12 April 2017

RESPONSIBLE WAGERING
AUSTRALIA

The Hon Justice John Eric Middleton
President
Australian Competition Tribunal

(c/o registry@competitiontribunal.gov.au)

Dear Justice Middleton

I am writing on behalf of Responsible Wagering Australia (RWA) and its members to express several serious concerns about the proposed acquisition of Tatts Ltd by Tabcorp Holdings Ltd ("the acquisition").

It is the view of RWA and its members that the acquisition should not be allowed to proceed for the reasons outlined in this letter. If, however, the Tribunal is ultimately minded to support the acquisition, outlined below are a range of potential undertakings that RWA would urge the Tribunal to require of the parties.

In preparing this submission, RWA has taken account of the Australian Competition & Consumer Commission's statement of issues dated 9 March 2017, as well as the filing lodged with the Tribunal by the parties to the proposed acquisition.

Responsible Wagering Australia

The membership of RWA is currently comprised of bet365, Betfair, CrownBet, Sportsbet, and Unibet. These companies are united by their commitment to support the development of a strong, sustainable and effective regulatory environment for wagering in Australia.

RWA members are all Australian licensed online wagering operators. All are now licensed in the Northern Territory. All are committed not only to fully meeting their license obligations (in key areas these are more demanding than Commonwealth rules), but also to working cooperatively with all Australian jurisdictions on improvements to the regulatory environment for wagering.

Crucially, we are committed to:

- Exceeding regulatory and licensing standards in terms of consumer protection.

- Delivering a strong harm-minimisation framework to wagering customers.
- Preserving the integrity of sport and racing by working closely with controlling bodies and police authorities.
- Reducing illegal offshore wagering activity by offering a safe, fair and competitive alternative to black-market wagering.
- Supporting government efforts to create a technology-neutral, fiscally responsible national framework for wagering to encourage legal, responsible and licensed providers.

To take all of this forward, RWA members are committed to a Code of Conduct that sets out their shared commitment and ambition for a wagering framework in Australia that we aspire to be amongst the world's best. We believe Australians deserve no less.

The acquisition must be judged in context

We consider that the filing provided by the parties to the Tribunal is deeply deficient in failing to identify some of the most important features of the wagering market within which the proposed acquisition would operate. In particular:

- Wagering is – and must be – regulated (one of the few points on which everyone agrees). Regulation must operate in the public interest, to limit the potential for harm which arises from unregulated wagering, in respect of consumers, problem gamblers, sports integrity and the prevention of organised crime, and the funding of sports and racing. The real question is how that regulatory framework is developed and operated. We argue that any judgment by the Tribunal on the acquisition must take account of the nature of Australia's outmoded and fragmented regulatory environment, and should only be allowed to proceed subject to undertakings to counter the adverse effects of the proposed merger, and the flow-on adverse consequences to the public, outlined in this submission.
- Wagering businesses in Australia are subject to intense competitive pressure from offshore operators, unregulated in Australia, and shortly to be made unequivocally illegal under proposed amendments to the *Interactive Gaming Act 2001 (Cth)* (IGA). The fact that this major group of *de facto* market participants is not mentioned by the parties to the proposed acquisition in their filing to the Tribunal is a serious omission. It is not accurate to predicate the case for the acquisition being allowed on the basis of an analysis that falsely claims the market is composed only of the parties and licensed Australian wagering operators. If that were the case then the whole effort by the Commonwealth to conduct the *Review of Illegal Offshore Wagering*, to amend the IGA, and to create a National Consumer Protection Framework for online wagering would be unfounded. We argue that the Tribunal should take a precautionary approach to a change in market structure that would be irreversible.

Discussion and issues

RWA emphasises that the acquisition would, if completed:

- Irreversibly end any credible competition for State and Territory retail wagering licences. The parties assert that other companies would be interested in entering this market as and when State licences are competed. This is fanciful: only the merged entity would have the customer base, technology and access to and control of media rights necessary to make a competitive bid. This market will be under permanent monopoly control, reducing competition whenever bidding for licences were to occur, thus reducing revenues to States and Territories as well as to the racing industry. It would also create an incumbent with strong incentives to resist regulatory reform in favour of consumers as well as reform in support of sports and racing integrity, deterring organised crime and tackling problem gambling. The parties' filing notes that Tabcorp/Tatts pay hundreds of millions of dollars to State and Territory racing bodies per year to fund these bodies and the racing industry. But the filing neglects to mention the monopoly that Tabcorp/Tatts have in their respective States, and that these payments are part of the consideration for these monopolies. These payments are not acts of altruism; rather they are the cost of monopoly rights such as theirs. These rights are inherently expensive because the respective State governments have foregone the right to sell these rights to anyone else. It follows that these payments are likely to decrease in the future if there is only one party to bid for them (see below).

- Likewise, effectively vitiate any meaningful competition for the Western Australia retail licence (if sold).

- Create a national monopoly in totalisator wagering. State and Territory policies have hitherto assumed that totalisator licences, if privatised, would be subject to a minimum level of competitive tension in each jurisdiction, and that consumers and State revenues would benefit as a result. This merger will create a monopoly. Corporate bookmakers can and do compete (with offshore operators too) in fixed odds wagering, but totalisator wagering (with its minimal risk and guaranteed profits) will be controlled by a monopolist. This is bad not just because it forecloses choice, and will certainly reduce innovation, but because it will allow the monopolist to use the resulting low-cost revenue stream and customer information to both cross subsidise and also to compete more effectively in the fixed odds market. This leaves corporate bookmakers at a serious disadvantage – one they cannot surmount as they cannot offer risk-free totalisator betting – while still facing strong offshore competition. The cost of this disadvantage will ultimately be borne by Australian customers.

- Enhance the capability of the monopolist to use its exclusive retail rights to gain competitive advantage in the digital channel. The Tribunal must consider the competition consequences of this structural segmentation and the knock-on public interest downsides, particularly as one segment (totalisator) – and only one operator, if this merger is approved – will be able to offer in-play online wagering via devices whereas the other segment (fixed odds) will not (see below). The advent of the internet, especially the mobile internet, has

caused consumers to move to online wagering as a means of consumption, regardless of the product being consumed. It is irreversible as a change in the means of consumption, and the area where innovation and growth occur. The ability to compete in this channel on a level playing field is therefore critical.

- Corporate bookmakers are currently barred from offering online in-play wagering on sporting events through the provisions of the IGA. These products may be offered in retail premises where the parties already have a series of State and Territory monopolies and would, if the acquisition proceeds, soon have a national monopoly. At the time of writing, amendments to the IGA were before Parliament, which, if passed, would mean that these parties would be able to offer online in-play betting on sports via devices (such as iPads) in retail premises and other licensed venues ("in-premises exception"). If the acquisition proceeds, the parties would soon have a national monopoly on the offering of online in-play betting on sports events. The fact that in their filings to the Tribunal the parties ignore the existence of illegal or unlicensed offshore providers is especially disingenuous in regard to online in-play betting on sports events. One of the key reasons offshore providers are so successful in Australia is the fact they offer in-play wagering, a product customers clearly want. Indeed, Tabcorp, one of the parties here, offers these very products to UK customers through its Sunbet venture. The combination of this in-play restriction, including the in-premises exception, and the creation of national retail and totalisator monopolies through this acquisition would mean the Australian market is structurally segmented, entrenching the parties' position against both Australian and offshore competition. None of this appears in the parties' analysis to the Tribunal and we consider it a serious and misleading set of omissions.

- Create an effective monopoly in racing broadcasting rights. This is a very serious competition issue. Sports and racing vision and sound are essential to its consumption. Control over this is, in competition terms, an essential facility (like access to a gas pipeline) because other 'downstream' markets (including the wagering market) are wholly dependent on this material to exist. Its control by an entity which is also competing in downstream markets like wagering should be subject to searching scrutiny. This issue is almost entirely glossed over in the parties' filed materials.

- This is not an idle prospect: Tabcorp has recently denied that its Sky Channel would be made unavailable to NSW clubs who chose to accept a competing CrownBet digital wagering advertising offer. The very fact of the denial suggests the prospect of loss of the Sky Channel would be material to these venues. In fact, it would be fatal to their ability to offer a wagering product. Further, we believe that Sky Racing currently does not accept the television advertising of any wagering operator with the exception of Tabcorp, Tatts and the WA tote. In other words, Australian punters watching racing via the only medium which broadcasts almost every Australian race to the exclusion of all other broadcasters will see via this channel only the advertisements of three wagering operators. This is the threat of foreclosure of the essential facility at work, deadening competition. The Tribunal must look hard at this egregious abuse of market power, and act to prevent it. The parties' argument that the

acquisition would lead to no worse concentration in this market as Tabcorp is already a monopolist is misleading, as Tatts (whatever its present position might be) represents a viable alternative future bidder for racing vision rights.

Other public interest concerns

In addition to these competition concerns, there are wider regulatory and public interest issues to be considered.

In our view:

- There is a clear public interest in and political consensus that wagering, while legal, must be regulated to protect consumers, minimise harm, and deal with integrity and money laundering issues. It must also (for States and Territories) provide a fair revenue base for the jurisdiction as well as a firm financial foundation for local racing industries. Much of the regulatory framework for wagering is, however, outmoded and fragmented. We argue that Australia should be seen as a single market for competition and regulatory purposes, and that regulation should be technology neutral. The Commonwealth's announcement of its intention to develop a National Consumer Protection Framework for online wagering suggests that this view is gaining ground.

- At the same time, offshore unlicensed provision of wagering services has produced intense competitive pressure, without countervailing consumer protections, nor provision for sports, racing, integrity, taxation and other public interest benefits. This competition has undoubtedly pushed prices down, but the lack of proper regulatory protections means that this effect cannot be judged as a benefit. The only proper wagering market is a regulated one, with competition and protection in balance for all providers and all customers. We are very far from this.

- The result is that wagering in Australia is poorly regulated, with incoherent provisions leading to outcomes that are sub-optimal for consumers, vulnerable punters, racing and sports bodies, States and Territories, and the public interest generally.

- The acquisition would, as it stands, worsen this unhappy picture. It would create an enterprise with a large market share and a dominant, entrenched position in retail wagering and totalisator wagering products, with a clear interest in the *status quo*. It would also have an interest in lobbying against any regulatory change, for example, that would allow any other Australian wagering operators to offer online in-play betting on sports, irrespective of customer appetite for this type of betting as well as the advantages to sports integrity and harm minimisation that would flow from any such regulatory change. This ultimately means customers have less choice if they wish to place bets online on sport with an Australian licensed wagering operator.

Conclusion

It is for these reasons that RWA and its members consider that the acquisition should not be allowed to proceed. At the very least, we urge the Tribunal to conclude that the acquisition, without intervention or meaningful conditions around access to media and restrictions on anti-competitive conduct, would operate or may be expected to operate against the public interest. Should the Tribunal ultimately be supportive of the acquisition, we would urge the Tribunal to require the following undertakings:

- Separate ownership of racing and sporting broadcasting and broadcasting rights (like Sky Channel) from wagering operations of any sort. If this were not pursued, we urge that access to Sky Channel be provided to all Australian venues and wagering providers on published, transparent and non-discriminatory terms.

- Failing this, specific and enforceable undertakings by Tabcorp and Sky Channel to not enforce any exclusive rights they enjoy to use racing media content for delivery to consumers via digital channels.

- Broadcast advertising from wagering competitors on the Sky network (across delivery platforms) on a non-discriminatory basis and on reasonable, competitive and non-discriminatory terms.

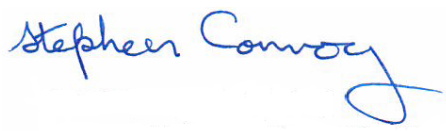
- Ensure the merged undertaking does not act to entrench its market position using its monopoly position in respect of access to or renewal of State and Territory licences. We would urge that the Tribunal look to ensure at least operational if not structural separation between the merged entity's activities in each State or Territory, with transparent and separate operating entities, separate Boards and separate published accounts for each jurisdiction.

- Ensure that the merged entity be required to separate its retail wagering from any online activity so the costs of capital in each market channel are separately disclosed, and unfair cross-subsidy prevented.

- An undertaking by the merged entity that any online in-play sports betting that is offered in their venues as well as pub/clubs is only offered via fixed terminals – for example, the existing terminals – and not via handheld devices such as iPads or other tablets.

RWA and its members would, of course, be delighted to meet the Tribunal to further develop these points.

Yours sincerely



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