

# Northern Territory Racing Commission

## Reasons for Decisions

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<b>Applicant:</b>	Betezy Pty Ltd
<b>Respondent:</b>	Northern Territory Racing Commission Investigation
<b>Heard Before:</b>	Mr Richard O'Sullivan (Chairman) Mr Philip Timney (Legal Member) Mr David Brooker
<b>Date:</b>	29 February 2012

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### Introduction

1. Mr Alex Kay was issued with an individual Sports Bookmakers Licence in August 2004 and commenced trading as 'Betezy'. Mr Kay later applied for and received a Corporate Sports Bookmakers Licence in October 2007 and operated as Betezy.com.au Pty Ltd with Mr Alex Kay as sole Director.
2. In March 2010 a Sports Bookmakers Licence was issued to Betezy Pty Ltd (Betezy). The company directors at the time were Mr Alex Kay, Mr Ryan Kay and Mr Vince McDonald.
3. Over the past twelve months there have been a number of changes in directorships. Mr David King was appointed a director in April 2010. Mr Alex Kay resigned in March 2010, with Mr Vince McDonald ceasing in May 2011. Mr David King has subsequently resigned and the current Directors, as at the date of this decision, are Mr Greg Columbus, Mr Chris Ryan and Mr Ryan Kay.
4. By way of letter dated 29 January 2012, Betezy was informed that the Northern Territory Racing Commission (the Commission) had determined to conduct an investigation into its operations as a licenced Bookmaker. As part of that investigation the Commission decided that a Hearing would be convened in Darwin on 29 February 2012. Correspondence to Betezy of 9 February 2012 outlined the scope of the issues the Commission wished to clarify. Betezy was put on notice that it would be required to answer queries in relation to:
  - a) *The contractual arrangements, both past and present, between MyBetShop Pty Ltd ('MyBetShop') and Betezy, that may impact on the future operation of the bookmaking business conducted by MyBetShop*
  - b) *All past and existing White Label agreements entered into by Betezy with third parties, both in Australia and overseas, for the purpose of the business conducted by Betezy under its sports bookmaker licence; and*
  - c) *Any other matters that may arise in the course of the Commission's investigations.*
5. The Commission was formally notified that Managing Director Mr Ryan Kay would attend on behalf of Betezy and that he would be represented by Counsel, Mr Miles Crawley acting under instruction from Mr Tom Griffith of Piper Alderman.

6. The decision that follows is composed of three parts. Part one outlines the regulatory framework and specific issues and reference points the Commission has considered in arriving at its decision. It also provides some generic information that may be of interest to other licence holders. Part two sequentially addresses each suspected breach of the Bookmaker Licence and the *Racing and Betting Act*. Part three is the final decision and includes the global penalty as a result of the Investigation launched by the Commission.

## Part One

### Functions and powers of the Commission of the Northern Territory and the relevant provisions of *The Racing and Betting Act*:

7. The Commission is established under Part II of the *Racing and Betting Act*.<sup>1</sup> At Section 17 the Functions of the Commission are detailed where subsection 17(a) specifically establishes that the Commission may initiate and undertake investigations of its own volition.
8. At Section 18 the Powers of the Commission are articulated. Of particular relevance for what follows is Section 18(2)(c) which empowers the Commission 'to do all such things as it considers necessary or desirable for the proper regulation and control, in the interests of the public, of betting by and with bookmakers'. The Commission is of the view that this Section of the Act authorized and sanctioned the commencement of its investigations in relation to Betezy.
9. At all material times the governing law of the matters before the Commission was that of the Northern Territory of Australia and, where applicable, the Commonwealth of Australia.

### Background to the investigation:

10. During the course of conducting an Investigation into another sports bookmaker licensed by the Northern Territory Commission certain observations were made in relation to the conduct of Betezy that were of concern. The specific nature of the concerns is dealt with below; suffice to say at this point the issues were such that the Commission determined to commence a further discrete investigation into the operation of Betezy. Simultaneous to points of interest becoming the focus of the Commission in relation to the compliance conduct and commercial operations of Betezy, a series of allegations were raised that were of particular alarm with respect to the corporate governance and operational systems under which the Bookmaker conducted its business.
11. Upon commencement of these further investigations it became apparent to the Commission that, due to the number and range of issues before it, there would need to be a joint and several approaches to its investigations. Thus the Commission had on foot three separate investigations that are all in some way related:
  - a) The MyBetShop Investigation;
  - b) The MyBetShop and Betezy Investigation; and

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<sup>1</sup> Northern Territory of Australia Racing and Betting Act

c) The Betezy Investigation.

12. The specific matters dealt with in the decision that follows relate entirely and exclusively to the Betezy Investigation and the Hearing conducted on 29 February 2012.
13. Anonymous allegations into Betezy's operations were put to the Commission on multiple occasions. Such claims were often conveyed to the Commission in a very detailed format, to the point where the precision of the facts provided demonstrated an intimate knowledge of Betezy procedures, protocols and operations. Where the Commission deemed such allegations worthy of further investigation the import of the claims were conveyed to Betezy who was provided with an opportunity to respond and counter factual errors and explain mitigating circumstances.
14. It should be made clear that the Commission went to great lengths to ensure that no weight whatsoever was afforded to any claim or allegation save for those where Betezy was given the opportunity to retort and rebut contentions made, or where supporting material of verifiable integrity was presented to, or obtained by, the Commission. In support of this position it is worthwhile to refer to comments made by Commissioner Timney at the commencement of the Hearing.
15. Commissioner Timney made a statement that served to place in context the evidentiary weight and broader referencing of third party allegations. He offered that; *'some of the material has been taken into account by the Commission and given weight, but only in circumstances where it's supported by other documentation'*. He then went on to outline a specific example of the style referred to above. The Commission is of the view that it is only fair and proper that its manner of dealing with allegations raised by third parties be part of the record and included in this decision.

***Racing and Betting Act – section 102(6):***

16. One further issue should be addressed in relation to a matter that, while on the face of it is peripheral to the Hearing, is in any event relevant to the conduct of Betezy and goes to its governance and operation as a Bookmaker. Section 102(6) of the *Racing and Betting Act* holds that:
  - *A person whose name is not endorsed on a licence who, except with the approval of the Commission, acquires or holds an interest in or derives a benefit from, the business of bookmaking carried on by the registered bookmaker is guilty of an offence.*
17. The Commission during the course of the Hearing indicated to Betezy that a further Section of the *Act* was of relevant consideration in relation to some of the alleged breaches. The Hearing panel thought it prudent at the time that the position of the Commission regarding Section 102(6) be absolutely clear. It follows then that some brief remarks should be included in this decision. It must be noted that what follows has not been taken into any account whatsoever in determining penalty as that Section of the *Act* in no way binds or compels Betezy in any sense. That said, it was apparent to the Commission that it could be argued, on the evidence before the panel, that Betezy had seemingly, perhaps unwittingly on occasion, induced parties to enter into an unlawful arrangement contrary to the Section of the *Act* as outlined above.

18. Section 102(6) of the *Racing and Betting Act* prohibits third parties from acquiring an interest in the proceeds of bookmaking without full disclosure to the regulatory body. The Hearing panel heard evidence that on multiple occasions Betezy had entered into arrangements with second and third parties. The principal purpose of such agreements was to distribute profits by way of commission paid to the counterparties. The agreements were in essence straightforward profit sharing contracts and had not been submitted in many instances for approval or notification to the Commission.
19. The Commission believes that, for the sake of clarity and to avoid confusion within the industry, it is important that some effort be made to illustrate the points where such agreements when not appropriately validated and endorsed, contravene Section 102(6). At the Hearing the Commission made it clear to Betezy that some of the counterparties to agreements to which Betezy had entered into were disrespectful at best and obstructionist at worst with requests and queries from the Manager Racing, Department Of Justice (the Manager Racing). The Commission will not tolerate such responses in the future and has reserved its right to take action against those who are receiving commissions from Betezy in contravention of Section 102(6) of the *Act*.
20. For the record the Commission articulates the agreements (*White Labels*) that it believes fall within the ambit of Section 102(6):
- **Affiliate Agreement**
    - A contract between the licence holder and an affiliate that entitles the affiliate to receive commission income. The commission paid to the counter party is calculated as a percentage of the losses attributable to clients introduced to the licence holder by the affiliate.
  - **Management Agreement:**
    - A tripartite contract between the licence holder, an affiliate and a third party who essentially administers the relationship between the licence holder and the affiliate. The manager receives commission distribution by way of calculation of percentage losses, percentage of turnover, or a combination of both.

As a result of the above definitions it is clear that any counter party to either or both of the agreements as defined who is not endorsed on the principal licence-holder's licence is operating in offence of Section 102(6) of the *Act* and liable to penalty.

### **Commission determination:**

21. It should be noted that the Commission finds the utility of such agreements of questionable benefit to the best practice operation of the industry. A comprehensive review of the manner and form of affiliate agreements will be undertaken by the Commission in due course. Counterparties to agreements that have not been endorsed by the Commission should make every effort to ensure that they are not operating in contravention of the *Act*. To be clear, the function, value and need for White Label agreements as outlined above will be the focus of a review in 2012.
22. Extending the above position, the distinction between White Label agreements and White Label web pages needs to be made. The Commission views 'Landing' or 'Traffic-Directing' web pages as a perfectly legitimate form of online marketing.

These pages, where there is no other party that stands to benefit and no possibility of clients being misled as to the ultimate operator of the site, are not considered to affront either the conditions of any licence issued or provisions within the *Racing and Betting Act*. It is, however, likely that in any investigation and review of White Label operations as a whole that some consideration will be given to online marketing pages operated by Licensees.

### **Procedural fairness, natural justice and other issues considered by the commission:**

23. On 24 January 2012 the Commission wrote to Betezy and outlined a series of compliance issues it believed warranted further investigation by way of a full Hearing of the Commission to be held in Darwin.
24. The Hearing on 29 February 2012 convened to deal with a series of perceived compliance issues and irregularities in relation to Betezy. At the commencement of the Hearing Commissioner O'Sullivan ordered that the proceedings before it would be heard in camera and that the Hearing would be closed to the public. There were no other procedural matters raised by counsel for Betezy and the Hearing commenced with a list of suspected apparent breaches read into the record by Commissioner Brooker.
25. The breaches alleged by the Commission included breaches of licence conditions and of provisions of the *Racing and Betting Act*. They appear below in summary form and are dealt with extensively in the body of the Decision that follows:
  - Licence Breaches:
    - Conditions 15, 17, 19, 22, and 23; and
  - *Racing and Betting Act* Breaches:
    - Section 81(a), (b) and (c).
26. The complex issues before The Commission and the inquisitorial nature of the investigation required a heightened awareness and acknowledgment of procedural fairness and natural justice issues. At all times the Commission was cognizant of the absolute necessity to respect and acknowledge the rights of Betezy in these areas and determined that it was appropriate to raise the matter at the commencement of the Hearing.
27. Commissioner Timney addressed the parties without objection stating that:

*“The Commission is now satisfied that as of the commencement of this Hearing that Betezy has been afforded complete natural justice and procedural fairness, and has been provided with copies of all documents on which the Commission intends to rely, and what the Commission would like to know at the outset is whether Betezy intends to raise or has any issues with procedural fairness and natural justice”.*
28. In response, Counsel for Betezy replied that he was unable to fully concede that his client had been afforded complete procedural fairness and natural justice. After some further discussion Commissioner Timney made the point absolutely clear from the point of view of the presiding members: *‘We don’t want to proceed while your client is at some disadvantage ... and if there is a disadvantage we would like to be alerted to it so that we can deal with it appropriately.’* After a short adjournment the Hearing resumed and at no further stage was the issue of

procedural fairness or natural justice raised again by counsel for Betezy or the sitting members of the Commission.

29. The Commission takes the view that in the absence of any formal raising of the issue of procedural fairness and natural justice during the course of the Hearing proper that it is fair to assume that the sequence of events that occurred at the commencement of the Hearing were a thorough exploration of the matters and that Betezy has indeed been afforded full and complete procedural fairness and natural justice at all times. For the sake of completeness, it should be further noted and added that in written submissions from counsel for Betezy at the conclusion of the Hearing no mention was made of either limb.

## **Part Two - Breaches considered by the commission:**

### **Licence Condition 15**

- *The Sports Bookmaker shall obtain the approval of the Commission before any change is made to the structure, the Company Nominee, the directors, and the persons concerned in the management or control of the Sports Bookmaker and, where the Sports Bookmaker is owned or controlled by a corporation, any change to the structure, directors and persons concerned in the management or control of that corporation. The Sports Bookmaker shall provide such information to the Commission as the Commission may require to enable the Commission to consider whether to grant approval under this condition.*

30. The *Racing and Betting Act* includes a number of offence provisions. Section 80 of the Act prescribes the penalties that may be imposed by the Commission on a corporate bookmaker for offences against the Act or the Rules:

#### **80 Suspension or cancellation of licence or permit**

- (1) *The Commission may discipline a bookmaker by reprimanding him, imposing on him a fine not exceeding 17 penalty units or, in the case of a sports bookmaker, not exceeding 170 penalty units or suspending or cancelling a licence or permit granted under this Part if it is satisfied that the bookmaker:*

(a) *has committed an offence against this Act or rules made under Section 83 or has failed to perform a duty required of him by this Act; or*

(b) *... ..*

31. The monetary value of a penalty unit is currently set at \$137.00, equating to a maximum fine applicable under Section 80 to a corporate bookmaker at \$23,290.00.
32. Section 81 of the Act is a specific offence provision which provides for the imposition of a monetary fine not exceeding 40 penalty units (\$5,480.00) for the offences specified in that Section:

#### **81 Licenced or registered bookmakers not to do certain things**

*A bookmaker who, except with the approval of the Commission:*

- (a) *enters into a partnership in relation to the business of bookmaking carried on under his licence or permit with a person whose name is not endorsed on his licence or permit; or*
- (b) *makes an arrangement or enters into an agreement with a person whereby that person becomes entitled to a share in the profits of that business; or*
- (c) *borrow money, except from an approved financial institution, for use in that business; or*
- (d) *lays off a bet with a person unless the person is licensed or registered in accordance with a law where the person conducts his business of bookmaking, is guilty of an offence.*

*Maximum penalty: 40 penalty units.*

33. Section 83 of the Act provides the Commission with the authority to make Rules for the control and regulation of betting by bookmakers. Section 83(3) of the Act provides that the maximum penalty applicable for offences against the Rules is a fine not exceeding \$5,000.00.
34. The Commission, during the course of its investigations, sought organisational charts and key personnel details from Betezy. It was apparent to the Commission that, despite the specific intent of Condition 15 being an unmistakable requirement on the licence holder that timely and accurate information regarding changes to directors and key personnel be provided, this was not the case. When the matter of the lax communication to the Commission of such changes was raised with Betezy Mr Ryan Kay responded that:
 

*'It is accepted that historically Mr. Vince MacDonald due to his illness may not have kept the regulator fully informed about organizational changes in a timely manner, and indeed the changes necessitated by Mr MacDonald's health issues itself did not enable prior approval to be sought from the Commission.'*
35. During the course of the Hearing, while addressing a particular instance raised by the Commission where the Managing Director, Mr David King, contacted the Commission directly and announced his resignation from the Board, counsel for Betezy submitted that it would unreasonable to expect that the Bookmaker should be able to notify the Commission prior to an autonomous announcement being made by a current Director. That point is conceded by the Commission, however, as the email referred to below establishes, Betezy was in fact aware of the intention of Mr King to resign. By way of email to the Manager Racing on 5 January 2012 Mr King wrote; *'as a matter of courtesy, and without wanting to preempt Ryan's formal notice, please be advised that I informed the board of Betezy a couple of months ago that I would need to resign before departing on an extended holiday in the UK'*.
36. Clearly the Betezy Board was aware that the Managing Director intended to shortly resign. Any suggestion that this was a surprise or that official notification of the resignation of Mr King was not required to be communicated to the Commission, because Mr King advised the Commission of his own volition, is not accepted.
37. The thrust of Condition 15 goes to the probity and integrity of the personnel involved in the day to day management and operations of the licence holder. The requirement for timely communication, perhaps more accurately communication without delay, is such because of the necessity of having individuals in positions

of authority who are not only aware of their duties under the licence issued by the Commission and the *Racing and Betting Act*, but who are also able to perform such duties to the highest standard.

38. It is the position of the Commission that the failure of Betezy to notify the Commission of multiple personnel, senior management, and Board changes over an extended period of time and under successive Managing Directors constitutes a breach of Condition 15 of the licence. The Commission has determined that the breach as outlined above warrants a penalty of a fine in the amount of \$3,500.00.

### **Condition 17**

- *The Sports Bookmaker shall immediately notify the Commission should any of the following events occur:*
    - *Any legal action being instigated against a Sports Bookmaker or any of their associated or entities; or*
    - *Any legal action being instigated by the Sports Bookmaker or any of their associated companies or entities; or*
    - *The service of a petition to wind up the Sports Bookmaker.*
39. The Commission, during the course of its investigations, became aware of three separate matters where litigation had commenced against Betezy. For the purposes of the breaches explored of Condition 17, the Commission is of the view that once a court docket or file number has been recorded and papers served, it is assumed that litigation has commenced. In and of itself, and this is conceded by the Commission, the commencement of proceedings against a licence holder reveals very little and is not assumed to reflect on the licence holder in one way or another.
40. That said it is perhaps illustrative to elucidate the specific import of Condition 17 from the perspective of the Commission. As stated above, the mere fact that a licence holder is a party to litigation is demonstrative of very little. It is the role of the Commission to make itself aware, under Condition 17 if it sees fit, of the type and quantum of the specific matter being litigated. It is only from this position that the Commission can rightly determine the appropriate import attributable on a case by case basis. It is for this reason that Condition 17 compels licence holders to notify the Commission pursuant to (a), (b), and (c) above.

### **The Newcastle Knights Litigation**

41. The court action for unpaid commission commenced by the Newcastle Knights against Betezy was reported in the media in New South Wales and, in particular, the Hunter Valley area with fanfare.
42. The evidence of Mr Kay at the Hearing was that the first he became aware of the litigation against Betezy was by way of a media report. It was the evidence of Mr Kay that as soon as he became aware of the litigation he informed the Manager Racing, Mr Malcolm Richardson, by telephone. On this occasion, where the litigant could clearly be motivated by the opportunity of generating negative publicity for Betezy it is highly believable that a simultaneous lodgement of documents and media release could have occurred. The proximity of the lodgement of documents and the reporting of the claims made against Betezy is certainly close enough to warrant the Commission giving Betezy the benefit of the doubt in this instance.



43. It is the finding of the Commission that the failure of Betezy to notify the commencement of litigation by the Newcastle Knights in a timely manner does not constitute a breach of Condition 17 of the licence.

### **South Australian Racing Litigation**

44. In relation to litigation commenced against Betezy by Racing South Australia (Racing SA) one distinct issue needs to be considered. Betezy claim that no papers were ever served by Racing SA. The Commission considers the following of importance in determining this breach.
45. By way of email exchange of 17 November 2011 Mr Kay informed the Manager Racing that he was of the view that no papers had been served on Betezy and that no court documents had been received. This position is consistent with his evidence at Hearing, however, the Commission is not disposed to accept that Betezy had no prior knowledge of the commencement of proceedings by Racing SA. In arriving at this position the Commission relies on the integrity of Racing SA as a model litigant and the content of the settlement deed.
46. The settlement deed, as executed by the plaintiffs on 23 December 2011, at page 4, reveals at Section I that;

*'The obligations of Betezy.com.au Pty. Ltd. and Betezy Pty. Ltd. referred to above are the subject of proceedings commenced by the SA Racing Authorities and Racing SA Pty. Ltd. ('Plaintiffs') in the Supreme Court of South Australia in Action No. 679 of 2011 ('Proceedings'). The Plaintiffs have notified the Northern Territory Commission and the South Australian Independent Gambling Authority of the existence of the Proceedings.'*

47. It is beyond belief, in the opinion of the Commission, that a court action number would be issued, statutory authorities would be notified, and that no papers would be served on Betezy by the plaintiffs.
48. It is the finding of the Commission that the failure of Betezy to notify the commencement of litigation by Racing SA constitutes a breach of Condition 17 of the licence.

### **Australian Taxation Office Litigation**

49. A petition to wind up a company is one of the most serious of measures available to a creditor. The Australian Taxation Office (the ATO) sought such an order against Betezy after what, on the evidence, seems to be a break down in negotiations after a considerable period of time.
50. It is inconceivable to the Commission that Betezy did not know the ATO had instituted proceedings. It is open to the Commission to query the professional standards of the accountants in withholding this information from Betezy management, which was the claim made by Mr Kay given in evidence at the Hearing. Further, in lieu of any information put before the Commission that an agent of the company had authority to administer legal proceedings, the Commission is of the view that the failure of Betezy to be aware of such a petition by the ATO is either an example of serious delinquency in governance at the senior management level or an incident of wilful blindness to serious litigation on foot.
51. Should Mr Kay's evidence in relation to the poor performance of the accountancy firm retained by the business be taken at face value, this is of some concern to

the Commission. To suggest that the responsible person involved in negotiations with the ATO, Mr Michael McLaren, was *'feeling a little guilty that he hadn't been able to resolve the matter – that is why he hadn't informed the business'*, is not only a poor indictment on the professional standards of Mr McLaren and Balance Corporation, but also raises genuine issues in relation to corporate governance. In relation to the organizational hierarchy at Betezy, the Commission flags its concerns at this point and reserves its right to place it under far more onerous scrutiny henceforth.

52. In submissions made to the Commission counsel for Betezy suggested that, *'in relation to the ATO litigation, the evidence of Mr Kay was that proceedings had been served upon the registered office of Betezy, being the office of its accountants, but the litigation had not been brought to the attention of the management of Betezy.'* Mr Crawley submits that therefore there was no intentional breach of the condition. The Commission takes the view that the consequences of having a registered office (and having someone at that office authorized to accept legal documentation on behalf of the company who is not competent) in a location distant from senior management oversight and operational scrutiny is the fault and responsibility of Betezy alone.
53. It should be noted that the evidence of Mr Kay given at Hearing conflicts with an email exchange between himself and the Manager Racing on 17 November 2011. In this exchange Mr Kay testified that he only became aware of the ATO litigation by way of a direct communication from the Compliance Department. During his evidence at Hearing Mr Kay held that, *'the first I found about it was when it was actually lodged in a court.'* He goes on to say that he, in fact, notified the Manager Racing within minutes of becoming aware of the status of the petition before the court.
54. It is the finding of the Commission that the failure of Betezy to notify the commencement of litigation by the Australian Taxation Office constitutes a breach of Condition 17 of the licence.
55. The Commission has determined that the penalty for the above breaches of licence condition reside at the more serious end of the spectrum, due in part to the fact that statutory authorities were involved. The penalty also reflects the view of the Commission that revenue collection by such authorities is clearly in the public interest. The penalty is AU\$4000.

## **Condition 19**

- *The licensee shall promulgate a set of clearly comprehensible betting rules and shall at all times adhere to those rules in its interaction with its client punters. The licensee shall notify the commission in writing, within fourteen days of any amendments or addition to the current approved rules and clearly highlight these changes on its website. The Commission, the Director or Deputy Director of Licensing reserves the right to approve, modify or not approve any changes to the current rules if deemed necessary.*
56. The Commission takes the view that the introductory portal and all of the content on a licence holders website must be of the highest calibre and incapable of misinterpretation. For the sake of clarity, the Commission considers that websites should be read and comprehensible as a whole document. It cannot be disputed

that the rules and the website must be considered in totality and thus form the basis of all transactions entered into by customers of Betezy.

57. The errors appearing on websites operated by Betezy were such that it is reasonable to suspect that some clients could be confused. Of particular concern to the Commission was the incorrect reference to a regulatory body that did not exist and claims that moneys lodged with the business were protected by that fictitious body. The Commission is not disposed to press this matter further in light of the fact of the rapid response by Betezy to the issues raised. That said it is best for the body of this decision to include the fact that Betezy acknowledged that there were multiple errors appearing on its websites.
58. It is the position of the Commission that while there are grounds to uphold a breach of Condition 19 of the licence the early response by Betezy warrants a penalty of a formal reprimand.

## Condition 22

- *The Sports Bookmaker shall not make any changes to its share capital and ownership structure, without the prior approval of the Commission.*

59. During the course of the investigations conducted by the Commission into the operations of Betezy it became apparent that potential breaches of Licence Condition 22 had occurred. Simultaneous to this discovery the Commission also received credible and corroborating information that alterations to the share capital and ownership structure of Betezy were on foot. The Commission had previously been alerted to the possibility that Betezy were looking to raise funds, by way of anonymous correspondence received in November 2011; however, without supporting evidence no enquiries were made at this time.
60. In the view of the Commission a brief chronology of events is of assistance in placing the discussion that follows in the appropriate context:
- 15 November 2011
    - Anonymous correspondence making claims that Betezy were attempting to raise funds;
  - 21 December 2011
    - Email from Ryan Kay to Malcolm Richardson:
      - *'The shareholders of Betezy have been arranging a shareholder restructure between the existing shareholders. The shareholders will not change just that Vince and my Dad will have a smaller percentage. Is the Commission happy for this to proceed? If so, I will let you know the shareholdings as soon as possible. The aim is to buy Vince out totally in the next few months.'*
  - 28 December 2011:
    - Draw down of funds ;
  - 5 January 2012
    - Commission writes to Betezy asking whether any funds were being raised and whether there were any anticipated changes in the structure of the company;

- 24 February 2012
    - Notification of the Short Term Preferential Loan Facility;
    - Notification of funds raised;
    - Categorization of the nature of the funds.
61. In response to the concerns of the Commission in relation to possible breaches under Condition 22 and Section 81(c) of the *Racing and Betting Act*, counsel for Betezy submitted that the regulator was notified in December 2011 of a proposal to alter the share structure of Betezy and that there was a *'clear indication that the changes would only affect existing shareholders'*. It is the position of the Commission that it is not sufficient that the Manager Racing be merely informed that some potential changes may occur. To suggest that the email to Manager Racing (and his response) on 21 December be given any substantive merit in the sense that the correspondence fulfilled the requirements of Condition 22 is to miss the import and meaning of the Condition entirely. When the email exchange is read fairly, and as a whole document, it is difficult to agree with any suggestion that this correspondence evinced a settled structure or a proposal that had been finalised.
62. On the contrary, Recital A in the Short Term Preferential Loan Facility Deed (which will be discussed in detail below) holds that the funds would be raised for a short term, *'whilst the Directors of Betezy determine the structure of the Betezy Group which structure may be approved by the Directors.'* Further, to rely on the email exchange referred to above as being conclusive evidence of approval for the restructuring to take place one would have to completely disregard the content of other emails and communications, including submissions from counsel, that indicate *'the legal characterization of the funds introduced had not been determined'*. Finally, it was the evidence of Ryan Kay that, *'at the time I sent the email we weren't sure of the actual, you know, structure that we were going to take – that was going to take place.'* The Commission is thus in the position of being asked to believe that the communication between Ryan Kay and the Manager Racing of December 2011 relieves Betezy of any obligation beyond that date in relation to the requirements of Condition 22 while on the evidence, the submissions from counsel, and the text within the deed itself it is acknowledged that the legal personality of the fund raising exercise had not been determined at that date.
63. It is for the above reasons that the generalist parameter-type exchange that occurred between Mr Kay and the Manager Racing on 21 December will not be afforded any substance in satisfying the requirements of Condition 22. At best this exchange can be considered a speculative gesture; at worst one could categorize it as a hasty response to an issue that had been raised in earlier correspondence to Betezy from the Commission.
64. The Commission considers that one further issue should be considered in relation to determining a breach, or otherwise, of Condition 22. This arises from the evidence of Mr Ryan Kay and goes to the actual strategy behind the corporate restructuring. There was clearly an approach that was contemplated that was designed to dilute the holding of Mr Vince McDonald. Mr Kay testified that existing shareholders were poised to purchase Mr McDonald's shares at a time in the near future but, *'we weren't quite sure of the timing of that and we thought it was best to, you know, leave that for a time as Vince had been, he may be possibly deluded.'* This evidence clearly evinces an intention at senior management level to restructure the shareholder register of Betezy that can be traced to well before

the actual Hearing; which is in direct contradiction of other evidence before the Commission.

65. By way of letter from Piper Alderman to the Commission on 24 February 2012 the Commission was formally introduced to the Short Term Preferential Loan Facility. It was highlighted at point three that:

*Betezy proposes to issue new shares to its existing shareholders. No new shareholders are proposed. As such, and on one view, any proposed share issue would not effect a change to Betezy's share capital and ownership structure, however, Betezy has adopted a conservative approach.*

66. The letter goes on to state at point four that; '*Betezy acknowledges and regrets the delay in seeking approval for the share issue*'. The Commission respectfully disagrees with the submission from Piper Alderman in relation to its view in relation to the changes in the share structure of the company. By any measure, the dilution of a major existing shareholder is a substantive change to the structure of any corporation with potential implications at Board level and in relation to governance and possible future financial support.
67. The position of the Commission in relation to the implausibility of the initial correspondence between Mr Kay and the Manager Racing as being anything more than speculative and exploratory is further confirmed within the Piper Alderman letter. The letter essentially sought retrospective approval for an initial fund raising (the funds that had already been received and partially dispersed) that had occurred prior to settlement on the nature of the raising and the manner in which it would be legally categorized. The response of the Commission to this request is dealt with below.

### **The Short Term Preferential Loan Facility Deed**

68. The Commission considers it appropriate to thoroughly articulate its specific concerns with the manner, form and process of the execution of the above deed by Betezy. In particular, the Commission is incensed that it has essentially been asked to approve a post-dated agreement where, on evidence heard at the Hearing, funds raised had already been distributed to third parties. This has the obvious consequence of essentially forcing the Commission to approve the facility.
69. The Commission is further concerned that it has been misled as to the actual reasons for the loan facility. In and of itself the Commission has neither reason nor right to intervene in the commercial operations and day to day management of any licensed bookmaker. That said it is the belief of the Commission where conflicting reasons are given for a particular fund raising exercise it is proper for further enquiries to be undertaken. At various times during the investigation into the potential breach of Condition 22 it was suggested that the funds were to be deployed to, 'reduce debt', satisfy the paying out of White Label agreements considered to redundant, and to facilitate the merger or facilitate its acquisition by another licensed bookmaker – 'the deal with Sportsbet'.
70. It is open to conclude that the funds were raised rapidly without any real settled structure and no debt or equity category in mind and that, as counsel suggests in his submissions; '*with the inquiry pending, the shareholders considered the status of these funds needed to be clarified and proposed that the funds introduced be characterized as a short term preferential loan facility.*' It is at this point that the

efforts to reverse-engineer the facility as one that had been approved at an earlier time by the Commission fails.

71. It is the position of the Commission that the regulator was misled because ultimately the changes did in fact alter the share capital and the composition of the shareholder register. The Commission thus finds that a breach of Licence Condition 22 has occurred and issues a penalty of a fine in the amount of \$2,500.00.

### Condition 23

- *The Sports Bookmaker must not allow third party access to electronic records or systems associated with the conduct of the Sport's bookmaker's business unless the approval of the Commission is obtained.*

72. A breach of Condition 23 goes to the very core concerns of the Commission in relation to probity and integrity of racing and wagering systems. Evidence presented to the Commission at the Hearing provided reassuring comfort that there was no reason to believe that third party access that could constitute serious security or system integrity breaches had occurred or could occur at Betezy. On the evidence before the Commission there is no reason to believe that access to electronic records or systems by unauthorised personnel has occurred.

73. It is the finding of the Commission that no breach of Condition 23 of the licence can be sustained.

### Section 81

74. Section 81 of the *Racing and Betting Act* holds that:

- *A bookmaker who, except with the approval of the Commission:*
  - a) *Enters into a partnership in relation to the business of bookmaking carried on under his licence or permit with a person whose name is not endorsed on his licence or permit; or*
  - b) *Makes an arrangement or enters into an agreement with a person whereby that person becomes entitled to a share in the profits of that business; or*
  - c) *Borrows money, except from an approved financial institution, for use in that business, is guilty of an offence.*

75. In determining the possible breaches under Section 81 of the *Racing and Betting Act*, as outlined above, the Commission considers it appropriate to establish at the outset that there are three possible scenarios in relation to potential breaches under Section 81(a) and Section 81(b). They are that a single agreement offends:

- Section 81(a); or
- Section 81(a) and (b) jointly; or
- Section 81(b)
- Section 81(c)

76. For the purposes of explaining the structure of the detail in the narrative that follows the Commission will provide an example of each potential breach and then list other breaches that it considers fall within the categories outlined above. That

is, each of the above four options will be considered in a discrete manner. Where multiple breaches of the *Act* have occurred, that is where there has been a breach of Section 81(a) and (b), the Commission considers these instances to be of a more serious nature. General information, prior communications, evidence, and final submissions will be considered immediately below and then the categories outlined above will be explored and surveyed in detail.

77. In determining whether potential breaches of the *Act* have occurred the Commission must, in the first instance, turn its mind to whether or not a particular agreement had been referred to it (or the Manager Racing) and then whether or not such agreement had been approved by the Commission. In order to fully inform itself of the above threshold requirement the Commission conducted extensive investigations of its own volition (as it is permitted to do under the *Act* as outlined above), sought information from Betezy prior to the Hearing, sought information from co-signatories prior to the Hearing, took evidence from Mr Ryan Kay at the Hearing, and then received submissions from Counsel at the conclusion of the Hearing.
78. The Commission considers that the submission of Counsel for Betezy seeking to evidence prior communication of White Label proposals by a former employee of the business (Ms Grace Brooks) needs to be addressed at this point. The Commission has been assured by the Manager Racing that no communications from Ms Grace Brooks have ever been received in relation to White Label agreements. Extensive data-matching and archive searches have been undertaken and the Commission is of the view that the evidence of Mr Kay with respect to suggesting that Ms Brooks sent email notification to the Manager Racing of White Labels prior to their launch and for the approval of the Commission is not accurate.
79. Counsel for Betezy submits that:
- The evidence of Mr Kay was that in a number of instances, he was informed by the previous manager, Mr Vince MacDonald, that the regulator had been notified of all white label sites. Such notification not specifically identified would have been via his secretary Grace Brooks. Unfortunately, Ms Brooks no longer works for Betezy and at the time of her leaving the email records of Ms Brooks were deleted by her from the system. Hence Betezy is unable to establish the actual approval status of certain of the affiliate-based sites.*
80. It should be recorded at this point that Mr Vince MacDonald, as both former Managing Director and substantial shareholder of Betezy, was invited to attend the Hearing but declined to do so.
81. The Commission considers not approved all but the White Label agreements that it can be established were in fact approved. The fact that Betezy is not able to establish which White Label agreements had not been approved by the Commission is of no concern to the Commission. The concern of the Commission are the White Label agreements where no evidence of approval (or otherwise) can be found in either the files of the Manager Racing or the Commission minutes.
82. The position that the Commission takes on this is in accord with the submission of Counsel for Betezy where it was put that; *'it is for the regulator to establish the lack of notification or that approval had not been obtained. There should be no onus on Betezy to establish that it has not been in breach of the Act.'* The outcome of this position is that those agreements that Betezy cannot establish

were approved, and those agreements where the regulator has no evidence of approval being sought or given, are not approved.

83. It should be noted, and the following is offered in support of the hard distinction settled on above, that there has been no instance of Betezy establishing submission and approval of a White Label agreement and the Commission (or the Manager Racing) not having evidence of such approval. The extended binary to this position is that for every agreement the Commission now has in its possession that it considers not approved there is no evidence that Betezy had ever sought approval. To allege or assume a breakdown in record-keeping procedures at the Manager Racing or Commission level is fanciful.
84. In further submissions at the conclusion of the Hearing Counsel for Betezy submitted that; *'it is significant that the regulator has not refused to approve any white label sites of which it was notified.'* The Commission is unsure why, should the position be simply inverted, it *would be* significant that where appropriate White Label approvals were sought under proper procedures and protocols all applications *were* approved. On the contrary it seems perfectly obvious to the Commission that when the proper procedures were undertaken by Betezy, and consultation occurred with the Department, that approval would be obtained forthwith. If Counsel for Betezy is suggesting that because there had been no rejections by the Manager Racing and as a consequence this somehow offered arbitrary approvals to all White Labels the Commission rejects such submission outright.
85. It follows then that the Commission rejects the position of Counsel that, *'in the circumstances, it is submitted that the Commission cannot be satisfied that there has been any breach of the Act in relation to the operation of these white labels.'* To be clear, where the Commission takes the view that a White Label has not been approved, this is considered to be a breach of the corresponding Section or Sections of the Act.
86. Counsel further offers that, *'none of the sites where approval status is unknown would have been of particular concern to the regulator or would not have been approved.'* Respectfully, the Commission disagrees with this suggestion from Counsel for Betezy. The Commission takes the view that the particular concerns of the Commission are best left for it to determine.

### **Section 81(a)**

87. For a breach of the above subsection to be sustained the Commission must be satisfied that there is a partnership agreement on foot between Betezy and another party that has not been approved. If it can be established that such a partnership exists and there is no evidence that formal approval has been received from the Commission, the view of the Commission is that a breach of the subsection of the Act has occurred.
88. By way of an example of a White Label agreement that the Commission considers to be in potential breach of the above subsection the Commission highlights the following:
  - **Betezy Pty Ltd and Box Hill Hawks Football Club.**
    - For the purposes of this decision the Commission has determined that commercial sensitivities be acknowledged and as such it is sufficient to



note only the Section that offends the *Racing and Betting Act*. Section 4 of the agreement holds that:

- In consideration of the Club's marketing and promotion of the Website and for the introduction of Members and Supporters on the Club Database and other interested customers to the Website, the operator will pay the Club the fees set out in Schedule B & C.
    - The Schedules detail that Betezy agrees to pay:
      - A minimum payment of funds to the counterparty on an annual basis;
      - A monthly payment based on turnover introduced to Betezy via the Website of the counterparty; and
      - A potential bonus payment calculated on a Net Profit Website basis.
89. The Commission finds that Betezy has breached Section 81(a) of the *Racing and Betting Act*. Additionally, it must be noted that there are multiple incidents of the same breach with other parties; however, the Commission is of the view that rather than itemise each successive breach it is more appropriate to note that the other agreements offending the Section of the *Act* are in the custody of the Manager Racing of the Northern Territory.
90. It is the finding of the Commission that the breaches outlined above warrant a penalty of a fine in the amount of \$10,000.00. This penalty reflects the fact that on multiple occasions Betezy were given opportunities to declare and rectify the breaches and declined to do so.

### **Section 81(a) and (b)**

91. For a breach of the above two subsections of the *Act* to be sustained the Commission must be satisfied that an agreement existed or exists between Betezy and a third party to not only enter into a partnership in relation to the business, but that the one and same agreement also includes a possibility for a party (whether or not it is the same party or another party) to share in the profits of that business.
92. If the above can be established and there is no evidence of formal approval from the Commission the view of the Commission is that a breach of the subsections of the *Act* can be sustained.
93. By way of an example of a White Label agreement that the Commission considers to be in potential breach of the above subsections the Commission highlights the following.
- **Betezy Pty Ltd, Gaythorne Sub-Branch Inc, and Ritnel Pty Ltd**
    - For the purposes of this decision the Commission has determined that commercial sensitivities be acknowledged and as such it is sufficient to note only the content of the agreement that offends the *Racing and Betting Act*. The relevant Section states that:
      - The Net Profit will be broken down between all parties stated in Section A of this agreement as Betezy 50, Club 40, and management 10.

94. The Commission finds that Betezy has breached Section 81(a) and (b) of the *Racing and Betting Act*. Additionally, it must be noted that there are multiple incidents of the same breach with other parties; however, the Commission is of the view that rather than itemise each successive breach it is more appropriate to note that the other agreements offending the Section of the *Act* are in the custody of the Manager Racing.
95. It is the finding of the Commission that the breaches outlined above warrant a penalty of a fine in the amount of \$10,000.00. This penalty reflects the fact that on multiple occasions Betezy were given opportunities to declare and rectify the breaches as outlined above and declined to take such opportunity to mitigate ultimate penalty.

### Section 81(b)

96. For a breach of the above subsection to be sustained the Commission must be satisfied that there is a profit sharing agreement on foot between Betezy and another party that has not been approved. If it can be established that such a profit sharing agreement exists and there is no evidence that formal approval has been received from the Commission the view of the Commission is that a breach of the subsection of the *Act* has occurred.
97. By way of an example of a White Label agreement that the Commission considers to be in potential breach of the above subsection the Commission highlights the following.
- **Betezy Pty. Ltd. and Ritnel Pty. Ltd.**
    - For the purposes of this decision the Commission has determined that commercial sensitivities be acknowledged and as such it is sufficient to note only the content of the agreement that offends the *Racing and Betting Act*. The relevant Sections of the agreement hold that:
      - Monthly fees are calculated on the basis of 1% of Total turnover on Sport and Racing derived from the Website which will be paid to a nominated bank account; further
      - Betezy undertakes to pay bonuses on winning months equal on profit share of 50/50.
98. The Commission finds that Betezy has breached Section 81(b) of the *Racing and Betting Act*. Additionally, it must be noted that there are multiple incidents of the same breach with other parties; however, the Commission is of the view that rather than itemise each successive breach it is more appropriate to note that the other agreements offending the Section of the *Act* are in the custody of the Manager Racing.
99. It is the opinion of the Commission that the breach outlined above warrants a penalty of a fine in the amount of \$5,000.00.

### Section 81(c)

100. For the purposes of determining possible breaches of the above Section the Commission considers it appropriate to explore the construction of the Section and subsection of the *Act* in detail. The Commission considers that on any plain English interpretation of this Section that Betezy is obligated to seek approval at two distinct junctures (although it is conceded that such approvals could be given

concurrently). That is, there is a requirement for an initial authorization under Section 81 for approval to be given to the licence holder so that it can borrow money. Secondly, under subsection (c) there is a requirement for a secondary approval to be obtained from the Commission. In the first instance the appropriate approval is sought to raise money; in the second instance the Commission is required to approve the financial institution from which the licence holder intends to borrow the funds.

101. This is an obligation of two limbs for a particular reason. The Commission is of the view that this Section of the *Act* operates to ensure that licence holders not only inform the Commission when there is a proposal for funds to be introduced into the business by way of debt (which may or may not be approved by the Commission), but that it also serves to ensure that such funds are acquired from reputable sources (a source that the Commission approves).
102. As a result, for a breach of the above Section to be sustained the Commission must be satisfied that Betezy borrowed funds without at first notifying (and obtaining approval) its intention to actually raise funds and then be satisfied that Betezy acquired the funds from a source or sources that were not approved by the Commission.
103. The evidence before the Commission in relation to the Short Term Preferential Loan Facility has been explored above. It is the view of the Commission that Betezy at no stage prior to 24 February 2012 informed the Manager Racing or the Commission that there was an intention to raise funds by way of a loan facility. The email relied upon by Betezy in relation to the upheld breach of Condition 22 was again relied upon as providing some notice of the intention of Betezy to raise loan funds and thus meeting the requirements of Section 81(c). For the reasons outlined above the Commission affords no weight whatsoever to the email exchange between Ryan Kay and the Manager Racing in determining whether this breach is upheld or otherwise. In the absence of any other communication with the Commission prior to 24 February 2012 that demonstrates approval had been sought and given the Commission can only rely on the following.
104. As indicated in evidence, Mr Kay confirmed that the funds (that ultimately became the quantum of the Short Term Preferential Loan Facility) were raised and distributed without either the proposal to seek a loan or the loan providers being approved. The Commission may have been disposed to give Betezy some benefit of the doubt that the version of events advanced, that the facility was put together with a view to then seeking the approval of the Commission, was an accurate portrayal of a proposed sequence of events. The distribution of the funds raised to repay debts, without the approval of the Commission is, however, fatal to any possibility of convincing the Commission that the above sequence had been contemplated by senior management.
105. The facts and evidence establish that the funds were raised without approval and from a source that had not been approved.
106. The Commission finds that a penalty of \$10,000.00 is warranted due to the serious nature of the above breach. Further, the seriousness of this breach is compounded by the fact that the Commission was placed in the position of being ultimately forced to approve an arrangement after a 'point of no return' had occurred.

## Part Three

### Decision Overview

107. It is of concern to the Commission that a prevailing culture of arrogance, passive governance, and complete administrative disorganisation has prevailed at Betezy for quite some time. Management seem particularly insensitive to the role and duties of the regulator. Betezy have failed to be transparent and honest to the Commission in many instances.
108. In terms of mitigation of penalty it must be noted that on several occasions Betezy was cautioned and reminded that; *'The Commission is conducting peripheral enquiries at present and reminds Betezy that no mitigation will be afforded where Betezy has delayed presenting information to the Commission that it has requested'*. The import of this warning was either lost or not considered worthy of attention by Betezy and it follows that many of the penalties issued in Part Two of the decision fall at the harsh end of the scale.
109. The fact that it appears there is no genuine diagnostic system for ascertaining the true status of White Labels, with whom Betezy is contractually obligated, is of significant concern to the Commission. The simple reality is that by obtaining the appropriate and required consents Betezy could have avoided most of the issues on which they appear before the Commission.
110. For the sake of clarity, the role of the Commission is to regulate bookmakers with the overall sustainability of the industry being one of its primary objects. The Commission seeks a business environment that is conducive to progressive enterprise and respectful of the commercial decision making autonomy of industry participants. The regulatory regime must operate for the benefit of all and as such cannot be undermined by those who seemingly choose to operate beyond the margin of acceptable conduct.
111. While some of what has been heard in relation to the breaches outlined above can be categorized as an abuse of not overly onerous regulatory requirements or a light regulatory touch it is only fair to acknowledge the short-comings of the systems operating within the Manager Racing's compliance area which to some degree may be attributable to resourcing issues. Compliance Department in certain areas. This does not, however, immunize Betezy or relieve them of their regulatory and compliance obligations in any way. The Commission is unable to accept that, at the first given opportunity Betezy availed themselves of the chance to proactively inform the Commission of corporate governance failures.

### Penalty

112. The Commission hereby approves the schedule of White Label agreements delivered to the Commission at the conclusion of the Hearing. This document is the singular repository and record of approvals by the Commission. Betezy is cautioned that any agreement that does not appear on this list is therefore operating in breach of the bookmaker's licence and the *Racing and Betting Act*.
113. Within a sixty day period all counterparties to all approved White Label agreements will be required to undergo probity checks conducted by and to the satisfaction of the Commission. The Commission reserves its right to immediately cancel any affiliate agreement where a counter party fails probity.

114. The Commission has imposed fines totalling \$45,000.00 in respect of the breaches found to have been committed by Betezy. The Commission considers the aggregate amount of the fines to be appropriate in the circumstances of the compliance failures identified in the above decision. That amount is to be paid by Betezy to the Receiver of Territory Monies within twenty-eight days of the date of publication of this decision.

Richard O'Sullivan  
Chairman

2 July 2012