

**IN THE HIGH COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

No. S118 of 2011

BETWEEN:

SPORTSBET PTY LTD

(ACN 088 326 612)

Appellant

STATE OF NEW SOUTH WALES

First Respondent

RACING NEW SOUTH WALES

(ABN 86 281 604 417)

Second Respondent

HARNESS RACING NEW SOUTH WALES

(ABN 16 962 976 373)

Third Respondent

STATE OF SOUTH AUSTRALIA

Fourth Respondent



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**APPELLANT'S SUBMISSIONS IN OPPOSITION TO APPLICATION FOR
LEAVE TO INTERVENE BY TAB LIMITED AND TABCORP HOLDINGS**

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Date of Document: 15 August 2011
Filed on behalf of the Appellant by:
Fitzpatrick Legal
Level 16, 190 Queen Street
Melbourne VIC 3000

Contact: David Fitzpatrick
File Ref: DJF:LB:080030
Telephone: (03) 9602 5444
Facsimile: (03) 9602 5094
Email: djf@fitzpatricklegal.com.au

1. The application¹ of Tab Limited (TAB) and Tabcorp Holdings Ltd (Tabcorp) for leave to intervene in the appeal should be refused because:
- (a) The legal interests of TAB and Tabcorp will not be adversely affected, either directly or substantially, should the appeal succeed;
 - (b) TAB and Tabcorp made a deliberate and considered decision not to intervene at first instance and in the Full Court, fully aware that the construction and operation of the Racing Distribution Agreement was in issue in the proceedings. It is too late for them to intervene at this juncture.
 - 10 (c) The submissions that they propose to advance either duplicate those already made, or seek to make new and tendentious factual points that the parties do not seek to advance; and
 - (d) The intervention would prolong the hearing of the appeal without assisting the Court to resolve any of the fundamental issues that are in question.

The TAB interests not adversely affected

2. The jurisdiction to allow non-party intervention is as an incident of the jurisdiction to hear and determine the appeal brought under s 73 of the Constitution². The subject matter of the appeal is the extent to which provisions of the *Racing Administration Act* and an administrative condition, made in common form, impede trade, commerce and intercourse between the Northern Territory and the States. Resolution of the proceeding will have commercial significance extending beyond the parties. The effect on wider commercial interests is indirect, inevitable in an appeal concerning the freedom or interstate trade, and insufficient to warrant intervention.
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3. The test for intervention by a private party seeking to secure commercial interests should be no less stringent than an application for joinder and it is for the applicant to show that its legal interests would be substantially and directly affected by the orders sought in the appeal³. Any direct effect on legal interests is to be judged by reference to the orders sought and not by reference to the issues that may be considered⁴. The requirement that the effect be direct serves to distinguish effects that “can only be characterised as only indirect or consequential”⁵.
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4. The TAB interests will not be adversely affected by the orders sought. If the legislation is held invalid, TAB and Tabcorp will be relieved of the legal obligation to pay race fields fees. If the approvals containing the turnover fee condition are overturned, Sportsbet will be freed from the obligation to meet the financial impost. TAB and Tabcorp will be unaffected or would get the benefit of the finding.

¹ made by summons filed 27 June 2011 AB AB HC 2924

² *Levy v Victoria* (1997) 189 CLR 579 at 601 (Brennan CJ)

³ *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [131]-[132]; *Australian Tape Manufactures Association Ltd v Commonwealth* (1990) 94 ALR 641; *News Limited v ARL* (1996) 64 FCR 410 at 524; *ACCC v News Corporation* (1997) 79 FCR 117 at 124.

⁴ *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [133]

⁵ *News Limited v ARL* at 525

5. TAB's submissions on intervention point to two matters: the RDA and Deed of Release that relate to a single issue, namely whether under the RDA, TAB was already paying to receive and use race fields information⁶. Their concern is to avoid "adverse findings"⁷ and they acknowledge that they seek to dispute "factual issues"⁸. Neither demonstrates that the orders sought in the appeal would directly affect legal interests.

The TAB interests decided not to participate

- 10 6. The TAB interests made a conscious decision not to participate in a proceeding in which they were aware of the issues to be raised,⁹ including the effect of the RDA. The proposed submissions do not articulate any general principle. To the extent that private commercial interests are involved, the TAB interests have been content to merely observe the course of the litigation. Refusal of leave to intervene does not involve any denial of procedural fairness.

The submissions involve duplication or contentious propositions of fact

- 20 7. The fundamental proposition sought to be advanced by the intervener, namely that it already pays for race fields information, is addressed by the First Respondent¹⁰. On that point, the intervener is simply duplicating an existing submission.
8. Further, the submissions by TAB Limited and Tabcorp Holdings Limited filed in anticipation of a grant of leave, seek to traverse factual matters including the amount of consideration ([22]), and the extent to which the race field information had "commercial value" independently of the statutory prohibition (27). Leave to intervene should be refused on the basis that the intervener, who sat back whilst the trial and appeal were heard, now seeks to agitate factual matters.

Intervention would delay the hearing

- 30 9. Finally, the Court has listed two appeals for three days. There are already tight time constraints, and intervention would delay the hearing and detract from the time available to the parties for oral argument.

Dated: 15 August 2011

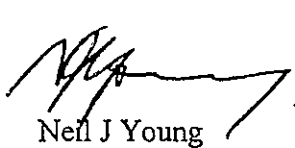
⁶ *Submissions by TAB Ltd and Tabcorp Holdings in Support of an Application for Leave to Intervene* 27 June 2011 at [7]- [10] and [13].

⁷ *Submissions by TAB Ltd and Tabcorp Holdings in Support of an Application for Leave to Intervene* 27 June 2011 at [10]

⁸ *Submissions by TAB Ltd and Tabcorp Holdings in Support of an Application for Leave to Intervene* 27 June 2011 at [8] and [9]

⁹ Affidavit of David John Fitzpatrick sworn 7 July 2011 AB HC 2938 at paras 3-12

¹⁰ First Respondent's Submissions filed 29 April 2011 at [51]

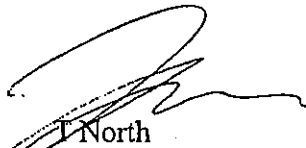


Neil J Young

Melbourne Chambers

Ph (03) 9640 3272

Fx (03) 9640 3101



T North

Aickin Chambers

Ph (03) 9225 7543



R M Niall

Melbourne Chambers

Ph (03) 9640 3285

Fx (03) 9640 3108

A Tokley

Anthony Mason Chambers

Ph (08) 8228 0000