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31 January 2013
Matter 82136696

Dear Ms Giannakos

Confidential

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

We refer to your letter of 21 December 2012 regarding third line forcing notifications filed by various Tabcorp entities (**Tabcorp**) and the public versions of the submissions made by Giddy-Up and Clubs Victoria regarding those notifications.

This letter responds to the ACCC's requests for further information. Prior to providing answers to the ACCC's specific requests, some general comments are made in response to the Giddy-Up and Clubs Victoria submissions.

1 Giddy-Up

The notified conduct is in respect of the supply of goods and services to members of various peak bodies (i.e. Nominated Membership Organisations). Giddy-Up's principal submissions are unrelated to this conduct. They should, accordingly, be disregarded by the ACCC. Giddy-Up is using the opportunity of third line forcing notifications to make unrelated and unwarranted allegations regarding the supply of transmission services by Sky Channel to Giddy-Up.

Notified conduct has had no material impact on Giddy-Up

'Tabcorp Venue Goods and Services' as described in the notifications could include Sky Channel's 'The Oracle' electronic tipping service. No current or contemplated arrangement with any Nominated Membership Organisation includes a discount, allowance, rebate, or credit in relation to 'The Oracle' service.

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[Restriction of Publication Claimed] 'The Oracle' service has been available to any pub or club, irrespective of membership in any peak body, for \$29 a week.¹ The \$29 weekly subscription rate applies not only in NSW and Victoria, where pubs and clubs provide Tabcorp wagering services, but throughout Australia.

Tabcorp wagering services are offered at 512 hotels and 147 clubs in Victoria and 1159 hotels and 767 clubs in NSW. **[Restriction of Publication Claimed]**

¹ Tabcorp notes that at certain times there have been promotional offers in respect of 'The Oracle' whereby a new subscriber was offered the first three months free when they agreed to enter into a 12 month contract.



If, at some future date, Tabcorp did offer a discount, allowance, rebate or credit in respect of 'The Oracle' service, this would not result in any relevant public detriment. Giddy-Up, and other providers of electronic tipping services, would be free to offer similar discounts (as acknowledged by Giddy-Up in its submission). In this respect, the supply of a discount, allowance, rebate or credit would result in a public benefit, in part, by encouraging greater competition in respect of the supply of electronic tipping services and therefore increasing the availability of products which enhance punter experience.

[Restriction of Publication Claimed]

No bundling of 'The Oracle'

Contrary to Giddy-Up's submissions, 'The Oracle' tipping service is not bundled with the supply of other Tabcorp goods or services. 'The Oracle' service is delivered using the same broadcast infrastructure which delivers the Sky Channel racing channels to pubs and clubs. In this respect, 'The Oracle' is only available to Sky Channel subscribers. However, no discount is given in respect of a Sky Channel subscription where a party also acquires 'The Oracle' and there is no obligation on any Sky Channel subscriber to acquire 'The Oracle'.

Unrelated and unwarranted market power allegations

Giddy-Up alleges that Tabcorp has market power in a broadcasting/data stream market and is leveraging this alleged market power into an onscreen rating and tipping service market. These allegations are unrelated to the notified conduct. As such, Tabcorp does not intend to respond to them in any detail.

Tabcorp notes, however, that the Giddy-Up submission itself contradicts its market power allegations. At paragraph 19, Giddy-Up notes the existence of other tipping service suppliers such as Surepick and Premier Ratings which supply tipping information and data to pubs and clubs using the internet (i.e. not using Sky Channel infrastructure). Giddy-Up could use a similar method to deliver its product. Also, at paragraph 13, Giddy-Up acknowledges that its service 'could be accessed via Foxtel/Austar but would be subject to data channel agreement negotiations'.

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2 Clubs Victoria

The Clubs Victoria submission makes, in essence, two allegations:

- (1) that Tabcorp has refused, without reason, to enter into a relationship agreement or agreements with Clubs Victoria in circumstances where Tabcorp has an agreement with Community Clubs Association of Victoria (**CCAV**); and
- (2) that this has had a negative effect in an alleged clubs market.

Tabcorp notes that the situation in Victoria is unique in that there are two peak bodies seeking to attract club membership and provide services to clubs. Tabcorp acknowledges that there may be some degree of competition between these bodies to attract membership, although Tabcorp understands that a number of clubs have opted to become members of both Clubs Victoria and CCAV. However, Tabcorp does not consider that the notified conduct has resulted in any unfair disadvantage to clubs that do not join CCAV, or has had the effect of distorting a market for the provision of services by peak bodies to clubs in Victoria. Tabcorp does not concede that such a market exists.

[Restriction of Publication Claimed] According to the Clubs Victoria website, there are approximately 1,100 registered clubs in Victoria. Of these only 147 have wagering facilities which might benefit from arrangements involving the supply of 'Tabcorp Venue Goods and Services'. Tabcorp understands that approximately 60-80 of these wagering clubs are CCAV members.



Peak bodies including both CCAV and Clubs Victoria offer a broad range of services to members. For example, Clubs Victoria advertises the following services/benefits to its members:

- employment relations advice;
- recruitment;
- club education;
- club constitution redrafting;
- advocacy, policy and research;
- club development services;
- food safety;
- legal, financial, insurance, and taxation issues; and
- liquor licensing and gaming advice.

Given the large number of potential member clubs in Victoria, the small proportion eligible for the benefits provided by Tabcorp, the limited benefits provided by Tabcorp, and the broader goods and services which peak bodies offer, it cannot be credibly asserted that any CCAV arrangement with Tabcorp regarding the supply of services to CCAV members would have a negative effect on an alleged club peak body market in Victoria.

Tabcorp also rejects any suggestion that Clubs Victoria is the natural peak body for clubs in Victoria and that any migration of membership from Clubs Victoria would have negative implications for clubs in Victoria. CCAV was founded by persons with extensive experience in clubs management and it provides a broad range of services to its member clubs.

Tabcorp open to arrangements with Clubs Victoria

Contrary to Clubs Victoria's submission, Tabcorp remains open to entering into an arrangement with Clubs Victoria. Such an arrangement could include the provision of benefits to Clubs Victoria members.

[Restriction of Publication Claimed] working with an effective peak body organisation assists Tabcorp by:

- providing it with an efficient way to coordinate activity with a large number of geographically disparate venues;
- providing opportunities for Tabcorp to promote its overall business; and
- promoting the professionalisation of the pub and club industry.

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Tabcorp continues to be open to entering into an arrangement with Clubs Victoria. However, any such arrangement is dependent on Tabcorp considering the arrangement to be to its commercial benefit. To be of commercial benefit, an arrangement with Clubs Victoria would need to bring benefits to Tabcorp beyond those already obtained through its existing relationship with CCAV.

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3 Response to ACCC requests

The paragraphs below respond to the ACCC's specific requests.

1. Confirm that the notified conduct is limited to Victoria and NSW.

It is currently so limited. Tabcorp has wagering licences in Victoria and NSW which allows it to distribute its products at retail venues in those states. The notified conduct is designed to encourage and promote the distribution of Tabcorp wagering products at retail venues. It is therefore unlikely that a peak body outside Victoria and NSW would be a Nominated Membership Organisation.

2. Provide details of the process by which Nominated Membership Organisations have been chosen, including any criteria organisations are required to satisfy to become a Nominated Membership Organisation.

Tabcorp considers there to be significant efficiency and promotional benefits generated by working with particular peak bodies and entering into associated arrangements. The notified conduct is a component of Tabcorp's initiatives in this respect. There are no specific criteria by which Tabcorp considers opportunities to work with any particular peak body. Ultimately, Tabcorp considers, in the context of any specific proposal, whether that proposal is likely to increase the efficient distribution of Tabcorp wagering products and/or otherwise promote Tabcorp wagering services within the particular state. The particular elements of any proposal may be suggested by the peak body, by Tabcorp, or developed through discussions between Tabcorp and the peak body. General criteria, which may be considered by Tabcorp in considering any specific proposal, include the following:

- 1 **Focus of membership** – A key component of Tabcorp's business is the distribution of wagering services. As a starting proposition, the extent to which a peak body's membership distribute Tabcorp's services or, alternatively, are persons with whom Tabcorp would contemplate entering into distribution/agency arrangements. Tabcorp, understandably, would be less interested in working with organisations whose membership, or membership ambitions, do not include a significant number of providers of Tabcorp wagering or gaming services.
- 2 **Effectiveness of membership organisation** – In order to maximise potential efficiency gains, Tabcorp will consider whether any particular peak body has an effective relationship with its membership base and whether it has adequate structures to collect information from and disseminate information to that membership base. Tabcorp will also consider whether a particular peak body can provide it with effective opportunities to promote Tabcorp's services to its membership base.
- 3 **Relationship of management to Tabcorp/Tabcorp products** – Tabcorp seeks to develop longer term constructive working relationships with peak bodies. The effectiveness of any relationship is dependent, in large part, on whether management of the peak body considers that there is significant overlapping interest between it, its members, and Tabcorp. Tabcorp recognises that Tabcorp's position, in respect of any particular issue, may differ from that of the peak body. However, if on balance the management of a peak body frequently takes a position that its interests are opposed to those of Tabcorp, and seeks to communicate an anti-Tabcorp position to its membership base and the wider community, it would be difficult for Tabcorp to work collaboratively with such a body. Such an organisation is unlikely to become a Nominated Membership Organisation.

For example, Tabcorp considers that its relationship with the AHA Victoria demonstrates the efficiency and promotional benefits generated by working with an effective peak body.



The AHA Victoria assists Tabcorp by facilitating and coordinating meetings with AHA Victoria members to discuss issues in respect of wagering and also regularly briefs Tabcorp on developments in the hospitality industry, including developments in respect of liquor licensing laws, which may affect profitability and dynamics in the hotel industry.

AHA Victoria recently also took an active role in assisting Tabcorp following the granting of a new wagering and betting licence in Victoria which meant that existing contracts with hotels needed to be novated to the new licence holder. The AHA Victoria effectively communicated the reasons for this to its members and actively assisted Tabcorp in the novation of relevant contracts.

3. Provide details of the process by which other organisations are invited, or able to apply, to become a Nominated Membership Organisation. Has Clubs Victoria been invited to become a Nominated Membership Organisation or has Clubs Victoria applied to become a Nominated Membership Organisation?

There is no specific process by which an organisation would be invited or apply to become a Nominated Membership Organisation. Tabcorp is open to consider proposals from other peak bodies. Proposals would be considered on a case by case basis.

[Restriction of Publication Claimed] Tabcorp remains open to considering any proposal from Clubs Victoria.

4. If applicable, details for why Tabcorp has chosen to limit the Nominated Membership Organisations to those notified, as listed in sections 3(a) of the Exclusive Dealing Form G.

Tabcorp has not limited Nominated Membership Organisations to those identified in the Notification. The list provided in the notifications is not intended to be exhaustive. Tabcorp will consider proposals from other peak bodies to work with them and to provide benefits to their members. Whether Tabcorp enters into any arrangement with a peak body, and the terms of that arrangement, would be dependent upon factors like those listed in response to question 2 above.

However, it should be noted that there tends to be a small number of effective peak bodies in each state.



5. Provide details of the specific goods and services that are supplied, or are likely to be supplied by Tabcorp to licensed venues (e.g. the "Tabcorp Venue Goods and Services", as defined in section 2(a) of the Exclusive Dealing Form G). In relation to these services please also provide:

- a) Details regarding the prices of these goods and services, and the specific amount of rebate or discount Tabcorp is, or envisages, providing in respect of these goods and services only to members of Nominated Membership Organisations.
- b) Examples over the last 2 years of the discounts, rebates, allowances or credits provided in relation to Tabcorp Venue Goods and Services to each of the Australian Hotels Association (NSW); Australian Hotels Association (Vic); Clubs NSW; and Community Clubs Association of Victoria Inc.
- c) Information on the terms and conditions (including the price) upon which the Oracle tipping service has been supplied to Nominated Membership Organisations since notification N93545 was lodged in 2008.
- d) The specific Tabcorp Venue Goods and Services that are only made available to members of Nominated Membership Organisations.

[Restriction of Publication Claimed]

No current or proposed arrangement with a Nominated Membership Organisation includes any commitment to supply 'The Oracle' at a discount. 'The Oracle' is available to any pub or club at the standard price of \$29 per week on a 12 month contract.

Tabcorp Venue Goods and Services

There are no Tabcorp Venue Goods and Services which are made available only to members of Nominated Membership Organisations. **[Restriction of Publication Claimed]** However, Tabcorp is prepared to negotiate with any particular venue in respect of providing support for capital projects or venue improvements irrespective of whether or not they are members of a Nominated Membership Organisation.

6. Please provide details of any occasions since the lodgement of notification N93545 where Tabcorp has refused to supply Tabcorp Venue Goods and Services, either outright or at a particular price point or refused to give or allow a discount, allowance, rebate or credit for the reason that a Club has not agreed to acquire membership services from a Nominated Membership Organisation.

[Restriction of Publication Claimed]

In respect of New South Wales, virtually all pubs and clubs which offer Tabcorp wagering services are members of either the AHA NSW or Clubs NSW. This reflects the historical strength of these organisations in New South Wales. Accordingly, Tabcorp is unaware of any circumstances where it had refused to supply services or refused to give or allow a discount, allowance, rebate or credit for the reason that a pub or club was not a member of Clubs NSW or the AHA NSW.

7. In relation to Tabcorp's tipping and ancillary wagering products, please provide details regarding how Tabcorp sources the relevant data for use in these products. If this data is sourced from a third party, please provide details of those arrangements.

Tabcorp does not understand how this information is relevant to the notifications.



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Interested party submissions

8. Whether it is correct that Tabcorp has refused to negotiate with Clubs Victoria Inc regarding proposed promotions and the basis on which this decision was made.

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9. Please also address Clubs Victoria Inc's concerns that since Tabcorp's notification N93545 was allowed to stand in 2008:

- a) Tabcorp has distorted the competition for membership services for licensed clubs due to its subsequent commercial activity, and preference for CCAV, and
- b) Tabcorp's commercial actions have damaged the standing of licensed clubs before Fair Work Australia by the inducement and encouragement of licensed clubs to join CCAV at the expense of the registered organisation.

No distortion of any membership services market

[Restriction of Publication Claimed] Of the approximately 1,100 registered clubs in Victoria, only 147 have wagering facilities which might benefit from potential benefits in respect of the supply of Tabcorp Venue Goods and Services. Tabcorp understands that approximately 60-80 of these wagering clubs are CCAV members.

In the context of the large number of potential member clubs in Victoria, the limited benefits provided by Tabcorp, and the broader goods and services which peak bodies offer, it cannot be credibly asserted that any Tabcorp arrangements regarding CCAV members has had any negative effect on a club peak body market in Victoria (assuming that such a market exists) or otherwise distorted competition for membership services.

No loss of Fair Work Australia standing

Clubs Victoria's submissions in respect of 'Fair Work Australia' (which has been re-named the Fair Work Commission as at 1 January 2013) appear to be intentionally vague. It appears that Clubs Victoria wants to imply that a decision by a club or number of clubs to become members of CCAV, as opposed to Clubs Victoria, means that all clubs are disadvantaged in respect of any interaction with the Fair Work Commission and that this disadvantage is the result of the notified conduct. This implication is not sustainable.

As a 'registered organisation', Clubs Victoria has standing in respect of certain matters relating to its members under the Fair Work Act 2009 (Cth) (FW Act). However, its rights under the FW Act are (broadly speaking) less extensive than the rights of employers (for example, a club). In this respect, a decision of a particular club to join CCAV does not result in any reduction of standing in the Fair Work Commission for that club.

Clubs Victoria has presented no information that it is in danger of losing its status as a registered organisation. It can, and presumably does, continue to act on behalf of its members before the Fair Work Commission.

To the extent that a club is not a member of Clubs Victoria, it cannot legitimately claim to represent that club. This, however, cannot be said to result in any public detriment. Individual clubs as employers will still have rights under the FW Act and if the status of a peak body as a registered organisation before the Fair Work Commission is considered



to be of value to Victorian clubs they have the freedom to choose to become or remain members of Clubs Victoria (possibly being members of CCAV as well).

10. Please respond to Giddy Up's concern the notification "is designed to entrench its [Tabcorp's] monopolist market position, not create new product choice for customer, and most importantly, reducing customer choice, by way of bundling live onscreen rating and tipping services to limit competition in the downstream market."

The notified conduct is designed to assist in the development and growth of Tabcorp's wagering business through the provision of certain benefits to members of peak bodies where Tabcorp considers there are efficiency gains in working with those peak bodies.

As noted in the introductory comments above, Giddy-Up's principal submissions are unrelated to the notified conduct **[Restriction of Publication Claimed]**

[Restriction of Publication Claimed]

Tabcorp considers that there are clear public benefits associated with the notified conduct and that Giddy-Up's submissions in this respect should be rejected.

- Tabcorp has identified the potential costs savings to wagering venues. These cost savings will reduce the price of providing relevant wagering services by venues. The resulting cost reductions will increase economic efficiency by increasing output at a reduced cost. This is clearly a public benefit.
- Tabcorp has provided information to the ACCC regarding various capital expenditure benefits which are specifically designed to encourage wagering facilities to update their premises. The provision of improved and enhanced facilities is clearly a benefit to the wagering public.
- As the ACCC is aware, Tabcorp is the principal funder of the racing industry in NSW and Victoria. Any increase in wagering output, while a public benefit in itself, will also directly contribute to the racing industry. This form of public benefit has been recognised by the ACCC in various authorisation decisions including, for example, in its 11 December 2012 authorisation of Tabcorp's pooling arrangements with RWWA and ACTTAB.²
- Giddy-Up's further submissions regarding 'market power' and 'market closure' are unrelated to the notified conduct and appear to be focused on the supply of services by Sky Channel to Giddy-Up **[Restriction of Publication Claimed]**.

Please contact me if you require any further information.

² See paragraph [107], p.19 and paragraphs [135], [136], p.23 of the ACCC's decision.



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Yours sincerely

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