

**NOTICE OF APPLICATION SEEKING AMENDMENT OF THE AUTHORISATION
IN RE NEW ZEALAND RACING BOARD [2016] NZCC 17**

15 May 2023

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- 1 TAB New Zealand (formerly the New Zealand Racing Board) requests that the Commerce Commission amend the authorisation it granted in *Re New Zealand Racing Board* [2016] NZCC 17 (the **Authorisation**) by adding the following **text** to that determination:

Determination

Pursuant to ss 61(6) and 61(6A) of the Act, the Commission is satisfied that the Specified Provisions will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition. Therefore, the Commission proposes to grant an authorisation for the Specified Provisions under s 58 of the Act for the period set out below.

Pursuant to s 61(2) of the Act, the authorisation will expire on the ninth anniversary of the date of the granting of the authorisation.

Pursuant to s 58B(2) of the Act, the authorisation will apply to Entain plc when it becomes a party to the Specified Provisions following TAB New Zealand's restructure (as outlined in TAB's 15 May 2023 s65 notice).

(the **Amendment**)

- 2 TAB seeks the Amendment because it has, subject to Ministerial approval, agreed to outsource its racing/betting functions under the Racing Industry Act 2020 to Entain plc (**Entain**) and relevant subsidiaries. To affect that arrangement:
 - 2.1 Entain will acquire [] its agreement with Tabcorp Wagering Manager (Vic) Pty Ltd (**Tabcorp**) that contains the Specified Provisions; and
 - 2.2 TAB will enter a strategic partnering arrangement with Entain to delegate it, inter alia, TAB's betting functions, including allowing Entain to give effect to the Specified Provisions.

(the **TAB Restructure**).



- 3 TAB submits that:
 - 3.1 the TAB Restructure is a “material change of circumstances since the authorisation was granted” under s65 of the Commerce Act 1986; and
 - 3.2 in those circumstances, the Commission may make the Amendment under that section.
- 4 TAB records, for completeness, that the TAB Restructure will not change the substance of, or benefits derived from, the existing authorised behaviour. All that will happen is that Entain will give effect to the Specified Provisions in place of TAB.
- 5 We expand on these points in Schedule A.

Relevant contact details

TAB

Nick Roberts, TAB General Counsel

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Matt Sumpter / George Spittle

Chapman Tripp

matt.sumpter@chapmantripp.com / george.spittle@chapmantripp.com

Entain

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Tabcorp

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SCHEDULE A: APPLICATION BACKGROUND

Commerce Act context

- 1 Section 65 of the Commerce Act provides:

65 Commission may vary or revoke authorisations

- (1) Subject to subsection (2), if at any time after the Commission has granted an authorisation under [section 58](#) the Commission is satisfied that—
- (a) the authorisation was granted on information that was false or misleading in a material particular; or
 - (b) there has been a material change of circumstances since the authorisation was granted; or
 - (c) a condition upon which the authorisation was granted has not been complied with,—
- the Commission may revoke or amend the authorisation or revoke the authorisation and grant a further authorisation in substitution for it.
- (2) The Commission shall not revoke or amend an authorisation or revoke an authorisation and substitute a further authorisation pursuant to subsection (1) unless the person to whom the authorisation was granted and any other person who in the opinion of the Commission is likely to have an interest in the matter is given a reasonable opportunity to make submissions to the Commission and the Commission has regard to those submissions.

- 2 It follows the Commission can “amend”, “revoke”, or “revoke and substitute” an authorisation if one of the section 65(1)(a), (b) or (c) conditions are met.
- 3 The Commission has described this process as follows:¹

*Section 65 of the Act enables the Commission to alter, revoke, or revoke and substitute authorisations made under s 58. Two stages are involved in considering the application of s 65. The **first stage** is to consider whether the authorisation was granted on information that is false or misleading in a material particular, or a material change of circumstances has occurred, or whether a condition of the authorisation has not been complied with. The **second stage** involves determining the appropriate response: to do nothing, to amend the authorisation, revoke the authorisation, or revoke the authorisation and substitute a further authorisation.*

- 4 In assessing whether there has been a material change of circumstances for that first stage analysis, the Commission takes a “stand back” approach:

¹ Commerce Commission Draft Determination on amending Decision 580 (16 March 2007), at [5].



- 4.1 it compares “the circumstances as they existed [when the original authorisation was granted], and the circumstances as they exist as a whole at the present time”;² and
- 4.2 then asks whether that change is “something more than a merely trivial”.³
- 5 That general, common-sense approach is consistent with s65’s purpose of giving the Commission a path to efficiently amend granted authorisations when relevant facts change – as they do from time-to-time.
- 6 In reaching the appropriate “second stage” response following a s65(1)(a)-(c) condition, the Commission has held:⁴
- if, despite [the applicable s65(1)(a)-(c) condition being fulfilled], circumstances are fundamentally unchanged and have altered in only a minor way, particularly as to the benefits and detriments of the authorised arrangement, the Commission may amend the authorisation, for example, by changing a condition on which it was granted, in order to ensure that the anticipated net benefits will in fact be achieved.*
- 7 In considering the appropriate response, the Commission has observed “[i]t would be only in very unusual circumstances that the existence of one of the conditions did not make it appropriate for the Commission to utilise one of the remedies”.⁵
- 8 In the next section we apply that context to TAB’s situation.

Facts in context

- 9 The TAB Restructure is a material change of circumstances.
- 10 Standing back:

² *Amendment of an authorisation granted to the New Zealand Rugby Union in Decision 580* (Commerce Commission Decision 601, 11 May 2007) at [91].

³ *Amendment of an authorisation granted to the New Zealand Rugby Union in Decision 580* (Commerce Commission Decision 601, 11 May 2007) at [92]. *Re a Revocation of Decision 221* (Commerce Commission Decision 238, 13 September 1989) at [29].

⁴ *Amendment of an authorisation granted to the New Zealand Rugby Union in Decision 580* (Commerce Commission Decision 601, 11 May 2007) at [102].

⁵ *Re a Revocation of Decision 221* (Commerce Commission Decision 238, 13 September 1989) at [29]).



- 10.1 When the Authorisation was granted, TAB operated its own betting functions and did not – and could not – foresee that those operations would be outsourced to Entain in seven years’ time.⁶
- 10.2 Now, though, Entain is about to operate TAB’s betting functions, which will see Entain give effect to the Specified Provisions in place of TAB. But despite Entain stepping into TAB’s operational shoes, TAB understands Entain may not be protected by the Authorisation given it was only expressed to apply to TAB and Tabcorp.⁷
- 11 That “then and now” difference is more than trivial.
- 12 TAB understands it may no longer benefit from the Authorisation following the TAB Restructure. And it follows that restructure must be a “material change of circumstances” for s65(1)(b) purposes.
- 13 In making this point, TAB observes that s65 applies to “a material change in circumstances” generally, regardless of whether that development affects the facts the Commission relied on to grant the authorisation in question.
- 14 Consistent with this view, s65(1)(b) – unlike s65(1)(a) – is not limited to material changes that affect a “material particular”.
- 15 TAB submits that the s65(1)(b) wording is intentionally broad to permit the Commission to amend authorisations efficiently when material administrative, but not substantive factual changes arise. The TAB Restructure being a paradigm example.
- 16 Having established that TAB has satisfied a s65(1)(a)-(c) condition, TAB submits that the Amendment is the Commission’s best available response.

⁶ For context, the NZRB’s constituting legislation did not permit it to outsource its betting functions. Following an industry review and recommendations to Parliament the Racing Industry Act 2020 effected various structural changes, including permitting TAB to outsource its betting and other functions, subject to the Minister for Racing’s approval. Because no other entity could have conducted the betting functions at the time NZRB and Tabcorp applied for the Authorisation, the Authorisation was not sought more broadly for any entity carrying out NZRB’s activities as part of the authorised conduct.

⁷ The Commission granted authorisation “for the Specified Provisions”, where Specified Provisions in the Authorisation means “certain provisions of proposed arrangements between [NZRB] and Tabcorp Wagering Manager (Vic) Pty Limited (Tabcorp) relating to the commingling of totalisator horse and greyhound racing betting pools”.



- 17 TAB says that because, in short, although the TAB Restructure is a material new development, the restructure does not affect the Commission's reasons for granting the 9-year-long Authorisation.
- 18 Expanding on this point:
- 18.1 Entain ([]) is stepping into TAB's operational shoes to run TAB's statutory-monopoly gambling business established by the Racing Industry Act 2020.
- 18.2 These operational functions are set out in the parties' strategic partnership agreement. This arrangement is in the nature of an outsourcing: while Entain will carry out these betting functions on its own account, it will do so under a delegation from TAB. TAB will not itself be carrying on any of those betting functions. Instead, Entain will, together with TAB, ensure TAB meets its s58 Racing Industry Act functions of:⁸
- (a) setting the racing calendar;
 - (b) issuing betting licences;
 - (c) distributing funds obtained from betting to the racing codes;
 - (d) conducting betting and broadcasting;
 - (e) developing programmes to minimise problem gambling; and
 - (f) entering commercial agreements with each or all of the racing codes.
- 18.3 It follows that, in carrying out these operational functions, Entain has the same incentives as TAB has today, and had on 29 August 2016, to grow and develop New Zealand sports and racing betting further to its statutory obligations.⁹
- 18.4 It is against that same factual reality that the Commission granted the Authorisation to allow the parties to implement the Specified Provisions until 29 August 2025. In doing so, the Commission accepted NERA's analysis that

⁸ [].

⁹ Under s57 of the Racing Industry Act 2020, TAB's objectives are to: (a) to facilitate and promote betting; and (b) subject to ensuring that risks of problem gambling and underage gambling are minimised, to maximise— (i) its profits for the long-term benefit of New Zealand racing; and (ii) its returns to New Zealand sports in accordance with agreements entered into under sections 79 and 80.



the net benefits of the Specified Provisions would far outweigh the detriments for that nine year period, which captures the current market environment.

18.5 Given TAB has no reason to believe that the facts or analysis which the Commission relied on to grant the Authorisation have changed, TAB does not consider the Commission's analysis needs to, nor should, be revisited. Rather, TAB simply makes this s65 request to ensure the status quo can continue after the TAB Restructure.

19 In these circumstances, and in line with the Commission's reasoning above, TAB submits that it is appropriate for the Commission to make the Amendment.¹⁰

20 In making this submission, TAB confirms it is not aware of any factual changes over the last seven years that might undermine the Commission's reasons for granting the Authorisation.¹¹ TAB believes the Commission's reasons for granting the Authorisation remain accurate, in particular:

20.1 "Our view is that there are significant public benefits to commingling between the NZRB and Tabcorp. These include benefits from allowing NZRB to offer a much increased range of races to New Zealand residents and avoided costs, plus benefits to customers from having a bigger range of higher quality pools that are more liquid and so more stable".¹²

20.2 "Any detriment is likely to be limited ... (a) it is not clear that any detriment would arise from authorisation of the Betting Rules provisions; and any detriment that would arise would be limited; and (b) any detriment that would arise from authorisation of the Revenue Leakage provisions would be confined to a small portion of customers that engage in high volume betting".¹³

20.3 And so:

(a) "any competitive detriments arising from the Specified Provisions are, in this case, likely to be outweighed by the public benefits ... [and] ...

¹⁰ Adopting the Commission's wording to demonstrate this point: "*despite [TAB's s65(1)(b) material change of circumstances], circumstances are fundamentally unchanged and have altered in only a minor way, particularly as to the benefits and detriments of the authorised arrangement, [as such] the Commission may amend the authorisation, for example, by changing a condition on which it was granted, in order to ensure that the anticipated net benefits will in fact be achieved*".

¹¹ Indeed, TAB would not have requested the Commission to amend the Authorisation had it not restructured its business.

¹² Authorisation decision at [114].

¹³ Authorisation decision at [117].



the Commission is satisfied that the Specified Provisions will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition”;¹⁴ and

- (b) “the Commission proposes to grant an authorisation for the Specified Provisions under s 58 of the Act ... [and] the authorisation will expire on the ninth anniversary of the date of the granting of the authorisation.”¹⁵

¹⁴ Authorisation decision at [117], [146].

¹⁵ Authorisation decision at [146]-[147].