



IN THE AUSTRALIAN COMPETITION TRIBUNAL

ACT 1 of 2017

RE: PROPOSED ACQUISITION OF TATT'S GROUP LIMITED BY TABCORP HOLDINGS LIMITED

STATEMENT OF GREGORY JOHN HOUSTON

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Filed on behalf of (name & role of party)

CrownBet Pty Ltd (Intervener)

Prepared by (name of person/lawyer)

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STATEMENT OF GREGORY JOHN HOUSTON

I, Gregory John Houston, of Level 40, 161 Castlereagh Street, Sydney, in the state of New South Wales, expert economist, say as follows:

1. Qualifications and Experience

- 1.1 I am a founding partner of HoustonKemp Economists (**HoustonKemp**), a firm of expert economists. I have held this position since April 2014.
- 1.2 I have worked as a consulting economist for over 25 years and have experience spanning a wide range of industry sectors. I have accumulated substantial experience in the economic analysis of markets and the provision of expert advice in business strategy and policy contexts. I have advised corporations, regulators and governments on a wide range of competition, regulatory and economics matters.
- 1.3 I hold a BSc (Hons) in Economics, a University of Canterbury post-graduate degree, which I was awarded with first class honours in 1983.
- 1.4 Now produced and shown to me as Annexure "**GJH-1**" is a copy of my current curriculum vitae.

2. Report

- 2.1 I have been engaged by MinterEllison, lawyers for CrownBet Pty Ltd (**CrownBet**), to provide an expert report on certain matters relating to the proposed acquisition by Tabcorp Holdings Limited (**Tabcorp**) of Tatts Group Limited (**Tatts**) (the **Application**).
- 2.2 Now produced and shown to me as Annexure "**GJH-2**" is a copy of the letter which sets out my instructions.
- 2.3 Now produced and shown to me as Annexure "**GJH-3**" is a copy of my report dated 21 April 2017.
- 2.4 This report contains information which is highly confidential to Tabcorp, Tatts, CrownBet, Racing Victoria and Racing.com, and information derived from the confidential information of some of those parties. Material that is confidential in this report is marked accordingly.
- 2.5 I have been provided with and have read Federal Court General Practice Note GPN-EXPT, including the Harmonised Expert Witness Code of Conduct attached to that practice note (together, the **Expert Guidelines**), which are contained in GJH-2. I confirm I have complied with the terms of the Expert Guidelines in the preparation of this report.
- 2.6 I acknowledge that the opinions I express in my report are based wholly or substantially on the specialised knowledge I have as a result of the qualifications and experience set out above.

2.7 I have made all inquiries that I believe are desirable and appropriate for the purpose of preparing this report. No matters of significance that I regard as relevant have, to my knowledge, been withheld from the Australian Competition Tribunal.

3. Annexures

3.1 Set out in Schedule "A" of my statement is a table of annexures that I refer to in my statement, and the confidentiality claims made in respect of each.

DATED 21 April 2017



Gregory John Houston

SCHEDULE A

INDEX OF ANNEXURES TO STATEMENT OF GREGORY JOHN HOUSTON

Annexure	Title	Confidentiality
GJH – 1	Curriculum vitae of Gregory John Houston	
GJH – 2	Letter of instructions dated 12 April 2017	
GJH – 3	Report of Gregory John Houston dated 21 April 2017	Restriction of publication of part document claimed

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

ANNEXURE CERTIFICATE

This is the annexure marked "GJH-1" annexed to the statement of GREGORY JOHN HOUSTON dated 21 April 2017.

Annexure **GJH-1**
Curriculum vitae of Gregory John Houston

Filed on behalf of (name & role of party)

CrownBet Pty Ltd (Intervener)

Prepared by (name of person/lawyer)

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Overview

Greg Houston is a founding partner of the firm of expert economists, HoustonKemp. He has twenty five years' experience in the economic analysis of markets and the provision of expert advice in litigation, business strategy, and policy contexts. His career as a consulting economist was preceded by periods working in a financial institution and for government.

Greg has directed a wide range of financial, competition and regulatory economics assignments during this consulting career. His work in the Asia Pacific region principally revolves around the activities of the enforcement and regulatory agencies responsible for these areas, many of whom also number amongst his clients. On competition and antitrust matters he has advised clients on merger clearance processes, competition proceedings involving allegations of anticompetitive conduct ranging from predatory pricing, anti-competitive agreements, anti-competitive bundling and price fixing. Greg also has deep experience of infrastructure access regulation matters, and intellectual property and damages valuation. In his securities and finance work Greg has advised clients on a large number of securities class actions, as well as market manipulation and insider trading proceedings, and on cost of capital estimation.

Greg's industry experience spans the aviation, beverages, building products, cement, e-commerce, electricity and gas, forest products, grains, medical waste, mining, payments networks, office products, petroleum, ports, rail transport, retailing, scrap metal, securities markets, steel, telecommunications, thoroughbred racing, waste processing and water sectors.

Greg has acted as expert witness in valuation, antitrust and regulatory proceedings before the courts, in various arbitration and mediation processes, and before regulatory and judicial bodies in Australia, Fiji, Malaysia, New Zealand, the Philippines, Singapore, the United Kingdom and the United States.

Prior to the formation of HoustonKemp in April 2014, Greg was a Director of the global firm of consulting economists, NERA Economic Consulting, where for twelve years he served on its United States' Board of Directors, for five years on its global Management Committee and for sixteen years as head of its Australian operations.

Greg also serves on the Competition and Consumer Committee of the Law Council of Australia.

Qualifications

1982	University of Canterbury, New Zealand B.Sc. (First Class Honours) in Economics
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Prizes and Scholarships

1980 University Junior Scholarship, New Zealand

Career Details

2014- **HoustonKemp Economists**
Partner, Sydney, Australia

1989-2014 **NERA Economic Consulting**
Director (1998-2014)
London, United Kingdom (1989-1997)
Sydney, Australia (1998-2014)

1987-89 **Hambros Bank, Treasury and capital markets**
Financial Economist, London, United Kingdom

1983-86 **The Treasury, Finance sector policy**
Investigating Officer, Wellington, New Zealand

Project Experience¹

Competition and Mergers

2016 **Bird & Bird/Generic Health**
Competitive effects of patent infringement
Expert reports and testimony in Federal Court proceedings concerning the damages arising from infringement of a pharmaceutical patent.

2016 **Manildra Group**
Competition analysis
Advice and preparation of an expert report assessing competitive constraints in the supply of fuel grade ethanol.

2016 **Clayton Utz/Anglo American**
Competitive effects analysis
Expert report assessing the economic impact on the equine critical industry cluster if certain thoroughbred breeding operations were to leave the Upper Hunter.

2014-16 **Ashurst and Gilbert + Tobin/Confidential Client**
Competitive effects of agreements
Analysis and advice prepared in context of an ACCC investigation of agreements between a supplier and its major customers that are alleged to harm competition.

2015-16 **King & Wood Mallesons/Confidential Client**
Competition analysis
Analysis and advice in the context of the ACCC's inquiry into eastern and southern Australia wholesale gas prices.

¹ Past ten years only.

- 2015** **Corrs/Confidential Client**
Merger clearance
 Analysis, advice and expert report submitted to the ACCC in the context of a proposed acquisition in the office products sector.
- 2014-15** **Australian Government Solicitor/Commonwealth of Australia**
Competition and trade analysis
 Expert report on competition and trade in tobacco products, prepared in the context of the World Trade Organisation dispute settlement proceedings concerning Australia's tobacco plain packaging legislation.
- 2014-15** **King & Wood Mallesons/Confidential Client**
Competitive effects of agreement
 Analysis and advice prepared in context of an ACCC investigation of agreements between a supplier and its major customers that are alleged to harm competition.
- 2013-14** **Corrs/Australian Competition and Consumer Commission**
Effect of cartel conduct
 Expert report on the price effects of an alleged market sharing arrangement in relation to the supply of forklift gas, prepared in the context of Federal Court proceedings brought against Renegade Gas (Supagas).
- 2013-14** **Australian Competition and Consumer Commission**
Merger clearance
 Expert report and testimony before the Competition Tribunal in the context of the ACCC's decision to oppose the acquisition of Macquarie Generation by AGL Energy.
- 2013-14** **Ashurst/BlueScope**
Merger clearance
 Expert reports submitted to the ACCC in the context of the clearance of three approved transactions in the domestic steel industry.
- 2013-14** **Australian Government Solicitor/ACCC**
Merger clearance
 Analysis and advice prepared in the context of the ACCC's review of the proposed acquisition of petrol retailing sites in South Australia.
- 2013** **Corrs/Generic Health**
Patent damages estimation
 Expert report on the nature and extent of the analysis necessary to estimate damages in a patent infringement proceeding.
- 2012-13** **Minter Ellison/Confidential Client**
Merger clearance
 Expert reports submitted to the ACCC in the context of a confidential application for clearance of a proposed acquisition in the industrial gases industry.
- 2011-12** **Gilbert + Tobin/Pact Group**
Merger clearance
 Expert reports submitted to the ACCC on the competitive implications of the proposed acquisition of plastic packaging manufacturer Viscount Plastics by Pact Group.

- 2010-12 Mallesons/APA
Merger clearance**
Expert reports submitted to the ACCC on the competitive implications of the proposed acquisition of the gas pipeline assets of Hastings Diversified Utilities Fund by APA Group.
- 2010-11 Johnson Winter & Slattery/ATC and ARB
Competitive effects of agreement**
Expert reports and testimony in Federal Court proceedings concerning the competitive effects of restrictions on the use of artificial techniques in the breeding of thoroughbred horses for racing.
- 2010-11 Victorian Government Solicitor/State of Victoria
Competitive effects of agreement**
Expert report prepared for the State of Victoria on the effects of certain restrictions applying to the trading of water rights on inter-state trade in the context of a constitutional challenge brought against the state of Victoria by the state of South Australia.
- 2009-11 Arnold + Porter/Visa Inc, Mastercard Inc and others
Payment card markets**
Expert reports and deposition testimony on behalf of defendants in the United States Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, on the effects of regulatory interventions in the Australian payment cards sector.
- 2010 Australian Competition and Consumer Commission
NBN Points of Interconnection**
Report and advice on the competition implications in the markets for both telecommunications backhaul and retail broadband services of different choices as to the number of 'points of interconnection' in the proposed architecture of the national broadband network.
- 2010 JWS, Gilbert & Tobin/Jetset Travelworld, Stella Travel Services
Merger clearance**
Advice on the competitive implications of the merger between Jetset Travelworld and Stella Travel Services.
- 2009-10 Australian Government Solicitor/ACCC
Misuse of market power**
Expert report and testimony in the context of Federal Court proceedings brought by the ACCC against Cement Australia in relation to conduct alleged to have breached sections 45, 46 and 47 of the Trade Practices Act.
- 2008-10 Gilbert & Tobin/Confidential
Merger assessment**
Advice on the competitive implications of the then proposed merger and then subsequently the proposed iron ore production joint venture between BHP Billiton and Rio Tinto.
- 2008-10 Allens/Amcor
Cartel damages assessment**
Advice and preparation of an expert report on the approach to and quantification of economic loss in the context of two separate actions seeking damages arising from alleged cartel conduct.

- 2009** **State Solicitor's Office/Forest Products Commission**
Alleged breach of s46
 Expert advice in the context of Federal Court proceedings alleging breaches of section 46 of the Trade Practices Act.
- 2009** **Clayton Utz/Confidential Client**
Joint venture arrangement
 Reviewed the competitive implications under s50 of the Trade Practices Act of a proposed joint venture transaction in the rail industry.
- 2009** **Blake Dawson Waldron/Airservices**
Effect of potential industrial action by Air Traffic Controllers
 Expert report in the context of a potential application to the Australian Industrial Relations Commission for termination or suspension of a bargaining period addressing the economic effect that certain forms of industrial action by Air Traffic Controllers would be likely to have on passengers, businesses, and the Australian economy.
- 2005-06, 08-09** **Phillips Fox/Fortescue Metals Group**
Access to bottleneck facilities
 Expert report and testimony in the Federal Court proceedings concerning whether or not access to the BHP Billiton and Rio Tinto rail lines, serving iron ore export markets in the Pilbara, amounted to use of a production process. Subsequently, prepared expert reports on matters arising in interpreting the criteria for declaration under Part IIIA, and testified before the Competition Tribunal in late 2009.
- 2009** **Clayton Utz/Confidential Client**
Competitive implications of agreement
 Advice on the competitive effects of a joint venture arrangement in the port terminal sector, in the context of Federal Court proceedings brought by the ACCC under section 45 of the Trade Practices Act.
- 2009** **Australian Competition and Consumer Commission**
Competitive effects of buy-sell agreements
 Advice to the ACCC on the extent to which buy-sell arrangements between the four major refiner-marketers of petroleum products in Australia may be inhibiting competition in a relevant market.
- 2008-09** **Watson Mangioni/ICS Global**
Alleged misuse of market power
 Expert report prepared in the context of Federal Court proceedings alleging breaches of section 46 of the Trade Practices Act.
- 2008-09** **Australian Competition and Consumer Commission**
Competitive effects of various agreements
 Expert advice on potential theories of competitive harm arising from agreements between competitors in the oil and gas, and petroleum retailing industry sectors.
- 2008** **Johnson Winter & Slattery/Pepsico**
Merger analysis
 Advice on the competitive implications certain potential transactions in the soft drinks sector.

- 2008** **Australian Competition and Consumer Commission**
Exemption from access undertaking
'Peer review' report of the ACCC's draft decision on applications by Telstra for exemption from its standard access obligations (SAOs) for the supply by resale of the local carriage service (LCS) and wholesale line rental (WLR) in 387 exchange service areas in metropolitan Australia.
- 2008** **Deacons/eBay**
Exclusive dealing notification
Expert report submitted to the ACCC analysing the competitive effects of eBay's proposal that users of its online marketplace be required to settle transactions using eBay's associated entity, PayPal
- 2007-08** **Australian Energy Market Commission**
Wholesale market implications for retail competition
Provided an overview of the operation and structure of the wholesale gas and electricity markets within the National Electricity Market (NEM) jurisdictions and identified issues the AEMC should consider when assessing the influence of the wholesale markets on competition within retail gas markets.
- 2006-07** **Essential Services Commission of South Australia**
Competition assessment
Directed the preparation of a comprehensive report analysing the effectiveness of competition in retail electricity and gas markets in South Australia.
- 2006-07** **Allens/Confidential Client**
Merger clearance
Retained to provide advice on competition issues arising in the context of s50 clearance of a proposed merger in the board packaging industry.
- 2006-07** **Johnson Winter & Slattery/Confidential Client**
Damages assessment
Advice on the quantification of damages arising from alleged cartel conduct in the electricity transformer sector.
- 2006** **Minter Ellison/Confidential Client**
Misuse of market power
Advice in relation to market definition, market power and taking advantage in the context of an alleged price squeeze between wholesale and retail prices for fixed line telecommunications services, for proceedings brought under section 46 of the Trade Practices Act.
- 2006** **DLA Phillips Fox/Donhad**
Merger clearance
Preparation of an expert report on competition issues arising in the context of s50 clearance for the proposed Smorgon/One Steel merger.
- 2006** **Johnson Winter & Slattery/Qantas Airways**
Competition effects of proposed price fixing agreement
Assessed the competition effects of the proposed trans-Tasman networks agreement between Air New Zealand and Qantas Airways.
- 2006** **Phillips Fox/ACCC**
Vertical foreclosure
Advice in the context of proceedings before the Federal Court concerning the acquisition of Patrick Corporation by Toll Holdings. The proceedings were subsequently withdrawn following a S87B undertaking made by Toll.

- 2006** **Gilbert + Tobin/AWB**
Arbitration, access to bottleneck facilities
 Expert report and testimony in an arbitration concerning the imposition of throughput fees for grain received at port and so bypassing the grain storage, handling and rail transport network in South Australia.
- 2006** **Qantas Airways, Australia/Singapore**
Assessment of single economic entity
 Advice in the context of Qantas' Application for Decision to the Competition Commission of Singapore that the agreement between it and Orangestar did not fall within the ambit of the price-fixing and market sharing provisions of the Singapore Competition Act.
- 2005-06** **Qantas Airways, Australia/Singapore**
Competition effects of price fixing agreement
 Expert report submitted to the Competition Commission of Singapore evaluating the net economic benefits of a price fixing/market sharing agreement, in relation to an application for exemption from the section 34 prohibition in the Competition Act of Singapore.
- 2005-06** **Australian Competition Consumer Commission**
Electricity generation market competition
 Advice on the competition effects under S50 of the Trade Practices Act of three separate proposed transactions involving the merger of generation plant operating in the national electricity market.

Regulatory Analysis

- 2016-2017** **Minter Ellison Rudd Watts/Trustpower, New Zealand**
Transmission pricing methodology
 Expert reports submitted to the Electricity Authority and to the High Court of New Zealand in relation to proposed reforms to the transmission pricing methodology and the distributed generation pricing principles.
- 2016** **Johnson Winter & Slattery/Australian Gas Networks**
Materially preferable decision
 Expert report reviewing whether aspects of the Australian Energy Regulator's (AER's) draft access arrangement decision would be likely to result in a materially preferable decision in terms of achievement of the national gas objective.
- 2015-17** **Government of New South Wales**
Economic regulation for privatisation
 Advisor to government of New South Wales on all economic regulatory aspects of the proposed partial lease the electricity transmission and distribution entities, TransGrid, AusGrid and Endeavour Energy.
- 2014-16** **Powerco**
Input methodologies review
 Advice and several expert reports prepared in the context of the Commerce Commission's reviews of cost of capital and others aspects of the Input Methodologies governing the determination of maximum prices for New Zealand electricity and gas distribution networks.

- 2015** **ActewAGL**
Regulatory price review
Expert report on the economic interpretation of provisions in the national electricity law and rules in relation to the application of the national electricity objective to the entire price determination of the Australian Energy Regulator.
- 2014-16** **Atco Gas**
Access price review
Expert reports on the economic interpretation of provisions in the national gas law and rules in relation to depreciation and the application of the national gas objective to the entire draft decision, submitted to the Economic Regulation Authority of WA.
- 2014-16** **Government of Victoria**
Economic regulation for privatisation
Advisor to government of Victoria on the economic regulation of the Port of Melbourne Corporation in the context of the privatisation of the port by way of long term lease.
- 2013** **Actew Corporation**
Interpretation of economic terms
Advice on economic aspects of the decision of the Independent Competition and Regulatory Commission in relation to the price controls applying to Actew.
- 2012-13** **Gilbert + Tobin/Rio Tinto Coal Australia**
Price review arbitration
Analysis and expert reports prepared in the context of an arbitration concerning the price to be charged for use of the coal loading facilities at Abbott Point Coal Terminal.
- 2012-13** **Ashurst/Brisbane Airport Corporation**
Draft access undertaking
Advice, analysis and expert reports in the context of the preparation of a draft access undertaking specifying the basis for determining a ten year price path for landing charges necessary to finance a new parallel runway at Brisbane airport.
- 2012** **King & Wood Mallesons/Origin Energy**
Interpretation of economic terms
Expert reports and testimony in the context of judicial review proceedings before the Supreme Court of Queensland on the electricity retail price determination of the Queensland Competition Authority.
- 2012** **Contact Energy, New Zealand**
Transmission pricing methodology
Advice on reforms to the Transmission Pricing Methodology proposed by Electricity Authority.
- 2011-12** **Energy Networks Association**
Network pricing rules
Advice and expert reports submitted to the Australian Energy Market Commission on wide-ranging reforms to the network pricing rules applying to electricity and gas transmission and distribution businesses, as proposed by the Australian Energy Regulator.

- 2010-12** **QR National**
Regulatory and competition matters
 Advisor on the competition and regulatory matters, including: a range of potential structural options arising in the context of the privatisation of QR National's coal and freight haulage businesses, particularly those arising in the context of a 'club ownership model' proposed by a group of major coal mine owners; and an assessment of competitive implications of proposed reforms to access charges for use of the electrified network.
- 2002-12** **Orion New Zealand Ltd, New Zealand**
Electricity lines regulation
 Advisor on regulatory and economic aspects of the implementation by the Commerce Commission of the evolving regimes for the regulation of New Zealand electricity lines businesses. This role has included assistance with the drafting submissions, the provision of expert reports, and the giving of expert evidence before the Commission.
- 2011** **Meridian Energy, New Zealand**
Undesirable trading situation
 Advice on the economic interpretation and implications of the New Zealand electricity rule provisions that define an 'undesirable trading situation' in the wholesale electricity market.
- 2011** **Ausgrid**
Demand side management
 Prepared a report on incentives, constraints and options for reform of the regulatory arrangements governing the role of demand side management in electricity markets.
- 2010-11** **Transnet Corporation, South Africa**
Regulatory and competition policy
 Advised on the preparation of a white paper on future policy and institutional reforms to the competitive and regulatory environment applying to the ports, rail and oil and gas pipeline sectors of South Africa.
- 2010-11** **Minter Ellison/UNELCO, Vanuatu**
Arbitral review of decision by the Vanuatu regulator
 Expert report and evidence before arbitrators on a range of matters arising from the Vanuatu regulator's decision on the base price to apply under four electricity concession contracts entered into by UNELCO and the Vanuatu government, including country risk component of the allowed rate of return and bringing to account events from the prior regulatory period.
- 2007-11** **Powerco/CitiPower**
Regulatory advice
 Wide ranging advice on matters arising under the national electricity law and rules, such as the framework for reviewing electricity distribution price caps, the treatment of related party outsourcing arrangements, an expert report on application of the AER's efficiency benefit sharing scheme, the potential application of total factor productivity measures in CPI-X regulation, and arrangements for the state-wide roll out of advanced metering infrastructure.

- 1999-2004,
2010-11** **Sydney Airports Corporation**
Aeronautical pricing notification
Wide ranging advice and expert reports on regulatory matters, including advice and expert reports in relation to SACL's notification to the ACCC of substantial reforms to aeronautical charges at Sydney Airport in 2001. This involved the analysis and presentation of pricing principles and their detailed application, through to discussion of such matters at SACL's board, with the ACCC, and in public consultation forums. Subsequent advice on two Productivity Commission reviews of airport charging, and notifications to the ACCC on revised charges for regional airlines.
- 2010** **Industry Funds Management/Queensland Investment Corporation**
Due diligence, Port of Brisbane
Retained to advise on regulatory and competition matters likely to affect the future financial and business performance of the Port of Brisbane, in the context of its sale by the Queensland government.
- 2009-10** **New Zealand Electricity Industry Working Group, New Zealand**
Transmission pricing project
Advice to a working group comprising representatives from lines companies, generators, major users and Transpower on potential improvements to the efficiency of New Zealand's electricity transmission pricing arrangements.
- 2007-09** **GDSE, Macau**
Electricity tariff reform
Advice to the regulator of electricity tariffs in Macau on a series of potential reforms to the structure of electricity supply tariffs.
- 2001-09** **Auckland International Airport Limited, New Zealand**
Aeronautical price regulation
Advice and various expert reports in relation to: the review by the Commerce Commission of the case for introducing price control at Auckland airport; a fundamental review of airport charges implemented in 2007; and the modified provisions of Part IV of the Commerce Act concerning the economic regulation of airports and other infrastructure service providers.
- 2008** **Western Power**
Optimal treatment and application of capital contributions
Advice on the optimal regulatory treatment of capital contributions, taking into account the effect of alternative approaches on tariffs, regulatory asset values, and network connection by new customers.
- 2000-08** **TransGrid**
National electricity market and revenue cap reset
Regulatory advisor to TransGrid on a range of issues arising in the context of the national electricity market (NEM), including: the economics of transmission pricing and investment and its integration with the wholesale energy market, regulatory asset valuation, the cost of capital and TransGrid's 2004 revenue cap reset.
- 2007** **Johnson Winter & Slattery/Multinet**
Review of outsourced asset management contracts
Expert report developing a framework for assessing the prudence of outsourcing contracts in the context of the Gas Code, and evaluating the arrangements between Multinet and Alinta Asset Management by reference to that framework.

- 2007** **Ministerial Council on Energy**
Review of Chapter 5 of the National Electricity Rules
 Advice on the development of a national framework for connection applications and capital contributions in the context of the National Electricity Rules.
- 2006-07** **Ministerial Council on Energy**
Demand side response and distributed generation incentives
 Conducted a review of the MCE's proposed initial national electricity distribution network revenue and pricing rules to identify the implications for the efficient use of demand side response and distributed generation by electricity network owners and customers.
- 2006** **Ministerial Council on Energy**
Electricity network pricing rules
 Advice on the framework for the development of the initial national electricity distribution network pricing rules, in the context of the transition to a single, national economic regulator.
- 2005-06** **Minister for Industry**
Expert Panel
 Appointment by Hon Ian Macfarlane, Minister for Industry, Tourism and Resources, to an Expert Panel to advise the Ministerial Council on Energy on achieving harmonisation of the approach to regulation of electricity and gas transmission and distribution infrastructure.
- 2005-06** **Australian Energy Markets Commission**
Transmission pricing regime
 Advice to the AEMC on its review of the transmission revenue and pricing rules as required by the new National Electricity Law.
- 1998-2006** **Essential Services Commission of Victoria**
Price cap reviews
 Wide ranging advice to the Essential Services Commission (formerly the Office of the Regulator-General), on regulatory, financial and strategic issues arising in the context of five separate reviews of price controls/access arrangements applying in the electricity, gas distribution, ports, rail and water sectors in Victoria. This work encompassed advice on the development of the Commission's work program and public consultation strategy for each review, direct assistance with the drafting of papers for public consultation, the provision of internal papers and analysis on specific aspects of the review, drafting of decision documents, and acting as expert witness in hearings before the Appeal Panel and Victorian Supreme Court.

Valuation and Contract Analysis

- 2015-16** **Clyde and Co/Apache Corporation**
Contract dispute
 Expert reports submitted in the context of Supreme Court of Victoria proceedings concerning the appointment of receivers for Burrup Fertilisers Pty Ltd, in relation to the market price of gas available to supply an anhydrous ammonia plant on the Burrup Peninsula.

- 2015-16** **Raja, Darryl & Loh/Serudong Power Sdn Bhd (SPSB)**
Power purchase agreement arbitration
 Expert reports submitted in the context of an international arbitration held in Kuala Lumpur concerning the interpretation of price indexation provisions in a power purchase agreement between SPSB and Sabah Electricity Sdn Bhd.
- 2015-16** **Australian Government Solicitor/Commonwealth of Australia**
Native title compensation
 Expert reports and testimony before the Federal Court in relation to the native title compensation claim against the Northern Territory for certain acts extinguishing native title in the town of Timber Creek.
- 2014-15** **Minter Ellison/Foxtel Management Pty Ltd**
Assessment of reasonable licence fee
 Expert reports prepared in the context of proceedings before the Copyright Tribunal concerning the appropriate valuation of the rights to be paid by Foxtel for the broadcast and communication of commercial recordings licensed by the Phonographic Performance Company of Australia.
- 2014-15** **Rahmat Lim & Partners/Port Dickson Power Berhad, Malaysia**
Power purchase agreement arbitration
 Expert reports submitted in the context of an arbitration held in Kuala Lumpur concerning the interpretation of the price indexation provisions in a power purchase contract between Port Dickson Power Berhad and Tenaga Nasional Berhad.
- 2013** **Johnson Winter & Slattery/Origin**
Gas supply agreement price review
 Analysis and advice on the implications of certain contract terms for the price of gas, to be determined in a potential arbitration concerning the terms of a substantial long term gas supply agreement.
- 2013** **Herbert Smith Freehills/Santos**
Gas supply agreement price review
 Analysis and advice on factors influencing the market price of gas in eastern Australia, to be determined in a potential arbitration concerning the terms of a substantial long term gas supply agreement.
- 2012-13** **Herbert Smith Freehills/North West Shelf Gas**
Gas supply agreement arbitration
 Expert reports on the implications of certain contract terms for the price of gas under a substantial long term gas supply agreement.
- 2012-13** **Allens/BHP Billiton-Esso**
Gas supply agreement arbitration
 Analysis, advice and expert report on the implications of certain contract terms for the price of gas under a substantial long term gas supply agreement.
- 2012** **King & Wood Mallesons/Ausgrid**
Power purchase agreement arbitration
 Expert report prepared and filed in an arbitration on the in relation to the effect of the government's newly introduced carbon pricing mechanism on the price to be paid under a long term power purchase and hedge agreement between an electricity generator and retailer.

- 2011** **Kelly & Co/Cooper Basin Producers**
Wharfage dues agreement arbitration
 Expert report and testimony in arbitration proceedings to determine the 'normal wharfage dues' to be paid for use of a facility that assists the transfer of petroleum products to tanker ships from a processing terminal in South Australia.
- 2010** **Barclays Capital/Confidential Client**
Due diligence, Alinta Energy
 Advice on the key industry related risks and issues facing Alinta Energy's gas and electricity assets during the due diligence process associated with its recapitalisation and sale.
- 2009** **Freehills/Santos**
Gas supply agreement price review
 Analysis and advice on factors influencing the market price of gas in eastern Australia, to be determined in a potential arbitration concerning the terms of a substantial long term gas supply agreement.
- 2008-09** **Clayton Utz/Origin Energy**
Gas supply agreement arbitration
 Expert reports and testimony in an arbitration concerning the market price of gas, which was determined and applied in a substantial long term gas supply agreement.
- 2008-09** **Minter Ellison/Confidential client**
Treatment of past capital contributions
 Expert report and evidence given in arbitration proceedings on the extent to which a discount should apply under a long term water supply contract, in recognition of a capital contribution made at the outset of the agreement.
- 2008** **Freehills/Tenix Toll**
Logistics contract arbitration
 Advice on the appropriate methodology for adjusting prices under a long term logistics contract in light of changing fuel costs.
- 2008** **BG plc**
Market analysis
 Advise on economic aspects of the operation of the east Australian wholesale gas market in the context of the potential development of coal seam gas for use in LNG production and export.
- 2008** **Gilbert + Tobin/Waste Services NSW**
Damages estimation
 Damages assessment in the context of a Federal Court finding of misleading and deceptive conduct in relation to the extent of environmental compliance in the provision of waste services.
- 2007** **Meerkin & Apel/SteriCorp**
Damages assessment
 Expert report and testimony in the context of an international arbitration on commercial damages arising from alleged non-performance of a medical waste processing plant.

- 2006-07 Middletons/Confidential Client**
Damages assessment
 Expert report on the methodological framework for assessing alleged damages arising from contractual non-performance and associated forecast for demand and supply conditions and prices for natural gas and ethane prices and over a ten year period.
- 2006 Confidential Client/Australia**
Valuation of digital copyright
 Advice in relation to the negotiation for a licence for digital copyright. This included the discussion of the matters that should be considered in determining fees for a digital copyright licence, including the extent to which digital material should be valued differently from print material and whether the charging mechanism for print is appropriate for digital copyright.
- 2006 Minter Ellison/Australian Hotels Association**
Valuation of copyright material
 Expert report in the context of proceedings before the Copyright Tribunal concerning the appropriate valuation of the rights to play recorded music in nightclubs and other late night venues.
- 2005-06 Minter Ellison and Freehills/Santos**
Gas supply agreement arbitrations
 Principal economic expert in separate arbitrations of the price to apply following review of two substantial gas supply agreements between the South West Queensland gas producers and, respectively, a large industrial customer and major gas retailer.

Securities and Finance

- 2016 Elliot Legal/Representative proceeding**
Misleading and deceptive conduct
 Expert reports in representative proceedings in the Supreme Court of Victoria concerning the effect of certain disclosures on the price of ASX listed securities in Downer EDI Ltd.
- 2016 Allens/confidential client**
Shareholder class action
 Ongoing advice and analysis for an ASX-100 listed entity on the extent of liability and potential damages arising from an shareholder class action alleging breach of ASX disclosure obligations.
- 2015-16 Maurice Blackburn/Representative proceeding**
Misleading and deceptive conduct
 Expert reports submitted to the Federal Court assessing the effect of alleged misstatements in relation to the annual accounts and associated going concern assumption in relation to Tamaya Resources Ltd (in liquidation).
- 2013-15 Sydney Water Corporation**
Cost of capital estimation
 Prepare three expert reports for submission to the Independent Pricing and Regulatory Tribunal (IPART) on the framework for determining the weighted average cost of capital for infrastructure service providers, and on estimation of an appropriate equity beta.

- 2012-15** **HWL Ebsworth/Confidential client**
Insider trading
 Expert advice and analysis in the context of criminal proceedings alleging insider trading in certain ASX-listed securities (2012-13). Subsequent expert report filed in Supreme Court of Tasmania estimating price effects of inside information in context of 'proceeds of crime' proceedings.
- 2014** **Wotton Kearney/Genesys Wealth Advisors**
Misleading and deceptive conduct
 Expert report submitted to the Supreme Court of Victoria assessing the accuracy of product disclosure statements and other information in relation to two fixed interest investment funds offered by Basis Capital.
- 2014** **TransGrid**
Cost of capital estimation
 Preparation of an expert report for submission to the Australian Energy Regulator (AER) estimating the weighted average cost of capital for electricity network service providers.
- 2011-13** **Slater & Gordon/Modtech**
Shareholder damages assessment
 Expert reports and testimony in representative proceedings before the Federal Court alleging misstatement and/or breach of the continuous disclosure obligations of the ASX-listed entity, GPT.
- 2011-12** **Freehills/National Australia Bank**
Shareholder damages assessment
 Expert advice in connection with representative proceedings before the Federal Court alleging misstatement and/or breach of the continuous disclosure obligations of an ASX-listed entity.
- 2012** **Johnson Winter & Slattery/Victorian gas distributors**
Cost of equity estimation
 Expert report submitted to the AER on the appropriate methodology for estimating the cost of equity under the Capital Asset Pricing Model.
- 2009-13** **Minter Ellison/Confidential client**
Misleading and deceptive conduct
 Expert report and related advice in light of investor claims and pending litigation following the freezing of withdrawals from a fixed interest investment trust that primarily held US-denominated collateralised debt obligations (CDOs), as offered by a major Australian financial institution. Analysis undertaken includes the extent to which the investment risks were adequately described in the fund documents, and the quantum of any potential damages arising.
- 2011** **Barringer Leather/Confidential client**
Market manipulation
 Expert report prepared in the context of criminal proceedings brought in the Supreme Court of NSW alleging market manipulation in the trading of certain ASX-listed securities.
- 2010-11** **Wotton Kearney/Confidential client**
Misleading and deceptive conduct
 Expert report and analysis in light of investor claims and pending litigation following the freezing of withdrawals from two fixed interest investment trusts that primarily held US-denominated collateralised debt obligations (CDOs).

- 2010-11** **Maurice Blackburn/Confidential client**
Shareholder damages assessment
 Analysis and advice in connection with representative proceedings before the Federal Court alleging misstatement and/or breach of the continuous disclosure obligations of an ASX-listed entity.
- 2010-11** **Mallesons/ActewAGL**
Judicial review of rate of return determination
 Expert report and testimony in Federal Court proceedings seeking judicial review of a decision by the Australian Energy Regulator of its determination of the risk free rate of interest in its price setting determination for electricity distribution services.
- 2009-11** **William Roberts/Clime Capital**
Shareholder damages assessment
 Expert reports submitted in representative proceedings before the Federal Court alleging misstatement and/or breach of the continuous disclosure obligations of ASX-listed entity, Credit Corp.
- 2009** **Jemena Limited**
Cost of equity estimation
 Co-authored an expert report on the application of a domestic Fama-French three-factor model to estimate the cost of equity for regulated gas distribution businesses.
- 2008-09** **Clayton Utz/Fortescue Metals Group**
Materiality of share price response
 Expert report and testimony before the Federal Court addressing alleged breaches of the ASX continuous disclosure obligations and the associated effect on the price of FMG securities arising from statements made by it in 2004.
- 2008-09** **Energy Trade Associations – APIA, ENA and Grid Australia**
Value of tax imputation credits
 Preparation of expert report on the value to investors in Australian equities of tax imputation credits, for submission to the Australian Energy Regulator.
- 2008-09** **Freehills/Centro Properties**
Shareholder damages assessment
 Assistance in the estimation of potential damages arising in representative proceedings concerning accounting misstatements and/or breach of the continuous disclosure obligations of an ASX-listed entity.
- 2008** **Slater & Gordon/Boyd**
Shareholder damages assessment
 Expert report for submission to a mediation on the damages arising in representative proceedings before the Federal Court alleging accounting misstatements and/or breach of the continuous disclosure obligations of EDI Downer.
- 2007-08** **Maurice Blackburn/Watson**
Shareholder damages assessment
 Advice in relation to damages arising in representative proceedings before the Federal Court alleging accounting misstatements and/or breach of the continuous disclosure obligation by the ASX-listed entity, AWB Limited.

- 2007** **Freehills/Telstra Corporation**
Shareholder damages assessment
 Advice and assistance in the preparation of the expert report of Dr Fred Dunbar submitted to the Federal Court in the context of proceedings alleging breaches of the continuous disclosure obligations by Telstra. The principal subject of this work was the assessment of the extent to which of material alleged not to have been disclosed was already known and incorporated in Telstra's stock price.
- 2006-07** **Maurice Blackburn/Dorajay**
Shareholder damages assessment
 Advice and assistance in the preparation of the expert report of Dr Fred Dunbar submitted to the Federal Court in the context of proceedings between Dorajay and Aristocrat Leisure. The principal subject of this work was the assessment of the extent and duration of share price inflation arising from various accounting misstatements and alleged breaches of the continuous disclosure obligations.

Institutional and Regulatory Reform

- 2008-11** **Department of Sustainability and Environment**
Management of bulk water supply
 Advice on the concept and merits of establishing market based arrangements to guide both the day-to-day operation of the bulk water supply system in metropolitan Melbourne, as well as the trading of rights to water between the metropolitan water supply system and those throughout the state of Victoria.
- 2008** **Department of Treasury and Finance**
Access regime for water networks
 Report on the principles that should be applied in developing a state-wide third party access regime for water supply networks.
- 2007** **Economic Regulatory Authority**
Options for competitive supply bulk water
 Report on institutional and structural reforms necessary to encourage the development of options for the procurement of alternative water supplies from third parties.
- 2006** **Bulk Entitlement Management Committee**
Development of urban water market
 Report for the four Melbourne water businesses on options for devolution of the management of water entitlements from collective to individual responsibility, including the development of associated arrangements for oversight and co-ordination of the decentralised management and trading of water rights.

Sworn Testimony, Transcribed Evidence²

- 2016** **Expert evidence before the Federal Court on behalf of Generic Health, in the matter of Bayer Pharma Aktiengesellschaft v Generic Health Pty Ltd**
 Expert reports, sworn evidence, Sydney, 14-15 December 2016

² Past ten years only.

Testimony before an UNCITRAL arbitral tribunal on behalf of Maynilad Water Service Inc (MWSI), in the matter of MWSI v Republic of the Philippines

Report, sworn evidence, Singapore, 6 December 2016

Expert evidence on behalf of Powerco, at the Commerce Commission's Conference on the Cost of Capital matters

Transcribed evidence, public hearings, Wellington, 7 September 2016

Expert evidence before the Federal Court on behalf of plaintiffs, in the matter of HFPS v Tamaya

Expert reports, sworn evidence, Sydney, 13 May 2016

Expert evidence before an arbitral tribunal on behalf of Serudong Power Sdn Bhd (SPSB), in the matter of SPSB v Sabah Electricity Sdn Bhd (SESB)

Expert reports, sworn evidence, Kuala Lumpur, 27-28 April 2016

Expert evidence before the Federal Court on behalf of the Commonwealth of Australia, in the matter of Griffiths v Northern Territory

Expert reports, sworn evidence, Darwin, 24-25 February 2016

2015 Expert evidence before an arbitral tribunal on behalf of Port Dickson Power Berhad (PDP), in the matter of PDP v Tenaga Nasional Berhad (TNB)
Expert reports, sworn evidence, Kuala Lumpur, 28 January 2015

2014 Expert evidence before a UNCITRAL arbitral tribunal on behalf of Manila Water Corporation Inc (MWCI) in the matter of MWCI v Metropolitan Waterworks and Sewerage System (MWSS)
Expert reports, sworn evidence, Sydney (by videolink to Manila), 31 August 2014
Expert evidence before the Australian Competition Tribunal on behalf of the ACCC, in the matter of AGL Energy v ACCC
Expert reports, sworn evidence, Sydney, 10-11 June 2014

2013 Expert evidence before the Supreme Court of Victoria on behalf of Maddingley Brown Coal in the matter of Maddingley Brown Coal v Environment Protection Agency of Victoria
Expert reports, sworn evidence, Melbourne, 12 August 2013
Expert evidence before the Federal Court on behalf of Modtech in the matter of Modtech v GPT Management and Others
Expert reports, sworn evidence, Melbourne, 27 March 2013

2012 Expert evidence before the Supreme Court of Queensland on behalf of Origin Energy, in the matter of Origin Energy Electricity Ltd and Others v Queensland Competition Authority and Others
Expert reports, sworn evidence, Brisbane, 3 December 2012

2011 Expert evidence before the Federal Court on behalf of the Australian Turf Club and Australian Racing Board, in the matter of Bruce McHugh v ATC and Others
Expert report, transcribed evidence, Sydney, 12 and 14 October 2011
Expert evidence in arbitration proceedings before J von Doussa, QC, on behalf of Santos in the matter of Santos, and Others v Government of South Australia
Expert report, transcribed evidence, Adelaide, 13-15 September 2011

- Expert evidence before a panel of arbitrators on behalf of UNELCO, in the matter of UNELCO v Government of Vanuatu**
Expert report, transcribed evidence, Melbourne, 23 March and 21 April 2011
- Expert evidence before the Federal Court on behalf of ActewAGL, in the matter of ActewAGL v Australian Energy Regulator**
Expert report, sworn evidence, Sydney, 17 March 2011
- Deposition Testimony in Re Payment Card Interchange and Merchant Discount Litigation, in the United States District Court for the Eastern District of New York**
Deposition testimony, District of Columbia, 18 January 2011
- 2010**
- Expert evidence before the Federal Court in behalf of the Australia Competition and Consumer Commission, in the matter of ACCC v Cement Australia and others**
Expert report, sworn evidence, Brisbane, 19-21 October 2010
- Expert evidence on behalf of Orion NZ, at the Commerce Commission's Conference on its Input Methodologies Emerging View Paper**
Transcribed evidence, public hearings, Wellington, 24 February 2010
- Deposition Testimony in Re Payment Card Interchange and Merchant Discount Antitrust Litigation, in the United States District Court for the Eastern District of New York**
Deposition Testimony, District of Columbia, 18 February 2010
- 2009**
- Expert evidence before the Australian Competition Tribunal on behalf of Fortescue Metals Group Ltd, in the matter of Application for Review of Decision in Relation to Declaration of Services Provided by the Robe, Hamersley, Mt Newman and Goldsworthy Railways**
Expert report, sworn evidence, Melbourne, 12-13 October and 5-6 November 2009
- Expert evidence on behalf of Orion NZ, at the Commerce Commission's Conference on its Input Methodologies Discussion Paper**
Transcribed evidence, public hearings, Wellington, 16 September 2009
- Expert evidence before the Federal Court on behalf of Fortescue Metals Group Ltd, in the matter of ASIC v Fortescue Metals Group and Andrew Forrest**
Expert report, sworn evidence, Perth, 29 April–1 May 2009
- Expert report and evidence in arbitration proceedings before Hon Michael McHugh, AC QC, and Roger Gyles, QC, between Origin Energy and AGL**
Expert report, sworn evidence, Sydney, 19-24 March 2009
- 2008**
- Expert evidence on behalf of Orion NZ, at the Commerce Commission's Conference on its Draft Decision on Authorisation for the Control of Natural Gas Pipeline Services**
Transcribed evidence, public hearings, Wellington, 21 February 2008
- 2007**
- Expert report and evidence in arbitration proceedings before Sir Daryl Dawson between SteriCorp and Stericycle Inc.**
Expert report, sworn evidence, 11 July 2007
- 2006**
- Expert report and evidence in arbitration proceedings before Sir Daryl Dawson and David Jackson, QC, between Santos and others, and AGL**
Expert report, sworn evidence, November 2006

Expert report and evidence before the Federal Court on behalf of Fortescue Metals Group in the matter of BHP Billiton v National Competition Council and Others

Expert report, sworn evidence, November 2006

Expert report and evidence in arbitration proceedings before Sir Daryl Dawson and David Jackson, QC, between Santos and Others, and Xstrata Queensland

Expert report, sworn evidence, September 2006

Expert report and evidence before the Copyright Tribunal on behalf of the Australian Hotels Association and others in the matter of PPCA v AHA and Others

Expert report, sworn evidence, May 2006

Expert report and evidence in arbitration proceedings before Hon Michael McHugh, AC QC, on the matter of AWB Limited v ABB Grain Limited

Expert report, sworn evidence, 24 May 2006

Expert report and evidence to Victorian Appeal Panel, in the matter of the appeal by United Energy Distribution of the Electricity Price Determination of the Essential Services Commission

Expert report, sworn evidence, 10 February 2006

Speeches and Publications³

2015

Electricity Networks Association Regulation Seminar, Brisbane

Participant in Expert Plenary Panel

Speech, Brisbane, 5 August 2015

NZ Commerce Commission Input Methodologies Review, Wellington

'Allocation of Risk' and 'New Technologies'

Panel Discussant, Wellington, 29 July 2015

Competition Matters Conference, Wellington

Disruptive Technologies

Chair, Discussion Panel, Wellington, 24 July 2015

Singapore Aviation Academy, Singapore

Private Financing of Airport Infrastructure Expansions

Speech, Singapore, 5 March 2015

GCR 4th Annual Law Leaders Forum Asia-Pacific

Differences in using economics in EU and Asia Pacific

Speech, Singapore, 5 March 2015

AEMC Public Forum

East Coast Gas Market Review

Speech, Sydney, 25 February 2015

2014

Competition and Consumer Workshop, Law Council of Australia

An Economist's Take on Taking Advantage

Paper and Speech, Brisbane, 14 September 2014

Energy Networks 2014

Innovation and Economic Regulation

Speech, Melbourne, 1 May 2014

³ Past seven years

The Network Industries Quarterly, Consumer Advocacy in Australian Regulatory Decision Making – ‘Hard Choices Await’, Vol. 16, No 1, 2014
Ecole Polytechnique Federale de Lausanne, 31 March 2014

GCR 3rd Annual Law Leaders Asia Pacific
Role of Economists in Competition Law Enforcement in Asia-Pacific
Speech, Singapore, 6 March 2014

2013 University of South Australia – Competition and Consumer Workshop
Empirical test and collusive behaviour
Speech and participation game, Adelaide, 16 November 2013

Energy in WA Conference
Capacity Payments in the WEM – Time to Switch?
Panel Discussion, Perth, 21 August 2013

ACCC/AER Regulatory Conference
Designing Customer Engagement
Speech, Brisbane, 25 July 2013

Victorian Reinsurance Discussion Group
Australian Mining – When Opportunities and Risk Collide
Speech, Melbourne, 1 March 2013

NZ Downstream Conference
Investment and Regulation
Panel Discussion, Auckland, 25 July 2013

2012 Rising Stars Competition Law Workshop
Expert Evidence in Competition Cases
Speech, Sydney, 24 November 2012

KPPU – Workshop on the Economics of Merger Analysis
Theories and Methods for Measuring the Competitive Effects of Mergers
Speech, Bali, 19-21 November 2012

University of South Australia – Competition and Consumer Workshop
Reflections on Part IIIA of the Competition Act
Speech, Adelaide, 12 October 2012

NZ Downstream Conference
Lines company consolidation – what are the benefits and risks?
Panel discussion, Auckland, 6-7 March 2012

2011 Law Council of Australia - Competition Workshop
Coordinated effects in merger assessments
Speech, Gold Coast, 27 August 2011

ACCC Regulatory Conference
Adapting Energy Markets to a Low Carbon Future
Speech, Brisbane, 28 July 2011

2010 IPART Efficiency and Competition in Infrastructure
Improving Performance Incentives for GTE's
Speech, Sydney, 7 May 2010

Law and Economics Association of New Zealand
Shareholder Class Actions – A Rising Trend in Australia
Speeches, Auckland and Wellington, 15-16 November 2010

- 2009**
- ACCC Regulatory Conference**
Substitutes and Complements for Traditional Regulation
Speech, Gold Coast, 30 July 2009
- Minter Ellison Shareholder Class Action Seminar**
Investor Class Actions – Economic Evidence
Speech, Sydney, 18 March 2009
- Competition Law and Regulation Conference**
Commerce Amendment Act: Impact on Electricity Lines Businesses
Speech, Wellington, 27 February 2009
- 2008**
- Non-Executive Directors**
Shareholder Class Actions in Australia
Speech, Sydney, 28 July 2008
- Mergers & Acquisitions: Strategies 2008**
Competition Law Implications for Mergers & Acquisitions
Speech, Sydney, 27 May 2008
- Institute for Study of Competition and Regulation**
Role of Merits Review under Part 4 and Part 4A of the Commerce Act
Speech, Wellington, 20 February 2008
- 2007**
- Law Council of Australia - Trade Practices Workshop**
Hypothetical breach of s46
Economic expert in mock trial, 20 October 2007
- Assessing the Merits of Early Termination Fees, *Economics of Antitrust: Complex Issues in a Dynamic Economy*, Wu, Lawrence (Ed)**
NERA Economic Consulting 2007
- Assessing the Impact of Competition Policy Reforms on Infrastructure Performance**
ACCC Regulation Conference
Speech, Gold Coast, 27 July 2007
- 2006**
- Trade Practices Workshop**
Access to Monopoly Infrastructure Under the Trade Practices Act: Current Issues with Part IIIa and Section 46
Conference Paper Co-Author, Canberra, 22 July 2006

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

ANNEXURE CERTIFICATE

This is the annexure marked "GJH-2" annexed to the statement of GREGORY JOHN HOUSTON dated 21 April 2017.

Annexure **GJH-2**
Letter of instructions dated 12 April 2017

Filed on behalf of (name & role of party)

CrownBet Pty Ltd (Intervener)

Prepared by (name of person/lawyer)

Geoff Carter

Law firm (if applicable)

Minter Ellison

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MinterEllison

12 April 2017

CONFIDENTIAL & PRIVILEGED BY EMAIL

Dr Greg Houston
Houston Kemp
Level 40, 161 Castlereagh Street
Sydney NSW 2000
Greg.Houston@houstonkemp.com

Dear Greg

Instruction letter – ACT 1 of 2017 - Australian Competition Tribunal merger authorisation application – CrownBet (as intervener)

1. Introduction

- 1.1 We act for CrownBet Pty Ltd (**CrownBet**).
- 1.2 We refer to our discussions with you in relation to the merger authorisation application (**Application**) filed by Tabcorp Holdings Ltd (**Tabcorp**) in the Australian Competition Tribunal (**Tribunal**) in respect of its proposed acquisition of Tatts Group Limited (**Tatts**) (the **Acquisition**). The proceedings are referred to as ACT 1 of 2017 (**Proceedings**).
- 1.3 CrownBet has applied for leave to intervene the Proceedings.
- 1.4 The purpose of this letter is to engage you to prepare an expert report for use by CrownBet as part of the Proceedings, expressing your opinion in accordance with this letter of instruction.

2. Scope of work

- 2.1 Subject to the exclusions in paragraph 2.2 below, based on your expertise and any assumptions provided, please provide in your expert report an opinion as to the following matters:
 - (a) Please identify and explain the principal economic or market variables that are likely to be affected by a merger transaction that alter the level of competition in one or more markets? Please explain how each of these variables are related to the broad objectives of the *Competition and Consumer Act 2010*, ie, the (economic) welfare of Australians?
 - (b) Please identify and explain the particular economic or market variables that are most relevant to your answer in question 2.1(a) in the context of the various wagering services offered by Tabcorp, Tatts and competing suppliers? Please identify and explain any other economic variables that, although themselves not measures of the level of competition in one or more relevant markets, may be said to be affected by, and so fall to be considered as, public benefits (or detriments) of the Acquisition?
 - (c) Please identify what you consider to be the appropriate markets for assessing the competitive effects of the Acquisition, including without limitation, any relevant functional dimensions. In forming your opinion on the relevant markets, please also consider and identify:
 - (i) the extent and relevance of product differentiation within any relevant market? and



- (ii) the extent and relevance of any areas of 'close competition' in any relevant market?
 - (d) Please provide your opinion on the likely effect(s) of the Acquisition on the type and extent of future competition in the market(s) you have identified in responding to question (c), as compared to the type and extent of future competition in circumstances where the transaction were not to proceed. In forming your opinion on this question (d), please specifically consider:
 - (i) the potential role of racing media (vision and audio) content (whether delivered by television, digital or other means) in punters' wagering experience, and its implications for:
 - (A) the wagering preferences and activity of punters; and
 - (B) competition in the markets you have identified in responding to question (c);
 - (ii) the likely effect of the Acquisition with respect to access to and supply of racing media (vision and audio) content and competition in the markets you have identified in responding to question (c).
 - (e) Please comment on the net public benefit assessment set out in the expert reports of Dr Christopher Pleatsikas, Mr Patrick Smith, Dr Flavio Menezes and Dr Ric Sime, taking into account your answers and analysis in responding to questions (a) through (d) above.
3. In answering questions (a)-(e), please indicate any material aspects on which you disagree with the opinions set out in the expert reports of Dr Christopher Pleatsikas, Mr Patrick Smith, Dr Flavio Menezes and Dr Ric Sime.
- 3.1 In providing your opinion and preparing your report, please note that no opinion is sought on matters relating to gaming services, lotteries or Keno that may arise from the Acquisition.
- 4. Materials**
- 4.1 Please review and have regard to the following materials in preparing your report:
- (a) the Form S Application filed by Tabcorp on 13 March 2017;
 - (b) the opinions and analysis contained in the following expert reports filed by Tabcorp with its Application on 13 March 2017:
 - (i) the Expert Report of Christopher Pleatsikas;
 - (ii) the Expert Report of Flavio Menezes;
 - (iii) the Expert Report of Patrick Smith; and
 - (iv) the Expert Report of Ric Simes;
 - (c) to the extent you consider relevant, other witness statements filed with or in support of the Application on 13 March 2017 (including material filed on behalf of or by Tabcorp and Tatts);
 - (d) to the extent you consider relevant, any other witness statements filed in the proceedings by CrownBet or any other party that are provided to you prior to completion of your expert report.
- 5. Guidelines for preparing your report**
- 5.1 We request that your report is prepared in accordance with the Federal Court General Practice Note GPN-EXPT, and that you comply with the Harmonised Expert Witness Code of Conduct attached to that practice note (together, the **Expert Guidelines**). A copy of the Expert Guidelines is enclosed at Attachment A.
6. In particular, as part of any reply, please state, specify or provide:

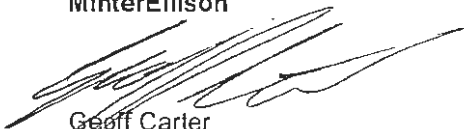
- (a) the name and address of the expert;
- (b) an acknowledgment that you have read the Harmonised Expert Witness Code of Conduct and agree to be bound by it;
- (c) your qualifications to prepare the report (including providing a curriculum vitae setting out details of those qualifications and expertise);
- (d) the assumptions and material facts on which each opinion expressed in the report is based (noting that a letter of instructions may be annexed);
- (e) the reasons for and any literature or other materials utilized in support of such opinion;
- (f) (if applicable) that a particular question, issue or matter falls outside your field of expertise;
- (g) the extent to which any opinion which you have expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
- (h) a declaration that you have made all inquiries which you believe are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which you regard as relevant have, to your knowledge, been withheld from the Court;
- (i) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
- (j) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (k) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

6.2 Please do not hesitate to contact us should you have any queries in relation to the Expert Guidelines.

7. Confidentiality

7.1 To the extent that, you are provided with access to confidential material of CrownBet or any other parties filed in the Proceedings (including material filed by Tabcorp in support of its application), we request that you strictly comply with the obligations of the relevant confidentiality regime applying to that material.

Yours faithfully
MinterEllison



Geoff Carter
Partner

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F: +61 3 8608 1096 geoff.carter@minterellison.com
Partner: Geoff Carter
OUR REF: 1161652



EXPERT EVIDENCE PRACTICE NOTES (GPN-EXPT)

General Practice Note

1. INTRODUCTION

- 1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* (“**Code**”) (see Annexure A) and the *Concurrent Expert Evidence Guidelines* (“**Concurrent Evidence Guidelines**”) (see Annexure B), applies to any proceeding involving the use of expert evidence and must be read together with:
- (a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework (“**NCF**”) of the Federal Court and key principles of case management procedure;
 - (b) the Federal Court of Australia Act 1976 (Cth) (“**Federal Court Act**”);
 - (c) the *Evidence Act 1995* (Cth) (“**Evidence Act**”), including Part 3.3 of the Evidence Act;
 - (d) Part 23 of the *Federal Court Rules 2011* (Cth) (“**Federal Court Rules**”); and
 - (e) where applicable, the Survey Evidence Practice Note (GPN-SURV).
- 1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

- 2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.
- 2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).
- 2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:
- (a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and
 - (b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

- 2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.
- 2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

- 3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.
- 3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.
- 3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness¹ should, at the earliest opportunity, be provided with:
 - (a) a copy of this practice note, including the Code (see Annexure A); and
 - (b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.
- 3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

¹ Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

- 4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.
- 4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.
- 4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

- 4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.
- 4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

- 5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).
- 5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:
 - (a) acknowledge in the report that:
 - (i) the expert has read and complied with this practice note and agrees to be bound by it; and
 - (ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;
 - (b) identify in the report the questions that the expert was asked to address;
 - (c) sign the report and attach or exhibit to it copies of:
 - (i) documents that record any instructions given to the expert; and

- (ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

- (a) whether a party should adduce evidence from more than one expert in any single discipline;
- (b) whether a common expert is appropriate for all or any part of the evidence;
- (c) the nature and extent of expert reports, including any in reply;
- (d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
- (e) the issues that it is proposed each expert will address;
- (f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);
- (g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and
- (h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

- 7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:
- (a) who should prepare any joint-report;
 - (b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties or the experts should assist in preparing such a list;
 - (c) the agenda for the conference of experts; and
 - (d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

Conference of Experts

- 7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.
- 7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:
- (a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;
 - (b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;
 - (c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.
- 7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

- 7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.
- 7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).
- 7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

- 7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.
- 7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

- 8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.
- 8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

- 8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

- 9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.
- 9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT²

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:
 - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
 - (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
 - (a) the name and address of the expert;
 - (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
 - (c) the qualifications of the expert to prepare the report;
 - (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
 - (e) the reasons for and any literature or other materials utilised in support of such opinion;
 - (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
 - (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
 - (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
 - (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

² Approved by the Council of Chief Justices' Rules Harmonisation Committee

knowledge of the expert, been withheld from the Court;

- (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

- 4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
- 5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

- 6. If directed to do so by the Court, an expert witness shall:
 - (a) confer with any other expert witness;
 - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
 - (c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

- 7. Each expert witness shall:
 - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
 - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique³ will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.
3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.
4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.
5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

³ Also known as the "hot tub" or as "expert panels".

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.
7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:
 - (a) the agenda;
 - (b) the order and manner in which questions will be asked; and
 - (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.
8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.
9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.
11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.
13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.
14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

- (a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;
 - (b) the experts will be grouped and called to give evidence together in their respective fields of expertise;
 - (c) the experts will take the oath or affirmation together, as appropriate;
 - (d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;
 - (e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;
 - (f) the judge will guide the process by which evidence is given, including, where appropriate:
 - (i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;
 - (ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;
 - (iii) inviting legal representatives to identify the topics upon which they will cross-examine;
 - (iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and
 - (v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.
15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.
16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.
17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.

IN THE AUSTRALIAN COMPETITION TRIBUNAL

ACT 1 of 2017

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

ANNEXURE CERTIFICATE

This is the annexure marked "GJH-3" annexed to the statement of GREGORY JOHN HOUSTON dated 21 April 2017.

Annexure **GJH-3** - Confidential (in part)
Report of Gregory John Houston

Filed on behalf of (name & role of party)

CrownBet Pty Ltd (Intervener)

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21 April 2017

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[Confidential to Tabcorp]

[Confidential to Tatts]

[Confidential to CrownBet]

[Confidential to Racing Victoria]

[Confidential to Racing.Com]

[HIGHLY CONFIDENTIAL derived
confidential information]

Executive Summary

I have been asked to prepare this report by Minter Ellison on behalf of CrownBet Pty Ltd (CrownBet). The context for my report is the application¹ before the Australian Competition Tribunal by Tabcorp Holdings Limited (Tabcorp) for authorisation to acquire Tatts Group Limited (Tatts).

Minter Ellison has asked me five questions in relation to the effect that the proposed transaction would have on competition and public benefits. In addressing these questions, I assess:

- the relevant markets for assessing the competitive effects of the proposed transaction;
- the likely effects on competition of the proposed merger between Tabcorp and Tatts; and
- the extent of public benefits that would be likely to arise.

Relevant markets

In my opinion, the relevant markets for the purposes of the proposed transaction are:

- a national market for wagering in Australia, and possibly a national market for the supply of totalisator wagering services;
- a market or markets for the rights to show racing media content; and
- markets for the acquisition of the Victorian totalisator licence in 2024 and the potential sale of WA TAB.

Effect of the merger on competition

In the table below, I present a diagrammatic summary of the state of competition for online wagering both prior to and following the proposed transaction, showing that the merged firm will have:

- the ability to leverage retail exclusivity in all states and territories, except Western Australia;
- the ability to integrate digital media across Australia; and
- substantially larger shares of online and over-the-telephone wagering revenue in four states or territories.

¹ Application – Form S, in relation to the Application by Tabcorp Holdings Limited under section 95AU of the Competition and Consumer Act 2010 for an authorisation under subsection 95AT (1) to acquire shares in the capital of a body corporate or to acquire assets of another person, ACT 1 of 2017 (hereafter 'Form S').

Tabcorp – pre-transaction competitive advantages in online and over-the-telephone wagering [HIGHLY CONFIDENTIAL derived confidential information]

	South Australia	Tasmania	Victoria	NSW	ACT	Queensland	NT
Ability to leverage retail exclusivity							
Ability to integrate digital media							
Share of online and telephone wagering revenue							

Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-19, p 2; Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4; Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.001.027.2115, tab 1, TBP.015.001.1843, tab 1, TBP.015.001.4261, tab 1, TBP.015.001.4262, tab 1 and TBP.001.022.0002, tab 1; and Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, tab 4.
Note: See the note of Figure 4.2 for my assumptions required for the analysis of the market shares.

Tatts – pre-transaction competitive advantages in online and over-the-telephone wagering [HIGHLY CONFIDENTIAL derived confidential information]

	South Australia	Tasmania	Victoria	NSW	ACT	Queensland	NT
Ability to leverage retail exclusivity							
Ability to integrate digital media							
Share of online and telephone wagering revenue							

Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-19, p 2; Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4; Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.001.027.2115, tab 1, TBP.015.001.1843, tab 1, TBP.015.001.4261, tab 1, TBP.015.001.4262, tab 1 and TBP.001.022.0002, tab 1; and Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, tab 4.
Note: See the note of Figure 4.2 for my assumptions required for the analysis of the market shares.

Combined Tabcorp-Tatts – increased competitive advantages in online and over-the-telephone wagering [HIGHLY CONFIDENTIAL derived confidential information]

	South Australia	Tasmania	Victoria	NSW	ACT	Queensland	NT
Ability to leverage retail exclusivity							
Ability to integrate digital media							
Share of online and telephone wagering revenue							

Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-19, p 2; Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4; Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.001.027.2115, tab 1, TBP.015.001.1843, tab 1, TBP.015.001.4261, tab 1, TBP.015.001.4262, tab 1 and TBP.001.022.0002, tab 1; and Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, tab 4.

Note: See the note of Figure 4.2 for my assumptions required for the analysis of the market shares.

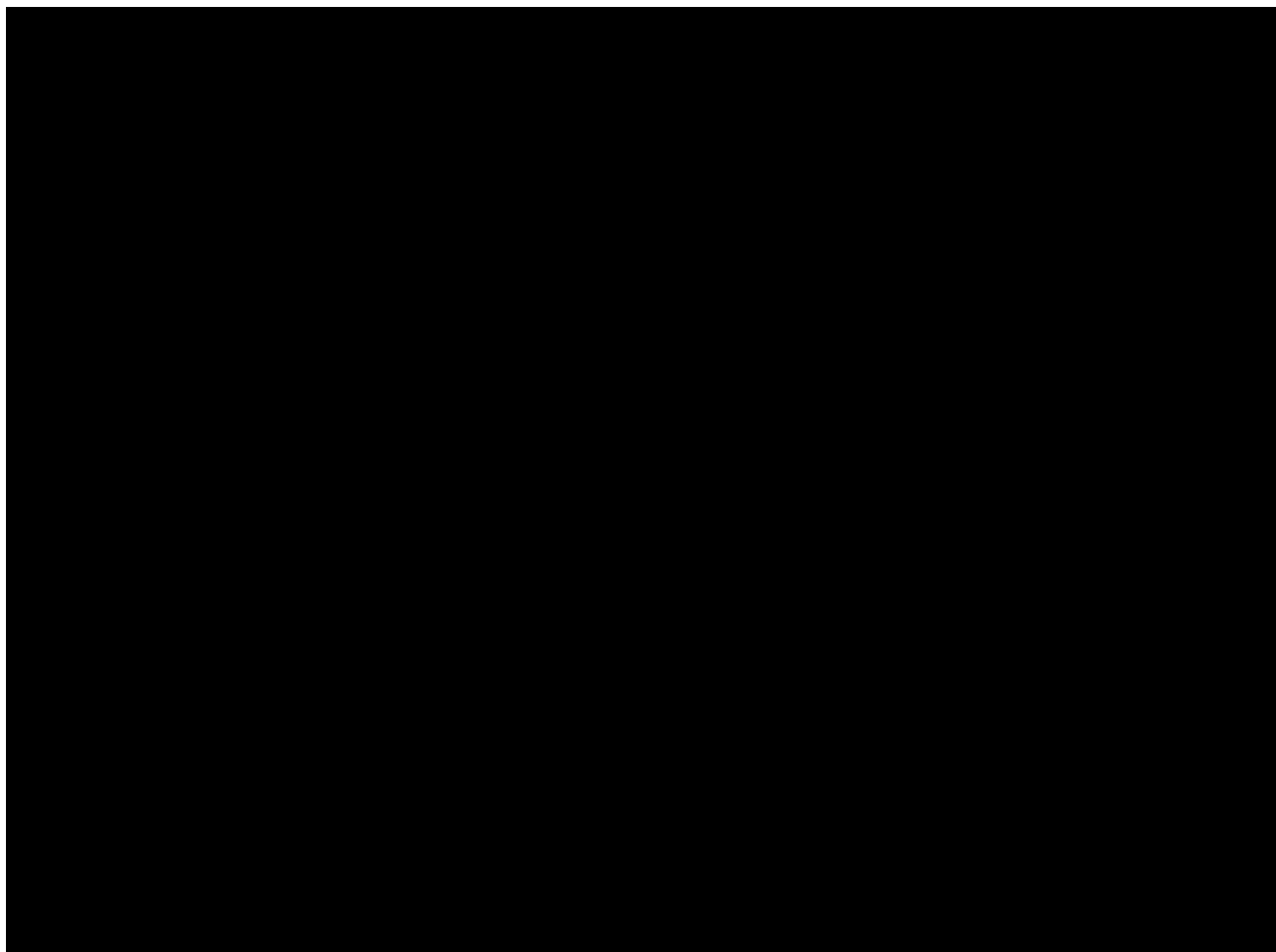
My analysis shows that the proposed transaction will lessen competition in a large and the fastest growing part of the national wagering market, being the provision of online and over-the-telephone wagering services, because:

- the transaction will bring together two strongly complementary forms of structural competitive advantage that are only available through the ongoing exercise of monopoly rights in the retail channel and market power in the acquisition of media rights, neither of which is able to be replicated by any of Tabcorp's competitors;
- consistent with the observation above [Confidential to Tatts]
- the RWWA, Tabcorp and Tatts are the only providers of online (and retail) totalisator wagering services, but because RWWA must comply with the take-out rate that Tabcorp sets through the SuperTAB pool, the merger will eliminate price-based competition for online totalisator wagering customers; and
- Tabcorp and Tatts are the two principal competitors in the supply of premium or rebated totalisator wagering services to large punters.

These detriments to competition are highly unlikely to be overcome by either new entry or expansion by existing competitors in the provision of online and over-the-telephone wagering. This is because not only will the effect of the proposed transaction be to raise the cost of rivals to the merged entity, but also there are significant barriers to entry in the provision of online and over-the-telephone wagering services.

The figure below shows that the merged firm will have a very substantial share of the national wagering market.

Share of national wagering market in 2016, by revenue [HIGHLY confidential to CrownBet]



Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4.

Further and relatedly, the merger will lessen competition in the acquisition of racing media rights because:

- the lessening of competition in the wagering market will increase Tabcorp's ability and incentive to exercise its market power in the acquisition of media rights;
- similarly, the merged firm's interdependent financial links with an increased number of PRBs will also increase Tabcorp's ability and incentive to exercise its market power in the acquisition of PRB's media rights; and
- the consequence of Tabcorp's increased ability and incentive to exercise its market power in the acquisition of media rights is that:
 - > PRBs are likely to realise a lower value for those rights; and
 - > the prospect or extent to which such rights will be made available on a non-exclusive basis will be reduced, thereby reinforcing the lessening of competition in the wagering market.

Finally, the proposed transaction will lessen competition for the acquisition of the Victorian wagering licence in 2024 and for the potential sale of the WA TAB, because in each case the number of credible bidders is likely to be reduced to one.

Public benefits

The public benefits of the proposed transaction – before taking into account the detrimental effects on competition – are substantially lower than those contended by Tabcorp, because:

- the cost savings anticipated by Tabcorp represent public benefits, but are likely to be offset by the economic effect of redundancies and reduced payments to suppliers; and
- the wagering revenue increases anticipated by Tabcorp are generally not public benefits, but mostly represent either public detriments or transfers of wealth from wagering customers to the merged entity.

I also identify numerous instances where developments anticipated by Tabcorp are unlikely to be a consequence of or specific to the proposed transaction, and so should not be taken into account in assessing its public benefits.

My analysis shows, in respect of the cost savings of [Confidential to Tabcorp] that:

- [Confidential to Tabcorp] of these costs savings result from an improved negotiating position which does not generate any increased consumption, but only reduced payments to suppliers for the same level of consumption – this is a transfer, not a benefit;
- this estimate assumes that [Confidential to Tabcorp] would immediately and as productively be re-deployed elsewhere in the economy – to the extent that this is not the case, the public benefits arising from the productive efficiencies claimed by Tabcorp will be less than the claimed cost savings; and
- [Confidential to Tabcorp] would be retained by the merged entity – to the extent that these are rents achieved through the exercise of market power they will not have the same value to the community as they would in the hands of punters.

Further, my analysis shows that, in respect of the revenue increases of [Confidential to Tabcorp] estimated by Tabcorp:

- [Confidential to Tabcorp] arises from revenue increases that Tabcorp estimates can be achieved by applying its risk management system to Tatts' business, increasing yields on existing Tatts products and no longer providing other products – these revenue increases are transfers and detriments respectively; and
- [Confidential to Tabcorp] arises from improvements to Tatts' wagering business, of which [Confidential to Tabcorp] is attributable to substitution from existing products provided by corporate bookmakers – meaning that only [Confidential to Tabcorp] is a public benefit, while of the remainder, [HIGHLY CONFIDENTIAL derived confidential information] is a transfer from corporate bookmakers and [HIGHLY CONFIDENTIAL derived confidential information] is a transfer from consumers.

I summarise this breakdown of benefits in the table below.

Estimate of public benefit provided by claimed revenue increases [Confidential to Tabcorp]
[HIGHLY CONFIDENTIAL derived confidential information]

Category	Description	Calculation	Improved fixed odds risk management	Improvements in Tatts' wagering business
Benefit claim made by Tabcorp	Benefit to the merged entity	A + B + C + D		
Public benefit	New sales made by the merged entity not captured from another bookmaker	A		
Public detriment	Sales no longer made by the merged entity	B		
Transfer from corporate bookmakers to the merged entity	Revenue on existing services previously earned by corporate bookmakers which substitute to the merged entity	C		
Transfer from consumers to the merged entity	Increased revenue on existing services by the merged entity due to higher yields	D		
Net public benefits		A - B		

Source: Statement of Damien Johnston, 6 March 2017, pp 30-48, paras 63-112; Confidential attachment TBP.100.001.0002, worksheets 'Inputs', 'Parimutuel' 'Fixed', 'Trackside' and 'Retail-Branding'.

Conclusion

Public benefits of the proposed merger are likely to be substantially lower than those cited by Tabcorp. Public benefits should only be accounted for where they provide value to the Australian community. Economic rents earned by the merged entity through the exercise of market power are unlikely to provide any value to the community, as compared with leaving this money in the hands of punters.

Although I am not able to quantify many of the competitive effects of the proposed transaction, the higher prices and lost services identified by Tabcorp alone are substantial. The combining of two forms of structural advantage available to the merged entity through the leverage of monopoly rights and exercise of market power will cause much greater, long term detriment to prices and output. The loss of innovation through more restricted access to digital vision will constrain the near and long term growth in wagering activity.

In my opinion, the competitive detriment arising from the proposed merger between Tabcorp and Tatts will dwarf its limited public benefits, such that it can be said with confidence that the merger will give rise to a significant net public detriment.

Responses to questions on the proposed transaction

(a) Please identify and explain the principal economic or market variables that are likely to be affected by a merger transaction that alter the level of competition in one or more markets? Please explain how each of these variables are related to the broad objectives of the Competition and Consumer Act 2010, ie, the (economic) welfare of Australians?

In section 4.1.1 I identify that the effect on competition of the proposed merger of two firms needs to be assessed by comparing the state or degree of competition in future:

- if the proposed transaction goes ahead (with the merger); and
- if the proposed transaction does not go proceed (without the merger).

I examine the likely state of competition in the relevant markets under these two scenarios, and the effect that any change in the degree of competition has on public welfare, which can be measured with reference to likely changes in prices, output, product quality and the anticipated extent of innovation over time.

- (b) Please identify and explain the particular economic or market variables that are most relevant to your answer in question 2.1(a) in the context of the various wagering services offered by Tabcorp, Tatts and competing suppliers? Please identify and explain any other economic variables that, although themselves not measures of the level of competition in one or more relevant markets, may be said to be affected by, and so fall to be considered as, public benefits (or detriments) of the Acquisition?**

In section 2.5 I explain that the relevant measures of price and output from an economic perspective are:

- the expected loss rate, which is the appropriate measure of price, as given by the take-out rate for totalisator wagers and the yield for fixed odds wagering;
- the revenue to wagering operators is a measure of gambling output that represents the resource cost or economic value added in the provision of wagering services; and
- the number of betting experiences gained for a given total expenditure is a reasonable measure of the welfare or utility gained by a consumer of wagering.

I explain the framework for assessing public benefits at section 5.1.

- (c) Please identify what you consider to be the appropriate markets for assessing the competitive effects of the Acquisition, including without limitation, any relevant functional dimensions. In forming your opinion on the relevant markets, please also consider and identify:**

- (i) the extent and relevance of product differentiation within any relevant market? And**
- (ii) the extent and relevance of any areas of 'close competition' in any relevant market?**

My answer to this question appears at the beginning of section 3.

I also explain the extent and relevance of product differentiation and areas of close competition in section 3.

- (d) Please provide your opinion on the likely effect(s) of the Acquisition on the type and extent of future competition in the market(s) you have identified in responding to question (c), as compared to the type and extent of future competition in circumstances where the transaction were not to proceed. In forming your opinion on this question (d), please specifically consider:**

- (i) the potential role of racing media (vision and audio) content (whether delivered by television, digital or other means) in punters' wagering experience, and its implications for:**
 - A. the wagering preferences and activity of punters; and**
 - B. in the markets you have identified in responding to question (c);**
- (ii) the likely effect of the Acquisition with respect to access to and supply of racing media (vision and audio) content and competition in the markets you have identified in responding to question (c).**

My answer to this question is at the beginning of section 4.

- (e) Please comment on the net public benefit assessment set out in the expert reports of Dr Christopher Pleatsikas, Mr Patrick Smith, Dr Flavio Menezes and Dr Ric Sime, taking into account your answers and analysis in responding to questions (a) through (d) above.**

My answer to this question is set out at section 5.

1. Introduction

1. I have been asked to prepare this report by Minter Ellison on behalf of CrownBet Pty Ltd (CrownBet). The context for my report is the application² before the Australian Competition Tribunal (the Tribunal) by Tabcorp Holdings Limited (Tabcorp) for authorisation to acquire Tatts Group Limited (Tatts). I refer to this application at various parts of my report as the proposed transaction.

1.1 Instructions

2. Minter Ellison has asked that I provide my expert opinion in relation to five particular questions arising in relation to the proposed transaction, ie:
 - (a) Please identify and explain the principal economic or market variables that are likely to be affected by a merger transaction that alter the level of competition in one or more markets? Please explain how each of these variables are related to the broad objectives of the *Competition and Consumer Act 2010*, ie, the (economic) welfare of Australians?
 - (b) Please identify and explain the particular economic or market variables that are most relevant to your answer in question 2.1(a) in the context of the various wagering services offered by Tabcorp, Tatts and competing suppliers? Please identify and explain any other economic variables that, although themselves not measures of the level of competition in one or more relevant markets, may be said to be affected by, and so fall to be considered as, public benefits (or detriments) of the Acquisition?
 - (c) Please identify what you consider to be the appropriate markets for assessing the competitive effects of the Acquisition, including without limitation, any relevant functional dimensions. In forming your opinion on the relevant markets, please also consider and identify:
 - (i) the extent and relevance of product differentiation within any relevant market? and
 - (ii) the extent and relevance of any areas of 'close competition' in any relevant market?
 - (d) Please provide your opinion on the likely effect(s) of the Acquisition on the type and extent of future competition in the market(s) you have identified in responding to question (c), as compared to the type and extent of future competition in circumstances where the transaction were not to proceed. In forming your opinion on this question (d), please specifically consider:
 - (i) the potential role of racing media (vision and audio) content (whether delivered by television, digital or other means) in punters' wagering experience, and its implications for:
 - A the wagering preferences and activity of punters; and
 - B competition in the markets you have identified in responding to question (c);
 - (ii) the likely effect of the Acquisition with respect to access to and supply of racing media (vision and audio) content and competition in the markets you have identified in responding to question (c).

² Application – Form S, in relation to the Application by Tabcorp Holdings Limited under section 95AU of the Competition and Consumer Act 2010 for an authorisation under subsection 95AT (1) to acquire shares in the capital of a body corporate or to acquire assets of another person, ACT 1 of 2017 (hereafter 'Form S').

- (e) Please comment on the net public benefit assessment set out in the expert reports of Dr Christopher Pleatsikas, Mr Patrick Smith, Dr Flavio Menezes and Dr Ric Sime, taking into account your answers and analysis in responding to questions (a) through (d) above.

In answering questions (a)-(e), please indicate any material aspects on which you disagree with the opinions set out in the expert reports of Dr Christopher Pleatsikas, Mr Patrick Smith, Dr Flavio Menezes and Dr Ric Sime.

3. Minter Ellison's instructions to me are attached to my report as annexure GJH-2.

1.2 Expertise

4. I am a founding Partner of the firm of expert economists, HoustonKemp. Over a period of more than twenty five years I have accumulated substantial experience in the economic analysis of markets and the provision of expert advice and testimony in litigation, business strategy and policy contexts. I have developed that expertise in the course of advising corporations, regulators and governments on a wide range of competition, regulatory and financial economics matters.
5. My industry sector experience spans aviation, beverages, building products, cement, credit reporting, e-commerce, electricity and gas, explosives, forest products, grains, industrial gases, logistics, medical waste, mining, payments networks, office products, petroleum, ports, rail transport, retailing, scrap metal, securities markets, steel, telecommunications, thoroughbred racing, travel agency, waste processing and water. I have testified on these matters on numerous occasions before arbitrators, appeal panels, regulators, the Federal Court of Australia, the Tribunal and other judicial or adjudicatory bodies.
6. I hold a BSc (Hons) in Economics, a University of Canterbury post-graduate degree, which I was awarded with first class honours in 1983. I attach a copy of my curriculum vitae as annexure GJH-1.
7. In preparing this report, I have been assisted by my Sydney-based colleagues, Luke Wainscoat, Sarah Turner, Daniel Young, Sam Forrest, Stuart Morrison and Sarah Nelson. Notwithstanding this assistance, the opinions in this report are my own and I take full responsibility for them.

1.3 Report structure

8. I have structured my report as follows:
- in section 2 I describe various economic features of the wagering and racing industries, focusing on matters of most relevance for my subsequent assessment of the competitive effects and public benefits arising from the proposed transaction;
 - in section 3 I describe the appropriate approach to defining markets for analysing the effects on competition, and the particular markets relevant for the purposes of the proposed transaction;
 - in section 4 I describe the economic framework for assessing the competitive effects of mergers and apply that to the proposed merger between Tabcorp and Tatts. I also draw attention to particular aspects of the expert reports of Christopher Pleatsikas, Patrick Smith and Flavio Menezes that either omit important considerations, or with which I disagree;
 - in section 5 I describe the appropriate analytical framework to apply to the public benefit test, and review the analysis of the public benefit arising from the proposed transaction, as informed principally by Form S, the statement of Damien Johnston and the expert report of Ric Simes;
 - in section 6 I draw together the analysis I present in sections 4 and 5 to derive my conclusion in relation to the net public benefit of the proposed transaction between Tabcorp and Tatts; and
 - section 7 contains my declaration, as explained below.
9. I confirm that in the course of preparing this report, I have been provided with a copy of and read, understood and complied with the Federal Court General Practice Note GPN-EXPT, and the Harmonised Expert Witness Code of Conduct attached to that practice note (together, the Expert

Guidelines). I attach a copy of the Expert Guidelines as part of annexure GJH-2. My declaration, made in accordance with the Expert Guidelines is contained at the end of my report, as section 7.

2. Industry context

10. Wagering involves customers (punters) placing bets on the outcome of an uncertain event.³ Wagering customers in Australia can place bets on thoroughbred, harness and greyhound racing⁴ events, as well as sporting and non-sporting events.⁵ However, the focus of my report is wagering on racing.
11. The wagering industry is closely interrelated with the racing industry and with racing media. The racing industry provides the races upon which punters place wagers, and spectators consume wagering services and different forms of racing vision – either directly through on-course attendance at race meetings or off-course, via racing media – in combination with each other.⁶
12. In this section I describe various economic features of the wagering and racing industries, focusing on matters of most relevance for my subsequent assessment of the competitive effects and public benefits arising from the proposed transaction. I have organised the section to describe in turn:
 - the structure of the wagering industry, including its suppliers, wagering products and distribution channels;
 - the nature of the economic relationships between wagering and racing;
 - the economic relationship between wagering and racing media;
 - important trends in the wagering industry;
 - the different potential measures of both the price and output of gambling activity; and
 - the likely actions of Tabcorp and Tatts absent the merger.

2.1 Wagering industry structure

13. There are numerous entities in Australia providing various wagering products via a range of distribution channels. I define the different types of wagering products, suppliers and supply channels below and then further describe the products and distribution channels offered by each of the supplier types.

2.1.1 Wagering products, suppliers and distribution channels

14. There are four separate classes of wagering products in Australia, namely:⁷
 - totalisator wagering – a system of betting in which all wagers of the same type on an event are pooled together, a percentage is removed as commission ('take-out') for the pool operator, and the remainder of the pool is distributed to winning customers in line with the outcome of the bets;⁸
 - totalisator derivative or price matching wagering – the odds of an event are set by reference to either the final totalisator dividend paid by one or more totalisator operators or the fixed odds offered by on-course bookmakers for the same event;⁹
 - fixed odds wagering – the odds of an event are fixed at the time a customer's bet is placed and accepted, and these odds do not change (unless there is a scratching).¹⁰ However, the odds may

³ Form S, p 18, para 4.3.

⁴ Throughout this report I use the term 'racing' to refer collectively to thoroughbred, harness and greyhound racing.

⁵ Form S, p 18, para 4.3.

⁶ Form S, pp 18-19, para 4.4.

⁷ Form S, p 19, para 4.6.

⁸ Form S, p 19, para 4.7.

⁹ Form S, p 19, para 4.8; and Statement of Nicholas David Tyshing, 13 April 2017, p 5, para 16.

¹⁰ Form S, p 19, para 4.9.

vary across punters that place bets at different times because the wagering operator adjusts the odds over time based on the quantities wagered on the outcomes;¹¹ and

- betting through a betting exchange – a customer's bet is matched directly with an opposing bet or bets, and bets are only placed when they are matched.¹² In order for bets to be matched, there needs to be a bet that a particular outcome will occur (a 'back bet') and a bet that the particular outcome will not occur (a 'lay bet') at agreed odds and bet size.¹³

15. Wagering suppliers in Australia can be divided into three broad groups:¹⁴

- totalisator operators – totalisator operators, or state TABs, are wagering operators that are licenced by a state or territory to pool bets within the given state or territory in order to provide totalisator wagering products;¹⁵
- bookmakers – individuals or companies that conduct fixed odds betting and may also offer totalisator derivative products;¹⁶ and
- betting exchanges – betting exchanges allow one of the punters in a matched bet to set the odds for a given event, and the matched punter then places their wager at the odds set by the other punter.¹⁷

16. Wagering suppliers may offer wagering products via four key channels:¹⁸

- on-course – betting facilities are located at a racing venue and punters make wagers in person;
- physical retail outlets – betting facilities are located in authorised off-course retail venues outside of a racing venue and punters place bets in the facilities, either in person or via self-service terminals.¹⁹ Retail venues include dedicated retail shopfronts (eg, TAB agencies) and licensed premises (eg, hotels, pubs and clubs);²⁰
- internet – bets are placed by customers online through a wagering operator's website or mobile app; and
- phone – bets are placed by customers over the telephone.

2.1.2 Totalisator operators

17. Totalisator operators provide totalisator wagering products to punters at retail premises in the state that they operate²¹ and by telephone and online, to punters in both their home and other states. Totalisator operators must hold a licence from the relevant state or territory in order to offer totalisator wagering.²² These licences are provided on an exclusive basis, resulting in a single totalisator provider in each state and territory.²³

¹¹ Statement of Douglas John Freeman, 8 March 2017, p 23, para 54.

¹² Form S, pp 19-20, para 4.10

¹³ Statement of Douglas John Freeman, 8 March 2017, pp 24-25, para 62.

¹⁴ Form S, Annexure A, pp 11-13, paras 27-33.

¹⁵ Statement of Douglas John Freeman, 8 March 2017, p 9, para 24.

¹⁶ Form S, p 21, para 4.18

¹⁷ Statement of Douglas John Freeman, 8 March 2017, pp 24-25, para 62.

¹⁸ Statement of Douglas John Freeman, 8 March 2017, p 11, para 29.

¹⁹ Statement of Douglas John Freeman, 8 March 2017, p 10, para 25.

²⁰ Statement of Douglas John Freeman, 8 March 2017, p 10, para 25.

²¹ Statement of Douglas John Freeman, 8 March 2017, pp 9-10, para 24. I understand that state and territory legislation provides that totalisator products in each state and territory can only be provided by the totaliser licenced in that state or territory. See for example, Totalisator Act 1997 (New South Wales).

²² Form S, Annexure A, p 33, para 111.

²³ Form S, Annexure A, p 33, para 111.

18. The conditions under which a totalisator licence may be granted to a totalisator operator is specified by legislation in each state and territory.²⁴ Totalisator licences afford totalisator operators with certain rights and obligations. Such rights include that totalisator operators are the sole providers of wagering in a retail environment, including dedicated retail shopfronts and licensed premises, and they are the only wagering suppliers that are licensed to accept cash bets.²⁵

19. **HIGHLY Confidential to Tabcorp** [REDACTED]

[REDACTED] For example, Tabcorp recently announced that as part of its strategy of integrating digital into retail, it was introducing two key initiatives:

- A new digital commissions model whereby clubs, hotels and TAB agents are paid commission [REDACTED] as well as when a customer bets through TAB's digital platforms within their venue.²⁸ The venue partners also receive ongoing commissions on out-of-venue digital activity conducted by account customers that have been signed up in their venue.²⁹ [REDACTED]

.³²

- Check & Collect, which enables customers to scan winning tickets on their TAB app and have winnings immediately deposited into their account.³³

20. Similarly, Tatts has engaged in a number of strategic initiatives to leverage its retail premises:

- improving the in-play betting offering at retail outlets – in-play betting is betting after an event has commenced (often known as 'live betting') and is only available via telephone or in person (except in the case of racing events where online in-play betting is legal);³⁴ and

- **HIGHLY Confidential to Tatts** [REDACTED]

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²⁴ Statement of Douglas John Freeman, 8 March 2017, p 18, para 42.

²⁵ Statement of Douglas John Freeman, 8 March 2017, p 10, para 25.

²⁶ **HIGHLY Confidential to Tabcorp** [REDACTED]

²⁷ Statement of Statement of David Attenborough, 8 March 2017, p 38, para 152.

²⁸ Tabcorp, Results for announcement to the market for the half year ended 31 December 2016, 2 February 2017, p 5; Tabcorp, 2016/17 First half results presentation, 2 February 2017, pp 6-7; and Statement of Statement of David Attenborough, 8 March 2017, p 38, para 152.

²⁹ Tabcorp, Results for announcement to the market for the half year ended 31 December 2016, 2 February 2017, p 5; Tabcorp, 2016/17 First half results presentation, 2 February 2017, pp 6-7; Tabcorp, Tabcorp and the AHA unveil new five-year exclusive retail betting partnership, p 1, 10 April 2017; and Statement of Statement of David Attenborough, 8 March 2017, p 38, para 152.

³⁰ **HIGHLY Confidential to Tabcorp** [REDACTED] and Statement of Nicholas David Tyshing, 13 April 2017, p 24, para 135.

³¹ **HIGHLY Confidential to Tabcorp** [REDACTED]

³² **HIGHLY Confidential to Tabcorp** [REDACTED]

³³ Tabcorp, Results for announcement to the market for the half year ended 31 December 2016, 2 February 2017, p 5.

³⁴ Form S, Annexure A, pp 65-66, para 194(e); and Corrs Chambers Westgarth, In-play betting – don't bet on it, 2 May 2016, <http://www.corrs.com.au/publications/corrs-in-brief/in-play-betting-dont-bet-on-it/>.

³⁵ **HIGHLY Confidential to Tatts** [REDACTED]

21. In exchange for the licence to operate a totalisator and the exclusive right to take bets at retail locations and to accept cash bets, totalisator operators enter into arrangements with the relevant state or territory racing bodies, under which they provide financial contributions to the racing industry.³⁶ Totalisator operators must also comply with various conduct requirements and betting rules, and obtain approval for conducting certain wagering activities – such as pooling with operators outside of the relevant state or territory (see below).³⁷
22. Four of the state totalisator licences cap the period over which the right to operate a totalisator is held exclusively. In particular, the exclusivity period for the South Australian totalisator licence expires this year, while that for Tasmania expires in 2027, New South Wales in 2033 and Queensland in 2044.³⁸ However, it is unlikely that a second totalisator licence would be issued in any of these states since totalisator wagering involves inherent economies of scale, with larger totalisator pools reducing the costs of wagering.³⁹
23. Consistent with this feature of pooled betting, only one totaliser licence has been issued per state and territory to date. At least three states have considered awarding multiple licences, but in each case a decision was made to award an exclusive licence.⁴⁰ Relatedly, Giles Thompson, the Acting Chief Executive Officer of Racing Victoria, indicates that it is unlikely the Victorian government will change the model of an exclusive retail licence, on the basis that an exclusive retail licence is the most efficient mechanism for funding the Victorian racing industry.⁴¹
24. In the remainder of this section, I describe:
 - totalisator wagering products;
 - fixed odds wagering products;
 - the distribution channels for totalisator operators' wagering products;
 - the current totalisator operators in Australia; and
 - the pooling arrangements between these totalisator operators.

Totalisator wagering products

25. Totalisator wagering involves a system of betting in which all wagers of the same type on an event are pooled together, a percentage is removed as commission or 'take-out' by the totalisator operator, and the remainder of the pool is distributed to winning customers in line with the outcome of the bets.⁴² Given that the final odds are calculated from the pool of all bets on the event, punters are only provided with 'indicative odds' at the time of betting, and these can change in the lead up to the event.⁴³
26. Totalisator operators offer a number of bet types on their totalisator products, including:⁴⁴
 - win – the customer selects the runner that finishes first;

³⁶ Statement of Douglas John Freeman, 8 March 2017, pp 18-19, para 42

³⁷ Statement of Douglas John Freeman, 8 March 2017, pp 18-19, para 42

³⁸ Table 2.1 below sets out the term of each totalisator licence by state, as well as the current holder of that licence. Form S, Annexure A, pp 23 and 33, paras 76 and 113.

³⁹ Productivity Commission, *Inquiry Report Gambling Volume 1*, 26 February 2010, p 2.40; Affidavit of Giles Mansell Thompson, 23 March 2017, p 5, para 29; and Statement of Andrew Charles Harding, 23 February 2017, p 6, para 19.

⁴⁰ Form S, Annexure A, p 33, para 111; and Affidavit of Giles Mansell Thompson, 23 March 2017, p 5, para 29.

⁴¹ Affidavit of Giles Mansell Thompson, 23 March 2017, p 5, para 29.

⁴² Form S, p 19, para 4.7.

⁴³ Form S, Annexure A, p 22, para 72; and Statement of Douglas John Freeman, 8 March 2017, p 17, para 38.

⁴⁴ Statement of Douglas John Freeman, 8 March 2017, p 26, paras 68-69; and Statement of Douglas John Freeman, 8 March 2017, Tab 12 of DF-1 [TBP.001.027.1737].

- place – the customer selects the runner that finishes first, second or third;
- quinella – the customer selects the runners that finish first and second, in any order;
- exacta – the customer selects the runners that finish first and second, in the correct order; and
- trifecta – the customer selects the runners that finish first, second and third, in the correct order.

27. Totalisator operators do not face any risk of loss from totalisator wagering because they derive income via the take-out rate, which is removed from the pool prior to sharing the totalisator dividend pool amongst winning punters.⁴⁵ Totalisator operator therefore have no financial interest in the outcome of the event on which totalisator wagers are placed.⁴⁶
28. By way of variation to these broad arrangements, totalisator operators also offer rebates to large punters, the purpose of which is to attract much larger, more price sensitive bets.⁴⁷ Such rebates are effectively financed by way of reduction in the take-out rate applicable to that particular bet, and so do not cause any reduction in the dividends received by punters across the rest of the totalisator pool.⁴⁸ A totalisator operator would have an incentive to attract large wagers whenever the incremental cost of receiving and administering the particular wager is less than the lower take-out rate implied by the rebate.

Take-out rates

29. The commission or take-out on a totalisator pool is used to pay the costs of operating the totalisator, including the retail premises at which bets are taken, the profits of the totalisator operator and the various forms of its contributions to the racing industry.⁴⁹ Each totalisator operator determines the take-out rate that it will set for each wagering product, subject to maximum levels prescribed in legislation by each state and territory and expressed as a percentage of the total amount invested in the pool.⁵⁰ Totalisator operators are not obligated to publish the actual take-out rates applied to any particular event and these rates are typically not readily available to punters, either in retail premises or online.⁵¹
30. Maximum take-out rates vary by state. In New South Wales, Victoria, Tasmania, the Australian Capital Territory and Western Australia, the maximum take-out rate also differs by bet type and whether the totalisator is pooled with international totalisators.⁵² The maximum take-out rate in New South Wales is 14.5 per cent on a win and 17.5 per cent on a quinella when the totalisator operator is not hosting international pool, whereas it is set at 25 per cent on a quinella when the totalisator operator is hosting international pools (but for a win the take-out rate remains unchanged at 14.5 per cent).⁵³
31. In contrast, the legislated maximum take-out rate in Queensland, South Australia and the Northern Territory is set at 25 per cent, with this uniformly higher rate applying regardless of the bet type or pooling participants.⁵⁴

⁴⁵ Statement of Douglas John Freeman, 8 March 2017, p 18, para 40.

⁴⁶ Statement of Douglas John Freeman, 8 March 2017, p 18, para 40.

⁴⁷ Statement of Nicholas David Tyshing, 13 April 2017, pp 17 and 81, paras 89 and 393(b); and Statement of Douglas John Freeman, 8 March 2017, p 69, para 191.

⁴⁸ [HIGHLY Confidential to Tabcorp]

⁴⁹ Statement of Nicholas David Tyshing, 13 April 2017, p 12, para 56; and Form S, p 26, para 4.43.

⁵⁰ Form S, p 19, para 4.7; and Form S, Annexure A, p 37, para 128.

⁵¹ Statement of Nicholas David Tyshing, 13 April 2017, p 17, para 92.

⁵² Form S, Annexure A, p 37, para 130.

⁵³ Form S, Annexure A, p 38, para 131, Table 3 and Table 4.

⁵⁴ Form S, Annexure A, pp 37-38, paras 129 and 131, Table 3 and Table 4.

32. [HIGHLY confidential to Tatts] [REDACTED]
[REDACTED] In particular, [HIGHLY confidential to Tabcorp]
[REDACTED]
[REDACTED] whereas, [HIGHLY confidential to Tatts]

⁶ For example:⁵⁷

- [REDACTED]
- [REDACTED] and
- [REDACTED]
33. [REDACTED]⁵⁸ with Tabcorp noting that reducing take-out rates results in minimal increases in turnover and is not profitable.⁵⁹ However, [REDACTED]
- [REDACTED]
- \$2

Fixed odds wagering products

34. In addition to totalisator wagering, totalisator operators are permitted to offer fixed odds products both from their retail premises and as cash bets.⁶³ These products are the same as those offered by bookmakers and betting exchanges, but with the exception that the latter are not permitted either to take cash bets or to operate retail premises. Totalisator operators were once restricted from offering fixed odds wagering, but all totalisator operators now offer fixed odds wagering services on racing, sports and other events.⁶⁴

⁵⁵ Statement of Robert Michael Sean Cooke, 9 March 2017, p 13, para 31; and Form S, Annexure B, pp 3-4, para 1.1; and Form S, Annexure A, pp 37-39, paras 131-132.

⁵⁶ Statement of Robert Michael Sean Cooke, 9 March 2017, p 13, para 31; and Form S, Annexure B, pp 3-4, para 1.1; and Form S, Annexure A, pp 37-39, paras 131-132.

⁵⁷ Statement of Robert Michael Sean Cooke, 9 March 2017, p 13, para 31; and Form S, Annexure B, pp 3-4, para 1.1; and Form S, Annexure A, pp 37-39, paras 131-132.

⁵⁸ Statement of Robert Michael Sean Cooke, 9 March 2017, p 13, paras 31-32; and Form S, Annexure B, pp 3-4, para 1.1.

⁵⁹ Statement of Douglas John Freeman, 8 March 2017, p 112, para 286.

⁶⁰ Statement of Douglas John Freeman, 8 March 2017, pp 112-113, paras 288-289.

⁶¹ Statement of Douglas John Freeman, 8 March 2017, pp 112-113, para 289.

⁶² Statement of Douglas John Freeman, 8 March 2017, pp 112-113, para 289.

⁶³ Statement of Douglas John Freeman, 8 March 2017, p 23, paras 57-58.

⁶⁴ Form S, p 20, para 4.14.

35. Totalisator operators can offer fixed odds products on races nationwide and accept cash for such bets in their retail outlets. However, as with totalisator products, these fixed odds offerings are restricted to being provided to punters at retail premises in the states in which the totalisator operator holds the totalisator licence,⁶⁵ and by telephone and online, to punters in both their home and other states.⁶⁶ Tabcorp therefore provides fixed odds wagering services in conjunction with its totalisator products in Victoria, New South Wales and the Australian Capital Territory.⁶⁷ Subject to regulatory approvals regarding permitted wagering events, Tabcorp's Victoria, New South Wales and the Australian Capital Territory customers can bet on the same racing events and be offered the same fixed odds (subject to fluctuations in the odds offered from time to time).⁶⁸ Similarly, Tatts provides fixed odds wagering in conjunction with its totalisator operations in Queensland, South Australia, Tasmania and the Northern Territory.⁶⁹
36. In addition to their fixed odds products offered on Australian races in the states in which they hold totalisator licences, both Tabcorp and Tatts also offer fixed odds betting nationally by means of their corporate bookmaking licences.⁷⁰ Tabcorp and Tatts both have Northern Territory-licensed bookmaker operations. In particular, Tabcorp provides totalisator derivative and fixed odds wagering services on racing (and other sports and events) nationwide, through Luxbet.⁷¹ Similarly, Tatts also has a sports bookmaker licence from the Northern Territory.⁷² Tabcorp offers fixed odds bets nationally online under both its Tabcorp brand and Luxbet brand, while the same applies for Tatts and its UBET brand.⁷³
37. Totalisator operators (and corporate bookmakers) face risk from offering fixed odds wagering because fixed odds wagering involves punters betting against the wagering operator, whereas totalisator wagering involves punters wagering against each other.⁷⁴ In consequence, a wagering operator's revenue on fixed odds products is determined in part by the outcome of the event, as well as the quantity and odds of the bets it has taken.⁷⁵
38. The odds offered on fixed price products reflect a wagering operator's assessment of the probability of the relevant outcomes and its targeted yield (known as its 'market percentage').⁷⁶ The market percentage refers to the targeted yield that a wagering operator expects to receive on a race, eg, a market percentage of 130 per cent indicates that the wagering operator expects to receive a 30 per cent gross profit on the race.⁷⁷ However, the market percentage is only a targeted yield and the actual yield may well differ from this value – CrownBet states that because bets made by punters are not evenly balanced or distributed, the yield earned by a bookmaker will usually be less than the market percentage.⁷⁸

⁶⁵ Statement of Robert Michael Sean Cooke, 9 March 2017, p 14, para 37; and Statement of Douglas John Freeman, 8 March 2017, pp 34-35, para 94.

⁶⁶ Form S, pp 5 and 13, paras 1.8 and 2.7.

⁶⁷ Statement of Douglas John Freeman, 8 March 2017, p 24, para 59.

⁶⁸ Statement of Douglas John Freeman, 8 March 2017, p 24, para 59.

⁶⁹ Form S, p 13, para 2.7.

⁷⁰ Statement of Douglas John Freeman, 8 March 2017, pp 33 and 47, paras 91(c) and 133; and Statement of Robert Michael Sean Cooke, 9 March 2017, p 28, para 74(d)(ii).

⁷¹ Form S, pp 5-6, para 1.8.

⁷² Tatts Group, Annual report 2016, p 106.

⁷³ Form S, pp 5 and 13, paras 1.8 and 2.7; and Statement of Robert Michael Sean Cooke, 9 March 2017, p 16, para 43.

⁷⁴ Statement of Douglas John Freeman, 8 March 2017, p 23, para 56.

⁷⁵ Statement of Douglas John Freeman, 8 March 2017, p 23, para 55.

⁷⁶ Form S, p 19, para 4.9; and Statement of Douglas John Freeman, 8 March 2017, p 23, para 54; and Statement of Nicholas David Tyshing, 13 April 2017, p 8, para 32.

⁷⁷ See Punters website, <https://www.punters.com.au/faq/what-are-market-percentages/>, accessed 28 March 2017.

⁷⁸ Statement of Nicholas David Tyshing, 13 April 2017, p 8, para 32.

Distribution channels

39. As well as offering wagering products at retail outlets, totalisator operators can distribute their products on-course, or via the internet or telephone. For example, Tabcorp's provides on-course totalisator and fixed odds wagering in Victoria, New South Wales and the Australian Capital Territory, as well as providing totalisator and fixed odds wagering by telephone, mobile apps and the internet nationwide.⁷⁹
40. Similarly, Tatts offers totalisator and fixed odds wagering on-course in Queensland, South Australia, Tasmania and the Northern Territory, and nationally over the telephone, mobile apps and internet nationwide.⁸⁰ I note that Tatts has recently launched its UBET brand for the Wagering Division of its business, and that Tatts' has retail outlets, telephone operations, a website and mobile app under the UBET name.⁸¹ Tatts also continues to offer wagering under the Tatts brand from the website www.tatts.com.⁸²
41. Online customers have access to only one totalisator pool per online account, since they are only able to participate in the pool that they joined at the time of sign-up.⁸³ For example, Tabcorp customers can choose to have their online account based in New South Wales, Victoria or the Australia Capital Territory. The location of the betting account determines the prices, pools and bet types that are available to the customer – New South Wales accounts have access to the New South Wales pool, and Victoria and Australia Capital Territory accounts have access to the SuperTAB pool (see below).⁸⁴ Customers are unable to change pools after they sign up, although they do have the ability to create a new account so as to access another pool.⁸⁵

Current totalisator operators

42. There are currently three totalisator operators in Australia, with these providers holding a total of eight exclusive retail licences across Australia, typically via a subsidiary – the totalisator operators licensed in each jurisdiction are referred to as 'State TABs' in Form S:⁸⁶
 - Tabcorp holds three totalisator licences – New South Wales, Victoria and the Australian Capital Territory;
 - Tatts holds four totalisator licences – Queensland, South Australia, Tasmania and the Northern Territory; and
 - the Western Australian Government-owned Racing and Wagering Western Australia (RWWA)⁸⁷ operates the WA TAB in Western Australia.
43. One of the above totalisator licences is due to expire in the medium term. In particular, the current Victorian licence expires in 2024, although the Victorian Government has the option to extend the current licence to 2026.⁸⁸ The process that the Victorian Government will use award the next Victorian licence is currently unknown.⁸⁹

⁷⁹ Form S, p 5, para 1.8.

⁸⁰ Form S, p 13, para 2.7; and UBET website, <https://ubet.com/resource/mobile-apps/about>, accessed 28 March 2017.

⁸¹ Statement of Robert Michael Sean Cooke, 9 March 2017, pp 14-16 and 51-53, paras 37, 41, 43 and 153.

⁸² Statement of Robert Michael Sean Cooke, 9 March 2017, p 54, para 154.

⁸³ Tabcorp website, https://tab.custhelp.com/app/answers/detail/a_id/278/kw/pool, accessed 15 April 2017.

⁸⁴ Tabcorp website, <https://www.tab.com.au/join>, accessed 15 April 2017.

⁸⁵ Tabcorp website, https://tab.custhelp.com/app/answers/detail/a_id/278/kw/pool, accessed 15 April 2017.

⁸⁶ Statement of Douglas John Freeman, 8 March 2017, pp 9, 19-20 and 49-50, paras 24, 44 and 143; and Form S, p 20, para 4.13.

⁸⁷ RWWA is a publicly owned body corporate with a statutory entitlement to conduct off-course totalisator wagering in Western Australia. Form S, p 20, para 4.13.

⁸⁸ Form S, Annexure A, p 33, para 113.

⁸⁹ Form S, Annexure A, p 33, para 114.

Pooling arrangements

44. Many of the above eight State TABs have entered into pooling arrangements to combine their respective pools in order to provide a single pool across the customers of each participating totalisator operator.⁹⁰ Pooling arrangements typically involve a totaliser operator with a relatively larger pool offering pooling services to one or more totalisator operators with smaller pools.⁹¹
45. Pooling between totalisator operators is highly regulated by state and territory governments in Australia and typically requires authorisation from the ACCC.⁹² A totalisator operator must generally obtain racing industry approval (under either the terms of its racing industry agreements or wagering licence), state or territory government approval and wagering tax exemptions to establish pooling arrangements with other Australian or international totalisator operators.⁹³
46. There are currently three combined totalisator pools in Australia, ie:⁹⁴
 - SuperTAB – hosted by Tabcorp Wagering Manager (Vic) Pty Ltd⁹⁵ through a combination of Tabcorp's Victorian and Australian Capital Territory pools and RWWA's Western Australian pool. SuperTAB also co-mingles with international pools under various pooling agreements;
 - NSWTAB – hosted by TAB Limited in New South Wales, NSWTAB co-mingles with international participants under various agreements, however NSWTAB does not pool with any other Australian totalisator operators; and
 - UBET – hosted by UBET Qld Ltd, a wholly-owned subsidiary of Tatts, this pool combines all of Tatts' pools across the four states in which Tatts is the totalisator operator (ie, Queensland, South Australia, Tasmania and the Northern Territory).
47. Pooling participants are required to comply with the betting rules and take-out rates that apply to the hosting totalisator.⁹⁶ For example, when other totalisators pool into NSWTAB or SuperTAB, the New South Wales and Victorian betting rules apply.⁹⁷ Similarly, when NSWTAB or SuperTAB pool into Hong Kong, the Hong Kong betting rules and deduction rates apply.⁹⁸ Further, pooling participants must pay the pool host a processing fee for its operation of the pool.⁹⁹ For example, in FY16, Tabcorp received approximately [HIGHLY Confidential to Tabcorp] [REDACTED]¹⁰⁰
48. Table 2.1 below summarises the current totalisator operators in each state and the pooling arrangements of each totalisator operator.

⁹⁰ Statement of Douglas John Freeman, 8 March 2017, p 49, para 141.

⁹¹ Statement of Douglas John Freeman, 8 March 2017, p 49, para 141.

⁹² Statement of Nicholas David Tyshing, 13 April 2017, p 93, para 449; Statement of Douglas John Freeman, 8 March 2017, p 59, para 164(a).

⁹³ Statement of Douglas John Freeman, 8 March 2017, p 49, para 142.

⁹⁴ Statement of Douglas John Freeman, 8 March 2017, pp 49-50, para 143.

⁹⁵ Tabcorp Wagering Manager (Vic) Pty Ltd is the operator of Tabcorp Wagering's licence.

See Statement of Douglas John Freeman, 8 March 2017, pp 19 and 38, para 44 and 102.

⁹⁶ Statement of Douglas John Freeman, 8 March 2017, pp 50-51 and 60, paras 144 and 164(c).

⁹⁷ Statement of Douglas John Freeman, 8 March 2017, pp 50-51, para 144.

⁹⁸ Statement of Douglas John Freeman, 8 March 2017, pp 50-51, para 144.

⁹⁹ Statement of Douglas John Freeman, 8 March 2017, pp 52 and 54, paras 149 and 154.

¹⁰⁰ Statement of Douglas John Freeman, 8 March 2017, p 49, para 143(a).

Table 2.1: Totalisator operators and pools by state and territory

State / territory	Parent company of State TAB	Off-course State TAB	Licence expiry	Combined totalisator pools
New South Wales	Tabcorp	TAB Limited	2097 (exclusivity until 2033)	NSWTAB
Victoria	Tabcorp	Tabcorp Wagering (Vic) Pty Ltd	2024 (exclusive for term)	SuperTAB
Australian Capital Territory	Tabcorp	Tabcorp ACT Pty Ltd	2064 (exclusive for term)	SuperTAB
Queensland	Tatts	UBET Qld Ltd	2098 (exclusivity until 2044)	UBET
South Australia	Tatts	UBET SA Pty Ltd	2100 (exclusivity until 2017)	UBET
Tasmania	Tatts	UBET Tas Pty Ltd	2062 (option to renew to 2111 and exclusivity until 2027)	UBET
Northern Territory	Tatts	UBET NT Pty Ltd	2035 (exclusive for term)	UBET
Western Australia	Government authority	RWWA	n/a (exclusive)	SuperTAB

Source: Statement of Douglas John Freeman, 8 March 2017, pp 19-20, para 44, Figure 8; and Form S, pp 20-21, para 4.16.

2.1.3 Corporate bookmakers

49. There are two classes of bookmakers in Australia:¹⁰¹

- traditional bookmakers; and
- corporate bookmakers.

50. Traditional bookmakers are typically small family businesses or sole traders.¹⁰² These wagering suppliers are permitted to operate on-course at a racing venue, either face-to-face with punters or over-the-telephone and internet.¹⁰³ Traditional bookmakers provide fixed odds products and typically provide simpler bet types, such as win and place bets.¹⁰⁴

51. Comparatively, corporate bookmakers are fully incorporated businesses that offer fixed odds and totalisator derivative wagering products over-the-telephone and internet to customers in all states and territories in Australia.¹⁰⁵ Corporate bookmakers are currently prevented from offering cash bets and operating off-course retail venues.¹⁰⁶ Further, corporate bookmakers are unable to provide on-course betting services, except for in Victoria where a corporate bookmaker can apply to conduct betting on-course as a 'registered bookmaker'.¹⁰⁷

52. Totalisator derivative or price matching products are offered by all corporate bookmakers, but not by totalisator operators (although Tabcorp does offer totalisator derivative products via Luxbet).¹⁰⁸ Totalisator derivative or price matching products involve corporate bookmakers offering wagers at the

¹⁰¹ Form S, p 21, para 4.18.

¹⁰² Form S, p 21, para 4.19.

¹⁰³ Form S, p 21, para 4.19.

¹⁰⁴ Form S, p 21, para 4.19.

¹⁰⁵ Form S, p 21, para 4.20; and Statement of Douglas John Freeman, 8 March 2017, pp 21 and 24, paras 49 and 60.

¹⁰⁶ Form S, p 21, para 4.20.

¹⁰⁷ Statement of Douglas John Freeman, 8 March 2017, p 11, para 29.

¹⁰⁸ Statement of Douglas John Freeman, 8 March 2017, pp 20-21, paras 45 and 49; and Form S, pp 5-6, para 1.8.

same or better odds as totalisator operators, but in circumstances where the corporate bookmaker bears the relevant risks,¹⁰⁹ rather than these being spread across all punters through the operation of a pool.¹¹⁰

53. In addition to offering the fixed odds bet types offered by totalisator operators (eg, win, place etc), corporate bookmakers offer a number of additional bet types (via their totalisator derivative or price matching products) that are not offered by totalisator operators.¹¹¹ For example, corporate bookers (including Luxbet) offer the following bet types:¹¹²
- top totalisator / best totalisator – customers are offered the highest dividend, based on the closing odds, of the three State TAB pools;
 - top totalisator plus / best totalisator plus – customers are offered the highest dividend paid of the three State TABs or the Starting Price¹¹³, whichever is higher;
 - mid totalisator – customers are offered the middle dividend of the three State TAB pools, and this product is typically offered on midweek races;
 - top totalisator plus x% – customers are offered the top State TAB dividend plus a predetermined percentage bonus, which is typically between 5 per cent and 20 per cent; and
 - best of the best – customers are offered the highest payout dividend of the best of the three State TAB pools or the Top Fluc¹¹⁴, whichever is higher.
54. In contrast to totalisator products, which do not expose totalisator operators to any risk of loss, corporate bookmakers are exposed to risk of loss from providing both fixed odds and totalisator derivative products.¹¹⁵ Bookmakers impose maximum payouts on certain derivative products (including quinellas and quadrellas) in order to manage this risk.¹¹⁶ These payout limits can reduce the appeal of these wagering products to some punters because they reduce the potential win size.¹¹⁷
55. The large majority of corporate bookmakers are licensed in the Northern Territory.¹¹⁸ The current annual corporate licence fee in the Northern Territory is \$23,000 and these licences are issued in the Northern Territory on a non-exclusive basis.¹¹⁹ Further, the annual tax on fixed odds gross profit is capped at a maximum of \$575,000 in the Northern Territory, regardless of turnover.¹²⁰

¹⁰⁹ Statement of Nicholas David Tyshing, 14 April 2017, pp 12-13, paras 60-62.

¹¹⁰ Form S, p 19, para 4.8.

¹¹¹ Statement of Douglas John Freeman, 8 March 2017, p 20, para 47; and Statement of Nicholas David Tyshing, 14 April 2017, p 27, para 147.

¹¹² Statement of Douglas John Freeman, 8 March 2017, pp 27-28, para 71; and Statement of Douglas John Freeman, 8 March 2017, Tab 12 of DF-1 [TBP.001.027.1737].

¹¹³ The Starting Price is the official and final on-course bookmakers' price transmitted at the advertised start of the race, usually by the Australian Prices Network.

Statement of Douglas John Freeman, 8 March 2017, p 27, para 71

¹¹⁴ The Top Fluc or "Top Fluctuation" is the highest official on-course bookmaker's odds. Statement of Douglas John Freeman, 8 March 2017, pp 27-28, para 71.

¹¹⁵ Statement of Douglas John Freeman, 8 March 2017, p 21, para 50.

¹¹⁶ Statement of Nicholas David Tyshing, 13 April 2017, p 8, para 35. Tyshing also states that CrownBet does not 'lay off' or 'bet back' with a totalisator or another wagering operator in order to reduce its risk, and that he expects this also to be the case for the majority of other corporate bookmakers. See Statement of Nicholas David Tyshing, 13 April 2017, pp 12-13, para 61.

¹¹⁷ Statement of Nicholas David Tyshing, 13 April 2017, p 8, para 35.

¹¹⁸ Statement of Douglas John Freeman, 8 March 2017, pp 10 and 24, paras 27 and 60.

¹¹⁹ Form S, p 23, para 4.28.

¹²⁰ Form S, p 25, para 4.34.

56. Tabcorp and Tatts consider that the Northern Territory regulatory environment advantages corporate bookmakers by offering limited taxes, lighter regulation, and lower payments to the race industry.¹²¹ Further, corporate bookmakers have the ability to offer:¹²²

- totalisator derivative products without being subject to any regulatory requirements regarding the creation and operation of the totalisator pool;
- bets on a wider range of betting events compared with the merger parties; and
- credit accounts to customers, whereas Tabcorp's businesses (excluding Luxbet) are prohibited from providing such accounts.

57. However, CrownBet considers that corporate bookmakers face numerous competitive disadvantages compared to totalisator operators.¹²³ For example, CrownBet notes that corporate bookmakers:¹²⁴

- are unable to offer totalisator wagering, live sports betting (other than by telephone) or wagering on virtual racing;
- have no guaranteed take-out rate on their products and instead bear risk on all wagering products that they offer;
- are precluded from establishing a physical retail presence;
- are unable to accept cash bets; and
- hold no or limited rights to racing media content.

2.1.4 Betting exchange

58. A betting exchange allows punters to wager directly with one another at fixed odds set by one of the punters.¹²⁵ Betting exchanges operate online and also operate call centres to allow customers to place bets over the telephone.¹²⁶ An exchange operator earns revenue from the betting exchange by charging commission on its customers' net winnings.¹²⁷ As such, the exchange operator does not face any risk of loss on bets.¹²⁸

59. Betfair (owned by Crown Resorts Ltd in Australia) is the only licensed betting exchange currently operating in Australia, and it matches bets on racing in all Australian jurisdictions.¹²⁹ I note that, in Victoria, Tabcorp is permitted to supply a betting exchange, however both Tabcorp and Tatts do not currently operate betting exchanges.¹³⁰

2.1.5 Summary

60. Table 2.2 below provides a summary of the wagering products offered by each of the different wagering suppliers and the distribution channels via which they supply these products.

¹²¹ Form S, Annexure A, pp 59-60, para 182; and Statement of Robert Michael Sean Cooke, 9 March 2017, pp 22 and 30-31, paras 58 and 84-86.

¹²² Form S, Annexure A, pp 59-60, para 182.

¹²³ Statement of Nicholas David Tyshing, 13 April 2017, pp 75-77, para 376.

¹²⁴ Statement of Nicholas David Tyshing, 13 April 2017, pp 75-77, para 376.

¹²⁵ Form S, p 21, para 4.21.

¹²⁶ Statement of Douglas John Freeman, 8 March 2017, p 11, para 29.

¹²⁷ Statement of Douglas John Freeman, 8 March 2017, pp 25, para 63.

¹²⁸ Statement of Douglas John Freeman, 8 March 2017, pp 25, para 63.

¹²⁹ Statement of Douglas John Freeman, 8 March 2017, pp 11 and 25, paras 28 and 63.

¹³⁰ Form S, p 22, footnote 85.

Table 2.2: Summary of wagering products, the suppliers of these products and the supply channels

Wagering supplier	Wagering products ¹	Wagering distribution channel
Totalisator operators / State TABs	Totalisator wagering Fixed odds wagering	On-course (cash and account) Retail (cash and account) Internet (account) Phone (account)
Traditional bookmakers	Fixed odds wagering	On-course (cash) Internet (account) Phone (account)
Corporate bookmakers	Fixed odds wagering Totalisator derivative wagering	Internet (account) Phone (account)
Betting exchange (Betfair)	Betting exchange products	Internet (account) Phone (account)

Notes: (1) Tabcorp also provides *Trackside*, a computer-simulated racing product. Source: Form S, pp 6 and 22, paras 1.8 and 4.24, Table 4.1. Statement of Douglas John Freeman, 8 March 2017, p 127, para 313(g).

2.2 Relationship between wagering and racing

61. Wagering on racing is closely interrelated to the broader racing industry.¹³¹ The racing industry provides racing products upon which a large proportion of wagering is conducted,¹³² while a portion of the proceeds from wagering feeds back to fund the racing industry.¹³³ In this section, I provide an overview of the racing industry, and describe the relationship between the racing industry and wagering operators.

2.2.1 The racing industry

62. The Australian racing industry is organised at the state and territory level and consists of the three codes of racing, namely:¹³⁴

- thoroughbred racing;
- harness racing; and
- greyhound racing.

63. Of the three racing codes, thoroughbred racing offers the highest prize pools. For example, in the 2015-16 season the total prizemoney on thoroughbred racing in New South Wales was approximately \$174 million, compared to \$33 million for harness racing and \$24 million for greyhound racing.¹³⁵ Similarly, greyhound racing and harness racing account for significantly less wagering turnover than thoroughbred racing.¹³⁶ For example, in the period 1 August 2015 to 31 July 2016, the national wagering turnover of thoroughbred, greyhound and harness racing was approximately \$15.7 billion, \$3.2 billion and \$1.8 billion respectively.¹³⁷

¹³¹ Form S, pp 18-19 and p 25, paras 4.4 and 4.36.

¹³² Form S, pp 18-19, para 4.4.

¹³³ Statement of Douglas John Freeman, 8 March 2017, p 30, para 82.

¹³⁴ I note that the Northern Territory does not have harness racing.

Form S, p 25, para 4.38.

¹³⁵ Fact Book, Racing season 2015/2016, p 8; Harness Racing New South Wales, Annual Report 2016, p 14; and Greyhound Racing NSW, Annual Report 2016, p 21.

¹³⁶ Statement of Douglas John Freeman, 8 March 2017, p 116, para 297(a).

¹³⁷ Statement of Douglas John Freeman, 8 March 2017, p 116, para 297(a); and Fact Book, Racing season 2015/2016, p 69.

64. Racing clubs are non-profit organisations that provide racing products by organising and conducting race meetings across metropolitan, provincial and country areas of Australia.¹³⁸ In Australia, there are approximately 405 thoroughbred racing clubs, 116 harness racing clubs and 67 greyhound racing clubs.¹³⁹
65. In addition to racing clubs, there are a number of other direct participants in the racing industry, including owners, jockeys, trainers, stewards, racing administrators, as well as numerous parties that provide services to the racing industry, including, veterinarians, feed suppliers and transportation providers.¹⁴⁰
66. Each state also has various peak racing bodies (PRBs) that are responsible for the control and general supervision of a certain code of racing within its territory.¹⁴¹ The state-based Principal Racing Authorities (PRA) exist for the purpose of managing and administering thoroughbred racing¹⁴² while, similarly, there are PRBs for harness racing and greyhound racing in each state and territory that operate these codes of racing.¹⁴³
67. The two largest racing industries in Australia are New South Wales and Victoria.¹⁴⁴ New South Wales and Victoria offer significantly higher annual prize money on thoroughbred racing than the other regions, at approximately \$174 million and \$178 million, respectively. Queensland offers the next highest prizemoney at approximately \$100 million, with the prizemoney between approximately \$4 million and \$60 million in all other states and territories.¹⁴⁵

2.2.2 Relationship with wagering operators

68. The business of wagering operators depends on the quality of the racing product¹⁴⁶ provided by the racing industry, with higher quality racing driving higher wagering.¹⁴⁷ Conversely, the public's engagement with the racing industry is intrinsically linked with wagering because the entertainment value of a race is enhanced by the ability for spectators to place a wager, as well as the ability to watch the race.¹⁴⁸
69. These arrangements give rise to an interdependent relationship between State TABs and the racing industry, because a State TAB's performance depends, in part, on the continued success of the racing industry, and the racing industry receives a share of the State TAB's revenue to fund the provision of racing products.¹⁴⁹

¹³⁸ Form S, p 25, para 4.39.

¹³⁹ Form S, p 25, para 4.39.

¹⁴⁰ Form S, p 113, para 18.5.

¹⁴¹ See for example: Office of the Racing Integrity Commissioner website, <https://www.racingintegrity.vic.gov.au/resources/frequently-asked-questions>, accessed 6 April 2017; and Australian Rules of Racing, Amended to 1 February 2017, pp 6-7, AR.1.

¹⁴² Annual report for Queensland All Codes Racing Industry Board 2015-16, September 2016, p 39; and Australian Rules of Racing, Amended to 1 February 2017, p 13, AR.7(ii).

The PRA's include NSW Thoroughbred Racing Board, Racing Victoria Limited, Racing Queensland Limited, Thoroughbred Racing S.A. Limited, Racing and Wagering Western Australia, the Tasmanian Thoroughbred Racing Council, Thoroughbred Racing NT and the Committee of the Canberra Racing. Australian Rules of Racing, Amended to 1 February 2017, p 7, AR.1.

¹⁴³ See for example, Harness Racing Australia website, <http://www.harness.org.au/rules/FORMSIDX.HTM>, accessed 6 April 2017; Greyhounds Australasia website, <http://galtd.org.au/general/members>, accessed 6 April 2017; and Greyhounds Australasia website, <http://galtd.org.au/general/about-greyhounds-australasia>, accessed 6 April 2017.

¹⁴⁴ Statement of Douglas John Freeman, 8 March 2017, p 31, para 83.

¹⁴⁵ Fact Book, Racing season 2015/2016, p 8

¹⁴⁶ Racing Queensland defines racing product as "the participation composition and broadcast race event". See, Racing Queensland, Annual report for Queensland all codes Racing Industry Board 2015-16, September 2016, p 39.

¹⁴⁷ Form S, pp 25-26, para 4.41.

¹⁴⁸ Statement of: Emeritus Professor John Vincent Yovich AM, 22 February 2017, p 4, para 19; and Form S pp 18-19, para 4.4

¹⁴⁹ Statement of Douglas John Freeman, 8 March 2017, pp 29 and 77, paras 76 and 227.

70. The success of the racing industry is dependent on the ability of race clubs to provide high quality racing events, with this influenced by a number of factors including:¹⁵⁰
- the quality of the race entrants;
 - the number of entrants for each race;
 - the condition of the race track and facilities;
 - on-course entertainment;
 - promotion of the race event;
 - the availability of vision of the event on all media; and
 - the amount of wagering on the event.
71. Racing clubs offer prize money to attract race entrants, and races with higher prize pools tend to attract higher quality and quantity of race entrants.¹⁵¹
72. Although racing clubs draw on various forms of revenue – including from ticket sales, sponsorships and the sale of media rights – wagering-related revenue accounts for a substantial proportion of racing clubs' funding.¹⁵² Racing clubs receive income from totalisator operators, corporate bookmakers and Betfair. All wagering operators are required to pay race field fees, while totalisator operators have industry funding obligations negotiated as part of their totalisator licences.¹⁵³
73. Totalisator operators pay a greater proportion of wagering revenue to the racing industry than corporate bookmakers due to totalisator operators having industry funding obligations that apply in addition to or instead of race field fees.¹⁵⁴ Tabcorp has estimated that the theoretical flow-through to the racing industry of a hypothetical, incremental \$100 wager (ie, a one-off, \$100 losing bet) with Tabcorp is approximately [Confidential to Tabcorp] ██████████¹⁵⁵ Comparatively, Tabcorp estimates that a hypothetical, incremental \$100 wager placed with a corporate bookmaker would result in approximately \$14.30 of that bet flowing back to the racing industry (based on the average race field fees paid by corporate bookmakers).¹⁵⁶
74. However, Racing Victoria have stated that [Confidential to Racing Victoria] ██████████
██████████
██████████¹⁵⁷
75. Further, in some circumstances, totalisator operators have negotiated the offset of race field fees against other fees payable to PRBs.¹⁵⁸ For example, Tatts negotiated more favourable terms when extending its Queensland wagering licence, including a reduction in tax rates and the continued offset of race field fees against other fees payable by Tatts to the Queensland racing industry.¹⁵⁹
76. I provide details of face field fees and industry funding arrangements below.

¹⁵⁰ Statement of Douglas John Freeman, 8 March 2017, p 29, para 77.

¹⁵¹ Racing NSW, Strategic Plan, October 2014, p 24; Statement of Douglas John Freeman, 8 March 2017, p 30, para 79; Statement of Ray Gunston, 24 February 2017, p 6, para 25; and Statement of David Jewell, 21 February 2017, p 15, para 80.

¹⁵² Statement of Douglas John Freeman, 8 March 2017, pp 30-31, paras 81-83.

¹⁵³ Statement of Douglas John Freeman, 8 March 2017, p 32, para 86.

¹⁵⁴ Statement of Douglas John Freeman, 8 March 2017, pp 31-33, paras 83 and 86.

¹⁵⁵ Statement of Douglas John Freeman, 8 March 2017, p 108, para 282.

¹⁵⁶ Statement of Douglas John Freeman, 8 March 2017, p 108, para 282.

¹⁵⁷ Third affidavit of Giles Mansell Thompson, 13 April 2017, p 11, para 46.

¹⁵⁸ Form S, p 102, para 14.23.

¹⁵⁹ Form S, p 102, para 14.23

Race field fees

77. Following their introduction in 2008, totalisator operators, corporate bookmakers and Betfair pay race field fees to race clubs for the use of race field information, such as the names of participating animals, their colours and barrier draws.¹⁶⁰ Race field fees are established by legislation or regulations in each state and territory of Australia, and fees are paid to the racing industry in the jurisdiction where the race is held.¹⁶¹
78. Race field fees vary by jurisdiction and are based on either a wagering operator's turnover or gross revenue,¹⁶² and may differ within a jurisdiction by:¹⁶³
- the level of turnover or gross revenue – race field fees are higher above predefined thresholds in some states and territories, eg, in Victoria and New South race field fees are one per cent on the first \$5 million of turnover, and then increase for all turnover above this threshold;
 - the type of race meeting – race field fees are typically higher for premium meetings than for standard meetings, eg, for fixed odds and totalisator turnover above \$5 million, race field fees in New South Wales are 1.5 per cent for standard race meetings and 2.5 per cent for premium race meetings; and
 - the type of wagering – race field fees can vary by wagering type, with race field fees sometimes lower for totalisator betting, eg, for turnover above \$5 million on standard races in New South Wales, race field fees are 1.5 per cent for fixed odds and totalisator wagering, and 2.5 per cent for totalisator-derived odds.
79. The introduction of race field fees is an example of the racing industry adapting to the changing preferences of punters and forms of wagering. Prior to the 1960's, it was illegal for wagering to occur off-course, however illegal wagering was conducted via unlicensed off-course bookmakers.¹⁶⁴ In an attempt to legitimise wagering that was occurring with illegal unlicensed off-course bookmakers, state governments introduced an off-course wagering licence in the 1960's.¹⁶⁵
80. Further, prior to 2000, almost all wagering on horseracing events in Australia occurred through state TABs or on-course bookmakers, and each state's racing industry was substantially funded by that state's TAB.¹⁶⁶ The introduction and growth in corporate bookmakers from 2000 raised concerns that these wagering providers were not contributing to the racing industry, and race field fees were introduced in light of that development.¹⁶⁷

Industry funding obligations

81. Under totalisator wagering licences and racing industry funding agreements, totalisator operators pay racing industry funding obligations.¹⁶⁸ These funding obligations are negotiated between the licence providers and totalisator operators, and so the payments vary across states. All of these funding

¹⁶⁰ Statement of Douglas John Freeman, 8 March 2017, pp 32 and 78, paras 86 and 228; and ACCC, Tabcorp Wagering Manager (Vic) Pty Ltd - Authorisation - A91323 - A91328, Determination, 11 December 2012, p 12, para 49.

¹⁶¹ Statement of Douglas John Freeman, 8 March 2017, p 32, para 86; and ACCC, Tabcorp Wagering Manager (Vic) Pty Ltd - Authorisation - A91323 - A91328, Determination, 11 December 2012, p 12, para 49.

¹⁶² Statement of Douglas John Freeman, 8 March 2017, p 32, para 86.

¹⁶³ Statement of Douglas John Freeman, 8 March 2017, pp 81-84, para 237, Figure 23.

¹⁶⁴ Statement of Nicholas David Tyshing, 13 April 2017, p 9, para 42.

¹⁶⁵ Statement of Nicholas David Tyshing, 13 April 2017, p 10, para 43.

¹⁶⁶ ACCC, Tabcorp Wagering Manager (Vic) Pty Ltd - Authorisation - A91323 - A91328, Determination, 11 December 2012, p 11, paras 44-45.

¹⁶⁷ ACCC, Tabcorp Wagering Manager (Vic) Pty Ltd - Authorisation - A91323 - A91328, Determination, 11 December 2012, pp 11-12, paras 44-48; and Form S, Annexure A, p 19, para 55.

¹⁶⁸ Statement of Douglas John Freeman, 8 March 2017, p 32, para 85; and Form S, Annexure A, pp 19 and 47, paras 58 and 147.

arrangements have been negotiated in the last six years – excluding the funding arrangements in South Australia, with Tatts obtaining the totalisator licence in 2002.¹⁶⁹

82. For example, Tabcorp's Victorian racing industry funding obligations require Tabcorp to make the following payments:¹⁷⁰

- 50 per cent of profit from Victorian wagering operations to VicRacing;
- [HIGHLY Confidential to Tabcorp] [REDACTED];
- [HIGHLY Confidential to Tabcorp] [REDACTED];
- [HIGHLY Confidential to Tabcorp] [REDACTED];
- [HIGHLY Confidential to Tabcorp] [REDACTED]¹⁷¹
- [HIGHLY Confidential to Tabcorp] [REDACTED]; and
- [HIGHLY Confidential to Tabcorp] [REDACTED].¹⁷²

83. Comparatively, Tabcorp's Australian Capital Territory funding obligations [HIGHLY Confidential to Tabcorp] [REDACTED]¹⁷³

- [REDACTED]

84. One result of these industry funding arrangements is that PRBs typically receive higher funding from totalisator wagering in their state than from fixed odds wagering via the totalisator operator. For example, [HIGHLY Confidential to Tabcorp] [REDACTED]

¹⁷⁴

85. However, race field fees can still account for a substantial proportion of PRBs income. For example, race field fees accounted for approximately 35 per cent of Thoroughbred Racing SA's total funding in FY16.¹⁷⁵ Similarly, race field fees accounted for 35 per cent of Racing Victoria's revenue in FY16.¹⁷⁶

86. In addition to their industry funding arrangements, totalisator operators pay wagering tax in their respective jurisdictions as part of the combined consideration payable for their totalisator licences and retail exclusivity.¹⁷⁷ From time to time, totalisator operators have re-negotiated more favourable tax arrangements as part of the amendment or renewal of their wagering licence. For example, Tatts

¹⁶⁹ Statement of Nicholas David Tyshing, 13 April 2017, pp 59-64, paras 297-319.

¹⁷⁰ Statement of Douglas John Freeman, 8 March 2017, pp 78-79, para 230.

¹⁷¹ PGI is an international pool. Statement of Douglas John Freeman, 8 March 2017, pp 49-50, para 143.

¹⁷² [HIGHLY Confidential to Tabcorp] [REDACTED] Statement of Douglas John Freeman, 8 March 2017, p 68, para 186.

¹⁷³ Statement of Douglas John Freeman, 8 March 2017, p 80, para 234.

¹⁷⁴ Statement of Douglas John Freeman, 8 March 2017, pp 78-79, para 230.

¹⁷⁵ Statement of Nicholas David Tyshing, 13 April 2017, p 67, para 337.

¹⁷⁶ Second affidavit of Giles Mansell Thompson, 13 April 2017, p 11, chart A.

¹⁷⁷ Statement of Nicholas David Tyshing, 13 April 2017, p 58, para 291.

recently negotiated more favourable terms when extending its Queensland wagering licence, including a reduction in tax rates.¹⁷⁸ Tatts states that this was undertaken in part to partially address Tatts' financial disadvantage relative to corporate bookmakers and enable it to compete more effectively with them.¹⁷⁹

2.3 Relationship between wagering and racing media

87. Punters enjoy the ability to place a wager on the outcome of a race and to view that race live, either in person on-course, or via racing media off-course,¹⁸⁰ and so spectators consume wagering and racing vision in conjunction with each other.¹⁸¹
88. Racing media is a key factor in facilitating participation in racing and wagering off-course.¹⁸² Racing vision allows more off course punters to watch thoroughbred races, which increases overall wagering activity that then flows through to the racing industry.¹⁸³ As such, racing vision is vitally important to racing and wagering participants, because the link between racing vision and wagering is inextricable.¹⁸⁴
89. The importance of live racing vision to off-course punters gives racing clubs and wagering providers a strong incentive to ensure that punters have access to racing media to promote wagering on the races.¹⁸⁵ Firms that offer the opportunity for punters to wager without vision are likely to find that punters will spend their wagering money elsewhere on events for which vision is available.¹⁸⁶ [Confidential to Tabcorp] [REDACTED]
90. Similarly, [HIGHLY confidential to CrownBet] [REDACTED]
91. Racing media is made available to punters through the acquisition of racing content from rights holders and the distribution of the content via various channels.¹⁹⁰ I discuss the owners of media rights, the holders of media rights and the channels by which race media is delivered in the remainder of this section.

¹⁷⁸ Statement of Robert Michael Sean Cooke, 9 March 2017, p 53, para 153(f).

¹⁷⁹ Statement of Robert Michael Sean Cooke, 9 March 2017, p 53, para 153(f).

¹⁸⁰ Form S, pp 18-19, para 4.4.

¹⁸¹ Form S, pp 18-19, para 4.4.

¹⁸² Statement of Nicholas David Tyshing, 13 April 2017, p 36, paras 186-187.

¹⁸³ Statement of James Watters, 28 February 2017, p 10, para 34.

¹⁸⁴ Statement of Luke Gatehouse, 16 February 2017, p 10, para 43.

¹⁸⁵ Statement of Douglas John Freeman, 8 March 2017, pp 72-73, paras 203-204 ; and Form S, p 116, para 18.31

¹⁸⁶ Statement of Luke Gatehouse, 16 February 2017, p 10, para 43.

¹⁸⁷ [HIGHLY Confidential to Tabcorp] [REDACTED]

¹⁸⁸ Statement of Nicholas David Tyshing, 13 April 2017, p 49, para 241.

¹⁸⁹ Statement of Nicholas David Tyshing, 13 April 2017, p 49, para 241.

¹⁹⁰ Form S, p 115, para 18.18.

2.3.1 Rights owners

92. The ultimate owners of racing media rights are the racing clubs that provide racing products by organising and conducting race meetings.¹⁹¹ However, the PRBs in each State and Territory typically acquire and aggregate the media rights held by their respective race clubs.¹⁹² PRBs then negotiate the sale of these media rights for distribution by others.¹⁹³

93. Racing media rights are divided and sold by distribution channel, providing for the following rights:¹⁹⁴

- the right to broadcast in retail venues;
- domestic broadcast rights, including:
 - > free-to-air rights;
 - > domestic pay television rights;
- international broadcast rights; and
- digital rights, including the rights for online distribution and live-streaming.

94. Each PRB can choose to sell these rights separately, or as a bundle, and may sell them on an exclusive or non-exclusive basis.¹⁹⁵ Historically, media rights have typically been sold on a bundled and exclusive basis, but Victoria and New South Wales have recently unbundled rights by platform and have also made available some of those rights on a non-exclusive basis.¹⁹⁶ I explain these developments in further detail in section 2.3.2, below.

2.3.2 Rights holders and media services

95. Totalisator operators, corporate bookers and free-to-air providers hold various media rights and distribute vision across a range of the distribution channels. I describe the rights held and the media services offered by each of these players in the remainder of this section.

Tabcorp

96. Tabcorp, via its media business operator Sky Channel Pty Limited (Sky Channel), holds rights to broadcast racing vision across all distribution channels and racing codes in Australia. Sky Channel holds all of these licences on an exclusive basis except for the media rights to Victoria thoroughbred racing and digital rights to New South Wales thoroughbred racing.¹⁹⁷

97. For example:

- Victoria: Tabcorp has non-exclusive domestic, digital and international rights for Victorian thoroughbred racing which expire in 2020.¹⁹⁸

¹⁹¹ Form S, Annexure A, p 20, para 65.

¹⁹² Form S, p 115, para 18.19

I note that some racing clubs negotiate broadcasting agreements directly with media providers. For example, Albion Park Harness Racing Clubs (APHRC) directly holds racing vision agreements with Sky Channel. See, Statement of Damian Raedier, 18 February 2017, p 11, para 57.

¹⁹³ Form S, p 115, para 18.19

¹⁹⁴ Form S, p 115, para 18.21

¹⁹⁵ Statement of Andrew Charles Harding, 23 February 2017, p 9, para 37; and Statement of Douglas John Freeman, 8 March 2017, p 74, para 213.

¹⁹⁶ Statement of Nicholas David Tyshing, 13 April 2017, pp 34-35, paras 173 and 181-184,

¹⁹⁷ Statement of Nicholas David Tyshing, 13 April 2017, p 36, para 189; and Statement of Douglas John Freeman, 8 March 2017, pp 74-75, paras 213-214.

¹⁹⁸ Tabcorp, Annual Report 2016, pp 35 and 39; and Sydney Morning Herald, Tabcorp faces Victorian racing fight, 10 February 2016.

- New South Wales: Sky Channel has an agreement with Racing NSW for thoroughbred rights which are exclusive for pay television and commercial venues, and non-exclusive in respect of digital rights – these rights expire in 2025.¹⁹⁹ Harness Racing NSW (HRNSW) has an agreement with Sky Channel for the broadcast of its clubs' harness races, excluding NSW Harness Racing Club, which has a separate broadcast agreement with Sky Channel for the distribution of its races – these arrangements are approaching the time for renewal and are currently under commercial negotiation with SKY.²⁰⁰
 - South Australia: Tabcorp currently holds exclusive rights to broadcast racing vision for all South Australian thoroughbred races and greyhound races in Australia (including digital) – the rights to broadcast thoroughbred races expire in July this year.²⁰¹
 - Tasmania: in 2015, Tabcorp entered into a ten year exclusive media rights agreement with Tasracing for national and international broadcasts across all distribution channels for Tasmanian thoroughbred, harness and greyhound racing.²⁰² Under the agreement, Tasracing has the right to stream all Tasmanian racing live on the Tasracing website and via every Tasmanian racing club website – free live streaming of Tasmanian racing is available to punters for viewing on these websites.²⁰³
 - Western Australia: towards the end of 2016, Sky Channel and RWWA executed new arrangements for media rights for all thoroughbred, harness and greyhound racing (not including metropolitan thoroughbreds) and retail agency, on-course and digital streaming distribution.²⁰⁴
98. Tabcorp also has various racing information and wagering data agreements with overseas racing clubs.²⁰⁵ Under these agreements, Sky Channel provides audio and visual racing coverage and Tabcorp wagering data to the overseas racing clubs in exchange for those clubs taking wagers from the general public and paying a portion of the wagering turnover to Sky Channel.²⁰⁶
99. Tabcorp offers both television and radio broadcasting services that focus on racing content.²⁰⁷ In particular, Tabcorp operates three Sky Channel television channels and broadcasts radio services via Sky Sports Radio.²⁰⁸ The three Sky Channel channels (Sky Channel1, Sky Channel2 and Sky Thoroughbred Central) offer national racing coverage to pay TV subscribers and to punters in Tabcorp and non-Tabcorp retail venues, and other licenced venues throughout Australia.²⁰⁹ Sky Sports Radio broadcasts racing content into New South Wales and the Australian Capital Territory, and is also available nationally online.²¹⁰
100. Sky Channel1 and Sky Channel2 provide Australian thoroughbred, harness and greyhound racing coverage.²¹¹ Sky Channel1 is the most popular channel and, as such, drives the scheduling process.²¹² Sky Channel2 provides additional racing content not covered on Sky Channel1, and typically shows

¹⁹⁹ Statement of Douglas John Freeman, 8 March 2017, p 75, para 214; and Tabcorp, Annual Report 2016, p 39.

²⁰⁰ Statement of John Dumesny, 22 February 2017, p 8, para 34.

²⁰¹ Statement of James Watters, 28 February 2017, pp 10-11, para 35; and Statement of Matthew Corby, 22 February 2017, p 10, para 57.

²⁰² Statement of Vaughn Lynch, 24 February 2017, p 9, para 53; and Statement of Nicholas David Tyshing, 13 April 2017, p 36, para 189.

²⁰³ Statement of Vaughn Lynch, 24 February 2017, p 9, paras 53-54.

²⁰⁴ RWWA, 2016 Annual report, p 10.

²⁰⁵ Statement of Douglas John Freeman, 8 March 2017, p 52, para 148.

²⁰⁶ Statement of Douglas John Freeman, 8 March 2017, p 52, para 148.

²⁰⁷ Statement of Dr Christopher Pleatsikas, 8 March 2017, p 54, para 122.

²⁰⁸ Form S, pp 6-7, paras 1.10 and 1.13.

²⁰⁹ Form S, p 6, paras 1.10 and 1.12.

²¹⁰ Form S, p 7, para 1.13.

²¹¹ Statement of Douglas Freeman, 8 March 2017, p 73, para 207.

²¹² Statement of Douglas Freeman, 8 March 2017, p 75, para 216.

lower quality races when there is a scheduling overlap.²¹³ Sky Thoroughbred Central is a thoroughbred racing channel, showcasing thoroughbred racing from Australia and internationally with in-depth analysis, mounting yard and expert comments.²¹⁴

101. Tabcorp licensed venues are required to subscribe to Sky Channel1 and Sky Channel2.²¹⁵ Similarly, Tatts also requires vision in its retail outlets, with Tatts' agreements requiring licensed venues to obtain 'a full race telecasting service'.²¹⁶ Although there is no specific reference to Sky Channel within the Tatts agreements, in order to comply with the vision requirement, Tatts considers that venues must, at a minimum, have Sky Channel1.²¹⁷ The result of these arrangements is that all retail outlets will subscribe to Sky Channel1, while some will also subscribe to Sky Channel2.²¹⁸
102. Tabcorp provides racing vision to Tatts and RWWA venues under agreements between these totalisator operators and Sky Channel, ie:²¹⁹
 - Tatts: the licensed venues that supply wagering services for Tatts' retail venues obtain vision directly from Sky Channel, with the exception of retail venues in Tasmania, where Tatts distributes Sky Channel vision to venues through an agreement directly with Sky Channel; and
 - RWWA: RWWA distributes Sky Channel vision to licensed venues in Western Australia.
103. I understand that Tabcorp also previously supplied racing vision to Tatts' digital account holders, however Tabcorp recently ceased this supply, at least temporally.²²⁰
104. Sky Channel is available to domestic pay television subscribers via Foxtel.²²¹ Sky Channel1 is available on Foxtel's base package, whereas both Sky Channel2 and Sky Thoroughbred central require a payment of \$5 per month in addition to Foxtel's base package.²²² In consequence of Sky Channel1 being more broadly available on pay television and in retail outlets, wagering is materially higher on a race when that racing product is on Sky Channel1 as compared with Sky Channel2.²²³ Consistent with this, Racing NSW has commented that the majority of wagering turnover comes from this channel.²²⁴
105. In addition to providing vision in retail venues and on pay television, Tabcorp also streams national racing vision on its website and app.²²⁵ However, not all vision may be available on Tabcorp's app – Tabcorp has stated that Sydney and Melbourne metro gallops meetings are available on Tabcorp's app until the end of May 2017.²²⁶

²¹³ Statement of Douglas Freeman, 8 March 2017, p 73 and 75, paras 207 and para 217.

²¹⁴ Statement of Douglas Freeman, 8 March 2017, p 73, para 207.

²¹⁵ Statement of Douglas Freeman, 8 March 2017, p 74, para 210.

²¹⁶ Statement of Douglas Freeman, 8 March 2017, p 74, para 211.

²¹⁷ Statement of Douglas Freeman, 8 March 2017, p 74, para 211.

²¹⁸ Statement of Nicholas David Tyshing, 13 April 2017, p 38, para 200; and Statement of Douglas Freeman, 8 March 2017, p 74, para 210.

²¹⁹ Statement of Douglas John Freeman, 8 March 2017, p 74, para 209.

²²⁰ Statement of Nicholas David Tyshing, 13 April 2017, p 86, para 413.

²²¹ Statement of Nicholas David Tyshing, 13 April 2017, p 37, para 193.

²²² Statement of Nicholas David Tyshing, 13 April 2017, pp 37-38, para 198.

²²³ Statement of Nicholas David Tyshing, 13 April 2017, p 38, para 199.

²²⁴ Statement of Nicholas David Tyshing, 13 April 2017, p 28, para 200.

²²⁵ Tabcorp, Annual Report 2016, pp 12 and 35; and TAB website, http://tab.custhelp.com/app/answers/detail/a_id/394 and <https://www.tab.com.au/blog/racing/products>, accessed 9 April 2017

²²⁶ TAB website, http://tab.custhelp.com/app/answers/detail/a_id/394 and <https://www.tab.com.au/blog/racing/products>, accessed 9 April 2017

Tatts

106. Tatts owns and operates a radio station, RadioTAB, which broadcasts racing and sports coverage into Queensland, South Australia, Tasmania and the Northern Territory.²²⁷ RadioTAB is also available on nationally via Tatt's website and mobile app.²²⁸

Corporate bookmakers

107. A number of corporate bookmakers have purchased media rights from the PRBs to stream certain racing content online.²²⁹ For example, William Hill entered into an exclusive corporate bookmaker agreement with Racing NSW for digital rights to stream certain New South Wales thoroughbred races.²³⁰ In addition, Sportsbet, CrownBet and Ladbrokes hold rights to live stream all Victorian races.²³¹ Corporate bookmakers have also sought to acquire digital rights in other states, eg, Thoroughbred Racing SA has received offers from corporate bookmakers to acquire its digital rights.²³²

Free-to-air

108. Racing.com, a joint venture between Seven West Media and Racing Victoria, supplies certain racing vision.²³³ Racing.com broadcasts Victorian thoroughbred racing events on free-to-air television, Foxtel and online (via its website and app).²³⁴ Racing.com is also seeking to acquire Thoroughbred Racing SA's media rights.²³⁵
109. Racing.com also partners with Racing Victoria to administer sublicensing and delivery of live race streams to the digital platforms of wagering providers, including Tabcorp's digital platform – Racing Victoria currently sub-licenses Victorian thoroughbred racing content to corporate bookmakers and RWWA.²³⁶ Racing.com has stated that it will endeavor to sublicense all rights to Sky on a non-exclusive basis and on fair commercial terms.²³⁷
110. Seven West Media broadcasts key racing meets that take place in Victoria, New South Wales, Queensland, Western Australia, South Australia and internationally on Channel 7 – its free-to-air television station.²³⁸ Such key events include the Melbourne Cup, Cox Plate and Caulfield Cup, as well as some other top-level races.²³⁹

Summary

111. Figure 2.1 to Figure 2.4 below summarise the media rights owners and holders by state and territory, delineating the various distribution methods and racing codes.

²²⁷ Form S, p 13, para 2.11.

²²⁸ Form S, p 13, para 2.11; and Tatts website, <https://tatts.com/racing>, accessed 28 March 2017; and UBET website, <https://ubet.com/resource/mobile-apps/about>, accessed 28 March 2017.

²²⁹ Form S, p 116, para 18.28.

²³⁰ Statement of Douglas John Freeman, 8 March 2017, p 75, para 214.

²³¹ Statement of Douglas John Freeman, 8 March 2017, p 76, para 220.

²³² Statement of James Watters, 28 February 2017, pp 10-11, para 35.

²³³ Form S, p 29, para 4.57.

²³⁴ Form S, p 29, para 4.57.

²³⁵ Statement of James Watters, 28 February 2017, pp 10-11, para 35.

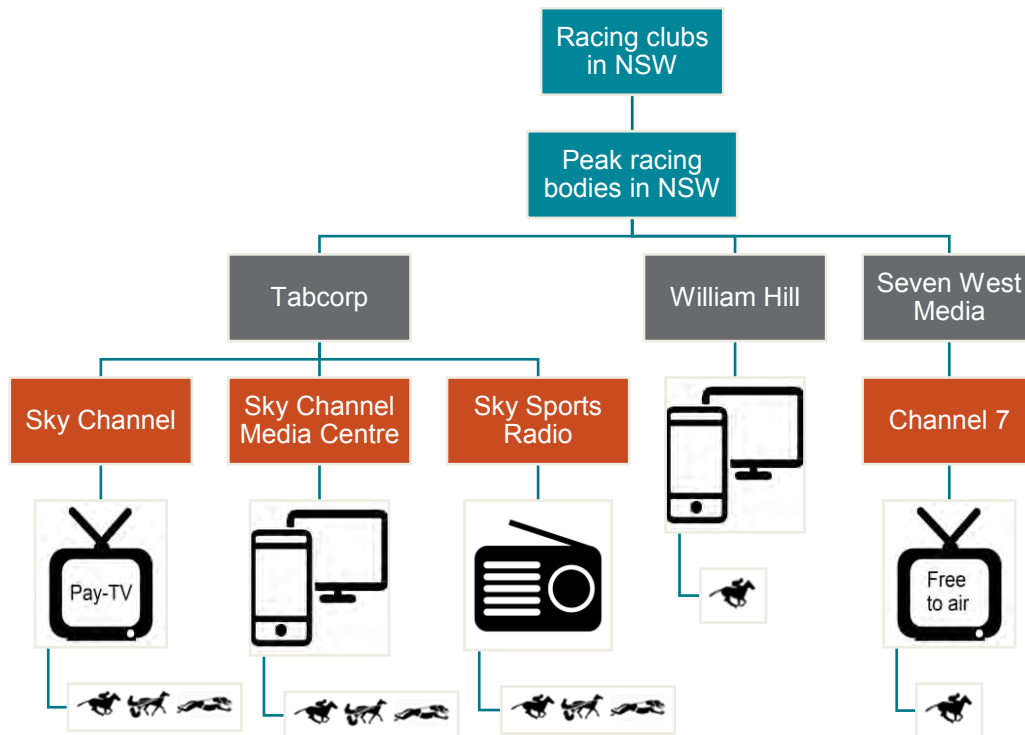
²³⁶ Statement of Andrew Paul Catterall, 17 April 2017, p 4, para 8(c).

²³⁷ Statement of Andrew Paul Catterall, 17 April 2017, p 36, para 141.

²³⁸ Form S, p 116, para 18.29.

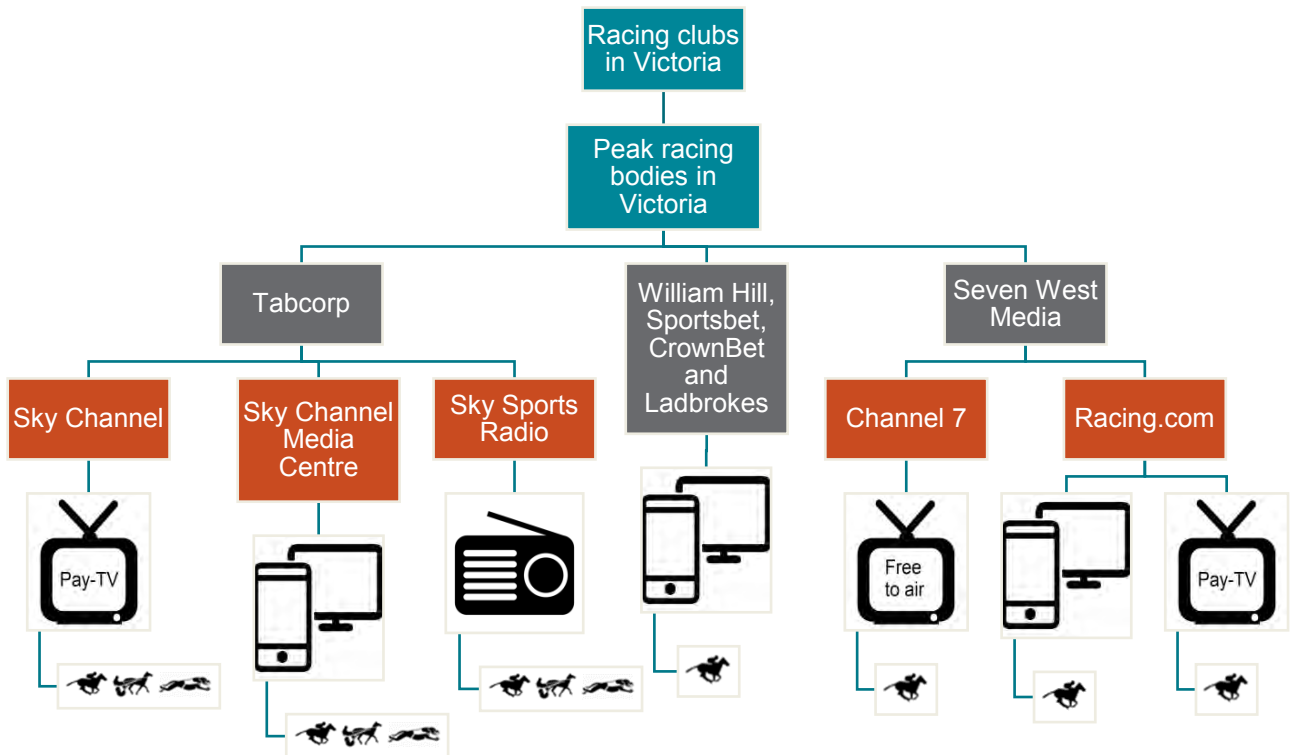
²³⁹ Form S, p 116, para 18.29.

Figure 2.1: Media rights for racing in New South Wales



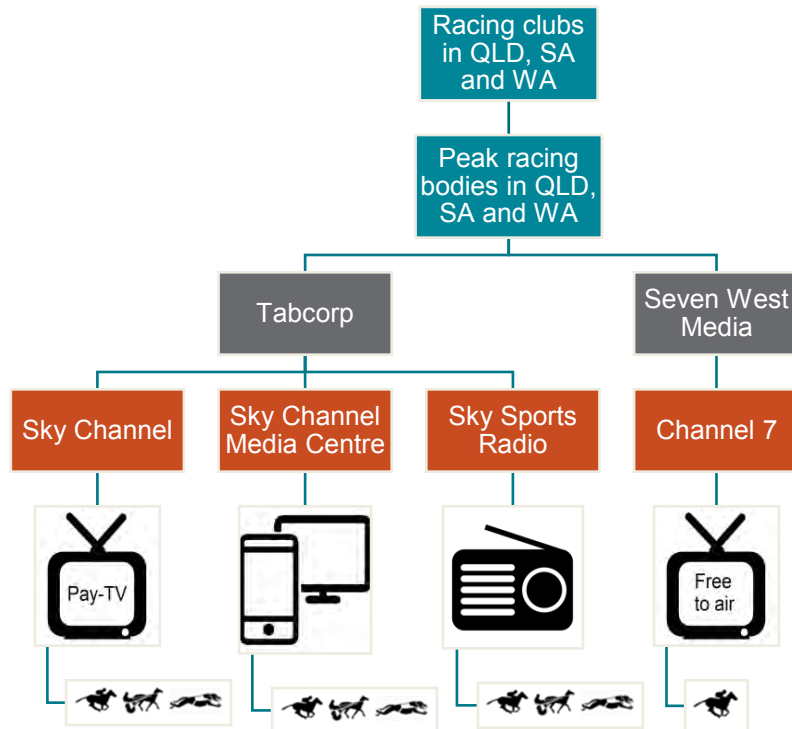
Source: Statement of Douglas Freeman, 8 March 2017, pp 72-77, paras 202-226. Statement of Nicholas David Tyshing, 13 April 2017, Non-confidential attachment NDT-19, p 2. Sky Channel Media Centre, Media Centre Subscription, <http://www.skyracing.com.au/index.php?component=subscription&task=subscribe&Itemid=125&id=27>, accessed 10 April 2017. Sky Channel Media Centre, Sky Channel Monthly Racing Schedule, <http://schedule.skyracing.com.au/>, accessed 10 April 2017.

Figure 2.2: Media rights for racing in Victoria

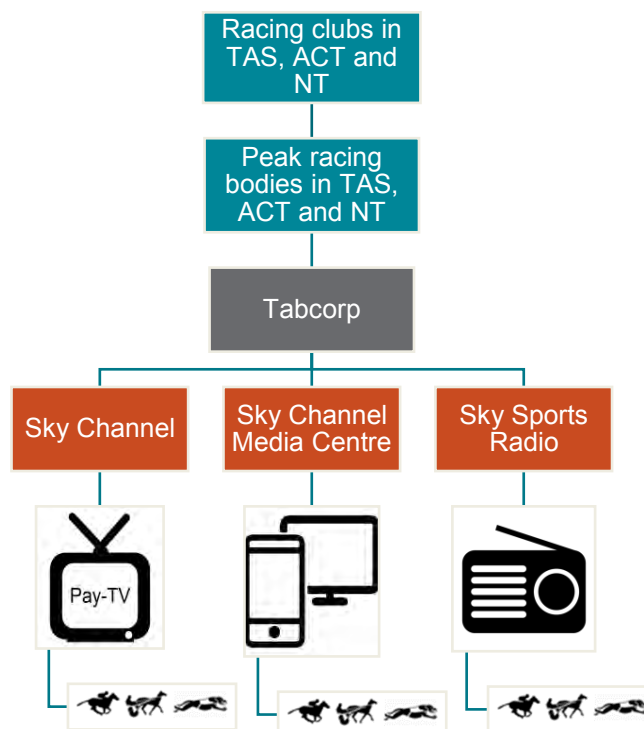


Source: Statement of Douglas Freeman, 8 March 2017, pp 72-77, paras 202-226. Statement of Nicholas David Tyshing, 13 April 2017, Non-confidential attachment NDT-19, p 2. Statement of Nicholas David Tyshing, 13 April 2017, Non-confidential attachment NDT-21, p 2. Sky Channel Media Centre, Media Centre Subscription, <http://www.skyracing.com.au/index.php?component=subscription&task=subscribe&Itemid=125&id=27>, accessed 10 April 2017. Sky Channel Media Centre, Sky Channel Monthly Racing Schedule, <http://schedule.skyracing.com.au/>, accessed 10 April 2017. TAB, TAB iPhone Application, https://tab.custhelp.com/app/answers/detail/a_id/394, accessed 9 April 2017. William Hill, VIC Live Racing, <https://www.williamhill.com.au/vic-live-racing>, accessed 10 April 2017.

Figure 2.3: Media rights for racing in Queensland, South Australia and Western Australia



Source: Statement of Douglas Freeman, 8 March 2017, pp 72-77, paras 202-226. Statement of Nicholas David Tyshing, 13 April 2017, Non-confidential attachment NDT-19, p 2. Sky Channel Media Centre, Sky Channel Monthly Racing Schedule, <http://schedule.skyracing.com.au/>, accessed 10 April 2017.

Figure 2.4: Media rights for racing in Tasmania, Australian Capital Territory and Northern Territory²⁴⁰

Source: Statement of Douglas Freeman, 8 March 2017, pp 72-77, paras 202-226. Statement of Nicholas David Tyshing, 13 April 2017, Non-confidential attachment NDT-19, p 2. Sky Channel Media Centre, Sky Channel Monthly Racing Schedule, <http://schedule.skyracing.com.au/>, accessed 10 April 2017.

2.4 Industry trends

112. There are three distinct forms of change evident in the wagering industry, ie:

- a change in the distribution channel by which punters are placing bets, in the form of an increase in online betting and a reduction in the extent of retail betting – although the latter trend has subsided in recent years so that the extent of retail betting has remained relatively stable;
- a change in the wagering products preferred by punters, so that fixed odds wagering has increased while the proportion of totalisator wagering has fallen; and
- a change in the type of events on which punters are wagering, with a reduction in the share of wagering on racing and an increase in the share of betting on sports events.

113. I explain these trends in more detail below.

2.4.1 Change in wagering distribution channels

114. Over the past ten years there has been a substantial increase in the extent of wagering undertaken online.²⁴¹ In particular, between FY06 and FY15 online wagering via websites or apps increased from 12 per cent to 51 per cent of wagering turnover.²⁴² Factors that have led to the increase in online wagering include the convenience of placing bets online, the increase in the popularity of smart phones, the

²⁴⁰ The Northern Territory does not have harness racing, see statement of Douglas Freeman, 8 March 2017, p 29, para 78.

²⁴¹ Form S, Annexure A, p 54, para 167.

²⁴² Form S, Annexure A, p 54, paras 167-168 and Figure 4; and Statement of Douglas John Freeman, 8 March 2017, p 94, para 254.

promotion and leveraging of their online channel at totalisator operators' retail premises,²⁴³ and advertising by corporate bookmakers.²⁴⁴

115. Comparatively, retail wagering has reduced its share of total wagering turnover, decreasing from 54 to 33 per cent of wagering turnover over the same ten year period.²⁴⁵ [HIGHLY Confidential to Tabcorp]

[REDACTED] ²⁴⁷

116. The trend towards increased online wagering and a reduction in the proportion of retail wagering is expected to continue in the future.²⁴⁸ Tabcorp estimates that by 2020, digital channels will increase to reflect [Confidential to Tabcorp] [REDACTED] of wagering turnover, while the share of retail channels will decline to account for [Confidential to Tabcorp] [REDACTED] of wagering turnover.²⁴⁹

2.4.2 Change in wagering products

117. The extent of fixed odds betting has increased since 2006, both as a percentage of total wagering and in absolute terms.²⁵⁰ In particular, fixed odds racing turnover has increased from approximately 20 per cent of total wagering turnover (representing \$3.6 billion) in FY06 to approximately 42 per cent of total wagering turnover (representing \$12.9 billion) in FY15.²⁵¹ Similarly, fixed odds sports turnover has increased from approximately 10 per cent of total wagering turnover (representing \$1.8 billion) in FY06 to approximately 21 per cent of total wagering turnover (representing \$6.4 billion) in FY15.²⁵²

118. In contrast, totalisator wagering has declined as both as a percentage of total wagering and in absolute terms over the same time period.²⁵³ The percentage of totalisator wagering has fallen from approximately 70 per cent of total turnover (representing \$12.6 billion) to approximately 35 per cent of total wagering turnover (representing \$10.7 billion).²⁵⁴ [Confidential to Tabcorp] [REDACTED]

[REDACTED] ²⁵⁵

119. The increase in fixed odds betting and decline in totalisator wagering is projected to continue in the future.²⁵⁶ Tabcorp has forecast that by 2020 fixed odds racing and totalisator derivative products combined will represent an estimated [Confidential to Tabcorp] [REDACTED] of total wagering turnover, while totalisator wagering will decline to represent an estimated [Confidential to Tabcorp] [REDACTED] of total wagering turnover.²⁵⁷

²⁴³ Statement of Statement of David Attenborough, 8 March 2017, p 38, para 152; Tabcorp, 2016/17 First half results presentation, 2 February 2017, pp 6-7; and Statement of Nicholas David Tyshing, 13 April 2017, pp 24 and 90, paras 136 and 431-433.

²⁴⁴ Form S, p 29, para 4.60.

²⁴⁵ Form S, Annexure A, p 54, paras 167-168 and Figure 4.

²⁴⁶ The CAGR is the mean annual growth rate of over a specified period of time.

²⁴⁷ [HIGHLY Confidential to Tabcorp] [REDACTED]

²⁴⁸ Statement of Douglas John Freeman, 8 March 2017, p 94, para 255.

²⁴⁹ Statement of Douglas John Freeman, 8 March 2017, p 94, para 255.

²⁵⁰ Form S, Annexure A, p 55, para 171; and Statement of Douglas John Freeman, 8 March 2017, p 24, para 61.

²⁵¹ I note that these percentages also capture corporate bookmakers' totalisator derivative products.

Statement of Douglas John Freeman, 8 March 2017, pp 99 and 101, paras 263 and 268, Figure 38.

²⁵² Statement of Douglas John Freeman, 8 March 2017, p 99, para 263.

²⁵³ Statement of Douglas John Freeman, 8 March 2017, p 24, para 61.

²⁵⁴ Statement of Douglas John Freeman, 8 March 2017, p 99, para 263.

²⁵⁵ Statement of Douglas John Freeman, 8 March 2017, p 102, para 269, Figure 39.

²⁵⁶ Statement of Douglas John Freeman, 8 March 2017, pp 100-101, para 267.

²⁵⁷ Statement of Douglas John Freeman, 8 March 2017, pp 100-101, para 267.

2.4.3 Change in wagering events

120. The majority of wagering turnover is on racing.²⁵⁸ During the period 1 August 2015 to 31 July 2016, total racing wagering turnover in Australia was \$20.6 billion.²⁵⁹ Comparatively, total sports betting turnover for the same period was \$8.2 billion.²⁶⁰
121. However, wagering on sports betting is increasing, having grown from 11 per cent of wagering turnover in FY06 to 21 per cent in FY15.²⁶¹ In absolute terms, wagering on sport has grown at approximately 14 per cent per year between FY06 and FY15 across all wagering providers.²⁶² At the provider level, annual growth rates in sports betting were similar across bookmakers (CAGR 15 per cent) and totalisator operators (12 per cent).²⁶³
122. Wagering on racing has been increasing over time, albeit at a lower rate than the growth on sports betting – the CAGR on wagering on racing was four per cent between FY06 and FY15.²⁶⁴ The annual growth on wagering on racing has been higher for bookmakers than totalisator operators – specifically, the CAGR was nine per cent between FY06 and FY15 for bookmakers, whereas the CAGR was two per cent for totalisator operators over the same period.²⁶⁵
123. The increase in wagering on sports is not expected to continue over the medium to long term.²⁶⁶ CrownBet considers that although sports wagering has been increasing, this trend is unlikely to continue, and wagering on sports is unlikely to match or exceed wagering on racing in the medium or long term.²⁶⁷ CrownBet states that the recent growth in sports wagering is unlikely to be sustained because there is uncertainty around the future ability of wagering operators to advertise in and around sports, and it is likely that sporting bodies will increase product fees in the future.²⁶⁸
124. Further, some of the recent growth in sports wagering has been driven by corporate bookmakers offering ‘click to call’ products to facilitate live betting on sports.²⁶⁹ Such products were offered by various corporate bookmakers between April 2015 and October 2016, and had a positive impact on the turnover of wagering providers.²⁷⁰ However, bookmakers are now precluded from offering click to call products.²⁷¹

2.5 Measures of the price and output of gambling

125. People typically engage in wagering and other forms of gambling for entertainment or recreational reasons.²⁷² In economic terms, there are a number of potential measures of both the price that punters pay to wager and the quantity (or output) of the gambling service provided to them.

²⁵⁸ Statement of Douglas John Freeman, 8 March 2017, p 25, para 65.

²⁵⁹ Statement of Douglas John Freeman, 8 March 2017, p 25, para 65.

²⁶⁰ Statement of Douglas John Freeman, 8 March 2017, p 25, para 65.

²⁶¹ Statement of Douglas John Freeman, 8 March 2017, p 102, para 270 and Figure 40.

²⁶² Form S, Annexure A, p 57, para 176.

²⁶³ Statement of Douglas John Freeman, 8 March 2017, p 102, para 270, Figure 40.

²⁶⁴ Form S, Annexure A, p 57, para 176; and Statement of Douglas John Freeman, 8 March 2017, p 102, para 270 and Figure 40.

²⁶⁵ Statement of Douglas John Freeman, 8 March 2017, p 102, para 270, Figure 40.

²⁶⁶ Statement of Nicholas David Tyshing, 13 April 2017, pp 18-19, paras 99 and 106.

²⁶⁷ Statement of Nicholas David Tyshing, 13 April 2017, pp 18-19, paras 99 and 106.

²⁶⁸ Statement of Nicholas David Tyshing, 13 April 2017, p 19, para 106.

²⁶⁹ Statement of Nicholas David Tyshing, 13 April 2017, p 19, para 107.

²⁷⁰ Statement of Nicholas David Tyshing, 13 April 2017, p 19-20, paras 108-109.

²⁷¹ Statement of Nicholas David Tyshing, 13 April 2017, p 20, paras 111-112.

²⁷² Productivity Commission, *Productivity Commission inquiry report – gambling*, February 2010, pp 5 and 6.3

126. The level of gambling turnover measures the total amount bet by punters with a wagering operator.²⁷³ However, the revenue attributable to a wagering operator is the much lower amount represented by the net loss to punters. Wagering operators' revenue can be determined by reference to:
- for totalisator products, the level of gambling turnover multiplied by the take-out rate; and
 - for fixed odds or totalisator derivative products, the value the wagering operator retains after making payments to customers that have placed successful wagers.²⁷⁴
127. Revenue from fixed odds or totalisator derivative products divided by turnover gives rise to the wagering operators' yield, which is equivalent to the take-out rate for totalisator wagering.²⁷⁵
128. The yield and take-out rate therefore represent the average rates paid by punters to the wagering operator for the provision of wagering products.²⁷⁶ The 'price' of a fixed odds or derivative wager is therefore the average loss a punter should expect when making a wager.²⁷⁷ Comparatively, the price of a totalisator product is built into the amount returned to the punter, and correspondingly, the amount kept by the totalisator, ie, the take-out rate. If the totalisator increases (decreases) its take-out rate, the price and so the amount returned to the punter decreases (increases).²⁷⁸ The price or average cost to punters of wagering on fixed odds and totalisator products is equivalent to the bookmaker's yield and the take-out rate, respectively.²⁷⁹
129. The quantity of wagering services (or output) provided to or consumed by punters can be measured in terms of either the amount of wagering turnover or the revenue to wagering operators. The former is a measure of gambling activity, while the latter represents the total resource cost or economic value added in the provision of wagering services. The revenue of wagering providers, which corresponds to the expected loss of punters, corresponds most closely to a measure of the contribution that wagering activity makes to a nation's gross domestic product.
130. The level of wagering activity – particularly as it relates to a program of events, such as in racing – can also be measured in terms of the number of bets that can be undertaken for a given level of wagering expenditure.²⁸⁰ In other words, by way of alternative to measuring wagering activity as the total amount bet by punters, the level of wagering activity can be measured in terms of the number of wagers that are undertaken.²⁸¹
131. The number of wagers that a punter is able to make with a set budget to spend (ie, lose) on one day of wagering (eg, \$100) depends on price of betting, ie, the take-out rate or yield.²⁸² For example, CrownBet estimates that an average punter with a \$100 budget and an average bet size of \$20 is able to have 50 bets with a bookmaker operating with a yield of 10 per cent, compared to 34 bets with a totalisator operator with a take-out rate of 15 per cent.²⁸³
132. In light of these different concepts, the relevant measures of price and output from an economic perspective are:

²⁷³ Statement of Nicholas David Tyshing, 13 April 2017, p 8, para 33.

²⁷⁴ Statement of Nicholas David Tyshing, 13 April 2017, pp 7 and 12, paras 28 and 56.

²⁷⁵ Statement of Nicholas David Tyshing, 13 April 2017, pp 7, 8 and 12, paras 28, 33 and 56-57.

²⁷⁶ Statement of Nicholas David Tyshing, 13 April 2017, pp 8 and 16, paras 33 and 83.

²⁷⁷ Statement of Nicholas David Tyshing, 13 April 2017, p 16, para 83.

²⁷⁸ Statement of Nicholas David Tyshing, 13 April 2017, p 7, para 27.

²⁷⁹ Statement of Nicholas David Tyshing, 13 April 2017, pp 7, 8 and 16, paras 28, 33 and 83.

²⁸⁰ Statement of Nicholas David Tyshing, 13 April 2017, pp 99-100, para 479.

²⁸¹ Statement of Nicholas David Tyshing, 13 April 2017, p 15, para 77.

²⁸² Statement of Nicholas David Tyshing, 13 April 2017, p 15, para 78.

²⁸³ This example assumes that the punter has at least one winning bet and that winning and losing punters funds are otherwise in balance. Statement of Nicholas David Tyshing, 13 April 2017, p 15, paras 79-80.

- the expected loss rate, which is the appropriate measure of price, as given by the take-out rate for totalisator wagers and the yield for fixed odds wagering; and
- the number of betting experiences gained for a given total expenditure is a reasonable measure of the welfare or utility gained by a consumer of wagering.

133. However, I note that there may be other more difficult to measure aspects of the gambling experience, such as quality of the venue, the level of the digital experience, and whether the race can be watched or listened to live. Both Tabcorp and CrownBet have indicated that live audio and visual coverage of races is an important way that punters can experience the event and derive further utility from their wagering activity.²⁸⁴

134. Finally, innovation in gambling products and changes in the mix of products consumed can also be expected to improve the economic welfare associated with gambling, either in terms of price or any relevant measure of the enjoyment gained. Innovations in wagering could occur in the retail or digital channels, and include the development of new bet types or means of displaying racing vision.²⁸⁵ For example, innovations in racing vision may include the use of speed maps, replays of the race and slow motion footage.²⁸⁶

2.6 Without the merger

135. Tabcorp and Tatts have taken steps to respond to the industry trends I describe above, such as the growth in online wagering and fixed odds wagering.²⁸⁷ Those steps include investing in digital wagering channels and investing in retail outlets as a means to support that digital strategy.²⁸⁸

136. For example, Tatts has recently taken steps to improve its product, including undertaking a comprehensive rebranding, improving its fixed odds and digital offering, redesigning its retail outlets and improving its in-play betting offering.²⁸⁹ Tatts has also indicated a number of initiatives for FY17, including:²⁹⁰

- targeting 270 UBET next generation retail spaces to be put in place in the year;
- introducing new generation self-service terminals in the UBET retail outlets, featuring cash in, and Ticket-in-Ticket-out technology;
- developing and improving the prototype of the unique in-venue in-play betting modules with an eye to a full retail launch;
- trialling affiliate marketing programs in FY17 to further drive digital demand; and
- launching its first virtual sports and racing products in the Northern Territory in FY17.

137. [HIGHLY confidential to Tabcorp] [REDACTED]
[REDACTED] Similarly, [HIGHLY confidential to Tatts]

²⁸⁴ Statement of Nicholas David Tyshing, 13 April 2017, p 36, paras 186-187; and Statement of Douglas John Freeman, 8 March 2017, p 72, para 203.

²⁸⁵ Statement of Nicholas David Tyshing, 13 April 2017, pp 53, 83 and 88, paras 255, 399 and 420.

²⁸⁶ Statement of Nicholas David Tyshing, 13 April 2017, p 88, para 420.

²⁸⁷ Statement of Nicholas David Tyshing, 13 April 2017, p 78, para 384; and Statement of Douglas John Freeman, 8 March 2017, pp 129-130, paras 319-320.

²⁸⁸ Statement of Nicholas David Tyshing, 13 April 2017, p 79, para 385; and Statement of Douglas John Freeman, 8 March 2017, pp 130-131, paras 321-324.

²⁸⁹ Form S, pp 101-102, paras 14.17 to 14.25. I note that Tabcorp claims these initiatives were made in direct response to the increasing competition from corporate bookmakers. In my opinion, Tatts also competes against Tabcorp, and these activities by Tatts would improve its position relative to Tabcorp, in addition to corporate bookmakers. Therefore, it cannot be the case that these initiatives were solely targeted at corporate bookmakers.

²⁹⁰ Tatts, Annual report 2016, pp 30-31; and Statement of Nicholas David Tyshing, 13 April 2017, p 79, para 387.

[REDACTED] For example:

- [HIGHLY confidential to Tabcorp] [REDACTED]

[REDACTED]²⁹¹ and

- [HIGHLY confidential to Tatts] [REDACTED]

[REDACTED]²⁹²

138. Further, [HIGHLY confidential to Tatts] [REDACTED]

[REDACTED]²⁹⁴

139. Moreover, absent the merger, there may be an increase in the availability of racing vision because [Confidential to Tabcorp] [REDACTED]

²⁹¹ [HIGHLY Confidential to Tabcorp] [REDACTED]

²⁹² [HIGHLY Confidential to Tatts] [REDACTED]

²⁹³ [HIGHLY Confidential to Tatts] [REDACTED]

²⁹⁴ [HIGHLY Confidential to Tatts] [REDACTED]

²⁹⁵ [HIGHLY Confidential to Tabcorp] [REDACTED]

3. Identifying and defining the relevant markets

140. In this section I describe the appropriate approach to defining markets for analysing the effects of mergers on competition, and the particular markets for the matter at hand. In my opinion, the relevant markets for the purposes of assessing the competitive effects of the proposed transaction are:

- a national market for wagering in Australia, and a market for the supply of wagering services for premium punters;
- a market or markets for the rights to show racing media content; and
- markets for granting the Victorian totalisator licence in 2024 and the privatisation of the WA TAB, if those sales go ahead.

3.1 Approach to market definition

141. I broadly agree with the approach to defining markets set out by Dr Pleatsikas and, as such, in this section I limit my commentary to a high level summary of the appropriate approach.²⁹⁶

3.1.1 Summary of approach

142. Market definition is the identification of the competitive constraints that are likely to have a substantial effect on a particular product or service (they are 'in' the market), and those that have a less immediate effect (they are 'out' of the market). However, such bright lines rarely exist in practice, and firms selling products that are out of the market may act as a competitive constraint, albeit to a lesser degree.

143. Defining a market is not an end in itself. It is a means of making competition analysis more tractable, because it focuses the analysis on the most important aspects of competition. In this case, a market is defined to help assess the effects on competition of the proposed merger between Tabcorp and Tatts.

144. The boundaries of a market are conventionally determined by reference to four dimensions, ie:²⁹⁷

- the product dimension, ie, the goods or services supplied by Tabcorp and Tatts and the products that are close substitutes;
- the functional dimension, ie, the part of the supply chain that is the relevant arena of competition;
- the geographic dimension, ie, the geographic area over which Tabcorp and Tatts and its rivals currently supply (or could supply) the relevant products; and
- the temporal dimension, ie, the time period over which substitution can take place.

145. A market encompasses the range of business activities, geographic areas and functional levels within which, if given a sufficient economic incentive, buyers can switch to a substantial extent from one source of supply to another ('demand-side' substitution), and/or sellers can switch to a substantial extent from one production plan to another ('supply-side' substitution).

146. The starting point for delineating relevant markets in this matter is to identify the products and geographic regions actually or potentially supplied by the merger parties.²⁹⁸ Market definition can be

²⁹⁶ Expert economic report of Dr Christopher Pleatsikas, 8 March 2017, pp 19-29, paras 39-62.

²⁹⁷ ACCC, *Merger Guidelines*, 2008, p 15.

²⁹⁸ ACCC, *Merger Guidelines*, 2008, p 16.

approached systematically, starting with these as the 'narrowest' possible candidate markets,²⁹⁹ and then progressively widening the dimensions to incorporate additional sources of supply, more functional levels, and an increasing geographic area that are close constraints on those in the candidate markets, until the boundaries of the markets are ultimately established.

147. The expansion of the bounds of the market can be performed using the hypothetical monopolist test, which has been well explained by Dr Pleatsikas.³⁰⁰ In some circumstances there is sufficient data to undertake a quantitative assessment of whether a candidate market should be expanded using the hypothetical monopolist test.³⁰¹ In other instances, including this one, it is necessary to apply qualitative evidence in combination with a degree of judgment to help determine whether a market should be expanded.³⁰²
148. In my opinion, the judgments that have been applied by the experts for Tabcorp are unlikely to be determinative in this case, except in relation to media rights, which I explain in section 3.3 below has been overlooked. Given the differentiated nature of the various wagering products supplied by the parties to the proposed transaction, it is more important to focus on the closeness of competition (and substitution) between the products for which the two firms overlap, rather than on the precise boundaries of the affected markets.

3.1.2 Functional dimension of the market

149. Dr Pleatsikas does not explain the basis for determining whether there may be separate functional dimensions to a market, and so I explain this briefly below.
150. The functional dimension of a market refers to that element of the vertical supply chain being considered, such as whether a product is being sold at the wholesale or retail level. Separate functional dimensions of the market exist whenever there are transactions occurring between different companies operating at different functional levels. For example, if there are firms that offer wholesale services to retailers, then the retail and wholesale functions are separate, even if some firms offer both services.
151. Without evidence of actual transactions, it may be necessary to consider whether, within what may appear to be a single function, there is the potential for trade to occur within that function. Separate functional levels exist whenever there are potential transactions between the up and downstream levels that would allow the functions to be 'economically separable'.
152. In this context, economic separability is the extent to which independent entities can undertake the related activities under arm's length contractual arrangements, ie, through market procurement. In contrast, if two related activities cannot be performed separately and so are only ever performed within the same firm, they are said to be economically inseparable.
153. If the total cost of producing a good or service under the 'market procurement' business model is less than the cost under an integrated model, then the relevant activities can be regarded as economically separable. In contrast, if the total cost of production under an integrated model is lower than under market procurement, then the activities may not be taken to be economically separable.

²⁹⁹ As noted by Dr Pleatsikas, it is sometimes the case that the starting point for delineating relevant markets is narrower than all of the products supplied by the merging parties, where they might be in separate markets. See: Expert economic report of Dr Christopher Pleatsikas, 8 March 2017, p 24, para 49.

³⁰⁰ Expert economic report of Dr Christopher Pleatsikas, 8 March 2017, p 22, para 44.

³⁰¹ Expert economic report of Dr Christopher Pleatsikas, 8 March 2017, p 25, paras 50-51.

³⁰² Expert economic report of Dr Christopher Pleatsikas, 8 March 2017, p 25, para 51.

3.2 National market for wagering

3.2.1 Product market

154. I describe in section 2.1 that there is a wide range of differentiated wagering products, whilst in section 2.4 I explain that long term trends show that the consumption of wagering is changing. For example, the amounts wagered on sports, fixed odds and online are increasing.
155. There is some overlap in the punters making different types of wagers, suggesting that there may be an important potential for punters to substitute between them. For example, approximately 35 per cent of people that bet do so in both sports and racing.³⁰³
156. For the purposes of my analysis, the precise delineation of this boundary is not especially important. Rather, in assessing a merger between two firms that both provide various forms of differentiated products, the greater focus should be on the closeness of competition between those firms in the supply of products in which their operations overlap.
157. My analysis therefore proceeds on the basis that there is a national market for wagering, but with a particular focus on the competitive implications of the transaction for:
- those particular products and distribution channels that appear subject to the most significant potential for growth and innovation, ie, online wagering, including how this is affected by the availability of racing media; and
 - those products where there is the greatest degree of horizontal aggregation and therefore potential for harm to competition, ie, totalisator wagering services.
158. Dr Pleatsikas states that it is possible that there may be a separate market for the supply of wagering products to large punters. I agree that large punters are likely to be in separate market from other punters because wagering operators can and do set different price levels to large punters.³⁰⁴
159. I extend the separate market for large customers to include sophisticated punters, some of whom may not bet at the same volume, but are significantly more likely than the 'average' punter to be successful.³⁰⁵ Such punters are methodical and diligent in their research, and can achieve profit-on-turnover rates that are significantly above average.³⁰⁶ In my opinion, the separate market raised by Dr Pleatsikas should include sophisticated wagerers, who can, along with large punters, be referred to collectively as 'premium' punters.³⁰⁷
160. On the supply side, premium punters are serviced by totaliser operators and betting exchanges – ie, Tabcorp, Tatts and Betfair.³⁰⁸ I understand that corporate bookmakers do not offer services to premium punters because they:
- must bear the risk of taking large wagers, whilst totalisator operators do not;³⁰⁹

³⁰³ TBP.003.001.0941, p 32.

³⁰⁴ As indicated by Dr Pleatsikas, 'The customer dimension is important in circumstances where suppliers (or buyers) can price discriminate so as to separate customers (or suppliers) into distinct groups for pricing purposes'. Dr Christopher Pleatsikas, 8 March 2017, p 27, para 58. Customers that wager more than [HIGHLY Confidential to Tabcorp] [REDACTED] Form S, p 331, Question 17(a).

³⁰⁵ Statement of Andrew Twaits, 19 April 2017, p 7 para 29.

³⁰⁶ Statement of Andrew Twaits, 19 April 2017, p 7 para 29.

³⁰⁷ Statement of Andrew Twaits, 19 April 2017, p 7 paras 28-29.

³⁰⁸ Statement of Timothy Moore-Barton, p 10-11, para 41-43.

³⁰⁹ Statement of Nicholas David Tyshing, 13 April 2017, p 17, para 91.

- cannot accept similar amount of turnover from sophisticated punters who are substantially more likely to be successful³¹⁰ because this would reduce their margins, which are already generally lower than totalisators'³¹¹; and
- further, cannot offer comparable pricing or rebates as a result of their turnover-based race field fee obligations and their generally lower margins.³¹²

161. It follows that potential Australian suppliers of wagering services to premium punters are limited to the two operators of the three totalisator pools and Betfair.

3.2.2 Geographic market

162. Customers can access any odds provided across Australia by a totalisator operator or corporate bookmaker online or over-the-telephone. Competition in the online and over-the-telephone channels is Australia wide, and this channel is a growing and very substantial part of the wagering market that competes with the retail channel.³¹³ By virtue of these arrangements, I agree with Dr Pleatsikas that the wagering market is likely to be nationwide.³¹⁴

163. Dr Pleatsikas states that:³¹⁵

If there is a separate market for the supply of wagering products to large punters, it is almost certainly international in terms of its geographic dimension.

164. Dr Pleatsikas draws this conclusion by reference to assumptions he was asked to make that premium punters are sophisticated investors and place bets into other pools that are not operated by Tabcorp, including those run by overseas totalisators in the United States, South Africa and Hong Kong.³¹⁶ In my opinion, this assumption is not sufficient to conclude that the market is international because it does not provide information on the substitutability between wagering in Australia and overseas. In any case, the more important consideration is the closeness of competition between different potential service providers for meeting the demands of premium punters.

3.2.3 Functional market

165. Although Tatts provides a racing radio service, whilst Tabcorp owns Sky Channel, which produces television and radio channels,³¹⁷ not all wagering providers are vertically integrated with racing media. Tatts is a major acquirer of racing media from Tabcorp, and no corporate bookmakers are vertically integrated with the supply of racing media content or rights.³¹⁸

166. It follows that the market for the supply of racing media rights is functionally separate from that for wagering services. I therefore agree with Dr Pleatsikas that the relevant functional level of the wagering product market is the supply of wagering products to end customers.³¹⁹

3.2.4 Conclusion

167. For the purposes of assessing the competitive effects of the proposed transaction, there is likely to be a national market for the supply of wagering products to customers, and a market for the supply of

³¹⁰ Statement of Andrew Twaits, 19 April 2017, p 8, para 31.

³¹¹ Statement of Nicholas David Tyshing, 13 April 2017, p 17, para 90.

³¹² Statement of Nicholas David Tyshing, 13 April 2017, p 17, para 90.

³¹³ See: section 2.4.1 and Statement of Douglas John Freeman, 8 March 2017, pp 92-94, paras 248-249 and 254.

³¹⁴ Expert economic report of Dr Christopher Pleatsikas, 8 March 2017, p 47, para 105.

³¹⁵ Expert report of Chris Pleatsikas, 8 March 2017, p 48, para 107.

³¹⁶ Expert report of Christopher Pleatsikas, 8 March 2017, Confidential attachment TBP.001.027.1829, p 79, para 306.

³¹⁷ See: section 2.3.2.

³¹⁸ Statement of Nicholas David Tyshing, 13 April 2017, p 50, figure 8.

³¹⁹ Expert economic report of Dr Christopher Pleatsikas, 8 March 2017, p 47, para 106.

wagering services to premium punters. However, given the differentiation of wagering products, it is relatively more important to pay particular attention to the closeness of competition at the individual product level when examining the competitive effects and premium of the proposed transaction.

3.3 Markets for racing media rights

168. The supply of racing media rights is typically controlled by the PRB that owns those rights in each state, as depicted in figures 2.1 to 2.4. For example, Greyhound Racing South Australia controls the sale of media rights to greyhound races in South Australia.³²⁰
169. Wagering providers purchase online racing media rights because punters prefer to wager on a race that they can see (see section 2.3). Indeed, CrownBet³²¹ and Tabcorp³²² both emphasise that holding racing vision rights drives wagering as well as customer acquisition and retention.
170. I describe in section 2.3.1 that racing media rights are divided and sold by distribution channel. Each PRB can choose to sell the rights for each channel separately, or as a bundle, and whether to sell the rights on an exclusive or non-exclusive basis. One consequence of the potential delineation of the various forms of right in the various jurisdictions is that there may be several separate markets for the sale and purchase of media rights, both by channel and in each state and territory. However, my competition analysis is not affected by whether the different potential forms of media rights are or are not in the same market, and so I do not give this question further consideration.
171. The merger does not change the fact that the PRBs have monopoly ownership of their own rights, and can divide them up in the way they see fit. Rather, the change arising from the merger is in the market power of the firm seeking to acquire those rights, and so this is the focus of my analysis.
172. The geographic market is likely to be Australia-wide because racing media rights are generally sold on the basis of being able to be shown Australia-wide. Consistent with this, Sky Channel acquires the exclusive right to broadcast racing vision domestically via its pay television channels and into commercial venues, and the three Sky Channel television channels are broadcast throughout Australia, while those corporate bookmakers that have been able to secure digital rights are able to stream to account holders located throughout Australia.³²³
173. Dr Pleatsikas states that there is a national market for television broadcasting to end consumers and state or sub-state markets for radio broadcasting to end users.³²⁴ Although I agree that there may be some form of market for broadcasting, in my opinion this is of tangential relevance for the analysis of the competition issues arising from the proposed merger.
174. Rather, the important point overlooked by Dr Pleatsikas is that the availability of racing media rights is a critical input to delivering some form of visual and audio experience to punters (whether by broadcast or online), and so the focus should be on the market for those rights, not the mechanism by which they may be delivered.

³²⁰ Statement of Matthew Corby, 22 February 2017, p 10, para 57.

³²¹ Statement of Nicholas David Tyshing, 13 April 2017, p 36, para 185.

³²² Statement of Douglas John Freeman, 8 March 2017, pp 72-73, paras 203-204.

³²³ Statement of Statement of David Attenborough, 8 March 2017, p 8, para 18; and Statement of Douglas John Freeman, 8 March 2017, pp 74-76, para 213, 215 and 220.

³²⁴ Expert economic report of Dr Christopher Pleatsikas, 8 March 2017, pp 55-56, para 129

3.4 Markets for granting the Victorian wagering licence and privatisation of the WA TAB

175. The Victorian wagering licence will be granted in 2024 and WA TAB may be privatised in the near future. These both give rise to separate markets, assuming those processes go ahead because both would involve unique assets and rights that have no close substitutes

4. Effects of the merger on competition

176. In this section I describe the economic framework for assessing the competitive effects of mergers and apply that framework to the proposed transaction between Tabcorp and Tatts. I also draw attention to particular aspects of the reports of Dr Pleatsikas, Mr Smith and Dr Menezes that either omit important considerations, or with which I disagree.
177. My analysis shows that the proposed transaction will lessen competition in a large and fast growing part of the national wagering market, being the provision of online and over-the-telephone wagering services, because:
- the transaction will bring together two strongly complementary forms of structural competitive advantage that are only available through the ongoing exercise of monopoly rights in the retail channel and market power in the acquisition of media rights, neither of which is able to be replicated by any of Tabcorp's competitors;
 - [Confidential to Tatts] [REDACTED]
 - the RWWA, Tabcorp and Tatts are the only providers of online (and retail) totalisator wagering services, but because RWWA must comply with the take-out rate that Tabcorp sets through the SuperTAB pool, the merger will eliminate price-based competition for online totalisator wagering customers; and
 - Tabcorp and Tatts are the two principal competitors in the supply of wagering services to premium punters.
178. Finally, these detriments to competition are highly unlikely to be overcome by either new entry or expansion by existing competitors in the provision of online and over-the-telephone wagering. This is because not only will the effect of the proposed transaction be to raise the costs of rivals to the merged entity, but also there are significant barriers to entry in the provision of online and over-the-telephone wagering services.
179. Further and relatedly, the merger will lessen competition in the acquisition of racing media rights because:
- the lessening of competition in the wagering market will increase Tabcorp's ability and incentive to exercise its market power in the acquisition of media rights;
 - the merged firm's interdependent financial links with an increased number of PRBs will also increase Tabcorp's ability and incentive to exercise its market power in the acquisition of media rights from the PRBs; and
 - the consequence of Tabcorp's increased ability and incentive to exercise its market power in the acquisition of media rights is that:
 - > PRBs are likely to realise a lower value for those rights; and
 - > the prospect or extent to which such rights will be made available on a non-exclusive basis will be reduced, thereby reinforcing the lessening of competition in the wagering market.
180. Finally, the proposed transaction will lessen competition for the acquisition of the Victorian wagering licence in 2024 and for the potential sale of the WA TAB, because in each case the number of credible bidders is likely to be reduced to one.

4.1 Economic framework

181. In this section I explain the economic framework relevant for the assessment of the effect that the proposed merger is likely to have on competition.

4.1.1 Forward looking comparison of competition with and without the merger

182. The effect on competition of a proposed merger needs to be assessed by comparing the state or degree of competition in future:

- if the proposed transaction goes ahead (with the merger); and
- if the proposed transaction does not go proceed (without the merger).

183. I examine the likely state of competition in the relevant markets under these two scenarios, and the effect that any change in the degree of competition has on public welfare, which can be measured with reference to likely changes in prices, output, product quality and the anticipated extent of innovation over time.

184. I explain in section 2.5 that, for wagering services, the appropriate measure of price is the expected loss rate faced by punters, which is the take-out rate for totalisator wagers and the yield for fixed odds wagering. Consistent with this, the level of wagering operator revenue is the appropriate measure of output, while the number of bets of a given size that punters can place is one indicator of the degree of consumer surplus or welfare obtained from wagering.

185. Merger analysis is intrinsically forward looking, and the focus of my assessment is the next five to ten years, because it is easier to make predictions about how competition will develop in the near term. In addition, any effects that may be expected to occur further into the future should be subject to greater levels of discounting, and so have a lesser effect on public welfare in today's terms.

186. In the scenario where the proposed transaction does go ahead, I assume that the parties would act as one to maximise their profits. Amongst other things, this means that Tatts (and its existing relationships with the PRBs) is combined with Sky Channel.

187. The scenario without the merger involves an assessment of the likely state of competition over the same time period, but under which Tabcorp and Tatts would be competing strongly with one another. In this scenario, I assume that both Tabcorp and Tatts would seek to maximise their profits, and that there would be no integration of Tatts with Sky Channel. Consistent with this, I refer in section 2.6 to the parties' plans to compete strongly in the wagering market in the event the merger does not proceed, including the initiatives that Tatts is proposing to undertake in the year ended 30 June 2017.

4.1.2 Horizontal effects

188. The effect of a merger on competition between firms operating at the same functional level in an industry supply chain depends upon:³²⁵

- the degree of competition that is lost, ie, the nature and intensity of competition between the parties now and expected to be so into the future; and
- the degree of competition that remains post-merger, ie, the nature and intensity of remaining competitive constraints on the merged firm.

189. The degree or intensity of competition is dependent upon competitive constraints imposed by:³²⁶

³²⁵ Motta, M, *Competition policy – theory and practice*, Cambridge University Press, 2004, pp 234-236

³²⁶ Motta, M, *Competition policy – theory and practice*, Cambridge University Press, 2004, pp 235-237.

- firms already in the market;
- potential entrants; and
- buyers that may be able to put pressure on suppliers to provide better services or products at lower prices.

190. The means by which a merger of two firms competing side-by-side in the same market lessens competition can be illustrated by reference to a simple example. In the ordinary course of competition in a market, a price rise by one firm (say, firm 1) will result in:

- a higher margin being earned by firm 1 on each sale it makes – leading to higher profits; and
- a lower quantity of sales for firm 1 as customers switch to other firms, including, say, to firm 2 – leading to lower profits.

191. Firm 1 will maximise its profits by increasing its prices up to the level at which further increases are no longer profitable, because the loss of profit from losing further sales is greater than the gain in profit from higher margins on the remaining sales it does make.

192. Mergers eliminate competition between the merging parties, which can lead to higher prices. As shown in Figure 4.1, a merger between firms 1 and 2 means that firm 1 will now find it profitable to raise its prices³²⁷ above the optimum level that would have prevailed before the merger because:

- the gain in profit from the higher margin on the remaining customers is the same as pre-merger; but
- the loss of profit from the lower level of sales is reduced, because some of the sales lost by firm 1 will be regained by firm 2, which is now part of the same entity.³²⁸

³²⁷ I assume for the sake of simplicity that the absence of merger-induced efficiencies means it is not likely to be profitable for the merged firm to reduce prices, as compared with those prevailing prior to the merger.

³²⁸ Armstrong, M, Porter, R, *Handbook of industrial organization – volume 3*, North-Holland, 2007, p 2,376.

Figure 4.1: Stylised effect of a merger on the profitability of a price rise



193. The extent to which a price rise by firm 1 will be more profitable with the merger, as compared to without it depends upon:³²⁹

- the level of profit for each sale lost by firm 1 and recaptured by firm 2; and
- the proportion of sales lost by firm 1 that will be recaptured by firm 2, which will reflect the closeness of competition between the firms.

³²⁹ Coate, M, Simons, J, *Critical loss vs. diversion analysis: clearing up the confusion*, GCP: The Antitrust Chronical (1), 2009, pp 3-4, footnote 12.

4.1.3 Effect of mergers on the risk of foreclosure

194. Vertical input foreclosure occurs when a vertically integrated firm refuses to sell, or will only sell at a higher price (or lower quality), an essential input to its downstream rivals.³³⁰ This can lessen competition when:
- a vertically integrated firm has the ability to foreclose its rivals, ie, it is able to increase its rivals' costs because it supplies an important input to them that cannot be purchased elsewhere for the same or similar cost;
 - a firm has an incentive to foreclose rivals, ie, it earns a greater profit from foreclosing rivals than not doing so;³³¹ and
 - the effect of such foreclosure is to lessen competition in the downstream market.³³²
195. A merger will lessen competition in a downstream market whenever there is an increased risk or a greater effect of foreclosure, so long as:
- each of the three conditions above applies in the scenario with the merger; and
 - one of the conditions is strengthened if the merger takes place, relative to the scenario without the merger, ie, either:³³³
 - > the merged firm has a greater ability to foreclose rivals; and/or
 - > the merged firm has a stronger incentive to foreclose rivals; and/or
 - > the effect of foreclosure on competition will be greater.

4.2 Totalisator operators have substantial competitive advantages

196. A recurring theme of the material placed before the Tribunal by Tabcorp and the expert reports filed on its behalf is that corporate bookmakers have a number of structural competitive advantages over Tabcorp and Tatts, such as those I list in section 2.1.3. For example, in its Form S Tabcorp contends that:³³⁴

The business model of Northern Territory corporate bookmakers is different from the businesses carried on by Tabcorp and Tatts and provides corporate bookmakers with a number of competitive advantages.

197. The extent of this contended advantage is not quantified in any comprehensive way in either the material set forth in Form S or the expert reports prepared on behalf of Tabcorp. Rather, the contended advantages of corporate bookmakers are referred to by way of *ad hoc* comparisons, such as the ones I present in section 2.1.3.
198. In my opinion, neither Tabcorp nor its economic experts portray these considerations in a balanced or comprehensive manner. I describe in section 2.1.2 that Tabcorp and Tatts both enjoy some very substantial advantages over corporate bookmakers in competing for customers in the wagering market. These include that:
- either Tabcorp or Tatts operates the totalisator and retail wagering monopolies in all states apart from Western Australia, each of which is highly profitable in its own right³³⁵ and, further, provides the relevant operator with the ability to leverage its exclusive access to retail-only customers in order to

³³⁰ Armstrong, M, Porter, R, *Handbook of industrial organization – volume 3*, North-Holland, 2007, pp 2148-2150.

³³¹ Armstrong, M, Porter, R, *Handbook of industrial organization – volume 3*, North-Holland, 2007, pp 2148-2150.

³³² Armstrong, M, Porter, R, *Handbook of industrial organization – volume 3*, North-Holland, 2007, pp 2148-2150.

³³³ Motta, M, *Competition policy – theory and practice*, Cambridge University Press, 2004, pp 373-374.

³³⁴ Form S, p 30, para 4.63.

³³⁵ Statement of Nicholas David Tyshing, 13 April 2017, p 77-78, para 380-382; and Tabcorp, Annual report 2016, p 79.

compete for their online wagering activity – the potential value of these customers is underlined by the fact that, on average, retail-only customers wager [Confidential to Tabcorp] [REDACTED] as those that bet only in the digital channel;³³⁶

- in each of the states in which one or other operates the totalisator, both Tabcorp and Tatts:
 - > have been able to build substantial shares in online wagering, the effect of which I present at section 4.3.1; and
 - > are able to offer services to customers that wager through multiple channels when, on average, these customers wager more than eight times the amount for punters that use only the online channel only;³³⁷
- Tabcorp and Tatts both have the ability to show live races in their retail outlets, while Tabcorp also makes digital content in relation to a large number of races available through its online channels whereas, in contrast, the corporate bookmakers hold only very limited media rights and so are generally unable to offer a wagering product that integrates digital vision (see section 2.3.2); and
- there are limited opportunities for corporate bookmakers to sponsor racing clubs because sponsorship rights to major race clubs are often held by either Tabcorp or Tatts, on a long term basis in agreements that are tied up with the relevant retail licence.³³⁸

199. Some of the competitive disadvantages contended by Tabcorp as applying to totalisator operations can reasonably be regarded as payments for advantages. In particular, the licence fee, wagering tax and racing funding obligations can be taken to represent the combined consideration payable for securing the benefits of an exclusive totalisator license, a retail wagering monopoly and joint venture arrangements with racing authorities in their respective jurisdictions.³³⁹

200. [HIGHLY Confidential to Tabcorp] [REDACTED]

[REDACTED]³⁴⁰

201. In my opinion, there is no economic basis on which it can safely be concluded that the totalisator operators have a structural competitive disadvantage relative to other wagering service providers. Rather, having regard to all the considerations, it is more likely that the totalisator operators continue to have a significant structural advantage over the corporate bookmakers in competing for and serving wagering customers.

4.3 Lessening of competition in the wagering market

202. My analysis shows that the proposed transaction will lessen competition in all elements of the wagering market that are not otherwise subject to the retail wagering monopoly. The wagering products affected by the merger are a fast growing part of the national wagering market, being the provision of online and over-the-telephone wagering services. The lessening of competition arises because:

³³⁶ [HIGHLY Confidential to Tabcorp] [REDACTED]

³³⁷ Statement of Nicholas David Tyshing, 13 April 2017, p 24, para 135.

³³⁸ Statement of Nicholas David Tyshing, 13 April 2017, p 53, para 254.

³³⁹ Statement of Nicholas David Tyshing, 13 April 2017, p 59, para 293. For example, TAB Limited is licensed under the Totalisator Act 1997(NSW) to provide off-course and on-course totalisator wagering services in New South Wales for thoroughbred, harness and greyhound racing until 2097. Under clause 43(2) of the Totalisator Act 1997 (NSW), the licensee of the New South Wales Wagering Licences must have in place commercial arrangements with the racing industry in respect of the licence and the conduct of activities authorised by the licence. Accordingly, TAB Limited entered into a Racing Distribution Agreement on 11 December 1997 with Racingcorp Pty Ltd (formerly NSW Racing Pty Ltd), Greyhound Racing New South Wales (formerly Greyhound Racing Authority), Harness Racing New South Wales (HRNSW), Racing New South Wales (formerly New South Wales Thoroughbred Racing Board) (Racing Distribution Agreement). Pursuant to these agreements, TAB Limited makes certain financial contributions to the New South Wales racing industry. See also: Statement of Douglas Freeman, 8 March 2017, pp 42-44, paras 117 to 122.

³⁴⁰ [HIGHLY Confidential to Tabcorp] [REDACTED]

- the transaction will bring together two strongly complementary forms of structural competitive advantage that are only available through the ongoing exercise of monopoly rights in the retail channel and market power in the acquisition of media rights, neither of which is able to be replicated by any of Tabcorp's competitors;
- [Confidential to Tatts] [REDACTED]
- the RWWA, Tabcorp and Tatts are the only providers of online (and retail) totalisator wagering services, but because RWWA must comply with the take-out rate that Tabcorp sets through the SuperTAB pool, the merger will eliminate price-based competition for online totalisator wagering customers; and
- Tabcorp and Tatts are the two principal competitors in the supply of premium or rebated totalisator wagering services to large punters.

203. Finally, these detriments to competition are highly unlikely to be overcome by either new entry or expansion by existing competitors in the provision of online and over-the-telephone wagering. This is because not only will the effect of the proposed transaction be to raise the costs of rivals to the merged entity, but also there are significant barriers to entry in the provision of online and over-the-telephone wagering services.

4.3.1 Tabcorp will have increased structural advantages unable to be replicated by competitors

204. The retail wagering operator in each state has the ability to leverage its retail monopoly rights to gain a substantial advantage in competing for online wagering customers from that state.³⁴¹ Tabcorp and Tatts both have a strong incentive to leverage that competitive advantage and are planning to increase the extent to which they do so.³⁴²

205. The ability to integrate racing media content with online wagering platforms is critical to driving online wagering activity, and so any firm that has access to such content is at a significant competitive advantage. This competitive advantage is increased if fewer firms hold those rights, and greatest if they are held exclusively.³⁴³

Tabcorp has substantial structural advantages without the merger

206. The competitive advantage of being able to secure online wagering customers through the operation of retail monopolies in every state and territory apart from Western Australia is currently shared between Tabcorp and Tatts, and this will continue to be the case absent the transaction.

207. Further, I explain in section 4.4.1 below that Tabcorp currently has market power in the acquisition of racing media rights. Tabcorp has been able to use that market power to secure exclusive rights to the vast majority of racing content.³⁴⁴ However, Tabcorp does not currently have the ability to leverage the full extent of its market power in those states where it does not also operate the totalisator and hold the associated retail wagering monopoly.

208. Consistent with this reduced ability to use its market power in media rights, Tabcorp has a much lower share of online wagering in states where Tatts holds the retail wagering monopoly, as compared

³⁴¹ For example, totalisator operators can cross-promote online and telephone operations through their retail network and they can service the highly valuable multi-channel customers. See: Statement of Nicholas David Tyshing, 13 April 2017, p 75, para 376 (j) and section 2.1.2 above. As a result, the totalisator operators have much greater share of online wagering turnover in those states in which they operate the totalisator. See: Figure 4.2.

³⁴² See: section 2.6.

³⁴³ Statement of Nicholas David Tyshing, 13 April 2017, pp 35-36, paras 182-184.

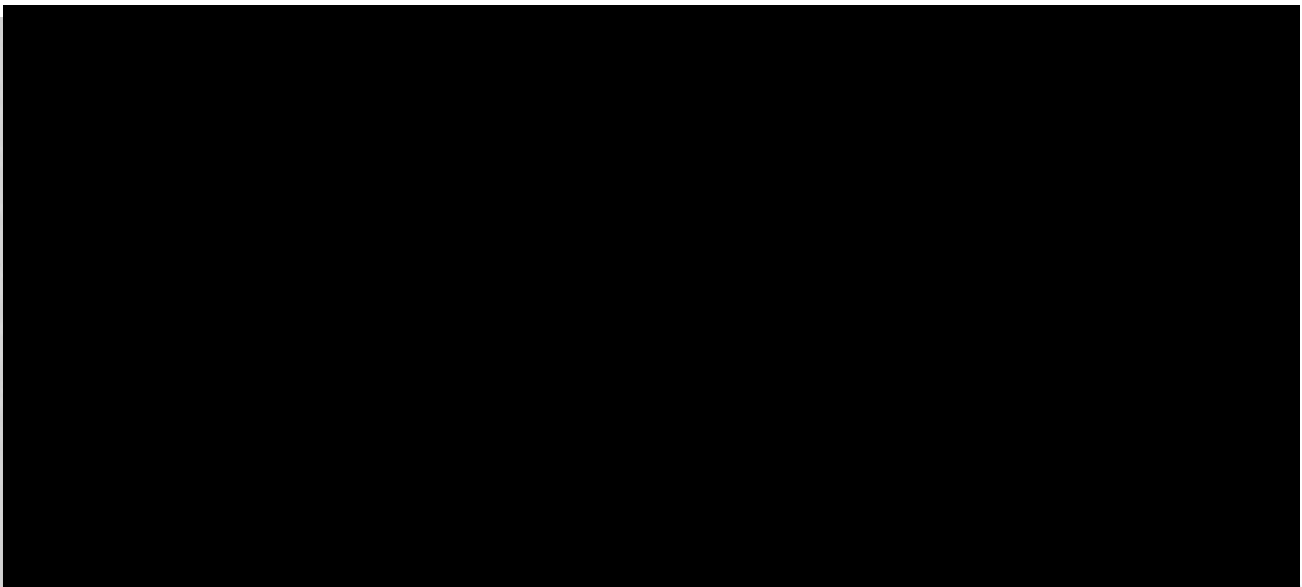
³⁴⁴ See: section 2.3.

with those states in which Tabcorp has combined the ability to leverage its retail monopoly with its ability to integrate digital content with its online wagering platforms, see Figure 4.2 below.³⁴⁵

Merged firm will have a substantially greater ability to secure online wagering customers

209. Post-transaction, the ability of the merged firm to leverage both its retail wagering monopoly and its market power in racing media rights to secure online wagering customers will be significantly increased. Further, the advantages conferred by this combination of regulatory and market power cannot be replicated by any of its rivals. In particular:
- Tabcorp will operate the retail monopoly in every state and territory, apart from Western Australia (although I explain in section 4.5 below that, most likely, it will also operate the Western Australian retail monopoly as soon as it becomes available for sale); and
 - Tabcorp will continue to maintain – indeed, for the reasons I explain in section 4.4, strengthen – its market power in the acquisition of racing media rights.
210. Put another way, Tabcorp will be able to use its market power in the acquisition of racing media rights to secure a competitive advantage across an additional four geographic, retail monopolies, with no prospect that this advantage can be replicated by its competitors in online wagering.
211. The consequence is that Tabcorp will strengthen its competitive advantage over all remaining rivals in securing online wagering customers, and most particularly in those states and territories in which it is not presently the totalisator operator. Consistent with the source of its strengthened ability to compete, Figure 4.2 shows that Tabcorp already has a much greater share of online and over-the-telephone wagering revenue in those states and territories where it is also the totalisator operator, as compared with Tatts.

Figure 4.2: Tabcorp and Tatts' share of online and over-the-telephone wagering revenue, year to 30 June 2016 [HIGHLY CONFIDENTIAL derived confidential information]



Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4; Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.001.027.2115, tab 1, TBP.015.001.1843, tab 1, TBP.015.001.4261, tab 1, TBP.015.001.4262, tab 1 and TBP.001.022.0002, tab 1; and Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, tab 4. Notes: I calculate Tatts turnover calculated from Statement of Patrick Smith, 9 March 2017, Confidential attachment TBP.001.027.2115 by filtering Channel 2 = 'Telebet' or 'Internet'. I assume Tatts' average yield in the attachments of Mr Johnston is representative of its online and over-the-telephone yield and multiply this value by the turnover. See: Statement of Damien Johnston, 6 March 2017,

³⁴⁵ Form S, p 44, para 4.134.

Confidential attachment TBP.100.001.0002, tab 4. I calculate Tabcorp's turnover separately for fixed odds and pari-mutuel wagering using the information in Statement of Patrick Smith, 9 March 2017, Confidential attachment TBP.001.022.0002, tab 1. To calculate revenue, I estimate the online and over-the-telephone yield, separately for fixed odds and pari-mutuel wagering using the data in Statement of Patrick Smith, 9 March 2017, Confidential attachment TBP.015.001.4261, tab 1, TBP.015.001.4262, tab 1, and multiply these by the turnover. I also assume that corporate bookmakers have the same market share in each state.

212. Tabcorp's competitive advantage will be strengthened over time if the transaction proceeds since, for the reasons I explain in section 4.4, the transaction will also increase Tabcorp's market power in the acquisition of media rights.
213. In my opinion, the extension of Tabcorp's retail wagering monopoly in combination with its market power in the acquisition of racing media rights will cause a lessening of competition for online wagering customers because:
- Tabcorp will not need to compete as hard to secure or provide services to online wagering customers, particularly in the states in which Tatts is currently the totalisator operator;
 - corporate bookmakers will be less likely to undertake investments to improve the attractiveness of their wagering products, because they will be facing a firm that is able to compete from a position of much greater advantage; and
 - the competitive constraint from potential entrants will be reduced, because Tabcorp will have a position of advantage that cannot be matched by any entrant.
214. In Table 4.1, Table 4.2 and Table 4.3 below I present a diagrammatic summary of the state of competition for online wagering both prior to and following the proposed transaction.

Table 4.1: Tabcorp – pre-transaction competitive advantages in online and over-the-telephone wagering [HIGHLY CONFIDENTIAL derived confidential information]

	South Australia	Tasmania	Victoria	NSW	ACT	Queensland	NT
Ability to leverage retail exclusivity							
Ability to integrate digital media							
Share of online and telephone wagering revenue							

Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-19, p 2; Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4; Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.001.027.2115, tab 1, TBP.015.001.1843, tab 1, TBP.015.001.4261, tab 1, TBP.015.001.4262, tab 1 and TBP.001.022.0002, tab 1; and Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, tab 4.

Note: See the note of Figure 4.2 for my assumptions required for the analysis of the market shares.

Table 4.2: Tatts – pre-transaction competitive advantages in online and over-the-telephone wagering [HIGHLY CONFIDENTIAL derived confidential information]

	South Australia	Tasmania	Victoria	NSW	ACT	Queensland	NT
Ability to leverage retail exclusivity							
Ability to integrate digital media ³⁴⁶							
Share of online and telephone wagering revenue							

Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-19, p 2; Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4; Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.001.027.2115, tab 1, TBP.015.001.1843, tab 1, TBP.015.001.4261, tab 1, TBP.015.001.4262, tab 1 and TBP.001.022.0002, tab 1; and Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, tab 4.

Note: See the note of Figure 4.2 for my assumptions required for the analysis of the market shares.

Table 4.3: Combined Tabcorp-Tatts – increased competitive advantages in online and over-the-telephone wagering [HIGHLY CONFIDENTIAL derived confidential information]

	South Australia	Tasmania	Victoria	NSW	ACT	Queensland	NT
Ability to leverage retail exclusivity							
Ability to integrate digital media							
Share of online and telephone wagering revenue							

Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-19, p 2; Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4; Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.001.027.2115, tab 1, TBP.015.001.1843, tab 1, TBP.015.001.4261, tab 1, TBP.015.001.4262, tab 1 and TBP.001.022.0002, tab 1; and Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, tab 4.

Note: See the note of Figure 4.2 for my assumptions required for the analysis of the market shares.

³⁴⁶ I understand that Tatts has the ability to stream SkyRacing in its wagering app, but does not have a licence that allows it to integrate the underlying digital content.

4.3.2 The parties are each other's closest competitor in online wagering

215. I explained in section 2.4 that there has been a substantial increase in online wagering over the last five years, and that this trend is expected to continue. For this reason, the nature and intensity of competition amongst providers in online wagering is perhaps the most important area of focus amongst the various differentiated products that comprise the national market for wagering.
216. In my opinion, the two parties to the proposed transaction are close competitive constraints upon one another in the provision of online wagering, with corporate bookmakers posing a lesser constraint because:
- Tabcorp and Tatts are both leaders in online wagering on racing events, which comprise the largest proportion of all online wagering;
 - Tabcorp and Tatts have similar brands that both cover a broad spectrum of wagering products;
 - [Confidential to Tatts] [REDACTED]
 - absent the proposed transaction [Confidential to Tabcorp] [REDACTED] and [Confidential to Tatts] [REDACTED] and [REDACTED]
 - finally, the analysis put forward by Mr Smith is not capable of supporting his contention that the parties' fixed odds yields do not respond to each other.

Tabcorp and Tatts are leaders in online wagering for racing

217. Online wagering in relation to racing events represents the largest proportion of all online wagering and is still also the dominant form of wagering for corporate bookmakers.³⁴⁷ In relative terms, the merger parties both have a strong presence in online wagering for racing events, whilst the corporate bookmakers are relatively strong in wagering on sports events. Table 4.4 shows that the share of online and over-the-telephone wagering turnover that is on racing events is [HIGHLY CONFIDENTIAL derived confidential information] [REDACTED] for the merger parties than for CrownBet.

Table 4.4: Racing and sports shares of online and over-the-telephone wagering turnover, year to June 2016 [Confidential to Tabcorp] [Confidential to Tatts] [HIGHLY confidential to CrownBet]

	Racing share of wagering turnover (%)	Sports share of wagering turnover (%)
Tabcorp	[REDACTED]	[REDACTED]
Tatts	[REDACTED]	[REDACTED]
CrownBet	[REDACTED]	[REDACTED]

Source: Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.015.001.1843, TBP.015.001.4261, TBP.015.001.4262 and TBP.001.027.2115, Tab 1; and Statement of Nicholas David Tyshing, 13 April, Confidential attachment NDT-10, p 2.

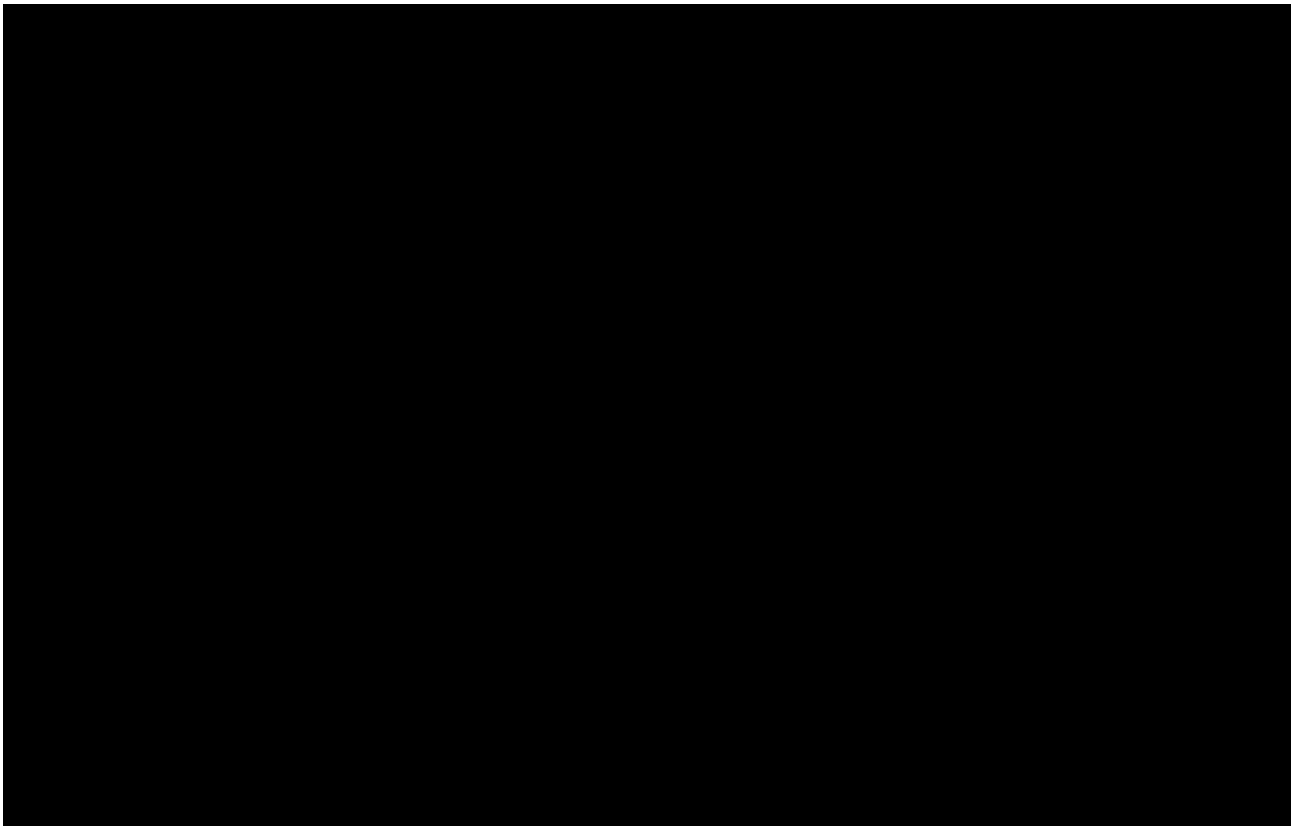
218. These relative strengths most likely reflect a combination of the strong historic association of totalisator operators with racing, their exclusive rights to retail wagering, and the more limited opportunities for corporate bookmakers to advertise in and around retail racing venues.³⁴⁸

³⁴⁷ [HIGHLY Confidential to Tabcorp] [REDACTED]; and Statement of Nicholas David Tyshing, 13 April 2017, p 17, paras 94-95.

³⁴⁸ Statement of Nicholas David Tyshing, 13 April 2017, p 19, para 106.

219. Tabcorp and Tatts are leaders in the securing of racing bets placed online. For example, in December 2015 they were rated first and second for the ease of placing racing bets on iPhones.³⁴⁹ This indicates that the parties are likely to be close competitors in online wagering on racing events, for either fixed odds or totalisator bets.
220. Figure 4.3 shows that the parties will earn approximately [HIGHLY CONFIDENTIAL derived confidential information] ██████████ of the total Australian online and over-the-telephone racing revenue from racing wagering, ie, combining both fixed odds and totalisator wagering.

Figure 4.3: Estimates of shares of national online and over-the-telephone wagering revenue for racing, year to 30 June 2016 [HIGHLY CONFIDENTIAL derived confidential information]



Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-10, p 2; Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4; Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.001.027.2115, tab 1, TBP.015.001.1843, tab 1, TBP.015.001.4261, tab 1, TBP.015.001.4262, tab 1 and TBP.001.022.0002, tab 1; and Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, tab 4.

Note: I calculate Tatts' turnover separately for pari-mutuel and fixed odds wagering from the Statement of Patrick Smith, 9 March 2017, Confidential attachment TBP.001.027.2115. I obtain my values for Tatts' pari-mutuel and fixed odds yields from the Statement of Damien Johnston, 6 March, Confidential attachment TBP.100.001.0002, tab 4, and multiply these values by the respective turnovers to obtain an estimate of revenue. I estimate Tabcorp's pari-mutuel and fixed odds wagering turnover on racing from the Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.015.001.4261 and TBP.001.022.0002. I estimate Tabcorp's average pari-mutuel and fixed odds yields from the sheets of sheets of the Statement of Patrick Smith, 9 March 2017, Confidential attachments TBP.015.001.4261 and TBP.015.001.4261, and calculate Tabcorp's revenue in a similar manner to Tatts'. I obtain the corporate bookmakers' turnover from the Statement of Nicholas Tyshing, 13 April 2017, NDT-60, p 4 and I assume that corporate bookmakers have the same share of online and over-the-telephone wagering in each state. I assume that wagering revenue for racing makes up the same proportion of revenue for all corporate bookmakers as the turnover proportion indicated for Crownbet by Mr Tyshing. See: Statement of Nicholas Tyshing, 13 April 2017, Confidential annexure NDT-10, p 2.

³⁴⁹ Statement of Douglas Freeman, 8 March 2017, TBP.003.001.0941, p 45.

Tabcorp and Tatts have similar brands

221. The parties respective brands appear to have the closest degree of similarity. For example, Tabcorp and Tatts are the only two wagering brands that have [HIGHLY Confidential to Tabcorp] [REDACTED]⁵⁰ Such a brand characterisation is consistent with Tatts' assessment of the target wagering customer segment, being [Confidential to Tatts] [REDACTED]⁵¹

[Confidential to Tatts] [REDACTED]

222. [Confidential to Tatts] [REDACTED]⁵³

Absent the merger, the parties will compete directly against one another

223. Figure 4.2 shows that Tabcorp and Tatts have a larger share of online and over-the-telephone wagering in the states in which they operate the retail and totalisator monopolies. This pattern also holds for only fixed odds wagering online and over-the-telephone.³⁵⁴ Mr Smith contends that this outcome implies that the parties only compete in the online and over-the-phone channels to a limited extent.³⁵⁵

224. Mr Smith does not seek to explain why Tabcorp and Tatts [HIGHLY Confidential to Tabcorp] [REDACTED]³⁵⁶

225. The material to which I refer in section 2.1.2 shows that both Tabcorp and Tatts regard their respective retail monopolies as highly important for their ability to compete to secure new online wagering customers and ongoing turnover. The totalisator operators are able to integrate their retail premises with their online offerings, thereby encouraging retail customers to sign up to and use their online services, through:³⁵⁷

- the payment of commission to venue partners for both the sign-up of new customers and in relation to their ongoing, out-of-venue digital activity; and
- through their strong brand presence with punters including, for Tabcorp, the advertising of its brand and online products on Sky Channel broadcasts, which are an intrinsic feature of retail venues.

226. Consistent with this strategic priority for both firms, Tabcorp states that [HIGHLY Confidential to Tabcorp] [REDACTED]⁵⁸

227. Further, Tabcorp is able to combine these advantages with its market power in the acquisition of racing media content in the states in which it holds the retail wagering monopoly. The fact that Tabcorp

³⁵⁰ [HIGHLY Confidential to Tabcorp] [REDACTED]

³⁵¹ Statement of Robert Cooke, 23 March 2015, Confidential attachment TAT.001.001.0331, p 6.

³⁵² Statement of Robert Cooke, 27 June 2013, Confidential attachment TAT.001.001.0284, p 12.

³⁵³ Statement of Robert Cooke, 27 June 2013, Confidential attachment TAT.001.001.0284, p 12.

³⁵⁴ See, for example, Figure 37 of Mr Smith, p 86.

³⁵⁵ Export Report of Patrick Smith, pp 6, 7, 89 and 92, para 10.2, 10.5, 180 and 187.

³⁵⁶ [HIGHLY Confidential to Tabcorp] [REDACTED]

³⁵⁷ See: section 2.1.2.

³⁵⁸ [HIGHLY Confidential to Tabcorp] [REDACTED]

and Tatts have higher shares of online and over-the-telephone wagering where they operate the retail monopoly supports the hypothesis that this monopoly provides both firms with a substantial competitive advantage.

228. For these reasons, I disagree with Mr Smith that the parties' differential shares implies that they compete in the online and over-the-telephone channels to a limited extent. I describe in section 4.1.2 that the competitive conduct of firms is driven by the customers that would switch between suppliers in response to a change in price, quality etc, rather than those who do not react to such changes.
229. I expect that a large proportion of customers would not switch away from the online and telephone businesses of Tabcorp or Tatts if they increased their fixed odds yields. Many punters may not even notice the change. However, these customers are not driving the competitive conduct of Tabcorp and Tatts and so are of limited relevance to the competitive effects of the merger.
230. Mr Smith states that the punters that place fixed odds bets with the party that is not their local retail licensee already display an awareness of options to place bets with out-of-state operators.³⁵⁹ These punters with a greater awareness of their wagering options are more likely to switch between the parties than those that do not have such an awareness.
231. The customers that are driving competitive conduct are those that would switch in the absence of the transaction. In my opinion, absent the transaction, a large amount of turnover may be lost from one party to the other if one of them increased their take-out rate, because:
- the parties are close competitors for the reasons set out above;
 - the customers who might switch away from Tabcorp and Tatts if they reduced their payout rates for fixed odds are likely to be the ones that have better knowledge of the options available to them, including the punters that have already switched away from their retail licensee, who may want to switch back;
 - as set out in Table 4.5, Tabcorp could lose [HIGHLY CONFIDENTIAL derived confidential information] if:
 - > it lost all of the fixed odds online and telephone turnover it has gained in states in which Tatts operates the retail monopoly; and
 - > Tatts is able to double its share of online and telephone fixed odds wagering in states in which it does not operate the totalisator; and
 - the proportion of the parties' online and telephone wagering that is held by the firm not operating the totalisator varies from [Confidential to Tabcorp],³⁶⁰ and so there is plenty of scope for the firm not operating the totalisator to increase its share of online and telephone wagering in most cases.

³⁵⁹ Expert Report of Patrick Smith, p 90, para 181.

³⁶⁰ I have excluded WA from this assessment because neither of the parties operate the totalisator in WA. [Confidential to Tatts] – see: Figure 4.2.

Table 4.5: Fixed odds racing wagering turnover online and over-the-telephone in states in which Tabcorp/Tatts do not operate the retail monopoly [HIGHLY confidential to Tabcorp] [HIGHLY confidential to Tatts] [HIGHLY CONFIDENTIAL derived confidential information]

	ACT	NSW	NT	QLD	SA	TAS	VIC	Total
Tatts racing turnover in state in which Tabcorp operates the retail monopoly								
Tabcorp racing turnover in state in which Tatts operates the retail monopoly								
Total								

Source: HoustonKemp analysis of TBP.001.022.0002 and TBP.001.027.2115. Tatts turnover calculated by filtering on Event='Racing', Product='Fixed Price', and Channel 2 = 'TeleBet' or 'Internet'. Tabcorp turnover is the sum of 'ACTTAB', 'NSWTAB', and 'VicTAB' turnover. Tatts turnover is the sum of 'NTTAN', 'SATAB', 'TABQ' and 'TASTAB'. Note: ACTTAB data is only available from 25 August 2015.

Contrary to the conclusion of Mr Smith, I explained in section 2.6 that Tabcorp and Tatts have both said that they will [HIGHLY CONFIDENTIAL derived confidential information]

. Consistent with this,

[Confidential to Tatts]

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Mr Smith's analysis is not sufficient to conclude that the parties' fixed odds yields do not respond to each other

232. Mr Smith claims that the parties' average fixed odds yields are different, and do not appear to respond to one another.³⁶³ The fact that their fixed odds yields are different has no bearing on whether they are substitutes for one another, and as Mr Smith notes, [HIGHLY Confidential to Tatts]

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233. In my opinion, Mr Smith did not present sufficient information to conclude that the yields do not respond to each other. Tabcorp's average yield increased in relation to Tatts over 2012 to 2016, but this could be due to the composition of bets or other factors set out by Mr Smith.³⁶⁵

234. Firms compete on aspects other than price, such as quality. Tabcorp may have reduced its payout rate in relation to Tatts, whilst also increasing the quality or marketing of its product. As a result, the overall attractiveness of Tabcorp and Tatts' services may have remained the same from 2012 to 2016, and if so, demand for their services would not change, thereby leading to the result that Mr Smith finds, ie, that Tatts did not change its yield.

³⁶¹ Statement of Robert Cooke, 27 June 2013, Confidential attachment TAT.001.001.0284, p 18.

³⁶² Statement of Robert Cooke, 27 June 2013, Confidential attachment TAT.001.001.0284, p 18.

³⁶³ Statement of Patrick Smith, 9 March 2017, p 8, para 10.6.

³⁶⁴ Statement of Patrick Smith, 9 March 2017, p 65, para 133.

³⁶⁵ Statement of Patrick Smith, 9 March 2017, pp 42-45, paras 93-99.

235. Mr Smith does not take into account the quality of services in his analysis, nor does he consider the effect of other factors that may affect demand such as income, price of other forms of gambling, advertising, special offers or other such factors.

236. Therefore, in my opinion, Mr Smith's analysis of responses to changes in fixed odds payout rates is not sufficiently robust to be relied upon.

4.3.3 Post-merger, only one firm will set totalisator take-out rates

237. I note in section 2.1 that a totalisator wager has different characteristics from a fixed odds wager, and so these products are differentiated forms of wagering service. It follows that the closest competitive constraint in the provision of an online totalisator wagering service is another firm providing the same service, with the constraint arising from fixed odds wagers likely to be more distant.

238. The RWWA, Tabcorp and Tatts are the only providers of online (and retail) totalisator wagering services. The WA TAB operated by the RWWA is part of the SuperTAB,³⁶⁶ and so the take-out rates for the WA TAB must comply with those that Tabcorp sets through the SuperTAB pool,³⁶⁷ and therefore without the merger there are two firms, Tabcorp and Tatts, setting take-out rates. After the merger, there will be just one firm setting take-out rates for online and retail totalisator wagering. Competition on price (ie, take-out rate) between online and over-the-phone totalisators will be eliminated.

239. Mr Smith argues that the parties' online totalisator offerings are significantly differentiated because the totalisator pools operated by them are of different sizes.³⁶⁸ They are both sufficiently large to attract premium punters.³⁶⁹ In my opinion, Mr Smith identifies a very minor difference between the parties, as compared with the difference between totalisator and fixed odds wagers, which have very different characteristics.

240. Tabcorp and Tatts are the only operators of totalisator pools in Australia. It follows that the parties are likely to be each other's closest competitive constraint in the provision of online and over-the-telephone totalisator wagering services. Evidence consistent with this conclusion, and further that online competition from Tabcorp is likely to be a close constraint on Tatts' determination of the take-out rate for its totalisator pool, includes that:

- Tabcorp and Tatts are close competitors in the supply of wagering services to premium punters;
- Tatts' take-out rates appear to be constrained by those of Tabcorp;
- neither Tabcorp nor Tatts has changed its totalisator take-out rates in response to competition from corporate bookmakers;
- totalisator derivative products are not a strong competitive constraint on totalisator wagering;
- Tabcorp is expected [Confidential to Tabcorp] [REDACTED] if the merger does not proceed;
- the parties have the ability and incentive to win significant online totalisator wagering revenue from each other; and
- Mr Smith's analysis is not capable of supporting his conclusion that the parties' totalisator operations do not compete with one another.

³⁶⁶ I understand that almost all of Western Australia's pari-mutuel turnover is combined with SuperTAB, see: <http://www.waroa.com.au/new-pooling-agreement-with-tabcorp-super-tab>, accessed 19 April 2017.

³⁶⁷ See: section 2.1.2, where I note that pooling participants are required to comply with the betting rules and take-out rates that apply to the hosting totalisator.

³⁶⁸ Statement of Patrick Smith, 9 March 2017, p 8, para 10.6.

³⁶⁹ Statement of Andrew Twaits, 19 April 2017, pp 8-9, para 32.

Tabcorp and Tatts are each other's closest competitors in the supply of wagering services to premium punters

241. Premium punters are able to secure discounts from Tabcorp or Tatts and, in some cases, from Betfair and potentially the WA TAB,³⁷⁰ in return for placing a high annual volume of bets. Premium punters [HIGHLY confidential to CrownBet] on racing products.³⁷¹
242. Dr Pleatsikas notes that there is competition for large punters from corporate bookmakers and other betting opportunities within Australia.³⁷² On the contrary, corporate bookmakers are not a competitive constraint for the reasons I set out in section 3.2.1 and Betfair is a much weaker constraint on the merged parties than either Tabcorp or Tatts.³⁷³
243. Betfair does not service premium punters in the same way or to the same extent as Tabcorp and Tatts, and is not a perfect substitute for their totaliser products.³⁷⁴ Betting exchanges rely on their ability to match opposing bets in the relevant market. A lack of liquidity in betting exchange markets, along with the absence of exotics wagering on the betting exchange, with the latter being a popular form of wagering amongst the premium customer segment, limits Betfair's competitiveness to Tabcorp and Tatts for premium customers.³⁷⁵
244. Nonetheless, Betfair considers itself to be a competitive constraint in the market for wagering services for premium punters.³⁷⁶
245. Dr Pleatsikas concludes that there is competition for premium punters from overseas wagering providers.³⁷⁷ However, the extent of the constraint on the supply of wagering services to premium punters in Australia depends on whether those punters are willing to move their wagering overseas if there is an increase in the take-out rate in Australia.
246. I expect that wagering overseas is not a close substitute for those punters who prefer betting on Australian races. Therefore, I expect that the domestic suppliers are a stronger competitive constraint upon one another than the overseas wagering operators.
247. In my opinion, the parties are each other's closest competitor and there is only one other weaker competitor in Australia, in which case the proposed merger will lessen competition in the supply of wagering services to premium punters.

Tatts' take-out rates are constrained by those of Tabcorp

248. Figure 4.4 shows that in the year ended 30 June 2016, Tabcorp and Tatts [HIGHLY CONFIDENTIAL derived confidential information]

³⁷⁰ Statement of Nicholas David Tyshing, 13 April 2017, p 17, paras 89-91.

³⁷¹ Statement of Andrew Twaits, 19 April 2017, p 33, para 127.

³⁷² Expert report of Christopher Pleatsikas, 8 March 2017, pp 68-69, para 160.

³⁷³ Statement of Nicholas David Tyshing, 13 April 2017, p 17, paras 90-91.

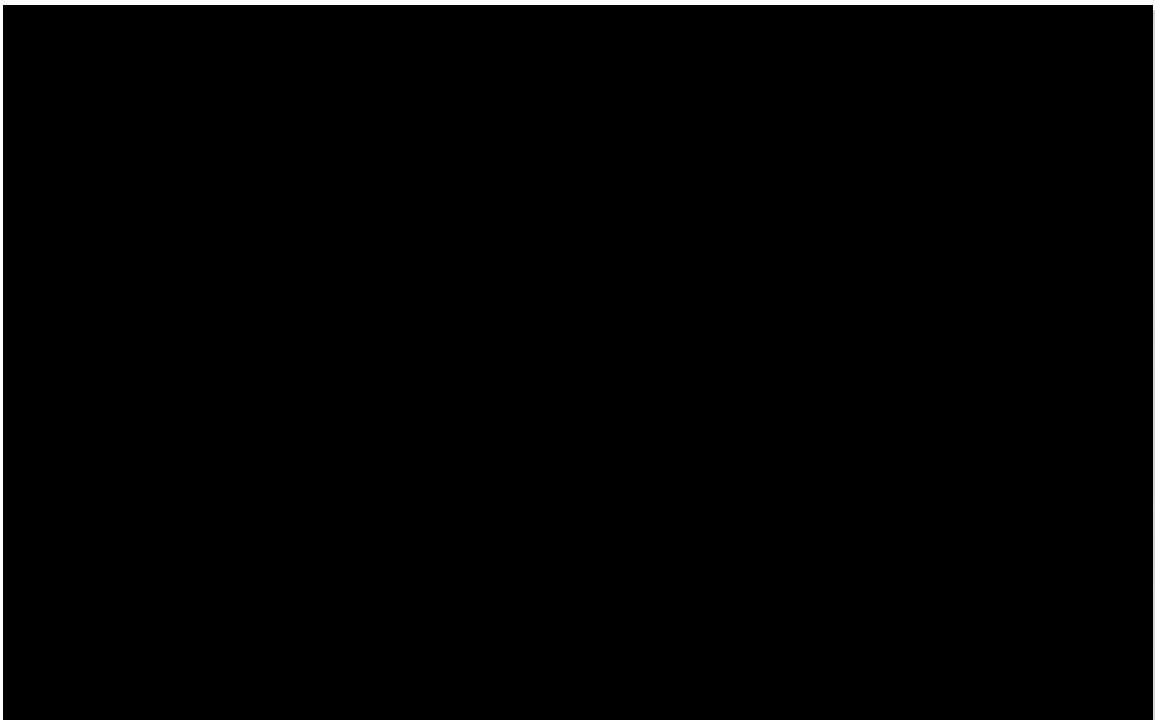
³⁷⁴ Statement of Andrew Twaits, 19 April 2017, 19 April 2017, p 9, para 33.

³⁷⁵ Statement of Nicholas David Tyshing, 13 April 2017, p 17, para 91.

³⁷⁶ Statement of Timothy Moore-Barton, p 11, para 44.

³⁷⁷ Expert report of Christopher Pleatsikas, 8 March 2017, p 48, para 107 and pp 68-69, para 160.

Figure 4.4: Maximum allowed and actual average take-out rates for totalisator products, year to 30 June 2016 [HIGHLY CONFIDENTIAL derived confidential information]



Source: Form S, Annexure A, p 38, Table 3; Form S, Annexure B, pp 3-4; and Form S, Annexure C, pp 2-3.

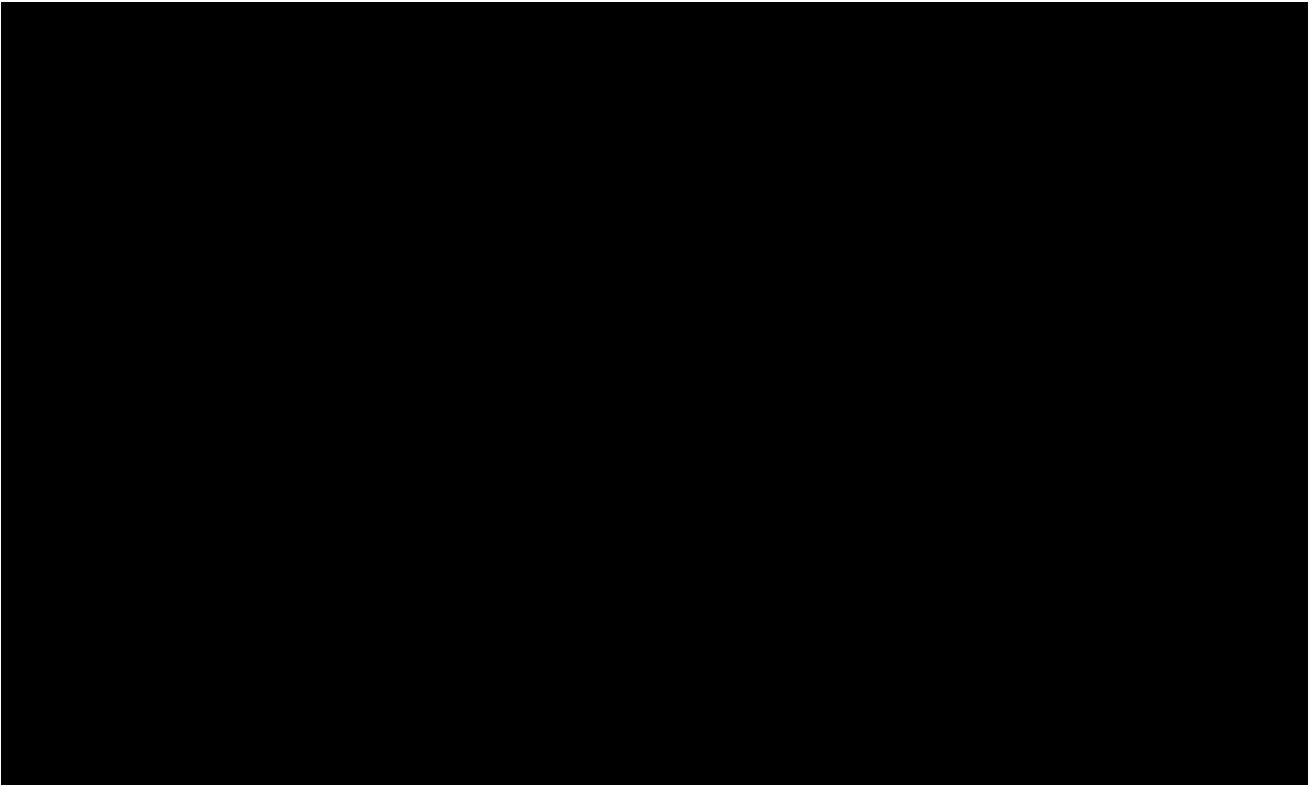
249. [Confidential to Tabcorp] [REDACTED]

[REDACTED]

[REDACTED] 378

³⁷⁸ Form S, Annexure B, pp 3-4 and Annexure C, pp 2-3.

Figure 4.5: Annual Tabcorp and Tatts take-out rates for totalisator products [HIGHLY CONFIDENTIAL derived confidential information]



Source: Form S, Annexure B, pp 3-4; and Form S, Annexure C, pp 2-3.

250. [Confidential to Tabcorp]

[Redacted text block]

Tabcorp and Tatts have not changed their totalisator take-out rates in the face of competition from corporate bookmakers

252. Figure 4.5 shows that Tabcorp and Tatts have [HIGHLY CONFIDENTIAL derived confidential information]

[Redacted text block]

³⁷⁹ The other possibility is that its profit maximising level of take-out happens to be equal to the maximum level as set by the legislation.

³⁸⁰ Form S, Annexure B, pp 61-62.

253. A firm that is maximising its profits (and whose prices are not constrained by legislation) can be expected to alter its prices in response to changes in demand. All other things equal, a reduction in demand will cause a firm to lower its prices. The fact that Tabcorp has not reduced its take-out rate for totalisator wagers suggests that either:

- competition from corporate bookmakers is reducing its profit maximising price or take-out rate, but it remains at a level that exceeds Tabcorp's legislative maximum rate; or
- corporate bookmakers are not having a substantial effect on the demand for totalisator wagering, implying that corporate bookmaking services are not close competitors with Tabcorp's totalisator operations.

254. Under either of these implications, corporate bookmakers are not constraining the totalisator take-out rate of Tabcorp. The same principle applies to Tatts, which appears to set its totalisator take-out rate by reference to that of Tabcorp.

Totalisator derivative products will not be a strong competitive constraint on the online totalisator wagering service of the merged firm

255. I explain in section 2.1.3 that corporate bookmakers offer price matching or 'totalisator derivative' products. However, the supply of these products will not constrain the parties from increasing their take-out rates or reducing their quality of totalisator products relative to without the merger, because the corporate bookmakers' products set prices *relative* to the totalisators, ie, by offering a wagering product that provides the best odds offered by the totalisators. It follows from the absence of independence from the totalisator take-out rates that the corporate bookmakers' yield on totalisator derivative products would increase if the merged firm raised its totalisator take-out rate.³⁸¹

256. Corporate bookmakers impose payout limits on totalisator derivative products, which restrict the amount a punter can win, in order to limit the risk borne by the bookmaker.³⁸² Payout limits preclude punters from winning significant jackpots, and can materially reduce the attractiveness of the bet, despite the headline odds often exceeding those offered by totalisators.³⁸³ Corporate bookmakers must impose payout limits to reduce risk, and consequently exclude some punters from accessing totalisator derivative pricing.³⁸⁴

257. On this basis, the supply of totalisator derivative products is unlikely to be a competitive constraint on the online totalisator wagering services of the merged firm.

[Confidential to Tabcorp] [REDACTED]

258. [Confidential to Tabcorp] [REDACTED]

260. Tabcorp expects its totalisator revenue to [Confidential to Tabcorp] [REDACTED]³⁸⁵ in which case it must expect at least some punters to respond to reductions in its take-out rates.

³⁸¹ In his assessment of why Tabcorp has not reduced its take-out rates for totalisator products, Mr Freeman states that: 'By their nature, totalisator derivative products automatically track the total final dividends of pari-mutuel products.' Statement of Douglas John Freeman, 8 March 2017, p 112, para 287.

³⁸² Statement of Andrew Twaits, 19 April 2017, p 6, para 24.

³⁸³ Statement of David Tyshing, 13 April 2017, p 8, para 35.

³⁸⁴ Statement of Andrew Twaits, 19 April 2017, p 7, para 26.

³⁸⁵ Statement of Douglas Freeman, 8 March 2017, pp 112-113, para 289.

[Confidential to Tabcorp]

261. I explained in section 4.2 that Tatts has a much larger share of the parties' combined online and over-the-telephone wagering turnover in states in which it operates the totalisator, and vice versa. Mr Smith argues that this implies that the parties only compete in the online and telephone channels to a limited extent.³⁸⁶ Again, I disagree with this conclusion, for the same reasons I explain in relation to fixed odds wagering above.

262. There is a large volume of online and over-the-telephone totalisator wagering turnover that Tatts could lose to Tabcorp if Tatts was to raise its take-out rates. For example, Table 4.6 shows that Tatts could lose an annual racing wagering totalisator turnover of [Confidential to Tatts] to Tabcorp if it increased its take-out rates relative to Tabcorp, on the assumptions that:

- Tatts could lose all of the turnover it has gained in states in which it does not offer the totalisator; and
- Tabcorp is able to double its share of totalisator online and telephone wagering in states in which it does not offer the totalisator.

Table 4.6: Totalisator racing wagering turnover online and by telephone in states in which Tabcorp/Tatts do not operate the retail monopoly [HIGHLY Confidential to Tabcorp] [HIGHLY Confidential to Tatts] [HIGHLY CONFIDENTIAL derived confidential information]

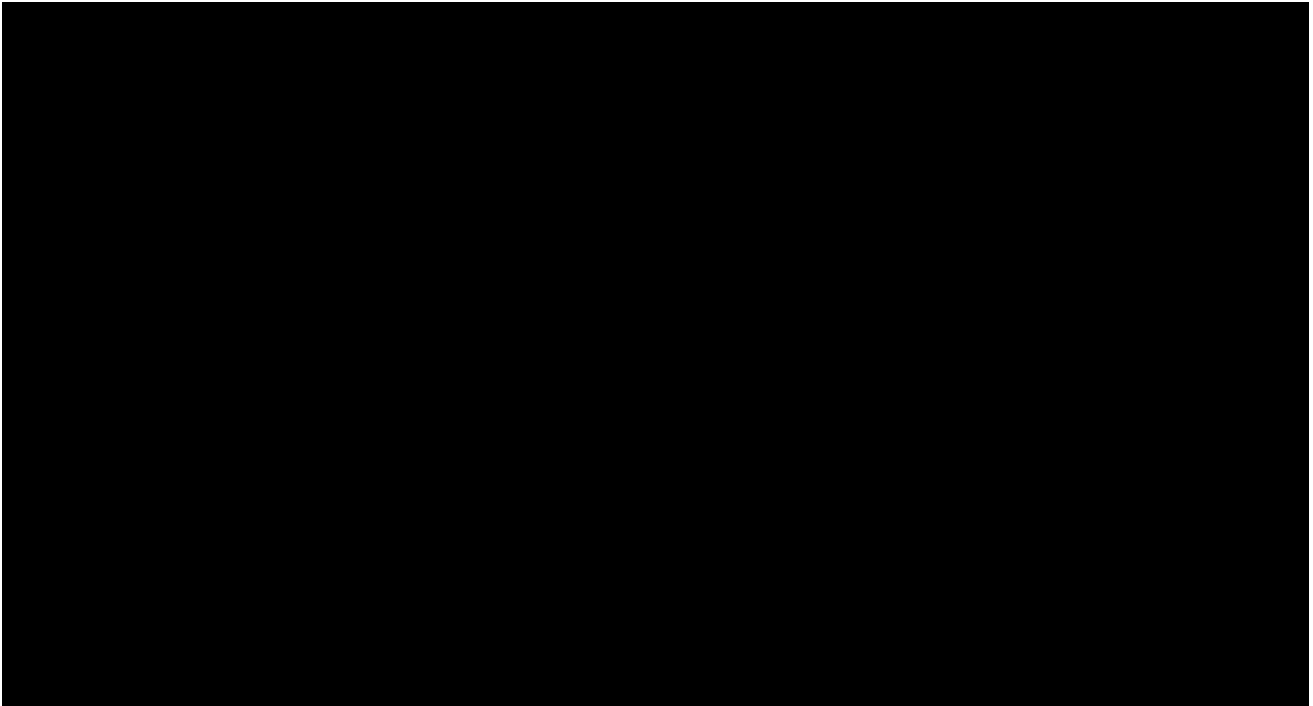
	ACT	NSW	NT	QLD	SA	TAS	VIC	Total
Tatts racing turnover in state in which Tabcorp operates the retail monopoly								
Tabcorp racing turnover in state in which Tatts operates the retail monopoly								
Total								

Source: HoustonKemp analysis of TBP.001.022.0002 and TBP.001.027.2115. Tatts turnover calculated by filtering on Event='Racing', Product='Pari-mutuel', and Channel 2 = 'TeleBet' or 'Internet'. Tabcorp turnover is the sum of 'ACTTAB', 'NSWTAB', and 'VicTAB' turnover. Tatts turnover is the sum of 'NTTAN', 'SATAB', 'TABQ' and 'TASTAB'. Note: ACTTAB data is only available from 25 August 2015.

263. Figure 4.6 shows that Tabcorp has been able to win a much larger share of online and telephone totalisator racing wagering turnover than Tatts in states in which it does not operate the totalisator. There is also some variation in their shares between the states. Both these facts indicate that it is possible for the parties (and in particular Tatts) to secure a greater share of online and over-the-telephone totalisator turnover without the merger.

³⁸⁶ Statement of Patrick Smith, 9 March 2017, p 6, para 10.2, p 7, para 10.5, and p 8, para 10.7.

Figure 4.6: Proportion of the parties considered online and over-the-telephone totalisator racing wagering, year to 30 June 2016 [HIGHLY CONFIDENTIAL derived confidential information]



Source: HoustonKemp analysis of TBP.001.022.0002 and TBP.001.027.2115. Tatts turnover calculated by filtering on Event='Racing', Product='Pari-mutuel', and Channel 2 = 'TeleBet' or 'Internet'. Tabcorp turnover is the sum of 'ACTTAB', 'NSWTAB', and 'VicTAB' turnover. Tatts turnover is the sum of 'NTTAN', 'SATAB', 'TABQ' and 'TASTAB'. Note: ACTTAB data is only available from 25 August 2015.

264. The closeness of competition between the parties means that a substantial proportion of customers that would switch away from Tatts if it increased its take-out rates are likely to wager with Tabcorp instead. Therefore, it will be more profitable for Tabcorp to raise the take-out rates in Tatts states as compared to the profitability for Tatts to undertake the same strategy without the merger.

Mr Smith's analysis is not capable of concluding that the parties' totalisator products do not compete

265. Mr Smith presents a series of analyses of how the level of the take-out rate affects totalisator wagering turnover for Tabcorp. He finds that turnover was not significantly higher in periods in which Tabcorp offered [Confidential to Tabcorp]

[Redacted text block]

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266. In my opinion, the analysis presented by Mr Smith is not capable of supporting the conclusion he seeks to draw because:

- punters have no easy way to understand what the take-out rate is, or how changes affect their likely payout, and there is no indication that they were informed that Tabcorp had reduced its take-out rate on the relevant occasions.³⁸⁹ Totalisator operators are not obliged to publish or to make available to

³⁸⁷ Statement of Patrick Smith, 9 March 2017, p 48, para 103

³⁸⁸ Statement of Patrick Smith, 9 March 2017, p 57, para 120

³⁸⁹ See: section 2.1.2 where I outline that take-out rates are often not readily available.

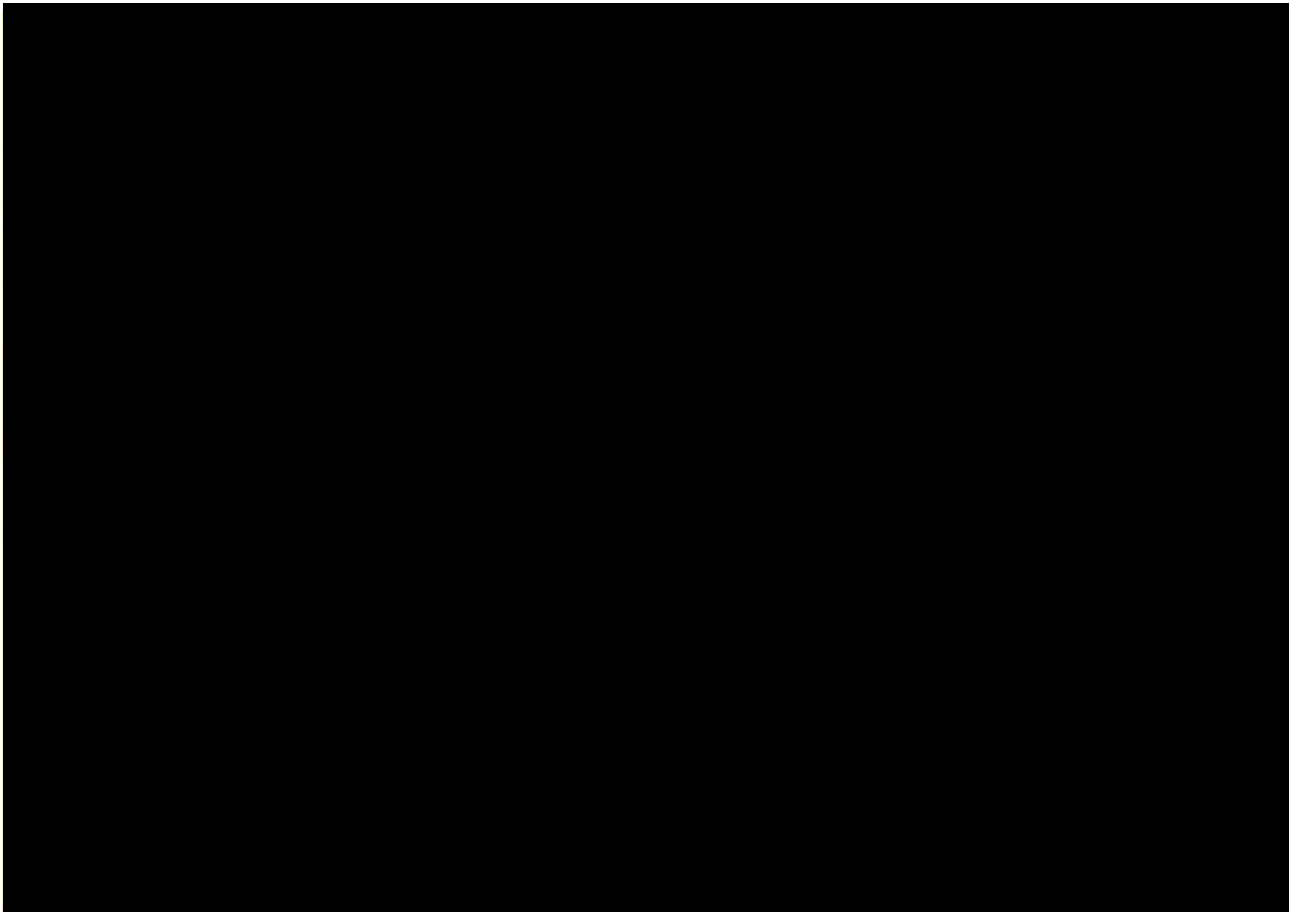
customers what take-out rate is applied, and I understand that totalisator operators do not, as a matter of practice, publish or make available the actual take-out rate,³⁹⁰

- there are insufficient changes in the take-out rate for the analysis undertaken by Mr Smith to be successful. The take-out rate for the win only changed for two very brief periods, and the rate for quinella, exacta and daily double only changed once over the last ten years (see Figure 4.7);
- there are trends in the popularity of various wagers over time that may mask any changes in turnover that may have been in response to changed take-out rates, eg, the proportion of totalisator bets made up of quinellas has been increasing over time, as shown in Figure 4.7, below;
- a number of variables that are likely to affect totalisator turnover were not taken into account in Mr Smith's analysis, such as income, the price of other forms of gambling and wagering, etc;³⁹¹ and
- the methods used for adjusting for seasonality are not consistent with the reason that one might expect seasonality to be present. For example, I would expect variation in the level of totalisator wagering across the year to be explained by the timing of group or listed races, whereas Mr Smith has assumed that the data has a weekly or monthly variation.

³⁹⁰ Statement of Nicholas David Tyshing, 13 April 2017, p 17, para 92.

³⁹¹ For example, Mr Freeman indicates that according to Tabcorp estimates, some corporate bookmakers likely have a substantially [Confidential to Tabcorp] total marketing spend than Tabcorp, which can influence consumer preferences and values. See: Statement of Douglas Freeman, 8 March 2017, p 129, Figure 56.

Figure 4.7: Proportion of Tabcorp's totalisator turnover that was for quinella wagers (NSW) [HIGHLY Confidential to Tabcorp]



Source: HoustonKemp analysis of TBP.015.001.4244 to TBP.015.001.4262. Proportion of turnover from Quinella is calculated by dividing the total turnover from Quinella for a given week by the total turnover from Daily Double, Exacta, Quinella and Win bets for a given week.

4.3.4 Merger will increase concentration in wagering

267. Table 4.7 shows that, following the proposed transaction, the combined Tabcorp and Tatts would have an estimated [HIGHLY confidential to CrownBet]

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³⁹² I set out the market shares by wagering operator revenue, rather than by wagering turnover as expressed in the Form S, Annexure B pp 61-63. In section 2.5 I explain why revenue is a preferred measure of wagering output, as compared with wagering turnover.

³⁹³ The HHI is calculated by adding the sum of the squares of the market shares. The ACCC will generally be less likely to identify horizontal competition concerns when the post-merger HHI is less than 2000, or greater than 2000 with a delta less than 100. ACCC *Merger Guidelines*, November 2008, p 37.

Table 4.7: Share of national wagering market in 2016, by revenue [HIGHLY confidential to CrownBet]

[illegible]

Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4.

Note: I calculate the HHI for both pre-transaction and post-transaction shares by summing the squares of the revenue share percentages.

268. [HIGHLY confidential to Tabcorp]

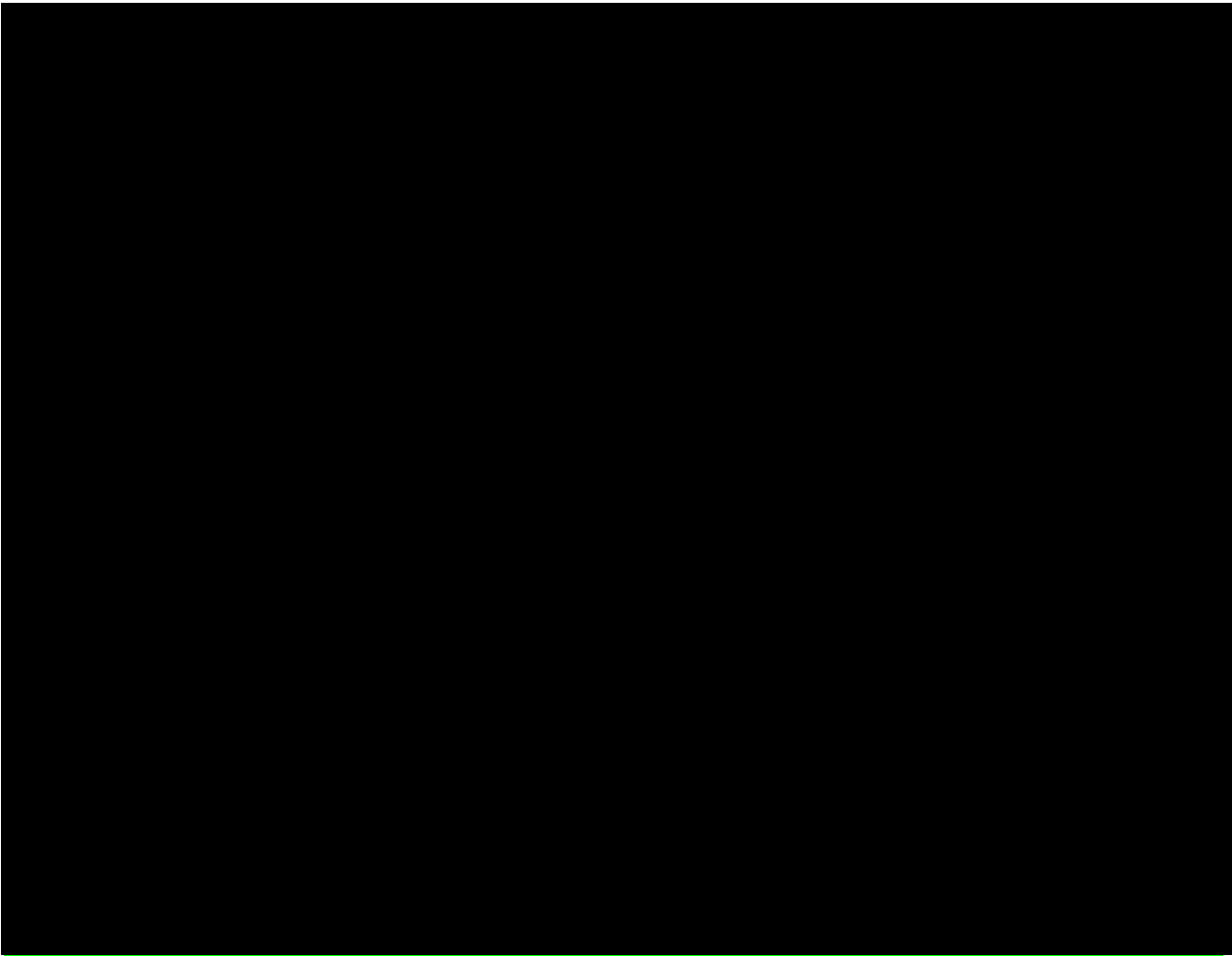
395

269. Figure 4.8 presents this same information on market share by revenue, both with and without the proposed transaction.

394 [HIGHLY Confidential to Tabcorp]

395 [HIGHLY Confidential to Tabcorp]

Figure 4.8: Share of national wagering market in 2016, by revenue [HIGHLY confidential to CrownBet]



Source: Statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4.

270. Table 4.8 below shows that the increase in concentration consequent upon the merger will also be substantial in online and over-the-telephone wagering only.

Table 4.8: Share of Australian revenue for online and telephone wagering, year ended 30 June 2016 [HIGHLY CONFIDENTIAL derived confidential information]

	National online and over-the-telephone revenue share (%)
Tabcorp	
Tatts	
Corporate bookmakers	

Source: HoustonKemp analysis of data from statement of Nicholas David Tyshing, 13 April 2017, Confidential annexure NDT-60, p 4; Statement of Patrick Smith, 9 March 2017, Confidential attachment TBP.001.027.2115, tab 1; and Statement of Patrick Smith, 9 March 2017, Confidential attachment TBP.015.001.1843, tab 1. Statement of Patrick Smith, 13 March 2017, Confidential attachment TBP.015.001.4261, tab 1; Statement of Patrick Smith, 13 March 2017, Confidential attachment TBP.015.001.4262, tab 1; and Statement of Patrick Smith, 13 March 2017, Confidential attachment TBP.015.001.1843, tab 1.
Note: See the note of Figure 4.2 for assumptions required for the market share analysis

4.3.5 Barriers to entry for online wagering are substantial

271. Given the significant trends in place, there have been relatively few recent entrants to the wagering market. Over the last seven years, there have been just two significant entrants in the wagering market, being Bet365 and Betfred, with only Bet365 lasting for more than a year.³⁹⁶ I would expect the rate of entry to slow as the online part of the wagering market matures.
272. In addition to the relevant licensing requirements, a new corporate bookmaker requires a number of critical inputs to commence offering wagering services in Australia, including:³⁹⁷
- racing/sports media content – the acquisition of rights to supply media content providing vision and/or audio coverage of (and related entertainment regarding) the event upon which wagering is being conducted, and in particular racing and sports media content;
 - advertising and branding – the acquisition of advertising, branding and signage opportunities from rights holders, including media groups;
 - race field/product information – the acquisition of race field information from state/territory racing bodies, in order to obtain relevant information on the racing product;
 - sport product information – the acquisition of sports information from sporting bodies, in order to obtain relevant information on sport product (such as team names, players, draw, time etc); and
 - customers/customer data – customer data, and associated databases and systems are required to operate an account-based wagering operation.
273. The acquisition of media content, advertising and branding, and customer data are the key barriers to entry. Racing is a larger share of wagering than sports, and the acquisition of racing media is very difficult and is likely to be more so after the proposed merger, as I set out in section 4.4. This makes it less likely that a corporate bookmaker can profitably enter the wagering market.
274. There is a large sunk cost required to develop a brand and attract customers. In large part this arises from the structural disadvantages faced by corporate bookmakers that do not have either a retail presence or access to racing media rights.
275. Those firms already in the market have in the past invested significant sums in establishing their brands. Table 4.9 shows Tabcorp's estimates of three corporate bookmakers' total spend on marketing, which indicate that William Hill and Sportsbet spent [Confidential to Tabcorp] on marketing, relative to their wagering revenue than does Tabcorp.

Table 4.9: Tabcorp's estimates of total marketing spend, year ended 30 June 2015 [Confidential to Tabcorp]

Source: Statement of Douglas Freeman, 8 March 2017, p 129, Figure 56.

³⁹⁶ Form S, p 46, para 4.151.

³⁹⁷ Statement of Nicholas David Tyshing, 13 April 2017, pp 28-29, para 148.

276. It is also quite possible that there will be less advertising of wagering on sporting events in future as a result of pending potential regulatory changes.³⁹⁸ Such changes would make it much more difficult for entrants to increase sports wagering turnover, which may deter potential entrants to the wagering market.

277. The acquisition of customers involves a large sunk cost, for example, [Confidential to Tatts] [REDACTED]³⁹⁹

278. Finally, I note that it is not possible for there to be a new totalisator operator in either the online or retail channels. There are three totalisator pools in Australia, with two of them being operated by Tabcorp, and one by Tatts.

4.4 Competition to acquire media rights will be lessened

279. The proposed merger will increase Tabcorp's market power in the acquisition of racing media rights because:

- the merged firm will be better able to exploit those rights to increase its revenue;
- the merged firm will have greater bargaining power in its negotiations with PRBs; and
- Tatts will no longer be a potential bidder for the rights.

280. It is more likely that Tabcorp will acquire digital racing media rights on an exclusive basis if the proposed merger takes place. Corporate bookmakers need these rights to be able to compete effectively against Tabcorp and Tatts in the future,⁴⁰⁰ and owning those rights significantly increases wagering for corporate bookmakers as I set out in section 2.3.

281. It follows that corporate bookmakers will be at a substantial disadvantage relative to whomever owns the rights in the wagering market if they cannot access those rights. As such, it will be more difficult for corporate bookmakers to compete against Tabcorp in the wagering market, lessening competition and reducing growth in that market.

4.4.1 Tabcorp currently has market power in the acquisition of racing media rights

282. I describe in section 2.3.2 that Tabcorp holds the rights to broadcast racing vision across all distribution channels and racing codes in Australia and has done so for some time.⁴⁰¹ This alone indicates that Tabcorp is likely to have market power in the acquisition of those rights. The source of this market power is that:

- Tabcorp has the greatest willingness to pay for digital racing media rights because it has the largest share of online wagering in Australia,⁴⁰² in part because of the advantages of operating many of the retail venues;
- Tabcorp is almost the only owner of racing broadcasting rights, and it can leverage its market power in the acquisition of those rights to digital racing media rights;
- the PRBs can increase their revenue by providing Tabcorp with exclusive rights in those states in which Tabcorp operates the totalisator;
- the PRBs need their races to be shown on Sky Channel, which strengthens Tabcorp's already strong negotiating position;

³⁹⁸ Statement of Nicholas David Tyshing, 13 April 2017, p 53, para 257.

³⁹⁹ Statement of Robert Cooke, 23 March 2015, Confidential attachment TAT.001.001.0331, p 6.

⁴⁰⁰ Statement of Nicholas David Tyshing, 13 April 2017, p 35, para 178 and p 88, para 419.

⁴⁰¹ I understand that, until around 2005, largely exclusive broadcasting rights had been held by Sky Channel. Statement of Nicholas David Tyshing, 13 April 2017, p 47, para 232

⁴⁰² Statement of Nicholas David Tyshing, 13 April 2015, Confidential attachment NDT-60, p 4.

- Tabcorp has a number of advantages over corporate bookmakers in future rights negotiations, such as an ability to exercise rights of first and/or last refusal when the rights holder seeks to supply the rights to another party;
- Tabcorp is able to undertake certain strategies to reduce the revenue of the PRBs in the states in which it is also the totalisator operator, also strengthening its negotiating position in those states; and
- there are substantial barriers to entry in setting up a broadcasting business that can acquire and utilise racing media rights.

Tabcorp has the greatest ability to pay for digital rights

283. Tabcorp has the greatest ability to pay for digital rights because:

- it holds the totalisator licences in the two most populous states in Australia;
- it can claw back some of the payments for the rights through its agreements with PRBs;⁴⁰³ and
- its operation of retail venues and the totalisator provide Tabcorp with an advantage in states in which it operates the totalisator, ie, it can attract:
 - > a large totalisator and fixed odds online wagering turnover;⁴⁰⁴ and
 - > higher value customers, ie, those that wager across multiple channels.⁴⁰⁵

284. Tabcorp therefore has the greatest online revenue in racing wagering,⁴⁰⁶ and this is under threat from the corporate bookmakers without the merger.⁴⁰⁷

285. Tabcorp will not necessarily pay a large amount of money for racing media rights if it has the greatest ability to pay. Other competitors may not be inclined to bid if they consider that they are unlikely to win, allowing Tabcorp to purchase rights at a low price. Further, other potential bidders are not likely to put competitive pressure on Tabcorp to offer a high price for the media rights for the reasons summarised above and set out in this section.

Tabcorp is almost the only owner of racing broadcasting rights

286. Tabcorp has been almost the only holder of subscription television and retail racing media rights for many years, and it is currently the only owner of these rights, with the very limited exception of Racing.com having the subscription television rights to thoroughbred racing in Victoria.⁴⁰⁸

287. The principal disruption to Tabcorp's ownership of these rights came in around 2005 when ThoroughVision Pty Limited (TVN), owned by the Victorian racing industry and Sydney race clubs, obtained exclusive broadcasting rights for Victorian and Sydney thoroughbred racing, and became an alternative channel to Sky Channel.⁴⁰⁹

288. In around late 2014, the New South Wales racing industry withdrew its support for TVN and entered into a new long term arrangement with Sky Channel, leaving TVN with only broadcast rights to Victorian thoroughbred racing. TVN was subsequently wound up in 2015.⁴¹⁰

⁴⁰³ Statement of Andrew Paul Catterall, 17 April 2017, p 14, para 38(b)(ii).

⁴⁰⁴ See: Figure 4.2.

⁴⁰⁵ Tabcorp, Tabcorp marketing: a new approach for better outcomes, [TBP.003.001.0941], p 41.

⁴⁰⁶ See analysis referenced in the source of Figure 4.3.

⁴⁰⁷ I note the increasing turnover for corporate bookmakers in Form S, Annexure B, pp 61-62.

⁴⁰⁸ Mr Tyshing states that 'I understand that, until around 2005, largely exclusive broadcasting rights had been held by Sky Channel through a number of content licensing arrangements'. See Statement of Nicholas David Tyshing, 13 April 2017, p 47, para 232. For current rights holders, see: section 2.3.

⁴⁰⁹ Statement of Nicholas David Tyshing, 13 April 2017, pp 47-48, para 233.

⁴¹⁰ Statement of Nicholas David Tyshing, 13 April 2017, p 48, para 234.

289. Racing.com is a joint venture between Seven West Media and Racing Victoria.⁴¹¹ It has non-exclusive rights to Victorian thoroughbred racing on free-to-air and subscription television,⁴¹² but it can only show a small fraction of the total races, eg, there are only 4,200 Victorian thoroughbred races each year, compared to the 105,000 races that Sky Channel broadcasts each year.⁴¹³
290. Despite the best efforts of a number of entities, including the PRBs themselves, Sky Channel still has access to all of the racing media rights for retail and subscription television, with Racing.com being the only other owner of these rights on a very limited basis.
291. Tabcorp has the ability to leverage its market power from the acquisition of subscription television and retail wagering rights to digital rights, for example, by making exclusive digital rights a condition of purchasing the subscription television and retail wagering rights.

PRBs benefit from helping Tabcorp where it operates the totalisator

292. I set out in section 2.2.2 that totalisator operators pay a greater proportion of wagering revenue to the racing industry than corporate bookmakers, since totalisator operators have industry funding obligations that apply in addition to, or instead of, race field fees.
293. It follows that PRBs will gain from assisting Tabcorp (for example, by selling it exclusive digital racing media rights) such that its share of wagering in the PRB's state increases at the expense of corporate bookmakers, so long as this does not reduce net revenue because of lower wagering growth and/or not being able to sell the digital rights to others.⁴¹⁴

PRBs need Tabcorp to show their races on Sky Channel

294. The PRBs need Tabcorp to show their races across Australia on Sky Channel in retail venues and in homes to drive wagering turnover for those races, which increases both totalisator-related funding and race field fees for the PRBs. Race field fees are an important part of PRB's funding. For example, 35 per cent of Racing Victoria's revenue came from race field fees in FY16, or over 40 per cent of revenue from wagering.⁴¹⁵
295. Tabcorp has demonstrated that it can and will use Sky Channel to impose economic harm on PRBs by reducing the amount of races that are shown on the channel. For example, I understand that there were periods in 2014 and 2015 in which there was no broadcasting of Victorian thoroughbred racing due to a decision by Tabcorp/Sky Channel to cease showing Victorian thoroughbred racing in order to improve its negotiating position with the Victorian racing industry.⁴¹⁶ A firm without market power could not profitably undertake an action of this kind.
296. Tabcorp can also use its ability to 'demote' races to a less popular channel to impose economic harm on PRBs. For example, during a trial by Racing Victoria of 30 minute gaps between races, metropolitan Melbourne thoroughbred races were 'demoted' to Sky Racing 2, which had a material effect on the availability of that content to end customers.⁴¹⁷

⁴¹¹ Statement of Nicholas David Tyshing, 13 April 2017, p 42, para 211.

⁴¹² Statement of Nicholas David Tyshing, 13 April 2017, p 42, para 211 and p 50-51, Figure 8.

⁴¹³ Statement of Nicholas David Tyshing, 13 April 2017, p 42, para 213.

⁴¹⁴ I note that this is consistent with the statement of Mr Catterall, in which he states that the 'PRAs have an incentive to grant media rights to the merged entity'. Statement of Andrew Paul Catterall, 17 April 2017, p 13, para 38(a)(ii)(E).

⁴¹⁵ Statement of Giles Thompson, 13 April 2017, pp 10-11, para 33.

⁴¹⁶ Statement of Nicholas David Tyshing, 13 April 2017, p 48, para 235. According to Mr Catterall, coverage of Victorian thoroughbred races was blacked out on Sky Channel channels after Racing Victoria Limited and the clubs publicly announced that Seven West Media was its preferred media rights partner for free to air and digital rights. Mr Catterall states that he considered that this was a retaliatory measure imposed by Tabcorp/Sky because Racing Victoria Limited and the Victorian racing clubs had decided to adopt a more broad based media strategy. Statement of Andrew Paul Catterall, 17 April 2017, pp 31-32, paras 123-126.

⁴¹⁷ Statement of Nicholas David Tyshing, 13 April 2017, p 38, para 201.

Tabcorp has a number of advantages over corporate bookmakers in future rights negotiations

297. Tabcorp has a number of other advantages over corporate bookmakers in future rights negotiations that increases its ability to purchase exclusive racing media rights, such as:⁴¹⁸

- pre-existing relationships with rights holders;
- an ability to exercise (or pressure the exercise of) options to extend the term of existing rights, where such options exist;
- an ability to exercise rights of first and / or last refusal when the rights holder seeks to supply the rights to another party;⁴¹⁹ and
- an ability to stagger expiry dates so that rights do not become available at the same time – for example, the media rights agreement is due to expire for South Australia in mid-2017, Queensland in 2020, New South Wales in 2025 and Tasmania in 2026.⁴²⁰

Table 4.10: Expiration dates of media rights

State / territory	Expiry date of media rights
New South Wales	2025
Victoria	
Queensland	2020
Australian Capital Territory	
South Australia	Mid 2017
Tasmania	2026
Northern Territory	unknown
Western Australia	Approximately 2022 or 2024

Statement of: Andrew Paul Catterall, 17 April 2017, pp 7 and 15, paras 19 and 45.

Tabcorp is in a strong bargaining position in negotiations with PRBs where it operates the totalisator

298. Tabcorp is able to undertake additional actions to inflict economic harm on PRBs, whilst suffering minimal or no harm itself in the states in which it operates the totalisator. For example:

- Tabcorp is able to reduce the value of digital rights to corporate bookmakers by making it more difficult or less attractive for them to enter into partnerships with anyone that operates a licenced Tabcorp retail venue such as clubs and hotels. For example, Tabcorp recently sought to stymie a partnership between CrownBet and ClubsNSW, which entails the proposed provision of a digital wagering advertising solution to member clubs of ClubsNSW;⁴²¹ or
- Tabcorp could encourage online customers in the state of the PRB to sign up to its online platform as if they were residing in another state. For example, I understand that Tabcorp has an incentive to migrate its online and telephone customers to the ACT jurisdiction and that it is doing so.⁴²²

⁴¹⁸ Statement of Nicholas David Tyshing, 13 April 2017, pp 46-47, paras 227-228.

⁴¹⁹ For example, according to Mr Catterall, Sky Channel sought to offer [HIGHLY CONFIDENTIAL TO RACING.COM] [REDACTED]

[REDACTED] Statement of Andrew Paul Catterall, 17 April 2017, p 16, para 46 (b).

⁴²⁰ Statement of Andrew Paul Catterall, 17 April 2017, pp 7 and 15, paras 19 and 45.

⁴²¹ Statement of Nicholas David Tyshing, 13 April 2017, p 25, paras 139-140; and Statement of Nicolas Keenan, 13 April 2017, pp 7-18, paras 27-68.

⁴²² Statement of Nicholas David Tyshing, 13 April 2017, pp 65-66, paras 329-331.

299. A firm can only undertake these actions to strengthen its negotiating position in relation to price or non-price terms for media rights if it operates the totalisator in the relevant state.

Substantial barriers to entry in setting up a broadcasting business that can acquire and utilise racing media rights

300. The primary difficulty in setting up a firm that can acquire and utilise racing media rights is that the rights are not easily available. They are owned on a largely exclusive basis by Tabcorp, and the rights are available to be purchased on a staggered basis,⁴²³ meaning a firm cannot quickly purchase the rights required to offer a broadcasting service with a wide selection of races.

301. Significant capital investment was required to set up Racing.com, and I expect the same could be said for a competitor broadcasting business.⁴²⁴ This investment included:⁴²⁵

- an executive team;
- a connectivity network to connect race track vision to broadcast capacity;
- channel production capacity;
- streaming capability;
- interfaces to enable other digital assets to display live racing vision;
- a roster of broadcasting talent; and
- international distribution capacity.

302. I understand that Racing.com would not have expanded into a full multi-platform broadcast offering without the free to air spectrum that its partner Seven West Media owned, and that such a partner would not be found for racing outside of Victoria and New South Wales.⁴²⁶ This limits the potential for entry into broadcasting.

303. Therefore, it is unlikely that there will be a new entrant in the broadcasting of racing media that would want to acquire racing media rights in competition with Sky Channel.

4.4.2 Tabcorp's market power will be weaker without the merger

304. As I set out in section 2.3, Tabcorp holds exclusive racing media rights in the online, subscription television and retail channels in all states except for thoroughbred races in New South Wales and Victoria.

305. The likely continued increase in wagering online and the growth of corporate bookmakers if the merger does not go ahead, means that the corporate bookmakers' willingness to pay for digital racing media rights will grow without the merger. As such, the incentive for PRBs to sell those rights to corporate bookmakers will increase over time.

306. The PRBs that have the most valuable media rights in New South Wales and Victoria have recently started to sell digital racing rights to corporate bookmakers, and others are likely to follow their lead if the merger does not take place.

⁴²³ See: Table 4.10.

⁴²⁴ Statement of Andrew Paul Catterall, 17 April 2017, p 33, para 129.

⁴²⁵ Statement of Andrew Paul Catterall, 17 April 2017, pp 33-34, para 129.

⁴²⁶ Statement of Nicholas David Tyshing, 13 April 2017, p 42, para 212.

4.4.3 The merger will exacerbate Tabcorp's market power in the acquisition of racing media rights

307. Digital rights to racing media are very valuable to corporate bookmakers, and they have purchased such rights wherever they have been permitted to do so.⁴²⁷ Wherever they are offered on a non-exclusive basis, there will be competition to purchase such rights. However, the merger will lessen such competition because:

- it will be more profitable for Tabcorp to exclude rivals in the national wagering market;
- Tabcorp's bargaining power relative to the PRBs will increase; and
- Tatts will no longer be a potential bidder for the racing media rights.

Excluding rivals will be more profitable if the merger takes place

308. Figure 4.2 shows that Tabcorp has a much higher share of online wagering revenue in states in which it operates the retail monopoly, and a lower share in states in which Tatts operates the monopoly, even though it has exclusive digital racing media rights in those states.

309. Tabcorp is able to secure a higher percentage of online customers in those states in which it operates the retail monopoly because it enjoys a structural competitive advantage arising from its retail presence, for example the ability to offer omni-channel products and provide incentives for customers to join Tabcorp online.⁴²⁸

310. Therefore, Tabcorp is able to benefit to a much greater extent from its ownership of exclusive media rights in increasing its share of online customers in those states in which it operates the totalisator. The merger will increase the number of states in which it operates the totalisator, and so it will increase the benefit to Tabcorp from owning exclusive racing media rights. This means that Tabcorp will be willing to pay more for those rights, and more willing to obtain and use them to harm rivals if the merger was undertaken.

Tabcorp's bargaining power relative to the PRBs will increase

The merger will further increase Tabcorp's market power in the acquisition of racing media rights from PRBs in states in which Tatts operates the totalisator because, as set out in section 4.3 above:

- PRBs benefit from helping Tabcorp where it operates the totalisator; and
- Tabcorp is in a strong bargaining position in negotiations with PRBs where it operates the totalisator.

Tatts will no longer be a potential bidder for the racing media rights

311. After Tabcorp, Tatts has the greatest need to show live races in retail wagering outlets, because it holds the rights to operate a large number of retail outlets, for which racing vision is an essential input. It follows that Tatts is a close potential competitor to Tabcorp in acquiring the right to show races in retail venues. The RWWA is the only other operator of retail wagering outlets.

312. Tatts is also a potential competitor to Tabcorp in acquiring racing media rights for use in online wagering, because it too has a substantial online wagering presence (see Figure 4.2 above), but without any digital media rights to racing.

313. Combining the retail, online and over-the-telephone wagering, Tatts has the second highest market share in wagering to Tabcorp,⁴²⁹ and so it has the greatest at stake in securing access to racing media

⁴²⁷ See: section 2.3.2.

⁴²⁸ I explain this ability of retail wagering operator to leverage its retail monopoly in section 2.1.2.

⁴²⁹ Statement of Nicholas David Tyshing, 13 April 2017, Confidential attachment, NDT-60, p4.

rights after Tabcorp. For these reasons, I expect that Tatts would be the closest competitor to Tabcorp in acquiring media rights across the retail wagering and digital channels. I also expect that Tatts would prefer not to rely on its closest competitor for access to these essential rights, especially given that Tabcorp recently ceased to supply racing vision to Tatts' digital account holders, at least for a period of time.⁴³⁰

314. I note that Tatts states that it has not sought to compete against Tabcorp to acquire racing media content.⁴³¹ However, I understand the explanation for this historical fact is that the media rights for all states where Tatts is the totalisator operator – and so has greatest ability to pay for media rights – have been exclusive to Tabcorp since before Tatts merged with UniTAB Limited, and thus before it was large enough to have any chance of competing for media rights.⁴³² Further, the cost of broadcasting has fallen in recent years and there are new methods to distribute vision. This suggests that there are now commercially viable options available to Tatts to distribute vision.⁴³³
315. It is unnecessary for Tatts to bid for the rights in order for it to place competitive pressure on Tabcorp. Rather, it is sufficient only for Tatts to be a potential competitor for it to impose a degree of constraint on Tabcorp.⁴³⁴
316. Tatts has an incentive and ability to reduce the extent to which it relies upon Tabcorp for racing media content to be shown at its retail venues and online if the merger does not proceed. This could involve a number of different strategies such as:⁴³⁵
- providing a lower cost option to Sky Channel's vision in sub licenced betting agencies;
 - working with Racing.com to introduce new and differentiated innovations that could be customised for Tatts' venues;
 - building the brand of UBET to a larger national audience to capture online wagering account holders from outside of states in which Tatts operates the retail monopoly through advertising on competitor media services like Racing.com; and
 - bidding directly for rights and secure a wholesale position on key rights to use as leverage in cost/price/service negotiations with broadcasters such as Sky and Racing.com.
317. Tatts has previously said that it would consider purchasing Racing.com's alternative to Sky Channel for thoroughbred racing vision for its online platforms in circumstances where Sky Channel and Tatts had failed to reach agreement over the fee charged by Sky Channel for its service and Sky Channel announced a blackout of live Sky Channel on UBET's website and mobile app.⁴³⁶ This is consistent with my expectations that, without the merger, Tatts would be working hard to maximise its profits and secure the best rights possible at the lowest price.
318. In my opinion, the merger would result in a loss of competition for media rights for broadcast in retail venues and online because a likely alternative bidder for those rights would be lost.

4.4.4 Competition in the wagering market will also be lessened

319. The markets for the acquisition of digital media rights and supply of wagering are linked. A firm that has a greater degree of market power in one will increase its market power in the other because:

⁴³⁰ Statement of Nicholas David Tyshing, 13 April 2017, p 86, para 413.

⁴³¹ Form S, p 115, para 18.24

⁴³² Statement of Andrew Paul Catterall, 17 April 2017, p 12, para 35.

⁴³³ Statement of Nicholas David Tyshing, 13 April 2017, p 86, para 412.

⁴³⁴ This is consistent with the opinion of Paul Catterall, see: Statement of Andrew Paul Catterall, 17 April 2017, p 12, para 32.

⁴³⁵ Statement of Andrew Paul Catterall, 17 April 2017, pp 11-12, para 31.

⁴³⁶ Statement of Andrew Paul Catterall, 17 April 2017, p 12, para 33.

- a firm that has greater market power in acquiring online racing media rights will be better able to exclude rivals in the wagering market by denying them access to those critically important rights;⁴³⁷ and
- a firm with a greater degree of market power in the national wagering market will have a higher willingness to pay for the rights to protect its market power and a greater incentive to harm rivals (if it has a higher market share), thereby exacerbating its market power in the acquisition of racing media rights.

320. It follows that the increase in Tabcorp's market power in the acquisition of online racing media rights will lessen competition in the market to acquire those rights, as well as in the wagering market.

321. Tabcorp already owns the rights to the vast majority of the online racing media rights,⁴³⁸ and it continues to refuse to make available its Sky Channel content to corporate bookmakers.⁴³⁹ Absent the merger, rights may become less exclusive as the online wagering market grows, whilst under the proposed transaction, for the reasons I set out above, Tabcorp will have a greater ability and incentive to deny access to online racing media to corporate bookmakers.

322. The potential for Tabcorp to harm rivals in the wagering market by using its ownership of media rights has been acknowledged for some time. For example, the Productivity Commission noted in 2010 that:⁴⁴⁰

Competition issues arising from the broadcast of racing may also warrant a national response. Tabcorp, through its ownership of Sky Channel, is the sole television broadcaster of harness and greyhound racing, and is the dominant provider of thoroughbred racing broadcasts in pubs and clubs. As noted by the ACCC, the vertical integration of Tabcorp's wagering and broadcast businesses has potentially serious implications for competition in the wagering market.

As the capacity for punters to view racing events is a key factor of production for wagering operators that compete with Tabcorp, this arrangement may frustrate competitive access to racing broadcasts.

⁴³⁷ Mr Tyshing explains that digital rights are critically important to drive wagering, particularly in the online channel. See: Statement of Nicholas David Tyshing, 13 April 2017, p 35, para 178

⁴³⁸ See: section 2.3.2.

⁴³⁹ Statement of Nicholas David Tyshing, 13 April 2017, p 42, para 214.

⁴⁴⁰ Productivity Commission, *Inquiry report – Gambling Volume 1*, 26 February 2010, p 38.

4.5 Auction of Victorian wagering licence and sale of WA TAB

323. There are two potential opportunities to bid for wagering licences or state owned wagering businesses prior to 2035:⁴⁴¹

- the grant of the next Victorian wagering licence in 2024; and
- the possible privatisation of the WA TAB (the WA government-owned totalisator).

324. As I explain in section 2.1.2, the South Australian totalisator licence expires this year, while that for Tasmania expires in 2027. However, it is unlikely that a second totalisator licence would be issued in these states since totalisator wagering involves inherent economies of scale, with larger totalisator pools reducing the costs of wagering.⁴⁴²

325. The statement of Flavio Menezes observes that:

- the merger will not have an anti-competitive effect in bidding for licences where there are no incumbency advantages or barriers to entry, ie, entry is ‘easy’;⁴⁴³ and
- sellers of licences may have a number of options for strategic behaviour that could counter an increase in the market power of bidders resulting from the merger, including:⁴⁴⁴
 - > setting reserve prices and/or negotiating with the merged entity to extract a higher price; or
 - > designing the auction so as to maximise competition for the licence.

326. In my opinion, there are significant incumbency advantages, or barriers to entry, enjoyed by the totalisator businesses and to an even greater extent the merged entity. The most significant of these is the ability to access racing vision on reasonable terms. Further, in the case of bidding for the Victorian wagering licence and, to a lesser extent, the possible privatisation of the WA TAB, I expect that the ability of state governments to act strategically to counter the increased market power of the merged entity may be limited.

327. Neither of these factors therefore support a conclusion that the proposed merger would not lessen competition for bidding for the next Victorian wagering licence in 2024 or in relation to the possible privatisation of the WA TAB.

4.5.1 Access to media content on reasonable terms is essential to bid for wagering licences

328. Access to media content is crucial for a firm to be able to offer retail wagering services in Victoria and Western Australia. As such, I expect that no one would bid for these opportunities unless they could be sure of having access to vision on reasonable terms.

329. Tabcorp owns Sky Channel so it has the media rights necessary to bid for the Victorian wagering licence and the WA TAB.

330. Tatts shows Sky Channel in its retail venues in a number of states so I expect it would be able to obtain Sky Channel in Western Australia or Victoria on reasonable terms. Tatts has some bargaining power against Tabcorp in the scenario without the merger because it has a large number of retail outlets in which it would be showing Sky Channel.

⁴⁴¹ Form S, p 122, para 19.3

⁴⁴² Productivity Commission, *Inquiry Report Gambling Volume 1*, 26 February 2010, p 2.40; Affidavit of Giles Mansell Thompson, 23 March 2017, p 5, para 29; and Statement of Andrew Charles Harding, 23 February 2017, p 6, para 19.

⁴⁴³ Statement of Flavio Menezes, 9 March 2017, p 23, para 48

⁴⁴⁴ Statement of Flavio Menezes, 9 March 2017, pp 30-31, paras 73-77

331. No other operator would have the same bargaining power with Tabcorp that Tatts has, and so no other bidder could be sure that it would be able to access Sky Channel on reasonable terms. In my opinion, any third party bidding for a state wagering licence would be justifiably cautious about the prospect that a significant part, or more, of the value derived from operating the totalisator business could be extracted from it in subsequent negotiations for racing vision with Tabcorp. This is consistent with bidding for the last Victorian wagering licence, in which there were only two bids.⁴⁴⁵ [HIGHLY Confidential to CrownBet]

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332. In the counterfactual without the merger, Tatts' bargaining power for racing media rights and subsequent valuation for wagering licences would be likely to constrain, to some extent, Tabcorp's ability to leverage its market power in racing media into bidding for wagering licences. It follows that the merger would remove Tatts as the party likely to have the second highest valuation for wagering licences, and reduce the likely number of bidders for the Victorian wagering licence and the privatisation of the WA TAB from two to one by the merger.⁴⁴⁷

333. It follows that the merger would increase Tabcorp's ability to leverage its advantage in racing media into bidding for state wagering licences. Absent effective strategic action by state governments, the workability of which I discuss below, with the removal of Tatts as a competitive constraint the merged entity would be able to procure wagering licences at prices that are lower than would be possible without the merger. This amounts to a lessening of competition in bidding for the Victorian wagering licence and the privatisation of the WA TAB.

4.5.2 State governments are unlikely to be able to act effectively as strategic sellers

334. I agree with Dr Menezes that there are circumstances in which sellers of a product at auction may be able to act strategically so as to counter market power held by bidders. However, I expect that the merger will limit this ability in respect of bidding for the next Victorian wagering licence, and to a lesser extent for a possible privatisation of the WA TAB.

335. Due to the difficulty that other parties would encounter in accessing media rights on reasonable terms, I do not anticipate any meaningful participation from entities other than Tabcorp or Tatts in the Victorian bidding process and a possible WA TAB privatisation process. Strategies that aim to increase competition through changes to the design of the bidding process are unlikely to be viable where the government will be faced with a single buyer.

336. The ability of a state government to act as a strategic seller when faced with a single buyer, and replicate outcomes in competitive bidding processes, is a function of two principal factors:

- the relative extent of asymmetric information between the government and the bidder with the highest value regarding the bidder's valuation for the wagering rights being sold; and
- the relative bargaining power of the government and the highest value bidder, which is largely a function of the outside options available to each party.

⁴⁴⁵ Tabcorp, *Tabcorp to be awarded the new Victorian Wagering and Betting Licence*, p 6. Available at, https://www.tabcorp.com.au/TabCorp/media/TabCorp/Media%20Releases/19_July_-_Vic_Wagering_and_Betting_Licence_announcement.pdf, accessed 18 April 2017.

⁴⁴⁶ Statement of Nicholas David Tyshing, 13 April 2017, p 94, paras 452-454.

⁴⁴⁷ [Confidential to Tabcorp]. Statement of David Attenborough, Confidential attachment TBP.001.001.8697, p 190.

Bidding for the Victorian wagering licence

337. In the case of the granting of the Victorian wagering license, the government faces uncertainty regarding the value of the license relative to both the highest value bidder, ie, Tabcorp and the second highest bidder, ie, Tatts, due to fact that these firms currently operate within the retail betting market and understand the value of the licence better than the Victorian government. In particular, this value includes not just the profits earned from retail totalisator wagering in Victoria, but the extent to which this position can be leveraged into profits from other activities, such as online and over-the-telephone wagering. This uncertainty reduces the ability of the government to be able to reliably identify the valuation of the highest bidder or use that information in setting a reserve price or subsequent negotiations.
338. The bargaining strength of each party will be reflected in its outside options. Further, the ability of the government to set (and commit to) a reserve price at an auction is derived from its bargaining strength. With or without the merger, Tabcorp's outside option is not to acquire the Victorian wagering licence. However, the merger would materially change the value of the government's outside option, since it would remove the only alternative bidder with a potentially comparable valuation, and leaving the license unallocated is not likely to be a viable approach.
339. This combination of informational disadvantage and poor bargaining strength means that the Victorian government would not be well placed to counter the market power posed by the merged entity, or to achieve an outcome for its wagering licence consistent with what would have occurred absent the merger. In my opinion, strategic actions by the Victorian government would therefore not be sufficient to prevent a lessening of competition for its wagering licence arising from the merger.

Bidding for a potential privatised WA TAB

340. The disadvantages faced by the Western Australian government are fewer than those faced the Victorian government, but may still be material to competition for the potential privatisation of the WA TAB.
341. Due to its ownership of a retail totalisator wagering operation, the Western Australian government is likely to have additional insights into the economics of operating in that industry. The extent to which there are significant asymmetries of information in relation to the potential privatisation of the WA TAB is less clear than it is in respect of bidding for the Victorian wagering licence in 2024.
342. Further, the Western Australian government has a viable outside option available – leaving the asset unsold and retaining ownership, which is not available to the Victorian government. However, the value of this outside option is likely to be exceeded by the potential value of Tabcorp or the merged entity operating the licence, since government ownership of the Western Australia totalisator business does not resolve the issue of obtaining access to racing media on reasonable terms. The effect of the merger will therefore still act so as to remove Tatts as a competitive constraint on Tabcorp in relation to the potential privatisation of the WA TAB.
343. In my opinion, the merger will give rise to a lessening of competition in any potential bidding for a privatised WA TAB.

5. Public benefits

344. In this section I describe the appropriate analytical framework for applying to the public benefit test set out at section 95AZH(2) of the *Competition and Consumer Act 2010*, and review the analysis of public benefits arising in relation to the transaction as contended by Tabcorp.⁴⁴⁸ I find that:

- the cost savings anticipated by Tabcorp represent public benefits, but are likely to be offset by the economic effect of redundancies and reduced payments to suppliers;
- the wagering revenue increases anticipated by Tabcorp are generally not public benefits, but mostly represent transfers of wealth to the merged entity from customers or public detriments; and
- a small element of Tabcorp's anticipated wagering revenue increases may be public benefits, being those arising to the extent that the merger results in services being provided to punters that would not otherwise be provided.

345. I also identify numerous instances where developments anticipated by Tabcorp are unlikely to be a consequence of or specific to the proposed transaction, and so should not be taken into account in assessing its public benefits.

346. In light of these findings, in my opinion the public benefits of the proposed transaction – before taking into account the detrimental effects on competition that I discuss in section 4 – are substantially lower than those contended by Tabcorp.

5.1 Analytical framework for applying the public benefit test

347. In assessing public benefits arising from the proposed transaction that are able to be quantified, I apply a framework that:

- counts as benefits the value of new services that are provided to consumers as a result of the merger;
- counts as detriments the value of services that are no longer provided to consumers as a result of the merger; and
- counts as transfers (ie, as neither benefits nor detriments) the extent to which the proposed transaction results in existing services either changing in price or being provided by the merging parties rather than their competitors.

348. This framework does not capture all relevant considerations in assessing public benefits, since it amounts to an unweighted total welfare standard. In contrast, Australian jurisprudence suggests that the appropriate approach to estimating public benefits also requires consideration of the distribution of benefits and their potentially differing values to the community. In the analysis presented below, I consider qualitatively whether other factors should bear on weighting the distribution of benefits that would arise in consequence of the proposed transaction.

5.1.1 Jurisprudence in relation to the public benefit test

349. The public benefit test requires an assessment of the benefits and detriments of the proposed transaction to society at large. Outside the narrower lens of the effect of the transaction on competition in markets, I understand that the assessment its public benefits can take account of:⁴⁴⁹

⁴⁴⁸ Consistent with paragraph 3.1 of my letter of instructions, in this section I have not assessed in any detail the public benefits contended to arise from the proposed transaction in relation to gaming services, lotteries or keno, other than the extent to which these arise in conjunction with wagering operations.

⁴⁴⁹ Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd (1976) 8 ALR 481, para 510

...anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.

350. This broad interpretation leaves open the question as to whether equal weight should be given to benefits that accrue to all parties (a 'total welfare standard'), or whether benefits should only be accounted for if they accrue to consumers (a 'consumer welfare standard'). The Tribunal has since clarified jurisprudence in relation to this issue, by identifying a total welfare standard but giving weight to outcomes that are deemed to be beneficial to the community:⁴⁵⁰

We consider that the phrase "benefit to the public" is to be given a broad definition which, in addition to group interests, takes into account (with appropriate weighting) individual interests to the extent that such interests are considered by society to be worthy of inclusion and measurement. This broad approach to public benefit promotes the achievement of both static and dynamic efficiencies.

Given the above reasoning, we have formed the view that the "public versus private" dichotomy used by the parties in relation to cost savings is of fairly limited assistance when examining the benefits relied upon for the purposes of s 90. Rather, the enquiry should be directed towards the extent to which the benefit has an impact on members of the community, that is society. Does it fall into the category of "anything of value to the community generally"? If it does, what weight should be given to that benefit, having regard to its nature, characterisation and the identity of the beneficiaries of it?

It follows that cost savings achieved by a firm in the course of providing goods or services to members of the public are a public benefit which can and should be taken into account for the purposes of s 90 of the Act, where they result in pass through which reduces prices to final consumers, or in other benefits, for example, by way of dividends to a range of shareholders or being returned to the firm for future investment. However, the weight that should be accorded to such cost savings may vary depending upon who takes advantage of them and the time period over which the benefits are received.

351. Within this framework, transfers in welfare between members of the community will not give rise to public benefits unless they reallocate benefits towards a purpose that is valued more highly by the community. The Tribunal's interpretation of 'benefit to the public' makes clear that benefits to the community need not be realised solely through lower prices to customers, but may also be reflected in benefits accruing to shareholders of the merging parties.
352. In my opinion, economic rents (or additional profits over and above those necessary to remunerate risk capital) accruing to the merging parties through the exercise of market power are unlikely to represent 'anything of value to the community' and should not be counted as benefits. This conclusion underpins one part of my analysis of Tabcorp's contended public benefits, which I set out in section 5.2 below.

5.1.2 Merger specificity of public benefits

353. It is important to note that the public benefit to be assessed must be those that '*would result, or would be likely to result*'⁴⁵¹ from the proposed transaction. Benefits that may be achieved with the merger, but would be likely to be achieved absent the proposed transaction, are not relevant to the assessment of public benefits.

5.2 Summary of contended public benefits

354. My understanding of Tabcorp's contention as to public benefits resulting from the proposed transaction is informed principally by Annexure A to Form S and the statement of Damien Johnston. Mr

⁴⁵⁰ Re Qantas Airways Limited [2004] ACompT 9 (12 October 2004), paras 187-189

⁴⁵¹ Competition and Consumer Act 2010, section 95AZH(1)

Johnston's statement includes spreadsheets that set out the underlying workings and assumptions that sit behind his calculations and some of the claims made in Form S.

355. The statement of Ric Simes estimates public benefits of adopts assumptions that are consistent with Mr Johnston's statement to compute a present value of public benefits of at least [Confidential to Tabcorp] [REDACTED] resulting from the proposed transaction.⁴⁵²

356. Form S sets out various claims for public benefits arising from the merger. Rather than describing a quantum of benefits, the claims in Form S relate to broad categories of benefits, of which some have an element of quantification. These claims comprise:⁴⁵³

- direct benefits from the proposed transaction, including cost savings and revenue increases;
- the pass through of direct benefits to other parties, including to the racing industry, state and federal government and to retail venues, Keno venues and sporting bodies;
- broader economic impacts arising from cost savings that result in efficiency improvements, as well as revenue being redirected from foreign-owned and operated corporate bookmakers towards Tabcorp and Tatts;
- the overcoming of structural disadvantages suffered by State TABs, which contribute a greater share of wagering turnover to the racing industry than corporate bookmakers, by enabling business improvements in Tatts' states and removing a barrier to combining pari-mutuel pools; and
- economic impacts arising from improved funding to the racing industry, which is particularly important for regional economies, through greater market share for State TABs of the merged entity.

357. Form S sets out claims for significant synergies arising from the proposed merger, based on the statement of Mr Johnston. In particular, Form S claims as direct benefits:⁴⁵⁴

- annual cost savings of [Confidential to Tabcorp] [REDACTED];
- annual wagering revenue increases of [Confidential to Tabcorp] [REDACTED]; and
- annual keno revenue increases of [Confidential to Tabcorp] [REDACTED].

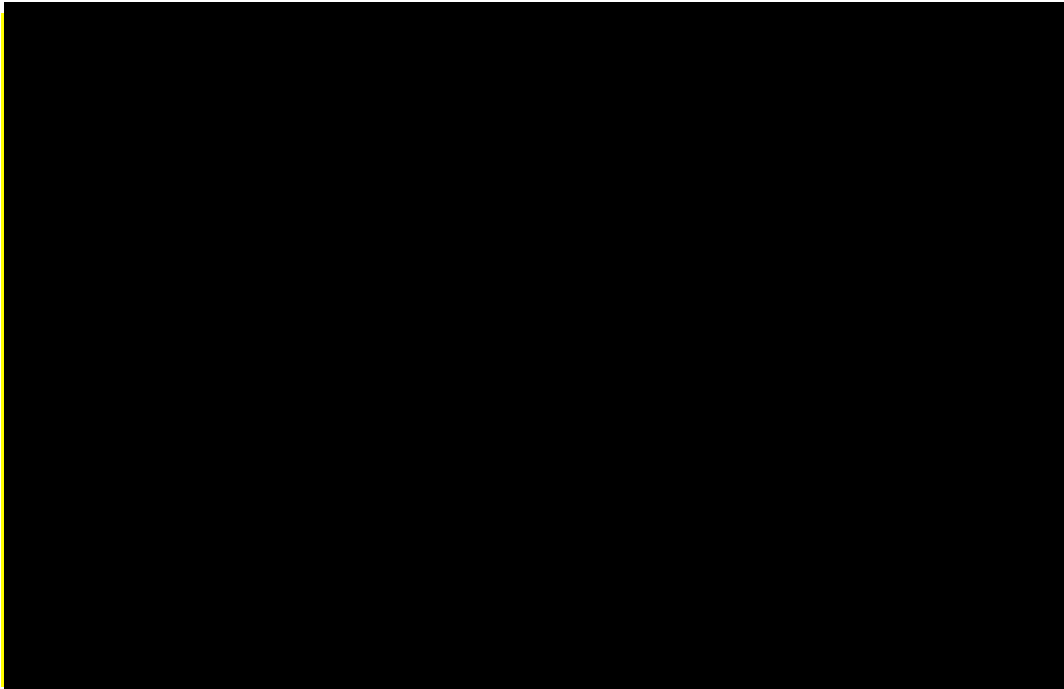
358. Tabcorp assumes that benefits, totalling [Confidential to Tabcorp] [REDACTED] per year, are achieved in full by the end of the third year following the completion of the proposed transaction. In Figure 5.1 below I set out a high-level composition of the cost savings and revenue increases contended by Tabcorp.

⁴⁵² Statement of Ric Simes, 8 March 2017, Table 2, p 31.

⁴⁵³ Form S, Annexure A, pp 96-104, paras 302-323.

⁴⁵⁴ Form S, Annexure A, p 96, para 302.

Figure 5.1: Composition of quantified claims for public benefits [Confidential to Tabcorp]



Source: Form S; Statement of Damien Johnston, 6 March 2017, pp 10-21, paras 29-38; and Assumptions for the expert report of Ric Simes, p 2, para 3. Numbers do not add due to rounding.

5.2.1 Contended cost savings

359. The cost savings contended by Tabcorp comprise:⁴⁵⁵

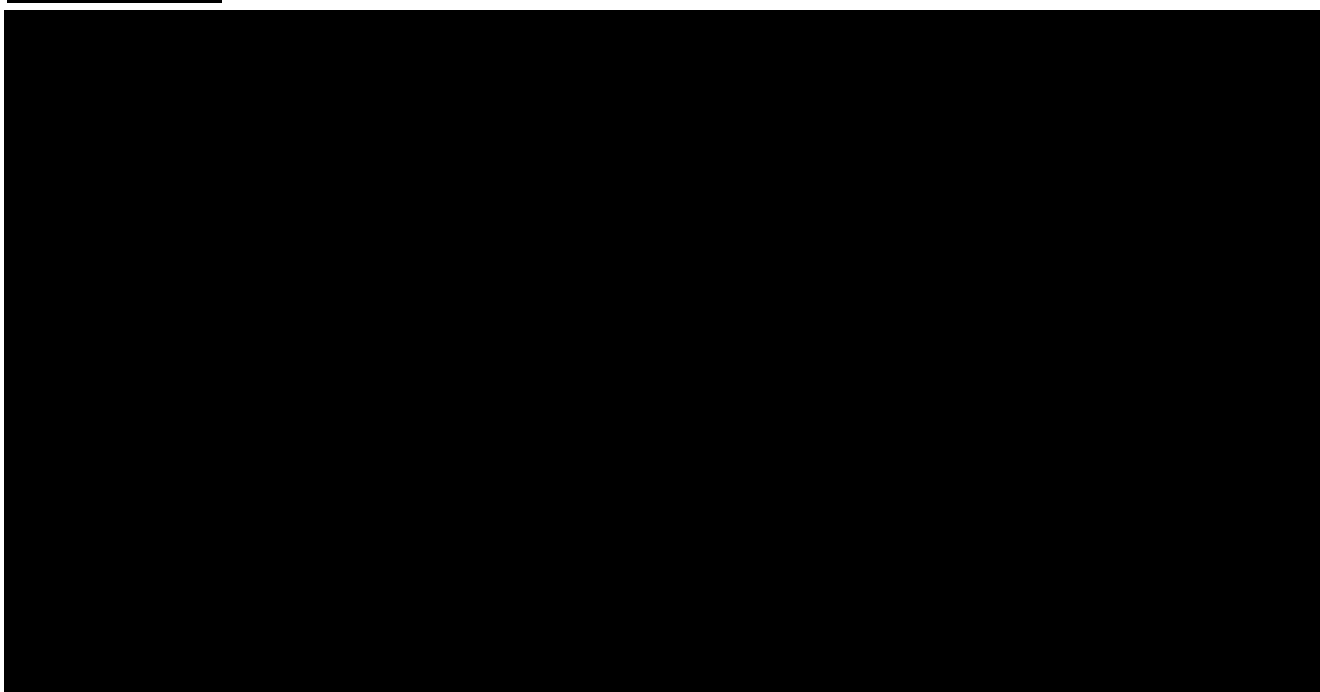
- reduced payments resulting from the removal of duplication in the merged business, totalling [Confidential to Tabcorp] [redacted] per year, consisting of: [Confidential to Tabcorp]
 > [redacted]
 > [redacted]
- reduced payments to suppliers result from the merged entity's improved ability to negotiate terms with suppliers, totalling [Confidential to Tabcorp] [redacted] per year.

360. [Confidential to Tabcorp] [redacted]

Figure 5.2

⁴⁵⁵ Statement of Damien Johnston, 6 March 2017, pp 10-21, paras 29-38; and Assumptions for the expert report of Ric Simes, p 2, para 3.

Figure 5.2: [Confidential to Tabcorp]



Source: Statement of Damien Johnston, 6 March 2017, pp 10-20, paras 29-36

361. Of these contended annual cost savings, Mr Johnston estimates that:⁴⁵⁶

- [Confidential to Tabcorp] per year will be passed to the racing industry in Victoria and New South Wales due to profit sharing arrangements with the racing industries in those states; and
- [Confidential to Tabcorp] per year will be passed to the federal government due to increased tax payments.

362. [Confidential to Tabcorp]

5.2.2 Contended revenue increases

363. The revenue increases contended by Tabcorp comprise:⁴⁵⁷

- improved fixed odds performance in Tatts' business, totalling [Confidential to Tabcorp]
- improvements to wagering business, totalling [Confidential to Tabcorp]; and
- improvements to the South Australian keno offering, totalling [Confidential to Tabcorp].

Fixed odds performance

364. Mr Johnston states that Tabcorp has invested [HIGHLY Confidential to Tabcorp] in the management of its fixed odds risk to improve its performance – a system which allows it to manage risk and improve its fixed odds performance [Confidential to Tabcorp].

⁴⁵⁶ Statement of Damien Johnston, 6 March 2017, pp 23-25, paras 47-48.

⁴⁵⁷ Form S, Annexure A, pp 96-97, para 302(b).

⁴⁵⁸ He states that [Confidential to Tatts] [REDACTED]

⁴⁵⁹

365. Mr Johnston observes that Tabcorp's fixed odds yield was 2.6 per cent higher than Tatts' in the 2016 financial year. [Confidential to Tabcorp] [REDACTED]

⁴⁶⁰

Improvements to wagering business

366. Tabcorp claims that wagering business improvements would follow from:⁴⁶¹

- introducing new products in Tatts' states and increasing the coverage of some products already offered by Tatts, totalling [Confidential to Tabcorp] [REDACTED];
- re-branding the Tatts business as 'TAB' which is assumed to have greater awareness than 'UBET'. [Confidential to Tabcorp] [REDACTED]; and
- [Confidential to Tabcorp] [REDACTED]

367. Mr Johnston estimates that Tabcorp would need to spend approximately [Confidential to Tabcorp] [REDACTED] to achieve the benefits noted in the second point above.⁴⁶²

Keno revenue increases

368. Tatts holds the rights to offer keno in South Australia, and is the only state in which it does so. Mr Johnston states that Tabcorp will improve the keno offering by:⁴⁶³

- using the Tabcorp keno brand in South Australia;
- upgrading keno venues in South Australia to enhance customer experience; and
- pooling South Australian keno jackpots with those in the Tabcorp network and [Confidential to Tabcorp] [REDACTED]

369. Mr Johnston states that these improvements would follow from a [Confidential to Tabcorp] [REDACTED] investment in the South Australian keno business and [Confidential to Tabcorp] [REDACTED]

⁴⁶⁴

Distribution of benefits

370. Of the revenue increases, Mr Johnston estimates that the revenue increases will be widely shared, and directly passed through to third parties including:⁴⁶⁵ [Confidential to Tabcorp] [REDACTED]

- [REDACTED]
- [REDACTED]

⁴⁵⁸ Statement of Damien Johnston, 6 March 2017, p 32, paras 68-69.

⁴⁵⁹ Statement of Damien Johnston, 6 March 2017, pp 33-34, para 73.

⁴⁶⁰ Statement of Damien Johnston, 6 March 2017, p 36, para 79.

⁴⁶¹ Statement of Damien Johnston, 6 March 2017, pp 38-44, paras 85-99.

⁴⁶² Statement of Damien Johnston, 6 March 2017, p 41, para 90.

⁴⁶³ Statement of Damien Johnston, 6 March 2017, p 46, para 104.

⁴⁶⁴ Statement of Damien Johnston, 6 March 2017, p 46, para 105.

⁴⁶⁵ Statement of Damien Johnston, 6 March 2017, pp 49-50, para 113.

[Redacted]

371. [Confidential to Tabcorp] [Redacted]

5.3 Review of Tabcorp's contended public benefits

372. In this section, I examine each of the public benefits contended by Tabcorp and identify the extent to which they are affected by the analytical framework I set out at section 5.1. I find that:

- the cost savings cited by Tabcorp are likely to be overstated because:
 - > the effect of these reduced payments for [Confidential to Tabcorp] [Redacted] are not accounted for; and
 - > the wider economic benefits modelled by Dr Simes, which predict a multiplier effect of 1.44, assume transmission of the cost savings as either lower prices or higher quality, but the evidence does not support this;
- the anticipate revenue increases are comprised principally of transfers to the merged entity rather than a public benefit;
- claims that substitution from foreign-owned businesses to Australian-owned businesses gives rise to public benefits do not follow from the framework I set out above; and
- many of the contended public benefits cited by Tabcorp are not outcomes that result from the proposed transaction.

373. On these findings, in my opinion the public benefits of the proposed merger are substantially lower than those cited by Tabcorp.

5.3.1 Contended public benefits from cost savings may be offset by costs elsewhere

374. I summarise at section 5.2 the basis for and components of Tabcorp's claim that the proposed merger would give rise to [Confidential to Tabcorp] [Redacted] per year in cost savings. These cost savings comprise [Confidential to Tabcorp] [Redacted] per year [Confidential to Tabcorp] [Redacted] and improved negotiation with suppliers that reduce payments by [Confidential to Tabcorp] [Redacted] per year.

375. Reduced payments to suppliers resulting from an improved negotiating position does not give rise to any increased consumption, but rather reduces payments to suppliers for the same level of consumption. In my opinion, such reduced payments are not a public benefit, but represent a transfer from those suppliers to the merged entity. This is consistent with the position of Tabcorp's expert, Dr Simes.⁴⁶⁶

376. Other cost saving contended by Tabcorp represent an improvement in productive efficiency that would be realised through reduced quantities of productive inputs utilised by the merged entity, including [Confidential to Tabcorp] [Redacted]. I summarise at section 5.2.1 that these contemplated cost savings include [Confidential to Tabcorp] [Redacted]

⁴⁶⁶ Statement of Ric Simes, 8 March 2017, p 5, para 31.

377. In my opinion, it is overly simplistic to suppose that the public benefit from improvements in productive efficiency are of a magnitude that is equal to the direct costs that are saved. It cannot simply be assumed that each dollar of goods and services that are no longer purchased by the merged entity represents a dollar of public benefit. Whether these savings result in any public benefit will depend upon the extent to which:

- resources no longer used in the production process are redeployed elsewhere in the economy; and
- payments that would otherwise be made to suppliers are instead shared with customers and the community.

378. Part of Dr Simes' analysis of public benefits focuses on the extent to which improvements in productive efficiency in the gambling sector gives rise to wider benefits to the Australian economy. The essential inputs to this aspect of Dr Simes' analysis are the estimated cost savings of [Confidential to Tabcorp] [REDACTED] [REDACTED].⁴⁶⁷ Dr Simes' modelling finds that the effect on the wider economy of these cost savings will be [Confidential to Tabcorp] [REDACTED] in present value terms – 1.44 times greater than the productive efficiencies themselves.

379. By contrast, Dr Simes' analysis does not directly examine the effect on the Australian economy of the [Confidential to Tabcorp] [REDACTED] that would be triggered by the proposed transaction. It appears to be an implicit assumption of Dr Simes' modelling analysis that these resources would immediately and as productively be re-deployed elsewhere in the economy. To the extent that this is not the case, the public benefits arising from the productive efficiencies claimed by Tabcorp will be less than the claimed cost savings.

380. Further, I note that Dr Simes' analysis explicitly assumes that:⁴⁶⁸

The benefits from the efficiency improvements and reduction in imports are transmitted to the representative agent through a decrease in price of goods and services in the gambling sector.

381. This assumption is critical to Dr Simes' application of a multiplier of 1.44 to the cost savings contended by Tabcorp. If the cost savings are retained by Tabcorp, and not dispersed in the form of lower prices or higher quality, then there will be no multiplier effect.

382. There is no evidence of which I am aware that the proposed merger will give rise to lower prices for wagering customers. Indeed, I explain in 5.3.2 below my understanding that, in relation to the revenue increases anticipated by, the proposed merger will give rise to increases in prices through higher yields on wagering services.

383. In such circumstances, my understanding of the Australian jurisprudence is that the benefits of cost savings that are not distributed widely throughout the community in the form of lower prices, but are instead retained by shareholders, should be given less weight rather than having some form of multiplier effect applied to them, as suggested by Dr Simes. For example, the Tribunal has stated that:⁴⁶⁹

If a merger is likely to result in the achievement of economies of scale and a considerable saving in the cost of supplying goods or services this might well constitute a substantial benefit to the public, even though the cost saving is not passed on to the consumers in the form of lower prices. Nevertheless, if such a merger benefited only a small number of shareholders of the applicant corporations through higher profits and dividends, this might be given less weight by the tribunal, because the benefits are not spread widely among members of the community generally.

⁴⁶⁷ Statement of Ric Simes, 6 March 2017, p 41, Table 1.

⁴⁶⁸ Statement of Ric Simes, 6 March 2017, p 30, para 137.

⁴⁶⁹ Re Howard Smith Industries Pty Ltd (1977) 28 FLR 385 at 391-392

384. In contrast, Dr Simes observes that a *decrease* in price:⁴⁷⁰

...is consistent with situations where observed prices do decrease, but also with situations where an observed price remains constant and the quality of a product improves.

385. Although Dr Simes observes frequently in his report that the proposed transaction will give rise to higher quality products, the basis for this observation is not clear to me. The assumptions provided to Dr Simes' do not allude to higher quality offerings, except in respect of South Australian keno.

386. Consistent with these observations, in my opinion Dr Simes' estimates of public benefits associated with cost savings arising from the proposed merger are likely to be substantially overstated.

5.3.2 Contended revenue increases flow from higher prices paid by wagering customers

387. The large majority of wagering revenue increases cited Tabcorp are projected to be achieved by increased yields on existing Tatts' fixed odds products and the introduction of new, higher yielding, fixed odds products in Tatts' states. A significant proportion of this increase in revenue is likely to be at the expense of corporate bookmakers.⁴⁷¹

388. I set out at section 2.5 above that the yield or take-out rate represents the average rate paid by punters to a wagering operator for the provision of wagering products. The number of wagers that a punter with a set budget is able to make reduces as yield increases. For this reason, when referring to the 'yield' of both totalisator and fixed odds wagering in this section, I refer to it interchangeably as the 'price' for wagering.

389. Within this framework, the wagering revenue increases that Tabcorp contends as resulting from the proposed transaction would be associated with higher prices for customers because:

- [Confidential to Tabcorp] [REDACTED] – put another way, the merged entity could achieve higher prices in these states than would be the case if operating as separate entities; and
- the merged entity would improve branding and retail coverage in Tatts' states so as to win increased market share from corporate bookmakers. I understand that the yield earned by corporate bookmakers is less than the yield earned by Tabcorp and Tatts on their fixed odds businesses.

390. Increases in yields also appear to underpin the revenue increases assumed to occur for South Australian keno.

391. Tabcorp's assumption that the proposed transaction would result in punters paying more for the merged entity's wagering services is consistent with the theory of harm that I set out in section 4.3. In particular, it is consistent with the increased ability of the merged entity to leverage the competitive advantage provided by its control of racing vision in order to charge customers more in Tatts states. If the merged entity had no market power, I would not expect to observe Tabcorp, Tatts or the merged entity being able to sustain – and impose increases in – fixed odds yields that are substantially greater than those earned by their competitors.

392. Revenue increases may give rise to a welfare benefit to the extent that the proposed merger results in a greater number of bets being placed, since this would imply some customers receive services when they otherwise would not have done so.

⁴⁷⁰ Statement of Ric Simes, 6 March 2017, p 30, para 138.

⁴⁷¹ Statement of Patrick Smith, 9 March 2017, para 282.

393. However, revenue share gains at the expense of other firms are *per se* not a welfare benefit. In some circumstances, such as where the relevant customers face higher prices or the denial of service as a result of the merger, higher revenues may be associated with transfers from customers to the merged firm, or welfare losses.
394. I estimate that the public benefits contended as arising from revenue increases of [Confidential to Tabcorp] [REDACTED] from improved fixed odds risk management for Tatts and [Confidential to Tabcorp] [REDACTED] from improvements in Tatts' wagering business are considerably overstated.⁴⁷² Rather, drawing on the underlying materials I estimate that these revenue increases to the merged entity collectively amount to a public detriment of approximately [Confidential to Tabcorp] [REDACTED]
395. I set out the basis for my calculation of this amount in Table 5.1, showing that the revenue increases contended by Tabcorp are mostly comprised of transfers and welfare losses. In the remainder of this section I explain the reasoning behind the assumptions set out in Table 5.1.

Table 5.1: Estimate of public benefits arising from contended revenue increases [Confidential to Tabcorp] [HIGHLY CONFIDENTIAL derived confidential information]

Category	Description	Calculation	Improved fixed odds risk management	Improvements in Tatts' wagering business
Benefit contended by Tabcorp	Benefit to the merged entity	A + B + C + D	[REDACTED]	[REDACTED]
Public benefit	New sales made by the merged entity not captured from another bookmaker	A		
Public detriment	Sales no longer made by the merged entity	B		
Transfer from corporate bookmakers to the merged entity	Revenue on existing services previously earned by corporate bookmakers which substitute to the merged entity	C		
Transfer from consumers to the merged entity	Increased revenue on existing services by the merged entity due to higher yields	D		
Net public benefits		A - B		

Source: Statement of Damien Johnston, 6 March 2017, pp 30-48, paras 63-112; Confidential attachment TBP.100.001.0002, worksheets 'Inputs', 'Parimutuel' 'Fixed', 'Trackside' and 'Retail-Branding'.

Half the increased revenue from better risk management is a welfare loss

396. The [Confidential to Tabcorp] [REDACTED] of revenue increases that Tabcorp estimates can be achieved by applying its risk management system to Tatts' business are assumed to result from [Confidential to Tabcorp] [REDACTED]. Mr Johnston assumes that:⁴⁷³

- 50 per cent, or [Confidential to Tabcorp] [REDACTED] of these improvements is achieved by [Confidential to Tabcorp] [REDACTED]; and
- equivalent revenues are achieved through increased yields on existing Tatts products.

397. The additional revenues earned by Tatts as a result of no longer providing bets to customers is not a benefit, but rather a loss, resulting from the proposed transaction. Absent the merger, these sales and the benefits that they provide to customers would continue to be provided.

⁴⁷² Statement of Damien Johnston, 6 March 2017, p 30, para 64, Table 15.

⁴⁷³ Statement of Damien Johnston, 6 March 2017, TBP.100.001.0002, Worksheet 'Fixed', cell M68.

398. Further, increased yields on existing Tatts' products are also not a public benefit. Rather, they are a 'benefit' to the merged entity achieved by setting higher prices for punters, thereby imposing an equivalent detriment on punters.

399. In sum, I estimate that improvements in Tatts' risk management systems contended as resulting from the merger do not give rise to any public benefit. Rather, they give rise to a public detriment of [Confidential to Tabcorp] [REDACTED].

Only a small part of the increased revenues from improved wagering operations is a public benefit

400. Tabcorp contends that the merged entity will be able to achieve increased revenues, a portion of which will be acquired from existing corporate bookmaker customers.⁴⁷⁴ Corporate bookmakers typically offer better odds, or lower prices, on wagering products as compared with the same product from a Tabcorp or Tatts business.⁴⁷⁵ A shift of consumer spending from lower priced wagering products supplied by corporate bookmakers to higher priced offerings from the merged entity represents the combination of:

- a transfer from corporate bookmakers to the merged entity, reflecting the value of the business that is lost; and
- a transfer from consumers to the merged entity, reflecting the increased yield that the merged entity is able to command.

401. Dr Simes offers an assumption that 50 per cent of the [Confidential to Tabcorp] [REDACTED] revenue uplift represents substitution away from products offered by competing corporate bookmakers.⁴⁷⁶ This amounts to a revenue shift of [Confidential to Tabcorp] [REDACTED].

402. I assume that none of this revenue shift arises from improvements in Tatts' risk management systems, ie, the [Confidential to Tabcorp] [REDACTED] figure appearing at Table 5.1. The basis for my assumption is that Mr Johnston assesses this revenue increase as arising from higher yields for existing customers and reduced exposure to low yielding products, rather than the substitution of revenues from competing wagering businesses.

403. Consequently, I assume that the additional revenue drawn from corporate bookmakers is entirely attributable to improvements in Tatts' wagering business. In other words, I estimate that [Confidential to Tabcorp] [REDACTED] of the contended [Confidential to Tabcorp] [REDACTED] of revenue arising from those improvements results from substitution away from fixed odds products provided by corporate bookmakers. Bringing together these assumptions, the remaining [Confidential to Tabcorp] [REDACTED] must result from new wagering services offered by the merged entity.

404. The increase in revenues earned by merged entity from substitution away from fixed odds products provided by corporate bookmakers consists of two forms of transfer, ie:

- the amount of revenue lost to corporate bookmakers and gained by the merged entity; and
- the effect of higher yields earned from by the merged entity from consumers.

405. To identify these transfers separately requires estimates of:

- the yield achieved by the merged entity on the customers that substitute away from corporate bookmakers; and
- the yield that would have been achieved by corporate bookmakers on these customers.

⁴⁷⁴ Expert report of Ric Simes, 9 March 2017, p 8, para 47.

⁴⁷⁵ Statement of Douglas Freeman, 8 March 2017, p 112, para 285.

⁴⁷⁶ Expert report of Ric Simes, 9 March 2017, p 9, para 53.

406. Mr Johnston estimates that the gross revenue increases achieved by the merged entity from [Confidential to Tabcorp] [REDACTED]. The combined effect of these changes is the [Confidential to Tabcorp] [REDACTED] figure appearing in Table 5.1.

407. Mr Johnston also estimates the distribution of this gross revenue increase across its different sources and the yield that the merged firm would earn for each of these activities.⁴⁷⁷ I use this information in Table 5.2 below to estimate the average yield earned by the merged entity on revenue increases substituted from corporate bookmakers. I estimate that this yield is [Confidential to Tabcorp] [REDACTED].

Table 5.2: Average yield earned by the merged entity on revenue increases substituted from corporate bookmakers [Confidential to Tabcorp]

Product substituted to	Yield	Revenue uplift (\$ million)	Turnover uplift (\$ million)
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, worksheets 'Inputs', 'Parimutuel' 'Fixed', 'Trackside' and 'Retail-Branding'.

Note: I assume that cannibalisation contributes to the merged entity's revenue uplift in proportion to the value of revenue uplift of each product. Figures do not add due to rounding.

408. Conversely, the yield earned by corporate bookmakers for the substituted customers would have been much lower. CrownBet estimates that the weighted average yield for CrownBet, William Hill, SportsBet and Ladbrokes was [HIGHLY Confidential to CrownBet] [REDACTED] in the 2016 financial year. I assume that this is representative of the average yields of all corporate bookmakers and so the yield on the products that consumers are assumed to substitute away from due to the merger. I note for comparison that Douglas Freeman estimates the average yield of Sportsbet, William Hill and Ladbrokes as [Confidential to Tabcorp] [REDACTED] in the same period.⁴⁷⁸

409. I estimate the extent of the transfer from corporate bookmakers to the merged entity as being the revenue that those businesses would have earned from the increase in turnover expected to accrue to the merged entity. This amounts to [HIGHLY CONFIDENTIAL derived confidential information] [REDACTED] which I calculated as:

- the estimated revenue increase for the merged entity that is due to substitution from corporate bookmakers – [Confidential to Tabcorp] [REDACTED]; divided by
- the average yield estimated to be earned by the merged entity on this revenue – [Confidential to Tabcorp] [REDACTED]; multiplied by
- the average yield earned by corporate bookmakers [HIGHLY Confidential to CrownBet] [REDACTED]

⁴⁷⁷ Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, worksheet 'Inputs'

⁴⁷⁸ Statement of Douglas Freeman, 8 March 2017, pp 107-108, Figure 45.

410. I estimate the extent of the transfer from wagering customers to the merged entity as being the extent to which the merged entity earns higher yields than corporate bookmakers. This amounts to [HIGHLY CONFIDENTIAL derived confidential information] [REDACTED], which I calculated as:

- the estimated revenue increase for the merged entity that is due to substitution from corporate bookmakers – [Confidential to Tabcorp] [REDACTED]; less
- the transfer from corporate bookmakers to the merged entity – [HIGHLY CONFIDENTIAL derived confidential information] [REDACTED].

411. I set out the steps I have applied in this calculation at Table 5.3 below.

Table 5.3: Analysis of substitution from corporate bookmakers to the merged entity [HIGHLY Confidential]

	Calculation	Total
Revenue increase due to substitution from corporate bookmakers (\$ million)	A	[REDACTED]
Yields for merged entity by product	B	
Turnover increase due to substitution from corporate bookmakers (\$ million)	$C = A / B$	
Yields for corporate bookmakers	D	
Consumer cost due to substitution from corporate bookmakers (\$ million)	$E = C \times D$	
Increased consumer cost due to substitution from corporate bookmakers (\$ million)	$F = A - E$	

Source: Statement of Damien Johnston, 6 March 2017, Confidential attachment TBP.100.001.0002, worksheets 'Inputs', 'Parimutuel' 'Fixed', 'Trackside' and 'Retail-Branding'.

Note: Figures do not add due to rounding.

Other experts' assessment of revenue increases

412. My opinion that the revenue increases contemplated by Tabcorp's include significant elements of both welfare transfers and welfare costs is consistent with the position adopted by Dr Simes. Dr Simes states that he is unable to quantify the benefits arising from the revenue increases claimed in Form S because:⁴⁷⁹

- the additional revenues flow largely from what he perceives as increases in quality (rather than decreases in price); but
- some punters do face a detriment as the result of fixed odds 'improvements'.

413. However, Dr Simes does identify a benefit in the form of revenue transfers from predominantly foreign-owned and operated corporate bookmakers to the proposed merged entity.⁴⁸⁰ I address this element of Mr Simes' opinion in section 5.3.5 below.

414. The statement of Patrick Smith also alludes to potential for revenue increases to give rise to welfare costs. Mr Smith concedes that higher payout ratios of corporate bookmakers may mean the transaction causes reduced economic welfare. However, he states that:⁴⁸¹

⁴⁷⁹ Statement of Ric Simes, 9 March 2017, pp 6-8, paras 37-45.

⁴⁸⁰ Statement of Ric Simes, 9 March 2017, pp 8-9, paras 46-54.

⁴⁸¹ Statement of Patrick Smith, 9 March 2017, p 131, para 284.

Conversely, the merged entity is likely to be less cost efficient than corporate bookmakers, so the additional turnover is more likely to give rise to multiplier effects within the parties' cost bases.

415. The above sentence is capable of more than one interpretation. On the assumption that Mr Smith is suggesting that greater multiplier effects will arise from shifting revenue from low cost to higher cost firms, I note that such a conclusion would act counter to the notion that cost savings are a source of public benefit. Alternatively, Mr Smith may intend to imply that, because the merged entity has higher costs than corporate bookmakers, the degree of efficiency savings available to the merged entity is greater. Although this may be true, it also suggests that overall industry costs may be increased by the merger – which is not consistent with the creation of public benefits.

5.3.3 Contended revenue increases are not merger specific

416. In addition to being the result of increases in price, many of the revenue increases contended by Tabcorp represent projects that would likely be both feasible and profitable for Tatts to pursue absent the proposed transaction. It follows that these claims are not merger specific, and can be disregarded.

417. Many of the contended revenue improvements require enabling investments to be realised. For example, I summarise in section 5.2.2 above that:

- [HIGHLY Confidential to Tabcorp] [REDACTED] it claims will realise revenue increases of [Confidential to Tabcorp] [REDACTED] per year;

- [Confidential to Tabcorp] [REDACTED]; and

- [Confidential to Tabcorp] [REDACTED]

418. Although the costs of these enabling investments are quantified by Mr Johnston, none of them are identified as being relevant to the public benefits claimed by Tabcorp. Instead, Tabcorp's claims focus on only the revenue increases that result from these investments. In my opinion, the costs of these investments are relevant to public benefits and should be considered in any framework for assessing them.

419. It is also notable that all three of the identified forms of revenue increase appear to offer an extremely high return on the investments that have been made or are proposed to be made. If Tatts could incur these costs itself to achieve the revenue increases, it would make sense for it to do so of its own accord, absent the proposed transaction.

420. Mr Johnston estimates that Tabcorp's investment in [HIGHLY Confidential to Tabcorp] [REDACTED], if applied to the Tatts business, would give rise to a present value of additional revenues that vastly exceed those costs. If these gains were practicable, then I expect that Tatts would seek to make this investment, and achieve these increases, even if the proposed transaction were not to proceed.

421. Assuming this to be the case, the increased revenue is not a result of the merger. At best, the merger specific element is the cost of the investment that Tatts will not have to incur as a result of having access to the benefits of Tabcorp's pre-existing investment. I discuss in section 5.3.1 why saved costs cannot be assumed to represent a public benefit.

422. Similarly, much of the benefits associated with [Confidential to Tabcorp] [REDACTED] could be achieved by Tatts acting on its own accord. I note at section 2.6 above that Tatts has recently taken steps to improve its product, including undertaking a comprehensive rebranding, improving its fixed odds

and digital offering, redesigning its retail outlets and improving its in-play betting offering. Tatts has also indicated a number of initiatives for the 2017 financial year, including:

- Targeting 270 UBET next generation retail spaces to be put in place in the year;
- Introducing new generation self-service terminals in the UBET retail outlets, featuring cash in, and Ticket-in-Ticket-out technology;
- developing and improving the prototype of the unique in-venue in-play betting modules with an eye to a full retail launch;
- trialling affiliate marketing programs in the 2017 financial year to further drive digital demand; and
- launching its first virtual sports and racing products in the Northern Territory in the 2017 financial year.

423. I note further that the statement of Robert Cook includes a board paper describing strategies for Tatts' wagering operations. Consistent with the information above, [Confidential to Tatts] [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

424. On this basis, I conclude that, aside from the introduction of specific TAB branding, none of the strategies giving rise to the revenue increases anticipated by Tabcorp and described by Mr Johnston are likely to be the result of or specific to the proposed transaction. There is no information made available by Mr Johnston that would definitively establish the value of the TAB brand in comparison to the UBET brand, or the effect of the change on revenues.

425. In relation to South Australian keno, Tabcorp assumes additional revenues of [Confidential to Tabcorp] [REDACTED] resulting from an initial investment of [Confidential to Tabcorp] [REDACTED] and ongoing costs of [Confidential to Tabcorp] [REDACTED] per year. This would appear to be represent an enormously profitable business opportunity for Tatts. To the extent that these benefits are available without the addition of Tabcorp, Tatts would have a strong incentive to make similar investments.

5.3.4 Pass through of direct benefits to the racing industry and other bodies

426. Mr Johnston notes that both cost savings and revenue increases will lead to increases in the profitability of the merged entity. Some [Confidential to Tabcorp] [REDACTED] of this increased profitability is assumed to be passed through to the racing industry through profit-sharing arrangements, to the Federal Government through taxation, to state government, and to retail venues and sporting bodies.

427. I state at section 5.3.2 that these revenue increases are achieved through higher yields (effectively, higher prices) on punters. In my opinion, this will give rise to a welfare loss, and not the public benefit that is contended by Tabcorp.

428. For the cost saving element, the recipients of those saving is also important to understanding the extent to which, if at all, productive efficiencies achieved by the proposed transaction may give rise to public benefits. I consider below how the flow of increased profits to the two largest recipients of the cost savings may affect the estimation of public benefits.

⁴⁸² [HIGHLY Confidential to Tatts] [REDACTED]

Increased taxation

429. Of the [Confidential to Tabcorp] [REDACTED] of cost savings achieved through eliminating duplication, [Confidential to Tabcorp] [REDACTED] is assumed to be paid to the federal government as corporate income tax and GST. An assumption underlying these cost savings is that Tabcorp has material fixed costs which would be duplicated in the merged entity.
430. The payment of tax to government is not, by itself, a public benefit but a transfer from one section of the community to another. The increased taxation that would result from the merger is therefore just one aspect of how the merged entity would share the benefits that it accrues from the merger.
431. However, it is also relevant to consider how the tax take may be negatively affected by the merger. For example:
- depending upon the cost structure of suppliers and the markets in which they are engaged, the elimination of payments to [Confidential to Tabcorp] [REDACTED] resulting from costs savings may result in lower tax payments from these parties; and
 - a loss of wagering revenue earned by corporate bookmakers as a result of revenue increases accruing to the merged firm is likely to give rise to lower taxation for these businesses.

432. These potential leakages of tax have not been accounted for by Mr Johnston's analysis.

Increased funds to the racing industry

433. Where this higher contribution arises from higher average prices, then it does not follow that the higher funding for the racing industry results in net benefits. Further, to the extent that increased funding to the racing industry gives rise to public benefits, it does not follow that the proposed merger is the only way to achieve these benefits.
434. The current contributions reflect government policies have been developed, at least in part, to address the free-rider problem noted by Dr Simes.⁴⁸³ In the 1960s, off-course bookmakers threatened to undermine the racing industry funding, which relied largely on spectator admission fees and fees paid by on-course bookmakers. In response, governments granted exclusive licences for the provision of off-course wagering to government-owned TABs that ensured the racing industry was paid for its products through agreements between the TABs and local racing authorities.⁴⁸⁴
435. When corporate bookmakers emerged in the 1990s, there was no regulatory requirement to compel them to pay product fees to the racing industry. By way of response to this development, the governments of New South Wales, Victoria, South Australia, Queensland and Tasmania enacted 'race fields legislation' that required corporate bookmakers to pay the racing industry for the right to use and publish racing fields.⁴⁸⁵
436. Race fields legislation enacted in New South Wales, Victoria, South Australia, Queensland, Western Australia, the ACT and Tasmania also addressed distortions in local racing industry funding between jurisdictions that had arisen from a 'gentlemen's agreement' that allowed TABs and bookmakers to accept wagers on interstate racing while paying only their local racing industry. The legislation empowered racing authorities in each jurisdiction and for each code, to set the product fee for the use of racing fields information by wagering operators across Australia.⁴⁸⁶
437. These examples reflect the ability of policymakers to respond to changing market circumstances. Although current government policies set a higher contribution on the totalisator agencies, it would be

⁴⁸³ Statement of Ric Simes, 9 March 2017, p 14, paras 80-82.

⁴⁸⁴ Productivity Commission, *Gambling – inquiry report – volume 2*, February 2010, pp 16.4-16.5.

⁴⁸⁵ Productivity Commission, *Gambling – inquiry report – volume 2*, February 2010, p 16.5.

⁴⁸⁶ Productivity Commission, *Gambling – inquiry report – volume 2*, February 2010, pp 16.18-16.20.

reasonable to expect that the current funding model will continue to be rebalanced, in the event the existing contribution gap contributes to a gradual shrinkage of the funding for the racing industry.

438. Further, the statement Giles Thompson notes that [Confidential to Racing Victoria] [REDACTED]

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439. Consistent with these observations, projections of increased funding to the racing industry, or any benefits that may be contingent on this, should not be taken to be a public benefit that is specific to the proposed transaction. To the extent there may be public benefits from such increased funding, other mechanisms are available for this to be delivered that do not require the proposed merger to proceed.

5.3.5 Profits made by foreign entities

440. I note in section 5.3.1 that Dr Simes' analysis does not assess any direct public benefits arising from Tabcorp's contended revenue increases. However, Dr Simes does assume that the proposed transaction would nonetheless give rise to indirect public benefits because it will cause the substitution of domestic for imported wagering products.

441. Dr Simes' categorisation of this revenue as a public benefit rests on his assumption that half of the revenue increases contended to accrue to the merged firm would come at the expense of wagering services otherwise provided by corporate bookmakers, and that these corporate bookmakers may, to some extent, be foreign owned and operated.⁴⁸⁸

442. Dr Simes estimates the present value of public benefits associated with this transfer of [Confidential to Tabcorp] [REDACTED]. His assessment assumes that 50 per cent of the additional wagering revenue to Tabcorp, amounting to [Confidential to Tabcorp] [REDACTED], substitutes for overseas produced goods and services.⁴⁸⁹

443. In my opinion, the public benefit associated with the substitution of imports is likely to be insubstantial or zero. My reasoning is that:

- I understand that Australian and New Zealand jurisprudence has previously taken benefits accruing to foreign-owned firms and their shareholders as not to be counted as a public detriment unless these amount to 'functionless monopoly rents';⁴⁹⁰ and
- I state at section 5.3.3 above that many of the revenue increases claimed to result from the merger are not specific to the proposed transaction and may be pursued by Tatts in any case, suggesting that they should not be attributed to the merger.

444. Even if some weight were to be given to a shift in revenues from entities that have some degree of foreign shareholding to those that have a lesser degree of foreign shareholding, on Tabcorp's own estimates, a significant proportion of these revenue increases arises from punters paying more to the merged entity than they would have paid for the same service to corporate bookmakers. Rather, in my opinion, the higher prices paid by punters for services if the proposed transaction were to proceed is not consistent with the creation of public benefits but, rather, is consistent with the theory of harm that I set out in section 4.3 above.

445. In contrast, to the extent that premium punters shift their wagering to offshore operators as a competitive response to the merger of Australia's two totalisator operators, this would give rise to a

⁴⁸⁷ Third statement of Giles Thompson, 13 April 2017, p 11, para 46.

⁴⁸⁸ Statement of Ric Simes, 9 March 2017, p 8, paras 46-49.

⁴⁸⁹ Statement of Ric Simes, 9 March 2017, p 9, para 53.

⁴⁹⁰ Re Qantas Airways Limited [2004] ACompT 9 (12 October 2004), paras 192-199; and Telecom Corporation of New Zealand Ltd v Commerce Commission [1991] 4 TCLR 473, para 531.

public detriment. Such a transfer of economic activity offshore is quite different from the question of whether profits made on Australia-based economic activity may fall to domestic or foreign shareholders and exceed a normal return on capital. The public detriment from any offshore leakage of wagering revenue arising as a result of the merger also extends to the potentially illegal nature of such gambling activity, the inability for the racing industry to capture the relevant product fees, and the loss tax revenue to Australian governments.

6. Conclusion

446. In this section I draw together the analysis I present in sections 4 and 5 to derive my conclusion in relation to the net public benefit of the proposed transaction between Tabcorp and Tatts.
447. I explain in section 4 that the proposed transaction will lessen competition in:
- the provision of online and over-the-telephone wagering services;
 - the acquisition of racing media rights; and
 - the acquisition of the Victorian wagering licence in 2024 and for the potential sale of the WA TAB.
448. The consequence of the lessening of competition in these markets will be:
- higher take-out rates and yields, ie, higher prices for wagering customers;
 - lower utility from wagering, because fewer punters will be able to view racing media; and
 - less innovation, particularly in the ways in which digital vision can be used to improve the wagering experience.
449. Each of the above effects will cause a public detriment in its own right, as well as reducing the level of wagering generally, which is an additional form of public detriment.
450. I explain in section 5 that the public benefits of the proposed merger are substantially lower than those contended by Tabcorp, and are limited to:
- cost savings resulting from the merger, but only after taking account of the detrimental effects of these savings on suppliers of inputs; and
 - a small quantity of additional sales made by the merged entity that are not captured from other bookmakers.
451. I also explain that public benefits should only be accounted for where they provide value to the Australian community. Economic rents earned by the merged entity through the exercise of market power are unlikely to provide any value to the community, as compared with leaving this money in the hands of punters.
452. Although I am not able to quantify many of the competitive effects of the proposed transaction, in section 5.3.2 I identify that the revenue increases contended by Tabcorp include:
- **[Confidential to Tabcorp]** [REDACTED] per year of competitive detriment arising from the merged entity no longer providing wagering services that Tatts otherwise would have provided; and
 - **[HIGHLY CONFIDENTIAL derived confidential information]** [REDACTED] per year of transfers from wagering customers to the merged entity consequent upon the increase in yields (prices) it would be able to earn from (charge) punters.
453. These effects alone are substantial. However, the competitive detriments from the proposed transaction extend well beyond the higher prices and lost services quantified by Tabcorp. The combining of two forms of structural advantage available to the merged entity only through the leverage of monopoly rights and exercise of market power will cause much greater, long term detriment to prices and output. Given its widely acknowledged role in driving wagering activity, the loss of innovation through more restricted access to digital vision will also constrain the near and long term growth of wagering activity.

454. In my opinion, the competitive detriments arising from the merger of Tabcorp and Tatts will dwarf its limited public benefits, such that it can be said with confidence that the proposed transaction will give rise to a significant net public detriment.

7. Declaration

I declare that I have made all the inquiries I believe are desirable and appropriate (save for any matters identified explicitly in my report) and that no matters of significance I regard as relevant have, to my knowledge, been withheld from the Court.



Greg Houston
21 April 2017



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