

10 October 2012

Ms Marie Dalins  
Director  
Adjudication Branch  
Australian Competition & Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

Dear Ms Dalins

**Notification 96146 – N96148 Lodged by Tabcorp Wagering (Vic) Pty Ltd, Tabcorp Wagering Manager (Vic) Pty Ltd and TAB Ltd.**

We refer to the above notification and unreservedly object to the application as we strongly believe the previous notification N93545 has negatively impacted the Victorian licensed club market significantly to the detriment of the representation of clubs, as employers, before Fair Work Australia.

We ask the ACCC before considering renewing the previous application with a new notification, they very carefully consider the impact the previous unfulfilled assurances, made by the applicant to the ACCC, has had on the market and the competitive restrictive practices their previous notification has, and continues to have, on the market. The applicant, Tabcorp, should have the right to conduct their business as they determine; but, they should not be allowed to influence a market they do not commercially operate in with a restrictive practice which is inadvertently proposed by the application.

It is our view the previous notification has impacted the representative market detrimentally, either through deliberate or consequential action allowed under the previous notification. This impact has meant clubs have had reduced adequate representation by the exclusion provisions that are implied commercially by the previous notification N93545.

We offer the following observations to help you determine the application:

1. Clubs Victoria was established in 1916 for the purpose of representing licensed clubs in the parliamentary and regulatory environs. It has since developed to be a strong organisation peak body representing the interests of licensed clubs, providing industrial relations advice, compliance and governance education, buying services and many other tasks which help and support the licensed club network.
2. Clubs Victoria is the registered organisation with Fair Work Australia (FWA) representing licensed clubs dealing with industrial relations (IR) matters. We provide IR advice and tools to help clubs maintain the important compliance of the Fair Work Act.
3. Membership of Clubs Victoria is not compulsory, however, as the peak employer group, licensed clubs have joined knowing they will receive adequate representation, advice and service on IR matters and other issues such as gaming and liquor compliance.
4. Clubs Victoria is the only registered body with FWA directly representing Victorian licensed clubs on matters dealing with the Fair Work Act and the Licensed Clubs Award.
5. Clubs are mostly governed by elected volunteers and rely on employed staff to provide

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adequate compliance and governance. Without commenting on the veracity of the governance skill capability within clubs, it could be asserted that the knowledge of effected legislation impacting their club is limited; thus, they rely on advice and communication of their peak body on all matters that may impact them with regard to industrial relations.

6. Clubs Victoria is recognised as the peak body within the licensed clubs market and as such is a member of Clubs Australia. No other body in Victoria is a member of Clubs Australia.
7. Clubs NSW is a member of Clubs Australia.
8. On 3 June 2008 the President of Clubs Victoria resigned stating he did not like the direction of Clubs Victoria (reference: Golf Victoria Magazine August/September 2012, Volume 53 – Number 4, page 20).
9. On 4 June 2008 Community Clubs Association of Victoria (CCAV) was established by the former President of Clubs Victoria.
10. CCAV is not registered before FWA and is not a member of Clubs Australia.
11. CCAV has as its major sponsors Tabcorp, Tabcorp Gaming Solutions, Keno ( a Tabcorp gaming product) Tab wagering. Tabcorp has been a major sponsor of CCAV since 2008.
12. On 26 June 2008 at a meeting of clubs invited to a CCAV meeting, it is believed a Tabcorp representative advised clubs that joined CCAV would be supported with a rebate on services and particularly the Sky Channel service. This same representative is believed to have advised the meeting that Tabcorp would not deal with Clubs Victoria and clubs would need to be a member of CCAV to receive the benefit..
13. Tabcorp was a long term major sponsor of Clubs Victoria until 2008 and previously asked Clubs Victoria to act on its behalf on many issues associated with gaming and gaming clubs.
14. Tabcorp and Clubs Victoria were previously in a strong partnership in providing clubs the very same services Tabcorp now seeks to exclude Clubs Victoria offering its members.
15. Some licensed clubs offer their members gaming which can include wagering. Due to State Legislation and enacted licensing, the only body licensed clubs can deal with when offering wagering to its members is Tabcorp.
16. It is a regulatory requirement for licensed clubs to provide a direct telecast of the events members are wagering upon.
17. The Tabcorp owned Sky Channel is the primary source of telecasts of events wagered upon.

It is reasonable for Clubs Victoria to make some assumptions associated with the manner in which Tabcorp may operate within the market. These include;

18. It would be efficient for Tabcorp to work with peak bodies and enter into arrangements with those bodies with particular focus on:
  - Membership – it would be a benefit to Tabcorp that they deal with a peak body that has members that use Tabcorp wagering and gaming products,
  - Effectiveness – it would be a benefit to Tabcorp that they deal with a peak body that

has strong communication with its wagering and gaming members which can promote Tabcorp products,

- Relationship – it would be a benefit to Tabcorp to have a relationship with a peak industry body that does not provide competition nor advice which is anti-Tabcorp
19. Tabcorp has a wagering and gaming license (Keno) in Victoria and therefore would benefit from a peak industry body/ies in Victoria supporting and promoting its brand and products and would receive efficiency gains by doing so. Limiting promotional opportunities would not be in the benefit to Tabcorp nor indeed the market.
  20. It would seem reasonable that Tabcorp accept proposals from peak bodies to help and promote Tabcorp brand and products and consider these on a case by case basis.
  21. It is reasonable to suggest that Tabcorp should not limit its opportunities within the market by the enacting of this notification if a peak body was able to meet its marketing and promotional requirements.
  22. It is reasonable to suggest that Tabcorp will support a wagering venue whether it is a member of a particular Nominated Membership Organisation or not. It would be against Tabcorp interests to not work with a wagering venue if they are not a member of a Nominated Membership Organisation .

With the above points 18 - 22 in mind, we offer the following information which supports our position that it is not in the best interests of the market for Tabcorp seeking, and thus having granted, a notification to prescribe a Nominated Membership Organisation. By doing so, we believe Tabcorp, whether deliberately, or more likely without intent, is forcing the market to shift to a favoured Nominated Membership Organisation at the detriment of the registered peak industry employer body, and by doing so diminishing that bodies' standing before Fair Work Australia.

Further, we offer the following for consideration;

23. Clubs Victoria was a former long term partner of Tabcorp until 2008, and promoted Tabcorp brand and products for many years.
24. After a dispute, Tabcorp withdrew club development funding from Clubs Victoria and immediately channelled similar funds to CCAV.
25. In June 2008 CCAV had little or no influence on the market; little membership; little access to funds other than sponsorship, including funds from Tabcorp. It offered little services and provided little support to the small amount of members it had registered. Yet, Tabcorp applied for, and was granted Nominated Membership Organisation status to CCAV, contrary to item 18 above. So it can be assumed Tabcorp would financially support CCAV until it matched its needs under item 18 and used the previously approved application N93545 to support that directed support.
26. CCAV was able to grow membership with the encouragement of Tabcorp and the use of the enacted notification N93545.
27. Tabcorp went to the market by offering a reduced rate for services if clubs were a member of CCAV thus inducing clubs to join CCAV. This is contrary to item 18 above, as Tabcorp would have had all the market advantage it needed if it used Clubs Victoria to promote its products

which it had done for many years prior. It therefore could be implied that a 3<sup>rd</sup>-line forcing arrangement was developed by the enactment of the notification N9345. This could not happen if the ACCC as assured at the time Tabcorp would allow opportunity for other member organisations, but this has not happened.

28. Clubs faced with the inducement to join CCAV to get a major benefit from Tabcorp if they were a member, joined CCAV. Then when faced with the issue of paying two membership fees they continued to remain a member of CCAV at the detriment of Clubs Victoria to gain the rebate.
29. There has been a measurable transfer of members from Clubs Victoria to CCAV. It has also been measurable that initially these transfers were Tabcorp product and service venues and as the years have passed gaming clubs who were clients of Tabcorp's other services were also transferring membership.
30. The transfer of membership from Clubs Victoria to CCAV has diminished the standing of the club sector before Fair Work Australia which is the detrimental impact of the notification enactment. This has been an unfortunate by-product of the approval of notification N93545 which we suspect was approved based on assurances from Tabcorp, that have unfortunately not been met.
31. Clubs Victoria has met with and submitted to Tabcorp on many occasions since 2008, and more specifically since August 2010, proposals for a relationship to exist between both organisations, yet this has been rebuffed without reason.
32. Tabcorp has inadvertently supported Clubs Victoria indirectly by purchasing advertising space in the Clubs Victoria awards magazine which is operated by an independent contractor. Every attempt to help Tabcorp with promoting their products through the widely distributed industry magazine published and distributed by Clubs Victoria have been ignored, which could indicate a covert requirement not to deal directly with Clubs Victoria.
33. The promotion of CCAV membership over the membership of the peak body, Clubs Victoria, supported by ACCC enacting the notification of exclusion, has diminished the member based Not for Profit peak body, Clubs Victoria.

Clubs Victoria retains its peak industry status and continues to represent the sector, however its operations have been markedly reduced by the change in market conditions which can be directly attributed to the establishment of CCAV, the organisation initially encouraged and financially supported by Tabcorp, indirectly helped by the ACCC Nominated Membership Organisation notification N93545. The ramifications are:

34. Tabcorp has refused to deal with Clubs Victoria directly, no matter the many attempts by Clubs Victoria to provide benefit to Tabcorp.
34. Clubs Victoria members have been disadvantage due to members being actively recruited to CCAV through the advantage of the Tabcorp notification N 93545 thus diminishing the clubs', and thus Clubs Victoria's standing before government; in particular, its registration as a Registered Organisation within the FWA Act. This means whilst the notification continues the market is negatively impacted, as there is no commercial reason why Tabcorp would refuse to deal with Clubs Victoria and its members other than an unstated strategic preference.
35. The Not for Profit market, in particular the Registered Organisation market is non-competitive

as there are legislative limitations. The establishment and growth of a Tabcorp supported organisation without peak body status has been detrimental to the market in which Tabcorp does not operate. It has meant confusion within the licensed clubs market and a diminishing of the relevance and reputation of Clubs Victoria due to clubs joining CCAV for an exclusive advantage provided by Tabcorp. The unfortunate market reaction to the approval of the notification N93545 is the diminishing of Clubs Victoria membership, vital to the continued representation of licensed clubs before government and in particular FWA. It therefore should not be the ACCC's intent to impact another market by the restrictive and exclusive commercial preference arrangements of Tabcorp is a separate market, but it does.

## Conclusion

Clubs Victoria does not support the notification which is virtually the renewal of the previous notification N93545, on the following basis;

- Clubs Victoria believes in a free market and that Tabcorp should be free to conduct its business fairly in a market that it operates.
- Clubs Victoria does not believe that the commercial preferences of Tabcorp in one market should have a direct negative effect in another market; and we advise their actions have been one of the contributory reasons for the diminishing of Clubs Victoria membership.
- Market conditions have changed significantly since 2008.
- Tabcorp has been active in changing market conditions in the market of peak industry representation without operating in that market, by requiring clubs to join their preferred membership body.
- Clubs Victoria membership has been diminished partly caused by the previous notification N93545 and the subsequent commercial activity of Tabcorp in the market.
- There has been a significant reduction in community benefit as the members who have changed membership seeking cost advantage have reduced their representative authority and access with Fair Work Australia,
- Tabcorp, for unknown reasons has refused to deal with Clubs Victoria clubs in terms of providing benefit and thus there are clubs not receiving advantage due to their decision to retain their representative services, although remaining as Tabcorp clients, because of this sustained negative commercial attitude towards Clubs Victoria.
- Tabcorp's commercial actions, perhaps without overt understanding of the consequences, have damaged the status and standing of licensed clubs before FWA by the inducement and encouragement of licensed clubs to join CCAV at the expense of the registered organisation. This has been possible by the approval of notification N93545.

We ask ACCC to not restrict the licensed club market in Victoria, and allow a free market, by not approving exclusive status by providing approval for a Nominated Membership Organisation.

If you would like further information regarding this matter please do not hesitate in contacting the writer.

Yours sincerely,

  
**RICHARD EVANS**  
Executive Director