



**Tabcorp Wagering Manager (Vic) Pty Ltd –
Applications for authorisation A91323 – A91328
Interim authorisation Decision
15 August 2012**

DECISION

The Australian Competition and Consumer Commission (the ACCC) has decided to grant conditional interim authorisation with respect to applications for authorisation A91323 - A91328 lodged by Tabcorp Wagering Manager (Vic) Pty Ltd (Tabcorp) on 12 July 2012.

The ACCC grants conditional interim authorisation under section 91(3) of the *Competition and Consumer Act 2010* to Tabcorp to give effect to agreements with Racing and Wagering Western Australia (RWWA) and Tabcorp and ACTTAB Limited (ACTTAB) (2012 Agreements) concerning their participation in the SuperTAB pool except the 'International Pool Requirement' and 'Foreign Totalisator Provision' contained in the 2012 Agreements. Authorisation is granted on condition that the parties do not give effect to the 'International Pool Requirement' and 'Foreign Totalisator Provision'.

THE APPLICATION

Tabcorp is seeking authorisation to give effect to the 2012 Agreements, with each of RWWA and ACTTAB, which will govern RWWA's and ACTTAB's ongoing participation in the SuperTAB pool, operated and hosted by Tabcorp.

Provisions of the 2012 Agreements sought to be authorised are:

- Pooling restriction
- Investment requirement
- Race fields approval requirement
- International pool requirement
- Foreign totalisator provision
- Betting rules (in accordance with the Victorian Totalisator Betting Rules).

The current application for authorisation includes two additional provisions to conduct authorised by the ACCC in 2009. These provisions relate to pooling agreements between RWWA /ACTTAB and foreign pooling hosts, namely the international pool requirement and foreign totalisator provision.

Tabcorp, RWWA and ACTTAB entered into the 2012 Agreements on 29 June 2012. Interim authorisation is sought for Tabcorp to give effect to the 2012 Agreements from 16 August 2012.

Tabcorp has applied for authorisation on the basis that clauses of the 2012 Agreements may contravene sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK, 45 and 47 of the *Competition and Consumer Act 2010* (the Act).

Both RWWA and ACTTAB currently participate in the SuperTAB pool. Their current participation is governed by authorisations granted by the ACCC in 2009 and expire on 15 August 2012.

Tabcorp is seeking authorisation for a period of 12 years, ending on 15 August 2024.

Further information regarding the application is available on the ACCC's public register at www.accc.gov.au/AuthorisationsRegister.

THE AUTHORISATION PROCESS

The ACCC can grant immunity from the application of the competition provisions of the Act if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

INTERIM AUTHORISATION

Section 91 of the Act allows the ACCC to grant interim authorisation without making a decision on the merits of the application.

The ACCC will only grant interim authorisation in appropriate circumstances. In many circumstances it is not appropriate to do so because interim authorisation allows an applicant, for a limited period, to engage in conduct before the ACCC has been able to fully assess whether the conduct satisfies the authorisation test.

CONSULTATION

Upon receipt of the application for authorisation on 12 July 2012, the ACCC undertook interested party consultation in order to consider the request for interim authorisation. The ACCC wrote to 44 interested parties including racing associations, government departments, other totalisators and bookmakers.

The ACCC received one submission from Harness Racing Victoria who supports the grant of interim authorisation.

Further information in relation to the proposed arrangements, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website www.accc.gov.au, by following the 'Public Registers' and 'Authorisations' links.

REASONS FOR DECISION

In granting conditional interim authorisation, the ACCC had regard to the following issues:

- Conditional interim authorisation will enable Tabcorp, RWWA and ACTTAB to operate in substantially the same way as authorised by the ACCC in 2009, thus maintaining the stability of the totalisator pool offered by RWWA and ACTTAB.
- The ACCC has not extended interim authorisation to give effect to the 'International Pool Requirement' and 'Foreign Totalisator Provision' as they are new provisions and not previously considered by the ACCC.

RECONSIDERATION OF DECISION

The ACCC may review its decision on conditional interim authorisation at any time. The ACCC's decision in relation to conditional interim authorisation should not be taken to be indicative of whether or not final authorisation will be granted.

When can Interim Authorisation be Granted?

Requests for interim authorisation are considered on a case by case basis. In *International Air Transport Association and Alitalia Linea Aerea Italiana SPA*¹ (the *IATA case*) the Tribunal noted that it would be impossible to attempt to define all relevant principles governing the grant of an interim authorisation. It stated that much would depend on the facts of the particular case, the urgency of the occasion and the conduct the subject of the application by the parties. It also noted that in considering a request for interim authorisation, it would generally be inappropriate to examine questions of law or facts too closely at an early stage of review.

While it is not possible to outline all of the issues that the Commission will take into account in determining whether a specific request for interim authorisation should be granted, some major factors considered in determining whether interim authorisation should be granted include the following:

- The policy of the CCA is clearly opposed to arrangements that are in restraint of trade and other anti-competitive practices. The Commission is therefore unlikely to grant interim authorisation to arrangements that are highly anti-competitive unless compelling reasons are provided.
- The Commission is unlikely to grant interim authorisation where this will 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, unless special circumstances apply. Similarly, a factor the Commission will consider is whether a person appealing in good faith against the refusal of authorisation by the Commission would be effectively denied their right of appeal to the Tribunal by the refusal of an interim authorisation. This would apply, for example, if the arrangement once departed from could not be reinstated in the event of a final decision favourable to the applicant.
- The Commission will consider the possible harm, if any, that will occur to the applicant if a grant of interim authorisation is denied.
- The possible harm that will occur to other parties (such as customers and competitors) if a request for interim authorisation is granted or denied will also be taken into account.
- The Commission will consider whether granting interim authorisation is urgent and/or necessary.
- The Commission will consider the extent to which the relevant market will change if interim authorisation is granted. For instance, interim authorisation is more likely to be granted in cases where it will maintain the status quo in the market.
- Any possible benefit or detriment to the public will be considered to the extent the Commission is able to make such an assessment at the time of considering the request for interim authorisation.
- In some cases it may be thought preferable not to disturb the existing position pending a final decision as the good or bad effects of the existing situation will usually be clearer than the possible effects of a change in that situation.
- The length of time that is likely to elapse between the granting of the interim authorisation and the anticipated date of final authorisation will be considered.

¹ (1995) ATPR 40-537

- A preliminary assessment of the public benefits and anti-competitive detriments likely to result from the proposed conduct may be undertaken.
- Whether there is a risk of legal action by a third party is a relevant consideration. The Commission has considered that it would be detrimental to the authorisation process if private legal action was commenced before an application for authorisation is determined.
- Whether a refusal to grant interim authorisation will result in potential public benefits being lost will also be considered.