

For public register

3 September 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

1 Introduction

- 1.1 We refer to the Commission's letter dated 17 August 2012 in which it invited submissions in relation to the likely public benefits and detriments arising from the conduct the subject of the collective bargaining notifications submitted by Harness Racing Australia Inc ("**HRA**") on 25 July 2012 and 8 August 2012.
- 1.2 This letter sets out comments in relation to the notified conduct on behalf of our client, Sky Channel Pty Ltd ("**Sky Channel**").

2 Summary

- 2.1 Sky Channel considers that the information provided in the notifications compels a conclusion that the detriments associated with the notified conduct outweigh any public benefits.
- 2.2 The notifications involve harness racing associations that, together, supply 90% of harness racing content in Australia (and with the exception of harness racing in the ACT, which accounts for approximately 1.25% of harness racing content shown on Sky Channel, 100% of the content outside Queensland), coordinating in relation to:
- (a) the supply of their respective vision and audio rights at common prices and on other common terms (e.g. duration and exclusivity);
 - (b) the means by which they distribute those rights (i.e. how and to whom the rights will be made available across different media, including television, internet streaming, mobile phones, tablets and other future technologies);

- (c) the geographic areas in which the participants will each supply those rights; and
 - (d) a range of other key commercial terms (e.g. minimum content to be broadcast, obligations in relation to accompanying material and scheduling of broadcasts).
- 2.3 Coordination on these issues will remove any competition between the vast majority of harness racing participants in relation to the supply of those rights, precluding future innovation, efficiencies, increased value, increased output and other improvements that might result from such competition. This will harm not only Sky Channel, but also all consumers in Australia who ultimately view that content.
- 2.4 The sole justification put forward by HRA for this wide-reaching coordination across nearly the entire industry is that it will enable an *"increase in price for supply of broadcasting rights for harness racing content"*.
- 2.5 The fact that coordination and a lessening of competition between suppliers may result in increased prices is not an outcome that the Commission should accept as a public benefit capable of outweighing the detriments set out above.
- 2.6 HRA appears to assert that the participants should be entitled to receive an increase in price because they each supply their respective rights to the major broadcaster (Sky Channel) and because the prices for harness racing content are lower than the prices for thoroughbred content. HRA also suggests that any increase in price it receives will be a public benefit because it would apply those funds to various uses (e.g. prize money and subsidising less popular race meets). However, these assertions do not provide any logical basis for concluding that the public benefits associated with the notified conduct outweigh any detriments.
- 2.7 This lack of logical basis is further apparent from the fact that:
- (a) the notification does not provide any evidence that there is currently any "under-valuation" of harness racing rights or a "market distortion" that would be addressed by collective bargaining. The simplistic comparison with thoroughbred rights ignores the obvious market-based reason for different valuation of thoroughbred and harness racing rights. Thoroughbred racing is significantly more popular with end consumers, which in turn attracts significantly greater viewer numbers, advertising revenue, sponsorships and wagering revenue. Indeed, highlighting its popularity, out of all three racing codes in Australia (namely harness racing, greyhound racing and thoroughbred racing), thoroughbred racing is the only code which features on free-to-air television (and it features on a regular basis);
 - (b) the notification does not provide any evidence that individual negotiations with Sky Channel (or individually negotiated payments) are in any way inefficient, or that collective bargaining would be more efficient or beneficial to the public. It is not at all apparent why a reduction in variations between licence fees between participants should be viewed as a benefit to the public;
 - (c) the notification does not provide any evidence that the reallocation of revenue to harness racing bodies (i.e. participants obtaining the benefit of higher prices at the expense of Sky, thoroughbred rights owners and consumers) would be more efficient or beneficial to the public; and
 - (d) the notification does not provide any compelling evidence that the intended uses of any increase in prices (e.g. prize money for race participants or cross-subsidising less popular and/or regional race meets) are efficient or would involve other benefits to the public.

- 2.8 Further, HRA does not address certain key detriments to thoroughbred rights owners and the public that would result from harness racing associations receiving additional amounts for their rights. HRA suggests that the additional amounts should come at the expense of rights fees that would ordinarily flow to thoroughbred racing or other codes. Sky Channel submits that if this were to occur, thoroughbred racing or other codes would be likely to suffer an equivalent detriment to the public benefit supposedly claimed by HRA (if not a greater detriment in the case of thoroughbred racing, given its increased popularity). In the event that the additional amounts did not come from a decrease in fees paid to other codes, the increased costs would likely be passed on by Sky Channel to the public in the form of increased distribution fees and subscription costs. This could result in a decrease in the distribution of Sky Channel's racing vision throughout Australia, leading to a potential decrease in wagering revenue for all racing codes, and reduced exposure for harness racing.
- 2.9 In these circumstances – and given that collective bargaining (and the exclusive appointment of HRA) will remove any potential competition between the vast majority of industry participants in relation to both television rights and new media rights (both in Australia and internationally), whether based on price, innovation, value, quality, duration, bundling of services or other aspects of the service – Sky considers that the notification compels a conclusion that the detriments associated with the relevant conduct outweigh any public benefits
- 2.10 Accordingly, Sky considers that the Commission should issue a draft notice under section 93A(1) of the *Competition and Consumer Act 2010* (“CCA”) in relation to the notification.

3 Collective bargaining

- 3.1 The CCA makes it clear that statutory immunity under a collective bargaining notification should only be available in circumstances where the benefits to the public outweigh any detriments.
- 3.2 The Commission's Guide to Collective Bargaining Notifications states that “*where proposed collective bargaining arrangements involve only a small proportion of participants in relevant markets, there is likely to be little risk of anti-competitive detriment*” (page 29). The Commission has also identified this as a key factor in a number of recent collective bargaining decisions. For example:
- (a) in granting authorisation in respect of proposed collective bargaining involving two Surat Basin coal producers (August 2012), the Commission stated that “*the voluntary nature of the arrangements, the limited composition of the collective bargaining group and the limited scope of the negotiations means there is little, if any, public detriment*”;
 - (b) in granting conditional authorisation in respect of proposed collective bargaining for small private hospitals (August 2012), the Commission imposed an express condition to limit the size of the bargaining group nationally and also its concentration in each state, noting that “*the condition addresses potential concerns about the size that the group may reach*”; and
 - (c) in granting interim authorisation in respect of proposed collective bargaining by the South East Potato Growers Association and its members (August 2012), the Commission expressly noted that “*there are approximately 70 potato grower businesses in South Australia and 17 of these belong to the South East Potato Growers Association*”.
- 3.3 This is clearly not the case in relation to HRA's notification. The notifications involve harness racing associations that, together, supply 90% of harness racing content in Australia, and 100% of the content outside Queensland and the ACT. In addition, none of the above authorisation applications

sought to justify industry-wide coordination on the basis that it would enable an increase in supply prices.

3.4 The Commission's Guidelines (pages 29-32) also state that the anti-competitive effects of collective bargaining arrangements are likely to be limited when:

- (a) the current level of individual bargaining between members of the group and the target is low;
- (b) the agreement does not restrict the ability of parties to compete in other ways, for example, on quality or services;
- (c) there is voluntary participation in the arrangements;
- (d) there are restrictions on the coverage, composition and representation of the bargaining group; and
- (e) there is no boycott involved.

3.5 However, again, many of these potentially ameliorating factors are not present in the case of HRA's application. In particular:

- (a) the participants have previously negotiated individually with Sky Channel. Sky Channel does not agree that the terms of supply are not capable of negotiation, or that standard confidentiality provisions (which are common across a wide range of industries) mean that *"it is not possible for the participants to compete"*;
- (b) the notified conduct involves comprehensive coordination between the participants which has the potential to remove all competition between them in relation to the supply of vision and audio rights (e.g. competition on product offerings, innovation, efficiencies, increased value, increased output and other improvements that might result from competition);
- (c) participation in the joint arrangements is not "voluntary". As notified to the Commission, all participants have appointed HRA as their exclusive agent for negotiating the supply of the relevant vision and audio rights. The appointment of a **single common (and exclusive) agent** across the industry means that the participants are all contractually required to channel their negotiations through the same industry body;
- (d) while Sky Channel does not necessarily agree with the market definitions advocated by HRA, the coverage of the bargaining group is significantly greater than previous matters in which the Commission has approved collective bargaining; and
- (e) HRA is yet to make it clear the extent to which the notified conduct may involve any boycott conduct. In its email to the Commission dated 7 August 2012, HRA stated that:

"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".

This does not address the issue. Sky Channel agrees that any terms and conditions that may be negotiated with it would not include any exclusionary provision. This is because Sky Channel would not agree to any such term. However, the key issue not yet addressed by HRA is that participation in any collective bargaining by Sky Channel should be entirely voluntary with no agreement by the participants to engage in boycott conduct in respect of the supply of vision and audio rights to Sky Channel under current or future arrangements.

The exclusive appointment of HRA by each participant raises a serious question in relation to this issue.

4 Impact on the development of future competition


- 4.1 Sky Channel does not agree with HRA's assertion that "*the existing level of competition between participants in the relevant market is negligible or non-existent*". This should not be the case, and appears to ignore the plain fact that each participant supplies similar types of vision and audio rights and seeks to position its content as more attractive for acquisition by one or more broadcasters. By way of example, there is significant competition between various harness racing bodies for their racing to appear during more commercially attractive timeslots (e.g. Friday nights during early evening). Competition for timeslots encourages harness racing bodies to make their racing the most attractive product – this can manifest its way through increased prize money for participants, leading to bigger fields and increased wagering turnover, which in turn benefits both the harness racing bodies and the participants.
- 4.2 In any event, the current collective bargaining notification extends well beyond existing competition for the supply of vision and audio rights for television. By its express terms, the notification seeks to enable coordination across nearly the entire industry in relation to the way that those rights are made available for subscription television and also through new media (e.g. internet streaming, mobile phones, tablets and other future technologies).
- 4.3 Consistent with its approach in the recent *Foxtel / Austar* acquisition, Sky Channel considers that the Commission should be very mindful to ensure that coordination in relation to these new rights does not limit or hinder the development of future competition in any market (e.g. through new media and other forms of content delivery). This is a material issue that is not addressed in HRA's notification. The effect of HRA's notification is that there cannot be any competition in relation to the supply of vision and audio rights in respect of those developing technologies.

5 Summary

- 5.1 Sky Channel considers that the information provided in the notifications compels a conclusion that the detriments associated with the notified conduct outweigh any public benefits. In particular, Sky Channel considers that the Commission should not accept that the key "public benefit" identified by HRA – namely, an intended increase in prices - is a public benefit that is capable of outweighing the significant detriments set out above.

5.2 Accordingly, Sky Channel respectfully submits that the Commission should issue a draft notice in accordance with section 93A(1) of the CCA in respect of the notifications.

Yours sincerely

per 

Wayne Leach
Partner
T +61 2 9296 2327
M +61 419 602 617
wayne.leach@au.kwm.com