

25 October 2013

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Dear Joanne

Racing Commission of Inquiry ("Commission")

We **enclose** the TattsBet's submissions for your consideration.

Yours faithfully



TATTSBET'S SUBMISSION ON PARAGRAPH (F) OF THE TERMS OF REFERENCE CONTAINED WITHIN THE COMMISSIONS OF INQUIRY ORDER (NO 1) 2013 ("TOR")

- 1 On Friday, 18 October 2013, TattsBet was notified by a letter on behalf of the Commission of Inquiry into Racing ("**Commission**") that while the Commission had no power to resolve the issue of the effect of the Product and Program Agreement dated 1 June 1999 ("**Agreement**"), as it is not asked to do so by the TOR and does not propose to do so, the Commissioner's report may contain observations to the effect that there is a compelling argument that Mr Grace's advice of 18 November 2008 ("**Grace Advice**") concerning the deductibility of NSW race information fees as Third Party Charges under the Agreement was correct.
- 2 Until receipt of the letter of 18 October 2013, TattsBet had chosen not to take an active role in the Commission hearing as the Commission had advised by way of letter dated 23 September 2013 that it was not minded to make findings on the correctness of the Grace Advice, because whether or not TattsBet could make deductions for Third Party Charges was a matter to be determined by a Court with the jurisdiction to do so.
- 3 As the letter of 18 October 2013 indicates a change to the Commission's original position, TattsBet seeks to make four submissions.
- 4 **Firstly**, making observations on the Grace Advice is outside the TOR, which is limited by paragraph (f) of the TOR to consideration of:

"The arrangements between Queensland Race Product Co Limited and TattsBet concerning fees paid by the Tatts Group for Queensland wagering on interstate races through TattsBet, in particular;

- (a) *how Queensland Race Product Co Limited responded to the introduction of race information fees;*
- (b) *whether the Boards of the relevant entities and/or Queensland Race Product Co Limited sought expert legal advice or other advice regarding the effect on fees payable by the Tatts Group to Queensland Race Product Co Limited as a consequence of race information fees being introduced and if not, why this advice was not sought;*

- (c) *the reasons why any expert advice sought at any time following the introduction of race information fees was or was not acted upon; and*
- (d) *whether the directors and senior executives of both the relevant entities and Queensland Race Product Co acted in good faith and consistently with their responsibilities, duties and legal obligations and the best interests of the company at the material time race information fees were introduced, or at any other time and whether their actions may have been influenced by any conflict of interest in being both a director of the relevant entities and/or Queensland Race Product Co Limited and/or the Tatts Group or by a relationship with any other person, or whether they used their position/s to gain a personal advantage.”*

5 Hence, any commentary on the Grace advice is outside the power of the Commission.

6 **Secondly**, it is respectfully submitted that it was, and is, correct that the question whether the thrust of the Grace advice is correct is a matter for the determination of a Court with appropriate jurisdiction. This was confirmed by counsel assisting the Commission (T2-6 line 24-29).

7 TattsBet has publicly announced that it will be seeking declaratory orders in the Supreme Court of Queensland (see attached press release) where it will fully develop legal arguments on this issue. We will forward a copy of those proceedings to the Commission when they are filed and will seek a listing on the Commercial List. Shane Doyle QC and Gareth Beacham will be representing TattsBet.

8 As such, the Commission should proceed on the basis that the issue raised by the Grace advice will be determined by the Supreme Court, which will have the benefit of full legal argument. The claim might, of course, be compromised prior to trial, but in that case there will be an agreement between **all** of the parties to the Agreement as to the appropriate disposition of the dispute.

9 **Thirdly**, it is submitted that the making of such commentary will not serve any purpose relevant to the Commission's function. As stated above, the issue will now be determined by

the Supreme Court, or otherwise resolved by agreement. There is, otherwise, no overriding public purpose served by commentary on the Grace advice. In contrast, such comments would run the risk of creating a public perception that the issue (that is yet to be litigated) is likely to be resolved against TattsBet. Where there is no overriding public purpose to be served by making the comments, it is submitted that there is no justification for running such a risk.

10 **Fourthly**, the foreshadowed observations cannot properly take into account, or make allowance for the very many matters that are relevant to the correctness, or otherwise, of the Grace advice. For example, the Grace Advice did not canvass a number of relevant matters, including:

- (a) No attempt is made to apply the customary principles of the construction of a commercial document to seek to ascertain the objective common intention of the parties. Instead, it focuses on a technical, pedantic analysis that has long been abandoned by the Courts¹;
- (b) It makes no reference to the arrangements with Racing Victoria Limited, Racing Information Service of Australia (“**RISA**”), Product Co and TattsBet **about** the formatting and supply of information which are critical to understanding how the Australian Racing Product is obtained by TattsBet;
- (c) It fails to identify that RISA would not provide the Australian Racing Product to TattsBet without TattsBet holding the required Race Field Licences. As such, the Australian Product Information could not be provided without the licence fees being paid;
- (d) It does not deal with the fact that the Australian Race Product has to be able to be used for the efficient and effective conduct of Race Wagering; and

¹ *Pan Food Company Importers and Distributors Pty Ltd –v- ANZ* (2000] 179 ALR 579, 584 at paragraph [24] per Kirby J

- (e) It does not deal with the deductions claimable by TattsBet under clause 10.2(d) which are in excess of any Third Party Charges. To date TattsBet have not claimed these amounts but reserves its rights to do so.

11 In addition, there are other views about the matters considered by the Grace Advice which would have to be considered, noted and referred to for any commentary to be a fair one.

Namely:

- (a) Graham Gibson QC provided TattsBet with an advice (provided to the Commission) that confirmed TattsBet could deduct Third Party Charges under the Agreement;
- (b) Crown Law gave advice to the Office of Liquor and Gaming on 6 August 2008, that TattsBet could claim the deduction of the Third Party Charges. The Commission had seen this advice but did not make reference to it until it was raised by Mr MacSparran in his re examination of Mr Michael Kelly (T12-52)
- (c) Mr Bob Lette, an experienced commercial lawyer from Mullins Lawyers, disagreed with the Grace Advice as did the majority of the board of Product Co on their understanding of the common intention of the parties at the time when the Agreement was executed;
- (d) No person gave evidence supporting the views expressed by the Grace Advice as reflecting the objective (or, indeed, subjective) views of the counterparties to the Agreement; and
- (e) On 3 February 2009, Mr Grace provided a further advice to Queensland Racing Limited that opined that TattsBet could set off the Third Party Charges. No reference was made to this advice by the Commission and no questions were addressed to witnesses on it despite much being made of the Grace Advice.

12 For the reasons set out above, TattsBet submits that the Commission should not make "observations" about the correctness of the Grace Advice.

King & Wood Mallesons
King & Wood Mallesons

25 October 2013

ASX ANNOUNCEMENT

16 October 2013



PRODUCT AND PROGRAM AGREEMENT

There has been recent public commentary regarding the correct interpretation of the Product and Program Agreement to which Tattsbet Limited (a group subsidiary), the Queensland All Codes Racing Industry Board (**Racing Queensland**) and Queensland Race Product Co Limited (**QRPC**) are parties. This Agreement was entered into in June 1999 prior to the Queensland Government listing the then State owned Tattsbet on the ASX.

Given the forum in which the commentary on this issue has arisen, Tatts Group intends making an application to the Queensland Supreme Court for a declaration as to the correct interpretation of the Product and Program Agreement. This step is being taken following consultation with Racing Queensland and QRPC.

Tatts' intended approach is to seek this declaration in a co-operative manner working with QRPC and Racing Queensland to determine this issue in a timely and cost effective manner for all parties.

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