

Form G

Commonwealth of Australia

Competition and Consumer Act 2010 — subsection 93 (1)

NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of persons giving notice:

(Refer to direction 2)

N96121 Tabcorp Wagering Manager (Vic) Pty Ltd (**Tabcorp Wagering Manager**); and
N96122 TAB Limited (**TAB**).

(b) Short description of business carried on by that person:

(Refer to direction 3)

Tabcorp Wagering Manager and TAB are part of the Tabcorp Group – a wagering, gaming and entertainment group.

Tabcorp Wagering Manager is authorised to provide wagering services in Victoria.

TAB holds licences to provide totalisator wagering services in New South Wales.

Please refer to the submission in support of the notification for further details.

(c) Address in Australia for service of documents on that person:

C/o Patrick Gay, Partner, Freehills, Level 32, MLC Centre, Martin Place, Sydney NSW 2000

2. Notified arrangement

(a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

1. The provision of totalisator pooling services to overseas wagering operators by Tabcorp Wagering Manager and TAB (**Totalisator Pooling Services**).
2. The provision of access to Tabcorp Wagering Manager and TAB's totalisator pools through an intermediary hub (**Pooling Interface Services**).

Please refer to the submission in support of the notification for further details.

(b) Description of the conduct or proposed conduct:

(Refer to direction 4)

1. Tabcorp Wagering Manager and TAB propose to:

(a) supply, or offer to supply, Totalisator Pooling Services.

(b) supply, or offer to supply, Totalisator Pooling Services at a particular price;
or

- (c) give or allow, or offer to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of Totalisator Pooling Services.

on the condition that the person to whom Tabcorp Wagering Manager and TAB supplies or offers or proposes to supply Totalisator Pooling Services (**Overseas Wagering Operator**) acquires Pooling Access Services from a nominated intermediary totalisator; and

2. Tabcorp Wagering Manager and TAB propose to:

- (a) refuse to supply Totalisator Pooling Services to an Overseas Wagering Operator;
- (b) refuse to supply Totalisator Pooling Services at a particular price to an Overseas Wagering Operator; or
- (c) refuse to give or allow a discount, allowance, rebate or credit in relation to the supply of Totalisator Pooling Services to an Overseas Wagering Operator,

for the reason that the Overseas Wagering Operator has not acquired, or has not agreed to acquire, Pooling Interface Services from a nominated intermediary totalisator.

3. **Persons, or classes of persons, affected or likely to be affected by the notified conduct**

(a) **Class or classes of persons to which the conduct relates:**

(Refer to direction 5)

Persons who are Overseas Wagering Operators seeking to 'pool' bets into Tabcorp's Australian totalisator pools.

(b) **Number of those persons:**

(i) **At present time:**

Less than 50.

(ii) **Estimated within the next year:**

Less than 50.

(c) **Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:**

Unknown.

[REDACTED]

4. **Public benefit claims**

(a) **Arguments in support of notification:**

(Refer to direction 7)

Please refer to the submission in support of the notification.

(b) **Facts and evidence relied upon in support of these claims:**

Please refer to the submission in support of the notification.

5. **Market definition**

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the

relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 8)

Please refer to the submission in support of the notification.

6. Public detriments

- (a) **Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:**

(Refer to direction 9)

Please refer to the submission in support of the notification.

- (b) **Facts and evidence relevant to these detriments:**

Please refer to the submission in support of the notification.

7. Further information

- (a) **Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:**

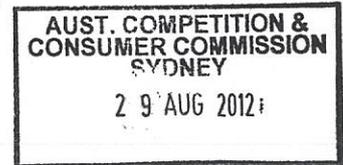
Patrick Gay, Partner, Freehills, MLC Centre, Level 32, Martin Place, Sydney 2000, +61 2 9225 4378.

Dated 29 August 2012

Signed by the applicant



Patrick Gay
Partner
Freehills



Submission

AUST. COMPETITION &
CONSUMER COMMISSION
SYDNEY

29 AUG 2012

Tabcorp – Notification of Exclusive Dealing Submission to the ACCC

29 August 2012

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1 Introduction

This submission is provided in relation to a Notification of Exclusive Dealing lodged by:

- Tabcorp Wagering Manager (Vic) Pty Ltd (**Tabcorp Wagering Manager**); and
- TAB Limited (**TAB**).

2 Background

2.1 Tabcorp

Tabcorp Holdings Limited (**Tabcorp Holdings**) operates through its subsidiaries and controlled entities, including Tabcorp Wagering Manager and TAB, and is a wagering, gaming and entertainment business whose operations are organised into four main business units including Wagering, Media and International, Gaming and Keno.

The wagering division operates totalisator and fixed odds businesses under licences and approvals in Victoria, New South Wales and the Northern Territory.

Tabcorp Wagering Manager

Tabcorp Holdings is licensed to provide wagering services in Victoria. The provision of wagering services provided pursuant to that licence is undertaken by Tabcorp Wagering Manager which is authorised as a wagering operator to provide wagering services pursuant to section 4.3A.1 of the *Gambling Regulation Act 2003 (GRA)*.

Tabcorp's Victorian wagering services are delivered to members of the public on-course and off-course principally through:

- stand-alone TAB Agencies and company operated mobile betting vans and other locations in Victoria;
- licensed venues in Victoria (ie PubTABs and ClubTABs); and
- telephone and internet accounts.

TAB

TAB holds licences to provide on and off-course totalisator wagering services in New South Wales. TAB also offers fixed odds betting on racing, sporting and other events.

TAB provides wagering services to its customers through similar distribution channels to Tabcorp Wagering Manager in Victoria.

2.2 Pooling

'Pooling' occurs only in the context of pari-mutuel wagering. In pari-mutuel wagering, bets are consolidated or 'pooled' into a totalisator pool.

Pooling (or 'co-mingling') refers to arrangements between two or more wagering operators whereby the wagering operators combine their respective pools in order to provide a single, larger pool into which the customers of each participating totalisator can wager.

Pooling arrangements generally involve a totalisator having a large pool (the 'host') offering 'pooling services' to one or more other wagering operators which each have a smaller pool (the 'guest participants'). In practice, the provision of pooling services means the provision by the host of the right to participate in the larger pool in return for a fee.

Totalisator pools in Australia

Three major totalisator pools operate within Australia:

- SuperTAB – being Tabcorp's Victorian totalisator pooled with the totalisators of Western Australia and the ACT, and certain international wagering operators including those in New Zealand and South Africa.
- NSW TAB – being TAB's NSW totalisator. TAB currently has a pooling arrangement in respect of the international wagering operator Premier Gateway International Limited (based in the Isle of Man), which allows it to pool certain bets into the NSW TAB.
- The UNITAB pool – this pool comprises the totalisators in Queensland, South Australia, the Northern Territory and Tasmania.

Pooling Approvals

(1) Pooling in New South Wales

In order to pool bets into the NSW TAB, TAB must obtain approval from both the Minister and the racing industry.

Ministerial approval

Pursuant to paragraph 14 of TAB's conditions of licence, the approval of the NSW Minister for Tourism, Major Events, Hospitality and Racing is required before TAB may enter into any arrangement with another body conducting totalisator betting outside of New South Wales.

Racing Industry approval

In New South Wales, TAB has entered into an agreement, the Racing Distribution Agreement, which governs aspects of its relationship with the local racing industry. Pursuant to clause 12 of that agreement, TAB must not make any arrangements in respect of pooling without the consent of Racingcorp Pty Ltd (the industry body that represents the three codes of racing).

(2) Pooling in Victoria

In Victoria, Tabcorp's arrangements with the local industry are governed by a Joint Venture agreement (**JVA**). The JVA requires racing industry approval in order to accept pooled bets into SuperTAB.

Unlike the position in New South Wales, ministerial approval is not strictly required. However, as a matter of practice and to secure certain taxation exemptions, Tabcorp will seek the approval of the Treasurer in Victoria prior to entering into any new pooling arrangement.

Rationale for pooling

Through the notified conduct Tabcorp is seeking to expand pooling into Australia – to provide overseas punters with the ability to bet into Tabcorp's totalisator pools.

Wagering operators generally seek to enter into pooling arrangements with other totalisators in order to have access to a larger totalisator pool as a number of benefits flow from access to a large pool. In the case of overseas wagering operators, there may be insufficient local interest in Australian racing to justify a stand alone pool. As a result pooling with an Australian pool will allow those operators to offer wagering on Australian racing.

Benefits resulting from access to a large totalisator pool include:

- (1) For consumers of pari-mutuel wagering products:

Stability

The larger the totalisator pool, the greater its stability – that is, larger bets will have less effect on the final odds (ie dividends), which benefits both consumers

placing larger bets, and consumers placing smaller bets whose dividends could be affected by the larger bets. In contrast, a large bet placed with a small totalisator (without access to a large pool) could substantially distort the calculation of odds for the relevant race and, in turn, affect potential winnings of all punters who have wagered on that race.

Size of dividend

A larger pool means that there is potentially more money available to distribute to winning punters. This increased liquidity enables customers to bet larger amounts on all contestants without significantly impacting the dividends paid.

(2) For totalisators

For 'guest' operators

Totalisator wagering, and pooling, is a market making activity. As with other market making businesses (for example, a stock exchange), a key feature of the attractiveness of the service is the number of people using the service. A larger totalisator pool is important to the attractiveness to the consumer of a totalisator operation because the larger the pool, the greater its stability. In a small pool, even moderate bets can affect the dividends.

Therefore, having access to a large pool assists a totalisator to attract punters, including high value punters, who are much more likely than recreational punters to place large bets. The size of the totalisator pool is an important factor considered by high value punters when choosing where to place a bet.

For the 'host' operator

Although host totalisators are typically larger than guest participants, hosts benefit from pooling arrangements in a number of ways:

- as discussed above, a large pool assists a totalisator to attract punters, including high value punters. Pooling arrangements will assist the host (as well as the guests) to compete more effectively with other large totalisator pools; and
- the host totalisator usually charges a fee for the provision of pooling services to other totalisators.

3 The conduct

The notified conduct is in respect of:

- (a) The provision of totalisator pooling services by Tabcorp Wagering Manager and TAB (**Totalisator Pooling Services**).
- (b) The provision of access to Tabcorp Wagering Manager and TAB's totalisator pools through an intermediary hub (**Totalisator Interface Services**).

Tabcorp Wagering Manager and TAB propose to:

- supply, or offer to supply, Totalisator Pooling Services;
- supply, or offer to supply, Totalisator Pooling Services at a particular price; or
- give or allow, or offer to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of Totalisator Pooling Services,

on the condition that the person to whom Tabcorp Wagering Manager and TAB supply or offers or proposes to supply Totalisator Pooling Services (**Overseas Wagering Operator**) will acquire Totalisator Interface Services from a nominated intermediary totalisator.

Tabcorp Wagering Manager and TAB further propose to:

- refuse to supply Totalisator Pooling Services to an Overseas Wagering Operator;
- refuse to supply Totalisator Pooling Services at a particular price to an Overseas Wagering Operator; or
- refuse to give or allow a discount, allowance, rebate or credit in relation to the supply of Totalisator Pooling Services to an Overseas Wagering Operator,

for the reason that the Overseas Wagering Operator has not acquired, or has not agreed to acquire, Totalisator Interface Services from a nominated intermediary totalisator.

At present, the following intermediary totalisators have been approved in New South Wales and Victoria:

New South Wales

- Premier Gateway International Limited;
- Racing Technology Ireland Limited; and
- Sportech Racing LLC.

Victoria

- Premier Gateway International Limited;
- Racing Technology Ireland Limited; and
- Sportech Racing LLC,

in respect of Premier Gateway International Limited, this is subject to approval from the Victorian Commission for Gambling and Liquor Regulation and the issue of a wagering tax exemption from the Treasurer.

By way of example, the following conduct is proposed:

Tabcorp proposes to enter into an agreement with [REDACTED] to provide Totalisator Pooling Services to [REDACTED], on the condition that [REDACTED] enters into an agreement with either of Premier Gateway International Limited, Racing Technology Ireland Limited or Sportech Racing LLC, in order to transmit bets into the Tabcorp pool.

4 Markets

4.1 Markets

Relevant markets include:

- the market or markets for the supply of Totalisator Pooling Services; and
- the market or markets for the supply of Totalisator Interface Services.

4.2 Suppliers and acquirers

In Australia pooling services are currently provided by Tabcorp and UNiTAB. There are a number of overseas wagering operators (including, for example, the New Zealand Racing Board) which provide equivalent services in order to allow hosting into their pools.

Acquirers of pooling services include ACTTAB and RWWA, in respect of Australia (and related UNiTAB parties in respect of the UNiTAB pool) as well as Tabcorp and other overseas wagering providers in respect of international pools.

Totalisator Interface Service providers include a number of overseas operators which may also operate their own totalisator pools. Examples include Sportech Racing LLC, Racing Technology Ireland Limited, Amtote, United Tote, and Las Vegas Dissemination Company.

Acquirers of Totalisator Interface Services include Overseas Wagering Operators seeking to access, through a 'hub', various totalisator pools.

5 Public benefits and detriment

5.1 Introduction

Tabcorp submits that the benefit to the public likely to result from the notified conduct would outweigh any detriment to the public likely to result from the conduct.

5.2 Benefits to the public

Benefits to the racing industry through increased participation in wagering

The notified conduct facilitates offshore bets being transmitted to Tabcorp pools. It will increase the size of the pools and result in co-mingling revenue.

The racing industries in New South Wales and Victoria have revenue and/or profit share arrangements with TAB and Tabcorp Wagering Manager. Accordingly, increased revenue generated from international pooling will increase the funds provided to the racing industry, benefiting a wide spectrum of industry stakeholders beyond Tabcorp and the ultimate shareholders.

An enhanced wagering product for consumers

Pool stability and liquidity benefits all punters. The larger the pool, the more stable the dividends paid by the pool because large bets would not have the same volatile effects as they do in smaller pools.

The notified conduct will facilitate the transmission of bets to Tabcorp pools thereby increasing the size, stability and liquidity of Tabcorp's pools.

Possibility of reciprocal 'guesting'

The strengthening of relationships between Tabcorp and Overseas Wagering Operators may lead to opportunities for Tabcorp to enter into additional 'guesting' arrangements with overseas totalisators. This will allow Tabcorp customers to bet into larger, more attractive pools on international events.

5.3 Detriment

The notified conduct would not result in public detriment, anti-competitive or otherwise, for the following reasons:

- Overseas Wagering Operators are under no obligation to participate in any pooling arrangement with Tabcorp.
- The notified conduct is in respect of the supply of Pooling Services to Overseas Wagering Operators through overseas suppliers of Totalisator Interface Services. Accordingly, the notified conduct has no effect on competition in any relevant Australian market.
- Potential suppliers of Totalisator Interface Services provide equivalent and related services in respect of totalisator pools other than the Tabcorp pools as well as, in certain circumstances, operate their own pools. The nomination of a certain supplier of Totalisator Interface Services as a 'hub' in respect of Tabcorp

totalisator pools will not otherwise affect competition between these providers in respect of the supply of relevant Totalisator Interface Services to Overseas Wagering Providers and international punters.

5.4 Responsible gambling

Tabcorp is confident that the proposed conduct would not raise responsible gambling concerns. However, given the publication of the Productivity Commission's Report on Gambling,¹ Tabcorp wishes to address the issue of responsible gambling in the context of this notification.

At the outset, a distinction should properly be made between activities that seek to promote the uptake of the wagering services supplied by a particular wagering operator by enhancing the customer experience, and those activities or environments that do not reflect responsible gambling practices. Gambling is a lawful activity in Australia and the vast majority of Australians who choose to gamble do so responsibly.² It is widely recognised that many thousands of Australians derive considerable enjoyment from wagering on racing and sporting events in a healthy and responsible manner. Many Australians also derive enjoyment from racing, and the racing industry in Australia is recognised to be highly dependent on wagering. Further, in every state and territory there is legislation in place which seeks to maximise responsible gambling behaviour. Therefore, it would be incorrect to conclude that any activity undertaken by a wagering operator that encourages customers and potential customers to use its services is not conducive to responsible gambling, particularly where these activities comply with applicable legislation.

Tabcorp is strongly committed to ensuring that people gamble responsibly. It has been recognised as a world leader in responsible gambling as voted by the Dow Jones Sustainability Index. Tabcorp's wagering division has a Responsible Gambling Code of Conduct, which has been approved by the Victorian Commission for Gambling and Liquor Regulation. Tabcorp operates BetCare, a voluntary self-exclusion program that enables members to exclude themselves from up to 15 TAB agencies as well as 15 participating hotels and clubs. Members of BetCare can also opt to have their Tabcorp betting account suspended.

The proposed conduct is designed by Tabcorp to provide an enhanced wagering experience to new account customers who are also patrons of Promotional Partners, as distinct from encouraging or promoting irresponsible gambling behaviour. Tabcorp believes that many patrons of Promotional Partners have a particular interest in wagering, racing and/or sport, and would therefore place value on having access to Tabcorp's offers and promotions. The proposed offers and promotions would be wide ranging and would not be confined to betting-related activities.

In addition to the benefits to consumers resulting from the proposed conduct, any resulting increase in the turnover of Tabcorp would result in increased funding to the NSW racing industry. Wagering operators provide substantial funding to the racing industry in Australia. The Commission has accepted in a number of determinations that increased funding for the racing industry resulting from increased turnover of wagering operators represents a public benefit.³ In each of those cases, the applicant(s) for

¹ The Inquiry Report was published in February 2010.

² The Productivity Commission's Inquiry Report on Gambling states that "[g]ambling is a common recreational pursuit and an enjoyable one for many. 70 per cent of Australians participated in some form of gambling in the last year." According to the Inquiry Report, 15 per cent of Australians gamble regularly (excluding Lotto and 'scratchies'), with roughly one in ten of this group being classified as "problem gamblers". Productivity Commission Report on Gambling, see Overview.

³ For example, in its determination of applications for authorisation lodged by TOTE Tasmania, ACTTAB Limited (ACTTAB) and Racing and Wagering Western Australia (RWAA) in relation to a proposed fixed odds wagering joint venture, the Commission stated, at 4.65:

authorisation had submitted to the Commission that its proposed conduct would result in an enhanced wagering product for consumers, thereby leading to increased wagering turnover and more funding for the racing industry. In its determinations, the Commission did not raise concerns regarding the effect of the proposed conduct on responsible gambling.

“... the ACCC considers that the proposed arrangements will facilitate the offering of a broader and more competitive range of fixed odds wagering services by the applicants. To the extent that this increases the applicants’ turnover, and thereby the funding provided by each applicant to their respective racing industries, the ACCC considers that some benefits to the public may arise.” (Commission Determination of A91127, A91128, A91129, A91130, A91131, A91132, A91162, A91163, A91164, A91165 dated 6 September 2009.)

In its determination of applications for authorisation lodged by Tabcorp Manager Pty Ltd (**Tabcorp Manager**) in relation to its pooling agreements with ACTTAB and RWVA, the Commission stated, at 4.101:

“... the ACCC considers that the proposed arrangements will facilitate improvements in the stability of the totalisator pool offered by RWVA and ACTTAB. To the extent that this leads to an increase in the turnover of RWVA and ACTTAB, and thereby the funding provided to their respective racing industries, the ACCC considers that some benefits to the public may arise.” (Commission Determination of A91123, A91124, A91158, A91159 dated 9 September 2009.)

In its determination of the applications for authorisation lodged by Tabcorp Manager in relation to its pooling agreement with TOTE Tasmania, the Commission stated, at 6.126:

“Therefore the ACCC accepts that pooling under the terms of the 2007 Agreement will result in a public benefit by ensuring TOTE Tasmania is able to provide funding to the Tasmanian racing industry and fulfil its statutory objective.” (Commission Determination of A91065, A91066, A91067 dated 5 March 2008.)