



Australian
Competition &
Consumer
Commission

Determination

Applications for authorisation

lodged by

Tabcorp Wagering Manager (Vic) Pty Ltd

in respect of

an agreement with ACTTAB Limited to
provide fixed odds wagering and
risk management services.

Date: 17 April 2013

Authorisation numbers: A91344 – A91346

Commissioners: Sims
 Schaper
 Court
 Dimasi
 Walker
 Willett

Summary

The ACCC grants authorisation for five years for Tabcorp Wagering Manager (Vic) Pty Ltd (Tabcorp) and ACTTAB Limited (ACTTAB) to give effect to the Book Management Agreement, dated 2 November 2012. The Book Management Agreement concerns the provision of fixed odds wagering and risk management services to ACTTAB Limited in return for a management fee.

The ACCC grants authorisation until 9 May 2018.

Tabcorp and ACTTAB are the sole licensed pari-mutuel wagering operators (TAB operators) in NSW and the ACT respectively. Each also offers fixed odds wagering through their retail outlets and by phone and internet.

ACTTAB previously acquired fixed odds wagering services from Centrebet Pty Ltd (Centrebet) under arrangements that were authorised by the ACCC in 2009. The arrangements with Centrebet expired on 28 November 2012.

Since then, Tabcorp has provided fixed odds wagering and risk management services to ACTTAB pursuant to the Book Management Agreement which was given interim authorisation by the ACCC on 28 November 2012. Under the arrangements with Tabcorp, ACTTAB customers have access to the same fixed odds products at the same prices or odds as Tabcorp customers.

The ACCC grants authorisation for a period of five years. The ACCC considers the arrangements are likely to result in public benefits that will outweigh the likely public detriments.

In the absence of an arrangement with a third party for the provision of fixed odds wagering and risk management services, the ACCC considers that ACTTAB would either cease to offer fixed odds wagering services or that it would develop its own fixed odds services, albeit reduced in scope. The ACCC considers that the Book Management Agreement is likely to result in public benefits arising from enhanced product offerings being available to retail customers in the ACT. It is also possible that the Book Management agreement will result in public benefits in the form of potential efficiencies in the provision of fixed odds wagering services.

The arrangements may result in public detriments associated with restrictions on ACTTAB's operations, particularly with respect to the prices offered for its fixed odds wagering services. However, the ACCC considers that the arrangements are unlikely to result in significant public detriment due to the significant presence of betting exchanges and corporate bookmakers in Australia and overseas, which compete with ACTTAB and Tabcorp for customers and drive pricing in relation to fixed odds wagering.

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Abbreviations

ACCC	Australian Competition and Consumer Commission
The Act	The <i>Competition and Consumer Act 2010</i>
ACTTAB	ACTTAB Limited
bet back or lay off	Bets made by one bookmaker with another bookmaker, in an effort to reduce liability in respect of existing bets.
Book Management Agreement	Agreement between Tabcorp and ACTTAB dated 2 November 2012 concerning the provision of fixed odds wagering and risk management services.
bookmaker	An individual who is licensed to provide fixed odds wagering services in a certain jurisdiction, a bookmaker accepts and pays off bets on the outcome of an event at agreed upon odds.
Centrebet Determination	ACCC Determination Re Applications for Authorisation A91123, A91124, A91158 & A91159 lodged by TOTE Tasmania Pty Ltd, ACTTAB Limited and Racing and Wagering Western Australia, 9 September 2009.
corporate bookmaker	A large business that operates on a 24/7 basis to receive bets over the phone and internet at agreed odds and pays off winnings.
Centrebet	Centrebet Pty Ltd, the former supplier of fixed odds management services to RWWA
fixed odds wagering	The dividend is fixed at the odds displayed when the bet (wager) is placed. Bets placed may affect the odds offered to the next punter.
gaming	A chance based form of gambling. It covers all legal forms of gambling other than wagering.
pari-mutuel wagering	A type of wagering where 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.

Previous Agreement	An agreement that joint venture parties, RWWA, TOTE Tasmania Pty Ltd and ACTTAB Limited, had made with Centrebet and Centrebet International Ltd (as guarantor) for the acquisition of fixed odds management services. The ACCC authorised the agreement on 9 September 2009.
punter	A person who places a bet or wager; a bettor
RWWA	Racing and Wagering Western Australia
SHL	Sportingbet Holdings Limited
Sportingbet	Sportingbet Australia Pty Ltd
TAB	Totalisator Agency Board
Tabcorp	Tabcorp Wagering Manager (Vic) Pty Ltd
totalisator	The totalisator agency board (TAB) licensed to provide pari-mutuel wagering for a given state or territory.
wagering	Betting something (usually money) on the outcome of an uncertain event. In contrast to gaming, wagering is usually seen as a skill-based activity.

The applications for authorisation

1. On 5 November 2012 Tabcorp Wagering Manager (Vic) Pty Ltd (Tabcorp) lodged applications for authorisation (A91344 – A91346) with the ACCC. Tabcorp also requested interim authorisation, which was granted by the ACCC on 28 November 2012, to enable it to engage in the proposed conduct while the ACCC considers the substantive application.
2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (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. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.¹
3. On 7 March 2013, the ACCC issued a draft determination proposing to grant authorisation for five years. A conference was not requested in relation to the draft determination.

The conduct

4. Tabcorp seeks authorisation to give effect to all provisions of an agreement between itself and ACTTAB Limited (ACTTAB) dated 2 November 2012 (Book Management Agreement). The Book Management Agreement governs the provision of fixed odds wagering and risk management services by Tabcorp to ACTTAB in return for a management fee. The relevant services include fixed odds wagering on racing, sporting and other events.
5. Under the Book Management Agreement Tabcorp will manage ACTTAB's fixed odds wagering product offering by integrating ACTTAB's fixed odds bets into Tabcorp's fixed odds book. Under the Agreement, Tabcorp will:²
 - undertake all research
 - establish opening fixed odds betting prices
 - manage event selling and fixed returns during the selling cycle
 - lay off any investments (if appropriate)
 - process results and calculate payouts.

¹ Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

² Tabcorp submission, 5 November 2012, p. 22.

6. Tabcorp submits that as a result of the Book Management Agreement, ACTTAB customers will have access to the same fixed odds products as Tabcorp customers and at the same odds (prices).
7. Certain provisions of the Book Management Agreement that are required to support and govern the proposed conduct may be anti-competitive or breach the Act. It is for this reason that authorisation is sought. Tabcorp has categorised provisions of the Book Management Agreement that may be relevant to the Act as follows:
 - **Betting Requirements** – includes requirement for ACTTAB to appoint Tabcorp as the exclusive provider of relevant services and to transmit all ACTTAB Bets made by a Qualified Person to Tabcorp. This conduct may be considered exclusive dealing under the Act.
 - **Re-supply Restriction** – Tabcorp provides relevant services to ACTTAB on condition that ACTTAB does not re-supply the services to other wagering operators. This conduct may be considered exclusive dealing under the Act.
 - **ACTTAB Event Approvals Requirement** – Tabcorp provides relevant services to ACTTAB on condition that ACTTAB has and maintains the ACTTAB Event Approvals. This conduct may be considered third line forcing under the Act. ACTTAB Event Approvals are the racing industry and regulatory approvals required by ACTTAB for it to use, publish or make available race fields information to conduct its betting operations.
 - **Third Party Contract Provision** – Tabcorp is not obliged to accept ACTTAB Bets where acceptance of such bets would place Tabcorp in breach of a contractual obligation to a third party. This conduct may be considered third line forcing under the Act.
 - **Pricing Provisions** – Tabcorp and ACTTAB will offer the same fixed odds pricing in respect of Approved Bet Types on Tabcorp Events. This conduct may be considered to be price fixing under the Act.
8. Tabcorp seeks authorisation for a period of five years from the Commencement Date of the Book Management Agreement. The initial term of the Book Management Agreement is three years, with the agreement providing for automatic renewal for successive 12 month periods (unless either party provides written notice to terminate).
9. ACTTAB's previous fixed odds arrangement for provision of fixed odds management services was with Centrebet Pty Ltd (Centrebet) and was authorised by the ACCC in 2009 (Centrebet Determination).³ This authorisation expired on 28 November 2012. The ACCC granted interim authorisation for Tabcorp and ACTTAB to give effect to the Book Management Agreement on 28 November 2012.

Tabcorp and ACTTAB

10. Tabcorp and ACTTAB are the sole licensed pari-mutuel wagering operator (TAB operator) in NSW and the ACT respectively. Each also offers fixed odds wagering

³ ACCC Determination in relation to applications for authorisation A91123, A91124, A91158 and A91159, 9 September 2009.

through their retail outlets and by phone and internet. 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.

11. The Tabcorp Group has interests in wagering, gaming and media. The ultimate parent company, Tabcorp Holdings Limited is listed on the ASX. The Tabcorp wagering division employs approximately 2800 people, and its revenue and EBIT for the year ending 30 June 2012 were \$1,637 million and \$242 million respectively. Revenue from fixed odd wagering was \$321 million. The Wagering Division operates under separate licences in Victoria, NSW and the Northern Territory.
12. ACTTAB was established in 1964 and operates as a Territory-owned corporation under the provisions of the Betting (ACTTAB Limited) Act 1964 (ACT) and the Territory-owned Corporations Act 1990 (ACT). The principal activity of ACTTAB is the provision of totalisator wagering services. In addition, it provides fixed odds wagering on sport, racing and other approved events (previously with the assistance of Centrebet).
13. Under the provisions of the Betting (ACTTAB Limited) Act 1964 (ACT), ACTTAB has the exclusive right in the ACT to provide totalisator services for races and other sporting events. In addition, ACTTAB is the only licensed supplier of retail wagering services in the ACT.⁴ Similar arrangements apply in other jurisdictions.
14. ACTTAB is a relatively small provider of fixed odds wagering services. Gross turnover in FY2012 was \$177 million, with fixed odds sales accounting for less than \$20 million.

Background

15. Gaming is a chance-based activity that covers all legal forms of gambling other than wagering. Gaming dominates Australian gambling in turnover and participant expenditure.
16. Wagering (or 'betting') involves a customer staking a wager (usually money) on the outcome of a particular event or contest, the outcome of which is uncertain. The principal forms of wagering in Australia are pari-mutuel and fixed odds wagering on sporting events and on thoroughbred, harness and greyhound races. Wagering generates a significantly lower turnover than gaming.
17. The main forms of wagering are pari-mutuel (totalisator) wagering and fixed odds (bookmaker) wagering, although other forms such as betting exchanges and 'TOTE-odds' bookmaker wagering are also available. Of the various types of wagering, pari-mutuel wagering is the dominant form.
18. In fixed odds wagering, the odds on the wager are fixed at the time the punter places the wager. The punter is aware of the odds at the time they place the wager and these odds will not change for that punter. However, the bookmaker will change the odds offered on future bets on the same outcome depending on betting patterns.

⁴ Tabcorp submission, 5 November 2012, p. 34.

19. Unlike pari-mutuel wagering, the bookmaker's revenue is not a set commission but is dependent on a number of factors, including the outcome of the particular event, the bookmaker's management of its book and whether or not the bet is 'laid off' with another bookmaker to spread risk.
20. Bookmakers may be categorised as 'traditional bookmakers' or 'corporate' bookmakers. Traditional bookmakers are generally natural persons operating as a sole trader or family company. They typically operate on-course but may also offer telephone wagering services.
21. Corporate bookmakers are large businesses that conduct their operations by way of online or telephone channels and offer a range of wagering products, including fixed odds and hybrid products such as TOTE-odds. Corporate bookmakers are typically licensed in the Northern Territory and, to a lesser extent, the Australian Capital Territory, for tax and regulation purposes. They are able to offer wagering products to punters in all Australian states and territories. Corporate bookmakers have steadily increased their presence in the wagering market in recent years.

Submissions received by the ACCC

22. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
23. The ACCC sought submissions from around 45 interested parties potentially affected by these applications, including racing associations, government departments, other totalisators and bookmakers.
24. The ACCC received a submission in support of the applications for authorisation from the Victorian Racing Industry (VRI), representing Racing Victoria, Harness Racing Victoria, Greyhound Racing Victoria and VicRacing Pty Ltd.
25. The VRI submits that as Tabcorp's wagering business joint venture partner, the proposed conduct is likely to increase its revenue from both the management fees charged to ACTTAB and through enhanced profitability of Tabcorp's Victorian fixed odds wagering business through greater capacity to offer competitive odds and accept large wagers. The VRI also submits that this will also improve the level of service to Victorian fixed odds wagering customers.
26. Broadly, Tabcorp submits that the Book Management Agreement is likely to result in enhanced wagering product offers to punters, administration and transaction cost savings, and benefits to the racing industry and ACT economy and community. Tabcorp submits that the proposed conduct will result in little if any public detriment.
27. No submissions were received after the ACCC's draft determination.
28. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

29. The ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests⁵ contained in the Act. While there is some variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition and weigh the two. In broad terms, the ACCC may grant authorisation if it is satisfied that the benefit to the public would outweigh the public detriments.
30. In order to measure and assess the likely benefits and detriments, the ACCC identifies the relevant areas of competition and the likely future with and without the conduct proposed for authorisation.

The relevant area of competition

Tabcorp's submission

31. Tabcorp submits the relevant areas of competition are:
 - the national market for the supply of wagering and risk management services for fixed odds wagering; and
 - the national market for the supply of wagering products to the public.
32. With respect to the supply of wagering products to the public, Tabcorp submits that 'there is, at the very least':
 - a national market for the supply of wagering on racing, including products offered by totalisators, bookmakers and betting exchanges; and
 - a national market for the supply of wagering on other sports and events, including products offered by totalisators, bookmakers and betting exchanges.¹⁶
33. However Tabcorp also submits that the relevant product market is likely to be broader, encompassing wagering on racing and other sports and events.⁷
34. Tabcorp submits that in its Centrebet Determination, the ACCC stated that 'the increase in consumer demand for online wagering services may also suggest that, for some consumers, retail (shop-front) and online services are increasingly substitutable'. Tabcorp submits that the acceptance of internet betting has subsequently increased and that all forms of distribution may be included in the same market.⁸

⁵ Subsections 90(5B), 90(7), and 90(8). The relevant tests are set out in Attachment A.

⁶ Tabcorp submission, 5 November 2012, p. 30.

⁷ Tabcorp submission, 5 November 2012, p. 30.

⁸ Tabcorp submission, 5 November 2012, p. 31.

The ACCC's view

35. The ACCC considers that the areas of competition previously identified by the ACCC remain relevant to its assessment of the Book Management Agreement.⁹ Namely:
- the supply of wagering and risk management services necessary to provide fixed odds wagering services to the public; and
 - the provision of wagering services to the public.
36. That being said, the ACCC notes the dynamic nature of the gaming and wagering industry and the differences between the Book Management Agreement and the previous arrangements with Centrebet.
37. The ACCC considers that the evolving nature of wagering services means that the relevant areas of competition as well as the competitive landscape are likely to change over time. For example, Centrebet was acquired by Sportingbet in 2009 and there are other potential acquisitions between wagering operators that may further alter the products and services offered by wagering operators. Similarly, in 2008, Tabcorp launched Luxbet and began to offer additional fixed odds wagering products, including NHL hockey, professional snooker, international rules matches and US, UK and Australian elections.
38. The ACCC considers that technological development has also extended the reach of gambling products, with the trend toward gambling online and on mobile devices making these products available to more customers, for longer hours and at greater convenience. It has also meant that customers are increasingly able to place wagers with operators that do not have a physical presence in their local area.

The supply of wagering and risk management services

39. Wagering and risk management services of the kind described at paragraph 4 enable ACTTAB and others to provide wagering services to the public.
40. The ACCC notes that there are a number of suppliers of wagering and risk management services in Australia, including Tabcorp, Sportingbet, Tatts and Paddy Power.
41. Suppliers are generally vertically integrated and offer wagering services to the public through related businesses. Some of these suppliers also provide services to third parties that supply wagering services to the public.
42. The ACCC notes that the provider of these services can be located in a different region/state to the service acquirer. For example, Sportingbet, based primarily in Darwin, proposes to offer the Management Services to RWWA, which is based in Western Australia. Similarly, Tabcorp Wagering Manager (Vic) Pty Ltd proposes to provide wagering and risk management services to ACTTAB.

The provision of wagering services to the public

43. The principal forms of wagering in Australia are pari-mutuel and fixed odds wagering on sporting events and on thoroughbred, harness and greyhound races.

⁹ ACCC Centrebet Determination, 9 September 2009, paragraph 4.8.

Phone and internet wagering has enabled providers to compete to supply wagering products to punters all around Australia. The ACCC notes that Tabcorp and ACTTAB compete with each other and with other totalisators and bookmakers to provide online and telephone wagering services to punters.

44. The ACCC considers that the markets for pari-mutuel wagering and fixed odds wagering have continued to converge since the Centrebet Determination. An increasing number of wagering service providers now offer fixed odds and pari-mutuel odds (or 'best of tote' odds) to punters side by side, to the effect that many punters now consider pari-mutuel wagering and fixed odds wagering offers to be substitutable.
45. Similarly, the ACCC has previously noted that the increase in consumer demand for online wagering services suggests that, for many consumers, retail and online wagering are substitutable. However, the ACCC also noted that there is a preference among some punters to place bets through retail outlets that provide a suite of facilities and services beyond just accepting the wager.¹⁰ In any case, the ACCC notes that ACTTAB has no retail presence in NSW and Tabcorp has no retail presence in the ACT.¹¹
46. For the purpose of assessing the current applications for authorisation, the ACCC considers it is not necessary to conclude whether traditional product markets for pari-mutuel betting and fixed odds betting on racing and fixed odds betting on sporting events have converged.

The future with and without

47. To assist in identifying and weighing the public benefit and public detriment, the ACCC considers the future with and without the conduct for which authorisation has been sought.¹² In doing so, the ACCC compares the balance of the benefits and detriments in the future with the conduct with those generated in the future without the conduct.

Tabcorp's submission

48. Tabcorp submits that in the absence of authorisation of the Book Management Agreement it would not provide Book Management Services to ACTTAB. Tabcorp submits that this would leave ACTTAB with the following options:
 - no longer acquire fixed odds wagering and risk management services; or
 - acquire fixed odds wagering services from an alternative supplier, including Centrebet.

¹⁰ ACCC Determination on applications for authorisation A91123, A91124, A91158 & A91159, lodged by TOTE Tasmania Pty Ltd, ACTTAB Limited and Racing and Wagering Western Australia, 9 September 2009, page 21.

¹¹ Tabcorp and ACTTAB are the sole licensed retail operators in their respective jurisdictions.

¹² *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.

49. Tabcorp submits that it is likely that the same competition law issues would arise regardless of whether ACTTAB sought the services from Centrebet, Tabcorp or an alternative supplier.
50. If ACTTAB were to no longer acquire fixed odds wagering and risk management services from a third party, Tabcorp submits that it would either not offer fixed odds wagering at all or it would offer fixed odds wagering products on a more limited scale and scope and at an increased cost. For example, ACTTAB would be unlikely to offer wagering on as many events and may offer fewer betting contingencies¹³ on those events.
51. On the basis of its advice from ACTTAB, Tabcorp further submits that 'given ACTTAB's small size, it is unlikely to be able to offer fixed odds wagering products to punters without acquiring fixed odds wagering and risk management services from a third party'.
52. Tabcorp submits that owing to its small scale, ACTTAB would face difficulty managing its risk profile and would therefore need to take a conservative approach to its provision of fixed odds wagering products. Tabcorp submits that this could mean that ACTTAB could refuse to take certain wagers or lower its wagering limits. Tabcorp also submits that increased costs arising from the establishment of its own fixed odds business would result in less attractive odds compared to those to be offered under the Book Management Agreement and that this would be likely to reduce revenue to ACTTAB and the ACT Government as its owner.¹⁴

The ACCC's view

53. The ACCC considers that in the absence of authorisation, ACTTAB would be unlikely to offer fixed odds wagering independently, or alternatively, that any such independently offered fixed odds wagering services would be reduced in scope and at less attractive odds than under the proposed arrangements with Tabcorp or previous offering provided with the assistance of Centrebet.
54. In its Centrebet Determination, the ACCC stated that:¹⁵

...given its smaller turnover, [than TOTE Tasmania and RWWA] there is some question as to whether ACTTAB would be a viable independent operator. Given that ACTTAB is the sole licensed supplier of retail wagering services in the ACT, if ACTTAB was not able to offer fixed odds wagering services these services would not be available at all to retail customers in the ACT.¹⁶
55. In FY2012, ACTTAB's gross turnover was \$177 million, with \$20 million coming from fixed odds sales. In FY2009, the equivalent measures were \$185 million and \$11 million, indicating that there has been significant growth in ACTTAB's fixed odds business as a proportion of gross turnover. ACTTAB states in its FY2012

¹³ A betting contingency refers to a specific outcome within an event such as first goal scorer, winning margin, half time margin etc.

¹⁴ Tabcorp submission, 5 November 2012, p.33–34.

¹⁵ ACCC Centrebet determination, 9 September 2009, p. 26.

¹⁶ The term retail customer generally refers to those customers making use of TAB facilities in person rather than by telephone or internet. Fixed odds wagering services would continue to be available to customers online and over the telephone.

annual report that 'it is evident that a transition has commenced away from pari-mutuel to fixed odds wagering...'.¹⁷

56. Notwithstanding the recent growth in fixed odds wagering turnover and the increasing significance of these products to ACTTAB's total gross turnover, the ACCC accepts that there remains some doubt as to whether ACTTAB would be a viable independent operator in the provision of fixed odds wagering products. For example, RWWA has a fixed odds wagering business that is many times larger than ACTTAB's fixed odds business.¹⁸ Yet RWWA has submitted to the ACCC that it 'does not have the means to individually conduct efficient and profitable fixed odds wagering operations...'.¹⁹
57. For the purposes of assessing the likely benefits and detriments arising from the Book Management Agreement, the ACCC considers it appropriate to compare the future with the Agreement to two alternative futures without the Agreement.
- First, a future or scenario in which ACTTAB ceases to offer fixed odds wagering products to consumers.
 - Second, while less likely, the ACCC also considers it appropriate to consider a future in which ACTTAB develops its own independent fixed odds wagering book. The ACCC considers that if ACTTAB were to provide fixed odds wagering products to itself, this would be on a smaller scale compared to the fixed odds wagering products it would be able to offer through the Book Management Agreement.

Public benefit

58. 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.²⁰

59. Tabcorp submits that the Event Approvals Requirement, the Third Party Contract Provision and the Pricing Provisions will deliver public benefits, including:
- managing risk and offering enhanced wagering products to punters
 - administration and transaction cost savings
 - benefits to the racing industry through increased participation in wagering
 - benefits to the ACT economy and community.

¹⁷ ACTTAB Annual Report 2011–12, p.5.

¹⁸ In 2010, Mr Richard Burt, CEO of RWWA told a Joint Standing Committee that RWWA's fixed odds betting on racing and sport would be just under \$200 million. See Joint Standing Committee on the Review of the Racing and Wagering Western Australia Acts, Transcript of Evidence taken at Perth, Friday 30 April 2010, p.15.

¹⁹ RWWA submission in support of applications for authorisation, 2 November 2012, p.6.

²⁰ *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.

60. Tabcorp has not made any specific public benefit claims regarding the Betting Requirements and the Re-Supply Restriction.
61. The ACCC notes that Tabcorp has applied for authorisation of the Book Management Agreement in its entirety, rather than just for the particular provisions it has highlighted in its submission. Tabcorp has provided an explanation of why each provision that may raise concerns under the Act is required for the proper operation of the agreement and to protect Tabcorp's commercial interests.²¹ In this way, all provisions of the Book Management Agreement are required to support Tabcorp's decision to enter into the Book Management Agreement.
62. On this basis, the ACCC considers it appropriate to assess the benefits and detriments of the Book Management Agreement as a whole, rather than in relation to specific provisions.
63. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Enhanced product offering to retail consumers

Tabcorp's submission

64. Tabcorp submits that given ACTTAB's small size, it is unlikely to be able to offer fixed odds wagering products without acquiring fixed odds wagering and risk management services from a third party.²² It follows that the Book Management Agreement would therefore provide retail customers in the ACT with a larger product offering that includes fixed odds wagering products that it would not otherwise be able to offer.

The ACCC's view

65. The ACCC accepts Tabcorp's submission that ACTTAB would be unlikely to develop its own independent fixed odds wagering book. Alternatively, if ACTTAB were to invest in its own independent fixed odds wagering business, the ACCC accepts that it would likely be on a smaller scale with a smaller range of events and contingencies on which its customers could place wagers.
66. Relative to either of these scenarios, ACTTAB's product offering would be enhanced or augmented by the full suite of fixed odds wagering services offered as a result of the Book Management Agreement.
67. The ACCC notes that if ACTTAB was unable to offer fixed odds wagering services, these services would consequently not be available to retail customers in the ACT. In this scenario, customers wanting to make fixed odds wagers would only be able to do so by telephone or online with another wagering operator.
68. Tabcorp submits that an enhanced product offering is likely to increase ACTTAB's ability to compete and consequently its turnover. In this regard, the ACCC also notes that where an operator is unable to offer punters a wager on a particular

²¹ Further details of the relevant provisions are provided in the ACCC's consideration of public detriments likely to arise.

²² Tabcorp submission, 5 November 2012, p.35.

event there is a risk that the punter will not only place that wager, but also subsequent wagers with an alternative provider.²³

69. The ACCC considers that an enhanced product offering is likely to benefit retail customers who will have access to a wider range of products at ACTTAB's retail outlets. The ACCC also accepts that some customers are likely to value the ability to acquire all their desired betting products from a single supplier. As a result, the ACCC considers that some mutually beneficial trades between customers and ACTTAB may be prevented if the Book Management Agreement were not in place.

Improved efficiency in the provision of wagering services

Tabcorp's submission

70. Tabcorp submits that the provision of fixed odds wagering services involves significant risk management costs, including the employment of 82 people to manage its own fixed odds book. Tabcorp also submits that ACTTAB has not previously managed a fixed odds wagering book of any scale and would need to acquire risk management systems and risk management integration systems.²⁴
71. Tabcorp submits that 'acquiring access to external risk management systems and book making staff through the Book Management Agreement will generate efficiencies and cost savings compared to ACTTAB developing or acquiring these services independently.'²⁵

The ACCC's view

72. The ACCC notes that ACTTAB is a small operator in the provision of wagering services generally, and that its fixed odds wagering services, while growing, currently represent a small fraction of its turnover (~11%). The ACCC notes that ACTTAB has historically elected to source fixed odds wagering and risk management services from an external party and that it appears to be in its commercial interests to continue such arrangements. In these circumstances, the magnitude of the establishment and ongoing costs of operating its own independent fixed odds wagering book are likely to be high relative to expected earnings.
73. However when compared to a future without the Book Management Agreement where ACTTAB does not provide fixed odd services at all, there is unlikely to be any public benefits flowing from increased efficiency as a result of these arrangements. That is, ACTTAB would not be required to undertake any expenditure associated with the provision of fixed odds wagering services because it would not offer these services.
74. It is also possible that if ACTTAB was unable to acquire fixed odds wagering and risk management services from a third party, it may elect to invest to establish its own fixed odds wagering book. The ACCC considers that relative to such a scenario, the Book Management Agreement would result in a benefit from improved efficiency in the provision of wagering services, particularly due to ACTTAB's limited scale.

²³ Centrebet determination, 9 September 2009, p.27.

²⁴ Tabcorp submission, 5 November 2012, p.38.

²⁵ Tabcorp submission, 5 November 2012, p.38.

Other claimed benefits

Tabcorp's submission

75. Tabcorp submits that the Book Management Agreement will generate increased revenue in the form of management fees and that this in turn will result in an increase in Tabcorp's funding of the racing industries in Victoria and NSW.²⁶
76. Tabcorp also submits that the Book Management Agreement is likely to allow ACTTAB to offer a broader range of wagering products to customers which is likely to increase ACTTAB's turnover and profitability. Tabcorp submits that to the extent the Book Management Agreement increases ACTTAB's turnover and reduces its risk, it will enable ACTTAB to continue to sponsor racing clubs, sporting bodies and community projects and to pay larger dividends to the ACT Government to assist it to fund public works.²⁷

The ACCC's view

77. The ACCC considers that, to the extent that these benefits are likely to arise, they result from the benefit of 'Enhanced product offering to retail consumers' and/or 'Improved efficiency in the provision of wagering services' and have already been considered.

Conclusion on public benefits

78. The ACCC considers that the proposed arrangements are likely to result in public benefits arising from enhanced product offerings for ACTTAB's customers. If ACTTAB were considered likely to establish its own fixed odds wagering services, it is also likely that the Book Management agreement would result in public benefits in the form of improved efficiency in the provision of fixed odds wagering services.

Public detriment

79. Public detriment is also not defined in the Act. However, 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.²⁸

Tabcorp's submission

80. Tabcorp submits that the Book Management Agreement will result in limited (if any) anti-competitive detriment. Tabcorp submits that there will be no anti-competitive detriment resulting from any diminution of price competition between ACTTAB and Tabcorp. Tabcorp also submits that there will be no anti-competitive detriment resulting from any reduction in the number of betting options available to customers.

²⁶ Tabcorp submission, 5 November 2012, p.39.

²⁷ Tabcorp submission, 5 November 2012, p. 39–40.

²⁸ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

The relevant test to be applied

81. Tabcorp submits that ‘the Betting Requirements and the Re-Supply Restriction may fall within section 47(2) of the [Act] and are consequently subject to a substantial lessening of competition test.’ And further, that ‘the relevant conduct would have little, if any, anti-competitive effect in any relevant market’ and that the ACCC should therefore grant authorisation in respect of these provisions.²⁹
82. The relevant authorisation tests, other than for conduct that may fall within section 47(6) or 47(7) of the Act, require the ACCC to be satisfied that the public benefit that would result, or would be likely to result, from the relevant provision outweighs any lessening of competition that would result, or would be likely to result, from that provision.
83. Although, the Australian Competition Tribunal has found that only public detriment constituted by a lessening of competition is relevant to the assessment of detriments under these tests,³⁰ the Tribunal has also stated that ‘[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.’³¹
84. The ACCC’s assessment of the likely public detriments from the proposed conduct follows.

Overarching effect of the Book Management Agreement on competition

85. The Book Management Agreement governs the provision of fixed odds wagering and risk management services by Tabcorp to ACTTAB.³² It includes provisions that are prima facie anticompetitive, including agreement to fix prices across Tabcorp and ACTTAB’s fixed odds wagering products, third line forcing and exclusive dealing. Agreements relating to the setting of prices between competitors or potential competitors will prima facie be assumed to cause consumer harm or detriment. However, the extent of any such detriment is variable and must be assessed by the ACCC on a case by case basis.

Supply of wagering services to the public

86. As a result of licensing arrangements, ACTTAB has no retail presence in NSW and Tabcorp has no retail presence in the ACT. For this reason, the only overlap in operations between Tabcorp and ACTTAB in the absence of the proposed

²⁹ Tabcorp Submission, 5 November 2012, p. 35.

³⁰ Australian Association of Pathology Practices Incorporated (2004), ATPR 41-985 at 48,549- 550. This view was supported in Re VFF Chicken Meat Growers’ Boycott Authorisation (2006), ACompT 2 at paragraph 67.

³¹ Re Association of Consulting Engineers, Australia (1981), ATPR 40-2-2 at 42,788. See also Media Council case (1978), ATPR 40-058 at 17,606, and Application of Southern Cross Beverages Pty. Ltd, Cadbury Schweppes Pty Ltd and Amatil Ltd for review (1981), ATPR 40-200 at 42,763 and 42,766.

³² For example, see item 2(a) of Form A submitted with Tabcorp’s applications for authorisation, 5 November 2012.

arrangements would be in the area of fixed odds wagering placed by phone or internet.

87. The ACCC has previously accepted in its Centrebet Determination that ACTTAB and the other applicants were not 'price setters' in respect of online wagering.³³ The ACCC notes Tabcorp's submission that corporate bookmakers drive competition in fixed odds wagering for online customers and that they have a competitive advantage through lower cost structures. The ACCC made similar observations in the Centrebet Determination.³⁴ If ACTTAB or Tabcorp attempted to raise its prices of fixed odds wagering products, it is likely that competitors would be able to offer lower prices and take market share. It is therefore unlikely that the Book Management Agreement would lead to reduced price competition in the provision of fixed odds wagering services to the public.
88. In the absence of the Book Management Agreement, the ACCC considers that ACTTAB would either cease to offer fixed odds wagering services entirely or it would develop its own fixed odds wagering services, but with a reduced scope. Therefore, absent the Book Management Agreement, ACTTAB is unlikely to offer more diverse or innovative fixed odd wagering products and enhance competition for the supply of those services. The ACCC therefore considers it unlikely that the Book Management Agreement would lead to a lessening of competition in the provision of fixed odds wagering services and products to consumers.
89. Consequently, the ACCC considers that the Book Management Agreement is unlikely to result in any significant detriment associated with removing the ability of ACTTAB to offer a competitive alternative in the area of fixed odds wagering.

Supply of wagering and risk management services necessary for supply of fixed odds wagering services to the public

90. The provider of wagering and risk management services can be located in a different region/state to the service acquirer. For example, Sportingbet, based primarily in Darwin, proposes to offer the Management Services to RWWA, which is based in Western Australia. Similarly, Tabcorp Wagering Manager (Vic) Pty Ltd which is based in Victoria proposes to provide wagering and risk management services to ACTTAB in the Australian Capital Territory. Therefore there are a number of potential suppliers of wagering and risk management services.
91. The ACCC notes that the Book Management Agreement does not in any way restrict Tabcorp's ability to offer similar services to other customers. The ACCC also notes that ACTTAB is not a supplier of the relevant services. On this basis, the ACCC considers that the Book Management Agreement is unlikely to result in any anticompetitive detriment in the area of competition relevant to the supply of fixed odds wagering and risk management services.
92. The ACCC's assessment of specific provisions within the Book Management Agreement that may breach the Act follows.

³³ ACCC Centrebet Final Determination, 9 September 2009, p. 37.

³⁴ ACCC Centrebet Final Determination, 9 September 2009, paragraph 4.124.

Specific Provisions of the Book Management Agreement

93. The Book Management Agreement contains a range of specific provisions that may cause concerns under the Act. These provisions are set out at paragraph 8.

Betting Requirements & Re-supply Restriction

Tabcorp's submission

94. Under the Betting Requirements, ACTTAB is required to transmit certain bets to Tabcorp and must not transmit certain bets to any service provider other than Tabcorp. The Betting Requirements make Tabcorp the exclusive provider of Book Management Services to ACTTAB, although ACTTAB remains able to accept certain bets that it is not required to transmit to Tabcorp and to place those bets into its own fixed odds book.
95. Tabcorp submits that the purpose of the Betting Requirements is to ensure Tabcorp achieves the commercial benefits underlying the decision to enter into the Book Management Agreement. The ACCC notes that Tabcorp is not restricted from supplying fixed odds wagering and risk management services to other wagering operators.
96. The Re-supply Restriction 'prevents ACTTAB from transmitting to Tabcorp for inclusion in a Tabcorp Book, any bets received from another wagering operator where that wagering operator is acting as an access point, conduit or agent for its punters to bet through ACTTAB into a Tabcorp Book.'³⁵ Tabcorp submits that the Re-supply Restriction is designed to ensure Tabcorp has a unique identifier for each punter who is transmitting bets into its books and to ensure it is able to effectively manage its risk and the integrity of its books. The restriction does not apply to 'bet backs' placed by other wagering operators.
97. Tabcorp submits that the Betting Requirements and the Re-Supply Restriction would have little, if any, anticompetitive effect.³⁶

The ACCC's view

98. The ACCC considers that as ACTTAB is a small supplier of fixed odds wagering services and in turn, a small acquirer of fixed odds wagering and risk management services, the Betting Requirements are unlikely to have a material effect on competition in that area.
99. The ACCC also considers that the Betting Requirements are unlikely to affect competition in the area of the provision of fixed odds wagering services because:
- ACTTAB would likely be unable to provide fixed odds wagering services either at all, or to the same extent in the absence of the Book Management Agreement.
 - Even with the Book Management Agreement, ACTTAB will continue to be a small provider of fixed odds wagering services.

³⁵ Tabcorp submission, 5 November 2012, p.24.

³⁶ Tabcorp Submission, 5 November 2012, p. 35.

- Broadly, in the current environment competition in the provision of fixed odds wagering services is driven by corporate bookmakers rather than TABs.
100. The ACCC notes that any benefits arising from economies of scale as a result of the Book Management Agreement may be undermined if ACTTAB did not transmit all relevant wagers through to Tabcorp. Therefore, the ACCC considers that this is also likely to assist in achieving the potential public benefits of the Book Management Agreement.
 101. Similarly, the ACCC considers that the Re-supply Restriction is unlikely to have any significant impact on either of the relevant areas of competition. In reaching this conclusion, the ACCC notes that:
 - Tabcorp remains able to provide fixed odds wagering and risk management services directly to other wagering operators, and
 - the restriction does not prevent ACTTAB from supplying fixed odds services to individual customers.
 102. The Re-supply Restriction is intended to prevent a third party from pooling wagers and placing them into a Tabcorp book via ACTTAB. However, the ACCC also notes that Tabcorp requires a unique identifier for each customer in order to manage its risk and ensure the integrity of its fixed odds wagering book. On this basis, the ACCC accepts that the restriction is required as part of the Book Management Agreement and to assist in achieving the anticipated public benefits.

ACTTAB Event Approvals Requirement & Third Party Contract Provision

Tabcorp's submission

103. Pursuant to the ACTTAB Event Approvals Requirement, Tabcorp provides the Book Management Services to ACTTAB on condition that ACTTAB has and maintains the ACTTAB Event Approvals and ACTTAB Regulatory Approvals and complies with the requirements of the Required Participation Approvals.
104. Tabcorp submits that the ACTTAB Event Approvals Requirement may be characterised as third line forcing conduct under the Act, but that the requirement does not necessarily relate to the acquisition of services and does not place any additional obligations on ACTTAB. Consequently, Tabcorp submits that it would not have any anti-competitive effect.
105. Tabcorp has advised that it could not provide the Book Management Services to ACTTAB without the Event Approvals Requirement and that no additional obligations are placed on ACTTAB because it is required by legislation to obtain them in any case.
106. The Third Party Contract Provision provides that Tabcorp is not obliged to accept ACTTAB Bets where acceptance of such bets would place Tabcorp in breach of a contractual obligation to a third party. In certain circumstances, Tabcorp could be said to offer to supply Book Management Services on

condition ACTTAB acquires services from a third party (to avoid breaching Tabcorp's contractual obligations to the same third party).³⁷

107. Specifically, Tabcorp submits that the effect of the Third Party Contract Provision is to require ACTTAB, in order for ACTTAB to be able to offer bets on certain international events, to obtain rights to use relevant data, information or vision directly from the relevant international racing or sports provider. Tabcorp submits that no anti-competitive detriment arises from this requirement.

The ACCC's view

108. The ACCC accepts that Tabcorp could not provide the Book Management Services to ACTTAB without the ACTTAB Event Approvals Requirement, and that the Event Approvals Requirement does not require ACTTAB to do anything which it is not otherwise required to do by law in order to offer fixed odds wagering products and services. Accordingly, the ACCC considers that the ACTTAB Event Approvals requirement is unlikely to have any adverse effect on any relevant area of competition, and is unlikely to create any inefficiency.
109. The Third Party Contract Provision is required to ensure that Tabcorp does not provide services in breach of its own contractual obligations. The ACCC understands that the Third Party Contract Provision may be particularly relevant to international events where rights to data and vision may be required. Where ACTTAB does not hold relevant rights to data or vision, under the Third Party Contract Provision, Tabcorp could refuse to accept relevant bets from ACTTAB.
110. The ACCC notes that on the basis of the information provided to it by Tabcorp, the Third Party Contract Provision does not impose any restrictions on ACTTAB or Tabcorp acquiring products or services from any other third party. On this basis, the ACCC considers that the Third Party Contract Provision is unlikely to affect any relevant area of competition and unlikely to create any inefficiency.
111. The ACCC also accepts that the ACTTAB Event Approvals Requirement and Third Party Contract Provision are integral to achieving the anticipated benefits of the Book Management Agreement because Tabcorp could not provide the services to ACTTAB without these clauses.

Pricing Provisions

Tabcorp's submission

112. Tabcorp submits that under the Book Management Agreement, Tabcorp and ACTTAB will offer the same fixed odds prices to their respective customers.
113. Tabcorp submits that there will be no anti-competitive detriment resulting from any diminution of price competition between ACTTAB and Tabcorp. Tabcorp also submits that there will be no anti-competitive detriment resulting from any reduction in the number of betting options available to customers.

³⁷ Tabcorp submission, 5 November 2012, p.27.

The ACCC's view

114. The ACCC's views on the Pricing Provisions are outlined in paragraphs 86–89. Broadly, the ACCC considers that the Pricing Provisions are unlikely to result in a significant reduction in competition between ACTTAB and Tabcorp in relation to fixed odds wagering services and consequently, are unlikely to give rise to significant public detriment. In particular:
- Tabcorp and ACTTAB do not have any overlap with respect to retail (e.g. shop front) services as they operate only within their respective States and Territory. It is also likely that absent the Book Management Agreement, ACTTAB would not offer fixed odds wagering services at all.
 - To the extent that ACTTAB would offer a fixed odds wagering service and compete with Tabcorp (and other suppliers) by phone and internet in the absence of the Book Management Agreement, the ACCC considers that this would be unlikely to drive competition in that market, due to the significant presence of betting exchanges and corporate bookmakers in Australia and overseas, which compete with ACTTAB and Tabcorp for customers and drive pricing in relation to fixed odds wagering.

Conclusion on public detriments

115. For the reasons set out above, the ACCC considers that the proposed arrangements are unlikely to result in significant public detriment.

Balance of public benefit and detriment

116. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
117. In the context of applying the net public benefit test in subsection 90(8)³⁸ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.³⁹
118. For the reasons outlined in this determination the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.
119. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

³⁸ The test at subsection 90(8) of the Act is in essence whether conduct is likely to result in such a benefit to the public that it should be allowed to take place.

³⁹ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

Length of authorisation

120. The Act allows the ACCC to grant authorisation for a limited period of time.⁴⁰ 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.
121. In this instance, Tabcorp seeks authorisation for a period of 5 years from the Commencement Date which will cover the Initial Term and provide for a further two years' extension.
122. The Commencement Date is defined as 'the later of the date on which the last condition precedent in clause 3.1 to be satisfied is satisfied or waived and 29 November 2012, or such other date as may be mutually agreed between the parties in writing.'
123. The ACCC grants authorisation for a period of 5 years from the date its Determination comes into effect. In deciding to grant authorisation for a period of 5 years, the ACCC notes that the arrangements are consistent with previous arrangements whereby ACTTAB engages a third party provider to facilitate its provision of fixed odds wagering. The ACCC also notes that section 91C(3) of the Act provides for re-consideration of the decision to grant authorisation if there is a material change of circumstances.

Determination

The application

124. On 5 November 2012 Tabcorp Wagering Manager (Vic) Pty Ltd (Tabcorp) lodged applications for authorisation A91344 – A91346 with the Australian Competition and Consumer Commission.
125. Application A91344 was made using Form A, Schedule 1, of the *Competition and Consumer Regulations* 2010. The application was made under subsection 88(1A) and 88(1) of the Act:
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
 - to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.
126. Application A91345 was made using Form B, Schedule 1, of the *Competition and Consumer Regulations* 2010. The application was made under subsection 88(1A) and 88(1) of the Act:

⁴⁰ Subsection 91(1).

- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.).
 - to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
127. Application A91346 was made using Form E, Schedule 1, of the *Competition and Consumer Regulations* 2010. The application was made under subsection 88(8) of the Act:
- to engage in conduct that constitutes or may constitute the practice of exclusive dealing.
128. In particular, Tabcorp seeks authorisation to give effect to the agreement between itself and ACTTAB Limited (ACTTAB) dated 2 November 2012 (Book Management Agreement). The Book Management Agreement governs the provision of fixed odds wagering and risk management services by Tabcorp to ACTTAB.

The net public benefit test

129. For the reasons outlined in this determination, the ACCC considers that in all the circumstances, the proposed arrangement for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
130. In addition, the ACCC is satisfied that the proposed arrangement for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.
131. The ACCC therefore **grants** authorisation to applications A91344 –A91346.

Conduct for which the ACCC grants authorisation

132. The ACCC grants authorisation to Tabcorp to give effect to all provisions of the Book Management Agreement which governs the provision of fixed odds wagering and risk management services by Tabcorp to ACTTAB for a period of 5 years from the date the ACCC's Determination comes into effect, that is, until 9 May 2018.
133. Further, the authorisation is in respect of all provisions of the Book Management Agreement as it stands at the time authorisation is granted. Any changes to the Book Management Agreement during the term of the authorisation would not be covered by this authorisation.

Interim authorisation

134. At the time of lodging the application Tabcorp requested interim authorisation to enable the parties to give effect to the Book Management Agreement on 29 November 2012. The ACCC granted interim authorisation under subsection 91(2) of the Act on 28 November 2012.
135. 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.

Date authorisation comes into effect

136. This determination is made on 17 April 2013. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 9 May 2013.

Attachment A - Summary of relevant statutory tests

Subsection 90(5B) provides that the ACCC shall not authorise a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision has resulted, or is likely to result, in a benefit to the public; and
- 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.

Subsection 90(7) states that the ACCC shall not authorise a provision of a contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the contract, arrangement or understanding has resulted, or is likely to result, in a benefit to the public; and
- 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.

Subsection 90(8) states that the ACCC shall not:

- 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.