REPORT OF THE REVIEW PANEL TO THE MINISTER IN RELATION TO EXPRESSIONS OF INTEREST IN THE GRANT OF A WAGERING AND BETTING LICENCE

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I. INTRODUCTION

1. This report of the Gambling and Lotteries Licence Review Panel (the **Panel**) is given to the Minister for Gaming (the **Minister**) pursuant to ss 10.2A.3(1)(b) and 10.2A.10(1)(a) of the *Gambling Regulation Act* 2003 (Vic) (the **Act**). The report concerns the first stage of the process for the grant of a wagering and betting licence (the **Licence**) under Part 3A of Chapter 4 of the Act for wagering, approved betting competitions, approved simulated racing events, and a betting exchange.

2. The new Licence regime introduced by the Act maintains the existing model of a single, exclusive parimutuel and fixed odds licence. Once granted, the Licence will be valid for 12 years, but may be extended for one or more periods of up to 2 years.

3. Following 2012, the Victorian Racing Industry (**VRI**) will be partly funded from the wagering operations of the new licensee, which will be required to enter into arrangements with the relevant VRI bodies on terms that are 'no less favourable' to the industry than the arrangements presently in place.

4. A two stage process is in place for granting of the Licence:

   4.1 First, interested parties submit a 'Registration of Interest' (**ROI**), in accordance with the 'Notice Calling for Registrations of Interest in the grant of a Wagering and Betting Licence'[1] (the **ROI notice**). The ROI notice invited non-natural persons with a place of business in Victoria to submit an ROI. Each ROI submitted by such a person (**the Registrant**) is evaluated for the purpose of enabling the Minister to determine whether there are reasonable grounds for believing that the Registrant will have the capacity and capability of satisfying him in respect of the matters specified in s 4.3A.7(2)(a)(i) to (x) of the Act (**the reasonable grounds criterion**).

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[1] Issued by the Minister for Gaming pursuant to s 4.3A.3 of the *Gambling Regulation Act* 2003 (Vic).

4.2 Second, the 'Invitation to Apply' (**ITA**) stage. The Minister will, by written notice, invite the selected Registrants to apply for the Licence. At the conclusion of this stage the Minister will select the successful applicant for the Licence.

5. This report relates to the probity of the ROI stage, which commenced with the issue of the ROI notice by the Minister on 5 November 2008 calling for Registrations of Interest in the grant of the Licence.

6. A special purpose commission (**the Commission**)[2] of the Victorian Commission for Gambling Regulation (**VCGR**) was established for the purpose of preparing reports to the Secretary of the Department of Justice (**the Secretary**). The Commission's reports relate to the repute and technical capabilities of the Registrants and, where relevant, their associates.

7. The Gambling Licences Review project team (**the GLR project team**) established an Evaluation Control Team (**ECT**) to report upon the financial, wagering and betting business capabilities of the Registrants and their capacity to promote a viable and growing Victorian racing industry (**the ECT report**).

8. At the ITA stage there will be a more comprehensive assessment of the applicants in respect of the above matters.

9. Consistent with its approach in previous reports,[3] the Panel provides this report prior to the Minister's public announcement of the outcome of the ROI stage.

II. FUNCTIONS OF THE REVIEW PANEL

10. Under s 10.2A.3(1)(b), the Panel is to consider, and report to the Minister, whether, in the preparation of recommendations or reports to the Minister by a relevant entity with respect to the authorisation and licensing process:

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2 The special purpose commission was established by Order of the Governor in Council on 22 October 2008 which appointed Judge Gordon Lewis, as a Commissioner and Deputy Chairperson and Kenneth Loughnan AO and Suzanne Jones as Sessional Commissioners of the VCGR.

3 See, for example, Victoria Report of the *Gambling and Lotteries Licence Review Panel to the Minister for Gaming in relation to the current public lottery licensing process*, Parl Paper No 49 (2007) (**Panel's first report**) at [8].

(i) *all registrants (if applicable) and applicants for an authorisation or a licence have been treated equally and impartially and have been given the same opportunity to access information and advice about the authorisation and licensing process; and*

(ii) *all protected information has been managed to ensure its security and confidentiality; and*

(iii) *all registrants and applicants referred to in subparagraph (i) have been evaluated in a systematic manner against explicit predetermined evaluation criteria; and*

(iv) *every relevant entity involved in the authorisation and licensing process has been required to declare any actual or perceived conflict of interest before participating in the process; and*

(v) *any conflict of interest referred to in subparagraph (iv) has been appropriately addressed; and*

(vi) *there has been any improper interference with the making of a recommendation or report; and*

(vii) *the preparation of a recommendation or report discloses bias or anything that could lead to a reasonable apprehension of bias.*

(**the Panel's questions**)

11. The Panel considered the meaning of the expression 'relevant entity' in the Panel's first report on the lottery licensing process.[4] The relevant entities engaged in the ROI stage include Ms Penny Armytage, (the Secretary to the Department of Justice) and the public officials assisting her (generally, the Steering Committee and the GLR project team, members of the Commission and the persons engaged to provide services to those public officials and

[4] At [46], [47] and [54].

bodies. The GLR project team, which is directed by the GLR project director, Mr Alan Clayton (**the GLR project director**), includes the ECT and the panels working beneath it. As explained in the Panel's first report, ministers and their advisers do not fall within the statutory definition of a 'relevant entity'.

III. THE WAGERING AND BETTING ROI STAGE

The relevant statutory provisions

12. Chapter 4 of the Act contains provisions relating to the conduct of wagering and betting under the Act. Part 3A of Chapter 4 sets out the process for the granting of the Licence[5], and the matters which must be considered in the course of that process[6].

13. The Minister may refuse to issue a Licence if the applicant fails to enter into a Related Agreement which complies with the requirements of the Act.[7] The Related Agreements can be with either the Minister[8] or a person or class of person the Minister specifies in a direction[9].

14. The matters to be taken into account by the Minister, in determining the applications for the Licence, are set out in s 4.3A.7(2). Those matters (the **statutory criteria**), are as follows:

> *(a) That the granting of the application is in the public interest, taking into account each of the following matters-*
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> *(i) Whether the applicant, and each associate of the applicant, is of good repute, having regard to character, honesty and integrity;*

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5 Section 4.3A.5.
6 Section 4.3A.7.
7 Section 4.3A.10.
8 Section 4.3A.10AA(1)(a).
9 Section 4.3A.10AA(1)(b).

(ii) Whether the applicant, or an associate of the applicant, has an association with a person or body that is not of good repute having regard to character, honesty and integrity as a result of which the applicant or the associate is likely to be significantly affected in an unsatisfactory manner;

(iii) Whether each executive officer of the applicant and any other person determined by the Minister to be concerned in or associated with the ownership, management or operation of the applicant's wagering and betting business, is a suitable person to act in that capacity;

(iv) Whether the applicant has sufficient technical capability and adequate systems to conduct the activities to be authorised by the licence;

(v) Whether the applicant is of sound and stable financial background;

(vi) Whether the applicant has financial resources that are adequate to ensure the financial viability of a wagering and betting business;

(vii) Whether the applicant has the ability to establish and maintain a successful wagering and betting business;

(viii) Whether the applicant has demonstrated a commitment to the promotion of a viable and growing Victorian racing industry;

(ix) any other matters that were specified in the notice calling for registrations of interest under section 4.3A.3;

(x) any other matters the Minister considers relevant; and

(b) that

(i) the arrangements between—

(A) the licensee under Part 3 (other than a licensee appointed under section 4.3.33) and VicRacing or Racing Products, as the case requires; or

(B) the previous wagering and betting licensee (other than a licensee appointed under section 4.3A.31) and VicRacing or Racing Products, as the case requires –

have been or, before the licence commences, will be, concluded to the reasonable satisfaction of the parties; or

(ii) a reasonable opportunity has been given for such a conclusion of those arrangements; and

(c) that the applicant has entered into, or made a binding offer to enter into, arrangements with VicRacing and arrangements with Racing Products that, in the opinion of the Minister, after consultation with the Secretary, are no less favourable to VicRacing and Racing Products than those last in force between—

(i) the licensee under Part 3 (other than a licensee appointed under section 4.3.33) and VicRacing or Racing Products, as the case requires; or

(ii) the previous wagering and betting licensee (other than a licensee appointed under section 4.3A.31)

and VicRacing or Racing Products, as the case requires; and

(d) that the Responsible Gambling Code of Conduct accompanying the application complies with any directions given under section 10.6.6 and the additional requirements set out in section 10.6.7, and has been approved by the Commission.

15. At the ROI stage, however, the Minister need only be satisfied of the matters referred to the Secretary for determination under s 4.3A.4 of the Act. Those matters, which are specified by s 4.3A.3(2)(c) and are published in the ROI notice, are essentially the same as the statutory criteria set out above in s 4.3A.7(2)(a)(i) to (x) of the Act. The ROI provides that the level of satisfaction as to those matters that is to be reached by the Minister before inviting a Registrant to apply for the Licence is determined by the reasonable grounds criterion.

Chronology of steps taken at the ROI stage

16. The ROI stage has involved the following steps and participants.

17. In the ROI notice issued on 5 November 2008, the Minister called for registrations of interest in the grant of the Licence[10] from persons who wished to be invited to apply for the Licence and who considered they met, or would be able to meet, the eligibility criteria set out in the Act[11] and the State's objectives and criteria set out in the ROI notice. The date for the lodgment of registrations of interest was 16 January 2009.[12]

18. Six ROI's were lodged in response to the ROI notice. One of the six Registrants did not submit a conforming ROI, and failed to pay the initial $20,000 deposit. The GLR project director sought further information from

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10 Issued pursuant to s. 4.3A.3 of the Act. Addenda to the ROI were issued on 19 and 29 December 2008.

11 The '**eligibility criteria**' are the requirements that a Registrant have a physical place of business in Victoria and not be a natural person or a prohibited person: see the Act, s 4.3A.3(4).

12 ROI notice, section 8.2.2, Pt C (General Terms and Conditions).

the Registrant and no further response was received. In consequence, the Minister wrote to the Registrant on 1 April 2009 stating that, in the circumstances, the Minister could not consider the purported ROI or refer it to the Secretary for consideration.

19. In accordance with s 10.4.7B of the Act, the Secretary requested that the Commission carry out the specified investigations to permit consideration of the ROI's lodged by the remaining five Registrants which were Tabcorp Wagering (Vic) Pty Ltd (**the Tabcorp registrant**), Victoria Licence Bid Co Pty Ltd (**the Tatts Group registrant**), Ladbrokes plc (**the Ladbrokes registrant**), Intrabet Pty Ltd (**the Intralot registrant or Intrabet**) and Tabgroup Pty Ltd (**the Tabgroup registrant or Tabgroup**). Since on or about 21 April 2010, the Tabgroup registrant was owned as to 50% by Tote Tasmania Pty Ltd and as to the remaining 50% by ALH Group Pty Ltd.

20. Pursuant to s 10.4.7H, the Secretary and the Commission entered into a Services Agreement on 23 August 2009. Under the agreement the Commission was to carry out all investigations and enquiries necessary to enable the Secretary to report to the Minister on, and to enable the Minister to properly consider, the statutory criteria concerning the repute and suitability of the Registrants and their associates and the technical capability of the Registrants. The GLR project team was to carry out all investigations and reports necessary to enable the Secretary to report to the Minister on, and to enable the Minister to properly consider, the statutory criteria concerning the financial and the wagering and betting business capability of the registrants, their capacity to promote a viable and growing Victorian Racing Industry, their commitment to responsible gambling and certain other incidental matters. The Secretary chaired the Steering Committee, which held numerous meetings to supervise and deal with issues in the course of the ROI stage.

21. The Commission and the GLR project team carried out the investigations and enquiries that they considered necessary to enable them to present their reports to the Secretary to enable her to report to the Minister pursuant to s 4.3A.4 of the Act. The reports of the Commission to the Secretary (the **VCGR reports**) reflect the investigations and enquiries carried out in respect of each of the

Registrants and their associates as at 5 May 2010. Subsequently, on 9 June 2010 the Commission updated the VCGR reports. The ECT report, which concerned the GLR project team's investigations and enquiries regarding the Registrants, and the Product and Distribution Methods Panel report were duly provided to the Secretary[13]. The Secretary's final report to the Minister under s 4.3A.4 of the Act was dated 25 June 2010 (**the Secretary's report)** and was provided to him with a briefing note dated 26 June 2010 (**the Secretary's briefing note**). The Secretary's report and briefing note, which contained amendments to the previous Secretary's report, addressed certain concerns raised by members of the Panel. The Secretary's report contained the Commission's, the ECT's and the Products and Distribution Methods Panel's, reports as annexures. As we later explain, after a further meeting with the Panel, the Secretary made further amendments to her briefing note and report on 26 July 2010 (**the Secretary's amended briefing note and report**).

22. During June 2010, the probity auditor, RSM Bird Cameron, provided the Secretary with its probity reports in respect of the Commission and the GLR project team (**the probity auditor's reports**).

23. This report of the Panel concerns the Panel's questions in relation to the preparation of the recommendations and reports to the Minister by the various relevant entities involved in the investigations and preparation of the reports referred to above and the persons providing services to them in relation to those investigations and reports. In this report the Panel has relied upon the Panel members individual enquiries in relation to the GLR's files recording the wagering and betting ROI stage, the extensive documentation of the GLR and of the Commission that has been made available to the Panel and the Panel's access to, and meetings with, the public officials supervising the ROI stage process and, where applicable, their advisers.

24. As has occurred on previous occasions, the Commission and the GLR project director provided drafts of the relevant reports to the Panel and sought to address certain concerns raised by individual members of the Panel in relation

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[13] The ECT report drew together the material facts and findings of the Industry Panel's report and the Financial and Commercial Panel's report.

to the Panel's questions prior to the VCGR's and the Secretary's reports being delivered.

25. As has also occurred on previous occasions, the Chair wrote to each of the five Registrants requesting they inform the Panel of any matters of concern in relation to the Panel's questions concerning the wagering and betting ROI stage process. Only two matters related to probity were raised in response to the Chair's letter. The first matter related to a complaint about public statements made by the Minister. As explained at [24] of the Panel's report on the Keno ROI process[14], the complaint does not fall within the Panel's questions and is not relevant to this report. The second matter related to the confidentiality of certain information provided by the incumbent, Tabcorp Ltd, to the State for the purposes of the current licensing process. The particular concern related to disclosure of Tabcorp's confidential information to any of the other registrants. A concern was also expressed about potential conflicts of interest within the VRI. The Secretary has explained that the information in question has been quarantined until the Minister determines who is to be invited to apply, and neither the Secretary nor the GLR project team has access to the information yet. Accordingly, the Panel is satisfied that the confidentiality of the information in question has not been compromised in the course of the ROI stage. Further, appropriate protocols are in place to ensure there is no unauthorised disclosure of Tabcorp's confidential information to any of the registrants. Also, appropriate conflict of interest protocols are in place in relation to the VRI.

26. During the course of the wagering and betting ROI process the Panel held meetings on 25 May 2009, 28 May 2009, 25 September 2009, 28 October 2009, 12 January 2010, 10 March 2010, 17 March 2010, 19 April 2010, 4 May 2010, 12 May 2010, 19 May 2010, 28 May 2010 and on 8 July 2010.

27. The Panel now turns to consider the matters of concern that have arisen in the course of the ROI stage.

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[14] Report of the Review Panel to the Minister in Relation to Registrations of Interest in the Grant of the Keno Licence Parl Paper No 274 (2006) (the Keno report).

IV. MATTERS OF CONCERN TO THE PANEL

28. Five matters of concern have arisen in the course of the ROI stage process.

28.1 The first matter relates to the approach to unresolved and ongoing matters in the Secretary's reports. The Panel's concern related to whether the Secretary's reports had disregarded or deferred consideration of those matters notwithstanding their relevance thereby leading to potentially unequal treatment as between the registrants.

28.2 The second matter relates to the Minister's acceptance of the late lodgment by the Tabgroup registrant of its ROI. While it is likely that the Minister had a discretion to accept the late lodgment, an issue has arisen as to whether the recommendation that he do so failed to consider the limited circumstances set out in the ROI notice that enliven the Minister's discretion. This question raises issues of unequal treatment and a failure to apply the relevant criteria.

28.3 The third matter concerns publicity by the Ladbrokes registrant of its ROI. The question is whether the publicity breached the confidentiality provisions set out in the ROI notice.

28.4 The fourth matter concerns a claim by Intralot, on its own behalf and on behalf of its subsidiary Intrabet, that any underperformance by Intralot under its Category 2 public lottery licence is ultimately attributable to conduct alleged by it against certain State officers who are engaged in the current ROI stage. Intralot claims that any underperformance by it should not be taken into account for the purpose of assessing the Intralot registrant. The Panel has considered whether these matters raised questions of impartiality, conflict of interest or a reasonable apprehension of bias.

28.5 The fifth matter concerns the performance of the probity auditor, RSM Bird Cameron, in the ROI stage.

Unresolved or Ongoing Matters

29. The VCGR and the Secretary's reports each refer to and outline the approach taken to matters described in the reports as being 'unresolved' or 'ongoing'. Although the term was not defined, it appears to be intended to cover any matters adverse to a particular registrant that are, or may be, contentious and/or have not been finalised in the sense of being finally determined.

30. The Panel observes that it is the nature of an investigative process, such as that undertaken by the Commission and the GLR project team, that contentious matters will arise and remain in dispute or unresolved. In its Keno report the Panel expressed its concerns about the approach of the Commission to ongoing and unresolved matters.[15] In substance, the view of the Panel was that the Commission and the Secretary were required to investigate and report on those matters as best they can in the circumstances and to consider and determine the weight to give any adverse material arising from that investigation, having regard to the fact that there will be a further investigation at the ITA stage.[16]

31. The Commission, in its report to the Secretary, stated that it approached 'unresolved matters' in relation to the wagering and betting licence in the following way:

> *'Where -*
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> - *allegations are unable to be substantiated or if available evidence is incomplete, this is stated in the Commission's reports;*
> - *the source of an allegation may reasonably be considered to be unreliable, this is stated, as are the reasons why the Commission has formed the view that the source may be unreliable; or*
> - *the Commission is unable to make further inquiries in relation to the subject matter, whether it be with specialist regulators or any other entity or source, this is also stated in its report together with reasons why further inquiries could not be made.*

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15 See the Panel's Keno report at [91] – [105].
16 The Panel's Keno report at [104] - [105].

Against the background of the relevant matters identified in a particular unresolved and / or ongoing matter, the Commission has included its view as to whether or not the factors in favour of the Registrant or Associate outweigh the factors of concern at this stage with the consequence that the reasonable grounds criterion can be regarded as satisfied.'

32. The Panel regards the Commission's approach as appropriate as it ensures that the Commission is investigating and reporting on unresolved matters as best it can in the circumstances. That approach enables the Secretary to consider the VCGR reports and determine the weight to give to the information and views the Commission has provided to her.

33. The Panel was concerned, however, about the approach that was taken to the numerous unresolved or ongoing matters described in the Secretary's report. The Secretary's report described the approach to such matters as follows:

- *'the report need not go into detail on the issues or allegations forming the basis of the matters but should simply refer to them in general terms as there will be further extensive investigations as part of the ITA process;*

- *the Secretary has considered the matters and concluded that, having regard to the fact that some are disputed, others are yet to be resolved and the uncertainty around if, how and when such matters will ever be resolved, the matters do not affect her opinion that it either is, or may be, open to the Minister to be satisfied that the registrants concerned have satisfied the reasonable grounds criterion.'*

34. A later section in the report, however, stated:

'The Secretary advises that the disclosure of unresolved allegations currently under investigation in relation to entities and individuals the subject of this Report, is not to be taken as any indication as to their truth or otherwise, and, absent a full and proper investigation, such

allegations should not be used in any decision making in relation to the relevant entities or individuals.'

35. The Panel was concerned about the apparent inconsistencies in the approach in the Secretary's report to unresolved and ongoing matters. Also, it is clear that many, if not all, of the so called unresolved and ongoing matters were unlikely to be resolved by the completion of the relevant licensing processes. Finally, as we later explain, there appears to be little justification in continuing to give those matters the special status they have been given in previous reports of the Secretary.

36. The Panel considered that the following issues and concerns arise in relation to this aspect of the Secretary's report:

    36.1 In the report, read as a whole, the Secretary appeared to consider, and give at least some weight to, the potentially adverse allegations that comprise the ongoing and unresolved matters. A later section of the report, however, states that 'such allegations should not be used in any decision making in relation to the relevant entities or individuals'. The Panel had difficulty in reconciling the substantive approach taken by the Secretary which outlines, discusses and determines the weight to be given to the allegations with the subsequent statement that they should not be used in any decision making process.

    36.2 As the functions of the Commission and the GLR project team are essentially investigative it is to be expected that many of the potentially adverse and contentious matters they are investigating will be, and may remain, unresolved. Indeed, there may never be a final resolution of those matters (eg by a judicial determination or otherwise). That only serves to emphasise that such matters need to be considered and given such weight as may be appropriate in the circumstances, rather than being deferred over to an event that may never occur (ie resolution of the matters).

    36.3 Further, deferring consideration of such matters because there will be 'further extensive investigations' at the ITA stage is not a sufficient

> reason for not considering those matters in the course of the ROI stage. The reason for that is twofold. First, all of the registrants may not be invited to participate in the ITA stage. In such a case, a registrant may have lost the opportunity to move to the ITA stage because adverse material in relation to ongoing matters concerning another registrant, who has moved to that stage, has not been addressed, investigated or reported on at the ROI stage, but has been deferred over to the ITA stage. Second, if the adverse material is relevant it is part of the function of the Secretary to consider it when applying the reasonable grounds criterion. Of course, because of the lower threshold of the reasonable grounds criterion, the investigation required at the ROI stage will be less than that required at the ITA stage. That is not, however, a basis for deferring consideration of relevant material and information that arises out of that investigation.

37. If the Secretary had maintained the approach taken by her in the report, she may have disregarded, not used or given no weight to potentially adverse, but relevant, material because it has been accorded the status of an unresolved or ongoing matter, but used and given weight to other potentially adverse, but relevant, material that has not been accorded the status of an unresolved or ongoing matter. If that approach was maintained there would be inequality of treatment[17] because there would be more significant ongoing and unresolved matters in relation to some of the registrants than there is with others, with the consequence that more significant relevant material would have been disregarded in respect of those registrants than in respect of the other registrants.

38. The approach in the Secretary's report would also have resulted in her not evaluating all registrants in a systematic manner against explicit predetermined evaluation criteria[18] as it would not be systematic to have regard to potentially adverse, but relevant, material in respect of matters that are not classified as ongoing or unresolved but to disregard, not use or give no weight to potentially adverse, but relevant, material in respect of matters that are classified as

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17 See s 10.2A.3(1)(b)(i) of the Act.

18 See s 10.2A.3(1)(b)(iii) of the Act.

ongoing or unresolved. By disregarding, not using or giving no weight to relevant material, the Secretary would not be having regard to all relevant material when applying the explicit predetermined evaluation criteria. A failure to take into account relevant adverse material, when required to do so, can involve reviewable error[19].

39. Although the Panel recognised that the Secretary has sought, and acted upon legal advice in relation to her report, it considered that it should again convey its concerns about the above matters in order to afford her a final opportunity to respond to those concerns. After a meeting of the Panel, which was attended by, inter alia, the Secretary's advisers, including senior counsel, the Secretary's amended briefing note and report were prepared. In those documents the Secretary incorporated the matters previously described as ongoing or unresolved matters into the body of the report and no longer accorded those matters any special status. Importantly, the Secretary evaluated each of the matters and reported on them as best she could in the circumstances after considering and determining the weight to give any material that was adverse to a particular registrant. The circumstances taken into account by the Secretary in her evaluation included that a number of the matters were disputed, some that were not yet resolved, and the uncertainty as to when and how they will be resolved. In view of the amended Secretary's briefing note and report, the Panel is now satisfied that the matters of concern raised by the Panel in relation to ongoing and unresolved matters have now been appropriately addressed in the Secretary's amended briefing note and report.

Tabgroup's ROI

40. The second issue of concern relates to the Tabgroup registrant's ROI. The relevant facts may be summarised as follows.

    40.1 On the due date for lodgment of the wagering and betting ROI, being 16 January 2009, a consortium lodged an ROI on behalf of Tabgroup, which had not yet been incorporated. The three members of the

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19 See the Panel's Keno report at [96] and *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425 per Brennan J.

consortium were Racing and Wagering Western Australia, Tote Tasmania and ACTTAB (the **consortium**). It is clear from the correspondence accompanying the ROI that, if invited to apply for the Licence, the consortium proposed to incorporate Tabgroup, which was to become the applicant for the Licence.

40.2 By a letter dated 21 January 2009, the GLR project director suggested to Tabgroup that the ROI did not satisfy the eligibility criteria[20] and sought to clarify certain matters concerning the Registrant. The consortium responded on 27 January 2009, by acknowledging that the lodging of the submission (ie the ROI) 'without technical compliance' with ss 4.3A.3(4)(a) and (b) of the Act, was a conscious decision. The two primary reasons given for not incorporating Tabgroup at that stage were that the consortium wanted the identity of the consortium members to remain confidential from competing wagering operators and that as two of the parties were in confidential commercial negotiations with another prospective Registrant it was not in the interests of the parties or the racing industries in their respective states for the joint venture to become public knowledge. The consortium also stated that its lawyers had now been instructed to incorporate Tabgroup at that stage, rather than after receiving an ITA, and that any schedules that relied upon Tabgroup's incorporation would be completed following its incorporation and then forwarded to the GLR.[21]

40.3 On 10 February 2009, the GLR project director sent a further letter to the consortium seeking submissions as to how its ROI could be said to comply with ss 4.3A.3(4)(a) and (b) of the Act. The letter also, among other things, identified 23 schedules and other information that was required to be provided in relation to the intended corporate registrant.

40.4 By letter dated 18 February 2009, the consortium acknowledged that the 'Tabgroup entity does not exist' but stated that it was committed to

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20 The relevant criteria are set out in footnote 11 above.

21 The consortium also indicated that its nominated address was that of one of its members in Melbourne and that Tabgroup intended to establish its headquarters in Victoria.

'register the organisation and completely satisfy the statutory criteria.' The letter concluded with a request that the Minister waive the requirement for the relevant schedules to be completed for Tabgroup as the intended corporate registrant, or consider varying the ROI notice by treating the three consortium members as the registrants who would incorporate Tabgroup if invited to apply.

40.5 On 23 March 2009, the GLR project director again wrote to the consortium indicating that there were two courses open to it. The first was to treat the ROI as that of a partnership if that arrangement was in place. The second was to incorporate the proposed registrant. The GLR project director stated that, if the latter course was selected and the Tabgroup submission did not otherwise change, the Minister could accept the submission [by the incorporated registrant] outside the time required for lodgment. The letter also stated that the submission should seek to have the documents previously submitted, together with the further submission, treated as the ROI.

40.6 On 27 March 2009, Tabgroup Pty Ltd was incorporated.

40.7 On 30 March 2009, the consortium informed the GLR project director that it wished to pursue the second course and had incorporated Tabgroup to satisfy the requirements of the Act. A number of the duly completed schedules required by the GLR project director were attached to the letter and Tabgroup stated it would 'appreciate' if its submission, constituted by the original ROI as now amended, be accepted by the Minister 'outside the time for lodgment' under the ROI notice.

40.8 On 23 April 2009, 22 May 2009 and 1 June 2009, Tabgroup provided the further material requested by the GLR project director.

40.9 On 22 May 2009, in accordance with a recommendation endorsed by the GLR project director, the Minister accepted the 'ROI from Tabgroup (as amended to reflect the incorporated entity) after the lodgment period'. The recommendation was that the Minister exercise

his discretion under section 8.2.4 of Pt C of the ROI notice. No reference was made in the recommendation to the Minister to the limited circumstances set out in section 8.2.4 in which a late lodgment could be accepted. The reasons put forward for the exercise of the Minister's discretion in favour of the late lodgment included the complexity and uncertainty as to who was the registrant and that the amended ROI reflected the changed status of the registrant and only changed the form and not the substance of the original ROI, which was 'otherwise substantially compliant'.

40.10 The basis for the Minister's ultimate acceptance of Tabgroup's ROI was stated by the GLR project director to the Panel to be as follows:

> *'In accordance with Section 8.2.4 of the Wagering ROI and section 4.3A.3(6) of the [Act] and in accordance with legal advice from Corrs Chambers Westgarth and Norman O'Bryan SC the Minister exercised his discretion to consider the Revised Tabgroup ROI, even though it amounted to a late ROI.'*

41. The Tabgroup registrant put a detailed submission to the Panel in relation to the circumstances in which its ROI was accepted. Its submission was to the effect that its ROI was lodged on the due date, 16 January 2009, and all that occurred after that date was that the ROI was duly amended in accordance with the ROI notice to satisfy the GLR project director's queries concerning the identity of the registrant.[22] Accordingly, so it is contended, this was a case of a duly lodged ROI being completed, updated and amended in accordance with the terms of the ROI notice to reflect the changed status of the registrant, Tabgroup Pty Ltd, which was always intended to be the applicant for the Licence.

42. There is some merit in Tabgroup's submission, but ultimately the facts do not support the conclusion it invites the Panel to reach. It may be accepted that the ROI of the consortium was lodged on the due date. When the consortium,

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[22] Tabgroup relied on the wide powers conferred, inter alia, in section 9 of Pt C of the ROI notice to enable incomplete ROI's to be duly completed, clarified or updated and for ROI's to be amended.

however, was given the option by the GLR project director in his letter dated 23 March 2009, to rely on that ROI or to incorporate Tabgroup on the basis of the Minister's power to accept the incorporated entity's ROI outside the time required for lodgment, Tabgroup opted for the latter course.[23]

43. Pursuant to that request, on 29 May 2009, the Minister, acting on a recommendation endorsed by the GLR project director, accepted the ROI from Tabgroup (as amended to reflect the incorporated entity), after the lodgment period.

44. The failure of the consortium to lodge a conforming ROI in the name of the Tabgroup registrant was the result of a deliberate decision by the consortium, taken for the strategic reason of not disclosing the identity of the members of the proposed registrant. It was not the result of mishandling of the ROI by the State or of a major incident, being the two circumstances outlined in section 8.2.4 of the ROI notice for enlivening the Minister's discretion to accept a late ROI.[24]

45. The ROI lodgment period ended on 16 January 2009. Pursuant to a request by the Tabgroup registrant, however, which only came into existence as a legal person on 27 March 2009, the Minister permitted Tabgroup to have its ROI lodgment dated effectively extended to 22 May 2009 to enable it, as an incorporated entity, to meet the eligibility criteria for the lodgment of an ROI under the Act. [25]

46. In these circumstances, the Tabgroup matter raises the following issues for the Panel:

    46.1 whether the Minister had the power to accept the late lodgment of Tabgroup's ROI without extending the lodgment period;

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23 As explained above, in its letter of 30 March 2009 the consortium provided the requisite schedules for the incorporated entity and requested that the amended ROI be accepted by the Minister outside the time for lodgment under the ROI notice.

24 Although Tabgroup submitted there was a 'major incident' upon which it could have relied, it did not provide any details of it to the Panel after being requested to do so.

25 22 May 2009 is the date on which the Minister exercised his discretion to accept the late lodgment of the ROI of the Tabgroup registrant.

46.2 whether Tabgroup received preferential, and therefore unequal, treatment by being permitted to lodge its ROI later than any other registrant;

46.3 whether the acceptance of the late lodgment was based on criteria that were inconsistent with the explicit criteria set out in the ROI; and

46.4 whether the above matters constituted unequal treatment or a failure to systematically evaluate Tabgroup's ROI against explicit predetermined evaluation criteria (ss 10.2A.3(1)(b)(i) and (iii) of the Act).

47. The resolution of these questions requires careful consideration of the statutory scheme in relation to the ROI, which included the provisions of the ROI notice gazetted in accordance with s 4.3A.3(1) of the Act. The main features of the scheme are as follows.

47.1 Sections 4.3A.3(1) and (2) empower the Minister, by a notice published in the Government Gazette, to call for Registrations of Interest in the grant of the Licence and to specify the procedure and other requirements for registering an interest.

47.2 Section 4.3A.3(4) provides for an entitlement in a non-natural person with a physical place of business in Victoria to register interest in the grant of the Licence by following the specified procedure and providing the requisite information.

47.3 Section 4.3A.3(5) requires the Minister to consider each ROI and, if it complies with the requirements in the ROI, to refer it to the Secretary for a report under s 4.3A.4.

47.4 Section 4.3A.3(6) provides:

> *'If a registrant fails to satisfy a requirement made by or specified under this section, the Minister may refuse to*

consider, or consider further, the registration of interest or to refer it to the Secretary;'[26]

47.5 After consideration of the Secretary's report under s 4.3A.4, the Minister may invite one or more the registrants to apply for the Licence (s 4.3A.3(7)).

47.6 The ROI notice gazetted by the Minister specified the lodgment period to be between particular times on 16 January 2009 and stated that any ROI lodged after that period will 'only' be accepted in accordance with section 8.2.4 of Pt C of the ROI notice

47.7 Sections 2.4 and 3 in Pt C of the ROI notice confer on the Minister broad discretionary powers in relation to, inter alia, refusing to consider, consider further or refer to the Secretary any ROI that does not comply with the Act or the ROI notice.

47.8 Notwithstanding the broad discretion conferred on the Minister in respect of a non-complying ROI, section 8.2.4 in Pt C of the ROI notice specifies only two circumstances in which the Minister may consider a late lodgment of an ROI, being where the late lodgment:

'a resulted from the mishandling of the ROI by the State; or

b was hindered by a major incident, and the integrity of the ROI process will not be compromised by accepting a ROI after the Lodgement Period.'

As explained above, it is clear that neither of the circumstances set out in a or b above has occurred.

47.9 Section 8.2.4 in Pt C of the ROI notice conferred a power on the Minister to extend the lodgment period by posting details on the specified Government website.

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[26] The terms of the section are substantially repeated in sections 2.4 and 8.2.4 of Pt C of the ROI notice.

47.10 Section 3(a) in Pt C of the ROI notice also conferred a power in the Minister to amend the ROI notice by issuing an addendum. Thus, if it was intended to widen the circumstances in which a late lodgment may be accepted it was open to the Minister to state those circumstances by an addendum.

47.11 The Minister did not extend the lodgment period or vary the ROI notice in respect of the circumstances in which a late lodgment might be accepted.

48. Initially, the Panel was concerned about the absence of an express provision in the Act, or in the ROI notice, empowering the Minister to accept the late lodgment of an ROI. The Panel has concluded, however, that the preferable view is that such a power is impliedly conferred by s 4.3A.3(6) of the Act and sections 2.4 and 8.2.4 of Pt C of the ROI notice, which appear to be predicated on the existence of a power in the Minister to consider a non-complying ROI, including one that has been lodged later than the specified time, unless the Minister exercises his discretion under the sections to refuse to consider, or consider further, the ROI or to refer it to the Secretary. Such a power appears to be necessarily implicit in those provisions.

49. In the Panel's view, however, the Minister's acceptance of the late lodgment of Tabgroup's ROI constituted unequal treatment as between the registrants. The reason for that is that all other registrants (and potential registrants) were required to lodge their ROI's within the specified times on 16 January 2009 and were informed in the ROI notice that any late lodgment would only be accepted in the two limited circumstances explicitly outlined in section 8.2.4 of Pt C of the ROI Notice. The late lodgment of Tabgroup's ROI, however, was accepted notwithstanding that neither of those limited circumstances appeared to be applicable.

50. The Panel also considers that the acceptance of Tabgroup's late lodgment was inconsistent with the criterion that the registrants be evaluated in a systematic manner against *explicit* predetermined evaluation criteria (s 10.2A.3(1)(b)(iii) of the Act). Neither of the two explicit predetermined evaluation criteria in the

ROI notice in respect of late lodgment appeared to be applicable but the late lodgment was nonetheless accepted.

51. The Panel acknowledges, however, that, on one view, the evaluation referred to in s 10.2A.3(1)(b)(iii) relates to the substantive evaluation concerning the merits of the registrant or applicant, rather than whether it has met the procedural requirements of an ROI or an ITA. The Panel, however, takes another view, which is that the sub-section is concerned with all of the evaluation criteria in an ROI or ITA that confront a registrant or an applicant. That interpretation better gives effect to the broad probity objectives of the statutory scheme, which treats all probity breaches as serious irrespective of whether they relate to substantive or procedural issues: see the Panel's first report at [33] – [34] where these objectives were discussed.

52. The Secretary and the GLR project director sought, and obtained, legal advice from their solicitors and senior counsel in respect of the Minister's power to accept a late lodgment, and then acted on that advice to conclude that there was a general discretion in the Minister to accept the late lodgment of Tabgroup's ROI. Having concluded that there was a general discretion the relevant entities did not consider, or draw to the Minister's attention, the highly restrictive criteria stipulated in section 8.2.4 of Pt C of the ROI notice, which explicitly state the circumstances in which the Minister's discretion can be exercised in respect of late lodgment. When the Minister applies criteria for late lodgment for one registrant that are different to the criteria set out in section 8.2.4 (as was the case with the factors relied on for acceptance of Tabgroup's late lodgment) that constitutes inequality of treatment and a failure to act in accordance with the explicit predetermined criteria. Those criteria (ie in section 8.2.4) were not referred to in the recommendations of the GLR project director to the Minister.

53. The Panel observes that when a discretion is to be exercised in relation to an ROI or an ITA for the benefit, or to the detriment, of a registrant or applicant, the relevant entities concerned in that process must consider the criteria set out in the ROI or ITA in relation to that discretion and the relevance, if any, of the

Panel's questions to the exercise of that discretion. When that occurs the probity and integrity of the licensing process will be enhanced.

54. However, notwithstanding the conclusions arrived at by the Panel, there are a number of mitigating circumstances that have the consequence that the late lodgment of Tabgroup's ROI would not appear to have resulted in prejudice to any other party nor does it appear to have had any adverse affect on the probity of the ROI process. Those circumstances are:

54.1 the Tabgroup consortium's ROI was lodged by the consortium within time on 16 January 2009;

54.2 the consortium foreshadowed that, if it was invited to apply, it would incorporate Tabgroup as the vehicle for the Licence application;

54.3 the GLR project director, acting on legal advice, led the consortium to believe that, without prejudicing its ROI it could choose to proceed with the ROI it lodged or to incorporate Tabgroup and request the Minister to accept it as a late lodgment;

54.4 Tabgroup chose the second option suggested by the GLR project director and, in due course, the Minister accepted the late lodgment on the basis of the GLR project director's recommendation;

54.5 the GLR project director's recommendation was made on the basis of the legal advice he had received;[27]

54.6 as the Tabgroup registrant's ROI replaced that lodged by the Tabgroup consortium, this is not a case where the registrants who lodged in time were competing with an additional registrant who did not lodge in time.

55. The GLR project director and the Minister contended the changes to the Tabgroup registrant's ROI should be seen to be no more than an amendment to

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[27] As is apparent from the Panel's analysis of these issues the Panel has formed a different view about the proper construction of Section 8.2.4 of the ROI notice, which in the Panel's view sets out the restrictive criteria that will be applied by the Minister when exercising a discretion concerning late lodgment.

the form, rather than the substance, of the ROI. Tabgroup also contended that it only amended the ROI to meet the GLR project director's requirements in respect of the newly incorporated entity. For the most part those contentions are correct. There were, however, some amendments to substantive aspects of the ROI. However, those amendments, which primarily related to Schedule Y, were made as a result of clarification questions that were put by the GLR project director to the Tabgroup consortium on 23 March 2009. Similar, but not identical, clarification questions were also put to the other registrants on 23 March 2009. Other substantive amendments updated earlier information, save that the information related to the newly incorporated registrant, rather than the consortium. After carefully considering the substantive amendments the Panel is satisfied that, in the circumstances, they did not unfairly or inappropriately allow the ROI to be improved. Also, putting to one side the issue of late lodgment, accepting the substantive amendments did not constitute unequal treatment.[28]

Confidentiality issues concerning Ladbrokes

56. Section 7.5 of Pt C of the ROI notice provides that the parties are to keep in confidence all information and communications with the State, State Parties and the VCGR relating to the ROI, the ROI process and the licensing process and are not to disclose any such information or communications other than in accordance with the ROI notice or with the prior written consent of the GLR project director. The terms also prohibit public comment in relation to the ROI, the ROI process or the licensing process or any other matter or thing relevant to the ROI process or the licensing process without the prior written consent of the GLR project director. The exception provided for is where a disclosure is required by law.

57. The Panel has been made aware of a complaint against Ladbrokes plc (a listed company in the UK) about the public disclosure by it of the fact that it is seeking a Licence and of reasons why it would be a preferable recipient of the Licence.

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[28] Section 9.6 of Pt C of the ROI notice permits amendments that do not unfairly or inappropriately allow the ROI to be improved or otherwise constitute unequal treatment.

58. The Panel accepts that the law can require a disclosure that a public company is a registrant, such as under the ASX Listing Rules. The problem in such a case is that a listed registrant (ie where the registrant or its ultimate parent is listed) will have a broader right of disclosure than a non-listed registrant company. The Panel considers that this may be seen to be unequal treatment. The Panel has some difficulty in accepting that a blanket ban on such disclosures is necessary, particularly when it is appreciated that a number of registrants, or ultimate holding companies of registrants, are publicly listed companies which may have a legal obligation to disclose their licence applications. This potential for unequal treatment could be removed in future ITAs. Also, having regard to the above matters, the Panel does not regard Ladbrokes confidentiality breach (ie identifying itself as a registrant) to be a significant breach that should result in an adverse recommendation.

59. The complaint relating to comments alleged to have been made by a representative of Ladbrokes in support of its registration of interest falls into a different category. The relevant facts are as follows.

59.1 On 23 January 2009, an article was published in the Herald Sun, which referred to Ladbrokes ROI and quoted Kevin Hopgood, Managing Director, International Development at Ladbrokes plc:

> *'Asked why Ladbrokes would be a better alternative to the incumbent, Hopgood said: "I think we would bring in better technology, which would bring in better presentation with more products, particularly in the sports betting side…'*

59.2 A Registrant complained to the probity auditor about the article. Ladbrokes was provided with an opportunity to make a submission as to whether it had breached the terms of the ROI notice, and if so, whether the Minister should refuse to further consider the ROI. Ladbrokes response was that it takes its compliance with its undertakings and obligations to the State very seriously and had in place the required protocols. It also stated that every member of the team (including those quoted in the article) had been informed of the

protocols, and emphasised the importance that Ladbrokes placed on compliance with the protocols. Finally, Ladbrokes explained that the circumstances reported in the article were investigated by it, and as a result of that investigation, Ladbrokes advised that the conversation reported in the article took place in the context of meeting industry contacts and no confidential details or content of its ROI was discussed.

59.3 The GLR project director subsequently requested that Ladbrokes provide a copy of the protocols that Ladbrokes was required to implement to ensure compliance with the confidentiality provision in the ROI Notice and a statutory declaration attesting to the circumstances that led to Ladbrokes staff being quoted in the media article.

59.4 The Group Secretary of Ladbrokes confirmed that the protocols substantially replicated the confidentiality requirements set out in the ROI notice, which had been circulated to all those involved in preparing Ladbrokes' response to the ROI notice, and that it has been made clear that strict compliance with the protocols is essential.

59.5 The program director of Ladbrokes provided a statutory declaration confirming the newspaper report but it stated that the purpose of the meeting was to obtain background information about the Australian market and provide background information about Ladbrokes capabilities and technology in the usual course of Ladbrokes' business. The director stated that at no point in the meeting was any confidential detail and content contained in the ROI, or matters relating to the ROI process or licensing process, disclosed or discussed.

59.6 The GLR project director reviewed the material and considered that the breach did not warrant Ladbrokes' exclusion from the licensing process but, instead, it was appropriate to write to Ladbrokes to remind it of the importance of complying with the probity requirements.

59.7 On 27 March 2009, the GLR project director sent to Ladbrokes a letter, which included the following comments:

> *'If it was clearly established that comment was made in the public domain about a possible competitor or its operations relevant to the Licensing Process, that would be a matter sufficient for a recommendation to the Minister that the relevant ROI should not be considered or considered further or referred to the Secretary as provided for in section 7.1 of Part C of the Notice.*
>
> *The view on behalf of the State is also that the terms of the Notice preclude the public disclosure of the participation of a Registrant in the registration process in the absence of the exercise of the discretion of the Minister to disclose that information.*
>
> *Based upon my review of the information available and after taking probity advice it is not proposed to take any further action in relation to this possible breach of the Notice requirements.*
>
> *While I acknowledge that Ladbrokes will seek to obtain information about the Australian market, I take this opportunity to remind you that any public comment in relation to the ROI process or any other aspect of the Licensing Process (unless authorised under the Notice) is a matter of serious concern. Any further occurrence may constitute a breach of the Notice causing the Minister to refuse to consider, or to consider the ROI further, or to refer the ROI to the Secretary under section 4.3A.3(6) of the Gambling Regulation Act 2003.'*

59.8 No further complaint has been received in relation to the article and there was no other alleged breach of the confidentiality provisions by Ladbrokes.

60. Having regard to all of the circumstances, the Panel does not regard the course taken by the GLR project director as inappropriate or as raising an issue of concern or significance in relation to any of the Panel's questions.

Intrabet's ROI

61. Intrabet Pty Ltd (***Intrabet***) is a wholly owned subsidiary of Intralot Australia Pty Ltd (***Intralot***), which was granted a Category 2 public lottery licence under the Act on 24 October 2007 (***Intralot's lottery licence***). On the same day, the Minister granted Tattersall's a Category 1 lottery licence (***Tattersall's lottery licence***).

62. The Panel's first report related to the process by which the Minister invited Tattersall's and Intralot to apply for the categories 1 and 2 lottery licences. It did not relate to the negotiation process pursuant to that invitation which led to the grant of the category 1 and 2 lottery licences to Tattersall's and Intralot respectively. Intralot's complaint, to which we shortly refer, relates to matters that first arose in the course of the negotiation process, which was not the subject of a report by the Panel.[29]

63. On 28 January 2010, Intralot lodged a complaint with the Panel claiming that Intralot had not been treated equally or impartially in relation to the 'Exclusive Arrangements' provisions in the respective lottery licences.[30] The Panel has corresponded with both Intralot and the Secretary in relation to the merits of Intralot's complaint and also in relation to whether the Panel has power to present a report about it to the Minister under s 10.2A.10 of the Act. The Panel is presently considering those matters.

64. An issue arose, however, about whether Intralot's complaint is relevant to the current wagering and betting licensing process. Intralot alleges that the exclusive arrangements provisions that were granted in Tattersall's lottery licence have significantly affected Intralot's performance as a licensee under

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29 Until Intralot's complaint no request was made to the Panel to prepare a report in relation to the lotteries license negotiation process.

30 As is later explained, the 'Exclusive Arrangements' provisions are set out in cl 10.3 of the respective public lottery licences. Although there may be a dispute as to whether all of the arrangements in cl 10.3 of Tattersall's lottery licence are 'exclusive' arrangements, in this report the Panel has adopted that label without forming a view as to its correctness.

Intralot's lottery licence. In its letter of 18 May 2010, Intralot informed the Panel that, to the extent that any report of the Secretary in relation to the wagering and betting licence is prepared for the Minister which adversely refers to Intralot's performance or reputation by reason of its performance under Intralot's lottery licence the report will not be treating its subsidiary Intrabet equally and impartially.

65. By a further letter dated 29 June 2010, Intralot referred to the 18 May 2010 letter and raised an additional concern about the State having contingency plans in the event of any potential collapse of Intralot's lottery licence. It contended that the matters disclosed in the letter indicate that there may be a lack of equal and impartial treatment of Intralot's related company, the Intralot registrant, in the current wagering and betting licensing process because of the exclusive lottery arrangements negotiated by Tattersall's and their negative impact upon Intralot's performance and reputation. The responses of the Director of the Office of Gaming and Racing and of the GLR project director to the Panel, which the Panel accepts, is that no relevant entities involved in the current licensing process have any function or involvement with any action being considered by the State in relation to Intralot's lottery licence. Any matters of the kind referred to in the letter will be dealt with by the Office of Gaming and Racing, which is separate from the relevant entities involved in any of the current gambling licensing processes.

66. The mixed questions of fact and law that arise in respect of the complaint raised by Intralot on 28 January 2010 are complex. On the limited information available to the Panel to date, they do appear to raise a question as to whether Intralot was treated equally and given the same opportunity as Tattersall's to access information about the lottery licensing process (s 10.2A.3(1)(b)(i) of the Act) and also whether Intralot and Tattersall's were evaluated in a systematic manner against explicit predetermined evaluation criteria (s 10.2A.3(1)(b)(iii) of the Act). Those questions, including the Panel's power to consider and report on them, will be considered by the Panel in due course.

67. The issue in the present context concerns the more limited question of the relevance, if any, to the present licensing process of the negative impact on

Intralot's performance of Tattersall's exclusive arrangement provisions. It is likely that relevant entities such as the Secretary and the GLR project director were involved in recommending or advising on the grant of those exclusive arrangement rights to Tattersall's.[31] Those same persons are now also involved in making recommendations to the Minister in relation to Intrabet's current ROI for the Licence. In that event those same persons may be considering and evaluating the reasons for that negative impact, which Intralot contends they, in part, caused. Put another way, the relevant persons are allegedly judging, albeit indirectly, their own conduct.

68. While Intralot has raised this issue in terms of Intrabet's entitlement to impartial and equal treatment (s 10.2A.3(1)(b)(i)) of the Act) the Panel considers that the complaint might also raise questions of an actual or perceived conflict of interest (s 10.2A.3(1)(b)(iv) and (v) of the Act) or reasonable apprehension of bias (s 10.2A.3(1)(b)(vii) of the Act). In order to appreciate how those questions might arise it is necessary to briefly outline the relevant facts.

69. A notice under section 5.3.2A calling for registrations of interest in the grant of a public lottery licence (**PLL**) was published in the *Victoria Government Gazette* on 17 June 2005 (the **PLL notice**). Registrations of interest were received from five parties of whom two, Tattersall's and Intralot, were shortlisted. The Minister wrote to both parties on 10 November 2005 inviting them to apply for a PLL.

70. Clause 3.7 of the PLL notice provided that the Minister would notify each applicant with whom he intended to negotiate of his desire to enter into negotiations and of the negotiation process. Such negotiations and the negotiation process formed part of the lottery licensing process. Clause 2.21.1 of the PLL notice stated that the draft conditions in the PLL reflect the Minister's current view but they may be changed by the Minister. The applicants were required to specify, and give the reasons for, any unacceptable conditions.

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[31] The Panel will consider these issues in detail when it reports on Intralot's complaint in the near future.

71. Tattersall's and Intralot applied for a PLL in response to the PLL notice. The Minister notified the applicants that negotiations would be conducted in relation to the applications under cl. 3.7 of the PLL notice before a determination was made as to the recipient of the PLL. Each of Tattersall's and Intralot received a letter specifying three types of terms that would be involved in the negotiation process. Relevantly, for present purposes, the materiality of the terms was stated as follows

Tier 1 terms	*full compliance with the relevant clause of the Licence or the Agreement is sought;*
Tier 2 and 3 terms	*were stated to be more negotiable.*

72. The parties were informed as to the importance of the tiers as follows:

> *'At the end of this process you will be requested to submit the form of Licence and Agreement acceptable to you for consideration by the State against its proposed form of Licence and Agreement. In undertaking such consideration, the State will have regard to the above Tiers of materiality.*
>
> *You may also at the same time formally update aspects of your Application.'*

73. Clause 10.3 was a Tier 1 cl in the draft PLL Agreement. It provided that any exclusive distribution arrangements would be prohibited.

74. After the conclusion of separate negotiations between GLR project team members with Tattersall's and Intralot, PLL's were issued to them on 24 October 2007. The Intralot lottery licence and the Tattersall's lottery licence contained different versions of cl 10.3. Consistently with the form of the GLR's cl 10.3 as a Tier 1 cl, cl 10.3 of Intralot's lottery licence provides:

> *'The Licensee must not engage in any exclusive distribution arrangements with a Distributor which have the purpose or effect or likely effect of precluding a Distributor from acting as a distributor for*

another Licensee, except where the Licensee controls the Distributor, within the meaning of s 50AA of the Corporations Act 2001 (Cth).'

75. Clause 10.3(1) of the Tattersall's lottery licence is in the same terms as cl. 10.3 of Intralot's lottery licence. But cl. 10.3 of the Tattersall's lottery licence contains three additional paragraphs which are not in the Intralot licence and were not in the GLR's cl 10.3 Tier 1 cl. They are:

> *'(2) Clause 10.3(1) does not preclude the Licensee requiring as part of its operational standards and distributor arrangements a Distributor to have a dedicated area within the Distributor's premises to be made available only for the Conduct of the Licensee's Authorised Lotteries.*
>
> *(3) Notwithstanding clause 10.3(1), the Licensee may have exclusive arrangements with Licensee Only Distributors as set out in Annexure D, for which the predominant purpose of the Distributor's business at establishment was the sale of Authorised Lotteries.*
>
> *(4) The Licensee will on an annual basis, as part of its reporting under clause 7.1(4) of the Agreement, provide to the Minister an updated list of Licensee Only Distributors, showing any deletions from those listed in Annexure D.'*

76. Intralot contends that at all material times it was unaware that the exclusive arrangements clause in Tattersall's lottery licence differed from the Tier 1 cl 10.3 which appeared in Intralot's lottery licence. It also contends that the Tattersall's clause is substantially to its detriment and that, had it been aware of the insertion of the additional paragraphs into cl 10.3 of the Tattersall's lottery licence, it would not have entered into the agreement for the issue of the PLL in the form it was granted to Intralot. Significantly, although Intralot has not informed the Panel of how it might propose to formulate its legal claims, Intralot is claiming that the failure to inform it of the form of Tattersall's cl 10.3 constituted a failure to accord it equal and impartial treatment.

77. In the usual course, it is a matter for the Secretary to determine if the performance of Intralot under its PLL is a relevant factor to consider in relation to the reasonable grounds criterion concerning Intrabet. However, if and insofar as Intralot's underperformance may be the result of any failure by the State (or its officers), Intralot is contending that a probity issue can arise as to whether, and how, any such underperformance on the part of Intralot that is causally linked to that conduct should be considered in the reports of the relevant entities who had been involved in the earlier conduct. In respect of that causal link, Intralot alleges that the existence of a Tattersall's dedicated area (which is expressed to be permissible under Tattersall's expanded cl 10.3) is generally the area next to the only cash register, where foot traffic and advertising is said to be most effective. Intralot contends that it has:

> *'… therefore been prevented from advertising and selling its lottery products from the location in outlets from which lottery products are normally sold. This has had a significant negative effect of Intralot's sales and is the main reason why Intralot has not been able to achieve forecast sales.'*

78. In summary, Intralot claims that its underperformance under the PLL is a result of the State's failure or omission to inform it of the changes to the Tattersall's exclusive arrangement provisions in the course of the negotiations and should not be taken into account as an adverse factor in assessing Intrabet's ROI for the Licence. The State does not contend that it informed Intralot of the changes to the Tattersall's exclusive arrangement provisions but says it had no obligation to do so.

79. The matter is further complicated by the fact that the VCGR has been conducting a comprehensive performance review of the conduct of Intralot under its lottery licence. The VCGR review is nearing completion and Intralot has been afforded one or more opportunities to comment on the draft reports. However, the VCGR's and the Secretary's wagering and betting reports refer to the review but do not rely on it because the report has not yet been finalised. Nonetheless, the Secretary's report states that the VCGR informed the Commission:

'…the review has not resulted in any evidence that may give rise to issues or concerns in relation to the reputation of Intralot Australia and its Associates, having regard to honesty and integrity.'

80. The Secretary, in a letter dated 22 April 2010, informed the Panel of her position in relation to Intralot's complaint concerning cl 10.3 of the Tattersall's lottery licence. In substance, the Secretary claims that:

80.1 Intralot has waited over two years since becoming aware of the terms of cl 10.3 of Tattersall's PLL licence before raising the issue;

80.2 the negotiation process provided a process for the parties to indicate their position in respect of the licence agreement, and for the Minister, in turn, to take into account any such departures from Tier 1, 2 and 3 terms which was sought by the parties;

80.3 there is a real issue as to whether cl 10.3 in the Tattersall's PLL actually derogates from the prohibition on Tattersall's engaging in any exclusive dealing arrangements.

81. Plainly, the parties differ in their views as to whether there was any failure on the part of the State or its officers as alleged by Intralot. There is, however, an issue about whether, in all the circumstances, the State was obliged, but failed, to notify Intralot of Tattersall's changes to cl 10.3. Intralot claims that the changes can be viewed as a material departure from a Tier 1 condition without giving it an opportunity to consider any revisions to its own application in response to that departure. The State disputes that claim. There may also be an issue about whether and, if so, how Intralot's current position would be significantly different if it had received the notice Intralot claims it ought to have received.

82. The question for the Panel in the present context is not one as to the merits of the above issues but, rather, whether they raise any question as to the probity of the processes being followed in relation to the Licence. In order to answer that question it is necessary to consider whether, and if so how, Intralot's lottery performance has been evaluated in the relevant reports of the Secretary and the GLR project team.[32]

83. The Panel has carefully considered the Secretary's briefing note and the Secretary's report (as well as the Secretary's amended briefing note and report) and the ECT report attached as an appendix to the reports. Both reports refer to issues that are related to Intralot's conduct under its lottery licence. However, the significant finding that is adverse to Intrabet's ROI did not concern its Intralot's lottery licence performance. Rather, it was a finding in the report that acknowledged the Intralot Group's global gambling and technology experience, but stated Intrabet's:

> *'…ROI, however, did not relate [Intrabet's] experience and strategy very well to the Victorian context and, in particular, did not appear to understand the importance of the Victorian Racing Industry.*
>
> *Intrabet's ROI presented some areas of potential weakness with respect to its business experience and proposed business model. The ECT regards the totality and likely impact of these areas of potential weakness as potentially significant in the context of the Minister's consideration of whether there are reasonable grounds for believing that Intrabet will have the capacity and capability to satisfy the Minister in respect of whether Intrabet has the ability to establish and maintain a successful wagering and betting business.'*[33]

84. In the briefing notes, and in the Secretary's report, the Secretary's relevant finding, based on the matters referred to above, was that it *'may be open*' to the

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32 The VCGR's reports made no relevant adverse findings against Intralot in relation to underperformance under Intralot's lottery licence.

33 The ROI in Part A – section 7.1 (Business Model) requires Registrants to
> *provide a high-level business model for their proposed Wagering and Betting Business in Victoria from 2012" and requires that the "high-level business model should deal with strategies and capabilities.'*

Minister to find that, if invited to apply, Intrabet will have the capacity and capability of satisfying the Minister of its ability to establish and maintain a successful wagering and betting business. That qualified finding may be contrasted with the unqualified finding that the Secretary was not prepared to make in respect of Intrabet, because of the wagering and betting matters referred to above, being that '*it is open*' to the Minister to find that, if invited to apply, Intrabet will have the capacity and capability of satisfying the Minister of its ability to establish and maintain a successful wagering and betting business.

85. Although parts of the Secretary's and the ECT's reports discuss issues arising in relation to Intralot's lottery licence performance, the Panel is satisfied that the significant deficiency found in Intrabet's ROI relates directly to wagering and betting issues, rather than to any underperformance or poor repute in relation to Intralot's conduct under its lottery licence. While there were some references to Intralot's performance and reputation in that regard, such references played a very insubstantial role in the evaluation of Intrabet's ROI.

86. More importantly, and relevantly, the Panel is satisfied that the Secretary's report and amended report and her briefing notes or the ECT report, which are the reports that are relevant to Intralot's complaint, do not rely upon any material that is adverse to Intralot's performance or reputation that might be related directly or indirectly to the presence in the Tattersall's lottery licence of the departures from the Tier 1 cl 10.3, any consequences that may have arisen in relation to Intralot by reason of those departures or to the failure to give Intralot notice of those departures.

87. The Panel adds that there was also little evaluation in the relevant reports of underperformance of the other registrants under unrelated licences or those of their ultimate parent companies. Of course, as was the case with the Intralot registrant, some issues that arose under those licences were addressed, insofar as they were relevant to specific criteria (eg repute, technical capacity etc). The adoption of that approach in the reports also tends to negative any claim of Intralot to unequal or partial treatment, or any other probity breach, in relation to the matters complained of by it.

88. The general equality of treatment referred to above, the insubstantial role played by Intralot's public lotteries licence performance and the absence of any causal link between that performance and Intralot's complaint about the processes followed in relation to the final form of cl 10.3 in the Tattersall's lottery licence have led the Panel to conclude that the Secretary's report and briefing note, including the amendments made to them, and the ECT report on which they were based, do not justify a finding by the Panel of partial or unequal treatment, of any actual or perceived conflict of interest or any reasonable apprehension of bias in relation to the Intralot registrant's ROI.

The Probity Auditor

89. As explained earlier, RSM Bird Cameron ('**the probity auditor')** was appointed as the probity adviser[34] in relation to the wagering and betting ROI process for the GLR project team and the Commission. The probity director of RSM Bird Cameron, Mr Stephen Marks, was again the director primarily responsible for the provision of the probity services to be provided by the probity auditor. The probity auditor's services involved providing probity advice and auditing the probity related processes within the GLR project team and the Commission.

90. In previous reports of the Panel, the Panel has observed that it does not possess any coercive investigative powers with the consequence that it must rely upon relevant entities, such as the probity auditor and other parties involved in the licensing processes, to enable the Panel effectively to discharge its statutory functions. In that regard, it is critical for the Panel to be in a position to rely upon the probity auditor and in particular, on the probity auditor duly discharging its duties and reporting on the outcome of its investigations.

91. In some of its previous reports the Panel has also made criticisms of the inadequacy of the investigations and reports of the probity auditor. In the

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[34] Although reference has been made to the appointment of a probity adviser it is clear from the relevant probity plans and other documents that the probity adviser's functions include probity auditing. Although there may be some uncertainty about the precise functions of a probity auditor, in the present context the Panel regards those functions including an appropriate investigatory role and not merely being reactive but also being proactive, in relation to probity issues.

Panel's first report on the public lottery licensing process the Panel observed that it was important for the probity auditor to be proactive rather than just reactive.[35] It also observed that it is not sufficient for the probity auditor to merely state its conclusions. Rather, the Panel observed that if relevant entities are to derive comfort from the reports of probity auditors, it was important for them to be fully informed 'of the forensic underpinning of those reports, which must be clear on the face of the reports'. In the Panel's subsequent report on the outcome of the review of the regulatory structure and associated arrangements of the gambling industry[36] the Panel again expressed its concerns about the probity auditor's role. In particular, criticism was made of the inadequate explanation of the factual basis that was relevant to certain matters dealt in the probity auditor's report and also the inadequacy of the reasoning leading to the conclusions expressed in the report. At paragraph 96, the Panel observed:

> *'… there is a real question as to the utility of a reporting process that merely states the probity auditor's conclusion without any explanation as to how the probity auditor arrived at it. The detail that needs to be given in a probity report is a matter that ought to be addressed in future probity plans in respect of the review or licensing processes.'*

92. While the probity auditor's reports in relation to the Keno ROI process addressed a number of the Panel's concerns, the same cannot be said about the two unsigned 'interim' probity reports received from the probity auditor in relation to the GLR project team and the Commission and dated 13 May 2010. The Panel had requested the reports to enable it to prepare its report to the Minister. The Panel accepts that the reports were draft reports. The probity auditor, however, had been engaged in relation to the audit of the wagering and betting ROI process from 28 April 2008 to 13 May 2010. In those circumstances, the Panel expected a reasonably comprehensive analysis in the

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35 At [151]-[152]. It is to be noted that the current probity auditor, RSM Bird Cameron, was not the probity auditor during the lottery licensing process.

36 *Report off the Gambling and Lotteries Licence Review Panel to the Minister for Gaming in Relation to Review of the Regulatory Structure and Associates Arrangements for the Operation of Gaming Machines, Wagering, Approved Betting Competitions and Club Keno and the Funding of the Racing Industry that are to apply after 2012* Parl Paper No 92 Vol 1 of 2 (2006 – 2008) at [88] to [98].

reports of the probity issues that had arisen in the course of that process. The reports were inadequate and included or referred to a significant amount of irrelevant material. The Panel raised a number of these issues with the probity director, and received a response on 27 May 2010 to the effect that it was not proposed to significantly amend the reports.

93. As a result of the probity auditor's approach, the Panel arranged a meeting with the probity director to directly raise the problems it had with the probity auditor's reports. The Victorian Government Solicitor also attended the meeting. It is sufficient for present purposes to state that the Panel found the probity director's approach and his responses to the Panel inadequate. The Panel raised its concerns with the Victorian Government Solicitor and indicated that the form of, and absence of relevant detail in, the reports were detrimental to the Panel's effective performance of its functions under the Act.

94. Normally, the Panel would outline its concerns in greater detail but it has since been informed that the probity auditor has indicated its intention to withdraw from providing probity services in relation to the gambling licensing processes after concluding its current reports. The Panel was also informed that new probity auditors have been appointed and arrangements are to be made for the new probity auditors to meet with the Panel to better understand the Panel's expectations. In the circumstances, the Panel considered that the outline of the events, as set out above, is sufficient to explain the background to the changes that have occurred in relation to probity auditing of the gambling licensing processes.

95. The probity auditor subsequently forwarded further interim probity reports dated June 2010, which address a number of the Panel's concerns. Any relevant matters in relation to those reports are dealt with in the last section of this report.

V. THE PANEL'S QUESTIONS

Equal and Impartial treatment (s 10.2A.3(1)(b)(i))

96. The Panel has been provided with copies of the reports of the various relevant entities involved in the wagering and betting ROI process.

97. Subject to the issue raised concerning Tabgroup earlier in this report, the Panel considers that, in the preparation of the recommendations and reports of the relevant entities, there is no evidence of unequal or partial treatment or of any registrant being provided with an opportunity to have access to or to receive information or advice about the licensing process that has not been available to the other registrants.

Confidentiality (s 10.2A.3(1)(b)(ii))

98. The Panel has considered the procedures in place to manage and protect the confidentiality of protected information, the disclosure of which can be an offence under section 10.1.30 of the Act. In general, the person acquiring information in the performance of functions under the Act commits an offence if that person discloses the information otherwise than in the performance of that person's functions under the Act or the regulations (s 10.1.30).

99. The Panel is satisfied that the comprehensive and carefully documented procedures and protocols put in place by the Secretary, the GLR project director and the Commission have operated to ensure the security and confidentiality of protected information submitted in the course of the wagering and betting ROI process.

100. Significantly, no confidentiality breach of consequence has been drawn to the Panel's attention other than the Ladbrokes breach of the confidentiality provisions in the ROI notice described earlier in this report. As explained earlier, however, the Panel accepts that the breach was appropriately considered and dealt with.

Systematic Evaluation (s 10.2A.3(1)(b)(iii))

101. Potential concerns in respect of the evaluation methodology were outlined in the Matters of Concern section dealing with 'ongoing' and 'unresolved' matters. In the result, the Panel is satisfied that those concerns were appropriately dealt with in the Secretary's reports and recommendations including the amended reports and recommendations. The Tabgroup matter is an exception but, as outlined above, the Panel does not make any adverse recommendation in relation to that matter for the reasons give at [54] – [55] above.

Conflict of Interest (s s 10.2A.3(1)(b)(iv) and (s 10.2A.3(1)(b)(v))

The VCGR

102. The VCGR probity plan is explicit in its definition of conflict of interest. All persons involved in the wagering and betting ROI process, including contractors, were required to acknowledge formally that they were familiar with the relevant processes in place to prevent any actual or perceived conflict of interest and with the obligation to report any such conflict or possible conflict.

103. All conflict of interest declarations were reviewed by the probity auditor and, where appropriate, managed in the normal course. The declarations related to relatively minor matters and the Panel is satisfied that any such conflicts of interest declared or considered have been appropriately addressed.

The GLR

104. The GLR probity plan was explicit in its definitions and expectations with regard to actual or perceived conflict of interest and the policies and procedures to be adopted by the GLR project team, Steering Committee members, advisers and contractors.

105. Additionally, there was a requirement for any other member of the Victorian Public Service involved in providing advice to the GLR to adhere to the relevant policies and procedures. The probity plan also enunciated policy and

procedures with regard to permitted interests and prohibited dealing, prohibition on holding shares, material and financial interests and interests held by close family members.

106. No significant conflict of interest issues arose in respect of members of the GLR project team or the Steering Committee**.** Accordingly, the Panel is satisfied that:

106.1 each relevant entity involved in the ROI process has been required to declare any actual or perceived conflict of interest; and

106.2 any conflict of interest so declared has been appropriately addressed.

107. The probity auditor's report discussed the role a of particular adviser who was engaged by the GLR project director to provide expert advice to the GLR project team, and concluded that a 'perceived conflict of interest' arose in respect of the adviser but that it was considered to be 'a low risk to the probity of the process'.

108. The adviser had been an employee of Racing Victoria Limited (**RVL**) and, in that role, had significant contact with the Tabcorp registrant's parent, Tabcorp Ltd. It appears that the expertise that was being sought by the GLR project director to assist the ECT panels was derived from the adviser's experience as an employee of RVL, which included extensive contact with Tabcorp Ltd as the licensee in respect of wagering and betting in Victoria. When the adviser was engaged by the GLR project director, the adviser has ceased to be an employee of the RVL. Accordingly, the adviser had no ongoing duty to, or interest in, RVL or Tabcorp other than in relation to protection of their confidential information which the adviser was not at liberty to impart.[37]

109. In recognition of the adviser's role with the ECT panels, the adviser's services agreement included comprehensive confidentiality obligations and an extensive conflict of interest warranty.

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[37] Any such duty of confidentiality is no different from that owed by any former employee. In any event, the adviser's contract excluded the State from accessing or relying upon confidential information of RVL, the VRI or of any registrant or applicant that the adviser possessed prior to the adviser's engagement as an adviser to the ECT panels.

110. In view of the above matters, the Panel does not consider that the adviser had an actual or perceived conflict of interest and therefore does not agree with the probity auditor's views that there was a perceived conflict of interest or that the adviser's appointment was a risk, albeit a low risk, to the probity of the process. In the Panel's view, the adviser's appointment cannot reasonably be perceived to present any real risk to the probity of the process in the circumstances outlined above, which include the absence of any reason to believe that the adviser will not comply with the adviser's contractual obligations in relation to the services being provided to the GLR project team.

Improper Interference (s 10.2A.3(1)(b)(vi))

111. The Panel has observed in its previous reports that improper interference, by its nature, may be unlikely to be disclosed voluntarily. That said, no issue has been raised with the Panel regarding any conduct which could be regarded as improper interference.

112. In particular, the Panel has concluded that the key entities, being the Secretary, the GLR project team and the Commission had procedures in place that guarded against improper interference and prohibited contact. Further, the probity auditor reported that the probity plans and protocols had been followed. Finally, there is nothing in the records of meetings or in the correspondence and the reports and recommendations of the relevant entities that suggests that the extensive and detailed procedures, including statutory declarations, set in place to prevent improper interference and lobbying activities have not been effective in achieving their objectives.

Apprehension of Bias (10.2A.3(1)(b)(vii))

113. The Panel is satisfied on the material before it that the preparation of the conformance testing report, the Commission's reports, the GLR project team reports, and the Secretary's reports and recommendations did not disclose any bias or anything that could lead to a reasonable apprehension of bias.

VI CONCLUSION

114. For the reasons outlined in the report, the Panel has considered the Panel's questions primarily in the context of the processes established to determine which of the Registrants should be invited to apply for the Licence. The Panel reports to the Minister as follows:

114.1 Save in respect of the Tabgroup matter discussed above**,** the five Registrants have been treated equally and impartially and have been given the same opportunity to access information and advice about the ROI process.

114.2 All protected information has been managed to ensure its security and confidentiality.

114.3 Save in respect of the Tabgroup matter discussed above, the five Registrants have each been evaluated in a systematic manner against explicit predetermined evaluation criteria.

114.4 The relevant entities engaged in the ROI process have been required to declare any actual or perceived conflict of interest before participating in the process.

114.5 Any actual or perceived conflicts have been appropriately addressed in the course of the ROI process.

114.6 There is no evidence of any improper interference with the making of a recommendation or report made in the course of the ROI process.

114.7 The preparation of recommendations and reports of the relevant entities engaged in the ROI process does not disclose bias or anything that could lead to a reasonable apprehension of bias.

114.8 For the reasons given at [54] – [55] above, the Panel does not regard the Tabgroup matter as warranting any adverse finding against Tabgroup or its ROI.

114.9 In all the circumstances, the Panel is of the view that none of the concerns raised by the Panel in this report are such as to constitute an impediment to the Minister proceeding to the ITA stage in this matter.

115. Finally, the Panel again expresses its gratitude for the invaluable contributions made by Dr Claire Noone in her capacity as secretary to the Panel and to Ms Elizabeth Bennett in her capacity as Counsel assisting the Panel. The Panel also expresses its gratitude to all of the individuals and entities who were prepared to appear before or assist the Panel and fully co-operate with it in respect of its many requests for information and documents. Without those contributions, the Panel would not have been able to perform its functions under the Act with the expedition that it has been able to achieve.

Ron Merkel QC (Chair of the Panel)

David Green

Barbara Yeoh

Mick Ellis

DATED the 28th day of July 2010