

**For public register**

6 August 2012

Ms Imogen Hartcher-O'Brien  
Acting Director  
Adjudication Branch  
Australian Competition and Consumer Commission  
23 Marcus Clark Street  
Canberra ACT 2601

Dear Ms Hartcher-O'Brien

**Notification of collective bargaining submitted by Harness Racing Australia Inc**

We refer to our telephone conversation on 2 August 2012. As discussed, we act for Tabcorp Holdings Ltd ("**Tabcorp**") and Sky Channel Pty Ltd ("**Sky Channel**") in relation to the collective bargaining notification submitted by Harness Racing Australia Inc ("**HRA**") on 25 July 2012.

Tabcorp and Sky Channel have a number of concerns in relation to HRA's collective bargaining notification. We have set out an initial and "high level" summary of those concerns below. This response has been prepared on an expeditious basis having regard to the statutory timelines for the ACCC's consideration of HRA's notification. Tabcorp and Sky Channel reserve the right to provide further and more detailed comments, if necessary, at a later date.

Tabcorp's and Sky Channel's initial comments are as follows:

**1. The notification does not meet the requirements for validity set out in the CCA.**

This is because the notification is not set out in the "form prescribed by the regulations" as required by section 93AB(6)(a) of the *Competition and Consumer Act 2010 (CCA)*. That section makes it clear that "to be valid, a collective bargaining notice *must* be in a form prescribed by the regulations and contain the information required by the form" (emphasis added). The clear consequence of this is that a notification that is not in the prescribed form (i.e. because it does not refer to section 44ZZRD of the CCA) is invalid.

A further consequence of not using the form prescribed in the regulations is that it does not notify the ACCC of the contracting parties' intention to make or give effect to a provision of the kind referred to in section 44ZZRD(2) or (3) of the CCA. Accordingly, the notice used by HRA is not capable of conferring immunity in respect of the cartel conduct apparently described in HRA's notification.

Sky Channel also considers that the Form GA submitted by HRA does not adequately satisfy the requirement in section 93AB(3) that HRA must “reasonably expect” that it will make one or more contracts with Sky Channel about the supply of goods or services by HRA. Even if HRA is appointed as agent (such that it enters into contracts on behalf of the other contacting parties – which is itself not clear), each of the Member parties identified in the notification already has an agreement in place with Sky Channel under which it supplies broadcasting and other rights. Those agreements each continue for a number of years, a number of which will post date the period of immunity applied for by the HRA (for example, the agreement with Harness Racing NSW expires in 2019). In the context of a collective bargaining notification that would be valid for only 3 years, this raises serious questions in relation to both: (a) whether HRA has the “reasonable expectation” required by the CCA, and (b) what the contracting parties propose to discuss and collectively negotiate during the period of any immunity conferred under the CCA.

For these reasons, Sky Channel submits that the collective bargaining notice lodged by HRA does not comply (or even substantially comply) with the mandatory requirements for validity set out in the CCA.

As none of the contracting parties currently has, or is likely to have, an agreement with Tabcorp in relation to the supply of the relevant rights, Tabcorp agrees with the ACCC’s assessment that the notice is not valid insofar as it purports to relate to Tabcorp.

**2. The notified conduct would involve substantial public detriments which are not outweighed by benefits to the public**

Even if HRA were to proceed under its presently invalid notification (or, to the extent even possible, having addressed the issue raised under section 93AB(3), HRA submits a new and valid notification), Sky Channel considers that, without HRA providing substantially greater information in its notification, the ACCC must be satisfied that any benefits to the public arising in connection with the notified conduct would not outweigh the likely detriment to the public. Accordingly, the ACCC should issue a draft objection notice. This is because:

- The conduct which is the subject of the notification involves very substantial coordination between the vast majority of the harness racing broadcast rights holders in Australia (stated by HRA to be 90%). In circumstances where the participants to the proposed collective bargaining currently compete with each other (and, together, represent a near monopoly in relation to the supply of Australian harness racing audio and vision), the notification involves them coordinating with each other to negotiate the supply of those rights on common terms, and to determine how they will collectively “divide” the granting of those rights across different media (free to air, cable television, internet, mobile phone, tablet and future technologies) and in different geographies. The notified conduct therefore involves very substantial coordination by a very large proportion of the industry (which currently supplies rights in competition). This is a materially different scenario than exists in other matters in which the ACCC has typically granted immunity for collective negotiations.
- It is not clear whether (but it appears that) the participants representing 90% of harness racing broadcast rights may be contemplating boycott conduct in relation to negotiations with Sky Channel. The notification states that there will be no withholding of audio / vision “*after entry into a licence agreement*”. However, this implicitly suggests that this may not be the case *prior* to the execution of any new licence agreements. Any proposed boycott conduct raises significant competition issues and potential detriments that must be considered by the ACCC.

- The notification also incorrectly suggests that new negotiations (which may cover issues not presently dealt with under existing licence agreement) will be governed by the dispute resolution procedures in the existing separate licence agreements.
- In circumstances where HRA has identified an increase in prices for the coordinated supply of harness racing audio and vision as the key public benefit, the ACCC should require substantially more information in order not to view this (and the notified conduct) as involving clear public detriments. HRA's notification makes it clear that the purpose and likely effect of the coordination is to increase prices. Without further evidence or explanation:
  - HRA asserts that any price rise will reflect the "fair value" of the broadcast rights which is currently "artificially low", and remove a "market distortion" (which HRA asserts is demonstrated by the fact that acquirers pay a higher amount for thoroughbred racing vision).

Given HRA's acknowledgment that thoroughbred racing is more popular than harness racing (which provides a clear market-based explanation for any pricing differential), it is not at all apparent that any of the matters listed by HRA can be justified or that they involve public benefits (as distinct from clear detriments and distortions); and

- HRA asserts that it is unlikely that an increase in prices for harness racing vision will affect the price at which Sky Channel provides broadcasting services.

This claim is not substantiated. However, even if the "more rational" outcome identified by HRA in its notification were to occur (i.e. the increase in prices for harness racing broadcast rights is subsidised by a lessening in the price paid for thoroughbred vision), it is not at all clear why this is a public benefit or in any way economically efficient or fair. It is also not clear how this would occur, given the reference in the notification to longer term contracts for the supply of thoroughbred broadcast rights.

As set out above, this letter has been prepared on an expeditious basis and sets out only Sky Channel's initial and high level views. Sky Channel anticipates that it may have a number of further and more detailed comments as it continues to review HRA's application (e.g. Sky Channel does not agree with the market definition proposed by HRA).

However, having regard to the matters set out above, Sky Channel submits that if (to the extent possible) HRA chooses to re-submit a valid notification under sections 93AB(1A) and (1) of the CCA, it is essential that HRA provides substantially greater information. In the absence of such information, the "public benefits" identified by HRA would appear to be very limited and, in fact, compel a conclusion that such benefits are outweighed by substantial public detriments.

If the ACCC requires further information, Sky Channel would be pleased to assist.

Yours sincerely

  
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