

Our ref: ADP:ARC:11/3380

For the Public Register

7 September 2012

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

By Email: Imogen.Hartcher-O'Brien@acc.gov.au
Confirmation By Mail

Dear Ms Hartcher-O'Brien,

Re: Notification of Collective Bargaining submitted by Harness Racing Australia Inc

We refer to the Commission's email dated 3 September 2012 attaching King & Wood Mallesons letter dated 3 September 2012 ("the Sky Channel submissions") regarding the likely public benefits and detriments arising from the conduct the subject of the collective bargaining notifications submitted by Harness Racing Australia Inc ('HRA').

Public benefit and detriment generally

When considering the relevant market it is necessary to look at both suppliers and acquirers. In this case there is one dominant acquirer, being Sky Channel. There is no competition between acquirers in the market for supply of harness racing content.

Broadcasting of races is integral to wagering on races. If a race is not broadcast then wagering is substantially reduced. The notifying parties cannot commercially withhold supply of harness racing content, but must deal with an acquirer.

Accordingly as the sole dominant acquirer Sky Channel are currently able to dictate terms to the notifying parties. One of the consequences of such dominant position is that Sky Channel have imposed confidentiality terms which it asserts prevent the notifying parties from communicating the terms upon which they each contract with Sky Channel between one another. In this regard we attach:

- (a) Letter from Sky Channel to HRA dated 6 August 2012;

- (b) Email from Gerard Patane to Andrew Kelly dated 4 September 2012.

The above matters demonstrate that competition in the relevant market is negligible or non-existent. There is no competition between acquirers and competition between suppliers is precluded by confidentiality obligations preventing communication of existing terms between suppliers.

In the absence of effective existing competition any potential diminishment of competition arising from the notified conduct will not result in public detriment.

Increased fees enabling development of harness racing is not the sole public benefit identified by the notifying parties. At section 6 (b) and (c) of the Notification the notifying parties also identify increased competition between acquirers by reference to geographic rights (typically international and domestic) or media (typically pay television, internet, tablet, smart phone etc.) as public benefits arising from collective bargaining.

Collective bargaining by the notifying parties will increase the potential for competition between:

- (a) acquirers of harness racing content, by enabling supply of domestic rights and international rights or new media rights to acquirers other than Sky Channel. Currently Sky Channel is able to impose terms providing for all relevant rights to be acquired by it, imposing insurmountable barriers for entry to other acquirers.

The potential to attract a competitive acquirer will be increased by the ability to supply a mixed program of racing content from the various notifying parties. In the absence of any ability to access such a mixed program a prospective competitive acquirer faces a much larger barrier to entry.

- (b) the notifying parties and suppliers of content for other codes of racing, principally thoroughbred and greyhound racing. The potential for collective bargaining to increase the price for supply of harness racing content will benefit the harness racing industry and Standardbred breeding industry as set out in section 6(a) of the Notification. A stronger harness racing industry is more able to compete with thoroughbred or greyhound content.

In this regard Sky Channel argues that lower prices paid for harness racing content reflect the lower popularity of such content. But this is a chicken and egg argument. Popularity of a given racing code is a result of the money which can be spent in development, publicising and presenting the relevant content. Sky Channel states that a fact highlighting the popularity of thoroughbred racing is that it is the only code to feature on free-to-air television. But most free-to-air time for thoroughbred racing, including significant metropolitan carnivals are purchased by thoroughbred content suppliers. It is precisely the capacity of thoroughbred content providers to firstly reserve rights to supply to free-to-air in their arrangements with Sky Channel and then spend monies to purchase free-to-air time and publicise thoroughbred content by exploiting such rights which drives the popularity of thoroughbred content and wagering on thoroughbred racing.

When required to negotiate with Sky Channel on an individual basis the notifying parties have been unable to resist Sky Channel's insistence on supply of an exclusive licence for "all rights". The prospect of collective bargaining enabling allocation of rights between acquirers who will actually exploit such rights or reservation of free-to-air rights so as to enable the

purchase of free-to-air time in competition with thoroughbred content is a significant factor in favour of the Notification.

Relative popularity of the different racing codes is not immutable. In France harness racing is approximately 50% of the pari-mutuel wagering market. In Sweden it is 90%. In Australia it is approximately 16% and has remained relatively static under the current broadcasting arrangements, while greyhound racing has improved its share of the wagering market and thoroughbred racing has reduced.

It is submitted that the appropriate conclusion having regard to the above benefits combined with the effective absence of competition in the current market indicate that the public benefits of collective bargaining will outweigh any public detriment.

Particular matters

We address particular matters in the Sky Channel submissions by reference to the numbered paragraphs:

Paragraph 2.7

Sky Channel criticises HRA for failing to provide evidence of current terms or negotiations when the confidentiality provisions imposed on the notifying parties by Sky Channel itself preclude provision of such evidence.

If the Commission considers that production of the existing agreements between the notifying parties and Sky Channel would assist it in consideration of the issues then HRA invites the Commission to override the confidentiality obligations precluding provision of such agreements by requiring production of such agreements either from Sky Channel or the notifying parties.

Paragraph 3.5(c)

Each participant has voluntarily appointed HRA as its exclusive agent pursuant to the Deed comprising Annexure 1 to the Notification. The appointment is to subsist for the earlier of 5 years or entry into a contract regarding the relevant rights. There is no contract between participants preventing a participant and HRA from terminating such appointment. Not all members of HRA have chosen to participate in such arrangements. In the circumstances participation in the arrangements is properly described as voluntary.

Paragraph 3.5(e)

As stated in the Notification no exclusionary provisions are identified because they do not exist. The question as to boycott has been addressed and explicitly answered in the negative.

Paragraph 4.1

Sky Channel identifies competition between harness racing content providers for commercially attractive timeslots as a relevant matter without producing any evidence that such competition has the effect asserted. Currently the state bodies coordinate timeslots at a state level. Collective bargaining will enable coordination at a national level, reducing congestion at popular times and enabling greater pre-race presentation and analysis. Congestion of racing vision for various timeslots, particularly of a Friday night, leads to lost wagering on events and shuffling of races to a less attractive and less popular alternative channel promoted to harness racing bodies by Sky

Channel. The participants would prefer to provide a coordinated schedule with sufficient wagering time, provision for the broadcast of accompanying material including interviews and consequent increase the total wagering. If the wagering per race drops, this results in lower consistency of dividends and lower wagering pools.

Paragraph 4.3

There is no current market for the acquisition of new media rights for harness racing content. Sky Channel imposes terms requiring supply of "all rights". Sky Channel's exploitation of such rights is limited to supply of content to Tabcorp customers.

The capacity to provide content to a competitive acquirer, unassociated with any particular wagering provider, will expand the market for acquisition of new media rights. Unless collective bargaining can create such capacity any competitive acquirer faces an insurmountable barrier to entry because all rights will be acquired by Sky Channel.

The capacity of the notifying parties to provide a commercial package of new media rights to a prospective acquirer in competition with Sky Channel is an important public benefit reducing the barriers to entry of a competitive acquirer into the market for supply of harness racing content.

Yours faithfully

Andrew Cox
Pointon Partners





Andrew Kelly
Chief Executive
Harness Racing Australia Inc
Level 1, 400 Epsom Road
Flemington VIC 3031

6 August 2012

Dear Andrew,

I refer to your letter dated 20 July 2012 informing SKY that a number of Members of HRA had committed to a Deed of Agency by which they appointed HRA as their agent to discuss concerns regarding SKY's activities. Your letter also indicated that HRA had lodged a Notification of Collective Bargaining (Notice) with the Australian Competition and Consumer (ACCC).

We confirm we have received a copy of the Notice from the ACCC and have been invited to comment. SKY has some significant issues and concerns with the content and scope of the Notice, and has raised these directly with the ACCC.

SKY values its relationship with HRA and the harness racing industry as a whole, however, while SKY has binding rights agreements directly with each of the Members listed in the Notice, SKY prefers to deal directly with those Members in relation to any issues or concerns they may have. To that end, SKY will be writing to each of the Members that are listed in the Notice.

SKY reminds HRA that while it has in place binding agreements with each of the Members, it would not expect any third party to induce or encourage a Member to breach its obligations under those agreements with SKY, including in relation to confidentiality and delivery of vision.

Yours sincerely


Brendan Parnell
Chief Operating Officer - Media & International Division

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 **Tabcorp**

From: "Patane, Gerard" <pataneg@tabcorp.com.au>

Date: Tue, 4 Sep 2012 16:35:51 +1000

To: Andrew Kelly <AKelly@hra.harness.org.au>

Subject: SKY/HRSA - Confidential Term Sheet - dated 24 September 2010

Dear Andrew,

It has come to our attention that Harness Racing South Australia (HRSA) faxed Harness Racing Australia (HRA) a signed Term Sheet between Sky Channel Pty Ltd (SKY) and HRSA, dated 24 September 2010 which was clearly marked as "Confidential".

Can you please confirm if HRA received this confidential document via facsimile on the 16th September, 2011?

If so, can you please confirm whether HRA is still in possession of the Term Sheet, or if it has been destroyed?

I look forward to your prompt response.

Regards,
Gerard



Gerard Patane
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