

IN THE AUSTRALIAN COMPETITION TRIBUNAL

ACT 1 of 2017

Re: Proposed acquisition of Tatts Group Limited by Tabcorp Holdings Limited

Tabcorp Holdings Limited (Applicant)



Applicant's Opening Submissions

This document contains confidential information which is indicated as follows:

- [HIGHLY Confidential to Tabcorp] [.....]
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- [HIGHLY Confidential to Tatts] [.....]
- [Confidential to Tatts] [.....]
- [Confidential to Tabcorp and Tatts] [.....]
- [HIGHLY Confidential to Tabcorp and Racing.com] [.....]
- [HIGHLY Confidential to Tabcorp and Federal Group] [.....]
- [HIGHLY Confidential to Tabcorp and CCV] [.....]
- [HIGHLY Confidential to CrownBet] [.....]

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**A OVERVIEW**

1. The present case has the unusual feature that, whilst Tabcorp and Tatts are large businesses in similar fields, their main operations are geographically distinct and non-overlapping. This precludes any issue about market concentration arising from the combination of their main operations. Further, each of Tabcorp and Tatts face very significant competition from corporate bookmakers who have substantially increased their market share in the Australian wagering market over the previous decade.
2. In relation to the limited areas of overlap, the proposed merger raises no serious question of public detriment because there will remain substantial competition post-merger. At the same time, however, the similarities in the companies' operations give rise to significant cost and revenue synergies from the proposed transaction. In circumstances where Tabcorp and Tatts have a long history of significant contribution to the racing industry in Australia, the benefits of those synergies will flow not only to the merging entities and the broader economy but to the racing industry as a whole.
3. The merger will support the long term sustainability of the Australian racing industry. By global standards, Australia has a significant racing industry – with more races, higher prize money and better horse breeding than most other racing nations. Racing forms part of our national conversation.<sup>1</sup> This strength is the result of long term co-dependency between the racing and wagering industries. Under commercial and regulatory arrangements in place in most states and territories, the exclusive TAB licensees in each jurisdiction share wagering revenue directly with local racing industries and this provides most of the funding needed to maintain and grow the sport. This feature of the industry means that, unlike other mergers, the public benefits associated with the proposed merger are both clear and can be guaranteed to be passed through to a range of third parties.
4. This proposed merger takes place in the context of a highly dynamic industry. Over the last decade, particularly following the High Court's decision in *Betfair*, there has been extensive shift in consumer preferences and market share away from totalisator wagering products to fixed odds products, and from retail “bricks and mortar” wagering (in agencies, pubs and clubs) to online wagering with corporate bookmakers using mobile devices. These trends have meant that online corporate bookmakers have dominated the growth of online wagering revenue in Australia for both sports and racing over the last decade and have taken significant market share from Tabcorp and Tatts. The impact on totalisator products has been particularly significant, with wagering on such products declining significantly in absolute terms, and even more significantly in relative terms.

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<sup>1</sup> Statement of Andrew Harding at [11].

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5. Corporate bookmakers (a number of which form part of global wagering businesses) have a competitive advantage compared to the State TABs by virtue of operating in a lower-cost environment. These competitors operate from low-tax jurisdictions within Australia and without the industry funding, retail distribution costs or many of the other regulatory obligations borne by Tatts and Tabcorp.
6. The merger will allow the merged entity to better compete against the corporate bookmakers. This is not because it will have any increased market power, but because it will be a more efficient, lower cost operator that is in a position to supply a wider range of more attractive products, including having access to a national and diversified wagering business (and control over pari-mutuel wagering pools) and retail distribution network that will enable it to strengthen and invest in the tote product and the retail business model.
7. In relation to the limited areas of current overlap between Tabcorp and Tatts, a close examination of these reveals that future competition is unlikely to be detrimentally affected by the merger, particularly in light of existing competition, the dynamics of the regulatory environment and the actions and commitments of Tabcorp in connection with the proposed acquisition. The identified theories of harm are highly speculative and at odds with commercial reality.
8. Tellingly, the supposed victims of the theorised anti-competitive effects do not agree that they will be adversely affected. Instead, they are supportive of the merger, and in many cases expressly reject the logic by which the putative harm is speculated. By contrast, the central opponents of the merger are trade rivals of Tabcorp or Tatts. Racing Victoria is in the Racing.com joint venture, where Racing.com is a trade rival of Sky. CrownBet is a direct trade rival, as is Betfair. Those parties have the usual commercial agenda of a trade rival. In relation to the supposed victims:
  - (a) With the exception of Victoria, the racing industry across Australia is supportive of the merger. The merger is supported by Racing NSW, Harness Racing NSW, NSW Greyhound Breeders, Owners, Trainers Association, Wyong Racing Club / Provincial Racing Association of NSW, Racing Queensland, Brisbane Greyhound Racing Club, Albion Park Harness Racing Clubs, RWWA, Perth Racing, Thoroughbred Racing SA, Harness Racing SA, Greyhound Racing SA, Canberra Racing, Canberra Harness Racing Club, Thoroughbred Racing NT, Darwin Turf Club, Darwin Greyhounds Association, Australian Trainers' Association, and Australian Jockeys' Association.
  - (b) The theory that the merger will impact on competition for media rights is expressly rejected by the rights holders themselves. It is expressly rejected by Dr Forbes, CEO of Racing Queensland, Professor Yovich, CEO of Perth

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Racing, Mr Watters, CEO of Thoroughbred Racing SA, Mr Matthew Corby of Greyhound Racing SA, Mr Peter V'landys of Racing NSW, Mr Dumesny, CEO of Harness Racing NSW, Mr Vaughan Lynch of Tasracing, Mr Andrew O'Toole of Thoroughbred Racing NT, and Mr Gregory Aldam of Darwin Greyhounds Association.<sup>2</sup> Professor Yovich also identifies that the "solutions" proposed by Racing.com would benefit Racing.com but harm competition for rights and thus rights holders. It is readily apparent that the alleged impact on competition for media rights is an artificial construct of Racing.com and Racing Victoria, to which the ACCC has become captive.

- (c) The theory that the merger will be harmful for the acquisition of RWWA or of licences from State Governments has been expressly rejected by Mr Burt, CEO of RWWA. Significantly, no State government has opposed the merger in any way.
- (d) In respect of pooling services, RWWA is the only acquirer of such services in Australia and its evidence is supportive of the merger.<sup>3</sup>
- (e) The theory that the merger will be harmful for retail venues (including by a theorised leveraging of Sky Racing in former Tatts states) is rejected in the evidence from the various retail bodies, including peak hotel and clubs bodies. For example, it is rejected by Mr Stephen Ferguson, Australian Hotels Association (**AHA**) National, Mr Leon Wiegard, Community Clubs Victoria, Mr David Curry, Australian Leisure and Hospitality Group, Mr Patrick O'Sullivan, AHA Victoria, Mr Bernie Hogan, Queensland Hotels Association, Mr Steve Old, Tasmania Hotels Association, and Mr Ian Horne, AHA SA.<sup>4</sup> The only real exception to this is ClubsNSW, which has recently entered into a commercial partnership with CrownBet.

It is difficult to imagine more powerful evidence that the ACCC's theories are not connected to reality. The Tribunal would be very slow indeed to conclude that all of these people do not know their industry, or are incompetent or confused.

9. Beyond these matters, the Australian Competition and Consumer Commission (**ACCC**) and intervenors (several of whom are Tabcorp's close competitors) have raised a raft of additional issues which are irrelevant to the question to be determined by the Tribunal because they exist pre-merger and are unaffected by the proposed merger. Indeed, it is apparent that some industry participants are dissatisfied with various aspects of the way in which aspects of the industry operate today and seek to

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<sup>2</sup> In the case of Forbes, Yovich, Watters, V'landys, Dumesny, Lynch and Aldam, see their reply statements.

<sup>3</sup> See, in particular, the reply statement of Mr Burt.

<sup>4</sup> See their reply statements in this regard.

enlist the Tribunal to effect changes in their commercial interests. Such concerns are wholly irrelevant to the task of Tribunal and ought properly be disregarded.

10. When the correct analysis is undertaken, it is apparent that the merger will lead to significant and enduring public benefits which will be widely shared with a wide range of stakeholders (many of whom are publicly supporting the merger before the Tribunal). At the same time, the proposed transaction involves no real likelihood of anticompetitive harm. In these circumstances, the transaction clearly meets the threshold for authorisation.

## **B BACKGROUND – THE RACING INDUSTRY**

### **B.1 Agreed facts**

11. This section sets out some of the key features of the operation of the racing industry and the wagering business conducted by the merger parties.
12. The parties are working to prepare an agreed “primer” of facts which will contain a more extensive description of the industry. That document has not been agreed at the time of preparing these submissions.

### **B.2 The Australian racing industry**

13. Australia has a large and successful racing industry.<sup>5</sup> It is divided on State and Territory lines and comprises the three codes of thoroughbred, harness and greyhound racing (with the exception of the Northern Territory, which does not have harness racing).<sup>6</sup>
14. Racing clubs, which are all non-profit organisations, operate in metropolitan, provincial and country areas across Australia and provide racing ‘products’ by organising and conducting race meetings.<sup>7</sup> Those race meetings are attended by the public and are broadcast around the country and overseas.
15. The racing industry makes a sizeable overall economic and social contribution to the Australian community. The activities associated with the racing industry are estimated to contribute \$11.3 billion annually to gross domestic product. The economic activity generated by the racing industry activity supports almost 83,000 fulltime equivalent jobs (FTE) and delivers household income impacts of \$5.8 billion.<sup>8</sup>

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<sup>5</sup> For example, in 2015 -2016, the thoroughbred code alone conducted over 19,000 races and paid out a total of over \$568 million in prize money as part of total returns of more than \$627 million: Harding Statement [11].

<sup>6</sup> First Freeman Statement [78], Grant Statement [24], Gunston Statement [15] and O’Toole Statement [7].

<sup>7</sup> First Freeman Statement [78(a)], Dumesny [26].

<sup>8</sup> See IER Report at [15]-[17]; see also Grant Statement [26], Nicholl Statement [19], Yovich Statement [33], Jewell Statement [46], Corby Statement [28], Dumesny Statement [31], Lynch Statement [17]

### B.3 Wagering and the racing industry

16. Wagering, or betting, on races is a key part of the racing industry. Wagering operators take bets from the public about the outcome of particular races, or multiple races or events. Customers who place a bet are generally referred to as punters.
17. The business of wagering operators is reliant upon the quality of the racing product. The better the races, the more is likely to be wagered.<sup>9</sup>
18. There are, generally, two forms of wagering:
  - (a) Pari-mutuel wagering: in this form of wagering, the operator takes bets from punters and the money bet goes into a pool held by the operator. Once the race is run, the operator takes a predetermined share from the pool of bets and returns the remainder to the winning punters;
  - (b) Fixed Odds wagering: in this form of wagering, punters are informed of the odds they will receive at the time bets are placed. Those odds do not change regardless of developments or betting patterns after the bet is placed
19. Pari-mutuel wagering is only offered by the State TABs, referred to as the “totalisator” or “tote”. Each state or territory has issued an exclusive licence such that only the State TAB has the right to conduct pari-mutuel betting.
20. The State TABs are operated by the following companies:
  - (a) by Tabcorp, in NSW, Victoria and the ACT;
  - (b) by Tatts, in Qld, SA, NT and Tas; and
  - (c) by RWWA (a government owned entity) in WA.
21. The State TABs, in each State or Territory also have an exclusive licence to conduct “retail” wagering. That is, operating physical outlets through which punters can come and place bets.
22. Other companies may carry out wagering operations online or by telephone. The other wagering operators are referred to as “corporate bookmakers”. The larger operators in the Australian market are all corporations incorporated in the Northern Territory.
23. Tabcorp distributes retail wagering products through various retail venues. These include dedicated retail shopfronts (such as TAB agencies, which are owned by Tabcorp) as well as third party licensed premises (such as hotels, pubs, clubs and live sites) with operator assisted and self-service terminals. Tabcorp pays

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<sup>9</sup> Gunston Statement [25], Yovich Statement [19], Jewell Statement [58].

commissions based on wagering turnover to these third party retail venues under a range of commercial agreements.<sup>10</sup>

#### B.4 Funding of the racing industry

24. One reason for the success of the Australian racing industry has been the industry's strong and stable funding arrangements.<sup>11</sup>
25. Unlike other sports, which are generally funded through ticket sales, sponsorship and media rights, the racing industry is heavily reliant on funding from wagering.<sup>12</sup>
26. In general terms, State racing industries receive funding from wagering operators as follows:
  - (a) **Product fees:** These are payments made by the State TABs to racing clubs based on the State TAB's revenue or turnover. These fees are not paid by other wagering operators.
  - (b) **Race field fees:** These are fees paid by wagering operators to the racing clubs which carry out the racing events. Race field fees are calculated based on a certain percentage of the revenue or turnover obtained by the wagering operator on the races. Race field fees are paid by both State TABs and other wagering operators.
27. The arrangements in the major jurisdictions can broadly be summarised as follows:
  - (a) **Victoria:** Tabcorp has a joint venture arrangement with the racing industry under which it shares 50% of profit from its Victorian wagering operations, and a range of other specific funding commitments.<sup>13</sup>
  - (b) **NSW:** Under the NSW Racing distribution agreement, Tabcorp has a range of funding obligations – its obligations under the NSW Racing Distribution Agreement essentially equate to a payment of 25% of the profit of NSW TAB's wagering business,<sup>14</sup> as well as various other specific payments.<sup>15</sup>
  - (c) **Queensland:** Under the Race Wagering Licence, Tatts makes a range of payments to the Queensland racing industry, including an annual fixed fee of \$15 million (indexed annually) and 39% of gross wagering revenue.<sup>16</sup>

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<sup>10</sup> First Freeman Statement, [240] – [242].

<sup>11</sup> Grant Statement [57] – [58], Gunston Statement [25], Harding Statement [12],[20] and Raedler Statement [59].

<sup>12</sup> First Freeman Statement, [80-[82]].

<sup>13</sup> First Freeman Statement, [230].

<sup>14</sup> V'Landys Statement, [8].

<sup>15</sup> First Freeman Statement, [232].

<sup>16</sup> First Cooke Statement, RC-1, TAT.001.015.0455.

- (d) **South Australia:** Under the agreements with the South Australian industry, Tatts contributes 39% of net wagering revenue, less race fields payable to interstate racing bodies, and an additional 6% of all net betting revenue attributable to racing.<sup>17</sup>
28. Funding of the racing industry in Tasmania, the ACT and the NT is carried out differently. In Tasmania and the ACT, the government funds the industry directly and fees (other than race field fees) are not directly payable by Tatts (for Tasmania) or Tabcorp (for the ACT). In the Northern Territory, the NT Government receives various payments from Tatts. The details of those payments are confidential and they have not been disclosed in the evidence before the Tribunal.
29. A substantial proportion of the funding of the racing industry comes from the State TABs.<sup>18</sup> Strong and stable funding from totalisator wagering and the State TABs has been a major reason for the Australian racing industry achieving its current scale and strength.<sup>19</sup>

#### **B.5 The rise of corporate bookmakers**

30. Over the last decade, the rise of online corporate bookmakers has had a significant effect on wagering and, by reason of that, the racing industry. Over recent years:
- (a) State TABs share of wagering turnover has declined from an estimated 73% in FY06 to 59% in FY15, while the estimated share of corporate bookmakers has increased from 17% to 38% over the same time period;<sup>20</sup>
- (b) the amount of wagering carried out through retail has fallen from 54% to 33% over the same time period.<sup>21</sup>
- (c) the effect of those changes has been:<sup>22</sup>
- (i) a \$1.9 billion decline in wagering turnover received by State TABs in respect of pari-mutuel betting between FY06 and FY 15 from \$12.6 billion to \$10.7 billion; and
- (ii) at the same time, a \$9.3 billion increase in turnover on fixed odds racing wagering over the same period from \$3.6 billion to \$12.9 billion.

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<sup>17</sup> First Cooke Statement, RC1, TAT.001.015.0830.

<sup>18</sup> First Freeman Statement, [305]; Dumesny Statement, [57]; Gatehouse Statement, [35]; Gunston Statement, [29]; Jewell Statement, [98]; Nicholl Statement, [42]; Raedler Statement, [72]; Scott Statement, [24]; Yovich Statement, [19].

<sup>19</sup> Grant Statement, [57]-[58]; Gunston Statement, [25]; Harding Statement, [12], [20]; Raedler Statement, [59].

<sup>20</sup> First Freeman Statement, [290A].

<sup>21</sup> First Freeman Statement, [254].

<sup>22</sup> First Freeman Statement, [263].

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- (d) those structural changes to the industry are also reflected in Tabcorp's and Tatts' own recent revenue and turnover figures:
- (i) Tatts turnover figures demonstrate that between FY12 and FY16, totalisator turnover has decreased by approximately **[Highly Confidential to Tatts]** [REDACTED] at the same time as turnover in fixed odds wagering increased by approximately **[Highly Confidential to Tatts]** [REDACTED],<sup>23</sup> and
  - (ii) Tabcorp's revenue figures show a fall in totalisator revenue of 2.1% in FY15 and 4.4% in FY16 at the same time as revenue in fixed odds racing wagering is increasing (by 33% in FY15 and 16.4% in FY16).<sup>24</sup>
31. Corporate bookmakers do not have the same close relationship with the racing industry and provide substantially less direct funding to it. For that reason, the move away from State TABs towards online, fixed-odds wagering from corporate bookmakers presents a significant threat to the revenue base of the Australian racing industry and has created significant challenges for the racing industry's funding model.<sup>25</sup> This is reflected in the evidence of those involved in the industry:
- (a) Racing industry witnesses describe corporate bookmakers as having "*exploited their considerable cost advantage over State TABs to compete fiercely*" with the effect that funding is "*drawn away*" from the racing industry "*because corporate bookmakers do not have the same level of funding commitments as the TAB*".<sup>26</sup>
  - (b) Venues involved in retail wagering have referred to having experienced "*a decline in wagering revenues as punters gravitate to corporate bookmakers*" and the fact that this "*has substantially undermined the feasibility of the current model*".<sup>27</sup>
32. Corporate bookmakers also have a competitive advantage compared to the State TABs by virtue of operating in a lower-cost environment. By supplying services using licences issued in the Northern Territory and solely through a digital channel, corporate bookmakers avoid a range of significant costs including:
- (a) a range of funding obligations to the racing industry;

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<sup>23</sup> First Cooke Statement, [135].

<sup>24</sup> First Freeman Statement, [265]; Second Freeman Statement, [163].

<sup>25</sup> Dumesny Statement [75]; Jewell Statement [98]; Nicholl Statement [42]; Scott Statement [35]; Raedler Statement [72].

<sup>26</sup> V'Landys Statement, [22]; Jewell Statement, [13], see also Innes Statement, [36]; Watters Statement, [29].

<sup>27</sup> Wiegard Statement, [27]; Horne Statement, [11]; Ferguson Statement, [35].

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- (b) significant state government wagering taxes, as Northern Territory state government taxes are capped at \$575,000 per year;
- (c) providing for staff and operations 'on the ground' in the various states and territories; and
- (d) other costs associated with maintaining a retail network, including capital investment, technology and promotional activities.

### C THE PROPOSED TRANSACTION

33. The transaction for which the parties seek authorisation is a purchase by Tabcorp of the shares in Tatts.
34. The effect of the proposed transaction is as follows:
- (a) Tabcorp purchases Tatts' wagering operations. Tabcorp would step into the shoes of Tatts' various operations, so the merged entity would be the holder of the exclusive totalisator and retail wagering licences in all States and Territories other than Western Australia.
  - (b) Tabcorp purchases Tatts' Keno and lottery services.
  - (c) Tabcorp purchases Tatts' electronic gaming services, but undertakes to divest one particular part of Tabcorp's business in Queensland. This is described in more detail in section J.2, below.

### D LEGAL PRINCIPLES

35. The legal principles which the Tribunal is required to apply are not controversial. Some matters have been set out in section 3 of the ACCC Report.
36. The central element of the legal test for the Tribunal is the "with and without" nature of the enquiry. This was described by the Tribunal in *Re AGL* as follows:<sup>28</sup>
- In order to assess the relevant public benefits and detriments likely to arise from a proposed acquisition, the Tribunal applies what is often described as a "future with and without test" ... This test is not a "before and after" test but one in which the Tribunal is to appraise the future in which the acquisition does take place "in light of the alternative outcome, were the acquisition not to take place" ...
37. The Tribunal must assess the benefits or detriments referred to by the parties by reference to whether they arise from the merger. That assessment must be based in the real world and not rest on speculation or theory alone.<sup>29</sup>

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<sup>28</sup> *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 at [169].

<sup>29</sup> *Application by Sea Swift Pty Limited* [2016] ACompT 9 at [42], referring to comments of French J (as his Honour then was) in *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137

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38. Public benefit is a wide concept, which may include anything of value to the community generally so long as it is brought about by the merger.<sup>30</sup> Benefits not widely shared may be benefits to the public, but the extent to which any benefits extend to ultimate consumers is a relevant matter in the weighing process conducted by the Tribunal.<sup>31</sup>
39. It will be seen that most of the complaints made by the various intervenor and ACCC witnesses:
- (a) are about matters that are unchanged by the merger;
  - (b) seek to benefit the competition position of individual competitors (i.e. the intervenors themselves), rather than the competitive process; or
  - (c) pay insufficient attention to the commercial realities of the racing industry, but are based on speculation and theory.
40. In accordance with the authorities, those matters are irrelevant to the Tribunal's weighing process.

### E PUBLIC BENEFITS

41. The public benefits that arise from the Proposed Transaction are significant and unique because of the close and co-dependent relationship between State TABs, the racing industry and retail wagering venues.
42. Unlike other mergers, where the degree to which benefits are likely to be shared outside the merging parties may be uncertain, in this case the commercial arrangements in place between Tabcorp/Tatts and the racing industry in various states guarantees that cost and revenue synergies will be passed through to those industries.

#### E.1 Cost and revenue benefits the merged business

43. In terms of quantifiable benefits, Tabcorp estimates that the Proposed Transaction will bring about operational, performance and strategic improvements to the business operations of the merged entity that will result the following quantifiable benefits:
- (a) cost savings of at least **[Confidential to Tabcorp]** million per year;
  - (b) increased revenue of at least **[Confidential to Tabcorp]** million per year.

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FCR 317; [2003] FCA 1525 in respect of the test in s 50 of the Act (which applies equally to the assessment which the Tribunal is required to make under s 95AZH(1)).

<sup>30</sup> *Application by Sea Swift Pty Limited* [2016] ACompT 9 at [42], referring to *Application by Medicines Australia Inc* (2007) ATPR 42-164; [2007] ACompT 4 at [107], [118]-[119].

<sup>31</sup> *Application by Sea Swift Pty Limited* [2016] ACompT 9 at [42], referring to *Hospital Benefit Fund of Western Australia Inc v Australian Competition and Consumer Commission* (1997) 76 FCR 369 at 375-377.

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44. The costs savings will arise from Tabcorp creating a more efficient and effective combined wagering business which is better positioned to compete against the corporate bookmakers. Tabcorp's quantification of the expected costs savings is not seriously disputed.<sup>32</sup> Mr Hines (on behalf of the ACCC) and Mr Thompson (of Racing Victoria), seek to provide some limited criticisms of the way in which Tabcorp has estimated the costs of the transaction.<sup>33</sup> None of those criticisms can withstand scrutiny. They are largely based on misconceptions and have been answered in Tabcorp's reply evidence.<sup>34</sup>
45. The increased revenue is expected to arise from Tabcorp introducing its unique fixed odds risk management system and by making business improvements such as introducing new products, investing in more attractive retail venues (including through the rollout of technological improvements), and a re-branding of the Tatts business to the more recognisable 'TAB' brand, all of which are expected to result in substantial revenue improvements to the State and Territory TABs in which Tatts is the licensed operator (notably Queensland, South Australia, Tasmania and the Northern Territory).<sup>35</sup>
46. The evidence from the racing industry supports the proposition that Tabcorp will be able to improve Tatts' wagering business (which is recognised as being underperforming) and in so doing win back customers from corporate bookmakers.<sup>36</sup>
47. The ACCC and the intervenors assert that Tatts could make changes to its fixed odds risk management system either independently or by merging with any fixed odds wagering business.<sup>37</sup> These assertions do not withstand scrutiny. Tabcorp's fixed odds management system is unique and has been developed over 5 years at a cost of **[HIGHLY Confidential to Tabcorp]** million.<sup>38</sup> There is no support for a conclusion that Tatts would be able to replicate the performance of Tabcorp's system in the likely future without the merger.
48. It is further asserted by the ACCC and the intervenors that the projected fixed odds yield improvement represents a public detriment as a result of the Merged Entity no longer providing bets to customers on low yielding products.<sup>39</sup> The argument misunderstands the operation of Tabcorp's fixed odds risk management system. The

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<sup>32</sup> First Johnston Statement [28] – [45].

<sup>33</sup> Third Thompson Statement. Hines Report. ACCC Report [5.13] and [5.31] – [5.33].

<sup>34</sup> Second Johnston Statement [6] – [39].

<sup>35</sup> First Johnston Statement, [85].

<sup>36</sup> Dixon Statement [32], Watters Statement [30], Nicholl Statement [55], Forbes Statement [44], Aldam Statement [40], Innes Statement [40]

<sup>37</sup> ACCC Report [5.25], Third Thompson Statement [36], Mellsop's Statement [86(b)], Tyshing's Statement [463] and Hines Statement at [102].

<sup>38</sup> First Johnston Statement [68]; First Freeman Statement [327] – [335].

<sup>39</sup> Houston's Statement [396]. ACCC Report [5.35] – [5.41]

system does not reduce the price (odds) offered to punters or the overall number of bets but rather [HIGHLY Confidential to Tabcorp] [REDACTED]

[REDACTED].<sup>40</sup> For example, prior to Tabcorp's acquisition of ACTTAB in 2014, Tabcorp was already setting ACTTAB's fixed odds by commercial agreement. However, ACTTAB retained the responsibility for managing the fixed odds book (including its yield). Following the acquisition, the ACTTAB book was brought within Tabcorp's fixed odds risk management system which had the effect of increased fixed odds yield from [HIGHLY Confidential to Tabcorp] [REDACTED] in the first year without any change in the odds. The assertion also ignores non-price aspects of competition, including the increase in product available to consumers – for example, [Confidential to Tatts] [REDACTED]

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## E.2 Improvement of the merged business means better funding for the racing industry

49. The effect of those improvements to Tabcorp's business is the generation of [Confidential to Tabcorp] [REDACTED] million per year in direct additional revenue for the Australian racing industry.
50. The merger will support the long term sustainability of the Australian racing industry. Pari-mutuel wagering – which is only offered by the State TABs – has historically, and continues to be, a particularly important source of funding for the racing industry. Pari-mutuel wagering in Australia has seen significant declines as a proportion of total wagering activity over the past 15 years in Australia and these trends are expected to continue in the future.<sup>42</sup>
51. Declines in pari-mutuel turnover create challenges to the continued viability of pari-mutuel pools, because smaller pools are less attractive to customers.<sup>43</sup> Some pools are already becoming so small to the point that they are too unstable to sustain a large bet,<sup>44</sup> and in some cases totalisators have had to provide subsidies to pools to guarantee a minimum level of turnover.
52. Unsurprisingly, therefore, Tabcorp's application for authorisation has been supported by state and territory racing bodies (of all codes), national bodies representing horse trainers and jockeys as well as national and state bodies representing retail wagering

<sup>40</sup> First Freeman Statement [332]. See also Second Smith Report [38].

<sup>41</sup> First Cooke Statement, [34].

<sup>42</sup> First Freeman Statement, [248]; First Cooke Statement, [133(b)], [133(i)], [134(c)], [135(c)], [137(c)] and [139] - [141].

<sup>43</sup> First Freeman Statement, [159]; First Cooke Statement, [169] - [174].

<sup>44</sup> First Freeman Statement, [158(f)].

venues, newsagents and others across both Tabcorp's and Tatts' jurisdictions. The only notable exception is the Victorian Racing Industry. Their objection to the merger is explicable by their ownership of Racing.com which competes with Tabcorp (Sky) for the acquisition of media rights.

53. The level of support received from the industry is indicative of the significant benefits that the transaction offers to the racing industry and its partners. The merger will help to address the challenges to their funding model that have arisen as a result of the emergence of corporate bookmakers.<sup>45</sup>
54. Another matter that is raised by various corporate bookmakers is a question of whether the funding of the racing industry provided by State TABs reflects the 'consideration' paid for commercial benefits they obtain as exclusive pari-mutuel operators.<sup>46</sup> This is entirely irrelevant. Whether characterised as 'consideration' or not, State TABs do, in fact, contribute a greater proportion of their wagering turnover to the State racing industries than corporate bookmakers. That is why the State racing industries will benefit from State TABs winning business back from corporate bookmakers. For example, Mr V'Landys of Racing NSW provides evidence that:

*where wagers are placed through the NSW TAB, the NSW racing industry receives approximately \$6.10 in respect of every \$100 wagered with the NSW TAB. These receipts are irrespective of the racing code and State hosting the race. By contrast, the NSW racing industry receives race fields fees on average receive \$2.20 per \$100 bet on NSW thoroughbred racing from wagering operators other than TAB.*<sup>47</sup>

### E.3 Benefits to retail partners (pubs, clubs and other wagering venues)

55. The retail channel is the "milk run" of wagering – providing an important face to face distribution channel for wagering products.<sup>48</sup> Tabcorp presently distributes through approximately 2,785 retail outlets in Victoria and NSW of which 289 are agencies or sub-agencies and 2,496 are licensed venues comprising hotels, clubs and kiosks.<sup>49</sup>
56. Tabcorp has invested heavily in its retail outlets.<sup>50</sup> This is multi-faceted and covers essential capital investment to improve the attractiveness of wagering areas in venues, as well as direct financial rebates and cost reductions to assist with the day to day operation and viability of venues. For example:

<sup>45</sup> Aldam Statement, [56]; Corby Statement, [52] - [53]; Dixon Statement, [30] - [34]; Dumesny Statement, [88], [91]; Gatehouse Statement, [58]-[62]; Gunston Statement, [39]; Harding Statement, [40] - [43]; Innes Statement, [36] - [39]; Jewell Statement, [108] - [109]; Lynch Statement, [59]-[60]; Nicholl Statement, [57]; O'Toole Statement, [48]; Raedler Statement, [64]-[67]; Stubbs Statement, [73]; Watters Statement, [23]; Yovich Statement, [80].

<sup>46</sup> Tyshing Statement, [294]; Barton Statement, [28].

<sup>47</sup> V'Landys Statement, [25]

<sup>48</sup> O'Sullivan Statement [17]

<sup>49</sup> First Freeman Statement, [103]; [119].

<sup>50</sup> [Highly Confidential to Tabcorp and CCV] [REDACTED], [29],[44(a)],[44(b)],[44(c)], [44(d)], [44(e)]; Ferguson Statement [30]-[32] and [42]-[44].

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- (a) Mr Ferguson (CEO of the National Office of the Australian Hotels Association) refers to Tabcorp's partnership agreements with NSW and Victorian peak bodies, which provide a range of benefits to venues that improve the attractiveness of retail wagering for publicans, by providing access to direct capital and other funding to assist with capital refurbishment, marketing funds, partnership and racing vision rebates and sponsorship benefits.<sup>51</sup> AHA members having recently also been given access to Trackside (an animated wagering product) and digital commissions (which provide commission to venues for wagering placed with Tabcorp online).<sup>52</sup>
57. Tabcorp has funded equipment investments for retail venues, including approximately **[Confidential to Tabcorp]** ██████████ for self-service electronic betting terminals for licensed venues, and approximately **[Confidential to Tabcorp]** ██████████ million for signage upgrades in licensed venues. Tabcorp sees improving the ease of transactions at retail venues for customers as an important way to compete with services offered by corporate bookmakers, whose services are accessed by customers by easy to use mobile apps.<sup>53</sup> While Tatts has commenced more recently to rollout self-service terminals, this rollout has still not been completed and the technology delivered by Tabcorp is seen by retail venues as superior "by far" to the terminals deployed by Tatts.<sup>54</sup>
- (a) Mr Wiegard, from Community Clubs Victoria, comments that "Tabcorp has invested heavily in Victorian clubs" and that this investment continues to occur.<sup>55</sup> Under the Partnership Term Sheet entered into between CCV and Tabcorp on 1 April 2017 for a period of 5 years, Tabcorp provides a range of support to clubs in Victoria, including direct sponsorship of the CCV, capital investment in venues, marketing funds, partnership rebates, digital commissions, and discounted rental fees on equipment.<sup>56</sup>
- (b) Tabcorp works with venues to improve venue design and wagering revenues.<sup>57</sup> Between June 2011 and June 2016, Tabcorp provided development funds of approximately **[Confidential to Tabcorp]** ██████████ ██████████ to each of AHA NSW, ClubsNSW and AHA Victoria. These funds have been used for a range of initiatives, including the rollout of the animated

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<sup>51</sup> Ferguson Statement [31].

<sup>52</sup> Ferguson Statement [32].

<sup>53</sup> First Freeman Statement, [323].

<sup>54</sup> Curry [30]; Ferguson Statement [32].

<sup>55</sup> Wiegard Statement [44(a)].

<sup>56</sup> Wiegard [21].

<sup>57</sup> Wiegard Statement [44(f)].

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wagering product, Trackside, in New South Wales, TAB / Sports bar refurbishment packages, sports theatre upgrades, kiosk unit upgrades, and signage upgrades.<sup>58</sup>

- (c) Tabcorp's digital commissions program, which allows venue owners to obtain a commission on bets wagered using mobile devices within a retail venue, is much anticipated by peak industry body stakeholders in current Tatts states.<sup>59</sup>

58. By contrast, evidence from retail witnesses across Tatts states is that there has been a lack of effective investment in the retail channel by Tatts for a number of years, reflected in a loss of staff, a lack of investment in venues and technology, a weak brand, inferior product development and a failure to support sponsorship or other opportunities.<sup>60</sup> Retail witnesses do not expect any significant improvement absent the merger.<sup>61</sup> The proposed merger has therefore been welcomed by peak bodies representing retail venues across Tatts states.

### E.4 Benefits to other stakeholders and the Australian economy

59. Apart from the financial benefits to Tabcorp (which lead directly to the amounts that flow through to the racing industry), Tabcorp estimates further benefits to other stakeholders, including retail venues and governments, of **[Confidential to Tabcorp]** million per year and economic benefits for the wider Australian economy, valued at \$1.561 billion on a 15 year present value basis.

60. The direct financial benefits to other stakeholders arise from:

- (a) additional payments of **[Confidential to Tabcorp]** million to third party retail wagering and Keno venues (such as pubs and clubs) and sporting bodies;<sup>62</sup> and
- (b) approximately **[Confidential to Tabcorp]** million in additional State and Federal government taxes.<sup>63</sup>

61. The increased funding of the racing industry will provide a wide range of flow on effects that will benefit racing industry participants and stakeholders including jockeys, trainers, breeders and other service providers such as veterinary services,

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<sup>58</sup> First Freeman Statement, [322].

<sup>59</sup> Hogan Statement [34(a)]; Curry Statement [21].

<sup>60</sup> Hogan Statement [19], [22], [23], [25], [26] regarding the performance of Tatts in Queensland; Horne Statement, [23]-[25] regarding the performance of Tatts in South Australia. Old Statement [28], [32] regarding the performance of Tatts in Tasmania.

<sup>61</sup> Old at [32].

<sup>62</sup> First Johnston Statement, [24(b)-(c)].

<sup>63</sup> First Johnston Statement, [24(d)-(e)].

feed producers and hospitality service providers.<sup>64</sup> The increased funding can also be expected to increase prize money which leads to larger and more attractive race fields, greater crowd sizes and ultimately, a positive impact on wagering activity.<sup>65</sup>

62. The estimate of economic benefits for the wider Australian economy are based on Dr Simes CGE modelling technique to quantify the broader economic impact of some of the improvements. Mr Simes estimates that the net present value of the increase in Australia's gross national income that can be expected to arise from these benefits is approximately \$1.561 billion.<sup>66</sup>
63. Dr Simes modelling is subject to criticism by the ACCC and interveners. However, the modelling is a well-recognised tool in economics frequently employed throughout the globe for policy and related analyses.<sup>67</sup> Further, there can be no doubt that the transaction will produce substantial productive efficiencies which will have flow on benefit the Australian economy and the ACCC and the intervenors have produced no alternative mode of analysis.
64. In addition, the merger will also remove a commercial barrier to national pari-mutuel pools<sup>68</sup> which, if implemented, would make pari-mutuel pools more attractive and competitive in the national wagering market and produce further substantial synergies, which will in turn flow through to the racing industry and the Australian economy. Larger pools are more attractive to punters because they are more stable (individual bets have less effect on final dividends), provide for larger dividends and allow for the offering of a greater range of different bet types.<sup>69</sup> These pooling synergies have not been included in the estimated benefits referred to above.
65. In general, the merger is likely to arrest some of the decline of pari-mutuel betting against the products offered by the corporate bookmakers by making pari-mutuel betting more competitive with fixed odds betting. This benefits the racing industry (who take a greater share from this type of betting), and the Australian economy.
66. A number of the benefits identified in relation to both the racing industry and increased investment in the retail distribution network are likely to be of particular benefit to regional areas of Australia. This is particularly the case in relation to any increased likelihood of a national pari-mutuel pool, which has particular benefits for

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<sup>64</sup> Dixon Statement [30], Watters Statement [37], Corby Statement [77, 78], Charles Statement [42], Nicholl Statement [49], O'Toole Statement [52], Scott Statement [33], Weston Statement [47], Dumesny Statement [93], Innes Statement [39].

<sup>65</sup> Corby Statement [78]; Nicholl Statement [49]; Weston Statement [47].

<sup>66</sup> First Simes Report [145].

<sup>67</sup> Second Simes Report [8] – [19].

<sup>68</sup> First Johnston Statement, [127] First Cooke Statement, [176]; First Freeman Statement, [164] – [166].

<sup>69</sup> First Freeman Statement, [159].

smaller clubs and codes, as Mr O'Toole explains from the perspective of the Northern Territory.

#### E.5 Certainty and enduring nature of benefits

67. The Tribunal can have a high degree of confidence that the expected business improvements and the pass through of those improvements will be achieved. Apart from the robust nature of those estimates, Tabcorp has announced to the ASX that it expects to achieve EBITDA synergies and business improvements (net of benefits to the racing industry, Governments and retail partners) of at least \$130 million<sup>70</sup> and has **[HIGHLY Confidential to Tabcorp]** [REDACTED]

68. These benefits are not merely private benefits. They will be widely shared with parties other than Tabcorp. It is expected that approximately **[Confidential to Tabcorp]** [REDACTED] of the benefits that will arise from the cost savings and business improvements will flow to parties other than Tabcorp.<sup>72</sup>

#### F NO DETRIMENT ARISING IN THE SUPPLY OF WAGERING PRODUCTS

69. There is broad agreement among Tabcorp, Tatts, the ACCC and interveners that Tabcorp and Tatts compete with corporate bookmakers as part of a single national market for wagering products, including pari-mutuel and fixed odds wagering products sold through online, phone, retail and on-course channels.<sup>73</sup> It has been suggested to the Tribunal that Tabcorp and Tatts are each other's closest competitors in the national wagering market and that the merger will result in the removal of a key source of competitive rivalry, leading to higher prices and worse outcomes for wagering customers. It has been further suggested that competition between Tabcorp and Tatts is a key driver of innovation in the market and that this driver of dynamic efficiency will be lost.

70. The merger will not give rise to any detriment in the supply of wagering products in the national wagering product market for three reasons:

- (a) **Tabcorp and Tatts do not substantially overlap in the national wagering product market.** Retail exclusivity ensures that there is no actual or potential competition between Tabcorp and Tatts for the supply of wagering products through bricks and mortar retail outlets. The only direct competition

<sup>70</sup> First Attenborough Statement, [60] – [62].

<sup>71</sup> **[HIGHLY Confidential to Tabcorp]** [REDACTED]

<sup>72</sup> First Simes Report, [122].

<sup>73</sup> Houston Report, [154] – [156]; Mellsop Report, [238] – [243]; Barry Statement, [125] – [128].

that does occur between them takes place through telephone and digital channels where Tabcorp and Tatts compete more far closely with corporate bookmakers than they do with each other. Even in the area of digital and telephone wagering, their operations are focused on the states in which they respectively have retail exclusivity, such that neither company's totalisator business involves significant cross-border wagering.<sup>74</sup> The activity of Tabcorp customers located in Tatts' states accounts for only [Confidential to Tabcorp] [REDACTED]

- (b) **Corporate bookmakers will exert a sufficient constraint on the merged firm.** Since the decision in *Betfair*, the proportion of the national wagering market accounted for by fixed odds betting has increased dramatically and the share of totalisator betting has correspondingly decreased.<sup>76</sup> Similarly, corporate bookmakers have grown rapidly,<sup>77</sup> which growth had motivated competitive responses by pari-mutuel operators who have introduced their own fixed odds offerings and other new products to better compete with the corporate bookmakers.<sup>78</sup> As the ACCC has acknowledged, this constraint from corporate bookmakers will continue following the proposed merger.<sup>79</sup> Indeed, this constraint is likely to increase due to the continuing trend away from retail and totalisator betting towards online and fixed odds betting.<sup>80</sup> Despite some muted speculation to the contrary on the part of CrownBet and Racing Victoria,<sup>81</sup> there is no real reason to doubt that this trend will continue in the future. That is particularly so given that corporate bookmakers enjoy a range of advantages over retail totalisators, including that they do make significant contributions to the racing industry.<sup>82</sup>
- (c) **Tabcorp and Tatts are not close competitors for any particular customer group.** While Tabcorp and Tatts are currently two of only three suppliers of pari-mutuel wagering products in Australia (the third being the WA TAB), there is nothing to suggest that pari-mutuel products are properly regarded as comprising a distinct market or sub-market. To the contrary, the evidence demonstrates close competition between pari-mutuel and fixed odds wagering products for almost all customer groups. The only possible

<sup>74</sup> First Smith Report, [156] – [157], [172] – [173]; First Freeman Statement, [183].

<sup>75</sup> First Freeman Statement, [183].

<sup>76</sup> First Freeman Statement, [263]-[269]; First Cooke Statement [132]-[134]

<sup>77</sup> First Freeman Statement, [290A]; First Cooke Statement [132]-[134]

<sup>78</sup> First Freeman Statement, [319]-[345]; First Cooke Statement [132]-[134], [150]-[160].

<sup>79</sup> Tab 37 of DF-1 in First Freeman Statement, TBP.006.001.0231

<sup>80</sup> First Freeman Statement, [259]-[269]; First Cooke Statement, [132]-[134].

<sup>81</sup> Second Thompson Statement [39], [41]-[49]; Tyshing Statement, [99]-[106], [107]-[113], [257]-[259], [275]-[279].

<sup>82</sup> Pleatsikas Report [147], First Freeman Statement [283] - [284].

exception is in respect of high value or 'premium' punters who do not typically engage in fixed odds wagering. Even for these customers, however, the merger does not raise any competitive concerns. The evidence demonstrates that there is no particular competition between Tatts and Tabcorp for high value punters pre-merger (whether in terms of rebates offered to such punters or otherwise), and that such customers typically wager with multiple totalisators (including internationally).<sup>83</sup> Post-merger, the potential for such punters to wager both with the WA TAB and internationally will sufficiently constrain the merged firm. Notably, none of these high value punters, who have a significant financial interest in maintaining their existing rebates due to the size of their wagering turnover, have raised concerns about the merger.

## **G NO DETRIMENT ARISING IN RESPECT OF BIDDING FOR WAGERING LICENCES**

### **G.1 Introduction**

71. One issue raised by others in the proceedings is an alleged potential loss of bidding tension for the acquisition of wagering licenses granted by State and Territory governments, flowing from the fact that Tabcorp and Tatts have previously (along with others) bid for such licences.
72. The issue arises in respect of only two possible future opportunities to acquire such rights:
- (a) a possible privatisation of the Western Australian state-owned totalisator; and
  - (b) a possible competitive bidding process for the Victorian retail wagering licence in 2024 or 2026, upon the expiration of the existing licence held by Tabcorp.
73. A number of points should immediately be made in respect to these opportunities.
- (a) First, it is uncertain whether either of these opportunities will ultimately arise in fact. The potential privatisation of the WA TAB has been the subject of speculation for some time, but there remains a significant level of uncertainty as to whether and if so, when and on what terms, any privatisation will occur.<sup>84</sup> The original political proponents of privatisation are no longer in power in Western Australia and the newly incumbent Western Australian Government has not yet confirmed that privatisation of the TAB is even on its political agenda, let alone formally announced any decision as to the WA TAB's future. Similarly, the nature of any future bidding process for the

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<sup>83</sup> First Freeman Statement, [194(c)], [196]

<sup>84</sup> First Attenborough Statement, [73].

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Victorian wagering licence is unknown. There have been recent extensions of exclusive licences in New South Wales and Queensland, and the Victorian licence might likewise be extended without any competitive tender process.<sup>85</sup> In light of these matters, there simply may not be any opportunity to acquire State or Territory wagering licences in the foreseeable future. If that is so, it would follow that the merger would involve no competitive detriment in respect of the possible acquisition of such rights. At the very least, the issue is entirely speculative.

- (b) Secondly, there is considerable uncertainty as to the contours of the competitive landscape that will exist at the time any such opportunities do arise. Given the pace of change in the wagering industry in recent years, one thing that is certain is that the competitive landscape will be markedly different from now. For example, CrownBet is seeking to insert itself into the existing retail network with its recent deal with Clubs NSW. Mr Tyshing, CEO of CrownBet, explains (at [131]-[139]) that this is to obtain better access to punters who bet in retail venues. Tabcorp says that CrownBet's initiative is illegal, but if it is legal then it will significantly devalue retail exclusivity and therefore devalue that which State Governments (including Victoria) currently license. Competition in the wagering market will take many forms in the future, with Governments seeking to maximise revenue from those opportunities. It would be an error for the Tribunal to proceed as if the competitive dynamics that operated in respect of past bids for similar rights would be replicated in the future.
- (c) Thirdly, and following from the second point, if such opportunities do arise in the future, the State governments will be free to structure the opportunity in whatever manner best serves the interests of the State.<sup>86</sup> This is not a field of commerce in which there is a single, unitary product of fixed dimensions; rather, wagering licences can be structured and restructured in numerous different ways depending upon the goals and priorities of the Government in question.<sup>87</sup> There is historical precedent for this in Victoria where the Government introduced a raft of structural changes to the Victorian wagering licence when it was last put out for tender in 2008.<sup>88</sup> The flexibility that State Governments have in dealing with these rights is such that they will have considerable power to structure any future tendering process in a manner that best serves the interests of the State and exploits the nature of prevailing

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<sup>85</sup> First Attenborough Statement, [161].

<sup>86</sup> See First Menezes Report, [211], [228]-[232]; Second Attenborough Statement, [78]

<sup>87</sup> See Second Attenborough Statement, [44].

<sup>88</sup> Second Attenborough Statement, [45]; Barile Affidavit, [8]-[10].

competitive rivalry.<sup>89</sup> In these circumstances, there cannot be any serious concern that the proposed transaction will lead to any public detriment in this regard. It is thus entirely unsurprising that the relevant Governments have not complained about the proposed merger.

- (d) Fourthly, Tatts was not a real competitor to Tabcorp in Victoria on the last occasion, as Tatts did not make a complying bid. That highlights that an independent Tatts is not necessary to extract value from such rights bidding, particularly having regard to the countervailing power of the State Government, a matter explored in the expert evidence of Tabcorp.
- (e) Fifthly, there would be other viable bidders for the reasons set out below.

74. With these general observations in mind, it is convenient to consider the possible Western Australian and Victorian opportunities separately.

## G.2 Possible Privatisation of WA TAB

75. The possible privatisation of the WA TAB is beset with uncertainty. Even assuming that the WA Government determined to privatise the WA TAB, the manner in which such privatisation would be effected is unclear. A large number of significant structural issues would need to be resolved before the WA could be privatised.

**[HIGHLY Confidential to Tabcorp]** [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] The obvious complexity

involved in these matters indicates that the Tribunal cannot assume that the WA TAB will be privatised in the near future. Again, if such privatisation does not occur, there would simply be no market for the WA wagering licence (and associated assets) that could be affected by the proposed merger.

76. Even if the Tribunal were to assume that the WA TAB will be privatised, however, the evidence demonstrates that competition to acquire the WA TAB and the associated wagering licence is likely to be fierce despite the proposed merger. The reply statement of Mr Burt, CEO of RWWA, emphasises a lack of concern in this regard. That position is more credible than the ACCC's speculations. The WA TAB is a standalone, independent totalisator operator with all of the personnel, know-how and

<sup>89</sup> See First Menezes Report, [211], [228]-[232].

<sup>90</sup> First Attenborough Statement, [97].

<sup>91</sup> First Attenborough Statement, [98].

facilities and systems to operate a pari-mutuel wagering enterprise.<sup>92</sup> As such, it is an attractive acquisition target for corporate bookmaker seeking to either establish a retail wagering presence in Australia or to enter into the supply of pari-mutuel wagering products. This is not mere speculation: the evidence indicates that corporate bookmakers have already participated in recent bidding processes,<sup>93</sup> with Ladbrokes being a shortlisted bidder in the Victorian privatisation process.<sup>94</sup> Indeed, representatives of both Sportsbet and Ladbrokes will give evidence before the Tribunal of their desires to acquire State and Territory wagering licences. [HIGHLY

Confidential to Tabcorp] [REDACTED]

[REDACTED]

[REDACTED] This demonstrates that the merger will not create any competitive detriment in respect of any possible privatisation of the WA TAB.

77. Notwithstanding these features of the WA TAB, there is some suggestion in the evidence that the merger might make corporate bookmakers more disinclined to compete to acquire that business for two reasons:
- (a) first, because it would be necessary for any totalisator operator to ensure that they had access to racing vision from around the country at a commercially reasonable rate;<sup>96</sup> and
  - (b) second, because it would be essential for the owner of the WA TAB to pool with third party totalisator operators and because Tabcorp might prevent such pooling post-merger.<sup>97</sup>
78. Neither proposition should be accepted.
79. As to access to racing vision (and related matters, such as cooperation on race scheduling), the WA TAB and Tatts have successfully operated totalisator and retail businesses for many years without maintaining an integrated media business, and without any guaranteed access to national racing vision. That they have been able to do so is unsurprising. Several points should be made:

<sup>92</sup>Second Attenborough Statement, [16].

<sup>93</sup> First Freeman Statement, [99].

<sup>94</sup> First Freeman Statement, [99].

<sup>95</sup> First Attenborough Statement, [105]-[106]. Second Attenborough Statement, [14].

<sup>96</sup> Barry Statement, [148(b)]; Brown Statement, [29(b)]; [HIGHLY Confidential to CrownBet] [REDACTED]

<sup>97</sup> Barry Statement, [148(c)]; Brown Statement, [29(a)]; [HIGHLY Confidential to CrownBet] [REDACTED]



intense degree of competition that exists between corporate bookmakers, Tabcorp, Tatts and others in the national wagering market, and nothing to do with the proposed merger. Indeed, the concerns expressed by corporate bookmakers regarding access to racing vision principally relate to access to digital content for use in their existing products and platforms.<sup>102</sup> Those concerns are irrelevant to these proceedings; they exist pre-merger and are unaffected by the merger. That being so, the suggestion that the issue of access to racing vision relates also to future competition for wagering licences should be treated with considerable scepticism. There is no evidence to suggest that access to racing vision has ever previously been considered an impediment to bidding for such licences, and ample evidence to the contrary.

81. As to pooling, even if there were any concerns with respect to this issue (which there are not), they have been addressed by a commitment that Tabcorp has made to RWWA to maintain the current pooling arrangements until 2024.<sup>103</sup> **[HIGHLY**

**Confidential to Tabcorp]** [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

82. **[HIGHLY Confidential to Tabcorp]** [REDACTED]  
[REDACTED] is unsurprising given it has strong commercial incentives to ensure pooling with the WA TAB continues, regardless of who owns it. The WA TAB contributes **[Confidential to Tabcorp]** [REDACTED]  
[REDACTED] of the SuperTAB pool liquidity.<sup>106</sup> The merger does not diminish these incentives in any way.

### G.3 Possible Future Tender for Victorian Licence

83. Similar to the position with the WA TAB, there is considerable uncertainty as to when and how the Victorian Government will choose to deal with the Victorian wagering licence in the future. The current licence held by Tabcorp is due to expire in 2024 (though it can be extended by the Victorian Government to 2026).
84. Further, there are the other general points raised above.
85. Assuming that the Victorian wagering licence will be put out to tender for the period after 2024 or 2026, and even assuming that the rights are similar to those licensed

<sup>102</sup> See, e.g., Barry, [81], [85]-[86].

<sup>103</sup> Second Attenborough Statement, [21]; Second Freeman Statement, [30]-[34].

<sup>104</sup> Second Freeman Statement, [36].

<sup>105</sup> Second Attenborough Statement, [22].

<sup>106</sup> Second Freeman Statement, [39].

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now (which is a large assumption), it is apparent that the proposed transaction will not result in any significant diminution in the competition for such rights. Corporate bookmakers are credible and capable bidders for those rights in competition with Tabcorp. Any such bookmaker could acquire the necessary technology and know-how to operate a totalisator business from third parties who specialise in supplying totalisator systems.<sup>107</sup>

86. As with WA, the suggestion that corporate bookmakers will be foreclosed from competing for any tender for the Victorian licence by reason of a lack of access to either racing vision or pooling is untenable.
87. With respect to access to racing vision, the same observations made above with respect to the WA TAB apply equally in the case of Victoria. Simply put, assured access to such vision has never previously been treated as an essential attribute of any bidder for a wagering licence, and Sky has never withheld access to such vision from rival bidders to Tabcorp. There is no reason to expect that this will change post-merger.
88. With respect to pooling, the issue is of even less concern in the case of Victoria than it is in the case of WA. That is because the Victorian pari-mutuel pool is large and so the operator of that pool is less dependent upon pooling arrangements.<sup>108</sup> Moreover, **[HIGHLY Confidential to Tabcorp]** [REDACTED]
89. There is a suggestion in the ACCC's evidence that Tabcorp enjoys incumbency advantages in Victoria that make it unlikely that a corporate bookmaker could succeed in winning a future tender for the Victorian licence. Thus, emphasis is placed on the fact that Tabcorp has a detailed knowledge of the Victorian market, an existing retail network in that State and extant infrastructure in place.<sup>111</sup> Even assuming such advantages exist, however, they are advantages that Tabcorp has pre-merger, and advantages that operate equally as between Tabcorp and Tatts. Any such advantages are not created by the merger and are therefore irrelevant to the analysis required of the Tribunal. In any event, Tabcorp has stringent obligations

<sup>107</sup> Second Attenborough Statement, [49]-[51].

<sup>108</sup> Second Attenborough Statement, [61].

<sup>109</sup> Second Attenborough Statement, [61].

<sup>110</sup> Second Attenborough Statement, [60]-[66].

<sup>111</sup> Barry Statement, [27].

to ensure a smooth transition to any new operator in Victoria and those arrangements mitigate the suggested incumbency advantage.<sup>112</sup>

**G.4 Conclusion**

90. The proposed transaction will not have any detrimental effect in connection with the bidding for State wagering licences. Whether there will in fact be any opportunities to bid for such rights in the near future is itself open to question. Even assuming there are such opportunities, however, the competitive threat posed to Tabcorp by corporate bookmakers is sufficient to ensure no anticompetitive effect from the proposed transaction, particularly once the countervailing power of the State governments in question is accounted for.

**H NO PUBLIC DETRIMENT ARISING IN RESPECT OF THE SUPPLY OF POOLING SERVICES**

91. The ACCC's Issues List suggests that one issue for consideration is whether the proposed acquisition will remove the only potential supplier of pooling services in Australia.<sup>113</sup>

92. At present, there is only one acquirer of such pooling services in Australia, being RWWA. RWWA's position with respect to pooling is now protected by the Commitment to Long Term Pooling Deed entered into by Tabcorp and RWWA on 4 April 2017 (**Pooling Deed**).<sup>114</sup> **[HIGHLY Confidential to Tabcorp]** [REDACTED]

[REDACTED]

93. Further, as noted above, **[HIGHLY Confidential to Tabcorp]** [REDACTED]

[REDACTED]

94. As the interests of the only acquirer of pooling services have been protected by these measures pre-merger, there cannot be any real concern that the merger will have a detrimental effect on the supply of pooling services.

<sup>112</sup> Second Attenborough Statement, [69].

<sup>113</sup> ACCC Issues List, Issue 3.

<sup>114</sup> Second Freeman Statement, [30].

<sup>115</sup> Second Freeman Statement, [31]-[34].

<sup>116</sup> Second Freeman Statement, [36].

I NO PUBLIC DETRIMENT ARISING IN RESPECT OF THE ACQUISITION OR SUPPLY OF RACING MEDIA

I.1 Introduction

95. A curious aspect of these proceedings is the ACCC's focus on racing media issues. The ACCC's Issues List raises three issues in connection with racing media:
- (a) whether Tabcorp/Sky, "as the dominant broadcaster of racing media content", is able to influence the level of wagering turnover generated by a race;<sup>117</sup>
  - (b) if so, whether the merged entity will have materially enhanced leverage in its dealings with racing media rights holders in Tatts retail jurisdictions;<sup>118</sup> and
  - (c) whether the merged entity will have materially enhanced leverage in its dealings with licensed venues that supply wagering services/race vision in Tatts retail jurisdictions.<sup>119</sup>
96. What makes these issues so curious is that Tatts is not a present or likely future acquirer of media rights or supplier of racing vision. Indeed, the evidence on this matter is clear and unequivocal: Tatts has never acquired media rights and has no plans to do so in the future.<sup>120</sup> In other words, there is no competition between Tabcorp and Tatts with respect to racing media pre-merger. That being so, it is difficult to understand how the merger could realistically lead to any material competitive detriments in connection with the acquisition or supply of racing media.
97. That is particularly so in circumstances where the industry has witnessed new and successful entry in respect of racing media in recent years in the form of Racing.com (a joint venture between Seven West Media and Racing Victoria). Racing.com is a free-to-air television channel that is dedicated to broadcasting racing content. It also broadcasts online (on its website and apps) and on Foxtel.<sup>121</sup> Racing.com has acquired rights to Victorian thoroughbred racing (some of which is also licenced to Sky for broadcast in retail venues). Racing.com's status as a successful new entrant is confirmed by the close competition between Racing.com and Tabcorp/Sky for rights offered by Perth Racing Club.<sup>122</sup> **[HIGHLY Confidential to Tabcorp and Racing.com]** [REDACTED]

<sup>120</sup> Second Cooke Statement, [50].

<sup>121</sup> First Freeman Statement, [219].

<sup>122</sup> Second Freeman Statement, [136]-[137].

<sup>123</sup> Second Freeman Statement, [134].

98. Thus, the position with respect to racing media is simple: Tatts is not (and has never been) a competitor, nor has it sponsored a competitor, and Sky faces close competition from an ascendant third party, Racing.com. In these circumstances, the suggestion that the merger raises any issues with respect to racing media is fanciful. It must again be emphasised that the Tribunal's task is not to entertain highly elaborate and speculative theories of harm, but rather to focus only upon detriments that have some real chance of occurring.
99. This is underscored by the wide ranging industry evidence from the rights holders discussed in the Overview section above, which rejects any detrimental impact from the merger and rejects the validity of the ACCC's theory of harm. Again, that evidence should be preferred to uninformed speculation.

**I.2 Sky has no commercial ability to 'manipulate' wagering turnover generated by an individual race**

100. The ACCC contends that a "preliminary issue" with respect to media rights is whether Tabcorp/Sky is able to influence the level of wagering turnover generated by a particular race, either by shifting the race from one Sky channel to another or by refusing to broadcast a race altogether.<sup>124</sup>
101. It will immediately be apparent that this suggested issue is not merger-specific. Indeed, as framed by the ACCC, the issue relates to whether Sky has such power pre-merger. The evident difficulty with that approach is that the ACCC is effectively inviting the Tribunal to conduct an enquiry that is at odds with the 'with and without' analysis required by the statute. What the ACCC appears to envisage is that the Tribunal will instead engage in some general assessment of whether there is an appropriate level of competition in connection with racing media at present. In circumstances where the merger cannot possibly lead to any plausible accretion of market power in connection with racing media, such an inquiry is inappropriate and would lead the Tribunal into error.
102. In any event, the evidence demonstrates that Sky has no real commercial ability to manipulate the level of wagering turnover by shifting races between its channels or by declining to broadcast particular races. Sky does not schedule the dates on which race meetings are held; rather, those dates are set by the racing bodies.<sup>125</sup> Sky is then forced to schedule its broadcasts around those dates. It does so by scheduling around the two largest racing bodies first, being Racing Victoria and Racing NSW.<sup>126</sup> In devising its broadcast schedule across its racing channels, Sky's principal

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<sup>124</sup> ACCC Issues List, Issue 4.

<sup>125</sup> First Freeman Statement, [216].

<sup>126</sup> First Freeman Statement, [216].

objective is to seek to generate the optimal wagering outcome for all stakeholders. It therefore tends to schedule those races that attract more wagering in peak times.<sup>127</sup>

103. Sky has never previously threatened to manipulate scheduling to ‘discipline’ or ‘punish’ racing bodies,<sup>128</sup> and the suggestion that it might do so in the future is nothing more than creative speculation. If Sky were to depart from this approach in an attempt to ‘punish’ or ‘discipline’ particular rights holders, the inevitable result would be that it would damage its relationship with rights holders, while compromising Tabcorp’s own wagering revenues.<sup>129</sup> Furthermore, the result of such conduct would inevitably be the loss of further rights to Racing.com.
104. Similarly, Sky has never used a threat of “blackouts” (refusing to televise races) as a means of exerting some improper leverage over rights holders. There have been occasions where Sky did not televise races, following periods of stalled negotiations between Sky Racing and each of TVN and Racing Victoria (involving disagreements about the nature of the rights).<sup>130</sup> That position cannot be described as anything other than commercially prudent in circumstances where Sky would otherwise be incurring an undetermined liability by televising the races in question. Moreover, even if Sky were to attempt to use “blackouts” as leverage over racing clubs, the likely result would again be the loss of rights to Racing.com. That being so, Sky has no commercial ability to use “blackouts” for anticompetitive ends.
105. The result is that the “preliminary issue” identified by the ACCC with respect to racing media simply does not arise with the effect that the remaining racing media issues likewise fall away. There is no sound basis upon which the Tribunal could conclude that the merger involves any public detriment in connection with racing media.

**I.3 The merged entity will not have materially enhanced leverage in its dealings with racing media rights holders in Tatts retail jurisdictions**

106. The ACCC hypothesises that:
- (a) the merged entity will have the “primary wagering relationship” with the PRAs in Tatts retail jurisdictions;
  - (b) those PRAs may be financially incentivised to maximise wagering with the merged entity and to prevent wagering with corporate bookmakers given that they benefit financially from totalisator wagering; and
  - (c) the merged entity would be able to control whose broadcast signal was shown in the retail wagering outlets in the Tatts retail jurisdictions;

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<sup>127</sup> First Freeman Statement, [217].

<sup>128</sup> Second Freeman Statement, [121], [124].

<sup>129</sup> First Freeman Statement, [218], Second Freeman Statement [122]-[123].

<sup>130</sup> Second Freeman Statement, [129].

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- (d) the merged entity might therefore be able to limit the ability of competing broadcasters to supply vision to retail wagering outlets in the Tatts retail jurisdictions; and
- (e) this might diminish the ability of competing broadcasters to acquire media rights in Tatts retail jurisdictions because of the uncertainty of whether they will be able to exploit such rights.<sup>131</sup>

107. The convoluted nature of this hypothesis is apparent:

- (a) Tatts already has the “primary wagering relationship” with the PRAs in the Tatts retail jurisdictions and those PRAs will, in many cases, already benefit more from pari-mutuel wagering than fixed odds wagering. Thus, the first and second steps in the ACCC’s hypothesis are unchanged by the merger.
- (b) The third and fourth steps in the ACCC’s reasoning implies that the merged firm would prefer Sky for its retail venues whereas this would not be the case pre-merger. In fact, the evidence is to the contrary. Tatts presently acquires Sky for its agencies because it prefers to acquire a comprehensive package of content, rather than negotiating separately with multiple content providers.<sup>132</sup> It wants its pubs and clubs to have the same package.<sup>133</sup> The evidence demonstrates that the racing industry and retail wagering venues strongly favours integrated “wall-to-wall” racing vision in retail venues as such content maximises wagering revenues.<sup>134</sup> In circumstances where Sky is presently the only supplier of such vision (and it is difficult to see how that would change in the near future), the suggestion that Tatts might shift to competing suppliers absent the merger is speculative.
- (c) The fifth step in the ACCC’s hypothesis ignores the fact that rights may be exploited in different media and in different ways. For example, those wagering with corporate bookmakers may wish to watch racing vision on their devices, or on free to air or pay television. There is not demand for racing vision only for display in retail venues, and Sky cannot control the disposition of rights in Tabcorp states. Moreover, Sky’s model is dependent upon obtaining rights to broadcast, and is therefore a ready sub-licensee. Therefore, other companies are able to acquire *and utilise* rights, and this is illustrated by Racing.com. Racing.com has been able to enter in a significant way. Its business model does not depend upon selling vision to retail venues in Tatts states: in fact, it does not sell any such vision. It sells vision to other

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<sup>131</sup> ACCC Issues List, Issue 5.

<sup>132</sup> Second Cooke Statement, [65].

<sup>133</sup> Second Cooke Statement, [65].

<sup>134</sup> Second Dumesny Statement, [11]; Gunston Statement, [48]; Ferguson Statement, [56]; Second Aldam Statement, [7]; Second Freeman Statement, [63], [106].

acquirers, and sublicences rights to Sky. Consequently, Racing.com has rights to Victorian racing, and these rights are also broadcast on Sky.

[HIGHLY Confidential to Tabcorp and Racing.com] [REDACTED]

[REDACTED] That behaviour, and the conduct of Racing.com more generally, is a natural experiment that is inconsistent with the ACCC's hypothesis.

108. More generally, the difficulty with this overall contention is that it ignores the width and complexity of current relevant competition for both media rights and wagering, let alone the likely extent of future competition. The competition for rights mirrors the competition in the Australian wagering market. Sky has a focus on tote-based retail wagering, but Racing.com will be likely to be supported, inter alia, by demand from corporate bookmakers. Further, rights to particular events are not necessarily sold exclusively to one acquirer: for example, NSW thoroughbred racing *on-line* rights have been sold by the rights holder to William Hill. As on-line rights become more valuable, it may be in the interests of the rights holders to sell them separately for the highest amount, as the NSW example demonstrates. That reveals a complex pattern of rights negotiations interacting with competition in the wagering market, and in respect of which rights holders take a sophisticated approach. None of that is affected by the present acquisition.
109. As noted in the Overview section above, the PRAs, in their reply evidence, have overwhelmingly rejected the ACCC/Racing.com thesis. Mr V'Landys, CEO of Racing NSW, describes it as a "complete furphy". That is an accurate description. Many of the other PRAs explain in detail why the reasoning process is simply wrong as a matter of reality, and emphasise the ability of the PRAs to maximise the value of their rights in light of the level of competition in wagering and the different ways that rights can be packaged and sold.

**I.4 The merged entity will not have materially enhanced leverage in its dealings with licensed venues in Tatts retail jurisdictions.**

110. The ACCC's final hypothesis with respect to racing media is that, post-merger, Tabcorp will be able to use its control of Sky to influence the behaviour of venues in Tatts retail jurisdictions. The hypothesis appears to be that, post-merger, Tabcorp will be able to use its control of Sky to influence the behaviour of venues in Tatts retail jurisdictions. In particular, the suggestion is that the merged entity may have the ability and incentive to choose not to provide access to Sky to venues, unless the venue is willing to acquire the merged entity's retail wagering services exclusively.<sup>135</sup>
111. A surprising and problematic aspect of this hypothesis is that Tatts already has rights to retail exclusivity in each of its retail jurisdictions (Queensland, South Australia,

<sup>135</sup> ACCC Issues List, Issue 6; ACCC Report, [4.52].

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Tasmania and the Northern Territory) at present under their State and Territory wagering licences. The same is true of Tabcorp in New South Wales, Victoria and the ACT. That is one of the valuable exclusive rights that Tatts and Tabcorp have acquired from the various governments. Thus, the merged firm would have no need to resort to leveraging the supply of Sky to prevent retail competition because it could do so much more directly by enforcing its rights to retail exclusivity in each State and Territory. That is confirmed by recent experience in New South Wales, where Tabcorp has sought to rely directly on its rights to exclusivity under its wagering licence in preventing certain activities by CrownBet in connection with Clubs NSW.<sup>136</sup> Tatts would take the same approach if there was a challenge to its retail exclusivity in Queensland, South Australia, Tasmania or the Northern Territory.<sup>137</sup>

112. Conversely, Tabcorp has never used Sky as a means of seeking to leverage retail exclusivity. Indeed, notwithstanding the activities of CrownBet and Clubs NSW, Tabcorp has confirmed that will continue to make Sky available to any clubs that enter into a digital wagering partnership with CrownBet and to do so in accordance with its existing national rate cards.<sup>138</sup>
113. Tabcorp has appropriate commercial as well as legal justifications in seeking to enforce its rights of retail exclusivity. In the face of significant competition from corporate bookmakers, retail wagering requires a significant degree of ongoing support and investment to be successful.<sup>139</sup> The prevalence of customers betting in retail venues with corporate bookmakers has created challenges to the profitability of retail wagering.<sup>140</sup> In this context, Tabcorp's enforcement of its rights to retail exclusivity in NSW is unsurprising and appropriate.
114. Moreover, again there is a natural experiment that disproves the hypothesis. CrownBet has sought to enter the retail market by entering into arrangements with clubs to provide services to punters in venues, thus (as CrownBet's evidence makes clear) seeking to appropriate what CrownBet recognises as a benefit held by the tote operators<sup>141</sup>, and for which they have paid money. However, CrownBet has chosen to do this not in a Tatts state, but in NSW, a Tabcorp state. It is hard to see how the transaction can credibly be seen to create a material disincentive to doing that which CrownBet has just done.
115. As noted in the Overview section above, again relevant industry witnesses, including peak retail bodies, have rejected the concerns.

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<sup>136</sup> First Attenborough Statement, [117]-[119]; Second Attenborough Statement, [88]-[96].

<sup>137</sup> Second Cooke Statement, [89].

<sup>138</sup> Second Attenborough Statement, [104]-[105].

<sup>139</sup> Wiegard Statement, [34]; Ferguson Statement [30]; Horne Statement, [19].

<sup>140</sup> Wiegard Statement, [27]; Horne Statement, [11]; Ferguson Statement, [35].

<sup>141</sup> Tyshing Statement, [124] – [139].

116. In these circumstances, there is simply no basis to conclude that there is any realistic prospect that Tabcorp would seek to leverage Sky in its dealings with licenced venues post-merger. It has never done so previously and the merger does not alter its incentives or power to do so. Again, the hypothesis advanced by the ACCC is unsupported by the past conduct of the parties and amounts to nothing more than imaginative and fanciful conjecture.

## **J NO DETRIMENT ARISING IN THE SUPPLY OF GAMING SERVICES**

### **J.1 EGMs**

117. Both Tatts and Tabcorp have various businesses in different states relating to Electronic Gaming Machines (**EGMs**), which are commonly referred to as poker machines.
118. These businesses are:
- (a) monitoring services, being the services required to carry out certain monitoring of EGMs as required by regulation;
  - (b) gaming systems, being the supply of software and hardware used to manage EGMs. This includes, for example, player loyalty programs and business intelligence software;
  - (c) field services, being the repair and maintenance of EGMs and gaming systems.
119. Three potential competition issues arise from the material before the Tribunal.

### **J.2 EGM monitoring services in Queensland**

120. Tabcorp (through Odyssey) and Tatts (through Max (formerly Maxgaming)) are the two active suppliers of EGM monitoring services in Queensland.<sup>142</sup>
121. Tabcorp has entered into agreements to divest Odyssey to address any potential competition concerns arising from the combination of Odyssey and Max. Tabcorp has entered into agreements with Australian National Hotels Pty Limited (**Federal Group**) for the sale of Odyssey. The sale is subject to the proposed merger proceeding.<sup>143</sup> Tabcorp has offered to the ACCC an enforceable undertaking pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) to reflect that sale, and has provided a Proposed Purchaser Notice in respect of Federal Group.<sup>144</sup>

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<sup>142</sup> Second Rytenskild Statement [10].

<sup>143</sup> Farrell Statement, [17]-[20]; Second Rytenskild Statement [7]-[8].

<sup>144</sup> Second Rytenskild Statement, [24]

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122. The divestment arrangements address any potential concerns arising from the combination of Odyssey and Max and ensure that Odyssey, under Federal Group ownership, will remain a sustainable, long-term competitor.<sup>145</sup> In particular:
- (a) Federal Group has significant experience in relation to gaming operations, including through its management of the distribution of gaming machines and Keno in Tasmania, and its operation of casinos in Tasmania;<sup>146</sup>
  - (b) through Odyssey, Federal Group will acquire the licence, systems and **[HIGHLY Confidential to Tabcorp and Federal Group]** [REDACTED] [REDACTED] which is necessary to run the business. It will be able to immediately continue providing monitoring services under the licence;<sup>147</sup>
  - (c) **[HIGHLY Confidential to Tabcorp and Federal Group]** [REDACTED] [REDACTED] [REDACTED] Tabcorp must also assist in updating the Sentinel system to ensure compatibility with QCOM 3 (a new EGM protocol being introduced by the Queensland Office of Liquor and Gaming Regulation);<sup>148</sup>
  - (d) Tabcorp will only be able to continue using the Sentinel monitoring system to service a limited number of customers not located in Australia;<sup>149</sup>
  - (e) Odyssey will be the exclusive distributor of eBET gaming systems in Queensland for a period of three years. This will allow Odyssey, under Federal Group ownership, to cement its relationship with customers. **[HIGHLY Confidential to Tabcorp and Federal Group]** [REDACTED] [REDACTED] [REDACTED]
  - (f) Federal Group will be provided with the Object Code and Source Code for the principal eBet gaming system product ('Metropolis'), and other products ('Breakaway' and 'Card IT'). It will have a perpetual licence in Queensland to use that code, including a right to modify the code. As a result, Federal Group will be able to provide products which are the same as and fully compatible

<sup>145</sup> Second Rytenskild Statement, [6], [9]; Farrell Statement, [19], [21], [31]-[32]; Flockhart Statement [21].

<sup>146</sup> First Rytenskild Statement, [297(a)]; Farrell Statement, A.2, [26], [31]-[32].

<sup>147</sup> First Rytenskild Statement, [291]; Second Rytenskild Statement, [11]; Farrell Statement, [25]-[32].

<sup>148</sup> First Rytenskild Statement, [292]; Second Rytenskild Statement, [12]; Farrell Statement, [28], [30].

<sup>149</sup> Second Rytenskild Statement, [11].

<sup>150</sup> Second Rytenskild Statement, [13(a)], [13(f)].

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with existing eBET gaming systems, and to develop new products based on these existing products/code;<sup>151</sup>

- (g) a customer who enters into an agreement with Odyssey for the supply of eBET products will not be affected if that agreement extends beyond the term of the Odyssey/eBET distribution agreement referred to in (e) above. The customer will not need to switch from the eBET product to the new Odyssey product until the end of the customer's existing contract with Odyssey.<sup>152</sup>

123. Three minor matters have been raised in respect of the divestment by third parties. The ACCC has not identified any concerns in respect of these issues.<sup>153</sup>

124. Those issues are:

- (a) A submission from the Arana Leagues Club dated 10 April 2017 is to the effect that the divestment strategy is flawed because the purchaser of Odyssey would only get access to a monitoring system and not a system with in-venue gaming capability. That is incorrect. Odyssey will be the exclusive distributor of eBET gaming systems (which it currently uses) in Queensland for three years. It will receive technical support and will have a perpetual license to use the product code which will enable it to develop the same or new gaming system products.

- (b) The Arana Leagues Club submission also suggests that Tabcorp would have in-depth intimate knowledge of Odyssey's commercially sensitive information.<sup>154</sup> This is not a significant concern. **[HIGHLY Confidential to Tabcorp and Federal Group]** [REDACTED]

[REDACTED]  
[REDACTED] In any case the Odyssey strategy (once it is under Federal Group's ownership) is likely to change. It is difficult to discern any other commercially sensitive information that Tabcorp would retain. None has been identified.

- (c) A statement from Tony Costain (of Hotel Clubs & Services Pty Ltd) which outlines a concern that the Federal Group would lose the exclusive use of the Metropolis gaming system if venues in Queensland wished to change to a different system. This is not correct. **[HIGHLY Confidential to Tabcorp and Federal Group]** [REDACTED]

<sup>151</sup> Second Rytenskild Statement, [13(d)], [13(E)]; Farrell Statement, [29].

<sup>152</sup> Second Rytenskild Statement [13(c)].

<sup>153</sup> ACCC Report, [4.180].

<sup>154</sup> Submission from Arana Leagues Club dated 10 April 2017, final paragraph.

<sup>155</sup> Second Rytenskild Statement, [23(a)].

- [REDACTED]
125. The effectiveness of the Odyssey divestiture at addressing competition concerns that may otherwise have arisen is supported by representative of both Clubs Queensland and the Queensland Hotels Association.<sup>157</sup> Together, these represent almost all venues that operate EGMs in Queensland. In addition, the effectiveness of the divestiture is supported by the national AHA.<sup>158</sup>

**J.3 Vertical integration of monitoring operator and supplier of in-venue gaming systems in NSW**

126. Max (which is currently owned by Tatts) is the exclusive monitoring operator in NSW until 2032.<sup>159</sup>
127. Tabcorp (through TGS and Intecq) supplies in-venue gaming systems and related services in NSW.<sup>160</sup>
128. Mr White (of Club Central) identifies a concern that Tabcorp may use commercially sensitive information obtained in its capacity as the exclusive monitoring operator for the purpose of assisting its own gaming systems operations. For example, it could use the data about EGMs of one venue to provide advice to another venue about how the second venue should set up their EGMs and gaming systems.<sup>161</sup>
129. There are various legal, regulatory and contractual restrictions why Tabcorp would not take such action. For example, section 139(2) of the *Gaming Machines Act 2001* (NSW) requires that a CMS licensee must not use or divulge CMS information to any person without the written consent of the Minister or as otherwise authorised in accordance with the CMS licence, the Act or the regulations. That offence has a maximum penalty of 100 penalty units.
130. There are numerous other such requirements in the legislation, regulations and contractual terms which would prohibit that use of the information.<sup>162</sup> Contravening the legislation could result in suspension or cancellation of Tabcorp's monitoring licence.<sup>163</sup> Tabcorp's licences are its most valuable assets and it is highly motivated to ensure appropriate measures are in place so breaches do not occur.<sup>164</sup>

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<sup>156</sup> Second Rytenskild Statement, [15]; Farrell Statement, [29].

<sup>157</sup> Flockhart Statement, [20] – [21]; Hogan Statement, [38] - [39]; Second Rytenskild Statement, [9].

<sup>158</sup> Ferguson Statement, [21].

<sup>159</sup> First Rytenskild Statement [228], First Makryllos Statement [24].

<sup>160</sup> First Rytenskild Statement, [134]-[135],[149].

<sup>161</sup> White Statement, [29].

<sup>162</sup> Second Rytenskild Statement, [28]-[38]; ACCC Report [4.190]-[4.195].

<sup>163</sup> Second Rytenskild Statement, [29].

<sup>164</sup> First Rytenskild Statement, [241].

131. In addition, Tabcorp recently entered into memorandums of understanding (**MOUs**) with AHA NSW<sup>165</sup> and ClubsNSW<sup>166</sup>. The MOUs provide that, subject to completion of the proposed merger, Tabcorp will adhere to various principles of independence and implement certain governance and data protection regimes, in connection with the Max monitoring business in NSW.
132. Tabcorp has had discussions with the NSW Regulator, Liquor and Gaming NSW (**L&G NSW**) to discuss the proposed merger. Tabcorp has made various commitments to L&G NSW that it will ensure that it continues to comply with obligations under the NSW monitoring licence, including commitments regarding operational independence.<sup>167</sup>
133. Tabcorp's various legal, regulatory and contractual obligations mean that there is no real prospect of Tabcorp misusing the information obtained from monitoring EGMs.
134. A further matter raised in the ACCC Report is the possibility of Tabcorp (as monitor of EGMs) foreclosing competing suppliers of gaming systems by reducing or restricting the functionality of competing gaming systems that operate through the monitoring system.<sup>168</sup> This is not a valid concern because:
- (a) under the current EGM protocol ('X-series') in NSW, there is no ability for the supplier of monitoring services to affect the functionality or operation of third party gaming systems;<sup>169</sup>
  - (b) New EGM protocols ('G2S' and 'QCOM') being introduced in NSW will involve some connection between the monitor and gaming systems providers.<sup>170</sup> However, under Max's new monitoring licence in NSW, Max will be **[Confidential to Tatts]**   
  
<sup>171</sup>
  - (c) In Tabcorp's MOUs with AHA and ClubsNSW, Tabcorp has undertaken to 'use its best endeavours to ensure that the new proposed CMS infrastructure

<sup>165</sup> Second Rytenskild Statement [32]. MOU between Tabcorp Holdings Limited and Australian Hotels Association NSW (**AHA NSW**) dated 13 April 2017.

<sup>166</sup> Second Rytenskild Statement [32]. MOU between Tabcorp Holdings Limited and The Registered Clubs Association of New South Wales (**ClubsNSW**) dated 26 April 2017.

<sup>167</sup> Second Rytenskild Statement [37]-[38].

<sup>168</sup> ACCC Report [4.203].

<sup>169</sup> First Rytenskild Statement [248].

<sup>170</sup> First Makryllos Statement, [26]; First Rytenskild Statement [249].

<sup>171</sup> First Makryllos Statement, [27].

(G2S QCOM) will facilitate all existing (operating) technologies and functionalities at no additional cost to relevant existing arrangements'.<sup>172</sup>

- (d) In any case, if the EGM monitor sought to act to foreclose competing suppliers, this would undoubtedly trigger a regulatory response. For example, under section 136C of the *Gaming Machines Act 2001* (NSW), the Minister may direct the monitor to provide additional specified services, which could include providing access to monitoring hardware.<sup>173</sup>

#### J.4 Merger of Tabcorp and Tatts EGM field services in Victoria

135. The ACCC Report refers to the fact that Tabcorp and Tatts each provide EGM fields services in Victoria.<sup>174</sup> The ACCC Report states that the proposed acquisition “should not lessen competition in this market”. Tabcorp agrees with this. The reasons for this are:

- (a) Tabcorp and Tatts do not compete closely in respect of EGM field services;<sup>175</sup>
- (b) there are a number of alternative suppliers of EGM field services in Victoria, including Amtek and Aristocrat;<sup>176</sup>
- (c) barriers to entry and expansion to provide EGM field services in Victoria are very low.<sup>177</sup>

136. EGM field services providers in NSW could easily enter Victoria if there was a commercial incentive to do so. Likely entrants into Victoria include IGT, United Technology Services, and NSW Poker Machines.<sup>178</sup>

#### J.5 Vertical integration of EGM monitors not permitted in Victoria

137. Tatts is in discussions to acquire Intralot Gaming Services Pty Ltd (**Intralot**), which holds the monitoring licence in Victoria.<sup>179</sup>

138. Mercury Group Victoria (**Mercury**) noted in its submission to the Tribunal filed on 5 April 2017 that Victorian legislation prohibits a company listed on the Roll of Manufacturers, Suppliers and Testers from holding a monitoring licence. Both Tabcorp and Tatts entities are listed on the Roll.

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<sup>172</sup> Second Rytenskild Statement [34]. MOU between Tabcorp Holdings Limited and AHA NSW dated 13 April 2017 at 5.2(d). MOU between Tabcorp Holdings Limited and ClubsNSW dated 26 April 2017 at 5.2(d).

<sup>173</sup> First Rytenskild Statement, [250].

<sup>174</sup> ACCC Report, [4.210].

<sup>175</sup> First Makryllos Statement, [73]; First Rytenskild Statement [273].

<sup>176</sup> First Rytenskild Statement, [274-277].

<sup>177</sup> First Makryllos Statement, [73]-[76] and First Rytenskild Statement [278]-[282].

<sup>178</sup> First Rytenskild Statement, [282].

<sup>179</sup> First Makryllos Statement, [39].

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139. Mercury's submission that the merged entity may seek to change the legislation is a matter of speculation. If Intralot is acquired by the merged entity, this issue will need to be addressed in order to ensure compliance with the *Gambling Regulation Act 2003* (Vic).
140. In any event, this is a regulatory issue raised by the proposed acquisition of Intralot. There is no difference in the position with or without the transaction.

### **K NO DETRIMENT IN THE SUPPLY OF KENO AND LOTTERY SERVICES**

#### **K.1 No material overlap in supply of Keno products**

141. The Commission has not raised any Keno-related issues for consideration.
142. There are no competition concerns arising from the proposed merger in relation to the supply of Keno products, because there is no material overlap in the products supplied by the merger parties.
143. Tabcorp is the only provider of Keno in retail outlets in Queensland, New South Wales, Victoria and the ACT, while Tatts is the only provider in retail outlets in South Australia.<sup>180</sup> The parties' retail businesses therefore do not overlap.<sup>181</sup>
144. The only possible overlap between Tabcorp and Tatts is in South Australia, where residents can access Tabcorp's online product. **[Confidential to Tabcorp]** [REDACTED]  
[REDACTED].<sup>182</sup> As such, any overlap is extremely limited.

#### **K.2 Lotteries**

145. The Commission has not raised any lotteries-related issues for consideration.
146. Tatts currently operates all public lotteries in each State and Territory except Western Australia (which has a government owned and operated lottery). Tatts either has the exclusive right or is the sole operator authorised to provide lotteries in those jurisdictions.<sup>183</sup>
147. There is no overlap between the merger parties as Tabcorp does not provide public lottery products in any State or Territory.<sup>184</sup> As such, Tabcorp is not a competitor for Tatts' lotteries business.<sup>185</sup>

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<sup>180</sup> First Rytenskild Statement [63], Van der Merwe Statement, [68], [70(a)].

<sup>181</sup> First Rytenskild Statement [78].

<sup>182</sup> First Rytenskild Statement [85].

<sup>183</sup> Van der Merwe Statement [32].

<sup>184</sup> First Rytenskild Statement [92].

<sup>185</sup> Van der Merwe Statement [58].

**L NO OTHER PUBLIC DETRIMENTS**

148. The ACCC Report refers to the possibility that the transaction will permit the merged entity to engage in “customer profiling, targeted digital marketing and cross selling to a range of gambling products to customers on this database, which will inevitably include vulnerable problem gamblers”.<sup>186</sup> However, the ACCC acknowledges that it can offer no view on that issue.<sup>187</sup> Tabcorp has a policy in respect of problem gambling.<sup>188</sup> It will continue to apply that policy.

**M CONCLUSION**

149. The transaction gives rise to substantial benefits, as set out in section E above.

150. When a with and without analysis is applied to the effects of the merger, there is no lessening of competition in any market. There are also no other matters of public detriment.

151. For all these reasons, the merger should be authorised.

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**8 May 2017**

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<sup>186</sup> ACCC Report, [4.211].

<sup>187</sup> ACCC Report, [4.212].

<sup>188</sup> First Freeman Statement [201A].