[PUBLIC VERSION]

IN THE AUSTRALIAN COMPETITION TRIBUNAL

ACT 1 of 2017

Re: 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

Applicant: Tabcorp Holdings Limited

STATEMENT OF JAMES MELLSOP

Statement of: James Mellsop

Address: NERA Economic Consulting, Level 18, 151 Queen Street, Auckland 1010, New Zealand

Occupation: Managing Director at NERA Economic Consulting

Date: 1 May 2017

Filed on behalf of	Australian Competition and Consumer Commission		
Prepared by	Simon Uthmeyer		
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I, James Mellsop, of Level 18, 51 Queen Street, Auckland 1010, New Zealand, say as follows:

INSTRUCTIONS, QUALIFICATIONS AND EXPERIENCE

1. I have prepared this statement at the request of DLA Piper Australia (**DLA**), solicitors for the Australian Competition and Consumer Commission. As is set out in my statement in this matter dated 27 April 2017 (**Earlier Statement**), I have been requested by DLA to act as an independent expert to the Australian Competition Tribunal in relation to an application by Tabcorp Holdings Limited (**Tabcorp**) to the Australian Competition Tribunal for authorisation of its proposed merger with Tatts Group Limited (**Tatts**).

2. My Earlier Statement contains my current curriculum vitae, a copy of my letter of instructions dated 25 April 2017 and the Federal Court of Australia Expert Evidence Practice Note (GPN-EXPT), including the Harmonised Expert Witness Code of Conduct annexed to that practice note (together, the **Expert Guidelines**). I confirm that I have read and complied with the Expert Guidelines.

REPORT

3. Now shown to me and marked **Annexure JM-4** is a copy of my report dated 1 May 2017.

4. This report contains information which is highly confidential to Tabcorp. Material that is confidential in this report is marked accordingly.

5. I confirm that I have made all due inquiries and there are no matters within my knowledge that are of significance or relevance that I have excluded from my report. I acknowledge that the opinions I express in my report are based wholly or substantially on the specialised knowledge I have as a result of the qualifications and experience set out above.

Dated: 1 May 2017

Signed: ....

JAMES MELLSOP

INDEX OF ANNEXURES TO STATEMENT OF JAMES MELLSOP

Annexure	Title	Confidentiality
JM-4	Report of James Mellsop dated 1 May 2017	Restriction of part publication claimed.

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ACT 1 of 2017

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Applicant:	Tabcorp Holdings Limited

ANNEXURE CERTIFICATE

This is the confidential annexure marked **JM-4** annexed to the statement of **James Mellsop** dated 1 May 2017.

Confidential Annexure JM-4

Report of James Mellsop dated 1 May 2017

Filed on behalf of	Australian Competition and Consumer Commission		
Prepared by	Simon Uthmeyer		
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[PUBLIC VERSION]

Tabcorp/Tatts: supplementary expert economic report of James Mellsop

DLA Piper

1 May 2017

Contents

1. Competitive issues raised by media rights

1.1. Introduction

1. The focus of my 27 April 2017 report was on the expert statements filed on behalf of the applicant. These statements did not analyse whether Tabcorp's significant ownership of media rights (via Sky) would raise any competition issues if the proposed Tabcorp/Tatts merger occurs.

2. In contrast, the expert statements of Mr Greg Houston (on behalf of CrownBet) and Dr Tom Hird (on behalf of Racing Victoria, Greyhound Racing Victoria and Harness Racing Victoria) contain quite detailed analyses of these issues. As I noted in my 27 April 2017 report, because these statements were only filed on 21 April 2017, I did not have a chance to review them carefully before I filed my 27 April 2017 report.

3. I have now had some more time to review the statements of Mr Houston and Dr Hird, and to more carefully consider the lay statements relevant to racing media rights. In this brief report, I provide my views on the relevant issues.

1.2. Importance of the digital channel under the counterfactual

4. When analysing the potential media issues, I think it is important to consider the likely difference between the forward-looking counterfactual and the status quo (and indeed the past).

5. As I noted at [102] of my 27 April 2017 report, the digital channel is [**Confidential to Tabcorp**] [redacted][1] and will likely be the key battleground under the counterfactual (see [121] of my 27 April 2017 report).

6. There are two key implications of this increasingly digital scenario.

7. Firstly, having access to content (digital rights) will likely be more critical to wagering operators than it has been to date. Mr Hines states that [86]:

   The next phase of competition is likely to involve digital streaming of vision provided corporate bookmakers have access to that vision.

8. Similarly Mr Tyshing states [188]:

   In my experience, this content significantly drives wagering turnover and will be increasingly important - indeed, critical - for competition in the wagering market in the future. The growth in online (digital) wagering means that content is an increasingly critical part of a wagering operator's offering and access to rights to content will underpin (or through a lack of access, impede) future competition among wagering providers. Digital content is particularly important for racing in driving wagering simply due to the duration of the wagering event (for example, a race as opposed to

[1] Excluding premium.

an entire AFL football match) which allows customers to consume the event more readily via digital devices.

9. This is relevant because the corporate bookmakers have managed to grow their racing products to this point with little direct access to vision rights.[2] But moving forwards, lack of access to vision may be more of an impediment.

10. Secondly, the incentives of peak racing authorities (PRAs) might change. In section 2.2.2 of his report, Mr Houston describes how totalisator operators pay a greater proportion of wagering revenue to the racing industry than corporate bookmakers, and he points out at [293] how this can skew PRAs to favouring their local tote (Tabcorp in his description) when selling media rights [293]. Similarly Mr Catterall states [38(a)]:

PRAs in a formal joint venture with the merged entity will be financially incentivised to maximise wagering revenue in the short-medium term with the merged entity which is likely to result in the foreclosure of negotiations with competing broadcasters of media rights.

…

Wagering revenue is ultimately shared with PRAs. Thus, the PRAs have an incentive to grant media rights to the merged entity.

11. However, this incentive would change if corporate bookmakers continue to grow faster than totes in the digital channel. Over the period FY10 to FY15, corporate bookmakers' racing turnover in the digital and phone channel [**Confidential to Tabcorp**] [redacted]. In contrast, over this same period the totes' racing turnover in this same channel has [**Confidential to Tabcorp**] [redacted].[3] Another way to analyse this data is through shares of the digital and phone channel: this same data shows that corporate bookmakers' share [**Confidential to Tabcorp**] [redacted]. Mr Tyshing states [338]:

Further, as corporate bookmakers share of the market increases, so too do the proportion of returns to the racing industry.

2 Analysis of data in TBP.001.022.0002 shows that, over the period FY10 to FY15, corporate bookmakers' racing turnover [**Confidential to Tabcorp**] [redacted] Over a longer time period from FY06 to FY16, bookmakers' racing turnover has [**Confidential to Tabcorp**] [redacted] (based on analysis of wagering market data in TBP.001.018.5686). It appears that this latter data covers all bookmakers, both corporate and other bookmakers, whereas the former data separates out corporate and other bookmakers and the [**Confidential to Tabcorp**] [redacted] figure just reported is that for corporate bookmakers only. For comparison, over the FY10 to FY15 period, combined racing turnover for Tabcorp and Tatts (both pari-mutuel and fixed odds wagering) has [**Confidential to Tabcorp**] [redacted] (based on analysis of data in TBP.001.018.5686).

3 Based on analysis of account wagering market data in TBP.001.022.0002.

12. If the PRA's incentives change in this way, then in Tabcorp States they should be more amenable to unbundling and selling rights to a broader set of firms (including corporate bookmakers), particularly in light of the evidence that the Victorian media rights allocation has resulted in:

    a) Higher revenue from selling media rights; and

    b) Higher wagering growth.

13. Regarding the evidence for higher revenue, Mr Hines states [87]:

    Media rights revenues have increased dramatically in Victoria which is the only State where thoroughbred racing has unbundled media rights and has made streaming of vision on digital devices available on a non-exclusive basis.

14. Regarding the evidence for higher wagering growth, Mr Blanksby states [14]:

    Since the inception of Racing.com at the beginning of the 2015/2016 season, there has been growth of more than 7% in wagering on Victorian thoroughbred races. This growth in wagering reflects the clear link between wagering and vision and the importance of having a broad based distribution strategy that recognises and exploits the changes in the wagering landscape.

15. Relatedly, Mr Catterall at [17] and [18] states:

    Since its inception in August 2015, the broad distribution strategy of Racing.com has had a marked positive impact on wagering turnover growth for Victorian thoroughbred racing. The annual growth rate in turnover is at over 8.5% per annum (year on year comparison), which is a marked improvement on the flat turnover performance of the two years prior to the inception of Racing.com.

    From my understanding of the limited data available in other jurisdictions, this is the highest growth rate for thoroughbred racing wagering turnover in Australia. This is significant given that Victoria is already the largest jurisdiction by wagering turnover.

16. Of course, the incentive change described above would not occur, or would not occur to the same degree, if the growth of corporate bookmakers slows.

1.3. Effect of merger

17. Against the background described above, I think there are two mechanisms through which the proposed merger could result in competitive detriments. I describe these in the next two subsections of my report.

1.3.1. Competitive advantage for Tabcorp/Sky

18. A first impact of the merger would be to provide Sky with an advantage over Racing.com in bidding for media rights in Tatts States. To the degree that a PRA still favours its local tote, then under the factual, a PRA in a Tatts (now Tabcorp) State would have an incentive to favour Sky over Racing.com when selling media (including digital) rights, all else being equal (see my analysis and the quote from Mr Catterall above). However, under the counterfactual, this particular incentive would not apply, as Sky (Tabcorp) would not be the

local tote in a Tatts State. Accordingly Racing.com would be competing on a more even playing field with Sky.

19. Mr Houston makes this same point in his first bullet under the (unnumbered) paragraph following [310] of his report.

20. It follows that to the degree PRAs have an incentive to favour their local tote, the merger would:

a) Give Sky a competitive advantage in bidding for media (including digital) rights in Tatts (now Tabcorp) States;

b) Reduce the probability of Racing.com winning those rights;

c) Reduce the probability of corporate bookmakers having access to vision rights. Sky is vertically integrated into wagering, and has to date not sub-licenced media rights to corporate bookmakers.[4] In contrast, Racing.com is not vertically integrated into wagering, and has sub-licensed vision rights to corporate bookmakers;[5] and

d) Reduce the extent to which vision is distributed more widely, e.g., on free-to-air television. In this regard I note Mr Catterall's statements that Tabcorp has a "narrow media distribution strategy" [29(d)], focussed on limiting competition from free-to-air and digital providers [101].

21. As already described in section 1.2 of my report above, it is possible that the incentives of PRAs to favour their local tote will diminish over time if the market share of corporate bookmakers increases. However, this change would be undermined if media rights are allocated to Sky – for the reasons outlined at [20] above, such an allocation would reduce the probability of corporate bookmakers having access to vision rights, and so would impede their expansion. In this regard, I note Mr Catterall's statement [19] that South Australian media rights will be contestable in 2017 (and 2024), and Queensland media rights will be contestable in 2020.

22. Racing.com could attempt to offset Sky's competitive advantage by adding a premium to its bid for media rights. However, its ability to do so would be undermined by the uncertainty over the value of those rights, for the reasons I discuss next.

1.3.2. Elimination of Tatts as a potential customer

23. A second impact of the merger would be to take out a potential customer (Tatts) for Racing.com as a bidder for media rights. Mr Catterall discusses the potential role of Tatts as a customer of Racing.com at [27-35] of his statement. Similarly, Mr Thompson (second

4 See Mr Tyshing's evidence at [207] (setting out the extent to which corporate bookmakers have licenses to media rights, which does not include any rights sub-licenced by Tabcorp) and [214] (noting that corporate bookmakers do not have rights to use or distribute racing content controlled exclusively by Sky Racing).

5 Mr Catterall refers to Racing.com partnering with Racing Victoria Ltd (RVL) to sub-licence Victorian thoroughbred racing content to corporate bookmakers [8(c)(ii)].

statement, [93]) refers to the ability for Tatts to threaten to move its retail agencies to Racing.com.

24. In my view, Racing.com would be a stronger bidder for media rights if it knew it could monetise any rights across Tatts. If Tatts was part of Tabcorp (via the merger), Tatts would be less willing and/or able to take content from a Sky rival (e.g., Racing.com), compared to the counterfactual. Mr Hines states [83]:

Without the merger, Tatts has the option of showing other racing channels in their agencies (ie other than Sky). If the merger proceeds, Tabcorp would only show Sky in those ex-Tatts agencies.

25. Dr Hird makes this same point at [252-257] of his report.

26. The strength of this harm depends in part on how much of a “must have” the relevant rights are. To take an extreme example, Racing.com might feel quite confident that if it won the media rights to the Cox Plate, Tatts would be a purchaser under both the counterfactual and factual. But for more run of the mill content, there is likely to be a difference.

27. Even if Racing.com considered that a complete refusal by the merged entity’s Queensland (say) retail network to take Queensland vision would be unlikely, Racing.com might still be concerned that the merged entity would only take some of the vision, not all of it. These sorts of concerns and uncertainties would lead Racing.com to discount its bid for the rights.

28. A counterargument is that Racing.com succeeded in winning media rights in Victoria, despite Tabcorp/Sky having the Victorian retail network, i.e., Racing.com was not deterred by the risk of Tabcorp not taking Racing.com’s Victorian content. However, this might be explained by the “must have” point above. Mr Hines states that PRAs in Victoria (and NSW) have a particularly high quality (and volume) of racing product [79]. Mr Catterall makes the same point at [133]. To the extent that punters in Tatts States would also wager on this higher quality content, this might have also increased Racing.com’s confidence in its ability to monetise this content in those Tatts States.

29. Accordingly, the merger would weaken Racing.com as a bidder for media rights, particularly from PRAs in the current Tatts states, and therefore provide Sky Racing with a competitive advantage for that content. This would reduce the probability of Racing.com acquiring media rights in Tatts States, at least in terms of the content which is not “must have.” Furthermore, the probability of corporate bookmakers obtaining vision rights would reduce, for the reasons discussed at [20(c)] above.

1.3.3. Conclusions

30. The merger is likely to:

a) Reduce the revenue received by PRAs (particularly in Tatts States) for their media rights;

b) Reduce the probability of Racing.com winning those rights; and

c) Reduce the probability of corporate bookmakers having access to vision rights, and therefore reduce their competitiveness compared to the counterfactual.

31. In my 27 April 2017 report, I concluded [27]:

On balance, my analysis indicates that the claimed public benefits of the proposed merger are unlikely to outweigh the public detriments that I have analysed so far.

32. As described in this report, I have now identified further competitive detriments of the merger, and accordingly I am more confident that the claimed public benefits of the proposed merger do not outweigh the public detriments.

33. As a final comment, I note the following statement by Dr Hird [250]:

Tabcorp could also use a monopoly over racing vision to favour its own wagering operations. For example, Tabcorp could bundle its vision with its wagering operations. This could take the form of:

- *Raising the price of access to vision for punters (e.g., Foxtel subscription prices or online access prices) unless they have a Tabcorp account. Indeed, as noted in the last dot point at paragraph 241, Tabcorp already does a version of this by offering free online access to Tabcorp account holders with an active account; or*
- *Making access to vision by commercial customers (e.g., pubs and clubs) contingent on them marketing/not marketing Tabcorp/non-Tabcorp wagering operations.*

34. The merger would likely provide a greater opportunity for bundling behaviour by Tabcorp. For example, consider Dr Hird's second bullet above. Under the factual, if Tabcorp made access to vision in (say) Queensland pubs and clubs contingent on them marketing Tatts' wagering operations, Tabcorp would receive any increased profits flowing to Tatts from any increased wagering turnover. However, under the counterfactual, Tabcorp would not, and so would have less incentive to behave in this way.

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