



**APPLICATION FOR AUTHORISATION BY THE
AUSTRALIAN COMPETITION TRIBUNAL**

Commonwealth of Australia

COMPETITION AND CONSUMER ACT 2010

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2017

Re: Application by Tabcorp Holdings Limited under section 95AU of the Competition and Consumer Act 2010 for an authorisation under subsection 95AT(1) to acquire shares in the capital of a body corporate or to acquire assets of another person

Applicant: Tabcorp Holdings Limited
Interveners: Racing Victoria Limited (ACN 096 917 930)
Harness Racing Victoria (ABN 22 764 910 853)
Greyhound Racing Victoria (ABN 76 642 748 029)

Affidavit of: **Simon Christopher Barrile**
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Occupation: General Counsel of Racing Victoria Limited
Date: 13 April 2017

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Filed on behalf of the Intervener

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A. INTRODUCTION

I, Simon Christopher Barrile, of 400 Epsom Road, Flemington, Victoria, 3031, General Counsel, Racing Victoria Limited, say on oath:

- 1 I am the General Counsel of Racing Victoria Limited ACN 096 917 930 (**Racing Victoria**).
- 2 I make this affidavit to describe the historical background and processes which led to the issuing, on 19 December 2011, of the Wagering and Betting Licence by the Victorian Minister for Gaming pursuant to the *Gambling Regulation Act*

2003 (Vic) to Tabcorp Wagering (Vic) Pty Ltd (**Tabcorp Wagering**). A copy of the Wagering and Betting Licence appears at Tab 23 of exhibit DF-1.

B. MY BACKGROUND AND EXPERIENCE



- 3 I have been employed by Racing Victoria since 2001 in a range of roles which always included that of principal in-house solicitor including:
 - a) Legal Counsel from 2001 to December 2012;
 - b) Executive General Manager of Corporate Services from 2013 to September 2014; and
 - c) General Counsel to present.
- 4 I have been a Senior Fellow at the University of Melbourne Law School and lectured at the University in Racing Industry Law and Regulation, which is a post graduate subject that was last taught by me in June 2016.

C. PRIVATISATION OF THE VICTORIAN TOTALIZATOR AGENCY BOARD (TAB) IN 1994

- 5 The Victorian Totalizator Agency Board (**TAB**) was privatised by the Victorian State Government in 1994 by listing Tabcorp Holdings Limited ACN 063 780 709 (**TAH**) on the Australian Stock Exchange and offering its shares for sale through an initial public offering. TAH's relevant subsidiary was granted an exclusive gaming and wagering licence under the *Gaming and Betting Act 1994* (Vic) to conduct off-course retail and pari-mutuel wagering and operate electronic gaming machines (**EGMs**) in venues for a term of 18 years from 15 August 1994 until 15 August 2012 for a consideration of \$597.2 million. The witness statement of Douglas John Freeman (**Freeman Statement**) describes this process in paragraph 13(a).
- 6 The privatised business was required to enter into a joint venture agreement and other arrangements with the Victorian Racing Interveners (being Racing Victoria, Harness Racing Victoria and Greyhound Racing Victoria) (**VRIs**), through their special purpose vehicles, VicRacing Pty Ltd ACN 064 067 849 (**VicRacing**) and Racing Products Victoria Pty Ltd ACN 064 067 867 (**Racing Products**). Under this joint venture arrangement, the VRIs received funding to sustain and grow the Victorian racing industry which was the 'quid pro quo' of the exclusivity in relation to off-course retail and pari-mutuel wagering and the duopoly concerning EGMs (**1994 Joint Venture**).
- 7 With respect to EGMs (but not off-course retail and pari-mutuel wagering), there was a duopoly with the other gaming operator licence granted to Tattersalls.

D. CHANGES TO WAGERING AND GAMBLING POLICY IN VICTORIA IN 2008

- 8 On 10 April 2008, the Victorian Government announced substantial changes to the gambling licences. A copy of the Government's announcement titled "New

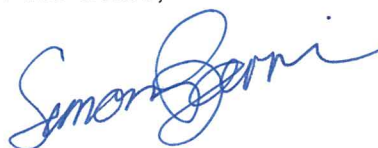




Structure for Gaming in Victoria Beyond 2012" is attached and marked as Annexure SCB-1 to this Affidavit. The key changes included that the racing industry would no longer receive 25% of TAH's gaming machine profits but that the new licensee would be required to offer "no less favourable terms" to the racing industry than those that applied under the existing gaming and wagering licence held by the relevant TAH subsidiary.

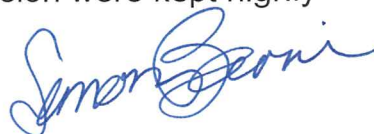

- 9 The new Betting and Wagering Licence (**Current Licence**), that would be issued by the State to the successful bidder for conducting betting and wagering on sports and racing, provided for an exclusive retail network and pari-mutuel betting pool in Victoria, for the period from 16 August 2012 to 15 August 2024, with an option on the part of the Victorian Government to extend for a further two years (to August 2026). The exclusivity is given effect to by section 4.3A.2 of the *Gambling Regulation Act 2003* (Vic) which states that no more than one wagering and betting licence can be granted at any one time.
- 10 As the Current Licence would no longer have the gaming revenue stream to support the funding of the Victorian racing industry, the Victorian Government, consistent with its policy of supporting a "growing and viable" Victorian racing industry, decided to re-direct a proportion of state taxation on pari-mutuel wagering to the VRIs, by way of a Victorian Racing Industry Benefit (**VRIB**) to cover the loss of gaming revenue.
- 11 The Government solicited input from a range of stakeholders in connection with the new arrangements. The Office of Gaming and Racing discussion paper titled "Wagering Licence Post 2012" is attached and marked as Annexure SCB-2 to this Affidavit. In consultations with the Government, the VRIs were concerned, and remain concerned, that the VRIB would decline over time because of the growth in fixed odds betting and the decline of pari-mutuel wagering. Nonetheless this approach was provided for in the constituent agreements that came into place once the Current Licence had been awarded and it continues to apply.

E. PROCESSES FOR THE AWARDING OF THE CURRENT LICENCE

- 12 On 5 November 2008, the Victorian Government issued a Notice calling for registrations of interest in the grant of a wagering and betting licence under the *Gambling Regulation Act 2003* (Vic). A copy of this notice appears at tab 25 of exhibit DF-1.
- 13 To manage and support the bidding process for the Current Licence, the Victorian Government established the Gambling Licence Review Project Team (**Project Team**) and made significant amendments to the *Gambling Regulation Act 2003* (Vic), which, at a high level:
 - a) provided for the bidding processes and the award of the Current Licence by the Minister for Gaming, for and on behalf of the State;

- b) confirmed that the Minister must only award the Current Licence if satisfied the funding for the Victorian racing industry was on “no less favourable terms” than those existing under the 1994 Joint Venture; and
 - c) prohibited the VRIs, and any of their constituent clubs, from bidding for the Current Licence under section 4.3A.3(4) of the Act.
- 14 In addition to the legislative scheme under the Act, the Victorian Government established probity protocols and processes to provide for confidentiality and to ensure fairness and a level playing field at all stages in the bidding and licensing process. A copy of the Probity Plan for the Victorian Racing Industry Consultations with the Victorian State Government and Interested Parties on the Wagering Licence Awarding Process & Associated Victorian Racing Industry Funding Arrangements of 2008 is attached and marked as Annexure SCB-3 to this Affidavit.
- 15 The role of the Project Team was to manage all stages of these processes. A central role of the Project Team was to design and implement a process that sought to ensure that both TAH (as the incumbent operator and licensee) and any other bidder or bidders would offer competitive bids both in terms of maximising the one-off licence fee paid to the State and in terms of maximising the ongoing funding provided to the racing industry through the 12 year duration of the Current Licence.
- 16 Section 4.3A.7 of the Act sets out the statutory criteria that are required to be satisfied by applicants for the grant of the Current Licence, which included probity, financial and operational capacity and capability, the “promotion of a viable and growing Victorian racing industry” and the funding of the Victorian racing industry on a “no less favourable” basis.
- 17 TAH’s advantages as the incumbent included ownership of the TAB brand, ownership of customer details, being the provider of pooling services operations, ownership and operation of existing wagering systems, management capability and experience in establishing, maintaining, refurbishing and operating a retail network across more than 90 TAB agencies and over 600 pubs and clubs as well as being the exclusive supplier of national three code live racing coverage via Sky Channel to those retail wagering outlets.
- 18 In order to ensure that as broad a range of competitive bids could be obtained as possible, the VRIs were, by virtue of section 4.3A.3(4) of the Act (and the definition of “prohibited person”), prevented from entering a business association with any prospective bidder in relation to the Current Licence and strict probity requirements kept the VRIs at arm’s length from the bidders with special probity arrangements in place with respect to the 1994 Joint Venture.
- 19 The detailed preparatory work by the Project Team commenced in or around 2006 and the details of the analysis undertaken as to how to minimise TAH’s incumbency advantages and maximise competitive tension were kept highly

confidential. The role of the VRIs was confined to advising the Project Team in relation to the nature of the terms and conditions of the new joint venture that would support the ongoing funding of the Victorian racing industry during the 12 year period of the Current Licence. In 2008 the Government of Victoria published a Notice calling for Registrations of Interest in the grant of a Wagering and Betting Licence which is attached and marked as Annexure SCB-4 to this Affidavit. The Notice identified at page 47 in relation to wagering and betting business model and capability, that a Registrant was to provide a high-level business model. As part of its advice role to the Project Team and in assisting the assessment of financial models submitted by any Registrant, the VRIs engaged Ernst & Young to develop a financial model and prepare a business case to estimate the industry funding requirements post 2012. This model incorporated into the VRIs' submission to the Victorian Government which is attached and marked as Annexure SCB-5 to this Affidavit. Attached and marked as Annexure SCB-6 is a presentation to the VRIs by the Department of Justice titled "Overview of Gambling Licence Process", dated 27 June 2008.

- 20 Section 4.3A.7(2)(c) of the Act required that the bidders each offered to enter into arrangements with VicRacing and Racing Products that were no less favourable to VicRacing and Racing Products than the arrangements that were then in place under the existing 1994 Joint Venture.
- 21 From 2009 into 2010, the VRIs prepared draft agreements, and negotiated their terms with the Project Team, which appointed an external business consultant to vet and challenge the proposed terms to ensure that they were appropriate and commercial. At the end of these extensive negotiations, the VRIs indicated that they were satisfied with a form of the proposed new joint venture, which the Project Team determined was acceptable to the State for placing before short listed applicants for the Current Licence, upon which those applicants would consider and price their respective bids to the State.
- 22 At no time in the bidding process did the VRIs have knowledge of the applicants or their respective bids other than what may have been reported in the media. A copy of the article published in the Australian Financial Review dated 16 January 2009 titled "Race is on for the new licence" is attached and marked as Annexure SCB-7 to this Affidavit. Notwithstanding the foreign interest referred to in the article, as mentioned in paragraph 99 of the Freeman Statement, Tabcorp Wagering, Tatts and Ladbrokes plc registered their interest and were invited to apply for the Current Licence.
- 23 Until mid-2011, the VRIs received no information with respect to the bidding and selection processes, which was solely the domain of the State. As mentioned in paragraph 99 of the Freeman Statement, Tab 26 of exhibit DF-1, and in a Sydney Morning Herald article titled "Ladbrokes exit race for licence" (attached and marked as Annexure SCB-8 to this Affidavit), Ladbrokes withdrew from the process in October 2010.




F. ANNOUNCEMENT OF TABCORP WAGERING AS THE SUCCESSFUL BIDDER FOR THE CURRENT LICENCE

- 24 On 19 July 2011, the Victorian Government publicly announced that Tabcorp Wagering was the successful bidder for the Current Licence (see the Media Release by the Honourable Michael O'Brien MP, attached and marked as Annexure SCB-9 to this Affidavit). Following that announcement, and until 19 December 2011, the VRIs, through VicRacing and Racing Products, conducted direct negotiations for the first time with TAH, for the purposes of finalising the new funding arrangements for the Victorian racing industry. This resulted in a suite of agreements comprising the Joint Venture Agreement, the Racing Information Agreement and the Racing Program Agreement, being concluded with the relevant TAH subsidiaries on 19 December 2011 for the commencement of operations on 16 August 2012 (**Current Joint Venture**). The relevant agreements are referred to in paragraph 230 of the Freeman Statement.
- 25 Under the Current Joint Venture, the VRIs are obliged to develop a racing calendar in each racing year that optimises wagering on races while the relevant TAH subsidiaries are obliged to fund the Victorian racing industry from the operations conducted under the Current Licence (including the payment of the VRIB which is a diversion of funds sourced from the reduction of State taxation on pari-mutuel wagering).

G. BENEFITS DERIVED BY THE VICTORIAN RACING INDUSTRY FROM ARRANGEMENTS PURSUANT TO THE CURRENT LICENCE

- 26 The Victorian racing industry receives an economic benefit, after tax, from all fees and profits derived under the Current Licence of over [**HIGHLY CONFIDENTIAL TO RACING VICTORIA**] with the balance paid to TAH. Funding derived under the Current Licence and New Joint Venture has been, and is, fundamental to the prosperity of the Victorian racing industry and the economic contribution that it makes to both the Victorian and national economy. For example, turnover on the Melbourne Cup, as the pinnacle of Victorian thoroughbred racing attracts \$210m of national wagering turnover, from which the racing industries in all States and Territories derive an economic benefit. Additionally, the Australian Racing Fact Book 2015/2016, which appears at Tab 8 of exhibit DF-1, identifies that Victorian thoroughbred races accounted for eight of the top 20 races and 11 of the top 25 races by prizemoney in 2015-16. Further, the Australian Racing Fact Book 2015/2016 at page 42 identifies that Victoria has the largest number of individuals who own horses who have raced in 2015/2016, the largest number of horse syndicates and the largest number of syndicate members.
- 27 The competitive tender for the 2012 licence resulted in the Government receiving a licence fee payment of \$410 million and the VRI receiving a significant economic uplift of approximately [**HIGHLY CONFIDENTIAL TO**]



Simon Gormie
Paul Gordon

RACING VICTORIA [REDACTED] as compared with funding to the VRI under the 1994 Joint Venture in its last financial year.

- 28 Section 10.2A.3 of the Act established a Review Panel to report to the Minister on the re-licensing process. Mr Ron Merkel QC, Mr Mick Ellis, Mr David G Green and Ms Barbara Yeoh were appointed to the Review Panel. In 2010, the Review Panel prepared a report titled "Report Of The Review Panel To the Minister In Relation To Expressions Of Interest In The Grant Of A Wagering And Betting Licence" (**Merkel Report**). This report of the Review Panel appear at Tab 28 of exhibit DF-1.
- 29 I was not privy to the Project Team's work and the initiatives that they undertook because all those details were the subject of strict confidentiality arrangements. However, it is clear that the initiatives were concerned with ensuring a competitive blind bidding process from bidders. In the end, it is clear from the Merkel Report that only Tatts, TAH's closest competitor, provided a fully compliant rival bid. This is not surprising, given TAH's incumbency advantages and the factors that underpin that advantage. Tatts is the only other participant that possesses the attributes, business capability and interest to acquire and operate the Victorian retail network and pari-mutuel pool. This would be lost with the Proposed Merger.
- 30 The Merkel Report does not suggest that the Project Team identified any mechanisms to ensure that the bids were beneficial to the State and the Victorian racing industry, other than initiatives that promoted Tatts' ability to make a competitive bid and thereby motivate TAH to offer a competitive proposal to better any other proposal in the bidding process. In other words, what drove competition for the Current Licence, and the successful outcome of that process, was the presence of Tatts as a competitive, viable alternative to TAH for the Current Licence.

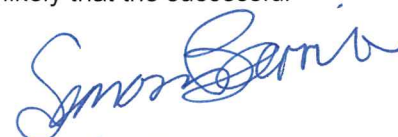
H. MY CONCERNS ABOUT THE PROPOSED MERGER ON FUNDING ARRANGEMENTS FOR THE VICTORIAN RACING INDUSTRY

- 31 The following paragraphs set out my concerns, based on my experiences in the processes relating to the issue of the Current Licence, arising from the Proposed Merger in terms of the future funding arrangements for the Victorian racing industry.
- 32 If the Proposed Merger were permitted to proceed, the merged entity would hold a virtual monopoly of pooling services (even assuming that Racing Wagering Western Australia (**RWWA**) remains under its present ownership). Accordingly, the merged entity would be the only bidder with any experience running an Australian retail wagering network and pari-mutuel operation and the likely permanent loss of effective competitive tension in the bidding process for the wagering and betting licence in 2024. This is reflected in the fact that TAH and Tatts were the two final bidders for the Current Licence.

- 33 If the underlying market for the wagering and betting licence is not competitive, then the funding of the Victorian racing industry is likely to decline, because without a competitive tender process, bidders will not be incentivised to make their most attractive offer in order to win the bid, which will likely result in significant economic detriments that includes the loss of jobs, stagnant or reduced prizemoney and the decline in the number and quality of racing for wagering and experience as a sport. These detriments will be felt beyond Victoria because of the significance of the Victorian racing industry to racing industries in other States.
- 34 I understand that the State government is currently turning its attention to the policies and processes that will be adopted in the lead up to the licence arrangements post 2024. There is an extensive lead-in time as was evident in relation to the 2012 licence when the State government first appointed its internal policy unit in around 2006 to consider the policy and legislative implications, and issued the notice calling for expressions of interest in 2008.
- 35 If the Proposed Merger were to proceed, any bidder (other than TAH) would not:¹
- (a) have an existing pari-mutuel pool in Australia nor the information systems necessary to run a pari-mutuel wagering business;
 - (b) own a broadcasting entity with Australia-wide racing broadcast rights; and
 - (c) have any experience in the retail wagering environment in Australia.
- 36 These attributes were all ones which were essential for a potential bidder to possess in order to make a competitive bid for the Current Licence. In my experience, such attributes will undoubtedly again be necessary in relation to the licence arrangements post-2024. Any bidder who did not possess all of those attributes would be unable to make a bid that satisfied the requirement that the bidder enter into arrangements that are no less favourable as TAH's current arrangements in order to comply with section 4.3A.7(2)(c) of the Act. It is unlikely the State, through any policy or other process, could address any potential bidder's, or bidders', failure to possess one or more of those attributes. Knowing this, TAH would also be in a position to refuse to make a compliant bid unless that section were repealed or amended to dilute its effect to provide for industry funding that may be less favourable to the VRIs, than that under the Current Licence.

¹ I note that currently the Western Australian TAB is owned and operated by the Western Australian government, and it is not clear who will own it when the bidding process for the 2024 Victorian licence commences. If the merger were to proceed, RWWA would either remain a State-owned entity, unlikely to bid for another State's licence, or if it were to be privatized, it is more likely that the successful purchaser would be the merged entity.



Simon Bernis

Sworn/Affirmed by the deponent at Adelaide

in South Australia

on 14 April 2017



Signature of deponent

Before me:



Signature of witness

PAUL LEE GORDON
*A Commissioner for taking affidavits in
the Supreme Court of South Australia*