

**NOTICE OF LODGMENT**  
**AUSTRALIAN COMPETITION TRIBUNAL**

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 23/03/2017 at 4.47pm 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: 23/03/2017 at 4.47pm 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.



**IN THE AUSTRALIAN COMPETITION TRIBUNAL**  
**APPLICATION BY TABCORP HOLDINGS LTD**  
**ACT 1 of 2017**

**OUTLINE OF SUBMISSIONS OF CROWNBET PTY LTD IN SUPPORT OF**  
**APPLICATION FOR PERMISSION TO INTERVENE**

1. CrownBet Pty Ltd (**CrownBet**) applies under s 109(2) of the *Competition and Consumer Act 2010* (Cth) (the **Act**) for permission to intervene in proceeding ACT 1 of 2017 before the Tribunal. The proceeding concerns an application by Tabcorp Holdings Ltd (**Tabcorp**) made under s 95AU of the Act for an authorisation under s 95AT(1) of the Act in relation to the acquisition of the share capital of Tatts Group Limited (**Tatts**).

**CrownBet**

2. CrownBet is a corporate bookmaker licensed in the Northern Territory under the *Racing and Betting Act* (NT). CrownBet operates as a subsidiary of Crown Resorts Limited, which also owns Betfair Pty Ltd, the operator of the only betting exchange licensed in Australia.
3. CrownBet supplies off-course wagering products across Australia online and via telephone. CrownBet's major wagering product is wagering on racing, namely, thoroughbred, harness and greyhound racing. At [7.9] of the Form S filed in this proceeding, Tabcorp describes CrownBet as "one of Australia's fastest growing bookmakers".

**Scope of proposed intervention**

4. CrownBet seeks permission to intervene in relation to wagering and racing media issues. It does not seek permission to intervene in relation to lotteries, Keno or gaming services issues.
5. CrownBet submits that Tabcorp's application gives rise to wagering and racing media issues that include:

- (a) the definition of the markets in which the competitive effects of the acquisition should be assessed, including whether:
  - (i) there is a single market for pari-mutuel and fixed odds wagering across racing and sports, including both online and retail channels;
  - (ii) there are vertically related and functionally separate markets for the supply and acquisition of key inputs used to provide wagering services, including, for example, markets for the acquisition of:
    - (A) rights to use racing media content;
    - (B) race fields information;
- (b) the likely effect of the proposed acquisition on competition in those markets, including whether:
  - (i) there are or would be constraints on effective competition by non-merger parties due to, among other things, barriers to entry and competitive advantages held by Tabcorp and Tatts, such as:
    - (A) State-based retail exclusivity;
    - (B) financial interdependency between the merger parties and the racing industry;
    - (C) regulatory disadvantages faced by corporate bookmakers which materially delimit the scope of their operations, including as regards advertising and the establishment of a physical (as opposed to online) presence in jurisdictions outside of their licensing domicile;
    - (D) control of rights to use racing media content held by Tabcorp's vertically related media business, Sky Racing;
  - (ii) there is product differentiation on areas of close competition within any relevant market in which competition may be particularly affected, including online and telephone channels for wagering;

- (iii) the proposed acquisition would be likely to:
    - (A) enhance and entrench barriers to effective competition;
    - (B) substantially lessen future competition in any relevant market;
    - (C) adversely impact end consumers in terms of price, quality or innovation in any relevant market;
  - (c) whether the proposed transaction would be likely to result in merger specific public benefits which outweigh the detriment associated with a lessening of competition in relevant markets; and
  - (d) in the event the proposed acquisition were to be authorised, what conditions of authorisation would be required to mitigate the impact on competition and consumers.
6. For the reasons outlined below, CrownBet as a corporate bookmaker (ie. key competitor affected by the proposed acquisition) has a real and substantial interest in these issues. Further, as the only competitor seeking to intervene in the proceeding, CrownBet is able to assist the Tribunal with useful supplementary evidence and submissions.

### **Applicable principles**

- 7. A proposed intervener must establish some connection with or interest in the subject matter of the proceeding which discloses that it is not merely an officious bystander.<sup>1</sup>
- 8. It is necessary to consider the extent to which the proposed intervener can usefully or relevantly add to, or supplement, proposed evidence or submissions of the parties, as well as how it might be affected by the outcome of the proceeding.<sup>2</sup> It is not necessary for the proposed intervener to show

---

<sup>1</sup> *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28; [2006] ACompT 6 at [35]; cited in *Application by Independent Contractors Australia* [2015] ACompT 1 at [28].

<sup>2</sup> *Application by Independent Contractors Australia* [2015] ACompT 1 at [28].

that its business interests or business activities may be detrimentally affected by the outcome of the proceeding.<sup>3</sup>

9. In *Application by Sea Swift Pty Ltd* [2015] ACompT 5 the Tribunal said (at [8]) that “earlier decisions” of the Tribunal indicate that a proposed intervener should have a “real and substantial interest” in the outcome of the proposed merger sufficient to warrant the time and cost incurred in the participation of the proposed intervenor. But in *Application by Independent Contractors Australia* [2015] ACompT 1, the Tribunal proceeded on the basis that there is no “sufficient” or “real and substantial” interest requirement, and that the discretion to grant leave to intervene is not limited by the introduction or application of such expressions. It is unnecessary for the Tribunal to resolve that issue in this case because, for the reasons set out below, CrownBet does have a real and substantial interest in the outcome of the present application.

**CrownBet has a real and substantial interest in the outcome of the proposed acquisition**

10. CrownBet has a real and substantial interest in the outcome of the proposed acquisition because it is one of Tabcorp's and Tatts' main competitors in the supply of wagering services. Any lessening of competition that occurs in wagering markets due to the proposed acquisition will directly (and adversely) affect CrownBet.
11. Tabcorp's own Form S underscores that CrownBet is anything but an “officious bystander”. It identifies CrownBet as a main competitor to the merger parties<sup>4</sup> and corporate bookmakers as a “free-rider” problem to be addressed by the proposed transaction.<sup>5</sup>

---

<sup>3</sup> *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28; [2006] ACompT 6 at [35].

<sup>4</sup> See, for example, at [4.65], [4.151], [4.152], [7.9], [7.14], [13.7], [14.27] and [18.28]; see also Annexure A to the Form S at [78], [101], [105], [114](c) and [184](c).

<sup>5</sup> See [21.2].

12. CrownBet participated in the ACCC informal clearance review process, albeit without the benefit of having seen any of the materials and submissions provided to the ACCC by Tabcorp and other industry participants.<sup>6</sup>
13. As the ACCC observed in its Statement of Issues, the proposed acquisition would irrevocably alter the structure of the competitive landscape for, among other things, wagering and racing media in Australia.<sup>7</sup> It would create a single entity that holds exclusive totalizator wagering rights and associated retail wagering exclusivity in every State of Australia except Western Australia, together with a dominant position in relation to racing content in Australia through Tabcorp's ownership of Sky Channel.<sup>8</sup>
14. Other corporate bookmakers that Tabcorp has identified as major competitors include Sportsbet, Betfair, William Hill, Ladbrokes, Bet365 and Unibet.<sup>9</sup> Each has provided a letter in support of CrownBet's application for permission to intervene. These letters are Annexure GC1 to the affidavit affirmed by Geoffrey Carter in support of this application, on 23 March 2017.

**CrownBet's intervention will usefully and relevantly add to the evidence and submissions of the parties**

15. CrownBet submits that its intervention will usefully and relevantly add to and supplement the evidence and submissions of the parties to the proceeding.
16. No other competitor has made an application to intervene in the proceeding. If this application is refused, there may be before the Tribunal no representative of a very significant category of participant within the wagering industry (and the key competitive threat identified by the merger parties).

---

<sup>6</sup> Affidavit of Geoffrey Robert Carter dated 23 March 2017 paragraph 16.

<sup>7</sup> Paragraphs 136 to 138 of the Statement of Issues published by the Commission dated 9 March 2017; Affidavit of Geoffrey Robert Carter dated 23 March 2017, paragraph 18.

<sup>8</sup> Racing is critical to the wagering industry, as wagering on racing represents approximately 80% of total wagering in Australia; Affidavit of Geoffrey Robert Carter dated 23 March 2017, paragraph 7.

<sup>9</sup> See Form S, [7.1]-[7.14].

17. Tabcorp commenced this proceeding a few days after the Commission released its Statement of Issues in respect of the proposed acquisition. The Statement of Issues called for submissions from industry participants and interested parties on a number of key issues relating to the future of the wagering industry and the competitive landscape assuming the acquisition was to proceed. Given that this process has now been terminated by Tabcorp, CrownBet considers it important that the Tribunal have the benefit of detailed evidence and involvement from a key competitor regarding the issues and questions raised by the ACCC in its Statement of Issues (as well as on the public benefit issues that were not relevant to, and therefore not raised during, the ACCC informal clearance process).
18. For example, CrownBet has extensive knowledge of relevant media rights issues. If granted leave to intervene, CrownBet proposes to adduce evidence on, among other things, corporate bookmaking businesses, the importance of racing media to wagering activities, racing media access issues and the effect of the proposed acquisition on competitive dynamics in relevant markets. CrownBet has direct experience of the strategies employed by Tabcorp with its dominant position in relation to racing media rights, and the interrelationship between those rights and wagering activity more generally. CrownBet's arrangement with ClubsNSW (referenced in the Form S, for example, at [4.65] and elsewhere), provides a recent example about which CrownBet is uniquely placed to adduce evidence.
19. CrownBet submits that its direct and timely involvement and focused contribution will be of considerable utility to the Tribunal as the matter proceeds, particularly as and when new issues and contentions arise during the course of the proceeding and (in real-time) during the hearing itself. CrownBet submits that it is unlikely to be practical for this kind of contribution to be made through any involvement short of formal intervention. That is particularly so given the importance of access to and engagement with Tabcorp's evidence, including the extensive elements which have been marked as 'confidential', and are therefore not accessible to non-parties.

20. If granted permission to intervene in this proceeding, CrownBet proposes to call the following witnesses:
- (a) 3 or 4 members of the senior management of CrownBet (including the Chief Operating Officer);
  - (b) a racing industry expert; and
  - (c) an expert economist.
21. CrownBet may also call senior representatives of other corporate bookers.

### **Procedural timetable**

22. On 17 March 2017, his Honour Justice Middleton made Orders for the conduct of this proceeding, including directions applicable to any person or entity seeking leave to intervene.
23. Relevantly, the Orders provide for:
- (a) any application for leave to intervene to be made by Friday, 24 March 2017;
  - (b) any proposed evidence to be filed one week later, by Friday, 31 March 2017; and
  - (c) the Applicant and the Commission to file and serve any submissions in relation to any application for leave to intervene by Monday, 3 April 2017, following which the Tribunal will determine the application on the papers (unless a hearing is required).
24. During the directions hearing on 17 March 2017 his Honour foreshadowed that potential interveners would have liberty to request a variation of this timetable if they had problems complying with it (see T9, 10, 18).
25. CrownBet is not able to comply with this timetable.<sup>10</sup> Its solicitor has deposed, on the basis of his experience (which includes recent merger authorisation

---

<sup>10</sup> See the affidavit of Geoffrey Robert Carter dated 23 March 2017 paragraph 25.

applications), that in order to prepare evidence that will provide real assistance to the Tribunal, CrownBet requires, at a minimum:

- (a) until Thursday, 13 April 2017 for its lay evidence; and
  - (b) until Friday, 21 April 2017 for its expert evidence.<sup>11</sup>
26. CrownBet's participation in the ACCC review process does not enable it to finalise its evidence any earlier than this. For the purpose of the ACCC's process CrownBet did not receive any of the materials that Tabcorp provided to the ACCC; it did not have any of the (volumes of) detailed evidence and other materials on which Tabcorp relies for the purpose of the current application (it still does not have unredacted versions of those materials); it did not consider the public benefit issues that arise from the current application; and it did not provide or prepare any lay or expert evidence.
27. CrownBet recognises the time limits applicable to applications made under s 95AU of the Act, and the consequent need for expedition in relation to the conduct of the proceeding.
28. CrownBet submits that the variations to the timetable which it proposes would not require any change to the hearing dates set down, nor necessitate any other amendments to the pre-hearing timetable.

## **Disposition**

29. CrownBet respectfully requests that the Tribunal:
- (a) grant permission to CrownBet to intervene in the proceeding on the basis outlined above; and
  - (b) make the requested variations to the procedural timeline in order to facilitate the intervention process.
30. If there are any objections to CrownBet being granted permission to intervene, CrownBet would respectfully request an oral hearing.

---

<sup>11</sup> Affidavit of Geoffrey Robert Carter dated 23 March 2017, paragraph 26.

Michael Borsky SC  
Andrew Barraclough  
**Counsel for CrownBet**

MinterEllison  
**Solicitor for CrownBet**