



Australian  
Competition &  
Consumer  
Commission

# **Draft Determination**

## **Applications for authorisation**

**lodged by**

**Tabcorp Manager Pty Ltd**

**in respect of**

**the 2007 Agreement governing TOTE Tasmania Pty Ltd's  
participation in the SuperTAB pool**

**Date: 30 January 2008**

**Commissioners:** Sylvan  
King  
Smith

**Authorisation no.:** A91065  
A91066 and  
A91067

**Public Register no.:** C2007/2111

# Summary

The ACCC proposes to grant authorisation to make and give effect to clauses 5.1, 5.6, 8 and 2.1 of an agreement entered into between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd governing TOTE Tasmania's participation in the SuperTAB pool, until 14 August 2012.

## 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

Tabcorp Manager Pty Ltd (Tabcorp) seeks authorisation to make and give effect to an agreement entered into between Tabcorp and TOTE Tasmania Pty Ltd (TOTE Tasmania) dated 23 October 2007 (2007 Agreement). The 2007 Agreement governs TOTE Tasmania's participation in the SuperTAB pool operated by Tabcorp.

Tabcorp has identified four provisions which raise trade practices issues. These are that:

- Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania does not re-supply those pooling services to any other totalisator (Pooling restriction) (Clause 8 of the 2007 Agreement and paragraph 8 of the public summary)
- Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania transmits to Tabcorp for inclusion in the SuperTAB pool all investments on the specific bet types received by TOTE Tasmania on nominated Tabcorp races (Investment requirement) (Clause 5.1 of the 2007 Agreement and paragraph 4 of the public summary)
- Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania acquires race fields approvals from Racing Victoria Limited (RVL), Greyhound Racing Victoria (GRV) and Harness Racing Victoria (HRV) (Race Fields Approval requirement) (Clause 2.1 of the 2007 Agreement and paragraph 2.3 of the public summary) and
- TOTE Tasmania agrees to comply with the Rules Relating to Betting Transactions in Victoria (Tabcorp Betting Rules) in respect of all pooled bets (Tabcorp Betting Rules requirement) (Clause 5.6 of the 2007 Agreement and paragraph 5 of the public summary).

## Background

Pooling arrangements generally involve a totalisator having a large pool (the host) who offers pooling services to one or more other totalisators which each have a smaller pool (the guest participants). In practice, the host will provide pooling services to guest participants in return for a fee.

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Tabcorp is the host of the SuperTAB pool. The SuperTAB pool includes wagers placed through TOTE Tasmania, Racing and Wagering WA, ACTTAB Limited, New Zealand Racing Board, Phumelela Gold Enterprises and Phumelela Gaming and Leisure Limited (a South African totalisator) and Victorian TAB.

Currently, TOTE Tasmania's participation in the SuperTAB pool is governed by an agreement between Tabcorp and TOTE Tasmania dated 22 September 1998 (1998 Agreement). The 1998 Agreement has not been authorised by the ACCC. The 1998 Agreement expires on 25 March 2008 with the option to extend the 1998 Agreement for a further term to 31 December 2008, subject to certain conditions.

### **Public detriment**

The ACCC considers that the 2007 Agreement is likely to result in some public detriment.

In particular the ACCC notes that while TOTE Tasmania may acquire pooling services from other totalisators, it is restricted in the bet types for which it may do so. Further, the Investment requirement prevents other totalisators from seeking to provide pooling services to TOTE Tasmania.

However, it is possible that TOTE Tasmania could have provided UNiTAB with an opportunity to compete with Tabcorp for the provision of pooling services prior to the 2007 Agreement being concluded. Indeed, it is likely to be in TOTE Tasmania's interests to seek out and obtain the best commercial terms for such services. Further, the ACCC notes that UNiTAB will be able to seek to provide pooling services to TOTE Tasmania at the end of the 2007 Agreement, should it choose to do so.

The ACCC considers that the Tabcorp Betting Rules requirement results in some public detriment, by requiring TOTE Tasmania to comply with the Tabcorp Betting Rules which outline the maximum commission rates which may be deducted on pooled bets. That being said, the ACCC notes that totalisators do not compete significantly in relation to the commission rates which they take out of their respective pools, as state and territory governments set the maximum commission rates in legislation.

The ACCC considers that the Pooling restriction does not raise significant competition issues because it is unlikely that TOTE Tasmania would seek to provide pooling services to another totalisator.

The ACCC considers that the public detriment generated from the Race Fields Approvals requirement is likely to be limited. In particular, the ACCC notes that without authorisation TOTE Tasmania is required by legislation to obtain race fields approval from the relevant controlling bodies should it wish to publish Victorian race fields data.

### **Public benefit**

The ACCC considered that the 2007 Agreement is likely to result in the following public benefits:

- enhanced wagering products supplied by totalisators, in particular those products provided by TOTE Tasmania
- improved competition on service and price for pooled bets between Tabcorp and TOTE Tasmania and

- maintaining funding for the Tasmanian racing industry.

### **Balance of public benefit and detriment**

Overall, the ACCC considers that in all the circumstances, the likely public benefit generated by the 2007 Agreement will outweigh the likely public detriment.

### **Length of authorisation**

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 the light of any changed circumstances.

In this instance, the ACCC considers it is appropriate for authorisation to be granted for the term of the agreement, that is until 14 August 2012.

### **Interim authorisation**

In reconsidering the issue of interim authorisation, the ACCC notes that no further information has been provided by Tabcorp to change its earlier assessment with respect to the request for interim authorisation. The ACCC notes that without interim authorisation, TOTE Tasmania will continue pooling with Tabcorp by way of the 1998 Agreement until such time as a final determination is issued by the ACCC. Accordingly, the ACCC does not consider it appropriate to grant interim authorisation at this time.

### **The next steps**

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. Submissions close on **22 February 2008**. The applicant 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

1998 Agreement	Agreement entered into between Tabcorp and TOTE Tasmania dated 22 September 1998
2007 Agreement	Agreement entered into between Tabcorp and TOTE Tasmania dated 23 October 2007
ACCC	Australian Competition and Consumer Commission
Act	<i>Trade Practices Act 1974 (Cth)</i>
ACTTAB	ACTTAB Limited
AHA	Australian Hotels Association
ARB	Australian Racing Board Limited
Betfair	Betfair Pty Limited
GRA	<i>Gambling Regulation Act 2003 (Vic)</i>
GRV	Greyhound Racing Victoria
HRV	Harness Racing Victoria
Investment requirement	TOTE Tasmania must transmit to Tabcorp for inclusion in the SuperTAB pool all investments on specified bet types on nominated Tabcorp races
NTTAB	NTTAB Pty Ltd
NZRB	New Zealand Racing Board
Parimutuel wagering	In parimutuel wagering the odds are calculated after the close of betting on the relevant event. All bets are consolidated into a totalisator pool. The winning tickets divide the total amount bet in proportion to their wagers less a percentage taken out for management, taxes etc
Phumelela	Phumelela Gold Enterprises and Phumelela Gaming and Leisure Limited
Pooling restriction	Tabcorp will offer pooling services to TOTE Tasmania on condition TOTE Tasmania does not re-supply those pooling services to other totalisators
Race fields approvals	Approvals under section 2.5.16A of the <i>Gambling Regulation Act 2003 (Vic)</i>
Race Fields Approval requirement	Tabcorp will offer pooling services to TOTE Tasmania on condition that TOTE Tasmania has obtained race fields approvals from the relevant controlling bodies

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RVL	Racing Victoria Limited
RWWA	Racing and Wagering WA
SA TAB	SA TAB Pty Ltd
SuperTAB pool	Tabcorp pools bets placed through TOTE Tasmania, RWWA, ACTTAB, NZRB and Phumelela and Tabcorp's Victorian operations
TAB	Totalisator Agency Board
Tabcorp	Tabcorp Manager Pty Ltd
Tabcorp Betting Rules	Tabcorp's Rules Relating to Betting Transactions in Victoria
Tabcorp Betting Rules requirement	Tabcorp will offer pooling services to TOTE Tasmania on condition that TOTE Tasmania complies with Tabcorp's Betting Rules
Tabcorp Holdings	Tabcorp Holdings Limited
<i>Racing (Totalisator Betting) Act</i>	<i>Racing (Totalisator Betting) Act 1952 (Tas)</i>
TOTE Tasmania	TOTE Tasmania Pty Ltd
UNiTAB	UNiTAB Limited
VCGR	Victorian Commission for Gambling Regulation
VicRacing	VicRacing Pty Ltd

# 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 The Act, however, allows the ACCC to grant protection from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain protection 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 applications for authorisation

- 1.8 On 6 November 2007, Tabcorp Manager Pty Ltd (Tabcorp) lodged applications for authorisation A91065, A91066 and A91067 with the ACCC.
- 1.9 Tabcorp applied for authorisation to make and give effect to the agreement entered into between Tabcorp and TOTE Tasmania Pty Ltd (TOTE Tasmania) dated 23 October 2007 (2007 Agreement). The 2007 Agreement governs TOTE Tasmania’s participation in the SuperTAB pool operated by Tabcorp.
- 1.10 Tabcorp seeks authorisation for the term of the 2007 Agreement, that is until 14 August 2012.



## Interim authorisation

- 1.11 Tabcorp requested interim authorisation to allow it to begin providing pooling services to TOTE Tasmania on the terms provided for in the 2007 Agreement while the ACCC considers the merits of the substantive applications.
- 1.12 The ACCC decided not to grant interim authorisation on 21 November 2007.

## Chronology

- 1.13 Table 1.1 provides a chronology of significant dates in the consideration of this application.

**Table 1.1: Chronology of application for authorisation A91065, A91066 and A91067**

<b>DATE</b>	<b>ACTION</b>
6 November 2007	Applications for authorisation lodged with the ACCC, including an application for interim authorisation.
16 November 2007	Closing date for submissions from interested parties in relation to the request for interim authorisation.
21 November 2007	The ACCC denied Tabcorp's request for interim authorisation.
30 November 2007	Closing date for submissions from interested parties in relation to the substantive applications for authorisation.
14 December 2007	Submission received from Tabcorp in response to interested party submissions.
30 January 2008	Draft determination issued.

## 2. Background to the application

### The applicant<sup>1</sup>

- 2.1 The Tabcorp Group is an Australian group of companies with interests in gaming and wagering.
- 2.2 Tabcorp Holdings Limited (Tabcorp Holdings) is the ultimate parent company of the Tabcorp Group and is listed on the ASX. Its operations are organised into three main divisions: casinos, wagering and gaming.
- 2.3 Tabcorp Manager is a wholly owned subsidiary of Tabcorp Holdings, and conducts gaming and wagering businesses pursuant to the Victorian gaming and wagering licences issued under the *Gaming and Betting Act (Vic)*, which expire in 2012.
- 2.4 The applications for authorisation relate to the Tabcorp Group's Wagering Division. The Wagering Division's operations are primarily conducted in Victoria and New South Wales and include:
- totalisator betting on racing and other sports in licensed agencies, hotels and clubs in Victoria and New South Wales
  - on-course totalisators in Victoria and New South Wales
  - fixed odds betting on racing and other sports under the TAB Sportsbet brand
  - national wagering broadcasting through the Sky Channel television service
  - 2KY radio network, a New South Wales radio broadcast service which specialises in race broadcasts and
  - Trackside – a virtual, fixed odds racing game distributed principally in Victoria.<sup>2</sup>
- 2.5 For the year ending 30 June 2007, the Tabcorp Group's Wagering Division's revenue was \$1479.1 million.
- 2.6 The Wagering Division's operations are operated under separate licences in Victoria and New South Wales, and have separate and distinct wagering pools. In both states, Tabcorp operates its wagering businesses in accordance with arrangements it has entered into with the relevant racing authorities in that state.

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<sup>1</sup> Information outlined in this chapter was largely obtained from the applicant's supporting submission, Tabcorp, *Submission to the Australian Competition and Consumer Commission: Application for Authorisation of 2007 SuperTAB Pooling Agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd*, 6 November 2007.

<sup>2</sup> Trackside is distributed in Victoria and in Star City Casino in New South Wales.

## Wagering operations in Victoria

- 2.7 Tabcorp Holdings 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 14 August 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
  - 132 470 telephone and internet accounts. These accounts are operated by 128 919 account holders and
  - a racing portal ([www.tab.com.au](http://www.tab.com.au)) which directs punters to RaceTAB (TAB NSW) or TAB Racing (TAB Victoria) ([www.tab.com.au/racing](http://www.tab.com.au/racing)) to place bets on thoroughbred, greyhound and harness racing in Australia, Hong Kong, New Zealand and the United Kingdom.
- 2.8 Tabcorp Holdings also has a licence to conduct on-course totalisators in Victoria.
- 2.9 The Wagering Division's Victorian operations involve the operation of the SuperTAB pool and the provision of parimutuel pooling services to TOTE Tasmania, Racing and Wagering WA (RWWA), ACTTAB Limited (ACTTAB), New Zealand Racing Board (NZRB) and Phumelela Gold Enterprises and Phumelela Gaming and Leisure Limited (Phumelela). The parties to the pooling arrangements have entered into separate agreements with Tabcorp under which:
- the smaller Australian totalisators (ie TOTE Tasmania, RWWA and ACTTAB), NZRB and Phumelela agree to participate in the SuperTAB pool and
  - Tabcorp agrees to provide these totalisators with pooling services in return for a fee.
- 2.10 The Tabcorp Group's Victorian wagering business is conducted through a joint venture agreement between Tabcorp Holdings, Tabcorp Participant Pty Ltd, Tabcorp Assets Pty Ltd, Tabcorp Manager Pty Ltd and VicRacing Pty Ltd (VicRacing), dated 25 May 1994. Under this agreement, Tabcorp pays a percentage of its total profit from gaming and wagering to VicRacing.
- 2.11 In addition, Tabcorp Holdings pays the major Victorian racing bodies a product fee in return for certain services and information, pursuant to a Racing Program Agreement and a Product Supply Agreement.

## Wagering operations in New South Wales

- 2.12 Tabcorp Holdings acquired NSW-based company Tab Limited in 2004. Tab Limited 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 provide on-course totalisator wagering services in New South Wales and offers totalisator and fixed odds betting on sporting and other events.

- 2.13 Tab Limited contributes a percentage of its net wagering revenue and wagering profits to the New South Wales racing industry.

## **TOTE Tasmania**

- 2.14 TOTE Tasmania is an Australian state-owned company incorporated in 2000 by the Tasmanian Government pursuant to the *TOTE Tasmania Act 2000* (Tas) to provide wagering services and administrative and financial support for the Tasmanian racing industry.
- 2.15 TOTE Tasmania's objectives are set out in section 7 of the *TOTE Tasmania Act 2000* (Tas) and include:
- the promotion and development of an efficient and effective racing and breeding industry and
  - the promotion of Tasmanian racing within the state and nationally, encouraging wagering on Tasmanian racing and to attract sponsorship income.<sup>3</sup>
- 2.16 TOTE Tasmania provides a variety of parimutuel and fixed odds wagering products in relation to racing and other sporting events. TOTE Tasmania's wagering distribution network comprises:
- a retail network of 121 outlets throughout Tasmania, including 32 dedicated retail outlets (which are TOTE Tasmania specialty shops) and 89 hotels
  - on-course totalisator facilities at 16 racetracks across Tasmania. TOTE Tasmania is the only provider of on-course totalisator facilities in Tasmania
  - more than 12 000 registered telephone betting services account holders and
  - an internet site that provides racing and sporting information and betting services.
- 2.17 In addition, TOTE Tasmania:
- is responsible for the non-probity functions of the Tasmanian racing industry including planning, administering, marketing and development of thoroughbred, harness and greyhound racing within Tasmania and nationally
  - manages the distribution of Sky Channel and ThoroughVision in Tasmania
  - operates a state-wide network of radio stations, covering Australian and international racing under the brand TOTE Support Radio (a wholly owned subsidiary of TOTE Tasmania)
  - controls the Elwick Racecourse in Hobart, Tasman Park at Launceston and Spreyton Park at Devonport

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<sup>3</sup> TOTE Tasmania, *Re Application for Authorisation of the 2007 SuperTAB Pooling agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd: Submission by TOTE Tasmania Pty Ltd*, 30 November 2007, p. 5.

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- assists with the maintenance of racing facilities at the showgrounds in Devonport and
- manages training centres at Brighton, Carrick and Longford.

2.18 In the 2006/2007 financial year, TOTE Tasmania's recorded turnover was \$387.1 million, up 20.6%.

## Racing and wagering in Australia

### Racing

2.19 The racing industry is comprised of three codes – thoroughbred, harness and greyhound racing. The codes are structured similarly such that:

- the activities in each state and territory are governed by the relevant controlling bodies which control the regulation, functions and commercial activities of the codes
- the relevant national administration body oversees the activities of the controlling bodies. The controlling bodies are the Australian Racing Board Limited for thoroughbred racing, the Australian Harness Racing Council for harness racing and Greyhounds Australasia for greyhound racing and
- the relevant controlling bodies and the national administrative bodies assist in the governance of the various racing clubs, which conduct race events in each code.

2.20 There are approximately 379 thoroughbred racing clubs, 126 harness racing clubs and 93 greyhound racing clubs in Australia.

2.21 The racing organisations are non-profit and provide racing product by organising and conducting race meetings.

2.22 The vast majority of funding for the racing industry is provided as a result of wagering on the races staged by the race clubs.

2.23 It is estimated that the racing industry will generate annual revenues of approximately \$1210.4 million in the 2007/2008 financial year, a decrease of 31.5% on the previous year's revenue, largely due to the equine influenza crisis.

2.24 The racing industry and wagering operators have a mutually dependent relationship in that the:

- racing industry supplies the product on which wagering operators conduct betting and
- totalisators provide a significant proportion of the funding for the racing industry.

2.25 Tabcorp submits that the relationship between racing and wagering differs from the relationship between wagering operators and other sporting events, as other sporting events are funded through means such as ticket sales, sponsorship and media rights, and

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do not receive funding or product fees from wagering operators who conduct betting on the event.

- 2.26 Tabcorp and TOTE Tasmania each made economic contributions to the racing industry in their respective states.

### **Wagering**

- 2.27 Wagering, as opposed to gaming<sup>4</sup>, involves staking something, usually money, on the outcome of a contest or any uncertain event or matter. In Australia, wagering has traditionally been divided into parimutuel and fixed odds wagering and its principal forms are on racing and sports betting. Recently other forms of wagering have been introduced such as betting exchanges.

#### *Parimutuel – totalisators*

- 2.28 In parimutuel wagering, 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 is referred to as the ‘dividend pool’ and is available for distribution to the winning customers who placed bets on the totalisator.
- 2.29 Parimutuel wagering is generally offered by a ‘totalisator’ who are licensed wagering operators in each state and territory. Table 2.1 outlines the totalisator which operates in each state or territory.

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<sup>4</sup> Gaming is a chance-based activity which comprises all legal forms of gambling other than wagering, including lotteries, gaming machines, casino table games and keno.

**Table 2.1 – Off-course totalisator operators (TABs)**

State	Status of off-course totalisator operators
New South Wales	Tab Limited – a wholly owned subsidiary of Tabcorp
Victoria	Tabcorp Holdings Limited – a listed public company
Queensland	UNITAB <sup>26</sup> – a listed public company
Western Australia	RWWA – a government authority
South Australia	SATAB Pty Ltd – a wholly owned subsidiary of UNITAB
Tasmania	TOTE Tasmania – a government owned company
Australian Capital Territory	ACTTAB – a government authority
Northern Territory	NTTAB Pty Ltd – a wholly owned subsidiary of UNITAB

Source: *Tabcorp Submission to the Australian Competition and Consumer Commission: Application for Authorisation of 2007 SuperTAB Pooling Agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd*, 6 November 2007, p. 13.

- 2.30 Parimutuel wagering is the main form of wagering in Australia, accounting for approximately 73% of wagering turnover in the year ended 30 June 2005.<sup>5</sup>
- 2.31 Totalisators may be either on-course or off-course totalisators. An on-course totalisator conducts its operation on-course and bets can only be placed by people physically present at the racecourse. An off-course totalisator may accept bets from people not physically present at the racecourse. The large majority of totalisator expenditure in Australia is off-course.
- 2.32 Tabcorp submits that totalisators have traditionally held a significant share of the wagering market in Australia, however in recent decades totalisators have lost market share to corporate bookmakers, whose revenues are growing at a faster rate than totalisators revenues.<sup>6</sup>

#### *Fixed odds betting – Bookmakers*

- 2.33 In fixed odds, 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 which occur after the 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 (that is, bets are placed with another wagering operator so as to spread the risk of the loss).<sup>7</sup>
- 2.34 Bookmakers conduct fixed odds betting on racing and other sports and derivative parimutuel wagering schemes. There are two types of bookmakers – traditional and corporate.

<sup>5</sup> Tabcorp, *Submission to the Australian Competition and Consumer Commission: Application for Authorisation of 2007 SuperTAB Pooling Agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd*, 6 November 2007, p. 11.

<sup>6</sup> *ibid.*, p. 14.

<sup>7</sup> *ibid.*, p. 12.

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- 2.35 Traditional bookmakers are located on-course (some may offer telephone betting) and generally offer fixed odds wagering only.
- 2.36 Corporate bookmakers (most of whom are licensed in the Northern Territory and to a lesser extent the ACT) do not have either off-course or on-course retail outlets, and distribute their products via telephone or the internet, with internet sales constituting the bulk of their business.

### *Betting exchanges*

- 2.37 A betting exchange is a means by which parties stake money on opposing outcomes of a future event. The betting exchange allows people to wager directly against each other on fixed odds bets, instead of betting against a totalisator or bookmaker. Betfair Pty Limited (Betfair) is the only betting exchange licensed in any Australian state or territory. Betfair is licensed to operate in Tasmania and it is prohibited by state legislation to operate in Western Australia.

## **Pooling**

- 2.38 Pooling refers to arrangements between two or more totalisators whereby the totalisators combine their respective pools in order to provide a single, larger pool into which the customers of all participating totalisators can wager. Pooling occurs only in the context of parimutuel wagering.
- 2.39 Pooling arrangements generally involve a totalisator having a large pool (the ‘host’) who offers ‘pooling services’ to one or more other totalisators which each have a smaller pool (the ‘guest participants’). In practice, the host will provide pooling services to guest participants in return for a fee.
- 2.40 Australia currently has three totalisator pools:
- The SuperTAB pool host is Tabcorp, which pools wagers placed through TOTE Tasmania, RWWA, ACTTAB, NZRB, Phumelela and Victorian TAB
  - Tab Limited operates its New South Wales pool on its own and does not provide pooling services to any other totalisator and
  - UNiTAB pools wagering received in Queensland, South Australia (through SA TAB Pty Ltd (SA TAB)) and Northern Territory (through NTTAB Pty Ltd (NTTAB)).
- 2.41 In percentage terms, SuperTAB’s share of the Australian wagering pools is the largest with 42%, Tab Limited with 36% and UNiTAB with 22%.<sup>8</sup>

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<sup>8</sup> Tabcorp, *Bringing the Excitement of Racing and Sport to You – Wagering Update*, 21 March 2007, p. 14. [http://www.tabcorp.com.au/resources.ashx/mediareleases/304/downloadableVersion/3E0C897A67118A91BC00C354D91E86C5/21\\_March\\_-\\_Wagering\\_Briefing.pdf](http://www.tabcorp.com.au/resources.ashx/mediareleases/304/downloadableVersion/3E0C897A67118A91BC00C354D91E86C5/21_March_-_Wagering_Briefing.pdf).



## SuperTAB Pool

- 2.42 Tabcorp has entered into separate pooling agreements with each of the guest participants.<sup>9</sup> There is no contractual relationship between the guest participants.
- 2.43 The SuperTAB pool operates on a ‘gross pool basis’ which works as outlined below:
- Each participant conducts its own parimutuel wagering business and accepts bets from its customers for inclusion in the SuperTAB pool. Each participant pools the funds it collects in its own pool.
  - The pools of each participant are notionally co-mingled in the SuperTAB pool. The SuperTAB pool is divided into separate pools for each particular bet type on each nominated event.
  - The commission rate is notionally deducted from the SuperTAB pool and credited to the participants (in proportion to the total wagers placed with that participant).
  - Tabcorp operates the SuperTAB pool and calculates the respective odds. It determines the amount available to pay dividends to winning punters.
  - Each SuperTAB pool participant pays dividends to successful punters who have made an investment with that participant.
  - Cash settlements are made between Tabcorp and one or more of the guest participants. A cash settlement is necessary in circumstances where the amount required to be paid by a participant to punters in the form of dividends does not equal the amount invested by punters with that participant.
  - Tabcorp invoices each guest participant for the amount of the processing fee.
- 2.44 TOTE Tasmania has pooled with Tabcorp since 1991. Currently, TOTE Tasmania’s participation in the SuperTAB pool is governed by an agreement between Tabcorp and TOTE Tasmania dated 22 September 1998 (1998 Agreement). The 1998 Agreement has not been authorised by the ACCC.
- 2.45 The 1998 Agreement expires on 25 March 2008 with the option to extend the 1998 Agreement for a further term to 31 December 2008, subject to certain conditions.

## Regulation of the wagering industry

- 2.46 The regulation of wagering in Australia is primarily state and territory based, with federal regulation limited to the regulation of internet gambling. Federal legislation prohibits gaming offerings such as casino type games, online poker machines, rapid draw keno and lotteries. Telephone betting services and wagering services offering racing and sports betting are specifically exempted.<sup>10</sup>

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<sup>9</sup> Tabcorp has entered into the 2007 Agreement with TOTE Tasmania, a pooling agreement with RWWA dated 2005, a pooling agreement with ACTTAB dated 2005, a pooling agreement with NZRB dated 2007 and a pooling agreement with Phumelela dated 2007.

<sup>10</sup> *Interactive Gambling Act 2001* (Cth).

- 2.47 State and territory based regulation includes regulation of the off-course totalisator licensee, and restricts advertising by wagering providers not licensed in the particular jurisdiction (for traditional print and broadcast media).
- 2.48 Tabcorp is licensed to conduct off and on-course parimutuel wagering in Victoria under the GRA. Among other things the GRA provides:
- The licence is an exclusive,<sup>11</sup> non-transferable<sup>12</sup> licence for 18 years, or a longer term determined by the Governor in Council.<sup>13</sup> The licence is subject to the conditions set out in the licence.<sup>14</sup>
  - An application for a licence must include an outline of the arrangements proposed to be entered into by the applicant with VicRacing and Racing Products Victoria Pty Ltd.<sup>15</sup>
  - The Victorian Commission for Gambling Regulation (VCGR) must approve totalisator equipment, or any change to totalisator equipment, before it is used in connection with a totalisator or approved betting competition.<sup>16</sup>
  - The licensee must have and comply with betting rules.<sup>17</sup> Among other things, the betting rules must specify the maximum commission rate that may be deducted as commission out of the total amount invested in each totalisator to which the rules relate.<sup>18</sup> The maximum commission rate specified in the betting rules cannot exceed 25% of the total amount invested in the relevant totalisator.<sup>19</sup> The Treasurer must approve the betting rule regarding the maximum commission rate before it has effect.<sup>20</sup>
  - The licensee must pay various taxes, fees and charges (including for the grant of the licence).<sup>21</sup>
- 2.49 TOTE Tasmania is authorised under the *Racing (Totalisator Betting) Act 1952* (Tas) (*Racing (Totalisator Betting) Act*) which provides that:
- TOTE Tasmania must conduct totalisator betting, and may establish totalisator premises in particular areas at which bets may be made on racing and certain other events approved by the Minister.<sup>22</sup>
  - Other than a licensed racing club, no other person, apart from TOTE Tasmania, may conduct totalisator betting.<sup>23</sup> A licensed racing club is only permitted to

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<sup>11</sup> *Gambling Regulation Act 2003* (Vic), section 4.3.3.

<sup>12</sup> *ibid.*, section 4.3.4.

<sup>13</sup> *ibid.*, section 4.3.9.

<sup>14</sup> *ibid.*, section 4.3.9.

<sup>15</sup> *ibid.*, section 4.3.5(3)(d).

<sup>16</sup> *ibid.*, section 4.2.3.

<sup>17</sup> *ibid.*, Chapter 4, Part 2, Division 2.

<sup>18</sup> *ibid.*, section 4.2.5(2A).

<sup>19</sup> *ibid.*, section 4.2.5(2B).

<sup>20</sup> *ibid.*, section 4.2.5(2C).

<sup>21</sup> *ibid.*, section 4.3.8.

<sup>22</sup> *Racing (Totalisator Betting) Act 1952* (Tas), section 57E.

<sup>23</sup> *ibid.*, section 57ZG.

conduct totalisator betting in limited circumstances (ie on-course and in respect of racing).<sup>24</sup>

- TOTE Tasmania must determine the grant it will make available to the Tasmanian Thoroughbred Racing Council, the Tasmanian Harness Racing Council, and the Tasmanian Greyhound Racing Council in each racing year and how the grant should be expended.<sup>25</sup>
- TOTE Tasmania must, in respect of each approved bet type, deduct specified commission rates.<sup>26</sup>
- TOTE Tasmania may enter into an agreement with a totalisator in another state or territory to pool with it and with international totalisator betting pools to conduct totalisator betting in the overseas country.<sup>27</sup> Such agreements may provide that the totalisator operating the pool will return to TOTE Tasmania 'such amount as commission out of the amount of the bets received by that body from TOTE Tasmania as is agreed on between that body and TOTE Tasmania'.<sup>28</sup>
- TOTE Tasmania may make betting rules regarding the business of conducting the totalisators.<sup>29</sup>
- Regulations may provide TOTE Tasmania to pay money to the Minister periodically.<sup>30</sup>

2.50 The *TOTE Tasmania (Racing Regulation) Act 2004* (Tas) confers powers and functions on TOTE Tasmania in relation to the racing industry and, in particular:

- allows TOTE Tasmania to direct the racing industry bodies to do certain things and
- requires TOTE Tasmania to pay a product fee to the Tasmanian racing industry each financial year, to be distributed among racing clubs in accordance with agreements made between TOTE Tasmania and each of the clubs.

2.51 State and territory legislation also requires that bookmakers must be registered by the relevant state bookmakers association, and requires bookmakers to meet certain financial and other criteria. The bookmakers licence specifies the racing code and location in which they may operate.

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<sup>24</sup> *Racing (Totalisator Betting) Act 1952* (Tas), section 57ZH.

<sup>25</sup> *ibid.*, section 57E(7).

<sup>26</sup> *ibid.*, section 57M.

<sup>27</sup> *ibid.*, sections 57F and 57FA.

<sup>28</sup> *ibid.*, sections 57F(3)(b) and 57FA(2)(b).

<sup>29</sup> *ibid.*, section 57ZR.

<sup>30</sup> *ibid.*, section 119(ci).

### **3. The applications for authorisation**

- 3.1 Tabcorp seeks authorisation to make and give effect to the 2007 Agreement between Tabcorp and TOTE Tasmania governing TOTE Tasmania's participation in the SuperTAB pool. Tabcorp seeks authorisation in respect of all provisions of the 2007 Agreement.
- 3.2 The conduct potentially raises concerns under the anti-competitive conduct provisions of the Act. Consequently, Tabcorp has lodged the applications for authorisation A91065, A91066 and A91067 with the ACCC.
- 3.3 Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct. TOTE Tasmania would obtain the benefit of authorisation under section 88(6).
- 3.4 Tabcorp seeks authorisation to make and give effect to the entire 2007 Agreement, though notes the applications principally concern four provisions of the 2007 Agreement which potentially raise trade practices issues. These are that:
- Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania does not re-supply those pooling services to any other totalisator (Pooling restriction) (Clause 8 of the 2007 Agreement and paragraph 8 of the public summary)
  - Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania transmits to Tabcorp for inclusion in the SuperTAB pool all investments on the specific bet types received by TOTE Tasmania on nominated Tabcorp races (Investment requirement) (Clause 5.1 of the 2007 Agreement and paragraph 4 of the public summary)
  - Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania acquires race fields approvals from Racing Victoria Limited (RVL), Greyhound Racing Victoria (GRV) and Harness Racing Victoria (HRV) (Race Fields Approval requirement) (Clause 2.1 of the 2007 Agreement and paragraph 2.3 of the public summary) and
  - TOTE Tasmania agrees to comply with the Rules Relating to Betting Transactions in Victoria (Tabcorp Betting Rules) in respect of all pooled bets (Tabcorp Betting Rules requirement) (Clause 5.6 of the 2007 Agreement and paragraph 5 of the public summary).
- 3.5 The 2007 Agreement is subject to four conditions precedent (see paragraph 3.9 to 3.14 below). One condition precedent is that the ACCC grants authorisation to the 2007 Agreement.

#### **2007 Agreement**

- 3.6 The key provisions of the 2007 Agreement are summarised below.

**Clause 1 - Introduction**

- 3.7 On 23 October 2007, Tabcorp and TOTE Tasmania entered into an agreement governing TOTE Tasmania's participation in the SuperTAB pool.
- 3.8 Under the terms of the 2007 Agreement, Tabcorp agrees to provide pooling services to TOTE Tasmania in return for a fee (processing fee).

**Clause 2 – Conditions precedent**

- 3.9 The 2007 Agreement is subject to four conditions precedent:
- (a) interim or final authorisation being granted from the ACCC by 31 December 2008
  - (b) obtaining all race fields approvals
  - (c) obtaining all required participation approvals and
  - (d) ensuring the tax exemption under the *Gambling Regulation Act 2003* (Vic) is current and applicable.
- 3.10 The condition precedent relating to authorisation provides that either interim or final authorisation will bring the 2007 Agreement into force providing this occurs by 31 December 2008. If interim authorisation is granted but is withdrawn and/or final authorisation is not granted by 31 December 2008, the 2007 Agreement automatically terminates.<sup>31</sup>
- 3.11 The condition precedent relating to race field approval provides that the 2007 Agreement will not come into force unless and until all race fields approvals have been obtained.
- 3.12 Race fields approvals means the approvals under section 2.5.16A of the GRA which TOTE Tasmania must obtain from the appropriate controlling bodies to make available race fields information in the course of its business.
- 3.13 The condition precedent relating to required participation approvals provides that the 2007 Agreement will not come into force unless and until all required participation approvals have been obtained in a form that is acceptable to Tabcorp.
- 3.14 Required participation approvals means the approvals or consents which Tabcorp must obtain from the racing industry or regulatory authorities for TOTE Tasmania to participate in the SuperTAB pool. Currently, these are the approvals from VicRacing and consents from the VCGR.

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<sup>31</sup> Tabcorp submits that if interim authorisation is not granted, or if interim authorisation is granted and subsequently withdrawn and final authorisation is not granted, the parties will continue to operate under the 1998 Agreement until its expiry on 25 March 2008 and then extend the 1998 Agreement for a further term to 31 December 2008.

### **Clause 3 - Term**

- 3.15 Subject to authorisation being granted, the 2007 Agreement will commence on the effective date, being the date that the last condition precedent is satisfied, and will continue until 14 August 2012, unless terminated earlier.
- 3.16 Either party may request an extension of the term to 31 April 2017.

### **Clause 4 – Investment requirement**

- 3.17 Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania transmits to Tabcorp for inclusion in the SuperTAB pool all investments on the specified bet types received by TOTE Tasmania on nominated Tabcorp Events.<sup>32</sup>
- 3.18 Tabcorp Events are defined as events which have been previously nominated by Tabcorp to TOTE Tasmania, and Tabcorp operates in the ordinary course of its business. The bet types are: Win/Place, Quinella, Exact, Daily Double, Trifecta, Quadrella, First Four, Flexibetting, Mystery Six, Running Doubles and Duet.
- 3.19 In the event Tabcorp implements an additional bet type, TOTE Tasmania may request consent to transmit investments in relation to such bet types to Tabcorp for inclusion in the SuperTAB pool.

### **Clause 5 – Rules and Directions**

- 3.20 TOTE Tasmania must comply with:
- all applicable laws and
  - the Tabcorp Betting Rules.
- 3.21 These provisions govern the acceptance of investments for inclusion in the SuperTAB pool and the calculation of dividends.
- 3.22 Tabcorp has not sought authorisation of the Tabcorp Betting Rules. In general, the Tabcorp Betting Rules contain:
- an agreement on the commission rates for different types of pooled bets. The commission rate is charged by a totalisator to punters for accepting bets and
  - a number of restrictions on the persons to whom and the circumstances in which the totalisator can supply wagering products to punters, for example, clause 3.2.1.1 states that ‘Investments made by or on behalf of or deposits lodged by persons under the age of eighteen years will not be accepted’.

### **Clause 6 – Integrity protocols**

- 3.23 Tabcorp and TOTE Tasmania must make details of betting transactions available to the following bodies and persons to investigate suspicious betting activity, to enforce the

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<sup>32</sup> The 2007 Agreement does not prevent TOTE Tasmania pooling on: bet types not specified in the 2007 Agreement; and investments received on non-Tabcorp Events.

respective rules of racing for each racing code and to investigate and enforce the respective betting rules for each state and territory:

- stewards of a racing code in a participating state or territory in the SuperTAB pool in respect of whose race wagers have been made and
- officers of any statutory authority whose function is to regulate wagering in the participating state or territory in the SuperTAB pool.

#### **Clause 7 – Copyright and protection of intellectual property**

- 3.24 Tabcorp grants TOTE Tasmania the non-exclusive right to use the Wagering Data provided to TOTE Tasmania by Tabcorp for the purposes of promoting and accepting investments on the Tabcorp Events and operating its betting engine via its website.
- 3.25 Wagering Data means totalisator odds and dividends for an event where the SuperTAB pool operates and TOTE Tasmania is participating in the SuperTAB pool for that event. It excludes race fields information.
- 3.26 TOTE Tasmania is not permitted to use the Wagering Data outside of Tasmania.
- 3.27 TOTE Tasmania must use its reasonable endeavours to prevent unauthorised parties from gaining access to, reproducing or disassembling the Wagering Data in any manner.
- 3.28 TOTE Tasmania may allow retail operators and any other third parties for whom Tabcorp has provided its consent to have access to the Wagering Data. Retail operators and, if consent is provided, such third parties will be subject to the same terms and conditions as TOTE Tasmania, and are not authorised to retransmit or rebroadcast the information.
- 3.29 TOTE Tasmania agrees to only use the SuperTAB Names for the purpose of promoting and accepting investments on the Tabcorp Events.<sup>33</sup>

#### **Clause 8 – Pooling restriction**

- 3.30 TOTE Tasmania must not pool or combine betting transactions conducted by them with any other totalisator (domestic or international) where those bets will form part of the SuperTAB pool, without the prior written consent of Tabcorp.

#### **Clause 9 – Cash settlement and accounting procedures**

- 3.31 The reconciliation and settlement of all accounts relating to the placement of investments, the payment of dividends, the payment of commissions and other adjustments shall be governed by procedures agreed between the parties from time to time.

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<sup>33</sup> SuperTAB Names are defined as SuperTAB, Super TAB, S\_TAB and S'TAB.

**Clause 10 – Unclaimed dividends**

3.32 TOTE Tasmania is entitled to retain all unclaimed dividends and dividend calculation fractions payable in respect of investments transmitted by it to Tabcorp for inclusion in the SuperTAB pool.

**Clause 11 – Fees**

3.33 Tabcorp is entitled to a Processing Fee for the supply of pooling services.

**Clause 12 – Maintenance of approvals**

3.34 At all times TOTE Tasmania must comply with all applicable required participation approvals and race field approvals.

**Clause 13 – Wagering tax**

3.35 In the event that investments transmitted by TOTE Tasmania to Tabcorp pursuant to the 2007 Agreement cease to be exempt from Wagering Tax under the GRA, TOTE Tasmania must:

- if it wishes to continue the pooling investments, reimburse Tabcorp of the payment of such tax or investments or
- terminate this 2007 Agreement without liability to Tabcorp.

**Clause 14 – Assurance**

3.36 Both Tabcorp and TOTE Tasmania must use their best endeavours to maintain in force all licences and approvals necessary for the purpose of the 2007 Agreement. The parties are to ensure their respective probity, integrity and reputation and that of the other party is not adversely affected in such a way that would jeopardise such licences and approvals or the probity, integrity and reputation of the other party.



## **4. Submissions received by the ACCC**

- 4.1 Tabcorp provided a supporting submission with its applications for authorisation. A summary of Tabcorp's submission is contained in paragraphs 4.5 to 4.6. A full copy of Tabcorp's submission is on the ACCC's website ([www.accc.gov.au](http://www.accc.gov.au)).
- 4.2 The ACCC also sought submissions from 46 interested parties, including thoroughbred, harness and greyhound race clubs, various bookmakers and other totalisators and government agencies. In response to Tabcorp's request for interim authorisation and their substantive applications for authorisation, the ACCC received public submissions from:
- Racing and Wagering WA
  - Tasmanian Turf Club Inc
  - Queensland Racing Limited
  - Australian Hotels Association
  - NSW Office of Liquor, Gaming and Racing
  - TOTE Tasmania
  - Tasmanian Racing Club Inc
- 4.3 Interested parties generally support the pooling arrangements and TOTE Tasmania's participation in the SuperTAB pool. The Tasmanian Racing Club Inc (Tasmanian Racing Club) generally supports the applications, however raised some concerns regarding the Investment requirement in the 2007 Agreement.
- 4.4 The views of interested parties are outlined in the ACCC's evaluation of the 2007 Agreement in Chapter 6 of this draft determination. Copies of public submissions are available from the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)) by following the 'Public Registers' and 'Authorisations Public Registers' links.

### **Tabcorp's supporting submission**

- 4.5 Tabcorp submits the 2007 Agreement results in substantial public benefits. Broadly, those benefits include:
- an enhanced wagering product for consumers and
  - benefits to the racing industry through increased participation in wagering.
- 4.6 Tabcorp submits the anti-competitive detriment resulting from the 2007 Agreement would be limited to a risk of some reduction in price competition between Tabcorp and TOTE Tasmania. However, Tabcorp submits that this risk would be minimal because:
- price competition between Tabcorp and TOTE Tasmania can occur under the terms of the 2007 Agreement

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- the 2007 Agreement does not restrict any other aspect of competition between Tabcorp and TOTE Tasmania and
- absent the 2007 Agreement TOTE Tasmania would set its commission rates according to the applicable Tasmanian legislation.

### **TOTE Tasmania**

- 4.7 TOTE Tasmania also provided a submission in support of the substantive applications for authorisation.
- 4.8 TOTE Tasmania submits that there is likely to be little, if any, public detriment arising from the 2007 Agreement.
- 4.9 TOTE Tasmania submits the 2007 Agreement will deliver greater commercial advantages to TOTE Tasmania, and will result in significant public benefits to:
- Tasmanian consumers
  - the Tasmanian racing industry
  - the Tasmanian economy and government
  - the Victorian racing industry and economy and
  - the racing and wagering industry generally.

## **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 A91065**

5.2 Tabcorp lodged application for authorisation A91065 under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.

5.3 The relevant test is found in section 90(8) of the Act.

5.4 Section 90(8) states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

5.5 Tabcorp has sought authorisation for the following provision which may be an exclusionary provision:

- Clause 5.6 of the 2007 Agreement (paragraph 5 of the public summary), under which TOTE Tasmania agrees to comply with the Tabcorp Betting Rules in respect of all pooled bets
- Further, Tabcorp seeks authorisation in respect of all provisions of the 2007 Agreement.

### **Application A91066**

5.6 Tabcorp lodged application for authorisation A91066 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.

5.7 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.

- 5.8 Tabcorp has sought authorisation for clause 5.6 of the 2007 Agreement (paragraph 5 of the public summary), under which TOTE Tasmania agrees to comply with the Tabcorp Betting Rules in respect of all pooled bets.
- 5.9 Tabcorp also seeks authorisation in respect of all provisions of the 2007 Agreement.

### **Application A91067**

- 5.10 Tabcorp lodged application A91067 under section 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing.
- 5.11 Section 90(6) states that the ACCC shall not authorise the proposed exclusive dealing conduct (other than conduct to which subsection 47(6) or 47(7) applies) 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 and
  - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or likely to result, if the proposed conduct was engaged in.
- 5.12 Tabcorp has sought authorisation for the following clauses which may constitute the practice of exclusive dealing:
- Under clause 5.1 of the 2007 Agreement (paragraph 4 of the public summary), Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania transmits to Tabcorp for inclusion in the SuperTAB pool all investments on the specified bet types received by TOTE Tasmania on nominated Tabcorp races (Investment requirement) and
  - Under clause 8 of the 2007 Agreement (paragraph 8 of the public summary), Tabcorp provides pooling services to TOTE Tasmania on condition that TOTE Tasmania does not re-supply those pooling services to any other wagering operator (Pooling restriction).
- 5.13 In respect of conduct which may constitute third line forcing, 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.
- 5.14 Tabcorp has sought authorisation for the following clauses which may be third line forcing:
- Under clause 2.1 of the 2007 Agreement (paragraph 2.3 of the public summary), Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania acquires race fields approvals from Racing Victoria Limited, Harness Racing Victoria and Greyhound Racing Victoria (Race Fields Approvals requirement).

## Application of the tests

- 5.15 There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).
- 5.16 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.<sup>34</sup>
- 5.17 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [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.<sup>35</sup>
- 5.18 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.
- 5.19 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

- 5.20 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.<sup>36</sup>
- 5.21 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.<sup>37</sup>

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<sup>34</sup> *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.

<sup>35</sup> *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.

<sup>36</sup> *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.

<sup>37</sup> *Re 7-Eleven Stores (1994)* ATPR 41-357 at 42,683.

## **Future with-and-without test**

- 5.22 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.<sup>38</sup>
- 5.23 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’.

## **Length of authorisation**

- 5.24 The ACCC can grant authorisation for a limited period of time.<sup>39</sup>

## **Conditions**

- 5.25 The Act also allows the ACCC to grant authorisation subject to conditions.<sup>40</sup>

## **Future and other parties**

- 5.26 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 future<sup>41</sup>
  - persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>42</sup>

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<sup>38</sup> *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.

<sup>39</sup> *Trade Practices Act 1974* (Cth), section 91(1).

<sup>40</sup> *ibid.*, section 91(3).

<sup>41</sup> *ibid.*, section 88(10).

<sup>42</sup> *ibid.*, section 88(6).

## 6. ACCC evaluation

6.1 The ACCC's evaluation of the making and giving effect to the 2007 Agreement 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 making and giving effect to the 2007 Agreement.

### 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 Defining the markets affected by arrangements proposed for authorisation assists in assessing the public benefit and public detriment from any lessening of competition from the arrangements. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets, as it may be apparent that a net public benefit will or will not arise regardless of this definition.

6.4 Tabcorp and TOTE Tasmania submit that it is not necessary to form a definitive view on market definition.

6.5 Tabcorp submits that there are a number of markets that may be relevant to the consideration of the applications for authorisation, and submits that in each market there would be significant public benefits and minimal public detriments. Tabcorp further defines two product markets that are relevant to its applications for authorisation. These are:

- the market for the supply of pooling services and
- the market for the supply of wagering products to punters.

6.6 TOTE Tasmania considers the markets which should be considered in assessing the public benefits and public detriments are:

- a racing and wagering market. TOTE Tasmania is of the view that there is no necessity to reach a concluded view on the geographic scope of a racing and wagering market in Australia and
- a national market for the supply of pooling services by larger totalisators to smaller totalisators.

6.7 In assessing the relevant markets for the applications for authorisation, the ACCC identifies the following areas of competition as being relevant to its assessment:

- the supply of pooling services and
- the provision of wagering services.

- 6.8 The ACCC has previously considered the issue of market definition in respect of pooling services and wagering services in its assessment of the proposed acquisition of UNiTAB by Tabcorp in 2006.

### **The supply of pooling services**

- 6.9 Tabcorp submits the market for the supply of pooling services is comprised of large totalisators who offer pooling services to smaller totalisators. Tabcorp submits that as there is one totalisator licensed in each state and territory, the market for the supply of pooling services is national in scope.
- 6.10 In its assessment in the proposed acquisition of UNiTAB by Tabcorp, the ACCC concluded that a national market exists for the supply of pooling services.<sup>43</sup>
- 6.11 The ACCC concluded that barriers to entry to this market are high, particularly given the need for new suppliers of pooling services to obtain a parimutuel wagering licence from a state or territory government.<sup>44</sup> The ACCC also concluded that currently there are only two suppliers of pooling services in Australia, that is, Tabcorp and UNiTAB.

### **The provision of wagering services**

- 6.12 Tabcorp notes that there is evidence of limited competition between totalisators for the supply of parimutuel wagering products to consumers in very recent years. Tabcorp submits this competition is most significant in respect of high value punters which is the fastest growing sector of the wagering market, but is also apparent to some degree in respect of recreational punters.<sup>45</sup>
- 6.13 Tabcorp submits that the development of radio, television, telephone and computer technology has increased the opportunity for people to wager without attending the actual event, and that further developments such as mobile phones, the internet and the ease of funds transfer also assists the expansion of new channels for wagering.
- 6.14 Tabcorp submits that these recent industry developments have resulted in state and territory boundaries becoming increasingly blurred.
- 6.15 The ACCC considered the issue of market definition in respect of wagering services in its assessment of the proposed acquisition of UNiTAB by Tabcorp in 2006. The ACCC has not been provided with information to suggest that the market definition should change for the purpose of assessing this authorisation application.
- 6.16 The ACCC recognises that there is limited competition between totalisators in different states,<sup>46</sup> though notes that different totalisators are still able to compete with respect to

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<sup>43</sup> ACCC, *Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, Public Competition Assessment*, 16 November 2006, paragraph 22 - 23.

<sup>44</sup> *ibid.*, paragraph 24.

<sup>45</sup> Tabcorp, *Submission to the Australian Competition and Consumer Commission: Application for Authorisation of 2007 SuperTAB Pooling Agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd*, 6 November 2007, p. 34.

<sup>46</sup> ACCC, *Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, Public Competition Assessment*, 16 November 2006, paragraph 30.



- the range of bet types offered and with regard to the quality of internet and phone services offered.<sup>47</sup>
- 6.17 Further, the ACCC notes that the level of cross border betting has remained low despite increases in recent years in the amount of phone and internet betting.<sup>48</sup>
- 6.18 Tabcorp also submits that there is increasing competition between totalisators and corporate bookmakers, with corporate bookmaker's share of the wagering market increasing from 7% in 1998 to 21% in 2006, with a corresponding decrease in the market share of off-course totalisators, with its share decreasing from 84% to 75%.
- 6.19 Tabcorp submits that corporate bookmakers operate with significant tax advantages which enable them to offer more attractive odds than those available from totalisators.
- 6.20 The ACCC considers that bookmakers, and in particular corporate bookmakers offering online wagering services, do compete with totalisators for punters and that betting exchanges potentially may become more significant players in the sector.<sup>49</sup>

## The counterfactual

- 6.21 As noted in Chapter 5 of this draft determination, 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'.
- 6.22 Both Tabcorp and TOTE Tasmania provided separate submissions outlining their views on the future without the 2007 Agreement.
- 6.23 In the absence of authorisation by the ACCC, the parties would not give effect to the 2007 Agreement. In this regard, the ACCC notes that authorisation is a condition precedent of the 2007 Agreement.
- 6.24 A consequence of this is that TOTE Tasmania would not be able to participate in the SuperTAB pool.
- 6.25 TOTE Tasmania notes that it is commercially imperative that it be able to enter into a pooling arrangement with a large totalisator.<sup>50</sup> TOTE Tasmania submits that the most likely counterfactual is a future in which TOTE Tasmania and other TABs are unable to pool with any other totalisator.
- 6.26 The ACCC considers that, given that Tabcorp has sought authorisation in respect of the 2007 Agreement to cover conduct that would otherwise breach the Act – exclusive dealing, exclusionary conduct and arrangements that are likely to substantially lessen competition – the ACCC considers that Tabcorp is unlikely to give effect to the 2007 Agreement and would not continue to offer pooling services to TOTE Tasmania if authorisation was not granted.

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<sup>47</sup> ACCC, *Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, Public Competition Assessment*, 16 November 2006, paragraph 31.

<sup>48</sup> *ibid.*, paragraph 34.

<sup>49</sup> *ibid.*, paragraph 47.

<sup>50</sup> TOTE Tasmania, *Re Application for Authorisation of the 2007 SuperTAB Pooling agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd: Submission by TOTE Tasmania Pty Ltd*, 30 November 2007, p. 10.

- 6.27 The ACCC considers that in the absence of authorisation of the 2007 Agreement and the provisions highlighted by Tabcorp as raising competition concerns, there are a number of possible counterfactuals including:
- TOTE Tasmania would operate on its own, and would not participate in any pooling arrangements. This is what TOTE Tasmania submits is the most likely counterfactual.
  - TOTE Tasmania may seek to enter alternative pooling arrangements, such as seeking access to the UNiTAB pool. However, the ACCC considers that if TOTE Tasmania were to seek to enter into a pooling agreement with UNiTAB, similar competition issues would be likely to arise.
  - TOTE Tasmania could seek to form separate pooling arrangements, for example with RWWA and ACTTAB. However, the ACCC considered in the proposed acquisition of UNiTAB by Tabcorp that a combined WA-Tasmania-ACT pool would be unlikely to be of sufficient size to be commercially attractive, particularly to large punters.<sup>51</sup>
- 6.28 The ACCC considers that absent authorisation, Tabcorp would not give effect to the 2007 Agreement and TOTE Tasmania would no longer participate in the SuperTAB pool, which would result in the likely counterfactual that TOTE Tasmania would continue to operate on its own and not participate in any pooling arrangement.

## Public detriment

- 6.29 Tabcorp submits that the clauses of the 2007 Agreement which raise competition concerns are in respect of the:
- Investment requirement
  - Tabcorp Betting Rules requirement
  - Pooling restriction and
  - Race Fields Approval requirement.
- 6.30 Tabcorp submits that any anti-competitive detriment which may result from the 2007 Agreement would be limited to a risk of some reduction in price competition between Tabcorp and TOTE Tasmania.
- 6.31 However, Tabcorp submits that any anti-competitive detriment which may arise from the 2007 Agreement would be minimal because:
- price competition between Tabcorp and TOTE Tasmania can occur under the terms of the 2007 Agreement

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<sup>51</sup> ACCC, *Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, Public Competition Assessment*, 16 November 2006, paragraph 25.

- the 2007 Agreement does not restrict any other aspect of competition between Tabcorp and TOTE Tasmania and
  - absent the 2007 Agreement, TOTE Tasmania would set its commission rates according to the applicable Tasmanian legislation.
- 6.32 TOTE Tasmania also submits that there is likely to be minimal, if any, public detriment arising from the 2007 Agreement.
- 6.33 The ACCC's assessment of the public detriments generated by the 2007 Agreement follows. These detriments primarily concern the provisions of the 2007 Agreement which Tabcorp has identified as raising trade practices issues.

### **Investment requirement**

- 6.34 Clause 5.1 of the 2007 Agreement states:
- ...The TOTE will transmit, and Tabcorp will accept and include in the Tabcorp Pool, all investments of the bet types set out in Part 1 of Schedule A received by the TOTE on the Tabcorp Events.
- 6.35 The specified bet types set out in the 2007 Agreement are: Win/Place, Quinella, Exacta, Daily Double, Trifecta, Quadrella (Quaddie), First Four, Flexibetting, Mystery Six, Running Doubles, and Duet.
- 6.36 Under the 2007 Agreement, Tabcorp Events are defined as those events which have been previously nominated by Tabcorp to TOTE Tasmania, and Tabcorp operates in the ordinary course of its business.
- 6.37 Tabcorp submits the Investment requirement will result in minimal public detriment as TOTE Tasmania remains free to acquire pooling services from totalisators other than Tabcorp in respect of:
- bet types not specified in the 2007 Agreement and
  - all bet types on non-Tabcorp Events (eg Singapore Racing events).
- 6.38 Tabcorp submits that the purpose of the Investment requirement is to prevent TOTE Tasmania from acquiring pooling services from other totalisators in respect of bet types and events which are covered by Tabcorp for the term of the 2007 Agreement.
- 6.39 Tabcorp submits the Investment requirement achieves certain commercial benefits such as a sufficiently large processing fee and an enhanced SuperTAB pool size.
- 6.40 TOTE Tasmania notes that it does not have any objection to the Investment requirement and regards the requirement as part of a commercial arrangement which overall is acceptable and in the best interests of TOTE Tasmania.<sup>52</sup>

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<sup>52</sup> TOTE Tasmania, *Re Application for Authorisation of the 2007 SuperTAB Pooling agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd: Submission by TOTE Tasmania Pty Ltd*, 30 November 2007, p. 12.

- 6.41 TOTE Tasmania submits that any detriment which may arise from the Investment requirement will most likely impact other potential providers of pooling services, as they will be prevented from contracting with TOTE Tasmania during the term of the contract.
- 6.42 The Tasmanian Racing Club noted that its principal concern with the 2007 Agreement is with the Investment requirement. The Tasmanian Racing Club expressed concern regarding the definition of ‘Tabcorp Events’ and Tabcorp’s ability to nominate which events are classed as ‘Tabcorp Events’. In particular, the Tasmanian Racing Club noted that the specific ‘Tabcorp Events’ are not disclosed in the application and it is concerned that the number of Tasmanian racing events which may be included are less than those provided for in the 1998 Agreement.
- 6.43 The Tasmanian Racing Club submits that it would be satisfied if the Tabcorp Events in the 2007 Agreement are effectively the same as those covered by the 1998 Agreement. The Tasmanian Racing Club submits that if the Tabcorp Events are significantly different, a condition should be imposed requiring the number of Tasmanian racing events to be at least equal to the number in the 1998 Agreement.
- 6.44 Further, the Tasmanian Racing Club also submits the inter-relationship of Tabcorp and Sky Channel Pty Ltd (Sky Channel)<sup>53</sup> may influence what content is broadcast on Sky Channel. The Tasmanian Racing Club is concerned that Tasmanian racing events which are not nominated by Tabcorp for the purposes of the 2007 Agreement, will be excluded from Sky Channel coverage. As a result, the Tasmanian Racing Club submits this may affect the income and profile of the Tasmanian racing industry. The Tasmanian Racing Club submits that a condition should be imposed requiring Sky Channel to provide an undertaking that it will maintain current levels of broadcast coverage of Tasmanian racing product.
- 6.45 The ACCC notes that while TOTE Tasmania may acquire pooling services from other totalisators, it is restricted in the bet types for which it may do so. The ACCC notes that TOTE Tasmania earns the majority of its revenue from the bet types outlined in the Investment requirement. For example, in 2005/06 the nominated bet types made up 98.8% of TOTE Tasmania’s revenue.<sup>54</sup>
- 6.46 The Investment requirement also prevents other totalisators from seeking to provide pooling services to TOTE Tasmania. As noted at paragraph 6.11, the ACCC considers that currently the only other potential provider of pooling services is UNiTAB.
- 6.47 Prior to concluding negotiations with Tabcorp for the 2007 Agreement, the ACCC notes that TOTE Tasmania could have given UNiTAB an opportunity to negotiate terms for the provision of pooling services.
- 6.48 In any event, which totalisator TOTE Tasmania decides to obtain pooling services from is a commercial decision for TOTE Tasmania.

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<sup>53</sup> Sky Channel is an Australian proprietary company and is part of the Tabcorp group. Sky Channel telecasts racing events as the holder of exclusive broadcasting rights granted in respect of the majority of Australian racing content. Sky Channel is distributed in Tasmania by TOTE Tasmania.

<sup>54</sup> Australian Racing Board Limited, *Australian Racing Fact Book – A Guide to the Racing Industry in Australia*, 2005-06, p. 69.

- 6.49 The ACCC notes that the term of the 2007 Agreement is for almost 5 years, with the possibility for the term to be extended for another 5 years. The ACCC does not consider that the length of the 2007 Agreement is unreasonable and notes that UNiTAB will be able to seek to provide pooling services to TOTE Tasmania at the end of the agreement, should it choose to do so.
- 6.50 The ACCC notes the concerns raised by the Tasmanian Racing Club regarding the Tasmanian racing events which will be included as Tabcorp Events under the 2007 Agreement. In response to the Tasmanian Racing Club's concerns, TOTE Tasmania advised that the Tasmanian racing events which are Tabcorp Events will be widely known as they are the events on which TOTE Tasmania offers wagers pooled in the SuperTAB pool.<sup>55</sup>
- 6.51 The ACCC notes that a statutory objective of TOTE Tasmania includes 'the promotion of Tasmanian racing within the state and nationally, encouraging wagering on Tasmanian racing and to attract sponsorship income'.<sup>56</sup>
- 6.52 Further, the ACCC notes that the 2007 Agreement is a result of commercial negotiations between TOTE Tasmania and Tabcorp and that the 2007 Agreement is acceptable to TOTE Tasmania. Indeed, TOTE Tasmania considers that the 2007 Agreement will assist its ability to provide funding to the Tasmanian racing industry (see paragraphs 6.121 to 6.124).
- 6.53 The ACCC notes that there are no provisions in the 2007 Agreement which relate to how racing content is broadcast on Sky Channel. The ACCC considers that the coverage Sky gives to racing events it shows on Sky Channel is a commercial decision for Sky. Further, the ACCC understands that the broadcast and transmission of Tasmanian racing is covered by a separate contract between TOTE Tasmania and Sky Channel.
- 6.54 Accordingly, the ACCC does not consider it appropriate to impose the conditions suggested by the Tasmanian Racing Club (see paragraph 6.43 to 6.44).
- 6.55 Overall, the ACCC considers that the Investment requirement is likely to result in some public detriment as it restricts TOTE Tasmania's ability to pool with other totalisators for certain bet types.

### **Tabcorp Betting Rules requirement**

- 6.56 Clause 5.6 of the 2007 Agreement requires TOTE Tasmania to comply with the Tabcorp Betting Rules in respect of all pooled bets.
- 6.57 Tabcorp submits that the stated purpose of the Tabcorp Betting Rules is:

[T]o make provision for the management and control of totalisators and the conditions under which transactions will be conducted at or through totalisator offices and for matters incidental to the operation of the GRA.

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<sup>55</sup> TOTE Tasmania, *Tabcorp – Applications for Authorisation A91065, A91066 and A91067: TOTE Tasmania response to Tasmanian Racing Club submission*, 16 January 2008, p. 2.

<sup>56</sup> *ibid.*, p. 5.

- 6.58 The Tabcorp Betting Rules specify the commission rates to be deducted for different types of pooled bets (Commission Rates provision). Tabcorp submits that the commission rate (or take out rate) is the price charged by a totalisator to punters for accepting bets. The Tabcorp Betting Rules also contain a number of restrictions on the persons to whom, and the circumstances in which, the totalisator can supply wagering products to punters.<sup>57</sup>
- 6.59 Tabcorp submits there is a risk that the arrangements between Tabcorp and TOTE Tasmania might be construed as having the purpose or effect of fixing, controlling or maintaining the price of parimutuel wagering products that are offered by Tabcorp and TOTE Tasmania to their respective customers and therefore seek authorisation for the provision.
- 6.60 The ACCC notes that Tabcorp is not seeking authorisation for the Tabcorp Betting Rules, but the requirement for TOTE Tasmania to comply with the Rules in respect of all pooled bets.
- 6.61 The Tabcorp Betting Rules identify the following ‘Totalisator Win Rates’ to be returned to punters in respect of each bet type.

**Table 6.1 – Totalisator Maximum Commission Deductions and Win Rates (Return to Investor) Racing (parimutuel)**

Bet Type	Maximum Commission Deduction (%)	Win Rate (%)
Win	14.50%	85.50
Place	14.25%	85.75
Quinella	14.75%	85.25
Duet	14.50%	85.50
Exacta	16.50%	83.50
Trifecta	20.00%	80.00
First 4	22.50%	77.50
Daily Double	17.00%	83.00
Running Double	17.00%	83.00
Quaddie	20.00%	80.00
Mystery 6	25.00%	75.00
International Pooled Bet	The lesser of 25.00% or the maximum commission applying in the pooling (host) jurisdiction	

Source: Tabcorp, *Rules Relating to Betting Transactions in Victoria*, commencement date 17 January 2008, p. 48.

- 6.62 Tabcorp submits that the Commission Rates provision is central to Tabcorp’s operation of the SuperTAB pool for a number of reasons:

<sup>57</sup> For example, clause 3.2.1.1 of the Tabcorp Betting Rules states that ‘investments made by or on behalf of or deposits lodged by persons under the age of eighteen years will not be accepted’.

- the SuperTAB pool operates according to gross pool pricing, not net pool pricing, because there is no technical ability to calculate dividends on the basis of different commission rates. That is, all SuperTAB bets are co-mingled and the common commission rate is then removed. Tabcorp submits there is no technical capability for Tabcorp to take into account different commission rates charged by different participants in the calculation of dividends.
  - a move to net pool pricing would require substantial software development. Tabcorp submits the introduction of net pool pricing would be complex, lengthy, expensive and an uncertain process.
  - Tabcorp submits that any move to net pool pricing would require new regulatory approvals and would likely attract significant regulatory scrutiny given its effect on the calculation and display of dividends. It would also require independent testing in order to obtain the necessary regulatory approvals. Tabcorp notes that any move to net pool pricing could impact on Tabcorp's current tax concessions.
- 6.63 Tabcorp also submits that the 2007 Agreement would have no impact on competition between Tabcorp and TOTE Tasmania in respect of non-pooled bets (as the parties remain free to determine their own commission rates subject to regulatory restrictions), and price competition would continue between SuperTAB pool participants and other totalisators who are not participants in the SuperTAB pool.
- 6.64 Further, Tabcorp submits that the 2007 Agreement would have no impact on other aspects of competition between Tabcorp and TOTE Tasmania in respect of pooled bets, including:
- superior service levels
  - the provision of other support and services to high value punters
  - the introduction of new and/or innovative products.
- 6.65 TOTE Tasmania submits that compliance with the Tabcorp Betting Rules does not result in a public detriment.
- 6.66 Agreements between competitors which influence the pricing decisions of market participants have the potential to result in allocative inefficiencies. That is, they can move prices away from levels that would be set in a competitive market. This can result in higher prices for consumers and send market signals which direct resources away from their most efficient use.
- 6.67 In this instance, clause 5.6 requires TOTE Tasmania to comply with the Tabcorp Betting Rules, which outline the maximum commission rates which Tabcorp and TOTE Tasmania will deduct on respective bet types from the SuperTAB pool.
- 6.68 In considering the proposed acquisition of UNiTAB by Tabcorp, the ACCC noted that totalisators did not compete significantly in relation to the commission rates which they

may take out of the respective wagering pool.<sup>58</sup> State and territory governments set a maximum limit on the proportion of the parimutuel wagering pool that a totalisator in their state may retain (that is, not return to punters as winnings). For example, section 57M(1A) of the *Racing (Totalisator Betting) Act* sets out the maximum commission rates which TOTE Tasmania may deduct from a parimutuel wagering pool. Table 6.2 below outlines the maximum commission rates specified under Tasmanian legislation and those outlined in the Tabcorp Betting Rules.

**Table 6.2 – Comparison of legislated commission rates in Tasmania and commission rates in the Tabcorp Betting Rules in respect of pooled bet types**

<b>Bet Type</b>	<b>Maximum commission rates (%) under the <i>Racing (Totalisator Betting) Act 1952 (Tas)</i></b>	<b>Maximum commission rates under the <i>Tabcorp Betting Rules</i> (%)</b>
Win	14.25	14.50
Place	14.25	14.25
Quinella	15.00	14.75
Exact	16.50	16.50
Daily double	17.00	17.00
Trifecta	19.00	20.00
Quadrella	19.00	20.00
First Four	n/a	22.50
Flexibetting	n/a	n/a
Mystery 6	n/a	25.00
Running doubles	n/a	17.00
Duet	n/a	14.50

Source: Tabcorp, *Submission to the Australian Competition and Consumer Commission: Application for Authorisation of 2007 SuperTAB Pooling Agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd*, 6 November 2007, Annexure L.

6.69 As evidenced from the above table, the commission rates set out in Tasmanian legislation compared to the commission rates set out in the Tabcorp Betting Rules are not substantially different.<sup>59</sup>

6.70 In considering the proposed acquisition of UNiTAB by Tabcorp, the ACCC noted that totalisators commission rates in practice are close to the regulatory maximum.<sup>60</sup>

<sup>58</sup> ACCC, *Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, Public Competition Assessment*, 16 November 2006, paragraph 35.

<sup>59</sup> Sections 57F(3)(a) and 57F(3)(b) of the *Racing (Totalisator Betting) Act* allows TOTE Tasmania to enter into an agreement with a totalisator in another state or territory to pool bets. The *Racing (Totalisator Betting) Act* therefore makes provision for Tabcorp to then return to TOTE Tasmania, commission rates on the amount of the bets received by Tabcorp from TOTE Tasmania, as is agreed between the parties. This means that the commission rate TOTE Tasmania ultimately takes out may differ from that legislated for under section 57M(1A) of the *Racing (Totalisator Betting) Act*.

<sup>60</sup> ACCC, *Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, Public Competition Assessment*, 16 November 2006, paragraph 35.



- 6.71 The ACCC considers that without authorisation, it is likely that TOTE Tasmania would retain commission rates from its parimutuel wagering pool which would be close to the regulatory maximum. Therefore, under the counterfactual where TOTE Tasmania would operate on its own and not participate in any pooling arrangement, there is likely to be minimal difference in the commission rates which Tabcorp and TOTE Tasmania could take from their respective parimutuel wagering pools.
- 6.72 In considering the proposed acquisition of UNiTAB by Tabcorp, the ACCC noted that changes in commission rates may not change the final odds offered to punters significantly.<sup>61</sup> Accordingly, any difference in commission rates between Tabcorp and TOTE Tasmania may not necessarily affect the final odds punters receive.
- 6.73 Further, the 2007 Agreement does not prevent Tabcorp and TOTE Tasmania from competing on other aspects such as service or the development of new products.
- 6.74 The ACCC considers that some public detriment may result from the requirement for TOTE Tasmania to comply with the Tabcorp Betting Rules and apply the same commission rates as Tabcorp.

### **Pooling restriction**

- 6.75 Clause 8.1 of the 2007 Agreement states:

The TOTE must not pool or combine betting transactions conducted by them with any bets from any other totalisator licensed in or operating in or from any domestic or international jurisdiction where those bets will form part of the Tabcorp Pool, without the prior written consent of Tabcorp.

- 6.76 Essentially, the clause provides that Tabcorp will supply pooling services to TOTE Tasmania on the condition that TOTE Tasmania does not re-supply those pooling services to any other totalisator.
- 6.77 Tabcorp submits that the pooling restriction is designed to prevent TOTE Tasmania being used as a vehicle to allow other wagering operators to pool with Tabcorp indirectly without Tabcorp's consent.
- 6.78 Tabcorp submits the Pooling restriction is important as it ensures that Tabcorp knows the participants in the pool and can set the conditions of their participation. Being able to set the conditions of participation in the pool allows Tabcorp to monitor and maintain the integrity of the pool, comply with anti-money laundering legislation and fulfil its obligations to VicRacing. Tabcorp submits that the provision does not have the likely effect of substantially lessening competition.
- 6.79 Tabcorp further submits that minimal public detriment will arise from the imposition of the Pooling restriction as TOTE Tasmania remains free to participate in other pooling arrangements with other totalisators (subject to the Investment requirement). For example, Tabcorp understands that TOTE Tasmania has entered into an arrangement

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<sup>61</sup> ACCC, *Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, Public Competition Assessment*, 16 November 2006, paragraph 35.

with Singapore Racing.<sup>62</sup> Under the arrangement TOTE Tasmania has been offering wagering on racing conducted in Singapore since January 2007. This conduct is permitted under the 2007 Agreement provided the bets which are pooled with Singapore Racing do not form part of the SuperTAB pool.<sup>63</sup>

- 6.80 TOTE Tasmania submits that it does not have any objection to the inclusion of this clause in the 2007 Agreement, and considers it will have little, if any, practical commercial significance.<sup>64</sup>
- 6.81 The Tasmanian Racing Club submits that clause 8.1 has the potential to inhibit the wagering services which TOTE Tasmania may potentially offer to punters by being restricted to pool or combine certain betting transactions.
- 6.82 The ACCC accepts that the Pooling restriction is required in order for Tabcorp to oversee the pool and to maintain its integrity and compliance with legislation.
- 6.83 As noted at paragraph 6.27, absent authorisation, the ACCC considers that TOTE Tasmania is unlikely to provide pooling services to another totalisator. Given that TOTE Tasmania is unlikely to be in a position to provide pooling services to another totalisator, the ACCC considers that the Pooling restriction in the 2007 Agreement results in minimal public detriment.
- 6.84 The ACCC notes that clause 8.1 of the 2007 Agreement does not prevent TOTE Tasmania from entering other pooling agreements in respect of wagering bets and racing events that do not form part of the SuperTAB pool as evidenced by the agreement TOTE Tasmania has with Singapore Racing.
- 6.85 Further, the ACCC notes that the 2007 Agreement does not prevent other totalisators from approaching Tabcorp and seeking to have their pool included in the SuperTAB pool.
- 6.86 The ACCC therefore considers that the Pooling restriction in the 2007 Agreement will result in minimal public detriment.

### **Race Fields Approval requirement**

- 6.87 Clause 2.1(b) of the 2007 Agreement sets out the conditions which must be satisfied before the 2007 Agreement comes into force. One of the conditions is that 'all race fields approvals have been obtained'. 'Race fields approvals' is defined as:

the approvals under section 2.15.16A of the Act which the TOTE must obtain from the appropriate controlling bodies listed in Part II of Schedule C to make available Victorian race fields in the course of its business...

- 6.88 Section 2.15.16A of the GRA requires that:

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<sup>62</sup> Tabcorp, *Submission to the Australian Competition and Consumer Commission: Application for Authorisation of 2007 SuperTAB Pooling Agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd*, 6 November 2007, p. 24.

<sup>63</sup> *ibid.*, p. 28.

<sup>64</sup> TOTE Tasmania, *Re Application for Authorisation of the 2007 SuperTAB Pooling agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd: Submission by TOTE Tasmania Pty Ltd*, 30 November 2007, p. 12.

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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.

- 6.89 The appropriate controlling bodies are Racing Victoria Limited (RVL) for thoroughbred racing, Harness Racing Victoria (HRV) for harness racing and Greyhound Racing Victoria (GRV) for greyhound racing.<sup>65</sup>
- 6.90 The effect of this legislative requirement is that TOTE Tasmania must obtain race fields approvals from the relevant bodies if it wants to publish Victorian race fields. Tabcorp has advised that TOTE Tasmania has obtained the required race fields approvals.
- 6.91 Tabcorp submits that while obtaining race fields approvals is a requirement set out in legislation, it seeks authorisation for this provision as it could be interpreted as third line forcing conduct whereby Tabcorp will supply pooling services on condition that TOTE Tasmania acquire race fields approvals from RVL, HRV and GRV.
- 6.92 Tabcorp and TOTE Tasmania submit that the proposed conduct would not result in an anti-competitive detriment because TOTE Tasmania is required by legislation to obtain race fields approvals should it wish to publish Victorian race fields data and offer wagering product on Victorian races. Further, TOTE Tasmania submits that it does not object to the inclusion of the Race Fields Approvals requirement in the 2007 Agreement. Both Tabcorp and TOTE Tasmania submit that the clause does not impose any additional obligation on TOTE Tasmania.
- 6.93 The Tasmanian Racing Club also submits that the requirement to obtain race fields approvals does not result in a public detriment.
- 6.94 The ACCC notes that without authorisation TOTE Tasmania is required by legislation to obtain race fields approval from the relevant controlling bodies should it wish to publish Victorian race fields data. Accordingly, the ACCC considers that the Race Fields Approval requirement in the 2007 Agreement does not impose an additional obligation on TOTE Tasmania and results in minimal public detriment.

### **ACCC conclusion on public detriments**

- 6.95 The ACCC considers that the 2007 Agreement results in some public detriment.
- 6.96 In particular the ACCC notes that while TOTE Tasmania may acquire pooling services from other totalisators, it is restricted in the bet types for which it may do so. Further, the Investment requirement prevents other totalisators from seeking to provide pooling services to TOTE Tasmania.
- 6.97 The ACCC considers that the Tabcorp Betting Rules requirement results in some public benefit by requiring TOTE Tasmania to comply with the Tabcorp Betting Rules, which outline the maximum commission rates it will deduct on bets pooled in the SuperTAB pool.

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<sup>65</sup> *Racing Act 1985* (Vic), section 83F.

## Public Version

- 6.98 The ACCC considers that the Pooling restriction does not raise significant competition issues because it is unlikely that TOTE Tasmania would seek to provide pooling services to another totalisator.
- 6.99 The ACCC considers that the public detriment generated from the Race Fields Approvals requirement is likely to be limited as TOTE Tasmania is required by legislation to obtain race fields approval from the relevant controlling bodies should it wish to publish Victorian race fields data.

## Public benefit

- 6.100 Tabcorp submits the 2007 Agreement results in substantial public benefits, including:
- an enhanced wagering product for consumers and
  - benefits to the racing industry through increased participation in wagering.
- 6.101 TOTE Tasmania submits the 2007 Agreement will result in significant public benefits and that the 2007 Agreement is likely to provide benefits to:
- Tasmanian consumers
  - the Tasmanian racing industry
  - the Tasmanian economy and government
  - the Victorian racing industry, economy and government and
  - the racing and wagering industry generally.
- 6.102 The ACCC's assessment of the public benefits likely to result from the 2007 Agreement follows.

## Enhanced wagering products

- 6.103 Tabcorp submits that pooling provides benefits to both totalisators and consumers.
- 6.104 Tabcorp submits that smaller totalisators seek access to enter into pooling arrangements with other totalisators to gain access to a larger totalisator pool. Tabcorp submits that a totalisator that has access to a larger pool is more attractive to consumers because it is more stable.
- 6.105 Indeed, TOTE Tasmania submits its primary rationale for entering into the 2007 Agreement is to gain access to a larger pool to enable it to consistently offer the benefits of a larger pool to its customers.<sup>66</sup>
- 6.106 Tabcorp notes that as a result of gaining access to a larger pool, smaller totalisators will be able to attract punters, particularly high value punters, who are more likely to place large bets than recreational punters. The size of the totalisator pool is an important

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<sup>66</sup> TOTE Tasmania, *Re Application for Authorisation of the 2007 SuperTAB Pooling agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd: Submission by TOTE Tasmania Pty Ltd*, 30 November 2007, p. 7.

factor considered by high value punters when choosing where to place a bet. Therefore, Tabcorp submits that pooling arrangements will assist smaller totalisators to compete more effectively with other large totalisator pools.

- 6.107 Tabcorp notes that pooling can also assist the host totalisator compete with other Australian totalisators pools to attract and negotiate international pooling agreements.
- 6.108 Tabcorp submits that consumers placing both larger and smaller bets will benefit from pooling, as a larger pool is more stable and does not result in the same distortion of odds for a race that a large bet might have in smaller totalisator pools. Indeed, TOTE Tasmania notes that it, and other smaller totalisators, have insufficient turnover to generate stable prices across all races and bet types.<sup>67</sup>
- 6.109 Tabcorp notes that other wagering providers, particularly corporate bookmakers, who rely on the totalisator product to place bet-backs also benefit from the stability that a larger pool provides.
- 6.110 Tabcorp also submits that pooling will result in both Tabcorp and TOTE Tasmania experiencing cost savings through the consolidation of wagering operations, related information technology and corporate administration.
- 6.111 The ACCC considers that the implementation of the 2007 Agreement will enable totalisators, in particular TOTE Tasmania, to offer a more enhanced wagering product and will result in the following benefits:
- having access to a large totalisator pool will assist TOTE Tasmania to compete more effectively with other larger totalisator pools, particularly for high value punters. High value punters place importance on the stability of the pool, which comes from a larger totalisator pool, when deciding where to place large bets.
  - pooling may assist Tabcorp to compete with other Australian totalisator pools to attract and negotiate international pooling agreements.
  - consumers will benefit from being able to place bets in a more stable pool which has less fluctuations in the odds for a race than might have occurred in a smaller totalisator pool.
- 6.112 The ACCC notes that pooling may result in other benefits, such as cost savings through the consolidation of wagering operations, related information technology and corporate administration, however without further information about the extent of these cost savings and who will benefit from these savings the ACCC does not accept this claim.
- 6.113 The ACCC considers that the 2007 Agreement is likely to result in a public benefit by enhancing the wagering products offered by totalisators, in particular those products offered by TOTE Tasmania.

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<sup>67</sup> TOTE Tasmania, *Re Application for Authorisation of the 2007 SuperTAB Pooling agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd: Submission by TOTE Tasmania Pty Ltd*, 30 November 2007, p. 7.



- TOTE Tasmania to pay an annual product fee to the Tasmanian racing industry for the conduct of race meetings (including prize money) and the administration, maintenance and improvement of horse racing and greyhound racing.
- 6.122 For example, in 2006/2007 TOTE Tasmania provided \$20 400 000 to the Tasmanian racing industry for prize money and running costs, which represented some 67% of the expenditure of the Tasmanian racing industry of \$30 200 000. TOTE Tasmania submits that it made payments to 2108 owners, trainers, drivers and jockeys for the thoroughbred and harness codes and by the three greyhound clubs to 658 owners and trainers in the greyhound code. TOTE Tasmania submits that it is these distributions which enable the Tasmanian racing industry to operate.
- 6.123 TOTE Tasmania submits that pooling enables it to access a larger pool to build a successful and profitable business which is capable of meeting its statutory objective and maintaining an adequate level of funding to the Tasmanian racing industry.<sup>72</sup>
- 6.124 TOTE Tasmania submits that the Tasmanian racing industry would either collapse or be dramatically reduced in size and scale in the absence of the financial support provided by a commercially viable TOTE Tasmania.<sup>73</sup>
- 6.125 TOTE Tasmania also submits that the Victorian racing industry will benefit from the 2007 Agreement as VicRacing receives a percentage of the service fee that TOTE Tasmania pays to Tabcorp under the 2007 Agreement. Tabcorp submits that while it has the ability to charge a processing fee, this fee is not directly related to the fee paid to VicRacing by Tabcorp. Tabcorp notes that the processing fee is calculated as a percentage of the amount placed in the SuperTAB pool by the guest participant. However, as Tabcorp is required to pay a percentage of its total profit from gaming and wagering to VicRacing, the processing fee will contribute to Tabcorp's profit from gaming and wagering, and thereby indirectly to the amount payable by Tabcorp to VicRacing.<sup>74</sup>
- 6.126 The ACCC notes that without authorisation, TOTE Tasmania would not have access to a large totalisator pool and therefore would not derive the benefits which may result from pooling (see paragraphs 6.103 to 6.113). This is likely to affect the ability of TOTE Tasmania to attract punters to place bets on its wagering products.
- 6.127 As noted by the Australian Hotels Association and the Tasmanian Turf Club Inc, participation in the SuperTAB pool is essential for the long term viability of TOTE Tasmania. Any reduction in wagering turnover received by TOTE Tasmania is likely to result in reduced funding to the Tasmanian racing industry.
- 6.128 Therefore the ACCC accepts that the 2007 Agreement will result in a public benefit by ensuring TOTE Tasmania is able to provide funding to the Tasmanian racing industry and fulfil its statutory objective.

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<sup>72</sup> TOTE Tasmania, *Re Application for Authorisation of the 2007 SuperTAB Pooling agreement between Tabcorp Manager Pty Ltd and TOTE Tasmania Pty Ltd: Submission by TOTE Tasmania Pty Ltd*, 30 November 2007, p. 7.

<sup>73</sup> *ibid.*, p. 18.

<sup>74</sup> Tabcorp, *Submission to the Australian Competition and Consumer Commission in response to a submission made by TOTE Tasmania Pty Ltd dated 28 November 2007*, 14 December 2007, p. 3.

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- 6.129 The ACCC accepts that the 2007 Agreement may also benefit the Victorian racing industry as the pool of revenue from which Victorian Racing will receive its share of funding will be increased through the processing fee that TOTE Tasmania pays to Tabcorp for participation in the SuperTAB pool.
- 6.130 However, the ACCC considers that this benefit is at the expense of funding which may have been received by the Tasmanian racing industry and is simply a transfer of funds.

### **ACCC conclusion on public benefits**

- 6.131 The ACCC considers that the 2007 Agreement is likely to result in the following public benefits:
- enhanced wagering products supplied by totalisators, in particular those products provided by TOTE Tasmania
  - improved competition on service and price for pooled bets between Tabcorp and TOTE Tasmania and
  - maintaining funding for the Tasmanian racing industry.

### **Balance of public benefit and detriment**

- 6.132 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the 2007 Agreement is likely to result in a public benefit that will outweigh any public detriment.
- 6.133 In the context of applying the net public benefit test at section 90(8)<sup>75</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>76</sup>
- 6.134 The ACCC considers the 2007 Agreement is likely to result in some public detriment.
- 6.135 In particular, the ACCC notes that while TOTE Tasmania may acquire pooling services from other totalisators, it is restricted in the bet types for which it may do so. Further, the Investment requirement prevents other totalisators from seeking to provide pooling services to TOTE Tasmania.
- 6.136 The ACCC notes that currently the only other provider of pooling services is UNiTAB. TOTE Tasmania has, for its own commercial reasons, decided to pool with Tabcorp. The ACCC notes prior to the 2007 Agreement being concluded, UNiTAB may have had an opportunity to compete with Tabcorp for the provision of pooling services to TOTE Tasmania.

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<sup>75</sup> 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.

<sup>76</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT5* at paragraph 22.



- 6.137 Further, the ACCC does not consider that the length of the 2007 Agreement is unreasonable and notes that UNiTAB will be able to seek to provide pooling services to TOTE Tasmania at the end of the agreement, should it choose to do so.
- 6.138 The ACCC considers that the Tabcorp Betting Rules requirement results in some public detriment. This detriment arises from the requirement for TOTE Tasmania to comply with the Tabcorp Betting Rules, which outline the maximum commission rates which Tabcorp and TOTE Tasmania will deduct on bets pooled in the SuperTAB pool.
- 6.139 That being said, the ACCC notes that totalisators do not compete significantly in relation to the commission rates which they take out of their respective pool, as state and territory governments set the maximum commission rates in legislation. The ACCC considers that without authorisation, it is likely that TOTE Tasmania would retain commission rates from its parimutuel wagering pool which would be close to the regulatory maximum. Therefore there is likely to be minimal difference in the commission rates which Tabcorp and TOTE Tasmania could take from their respective parimutuel wagering pools. In any event, differences in the commission rates between totalisators may not change the final odds offered to punters significantly.
- 6.140 Further, the 2007 Agreement does not prevent Tabcorp and TOTE Tasmania from competing on other aspects such as service or the development of new products.
- 6.141 The ACCC considers that the Pooling restriction does not raise significant competition issues because it is unlikely that TOTE Tasmania would seek to provide pooling services to another totalisator.
- 6.142 The ACCC considers that the public detriment generated from the Race Fields Approvals requirement is likely to be limited. In particular, the ACCC notes that without authorisation TOTE Tasmania is required by legislation to obtain race fields approval from the relevant controlling bodies should it wish to publish Victorian race fields data.
- 6.143 While the ACCC considers the 2007 Agreement results in some public detriment, the ACCC is satisfied that the 2007 Agreement results in public benefit. In particular, the ACCC considers that the 2007 Agreement will result in the following public benefits:
- enhanced wagering products supplied by totalisators, in particular those products provided by TOTE Tasmania
  - improved competition on service and price for pooled bets between Tabcorp and TOTE Tasmania and
  - maintaining funding for the Tasmanian racing industry.
- 6.144 Overall, the ACCC is satisfied that the public benefits generated by the 2007 Agreement outweigh the public detriments.

### **Imposition of conditions**

- 6.145 The Act allows the ACCC to grant authorisation subject to conditions.<sup>77</sup> 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.
- 6.146 The Tasmanian Racing Club submits that the ACCC should impose a number of conditions on authorisation.
- 6.147 The Tasmanian Racing Club submits that for the purposes of the 2007 Agreement, Tabcorp should be required to include the number of Tasmanian racing events equal to or more than the number of racing events for which wagering is pooled with TOTE Tasmania pursuant to the 1998 Agreement. The Tasmanian Racing Club is concerned that if fewer events are included for the purposes of the 2007 Agreement, it would reduce interest in Tasmanian racing. The ACCC notes that it is a matter for commercial negotiation between Tabcorp and TOTE Tasmania as to which Tasmanian racing events are included as a Tabcorp Event. Further, the ACCC notes that TOTE Tasmania has a statutory objective to promote and encourage wagering on Tasmanian racing, and consequently the ACCC does not consider it necessary to impose such a condition.
- 6.148 The Tasmanian Racing Club also submits that a condition should be imposed requiring Sky Channel to provide an undertaking that it will maintain current levels of broadcast coverage of Tasmanian racing product. The ACCC notes that there are no provisions in the 2007 Agreement which relate to how racing content is broadcast on Sky Channel. Further, the ACCC considers it is a commercial decision for Sky to determine what content it broadcasts. Accordingly, the ACCC does not consider it appropriate to impose such a condition.
- 6.149 Further, the Tasmanian Racing Club submits that a condition be imposed requiring TOTE Tasmania to provide undertakings in relation to continued wagering on Tasmanian racing events and the days on which Tasmanian events are held. TOTE Tasmania submits that it has legislative authority to program all racing events in Tasmania and that it exercises this authority to ensure that returns to TOTE Tasmania and the Tasmanian racing industry are maximised. The ACCC notes that it is a commercial decision for TOTE Tasmania to decide which Tasmanian racing events it will take bets on. The ACCC therefore does not consider it appropriate to impose such a condition.

### **Length of authorisation**

- 6.150 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 the light of any changed circumstances.
- 6.151 In this instance, Tabcorp seeks authorisation of the 2007 Agreement for the term of the Agreement, until 14 August 2012.
- 6.152 The ACCC considers that given Tabcorp's exclusive licence expires on 14 August 2012, it is appropriate for authorisation to be granted for the term of the agreement.

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<sup>77</sup> *Trade Practices Act 1974* (Cth), section 91(3).

## 7. Draft determination

### The application

- 7.1 On 6 November 2007 Tabcorp Manager Pty Ltd (Tabcorp) lodged applications for authorisation A91065, A91066 and A91067 with the Australian Competition and Consumer Commission (the ACCC).
- 7.2 Application A91065 was made under section 88(1) of the *Trade Practices Act 1974* (Cth) (the Act) to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 7.3 Application A91066 was made 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.
- 7.4 Application A91067 was made under section 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing.
- 7.5 Tabcorp seeks authorisation to make and give effect to an agreement entered into by Tabcorp and TOTE Tasmania Pty Ltd (TOTE Tasmania) governing TOTE Tasmania's participation in the SuperTAB Pool (2007 Agreement). Tabcorp seeks authorisation in respect of all provisions of the 2007 Agreement, in particular to the following provisions:
- Clause 5.1 of the 2007 Agreement (paragraph 4 of the public summary), under which Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania transmits to Tabcorp for inclusion in the SuperTAB pool all investments on the specified bet types received by TOTE Tasmania on nominated Tabcorp races
  - Clause 5.6 of the 2007 Agreement (paragraph 5 of the public summary), under which TOTE Tasmania agrees to comply with the Tabcorp Betting Rules in respect of all pooled bets
  - Clause 8 of the 2007 Agreement (paragraph 8 of the public summary), under which Tabcorp provides pooling services to TOTE Tasmania on condition that TOTE Tasmania does not re-supply those pooling services to any other wagering operator and
  - Clause 2.1 of the 2007 Agreement (paragraph 2.3 of the public summary), under which Tabcorp provides pooling services to TOTE Tasmania on the condition that TOTE Tasmania acquires race fields approvals from Racing Victoria Limited, Harness Racing Victoria and Greyhound Racing Victoria.

### The net public benefit test

- 7.6 For the reasons outlined in Chapter 6 of this draft determination:

- the ACCC considers that in all the circumstances the arrangements for which authorisation is sought under A91066 and A91067 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 A91065 and A91067 are likely to result in such a benefit to the public that the arrangements should be allowed to take place.

7.7 The ACCC therefore **proposes to grant** authorisation to applications A91065, A91066 and A91067.

### **Conduct for which the ACCC proposes to grant authorisation**

7.8 The ACCC notes that Tabcorp sought authorisation for all provisions of the 2007 Agreement, however identified four provisions which principally raise trade practices issues. Consequently, the ACCC has limited its analysis to the effect of these provisions.

7.9 As such, the ACCC proposes to grant authorisation to Tabcorp to make and give effect to clauses 5.1, 5.6, 8 and 2.1 of the 2007 Agreement for the term of the Agreement, that is until 14 August 2012.

7.10 Further, the proposed authorisation is in respect of clauses 5.1, 5.6, 8 and 2.1 of the 2007 Agreement as they stand at the time authorisation is granted. Any changes to these clauses during the term of the proposed authorisation would not be covered by the proposed authorisation.

7.11 This draft determination is made on xx January 2008.

### **Conduct not proposed to be authorised**

7.12 The proposed authorisation does not extend to the Rules Relating to Betting Transactions in Victoria (Tabcorp Betting Rules) set by Tabcorp. Further, the proposed authorisation does not extend to the remainder of the provisions of the 2007 Agreement.

### **Interim authorisation**

7.13 At the time of lodging the application Tabcorp requested interim authorisation to give effect to the 2007 Agreement. The ACCC denied interim authorisation on 21 November 2007.

7.14 The ACCC denied interim authorisation because it considered that the parties did not demonstrate:

- whether the claimed savings to TOTE Tasmania in operating under the commercial terms of the 2007 Agreement were a results of increased efficiencies or simply transfers from other participants in the pool and

- an argument of urgency given TOTE Tasmania's ability to continue to participate in the SuperTAB pool.

7.15 In reconsidering the issue of interim authorisation, the ACCC notes that no further information has been provided by Tabcorp to change its earlier assessment with respect to the request for interim authorisation. The ACCC notes that without interim authorisation, TOTE Tasmania will continue pooling with Tabcorp by way of the 1998 Agreement until such time as a final determination is issued by the ACCC. Accordingly, the ACCC does not consider it appropriate to grant interim authorisation at this time.

### **Further submissions**

7.16 The ACCC will now seek further submissions from interested parties. Submissions on the draft determination close on **22 February 2008**. 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.