

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 24/03/2017 at 9.42am AEDST and has been accepted for lodgment under the Practice Direction dated 23 September 2016. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Application to Intervene

File Number: ACT 1 of 2017

File Title: Application by Tabcorp Holdings Limited under section 95AU of the *Competition and Consumer Act 2010* for an authorisation under subsection 95AT (1) to acquire shares in the capital of a body corporate or to acquire assets of another person

Registry: NEW SOUTH WALES – AUSTRALIAN COMPETITION TRIBUNAL

Dated: 24/03/2017 at 9.42am AEDST



Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Tribunal. Under the Tribunal's Practice Direction the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4:30 pm local time at that Registry) or otherwise the next working day for that Registry.



COMMONWEALTH OF AUSTRALIA

COMPETITION AND CONSUMER ACT 2010

**APPLICATION FOR LEAVE TO INTERVENE IN REVIEW BY THE
AUSTRALIAN COMPETITION TRIBUNAL AND FOR VARIATION OF
DIRECTIONS MADE ON 17 MARCH 2017**

In the Australian Competition Tribunal

File No.: ACT 1 of 2017

Re: Application for leave to intervene in the application for merger
authorisation of the proposed acquisition of Tatts Group Limited by
Tabcorp Holdings Limited

**Applicant
Interveners**

Racing Victoria Limited (ACN 096 917 930)

Harness Racing Board, trading as Harness Racing Victoria (ABN 22 764 910
853)

Greyhound Racing Control Board, trading as Greyhound Racing Victoria
(ABN 76 642 748 029)

**Address for
Service**

Jones Day attn: Prudence Smith

Level 41, 88 Phillip Street, Sydney NSW 2000

Filed on behalf of the Interveners

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APPLICATION FOR LEAVE TO INTERVENE

A. The Applicant Interveners

1. Racing Victoria Limited (**Racing Victoria**), Harness Racing Victoria (**Harness Victoria**) and Greyhound Racing Victoria (**Greyhound Victoria**) (the **Victorian Racing Interveners**) apply, pursuant to Order 2 of the Orders made by the Australian Competition Tribunal (**Tribunal**) on 13 March 2017 to intervene in the application for merger authorisation of the proposed acquisition of Tatts Group Limited by Tabcorp Holdings Limited (**Tabcorp**) (**Proposed Merger**).

B. Submissions

2. We refer to the application by Tabcorp for authorisation submitted to the Tribunal on 13 March 2017 in relation to the proposed acquisition by Tabcorp of all of the shares in Tatts Group Limited (**Tatts**) by means of a scheme of arrangement.
3. Racing Victoria is the governing thoroughbred racing authority in Victoria. It is an unlisted public corporation established pursuant to the *Racing Act 1958* (Cth) (**Racing Act**). It is responsible for, among other things, promoting thoroughbred horse racing in Victoria by licensing and supervising industry participants and providing support and direction for racing clubs. Its constitutional objective is to:

“encourage, develop, promote and manage the conduct of the racing of thoroughbred horses in Victoria and to do all things the Board [of directors of Racing Victoria] considers to be conducive of doing so”.

4. Without limiting the generality of this objective, Racing Victoria pursues the following objectives:
 - a. Providing excellent service to patrons, punters and other customers, and providing a source of exciting entertainment for a wider audience;
 - b. Managing Victorian thoroughbred racing with optimal efficiency;
 - c. Encouraging the fullest possible participation in all aspects and at all levels of the Victorian thoroughbred racing industry; and
 - d. Optimising the economic benefits of Victorian thoroughbred racing to, among others, the communities in which Victorian thoroughbred racing operates and the Victorian economy generally.
5. Greyhound Victoria is the governing racing authority in Victoria. It is a statutory body established under the Racing Act to:
 - a. Control and promote the sport of greyhound racing;
 - b. Carry out research into aspects of greyhound racing to assist in planning future development;

- c. Promote and improve animal welfare within the sport of greyhound racing;
 - d. Promote and monitor compliance with any rules it makes in relation to restrictions on, and licences for, greyhound racing;
 - e. Conduct greyhound races;
 - f. Register greyhounds for greyhound racing or for stud or other purposes and to regulate the breeding, kennelling and verification of lineage of greyhounds for greyhound racing or for stud or other purposes;
 - g. Consult with greyhound racing industry participants and facilitate consultation amongst greyhound racing industry participants; and
 - h. Exercise other powers, functions and duties conferred on it.
6. Greyhound Victoria is responsible for, among other things, promoting and controlling the sport of greyhound racing, including through the setting of standards and by regulating and policing the industry and its participants and employees. In achieving this, Greyhound Victoria pursues the following key strategic priorities:
- a. **Animal Welfare:** providing a racing industry environment in which the safety and welfare of greyhounds comes first;
 - b. **Regulatory Standards:** a program of enhanced industry supervision that drives improved outcomes;
 - c. **Capabilities, Culture and Financial Sustainability:** lead the industry in regaining its social licence by developing an enhanced organisational capability to deliver world leading animal welfare strategies supported by a program of monitoring and enforcement;
 - d. **Social Responsibility:** an open industry culture where participants follow contemporary rules, laws and ethical behaviours;
 - e. **Club Support:** provide relevant and timely advice, governance, management and corporate services to greyhound racing clubs;
 - f. **Industry Growth:** careful management of wagering and broadcasting partnerships, the development of strong industry relationship and sustainable business growth strategies.
2. Harness Victoria is the governing harness racing authority in Victoria. It is a statutory body established under the **Racing Act** to:
- a. Control the sport of harness racing;
 - b. Conduct harness races;

- c. Consult with harness racing industry participants and facilitate consultation amongst harness racing industry participants; and
 - d. Exercise other powers, functions and duties conferred on it.
3. Harness Victoria is responsible for administering, developing and promoting the sport of harness racing in Victoria.

In achieving this mission, Harness Victoria pursues the following goals and key objectives:

- a. Maximising returns to participants and remaining a market leader;
 - b. Improving the product and brand of harness racing;
 - c. Increasing harness wagering turnover and market share;
 - d. Building a business that is stronger and more financially viable; and
 - e. Increasing the professionalism of the sport of harness racing.
4. Combined, the Victorian Racing Interveners are the peak bodies representing many tens of thousands of people who gain their livelihood from the Victorian racing industry. Tabcorp and Tatts are the two largest sources of Victorian wagering revenue and revenue from wagering is the primary source of revenue including for prize money for Victorian racing clubs. This revenue including the racing prize money is the primary source of funding from which these thousands of people gain their livelihood. As such, the Victorian Racing Interveners themselves, and the many other persons they represent, are centrally affected by the matters that are the subject of Tabcorp and Tatts application to the Tribunal.
5. The Applicant has filed 36 witness statements of which four are from experts and 22 are from industry witnesses. These statements and annexures run to thousands of pages, yet none of the industry witnesses are from the Victorian components of the racing industry. There is therefore a void in relation to evidence coming from the Victorian racing industry itself, Victoria being the second most populous State and the State with the largest, or equal largest, racing industry, concerning the impact the merger will have in that State. The Victorian Racing Interveners wish to place that evidence before the Tribunal.
6. Further, Racing Victoria, Harness Victoria and Greyhound Victoria apply to the Tribunal to intervene in Proceeding No. ACT 1 of 2017 on the basis that the interests of the Victorian racing industry will be affected by the proposed merger, and the Tribunal should not be satisfied in all the circumstances the proposed merger would comply with section 50 of the CCA nor should the Tribunal be satisfied that the merger would result, or is likely to result, in such a benefit to the public that the merger should be allowed to occur, including because:
- a. The common ownership of media and ownership of Tabcorp's Sky Racing channel with the retail networks of Tatts that would result from the Proposed

Merger would create significant market challenges by increasing the degree of market power in dealings with licensed venues and racing media rights owners, which in turn would be likely to result in a decrease in the revenue to the Victorian Racing Intervenors, all of which are non-profit organisations, and thereby diminish the funding available to the Victorian Racing Intervenors to hold high quality race meetings for the public. The proposed acquisition may also remove Tatts as a party that could facilitate the entry of a prospective competitor for racing media rights, which would significantly lessen competition;

- b. The merger would remove the last significant remaining independent purchaser of retail vision (for Tatts territories);
- c. The Proposed Merger will result in the removal of one of only a small number of serious bidders (and quite likely a reduction from two down to one serious bidder) for the Victorian TAB licence to supply off-course retail wagering services when the process commences for the licence to be re-tendered. This will significantly reduce competition in the retail market for pari-mutuel betting and/or the broader off-course wagering market, which will lead to poorer outcomes for the Victorian racing industry, its participants and consumers. Additionally, the reliance of potential bidders for licences on the merged entity for racing vision would place the merged entity in a position to deter other future bidders or new entrants into the bidding process for retail wagering licences. These issues are also relevant in each other State and Territory at a later time upon the next occasion that they (re-)licence an off-course retail (TAB) wagering services operator;
- d. The Proposed Merger would result in the reduction from two down to one pari-mutuel pooling partner for any bidder other than Tabcorp or Tatts for the Victorian TAB licence upon the next occasion it is put up for relicensing;
- e. Racing is a particularly important industry in Victoria as a major employer, both within the industry and in related industries such as tourism. The relevance, importance and potential vulnerability of the racing industry including in Victoria to the merger is acknowledged in numerous places in the Application (see for example 4.36-4.58, 18.3-18.45) and the material in support; and
- f. Section 95AZH(1) of the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**) provides:

The Tribunal must not grant an authorisation in relation to a proposed acquisition of shares or assets unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.

The merger does not have the required “net public benefit” in order for the Tribunal to authorise the acquisition under section 95AT of the Competition and Consumer Act. That is, any limited public benefits that the proposed transaction may have are not outweighed by the significant anti-competitive

detriment that the proposed transaction will have on the Victorian racing industry.

C. Variation to Directions

7. The Victorian Racing Interveners seek that order 9 of the orders made by the Tribunal on 17 March 2017 which requires the Interveners to lodge and serve any proposed lay or industry-based evidence by 5pm on Friday 31 March 2017 be extended to 5pm on 14 April 2017 and that a direction be made for any expert evidence to be relied on by the Victorian Racing Interveners be lodged and served by 5pm on 21 April 2017.
8. As noted above, the Applicant has filed 36 witness statements of which four are from experts and 22 are from industry witnesses, many of which have only been made available to the Victorian Racing Interveners on 22 March 2017. These statements and annexures run to thousands of pages. More time than the less than two weeks allowed by the Tribunal is required for preparation of lay, industry-based and expert evidence. The dates proposed by the Victorian Racing Interveners are 13 April 2017 for lay and industry-based evidence and 21 April 2017 for expert evidence. Variations to the directions made on 17 March 2017 are sought accordingly. These dates reflect the minimum time that would be reasonable to enable such evidence to be prepared.
9. The application and supporting statements have extensive redactions for confidentiality and in many instances what remains un-redacted is rendered incomprehensible in key respects. The confidentiality regime agreed by Tabcorp, Tatts and the ACCC provides that the full version of the materials will only be made available to lawyers and experts retained by interveners once they have applied to intervene. If the timetable is not amended, there would only be one full week or so for the interveners to review, analyse and respond to the extensive tracts of material that are redacted.
10. The retainer of experts such as economists and other experts and the preparation by them of reports pertaining to an industry which in Victoria is worth hundreds of millions of dollars cannot be done in the time currently allowed. The proposed date of 21 April is the minimum reasonable time for the preparation of such evidence.

Proposed Role in the Australian Competition Tribunal Hearing

11. The Victorian Racing Interveners have not yet decided upon the level of participation that they seek to engage with in this proceeding. Further advice on this point will be provided in the event that leave is granted to intervene.
12. Please contact Prudence Smith at Jones Day for further information and provide Jones Day with all relevant documents relating to this application.

Dated: 23 March 2017

Peter Bick QC
Jones Day