

The Tabcorp/Tatts case should end the clash between the ACCC and the Competition Tribunal

Written by Julie Clarke, Associate Professor, Melbourne Law School, University of Melbourne

A long-running tension between the Australian Competition and Consumer Commission (ACCC) and the Australian Competition Tribunal is coming to a head. The ACCC disagrees with the Tribunal's decision on the merger of two of Australia's biggest gaming companies, Tabcorp Holdings and Tatts Group, and has [taken the matter to the Federal Court](#).

The ACCC and the Tribunal disagree on how to value the "public benefit" of a merger, based on whether the benefits flow to the merging parties (in this case Tabcorp/Tatts) or to the broader public. The Federal Court will now have an opportunity to clarify this, ensuring that the ACCC and the Tribunal are applying the same standard, giving more certainty to Australian businesses.

The ACCC typically places more weight on consumer welfare, in the form of lower prices and better products, when considering mergers. Whereas the Tribunal is more willing to count benefits that flow to the merging parties, such as cost savings, even when these are not passed on to consumers. However, the Tribunal does [acknowledge](#) that these benefits might "carry less weight than gains which flow to the community generally".

Tabcorp had initially sought clearance of the merger from the ACCC, but [withdrew this application](#) after the ACCC raised some initial concerns. Tabcorp gambled that it could receive a more favourable and efficient outcome by proceeding directly to the Tribunal.

The Tribunal then [authorised](#) the Tabcorp/Tatts merger, accepting [Tabcorp's claims](#) that there would be "substantial" public benefit from the merger taking place. The Tribunal thought the possible detrimental effects of the merger were either unlikely to arise or didn't outweigh the benefits of the merger. These detriments included reduced competition and other factors such as increased problem gambling and reduced employment.

In referring the decision to the Federal Court, the ACCC [claims](#) that the Tribunal made an error by giving inappropriate weight to benefits that would be retained by Tabcorp/Tatts and not shared with consumers.

Why refer the Tribunal's decision?

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The current tension between the ACCC and the Tribunal leads to uncertainty for businesses about public benefit assessment, particularly in merger cases.

However, the court will not be able to reverse the Tribunal's authorisation of the Tabcorp/Tatts merger. The most the ACCC can hope for is that the Federal Court agrees that the Tribunal made an error and sends the matter back to the Tribunal for reconsideration. Even if it does this, there is a good chance that the outcome will be the same.

But there's still a good reason for the Federal Court to hear this out: to settle the importance of the trade-off between the benefits to the merging parties and consumers.

"Public benefits" are not defined in the [Competition and Consumer Act 2010](#) . But the Tribunal [considers it to include](#) anything of value to the community more generally.

For example, when assessing the [Qantas/Air New Zealand alliance in 2004](#) , the Tribunal accepted Qantas' claims that the public would benefit because it was in the national interest for the airline to be "strong and efficient" and that the move would benefit tourism.

The ACCC grants authorisations for a variety of types of company conduct, not related to mergers. This includes collective bargaining which might otherwise breach cartel laws. In each of these assessments the ACCC applies a similar public benefit assessment to the one applied by the Tribunal to mergers.

If the [Competition and Consumer Amendment \(Competition Policy Review\) Bill](#) (currently before parliament) passes, the ACCC will regain the power to grant merger authorisations. Any authorisation granted by the ACCC is subject to appeal to the Tribunal. So the approach the Tribunal takes in assessing public benefits will have a direct influence on the ACCC.

What next?

The Federal Court won't review what detrimental effects the Tribunal considered, such as a

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potential increase in problem gambling (a concern raised by the ACCC) or the cost of lost employment (a concern raised by another party in this case). These concerns were quickly dismissed by the Tribunal, which instead focused on economic considerations.

Given the potential for mergers to impact on social or environmental goals or other matters of public interest (both beneficially and detrimentally), it's a pity the court will not have the opportunity to comment on how these factors should be balanced against economic factors.

Despite these limitations, the Federal Court can end the tension between the approach of the Tribunal and the ACCC to public benefit assessment. This will result in greater certainty for businesses.

Julie Clarke does not work for, consult, own shares in or receive funding from any company or organisation that would benefit from this article, and has disclosed no relevant affiliations beyond the academic appointment above.

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