



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Applications for authorisation

lodged by

Tabcorp Wagering Manager (Vic) Pty Ltd  
and TAB Limited

in respect of

international pooling arrangements

Date: 27 August 2014

Authorisation numbers: A91419-A91424

Commissioners: Sims  
Rickard  
Court  
Featherston  
Walker

# Summary

**On 7 May 2014, Tabcorp Wagering Manager (Vic) Pty Ltd and TAB Limited (referred to jointly as Tabcorp or the Applicants) lodged applications for authorisation A91419-A91424 with the ACCC.**

**Tabcorp is seeking authorisation in relation to international pooling arrangements with overseas wagering operators and Premier Gateway International (PGI) (an intermediary hub) to allow for the transmission of bets by overseas punters into Tabcorp totalisator pools and the transmission of bets by Australian punters into overseas pools.**

**The ACCC proposes to grant authorisation to Tabcorp for seven years to give effect (or, for future agreements, to make and give effect) to specified provisions in international pooling agreements with PGI and overseas wagering operators which are described in paragraph 5 of this draft determination.**

**As requested, the ACCC grants interim authorisation to Tabcorp to enter into international pooling agreements with identified parties (whose identities are confidential) that contain the specified provisions, and to give effect to those provisions.**

## Background

Government owned Totalisator Agency Boards (commonly known as TABs) were granted exclusive licences in the 1960s to provide off-course pari-mutuel wagering services to address the issue of bets being taken on the outcome of races without any compensation or payment being made to the racing industry for those racing products (free-riding), and at that time, to provide a legal avenue for wagering.

TABs are the primary funders of the racing industry through the payment of fees for the use of their products.<sup>1</sup> TABs also pay taxes to state and territory governments.

Most TABs have now been privatised and Tabcorp has exclusive licences to operate in Victoria and NSW.<sup>2</sup> TABs are also now able to offer fixed odds wagering through their retail outlets, by phone and the internet.

Pari-mutuel wagering, until recently, was the main form of wagering in Australia, however, its share has been declining over the past few years. In pari-mutuel wagering the final odds are not calculated until after the close of betting on the relevant event. All bets are consolidated or 'pooled' into a totalisator pool and the winning bets are divided by the total amount in the pool, less the commission or 'take-out' rate.

Totalisator pools can be stand-alone (i.e. where only one wagering operator manages the pool) or, they can include guest wagering operators placing bets into a host wagering operator's pool.

Tabcorp currently has domestic pooling arrangements with Racing and Wagering Western Australia (RWWA) and ACTTAB.

## The arrangements

Tabcorp is seeking authorisation for international pooling arrangements with various overseas wagering operators and an intermediary hub, to allow it to transmit bets by Australian punters into overseas pools and to transmit bets by overseas punters into Tabcorp operated pools in Australia.

<sup>1</sup> Productivity Commission, 2010, *Gambling*, Report no. 50, Canberra, paragraph.16.4.

<sup>2</sup> At the time that this draft determination was issued, TAB was seeking an informal clearance from the ACCC to acquire ACTTAB.

Tabcorp has sought authorisation to give effect to its existing international pooling arrangements with Premier Gateway International (PGI) and overseas wagering operators. PGI provides totalisator and interface services (i.e., it is also an intermediary hub) and is a 50/50 joint venture between Tabcorp and Phumelela.<sup>3</sup>

Tabcorp has also applied for authorisation to make and give effect to international pooling arrangements between Tabcorp and various overseas wagering operators as identified in Tabcorp's Confidential Submission in Support of its Applications for Authorisation dated 7 May 2014 (Tabcorp Confidential Submission) (referred to as the Identified Parties).<sup>4</sup>

Tabcorp submits that overseas wagering operators are not licensed to offer wagering services in Australia and therefore cannot actively advertise in Australia, and Tabcorp is not licensed to operate in any overseas jurisdictions. For this reason, Tabcorp has not previously sought authorisation for its existing international pooling arrangements because it did not consider that it was relevantly competitive with overseas wagering operators and as such the arrangements would not raise concerns under the *Competition and Consumer Act 2010* (the CCA).

However, Tabcorp submits that out of an abundance of caution it is now seeking authorisation to give effect to existing arrangements and to allow it to make and give effect to proposed arrangements with the Identified Parties and unidentified future parties. Tabcorp submits that potential regulatory and other changes may occur at some time in the future such that Tabcorp and overseas wagering operators may become relevantly competitive.

Tabcorp submits that there are seven provisions of the pooling arrangements that may raise concerns under the CCA which are described further at paragraph 5 (the Specified Provisions).

The Specified Provisions include:

- a requirement that overseas wagering operators cannot accept bets from other wagering operators (generally other Australian totalisators) without Tabcorp's consent
- a requirement that overseas wagering operators must transmit specified bets to Tabcorp and must not transmit specified bets to other wagering operators
- a series of requirements to prevent the 'leakage' of bets (and hence racing industry revenue) to overseas wagering operators that would otherwise have been placed with Tabcorp.

Tabcorp argues that without the Specified Provisions being included in the international pooling arrangements it would not be commercially viable for Tabcorp to offer pooling on Australian races to punters located outside of Australia and it would offer less betting opportunities to Australian punters on overseas races.

Tabcorp has also sought interim authorisation to make and give effect to international pooling arrangements with the Identified Parties that contain some or all of these Specified Provisions.

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<sup>3</sup> Phumelela Gold Enterprises and Phumelela Gaming and Leisure Ltd.

<sup>4</sup> Tabcorp, Confidential Submission in Support of its Applications for Authorisation, paragraph 2.1, page 4, 7 May 2014.

### **Potential benefits**

The ACCC considers that public benefits are likely to arise from greater exports of Australian racing overseas and consequently increase the profile of Australia generally and Australian racing in particular. Public benefits are also likely to result from preventing revenue being lost to a foreign wagering operator that would otherwise be directed to state and federal governments, the racing industry and an Australian totalisator.

The ACCC also considers that the arrangements will result in some public benefit by providing additional racing products on which Australian punters can bet, creating greater pool stability and ensuring compliance with various state and territory legislation and racing industry requirements.

### **Potential detriments**

The Specified Provisions of the international pooling arrangements contain a number of restrictions that may result in detriment by reducing the ability of other Australian or overseas wagering operators to compete with Tabcorp in providing pari-mutuel wagering services to Australian punters.

However, any detriment arising from the arrangements is mitigated by the continuing convergence of wagering services, with rapid growth in retail and online wagering and shifting demand from pari-mutuel wagering to fixed odds wagering.

Moreover, the Specified Provisions do not prevent other Australian totalisators (e.g., TattsBet) from entering into similar arrangements with overseas wagering operators that do not have arrangements with Tabcorp, nor do they prevent other Australian totalisators from entering into pooling arrangements with totalisators in respect of bets not covered by the arrangements with Tabcorp. The ACCC notes that no Australian totalisator has raised any concerns with the proposed arrangements. There are also no restrictions on overseas wagering operators offering fixed-odds betting on Australian racing.

Further, the arrangements do not prevent Australian punters from placing bets directly with an overseas wagering operator that does not have an agreement with Tabcorp.

Australian punters may also bet directly with an overseas wagering operator that has an agreement with Tabcorp in relation to other bet types (i.e., fixed odds bets), as well as betting directly with an overseas wagering operator that does not have an agreement with Tabcorp, or corporate bookmakers and betting exchanges.

The ACCC recognises that the pooling arrangements may give rise to detriments in other jurisdictions where Tabcorp enters into international pooling arrangements that prevent an overseas wagering operator from pooling with other wagering operators for nominated races. The ACCC notes that any authorisation granted would not provide Tabcorp with immunity in foreign jurisdictions.

Overall, the ACCC considers the arrangements are likely to result in limited detriments.

### **Draft determination**

The ACCC proposes to grant authorisation to Tabcorp for seven years to give effect (or, for future agreements, to make and give effect) to the Specified Provisions in international pooling agreements with PGI and overseas wagering operators.

**Interim authorisation**

The ACCC grants interim authorisation to Tabcorp to enter into international pooling agreements with the Identified Parties that contain the Specified Provisions, and to give effect to those provisions.

**Next steps**

The ACCC will seek submissions in relation to this draft determination before making its final decision.

## The Applications for authorisation

1. On 7 May 2014, Tabcorp Wagering Manager (Vic) Pty Ltd and TAB Limited (referred to jointly as Tabcorp or the Applicant) lodged applications for authorisation A91419-A91424 with the ACCC.
2. Authorisation is a transparent process where the Australian Competition and Consumer Commission (ACCC) may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the CCA). 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.

## The conduct

3. As outlined in Tabcorp's Submission in Support of its Applications for Authorisation, Tabcorp has sought authorisation to:
  - a. continue to give effect to international pooling arrangements with:
    - i. the New Zealand Racing Board (NZRB)
    - ii. Phumelela Gold Enterprises and Phumelela Gaming and Leisure Limited (together, Phumelela)
    - iii. The Singapore Turf Club (STC)
    - iv. Premier Gateway International Limited (PGI)
    - v. RSV Rennsport Vertiebs GmbH (Winrace)
    - vi. Aqua Overseas Corp (AOC)
  - b. make and give effect to conditional international pooling arrangements with the Identified Parties<sup>5</sup>
  - c. make and give effect to international pooling arrangements with future parties on substantially equivalent terms
  - d. extend, or enter into new international pooling arrangements at the expiry of any of the arrangements listed above.
4. Tabcorp sought authorisation in respect of each of the terms of the relevant arrangements including the Specified Provisions.
5. In particular, Tabcorp considers that certain provisions of the current and future international pooling arrangements may raise competition issues under the CCA.

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<sup>5</sup> Tabcorp provided details of the Identified Parties in its Confidential Submission in Support of its Applications for Authorisation, 7 May 2014.

The Specified Provisions are those provisions which require the guest wagering operator (which may be Tabcorp, PGI or an overseas wagering operator):

- a. to only transmit bets to the host wagering operator that are subject to specified Betting Rules (Betting Rules Requirement)

The Betting Rules (which may be the Victorian Betting Rules, New South Wales Betting Rules or the Betting Rules of an overseas jurisdiction, depending on the identity of the host wagering operator) may contain restrictions on the persons to whom, and the circumstances in which, the wagering operator can provide services to punters and also specify the applicable commission rates to be charged by the wagering operator on particular pari-mutuel bet types.

- b. not to transmit bets to the host wagering operator from customers who:
  - i. are not located within and/or a resident of a specified territory; and/or
  - ii. are existing customers of the host wagering operator or a related party of the host wagering operator (Qualified Person Provision)
- c. to comply with restrictions on the transmission of bets to the host wagering operator where rebates, or rebates above a certain amount, have been paid in relation to the bet (Rebate Provision)

and those provisions which require PGI and overseas wagering operators:

- d. to acquire and maintain any relevant approvals required from various regulatory and controlling bodies (Approvals Requirement)
- e. to not re-supply pooling services provided by Tabcorp (Pooling Restriction)
- f. to:
  - i. transmit to Tabcorp certain bets received by the guest wagering operator; and/or
  - ii. not transmit such bets to other totalisators (Investment Requirement)
- g. to not permit certain persons to co-mingle or pool in the overseas wagering operator's pool (Guesting Requirement).

6. Authorisation is sought for seven years.

## Background

### *Wagering*

7. In Australia, wagering is traditionally divided into pari-mutuel wagering and fixed odds wagering (also known as 'bookmaking'). Recently, other forms of wagering have been introduced, such as tote odds bookmaker betting (a derivative of pari-mutuel wagering schemes) and betting exchanges. Wagering primarily occurs on racing and sports events.

### *Pari-mutuel wagering*

8. Pari-mutuel or totalisator wagering was, until recently, the main form of wagering in Australia.
9. In pari-mutuel wagering, an operator establishes 'totalisator pools' for individual racing and sporting events. All pari-mutuel wagering bets accepted by the operator on the relevant event are consolidated into the totalisator pool created for that event, and the pari-mutuel operator deducts from the pool a predetermined commission percentage. The remainder of the pool is divided by the number of units bet on the successful outcome to arrive at the dividend per unit wagered. Therefore, the final odds are not calculated until after the close of betting on the relevant event, and the odds for a pari-mutuel wager can continue to vary until the close of betting.
10. Pari-mutuel wagering is classified as either on-course or off-course, depending on whether the betting takes place within a racecourse. The vast majority of pari-mutuel turnover in Australia is off-course, that is, processed by operators who may accept bets from people not physically present at a racecourse.
11. In each Australian state and territory, one operator is licensed to conduct off-course pari-mutuel wagering and may operate totalisator pools. These operators are known as totalisator agency boards, or more commonly, TABs.
12. Tabcorp submits that there have been two major trends in the past few years in Australian wagering. Firstly, Tabcorp submits, there has been a rapid expansion of corporate bookmakers. Secondly, Tabcorp submits, there has been a shift in consumer demand from pari-mutuel to fixed odds wagering.

### *Pooling arrangements*

13. Pooling (or 'co-mingling') arrangements allow TABs in multiple jurisdictions to combine their respective totalisator pools for particular events, instead of operating their own individual, smaller pools for those events. This generally involves a 'host' TAB with a large pool offering pooling services, for a fee, to one or more 'guest' TABs. This arrangement allows TABs to access larger totalisator pools, which provides increased liquidity resulting in more stable odds.
14. Pooling also enables guest TABs to offer pari-mutuel wagering that their customers would not otherwise be able to access. This is because some events may not generate sufficient interest in a particular jurisdiction to justify the TAB in that jurisdiction establishing a totalisator pool for that event.

### *Domestic pooling*

15. Pooling arrangements exist domestically in Australia, with TABs in most states and territories pooling into a totalisator pool operated by Tabcorp or a totalisator pool offered by TattsBet.
16. TABs in Victoria, Western Australia and the Australian Capital Territory combine their respective pools on particular events into Tabcorp's SuperTAB totalisator pool for those events. TABs in South Australia, Tasmania and the Northern Territory combine their respective pools on particular events into Tatts Group Limited's TattsBet totalisator pool for those events. A separate pool operates in NSW due to different regulatory and industry approval requirements in that jurisdiction.

*International pooling*

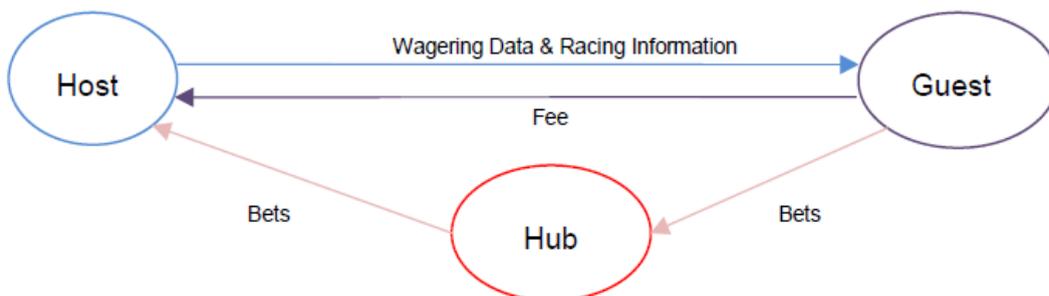
- 17. Tabcorp is currently the sole Australian wagering operator with international pooling arrangements. International pooling enables Tabcorp to combine its pools with the pools managed by overseas wagering operators for certain events.
- 18. As in domestic pooling, international pooling allows a wagering operator to offer pari-mutuel wagering on events that might not garner sufficient local interest to justify the operator offering a stand-alone totalisator pool. Therefore, international pooling arrangements enable overseas wagering operators to offer pari-mutuel wagering on Australian events and enable Tabcorp to offer its customers pari-mutuel wagering on foreign events.
- 19. Tabcorp engages in two types of international pooling arrangements with overseas wagering operators: 'direct' and 'indirect' pooling arrangements.
- 20. Direct international pooling arrangements (see Figure 1) involve the wagering operator who hosts the arrangement sending wagering data and racing information to a guest wagering operator. The guest wagering operator accepts bets from punters in its jurisdiction, and transmits bets back to the host wagering operator for inclusion in the host wagering operator's totalisator pool. The guest wagering operator also transmits a processing fee (a percentage of the betting turnover transmitted) to the host wagering operator.

**Figure 1. Direct pooling arrangements**



- 21. Indirect pooling arrangements (see Figure 2) involve the wagering operator who hosts the arrangement sending wagering data and racing information to a guest wagering operator. The guest wagering operator accepts bets from punters in its jurisdiction and transmits the bets to an intermediary hub. The intermediary body transmits the bets back to the host wagering operator for inclusion in the host wagering operator's pool. The guest wagering operator also transmits a processing fee to the host totalisator.

**Figure 2. Indirect pooling arrangements**



22. Intermediary hubs or bodies provide 'pooling interface services' to wagering operators for indirect pooling arrangements. Pooling interface services involve the intermediary hub collecting bets from guest wagering operators overseas and then transmitting those bets to the host totalisator for inclusion in a host totalisator pool. Intermediary hubs may also collate and prepare settlement reports to allow the host and guests to settle their financial obligations and adjust dividends between them as appropriate.
23. Under certain circumstances, wagering operators may prefer indirect pooling to direct pooling. It may be more efficient for a wagering operator to establish a link with an intermediary hub, and to connect with a variety of overseas wagering operators through that hub, rather than to establish separate pooling arrangements directly with a number of overseas wagering operators.
24. Technology constraints (e.g. a limited number of channels/nodes into which connections may be made) may also restrict the number of direct arrangements that a wagering operator can enter into, thereby encouraging the use of indirect arrangements through an intermediary hub.
25. The size of the overseas wagering operators, and any pre-existing relationships between the wagering operators and intermediary hubs, may also influence the decision whether to pool directly or indirectly.

#### *Regulation of TABs*

26. Off-course totalisator licensee operations are highly regulated by Australian state and territory governments.
27. Regulations specify maximum commission rates for the licensees, require licensees to enter into arrangements with relevant racing industry bodies (whereby licensees must obtain approval to conduct their activities and provide economic contributions to the racing industry), and allow for the collection of taxes and other fees in each jurisdiction.

#### *Approvals requirements for international pooling arrangements*

28. Tabcorp requires approval from government and industry bodies to engage in international pooling arrangements.
29. In New South Wales, Tabcorp requires approval from the New South Wales government and from Racingcorp Pty Ltd (an industry body that represents the three codes of racing in New South Wales). In Victoria, Tabcorp requires approval under a Joint Venture Agreement that governs its arrangements with the Victorian Racing Industry.
30. Tabcorp submits that government and industry will not provide it with the necessary approvals or exemptions unless its arrangements include some of the provisions outlined in paragraph 5. In particular, Tabcorp submits that the provisions will assist to maintain the integrity of its totalisator pools and prevent leakage of revenue to overseas wagering operators.

#### *Provisions to prevent revenue leakage: Rebate and Qualified Person Provisions*

31. Tabcorp submits that state and federal governments, as well as the racing industries in New South Wales and Victoria, will only support international pooling where the arrangements are likely to result in new betting on Australian racing, rather than in a transfer of existing betting from Tabcorp to overseas wagering

operators. This is because a transfer of existing betting would result in 'revenue leakage' in favour of overseas wagering operators, through lost taxes and racing industry fees. As such, Tabcorp submits that the Rebate and Qualified Person Provisions are essential components of its agreements.

32. Tabcorp submits that it is the principal source of revenue for the racing industries in New South Wales and Victoria. In accordance with its licensing arrangements, Tabcorp pays a percentage of its net wagering revenue in each state, and additional distributions, to the relevant racing industry bodies. In the 2012-2013 financial year, this obligation saw Tabcorp direct \$728.2 million to the New South Wales and Victorian racing industry bodies. Tabcorp submits that this amount represents 60-75% of the total funding of these bodies. As outlined above, Tabcorp also pays wagering taxes and GST to the state and federal governments.
33. In contrast, Tabcorp submits that a bet placed with an overseas wagering operator and transmitted into a Tabcorp pool through international pooling arrangements provides significantly less revenue to the racing industry and to state and federal governments, as compared to a bet of the same size placed directly with Tabcorp.
34. In relation to the revenue distributed to governments, the reduction in revenue arises because overseas wagering operators do not pay wagering taxes and GST to Australian governments. Tabcorp has obtained approvals from the relevant Ministers in Victoria and New South Wales and secured wagering tax exemptions for overseas wagering operators who enter into international pooling arrangements with Tabcorp.
35. Tabcorp submits that it is necessary for the government to exempt overseas wagering operators from wagering taxes in order to make international pooling arrangements commercially viable. In the absence of the exemptions, bets accepted by an overseas operator and co-mingled into a Tabcorp pool would be taxed twice (i.e. in the originating jurisdiction and in Victoria or New South Wales). In addition, the processing fee Tabcorp would receive from hosting the pool may not be sufficient to cover the taxes and racing industry fees Tabcorp would be required to pay. If Tabcorp increased its processing fees to cover these costs, Tabcorp argues that pooling would not be an attractive proposition for overseas wagering operators.

#### **Relevant previous notifications and authorisations**

36. The ACCC has previously considered notifications and applications for authorisation in relation to Tabcorp and pooling arrangements:
  - The ACCC allowed a notification to stand from Ubetpro<sup>6</sup> in relation to arrangements where Ubetpro would supply wagering software services on condition that customers use the interface services of a nominated intermediary hub to acquire Tabcorp's wagering services.
  - The ACCC allowed a notification to stand from Tabcorp<sup>7</sup> in relation to arrangements where Tabcorp would supply pari-mutuel pooling services to overseas wagering operators on condition that the operators acquire interface services from a nominated intermediary hub.

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<sup>6</sup> N96031 allowed to stand on 13 August 2012

<sup>7</sup> N96121-N96122 allowed to stand on 4 October 2012

- In 2012, the ACCC granted authorisation to Tabcorp Wagering Manager (Vic)<sup>8</sup> to give effect to agreements governing the participation of ACTTAB and RWWA in the SuperTAB Pool, including International Pool Requirement and Foreign Totalisator provisions.
- In 2008, the ACCC granted authorisation to Tabcorp Wagering Manager<sup>9</sup> to give effect to an agreement governing TOTE Tasmania's participation in the SuperTAB pool operated by Tabcorp.

## The applicants and relevant parties

### *Tabcorp*

37. The Tabcorp Group, the parent company of the Applicants, has interests in wagering, gaming and media. The applications for authorisation relate to the Tabcorp Group's wagering operations, and in particular to the Tabcorp Group's off-course pari-mutuel wagering activities on racing and other sports.
38. The Tabcorp Group's pari-mutuel wagering activities are conducted primarily in New South Wales and Victoria, and occur in licensed agencies and licensed venues, as well as by telephone and the internet.
39. These activities are conducted through the Applicants, which operate under separate licences in Victoria and New South Wales and have separate and distinct totalisator pools in these states. The Applicants operate their pari-mutuel wagering businesses in accordance with arrangements they have entered into with each state's relevant racing industry authorities.
40. Tabcorp Wagering Manager (Vic) Pty Ltd holds a licence to conduct off-course pari-mutuel wagering in Victoria until 2024 and it operates the SuperTAB totalisator pool.
41. TAB Limited holds a licence to provide off-course pari-mutuel wagering services in New South Wales for thoroughbred, harness and greyhound racing until 2097, and it operates the TAB totalisator pool.

### *Overseas wagering operators*

42. Tabcorp has existing international pooling arrangements as both host and guest with the following parties:
  - i. NZRB, which is the sole provider of totalisator services in New Zealand.
  - ii. Phumelela, which provides totalisator services in South Africa.
  - iii. Tabcorp acts as guest through direct pooling arrangements, and acts as host in indirect pooling arrangements (via the intermediary PGI) with the STC. STC is the sole licensed provider of totalisator services in Singapore.

Tabcorp has existing international pooling arrangements as host with the following parties:

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<sup>8</sup> A91323-A91328, Tabcorp Wagering Manager (Vic) Pty Ltd, 10 December 2012. Similar arrangements were authorised on 9 September 2009 albeit without the international elements - see A91127-A91165.

<sup>9</sup> A91065-A91067, Tabcorp Manager Pty Ltd, 5 March 2008.

- i. PGI, which is a joint venture between Tabcorp and Phumelela. PGI provides totalisator services in the Isle of Man. It acts as a wagering operator in its own right (PGI may accept bets directly from customers) and it also acts as an intermediary hub between other wagering operators in international pooling arrangements.
  - ii. Indirectly via the intermediary PGI with AOC. AOC is a provider of totalisator services and is based in the British Virgin Islands.
  - iii. Indirectly via the intermediary Sportech with Winrace. Winrace provides totalisator services in Germany.
43. Tabcorp proposes to enter into new international pooling arrangements with the Identified Parties and unidentified future parties, and extend its international pooling arrangements at the expiry of any of its existing arrangements subject to authorisation being granted.

## **Submissions received by the ACCC**

44. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
45. The ACCC sought submissions from 51 interested parties potentially affected by the applications, including racing associations, government departments, other TABs and bookmakers.
46. The ACCC received submissions from two interested parties: a submission from Harness Racing Australia in which it submits that it does not oppose the applications for authorisation, and a submission from the Victorian Racing Industry, comprising representatives from Racing Victoria Limited, Harness Racing Victoria, Greyhound Racing Victoria, and VicRacing Pty Ltd.
47. The Victorian Racing Industry strongly supports the applications on the grounds that the proposed expansion of international pooling will create significant benefits, including:
- facilitating the export and promotion of Australian racing and the opening up of new revenue streams for the racing industry, and
  - enhancing the wagering product available to Australian punters.
48. Copies of all public submissions may be obtained from the ACCC's Public Register at [www.acc.gov.au/authorisationsregister](http://www.acc.gov.au/authorisationsregister).

## **ACCC evaluation**

49. The ACCC's evaluation of the international pooling arrangements is in accordance with the relevant net public benefits tests<sup>10</sup> contained in the the CCA (which are set out at Attachment A).
50. In broad terms, under the relevant tests the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the likely benefit to the public from

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<sup>10</sup> Subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8) of the CCA.

the relevant conduct or agreement would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result. The ACCC must not grant authorisation unless it is satisfied in all the circumstances that the relevant conduct or agreement will result in such a benefit to the public that it should be allowed to occur.

51. In order to assess the effect of the proposed arrangements and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future with and without the conduct.

## The relevant areas of competition

52. Tabcorp has not previously applied for authorisation of its existing international pooling arrangements as it did not consider that it and overseas wagering operators were relevantly competitive in respect of the supply of wagering services.
53. While Tabcorp does not consider that it is currently relevantly competitive with overseas wagering operators, it submits that developments are occurring in relevant markets (for example, there is the potential for further industry deregulation) such that Tabcorp may become relevantly competitive with overseas wagering operators at some time in the future.
54. Tabcorp submits that the narrowest arguable market is a national market for the supply of wagering on racing, including, at least in Australia, products offered by bookmakers, betting exchanges and other TABs (i.e. TattsBet).
55. Tabcorp submits that it is arguable that the relevant product market is broader and includes wagering on other sports or events and other forms of gambling.
56. The ACCC considers that for the purposes of the present applications for authorisation the relevant areas of competition are those for:
- the supply of pooling services to wagering operators and
  - the provision of wagering services to the Australian public.
57. As previously outlined, in each state and territory only a single TAB operator is licensed to provide totalisator and fixed odds wagering through retail outlets and this has resulted in limited competition between TAB operators in different states.
58. The ACCC notes Tabcorp's submission that there have been two major trends in the past few years in Australian wagering. Firstly, Tabcorp submits, there has been a rapid expansion of corporate bookmakers. Secondly, Tabcorp submits, there has been a shift in consumer demand from pari-mutuel to fixed odds wagering. The ACCC has previously stated 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 punters may now consider pari-mutuel wagering and fixed odds wagering to be substitutable'<sup>11</sup>

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<sup>11</sup> Tabcorp Wagering Manager (Vic) Pty Ltd, Authorisation A91344 – A91346, 17 April 2013.

59. The High Court, in *Betfair v Western Australia* (2008)<sup>12</sup> recognised a national market for the provision of wagering services on racing and sports events by the provision of the telephone and the internet.
60. There has also been an increase in the demand for telephone and online wagering services which suggests that national or jurisdictional boundaries are breaking down and there is movement toward an international market.
61. However, the ACCC does not consider it necessary to comprehensively define the areas of competition as its assessment will not be significantly affected by precise definitions.

## The future with and without the conduct

62. To assist in its assessment of the conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
63. Tabcorp submits that without the Specified Provisions outlined at paragraph 5, it would not enter, or obtain the necessary approvals to enter, the international pooling arrangements.
64. Tabcorp submits that if the arrangements are not authorised, overseas wagering operators will not participate in the Tabcorp pools. Moreover, Tabcorp would not be in a position to continue its current pooling arrangements, which would have significant consequences for its customers and the racing industry. In particular, Tabcorp submits that the export of Australian racing would be curtailed as it is the only wagering market participant taking Australian racing vision to the world; Australian customers would have a more limited choice of products on which to bet and the racing industry would receive lower returns and lose an important source of funding.
65. The ACCC considers that without the Specified Provisions outlined at paragraph 5 Tabcorp is unlikely to enter into pooling arrangements in the form proposed with overseas wagering operators as the arrangements are unlikely to be commercially viable.

## Public benefit

66. Public benefit is not defined in the CCA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>13</sup>

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<sup>12</sup> *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 114; the Federal Court (Perram J) in *Sportsbet Pty Ltd v NSW & Ors* [2010] FCA 604 at [21] and the High Court in *Betfair Pty Ltd v NSW & Ors* [2012] HCA 12 at [2] also accepted the national wagering market found by the High Court in 2008.

67. Tabcorp submits that the international pooling arrangements will deliver public benefits in the form of:
- a. the export of Australian racing
  - b. increased funding to the racing industry
  - c. increased liquidity in totalisator pools
  - d. increased wagering opportunities for consumers
  - e. maintaining integrity of totalisator pools.

#### *Export opportunities*

68. Tabcorp submits that international pooling arrangements create significant export opportunities for Australian racing that would not be possible without the proposed arrangements. Tabcorp notes that the demand for racing vision internationally is, to an extent, linked to the availability of pooling arrangements. Tabcorp submits that in the absence of the proposed pooling arrangements, pools on Australian racing may be too small to be commercially viable for overseas wagering operators, such that wagering operators will not offer pari-mutuel wagering on Australian racing to their own customers, and will therefore have a reduced need to acquire racing vision from the Australian racing industry.
69. Tabcorp submits that the export of more Australian racing through the international pooling arrangements has the public benefit of increasing the international profile of the Australian racing industry. This, Tabcorp submits, will provide greater opportunities for the racing industry to attract international participants, particularly with regard to states and codes that would otherwise have low profiles internationally. Tabcorp submits that an increased racing profile also leads to the potential for increased tourism, with associated benefits to the Australian economy.
70. The ACCC accepts that, by acting as a host in pooling arrangements, Tabcorp is likely to create public benefits by increasing exports of Australian racing and consequently increasing the international profile of the Australian racing industry. To the extent that increasing the international profile of the Australian racing industry leads to an increase in tourism in Australia, the ACCC considers that international pooling arrangements may give rise to further benefits.

#### *Increased funding to the racing industry*

71. The Australian racing industry is largely funded by wagering revenues (significantly through bets placed with TABs). Racing has the economic characteristics of a public good, in that multiple wagering operators can use the same racing product and that use is hard to prevent without regulation. This potentially results in a 'free rider' problem and under funding of racing in relation to consumer demand for wagering.
72. Tabcorp submits that international pooling arrangements will increase the funding available to the Australian racing industry. When Tabcorp acts as a host, it will increase its revenue by collecting a processing fee from overseas wagering operators and by charging overseas wagering operators for Australian

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<sup>13</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

racing vision. In addition, pooling arrangements bring customers into Tabcorp pools who would not otherwise bet with Tabcorp, providing revenue that the racing industry would not otherwise receive. When Tabcorp acts as a guest (i.e. when Tabcorp offers pari-mutuel wagering on foreign events to Australian customers) the introduction of new or enhanced wagering products to Australian punters may increase wagering and Tabcorp revenues. Tabcorp submits that its funding arrangements with the racing industry ensure any increase in its revenue will result in a direct financial benefit to the racing industry and will provide associated benefits to the community.

73. Tabcorp considers that the Rebate and Qualified Person Provisions are essential to prevent leakage of revenue to overseas wagering operators (see paragraphs 31-35). Tabcorp submits that in the absence of these provisions, the pooling arrangements could provide overseas wagering operators with the opportunity to poach Australian customers by encouraging punters to place a bet into the mingled pool through the overseas wagering operator, rather than through Tabcorp. Avoidance of this, Tabcorp submits, results in a public benefit by preventing revenue that would otherwise be directed to Tabcorp (and ultimately to state and federal governments through taxes, and to racing industry bodies through fees) from being lost.
74. Tabcorp submits that the Qualified Person Provision of the international pooling arrangements will enable it to limit the geographic area from which each overseas wagering operator can collect and transmit bets into the Tabcorp pool, and prevent Australian residents and/or existing Tabcorp customers from placing bets into its pools via an overseas wagering operator.
75. The Rebate Provision restricts the level of rebates an overseas wagering operator can offer to punters whose bets will be transmitted into a Tabcorp pool. Tabcorp submits that this will prevent an international wagering operator from using rebates as a mechanism to attract Tabcorp's 'premium' punters (punters who engage in high-value pari-mutuel wagering).
76. The ACCC has previously considered and accepted that there may be public benefits associated with preventing revenue that would otherwise be directed to an Australian TAB from being lost to an overseas wagering operator.<sup>14</sup> The ACCC understands that there is a difference in revenue distributions where bets are made directly with an Australian TAB compared to where bets are made overseas (and then transmitted to an Australian TAB pool). The ACCC also accepts that these provisions are directed at restricting the leakage of revenue to overseas wagering operators and minimising revenue losses for state and federal government, the Australian racing industry and Tabcorp.

#### *Increased liquidity in totalisator pools*

77. Tabcorp submits that international pooling arrangements provide customers with larger pools that have greater liquidity. Tabcorp submits, the public benefits associated with increased liquidity are twofold. Firstly, a larger totalisator pool increases wagering stability: a large bet placed with a small totalisator could distort the calculation of odds for the relevant race and potentially the winnings of other punters who have wagered on that race, whereas the same bet in a large pool will have less effect on the indicative and final dividends. Secondly, a

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<sup>14</sup> Tabcorp Wagering Manager (Vic) Pty Ltd, Authorisation A91323 – A91328, paragraph 111.

larger totalisator pool means there is potentially more money available to distribute to winning punters.

78. The ACCC has previously considered and accepted that pooling arrangements are likely to allow totalisators to offer more stable pools than if totalisators were to operate individually<sup>15</sup> and that stability of the pool is an important feature to some punters.<sup>16</sup> The ACCC accepts the international pooling arrangements will enable Tabcorp to offer more stable pools to punters betting on Australian and International races. To the extent that increased liquidity leads to greater confidence in the stability of totalisator pools, the ACCC accepts that this gives rise to a public benefit.

#### *Increased wagering opportunities for punters*

79. Tabcorp submits that international pooling arrangements enable it to provide an enhanced product offering to Australian punters. In the absence of guest arrangements, Tabcorp would be unlikely to generate sufficient interest on many international races to justify offering pari-mutuel wagering on those races via stand-alone pools. Tabcorp submits that there is a public benefit associated with an increase in opportunities for punters to bet on non-Australian racing.
80. The ACCC accepts that the international pooling arrangements are likely to result in some benefit by providing greater choice by providing more opportunities for Australian punters to bet on overseas races. To the extent that this leads to greater choice, the ACCC considers that some benefits to the public may arise.

#### *Maintaining integrity of totalisator pools*

81. Tabcorp submits that the Qualified Person and Pooling Restriction provisions of the international pooling arrangements will enable it to prevent its pools from being used for money laundering, and will allow it to impose audit and reporting provisions which contribute to ensuring integrity in racing.
82. The ACCC accepts that the Qualified Person Provision and Pooling Restriction (i.e. the restriction on the re-supply of the pooling services that Tabcorp provides) will aid Tabcorp to maintain the integrity of its totalisator pools. To the extent that this prevents the pools from being used for illegal activities, and assists Tabcorp to meet its obligations under state and federal law, the ACCC considers that some benefits to the public will arise.

## **Public detriment**

83. Public detriment is also not defined in the CCA but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>17</sup>

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<sup>15</sup> Ibid at paragraph 90.

<sup>16</sup> Tabcorp Manager Pty Ltd, Authorisation A91127 – A91132 & A91162 – A91165at paragraph 4.58.

<sup>17</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

84. Tabcorp submits that while Specified Provisions of the international pooling arrangements may limit the ability of overseas wagering operators to provide certain services to Australian punters, there is little or no anti-competitive detriment resulting from those limitations.

*Limited competition*

85. Tabcorp submits that there is little, if any relevant competition between it and overseas wagering operators. Tabcorp submits that overseas wagering operators are not licensed to offer wagering services in Australia and therefore cannot actively advertise in Australia due to legislative restrictions. Similarly, Tabcorp is not licensed to offer wagering services in overseas jurisdictions and does not actively advertise in any overseas jurisdiction. Tabcorp submits this lack of competition between Tabcorp and overseas wagering operators is demonstrated by the decision of overseas bookmakers, such as Ladbrokes, acquiring Australian corporate bookmakers in order to compete for Australian customers rather than seeking to attract them through their UK businesses.
86. In addition, Tabcorp submits that in any event, there are substantial competitive constraints from betting exchanges and corporate bookmakers, and pooling arrangements do not impose any restrictions in relation to fixed odds bets on Australian racing.
87. While the pooling arrangements place a number of restrictions on pool participants, the ACCC considers that any anti-competitive detriment is likely to be limited. Legislative restrictions on providing pari-mutuel wagering services in each jurisdiction in Australia prevent overseas totalisators from marketing their services directly to Australian punters by advertising in Australia and therefore limit the level of competition between Australian and foreign totalisators.
88. The pooling arrangements do not prevent other Australian totalisators (e.g. TattsBet) from entering into similar arrangements with overseas totalisators that have not signed an agreement with Tabcorp. There would appear to be a large number of alternative totalisators with whom TattsBet could enter into international pooling arrangements. The ACCC also notes that TattsBet has not raised any concerns with the arrangements.
89. The Specified Provisions also do not prevent Australian punters from placing bets directly with overseas wagering operators for other services and products.
90. Further, the ACCC considers that without the pooling arrangements, it is unlikely that overseas wagering operators would be able to attract sufficient interest in Australian racing and it is therefore unlikely to be commercially viable to operate a stand-alone pool. In these circumstances overseas wagering operators would be unlikely to compete with Tabcorp to offer pari-mutuel betting services on most Australian races.

*Investment and Guesting Requirements*

91. The Guesting Requirements are relevant to arrangements where Tabcorp 'guests' into a pool operated by an overseas wagering operator.
92. The Guesting Requirement provides that Tabcorp will only acquire pooling services from an overseas wagering operator on condition that they do not permit certain persons to co-mingle into the merged pool without Tabcorp's consent.

93. In effect, this means the international pooling arrangements could restrict overseas wagering operators from offering pooling on nominated events with any wagering operator other than Tabcorp.
94. The Investment Requirement works in reverse, and is relevant to arrangements where Tabcorp 'hosts' a pool. That is, under the Investment Requirement Tabcorp may require an overseas wagering operator to transmit certain types of bets to Tabcorp as a condition of providing pooling services.
95. Tabcorp submits that neither the Guesting nor the Investment Requirements have the purpose or effect, or likely effect, of substantially lessening competition in any market, nor will they have a detrimental impact upon punters.
96. In relation to the Investment Requirement, Tabcorp submits that the inability of other Australian wagering operators to host pools on Australian races with overseas wagering operators who have pooling arrangements with Tabcorp will not give rise to any detriment for Australian punters because Australian wagering operators remain free to enter into international pooling arrangements with overseas wagering operators that have not established international pooling arrangements with Tabcorp, or with Tabcorp's pooling partners at the expiration of relevant agreements.
97. In relation to the Guesting Requirement, Tabcorp submits that Australian punters will continue to have alternative methods of betting on relevant international races, including fixed odds betting with corporate bookmakers, and betting into stand-alone pools operated by other Australian wagering operators.
98. Tabcorp acknowledges that Australian punters who wish to bet into relevant international pools must bet through Tabcorp, but submits that there will be no detrimental impact for Australian punters because they would not be able to bet into any international pools in the absence of Tabcorp's international pooling arrangements. In addition, Tabcorp submits that preventing other Australian wagering operators from betting into relevant international pools will not affect price competition, because pooling involves an alignment of commission rates through the adoption of equivalent Betting Rules rather than setting the final dividend price.
99. The ACCC notes that the Guesting and Investment Requirements may provide Tabcorp with the exclusive right to supply and acquire pooling services to or from particular overseas wagering operators. After entering into pooling arrangements with Tabcorp, overseas wagering operators may be prevented from entering into pooling arrangements on nominated racing events with other wagering operators unless Tabcorp provides its consent. As such, these provisions could allow Tabcorp to be the only Australian exporter of pari-mutuel wagering on nominated races in particular jurisdictions, and would allow Tabcorp to be the sole Australian provider of pari-mutuel wagering on particular international racing events.
100. However, despite the exclusivity that the Guesting and Investment Requirements generate, the ACCC accepts that Tabcorp will continue to be constrained in its provision of wagering and pooling services in Australia, particularly by corporate bookmakers.
101. The ACCC considers that the Investment Requirement may limit other Australian totalisators from entering into pooling arrangements with overseas

wagering operators, however the ACCC is not aware of any Australian totalisator that wishes to do so. Moreover, the arrangement is limited to pari-mutuel betting and does not prevent Australian wagering operators from offering fixed odds betting on international races.

102. The ACCC notes that the conduct may give rise to detriments in other jurisdictions where Tabcorp enters into international pooling arrangements. In particular, the ACCC notes that the exclusivity Tabcorp affords itself through the Guesting Requirement may restrict competition in that jurisdiction by preventing an overseas wagering operator from pooling with other wagering operators for nominated races. In this regard, any grant of authorisation would not provide Tabcorp with immunity in foreign jurisdictions.

#### *Betting Rules Requirement*

103. The Betting Rules Requirement specifies the applicable commission or ‘take-out’ rate to be charged by the totalisator on particular pari-mutuel bet types. The provision also places restrictions on the persons to whom totalisators can supply wagering services, and in what circumstances – for example, it prohibits totalisators from accepting bets from minors.

104. Tabcorp submits that the Betting Rules Requirement might be construed as having the purpose or effect of fixing, controlling or maintaining the price of pari-mutuel wagering products offered by Tabcorp and each overseas wagering operator to their respective customers.

105. However, Tabcorp submits that it currently does not have the technology to take into account different take-out rates charged by different pool participants in the calculation of pricing, i.e. net pool pricing. Accordingly, it applies the take-out rate approved by the Victorian and New South Wales governments/regulators.

106. Consistent with previous assessments, the ACCC considers the Betting Rules Requirement is likely to result in some detriment by limiting competition in setting the price for wagering services, but any detriments will be mitigated by the specific characteristics of the wagering industry. In particular, the significant presence of corporate bookmakers using telephone and internet-based wagering services in both Australia and overseas, are likely to act as a constraint on the level of detriment.<sup>18</sup>

#### *Rebate and Qualified Person provisions*

107. The Rebate Provision is intended to prevent revenue leakage from Tabcorp (and by extension, Australian state and territory governments and the racing industry) by prohibiting overseas wagering operators from targeting Tabcorp’s Australian customers through the offer of higher rebates to Australian punters than Tabcorp might offer.

108. The Qualified Persons provision limits the geographic area for which each overseas wagering operator can collect bets, similar to a distribution agreement. Tabcorp submits this provision is intended to provide incentives for operators to promote Australian racing within a particular territory but is also intended to prevent those operators from targeting Tabcorp’s Australian customers.

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<sup>18</sup> For example, see Tabcorp Wagering Manager (Vic) Pty Ltd A91323-A91328, paragraphs 124 – 129.

109. In relation to the Rebate Provision, Tabcorp submits that this only applies to bets that will be co-mingled in Tabcorp pools and does not affect other bets on Australian racing, such as fixed odds.
110. Further, Tabcorp submits that overseas wagering operators will continue to be able to offer rebates or other discounts to customers, subject to local requirements but they cannot place those bets into Tabcorp pools.
111. Tabcorp submits that the Qualified Person provision neither has the purpose nor effect of substantially lessening competition in any market because Australian residents and residents of other jurisdictions:
- remain free to place bets with overseas wagering operators, subject to any relevant legal restrictions and operator preferences, those bets just will not be included in the Tabcorp pools, and
  - have a number of other Australian based wagering options for betting on Australian racing, including corporate bookmakers, oncourse bookmakers or with betting exchange Betfair, in addition to being able to place bets directly with Tabcorp.
112. The ACCC considers that any detriments arising from the Qualified Person and Rebate Provisions are limited. In particular, these provisions are intended to prevent overseas wagering operators targeting Tabcorp's customers, however, they are only able to do because of the pooling arrangements. Further, while the arrangements place restrictions on the rebates that may be offered by overseas wagering operators to Australian punters, this only applies to bets that are to be included in Tabcorp pools and does not prevent overseas operators from providing rebates to punters in relation to fixed odds betting, or where the bets are not included in the Tabcorp pools.

#### *Pooling Restriction and Approvals Requirement*

113. Tabcorp must comply with a number of state and racing industry requirements and the Pooling Restriction and Approvals Requirement is in part designed to ensure Tabcorp's compliance with these requirements.
114. For example, the Pooling Restriction is required by both the New South Wales and Victorian racing industries as part of their approvals processes. Tabcorp submits this restriction is designed to prevent overseas wagering operators being used as a vehicle to allow other wagering operators to pool with Tabcorp indirectly without the consent of Tabcorp or the racing industry.
115. Tabcorp submits that the provision is intended to act as a safeguard to protect the integrity of the pool and also in complying with anti-money laundering legislation.
116. Tabcorp submits that overseas wagering operators can approach Tabcorp to pool directly or via an intermediary hub, subject to the appropriate integrity checks.
117. The ACCC considers that this provision is likely to be necessary to protect the integrity of the pools, for example, by preventing them from being used for money laundering purposes. Moreover, it appears to be required by Tabcorp to

ensure its compliance with its agreements with the Victorian and New South Wales racing industry agreements.

118. Tabcorp submits the Approvals Requirement may include compliance with state legislation relating to race fields. The ACCC accepts that this is to ensure that parties comply with relevant state legislation and therefore does not give rise to any detriment.

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

119. The ACCC considers that the international pooling arrangements are likely to result in some benefits by increasing the international profile of Australian racing and by providing increased wagering opportunities for consumers.

120. To the extent that the arrangements prevent leakage to overseas wagering operators and increase Tabcorp's revenue, and therefore funding to the Victorian and New South Wales racing industries and federal and state governments, the ACCC considers that this is a public benefit.

121. The ACCC considers that the agreements are also likely to result in some detriment because overseas wagering operators that have pooling arrangements with Tabcorp will be unable to compete with Tabcorp to offer pari-mutuel betting services to Australian punters on most Australian races.

122. The Specified Provisions may also result in some detriment by limiting overseas wagering operators' ability to pool with other totalisators in relation to certain bet types, or to offer certain levels of rebates or accept bets from certain persons. However, the ACCC considers that any detriment is likely to be limited because the opportunity for overseas wagering operators to provide wagering services on Australian racing primarily occurs because of the pooling arrangements.

123. In the ACCC's view, without the pooling arrangements, competition between Tabcorp and overseas wagering operators to provide pari-mutuel wagering services to Australian punters would currently be limited in any event due to legislative restrictions.

124. Moreover, Australian punters have the option of placing fixed odds bets through traditional and corporate bookmakers, as well as betting exchanges.

125. As a result the ACCC considers that the international pooling arrangements are unlikely to result in any significant detriments by reducing competition from overseas totalisators.

126. For the reasons outlined in this draft determination the ACCC is satisfied that, in all the circumstances, the likely benefits to the public resulting from the making and/or giving effect to any of the Specified Provisions that may be contained in international pooling arrangements will outweigh the detriment to the public constituted by any lessening of competition that is likely to result from the arrangements. The ACCC is also satisfied that, in all the circumstances, the making and/or giving effect to any of the Specified Provisions which may be contained in international pooling arrangements is likely to result in such a benefit to the public that the arrangements should be allowed to be made and/or given effect to.

127. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

## **Future parties**

128. Tabcorp sought authorisation to make and give effect to international pooling arrangements that may contain the Specified Provisions with other as yet unidentified overseas wagering operators.

129. The ACCC considers that Tabcorp entering into additional arrangements with future parties is unlikely to have a detrimental impact on competition because, as evidenced by TattsBet, it is not critical for wagering operators to have international pooling arrangements to be able to provide pari-mutuel services in Australia.

130. The evaluation set out in this Draft Determination also applies to future parties, such that it is likely additional benefits will arise from future arrangements that would outweigh any detriments.

131. Moreover, Tabcorp intends to enter into contracts for five year periods and the proposed authorisation is only to extend for 7 years. This means that other Australian wagering operators can seek to enter into arrangements with overseas wagering operators when their contracts with Tabcorp expire.

132. For these reasons, the ACCC considers it appropriate that authorisation extend to future parties.

## **Length of authorisation**

133. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>19</sup> This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

134. In this instance, Tabcorp is seeking authorisation for a seven year period. Tabcorp submits that a seven year authorisation period will cover existing arrangements, current conditional arrangements and any future arrangements entered into within the next two years.

135. The ACCC considers that as the agreements are generally for a five year period, and some of those agreements may be due to expire in the next few years, seven years is an appropriate period to grant authorisation.

136. The ACCC is not proposing to grant authorisation for Tabcorp to continue to give effect to arrangements entered into during the period of authorisation beyond the proposed seven year period.

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<sup>19</sup> Subsection 91(1).

# Draft determination

## The application

137. On 7 May 2014, Tabcorp Wagering Manager (Vic) Pty Ltd lodged A91419-A91421 and TAB Limited lodged A91422-A91424 using Forms A, B and E of Schedule 1, of the Competition and Consumer Regulations 2010. The applications were made under sections 88(1A), 88(1) and 88(8) of the CCA to give effect to current, and to make and give effect to proposed draft international pooling arrangements.
138. Specifically, Tabcorp Wagering Manager (Vic) Pty Ltd and TAB Limited (jointly referred to as Tabcorp) have applied for authorisation to give effect to agreements with Premier Gateway International (PGI) and overseas wagering operators to govern their participation in Tabcorp's TAB and SuperTAB pools.
139. Tabcorp has also applied for authorisation to give effect to, or to make and give effect to, international pooling arrangements between Tabcorp and Identified Parties<sup>20</sup> and unidentified future overseas wagering operators. In particular, Tabcorp is seeking authorisation for the Specified Provisions that may be included in international pooling agreements.
140. The Applicants seek authorisation of these arrangements as they may:
- a. contain cartel provisions (Betting Rules Requirement; Rebate Provision; Qualified Person Provision)
  - b. contain provisions that may have the effect of substantially lessening competition (Qualified Person Provision)
  - c. contain exclusionary provisions (Qualified Person Provision)
  - d. lead to conduct that constitutes exclusive dealing (Pooling Restriction; Investment Requirement; Guesting Requirement), including third line forcing (Approvals Requirement).
141. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

## The net public benefit test

142. For the reasons outlined in this draft determination the ACCC is satisfied that, in all the circumstances, the likely benefits to the public resulting from the making and/or giving effect to international pooling arrangements that contain the Specified Provisions will outweigh the detriment to the public constituted by any lessening of competition that is likely to result from those international pooling arrangements.

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<sup>20</sup> Tabcorp provided details of the Identified Parties in its Confidential Submission in Support of its Applications for Authorisation, 7 May 2014.

143. The ACCC is satisfied, in all the circumstances that the making and/or giving effect to international pooling arrangements that contain the Specified Provisions is likely to result in such a benefit to the public that the arrangements should be allowed to be made and/or given effect to.
144. The ACCC therefore **proposes to grant** authorisation to applications A91419 – A91424.

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

145. The ACCC proposes to grant authorisation to Tabcorp to:
- a. continue to give effect to any Specified Provisions (as set out in paragraph 146 below) contained in international pooling arrangements with:
    - i. New Zealand Racing Board
    - ii. Phumelela Gold Enterprises and Phumelela Gaming and Leisure Limited
    - iii. The Singapore Turf Club
    - iv. Premier Gateway International Limited
    - v. RSV Rennsport Vertiebs GmbH
    - vi. Acqua Overseas Corp
  - b. make international pooling arrangements with the Identified Parties which contain any of the Specified Provisions, and to give effect to those Specified Provisions
  - c. make international pooling arrangements with overseas wagering operators which contain any of the Specified Provisions, and to give effect to those Specified Provisions
  - d. extend, or enter into new international pooling arrangements that contain any of the Specified Provisions, at the expiry of any of the arrangements listed above.
146. The Specified Provisions are those provisions which require the guest wagering operator (which may be Tabcorp, PGI or an overseas wagering operator):
- a. to only transmit bets to the host wagering operator that are subject to specified Betting Rules (Betting Rules Requirement)

The Betting Rules (which may be the Victorian Betting Rules, New South Wales Betting Rules or the Betting Rules of an overseas jurisdiction, depending on the identity of the host wagering operator) may contain restrictions on the persons to whom, and the circumstances in which, the wagering operator can provide services to punters and also specify the applicable commission rates to be charged by the wagering operator on particular pari-mutuel bet types.
  - b. not to transmit bets to the host wagering operator from customers who:

- i. are not located within and/or a resident of a specified territory; and/or
  - ii. are existing customers of the host wagering operator or a related party of the host wagering operator (Qualified Person Provision)
- c. to comply with restrictions on the transmission of bets to the host wagering operator where rebates, or rebates above a certain amount, have been paid in relation to the bet (Rebate Provision)

and those provisions which require PGI and overseas wagering operators:

- d. to acquire and maintain any relevant approvals required from various regulatory and controlling bodies (Approvals Requirement)
- e. to not re-supply pooling services provided by Tabcorp (Pooling Restriction)
- f. to:
  - i. transmit to Tabcorp certain bets received by the guest wagering operator; and/or
  - ii. not transmit such bets to other totalisators (Investment Requirement)
- g. to not permit certain persons to co-mingle or pool in the overseas wagering operator's pool (Guesting Requirement).

147. This draft determination is made on 27 August 2014.

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

148. The ACCC cannot grant authorisation to provide protection from legal action in other jurisdictions (to the extent that this may be necessary).
149. The ACCC is not granting authorisation for Tabcorp to make or give effect to any provisions of agreements that may contravene the CCA, other than the Specified Provisions.

## **Interim authorisation**

150. At the time of lodging the applications Tabcorp also requested interim authorisation to make and give effect to international pooling arrangements that contain the Specified Provisions with the Identified Parties while the ACCC considers the substantive applications for authorisation.
151. Based on the above assessment that it is likely that the arrangements will result in public benefits that outweigh any public detriment, the ACCC has decided to grant interim authorisation under subsection 91(2) of the CCA for Tabcorp to make international pooling arrangements with the Identified Parties that contain any of the Specified Provisions (set out at paragraph 146), and to give effect to those Specified Provisions.

152. Interim authorisation commences immediately and will remain in place until the date the ACCC's final determination comes into effect or until it decides to revoke interim authorisation.

## **Further submissions**

153. 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 CCA.

## Attachment A - Summary of relevant statutory tests

**Subsections 90(5A) and 90(5B)** provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) 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 were made or given effect to, or in the case of subsection 90(5B) 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.

**Subsections 90(6) and 90(7)** 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 in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) 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 was given effect to, or in the case of subsection 90(7) 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;  
or

- 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.