21 No. 8 M & A Law. NL 2

The M & A Lawyer | September 2017
The M&A Lawyer
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Tabcorp/Tatts Decision: Key Lessons and the Future of the Competition Tribunal

The Australian Competition Tribunal ("Tribunal") has authorized the proposed acquisition of Tatts Group Limited ("Tatts") by Tabcorp Holdings Limited ("Tabcorp") in a decision which strongly suggests that the landscape for merger authorizations under the Competition and Consumer Act 2010 (Cth) ("CCA") is changing. The success of Tabcorp's application, and the unique nature of these proceedings when compared with the previous two applications that were heard and decided by the Tribunal, was delivered by a statutory process which provides the merger parties with a distinct advantage over any potential objectors to the transaction. This advantage does not exist under any other merger clearance processes in Australia. However, as it was recommended that this process be written out of the CCA in the recent review of Australia's antitrust laws, [1] it is possible that this road to clearance may soon be abolished by the Australian Parliament.

Background: Merger Clearance Processes in Australia

Australia has a voluntary clearance regime. There is no requirement to file with the antitrust agency (the Australian Competition and Consumer Commission, or ACCC), although it is strongly recommended for transactions where the merged firm will have a market share of greater than 20%.

In Australia, merger parties can choose to undertake one of three processes to have their merger assessed:

1. Informal merger clearance by the ACCC, in which the merger parties seek the ACCC's opinion on whether it would seek an injunction from the Federal Court of Australia to prevent a merger;
2. Formal merger clearance by the ACCC under section 95AC of the CCA; or
3. Assessment by the Tribunal in an application for authorization under section 95AT of the CCA upon an application by the acquirer.

The merger parties are free to choose the process which may be influenced by the legal test to be applied by each process, the decision-maker (*i.e.*, ACCC or Tribunal), the level of

transparency, the timing, the onus of proof, the certainty of the decision and the legal costs associated with the process. If they are successful in gaining formal merger clearance or authorization from the Tribunal, the ACCC and any third parties will be precluded from taking action, including seeking an injunction under section 50 of the CCA. Conversely, an informal clearance, whilst reliable, is not binding on the ACCC or third parties, and may leave the merger open to court action.[2]

Alternatively, because there is no mandatory notification requirement in Australia, the merger parties may elect to proceed to complete the transaction without obtaining regulatory approval by either the ACCC or the Tribunal (although this will not prevent the ACCC from separately investigating the transaction and potentially commencing legal proceedings).

Significantly, the legal tests to be applied for formal merger clearance and Tribunal authorization are different; in the ACCC's formal merger clearance process, the ACCC will only grant clearance if it is satisfied that the merger would not have the effect, or be likely to have the effect, of substantially lessening competition in a market. However, in the case of merger authorization, the Tribunal may only grant authorization if it is satisfied that the proposed merger is likely to result in such a benefit to the public that the merger should be allowed to occur. This is commonly referred to as the "Net Public Benefits Test."

The informal merger clearance process is by far the most frequently chosen option by merger parties; the ACCC's formal merger clearance process has never been used, and the Tribunal authorization process has only been used four times, and seen through to a determination by the Tribunal (that is, without being abandoned prior to a decision) three times. These three instances are:

1. Tabcorp's application;
2. *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* ("*Re AGL*"); and
3. *Application by Sea Swift Pty Limited* ("*Re Sea Swift*").

Tabcorp's Application

Tabcorp and Tatts both provide wagering and gaming products and services. Tabcorp also holds a licence to operate Keno (a lottery-like gambling game) in Victoria, the Australian Capital Territory and New South Wales, and Tatts is also the exclusive operator of all major public lotteries. Between them, the two entities hold every State and Territory exclusive licence to conduct pari-mutuel wagering[3] operations, with the exception of Western Australia, which has not (yet) been privatized.

Tabcorp and Tatts had previously applied for informal merger clearance by the ACCC, and on November 25, 2016 the ACCC commenced a review under its Merger Process Guidelines. Initially the date for announcement of the ACCC's findings was advised as February 23, 2017, but on February 14, 2017, this was delayed until May 4, 2017 to allow the merger parties to

provide additional information. On March 9, 2017, the ACCC published its Statement of Issues ("SOI"), outlining its preliminary competition concerns. The SOI contained one "red light" issue (issue of concern), five "yellow light" issues (issues that may raise concerns) and one "green light" issue (issue unlikely to raise concerns). Tabcorp had, however, recently provided the ACCC with a proposal to divest its Queensland electronic gaming machine monitoring business, Odyssey Gaming, to address the red-light issue.

Immediately following the release of the SOI, on March 13, 2017 Tabcorp withdrew its request to the ACCC for informal merger clearance and lodged an application for merger authorization with the Tribunal. In addition to the application (Form S), Tabcorp and Tatts (as an intervener) collectively lodged 37 lay witness statements and four expert reports, totalling approximately 25,000 pages in length.

In late March, Racing Victoria, Harness Racing Victoria, and Greyhound Racing Victoria (collectively, the "Victorian Racing Interveners"), CrownBet and Racing.com made applications to intervene in the proceedings. The Tribunal granted leave for each of these parties to intervene on March 31, 2017, and the interveners subsequently filed both lay and expert evidence in April.

In merger authorization applications before the Tribunal, the ACCC essentially acts as "amicus curiae," assisting the Tribunal in assessing whether the public benefits of the merger outweigh any likely anti-competitive detriments. As part of this role, it was required to provide the Tribunal with an "issues paper" within 22 days of the application, and a report within 45 days of the application. The ACCC also provided lay and expert evidence in late April.

The Tribunal's Determination

The key concerns of the interveners and the ACCC stemmed from the fact that the proposed merger would:

1. remove Tatts as one of only two serious bidders for the State and Territory exclusive totalisator licences, leading to a substantial lessening of competition in the bidding for these licence; and
2. combine Tabcorp-owned Sky Racing with Tatts' retail wagering operations in States and Territories where Tatts currently holds the totalisator licence, which would lead to a substantial imbalance in negotiating power between the merged entity on the one hand, and racing media rights owners and licenced venues on the other.

The matter was heard over 14 days between May 16 and June 2, and on June 22, the Tribunal granted Tabcorp authorization to acquire shares in Tatts, subject to the condition that Tabcorp provide an undertaking to the ACCC related to its divestment of Odyssey. The Tribunal found that the proposed merger is not likely to lead to a public detriment due to any substantial lessening of competition in the relevant markets, and that there will be substantial benefits that will flow from the merger, related to cost synergies and savings associated with the

combination of Tatts and Tabcorp.

Significance

Role of the Interveners

The proceedings are significant as the first merger authorization proceedings before the Tribunal in which the intervening parties (the Victorian Racing Interveners, CrownBet and Racing.com) actively opposed the acquisition. In *Re Sea Swift*, the Maritime Union of Australia was granted limited leave to intervene, but only to address one aspect of the public benefits assessment by the Tribunal. There were no interveners in *Re AGL.*

This resulted in a drastic change in the nature of the hearing and the role of the ACCC, compared with previous matters before the Tribunal. The Tribunal allowed each of the interveners to cross-examine Tabcorp's and Tatts' witnesses, on the proviso that duplication of cross-examination was minimized. In this regard, each of the interveners and the ACCC shared the cross-examination of Tabcorp's and Tatts' witnesses, with the intervening parties generally cross-examining the witnesses who gave evidence on the issues relevant to their concerns, and the ACCC covering topics not covered by the other parties (similarly, Tabcorp and Tatts shared the cross-examination of the interveners' and the ACCC's witnesses). This required a degree of co-operation between the interveners and the ACCC, to avoid duplication of both evidence and cross-examination.

Expert Evidence

The proceedings are significant for the use of concurrent expert evidence, which has been commonly called the "hot tub" method. Despite the mental image that this phrase may conjure, this proved to be an efficient method to allow each of the seven experts (one on behalf of the Victorian Racing Interveners, one on behalf of CrownBet, one on behalf of the ACCC, and four on behalf of Tabcorp and Tatts) to give evidence.

Two Tabcorp experts and two non-Tabcorp experts (as identified by the parties) engaged in four different hot tubs, being "consumer wagering," "bidding for licences," "racing media," and "public benefits." The experts met (virtually) prior to the hearing for the purposes of identifying areas of disagreement between them. In each session of concurrent evidence, the four experts would give separate short five-minute opening statements, then respond to each other's evidence, and then be cross-examined by the parties. At any point when the experts are giving evidence, the Tribunal is able to ask questions of the experts, which they did on several occasions.

Applicant-Friendly Process

It is arguable that the Tribunal authorization process, when instigated by the merger parties, is a highly applicant-friendly process. Under the CCA, the Tribunal must either make a determination within three months of the application being made, or extend the period in which

it must make a determination by up to three months. This is in stark contrast to the ACCC's informal merger clearance process, which has an open-ended deadline that can be easily extended by the ACCC (and in fact, in the ACCC's review of the Tabcorp-Tatts merger, the date for announcement of the ACCC's findings was delayed from February 23 to May 4).

In this case, Justice Middleton demonstrated a strong willingness to adhere to the original statutorily prescribed three months, and declined several requests from the parties, including the ACCC as amicus, to extend the time period. He was mindful of the fact that the Tribunal is only entitled to extend time once, and so only elected to do so until after the hearing concluded to allow the Tribunal more time to make a determination.

This meant that the interveners and the ACCC had only a very limited period of time in which to prepare evidence after Tabcorp made its application on March 13:

- The interveners were required to file lay evidence by April 13 and expert evidence by April 21; and
- The ACCC was required to file its issues list by March 27, and its report by April 27.

Because Tabcorp and Tatts filed evidence in support on the day they made the application, they essentially were able to take as much time as was necessary, prior to this date, to prepare their evidence in support of Form S (although they were similarly limited in their timeframe to prepare evidence in response). In fact, the witness statements provided by industry witnesses had been prepared many months before the application was filed with the Tribunal, demonstrating that Tabcorp and Tatts did in fact take significantly more time to prepare their evidence than was allowed to the interveners or the ACCC.

Appeal

On July 10, the ACCC applied to the Full Court of the Federal Court of Australia ("Federal Court") for judicial review of the Tribunal's decision, alleging that the Tribunal made three reviewable errors. This is the first time that a merger authorization decision by the Tribunal has been appealed.

In a judicial review, the appellants are only entitled to rely on grounds related to the incorrect application of legal principles or jurisdiction; that is, the Federal Court cannot review the factual findings or merits of the Tribunal's determination. In this case, the ACCC's grounds of appeal are that the Tribunal erred by:

1. Incorrectly applying the statutory net public benefits test by concluding that the proposed acquisition was likely to result in a detriment only if it also concluded that there would be a substantial lessening of competition;
2. Failing to compare the future with and without the proposed acquisition in its consideration of whether the proposed acquisition was likely to result in a detriment; and
3. Failing to discount the weight given to benefits, such as cost savings and revenue

synergies, which would be retained by Tabcorp and not shared with consumers more broadly.

CrownBet, in addition to alleging these grounds, also alleges that the Tribunal erred because the determination was so unreasonable that no reasonable person could have made it. This is significant, because this ground (commonly referred to as "Wednesbury Unreasonableness") allows the Federal Court to examine the merits of the decision.

The appeal emphasizes the significant role that the ACCC and interveners play in the Tribunal authorization process in ensuring that the Tribunal does not erroneously exercise its power. Although the ACCC and CrownBet are theoretically acting to assist the Tribunal and Federal Court to appropriately exercise its power, there is no doubt that this is an adversarial system, and it is important that both sides of the case are well represented. We will keep you updated as the appeal progresses.

The ACCC initially sought an injunction restraining completion of the merger prior to the Federal Court's decision, but withdrew its application. Tabcorp and Tatts are now proceeding with the merger (pending a favorable Federal Court ruling), and the appeal was expedited such that the matter was heard over two days on August 28-29. At the time of writing, the Court is reserved on its decision but the overwhelming expectation is that a decision rejecting the appeals will be delivered within the month, making way (unless there is a surprise appeal to the High Court) for the merger to proceed before the end of 2017.

Future of the Tribunal

In March 2015, the Competition Policy Review Final Report ("Harper Review") was released. One of its recommendations was that the formal merger clearance and authorization processes be combined and reformed, such that the ACCC is the decision-maker at first instance, and its decisions are subject to review by the Tribunal under a process that is also governed by strict timelines. Therefore, while the 100% success rate of merger parties before the Tribunal, and the highly publicized nature of these successes, may prompt more applications for authorization in the immediate future, it is entirely feasible that the Tribunal authorization process will soon be abolished.

The Harper Report recommends that the ACCC be empowered to authorize a merger if it is satisfied that the merger does not substantially lessen competition, or if it is satisfied that the merger would result, or would be likely to result, in a benefit to the public that would outweigh any detriment. This would allow applicants to rely on either the substantial lessening of competition test, or the net public benefits test (with potentially slightly altered wording to the current test), before the same decision-maker, whereas previously they would be required to choose which test to apply (by choosing between the ACCC merger clearance and the Tribunal authorization processes).

These recommendations have been broadly adopted by the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 ("the Bill"), which was introduced to the

House of Representatives on March 30, 2017. Under the Bill, the decision-maker at first instance for merger authorizations would be the ACCC, and mergers would now be subject to the general authorization process in section 88 of the CCA (although with some procedural differences between merger and non-merger authorizations). The Bill adopts the tests recommended by the Harper Report; that is, it provides that the ACCC must not make a determination granting an authorization in relation to conduct unless it is satisfied in all the circumstances:

a) "that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or

b) that: i., the conduct would result, or be likely to result, in a benefit to the public; and ii., the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct."

Given that in *Re AGL, Re Sea Swift* and Tabcorp, the ACCC has concluded that the respective mergers would result in a substantial lessening of competition in the relevant markets (despite the Tribunal authorizing each merger), it is possible that the new authorization process may not be as "applicant-friendly" as the Tribunal process has thus far proven to be.

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Footnotes

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1 Recommendation 35 Competition Policy Review—March 2015, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf.

2 The ACCC has never taken court action after granting informal merger clearance. However, there have been instances where third parties have brought proceedings after the ACCC granted informal clearance. For example, see *Davids Holdings Pty Limited & Ors v. Attorney General of the Commonwealth and Anor* (1994) ATPR 41-304, where the Trade Practices Commission (the ACCC equivalent in 1994) also elected not to intervene once proceedings were commenced by the applicants.

3 In pari-mutuel wagering (as opposed to fixed-odds wagering), bets are placed into a pool and the payoff odds are calculated by sharing the pool among all winning bets.

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