



IN THE AUSTRALIAN COMPETITION TRIBUNAL

No. ACT 1 of 2017

**Proposed acquisition of Tatts Group Limited by Tabcorp Holdings Limited  
by way of scheme of arrangement**

**Tatts' Outline of Opening Submissions**

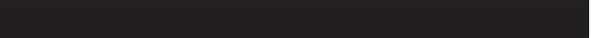
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[HIGHLY Confidential to Tatts] [.....]  
[HIGHLY Confidential to Tabcorp] [.....]  
[Confidential to Tatts] [.....]  
[Confidential to Tabcorp] [.....]

**A. Introduction**

1. Tatts Group Ltd (**Tatts**) supports the application by Tabcorp Holdings Ltd (**Tabcorp**) to this Tribunal for authorisation to acquire by means of a scheme of arrangement the shares in Tatts, and adopts Tabcorp's opening submissions. These submissions supplement those, focussing on the issues as they relate to Tatts.
2. The proposed acquisition will create a larger, more efficient company that will offer improved products to its customers. Moreover, the benefits of the merger will not be confined to the shareholders or customers of the merged entity. The costs savings and revenue improvements achieved by the merger will directly benefit the racing industry through the various revenue and profit sharing arrangements that apply in various States and Territories in Australia. In addition, the efficiencies achieved through the integration of the two companies will deliver a lasting benefit to the Australian economy many times greater than the annual cost saving.
3. These significant public benefits are not offset by any detriments. The two businesses compete with each other only to a limited extent. Tatts' absence will not lead to a lessening of competition in any relevant market. If anything, the merger will allow the combined operation to compete more effectively with corporate bookmakers, whose market share is significant and growing.

## PUBLIC VERSION

4. The principal opponents to the merger are corporate bookmakers which are generally owned by large and successful European organisations. Since 2008, corporate bookmakers in Australia have succeeded in taking a significant share of the national wagering market from Tatts and Tabcorp. Claims of their competitive disadvantage and the adverse impact of the merger should be treated with caution. The same is true of claims made by Racing Victoria and its joint venture partner, Racing.com. All of the objections of these parties are conceived in self-interest and could not be said to be objective or impartial.
5. Specifically, it has been suggested that the loss of Tatts will:
  - (a) lessen competition in the wagering market;
  - (b) lessen competition in bidding for exclusive retail wagering licences;
  - (c) reduce the number of potential suppliers of pooling services; and
  - (d) increase Sky's dominance in the acquisition of racing vision.
6. However, each of these concerns is based on a mistaken view of Tatts' role. In particular:
  - (a) Tatts is not Tabcorp's closest competitor in online and phone wagering (the only types of wagering in which the two businesses compete);
  - (b) **[HIGHLY Confidential to Tatts]**   

  - (c) Tatts has never offered pooling services to third parties in the Australian wagering market, **[HIGHLY Confidential to Tatts]**   
 and
  - (d) Tatts has never bid for media rights, and has no interest in doing so (either by itself or as a joint venture with Racing.com).
7. Seen in light of these incontrovertible facts, the supposed competition concerns fall away. A further concern that the merged firm would misuse gaming monitoring information also lacks any substance.

## B. Relevant Principles

8. The principles relevant to the Tribunal's task under s 95AZH(1) have been considered by the Tribunal in previous authorisation decisions.<sup>1</sup> They can be summarised briefly as follows:

- (a) the Tribunal "must examine the likely anti-competitive effects of a proposed acquisition on the one hand, and the likely public benefits flowing from it on the other and weigh them against each other": *Sea Swift*, [41].
- (b) public benefit "is a wide concept and may include anything of value to the community generally so long as there is a causal link between the proposed acquisition and the benefit": *Sea Swift*, [42].
- (c) in examining the benefits and detriments said to arise from the proposed acquisition, the Tribunal compares two futures: one in which the merger proceeds, and the other in which it does not: *Sea Swift*, [44]; and
- (d) it is important that the Tribunal's decision be based on the real world and not rest on speculation or theory: *Sea Swift*, [47].

9. The last principle deserves special emphasis in light of the speculative nature of many of the concerns expressed. In *Australian Gas Light Company v ACCC* (2003) 137 FCR 317, French J (as he then was) addressed the meaning of "likely" in the context of s 50 of the *Trade Practices Act* (1974):

The meaning of "likely" reflecting a "real chance or possibility" does not encompass a mere possibility. The word can offer no quantitative guidance but requires a qualitative judgment about the effects of an acquisition or proposed acquisition. The judgment it requires must not set the bar so high as effectively to expose acquiring corporations to a finding of contravention simply on the basis of possibilities, however plausible they may seem, generated by economic theory alone. On the other hand it must not set the bar so low as effectively to allow all acquisitions to proceed save those with the most obvious, direct and dramatic effects upon competition. By the language it adopts and the function thereby cast upon the Court and the regulator in their consideration of acquisition s 50 gives effect to a kind of competition risk management policy. The application of that policy, reflected in judgments about the application of the section, must operate in the real world. The assessment of the risk or real chance of a substantial lessening of competition cannot rest upon speculation or theory. To borrow the words of

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<sup>1</sup> *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 (**Macquarie Generation**); *Application by Sea Swift Pty Limited* [2016] ACompT 9 (**Sea Swift**).

the Tribunal in the *Howard Smith* case, the Court is concerned with "commercial likelihoods relevant to the proposed merger". The word "likely" has to be applied at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration – *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [41].

10. Although these comments were directed to the application of s 50, this Tribunal has held that they are equally applicable to the assessment which the Tribunal is required to make under s 95AZH(1): *Sea Swift*, [47]. The Tribunal is called upon to make "a robust and commercially realistic judgment of the claimed public benefits and public detriments": *Sea Swift*, [48].

### **C. Overview of Tatts**

11. The following section provides a brief summary of Tatts' business. Tatts operates its business under three divisions: lotteries, wagering and gaming.<sup>2</sup>

#### **(i) Lotteries**

12. Lotteries is the biggest part of the Tatts business. In the financial year ended 30 June 2016, lotteries comprised \$2,139 million, or 73%, of Tatts' overall revenue of \$2,928 million.<sup>3</sup>

13. Tatts operates lotteries in all States and Territories of Australia, except Western Australia. Tatts also operates Keno in South Australia as part of its South Australian Lotteries master agency agreement with the Lotteries Commission of South Australia.<sup>4</sup> Tatts' Keno products are distributed through retail outlets including pubs, clubs, TAB outlets and newsagents in South Australia.

14. There is no overlap between the merger parties in relation to lotteries and very limited overlap in relation to Keno.<sup>5</sup>

#### **(ii) Wagering**

15. In the 2016 financial year, wagering comprised \$610 million, or approximately 21% of Tatts' total revenues.

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<sup>2</sup> Cooke, [16]-[17].

<sup>3</sup> Cooke, [16].

<sup>4</sup> van der Merwe, [26(d)], [93]-[94].

<sup>5</sup> The only possible overlap arises in South Australia where residents can access Tabcorp's online product: Form S, [4.142] to [4.144].

16. Tatts' wagering business comprises:
- (a) a retail network of outlets branded 'UBET' and licensed venues in Queensland, South Australia, Tasmania and the Northern Territory, which supply racing and sports wagering products (referred to as a retail network);<sup>6</sup> and
  - (b) a national online presence and telephone betting service supplying racing and sports wagering products through the UBET brand.
17. Tatts also operates RadioTAB, which broadcasts audio racing content in Queensland, South Australia, Tasmania and the Northern Territory.<sup>7</sup> RadioTAB is also available nationally online.<sup>8</sup>
18. In each of Queensland, South Australia, Tasmania and the Northern Territory, Tatts (UBET) is licensed by the State/Territory Government to be the exclusive supplier of off-course totalisator and retail wagering services in the State/Territory.
- (iii) Gaming**
19. Finally, Tatts' gaming services business comprises two separate business units, Maxgaming and Bytecraft:<sup>9</sup>
- (a) Maxgaming is Tatts' gaming venue services unit. It is a licensed monitoring operator in Queensland, NSW and the Northern Territory.<sup>10</sup> It also supplies other gaming and related services to its venues.<sup>11</sup>
  - (b) Bytecraft is Tatts' provider of maintenance, technology and logistics support. Bytecraft supplies electronic gaming machine (EGM) repair and maintenance to gaming venues in all States and Territories in Australia.<sup>12</sup>
20. Tatts' gaming operations contribute \$211 million, or roughly 7% of Tatts' overall revenue.

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<sup>6</sup> Cooke, [20].

<sup>7</sup> Cooke, [18].

<sup>8</sup> Cooke, [18].

<sup>9</sup> Makryllos, [12].

<sup>10</sup> Cooke, [17].

<sup>11</sup> Cooke, [17].

<sup>12</sup> Cooke, [17].

**(iv) Tatts' future without the merger**

21. If the merger is not authorised by the Tribunal, Tatts will continue to operate the business on a standalone basis for the foreseeable future.<sup>13</sup>
22. Since the proposed merger was announced, a consortium of investors known as the Pacific Consortium has made two indicative proposals to purchase 100% of Tatts' shares.<sup>14</sup> On 28 April 2017, the Tatts Board determined the revised indicative proposal was not a superior proposal, and could not reasonably be expected to result in a superior proposal. Tatts' Board considers that the proposed acquisition by Tabcorp is in the best interest of Tatts shareholders.<sup>15</sup>

**D. Public Benefits**

**(i) Overview of public benefits**

23. The merger is expected to generate enduring costs savings and revenue increases for the merged firm. These synergies will significantly increase the payments that the merged firm makes each year to the racing industries in each state and territory, and deliver a boost to the economy as a whole. The transactions will also remove a commercial barrier to merging the pari-mutuel pools of Tabcorp and Tatts.

**(a) Cost savings and revenue increases**

24. The merged firm is expected to generate annual ongoing cost and capex synergies of **[Confidential to Tabcorp]** million.<sup>16</sup> It is likely that these savings will be fully realised in the third year following completion of the proposed merger.
25. In addition to these costs savings, it is expected that during the third year following the proposed merger, the proposed merger will result in an annual increase in revenue of **[Confidential to Tabcorp]** million.<sup>17</sup> These increases are expected to be generated from three sources: (i) increased revenue from improving Tatts' average fixed odds yield; (ii) increased turnover and revenue from wagering business improvements; and (iii) increased turnover and revenue from keno business improvements in South Australia.

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<sup>13</sup> Cooke, [162].

<sup>14</sup> ASX Announcement, 23 December 2016.

<sup>15</sup> ASX Announcement, 28 April 2017.

<sup>16</sup> Johnston, [22].

<sup>17</sup> Johnston, [64].

26. These savings and revenue improvements reflect dynamic and productive efficiencies, both of which have been recognised by this Tribunal as important forms of public benefit.<sup>18</sup> As the High Court has recognised, the main virtue of competition is that it provides a powerful means of securing important gains in dynamic efficiency.<sup>19</sup>

(b) *Increased payments to the racing industry*

27. The costs savings and revenue increases will directly increase the merged entity's contributions to the racing industry. Tabcorp estimates that, as a result of the cost savings and revenue increases, the merged entity will contribute at least an additional [Confidential to Tabcorp] million annually to the racing industry via the revenue and profit sharing arrangements in place in the various States and Territories.<sup>20</sup> This is on top of the \$1 billion the two companies already contribute annually to the racing industry.<sup>21</sup> This increase in funding represents a significant public benefit for the purposes of s 95AZH.

28. This extra funding will enable thoroughbred, harness and greyhound racing bodies to invest in their industries. Representatives of racing bodies in NSW,<sup>22</sup> Queensland,<sup>23</sup> South Australia,<sup>24</sup> Tasmania,<sup>25</sup> Western Australia,<sup>26</sup> the Northern Territory<sup>27</sup> and the ACT<sup>28</sup> have all provided statements in support of the proposed transaction. These witnesses have described how the extra funding will enable them to increase prize money, retain field sizes, improve racing and patron facilities, and improve animal welfare programs, all of which will be to the betterment of the industry as a whole. Even Racing Victoria, which opposes the merger for its own commercial reasons,

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<sup>18</sup> See *Macquarie Generation* [2014] ACompT 1, [159], [160].

<sup>19</sup> *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, [87] quoting from *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1, [63].

<sup>20</sup> Johnston, [24(a)].

<sup>21</sup> Form S, [4.44].

<sup>22</sup> V'Landys.

<sup>23</sup> Forbes.

<sup>24</sup> Watters, Corby.

<sup>25</sup> Lynch, Lynch reply.

<sup>26</sup> Yovich, Yovich reply.

<sup>27</sup> Dixon.

<sup>28</sup> Weston, Stubbs.

acknowledges the vital importance of wagering revenue to the Australian racing industry.<sup>29</sup>

(c) *Benefit to the economy of improved productive efficiency and import replacement*

29. Dr Ric Simes from Deloitte Access Economics has used a CGE (computer generated equilibrium) model to quantify the broader economic impact of the costs savings and the increase in market share the merged entity expects to make.<sup>30</sup> CGE models provide a robust, realistic representation of how changes in one part of an economy – in this case, costs savings and import replacement – flow, or spread through to other parts. Dr Simes estimates that the net present value of the increase in Australia's GDP and GNI (which takes into account net income receipts from abroad) which can be expected to arise from these benefits over 15 years is \$1.5 billion.

(ii) ***Criticisms of public benefits***

30. Although there is a reluctant acceptance that the merger of the two companies is likely to result in some public benefits,<sup>31</sup> several criticisms have been levelled at Tabcorp's evidence.

31. *First*, it is asserted that the benefits are not merger-specific.<sup>32</sup> A number of witnesses assert that the benefits could be achieved without the merger - either as a result of Tatts' own efforts, or through a merger with another company.<sup>33</sup> But the Tribunal's task is not to ask whether the benefits could be achieved in any other manner, but whether they are likely to be achieved in the absence of the merger, the answer to which is no. There is no alternative bidder that could provide the sorts of synergies that a merger with Tabcorp's complementary business can provide. The only other offer on the table was from a consortium of financial investors. The evidence also demonstrates that absent the merger, Tatts is unlikely to achieve the revenue improvements that Tabcorp is likely to achieve.

32. *Secondly*, it is asserted that the costs savings are overstated.<sup>34</sup> The costs savings (and revenue increases) are detailed in the evidence of Tabcorp's CFO, Mr Damien

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<sup>29</sup> Thompson No 2, [6].

<sup>30</sup> Simes, [25].

<sup>31</sup> ACCC report, [1.35], [1.36].

<sup>32</sup> ACCC report, [1.13], [1.36],

<sup>33</sup> See e.g. Thompson No 3, [8] and [34]; Houston, section 5.3.3, Hird, section 6.2.1 ff.

<sup>34</sup> ACCC report, [1.36].

Johnston.<sup>35</sup> Tatts' CFO, Mr Neale O'Connell, who has significant experience in the integration of wagering businesses, considers that Mr Johnston's estimates are reasonable.<sup>36</sup>

33. *Thirdly*, it is asserted that the revenue increases do not represent a public benefit.<sup>37</sup> In particular, the ACCC argues that **[Confidential to Tabcorp]** million of the claimed revenue increases are better characterised as either as a transfer or a detriment to wagering customers. This misunderstands the nature of these revenue improvements. As Mr Cooke, Tatts' CEO, explains, the improvement in fixed odds wagering yield from the merger will be at the expense of some sophisticated punters who currently can bet with UBET in ways that create the risk of losses for UBET. The improvement does not involve an increase in the average price of fixed odds wagering as claimed by a number of witnesses for the interveners and the ACCC.<sup>38</sup>
34. *Fourthly*, the modelling undertaken by Deloitte Access Economics has been criticised.<sup>39</sup> The process by which a costs saving creates much larger changes in total output and welfare is (or at least should be) uncontroversial: in this case, the cost savings free up more than **[Confidential to Tabcorp]** million in resources, which can be deployed elsewhere in the economy; this overall increase in economy activity in turn encourages further investment and an increase in the labour supply (as more people enter the workforce or people work more). The result is that GDP and GNI expand by more than the direct improvement in productive efficiency would imply. CGE modelling allows economists to predict the size of the "shock" to the economy. It is a technique routinely used by both State and Federal Governments to assess the impact of changes in economic policy.<sup>40</sup> Contrary to the ACCC's report, the underlying assumptions are not untested, but supported by the evidence of the CFOs of both companies, Mr Johnston and Mr O'Connell. While the precise magnitude of the impact on output and welfare is difficult to predict, Dr Simes' analysis, conducted across a range of sensitivities, confirms that it will be significant.<sup>41</sup>

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<sup>35</sup> Johnston, Johnston reply.

<sup>36</sup> O'Connell, [20], [22].

<sup>37</sup> ACCC report, [1.36].

<sup>38</sup> Cooke reply.

<sup>39</sup> ACCC report, [1.36].

<sup>40</sup> Simes reply; Simes, [117].

<sup>41</sup> Simes, [144] and Attachment B, Simes reply.

**D. Alleged Competitive Detriments**

35. The ACCC identifies five areas where they argue there may be a loss of competition and/or public detriments arising from the transaction:
- (a) a potential lessening of competition in wagering due to the removal or direct competition between Tabcorp and Tatts;
  - (b) a potential loss of bidding tension in the exclusive wagering licence auctions in WA, and Victoria in 2024;
  - (c) a reduction in the number of potential suppliers of pooling services for acquirers of the WA licence;
  - (d) an increasing dominance of Sky in relation to the acquisition of media rights; and
  - (e) a concern that a merged entity will misuse information acquired through its gaming monitoring business to advantage its gaming services business.<sup>42</sup>

36. Each of these is considered in turn below.

**(i) Concerns about competition in the national wagering market**

37. It appears to be common ground that there is a national market for the supply of wagering products on horse races and other sporting events.<sup>43</sup> This is consistent with two decisions of the High Court and two decisions of the Full Court of the Federal Court in litigation involving parties who are interveners in this case.<sup>44</sup>

38. The only part of this market in which the merger parties currently compete is in relation to online and phone wagering, and even within this segment, competition between the merged parties is limited. Rather, it is the corporate bookmakers which drive competition and provide the closest constraint on each of the merger parties.

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<sup>42</sup> ACCC report, [1.13].

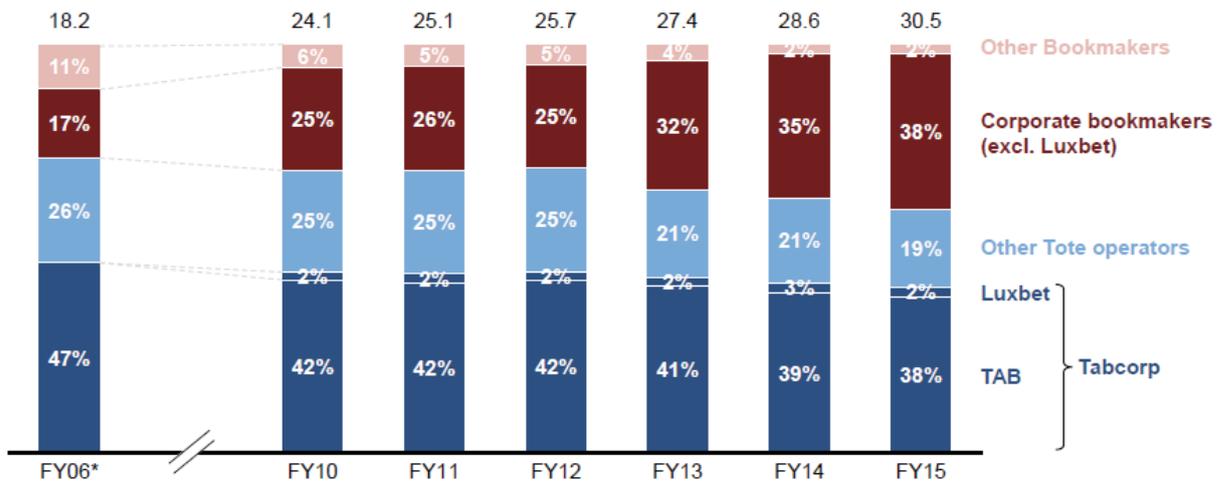
<sup>43</sup> Pleatsikas, [96] to [106]; ACCC report, [4.15].

<sup>44</sup> *Betfair v State of Western Australia* (2008) 234 CLR 418; *Betfair v Racing New South Wales* (2012) 249 CLR 217, 282; *Betfair v Racing New South Wales* (2010) 189 FCR 356; *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8.

39. In the evidence before the Tribunal, the corporate bookmakers describe themselves as struggling to compete against the merger parties. But the basic facts reveal a different story:

- (a) between FY2006 and FY2015, the turnover of corporate bookmakers increased sharply from approximately \$2.6 billion to \$12.3 billion,<sup>45</sup> while their share of national wagering turnover increased from 16.8% to 37.9%.<sup>46</sup>
- (b) in FY2016, Tabcorp's totalisator turnover decreased approximately 4.4%, and Tatts' totalisator turnover decreased approximately 11.7%, compared with the previous year.<sup>47</sup>
- (c) the merging parties' share of turnover between FY10 to FY15 has been decreasing steadily, as shown by the below table:<sup>48</sup>

**WAGERING TURNOVER MARKET SHARE**  
Percent; \$ Billions turnover



\* 2006 based on March 2012 strategy workshop  
Source: Tabcorp estimates; Australian Gambling Statistics 31<sup>st</sup> Ed.; ARB fact book

40. This remarkable growth is attributable to a number of advantages the bookmakers enjoy over the merger parties, namely: (i) they are able to derive substantial betting

<sup>45</sup> Freeman, [277].

<sup>46</sup> Freeman, [33].

<sup>47</sup> Freeman, [265(a)] and [269].

<sup>48</sup> Freeman, [290A].

revenues from synthetic tote products which are a substitute for totalisator wagering;<sup>49</sup> (ii) they operate in a virtually zero tax environment;<sup>50</sup> and (iii) they make more limited contributions to racing industry funding than Tabcorp and Tatts, paying only race field fees.<sup>51</sup>

41. Industry trends will continue to strengthen the constraint imposed by bookmakers, in particular, increasing consumer preferences for: (i) fixed odds wagering over totalisator wagering;<sup>52</sup> (ii) sports wagering over racing wagering;<sup>53</sup> and (iii) wagering through digital channels rather than in retail outlets.<sup>54</sup>
42. Given the strong and increasing competition by corporate bookmakers, Dr Chris Pleatsikas concludes that the merger is unlikely to result in a lessening of competition in the national wagering market.<sup>55</sup>
43. Corporate bookmakers have sought to downplay their success and identify various competition concerns about the proposed merger. The ACCC has adopted these concerns, wrongly in Tatts' submission.
44. *First*, the ACCC points to the fact that the merged entity would have a large share of the total wagering market.<sup>56</sup> But these figures give a misleading impression of the change in market as a result of the transaction: the companies do not currently compete in relation to their retail businesses; the only overlap that currently exists between the merged companies is in relation to online and phone channels where the combined market share of the merging entities is much smaller.<sup>57</sup>

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<sup>49</sup> Cooke, [145(a)].

<sup>50</sup> Cooke, [145(b)]; cf. Cooke reply.

<sup>51</sup> Cooke, [58], [64].

<sup>52</sup> Over the past 10 years, fixed odds racing and sports wagering has grown from 26% to 63% of industry turnover. Freeman, [248]; see also Cooke, [133(h)], [134(a)], [135(a)], [136(a)] and [137(a)].

<sup>53</sup> Over the past 10 years, sports betting has increased from 11% of total national wagering to 21%, with current growth rates at 14% per year. Freeman, [270]; see also Cooke, [133(c) to (f)], [134(b)], [135(b)], [136(c)-(d)] and [138].

<sup>54</sup> Over the past 5 years digital wagering (online via website or apps) has increased from 30% to 51% of industry turnover. Freeman, [248], see also Cooke, [133(b)], [133(i)], [134(c)], [135(c)], [130] – [141].

<sup>55</sup> Pleatsikas, [155].

<sup>56</sup> ACCC report, [1.14]. The ACCC estimates that the merged entity's share of the total Australian wagering market (based on revenue) will be approximately 65% (ACCC report, [4.8]); based on turnover, the figure is 48%: Form S, [9.4].

<sup>57</sup> Immediately, post-merger, Tabcorp estimates that the merged entity's share of the telephone and digital segment will be approximately [Confidential to Tabcorp] [REDACTED] Even this figure gives a

45. *Secondly*, the ACCC argues that, based on the take-out rates charged by Tabcorp and Tatts, bookmakers do not constrain the pricing of totalisator products.<sup>58</sup> But this analysis presents a simplistic view of pricing, and competition more generally. Take-out rates are at best one aspect of the price/product mix offered by Tabcorp and Tatts, and for the purposes of competing with bookmakers, not the most important. The constraint imposed by bookmakers is evident from their growing market share. Tabcorp and Tatts have both described in their evidence to the Tribunal the variety of ways in which they have sought to respond to this competitive threat. For Tatts' part, this includes: (i) the rebranding of UBET in April 2015; (ii) improving Tatts' fixed price sports and racing offering; (iii) improving Tatts' digital offering; (iv) redesigning the layout of Tatts' retail premises; (v) establishing a dedicated wagering and marketing team; and (vi) developing a wagering customer loyalty program called UBET+.<sup>59</sup>
46. *Thirdly*, the ACCC argues that bookmakers' growth has been through the accumulation of new customers, rather than at the expense of Tabcorp's and Tatts' retail customers.<sup>60</sup> This is inaccurate; in fact, Tabcorp's and Tatts' retail revenues have been falling.<sup>61</sup> But in any event, the extent to which bookmakers constrain Tabcorp's and Tatts' retail businesses is not the relevant inquiry, given that the two firms do not overlap in that part of the market. In relation to online wagering – the only area of the wagering market in which the two firms do overlap – the figures relied upon by the ACCC confirm the increasing dominance of corporate bookmakers.
47. *Fourthly*, CrownBet's expert, Mr Greg Houston, asserts that Tatts regards Tabcorp as its closest competitor.<sup>62</sup> In support of this proposition Mr Houston relies on an excerpt from a single Tatts document analysing website hits. Mr Houston ignores the context of the passage and the balance of the document,<sup>63</sup> but also, more importantly, the evidence as a whole. An objective review of that evidence demonstrates that while Tatts and Tabcorp regard each other as competitors for online and phone customers, competition is driven by the corporate bookmakers. This is reflected in the market

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slightly misleading sense of the change in competition produced by the merger, given the extremely limited extent to which the parties' online and phone customers bet outside their own State or Territory: Freeman, [261].

<sup>58</sup> ACCC report, [4.17].

<sup>59</sup> Cooke, [153] and [158].

<sup>60</sup> ACCC report, [4.26].

<sup>61</sup> Cooke [23]; Freeman, [255].

<sup>62</sup> Houston, [177], [202], [216], [222].

<sup>63</sup> Smith reply.

share figures, the internal business records of Tabcorp and Tatts, and the sworn evidence of Tabcorp and Tatts executives in the current proceedings. The limited extent of competition between Tabcorp and Tatts even within the online and phone channels is also illustrated by the fact that the vast majority of customers that choose to place tote and fixed odds bets with either of Tabcorp and Tatts place those bets with their "home operator", that is the party that is the customer's retail licensee.<sup>64</sup> By contrast, corporate bookmakers achieve online and phone wagering turnovers that are many times higher than the turnover achieved by Tabcorp or Tatts in states in which they are not the local retail licensee.<sup>65</sup>

48. *Fifthly*, both CrownBet and the ACCC seek to adduce copious evidence about Tabcorp's response to the 10-year agreement recently announced between CrownBet and Clubs NSW which provides, among other things, for CrownBet to facilitate online betting in over 1,000 NSW clubs via an app for mobile phones and tablets.<sup>66</sup> The relevance of this material to the Tribunal's assessment of the proposed acquisition is unclear: Tabcorp is entitled to take legitimate steps to protect its existing exclusive licence in NSW, and absent the merger, Tatts would do the same if CrownBet sought to introduce a similar initiative in Queensland clubs.<sup>67</sup> Tabcorp has also confirmed publicly, and in evidence to this Tribunal, that it will not cut Sky vision to clubs that enter into arrangements with other wagering providers.<sup>68</sup>
49. *Sixthly*, a good deal of the evidence details alleged grievances on the part of NSW clubs about the service currently provided by Sky and/or Tabcorp. It is not clear whether this material is said to be relevant to competition in the wagering market or some other market but the theory appears to be that absent the merger, Tatts would have the incentive and ability to act as a "counterweight" in clubs' dealings with Sky. Like a number of the ACCC's contentions, this rests on an inaccurate view of how things work – the majority of retail premises in Tatts states deal directly with Sky with no involvement from Tatts, and those clubs prefer to deal with one supplier of vision (regardless of whether they are Tatts or Tabcorp venues).

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<sup>64</sup> Form S, [4.134]; Smith, [10], [247].

<sup>65</sup> Smith, [11].

<sup>66</sup> Discussed at ACCC report [1.19], [4.53] – [4.58].

<sup>67</sup> Cooke reply.

<sup>68</sup> Letter dated 16 March 2017 from Tabcorp CEO Mr David Attenborough to Clubs NSW, discussed at ACCC report, [4.57].

50. *Seventhly*, the bookmakers submit that future regulatory changes may advantage the merger parties and disadvantage bookmakers.<sup>69</sup> These potential changes include laws to restrict advertising on sports betting, allow in-play betting in retail venues, or introduce a point of consumption tax, any of which bookmakers argue would favour the merger parties over the bookmakers. No doubt the wagering industry will be affected by future regulatory developments. But predicting the extent of that effect is difficult. Further, predicting the likely future outcome of any political process is fraught, particularly one that is likely to be the subject of intense lobbying efforts by a variety of well-funded and influential entities. There is no basis to conclude that absent the merger, corporate bookmakers will cease to be effective competitors. Recent history attests to the ability of bookmakers not only to adapt to the regulatory environment, but thrive.

**(ii) *Concerns about competition for exclusive wagering licences***

51. The ACCC also asserts that the proposed acquisition will result in the loss of competitive tension in competitive bidding processes for exclusive licences.<sup>70</sup> These licences may become available in Victoria in 2024 or 2026 and may also become available in Western Australia, depending on whether the Western Australian Government proceeds to privatise the state-owned RWWA.

52. There is a question as to whether the acquisition of licences constitutes a market for competition law purposes or simply an input necessary to compete in the wagering market. But the answer may not ultimately matter very much. This is for several reasons:

- (a) The terms of the sale process in Victoria have not been announced and in Western Australia, a decision has not even been made about whether to proceed with the privatisation;<sup>71</sup>
- (b) The rapid and ongoing changes in the wagering industry – in particular, the growth of corporate bookmakers, and the move to online gambling – make it difficult to predict the nature of any future sale process for exclusive retail wagering licences;

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<sup>69</sup> ACCC report, [4.36] – [4.42].

<sup>70</sup> ACCC report, [1.16], [4.72] – [4.85].

<sup>71</sup> Cooke, [180] – [181].

(c) As things presently stand, [HIGHLY Confidential to Tatts]



- (d) There are a number of other potential bidders for the licences.<sup>74</sup> SportsBet/PaddyPower, William Hill and Ladbrokes have all operated and have expertise in operating, physical retail markets for wagering. Ladbrokes have previously expressed an interest in bidding for retail licences. All of the corporate bookmakers, other than Bet365 and CrownBet, have proven experience in operating retail wagering in several overseas markets.<sup>75</sup> A totalisator system is simpler to operate than a fixed odds business and can be readily acquired, either through a bid for RWWA (which has a totalisator) or from a third party supplier.<sup>76</sup> In statements provided to the Tribunal, Ladbrokes and CrownBet have identified several issues that would need to be met for them to bid for future licences.<sup>77</sup> But any potential bidder, including Tatts, faces these or similar issues in challenging Tabcorp. As such, they underscore point (b) above; and
- (e) Lastly, a State Government can take steps to ensure that it is not disadvantaged in any future auction process. Dr Flavio Menezes, an expert in the economics of auctions with significant practical experience consulting to governments in this area, describes various strategies that can be adopted by a government to achieve a high sale price. These include setting an optimal reserve, setting a longer exclusive licence period and structuring the

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<sup>72</sup> Cooke, [200] ff.

<sup>73</sup> Cooke, [207]-[210].

<sup>74</sup> Attenborough, [143]; Cooke, [78] and [80].

<sup>75</sup> Brown, [25]; Barry, [150].

<sup>76</sup> Cooke reply.

<sup>77</sup> Brown, [28(a)]; Tyshing, [454].

format of the auction to encourage new bidders.<sup>78</sup> The expert reports filed by the other interveners and the ACCC do not satisfactorily address Dr Menezes' analysis.

**(iii) Concerns about the availability of pooling services**

53. The ACCC also raises a concern that the merger is likely to result in the loss of a potential supplier of pooling services. Three brief points are relevant in this context.

54. *First*, the removal of Tatts does not affect the availability of pooling services. Tatts has never offered pooling services to third parties in the Australian wagering market, [HIGHLY Confidential to Tatts] [REDACTED]<sup>79</sup> Given this evidence, the loss of Tatts makes no difference to the future availability of pooling services within Australia – whatever that level may be.

55. *Secondly*, the question of pooling services only arises in relation to WA. In Victoria, the pool is big enough by itself that any bidder for the Victorian exclusive retail wagering licence is not likely to require access to pooling services.<sup>80</sup>

56. *Thirdly*, in relation to WA, Tabcorp and RWWA have entered a long-term pooling deed, which is designed to ensure that any potential purchaser of RWWA will be able to obtain access to Tabcorp's SuperTab. The ACCC says it is concerned that "Tabcorp is seeking to address a substantial competition concern, the loss of competition in pooling services, through a long-term behavioural commitment in a deed".<sup>81</sup> But the availability of pooling services is not adversely affected by the merger; on the contrary, the proposed acquisition improves the current position by providing the State with an assurance it would not have in the absence of the merger.

**(iv) Concerns in relation to racing vision**

57. The ACCC asserts that the merger may increase Sky's dominance in relation to the acquisition of racing vision from principal racing authorities (**PRAs**).<sup>82</sup> The ACCC and CrownBet submit that there is a national market for the acquisition of racing media content and rights, whereas Tabcorp and Tatts submit that that racing media is more naturally characterised as an industry related to the wagering market, rather than a

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<sup>78</sup> Menezes, [73] to [77], [211].

<sup>79</sup> Cooke, [168].

<sup>80</sup> Cooke, [97] – [99].

<sup>81</sup> ACCC report, [4.113].

<sup>82</sup> ACCC report, [1.24] – [1.27].

market in its own right.<sup>83</sup> However, for the reasons set out below, the precise characterisation does not matter much.

58. The ACCC asserts that the proposed acquisition may reduce competition with Tabcorp/Sky in the acquisition of racing vision content, with the result that PRAs will obtain less for media rights. In support of this assertion, the ACCC says that Tatts has an "incentive" to bid for media rights in the future, either by itself or possibly in a joint venture with Racing.com.<sup>84</sup> But Tatts has never bid for media rights in the past, and has no interest in doing so in the future.<sup>85</sup> Similarly, it has never approached Racing.com about a possible joint venture, nor been approached by them.<sup>86</sup> This is yet another instance (like pooling services) where the commercial likelihoods do not support the concerns expressed.
59. The ACCC's analysis also fails to acknowledge the competitive dynamics in relation to the acquisition of racing vision. Rights holders possess significant countervailing power and are not beholden to Sky. This is illustrated through the experience of Victoria, NSW and, most recently, South Australia.
60. In Victoria, Racing Victoria chose not to sign an exclusive deal with Sky, but instead chose to create Racing.com.<sup>87</sup> Similarly, in NSW, Racing NSW granted non-exclusive digital rights to William Hill. Both of these developments occurred in a jurisdiction where Sky was already "vertically integrated" with the tote operator.
61. In South Australia, in the recent tender process conducted by Thoroughbred Racing SA (**TRSA**), Racing.com has competed vigorously against the incumbent rights holder, Sky. According to Mr Jim Watters, TRSA's CEO, the proposed merger will not decrease TRSA's bargaining power in relation to the sale of its media rights, nor the value of those rights. He also rejects the ACCC's contention that if it were dealing with the merged entity it would simply award media rights to Sky because of the revenue sharing arrangements between the merged entity and TRSA. According to Mr Watters, the best way for TRSA to maximise the payments which are made to it is to have its racing vision shown as broadly as possible across Australia. Mr Watters does not regard Tatts as a "counterweight" in negotiations – Tatts is not, and never

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<sup>83</sup> ACCC report, [4.124] and Houston, [140]; cf Form S, page 112; Pleatsikas, [16].

<sup>84</sup> ACCC report, [1.26], [4.142] – [4.146].

<sup>85</sup> Cooke reply.

<sup>86</sup> Cooke reply.

<sup>87</sup> Catterall, [8].

has been, a tenderer for South Australian vision rights, and has never been in a position to influence the sale of those rights.<sup>88</sup> For similar reasons, Mr John Vincent, the Managing Director of Western Australian Turf Club, rejects the contention that the merger will adversely impact the sale of media rights in WA.<sup>89</sup>

**(v) Concerns about gaming systems and related services**

62. The proposed divestiture of Tabcorp's business, Odyssey, to Australian National Hotels Pty Ltd addresses the overlap between the two companies in respect of gaming monitoring businesses in Queensland.<sup>90</sup>
63. The ACCC has raised two further "public detriments" with regard to the operation of the merged firm's central monitoring system (**CMS**) in NSW, namely: (i) the merged firm would have an incentive to misuse data to advantage its gaming machine consultancy service; and (ii) the merged firm would degrade third parties' access to its CMS to advantage its own business.<sup>91</sup>
64. These concerns should be rejected. It would make no sense for the merged firm to risk its monitoring business for the sake of its smaller consultancy service. Further, both types of conduct would involve the merged entity breaking the law, and breaching its monitoring licence. The ACCC has not identified any basis to justify its suspicion that the merged entity may engage in such serious misconduct.

**E. Conclusion**

65. Tabcorp has identified a significant, tangible public benefit to the proposed transaction. By contrast, the alleged detriments are speculative and conceived in self-interest.

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**Gerald Ng**

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8 May 2017

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<sup>88</sup> Watters, [35]-[36], Watters reply.

<sup>89</sup> Vincent reply.

<sup>90</sup> ACCC report, [1.28].

<sup>91</sup> ACCC report, [1.30].