Blanch, Belinda

From: Andrew Cox [redacted]
Sent: Tuesday, 7 August 2012 4:48 PM
To: Tan, Jasmine
Cc: Hartcher-O'Brien, Imogen; Sophie Morelli; Andrew Kelly
Subject: RE: Request for response to concerns raised by Sky about HRA notification [SEC=UNCLASSIFIED]

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For the Public Register

Dear Ms. Tan,

Further to your email below we respond as follows:

1. After considering the various alternatives our client has elected, for the avoidance of doubt, to lodge a related notification as regards s.44ZZRD and will do so before close of business tomorrow.

   As regards geographical restriction we note that it is not intended to allocate geographical areas in the market for provision of harness racing content geographically between notifying parties as referred to in s.44ZZRD(3)(b)(iii). The reference in paragraph 3(g)(ii) of the notification is a reference to geographical limits in the form of licence to be granted by the notifying parties, meaning, for example, division between domestic and international rights to broadcast.

2. The current notification is not invalid by reason of the striking out of reference to s.44ZZRD. The form provides that paragraphs which are not intended to be the subject of notification are to be struck out, not struck through. Striking out connotes omission. For example when material in a pleading is struck out, it is omitted from the surviving material.

3. As regards ss.93AB(3) and (5) regarding reasonable expectation of entry into a contract with the target we submit as follows:

   (a) The reasonable expectation of the notifying party ought not to be determined by reference to the intentions of the target. It would entirely defeat the purpose of the legislation if a target could avoid the operation of the notification provisions simply by stating that it had no intention of negotiating or re-negotiating with one or more of the notifying parties.

   (b) We submit that the proper test for determining whether a party has a reasonable expectation of entry into a contract is whether it can supply goods or services of a kind which the target acquires (or vice versa) and whether it has the commercial capacity to do so on terms which might be accepted by the target.

   In the current case it is clear that the notifying parties can so supply and that they have such capacity, because they already have contracts with the target.

   (c) In this case the notifying parties expect that if:

   (i) the target agrees to re-negotiate the existing contracts on a collective basis; or
   (ii) any acquirer of the business of the target agrees to re-negotiate the existing contracts on a collective basis, for example where consent to assignment or novation is required; or
   (iii) as each of their current contracts falls for renewal.

then each of the notifying parties will enter into a contract with the target. They have such expectations now and had them when the notification was lodged.

In this regard it is important to note that s.93AB(3) does not contain any requirement that the notifying party have a reasonable expectation of entry into a contract within any particular time. It is the protection provided by notification that is limited in time, not the qualifying requirements.

What is required is that the expectation of contracting should be reasonable. A reasonable expectation need not be certain, or more likely than not, or even probable. A reasonable expectation is simply something that could occur, rather than something for example, that could never occur under any circumstances.

It is not unreasonable for each of the notifying parties to believe that they would enter into a further contract with the target in the above circumstances.

(d) If the ACCC is of the view that it is necessary or appropriate to have regard to the terms of existing contracts when determining whether ss.93AB(3) and (5) are satisfied then we submit that all of the existing contracts should be provided to the ACCC and viewed together. Given that the target is the common party in possession of such contracts and that there are potential confidentiality issues we suggest that the ACCC request the target to provide the contracts to it. That could be done confidentially.

As set out above, however, we do not believe it is necessary or appropriate for the ACCC to have regard to such matters. Rather we submit that the existence of current contracts is a matter demonstrating of itself that it is reasonable to expect that, in the circumstances described above, contracts might be entered into between the notifying parties and the target.

4. In relation to the matters set out in the King & Wood Mallesons letter of 6 August 2012 regarding public detriment we note as follows:

(a) When considering the market share which the notifying parties might have in the market for supply of harness racing content, it is important to keep in mind that the target is the sole substantial acquirer in such market. It has a monopoly position and dominant market power. In such circumstances collective bargaining by suppliers is a natural reaction to prevent a monopoly acquirer from exploiting its market dominance;

(b) The notification requests at paragraph 3(i) that the notifying parties identify any parts of the proposed collective arrangements which relate to a possible or proposed exclusionary provision. No such arrangements are identified, because they do not exist. As is made clear, it is not proposed that the terms and conditions to be negotiated will include any exclusionary provision;

(c) The notifying parties will be subject to existing dispute resolution procedures under current licensing arrangements while collective bargaining is occurring unless the term of such existing contract has expired. If the notifying parties and the target believe that such procedures should be extended to include issues not presently dealt with under existing licence arrangements there is no impediment to them doing so by agreement;

(d) HRA refers generally to the matters set out in the appendices regarding the substantial disparity between the value of broadcast rights for harness racing content and thoroughbred content. If the ACCC considers that it is necessary or appropriate to review the terms of existing harness racing content contracts to determine whether the price is artificially low or a market distortion then we submit it would be appropriate to request the target to provide copies of existing contracts on a confidential basis.

Yours faithfully,

Andrew Cox
Consultant

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