

## Determination

### The New Zealand Racing Board [2016] NZCC 17

**The Commission:** Dr Mark Berry  
Elisabeth Welson  
Dr Jill Walker  
Sarah Court

**Summary of application:** The New Zealand Racing Board has applied for authorisation for Specified Provisions of proposed arrangements between itself and Tabcorp Wagering Manager (Vic) Pty Limited.

**Determination:** The Commerce Commission has decided to authorise the application, as it is satisfied that the public benefits that will in all the circumstances result, or be likely to result, from the Specified Provisions will outweigh the lessening in competition which will result, or be likely to result, from the Specified Provisions.

**Date of determination:** 29 August 2016

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

## CONTENTS

<b>INTRODUCTION .....</b>	<b>4</b>
<b>DETERMINATION .....</b>	<b>4</b>
<b>ASSESSMENT PROCEDURE.....</b>	<b>4</b>
<b>BACKGROUND .....</b>	<b>4</b>
PARTIES TO THE ARRANGEMENTS .....	4
<i>The NZRB.....</i>	4
<i>Tabcorp.....</i>	5
TOTALISATOR BETTING .....	5
COMMINGLING BETWEEN THE NZRB AND TABCORP TO DATE.....	6
MATTERS FOR WHICH AUTHORISATION IS SOUGHT .....	7
<b>HOW WE ASSESS RESTRICTIVE TRADE PRACTICE AUTHORISATIONS.....</b>	<b>11</b>
<b>PROCEDURAL ISSUE IN TERMS OF S 59A .....</b>	<b>11</b>
<b>RELEVANT MARKET.....</b>	<b>12</b>
PRODUCT AND FUNCTIONAL DIMENSION .....	12
GEOGRAPHIC DIMENSION.....	13
<b>ANALYSIS OF S 30.....</b>	<b>14</b>
GENERAL APPROACH.....	14
DO THE SPECIFIED PROVISIONS CONTAIN A PRICE FIXING PROVISION? .....	15
ARE THE PARTIES TO THE SPECIFIED PROVISIONS IN COMPETITION WITH EACH OTHER? .....	16
<b>THE EXTENT TO WHICH THE SPECIFIED PROVISIONS ARE LIKELY TO LESSEN COMPETITION.....</b>	<b>16</b>
WITH THE ARRANGEMENTS.....	16
WITHOUT THE ARRANGEMENTS.....	17
<i>Betting rules provisions.....</i>	20
<i>Revenue leakage provisions.....</i>	22
<i>The extent of the lessening of competition.....</i>	24
<b>ASSESSMENT OF BENEFITS AND DETRIMENTS.....</b>	<b>24</b>
BENEFITS .....	25
<i>Improved quality, range and price for New Zealand customers.....</i>	26
<i>Avoided costs.....</i>	27
<i>Conclusion on likely benefits.....</i>	29
DETRIMENTS.....	29
<i>Betting rules provisions.....</i>	30
<i>Revenue leakage provisions.....</i>	30
[.....]	31
[.....]	32
[.....]	32
<i>Conclusion on likely detriments .....</i>	34
BALANCING AND QUANTIFICATION OF BENEFITS AND DETRIMENTS .....	34
<b>DETERMINATION .....</b>	<b>36</b>

## Introduction

1. On 2 June 2016 the Commerce Commission (the Commission) received an application (the Application) from the New Zealand Racing Board (the NZRB or the Applicant) under s 58 of the Commerce Act 1986 (the Act) for authorisation of possibly restrictive trade practices.
2. The NZRB seeks authorisation for certain provisions of proposed arrangements between itself and Tabcorp Wagering Manager (Vic) Pty Limited (Tabcorp) relating to the commingling of totalisator horse and greyhound racing betting pools (the Specified Provisions). The Specified Provisions (discussed further in detail below) would set the terms for, and place restrictions on, participation in those commingled pools.
3. We have considered the Application under our streamlined authorisation process.<sup>1</sup>

## Determination

4. Our determination is to grant authorisation for the Application. We have concluded that while the Specified Provisions are likely to lessen competition, the competitive detriments are outweighed by the likely public benefits.

## Assessment procedure

5. In making this determination, we:
  - 5.1 reviewed the information and analysis in the Application;
  - 5.2 sought further information from the parties to the proposed arrangements;
  - 5.3 published a draft determination on 9 August 2016, which set out our preliminary view that authorisation should be granted and called for submissions; and
  - 5.4 considered comments received from the Applicant on the draft determination.

## Background

### Parties to the arrangements

#### *The NZRB*

6. The NZRB is a statutory body established under the Racing Act 2003. Its primary purpose is 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. The NZRB's net profits are distributed to New Zealand racing industry and sports bodies.

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<sup>1</sup> See Commerce Commission, *Authorisation Guidelines* (July 2013) for further information on our streamlined process.

7. The NZRB operates the New Zealand TAB which is the country's sole provider of betting on racing and sport. It offers wagering through a range of betting channels, including cash channels (eg, retail and on-course), telephone and online.<sup>2</sup>

#### *Tabcorp*

8. Tabcorp is the other party to the proposed arrangements with the NZRB.
9. Tabcorp 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 Victoria, New South Wales and the Australian Capital Territory. Tabcorp is one company within a wider Tabcorp Group.<sup>3</sup>
10. New Zealand residents can currently access wagering services supplied by Tabcorp directly via its online betting service or indirectly through commingling arrangements with the NZRB.

#### **Totalisator betting**

11. The Application relates to totalisator horse and greyhound racing betting. In totalisator betting (also called pari-mutuel wagering), all bets placed on a race are consolidated into pools (for any given race, there are individual pools for each bet type). The party operating the betting (the totalisator) deducts a pre-determined percentage of each pool as its take-out rate.<sup>4</sup> The amount of money that remains after the take-out rate is deducted is the "dividend" pool that is paid out to winning customers after the race.<sup>5</sup> The totalisator may also 'seed' the pool by placing an initial amount of money in a pool to make the pool more attractive to customers. The amount of the dividend pool for a particular race is influenced by the total value of bets placed, the take-out rate, and any pool seed. In addition, people that engage in high volume betting may receive rebates from totalisators.<sup>6</sup>
12. Take-out rates and any rebates are components of the price of totalisator betting. NERA (on behalf of the NZRB) submitted that the best way to conceptualise the "price" paid by customers in totalisator betting is the relevant take-out rate that is deducted from the pool by the totalisator, net of any rebates paid to customers. NERA submitted that it is this amount that the totalisator receives for offering betting services, and that customers effectively pay (regardless of the outcome of a bet).<sup>7</sup> Where customers have losing bets, the cost they incur (on top of this price) includes the value of bets placed net of take-out rates. However, this money is not revenue for the totalisator (or part of the price they charge for betting services);

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<sup>2</sup> Authorisation application from the NZRB at [2.3.9].

<sup>3</sup> The Tabcorp Group has four main business units: Wagering, Media and International, Gaming and Keno.

<sup>4</sup> The NZRB's take-out rates are set out in its betting rules, which are available at <http://www.tab.co.nz/help/tc-rules/tc-rules.html>.

<sup>5</sup> Authorisation application from the NZRB at [2.2.1-2.2.2].

<sup>6</sup> Any rebates paid to such a customer are a percentage of the value of bets placed by that customer, regardless of whether the customer wins or loses on their betting. For example, if the NZRB were to agree to give a customer a 2% rebate and that customer placed bets to the value of \$100,000 with the NZRB over a year, their annual rebate would be \$2,000.

<sup>7</sup> NERA cost-benefit analysis of proposed commingling arrangement (1 June 2016) at 4.

instead it is part of the dividend pool that is distributed to other customers with successful bets.

### **Commingling between the NZRB and Tabcorp to date**

13. Since 2007, the NZRB and Tabcorp have had arrangements that provide for the commingling of totalisator horse and greyhound racing betting pools. These arrangements allow New Zealand residents to place bets on Australian (and other overseas) racing through the NZRB, and similarly for Australian residents to place bets on New Zealand racing through Tabcorp. Commingling means that the NZRB and Tabcorp combine their respective betting pools into a single larger pool into which customers of the two betting operators can wager.
14. Where the NZRB and Tabcorp commingle, the betting rules of the host jurisdiction apply. Betting rules specify, amongst other things, a totalisator's take-out rate. This means that when the NZRB is commingling as a guest into Tabcorp hosted pools, Tabcorp's take-out rate applies. When Tabcorp is commingling as a guest into NZRB-hosted pools, the NZRB's take-out rate applies.
15. The commingling arrangements agreed between the NZRB and Tabcorp in 2007 expired on 30 June 2015. The proposed arrangements will allow this commingling to continue, although additional restrictions are proposed to be put in place regarding rebating to stem Revenue Leakage between NZRB and Tabcorp in terms of customers that engage in high volume betting.
16. There are currently transitional arrangements in place which allow commingling to continue on a more limited basis pending the outcome of the Application and negotiation of new arrangements. These transitional arrangements expire on [ ].<sup>8</sup>
17. Under the transitional arrangements:<sup>9</sup>
  - 17.1 the NZRB is commingling into Tabcorp hosted pools on a limited basis – it is only permitted to commingle Win and Place bet types into Australian racing pools and Win, Place and Quinella bet types into certain international (outside Australia) racing pools hosted by Tabcorp, such that the NZRB is currently operating some stand-alone pools on Australian racing;<sup>10</sup> and
  - 17.2 Tabcorp continues to fully commingle into NZRB pools on New Zealand racing (across all applicable bet types).

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<sup>8</sup> E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June 2016).

<sup>9</sup> Authorisation application from the NZRB at [1.5.5].

<sup>10</sup> Up until 30 June 2015, the NZRB was commingling into Tabcorp pools for five bet types (Win, Place, Quinella, First4 and Quaddie).

18. The transitional arrangements contain no restrictions on rebates that the NZRB and Tabcorp may pay high volume customers.<sup>11</sup>
19. Practices around which take-out rate applies to a commingled betting pool are included as provisions within the existing transitional and proposed commingling arrangements between the NZRB and Tabcorp.<sup>12</sup>

#### **Matters for which authorisation is sought**

20. The Application relates to new arrangements that the NZRB and Tabcorp propose to enter into to replace the transitional commingling arrangements.
21. The NZRB seeks authorisation for Specified Provisions of proposed arrangements between itself and Tabcorp relating to the commingling of totalisator horse and greyhound racing betting pools.<sup>13</sup> The Specified Provisions form part of a wider suite of arrangements that the NZRB intends to enter into, and give effect to, with Tabcorp.
22. The NZRB did not seek authorisation for the commingling arrangements entered into with Tabcorp in 2007 which included agreement on adopting the take-out rate of the host. This is because, in respect of the 2007 commingling arrangements, the NZRB did not consider itself to be “relevantly competitive” with Tabcorp and so considered that the parties did not meet the ‘in competition’ test under section 30.<sup>14</sup> The NZRB did not seek, and is not seeking, authorisation for the existing transitional commingling arrangements between the NZRB and Tabcorp which also contain such an agreement on adopting the take-out rate of the host totalisator.
23. The NZRB is seeking authorisation for Specified Provisions of new arrangements to be entered into because they are to include additional restrictions on components of the price of totalisator betting in terms of commingled pools. In addition, the NZRB submitted that developments (occurring with technology and in the relevant markets) may have led to competition arising between the NZRB and Tabcorp.<sup>15</sup>
24. The restrictions under the proposed new commingling arrangements relate to the NZRB’s and Tabcorp’s take-out rates from the commingled pools (Betting Rules provisions) and the rebates that the NZRB and Tabcorp may pay high volume customers (Revenue Leakage provisions). The NZRB submitted that the purpose and effect of the restrictions are to limit the loss of revenues that would otherwise ultimately flow through to the New Zealand and Australian racing industries.<sup>16</sup>

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<sup>11</sup> The 2007 commingling arrangements between the NZRB and Tabcorp also contained no restrictions on rebates. Authorisation application from the NZRB at [1.4.7].

<sup>12</sup> E-mail from Bell Gully (on behalf of Tabcorp) to the Commerce Commission (24 June 2016) and e-mails from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June and 5 July 2016).

<sup>13</sup> Section 62 of the Racing 2003 provides that the NZRB can commingle certain betting pools with overseas totalisator betting organisations.

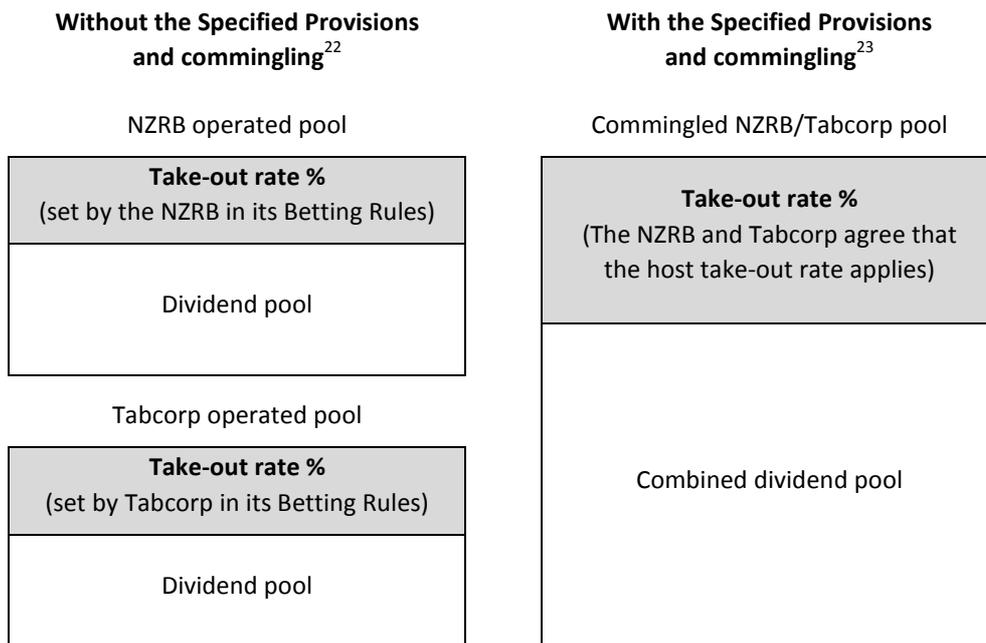
<sup>14</sup> Authorisation application from the NZRB at [1.4.7].

<sup>15</sup> Ibid at [1.4.8].

<sup>16</sup> Ibid at 2.

- 24.1 The **Betting Rules** provisions mean that NZRB customers and Tabcorp customers receive and see the same approximate dividends from the commingled pools.<sup>17 18</sup>
- 24.2 The purpose of **Revenue Leakage** provisions are 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 the NZRB from using rebates to compete for customers that would normally bet directly with Tabcorp on Australian racing).<sup>19</sup>
- 25. The Specified Provisions for which authorisation is sought are summarised below.<sup>20</sup>
  - 25.1 **Betting Rules** – the NZRB and Tabcorp agree that a guest totalisator must accept process and transmit approved bets to the host totalisator in accordance with the host operator’s Betting Rules.<sup>21</sup> The Betting Rules specify, amongst other things, the applicable take-out rates to be charged by the totalisator on particular bet types. The impact of the Betting Rules on take-out rates and dividend pools is depicted in Figure 1.

**Figure 1: Take-out rates with and without the Specified Provisions**



Note: figure is not necessarily to scale

<sup>17</sup> Ibid at [1.5.16].

<sup>18</sup> As noted above, dividends are the pool of money that is available for distribution after the totalisator has deducted their commission/take-out rate.

<sup>19</sup> Authorisation application from the NZRB at [1.5.10].

<sup>20</sup> The Specified Provisions are set out more fully in the Authorisation application from the NZRB at [1.4.10] and [ ].

<sup>21</sup> [ ].

<sup>22</sup> This scenario is also the case in respect of bet types which are not currently commingled.

<sup>23</sup> This scenario is also the case where the parties are commingling under the transitional arrangements.

25.2 **Revenue Leakage** – to ensure that the commingling arrangements do not harm the New Zealand (and Australian) racing industry through Revenue Leakage from customers that engage in high volume betting, the NZRB and Tabcorp agree that a guest totalisator would not pay rebates (or rebates above a certain level) in respect of bets placed by Qualified Persons (discussed below) and transmitted to a host pool.<sup>24</sup> In particular:

25.2.1 [ ];<sup>25</sup> and

25.2.2 [ ]:<sup>26</sup>

28.2.2.1 [ ];<sup>27</sup> and

28.2.2.2 [ ]:<sup>28</sup>

25.3 **Qualified Person** – a Qualified Person definition supports the functioning of the Revenue Leakage requirement.

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<sup>24</sup> The Revenue Leakage provisions would not affect rebates offered by the NZRB on New Zealand domestic totalisator horse and greyhound racing betting, Australian and other international totalisator horse and greyhound racing betting that is not commingled with Tabcorp, or fixed odds racing and sports betting. Authorisation application from the NZRB at 3.

<sup>25</sup> [ ]

<sup>26</sup> [ ]

<sup>27</sup> [ ]

[ ] Authorisation application from the NZRB at [1.4.11].

<sup>28</sup> [ ]

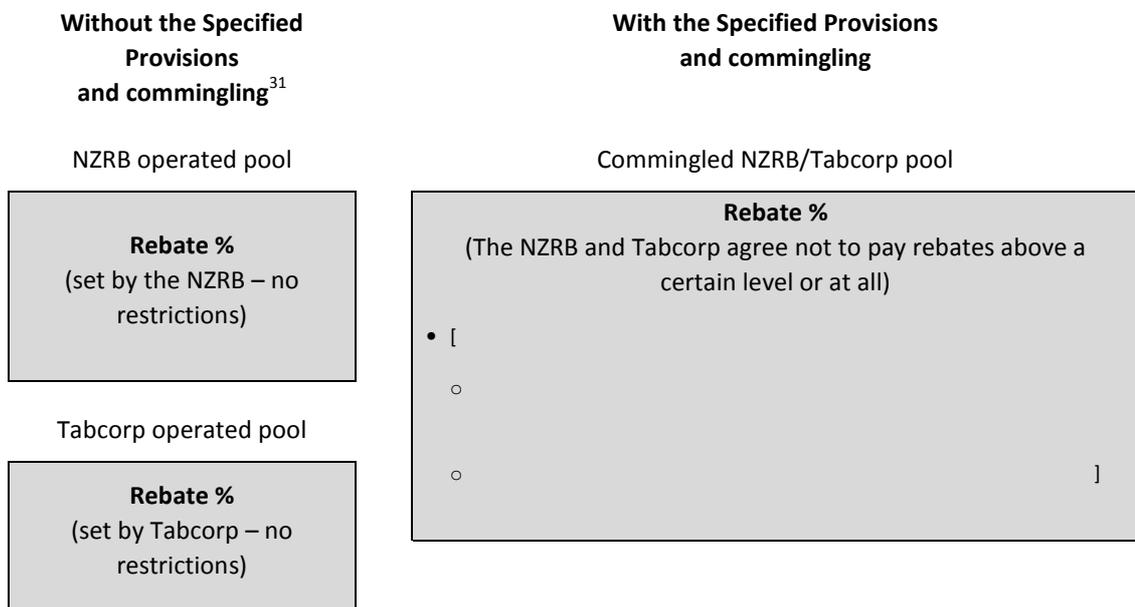
]

25.3.1 Where Tabcorp commingles with the NZRB, a Qualified Person is a natural person who is a retail customer of Tabcorp, holds a betting account with Tabcorp or places a bet with any approved Australian totalisator licensee.<sup>29</sup>

25.3.2 Where the NZRB commingles with Tabcorp, a Qualified Person is a natural person who is a retail customer of the NZRB or any person that holds a betting account with the NZRB.<sup>30</sup>

26. The impact of the **Revenue Leakage** and **Qualified Persons** provisions on rebates is depicted in Figure 2.

**Figure 2: Rebates with and without the Specified Provisions**



Note: figure is not necessarily to scale

27. The Specified Provisions only apply to the commingling of totalisator horse and greyhound racing betting pools. They do not apply to, and would have no impact on, fixed odds betting on racing and sporting events.<sup>32</sup>

28. The NZRB submitted that there is some risk that the Specified Provisions could be construed as having the purpose or effect of fixing, controlling or maintaining the price of totalisator betting products that are offered by the NZRB and Tabcorp to their respective customers. The Application seeks authorisation on the basis that s 27 (via s 30) of the Act might apply to an arrangement which includes the Specified Provisions.<sup>33</sup>

<sup>29</sup> [ ]

<sup>30</sup> [ ]

<sup>31</sup> This scenario is also the case under the current transitional commingling arrangements and the previous 2007 arrangements.

<sup>32</sup> Authorisation application from the NZRB at [7.1.3].

<sup>33</sup> Ibid at [1.4.9].

29. Authorisation is 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.<sup>34</sup>
30. Tabcorp has, in Australia, already sought and been granted authorisation from the Australian Competition and Consumer Commission (ACCC) to enter into international commingling arrangements with overseas wagering operators, including the NZRB.<sup>35</sup> The ACCC's 2014 authorisation was granted for a period of seven years. The NZRB submitted that the Application reflects the policy and commercial ramifications of Tabcorp's ACCC authorisation.<sup>36</sup>

### How we assess restrictive trade practice authorisations

31. Section 30 prohibits provisions that have the purpose, effect or likely effect of fixing, controlling or maintaining the price of goods or services. Section 27 of the Act prohibits contracts, arrangements or understandings that have the purpose, effect, or likely effect, of substantially lessening competition in a market. Section 30 deems price fixing to substantially lessen competition and breach s 27.
32. Upon application under s 58 of the Act, we can authorise conduct that may otherwise breach s 27 of the Act.<sup>37</sup> However, we must be satisfied that such conduct would be likely to result in benefits to the public of such a degree as to outweigh the likely lessening of competition (ie, the competitive detriments).
33. In assessing an application, we first determine whether the conduct would likely lessen competition. The lessening of competition need not be substantial.<sup>38</sup> If we do not consider that a lessening of competition is likely, we do not have jurisdiction to further consider an application and, consequently, will not go on to consider the public benefits of the conduct.
34. If we are satisfied that the public benefits either outweigh the competitive detriments or are likely to do so, we may grant authorisation. Otherwise, we will decline to grant authorisation.

### Procedural issue in terms of s 59A

35. Section 59A of the Act provides that we can grant authorisation for provisions of contracts, arrangements or understandings that have already been entered into or that are already being given effect to. However, s 59A(2) requires that parties discontinue giving effect to the provisions until authorisation is granted (unless they can prove that this would result in exceptional hardship).

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<sup>34</sup> Ibid at [1.4.12].

<sup>35</sup> For decision, see <http://registers.accc.gov.au/content/index.phtml/itemId/1178280/fromItemId/401858>.

<sup>36</sup> Authorisation application from the NZRB at 2.

<sup>37</sup> While no specific reference to s 30 appears within ss 58 or 61, the s 30 price fixing provision deems a substantial lessening of competition and therefore a breach of s 27. That is, if a price fixing provision is established for the purposes of s 30 there will necessarily be a contravention of the prohibition in s 27(1).

<sup>38</sup> Commerce Act 1986, s 61(6A).

36. The Application raised a potential issue under s 59A because equivalent provisions to one of the Specified Provisions for which authorisation is sought (specifically, the **Betting Rules** provisions relating to take-out rates) are contained and given effect to within the existing transitional commingling arrangements between the NZRB and Tabcorp. Currently, Tabcorp's betting rules and take-out rates apply when the NZRB is commingling as a guest into Tabcorp hosted pools. Currently, the NZRB's betting rules and take-out rates apply when Tabcorp is commingling as a guest into NZRB-hosted pools.<sup>39</sup>
37. This determination only relates to the Specified Provisions for which authorisation is currently sought, being provisions of new arrangements that the NZRB and Tabcorp propose to enter into to replace the transitional commingling arrangements. Any authorisation that we may grant for the Specified Provisions would not cover the existing transitional commingling arrangements between the NZRB and Tabcorp.

### Relevant market

38. When we consider an application for authorisation of potentially restrictive trade practices, we assess the competitive effects of those practices in respect of a particular relevant market in New Zealand.<sup>40</sup>
39. Determining the relevant market requires judgement as to whether, for example, two products are sufficiently close substitutes (as a matter of fact and commercial common sense) so as to provide significant competitive constraints on each other. Markets are defined in a way that best isolates the key competition issues that arise from an application.
40. The NZRB submitted that the narrowest market definition available for the purposes of assessing the anti-competitive detriments resulting from the Specified Provisions is a national market for the supply of pari-mutuel wagering (ie, totalisator betting) on racing.<sup>41</sup>
41. For the reasons set out below, for the purposes of analysing the Application, we have treated the market as a market for the provision of totalisator horse and greyhound racing betting services in New Zealand.

### Product and functional dimension

42. The relevant question is whether, in response to a small but significant price increase (SSNIP), sufficient customers would switch away from one product (eg, a win totalisator bet on the opening race at the Melbourne Cup) to the next closest

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<sup>39</sup> Rule 10.10.3(b) the NZRB's Betting Rules made pursuant to s 52 of the Racing Act 2003 provides that when commingling as a guest, the betting rules of the host jurisdiction apply. The NZRB submitted that it is an international norm for the host take-out rates to apply to commingled pools. E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June 2016).

<sup>40</sup> Commerce Act 1986, s 3(1A): "the term market is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them".

<sup>41</sup> Authorisation application from the NZRB at [3.1.2].

alternative (eg, a trifecta totalisator or fixed odds bet on the same race, or a win totalisator bet on a different race) to render such a price increase unprofitable.

43. If defined strictly, there are potentially hundreds of markets from a demand perspective. There are also potentially delineations across customer markets.
44. These bets could be considered together if they are substitutable from a supply-side perspective – if suppliers can quickly, easily, and with little investment switch between supplying different types of products. In betting, the NZRB, Tabcorp and other parties already provide fixed odds betting on a range of races, which may be close enough substitutes that fixed odds betting is in the same market as totalisator betting.
45. However, we do not find it necessary to be definitive regarding the market delineation for the purposes of assessing the Application. 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, we adopt a narrow market definition that excludes fixed odds betting. Adopting this narrow market definition is a conservative approach that sees us analyse the largest possible detriment in assessing the Application. If authorisation of the Specified Provisions would be likely to result in benefits to the public that outweigh the lessening of competition in this market, it is likely to also do so in a wider market (where we would bring in additional substitutes such that detriments would be smaller).
46. To the extent that the NZRB and Tabcorp differ in their strengths to provide these services to types of customers or for types of races (particularly races in New Zealand versus those in Australia), we consider aspects of this in our subsequent analysis.

### **Geographic dimension**

47. The NZRB is the sole provider of racing betting and sports betting in New Zealand. It supplies and advertises betting on racing and sports throughout the country. On this basis, the NZRB submitted that the geographic scope of the market is national.<sup>42</sup>
48. For the purposes of analysing the Application, we have treated the geographic dimension of the market to be New Zealand. Both NZRB and Tabcorp are able to supply betting services to New Zealand residents online for both local and international races.
49. In considering the geographic scope of the market we have considered the impact of a number of facts specific to the provision of betting services.
  - 49.1 Online racing and sports betting is an area of significant growth and now represents a significant portion of the NZRB's total betting turnover.<sup>43</sup> Both New Zealand and overseas residents can bet online with the NZRB.<sup>44</sup>

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<sup>42</sup> Ibid at [3.4.1].

<sup>43</sup> Ibid at [2.3.9].

- 49.2 The NZRB offers betting on New Zealand and overseas racing. The NZRB has acknowledged that it is experiencing a decline in betting on domestic racing because New Zealand customers are increasingly interested in betting on Australian and overseas races (which are on a larger scale).<sup>45</sup> This was confirmed by data provided by the NZRB.<sup>46</sup>
- 49.3 While it is illegal to promote overseas gambling in New Zealand,<sup>47</sup> New Zealand residents are not prohibited from gambling online with overseas providers (including Tabcorp).<sup>48</sup> Offshore providers offer wagering services to New Zealand residents over the Internet.<sup>49</sup> Data provided by Tabcorp also confirmed that it receives bets directly from New Zealand residents.<sup>50</sup>
50. In its Tabcorp authorisation decision, the ACCC noted that increased demand for online wagering services might be breaking down national and jurisdictional boundaries. However, the ACCC defined the relevant market to be a market for the provision of wagering services to the Australian public.<sup>51</sup>

### Analysis of s 30

51. As noted earlier, the Application seeks authorisation on the basis that s 27 (via s 30) of the Act might apply to an arrangement which includes the Specified Provisions.<sup>52</sup>
52. The key issue raised by the Application is whether the Specified Provisions contain price fixing provisions that are likely to breach s 30 of the Act. Such arrangements may be authorised under s 61(6) if they are of net benefit to the public.
53. This section explains our view that the Specified Provisions are likely to breach s 30 of the Act.

### General approach

54. We first determine whether the Specified Provisions contain, or may contain, a price fixing provision under s 30 of the Act.

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<sup>44</sup> Overseas residents can bet online with the NZRB subject to local jurisdictional laws. For example, in 2015, totalisator bets to the value of [ ] were placed directly with the NZRB by Australian residents. E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June 2016).

<sup>45</sup> Authorisation application from the NZRB at [2.3.4].

<sup>46</sup> In 2013, [ ] of the value of totalisator betting with the NZRB was on New Zealand racing and [ ] was on Australian racing. In 2015, [ ] was on New Zealand racing and [ ] was on Australian racing. E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June 2016).

<sup>47</sup> Gambling Act 2003, s 16.

<sup>48</sup> Authorisation application from the NZRB at [2.3.11].

<sup>49</sup> Ibid at [5.2.1].

<sup>50</sup> In 2015, totalisator bets to the value of [ ] were placed directly with Tabcorp by New Zealand residents. E-mail from Bell Gully (on behalf of Tabcorp) to the Commerce Commission (24 June 2016).

<sup>51</sup> ACCC Determination on an application for authorisation lodged by Tabcorp (29 October 2014) at 14.

<sup>52</sup> Authorisation application from the NZRB at [1.4.9].

55. Under s 30 of the Act, a price fixing provision will be found if both of these limbs are met:
- 55.1 provisions of the Specified Provisions have the purpose, effect or likely effect of fixing, controlling or maintaining the price of goods or services or any discount, allowance, rebate or credit in relation to goods or services; and
  - 55.2 the goods or services are supplied or acquired by the parties to the Specified Provisions who are in competition with each other, or who would likely be in competition with each other but for the Specified Provisions in a market in New Zealand.
56. However, if there is a deemed lessening of competition, we will go on to assess whether the conduct would, in all the circumstances, result, or be likely to result, in a benefit to the public which would outweigh the lessening of competition. If the benefits outweigh the lessening of competition, we may grant authorisation. Despite the deeming effect of s 30, in the authorisation context, we must determine the extent of the lessening of competition that would result from the Specified Provisions.<sup>53</sup>

#### **Do the Specified Provisions contain a price fixing provision?**

57. In our view, the Specified Provisions are likely to contain price fixing provisions under s 30.
58. As noted above, the NZRB submitted that the Specified Provisions could be construed as having the purpose or effect of fixing, controlling or maintaining the price of totalisator betting products that are offered by the NZRB and Tabcorp to their respective customers.<sup>54</sup>
59. There are two ways in which the Specified Provisions may breach s 30. These are summarised below.
- 59.1 **Betting Rules** – the Betting Rules provisions would see the NZRB and Tabcorp collectively agree the take-out rates that would apply to any commingled racing pools. The take-out rates in turn impact on the total dividends that are available to be paid to customers betting in the commingled pools. As such, the Betting Rules provisions are likely to have the effect of “fixing, controlling or maintaining” a component of the price of betting services.
  - 59.2 **Revenue Leakage** – the Revenue Leakage provisions would see NZRB and Tabcorp collectively agree to restrict the level of rebates paid to customers that engage in high volume betting (eg, [ ]). As such, the Revenue Leakage provisions are likely to have the effect of “fixing, controlling or maintaining” a component of the price of betting services for such customers.

<sup>53</sup> *New Zealand Vegetable Growers Federation (Inc) v Commerce Commission (No.3)* (1988) 2 TCLR 582.

<sup>54</sup> Authorisation application from the NZRB at [1.4.9].

60. Both of the above provisions would interfere with the competitive determination of the price of betting services.

### **Are the parties to the Specified Provisions in competition with each other?**

61. To amount to price fixing under s 30, the NZRB and Tabcorp must be in competition with each other for the supply of services that are the subject of the provisions in a market in New Zealand.<sup>55</sup>
62. We have already defined the market, for the purposes of analysing the Application, as the market for the provision of totalisator horse and greyhound race betting services in New Zealand.
63. While Tabcorp is based in Australia, it can and does supply online totalisator betting services to New Zealand residents and accordingly constrains the NZRB to some degree. Despite the fact that the NZRB is, by statute, the sole provider of racing and sports betting services in New Zealand,<sup>56</sup> and the territorial limits of the definition of the market, the practical reality is that New Zealand residents have choices between placing bets with the NZRB in New Zealand or overseas with Tabcorp and other parties. For the purposes of this application we have therefore proceeded on the basis that the NZRB and Tabcorp are in competition with each other for the provision of totalisator horse and greyhound race betting services in New Zealand.

### **The extent to which the Specified Provisions are likely to lessen competition**

64. As noted above in our analysis of s 30, despite the deeming effect of s 30, in the authorisation context and for the purposes of s 61(6), we must determine the extent of the lessening of competition which arises from the Specified Provisions to which s 30 applies.<sup>57</sup>
65. To assess the extent of a lessening of competition from an arrangement, we compare the likely state of competition with the arrangement and the most competitive, likely state of competition without the arrangement.

### **With the arrangements**

66. With authorisation of the Specified Provisions, the NZRB and Tabcorp would, subject to the restrictions provided by the Specified Provisions, combine their agreed totalisator horse and greyhound racing betting pools on New Zealand and Australian racing. Customers of the NZRB would (without the limitations that apply under the existing transitional arrangements) be able to place bets on Australian (and other overseas) racing through the NZRB. The NZRB would commingle the full suite of agreed bet types into Tabcorp's totalisator pools on such racing. Customers of Tabcorp would continue to be able to place bets on New Zealand racing through Tabcorp.

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<sup>55</sup> Commerce Act 1986, s 30(1)(a) and *Commerce Commission v Air New Zealand Ltd* (2011) 9 NZBLC 103,318, at [273(a)].

<sup>56</sup> Authorisation application from the NZRB at [1.5.1].

<sup>57</sup> *New Zealand Vegetable Growers Federation (Inc) v Commerce Commission (No.3)* (1988) 2 TCLR 582.

67. With commingling, a material portion of the NZRB’s betting turnover would be derived from betting commingled with Tabcorp.
68. The NZRB submitted that with authorisation of the Specified Provisions [ ]<sup>58</sup> The NZRB further submitted that [ ]<sup>59</sup> The NZRB indicated that [ ]<sup>60</sup>
69. We consider that, with authorisation of the Specified Provisions, the NZRB is likely to lose all of the business of its existing, overseas-based, VIP customers ([ ]).
- [ ]<sup>61</sup>
- [ ]<sup>62</sup> [ ]

**Without the arrangements**

70. The without scenario in this case is not the status quo.
71. The NZRB submitted that in the absence of the Specified Provisions being authorised, Tabcorp would not permit the NZRB to commingle with it.<sup>63</sup> The NZRB submitted that the relevant without scenario is, therefore, no guesting by the NZRB into Tabcorp’s pools (ie, the NZRB and Tabcorp would not combine their betting pools for Australian racing).<sup>64</sup> Instead, the NZRB submitted that it would need to take a

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<sup>58</sup> Authorisation application from the NZRB at Annexure 6 and Commerce Commission meeting with the NZRB (24 June 2016).

<sup>59</sup> NERA cost-benefit analysis of proposed commingling arrangement (1 June 2016) at 2.

<sup>60</sup> Commerce Commission meeting with the NZRB (24 June 2016).

<sup>61</sup> Authorisation application from the NZRB at 3 and e-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June 2016).

<sup>62</sup> The NZRB advised that [ ] E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (14 July 2016).

<sup>63</sup> Authorisation application from the NZRB at [4.1.3].

<sup>64</sup> Ibid at [4.1.4].

number of steps to be able to offer NZRB customers an alternative Australian racing product offering separate from betting offered by Tabcorp (ie, stand-alone NZRB totalisator pools on Australian racing).<sup>65</sup>

72. The NZRB estimates that  
[ ]<sup>66</sup>  
However, the NZRB submitted that  
[ ]  
] <sup>67 68</sup>

73. The NZRB submitted that,  
[ ]  
] <sup>69</sup>

74. The NZRB submitted that without authorisation of the Specified Provisions  
[ ]  
] <sup>70</sup>

75. Tabcorp submitted that without authorisation  
[ ]<sup>71</sup> However, the NZRB  
submitted that in the without scenario, it  
[ ]  
] <sup>72</sup>  
]

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<sup>65</sup> Ibid at [4.2.1].

<sup>66</sup> Ibid at [4.2.3].

<sup>67</sup> Authorisation application from the NZRB, Commerce Commission meeting with the NZRB (24 June 2016) and e-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (5 July 2016).

<sup>68</sup>

[ ]  
] E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June 2016).

<sup>69</sup> Authorisation application from the NZRB at footnote 38 at 32.

<sup>70</sup> Authorisation application from the NZRB at Annexure 6 and Commerce Commission meeting with the NZRB (24 June 2016).

<sup>71</sup> E-mail from Bell Gully (on behalf of Tabcorp) to the Commerce Commission (24 June 2016).

<sup>72</sup> Authorisation application from the NZRB at [4.1.5].

76. In the absence of the Specified Provisions, we consider:
- 76.1 the NZRB and Tabcorp would not combine their betting pools for Australian racing;
- 76.2 the NZRB would [ ] offer its own stand-alone totalisator horse and greyhound racing betting pools on Australian racing (providing NZRB customers with a way to bet on Australian racing), [ ];
- 76.3 the NZRB is likely to lose all of the business of its existing, overseas-based, VIP customers [ ];
- 76.4 [ ];
77. The NZRB submitted that the lessening of competition would be minor.<sup>73</sup> The NZRB submitted that the vast majority of its customers would not be adversely impacted by the Specified Provisions. In fact, they would benefit greatly from the continuation of commingling. In practice only a small number of “premium/VIP” customers (who are all based overseas) that engage in high volume betting may be affected by the rebate restrictions. As noted above, we consider that, both with and without authorisation, the NZRB would lose all of its existing, overseas-based, VIP business ([ ]).
78. We note the NZRB’s submission that the scope of any competition between the NZRB and Tabcorp may be limited.<sup>74 75</sup> Data provided by the parties shows that the majority of the bets placed with each totalisator are placed by residents within their own jurisdictions.<sup>76</sup> Data also shows that New Zealand and Australian residents

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<sup>73</sup> Ibid at 3.

<sup>74</sup> Authorisation application from the NZRB at 3.

<sup>75</sup> This is consistent with the views expressed by the ACCC in its Tabcorp authorisation decision. ACCC Determination on an application for authorisation lodged by Tabcorp (29 October 2014) at [93] and [130].

<sup>76</sup> In 2015, [ ] of the value of totalisator bets placed with the NZRB were bets placed by New Zealand residents. In the same year, [ ] of the value of totalisator bets placed with Tabcorp were bets placed by Australian residents.

betting via the NZRB and Tabcorp mainly bet with the totalisator in their own country.<sup>77</sup> This is relevant to our assessment of the extent of lessening and detriment that may arise from authorisation of the Specified Provisions.

79. The extent of the lessening of competition that is likely to result from the Specified Provisions is difficult to assess. However, our view is that there is a lessening of competition, but it may be small.
- 79.1 With authorisation of the Specified Provisions and commingling, customers would lose an alternative in the NZRB or Tabcorp. There is also the potential that the removal of competition between the NZRB and Tabcorp may result in higher prices (take-out rates).
- 79.2 Prices would increase to VIP customers and [ ] through restrictions on rebating. While the likely customers affected by these arrangements do not reside in New Zealand we cannot exclude the real chance that New Zealand customers would not fall into this category. In fact the NZRB submitted that [ ]<sup>78</sup>.
80. The reasons for our views on the extent of the lessening of competition associated with each of the Betting Rules provisions and the Revenue Leakage provisions are set out in turn below, before we go on to consider the overall extent of the lessening of competition from the Specified Provisions as a whole.

#### *Betting rules provisions*

81. The Betting Rules provisions (as well as the existing transitional arrangements) involve the NZRB and Tabcorp agreeing that the host take-out rates would apply in the case of commingled pools. This means that a customer would receive and see the same approximate dividends from betting on commingled pools regardless of whether they bet through the NZRB or Tabcorp.
82. The NZRB's current take-out rates are different to Tabcorp's take-out rates.<sup>79</sup> Table 1 sets out the two totalisators' take-out rates for key bet types. It shows that the NZRB has higher take-out rates than Tabcorp.

<sup>77</sup> In the last three years, [ ] of the value of totalisator bets placed by New Zealand residents were placed directly with the NZRB (either into NZRB pools or Tabcorp commingled pools). Similarly, [ ] of the value of totalisator bets placed by Australian residents were placed with Tabcorp. Less than [ ] of bets placed by New Zealand residents were placed directly with Tabcorp. Less than [ ] of bets placed by Australian residents were placed directly with the NZRB.

<sup>78</sup> Authorisation application from the NZRB at footnote 2 at 3.

<sup>79</sup> The NZRB's take-out rates are available at <http://www.tab.co.nz/help/tc-rules/tc-rules.html>. Tabcorp's take-out rates are available on its website at [http://tab.custhelp.com/app/answers/detail/a\\_id/115](http://tab.custhelp.com/app/answers/detail/a_id/115).

**Table 1: Take-out rates on totalisator betting**

Bet type	NZRB take-out rate	Tabcorp take-out rate
Win	15.50%	14.50%
Place	15.50%	14.25%
Quinella	21.00%	17.50%
Trifecta	25.00%	20.00%
First4	25.00%	22.50%
Quaddie	26.00%	20.00%

Source: NZRB and Tabcorp

83. We note that Tabcorp’s take-out rates are subject to regulation in Australia and effectively price capped. The NZRB’s take-out rates are not subject to regulation in New Zealand. This may be a reason for the parties having different take-out rates. It may also limit the potential detriment from authorisation of the Betting Rules provisions.
84. Without commingling with Tabcorp, the NZRB would independently set its take-out rates on any stand-alone NZRB totalisator pools on Australian racing.
85. In the without scenario, differences in the take-out rates of the NZRB and Tabcorp may be a basis on which they compete for customers (given that take-out rates are components of the price of totalisator betting). With authorisation of the Specified Provisions, New Zealand residents would lose the option of betting on stand-alone totalisator pools on Australian racing offered by the NZRB and lose the possibility of the NZRB offering more favourable take-out rates than Tabcorp in order to attract New Zealand customers to its betting services. The Betting Rules provisions would thus be likely to result in some detriment by limiting competition in setting the price of betting services between the with and without scenarios. This detriment would impact on all customers placing bets into commingled totalisator pools operated by the NZRB and Tabcorp (not just “premium/VIP” customers).
86. However, it is unclear whether competition between the NZRB and Tabcorp in the without scenario would result in lower take-out rates than in the scenario with authorisation and commingling. There are some Australian bet types that are currently not commingled that the NZRB offers to its customers and [ ].<sup>80</sup> As noted below, the NZRB therefore [ ]
- [ ]. Evidence instead suggests that [ ]. This means that customers could in fact benefit from lower prices should the Betting Rules provisions be authorised.

<sup>80</sup> E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June 2016).

87. The NZRB submitted:

87.1 In the scenario without commingling,  
[

].<sup>81</sup>

87.2 [

].<sup>82</sup>

87.3 [

].<sup>83</sup>

*Revenue leakage provisions*

88. The Revenue Leakage provisions involve the NZRB and Tabcorp agreeing to restrict the level of rebates paid to customers that engage in high volume betting.

89. The NZRB and Tabcorp currently offer rebates as set out in Table 2. Table 2 also sets out how the Revenue Leakage provisions would impact on these rebate levels.

**Table 2: Rebates totalisator betting**

Totalisator	Rebate type/criteria	Rebate levels
NZRB	[ ]	[ ]
	[ ]	[ ]
Tabcorp	[ ]	[ ]
	[ ]	[ ]

Source: NZRB and Tabcorp

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (5 July 2016).

90. As noted earlier, the purpose of Revenue Leakage provisions (rebate restrictions) is to prevent ‘guest’ pool participants from using rebates as a mechanism to encourage VIP customers from entering the host pool via a guest totalisator rather than via the host totalisator.<sup>84</sup> For example, to prevent the NZRB from trying to get Tabcorp customers to wager into Tabcorp’s pools via the NZRB (instead of directly with Tabcorp).<sup>85</sup> These rebates are significant (with the NZRB paying rebates of [ ] in the year ended 31 July 2015 related to betting by VIP customers on Tabcorp hosted races) and so we cannot rule out that the loss of these rebates would not constitute a lessening of competition for this category of customers.
91. The NZRB submitted that the rebate restrictions would result in potentially reduced competition between the NZRB and Tabcorp for “premium/VIP” customers.<sup>86</sup> The NZRB submitted that [ ].<sup>87</sup>
92. In the without scenario, rebates offered by the NZRB and Tabcorp may be a basis on which they compete for high volume customers who are entitled to rebates (which are, for those customers, a component of the price of totalisator betting).<sup>88 89</sup> The Revenue Leakage provisions would be likely to result in some detriment by limiting competition in setting the price of betting services between the with and without scenarios.
93. However, as already noted, we consider that, both with and without authorisation, the NZRB would lose all of its existing, overseas-based, VIP business ([ ]).

[ ] However, the Revenue Leakage provisions may still result in detriment for [ ], which we consider further in our analysis of benefits and detriments.

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<sup>84</sup> Authorisation application from the NZRB at [1.5.10].

<sup>85</sup> Ibid at [1.5.6].

<sup>86</sup> Ibid at 4.

<sup>87</sup> E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June 2016).

<sup>88</sup> The NZRB acknowledged that

[ ]. E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June 2016).

<sup>89</sup> Tabcorp submitted that

[ ]. E-mail from Bell Gully (on behalf of Tabcorp) to the Commerce Commission (24 June 2016).

### *The extent of the lessening of competition*

94. In summary, while the extent of the lessening of competition from the authorisation of the Specified Provisions is difficult to assess, we do consider there will be a small lessening of competition.

94.1 With authorisation, customers would lose an alternative in the NZRB or Tabcorp. Although there is also the potential that the removal of competition between the NZRB and Tabcorp may result in higher prices (take-out rates), evidence suggests that

[ ],  
indicating that Tabcorp may not have a price disciplining effect on the NZRB.

94.2 With authorisation, prices would increase to VIP and [ ] customers through restrictions on rebating. Currently, there are no New Zealand residents that meet the criteria to be a VIP customer. As noted earlier, the NZRB submitted that

[ ].<sup>90</sup> However, we cannot rule out the possibility that a New Zealand resident might be affected by the rebate restrictions at some point in the future. Such a person would be worse off with authorisation.

### **Assessment of benefits and detriments**

95. Under s 61(6) of the Act, if we are satisfied that the public benefits either outweigh the competitive detriments or are likely to do so, we may grant the authorisation.

96. The benefits and detriments calculation considers the impact of the Specified Provisions on New Zealand residents. Authorisation of the Specified Provisions would affect both the NZRB and New Zealand resident customers.

97. The benefits of authorisation of the Specified Provisions are calculated as the total gains to the NZRB of offering a larger range of totalisator betting on Australian races of better quality (more liquid betting pools), as well as the total costs that the NZRB would save from commingling with Tabcorp on Australian races rather than setting up stand-alone pools [ ]. These benefits have been quantified by NERA on behalf of the parties and we have checked those calculations, arriving at a five-year NPV benefits estimate of just over [ ] (equating to over [ ] per annum).<sup>91</sup> These are only the benefits that would accrue to the NZRB. The further consumer surplus benefits to customers arising from commingling, such as greater

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<sup>90</sup> Authorisation application from the NZRB at footnote 2 at 3.

<sup>91</sup> While authorisation is sought for a period of nine years, we have quantified the benefits of authorisation over the five year period in line with the analysis undertaken by NERA for the NZRB. We consider that the analysis of benefits and detriments would not change in this case if we were to extend the analysis to a nine year period. The NZRB advised that [ ].  
E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (5 July 2016).

customer choice and more liquid betting pools, have not been quantified.

98. The detriments of authorisation of the Specified Provisions are the total efficiency losses from restricting competition for future high volume customers and [ ]. While we have not been able to precisely quantify these detriments, we consider that only a small portion of the NZRB's turnover for the year ended 31 July 2015 from [ ] of under [ ] per annum would be affected.<sup>92</sup>
99. Therefore, we are satisfied that, even in the worst case scenario, the net benefits of authorisation of the Specified Provisions are likely to significantly outweigh any detriments.

### Benefits

100. The NZRB submitted that the proposed commingling arrangements between the NZRB and Tabcorp would deliver significant public benefits from:<sup>93</sup>
- 100.1 **quality improvement** – access to deeper, more liquid pools, increased betting stability and frequently bigger dividends for New Zealand residents betting on Australian racing;
- 100.2 **increased product variety** – commingling with Tabcorp would allow the NZRB to offer a much increased range of races to New Zealand residents (ie, many more races and more bet types) compared to the range of stand-alone race pools it could offer; and
- 100.3 **avoided costs** – with authorisation, the NZRB would avoid the increased costs, reduced revenue and customer losses that it would face setting up stand-alone betting pools [ ].
101. We have assessed the NZRB and NERA's estimations of avoided costs and improved range and quality of betting products to arrive at a five-year NPV benefits estimate of just over [ ] (or over [ ] per annum).
102. This figure excludes price and quality consumer surplus benefits to customers arising from commingling, such as greater customer choice and more liquid betting pools. The figure also does not include the additional benefits to other New Zealand customers who would receive lower prices [ ]. We consider that this additional benefit would further increase the estimated benefit amount but we did not undertake its quantification.

<sup>92</sup> See paragraph 140 for assumptions behind the calculation of this figure.

<sup>93</sup> Authorisation application from the NZRB at 4.

*Improved quality, range and price for New Zealand customers*

103. Two of the benefits submitted by the NZRB (quality improvement and increased product variety) are benefits that the ACCC identified in its Tabcorp authorisation decision. On these benefits, the ACCC concluded:<sup>94</sup>

*Increased liquidity in totalisator pools*

...

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*

...

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.

104. We agree with the NZRB and the ACCC that quality improvement and increased product variety are benefits of the proposed commingling arrangements. Absent commingling with Tabcorp, the NZRB may not be able to offer its customers the same range of opportunities to bet on Australian and international races. Even if the NZRB were to operate its own stand-alone totalisator pools on such racing, the total value of the bets placed in any stand-alone NZRB pool would likely be less, reducing the liquidity, and so the quality of the stand-alone pool compared to a commingled pool. The pools for the stand-alone NZRB races would likely be smaller and less stable and so would be considered of lower quality compared to Tabcorp pools. The Tabcorp pools for Australian races are on average [ ] times<sup>95</sup> the size of the NZRB revenues with commingling so would likely be even larger relative to the stand-alone pools.

105. As noted earlier, without authorisation of the Specified Provisions and commingling, the NZRB would seek to offer on a stand-alone basis totalisator betting pools on

[ ]<sup>96</sup>

[ ]<sup>97</sup>

<sup>94</sup> ACCC Determination on an application for authorisation lodged by Tabcorp (29 October 2014) at 17-18.

<sup>95</sup>

[ ] E-mail from Bell Gully (on behalf of Tabcorp) to the Commerce Commission (24 June 2016).

<sup>96</sup> Authorisation application from the NZRB at Annexure 6 and Commerce Commission meeting with the NZRB (24 June 2016).

<sup>97</sup> E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (5 July 2016).

106. The five-year NPV of the producer surplus gained from the increased product variety of commingled pools and [ ] if the Specified Provisions were authorised, amounts to [ ].<sup>98</sup>  
[ ]<sup>99</sup>
107. The five-year NPV of the producer surplus – that is the benefit accruing to the NZRB – gained from the better quality commingled pools is [ ].<sup>100</sup>  
[ ]  
[ ] The NZRB estimated [ ].<sup>101</sup> This total does not include any price and quality consumer surplus benefits to customers arising from commingling.

*Avoided costs*

108. The third benefit submitted by the NZRB (avoided costs) was not considered by the ACCC in its Tabcorp authorisation decision. This benefit relates to the costs that the NZRB would incur by setting up stand-alone pools on Australian races should it no longer be able to commingle pools with Tabcorp. These avoided costs arise from:<sup>102</sup>

108.1 [ ]

];

108.2 [ ]

];

---

<sup>98</sup>

[ ]

<sup>99</sup>

We do not consider any switching from commingled betting pools to fixed-odds betting in line with the markets we are considering for the purposes of this determination.

[ ]

<sup>100</sup>

[ ]

<sup>101</sup>

[ ]

E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (5 July 2016).

<sup>102</sup>

Authorisation application from the NZRB, NERA cost-benefit analysis of proposed commingling arrangement (1 June 2016) and Commerce Commission meeting with the NZRB (24 June 2016).

108.3 [

];

108.4 [

];

108.5 [

];

108.6 [

];

108.7 [

];

109. The NZRB submitted that

[  
].<sup>103</sup>

110. As mentioned, the NZRB

[  
].

111. For the races it would offer, the NZRB advised that it would need to

[  
],<sup>104</sup>  
[  
].

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<sup>103</sup> Authorisation application from the NZRB at 64.

<sup>104</sup> The NZRB told us that

[  
Commission meeting with the NZRB (27 May 2016).

]. Commerce



be limited. While the Betting Rules and Revenue Leakage provisions are deemed to substantially lessen competition:

- 117.1 it is not clear that any detriment would arise from authorisation of the Betting Rules provisions; and any detriment that would arise would be limited; and
  - 117.2 any detriment that would arise from authorisation of the Revenue Leakage provisions would be confined to a small portion of customers that engage in high volume betting.
118. As noted earlier, for the purposes of analysing the Application, we have treated the market as being the market for the provision of totalisator horse and greyhound racing betting services in New Zealand. We note that any detriments would be even less if we had defined a wider market that included fixed odds betting services offered by the NZRB, Tabcorp and other parties.<sup>109</sup> Our assessment of the detriments of authorisation of the Specified Provisions, therefore, reflects the worst case scenario.

#### *Betting rules provisions*

119. In terms of the Betting Rules provisions, as noted above, New Zealand customers are unlikely to incur higher take-out rates on totalisator betting on Australian races with authorisation. Instead, with authorisation, New Zealand customers would benefit from the lower, regulated take-out rates offered on Tabcorp-hosted races. In comparison, as discussed above, without authorisation, [ ]. As such, this is a benefit rather than a detriment that would result from authorisation of the Specified Provisions.
120. In terms of the Betting Rules provisions and their impact on NZRB-hosted races, as set out earlier, we consider that the NZRB, without authorisation, [ ]. That is, we consider [ ], and, as such, no benefit or detriment would arise. As a consequence, we do not consider further the impact of the Betting Rules provisions on NZRB-hosted races.

#### *Revenue leakage provisions*

121. We consider that the possible detriments arising from the Revenue Leakage provisions are limited to customers that engage in high volume betting. The Revenue Leakage provisions would:
- 121.1 restrict the rebates offered to these customers by the NZRB and Tabcorp; and

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<sup>109</sup> This is because a wider market would bring in additional substitutes to which consumers would turn before the NZRB and Tabcorp would increase prices or reduce quality.

121.2 affect the ability for NZRB and Tabcorp to retain high volume customers which in turn may affect NZRB earnings and potentially affect the quality of betting pools.

122. However, for the purposes of calculating the detriment to the New Zealand public, we consider only the following customer groups are relevant:

122.1 [ ];

122.2 [ ]; and

122.3 [ ].

123. The calculations provided by NERA (on behalf of the NZRB) do not assess the impact on these customers. Rather, the detriment is calculated only in respect of the NZRB's existing VIP customers. Because, as noted earlier, we consider that, both with and without authorisation of the Specified Provisions, the NZRB would ([ ]) lose all of its existing, overseas-based, VIP business ([ ]), we do not consider any detriment in terms of these customers in this determination.

124. We agree with the NZRB and NERA that the detriment is likely to impact betting for New Zealand rather than Australian races. This is because the NZRB is 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 (which would be allowed without authorisation of the Specified Provisions), and so high volume customers would be unlikely to prefer betting through the NZRB on those races.

[ ]

125. With authorisation of the Specified Provisions, both the NZRB and Tabcorp would be restricted to [ ].<sup>110</sup>

[ ]<sup>111</sup>

126. [ ]

---

<sup>110</sup> [ ]

<sup>111</sup> The NZRB advised that [ ]

[ ]. E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (25 July 2016).

]

127. [ ]

128. [ ]<sup>112</sup>  
[ ]

[ ]

129. [ ]

130. [ ]<sup>113</sup> The NZRB advised that [ ]<sup>114</sup>  
[ ]  
[ ]

131. [ ]<sup>115</sup>

[ ]

132. The Revenue Leakage provisions would restrict the NZRB from [ ]  
[ ]. In the year ended 31 July 2015, approximately [ ]

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<sup>112</sup> E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (14 July 2016).

<sup>113</sup> [ ]

<sup>114</sup> E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (25 July 2016).

<sup>115</sup> [ ]

of the NZRB's VIP customer spend was on commingled races.<sup>116</sup>

[ ]<sup>117</sup> Further, under the Revenue Leakage provisions, Tabcorp would be [ ].

133. In the year ended 31 July 2015, the NZRB had only [ ] VIP customers, none of whom are resident in New Zealand. The NZRB's lowest spending VIP customer spent [ ] with it in the year ended 31 July 2015. The increase in price to an equivalent New Zealand resident under the new restrictions would be a [ ]<sup>118</sup> loss in rebates over commingled races amounting to a loss of [ ]<sup>119</sup>.
134. As noted, there are currently no New Zealand residents that meet the criteria to be a VIP customer, although the NZRB [ ]<sup>120</sup> We cannot rule out the possibility that New Zealand residents might be affected by the rebate restrictions on VIP customers at some point in the future; however, the impact of the restriction on rebates to new VIP customers is also likely to be small.
135. The detriment to such parties is difficult to assess.
136. The NZRB submitted, and we agree, that [ ]<sup>121</sup> As the ACCC noted in its Tabcorp authorisation decision, the provisions do not prevent overseas operators from offering rebates to these customers.<sup>122</sup>
137. However, the extent to which these options do away with any detriment depends on the thresholds and rebate criteria set by other suppliers of betting services. For instance, [ ]<sup>123</sup> The NZRB threshold for VIP customers is [ ] while Tabcorp's [ ]<sup>124</sup> Customers betting at this level would lose the rebates they qualified for through the NZRB with the authorisation and potentially not have alternative suppliers willing to offer them VIP level rebates for an equivalent set of races.

<sup>116</sup> E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (14 July 2016).

<sup>117</sup> Ibid.

<sup>118</sup> [ ]

<sup>119</sup> [ ]

<sup>120</sup> Authorisation application from the NZRB at footnote 2 at 3.

<sup>121</sup> Ibid at 3.

<sup>122</sup> ACCC Determination on an application for authorisation lodged by Tabcorp (29 October 2014) at 118.

<sup>123</sup>

[ ]

<sup>124</sup> E-mail from Bell Gully (on behalf of Tabcorp) to the Commerce Commission (24 June 2016) and e-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (24 June 2016).

138. [

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### *Conclusion on likely detriments*

139. The likely detriments relating to existing and potential New Zealand high volume customers are difficult to estimate but we agree with the parties that, even in the worst case scenario, the detriments are likely to be small.
140. Only a small portion of the spending by high volume customers would be considered a detriment to New Zealand, as opposed to all their spending. For the year ended 31 July 2015, total spending by [ ] was under [ ] per annum.<sup>125</sup> Any relevant detriment would only be a portion of this figure, so would be below [ ] per annum.

### **Balancing and quantification of benefits and detriments**

141. The NZRB submitted that the net benefits of commingling between the NZRB and Tabcorp far outweigh the limited anti-competitive detriment that would result from the Specified Provisions.<sup>126</sup>
142. On a qualitative level, our view is that any competitive detriments arising from the Specified Provisions are, in this case, likely to be outweighed by the public benefits. Nevertheless, benefits and detriments should be quantified where practicable and appropriate.<sup>127</sup> This analysis supports our qualitative view: we assess the benefits from commingling at [ ] the detriments.<sup>128</sup>
143. In reaching this conclusion we have reviewed NERA's calculation of benefits. We consider there are no material errors in the analysis that would change the ultimate conclusion that there would be net benefits from the Specified Provisions being authorised.<sup>129</sup> Sensitivity analysis and amendments to the analysis undertaken by the NZRB and NERA at our request showed that changes to the quantification of benefits did not affect this ultimate conclusion.<sup>130</sup> NERA's sensitivity analysis<sup>131</sup> on the

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<sup>125</sup>

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<sup>126</sup> Authorisation application from the NZRB at [7.1.1].

<sup>127</sup> Commerce Commission, *Authorisation Guidelines* (July 2013) at [49]. The level of detail in the quantification exercise will, however, vary as appropriate for each case.

<sup>128</sup> We assess the benefits to be [ ] over five years. This equates to over [ ] each year compared to detriments of under [ ] each year.

<sup>129</sup>

[

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<sup>130</sup> E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (5 July 2016).

benefits calculation gives a range of benefits between [ ], excluding the price and quality consumer surplus benefits to customers arising from commingling. Even in the worst case scenario, the benefits of authorisation of the Specified Provisions would outweigh the detriments.

144. Information provided by the NZRB also indicates that some of the assumptions in its analysis are conservative and could understate the benefits of authorisation of the Specified Provisions and continued commingling between the NZRB and Tabcorp.
145. The above conclusion is consistent with the conclusions of the ACCC in its Tabcorp authorisation decision. The ACCC concluded that the likely benefit to the public from granting authorisation for commingling arrangements that contain the Specified Provisions would outweigh any detriment.<sup>132</sup>

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<sup>131</sup> [ ] E-mail from Minter Ellison Rudd Watts (on behalf of the NZRB) to the Commerce Commission (5 July 2016).

<sup>132</sup> ACCC Determination on an application for authorisation lodged by Tabcorp (29 October 2014) at 25.

**Determination**

146. Pursuant to ss 61(6) and 61(6A) of the Act, the Commission is satisfied that the Specified Provisions will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition. Therefore, the Commission proposes to grant an authorisation for the Specified Provisions under s 58 of the Act for the period set out below.
147. Pursuant to s 61(2) of the Act, the authorisation will expire on the ninth anniversary of the date of the granting of the authorisation.

Dated this 29<sup>th</sup> day of August 2016

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Dr Mark Berry  
Chairman