhounds-

- (a) *nominated for, or which will otherwise take part in, an intended horse race, harness race or greyhound race to be conducted in Victoria; or*
- (b) *that have been scratched or withdrawn from an intended horse race, harness race or greyhound race to be conducted in Victoria."*

Section 2.5.16A was inserted into the GRA in 2005 by The Racing and Gambling Acts (Amendment) Act 2005 (**GRA Amendment Act**). A copy of the GRA Amendment Act and the Explanatory Memorandum to the bill are provided as Annexures A and B respectively.

The requirement to obtain approval from HRV to publish harness race field data applies only to wagering service providers not licensed in Victoria.⁷ Neither Tabcorp, as the

⁶ Section 2.5.16A(2) states that the definition of "controlling body" has the same meaning as in section 83F of the Racing Act 1985.

holder of the exclusive off-course totalisator wagering licence in Victoria, nor bookmakers licensed in Victoria, are required by the legislation to obtain approval from HRV.

It is important to distinguish between the grant of approval to 'publish or otherwise use' race field data (which approval can be granted only by the appropriate controlling body), and the supply of race field data (which is undertaken on a commercial basis by a number of operators including Racing Information Services Australia (**RISA**) and Australian Associated Press (trading as AAP)). There is no legislative requirement that wagering service providers not licensed in Victoria obtain Victorian race field data from a controlling body.

4.2 Purpose of the legislation

(a) Introduction

Section 2.5.16A was a direct response by the Victorian Government to the impact on the Victorian racing industry of interstate and overseas corporate bookmakers, who make little or no direct contribution toward the funding of racing in Victoria despite deriving revenue from its operations. This problem has been recognised by both the Cross-border Betting Task Force and the Australian Productivity Commission, as discussed at 4.2(c) and 4.2(d) below.

Put simply, the nature of racing events makes it difficult to exclude parties from using the primary product of the event, that is, the outcome of or result of a race. It is therefore possible to free ride on the racing industry, taking bets on races without contributing to the cost of running them.⁸

In two important areas, TABs (and indirectly the racing industry) bear a significant proportion of the cost burden associated with racing and wagering, including:

- 1 the costs of presenting the racing product to the general public (via Sky Channel, audio and print media etc). Tabcorp has previously raised with the Victorian Racing Industry the prospect of Tabcorp's reducing or discontinuing its voluntary funding of Sport 927 because of its loss of market share to corporate bookmakers who make little or no contribution to the distribution of the racing product; and
- 2 the costs associated with operating totalisator wagering and ensuring its actual and perceived integrity. Contrary to the Draft Notice, corporate bookmakers generally do not "frame a market" on Victorian harness racing, nor on many other forms of racing. Most offer TAB-odds products. This involves the corporate bookmaker accepting bets not at a predetermined price about an outcome, but rather on the basis of the payout being related to the dividend of the totalisators (in practice these schemes involve the bookmaker offering totalisator odds plus some margin). Corporate bookmakers are predominantly arbitragers rather than genuine risk takers as with traditional bookmakers. Consequently, the integrity of the totalisator pool is just as important to the punter having a bet with a bookmaker at TAB odds as it is to a punter betting directly into a TAB pool.⁹ In offering TAB-odds products, corporate bookmakers are free riding directly on TAB (and racing industry) expenditure.

Therefore, section 2.5.16A was inserted into the GRA to provide a means to require interstate and overseas bookmakers who derive revenue from the Victorian racing industry to make an economic contribution to the ongoing health and viability of that

⁷ Section 2.5.16A(2)(a) and (b).

⁸ Betting Task Force Report, p 186.

⁹ Report of the Cross-border Betting Task Force dated 1 November 2002 (**Betting Task Force Report**), p 92.

industry. Considered in this context, the proposed Rebate is simply an attempt by HRV to avoid double taxation (ie it is recognition that when a bookmaker bets-back with Tabcorp, an economic contribution will ultimately be made through Tabcorp to the Victorian racing industry, and this contribution should offset the economic contribution required of that bookmaker through an approval granted under the Victorian Race Fields legislation).

(b) Second Reading Speech

The purpose of section 2.5.16A was set out in the Second Reading Speech delivered by the Minister for Gaming, Mr Pandazopoulous, on 26 May 2005 (**Second Reading Speech**). In particular, Mr Pandazopoulous made the following statements:

- *“This bill contains measures which protect racing industry and government revenue, enhance the integrity of racing and wagering and support the industry to efficiently and effectively administer the conduct of racing.”*
- *“Strategies contained within this bill support the economic contribution of the racing industry by guarding against practices which seek to divert revenue from Victoria.”*
- *“This amendment is designed to protect the industry against the current and potential practices of unauthorised wagering operators based interstate or overseas.”*
- *“Unauthorised wagering service providers generate, or have potential to derive, significant revenue from Victorian racing however unlike authorised operators make no financial contribution to the industry or to State revenue in return.”*
- *“It has been established that betting turnover on Victorian racing, currently being generated by large corporate bookmakers in the Northern Territory, is resulting in significant revenue loss to the Victorian racing industry and government.”*
- *“This new offence adds another brick to the wall of protection of the Victorian racing industry and all its related revenues. The offence is intended to deter interstate and overseas operators from unauthorised use of Victorian racing product.”*

A copy of the Second Reading Speech is attached as Annexure C.

(c) Betting Task Force Recommendations

A Cross-border Betting Task Force of government officers and racing industry representatives from the eight Australian States and Territories was established (**Betting Task Force**) by the Conference of Australasian Racing Ministers on 17 May 2002. The Betting Task Force delivered its report to the Australasian Racing Ministers on 1 November 2002 (**Betting Task Force Report**).

Relevantly, the Report noted that the strong growth of corporate bookmakers operating in the Northern Territory and the ACT created a number of major concerns that threaten to undermine the long-term viability of the racing industry. In particular, the Betting Task Force identified the following key concerns:

- *“corporate bookmakers operate on quite different arrangements to on-course (‘stand-up’) bookmakers, creating an unfair competitive environment. This is of particular concern to racing given the important contribution on-course (‘stand-up’) bookmakers make to the industry, providing both an attraction and a quality service for punters. By undermining the competitive position of stand-up bookmakers, corporate bookmakers are reducing the ability of bookmakers to continue to make a contribution to racing and a service to on-course punters.*
- *corporate bookmakers are acting as free riders, generating very substantial turnover and net income from racing but making no financial contribution. Corporate bookmakers run books on racing but unlike TAB’s and on-course bookmakers pay no fee for the product they are using.*

- *not only are the corporate bookmakers free riders, but they take turnover away from both TABs and the on-course bookmakers and hence reduce revenue to racing. TABs pay a product fee ranging upwards from around 4.5% of turnover while on-course bookmakers pay a fee that is on average around 1% and also make a qualitative contribution to racing. By diverting revenue from racing, the corporate bookmakers are in effect undermining the financial viability of the very industry from which they derive income.*¹⁰

(d) Productivity Commission Report

In a 1999 report titled "Australian Gambling Industries", the Commonwealth Productivity Commission described 'free riding' in the context of wagering on Australian racing:

- *"... unlike sports betting on football matches or car races, wagering is the major reason for horse racing to take place. If those providing wagering services were not to contribute to the racing industry, the industry itself would decline."*
- *"Without some form of policy response, 'free riding' might lead to the racing industry providing too few races..."*

*it is possible that betting service providers could "free ride" on the racing industry, taking bets on races without contributing to the costs of running them. Such a situation could lead to there being too few race meetings and a smaller racing industry (CIE 1998, p. 36).*¹¹

5 Tabcorp comments on HRV proposal

5.1 HRV proposal

Tabcorp considers that the broad objectives of the HRV proposal are legitimate. However, as currently formulated, the HRV proposal is too broad and does not properly reflect the purpose of section 2.5.16A. Therefore, Tabcorp does not support the HRV Notification in its current form.

5.2 Tabcorp's proposal

However, Tabcorp would support the HRV Notification provided that:

- bet-backs were not the only form of economic contribution that bookmakers could make to the Victorian harness racing industry in order to qualify for the Rebate. Interstate bookmakers should be provided with a greater choice of ways to make economic contributions to the racing industry. For example, the approach of Racing Victoria Limited (**RVL**), the governing body for the thoroughbred racing industry, includes contributions via sponsorship and donation;
- the Rebate was available on bet-backs made with any wagering operator licensed in Victoria and not just on bet-backs made with Tabcorp;
- the Rebate was available to all interstate bookmakers wagering on Victorian harness racing; and

¹⁰ Betting Task Force Report, p iii.

¹¹ Productivity Commission Report titled "Australia's Gambling Industries" dated 26 November 1999, p 14.24. The Productivity Commission Report cites the Centre for International Economics (CIE), "National Competition Policy Review of Racing and betting legislation in Victoria: A Discussion Paper, 1998".

- the Rebate was available on bet-backs made on Victorian harness racing only and not on all harness racing throughout Australia.

Tabcorp submits that these changes address any concerns expressed by the ACCC in the Draft Notice, while ensuring that the objectives of the GRA Amendment Act and the statutory obligation of HRV to promote harness racing in Victoria are met.

5.3 Public benefits

Tabcorp submits that the notified conduct, as refined, would result in public benefits including:

- the continued viability of harness racing in Victoria;
- the continued and enhanced provision of voice, video, data and form services funded by HRV;
- the furtherance of Victorian Government policy; and
- the avoidance of higher charges being imposed upon licensed Victorian operators by HRV.

5.4 Detriments

If amended in accordance with Tabcorp's proposal, the conduct would have minimal competitive detriments.

In particular, the proposed conduct would have minimal impact on whether or not the relevant bookmakers place bet-backs with Tabcorp or any other licensed wagering operator in Victoria. This is because a bookmaker considers numerous factors before placing a bet-back, many of which relate to the decision whether or not to place a bet-back at all. The most important factor affecting a bookmaker's decision is the price offered on the bet-back. The provision of a rebate of the level proposed by HRV would be relatively immaterial to a bookmaker's decision. (For further information on the factors relevant to a bookmaker's decision, see 7(d) below).

6 Inaccuracies in the Draft Notice and submissions

Tabcorp has identified a number of factual and other errors in the submissions provided to the ACCC by interested parties, some of which are reflected in the Draft Notice. Some of these errors and misconceptions are set out below.

(a) Tabcorp joint venture arrangement:

Paragraph 2.3 of the Draft Notice states:

"race controlling bodies (through the companies VicRacing Pty Ltd and Racing Products Pty Ltd) are in a joint venture with Tabcorp in which they receive distribution of income from Tabcorp's wagering revenue."

In addition, paragraph 2 of section 4.1 of Betfair's submission states:

"HRV is part of a joint venture with Tabcorp, RVL and Greyhound Racing Victoria (GRV) pursuant to which each of the controlling bodies in Victoria share in the profits and losses of the operation of Tabcorp's wagering and gaming licences."

These statements are incorrect. The race controlling bodies are not in a joint venture with Tabcorp. Tabcorp's Victorian wagering business is conducted through a joint venture agreement between Tabcorp Participant Pty Ltd (a wholly-owned subsidiary of Tabcorp)

and VicRacing Pty Ltd, a company established by the Victorian racing industry. Overall responsibility for the joint venture is vested in a Management Committee and each joint venturer is entitled to appoint three representatives for this purpose. Tabcorp is also party to the Product Agreements (see 3.1(a) above).

(b) Bookmakers "frame a market"

Paragraph 2.10 of the Draft Notice states:

"bookmaker will "frame a market" for a particular race by offering odds for different horses in the race and taking wagers based on those odds with the intention of reaching a position where the net outcome of all bets placed will be in the bookmaker's favour regardless of the outcome of the event."

This is not a correct description of a corporate bookmaker's operations. Tabcorp understands that a corporate bookmaker generally will not "frame a market" on Victorian harness racing or offer odds as described.¹² Most offer TAB-odds products (see 3.1(b) above).

(c) Bet-backs and Layoffs

Paragraph 5.8 of the Draft Notice states that "totalisators also place bet backs with each other and with bookmakers". This statement is incorrect. Bet-backs are only placed by bookmakers, and TABs (in respect of their pari-mutuel/totalisator wagering operations) do not place bet-backs with each other or with bookmakers. Totalisators do not need to bet back because the operation of a totalisator does not involve a risk to the operator (ie the dividends are distributed from the pool).

(d) Benefits to Victorian harness racing

Paragraph 5.22 of the Draft Notice states:

"In each state or territory there is one operator licensed to conduct off-course pari-mutuel wagering and a condition of these exclusive licences is that a proportion of wagering turnover is returned to the local racing industry."

It is incorrect to say that Tabcorp pays a proportion of its wagering turnover to the local racing industry. Further, the description of the basis of payments made by Tabcorp to HRV at paragraph 5.15 of the Draft Notice is misleading.

As set out at 3.1(a) above, Tabcorp is required to pay [RESTRICTION OF PART OF PUBLICATION CLAIMED] of its total profit from gaming and wagering to VicRacing Pty Ltd. It also pays product and marketing fees to the major Victorian racing bodies in return for the provision of certain services and information by those bodies.

(e) Private benefit to Tabcorp

Betfair states at page 7 of its submission that:

"... 75% of the amount that is wagered with Tabcorp represents a private benefit to Tabcorp and its shareholders. In 2004/5, of the remaining 25, only 16.7% (or 4.2% of bets with Tabcorp) was distributed to HRV. This means that if a bookmaker is required to make \$100 of bet-backs with Tabcorp to reduce his or her fee to HRV, \$75 of this amount represents a private benefit to Tabcorp, and approximately \$4.20 represents a distribution to HRV."

This statement is incorrect (see 3.1(a) and 3.2(a) above). It does not take into account the substantial amounts paid by Tabcorp to the Victorian racing industry under the Product Agreements, other operating expenses, and the payment of taxes. For example, for the year ended 30 June 2007, Tabcorp's Wagering Division earned revenues of \$1,479.1 million, but had EBIT of just \$253.7 million. In that year, Tabcorp paid \$885.8

¹² However, some corporate bookmakers will "frame a market" on premium Saturday thoroughbred race meetings.

million in taxes (excluding income tax) and operator commissions and \$290 million in net operating expenses.¹³

(f) Fees paid by corporate bookmakers

Paragraph 5.32 of the Draft Notice asserts that "the reduction in fees for the nominated bookmakers, is simply an offset of the fees charged by HRV and is a straight offset of funds returned to the Victorian harness racing industry".

This analysis is not correct because HRV would receive a disproportionately higher fee should a bet-back be placed with Tabcorp as compared to another wagering operator.

(g) Victoria harness racing data

The ACCC's assertion in paragraph 5.43 and 5.56 of the Draft Notice that HRV is the only body supplying Victorian harness race field data is incorrect. Race field information is compiled and supplied by a number of firms, including RISA and Australian Associated Press (trading as AAP). The Victorian legislation does not vest ownership of race fields in any person, including controlling bodies. HRV does not have any proprietary interest in Victorian harness race fields, nor is HRV required to provide race fields data to approved wagering operators as part of the approval process.

7 Concerns raised by the Commission

We provide answers to your specific questions as outlined in the Draft Notice below.

(a) *What effect will HRV's proposal to offer a rebate to the nominated bookmakers have on the abilities of other harness racing clubs and wagering service providers' abilities to compete?*

Tabcorp believes its suggested proposal will not have any adverse effect on the ability to compete of other harness racing clubs and wagering services providers.

(b) *Would other harness racing clubs consider offering a discount or rebate to wagering service providers in respect to HRV's offer? Why or why not?*

Tabcorp does not have this information.

(c) *Would other wagering service providers consider offering a discount or rebate to encourage the nominated bookmakers to place bet-backs with them? Why or why not?*

The conduct described in the HRV notification involves the offer of rebates by race governing bodies (namely, HRV) not by wagering service providers.

The practices of wagering services providers vary greatly. So far as Tabcorp understands it, the circumstances in which each wagering service provider offers rebates, and the amount or level of rebate, is confidential. However, in Tabcorp's view, generally rebates are not specifically targeted at bet-backs but rather are a form of incentive aimed at attracting punters to wager with the relevant totalisator in a general sense.

(d) *Whether the presence and size of the rebate will encourage bookmakers to place bet-backs with Victorian TAB at the expense of shopping around for the best odds to spread their risk?*

Tabcorp's view is that the Rebate will not have a significant impact on whether or not the relevant bookmakers place bet-backs with Tabcorp. This is because a bookmaker considers numerous factors before placing a bet-back, many of which relate to the

¹³ Tabcorp Annual Report 2007 at p 8.

decision whether or not to place a bet-back at all. The most important factor affecting a bookmaker's decision is the price offered on the bet-back. The provision of a rebate, of the level proposed by HRV, would be relatively immaterial to a bookmaker's decision. Other relevant factors would include:

- the size of bet;
 - the past betting performance of the customer;
 - the price of the bet accepted by the bookmaker (ie tote/best tote/fixed odds);
 - the current price in the market place;
 - the expected price in the market place;
 - the existence of an arbitrage opportunity;
 - pool liquidity with a pari-mutuel operator or betting exchange;
 - the risk appetite of alternative bookmakers;
 - the ability of the bookmaker to pay the customer in the event his/her bet is successful;
 - the availability of credit.
- (e) *Whether other wagering service providers offer rebates or discounts (including which wagering service provider and the type of rebate or discount offered) and how the presence of these rebates or discounts may affect bookmaker's decision of where to place a bet-back or layoff?*
- The conduct described in the HRV notification involves the offer of rebates by race governing bodies (namely, HRV) not by wagering service providers.
- The practices of wagering services providers vary greatly. So far as Tabcorp understands it, the circumstances in which each wagering service provider offers rebates, and the amount or level of rebate, is confidential. However, in Tabcorp's view, generally rebates are not specifically targeted at bet-backs but rather are a form of incentive aimed at attracting punters to wager with the relevant totalisator in a general sense.
- (f) *What is the approximate value of bet-backs placed on harness racing by the nominated bookmakers?*
- Tabcorp does not have this information.
- However, with respect Tabcorp's wagering operations, it does not (and cannot) identify the reason for any particular bet, for example whether the bookmaker is simply placing a wager, or a bet-back or lay-off.
- (g) *What is the size of the harness racing and wagering turnover for the three wagering pools operating in Australia?*
- Tabcorp does not have this information.
- (h) *What is the typical size of a bet-back placed by a bookmaker?*
- Tabcorp does not have this information.
- (i) *Whether bookmakers consider the size of the pool in deciding which wagering service provider to place a bet-back with?*
- Refer to (d) above.