

1. Introduction

Betchoice supports the findings of the Productivity Commission in its Draft Report and wishes to register its appreciation for the thorough and comprehensive analysis the Commission has undertaken. This is our second submission in connection with this Inquiry.

Since the Commission's Draft Report, a number of submissions have been made in connection with the Chapter 13 of the Draft Report, both in writing to the Commission and at public hearings that have been held through late November and early December. Betchoice addresses a number of issues that have been raised in these submissions, as well as questions asked by the Commission in the Draft Report.

2. Have corporate bookmakers resulted in a decline in the racing industry?

Various submissions have been made to the effect that an increase in the market share of corporate bookmakers has resulted in a decline in racing revenues.

Betchoice does not believe this is the case. Contrary to the findings of the Draft Report, wagering turnover has not decreased.

Wagering turnover has not decreased

At [13.7], the Commission contends that, over the period from 2000 to 2007, the turnover of TABs and on-course bookmakers decreased in real terms. Betchoice submits that this view is incorrect.

The Australian Gambling Statistics 1981-82 to 2006-07 (the most recent available) indicates that TAB turnover in 2000-01 was \$11.852 billion (adjusted for inflation). In 2006-07, TAB turnover was \$12.646 billion. While TAB turnover has moved up and down during the period, it has not declined.

The statistics for on-course bookmakers paint a similar picture. In 2000-01, turnover was \$1.520 billion (adjusted for inflation). In 2006-07, turnover was \$4.045 billion. While Betchoice notes that these figures include the turnover of corporate bookmakers based in the Northern Territory, when the figures for Northern Territory bookmakers are removed from both totals, the results are \$1.295 billion and \$1.317 billion respectively.

On 18 December 2009, the Australian Racing Board released the Australian Racing Fact Book 2008-09. The Commission referred extensively to the Fact Book in the Draft Report. We have summarised the latest wagering turnover figures for the benefit of the Commission in the table below.

Table 1. Wagering turnover between 2007-2008 and 2008-2009 (\$ million).

Jurisd.	TAB			Bookmakers			Total		
	07/08	08/09	Δ %	07/08	08/09	Δ %	07/08	08/09	Δ %
NSW	3,036.39	3,342.98	10.10	468.98	564.26	20.32	3,505.37	3,907.24	11.46
VIC	2,508.46	2,705.94	7.87	450.59	482.37	7.05	2,959.05	3,188.31	7.75
QLD	1,534.59	1,670.00	8.82	190.99	227.94	19.35	1,725.58	1,897.94	9.99
SA	480.06	523.66	9.08	69.10	49.11	-28.93	549.16	572.77	4.30
WA	857.90	934.63	8.94	86.25	81.84	-5.11	944.15	1,016.47	7.66
TAS	353.22	467.98	32.49	2.07	2.09	0.97	355.29	470.07	32.30
ACT	120.80	130.72	8.21	55.42	38.08	-31.29	176.22	168.80	-4.21
NT	105.64	120.84	14.39	2,267.88	3,090.77	36.28	2,373.52	3,211.61	35.31
Total	9,051.4	9,896.8	9.34	3,591.3	4,536.5	26.32	12,642.7	14,433.2	14.16

Source: Australian Racing Fact Book 2008-09.

As is immediately evident, wagering turnover has grown in every jurisdiction with the exception of the Australian Capital Territory. TAB turnover increased in each jurisdiction (except the ACT) by almost ten percent. Betchoice notes these figures are supported by several recent newspaper articles, all claiming increases in turnover in 2009¹.

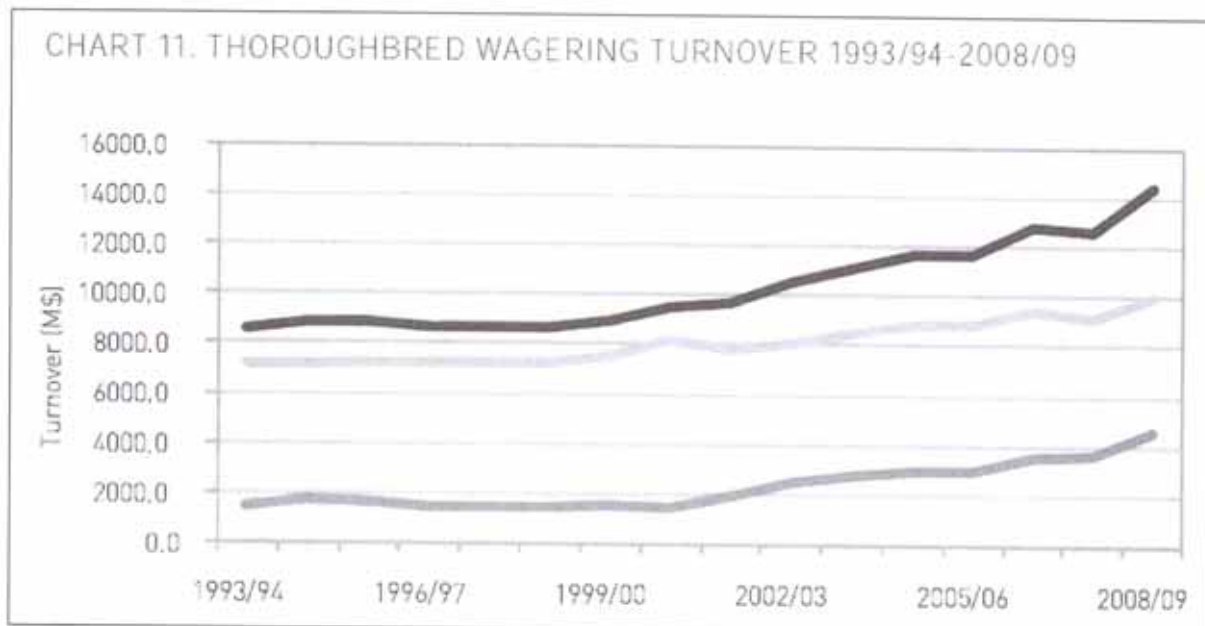
We note the comments made at the Productivity Commission's public hearing in Melbourne on 26 November 2009 by Robert Nason, the then Managing Director of Wagering at Tabcorp. Mr Nason stated that "The notion in the report that the racing industry's funding is declining [is] absolute rubbish."² We share Mr Nason's view about the funding available to the racing industry – it has increased over the relevant period. Betchoice submits that competition has encouraged, not hampered, growth. Low-cost operators such as Betchoice encourage different types of customers to wager, including customers who are averse to the high price products of totalisators.

We also note two important charts in the Fact Book, excerpted below.

¹ R Thomas, 'Record betting in tough times', Daily Telegraph, 19 November 2009, <http://www.dailytelegraph.com.au/news/opinion/record-betting-in-tough-times/story-e6frezz0-1225799888679>, Accessed: 30 November 2009; D Miletic, 'Records fall as punters dig deep', The Age, 4 November 2009, <http://www.theage.com.au/news/sport/horse-racing/records-fall-as-punters-dig-deep/2009/11/03/1257010200500.html>, Accessed 27 November 2009; D Cartwright, 'More pomp than party at Eagle Farm', Bloodstock.com.au, 3 November 2009, <http://www.bloodstock.com.au/news/story.php?id=2799>, Accessed 27 November 2009; AAP, 'Punters splurge millions on cup', The Age, 3 November 2009, <http://news.theage.com.au/breaking-news-sport/punters-splurge-millions-on-cup-20091103-hu4n.html>, Accessed 27 November 2009.

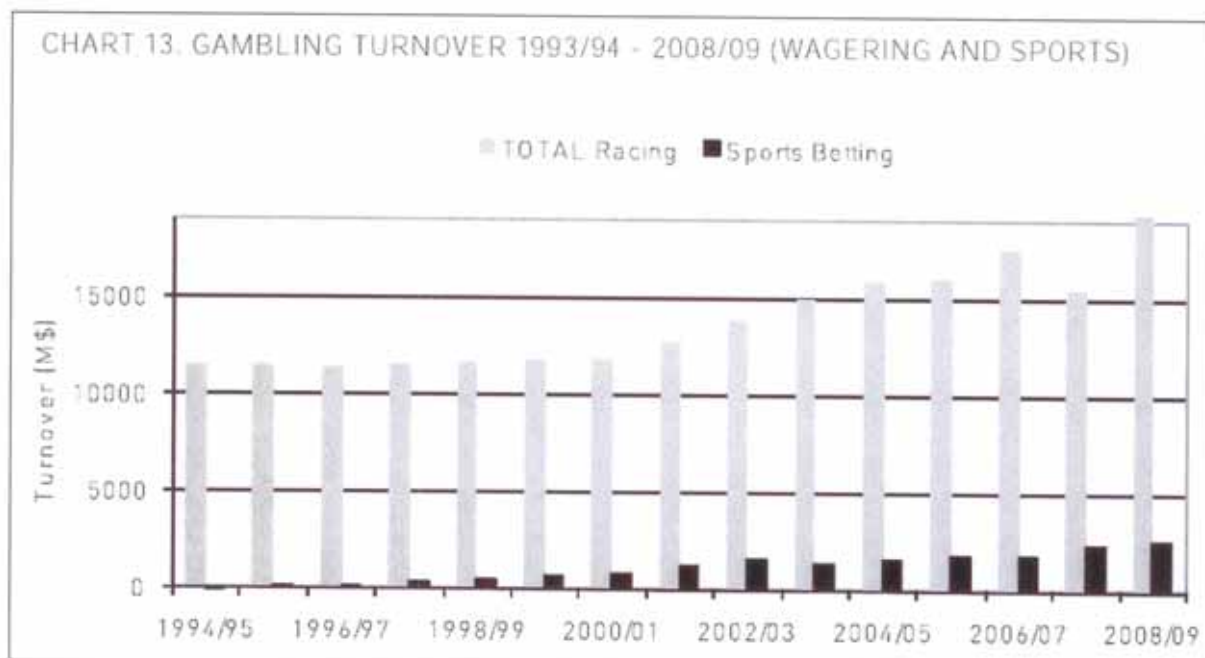
² R Nason, *Transcript of the Public Hearing of the Productivity Commission Inquiry into Gambling*, Melbourne, 26 November 2009, p 17.

Chart 1. Thoroughbred Wagering Turnover 1993/94 – 2008/09.



Source: Australian Racing Fact Book 2008-09.

Chart 2. Gambling Turnover 1993/94 – 2008/09 (Wagering and Sports)



Source: Australian Racing Fact Book 2008-09.

Betchoice submits these charts demonstrate the correctness of the argument we made in our original submission that, to the extent turnover had declined in 2007-08, this was the result of external factors (such as Equine Influenza).

The extraordinary strength of Australia's wagering industry is demonstrated by a comparison with the global trend.

Table 2. Comparison between leading racing countries globally (including Australia) and Australia.

	Global	Australia
Races	11.7% decrease	10.1% decrease
Individual Starters	2.9% decrease	0.8% decrease
Total Starters	10.6% decrease	0.8% decrease
Prize Money	24.5% decrease	23.0% increase
Turnover	32.5% decrease	43.2% increase

Source: Australian Racing Fact Book 2005-06, 2006-07 and 2007-08.

Betchoice supports the submission made by the Australian Bookmakers Association at the public hearing in Canberra³ that the countries where prize money has increased have been those industries that involve mixed totalisator and fixed-odds systems (such as Australia).

We strenuously oppose the suggestion that a decline racing revenues is inevitable. What the industry requires is more competition in racing to drive innovation among wagering operators and more investment by racing administrators in marketing and infrastructure. As the Spring Carnival figures referred to in the Australian Racing Fact Book demonstrate, Australians are eager to bet on racing – the product simply needs to be of a calibre to warrant their attention.

We believe that corporate bookmakers can help in two ways. By attracting customers from the low-end of the market, bookmakers help bring in punters who might otherwise prefer other gambling options. Furthermore, as businesses that keenly appreciate the importance of marketing, they are well-placed to promote racing to new markets. That expertise is available for use by racing administrators, and to the benefit of the wider industry.

3. Have corporate bookmakers grown at the expense of totalisators?

A related, but distinct, claim made in connection with the suggestion that corporate bookmakers are the result of a decline in the racing industry is that corporate bookmakers have grown to the severe detriment of existing wagering operators, particularly totalisators. Betchoice believes this is incorrect – over recent times there has been growth in the turnover of both the corporate bookmakers and totalisators.

Betchoice points out that overall TAB turnover has grown in every jurisdiction in Australia over the period from 2000 to 2009, with overall growth almost 10 per cent in 2008-09 (in some cases, growth was as high as 32 per cent).

This raises the question as to how both TABs and corporate bookmakers can be succeeding. Betchoice submits two reasons why this is the case.

Customers are from a different market segment

³ The transcript for this hearing was unavailable at the time of writing.

Betchoice agrees that the growth in the turnover of TABs and on-course bookmakers has not been as dramatic as the growth in turnover of corporate bookmakers. However, Betchoice submits that this is entirely consistent with TABs and on-course bookmakers offering a product to a mature market segment whereas corporate bookmakers are developing a new segment of the market. Over time, we would expect corporate bookmaking growth to slow.

We agree with the Commission's reference in the Draft Report to the Credit Suisse Equity research report at [13.31]. Credit Suisse found that in relation to the growth of corporate bookmakers:

Our conclusion is that corporate bookmakers are actually tapping into a market that only exists at the low take-out rates of 4-6 per cent and would not exist at > 16 per cent take-out pricing of totalisators.

This is an important argument because it suggests that the market which corporate bookmakers exploit is a segment of the market that is unavailable to totalisator operators because of their high take-out rates. Accordingly, customers within this segment are not customers who would typically bet with totalisators. This is one of the primary reasons why the TABs have entered the bookmaking sector by offering fixed odds wagering online (e.g. Luxbet).

There is a further difference between the customers of corporate bookmakers and totalisators. Eighty to eighty-five per cent of Betchoice customers place their bets via the Internet. This compares with between 9 to 31 per cent for totalisators (depending on the particular totalisator). Betchoice's customers are customers who want the convenience and service provided through online wagering. The totalisators, whose customers primarily bet through retail outlets, service a different type of customer – one who prefers being able to visit a physical location. It is important to note that these customers still represent the overwhelming majority of wagering customers.

Bookmakers are the totalisators' biggest customers

Corporate bookmakers have not grown at the expense of totalisators because corporate bookmakers are major customers of totalisators. In order to offset their risk, corporate bookmakers bet back into totalisator pools, thereby helping to reduce their exposure. This helps to boost totalisator turnover and means that a dollar bet with a bookmaker is not a dollar lost to the totalisator.

This argument has been used as one of the primary justifications for the objectives of the race fields regime, namely that the corporate bookmakers are "free-riding" on the racing sector due to the decrease in totalisator revenues. It is important to note that a dollar of turnover generated by the corporate bookmakers is not a dollar of turnover lost by the totalisators; in fact the reality is quite different.

Indeed, the potential for revenues for the racing sector increases as a result of the willingness and ability of corporate bookmakers to contribute "product fees" to the racing industry; however, care needs to be taken to ensure that the levy charged is not of a rate that makes it uneconomic for the corporate bookmakers to continue to conduct their business.

4. What are the race fields regimes in the various States and Territories?

Although the race fields regimes operating in each State and Territory share broad similarities, there are important differences from jurisdiction to jurisdiction and from code to code.

A number of changes are required to Table 13.2 of the Draft Report. The table below sets out the position as at the date of this submission.

Table 3. Race fields fee in Australia.

Jurisdiction	Thoroughbred	Harness	Greyhounds
New South Wales	1.5% of turnover	1.5% of turnover	The <i>lesser</i> of 1.5% of turnover OR 10% of revenues
Victoria	10% of revenues ⁴ 15% during October and November	1.5% of turnover	1.5% of turnover ⁵
Queensland	1.5% of turnover	1.5% of turnover	1.5% of turnover
South Australia ⁶	10% of revenues	10% of revenues	10% of revenues
Tasmania ⁷	None	None	None
Western Australia ⁸	1.5% of turnover OR the <i>greater</i> of 20% of revenues or 0.2% of turnover	1.5% of turnover OR the <i>greater</i> of 20% of revenues or 0.2% of turnover	1.5% of turnover OR the <i>greater</i> of 20% of revenues or 0.2% of turnover
Northern Territory	None	None	None
Australian Capital Territory ⁹	% of revenues	% of revenues	% of revenues

⁴ Racing Victoria Limited uses revenues from the previous year to calculate a fixed amount so as to comply with the requirement in the *Gambling Regulation Act 2003* (Vic) that the fee be “an amount” (see decision in the “TAB case”).

⁵ Greyhound Racing Victoria uses turnover from the previous year to calculate a fixed amount so as to comply with the requirement in the *Gambling Regulation Act 2003* (Vic) that the fee be “an amount” (see decision in the “TAB case”).

⁶ Rather than being a condition of an approval or authority as in other jurisdictions, South Australia implements its race field fee through contribution and integrity agreements that betting operators are required to enter into with the relevant controlling bodies of racing by the *Authorised Betting Operations Act 2000* (SA). Betchoice understands that all contribution agreements apply a standard of 10 per cent of revenues.

⁷ The Tasmanian Director of Racing has advised betting operators that, as a result of the decision in the *TAB* case and on the advice of the Solicitor-General of Tasmania, the Director of Racing will issue approvals to publish Tasmanian race field information without requiring a fee to be paid. Prior to this decision, operators had been advised the fee would be 10 per cent of revenues.

⁸ The Western Australian race fields regime is implemented by the *Betting Control Act 1954* (WA) and the *Racing Levy Act 2009* (WA). While the *Racing Levy Act* has commenced, the relevant sections of the *Betting Control Act* have yet to take effect. They will commence on a date to be proclaimed. The Western Australian Government has not indicated when this will occur.

5. Should the product levy be a fee based on revenues?

Betchoice strongly supports Draft Recommendation 13.1 that a national levy should be paid on the basis of gross revenues. The alternative, as suggested by some in the racing industry, is a levy that is paid on the basis of turnover.

The Commission correctly pointed out that this would have the greatest effect on low-margin operators and would reduce overall competition. We have provided the Commission with information on a confidential basis that indicates the drastic effect this would have on Betchoice's business.

While we support the Commission's reasoning, we do wish to point out the errors in the arguments against a gross revenues fee. During the course of the public hearings and in the submissions that have been made to the Commission we have identified three arguments. We deal with each in turn.

Argument 1: Bookmakers can afford to pay the fee

The comment was made by Racing NSW that:

We've talked about the fact that we don't think that turnover based fees will drive operators out of business. The fees have been in operation for over 12 months and there's no evidence of any wagering operator ceasing activities or drastically altering its business models.¹⁰

It is a myth that all corporate bookmakers succeed. Winbet and Multibet are two operators who have ceased business, partly as a result of the product fees imposed by racing authorities such as Racing NSW. More operators will be affected over time.

Moreover, it is important to note that corporate bookmakers have, since their inception, been paying race fields fees calculated on the basis of turnover, such as those imposed by Racing NSW, "under protest"¹¹. These fees have been paid so as to ensure corporate bookmakers' compliance with legislation in each jurisdiction. Corporate bookmakers do not believe such product fees are valid and have launched numerous challenges in courts at the State and Federal level. In the event that these challenges fail and jurisdictions are able to impose turnover-based fees, corporate bookmakers, such as Betchoice, will be forced to reconsider the economics of their operations.

Argument 2: Revenues are an uncertain metric

One of the most frequently deployed arguments against a revenue-based fee is the suggestion that revenues are an uncertain metric. Proponents often refer to the decision in the *TAB* case

⁹ On the 8 December 2009, the Australian Capital Territory Parliament passed the *Racing Amendment Bill 2009* (ACT). This will amend the *Racing Act 2009* (ACT) so as to implement a race fields regime. This regime will go into effect on 1 March 2010 and provide for a fee calculated as a percentage of revenues. The percentage of revenues is at the discretion of the controlling body for each particular code of racing. The controlling bodies have not indicated what percentage they will select.

¹⁰ A Brown, *Transcript of the Public Hearing of the Productivity Commission Inquiry into Gambling*, Sydney, 1 December 2009, p 181.

¹¹ A Brown, *Transcript of the Public Hearing of the Productivity Commission Inquiry into Gambling*, Melbourne, 7 December 2009, 175.

and mistakenly characterise it as establishing that fees calculated by reference to revenue are inherently uncertain. In Tabcorp's oral submission, for instance, Robert Nason stated:

...the sole purpose of us undertaking [the *TAB* case] was to demonstrate the uncertainty involved in a revenue based calculation and the court gave an unequivocal decision that there was sufficient uncertainty to make that unreliable and not as a mechanism for which product fees should be levied.¹²

This is not true. While the Court made a number of findings, one of them was not an "unequivocal decision" that revenue-based calculations are uncertain. As noted by the Commission at [13.29], the judgment contained two findings relevant to the issue of the fee to be paid¹³:

- (a) the particular wording of the section of the Victorian race fields legislation required the fee to be a fixed amount; and
- (b) in the event that the finding that the fee be a fixed amount was incorrect, the formula specified was legally uncertain.

As is immediately apparent, the first finding was particular to the wording of the Victorian race fields legislation and applies to any calculation based on formula (including one on the basis of turnover). We note that the only jurisdiction in Australia that uses similar wording to Victoria is Tasmania¹⁴.

The second finding was that the formula specified by the racing administrators in question was legally uncertain. To properly understand this finding, it is necessary to understand what is meant by "legal certainty" in a legal context. Legal certainty is a requirement that, when a formula is set for a fee, the formula is able to be applied without discretion¹⁵.

The Court found that the particular formula used by the relevant racing administrators did not meet this standard because:

- (a) in the case of Racing Victoria, unclaimed dividends, bad debts, errors and customer claims, costs for multi-leg bets and free bets were not sufficiently defined and so were at the discretion of Racing Victoria as to how they were applied; and
- (b) in the case of Greyhound Racing Victoria, unclaimed dividends, free bets and multi-leg bets were not sufficiently defined and were at the discretion of Greyhound Racing Victoria as to how they were applied.

This is not an issue that has anything to do with gross revenues. The Court did not find that a fee calculated on the basis of gross revenues was legally uncertain. Rather, the Court considered that, in the process of calculating gross revenues, there was legal uncertainty in the way that the deductions were applied by the two racing administrators.

¹² R Nason, *Transcript of the Public Hearing of the Productivity Commission Inquiry into Gambling*, Melbourne, 26 November 2009, p 19.

¹³ In total Davies J made nine findings, of which only two related to the use of a formula as the basis of a fee. The findings are set out in the judgment at [18] to [53].

¹⁴ As noted above, Tasmania has suspended its requirement for a fee paid on the basis of a formula as a result of advice from the Solicitor-General.

¹⁵ See *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 198 (Dixon J).

Betchoice submits that, as similar deductions are permitted in situations where a fee is calculated on the basis of turnover, then similar issue of legal uncertainty can arise. In other words, the problem is not, as some in the race industry have claimed, the method of calculating the fee. The problem is in ensuring that deductions which are permitted are correctly drafted¹⁶.

Argument 3: Revenue-based fees operate successfully

The claim that a product fee calculated on the basis of revenues is necessarily uncertain is belied by the product fees being applied around Australia without any issue. The Commission recognised as much at [13.30]. We supplement that list to take into account the corrections in Table 3:

- New South Wales (thoroughbred¹⁷, greyhounds);
- Victoria (thoroughbred¹⁸);
- South Australia (thoroughbred, harness and greyhounds);
- Western Australia (thoroughbred, harness and greyhounds); and
- ACT (thoroughbred, harness and greyhounds).

In the case of Western Australia and the ACT, the race fields regimes implementing a fee calculated on the basis of revenues were passed after the decision in the *TAB* case.

In addition, we draw the attention of the Commission to the other professional bodies that use revenues as the basis for their fee:

- Australian Football League;
- Cricket Australia;
- National Rugby League;
- Professional Golfers' Association of Australia; and
- Tennis Australia.

Finally, Betchoice draws the attention of the Commission to the fact that almost all other gambling taxes in Australia (electronic gaming machines, casino, lotteries, keno, interactive gaming) are calculated on the basis of gross revenues¹⁹. Again, it is clearly not a metric that other administrators have issues in applying.

Argument 4: Turnover-based fees are easier to calculate

¹⁶ This would cause a number of the issues alluded to in the oral submissions made by Racing NSW at the Sydney Public Hearing to be addressed.

¹⁷ Tabcorp funding obligations to Racing New South Wales are, in part, calculated on the basis of revenues.

¹⁸ As a result of the decision in the *TAB* case, Racing Victoria now calculates a fixed fee on the basis of reported revenues for the previous year.

¹⁹ We refer the Commission to the Interstate Comparison of Taxes 2008-09 at http://www.treasury.nsw.gov.au/Treasury_Research_Papers

It is clear that the suggestion that revenues are an uncertain and unworkable metric is simply not supported by the evidence. As much was acknowledged by Michael Kenny, Chairman of the Racing Industry Consultation Group, when he stated in his oral submission that the implementation of a revenue-based fee was “not impossible”²⁰.

This leaves only three arguments in favour of a fee calculated on the basis of turnover:

- that it is easier to calculate²¹;
- that it ensures the same amount is paid by each operator; and
- that it is fairer to administer because administrators are compensated for the cost of conducting the race.

The suggestion that revenue-based fees are more difficult to calculate implies that the calculations are performed by the racing administrators. This is not the case. Racing administrators around Australia provide wagering operators with forms to complete to calculate the fees that are payable. Any difficulty that may exist in calculating a levy on the basis of revenues lies with the wagering operator. Despite this, corporate bookmakers consider that a fee calculated on the basis of revenues is preferable.

Argument 5: Turnover-based fees are fairer to competitors

The second argument put in favour of turnover-based fees is that a fee calculated on the basis of turnover ensures that the same amount is paid by each operator for the use of the information and so puts all operators on a level playing field²².

There are two problems with this argument. First, it assumes that all wagering operators are already on a level playing field. This is manifestly not the case. Totalisators have exclusive monopolies over providing pari-mutuel betting. In contrast, bookmakers and betting exchanges conduct business using high-risk business models. This situation might not be so problematic were it not for the fact that totalisators were awarded their exclusive licences when they were all still government-owned bodies

As a result, and as the Commission notes at [13.30] and [13.31], the effect of a fee calculated on the basis of 1.5 per cent of turnover would result in an effective fee of 9.4 per cent of gross revenues for totalisators, 25 per cent of gross revenues for fixed-odds bookmakers and 33.3 per cent of gross revenues for betting exchanges. This is hardly a level playing field.

The second issue with the argument is that it relies on an assumption that the use of race fields to the benefit of one operator (obtaining a bet) come at the equal detriment to another (that is \$100 bet with a bookmaker is \$100 not bet with the totalisator). As indicated above, any money bet with the wagering operators at the low-end of the market is not money lost to the higher end of the market as the statistics showing growth in TAB turnover of almost 10 per cent demonstrate.

Argument 6: Turnover-based fees are fairer to administrators

²⁰ M Kenny, *Transcript of the Public Hearing of the Productivity Commission's Inquiry into Gambling*, Sydney, 1 December 2009, p 165.

²¹ See M Kenny, *Transcript of the Public Hearing of the Productivity Commission's Inquiry into Gambling*, Sydney, 1 December 2009, pp 163 and 165.

²² See P V'landys, *Transcript of the Public Hearing of the Productivity Commission's Inquiry into Gambling*, Sydney, 1 December 2009, p 174.

The third and final argument in favour of turnover-based fees is that they are fairer to administrators because they compensate the administrator for the cost of conducting the race that produces the product.

Determining what price is “fair” will rarely be easy. There is a risk that the supplier of services will seek to increase the amount of money they can extract from users while users will seek to decrease the amount of money they have to pay to suppliers. Effective balancing can be a difficult task.

However, there is an area of public policy that can assist. Betchoice submits that, in determining what price is fair, the competition principles that underlie Part IIIA of the *Trade Practices Act 1975* (Cth) provide guidance in this respect. Part IIIA contains procedures for determining pricing of services where those services are provided by owners of “monopoly” facilities. Although not directly applicable in this instance, they can nevertheless be a useful tool.

The decision in *Re Australian Union of Students* (1997) 140 FLR 167 at 171 succinctly summarises the principles behind Part IIIA:

...competition, efficiency and public interest are increased by overriding the exclusive rights of the owners of “monopoly” facilities to determine the terms and conditions on which they will supply their services.

Betchoice is concerned that, in calculating the fee, some racing administrators have failed to conduct an analysis along these lines. Rather, they have sought to protect existing arrangements regardless of whether those are in the best interests of the consumer (or indeed the wider wagering industry).

6. What is an appropriate amount for the levy?

The Productivity Commission does not recommend a specific quantum for the fee although at [13.32] the Commission does note that a fee of 10 per cent would match the levy applied in the UK. Betchoice supports the Commission’s concern to have a levy set at a level that is sustainable for all operators.

Clearly the question of the method of calculating the levy becomes somewhat academic if the quantum is so high as to drive operators out of business. While we support the establishment of a national body to set the levy (see below), we nevertheless think the Commission can make an important contribution to public debate in terms of providing an upper limit for the fee (the Commission’s observations at [13.32] come close to doing this already).

Betchoice takes the position that a fee of 10 per cent should be the upper limit for any race fields fee. We note that a fee of 10 per cent of gross revenues would be approximately the same as the levy of 1.5 per cent of turnover from the perspective of the TABs. As a result, there would be no decrease in revenues from totalisator operators for the current jurisdictions that use a turnover-based fee. It would be less from the perspective of bookmakers and betting exchanges and allow them to continue operating in a manner that is financially viable.

The Commission noted frequently throughout the Public Hearings that the issue of the basis for the levy is somewhat moot if the quantum is so high as to drive corporate bookmakers out of business. Betchoice endorses this view. While Betchoice prefers a fee calculated on the basis of gross revenues, we would be able to work with racing administrators to develop a fee calculated on the basis of turnover provided that the quantum of the fee was not so large as to

create competitive disadvantage between bookmakers and other wagering operators. Betchoice submits that, for the reasons explained above, 1.5 per cent represents a fee that creates such a disadvantage.

7. Should there be a national body to set the levy?

Betchoice agrees with Draft Recommendation 13.1 that a national levy should be set by an independent body. We support the structure of such a body in a form similar to the New South Wales Independent Pricing and Review Tribunal. We concur with the Commission that many racing administrators are in danger of lacking the independence necessary to set prices that are fair to all wagering operators.

An appropriate model

At [13.34], the Commission contended that an independent body was likely to deliver the best results in terms of consumer outcomes. The New South Wales Independent Pricing and Regulatory Tribunal (IPART) was held up as a model for how such a body would be structured.

During the Productivity Commission's public hearings, questions were raised over the appropriateness of such a model. For instance, Alan Brown, Chairman of Racing NSW:

We say that to suggest that the industry prices be established by a body similar to IPART would be inconceivable. As I understand it, that's a body that oversees regulation of the water, gas, electricity and public transport industries of New South Wales. The primary purpose is to regulate the maximum prices charged in monopoly services by government utilities. We're a private enterprise, not a government utility, and we don't provide services for and on behalf of the government. But we as a body have responsibility for - and I've stated here it's pretty much from the act under which we were established - overseeing the business, economic and strategic development of the horseracing industry, and initiating, developing and implementing policies considered conducive to the promotion, strategic development and welfare of the horseracing industry in the state, as well as protecting the public interest in relation to that industry. We think it would be ludicrous to suggest that that could be undertaken without the ability to control the industry's revenue streams.²³

Betchoice submits that, contrary to the assertions by Mr Brown, racing administrators very closely resemble providers of monopoly services. Racing NSW is a corporation created by statute²⁴ with the exclusive rights to control, supervise and regulate thoroughbred horse racing in New South Wales²⁵.

Independence is crucial

As the Commission observed at [13.34], there are "significant drawbacks" to the administration of a national levy by racing authorities. The Commission referred to the close historical association between racing authorities and totalisator operators and the dangers this posed in terms of conflicts of interest.

²³ A Brown, *Transcript of the Public Hearing of the Productivity Commission Inquiry into Gambling*, Sydney, 1 December 2009, pp 181-182.

²⁴ *Thoroughbred Racing Act 1996* (NSW), section 4.

²⁵ *Thoroughbred Racing Act 1996* (NSW), section 13.

Betchoice's experiences dealing with some racing authorities suggest this danger is very real. In 2008, when the New South Wales government agreed to relax advertising restrictions as a result of the decision in *Betfair*, Betchoice contacted the Australian Jockey Club in Sydney regarding race sponsorship. When Betchoice informed the AJC they were a wagering operator, they were told that Betchoice would be unable to sponsor any races. A similar response was received from the Victorian Racing Club.

In some cases, wagering operators have been able to sponsor races but this has taken considerable effort due to resistance by racing authorities and clubs to enter into these arrangements²⁶. Betchoice can see no justification for such reluctance on the part of clubs to refuse sponsorship other than a perception that to do so will protect totalisator operators. It leads to the conclusion that racing authorities are too conflicted to set a fair fee for their product.

Consumer interests

The failure to set a fair fee will have a negative impact upon consumers. A fee which is not sustainable for operators such as Betchoice will drive corporate bookmakers out of the market and restrict the range of wagering options available to consumers. Yet despite this, some authorities have shown little or no interest in even discussing what would constitute a reasonable fee.

In Queensland, for example, initial requests by bookmakers to make submissions on an appropriate fee were rebuffed and Betchoice understands that it was only after a wagering operator commenced court action against Queensland Racing that a decision was made to provide wagering operators with an opportunity to put their case on an appropriate fee.

Racing NSW has maintained that, if a fee calculated on the basis of 1.5 per cent of turnover makes it unsustainable for corporate bookmakers to operate, corporate bookmakers should simply change their business model. Little or no regard is had to the impact this will have on the customers of corporate bookmakers.

Simply put, many racing authorities are not in an appropriate position to decide on an appropriate fee given the multitude of different interest groups involved. A body such as IPART, which can gather representatives from all parties, stands a far better chance of selecting a fee that is reasonable and sustainable for consumers and the industry.

8. Should the national body directly distribute to the racing clubs?

At [13.36], the Commission requested feedback on the feasibility of a direct distribution model. The Commission observes that ideally the proceeds from any national levy should be returned directly to the clubs. Betchoice agrees. The Commission points out that this may be difficult to do as the financial and administrative feasibility of such a proposal is unknown.

Correlation of product and price

Before Betchoice addresses those two issues, we submit there is an important point regarding the logic behind direct distribution that is worth considering. At present, a wagering operator

²⁶ In a similar vein, Rob Waterhouse, in his oral submission to the Commission, referred to the way in which sponsorship by TABs has made it difficult for other wagering operators to even be mentioned in the media. See R Waterhouse, *Transcript of the Public Hearing of the Productivity Commission Inquiry into Gambling*, Melbourne, 26 November 2009, p 32.

such as Betchoice pays a race fields fee to a racing administrator. This fee is then divided between the clubs. In return for this, Betchoice receives nothing other than a covenant not to sue.

Accordingly, while the fee is characterised as a “product” fee there is no product actually provided. Instead, operators need to purchase, at their own expense, the race field information for which the fee is nominally paid.

This is particularly problematic in New South Wales where it is clear that the payment of the product fee does not entitle the payer necessarily to the benefit of any intellectual property rights that may subsist in race fields. In other words, despite paying the product fee (for which no product is provided) and a data fee, a wagering operator like Betchoice may still need to pay a further licensing fee for the use of that intellectual property.

Indeed, in October 2009, Racing NSW attempted to do just this. Letters were sent to wagering operators demanding that each operator enter into a deed with Racing NSW to pay a licensing fee in respect of copyright based on 3 per cent of turnover. While this letter was withdrawn a few days later, Racing NSW, in its oral submissions, indicated it still holds the view that such a licensing fee can and will be levied in respect of copyright²⁷. Additional fees may be payable by the wagering operator to facilitate access to the data to enable the race fields to be utilised in the course of the operator’s business.

Direct distribution to the clubs would align product with payment. However, care would need to be taken that the payment of the fee in return for race fields include a licence to use the copyright.

Financial feasibility

We now turn to the issue of feasibility. Betchoice is unaware of any detailed arguments that have been put to the Commission either in the public hearings or in the written submission regarding the financial feasibility of such a decision. Of the arguments that have been made, most have suggested that to allow clubs to compete would be detrimental because it would disrupt the agreements that have been struck relating to the organisation of racing meetings.

Betchoice submits that any disruption would really be the energy unleashed by competition. As it currently stands, clubs have little opportunity to innovate. Night racing presents an excellent example of how this system has failed the industry.

Despite the huge potential for growth in industry revenues presented by night racing for thoroughbreds, changes have been slow due to the complex agreements that exist between the different racing code authorities. This is particularly unfortunate given Australia’s geographic location. The east coast of Australia is between two and three hours ahead of major wagering markets such as Hong Kong, Macau and Singapore. Evening thoroughbred racing would allow racing clubs to tap into these major overseas markets, potentially leading to large increases in revenue²⁸.

²⁷ A Brown, *Transcript of the Public Hearing of the Productivity Commission Inquiry into Gambling*, Sydney, 1 December 2009, p 188.

²⁸ The NSW TAB estimates that some clubs could double revenue by introducing night racing. See E Herd, ‘Gosford race club could double revenue says TAB’, *Central Coast Express Advocate*, 26 November 2009, <http://express-advocate-wyong.whereilive.com.au/news/story/gosford-race-club-could-double-revenue-says-tab/>, Accessed 18 December 2009.

Direct distribution would encourage such innovation because it would provide clubs with a financial incentive.

Administrative feasibility

Betchoice submits that there is no reason why a direct distribution model would be administratively infeasible. As it stands, racing authorities are necessary for the following primary purposes:

- collecting and distributing product fees;
- negotiating agreements between the different codes; and
- collecting race field information data from clubs and transmitting the data to Racing Information Services Australia (“RISA”).

We note that, if a national body collected the product fee, the first purpose would be unnecessary. Further, if the codes received product fees relative to the bets taken on their particular code, there would be no need for the complex funding agreements that racing administrators presently administer.

If codes and clubs were permitted to compete freely with one another, then the other agreements between the codes would also be unnecessary.

With respect to the third purpose, it is Betchoice’s understanding that the race clubs presently provide the information to racing administrators who then provide the information to RISA. Clearly, there is no reason why the clubs could not send this information directly to RISA.

There may still be necessary functions that a representative body could undertake. However, Betchoice submits that it would be more equitable for those clubs to choose to fund the bodies that represent their interests rather than have those representative bodies choosing the revenues that are returned to the clubs.

9. Should Tabcorp’s ownership of SKY be investigated?

Betchoice supports Draft Recommendation 13.2 that the Australian Government should request the Australian Competition and Consumer Commission to examine any adverse implications for competition associated with the ownership arrangements for SKY Channel.

As noted above in respect to race sponsorship, the threat of anticompetitive behaviour in wagering should be treated with utmost concern. Betchoice has itself been denied the opportunity to purchase advertising and understands that other corporate bookmakers have similarly been unable to obtain advertising on SKY, a significant competitive disadvantage considering the reach of the network²⁹. Indeed, it would be commercially inappropriate for Tabcorp, as the owner of Sky Channel, to allow advertising by its competitors to take place as that could only operate to the commercial disadvantage of its wagering operations.

²⁹ We note that the only serious competitor to SKY, TVN, is in talks to merge its operations. See A Dunn, ‘TVN Sky close to striking deal’, *Daily Telegraph*, 10 November 2009, <http://www.dailytelegraph.com.au/sport/racing/tvn-sky-close-to-striking-deal/story-e6fre6r-1225795874319>, Accessed 18 December 2009.

10. Should credit betting be broadened to other providers?

At [13.43], the Commission requests further feedback on whether credit betting should be extended to other betting providers. Betchoice considers that, in the interests of promoting competition and creating a level playing field, credit betting should be open to all operators.

Betchoice considers that the harm minimisation measures proposed by the Commission strike the right balance and would ensure that the risks of credit betting are appropriately minimised.

11. Should retail exclusivity be removed?

Betchoice supports Draft Finding 13.5 that the arguments for renewing TAB retail exclusivity are not compelling. Betchoice urges the Commission in its final report to recommend that such arrangements are not continued.

Justification for maintaining exclusivity

As the Commission notes at [13.45], there are three grounds to justify retail exclusivity. Two of the grounds no longer apply, leaving the only justification to be harm minimisation. Betchoice concurs with the view of the Commission that granting a monopoly is a poor means of ensuring harm is minimised. It is inconsistent with the approach taken by governments regarding other forms of gambling (electronic gaming machines and casinos, for example).

Betchoice submits that there are significant negative outcomes as a result of granting a monopoly in relation to retail off-course wagering. Obviously, the consumer is worse off. The expensive product offered by TABs discourages customers from wagering which, ironically given their position on the issue, deprives racing administrators of revenue from product fees that other operators with retail access would pay.

However, retail exclusivity also hurts hotels and clubs. Such organisations have limited scope to negotiate. The massive interest that was reported in the VenueNet terminal suggests a number of venues are keen to find alternatives to the arrangements that currently exist with the TABs in each State and Territory³⁰.

Retail presence should require a premium

Betchoice stands by the oral submission it made to the Productivity Commission that wagering operators that have a retail presence should be required to pay a premium. We do not make a submission as to what this premium should be but note that the issue is complex. We submit that a trial is required to see to what extent other providers could compete with the TAB and what the effect on racing funding would be.

³⁰ See D Oakes, 'Curtain up on screen war worth millions', *The Age*, 28 October 2009, <http://www.theage.com.au/business/curtain-up-on-screen-war-worth-millions-20091027-hj4o.html>, Accessed 19 December 2009; A Hamilton, 'New pub terminal allows interstate betting', *Herald Sun*, 7 May 2009, <http://www.heraldsun.com.au/news/rival-moves-in-on-pubtab/story-0-1225710383491>, Accessed 19 December 2009.

12. Should tote-odds betting be permitted?

Betchoice supports Draft Finding 13.3 that tote-odds betting should not be prohibited as there are better ways of dealing with the risks it involves and agrees with the arguments the Commission makes to support this finding.

Customer demand

The Commission noted at [13.40] that tote-odds products are products that consumers “highly value”. Betchoice believes it is important to consider the consequences of this observation. The reason that corporate bookmakers offer tote-odds products is that customers want them. If Australian-based operators are prevented from offering tote-odds products, customers interested in these products will either not bet or will bet with offshore providers who are not subject to Australian regulation. Both options will result in less revenue for the wagering industry and put the totalisators in a worse position.

Tax and fee arbitrage

Submissions were made during the Commission’s public hearings that corporate bookmakers bet all their tote-odds wagers into the totalisator pool and that, as a result, were simply taking advantage of a tax and fee arbitrage.

This is not the case with Betchoice. We have submitted material to the Commission that indicates the amounts bet back with totalisators and it is clear that it is not simply a case, as was asserted³¹, of investing the money at no-risk.

The difference between the amount bet back with totalisators and the amount received from the punter represents a real risk that Betchoice, as a bookmaker, takes on. It is by successfully assessing this risk and offering a better price as a result that corporate bookmakers make money on tote-odds products.

Lack of detriment

The final point is to ask what the detriment has been. Peter V’landys, CEO of Racing NSW, argued that corporate bookmakers can offer tote-odds products without risk because they took advantage of rebates offered by totalisators. It is unclear, if totalisators are in such danger of suffering detriment from tote-odds betting, why they would encourage corporate bookmakers by offering rebates. Also, Betchoice understands that Luxbet offers a tote-odds products, despite being operated by Tabcorp.

As noted earlier in this submission, TAB turnover has increased this year in every jurisdiction. We note this figure includes both fixed-odds products (which TABs are now permitted to offer). However, reference to the Australian Racing Fact Book 2008-09 indicates totalisator betting has similarly increased in all jurisdictions.

13. Should pre-commitment system be introduced?

Although the Commission did not deal with the issue of pre-commitment in the chapter concerning wagering, we note that, in the previous chapter concerning online gaming, the Commission at [12.27] considered that the harm minimisation measures discussed in the

³¹ See P V’landys, *Transcript of the Public Hearing of the Productivity Commission Inquiry into Gambling*, Sydney, 1 December 2009, p 177.

context of online gaming were “likely to be beneficial to all types of online gambling, including wagering on racing and sports betting.”

Betchoice supports a pre-commitment system and agrees with the Commission’s finding at [12.23] that the account-based nature of online operators make it relatively straightforward to implement measures.

The only concern that Betchoice has is that such a system be national. We draw to the Commission’s attention the recent efforts regarding pre-commitment that are currently being undertaken by the South Australian Independent Gambling Authority (“SA IGA”).

The SA IGA is presently in a process of consultation with wagering operators to determine an appropriate pre-commitment system. Betchoice is concerned to avoid a situation where different pre-commitment systems are in place throughout Australia.

Betchoice is of the view that the logic behind the Commission’s finding that a national racing levy should be established supports the establishment of a national pre-commitment system, as opposed to one fragmented by jurisdiction. We note that fragmented approach runs the real risk of being incapable of implementation given the cross-border nature of online wagering transactions.

As a consequence, Betchoice submits that, if the Commission is of the view that a pre-commitment system should be introduced for wagering operators, such a system should be national.

14. Should a national gambling regulator be created?

At [12.26], the Commission proposes that a national body to regulate online gambling be established. Betchoice notes that, while the Commission is in favour of such a body – the Commission mentions the current regulator of the *Independent Gambling Act 2001* (Cth), the Australian Communications and Media Authority (“ACMA”) – it does not provide a great deal of detail on what entity would be appropriate for this task.

Although the Commission does not expressly request feedback on this issue, Betchoice submits that ACMA is not an appropriate body. ACMA’s expertise is in regulating broadcasting and Betchoice is concerned that it lacks the necessary understanding and experience required to regulate an industry as large and complex as gambling.

Consequently, Betchoice recommends the establishment of a new national gambling regulator. Preferably, such a body would draw its personnel, at least initially, from regulators of state institutions.

15. Conclusion

Betchoice concludes by reaffirming its support for the findings and the recommendations on wagering contained in Chapter 13 of the Draft Report. We believe that the changes in the wagering sector represent huge potential benefit and that, by promoting competition, the racing industry stands to gain.

This will not be assisted by calculating race fields on the basis of turnover rather than revenue. Care needs to be taken that the race fields levy does not become a means that stifles or materially impacts on the competition and consumer advantages generated by the activities of the corporate bookmakers.

Wagering turnover has increased for both corporate bookmakers and TABs and there is renewed interest in racing. We believe this is largely due to the interest provoked by new entrants to the market.

Betchoice submits that decisions that make it financially unviable for such entrants to operate are misguided at best. They seek to “wind back the clock” to an era that is past. The Australian punter has a wealth of competing options when it comes to their gambling dollar. Racing’s survival will not be found by shutting out this competition; instead it must embrace it.