

**BRITISH HORSERACING AUTHORITY**  
**SUBMISSION TO SIR PHILLIP OTTON,**  
**ACTING AS CONSULTANT TO THE HORSERACE BETTING LEVY BOARD**

**A. INTRODUCTION**

- 1.1 The British Horseracing Authority ("BHA") welcomes the appointment of Sir Philip Otton by the Horserace Betting Levy Board (the "**Levy Board**") as a consultant *"to provide independent advice to the Levy Board, in particular to the independent members, in respect of their consideration of the 48<sup>th</sup> Levy Scheme"*.
- 1.2 We also note, and share the Levy Board's hope, that *"a neutral view from a distinguished and independent third party who has considered the arguments....may assist in the process of fixing the levy."*
- 1.3 The task of providing a recommendation is formidable.
- 1.4 We have considered how best the BHA might seek to assist you in this process, given the limited timescale and the complexity of the issues involved. We believe this process is unsuited to any full economic analysis (although the BHA remains willing and able to assist with such an analysis, if necessary, as part of any determination process).
- 1.5 Our conclusion is therefore that the most useful assistance we can provide is to offer our summary of the key issues, and how, as a consequence, we believe the 48th Levy Scheme should be settled.
- 1.6 We shall deal with the issues in the following order:
  - 1.6.1 The legislative background and "the test" for determining the Levy.
  - 1.6.2 Relevant background - events prior to the 47th Levy Scheme.
  - 1.6.3 The 47th Levy Scheme - the determination process.
  - 1.6.4 Developments since the 47th Levy Scheme determination (including developments in relation to Turf TV and the Bookmakers' Committee Recommendations for the 48th Scheme).

## B. THE TEST

### 2. A new scheme or a "roll over" of the existing scheme?

- 2.1 If the Levy Board has not approved the Bookmakers' Committee Recommendations for the 48th Levy Scheme by 31 October 2008, the Betting, Gaming and Lotteries Act 1963, as amended, requires that the 48th Levy Scheme is referred to the Secretary of State for determination.
- 2.2 The Secretary of State has the freedom to determine a new scheme, or to direct that the current scheme shall continue to have effect (a "**Roll-Over**"), subject to any modifications he may specify. When he determined the 47th Levy Scheme, the Secretary of State elected to Roll-Over the 46th Levy Scheme.

### 3. Statutory Background

It is worth summarising the legislative context in which any Levy determination is conducted.

(a) *The Betting Levy Act 1961 ("1961 Act")*

The 1961 Act introduced a levy payable by off-course bookmakers.

Section 1 of the 1961 Act established the Levy Board for the purposes of assessing and collecting monetary contributions from bookmakers and from the Tote, such monies to be applied in accordance with the schemes approved pursuant to that Act for the purposes, set out in Section 1(1) (which were reproduced from the Racecourse Betting Act 1928). These were:

*"(a) the improvement of breeds of horses;*

*(b) the advancement or encouragement of veterinary science or veterinary education;*

*(c) the improvement of horse racing"<sup>1</sup>.*

Section 3 of the 1961 Act set out the parameters of the schemes (for assessing the amount, and contributions to be made by various categories of bookmaker) which are to be devised by the Bookmakers' Committee, for approval by the Levy Board. If approval was not given by the Levy Board, the three independent members (including the chair person) of the Levy Board were, under Section 3(6), to consider and compare:

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<sup>1</sup> It is worth noting that in the Peppiatt Report, commissioned by the Government in advance of introducing the Levy in 1961, its authors stated they did not: "*think that it is necessary to establish that horseracing is declining to justify a levy. The United Kingdom has for a long time been in the lead in horse racing and [the Committee thought] that the infusion of fresh money [i.e. the levy] should be regarded not as serving to bolster a declining industry but as an aid to improving it.*" This reasoning was referred to by the then Home Secretary (Mr R Butler) as providing the "*desirability*" for the imposition of a Levy system.

- the extent of the *need* for the time being for contributions for the purposes of (a) to (c) above;
- the *capacity* for the time being of bookmakers to make contributions for such purposes; and
- the *capacity* for the time being of the Totalisator Board to make such contributions.

In the light of such consideration/comparison, the independent members were to make their own determination of the scheme. This is the so called "**Need/Capacity to Pay Test**".

(b) The Betting, Gaming and Lotteries Act 1963 ("1963 Act")

The 1963 Act consolidated various provisions in relation to betting, gaming and lotteries, such that Section 1 of the 1961 Act became Section 24 of the 1963 Act (which remains on the statute book) and Section 3 of the 1961 Act became Section 27 of the 1963 Act.

(c) The Horseracing Betting Levy Act 1969 ("the 1969 Act")

The provisions of the 1963 Act relevant to the Levy remain substantially on the statute book, with the exception that Section 27(5) of the 1963 Act (which replaced Section 3(6) of the 1961 Act - i.e. the Need/Capacity to Pay Test) was repealed by Section 7(4) of the 1969 Act.

By Section 1(2)(b) of the 1969 Act, if any scheme recommended by the Bookmakers' Committee is not approved by the Levy Board *"the Secretary of State shall determine the scheme"*. In doing so, by Section 1(2)(c) he may either determine a new scheme, or direct that the current scheme shall continue to have effect for that period also, subject to any modifications (if any) as he may specify".

(d) Factors historically taken into account in determining the Levy

Following the repeal of the Needs/Capacity to Pay Test, the Secretary of State now has a broad discretion, subject to public law principles, to set a new levy, or continue an existing scheme, as he sees fit. The Levy legislation is now silent on the question of what factors should be taken into account as part of the "test" when determining the Levy.

However, it is clear that the Needs/Capacity to Pay Test, has (amongst other factors) has remained important to the determination of the Levy:

- (i) The promoter of the 1969 Act, Elystan Morgan made the following comments, recorded in Hansard:
- ***"I also give the House this assurance. In exercising the functions conferred on him by the Bill, the Home Secretary will have regard to the capacity of the bookmakers to pay and also of the ability to pay of the Tote Board. At the same time, he will have regard to the needs of horseracing."***

***I cannot see how the Home Secretary could carry out this function without having regard to these factors, but I am fully aware of the anxieties that have been expressed by the bookmakers and, for that reason, I give that considered assurance."*** (Horseracing Betting Levy Bill 1969 - 5 March 1969, 567)

- ***"The Secretary of State will have to weigh the considerations I have outlined, but they may not be the only ones. The transfer of this responsibility to a Minister of the Crown must enlarge the perspective of judgment as compared with that which was vested in the independent members of the Levy Board. The public interest may require certain other considerations, fiscal, social or economic, also to be taken into account."*** (Horseracing Betting Levy Bill 1969 - 28 January 1969, 1220)

(ii) The report submitted by the consultants appointed by DCMS to assist determination of the 41st Scheme considered needs and capacity to pay as the *only* relevant factors to determining quantum (OCP - "Determining the Levy 41st Scheme". 17 December 2001, para 1.6).

(iii) In the tender appointing consultants to assist the DCMS in the determination of the 47th Scheme, DCMS expressly required their chosen consultants to *"to arrive at an in-depth understanding of the capacity of bookmakers to pay and the needs of racing"*. DCMS instructed their consultants as follows:

*"The legislation is silent about how the Secretary of State is to determine the scheme and about any criteria to be applied in reaching a determination. However, during the passage of the [1969 Act], which transferred the responsibility for determination to the Secretary of State, assurances were given that the Secretary of State "will have regard to the capacity of the bookmakers to pay...at the same time, will have regard to the needs of horseracing". The Secretary of State should act, and be seen to act, fairly and even handedly."*

(Mini Tender requirements for the provision of Consultancy Services for the determination of the Horserace Betting Levy Referral, dated 9/11/07 paras 4 and 7)

(iii) The Bookmakers' Committee adopted this same formulation in its submission to the DCMS concerning the determination of the 47th Scheme:

*"the capacity of the bookmakers to pay the Levy has always been one of two main considerations in the setting of the annual levy (the other being the needs of racing)"*

(Bookmakers' Committee submission to the DCMS dated 26 November 2007, para 15).

#### 4. The test to be applied for determining the Levy - the BHA's view

4.1 In the BHA's submissions in respect of the 47th Scheme, provided to the Secretary of State on 26 November 2007 and 21 December 2007 (the "**BHA's 47th Scheme Submission**"), the BHA gave its view as to what the Secretary of State should consider relevant and irrelevant considerations as part of the test based on public law principles, in the context of the Secretary of State's overall obligation to act reasonably in the exercise of his discretion. The determination of the Secretary of State necessarily involves ascertaining the proper statutory purposes for which he may exercise his discretion.

4.2 BHA's submission as to the factors the Secretary of State should have in mind in the context of the 47th Levy Scheme determination can be summarised by the following extracts from the BHA's 47th Scheme Submission:

- *"The role of the Levy is clear: it should ensure that, in recognition of its sporting, economic, social and cultural benefits, British racing not only survives, but improves"*<sup>2</sup>.
- *"In determining the Scheme, the Secretary of State is tasked with setting a fair and reasonable Levy. In doing so, he should address the "needs" of racing and the bookmakers' capacity to pay but should also take account of other fiscal, social and economic considerations"*<sup>3</sup>.
- *"In considering the "needs" of racing, the role of the Levy is to ensure that British racing not only survives, but improves; the "needs" of racing should be measured against that high standard"*<sup>4</sup>.
- *"It would be counter-intuitive to take a narrow, restricted view of any part of that Determination, including the consideration of bookmakers' capacity to pay – instead, the Secretary of State should properly have regard to the prevailing economic, social and fiscal conditions at all times, including when assessing the bookmakers' capacity to pay"*<sup>5</sup>.
- *"Therefore, consideration should be given to the whole of the bookmakers' businesses. This requires an assessment of the wider revenues from the bookmakers' entire operation (i.e. including revenues made from*

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<sup>2</sup> Section 2.2 of the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007. The BHA was and remains of the view that the purpose of the Levy is to "improve" horseracing (i.e. not merely "maintain" it), as per the clear words of the statute and in this context the BHA contends that the word "improve" should bear its plain English meaning.

<sup>3</sup> Section 2.3 of the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007.

<sup>4</sup> Sections 2 and 3.1 of the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007.

<sup>5</sup> Sections 2.3 and 3.2.2 of the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007.

*FOBTs/amusement with prizes machines in their shops, profits made from the Irish lottery, other sports betting etc), which ... are achieved as a result of the betting industry's historical symbiosis with horseracing, and so are directly related to betting on horseracing."*<sup>6</sup>

## **5. The test - the Bookmakers' Committee adopted a different approach**

- 5.1 Although the Bookmakers' Committee's approach to the test has varied between its submissions, both the BHA and the Bookmakers' Committee agreed that the needs of horseracing and capacity to pay remain relevant factors. However, there was disagreement as to the scope of, and precise meaning to be given to, those terms.
- 5.2 In particular, the Bookmakers' Committee rejected BHA's argument that in considering the gambling operators' "capacity to pay" the Secretary of State need not be limited to considering only the betting revenues deriving directly from bets placed on British horseracing.
- 5.3 The parties also disagreed as to the permissibility of referring to Hansard and other extraneous materials in assisting with the statutory purpose and relevant and irrelevant factors (see further sections B 5.12 to 5.14 below). The differences in approach are evident in the Memorandum from the Bookmaker's Committee to the DCMS dated 7 January 2008 (the "**BC Memorandum**"), responding to the BHA's 47th Scheme Submission.

### **"Need"**

- 5.4 The BHA argues that racing's needs should be assessed according to the statutory purpose of the "improvement of horseracing", i.e. "need" should not be limited to maintaining the status quo but should be what is needed to make horseracing better. The Bookmakers' Committee did not express in detail what it regards as constituting "need", but on its view of the statutory purpose as we understand it from the BC Memorandum, then this would appear to be limited to what is needed merely to fund racing (i.e. retain the status quo). We regard this limited view of the statutory purpose as incorrect because it ignores the word "improvement" and as such, the Secretary of State should not take the view that "need" is limited in this way.

### **Capacity to pay**

- 5.5 In the BC Memorandum (in comments attributed to Pushpinder Saini QC), the Bookmakers' Committee says that the term "capacity to pay" is misleading in that it might suggest that a bookmaker should pay whatever he can afford even if it leaves him with little or no profit and that it is more appropriate to refer to a bookmaker being required to pay what is reasonable. In general, the BHA does not object to this: the BHA would say that when considering the bookmakers'

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<sup>6</sup> Please refer to Section 3.2.2 of the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007, where the arguments in favour of the consideration of bookmakers' wider revenues are set out.

capacity to pay, the Secretary of State should act reasonably considering all the relevant circumstances (including economic realities) and therefore should not come to a conclusion which prevents the bookmakers from operating with economic efficiency.

- 5.6 However, more significantly, the BC Memorandum alleges that: it would be "*an error of law and also irrational for the amount of the Levy to be based in any way on ... non-British racing or from other sports or gambling (such as FOBTs)*".
- 5.7 The BHA strongly disagrees. To establish that this conclusion would be an error of law (if made by the Secretary of State), it would be necessary to show that this conclusion is irrational in sense of being *Wednesbury* unreasonable.
- 5.8 The BHA has set out to establish why it is entirely reasonable for income from sources other than British racing to be considered when considering the bookmakers' capacity to pay<sup>7</sup>. The Bookmakers' Committee may not agree with the BHA's arguments, but it has not demonstrated that a decision maker agreeing with them would be acting unreasonably in the public law sense. Indeed, on the contrary, the BHA would submit that it is the position advocated by the Bookmakers' Committee which is irrational, since, if it were correct, the betting industry would be free to use the racing product as a "loss leader" from which it derives no direct profit, yet increases profit from other activities such as FOBTs, and would be liable to pay no Levy at all. We would submit that that could not be a rational outcome for any Levy determination.
- 5.9 Even the Bookmakers' Committee's own submissions are confused on the subject. We refer you to our comments on the Bookmaker's Committee recommendations for the 48th Levy Scheme set out at section E 3 below.
- 5.10 It seems probable that Bookmakers' Committee's conclusion is based on section 27(2)(a) of the 1963 Act which states that the Levy shall only be payable "*in respect of so much of the business of the bookmaker as relates to ... betting transactions [on horse racing]*". However, this wording plainly relates to the sum (the "pot") upon which the Levy is levied. In so doing the 1963 Act prevents a scheme being approved or determined which requires sums to be paid out of revenues other than those gained from horse racing. This wording is not expressed to operate, and should not operate, to limit the bookmakers' revenues which might properly be considered by the Secretary of State when determining "capacity to pay". In our view, it would be entirely incorrect for a decision maker to direct itself, on the basis of the statutory wording in section 27(2) alone, that other revenues are an irrelevant factor.

#### **Other "fiscal, social and economic considerations"**

- 5.11 The BC Memorandum did not specifically reject the BHA's contention that the Secretary of State should consider other "fiscal, social and economic

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<sup>7</sup> Please refer to Section 3.2.2 of of the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007.

considerations", although it does not specifically accept them. We would continue to assert that these should be considered by the Secretary of State, for the reasons set out in the BHA's 47th Scheme Submission.

### **Reference to extraneous materials in determining the scope and exercise of discretion**

- 5.12 The BHA's 47th Scheme Submission recommended that the Secretary of State adopt BHA's view of the proper statutory purpose of the Levy, together with the BHA's views on what should be considered relevant and irrelevant factors. In support of the BHA's recommendations, the BHA referred to the Peppiatt Report, commissioned by the Government in advance of introducing the Levy in 1961, and to comments by the promoter of the original legislation in Parliament.
- 5.13 The Bookmakers' Committee criticised the BHA's references to the Peppiatt Report and Hansard on public law grounds. However, in the BHA's view, it is entirely proper for a Secretary of State, having reached a view on the proper purpose of the legislation, or on what are relevant and irrelevant considerations, to consider Hansard or other extraneous materials in order to confirm those views. In the present case, he will find such confirmation unambiguously in the words of the promoter of the Bill and in the Peppiatt Report. It follows that we would disagree with the Bookmakers' Committee's assertion that such comments are irrelevant.
- 5.14 Indeed, in the BHA's view it is entirely reasonable for the Secretary of State to have regard to extraneous materials when forming his view in the first place. In that regard it is, to the BHA's mind, illogical to argue, as the Bookmakers' Committee appear to have argued (in reliance on *Pepper v Hart* and subsequent case law) in the BC Memorandum, that it would be "unreasonable" for the Secretary of State to have regard to ministerial statements or other extra-statutory materials when considering the exercise of his discretion. *Pepper v Hart* and the subsequent case law referred to concern only the extent to which the courts can use Hansard in the context of judicial review, *ex post facto*, of government decisions. They do not place a limit on the sources of information that the Secretary of State himself may reasonably use to assist him in making a decision. Again, it follows that we would disagree with the Bookmakers' Committee's assertion that such materials are irrelevant.

## **C BACKGROUND/CHRONOLOGY**

### **1. Attempts to find a commercial alternative to the Levy**

- 1.1 When announcing her determination of the 41<sup>st</sup> Scheme on 31 January 2002, Tessa Jowell stated that she would: *“like to encourage the betting and racing industries to develop a modern relationship as business partners and move away from an adversarial approach...in developing their businesses to their mutual benefit”*.
- 1.2 We set out, at Schedule 1, a chronology of events relating to the various attempts to find a solution. We set out below, two key events which have shaped the present circumstances.

### **2. Database rights are not a robust commercial alternative.**

Racing identified the sale of pre-race data as a mechanism for the possible replacement of the Levy, and implemented arrangements for the sale of such data. Plans to abolish the Levy in favour of income from commercial sources were far advanced when judgment was handed down by the European Court of Justice in November 2004 (indeed legislation abolishing the Levy had already received Royal assent). As well as this judgement effectively necessitating the abolition of plans to replace the Levy, British racing lost over £18,000,000 per annum from non-British betting operators who are now able to make use of the British racing product without paying anything to the sport.

### **3. The Donoghue Report on the future funding of racing**

- 3.1 Facing the loss of statutory and commercial funding for the sport, in January 2005, the British Horseracing Board, in conjunction with the Bookmakers' Committee, the Levy Board and the DCMS commissioned the Future Funding of Racing Review Group ("**FFRRG**"), chaired by Lord Donoghue, to propose an enforceable and sustainable mechanism by which betting operators could contribute to the funding of British racing in the future.
- 3.2 The FFRRG's key recommendations were:
- The creation of a new single organisation to assume the central administration, governance and regulatory roles of the sport in a streamlined and cost effective manner (the "**Governance Solution**"); and
  - A purely commercial Levy replacement solution should (provided it was compatible with competition law) be based on the sale by racing to UK and Irish bookmakers of a package centred on access to the racecourses for the purpose of acquiring pictures, race-day data and all other related rights (the "**Commercial Solution**").

3.3 The Governance Solution - has been achieved by the creation of the British Horseracing Authority

With the launch of the BHA, racing has kept up its own commitment to achieving streamlining and modernisation. The Authority now runs and regulates British horseracing to the highest standards.

3.4 The Commercial Solution - not achieved - the effect is that the Levy remains essential to the funding of British racing

- In 2006, the BHB set up a Commercial Structure Group, with bookmaker representation, to assess the feasibility of the proposed commercial solution. Following consideration of extensive legal advice and a subsequent exhaustive appraisal, this Group concluded that it was not possible to guarantee the level of certainty necessary for the new mechanism to be relied upon to replace the Levy. Accordingly, the Group encouraged the Minister to consider a continuation of the current statutory Levy mechanism.
- From that point, further extensive consultation between Government, racing and betting occurred, and, after a period of considerable uncertainty, on 14th December 2006, the then Minister for Sport Richard Caborn announced that, in the absence of an acceptable Commercial Solution, the Levy Board and the levy scheme would continue as the central funding mechanism for racing. The background and reasons for this were set out in the Minister's statement. Racing fully supports the Government decision, as it did the findings of Lord Donoughue's comprehensive, independent FFRRG report on which the decision drew. The British-based betting operators and exchanges also fully supported the Government and Lord Donoughue.
- In July 2007, the Under Secretary of State for the DCMS (Mr Gerry Sutcliffe) confirmed that, just as Richard Caborn MP had stated that the Government was content that there was no viable alternative to the levy in December 2006 (see above), this remained the position in July 2007, "*we still have not identified a stable commercial alternative*" (Fifth Delegated Legislative Committee, 10 July 2007, discussing the draft Gambling Act 2005 (Horserace Betting Levy) Order 2007).
- In short, the Government's decision and Lord Donoughue's analysis remains correct, and nothing has changed to alter the validity of the decision to maintain the levy and the Levy Board: replacement of the Levy has not taken place and the Levy remains the appropriate basis for determining the relationship between the betting and racing industries. However, in considering the amount at which the Levy should be set, it is critical that that level should reflect the commercial realities of the modern relationship between Racing and Betting.

4. **Events since the determination of the 47th Levy Scheme**

- 4.1 In announcing his determination of the 47th Scheme on 20 February 2008, Gerry Sutcliffe reiterated the comments of Tessa Jowell in announcing the determination of the 41<sup>st</sup> Scheme on 31 January 2002. He stated that: "*to this end [he was] convening a meeting, under the auspices of the All-Party Racing and Bloodstock Industries Group, to initiate discussions of a wide range of issues*".
- 4.2 Racing has wholeheartedly embraced that process, and progress is summarised in section E 1 below.

## D THE 47TH SCHEME - THE DETERMINATION PROCESS

### 1. Racing's position and the difficult issues involved

1.1 Racing's views on the determination of the 47th Levy Scheme were set out in the BHA's 47th Scheme Submission. Racing's views remain substantially the same.

### 2. We would summarise the BHA's 47th Scheme Submission as follows:

#### 2.1 The importance of Racing and the role of the Levy

- (a) Racing is a deeply engrained and important part of Britain's sporting and cultural life. Racing also makes a strong contribution to the economy and society as a whole.
- (b) The Levy recognises the unique relationship between racing and the betting industry, and was established as the mechanism by which this contribution could be quantified, and a fair and reasonable return made to the sport.
- (c) The Levy is an integral part of Britain's market-led approach to betting. It is the mechanism in the British legal framework which provides for the transfer of funds from betting on racing for the underpinning and development of the sport.
- (d) In considering the "needs" of racing, those who created the Levy indicated that they considered that there was a need to ensure that British racing not only survives, but improves; the "needs" of racing should be measured against that high standard.
- (e) In determining the Scheme, the Secretary of State is tasked with setting a reasonable amount for the Levy. In light of the various formulations used to describe this process by various Secretaries of State, Racing dubbed this task as achieving "a fair and reasonable outcome".

#### 2.2 Racing's Methodology

Racing adopted two approaches:

- (a) **Methodology 1:** firstly, Racing considered the last previous occasion on which a Scheme was determined, the 41<sup>st</sup> Scheme for the period 2002/3, which included consideration of "needs" and "capacity to pay", and updated this to the conditions of 2008/9 ("Methodology 1")<sup>8</sup>; and
- (b) **Methodology 2:** secondly, Racing retained economists LECG to carry out a validation exercise, to identify the range of a reasonable return to racing

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<sup>8</sup> See Section 3 of the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007/

based on a hypothetical negotiation between racing and betting operators that mirrors the key features of the Levy ("Methodology 2")<sup>9</sup>.

### 2.3 Methodology 1

When considering Methodology 1 (i.e. that adopted on the previous occasion on which a Scheme was determined, the 41<sup>st</sup> Scheme for the period 2002/3, which included consideration of "needs" and "capacity to pay", and updated this to the conditions of 2008/9), Racing's position was that:

(a) the "test to be applied": the Secretary of State should set a reasonable Levy. In that regard, it is reasonable for him to have regard, in the context of the relevant legislation<sup>10</sup> to the "needs of racing" and the bookmakers' "capacity to pay", but also to the prevailing economic conditions and other "fiscal, social and economic" considerations. See further Section B above, but in summary Racing's position was that:

(i) "needs":

- horseracing continues to face all of the costs and challenges it faced at the time of the last Levy Determination in 2002. In addition, racing faces issues such as the real challenge of globalisation and the superior prize money available outside Britain, and also those created by the changing betting market. These increased challenges mean increased costs to racing;
- it cannot, in Racing's view, be reasonable for these costs to be met through the re-direction of investments in other aspects of racing and/or returns to owners, employees and other participants. Racing's participants are bearing a disproportionate share of the costs, while betting operator returns are very high. To continue risks precipitating the decline of the sport; the resulting "squeeze" will lead to a period of decline within the sport and the benefits that it provides to Britain (social, economic and cultural) will wither;

(ii) "capacity to pay":

- betting operators have experienced substantial growth in turnover and profit. Their "capacity to pay" is hugely increased since 2002, during which time bookmakers enhanced and diversified their businesses, and benefited from cost saving opportunities;

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<sup>9</sup> See Section 4 of the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007

<sup>10</sup> When read in the context of interpretative comments made by the Promoters of such legislation - see further section B above.

- the transition, in 2002, to a gross profits-based Levy scheme had the effect of diminishing any argument by the Bookmakers' Committee that they do not have the capacity to pay an increased Levy. This is because there is an inherent link between gross profit and ability to pay. If gross profit exists, there is, self evidently, a capacity to pay;
  - in any event, when determining the bookmakers' capacity to pay (and contrary to the assertions of the bookmakers) there is no basis in law to suggest that, in making his assessment, the Secretary of State is restricted to considering those revenues which bookmakers derive directly from their British horseracing business;
  - instead, he should make an informed decision, taking into account the prevailing economic conditions and other "fiscal, social and economic" circumstances, and must arrive at a fair and reasonable Levy;
  - it follows that it would be counter-intuitive to take a narrow, restricted view of any part of that determination, including consideration of bookmakers' "capacity to pay" – instead the Secretary of State should reasonably have regard to the prevailing economic, social and fiscal conditions at all times, including when assessing the bookmakers' capacity to pay.
- (b) Betting exchanges: Racing's view was that betting exchanges require separate and detailed consideration<sup>11</sup>. Due to their different business model, betting exchanges cannot be treated in the same way as traditional bookmakers for Levy calculation purposes. Racing does not accept that the exchange market should be assessed on the same basis as traditional bookmakers (i.e. gross profit of the exchange itself) - see further Section E 3.7 below. Racing has particular concerns because:
- as betting exchanges increase in popularity, an increasing number of otherwise "leviable" bets are conducted in an environment in which, under the current regime, racing does not share properly in a fair and reasonable way. The problem is getting worse;
  - betting exchanges were still in their infancy when the 41<sup>st</sup> Scheme was determined and the current approach to profit made on bets via exchanges is no longer fit for purpose. In Racing's view, the levy mechanism must be amended to create

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<sup>11</sup> See further Section 3.2.3 of the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007 and Section B7 of the BHA's submissions in respect of the 47th Scheme, dated 21 December 2007.

an equitable solution which remedies the current lacuna, ensuring a fair levy return relating to every pound staked, irrespective of whether that is with a licensed bookmaker or via an exchange.

- (c) Turf TV: Racing's view<sup>12</sup> was that licence fees paid by bookmakers to Turf TV should not be seen as reducing the bookmakers' capacity to pay, nor reducing the needs of Racing at all, and certainly not in the manner the bookmakers argued (i.e. a straight line basis):
- there is no reason in principle to distinguish Turf TV costs from any other overhead or expense incurred in running a bookmaker's business which have not hitherto been deductible, and as such they should not, contrary to the bookmakers' assertions, be deductible from Levy amounts otherwise payable to Racing;
  - there is no equivalence between revenue generated by Turf TV and income satisfying the "needs" of Racing;
  - unlike the data licences proposed as a replacement to the Levy (prior to the ECJ intervention referred to at section C2 above), Turf TV does not amount to a commercial solution the revenues from which are capable of being offset against the Levy, or which can ultimately replace the Levy;
  - in any event, the additional costs incurred by bookmakers as a result of subscribing both to SIS and Turf TV are not as significant as the bookmakers suggested, and also benefit bookmakers by improving their offering.
- (d) Overseas bookmakers: Overseas betting operators who offer betting on British racing avoid the Levy. Although in its submissions for the 47th Levy Scheme Racing did not make specific proposals for securing some form of return of value to British racing in return for the provision of this service, Racing requested that a solution be sought, with Racing, the Levy Board, the Bookmakers' Committee, the Gambling Commission and Government all working in conjunction with one another<sup>13</sup>.
- (e) Other Specific Issues: Racing and the Bookmakers' Committee had divergent views in respect of various other complex and detailed issues,

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<sup>12</sup> See further Sections 4(a), A3, A10 and B2 of the BHA's submissions in respect of the 47th Scheme, dated 21 December 2007.

<sup>13</sup> See further Section 3.2.4(d) the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007

including thresholds for abated levy payments and on-course bookmakers<sup>14</sup>.

Having applied this methodology, Racing's conclusion was that if the Levy was to become fit to achieve its purpose, its size and shape must shift in favour of Racing. Even if the Determination of the 41st Levy Scheme (2002/3) reached a reasonable conclusion at the time, the same conclusion would no longer be reasonable. Since the 41st Levy Scheme was intended to yield £90 million to £105 million, this would necessitate an increase to a range of approximately £111 million to £130 million in respect of the 47th Scheme. In any event, circumstances have changed which require an additional uplift in the Levy.

Taking account of indexation within the increased costs in relation to fixtures, and integrity and regulatory costs, and allowing for fixture related increases in the latter, Racing's analysis showed that a fair and reasonable return to British horseracing would require a Levy return in the range of £135 to £153 million. This equates to a gross win rate on British horseracing for all betting operators of between 14% and 16%.

## 2.4 Methodology 2

- (a) By using Methodology 2, Racing sought to validate the analysis set out at Methodology 1 by commissioning independent economic analysis, undertaken by LECG, to consider the value range that British horseracing could reasonably expect to secure from betting operators, should there be a commercial mechanism which operated on an equivalent basis to the Levy.
- (b) The first part of LECG's analysis indicated that a range would be likely to be significantly higher than the current levy. The analysis indicated a return in a range of 15% - 19%, or £152 million - £186 million in total (using 2006 figures).
- (c) The second part of their analysis estimated the scale of additional contribution based on a full recognition of value across all relevant revenue lines. This might add an additional 2.6% - 4% to the levy, or £14 million - £22 million (using 2006 figures).

## 2.5 Conclusion in relation to Racing's approach to the 47th Levy Scheme:

- (a) Having carefully considered the outcome of Levy assessment by Methodology 1, as validated by Methodology 2, Racing's proposal was that the 47th Levy Scheme should specify a payment of 15% of gross profits on British horseracing by off-course bookmakers. 15% is the mid point in the range we identified from our analysis, based on bringing the 41st Scheme up to date. It is also the bottom end of the lower range of

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<sup>14</sup> See, for example, Section 3.2.4 of the BHA's submissions in respect of the 47th Scheme, dated 26 November 2007.

reasonable outcomes from the LECG analysis, despite our case that the higher range applies.

- (b) The exchange market's contribution to the 45th Scheme (2006/7) was £6 million. As part of delivering the increased levy return set out above, it was argued that this needed to increase to £20 million. The different business model of betting exchanges requires a different levy charging mechanism within the existing framework. Using the same net winnings basis as exchanges themselves use to charge their customers, racing proposed a charge on exchanges equivalent to 1.15% of their customers' net winnings. If this fair and reasonable return from exchanges were established, it would allow the headline gross win levy rate for traditional bookmakers to be reduced to 14%.

### **3. Racing's concerns with the determination process and, in particular, the Organisation Consulting Partnership ("OCP")**

- 3.1 The BHA considers the process by which the 47th Levy Scheme was determined was flawed. Inter alia, we were concerned that:

- 3.1.1 OCP appeared inadequately instructed, briefed or resourced to complete their task properly.

- 3.1.2 OCP interpreted their brief narrowly (in our view incorrectly) and, having done so, strayed away from that brief in any event.

- 3.1.3 OCP appeared to place reliance on assertions made by the Bookmakers' Committee, Betfair and others which BHA became aware of only after the process was complete and which are disputed by the BHA.

- 3.1.4 OCP's final report contains errors of fact.

In short, OCP's recommendations (which advocated a reduction in the Levy) were not followed by the Secretary of State and, in the BHA's view, should not be relied upon in this or any future Levy process.

- 3.2 We have provided a full report of our concerns to the DCMS, a copy of which is attached to this submission as Schedule 2.

## **E DEVELOPMENTS SINCE THE PREVIOUS DETERMINATION**

### **1. The review process**

- 1.1 When announcing his determination of the 47th Scheme on 20 February 2008, Gerry Sutcliffe stated that he was "convening a meeting, under the auspices of the All-Party Racing and Bloodstock Industries Group, to initiate discussions of a wide range of issues". Separately, the Secretary of State confirmed to the BHA on the same day that his intention was to commence a full review of the funding of racing and that "nothing would be left off the table".
- 1.2 Following a series of meetings, the Levy Board met on 19 March 2008, and set up two groups (each including representatives both of racing and the betting industry) which were to investigate the future funding of racing.
- 1.3 **Group 1** is the Executive Working Group, comprising of Chief Executives of the Levy Board, the BHA, Racecourses and Owners Associations and Secretary of the Bookmakers' Committee. Group 1's terms of reference are to provide scenarios for modernising the Levy, including taking forward the Donoghue Report (part III).
- 1.4 **Group 2** is the Non-Executive Working Group, comprising of Chairman or CEO or appointed representative of key stakeholders in racing and betting industries, including a range of racecourse representatives and drawing on others where appropriate. Group 2's terms of Reference are to provide scenarios for the overall quantum and mechanism for:
  - 1.4.1 A deal between Racing and Betting (including all aspects of the relationship, measuring and reflecting the value and contribution of each to the other, revenue sources and overall costs).
  - 1.4.2 Creating clear and certain relationships between the two.
  - 1.4.3 Achieving mutually beneficial arrangements, including surrounding issues such as TurfTV/SIS, fixtures, off-shore betting, VAT, Competition Law, opportunity costs, European dimension, marketing and sponsorship.
- 1.5 Three meetings of each Group were scheduled in lead up to Levy Board Strategy Meeting on 16 April. Racing has committed itself to contributing to this review to the fullest extent possible, through the leadership of the three Racing representatives on the Levy Board with the support and resources of their executive teams. The three representatives are:

Paul Roy	Chairman, British Horseracing Authority (BHA)
Paul Dixon	President, Racehorse Owners Association (ROA)
David Thorpe	Chairman, Racecourse Association Ltd (RCA)

Further, the RCA has assembled a team which represents the breadth of racecourses, whilst the ROA has involved its fellow members of the Horsemen's

Group (which also comprises the organisations representing licensed trainers, thoroughbred breeders, professional jockeys and stable staff).

- 1.6 A summary of the Groups' activities is set out at Schedule 3. However, progress has been limited in both groups:

1.6.1 In the context of Group 1, in the absence of any positive movement, BHA has sought to lead the discussion by submitting some proposed options for how the Levy legislation may be amended or replaced. These were set out in an Options paper which we prepared for a meeting between Racing, Betting and the Levy Board on 8 July 2008. These proposals have met with no substantive response from representatives of the Bookmaker Committee. Indeed, the Levy Board have recanted their initial agreement to jointly instruct legal counsel to undertake analysis which might assist our approach to the viability of the options proposed. The activities of Group 1 are considered further in Section E 3.6 below.

1.6.2 In the context of Group 2, the possibility of substantive progress has been prevented by the ongoing legal action taken by Betting in relation to the Turf TV service.

## **2. Turf TV**

- 2.1 In his determination of the 47th Levy Scheme the Secretary of State commented that:

*"I accept that an argument can be put forward that bookmakers' subscriptions to the new service constitute a commercially-based flow of money to racing, albeit only from certain bookmakers to certain racecourses. I therefore accept that it may have a material effect both on the bookmakers' ability to pay and on the needs of racing. However, it is apparent from the failure of the Bookmaker's Committee and the Levy Board to agree, and from the OCP report, that bookmakers and the racing industry hold widely divergent views on the status of Turf TV and the impact it should have on the level of the Levy. In time its full economic impact on bookmakers, racecourses and on horseracing generally may become clearer. However at this stage I consider that it would not be appropriate to take Turf TV into account in setting the level of the 47th Levy."*

- 2.2 In its recent recommendation to the Levy Board, the Bookmakers' Committee asserted that:

*"The picture is now clear. Bookmakers' costs have increased. Costs generally are not going to go down and there will be little or no growth against which to offset such costs. With the economic downturn and the increased pressure on costs, the industry's capacity to pay the Levy is inevitably reduced."*

- 2.3 As a result, the Bookmakers' Committee has recommended the introduction of a Flat Rate Rebate of £2000 per annum per shop to offset the incremental cost of

acquiring television pictures of British horseracing. When challenged by the Levy Board as to the amount of its proposed reduction, the Bookmakers' Committee<sup>15</sup> cited the conclusion of OCP in the context of the 47th Levy Scheme as supporting such a reduction.

2.4 The BHA would dispute reliance on the conclusions reached by OCP for the reasons referred to at D3 above. Indeed, rather than the "picture now being clear", we would submit that the events since determination of the 47th Levy Scheme have only served to demonstrate that there remains no clear consensus on the economic impact of Turf TV on bookmakers, racecourses and on horseracing generally:

2.4.1 First, there remains no agreement between Racing, the Levy Board and the Bookmaker's Committee in relation to the impact of Turf TV.

2.4.2 Second, any meaningful discussion between the parties which might have established common ground has been impossible in the period since determination of the 47th Levy Scheme because of the legal action taken by Betting against Turf TV: Bookmakers' Afternoon Greyhound Services Ltd ("BAGS") v Amalgamated Racing Ltd ("AMRAC").

2.4.3 Third, since our understanding is that the first decision in that case is to be appealed, this uncertain state of affairs is likely continue for some time.

2.4.4 Fourth, the judgment in BAGS v AMRAC did not address the defendants' counterclaim regarding allegations that there was a concerted practice by Coral, Ladbrokes and William Hill to withdraw sponsorship of races being run at courses that had granted exclusive rights to AMRAC or a second claim that the bookmakers were party to a concerted practice to refuse to purchase Turf TV and/or exclude AMRAC's entry into the market. These matters are subject to a separate judgment at a later date.

2.4.5 Fifth, no consideration is given in the Bookmaker's Committee recommendations to the operations of SIS, which was considered in BAGS v AMRAC. SIS is a wholly owned subsidiary of SIS (Holdings) Ltd, and the current position as to bookmaker shareholdings in the latter is: Ladbrokes (23.4%), William Hill (19.5%), BetFred ((via Mr Done) 7.5%) and the Tote (6%). Therefore bookmakers currently hold around 56.5% of the shares in SIS (Holdings) Ltd and control 5 of the 11 directors of the company. In our view, two issues arise from the relationship between Betting and SIS:

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<sup>15</sup> Bookmakers' Committee letter to Rob Hughes dated 24th September 2008

- (a) If the purchase of Turf TV should correctly be considered a cost centre to Betting which reduces its "capacity to pay", why should the profits of SIS not be taken into account?
- (b) The case found that the defendants "were in fact increasing competition in a previously monopolistic market". SIS's service is also a cost centre to betting shops. It should be expected that the introduction of competition into the market for the supply of pictures into betting shops would assert a downward pressure on the pricing of any service. In the present case, we have no means to assess whether SIS has reduced the cost of its service in line with what should be expected in the current market conditions, or whether it now represents an inflated cost centre to the Betting industry.

In short, given the relationship between SIS and the members of the Bookmakers' Committee, we believe that it is necessary to give careful consideration to the activities and pricing of SIS in order to assess whether these have the effect of increasing the costs of betting shops in a manner inconsistent with market norms.

### **3. The Bookmakers' Committee Recommendations.**

3.1 In its recommendations to the Levy Board for the 48th Levy Scheme, the Bookmakers Committee makes its case for reducing the Levy by an estimated £21,750,000. In doing so, the Bookmakers Committee raise a number of arguments the BHA would dispute, for the reasons set out in the following paragraphs

#### **3.2 The economy:**

3.2.1 The recommendations emphasise the effect of a downturn in the economy on betting and argue that this justifies a reduction in the Levy. However, since the Levy on bookmakers is a percentage of gross profits, it follows that any adverse impact of the economy on bookmakers' gross profits from British racing will in any event automatically lead to a reduction in the amount received by Racing from the Levy.

3.2.2 The recommendations also state that "*racing ... has been sustained by the record yield from the 46<sup>th</sup> Levy Scheme*". However, we would submit that the increased yield from the 47th Scheme cannot correctly be used to justify future reductions in the Levy as the Bookmakers' Committee suggests. The fact that yield increased in this matter was simply a consequence of Betting's own record gross profits from Racing during that Levy period. Moreover, the betting industry has been sustained over the last few years by exponential growth in its earnings. In any proper,

reasoned process, Racing's massive contribution, both direct and indirect, to this would be fully recognised.

### 3.3 Impact on Bookmaker costs:

3.3.1 In its recommendations for the 48th Levy Scheme, the Bookmakers' Committee cite four contributory cost centres as justification for reducing the Levy:

"(a). The costs of acquiring live horseracing pictures from Turf TV (which did not exist before 2007, but were deemed too uncertain to take into account in the 47th determination);

(b). Increases in Amusement Machine Licence Duty to £2,030.00 per machine; a figure significantly above inflation;

(c). The widening of that duty to include B2 Gaming Machines and the concomitant liability for VAT, which is largely irrecoverable by bookmakers.

(d). Gambling Commission fees and compliance costs, which have also been increased above inflation".

The Bookmakers' Committee states that: "Whilst acknowledging that AMLD, Gambling Commission and compliance costs **have nothing to do with horseracing** [our emphasis], both are rising faster than inflation, thus diminishing profitability overall and with it the ability of the shop operator to pay the Levy."

3.3.2 So, the Bookmakers' Committee asserts that these costs are relevant to the issue of whether the bookmaker has capacity to pay, yet as set out at section B5 of this submission has rejected the BHA's assertion that the *profits* of FOBT's etc are irrelevant to the issue of "capacity to pay". We would submit this distinction is unsustainable and that unless full recognition is given to *all* profits realised by bookmakers it is illogical to consider cost centres which "*have nothing to do with horseracing*".

### 3.4 "Supply problems":

The Bookmakers' Committee blame Racing for making its product "*less attractive and accessible to betting shop customers*". Putting to one side the merits of these claims and the role of SIS in this, again, to the extent that they do have an effect on horseracing's attractiveness, etc, this will be reflected in bookmakers' gross profits and the amount of the Levy.

### 3.5 Cost of Pictures:

3.5.1 The BHA does not accept the Bookmakers' Committee's argument that an increase in picture acquisition costs should lead to an equivalent reduction in the Levy.

- 3.5.2 The BHA has already indicated why we regard the Bookmakers' Committee's assertion that "the picture is now clear" as untrue (see Section E2 above). Indeed, their own paper acknowledges "it is impossible to be definitive because of the commercial confidentiality of Turf TV and SIS contracts". Moreover, as noted above, there is no acknowledgement of the impact of the relationship between SIS and its bookmaker shareholders and what effect this has on BAGS' costs of acquiring rights and the amount charged to betting shops.
- 3.5.3 We will not add further to our comments at Section E2 except to say that what the Bookmakers' Committee does not address is that: (a) there was a monopoly in the supply of pictures to betting shops for 20 or so years, with the usual consequence being that the monopolist paid much less than it would at market rates; and (b) the costs of Racing have increased considerably, a fact which they ignore, but upon which we can provide further information as required.

### 3.6 **Modernisation:**

- 3.6.1 In its recommendations, the Bookmakers' Committee seeks to paint a picture whereby progress in relation to discussions on modernisation have not progressed as a result of Racing's insistence on pursuing legislative change to introduce a so called "licence to bet", pursue overseas bookmakers and increase levy yield from exchanges.
- 3.6.2 The BHA would submit that this section of the recommendations is disingenuous and misleading. Whilst it is true that no agreed alternatives to the current statutory scheme have yet been agreed, this is, in large part, due to the obstructiveness of the Bookmakers' Committee and their apparent unwillingness to contemplate any solution which might require legislation or which departs from the recommendations made in the Donoghue committee's third report. This is illustrated by the Bookmakers' Committee's paper of 6 August 2008 headed "Donoghue Phase 3 – Updating the Levy Mechanism".
- 3.6.3 Furthermore, paragraph 21 of the Committee's recommendations misrepresents our position. The Options paper which we prepared for our meeting with the bookmakers and the Levy Board on 8 July (and to which the Bookmakers' Committee's 8 August paper was a response) set out three options:
- Option 1 - a modernised Levy mechanism with Secretary of State determination in the event of no agreement;
  - Option 2 - as Option 1 but with an alternative determination process by an independent tribunal; and
  - Option 3 - a new statutory rights-based mechanism.

3.6.4 The BHA's Options paper said explicitly *"it is assumed for the purposes of this note that Options 1 and 2 are the options to explore for the time being, due to the support which has been expressed in the current review process across Parliament, across betting and within racing, for continuation of a Levy mechanism – all provided it is "fit for purpose"*.

3.6.5 The BHA has, in good faith, made every effort to come up with alternative mechanisms to meet the Minister's terms of reference but, despite the bookmakers' public statements, they have continually refused to engage positively.

### 3.7 **Betting exchanges and overseas bookmakers:**

3.7.1 These issues do of course have to form part of the Levy scheme – and again, we have received no meaningful engagement from the Bookmakers' Committee, despite the Chairman of the Committee saying that he fully supports our case that exchange betting must contribute considerably more than it does now, as do the large majority around the Bookmakers' Committee table.

3.7.2 The Bookmakers' Committee should publicly support our position so this issue can be dealt with now. Incidentally, we note that the Committee is recommending that spreadbetting bookmakers should only pay Levy at 2% of their gross profit. We assume that this is because spreadbetting operates on a different business model from traditional bookmakers. If this is the explanation, the Levy scheme simply must take account of the different business model upon which betting exchanges operate.

## F CONCLUSIONS

We would conclude by highlighting some of the key issues which are identified by this submission, and which we would ask you to consider further in making your recommendation:

1. First, you should not form the impression that the issues which separate Racing and Betting relate simply to Turf TV and whether, as the Bookmakers' Committee contends, the existence of Turf TV justifies a significant reduction in Levy yield from the 48th Levy Scheme. The issue of Turf TV is only one of many important issues, which are highlighted in this submission, which require detailed analysis and which, we submit, cannot be properly dealt with in the time available to you.
2. Second, there has been no agreement as to what should be the proper test by which the Levy is determined. We have set out our views on what that test should be under present circumstances. Our concern is that the test should reflect the modern realities of the relationship between Betting and Racing. At present we regard the position of the Bookmakers' Committee in relation to the test to be untenable. The Bookmakers' Committee asserts that Betting's capacity to pay the Levy has been reduced as a consequence of Turf TV and a number of other factors which in the Bookmakers' Committee's own words "have nothing to do with horseracing", yet, at the same time the Committee refuses to acknowledge that any consideration should be given, when considering Betting's "capacity to pay", to profits received by Betting from other sources such as FOBTs. This approach appears to us inconsistent and unfair.
3. Third, the BHA has suggested that in the circumstances the most appropriate solution is for the 47th Levy Scheme to be "rolled over" into the 48th Scheme. You should not assume from this that the BHA was content with the settlement of the 47th Levy Scheme. Indeed the BHA has already indicated why we consider the process by which the 47th Levy Scheme was determined (and in particular the supporting analysis conducted by OCP) was flawed. Instead, the BHA has offered this solution:
  - (a) to avoid another lengthy determination process;
  - (b) to facilitate the ongoing review process initiated by the Secretary of State last year to which the BHA is fully committed, which has been jeopardised by the Bookmakers' Committee's stance;
  - (c) because of the proximity to the last determination, and the lack of progress or clarity achieved since in relation to any of those issues which prompted the Secretary of State to "Roll Over" the 46th Levy Scheme into the 47th Levy Scheme;
  - (d) because the powers of the Secretary of State readily permit him to roll over the existing scheme as an alternative to recommending a new scheme; and

- (e) because it is clear to Racing that the Secretary of State would prefer to complete the review process he initiated as part of his determination of the 47th Levy Scheme, rather than engage in another determination.

In summary, it is clear that the Secretary of State is not in any better position to make a determination than he was in 2007, when he elected to "Roll Over" the 46th Levy Scheme. Consequently the BHA has expressed its willingness to accept such an arrangement.

- 4. Fourth, in their recommendations, the Bookmaker's Committee has sought to justify a significant reduction in the 48th Levy Scheme by relying on suggestions made by OCP for the DCMS in the context of the determination of the 47th Levy Scheme. However, it is important to remember that in relevant part the Secretary of State rejected OCP's suggestions. In this submission we have established the reasons for our view that OCP's report was an unreliable and flawed piece of work which should not be allowed to justify a reduction in the Levy any more now than in the context of the 47th Levy Scheme.
- 5. Fifth, notwithstanding the above, the BHA remains committed to the view that the Levy Scheme approved by the Levy Board, or properly determined by the Secretary of State, should result in a substantial increase in the return received by British horse racing. This view was put fully in the BHA's 47th Scheme Submission. If necessary, the BHA will be prepared to restate its case in full if the 48th Levy Scheme is again referred to the Secretary of State, although for all the reasons set out above we sincerely hope this step can be avoided.

**8 October 2008**

## SCHEDULE 1

### CHRONOLOGY OF EVENTS RELATING TO ATTEMPTS TO FIND A COMMERCIAL REPLACEMENT FOR THE LEVY

Date	Event
11 March 1996	The Database Directive (Directive 96/9/EC) introduced
1 January 1998	The Copyright and Rights in Databases Regulations 1997 come into force, implementing the Database Directive in the UK
10 November 1998	BHB chairman Peter Savill calls for the Levy to be replaced by a commercial funding mechanism based on the sale of picture signals
2 March 2000	Government announces its intention to abolish the Levy Board and the Levy
23 March 2000	BHB and others bring proceedings against William Hill in the High Court for infringement of database rights
June 2000	Peter Savill calls for a commercial funding system based on "pooled" media rights from tracks (pictures) and the BHB (pre-race data)
June 2000	BHB asks the OFT to consider its rules and regulations so that it can be sure it is operating in accordance with competition law
17 October 2000	Future Funding Plan (" <b>FFP</b> ") published by BHB with "pooled" media rights to be sold to off-course bookmakers – designed to come into effect on 1 May 2002 and generate £140m per annum
9 February 2001	High Court finds in favour of BHB. William Hill appeals to the Court of Appeal
7 March 2001	Government abolishes betting duty with bookmakers to be taxed on their gross profits at a rate of 15% (from 1 January 2002)
31 July 2001	Court of Appeal indicates that it is inclined to support the High Court judgment in BHB/William Hill, but since questions of

	interpretation of European law are involved it stays proceedings and will refer questions to the ECJ
December 2001	Betfair and Flutter.com announce merger
31 January 2002	Tessa Jowell announces that the Levy for 2002/03 (41 <sup>st</sup> ) will be based on the payment by off-course bookmakers of around 9% of their gross profits from horseracing
7 March 2002	41 <sup>st</sup> Levy finalised by Tessa Jowell – the payment by off-course bookmakers of around 9% of their gross profits from horseracing is expected to yield £90m - £105m
17 April 2002	Ladbrokes, William Hill, Coral, Stanleys and Dones sign five-year deals with BHB allowing them to use BHB's data for their British betting shops and telephone and internet operations. Each bookmaker pays an annual charge of 10% of gross profits from horserace betting on horse racing taking place in Great Britain
7 May 2002	FFP collapses as race courses enter into their own picture deal with off-course bookmakers
24 May 2002	Court of Appeal in BHB/William Hill refers various questions on Article 7 of the Database Directive to the ECJ for a preliminary ruling
31 October 2002	Levy for 2003/04 (42 <sup>nd</sup> ) agreed – the payment by off-course bookmakers of around 10% of their gross profits from horseracing (if above £75,000) is expected to yield £94m
5 February 2003	Sporting Options, with the support of Betfair, launches legal challenge against the Levy Board's 10% charge on betting exchanges, due to come into effect on 1 April 2003
8 April 2003	OFT publishes report which warns BHB that it is breaking competition laws relating to the fixture list and provision of race data
May 2003	Sporting Options wins its legal action to obtain a judicial review of the 42 <sup>nd</sup> Levy
31 July 2003	Court finds in favour of Sporting Options, ruling that the 42 <sup>nd</sup> Levy, as it relates to exchanges, is unlawful and irrational
22 October	Levy for 2004/05 (43 <sup>rd</sup> ) agreed – the payment by off-course bookmakers of around 10% of their gross profits (if above £75,000)

2003	from horseracing is expected to yield £91.7m
10 June 2004	OFT reaches a provisional agreement with the BHB to reform the running of British horseracing
23 September 2004	Levy for 2005/06 (44 <sup>th</sup> ) agreed – the payment by off-course bookmakers of around 10% of their gross profits (if above £75,000) from horseracing is expected to yield £94m
28 October 2004	Horserace Betting and Olympic Lottery Act 2004 (" <b>HBOL Act</b> ") comes into force giving the Government the power to abolish the Levy
9 November 2004	ECJ ruling on Article 7 favourable to the position taken by William Hill - case returned to the Court of Appeal
January 2005	Lord Donoughue asked by BHB to conduct an Independent Review of Racing's Funding
11 March 2005	Lord Donoughue presents interim report to the Government – recommends an extension of the Levy by 3 years conditional on an agreement to roll over the 44 <sup>th</sup> Levy
18 March 2005	Richard Caborn announces that the Levy will continue until 31 March 2009 and the Levy Board will be closed 6 months later
13 July 2005	Court of Appeal applies ECJ's findings to rule in favour of William Hill in its dispute with BHB
1 November 2005	Levy for 2006/07 (45 <sup>th</sup> ) agreed – the payment by off-course bookmakers of around 10% of their gross profits (if above £80,000) from horseracing is expected to yield between £98.75m and £101.9m
December 2005	Lord Donoughue presents final report. Recommends that the sale by racing of a package of televised pictures and associated data may present a way forward, subject to obtaining legal advice on whether any such arrangement would be likely to withstand a competition law challenge
23 March 2006	Richard Caborn and representatives of the racing industry discuss the Levy and the Donoughue group is then asked to conduct a further review of how the Levy legislation and procedures should be modified were the Government to decide to retain the Levy
20 September	Levy for 2007/08 (46 <sup>th</sup> ) agreed - the payment by off-course bookmakers of around 10% of their gross profits (if above £82,600)

2006	from horseracing is expected to yield no less than £91m
14 December 2006	Government announces its intention to retain the Levy Board and the Levy "until such time as a secure and adequate alternative commercial funding arrangement can be identified". Government intends to repeal the parts of the HBOL Act which gives it power to abolish the Levy
January 2007	Racing UK and Alphameric announce Turf TV joint venture
April 2007	Turf TV launches
6 June 2007	David Harding, chief executive of William Hill, says that the bookmaker will use all means at its disposal to win the "war" declared on bookmakers by the racing industry
31 October 2007	Levy for 2008/09 (47 <sup>th</sup> ) not agreed between bookmakers and Levy Board and referred to the Secretary of State for determination by April 2008
October 2007	Bookmakers Afternoon Greyhound Services (BAGS), William Hill, Ladbrokes, Coral (later withdrew) and Betfred sue Turf TV stating that it is running a price-fixing operation that amounts to an illegal cartel. Turf TV counter-claims, alleging that the bookmakers colluded in refusing to sign up to its service and by collectively withdrawing sponsorship from the courses involved
November 2007	Ladbrokes and Coral call for abolition of the Levy
December 2007	Coral signs up to Turf TV
January 2008	Ladbrokes and William Hill sign up to Turf TV
20 February 2008	Written ministerial statement by Gerry Sutcliffe determining that the 47 <sup>th</sup> Levy (2008/09) shall be the same as the 46 <sup>th</sup> Levy and calling for racing and the bookmakers to develop a modern business partnership
April 2008	Turf TV case starts in the High Court
9 August 2008	The claim by the bookmakers and BAGS against Turf TV fails. Judgement on Turf TV counter-claim to be dealt with in a separate judgement later in the year

**SCHEDULE 2**

**BHA LETTER TO DCMS RE: CONCERNS WITH OCP REPORT**

**Attached**

## SCHEDULE 3

### SUMMARY OF THE PROGRESS OF GROUP 1 AND GROUP 2

#### **A. GROUP 1**

- 1 The Racing team has, to date, played the lead role in this Group's work. The key objective is to ensure that there would be a resilient, sustainable mechanism for generating a fair return for Racing. Subject to that overriding principle, we have looked at ways to enable the Secretary of State to remove himself from the determination process. There are two principal options:
  - (i) The introduction, through primary legislation, of a 'right to bet' through which the betting industry would provide fair consideration to Racing for taking bets on the sport; and
  - (ii) The introduction of a formal binding arbitration process to replace the determination process.
- 2 The first option has made little headway at present, principally because it has no support from the Bookmakers' Committee. Further, the necessary legislation would take a considerable time to enact.
- 3 The Bookmakers' Committee has suggested that a commercial alternative to the betting levy could be based around the licensing of audio/visual rights to horseracing. This option was exhaustively researched by the Future Funding Review Group, chaired by Lord Donoughue. The Group obtained Counsel's Opinion from Christopher Vajda, QC, which concluded that the licensing of such rights did not, in present circumstances, provide a stable commercial alternative to the Levy.

Further, a significant number of existing Levy contributors, such as betting exchanges, internet and telephone betting operators, do not require direct access to such rights to profit from betting on horseracing.
- 4 Racing has developed another proposal for an independent tribunal to conduct a binding arbitration, to replace the determination by the Secretary of State. This has been discussed in outline with both the Levy Board Executive and the Bookmakers' Committee representatives. Further work will be required to refine the concept, including research by DCMS as to whether the proposal would require primary or secondary legislation.
- 5 Meanwhile, Racing has prepared a draft agreement for a proposed arbitration, for confirmation by the Secretary of State in line with his existing responsibilities, in the event that the 48<sup>th</sup> Scheme is not settled by 31<sup>st</sup> October.

#### **B. GROUP 2**

- 1 There have been a number of formal Group 2 meetings since February 2008, which have been augmented by a number of smaller informal meetings between Racing and the betting industry.

- 2 Progress has been limited principally because of the Bookmakers' Committee's insistence that the principal issue to be resolved is the impact, or otherwise, of the provision of two betting programme services (SIS and TurfTV) on bookmaker costs.
- 3 The Bookmakers' Committee asserts that the impact of the two programme service is now clear. This is far from the case. The Bookmakers' Committee's approach is far too simplistic. They calculate the increased costs of the supply as the cost of the TurfTV (which in itself is not known as the terms are not public and vary from customer to customer), with the fee reduction SIS made to reflect the reduction in the rights costs. This ignores a number of key factors, including the following:
- (i) The impact of SIS pricing of the vertical integration of the betting shop distribution. It is a point that the major shareholdings in SIS of Ladbroke and William Hill, who are also SIS' largest shareholders, acted to limit, if not prevent, the price competitiveness of SIS' product. In a normal commercial relationship, we would have expected that a reduction in SIS' price would reflect the loss in the value to the customer of this product, rather than a simple reduction in rights costs. Indeed, it appears that bookmakers through BAGS, or otherwise, committed themselves to SIS before it was clear whether SIS would have access to the rights.
  - (ii) The price of audio visual rights had increased significantly, in large part due to the activities of BAGS which bought significant rights on an exclusive basis. It is estimated that the price increase claim would have amounted to at least £16 million per annum out of the increased costs of the combined supply of the SIS and TurfTV services, which in May 2008 the Bookmakers' Committee estimated at £29 million (net of VAT). It is very likely that the inefficiencies in the SIS model (see clause 3.3(i)) will account for the significant majority, if not all, of the balance of £13 million unaccounted for.
  - (iii) The restrictions on the availability of detailed income and cost information from SIS and TurfTV, because of the recent Court action between BAGS and TurfTV (and others), mean it is not possible to precisely identify the underlying effect of the two services on bookmakers' costs.
- 4 The Court case between BAGS and TurfTV has been a significant obstacle to the progress at Group 2, which of course was instigated by BAGS. The final outcome of that litigation is as yet unknown and may be subject to Appeal. It is ironic that the Bookmakers' Committee has referred to the absence of progress in the discussions as justification for its claim in the reduction of the Levy rate.

#### **Presentation of horseracing in LBOs.**

- 5 The Bookmakers' Committee indicated, in July 2008, that the competition between the two television services was having a material adverse effect on the presentation of horseracing in LBOs.
- 6 Racing has responded positively to these concerns by meeting, on 25<sup>th</sup> September, with bookmaker representatives and representatives of both SIS and

TurfTV. We are very hopeful that significant progress can be made in the near future to resolve these problems, provided SIS and TurfTV are prepared to work together to overcome the practical difficulties. Racecourse shareholders in TurfTV have already shown their willingness to encourage TurfTV to respond positively. We understand that the principal bookmaker customer shareholders in SIS will be seeking similar assurances from SIS. Meanwhile any short-term effect on bookmakers is being appropriately compensated by a proportionate reduction in Levy, which is based on breakdown of gross profits.

### **Fixture List**

- 7 The Bookmakers' Committee has justified, in part, its submission to the Levy Board because of weaknesses in the Fixture List. This does not stand close scrutiny. The 2009 changes to the Fixture List are some 24 out of a 2008 level of 1,504, a reduction of less than 2%. Because of the gross profit basis of the Levy, Racing would share in any resulting loss. It is worth noting that the increases in the Fixture List over the past few years did not have a proportionate effect on Levy income.
- 8 Nevertheless, Racing remains committed to working with the betting industry to produce the optimal Fixture List. This can only be done effectively if the betting industry is able and willing to provide detailed information to demonstrate the marginal effect of additional fixtures (or, indeed, the movement of existing fixtures) together with an appropriate share of the risks as well as the rewards.

### **Betting Exchanges**

- 9 It was intended by the Minister that the Review would be wide-ranging. This must necessarily include the examination of the effect of betting exchanges on the Levy.
- 10 It is disappointing that, to date, the Bookmakers' Committee has not been prepared to engage on this issue. This is evidenced in the Bookmakers' submission of 11<sup>th</sup> September (paragraphs 37 to 39).