

UPDATE: TRIBUNAL CONFIRMS TABCORP'S PROPOSED MERGER MEETS PUBLIC BENEFIT TEST AND SHOULD BE ALLOWED TO OCCUR

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Legal Briefings - By **Grant Marjoribanks, Chris Jose, Patrick Gay, Merryn Quayle and Sarah Benbow**

On Tuesday the Australian Competition Tribunal gave Tabcorp Holdings Limited (**Tabcorp**), represented by Herbert Smith Freehills, the green light to proceed with its \$11 billion merger with Tatts after the granting authorisation to acquire shares in Tatts Group Limited as set out in their Merger Implementation Deed dated 18 October 2016. [Herbert Smith Freehills acts for Tabcorp in successful authorisation application to acquire Tatts.](#)

The Tribunal published its reasons for the decision this afternoon.

To authorise the merger the Tribunal needed to be unless 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”. The Tribunal affirmed that the benefits to the public of the merger “are substantial” and that there are no material detriments weighed in the balance which are of significance or likely to arise that outweigh those benefits.

PROPOSED CONDITIONS NOT NECESSARY

The Tribunal’s authorisation was subject to one condition – that Tabcorp divest its Queensland gaming business, which it had already agreed to do at the outset of the authorisation process.

Many other suggested conditions were put forward during the course of the hearing by the ACCC, Racing.com and Victorian Racing. The Tribunal's view on these was:

- in respect of conditions proposed by the Victorian Racing interveners in relation to bidding for the Victorian licence, the Tribunal agreed with Tabcorp that these “involve a degree of commercial and political unreality” and found that in some respects, the proposed conditions “are anti-competitive in themselves”.
- In respect of conditions proposed by Racing.com relating to media, the Tribunal was of the view that the media rights holders have sufficient countervailing power to negotiate in a competitive environment and should be left to determine their own future strategies. Responses of some of the peak racing bodies responded to certain of the proposed conditions highlighted that,

“far from having the effect of constraining any anticompetitive conduct by Tabcorp, the suggested conditions had the effect of constraining PRAs from achieving the best outcome for their members and affiliate.”

RACING INDUSTRY “OVERWHELMINGLY SUPPORTIVE” OF THE MERGER

The Tribunal noted that the evidence before the Tribunal from the racing industry and retail sector is “overwhelmingly supportive” of the merger or does not actively oppose it:

- with only one exception (Victoria) all state racing peak bodies support the merger and put on evidence to that effect;
- various peak hotel and clubs bodies “expressly rejected” the notion that the merger would be harmful to their venues; and
- no state government opposed the merger.

NO SUBSTANTIAL LESSENING OF COMPETITION IN CONSUMER WAGERING AS A RESULT OF THE MERGER

The Tribunal found that the decline in market share of both Tabcorp and Tatts, in the key areas in which they hold exclusive licences – retail and pari-mutuel wagering – “indicates that the business models of the Merger Parties will continue to come under substantial pressure.”

The Tribunal considered Tabcorp’s application to be consistent with the larger trend towards industry consolidation, an industry in which Corporate bookmaker ‘rivals’ – including Sportsbet, CrownBet, Ladbrokes, Bet365 and William Hill – compete with Tabcorp and Tatts and each other.

On bidding for wagering licences, the Tribunal noted that while it was generally accepted that as the incumbent licensee Tabcorp would be the strongest bidder for upcoming Victorian retail and pari-mutuel licences, and would be a strong bidder for the WA TAB if that came to market, the merger was unlikely to change, and should actually strengthen, that position – causing no reduction in economic efficiency nor any public detriment.

The Tribunal agreed with Tabcorp and Tatts’ submission that it is difficult to predict the nature of any future bidding process for the Victorian licence and that “the reality is that it is not likely that the process for the [next licence] will be the same as the earlier bid.”

NO COMPETITIVE HARM IN RELATION TO RACING MEDIA

The Tribunal disagreed with the ACCC and the interveners that any competitive harm in relation to racing media would result from the transaction. It agreed with the comments of Mr V’landys (of Racing NSW) whose evidence to the Tribunal was that:

"[T]he suggestions that the Proposed Transaction will have any impact on competition in the market for broadcasting of racing vision is a complete furphy. I am also of the view that the efforts by the intervening parties ... to assert otherwise are simply opportunistic attempts by competitors of Tabcorp and Tatts to use the application to the Tribunal to improve their financial position and/or to damage Tabcorp and Tatts. Again, I stress that nothing changes from the current situation for media rights if the Proposed Transaction proceeds."

The merger was found to materially change nothing in respect of the media landscape – other than putting Tabcorp in a weaker bargaining position vis-à-vis the media rights holders by reason of Tabcorp’s increased dependence on obtaining those media rights. That bargaining position is accentuated by the relatively recent emergence of a competing purchase of those rights, Racing.com.

PUBLIC BENEFITS

Tabcorp presented evidence that public benefits arose from merger specific expected cost synergies and revenue improvements. Those estimates were supported by detailed calculations of cost synergies and revenue improvements.

In large part the Tribunal accepted that the proposed merger would deliver substantial public benefits. Specifically:

- the Tribunal rejected the ACCC's submissions that the estimated synergies and revenue improvements lacked veracity or sufficient verification noting that they were underpinned by detailed modelling which provided a sufficient basis for both Tabcorp and Tatts Boards to make market disclosures on the relevant forecasts;
- the Tribunal accepted that merger specificity is key to the assessment of public benefits from the merger and also noted that the likely counterfactual against which the "future with" the merger is measured was one where Tatts remains a stand-alone entity. In this counterfactual Tatts is not likely to achieve cost savings to the same degree as the merged entity and the Tribunal noted:

"In the context of Tabcorp's ability to achieve these claimed costs savings, a stand-alone Tatts is not likely to achieve costs savings to the same degree. Under the counterfactual, Tatts will no doubt continue to strive for efficiencies, but there is no reason to conclude that it has not already been doing so. The fact is that these claimed costs savings are largely derived from scale efficiencies that a Merged Entity could credibly achieve to a greater degree than Tatts alone could do."

Similarly on revenue improvements, while the Tribunal did not conclude that Tatts would never catch up with Tabcorp in the relevant business operations, that was very unlikely in the next few years and therefore, to a significant extent, the revenue increases are merger-specific.

- The Tribunal held that while the proposed merger would not significantly address the long-term financing issues facing the Australian racing industry this does not detract from the public benefit that will likely arise from the additional funding of the racing industries expected from the merger.

AN INNOVATIVE STRATEGY

It is rare for a company to use the Australian Competition Tribunal's more formal merger authorisation process with most mergers being better suited to ACCC's informal clearance process.

The strategic decision to proceed directly to the Tribunal for authorisation of the transaction on public benefit grounds (rather than wait for a decision from the ACCC strictly on competition grounds) was criticised in the press, with many armchair commentators questioning the wisdom of the strategy.

That decision, which at various times was described as "unusual" and "the wrong call" in the market has now been proven to be the right one – even one of the strategy's most strident critics is now hailing Tabcorp's win a "stunning victory".

The efficiency of the Tribunal and the outcome illustrates that the Tribunal process can give greater transaction certainty in more complex or contentious mergers than may necessarily be achieved through the ACCC's informal clearance process. Authorisation allows the public benefits of a merger to be balanced against any impacts on competition – a broader test than the ACCC applies which only considers competition impacts. It also provides companies with greater transparency with all evidence and submissions being available so that they can be directly tested and addressed.

The Tribunal also works to a very tight timeframe which in complex matters can be substantially quicker than ACCC clearance.

The ability to seek merger authorisation directly from the Tribunal (and by-pass the ACCC) was first introduced in 2007 but lay dormant as companies continued to favour the ACCC's informal clearance process.

The formal authorisation process was first used in 2013 when Murray Goulburn, advised by Herbert Smith Freehills-took its proposed hostile takeover of Warrnambool Cheese & Butter to the Tribunal. That matter did not proceed to a final decision but demonstrated that the Tribunal process was viable, effective and efficient and should be considered even in the face of procedural challenges.

Since then the Tribunal authorisation process has successfully been used 3 times:

- by AGL in its acquisition of Macquarie Generation;
- Sea Swift in the purchase of a Toll shipping business in Northern Territory; and
- now by Tabcorp for the Tatts acquisition.

KEY CONTACTS

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



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