

RESTRICTION OF PUBLICATION CLAIMED



Our Ref: DSC:BES:100009
Your Ref: 49759

t 02 8272 7100
f 02 8272 7199

16 November 2012

Bridges Lawyers Pty Ltd
ACN 160 506 114
Gold Fields House
Level 6, 1 Alfred Street
Sydney NSW 2000

Australian Competition & Consumer Commission
Adjudication Branch
GPO Box 3131
Canberra ACT 2601

PO Box R1115
Royal Exchange
NSW 1225

Attention: Ms Anna Giannakos

DX 10130 Sydney
Stock Exchange

Email: anna.giannakos@accg.gov.au

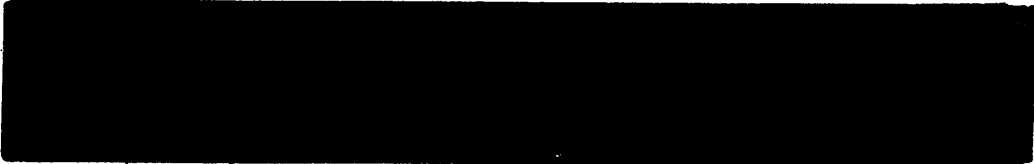

www.bridgeslawyers.com.au

By Email

COMMERCIAL-IN-CONFIDENCE

Dear Madam

Notifications N96146-N96148 lodged by Tabcorp Wagering (Vic) Pty Ltd, Tabcorp Wagering Manager (Vic) Pty Ltd and TAB Ltd (Tabcorp Notifications)

1. Thank you for your correspondence dated 3 October 2012. My client, Giddy-Up Ratings Pty Ltd (**Giddy-Up**), welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission (**ACCC**) in relation to the Tabcorp Notifications.
2. 
3.  Giddy-Up notes that Tabcorp is seeking to offer hotels and/or clubs goods and services at a discounted price, by way of rebates and/or credit, on condition that a hotel and/or club has acquired or agrees to acquire a membership of a 'Nominated Membership Organisation'¹.
4. These goods and services include:
 - a. Tabcorp racing channels or equipment used in conjunction with wagering services, namely, the Oracle product;
 - b. financial funding, to promote retail standards²; and
 - c. inactive programs which apply where licensed venues experience significant growth in respect of their Tabcorp-related businesses.

¹ The current Nominated Membership Organisations are Australian Hotels Association NSW, Australian Hotels Association VIC, Clubs NSW, and Community Clubs Association of Victoria.

² Giddy notes that the amount of funding and 'retail standards' have not been discussed in the Tabcorp submission.
041846

5.

[REDACTED]

[REDACTED] Giddy-Up is of the view that the ACCC should not allow the current notifications to stand based on the current market dynamics.

A. Background: Giddy-Up's Live Onscreen Rating and Tipping Services

6. Giddy-Up was established in 2003, and since this time it has provided a live onscreen rating and tipping service, for a charge, to hotels, clubs, and retail TAB outlets throughout Australia. In order to provide these services, Giddy-Up has a distribution contract (**the Agreement**) with Sky Channel,

[REDACTED]

7.

[REDACTED]

8.

9.

[REDACTED]

10.

B. Background: Sky Channel's Oracle Live Onscreen Rating and Tipping Service

11. As ACCC may be aware, Sky Channel currently provides a live onscreen rating and tipping service, the Oracle, which competes with Giddy-Up's live onscreen rating and tipping service. Oracle was launched 1 March 2008,

[REDACTED]

C. Background: Ratings Distribution Channel Options

12. Currently there are two ways in which rating can be provided to customers, the Sky Channel satellite network and internet connections.

C1. Sky Channel Satellite Network

13. Analogue VBI Data Distribution – Sky Text and GU distribution method. This is being phased out with Sky's digital rollout. This channel could be accessed via Foxtel/Austar but would be subject to data channel agreement negotiations.
14. Digital Satellite Distribution on Sky Channel – Vision stream channel distribution, i.e. Oracle. This method uses much more bandwidth than VBI data distribution.

C2. Internet Connections

15. IP Solutions – effectively using individual site internet connections

[REDACTED]

D. Background: Sky Channel Digital Rollout

16. Sky Channel is progressing through a rollout of a replacement of in-venue decoding equipment, replacing analogue decoders with a custom built SKY-TMOD (DVB-S/S2 to DVB-T Trans-modulator with remote control) [REDACTED] Sky Channel are planning to complete the rollout by the end of the first quarter of 2013.
17. The SKY-TMOD affords Sky Channel the capability to deliver multiple services to a TAB venue with the use of one piece of hardware, as opposed to the older analogue infrastructure that required one

decoder per service. Services that can be delivered [REDACTED] include:

- a. Sky Racing 1;
- b. Sky Racing 2;
- c. Sky Racing World;
- d. Sky Ringside (Boxing channel);
- e. Sky Sports Radio;
- f. Text data;
- g. Oracle; and
- h. Trackside.

18. [REDACTED]

E. Other Competitors in the Market

19. Giddy-Up notes that there are other competitors competing in relation to the live onscreen tipping services, there are Surepick and Premier ratings. Surepick Ratings (formerly referred to as "Waterhouse Surepick Ratings")³, has approximately 200 subscribing TAB venues predominantly in New South Wales, and is hosted by Flexicast's IP platform. Premier Ratings (formerly referred to as "Read Ratings")⁴, has approximately 75 subscribing TAB venues predominantly in Victoria, and is hosted by Flexicast IP platform.
20. Giddy-Up also notes that there are other competitors in relation to the live onscreen rating services, Hotpicks and Flexicast. Hotpicks (Flexicast) has approximately 50 – 75 subscribing TAB venues predominantly in New South Wales⁵. Flexicast Text Screen Package⁶, which is sold as a replacement to TAB venues Sky Text, and may include the provision of "Hotpicks" an auto generated ratings service.

F. The Relevant Markets Regarding Notification N96146-N96348

21. Giddy-Up is of the view that two related product markets may be relevant when examining the proposed notification of Tabcorp:
 - a. the broadcasting/data stream market (currently VBI and potentially digital), in which Tabcorp, the relevant (sole) service provider has market power, and leverages that power (the upstream market); and
 - b. the market for on-screen rating and tipping service offerings (the downstream market).
22. When analysing Tabcorp's conduct in accordance with the purposive approach to market definition, the relevant geographic markets can be defined as:
 - a. a state and/or national market for the supply of broadcasting/data streams (the upstream market); and

³ <https://www.surepick.com.au>

⁴ <http://www.premierratings.com>

⁵ <http://www.flexicast.com/hotpicks.php>

⁶ <http://www.flexicast.com>

- b. a state and/or national market for the supply of live on-screen rating and tipping service offerings (the downstream market).
23. In Giddy-Up's view, the downstream market definition involves two important considerations. Firstly, there is a market for the supply of wagering services to TAB agents, hotels and clubs, and internet and telephone betting services in the provision of products and/or services to end-customers. Secondly, the geographic scope of the market is likely to be state-based, not localised. It is highly likely that the state-based market is the relevant geographic market (with the exception of major national wagering events, such as the Melbourne Cup). Giddy-Up notes that these market considerations of the downstream market were also taken into account, and acknowledged in the ACCC's Authorisation decision, see A91125 (26 June 2009).

G. The ACCC's 2008 Notification: N93545

24. The ACCC, in making its decision regarding the previous notification N93545, considered the impact of the arrangements on competing suppliers. Giddy-Up agrees with the ACCC's observation that other suppliers are free to respond with competing offers of their own. However, Giddy-Up notes that the market dynamic, ex-post the approval of notification N93545, has significantly altered the market in which Tabcorp and Giddy-Up compete.

Accordingly, Giddy-Up submits that the ACCC ought to consider conducting an ex-post assessment of the notification N93545.

25. American Law Professor William Kovacic (2001b:849) suggests that:

a routine of performing ex-post evaluations of the effects of enforcement decisions would supply an informative basis for analyzing the wisdom of existing competition policies and the processes for implementing them. A commitment by national competition agencies to subject their work to review by outsiders would promote healthy transparency, facilitate the international discussion of specific cases, and help achieve consensus on matters of doctrine and procedure.

26. Audits of competition agency decisions ensure that the agency minimises the chance of making 'type 1' or 'type 2' decision errors in relation to future decisions (Round 2004:3). A type 1 decision error occurs when a competition regulator does not grant an authorisation that on balance is socially beneficial. A type 2 error involves granting an authorisation that on balance is not socially beneficial. Ex-post audits will provide the firms seeking an authorisation with an incentive to ensure that their claims of 'public benefits' and 'public detriments' will be recognised by the ACCC. Giddy-Up is concerned that Tabcorp has failed to provide information to the ACCC regarding its claims of 'public benefits' and 'public detriments' regarding notification N93545, which may suggest that the claims made in its notification N93545 have not been realised, particularly in relation to revenue streams, thereby creating a type 2 decision error.

H. Tabcorp's Submission in relation to Public Benefits and Public Detriment of Notifications N96146-N96148

27. Giddy-Up understands that Tabcorp alleges that the notified conduct will generate five public benefits.
28. Firstly, it will reduce costs to licensed venue which might not otherwise provide equivalent services to their customers. However, Tabcorp has failed to identify these cost savings. Ultimately, these cost savings would be a private benefit to licensed venue holders.
29. Second, Tabcorp claims it will encourage licensed venues to invest in their facilities which will increase amenities and levels of service provided to customers in general and wagering customers in particular. Whilst some end-consumers may experience an enhanced level of gaming experience due to possible amenity upgrades, the extent of which has not been disclosed.

- 30. Third, the notification it will lead to increased awareness and increased promotion of Tabcorp services at licensed venues. However, revenues generated would largely flow onto Tabcorp and industry stakeholders, [REDACTED] as private benefits, rather than the public benefits to the community at large.
- 31. Fourth, the notification it will promote competition by encouraging other suppliers of goods and services to pubs and clubs to other similar value added services. However, Tabcorp's level of concentration in the relevant market will substantially increase given its control of the upstream market. The increased market power that will flow, should the conduct be allowed, will result in a reduction in the intensity of competition within the downstream market.
- 32. Fifth, the notification it will provide additional benefits to licensed venues which elect to acquire services from a Nominated Membership Organisation. However, Tabcorp have failed to substantiate these additional benefits to licensed venues in a meaningful way.
- 33. Tabcorp alleges that the notified conduct will not result in any public detriment. Clearly, Tabcorp's submission to the ACCC fails to take into consider the impact of market closure as a result of the notification being allowed to stand.

I. Current Market Dynamics

- 34. Since 2008, Tabcorp has been offering bundled and cross subsidised live onscreen rating and tipping services to hotels, clubs, and TAB Agents, which includes the Oracle product. [REDACTED]

35. [REDACTED]

36. [REDACTED]

37. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

38.

[REDACTED]

39.

[REDACTED] Giddy-Up is unable to effectively compete with Tabcorp's product offering. [REDACTED]

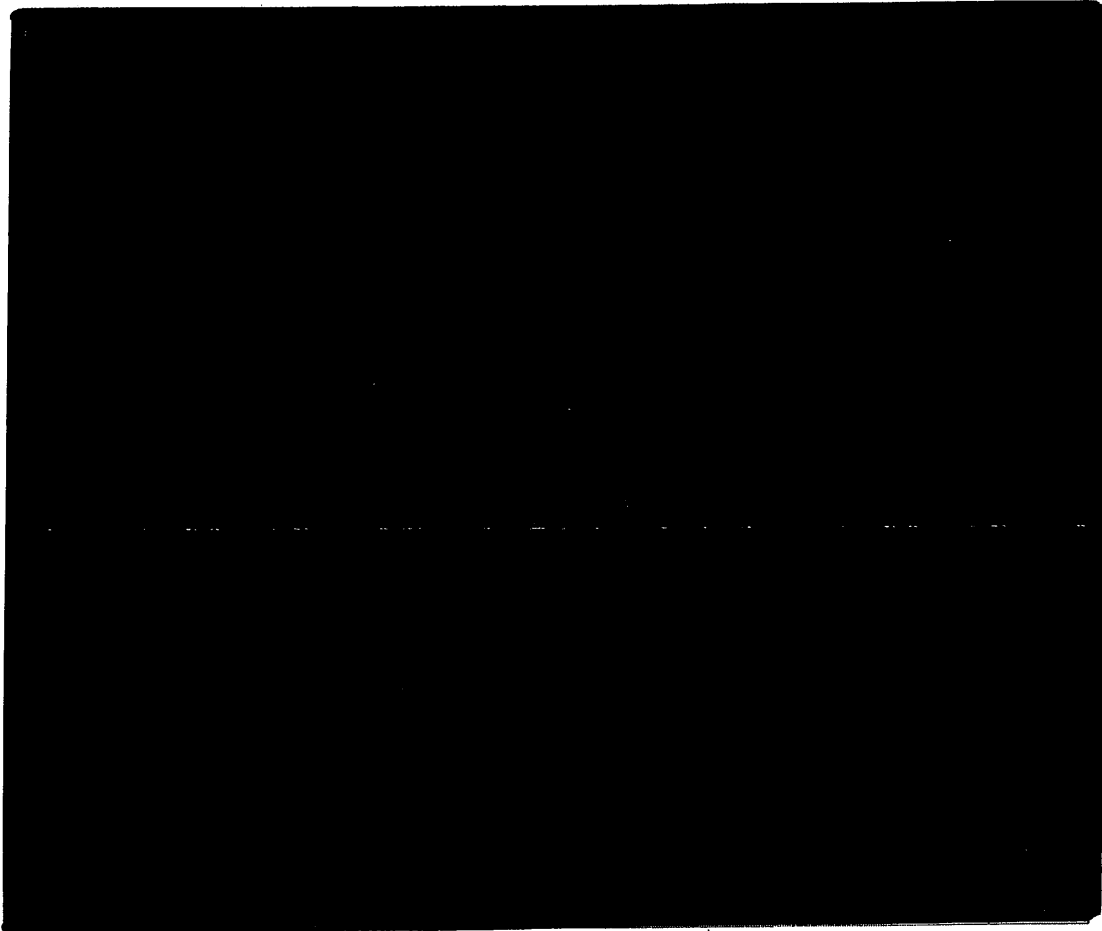
40.

[REDACTED]

41.

42.

[REDACTED]



11. Market Concentration

43. The level of market concentration is one indicator of the (likely) degree of competition within a market. The more suppliers within a market, the less likely it is that any one has sufficient market power so as to influence the prices paid by consumers. Tabcorp is the sole, monopolist supplier of the current broadcasting/data stream utilised by Giddy-Up and its competitor's and/or it is potentially a monopolist supplier of any future data stream services.

Tabcorp can heavily influence the prices paid for the data stream, and in doing so, has the ability to determine supply conditions. confidential basis.

12. Barriers to Entry

44. When assessing market dynamics, the extent to which the threat of new entry acts to constrain the behaviour of existing market participants is considered. Even if the number of participants in a market is low, their ability to extract economic profits from this market may be constrained by the threat of potential entry by new suppliers. However, where structural barriers to entry into a market are significant, the threat of entry is likely to be low and is unlikely to act as a constraint on the behaviour of existing market participants.

45. The most significant barrier to entry for supplying the broadcasting/data stream is the regulatory provisions. As a consequence, Tabcorp is able to hold a licence to operate in its own right by way of

offering data services, whereas other competitors such as Giddy-Up cannot hold a licence for the provisions of broadcasting/data stream in their own right.

46. Another barrier to entry is the cost associated with establishing Giddy-Up's business. A significant proportion of the costs may represent sunk costs, such as administrative and other costs in setting up the business, staff training, and establishing relationships with customers and with commercial users of the service. Significant sunk costs tend to mean that participants in the market will seek long term contracts from suppliers.

13. Lack of Countervailing Buyer Power

47. Countervailing buyer power can restrict the ability of service providers to act independently of their customers. Such power is more likely where a customer accounts for a large proportion of the producer's total output, is well-informed about alternative sources of supply, is able to switch to other suppliers readily at little cost to itself, and where it may even be able to begin producing the relevant product itself.

48. It is clear that in the downstream market, retail customers, such as TAB agents, hotels and/or clubs are not likely to have significant buyer power. Despite the ACCC trying to address this market issue via a recent Authorisation for collectively bargaining, the countervailing power redress is yet to be realised, if any, and in turn, the flow on benefits to competition into relevant the upstream and downstream market.

14. Summary of the Market Dynamics

49. Whilst it may be accepted that there is competitive pressure in the downstream market with the competitive impact of Giddy-Up and other competitors currently providing service offerings, Tabcorp is only able to supply services profitably in downstream markets, while reducing the margins of its competitors by virtue of it using its market power and potentially denying them supply after October 2013. In the absence of such market power, customers would either be able to switch suppliers of broadcasting/data stream services, or alternatively, competition would force Sky Channel to supply its broadcasting/data stream services on competitive and on-going supply terms. Accordingly, based on this information, Giddy-Up is of the view that the ACCC should deny Tabcorp's notification that is designed to entrench its monopolist market position, not create new product choice for customers, and most importantly, reducing customer choice, by way of bundling live onscreen rating and tipping services to limit competition in the downstream market.

J. **Final Remark**

50. Once again, thank you for the opportunity to make a submission to the ACCC in relation to the Tabcorp Notifications.
51. Giddy-Up would welcome the opportunity to discuss Giddy-Up's submission with ACCC representatives. Please do not hesitate to contact Dominic Calabria of our office on 02 8272 7117 to arrange a suitable meeting time.

RESTRICTION OF PUBLICATION CLAIMED



52. Should you have any queries or require further information please do not hesitate to contact our office.

Yours faithfully

A handwritten signature in black ink, appearing to read "D Calabria".

per Dominic Calabria
Partner

direct 02 8272 7117
email dcalabria@bridgeslawyers.com.au

Encl.