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16 July 2014

Dr Richard Chadwick
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Australian Competition & Consumer Commission
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By email: richard.chadwick@accg.gov.au

Dear Richard



Tabcorp Wagering Manager (Vic) Pty Ltd & TAB Limited Applications for Authorisation A91419 – A91424

We refer to Tabcorp's call with ACCC staff on 8 July 2014.

Information requests

In the telephone conversation on 8 July 2014, the ACCC requested further information about the Investment Requirement and Guesting Requirement provisions of Tabcorp's international pooling arrangements.

In particular, the ACCC requested further information regarding:

1. The rationale for / necessity of the provisions, including further information about the costs associated with establishing connections with overseas wagering operators;
2. The likely effect of these provisions on Australian punters, wagering operators and racing bodies; and
3. Current competitive dynamics relating to the provision of Australian wagering services.

We provide this information below.

In summary, both provisions are designed to protect the substantial investment Tabcorp makes in relation to its international pooling arrangements. Tabcorp does not consider they have any anti-competitive effect. Rather they are output expanding and ensure the significant public benefits associated with international pooling are realised.

1. Rationale for the provisions

A. *Exclusivity necessary to protect significant investment*

Both the Investment Requirement and Guesting Requirement are consistent with ordinary commercial practice – exclusivity is a legitimate and sensible commercial objective in many partnerships.

[Restriction of Publication of Part Claimed] As set out in Tabcorp's submission to the ACCC dated 7 May 2014, this is of significant benefit to punters, the Australian racing industry, and State and Territory Governments. Tabcorp's investment in international pooling:

- Allows Australian punters to bet into overseas pools;

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- Increases awareness and promotion of Australian racing overseas;
- Provides new revenue streams to the Australian racing industry; and
- Results in additional tax payments to State and Territory Governments.

No other Australian wagering operator has sought to bring these benefits to the Australian wagering and racing industries. As a global pioneer in this space, the development of international pooling has required substantial investment by Tabcorp.

Both the Investment Requirement and Guesting Requirement are primarily designed to protect Tabcorp's ongoing investment in international pooling. Without the ability to negotiate exclusive arrangements, the risk of Tabcorp not generating a sufficient return on its pooling investments is greatly increased:

- The Investment Requirement is a key facet of agreements where Tabcorp is acting as a host (i.e. accepting bets from overseas wagering operators on Australian racing).

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- The Guesting Requirement, which provides Tabcorp with exclusivity in transmitting bets to a certain wagering operator, is important because it provides Tabcorp with a differentiated and enhanced service offering. This enables Tabcorp to generate a return on its investment.

As a result, Tabcorp is unlikely to pursue and enter into a broad suite of arrangements without the ability to include the Investment Requirement and/or Guesting Requirement to justify the necessary investment.

B. Costs associated with international pooling arrangements

As discussed in the call on 8 July 2014, [Restriction of Publication of Part Claimed]

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2. Effect of the provisions – no public detriment

Neither of the provisions has resulted in, nor will they result in, any public detriment (anti-competitive or otherwise).

To the extent that it could be argued that there was any public detriment (which Tabcorp disagrees with), this is outweighed by the significant public benefits associated with pooling.

Tabcorp considers that the narrowest possible market in which to assess any anti-competitive effect is a market for the supply of wagering on racing, including products offered by bookmakers and betting exchanges. The ACCC has previously acknowledged the convergence of pari-mutuel and fixed odds wagering.¹ It is arguable that this market is much broader.

As shown below, the growth of corporate bookmakers in particular means that, despite the exclusivity provisions, Tabcorp will continue to be heavily constrained in its provision of wagering and pooling services in Australia.

A. Investment Requirement

The Investment Requirement involves the supply of pooling services by Tabcorp on condition that the guest:

- Transmits specified bets to Tabcorp; and/or

¹ ACCC Determination on Tabcorp's pooling arrangements with RWWA and ACTTAB, 11 December 2012, paras 71 and 138.



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- Does not transmit specified bets to other totalisators.

The Investment Requirement does not result in any public detriment for the following reasons:

1. *There is no impact on Australian punters.*

There is no material effect on Australian customers as a result of the inability of other Australian wagering operators to receive bets on Australian races from overseas wagering operators who have arrangements with Tabcorp.

Australian punters are still able to place bets on Australian races with Tabcorp, other Australian totalisators, corporate bookmakers or betting exchanges. The provision of wagering services in relation to Australian races is highly competitive.

2. *The provision has minimal effect on other Australian wagering operators.*

This is despite the fact that other Australia wagering operators are prevented from receiving bets from the overseas wagering operators who have entered into arrangements with Tabcorp. The reasons for there being only a minimal effect on other Australian wagering operators are:

- The ability to receive bets from overseas punters is not a core component of competition in the Australian wagering market. It is not an input in any wagering offering and as such, there is no foreclosure effect. The only impact of the Investment Requirement on other Australian totalisators is the loss of potential revenue associated with acting as a host to overseas wagering operators (i.e. the pooling fee).

Irrespective of the Investment Requirement, this revenue stream is not available to key Tabcorp competitors, namely corporate bookmakers and Betfair, who do not offer pools on which foreign bets can be hosted. As discussed below, corporate bookmakers and Betfair have experienced rapid growth in Australia despite the inability to pool with overseas wagering operators.

- To the extent that other Australian totalisators seek to offer pooling services to overseas wagering operators they remain free to approach:
 - A number of other overseas wagering operators with whom they could enter into pooling arrangements, for example those in the United States or France; or
 - Tabcorp's pooling partners at the expiry of relevant agreements
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Tabcorp believes that in this sense there is "competition for the market".

3. *Benefits still flow back to the relevant State racing bodies.*

As noted in Tabcorp's submission of 7 May 2014, racing clubs throughout Australia benefit from Tabcorp's international pooling arrangements as a result of increased export revenue generated from the racing clubs' vision rights.

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4. *Tabcorp will continue to be constrained.*

The Investment Requirement does not afford Tabcorp any market power. The Investment Requirement allows Tabcorp to expand and enhance its service offering. It then shares the benefits it receives from this increased output with the racing industry.



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In addition, Tabcorp will continue to face significant competition, including by corporate bookmakers and betting exchanges such as Belfair. As outlined below, the activities of corporate bookmakers and betting exchanges are expanding rapidly, changing the face of the Australian market at the expense of Australian totalisators.

B. Guesting Requirement

The Guesting Requirement involves the acquisition of pooling services by Tabcorp on condition that the host does not permit certain persons to co-mingle into the merged pool.

Again, the Guesting Requirement does not result in any public detriment for the following reasons:

1. *There is no impact on Australian punters.*

Tabcorp acknowledges that, as a result of the Guesting Requirement, any Australian punter who wishes to bet into relevant international pools must bet through Tabcorp.

However, Tabcorp does not believe this is a significant concern for the following reasons:

- Prior to Tabcorp investing in international pooling arrangements, Australian punters never had the option to bet into overseas pools through Australian wagering operators. Tabcorp has entered into guest pooling arrangements to provide Australian punters with new and enhanced products.
- If other Australian totalisators were permitted to guest into the same international pools as Tabcorp, there would be no increase in price competition. This is because, as the ACCC is aware, pooling involves an alignment of commission rates through the adoption of equivalent Betting Rules. This means punters receive the same dividends for pooled bets.
- The Guesting Requirement does not preclude Australian punters from betting on international racing with any other Australian totalisator or corporate bookmaker who offers wagering on those races. While Tabcorp considers that pooling results in an enhanced product, almost all Australian corporate bookmakers, totalisators and betting exchanges offer betting on international races:
 - o Corporate bookmakers currently offer fixed odds betting on a wide range of international races, including races which are the subject of Tabcorp's guest pooling arrangements. As noted below, corporate bookmakers can also offer fixed odds products which pay odds by reference to the dividend being offered by one or more totalisators (i.e. "tote derivative" products) on international races. The effect of this is that customers can bet on international races and receive the same (or better) dividend that Tabcorp or other totalisators are paying; and
 - o Similarly, Australian totalisators offer fixed odds betting on international races and, where appropriate, can operate their own stand-alone pools on international races.

This means there are a number of options available for Australian punters who wish to bet on international races.

On 16 July 2014, punters across Australia wishing to bet on races held in Taraunga, New Zealand, had a choice of betting with the following Australian wagering operators:



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- SuperTAB (which pools with NZRB);
- NSW TAB;
- TattsBet pool;
- Betfair (or other corporate exchanges); and
- A number of corporate bookmakers including SportingBet, Tom Waterhouse, BetStar, BetEzy, Centrebet, Bet365 and Ladbrokes. We note that each of these corporate bookmakers offered “tote derivative” products, whereby the dividend that a punter received for placing a successful bet was based on the dividend paid out by one of the three totalisators (i.e. SuperTAB, NSW TAB or Tattsbet).²

2. *The provision has minimal effect on other Australian wagering operators.*

This is because:

- Again, offering pooled bets on overseas races is not a core component to competition in the Australian wagering market. It is not an input and as such, there is no foreclosure effect. Tabcorp notes that the vast majority of wagering in Australia is wagering on Australian races. Further, as noted above, Australian wagering operators (including totalisators) can still offer wagering on all international races.
 - To the extent Australian totalisators wish to enter into guest arrangements, they remain free to approach:
 - A significant number of other overseas wagering operators; or
 - Tabcorp’s pooling partners at the expiry of relevant agreements **[Restriction of Publication of Part Claimed]**
- Tabcorp believes that in this sense there is “competition for the market”.
- There is no impact on corporate bookmakers or Betfair who (as shown below) act as a significant constraint on Tabcorp. Corporate bookmakers currently provide fixed odds wagering on many international races, including “tote derivative” products.

3. *Tabcorp will continue to be constrained.*

Similarly to the Investment Requirement, the Guesting Requirement does not afford Tabcorp any market power. The Guesting Requirement facilitates Tabcorp offering new products to its customers. It will continue to be constrained by competitors, including other totalisator operators, corporate bookmakers and betting exchanges such as Betfair, who offer wagering on international races and can pursue similar international pooling arrangements.

3. **Competitive dynamics**

As mentioned in the call on 8 July 2014, Tabcorp has observed two major trends in the past few years in Australian wagering:

- A shift in consumer demand from totalisator to fixed odds wagering; and
- A rapid expansion of corporate bookmakers.



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² And some of these corporate bookmakers offered a “Mid Div” product whereby the dividend that punters received was tied to the second highest of the three totalisators, whichever that may have been for the relevant race.

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In addition, since the High Court's decision in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418,³ corporate bookmakers and Betfair have substantially increased their advertising presence, including through advertising in print, radio, television and other media. This includes comparative advertising with totalisator products.

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Tabcorp will continue to face significant competition from corporate bookmakers and other Australian wagering operators despite its international pooling agreements.

Please do not hesitate to contact me should you require any further information.

Yours sincerely,

Daniel Lovecek
Senior Legal Counsel



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³ Following this decision State governments have largely repealed or amended the legislative provisions which restricted advertising by wagering operators not licensed in the State, or announced that those provisions would not be enforced.