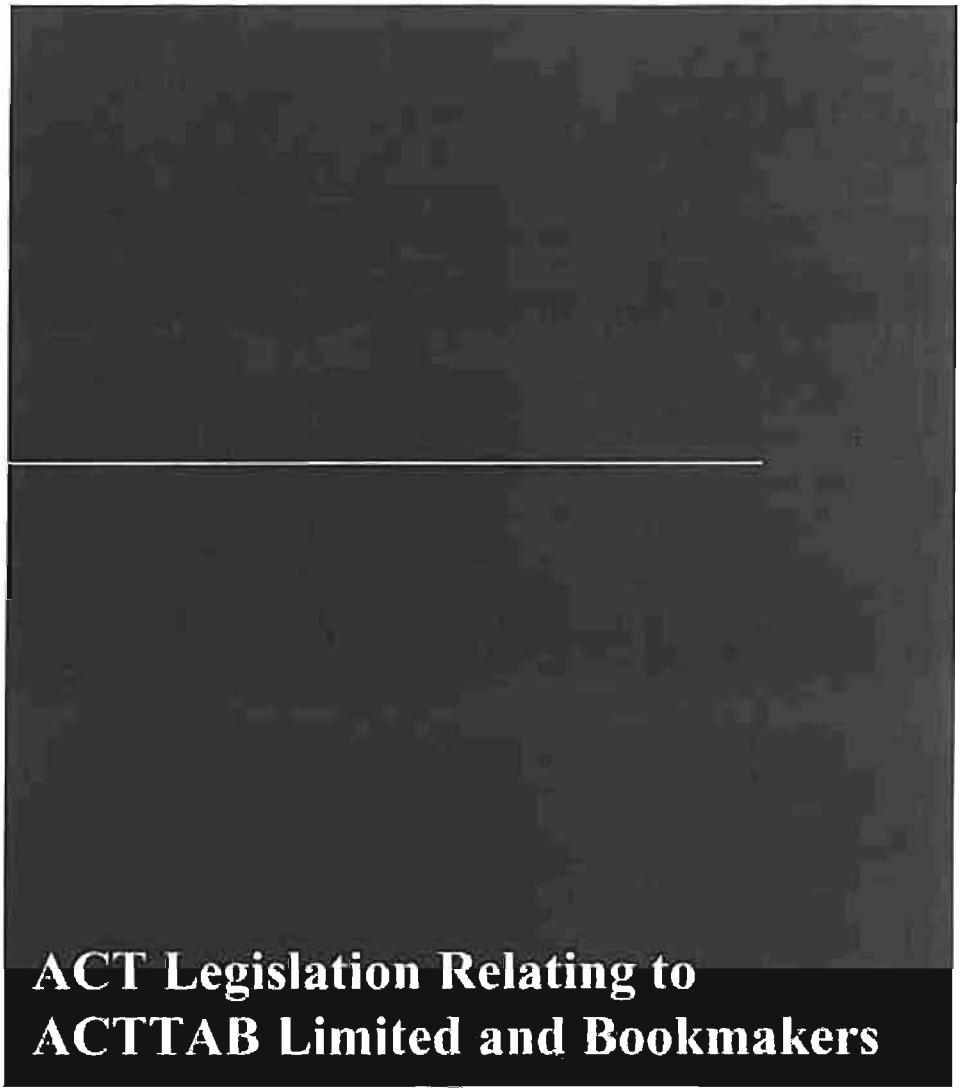

ACT Legislation Relating to ACTTAB Limited and Bookmakers

Compliance with National Competition Policy

November 1999

Final Report

Department of
Treasury & Infrastructure

The Allen Consulting Group

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Abbreviations

ACT	Australian Capital Territory
ACTRC	ACT Racing Club
BLC	Bookmakers Licensing Committee
BPS	Bookmakers Pricing Service
CoAG	Council of Australian Governments
CPA	*Competition Principles Agreement*
EGM	electronic gaming machine
GRC	Gambling and Racing Commission
NCC	National Competition Council
NCP	National Competition Policy
NSW	New South Wales
NT	Northern Territory
PC	Productivity Commission
Qld	Queensland
SA	South Australia
SSNIP	small but significant and non–transitory increase in price
TAB	a provider of totalisator services
Tas	Tasmania
TPA	*Trade Practices Act 1974*
TRB	Thoroughbred Racing Board
Vic	Victoria
WA	Western Australia

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Chapter One

Summary and Overview

Chapter One

Summary and Overview

As part of its commitments under National Competition Policy (NCP), the Government of the Australian Capital Territory (ACT) undertook to review three pieces of legislation that regulate wagering in ACT:

- *Betting (ACTTAB Limited) Act 1964*;
- *Betting (Corporatisation) (Consequential Provisions) Act 1996*; and
- *Bookmakers Act 1985*;

against the guiding principle that legislation:

> ... should not restrict competition unless it can be demonstrated that:
>
> a) the benefits of the restriction to the community as a whole outweigh the costs; and
>
> b) the objectives of the legislation can only be achieved by restricting competition.
>
> *Competition Principles Agreement*, Sub-clause 5(1).

Applying this guiding principle, this report is the product of:

- consultation with key stakeholders;
- desk research; and
- analysis of NCP reviews and reform trends in other Australian jurisdictions.

This report is a logical complement to the ACT's recent NCP reviews of gaming[1] and racing[2] and the Productivity Commission's (PC's) draft report on gambling.[3]

1.1 Rationales for the Regulation of Wagering

A key task for the Group was to determine the appropriate objectives for government legislation. That is why should parimutuel totalisator betting and bookmaking be regulated?

In the Group's previous review of gambling legislation four objectives were identified for the regulation of gambling generally — government should regulate to:

- contain the social costs of gambling;
- ensure product quality and consumer protection;

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1 The Allen Consulting Group, *Gambling Legislation in the Australian Capital Territory — A National Competition Policy Review*, Sydney, 1998.

2 The Allen Consulting Group, *The Racing Bill 1998 — National Competition Policy Review*, Sydney, 1998.

3 Productivity Commission, *Inquiry into Australia's Gambling Industries: Draft Report*, Canberra, 1999.

- secure a significant revenue base for the Territory; and
- control monopolistic exploitation[4].

These objectives were considered by all participants to be justifiable rationales for regulating wagering.

In addition, a two further legitimate rationales were advanced during the course of the consultations:

- to support the ACT racing industry — given that racing is conducted more-or-less for the purpose of wagering there will be sub-optimal production of racing if the wagering industry does not support the racing industry. There is a legitimate role for government in ensuring that free-riding is reduced and the industry maintained; and
- to minimise systemic risk and contagion — in some respects the wagering and interactive gaming markets suffer from systemic and contagion risks similar to those in the financial system. That is, a loss of public confidence in a sports bookmaker (eg, because of fraud) may lead to a loss of confidence in sports bookmaking generally in the ACT, possibly also undermining interactive gaming, and hence threatening the viability of other holders of sports betting and interactive gaming licences. In this way, a problem with one licence holder can be transmitted throughout the ACT's wagering and interactive gaming industries. There is a case for the Government to regulate to minimise the risk.

A number of other public benefits identified by interested parties are worthy of comment:

- the justification of 'securing a significant revenue base for the territory' does not mean that any form of regulation is appropriate as long as it raises significant revenue. While revenue collection is a legitimate justification for the regulation of gambling, it is not a *per se* justification for revenue raised by methods that explicitly create rents that are siphoned off by government;[5] and
- to maintain the value of public assets — an argument for regulation (or at least specific forms of regulation) has been that the ACT Government is the one hundred percent owner of a significant asset — ACTTAB — and that regulation should preserve the value of this asset. Without an offsetting public benefit, protection of ACTTAB from competition because it would reduce the value of a 'public entity' would contravene the ACT's commitment to the principle of Competitive Neutrality in that it would provide a justification for regulation in a manner that would not be available to a private sector provider.

Furthermore, the Group is not persuaded by the argument that a regulatory approach could be justified to some degree simply because it had been employed in another jurisdiction — see Box 1.1.

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[4] The Allen Consulting Group, *Gambling Legislation in the Australian Capital Territory — A National Competition Policy Review*, Sydney, 1998.

[5] See Productivity Commission, *Inquiry into Australia's Gambling Industries Draft Report*, AGPS, Canberra, 1999, p.11.8.

Box 1.1

Should the ACT Automatically Follow the Example of Other Jurisdictions?

An argument raised by a number of parties to the review was that:

> **"The restrictions on competition** applicable **in the ACT are** largely **mirrored in all other Australian States and** Territories, including **those in** which **national** competition **policy reviews have already** been conducted. **In our view, this** reinforces **the reasonable nature of the current regulatory regime as it applies in the ACT.**
>
> **While this does not conclusively prove that the ACT system of regulation is necessarily optimal, it does** point **to a common assessment across all Australian States and Territories that the public interest is best served by a balanced approach that recognises that some limitations on competition are essential to ensure that vital public and social policy objectives are achieved."**
>
> **ACTTAB submission, p.16.**

While approaches adopted **in other jurisdictions are useful indicators, a number of comments are** worth **making about this view.**

Firstly, while a number of states have undertaken NCP reviews of their wagering laws, the NCC has not yet passed judgement **on the** adequacy **of these reviews. It has flagged an intention to make** the **assessment in the** third tranche **assessment process following the PC's gambling** inquiry. **In light of the PC's draft report on gambling the Group considers that it will be difficult for the NCC to support a number of arrangements that have been** justified **by reviews. This is particularly the case where reviews have justified** legislative **changes once the changes have been completed.**

Secondly, circumstances will vary between jurisdictions. For example different policy prescriptions **may be necessary given the scale of existing wagering** providers, different **population bases, gambling patterns, socio-economic conditions, and so on.**

Note: see National Competition Council, *Assessment of State and Territory Progress with Implementing National Competition Policy — Second Tranche Assessment*, Melbourne, 1999, p.163.

Source: The Allen Consulting Group

1.2 An Overview of NCP Concerns and Suggested Reforms for NCP Compliance

The *Betting (ACTTAB Limited) Act* and the *Betting (Corporatisation) (Consequential Provisions) Act* provide for the Government-owned ACTTAB to:

- conduct or provide totalisator betting services; and
- accept fixed odds bets on a sports betting event as an agent on behalf of a bookmaker.

Bookmakers operating in the ACT must be licensed under the provisions of the *Bookmakers Act* before they can commence business. The *Act* sets out the arrangements for:

- annual licensing process;
- the payment of a licence fee (ie, a turnover tax);
- the licensing of an agent;
- the establishment of the Bookmakers Licensing Committee (BLC);

- on-course telephone betting; and
- sports betting.

A range of legislative restrictions were identified by the review team and presented for comment in the issues paper provided to interested parties.[6]

The current regulatory framework displays a number of characteristics that require scrutiny under NCP. Principal amongst these is the existence of licensing. Licensing regimes can raise barriers to entry and could be used to exclude potential competitors.

In general the Group suggests that there is a significant role for licensing of providers of wagering products. While licensing can never guarantee the ongoing integrity and capability of providers, licensing serves as an important screening process and signals consumers about the past quality of wagering providers.

The administrative costs of government licensing can be lessened in certain circumstances by 'dual regulation' (ie, where industry and the government jointly have a role in licensing). A dual regulatory approach to licensing can be adopted when:

- the risks of regulatory failure are minimal;
- where the consequences of such regulatory failure are relatively confined; and
- where the co-regulator bears some ongoing responsibility for the performance and probity of the regulated party.

Such a dual regulatory approach exists at present with the racing clubs, in effect, jointly regulating standing bookmakers. While some details can be improved, licensing of standing bookmakers is an appropriate circumstance for dual regulation.

The remainder of this section provides a broad overview of the major NCP issues considered during the review and suggests reforms that should overcome these concerns.

Streamline and consolidate licensing criteria

There are two major areas of concern with respect to licensing criteria:

- the licensing criteria applied to prospective sports bookmakers is prescriptive and second–guesses the market, and the license itself is inflexible (largely because a licence cannot be granted with conditions attached); and
- ACTTAB is presumed to be a suitable operator of a totalisator service because of their status as a Territory owned business.

The Group suggests that, to promote regulatory consistency, licensing criteria used for the granting of interactive gaming licences should be applied to applicants for a sports bookmakers licence and possibly also applicants for a totalisator licence. While these are different forms of gambling, the

[6] The Allen Consulting Group, *Issues Paper: Review of ACT Legislation Relating to ACTTAB Limited and Bookmakers — Compliance with National Competition Policy Obligations*, Sydney, July 1999.

Group considers the systemic and consumer protection risks to be similar and hence deserving of similar regulatory conditions.

Consolidate regulatory functions with the Gambling and Racing Commission

With the imminent formation of the Gambling and Racing Commission (GRC) the Group suggests that regulatory consistency and impartiality would be enhanced by consolidating the functions and responsibilities of the Registrar of Bookmakers and the Bookmakers Licensing Committee (BLC) into the GRC.

Arbitrary limits on the number of wagering licences are poor devices to protect consumers and contain the social costs of wagering

The Group is not convinced that the public benefits associated with:

- the legislated monopoly for on– and off–course parimutuel racing wagering provided to ACTTAB; and
- the limit of four sports bookmaking licences;

are the most appropriate manner in which to provide consumer protection, manage the social costs associated with gambling or provide a revenue base for the ACT. Unless there is another legitimate policy objective, these objectives should be addressed specifically rather than by the creation of market power through a limit on the number of licences.

No new totalisator licences should be issued to interstate totalisator operators

The Group considered the merits of allowing new totalisator services to operate in the ACT. The problem with such an approach is that interstate operators operating in the ACT may actively or passively create a leakage of taxation revenue from the ACT to other jurisdictions. Such leakage is a cost to the ACT's budgetary position and the ACT racing industry (which is supported via a levy on wagering). As a result, the Group recommends that no licences be made available to interstate TABs, until the ACT Government is satisfied that systems and procedures are in place to prevent such leakage occurring.

Totalisator licences should be available to parties who wish to operate totalisator services wholly within the ACT

The threat of revenue leakage is non-existent if the totalisator operates wholly within the ACT (as does ACTTAB). While the Group considers it extremely unlikely that any party would wish to establish a rival to ACTTAB (given the small size of the ACT market which would have to be shared amongst ACTTAB and any new operators) whether or not a new party seeks to enter the market should be a commercial decision and not restricted by legislation.

The racing industry should continue to be supported by a levy on totalisator turnover

The problem of free-riding provides a legitimate rationale for on-going government support of the ACT racing industry. That is, because of poorly defined property rights in the racing product there will, without some form of external support, be a sub-optimal level of racing. As a result, the Group supports the continued funding of the ACT racing industry by a levy on totalisator turnover.

Provide sports bookmakers with greater operational flexibility

Sports bookmakers face a raft of unjustifiable competitive restrictions on the location from which they can operate and the times at which they can operate. As a result, the Group recommends that:

- sports bookmakers no longer be required to operate back-office operations (ie, non-retail operations) at the Betting Auditorium. However, if sports bookmakers wishes to locate away from the Betting Auditorium they should bear the incremental costs associated with maintaining the same level of regulatory oversight at the alternative locations;
- sports bookmakers should be allowed to retail racing-related sports betting at any class of venue which parimutuel racing is currently able to be provided (ie, at totalisator outlets, hotels and clubs). This would still preclude sports bookmakers from establishing a dedicated retail outlet;[7] and
- the Group is generally supportive of also allowing non-racing sports bookmaking to be distributed through the same retail outlets as those through which racing sports betting products are distributed. Certainly this is the intention of the current legislation given that ACTTAB already has a right to distribute sports betting products. However, given that the social costs of such an expansion are indeterminate at this stage, the Group suggests that this expansion be considered by the Government following some feedback on the impact of expanded retail sports betting in Victoria.

Remove minimum phone betting limits

Bookmakers are currently restricted from accepting bets of less than $250 over the phone. This restriction only serves to protect ACTTAB's phone betting operation and should be abolished.

1.3 Recommendations

The approach outlined in the previous sections, and discussed more fully in the body of the document, is embodied in the following recommendations.

1.3.1 Chapter Five — The Regulation of ACTTAB Limited

RECOMMENDATION 5.1

The ACT Government should not open the market to interstate totalisators until it is satisfied that there are ongoing systems and procedures in place that will enable the racing turnover (and any other turnover-based taxes and licences) to be extracted from wagers that originated from within the ACT.

RECOMMENDATION 5.2

The Betting (ACTTAB Limited) Act 1964 should be amended to allow the Government to issue new licences to totalisators that are operated wholly within the ACT.

RECOMMENDATION 5.3

The licence fee for the operation of totalisator services should be based on a percentage of turnover.

[7] This is not technically an expansion given that ACTTAB currently has a right to distribute sports betting products through its retail network as an agent for a licensed sports bookmaker.

1.3.2 Chapter Six — The Regulation of Standing Bookmakers

RECOMMENDATION 6.1 — *The issuance of a bookmakers licence should not be contingent upon prior approval of a racing club.*

RECOMMENDATION 6.2 — *A standing bookmakers licence should allow a bookmaker to operate at any approved racecourse.*

RECOMMENDATION 6.3 — *The licensing functions of the Registrar and the Bookmakers Licensing Committee should be transferred to the Gambling and Racing Commission.*

RECOMMENDATION 6.4 — *The Bookmakers Act should continue to restrict standing bookmakers licences solely to natural persons.*

RECOMMENDATION 6.5 — *Standing bookmakers should continue to be restricted to operating from racecourses.*

RECOMMENDATION 6.6 — *There should be no restriction on the minimum amount that can be wagered over the phone on fixed odds.*

1.3.3 Chapter Seven — The Regulation of Sports Bookmakers

RECOMMENDATION 7.1 — *Sports bookmakers (and their agents) should not be required to hold a standing bookmakers licence.*

RECOMMENDATION 7.2 — *The suitability requirements for sports bookmakers should mirror those for holder of interactive gambling licences under the Interactive Gambling Act 1998.*

RECOMMENDATION 7.3 — *The Gambling and Racing Commission should have the power to impose licence conditions or cancel a licence if an unlicensed person gains a material degree of control or influence over the operations of a licensed sports bookmaker.*

RECOMMENDATION 7.4 — *The Bookmakers Act should be amended to incorporate 'key persons' requirements consistent with such requirements in the Interactive Gambling Act 1998.*

RECOMMENDATION 7.5 — *Selection criteria employed in assessing the suitability of an applicant for a sports betting licence should focus on the technical ability to provide the service in a manner consistent with the rules for sports betting.*

RECOMMENDATION 7.6 — *The Ministerial limit of four sports betting licences should be removed. There should be no arbitrary restriction on the number of sports betting licences.*

RECOMMENDATION 7.7 — *The Minister should retain the discretion, on the advice of the Gambling and Racing Commission, to allow bookmakers to operate off-course on special occasions under strict conditions. Such allowances should be seen as the extreme exception rather than the rule.*

RECOMMENDATION 7.8 — *Holders of sports betting licences should be entitled to establish back-office (ie, non-retail) operations at any secure location. Such licence holders will be required to cover all incremental regulatory costs associated with operations away from the Betting Auditorium.*

RECOMMENDATION 7.9

Fixed odds betting on racing should be able to be provided by holders of a sports betting licence at all venues at which totalisator wagering products are currently able to be sold (ie, racecourses, totalisator outlets, hotels and clubs, and the casino). Providers of retail sports betting should be required to cover all incremental regulatory costs associated with operations away from the Betting Auditorium.

RECOMMENDATION 7.10

Upon the ACT Racing Club receiving 'Principal Club' status, there should be no regulatory restriction on the ability of sports bookmakers from taking face-to-face bets on particular days.

RECOMMENDATION 7.11

The size of the security guarantee provided by sports bookmakers should be tied more closely with the operational risks.

1.4 The Impact of Recommended Reforms

This section highlights, where possible, the impact of the proposed reforms on the ACT Government and ACT employment.

1.4.1 The Impact on Government

The inquiry terms of reference specifically ask for the impact of reforms upon the ACT Government.

In general the approach recommended in this report will impact upon the ACT Government in three related public functions:

- as a taxing (ie, revenue raising) body;
- as the provider of services to the ACT community; and
- as the one hundred percent owner of ACTTAB.

These impacts are summarised in the following sections.

Taxation

The net impact on the level of revenue raised through taxation is difficult to determine as it is dependent upon the strategic decisions made by holders of totalisator and off-track bookmaker licences. Government revenue:

- will increase to the extent that new totalisator operators grow the totalisator market. This growth may be by attracting non-gamblers to totalisator products, by encouraging existing parimutuel wagerers to increase their expenditure or encouraging consumers of less revenue generating products to switch to wagering on the tote. Given that new totalisator entry is unlikely in the foreseeable future this revenue impact is expected to be zero;
- will decrease to the extent that on- and off-course bookmaking replaces totalisator betting. Any moves towards fixed odds betting will reduce the revenue collected by the Government; and
- will increase to the extent that sportsbetting (particularly by overseas customers) increases sports betting turnover.

Expenditure

The Group suggests that the reforms advocated in this report will have little impact on Government expenditure:

- there will be no increased call on the Government to support the racing industry as continued support of the Racing Fund is a requirement for the entry of new totalisators. Again, however, if there is a dramatic shift to fixed odds betting the racing fund will decrease and there may be industry calls for further direct (ie, budget funded) assistance — the Group does not consider this a significant threat in the short to medium term; but
- there may be a need for increased expenditure to the extent that the reforms advocated increase problem gambling and create wider social problems (eg, health concerns, criminal activity, etc). The Group doubts that this extra expenditure is significant given; any incremental social problems related to wagering will be swamped by the costs related to electronic gaming machines (EGMs), and the reforms do not materially expand access to wagering.

Returns to the Shareholder

The returns to the ACT Government can be expected to decline in the short to medium term, but not to any significant degree

The impact of the reforms on the short to medium term value of ACTTAB and its profits is difficult to determine as it is so dependent upon the strategic decisions made by rival providers of wagering products.

In particular, the extent to which the value of ACTTAB will decrease will depend upon whether there is new entry by:

- fixed odds off-course bookmakers; and
- new totalisator operators;

and how successful they are at attracting business away from ACTTAB.

As noted previously, the Group does not expect any new entry by interstate or ACT-based totalisator services in the short to medium term.

Even with increased pressure from sports bookmakers and the possible (although unlikely) entry of new local totalisators ACTTAB will retain significant market share and value. In particular, ACTTAB has the benefit of incumbency — it:

- has an established brand name in the ACT which it can leverage into sportsbetting;
- is established as the default provider at existing racecourses, and in many clubs and hotels; and
- has a chain of retail operations in key retail positions.

As a result, the Group suggests that the shareholder returns to the ACT Government from ACTTAB can be expected to decline in the short to medium term, but not to any significant degree.

In the longer term the value of ACTTAB is likely to decline irrespective of the reforms advocated in this report

In the longer term the Group suggests that the Government's returns from owning ACTTAB can be expected to decrease significantly.

Cross-border competition between TABs is already intense — particularly for the informed regular high value phone punters — and can be expected to increase. Furthermore, ready general access to wagering by phone and the Internet will place increased on ACTTAB's returns.

PKF Consulting estimated that, with a forty percent probability of occurring, increased competition (eg, from NSW TAB) would result in a likely impact on net profit after tax of somewhere between -$0.3 million and -$2 million and hence decrease the value of ACTTAB of $8.2 million.[8] This suggests that the value of ACTTAB would fall to somewhere in the vicinity of $27 to $36 million.

Conclusion

Reform should not be opposed merely because the value of ACTTAB will be reduced and returns to Government may be reduced.

Without an offsetting public benefit, protecting ACTTAB from competition because it would reduce the value of a 'public entity' would contravene the ACT's commitment to the principle of Competitive Neutrality:

> Under NCP, governments have ... agreed to apply competitive neutrality principles, essentially removing any net competitive advantage arising from government ownership, where government businesses face actual or potential competition from the private sector. This allows the two sectors to compete on an equal footing and encourages efficient operation of public enterprises. The underlying aim is to ensure that the community's resources are used as efficiently as possible.
>
> National Competition Council, *Annual Report 1997-98*, Melbourne, 1998, p.131.

As previously stated there is no *per se* public benefit associated with the maintenance of ACTTAB's monopoly over racing totalisation.

The potential decline in the value of publicly owned organisations and shareholder returns as such organisations have become exposed to competition is one of the reasons for the payment by the Commonwealth of NCP-contingent grants to the states and territories. Thus, any decline in the value of ACTTAB is, in effect, already compensated by the NCP grants.

1.4.2 The Impact Upon Employment

A significant concern of the Government and the ACTTTAB Agents relates to the potential for the loss of ACT employment because of reforms advocated in this report.

The Group suggests that there will be no employment effects on the wider racing industry (racing clubs, jockeys, etc) as employment is determined by factors outside of this review.

[8] PKF Consulting, *ACTTAB Limited — Scoping Review of Options*, 1998, p.56.

The net impact on the level of employment in the ACT wagering industry is difficult to determine as it is dependent upon the strategic decisions made by holders of totalisator and off-track bookmaker licences. Table 1.1 provides an overview of the conflicting impacts that the reforms may have upon employment.

Table 1.1

Conflicting Impacts on Employment

Action	Positive Impacts on Employment	Negative Impacts on Employment	Net Impact and Likelihood
The entry of new local totalisator operators	Entry will create employment as new retail outlets, call centres and web sites are established.	ACTTAB employment may decline if new entrants capture a portion of ACTTAB's market share rather than grow the wagering business. Employment may decline if new entrants 'cherry pick' ACTTAB's most profitable retail locations and force a rationalisation of ACTTAB's retail network.	Small increase in employment, but with a very low probability of occurring.
The entry of interstate totalisator operators	Entry will create employment as new retail outlets are established.	ACTTAB employment may decline if new entrants capture a portion of ACTTAB's market share rather than grow the wagering business. Employment may decline if new entrants 'cherry pick' ACTTAB's most profitable retail locations and force a rationalisation of ACTTAB's retail network.	Small loss in employment but with no probability of occurring in the short term to medium term, and only a slight possibility in the longer term.
New sports bookmakers establish in the ACT	New sports betting operations will require people to take phone bets and provide Internet-related services. Given the scope for international expansion, new operators who focus on sports are likely to increase net employment in the ACT.	To the extent that new sports betting providers focus on domestic sports it is likely that the market share of two of the incumbents would decline and therefore threaten existing employment. This is not a significant threat because operators who have already approached the authorities have expressed a desire to focus on international sports (where the market is far from saturated).	Small but significant increase in employment with a high probability of occurring.

Source: The Allen Consulting Group

Table 1.1 suggests that it will be difficult to precisely determine the net employment impact of the reforms, although the most likely outcome is a small increase in ACT employment.

In making this assessment it is necessary to highlight that employment in the provision of parimutuel-related wagering is likely to decline whether or not the reforms advocated in this report are adopted. ACTTAB is an organisation of sub-optimal scale that only operates effectively because it is able to pool with other TAB operators. This places it in a precarious market position. Even without the entry of new retail TABs in the ACT it is likely that ACTTAB's market share will be eroded by the increasingly aggressive phone and Internet services provided by, amongst others, the NSW TAB and Tabcorp.

It is also important to note that increased competition is likely to effect the location and nature of employment within the ACT as well as the level of employment. For example, if a new TAB operates wholly within the ACT it will seek to operate in the most profitable locations, possibly putting pressure on ACTTAB to rationalise its retail network (by closing the less profitable outlets or converting outlets to agencies) and employment in a smaller number of locations.[9]

1.5 Report Structure

The remainder of this report is structured in the following manner:

- Chapter Two provides an overview of NCP and the principles underlying this review;
- Chapter Three discusses the extent of wagering in the ACT and the possible rationales for government regulation of wagering;
- Chapter Four discusses the validity of using licensing to restrict the entry of potential providers of wagering products and services; and
- Chapters Five, Six and Seven consider the merits of particular restrictions in existing legislation as they relate to ACTTAB, standing bookmakers and sports bookmakers respectively.

[9] This may have implications for the availability of totalisator outlets in some suburban shopping centres. While Internet and telephone banking will make totalisator services more accessible to some, any reduction in suburban accessibility is likely to be felt most by the elderly (who have a lower acceptance of phone and Internet commerce). This possible impact is akin to the rationalisation of banking facilities as banking competition increased in the mid to late 1990s. It is difficult to argue that the Government should restrict competition to ensure ready access to totalisator outlets when there is no such approach to ensure retail outlets of truly essential privately owned services.

2

Chapter Two

National Competition Policy

Chapter Two

National Competition Policy

This chapter describes the policy frameworks that underlie this review.

2.1 The Development of National Competition Policy

The inaugural Council of Australian Governments (CoAG) meeting commissioned the 'Hilmer Committee' to conduct an inquiry into the development of a more nationally focused approach to competition policy. The *Hilmer Report*[10] was presented to CoAG in August 1993, and formed a major input to micro-economic reform discussions for CoAG.

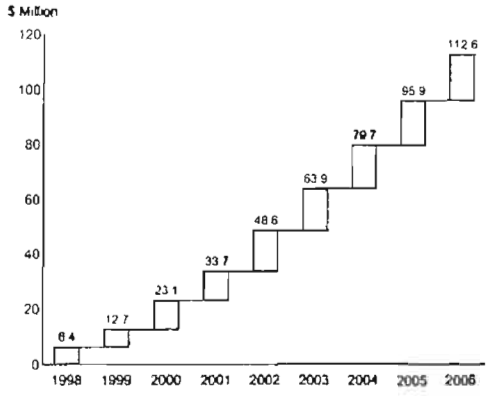
At the April 1995 CoAG meeting, the Commonwealth, State and Territory Governments agreed to implement a NCP reform agenda based on the *Hilmer Report*'s recommendations. As a result, three agreements were signed:

- the *Competition Principles Agreement* (*CPA*) established the principles agreed by governments in relation to prices oversight, structural reform of public monopolies, review of anti-competitive legislation and regulation, third party access to essential infrastructure facilities, the elimination of any net competitive advantage possessed by Government businesses, and the application of the competition principles to local government;
- the *Conduct Code Agreement* set out the processes for amendments to the competition laws of the Commonwealth, States and Territories; and
- the *Agreement to Implement the National Competition Policy and Related Reforms* set out the conditions for payment of Commonwealth 'Competition Grants' to the States and Territories. Payment of these grants requires the National Competition Council's (NCC's) advice that the States and Territories had made adequate progress towards meeting the achievement of micro-economic reform targets in a range of sectors. The ACT's cumulative grants are shown in Figure 2.1.

[10] The Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, 1993.

Figure 2.1

Competition Policy Payments to the ACT (Cumulative)



Source: ACT National Competition Policy Unit, http://www.competition.act.gov.au/what.html.

2.2 Legislation Review and the Public Interest

2.2.1 Application of the Competition Test

The *Hilmer Report* described regulation by all levels of government as the greatest impediment to enhanced competition in many key sectors of the economy. It did, however, recognise that there may be a need for some government regulation when market failures occur. The *Hilmer Report* recommended:

- the reform of regulation that unjustifiably restricts competition; and
- any restriction on competition that is to remain must be clearly demonstrated to be in the public interest.

As a consequence of these observations, through the *CPA* all State and Territory Governments committed themselves to ensuring that new legislation does not impose undue competitive restrictions:

> (1) The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:
>
> a) the benefits of the restriction to the community as a whole outweigh the costs; and
>
> b) the objectives of the legislation can only be achieved by restricting competition. ...
>
> (5) Each Party will require proposals for new legislation that restricts competition to be accompanied by evidence that the legislation is consistent with the principle set out in subclause (1). ...
>
> (9) Without limiting the terms of reference of a review, a review should:
>
> a) clarify the objectives of the legislation;
>
> b) identify the nature of the restrictions on competition;

> c) analyse the likely effect of the restriction on competition and on the economy generally;
>
> d) assess and balance the costs and benefits of the restriction; and
>
> e) consider alternative means for achieving the same result including non-legislative approaches.
>
> *Competition Principles Agreement*, Sub-clauses 5(1), (5) and (9).

This test is intended to establish whether particular restrictions on competition remain necessary, through an assessment of the costs and benefits of current and alternative means of achieving policy objectives.

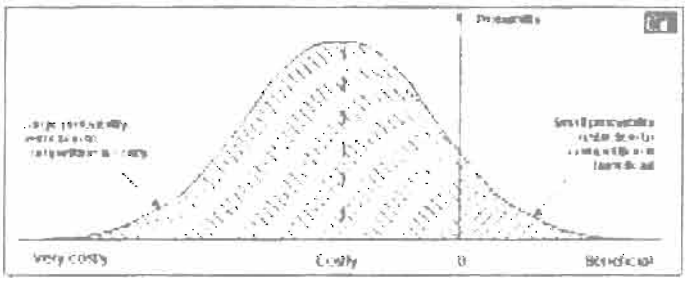
The burden of proof is on governments, and those who benefit from competitive restrictions, to establish the public interest case for the retention or enactment of legislation which restricts competition.

The competition test is built on the presumption that restrictions to competitive economic behaviour impose costs on the community.[11]

This test is summarised, in terms of a probability analysis, in Figure 2.2.

Figure 2.2

NCP Presumes that Competitive Restrictions Are More Likely Than Not to Impose Net Community Costs



Source: Centre for International Economics, *Review of the Victorian and South Australian Barley Marketing Act 1993 Under the National Competition Policy Review of Legislative Restrictions on Competition — Final Report*, 1997, p.24

2.2.2 Public Interest Justifications for Restrictive Legislation

NCP acknowledges that competition is not an end in itself; that while, in general, the introduction of competition will deliver benefits to the consumer, there are situations where community welfare will be better served by not effecting particular competition reforms (ie, the regulation falls in the extreme right of the distribution shown in Figure 2.2). That is, competition is to be implemented to the extent that the benefits that will be realised from competition outweigh the costs.

NCP recognises that where anti-competitive behaviour is acceptable to achieve a public good, there must be a transparent process for assessing the

[11] In particular, restrictions to competition are presumed to reduce businesses' incentives to: improve their performance; develop new products; and/or respond to changing circumstances.

balance between benefit and costs, and the behaviour must be subject to review.

Sub-clause 1(3) of the *CPA* provides for considerations other than strictly economic criteria in assessing public benefit in circumstances where, on balance, there is a net benefit for the community. Sub-clause 1(3) sets out the circumstances in which the weighing up process is called for, and also some of the factors which need to be taken into account in making the decision:

> Without limiting the matters that may be taken into account, where this Agreement calls:
>
> (a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
>
> (b) for the merits or appropriateness of a particular policy or course of action to be determined; or
>
> (c) for an assessment of the most effective means of achieving a policy objective;
>
> the following matters shall, where relevant, be taken into account:
>
> (a) government legislation and policies relating to ecologically sustainable development;
>
> (b) social welfare and equity considerations, including community service obligations;
>
> (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
>
> (d) economic and regional development, including employment and investment growth;
>
> (e) the interests of consumers generally or of a class of consumers;
>
> (f) the competitiveness of Australian businesses; and
>
> (g) the efficient allocation of resources.

'Public interest test' (sometimes called the public benefit test) is a shorthand expression to describe the interplay of sub-cls.1(3), 5(1), 5(5) and 5(9) of the *CPA*.

The NCC has stated that:

> A central feature of the National Competition Policy is its focus on competition reform 'in the public interest'. In this respect, the guiding principle is that competition, in general, will promote community welfare by increasing national income through encouraging improvements in efficiency. ...
>
> The aim in applying s.1(3) is to assess any special treatment in a transparent and consistent manner, with the benefits and costs of particular anti-competitive behaviour subject to public scrutiny.
>
> National Competition Council 1996, *Considering the Public Interest under the National Competition Policy*, AGPS, Melbourne, pp.2 & 8-9.

The NCC emphasises that sub-cl.1(3) is not exclusive or prescriptive. Rather, it provides a list of indicative factors a government could look at in

considering the benefits and costs of particular actions, while not excluding consideration of any other matters in assessing the public interest.[12]

It is important when considering whether the public interest is served by competitive restrictions to identify any public detriment that may arise from competitive restrictions. Primary emphasis is on those detriments which affect economic efficiency and which may take the form of:

- a reduction in the number of effective competitors (for example, as a consequence of excessively prescriptive regulation);
- increased restrictions on entry; and
- constraints on competition by market participants affecting their ability to innovate effectively and conduct their affairs efficiently and independently.

Furthermore, it is also important to note that, even when a net public benefit is established, it must be demonstrated that the benefit can only be achieved by restricting competition.

2.2.3 The Aim of Creating 'Better' Regulation

One of the implicit goals of the legislation review process is to create 'better' regulation.[13] This may mean:

- greater regulation if pro-competitive frameworks need to be established or market imperfections corrected; or
- less regulation where market forces provide appropriate outcomes.

This focus on the appropriateness of regulatory regimes rather then the traditional black and white issues of 'more' or 'less' regulation has been reinforced by the Deputy Executive Director of the NCC:

> it needs to be emphasised that the NCP legislation review program is <u>not</u> about deregulation for deregulation's sake, nor that it allows no room for (so-called) non-economic considerations, and nor that it sees no role for government. ...
>
> Rather, the NCP legislation review program is about:
>
> — ensuring that, where government does regulate, that regulation is necessary, effective and well designed;
>
> — ensuring that regulation is not used to prop up the incomes and conditions of vested interest groups, at the expense of the rest of us; and
>
> — replacing the 'maximum visible regulation' of the past with 'minimum effective regulation', which can pass the test of 'net public benefit'.

[12] This approach was re-affirmed by the House of Representatives Standing Committee on Financial Institutions and Public Administration — House of Representatives Standing Committee on Financial Institutions and Public Administration 1997, *Cultivating Competition: Report of the Inquiry Into Aspects of the National Competition Policy Reform Package*, AGPS, Canberra, June, p.10.

[13] See sub-cl.5(9) of the *CPA*.

> So we are talking about reorienting and refining, rather than rejecting, the regulatory role of government.
>
> Cope, D. 1998 'National Competition Policy: Rationale, Scope and Progress, and Some Implications for the ACT and the Role of Government' at the *ACT Department of Urban Services' Summer Seminar Series*, Canberra, 20 March, 17. Emphasis in original.

This approach to regulatory reform is consistent with the work conducted by the ACT's Red Tape Task Force.[14]

When proposing regulatory arrangements different to those that currently exist — particularly where there is some discretion as to alternative arrangements — this report has drawn upon the five principles of good regulation endorsed by the Financial System Inquiry (the Wallis Inquiry). The five principles are:

- competitive neutrality — the regulatory burden should apply equally to all members of the industry;
- cost effectiveness — the regulatory framework must be effective without imposing unnecessary costs on businesses;
- transparency — requires that all legislation and associated structures and practises are transparent and understood by the industry;
- flexibility — regulation should be flexible to incorporate new developments which arise in the industry; and
- accountability — regulatory practises should operate independently of sectional interests with appropriately skilled staff.[15]

2.3 Competitive Neutrality

One of the major features of the competition policy reforms implemented following the *Hilmer Report*[16] was the removal of the 'Shield of the Crown' from government-owned enterprises. As a result, government businesses are now subject to the *Trade Practices Act 1974* (*TPA*) and, unless there are intervening regulatory factors, are exposed to competition from private sector providers.

If competition between public and private bodies is to be on an equitable basis, the players must operate under similar rules (ie, on a level playing field). To facilitate the creation of this level playing field the post-Hilmer reforms — contained in the *CPA* and subsequently implemented in each jurisdiction — established the principle of 'competitive neutrality'. The principle is set out in sub-cl.3(1) of the *CPA*:

---

[14] The Task Force, convened in 1995, consisted of Government and business representatives with the aim of reporting on regulatory processes where 'red tape' appears to impose unnecessary burdens, cost or disadvantages to the business sector.

[15] Financial System Inquiry, *Final Report*, AGPS, Canberra, 1997, pp.196-197.

[16] The Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, 1993.

> The objective of the competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.

A jurisdiction's competitive neutrality requirements can be interpreted in a number of ways.[17]

The minimalist approach is that all government business activities are required to fully attribute costs on the same basis as private firms. Subject to the cost/benefit test, significant business enterprises and activities will also be required to:

- pay all Commonwealth and Territory tax or tax equivalent payments;
- pay debt guarantee fees if in receipt of concessional interest rates that reflect their government ownership rather than their commercial status; and
- comply with the same regulations that apply to their private sector counterparts.

Simple application of this approach has the tendency to be mechanistic in nature and, the Group suggests, may not capture the intent of the Hilmer reforms. The Group suggests that the appropriate question is, particularly when considered in the context of a legislative review, "Would the Government treat the business activity any differently if it were privately owned rather than publicly owned?".

[17] "Each Government is free to determine its own agenda for the implementation of competitive neutrality principles." — sub-cl.3(2) *CPA*.

3

Chapter Three

Wagering in the ACT and the Rationale for Regulation

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3.1 Wagering in the ACT

Wagering in the ACT is conducted by three classes of organisations:

- racing totalisators — of which there is only one (ie, ACTTAB);
- sports bookmakers — there are four sports bookmakers that take bets on a myriad of racing and other events in Australia and overseas; and
- standing bookmakers — bookmakers operating from racecourses and taking bets on thoroughbred, harness and greyhound races.

In addition, interstate or overseas organisations provide wagering products to ACT residents over the phone and the Internet.

3.1.1 The Extent of Wagering

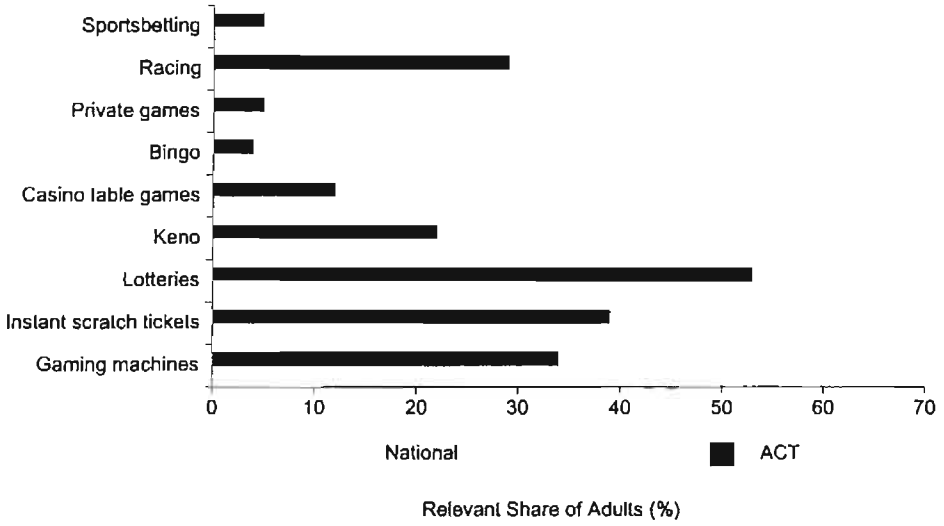
The PC's recent survey of gambling habits found that 82.7 percent of ACT residents aged 18 and over had gambled in one form or another over the last twelve months.

As shown in Figure 3.1, just under 30 percent of ACT residents gambled on racing, with 5 percent of people gambling on sports.[18] Betting on racing in the ACT was the fourth most popular form of gambling, and sports-betting the seventh.

[18] The combined number of people gambling on racing and sports will be less than the simple addition of these two numbers because some people would have gambled on both racing and sportsbetting in the past twelve months.

Figure 3.1

People Who Gambled at Least Once in the Past 12 Months

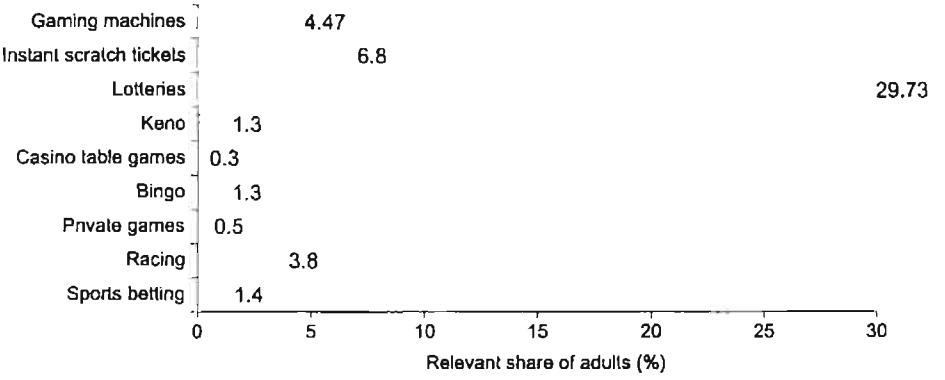


Source: Productivity Commission, *Inquiry into Australia's Gambling Industries: Draft Report*, AGPS, Canberra, 1999, p.6.48.

Focusing on national figures of people who gamble, on average, at least once per week, gambling on racing is the fourth most popular form of gambling, and sportsbetting the fifth — see Figure 3.2.[19]

Figure 3.2

People Who Gambled At Least Every Week in the Past 12 Months



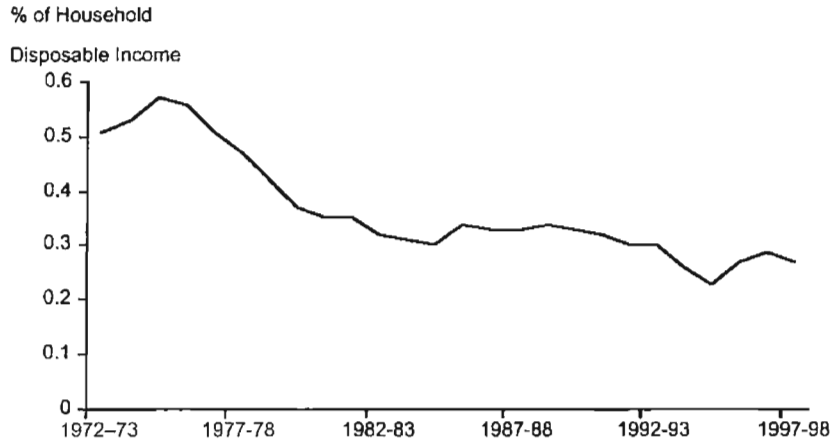
Source: Productivity Commission, *Inquiry into Australia's Gambling Industries: Draft Report*, Canberra, 1999, p.6.48.

Wagering has been declining in relative importance for the past three decades. For example, as Figure 3.3 shows, expenditure on wagering as a percentage of ACT household incomes has almost halved since the mid-1970s.

[19] The PC's draft report did not include weekly gambling patterns for ACT residents.

Figure 3.3

ACT Expenditure on Racing Wagering

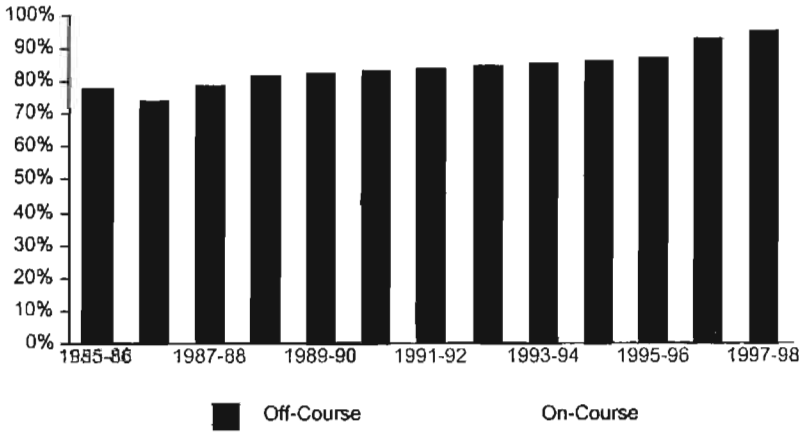


Source: Tasmanian Gaming Commission, 1999.

One of the clear trends, as shown in Figure 3.4, has been the move away from on-course wagering to off-course wagering.

Figure 3.4

The Distribution Between On- and Off-Course Wagering in the ACT

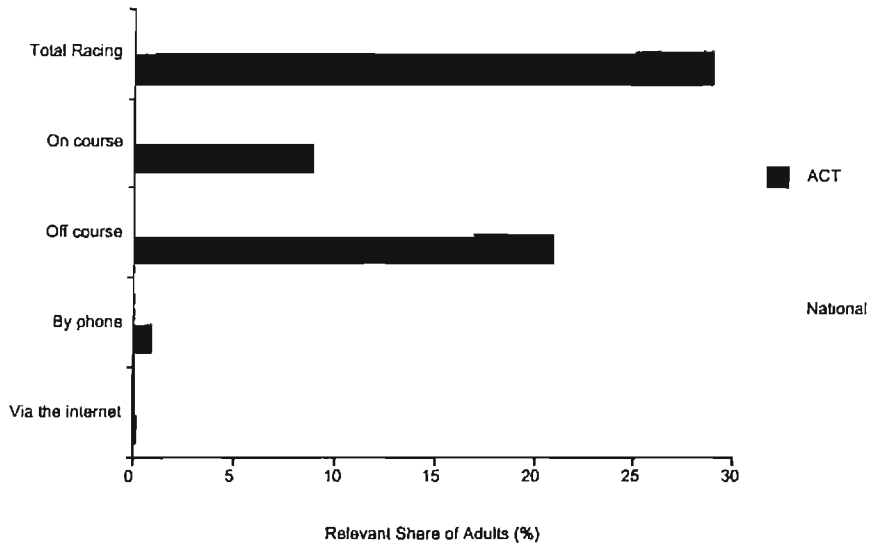


Source: Tasmanian Gaming Commission, 1999.

As a result of this movement, wagering in the ACT is dominated by off-course betting on races. As shown in Figure 3.5, the ACT is indeed more reliant upon off-course wagering than Australia as a whole.

Figure 3.5

Percent of Adults Gamblers Who Participated in the Last 12 Months

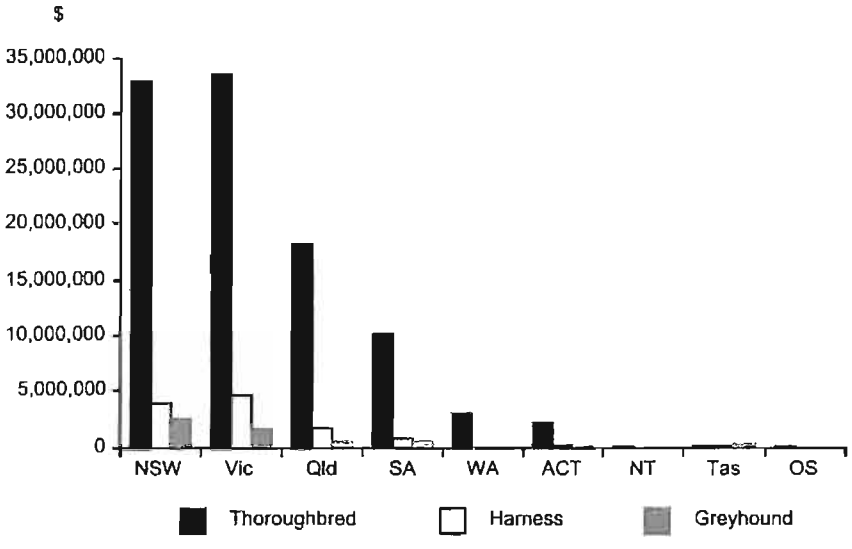


Source: Productivity Commission, *Inquiry into Australia's Gambling Industries: Draft Report*, Canberra, 1999, p.B.2.

One of the interesting features of ACT wagering patterns is the dominance of wagering on thoroughbred racing, and also how little is actually wagered on ACT races — see Figure 3.6.

Figure 3.6

ACTTAB Turnover By Meeting Code and Location



Note: 'OS' represents meetings held overseas.

Source: ACTTAB, *Annual Report 1998*, p.25.

3.1.2 Problem Wagering

In its recent draft report on gambling in Australia the PC undertook a comprehensive survey to identify gambling patterns. The national problem gambling results — shown in Table 3.1 — demonstrate, across a range of measures of problem gambling, the relatively higher incidence of problem gambling for regular racing gamblers and sports betters (along with players of EGMs and casino table games).[20]

Table 3.1

Problem Gambling Prevalence and Harm Incidence by Gambling Mode and Frequency

	Measures of Problem Gambling		
	SOGS 5+	**SOGS 10+**	**HARM**
All gamblers	*2.82*	*0.43*	*2.08*
At least once per year			
Gaming machines	5.15	0.76	3.82
Instant scratch tickets	3.25	0.37	2.20
Lotteries	3.04	0.36	2.26
Keno	6.40	1.16	3.89
Casino table games	7.43	1.14	4.61
Bingo	9.49	0.75	8.45
Private games	9.63	0.88	4.77
Racing	5.12	0.85	3.76
Sportsbetting	9.58	1.06	7.59
Weekly players			
Gaming machines	21.56	3.59	13.93
Instant scratch tickets	6.61	1.21	6.07
Lotteries	2.66	0.32	2.33
Keno	21.81	3.59	11.99
Casino table games	37.81	7.52	31.61
Bingo	8.46	0.00	6.54
Private games	16.99	2.82	13.59
Racing	14.85	3.30	11.44
Sportsbetting	10.49	1.01	7.58
Regular non–lottery	*14.72*	*2.98*	*10.07*

Source: Productivity Commission, Inquiry into Australia's Gambling Industries: Draft Report, AGPS, Canberra, 1999, p.6.48.

An interesting observation from Table 3.1 is that, for regular gamblers (ie, at least one gamble per week on average), the prevalence and incidence of harm associated with racing is almost identical to that of the average of non-lottery gamblers.

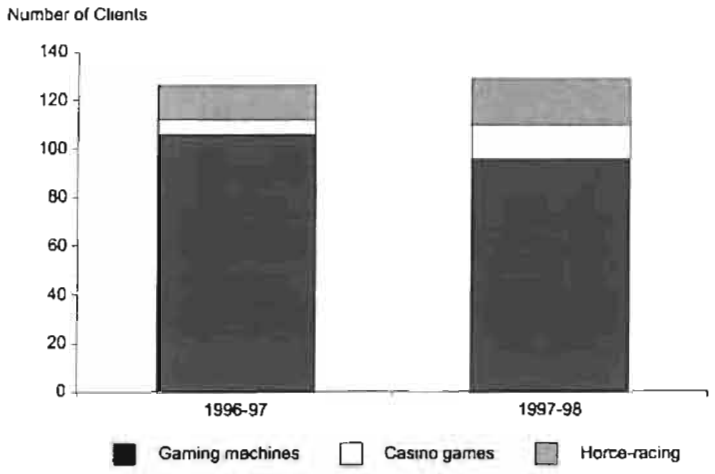
[20] Productivity Commission, *Inquiry into Australia's Gambling Industries: Draft Report*, Canberra, 1999, p.6.1.

The clear message from the PC report is the overwhelming concern for the social costs caused by problem gambling on EGMs.

Ongoing ACT-specific analysis of the source of problem gambling is limited to information obtained from Lifeline. As shown in Figure 3.7, in 1997-98 15 percent of Lifeline's gambling counselling clients (ie, 19 people) sought counselling on the basis of problems associated with horse racing. This was an increase on the previous year where 11 percent, or 14 people, had sought help for racing-related problems.

Figure 3.7

Counselling Provided by Lifeline by Gambling Type



Source: Lifeline Canberra, *27th Annual Report 1997-1998*, Canberra, 1998, p.19.

Interestingly, the one person who identified themselves to Lifeline as having a problem on sports-betting gambled through a sports bookmaker in the NT.

3.2 Rationales for the Regulation of Wagering

A key task for the review team is to determine the appropriate objectives for government legislation. That is why should parimutuel totalisator betting and bookmaking be regulated?

In the Group's previous review of gambling legislation four objectives were identified for the regulation of gambling generally — government should regulate to:

- contain the social costs of gambling;
- ensure product quality and consumer protection;
- secure a significant revenue base for the Territory; and
- control monopolistic exploitation.[21]

[21] The Allen Consulting Group, *Gambling Legislation in the Australian Capital Territory — A National Competition Policy Review*, Sydney, 1998.

These objectives were considered by all participants to be justifiable rationales for regulating wagering.

In addition, a number of further rationales were advanced during the course of the consultations: to support the ACT racing industry, and to maintain the value of public assets. These claimed justifications are considered in the sections below.

3.2.1 Support the ACT Racing Industry

The PC, in its recent review of gambling, set out an economic rationale for the government support of racing industries:

> Unlike sports betting on football matches or car races, wagering on horse racing is the major reason for horse racing to take place. If those providing wagering services were not to contribute to the racing industry, the industry itself would decline. Without some form of policy response, 'free riding' might lead to the racing industry providing too few races.
>
> Productivity Commission, *Inquiry into Australia's Gambling Industries Draft Report*, AGPS, Canberra, 1999, p.13.20.

The Group agrees that there is a legitimate role for government in ensuring that free-riding is reduced and the industry maintained.

While there is a justification to intervene in the provision of wagering to protect the supply of racing product, this does not explain how such support should be given, or the level of support. While beyond the scope of this study, the group notes comments by PKF Consulting that imply that the racing is relatively over-compensated compared to a number of other jurisdictions — see Table 3.2.

Table 3.2

Distribution Turnover Versus Local Racing Contribution (1996)

Jurisdiction	Distribution to Local Racing	Turnover on Local Racing	Distribution Ratio
Vic	$163m	$1,226m	13%
NSW	$119m	$1,585m	8%
Qld	$54m	$370m	15%
NT	$4.4m	$1.9m	229%
ACT	$3.8m	$2.3m	168%

Source: PKF Consulting, *ACTTAB Limited — Scoping Review of Options*, 1998, p.23.

ACTTAB, however, sees its comparable businesses are other TABs subject to diseconomies of scale: NTTAB and TASTAB. Looking solely at the returns to racing in these three jurisdictions, but on the basis of all turnover rather than turnover just on local races, provides a more balanced picture that suggests that the legislatively enforced subsidy of the ACT racing industry is broadly in line with other jurisdictions – see Table 3.3.

Table 3.3

Distribution Turnover Versus Local Racing Contribution

Jurisdiction	Distribution to Local Racing	Turnover on Racing	Distribution Ratio
ACTTAB	$5,000,465	$117,946,250	4.2%
TASTAB	$13,542,704	$240,488,211	5.6%
NTTAB	$2,656,000	$87,894,000	3.0%

Source: ACTTAB, *Annual Report 1998*, p.20.

While the Group agrees that there is a legitimate rationale for government to support the racing industry, the scope of that support is beyond this review's terms of reference.

3.2.2 Securing a Significant Revenue Base for the Territory

While the Group's earlier study on gambling found that there is a justification for regulation to maintain a sufficient revenue base,[22] this justification needs further clarification in the context of this review.

While revenue collection is a legitimate justification for the regulation of gambling, it is not a *per se* justification for revenue raised by methods that explicitly creates economic rents that are siphoned off by government. This approach is consistent with that advocated by the PC in its recent study:

> The persistence of monopoly (or 'exclusivity') arrangements in the gambling industries appears to be mainly driven by revenue considerations. Revenue collection, by itself, provides an unconvincing rationale for creating such exclusive rights. If it were accepted that governments should raise significant revenue from the gambling industries, then explicit taxes, through their greater transparency, accountability and flexibility, are preferred measures for collection.
>
> Productivity Commission, *Inquiry into Australia's Gambling Industries Draft Report*, AGPS, Canberra, 1999, p.11.8.

3.2.3 To Maintain the Value of Public Assets

An argument for regulation (or at least specific forms of regulation) has been that the ACT Government is the one hundred percent owner of a significant asset — ACTTAB — and that regulation should preserve the value of this asset.

For example ACTAB has stated that: "It must be said that ACTTAB itself is a significant public asset. ... Thus, it is essential that the community's interest in the maintenance of that value not be jeopardised."[23] This view was firmly expressed by a number of parties consulted during the review.

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[22] The Allen Consulting Group, *Gambling Legislation in the Australian Capital Territory — A National Competition Policy Review*, Sydney, 1998.

[23] ACTTAB submission, p.13.

The Group is far from convinced that this is either a rationale for regulation or a rationale for regulation that is restrictive of competition.

Without an offsetting public benefit, protecting ACTTAB from competition because it would reduce the value of a 'public entity' would contravene the ACT's commitment to the principle of Competitive Neutrality:

> Under NCP, governments have ... agreed to apply competitive neutrality principles, essentially removing any net competitive advantage arising from government ownership, where government businesses face actual or potential competition from the private sector. This allows the two sectors to compete on an equal footing and encourages efficient operation of public enterprises. The underlying aim is to ensure that the community's resources are used as efficiently as possible.
>
> National Competition Council, *Annual Report 1997-98*, Melbourne, 1998, p.131.

Governments made the commitment to NCP knowing that the removal of artificial and unjustifiable barriers to competition could result in the potential for a decline in the value of publicly owned bodies and the loss of monopoly rents. Indeed, in a range of areas NCP has resulted in liberalisation with significant implications for the underlying value of publicly owned organisations (eg, electricity retailers and generators[24] and Australia Post[25]) and returns to governments.

The potential decline in the value of publicly owned organisations and shareholder returns as such organisations have become exposed to competition is one of the reasons for the payment by the Commonwealth of NCP-contingent grants to the states and territories:

> Under National Competition Policy, the Commonwealth Government is paying the States and Territories some $16 billion over a nine year period to 2006 for implementation of the full National Competition Policy program. This provides the States and Territories with the flexibility to enable structural adjustment assistance to be provided where appropriate.
>
> Samuel, "Nobody Likes Monopolies — Except Monopolists" presented to the Australian Institute of Company Directors, Melbourne, Monday 26 April 1999, p.6.

3.2.4 To Minimise Systemic Risk and Contagion

In some respects the wagering and interactive gaming markets suffer from systemic and contagion risks similar to those in the financial system.[26] That is, systemic risk is significant:

---

[24] For example, as a result of the NCP reforms in the retail electricity market, "once opened to full competition, the Electricity Retail business [of ACTEW] is likely to encounter difficulty maintaining its viability under current ownership" — DGJ Projects and ABN-Amro, *Scoping Study of ACTEW Corporation*, 1998, p.38.

[25] See the discussion in National Competition Council, *Review of the Australian Postal Corporation Act*, AGPS, Melbourne, 1998.

[26] See Financial System Inquiry, *Financial System inquiry Final Report*, AGPS, Canberra, 1997, pp.363-365.

> because of the potential for financial distress in one institution to be communicated to others. This contagion may result from a loss of customer confidence or because the failure of one institution to settle its obligations directly may cause the failure of other fundamentally sound institutions.
>
> See Financial System Inquiry, *Financial System Inquiry Final Report*, AGPS, Canberra, 1997, p.363.

For example, given the marketing reliance upon the good name of the ACT's regulatory system, a loss of confidence in a sports bookmaker or ACTTAB may lead to a loss of confidence in sports bookmaking more generally in the ACT, and maybe also harm wider perceptions of the integrity of ACT interactive gaming licencees. As a result, this undermining of consumer confidence may threaten the viability of other holders of sports betting licences and interactive gaming licencees. In this way, a problem with one licence holder can be transmitted throughout the ACT's wagering and interactive gaming industries. There is, therefore, a legitimate role for Government to regulate some providers of betting products in order to reduce the risk of the undermining the ACT's good regulatory reputation in wider spheres of betting, and hence reduce the risk of contagion.

4

Chapter Four

A Common Issue — Why Licensing?

Chapter Four

A Common Issue — Why Licensing?

Licensing is a common feature of the regulation of gambling; products are prohibited unless authorised and provided by approved (ie, licensed) individuals or organisations. This chapter (at a very abstract level) considers the appropriateness of licensing gambling providers.

4.1 The Costs and Benefits of the Current Licensing Regime

The broad types of costs and benefits associated with licensing certain types of providers are now well established. In general:

> The regulation of occupations can reduce the likelihood of fraud by unscrupulous practitioners, and can address information failures by providing greater assurance to non-contracting parties who may be incidentally affected by decisions taken on professional advice. Indeed, the main rationale for the registration of occupations is to correct information failures.
>
> Registration can, however, restrict competition by limiting the number of people who are registered to provide a good or service. This can enhance their market power, allowing them to charge higher prices to the disadvantage of consumers.
>
> Office of Regulation Review, *Impact of Mutual Recognition on Regulations in Australia*, AGPS, Canberra, p.14.

The key is to determine the relative weights associated with the costs and benefits of such regulation.

4.1.1 Possible Costs Associated with Licensing

Costs associated with a licensing regime may broadly be classified as:

- *administrative and compliance costs*, both for industry and for those who enforce the regulation; and
- *costs to economic efficiency* which arise from any restriction on competition.

These possible costs are discussed in turn.

Administrative and Compliance Costs

Providers of wagering products incur direct financial costs in complying with licensing requirements imposed by the *Bookmakers Act*. However, the financial cost of a licence is not high, particularly in comparison to some other jurisdictions — see Table 4.1.[27]

[27] The comparison in Table 4.1 may understate the cost, however, because a separate licence is required for each code in the ACT. This issue is discussed further in section 6.1.

Table 4.1

Fees for Bookmakers

	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
Initial	$300	Nil	$210-$380	$95	$275-$285	$100	$62	$1,000
Annual	$300	Nil	$210-$380	$75	$275-$285	$100	$62	$1,000

Note: The initial South Australian fee includes a $20 application fee.

Source: Australian Racing Board, *Analysis of Bookmaking in Australia*, May 1999, p.20.

The ACT Government also incurs direct financial costs in administering the licensing regimes. Again, these do not appear overly onerous in the current circumstances.

Costs to Economic Efficiency

Licensing regimes have, at least in theory, an impact on economic efficiency because they distort underlying supply decisions.

A simple supply and demand model for the supply of wagering products shows the potential efficiency costs associated with a licensing regime — see Figure 4.1.[28]

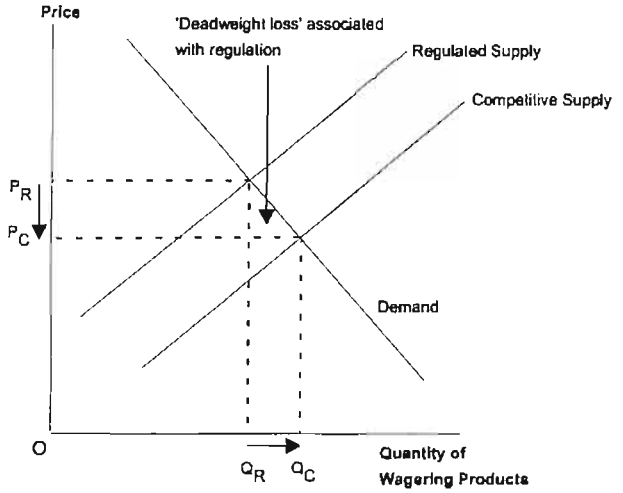
The current market equilibrium point exists with Q_R wagering products supplied at price P_R (ie, prices and quantities under licensing regulation). If the licensing regime is removed the supply curve will shift to the right, entry is easier, creating an expansion of output (Q_C minus Q_R) at a lower price (P_C).

The move from licensing to free entry removes the 'deadweight loss' associated with licensing. The shaded triangle in Figure 4.1 represents a loss (ie, not a transfer between two groups) in efficiency because there are a number of consumers who are willing to pay above the competitive market price (P_C) but below the regulated market price (P_R), but are denied wagering products because licensing creates a minimum price of P_R.

[28] This model most closely approximates the standing bookmakers licensing regime which has no cap on the number of available licences.

Figure 4.1

The Economic Impact of Licensing



Source: Derived from Logan, Milne and Officer, "Competition Policy in Regulated Markets" in James (ed), *Regulating for Competition? Trade Practices Policy in a Changing Economy*, Centre for Independent Studies, Sydney, 1989, pp.115-139 at p.127.

The potential for negative consequences associated with a licensing regime for bookmakers was noted in ACIL's study of the ACT racing industry: "The entry restriction may raise average earnings of remaining/incumbent bookmakers."[29] In addition, ACIL also notes that the restrictions are, "more likely to lower than raise aggregate turnover of bookmaking in the ACT".[30] Such a decline in aggregate turnover may represent a loss in community welfare (ie, a deadweight loss), and the raised earnings represents a transfer from consumers to licensed bookmakers.

At least in the first instance (ie, before taking into account potential quality concerns), the potential winners from the removal of licensing requirements are:

- consumers of wagering products — who would expect to pay lower prices and have wider choices; and
- potential providers of wagering products — who would find it easier (ie, less costly in time and effort) to enter the ACT market.

[29] ACIL Australia, *The Contribution of the Racing Industry to the Economy of the Australian Capital Territory*, Sydney, 1992, p.21.

[30] ACIL Australia, *The Contribution of the Racing Industry to the Economy of the Australian Capital Territory*, Sydney, 1992, p.21.

4.1.2 Potential Advantages of Licensing

> Many of the restrictions in gambling legislation reflect a desire to address actual or perceived social problems ... Licensing restrictions on operators are, in part, a response to the community's desire to minimise the probability that these activities might be involved with criminal elements (for example, as money laundering operations).
>
> National Competition Council, *Assessment of State and Territory Progress with Implementing National Competition Policy — Second Tranche Assessment*, Melbourne, 1999, p.163.

The main benefit claimed for licensing is that the establishment of clear entry criteria ensures that providers of wagering products are not corrupt or incompetent. Furthermore, the threat of license revocation can be used as an enforcement tool in ensuring the maintenance of wagering standards.

This logic — by attempting to control the quality of inputs licensing attempts to improve the quality of these services — suffers from one potential problem; it is not clear whether or not wagering will actually be conducted in an honest and competent manner.

4.2 Alternatives to Licensing

This section explores a number of different approaches that could be employed in place of, or possibly in conjunction with, licensing.

4.2.1 Self–Regulation

Industry self–regulation describes the type of actions or procedures that the industry determines to be appropriate conduct — ranging from simple statements of intent to rules of conduct.

Amongst a number of benefits associated with self-regulation, see Table 4.2, two stand out — self–regulation:

- maximises industry flexibility — it allows for easy adjustment by industry participants to changes in the nature of the industry or occupation; and
- reduces the need for and the cost of government resources spent administering a regulatory framework.[31]

[31] However, at least some of the costs will be transferred to the industry.

Table 4.2

Potential Advantages and Disadvantages of Self–Regulation

Advantages of Industry Made and Enforced Rules	Disadvantages of Industry Made and Enforced Rules
They are more likely to be observed because they are made by those to whom they apply.	There are no legal remedies for breaches of industry developed codes.
They utilise the insiders' expertise and experience in the formulation of codes or agreements.	They could be used to promote anti–competitive behaviour.[32]
They can be more responsive and flexible than regulation with changes and updating occurring more often.	They impose monitoring cost which are incurred by the industry or professional association.
They can allow for innovative behaviour of industry participants.	Compliance may be low if a sense of commonality amongst those affected is not present.
They have the agreement of major industry participants and therefore awareness and compliance is likely to be higher.	They may implicitly create barriers to entry.
They provide a market solution for the regulation of ethical behaviour.	
They are cheaper for governments to develop and monitor as those being regulated bear the cost of regulating.	
They may provide a dispute resolution mechanism, via independent arbitrators, the ombudsman, or industry councils.	

Source: The Allen Consulting Group

However, for self–regulation to be effective:

- there must be sufficient power and commonality of interest within an industry to deter non–compliance; or
- the cost of non–compliance must be small.

While self-regulation has been adopted for bookmakers in some jurisdictions — see Box 4.1 (next page) — neither of these criteria are wholly satisfied with respect to bookmaking in the ACT:

- while the thoroughbred code is of a significant size the two remaining racing codes are relatively small and lacking in resources, possibly making the costs of administration prohibitive; and
- the risks associated with regulatory failure may be so significant — both directly and indirectly — that complete self-regulation is not an appropriate regulatory approach.

[32] Since the *Competition Policy Reform Act 1995* all sectors of the economy are subject to the *Trade Practices Act 1974*. Any anti–competitive self–regulatory codes would need to be authorised under the *Trade Practices Act 1974*.

Box 4.1

Industry Regulation of Bookmakers

In three jurisdictions — New South Wales, Queensland and South Australia — the licensing of bookmakers is principally carried out by organisations other than the relevant governments.

For example, in NSW a number of Racing Associations may license bookmakers to offer betting services on thoroughbred racing. The NSW Government issues a licence number, but this is only really for taxation purposes. A recent change means that a licence obtained through any Racing Association may be used anywhere in NSW. Applicants must satisfy certain probity requirements, such as criminal, asset, and character checks. Previous experience is also taken into account, including bookmaking in other codes, although experience in other codes is not a guarantee of the applicant's success in obtaining a thoroughbred bookmakers licence. In addition, thoroughbred bookmakers licences are not recognised by harness or greyhound racing bodies in NSW. This suggests that the degree of probity may vary across codes and that self-regulation may still retard the free movement of bookmakers between codes.

Source: Discussion with the Thoroughbred Racing Board

While complete self-regulation is not appropriate as a general response to the current licensing regime for bookmakers, in certain circumstances it may be reasonable to rely on self-regulation as a complement to other regulatory tools. For example:

> Although the self-regulation techniques do not stop the addict from gambling, they do provide an initial means of protection for people who are concerned about others' gambling habits. For parents who do not want their children to gamble, the filtering programs provide a mechanism for preventing the behaviour. Furthermore, children will not be able to do at school what is not allowed at home if the schools have filtering programs. Finally, filters provide employers a means of curbing non-work related activities of their employees.
>
> Montpas, "Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation will not Stop the Newest Form of Gambling" (1996) 22(1) *University of Dayton Law Review* 163 at 187.

Self–regulation can also be used as a complement to government regulation. For example, a dual regulatory approach to licensing (ie, where industry and the government jointly have a role in licensing) can be adopted when:

- the potential for regulatory failure is not so significant;
- where the consequences of such regulatory failure are relatively confined; and
- where the industry regulator bears some ongoing responsibility for the performance and probity of the regulated party.

Such a dual regulatory approach exists at present with the racing clubs, in effect, jointly regulating standing bookmakers.

4.2.2 Negative Licensing

A negative licensing scheme is one which removes the licensing restriction altogether, and permits a person to provide wagering products without any formal test of competence. However, under negative licensing the Government still retains the authority to withdraw the right to provide

wagering services if that person subsequently fails to meet minimum standards of work and conduct.

Negative licensing can take two forms — where there are:

- no entry requirements necessary to get a licence (ie, just sign up); or
- restrictions on entry based on certain negative characteristics (eg, serious criminal convictions) rather than specification of any positive requirements for licensing (eg, educational requirements).

Advantages of negative licensing may include:

- lower compliance costs — negative licensing imposes fewer costs on participants which should result in lower prices for consumers;
- lower administrative costs — whilst the Government would still incur some continuing administrative costs under a system of negative licensing, compared to costs required to maintain a system of 'positive licensing' there would probably be a small net saving to the Government;
- lower entry barriers — costs of entry are lower, and dominant industry bodies can not seek to restrict competition by setting too stringent conditions of entry; and
- the ability to 'punish' contravention of licence conditions — while registration alone may not ensure high quality, the threat of licence revocation may be enough to provide gambling providers with the incentive to provide honest and high quality services. In essence, this would amount to a system of free entry and enforced exit.

In comparison, the potential disadvantages of negative licensing include:

- as no positive screening occurs the number of inappropriate participants initially entering an industry may be higher than under a registration process;
- some wagering providers may be able to operate undetected or act inappropriately before they are detected. That is, licence removal will only occur after the detection of a breach. This is potentially a significant disadvantage given the importance of maintaining the ACT's reputation as a transparently regulated industry; and
- enforcement activities may need to be increased, thereby increasing monitoring costs.

Parties to the review generally felt that negative licensing was inappropriate as the costs of allowing fraudulent behaviour to occur before the removal of the licence was too significant.

4.2.3 Co-Regulation

Co–regulation is a system of government regulation in which administrative responsibility is handed over, to a greater or lesser degree, to the industry itself.

In the ACT a co-regulatory system could be structured so that:

- the ACT Government would issue requirements for licensing and practice regulations;
- the licensing of bookmakers could also be undertaken by, for example, the ACT Racing Club (ACTRC);
- alleged contravention of the *Act* could be investigated by the ACTRC, and possibly even decided by the ACTRC in the first instance; and
- the operations of the ACTRC could be monitored by the ACT Government (ie, the GRC).[11]

The principal benefit of co-regulation is that it harnesses the industry's desire to be regulated and puts the onus on the industry to take on more responsibility. A co-regulatory approach need not lessen standards — the Government's ongoing need to protect consumers can be met by establishing the ground-rules such as the rules for betting.

A problem with co-regulation in the ACT is that the ACTRC does not represent the interests of the racing clubs more generally, and the two lesser codes probably lack the resources to become regulators themselves.

While co-regulation is often hailed as a more cost-effective form of regulation, in many cases the cost savings are to the government, but such costs would, in practice, simply be transferred to the industry and then on again to consumers.

4.2.4 Certification

One of the most common alternatives to licensing is certification. Under a certification regime anyone is allowed to provide wagering services, but formal certificates of competency are provided to those providers who desire them and can meet the necessary standards.

Certification standards tend to be similar to those in place under a licensing regime. Under a licensing arrangement, however, only those individuals who meet the requirements are allowed to practice; certification does not preclude practice by non-certified professionals.

Certification has a number of advantages over licensing. One of the most important benefits of certification, as opposed to licensing, is that it allows consumers greater freedom of choice. An individual could choose either a non-certified provider, or a (presumably less risky) certified provider. Friedman strongly supports the freedom to chose under a certification regime:

> If the argument is that we are too ignorant to judge good practitioners, all that is needed is to make the relevant information available. If, in full knowledge, we still want to go to someone who is not certified, that is our business.
>
> Friedman, "Occupational Licensure", in *Capitalism and Freedom*, Chicago, 1962, pp.137–160 at p.149.

[11] To see how such a supervisory arrangement works in the Victorian co-regulatory regime for lawyers see The Allen Consulting Group, *Restrictions on the Availability of Clerking Services: A Competitive Analysis*, Report to the Victorian Legal Ombudsman, 1998.

A system of certification, however, is not necessarily a desirable alternative to licensing:

- like licensing, mandatory entry requirements for a certificate may not increase service quality if they focus on inputs;
- certification may not lessen quality problems associated with externalities.[34] A consumer who chooses a non-certified provider, for example, may not take into account the possible effect of his or her decision on others (eg, the risk that the provider will cause problems for third parties); and
- certification may be undesirable when the costs of an inaccurate assessment of quality is high. As a certification regime provides no information on the quality of a non-certified provider, a consumer may not know if the service of an uncertified provider is acceptable or extremely poor. If a consumer chooses a non-certified provider who is incompetent, a consumer could incur significant costs. The argument against certification in this case, however, neglects the fact that the individual can choose either a certified provider with a lower risk of poor quality or a non-certified provider with a higher risk of poor quality. Unless the consumer is unaware of the increased risk associated with non-certified provider, the individual that chooses the lower priced, higher risk, non-certified provider must prefer this option. Such an informed consumer would be worse off under a regulatory framework, such as licensing, that did not allow choice.

4.2.5 Monitoring the Quality of Outputs

To avoid the ambiguous quality effects that stem from mandatory entry requirements, it may be appropriate to implement a system of service monitoring. Such a system would set standards of competence, monitor to insure compliance with standards, and penalise those who fail to comply. The aim of such a regime would be to lessen providers' incentives to engage in undesirable activities. Output monitoring may also be used in conjunction with licensing, certification, or registration.

The effectiveness of output monitoring, however, is dependent on the degree to which regulators:

- can (and do) monitor outputs; and
- apply appropriate penalties for non-compliance.

Output monitoring can be costly to administer in comparison to certification and licensing. A staff must be employed (either directly or by contracting out the work) to monitor the performance of providers.

Quality monitoring can be used in conjunction with a number of different options. Its advantage is that it directs government oversight at the actual service being delivered rather than factors that have only a (possibly weak) link with the quality of wagering services.

[34] Wolfson, Trebilcock & Tuohy, "Regulating the Professions: A Theoretical Framework", in Rottenberg (ed), *Occupational Licensure and Regulation*, Washington DC, AEI, 1980, p.205.

4.3 Conclusion

Table 4.3 sets out the major advantages and disadvantages of licensing alternatives as they may be applied to the regulation of wagering in the ACT.

Table 4.3

Advantages and Disadvantages of Licensing Alternatives

Option	Advantages	Disadvantages
Self-regulation	Likely to be flexible with no public restrictions on entry by wagering providers.	Insufficient commonality of interest among gambling providers to self-regulate to a particular standard of service. There is a significant risk for consumers and the integrity of the ACT's gambling-related regulatory regimes in allowing at least one 'bad' operator.
Licensing	A signal to consumers that past behaviour has been in line with community expectations. The threat of licence revocation of a licence acts as an incentive for future behaviour to be in line with community expectations.	Licences have a tendency to be focussed on issues that restrict competition without any (or few) offsetting public benefits.
Dual licensing	A means of sharing the administrative costs between government and the private sector. Provides the ability to regulate the gaps that self-regulation might miss, overlaid with the flexibility of self-regulation.	To be effective there must be at least one industry body (i) with sufficient resources to bear the administrative costs and (ii) interest in the quality of wagering. Consumers may mistake the self-regulation as being explicitly government-endorsed
Negative licensing	Less restrictive than licensing as entry is relatively automatic.	There is a significant risk for consumers and the integrity of the ACT's gambling-related regulatory regimes in allowing even one operator to breach the licence conditions.
Co-regulation	No significant advantage in the case of wagering regulation.	This option is hampered by the lack of a body (or bodies) of sufficient size and coverage (ie, that sufficiently represent the broad interests of the industry).
Certification	Allows consumers to choose between certified (ie, government sanctioned) providers and non-certified providers.	Certification may not lessen quality problems associated with externalities, and may be undesirable when the costs of an inaccurate assessment of quality is high.

Source: The Allen Consulting Group

The analysis presented in this chapter and summarised in Table 4.3 suggests that while there are significant theoretical concerns with licensing (because

of their restrictive impact on competition), licensing is likely to be an appropriate regulatory tool in the case of wagering. In particular, the costs (ie, the financial costs to consumers and costs associated with a loss of consumer confidence in ACT wagering generally) of inappropriate (eg, fraudulent or incompetent) wagering operations are likely to be so significant that it is relevant to set up a screen whereby clearly incompetent or fraudulent/criminal operators are denied the right to provide wagering services.

While the Group endorses licensing as a regulatory tool in this case, licensing criteria should be implemented in a manner that seeks to minimise market failures while also minimising administrative and economic costs associated with the licensing regime. In some cases this may mean outright government licensing, and in others a dual licensing approach may be suitable.

5

Chapter Five

The Regulation of ACTTAB Limited

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The Regulation of ACTTAB Limited

5.1 Background

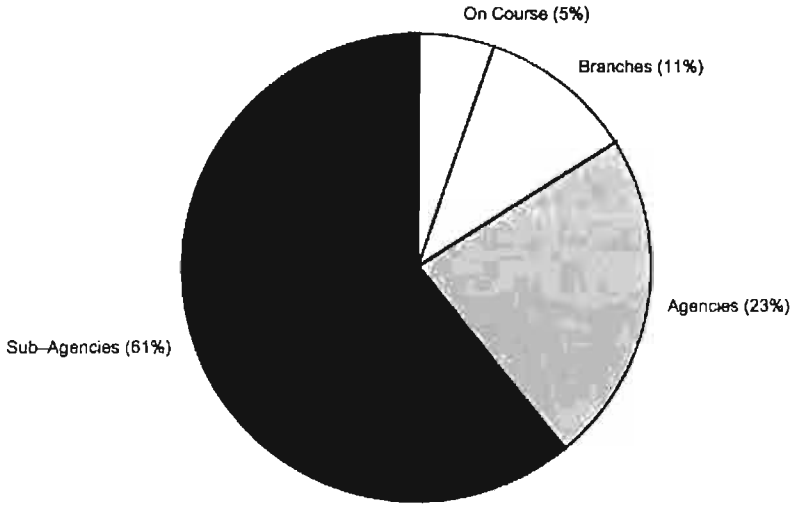
ACTTAB was established in 1964 to provide a legal off-course betting system. It is wholly owned by the ACT Government.

ACTTAB's principal activity is the provision of totalisator betting services. It has, in the ACT, the exclusive right under the *Betting (ACTTAB Limited) Act* to conduct or provide totalisator betting services for races held whether within or outside the ACT.[55]

ACTTAB distributes its wagering products through a number of alternative channels. Figure 5.1 shows the make-up of ACTTAB's 56 physical distribution points. In addition, ACTAB operates a phone betting service.

Figure 5.1

ACTTAB Distribution Points as at 30 June 1998



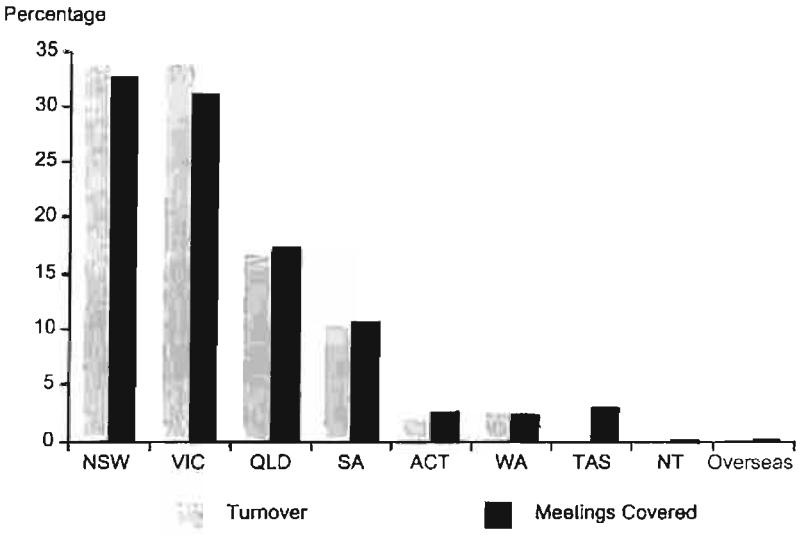
Source: ACTTAB, *Annual Report* 1998, p.26.

While the majority of ACTTAB's customers are likely to be ACT residents, the vast majority of wagers are placed on interstate or overseas races, with ACT races representing only 2.6 percent of races covered by ACTTAB and two percent of ACTTAB's turnover — see Figure 5.2.

[55] Totalisator (or parimutuel) betting involves the placing of the money from bets into a pool for each bet type on each race. After the deduction of approximately fifteen percent for tax, race club contributions and operating costs, the remainder of the pool of money is shared by those punters selecting winners, placegetters or correct combinations in the case of multiple bet types such as quinella, trifecta and doubles.

Figure 5.2

Geographic Focus of Wagers Placed with ACTTAB (1997-98)



Source: ACTTAB, *Annual Report 1998*, p.26.

5.2 ACTTAB's Exclusive Licence

5.2.1 What Does ACTTAB's Exclusive Licence Cover?

Under the *Betting (ACTTAB Limited) Act* ACTTAB has an exclusive and non-transferable licence to conduct or provide totalisator betting services. There is some doubt, however, as to what precisely the exclusivity provision covers.

There is an implicit assumption that ACTTAB has a monopoly in both off-course and on-course totalisator betting services. ACTTAB itself asserts in its submission that, "ACTTAB is the only body that can operate totalisator or parimutuel betting in the ACT, both on-course and off-course.".[36]

However, ACTTAB's licence does not automatically provide ACTTAB with a monopoly over all totalisator betting services.

According to legal advice sought by the ACT Government, ACTTAB's exclusive licence granted under the *Betting (ACTTAB Limited) Act* merely gives ACTTAB the exclusive right to run a totalisator betting service operated by ACTTAB. The legislation does not prevent the Government granting a licence to another organisation under either the *Pool Betting Act* or the *Bookmakers Act* to provide totalisator betting.[37]

While the legal advice was in relation to the possible introduction of a totalisator sports bookmaker, the same logic could be applied just as

[36] ACTTAB submission, p.7. See also PKF Consulting, *ACTTAB Limited — Scoping Review of Options*, 1998, p.36.

[37] Correspondence between ACT Government Solicitor and ACT Bureau of Sport, Recreation and Racing, 13 November 1997.

effectively to providers of totalisator betting services in general (ie, to racing–related parimutuel wagering).

While the Group is satisfied by the Government's legal advice, it would appear somewhat unorthodox for the Government to maintain ACTTAB's apparently exclusive licence and then issue competing licences through alternative legislation. This approach would be problematic as direct competitors providing identical products would operate under different:

- regimes and taxation; and
- licensing criteria.

Rather than seeking to circumvent ACTTAB's exclusive licence by legal approaches that could be challenged in court by ACTTAB, the Group considers it most appropriate to assume that ACTTAB has an exclusive licence in all totalisator betting services and address the issue of exclusivity directly.[18]

5.2.2 What Market Power Does the Exclusive Licence Provide?

In order to assess the market power provided by ACTTAB's exclusive licence it is necessary to define the appropriate market. This section lays out the basic principles which can be employed to define a market, and raises a number of peculiarities that may be pertinent to the assessment of ACTTAB's market power.

An Overview of the Principles Underlying Market Definition

'Substitution' is the key concept under-pinning the identification of a market.

When defining the market boundaries, both demand–side and supply–side substitution are relevant:

- demand–side substitution involves purchasers of a good switching their demand to another good in response to a change in price; and
- supply–side substitution, on the other hand, occurs when other producers or suppliers alter their production or distribution to supply in response to a change in price.[19]

While a prime focus of most market-related inquiries is upon the *product* boundaries (ie, the identification of substitutable goods and/or services in the market), substitutability also has spatial, functional and temporal aspects. That is, in delineating a market, an analysis is required not only of the availability of product substitutes, but also:

- the geographical area within which these substitutes for a good are an effective constraint on the market power of sellers of that good;

[18] See Section 5.2.5.

[19] This description follows the tradition of introducing market definition in relation to price changes; non–price substitution is also relevant.

- the potential for competition at a different level of supply (eg, retail competition may be different to wholesale competition) to constrain market power; and
- the time-frame over which competitive constraints can emerge.

The classic statement setting out the centrality of substitution as the key to market definition was provided by the Trade Practices Tribunal in these terms:

> A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them (if there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives. It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction?
>
> *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 517.[40]

This statement has become the foundation upon which many subsequent market analyses have relied.

To assist in determining market boundaries the Australian Competition and Consumer Commission (ACCC), and the both the Department of Justice and the Federal Trade Commission in the United States, use the 'hypothetical monopolist' approach to assess the outer boundaries of the relevant market. Picking up on the Tribunal's approach to ask what would happen if a firm 'gave less and charged more',[41] the hypothetical monopolist approach seeks to identify the:

> area of product, functional and geographical space within which a hypothetical current and future profit maximising monopolist would impose a small but significant and non–transitory increase in price (SSNIP) above the level that would prevail absent the merger.
>
> Australian Competition and Consumer Commission, *Merger Guidelines*, para 5.46, available at http://www.accc.gov.au. Footnotes omitted.

Although it is vital to make an assessment of the appropriate market, the definition of a market is not an end in itself. Rather, an assessment of the market's boundaries should be regarded a tool under which to assess the particular question at hand.

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[40] Woodward J, President; Shipton and Brunt, Members). This statement was reaffirmed in the joint judgment of Mason CJ and Wilson J, and also by each of Dawson J and Toohey J, in *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited* (1989) 167 CLR 177.

[41] *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 517.

Given this utilitarian purpose it is likely that there will be legitimate differences of opinion as to the appropriate market boundaries. This was noted in a number of judgements in the seminal *Queensland Wire Industries*:

- Dawson J noted that, "A question of degree is involved — at what point do different goods become closely enough linked in supply or demand to be included in the one market — which precludes any dogmatic answer."[42]
- Deane J referred to the involvement of, "value judgments about which there is some room for legitimate differences of opinion".[43]

In Which Markets Does ACTTAB Operate?

The most contentious issue in market definition is the product boundary.

Wagering has traditionally been seen as a different form of gambling than gaming (principally EGMs), with lotteries, kenos and other games forming their own market.

However, a number of submissions argued that these distinctions are breaking down and that ACTTAB now competes with:

- standing bookmakers;
- sports betting bookmakers in the ACT and elsewhere;
- TABs in other jurisdictions;
- electronic gaming; and
- casino games.

For example, ACTTAB's submission stated:

> The truth is that there is a very healthy and vigorous level of competition in the industry, both between ACTTAB, licensed bookmakers and the holders of sports betting licences, and between them and all the other various alternative forms of gambling that are available in the ACT including the casino, licensed clubs, lotteries, and through telephone betting and Internet accounts with other interstate TABs and sports bookmakers.
>
> ACTTAB submission, p.8.

Similarly, ACIL supported a wide market definition, and referred to work done by the Centre for International Economics to justify its view:

> In its review of the proposals for the privatisation of the NSW TAB, the Centre for International Economics (CIE) considered that TAB Ltd customers were also potential customers — in varying degrees — of a range of other betting and gambling operators. They included:
>
> - interstate totalisators, which can and do accept bets from NSW residents by telephone;
> - bookmakers both in NSW and interstate; and
> - lotteries, casinos and gaming machine operators.

[42] *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) 167 CLR 177 at 199 per Dawson J.

[43] *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) 167 CLR 177 at 196 per Deane J.

> Moreover, the CIE concluded that competition between the various forms of gambling had increased in recent years. This was due to the proliferation of the number of Lotto operators and scratch lotteries, the extension of gaming machines to hotels, the introduction of Keno and sports betting, and the opening of the Star City casino.
>
> ACIL submission, pp.10-11.

In its recent second tranche assessment the NCC appeared to support some variant of this wider view of the market when it stated that:

> TABs face competition from a range of providers of gambling services, including other jurisdictions' TABs. While this competition does not take exactly the same form, for example, other jurisdictions' TABs are accessible by telephone rather than through a physical presence, the Council accepts that each jurisdiction's TAB is not a monopoly provider of gambling services.
>
> National Competition Council, *Second Tranche Assessment*, AGPS, Melbourne, 1999, p.80.

Indeed, some would go further to call parimutuel wagering just another form of entertainment that competes with an even wider range of leisure activities (eg, going to the movies).

The Group is very cautious in favouring a wide market definition. For example, applying the SSNIP,[44] were ACTTAB to increase its price[45] by five percent — from 14.4 percent of a wager[46] to 15.12 percent — for a sustained period of time, would:

- consumers switch to alternative forms of gambling?
  - Following consultations the Group suggests that consumers are not likely to switch to EGMs or other non-wagering forms of gambling in response to such a price rise.
  - Furthermore, discussions with parties suggest that consumers who follow racing are unlikely to switch their interest, and hence betting, to sports in place of racing.
  - Consumers who currently use phone accounts may establish phone accounts with interstate TABs and may divert some or all of their parimutuel wagering to these accounts. Such switching consumers are likely to be high-volume regular punters.
  - There may be some substitution to fixed odds betting. Such a switch, however, is constrained by the fact that the majority of consumers place bets at retail outlets and would probably be unwilling to switch to the use of the phone and Internet or attend the Betting Auditorium at the ACTRC or the betting rings at the three racecourses.
- gambling suppliers be attracted to the ACT region, or expand their ACT regional operations?
- the Group considers it unlikely that a five percent increase in the price of ACTTAB's parimutuel services would spark new or expanded entry by bookmakers, and TABs are prohibited from entering the ACT.

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[44] It should be remembered that the SSNIP test is purely an analytical tool and it is not relevant for the sake of testing whether ACTTAB is actually able to increase its price. In reality, ACTTAB cannot increase its prices without the agreement of its pooling partner, (SuperTAB).

[45] The 'price' refers to the percentage of the pool extracted by ACTTAB prior to distribution to wagerers.

[46] Productivity Commission, *Inquiry into Australia's Gambling Industries: Draft Report*, Canberra, 1999, p.13.

The Group considers that a narrower approach to market definition is supported by the comments of the ARB: "Bookmakers compete aggressively between themselves and with punters, totalisators and illegal betting operators."[47] While the ARB also singles out a range of potential competitive threats, including EGMs, these are viewed as being effective in the 'long term',[48] and in the Group's opinion will not form part of the market for the foreseeable future.

Like many businesses in the ACT, the appropriate market boundary probably extends to include Queanbeyan in NSW — this is referred to as the ACT region.

From a functional perspective, ACTTAB operates only in the retail market — it relies on SuperTAB for the provision of the wholesale services (ie, the parimutuel pool).

As a result of the foregoing discussion the Group considers there to be a market for racing–related wagering products in the ACT region.[49]

Does ACTTAB Have Market Power?

While ACTTAB may not be a monopoly provider of racing-related wagering products in the ACT region there are significant areas (ie, sub-markets) of wagering where it does enjoy a monopoly position, namely on-course and retail (off-course) totalisator betting.

As quoted earlier, ACTTAB stated the following in defence of existing competition in the industry:

> The truth is that there is a very healthy and vigorous level of competition in the industry, both between ACTTAB, licensed bookmakers and the holders of sports betting licences, and between them and all the other various alternative forms of gambling that are available in the ACT including the casino, licensed clubs, lotteries, and through telephone betting and Internet accounts with other interstate TABs and sports bookmakers.
>
> ACTTAB submission, p.8.

The ACTTAB Agents Association went even further, suggesting that competition may have already gone too far:

> There is already substantial competition between wagering outlets in the ACT (ie. 18 Agencies and Branches, a large number of Pubtabs and Clubtabs, the Auditorium and Bookmakers. Indeed, it is arguable that the substantial and excessive proliferation of Pubtabs and Clubtabs in the ACT has resulted in competitive pressures going too far. Average betting turnover per outlet is lower in the ACT than in the rest of Australia and full Agents are not able to secure a sufficient income.
>
> ACTTAB Agents Association submission, p.1.

Both these statements imply that ACTTAB's exclusive licence provides it with little or no market power.

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[47] Australian Racing Board, *Analysis of Bookmaking in Australia*, May 1999, p.5.

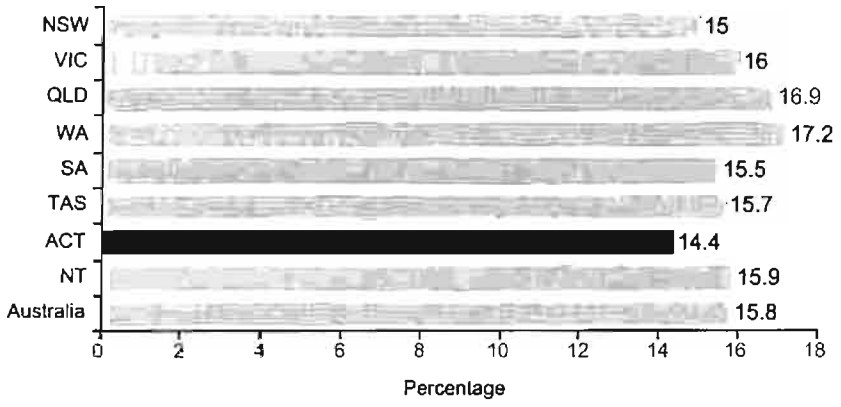
[48] Australian Racing Board, *Analysis of Bookmaking in Australia*, May 1999, p.5.

[49] This includes interstate and overseas providers who are accessible to local wagerer by phone.

Indeed, looking at the Tasmanian Gaming Commission's estimates of the prices[50] of parimutuel wagering in different jurisdictions it is reasonable to suggests that ACTTAB is more price-competitive than other Australian TABs — see Figure 5.3. The Group suggests that this low price is to some extent the product of the ACT facing greater pressure because of the ACT's location within NSW and hence within the NSW TAB's geographic market.

Figure 5.3

The 'Price' of a Parimutuel Wager (1997-98)



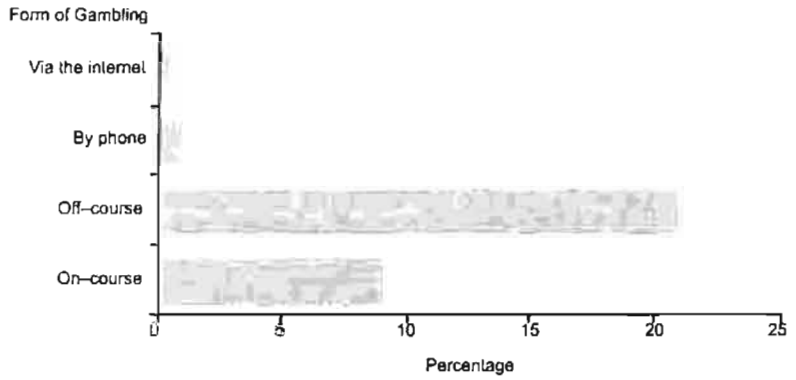
Note: 'Price' refers to expenditure as a percentage of turnover.
Source: Tasmanian Gaming Commission, 1999.

However, off-course betting, where ACTTAB and its agents enjoy exclusive rights, is the most prominent form of betting and easily surpasses on-course betting, or betting by telephone or over the Internet. Figure 5.4 shows the percentage of people who bet on (ie, of all people who bet in any form in the last twelve months approximately nine percent bet on racing on-course).

[50] As noted in footnote 44, 'price' refers to the percentage of the pool extracted by a TAB prior to distribution to wagerers, or put another way, the consumer expenditure (bets minus winnings) as a percentage of turnover.

Figure 5.4

Method of Wagering by ACT Adults Gamblers Who Bet on Racing in the Last 12 Months



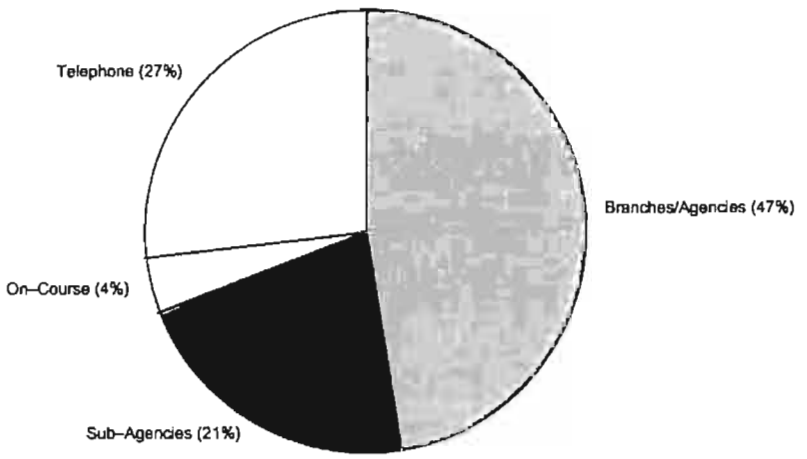
Note: Wagering via the Internet is less than 0.5 percent.

Source: Productivity Commission, *Inquiry into Australia's Gambling Industries: Draft Report*, Canberra, 1999, p.B.2.

Furthermore, just over 73 percent of turnover passes through physical distribution channels — see Figure 5.5. Tellingly, just under 69 percent of ACTTAB's turnover came through distribution channels unavailable to interstate TABs and standing and sports bookmakers.

Figure 5.5

Percent of Adults Gamblers Who Participated in the Last 12 Months



Source: ACTTAB, *Annual Report 1998*, p.15.

The restriction on direct competition can allow ACTTAB to provide its services at higher prices than in a more competitive market. This allows ACTTAB to generate a return over and above that return which would induce a competitive provider to supply the existing level of service.

5.2.3 Costs Associated with ACTTAB's Exclusive Licence

From the viewpoint of recreational gamblers, exclusive licensing reduces the benefits they would otherwise obtain. The exclusive licence clearly affect the options open to consumers, in terms of where, on what events and how they may make bets, and the prices at which betting is made available.

Although wagerers can bet by telephone, they cannot choose between competing (off-course) TABs in the same jurisdiction, and so any scope for the establishment of lower cost operators (ie, TABs with scale economies) who might offer better odds or service is forgone.

The overall impact of the exclusive licence is best summed in one submission:

> The imposed monopoly restricts innovation and consumer choice without significant benefits that may arise from further competition in the market. Restricting competition promotes inefficient market behaviour.
>
> McNamara submission, p.2.

ACTTAB has admitted that, should its exclusive licence be removed, at least two of the three major TABs would enter the ACT market.[51] One would expect that this would have a positive influence in reducing the 'price' of wagering.[52] As demand is price elastic,[53] price reductions should lead to greater turnover and ultimately government revenue.

5.2.4 Is the Restriction to Competition Justified?

Under NCP there is a presumption against the retention of legislation which is restrictive of competition unless such restrictions can be justified as being in the public interest. In its submission, ACTTAB identified a number of public benefit justifications for its exclusive licence. These are discussed below.

Ensure Product Quality and Consumer Protection

The initial justification for TABs was to combat the rise of illegal or SP bookmaking. According to the ACTTAB's submission:

> The introduction of TABs was pressed not to encourage betting but rather to divert the illegal traffic into channels in which it could be controlled, and from which some profits could be used for the good of the community and of the racing industry.
>
> ACTTAB submission, p.5.

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[51] ACTTAB submission, p.12.

[52] For discussion of the positive impact that the entry of a second and third competitor can have on prices see the study of geographically isolated monopolies, duopolies and oligopolies in retail and professional services conducted by Bresnahan and Reiss — "Do Entry Conditions Vary Across Markets?" (1987) 3 *Brookings Papers on Economic Activity* 833; "Entry in Monopoly Markets" (1990) 57(4) *Review of Economic Studies* 531; and "Entry and Competition in Concentrated Markets" (1991) 99(5) *Journal of Political Economy* 977.

[53] Morgan & Vaschè, "A Note on the Price Elasticity of Demand for Wagering" (1982) 14 *Applied Economics*, p.469 at 472-473; and Productivity Commission, *Inquiry into Australia's Gambling Industries Draft Report*, AGPS, Canberra, 1999, p.5.8.

It is difficult for the ACTTAB to argue that its role is not to encourage wagering given the principal objective of a Territory owned corporation such as ACTTAB is to:

> carry on business successfully and, to this end –
>
> (a) to operate at least as efficiently as any comparable business; and
>
> (b) to maximise the sustainable return to the Territory on its investment in the corporation in accordance with the performance targets contained in the latest statement of corporate intent of the corporation.
>
> Section 7, *Territory Owned Corporations Act 1990.*

Curbing illegal and disreputable activity off–track is still a valid objective, but it is one that requires probity, not necessarily exclusivity.

It is likely that only having one licensed off-course operator facilitates probity because of the small number of venues involved. Effectively this is an argument based on the benefits of achieving regulatory economies of scale. But these economies have to be set against inefficiencies which arise from having a single exclusive licence. As discussed earlier, these include reduced choice and convenience to wagerers and the price effects of having an exclusive licence. It is the balance of such costs and benefits which is important. The PC states:

> Governments do not argue that there should only be a single insurance company or bank because of the economies which would be involved in prudential checking or tax auditing — the offsetting benefits in such areas as price, choice and savings in time are indisputable.
>
> Productivity Commission, *Inquiry into Australia's Gambling Industries Draft Report*, AGPS, Canberra, 1999, p.13.19.

The Group suggests any extra regulatory costs associated with a reduction in exclusivity:

- could be met by a new entrant; or in any case
- would cost less than the public benefits that would flow from increased competition.

Furthermore, as long as ACTTAB remains the exclusive provider of off-course betting services charging above normal prices, the incentive for illegal gambling to provide services at a lower rate will remain. Introducing competition in off-track betting services will inevitably lead to competitive prices for betting services, which will lessen the incentive for illegal activity. This was the incentive for competitive provision of legal off-course betting in a number of overseas jurisdictions:

> In Britain, off-course monopoly betting was placed largely in the hands of private betting shops so that there was no competitive advantage for illegal bookmakers In the United States, off-track betting was legalized in New York and Connecticut in the early 1970's but has not spread into other jurisdictions. Illegal horse betting activity continues to thrive in most of the other states where there is a traditional reluctance to facilitate regular, organized gambling of this type.
>
> McMillen and Eadington, "The Evolution of Gambling Laws in Australia" (1986) 8 *New York Law School Journal of International and Comparative Law* 167 at 180-181.

Ensuring product quality and consumer protection, while important in it own right, is not a valid justification of ACTTAB's exclusive licence.

Support the ACT Racing Industry

ACTTAB's exclusive licence has been justified as the best means of supporting the ACT racing industry. Indeed, in its submission, ACTTAB asserted that one of the generally recognised objectives of the present regulatory regime is to, "support the ACT racing industry predominantly by a major financial contribution related to ACTTAB turnover".[54]

The conditions governing ACTTAB's exclusive licence includes the requirement that it contributes funds to the thoroughbred, harness and greyhound industries. A similar requirement is placed on all TABs in Australia, whether government-owned or private.

This requirement reflects the fact that, unlike sports betting on cricket or soccer, wagering is the major reason for racing to take place. If those providing wagering services were not to contribute to the racing industry, the industry itself would decline. The nature of racing events is such that it is difficult to exclude parties from utilising the primary product of the event — the outcome or result of a race. As such, it is possible that providers of wagering products could 'free ride' on the racing industry, taking bets on races without contributing to the costs of running them. Such a situation could lead to there being too few race meetings and a smaller racing industry.

Exclusively licensing ACTTAB, heavily restricting the competition it faces, and requiring it to direct some of its revenues to the racing industry are the means by which this problem is currently addressed. While the PC has acknowledged the need for ongoing support for the racing industry, it has questioned whether a more suitable instrument can be found:

> While it is a convenient and effective way of raising tax revenue and providing secure funding to the racing industry (and may have other benefits with respect to assuring punters of the integrity of the betting activity), it is a blunt instrument for overcoming such 'market failure'.
>
> In short, there is still a case for government intervention to overcome the particular market failures that affect the racing industry...But TAB exclusivity and the restrictions which underpin it do not appear necessary to ensure an appropriate level of funding for the racing industry.
>
> Productivity Commission, *Inquiry into Australia's Gambling Industries Draft Report*, AGPS, Canberra, 1999, p.13.21-22.

[54] ACTTAB submission, p.10.

Alternative ways of achieving appropriate funding for the racing industry without restricting competition may need to be canvassed. This is discussed in section 5.2.5.

Maintaining the Value of ACTTAB as a Significant Public Asset

ACTTAB argues that any easing of the current restrictions might have negative implications for the value of ACTTAB as a significant public asset. As discussed in sections 1.1 and 3.2.3, the principle of competitive neutrality requires that a government-owned enterprise be treated in the same manner as a privately owned enterprise. Many recommendations resulting from NCP reviews have had negative implications for businesses, both private and publicly-owned. The underlying aim is to ensure that the community's resources are used as efficiently as possible. Therefore maintaining the value of an enterprise is not a valid justification, *per se*, for ACTTAB's exclusivity provision.

5.2.5 The Feasibility of Removing ACTTAB's Exclusive Licence

There are several alternatives to maintaining ACTTAB's exclusive licence that would facilitate greater competition in the provision of betting services in the ACT. This section considers the feasibility of removing the exclusivity provision in ACTTAB's licence and allowing other TABs to operate in the ACT.[55]

In its submission, ACTTAB raised the following objections to this option:

> To allow other interstate TABs to operate parimutuel gambling in the ACT would see a diversion of funds away from the ACT and its racing industry. Moreover, it would reduce the size of the ACT pool and fundamentally threaten its continued viability for the following reasons:
>
> - the TABs in New South Wales and Victoria have been sold to private interests with continuing exclusivity rights (16 and 18 years respectively), and the Queensland TAB is similarly expected to be privatised with ongoing exclusivity rights;
> - if ACTTAB no longer enjoyed retail exclusivity in the ACT, it would have to be expected that at least two of these three major TABs would enter the ACT market;
> - for its part, because of the exclusivity arrangements in place in the other jurisdictions, ACTTAB would have no reciprocal rights or ability to compete with TABs in other States and Territories, particularly not in New South Wales and Victoria; and
> - additionally ACTTAB could not be expected to compete effectively with those other TABs in the ACT, given their ability to leverage much larger pools and to offset their operational and capital costs for the ACT to their exclusive State-wide networks;
> - it would be reasonable to expect that that other TABs would be selective in their intrusion into the ACT market, and would not provide the full range of retail locations, products and services offered by ACTTAB.

[55] Another, less direct approach, is to introduce greater competition by liberalising the operations of bookmakers to provide greater competition for ACTTAB. This option is considered in section 6.3 for standing bookmakers and section 7.4 for sports bookmakers.

- it would thereby reduce the return otherwise made by ACTTAB to the community and the industry; and
- it would reduce the value of ACTTAB as a significant public asset.

ACTTAB submission, p.12.

It is difficult to argue that because ACTTAB suffers from diseconomies of scale[56] that it should be protected from organisations that can reap the benefits of scale economies.

It would appear from the passage above, that ACTTAB's prime concern is in the continued viability of the ACT pool (and consequently of ACTTAB), any decline in which they argue would lead to reduced funds to the ACT and its racing industry. The continued viability of the ACT pool is not in itself a valid objective of maintaining the current restrictions. It is true that, assuming all else stays the same, lower ACTTAB turnover would result in ACTTAB reducing its payments to the ACT Government and to the racing industry.

The problem with allowing new entrants into the market is that an operator could enter the retail market and create a brand following. Then, rather than operating a betting operation in the ACT the operator would direct phone bets to call centres in other jurisdictions and legally transact wagers in other jurisdictions. Thus, even though it may appear to consumers that they are transacting in the ACT the wager would take place interstate, with tax revenue flowing to the interstate jurisdiction and racing industry levies from ACT wagers being used to support interstate racing.

Provided that these payments can be extracted from new entrants to the market the objectives of maintaining Government revenue and funding for the racing industry would be achieved without having to maintain the current monopoly licensing.

In its draft report on gambling the PC[57] identified two ways in which the racing industry could potentially be funded from wagering without relying on exclusivity:

- by clarifying property rights — free riding could be solved by establishing legally enforceable rights to gambling on racing events and allowing any betting agency to negotiate fee arrangements with the holder of those rights (eg, racing clubs). These arrangements would only be applied to those cases where the incentive to operate races came essentially from the wagering and that it would be undermined in the absence of such a mechanism, and not to sporting events undertaken for other reasons (eg, almost all sports). There is however some dispute over the practicalities of this approach, ownership of the racing product being a longstanding area of controversy in the industry; and
- by a self-regulated industry levy — another approach would be to levy all wagering on racing, whether undertaken through TABs or racing and

[56] See ACTTAB, *Annual Report 1998*, Canberra, 1998, p.20.

[57] Productivity Commission, *Inquiry into Australia's Gambling Industries Draft Report*, AGPS, Canberra, 1999, p.13.23.

sports bookmakers, and pay a proportion to the industry. Industry members could determine the size of the levy, reducing the role of government to seeing that the levy is agreed to and enforced. The industry as a whole could therefore decide how much ought to be collected and how it should be used. A similar approach has been used in the United Kingdom explicitly to provide funding for the racing industry.[58] The concern with this approach is that, as a self-regulatory mechanism there is still substantial scope for free-riding.

In addition to these options racing can be funded by:

- direct budget funding — this would involve the ACT government taking on funding responsibility for the racing industry. Such an approach has the benefit of making the forced subsidy transparent, but may in fact reduce the potential funding over the longer term as inevitable budgetary pressures may cause the pruning back of the direct subsidy; and
- a government levy on all TAB operators — this option is merely an extension of current arrangements, but rather than ACTTAB alone supporting the racing industry, ACTTAB and any new parimutuel providers would pay a levy on turnover to the government that is hypothecated to the industry. The major problem with this approach is that there is the potential for leakage of turnover from the ACT to other jurisdictions. For example, if NSW TAB entered the ACT its phone betting could actually direct a caller to a NSW phone center and the wager would be legally transacted in NSW. As a result, the NSW racing industry could receive a benefit from the wager and the ACT racing industry would be bypassed.

Of the four options identified the Group favours the last — a government levy on all providers of parimutuel racing products. The objective would be to impose a levy on incoming entrants equal to the 4.5 per cent of turnover currently being levied on ACTTAB.

If the new entrant establishes a retail (ie, shopfront) presence in the ACT it would be relatively straightforward to apply the turnover levy to it on the same basis as ACTTAB and capture the levy.

Capturing the turnover from wagers made by people in the ACT that are made on the phone or over the Internet is somewhat more problematic. As it currently stands, ACT residents who phone interstate TABs to place bets are considered to be placing a bet in that interstate jurisdiction.

To overcome this 'leakage' the Government could require entrants who wish to operate on a retail (ie, shopfront) basis to develop transparent means of identifying phone and Internet turnover that originates within the ACT. The Government could then levy and tax that turnover. It is not clear how technically feasible such monitoring is:

[58] Field and Dumore, *The Impact of the National Lottery on the Horse Race Betting Levy*, Second Report, Home Office, United Kingdom, 1997, at http://www.homeoffice.gov.uk/rds/pdfs/occ-lottery.pdf.

- interstate TABs know where their clients are resident because the opening of a betting account requires consumers to prove their address. Thus, when a consumer places a bet using an account the TAB knows where the person lives; but
- it would be difficult for the ACT Government to be satisfied that a TAB in another jurisdiction was logging and reporting to the ACT Government all transactions originating from the ACT. It is not clear whether there is a technical solution that would satisfy the Government that such logging and reporting is foolproof.

A significant issue with such a monitoring regime is that the potential new entrants may be double-taxed — paying a racing levy once in their home jurisdiction and once in the ACT — placing them at a commercial disadvantage in comparison to ACTTAB. From the perspective of the ACT market however, all entrants are faced with the same levy. Any additional cost that entrants may incur as a result of being located outside of the ACT becomes purely a commercial concern. There may, however, be two ways around this double levy:

- a new totalisator operator could establish phone and Internet facilities in the ACT and hence be treated as an ACT competitor; or
- a new totalisator operator could explicitly provide that the contractual offer and acceptance have occurred in the ACT.[59] This may not always be possible, depending upon the legislation operating in particular jurisdictions.

Again, the problem with these approaches is that leakage may still occur (and indeed may be encouraged). For example, an interstate operator may set up a small call centre in the ACT but do little to hide an interstate phone number. If there is congestion ACT residents, comfortable with the brand created by the TAB's operation in the ACT, may be inclined to call the interstate number and hence create a revenue leakage from the ACT.

Given the need for certainty in funding of the ACT racing industry, and the lack of certainty as to whether transactions from the ACT could be appropriately monitored, the Group suggests that it would not yet be prudent to open the totalisator market to interstate TABs.[60] However, the ACT Government should reconsider opening the ACT market to interstate operators when it is satisfied that there are ongoing systems and procedures in place that will enable the racing turnover (and any other turnover-based taxes and licences) to be extracted from wagers that originated from within the ACT.

RECOMMENDATION 5.1

The ACT Government should not open the market to interstate totalisators until it is satisfied that there are ongoing systems and procedures in place that will enable the racing turnover (and any other turnover-based taxes

[59] See Carter, *Legal Issues in E-Commerce*, available at http://www.inforich.com.au/fintech/blakes.html (7 August 1999); and Hockey, *A Policy Framework For Consumer Protection In Electronic Commerce — Exposure Draft*, Commonwealth Treasury, Canberra, 1999.

[60] The issue of licensing criteria for totalisator operators is further discussed in section 7.1.2.

and licences) to be extracted from wagers that originated from within the ACT.

This continued restriction on competition is justified on the grounds that it protects the leakage of government revenue and provides ongoing support for the ACT racing industry.

This rationale for ongoing competitive restrictions does not provide any support, however, for restricting new operators that operate only within the ACT. That is, if a totalisator operates a local retail business and/or has all its internet and phone betting facilities in the ACT (like ACTTAB) there is no chance of leakage of revenue to other jurisdictions.

While the Group is mindful that ACTTAB is already of a sub-optimal scale. This suggests that it is extremely unlikely that any other operator would want to establish themselves in the ACT. This is a commercial judgement, and given that the minimum efficient scale of operations change over time in almost all industries, there is no legitimate rationale for the *Act* to restrict the entry of ACT totalisator operators.

RECOMMENDATION 5.2

The Betting (ACTTAB Limited) Act 1964 should be amended to allow the Government to issue new licences to totalisators that are operated wholly within the ACT.

The ACT Government currently receives about $3.5 million from ACTTAB which represents an, "annual licence fee calculated on the basis of 10% per annum of the assessed value of its exclusive licence from time to time".[61] Given a decrease in the value of ACTTAB's licence if other totalisators are allowed to enter the ACT market this value can be expected to decrease substantially.

This licence fee is an attempt by the ACT Government to transfer the excess profits earned because of ACTTAB's legislative market power to the Government. Rather than such an explicit up-front payment the Group suggests that the licence fee should be an operational fee based on turnover (ie, set at three percent turnover to maintain the value of the current licence) and applied to all TABs that operate in the ACT. Given the reduction in market power it is not realistic to seek to extract the licence fee at the monopoly level when there is competition. Therefore, it is reasonable to assume that the ACT Government would reduce the fee, possibly over time, to a somewhat reduced level (say, to two percent) if and when new parimutuel operators are licensed to operate in the ACT.

RECOMMENDATION 5.3

The licence fee for the operation of totalisator services should be based on a percentage of turnover.

[61] ACTTAB submission, p.9.

5.3 Credit Betting

Section 52 of the *Act* provides that: "The Company shall not, without reasonable excuse, provide credit to a person for the purpose of providing funds for betting."

This restricts the ability of ACTTAB to offer credit to customers in circumstances when it feels that credit is appropriate. The restriction is most visible in that bookmakers can accept credit bets.

In outlining the rationale behind restrictions on credit betting, a recent NCP review of Western Australia's (WA's) wagering legislation noted that:

> Bookmakers are currently the only suppliers of gambling products that are able to offer credit. This is largely a reflection of traditions of credit betting with bookmakers and it is unlikely that if regulation of betting activities were to be developed without this history that any credit betting would be permitted due the potential problems of indebtedness of punters.
>
> Office of Racing, Gaming and Liquor, *NCP Legislation Review*, Perth, 1998, p.90.

It is not disputed that maintaining the current restriction on the availability of credit betting is justifiable in that it satisfies the objective of containing the social cost of gambling. Indeed, ACTTAB does not oppose the competitive restriction:

> The prohibition on the provision of credit betting by ACTTAB, while placing it at some commercial disadvantage, is nevertheless a positive commercial safeguard that sets it apart from it competitors and is important to the attainment of the underlying social objectives.
>
> ACTTAB submission, p.11.

Given the underlying social concerns with the widespread availability of credit betting, the Group supports the ongoing restriction limiting ACTTAB to debit wagers.

The Group expects the same restriction to apply to new entrants who choose to provide totalisator betting services. This would also avoid placing ACTTAB at a further disadvantage.

5.4 Other Matters

The issues paper provided by the Chief Minister's Department as a precursor to the review outlined a number of additional issues to be addressed in the Review. These are discussed below.

5.4.1 Range of Bets Offered

The Chief Minister's Department's issue paper expressed some concern about the range of bets offered, as follows:

> ACTAB currently provides pari-mutuel Totalizator betting on thoroughbred, harness and greyhound racing. Within this type of gambling, there is a limited range of bets available.

> These comprise the standard and popular win and place bet, together with a limited range of 'exotic' bets such as Trifecta, Quinella, Exacta, Double, Superfecta, and trebles and Mystery bets.
>
> Due to restrictions of its pooling arrangements, ACTTAB does not have access to the full range of bets, eg Superfecta, Quadrella and Extra-Doubles. Hence ACTTAB is effectively limited to the range of pari-mutuel betting products that its pooling supplier, Tabcorp elects to provide. This is a severe limitation of the current pooling arrangements that would provide greater flexibility and range of services consistent with maintaining revenue to the Territory.
>
> ACT Chief Minister's Department, *Issues Paper*, 1999, p.2.

This comment appears to be based upon comments made by PKF Consulting.[62]

ACTTAB responded to these concerns in its submission, commenting on the issues paper in the following terms:

> This passage is substantially in error. The fact that certain bets are not offered by ACTTAB does not reflect any lack of flexibility or other restriction in the current pooling arrangements. The fact is that ACTTAB has access to the full range of bet types. Where it does not offer a particular type, that is due to its own commercial assessment of consumer demand, its technical priorities and the costs of meeting such demand as it may exist. It should be noted that a full range of bets is not available in other much larger jurisdictions – for example, Superfecta is available only in New South Wales, and Quadrella is available only in Victoria. In any event, it needs to be recognised that these products, where offered, only enjoy low patronage – for example, Superfecta in New South Wales represents only 0.56% of turnover.
>
> ACTTAB submission, p.15.

It is clear that competition will drive innovation in products. While the fact that ACTTAB, as a holder of an exclusive licence for on- and off-course parimutuel racing wagering, may have less incentive to pursue these innovations is a matter for some consideration, the decision about which services to offer is ultimately a commercial one.

5.4.2 Other Gambling Options

The Chief Minister's Department also raised concern about the restriction on the range of gambling products placed on ACTTAB by the legislation: "Apart from ACTTAB Keno, the legislation does not enable ACTTAB (or its agents) to offer any other gambling products."[63]

This issue was discussed thoroughly in ACTTAB's submission:

> This statement is incorrect in two areas. First the *Betting (ACTTAB Limited) Act 1964* provides that, in addition to totalisator betting, ACTTAB has the right to act as an agent for a sports bookmaker offering fixed priced bets on sports betting events. Secondly, although the legislation under consideration by the Review does not allow ACTAB to offer Keno, the ACT Government has approved ACTTAB to offer Keno under the *Pool Betting Act 1964* and the *Lotteries Act 1964*.
>
> In ACTTAB's view, the legislation and its own Constitution do provide considerable scope for diversification of its product and service base.

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[62] PKF Consulting, *ACTTAB Limited: Scoping Review of Options*, 1998, pp.43-44.

[63] ACT Chief Minister's Department, *Issues Paper*, 1999, p.2.

ACTTAB submission, p.16.

ACTTAB is correct in asserting that although the legislation under review, namely the *Betting (ACTTAB Limited) Act*, does not permit ACTTAB to offer Keno, there are a range of options available under different legislation that would allow it to pursue permission to provide various other gambling products. ACTTAB is therefore not unduly restricted in offering gambling products, should it wish to do so. Again, the decision to offer other gambling products should be determined on commercial grounds.

6

Chapter Six

The Regulation of Standing Bookmakers

Chapter Six

The Regulation of Standing Bookmakers

6.1 Licensing

Traditional bookmakers, operating from racecourses and betting solely on races, require a standing bookmakers licence. Such a licence is issued by the Registrar of Bookmakers.

6.1.1 Prior Approval of Licence Applicants by Clubs

As the *Act* currently provides, applicants for a bookmakers standing licence are required to have obtained a permit to field from a racing club prior to the issue of the licence.[64] In effect, the clubs have first veto over who can and cannot obtain a bookmakers licence.

The dual regulatory approach is also evident in the issuance of agents licences. In cases where a bookmaker requires an agent to stand in their place, for a meeting or a number of meetings, an agents licence is required. Approval is required from the relevant race club for the agent to field on behalf of the bookmaker, with the approval forwarded to the Registrar of Bookmakers. There is no fee charged for the issue of an agents licence.

In essence, government regulatory power is constrained by the three racing clubs. While an applicant may meet all government criteria he or she cannot be granted a licence to acknowledge the attainment of the criteria without the involvement of a third party. While endorsing the dual regulatory approach, the Group suggests that Government's ability to issue a standing bookmakers licence should not be fettered by a third party.

RECOMMENDATION 6.1

The issuance of a bookmakers licence should not be contingent upon prior approval of a racing club.

This recommendation does not limit the ability of clubs to determine who can field at a particular racecourse, nor does it restrict the clubs from placing a limit on the number of bookmakers that can operate in the auditorium. Indeed, to reinforce the dual regulatory role of clubs the *Act* could be amended to explicitly state that the licence is granted subject to any further conditions that racing clubs and AROs may impose. It should be made clear that obtaining a licence merely confirms that all government criteria have been met and does not confer any automatic rights to conduct bookmaking at clubs.

[64] Section 24.

6.1.2 Code-Specific Licences

A related restriction is that a potential bookmaker has to identify in advance which club or clubs the bookmaker intends to field and seek a separate licence for each code. That is, a bookmaker wanting to field at ACTRC meetings as well as Canberra Harness Racing Club meetings and Canberra Greyhound Racing Club meetings requires three separate standing licences even though the criteria for each, from the Government's perspective, are identical.

This approach lacks flexibility, increases the costs associated with licensing and may restrict the free movement of bookmakers between codes. Given the common requirements, apart from approval by the club, the Group sees little point in requiring code-specific licences.

RECOMMENDATION 6.2

A standing bookmakers licence should allow a bookmaker to operate at any approved racecourse.

Under this approach it is up to the clubs themselves to limit access to each course.

6.1.3 The Role of the Bookmakers Licensing Committee

The licensing process is carried out by the Registrar with the support of the BLC:

> (1) On receipt of an application under section 24, together with the determined fee, the Registrar shall, subject to subsection (2), grant a standing licence to the applicant.
>
> (2) Where the Registrar has reasonable grounds for believing that an applicant for a standing licence-
>
> (a) has been found guilty of an offence against this Act or the Regulations or against a corresponding law;
>
> (b) has, within the period of 5 years immediately preceding the date of the application, been found guilty in Australia of an offence punishable by imprisonment for 12 months or more; or
>
> (c) has failed to pay, in accordance with this Act, an amount due under this Act,
>
> the Registrar shall refer the application to the Committee.
>
> Section 25 *Bookmakers Act.*

The GRC has had a very minimal role under sub-s.25(2).

The composition of the BLC is specified in sub-s.9(1) of the *Act*:

> The Committee shall consist of 7 part-time members appointed by the Minister, of whom-
>
> (a) 3 shall be nominees of the Minister;
>
> (b) 1 shall be nominated by the Australian Capital Territory Racing Club, being a body incorporated under the Associations Incorporation Act 1953;

(c) 1 shall be nominated by the Canberra Trotting Club, being a body incorporated under the Associations Incorporation Act 1953;

(d) 1 shall be nominated by the Canberra Greyhound Racing Club, being a body incorporated under the Associations Incorporation Act 1953; and

(e) 1 shall be nominated by the A.C.T. Bookmakers Association, being a body incorporated under the Associations Incorporation Act 1953.

There has been some concern about the politicisation of the appointments made by the Minister.

The Group also has some concerns about specification of those who can be appointed to the BLC:

- by specifying the three existing racing codes the BLC may result in the exclusion of representatives of AROs; and
- the representative of the A.C.T. Bookmakers Association could be involved in determining whether a potential competitor should be allowed to compete in the ACT.

Given the creation of the GRC it would be appropriate for the assessment process to be handled by the GRC. This change will facilitate consistency of approach in undertaking probity assessments.

RECOMMENDATION 6.3

The licensing functions of the Registrar and the Bookmakers Licensing Committee should be transferred to the Gambling and Racing Commission.

If there is a continued need for industry input into the licensing process this can be done either through appointments to the GRC, or by co-opting persons to assist in assessments.

6.2 Regulation of the Form of Bookmakers

The *Act* limits the operational structure of licence holders by restricting standing licences solely to natural persons.

This requirement may restrict the ability of bookmakers to:

- diversify their risk by using alternative organisational structures;
- structure their affairs to legitimately minimise taxes; and
- have access to capital injections from third parties.

Different jurisdictions have adopted differing approaches to the structure of bookmakers. Table 6.1 indicates the different corporate forms permitted for both standing and sports bookmakers.

Table 6.1

Summary of Permissible Bookmaker Operating Structures

	Racing			Sport		
	Sole Trader	Partnership	Company	Sole Trader	Partnership	Company
NSW	✔			✔		
VIC	✔			✔		
QLD	✔			✔		
WA	✔			✔		
SA	✔			✔		
TAS	✔	✔		✔	✔	
ACT	✔			✔	✔	✔
NT	✔			✔		✔

Source: NSW Department of Gaming and Racing, *Bookmaker Operating Structures*, Sydney, 1999, p.3.

The issue of incorporation of bookmakers has been considered in a number of other fora. The arguments against allowing incorporation were advanced by Cooper:

> **Incorporation of Bookmakers**
>
> Bookmakers Associations in all states were recently asked to make submissions to their relevant Racing Minister's following the above issue being raised by the Victoria Racing Club.
>
> It was generally agreed by bookmakers throughout Australia that the Racing Industry would be best served if bookmakers were to remain sole traders due to:
>
> **1. Self Destruction**
>
> In a very short time the number of individual companies would diminish rapidly as larger operations sought to increase market share by taking over companies with smaller turnover. The individual bookmaker would either disappear altogether or be left with a small share holding in one of the larger companies.
>
> **2. Corruption**
>
> It would be impossible to stop illegal or "black money" becoming a part of the bookmaking scene and control of companies passing to a criminal element.
>
> **3. Competition**
>
> As the number of operating companies contracted the competition that has historically existed between individual bookmakers would disappear or at least be drastically reduced and the control of markets would be subject to manipulation and abuse to the detriment of the punting public.
>
> **4. Continuity of Service**
>
> The 1600 or so licensed bookmakers in Australia are currently servicing meetings at remote country towns that the majority of Australian have never heard of.

> In a corporatised bookmaking would the larger companies would be most unlikely to service small, remote and unprofitable meetings which would result in bookmaker service at these meetings diminishing in the short term and disappearing altogether in the long term.
>
> **5. Bookmaker/Punter Relationship**
>
> The survival of the on–course bookmaker has been dependent on a personal relationship between the individuals involved and the long held belief by some punters "that you can beat an individual person but not a machine". Incorporation would almost surely see a further shift of patronage to the totaliser system or to the illegal SP operator.
>
> Cooper, "Bookmaking: The Last Bastion of Individuality" in O'Connor (ed), *High Stakes in the Nineties: NAGS '95 — Sixth National Conference of the National Association for Gambling Studies*, Curtin University, Fremantle, 1995, pp.67-72 at pp.69-70. Emphasis in original.

The Group considers Cooper's assessment to be excessively pessimistic in regards to the impact that incorporation would have upon bookmakers.

As a general rule the Group would suggest that businesses should be free to structure themselves as they wish.

In the case of standing bookmakers, however, the Group suggests that the restriction on corporate form is appropriate for a number of reasons:

- the restriction acts as a natural limitation on the availability of credit betting (because the person providing the credit is personally liable there is less incentive to increase its availability and hence the risk of increased social costs); and
- the regulatory approval by Government is of a personal nature (ie, focusing on the past actions of the individual) and relies upon a third party (ie, the clubs) for additional regulatory input.

RECOMMENDATION 6.4

The Bookmakers Act should continue to restrict standing bookmakers licences solely to natural persons.

If a corporation or partnership wish to have fixed odds at racing events they should obtain a sports betting licence and offer wagers on racing under that licensing regime.

6.3 Location of Bookmakers

Standing bookmakers are currently restricted to operating at approved racecourses. Clearly, this restricts the ability of standing bookmakers to compete against ACTTAB.

One option to increase competition in the wagering market would be to expand the locations at which standing bookmakers could offer betting services, including off–course services.

ACTTAB identified the following concerns about this alternative:

> To allow licensed bookmakers to offer retail off-course fixed price bookmaking would have significant adverse consequences:
>
> - it would make gambling products, especially uncontrolled and low limit betting on credit, simply too readily available in the community and without any consequent return to the community for the public benefit;
> - it would detract from the market available to ACTTAB;
> - it would thereby reduce the return otherwise made to ACTTAB to the community and the industry; and
> - it would reduce the value of ACTTAB as a significant public asset.
>
> ACTTAB submission, p.11.

Allowing bookmakers off-course would not detract from ACTTAB's available market, it would merely make the market more contestable, which is the very objective of competition policy reform.

In reality, few bookmakers would be likely to offer off–course wagering. The costs of establishing an off-course presence alone would render the opportunity impractical for most bookmakers. There is an added disadvantage for bookmakers off–course in that they are unable to access the Bookmakers Pricing Service (BPS), removing their ability to keep abreast of market prices and hence increasing their risk.

However the key issue that should be focussed on is not whether bookmakers are likely to operate off–course, but whether they should be legislatively restricted from doing so.

The recent WA NCP review of Western Australia's (WA's) wagering legislation noted that: "To reduce access to credit betting within the community, it is considered necessary to restrict the locations at which bookmakers can conduct business."[65] While the Group is mindful of the legitimate objective of containing the social cost of wagering, there would be ways of containing the social cost of off–course fixed odds betting while still providing more consumer choice.

The Group suggests, however, that the reason for supporting the restriction of standing bookmakers to racecourses relies upon consumer protection rather than problem gambling. Bookmakers currently operate under the umbrella of the racing clubs, and to some extent are accountable to them. Therefore if operating off–course there would be less regulatory oversight by the industry.

Allowing bookmakers to operate off–course would require a greater degree of government probity and transparency than is currently applied to standing bookmakers.

Rather than increasing the ability of standing bookmakers to operate beyond racecourses the Group suggests that current restrictions should be retained for standing bookmakers.

[65] Office of Racing, Gaming and Liquor, *NCP Legislation Review*, Perth, 1998, p.90.

RECOMMENDATION 6.5

Standing bookmakers should continue to be restricted to operating from racecourses.

This recommendation should be read in conjunction with proposed changes to the existing restrictions placed on sports bookmakers — see section 7.4.

6.4 Minimum Telephone Bets

Sub-section 41A(a) of the *Act* provides that a bookmaker shall not accept a bet by telephone unless, "the bet is equal to or greater than the prescribed amount or the amount that may be won on the bet is equal to or greater than the prescribed amount". Regulation 5A of the *Bookmakers Regulations* provides that

> (a) for a bet accepted by a bookmaker on a metropolitan thoroughbred race meeting-
>
> (i) the prescribed amount first referred to is $200; and
>
> (ii) the prescribed amount second referred to is $2,000; and
>
> (b) for a bet accepted by a bookmaker on a race meeting other than a metropolitan thoroughbred race meeting-
>
> (i) the prescribed amount first referred to is $100; and
>
> (ii) the prescribed amount second referred to is $1,000.

6.4.1 Costs of the Restriction

Minimum limits on telephone bets were introduced initially to protect the revenue streams of the Government and the racing industry that flowed from ACTTAB turnover. A further objective of the restriction might be to contain the level and hence the social cost of gambling, particularly credit gambling.

Regulation of the minimum possible bet conducted by telephone raises a number of concerns under NCP:

- there is a reduction in bookmaking services available to punters. That is, if a wagerer wants to place a small bet by phone there is only one provider who can legally accept the bet (ie, ACTTAB);
- there are costs imposed on bookmakers through restriction of business opportunities and because bookmakers are placed at a competitive disadvantage in comparison to ACTTAB, sports bookmakers and bookmakers in other states;

- there are costs imposed on racing clubs through restricted abilities to attract bookmakers, maintain viable betting rings and obtain revenues from bookmaking levies. This is likely to particularly impact on the smaller racing codes. It can be argued that the higher minimum for metropolitan thoroughbred races in comparison to other races is an acknowledgement of the potential impact on the non-thoroughbred codes;[66] and
- the artificial minimum may have, "forced some punters to bet beyond their comfort level," with attendant risks of facilitating problem gambling.[67]

6.4.2 Claimed Public Benefits

There are two principal arguments used to support the minimum telephone bet requirement:

- maintenance of revenue streams to government and the racing industry from off–course betting with ACTTAB; and
- reduced negative impacts of betting activities on the community through lower levels of betting, particularly credit betting.

These points were made by ACTTAB in arguing for the maintenance of the restriction:

> the minimum telephone bet level for bookmakers should not be reduced below $250. To do so would make credit betting too readily available and would be contrary to the consumer protection objectives of the legislation. Moreover, it would place a significant portion of ACTTAB's business at risk and thus reduce its value as a public asset.
>
> ACTTAB submission, p.11.

Similar arguments were put by the ACTTAB Agents Association:

> The ACTTAB Agents Association is strongly opposed to increasing the off-course wagering activities of bookmakers. This includes ... any reduction of the $250.00 minimum telephone bet for bookmakers (this amount should now be increased, not reduced) ... To deregulate in any of these areas would result in unfair competition to Agencies, undermine the wagering network, and facilitate the takeover of ACT wagering operations by an inter-state TAB (such a TAB could operate an ACT bookmaking operation and then progressively use this to take over other outlets). In addition, net revenue to the ACT Government would be reduced and the potential for corruption would be increased.
>
> ACTTAB Agents Association submission, p.2.

6.4.3 Assessment of Public Benefit

The issue of minimum phone bet levels has recently been considered in a number of public fora:

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[66] See Cooper, "Bookmaking: The Last Bastion of Individuality" in O'Connor (ed), *High Stakes in the nineties: NAGS '95 — Sixth National Conference of the National Association for Gambling Studies*, Curtin University, Fremantle, 1995, pp.67-72 at p.68.

[67] Cooper, "Bookmaking: The Last Bastion of Individuality" in O'Connor (ed), *High Stakes in the nineties: NAGS '95 — Sixth National Conference of the National Association for Gambling Studies*, Curtin University, Fremantle, 1995, pp.67-72 at p.68.

- the WA NCP review recommended the restriction be abolished. It stated the benefits that may arise from protecting revenues to the government and racing clubs from TAB betting were considered to be small and outweighed by potentially substantial costs to punters, bookmakers and racing clubs, particularly in relation to betting services for small events and minor codes;[68]
- the Australian Racing Board has publicly concluded that no evidence has been put forward for it to support the contention that abolishing minimum telephone bets would have a serious effect on TAB turnover;[69] and
- the Victorian Government has indicated that it is considering abolishing the restriction on minimum telephone bets.

The Group suggests that while logic dictates that there will be an impact on ACTTAB revenues, and hence Government revenue and the racing fund, the claims of ACTTAB are overstated because:

- ACTTAB has an established reputation, and as such less frequent or smaller wagerers are likely to be more comfortable placing small phone bets with ACTTAB rather than other parties;
- bookmakers, because of the restrictions on corporate form (see section 6.2) are unlikely to have the capacity to compete with ACTTAB on any significant scale;
- bookmakers are unlikely to take phone bets from complete strangers as the risks of default are too significant. As a result, there will be a strong incentive for bookmakers to independently restrict the availability of phone betting, as occurs now, to established and known clients; and
- it is likely that bookmakers will self-impose a minimum bet level on the grounds of administrative simplicity and cost.

As a result, the Group concludes that the costs associated with the restriction are not likely to be offset by a corresponding public benefit, and hence the restriction on minimum telephone bets should be removed from the *Act*.

RECOMMENDATION 6.6

There should be no restriction on the minimum amount that can be wagered over the phone on fixed odds.

[68] Office of Racing, Gaming and Liquor, *National Competition Policy Legislation Review: Betting Control Act 1954 and Totalisator Agency Board Betting Act 1960*, Perth, 1998, p.103.

[69] Australian Racing Board, *Analysis of Bookmaking in Australia*, 1999, p.52

7

Chapter Seven

The Regulation of Sports Bookmakers

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The Regulation of Sports Bookmakers

> Sports betting involves wagering on all types of local, national or international sporting events — whether on-course, off-course, in person, by telephone or by the internet.
>
> Productivity Commission, *Inquiry into Australia's Gambling Industries: Draft Report*, Canberra, 1999, p.12.36.

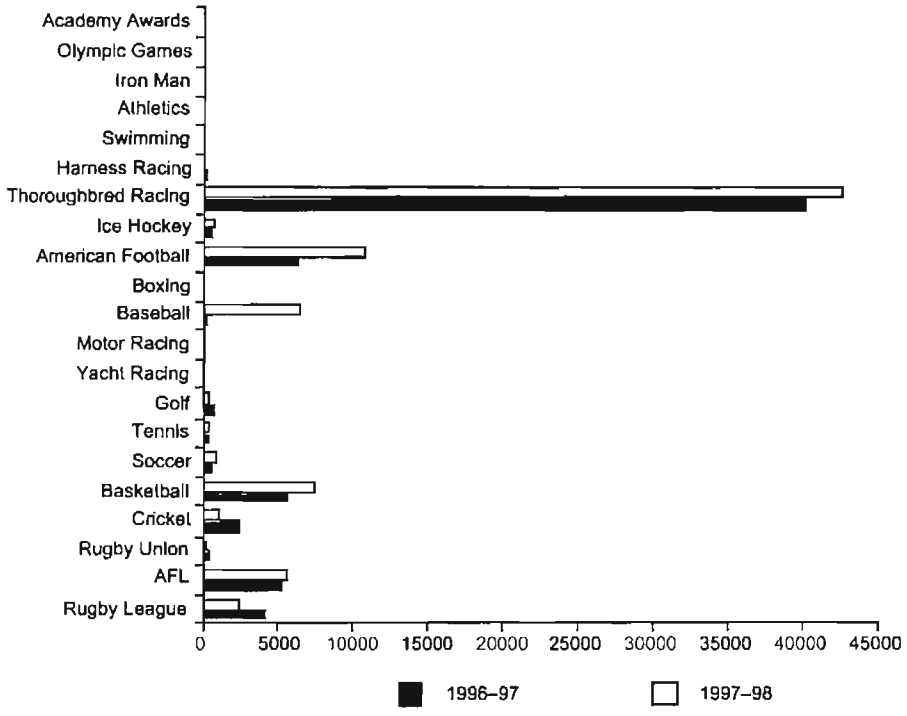
On 14 September 1994 the ACT Legislative Assembly amended the *Bookmakers Act* to provide for the regulation and control of sports betting in the ACT.

Sports betting has been operation in the ACT since October 1995. There are currently four sports bookmaking companies licensed in the ACT, all operating from the Betting Auditorium at the Canberra Racecourse.

The bookmakers field on a wide range of sporting and other contingencies. Figure 7.1 shows the broad range of contingencies (generally called 'sports') upon which wagers have been accepted and their relative popularity.

Figure 7.1

Sports Betting Turnover in the ACT ($ '000)



Source: ACT Government, *Sports Betting. 1997-98 Status Report*, 1998.

Two of the four licences sports bookmakers concentrate almost exclusively on overseas events. For example, *The Economist* recently noted that:

> The leading sports bookie, Centrebet (which also claims to be among the top five worldwide) is pushing into Scandinavia, accepting bets on Finnish baseball and Danish ice hockey.
>
> *The Economist*, "Betting Against the House" available at http://www.economist.com/editorial/justforyou/current/wb5540.html (accessed 9 September 1999).

The remaining two are more domestically focussed.

While racing has been the most popular sport, as Table 7.1 shows, growth has been strongest in non-racing sports, and particularly those with an international flavour (ie, baseball, basketball and soccer).

Table 7.1

Sports Betting Turnover in the ACT ($ '000)

	1996–97	1997–98	Percentage Change
Racing	$40,658	$42,727	+5.1%
Other	$26,693	$36,086	+35.2%
TOTAL	*$67,351*	*$78,813*	*+17.1%*

Note: 'Racing' includes thoroughbred and harness racing

Source: ACT Government, *Sports Betting, 1997-98 Status Report*, 1998.

This move to international sports is an acknowledgement that the international market has the greatest potential for growth. For example, there is a significant untapped sports betting market in the United States:

> Americans love to gamble. At least 56 percent of Americans gambled in 1995. It was estimated that Americans would wager more than $600 billion in 1998 ... About $100 billion of that sum [$600 billion] would go toward illegal bets on professional and college sports ...
>
> Bell, "Internet Gambling: Popular, Inexorable, and (Eventually) Legal" (1999) 336 *Policy Analysis*, p.2.

Conversion of only a small portion of this illegal US sports betting to legal ACT sports betting provides significant growth potential. Even without the US as a source of punters there is still considerable room for growth. For example, *The Economist* recently stated that:

> Since it was taken over by Jupiters, which is part-owned by America's Hilton Hotels, Centrebet has turned away American-based punters; despite that handicap, its Internet business, which now generates A$50m ($32m) a year, doubles every year.
>
> *The Economist*, "Betting Against the House" available at http://www.economist.com/editorial/justforyou/current/wb5540.html (accessed 9 September 1999).

7.1 Licensing Criteria

Before an applicant is granted a sports betting licence he or she must satisfy the suitability requirements contained in the *Act* and the selection criteria

determined by the Minister.[70] The BLC is charged with the responsibility to select the applicants to be granted sports betting licenses.

7.1.1 The Need to Have a Standing Bookmakers Licence

Bookmakers who hold a standing licence, issued in the ACT under s.25 of the *Act*, are eligible to apply for a sports betting licence. As a result:

- individual applicants must hold a standing bookmakers licence;
- the members of syndicates must each have a standing licence; and
- at least one director of a corporate applicant must hold a standing licence.[71]

This requirement imposes an extra level of cost and licensing into the granting of a sports betting licence.

The Group considers that this requirement (ie, for sports bookmakers to have a standing bookmakers licence) provides no significant public benefits because:

- the minimalist nature of the requirements for obtaining a standing bookmakers licence are already exceeded by the suitability requirements that sports bookmakers are required to meet;
- the requirement that a person seek approval from a race club to get a bookmakers licence is illogical given that a sports bookmaker may never provide racing related wagering products.

RECOMMENDATION 7.1

Sports Bookmakers (and their agents) should not be required to hold a standing bookmakers licence.

This recommendation, to some degree, acknowledges that the original nexus between racing and sports bookmakers is waning, and that the role for race clubs in regulating sports bookmakers is increasingly superfluous.

7.1.2 Suitability Criteria

The *Bookmakers Act* provides the suitability requirements that must be satisfied before an applicant may be granted a sports betting licence. Section 3 of the *Act* provides that:

> 'suitability requirements' in relation to a person, means that the person should -
>
> (a) have a reputation for sound business conduct;
>
> (b) have a reputation for sound character;
>
> (c) not have been associated, and not have entered into any business or financial arrangements, with any person who does not have a reputation for sound business conduct and sound character;

[70] In the case of a company application, all directors of the company must individually satisfy the suitability requirements.

[71] Section 39E.

(d) not have been found guilty of an offence against this Act or the regulations or an offence against a corresponding law;

(e) not to have failed to pay an amount due under this Act, in accordance with this Act;

(f) within the period of 5 years immediately preceding the date on which the suitability requirements are being applied, not have been found guilty in Australia of an offence punishable by imprisonment for 12 months or more;

(g) not have been found guilty in Australia of an offence relating to betting upon any event or contingency relating to a race; and

(h) have provided a security guarantee;

To allow for the appropriate probative process applicants, in lodging the application, are required to provide a consent to allow the checking of their background and *bona fides*. Failure to provide this consent renders an application invalid.

The Group was surprised that paragraph (g) is only limited to offences in Australia, but assumes that offences committed overseas could reasonably be considered under paragraphs (a) to (d) inclusive (depending upon the precise circumstances).

An alternative (and less prescriptive) approach is to adopt the suitability requirements used in the *Interactive Gambling Act 1998*. Sub-section (1) of the *Interactive Gambling Act* provides that:

For the purpose of deciding whether an applicant is a suitable person to hold an interactive gambling licence, the Minister shall have regard to the following matters:

(a) the applicant's character and business reputation;

(b) the applicant's current financial position and financial background;

(c) if the applicant is not an individual — whether the applicant has, or has arranged, a satisfactory ownership, trust or corporate structure;

(d) whether the applicant has, or is able to obtain, appropriate resources and appropriate services;

(e) whether the applicant has the appropriate business ability to conduct interactive games successfully under an interactive gambling licence;

(f) if the applicant has a business association with another entity —

(i) the entity's character or business reputation; and

(ii) the entity's current financial position and financial background;

(g) any other prescribed matter.

There is significant logic in the adoption of the same suitability requirements. This will make the application process easier for parties who may wish to provide both interactive gaming and sports betting through the same Internet site. Furthermore, identical criteria, even though they may be applied somewhat differently depending upon whether a person is seeking a sports betting or interactive gambling licence, will also likely make the task

of the GRC easier. The Group further suggests that thought should be given to also adopting these criteria for the awarding of totalisator licences.

RECOMMENDATION 7.2

The suitability requirements for sports bookmakers should mirror those for holders of interactive gambling licences under the Interactive Gambling Act 1998.

The *Bookmakers Act* currently provides for the cancellation of the licence if the licensee subsequently fails to satisfy the suitability requirements. Any subsequent changes to the company structure, including directorships and significant shareholding arrangements, must be approved by the BLC. The concern with this approach is that it does not guarantee the probity of the operations if the licence is somehow controlled or influenced by a third party who does not have a shareholding. For example, a licensed company may enter into a joint venture which accedes some degree of influence of control to the non-licensed joint venture party. To maintain the integrity of the licensing process the Group suggests that the Government should have the ability to flexibly respond to changing circumstances that are more subtle than shareholding changes.

RECOMMENDATION 7.3

The Gambling and Racing Commission should have the power to impose licence conditions or cancel a licence if an unlicensed person gains a material degree of control or influence over the operations of a licensed sports bookmaker.

For the sake of consistency, and as a complement to Recommendation 7.2, the Government should also extending the 'key persons' requirements from the *Interactive Gambling Act* to sports bookmakers. This approach would require not just the sports bookmaking organisation to be licensed, but also key persons associated with the organisation to be vetted by the GRC on probity grounds. Subsection 5(1) of the *Interactive Gambling Act* sets out who is considered a 'key person' — such a person:

> (a) occupies or acts in a managerial position, or carries out managerial functions, in relation to operations carried out under an interactive gambling licence or the business of the licensed provider;
>
> (b) is in a position to control or exercise significant influence over the operations conducted under an interactive gambling licence;
>
> (c) occupies or acts in a position designated in the licensed provider's approved control system as a key position;
>
> (d) occupies a position with, or carries out functions for, a licensed provider that makes the person a key person under criteria prescribed under the regulations; or
>
> (e) is a business or executive associate of a licensed provider designated by the Commissioner, by written notice given to the licensed provider, as a key person.
>
> sub-s.5(1) *Interactive Gambling Act*

There are a range of reasons why a key person licence could be suspended or cancelled:

> Each of the following is a ground for suspending or cancelling a key person licence:
>
> (a) that the licensee is not, or is no longer, a suitable person to hold a key person licence;
>
> (b) the licensee has been convicted of an offence against this Act, a tax law or a corresponding law;
>
> (c) the licensee has been convicted of an indictable offence;
>
> (d) the licensee has contravened a condition of the licence;
>
> (e) the licensee has contravened a provision of this Act or a corresponding law, being a provision a contravention of which does not constitute an offence;
>
> (f) the licence was obtained by a materially false or misleading representation or declaration or in any other improper way.
>
> s.60 *Interactive Gambling Act*

This approach seeks to ensure that the ACT's good reputation for sports bookmaking is maintained and that consumers are able to wager with some degree of certainty that the persons in day-to-day control of the sports betting provider do not have a history that would suggest future criminal or fraudulent behaviour.

This approach is unlikely to materially affect competition for the provision of sports betting services, with only a negligible impact on the market for managerial services. Furthermore, the costs associated with this process are unlikely to be significant.

RECOMMENDATION 7.4

The Bookmakers Act should be amended to incorporate 'key persons' requirements consistent with such requirements in the Interactive Gambling Act 1998.

The Group would expect that the GRC would apply mutual recognition principles to persons who have passed similar key persons requirements in other jurisdictions.

The Government may wish to also consider such a 'key person' requirement for the management of TABs.

7.1.3 Licensing Criteria Employed by the Bookmakers Licensing Committee

In assessing alternative licence applications the BLC applies a series of criteria to determine the most suitable applicant(s). Table 7.2 sets out the criteria to which the BLC has regard in deciding whether to grant a sports betting licence to an applicant.

Table 7.2

Criteria Used to Assess Sports Betting Licence Applicants

Criteria	Description
Financial	Satisfactory financial position and backing for the sports betting service and satisfactory risk management strategies
Experience	Acceptable level of experience and longevity in bookmaking, including experience in relation to betting on sporting events
Scale	Acceptable scale of existing operation and structure proposed for future operations incorporating, but not limited to, the break-up between racing and other sports
Personnel	Acceptability and suitability of the personnel who will be assisting in the delivery of the sports betting service
Operational	Satisfactory proposed operational structure for the sports betting service
Potential	Acceptable plans of the applicant in regard to the sports betting service and satisfactory assessment of potential growth of the operation both nationally and internationally
Technology	Acceptable level of equipment, current or proposed, that may be utilised to assist in the delivery of the sports betting service
Audit	Satisfactory reporting and accounting arrangements

Source: Bookmakers Licensing Committee, *Information on the Grant of a Sports Betting Licence*

Under NCP there are — or at least could be depending upon the precise interpretation adopted — a number of problems with the criteria identified in Table 7.2.

The general problem is that a number of the criteria may be employed to exclude potential providers who have the necessary skills to provide wagering services in an appropriate manner. For example:

- the 'experience' criteria could be used to exclude firms with significant financial and information technology skills (eg, Microsoft, Telstra, etc) or firms with significant skill in non-bookmaker betting (eg, ACTTAB, Casino Canberra, etc), even those firms could relatively easily acquire the expertise to run a sports betting operation;
- why is it necessary, employing the 'scale' criteria, for the Government to have a say in the current or future scale of any single provider, or attempt to divide the market between providers? This is particularly strange given that, once a sports betting licence is granted there is nothing stopping the sports bookmaker change the product mix or the scale of operations; and
- the 'potential' criteria makes the common mistake of Government trying to guess the market potential. The folly of this is amply demonstrated by the fact that sports betting turnover is already significantly higher than originally forecast by the Government prior to the introduction of sports betting.

It would be more consistent with NCP, and in line with the thrust of the PC's recommendations, if the criteria employed in choosing applicants focused on issues related to probity, technical capability, and financial

resilience of potential licence holders, rather than on their marketing strategy or the prospects of the industry in general.

As a result, the Group suggests that the criteria listed in Table 7.3 may be more appropriate than those currently used.

Table 7.3

Suggested Criteria for Assessing Sports Betting Licence Applicants

Criteria	Description
Financial	Satisfactory financial position and backing for the sports betting service and satisfactory risk management strategies
Experience	Acceptable level of experience and the provision of wagering products
Personnel	Acceptability and suitability of the personnel who will be assisting in the delivery of the sports betting service
Operational	Satisfactory proposed operational structure for the sports betting service
Technology	Acceptable level of equipment, current or proposed, that may be utilised to assist in the delivery of the sports betting service
Audit	Satisfactory reporting and accounting arrangements

Source: The Allen Consulting Group

RECOMMENDATION 7.5

Selection criteria employed in assessing the suitability of an applicant for a sports betting licence should focus on the technical ability to provide the service in a manner consistent with the rules for sports betting.

7.1.4 The Role of the Bookmakers Licensing Committee

As discussed in section 6.1.3, the Group recommends that the licensing functions of the BLC should be transferred to the GRC — see Recommendation 6.3. If the Group's recommendation to synchronise the suitability requirements for sports bookmakers and holders of interactive gambling licences (Recommendations 7.2 and 7.4) is adopted then the logic of Recommendation 6.3 is further enhanced.

7.2 The Restricted Number of Licences

Section 39D of the *Bookmakers Act* provides for the Minister to determine the maximum number of licenses to be granted by the BLC.

To provide security of tenure for the applicants granted a licence and to encourage the investment in technology to provide a comprehensive, competitive service, licenses were granted for a fifteen year period.

The Minister has determined that, at this stage, a maximum of four licenses will be granted. The sports bookmakers currently licensed in the ACT are:

- Canbet Sports Betting;
- Capital Sports;

- City Index Sports; and
- Mega Sports.

The rationale for the cap on sports bookmakers is not clear. In some respects it represents a cautious approach to the introduction of a new and somewhat uncertain gambling product in 1994. If it proved unsuccessful or problematic it would have been easier to deal with the problems if there were fewer licences.

There does not appear to have been any harm minimisation rationale underpinning the cap on the number of available licences.

The cap on the number of available licences can be viewed in two very different ways:

- one view suggests that the cap is illusory. As any quick search of the Internet reveals, there are a multitude of parties based in Australia and overseas who provide sports betting. As such, it is unreasonable to suggest that a limitation on the supply of licences in the ACT restricts the market; and
- the alternative view is that the cap has an impact on the market for ACT licences. This is most amply demonstrated by the fact that one of the licence holders valued the goodwill in the fifteen year licence at $800,000. This implicitly assumes that the cap on ACT licences enables a person to capture a return that could not be achieved in a competitive marketplace. If this valuation were accepted it would represent a market cost of $3.2 million over fifteen years (ie, $213,000 per year).[72]

To some extent both these views have some validity. There market for sports betting, through the phone and the Internet, is international in scale. In such circumstances it is normally very difficult to argue that any limit on domestic producers will have any impact. However, the current sports bookmakers, because of the ACT's international reputation as a jurisdiction with high probity/suitability requirements, have nevertheless been able to capture market rents because of the restricted availability of licences.[73]

To some extent this is a public cost on overseas consumers (who are the predominant sports betters) and a benefit to the ACT. This view, however, ignores that significant taxation revenue will flow to the ACT with expansion of sports betting. And since almost all sports betting is undertaken by interstate and overseas customers, there are very few social costs with problem gambling.[74] In any case, as noted by the PC, licence restrictions are a poor way of targeting problem gambling.

The current sports bookmakers are all adamant that increased licence numbers would weaken the reputation of the ACT regulatory regime. It was argued that as numbers increased the risks associated with getting a bad

[72] This valuation is not accepted by the other three licence holders who have not included a licence goodwill component in their financial records.

[73] The vigour with which some of the sports bookmakers are opposing the granting of further licences suggests that there is some competitive advantage associated with a restricted number of licences.

[74] Indeed, as with Lifeline's one sports betting problem gambler, problem gamblers are just as likely to gamble with interstate or overseas bookmakers as the ACT bookmakers.

provider (ie, a provider whose actions would harm the reputation of other providers and regulatory the system itself) would increase. Maintenance of the reputation of the system, by limiting systemic and contagion risk, is a legitimate goal of the regulation of the sports bookmakers (see section 3.2.3), but this should be addressed through more direct means (eg, bonds, probity cheques, ongoing monitoring, etc) rather than through competitive restrictions.[75]

As a result, the Group concurs with the conclusion drawn in the ACIL submission:

> These restrictions are neither in the interests of the ACT community, nor are they consistent with the principles of National Competition Policy.
>
> Removal of these restrictions would yield clear benefits to the citizens of the Territory. Those benefits would involve a broadening of consumer choice and increased competition across all gambling products at least to some degree.
>
> ACIL Consulting submission, p.19.

As long as probity requirements are maintained, and given the offshore focus of potential providers, negative social costs would likely be zero for the ACT community.

RECOMMENDATION 7.6

The Ministerial limit of four sports betting licences should be removed. There should be no arbitrary restriction on the number of sports betting licences.

In relation to sports betting ACTTAB suggested that:

> the maximum of four licences in the Auditorium for telephone or Internet betting should not be increased unless:
>
> - there is a justification for that increase based on demand; and
> - ACTTAB is licensed to operate exclusively in the retail market.
>
> This is the trend in other jurisdictions where the TABs in each State has, or will have, the exclusive right to offer sports betting outside the Betting Auditorium through its retail network.
>
> ACTTAB submission, p.16.

The Group disagrees with ACTTAB's claimed automatic right to a (or the) sports betting licence. On the grounds of competitive neutrality, should ACTTAB wish to offer sports betting products it should be required to formally seek a licence on the same conditions as every other applicant.

7.3 Restrictions on Available Sports

Sports bookmakers can only offer wagering products on sports approved under the *Act*. Box 7.1 lists the sports betting events that have been approved by the Minister under s.39A of the *Act*.

[75] See section 7.6 for discussion of our proposal to reduce the risks associated with operational failure.

Box 7.1

Approved Sports

- rugby league
- Australian rules football
- rugby union
- cricket
- basketball
- soccer
- tennis
- golf
- yacht racing
- snooker
- showjumping
- motor racing
- baseball
- boxing
- American football
- ice hockey
- thoroughbred racing
- harness racing
- rowing
- darts
- netball
- iron man
- surfing
- Olympic Games events
- Commonwealth Games events
- Academy Awards
- elections
- cycling
- greyhound racing
- swimming
- athletics
- triathlon

Source: Bookmakers Licensing Committee, *Information on the Grant of a Sports Betting Licence*, Attachment A

This prescriptive approach to sports and events that bookmakers can field bets limits the flexibility of bookmakers to respond to possible wagering events as and when they arise.

While this is a restriction, parties to the review felt that the restriction was slight, in that there is scope to have the Minister approve new events, and the Minister has done so when requested.

The restriction on the events upon which bets can be accepted provides a number of benefits. In particular:

- it assists in ensuring that bookmaking activities and the relevant sporting events are able to be monitored and controlled so as to avoid betting-related corruption in the sports; and to a lesser extent
- limits the extent of bookmaking activities where this (ie, the restriction) is regarded as in the public interest (eg, it would be unlikely that parties would be allowed to bet on the number of people ultimately killed by a serial killer).

In view of the potential for betting-related corruption, the Group considers the restriction to provide a net public benefit.

An alternative approach to achieve the benefits in a less restrictive manner would be to impose a duty on sporting organisations to monitor and control betting activities and ensure that these are carried out in a fair and proper manner. This is not considered to be a practical because:

- the high potential for betting-related corruption is considered to justify more rigorous overseeing of the monitoring and control of betting by a regulatory authority that does not have a financial interest in the betting activities; and

- the current restriction allows the potential community effects of betting to be taken into account in determining whether betting should occur for a sporting event or at a particular venue. It would be difficult to impose a requirement on sporting organisations to consider such effects, particularly organisations in Australian jurisdictions outside the ACT and organisations outside Australia.

The Group considers the restriction to provide a net public benefit. There is no alternative and less restrictive means of achieving the legislative objective and s.39A of the *Act* should therefore be retained.

7.4 Restrictions on the Location of Sports Bookmakers

The sports betting service is provided from a betting auditorium located at the Canberra Racecourse. The auditorium is open to the public on a daily basis and sports bookmakers are permitted to operate up to 24 hours per day.

All Australian jurisdictions limit, to some extent, where sports bookmakers can operate — see Table 7.4.

Table 7.4

Restrictions on the Operations of Sports Bookmakers

Jurisdiction	Locations	Times of Operation
NSW	Racecourses and auditorium	24 hours, 7 days a week
Vic	Approved racecourses (Flemington auditorium)	24 hours, 7 days a week
	Other racecourses or authorised race or sports meetings	3 hours before advertised staring time of 1st race until 3 hours after actual starting time of last race
Qld	Racecourses	During race meetings
WA	Racecourses	From a racecourse at any time
SA	Racecourses, auditoriums and registered premises (a range of sporting grounds)	Race meetings: 30 minutes before first race to 30 minutes after last race Auditorium: All racedays except when a metropolitan thoroughbred race meeting is being held
Tas	On-course and approved off-course venues	24 hours, 7 days a week
ACT	Racecourse, auditorium and approved sporting venues	24 hours, 7 days a week
NT	Racecourses and approved sporting venues	24 hours, 7 days a week

Source: Productivity Commission, *Inquiry into Australia's Gambling Industries: Draft Report*, Canberra, 1999, p.12.38.

7.4.1 Locational Restrictions

Section 39B of the *Bookmakers Act* provides for the Minister to determine a place to be an approved sports betting venue and determine the operational arrangements for the venue(s).

Currently sports bookmakers are obliged to operate at the Betting Auditorium at the ACTRC.[76]

However, under s.51 of the *Betting (ACTTAB Limited) Act* ACTTAB also has a right to, acting as an agent for a licensed sports bookmaker, distribute fixed price sports betting products through its offices and agencies. ACTTAB has not sought to act as an agent for a licensed sports bookmaker.

At the discretion of the Minister, sports bookmakers are also allowed off track to certain designated venues for special occasions (eg, operating at the Casino on the day of the Melbourne Cup or at temporary accommodation during the V8 Racing series in Canberra next June). The Group considers this an appropriate course of action as the defined area of operation keeps the nexus between the venue operator and the bookmaker.

RECOMMENDATION 7.7

The Minister should retain the discretion, on the advice of the Gambling and Racing Commission, to allow sports bookmakers to operate off-course on special occasions under strict conditions. Such allowances should be seen as the extreme exception rather than the rule.

7.4.2 Costs and Benefits of Locational Restrictions

Costs Associated with the Restriction

The obligation to operate sports betting services from the Betting Auditorium has a number of problems under NCP:

- it limits the flexibility of sports bookmakers to choose the locations that are most logical for their business. For example:
  - as some sports bookmakers will never take face-to-face bets (because their clientele is almost exclusively overseas) there is little purpose being in a facility that is designed to a standard suitable for customers;
  - some other sports bookmakers may prefer to be in locations that are accessible to over the counter customers, rather than being located in the relatively remote racecourse; and
  - the existing sports bookmakers claim that existing rents are approximately twice that of comparable commercial rents. This adds to the cost structure of their business and places them at a competitive disadvantage with lower cost operators;
- it provides an advantage to the ACTRC which is not enjoyed by the racing codes; and

[76] As a result, sports betting bookmakers are required to pay the following to the manager of the auditorium (the ACTRC): an agreed amount per square metre of space occupied; 0.06 percent of all turnover as a management fee; and a share of the costs associated with the provision of the National Bookmakers Pricing Service (if the licensee gains a benefit from the BPS in the normal course of business).

- it provides a competitive advantage to one commercial landlord, the ACTRC, over all other landlords in the ACT.

Benefits of Centralised Provision

There are a number of benefits ascribed to the decision to locate sports bookmakers at the ACTRC:

- the central location creates a racing and betting precinct provides a hub of activity. This adds an element of flavour to the racecourse, possibly increasing revenue to the ACTRC and hence reducing calls for increased public subsidy;
- it facilitates easier regulatory oversight of sports bookmakers — the ACT Government has been responsible for the establishment of the central telecommunications framework (ie, for phones and the Internet) at the betting auditorium to allow for the monitoring and recording of all betting transactions.

7.4.3 Alternatives to Current Arrangements

The Group considers that alternatives to the current restrictions need to be considered in two separate circumstances — the permissible location of:

- back-office functions; and
- retail outlets.

Flexibility in Locating Back-Office Functions

The Group is not convinced that those licence holders which do not wish to have a retail presence should be required to locate at the Betting Auditorium. Allowing such licence holders to move away from the Betting Auditorium creates absolutely no social costs (because there is no interaction with the community) but may be a more efficient form of service delivery.

However, any movement by licence holders away from the Betting Auditorium should be on the grounds that current levels of regulatory oversight are not diluted and hence such licence holders should be required to fund the incremental regulatory costs associated with moving away from the betting Auditorium (eg, putting in dedicated data lines, etc).

RECOMMENDATION 7.8

Holders of sports betting licences should be entitled to establish back-office (ie, non-retail) operations at any secure location. Such licence holders will be required to cover all incremental regulatory costs associated with operations away from the Betting Auditorium.

Existing holders of sports betting licences felt that this would place them at a competitive advantage relative to new providers operating out of less expensive accommodation. The Group acknowledges that existing licence holders have entered into five year lease agreements at the Betting Auditorium and hence will be unable, in the short term, to take advantage of the increased flexibility provided by Recommendation 7.7. The Group suggests, however, than any commercial advantage for new providers, if such an advantage exists at all, will be marginal given the need for new providers

to provide for the incremental costs of providing regulatory oversight away from the auditorium.

Flexibility in Locating Shop-Fronts

The issue for shopfronts is two-fold:

- where they should be allowed; and
- who should be allowed to operate them.

Retail sports betting is possible in a number of jurisdictions. For example in Victoria Tabcorp states that, "Cash bets can be placed at any one of National Sportsbet's 43 outlets throughout Melbourne and Geelong."[77] Indeed, as noted earlier, the *Betting (ACTTAB Limited) Act* provides that has a right to, acting as an agent for a licensed sports bookmaker, distribute fixed price sports betting products through its offices and agencies.

ACTTAB suggests that if there is justification for retail sports betting it alone should have the right to operate. It argues that:

> This is the trend in other jurisdictions where the TABs in each State has, or will have, the exclusive right to offer sports betting outside the Betting Auditorium through its retail network.
>
> ACTTAB submission, p.16.

The Group considers that there will be little risk of increased problem gambling if new products are provided that are substitutable for existing products. The issue then is the relative substitutability between:

- fixed odds betting on racing and totalisator betting on racing — parties consulted as part of this review generally saw these as substitutes; and
- fixed odds betting on non-racing sports/events and totalisator betting on racing — there was a general view that gambling on racing attracted a different clientele to wagering on sports.

Given that sports betting on racing is a sufficient substitute for other forms of wagering on races the Group suggests that sports betting on racing events should be allowed at all classes of venue that ACTTAB currently sells its products (ie, at racecourses, hotels and clubs, and the casino).[78] While this is an expansion in the availability of the particular product (ie, sportsbetting) it is not in any way an increase in the accessibility of wagering because parimutuel wagering is already potentially available at the same venues.

RECOMMENDATION 7.9

Fixed odds betting on racing should be able to be provided by holders of a sports betting licence at all venues at which totalisator wagering products are currently able to be sold (ie, racecourses, totalisator outlets, hotels and

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[77] See http://www.tabcorp.com.au/tabcorp/sports/index.html (28 July 1999).

[78] The Group has previously stated its view that there is little policy justification for excluding the availability of otherwise available gambling products from the casino, "Once the community has made the decision to allow a casino it appears illogical to deny a dedicated gambling venue access to a form of gambling that is available in other venues (which are not primarily gambling venues)." The Allen Consulting Group, *Gambling Legislation in the Australian Capital Territory — A National Competition Policy Review*, Sydney, 1998, p.50. The Group continues to support this view and would encourage sports betting to be allowed in the casino even if the decision is taken not to implement Recommendation 7.9.

clubs, and the casino). Providers of retail sports betting should be required to cover all incremental regulatory costs associated with operations away from the Betting Auditorium.

Whether sports bookmakers will actually want to set up retail operations is uncertain:

- in addition to the extra regulatory costs associated with Recommendation 7.9, the lack of access to the BPS off-course will increase the risk bookmakers are exposed to by not having up to date information about odds; and
- currently only two sports bookmakers focus on domestic racing and new entrants to the market are most likely to focus on the burgeoning international market.

In short, the Group would not expect to see a large increase in the provision of these services, but that fact in itself does not justify maintaining the current restrictions.

The Group is somewhat uncertain about the freedom that sports bookmakers should have to sell sports wagers on a retail basis:

- on one hand, ACTTAB already has the ability to act as an agent for a sports bookmaker and so there is an implicit acceptance that sports betting should be able to be provided on a retail basis. Thus, it is difficult to argue that other totalisator outlets should not have similar rights; but
- the Group is wary of advocating the introduction of a new wagering product (ie, one that is not a readily substitutable product, in a practical sense, for any other retailed product).

Thus, while the Group supports, in principle, the introduction of non-racing sports betting at a retail level on the same basis as racing sports betting, the Group would like to see some analysis of the net social impacts associated with the introduction of retail sports betting in other jurisdictions (eg, Victoria). This is an issue that should be considered by the GRC following the release of the PC's final report into gambling.

7.5 Operational Restrictions at the Betting Auditorium

A number of operational restrictions exist that restrict when sports bookmakers can accept wagers at the auditorium.

For example, sports bookmakers are not allowed to accept face-to-face wagers when the ACTRC and the Queanbeyan Racing Club are conducting race meetings. This leads to the situation whereby a customer can stand facing a sports bookmaker and phone up to place a wager, but cannot do it without the phone.

The reason behind this restriction is that, as the ACTRC is not a 'Principal Club', the ACTRC must run its meetings under the authority of NSW stewards. In effect, the South Eastern Racing Association (the organisation

controlling the stewards in the ACT and the local NSW region) will not do anything, such as allowing sports bookmakers to compete with standing bookmakers at Queanbeyan, that undermines NSW racing.

This problem should be resolved once the ACTRC receives 'Principal Club' status and ACT stewards can oversee meetings. The ACTRC is in the process of gaining 'Principal Club' status.

RECOMMENDATION 7.10

Upon the ACT Racing Club receiving 'Principal Club' status, there should be no regulatory restriction on the ability of sports bookmakers from taking face-to-face bets on particular days.

7.6 Security Requirements

A number of operational requirements were developed prior to the operation of sports bookmakers, and as such, were developed on the basis of forecast turnover. Turnover for sports betting is well ahead of forecasts, and as such, some operational requirements may not meet the level of security and consumer protection originally envisaged.

The Group suggests that any arbitrary operational requirements be reassessed to reflect the operational risks. This may mean, for example, that in order to protect consumers in the event that a sports bookmaker ceases operation with outstanding winnings, sports bookmakers should be required to provide:

- a minimum level of security for turnover up to a certain specified level; and
- an additional percentage of turnover above the specified level.

While any increase in operational costs will be opposed by the sports bookmakers, this change can be justified on the grounds that it provides better protection for consumers and also increases the integrity of the ACT sportsbetting regime.

RECOMMENDATION 7.11

The size of the security guarantee provided by sports bookmakers should be tied more closely with the operational risks.

A

Appendix A

Terms of Reference

Appendix A
Terms of Reference

Review Legislation

The Contractor will examine the case for reform of legislative restrictions on competition, and any other issues arising in the course of the review that are germane to the quality and comprehensiveness of the review contained, but not limited to:

- *Betting (Totalizator Administration) Act 1964;*
- *Betting (ACTTAB Limited) Act 1964;*
- *Betting (Corporatisation) (Consequential Provisions) Act 1996;* and
- *Bookmakers Act 1985.*

The review will also consider both the following Acts as they related to ACTTAB:

- *Public Sector Management Act 1994;* and
- *Territory Owned Corporations Act 1990*

Considering that the legislation governing Racing has been recently reviewed and subject to a public benefit test it should be excluded from further consideration.

The review should consider the arrangements apply to pari–mutuel betting in the ACT, and specifically make recommendations in respect to any monopoly that ACTTAB Limited may exercise over part or whole of those arrangements.

In considering this, the review should take into account pari–mutuel betting arrangements and the legislative framework in other States.

Analyse the Legislation and Restrictions on Competition

The Contractor will review the legislation against clause 5(1) of the Competition Principles Agreement which states:

"The guiding principle is that legislation ... should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition."

In particular, the Contractor will examine evidence and report its findings in relation to:

- Clarification of the objectives of the legislation;
- Identification of the nature of the restrictions on competition;
- Analysis of the likely effects of the restriction on competition and the economy in general;
- Assessment of the costs and benefits of the restriction; and
- Consideration of alternative means of achieving the same result, including the use of non–legislative means.

Reform Options

The Contractor should address the questions below and any other questions that enhance the robustness and quality of the review.

- Is there a need for regulation?
- Does the regulation restrict competition?
- What alternatives are available to regulation that achieve the same ends as effectively but do not involve legislation?
- What are the impacts of deregulation on government?
- What are the consequences if regulatory failure occurred?
- What are the costs and benefits of the proposal and how might those risks by reduced, managed or transferred?
- When is Government intervention required or desirable in gambling activity?

Public Consultation

The Contractor will undertake appropriate public consultation including, but not limited to, inviting written submissions from people and/or organisations notified by the Territory to the Contractor on execution of this Agreement.

B

Appendix B

Consultation

Appendix B

Consultation

Given the short timeframe provided for the review the consultation was organised in the following manner:

- the Group, drawing upon the issues paper prepared by the Chief Minister's Department, prepared an issues paper that was distributed to a number of parties that were considered to have an interest in the review;
- an advert was placed in a Saturday *Canberra Times*; and
- meetings — either face-to-face or by telephone — were held with parties that requested meetings; and
- parties were invited to provide written submissions.

The involvement of various parties in the consultation process is summarised in Table B1.

Written submissions to the review are available from the Chief Minister's Department.

Table B1

Consultation Details

Organisation or Individual	Provided with the Issues Paper	Face-to-Face Meeting	Meeting by Phone	Written Response
ACIL Consulting				✔
ACT Bookmakers Association	✔	✔		
ACT Bookmakers Licensing Committee	✔	✔		
ACT Casino Surveillance Authority	✔			✔
ACT Racing Club	✔	✔		
ACT Revenue Office	✔	✔		
ACTTAB Agents Association	✔			✔
ACTTAB Limited	✔	✔		✔
Canberra Greyhound Racing Club	✔	✔		
Canberra Harness Racing Club	✔		✔	
Canbet Pty Ltd	✔	✔		
Capital Sports Pty Ltd	✔	✔		
City Index (Australia) Pty Ltd	✔	✔		✔
Jason McNamara	✔	✔		✔
Leo Morrisey	✔			
Licensed Clubs' Association of the ACT	✔	✔		
Lifeline Canberra Inc	✔	✔		
MegaSports (ACT) Pty Ltd	✔	✔		
NSW TAB	✔			✔
Pacific Casino Management Pty Ltd	✔			
Rodmain Pty Ltd	✔			
Sporting Management Concepts	✔			
Tabcorp	✔			
Tattersall's Gaming Pty Ltd	✔			
Thoroughbred Racing Board			✔	

Note: The ACIL Consulting submission was made on behalf of Tattersall's.