

[Restriction of Publication of Part Claimed]

NON-CONFIDENTIAL SUBMISSION

**APPLICATION FOR AUTHORISATION OF AN
ARRANGEMENT BETWEEN THOROUGHVISION PTY LTD,
TABCORP HOLDINGS LIMITED AND SKY CHANNEL PTY
LTD**

15 February 2007

1. Introduction and Procedural Matters

1.1 This submission supports the Application and Related Application for authorisation of the arrangements described in Schedules 1 to 7 of the Memorandum of Understanding (“MOU”) between Tabcorp Holdings Limited (“**Tabcorp**”), Sky Channel Pty Ltd (“**Sky**”) and ThoroughVisioN Pty Limited (“**TVN**”) (collectively, “**the Parties**”) dated 1 February 2007 (“**Settlement Agreement Terms**”) and any long form agreements made under clause 2.3 of the MOU which are consistent with the MOU (“**Settlement Agreements**”).

A copy of the MOU is attached at **Annexure “A”** to this submission.

1.2 The Application and Related Application and this submission are made on behalf of and for the benefit of all of the Parties.

1.3 The Settlement Agreement Terms and any Settlement Agreements are subject to a condition precedent that the Commission makes a final determination to grant the authorisation on acceptable terms, and the authorisation comes into force.

1.4 The arrangements have been announced to the public. Accordingly, we confirm that the Commission is free to undertake market enquiries in relation to the arrangements.

1.5 Definitions for words or expressions used in this submission are set out in the Glossary at the end of this submission.

2. Confidentiality

2.1 The terms of the MOU are commercially sensitive and are provided to the Commission on a strictly confidential basis.

2.2 ~~This submission contains confidential information and may not be disclosed to any person without the prior written consent of the Parties. The Parties claim that this information and the MOU are exempt from disclosure under the *Freedom of Information Act 1982* (Cth).~~

3. Parties

Tabcorp

3.1 Tabcorp is an Australian company with interests in gaming and wagering which was formed through the privatisation of the Victorian Totalizator Agency Board in 1994.

3.2 Tabcorp holds the exclusive licence under the *Gambling Regulation Act 2003* (Vic) to provide off-course totalizator wagering services in Victoria for thoroughbred, harness and greyhound racing until August 2012.

3.3 Tabcorp also has a licence to conduct the on-course totalizator in Victoria and further offers totalizator and fixed odds betting on sporting and other events.

3.4 In 2004, Tabcorp acquired the NSW-based company Tab Limited. Tab Limited holds an exclusive licence to conduct totalizator off-course wagering (which it does through over 2,000 retail outlets and to approximately 117,000 active account holders) under the *Totalizator Act 1997* (NSW) and is also licensed to conduct on-course totalizator wagering. Tab Limited also provides on-course totalizator wagering services to a

limited number of Queensland race clubs. Tab Limited's other businesses are the Sky Channel television service (more fully described below) and a NSW radio broadcast service (2KY1017), which specialises in race broadcasts.

3.5 In addition, the Tabcorp Group conducts activities including:

- (a) gaming operations in Victoria under the Tabaret brand (Tabcorp operates 13,614 gaming machines in 264 licensed venues in Victoria);
- (b) casino and hospitality operations at the Star City Casino in NSW and, following its merger with Jupiters Limited in 2003, three casinos in Queensland, with a total of approximately 4,560 gaming machines and 441 tables;
- (c) Keno operations in over 2,000 venues across Queensland, NSW and Victoria (with the Victorian Keno operations being operated jointly with Tattersall's under licence);
- (d) providing a sports bookmaking service to UNiTAB, TOTE Tasmania, ACTTAB and RWWA; and
- (e) providing a virtual racing product called Trackside which is distributed to venues in Victoria.

Sky

- 3.6 There are a number of entities within the Sky group of companies (referred to generally in this submission as “**Sky**”) – including Sky Channel Pty Ltd and Tahwind Channel Marketing Pty Ltd, formerly known as Sky Channel Marketing Pty Ltd. The name **Sky Channel** is used in this submission to refer to the two signals broadcast by Sky to its commercial subscribers and via pay TV platforms.
- 3.7 In 1998, the newly privatised Tab Limited acquired Sky Channel Pty Ltd for \$260 million.¹ Thus, Sky Channel Pty Ltd is a wholly-owned subsidiary of Tab Limited, which is a wholly-owned subsidiary of Tabcorp. Tahwind Channel Marketing Pty Ltd is a wholly-owned subsidiary of Sky Channel Pty Ltd.
- 3.8 Sky is a television broadcaster that telecasts race meetings from the three codes of racing (thoroughbred, harness and greyhound racing) and, from time to time, other sporting events, throughout Australia. In particular, Sky acquires the right to use video picture of racing and other sports content from clubs or other entities, and packages such content to produce television channels and data feeds for transmission via a number of means.
- 3.9 Sky commenced operations in 1986, broadcasting to commercial premises. Initially, Sky broadcast a variety of sporting and entertainment programs, including both racing and non-racing content. Over time (and in particular since around the mid to late 1990s), the amount of non-racing content broadcast by Sky has reduced, as more and more racing was broadcast. Today, Sky broadcasts mostly racing vision.
- 3.10 Since its commencement, Sky has broadcast continuously to commercial premises (primarily hotels, clubs and TAB agencies). Sky Channel is currently available in approximately 4,500 venues [Restriction of Publication of Part Claimed] across Australia.

¹ Sky website, available at www.skychannel.com.au/aboutsky/home.php.

[Restriction of Publication of Part Claimed]

- 3.11 Since 1998, Sky Channel has also been broadcast via the Foxtel, Optus and Austar platforms, reaching approximately 1.6 million home viewers.² Sky Channel is supplied to each of Foxtel, Optus and Austar by means of separate commercial agreements between each of these pay TV operators and Sky. Sky Channel is available on the basic tier of the Foxtel, Optus and Austar services. Accordingly, all Foxtel, Optus and Austar subscribers receive Sky Channel. No additional fee is charged to access Sky Channel. Sky has no contractual relationship with individuals who subscribe to Foxtel, Optus or Austar in respect of the supply of Sky Channel. Rather, its contractual relationships are with Foxtel, Austar and Optus themselves.
- 3.12 Sky provides up to 15 hours daily live programming on Sky Channel. This programming includes the broadcast of around 125 race meetings live each week, and more than 5,500 race meetings (or 50,000 races) each year. Most of these races are domestic – however, Sky also imports international racing from – in particular – the United Kingdom, Hong Kong, South Africa, Japan and New Zealand. International racing tends to be shown in off-peak times to fill scheduling opportunities that cannot be filled by domestic races.
- 3.13 Sky works with the racing industry and TABs to schedule Australian race meetings. Sky’s involvement in racing scheduling is designed to allow a maximum number of races to be broadcast live. Sky has significant and varied relationships (joint ventures, rights exploitation, etc) with race clubs, racing authorities, TABs, hotels and international racing, wagering and telecasting organisations.
- 3.14 In addition to the broadcast of races, Sky also produces a number of magazine and other information-type programs, which it broadcasts throughout the week during times when live racing is not available. The content of these programs is focussed on racing. Finally, Sky broadcasts other sporting events from time to time – primarily pay per view boxing matches.
- 3.15 Sky’s objective is to optimise returns to the wagering, racing and associated industries by maximising wagering turnover. This is facilitated by providing “wall to wall” racing coverage with associated programming content to stimulate customer involvement and potential wagering investment. Accordingly, race meetings are scheduled so that when a particular race ends Sky Channel can cut to another race which is about to begin at another venue. As described in more detail below, the Sky Channel product is closely linked to wagering. Punters generally want to see the races on which they have backed a particular runner. Likewise, the wagering industry has an interest in having punting opportunities shown live as punters are significantly more likely to wager on races which are broadcast.
- A copy of Sky’s broadcast schedule for the period 14 February to 20 February 2007 is attached at **Annexure “B”**
- 3.16 In 2001, Sky acquired radio station 2KY, which provides in NSW radio broadcasts of race meetings.

² Sky website, available at www.skychannel.com.au/aboutsky/home.php.

- 3.17 Sky also conducts various international services providing vision from Australian racing to customers around the globe, including customers in the United Kingdom, the USA, Canada, New Zealand, Sri Lanka, Asia and the Middle East.³
- 3.18 Sky's website is found at www.skychannel.com.au.

TVN

- 3.19 TVN is a premium sports and interactive rights management company that specialises in thoroughbred racing.⁴ In particular, TVN's stated objective is to enhance the presentation of the sport of thoroughbred racing for the enjoyment of racefans and viewers.⁵
- 3.20 The TVN Channel is designed to be a channel for the thoroughbred racing industry as a whole. In developing its programming TVN considers the needs of the full thoroughbred "racing supply chain", including:
- (a) Breeders - TVN has developed and is developing further "breeding shows";
 - (b) Owners - who are interested in the breeding shows and the interviews with owners;
 - (c) Jockeys - through interviews with jockeys;
 - (d) Trainers and associated employees/contractors (including farriers, vets and stable hands);
 - (e) Racing clubs - by profiling and promoting the activities and events conducted by racing clubs beyond the broadcasting of the actual race; and
 - (f) People interested in racing (for reasons other than wagering) including those interested in the coverage of racing fashion and the background of various horses, and punters who are interested in a more detailed understanding of form through extended live coverage and review programs.
- 3.21 The TVN Channel aims to promote thoroughbred horse racing as a positive and upmarket form of sports entertainment. As well as providing state of the art coverage of race meetings, TVN produces high quality 'magazine' style features on upcoming race meetings and racing related events.

A copy of TVN's broadcast schedule for the week beginning 12 February 2007 is attached at **Annexure "C"**.

- 3.22 TVN is owned by the following parties:

³ Tabcorp Concise Annual Report 2005, page 10.

⁴ TVN website, available at www.tvn.com.au (refer About Us).

⁵ TVN website, available at www.tvn.com.au (refer Frequently Asked Questions).

| | |
|--------------------------|-------|
| Australian Jockey Club | 25% |
| Sydney Turf Club | 25% |
| Victorian Racing Club | 12.5% |
| Melbourne Racing Club | 12.5% |
| Monee Valley Racing Club | 12.5% |
| Country Racing Victoria | 12.5% |

- 3.23 TVN holds the exclusive broadcasting rights for all thoroughbred race meetings held in Victoria and the Northern Territory, and has entered into agreements under which it is expressed to act as an agent for the two Sydney metropolitan race clubs (the Australian Jockey Club (“**AJC**”) and the Sydney Turf Club (“**STC**”)).
- 3.24 The TVN Channel is available in more than 3,200 pubs/clubs and TAB agencies in NSW, Victoria, ACT and Tasmania, and has been rolled out to a number of agencies in Queensland, SA and the NT. The service is also available to subscribers through the Foxtel digital network by the use of access undertakings provided to the Commission by Foxtel. **[Restriction of Publication of Part Claimed]** The TVN Channel is also available on the Austar digital network.
- 3.25 Further, TVN provides on demand broadcast of moving and still racing footage to mobile phones and to the internet, broadcasts live and archival racing footage to BigPond broadband subscribers and sells archival racing footage.⁶
- 3.26 TVN’s website is found at www.tvn.com.au.

4. Summary of the Memorandum of Understanding

- 4.1 This section contains a summary of the key provisions of the MOU relevant to the applications for authorisation. It should be noted that the MOU does not contain any provisions relevant to advertising or New Media rights. TVN and Sky will continue independently to sell advertising on their respective channels. Further, the grant of content licences described below does not include any rights in respect of the display of vision on New Media applications.
- 4.2 The following summary contains material confidential to the Parties.

General Matters

- 4.3 Certain aspects of the MOU are effective now (“**Extended Interim Arrangements**”) with the remainder of the arrangements becoming binding 30 days after the grant of authorisation by the Commission (“**Effective Date**”), if granted. Further information in respect of the Extended Interim Arrangements is provided at paragraph 8.73 of this submission.
- 4.4 If the Commission grants authorisation before 31 January 2008, the MOU will continue until 31 December 2012 (“**Term**”), save to the extent that the Settlement Agreement Terms are replaced by the Settlement Agreements.

⁶ TVN Website, available at www.tvn.com.au (refer Frequently Asked Questions and Venue Listings).

- 4.5 The Parties have agreed that they will, in good faith, negotiate Settlement Agreements, to record and give effect to the Settlement Agreement Terms, as soon as practicable after the date of the MOU (1 February 2007). However no steps have been taken by the parties in terms of agreeing Settlement Agreements.

Sky Channel to grant a sub-licence to TVN

- 4.6 Subject to Sky's consultation with (and, where necessary, the approval of) the relevant race clubs, Sky grants TVN a non-exclusive licence to broadcast on the TVN Channel [Restriction of Publication of Part Claimed] non-TVN shareholder premium thoroughbred race meetings [Restriction of Publication of Part Claimed] from the rights which Sky holds (including rights Sky acquires during the Term of the MOU). [Restriction of Publication of Part Claimed]
- 4.7 Sky must use its reasonable endeavours to secure the right to sub-licence the audio-visual coverage to TVN. [Restriction of Publication of Part Claimed]
- 4.8 TVN is not permitted to broadcast any visual coverage of Sky-provided races in conjunction with either TVN or third party generated audio, provided that the visual coverage is made available to TVN in conjunction with audio of an appropriate quality. The rights that Sky grants TVN in relation to non-TVN races are only for use on the TVN Channel for broadcast on pay TV to residential premises and commercial subscription television via satellite to commercial outlets in Australia.
- 4.9 Wagering operators controlled by Tabcorp must provide to TVN any Tabcorp group wagering information required by TVN for broadcast on the TVN Channel. Tabcorp is also required to provide to TVN certain wagering information relating to international races.
- 4.10 Sky acquires the option to place up to two hours of Approved Content⁷ on the TVN Channel per day at certain times of the day.
- 4.11 TVN owns the TVN Channel, the TVN brand and TVN Shareholder race and non-race footage and TVN Shareholder archival material produced exclusively for the TVN Channel. Sky owns the intellectual property rights in the Sky magazine shows. TVN does not own non-TVN shareholder archival material.

TVN to grant a pay TV licence to Sky

- 4.12 Without limiting TVN's rights to broadcast the coverage on the TVN Channel, TVN grants Sky an exclusive licence to broadcast and sub-licence to pay TV operators the audio-visual coverage of TVN shareholder races, Darwin Turf Club and Alice Springs Turf Club races and any other thoroughbred races to which TVN held the rights as at 15 May 2006. [Restriction of Publication of Part Claimed]
- 4.13 Sky pays rights fees to TVN for the grant of the licence.

⁷ 'Approved Content' means content that:

- is not coverage of harness racing or greyhound racing;
- is not content which might offend the sensibilities of viewers; or
- is not content which TVN, acting reasonably, considers might adversely impact on a material basis the branding of TVN, the TVN Channel or thoroughbred racing.

- 4.14 TVN and individual race clubs are not restricted from negotiating exclusive deals with free to air commercial television stations to broadcast live certain excluded events to the domestic market and non-exclusive deals with free to air commercial television stations to broadcast live certain other excluded events to the domestic market.
- 4.15 The licence does not permit Sky to broadcast any visual coverage of TVN races in conjunction with either Sky or third party generated audio, provided that the visual coverage is made available to Sky in conjunction with audio of an appropriate quality.
- 4.16 In relation to any rights acquired by TVN on or at any time after 16 May 2006 to broadcast coverage of non-TVN shareholder premium thoroughbred racing during the Term (“**New Rights**”)[**Restriction of Publication of Part Claimed**] If Sky and TVN fail to reach agreement within 21 days, then Sky can request that the fair market value of the non-exclusive licence of the New Rights be determined by a valuer (“**Expert**”) in accordance with the following:
- (a) the Expert is to be appointed by agreement between Sky and TVN, or in default of agreement within 15 business days of a request by Sky to have an Expert appointed, Sky may request the President of the Institute of Chartered Accountants in Australia to appoint the Expert;
 - (b) each of Sky and TVN may make submissions and provide relevant information and material to the Expert;
 - (c) the determination of the Expert must be in writing and provided to the parties within 30 business days from the acceptance by the Expert of the appointment and, in relation to domestic premium thoroughbred racing only, will be final and binding on the parties;
 - (d) in relation to international premium thoroughbred racing, the determination of the Expert must be in writing and provided to the parties within 30 business days from the acceptance by the Expert of the appointment and will be final and binding on the parties if Sky confirms it wishes to acquire the New Rights at the fee determined by the Expert; and
 - (e) TVN must use reasonable efforts to secure the right to sub-license any New Rights to Sky, but TVN has no obligation to pay any additional rights, fees or costs to permit the broadcast of the relevant races on Sky Channel as well as the TVN Channel unless reimbursed by Sky.
- 4.17 TVN must use its best endeavours (not involving the payment of money) to procure that Sky has the right to broadcast racing information concerning TVN shareholder races and other races included in the coverage licensed to Sky at no cost. TVN must also use its best endeavours to procure that each TVN shareholder race club uses its best endeavours to make available its racing information for use by Sky in connection with the broadcast of their races internationally.
- 4.18 TVN must procure that each TVN shareholder will ensure that Sky is granted non-exclusive race track access rights to its race tracks for quality control purposes.

TVN to grant a commercial licence to Sky

- 4.19 Without limiting TVN’s rights to broadcast the coverage on the TVN Channel, TVN grants Sky an exclusive licence to broadcast live on subscription television services into commercial outlets the audio-visual coverage of TVN shareholder races, Darwin Turf Club and Alice Springs Turf Club races and any other thoroughbred races to which TVN held the rights as at 15 May 2006.

- 4.20 Sky pays rights fees to TVN for the grant of the licence.
- 4.21 TVN and individual clubs are not restricted from negotiating exclusive deals with free to air commercial television stations to broadcast live certain excluded events to the domestic market and non-exclusive deals with free to air commercial television stations to broadcast live certain other excluded events to the domestic market.
- 4.22 The licence does not permit Sky to broadcast any visual coverage of TVN races in conjunction with either Sky or third party generated audio, provided that the visual coverage is made available to Sky in conjunction with audio of an appropriate quality.
- 4.23 In relation to any rights acquired by TVN on or at any time after 16 May 2006 to broadcast coverage of non-TVN shareholder premium thoroughbred racing during the Term (“**New Rights**”)[**Restriction of Publication of Part Claimed**] If agreement cannot be reached then the same Expert determination process described in paragraph 4.16 above will apply.
- 4.24 As outlined in paragraph 4.17 above, TVN must use its best endeavours to procure that Sky has rights to broadcast its racing information.
- 4.25 As outlined in paragraph 4.18 above, TVN must procure that each TVN shareholder ensures that Sky is granted non-exclusive race track access rights to its race tracks for quality control purposes.

Distribution of the TVN Channel

- 4.26 Tabcorp is granted a non-exclusive right to distribute (and to sub-license any other Tabcorp group company to distribute) the TVN Channel under the names or branding “TVN” or “ThoroughVisioN” to certain hotels, clubs, other commercial outlets with a liquor licence, other commercial outlets with a wagering facility and racecourses. It may retain all associated revenues from doing so other than advertising revenues. Tabcorp pays distribution rights fees to TVN.
- 4.27 Sky also agrees to provide Sky Channel and TVN Channel, [**Restriction of Publication of Part Claimed**] to the physical betting rings at which totalizators can be accessed and administration offices on TVN shareholder racecourses, certain other public areas of TVN shareholder racecourses, and on-course clubs owned by TVN shareholders. On race days at the relevant racecourse, Sky is to provide the TVN Channel to any other areas of TVN shareholder racecourses requested by TVN [**Restriction of Publication of Part Claimed**] to TVN or the TVN shareholders.
- 4.28 An additional fee is payable in relation to the provision of Sky Channel on TVN shareholder racecourses to corporate bookmaker headquarters or betting auditoriums used primarily by wagering operators other than licensed totalizator operators.

Production of the TVN Channel

- 4.29 Sky agrees to produce the TVN Channel for TVN in accordance with agreed production requirements [**Restriction of Publication of Part Claimed**]. Sky must provide facilities, infrastructure and staff for the preparation and production of the TVN Channel.
- 4.30 Sky also agrees to cover the cost of the production of the TVN Channel up to a specified amount as part of the consideration for the rights granted by TVN to Sky under the pay TV licence. Any additional costs or expenses required to be incurred in the production, operation or any other aspect of the TVN Channel is paid by TVN.

- 4.31 Both Sky Channel and TVN Channel use elements of the raw race feed coverage. TVN is responsible for paying certain third party service providers and suppliers used to produce and broadcast the TVN Channel.
- 4.32 TVN agrees to employ and incur the cost of its talent. The talent is to be deployed in producing the TVN Channel. TVN must ensure its talent co-operates with Sky, observes Sky's reasonable safety and other requirements and, if the talent prevents or delays Sky's performance of its obligations, Sky is not liable to TVN.
- 4.33 TVN's executive producer determines the content or "look" (graphics, logos, wagering overlays, sets or wardrobe) of the TVN Channel and no changes can occur without prior approval of TVN. TVN is responsible for sourcing all advertising for the TVN Channel and retains associated gross advertising revenues.
- 4.34 Sky provides facilities for the preparation and production for TVN of TVN existing magazine programs. Production of these programs is at TVN's cost.

Free to air promotion

- 4.35 The MOU provides for a promotional arrangement pursuant to which Tabcorp pays TVN a commission fee for certain additional "Category 2" races sold to, and screened live by, a main free to air television station, where those races were not shown live on free to air television during the 12 month period prior to the Effective Date.
- 4.36 Category 2 races include Australia Cup Day, Ascot Vale Stakes Day, Turnbull Stakes Day, Caulfield Cup Day, Caulfield Guineas Day, Thousand Guineas Day, Blue Diamond Stakes Day, Sandown Classic Day, Cox Plate Date, Golden Slipper Day, AJC Derby Day, AJC Metropolitan Day, AJC Sydney Cup Day, AJC Oaks Day, AJC Doncaster Day, AJC Epsom Day, Manikato Stakes Day, Australia Stakes Day, Rosehill Guineas Day, Coolmore Classic Day and Golden Rose Day.

Archival Material

- 4.37 Where it has the rights to do so and subject to consultations with the relevant clubs, Sky grants TVN a licence to broadcast non-TVN premium Australian thoroughbred race archival material on the TVN Channel.
- 4.38 In consideration of a once-off licence fee paid by Sky to TVN, Sky is granted the right to use TVN shareholder racecourse feed archival material on pay TV, and in connection with any magazine show or advertisement broadcast on pay TV. Sky does not own the intellectual property rights in the TVN shareholder racecourse archival footage which may be included in the Sky magazine shows and any broadcasts or other transmissions of TVN race or non-race footage which may be included in the Sky magazine shows.
- 4.39 In consideration of a once-off licence fee paid by Sky to TVN, Sky is also granted the right to use TVN shareholder racecourse feed archival material on subscription television services into commercial outlets (including at racecourses), and in connection with any magazine show or advertisement broadcast on Sky Channel.

[Restriction of Publication of Part Claimed]

- 4.40 **[Restriction of Publication of Part Claimed]**

Obligation of Sky to third party Victorian wagering licensee

- 4.41 Within 30 days of the date on which the Government of Victoria announces the identity of a third party Victorian licensee (that is, a licensee who is not Tabcorp or any of its related bodies corporate), Sky must offer to supply the racing and wagering channel (not being the TVN Channel) distributed by Sky to the commercial venues which include coverage of Victorian and Sydney Metropolitan thoroughbred racing to the third party Victorian licensee for the period between 16 August 2012 and 31 December 2012 on reasonable commercial terms.
- 4.42 If the third party Victorian licensee wishes to enter into an agreement with Sky for the distribution of the Commercial Channel, Sky must negotiate in good faith with the third party Victorian licensee in order to reach agreement on the licence fee for the Commercial Channel.
- 4.43 If Sky and the third party Victorian licensee are unable to agree on the licence fee by 1 January 2012, the matter is to be referred for decision to an independent expert.
- 4.44 The independent expert is to be appointed by agreement between Sky and the third party Victorian licensee, or, in default of agreement, within 15 business days, Sky or the third party Victorian licensee may request the President of the Institute of Chartered Accountants in Australia to appoint the independent expert.
- 4.45 All costs incurred by the independent expert must be borne by Sky and the third party Victorian licensee in equal shares.
- 4.46 For the period between 16 August 2012 and 31 December 2012, Sky must not, except in circumstances where the third party Victorian licensee is permitted to sub-license the Commercial Channel in accordance with the terms of the agreement between Sky and the third party Victorian licensee, refuse to supply the Commercial Channel to any of:
- (a) hotels;
 - (b) clubs;
 - (c) other commercial outlets with a liquor licence;
 - (d) other commercial outlets with wagering facilities; and
 - (e) race courses,

(each a “**Commercial Operator**”) within Victoria by reason that the Commercial Operator has entered into a commercial arrangement with a third party Victorian licensee. Such Commercial Operator will be supplied with the Commercial Channel on their existing terms of supply or, if they have not previously received the Commercial Channel, on the standard terms and conditions for the supply of the Commercial Channel applicable in Victoria immediately prior to 15 August 2012.

Settlement of proceedings

The proceedings

- 4.47 The Parties to the MOU, or some of them, are currently parties to Federal Court Proceedings No 1235 of 2005, 545 of 2005, 1291 of 2005 and Victorian Supreme Court Proceedings No 2133 of 2005 (“**Proceedings**”).

Continued stay of proceedings

- 4.48 Subject to the comments below, the relevant Parties agreed, immediately upon execution of the MOU, to the continued stay of all outstanding claims in the Proceedings until 31 January 2008 or, broadly speaking, any date on which it becomes clear that the Parties will not obtain authorisation from the Commission, at which point the litigation may revive.

Settlement and release

- 4.49 The relevant Parties agreed, immediately upon execution of the MOU (and the payment by Tabcorp of an agreed sum to TVN), to the settlement and release of any claims or cross-claims relating to the supply of the TVN Channel into Victorian TAB agencies for the period between 5 May 2005 and 15 May 2006.
- 4.50 Subject to the payment by Sky of certain sums, the relevant Parties also agreed to the settlement and release of any claims or cross-claims relating to the supply of the TVN Channel into Victorian TAB Agencies for the period 16 May 2006 to 31 January 2008.
- 4.51 The Parties have agreed, on and from the Effective Date, to the settlement and release of all remaining claims and cross-claims in the Proceedings.

5. Rationale

- 5.1 While the Parties will separately provide their own confidential statements regarding business rationale and the counterfactual, at a higher level the arrangements will restore the need of each party for a complete racing vision product:
- (a) From a Tabcorp perspective, the arrangements will restore to Sky the ability to provide “wall to wall” racing from a single source that Tabcorp and the other TABs demand in order to drive wagering;
 - (b) For TVN, the arrangements will allow the further development of a premium thoroughbred racing channel designed to promote thoroughbred horse racing and the thoroughbred racing industry as a whole; and
 - (c) For both Parties, the arrangements will bring to an end expensive and uncertain litigation and ensure that Sky and TVN customers and stakeholders will enjoy the benefits set out in this submission.
- 5.2 As this submission shows, the interests of Sky and TVN are wholly congruent to the public benefits that will result from the proposed arrangements.
- 5.3 An increase in wagering revenues is clearly a benefit to Tabcorp and other totalizators. However, as wagering revenues are also the principal source of funding for the Australian racing industry, an increase in wagering revenues is also a significant public benefit.
- 5.4 Further, the arrangements benefit TVN insofar as it can fulfil its commercial objective to develop a thoroughbred racing channel in a cost-effective and efficient manner. This too will result in public benefits through its promotion of the Australian thoroughbred industry.
- 5.5 The arrangements will result in two specialised channels, one focussed on punters and one focussed on thoroughbred enthusiasts. Consumers will be offered more choice and be in a position to allocate their demand accordingly.

6. The Statutory Test for Authorisation

- 6.1 The Parties' application comprises the following applications under Division 1 of Part VII of the TPA:
- (a) section 88(1) of the TPA: Form B; and
 - (b) section 88(8) of the TPA: Form E.
- 6.2 Section 90(6) of the TPA provides that the Commission must be satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding or the proposed conduct would result, or would be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract, arrangement or understanding were made or the proposed conduct were engaged in.

7. Factual and Counterfactual

- 7.1 In order to apply the “future with and without” test it is necessary to identify a “factual” and “counterfactual”. That is, the Commission considers the public benefits and anti-competitive detriments which are likely to arise from a proposed set of arrangements if authorisation is granted (“**factual**”), compared to those which would be likely to arise if authorisation is not granted (“**counterfactual**”).

Factual

- 7.2 In this matter the factual scenario is the implementation of the arrangements contained within the MOU. The implementation of the MOU will end “split vision” by allowing Sky Channel to return to its role as a “wall to wall” racing broadcaster. As explained in further detail below, “split vision” refers to circumstances in which coverage of Australian thoroughbred racing is split between Sky Channel and the TVN Channel. Prior to the implementation of the Interim Arrangements (also described in more detail below) split vision occurred from 4 May 2005 to 16 May 2006. With substantial negative consequences for the racing industry. It will also allow TVN to pursue the development of a thoroughbred-focussed channel as a means to expand interest in thoroughbred racing throughout Australia. The return of all racing to Sky Channel coupled with the development and expansion of TVN will, ultimately, lead to increased wagering and increased attendance at racing events to the benefit of the racing industry.

Counterfactual

- 7.3 Tabcorp and TVN have separately considered the likely counterfactual. Each Party will separately provide a confidential submission in respect of its view of the likely counterfactual.
- 7.4 While separate submissions will be provided, the Parties jointly submit that, at a minimum, the counterfactual will involve a return to litigation and, necessarily, split vision with direct consequences for wagering turnover and racing industry funding. Ongoing litigation will be costly and take considerable time to complete. Further, the results of the litigation are uncertain.

8. Background to the Racing and Wagering Industries

Racing Industry

- 8.1 The racing industry comprises three codes of racing – thoroughbred racing, greyhound racing and harness racing. The racing industry is an important part of the national economy and a major employer, particularly in regional and rural Australia. In 2001, a study found that nationally the thoroughbred racing industry had a direct economic benefit of \$7.4 billion to the economy and employed in excess of 249,063 people (including full time, part time and casual employees), with the harness and greyhound racing industry collectively employing about half that number of people.⁸ Of these jobs, 80,970 were in metropolitan areas and 168,093 were in non-metropolitan areas. Since 2001 there are no national statistics but detailed economic contributions statistics have been compiled for particular States, including:
- (a) The economic value of the racing industry in Victoria in 2005/2006 was \$2.1 billion with direct spending of \$1.8 billion into the economy⁹;
 - (b) The gross economic benefit of racing and wagering in NSW in 2002/2003 was \$4.2 billion¹⁰;
 - (c) The direct industry value added by the racing and wagering industries in Western Australia in 2003/ 2004 was \$124 million representing approximately 0.5% of Western Australia's Gross State Product¹¹; and
 - (d) The economic value of the South Australian Racing Industry in 2004/2005 was estimated to be \$274 million¹².
- 8.2 A case study of the economic impact on regional areas can be found in the statistics surrounding the Victorian Spring Racing Carnival and set out in the Size and Scope of the Victorian Racing Industry publication of March 2006 as follows:
- (a) 95% of Victoria's racing clubs and 80% of the race meetings occur in regional Victoria;
 - (b) in 2005 the gross economic benefit of the Spring Racing Carnival was \$524 million, \$95 million of which was a benefit to regional Victoria;
 - (c) there are numerous regional communities which participate in the Spring Racing Carnival through having carnival race days, local festivals, parades, tourism promotions and other special events. Those communities include:

⁸ Size and Scope of the Australian Thoroughbred Industry, December 2001 (from Australian Racing Board website).

⁹ Size and Scope of the Victorian Racing Industry, March 2006.

¹⁰ Size and Scope of Tab Ltd and New South Wales Racing, September 2003.

¹¹ Size and Scope of the Western Australian Racing Industry, July 2004.

¹² Size and Scope of the Victorian Racing Industry, March 2006.

| | | |
|------------|------------------|-------------|
| Ararat | Hamilton | Seymour |
| Avoca | Horsham | Stony Creek |
| Bairnsdale | Kilmore | St. Arnaud |
| Ballan | Kyneton | Tatura |
| Ballarat | Manangatang | Terang |
| Benalla | Mildura | Traralgon |
| Bendigo | Moe | Wangaratta |
| Colac | Mornington | Warrnambool |
| Cranbourne | Mount Wycheproof | Werribee |
| Dunkeld | Murtoa | Wodonga |
| Echuca | Pakenham | Yarra Glen |
| Geelong | Sale | |

8.3 The structures of the three codes of racing are broadly similar:

- (a) in each code, activities in each State and Territory are governed by statutory bodies, known as Principal Racing Authorities “**PRAs**”), which control the regulation, functions and commercial activities of the codes;
- (b) in turn, a national administrative body exercises oversight responsibilities in relation to these statutory bodies. The national bodies are the Australian Racing Board Limited (“**ARB**”) (thoroughbred), Greyhounds Australasia (greyhound) and the Australian Harness Racing Council (harness); and
- (c) together, these organisations assist in the governance of racing clubs which conduct racing in each code, for the benefit of participants and stakeholders in the industry.

8.4 There are approximately 379 thoroughbred racing clubs, 126 harness racing clubs and 93 greyhound racing clubs in Australia.

8.5 A relevant feature of these racing organisations is that they are all non-profit organisations, so that all their income is used to provide racing “product”, through the provision of race facilities, infrastructure and services, and the payment of prize money, which in turn is used to pay owners, jockeys, trainers, drivers, farriers, stable hands and others. In addition, income is used to support a wide variety of other aspects of the racing industry. These include investments in training, and veterinary services.

The Wagering Industry

8.6 Gambling activities are categorised as either wagering or gaming. Wagering involves betting on the outcome of live events, primarily racing (thoroughbred, harness and greyhound racing) and other sporting events. Wagering in Australia has been traditionally divided into totalizator and fixed-odds wagering (known as ‘bookmaking’). The licensing of Betfair in Tasmania has introduced “betting exchange” forms of wagering. Other forms of gambling are ‘gaming’.

Wagering and Totalizators

8.7 Totalizators are the main form of wagering in Australia, comprising approximately 78% of wagering turnover in the year ended 30 June 2006. Approximately 94% of totalizator wagering turnover is “off-course” betting (that is, the customer is not present at a racecourse when placing the bet).

- 8.8 In each State or Territory there is one operator licensed to conduct off-course totalizator wagering. These operators are authorised to conduct totalizator wagering and, subject to certain restrictions, to conduct fixed-odds wagering on racing.¹³ In addition to Totalizators, oncourse bookmakers, corporate bookmakers and betting exchanges (ie Betfair) are licensed to take wagers on racing in various states and territories.
- 8.9 Each off-course totalizator was originally established as a statutory authority of the relevant State or Territory and known as the Totalizator Agency Board. However in recent years a number of State and Territory governments have corporatised and/or privatised the off-course wagering operators. The following table sets out the status of the off-course wagering operator in each State.

Table 2: Off-course Wagering Operations in Australia

| State | Status of off-course wagering operator |
|--------------------|--|
| NSW | Tab Limited – a wholly owned subsidiary of Tabcorp |
| Victoria | Tabcorp Holdings Limited – a listed public company |
| Queensland | UNiTAB ¹⁴ – a listed public company |
| Western Australia | RWWA – government authority |
| South Australia | SATAB Pty Ltd – a wholly owned subsidiary of UNiTAB |
| Tasmania | TOTE Tasmania Pty Ltd – government authority ¹⁵ |
| ACT | ACTTAB – government authority |
| Northern Territory | NTTAB Pty Ltd – wholly owned subsidiary of UNiTAB |

- 8.10 Off-course totalizators can accept off-course wagers through outlets in the relevant State or Territory as well as by telephone or internet.
- 8.11 The operation of totalizator wagering services is highly regulated at the State and Territory level. The legislation controlling totalizator betting is similar in each State and Territory. The legislation specifies the conditions under which a licence may be granted for the conduct of totalizator wagering services. The TAB in each State and Territory must comply with a large number of conditions and obligations under the relevant legislation.

The Relationship between the Racing and the Wagering Industry

- 8.12 The racing and wagering industries are closely interrelated, both economically and legally.

¹³ Fixed-odds wagering on racing is a very limited component of TAB operations. On an annual basis, combined wagering turnover on fixed-odds racing for Tabcorp and TAB Limited is only approximately \$40 million.

¹⁴ Note that on 12 October 2006, UNiTAB became part of Tattersall's Limited as a result of a merger of both companies.

¹⁵ Betfair is also a licensed off-course wagering provider in Tasmania.

- 8.13 The predominance of wagering on racing events has resulted in an inter-dependent relationship between the racing industry and the off-course wagering operators in which:
- (a) the racing industry supplies the product (ie stages the races) on which wagering operators conduct betting; and
 - (b) the off-course wagering operators provide the vast majority of the funding for the racing industry.
- 8.14 In this respect the relationship between the racing industry and wagering operators differs substantially from that which exists in relation to other sporting events, because other sporting events are generally funded through means such as ticket sales, sponsorship and media rights, and do not receive funding or product fees from wagering operators who conduct betting on the event.
- 8.15 In respect of the year ended 30 June 2006, Tabcorp paid over \$503.4 million by way of fees to the NSW and Victorian racing industries.
- 8.16 The relationship between totalizator operators, the racing industry and State governments can perhaps be best understood by considering the distribution of wagering turnover. For example, in the case of Tab Limited, a breakdown of the distribution of turnover is approximately as follows:

Table 3: Breakdown of Distribution of Turnover for Tab Limited

| Recipient | Percentage |
|-------------------------|-------------|
| Customers (in winnings) | 83.2% |
| NSW Government | 4.6% |
| NSW Racing | 4.5% |
| TAB Expenses | 3.3% |
| Sales Commissions | 1.8% |
| Federal Government Tax | 0.8% |
| TAB Profit | 1.8% |
| Total | 100% |

- 8.17 When the off-course totalizator operators were government authorities, support of the racing industry was generally achieved by way of a statutory distribution. In States which have privatised their off-course totalizator operator, upon privatisation the statutory distribution was generally replaced by a statutory requirement to have and give effect to commercial agreements between the off-course totalizator operator and the racing industry in the relevant State or Territory.
- 8.18 Details of the arrangements for each State and Territory are set out below.

Tabcorp's arrangements with VicRacing

- 8.19 Tabcorp's Victorian wagering business is conducted through a joint venture agreement (**“Joint Venture Agreement”**) between a wholly-owned subsidiary of Tabcorp and VicRacing Pty Ltd, a company established by the Victorian Racing Industry. Overall responsibility for the joint venture is vested in a Management Committee and each joint venturer is entitled to appoint three representatives to the Management

Committee. The Committee must approve new wagering products, operating plans and budgets, betting rules and advertising programs. Tabcorp has responsibility for the day-to-day joint venture business operations within the terms of the Joint Venture Agreement, approved operating plans and budgets, and the lawful directions of the Management Committee. Tabcorp must act in the best interests of the joint venture when carrying out its day-to-day management responsibilities.

- 8.20 The other key points of the joint venture are as follows:
- (a) Tabcorp holds wagering and gaming licences and uses these licences for the benefit of the joint venture in the conduct of its normal business operations.
 - (b) Tabcorp conducts the following business operations on behalf of the joint venture:
 - (i) Wagering: Tabcorp holds an exclusive licence to operate pari-mutuel wagering on Australasian thoroughbred, harness and greyhound racing events and a non-exclusive licence to conduct wagering on other wagering products, through a distribution network comprising 588 retail stores, call centres and on-course facilities. The Joint Venture Agreement gives the racing industry the power to restrict entry by Tabcorp into fixed odds race wagering (currently for Tabcorp, such bets are limited to certain group and listed races approved by the Victorian Racing Industry). As a consequence, Tabcorp can offer fixed odds bets on one race each day and on all group/listed races.
 - (ii) Gaming: Tabcorp is one of two licensed gaming operators in Victoria, operating up to 13,750 gaming machines in 280 pubs and clubs throughout the State. The other licensed operator is Tattersall's.
 - (iii) Club Keno: As an adjunct to the gaming licence, Tabcorp is one of two licensed Club Keno operators in Victoria, operating through a joint venture arrangement with the other licensed operator, Tattersall's.
 - (iv) Trackside: Tabcorp operates a virtual racing product which is distributed to various establishments in Victoria.
- 8.21 Pursuant to the Joint Venture Agreement, Tabcorp is required to pay 25% of the total profit from the joint venture (which is derived from gaming and wagering revenue, after deduction of charges to Tabcorp and payments to Racing Products Victoria) to VicRacing.
- 8.22 In addition, Tabcorp is party to a Racing Program Agreement and a Product Supply Agreement (collectively, “**Product Agreements**”), which are agreements whereby the major Victorian racing bodies undertake to provide the racing product, in the form of scheduled race meetings, and racing information and data for use by the TAB and customers to enable wagering on the scheduled race meetings. The Victorian Racing Industry retains ownership of all intellectual property with regard to the racing information and data. The following fees are payable by Tabcorp to Racing Products Victoria Pty Ltd pursuant to the Product Agreements:
- (a) a racing program fee, being a fixed amount which is indexed in accordance with off-course wagering growth since 1996;
 - (b) a product supply fee, being 18.8% of Tabcorp’s net wagering revenue; and
 - (c) a marketing fee being a fixed amount which is indexed in accordance with off-course wagering growth since 1996.

- 8.23 Overall Tabcorp paid a total of approximately \$288 million to the Victorian Racing Industry in the financial year ending 30 June 2006.¹⁶ These payments are made out of the revenue derived from the Joint Venture's wagering and gaming business managed by Tabcorp.
- 8.24 Tabcorp is responsible for the provision of all wagering, gaming and Club Keno infrastructure, including the employees needed to undertake normal business operations, the required equipment (such as computer hardware and software, and gaming machines) and the rental of TAB agency outlets. Tabcorp remains responsible for all employment contracts of non-retail outlet personnel and retains all intellectual property developed by employees for the purposes of the joint venture. Tabcorp seeks to recover the infrastructure costs from the joint venture through a series of management charges for operating costs and assets charges for the use of assets acquired or developed by Tabcorp for the benefit of the joint venture.
- 8.25 If invited to do so, the Victorian Racing Industry may contribute to the funding of an asset through an upfront contribution to the cost of acquisition of the asset. Such a contribution will confer proportionate ownership rights in the asset on the Victorian Racing Industry. To date, no such arrangement has occurred between Tabcorp and the Victorian Racing Industry in relation to any joint venture assets.

Tab Limited's arrangements with RacingCorp

- 8.26 Similarly, in New South Wales, Tab Limited, Tabcorp, RacingCorp Pty Ltd (**"RacingCorp"**) (formerly called New South Wales Racing Pty Ltd) and each of the racing controlling bodies in NSW (ie Racing NSW, Greyhound Racing NSW and Harness Racing NSW) are parties to a Racing Distribution Agreement (**"Racing Distribution Agreement"**). In broad terms, the Racing Distribution Agreement requires Tab Limited to act and make decisions with the intent of maximising total payments of certain fees to RacingCorp, and governs the program of races on which Tab Limited can conduct off-course totalizators. It also requires Tab Limited to pay certain fees to RacingCorp, including:
- (a) a Product Fee (22% of net wagering revenue), and an annual fixed product fee; and
 - (b) a Wagering Incentive Fee (25% of wagering earnings).
- 8.27 The product fees are paid to the racing industry out of the 16% allowable commission taken by Tab Limited.
- 8.28 A total of \$214.7 million was distributed to the NSW racing industry in the financial year ending 30 June 2006 as a result of the above payments by Tab Limited to RacingCorp.¹⁷

Queensland Product and Program Agreement¹⁸

- 8.29 UNiTAB is a party to a product and program agreement with:
- (a) Queensland Race Product Co Limited (**"Product Co"**);

¹⁶ Tabcorp Concise Annual Report 2005, page 5.

¹⁷ Racing NSW Annual Report 2006, page 24.

¹⁸ UNiTAB Bidder's Statement in relation to Takeover of Tab Limited, 22 January 2004

- (b) the Queensland Thoroughbred Racing Board;
 - (c) the Queensland Harness Racing Board; and
 - (d) the Greyhound Racing Authority.
- 8.30 The agreement continues for the duration of the period for which the race wagering licence grants exclusivity to UNiTAB. Under the agreement, in return for a product and program fee of 39% of UNiTAB's race wagering commission revenue in Queensland, Product Co agrees to supply to UNiTAB:
- (a) Australian racing product;
 - (b) the Queensland racing calendar; and
 - (c) the Queensland racing program
- 8.31 A product and program fee of \$119.4 million was paid to Queensland Racing and was available for distribution to the Queensland racing industry in the financial year ending 30 June 2006.¹⁹

*South Australia*²⁰

Racing Distribution Agreement

- 8.32 SA TAB is a party to a racing distribution agreement with:
- (a) Racing SA Pty Ltd (“**Racing SA**”);
 - (b) Thoroughbred Racing S.A. Ltd;
 - (c) Harness Racing SA Ltd; and
 - (d) Greyhound Racing SA Ltd.
- 8.33 The agreement continues for the duration of the South Australian major betting operations licence. Under this agreement, SA TAB pays product and program fees of 39% of wagering commissions to the other parties to the agreement. In return, Racing SA agrees to supply specified information with respect to South Australian and interstate racing together with the annual program of South Australian race meetings.

Duty Agreement²¹

- 8.34 The Treasurer of South Australia and SA TAB are party to a duty agreement which continues in force until the date the major betting operations licence is cancelled, surrendered or expires. Under this agreement, the duty payable by SA TAB is set for the 15 year period from 6 December 2001 at effectively 6% of net betting revenue.

¹⁹ Queensland Racing Annual Report 2006, page 34.

²⁰ UNiTAB Bidder's Statement in relation to the Takeover of Tab Limited, 22 January 2004

²¹ As above

- 8.35 A product and program fee of \$27.5 million (net of the duty payable under the Duty Agreement) was paid to Thoroughbred Racing SA in the financial year ending 30 June 2006, with \$24.6 million of that being distributed to the South Australian racing industry.²²

*Northern Territory*²³

- 8.36 No product fee is payable by UNiTAB to the Northern Territory racing industry. Rather, the Territory Government receives wagering taxes of 40% of totalizator wagering commissions. Additionally, a variety of rates apply from 0 to 1.5% on fixed odds sales. The Territory Government is responsible for payments to the racing industry in the Northern Territory.

Tasmania

- 8.37 TOTE Tasmania must pay a yearly product fee of at least \$10 million (calculated as a specified number of “fee units”, the value of which increases each year) to the Tasmanian racing industry to be distributed to the individual racing clubs pursuant to the agreement between TOTE Tasmania and each of those clubs. In addition, TOTE Tasmania must set aside:
- (a) any unclaimed dividend or unclaimed refund;
 - (b) up to 25% of its net earnings for the financial year; and
 - (c) the payments it receives under the *Gaming Control Act 1993* (Tas), being a share of the tax collected by the Tasmanian Government in relation to major lottery endorsements and the operation of betting exchanges,
- for the benefit of the Tasmanian racing industry.
- 8.38 Pursuant to these arrangements, TOTE Tasmania distributed \$18.8 million in 2005/06 to the Tasmanian racing industry.²⁴

Western Australia

- 8.39 Until 31 July 2006, the *Racing and Wagering Western Australia Act 2003* (WA) established the statutory allocation of the first \$50 million of RWWA profits for distribution to WA race clubs, with RWWA responsible for determining the allocation of all profits above the first \$50 million. Total distribution to the Western Australian racing industry in 2005/06 was \$81.9 million.²⁵
- 8.40 From 1 August 2006, RWWA is responsible for determining the allocation of all profits to the Western Australia racing industry, using its best endeavours to ensure that the amounts paid to each club are equivalent to the revenue generated from wagering on races conducted by that club.

ACT

²² Thoroughbred Racing SA Annual Report 2006, page 21.

²³ UNiTAB Bidder's Statement in relation to the Takeover of Tab Limited, 22 January 2004

²⁴ TOTE Tasmania Pty Ltd Annual Report 2006, pages 8, 16.

²⁵ RWWA Annual Report 2006, pages 6, 43.

- 8.41 ACTTAB must pay a percentage of all bets (such percentage to be determined by the Minister) to the ACT Government pursuant to the *Betting (ACTTAB Limited) Act 1964* (ACT). The Minister determines the amount paid from the fund to each of the clubs in the ACT for the purposes of construction, racetrack improvements and other promotional activities.
- 8.42 During 2005/06, ACTTAB paid \$6.0 million to the ACT Government in licence fees and taxes, and distributed a further \$7.6 million to the ACT racing industry.²⁶ Of this, the Canberra Racing Club received \$5.04 million in distributions from the ACTTAB.

The Role of the Racing Broadcast Industry

- 8.43 Attracting wagering customers depends on the customers having accurate and timely access to racing information and to live television or audio coverage of the races. Media coverage is therefore essential to a wagering service and TABs actively pursue opportunities to enhance the media availability of racing events on which their customers can bet. In part this has involved liaising with racing industry representatives in relation to more efficient race scheduling.
- 8.44 Media coverage may take several forms, including television, radio, newspaper and internet. The provision of racing coverage by television is particularly important, as it has strong complementarities with the provision of wagering on racing, and may be conceptualised as input to the provision of wagering.
- 8.45 As wagering involves betting on live events, customers generally want to watch the event on which they have bet. Tabcorp estimates that turnover on racing events can be increased by approximately 40-60% if races are televised and are broadcast in clubs, pubs, TAB agencies and into the home via Pay TV. The impact of broadcasting on wagering turnover may be less pronounced (but still significant) in respect of certain races (eg Saturday metropolitan races) as there is a core punter who bets habitually on such races and information in respect of those races is covered by other forms of media. Given the relationship between racing broadcasting and wagering revenue, when racing broadcasting is destabilised wagering drops. The negative effect on wagering revenue from the reduced access to and quality of racing broadcasting caused by split vision is discussed in paragraphs 8.60 and following.
- 8.46 The inter-dependence between broadcasting and wagering has led to a degree of vertical integration, with Sky Channel being owned by Tabcorp and TVN being owned by Victorian and Sydney metropolitan clubs. In respect of Sky Channel, the connection with wagering resulted in its developing from its earlier operations as a producer of general entertainment to hotels and clubs into a specialist “wall to wall” racing broadcaster.
- 8.47 The racing and wagering industries have invested significantly to increase the availability of racing events on which their customers can bet. In order to facilitate race coverage, Sky Channel liaises with racing industry representatives and TABs to schedule races with a view to ensuring maximum broadcast coverage. Tabcorp estimates that on Sky channel it broadcasts over 5,500 race meetings a year covering more than 50,000 individual races,²⁷ which is more than double its initial racing broadcast coverage. All of the Australian totalizators have an interest in the continued supply of comprehensive racing coverage. Each of the various state totalizators have

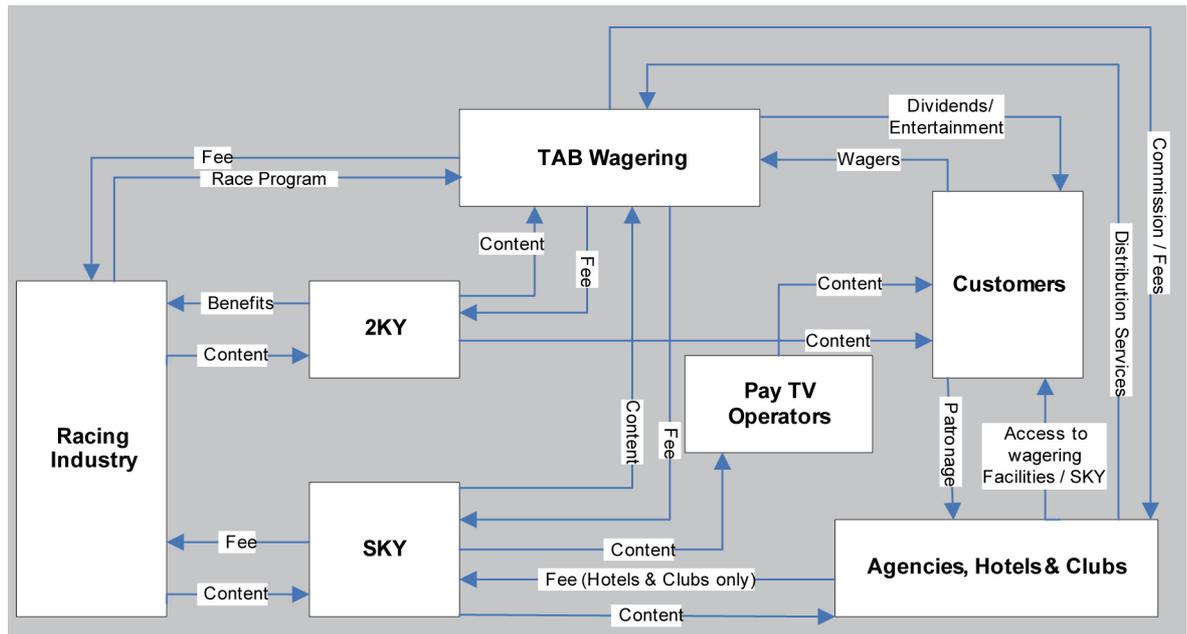
²⁶ ACTTAB Annual Report 2005-06, pages 10, 57.

²⁷ Tabcorp, *Investor Compendium*, August 2006, p 16.

existing contracts with Sky for the supply of Sky Channel into their agencies. Agreements with certain TABs also contain specific cost contributions in respect of the pay TV component of Sky Channel's production.

- 8.48 The inter-dependence between the racing industry, racing media and wagering operators, described as the "circle of fees" within the three industries, is illustrated in respect of Sky Channel and 2KY racing radio as follows:

Figure 1: Interdependence of Racing, Media and Wagering Operators



The emergence of "split vision"

- 8.49 Prior to the existence of the TVN Channel, Sky was the principal broadcaster of Australian racing. It held the broadcast rights to practically all thoroughbred racing in Australia (as well as harness and greyhound racing), having negotiated for such rights with the individual race clubs in question, or bodies on their behalf.
- 8.50 During 2004 and ending in February 2005, Sky and TVN had discussions to develop jointly a thoroughbred only channel in addition to Sky Channel. However, Sky and TVN could not reach commercial terms in respect of the joint development of such a channel. In this period (and prior to this period) TVN acted as a rights aggregator. While it held the rights to the Victorian thoroughbred racing coverage, it licensed those rights to Sky for broadcast on Sky Channel.
- 8.51 On 4 and 5 March 2004 the AJC and STC each made offers to Sky in respect of Sky's acquisition of their rights for the period until 4 May 2005. Sky rejected or did not accept these offers. TVN then obtained the AJC and STC rights until 4 May 2005. This resulted in periodic "blackouts" whereby AJC and STC coverage was not made available to domestic viewers on Sky Channel.
- 8.52 In the context of the joint venture discussions (noted above) the Sydney races were returned to Sky Channel pursuant to an agreement with TVN dated 6 August 2004. However, discussions in relation to the establishment of the proposed joint venture then largely broke down. TVN entered into agreements with each of the AJC and STC in relation to the transmission of AJC and STC race coverage on the TVN Channel from 4 May 2005. On 4 May 2005, Sky's licence agreement with TVN in respect of the broadcast of Victorian thoroughbred races also expired.

- 8.53 Consequently, on 4 May 2005 Sky ceased to hold the rights to broadcast race meetings conducted by the AJC, STC and all Victorian thoroughbred meetings to the Australian market. Sky continued to broadcast other Australian thoroughbred and all non-thoroughbred racing to its commercial subscribers and via pay TV.
- 8.54 On 4 May 2005 TVN began broadcasting AJC, STC and Victorian thoroughbred race coverage to commercial premises on the TVN Channel.
- 8.55 In addition, TVN was able to broadcast AJC, STC and Victorian races on the TVN Channel to residential subscribers to Foxtel's digital service by means of the enforceable access undertakings given by Foxtel to the Commission.
- 8.56 Thus TVN has (since May 2005) been engaged in broadcasting thoroughbred racing coverage on a subscription basis to commercial venues and, to a limited extent, to residential premises through the Foxtel undertakings.
- 8.57 This led to the screening of thoroughbred racing vision across two separate, but complementary, services (ie, "split vision"). Victorian and Sydney metropolitan races were shown on TVN and other thoroughbred races were shown on Sky Channel as well as races from the other codes (ie harness and greyhounds).
- 8.58 Against this background, broadcasting rights disputes and associated disputes became the subject of litigation between many parties, including the following proceedings:
- (a) contract and tort claims by Sky against AJC, STC and TVN in relation to certain 'first and last rights' held by Sky for AJC, STC and Victorian race coverage (with cross-claims by TVN based on contraventions of the TPA);
 - (b) contract claims by Sky against Austar and TVN in relation to arrangements between TVN and Austar to broadcast racing on the Austar pay TV platform;
 - (c) claims by TVN against the Tabcorp/Sky Group for various alleged contraventions of the TPA;
 - (d) claims by TVN (and others) against Sky in relation to a discrete copyright issue involving the broadcast of certain content on Sky's "Racing Retro" television program; and
 - (e) contractual claims by TVN against Tabcorp in relation to the fee payable by Tabcorp to TVN for the supply of the TVN Channel into certain TAB agencies.
- 8.59 All of the above proceedings (with the exception of the contract claim in (b) which was discontinued in April 2006) were stayed by 29 May 2006 pursuant to a conditional settlement agreement which was signed on 15 May 2006. A detailed summary of the litigation is attached at **Annexure "D"**.

Consequences of "split vision"

- 8.60 Split vision had significant negative consequences for virtually all stakeholders in the Australian racing industry. Wagering turnover fell, funding to the industry decreased, prize monies decreased, races were cancelled, pubs and clubs faced increased costs and loss of patronage, and punters were frustrated and bet less.
- 8.61 During the period of split vision, whilst Sky retained over 90% of racing vision content (by number of races), the TVN Channel was the only source of vision for a significant proportion of premium thoroughbred racing vision. A significant portion of

Tabcorp turnover from wagering was derived from wagering on the TVN Channel races (approximately 35% prior to split vision).

- 8.62 In respect of Sydney metropolitan and Victorian thoroughbred races (ie, TVN shareholder races), split vision meant that punters had to divert their attention from Sky Channel to the TVN Channel, assuming that the TVN Channel was available in the particular venue. During TVN shareholder races, Sky Channel would broadcast other programming, such as wagering odds and information, previews, interviews and advertising to allow punters to follow the race on the TVN Channel if available.
- 8.63 During the period of split vision punters needed to monitor happenings on two channels. This process often caused confusion which in turn resulted in decreased wagering. Punters watching Sky Channel would often not be fully aware that it was time to switch to the TVN Channel in order to watch a particular race. Further, Sky could not broadcast “at the barrier” shots for races shown on the TVN Channel. These shots more than any other factor tend to prompt last minute bets. Further, the TVN Channel was unavailable on the Austar and Optus networks which meant that those persons who relied on those services for racing vision could not see TVN shareholder races.
- 8.64 In short, the fact that not all thoroughbred racing was on a single consolidated channel caused punters to miss races (or not be in a position to see races at all) and resulted in significant confusion and inconvenience. This, in turn, contributed significantly to a substantial decline in wagering turnover with direct flow-on impacts on the racing industry.
- 8.65 Split vision also had negative consequences for pubs and clubs. For those pubs and clubs which are also TAB Agencies, split vision threatened commissions. More generally, confusion on the part of customers as to when and where races would be shown threatened patronage, as persons would elect not to come to the pub or club or to spend less time there. Further, for those pubs and clubs whose patrons expected them to provide vision for all Australian races this necessitated the acquisition of both Sky Channel and the TVN Channel. Pubs and clubs needed to enter into contracts with both Sky and TVN, and depending upon the configuration of the individual pub or club, the acquisition of multiple television screens or switching between channels.
- 8.66 There is considerable evidence regarding the effect of split vision on the wagering and racing industry which, as outlined above, is principally funded through wagering revenues.²⁸

²⁸ See the following media articles: P Caton, *TV barrier trials: Television wars are hobbling country racing*, Daily News, 21 April 2006; L McLean, *Race deal could save industry*, Maitland Mercury, 28 April 2006; R Thomas, *Industry claws way back*, The Daily Telegraph, 19 June 2006; D Riccio, *TV ban has angry TAB punters in dark*, The Daily Telegraph, 5 May 2006; R Thomas, *Damage control: TV war shelves prizemoney hike*, The Daily Telegraph, 10 June 2006; A Hamilton, *TV war hits Miracle stakes*, Herald Sun, 29 June 2006; Market wrap, *Rivals Tabcorp, Unitab aren't the only ones brawling*, Australian Financial Review, 12 October 2005; C Nicolussi, *Racing NSW takes the axe to bush meetings*, The Daily Telegraph, 16 February 2006; M Manley, *VRC to reduce race cards*, Herald Sun, 22 December 2005; R Thomas, *Betting bonanza -Punters back after TV war ends*, The Daily Telegraph, 23 May 2006; G Young, *Let's hope for a few gains from racing's costly broadcast war*, The Sydney Morning Herald, 8 May 2006; C Nicolussi, *Saturation Point - Punters switch off as TV war bites*, The Daily Telegraph, 30 March 2006; R Thomas, *Headed for a fall - TV wars blamed on expected slump*, The Daily Telegraph, 18 November 2005; R Zachariah, *Bill goes Sky high - Racing TV war will cost the sport millions*, The Sunday Telegraph (Sydney), 9 October 2005; R Zachariah, *\$40m a year - That's how much the TV war is costing racing*, The Sunday Telegraph (Sydney), 9 October 2005; E Greenblat, *Dispute a turn-off for punter*, Australian Financial Review, 9 September 2005; R Thomas, *Spit vision deal - Minister's attempt to end TV wars*, The Daily Telegraph, 26 August 2005; H

- (a) Wagering turnover decreased during the period of split vision: For example, total TAB sales were down more than 3 per cent.²⁹ For thoroughbred racing, wagering decreased on the previous year by 2.59% in NSW, and by 3.86% in South Australia.³⁰ In Victoria, wagering on thoroughbred racing only increased by 0.34%.³¹ In Queensland, wagering on thoroughbred racing grew by less than 1% over the previous financial year; this marginal growth was attributed to split vision.³² For harness racing, Harness Racing Victoria recorded that wagering growth was down by approximately 1% compared to the previous year.³³ Country racing also recorded falls in wagering turnover.³⁴
- (b) Funding to the racing industry decreased: All three codes of racing and all States and Territories were impacted, affecting the ability of the racing bodies to meet their funding requirements and responsibilities. For example, the NSW thoroughbred racing industry lost over \$6.2 million in product fees.³⁵ In Victoria, funding received by Racing Victoria was \$135.3 million, which reflected the lower wagering turnover growth during the year.³⁶ SA thoroughbred racing lost in excess of \$1.5m in revenue for the period of the dispute.³⁷
- (c) Country racing was the most heavily impacted by split vision - interest levels in country areas dropped (as TVN shareholder races were not shown on Austar), and the downturn in turnover resulted in a depleted revenue base to fund country racing.³⁸
- (d) In harness and greyhound racing, split vision had a similar effect. For example, the loss to Harness Racing Victoria attributable to split vision was estimated as being in excess of \$2m compared to its budget.³⁹ Greyhound Racing SA estimated that the

Matterson, *Business Big Shot*, The Australian, 26 July 2005; R Hickson, *\$40 m downturn - Feud continues over racing's cash drain*, The Daily Telegraph, 1 July 2005.

²⁹ Racing NSW Annual Report 2006, page 2.

³⁰ Australian Racing Board Ltd, *Australian Racing Fact Book: A guide to the racing industry in Australia, 2005/2006*, p 61, 62.

³¹ Australian Racing Board Ltd, *Australian Racing Fact Book: A guide to the racing industry in Australia, 2005/2006*, p 61.

³² Queensland Racing Annual Report 2006, page 4.

³³ Harness Racing Victoria Annual Report 2006, page 3. This decrease was also attributed to other factors, such as the decision by the NSW government not to allow pooling of the NSW and SuperTAB pools.

³⁴ Racing NSW Country Annual Report 2006, page 39. Racing NSW Country recorded that total payments decreased by 1.8%, or \$549,000 to \$29.79 million. This decrease was attributed to the reduction in wagering. See also Country Racing Victoria Annual Report 05-06, page 24, 26, which recorded a 22% decrease in revenue received through the joint venture as a result of the fall in wagering.

³⁵ Racing NSW Annual Report 2006, page 2.

³⁶ Racing Victoria Limited Annual Report 2006, page 6, 49.

³⁷ Thoroughbred Racing SA Annual Report, page 1, 4.

³⁸ Racing NSW Annual Report 2006, page 16; Racing NSW Country Annual Report 2006, page 8, 10.

³⁹ Harness Racing Victoria Annual Report 2006, page 3, 12.

decline in turnover as a result of split vision resulted in a loss of greyhound wagering revenue of approximately \$324,000.⁴⁰

- (e) Race clubs also complained of the loss of revenue from split vision.⁴¹ For example, TAB wagering on STC events fell by 0.9%.⁴²
 - (f) The number of race events decreased: Almost every region lost 7-10 per cent of race meetings.⁴³ For example, in February, Racing NSW Country was forced to discontinue 47 race meetings in the 2006/2007 season.
 - (g) Instead of promoting racing, racing broadcasting (in particular the Sky/TVN dispute) was having the reverse effect.⁴⁴
 - (h) Racing Industry jobs were threatened.⁴⁵
 - (i) The social fabric of country towns was threatened, including tourism arising from the races.⁴⁶
 - (j) However, there was an immediate turnaround in wagering revenue following settlement of the split vision issue between Sky and TVN.⁴⁷ This turnaround and a more detailed analysis of the impact of split vision on wagering is provided at paragraphs 11.6 to 11.24 of this submission.
- 8.67 Various racing industry bodies and totalizators expressed their concerns in their 2006 Annual Reports about the impact of split vision on wagering turnover and the racing industry generally. For example:

- (a) Queensland Racing stated:

“The divided broadcast between Sky Channel and ThoroughVision had a marked impact on wagering nationwide. In the end, wagering grew by less than 1% over the previous financial year. No doubt this marginal wagering growth can be attributed to both Sky Channel and ThoroughVision sharing thoroughbred racing across two channels. Quite clearly, wagering customers voted with their feet and shunned the split broadcast.

⁴⁰ Greyhound Racing SA Annual Report 2006, page 9, 16.

⁴¹ For example, Sydney Turf Club Annual Report 2006, page 3; Moonee Valley Racing Club Annual Report 2006 page 5.

⁴² Sydney Turf Club Annual Report 2006, page 5.

⁴³ Hawkesbury Race Club website at www.hawkesburyraceclub.com.au; Racing NSW Country Annual Report 2006, page 8; P Caton, *TV barrier trials: Television wars are hobbling country racing*, Daily News, 21 April 2006; L McLean, *Race deal could save industry*, Maitland Mercury, 28 April 2006.

⁴⁴ Racing NSW Annual Report 2006, page 15; Queensland Racing Annual Report 2006, page 4.

⁴⁵ P Caton, *TV barrier trials: Television wars are hobbling country racing*, Daily News, 21 April 2006.

⁴⁶ P Caton, *TV barrier trials: Television wars are hobbling country racing*, Daily News, 21 April 2006.

⁴⁷ Racing NSW Annual Report 2006, page 2; Queensland Racing Annual Report 2006, page 4; Thoroughbred Racing SA Annual Report, page 1, 4; Greyhound Racing SA Annual Report 2006, page 9; Racing NSW Country Annual Report 2006, page 10.

However, resilience is befitting of the wagering customer's character and towards the end of the financial year, once the dispute between Sky Channel and ThoroughVision had been resolved and once again we returned to a single broadcaster, customers returned and the wagering response was immediate.⁴⁸

(b) Harness Racing Victoria stated:

“The year long dispute created disillusionment with punters which saw several years of strong wagering growth flatline as a result of an estimated 5% negative impact of the split picture racing vision. ... We were pleased to eventually see a resolution of this dispute late in the year, but we are concerned that the dispute has done irreparable damage to wagering with some punters.”⁴⁹

(c) UNiTAB stated:

“The race wagering business struggled for the first 10 months of the year as a result of the split in the national race telecasting service. The recovery in sales since May has been encouraging. Customers have quickly returned to normal spending patterns since the single service became available again.”⁵⁰

(d) ACTTAB Limited stated:

“This dispute over racing broadcasting rights spanned the reporting period until 16 May 2006 and resulted in TVN broadcasting major Sydney and all Victorian race meetings and Sky broadcasting all other races. This ‘split vision’ dispute, as it became known, annoyed many traditional ACTTAB customers and there is little doubt that it impacted adversely on racing turnover in the ACT as well as all other Australian jurisdictions.”⁵¹

8.68 The NSW and Victorian State Ministers for Racing and Gaming also expressed their concerns about the impact of split vision on wagering and the racing industry generally:

- (a) NSW Racing and Gaming Minister Grant McBride stated that the split vision dispute had cost the racing industry “millions of dollars” and “country communities are innocent victims in all this”;⁵²
- (b) Mr McBride accused the dispute of sending the previously expanding NSW racing industry into “spiralling” decline, causing a loss of revenue which has forced country race clubs to slash the number of race events risking the employment of the 60,000 people employed in racing in NSW;⁵³
- (c) Mr McBride was further quoted as saying in March 2006: “Every punter and industry participant I speak with is angered by the TV war. The entire racing

⁴⁸ Queensland Racing Annual Report 2006, page 4.

⁴⁹ Harness Racing Victoria Annual Report 2006, pages 2-3.

⁵⁰ UNiTAB Concise Annual Report 2006, page 3.

⁵¹ ACTTAB Annual Report 2006, page 4.

⁵² *Racing TV dispute affects country fans*, Narrandera Argus, 14 March 2006.

⁵³ P Caton, *TV barrier trials: Television wars are hobbling country racing*, Daily News, 21 April 2006.

industry is in decline as a result of this dispute. All three codes are suffering from a multi-million-dollar shortfall through no fault of their own.”⁵⁴

- (d) Victorian Racing Minister John Pandazopoulos stated, in a media release on 30 August 2005, that: “The Australian racing industry is desperate for a resolution after 15 months of disruption and broadcasting blackouts... It is within everyone's best interests to have this matter resolved ... ”.⁵⁵

Interim arrangements ending split vision

- 8.69 On 15 May 2006 Tabcorp, Sky, TVN and TVN’s shareholders entered into a binding Heads of Agreement and Term Sheet. Aspects of the Heads of Agreement and Term Sheet came into effect immediately (“**Interim Arrangements**”). The remainder (“**Long Term Arrangements**”) were subject to conditions precedent, including the Commission giving informal clearance to, or otherwise not objecting to, the Long Term Arrangements. The Commission declined to give informal clearance to the Long Term Arrangements.
- 8.70 Under the Interim Arrangements:
- (a) TVN, AJC and STC agreed to make coverage of Sydney and Victorian thoroughbred races available to Sky for broadcast on its existing Sky Channel services to pubs, clubs, TAB outlets, on-course and on Pay TV to residential premises;
 - (b) Sky agreed to make coverage of premium non-TVN thoroughbred races to which it has rights available to TVN for broadcast on its existing TVN channel service (subject to consultation with, and where necessary consent from, the relevant race clubs that have licensed to Sky the right to broadcast coverage of their races); and
 - (c) the parties agreed to a stay of all litigation between the parties (and the discontinuance and full release of litigation upon the Long Term Arrangements coming into effect).
- 8.71 The Interim Arrangements resolved the immediate split vision crisis. Sky returned to its pre-dispute position of providing comprehensive “wall to wall” coverage of racing (including Sydney and Victorian thoroughbred races) on its channel with the express aim of maximising wagering revenue. TVN received certain premium thoroughbred races, which enhanced TVN’s ability to promote thoroughbred racing as a sport.
- 8.72 Mr Pandazopoulos (the Victorian Racing Minister) issued a media release at the time the Interim Arrangements were announced in May 2006. Mr Pandazopoulos stated: “As long as the necessary regulatory and ACCC hurdles are cleared, this deal will be great news for the Victorian racing punter who will again be able to see the best of Australian racing on one screen... This dispute has angered many Victorian punters – and resulted in a decline in racing wagering revenue - with people unable to see the best of Australian racing on one screen.”⁵⁶

⁵⁴ R Thomas, *Fix the TV war says angry Minister*, The Daily Telegraph, 31 March 2006

⁵⁵ Media release, Mr John Pandazopoulos, *TVN & Sky Channel/Tabcorp agree to mediation*, 30 August 2005.

⁵⁶ Media release, Mr John Pandazopoulos, *Minister welcomes racing split screen resolution*, 16 May 2006.

- 8.73 The Interim Arrangements originally contained within the Heads of Agreement have been, in essence, extended pursuant with the MOU's Extended Interim Arrangements. Pursuant to the Extended Interim Arrangements Sky [Restriction of Publication of Part Claimed] and Tabcorp made certain payments to TVN. The litigation remains stayed until 31 January 2008 (if authorisation is granted, the parties agree to the settlement and release of all litigation, claims and cross-claims in the proceedings). [Restriction of Publication of Part Claimed]

9. Relevant Markets

- 9.1 The Parties submit that, consistent with the Commission's approach in A90987, it is not necessary for the Commission to "comprehensively define" the relevant markets. As noted by French J in the context of section 46:
- “(G)iven the complexity of the possible combinations of choices and the varieties of circumstances of potential purchasers, it is difficult and, if not necessary, probably inappropriate to essay a precise market definition. In one sense it is sufficient to pose the question whether within the range of arguable product markets there is any in which Singapore Airlines has a substantial degree of power and which would answer the description of the market to which s.46 applies in this case.”
- 9.2 It is the Parties position that, “within the range of arguable product markets” likely to be considered by the Commission in the context of the Applications, the assessment of detriments and benefits will not be relevantly affected. In any of the arguable product markets considered by the Commission, the Parties believe that the arrangements will result in little or no anti-competitive detriments and significant public benefits.
- 9.3 As described above, the Parties have stayed significant litigation pending the Commission's decision in respect of the Applications. Key issues in that litigation include market definition. In such circumstances, the Parties do not propose, either jointly or separately, to advance specific market definitions in the context of this Application. The Parties are concerned that to do so might prejudice their respective positions in the litigation which will be recommenced should the arrangements not be authorised.
- 9.4 Tested against any arguable variation in market definition, the benefits flowing from the proposed arrangements will outweigh any anti-competitive detriment. However, in order to assist the Commission, the Parties note that the following are possible markets which might be considered.

Possible Upstream markets

Sports Rights Market

- 9.5 The market for the supply and acquisition of the rights to transmit coverage of sports events. Suppliers in this market would include various thoroughbred, harness and greyhound racing clubs as well as the AFL, the NRL, the NBL, Cricket Australia and Soccer Australia amongst others. Purchasers would include aggregators and broadcasters of content including TVN, Sky Channel, Fox Sports, Seven Network, Network Nine, Network Ten and the ABC.
- 9.6 There may be different functional levels within possible sport rights markets. For example, rights may be aggregated for resale to a vision provider. There may also be distinctions between the types of rights in respect of usage (eg pay TV as compared to New Media rights).

Racing Rights Market

- 9.7 The market for the supply and acquisition of the rights to transmit coverage of thoroughbred, harness and greyhound racing events. This potential market is a subset of the Sports Rights Market described above. Suppliers would include the various thoroughbred, harness and greyhound racing clubs. Acquirers would include Sky Channel, which would seek to obtain those rights to assist in the development of its wagering promotion channel, the various free to air networks which would consider the acquisition of racing rights in respect of a general sporting entertainment product, and TVN which would use the rights to provide for its Australian thoroughbred promotion channel.

Thoroughbred Racing Rights Market

- 9.8 In previous correspondence with the Mergers Branch the Commission posited a narrow market for the acquisition of thoroughbred racing broadcast rights. Even if, for the purposes of this application, the Commission considered that such a market existed, it would not relevantly affect the Commission's determination. That is, assuming a thoroughbred racing rights market, the conditions for authorisation will be satisfied.

Possible Downstream markets

Sports Channel Market

- 9.9 The market for the supply of wholesale sports television channels. Suppliers in this market would include Fox Sports, Sky Channel, TVN, Setanta and ESPN. The purchasers in the sports channel market would include Optus, Foxtel, Austar, pubs, clubs, commercial premises and TAB branches and agencies.
- 9.10 In the Commission's recent determination in respect of an application for authorisation by the various Australian Hotels Association's divisions (A90987), the Commission appeared to conclude that a separate market exists for the supply of pay TV services to commercial operators (ie pubs and clubs). On this basis, the Commission may consider whether there are separate markets for the supply of sports channels to commercial operators and the supply of sports channels to pay TV operators. There may also be differentiated markets in respect of the supply of channels through New Media platforms.

Racing Channel Market

- 9.11 In its market enquiries letter regarding the then proposed Sky/TVN arrangements, the Commission Mergers Branch stated that its assessment, in part, would be likely to focus on "competition for the supply of race broadcasting services to pubs, clubs and pay TV providers". This may suggest the Mergers Branch considered there to be a separate market in which racing channels, as compared to sports channels, are provided.
- 9.12 However, even if the Commission considered that such a market existed, it would not relevantly affect the Commission's determination. That is, assuming a racing channel market, the conditions for authorisation will be satisfied.

Residential Pay Television Market

- 9.13 The market for the supply of subscription pay TV services to residential customers. This market would be characterised principally by the bundled supply of Pay TV channels by Foxtel, Optus and Austar to residential customers.

Wagering Markets

- 9.14 The markets in which wagering services are provided. Participants in these markets would include licensed State and Territory totalizators and both on-track and off-track bookmakers.

Pub/Clubs Services Markets

- 9.15 The market in which pubs and clubs supply hospitality services to consumers.

10. Anti-competitive Detriment

- 10.1 The conduct to be authorised does not raise any material risk of contravening sections 45 or 47 of the TPA. Accordingly, there is minimal, if any anti-competitive detriment.
- 10.2 This section of the submission discusses any possible issues and addresses the reasons why there is minimal or no anti-competitive detriment.

Competition between TVN and Sky for the Acquisition of Rights

- 10.3 The MOU includes obligations to sub-license content for “future” domestic rights acquired by either of the parties during the term of the MOU⁵⁷.
- 10.4 The Commission has previously queried whether such obligations might decrease the Parties' incentives to compete when bidding for “future rights”. The Parties have sought to deal with this concern by providing in the MOU that, in respect of TVN’s obligation to sub-license future rights to Sky, the Parties must negotiate in good faith the licence fee to be paid for such rights. If the Parties cannot agree on an appropriate licence fee for these rights, then the matter will be referred to an expert for determination, which determination will be final and binding on the parties. In any event, the MOU does not decrease the incentives for the Parties to compete for the acquisition of rights for the reasons set out below.
- 10.5 As a preliminary point we note that, under the MOU, the Parties have no obligation to share content after the expiry of the MOU. As such, their incentives to bid for rights that arise after, or extend beyond, 31 December 2012 should not be in question. The only possible issue relates to rights that arise and subsist during the term of the MOU.
- 10.6 The Parties understand that the broadcast rights for thoroughbred racing conducted in the following States that will come up for renewal during the term of the MOU are:
- (a) Tasmania;
 - (b) South Australia; and
 - (c) Queensland.

⁵⁷ [Restriction of Publication of Part Claimed] provide for the grant by TVN to Sky of an exclusive license to broadcast, live on pay TV and live on subscription television services into commercial outlets, audio visual coverage of TVN shareholder races, the Northern Territory Turf Club races, any other thoroughbred races to which TVN held the rights as at 15 May 2006, and any new rights that Sky acquires during the Term. [Restriction of Publication of Part Claimed] provides for the grant by Sky to TVN of a non-exclusive license to broadcast on the TVN Channel audio-visual coverage of [Restriction of Publication of Part Claimed] non-TVN shareholder premium thoroughbred race meetings [Restriction of Publication of Part Claimed] (as selected by TVN) from the rights which Sky has, including rights Sky acquires during the Term.

- 10.7 TVN and Tabcorp/Sky have separately considered their strategies to acquire future rights. Separate confidential submissions will be provided by the Parties.
- 10.8 Whilst separate submissions will be provided, the Parties jointly submit that each will have significant incentives to acquire these rights directly as head licensee, rather than relying on sub-licensing rights under the MOU, because of the following commercial needs.

(a) **The Need to Secure Rights Post 2012**

It is likely that all of the broadcasting rights for thoroughbred racing which become available during the term of the MOU will be subject to contracts which expire after the termination of the MOU on 31 December 2012. Therefore, only the head licensee will be able to broadcast these relevant races after that date. This creates significant commercial incentives for both parties to become the head licensee.

(i) **TVN's incentives**

TVN needs to hold the rights as at that date to ensure that it has an attractive range of thoroughbred racing to offer customers within Australia.

(ii) **Tabcorp/Sky's incentives**

Tabcorp/Sky also have a significant incentive to bid for the rights for similar reasons but, additionally, they will have an incentive to hold the rights to minimise the extent of “split vision”.

One of the primary reasons for Tabcorp/Sky settling the litigation was its desire to end “split-vision”. As discussed above, split vision had a significant impact upon wagering turnover. In NSW alone wagering turnover was down by approximately \$177 million, as compared to the previous 12 month period (see further paragraphs 8.66 – 8.68 above).

Therefore, Tabcorp/Sky have a strong incentive to bid aggressively for any rights that become available during the Term of the MOU and which will expire after 2012. If it did not bid aggressively for these rights, it would risk even more serious split vision for the period between 31 December 2012 and the date of the expiry of the rights.

(b) **Commercial Benefits of Being the Head Licensee During the Term of MOU**

There are a range of commercial benefits which would accrue to the head licensee during the term of the MOU which will not be available to a party who is merely a sub-licensee. These include the following:

- (i) **Limited Scope of the Sub-Licence:** Any rights obtained by the parties by way of a “sub-licence” under the MOU are limited for use on the TVN Channel and Sky Channel, respectively, and cannot be used more broadly.
- (ii) **New Media Rights:** The “sub-licences” under the MOU do not include New Media rights. In this context, New Media rights means the rights of the Parties to exploit thoroughbred racing vision on New Media such as third generation (3G) mobile networks and the internet. Both Parties believe that holding the rights to exploit thoroughbred racing vision on New Media will be important in the future. There are economies of

scope in holding both traditional and New Media rights and as a result being able to utilise a single production process for both media platforms. If traditional and New Media were held separately, each holder would need to incur the costs of producing the vision. Under common ownership the same vision can be distributed over all platforms. Therefore, there will be a strong incentive for both Parties to acquire the rights of clubs (including their New Media rights) to be in a position to exploit New Media. To date clubs have tended to sell their rights in a single integrated bundle.

- (iii) **International Rights:** The “sub-licence” under the MOU does not include International Rights. In this context, “International Rights” means the right to exploit vision of local races by selling it to international customers. Holding the International Rights is important for the following reasons:
- A. There is a concerted attempt in the Australian wagering industry to “export” wagering on Australian thoroughbred racing to overseas jurisdictions. The vision of these races by international customers is a necessary, and therefore valuable, part of that export. This is discussed in more detail below.
 - B. Australian wagering operators are also seeking to “import” coverage of foreign races for wagering by Australian customers. It is often a feature of licence arrangements with overseas jurisdictions that there be a reciprocal licence of Australian vision, thus enhancing its value of coverage of Australian thoroughbred horse racing.

As is the case with New Media rights, there are economies of scope in holding both domestic and International Rights as a result of being able to utilise a single production process for the delivery of vision both domestically and overseas. Therefore, there will be a strong incentive for both parties to acquire the rights of clubs to be in a position to exploit the economies to be gained from being able to exploit both domestic and international rights.

Exclusivity

- 10.9 The MOU provides for the grant by TVN to Sky of an exclusive licence to broadcast live on pay TV and subscription television services into commercial outlets, audio visual coverage of TVN shareholder races, the Northern Territory Turf Club races, any other thoroughbred races to which TVN held the rights as at 15 May 2006 and any new rights that TVN acquires during the Term.⁵⁸
- 10.10 These arrangements will not result in any anti-competitive detriment. While TVN is providing an exclusive licence to Sky, TVN vision will continue to be available through the TVN Channel. Consequently, there is no possibility of Tabcorp seeking to withhold access to TVN vision to any particular customer as TVN or another licensee could supply the TVN Channel.
- 10.11 Further, and as outlined in detail below, the MOU specifically obliges Sky to supply Sky Channel (including the TVN vision) to a third party Victorian wagering licensee.

⁵⁸ [Restriction of Publication of Part Claimed].

- 10.12 TVN granting Sky an exclusive licence will have no impact on the way in which racing clubs provide their rights to broadcasters. Sports vision rights are generally provided on an exclusive basis. This suggests that rights holders view it as an efficient way to deal with their rights. In respect of existing TVN rights, racing clubs have already provided rights to TVN on an exclusive basis.
- 10.13 In respect of any rights that are obtained by TVN during the Term of the arrangements it will be up to individual clubs to decide if the terms of their supply to TVN will permit the sub-licence of their vision to Sky on an exclusive basis. As noted above, the possibility of being provided with an exclusive licence in respect of future rights will not negatively impact on incentives to bid for those rights in the first instance.
- 10.14 Finally, the Parties note recent comments by the Commission in respect of the relationship between exclusive content rights and New Media competition.⁵⁹ The Parties submit that such concerns are not applicable to the acquisition of racing content. However, even if that were not the case, such concerns are not relevant to the arrangements as the exclusivity provisions do not cover New Media rights.

Distribution Arrangements

- 10.15 Pursuant to Schedule 4 of the MOU, Tabcorp will have a non-exclusive right to distribute the TVN Channel to commercial outlets including hotels, clubs, other venues with a liquor licence, commercial outlets with a wagering facility, and race courses.
- 10.16 These distribution arrangements will not result in any anti-competitive detriment. First, the distribution rights are non-exclusive. TVN retains the right to distribute to commercial venues on its own and the right to appoint another distributor. Second, the MOU does not impose any conditions on Tabcorp in respect of the distribution of the TVN Channel (except in respect of TVN shareholder racecourses which are to be provided both by Sky Channel and TVN Channel at no cost).

The Term of the MOU

- 10.17 Tabcorp currently holds an exclusive licence to conduct wagering in Victoria. That licence expires in August 2012. The MOU expires on 31 December 2012. Tabcorp's NSW wagering licence extends beyond 31 December 2012.
- 10.18 The commercial reason for the MOU expiring in the month of December is because Tabcorp and Sky wish to ensure that they have access to the Melbourne Spring Racing Carnival in 2012 (assuming that their licence is renewed either on an exclusive or non-exclusive basis).
- 10.19 The Commission Mergers Branch has previously expressed a concern that any content sharing arrangement between TVN and Sky that continues until 31 December 2012 may have the consequence of allowing Tabcorp/Sky to deny access to thoroughbred racing vision to any replacement or co-existing wagering licensee that may enter the market when the wagering licence is re-tendered by the Victorian State Government in August 2012.
- 10.20 In order to alleviate this concern, clause 15 of the MOU provides that, within 20 days of the date on which the Government of Victoria announces the identify of any third

⁵⁹ Graeme Samuel, "Australia's Changing Communications and Media Landscape", La Trobe University Media Studies Lecture, 14 August 2006.

party Victorian licensee, Sky will offer to supply Sky Channel to that licensee for the period 16 August 2012 to 31 December 2012. If Sky and that third party cannot agree on the licence fee, the matter is to be referred for decision to an independent expert.

10.21 Therefore, no anti-competitive detriment arises by virtue of the term of the MOU.

11. Public Benefits

11.1 There are numerous public benefits arising from the MOU including:

- (a) **Increased output and improved quality of services:** Granting access to each other's rights allows Sky and TVN to create two channels tailored specifically to the needs of, respectively, punters and general thoroughbred racing enthusiasts, while at the same time ending the confusion and inconvenience caused by split vision. Thus it results in dynamic efficiency for the benefit of consumers.
- (b) **Benefits of increased wagering turnover:** The end of split vision will result in (and has already resulted in) an increase in wagering turnover which will result in an increase in funding to the racing industry. The end of split vision pursuant to the Initial and Extended Interim Arrangements brought an immediate upturn in wagering. The continual end to split vision is, however, contingent on authorisation. There will be increased funding for prize money, infrastructure development, education and training programs, breeding support programs and veterinary services, all of which are provided by the racing industry and racing clubs from monies received from totalizator funding.
- (c) **Improved innovation:** The MOU will result in improved innovation and, therefore, quality of programming. Cost savings achieved by TVN through the MOU will enable it to develop innovative new programs dedicated to thoroughbred racing. The MOU will also allow Sky to focus its energies on developing new products and improved services.
- (d) **Production efficiencies leading to a more efficient allocation of resources:** Production efficiencies deriving from the outsourcing of the production of the TVN Channel to Sky will result in more efficient allocation of resources and lower production costs.
- (e) **Transaction costs:** The arrangements will result in a decrease in transaction costs for pubs, clubs and other commercial venues with wagering facilities. Sky will have a non-exclusive right to distribute the TVN Channel and, because Sky Channel now contains all racing (including TVN shareholder races), these commercial premises will only need to deal with one entity (although TVN can still distribute its own product as Sky Channel's rights are non-exclusive).
- (f) **Promotion of the Australian racing industry:** The promotion of the racing industry in Australia, which will result in employment growth. In particular, increased exposure for regional racing will provide economic and employment benefits in regional areas by promoting county racing.

Increased Output and Improved Quality of Services

11.2 The MOU creates significant dynamic efficiencies through the creation of two products which are more aligned with the interests and wishes of customers. If Sky is allowed access to TVN's rights, and TVN is allowed access to Sky's rights, then the viewers will have access to two channels both of whose content is more tailored to the

different types of viewers (punters and general thoroughbred racing enthusiasts) in the market. As a result the quality and service offered is greatly improved:

- (a) TVN's channel will be significantly improved because it will be able to showcase premium quality thoroughbred racing from all States and Territories around Australia which is what thoroughbred racing enthusiasts want; and
 - (b) Sky Channel will be significantly improved because the purpose of the channel is to facilitate wagering and it will be able to show races from all over Australia that punters may wager on, which is what punters want.
- 11.3 In part, this improvement in services will result from the termination of split vision. As outlined above, split vision caused a loss of goodwill from racing enthusiasts and various stakeholders in the industry, as well as significant confusion and inconvenience for punters. This, in turn, resulted in the decrease in levels of wagering turnover during the period of split vision. The MOU ends the split vision and has the following benefits:
- (a) An increase in output; and
 - (b) The broader distribution of thoroughbred racing which will result in more races being more readily accessible to more consumers in a form which best suits their particular interest. This expanded coverage of races available on each channel will generate increased interest in thoroughbred racing and encourage wagering by new and occasional punters.
- 11.4 In respect of TVN, the improvement in services will also result from the fact that access to the Sky racing vision is necessary to have sufficient content to make the TVN Channel attractive. The following table outlines the number of racing meetings that TVN can show if the MOU is operational and if the MOU is not operational:

Table 4: Indicative TVN Channel Race Meetings with and without the MOU

| Day | Sun | Mon | Tues | Wed | Thurs | Fri | Sat |
|-----------------------------------|----------|----------|----------|----------|----------|----------|----------|
| With MOU - Day Meetings | 3 |
| - Night Meetings | 0 | 0 | 0 | 1 | 1 | 1 | 1 |
| Without MOU - Day Meetings | 2 | 1 | 1 | 2 | 1 | 1 | 2 |
| - Night Meetings | 0 | 0 | 0 | 0 | 1 | 1 | 1 |

- 11.5 It can be seen from this table that TVN would only have one or perhaps two races per day without the MOU. TVN considers that it is necessary to have access to Sky content to provide a channel of sufficient quality that is attractive to the industry.

Benefits of Increased Wagering Turnover

- 11.6 One consequence of the MOU is that it will end split vision (or, rather prevent its return) and therefore significantly increase wagering turnover as compared to the counterfactual. The benefits this increase in turnover will produce are widespread. They include:
- (a) An increase in the funding provided to the racing industries. Totalizators through arrangements with the racing industry provide the vast majority of the funding for the racing industry. Funding levels are linked to wagering turnover. In respect of the

year ended 30 June 2006, Tabcorp and TAB Limited together paid over \$503.4 million by way of fees to the NSW and Victorian racing industry. While this submission examines the impact of split vision on wagering in Victoria and NSW, split vision negatively impacted totalizator wagering across Australia and thus impacted distributions to the racing industry on a nation wide basis. Any increase in wagering turnover results in increased funding to the racing industry and clubs which, in turn, makes the industry more viable. Equally, any diminution in wagering turnover directly reduces the amount of funding available to the racing industry and racing clubs.

- (b) Funding to the industry and clubs will also create dynamic efficiencies. The industry and clubs will be able to offer more prize money and to hold more races, as well as improve the quality and number of facilities, services and viewing opportunities for punters and general racing enthusiasts and provide additional funding for training and breeding programs which, amongst other programs relevant to the ongoing health and viability of the racing industry, are funded by racing associations and clubs through wagering distributors.
 - (c) An increase in funding to clubs is particularly important for regional racing clubs. Regional racing provides significant economic benefits to regional communities through the attraction of people from the city who spend money in the region.
- 11.7 Split vision had a substantial negative impact on wagering turnover. In May 2006 at a meeting with the Commission, the Parties estimated that during the 12 months to April 2006, wagering turnover in NSW was down by approximately \$160 million, as compared to the previous 12 month period. Since that meeting, Tabcorp has considered in further detail the impact of split vision on racing turnover. The actual decline was even greater than the initial estimate provide to the Commission, being in fact, approximately \$177 million.
- 11.8 The implementation of the MOU will prevent a return to split vision. It will allow Sky to return to its role as a complete “wall to wall” racing broadcaster and will allow TVN to develop its thoroughbred channel. This is the “future with” the MOU (the factual). In contrast, if the proposed arrangements are not authorised, vision rights would again be split between Sky and TVN. This is the “future without” the MOU (the counterfactual).
- 11.9 During the split vision period the impact on wagering turnover in NSW and Victoria was as shown in the table below. The table contains four columns “Split Vision”, “Comparative Period”, “Turnover Change” and “Percentage Change”:
- (a) The Split Vision Period is from Wednesday, 4 May 2005 to Tuesday, 16 May 2006. These are the dates between which all the TVN races were not shown on Sky Channel. The figures shown are total wagering turnover in NSW and Victoria during this period;
 - (b) The Comparative Period is from Wednesday, 5 May 2004 to Tuesday, 17 May 2005. It is the days of the week that need to be aligned in order to compare wagering turnover between any two periods (in this case, from Wednesday to Tuesday). The Comparative Period includes the same number of days and days of the week in both periods. As different days take substantially different turnover, measuring the same weekdays ensures the fairest comparison. This is how Tabcorp compares turnover between any two periods. It is the approach adopted in this submission.

- (c) The column entitled Turnover Change is simply the Split Vision Period minus the Comparative Period; and
- (d) The column entitled Percentage Change compares the difference in wagering turnover between the Split Vision Period and the Comparative Period as a percentage.

Table 5: Impact of split vision on wagering turnover in NSW and Victoria (\$ millions)

| | Split Vision Period | Comparative Period | Turnover Change | Percentage Change |
|--------------|----------------------------|---------------------------|------------------------|--------------------------|
| NSW | \$4,689.075 | \$4,865.937 | (\$176.862) | (3.6%) |
| Victoria | \$3,576.204 | \$3,548.088 | \$28.116 | 0.8% |
| Total | \$8,265.279 | \$8,414.025 | (\$148.746) | (1.8%) |

- 11.10 These figures show a substantial decline in wagering turnover in NSW and only a very minor increase in wagering turnover in Victoria. While wagering did increase in Victoria its growth was significantly smaller than both the historical trend and forecast. For the year ended 30 June 2006 Tabcorp estimated wagering growth in Victoria of approximately 7.4%. The estimates for 2005/2006 were prepared on the basis that the split vision issue would be resolved prior to June 2005.⁶⁰
- 11.11 It is noted that the Comparative Period contains wagering turnover from the period in which AJC and STC races were periodically “blacked out” as described in paragraph 8.51 above. Wagering revenues were depressed when AJC and STC races were not broadcast. If these “blackouts” had not occurred the impact of split vision would appear even more pronounced.
- 11.12 Because Tabcorp is the principal source of funding for the racing industry in Victoria and NSW, all three codes of racing and all States and Territories were impacted. This in turn affected the ability of the racing bodies to meet their funding requirements and responsibilities. This includes funding facilities, infrastructure and services, and paying prize money, which in turn is used to pay owners, jockeys, trainers, drivers, farriers, stablehands and other racing industry aligned roles such as breeders, livestock transporters and feed growers.
- 11.13 Split vision had an even greater impact when one considers the impact of split vision on actual wagering growth rates. Prior to split vision, wagering turnover was experiencing strong growth in Victoria and reasonable growth in NSW. During split vision growth turned almost flat in Victoria and declined in NSW.
- 11.14 In order to demonstrate this, the below table contains three columns “Prior to Split Vision”, “During Split Vision” and “Post Split Vision”:
 - (a) Prior to Split Vision compares the percentage change in wagering turnover between Wednesday 5 May 2004 to Tuesday 3 May 2005 and Wednesday, 7 May 2003 and Tuesday, 4 May 2004;

⁶⁰ The percentage variance comparing actual turnover for the period to the year ended June 2006 against the turnover budgeted for that period was -7.4% in NSW and -5.0% in Victoria.

- (b) During Split Vision compares the percentage change in wagering turnover between Wednesday, 4 May 2005 to Tuesday, 16 May 2006 and Wednesday, 5 May 2004 to Tuesday, 17 May 2005; and
- (c) Post Split Vision compares the percentage change in wagering turnover between Wednesday, 17 May 2006 to Saturday, 27 January 2007 and Wednesday, 18 May 2005 to Saturday, 28 January 2006.

11.15 In respect of NSW, wagering revenues which were growing prior to split vision, declined significantly during split vision and recovered thereafter. In Victoria split vision had a similar effect. While wagering revenues continued to grow during the split vision period the levels of growth were substantially reduced from those experienced both prior to and after split vision.

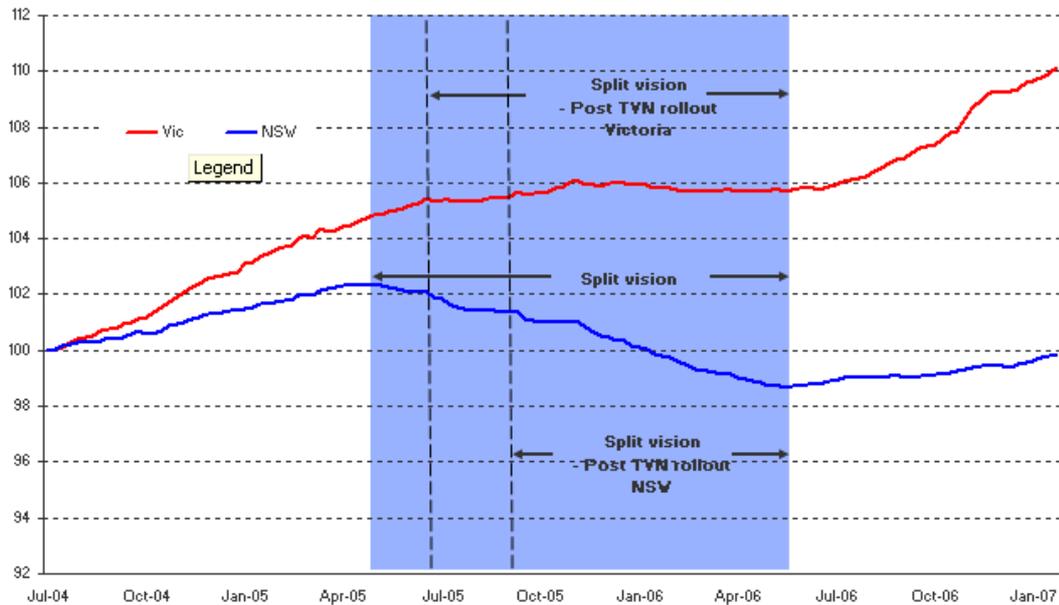
Table 6: Impact of split vision on wagering turnover growth

| | Prior to Split Vision | During Split Vision | Post Split Vision |
|--------------|-----------------------|---------------------|-------------------|
| NSW | 2.8% | (3.6%) | 1.6% |
| Victoria | 5.3% | 0.8% | 6.0% |
| Total | 3.9% | (1.8%) | 3.5% |

11.16 The impact of split vision on wagering growth in NSW and Victoria is also demonstrated graphically in the following chart.⁶¹ The chart plots wagering turnover in NSW and Victoria during the most recent 52 weeks on a rolling average basis using wagering turnover as at 1 July 2004 as an index.

⁶¹ This chart shows New South Wales and Victoria wagering turnover indexed so that turnover for each state has the same starting point as at July 2004 (index = 100). This makes it easier to appreciate visually the comparative effect that split vision had on wagering turnover in each state. The graph then calculates wagering turnover in New South Wales and Victoria on the basis of a rolling 52 week average. As you move from left to right across the graph, wagering turnover from the latest week's races are included as the oldest races drop off. The slight variation on this week by week calculation concerns the inclusion of wagering turnover from the Easter carnival races. Because Easter moves each year, the two main carnival races (Slipper and Doncaster) are not always run in the same week. Therefore, the trend over Easter has been smoothed over a two week period to ensure that the same races are included in the rolling average.

Chart 1: Wagering turnover growth (12 month rolling)



Index 100 = Wagering turnover as at 4th July 2004 (NSW = \$4,591m, Vic \$3,266m)

11.17 The broken lines on the chart divides the split vision period into two component parts:

- (a) The TVN Rollout Period between 4 May 2005 – 30 June 2005 in respect of Victoria and between 4 May 2005 – 31 August 2005 in respect of NSW. While TVN was installed in all TAB agencies in Victoria prior to the start of split vision it took some time to roll the product out to pubs and clubs in Victoria. The roll out period in NSW was slightly longer. While certain venues continued to acquire the TVN Channel following these dates the customer base for TVN was primarily installed by 30 June 2005 in Victoria and 31 August 2005 in NSW; and
- (b) The Post TVN Rollout Period between 1 July 2005 and 16 May 2006 for Victoria and between 31 August 2005 and 16 May 2006 for NSW.

11.18 The chart shows that the negative impact of split vision increased the longer split vision continued. One might have expected that the impact of split vision on wagering turnover would have been greatest during the period in which TVN was being installed into venues. During this period outlets, punters and racing industry participants generally were also having to adjust to split vision. Different methods were tried during this initial period to minimise the disruption of split vision. For example, in some venues staff tried to alternate the volume on channels turning up either TVN or Sky Channel depending on which channel was showing a particular race. Other venues opted to turn the sound off on both stations and listen to racing radio instead which was a less than ideal situation given the delay between the radio call and the video image.

11.19 However, as shown in the chart above, rather than stabilise, wagering turnover continued to decline. Punters were at first prepared to tolerate the initial inconvenience and frustration of split vision. However, the major decrease in service quality resulting from split vision eventually took effect. By the time the Spring Carnival finished just prior to Christmas 2005, punters were abandoning wagering in significant numbers.

- 11.20 The table below sets out total wagering turnover in NSW and Victoria for both the TVN Roll Out Period and the Post TVN Rollout Period. It compares wagering turnover in each of these periods against wagering turnover in a Comparative Period. The Comparative Period was calculated in the same manner as described in paragraphs 11.9(b) above (ie the equivalent period from the previous year):
- (a) Split Vision during the TVN Rollout Period for Victoria compares wagering turnover from Wednesday, 4 May 2005 to Thursday, 30 June 2005 and Wednesday, 5 May 2004 to Thursday, 1 July 2004; and for New South Wales compares wagering turnover from Wednesday 4 May 2005 to Wednesday 31 August 2005 and Wednesday 5 May 2004 to Wednesday 1 September 2004;
- (b) Split Vision Post TVN Rollout Period for Victoria compares wagering turnover from Friday, 1 July 2005 to Tuesday, 16 May 2006 and Friday, 2 July 2004 to Tuesday, 17 May 2005 and for New South Wales compares wagering turnover from Thursday 1 September 2005 to Tuesday 16 May 2006 and Thursday 2 September 2004 to Tuesday 17 May 2005;

Table 7: Effect of TVN rollout on wagering turnover

| | Split Vision (TVN Rollout Period) | | | Split Vision (Post TVN Rollout Period) | | |
|--------------|-----------------------------------|------------------|---------------|--|------------------|---------------|
| | Comparative Period | TVN Rollout | % Var | Comparative Period | Post TVN Rollout | % Var |
| NSW | 1,436.741 | 1,394.452 | (2.9%) | 3,429.196 | 3,294.623 | (3.9%) |
| Victoria | 482.388 | 502.316 | 4.1% | 3,065.700 | 3,073.888 | 0.3% |
| Total | 1,919.129 | 1,896.768 | (1.2%) | 7,244.242 | 7,090.018 | (1.9%) |

- 11.21 As shown, the comparative decline in wagering turnover in NSW was greater during the Post TVN Rollout Period than the TVN Roll Out Period (minus 3.9% as compared to minus 2.1%). In Victoria the rate of growth was smaller in the Post TVN Rollout Period than in the TVN Rollout Period (0.3% as compared to 4.1%).
- 11.22 The Parties note that in NSW a smoking ban was imposed in pubs and clubs on 1 July 2005. This likely had some additional impact on wagering declines in NSW at that time. However, the decline in wagering revenues began when the split vision period began (three months prior to the smoking ban) and ended immediately following the return of all racing to Sky Channel. It is also noted that throughout the split vision period the TVN Channel was not shown on Austar or Optus and the Sky Channel service available on Austar and Optus did not include TVN races. This would have had an ongoing impact on wagering throughout the split vision period.
- 11.23 A decision not to authorise the arrangements would result in a return to split vision and a consequent decline in wagering. This would impact not only the Totalizators but, and significantly from a public benefit perspective, the racing industry which is funded by wagering revenues. For the year July 05-June 06 (which contained a substantial portion of the split vision period) total payments to the racing industry by Tabcorp were more than \$30 million less than budgeted. As noted above, the Tabcorp budget for the 05-06 fiscal year assumed that the split vision issue would be resolved.
- 11.24 Authorisation will not merely enable a return to pre-split vision expectations in respect of wagering activity but should, in fact, result in increased wagering levels.

The Parties believe that future growth opportunities in wagering will arise, not merely from increasing the opportunities for dedicated punters to wager, but rather from attracting the interest of new or marginal wagerers. The TVN Channel - by focussing on relatively few thoroughbred racing meetings - provides an opportunity to introduce viewers to racing. This will have a knock-on effect on wagering. Further, by providing additional focus to thoroughbred racing it is expected that the TVN Channel has the potential to stimulate additional interest in wagering from the pre-existing thoroughbred enthusiast.

Improved Innovation and Quality

- 11.25 The implementation of the MOU will lead to a range of production efficiencies that will in turn be used to achieve dynamic efficiencies.
- 11.26 The production efficiencies will derive from significant cost savings for TVN that will be achieved through, among other things, the outsourcing of distribution and production to Sky and efficiencies achieved in distribution. TVN estimates these cost savings to be in the order of [Restriction of Publication of Part Claimed].⁶²
- 11.27 These cost savings will be reinvested into creating innovations and improving quality of the TVN Channel such as new programs. By way of example, after the introduction of the Interim Arrangements, TVN was able to invest in the “Rising Stars”:
- (a) **Meet the Press (30 min weekly, repeats):** New host and interview talent, with leading industry guests covering current racing topics.
 - (b) **Breeding Show (30 min weekly, repeats):** Hosted interviews, location presentation of studs and stallions in Australia, Blood lines, progeny, industry experts, facts and figures.
 - (c) **Have Your Say (30 mins weekly, repeats):** Hosted talkback program where viewers raise issues, topics and concerns with racing.
 - (d) **Turf History (30 mins weekly, repeats):** Hosted filmed interview and archive material format looking at the best of racing from past to present, people, horses, places and events. The story of Australian racing.
 - (e) **Rising Stars (weekly, repeats):** Hosted filmed interview format looking at the emerging young people who are the future of racing in Australia. New approaches, technology, industry directions for the future.
 - (f) **Race Day Preview (30 mins daily):** Daily industry news and all the insight and expert form for all the meetings to be presented by TVN for the day. It is intended that this program will be hosted and produced to a fixed daily format with its start timed to lead into live race day coverage.
 - (g) **Trackside (30 mins daily):** Complete wrap up of the day's racing and events with all the highlights information presented each evening following live race day.
- 11.28 TVN intends to air these new programs from March 2007. Additional programs which are currently under development include Jumps World Special (looks at racing over the fences) and Horse World (show dedicated to children which covers matters from riding and caring for ponies to equestrian events).

⁶² TVN Budget 2006/07.

- 11.29 Other innovations which TVN may consider developing are:
- (a) Pace record line in thoroughbred racing (ie virtual line displayed to show how fast the horses are running by reference to a certain record, similar to technology used in the visual broadcasting of swimming competitions);
 - (b) virtual advertising (ie where electronically generated advertisements are shown on the race track). This is particularly important in the context of thoroughbred racing which is generally an off-course product; and
 - (c) enhanced coverage of racing through the use of additional cameras and the use of new technology as it becomes available.

11.30 The implementation of the MOU will allow Sky to give additional focus on the content and coverage of its consolidated channel. This will benefit the customer and also provide growing returns to racing and wagering industries.

An example is delivering increased quality and quantity of race meeting content and wagering information, such as:

- (a) increased import of quality international races from countries such as Hong Kong, South Africa and France;
- (b) introduction of improved new betting ‘infotainment’ segments; and
- (c) launching new sports programs such as ‘Sportsbet Fever’.

This is as a result of the split-vision distractions being resolved.

11.31 Further, the implementation of the MOU and the consequent ending of split vision may make certain already anticipated types of innovative services, such as interactive wagering, of more interest to consumers.

Production Efficiencies

11.32 Under the MOU, TVN will outsource production of the TVN Channel to Sky. This will enable both Sky and TVN to re-allocate resources in order to reduce the net cost of both channels while improving the quality and range of products they offer. The following provisions will apply:

- (a) **[Restriction of Publication of Part Claimed]**
- (b) Sky provides its facilities, resources and staff for use in the production of the TVN Channel;
- (c) TVN pays for certain third party service providers and suppliers, including on-air presenters (talent);
- (d) TVN maintains control over the content and look of the TVN Channel;
- (e) service standards must, at a minimum, be equivalent to those employed by Sky in the production of the Sky Channel; and
- (f) TVN may terminate by providing six months' written notice to Sky.

11.33 These arrangements will result in:

- (a) cost savings to TVN, as Sky is a more efficient producer of the TVN Channel. TVN's cost savings are estimated to be in the order of [Restriction of Publication of Part Claimed];⁶³ and
 - (b) production efficiencies, as Sky will meet a substantial proportion of its obligation to produce TVN by spreading its existing resources and costs across an increased level of output.
- 11.34 A significant proportion of Sky's assets are presently under-utilised. This includes both physical assets (e.g. production equipment) and staff. The arrangements with TVN will result in Sky producing more without any corresponding increase in its own costs. Sky will, in effect, cover a portion of the cost of the production of the TVN Channel using its existing building, equipment and staff.
- 11.35 [Restriction of Publication of Part Claimed]

[Restriction of Publication of Part Claimed]

[Restriction of Publication of Part Claimed]

- 11.36 [Restriction of Publication of Part Claimed]⁶⁴
- 11.37 [Restriction of Publication of Part Claimed]

Transaction Costs

- 11.38 The arrangements will result in a decrease in transaction costs for those pubs, clubs and other commercial venues with wagering facilities that wish to deal only with Sky to receive wagering vision. Under split vision, vision was split between two channels. Commercial venues were therefore obliged to contract with both Sky Channel and TVN in order to deliver the complete wagering package demanded by patrons. Now, those venues can choose to deal only with one entity with a consequent reduction in transaction costs.

Development of Regional Areas through Improved Coverage of Regional Races

- 11.39 The MOU will improve coverage given to country races, particularly in States other than Victoria (where TVN currently holds the rights to broadcast country races). This is because:
- (a) Sky is likely by nature of its "wall to wall focus" to broadcast only the races with a small amount of commentary; and
 - (b) If TVN decides to cover the race meeting or certain races at the country racing club then it is likely to broadcast a range of additional commentary potentially including interviews with local owners, jockeys and other local personalities. TVN may also feature the relevant regional area.

⁶³ [Restriction of Publication of Part Claimed]

⁶⁴ [Restriction of Publication of Part Claimed]

- 11.40 Under split vision TVN would not be able to showcase country racing in States where TVN does not hold the rights including, for example, NSW and Queensland. If the MOU is authorised then country races which TVN is likely to consider showcasing include the Gold Coast Magic Millions, Sunshine Coast, Newcastle and Gosford.
- 11.41 The additional promotion of country racing will have significant benefits for those regional communities. In particular, coverage of regional races tends to attract patronage from both the regional and metropolitan areas. This includes direct benefits (including increased wagering turnover on those races and therefore increased funding for the regional clubs and increased sponsorship and advertising revenue) and indirect benefits (such as increased employment and tourism).

Promotion of the Australian Thoroughbred Racing Industry

- 11.42 The implementation of the MOU will significantly promote the thoroughbred racing industry in a number of ways including:
- (a) The improvement of the content of TVN Channel is designed to promote thoroughbred racing in all States and Territories.
 - (b) TVN will receive from Tabcorp a commission fee for each additional Category 2 race sold to, and screened live by, a main free to air television broadcaster. This will provide a number of benefits:
 - i. since free to air television is free for viewers and tends to be accessed by a broader range and number of people than pay TV, screening Category 2 races on free-to-air television will enhance the individual event's profile by exposing the event to a broader audience; and
 - ii. economic benefits for racing clubs. For example, TVN is currently undertaking negotiations with a free to air network to screen additional thoroughbred races. The proposed agreement provides Clubs with additional coverage and advertising through which to promote their events.
 - (c) A stronger profile of thoroughbred racing is likely to encourage improved attendance at the event. Wagering will also be likely to increase since the race is broadcast to a greater number of people. As outlined above, the thoroughbred racing industry provides a significant economic benefit to both metropolitan and regional communities. Therefore, increased promotion of the industry is likely to increase these economic benefits.

12. Glossary

In this submission:

“**ACTTAB**” means ACTTAB Limited ABN 071 257 504.

“**AJC**” means the Australian Jockey Club.

“**Application**” and “**Related Application**” means Forms B and E lodged by the Parties pursuant to s88(1) and s88(8) of the TPA respectively.

“**Applications**” means both the Forms B and E lodged by the Parties pursuant to s88(1) and s88(8) of the TPA respectively.

“**Austar**” means Austar Pty Ltd ACN 080 134 783.

“**Australian Racing Board**” means Australian Racing Board Limited ACN 104 986 334.

“**Commission**” means the Australian Competition and Consumer Commission.

“**Effective Date**” means the date 30 days (or such other period as may be agreed by the parties) after the date on which the ACCC Authorisation comes into force.

“**Foxtel**” means Foxtel Management Pty Limited ACN 068 671 938.

“**International Rights**” means the right to exploit vision of local races by selling it to international customers.

“**Joint Venture Agreement**” means the agreement between Tabcorp and VicRacing Pty Ltd regarding the distribution of Tabcorp's gaming and wagering profits in Victoria.

“**MOU**” means the Memorandum of Understanding dated 1 February 2007 between Tabcorp, Sky and TVN.

“**New Media**” means the rights of the parties to exploit thoroughbred racing vision on New Media such as third generation (3G) mobile networks and the internet.

“**Optus Vision**” means Optus Vision Pty Limited ACN 066 518 821.

“**Parties**” means Tabcorp, Sky and TVN.

“**RacingCorp Pty Ltd**” means RacingCorp Pty Ltd ACN 080 959 495.

“**Racing Industry**” means the three codes of legalised racing events - thoroughbred racing, harness racing and greyhound racing.

“**Racing Products Victoria Pty Ltd**” means Racing Products Victoria Pty Ltd ACN 064 067 867.

“**RWWA**” means Racing and Wagering Western Australia.

“**Sky**” means Sky Channel Pty Ltd ACN 009 136 010.

“**Split Vision**” means the screening of thoroughbred racing vision across two separate, but complementary, services.

“**Spring Racing Carnival**” refers to the 50 day event taking place annually in Victoria from early October to late November and includes both metropolitan and country race meetings.

“**STC**” means the Sydney Turf Club.

“**Tabcorp**” means Tabcorp Holdings Limited ACN 063 780 709.

“**Term**” means the period commencing on the Effective Date until 31 December 2012.

“**TOTE Tasmania**” means TOTE Tasmania Pty Ltd ACN 095 972 106.

“**TPA**” means the *Trade Practices Act 1974* (Cth).

“**Tribunal**” means the Australian Competition Tribunal.

“**TVN**” means ThoroughVisioN Pty Limited ACN 100 040 033.

“**TVN Channel**” means the broadcasting channel owned, produced and distributed by TVN.

“**UNiTAB**” means UNiTAB Limited, a wholly-owned subsidiary of Tattersall’s Limited.

“**VicRacing Pty Ltd**” means VicRacing Pty Ltd ACN 064 067 849.

“**Wagering**” means betting on the outcome of live events, primarily racing (thoroughbred, harness and greyhound racing) and other sporting events.

Annexure A
Memorandum of Understanding

See attached.

[Restriction of Publication of Part Claimed]

Annexure B
Sky Broadcast Schedule

See attached.

Annexure C

TVN Program Schedule

See attached

Annexure D

Litigation Summary

See attached

[Restriction of Publication of Part Claimed]