

ACCC AND CROWNBET ROLL THE DICE - APPLY FOR JUDICIAL REVIEW OF TABCORP/TATTS MERGER AUTHORISATION

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IN BRIEF:

- On 10 July 2017, the ACCC applied to the Federal Court for judicial review of the Australian Competition Tribunal (**Tribunal**)'s determination to grant authorisation to Tabcorp Holdings Limited's proposed acquisition of Tatts Group Limited.
- CrownBet Pty Ltd, an intervener in the Tribunal proceedings, followed suit by filing its own application for judicial review in the Federal Court on 12 July 2017.
- The determination is only the third time a merger authorisation has been granted under the current merger authorisation provisions. The ACCC/CrownBet appeals represent the first time that an authorisation of this kind has been appealed (been the subject of review).
- Tabcorp is opposing the appeals which have been concurrently listed for a two day hearing before a Full Court on 28 August 2017.
- The ACCC and CrownBet assert three grounds for review relating to the application of the "net public benefits test" which is the relevant test applied in merger authorisations heard by the Tribunal. The parties assert that the Tribunal erred by:
 - failing to consider detriments other than a substantially lessening of competition (thus misapplying the net public benefits test);
 - failing to apply the "future with and without" test in assessing detriments; and
 - incorrectly assigning weight to benefits or taking irrelevant considerations into account.
- The CrownBet application includes a fourth ground for review which asserts that the determination is an improper exercise of power because it is so unreasonable that no reasonable person could have exercised the power and/or is otherwise contrary to law in that it was irrational, illogical and not based on findings or inferences of fact supported by logical grounds.
- The appeals are significant as they bring into question the correct application of the net public benefits test which is applied in merger authorisations as well as authorisations for a wide range of non-merger

conduct such as exclusive dealing, entering into or giving effect to cartel provisions and resale price maintenance.

On 10 July 2017 the proposed merger of Tabcorp Holdings Limited (**Tabcorp**) and Tatts Group Limited (**Tatts**) took another unexpected turn when the Australian Competition and Consumer Commission (**ACCC**) applied to the Federal Court for judicial review of the Australian Competition Tribunal (**Tribunal**)'s decision on 22 June 2017 to grant authorisation for the merger (**Determination**). Two days later, CrownBet Pty Ltd (**CrownBet**) filed its own application to the Federal Court for judicial review of the Determination.

This is new territory for all parties involved as it is the first time that a Tribunal merger authorisation has been appealed. Tabcorp's application to the Tribunal is only the fourth time in history that the Tribunal has been engaged for a merger authorisation process and is the third time that the process has proceeded to a final decision by the Tribunal. In each of these decisions, the Tribunal has granted authorisation to the merger parties.

The only avenue for a party/intervenor seeking a review/to appeal the Tribunal's authorisation determination is to seek judicial review of the legal principles applied by the Tribunal in reaching its decision (rather than a merits review/appeal on the factual findings of the Tribunal). Both parties are seeking an order that the Determination be set aside and the matter be referred back to the Tribunal for further consideration.

Given that the Tribunal was unwavering in its identification of "substantial public benefits", it is not expected that judicial review will change the decision of the Tribunal. However, it does remain an outside possibility if the Federal Court finds that the Tribunal took an incorrect approach in assessing public benefits and detriments.

The uncertainty of this novel process may well delay the completion timeframes for the merger (notwithstanding that the ACCC sought but is now not proceeding with an application for an interlocutory injunction restraining completion). The applications have been concurrently listed for a two day hearing before a Full Court on 28 August 2017.

The participation of three judges in the appeals is a statutory requirement under the *Federal Court of Australia Act 1976 (Cth)* since the Tribunal members included a judge of the Court, Justice Middleton.

BACKGROUND

In November 2016, Tabcorp applied to the ACCC for informal merger clearance of its proposed acquisition of Tatts. On 9 March 2017, the ACCC released a *Statement of Issues* which flagged a number of areas of concern with the proposed acquisition. A few days later, on 13 March 2017, Tabcorp took the unusual step of lodging an application with the Tribunal seeking authorisation of the merger as a means to by-pass ACCC clearance.

After a three week hearing involving extensive witness evidence from Tabcorp, Tatts, the ACCC and three non-party interveners (CrownBet, Victoria Racing Industry and Racing.com), the Tribunal released its determination on 22 June 2017 granting authorisation to the proposed merger. Pursuant to the legislative framework, merits review of the Tribunal Determination is not possible with administrative review by the Federal Court being the only available option.

GROUNDS FOR REVIEW

The applications for judicial review filed by the ACCC and CrownBet contain three common or similar grounds for review. CrownBet has gone further and added a fourth, strongly worded ground for review.

1. Application of the net public benefits test

The first ground for review in both appealing parties' applications relates to the Tribunal's application of the net public benefits test. Pursuant to section 95AZH of the *Competition and Consumer Act 2010 (Cth)* (**CCA**), the Tribunal must not grant an authorisation unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur. This test necessarily requires the Tribunal to weigh up any relevant public benefits and detriments that would arise from the proposed acquisition.

Both applications for judicial review suggest that the Tribunal erroneously took the view that only a substantially lessening of competition will constitute a detriment. Since the Tribunal determined that there was no substantially lessening of competition, the Tribunal did not consider any lessening of competition as a detriment.

The ACCC asserts that this is a misapplication of the net public benefits test as similar to the characterisation of benefits, detriments will include any detriment to society and can therefore include (but is not limited to) a lessening of competition to any degree.

Interestingly, a recent decision by the New Zealand competition regulator, the Commerce Commission, refused to authorise a proposed media acquisition by NZME of Fairfax New Zealand (on 3 May 2017). One of the key detriments to the public found by the Commerce Commission in that proposed merger was the loss of plurality/diversity that resulted from the acquisition of Fairfax New Zealand - clearly separate from any "anticompetitive detriments".

2. Failure to apply the "future with and without" test

The second ground for review in both applications relates to the Tribunal's failure to compare the likely future state of competition both with and without the proposed acquisition in its consideration of whether the proposed acquisition was likely to result in any detriment. While the Tribunal took the view that such an assessment was not necessary (in light of its finding that the acquisition would not result in a detriment), the ACCC and CrownBet assert that the failure to apply this comparison is an error of law.

In particular, the ACCC states that in failing to undertake the relevant counterfactual analysis, the Tribunal ignored the 'with' scenario which would see the removal of Tatts as a competitor in the relevant markets and the 'without' scenario which would see Tatts acting as a competitive constraint on Tabcorp and other participants in the relevant markets.

CrownBet further added that the 'with' scenario should take note of the merged entity's effective monopoly on certain wagering services, exclusive access to Sky Channel and dominant market share.

3. Assessment of benefits

While both the ACCC and CrownBet assert as a third ground for review that the Tribunal erred in its assessment of the benefits of the proposed acquisition, the two applications plead these arguments slightly differently.

The ACCC asserts that the Tribunal erred by failing to assign a lesser weight to benefits that would be retained by Tabcorp rather than being passed on to consumers or to the public more broadly.

The ACCC's application asserts that in assessing public benefits, a modified total welfare standard should be applied whereby benefits flowing through to a limited number of members of the community should bear less weight than benefits flowing through to the community more generally. In particular, the ACCC raised concerns about benefits to shareholders and certain counterparties of the merged entity that were not attributed with less weight by the Tribunal.

This assertion about the relative "weight" of benefits depending on whether a narrower or larger section of the public are the beneficiaries of the benefits is likely to be an important issue going forward as a significant number of applications for authorisation (non-merger related) and notifications, tend to result in benefits to relatively small cross sections of the public. Ascribing a lesser "weight" to such benefits may well, depending on the circumstances, affect the overall decision whether to grant authorisation - depending on the level of detriment generated by the proposed conduct.

Rather than asserting that the Tribunal inappropriately assigned weight to certain benefit considerations, CrownBet's application states that the Tribunal erred by taking irrelevant public benefit considerations into account and by not taking into account relevant public benefit considerations. The irrelevant public benefit considerations identified in CrownBet's application include cost savings claimed by Tabcorp which would not be passed onto consumers and revenue increases claimed by Tabcorp which are paid by consumers. Similar to the second ground for review, CrownBet asserts that the Tribunal erred by not applying the future with and without test in order to determine whether, and the extent to which, the proposed acquisition would be likely to give rise to each claimed benefit.

4. Improper exercise of power and/or contrary to law

While the ACCC's application stops at the three abovementioned grounds for review, the CrownBet application goes further. CrownBet makes the assertion that the Determination is an improper exercise of power because it is so unreasonable that no reasonable person could have exercised the power and/or is otherwise contrary to law in that it was irrational, illogical and not based on findings or inferences of fact supported by logical grounds. To support these claims, CrownBet points to the errors alleged in the former three grounds, as well as illogical reasoning applied by the Tribunal including that the proposed acquisition is necessary to enable Tabcorp and Tatts to compete effectively in the market and that revenue increases claimed by Tabcorp should be considered as contributing to cost savings.

WHY JUDICIAL REVIEW IS CRITICAL TO THE ACCC - THE IMPACT ON THE AUTHORISATION REGIME MORE GENERALLY

While the ACCC's judicial review may have come as a surprise to some, ACCC Chairman Rod Sims has publically commented that "*we believe we had no option but to seek a review.*"

[1]

Sims has further had to defend allegations that the ACCC is steadfast about ensuring that merger authorisations by the Tribunal do not become standard practice for contentious mergers. In our view, it is unlikely that the ACCC's "concerns" may be realised given the proposed changes to the formal clearance process that were recommended in the Harper Review (see below) that are presently before the Parliament.

CrownBet's appeal, although arguably somewhat self-serving, is also significant as it highlights the important role of non-party interveners in ensuring that proper legal processes are followed by the Tribunal.

In accordance with section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), only a "person who is aggrieved by a decision" may apply for a review of the decision. As outlined in the ACCC's application for judicial review, the ACCC is very much aggrieved as the Determination creates uncertainty regarding the basis for granting an authorisation under the CCA in respect of both mergers and other conduct.

To understand what "uncertainty" the ACCC is referring to here, it is necessary to look beyond the particular provisions of the CCA that are directly relevant to the ACCC or the Tribunal assessing mergers. Section 88 of the CCA grants the ACCC the power to grant authorisations for a wide range of non-merger conduct such as making or giving effect to a cartel provision, resale price maintenance and exclusive dealing. In granting such authorisations, the ACCC is required to apply the relevant test assigned in section 90 of the CCA.

For example, pursuant to section 90(8), when the ACCC is determining whether to grant an authorisation for resale price maintenance, the ACCC must apply the net public benefits test, which is described in section 90(8) in exactly the same terms as the test to be applied by the Tribunal when assessing merger authorisations (section 95AZH).

Given that the ACCC's application for judicial review centres on the proper application of the net public benefits test, a fundamental test that is regularly applied by the ACCC in granting authorisation for a wide range of conduct, it is clear why judicial review is of critical importance to the ACCC.

THE FUTURE OF MERGER AUTHORISATIONS

The appeals are also significant in light of the Harper Review amendments to the CCA which are currently before Federal Parliament. On the assumption that these reforms will be passed by the Parliament, in future it will be the ACCC, through the "formal clearance" process/regime that will at first instance consider any applications to "authorise" mergers by applying either the substantially lessening competition test or applying the net public

benefits test that is currently applied by the Tribunal. The position of the Tribunal will be different under such a regime. It will only review the ACCC's determination on the "papers" rather than being able to rehear the matter.

Regardless of whether the Federal Court finds that the Tribunal made an error of law or not, it is in the interests of both the ACCC and companies considering potential mergers or acquisitions in the future for the net public benefits test to be clarified.

While the appeals bring into question the correctness of the Tribunal's application of legal tests, the process as a whole in this matter has demonstrated some available benefits of the merger authorisation process as opposed to informal merger clearance. Notwithstanding the appeals, the Tribunal's Determination, the third of its kind in favour of merger parties, demonstrates the capacity of the Tribunal to handle complex merger matters with extensive documentary evidence in relatively short timeframes. A number of other potential advantages of the merger authorisation process were also on display in the Tribunal's hearing of the Tabcorp and Tatts merger, including the ability to test alleged competitive harm in a transparent setting based on evidence rather than the less transparent informal clearance process - which is very efficient for the vast majority of mergers but less so for more "difficult" mergers.

These benefits (which stand for the time being) arguably cast some doubt on whether the Harper Review's recommendation to make the ACCC the first instance decision-maker in all merger decisions will make for more a more efficient and streamlined merger review process, as is intended. It remains to be seen whether the ACCC's new ability to authorise mergers by applying the broader test of net public benefits will result in a more efficient process for "more difficult" mergers.

In the meantime, the Determination has highlighted that the little-used merger authorisation process, and in future, the formal clearance process, may be worth the added expense for commercial parties in complex or contentious merger matters. Further, the clarification of the net public benefits test is significant and will have implications on future grants of authorisations in non-merger contexts as well as merger matters both before and after the Harper Review changes come into effect.

Notes:

[1]<http://www.smh.com.au/business/accc-applies-for-federal-court-review-of-tabcorp-tatts-merger-20170710-gx841j.html>

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