

Determination

TAB authorisation amendment [2023] NZCC 15

The Commission:

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Summary:

TAB New Zealand (previously the New Zealand Racing Board) has requested an amendment to the authorisation granted in [2016] NZCC 17. That authorisation related to totalisator pool commingling arrangements between the New Zealand Racing Board and Tabcorp Wagering Manager (Vic) Pty Ltd, and the authorised provisions related to betting rules and revenue leakage.

Determination:

The Commerce Commission's decision is to grant TAB New Zealand's request for an amendment, as it is satisfied that a material change of circumstances has occurred since the authorisation was granted and the Commission considers the requested amendment is appropriate.

Date of determination:

26 June 2023

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Executive Summary

1. On 29 August 2016, the Commission granted authorisation for certain provisions of proposed arrangements between TAB New Zealand (TAB) and Tabcorp Wagering Manager (Vic) Pty Limited (Tabcorp) relating to the commingling¹ of totalisator horse and greyhound racing betting pools (the Specified Provisions).
2. The Specified Provisions set the terms for, and placed restrictions on, participation in those commingled pools. The Specified Provisions aimed to limit the loss of revenues that would otherwise ultimately flow through to the New Zealand and Australian racing industries by setting the parties' take-out rates from the commingled pools and the rebates the parties paid to high volume customers.
3. The Commission granted authorisation because it concluded that, while the Specified Provisions were likely to lessen competition, the competitive detriments were outweighed by the likely public benefits.² In these reasons, we refer to that decision as the Authorisation. Authorisation was granted for nine years, until 29 August 2025.
4. In April 2018, the Minister for Racing commissioned a report into the future of the New Zealand racing industry, the Messara Report, which ultimately recommended a restructure of the wagering industry in order to compete with global wagering operators. This included outsourcing TAB's commercial activities to an international operator.
5. On 28 March 2023, TAB announced that it had entered into a strategic partnership agreement with Entain plc (Entain), under which TAB would outsource its betting operations to Entain for 25 years (TAB Restructure). That agreement was approved by the Minister of Racing on 23 May 2023, and the agreement took effect from 1 June 2023.
6. As Entain does not have the benefit of legal immunity to engage in the authorised conduct covered by the Authorisation, on 15 May 2023, TAB requested that the Commission amend the Authorisation under section 65 of the Commerce Act 1986 (the Act) so it could apply to Entain.³ TAB submitted that:⁴
 - 6.1 the amendment would allow Entain to step into TAB's operational shoes, to give effect to the Specified Provisions in the same manner and with the same incentives as TAB; and

¹ Commingling is when two betting operators (here, TAB and Tabcorp) combine their respective betting pools into a single larger pool into which customers of the two betting operators can wager, ie bet a sum of money on an unpredictable event.

² The New Zealand Racing Board [2016] NZCC 17 (2016 Authorisation) at [4].

³ The strategic partnership deal closed on 1 June 2023 and this amendment only applies from 26 June 2023, the date of this decision. The amendment does not cover conduct between 1 June and 26 June 2023.

⁴ TAB, "Request for variation to authorisation" (15 May 2023) (*Amendment Request*).

- 6.2 it is not aware of any factual changes over the last seven years that might undermine the Commission's reasons for granting the Authorisation.
7. As set out below, the Commission has determined to grant the amendment requested by TAB.

Determination

8. TAB requested the following italicised text be added to the Commission's determination in [2016] NZCC 17, following [147] of that decision:⁵

Pursuant to s 58B(2) of the Act, the authorisation will apply to Entain plc when it becomes a party to the Specified Provisions following TAB New Zealand's restructure (as outlined in TAB's 15 May 2023 s65 notice).

9. Our determination is to grant the amendment requested by TAB, with minor amendments to the form of the requested amendment (the Proposed Amendment).⁶ The Commission is satisfied that:
- 9.1 a material change of circumstances has occurred; and
- 9.2 it is an appropriate exercise of the Commission's discretion to grant the Proposed Amendment.
10. Our view is based on our assessment of the likely benefits and detriments of the Proposed Amendment compared with the situation if we do not amend the Authorisation.
- 10.1 Our view is that the likely situation with the amendment is that Entain will continue to implement the Specified Provisions in the same manner as TAB has to date.
- 10.2 On the other hand, because TAB has already undertaken the TAB Restructure, the situation without the amendment is not the status quo. Instead, we consider that, without the amendment, Entain would likely seek to establish stand-alone totalisator pools for all Australian racing,
[
].
- 10.3 In summary:
- 10.3.1 the situation with the Proposed Amendment does not materially differ from the situation before the TAB Restructure; and

⁵ Amendment Request at [1].

⁶ Refer to paragraphs [92]-[94], below.

10.3.2 the situation without the amendment is broadly similar to the counterfactual we considered in 2016.

10.4 In light of our assessment of the likely factual and counterfactual, to determine whether the benefits of granting the Proposed Amendment outweigh the detriments of doing so, we assessed whether there were any material changes to the benefits and detriments analysis undertaken in 2016. As discussed below, we consider that the net benefits of granting the amendment are slightly lower than the net benefits of the Specified Provisions were at the time of the Authorisation. Nonetheless, we did not consider this likely to be a material change, and are satisfied overall that the benefits of granting the amendment outweigh the detriments of doing so.

11. Accordingly, the Commission's determination is to amend the Authorisation granted in [2016] NZCC 17 by adding after [147] of that decision, the following text:

Pursuant to s 58B(2) of the Act, from 26 June 2023 the authorisation will apply to Entain plc (and any relevant New Zealand entity owned or controlled by Entain Plc), which became a party to the Specified Provisions following TAB New Zealand's restructure (as outlined in TAB's 15 May 2023 s 65 notice).

Background

TAB, Tabcorp and Entain

12. TAB is a statutory body established under the Racing Industry Act 2020.⁷ Its primary purposes are to promote the racing industry, to facilitate and promote racing and sports betting, and to maximise its profits for the long-term benefit of New Zealand racing. TAB's net profits are distributed to the New Zealand racing industry and sports bodies. It offers a wide range of totalisator and fixed odd betting products (see below for further information about sports betting).
13. In April 2018, the Minister for Racing commissioned the Messara Report into the future of the New Zealand racing industry. That report recommended that TAB undergo a restructure to compete with global wagering operators, which included outsourcing TAB's commercial activities to an international operator.⁸ The tender process for this was completed in March 2023 when TAB announced its 25-year strategic partnership with Entain that is the subject of this Proposed Amendment.
14. Tabcorp is the other party to the Authorisation. It is one of the major wagering operators in Australia with a licence to operate totalisator pools. It offers totalisator and fixed odds betting on racing and sporting events. Tabcorp holds totalisator licences in all states and territories of Australia excluding Western Australia. It is one

⁷ It was previously established as the New Zealand Racing Board under the Racing Act 2003. Through reforms under the Racing Reform Act 2019 and the Racing Industry Act 2020, the New Zealand Racing Board was re-established as TAB.

⁸ John Messara AM *Review of the New Zealand Racing Industry* (31 July 2018).

company within the wider Tabcorp Group. After receiving authorisation from the Australian Competition Tribunal,⁹ Tabcorp merged with Tatts Group Ltd in 2017.

15. Entain is one of the world's largest sports betting and gaming groups operating in the online and retail sector.¹⁰ Before the TAB partnership, Entain did not directly operate in New Zealand, although the Commission understands a small number of New Zealanders (fewer than 20) conducted online betting with offshore Entain businesses. Entain has conducted online bookmaking operations in Australia since 2012 and also operates sports bookmaking under the Ladbrokes and Neds brands in the Northern Territory.¹¹ Entain does not conduct totalisator wagering in the states and territories where Tabcorp has exclusive licences.

Betting in New Zealand

16. Prior to its strategic partnership with Entain, TAB has been the sole provider of racing betting and sports betting in New Zealand.¹² TAB operates a network of physical outlets in New Zealand, and both New Zealand and overseas residents can bet online with TAB. It offers betting on both New Zealand and international races.¹³
17. International wagering operators (including Tabcorp) are not able to be licensed or authorised to provide wagering services in New Zealand and cannot actively advertise in New Zealand to target New Zealand customers.¹⁴ However, New Zealand residents are not prohibited from gambling online with overseas providers (including Tabcorp) and offshore providers do provide wagering services to New Zealand residents over the Internet.¹⁵ The Messara Report commented that this created a need for TAB to remain competitive with other international wagering operators.¹⁶
18. The two major types of racing betting are totalisator betting and fixed odds betting.

⁹ *Applications by Tabcorp Holdings Limited* [2017] ACompT 5.

¹⁰ Entain operates in more than 20 countries across five continents and offers sports betting, casino, poker, and bingo online. Entain operates major global betting brands including Ladbrokes, Sportingbet, and Coral.

¹¹ Letter from Entain to Commerce Commission (26 May 2023) at [4].

¹² 'Racing betting' includes totalisator racing betting, equalisator betting and fixed-odds betting conducted by, or on behalf, of TAB on any race or races run within or outside New Zealand. 'Sports betting' means betting (including totalisator betting and fixed-odds betting) conducted by, or on behalf of, TAB on any sporting event(s) held within or outside New Zealand: Racing Industry Act 2020, s 5.

¹³ Overseas residents can bet online with TAB subject to local jurisdictional laws.

¹⁴ New Zealand Racing Board Authorisation Application (1 June 2016) (*Authorisation Application*) at [5.1.2] and Gambling Act 2003, section 16(1).

¹⁵ Authorisation Application at [2.3.11] and [5.2.1].

¹⁶ Messara Report at p. 36. To address revenue leakage to offshore corporate bookmakers and away from New Zealand, a consumption charge was introduced by Part 5 of the Racing Industry Act 2020 for offshore gambling operators taking bets on racing and sporting events, held in or outside of New Zealand, from persons resident in New Zealand. It is unclear the revenue leakage this charge has avoided to date. The Racing Industry Act also enables certain offshore betting operators to avoid these charges if the revenue from these events amounts to less than an amount specified by regulations (currently \$60,000 per year). Ultimately, this point is not material to our decision to amend the Authorisation, other than to note that there is now further constraint on TAB from overseas betting providers offering services to New Zealanders online than there was at the time the Authorisation was granted.

- 18.1 In totalisator betting (also known as pari-mutuel wagering), all bets placed on a race are consolidated into pools and the totalisator (who operates the betting) deducts a pre-determined percentage of each pool as its take-out rate. The remaining money after the take-out rate is deducted is the ‘dividend’ pool paid to the winners. The amount of the dividend pool is influenced by the total value of bets placed, the take-out rate, and the pool seed money.¹⁷ In addition, people who engage in high volume betting (Premium/VIP customers)¹⁸ may receive rebates from totalisators.
- 18.2 Fixed odds betting instead involves a fixed pay-out made conditional on a specified outcome occurring, which is not affected by other bets placed (unlike totalisator betting, the pay-out for which depends on the number and value of bets placed). With fixed odds betting, the wagering operator also bears risk, and its revenue will depend on the outcome of the event. Even with a built-in profit margin, the margin on fixed odds wagering is lower than totalisator betting.¹⁹
19. Traditionally, TAB derived the majority of its profits from high margin totalisator betting but in recent years, there has been a gradual shift in customer preference towards fixed odds betting.²⁰ Both of these types of betting are conducted in New Zealand by TAB in accordance with Part 4 of the Racing Industry Act 2020.

2016 authorisation application²¹

Background

20. Before 2016, TAB (then the New Zealand Racing Board) and Tabcorp had commingling arrangements for totalisator horse and greyhound racing betting pools in Victoria, New South Wales, and the Australian Capital Territory.²² These arrangements allowed New Zealand residents to place bets on Australian (and other overseas) racing through TAB, and similarly for Australian residents to place bets on New Zealand racing through Tabcorp.
21. Where TAB and Tabcorp commingled, the betting rules of the host jurisdiction applied, including a totalisator’s take-out rate. That is, when TAB was commingling as a ‘guest’ into Tabcorp-hosted Australian pools, Tabcorp’s take-out rate applied, and vice versa when Tabcorp was commingling as a guest in TAB’s pools in New Zealand.

¹⁷ The seed money is where the totalisator places an initial amount of money in a pool to make the pool more attractive to customers.

¹⁸ Premium/VIP customers engage in very high volume totalisator betting and are offered rebates or volume discounts.

¹⁹ Authorisation Application at [2.2.15]–[2.2.16].

²⁰ Authorisation Application at [2.3.3] and [2.3.8]; and Messara Report at p. 37.

²¹ For references in this section, as well as further information on the Authorisation, see the 2016 Authorisation, above n 1.

²² The arrangements began in 2007. At that time, TAB did not consider itself to be “relevantly competitive” with Tabcorp and did not seek authorisation for those arrangements. See Authorisation Application at [1.4.7].

22. The Authorisation Application related to new arrangements between TAB and Tabcorp. These arrangements contained the Specified Provisions, which allowed commingling to continue with additional restrictions put in place. Those restrictions were to limit the loss of revenues that would otherwise ultimately flow through to the New Zealand and Australian racing industries, as follows.
- 22.1 The Betting Rules provisions related to take-out rates.
- 22.1.1 TAB and Tabcorp agreed that a guest totalisator must accept, process, and transmit approved bets to the host totalisator in accordance with the host operator's betting rules. The Betting Rules specify, among other things, the applicable take-out rates to be charged by the totalisator on particular bet types.
- 22.1.2 These provisions meant that TAB and Tabcorp customers would receive and see the same approximate dividends from the commingled pools.
- 22.2 The Revenue Leakage provisions were limits on rebates to high volume customers.
- 22.2.1 In order to ensure that the commingling arrangements do not harm the New Zealand (and Australian) racing industry through revenue leakage from VIP customers, TAB and Tabcorp agreed that a guest totalisator would not pay rebates (or rebates above a certain level) in respect of bets placed and transmitted to a host pool.
- 22.2.2 These provisions were to prevent guest pool participants from using rebates as a mechanism to encourage VIP customers to enter the host pool via a guest totalisator rather than via the host totalisator (in other words, discourage TAB from using rebates to compete for customers that would normally bet directly with Tabcorp on Australian racing).
23. The Specified Provisions only applied to the commingling of totalisator horse and greyhound racing betting pools. They did not apply to fixed odds betting on racing and sporting events.²³
24. TAB sought authorisation on the basis that section 27 (via section 30)²⁴ of the Act might apply to an arrangement which includes the Specified Provisions.²⁵

²³ 2016 Authorisation at [27].

²⁴ At that time, conduct that breached the price-fixing prohibition in section 30 of the Act was a 'deemed' breach of section 27. This is no longer the case, and price-fixing is now in itself a breach of section 30: Commerce (Cartels and Other Matters) Amendment Act 2017.

²⁵ Tabcorp had already been granted authorisation from the Australian Competition and Consumer Commission (ACCC) in 2014 to enter into international commingling arrangements with overseas wagering operators, including TAB. That authorisation was granted for seven years and expired on 20 November 2021: ACCC, *Determination – Applications for authorisation lodged by Tabcorp Wagering*

Authorisation was sought for nine years on the basis that the long-form agreements to be entered into would have an initial term of [] and be able to be extended for a further [] by written agreement between the parties.

Commission's decision in [2016] NZCC 17

25. The Commission concluded that the benefits of commingling between TAB and Tabcorp outweighed the anti-competitive detriment that would result from the Specified Provisions.

26. The Commission considered that the benefits of the Specified Provisions included:²⁶

26.1 Quality improvement and increased product variety:

26.1.1 Even if TAB were to operate stand-alone pools on Australian and international racing, the total number of bets placed in any stand-alone pools would likely be less, reducing the liquidity, and therefore the quality, of the stand-alone pool compared to a commingled pool. The pools for stand-alone TAB races would likely be smaller and less stable and so would be considered lower quality than Tabcorp pools.

26.2 Avoided costs compared with the counterfactual where authorisation was not granted, including:

26.2.1 [

];

26.2.2 []:

(a) [];

(b) [] and

(c) [] and

Manager (Vic) Pty Ltd and TAB Limited in respect of international pooling arrangements (29 October 2014) A91419—A91424. Tabcorp did not apply for re-authorisation and told the Commission that this was due to []; Tabcorp response to Commerce Commission information request (2 June 2023) at [6.1.2(a)].

²⁶ 2016 Authorisation at [100]–[114].

26.2.3 []].

26.2.4 []].

27. The Commission considered that the detriments of the Specified Provisions were likely limited.²⁷

27.1 It was not clear that any detriment would arise from the Betting Rules provisions; and if it did, it would be limited. With authorisation, New Zealand customers would likely benefit from lower, regulated take-out rates offered on Tabcorp-hosted races and [] take-out rates on TAB-hosted races.

27.2 Any detriment that would arise from the Revenue Leakage provisions would likely be small and would be confined to a small portion of VIP customers (at the time, these were all non-New Zealand residents).

27.2.1 The provisions would restrict rebates offered to these customers and affect the ability for TAB and Tabcorp to retain VIP customers which in turn may affect TAB earnings and the quality of betting pools.

27.2.2 However, without authorisation, TAB was unlikely to be an effective alternative to Tabcorp for Australian races since it would offer a lower quality product, even if it could offer competitive rebates, so VIP customers would be unlikely to prefer betting through TAB on those races.

27.2.3 Further, with or without authorisation, TAB would lose all its existing overseas VIP business so there would be no detriment.

27.2.4 Only a small portion of the spending of VIP customers would be considered a detriment to New Zealand, as opposed to all these customers' spending.

28. Overall, the Commission concluded that any competitive detriments arising from the Specified Provisions were likely to be outweighed by the public benefits. We estimated, having reviewed analysis undertaken for TAB by NERA, that the benefits were likely to be [] as the detriments over the course of the Authorisation.

²⁷ 2016 Authorisation at [115]–[140].

Recent events

29. In the years following the Authorisation, TAB has faced increasing competition, rising costs, and capital constraints, as well as other challenges, which has impacted its ability to deliver adequate funding to the racing and sports industries.
30. In April 2018, the Minister for Racing commissioned the Messara Report into the future of the New Zealand racing industry, which recommended a restructure of the wagering industry in order to compete with global wagering operators. This included outsourcing TAB's commercial activities to an international operator, which would allow TAB to improve its product offerings, upgrade technology, improve customer service, drive cost savings and incremental revenue, and offer New Zealand customers a compelling global product.²⁸
31. After a tendering process, a 25-year strategic partnership between Entain plc and TAB was announced on 28 March 2023.²⁹ Under this strategic partnership, Entain has taken operational control of TAB's betting operations, in return for significant investment in TAB as well as a commitment to racing and other sporting industries. Entain will receive 50% of TAB's revenue during the term of the arrangement.
32. The partnership was given ministerial approval by the Minister of Racing on 23 May 2023 and commenced on 1 June 2023.³⁰ As a result, Entain is now operating TAB's betting functions through a subsidiary company, Entain New Zealand Limited.³¹
33. Accordingly, TAB sought this amendment to ensure that the Authorisation also applies to Entain when it became a party to the Specified Provisions, so that it can give effect to the Specified Provisions. The Specified Provisions (described above) have not changed since the Authorisation was granted. TAB did not seek any other amendments to the Authorisation (for example, to its scope or length).

Legal Framework

Introduction

34. Section 65 of the Act enables the Commission to amend, revoke, or revoke and substitute authorisations made under section 58 if it is satisfied that:
 - 34.1 the authorisation was granted on information that was false or misleading in a material particular; or
 - 34.2 there has been a material change of circumstances since the authorisation was granted; or

²⁸ Messara Report at p.6.

²⁹ Entain, "Entain selected by TAB New Zealand as preferred partner for a 25-year strategic arrangement" (28 March 2023) We note Tabcorp was an unsuccessful tenderer.

³⁰ Entain, "Strategic partnership with TAB New Zealand receives Government approval" (23 May 2023) and Email from Chapman Tripp to Commerce Commission (16 June 2023).

³¹ At the time the request was registered, this company was called NZ ENT Limited.

- 34.3 a condition upon which the authorisation was granted has not been complied with.
35. Before making a decision under section 65, the person to whom the authorisation was granted and any other person who in the opinion of the Commission is likely to have an interest in the matter needs to be given a reasonable opportunity to make submissions.
36. Section 65(1)(a) and (c) are not relevant in this case because:
- 36.1 the Commission has not received any information to suggest that the Authorisation was granted on information that was false or misleading in a material particular; and
- 36.2 there were no conditions upon which the Authorisation was granted.
37. We therefore consider below whether there has been a material change of circumstances.

Has there been a material change of circumstances?

38. Section 65 is permissive rather than mandatory. The general tenor of its wording makes it clear that it requires something more than a merely trivial change.³²
39. TAB submitted that there has been a material change of circumstances.³³
- 39.1 Then (at the time the Authorisation was granted), TAB operated its own betting functions and could not have foreseen that those operations would be outsourced to Entain in seven years' time. At the time, the Racing Act 2003 did not permit it to outsource its betting functions.
- 39.2 Now, due to TAB outsourcing its racing/betting functions under the Racing Industry Act 2020 to Entain, Entain NZ will operate TAB's betting functions and give effect to the Specified Provisions in place of TAB.
- 39.3 The difference between the situation at the time of the Authorisation and the situation now is more than trivial because Entain may not be protected by the Authorisation as it was only expressed to apply to TAB and Tabcorp, and TAB may no longer benefit from the Authorisation.³⁴

³² Commerce Commission, *Decision 238: New Zealand Kiwifruit Exporters Association/New Zealand Kiwifruit Coolstorers Association – Determination on amendment/revocation of Decision 221*, 13 September 1989 (*Decision 238*) at [29]-[34]; and Commerce Commission, *Decision No. 601: Amendment of an authorisation granted to the New Zealand Rugby Union in Decision 580*, 11 May 2007 (*Decision 601*) at [92].

³³ Amendment Request at [9] and [10].

³⁴ Amendment Request at [10.2], [11]–[12] and footnote 7. The Authorisation was granted for the Specified Provisions (being provisions in arrangements between NZRB (now TAB) and Tabcorp). Under s 58B(1) of the Act, an authorisation also applies to any parties named in the authorisation application as parties to

40. TAB submitted that the wording of section 65(1)(b) is intentionally broad to permit the Commission to amend authorisations efficiently when material administrative, but not factual, changes occurred, of which this situation was a paradigm example.³⁵
41. Although we do not agree with TAB's submission that the change of circumstances is merely administrative and not factual, we are satisfied that a material change of circumstances has occurred since the Authorisation was granted.
42. The restructure of TAB that resulted in TAB outsourcing its betting functions (including the implementation of the Specified Provisions) to Entain stemmed from the 2018 Messara Report, which was not anticipated at the time of the Authorisation.³⁶ The restructure is relevant to the Authorisation, and results in a change to the parties giving effect to the authorised conduct. We are satisfied based on the information before us that there has been a change of circumstances which is material.

Exercise of the Commission's discretion

Discretion of the Commission under section 65

43. Once the Commission is satisfied that it has jurisdiction under section 65, it needs to consider whether it should: revoke the authorisation; amend the authorisation; revoke the authorisation and grant a further authorisation in substitution for it; or allow the original authorisation to remain in effect without amendment.
44. In previous cases, the Commission has considered amendment of an existing authorisation to be appropriate where:
 - 44.1 all the basic elements of the facts and reasoning on which the determination was based are still in place, but some material detail or details should be altered;
 - 44.2 it becomes apparent that the conduct has changed in a minor way, or the benefits or detriments (or both) associated with the conduct in question differ in a minor way from those on which the authorisation was based, so that the authorisation should remain in force fundamentally unchanged but amended to reflect changes that may be required to ensure the benefits of the authorised conduct are realised; and/or

the contract. Entain was not named in the Authorisation Application. Under s 58B(2)(a), an authorisation may also be expressed to apply to a person who becomes a party to the contract after it is entered into, but this was not sought by NZRB at the time.

³⁵ Amendment Request at [15].

³⁶ If future changes to the parties implementing the Specified Provisions had been anticipated at the time of the Authorisation, TAB could have requested that the Authorisation was to apply to future parties to the Specified Provisions under s 58B(2) of the Act. However, as mentioned above, at that time, under the Racing Act 2003, TAB (then the New Zealand Racing Board) was not able to outsource its functions to any other parties.

- 44.3 it is proposed to alter the existing authorisation, but not to the extent that it would become, in effect, a new authorisation.
45. While the Commission is not required to conduct a public benefit/detriment analysis when exercising its discretion under section 65 of the Act, it has been its practice to do so. This is consistent with the exercise that the Commission is required to undertake when assessing applications for authorisation.³⁷
46. In previous decisions to amend an authorisation, the Commission has compared the benefits and detriments in the future with the extant authorisation continuing in force, with the benefits and detriments in the future with an amended authorisation in force.³⁸
47. However, in our view, if:
- 47.1 the benefits or detriments (or both) associated with the conduct in question after amendment to the authorisation are likely to differ in only a minor way from those on which the original authorisation was based; and
- 47.2 the net benefit from the amended authorised conduct would still be positive,
- then the Commission should be able to exercise its discretion to approve the amendment without detailed inquiry.
48. Both of these approaches (set out at paragraphs 46 and 47) have potential merit in cases where the conduct in question after amendment to the authorisation would only differ in a minor way from the conduct on which the original authorisation was based. In this particular case, for the reasons outlined below, we consider that the Commission would exercise its discretion to approve the amendment using either approach.
49. Given that we received submissions on benefits and detriments, we have explained our analysis of them in this determination, although we have not engaged in detailed quantitative analysis. Instead, we have been guided by the evaluation of the relevant benefits and detriments in the Authorisation (as explained below) and have compared the benefits and detriments of the Proposed Amendment to the benefits and detriments of the original Authorisation, to assess whether they differ in only a minor way.
50. We have conducted this analysis by reference to the ‘with the amendment’ and ‘without the amendment’ scenarios. However, as explained in the ‘factual and counterfactual’ section below, because Entain and TAB have already concluded their agreement, the ‘without the amendment’ scenario in this case is not TAB and Tabcorp continuing to give effect to the extant authorisation. Rather, it involves an

³⁷ Commerce Commission, *Decision No. 581: OMV New Zealand Limited, Shell Exploration New Zealand Limited, Shell (Petroleum Mining) Company Limited, and Todd (Petroleum Mining Company) Limited*, 2 June 2006 (*Decision 581*) at [82] and *Decision 601* at [101].

³⁸ *Decision 581* at [83]-[84] and *Decision 601* at [102]-[103].

assessment of what TAB, Entain and Tabcorp would do in the absence of the Proposed Amendment.

Assessment of whether the Authorisation should be amended

TAB's submissions

51. TAB submitted that the Authorisation should be amended because:³⁹
- 51.1 although the TAB restructure is a material development, it does not affect the Commission's reasons for granting the nine-year-long Authorisation;
 - 51.2 Entain is stepping into TAB's operational shoes to run TAB's statutory monopoly gambling business established by the Racing Industry Act 2020. This is in the nature of an outsourcing arrangement, and Entain has the same incentives as TAB (now, and at the time the Authorisation was granted) to grow and develop New Zealand sports and racing betting under its statutory obligations;
 - 51.3 the facts and analysis on which the Commission relied to grant the Authorisation have not changed. It is not aware of any factual changes over the last seven years that might undermine the Commission's reasons for granting the Authorisation;
 - 51.4 the Authorisation was granted for a nine-year period, which captures the current market environment. The Commission accepted that the net benefits of the Specified Provisions would far outweigh the detriments for this period; and
 - 51.5 The Commission's reasons for granting the Authorisation remain accurate, including regarding the significant public benefits and limited detriment arising from the Specified Provisions.

Factual and counterfactual

Submissions on the situation without the Proposed Amendment

52. TAB told the Commission that if the Commission did not grant the Proposed Amendment
[

].⁴⁰ Entain advised the Commission that
it took the same view on this matter.⁴¹

53. Nonetheless, Entain also submitted that if it were not able to offer commingled totalisator pools it would

³⁹ Amendment Request at [16]-[20].

⁴⁰ Letter from Chapman Tripp to Commerce Commission (2 May 2023) at [8].

⁴¹ Email from Entain to Commerce Commission (31 May 2023) at [1].

[
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54. Tabcorp submitted that if the Commission did not grant the amendment and Entain was not able to commingle with Tabcorp, Tabcorp would
[
].⁴³ In that case,
[
]. Entain stated that
[
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55. Tabcorp submitted without the amendment,
[
].

Submissions on the situation with the Proposed Amendment

56. TAB submitted that if the Commission amends the Authorisation, Entain would carry out TAB’s existing functions and engage in commingling with the Specified Provisions in place. That is, there would no difference to the situation as it was before TAB entered into the strategic partnership with Entain.⁴⁵

57. Entain submitted that
[
].⁴⁶ It stated that
[
].

58. Tabcorp submitted that it
[
].⁴⁷

⁴² Letter from Entain to Commerce Commission (26 May 2023) at [5].
⁴³ Tabcorp response to Commerce Commission information request (2 June 2023) at [10].
⁴⁴ Email from Entain to Commerce Commission (31 May 2023) at [4].
⁴⁵ Amendment Request at [17]-[18].
⁴⁶ Letter from Entain to Commerce Commission (26 May 2023) at [2]-[3].
⁴⁷ Tabcorp response to Commerce Commission information request (2 June 2023) at [5].

*Commission's view on the factual and counterfactual*⁴⁸

59. Our assessment of the likely factual, based on the information before us, is that if the amendment is granted Entain will operate in the same manner as TAB has done previously. We consider this is likely to occur [] until the end of the current authorisation in August 2025.

60. Our assessment of the likely counterfactual, based on the information before us, is that if the amendment is not granted, Entain would likely seek to establish stand-alone totalisator pools for all Australian racing. However, [

]. We set out the reasons for this conclusion below.

60.1 TAB's betting business has already been transferred to Entain and accordingly this will be the case in every potential counterfactual. That is, there is no likely 'status quo' counterfactual in this case where the authorised conduct continues exactly as it was previously.

60.2 In the Authorisation, the Commission considered the likely relevant counterfactual to be that TAB would offer stand-alone totalisator horse and greyhound betting pools on Australian racing.⁴⁹

60.3 We have considered TAB and Entain's submission that []. Ultimately, for the reasons set out below, we are not satisfied that this is the appropriate counterfactual against which to assess this Proposed Amendment.

60.3.1 In the Authorisation, we considered that the Specified Provisions []. We see no reason to revisit that conclusion; and TAB and Entain's submissions that [] indicate that they do not disagree with this conclusion.

⁴⁸ During our consideration of this matter, there was media reporting relating to a potential amendment to the Gambling Act 2003 to prohibit offshore providers from offering wagering services to New Zealand-based customers online. However, there is no Bill before Parliament nor has any clear decision been made in respect of this issue, and so we do not consider it appropriate to consider this issue further in either the factual or counterfactual.

⁴⁹ 2016 Authorisation at [76].

60.3.2 Accordingly, the starting point for this submission on the counterfactual is that Entain's []. We note that [].

60.3.3 Neither TAB nor Entain have provided clear, specific evidence to the Commission as to the applicability of []. For example, we have not been provided with evidence of [].

60.3.4 Accordingly, and particularly in light of our decision to grant this amendment, we do not consider it appropriate to make any conclusions as to whether [] in this situation. We advised both TAB and Entain of this general point during our consideration of this matter, and that [].⁵⁰

60.3.5 We understand that Entain []. We make no comment in this determination as to Entain's []. However, we observe that while Entain [], this does not necessarily mean that were the amendment not granted it would likely [], despite its submission otherwise.

60.4 Even if [] as the parties submit, Entain's conduct []. That is, notwithstanding [], authorisation would still be required in order for Entain to legally give effect to the Specified Provisions [].

60.4.1 In considering the Authorisation, the Commission determined that the effect of the Specified Provisions would be to lessen competition, although we were not required to consider whether or not that lessening would be substantial.⁵¹ We have not been presented with any evidence to suggest that this conclusion no longer holds and the

⁵⁰ Email from Commerce Commission to Chapman Tripp (1 June 2023); Email from Commerce Commission to Entain (1 June 2023).

⁵¹ 2016 Authorisation at [94].

parties did not make any submissions to the effect that [].

60.4.2 In assessing Entain’s conduct against section 27, the Commission would likely adopt a “with and without the conduct” counterfactual assessment, which would involve the consideration of a counterfactual in which Entain does not give effect to the Specified Provisions.⁵²

60.4.3 As for our conclusion above in respect of [], we make no conclusion as to whether []. However, we consider this to be another reason our approach to the counterfactual set out below is appropriate.

60.5 Accordingly, taking into account the matters discussed above, we consider that a scenario in which Entain does not give effect to the Specified Provisions and instead takes steps towards providing totalisator pools on Australian racing itself for New Zealand customers is the appropriate counterfactual in this case. In coming to this conclusion, we have been guided both by our conclusions in the Authorisation as well as by Entain’s submissions as to what it considers may occur if it could not engage in the authorised conduct.

60.6 In the Authorisation, we considered that TAB would likely [] and that []. We note Entain’s submissions that []. We also identify that, unlike TAB in the Authorisation, Entain submitted it [].

60.7 We also note TAB’s submission that in carrying out TAB’s operational functions, Entain has “the same incentives as TAB has today, and had on 29 August 2016, to grow and develop New Zealand sports and racing betting further to its statutory obligations.”⁵³ Accordingly, in our view it is reasonable to consider that our conclusion in the Authorisation is a reasonable proxy for what Entain – stepping into TAB’s shoes – is likely to do.

60.8 However, we qualify this by stating that, on the evidence before us, Entain is likely to [] than we considered TAB would have done in the likely counterfactual in the Authorisation. That is, Entain would [] than

⁵² See Commerce Commission, “Agreements that substantially lessen competition” (July 2018). See also *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC).

⁵³ Amendment Request at [18.3].

TAB could.

Market definition

61. In the Authorisation, the Commission treated the relevant market as the market for the provision of totalisator horse and greyhound betting services in New Zealand.⁵⁴ The Commission found that:
- 61.1 in relation to product and functional dimension: since the Specified Provisions apply to commingling of totalisator horse and greyhound racing betting pools, and not to fixed odds betting on racing and sporting events, the Commission adopted a narrow market definition that excluded fixed odds betting.⁵⁵ The Commission adopted this narrow market definition as a conservative approach that considered the largest possible detriment in assessing the application.
- 61.2 in relation to geographic dimension: TAB is the sole provider of racing betting and sports betting in New Zealand, so the geographic scope of the market was national.⁵⁶ As both TAB and Tabcorp are able to supply betting services to New Zealand residents online for both local and international races, the geographic dimension of the market was considered to be New Zealand.
62. There have been some changes in New Zealand betting over the last eight years including the continued growth of digital-only operators (including overseas operators), alongside the continued decline of totalisator and cash retail betting.
63. Notwithstanding the changes we understand to have occurred in the industry since 2016, we adopt the market definition used in the Authorisation as the basis for our assessment of the Proposed Amendment. Accordingly, our assessment is by reference to the market for the provision of totalisator horse and greyhound betting services in New Zealand. However even if we adopted a broader market definition, this would not change our decision to amend the Authorisation.

Analysis of benefits and detriments

64. In assessing the benefits and detriments of the Proposed Amendment, the Commission notes that:
- 64.1 the likely situation with the Proposed Amendment sees Entain stepping into TAB's shoes and giving effect to the Specified Provisions as TAB did previously; and
- 64.2 the likely situation without the Proposed Amendment is a scenario in which Entain has been assigned TAB's betting operations but does not commingle with Tabcorp in the same manner as TAB did previously, and therefore seeks

⁵⁴ 2016 Authorisation at [41].

⁵⁵ At [42]-[46].

⁵⁶ At [47]-[50].

to establish its own totalisator pools for Australian racing, as discussed above.

65. It is the relevant benefits and detriments of the ‘with the Proposed Amendment’ scenario that we compare to the ‘without the Proposed Amendment’ scenario.
66. However, as will be clear below, we have been guided in this assessment by our evaluation of the relevant benefits and detriments in the Authorisation in 2016. We have not engaged in detailed quantitative analysis, and have instead compared the relative level of the benefits and detriments to those set out in the Authorisation.

Benefits

67. As set out in paragraph 26, above, the Commission previously considered the following categories of benefits in the Authorisation:
- 67.1 Quality improvement: Access to deeper, more liquid pools, increased betting stability and frequently bigger dividends from New Zealand residents betting on Australian racing.
- 67.2 Increased product variety: Commingling with Tabcorp would allow TAB to offer a much-increased range of races to New Zealand residents compared to the range of stand-alone race pools it could offer.
- 67.3 Avoided costs: This benefit relates to the costs that TAB would incur by setting up stand-alone pools on Australian races should it no longer be able to commingle pools with Tabcorp.
68. To assess the appropriateness of amending the Authorisation we consider the extent to which the change in operator materially impacts any of the benefits previously assessed.

Submissions by parties

69. On quality improvements, Entain submitted that, if it could not commingle (ie in the ‘without the amendment’ scenario we have outlined at paragraph 64.2 above):⁵⁷
- 69.1 it would be unable to offer commingled totalisator pools to New Zealand customers. This would reduce the quality and scope of Entain’s offering to New Zealand customers because
[];
- 69.2 significant changes to New Zealand customers would happen with little advance warning, which would provide a poor experience for New Zealand customers; and

⁵⁷ Letter from Entain to Commerce Commission (26 May 2023) at [5]. We refer to the scenario in which the parties cannot commingle as the ‘without the amendment scenario’ below.

- 69.3 Entain would lose the benefit of
[
]. Replacing these would take time and resources to
develop and add additional cost for no customer benefit.
70. Conversely, Entain submitted that with the amendment, there will be improved
product quality
[
].⁵⁸
71. Tabcorp submitted that without the amendment,
[
].⁵⁹
72. In relation to product variety, Entain stated that:⁶⁰
- 72.1 in the ‘without the amendment’ scenario, it would
[]; but
- 72.2 [] a poor customer experience; and
- 72.3 further, in the ‘without the amendment’ scenario, it would assess whether
the current bet types and commission rates remain appropriate and
[].
73. On avoided costs, Entain submitted that in the ‘without the amendment’ scenario:
- 73.1 it would establish stand-alone totalisator pools to New Zealand customers for
Australian racing, but
[];
- 73.2 it would be required to
[]; and

⁵⁸ Letter from Entain to Commerce Commission (26 May 2023) at [6].

⁵⁹ Tabcorp response to Commerce Commission information request (2 June 2023) at [10].

⁶⁰ Letter from Entain to Commerce Commission (26 May 2023) at [5].

- 73.3 it would no longer incur the pooling fees of []% of commingled turnover on Australian and international races, which should be offset against other avoided costs. It estimated these savings to be approximately [].

Commission's view on the benefits of the Proposed Amendment

74. There is some evidence that, compared with the Authorisation, the benefits to New Zealand would be lower than previously considered. This is because:
- 74.1 there is some indication that the avoided costs may be lower than at the time of the Authorisation, due to Entain already having operations in Australia and as such [],⁶¹ and
- 74.2 Entain has indicated that it would be able to [] whereas in 2016 TAB submitted that [].
75. However, in our view there would continue to be benefits from the Authorisation if the Proposed Amendment were to be granted, compared to the 'without the amendment' scenario in which commingling is discontinued and Entain establishes pools itself. In particular, in our assessment there would continue to be some reduced costs, as well as improved quality in the offering to customers, due to the improved liquidity and size of the totalisator pools and greater product variety [] compared to the 'without the amendment' scenario. In coming to this conclusion, we have been mindful that the Authorisation expires in August 2025. As such, the relevant period in which we are assessing these benefits is relatively limited.

Detriments

76. As set out in paragraph 27, above, in the Authorisation the Commission considered that there would be two sources of potential detriment from the Specified Provisions:
- 76.1 betting rules setting the price of wagering services having the potential to prevent price competition between TAB and Tabcorp on take-out rates; and

⁶¹ We also note that following the strategic agreement a proportion of the increased returns generated by the improved offering may leave New Zealand, because now a share of the revenue will be taken by Entain, which has ultimate owners outside of New Zealand. As set out in our *Authorisation Guidelines*, transfers of wealth overseas may be a public detriment and that we will decide on a case-by-case basis whether and to what extent to discount benefits to take into account overseas wealth transfers: *Authorisation Guidelines* at [84]-[87]. In this case, we do not consider it necessary to specify the degree to which we discount any benefits to take into account these overseas wealth transfers.

76.2 revenue leakage provisions limiting price competition for premium/VIP customers by restricting rebates.

Take-out rates

77. In the Authorisation, the Commission considered that New Zealand customers were unlikely to incur higher take-out rates on totalisator betting on Australian races with the Specified Provisions in place, as with the commingling New Zealanders would benefit from lower regulated take-out rates offered on Tabcorp-hosted races.⁶² That is, these take-out rates were likely a benefit, rather than a detriment.
78. We note that the regulations on take-out rates remain in place and Entain has submitted that in the 'without the amendment' scenario, [].⁶³ We also consider that the continued growth of fixed odds betting and the reduction in totalisator betting may indicate that there would be some constraint on take-out rate pricing from fixed odds betting, which is not constrained by the Specified Provisions.
79. However, unlike at the time of the Authorisation when the Commission considered that the Specified Provisions may ultimately lead to lower take-out rates, Entain has indicated that if it could not commingle with Tabcorp, it would []. Entain stated that [].⁶⁴

Rebates

80. In the Authorisation, the Commission considered that only a small proportion of the spending by certain high volume customers would be considered a detriment to New Zealand, as opposed to all their spending. Given this, we considered that only certain specified customer groups were relevant.⁶⁵
81. However, the Commission considered that relevant detriments only arose with respect to TAB's existing VIP customers, because in any event TAB would [] overseas-based VIP customers and would therefore lose these customers.⁶⁶ The Commission also considered that these detriments would only arise in respect of betting for New Zealand rather than Australian races, because even if TAB offered competitive rebates for Australian racing its Australian racing products would be lower quality than Tabcorp's.⁶⁷

⁶² This is because, without the authorisation, TAB would have []: 2016 Authorisation at [119]-[120].

⁶³ Letter from Entain to Commerce Commission (26 May 2023) at [5].

⁶⁴ [].

⁶⁵ 2016 Authorisation at [122].

⁶⁶ At [123].

⁶⁷ At [124].

82. Ultimately, we considered that likely detriments relating to existing and potential New Zealand high volume customers were difficult to estimate but even in the worst-case scenario, the detriments were likely to be small (less than \$[] per year).⁶⁸
83. In considering TAB’s request for an amendment, the evidence before us does not suggest that the new strategic partnership with Entain would materially alter the Commission’s assessment in respect of these rebates.
- 83.1 TAB submitted that
[]⁶⁹
- 83.2 The value of the rebates TAB has paid
[]⁷⁰
- 83.3 Entain suggested to the Commission that it may
[] but provided no material details.⁷¹

Commission’s view on detriments

84. There is some evidence that, compared with the situation when the Authorisation was granted, the detriments to New Zealand may be higher than previously considered. This is because there is some chance that in the counterfactual [].
85. An accurate assessment of the detriments with the amendment compared with the “without the amendment” scenario is challenging. However, given the relatively short period remaining on the Authorisation, the fact that Australian take-out rates are already regulated, and there is likely some competition from fixed odds betting, we assess that any detriments from potential [] compared with the “without the amendment” scenario are likely to remain relatively small.

Commission’s view on balancing benefits and detriments

86. In considering the benefits and detriments we have not conducted a full quantitative assessment but have given weight to the scale of the benefits quantified in the Authorisation compared with the limited detriments.
87. In our assessment, we consider that the net benefits of the Proposed Amendment may be smaller compared with those expected at the time of the Authorisation for the same period (due to changes in the “without the amendment” scenario following the strategic agreement with Entain).

⁶⁸ At [139]-[140].

⁶⁹ Email from Chapman Tripp to Commerce Commission (22 June 2023) at [6].

⁷⁰ Email from Chapman Tripp to Commerce Commission (22 June 2023) at [6].

⁷¹ Letter from Entain to Commerce Commission (26 May 2023) at [3.2].

88. However, overall we are satisfied that there is likely to be little material difference between the benefits and detriments in the situation with the Proposed Amendment and those at the time of the Authorisation. We therefore consider that there is a net benefit of amending the Authorisation relative to the “without the amendment” scenario.
89. In coming to the conclusion above, we have been mindful that the Authorisation expires in August 2025. As such, the relevant time period over which we are assessing these benefits and detriments is just over two years. Were Entain and Tabcorp to apply for authorisation to continue the Specified Provisions beyond 2025, our assessment of the relevant counterfactual, the relevant market(s) as well as the relevant benefits and detriments could well be different.
90. Our overall assessment therefore is that the benefits of the Proposed Amendment are likely to outweigh the detriments.

Conclusion on exercise of discretion

91. For the reasons set out above, we are satisfied that the Commission should exercise its discretion to grant the Proposed Amendment.
- 91.1 As discussed above at paragraphs 41-42, we consider that the outsourcing arrangements between TAB and Entain constitute a material change of circumstances.
- 91.2 With reference to the factors discussed above at paragraph 44, we consider this is an appropriate situation for the Commission to exercise its discretion under section 65 of the Act to amend the Authorisation, because:
- 91.2.1 The core facts and reasoning on which the determination in the Authorisation were made are still in place, but a material detail – linked to the material change of circumstances that has occurred – should be amended.
- 91.2.2 The authorised conduct has not changed, instead the identity of one of the parties carrying out that conduct has changed.
- 91.2.3 In this case, we consider that it is appropriate to grant the Proposed Amendment, in order to allow the Authorisation to continue in force, with only sufficient changes to ensure the relevant public benefits from the authorised conduct are realised. The Proposed Amendment does not alter the Authorisation to the extent that it would become, in effect, a new authorisation.
- 91.3 We consider that there is a net benefit of amending the Authorisation (the situation with the Proposed Amendment) relative to the situation without the Proposed Amendment, as those situations are described above. In coming to this conclusion, we have been guided by:

91.3.1 our previous evaluation of the relevant benefits and detriments in the Authorisation;

91.3.2 our view of the “with the amendment” and “without the amendment” scenarios; and

91.3.3 our assessment of the small differences between the relevant benefits and detriments at the time of the Authorisation and now.

Form of the Proposed Amendment

92. Finally, we consider the form of the Proposed Amendment sought by TAB. TAB has sought for the following text to be added to the Authorisation after [147]:

Pursuant to s 58B(2) of the Act, the authorisation will apply to Entain plc when it becomes a party to the Specified Provisions following TAB New Zealand’s restructure (as outlined in TAB’s 15 May 2023 s65 notice).

93. The amendment is expressed in future terms, but we understand that a local subsidiary of Entain, Entain New Zealand Limited, became a party to the Specified Provisions on 1 June 2023. We therefore consider that the following amendment is more appropriate:

Pursuant to s 58B(2) of the Act, from 26 June 2023 the authorisation will apply to Entain plc (and any relevant New Zealand entity owned or controlled by Entain Plc), which became a party to the Specified Provisions following TAB New Zealand’s restructure (as outlined in TAB’s 15 May 2023 s65 notice).

94. We are satisfied that Entain should be added as a party rather than replace TAB, as TAB [] under the partnering agreement with Entain.

95. The Commission does not have the power to retroactively grant authorisation amendments, so we have also specified the date that the amendment takes effect, which is the date of this decision. We are otherwise satisfied that the Proposed Amendment is appropriately tailored to meet the change of circumstances.

Conclusion

96. The Commission considers that:

96.1 The strategic partnership between TAB and Entain constitutes a material change of circumstances for the purposes of section 65(1)(b) of the Act; and

96.2 It is appropriate for the Commission to exercise its discretion to amend the Authorisation granted in [2016] NZCC 17 because, in our view, taking into account the likely scenario if the authorisation is not amended, the benefits of granting the amendment exceed the detriments of doing so.

Determination

97. Pursuant to section 65(1)(b) of the Act, the Commission is satisfied that a material change of circumstances has occurred since the Authorisation in [2016] NZCC 17 was granted, and that it is appropriate for the Commission to amend that authorisation to add the following text after [147] of that decision:

Pursuant to s 58B(2) of the Act, from 26 June 2023 the authorisation will apply to Entain plc (and any relevant New Zealand entity owned or controlled by Entain Plc), which became a party to the Specified Provisions following TAB New Zealand's restructure (as outlined in TAB's 15 May 2023 s65 notice).

Dated this 26th day of June 2023

Sue Begg
Deputy Chair