



**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 Board, trading as Harness Racing Victoria (ABN 22 764 910 853)  
Greyhound Racing Control Board, trading as Greyhound Racing Victoria (ABN 76 642 748 029)

**Affidavit of:** **Giles Mansell Thompson**  
**Address:** 400 Epsom Road, Flemington, Victoria, 3031  
**Occupation:** Acting Chief Executive Officer of Racing Victoria Limited  
**Date:** 13 April 2017

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1	Second Affidavit of Giles Mansell Thompson affirmed on 13 April 2017	
2	Annexure GMT-1, being 2016 Annual Report of Racing Victoria	1

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Filed on behalf of the Interveners Racing Victoria Limited  
Greyhound Racing Victoria  
Harness Racing Victoria

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**A. INTRODUCTION**

I, Giles Mansell Thompson, of 400 Epsom Road, Flemington, Victoria, 3031, affirm:

- 1 I am the Acting Chief Executive Officer and Chief Financial Officer of Racing Victoria Limited (**Racing Victoria**). I am also a director of VicRacing Pty Ltd (**VicRacing**).
- 2 I make this affidavit in support of the intervention by Racing Victoria Limited (**Racing Victoria**), Harness Racing Victoria and Greyhound Racing Victoria (**Victorian Racing Interveners**) in the application by Tabcorp Holdings Limited (**Tabcorp**) under section 95AU of the *Competition and Consumer Act 2010* (**Competition and Consumer Act**) for an authorisation under subsection 95AT(1) to acquire shares in the capital of a body corporate or to acquire assets of another person (**Proposed Merger**) (the **Application to the Tribunal**).
- 3 I have affirmed an earlier affidavit in support of the Victorian Racing Interveners application to intervene in the Application to the Tribunal, being my affidavit dated 23 March 2017 (my **First Affidavit**). In this affidavit, I adopt the same definitions I used in my First Affidavit.
- 4 I make this affidavit from my own knowledge, unless stated otherwise. Where I refer in this affidavit to being informed of matters, I believe those matters to be true.

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- 5 The matters set out in this affidavit are based on my knowledge and experience gained from working in the thoroughbred racing industry and the gambling and wagering industries, my experience as a qualified chartered accountant and my knowledge of and participation in Racing Victoria's operations as a member of its Executive team. I first joined a wagering and gambling company in 2006 and then joined Racing Victoria in 2015. As the current Acting Chief Executive Officer and Chief Financial Officer of Racing Victoria, I am required to understand all aspects of its business and the thoroughbred racing industry, including associated industries related to gambling and wagering, and broadcasting of thoroughbred racing.

## B. VICTORIAN RACING INDUSTRY

- 6 A key basis for the appeal of racing as a sport is that punters are included, and are active participants, in the thrill of the race through the bets that they place on particular horses. Without a substantial prizemoney offering to attract quality horses, the punter would be left with substantially lesser quality and fewer fields to bet on. Without the funding that wagering and betting operators contribute to the industry, racing cannot meet the other costs to host events. In this way, the racing industry and the wagering and betting industry rely on each to provide their respective product offerings which together result in attracting punters. In the process a great deal of employment and economic activity is generated, the vast majority of which is in the racing industry, these participants are identified in paragraph 11 below.

### B.1 Victorian Racing Industry Participants

- 7 The three Victorian Racing Interveners are Racing Victoria Limited (**Racing Victoria**), Harness Racing Victoria (**Harness Victoria**) and Greyhound Racing Victoria (**Greyhound Victoria**) (**the VRIs**). Together, the VRIs constitute the Victorian racing industry.
- 8 The VRIs were granted leave to intervene at the Directions hearing before Justice Middleton on 31 March 2017.
- 9 The VRIs respectively control the sports of thoroughbred racing, greyhound racing and harness racing in Victoria. In this affidavit I will refer to the Victorian thoroughbred racing industry as the Victorian racing industry.
- 10 In Victoria, there are: 72 thoroughbred racing clubs;
- 11 Participants in and customers of the Victorian racing industry include:
- a) Breeders;
  - b) Owners and syndicate members;
  - c) Trainers and their employees;
  - d) Jockeys, drivers and apprentices;
  - e) Racing Club members, employees and volunteers;

- f) Racing spectators, both at racing venues and via media outlets; and
  - g) Consumers of wagering products, colloquially referred to as “punters”.
- 12 Participants in and customers of the Victorian racing industry include:
- a) Breeders;
  - b) 60,051 Owners and syndicate members (being those who have had a horse nominated to race in the last two years);
  - c) 1,015 licensed trainers including 23 visiting international trainers;
  - d) 322 registered **[check correct term]** jockeys (inclusive of 13 visiting international jockeys and 2 visiting international jumps jockeys);
  - e) 3,415 licensed stable employees (inclusive of 39 visiting international across the various categories);
  - f) Racing Club members, employees and volunteers;
  - g) Racing spectators, both at racing venues and via media outlets (a Racing Victoria Customer Market Sizing research project undertaken by Forethought in 2016 estimated that there are 920,000 race-goers and a total of almost 1.9 million race viewers);
  - h) Consumers of wagering products, colloquially referred to as “punters” were estimated at 1,880,460 in a Racing Victoria Customer Market Sizing research project undertaken by Forethought in 2016

## B.2 Racing and the Victorian economy

- 13 Each of the VRIs and the racing clubs for which they are the peak racing body are non-profit organisations. They are devoted to producing the highest quality racing product. In addition, the VRIs, as the peak racing body for their respective sports, they are responsible for the proper governance and maintaining the integrity of their respective sports. They are responsible for the training, licencing and registration of all key participants and the policing of their respective sports. Annexed to this statement and marked GMT-1 and GMT-2 respectively are Racing Victoria’s 2016 Annual Report and the 2016 Annual Report of one of the 72 Victorian thoroughbred racing clubs, Victorian Racing Club, which provide a snapshot of the manner in which and the purposes for which revenue is spent in the Victorian racing industry.
- 14 According to the witness statement of Douglas John Freeman dated 8 March 2017 (**Freeman Statement**) at tab 8 of DF-1, eight of the top twenty and eleven of the top twenty-five stakes races in Australia occurred in Victoria for the 2015/16 financial year.
- 15 The Victorian racing industry is responsible for a substantial contribution to the Victorian, and Australian, economies. For example, the economic and social

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benefits of Victorian thoroughbred racing have been evaluated by an independent study undertaken by IER in 2013 (**2013 Study**). The 2013 Study is attached as Annexure GMT-3 to this Affidavit. The study identified that the thoroughbred code in Victoria generates:

- a) \$2.1 billion per annum of economic value (real gross value added);
- b) 72,000 jobs and participation roles, comprising 12,300 jobs and 59,800 volunteer workers and hobby participants, including a racehorse ownership base of 50,000. In particular, 60% of these participants reside in regional Victoria;
- c) \$116 million in Goods and Services Tax revenue;
- d) 750 million overseas viewers;
- e) 207,500 international and inter-state tourists; and
- f) 71 racing clubs supported by more than 62,000 members (there are presently 72 racing clubs in Victoria).

16 Additionally, the 2013 Study also found that that in 2013:

- a) Victorian racing clubs financially assist close to 630 community organisations or charities;
- b) More than 430 community organisations share racing club facilities and resources; and
- c) More than 62,000 persons held racing club memberships.

17 The 2013 Study found that the corresponding economic impact of the whole Victorian racing industry, including Harness Racing and Greyhound Racing, shows an even greater footprint:

- a) \$2.8 billion per annum of economic value (real gross value added);
- b) An estimated 142,800 people are either employed by, or participate in, the Victorian racing industry or relevant support industries;
- c) In the 2010/11 racing season, 1,979 race meetings were held in Victoria (rising to over 2,000 race meetings in 2014/15), attracting more than 1.84 million attendees; and
- d) 83.7% of these race meetings were held in regional Victoria.

18 As not-for-profit organisations, the VRIs and their racing clubs apply their incomes to the development and promotion of racing through the provision of racecourse infrastructure, integrity services, race day operations, other principal racing authority functions and the payment of prize money, which supports the livelihood of industry participants and provides a direct benefit to the Victorian economy. Beyond direct economic value, racing is also widely regarded as an

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important social and cultural institution which helps build and connect communities, in particular throughout regional and rural Victoria. Approximately 46.5% of the total added-value impact occurs outside the metropolitan area. These regional communities and race meetings are the most vulnerable to reduced turnover from decreased competition under a merged entity, because in the scenario where the Victorian racing industry is receiving reduced funding, it would necessitate concentration on the race meetings with the greatest economic impact. Consequently, rationalisation of regional venues and clubs may need to be undertaken.

- 19 Additionally, as the provider of the most high-profile races (in particular, thoroughbred races in the Victorian Racing Carnival) in Australia, the Victorian racing industry holds a vitally important role in the promotion of both interstate and international tourism for Victoria. This will be further explored in the section headed 'Importance of Victorian Racing for International Participation' below.

### B.3 Importance of Victorian Racing for International Participation

- 20 The importance of Victorian thoroughbred racing for other States can be illustrated by the share of totalisator turnover generated on Victorian Thoroughbred races. The following table sets out the Victorian turnover share for five other states.

	NSW	QLD	SA	WA	Tasmania
2015/16 TAB Australian Thoroughbred Turnover (Australia Racing Factbook)	3,421	1,620	475	1,144	242
2015/16 Racing Victoria Thoroughbred Turnover	951	477	147	316	83
Share of Victorian Thoroughbred racing turnover of total turnover	28%	29%	31%	28%	35%

### B.4 International Participation in the Victorian racing industry

- 21 Victoria is the most important State in relation to international participation in thoroughbred racing in Australia.
- 22 In 1993, an objective was included for the Victorian racing industry to "internationalise" key Victorian thoroughbred race meetings, including races in

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the Spring Racing Carnival such as the Caulfield Cup, Geelong Cup, Cox Plate and Melbourne Cup. Since then, and in particular in the last ten years, there have been a large number of, high quality international horses (i.e. a horse that resides in a country other than Australia or New Zealand that was specifically sent to Australia for the purpose of racing) competing in Melbourne every year. For example:

- a) In 2016 there were 16 international thoroughbred horses and 25 individual starts across 13 races, including the following Group 1 races:

- Caulfield Cup;
- Cox Plate; and
- Melbourne Cup.

In particular, international starters placed in the top three in the Caulfield Cup and Melbourne Cup, and won the Bendigo Cup, Geelong Cup, Lexus Stakes, Queen Elizabeth Stakes and Zipping Classic.

- b) In 2015 there were 21 international thoroughbred horses and 29 individual starts across 12 races, including the following Group 1 races:

- Caulfield Cup;
- Cox Plate;
- MacKinnon Stakes;
- Melbourne Cup; and
- Emirates Stakes.

In particular, international starters placed in the top three in the Apache Cat Classic, Caulfield Cup, MacKinnon Stakes, Melbourne Cup, Queens Cup and BM70 Handicap, and won the Maiden Plate.

- c) In 2014 there were 19 international thoroughbred horses and 27 individual starts across 12 races, including the following Group 1 races:

- Caulfield Stakes;
- Toorak Handicap;
- Caulfield Cup; Cox Plate;
- MacKinnon Stakes; and
- Melbourne Cup.



In particular, international starters placed in the top three in the Caulfield Stakes, Monee Valley Cup, MacKinnon Stakes and Sandown Classic, and won the Caulfield Cup, Cox Plate and Melbourne Cup (in fact, international starters constituted three of the top five finishers in the 2014 Melbourne Cup).

- 23 For comparison, corresponding numbers for The Championships of NSW Thoroughbred racing over the last three years are relatively smaller:
- a) In 2014, there were two international thoroughbred horses and five individual starts;
  - b) In 2015, there was an increase to six international thoroughbred horses and eleven individual starts; and
  - c) In 2016, there was only one Japanese thoroughbred horse that was able to run.
- 24 I understand that between 2000 and 2015, international thoroughbred horses received \$33,875,100 in prizemoney in Victorian thoroughbred races. International thoroughbred horses have finished in the top three in the most lucrative race in Victoria, the Melbourne Cup, in every year since 2000 except for 2005. On five occasions in this period an international thoroughbred horse has won the Melbourne Cup.
- 25 The increasing number of international horses participating in the Spring Racing Carnival correlates with an increase in the number of international visitors to the event. These visitors booked over 55,000 bed nights, stayed on average for 5.3 days and spent nearly \$20 million during their stay (IER, 2015, p 9). A 2015 IER Study titled "Spring racing Carnival – Economic Impact Study" highlighting this correlation is attached as Annexure GMT-4 to this Affidavit.
- 26 In 2016 a Japanese horse named Curren Mirotic ran in the Melbourne Cup. This was the first year in which a Japanese thoroughbred horse competed in the Melbourne Cup and Japanese punters were permitted to bet on the Melbourne Cup. As a result, Japanese punters wagered \$8.73 million on the race. The Japan Racing Association only allows betting on a limited number of non-Japanese races, and only if the individual race involves Japanese participation. This means that if the owners of Japanese thoroughbred horses are disincentivised to enter the horses in the Melbourne Cup, this amount would not be wagered. The above illustrates the detriment to the Australian racing industry should opportunities to internationalise be diminished through more limited funding of the Victorian racing industry. A Racing Victoria Media Release detailing this is attached as Annexure GMT-5 to this Affidavit.
- 27 Increases in prizemoney are a major factor in attracting these international horses, which in turn attracts greater international interest demonstrated by additional international visitors and increased product and licensing fees from overseas.
- 28 While races in other states of Australia rarely have a significant number of international horses, the Melbourne Cup is overwhelmingly an international race



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with only one of the 24 starters in 2016 being an Australian horse (Racing Season 2015/16 Factbook, p 16) [Freeman Statement Tab 8]. In comparison, in the same year, as noted above, only one international horse participated in the entire NSW race calendar. This reflects the international status of the Spring Racing Carnival and the Victorian racing industry in general, which is quite distinct from the largely domestic focus of the other racing industries in other parts of Australia.

- 29 In 2013, the Victorian racing industry attracted over 750 million international viewers (see page 3 of Annexure GMT-3). In 2015, the Spring Racing Carnival attracted 23,924 international visitors (see Annexure GMT-4). In 2016, it was broadcast into 163 territories, simulcast in Hong Kong and Japan, live streamed to a global audience on Twitter, in the first live stream deal anywhere in the world outside of the United States and the #MelbourneCup Twitter reached number one in 25 locations. A Media Release from the Minister for Tourism and Major Events dated 29 March 2017 outlining this fact is attached as Annexure GMT-6 to this Affidavit.
- 30 A reduction in quality of Victorian thoroughbred races (including due to a reduction in wagering revenue for the Victorian racing industry) could also lead to a further reduction in wagering revenue from international customers. For example, the Melbourne Cup currently generates fees from the United Kingdom, Ireland, New Zealand, Singapore, South Africa, France, the United States and Japan. These fees will be significantly reduced if the Melbourne Cup diminishes in profile due to a reduction in quality of the race fields.

## **B. 5 Funding of the Victorian racing industry**

- 31 Funding for the Victorian racing industry is sourced from the following streams:
- a) race fields fees;
  - b) Joint Venture Distributions from the Joint Venture referred to in section B9 below; and
  - c) other non-wagering revenue (e.g. international distributions and rights fees).

### *Race field fees*

- 32 Is the fee charged to all wagering service providers paid for the publication and use of Victorian thoroughbred race fields.

### *Joint Venture and international distributions*

- 33 Distributions from the Joint Venture and international distributions are the largest source of funding for the Victorian racing industry. For example, in the 2015/2016 financial year, distributions from the Joint Venture constituted 50% of Racing Victoria's funding. Wagering revenue accounted for 84% of Racing Victoria's total revenue during this period. Chart A (below) provides the breakdown in sources of funds for Racing Victoria in the 2015/16 financial year.

## RACING VICTORIA REVENUE FY16

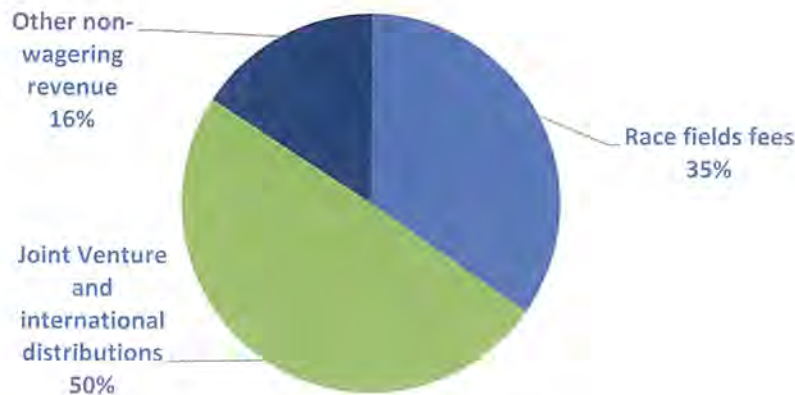


Chart A: Sources of funds for Racing Victoria in the 2015/2016 Financial Year

*Other non-wagering revenue (e.g. including international distributions and rights fees)*

- 34 As shown in Chart A, the non-wagering revenue constitutes only a small percentage of Racing Victoria's revenue. For example, as shown in Chart A, other non-wagering revenue accounted for 16% of total revenue for the 2015/2016 financial year.

### B.6 Impact of wagering on the Victorian racing industry

- 35 The wagering industry depends on the availability of a quality racing product on which bets can be taken, while the Victorian racing industry depends on wagering for a substantial share of its funding. For example, in 2016, 84% of total income referred to above equated to approximately \$340 million in 2016. This funding and product interdependence differentiates wagering on racing from wagering on other sports.
- 36 This funding relationship is dynamic. For instance, reductions in revenue to the wagering provider will impact on their payments to the Victorian racing industry, which will consequently impact on the Victorian racing industry's ability to provide a high quality product and to pay stakes. A reduction in stakes, in turn, impacts on owner returns and their decision to invest in the industry. Any reduction in stakes or investments would then impact on the quality of the Victorian wagering product. This demonstrates that the wagering industry, and the revenue it provides to the Victorian racing industry, is of vital importance to the sustainability of high quality thoroughbred, harness and greyhound racing in Victoria. Figure A (below) illustrates the importance of the contributions of wagering providers in providing a quality racing product to punters.

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Figure A

- 37 Retail wagering products, and pari-mutuel wagering products as a subset of retail wagering products, are particularly important to the Victorian Wagering Industry, because the Victorian Retail Licence is awarded on an exclusive basis. This exclusivity forms the economic basis to allow a greater share of wagering revenue to be provided to the Victorian racing industry in support of a quality racing product. Therefore, under the Joint Venture between the Victorian racing industry and the successful bidder for the Retail Licence (which is discussed in more detail below), the Victorian racing industry receives a percentage share of all profit generated from retail and pari-mutuel wagering products.

## B.7 Retail and Parimutuel Wagering vs Wagering on Corporate Bookmakers

- 38 I have reviewed the Freeman Statement and I generally accept his description in sections B.1, B.2, B.4, and paragraphs 45 and 46 of B.6 (although I notice that some of the details, for example dates, are not completely correct) which describe the different types of wagering operators and the historic development of the industry.
- 39 Section B.1 of the Statement explains when corporate bookmakers first become an option available to, and selected by a significant body of punters and how they have since built significant businesses. Notwithstanding that a significant part of their businesses have been built on punters who migrated to them from TABs, I do not accept that there is significant ongoing close degree of competition between the TABs and corporate bookmakers in significant parts of the customer base.
- 40 Racing Victoria incurs significant and necessary annual costs for attracting international horses to compete in races over the Spring Racing Carnival. In particular, Racing Victoria is authorized by the Commonwealth Department of Agriculture, Forests and Fisheries (DAFF) to operate Racing Victoria's quarantine facility at the Werribee International Horse Centre (WIHC) pursuant to the *Quarantine Act 1901* (Cth). The WIHC is a purpose-built facility consisting of 24 horse boxes in 3 separate stables with access to Werribee racecourse that allows international horses to continue training over the quarantine period in the lead up to racing. Annual accreditation and audits are conducted by DAFF. All

operational costs of the WIHC quarantine facility are absorbed by Racing Victoria which are not recovered from the connections of the international horses who have themselves incurred significant expense in relation to travel, accommodation and commitment over the quarantine period of at least 4 weeks on average. Any reduction of funding and/or the decline in international participation would adversely impact the financial capacity to maintain and fund the WIHC into the future which is an essential gateway for the importation of international horses for competition in Victoria's prestige races and all the economic and promotional benefits that flow from international participation.

- 41 The growth of corporate bookmakers and the increasing popularity of fixed-odds wagering, while attracting some previous customers of pari-mutuel wagering products, have also attracted considerable numbers of new customers into wagering. The customers who first bet through a corporate bookmaker do not generally migrate to the TAB and, similarly, once the TAB has lost a pari-mutuel punter to a corporate bookmaker that customer is not very likely to return to utilising pari-mutuel wagering products to any great extent. In this sense, most punters who start using corporate bookmakers are then not contestable to any significant extent by the tote products offered by the TAB.
- 42 Customers of the TABs (either in a retail outlet or on-line; whether they bet on pari-mutuel products or fixed odds provided by the TABs) generally often fall into one or more of the following categories:
- a) Some customers value the TAB retail experience while they bet. These customers value the retail environment and will often spend considerable time in the retail space, prior to, and after placing their wagers, researching form and odds, interacting with other customers and viewing races.  
  
These customers may alternate between pari-mutuel and in-TAB fixed-odds wagers, but would be unlikely to consider wagering products offered online or over the phone.
  - b) Some customers strongly prefer to use cash when purchasing wagering products. For example, in 2012 70% of Tabcorp's account deposits occurred in cash in retail outlets<sup>1</sup>. This overwhelming preference for the use of cash largely prevents those customers from being contestable by corporate bookmakers who are restricted from offering to supply wagering products in exchange for cash.
  - c) Many customers place wagers on racing events only very occasionally. Many of these may only place a wager in relation to one or two events each year, such as the Melbourne Spring Racing Carnival. While there is some adoption of online wagering products, these customers still primarily place bets either on course or in a retail environment. These customers tend to do minimal research on racing form, and rarely compare odds between different suppliers of wagering products. They do however place

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[https://www.tabcorp.com.au/TabCorp/media/TabCorp/Media%20Releases/TAH\\_Merrill\\_Lynch\\_Online\\_Presentation\\_Fin al.pdf](https://www.tabcorp.com.au/TabCorp/media/TabCorp/Media%20Releases/TAH_Merrill_Lynch_Online_Presentation_Fin al.pdf)



significant value on the social aspects and excitement associated with the large racing carnivals.

On course, these customers are also very unlikely to switch between the totes and corporate bookmakers in response to price changes or service changes. Instead they by and large use the totes' on course options given their brand saturation of these larger events and their significant advantages in terms of brand awareness over other on-course bookmakers.

In the retail environment, these customers often place a bet socially with colleagues, friends or family in the lead up to, or on the day of the major Spring Racing Carnivals. While possible through the use of mobile devices, they are unlikely in this environment to switch in any significant numbers between the totes and corporate bookmakers in response to price changes or service changes.

- d) Some customers have a strong preference for unique aspects of pari-mutuel wagers such as:
  - The market determines the odds for pari-mutuel wagers, instead of the bookmaker; and
  - There are some types of bets that are exclusively available as pari-mutuel wagers.
- e) There is also a class of punters for whom, because of the races they intend to place wagers on, there is no alternative to the tote, as it is the only supplier with sufficient volume to provide competitive odds.
- f) There are also some punters whose fixed-odds wagers are refused, or limited in value, by wagering providers, due to previous successes in the market. Suppliers of pari-mutuel wagering products do not impose these restrictions. Therefore, for these customers, there is no alternative to the totes.

- 43 Corporate bookmakers attract punters of the type who are not listed above.
- 44 There is not, however, complete isolation between these two groups of punters. There is a segment of customers who will place both pari-mutuel wagers and fixed-odds wagers with corporate bookmakers, and customers who will place wagers with both tote operators and corporate bookmakers. However, in my experience there is a significant percentage of wagerers who have a strong preference for placing a pari-mutuel bet and/or for using retail product.
- 45 One strong indirect indication that the pari-mutuel punter population and the population of punters who use corporate bookmakers is far from homogeneous are the stark demographic differences of the two populations.



- [REDACTED]
- 46 Qualitative comments in the same research indicate that the punters concerned had marked preferences for one or the other:
- a) "I bet early and don't trust the fixed odds available at the time I bet".
  - b) "I bet almost exclusively on exotics (doubles)"
  - c) "Because fixed odds betting is unpredictable and deductions are often made on winning bets."
  - d) "Smaller punter and always bet with the TAB. Fixed odds are only for those in the know."
- 47 In my experience there are other strong indications that there is an ongoing significant proportion of wagerers who have a strong preference for retail or tote wagering. I have observed that while Tabcorp and Tatts have maintained relatively stable market shares over the last few years, including their percentage of online wagers, there has been substantial competitive conduct between corporate bookmakers who compete amongst themselves largely unaffected by the actions of Tabcorp and Tatts. This competitive tension is evident from the fluctuations in market shares amongst corporate bookmakers.
- 48 For example, while corporate bookmakers such as William Hill and Betfair have lost ground, other corporate bookmakers such as Ladbrokes, Bet365 and Paddy Power appear to have made significant gains. The competitive tension that exists between these corporate bookmakers has resulted in some leakage of customers from the totes, but the majority of their revenue growth has been in attracting new customers to wagering services and competing for each others' customers.
- 49 The lack of competitive constraints posed by corporate bookmakers on this significant customer segment is also evident in the fact that the totes are able to sustainably earn twice the margin of corporate bookmakers. The Victorian TAB, for example, can sustainably earn margins of more than 15% on both pari-mutuel and fixed odds products while returns on Australian corporate bookmakers' businesses rarely exceed 7%.

## **B.8 Licensing for retail and pari-mutuel wagering**

- 50 Licenses for retail and pari-mutuel wagering are issued by each Australian State or Territory, and typically comprise exclusivity for both retail wagering outlets and pari-mutuel betting for the whole State or Territory. They enable the licensee to establish a retail network consisting of agencies and point-of-sale presences in the affiliated pubs and clubs that offer pari-mutuel and fixed odds wagering. They are also able to offer pari-mutuel betting through a range of distribution channels, such as retail, phone and online. According to the Freeman Statement at [103], there are currently 92 TAB agencies, and a further 639 licensed venues, such as hotels or clubs, operated under the VicTAB Joint Venture. TABs are also present at Racing Victoria's race courses.

- 51 The Victorian Wagering and Betting Licence (**Victorian Retail Licence**), which is contained in **tab 24** of **DF-1** for the Freeman Statement, is an exclusive licence to conduct pari-mutuel (totalisator) betting and retail wagering services in premises in the State of Victoria, awarded by the Victorian Government. The *Gambling Regulation Act 2003* (Vic) (**GRA**) prohibits the Victorian racing industry from bidding for the Retail Licence. Once the Retail (TAB) Licence is awarded, the Victorian Government collects the licence fees from the successful bidders according to the agreed payment schedule, and the winning bidder enters into a joint venture agreement with the Victorian racing industry, which governs the formal relationship between the winning bidder and the Victorian racing industry in relation to wagering and betting operations conducted under the Retail Licence. The quid pro quo of the exclusivity of the Victorian Retail Licence is the funding of the Victorian racing industry. This is reflected in section 4.3A.7(c) of the *Gambling Regulation Act 2003* (Vic), which provides that the Minister, in determining whether to grant or refuse a licence application, must be satisfied, amongst other matters, that the successful bidder had agreed to binding obligations with the Victorian racing industry that a less favourable than those last in force under the previous licence.
- 52 Maintaining competitive tension for future tenders issued by State governments, including the Victorian Government, is therefore of obvious importance to achieving the best outcome for users of totalisators, retail wagering customers, racing participants, race-goers, racing bodies and the State government itself.
- 53 The 2012 Retail Licence was awarded to Tabcorp in July 2011 (after a protracted competitive bidding process lasting over two and a half years from the initial notification inviting applicants to register their interest in the license to the final decision point). It was for a period of twelve years, commencing from 16 August 2012, which may be extended for a further period of two years at the discretion of the responsible Minister. Tabcorp's successful bid was for an initial licence fee of \$410 million, payable to the Victorian Government. Following the award, Tabcorp commenced a Joint Venture with the Victorian racing industry from 16 August 2012 (Joint Venture). The Joint Venture is discussed in more detail below.

## **B.9 Structure of the Joint Venture**

- 54 VicRacing was formed following the privatisation of the Victorian Totalisator Agency Board (TAB) to represent the three principal racing codes in Victoria: Racing Victoria, Harness Racing Victoria and Greyhound Racing Victoria.
- 55 VicRacing was formed for the specific purpose of entering into a joint venture with Tabcorp Participant Pty Ltd (ACN 064 304 105), the wholly-owned subsidiary of Tabcorp which was granted a wagering and betting licence by the Victorian Government in 2012.
- 56 The Joint Venture's operations involve the organisation, conduct, promotion and development of wagering and betting authorised by the Wagering and Betting Licence.



- 57 The Joint Venture offers customers pari-mutuel and fixed odds betting on thoroughbred, greyhound and harness racing, simulated racing, and approved sporting and other events in Victoria, interstate and internationally.
- 58 The Joint Venture arrangements (Arrangements) comprise:
- a) the Unincorporated Joint Venture Agreement dated 21 December 2011 between VicRacing, Racing Products Victoria Pty Ltd (**Racing Products Victoria**), Tabcorp Wagering Manager (Vic) Pty Ltd (**Tabcorp Wagering Manager**), Tabcorp Wagering Participant (Vic) Pty Ltd (**Tabcorp Wagering Participant**), Tabcorp Wagering (Vic) Pty Ltd (**Tabcorp Wagering**) and Tabcorp Wagering Assets (Vic) Pty Ltd (**Tabcorp Wagering Assets**);
  - b) the Racing Information Agreement dated 21 December 2011 between VicRacing, Racing Products Victoria, Racing Victoria, Greyhound Racing Victoria, Harness Racing Victoria, Tabcorp Wagering Manager, Tabcorp Wagering Participant and Tabcorp Wagering; and
  - c) the Racing Program Agreement dated 21 December 2011 between VicRacing, Racing Products Victoria, Racing Victoria Ltd, Greyhound Racing Victoria, Harness Racing Victoria, Tabcorp Wagering Manager, Tabcorp Wagering Participant and Tabcorp Wagering.
- 59 Under the Arrangements:
- a) VicRacing and Tabcorp Wagering Participant are the parties to the Joint Venture, with the Victorian racing industry receiving over **[HIGHLY CONFIDENTIAL TO RACING VICTORIA]** of distributions from the Joint Venture;;
  - b) Tabcorp Wagering Manager manages the Joint Venture on behalf of VicRacing and Tabcorp Wagering Participant; and
  - c) Tabcorp Wagering Manager operates the 2012 Retail Licence awarded to Tabcorp Wagering by the Victorian Government in December 2011.
- 60 Customers are able to place bets with the Joint Venture via the following channels:
- a) on-course;
  - b) on the telephone;
  - c) online by signing up for an account at tab.com.au or via the "Tab app" and electing to become a "Victorian" customer. Online betting via these channels is available to all Tabcorp customers (i.e. including customers of Tabcorp's operations in NSW and ACT), and not just the customers of the Joint Venture; and

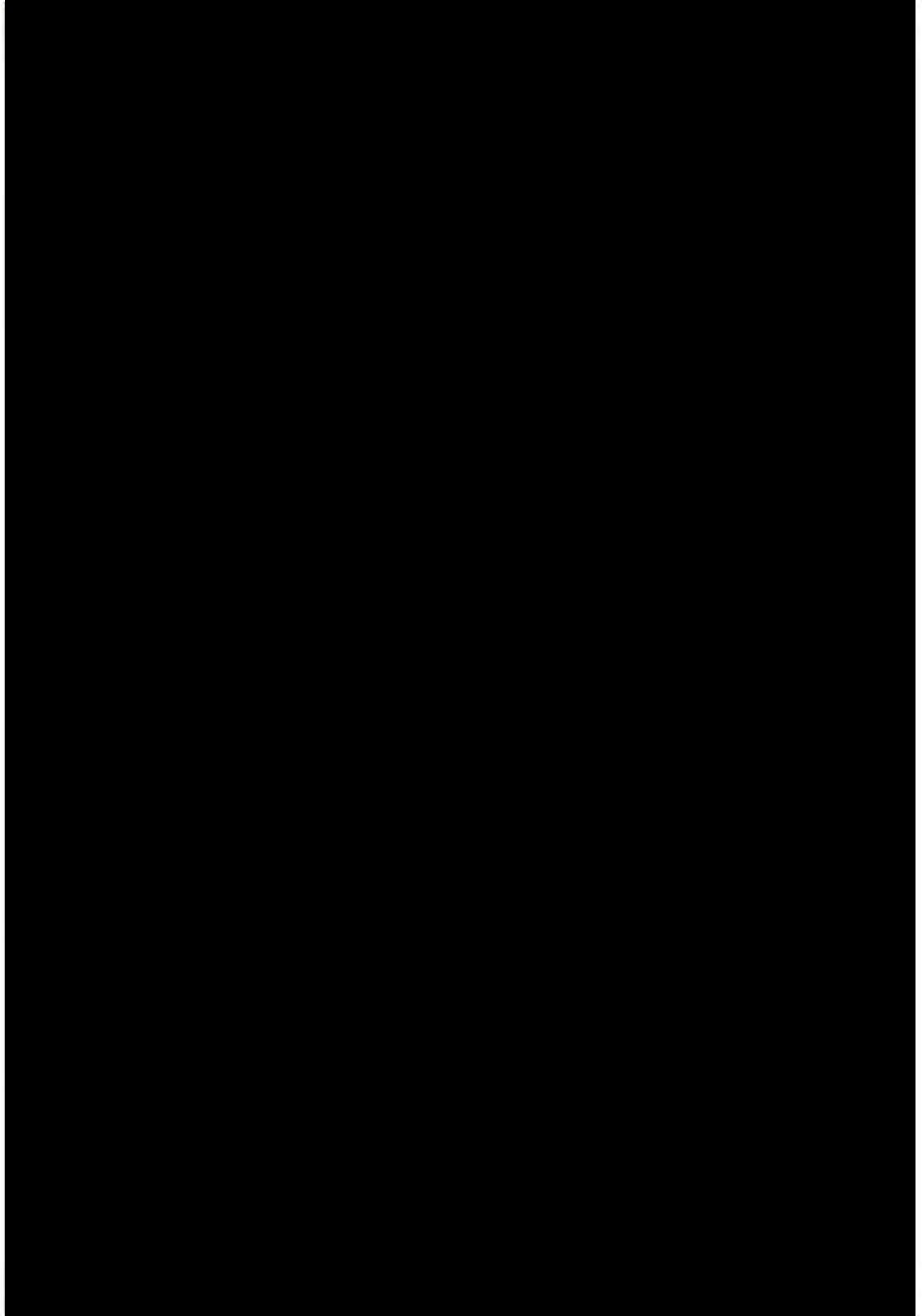
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- d) at the Joint Venture's off-course retail network. The off-course retail network consists of retail agencies, known as Victorian TAB Agencies, and licensed venues.

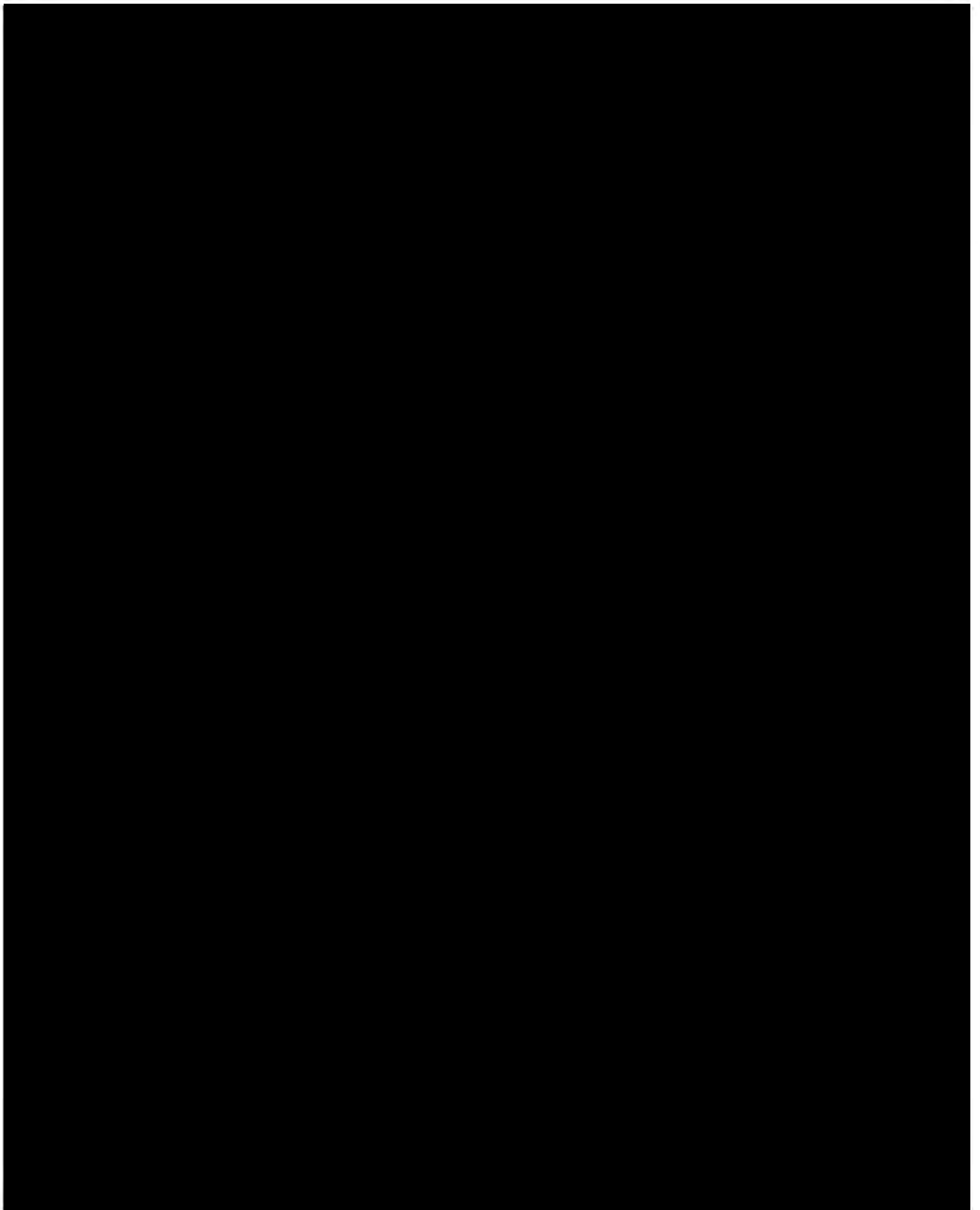
61

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64 Under the Arrangements, distributions under the Joint Venture for the previous three financial years have been as follows:

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A handwritten signature in blue ink, appearing to be 'L. M.', is located above the page number.

Financial year	Payments to Victorian racing industry entities (\$'000s)	Payments to Tabcorp entities (\$'000s)	Joint Venture profit (distributed evenly between VicRacing and Tabcorp Wagering (\$'000s)
2015/2016			
2014/2015			
2013/2014			

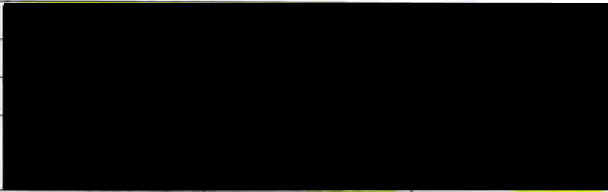
- 65 Aggregating these payments resulted in the following revenue shares between Tabcorp and the Victorian Racing Industry:

	Actual	Actual	Actual
	<u>2013/14</u>	<u>2014/15</u>	<u>2015/16</u>
VRI			
TABCORP			

*Ant*

*Jc*



			
VRI %			
TABCORP %			
	100.0%	100.0%	100.0%

## C. THE EFFECT OF THE PROPOSED MERGER ON BIDDING FOR THE 2024 LICENCE

### C.1 Likely Process for the 2024 Licence

- 66 Although the new Victorian Retail Licence commences in 2024, based on the 2012 process, it is likely to be a lengthy process that would start in approximately 2018. I have no reason to suppose that the process in 2024 will be materially different to the process adopted in 2012, described in the affidavit of Simon Christopher Barrile sworn 13 April 2017 (**Barrile Affidavit**), which delivered a successful outcome due to the existence of competitive tension in the bidding process, particularly between Tatts and Tabcorp. Where I refer to any events that occurred in 2012, my understanding of those events is coming from the Barrile affidavit.
- 67 Every time there has been a re-licence process or a change in the holder of the licence through privatisation, the Government in question has resolved to institute or maintain an exclusive retail and pari-mutuel licence as the best way of maximizing the benefits to the State government and the racing industry. For example:
- In Victoria, Tabcorp was awarded the Retail Licence in 1994 following the initial privatization of the Victorian TAB, and was subsequently the successful bidder for the 2012 Retail Licence.
  - In New South Wales, the NSW TAB was privatised through an initial public offering as TAB Ltd in 1998, and subsequently acquired by Tabcorp in 2004. In 2013, Tabcorp's exclusive Retail Licence was extended.
  - In the Australian Capital Territory the ACT TAB was sold to Tabcorp.
  - In Queensland, UniBet was initially listed on the Australian Stock Exchange, and Tatts' exclusive licence was extended in 2013.
  - In the Northern Territory, the NT TAB was privatised through sale to Tatts in 2000, and Tatts' exclusive licence was extended in 2015.

### C.2 Only Tatts Provides Significant Competitive Tension for Tabcorp 2024

- 68 As the incumbent, Tabcorp holds a significant advantage (incumbency advantage) over all other potential bidders.

- 69 Despite Tabcorp's incumbency advantage in the bidding for the 2024 Victorian Retail Licence, an independent Tatts would be a serious and competitive bidder. Tatts has recently demonstrated an ability to take over another State's retail and pari-mutuel operation when it acquired Tote Tasmania, which is discussed below. Therefore, without any competitive constraint to Tabcorp, Victoria will be severely and gravely jeopardised because Tabcorp will be in a position to be a price maker, to the significant detriment of the Victorian racing industry.
- 70 In recent license sales processes (in either Tabcorp or Tatts territories), Tabcorp and Tatts have always been the last two bidders considered:
- a) At the last Victorian Retail License tender process, Tabcorp and Tatts were the final bidders.
  - b) At the sale of ACT TAB, which was ultimately awarded to Tabcorp, Tatts and Tabcorp were the only two bidders shortlisted (see page 58 of the Auditor-General's Report titled "Sale of ACTTAB", attached to this Affidavit and marked as Annexure GMT-7.
  - c) At the sale of the Tasmanian retail wagering service operator to Tatts, Tabcorp was the only other potential buyer considered (see pages 15 to 16 and 24 of the Auditor-General's Report titled "Sale of Tote Tasmania", attached to this Affidavit and marked as Annexure GMT-8. Pages 15 to 16 note that there were "parties" (plural) engaged in the sales process, and that one criteria for the selection of the parties to engage in the sales process was "ability to pool with SuperTab, UNITAB or alternate pooling arrangements". Page 24 then states that "Two binding offers were submitted to Treasury n 23 November 2011", of which Tatts was clearly one, as the ultimately successful bidder. Based on the above, Tabcorp is the only possible other bidder).
- 71 Considering the 2024 Victorian Retail license tender in particular, an independent Tatts would retain a number of significant advantages over any other potential national or international bidder as follows:
- a) The operational capabilities required to operate retail and pari-mutuel systems in Australia;
  - b) The capacity and proven experience to take over and integrate a new retail territory (as proven by their most recent expansion into Tasmania after privatization);
  - c) Sufficient scale to sustain a profitable Australian wagering service operation (the benefit of combining operations in multiple territories without duplicating fixed cost elements is demonstrated by the cost synergies claimed by Tabcorp from the Proposed Merger);
  - d) Access to a sufficient Australian pari-mutuel wagering pool;
  - e) Stronger bargaining power for a fair share of advertising content on Sky Racing (as stated above); and



- f) Stronger bargaining power for access to racing vision (as stated above).

### **C.3 If the Merger Proceeds there will be Little or No Competition from Other Bidders**

- 72 If the Tabcorp/Tatts Proposed Merger were to proceed, there would likely be no other serious bidders for the 2024 Retail Licence, either domestic or international, due to limitations in capability, including in relation to:
- a) Lack of unique retail expertise or specific pari-mutuel expertise for corporate bookmakers. Although the holding companies of Australian corporate bookmakers (such as Ladbrokes, William Hill or Bet365) have a retail presence in the UK market, the UK business model is vastly different in that it relies on offering fixed-odds wagering and combines retail betting with gambling venues featuring electronic gaming machines. This means that corporate bookmakers have no expertise in either the Australian retail market or in pari-mutuel wagering in Australia.
  - b) Inability to meet funding requirements, because the successful bidder for a Retail Licence would be required to expend a large, upfront capital outlay, to establish a “bricks and mortar” retail network with pari-mutuel wagering and other capability. Additionally, the cost structure of the Licence would be much higher than the current arrangements. The winning bidder would effectively have to segregate two businesses (existing online and the Retail Licence), which becomes very complicated when the existing business has Victorian residents.
  - c) Outside Australia, the entities that are significant operators of pari-mutuel pools with retail networks (the PMU in France, the JRA in Japan and the HKJC in Hong Kong) are all owned by the government or established under statute, and therefore are likely to be constrained by law, policy or commercial imperatives from launching a substantial business outside their home jurisdiction<sup>2</sup>.
  - d) Issues related to access to vision, as there is no framework in place in which a corporate bookmaker would be guaranteed access to national racing vision. Currently, national racing vision is only available from Sky Channel, which is controlled by Tabcorp. Even if a framework were to be established, it is uncertain if it could be palatable for all parties. Sky contains advertising and ongoing logo / TM placement for TAB. Corporate bookmakers would not be keen to pay for access to the Sky vision while it shows advertisements or promotions for a competitor without them also being granted rights to advertise.

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<sup>2</sup> Depending on how you view the situation, a possible exception to this proposition is the French pari-mutuel operator (PMU), who has expanded outside France, but only within the European Union:  
<http://www.gamingintelligence.com/manda/33756-pmu-enters-german-horse-race-betting-market-with-tote-acquisition>

- 73 Without the existence of Tatts as an independent competitor, there is no reason why Tabcorp would not take these steps to the point it believes other competitors may bid. The Victorian Government can only maximise competition to the extent allowed by the competitive tension that exists in the market. That is, if there is no competition for the 2024 Victorian Retail Licence the Victorian Government, and consequently the Victorian racing industry, will not be able to obtain a satisfactory arrangement with the winning bidder (being the merged entity).
- 74 A combined Tabcorp/Tatts entity would not face significant competitive constraints for the reasons outlined above, and would be likely to seek to:
- a) reduce or remove one or more of the payments (for example, the program fee or product fees) that are made to the Victorian racing industry prior to the point that the distributions are made to the Joint Venture parties under the 50/50 Joint Venture.
  - b) move turnover (or for that matter, revenue) out of Victoria to another State as described in the section below titled "Licence Arbitrage" in paragraphs 102 to 112.
- 75 By taking a greater share of the revenue derived under the Victorian exclusive licence, the merged entity would leave less revenue to be distributed to support a vibrant Victorian racing industry with flow-on economic benefits..
- D. ADDITIONAL ANTICOMPETITIVE LEVERAGING BY TABCORP THROUGH SKY CHANNEL ARISING FROM THE MERGER**
- 76 The availability of live racing vision is very important to punters. Many punters are unlikely to place a bet on races that they cannot view live. Indeed wagering revenue on any given race is even higher if the broadcast starts several minutes before the commencement of the race itself.
- 77 There is a significant demand for vision to be supplied in a way that enables punters in each of the different off-course wagering cannels to be able to view races:
- a) "Wall to wall" vision in TAB retail wagering agencies;
  - b) At pubs and other outlets licensed to offer wagering products;
  - c) Through broadcast television (either pay TV or free-to-air TV);
  - d) Online via the wagering operators' websites; and
  - e) On mobile and portable devices via online streaming services.
- 78 The principal racing authority (or specific clubs) for each of the codes in each of the States and Territories is owner of the broadcast rights and periodically makes those rights available to broadcasters. The rights holder has two key priorities when licencing broadcast rights:



- a) The first (and more important) purpose is to ensure that its races obtain as broad and high quality coverage as possible in order to ensure that the revenue earned from wagering on the races is maximized. This means that there is a strong incentive to ensure that the races are made available to punters in all channels; and
- b) The second purpose is to earn revenue from the sale of the rights themselves.

- 79 Although the degree of 'home State' preference diminishes each year, there are still many punters who are significantly more interested in the races that occur in their home State or Territory. Nevertheless, most punters are also interested in races occurring in other States and Territories.
- 80 While there are a small number of punters who place a single bet on a specific race most spend a block of an hour or more in which they follow and bet on multiple races. This means that the vision provided to them needs to have a continuous line-up of content so that race follows race without a break.
- 81 No one code in any one State or Territory has sufficient content to provide a continuous line-up of quality racing content and, therefore, a fully effective broadcaster needs to obtain multiple rights packages from different principal racing authorities and similarly principal racing authorities have an interest in having their product shown together with other product as part of a continuous broadcast.
- 82 Sky Channel is the only comprehensive source of racing vision in Australia covering all three codes in all States and Territories. For the Victorian thoroughbreds, Sky Channel has a licence that is exclusive in relation to commercial venues and on the Foxtel platform<sup>3</sup>. It also has a non-exclusive licence on digital devices.
- 83 Racing.com has rights for Victorian thoroughbred racing only on free-to-air and digital platforms.
- 84 The unexpired duration of the current rights agreements in the five largest States as at 1 January 2017, and the unexpired duration of the TAB licenses in those States, is depicted in the following graph.

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<sup>3</sup> Sky has consented to the re-transmission of Channel 78 on the Foxtel platform

Jurisdiction	2017	2018	2019	2020	2021	2022	2023	2024	2025
<b>VIC</b>									
Thoroughbred									
Harness									
Greyhound									
<b>NSW</b>									
Thoroughbred (1)									
Harness									
Greyhound (2)									
<b>QLD</b>									
Thoroughbred									
Harness									
Greyhound									
<b>SA</b>									
Thoroughbred									
Harness									
Greyhound									
<b>WA</b>									
Thoroughbred (3)									
Harness									
Greyhound									

(1) William Hill digital stream allowed  
 (2) NSW Greyhounds are currently on a rolling month by month contract  
 (3) Perth racing agreement exists until 2022, thoroughbred racing outside Perth until 2021

■ Exclusive to Sky    !-! Non-exclusive

- 85 As explained above, each principal racing authority has a strong interest in its content being carried in all vision distribution channels (retail outlets, venues, Foxtel and over the internet), especially in the retail outlets in their home State. Each principal racing authority also has a strong interest in its content being carried by a broadcaster who can aggregate that content with other racing content to provide a continuous broadcast.
- 86 Each time a principal racing authority's broadcast rights deal expires, Sky Channel is the only party who can satisfy all the characteristics sought by the authority because broadcast rights expire in a staggered fashion. I therefore regard Sky Channel as enjoying a position of dominance in broadcast rights negotiations. Sky Channel has purchased so much racing content that it cannot all be accommodated on its primary channel (**Sky Racing 1**) and it has a secondary channel (**Sky Racing 2**).
- 87 Sky Channel's dominance is further entrenched because it:
- generally seeks and obtains a "first and last rights" provision in its rights contracts so that even after the current rights expire it has a right to match the bid submitted by any competing broadcaster; and
  - has an exclusive agreement with Foxtel that prevents any other broadcaster from being re-broadcast over the cable with an exception having been made only for Victorian thoroughbred races carried on racing.com which is re-broadcast on Foxtel.
- 88 Sky Channel has leveraged its dominant position on numerous occasions. For example:



- a) **The 30 minute trial:** In December 2015, Racing Victoria gave notice to Sky that it proposed to conduct 'a week-long trial utilising 30 minute gaps' for race meetings conducted in the period 6 February 2016 to 12 February 2016, with the aim of enhancing the customer experience by shortening the race day and providing predictability of programming for Victorian thoroughbred races. Under Sky Channel's race clash policy at the time, Victorian thoroughbred races ought to have had priority, as races that generated higher turnover (and thereby greater revenues for both the racing industry and Tabcorp) as against other races from all three codes (greyhound, harness and thoroughbred racing) that had lower turnover.

However, without consultation and unilaterally, Sky Channel changed its race clash policy and on occasions moved Victorian thoroughbred races from Sky Racing 1 to Sky Racing 2. This adversely impacted wagering revenues, not only from Victorian thoroughbred racing but also from other racing events. Many customers, whose subscription packages did not include access to Sky Racing 2, were not able to follow prestigious Victorian races.

- b) **The 2015 Blackout:** In 2015, during the most recent re-negotiation of Victorian thoroughbred vision rights, Racing Victoria entered into a new joint venture with Seven West Media for the live broadcast of Victorian thoroughbred content on free-to-air television and racing.com's digital platform. Racing Victoria also retained non-exclusive rights for granting live digital streaming of racing coverage to wagering service providers and their customers. These arrangements were made with the expressed intention that Racing Victoria would license to Sky Channel live racing content exclusively on subscription platforms (being commercial and pay TV), and digital non-exclusively on Tabcorp's digital platforms.

In response, Sky Channel halted coverage of Victorian thoroughbred racing, in a clear attempt to pressure Racing Victoria into reversing its decision, from 16 June 2015 to 8 August 2015 (**black-out period**). The black-out period had a significant negative effect on wagering turnover for the Victorian racing industry, and also for the Australian wagering industry overall, because Victorian racing attracts significant interstate betting volumes. This is because many customers were not able to follow some of the most prestigious races in Australia, either on their subscription racing channel or in TAB agencies or pubs offering TAB services. It was these negative business consequences that ultimately led to the end of the black-out period.

- c) **Joint Venture Proposed Coverage Package Dispute:** VicRacing is in dispute concerning the charges that Tabcorp has charged, and seeks to charge, the Victorian TAB joint venture for Sky Channel coverage and that dispute is currently the subject of arbitration proceedings. The Confidential Arbitration Documents are attached as Confidential Annexure GMT-9 to this Affidavit. [HIGHLY



- 89 Racing.com is the only other broadcaster currently operating and it has a much more limited suite of rights (i.e. Victorian thoroughbreds only, with the exception of rights to some international events) and a more limited range of distribution channels. The Victorian industry joined with Channel 7 to form racing.com because it was frustrated by the coverage and financial arrangements that Sky Channel had imposed upon the industry. Racing.com is providing evidence directly to the Tribunal detailing the challenges it faces and I will not duplicate that evidence in my statement. Suffice to say that the history of the establishment of racing.com, and its efforts to obtain a broader range of broadcast rights and access to viewers, is further evidence of the dominance of Sky Channel and not an example of ready entry to the racing broadcast market that could be emulated by others.
- 90 While I consider Sky Channel to be in a very strong position, its dominance is not totally unassailable in each and every viewer channel for the following reasons. A significant proportion of the costs of operating a racing broadcasting operation comprise the costs of purchasing the rights and of putting each broadcast together. Having purchased the rights and put broadcasts together, it is in the strong interests of Sky Channel to obtain revenue (both license fees and advertising revenue) from as many viewer channels as possible. The TAB licensee in each State and Territory control access by Sky Channel to the viewers who attend TAB retail outlets. This means there is a degree of mutual dependence between:
- a) the TAB licensee who requires quality, continuous vision to attract punters; and
  - b) Sky Channel who seeks to reach as many viewers as possible.
- 91 Sky Channel's parent, Tabcorp, controls access to the viewers in 90 agencies in Victoria until 2024, and 197 agencies in NSW until 2033 and ACT until 2064. However, in the non-Tabcorp TAB territories, Sky Channel must negotiate with the following customers to gain access to the substantial and valuable cohort of viewers who frequent the TABs in the other jurisdictions:
- a) Tatts controls access to the viewers in its 95 agencies in Queensland, 46 agencies South Australia, 7 agencies in the Northern Territory and 21 agencies in Tasmania; and
  - b) RWWA controls access to the viewers in 89 agencies in Western Australia.



- 92 Tatts has demonstrated that it asserts a degree of countervailing power by refusing to pay Sky Channel for at least some of its product on digital platforms.
- 93 Tatts could also threaten to move its 169 TAB agencies across from Sky Channel to racing.com (or another entrant) especially if it arranged with racing.com for it to make a concerted effort to obtain the thoroughbred broadcasting rights for Queensland in 2021 with the other Queensland rights to follow in 2023.
- 94 In 2024, anyone who wishes to bid for the Victorian licence will need to have a way to obtain wall-to-wall racing vision. Absent the merger, Tabcorp will of course have access to Sky Channel. Even without taking the approach referred to in the previous paragraph, Tatts would also be in a position to bid on the basis that it could combine its 169 existing agencies with the 90 agencies that it would open in Victoria to negotiate to obtain (more) reasonable terms for Sky Channel under threat of moving the whole portfolio to racing.com or another competitor.

**E. DETRIMENT TO INDUSTRY RESULTING FROM COERCIVE POOL MERGERS BY TABCORP POST MERGER**

- 95 At present, the three Australian pari-mutuel pools – the NSW pool, the SuperTab pool and the Tatts pool – are all reasonably balanced and viable. Although larger pools can provide some benefits, there are benefits of multiple pools that would be permanently lost if pools were merged. Furthermore, if the merger were to proceed and the merged entity and the merged entity were to control the manner in which pools are merged, it would provide an opportunity for that entity to benefit at the expense of the racing industry.
- 96 The pooling arrangements for each of the three pools has been the outworking of a competitive process. Tabcorp and Tatts have competed to make agreements to host smaller jurisdictions into larger jurisdictions and the resulting fees reflect that competitive process. As between the two Tabcorp pools, Tabcorp's two joint venture partners, the Victorian and NSW principal racing authorities have competed with each other to offer to host smaller jurisdictions into their pools.
- 97 If the merger were to proceed, the opportunity would arise for Tabcorp to cause artificial disruption that would drive several principal racing authorities to be coerced into shifting between pools or agreeing to merge their pool on terms that enabled Tabcorp to extract a commercial benefit for itself.
- 98 For example, if the WA licence were to be privatized, Tabcorp would be the only bidder with the sort of advantages that I have discussed above and it would almost certainly succeed in taking that licence. If it did, Tabcorp could decide which pool the Western Australian TAB would be associated with post privatization. Tabcorp would have the incentive to shift the Western Australian TAB to the largest of the other pools so as to disrupt the viability of the SuperTab pool such that it would lose scale and its members would have to seek Tabcorp's agreement to join one of the other pools. The likely sequence would be:

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- a) The remaining smaller contributors to the remaining SuperTab pool (each of the Tasmanian TAB and the foreign guests) who are net payers would soon find that the fees they pay to Victoria as host would not be justified by the level of diversity benefits and they would seek to shift to one of the other pools and Tabcorp could charge fees for agreeing to the shift.
  - b) With all the guests gone, even the host of the Superpool, Victoria would be short on diversity benefits and it would no longer be receiving hosting fees. Victoria too would be driven to seek Tabcorp's agreement to shift to another pool which, again, would provide Tabcorp with an opportunity to extract additional fees as a condition to agreeing to the shift.
- 99 All the fees that Tabcorp could extract for coercive shifting between pools would be lost benefits to the racing industry both in Victoria and nationally.

#### **F. DETRIMENTAL LICENCE ARBITRAGE AND RETAIL OUTLET ARBITRAGE ARISING FROM THE MERGER**

- 100 There are two areas in which the merged entity would have greater scope to exploit existing arbitrage opportunities in the market:

- a) Licence arbitrage; and
- b) Retail outlet arbitrage.

- 101 I discuss these in more detail below.

##### **F.1 Licence Arbitrage**

- 102 "Licence arbitrage" is a term used at Racing Victoria to refer to the situation where an entity that operates more than one TAB licence has an ability and incentive to direct a significant volume of wagering activity to the licence in which it gains or retains the highest share of wagering revenue and the one where the combined share paid to industry and in taxes takes the lowest share of revenue. For example, if a new punter from Queensland logs onto Tabcorp's site to set up a new pari-mutuel on-line betting account, Tabcorp can direct that customer to any of its three TAB licenced operations in the ACT, NSW or Victoria. At present, Tabcorp's incentive is to direct such a new customer to the ACTTAB which contributes a significantly lower shares to the racing industry than either the NSW or Victorian licences. Licence Arbitrage is therefore analogous to strategies employed by multinational corporations to minimise company taxes paying in a higher cost country by channelling profits to a lower taxing country.
- 103 Another mechanism to drive licence arbitrage is through scheduling arrangements that disadvantage territories with higher race fields fees (and without any tangible reduction in wagering revenue for the merged Tabcorp/Tatts entity, as it will be present in almost all Australian States and territories).



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- 104 The following is a specific example. The gross revenue (pre operating costs) for Tabcorp for an incremental pari-mutuel bet on Queensland thoroughbreds that yielded 14.5% under the current VIC TAB JV is compared in the following figure with the resulting allocation to the merged entity where that same bet is directed to their ACTTAB licence. If the bet is placed in the Victorian TAB, Tabcorp must contribute to the wagering tax, Victorian product fee and the Victorian racing industry Benefit. Not so if the bet is placed on the ACTTAB. Tabcorp earns [HIGHLY CONFIDENTIAL TO RACING VICTORIA] more (ie [HIGHLY CONFIDENTIAL TO RACING VICTORIA] instead of 5.74%) by steering the bet to the ACTTAB rather than VicTAB.

[HIGHLY CONFIDENTIAL TO RACING VICTORIA]

- 105 Overall, the Tabcorp jurisdictions are well above average contributors to government and industry while Tatts jurisdictions on average contribute considerably less. Nevertheless, Tatts too can engage in profitable licence arbitrage because, for example, its Tasmanian licence contributes significantly less to government and industry than does its Queensland licence.
- 106 At present, the ability to engage in licence arbitrage is not unfettered. The first kind of constraint upon licence arbitrage is contractual restrictions (the **First Licence Arbitrage Constraint**). The current Victorian joint venture arrangements contain provisions which [HIGHLY CONFIDENTIAL TO RACING VICTORIA]

However, there is a broad range of license arbitrage activity that Tabcorp can and does engage in that it maintains does not contravene the joint venture provisions. For example, advertising and promotions on Sky Channel are viewed by many NSW and Victorian TAB customers and even if they already

hold an account in their home state, advertising may encourage them to shift to the ACTTAB.

- 107 The second form of constraint upon licence arbitrage is competition (the **Second Licence Arbitrage Constraint**). There are currently three competing TAB operators – Tabcorp, Tatts and RWWA. One strong incentive for Tabcorp to keep a Victorian TAB customer happy to stay with the Victorian TAB because if they start to “shop around” they might move to ACTTAB (which would be of benefit to Tabcorp) but they equally might move to the Tasmanian licence (which would result in Tabcorp losing the customer to Tatts) or to the Western Australian TAB (which would result in Tabcorp losing the customer to RWWA).
- 108 The merger would remove the Second Licence Arbitrage Constraint and unambiguously result in much greater opportunity and incentive for profitable licence arbitrage. If the merger were to proceed, Tabcorp could take active steps to encourage as many NSW, Victorian and Queensland TAB customers to re-consider whether to open an account in a less expensive TAB jurisdiction. For example, it could reduce trading hours let the retail outlets run down and have a concerted Sky Channel advertising campaign to promote the ACTTAB or Tasmanian TAB.
- 109 In 2024, the Victorian industry is exposed to a much more acute licence arbitrage risk than NSW and Queensland because at that time the First Licence Arbitrage Constraint falls away. At that time, even if Tabcorp chooses to bid for the licence, the joint venture provisions are up for renegotiation and Tabcorp could negotiate for more laxidascal contractual constraints against license arbitrage.
- 110 There is, however, an even more damaging possibility or probability. If Tabcorp chose not to bid for the licence, under the joint venture agreement **[HIGHLY CONFIDENTIAL TO RACING VICTORIA]** [REDACTED] It could effectively stymie anyone else from making a competitive bid by refusing to provide Sky Channel and pooling services and simultaneously **[HIGHLY CONFIDENTIAL TO RACING VICTORIA]** [REDACTED]
- 111 The following table provides an indicative estimate of the impact to the Industry and Government of licence arbitrage.

**[HIGHLY CONFIDENTIAL TO RACING VICTORIA]** [REDACTED]



- 112 The effect post-merger of Tabcorp electing to pursue the strategy outlined in paragraph 110 would be a very steep decline in the share of wagering revenue obtained by the Victorian industry and a somewhat less steep decline in the other two States in which the industry receives relatively more from the TAB and instead increase revenue in the jurisdictions in which the industry and government benefit relatively less. The net effect would be a very significant diminution in the average returns to the Australian racing industry as a whole.

## **F.2 Retail outlet arbitrage**

- 113 Even prior to bidding for the 2024 Victorian Retail Licence, currently retail outlets, which are not owned and operated by the state licensee directly, typically have to pay two types of fees to the licensee:
- a) A fee for the operating licence; and
  - b) A fee for the Sky racing vision rights.
- 114 Both are essential in order to operate a retail outlet. The split between these two fees is particularly relevant for clubs and pubs that have to make a decision between two options:
- a) Subscribing only to racing vision, with wagering at the venue therefore occurring independently, predominantly on mobile apps; or
  - b) Subscribing to a full retail wagering operation, with live coverage on in-venue screens.
- 115 For retail territories where Tabcorp has an exclusive retail licence, this clearly represents an arbitrage opportunity, because Tabcorp can shift revenue and profits from the operating licence to vision subscriptions, or vice versa, while maximising overall group profits.
- 116 This arbitrage opportunity presents a concern for the Victorian racing industry, because:
- a) the main economic interest for Tabcorp is to maximise the number of retail wagering outlets, and to minimise the pubs and clubs that subscribe to vision only.
  - b) The Victorian racing industry's main interest is to maximise both the number of retail wagering outlets and the number of pub and clubs with racing vision.
- 117 Lower availability of live racing vision in pubs and clubs reduces competition between operators for wagering turnover. The Proposed Merger will expand the number of territories to which this arbitrage opportunity can be extended.
- 118 If the Proposed Merger were not to proceed, significant competitive tension would exist in bidding for the 2024 Victorian Retail Licence.

## **D. SUMMARY OF THE HARM ARISING FROM THE MERGER**



- 119 I have reviewed the claimed cost savings, revenue increases and pooling benefits claimed in the Statement of Johnston and for the reasons set out in my accompanying affidavit I do not consider that they amount to material benefits arising from the Proposed Merger.
- 120 Rather, the merger would almost certainly result in a substantial detriment to the public for the reasons set out in this section of my affidavit. The key detriments will be as follows:
- a) Detriments to the Victorian racing industry resulting from the substantial lessening of competition between Tabcorp and Tatts for the Victorian TAB licence commencing in 2024. I have explained how this would occur at paragraphs 66 to 75 above.
  - b) Detriments to the racing industry resulting from the loss of countervailing power exercised by Tatts against the Sky Channel. I have explained how this would occur at paragraphs 76 to 94 above.
  - c) Detriments especially to the Victorian racing industry but also to the NSW and Queensland racing industries due to significantly reduced industry funding arising from Licence arbitrage. Given the relative importance of these three jurisdictions in the over-all Australian racing industry, this Licence Arbitrage will have a significant detrimental effect on the average level of industry funding nationally. I have explained how this would occur at paragraphs 102 to 112 above.
  - d) Detriments to the Queensland, Tasmanian, ACT and NT racing industries due to retail outlet arbitrage. I have explained how this would occur at paragraphs 113 to 118 above.
  - e) Detriments arising Tabcorp being able to coerce principal racing bodies to merge their pari-mutuel pools on unfavourable terms. I have explained how this would occur at paragraphs 95 to 99 above.
  - f) Because the Victorian racing industry is highly internationalised, the loss of Victorian industry funding arising from (a) and (c) in particular, will result in a significant loss in export revenue.
- 121 The last of these detriments warrants additional explanation. In paragraphs 21 to 30 above, I have provided details of how the Victorian industry attracts tourists to attend races such as the Spring Carnival and also how very significant numbers of international horses run in Victorian races. Consistent with international norms established by the International Monetary Fund, the Australian Bureau of Statistics defines spending in Australia by non-resident travelers as one category of exports. Likewise spending in Australia by foreign horse owners for the period their horses are in the country is also counted as an export.
- 122 Both the inbound international tourists and horses are attracted by the significant prize money offered by the Victorian racing industry and promotional investments made by the Victorian industry since 1992. Much of this

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international investment has been possible because the Government has twice been able to obtain the most generous contribution to the racing industry in Australia through vigorous competition for the Victorian TAB licence.

- 123 As discussed above, there is already an opportunity for License arbitrage with the portfolio of licences that each of Tabcorp and Tatts have that would be significantly increased upon closing of the merger transaction between the two businesses.

#### E. ACCC ISSUES PAPER

- 124 In the table below I identify where I address the issues in the ACCC issues paper, in both this Affidavit and my Third Affidavit dated 13 April 2017 (**Third Affidavit**).

#	Issue	Paragraphs where addressed
1.	An issue for consideration is whether corporate bookmakers will provide a sufficient competitive constraint to the merged entity given that they are limited in the wagering products (fixed odds) and channels (online and telephone) in which they can compete directly with the merged entity.	38-49
2.	An issue for consideration is whether the proposed acquisition would remove Tatts as the only other credible bidder to Tabcorp for wagering licences.	50-53
3.	An issue for consideration is whether the proposed acquisition will remove the only other potential supplier of pooling services in Australia, resulting in the merged entity having increased market power in negotiating pooling arrangements.	95-99
4.	A preliminary issue is whether, as the dominant broadcaster of racing media content, Tabcorp/Sky is able to influence the level of wagering turnover generated by a race. For example, by determining whether races are broadcast on the primary wagering channel (Sky Racing 1) or demoting races to the secondary wagering channel (Sky Racing 2) or otherwise engaging in "blackout" conduct where vision for a race is not broadcast on Sky. This relates to whether Tabcorp/Sky currently has a significant degree of power or influence in its dealings with racing bodies because returns to racing bodies are driven by the amount of wagering that occurs on their racing product.	71-88
5.	If Tabcorp does have influence or power in its dealings with racing bodies through control of Sky, an issue for consideration is whether the merged entity will have	71-88

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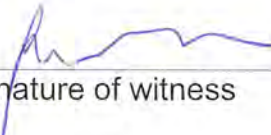
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	materially enhanced leverage in its dealings with racing media rights holders in Tatts retail jurisdictions (Queensland, South Australia, Tasmania and Northern Territory).	
6.	If Tabcorp does have the ability to use its control of Sky to influence the behaviour of a venue, an issue for consideration is whether the merged entity will have materially enhanced leverage in its dealings with licensed venues that supply wagering services/race vision in Tatts retail jurisdictions (Queensland, South Australia, Tasmania and the Northern Territory). It is relevant to consider whether the merged entity will have the ability and incentive to choose not to provide access to Sky to venues, unless the venue is willing to acquire the merged entity's retail wagering services exclusively	113-118
7.	An issue for consideration is whether Tabcorp's proposed divestment of Odyssey is likely to effectively address the detriments arising from the combination of the two active EGM monitoring operators in Queensland.	N/A
8.	An issue for consideration is whether the merged entity would have the ability and incentive to: <ul style="list-style-type: none"> <li>• Access and misuse commercially sensitive data of venues to gain a competitive advantage over competing suppliers of gaming systems and related services.</li> <li>• Foreclose competing suppliers of gaming systems reducing or restricting the functionality of competing gaming systems that operate through the monitoring system.</li> </ul>	N/A
9.	An issue for consideration is whether TGS and Bytecrafft's repair and maintenance businesses compete closely, or may do so in the future without the proposed acquisition. For example, if TGS commenced supplying repair and maintenance services on a stand-alone basis.	N/A
10.	An issue for consideration is whether other public detriments arise from the proposed acquisition.	100-112
11.	An issue for consideration is whether public benefits will arise from the claimed cost saving and efficiencies.	8-32 of Third Affidavit
12.	An issue for consideration is whether public benefits will arise from the claimed improved product and service	40-42 of Third

	offerings.	Affidavit
13.	An issue for consideration is whether public benefits will arise from the claimed prospect of a national pool following the proposed acquisition.	48-51 of Third Affidavit
14.	An issue for consideration is whether public benefits will arise from the claimed increase to gross national income.	21-30 & 121-123

Sworn / Affirmed by the deponent  
at MELBOURNE  
in  
on 13 APRIL 2017  
Before me:

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)  
)  
)  
Signature of deponent

  
Signature of witness

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within the meaning of the Legal  
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