Decision and reasons for decision

In the matter of disciplinary action against Tabcorp Wagering (VIC) Pty Ltd under s 4.3A.27 of the *Gambling Regulation Act 2003* (Vic) for contravention of two directions issued under s 4.3A.39B in relation to the major outage of the Wagering and Betting System on 7 November 2020.

Commission:	Fran Thorn, Chair Andrew Scott, Deputy Chair and presiding chair at the hearing Ron Ben-David, Deputy Chair Chris O'Neill, Commissioner
Date of hearing:	28 July 2023
Date of decision and reasons:	4 September 2023
Appearances:	Dr Ruth Higgins SC of counsel Ms Bryony Adams Mr Christopher Tran of counsel
Decision:	For the reasons attached to this decision, the Victorian Gambling and Casino Control Commission has decided to take disciplinary action against Tabcorp Pty Ltd under s 4.3A.27 of the *Gambling Regulation Act 2003* and impose a fine of $1,000,000 for its unlawful conduct in contravening s 4.3A.39B on two occasions.
Signed:	
	Fran Thorn
	Chair

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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 (**Tabcorp**) under s 4.3A.27 of the *Gambling Regulation Act 2003* (Vic) (**the Act**) having issued Tabcorp a notice to show cause on 7 June 2023 (**Notice**) why disciplinary action should not be taken on the grounds specified in the Notice.
2. Tabcorp responded to that Notice by letter dated 4 July 2023 attaching a submission (**Tabcorp Written Submissions**) and accompanying documents that were footnoted in the Tabcorp Written Submissions.
3. The Commission has considered the letter, Tabcorp Written Submissions and accompanying documents.
4. In its letter of 4 July 2023, Tabcorp requested an opportunity to be heard. That request was granted and a hearing was held at the Commission's offices in Richmond on 28 July 2023.
5. Prior to the hearing, the Commission provided Tabcorp with a list of questions they would like addressed at the hearing by letter dated 21 July 2023.
6. As requested by the Commission, Tabcorp provided a response to question five on 25 July 2023. The Commission has considered that response.
7. The hearing was held, as scheduled, on 28 July 2023. In attendance at that hearing were the following:

VGCCC Attendees	Role
Christopher Tran	Counsel Assisting the Commission
Sharon Concisom	General Counsel and Executive Director, Legal, Policy and Harm Minimisation
Lilli Owens- Walton	Principal Solicitor, Commission
Tabcorp Attendees	**Role**
Adam Rytenskild	Chief Executive Officer
John Fitzgerald	Chief Legal and Risk Officer
Dr Ruth Higgins SC	Counsel
Bryony Adams	Partner, Herbert Smith Freehills

8. At the hearing, Tabcorp provided a written response to the questions in the letter dated 21 July 2023 (**Supplementary Tabcorp Written Submissions**) together with some accompanying documents. The Commission has considered these.
9. Tabcorp was also provided an opportunity to address the Commission directly through its officers and legal representatives, and to answers questions asked by the Commission and by its counsel assisting. Tabcorp took that opportunity. The Commission has considered what was said at the hearing.
10. After the hearing, Tabcorp provided written submissions and material on 4 August 2023 and 15 August 2023 in response to questions taken on notice at the hearing and requested by the Commission in letters dated 31 July 2023 and 9 August 2023. The Commission has considered this post-hearing material.

Summary

11. For the reasons that follow, the Commission has determined to fine Tabcorp **$1,000,000**.

Background

12. This disciplinary action arises out of Tabcorp's response to the Commission's efforts to understand what happened on the day of the major outage that occurred on 7 November 2020 (outage), obtain assurance that it would not happen again and examine Tabcorp's conduct in response to the Commission's enquiries.

13. Important context is provided, therefore, by a brief description of what occurred in that outage. For that purpose, it is convenient to describe the incident by reference to how Tabcorp described it in a significant incident report.[1]

    13.1. On Saturday 7th November 2020, an incident occurred at the Global Switch Ultimo (GSU) data centre in Sydney in the data hall CS03, a dedicated Tabcorp space in the data centre which houses storage, networking and computer equipment used by Tabcorp, resulting in an outage of core Tabcorp internal and customer-facing systems, and subsequently the shutdown of core customer services.

    13.2. At approximately 11:30 am on 7 November 2020, Tabcorp received system alerts indicating a major outage had occurred at the GSU Sydney data centre. This impacted the ability of customers to place bets on TAB and Trackside (Wagering) products via all distribution channels, limited access to certain Gaming Services systems and the display of Keno jackpot pooling values in all jurisdictions.

    13.3. During the incident, approximately 700 servers were impacted across the business, further impacting applications in the managed private cloud environment located at GSU across Gaming, Lotteries and Keno, Wagering and Tabcorp's corporate systems.

    13.4. On 9 November 2021[2] (sic), Tabcorp announced to the ASX that lost wagering turnover over the relevant weekend was estimated to have impacted Tabcorp EBITDA by less than $10 million.

14. At the hearing, Tabcorp accepted, appropriately, that this outage was a significant event and that Tabcorp was keenly interested to understand and ensure that it was not repeated.[3] Tabcorp accepted that the Commission had a legitimate interest in understanding what occurred and ensuring that it was not repeated.[4] And Tabcorp accepted that it could be inferred, and the Commission finds, that Tabcorp appreciated at the times relevant to this disciplinary action (for example, the time during which it sought to comply with directions to which this determination will turn shortly) that the Commission had this legitimate interest.[5]

15. In the aftermath of the outage, Tabcorp sought to investigate the circumstances surrounding that outage through the engagement of an external law firm and a third-party assessor (Deloitte). When the Commission sought production of the report that was prepared at the time, Tabcorp declined to provide it on the grounds of legal professional privilege.

16. It is against this background that the Commission had to turn to its compulsory powers to gain assurance that another outage would not occur.

17. Relevantly, s 4.39A.39B(1) of the Act provided:

> The Commission may give a written direction to the wagering and betting licensee or operator relating to the conduct of activities authorised under the wagering and betting licence and the licensee or operator must comply with the direction as soon as it takes effect.

18. At the heart of this disciplinary action is Tabcorp's non-compliance with directions made in 2021 and 2022 respectively.

First Direction

19. On 27 July 2021, the Commission issued a written direction under s 4.3A.39B of the Act (**First Direction**). The First Direction said:[6]

> I hereby direct Tabcorp Wagering (Vic) Pty Ltd (the Licensee) to procure the conduct of an independent expert assessment of the suitability of Tabcorp's business continuity and disaster recovery infrastructure and processes for the wagering and betting system, and provide a copy of the report of the findings of that assessment to the Commission upon completion.

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[1] TAH.0003.0002.2731.
[2] The date of the ASX listing was 9 November 2020, but this was incorrectly cited as 2021 in the significant event report.
[3] T12:14-18.
[4] T12:20-24.
[5] T12:26-T13:1.
[6] TAH.0003.0002.2743.

The assessment is required to:

- Be undertaken by an appropriately qualified independent expert
- Confirm whether the business continuity and disaster recovery arrangements for the wagering and betting system established subsequent to the outage are 'fit for purpose' to deliver the 'continuously available' performance requirement specified in the Wagering and Betting Licence and Agreement
- Detail which features of those arrangements inform that assessment.

The report arising from the assessment is required to be provided to the Commission prior to the commencement of the Spring Racing Carnival in Victoria on Saturday 29 August 2021.

20. On 23 September 2021, Tabcorp provided the Commission with a report prepared by Deloitte entitled 'DR & BC Assessment Tabcorp Wagering and Betting Systems (Vic Baseline)' (**2021 Deloitte Report**).[7]

21. The 2021 Deloitte Report recorded that '[t]his report has been prepared for use by Tabcorp for the purpose of assisting them in meeting reporting requirements to the VCGLR'.[8] It later explained that '[t]he VCGLR required Tabcorp to undertake (and report the findings of) an independent assessment of the suitability of Tabcorp's business continuity and disaster recovery arrangements for the WBS. In this context, 'business continuity' are the activities the business undertakes whilst Technology is recovering the in-scope systems impacted by the disaster'.[9] That much is consistent with the First Direction.

22. The 2021 Deloitte Report went on to say that '[t]his assessment considered whether Tabcorp's Business Continuity (BC) and Disaster Recovery (DR) plans for the WBS VCGLR Baseline, established subsequent to the outage, meet and adhere to resilience targets as defined by Tabcorp'.[10]

23. The 2021 Deloitte Report did not:

    23.1. Elaborate on what these resilience targets were that had been defined by Tabcorp;

    23.2. Confirm whether the business continuity and disaster recovery arrangements for the WBS established subsequent to the outage are fit for purpose to deliver the "continuously available" performance requirement specified in the Wagering and Betting Licence and Agreement, as required by the First Direction.

24. Tabcorp submitted that the 2021 Deloitte Report complied 'in substance' with the First Direction.[11] The Commission does not accept this at face value.

25. The First Direction was directed at receiving assurance that arrangements then in place were adequate to deliver on the continuously available requirement. The 2021 Deloitte Report does not do that in substance.

26. The 2021 Deloitte Report identifies some measures which Tabcorp has implemented, some measures which it proposes to implement and some measures which it should implement. It is not possible to confidently piece together from these matters a conclusion that existing arrangements at the time of Deloitte's assessment were sufficient to ensure that the outage will not occur again.

27. By way of illustration, assume that Tabcorp had improved upon what it had in place at the time of the outage. It does not follow that the improvements (while better than before) are objectively adequate to ensure compliance with obligations under the Wagering and Betting Licence and Agreement. That there were improvements planned but not yet implemented and recommendations from Deloitte that Tabcorp had not itself identified makes it difficult, if not impossible, for the Commission to conclude that, in substance, Tabcorp's existing arrangements at the time of Deloitte's assessment were fit for purpose.

28. At the hearing, Tabcorp elaborated on its submission to explain that it placed emphasis on what it had said in the Tabcorp Written Submissions. Namely, that there had been compliance with the First Direction in substance 'at least, as best it could achieve at the time'.[12] Tabcorp emphasised that it was dealing with a reputable independent expert (Deloitte) in a tight timeframe in circumstances where that expert had raised an

[7] TAH.0001.0001.0542.
[8] TAH.0001.0001.0542 at p 3.
[9] TAH.0001.0001.0542 at p 5.
[10] TAH.0001.0001.0542 at p 5.
[11] Tabcorp Written Submissions at pp 4-6.
[12] Tabcorp Written Submissions at p 4.

issue about the meaning of the relevant criterion (the continuously available requirement from the Wagering and Betting Agreement (**WBA**)).[13]

29. These matters do not show that there was substantial compliance with the First Direction. That question can be answered simply by comparing the First Direction with the 2021 Deloitte Report, as has been set out above.

30. Further, it is not apparent why Deloitte could not have provided a report on alternative bases. There is nothing to suggest that Tabcorp thought to do so. A licensee concerned to cooperate with the Commission and to do its utmost to ensure that an outage did not occur again (and to satisfy the Commission as such) might be thought to have acted proactively in that way.

31. This points to a more general concern with Tabcorp's engagement with Deloitte in respect of the First Direction. If an expert such as Deloitte raises a concern that it cannot offer an expert opinion because it does not understand the meaning of some legal expression, the Commission expects that a reasonable licensee would, as soon as reasonably practicable, instruct the expert to assume a particular meaning, if necessary, after seeking appropriate advice on the issue. A reasonable licensee would raise the matter with the Commission at the time and in a timely fashion. There is no evidence that either course of action was pursued at the time of and for the purpose of Tabcorp seeking to comply with the First Direction.

32. Tabcorp has said that it accepts that it would be open to the Commission to conclude that there was:[14]

> Non-compliance with the First Direction insofar as the Deloitte Report that Tabcorp provided in response to the First Direction failed to confirm expressly whether the BC and DR arrangements were 'fit for purpose' to deliver on the 'continuously available' performance requirement …

33. At the hearing, Tabcorp confirmed that it accepted it had not complied with the First Direction to this extent.[15] The Commission agrees that it is open to it to find, and it does find, that Tabcorp failed to comply with the First Direction because the 2021 Deloitte Report did not expressly confirm whether the business continuity and disaster recovery arrangements for the Wagering and Betting System established subsequent to the outage are 'fit for purpose' to deliver the 'continuously available' performance requirement specified in the Wagering and Betting Licence and Agreement.

34. However, the Commission considers that Tabcorp's submission understates and minimises to a degree the extent of Tabcorp's non-compliance with the First Direction. As set out in paragraphs 24 to 29, the Commission finds that Tabcorp did not comply in substance with the First Direction. The non-compliance is not confined to the absence of an express confirmation one way or the other. In both form and substance, there was non-compliance with the First Direction.

35. Additionally, in so far as Tabcorp submits that it did 'as best it could achieve at the time', Tabcorp did not engage with the Commission in respect of the First Direction to ask for more time (beyond a request for a one day extension) or to clarify issues concerning the Availability Requirement.

Second Direction

36. On 20 December 2021, the Commission issued Tabcorp with a further direction under s 4.3A.39B of the Act which required an assessment to be completed and reported to the Commission by 31 March 2022 (**Second Direction**). It provided (footnote omitted):[16]

> I hereby direct Tabcorp Wagering (Vic) Pty Ltd (the Licensee) to procure an independent due diligence assessment of the Disaster Recovery (DR) capabilities associated with the Wagering and Betting System (WBS) operated by Tabcorp under the Licence and Agreement.
>
> The due diligence assessment is required to
>
> - Be performed at the Licensee's expense, within the specified time
> - Be performed by an independent specialist vendor engaged by Tabcorp who is acceptable to the Commission, on terms of engagement acceptable to the Commission
>
> (requirements in respect of vendors who may be acceptable to the Commission are specified in the Addendum; terms of engagement which may be acceptable to the Commission must provide for the assessor's absolute independence in terms of investigations, analysis, findings and recommendations; provide adequate access to

[13] T21-T22.
[14] Tabcorp Written Submission at p 20.
[15] T20:1-15.
[16] TAH.0003.0002.6352.

Tabcorp facilities, systems, persons, contractors and information resources; specify the vendor's methodology; and provide for reporting of draft and final reports from the vendor directly to the Commission)

- Assess the DR infrastructure capabilities, resources and practices associated with the WBS with reference to relevant Australian and International Standards Organisation (ISO) Standards
- Be informed and supported by Tabcorp's undertaking of (or arrangement of) any demonstration of WBS and related systems DR capabilities which is considered necessary by the assessor to inform the assessment
- Make and substantiate findings regarding the suitability of the DR capabilities of the WBS to
- Comply with relevant Australian and ISO Standards
- Deliver the availability requirements of the Licence and Agreement
- Sustain WBS services in circumstances of a 'complete primary site failure' (in which it assumed that the primary site is not recoverable (at least for some time) and Tabcorp undertakes a process of restoring data and services to a secondary survived site)
- Investigate, assess and report on the suitability of the DR infrastructure, processes, documentation and other resources, making any relevant findings and recommendations
- Identify any aspects of the DR arrangements and capabilities for the WBS which require remediation to meet relevant Standards and/or to meet the applicable availability requirements
- Provide for the referral of any relevant matter for advice, by the assessor, to a member of the Roll of Manufacturers, Suppliers and Testers, as may be considered necessary by the assessor, in consultation with the Commission
- Provide the independent assessor's draft and final reports directly to the Commission, concurrently with provision to Tabcorp.

The assessment is required to be completed and reported to the Commission by 31 March 2022.

37. The deadline was extended by agreement of the Commission to 31 May 2022.
38. Despite this deadline, a final report was not submitted until 27 September 2022 (**Final 2022 Deloitte Report**).
39. Tabcorp has accepted that it would be open to the Commission to find that there was:[17]

> Non-compliance with the Second Direction insofar as the Second Deloitte Report was not provided to the Commission between the nominated compliance date of 31 May 2022 and 8 July 2022 and was then not finalised until 27 September 2022.

40. At the hearing, Tabcorp confirmed that it accepts that it did not comply with the Second Direction in so far as the Final 2022 Deloitte Report was not provided until 27 September 2022.[18]
41. The Commission agrees that it is open to it to find, and it does find, that Tabcorp failed to comply with the Second Direction because the Final 2022 Deloitte Report was not provided to the Commission until 27 September 2022, which was almost four months after the extended deadline.
42. Implicit in the Commission's finding on this ground is that the Draft 2022 Deloitte Report provided on 8 July 2022 was not sufficient to comply with the Second Direction. To be clear, the Commission accepts that it was open for the Draft 2022 Deloitte Report not to have recommendations in them yet, so long as the purported final report did so. It was the final report, rather than the draft report, which would have to comply with the Second Direction.

Tabcorp's conduct – reasonable and in good faith?

43. The State of Victoria has entered into the WBA with Tabcorp Wagering (Vic) Pty Ltd on 19 December 2011. Contravention of the WBA by the wagering and betting licensee is a ground for disciplinary action under s 4.3A.26(e) of the Act.
44. Clause 2.3 of the WBA provides that:

> **2.3 Conduct of Licensee**

[17] Tabcorp Written Submissions at p 20.
[18] T20:14-15.

> The Licensee must at all times act reasonably and in good faith in its dealings with the State (including, for the avoidance of doubt, the Minister and the Commission) associated or in connection with this Agreement.

45. The meaning of this clause is to be determined through the application of principles of contract interpretation.[19]

    45.1. The first question is whether this clause imposes two obligations (to act reasonably and to act in good faith) or one compound obligation to act reasonably and in good faith.

    45.2. While each contract has to be construed in its own context, the weight of authority is that the obligation is a single compound obligation.[20]

    45.3. In any event, it has been said that there is little distinction between the two even if they are separate obligations.[21]

46. In *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd*, the Full Court of the Federal Court said:[22]

> The obligation, expressed as one of good faith and reasonableness, is to be considered in a composite and interrelated sense. To the extent the consideration is given to whether a party's conduct is reasonable or not, it is directed to the primary component of the obligation, namely of good faith. Reasonableness is not to be approached in a case such as this as akin to a tortious duty to exercise due care and skill or to produce a reasonable outcome. Rather it goes to the quality of the conduct, here in exercising the price setting power, to discern whether it was capricious, dishonest, unconscionable, arbitrary or the product of a motive which was antithetical to the object of the contractual power. Conduct attended by any of those qualities could never be said to be in good faith. Consideration of the relevant conduct within these confines informs the question whether or not the power has been exercised in good faith

47. In *Paciocco v Australia and New Zealand Banking Group Ltd*, Allsop CJ said:[23]

> The usual content of the obligation of good faith that can be extracted from cases such as *Renard Constructions*, *Hughes Bros Pty Ltd v Trustees of Roman Catholic Church (Archdiocese of Sydney)* (1993) 31 NSWLR 91, *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, and *United Group Rail Services Ltd* is an obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

48. In *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd*, the NSW Court of Appeal said:[24]

> The content of the obligation has commonly been held to embrace three related matters:
>
> (1) An obligation on the parties to co-operate to achieve the contractual objectives.
>
> (2) Compliance with honest standards of conduct.
>
> (3) Compliance with standards of conduct that are reasonable having regard to the interests of the parties.

49. In *Ali v Australian Competition and Consumer Commission*, the Full Court of the Federal Court quoted the following principles distilled by the primary judge in that case without criticism:[25]

> (1) the term "good faith" imports a normative standard to be observed by the parties in dealings as to matters to which the standard is applied;
>
> (2) the normative standard embraces an obligation to act honestly and with fidelity to the bargain concluded between the parties;

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[19] The High Court recently restated those principles as follows in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* (2023) 97 ALJR 194 at [27]:

> It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.

[20] *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* [2017] ATPR 42-563 at [164] (Gilmour, Nicholas and Moshinsky JJ).
[21] See, eg, *Primary Flooring Pty Ltd v Australian Comfort Group Pty Ltd* [2019] VSC 104 at [41] (Croft J).
[22] [2017] ATPR 42-563 at [164] (Gilmour, Nicholas and Moshinsky JJ). See also *Trampoline Enterprises Pty Ltd v Fresh Retailing Pty Ltd* [2019] VSCA 74 at [63] (Kaye, McLeish and Hargrave JJA);
[23] (2015) 236 FCR 199 at [288].
[24] [2012] NSWCA 184 at [145] (Bathurt CJ; Macfarlan and Meagher JJA agreeing).
[25] (2021) 394 ALR 227 at [194].

(3) the normative standard also embraces an obligation to act co-operatively in matters related to performance;

(4) the standard does not require a party to subordinate its legitimate interests to those of the counterparty, but is does require due regard to the legitimate interests that both parties have in the performance of the contract they have made;

(5) conduct which is dishonest, capricious, arbitrary or motivated by a purpose which is antithetical to the evident object of any provision of the franchise agreement or the Code that governs the conduct being scrutinised or conduct which is otherwise motivated by bad faith will not meet the standard;

(6) where the scrutinised conduct, viewed in the particular context, is objectively unreasonable then the unreasonableness may form part of the basis for a conclusion that there has been a lack of good faith, but objective unreasonableness is insufficient of itself to amount to a lack of good faith; and

(7) the quality of the scrutinised conduct is to be evaluated having regard to the circumstances of the particular parties, particularly their sophistication, commercial power and the relative significance for each party of the subject matter of the conduct.

50. The Commission accepts that it does not have evidence before it of actual dishonesty.

51. The Commission was, and remains, concerned that aspects of Tabcorp's conduct were objectively unreasonable (as described below: see [74]-[82] below. This conduct is particularly concerning given:

    51.1. Tabcorp is a sophisticated and well-resourced entity;

    51.2. it was in Tabcorp's own interests to comply with the directions; and

    51.3. the Commission had no interest inconsistent with that of Tabcorp.

52. Generally, non-compliance with the directions, and Tabcorp's delays in complying are indicative of a lack of co-operation, which is of concern. Similarly concerning was Tabcorp's apparent lack of interest in engaging positively, proactively and promptly with the Commission to resolve areas of disagreement or matters requiring clarification. Tabcorp's own submissions said that its current management would do things differently.

53. The Commission has considered whether these circumstances might demonstrate capriciousness by Tabcorp in its dealings with the Commission so as to amount to a breach of the obligation. Ultimately, the Commission has concluded that it has insufficient material before it to conclude that the obligation to act reasonably and in good faith has been contravened. Absent a more extensive review of Tabcorp's documentary evidence and possible examination of employees still with Tabcorp, it is not open to the Commission to reach such a conclusion in this case.

54. That said, this should not be interpreted as a finding that Tabcorp did act reasonably and in good faith. There is inadequate evidence before the Commission to make that positive finding in Tabcorp's favour, especially when the Commission considers that some of Tabcorp's conduct was objectively unreasonable, as discussed below.

55. In any event, the Commission expects licensees to work cooperatively, proactively and promptly with the regulator at all times and on all matters. That Tabcorp failed to do so following the events of November 2020 remains a concern for the Commission.

Contraventions

56. In light of the above, the Commission concludes that Tabcorp has engaged in the following contraventions.

57. By failing to comply with the First Direction, Tabcorp:

    57.1. Failed to comply with s 4.3A.39B of the Act, which means that it has failed to comply with clause 5.1 of the Wagering and Betting Licence (which requires compliance with the Act).

    57.2. Failed to comply with clause 5.4 of the Wagering and Betting Licence, which requires Tabcorp to "promptly observe and comply with any lawful direction given by either the Minister or the Commission".

58. By failing to comply with the Second Direction, Tabcorp:

    58.1. Failed to comply with s 4.3A.39B of the Act, which means that it has failed to comply with clause 5.1 of the Wagering and Betting Licence (which requires compliance with the Act).

    58.2. Failed to comply with clause 5.4 of the Wagering and Betting Licence, which requires Tabcorp to "promptly observe and comply with any lawful direction given by either the Minister or the Commission".

59. In the circumstances set out above, Tabcorp has breached the Wagering and Betting Licence and the Act and therefore grounds for disciplinary action under s 4.3A.26(d)(ii)(iii) of the Act are established.

What is the appropriate sanction?

60. 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.

61. Tabcorp has submitted:[26]

> That, if the Commission's considered view is that a letter of censure is appropriate in the circumstances of the present case, the issuing of a letter of censure pursuant to s 4.3A.27(3)(a)(i) would fall within the range of legally permissible outcomes in relation to non-compliance of the type discussed above.
>
> In the circumstances of the present case, where there have been substantial personnel changes within the Tabcorp group such that none of the members of the Executive Leadership Team Steering Committee or the personnel who had direct managerial responsibility for dealing with the Commission in respect of the Outage remain with Tabcorp, Tabcorp submits that it would be appropriate for any letter of censure to acknowledge that the relevant noncompliance occurred prior to changes in Tabcorp's management.

62. The Commission does not consider that a letter of censure would be a sufficient and proportionate sanction, having regard to the following:

62.1. the fact that it was not only a single direction, but two directions of the Commission were not complied with;

62.2. the period of time over which the contraventions occurred;

62.3. the objective seriousness of the matter, in a context where the Commission was seeking assurance that a serious outage would not occur again;

62.4. the need in this matter for both general and specific deterrence (which continues despite a changeover in personnel).

63. In the circumstances, a fine is the appropriate sanction.

64. In reaching that conclusion, the Commission notes and has considered the following written submission by Tabcorp:[27]

> Tabcorp respectfully submits that a fine would not be an appropriate or proportionate disciplinary action for the Commission to take having regard to the circumstances set out in this document.

65. At the hearing, Tabcorp did not submit that a fine would not be open, because that would depend on the findings made by the Commission and, understandably, Tabcorp could not know in advance what findings would be made.[28] That was an appropriate submission, and the Commission does not interpret it as a general submission that a fine is not available.

66. Ultimately, the Commission has concluded that a fine is warranted in the circumstances. The findings that underpin that conclusion are as follows.

67. *First*, Tabcorp failed to comply with two separate directions.

68. *Second*, the directions were made in the context of the November 2020 outage, which was a significant event, and after the Commission had to resort to its compulsory powers to better understand what occurred because Tabcorp had not been sufficiently cooperative beforehand. The Commission had a legitimate interest in having confidence that it would not occur again, and these directions were made to try to ascertain whether it could

[26] Tabcorp Written Submissions at p 20.
[27] Tabcorp Written Submissions at p 20.
[28] See T42:31-36.

have that confidence. Tabcorp must have been aware of this. This context elevates the significance of the directions, compliance with them, Tabcorp's non-compliance and Tabcorp's interactions with the Commission more generally.

69. *Third*, general deterrence would not be achieved by anything less than a fine. The power to issue directions can be exercised in many different ways and in many different contexts. It is of the utmost importance that those subject to the Commission's regulation appreciate that they must comply with directions given to them and do so promptly.

70. By way of analogy only, it is the case in other areas of law that a lesser disposition (or even being excused entirely) will not be ordered because doing so would not achieve general deterrence.[29] The Commission considers that to be the position here; that is, not imposing a fine would fail to achieve general deterrence because a letter of censure would be regarded as a soft slap on the wrist.

71. *Fourth*, specific deterrence would not be achieved by anything less than a fine. Tabcorp has emphasised the turnover in its management team.[30] But there is some degree of continuity of personnel who had a degree of involvement with or knowledge of the directions, and what is ultimately important is that Tabcorp as an entity be deterred.

72. *Fifth*, the Commission considers that some aspects of Tabcorp's conduct were objectively unreasonable (albeit not rising to the level, on the material before the Commission, of the compound concept of unreasonableness and lacking in good faith).

73. The Commission draws attention to the following.

74. Tabcorp's approach to the perceived lack of clarity about the 'continuously available' obligation is concerning.

75. Clause 2.7 of the WBA provides:[31]

> **2.7 Wagering and Betting System**
>
> (a) The Licensee must ensure that at all times during the Term the Wagering and Betting System is operational and continuously available in accordance with the Distribution Arrangements of the type referred to in clause 5.5 of the Licence so that the Wagering and Betting System is operational and available at all times when the Distribution Arrangements are authorised to be available or open to sell Tickets or other forms of entry in, or pay prizes in relation to, Authorised Betting Competitions, in accordance with the Act, the Licence and Law, subject to the constraints of the Commissions' Technical Standards (Availability Requirement).
>
> (b) The Licensee will not be taken to have failed to meet the Availability Requirement to the extent that any non-compliance with clause 2.7(a) is due to:
>
> (i) regularly scheduled downtime for the purpose of maintenance of the Wagering and Betting System;
>
> (ii) failures in communication systems that are outside the reasonable control of the Licensee;
>
> (iii) any failure of items forming part of the Wagering and Betting System that are located in venues in accordance with the Distribution Arrangements (e .g. Terminals and peripheral equipment for selling Tickets or other forms of entry and for validating winning Tickets or other forms of entry, or visual display units, located in venues in accordance with the Distribution Arrangements) (Venue Items), provided that the Licensee takes all reasonable steps to ensure that such items undergo regular and appropriate preventative maintenance and that any failure is resolved promptly;
>
> (iv) any loss or destruction of Venue Items that is outside the Licensee's reasonable control, provided that the Licensee takes all reasonable steps to ensure that such items are replaced and that the replacement items are made operational as soon as practical;
>
> (v) the occurrence of a Force Majeure Event; or
>
> (vi) malicious damage, provided that the Licensee has implemented reasonable security measures to protect the Wagering and Betting System,
>
> Provided that (without limiting anything above) the Licensee takes all reasonable steps to minimise the impact of any such event on its achievement of the Availability Requirement.

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[29] See, eg, *R v Price* [2008] QCA 330 at [16]-[17] (Keane JA; Holmes and Fraser JJA agreeing); *RLG v Donnelly* [2012] WASC 230 at [67], [73] (Beech J); *Harrex v Fraser* (2011) 85 ATR 706 at [89]-[90] (Refshauge ACJ); *Australian Securities and Investments Commission v Healey [No 2]* (2011) 196 FCR 430 at 443 [91]-[92] (Middleton J).

[30] See, eg, Tabcorp Written Submissions at p 22.

[31] TAH.0005.0001.0001.

(c) The Licensee must advise the Commission of the location of the Wagering and Betting System throughout the Term.

(d) The Licensee warrants that the Wagering and Betting System is fit for purpose in accordance with the Commission's Technical Standards.

76. On 8 March 2022, Tabcorp submitted in writing that the Availability Requirement should be interpreted as follows:

> However, even in the ordinary course, Tabcorp submits that it is reasonable to expect that some unplanned maintenance activities will need to occur (being the other forms of Anticipated Event referred to in item 1(b)(ii) above). As a general rule of thumb, and noting that there will inevitably be variations over a 12-month period, Tabcorp's position is that an adjustment to standard operating hours of approximately 5% is appropriate in a Business-as-Usual context. In other words, leaving to one side any Exceptional Events (discussed below), the Availability Requirement obliges Tabcorp to have the WBS operational for approximately 95% of the applicable opening hours for each channel over a rolling 12-month period (based on the industry standard availability formula set out in **Schedule 1**).

77. In its submission, Tabcorp submits that this clause was 'open to interpretation',[32] that there was 'contractual ambiguity'[33] and that 'there was scope for interpretation'.[34] This was maintained at the hearing.

78. The Commission's own view is that there is no ambiguity. What is required is that the Wagering and Betting System is operational and available at all times when the Distribution Arrangements are authorised to be available or open to sell Tickets or other forms of entry in, or pay prizes in relation to, Authorised Betting Competitions, not at 95% of those times.

    78.1. The text of clause 2.7(a) says, emphatically, 'at all times' on two occasions.

    78.2. The generality an absolute quality of the language in clause 2.7(a) is reinforced, rather than undermined, by the qualifications in clause 2.7(b). That the drafters agreed to qualifications in clause 2.7(b) shows that clause 2.7(a) should otherwise be given its natural and ordinary meaning.

    78.3. There is no unreasonableness about giving clause 2.7(a) its ordinary and natural meaning. If there may be unexpected maintenance activities, Tabcorp could have processes in place to deal with such known unknowns. Conversely, Tabcorp's 95% interpretation does lead to unreasonable outcomes. That would mean, at least mathematically, that the systems could be offline for every Victorian Group 1 race-day in any year.

79. That said, the Commission's determination does not depend on who is legally correct about the meaning of this provision. It accepts that, with hindsight, the Commission itself could and should have been clearer in its own communication with Tabcorp about this. The Commission's determination does not assume that it is correct as to the meaning of the provision.

80. Rather, the Commission's present concerns lie in the way Tabcorp chose to deal with this issue.

81. In the context of the First Direction, it was objectively unreasonable (but not in the circumstances said to be unreasonable and lacking in good faith) to:

    81.1. not raise this issue with the Commission before the due date for compliance with the First Direction;

    81.2. not ask Deloitte to consider preparing a report on alternative bases;

    81.3. not seek external legal advice on the meaning of the legal standard and then instruct Deloitte to assume that meaning (for the avoidance of doubt, Tabcorp has informed the Commission that, in the context of the Second Direction, it did obtain legal advice).

82. Separately, the amount of time taken to finalise the letter of instruction to Deloitte for the Second Direction was objectively unreasonable. Tabcorp notes, accurately enough, that Deloitte and the Commission had to be involved and had to agree. Nonetheless, the amount of time taken was far too long and is not satisfactorily explained by pointing the finger at Deloitte and the Commission. Tabcorp was aware that others (namely the expert and the Commission) had to be involved in the process.

[32] Tabcorp Submission at p 6.
[33] Tabcorp Submission at p 14.
[34] Tabcorp Submission at p 14.

Number of fines

83. As to the number of fines that can be imposed, Tabcorp has submitted 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.

84. The Commission accepts that submission, but 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 two directions were not complied with.

Setting the fine in this case

85. 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.[35] Rather, the Commission provides its reasons for concluding that a fine of $1,000,000 is appropriate in this case.

86. *First*, the maximum penalty is 50,000 times the value of a penalty unit. 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.

87. Given that the fining power is tied to the issue of a written notice of show cause rather than the grounds for disciplinary action as accepted in [83] above, the latter may be arguable. The maximum fine would thus be $192.31 * 50,000 = $9,615,500.

88. But if the former were correct, then the maximum penalty as at the time for compliance with each of the First Direction and the Second Direction was $181.74, so the maximum penalty was $9,087,000.

89. 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 lower penalty of $9,087,000, consistently with Tabcorp's submissions.[36]

90. A fine of $1,000,000 is about 11% of the maximum adopted in [89] above. While the setting of a fine is not a mathematical exercise, and the Commission recognises this, a fine at this level seems eminently within a lawful range. 11% is 'very much at the low end' of the range as senior counsel for Tabcorp had put it when making submissions on the possible quantum of a fine.[37]

91. *Second*, the maximum penalty is a yardstick for the worst category of contravention.[38] Here, the Commission accepts that the narrow grounds that have been established are, individually, at the lesser end of the range of contravening conduct as submitted by Tabcorp.[39]

92. 'Lesser end' should not be misunderstood to suggest that the grounds were not serious and there is a danger in labels such as low, middle, high and the like because they can mean subtly different things to different people.[40]

93. What is important is that contravening conduct was committed in the context of a serious matter, namely the aftermath of the November 2020 outage. Tabcorp's failures to comply meant that the Commission could not be assured that another outage would not occur until the time of the Final 2022 Deloitte Report. Tabcorp's failures thus undermined the Commission's performance of its regulatory, investigative, and disciplinary functions under the Act.

94. As to the circumstances of each non-compliance, the Commission refers in particular to [81] above in relation to the First Direction and [82] above in relation to the Second Direction.

95. As to the Second Direction, the Commission notes that some delay in finalising Deloitte's work was caused by Tabcorp failing to provide a CDT artefact to Deloitte until Deloitte sought Tabcorp's comments on a draft report.

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[35] 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 and Responsible Service of Gambling failings https://www.vgccc.vic.gov.au/sites/default/files/reasons_for_decision_rsg_da.pdf.

[36] T42:44-T43:11.

[37] T43:14-29

[38] *Markarian v The Queen* (2006) 228 CLR 357 at [30]-[31].

[39] T43:28.

[40] See, eg, *Cargnello v DPP (Cth)* (2012) 224 A Crim R 204 at [88] (Basten JA; Price and S G Campbell JJ agreeing); *Martellotta v R* [2021] NSWCCA 168 at [65] (Adamson J; Basten JA and Walton J agreeing).

Moreover, this occurred in circumstances where this document was likely to be the most material and relevant document to Deloitte's assessment of suitability to sustain WBS services in the circumstances of a 'complete primary site failure'.

96. The Commission also notes as to the Second Direction that it is a matter of aggravation that Tabcorp did not comply despite having been warned that enforcement action might ensue.

97. More generally, the fact that two directions were not complied with is a matter of seriousness. Put simply, to not comply with two directions is more serious than to not comply with one.

98. *Third*, general deterrence weighs heavily on the Commission in setting a fine in this case. It is critically important for those dealing with the Commission to appreciate that they must comply with directions. General deterrence weighs heavily in favour of a substantial penalty.

99. *Fourth*, specific deterrence has a role to play in the setting of this fine. The Commission is not satisfied that "there is little or no call for specific deterrence" as submitted by Tabcorp.[41] As already noted, the Commission accepts that there has been a degree of turnover in personnel at Tabcorp, which provides some degree of assurance that the same conduct may not be repeated in the future. But this does not mean that a substantial penalty is not needed to ensure specific deterrence. There has not been complete turnover, and some people with involvement (of differing degrees) in responding to the directions remain at Tabcorp. Moreover, it is Tabcorp itself which has failed to comply with two directions, and it is ultimately Tabcorp which needs reminding to comply with its obligations.

100. Ultimately, the Commission does not accept that further similar contravention or instances of non-compliance are unlikely.[42] Tabcorp has submitted that it takes a new approach to regulatory compliance under the current management, but it remains too early to assess that claim with confidence, or to put so much weight on that contention as to give no consideration to specific deterrence. It is of concern that Tabcorp failed to comply with two different directions in relation to a serious event, where compliance should have been understood to be in the common interests of Tabcorp and the Commission. It is noted that there has not been complete turnover of personnel.

101. Further, in seeking to reach agreement on the terms upon which Deloitte would be retained in response to the Second Direction, Tabcorp sought to reduce the scope of work for Deloitte and to only review a sample of three Wagering and Betting System components in the interests of timeliness. It was only in late May 2022 that Tabcorp agreed to have all nine components of the WBS to be assessed. The Commission is concerned that a licensee which seeks to be the gold standard in the industry would take an approach which has at least the appearance of cutting corners.

102. *Fifth*, in assessing what is needed to achieve general and specific deterrence, the size of Tabcorp is relevant. Generally speaking, the larger the wrongdoer, the larger the fine needed to ensure that it has sufficient sting to achieve general and specific deterrence.[43] Tabcorp is a substantial company with considerable profits. The Commission's decision does not depend upon a precise understanding of how much profit it makes.

103. *Sixth*, it is appropriate to moderate the penalty to take account of Tabcorp's willingness to facilitate an efficient result in this matter through its pre-hearing admissions, and through the conduct of its legal representatives in cooperating generally in the conduct of this disciplinary action.[44]

104. *Seventh*, the Commission accepts that there is no evidence of actual loss to consumers by Tabcorp's contravening conduct. But its non-compliance and delay frustrated the Commission's ability to assure itself that an outage would not occur again. Tabcorp's conduct thereby created a risk of loss being suffered by consumers.

105. More to the point, the failure to provide the Commission with the information it was looking for in a timely fashion caused harm to the Commission. It hindered the efforts of the Commission by inhibiting it in the

[41] Tabcorp Written Submissions at p 22.
[42] Tabcorp Written Submissions at p 22.
[43] 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).
[44] See and compare *R v Doff* [2005] NSWCCA 119.

performance of its functions, including in requiring its staff to deal with Tabcorp more than should have been necessary. Such harm may be more intangible, but is a form of harm that has been recognised by the courts.[45]

106. *Eighth*, the Commission accepts that there is no evidence that Tabcorp made a profit from its conduct in failing to comply with the directions or that this conduct was motivated by greed. The presence of these factors would have aggravated the seriousness of the offending. The absence of an aggravating factor is not mitigatory in effect.

107. *Ninth*, the Commission accepts that Tabcorp has shown some insight into its contravening conduct and has expressed some contrition. Nonetheless, the Commission is concerned that current Tabcorp management continues to show an inclination towards minimising its own responsibility for the contravening conduct by pointing the finger at others, namely the Commission and Deloitte. Where a licensee has an obligation and compliance with that obligation depends upon the inputs of others, it is incumbent upon the licensee to act proactively to ensure that whatever inputs are needed are obtained in a timely way to ensure that the licensee can comply.

108. This inclination to minimise responsibility manifested in a different way. In so far as Tabcorp accepted responsibility for the contravening conduct, it was keen to lay the blame for it at the feet of the former management. But that tended to downplay the fact that there was some degree of continuity in personnel; not everyone involved in dealing with the Directions has left Tabcorp. And Tabcorp as an entity is ultimately responsible for compliance.

109. The Commission has taken disciplinary action against Tabcorp on four occasions, which resulted in letters of censure, directions and fines imposed between $5,000 and $30,000. Tabcorp is therefore not entitled to leniency on the basis that this is the first disciplinary action taken against it.

110. The Commission considers that the contraventions relevant to this disciplinary action are significantly more serious than, and in any event entirely different from, the conduct which resulted in disciplinary action in those cases. The conduct the subject of this disciplinary action arose in the context of a serious outage, occurred over an extended period of time, and concerns Tabcorp's engagement with the Commission.

111. Further, regulated entities should not consider that fines at the level of those in [109] above offer a valuable or reliable guide to fines that may be imposed by the Commission now and in the future. Regulated entities have many privileges and compliance with their obligations is not only a central responsibility but also an important requirement to ensure that harm is not caused by their conduct. Fines at the previous level could not today be regarded as being set at a level sufficient to achieve general and specific deterrence and to denounce the non-compliance which occurred.

112. Finally, this is only the second occasion that disciplinary action is being taken for non-compliance with directions.[46] It is also an instance where the Commission had to rely upon the directions making power to obtain information from a regulated entity. There are, therefore, no clear guidelines for where a fine ought to be set in this disciplinary action. What must be sought, instead, is a fine which balances the various competing considerations that are relevant to setting a fine. What this disciplinary action should show, to Tabcorp and to others, that non-compliance with directions will not be tolerated and cannot be treated as a mere cost of doing business.

[45] See, eg, *Australian Energy Regulator v AGL Sales* [2020] FCA 1623 at [69], [76] (Anderson J).
[46] The first occasion concerned the disciplinary action taken against the casino operator on 3 November 2022 for non-compliance with the 'pick direction' https://www.vgccc.vic.gov.au/sites/default/files/reasons_for_decision_rsg_da.pdf.