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General Manager - Adjudication  
Australian Competition and Consumer  
Commission  
PO Box 1199  
DICKSON ACT 2062

13 June 2007  
Matter 81170566

~~Confidential submission~~ KH  
By email

Dear Mr Gregson

**Authorisation applications A91031 & A91032  
Response to public submissions following draft determination**

This letter sets out Tabcorp/Sky's and TVN's (**Parties**) joint response to various third party submissions received by the ACCC following the release of the ACCC's draft determination (**Draft Determination**).

Tabcorp/Sky consider that this letter contains information which is confidential. Accordingly, Tabcorp/Sky request that the ACCC does not disclose this letter, or its content, to any third party without the consent of Tabcorp/Sky.

**Comments regarding Betfair submission**

As was the case with the initial Betfair submission, the second Betfair submission is wholly opportunistic. It seeks the imposition of conditions in respect of alleged concerns which are unrelated to the Arrangements.

The Betfair submission appears to be premised on the incorrect assumption that under the counterfactual there would be more viewers of the TVN Channel, compared to the factual. While not fully articulated by Betfair, it is this assumed circumstance which is said to give rise to its alleged market power concerns.

As noted at paragraphs 6.39 and 6.40 of the Draft Determination, the ACCC considers that a possible counterfactual 'is that TVN may find it difficult to continue to operate, particularly in the face of significant costs and uncertainty of litigation'. Insofar as Betfair assumes greater viewership of the TVN Channel under the counterfactual, it fails to take into consideration the prospect of TVN ceasing to exist or needing to roll back its services significantly absent authorisation.

The Betfair submission also chooses to ignore the fact that the Arrangements result in a more attractive and viable TVN product. The TVN Channel is enhanced by the terms of the Arrangements. It will have additional content, be available on pay television networks, and can be widely distributed through the distribution arrangements with Sky. In such circumstances, the Parties believe the number of TVN Channel viewers should increase. While the TVN Channel will attract thoroughbred enthusiasts, and is expected to attract new persons to racing, this does not mean that it will be of no interest to punters. Tabcorp/Sky intend to display the TVN Channel in their stand-alone agencies precisely because they believe that the TVN Channel will have a positive impact on wagering.

To some extent the Betfair submission appears to be premised on a hypothetical comparison of the value, to Betfair, of its content or advertising appearing on the TVN Channel in both the factual and counterfactual. As the number of viewers which that

content or advertising would reach is expected to be greater under the factual, that hypothetical value should be greater. Betfair implied it will be less.

The comparison is hypothetical as Betfair advertising or content does not currently appear in either the Sky Channel or the TVN Channel coverage. Furthermore, there are advertising regulations which affect the ability of Betfair to promote itself on Sky Channel or the TVN Channel.

Incentives to obtain content or advertising from Betfair remain unchanged in both the factual and counterfactual. There is nothing in the Arrangements which limits the ability of either party to accept advertising, or which dictates editorial content. There is, accordingly, absolutely no basis upon which Betfair can assert, as it does, that the Arrangements give rise to 'greater incentive' to refuse to supply goods or services to third party wagering providers. Incentives are unchanged. Further, insofar as the Arrangements help create a robust TVN Channel, advertising opportunities for Betfair are increased in the factual. The Parties also note the existence of other vehicles for Betfair advertising/content (assuming the lifting of current legislative restrictions). These include the expanded thoroughbred racing coverage on free to air television .

Betfair also seeks to establish a link between Tabcorp's commitment to provide Sky Channel to any new Victorian totalisator and Betfair's proposed conditions. The commitment in respect of any new Victorian totalisator is in respect of the supply of the Sky Channel service to that totalisator's agents. That commitment is based on the assumption that any Victorian licensee will operate a retail network and will want racing vision as a component of that network.

Betfair is not seeking to be supplied with the Sky Channel service for distribution to its retail outlets. As noted by Betfair in its submission, Betfair does not operate retail outlets. Rather, Betfair, couching its submission in the language of 'access', requests that the ACCC impose conditions such that Sky Channel would be required to operate in a manner which Betfair would decide was in Betfair's best interest.

Betfair, using the pretext of the authorisation application, seeks to free ride on Sky Channel. The requested conditions are also undefined and unworkable. For example:

- would open access to Sky Channel allow Betfair to dictate what Sky Channel presenters say or what races are shown on Sky Channel?
- would it mean that Tabcorp would be expected to provide different versions of Sky Channel, one to all customers and one for distribution by Betfair?
- what, exactly, does Betfair mean by a condition requiring any media outlets it owns to refrain from giving no or negative editorial coverage of Betfair? Does this mean that Tabcorp would be required actively to promote the Betfair product on air or would be required to do so if Betfair provided an appropriate commercial fee?

Any condition which, in effect, limits or restricts content would be unprecedented and inappropriate in the context of an authorisation application.

### **Harness Club submissions**

Identical submissions were provided by the Albion Park Harness Racing Club and Queensland Harness Racing. The Parties reject the assertions of these clubs that the arrangements will have a detrimental impact on the harness and greyhound codes of racing. Split vision had a negative impact on wagering turnover across all codes as punters moved away from wagering generally.

In respect of the condition requested by these clubs, Tabcorp/Sky note that it has ongoing commitments to all codes of racing and that the display of vision from all codes remains fundamental to the Sky Channel model. That said, the specific mix of racing on Sky Channel is dependant on the availability of races and, importantly, the preferences of viewers/punters. The exact mix of racing on Sky Channel is therefore subject to change in both the factual and counterfactual. Any condition imposed by the ACCC which would

freeze content at certain levels would be inappropriate, as it would prevent the Parties from responding to market forces.

### **Clubs NSW**

Clubs NSW has indicated that it does not oppose the authorisation. Nevertheless, it expresses a concern that venues 'ought not to be penalised by being charged a fee for the removal of one of the supplier's equipment sets, should a venue elect to continue with forming one service and not the other'. The Parties do not consider that this concern is relevant to the ACCC's assessment. Content on Sky Channel and the TVN Channel is variable in both the factual and counterfactual. Individual customers could, in both the factual and counterfactual, seek to terminate arrangements with either Sky or TVN, subject to any contractual termination provisions including equipment removal fees. Nevertheless, the ACCC has asked the Parties what their intentions are in respect of the removal of equipment.

If a pub or club chooses to terminate its Licence Agreement with Sky Channel, that termination would be governed by the terms of the Agreement. On termination, the customer is responsible for the costs associated with the removal of equipment, and, in some instances, a 'Connection Fee'. The equipment removal fee is calculated on an hours of work basis. For larger jobs Sky contracts with a third party to perform this function and passes on that charge. On average, the removal fee is approximately \$400. The Connection Fee is \$2,000. It is only payable however if the Customer terminates the Licence Agreement within the first 12 months of being supplied with Sky Channel.

Tabcorp/Sky note that pursuant to Clause 3(a) of Schedule 4 of the MOU, Tabcorp/Sky has the option to acquire TVN decoders and TVN can require the acquisition of decoders by Tabcorp/Sky. It is possible that, in respect of a particular decoder located at a club which no longer receives TVN, that the decoder will have been acquired by Sky. In circumstances where there is no contractual relationship between Tabcorp/Sky and that club for the supply of the TVN Channel, there would be no fee imposed by Tabcorp/Sky for the removal of that decoder.

For completeness of information, in Tabcorp/Sky's view if authorisation is granted certain pubs and clubs which are receiving the TVN Channel from TVN may wish to be supplied the TVN Channel from Tabcorp/Sky. In these circumstances, if TVN seeks to have Tabcorp/Sky acquire the decoders then Tabcorp/Sky's position is that it will not require pubs and clubs to bear the cost of that acquisition. It should be noted that TVN has made no decision as to whether it will or will not require Tabcorp/Sky to acquire the decoders. If a pub or club that has not previously acquired the TVN Channel seeks to have the TVN Channel supplied by Tabcorp/Sky, there will be standard installation charges applied in respect of the installation of the necessary equipment.

### **AHA**

The Parties consider the AHA's submission to be inappropriate. Without raising any specific issues or concerns, let alone attempting to link those concerns to the Arrangements themselves, the AHA asks that the ACCC defer making any final decision until it considers whether it, or its divisions, wish to make any submissions.

In any event, the Parties do not consider that the Arrangements have resulted in any increase in relative market power in respect of dealings with downstream customers including pubs and clubs. [RESTRICTION OF PUBLICATION OF PART CLAIMED]. Tabcorp/Sky will, however, comply with the condition contained in the Draft Determination which is to address the ACCC's apparent concerns in respect of bundling if that condition is contained in the final determination.

Yours sincerely

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