



IN THE AUSTRALIAN COMPETITION TRIBUNAL

ACT 1 of 2017

RE: PROPOSED ACQUISITION OF TATTS GROUP LIMITED BY TABCORP HOLDINGS LIMITED

STATEMENT OF ANDREW TWAITS

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**STATEMENT OF ANDREW TWAITS**

1. I, Andrew Twaits, of 145 Spotiswood Road in the state of Victoria, Managing Principal of The Strategy Canvas, say as follows:

**Introduction**

2. In this statement, the '**proposed transaction**' means the proposed acquisition by Tabcorp Holdings Limited (**Tabcorp**) of Tatts Group Limited (**Tatts**) (the **Application**).
3. Unless otherwise defined in this statement, terms used in this statement have the same meaning as defined in the Form S filed by Tabcorp in the Application.

**Background and experience**

4. I am the Managing Principal of The Strategy Canvas - a consultancy business which assists corporate clients in the development and implementation of digital and data strategy (among other things). I provide strategic advice to companies in a diverse range of industries including retail, media, sport, financial services and mining. My clients have included Wesfarmers (and associated entities), BHP Billiton, AustralianSuper, Super Retail Group, Cotton On Group, Nine Entertainment Co, Southern Cross Austereo, Cricket Australia, Football Federation Australia, the NRL and a range of other large companies and well-known brands.
5. Since May 2012, I have been a member of the advisory board to the AFL Players' Association (**AFLPA**). In April 2017 I was appointed as the AFLPA's first independent director and chairman.
6. Between September 2013 and September 2016, I was a director of Racing Victoria Limited. Racing Victoria is the peak body for thoroughbred racing in Victoria. Its constitutional objectives are to develop, encourage, promote and manage the conduct of the racing of thoroughbred horses in Victoria. As a board member, I was involved in strategic decision making and negotiations and have personal knowledge of many issues that arose during that period relating to (among other things):
  - (a) racing media rights;
  - (b) wagering performance;
  - (c) race fields fees;
  - (d) race programming;
  - (e) the dispute between Thoroughbred Vision Network (**TVN**) and Tabcorp / Sky Racing and associated negotiations in respect of rights to Victorian thoroughbred racing content;
  - (f) the establishment of Racing.com; and
  - (g) the establishment of a joint venture between Seven West Media and Racing Victoria regarding the subsequent operation of Racing.com.
7. For the last two years on the board, I was the chair of Racing Victoria's Media Rights and Wagering Subcommittee, which met approximately monthly.

8. I was also chair of the Victorian thoroughbred industry's Media Rights Working Group between late December 2014 and May 2015, which was the period when negotiations were taking place in relation to rights to Victorian thoroughbred racing media content.
9. Between April 2005 and January 2012, I was employed by Betfair. Betfair is a betting exchange wagering platform that allows punters to effectively bet against each other on a range of racing, sporting and other events. I was the first employee of the Australasian operations and from October 2008, I was the Chief Executive Officer. I understand that in or about August 2014, Crown Resorts Limited acquired Betfair Group plc's 50% equity interest in Betfair's Australasian operations.
10. Between October 1999 and March 2005, I was employed by Cricket Australia (ultimately in the role of General Manager - Legal and Business Affairs). I joined Cricket Australia as its first in-house lawyer, with responsibilities that included behavioural policies for players, contracts, compliance and governance, and subsequently oversaw the development of Cricket Australia's strategic plan (including its digital strategy) and was centrally involved in the negotiation and documentation of both domestic and overseas media rights.
11. Prior to that, I was a lawyer at Brian Ward & Partners from May 1995 to September 1999. In that role, I worked on a range of sporting matters, including a gambling-related integrity inquiry for Cricket Australia (then known as the Australian Cricket Board).
12. My qualifications include:
  - (a) Bachelors of Commerce/Laws from Bond University (1993);
  - (b) Master of Laws from The University of Melbourne (1998); and
  - (c) Master Business Administration from the Melbourne Business School (2004).
13. I am also a Graduate Member of the Australian Institute of Company Directors (2012).
14. As set out above, I have worked in and around the sport, racing and wagering industries since 1995. This statement reflects my views having regard to my knowledge and experience gained in these industries. I note for completeness that I have been reimbursed for my time in connection with this statement at my standard consultancy rates. Neither I nor any related party of mine owns or controls any equities in any gambling or media entity.

#### **Scope of statement**

15. I have been asked by MinterEllison, whom I understand are the solicitors for CrownBet - which is an intervener in the Tribunal proceedings, to provide an evidentiary statement on issues arising in relation to the wagering, racing and media sectors as set out in the List of Issues filed by the ACCC with the Tribunal. The evidence set out in this statement is based on my own general knowledge and experience and, where relevant, my first-hand knowledge of specific matters referred to in this statement.

16. I have, for convenience, set out my evidence by reference to the ACCC's List of Issues. In providing this statement, I have had regard to the public version of the Form S of the Application and the public version of certain witness statements filed by Tabcorp in connection with the Application, including the statements filed by Mr Patrick Smith, Mr Flavio Menezes, Dr Ric Simes, Mr David Attenborough, Mr Doug Freeman and Mr Peter V'landys.
17. In giving this statement, I have not sought to provide general background information on the wagering, sporting and racing industries as I understand that such material is covered in other statements filed with the Tribunal. I have only provided background information to the extent relevant to the specific evidence I wish to give.

**Views on competition issues arising from the proposed transaction by reference to issues set out in the ACCC List of Issues**

18. I have read the List of Issues filed by the ACCC in relation to the proposed transaction. I make the following observations on the impact of the proposed transaction by reference to the issues raised in that list.

**Issue 1: 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.**

19. The ACCC's List of Issues identifies five questions that it considers are relevant to this issue:
- (a) *Do separate wagering product markets exist? In particular, are there separate product markets for the supply of totalisator (pari-mutuel) products and fixed odds products, or for the supply of racing products and sports (non-racing products)?*
  - (b) *Do separate wagering product markets exist for distinct distribution channels, in particular retail (bricks and mortar) wagering and digital (on line) wagering?*
  - (c) *Do separate functional markets exist across the wagering supply chain? In particular, are there separate upstream markets, including bidding for totalisator and retail licences, access to pooling arrangements or acquisition of racing media broadcast rights?*
  - (d) *Will corporate bookmakers competitively constrain the merged entity in the supply of wagering products?*
  - (e) *Are there customers for whom the corporate bookmakers are not an option or are not seen as a substitute for the wagering products provided by the merged entity?*
20. I address these issues below.
21. In my view, in order to properly understand the competitive dynamics that exist in wagering markets and the extent to which corporate bookmakers are likely to constrain the merged entity, it is important to appreciate that, at the very least, there are significant differences between the competitive constraints that exist in relation to totalisator wagering, in relation to fixed odds betting, in relation to online / telephone, and in relation to retail channels and racing and sports

wagering. Having said that, there are also important interdependencies between totalisator and fixed odds racing wagering products, and between retail and online / telephone racing wagering channels.

*Totalisator wagering versus fixed odds wagering*

22. While these products meet the same basic function of permitting a wager to be made on racing contingencies, there are important differences between them. I discuss those differences below by reference to limits on the degree of substitutability of fixed odds products for totalisator products, including:
- (a) the extent to which tote derivative products are substitutes for totalisator products;
  - (b) the extent to which fixed odds and tote derivative products are suitable for premium punters;
  - (c) the extent to which competition from corporate bookmakers would constrain the merged entity in relation to take out rates on totalisator wagering;
  - (d) the extent to which the inability of corporate bookmakers to offer retail wagering services limits the extent to which they can constrain totalisator operators; and
  - (e) the extent to which sports wagering products are substitutes for racing wagering products.
23. I then discuss a range of other competitive disadvantages currently faced by corporate bookmakers that would limit their ability to effectively constrain the merged entity if the proposed transaction proceeds.

*Tote derivative products*

24. In my view, it is necessary to commence with an accurate general description of tote derivative products and the role they play in competition between corporate bookmakers and totalisator operators. It would be wrong to suggest that those products are equivalent to (and substitutable for) products offered through totalisator pools, and that corporate bookmakers compete effectively against a totalisator with respect to these products. This is inaccurate because tote derivative products for exotic bet-types are, in general, subject to 'payout limits' which corporate bookmakers place on the total amount that can be won by a punter. Corporate bookmakers must do this because, unlike totalisator wagering, they bear the risk of having to pay out more in customer winnings than they have received in stakes. This risk is higher in the case of tote derivative products than it is for fixed odds products because the final odds (and therefore the payout liability) are not known until after the final dividends are declared by the totalisator operator. The risk is heightened in the case of exotic bet types because of the potential for very high dividends. Corporate bookmakers are unable to effectively manage their risk on these exotic bet types without imposing payout limits. Consistent with these observations, my understanding is

that, in relative terms, exotic bet types constitute a much higher proportion of total revenue for totalisators than for corporate bookmakers.

25. In contrast, totalisator operators do not face any risk in respect of such payouts and do not need to impose payout limits. Tote-derivative products offered by corporate bookmakers such as 'best tote' or 'tote plus 5%' on 'win' and 'place' pools are popular products because they typically offer a better price to some punters. However, these bet types are not made available by corporate bookmakers to all customers - particularly those who are more successful - because of the risk that is carried by the corporate bookmaker.
26. In conclusion on this issue, while corporate bookmakers offer tote derivative wagering, corporate bookmakers must necessarily impose payout limits on tote derivative exotic bets, in order to limit risk, and exclude some customers from accessing tote derivative prices on exotic and win/place bet types. In other words, because they cannot take on the risk of large payouts on these exotic products and they cannot offer tote derivative bet types to large segments of customers, corporate bookmakers are at a competitive disadvantage to Tabcorp and Tatts.
27. In my view, therefore, tote derivative products offered by corporate bookmakers are only direct substitutes for totalisator win and place bet types offered by totalisator operators in circumstances where the customers are transacting online or via telephone, have relatively low prospects of winning, and are not staking large amounts on individual markets.

#### *Premium punters*

28. In my experience, it is commonly understood within the racing industry that there is a segment of punters who participate in pari-mutuel wagering markets in Australia and internationally that are referred to as 'premium punters'. I note that some of the statements filed by Tabcorp in support of the Application tend to equate 'large punters' with 'premium punters' or the 'premium sector' of the wagering base. In this context, 'large' means a punter that stakes large or very large amounts of money either on an individual wagering market and / or over a period of time.
29. I agree that these punters would fall within the 'premium punter' segment of the wagering market. However, I would define this segment as not only being defined by the volume of wagering undertaken but by the sophistication and skill of the customer base. In other words, most of this customer segment is comprised of punters that, at least to some degree, seek to make some part of their living from gambling and have some degree of success in doing so. They are experienced and sophisticated punters, who are very disciplined and methodical in their research and their wagering strategies. Many of them are able to achieve profit-on-turnover rates well above that of the 'average' punter (including the average 'well-informed' punter) as a result. Some of the largest premium punters employ large numbers of staff to conduct research, assess 'form', build algorithms and develop, execute and review wagering strategies.
30. From the perspective of large or premium punters, there are at least four essential aspects that any wagering operator must be able to offer them in order for that wagering operator to successfully compete for their custom:



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- (a) first, they must be able to 'get on' (that is, they require a wagering service that will consistently accept large, often very large, bets) regardless of their win/loss ratio or betting behaviour, in a market that is sufficiently liquid for their purposes;
  - (b) second, they must be able to technically interface with the wagering operator (typically via an 'application programming interface' (**API**) in a way that enables them to reliably place very high volumes of bets, often simultaneously, very close to the start of a race;
  - (c) third, they must be offered volume-based rebates to improve their probability of making a profit; and
  - (d) fourth, they must be able to access up-to-date pre-race information about the size of individual pools and bet distribution.
31. Corporate bookmakers (and the fixed odds operations of Tabcorp and Tatts) are unable to meet the requirements of this category of premium punter because:
- (a) they cannot accept similar amounts of turnover from successful (or even moderately unsuccessful) punters, and in the case of exotic bet types they already offer a less competitive bet type;
  - (b) the payout risks associated with bets placed very close to the start of a race is difficult, if not impossible, to effectively manage. This is particularly the case for high volumes of exotic bet types that can be placed by a single customer;
  - (c) offering price advantages to premium customers would have a further negative impact on their operating margins; and
  - (d) they only have access to publicly available information about pool sizes and bet distributions, which is materially inferior to the live information held by totalisator operators.
32. In contrast, Australian totalisator operators can and do service this customer segment effectively via their pari-mutuel products because:
- (a) they bear no risk on pari-mutuel bet types and are agnostic as to the win/loss ratio of particular customers;
  - (b) they have invested in sophisticated mechanisms that allow premium punters the ability to reliably place very high volumes of very large bets, sometimes simultaneously, into pari-mutuel pools;
  - (c) they offer rebates to customers based on volumes, which, depending on the size of the rebates, materially reduces the risk to the premium punter but has no bearing on the risk to the totalisator operator;



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- (d) they are able to provide preferred access to information about pool sizes and bet distributions in ways that allow premium punters to feed that information into their own analysis and transactional tools.
33. The only other type of Australian licensed wagering operator that can service this customer segment is Betfair Australia, a licensed betting exchange. A betting exchange operator can service these customers better than a corporate bookmaker because it offers a 'matching service' between parties with opposing wagers and makes revenue through commission. It does not bear transactional risk and will therefore not limit a punter from 'getting on' or need to impose payout limits. However, the betting exchange product is also subject to limitations in its ability to compete with totalisator operators for premium punters (and more generally) and is not a perfect substitute because it may not offer sufficient liquidity (i.e. all bets have to be matched with opposing bets in a relevant market) and it does not offer exotic bet types.
34. The likely consequence of the proposed transaction for premium punters is that the two closest competitors will merge their pools, thus reducing available options and competition for these punters. In terms of Australian licensed operators, the only remaining constraint would be Betfair Australia, which can only pose a limited constraint in respect of the demand for win and place bet types (and none whatsoever for exotic bet types) for the reasons outlined above. There is also a real chance that if the proposed transaction proceeds, the effective price paid by premium punters will be materially increased – regardless of whether or not the Tabcorp and Tatts pools merge – because the merged entity will have an incentive to reduce the rebates it offers those customers. This is highly likely to have a negative impact on turnover and may have four corresponding negative impacts for the racing industry and government:
- (a) first, a decline in turnover may result in an immediate decline in revenue paid to the racing industry by totalisator operators;
  - (b) second, a decline in turnover from premium punters may negatively impact liquidity and price stability;
  - (c) third, a decline in turnover from premium punters, combined with the likely flow-on effect to the pari-mutuel pools more generally, may negatively impact the value of totalisator licences and the funding commitments that the racing industry is able to negotiate through the offering of those licences; and
  - (d) fourth, if there are insufficient attractive wagering options for these premium punters through Australian licensed wagering operators, there is a real risk that revenue will be redirected to illegal offshore operators who typically pay no product fees, nor tax nor generate any employment in Australia. Should this occur, it would not be in the interests of anyone in Australia, particularly the racing industry who provide the content on which this wagering occurs. There are also serious integrity concerns generated by wagering

with these offshore operators, many of whom do not have integrity and information sharing arrangements with Australian racing and sporting bodies.

35. For these reasons, I consider that the claims in statements filed by Tabcorp (for example paragraphs 10.4 and 10.5 of the Statement of Patrick Smith) that these premium (large) punters would have the 'best ability' to counteract any negative effects from the proposed transaction to be misconceived. These claims are predicated on the assumption that these punters would be able to bet with fixed odds operators, and corporate bookmakers in particular. For the reasons set out above, this is simply not the case.

*Competition in relation to take out rates*

36. As the Tribunal is likely aware, totalisator wagering is a pari-mutuel system of wagering in which the operator pools all wagers on a particular event that have the same bet type. The operator then deducts from the pool a set percentage as its commission (described as a 'take-out'). Punters who have placed bets on a particular wagering market effectively compete amongst each other for the balance of the pool, with final dividends set after the close of betting based on the weight of money wagered on each possible outcome.
37. Regulations in each State and Territory prescribe maximum take-out rates for totalisator operators licensed in those jurisdictions. I refer to Table 3 of Annexure A to the Form S, which sets out these rates. I understand that the take-out rates for Tabcorp win and place bets are capped at a lower rate than for exotic bets (for example, 14.25% to 14.50% for win/place bets compared with an average take out rate of approximately 20% for exotic bets). Leaving aside rebates to premium punters, I understand that Tabcorp generally deducts the maximum permissible take out rate on each of its bet types. It therefore appears to be pricing at or close to the regulatory maximum permitted under its totalisator licences.
38. The situation in the States and Territories in which Tatts holds totalisator licences is different. In those State and Territories, the maximum permissible take out rates for win and place bets is 25%. However, my understanding is that Tatts does not charge take out rates at or close to this maximum. While I am not aware in precise terms of its actual average take out rate, my understanding is that it applies take out rates for win and place bets that are very close to the take out rates charged by Tabcorp. It therefore appears that its pricing of totalisator wagering products is not constrained by the statutory maximum permissible rates, but must be constrained by other factors. I am also aware that, in general, corporate bookmakers operate on fixed odds yields that are significantly lower than Tabcorp's maximum totalisator take out rate (which is likely to be very close to its actual take out rate). It would therefore appear that Tatts is not currently setting its own totalisator take out rates with a view to directly competing with corporate bookmakers on price. It follows, in my view, that it is therefore highly likely that Tatts is in fact currently setting its actual take out rate by reference to Tabcorp's take out rates and is constrained in its pricing by Tabcorp. Two reasons it is likely that it is does this may be:

- (a) in order to remain attractive to more price sensitive punters (including premium punters) who are important in contributing to turnover volume and liquidity in its pools; and/or
  - (b) because it cannot effectively and profitably price discriminate between retail totalisator customers (who may be relatively less price sensitive and less able to switch providers) and on-line totalisator customers (who may be relatively more price sensitive and more able to switch providers than its retail customers).
39. For these reasons, I consider that the Statements in the Form S (for example at paragraph 15.1 and 15.2) to the effect that Tabcorp and Tatts have largely complementary pari-mutuel wagering products and that Tatts is not a particularly effective competitor to Tabcorp are inaccurate.
40. In relation to take-out rates, I consider that the following detrimental effects on competition are likely to arise from the proposed transaction:
- (a) first, the potential for future competition to stimulate discounting of take out rates and therefore demand for pari-mutuel wagering on racing is likely to be stymied or eliminated as a result of the proposed transaction;
  - (b) secondly, there will be a much greater commercial incentive for the merged entity to seek to increase its actual totalisator take out rates on pools operating under Tatts totalisator licences in Queensland, South Australia, Tasmania and the Northern Territory. Post-transaction, this strategy would be open to it, and in my view potentially very attractive to the merged entity. This is because totalisator wagering revenue that might previously have been lost as a result of increasing take out rates would (post-transaction) be likely to flow back in large part to the merged group. If price-sensitive punters are deterred from betting with Tatts as a result of price increases, many of them are likely to bet instead with Tabcorp totalisator products as it is the most directly equivalent product. Tabcorp would also have a strong incentive and ability to seek to shift those customers to one of its totalisator businesses operating in a zero tax regime, such as the ACT;
  - (c) to the extent that price sensitive punters in those jurisdictions chose fixed odds products instead, there would also be a relatively high likelihood that those bets would also be captured by either Tatts or Tabcorp fixed odds products because of the seamless brand and transactional experience the merged entity would be able to offer those customers across all of its channels. Those customers that were not so price sensitive, including for example many of Tatts' retail customers, would simply pay higher prices in the form of higher take out rates.
41. The reduction in competition in relation to take out rates is, in my view, a key issue arising from the proposed transaction that is not addressed in the Form S. It has the potential to be highly detrimental to punters, in terms of them paying higher effective prices for wagering activities, but in the medium to longer term it will also be detrimental to the racing industry. The potential consequences for the racing industry are twofold. First, if competitive pricing is not offered to

punters on racing, over time racing will continue to decline in popularity versus other forms of wagering (such as on sports) and the most price sensitive, high volume customers will be driven offshore and/or underground. In other words, the racing industry needs to ensure that punters find racing an attractive proposition in the long term to gamble on, and price and value to punters is an extremely important component necessary to ensure the longer term viability of the racing industry. Second, higher takeout rates will lead to lower turnover on pari-mutuel pools, which in turn will impact the attractiveness of pari-mutuel markets and, therefore, the value of pari-mutuel licences. As the value of totalisator licences diminishes, so too will the funding commitments that the racing industry is able to negotiate when those licences are offered from time to time.

42. If the proposed transaction does not proceed, I would expect to see Tatts and Tabcorp seek to advertise, offer new products, continue to invest in better customer experiences, price more competitively for some customer segments and otherwise promote their online products more vigorously outside their 'home States' as it is well understood that growth in wagering is occurring in the online channels and not retail channels. In their own home States they would also seek to leverage the advantage they have over the other totalisators and over corporate bookmakers by virtue of their retail premises exclusivity.

*Retail vs online channels*

43. In my view, retail wagering and online wagering channels are key sub-segments of the Australian wagering market. The retail channel is characterised by punters who may exhibit any or all of the following traits:
- (a) they bet directly with cash;
  - (b) they deposit cash into their wagering accounts, which can then be used to wager via different channels (including phone, internet and in-venue terminals);
  - (c) they do not otherwise have access to racing vision (eg they cannot access it through their own television or digital device);
  - (d) they may enjoy betting on cartoon racing (i.e. Trackside, which can only be offered in some jurisdictions, such as Victoria and NSW);
  - (e) they enjoy the social experience of being in an agency or PubTAB; and
  - (f) they enjoy betting in-play (i.e. after an event has started).
44. Whilst the proportion of reported retail wagering relative to online wagering has declined significantly over time, it still comprises a significant proportion of total turnover and remains an extremely important channel, including in relation to branding, customer insight generation, customer experience and customer engagement. In particular, the monopoly that totalisator operators have over retail wagering channels in their home State provides them with significant advantages in competing with operators in the online channel as a result of their ability to reinforce their brand, to convert retail customers to account-based online customers and to provide a greater range of engaging customer experiences.

45. As the Tribunal is no doubt aware, cash bets can only be accepted (and paid out) by retail operators (i.e. totalisators) and on-course bookmakers. Corporate bookmakers do not and cannot compete for cash punters. They are at a competitive disadvantage because they can only conduct wagering through account-based operations, which requires the customer to verify their identity. Corporate bookmakers exert only an indirect competitive constraint on retail wagering, to the extent that they can attract retail customers to open an account with them and bet online or by telephone instead of, or in addition to, wagering in a retail environment.

*Sports versus racing wagering products*

46. In my view, racing and sports wagering products are partial substitutes for each other. While there are similarities between the products and there is significant cross-over in the target demographics for these products, there are also significant differences.
47. The differences between the products include:
- (a) sports wagering is typically simpler to understand and form an opinion, as there are fewer runners (individuals or teams in sport) and high level analysis is easier to conduct in sports;
  - (b) media coverage of sports on which wagering is conducted is generally more widely available to the public and to the target customer demographic (this is generally true across all media channels, namely, free to air, subscription and digital streaming);
  - (c) sports wagering tends to appeal to a younger demographic than racing;
  - (d) sports wagering generally offers cheaper prices (in terms of bookmaking yields) than races and is therefore more attractive on price to the punter, but less profitable for the wagering operator;
  - (e) there are more, and more cost effective, advertising opportunities for corporate bookmakers to advertise and promote sports wagering (although this may be curtailed in the future by certain proposed legislation) than there are for them to promote racing wagering, due to the dominant position held by Sky Racing which will not permit advertising by corporate bookmakers;
  - (f) sports wagering is growing at a faster rate than wagering on racing; and
  - (g) sports wagering is much cheaper for wagering operators to offer than racing, because Australian sports charge much lower product fees than the racing industry and international sports charge no product fees.
48. In my view, the key implications of the above in the present context are as follows:
- (a) first, sport wagering is not a complete or effective substitute for wagering on racing for bookmakers;

- (b) secondly, wagering on sports is not a complete or perfect substitute for wagering on racing for punters;
- (c) finally, the experience of sports wagering demonstrates:
  - (i) the broad availability of media content is very important to the popularity and growth rate of wagering on that content;
  - (ii) access to digital racing media is critical to the ability of corporate bookmakers to effectively compete with the totalisator operators now, or if the proposed transaction proceeds, with the merged entity; and
  - (iii) broader dispersion of racing media on free to air and subscription TV together with non-exclusive access to digital racing media by corporate bookmakers not only enables corporate bookmakers to compete effectively, and directly benefits punters, but is in fact critical to the long term growth of wagering on racing and therefore to the longer term viability of the racing industry itself, particularly if the value of totalisator and retail licences declines.

*Removal of Tatts as a competitor*

49. For the reasons outlined above, I take issue with the statements in the Form S that Tatts is not a vigorous or effective competitor with respect to the supply of wagering products. I disagree that it is not currently an effective competitor, and also consider that this overlooks the competitive constraint that Tatts would impose on Tabcorp in the future. Tatts has the capability, resources and incentive to continue to grow its wagering business, particularly in the online channel. The brand investment they have made with the launch of UBET, the digital platforms associated with UBET and the digital pedigree of their CEO and other key staff are examples of the significant ways that Tatts could grow, innovate and compete in the wagering sector.

*Competitive advantages of Tabcorp and Tatts*

50. Tabcorp and Tatts have significant competitive advantages over corporate bookmakers. In particular, they have exclusive rights to conduct pari-mutuel betting in a particular jurisdiction, to conduct retail wagering operations and to offer other products such as cartoon racing (i.e. Trackside) as a way of increasing customer engagement and optimising customer spend. Through their strategic and commercial relationships with the racing industry, their totalisator products also attract substantially lower product fee rates in some jurisdictions (such as Victoria).
51. The value Tabcorp and Tatts place on the advantages conferred by these exclusive retail and exclusive pari-mutuel rights is reflected in the significant up front and ongoing consideration paid for such rights. In this respect, it is very important to recognise that the 'investment' and 'funding contributions' to the racing industry that Tabcorp and Tatts claim as a public benefit are, in fact, payments in consideration of these valuable rights.



52. These exclusive rights confer a range of competitive advantages, including the ability to conduct cash-based wagering and the benefit of operating a highly visible retail network, with its associated branding, promotional and customer engagement advantages. At present and in the future, these exclusive rights also confer a range of additional advantages in terms of the ability to 'leverage' those retail operations to advance online activities.

*Leveraging retail advantages – access to multi-channel consumers*

53. A key competitive advantage that Tabcorp and Tatts enjoy over corporate bookmakers is their ability to use their retail operations to drive customers into, and drive turnover associated with, the online segment. That is, they have a unique ability to access valuable multi-channel customers.
54. An example is Tabcorp's conversion of a significant proportion of its cash-based customers to accounts through its "TAB Rewards" loyalty scheme. The published terms and conditions of the TAB Rewards loyalty scheme permit Tabcorp to share customer details and information amongst its different wagering businesses in different jurisdictions. This provides a significant advantage for Tabcorp in retaining existing customers within the broader Tabcorp wagering group by sharing customers' profiles, behaviours and performance across its different businesses. This advantage would be amplified if the proposed transaction proceeds.

*Leveraging retail operations across jurisdictions – forum shopping*

55. This advantage also provides a basis for encouraging or incentivising customers to transfer to, or open their accounts in, other jurisdictions - in particular the ACT where Tabcorp has a very favourable tax regime, including a zero percentage tax rate for revenue generated on pari-mutuel betting.
56. Post transaction, the merged entity will have an ability (via loyalty schemes and significant investments in customer relationship management systems, customer insight tools and marketing automation) and incentive to shift large numbers of customers from high-tax jurisdictions to low (or zero) tax jurisdictions. Adding the Tatts customer database to Tabcorp's, and combining the parties' account management systems and digital platforms (including apps), would increase the merged entity's ability to incentivise customers to open their account in, or move them to, a jurisdiction where the merged entity pays little or no wagering tax, particularly on pari-mutuel products. This may lead to the merged entity paying less (not more) wagering taxes. These outcomes would represent a significant economic detriment.

*Claimed competitive disadvantages of Tabcorp and Tatts*

57. The Form S and statements filed by Tabcorp (for example paragraph 11.3 of the Statement of Patrick Smith) claim that Tabcorp and Tatts are at a significant disadvantage to corporate bookmakers because Tabcorp and Tatts experience higher marginal costs due to their higher taxes and higher funding obligations to the racing industry, and additional contributions to the provision of racing information services to the public.
58. In my view, these claims overlook the bases for those costs and funding obligations, as:



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- (a) those payments to the racing industry are made in consideration for the exclusive and valuable benefits conferred on Tabcorp and Tatts by state governments (i.e. exclusive retail rights and exclusive pari-mutuel rights), that Tabcorp and Tatts elected to acquire;
  - (b) the payment arrangements – upfront and ongoing – were negotiated by Tabcorp and Tatts at the time of acquiring those respective rights and in an environment where the regulatory and taxation regimes governing corporate bookmakers was well-established;
  - (c) there is substantial fluidity to those payment arrangements enabling Tabcorp and Tatts to negotiate more favourable payment terms and conditions, including through negotiating lower product fees or offsetting benefits;
  - (d) the costs relating to the provision of racing information services may be subsidised by contributions from local principal racing authorities (for example, in Victoria, form production and distribution and racing media rights are to some extent subsidised by the Victorian racing industry under the terms of the joint venture agreement);
  - (e) Tabcorp and Tatts possess significant power to push additional costs or burdens onto the racing industry (for example, in Victoria some of the costs associated with racing and sports sponsorships, staff redundancies, anti-money laundering compliance and technology development can be passed through to the racing industry under the joint venture agreement).
59. With respect to the claim that aspects of the current funding arrangements with Victoria are more favourable than prior arrangements (as claimed in paragraph 270 of the Statement of Patrick Smith), I consider that this ignores the aspects of the arrangements that are worse, and overlooks the arrangements as a whole. For example, as part of the 2012 licensing process in Victoria, the Victorian racing industry lost its share of poker machine revenue and Tabcorp was able to negotiate tax arrangements that incentivise them to transfer customers away from win/place pari-mutuel betting (to fixed odds alternatives), thus negatively impacting the value of the next totalisator licence process.
- Issue 2: whether the proposed acquisition would remove Tatts as the only other credible bidder to Tabcorp for wagering licences.**
60. The ACCC's List of Issues identifies the following questions that it considers are relevant to this issue
- (a) *Are Tabcorp and Tatts each other's closest competitors for state and territory wagering licences?*
  - (b) *To what extent is the proposed acquisition likely to reduce competition in any future state or territory government bidding process for a particular licence? Would the removal of Tatts as a potential bidder for a particular licence be likely to result in the merged entity being the only credible bidder for that licence?*

- (c) *Would the removal of Tatts be likely to materially reduce the licence value or benefits to the racing industry that can be achieved by state or territory governments?*
- (d) *Are state and territory governments likely to have countervailing power such that they are able to maximise the value of a licence or benefits to the racing industry irrespective of any reduction in competing bidders?*
- (e) *Does any reduction in the number of bidders for licences affect competition in the supply of wagering products to customers or result in other public detriments?*
- (f) *Does the proposed acquisition exacerbate any existing scale or incumbency advantages that Tabcorp and Tatts may have as current licence holders? If so, will this raise barriers to entry to wagering markets?*
- (g) *Are there any conditions capable of addressing any detriments arising from the proposed acquisition with respect to bidding for licences?*
61. I address each of these below other than question (g).
62. In my view, there are separately identifiable markets for bidding for totalisator licences and retail exclusivity that are, in principle, intermittently contestable. However, I consider that significant barriers to entry exist in respect of the bidding market for totalisator and retail licences, including all of those identified by the ACCC. In addition to the barriers identified by the ACCC, there are other practical barriers to entry, which would make it very difficult for any other entity to participate, much less compete, in the bidding market. In the case of Victoria, there is also a statutory barrier to entry that prevents the racing industry from bidding for any component of the Victorian wagering licence.
63. In my view, any future licence holder(s) would necessarily be required to commit substantial levels of funding to the relevant racing industry, and provide ancillary products and services to the local punting community, from the day that the licence takes effect, as part of the consideration for the licence. Whilst it theoretically may be possible for a new operator to rapidly set up a new totalisator platform and retail network and establish pooling arrangements with other totalisator operators (or, following the proposed transaction, the merged entity) it is extremely unlikely that any new entrant would be able to balance the operational and commercial requirements needed to generate sufficient returns to maintain the funding requirements of the racing industry or provide an adequate service to the punting community in the time frames it would be subject to. This would not be the case for Tabcorp or Tatts.
64. A further, and perhaps the most critical issue, is access to racing vision. A potential bidder is highly unlikely to be able to do a deal with Sky Racing / Tabcorp prior to submitting a bid (and so would be bidding with the risk of not being able to have racing content in retail venues). Even if a deal for access was able to be done with Sky Racing / Tabcorp, there is the residual issue of having Sky Racing feed – with exclusive and prominent Tabcorp branding and editorial content – broadcast into the rival operator's retail network. These factors would affect whether another operator would bid at all and / or the terms of its bid.

65. Given these factors, and the other factors identified by the ACCC, in my view, Tatts is undoubtedly the strongest (and, in reality, only likely) competitor to Tabcorp in respect of the bidding market for wagering licences. I do not consider that there are or would be any other bidders who could make comparable and compliant offers for the totalisator and/or retail licences.
66. It is worth noting again that the Victorian racing industry is prohibited by law from bidding for the Victorian wagering licence. But even if the Victorian Government were to remove that restriction, it would be virtually impossible for the industry to overcome the relevant commercial and practical barriers to entry and otherwise meet the criteria in relation to technical and commercial expertise in totalisator operation that applied to the last Victorian licence renewal. Owning and operating the licence may also compromise the respective PRAs' roles as regulators of the industry.
67. The reduction in the number of credible bidders from two to one for the Victorian wagering licence (for example) will, in my view, cause significant detriment to the Victorian racing industry. By removing Tatts from the bidding process for the next Victorian licence, the Victorian racing industry will have less bargaining power in any tender process, and is, in my view, certain to be faced with a significant reduction in funding from the successful bidder. It also likely to be exposed to pressure from the merged entity:
- (a) to agree to the merged entity's requests for further increases in take out rates, leading to totalisator punters being worse off; and
  - (b) not to increase race field fees for interstate totalisator operators to the extent that such increases negatively impact the financial position of the merged entity in its capacity as an interstate totalisator operator.
68. I do not consider it likely that the Victorian government could take actions to 'shore up' the value of the licence in the event of the proposed transaction occurring. In my view, placing a 'reserve' on the licence (as suggested in the Statement of Patrick Smith) is impractical because it would effectively result in the licence reverting back to government ownership. I do not consider it likely this would be acceptable to the Victorian Government from a policy perspective but, even if the Victorian Government were to operate the licence itself, given the Government's lack of recent commercial experience, it would most likely lead to a suboptimal result for punters and therefore damage returns to the racing industry.
69. In conclusion on this issue, the removal of the likely other bidder for the Victorian wagering licence will place the merged entity in a far stronger position to negotiate an early extension of the existing Tabcorp licence in that state, and on more favourable terms. I consider this will cause significant detriments to the Victorian racing industry in the medium to long term.

**Issue 3: 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.**

70. The ACCC's List of Issues identifies the following questions that it considers are relevant to this issue:
- (a) *Does the proposed acquisition result in the removal of Tatts as a potential provider of pooling services to third party totalisators either currently or future new entrants?*
  - (b) *Does Tatts, as the only other potential suppliers of pooling services in Australia, currently constrain Tabcorp when supplying pooling services? What is the likely effect of the removal of Tatts, as a potential provider of pooling services, on barriers to entry for potential bidders in future wagering licence processes or new entrants which may seek to acquire existing totalisators, such as the WA TAB?*
  - (c) *Does Tatts have the ability to supply pooling services or, if not, the incentive to obtain the capabilities to do so? Without the proposed acquisition is Tatts likely to invest in its system capabilities to implement ITSP technology, the globally accepted protocol to inter-tote communications, to facilitate supply of third party pooling services?*
  - (d) *Are the proposed commitments to RWVA likely to effectively address any detriments arising from the proposed acquisition?*
71. I set out my views on this issue below.
72. In my view, if the proposed transaction proceeds, the merged entity will have significantly greater market power in relation to the supply of pooling services. This is likely to see further restrictions on the ability of pooling partners to offer price and other incentives to punters, whether premium punters or otherwise. **HIGHLY CONFIDENTIAL** [REDACTED]
- [REDACTED]
- [REDACTED] Under a scenario in which the proposed transaction proceeds, the merged entity would be in a position to create greater disincentives for pooling partners such as RWVA to offer price incentives to punters.
73. Tatts has the capability to provide pooling services, and also (like Tabcorp) to provide the ability for third party wagering operators to act as online 'agencies' for their products. In my view, the removal of Tatts as a potential pooling partner would effectively preclude any possibility of a potential new entrant from acquiring RWVA. The Western Australian totalisator operator would be unable to sustain its totalisator platform without a pooling partner (due mainly to a lack of liquidity and inability to compete for customers) and I expect that the terms it would be in a position to

negotiate with the merged entity would be materially more restrictive than those that exist today in respect of the Tabcorp pooling agreement.

74. The proposed commitments to RWWA do not, in my view, amount to an effective way of addressing this issue. In particular, I do not consider that simply extending the existing pooling agreement represents a good basis for the proposed commitment to continue pooling with RWWA, because it effectively limits price-based competition for totalisator wagering.

**Issue 4: whether, as the dominant broadcaster of racing media content, Tabcorp/Sky is able to influence the level of wagering turnover generated by a race.**

75. The ACCC's List of Issues identifies the following questions that it considers are relevant to this issue:

- (a) *Does a separate market exist for the supply and acquisition of racing media broadcast rights (including for separate modes of delivery: digital, free to air, television, commercial and subscription domestic television)?*
- (b) *Are any such racing media markets relevant to an assessment of the competition effects of the proposed acquisition?*
- (c) *Does Sky have the ability and incentive to influence the level of wagering turnover generated by a race?*
- (d) *How important is it to racing bodies that their races are shown in retail outlets in their home State / Territory and elsewhere?*

76. I address these questions in turn below.

- (a) Question (a): Yes, there is no doubt that there is a separate market, or potentially markets subdivided as suggested by the ACCC, for the acquisition of racing media rights. Within that market(s), while the suppliers of the content are the same (that is, the peak bodies for the racing codes in each State), the purchasers vary in terms of their commercial incentives and ability to acquire and exploit content. Demand for subscription and free-to-air rights is confined to purchasers who have the ability to aggregate and distribute or resupply that content via commercial or domestic subscription TV or free-to-air TV. These potential purchasers include Sky Racing, Racing.com and potentially Tatts. In relation to digital racing media rights, these are critically important inputs for corporate bookmakers who can, and do, also bid for these rights if they are available, in addition to the types of purchasers identified above. To this end, Racing Victoria ran a separate process from early 2015, for digital media rights, outside the free-to-air and subscription media rights negotiations in which Seven West Media and Tabcorp were involved.
- (b) Question (b): Yes, racing media markets are highly relevant to wagering media markets as media rights are a critical input to, and driver of, wagering turnover in wagering markets.

In the present context, there are three ways in which impacts on racing media markets affect competitive outcomes in wagering markets:

- (i) first, broad dispersion of racing media content (whether through free-to-air, subscription and/or digital channels) is of critical importance to the absolute and relative growth rate of wagering on racing and therefore to longer term funding and viability of the racing industry;
- (ii) second, control of subscription TV rights provides a very significant competitive advantage to the entity controlling the distribution and pricing of that subscription TV service (currently Tabcorp / Sky Racing);
- (iii) finally, the extent of non-exclusive distribution of digital racing media rights by corporate bookmakers, as well as totalisator operators, is a critical input that, having regard to the growth in online channels, will drive future service quality, innovation, price competition, racing product differentiation and, ultimately, turnover growth for the benefit of punters and the racing industry.

(c) Question (c): Yes, Sky Racing can affect the level of wagering on a particular race and has demonstrated its willingness to use this as leverage in racing media acquisition negotiations and racing funding negotiations.

(d) Question (d): This is extremely important. As stated earlier in this statement, retail wagering (both in agencies and in licensed venues) is still an extremely important wagering channel. Retail venues also have extensive and valuable ancillary benefits, including in a promotional sense. There are several reasons why it is important to racing bodies that their races are shown in retail venues in their home state:

- (i) first, the relevant PRA derives revenue from punters betting on local product;
- (ii) second, some jurisdictions (for example, Victoria) allocate future funding on a dynamic 'market share' mechanism that is broadly based on the differential market share between the three racing codes; and
- (iii) third, generally speaking, local retail punters tend to have a higher propensity to bet on local product than interstate product, so showing local content is important for the relevant PRA in terms of brand development, stakeholder engagement and wagering.

77. I expand on these answers in various respects below.

78. It is widely accepted in the wagering and racing industry that the ability to watch a race is an integral and important driver of wagering turnover. However, I would also add that another important factor, even amongst less sophisticated punters, is the ability to see horses in the mounting yard, behind the barriers and otherwise to view racing content relevant to 'form'. This



- nuance is important, because an issue of concern to the racing industry, particularly the Victorian racing industry, is the relatively homogenised 'wall to wall' nature of the offering on Sky 1 and Sky 2.
79. Tabcorp's overarching strategy with respect to racing content appears to be characterised by an intent to 'homogenise' the racing product, such that there is little discernible difference between one race and another from a betting perspective. My understanding is that Sky already 'promotes' Australian racing to overseas markets in this homogenised way. For example, Victorian metropolitan thoroughbred may be labelled race 'Australia A', a provincial thoroughbred race may be labelled 'Australia B' and a South Australian harness race may be labelled 'Australia C'. As a result, the identity of the meeting - and thus any value in the 'premium' nature of Victorian racing, for example - is effectively stripped away and there is no incentive or ability for the relevant principal racing authority (**PRA**) to promote the product in overseas markets. This homogenisation of racing content also shifts negotiating power in relation to supply and acquisition of racing media rights in favour of Sky Racing and away from racing bodies. This is because Sky Racing typically links media rights fees to the amount of wagering that is conducted on each PRA's races. Less media coverage overseas means less wagering by overseas punters and less returns to the racing industry.
80. In my view, this lack of quality coverage and the 'wall to wall' nature of most coverage already negatively impacts on the turnover able to be achieved on high quality races. The funding model for racing has been built on the premise that the local racing industry profits off the wagering returns of the local totalisator licensee, no matter where their wagering revenue comes from (for example, interstate racing, international racing, sport or other contingencies). Unfortunately, in my view this has created an incentive for Sky Racing to seek to promote high volumes of racing wagering product without due regard for the quality of that offering. Insufficient attention has been given to the longer term need to provide a high quality product that can compete with other high quality and entertaining content which ultimately competes for a share of the 'wagering wallet'. In my view, an important causal factor for the decline in relative terms of wagering on racing (as opposed to sports) has included the lack of availability of higher quality racing media content as well as the more narrow distribution channels on which racing content is made available due to the business model operated by Sky Racing / Tabcorp. This was a key issue that Racing Victoria sought to address during my time as a director, but which in my view remains a key issue that the racing industry needs to address. In my view, the proposed transaction is unlikely to enhance the 'quality' of racing vision.
81. Sky Racing also has the ability to influence turnover on a race by the way it influences programming of races and the way it unilaterally chooses to promote them. Based on my experience, its decisions in this regard are impacted by what is in Tabcorp's best commercial interests. In my view, important factors in this regard include Tabcorp's desire to promote high frequency betting and have customers bet on products that generate the highest net profit



margins (for example, products with low product fees) via channels that require them to pay the least amount of tax (for example, totalisator betting in the ACT with a zero percentage tax rate).

82. Tabcorp / Sky Racing have also engaged in conduct in the past to cause, and threaten to cause, detriment to the racing industry as part of negotiations over racing vision.

*TVN and Victorian vision blackouts*

83. TVN (Thoroughbred Vision) was launched in 2005 and was an Australian thoroughbred horse-racing TV channel carried by subscription TV services, such as Foxtel, Austar and Optus TV. TVN was formed after Tabcorp, the owner of Sky Racing, pulled out of plans it was developing with Racing Victoria in February 2005 to launch a dedicated thoroughbred racing channel. TVN was half owned by the three Victorian metropolitan thoroughbred racing clubs and Country Racing Victoria on the one part and the NSW-based Australian Jockey Club and Sydney Turf Club on the other part, and was set up as a competitor to Sky Racing.
84. A dispute arose between TVN and Sky Racing / Tabcorp in 2014 over the rights to broadcast NSW and Victorian vision domestically on pay TV and in pubs and clubs, internationally and on digital channels. TVN offered a standalone TV channel, but had previously sold the rights to NSW and Victorian racing to Sky Racing on short-term deals. In December 2014, TVN and Sky Racing / Tabcorp were negotiating the next of their vision contracts – attempting to move on from short-term roll-over deals to a new long-term contract.
85. I understand that negotiations broke down between TVN and Sky Racing around 17 December 2014. A 'black out' of Victorian thoroughbred racing vision followed when Sky Racing refused to broadcast any content. The first time this happened, I believe the negative impact on overall Victorian thoroughbred wagering turnover was approximately 5% over the period of the black-out.
86. On 24 December 2014, Racing NSW and the Australian Turf Club (the owners of the NSW rights) walked away from TVN and brokered a new deal with Sky Racing / Tabcorp which would see its racing meets broadcast exclusively on Sky Racing. This left TVN with only the Victorian broadcast rights and in what I understood to be an untenable financial position. In February 2015, TVN announced its closure before ceasing broadcasting on 15 March 2015.
87. On another occasion, during subsequent negotiations with the Victorian racing industry relating to rights to Victorian thoroughbred racing content in or around June 2015, Sky Racing 'blacked out' Victorian content (i.e. stopped showing the races on any of the three Sky channels). I believe that the second time that Sky Racing caused a 'black out' of thoroughbred racing vision, the impact on wagering was slightly less (down around 3% for the period of the 'black out') because, by that stage, digital streaming rights had been made available on a non-exclusive basis to Racing.com and corporate bookmakers, and at least one or two bookmakers had taken up those rights.

*Gaps between races*

88. Another example occurred more recently, when Racing Victoria sought to trial 30-minute gaps between races in January 2016 (instead of the longer 40-minute or so gap). Racing Victoria

introduced this trial to experiment with providing a better experience to race goers, punters (on Victorian product) and industry participants. In my view, experiments like this are very important to the longer term interests of the racing industry, as it seeks ways to innovate and increase its popularity as a form of entertainment and to maintain relevance to a time-poor audience.

89. In response to this trial, Sky Racing pushed some 'premium' Victorian races (including Saturday metropolitan races) onto Sky 2 with virtually no notice to the punting community, in preference to inferior interstate and non-thoroughbred races. This meant that virtually no one could watch the premium racing that was taking place at the relevant time, other than a handful of Sky 2 subscribers and customers in retail venues. Sky's conduct made it difficult to assess the results from the trial (i.e. so the true impact on wagering of 30-minute gaps could not be measured) and exerted pressure on Racing Victoria to abandon the trial. I believe Sky Racing acted this way because it has a commercial interest in having greater gaps between 'premium' content. This enables it to fill the gaps with additional (lower quality) content and to increase the length of the viewing day (i.e. so people watch Sky Racing for longer and bet more often and for longer).

**Issue 5: whether the merged entity will have materially enhanced leverage in its dealings with racing media rights holders in Tatts retail jurisdictions (Queensland, South Australia, Tasmania and Northern Territory).**

90. The ACCC's List of Issues identifies the following questions that it considers are relevant to this issue:
- (a) *Will the combination of Sky and the retail wagering operations in Tatts' retail jurisdictions (Queensland, South Australia, Tasmania and Northern Territory) provide the merged entity with an increased ability to deter racing bodies from supplying racing media rights to competing broadcasters or wagering operators?*
  - (b) *Will the proposed acquisition increase Sky's ability to acquire racing media broadcast rights on an exclusive and fully bundled (including digital, free to air and pay television) basis? If so, what impact will this have on competing broadcasters of racing content or wagering operators?*
  - (c) *Will the merged entity have increased leverage in its racing media rights negotiations with racing bodies (particularly in Queensland, South Australia, Tasmania and Northern Territory) because the merged entity:*
    - (i) *will have the primary wagering relationship with the PRA which controls the main source of funding for the relevant racing bodies?*
    - (ii) *is able to control which broadcast signals are shown in retail wagering networks in these jurisdictions and may be able to refuse a sub-licence to display the vision on Sky (content can be sub-licensed to Sky by the primary acquirer of the media rights for broadcast in retail bricks and mortar outlets)?*

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- (d) *What are the nature and extent of barriers to entry and expansion for potential acquirers or broadcasters of racing media vision? In particular:*
- (i) *are the contracts currently held by Sky with rights holders a barrier to entry or expansion for competing broadcasters?*
- (ii) *what are the constraints faced by racing bodies in commencing a similar venture to that of Racing.com to exploit their own racing media rights?*
- (e) *Do the major racing bodies in Victoria and New South Wales have greater bargaining power in their media rights negotiations than racing bodies in other jurisdictions due to the quality or profile of their racing product?*
- (f) *Have Sky (and/or Tabcorp) previously engaged in strategic conduct to deter entry or expansion by media rights acquirers? Will the proposed acquisition increase barriers, including Tabcorp's ability to engage in strategic conduct?*
- (g) *To what extent is Tatts likely, without the proposed acquisition, to compete directly for the acquisition of racing media broadcast rights? Would Tatts, without the proposed acquisition, have an incentive to support the expansion of a competing broadcaster of racing content to increase competition with Sky?*
- (h) *Are there any conditions capable of effectively addressing any detriment arising from the proposed acquisition arising from the proposed acquisition with respect to the merged entity's influence of power in its dealings with racing media rights holders? If so, what is the nature of any such conditions?*
91. I address these questions in turn below.
92. *Question (a):* In my view, yes. The combination of Sky and the retail wagering operations in Tatts' retail jurisdictions would provide the merged entity with an increased ability to deter racing bodies from supplying racing media rights to competing broadcasters or wagering operators. There are two reasons for this. First, because the staggered nature of the existing media rights terms creates a significant risk to a new media rights entrant – and the party most able to absorb that risk is Tatts, because of its scale and retail and totalisator licences. Second, because the merged entity will have a greater ability to shift promotional focus and operational resources than either Tabcorp or Tatts currently have. The entrenched imbalance of negotiating power between racing bodies (and rights holders) and Sky Racing will be exacerbated should the proposed transaction occur. It would provide near exclusive control over the marketing, promotion and programming of all three racing codes into the hands of an entity which has commercial affiliation with racing bodies in every jurisdiction except (currently) WA, enabling the merged entity to leverage its power over content into other aspects of the relationship with the racing industries (for example, in relation to funding or offsets).

93. In my view, it would not be possible or practicable for racing bodies to collectively band together to negotiate with Sky Racing over rights to racing content. Barriers to doing so would include the fact that the end dates of media rights contracts are staggered such that racing bodies have limited ability to collectively negotiate a complementary or alternative outcome to the prospect of a bundled (that is, an 'all or nothing') deal with Sky Racing.
94. *Question (b)*: In my view, yes. I consider that the proposed transaction will increase Sky Racing's ability to acquire racing media broadcast rights on an exclusive and fully bundled basis, and that this will adversely impact on competing broadcasters of racing content and wagering operators. First, by acquiring rights on a bundled basis, competing acquirers (including corporate bookmakers) will be unable to acquire rights to unbundled content, impeding their ability to offer racing content in conjunction with their wagering products. Second, competing wagering operators will also be adversely affected because, as punters will only see the merged entity's branding on Sky Racing, they will only see the merged entity's prices (when they can currently see multiple totalisator products), and they will only hear the merged entity's opinions and editorial on industry issues. The proposed acquisition will also have a negative impact on Racing.com's ability to acquire racing media rights (I discuss this further below).
95. *Question (c)*: In my view, yes. Based on my previous experience, it is likely that the merged entity will be in a position to use aggressive negotiating tactics (such as 'black outs' and adverse programming decisions). The negative impact that the merged entity will be able to have on wagering returns to a non-compliant PRA (both in the short and long term) will make it extremely difficult for another broadcaster to provide sufficient financial guarantees to the body to offset the reaction from the merged entity (including the risk of a 'black out'). In my view, the merged entity will especially have increased leverage in its racing media rights negotiations with racing bodies in jurisdictions that have lower quality racing because they have a very high dependency on their races being shown on Sky 1. Sky 1 is the wall-to-wall racing channel that is free with the sports package on Foxtel and is the main channel in retail venues. Races shown on Sky 2 (which Foxtel customers have to pay extra for, even if they have the sports package, and which many retail venues do not show) do not generate as much wagering turnover as races on Sky 1 because, as I understand it, Sky 2 has a vastly smaller audience. Sky Racing is therefore able to program races on (or threaten to demote those races to) Sky 2 rather than Sky 1, thus causing direct and indirect financial loss to the racing body but little or no loss to the merged entity because they can simply promote another race from Sky 2 to Sky 1 to take its place. Sky Racing is able to shift races between Sky 1 and Sky 2 very quickly and easily and, to my knowledge, there is no requirement for Sky Racing to obtain approval from the PRA before doing so. Even if there were, there is no reason to think that Sky Racing would accept such a condition in future negotiations over racing media content. In my view, given what I understand to be very low subscriber rates on Sky 2, I believe the only reason Sky Racing charges a fee for people to watch that channel is to avoid dilution of viewers on Sky 1, which has traditionally been the main wagering driver for racing.

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96. *Question (d)*: In terms of the nature and extent of barriers to entry and expansion for potential acquirers or broadcasters of racing media vision other than Tabcorp are generally high, but are even higher in relation to access to lower quality racing jurisdictions (i.e. outside Victoria and NSW). Aside from incumbency barriers, one of the other barriers is the flat or negative growth in wagering in lower quality racing jurisdictions, and the effect this has on the local PRA's willingness to consider long-term issues, especially when a degree of perceived risk is involved. In particular, as noted above, lower quality racing has a greater need to be on Sky 1 because punters are less likely to seek out (or pay for) a dedicated channel in order to experience and bet on their races alone. Without the support of their home TAB, it is therefore less likely that a racing body outside Victoria or NSW could make the initial investment, ride out the tactical response from Sky Racing (i.e. possibly including black outs or demotion to Sky 2) and sustain the execution of a strategy to build a wagering destination for their product. If the proposed transaction proceeds, the home TAB in all cases except WA would be the merged entity.
97. *Question (e)*: In my view, yes, to a limited degree. Major racing bodies in Victoria and New South Wales do have greater bargaining power in their media rights negotiations than racing bodies in other jurisdictions due to the relative quality and profile of their racing product (i.e. their product is considered 'premium' product). For example, Racing Victoria was, ultimately, able to sustain itself through two 'black outs' caused by Sky Racing and invest in its own digital (via a joint venture with Seven West Media) and free-to-air platforms. I do not think this would be the case for smaller jurisdictions. The premium nature of the Victorian product, and the steps the Victorian thoroughbred racing industry has taken to distribute content more broadly and non-exclusively, have helped to minimize the extent of the losses caused by Sky's conduct because the content could be seen during the second 'black out' on some digital platforms.
98. *Question (f)*: In my view, yes. Sky Racing (and/or Tabcorp) has clearly previously engaged in strategic conduct to deter entry or expansion by media rights acquirers. For example, the second 'black out' perpetrated on Victorian thoroughbred racing by Sky Racing was directly related to Racing Victoria's simultaneous negotiations with Sky Racing and Seven West Media, and consideration of an unbundled rights regime.
99. *Question (g)*: In my view, Tatts is likely, in the absence of the proposed transaction, to compete directly for the acquisition of racing media broadcast rights. Absent the proposed transaction, Tatts is likely to seek to acquire such rights because – with its existing retail operations across four states or territories – it is likely to have a strong commercial incentive in the future to do so. Part of the reason for this would be to ensure that it was not dependent on Tabcorp for such rights in circumstances where leveraging retail assets to maintain and grow market share in the growing online segment would be a key commercial objective. Securing racing vision rights would both protect the value of its retail venues in Queensland, Tasmania, the Northern Territory and South Australia and also enable Tatts to provide a better online experience to its customers, and to better promote its brands and products. I consider Tatts' significant investment in consolidating

and re-branding its operations under the UBET brand illustrate the investment it would be willing to make to build and enhance its brand and marketing profile, both in retail and online.

100. Tabcorp has stated in its Application that there is no prospect of Tatts entering the media space because it does not have the necessary capabilities. I disagree with that statement, not only because of the enhanced incentives Tatts would face in the future without the proposed transaction to do so, but also because the technology that enables the capture, production and broadcast of racing and sporting content is infinitely better, cheaper and easier to use today than it was a few years ago (and the rate of progress is only increasing). Changes in the free-to-air television industry (particularly in a commercial sense) are also reducing the opportunity cost for free-to-air broadcasters to make spectrum / channel-space available for the distribution of third party content.
101. *Question (h)*: Yes. For example, the divestment of Sky Racing to an entity that was not affiliated with and independent of Tabcorp or another wagering operator would substantially resolve these issues.

**Issue 10: whether other public detriments arise from the proposed acquisition.**

102. The ACCC's List of Issues identifies the following questions that it considers are relevant to this issue:
- (a) *To what extent will the combination of the merger parties' customer information databases across a broad spectrum of gambling products increase the ability of the merged entity to engage in customer profiling, targeted digital marketing and cross selling of a range of gambling products, including to vulnerable problem gamblers?*
  - (b) *To what extent will the proposed acquisition reduce the value of future licences or assets sales that can be achieved by state and territory governments, with flow on effects for government revenue or the racing industry?*
  - (c) *Are there any other public detriments that are likely to result from the proposed acquisition? If so, what is the nature and extent of those detriments?*
103. I address these questions in turn below.
104. *Question (a)*: In my view, the combination of the Tabcorp's and Tatts' customer database and broad spectrum of gambling products will provide the merged entity with a significant competitive advantage over other wagering operators. I understand that Tabcorp has invested considerable amounts over the past two years or so in its customer relationship management systems, analytics and digital marketing capabilities. The purpose of this investment is to perform deep analytics and engage in highly targeted marketing so that Tabcorp can generate higher returns from customers. I would be concerned from the perspective of the racing industry that the ability to influence customers to use alternative gambling products may be detrimental to racing wagering turnover and industry funding. The ability to leverage this investment will be heightened



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in the merged entity because the merged entity will have access to larger pools of customer data and will be able to identify and assess customers who have held accounts with both Tabcorp and Tatts, and will (as I discussed above) be able to migrate customers to jurisdictions where it incurs less costs (such as the ACT) and wagering products where it pays no product fees (such as US basketball and English soccer). I do not have a view as to whether this would flow through to higher levels of problem gambling.

105. *Question (b)*: In my view, the proposed transaction will have a significant adverse effect on the upfront value of the Victorian wagering licence (particularly the totalisator and retail components of that licence), and the continuing funding obligations to the racing industry in that state. I do not believe that unbundling the licence components, and/or making any of the components non-exclusive and/or placing a reserve on any of the components would preserve the value of the wagering licence.
106. *Question (c)*: In my view, the proposed transaction will have a range of adverse impacts. Many of the benefits claimed by the parties, in my view, will actually cause detriment. I explain why below.
- Effect on prices*
107. Having read the public versions of the Form S and various statements filed by Tabcorp, I understand that a key claimed benefit of the proposed transaction is that it will enable the merged entity to increase both turnover and revenue as a result of an enhanced position against corporate bookmakers.
108. As a threshold issue, I do not believe that Tabcorp or Tatts – individually – have any competitive disadvantage relative to corporate bookmakers such that their competitive position needs to be enhanced. Rather, it is Tabcorp and Tatts who – individually – possess material competitive advantages over corporate bookmakers. The aggregation of such advantages through the proposed transaction will make the competitive position of corporate bookmakers even worse.
109. Second, the primary (if not the only) mechanism by which the merged entity could increase both turnover and revenue is by requiring punters to pay higher prices, compared to what they would have paid if the proposed transaction does not proceed, and / or engaging in strategic conduct to change the regulatory and taxation landscape to increase its turnover at the expense of corporate bookmakers, and / or increase prices for punters. State based point of consumption taxes, which Tabcorp and Tatts are public in supporting, are an example.
110. Even if the parties can establish that there would be increases in turnover and revenue, this will only benefit the racing industry in the long term if that turnover is on their own product. To the extent that turnover growth comes as a result of the merged entity promoting betting on sport or cartoon racing such as Trackside, that will ultimately undermine the attractiveness and sustainability of the entire racing industry. This will, in turn, weaken the position of the racing industry whenever product fee and licence negotiations take place.



*Effect on funding*

111. As I explained above, the arrangements under which Tabcorp and Tatts make payments to the government and racing industry in return for their exclusivity provides Tabcorp and Tatts, currently, with significant negotiating power and an ability to secure changes that favour their operations. The proposed transaction would make this materially worse.
112. Ultimately, in my view, the proposed transaction will result in a decline in funding for racing in the short term and a significant decline in the medium-long term because:
- (a) the merged entity would be in a stronger position to place downward pressure on product fees that are paid by totalisator operators;
  - (b) the merged entity would be in a dominant position to negotiate more favourable terms for the Victorian wagering licence (including lower funding obligations to the racing industry) because of the absence of a credible competitor for that licence;
  - (c) the merged entity would be able to shift Tatts' customers to lower-tax jurisdictions, such as the ACT;
  - (d) the merged entity would be better able to promote non-racing products to Tatts' customers;
  - (e) the merged entity is likely to increase take out rates on totalisator bet-types, which will negatively impact the appeal of totalisator wagering to the direct detriment of punters and the medium/long term value of totalisator licences; and
  - (f) the merged entity is likely to reduce rebates for premium punters, which will have a direct and immediate impact on totalisator turnover in the short term

**Issue 11: whether public benefits will arise from the claimed cost saving and efficiencies.**

113. The ACCC's List of Issues identifies the following questions that it considers are relevant to this issue:
- (a) *Are Tabcorp's cost savings and efficiencies robust and commercially realistic? Are they one off saving or are they enduring? To what extent would business improvements (such as improving the merged entity's fixed odds performance) occur in the absence of the proposed acquisition?*
  - (b) *To what extent are Tabcorp's claimed benefits merely transfers between parties (and therefore not actual cost savings)?*
  - (c) *What weight should be given to any cost savings and efficiencies flowing to third parties?*
  - (d) *Will the proposed acquisition impact on agreements or negotiations between the merged entity and racing bodies and state governments in relation to industry funding? Will the*

*merged entity have increased leverage in future negotiations with state governments concerning funding to the racing industry? Are state governments likely to increase race field fees in the future, and in the absence of the proposed acquisition, to address any funding imbalance due to the rise of corporate bookmakers?*

114. I address these questions in turn below.
115. *Question 1:* Without access to confidential redacted material it is not possible for me to comment on whether the proposed cost savings are commercially realistic, one off or enduring. In relation to claimed business improvements, I am strongly of the view that it is very unlikely that there are many, if any, genuine business improvements that could not be made individually by Tabcorp and Tatts in the absence of the proposed transaction. Indeed, both of them have publicly announced many individual investments that they tout as business improvements that are completely independent of the proposed transaction. Given the impetus to compete with each other, as well as corporate bookmakers, in my view there would be a very strong incentive to make profitable investments in business improvements in the absence of the proposed transaction.
116. *Question 2:* In my view, many of the claimed benefits are not only transfers from third parties, they are clear detriments, not benefits. For example:
- (a) the Form S and various statements filed by Tabcorp (for example, paragraph 37 of the Statement of Patrick Smith) claim that cost efficiency savings will lead the merged entity to offer lower prices. I do not consider that this is likely as a claim that Tabcorp will offer lower prices ignores the fact that Tabcorp, based on my experience:
    - (i) operates its totalisator pools at or close to the highest take out rates allowed under the statutory cap;
    - (ii) has successfully applied to raise the statutory cap on international totalisator to 40%, and has profitably raised its take out rates accordingly;
    - (iii) is claiming that by applying its enhanced account management systems to Tatts' fixed odds operation, it will result in increased yields from customers;
    - (iv) **HIGHLY CONFIDENTIAL** [REDACTED] and [REDACTED]
    - (v) **HIGHLY CONFIDENTIAL** [REDACTED]
  - (b) these are all examples of Tabcorp seeking – and being able – to increase prices, not decrease prices. To the extent the proposed transaction would achieve cost efficiencies,

there is no guarantee or commitment that this would be passed through to consumers (i.e. punters) in the form of lower prices. In fact the opposite appears highly likely.

117. *Question (c)*: In my view, limited or no weight should be given to the claims that cost efficiencies will be passed through to the racing industry (as claimed, for example, at paragraph 277 of the Statement of Patrick Smith). Benefits arising from a reduction in duplication (as claimed in paragraph 30 of the Statement of Dr Ric Simes) only arise to the extent that service levels to punters and the racing industry are not compromised. Even if there was some pass through in the short term, this will be outweighed in my view by the longer term detriments to the racing industry resulting, among other things, from higher wagering prices, lower relative growth rate of wagering on racing relative to sports and other forms of gambling entertainment, greater leverage in negotiations to acquire racing media rights, elimination of competition for future contests for totalisator licences or retail exclusivity and reduced levels of innovation in racing wagering products.
118. *Question (d)*: The merged entity will have far greater power in negotiations regarding industry funding, for the reasons set out previously.

**Issue 12: whether public benefits will arise from the claimed improved product and service offerings.**

119. The ACCC's List of Issues identifies the following questions that it considers are relevant to this issue:
- (a) *To what extent are these outcomes likely to be achieved in the absence of the proposed acquisition?*
120. In my view, not only will there be improvements to product and service offerings if the proposed transaction does not proceed, it is likely that the quality of service offerings and innovations will be higher if the proposed transaction does not proceed. In my view, dominant incumbents are not typically the innovating force in an industry and I consider, based on my experience, that this is true in respect of the racing and wagering industry. In my view, the industry experienced hardly any innovation in product or service offerings until corporate bookmakers began to compete with local totalisator operators in some segments of the market (such as fixed odds win/place betting on racing and sports betting).
121. As a general observation, I have noted that public statements from Tabcorp and Tatts, over many years, tend to blame price competition (not competition on service or innovation dimensions) for a deterioration in their performance relative to corporate bookmakers. And yet they have tended to push their own prices up, not down. Ironically, the only customer segment that has benefitted from lower prices is the premium punter segment, which is a segment that is not serviced by corporate bookmakers. The incentive to reduce prices for premium punters has come entirely from competition between totalisator operators. From my perspective, nothing about the proposed transaction would give the merged entity a materially greater ability or incentive to

invest in new products and better customer experiences compared to what both Tabcorp and Tatts could implement individually, given sufficient incentive, if the proposed transaction does not proceed.

122. In my view, removing Tatts as a competitor will actually be likely to lead to a further deterioration in product and service offerings by the merged entity. These innovations are critically important to driving growth in wagering spend, as for many punters (perhaps with the exception of premium punters) the overall wagering experience (rather than simple return on investment or price) is a key driver for their wagering spend.

**Issue 13: whether public benefits will arise from the claimed prospect of a national pool following the proposed acquisition.**

123. The ACCC's List of Issues identifies the following questions that it considers are relevant to this issue:

- (a) *To what extent is a national pool likely to be facilitated by the acquisition? As existing pools under common Tabcorp ownership have not been merged to date, are any benefits attributed to a national pool likely to occur as a direct effect of the proposed acquisition?*
- (b) *Could reduction in choice between totalisator pools be likely to impact on the level of wagering turnover contributed by premium customers?*

124. I address these questions in turn below.

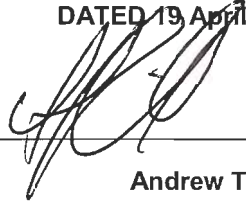
125. *Question 1:* In my view, a national pool is not likely to be facilitated by the proposed transaction. A merged pool will, in my view, not take place until the merged entity and the relevant PRAs (to the extent that they have rights of veto) are satisfied that there is no commercial incentive for RWWA or any other pooling partner to offer cheaper prices on pari-mutuel products, for example, through offering of high rebates to premium punters.

126. In any event, I do not agree that a merged pool would be a benefit. It is likely to lead to higher prices through reduction of rebates to premium punters (or potentially increases in take-out rates (see my discussion of this issue above), both of which are likely to reduce turnover and inhibit growth of racing wagering versus sports to the long term detriment of racing industry funding. It is also likely to result in increased revenue leakage to illegal offshore operators, again with adverse funding implications for the racing industry and Governments' tax receipts.

127. *Question 2:* In my view, the answer is yes. I believe there will be a material negative impact on the level of turnover by premium customers who collectively comprise, based on my experience in the racing industry, up to **HIGHLY CONFIDENTIAL** on totalisator products. A turnover decrease in this segment is likely to occur because the merged entity is likely to reduce the size of rebates paid to those highly price-sensitive customers.

I verify that I have read the contents of this statement and the documents referred to in it and that I am satisfied that to the best of my knowledge, information and belief, it is true and correct in every particular.

DATED 19 April 2017



Andrew Twaits