

10 July 2017

ACCC APPEALS TRIBUNAL DECISION IN TABCORP-TATTS MERGER

The Australian Competition and Consumer Commission has applied to the Federal Court for judicial review of the Australian Competition Tribunal's decision to grant authorisation for Tabcorp Holdings Limited (ASX:TAH) to acquire Tatts Group Limited (ASX:TTS).

The Tribunal's reasons for its decision found that the proposed acquisition was likely to result in substantial public benefits and no material detriment.

"The ACCC is alleging the Tribunal made three reviewable errors. It is therefore seeking clarification of these three points of law which are central to the Tribunal's assessment of Tabcorp's proposed acquisition of Tatts," ACCC Chairman Rod Sims said.

"We are seeking judicial review because we believe these legal principles are fundamental not only to the Tabcorp decision but to all future merger and non-merger authorisation assessments."

The three grounds for review are:

- 1) The ACCC is seeking a review of the Tribunal's reasoning that it could only conclude that the proposed acquisition was likely to result in a detriment if the Tribunal concluded that there would be a substantial lessening of competition.

The ACCC will submit this is not the correct application of the statutory test, and is inconsistent with previous Tribunal decisions. In previous decisions, the Tribunal has taken into account the detriment constituted by any lessening of competition when assessing authorisation applications.

The ACCC observes that all benefits are counted, not just those which are found to be substantial and will submit that this must also be the case with detriments.

- 2) The ACCC is also seeking a review of 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.

The Tribunal reasoned that such analysis was not necessary unless analysis of the market demonstrated that the merger was likely to result in a detriment, and that would only be the case if there was a substantial lessening of competition.

The "future with and without" comparison is, however, fundamental to the

assessment of likely detriment in all competition cases. The ACCC will submit that without this analysis, it is impossible to isolate and assess the impact of a merger from other factors in the market that would occur absent the merger.

- 3) Finally, the ACCC is seeking review on the ground that the Tribunal made an error in the weight it gave to benefits, such as cost savings and revenue synergies, which would be retained by Tabcorp and not shared with consumers more broadly.

The ACCC will submit that the correct application of the statutory test required that the weight attributed to such private benefits be discounted relative to benefits that flow to consumers.

The ACCC is also seeking an order that this matter be dealt with on an expedited timetable.

Notes to editors

Section 50 of the Competition and Consumer Act 2010 (Cth) (the Act) prohibits acquisitions that would have, or would be likely to have, the effect of substantially lessening competition.

This is the test the ACCC applies when it is assessing a merger for informal clearance, but this test is significantly different to the test applied by the Tribunal for authorisation of a merger.

Under Section 95AT of the Act, the Tribunal may authorise an acquisition where it is satisfied that a proposed acquisition would result, or be likely to result, in such a benefit to the public (that is, that public benefits outweigh public detriments) that the acquisition should be allowed to occur (s 95AZH of the Act).

Background

Tabcorp sought informal merger clearance, and the ACCC commenced a review of the proposed acquisition in November 2016.

In March 2017, shortly after the ACCC had published a [statement of issues](#) regarding the proposed acquisition, Tabcorp withdrew its application for informal clearance and lodged an application for authorisation with the Australian Competition Tribunal.

During the Tribunal process, the ACCC assisted the Tribunal by providing a report, assessing the evidence, and making submissions on relevant issues for the Tribunal's consideration.

In June 2017, the Australian Competition Tribunal [granted merger authorisation](#) for Tabcorp to acquire Tatts.

Media enquiries: 1300 138 917
Email: media@accg.gov.au
www.accc.gov.au/media