



COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2017

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

Third Party: Racing and Wagering Western Australia

Address: 14 Hasler Road, Osborne Park, Western Australia, 6017

Submissions by Interested Third Party

These submissions are lodged pursuant to Order 10 of the orders of the Tribunal dated 17 March 2017 as amended by Order 6 of the orders of the Tribunal dated 31 March 2017

1 INTRODUCTION

- 1.1 On 16 December 2016 Racing and Wagering Western Australia (**RWWA**) lodged submissions with the Australian Competition and Consumer Commission (**ACCC**) that set out its views on the proposed merger between Tabcorp Holdings Ltd (**Tabcorp**) and Tatts Group Ltd (**Submissions**).
- 1.2 The Submissions explained the reasons for RWWA's concerns that the proposed merger would be likely to substantially lessen competition in one or more markets in Australia.
- 1.3 Since that time, RWWA has engaged in discussions with:
 - (a) the ACCC and Tabcorp about its concerns; and
 - (b) Tabcorp in relation to the steps that could now be taken to address those concerns.
- 1.4 As a result of those discussions RWWA and Tabcorp have entered into arrangements that provide a level of comfort for RWWA about its position in the market both during the term of the current confidential pooling agreement (**Pooling Agreement**) and after it expires on 15 August 2024.

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- 1.5 However, those new arrangements have not fully resolved RWWA's concerns about the proposed merger but RWWA accepts that it may not be possible to fully resolve its concerns now.

2 RESOLUTION OF CONCERNS

- 2.1 RWWA's concerns about the proposed merger may be summarised as follows:
- (a) will RWWA continue to have access to pooling services (both during the during the term of the Pooling Agreement and after its expiry on 15 August 2024);
 - (b) will there be any competitors in the market for the acquisition of the WA state-based wagering licences if RWWA's wagering operations are privatised;
 - (c) the effect of unified 'tab.com.au' and 'TAB' brands in all States and Territories of Australia except Western Australia, particularly the effect that will have on RWWA's 'TAB Touch Brand'; and
 - (d) will RWWA continue to be able to access broadcasting slots for Western Australian racing on Sky Channel on reasonable commercial terms (both during the term of the Pooling Agreement and after its expiry on 15 August 2024).
- 2.2 RWWA's discussions with Tabcorp have led to the parties reaching a confidential agreement which addresses some, but not all, of those concerns.
- 2.3 The new confidential arrangements between RWWA and Tabcorp are contained in:
- (a) a letter agreement dated 6 March 2017 (**Letter Agreement**); and
 - (b) a Commitment to Long Term Pooling Deed dated 15 March 2017 (**Deed**).
- 2.4 RWWA understands that Tabcorp has provided copies of the Letter Agreement and the Deed to the Tribunal.

3 POOLING ARRANGEMENTS

- 3.1 The Deed provides that the terms of the Letter Agreement that relate to the pooling arrangements no longer have any effect.
- 3.2 In an ideal world, the Deed would have fully resolved all of RWWA's concerns. RWWA accepts that that was not a realistic outcome when parties are negotiating about what is to occur seven years into the future and there is no clarity or certainty about market conditions at that time. The Deed has substantially addressed RWWA's concerns identified in paragraphs 2.1(a) and 2.1(b) above. It has not fully resolved the issues because:
- (a) the Deed does not guarantee that RWWA (or whoever hold the WA state-based wagering licence) will secure an agreement to acquire pooling services from Tabcorp after 15 August 2024;
 - (b) there is a real risk that RWWA (or whoever hold the WA state-based wagering licence) will not be able to reach agreement with Tabcorp on the commercial terms of a new pooling services agreement;
 - (c) there is no guarantee that RWWA (or whoever hold the WA state-based wagering licence) will be offered pooling services in relation to new bet types,

international racing or new events (potentially including totalisator wagering on sports). This risk exists now; and

- (d) there is no guarantee that any agreement for pooling services after 15 August 2024 between RWWA (or whoever hold the WA state-based wagering licence) and Tabcorp will receive the required third party authorisations (including from ACCC and relevant racing authorities) so that it becomes effective.

3.3 RWWA completely understands that the uncertainty about future market conditions makes it difficult for parties to bind themselves to agreements or commitments that come into effect close to a decade in the future. For one thing, there are commercial factors which militate against RWWA and Tabcorp now binding themselves to such agreements and commitments. Those factors include, for example, the setting of the fees payable for pooling services now when the future of totalisator wagering is uncertain.

3.4 Given Tabcorp's Victorian wagering and betting licence expires on 15 August 2024, RWWA understands that it is unlikely that Tabcorp can (or would) agree to do more than engage in good faith negotiations in relation to pooling services for any period after 15 August 2024.

3.5 RWWA continues to have concerns that the proposed merger may have effects on competition in relation to access to pooling services and, consequently, the viability of competition in the market for the acquisition of the WA state-based wagering licence, but it believes that its concerns have been addressed to the extent possible since RWWA lodged the Submissions.

4 AMENDMENT TO THE IP SETTLEMENT DEED

4.1 The terms of the Letter Agreement recast the terms of an existing IP Settlement Deed between RWWA and Tabcorp. Amongst other things, the IP Settlement Deed regulates:

- (a) the use of the 'tab.com.au' and 'TAB' brands by Tabcorp and the use of the 'TAB Touch' brand by RWWA in Australia;
- (b) RWWA's access to broadcasting slots for Western Australian racing on Sky Channel; and
- (c) RWWA's access to display its fixed-odds prices on Sky Racing Channel.

In RWWA's view, those provisions of the Letter Agreement that relate to the extension and variation of the IP Settlement Deed between the parties satisfactorily resolve the concerns identified in paragraphs 2.1(c) and 2.1(d) above.

Dated the 6th day of April 2017



Squire Patton Boggs (AU)

Solicitors for Racing and Wagering Western Australia