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David Hatfield  
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Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

## **PUBLIC VERSION**

Dear David

### **Interim authorisation of pooling agreement between Tabcorp and TOTE Tasmania – TOTE Tasmania Submission**

We act for TOTE Tasmania Pty Ltd (**TOTE Tasmania**). We refer to the application by Tabcorp Manager Pty Ltd (**Tabcorp**) for interim authorisation of certain conduct arising from the SuperTAB Pooling Agreement between Tabcorp and TOTE Tasmania dated 23 October 2007 (**2007 Agreement**).

TOTE Tasmania strongly supports the grant of such interim authorisation on an urgent basis for the reasons set out in this submission.

#### **1. Background**

1.1 Tabcorp and TOTE Tasmania currently have an agreement, pursuant to which Tabcorp provides pooling services to TOTE Tasmania, dated 22 September 1998 (**1998 Agreement**). [*Confidential information redacted*]

1.2 [*Confidential information redacted*]

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1.3 Accordingly, in assessing the application for the interim authorisation, the appropriate comparison for the Commission to make is between:

- (a) a 'factual' scenario in which the parties pool bets pursuant to the terms of the 1998 Agreement, at least until 25 March 2008 [*Confidential information redacted*]; and
- (b) a 'counterfactual' scenario in which the parties pool bets pursuant to the terms of the 2007 Agreement from the date of interim authorisation until such time as interim authorisation is withdrawn or final authorisation is granted and comes into effect (the 2007 Agreement being subject to a condition that the agreement will be terminated if interim authorisation is withdrawn at any time or final authorisation is not granted).

## **2. Factors relevant to grant of interim authorisation**

- 2.1 In considering an application for authorisation, the Commission has indicated that it will take into account, inter alia, the following factors<sup>1</sup>:
- (a) the extent to which the relevant market will change if interim authorisation is granted (interim authorisation being more likely to be granted when it will maintain the status quo, and less likely to be granted if it would permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if final authorisation is later denied);
  - (b) the urgency of the need for interim authorisation;
  - (c) the possible harm, if any, to the applicant or other parties if a grant of interim authorisation is denied; and
  - (d) any possible benefit or detriment to the public that the Commission could assess at the time of considering the request for interim authorisation.
- 2.2 In effect, the Commission is required to undertake a limited form of net public benefit analysis having regard to the available information at the time, together with consideration of the need for urgency and potential for permanent or irreversible changes within a market.

## **3. Comparison between the 1998 and 2007 Agreements**

- 3.1 Copies of the 2007 Agreement and the 1998 Agreement have been provided to the Commission by Tabcorp on a confidential basis, as well as a public summary of the 2007 Agreement.
- 3.2 For present purposes, the key differences between these agreements are as follows:
- (a) TOTE Tasmania considers the terms of the 2007 Agreement to be commercially preferable to the 1998 Agreement; and
  - (b) the commercial terms of the 2007 Agreement are also more flexible and enable TOTE Tasmania to engage in competitive conduct not possible under the 1998 Agreement.
- 3.3 TOTE Tasmania considers that the 2007 Agreement delivers commercial advantages to TOTE Tasmania. This will in turn deliver benefits to the Tasmanian Racing Industry (TRI), the Tasmanian economy and the Australian racing and wagering industry generally which will be forgone in the relevant period if interim authorisation is not granted. This is discussed in further detail below.

## **4. Public detriment**

- 4.1 TOTE Tasmania appreciates that the Commission will be reluctant to authorise conduct that could result in possible competitive detriment or harm to other parties.
- 4.2 In this case, it is clear that there would be no competitive detriment likely to flow as a result of granting interim authorisation. The parties have been pooling bets under the

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<sup>1</sup> ACCC, Guide to Authorisation, March 2007, Page 50.

1998 Agreement since 1998 and will continue to do so until at least March 2008 when the 1998 Agreement expires.

- 4.3 Specifically, there is no risk at all that interim authorisation might permanently alter the existing competitive dynamics of wagering and racing markets in Tasmania or Australia more generally. As pooling of bets has existed for many years and will continue, albeit under the terms of the 1998 Agreement until at least 25 March 2008, there is no risk that interim authorisation will lead to the position where the market is unable to return to its pre-interim authorisation state.

- 4.4 *[Confidential information redacted]*

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**5. Public benefits**

**2007 Agreement is commercially preferred by TOTE Tasmania**

- 5.1 *[Confidential information redacted]*

- 5.2 *[Confidential information redacted]*

- 5.3 *[Confidential information redacted]*

- 5.4 *[Confidential information redacted]*

- 5.5 *[Confidential information redacted]*

- 5.6 *[Confidential information redacted]*

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- 5.7 *[Confidential information redacted]*

- 5.8 *[Confidential information redacted]*

- 5.9 *[Confidential information redacted]*

- 5.10 *[Confidential information redacted]*

- 5.11 *[Confidential information redacted]*

- 5.12 *[Confidential information redacted]*

**Commercial terms of the 2007 Agreement enable TOTE Tasmania to engage in competitive conduct not possible under the 1998 Agreement.**

- 5.13 *[Confidential information redacted]*

- 5.14 *[Confidential information redacted]*

- 5.15 *[Confidential information redacted]*

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- 5.16 *[Confidential information redacted]*

- 5.17 *[Confidential information redacted]*

**Commercial benefits to TOTE Tasmania will flow through as immediate public benefits to the TRI**

- 5.18 TOTE Tasmania is a state-owned company established by the Tasmanian Government to provide wagering services and administrative and financial support for the TRI. The statutory objectives of TOTE Tasmania include promotion of the Tasmanian thoroughbred, harness and greyhound racing within Tasmania and nationally. TOTE Tasmania is central to developing and maintaining a vibrant and successful racing industry in Tasmania. The TRI includes breeders, owners, trainers, race clubs and bookmakers as well as TOTE Tasmania itself.
- 5.19 In 2006/07, TOTE Tasmania provided \$20,400,000 to the TRI for prize money and running costs, which represented some 67% of the expenditure of the TRI of \$30,200,000. The distributions TOTE Tasmania makes to the racing industry are critical to its viability.
- 5.20 By supporting the TRI, TOTE Tasmania makes an important contribution to the Tasmanian economy. Recent independent economic analysis estimates that the TRI generates \$74,100,000 per annum in output for the Tasmanian economy from ongoing operations and another \$73,700,000 in construction output (over a 5 year period), representing 2,467 Full Time Equivalent jobs in the Tasmanian economy from ongoing operations and another 1,009 jobs from construction activities.<sup>2</sup> These are jobs that are being supported in regional and rural Australia and in a jurisdiction that has one of the highest rates of unemployment in the country. The TRI also represents an important sporting and cultural community and provides recreational opportunities that are enjoyed by a large number of Tasmanians.
- 5.21 The commercial benefits that TOTE Tasmania will derive if it is able to move to the 2007 Agreement are not merely private financial benefits but will flow through as public benefits to the TRI. *[Confidential information redacted]*
- 5.22 It is also important to note that the 2007/08 trading year for all TABs, including TOTE Tasmania, has been significantly impacted by the outbreak of Equine Influenza. At a recent Board Meeting, TOTE Tasmania's profit after taxation was revised down by a substantial quantum. *[Confidential information redacted]*
- 5.23 *[Confidential information redacted]*
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- A more competitive TOTE Tasmania will provide wider public benefits to the wagering and racing industry in Australia**
- 5.24 As the Commission recognised in its consideration of the proposed UNiTAB/Tabcorp merger<sup>3</sup>, pooling on reasonably commercial terms is critical to the economic viability of smaller totalisators such as TOTE Tasmania. Indeed, one of the major competitive concerns the Commission had in the context of that proposed merger was the foreclosure of opportunities for totalisators such as TOTE Tasmania to acquire pooling services on reasonable commercial terms if Tabcorp acquired UNiTAB. In that context, the Commission's concern was that the lack of availability of pooling services on reasonable terms would have anti-competitive consequences. The Commission also expressed concerns about 'latent competition' between totalisators using phone and internet across state borders being inhibited as a result of the merger.
- 5.25 *[Confidential information redacted]*
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<sup>2</sup> Economic Impact of the Tasmanian Racing Industry, Draft Final Report June 2007, Economic and Market Development Advisers.

<sup>3</sup> Proposed acquisition of UNiTAB by Tabcorp (2006), Public Competition Assessment, ACCC.

5.26 For the reasons described above, moving to the 2007 Agreement will provide TOTE Tasmania with an enhanced ability to compete on service and price with other totalisators. Maximising TOTE Tasmania's ability to more effectively compete with Tabcorp and other totalisators is of obvious public benefit to consumers in both Tasmania and in other jurisdictions that acquire TOTE Tasmania services via the internet or telephone. It will directly stimulate the potential for 'latent competition' identified by the Commission in the UNiTAB /Tabcorp matter.

**6. Consequences for TOTE Tasmania of not pooling at all**

6.1 *[Confidential information redacted]*

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6.2 *[Confidential information redacted]*

6.3 *[Confidential information redacted]*

6.4 The significant impact of TOTE Tasmania being ultimately forced to cease pooling will be addressed in further detail as part of TOTE Tasmania's submission in support of Tabcorp's application for final authorisation. This will be lodged shortly with the Commission.

**7. Urgency**

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7.1 *[Confidential information redacted]*

7.2 TOTE Tasmania requests that the Commission make their decision as soon as possible within the Commission's 30 day period for consideration. TOTE Tasmania is hopeful that the interim authorisation can be granted in time for the period of major trading during the spring/summer racing seasons. *[Confidential information redacted]*

7.3 TOTE Tasmania further submits that there is a strong case that public consultation is not required as a pre-condition to interim authorisation in this instance. This is for the following reasons.

7.4 First, the two parties directly affected by the conduct (Tabcorp and TOTE Tasmania) both support an urgent consideration of the application for interim authorisation. Further, Vic Racing has been informed of the commercial terms of the 2007 Agreement and TOTE Tasmania has been advised [by Tabcorp] that each of the Required Participation Approvals and Race Field Approvals (which are conditions precedent to the 2007 Agreement) have been authorised by Racing Victoria Limited, Greyhound Racing Victoria and Harness Racing Victoria respectively.

7.5 Secondly, while the 2007 Agreement is considered by TOTE Tasmania to be commercially preferable, it does not fundamentally change the status quo with respect to the existence of a pooling agreement, the party with whom TOTE Tasmania currently pools, or otherwise adversely affect any third party stakeholder vis-à-vis the counterfactual of the 1998 Agreement continuing.

7.6 Finally, TOTE Tasmania notes that the Commission has had the benefit of making extensive and recent market inquiries in the wagering and racing industry in the UNiTAB/Tabcorp matter. TOTE Tasmania is therefore hopeful that the Commission is familiar both with the industry, the specific issues that arise in relation to pooling arrangements and the likely position that many stakeholders may take on the ultimate issues.

TOTE Tasmania strongly supports the application made by Tabcorp for interim authorisation of the 2007 Agreement and we look forward to the Commission's decision at the earliest possible juncture.

If you have any questions or require any further information, please contact Geoff Carter on (03) 8608 2168.

Yours faithfully  
**MINTER ELLISON**



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