IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S118 of 2011

BETWEEN:

SPORTSBET PTY LTD

Appellant

and

STATE OF NEW SOUTH WALES

First Respondent

10 RACING NEW SOUTH WALES

Second Respondent

HARNESS RACING NEW SOUTH WALES

Third Respondent

ATTORNEY-GENERAL FOR SOUTH AUSTRALIA

Fourth Respondent

SUBMISSIONS BY TAB LIMITED AND TABCORP HOLDINGS IN SUPPORT OF AN APPLICATION FOR LEAVE TO INTERVENE

20 **Introduction**

1. Tab Limited (**TAB**) and Tabcorp Holdings Limited (**Tabcorp Holdings**) seek leave to intervene in this appeal. They seek that leave in order to make submissions, both in writing and orally, on a discrete issue that arises for the Court's consideration.

2. The discrete issue concerns the contractual rights and obligations of the parties to the Racing Distribution Agreement (**RDA**) in respect of race fields information.

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3. TAB and Tabcorp Holdings rely upon the affidavit of Juliana Rose Warner, sworn on 24 and filed on 27 June 2011 (the **Warner Affidavit**), in support of their application, commenced by way of summons dated 27 June 2011.

Principles governing intervention

4. In *Levy v The State of Victoria* (1997) 189 CLR 579, Brennan CJ considered the Court's jurisdiction to grant leave to non-parties to intervene (at 601-604), and said this (footnotes omitted):

> If there be jurisdiction apart from s 78A to allow non-party intervention, it must be an incident of the jurisdiction to hear and determine the matters prescribed by the several constitutional and statutory provisions which confer this Court's jurisdiction. It is of the nature of that jurisdiction that it should be exercised in accordance with the rules of natural justice. Accordingly, its exercise should not affect the legal interests of persons who have not had an opportunity to be heard. Therefore, a non-party whose interests would be affected directly by a decision in the proceeding – that is, one who would be bound by the decision albeit not a party – must be entitled to intervene to protect the interest liable to be affected.
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> But the legal interests of a person may be affected in more indirect ways than by being bound by a decision. They may be affected by operation of precedent – especially a precedent of this Court – or by the doctrine of stare decisis. Apart from the obsolete exception contained in s 74 of the Constitution, an exercise of the jurisdiction conferred on this Court is not subject to appeal nor to review by any other court. As this Court's appellate jurisdiction extends to appeals whether directly or indirectly, from all Australian courts, a decision by this Court in any case determines the law to be applied by those courts in cases that are not distinguishable. A declaration of a legal principle or rule by this Court will govern proceedings that are pending or threatened in any other Australian court to which an applicant to intervene is or may become a party. Even more indirectly, such a declaration may affect the interests of an applicant either by its extra-curial operation or in future litigation. Ordinarily, such an indirect and contingent affection of legal interests would not support an

> application for leave to intervene. But where a substantial affection of a person's legal interests is demonstrable (as in the case of a party to pending litigation) or likely, a precondition for the grant of leave to intervene is satisfied. Nothing short of such an affection of legal interests will suffice...
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> where a person having the necessary legal interest to apply for leave to intervene can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene. The grant may be limited, if appropriate, to particular issues and subject to such conditions, as to costs or otherwise, as will do justice as between all parties. In that situation intervention may prevent an error that would affect the interests of the intervener. Of course, if the intervener's submission is merely repetitive of the submission of one or other of the parties, efficiency would require that intervention be denied.

Basis for intervention

5. Since its execution, on or about 11 December 1997, TAB has been a party to the RDA. Tabcorp Holdings became a party to the RDA pursuant to a Deed of Accession Cooperation and Amendment in December 2004 (see [15(b)] Warner Affidavit). Similarly, both TAB and Tabcorp Holdings are parties to the Deed of Release, which was entered into on 25 November 2009.[1]

(i) The RDA

6. The RDA is addressed by the Full Court at (2010) 274 ALR 12, at 18-20, [22] - [26].

7. The Attorney-General for the Commonwealth has submitted (at [49]):

> [49] There will be discrimination against interstate trade if it is established that, notwithstanding that TAB Ltd is also required to pay the turnover fee, TAB Ltd was insulated from the effect of turnover fee. This requires showing more than just that an amount equivalent to the turnover fee in one or more years was paid to TAB Ltd by the racing control bodies, but

[1] See Sportsbet's Chronology, entry 61.

rather that in the circumstances, TAB was not subject to **the particular burden** imposed on Sportsbet. Relevant factual issues would include: (i) whether TAB Ltd was paying to receive race field information before the introduction of the turnover fee and (ii) if so, how much TAB Ltd was paying for that information (out of the total amount being paid by TAB Ltd under the Racing Distribution Agreement).

8. The Commonwealth Attorney-General merely raises these factual issues; the Commonwealth makes no submissions as to their proper resolution.

9. Sportsbet Pty Ltd (**Sportsbet**) addresses related factual issues in a number of places, but most clearly in its Reply Submissions (at [66] and [67]):[2]

> [66] No part of the consideration paid by TAB either under the RDA or under the licence payment was directly attributable to the supply and use of the NSW race information. Nor can it be concluded that the parties ascribed any particular value to the rights conferred by cl 6 and 8: the information was freely available in the public domain, and not subject to any intellectual property rights.
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> [67] On a fair reading, it is not correct to say that TAB paid under the RDA for the supply and use of NSW racing information. Certainly, TAB did not prosecute the dispute between the TAB and the control bodies on the basis that the turnover condition meant that it was paying twice for the information. Its claim was that it should not pay at all.

10. TAB and Tabcorp Holdings reject those submissions. None of the parties to the appeal is appropriately placed to contradict the submissions. Adverse findings by this Court are likely to have a direct and negative effect on the rights of TAB and Tabcorp Holdings.

11. The Second and Third Respondents (**RNSW** and **HRNSW** respectively) are parties to the RDA. They advance certain contentions about the RDA, but do not squarely

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[2] See further: Sportsbet's Submissions in Chief at [6], [33], [44], [48], [50] – [52], [66] – [68], and [89]; Sportsbet's Submissions in reply [6] – [15]; [16] – [25], [36] and [62] – [68]; Sportsbet's Chronology Part II, entries: 3; 9; 29; 58 and 61.

address the issues raised by the Attorney-General for the Commonwealth.[3] That is for a very good reason – their interests on this issue are mixed.

(ii) The Deed of Release

12. The Full Court dealt with the Deed of Release at (2010) 274 ALR 12 at 23, [40] - [41] in the following way:

> [40] TAB disputed RNSW's right to payment for the provision of use of race field information assured to TAB under the RDA. TAB's position was that under the RDA it was already entitled, as against the NSW racing authorities, to use race field information without further payment beyond that required of it by the RDA. Negotiations ensued.
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> [41] On 25 November 2009 the Board of RNSW executed a deed of release with TAB and Tabcorp, Luxbet, Racing Corp, GRNSW and HRNSW pursuant to which RNSW agreed to pay TAB an amount of money being the equivalent of the fee paid by TAB to RNSW. The deed of release stated that "the Payment Amount is not a refund or return of any part of the Applicable NSW Race Fields Fees".

13. In the negotiations identified by the Full Court, it was in TAB's interests to propound the proposition that, by virtue of the terms of the RDA, TAB was already paying to receive and use race field information – for itself and also for use by related bodies corporate, in this case being Tabcorp Holdings and Luxbet Pty Ltd (**Luxbet**). It was in the interests of RNSW and HRNSW and their agent, Racingcorp, to propound the opposite position.

14. The Deed of Release resolved disputes relating to the provision of race fields solely for the 2008/2009 year (Warner Affidavit [27] and [35]). It did not address matters beyond that date. Clause 19.1(a) in effect provides that the RDA will continue in force and effect for whilst ever TAB, and its related entities, holds a Wagering Licence under the *Totalizator Act 1997* (NSW) or a Gaming Licence under the Gaming Legislation (as defined in clause 1.1).

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[3] See Submissions of Second and Third Respondents at: [3(b) – (d)]; [12]; [15] (which notably states that, "TAB's net position will depend on the extent to which it can claim damages for the alleged breach arising from the charging of the race fields fees (discussed below)"); [23]; [25] – [33]; [44]; [59] – [60].

(iii) The Court's Jurisdiction is Engaged

15. There has been no resolution between TAB and Racingcorp (or RNSW and HRNSW) in relation to race fields fees paid by TAB, Tabcorp Holdings or Luxbet for any period after 2009; with the consequence that, for the time being, those bodies have been paying twice for the information. TAB has, however, notified Racingcorp that it considers that Racingcorp is in breach of the RDA in light of the imposition of NSW race fields fees on TAB, Tabcorp Holdings and Luxbet, during the 2009/2010 and 2010/2011 years and intends to commence formal disputes against Racingcorp under the RDA arising from such breach unless TAB's claims are settled (Warner Affidavit [38]). Similar disputes may arise in respect of future periods of time depending upon the manner in which this dispute unfolds.

16. It will be necessary for TAB and Racingcorp (and hence also RNSW and HRNSW) to address the question of whether damages or compensation are to be paid to TAB in respect of race fields fees that TAB, Tabcorp and Luxbet have incurred and continue to incur. The matter will need to be addressed by negotiation and, if necessary, by arbitration pursuant to the dispute resolution provisions in the RDA (clause 24 RDA). In either context, the commercial interests of RNSW and HRNSW are consistent with advancing the proposition that TAB was not paying to receive race fields information under the RDA.

17. In the event that this Court concludes (TAB would contend, wrongly) that TAB is not paying to receive race fields information under the RDA, or that the amount being paid is less than the amount of the race fields fees, or that TAB has no enforceable contractual right to recover damages flowing from Racingcorp's failure to procure the supply to TAB of race fields information, that would be to the serious detriment of TAB in the context of any future negotiations with or proceedings against Racingcorp, RNSW and HRNSW (see Warner Affidavit [25] and [38] – [41]).

18. The State of New South Wales, the First Respondent, makes certain submissions that are generally consistent with TAB's legal interests (see, in particular, [51]).[4] However, not being a party to the RDA, and not having been involved in the various disputes

[4] Submissions of First respondent at [9] and [50] – [51]

which have arisen thereunder, the State's submissions necessarily speak at a higher level of generality than would submissions made on behalf of TAB and Tabcorp Holdings, and will not voice the same perspective on the issues involved.

19. By reason of the above matters, this Court is likely to be asked to draw conclusions regarding the rights and obligations of the parties to the RDA. These matters directly invoke, and are likely significantly to affect, the rights and interests of TAB and Tabcorp Holdings. Further, the perspective of TAB and Tabcorp Holdings on matters concerning the true construction and effect of the RDA is necessarily distinct from that of RNSW or HRNSW (being past and potentially future opponents in disputes with TAB and Tabcorp Holdings under the RDA), or of the several Attorneys General (being parties not directly involved in either the RDA or disputes thereunder). Accordingly, submissions made on behalf of TAB and Tabcorp Holdings would assist the Court in reaching a correct determination. For these reasons, the Court's jurisdiction to grant leave to intervene is engaged.

Outline of submissions in event of intervention

20. Without knowledge of the contents of the Appeal Book, TAB and Tabcorp Holdings cannot exhaustively advance the submissions they would seek to make were leave granted. However, upon the materials available, TAB and Tabcorp Holdings would contend, by way of summary, at least as follows.

(i) TAB's regulatory obligation to pay for race fields information

21. *First*, each of TAB, Tabcorp Holdings and Luxbet is required to pay a race fields fee for the use of NSW race fields information as a condition of the grant of a race fields approval from each of the NSW controlling bodies. This obligation arises through the combined operation of ss 33 and 33A of the *Racing Administration Act 1998* (NSW) (the **RAA**), reg 16(2)(a) of the *Racing Administration Regulation 2005* (NSW) (the **RAR**) and the policies of the various NSW controlling bodies as in force from time to time. These matters appear uncontroversial.

(ii) TAB's contractual obligation to pay for race fields information

22. *Secondly*, clause 9.1 of the RDA subjects TAB to an additional requirement to pay fees for the use of NSW race fields information along with other information and services.

Specifically, clause 9.1(a)(i)-(v) requires TAB to pay: the Fixed Product Fee; the Product Fee; an additional product fee, under clause 9B, in respect of fixed odds wagering; the Wagering Incentive Fee, and the Gaming Incentive Fee.

23. Clause 9.1 specifies that each of these fees is required to be paid by TAB "in consideration of all the services to be provided by [Racingcorp] under this Agreement". None of these fees is expressly referable to a particular service.

24. However, recitals F(i) – (iv) to the RDA, which provide assistance in construing the agreement,[5] identify four "services and products" provided by Racingcorp to TAB under the RDA, being: procuring the staging of an annual program of NSW race meetings (i.e. ensuring that NSW races are being staged); procuring the supply of associated race information (which information is comprised of NSW race fields information and associated information) to TAB; appointing TAB to distribute that race information, and providing consultancy services to TAB.

25. The recitals then narrate that, in return for those services and products, and "with the intent of maintaining the long term quality of those services and products for TAB's wagering business", TAB will make various payments to Racingcorp.

26. Having regard to the narrative history and contractual context the recitals expose, and the express language of clause 9:

(a) Racingcorp is obliged to ensure that NSW racing events are being staged, to enable TAB to conduct wagering activities in respect of those events;

(b) Racingcorp is obliged to ensure that TAB (and, through distribution rights, certain of its related bodies corporate) has and can use all the information it requires to conduct those wagering activities; and

(c) TAB, in turn, pays substantial fees to Racingcorp, which fees are derived in large part from revenues attributable to those wagering activities (which it is obliged to maximise pursuant to Part 3 of the RDA).

27. TAB pays fees under the RDA in consideration for receipt of the core elements it requires to conduct its wagering activities: races and race *information*. Sportsbet's

[5] *Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2007] 2 B.C.L.C. 23; K Lewison, *The Interpretation of Contracts* (4th edition) (London: Sweet & Maxwell, 2007) [10.10] – [10.16] at pp. 395-407

contention that no part of the payments made under the RDA is "directly attributable to the supply and use of the NSW race information" (Reply [66]) neglects the commercial operation of the RDA: the language of the RDA contemplates and accommodates the supply of both races and race information.

28. Sportsbet's related submission (Reply Submissions [65] – [68]) that the parties to the RDA ascribed no particular value to the rights conferred by clauses 6 and 8 thereof because such information was "freely available" and "not subject to any intellectual property rights" should be rejected.

29. TAB makes substantial payments under the RDA for the right, for the term of the RDA, to obtain and use NSW race information in the conduct of its wagering business, and can only obtain that information from Racingcorp. That has been the position since before the introduction of the NSW race fields legislative scheme. Of that race information, race fields information is the most valuable element in the conduct of TAB's wagering activities. TAB cannot offer or accept bets without reference to such information. The "use" of NSW Racing Information conferred upon TAB by the RDA is broad (clause 8.2(a)). Such use extends to TAB's totalisator wagering and other betting activities, to the extent that those activities are covered by TAB's NSW wagering licence or other licence, approval or permission under NSW legislation. Moreover, this use is facilitated (if necessary) by the grant by Racingcorp of a non-exclusive royalty-free licence (clause 8.2). This entitlement to a royalty-free licence reflects the fact that TAB is taken to pay for the use of the race fields information through the payments structured under Part 9 of the RDA.

30. Payments made by TAB and attributable to the supply or use of NSW race fields information under the RDA exceed the amount TAB is otherwise required to pay for NSW race fields fees. This is particularly so, having regard to the following: significant sums are payable by TAB under the RDA by reference to percentage of earnings and revenue; TAB's 'Net Wagering Revenue' extends to races outside NSW; and the absence of any exemption threshold.

(iii) The basis of Tabcorp Holdings' and Luxbet's use of race fields information

31. *Thirdly*, Tabcorp Holdings and Luxbet are each entitled to use NSW Racing Information as a function of TAB's entitlement, (subject to clauses 8.3 and 8.4) to sub-licence or otherwise permit others to use the NSW Racing Information and Racing Program (clause 8.2(b)), on condition that no fee is charged for such use permission (clause 8.2(d)).

(iv) Racingcorp's breach of the RDA and the correct depiction of the dispute resolved by the Deed of Release

32. *Finally*, the requirement imposed on each of TAB, Tabcorp Holdings and Luxbet to pay race fields fees under the NSW race fields legislative regime has the consequence that Racingcorp is placed in breach of its contractual obligation to procure the supply of NSW Racing Information to TAB (clauses 6.1, 6.2, 6.3 and 8.2 RDA). This breach entitles TAB to damages or compensation.

33. These cumulative matters expose certain defects in Sportsbet's depiction of the dispute resolved through the Deed of Release.

34. *First*, TAB's claim within that dispute was not for any form of refund, adjustment, offset or other reduction or reimbursement (however phrased) of Tabcorp's race fields fees payable under the NSW race fields legislative scheme. Each of TAB, Tabcorp Holdings and Luxbet has at all material times paid (without any exemption or recovery) the full amount of its NSW race fields fees.

35. *Secondly*, the payment to TAB, in November 2009 pursuant to the Deed of Release, was made in settlement of a contractual damages claim arising from a disputed assertion by TAB that Racingcorp had failed to procure TAB's race fields fees at no additional fee (in breach of the RDA) in circumstances in which TAB already paid a substantial fee for supply and use of race fields information under the RDA.

36. *Thirdly*, contrary to Sportsbet's contention that TAB prosecuted the dispute on the basis that "it should pay nothing at all", the dispute notices reveal that TAB contended it should not be required to make "further" payment. Moreover, TAB did not recover the totality of its claim in the disputes.

37. *Finally*, the Deed of Release recorded a 'one-off' resolution in respect of fees for the period 1 September 2008 to 30 June 2009. Since that time, Tabcorp has continued to

pay both the regulatory and contractual fees described above. This in effect is a double payment. Since that time, the parties to the RDA have failed to reach a negotiated settlement in respect of payments referable to future periods. Future arbitrations under the mechanism of the RDA dispute process are likely.

Conclusion

38. For the reasons identified above, TAB and Tabcorp Holdings respectfully seek the relief specified in the summons.

Dated: 27 June 2011

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