

## Decision and reasons for decision

Disciplinary action against Tabcorp Wagering (Vic) Pty Ltd under section 4.3A.27 of the *Gambling Regulation Act 2003* (Vic) (**the Act**) on the grounds set out in section 4.3A.26(d)(i) and 4.3A.26(i).

<b>Commission</b>	<b>Fran Thorn, Chair</b> <b>Andrew Scott, Deputy Chair</b> <b>Dr Ron Ben-David, Deputy Chair</b> <b>Claire Miller, Commissioner</b> <b>Chris O'Neill APM, Commissioner</b>
<b>Date of decision and reasons</b>	6 August 2024
<b>Date of reasons</b>	20 August 2024
<b>Decision</b>	<p>For the reasons attached to this decision, the Victorian Gambling and Casino Control Commission has determined:</p> <ol style="list-style-type: none"> <li>a. To take disciplinary action against Tabcorp Wagering (Vic) Pty Ltd under section 4.3A.27 of the Act for contravening conditions 5.1 and 5.4 of the Wagering and Betting Licence and repeatedly breaching the 2014 Responsible Gambling Code of Conduct; and</li> <li>b. That the appropriate disciplinary action is the imposition of a fine of \$4,600,000</li> </ol>
<b>Signed</b>	
	Fran Thorn
	Chair

## Introduction

- 1) This is the Victorian Gambling and Casino Control Commission's (**Commission**) determination of what, if any, disciplinary action to take against Tabcorp Wagering (VIC) Pty Ltd (**the Licensee**) under s 4.3A.27 of the *Gambling Regulation Act 2003* (Vic) (**the Act**) having issued a notice to show cause on 18 June 2024 (**Notice**) why disciplinary action should not be taken on the grounds specified in the Notice.
- 2) The Commission issued the Licensee with this Notice after the Commission had initially sent it two notices in respect of the same alleged conduct on 12 April 2024.
  - a. One notice alleged, among other things, that the Licensee had failed to comply with the harm minimisation direction made by the Minister and published in the Government Gazette (Ministerial Direction S 349) on 6 July 2022 (**Harm Minimisation Direction**) in its dealings with respect to the Customer<sup>1</sup> and thereby failed to comply with a condition of its Wagering and Betting Licence (**the Licence**).
  - b. One notice alleged, among other things, that the Licensee had failed to implement its Responsible Gambling Code of Conduct contrary to s 4.3A.10A(b) of the Act in its dealings with respect to the Customer because it had not complied with that Code in those dealings.
- 3) The Licensee provided written responses to those notices on 10 May 2024 and 17 May 2024 respectively. In general terms, the Licensee:
  - a. acknowledged that "it did not fully adhere to the Harm Minimisation Direction" in respect of the Customer;
  - b. submitted that, in law, non-compliance with its Responsible Gambling Code of Conduct did not amount to a failure to implement it; and
  - c. offered to accept disciplinary action under s 4.3A.26(i) for repeated breaches of its Responsible Gambling Code of Conduct if the conduct the subject of both notices was to be considered together.
- 4) Whether the second general submission is accurate or not need not be determined, and the Commission should not be understood to have formed a position on it. Instead, it is expedient and appropriate to adopt a variation on the practical course proposed by the Licensee.
- 5) It appears to the Commission that the Licensee may have been suggesting that the only ground for disciplinary action be for repeated breaches of its Responsible Gambling Code of Conduct. In so far as that was proposed, the Commission does not consider that this would adequately reflect the totality of the Licensee's wrongdoing.
- 6) What the Commission did instead in its Notice was to combine the two notices into one, maintain the allegation of non-compliance with the Harm Minimisation Direction and also allege repeated breaches of the Responsible Gambling Code of Conduct. In general terms, those are the grounds in the Notice which underpins the present decision.
- 7) On 16 July 2024, the Licensee confirmed that it was content to rely on its responses dated 10 May 2024 and 17 May 2024 in response to the current Notice.
- 8) The Commission has considered all material provided to it by the Licensee for this matter.

## Summary

- 9) For the reasons that follow, the Commission has determined to fine the Licensee **\$4,600,000**.

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<sup>1</sup> A pseudonym has been used to maintain the Customer's privacy.

## Background

- 10) This disciplinary action arises out of the Licensee’s dealings with the Customer in late 2022 and early 2023.
- 11) On 8 August 2020, the Customer called the Licensee’s Customer Service Centre and requested they reopen a previously closed account. The Customer notified the Licensee during that call that they did not want to receive any marketing materials through any method of communication. In the phone call, the following exchange occurred:
- Licensee employee: Alright [Customer] so just before you go, I just want to check if you’d like to opt in for marketing or if you want to opt out of marketing?
- Customer: Yeah, opt out if I could.
- Licensee employee: Opt out. Alright, perfect. I will just - -
- Customer: Yes thanks.
- Licensee employee: - - note that on your account, just bear with me.
- Customer: Yep.
- Licensee employee: Which means that you won’t receive any text messages or any um communications from us, from us, is that right?
- Customer: Yes.
- Licensee employee: Alright - -
- Customer: Yes.
- Licensee employee: - - okay I will just opt you out so no TAB mail and no market research. Alright. So you have been - -
- Customer: Thank you.
- Licensee employee: - - opted out of all marketing. Alright [Customer] - -
- Customer: Yep. Great.
- 12) Between 1 January 2022 and 28 February 2023, there were significant increases in the value of deposits made, number of deposits made, value of bets placed and the number of bets placed by the Customer as set out in the table below:

MONTHLY DATA 2022-2023							
Value of deposits monthly 2022-2023				Number of deposits monthly 2022-2023			
Year	Value of deposits monthly 2022-2023	Difference	% change	Year	Number of deposits monthly 2022-2023	Difference	% change
Jan-22	\$3,792.00	\$0.00		Jan-22	45	0	
Feb-22	\$2,030.00	-\$1,762.00	-46.47%	Feb-22	24	-21	-46.67%
Mar-22	\$19,234.00	\$17,204.00	847.49%	Mar-22	73	49	204.17%
Apr-22	\$18,348.00	-\$886.00	-4.61%	Apr-22	69	-4	-5.48%
May-22	\$15,190.00	-\$3,158.00	-17.21%	May-22	68	-1	-1.45%
Jun-22	\$14,996.00	-\$194.00	-1.28%	Jun-22	39	-29	-42.65%
Jul-22	\$112,894.00	\$97,898.00	652.83%	Jul-22	146	107	274.36%
Aug-22	\$84,009.00	-\$28,885.00	-25.59%	Aug-22	89	-57	-39.04%
Sep-22	\$261,659.00	\$177,650.00	211.47%	Sep-22	202	113	126.97%
Oct-22	\$246,764.00	-\$14,895.00	-5.69%	Oct-22	260	58	28.71%
Nov-22	\$251,156.00	\$4,392.00	1.78%	Nov-22	236	-24	-9.23%
Dec-22	\$80,684.00	-\$170,472.00	-67.87%	Dec-22	130	-106	-44.92%
Jan-23	\$184,228.00	\$103,544.00	128.33%	Jan-23	236	106	81.54%
Feb-23	\$59,418.00	-\$124,810.00	-67.75%	Feb-23	182	-54	-22.88%

  

Value of bets staked monthly 2022-2023				Number of bets staked monthly 2022-2023			
Year	Value of bets staked monthly 2022-2023	Difference	% change	Year	Number of bets staked monthly 2022-2023	Difference	% change
Jan-22	\$7,919.50	\$0.00		Jan-22	105	0	
Feb-22	\$2,701.50	-\$5,218.00	-65.89%	Feb-22	38	-67	-63.81%
Mar-22	\$38,052.50	\$35,351.00	1308.57%	Mar-22	182	144	378.95%
Apr-22	\$27,931.50	-\$10,121.00	-26.60%	Apr-22	132	-50	-27.47%
May-22	\$20,807.50	-\$7,124.00	-25.51%	May-22	125	-7	-5.30%
Jun-22	\$32,394.50	\$11,587.00	55.69%	Jun-22	103	-22	-17.60%
Jul-22	\$225,197.00	\$192,802.50	595.17%	Jul-22	352	249	241.75%
Aug-22	\$230,691.50	\$5,494.50	2.44%	Aug-22	333	-19	-5.40%
Sep-22	\$691,029.50	\$460,338.00	199.55%	Sep-22	818	485	145.65%
Oct-22	\$646,227.50	-\$44,802.00	-6.48%	Oct-22	1042	224	27.38%
Nov-22	\$623,594.00	-\$22,633.50	-3.50%	Nov-22	917	-125	-12.00%
Dec-22	\$279,781.00	-\$343,813.00	-55.13%	Dec-22	618	-299	-32.61%
Jan-23	\$486,357.00	\$206,576.00	73.83%	Jan-23	932	314	50.81%
Feb-23	\$129,010.50	-\$357,346.50	-73.47%	Feb-23	566	-366	-39.27%

- 13) Emails were sent to the Customer as part of the Licensee's 'Early Intervention Email Campaign' on 9 November 2021, 12 April 2022, 12 July 2022, 16 October 2022 and 12 February 2023.
- 14) One of the Licensee's own business records for 16 October 2022 states:  
Significant increase in losses and turnover over last 3 months. 12M losses \$160k, 1M losses 135K. Staking seems consistent although active most days recently with large volume of bets. Recommend call if none recently.
- 15) The Licensee's call log for 26 October 2022 states that a responsible gambling check was required because "Betting on account has increased dramatically over the past two months – RG check in required and further information regarding account".
- 16) A phone call was placed by the Licensee to the Customer on 26 October 2022. During this call a deposit match promotion of \$2000.00 was communicated to the Customer and added to their account.
- 17) On 2 November 2022, the Licensee's risk assessment process detected concerns in relation to potential problem gambling and recommended an affordability and source of wealth check be undertaken on the Customer. An extract of the High Deposit Dashboard is as follows:  
Customer has increased their betting and spending since June, with losses reaching \$171k and frequent betting sessions on a weekly basis. 12M losses are \$186k, so majority of activity and losses have been since June. Unable to locate any open source info. RG check required to assess comfortability with losses and increased time spent betting. Affordability and soft SOW should be addressed also.
- 18) Between 30 August 2022 and 16 February 2023, the Licensee engaged in the following direct marketing to the Customer:
- On 2 occasions (the 30 August 2022 and 10 January 2023) the Licensee provided a promotion in the form of a bonus bet, which was communicated by SMS (on 30 August 2022) and email (on 10 January 2023).
  - On 2 occasions (19 October 2022 and 16 February 2023) the Licensee provided a promotion in the form of a deposit match, which was communicated by SMS.
  - On one occasion (26 October 2022) the Licensee provided a promotion in the form of a deposit match, which was communicated by telephone; and
  - On one occasion (6 December 2022) the Licensee offered event tickets/ hospitality (Australian Open quarter final tickets), which was communicated by SMS.
- 19) In table form, the direct marketing was as follows:

Date	What was provided (bonus/ promotion type)	Value	Method
30 August 2022	Bonus bet	\$200	Email
19 October 2022	Deposit match offer	\$500	SMS
26 October 2022	Deposit match offer	\$2,000	Telephone call
6 December 2022	Invite to attend Australian Open quarter finals with a guest	Estimated \$1,000	SMS
10 January 2023	Bonus bet in lieu of Australian Open tickets	\$1,000	SMS
16 February 2023	Deposit match offer	\$2,000	SMS

- 20) The Customer's account was closed by the Licensee on 17 May 2023.

## Breaches of the Harm Minimisation Direction

### The Licensee's obligations

- 21) Clause 5.4 of the Licence requires the Licensee to "observe and comply with any lawful direction given by either the Minister or the Commission".

- 22) Relevantly, on 6 July 2022, a notice (Ministerial Direction S 349) was published by which the Minister directed the Licensee (as a wagering service provider defined in s 1.3(1) of the Act) to meet a specified harm minimisation requirement (as defined in ss 4.8A.1 and 4.8A.3 of the Act). That is the **Harm Minimisation Direction** that has already been referred to in these reasons.
- 23) Clause 5.1 of the Harm Minimisation Direction provides:  
A wagering service provider or a person acting on behalf of a wagering service provider must not send any direct marketing to a person unless that person has provided his or her express consent to receive direct marketing.
- 24) Clause 1 of the Harm Minimisation Direction defines “direct marketing” as follows:  
**Direct marketing** includes any advertising, promotion or offer made by or on behalf of a wagering service provider directly to a person by means of telephone, email, SMS, text message, post, electronic transmission, datacast or other direct means, including directly to an Internet application, website or broadcast service that can be used by an account holder to make a bet (but does not include those parts of an Internet application, website or broadcast service that can only be accessed by an existing account holder).

### Findings on the Licensee’s conduct

- 25) The Commission concludes that the conduct summarised in paragraphs 18) and 19) above on 19 October 2022, 26 October 2022, 6 December 2022, 10 January 2023 and 16 February 2023 constitute “direct marketing” within this definition. The Customer was contacted directly. During those contacts, promotions or offers were made to the Customer to induce them to place a bet or wager with the Licensee. The Commission notes that the Licensee has conceded that these five interactions constitute direct marketing.
- 26) That leaves the conduct on 30 August 2022, about which the Licensee makes no concession.
- 27) The Licensee has explained that conduct as the Customer being assigned an Account Manager. The Licensee further explained:  
The Account Manager provides an introduction to their services and asks the Customer to complete a survey to assist with sporting preferences.  
Bonus bet is applied to the Customers account
- 28) The Licensee further explained:  
By way of background, the Customer was treated as a Managed Customer between different periods from 2019 to 2023. For the purpose of this incident, however, ... [they were] assigned to an Account Manager from 30 August 2022 to February 2023. The assignment of a customer to an Account Manager (i.e. Managed Customer status) occurs in respect of a small percentage of the overall customer population (in Victoria, around 0.2%). This assignment provides the customer with access to a specific Tabcorp employee (Account Manager) to manage Tabcorp’s ongoing relationship with that customer. Among other things, from time to time Managed Customers can be provided with bespoke promotional offers and/or hospitality opportunities to attend Tabcorp affiliated events, noting however they should only make promotional offers that constitute “direct marketing” with the Managed Customer’s express consent.
- 29) It is not apparent from these submissions why the application of a bonus bet should not be regarded as an instance of direct marketing. The Commission concludes that it should be so regarded.
- First*, it is open to infer (and the Commission does infer) that a purpose of applying the bonus bet is to encourage the customer to bet or place a wager with the Licensee. Indeed, a purpose is to encourage them to do so beyond the quantum of the bonus bet. That falls naturally within the meaning of “marketing”.
  - Second*, the marketing was direct in that it was applied directly to the Customer’s account. It could be used by them directly. That falls within the terms “other direct means” in the definition (see paragraph 24) above).
  - Third*, the definition of “direct marketing” is inclusive. It should be given a broad meaning reflecting its remedial and beneficial purpose.
- 30) On each of the 6 occasions (the 5 which the Licensee has conceded and the sixth which the Commission has found), the Licensee contravened clause 5.1 of the Harm Minimisation Direction. There

is no evidence that the Customer provided their express consent to receiving the direct marketing. And to the contrary, on 8 August 2020, the Customer opted out of receiving direct marketing: see paragraph 11).

## Repeated breaches of the Code

### The Licensee's obligations

- 31) Under s 4.3A.10A(b) of the Act, it is a condition of the Licence that the Licensee implement a Responsible Gambling Code of Conduct that complies with each Ministerial Direction given under s 10.6.6(1) that applies in relation to the Licence.
- 32) On 17 September 2018, a direction was published in the Government Gazette (Ministerial Direction S 430) by which the Minister gave directions in relation to the content requirements for a Responsible Gambling Code of Conduct (as a relevant person defined in s 10.6.5 of the Act).
- 33) On 3 April 2014, the Licensee approved a Responsible Gambling Code of Conduct (**2014 Code**) for the purposes of Ministerial Direction S 430.
- 34) The sections of the 2014 Code relevant to this decision are as follows.
  - a. Clause 8 (Definitions) defines "Problem Gambling" as follows:
 

**Problem gambling** occurs when people have difficulties in managing their gambling activities, particularly the scope and frequency of gambling and the amount of recreational time spent gambling. The negative impacts may include:

    - Extreme financial losses relative to their sources of income;
    - Adverse personal affect on the customer, his or her family and friends;
    - Adverse affect on employers and work performance
  - b. Clause 2.1 (Aim of the Code) states:
 

...

It is designed to:

    - set standards and requirements across our Wagering business to assist in the responsible delivery of gambling products across our operations and our retail network;
    - ensure compliance with all Australian state and territory based legislative or regulatory operations;
    - reflect our underlying values, and our commitment to minimising the potential harm associated with gambling;
    - align with the Victorian Responsible Gambling Ministerial directions.
  - c. Clause 3.4 (Tabcorp Wagering Victoria Policies and Procedures) provides:
 

Tabcorp Wagering Victoria ensures that all employees and the Tabcorp retail network is provided with compliance tools, information and training that supports this Code, and the responsible delivery of our wagering products and services.

These include operational policies and processes, clear lines of accountability for compliance with the Code, reporting mechanisms to report breaches of the Code and follow-up procedures for dealing with responsible gambling issues. We will also monitor the implementation and ongoing management of this Code throughout Tabcorp Wagering Victoria and the Tabcorp retail network.
  - d. Clause 3.7 (Indicators of Problem Gambling by employees or customers) provides:
 

Tabcorp Wagering Victoria employees, Agents and their employees are trained in identifying behaviours that may indicate a customer has a problem with their gambling. Where an employee, Agent, their employee or customers are exhibiting or displaying observable signs of distress, or behaviour indicating a problem with their gambling, we:

    - Ensure that they are provided with information on access to support services;
    - Provide information to them [sic] Tabcorp Wagering's self-exclusion program Betcare;
    - Consider involuntary exclusion from our products and services;

- ...
- Support them in a sensitive and appropriate manner.
- e. Clause 3.10 (Advertising, Marketing and Promotions) states:
- In compliance with the Tabcorp Wagering Victoria Marketing Sign off Program, Tabcorp Wagering Victoria ensures that any advertising, marketing or promotion:
- Complies with all applicable Commonwealth and State laws, regulations and codes relating to the advertising or promotion of wagering products...

## Findings on the Licensee's conduct

### Breaches 1 to 6

- 35) The Commission finds that the Licensee's conduct in sending direct marketing to the Customer without their express consent to receive it itself constituted breaches of the 2014 Code. That is because, by reason of breaching the Harm Minimisation Direction, the Licensee has also breached clause 3.10 of the 2014 Code. The Harm Minimisation Direction is a law or regulation relating to the advertising or promotion of wagering products. To fail to comply with it is to fail to ensure that its advertising, marketing or promotion complies with all applicable State laws and regulations.
- 36) The Commission notes that it is not unusual for conduct to contravene multiple legal norms or obligations. For the avoidance of doubt, the Commission has been careful not to penalise the Licensee twice for the same conduct.

### Breach 7

- 37) The Commission finds that the Licensee did not comply with clause 3.4 of the 2014 Code because it did not ensure that all employees were provided with compliance tools, information and training that supports the 2014 Code, and the responsible delivery of its wagering products and services.
- 38) In this regard, the Commission relies upon the Licensee's submissions, which summarise a review which was completed on 30 April 2024 into its systems. For present purposes, it is sufficient to note that the review concluded that the Licensee's systems were effective in some respects but that they also had the following deficiencies:

The Review found the TABX team did not appreciate that providing personalised marketing offers and generosity to Managed Customers was direct marketing - instead viewing this communication as a form of relationship management. This was also reflected in the Review Interim Report provided to the Commission on 14 April 2023, where a distinction is made between 'Direct Marketing via Customer Relationship Management (CRM) Contact' and 'Direct Marketing via Personalised Contact.'

The Review found that while some relevant guidelines existed (such as the VIP Risk Operational Procedures Manual, which was provided to the Commission as a response to a Notice to Produce dated 19 June 2023), the guidelines were unclear.

The Review found that more guidance was needed for standardised call recording and note-taking within Tabcorp's CAM system, Salesforce. Without this guidance, there was an increased risk that promotional calls and text messages were inaccurately labelled, and a customer's change in marketing preferences not recorded.

The Review also found that Account Managers' records of customers' direct marketing preferences existed outside of established Tabcorp systems. This means an Account Manager may have relied on their informal, individualised record keeping of customer preferences, instead of relying on preferences formally indicated by the customer within Tabcorp systems.

This may, in turn, have led to a failure to check a Managed Customer's direct marketing preferences prior to contact with the Managed Customer.

The Review found that direct marketing training for Account Managers (as the personnel responsible for Managed Customers) required improvement insofar as it ought to have included:

- a) What is defined as direct marketing to a Managed Customer;
- b) When direct marketing cannot be provided to a Managed Customer;
- c) The different types of direct marketing opt out preferences and how to check the direct marketing status of a Managed Customer in Tabcorp systems;

- d) When to check a Managed Customer's direct marketing status within the Tabcorp systems;
  - e) How to record contact with Managed Customers and the supporting information to be recorded and retained (e.g. SMS or emails) including when a generosity is provided to a Managed Customer, at their invitation, via a communication channel from which the Managed Customer had opted out.
- 39) The Commission has determined that this summary of the review provides it a sufficient basis to conclude that there was non-compliance with clause 3.4. The Commission reaches that conclusion more readily in circumstances where the Licensee's submissions note that the Commission alleged a contravention of clause 3.4 and submitted "*Tabcorp accepts that it did not meet the standards of the 2014 Code in respect of its provision of direct marketing to the Customer*". While that submission did not refer expressly to clause 3.4, the Commission reaches its determination more readily in circumstances where the Licensee was given the opportunity to respond and either conceded the allegation or at least did not resist it clearly.

#### Breaches 8 and 9

- 40) The Commission finds that the Customer was "exhibiting or displaying observable signs of distress, or behaviour indicating a problem with their gambling" and that the Licensee did not support the Customer "in a sensitive and appropriate manner" as required by clause 3.7 of the 2014 Code.
- 41) The Commission finds that the Customer's betting behaviour as set out in paragraph 12) above exhibited or displayed observable signs of distress and constituted behaviour indicating a problem with their gambling. The Commission makes that finding due to the significant increase in the number and value of deposits made and the number and value of bets made within the period summarised in that paragraph.
- 42) The Commission makes that finding more comfortably because the evidence suggests that the Licensee itself became concerned about the Customer's gambling.
- 43) The Commission relies on the following in that regard:
- a. An Early Email Intervention Review document in relation to the Customer and provided to the Commission by the Licensee recommends, at 10 October 2022, a responsible gambling check and contains the following commentary:
    - Significant increase in losses and turnover over last 3 months. 12M losses\$160k, 1M losses 135K. Staking seems consistent although active most days recently with large volume of bets. Recommend call if none recently.
  - b. A call log records the following note on 26 October 2022:
    - Called [Customer] and left VM to contact back – Betting on account has increased dramatically over the past two months – RG check in required and further information regarding account
  - c. The Commission refers again to the High Deposit Dashboard quoted at paragraph 17) above.
- 44) Further, the Commission does not understand the Licensee to have disputed that that the Customer's betting behaviour as set out in paragraph 12) above exhibited or displayed observable signs of distress and constituted behaviour indicating a problem with their gambling. Indeed, the Licensee submitted:
- During the period between 1 January 2022 to 28 February 2023 (the **Relevant Period**), Tabcorp acknowledges that the Customer exhibited a number of signs of potential problem gambling (as defined in the 2014 RG Code).
- 45) The obligation in clause 3.7 of the 2014 Code to support the Customer "in a sensitive and appropriate manner" was thus engaged.
- 46) The Commission finds that the Licensee did not support the Customer in a sensitive and appropriate manner for two separate reasons.
- 47) *First*, the account manager who called the Customer with the intention of checking in on the Customer (ie, conducting a responsible gambling call) then used that opportunity to engage in direct marketing by advising the Customer that they had set up a \$2000 deposit match. Towards the end of the call, the following exchange occurred:



Account Manager: Yeah. Yeah, great. Obviously next week a big week. I have set up a deposit match for you.

Customer: Yep.

Account Manager: Up to 2000 bucks.

Customer: Yep.

Account Manager: So that'll be on the account for you just in a couple of minutes and away you go. It will trigger on your next deposit.

Customer: Yep, sure.

Account Manager: And a couple of extra bonuses to play with.

Customer: Thank you.

Account Manager: And, no that's all right.

Customer: All right.

Account Manager: Big, big and busy period time of the year, so...

Customer: Yeah, I know, that's right, I have to study up.

Account Manager: Yes, yes, have a look at the form. I'll be doing the same.

Customer: Yes.

Account Manager: Well, well, I'm at, I'm at Flemington across the four days, so...

Customer: Oh, nice.

Account Manager: ...it will be a very big week.

48) The Licensee's submissions make the following concession:

However, Tabcorp concedes that the call did not *in fact* meet the standard required of a responsible gambling call. Further, the value of the welfare check-in was undermined by the making of a promotional offer to the Customer at the conclusion of the call. Tabcorp notes that this offer should not have been made, consistent with its policies and procedures at the time. ...

49) *Secondly*, the Commission considers that the Account Manager did not carefully probe the Customer's sources of wealth or explore potential responsible gambling strategies with them in light of their wealth position. The phone call simply failed to descend to that level of detail and care.

50) The Licensee's submissions make the following concessions:

Tabcorp accepts that the SOW check during the 26 October Call was insufficient in that it:

- did not occur in response to the recommendation in the November Risk Assessment; and
- insufficiently probed the Customer as to ... [their] SOW in relation to the size of the deposits being made.

...

... Tabcorp concedes that while enquiries were made as to certain SOW elements with respect to the Customer, these enquiries were not granular enough to properly support the Customer in the setting of appropriate limits on future betting activities.

... The 26 October Call ought to have been undertaken to a substantially higher standard of responsible gambling questioning. There ought to have been more done to test the Customer's sources of wealth and put in place responsible gambling strategies that reflected [their] wealth position.

51) For the avoidance of doubt, the Commission has considered the fact that these two breaches are linked (occurring as they did in the one telephone call) in its assessment of sanctions.

## Contraventions

52) In light of the above, the Commission concludes as follows:

- a. The Licensee failed to comply with clause 5.4 of the Licence, which requires the Licensee to promptly observe and comply with any lawful direction given by the Minister. It failed to do so on six occasions, namely on 30 August 2020, 9 October 2022, 26 October 2022, 6 December 2022, 10 January 2023 and 16 February 2023.

- b. The Licensee engaged in repeated breaches of the 2014 Code contrary to s 4.3A.26(i) of the Act. Those breaches were: the six failures to comply with the Harm Minimisation Direction, a failure to ensure that all employees were provided with compliance tools, information and training that supports this Code and the responsible delivery of its wagering products and services, and a failure to comply with clause 3.7 in two separate ways in dealings with the Customer.
- 53) In the circumstances set out above, the Licensee has breached the Licence and the Act and therefore grounds for disciplinary action under ss 4.3A.26(d)(i) and 4.3A.26(i) of the Act are established.

### What is the appropriate sanction?

- 54) Section 4.3A.27(3) of the Act provides that:
- After considering any submissions made under subsection (2), the Commission—
- (a) may take either or both of the following disciplinary actions—
- (i) issue a letter of censure to the licensee or operator;
- (ii) fine the licensee or operator an amount not exceeding an amount that is 50 000 times the value of a penalty unit fixed by the Treasurer under section 5(3) of the Monetary Units Act 2004; or
- (b) may make a written report to the Minister recommending that the Minister take disciplinary action against the licensee under section 4.3A.28.
- 55) The Commission does not consider that a letter of censure would be a sufficient and proportionate sanction in this case. Rather, it considers that a fine would be the appropriate sanction.
- 56) The Commission's decision is informed by the following considerations.
- 57) *First*, two grounds for disciplinary action have been established, and the wrongfulness of one is not wholly encompassed within the other.
- 58) *Second*, within those grounds, there are multiple contravening acts. On multiple occasions, direct marketing was sent to the Customer. In different ways, there have been breaches of the 2014 Code.
- 59) *Third*, the contravening conduct occurred over a somewhat extended time period.
- 60) *Fourth*, compliance with the 2014 Code and with the Harm Minimisation Direction is very important. The Licensee's conduct would not be adequately denounced, and general and specific deterrence would not be adequately achieved, by a letter of censure.
- 61) *Fifth*, the Commission is not aware of the Licensee having offered any compensation or taken any steps to remediate any damage to the Customer. That is not an aggravating factor, but it is the absence of a mitigating factor.
- 62) *Sixth*, while the contravening conduct relates to one customer (the Customer), that does not serve in this case to reduce the gravity of what occurred.
- a. One breach of the 2014 Code was more systemic in nature: see paragraphs 37) to 39) above in respect of clause 3.4.
- b. A purpose of the Harm Minimisation Direction and of the 2014 Code is to ensure that vulnerable people are protected from harm. A failure to comply that exposes such an individual to risk is serious when measured against this purpose.
- 63) *Seventh*, the Commission acknowledges that the Licensee has taken steps to improve its systems and to retrain those whom it considers require retraining. This is a mitigating factor and is to the Licensee's credit. It does not, however, outweigh the other considerations. The Commission has, though, taken this into account.
- 64) The Commission considered whether to make a written report to the Minister recommending that the Minister take disciplinary action against the Licensee, but it decided not to do so. That would delay finalisation of this matter, and there is no particular reason to have the Minister consider this case rather than have the Commission impose a sanction.

## Number of fines

- 65) In a decision on disciplinary action against the Licensee on 4 September 2023, the Commission accepted the submission that there is power to fine a licensee up to 50,000 times the value of a penalty unit following the issue of a written notice of show cause, and that this is not increased where the notice contains multiple grounds for disciplinary action.
- 66) The Commission proceeds on that basis here. As in that other decision, the Commission also proceeds on the basis that, in determining a fine that is appropriate within the single maximum of 50,000 times the value of a penalty unit, it is appropriate to take into account that both the Harm Minimisation Direction and the 2014 Code were breached, and that two grounds of disciplinary action were established.

## Setting the fine in this case

- 67) The Commission has set out its approach to setting a fine when taking disciplinary action in other determinations and it does not set out that approach here.<sup>2</sup> Rather, the Commission provides its reasons for concluding that a fine of **\$4,600,000** is appropriate in this case.

## Maximum penalty

- 68) The maximum penalty is 50,000 times the value of a penalty unit.
- 69) A question arises whether a penalty unit should be determined as at the date of the relevant wrongdoing or as at the date of the Commission's determination, and if the former then a subsequent question is what that date should be where there are multiple contraventions or multiple contravening acts.
- 70) Given that the fining power is tied to the issue of a written notice of show cause rather than the grounds for disciplinary action, the latter may be arguable. The maximum fine would thus be  $\$192.31 * 50,000 = \$9,615,500$ .
- 71) But if the former were correct, then the maximum penalty as at the time of the wrongdoing was mostly  $\$184.92$ , so the maximum penalty would be  $\$9,246,000$ . One piece of contravening conduct occurred at a time when a penalty unit was  $\$181.74$ .
- 72) In circumstances where the value of a penalty unit alters over the course of contravening conduct, the usual approach is to adopt the higher value but to take account of the fact that a lower maximum applied during the relevant period.<sup>3</sup>
- 73) For the avoidance of doubt, the Commission would impose no different penalty whichever maximum is applied, and so it need not resolve the issue. It will proceed by reference to the maximum penalty of  $\$9,246,000$ .
- 74) A fine of  $\$4,600,000$  is about 50% of this maximum. While the setting of a fine is not a mathematical exercise, and the Commission recognises this, a fine at this level is within a lawful range.

<sup>2</sup> See the Commission's reasons for decision in disciplinary action taken against the casino operator for the 'China Union Pay' process [https://www.vgccc.vic.gov.au/sites/default/files/vgccc\\_decision\\_-\\_china\\_union\\_pay\\_0.pdf](https://www.vgccc.vic.gov.au/sites/default/files/vgccc_decision_-_china_union_pay_0.pdf) and Responsible Service of Gambling failings [https://www.vgccc.vic.gov.au/sites/default/files/reasons\\_for\\_decision\\_rsg\\_da.pdf](https://www.vgccc.vic.gov.au/sites/default/files/reasons_for_decision_rsg_da.pdf).

<sup>3</sup> See, eg, *R v White* (BC9101745, NSWCCA, 25 July 1991, unreported) (attached); *Fair Work Ombudsman v Grouped Property Services Pty Ltd [No 2]* [2017] FCA 557 at [394]-[401] (Katzmann J); *Fair Work Ombudsman v Australian Workers' Union* [2020] FCA 60 at [47] (Snaden J); *Fair Work Ombudsman v Tac Pham Pty Ltd* [2018] FCA 120 at [68] (Siopis J); *United Voice v Lloyds Services Act Pty Ltd* [2017] FCA 1007 at [11(b)] (Jagot J); *Fair Work Ombudsman v Phua & Foo Pty Ltd* [2018] FCA 137 at [31] (Siopis J); *Ahmed v Al-Hussain Pty Ltd t/as The Cheesecake Shop (No 3)* [2019] FCA 848 at [35]-[36].

### Seriousness of the wrongdoing

- 75) The maximum penalty is a yardstick for the worst category of contravention.<sup>4</sup> The Commission considers this conduct to be about mid-range. In saying that, the Commission cautions that such characterisations are subjective and can mean different things to different people. It would be inappropriate to attempt to parse the language of “mid-range”. It should not be assumed that the Commission arrived at the penalty of \$4,600,000 via any mathematical translation between “mid-range” and the midpoint of the maximum penalty. Its approach was not mathematical in that way.
- 76) The matters of significance which are particularly important to the Commission’s assessment of the gravity of the contravening conduct are as follows:
- 77) *First*, it is highly egregious for the Account Manager to set out to make a responsible gambling call on 26 October 2022 and then to use that call as an opportunity to offer the customer an inducement to gamble. That undermines the purpose of the call and evidences a mindset that does not show respect for what responsible gambling principles and policies are meant to achieve.
- 78) Further, even leaving aside this highly egregious conduct, the phone call did not adequately inquire into the Customer’s sources of wealth. Nor did it adequately explore responsible gambling strategies with the Customer.
- 79) *Second*, the Customer had expressly opted out of receiving marketing from the Licensee. The direct marketing was sent not only without their express consent to receive it but in the face of an express request to opt out.
- 80) The Commission notes the Licensee’s submission that:
- Tabcorp had asked the Customer for their opt-out preferences, recorded those preferences and thereafter withheld all instances of direct marketing via its primary direct marketing channel (being marketing through the Customer Relationship Management Team).
- 81) This is relevant to an assessment of the overall gravity of the conduct. It does not mean that what occurred is any less serious. Had the Licensee not withheld marketing via its primary direct marketing channel, that would be even worse conduct.
- 82) *Third*, the review which the Licensee conducted revealed several ways in which its systems were deficient, leading to the Commission’s conclusion that there was a breach of clause 3.4 of the 2014 Code. Such a systemic failure in such an important area of the Licensee’s operations is of serious concern.
- 83) *Fourth*, the Commission does not regard as mitigating the fact that mass marketing was not sent to the Customer. Had it been, that would be even worse contravening conduct. It does not diminish the gravity of what occurred here.
- 84) *Fifth*, the Commission acknowledges that the Licensee did identify the Customer as a person who required a check in. That is a good start. But where the follow through is as poorly executed as it was here, it is open to the Commission to regard the contravening conduct as serious.
- 85) *Sixth*, two grounds for disciplinary action have been established, and there are multiple failures to comply with the Harm Minimisation Direction and the 2014 Code. That breaches occurred on several occasions is an aggravating feature.
- 86) *Seventh*, the Commission acknowledges that the Licensee has taken steps to improve its processes and to achieve “up-lift” in its controls. That is a mitigating factor, but the Commission is cautious in giving this significant weight. Specific deterrence remains important to ensure that these up-lifted controls actually achieve their goals.
- 87) Some of these factors warrant additional elaboration.

<sup>4</sup> *Markarian v The Queen* (2006) 228 CLR 357 at [30]-[31].

## General deterrence

88) General deterrence is a very significant factor in this case because of the importance of responsible gambling codes of conduct and the Harm Minimisation Direction. As the Licensee submitted in one of its responses:

Tabcorp acknowledges that harm minimisation is of critical importance to the Commission (and to the public interest more generally) and that its harm minimisation responsibilities are therefore fundamental.

89) General deterrence thus calls for a substantial penalty. Repeated breaches of the code was inserted into the Act as a ground of disciplinary action as one measure to “ensure that the new licence-holders will be required to provide their gambling products in a manner that fosters responsible gambling”.<sup>5</sup>

90) In assessing what is needed to achieve general deterrence, the size of the Licensee is relevant. Generally speaking, the larger the wrongdoer, the larger the fine needed to ensure that it has sufficient sting to achieve general deterrence.<sup>6</sup> The Licensee is a substantial company with considerable profits. The Commission’s decision does not depend upon a precise understanding of how much profit it makes.

## Specific deterrence

91) Specific deterrence has a role to play in the setting of this fine. The Commission accepts that the Licensee has shown some contrition in cooperating with the Commission and in taking steps to improve its processes. This does not mean that a substantial penalty is not needed to ensure specific deterrence.

92) In assessing what is needed to achieve specific deterrence, the size of the Licensee is relevant for the same reasons and in the same way that it is relevant to general deterrence: see paragraph 90) above.

93) The Licensee is not entitled to any leniency on account of being a first time offender because the Commission has taken disciplinary action against the Licensee on five previous occasions. That it has contravened in the past is a factor that weighs in favour of a fine having work to do in this case to achieve specific deterrence.

94) In assessing what specific deterrence requires, the Commission notes that, contemporaneously with the current disciplinary action, it will be taking disciplinary action against the Licensee in the following circumstances.

a. Opt-out disciplinary action

- i. On 28 July 2023 the Licensee sent SMS text messages as part of a marketing campaign to 4169 customers, but the SMS text message did not contain a link to opt-out of receiving marketing.
- ii. Each customer was based in Victoria and had previously consented to receive direct marketing.
- iii. As each of the customers was based in Victoria, the Harm Minimisation Direction applied. Clause 5.3 of the Harm Minimisation Direction states:  
A wagering service provider or person acting on behalf of a wagering service provider must not provide direct marketing to a person who has consented to receive direct marketing unless that person can unsubscribe and the process for unsubscribing is easy to access and use.
- iv. The Commission issued a show cause notice to the Licensee on 27 February 2024, and the Licensee responded to that notice on 21 March 2024.
- v. In the response, the Licensee set conceded that the conduct had occurred and set out the circumstances of the contraventions and mitigating factors to be taken into account.
- vi. The Commission found that each time a SMS text message was sent without a link to opt-out of receiving the direct marketing constituted a breach of the Harm Minimisation Direction, and therefore condition 5.4 of the Licence.
- vii. The Commission determined to take disciplinary action in the form of a letter of censure.

<sup>5</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 17 April 2008 at 1444.

<sup>6</sup> See generally *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301 at [39] (Goldberg J); *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2016) 118 ACSR 124 at [89] (Wigney J).

- b. Take-a-break disciplinary action
    - i. Between 14 February 2024 and 14 May 2024, the Licensee reported that 344 customers received marketing after they had elected to utilise the Licensee's responsible gambling tool 'take-a-break'.
    - ii. Clauses 7 and 17.2 of the Licensee's current Responsible Gambling Code of Conduct, dated 23 June 2023, stipulates that the Licensee will not provide any direct marketing or advertising to a customer who has elected to take-a-break.
    - iii. The Commission issued a show cause notice to the Licensee on 12 July 2024 and the Licensee responded to that notice on 9 August 2024.
    - iv. In the response, the Licensee updated the circumstances of the contraventions, and instead confirmed that 153 customers had received direct marketing material following their request to take-a-break.
    - v. The Licensee also set out mitigating factors for the Commission to consider, which importantly included that no customer was able to access their account while the take-a-break was in effect, and have since implemented a solution with as close to real-time suppression of marketing as possible (within 2-3 minutes of a take-a-break being activated).
- 95) These disciplinary actions pertaining to marketing obligations. It tends to show that the present conduct was not entirely out of character or an aberration, and that a substantial fine is needed to ensure specific deterrence. Further, the conduct described in paragraph 94 occurred after the Licensee was informed of the Commission's investigation into the complaint from the Customer. This indicates to the Commission that misconduct related to direct marketing has occurred even though the Licensee has been on notice of the Commission's concerns about its conduct. The Commission acknowledges that the nature of the relevant misconduct is different. What this all suggests though, is a heightened need for specific deterrence. A substantial penalty is needed to ensure compliance with direct marketing obligations.
- 96) The Commission notes that the Licensee has not put forward any evidence of having offered any compensation or remediation to the Customer. That is not an aggravating factor. Had it occurred, though, that might have led to a more favourable finding on contrition, rehabilitation and ultimately specific deterrence.

### Cooperation

- 97) The Licensee has cooperated in this matter by making concessions and offering to resolve the matter through a finding of repeated breaches of the 2014 Code. It is appropriate to moderate the penalty to take account of its conduct in this disciplinary action. The fine would have been higher but for this cooperation.