

UPDATE: COMPETITION TRIBUNAL CONFIRMS TABCORP'S PROPOSED MERGER WITH TATTS IS "PRO-COMPETITIVE"

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Legal Briefings - By **Grant Marjoribanks, Patrick Gay and Merryn Quayle**

The Australian Competition Tribunal has now published its reasons for granting authorisation to Tabcorp Holdings Limited to acquire Tatts (see our original legal briefing [here](#)).

Herbert Smith Freehills acted for Tabcorp in its successful merger authorisation application. To authorise the merger the Tribunal needed to be satisfied that, in all of the circumstances, 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".

In applying this test, the Tribunal largely affirmed its findings in its original determination of June 2017. The matter was remitted to the Tribunal reconsideration following a judicial review application by the competition watchdog, the ACCC, and corporate bookmaker CrownBet.

The Tribunal confirmed that:

- the merger will likely enhance competition;
- the benefits to the public of the merger are "substantial"; and
- there are no material detriments weighed in the balance which are of significance or likely to arise that outweigh the benefits.

The Tribunal also addressed the error of law identified by the Full Court in respect of the Tribunal's initial decision and made further observations and findings on a number of issues raised by the parties and interveners during the rehearing of the matter, which took place in October this year.

GREATER COMPETITION IN WAGERING AS A RESULT OF THE MERGER

The Tribunal not only confirmed its original conclusion that the merger would not lead to a material lessening of competition in the market for Australian wagering, but emphasised that the transaction would make the Merged Entity a more effective competitor, thereby leading to greater competition in online wagering:

*The proposed merger is consistent with the trend towards industry consolidation, with the Merged Entity acquiring greater scale in addition to lower costs. The Merged Entity will consequently be a more effective competitor than the Merger Parties would be separately without the merger. As such, **there will likely be greater competition than without the merger, particularly in online wagering, something that would add to the public benefits identified by Tabcorp, which would accrue to the racing industry and to consumers.*** (emphasis added)

The Tribunal stated that its earlier conclusions with respect to the trends in the wagering market – including migration away from pari-mutuel wagering towards fixed odds wagering and the corporate bookmakers' acquisition of market share from the totalisator operators including Tabcorp and Tatts – “remain valid (if not reinforced)” by the further evidence before the Tribunal in the second hearing:

The evidence presented to the Tribunal suggests that primary and dominant source of competitive pressure on the Merger Parties, individually and together, has been, and will continue to be, from the aggressive market growth and acquisitions strategies of the corporate bookmakers which are drawing customers to their fixed-odds products and away from the Merger Parties' pari-mutuel products.

Ultimately, the Tribunal considered that the corporate bookmakers were the main drivers of competitive pressure in the market:

...Tatts is not a leading competitor in this market segment. If anything, Tatts is following the lead set by the corporate bookmakers. In that context, the removal of Tatts as a provider of totalisator products would not lessen competition in such a way that detriment would follow.

Despite evidence put before the Tribunal by corporate bookmakers CrownBet and Ladbrokes of the potential regulatory changes which may affect the competitiveness of corporate bookmakers in the wagering market, the Tribunal found that the degree of uncertainty as to the likely introduction and effect of these changes rendered it too difficult to accurately account for their potential impact – which the Tribunal was unpersuaded, in any event, would be as significant as suggested by Tabcorp's competitors.

SUBSTANTIAL PUBLIC BENEFITS GENERATED BY THE MERGER

In large part, the Tribunal's position remained unchanged from its original conclusion that the proposed merger would deliver substantial public benefits. In reaching this conclusion, the Tribunal noted that:

- it was unnecessary to address CrownBet's contention that the benefits of the transaction which accrued to a limited subset of the broader public could not be considered as "public benefits" as, irrespective of CrownBet's approach, it ultimately did not matter. That is because the acquisition would result in benefit to consumers generally because of an increase in the level of competition, as well as a benefit to the racing industry in the form of product fees and benefits to shareholders from cost savings; and
- despite evidence of potential dis-synergies, integration risks and increased costs of the transaction, such costs were not of a sufficient magnitude or type to neutralise the substantial and ongoing cost savings arising out of the transaction.

PROPOSED CONDITIONS UNNECESSARY

As with its first determination, the Tribunal's authorisation is subject to one condition – the pre-agreed divestment of Tabcorp's Odyssey gaming business.

The Tribunal re-affirmed its refusal to impose any further conditions, concluding that no material detriment was likely to arise so as to warrant their imposition.

THE LAST OF ITS KIND

The Australian Competition Tribunal's formal merger authorisation process has been rarely used by companies seeking competition clearance for contentious mergers. Prior to Tabcorp's application, the process had been successfully used on only two prior occasions: by AGL in its acquisition of Macquarie Generation and by Sea Swift in its purchase of a Toll shipping business in the Northern Territory.

However, following the passage of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth) in October this year, the option of proceeding directly to the Tribunal for merger authorisation is no longer available. Under the amendments, the ACCC is now the decision-maker at first instance in all merger authorisation applications, with reviews of ACCC authorisation decisions to be carried out by the Tribunal.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**GRANT
MARJORIBANKS**
PARTNER, SYDNEY

+61 2 9225 5517
Grant.Marjoribanks@hsf.com



PATRICK GAY
PARTNER, SYDNEY

+61 2 9322 4378
Patrick.Gay@hsf.com

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