



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation

lodged by

Tabcorp Manager Pty Ltd

in respect of

**agreements governing ACTTAB Limited and
Racing and Wagering Western Australia's
participation in the SuperTAB pool.**

Date: 15 July 2009

Authorisation no.: A91127
A91128
A91129
A91130
A91131
A91132

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Willett

Public Register no.:C2009/708

Summary

The ACCC proposes to grant authorisation in respect of agreements entered into between Tabcorp Manager Pty Ltd (Tabcorp) and each of ACTTAB Limited (ACTTAB) and Racing and Wagering Western Australia (RWVA) governing ACTTAB and RWVA's participation in the SuperTAB pool.

The ACCC proposes to grant authorisation until 14 August 2012.

Tabcorp has sought authorisation to give effect to the agreements entered into between Tabcorp and ACTTAB on 20 March 2009 and between Tabcorp and RWVA on 16 March 2009 in respect of all provisions of the ACTTAB and RWVA 2009 Agreements.

The ACTTAB and RWVA 2009 Agreements govern ACTTAB's and RWVA's participation in the SuperTAB Pool operated by Tabcorp.

Tabcorp, ACTTAB and RWVA are each the sole licensed off-course pari-mutuel wagering operator (TAB operator) in their respective state or territory. Each of Tabcorp, ACTTAB and RWVA also offer fixed odds wagering through their retail outlets and by phone and internet. In addition to Tabcorp, ACTTAB and RWVA, a number of corporate bookmakers and TAB operators in other states and territories also offer fixed odds wagering by phone and internet and, in the case of TAB operators, through retail outlets in their respective state or territory.

Previously, ACTTAB and RWVA have offered pari-mutuel wagering products through their participation in the SuperTAB pool operated by Tabcorp. Tabcorp seeks authorisation to give effect to new agreements governing ACTTAB and RWVA's participation in the SuperTAB pool.

The ACCC considers that the 2009 Agreements are likely to result in benefits to the public by improving the stability of the totalisator pool offered by RWVA and ACTTAB than if they were to operate on their own. To the extent that this leads to an increase in the turnover of RWVA and ACTTAB, and thereby the funding provided to their respective racing industries, the ACCC considers that some benefits to the public may arise.

Balanced against these potential public benefits the ACCC considers that the arrangements are likely to result in anti-competitive detriment – in particular under the arrangements the SuperTAB pool participants will generally offer consumers identical pari-mutuel odds both through retail outlets and by phone and online. The ACCC considers however that detriment flowing from this reduction in competition is likely to be mitigated by the following:

- With or without the SuperTAB arrangements, legislative restrictions prevent totalisators and corporate bookmakers from competing for wagering customers acquiring services through retail outlets.
- To the extent that online and phone wagering products offered by non-SuperTAB totalisators and corporate bookmakers compete with the products offered by the SuperTAB pool, these competitive pressures are likely to act as a constraint on the level of detriment arising under the 2009 Agreements.

On balance the ACCC considers the public benefit that is likely to result from the arrangements is likely to outweigh the public detriment and is proposing to grant authorisation to the arrangements until 14 August 2012.

The attachments to this determination form part of the draft determination.

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

On 29 April 2009 the ACCC granted interim authorisation to the proposed arrangements. Interim authorisation will remain in place until the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

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List of abbreviations

2009 Agreements	The ACTTAB 2009 Agreement and the RWWA 2009 Agreement
ACCC	Australian Competition and Consumer Commission
Act	<i>Trade Practices Act 1974 (Cth)</i>
ACTTAB	ACTTAB Limited
ACTTAB 2009 Agreement	Agreement entered into between Tabcorp and ACTTAB on 20 March 2009
Centrebet	Centrebet 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
Race Fields Approval requirement	Tabcorp will offer pooling services to ACTTAB and RWWA on condition that ACTTAB and RWWA have obtained race fields approvals from the relevant controlling bodies
RWWA	Racing and Wagering Western Australia
RWWA 2009 Agreement	Agreement entered into between Tabcorp and RWWA on 16 March 2009
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
TAH	Tabcorp Holdings Limited
TOTE Tasmania	TOTE Tasmania Pty Ltd
Tribunal	Australian Competition Tribunal

UNiTAB	UNiTAB Limited
VicRacing	VicRacing Pty Ltd

1. The applications for authorisation

- 1.1. On 30 March 2009 Tabcorp Manager Pty Ltd (Tabcorp) lodged applications for authorisation A91127 to A91132 for agreements governing ACTTAB Limited (ACTTAB) and Racing and Wagering Western Australia's (RWWA) participation in the SuperTAB pool with the Australian Competition and Consumer Commission (ACCC).
 - 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the Trade Practices Act 1974 (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of these applications is contained in Attachment B. These attachments form part of this draft determination.
 - 1.3. Applications A91127 and A91130 were made 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.
 - 1.4. Applications A91128 and A91131 were 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.
 - 1.5. Applications A91129 and A91132 were made under section 88(8) of the Act to engage in conduct that constitutes, or may constitute, exclusive dealing.
 - 1.6. In particular, Tabcorp applied for authorisation to:
 - give effect to the ACTTAB 2009 Agreement, including, in particular, but not limited to clauses 2.1, 5.1, 5.8 and 8.1 of the ACTTAB 2009 Agreement
 - give effect to the RWWA 2009 Agreement, including, in particular, clauses 2.1, 5.1, 5.7 and 8.1 of the RWWA 2009 Agreement.
- A summary of the effect of these clauses is below at paragraph 1.9. The ACTTAB 2009 Agreement and the RWWA 2009 Agreement are together referred to as the 2009 Agreements.
- 1.7. Tabcorp provided copies of the 2009 Agreements which were not placed on the public register at the request of Tabcorp. Tabcorp also provided a summary of the 2009 Agreements that was placed on the public register. This summary is at Attachment D.
 - 1.8. Tabcorp seeks authorisation until 14 August 2012.

1.9. The applications principally concern the following aspects of the 2009 Agreements:

- Tabcorp provides pooling services to each of ACTTAB and RWWA on the condition that each of ACTTAB and RWWA does not re-supply those pooling services to any other totalisator.¹
- Tabcorp provides pooling services to each of ACTTAB and RWWA on the condition that each of ACTTAB and RWWA transmits to Tabcorp for inclusion in the SuperTAB pool all investments on the specified bet types received by each of ACTTAB and RWWA on nominated Tabcorp races.²
- Tabcorp provides pooling services to each of ACTTAB and RWWA on the condition that each of ACTTAB and RWWA acquires Race Fields Approvals from a number of racing bodies.³
- Each of ACTTAB and RWWA agrees to comply with the Rules Relating to Betting Transactions in Victoria (Tabcorp Betting Rules) in respect of all pooled bets, which specify the applicable commission rates to be charged by the totalisator on particular pari-mutuel bet types. In addition, these rules contain restrictions on the persons to whom and the circumstances in which the totalisator can provide services to punters.⁴

1.10. In respect of the four provisions specified by Tabcorp, the 2009 Agreements are relevantly the same. Three of the provisions concern potential exclusive dealing conduct by Tabcorp. The fourth provision concerns a contract between Tabcorp and each of ACTTAB and RWWA potentially in contravention of section 45 of the Act.

1.11. Tabcorp has applied for authorisation on the basis that:

- in the case of the exclusive dealing conduct, Tabcorp (and not ACTTAB or RWWA) would engage in the relevant conduct
- in the case of the contracts potentially in contravention of section 45, ACTTAB and RWWA would obtain the benefit of the ACCC's grants of authorisation to Tabcorp by virtue of section 88(6) of the Act.

1.12. In addition to its agreements with ACTTAB and RWWA, in 2007 Tabcorp entered into separate pooling agreements with each of TOTE Tasmania Pty Ltd (TOTE Tasmania), the New Zealand Racing Board (NZRB), and Phumelela Gold Enterprises and Phumelela Gaming and Leisure Limited (together, Phumelela).

1.13. In November 2007, Tabcorp applied for authorisation to give effect to its pooling agreement with TOTE Tasmania. The ACCC granted authorisation to the agreements on 5 March 2008.

¹ RWWA 2009 Agreement, clause 8.1; ACTTAB 2009 Agreement, clause 8.1.

² RWWA 2009 Agreement, clause 5.1; ACTTAB 2009 Agreement, clause 5.1.

³ RWWA 2009 Agreement, clause 2.1(b), 1.1 (Definitions) and Part II of Schedule C; ACTTAB 2009 Agreement, clauses 2.1(b), 1.1 (Definitions) and Part II of Schedule C.

⁴ RWWA 2009 Agreement, clause 5.7(b) and ACTTAB 2009 Agreement clause 5.8(b), which provide that RWWA and ACTTAB respectively must comply with the Tabcorp Betting Rules.

Interim authorisation

- 1.14. Tabcorp requested interim authorisation for the 2009 Agreements at the time of lodging the applications for authorisation on 30 March 2009.
- 1.15. On 29 April 2009 the ACCC granted interim authorisation to the applications. In granting interim authorisation the ACCC considered that the protection provided by interim authorisation would allow Tabcorp to continue to provide pooling services to ACTTAB and RWWA on the new terms negotiated.

2. Background to the applications⁵

The wagering industry

- 2.1. Wagering is one form of gambling, the principal forms of which in Australia are wagering on racing (thoroughbred, harness and greyhound) and sporting events.
- 2.2. The other common form of gambling is ‘gaming’ such as on lotteries or pokies. Wagering is considered to be a more skill based activity than gaming which is generally considered to be a ‘chance’ based activity.
- 2.3. Racing comprises the large majority of wagering turnover. According to Centrebet Pty Ltd (Centrebet), national racing turnover for 2006/2007 was \$17.6 billion, representing 92 percent of all wagering turnover.
- 2.4. Wagering in Australia has traditionally been divided into pari-mutuel (totalisator) wagering and fixed odds wagering (also known as bookmaking). Recently other forms of wagering have been introduced to Australia – ‘Tote odds’ bookmaker wagering and betting exchanges.
- 2.5. Tabcorp estimates that while pari-mutuel wagering as a share of overall wagering decreased from around 70 to around 60 percent between 2005 and 2008, fixed odds wagering rose from around 30 percent to around 40 percent.

Pari-mutuel (or ‘totalisator’) wagering

- 2.6. Pari-mutuel wagering is the main form of wagering in Australia.
- 2.7. In pari-mutuel wagering the final odds are not calculated until after the close of betting. All bets are consolidated and the pari-mutuel operator deducts from the pool of bets a predetermined commission percentage (the ‘commission rate’ or ‘take out rate’). The remainder of the pool (the dividend pool) is divided by the number of units bet on the successful outcome to arrive at the dividend per unit wagered. Therefore, odds received for a pari-mutuel wager can vary after a bet is placed according to other bets placed until the close of betting.
- 2.8. More recently, some bookmakers have also been offering ‘tote odds’ wagering which involves the bookmaker setting odds by reference to the dividends being offered by one or more totalisators. For example, the ‘best of’ the odds offered by the three totalisator pools or ‘home tote’ odds plus 5 percent.
- 2.9. The revenue of a totalisator operator on an event is a percentage of the turnover wagered on the event, with the amount of the totalisator operator’s revenue being a function of the totalisator pool (that is, the turnover) and the commission rate.

⁵ The information in this chapter is taken predominantly from Tabcorp’s submission in support of its applications for authorisation and from TOTE Tasmania Pty Ltd and Ors’ submission in support of applications for authorisation A91123 to A91124 lodged on 27 February 2009 in relation to TOTE Tasmania, RWWA and ACTTAB jointly offering fixed odds wagering services and the supply of services by Centrebet.

- 2.10. Relevant legislation in each state and territory regulates the totalisator's maximum commission rates. For example, the maximum rate could be calculated as a maximum rate per bet type or a maximum overall rate across all bet types over the course of a year.
- 2.11. In New South Wales, the maximum allowable commission rate which may be prescribed in rules made by the licensee is 25 percent for each totalisator pool conducted in respect of a particular bet type. In Victoria the maximum take-out rate is 25 percent for each totalisator pool.⁶
- 2.12. In Queensland and the Northern Territory, the maximum commission rate allowable is 25 percent for each totalisator pool conducted in respect of a particular bet type subject to the requirement that the total overall annual maximum commission rate for the year is 16 percent.⁷
- 2.13. In Western Australia and Tasmania, the commission rate is between 14.5 and 25 percent, depending on whether the bet is for a win or a place, whether the bets are pooled, and the exact totalisator bet type.⁸
- 2.14. In South Australia, the license of an on-course totalisator must be given on the condition that it specifies the maximum commission rate.⁹
- 2.15. In the ACT there is no legislated maximum commission rate, however commission rates are broadly consistent with other states.

Suppliers of pari-mutuel wagering

- 2.16. Totalisators can be classified as either on-course or off-course. The vast majority of pari-mutuel turnover in Australia is off-course. In each Australian state and territory one operator is licensed to conduct off-course pari-mutuel wagering. These operators are referred to as totalisator agency boards or more commonly, the TAB.
- 2.17. These TABs were originally established by the relevant state and territory government as a statutory authority or government owned company, although governments have increasingly sought to privatise or corporatise their TABs. Table 2.1 below sets out the off-course totalisator in each state and territory.

State/Territory	TAB
New South Wales	Tab Limited – a wholly owned subsidiary of Tabcorp
Victoria	Tabcorp Holdings Limited – a listed company
Queensland	UNiTAB – a listed company that is part of Tatts Group Limited
Western Australia	RWWA – a government authority
South Australia	SATAB Pty Ltd – a wholly owned subsidiary of

⁶ *Gambling Regulation Act 2003* (Vic), s 4.2.5(2B).

⁷ *Wagering Act 1998* (Qld), s163; *Wagering Regulation 1999* (Qld), Reg 5. The body administering the relevant legislation may make rules in relation to the deduction of a commission rate- *Totalisator Licensing and Regulation Act 2000*, s46(2)(f) (NT); *Totalisator Rules 2000* (NT), rule 6.

⁸ *Betting Control Regulations 1978* (WA), reg 17C. *Betting Control Act 1954* (WA), s 17. *Racing (Totalizator Betting) Act 1952* (Tas), s 57M(1A).

⁹ *Authorised Betting Act Operations Act 2000* (SA), s36(3).

	UNiTAB
Tasmania	TOTE Tasmania – a government owned company ¹⁰
Australian Capital Territory	ACTTAB – a Territory owned corporation
Northern Territory	NTTAB Pty Ltd – a wholly owned subsidiary of UNiTAB.

- 2.18. While TABs were originally confined to offering pari-mutuel wagering, legislative amendments have allowed them to expand into fixed odds wagering. Consequently, TABs in each state and territory currently provide, among other things, pari-mutual and fixed odds wagering on racing and fixed odds wagering on sporting and other events.
- 2.19. Totalisators distribute wagering services through a variety of distribution channels including on-course operations, agency premises, licensed premises (clubs and pubs), telephone, internet and electronic betting terminals.
- 2.20. States and territories also allow other parties (for example, racing clubs) to conduct ‘on-course’ totalisators for racing events at racecourses in that state or territory. However, most racing clubs contract with the state or territory off-course totalisator operator to operate their on-course pari-mutuel wagering.
- 2.21. Totalisators in Australia generally ‘pool’ their pari-mutual wagering. Pooling refers to arrangements between two or more totalisators whereby they combine their respective pools in order to provide a single, larger pool into which customers of each participating totalisator can wager.
- 2.22. Pooling arrangements generally involve a totalisator with a larger pool (the host) offering pooling services to totalisators with smaller pools.
- 2.23. Current pooling arrangements involving TABs are as follows:
- The SuperTAB pool is hosted by Tabcorp. Current guest participants are RWWA, ACTTAB, TOTE Tasmania, the NZRB and Phumelela.¹¹
 - Tab Limited (the NSW totalisator) does not currently participate in any pooling arrangements. While Tabcorp has been seeking to pool with Tab Limited, regulatory barriers currently prevent Tab Limited’s participation in the SuperTAB pool.
 - TOTE Tasmania entered into a pooling arrangement with Singapore Racing in 2007.
 - UNiTAB operates its own pool. Current participants are UNiTAB’s subsidiaries SATAB Pty Ltd and NTTAB Pty Ltd.
- 2.24. On 5 March 2008 the ACCC granted authorisation for an arrangement to give effect to the pooling agreement covering TOTE Tasmania’s participation in the SuperTAB pool.¹²

¹⁰ The Tasmanian Government has recently announced that it intends to sell TOTE Tasmania by way of a competitive tender.

¹¹ Phumelela conducts horseracing and operates totalisator betting under the TAB banner in four of South Africa’s nine provinces.

¹² ACCC, *Tabcorp Manager Pty Ltd applications for authorisation A91065 to A91067*, 5 March 2008.

Regulation of TABs

2.25. Legislation specifies the conditions under which an off-course totalisator licence may be granted, including the period of time for which it is granted, and requires the licensee to comply with a number of conditions. Obligations and restrictions include:

- the payment of taxes and other fees to the state or territory government
- compliance with legislated maximum or specified commission or take out rates
- entry into arrangements with the relevant racing industry bodies under which the TAB provides economic contributions to the racing industry and obtains approvals to conduct wagering activities
- the requirements for the conduct of the TAB.

2.26. Tabcorp is licensed until 2012 to conduct off-course pari-mutuel wagering in Victoria under the *Gambling Regulation Act 2003* (Vic) which provides:

- the licence is an exclusive, non-transferable licence for 18 years, and is subject to the conditions set out in the licence
- an application for a licence must include an outline of the arrangements proposed to be entered into by the applicant with VicRacing Pty Ltd and Racing Products Victoria Pty Ltd
- the Victorian Commissioner for Gambling Regulation must approve totalisator equipment or any changes to totalisator equipment before it is used in connection with a totalisator or approved betting competition
- the licensee must make and comply with betting rules, which must specify, among other things, the maximum commission rate that may be deducted as commission out of the total amount invested in each totalisator to which the rules relate, which the Treasurer must approve
- the licensee must pay various taxes, fees and charges. Tabcorp is required to pay a wagering tax of 19.11 percent of its wagering revenue to the Victorian Government.

2.27. ACTTAB is authorised under the *Betting (ACTTAB Limited) Act 1964* (ACT) to conduct or provide totalisator betting services under a licence, which provides, among other things:

- the licence is exclusive and non-transferable for a period of 20 years
- ACTTAB may make rules providing for terms upon which it accepts totalisator bets. These rules must specify maximum totalisator commission deductions for pari-mutuel racing.

2.28. RWWA is authorised under the *Racing and Wagering Western Australia Act 2003* (WA) to carry on the business of operating an off-course totalisator wagering service on races and certain sporting and other events. This act provides, among other things:

- RWWA may include a wager received from a wagering club in a totalisator pool operated by it, which it may transmit to a combined totalisator pool
- RWWA may participate in a combined totalisator pool scheme with any other approved person in Western Australia, and may adopt and operate under any relevant rules or make other relevant arrangements at the discretion of the board of directors of RWWA
- RWWA is required to deduct from any bet (other than a fixed odds bet) a commission amount as prescribed or otherwise determined by RWWA.

Fixed odds wagering

- 2.29. The other major form of wagering in Australia is fixed odds wagering. Fixed odds wagering in Australia is offered by totalisators and bookmakers.
- 2.30. In fixed odds wagering the customer is informed of the odds at the time the bet is placed and the odds (for that customer's bet) do not change regardless of betting patterns. The operator will however change the odds on offer for future bets on the same outcome depending on betting patterns.
- 2.31. Unlike totalisator wagering, in fixed odds wagering the operator's revenue is not a set commission. Rather, the operator's revenue depends on a number of factors including the outcome of the event, the management of the book of bets and the extent to which any risk is bet back or laid off (that is, bets placed with another wagering operator so as to spread the risk of loss).
- 2.32. In recent years fixed odds wagering has enjoyed an increasing share of Australian wagering.

Suppliers of fixed odds wagering

- 2.33. Bookmakers are regulated by state and territory legislation. However, there is no statutory limit to the number of bookmakers' licenses issued.
- 2.34. Bookmakers can be either traditional on-course bookmakers or corporate bookmakers. The traditional on-course (rails) bookmaker is a natural person operating as a sole trader. Generally, traditional bookmakers are located on-course, although they may also offer telephone betting.
- 2.35. There are approximately 650 on-course bookmakers operating in Australia. However, Tabcorp submits that the number of traditional bookmakers, and their turnover, is in decline as more punters place bets with large corporate bookmakers who offer wagering services by internet and telephone.
- 2.36. Corporate bookmakers are generally larger corporate structures that conduct business through telephone and online channels, offering a range of wagering products, including fixed odds, and hybrid products such as TOTE odds, on a range of sporting and other events. Tabcorp submits that it understands that some corporate bookmakers are exploring other avenues to distribute their products, such as through entering into

arrangements with clubs and pubs regarding the installation of betting kiosks in venues that would provide potential punters with links to the corporate bookmaker's website.

2.37. Most corporate bookmakers are located in the Northern Territory, and to a lesser extent, the ACT. Tabcorp estimates that around 66 percent of bookmaker turnover in Australia is through Northern Territory based corporate bookmakers.

2.38. Corporate bookmakers currently operating in Australia include:

- Centrebet which is licensed in the Northern Territory to offer fixed odds wagering on sports, racing and other events to customers in Australia and overseas
- International All Sports Limited (which includes subsidiaries IASbet and Canbet) which is licensed in Australia and the United Kingdom
- Sportsbet which is an Australian based wagering operator licensed in the Northern Territory¹³
- Sportingbet which is United Kingdom based and operates in Australia from the Northern Territory
- Sports Acumen which is licensed in the ACT
- Centre Racing which is a subsidiary of NT TAB (part of UNiTAB) and licensed in the Northern Territory
- Luxbet which is owned by Tabcorp and licensed in the Northern Territory.

Betting exchanges

2.39. Betting exchanges permit punters to wager directly against each other (rather than against the totalisator or bookmaker) by wagering (with fixed odds) on opposing outcomes of a particular event. Punters can bet for or against a particular outcome, with wagers on opposing outcomes matched. The betting exchange operator facilitates the wagers but does not take on any risk with respect to the event's outcome.

2.40. Currently, Betfair, which is licensed in Tasmania, is the only betting exchange licensed in Australia. However, the Victorian Government has announced that in awarding wagering and betting licenses post 2012 it will include a betting exchange license.

Interrelationship between racing and wagering

2.41. The racing and wagering industries are closely interlinked. The predominance of wagering on racing events, and the historical development of the racing and wagering industries, has resulted in a mutually dependent relationship between the racing industry and wagering operators. The racing industry supplies the 'product' on which wagering operators conduct wagering and wagering operators provide a significant portion of funding to the racing industry.

¹³ Sportsbet Pty Ltd is currently seeking to acquire International All Sports Limited and the merger is currently being assessed by the ACCC.

2.42. These contributions are largely a result of the historical development of the racing and wagering industry. In each state and territory the licensed off-course TAB was originally established by the state or territory government with the money obtained through TAB wagering used to fund the racing industry.

2.43. According to RWWA and ACTTAB in 2007/2008:

- RWWA contributed \$109.4 million to the Western Australian racing industry
- ACTTAB contributed \$7.4 million to the ACT racing industry.

2.44. These contributions to the racing industry differ from the relationship between wagering and other sporting events which are generally funded through ticket sales, sponsorship and media rights, with (comparatively) little funding provided by the wagering industry. However wagering providers do provide funding to other sports organisations such as the Australian Football League, National Rugby League and the Coalition of Major Professional Sports in consideration for the sports 'product' being provided by the relevant association or organisation.

Regulation of racing in Australia

2.45. As noted, each Australian state and territory has a single, regulated, TAB operator. Legislation in each state specifies the conditions under which the TAB licenses are granted. These conditions include obligations and restrictions such as:

- the payment of taxes and other fees to the state or territory government
- compliance with legislated maximum or specified commission or take out rates
- entry into arrangements with the relevant racing industry bodies under which the TAB provides economic contributions to the racing industry and obtains approvals to conduct wagering activities
- the requirements for the conduct of the TAB.

2.46. Bookmakers must be registered in the state in which they operate, generally by the state bookmakers' association. A previous bookmakers' turnover tax has been abolished and replaced by a fixed fee in most states. Bookmakers (and other wagering operators such as TABs) are also required to pay a fee for the use and publication of racing information or race fields under state based race field legislation. These fees vary from state to state, and are calculated by reference to turnover or gross revenue.

Previous restrictions on advertising by wagering providers not licensed in the jurisdiction

2.47. There is, or has been in the recent past, legislation in many states and territories restricting advertising by wagering providers not licensed in that jurisdiction. However, it is not unlawful for punters residing in one state or territory to bet with a wagering operator in another state or territory.

- 2.48. However, the decision of the High Court in *Betfair v Western Australia*¹⁴ on 27 March 2008 cast doubt on the validity of many of these legislative restrictions and a number of state governments have repealed, amended, or announced that they would not be enforcing advertising restrictions pending their repeal.
- 2.49. In effect, this has provided the opportunity for online wagering providers, by advertising their services outside of the jurisdiction in which they are licensed, to more pro-actively seek to attract customers from outside the jurisdiction in which they are licensed.

The parties to the proposed arrangements

Tabcorp Manager Pty Ltd

- 2.50. Tabcorp Group is an Australian group of companies with interests in casinos, wagering and gaming. The parent company, Tabcorp Holdings Limited (TAH), is listed on the ASX.
- 2.51. Tabcorp Group's Wagering Division's operations, which are primarily conducted in Victoria and New South Wales, include:
- totalisator betting on racing and other sports in licensed agencies, hotels and clubs in Victoria and New South Wales and by telephone and internet
 - on-course totalisators in Victoria and New South Wales
 - fixed odds betting on racing and other sports under the TAB Sportsbet brand
 - Luxbet (a Northern Territory Bookmaker operating since September 2008)
 - national racing broadcasting through the Sky Channel television service
 - 2KY radio network, a New South Wales radio broadcasting service specialising in race broadcasts
 - Trackside (a virtual fixed odds racing game distributed principally in Victoria).
- 2.52. Tabcorp Group's Wagering Division employs around 2900 people and earned revenue and EBIT of \$1477.5 million and \$264.4 million respectively for the year ended 30 June 2008.¹⁵ Tabcorp Group's Wagering Division operates under separate licenses and with separate wagering pools in Victoria and New South Wales.
- 2.53. In Victoria, TAH holds the exclusive license to provide off-course totalisator wagering services in Victoria for thoroughbred, harness and greyhound racing until 14 August 2012.
- 2.54. Tabcorp Group's Wagering Division's Victorian activities involve operating the SuperTAB pool and the provision of pari-mutuel pooling services to ACTTAB, RWWA, TOTE Tasmania, NZRB and Phumelela.

¹⁴ *Betfair v Western Australia* [2008] HCA 11.

¹⁵ Tabcorp Manager Pty Ltd Annual Report, 2007/2008.

2.55. TAH's Victorian network is comprised of:

- approximately 611 retail outlets, including 91 agencies, 551 licensed venues (comprising hotels, clubs and kiosks) and 9 branches
- 164 331 open telephone and internet accounts¹⁶
- a racing portal which directs punters to RaceTAB (TAB NSW) and TAB Racing (TAB Victoria) to place bets on thoroughbred, greyhound and harness racing in Australia, Hong Kong, New Zealand and the United Kingdom
- Tab.mobi (a platform for betting via mobile phones).

2.56. Tabcorp Group's Victorian wagering business is conducted through a joint venture agreement between TAH, Tabcorp Participant Pty Ltd, Tabcorp Assets Pty Ltd, Tabcorp Manager Pty Ltd¹⁷ and VicRacing (a company established by the Victorian racing industry). Under this joint venture agreement Tabcorp is required to pay a proportion of its profit to VicRacing.

2.57. TAH is also party to a Racing Program Agreement and a Product Supply Agreement under which the major Victorian racing bodies provide Tabcorp with certain services and information in return for a product fee and a marketing fee.

2.58. In NSW, Tab Limited (acquired by TAH in 2004) holds a license to provide off-course totalisator wagering services for thoroughbred, harness and greyhound racing until 2097, with an exclusivity period until June 2013. Tab Limited is also licensed to conduct on-course totalisators in New South Wales and offers totalisator and fixed odds betting on sporting and other events.

2.59. Tab Limited is required to provide a product fee and a wagering incentive fee to the New South Wales Racing Industry.

Racing and Wagering Western Australia

2.60. RWWA is a body corporate, established in 2003 as the controlling statutory authority for thoroughbred, harness and greyhound racing. RWWA is not a Crown agency or subject to ministerial direction, but it is subject to various accountability mechanisms (including a requirement to report to Parliament) and is regulated by the Western Australian Gaming and Wagering Commission.

2.61. RWWA's responsibilities include:

- carrying on the business of offering on-course and off-course pari-mutuel wagering services
- carrying on the business of setting, accepting and making fixed odds wagers

¹⁶ All figures are provided by Tabcorp and are current as at 19 March 2009.

¹⁷ Tabcorp Participant Pty Ltd, Tabcorp Manager Pty Ltd and Tabcorp Assets Pty Ltd are wholly owned subsidiaries of TAH.

- controlling, supervising and regulating the conduct of thoroughbred, harness and greyhound racing in Western Australia
- registering racing clubs and racing animals and licensing race meetings, race venues and participants
- undertaking and managing industry strategic planning, promotion, marketing, sponsorship and administration
- making loans or grants to racing clubs and allied bodies
- setting race dates and determining the race meetings to be held in Western Australia
- liaising with government and other authorities with respect to, and represent the interest of, the racing industry in Western Australia.

2.62. RWWA is the principal funding arm of the Western Australian racing industry, distributing all its profits to the Western Australian racing industry, other than that retained in its reserves¹⁸. In 2007/2008, RWWA contributed \$109.4 million (7 percent of turnover) to the Western Australian racing industry.¹⁹ RWWA also pays 25 percent of wagering revenue on sporting events (after paying dividends/winnings and wagering taxes) into a government sports account for distribution to Western Australian sports. This amounts to a contribution of approximately \$2 million annually.²⁰

2.63. RWWA also contributes to the Western Australian economy by paying ‘betting tax’ to the Western Australian government at rates of 5 percent of pari-mutuel sports turnover, 0.5 percent of fixed odds sports wagering turnover, and 2 percent of fixed odds racing wagering turnover.²¹

2.64. RWWA offers off-course pari-mutuel betting trading as the ‘TAB’ (in the SuperTAB totalisator pool) and offers fixed odds wagering (formerly through TAB Sportsbet) on sports, racing and other events.²² RWWA also operates the TABozbet internet betting platform offering TAB betting products.

2.65. RWWA’s network is comprised of 286 licensed retail outlets, PubTAB outlets and ‘self service’ sites, and internet and telephone distribution channels. Approximately 84.1 percent of business is transacted through RWWA’s retail network, with the remainder through online and telephone channels.²³

2.66. RWWA’s wagering turnover for the 2007/2008 financial year was \$1.519 billion, an increase of 2.5 percent on the previous year.²⁴

¹⁸ Section 106 of the *Racing and Wagering Western Australia Act 2003* (WA).

¹⁹ RWWA Annual Report for 2007/2008.

²⁰ Section 107 of the *Racing and Wagering Western Australia Act 2003* (WA).

²¹ RWWA Annual Report for 2007/2008.

²² The ACCC issued a draft determination proposing to grant authorisation to TOTE Tasmania, RWWA and ACTTAB for a fixed odds wagering joint venture and the supply of services by Centrebet on 24 June 2009.

²³ RWWA Annual Report for 2007/2008.

²⁴ RWWA Annual Report for 2007/2008.

ACTTAB Ltd

- 2.67. ACTTAB is an ACT government-owned corporation established in 1964 and licensed to provide betting services in the ACT. The functions of ACTTAB include the provision of wagering and gaming services and conducting or acting as an agent for lotteries.
- 2.68. ACTTAB paid \$8.5 million in license fees, dividends and taxes to the ACT government and \$7.4 million to the ACT racing industry in 2007/2008.²⁵ Since its creation ACTTAB has contributed \$115 million and \$114 million to the ACT racing industry and the ACT government respectively.²⁶ Funding to the ACT racing industry is derived from ACTTAB's pari-mutuel revenue. Contributions made to the ACT government are derived predominantly from pari-mutuel revenue, but also from fixed odds and lotteries.
- 2.69. ACTTAB provides on-course and off-course pari-mutuel betting through the SuperTAB pool and fixed odds wagering (formerly through TAB Sportsbet).²⁷ ACTTAB also operates Keno and Trackside.
- 2.70. ACTTAB's network is comprised of over 50 ACT retail outlets (including branches, agencies, and sub-agencies), a number of on-course outlets at ACT race courses, and internet and telephone betting services provided to account customers.
- 2.71. ACTTAB's wagering turnover for the 2007/2008 financial year was \$177.1 million, including \$164.5 million in racing turnover (up 3.90 percent) and \$8.6 million in fixed odds wagering turnover derived through the TAB Sportsbet arrangements.²⁸

Rationale for totalisator pooling

- 2.72. In pari-mutuel wagering, the bets are consolidated or 'pooled' into a totalisator pool. Pooling involves two or more totalisators combining their respective pools in order to provide a single, larger pool into which their customers can wager.
- 2.73. Pooling arrangements generally involve a totalisator having a large pool (the 'host') offering 'pooling services' to one or more other totalisators which each have a smaller pool (the 'guest participants') for a fee.
- 2.74. Smaller totalisators seek to enter into pooling arrangements with other totalisators in order to have access to a larger totalisator pool, which carries a number of benefits.

Consumers of pari-mutuel wagering products

- 2.75. Pooling can facilitate more stable odds and larger dividends being offered to punters.
- 2.76. The larger the totalisator pool, the greater its stability. Large bets placed with a small totalisator (without access to a larger pool) can substantially distort the calculation of

²⁵ ACTTAB Annual Report for 2007/2008

²⁶ ACTTAB Annual Report for 2007/2008.

²⁷ The ACCC issued a draft determination proposing to grant authorisation to TOTE Tasmania, RWWA and ACTTAB for a fixed odds wagering joint venture and the supply of services by Centrebet on 24 June 2009.

²⁸ ACTTAB Annual Report for 2007/2008.

odds for the relevant race and affect potential winnings of all punters who have wagered on that race.

- 2.77. A larger pool means that there is potentially more money available to distribute to winning punters. This increased liquidity enables customers to bet larger amounts on all contestants without significantly impacting the dividends paid.

Totalisators

- 2.78. Totalisator wagering, and pooling, is a market making activity (like a stock exchange) and thus a key feature of the attractiveness of the service is the number of people using the service. A large pool is important to the attractiveness of the totalisator operation to a consumer because, as discussed above, it results in greater stability of odds.
- 2.79. Tabcorp submits that wagering, particularly totalisator wagering, requires a critical mass of wagerers to be viable, such that one wager does not significantly alter the odds for all participants in the totalisator.
- 2.80. Having access to a large pool assists a totalisator to attract punters, particularly high end punters who are likely to place large bets. The size of the totalisator pool is an important factor considered by high end punters in choosing where to place a bet, and therefore pooling arrangements assist totalisators to compete more effectively with other large totalisator pools.
- 2.81. A guest participant may have access to new pari-mutuel wagering products, including internationally pooled bets, from the host totalisator through participation in the pool. In this regard, pooling arrangements can create synergies for participating totalisators because the international pooling arrangements can be organised by the host totalisator for the benefit of all participating totalisators. By participating in the SuperTAB pool, RWWA and ACTTAB obtain access to pooling arrangements negotiated with NZRB and Phumelela.
- 2.82. A large totalisator pool is more attractive to international totalisators seeking to pool with Australian totalisators. In this regard, pooling can assist the host to attract and negotiate international pooling arrangements.
- 2.83. The host totalisator usually benefits from providing pooling services to smaller totalisators by charging a service fee.

Pooling arrangements in Australia

- 2.84. Australia has more totalisator pools than many other countries which, despite having larger populations and higher total wagering turnover, have a single national totalisator pool.
- 2.85. The existence of multiple pools in Australia is the result of historical factors, in particular, the fact that state and territory governments each established their own totalisator. Australian operators often seek to combine their pool with other operators; while there are eight off-course totalisator operators in Australia, as noted at paragraph 2.23 there are three totalisator pools operating in Australia.

2.86. As discussed in paragraph 2.23, pools operating in Australia include the SuperTAB pool and the UNiTAB pool.

The SuperTAB pool

2.87. Tabcorp as host of the SuperTAB pool has entered into separate agreements with each of ACTTAB, RWWA, TOTE Tasmania, NZRB and Phumelela. There is no contractual relationship between the guest participants.

2.88. Under each of these agreements, the guest participants agree to participate in the SuperTAB pool and Tabcorp agrees to provide these totalisators with pooling services and accept investments of certain bet types for inclusion in the SuperTAB pool in return for a pooling or processing fee.

2.89. In practice, the SuperTAB pooling arrangement is operated on a ‘gross pool basis’, which works as follows:

- Each of the participating TABs conduct its own pari-mutuel wagering business in the course of which it supplies SuperTAB wagering products to punters.
- The funds collected in respect of SuperTAB products are then pooled by each TAB.
- The pools of each participating TAB are nominally commingled in the SuperTAB pool. In practice, 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 SuperTAB pool participants (in proportion to the total wagers placed with that participant).
- Tabcorp operates the SuperTAB pool and calculates the respective odds and 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. Cash settlements take place four weekly in arrears.
- Tabcorp invoices each guest participant for the amount of the processing fee.²⁹

2.90. Under the joint venture agreement with VicRacing, Tabcorp has agreed that it will not provide access to its pool to any other guest participant conducting wagering activities outside Victoria, unless the guest participant’s participation has been approved by VicRacing.

²⁹ RWWA’s Processing Fee under the RWWA 2009 Agreement is set out in Part II of Schedule A. ACTTAB’s Processing Fee under the ACTTAB 2009 Agreement is set out in Part II of Schedule A.

2.91. In practice, VicRacing imposes conditions on a totalisator's participation in the SuperTAB pool as a condition of providing its approval. VicRacing has approved each of RWWA and ACTTAB's participation in the SuperTAB pool pursuant to the terms of the 2009 Agreements.

Existing arrangements

2.92. RWWA and ACTTAB currently participate in the SuperTAB pool.

2.93. Prior to the granting of interim authorisation, Tabcorp provided pari-mutuel pooling services to RWWA and ACTTAB pursuant to separate agreements, made with RWWA and ACTTAB respectively, in 2005.

2.94. The 2009 Agreements would allow RWWA and ACTTAB to continue to participate in the SuperTAB pool.

2.95. Tabcorp notes that if the RWWA 2009 Agreement does not come into effect then RWWA will not continue to participate in the SuperTAB pool. In contrast, the terms of the ACTTAB 2009 Agreement are such that if the ACTTAB 2009 Agreement does not come into effect before the 'Cut Off Date', ACTTAB's 2005 agreement with Tabcorp will remain in full force and effect.

3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application. A summary of the submissions received by the ACCC from the applicants and interested parties follows.
- 3.2. Broadly, Tabcorp submits that the arrangements benefit consumers by making the products offered to punters more attractive. Tabcorp submits that the arrangements have the potential to increase RWWA and ACTTAB's turnover, providing additional funds for distribution to their respective state/territory racing industry.
- 3.3. In contrast, Tabcorp submits that any anti-competitive detriment from the arrangements would be limited by Tabcorp and RWWA/ACTTAB continuing to compete on price and other aspects of competition.
- 3.4. The ACCC sought submissions from a number of interested parties potentially affected by the applications, including racing associations, government departments, other totalisators and bookmakers.
- 3.5. RWWA strongly supports the grant of authorisation to give effect to the RWWA 2009 Agreement. RWWA submits that as a smaller totalisator, having access to a larger totalisator pool has a number of benefits for RWWA, as well as benefits for consumers, the Western Australian racing industry and the Western Australian economy.
- 3.6. RWWA and Tabcorp submit that given that the ACCC granted authorisation to the TOTE Tasmania pooling agreement with Tabcorp on 5 March 2008, which is 'relevantly the same' as the 2009 Agreements, there is a strong basis for the ACCC to grant authorisation to the 2009 Agreements.
- 3.7. The views of Tabcorp and interested parties are outlined in the ACCC's evaluation of the 2009 Agreements in Chapter 4 of this draft determination. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

4. ACCC evaluation

- 4.1. The ACCC's evaluation of the 2009 Agreements is in accordance with test(s) found in:
- section 90(8) of the Act which 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
 - sections 90(6) and 90(7) of the Act which 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
 - section 90(8) of the Act which 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.
- 4.2. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#) of this draft determination.

The market

- 4.3. 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.
- 4.4. Tabcorp submits that there are a number of arguable markets that may be relevant to the ACCC's consideration of the applications, and that in respect of each of these markets, the 2009 Agreements would result in significant public benefits and minimal, if any, public detriments.
- 4.5. Tabcorp submits that the product markets relevant to the applications are arguably the market for the supply of pooling services and the market for the supply of pari-mutuel wagering on racing.
- 4.6. RWWA agrees with Tabcorp's delineation of the relevant markets, namely, a national market for pari-mutuel wagering on racing and a national market for the supply of pooling services.

The supply of pooling services

- 4.7. 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.

- 4.8. Tabcorp considers the following factors to be relevant in assessing the market for the supply of pooling services:
- Pooling between totalisators is highly regulated in Australia, such that totalisators do not freely compete to provide pooling services to other totalisators.
 - In order to pool, the incentives of the host and guest totalisator must be aligned.
 - The incentives to pool have changed significantly since the ACCC considered the Tabcorp/UNiTAB merger. Guest totalisators can now compete aggressively with the host totalisator, the racing industry loses product fees on (non-domestic) turnover, and the relevant state government loses tax revenues.
 - UNiTAB does not pool with any totalisators other than its subsidiaries. Tab Limited is not permitted to pool without necessary approvals.
- 4.9. 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.³⁰
- 4.10. The ACCC also 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.³¹

The provision of wagering services to the public

- 4.11. Tabcorp submits that as the 2009 Agreements relate to the SuperTAB pool, and that punters purchasing a SuperTAB product are engaging in pari-mutuel wagering, the starting point for market definition is a market for the supply of pari-mutuel wagering on racing. In Australia all pari-mutuel wagering product is supplied by TABs.
- 4.12. In its assessment of Tabcorp's merger with TAB Limited the ACCC considered that there were separate product markets for pari-mutuel betting by state totalisators on racing, fixed odds betting by state totalisators/bookmakers on racing, and fixed odds betting by state totalisators and bookmakers on sporting events.
- 4.13. Tabcorp however has argued that the relevant product market is broader than that previously identified by the ACCC in its assessment of Tabcorp's merger with TAB Limited and includes other types of wagering on racing (including wagering products offered by bookmakers and betting exchanges), wagering on sports or events and other forms of gambling.

³⁰ ACCC, *Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, Public Competition Assessment*, 16 November 2006, paragraph 22 - 23.

³¹ *ibid.*, paragraph 24.

4.14. Tabcorp submits that there has been rapid growth of large corporate bookmakers and that there is evidence of competition between corporate bookmakers and the TABs, including:

- evidence that fixed odds wagering products are increasing their share of the Australian wagering market
- evidence that corporate bookmakers' share of the total wagering market is increasing
- evidence of corporate bookmakers directly competing with TABs by offering TAB-odds based on the odds offered by one or more of the totalisators, including odds equivalent to the best of the three totalisators, or the home totalisator plus 5 percent
- the introduction of operating concessions in some states, including increased telephone betting, increased ability to offer sports betting on racecourses via the internet, 24/7 internet betting on sporting and future events, overseas betting, corporate bookmakers being permitted to operate at more than one race meeting at the same time, and abolition of minimum telephone bet limits
- the ACCC previously recognising that bookmakers, particularly corporate bookmakers offering online wagering services, are likely to compete with totalisators for punters.³²

4.15. Tabcorp submits that the products offered by corporate bookmakers are in the same market as pari-mutuel wagering products and offer wagering on the same racing and sporting events as the totalisators. Tabcorp submits that while ostensibly offering a fixed odds product, corporate bookmakers' odds are usually determined by reference to the odds being offered by the totalisator pools, and that operating under tax and other advantages enables corporate bookmakers to offer more attractive odds than those available from the TABs.

4.16. The ACCC has previously recognised that bookmakers offering online wagering services are likely to compete with totalisators for punters.³³

4.17. Tabcorp submits that there is some evidence of demand side substitution between wagering on racing and wagering on other sports and events. Further, Tabcorp submits that there would appear to be supply side substitution across wagering products, because wagering on racing and wagering on sports and other events are supplied by the same providers. Tabcorp submits that to some extent other gambling products compete with each other for customer dollars.

4.18. Tabcorp submits that it is not appropriate to consider thoroughbred, harness and greyhound racing separately. Tabcorp submits that the conduct is most appropriately analysed within a broader market for the supply of wagering product to punters generally, rather than distinguishing between types of punters. Tabcorp considers that all forms of distribution (retail, telephone, internet, mobile phones and interactive

³² ACCC, *Sky, Tabcorp and TVN Final Determination*, paragraph 6.33. ACCC, *UNiTAB PCA*, paragraph 47. See also *Befair's submission to the ACCC regarding the MOU Authorisation Application*, 20 March 2007, p 20.

³³ *ibid.*

television) should be included in the same market as punters and wagering operators can shift between various distribution channels.

- 4.19. Tabcorp submits that, as a result of regulatory and other changes, totalisators increasingly compete and attract customers beyond their traditional state and territory boundaries, and Tabcorp applies a national market for pari-mutuel wagering on racing.

ACCC view

- 4.20. As discussed in Chapter 2, the primary forms of wagering in Australia are pari-mutual wagering and fixed odds wagering. Recently, other forms of wagering such as tote odds bookmaker wagering and wagering through betting exchanges have also been introduced.
- 4.21. The primary distribution channels through which wagering services are supplied are retail outlets and telephone and online betting accounts.
- 4.22. At present, there is only one operator licensed in each state to supply wagering services through retail outlets. While a license is also required to provide wagering services by phone and internet there is no limit on the number of such bookmaking licenses granted. Similarly, there are no restrictions on customers placing bets with suppliers outside their own state or territory. Although, traditionally, advertising restrictions have made it difficult for wagering operators to attract customers from outside the jurisdiction in which they are licensed. However, as a result of the *Betfair* decision³⁴ most states and territories have removed, or are in the process of removing, restrictions on advertising by wagering providers not licensed in that jurisdiction.
- 4.23. The ACCC has previously considered the issue of market definition in respect of wagering services in its assessment of the proposed acquisition of UNiTAB by Tabcorp in 2006³⁵ and in considering an application for authorisation lodged by Tabcorp in relation to agreements governing the participation of TOTE Tasmania in its SuperTAB totalisator pool.³⁶
- 4.24. The ACCC has concluded previously that there is limited competition between wagering operators in different states. The ACCC has stated that this is largely explained by the inability of service providers to advertise outside their home state and by restrictions which meant that only the licensed totalisator in each state can establish retail outlets.
- 4.25. However, the ACCC has also noted that, through offering online and telephone wagering services, corporate bookmakers have, to an extent, competed outside the jurisdictions where they are licensed.
- 4.26. The ACCC notes that the restrictions on the establishment of retail outlets that, in part, have lead the ACCC to form this view in the past, remain. In each state and territory, only a single licensed TAB operator is able to provide totalisator and fixed odds wagering services through retail outlets.

³⁴ *Betfair v Western Australia* [2008] HCA 11.

³⁵ ACCC, *Proposed acquisition of UNiTAB Limited by Tabcorp Holdings Limited, Public Competition Assessment*, 16 November 2006.

³⁶ ACCC, *Tabcorp Manager Pty Ltd applications for authorisation A91065 to A91067*, 5 March 2008.

- 4.27. Tabcorp has submitted that some corporate bookmakers are exploring the possibility of entering into arrangements with clubs and pubs regarding the installation of betting kiosks in venues to provide potential punters with links to the corporate bookmaker's website. While noting these possible developments, the ACCC considers that such arrangements are still very much in their infancy.
- 4.28. However, as noted, most states and territories have removed, or are in the process of removing, restrictions on advertising by wagering providers not licensed in that jurisdiction. This, in combination with the increased prevalence of telephone and internet wagering, has facilitated greater competition between wagering providers across jurisdictions.
- 4.29. As noted at paragraph 2.5, Tabcorp estimates that pari-mutuel wagering as a share of overall wagering decreased from around 70 percent to around 60 percent between 2005 and 2008, while fixed odds wagering rose from around 30 percent to around 40 percent. In its submission Tabcorp has also estimated that around 66 percent of all fixed odds wagering through bookmakers is through Northern Territory based corporate bookmakers.
- 4.30. For the purpose of the ACCC's assessment of Tabcorp's applications for authorisation it is not necessary for it to conclude whether the traditional product markets for pari-mutuel betting by state totalisators on racing, fixed odds betting by state totalisators/bookmakers on racing, and fixed odds betting by state totalisators and bookmakers on sporting events have converged.
- 4.31. The ACCC does however note that the developments identified by Tabcorp may suggest that the markets for some traditional wagering products are, to a degree, converging with an increasing number of consumers now considering pari-mutual wagering and fixed odds wagering offers to be in competition with each other.
- 4.32. The increase in consumer demand for online wagering services may also suggest that, for some consumer, retail (shop-front) and online services are increasingly substitutable. However, the ACCC also notes that there is also a preference among a proportion of consumers to place bets through retail outlets that provide a suite of facilities and services beyond just accepting the wager.

The 'future-with-and-without test' or counterfactual

- 4.33. 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.³⁷
- 4.34. 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

³⁷ 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.

relevant markets will react if authorisation is not granted. This prediction is referred to as the 'counterfactual'.

- 4.35. Tabcorp submits that if the RWWA 2009 Agreement does not come into effect, RWWA will not participate in the SuperTAB pool in the future.
- 4.36. In contrast, Tabcorp submits that if the ACTTAB 2009 Agreement does not come into effect on or before the Cut Off Date due to a failure of the parties to satisfy the conditions precedent in clause 2.1, the ACTTAB 2005 Agreement will remain in full force and effect such that ACTTAB will continue to participate in the SuperTAB pool.
- 4.37. RWWA submits that the appropriate counterfactual is that RWWA does not pool with another totalisator, but that ACTTAB and TOTE Tasmania have arrangements that allow them to continue to participate in the SuperTAB pool.
- 4.38. In the future with the 2009 Agreements, Tabcorp submits that RWWA and ACTTAB would be allowed to continue participating in the SuperTAB pool and would be able to provide an improved wagering product to their customers compared to the case if they did not pool with one or more other totalisators.
- 4.39. Tabcorp submits that the distribution of pari-mutuel wagering in Australia would not be affected and that pooling may tend to facilitate the offering of standardised pricing. Tabcorp submits, however, that the 2009 Agreements do not prevent price competition through individual promotions, the offering of rebates, advertising, offering superior service, the provision of other services to high value punters, and the introduction of new or innovative products.
- 4.40. Tabcorp submits that the 2009 Agreements would not affect competition between Tabcorp and RWWA/ACTTAB in respect of non-pooled bets, price and other competition would continue between SuperTAB pool participants and other totalisators, and price and other competition would continue between SuperTAB pool participants and corporate bookmakers.

ACCC view

- 4.41. The ACCC notes that Tabcorp has sought authorisation in respect of the 2009 Agreements to cover conduct that would otherwise breach the Act – exclusive dealing, exclusionary conduct and arrangements that are likely to substantially lessen competition – and that authorisation is a condition precedent of the 2009 Agreements. In these circumstances the ACCC considers that, in the absence of authorisation, the parties are unlikely to give effect to the pooling arrangements as currently provided for by the 2009 Agreements.
- 4.42. To the extent that the 2005 Agreement between Tabcorp and ACTTAB raises competition concerns the ACCC also considers that it is unlikely that the parties would give effect to the agreement in the same form in the absence of authorisation.
- 4.43. The ACCC considers that in the absence of authorisation of the 2009 Agreements, and specifically, the provisions identified by Tabcorp as raising competition concerns, there are a number of possible counterfactuals including:

- RWWA and/or ACTTAB would operate on their own, and would not participate in any pooling arrangements
- RWWA and/or ACTTAB may seek to enter alternative pooling arrangements, such as seeking access to the UNiTAB pool
- RWWA and/or ACTTAB could seek to form separate pooling arrangements, for example a pool with RWWA, ACTTAB and TOTE Tasmania or other smaller totalisators. However, the ACCC considers that if RWWA and ACTTAB were to seek to enter into separate pooling arrangements with other smaller totalisators, similar competition issues would be likely to arise. Further, RWWA notes that the appropriate counterfactual is that it does not pool with another totalisator.

4.44. In summary, the ACCC considers that absent authorisation, Tabcorp would not give effect to the 2009 Agreement and RWWA and ACTTAB would no longer participate in the SuperTAB pool, which would result in the likely counterfactual that RWWA and ACTTAB would operate on their own and not participate in any pooling arrangement.

Public benefit

4.45. 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.³⁸

4.46. Tabcorp submits the pari-mutuel pooling arrangements will deliver public benefits, including:

- enhanced wagering products for consumers
- benefits to the racing industry through increased participation in wagering.

4.47. In considering public benefits - particularly cost savings from increases in productive efficiency from conduct proposed for authorisation - the ACCC applies a public benefit standard when determining the weight to be given to productive efficiency savings. That is, the ACCC will consider how much weight society considers should be attached to a public benefit. Of particular interest will be the number and identity of the proposed beneficiaries.

4.48. The ACCC's assessment of the likely public benefits from the proposed arrangements follows.

³⁸ 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.

Improving the stability of the totalisator pool

- 4.49. Tabcorp submits that pooling provides benefits to both totalisators and consumers.
- 4.50. Tabcorp submits that smaller totalisators seek access to enter into pooling arrangements with other totalisators to gain access to a larger totalisator pool.
- 4.51. Tabcorp submits that a totalisator that has access to a larger pool is more attractive to consumers because it is more stable. Tabcorp submits that RWWA and ACTTAB's participation in the SuperTAB pool provides those punters in Western Australia and the ACT, respectively, which do not want to wager by internet or telephone, with access to a better product (i.e. a larger totalisator pool and access to products pooled with wagering operators located outside Australia).
- 4.52. 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 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.
- 4.53. Tabcorp notes that pooling can also assist the host totalisator compete with other Australian totalisator pools to attract and negotiate international pooling agreements.
- 4.54. 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.
- 4.55. RWWA submits its key rationale for entering into the RWWA 2009 Agreement is to gain access to a larger pool. RWWA submits that while smaller totalisators would have capabilities to operate stand alone pools, a sustainable pool scale for a smaller totalisator enables:
- larger dividends, potentially flowing from the larger pool size
 - increased liquidity resulting in the reduced volatility of odds
 - potential access to new pari-mutuel wagering products such as internationally pooled bets
 - the potential for greater consumer confidence in the integrity of the pools (as a larger pool minimises the potential for manipulation by the placement of large bets) and thereby maximising returns
 - smaller totalisators to attract high value punters, to which pool size is important
 - small totalisators to maintain funding to distribute to the racing industry, due to attracting increased customer participation.
- 4.56. RWWA submits that the proposed conduct would benefit consumers by:
- providing consumers with access to pools and odds that are more stable

- providing consumers with potential access to new pari-mutuel wagering products such as internationally pooled bets
- providing consumers with more confidence in the integrity of the pools and the ability to maximise returns for investors
- providing consumers with continued access to the SuperTAB pool thereby enabling systems and software betting platforms ongoing use of their betting strategies.

ACCC view

- 4.57. The ACCC considers that the implementation of the 2009 Agreements is likely to allow RWWA and ACTTAB to offer a more stable totalisator pool than if they were to operate on their own.
- 4.58. In particular the ACCC considers that having access to a larger totalisator pool is likely to assist RWWA and ACTTAB to compete more effectively by providing access to a more stable pool which has less fluctuations in the odds for a race than might have occurred in a smaller totalisator pool. The ACCC understands that this is particularly important in seeking to attract high value punters who place importance on the stability of the pool.
- 4.59. The ACCC considers that the terms of the 2009 Agreements are likely to result in a public benefit by improving the stability of the totalisator pool offered by ACTTAB and RWWA.

Contributions to the racing industry

- 4.60. Tabcorp submits that larger pools attract more customers both domestically and internationally, resulting in increased participation in wagering.
- 4.61. Tabcorp and RWWA submit that the proposed arrangements will also benefit the racing industries in Western Australia and the ACT. Tabcorp submits that the racing industries in all states and territories have revenue and/or profit share arrangements with the TAB licensed in that state or territory. Tabcorp submits that it follows that increased participation in wagering will result in additional funds being provided to racing industry bodies.
- 4.62. For example, in 2007/2008, RWWA distributed \$107.4 million funding to the Western Australian racing industry in the form of stakes, capital grants, subsidies and participant payments.³⁹
- 4.63. RWWA submits that the arrangements benefit the Western Australian economy, including employing over 3700 people.

³⁹ RWWA Annual Report 2008.

ACCC view

- 4.64. As noted at paragraph 2.43, in 2007/2008:
- RWWA contributed \$109.4 million to the Western Australian racing industry
 - ACTTAB contributed \$7.4 million to the ACT racing industry.
- 4.65. As discussed above, the ACCC considers that the proposed arrangements will facilitate improvements in the stability of the totalisator pool offered by RWWA and ACTTAB. To the extent that this leads to an increase in the turnover of RWWA and ACTTAB, and thereby the funding provided to their respective racing industries, the ACCC considers that some benefits to the public may arise.

Public detriment

- 4.66. 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.⁴⁰

- 4.67. Tabcorp and RWWA submit that the detriments of the 2009 Agreements will be limited to a risk of some reduction in price competition between Tabcorp and RWWA/ACTTAB.
- 4.68. Tabcorp submits that price competition between Tabcorp and RWWA/ACTTAB can occur under the terms of the 2009 Agreements and the 2009 Agreements do not restrict any other aspect of competition between Tabcorp and RWWA/ACTTAB, as discussed in paragraph 4.38.
- 4.69. Further, as discussed in paragraph 4.39, Tabcorp submits that the 2009 Agreements do not affect competition between SuperTAB pool participants and other totalisators and corporate bookmakers.

ACCC view

- 4.70. 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.
- 4.71. Agreements between competitors which impose restrictions on their decisions as to what they deal in, or with whom they deal, can also result in allocative inefficiencies. Such agreements can distort market signals and can suppress competitive dynamics that would exist in a competitive market.

⁴⁰ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.72. Such agreements also have the potential to increase barriers to market entry or expansion, which reduces the competitive restraint applying to market participants. Both can lead to increased prices and reduced choice for consumers and significant inefficiencies.
- 4.73. Under the proposed arrangements Tabcorp, ACTTAB, RWWA and TOTE Tasmania as participants in the SuperTAB pool will, subject to any discounts, rebates or other benefits that might be offered by an individual provider, offer identical pari-mutuel odds. In this respect, the ACCC does not place great weight on the Tabcorp's argument that the arrangements do not restrict competition between them other than on price, as price is an important component of the product offer in question.
- 4.74. However, while the SuperTAB pool participants will agree to generally offer the same odds under the proposed arrangements, the majority of each participant's customers place wagers through retail outlets where Tabcorp, ACTTAB and RWWA are the sole licensed operator in their respective jurisdiction. Therefore, other than through potentially inducing these customers to switch to placing wagers by phone or online, the participants are unable to compete for customers placing wagers through retail outlets with or without the proposed arrangements.
- 4.75. The proposed arrangements also limit price competition between the participants in offering pari-mutuel wagering online and by telephone. The ACCC notes that while the participants offer parimutuel wagering predominantly through retail outlets, the participants are increasing their focus on online wagering.
- 4.76. As noted at paragraph 4.23 to 4.26 consumers placing pari-mutuel bets online or by phone are able to consider the competing offers made by both corporate bookmakers and the competing totalisator products of TAB Limited and UNiTAB. In this respect the ACCC notes that corporate bookmakers currently offer products seeking to compete with the SuperTAB, including the 'best of' the odds offered by the three totalisator pools or 'home tote' odds plus 5 percent products. The ACCC considers that, to the extent these products compete with the products offered by the SuperTAB pool, they are likely to act as a constraint on the level of competitive detriment arising under the 2009 Agreements.

Balance of public benefit and detriment

4.77. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the 2009 Agreements governing ACTTAB Limited and Racing and Wagering Western Australia's participation in the SuperTAB pool are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

4.78. In the context of applying the net public benefit test at section 90(8)⁴¹ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁴²

⁴¹ 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.

⁴² Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

- 4.79. The ACCC considers that the 2009 Agreements are likely to result in benefits to the public by improving the stability of the totalisator pool offered by RWWA and ACTTAB than if they were to operate on their own. To the extent that this leads to an increase in the turnover of RWWA and ACTTAB, and thereby the funding provided to their respective racing industries, the ACCC considers that some benefits to the public may arise.
- 4.80. Balanced against these potential public benefits the ACCC considers that the arrangements are likely to result in anti-competitive detriment – in particular under the arrangements the SuperTAB pool participants will generally offer consumers identical pari-mutuel odds both through retail outlets and by phone and online. The ACCC considers however that detriment flowing from this reduction in competition is likely to be mitigated by:
- with or without the SuperTAB arrangements, legislative restrictions prevent totalisators and corporate bookmakers from competing for wagering customers acquiring services through retail outlets
 - to the extent that online and phone wagering products offered by non-SuperTAB totalisators and corporate bookmakers compete with the products offered by the SuperTAB pool, these competitive pressures are likely to act as a constraint on the level of detriment arising under the 2009 Agreements.
- 4.81. On balance the ACCC considers the public benefit that is likely to result from the arrangements is likely to outweigh the public detriment.

Length of authorisation

- 4.82. The Act allows the ACCC to grant authorisation for a limited period of time.⁴³ 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.
- 4.83. In this instance, Tabcorp seeks authorisation until 14 August 2012, being the term of the 2009 Agreements (unless terminated earlier).
- 4.84. The ACCC considers that given Tabcorp's exclusive licence expires on 14 August 2012, it is appropriate for authorisation to be granted until that time.
- 4.85. As such, the ACCC proposes to grant authorisation to the 2009 Agreements until 14 August 2012.

⁴³ Section 91(1).

5. Draft determination

The application

- 5.1. On 30 March 2009 Tabcorp Manager Pty Ltd lodged applications for authorisation A91127 to A91132 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Applications A91127 and A91130 were made using Form A, A91128 and A91131 were made using Form B, and A91129 and A91132 were made using Form E Schedule 1, of the Trade Practices Regulations 1974. The applications were made under subsection 88(1) and 88(8) of the Act to:
 - give effect to the agreements entered into between Tabcorp and ACTTAB Limited on 20 March 2009 and between Tabcorp and Racing and Wagering Western Australia on 16 March 2009 in respect of all provisions of the ACTTAB and RWWA 2009 Agreements. The ACTTAB and RWWA 2009 Agreements govern ACTTAB's and RWWA's participation in the SuperTAB pool operated by Tabcorp.
- 5.3. In particular, Tabcorp seeks authorisation to:
 - give effect to the ACTTAB 2009 Agreement, including, in particular, but not limited to clauses 2.1, 5.1, 5.8 and 8.1 of the ACTTAB 2009 Agreement
 - give effect to the RWWA 2009 Agreement, including, in particular, clauses 2.1, 5.1, 5.7 and 8.1 of the RWWA 2009 Agreement.

The net public benefit test

- 5.4. For the reasons outlined in Chapter 4 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought 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.
- 5.5. The ACCC is also satisfied that the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.
- 5.6. The ACCC therefore **proposes to grant** authorisation to applications A91127 to A91132.

Conduct for which the ACCC proposes to grant authorisation

- 5.7. The ACCC proposes to grant authorisation to Tabcorp to give effect to the 2009 Agreements until 14 August 2012.
- 5.8. Further, the proposed authorisation is in respect of the 2009 Agreements as they stand at the time authorisation is granted. Any changes to the 2009 Agreements during the term of the proposed authorisation would not be covered by the proposed authorisation.

- 5.9. This draft determination is made on 15 July 2009.
- 5.10. The attachments to this determination form part of the draft determination.

Interim authorisation

- 5.11. At the time of lodging the application, Tabcorp requested interim authorisation to give effect to the 2009 Agreements. The ACCC granted interim authorisation on 29 April 2009.
- 5.12. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

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

Attachment A — the authorisation process

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.

The Act, however, allows the ACCC to grant immunity 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 immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

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.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

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.

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.

Attachment B — chronology of ACCC assessment for applications A91127 to A91132

The following table provides a chronology of significant dates in the consideration of the applications by Tabcorp.

DATE	ACTION
30 March 2009	Applications for authorisation lodged with the ACCC, including an application for interim authorisation.
21 April 2009	Closing date for submissions from interested parties in relation to the request for interim authorisation.
29 April 2009	The ACCC granted interim authorisation.
30 April 2009	Closing date for submissions from interested parties in relation to the substantive applications for authorisation.
15 July 2009	Draft determination issued.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
 - (b) the proposed covenant were given, and were complied with; or
 - (c) the proposed conduct were engaged in;

as the case may be.

- (7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.
- (8) The Commission shall not:
 - (a) make a determination granting:

- (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
- (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
- (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
- (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.
- (9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.
- (9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):
- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
 - (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

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.⁴⁴

⁴⁴ *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.

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.⁴⁵

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.

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).

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.⁴⁶

Future and other parties

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 future⁴⁷
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.⁴⁸

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation⁴⁹. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

⁴⁵ 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.

⁴⁶ Section 91(3).

⁴⁷ Section 88(10).

⁴⁸ Section 88(6).

⁴⁹ Section 90(10A)

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.⁵⁰ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.⁵¹

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a ‘minor variation’ and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the arrangements.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.⁵² The ACCC may also review an authorisation with a view to revoking it in certain circumstances.⁵³

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.⁵⁴ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.⁵⁵

⁵⁰ Subsection 91A(1)
⁵¹ Subsection 87ZD(1).
⁵² Subsection 91B(1)
⁵³ Subsection 91B(3)
⁵⁴ Subsection 91C(1)
⁵⁵ Subsection 91C(3)

Attachment D — Summary of 2009 Agreements

**Submission to the
Australian Competition
and Consumer
Commission:**

**Summary of the 2009
SuperTAB Agreement
between Tabcorp
Manager Pty Ltd and
Racing and Wagering
Western Australia**

2009 Agreement Summary

1 Introduction

On 16 March 2009, Tabcorp Manager Pty Ltd (**Tabcorp**) and Racing and Wagering Western Australia (**RWWA**) (together referred to as the **Parties**) entered into an agreement governing RWWA's participation in the SuperTAB Pool (**2009 Agreement**).

Under the terms of the 2009 Agreement, Tabcorp agrees to provide pooling services to RWWA in return for a fee (**Processing Fee**).

The following is a summary of the 2009 Agreement.¹ The summary does not contain information confidential to the Parties and may be used by the Australian Competition and Consumer Commission (**Commission**) in undertaking market enquiries.

2 Conditions precedent

2.1 Conditions

The 2009 Agreement is subject to five conditions precedent:

- (a) final authorisation being granted and coming into force;
- (b) RWWA obtaining all Race Fields Approvals;
- (c) Tabcorp obtaining all Required Participation Approvals;
- (d) RWWA obtaining all Regulatory Approvals; and
- (e) ensuring the tax exemption under the *Gambling Regulation Act 2003 (Vic)* (**GRA**) is current and applicable.

Tabcorp may terminate the 2009 Agreement immediately by notice in writing to RWWA if the above conditions are not satisfied by 30 September 2009;

2.2 Authorisation

The condition precedent relating to authorisation provides that:

- in the absence of interim authorisation being granted, the 2009 Agreement does not come into force unless and until final authorisation is granted and comes into force;
- the granting of interim authorisation will bring the 2009 Agreement into force (subject to other conditions precedent being satisfied).

If final authorisation has not come into force by 30 September 2009, Tabcorp may terminate the 2009 Agreement immediately by notice in writing to RWWA.

If interim authorisation is granted but is withdrawn or revoked and/or final authorisation has not come into force by 30 September 2009, either party may terminate the 2009 Agreement by notice in writing to the other party.

¹ General boilerplate clauses have not been included.

2.3 Race Fields Approvals

The condition precedent relating to Race Field Approval provides that the 2009 Agreement will not come into force unless and until all Race Fields Approvals have been obtained by RWWA.

'Race Fields Approvals' means the racing industry and Regulatory Approvals required by RWWA for it to use, publish and make available Race Fields Information in the course of its business and to conduct betting operations in a State or Territory.

2.4 Required Participation Approvals

The condition precedent relating to Required Participation Approvals provides that the 2009 Agreement will not come into force unless and until all Required Participation Approvals have been obtained in a form that is acceptable to Tabcorp.

'Required Participation Approvals' means the approvals or consents which Tabcorp must obtain from the racing industry or regulatory authorities for RWWA to participate in the SuperTAB Pool. Currently, these are the approvals from VicRacing Pty Ltd and consents from the Victorian Commission for Gambling Regulation.

2.5 Regulatory Approvals

The condition precedent relating to Regulatory Approvals provides that the 2009 Agreement will not come into force unless and until RWWA has obtained all Regulatory Approvals that it requires in connection with the 2009 Agreement.

"Regulatory Approvals" means consents, approvals, authorisations, licences, permits, instruments or other acts made or given by a government agency or Minister.

3 Term

The 2009 Agreement will commence on the Effective Date, being the date that the last condition precedent to be satisfied is satisfied, and continue until 14 August 2012, unless terminated earlier (**Term**).

4 Investment Requirement

Tabcorp provides pooling services to RWWA on the condition that RWWA transmits to Tabcorp for inclusion in the SuperTAB Pool all Investments on the specified bet types received by RWWA on Tabcorp Events.²

'Tabcorp Events' are defined as events on which Tabcorp conducts totalisator betting from time to time in the ordinary course of its business.

'Investments' means the bet types set out below.

The bet types are: Win/Place, Trifecta, Quaddie and First Four.

² The 2009 Agreement does not prevent RWWA pooling:

- bet types not specified in the 2009 Agreement; and
- Investments received on non-Tabcorp races,

with third party betting operators.

In the event Tabcorp implements an additional bet type, RWWA may request Tabcorp's consent to transmit Investments in relation to such bet types to Tabcorp for inclusion in the SuperTAB Pool.

5 Rules and Directions

RWWA must comply with:

- all Applicable Laws; and
- the Tabcorp Betting Rules.

These provisions govern the acceptance of Investments for inclusion in the SuperTAB Pool and the calculation of dividends.

6 Integrity protocols

Tabcorp and RWWA must make details of betting transactions available to the following bodies and persons to investigate suspicious betting activity, to enforce the respective rules of racing for each racing code, and to investigate and enforce the respective betting rules for each State, Territory and other jurisdictions participating in the SuperTAB Pool:

- controlling bodies and stewards of a racing code in a State, Territory or other jurisdiction participating in the SuperTAB Pool in respect of whose races wagers have been made; and
- officers of any statutory authority whose function is to regulate wagering in the participating State, Territory or other jurisdiction participating in the SuperTAB Pool.

7 Copyright and protection of intellectual property

Tabcorp grants RWWA the non-exclusive right to use the Wagering Data provided to RWWA by Tabcorp solely for the purposes of promoting and accepting Investments on the Tabcorp Events and operating its betting engine via its website.

'Wagering Data' means totalisator odds and dividends for an event where the SuperTAB Pool operates and excludes Race Fields Information.

RWWA must at least use reasonable efforts to prevent unauthorised parties from gaining access to, reproducing or disassembling the Wagering Data in any manner.

Retail Operators, and any other third parties for whom Tabcorp has relevantly licensed, may use the Wagering Data for the purpose of carrying on RWWA's business.

'Retail Operators' means legal agents of RWWA who operate retail wagering outlets under the RWWA brand on behalf of RWWA in Western Australia.

Retail Operators' use of the Wagering Data will be subject to the terms and conditions set out in a Schedule to the 2009 Agreement.

If Tabcorp approves third parties to use the Wagering Data, Tabcorp may determine the terms and conditions of such use in its discretion.

RWWA agrees to use the SuperTAB Names for the sole purpose of promoting and accepting Investments on the Tabcorp Events.³

8 Pooling Restriction

RWWA must not

- transmit to Tabcorp for inclusion in the SuperTAB pool any bets from any other wagering operator or totalisator (domestic or international); or
- pool or combine betting transactions conducted by ACTTAB with any other wagering operator or totalisator (domestic or international) where those bets will form part of the SuperTAB Pool,

without the prior written consent of Tabcorp.

9 Cash settlement and accounting procedures

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.

10 Unclaimed dividends

RWWA 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.

11 Fees

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

12 Maintenance of approvals

At all times RWWA must comply with all applicable Required Participation Approvals and Race Field Approvals.

13 Wagering tax

In the event that Investments transmitted by RWWA to Tabcorp pursuant to the 2009 Agreement cease to be exempt from Wagering Tax under the GRA, RWWA must:

³ SuperTAB Names are defined as SUPERTAB, SUPER TAB, S_TAB, and S'TAB.

- if it wishes to continue the pooling of Investments, reimburse Tabcorp for the payment of such tax on Investments; or
- terminate the 2009 Agreement without liability to Tabcorp.

14 Assurance

Both Tabcorp and RWWA must use their best endeavours to maintain in force all licences and approvals necessary for the purpose of the 2009 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.