

MEMORANDUM AS TO TAB DECISION IN SUPREME COURT OF VICTORIA

Description of the TAB decision in the draft report

At page 13.29 of the Draft Report, the Productivity Commission states that

"Certainly, the recent Victorian Supreme Court Decision demonstrates some of the difficulties associated with the use of gross revenue. The decision invalidated the product fees put into place by Racing Victoria and Greyhounds Victoria due to:

- *the inconsistency of the arrangements with the underlying Racefields legislation. In particular the Racefields legislation requires fees to be a fixed amount, not based on a formula.*
- *the ambiguity of calculating gross revenue in certain circumstances."*

Summary of the TAB decision

Her Honour Justice Davies held that the fees imposed by Racing Victoria Limited (RVL) and Greyhound Racing Victoria (GRV) were invalid on several grounds

Relevantly, her Honour concluded that, as a matter of law:

- (a) section 2.5 19D(7) of the *Gambling Regulation Act 2003* did not authorise RVL and GRV to impose fees determinable by the application of a formula, rather than a quantified sum (see judgment at paragraphs [29]-[31]), and
- (b) alternatively, if it is valid to set a fee expressed other than as a quantified sum, it is a requirement for the valid exercise of the power to set a fee that an actual amount can be determined from the expression of the fee. Because the *Gambling Regulation Act* creates a liability to pay an amount, the amount must be capable of being worked out if it is not specified as an actual amount and this necessarily means that its calculation should not require any exercise of judgment or discretionary element (see judgment at paragraphs [32]-[33]).

Her Honour held that the fees imposed by RVL and GRV were invalid because neither body had stipulated a quantified sum as the fee payable by TAB (see judgment at paragraph [31]).

Her Honour also held that the fees imposed by RVL and GRV were invalid because

- the evidence showed that TAB's revenue from its operations is derived from several sources;
- the determination of the fee payable as a percentage of revenue would involve a number of integers;
- the application of some of those integers will involve matters of judgment, about which there may be legitimate differences of opinion between TAB and the controlling bodies – her Honour identified unclaimed dividends, free bets and the apportionment of profits from a

single wagering transaction involving more than one code or location as some of these integers.

it is not an answer that such uncertainty ought to be capable of resolution between the parties or, failing resolution, adjudicated upon by a Court applying ordinary principles of construction and interpretation and

in those circumstances, RVL and GRV failed to express their fee conditions in terms that fix a definite standard or criterion by which the amount of the fee can be ascertained with certainty, and that failure vitiates the exercise of the power to set a fee under the Gambling Regulation Act (see judgment at paragraphs [34]-[40]).

The application of the judgment to a turnover based fee

At page 13.29 the Draft Report stated that "it appears that [the Court's] ruling would equally apply to product fees based on turnovers."

The Draft Report correctly stated that the Court's finding that a fee must be a quantified sum in order to be valid would apply with similar effect to invalidate a fee expressed as a percentage of wagering turnover.

Her Honour did not need to, and did not, consider or express any views as to the certainty of a fee based on turnover.

It would be unsafe to seek to extrapolate from her Honour's findings on the uncertainty of the revenue based fees which were before the Court to a conclusion as to the certainty of any formulation, or particular formulation of a turnover based fee. Different considerations would apply to such a fee.



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