

**For the public register**

5 October 2012

Ms Imogen Hartcher-O'Brien and Ms Jasmine Tan  
Mergers & Adjudication Branch  
Australian Competition and Consumer Commission  
23 Marcus Clark Street  
Canberra ACT 2601

Dear Imogen and Jasmine

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

**1 Introduction**

- 1.1 We refer to the letter to the Commission from Harness Racing Australia Inc ("**HRA**") dated 7 September 2012.
- 1.2 This letter sets out further information from Sky Channel Pty Ltd ("**Sky Channel**") in relation to the matters raised in HRA's letter.

**2 HRA's letter**

- 2.1 In its letter, HRA appears to suggest that:
- (a) standard confidentiality requirements in a commercial contract are the "consequence" or result of "dominance", and that competition would be enhanced if suppliers were able to communicate with each other in relation to the terms they offer to customers;
  - (b) the ability of the harness racing associations to offer a "mixed program" aggregating their vision and audio content would increase competition between potential acquirers (even though it would not be contractually possible for such a "mixed program" to be offered to another acquirer without terminating existing agreements with Sky Channel);
  - (c) the notified conduct would increase competition between the harness racing associations and suppliers of content for other racing codes, with the result of such increased competition being an *increase* in prices; and
  - (d) paying increased fees to the harness racing associations (relative to other racing codes) would be likely to increase the exposure, and therefore popularity, of harness racing (again, at the expense of other racing codes).

- 2.2 HRA's letter also appears to suggest that the existence of one major broadcaster of harness racing audio and vision rights (that has separate contracts with each supplier) itself means that competition would be enhanced, and public benefits generated, by removing competition between 90% of suppliers.
- 2.3 Sky Channel does not agree with these assertions. It also does not agree that the proposed comprehensive coordination between all harness racing associations (other than Queensland and the ACT) in relation to the supply both of current and new media rights would result in public benefits that outweigh the clear detriments.
- 2.4 Sky Channel also considers that a number of public detriments will arise from the exclusive appointment by all Members of HRA as their agent (i.e. the appointment of a common agent is likely to result in a significant reduction in competition between suppliers). Sky Channel requests that the Commission considers this issue as part of its broader assessment. Although HRA states there is no contract between any Member and HRA that prevents Members from terminating their Deed of Agency, each Deed of Agency is binding such that the only way it can be terminated prior to its expiration is by agreement between the Member and HRA.
- 2.5 Further reasons for Sky Channel's views are set out below.

***Confidentiality requirements***

- 2.6 As set out in our letter dated 3 September 2012, Sky Channel considers that the various harness racing associations compete with each other in relation to the supply of harness racing audio and vision rights. Sky Channel does not agree with HRA's apparent assertion that suppliers cannot compete with each other because they cannot communicate with each other in relation to the price and non-price terms on which they deal with customers.
- 2.7 While price transparency can, in certain circumstances, facilitate competitive outcomes, discussions between competitors on price and other customer terms can also give rise to significant anti-competitive detriment. Sky Channel is not aware of any legal or policy basis for suggesting that "*competition between suppliers is precluded*" because there are standard confidentiality provisions in contracts to prevent "*communication of existing terms between suppliers*". This type of communication is itself frequently viewed as anti-competitive.
- 2.8 Sky Channel is also not aware of any legal or policy basis for suggesting that the existence of confidentiality provisions in one or more bilateral contracts is a consequence of (or in any way related to) market "dominance". Confidentiality obligations occur in a wide range of commercial contracts across a large range of industries. This occurs in highly competitive markets and regardless of the size of the participants.
- 2.9 Accordingly, Sky Channel considers that the Commission should attribute no weight to HRA's apparent submissions that:
- (a) confidentiality provisions in contracts are somehow inappropriate or a consequence of market power,
  - (b) competition between suppliers is not possible without communication about the terms on which they deal with customers, or
  - (c) the removal of competition between 90% of the suppliers of harness racing rights is an end that should be pursued merely because there is one major acquirer of those rights.

**Competition between acquirers**

- 2.10 HRA's letter suggests that one of the public benefits associated with the notified conduct is that it will enable the supply of "*a mixed program of racing content from the various notifying parties*" which will, in turn, increase the potential to attract a competitive acquirer (and therefore competition between acquirers). However, HRA does not explain how this claimed public benefit will *in fact* be delivered during the period potentially covered by HRA's collective bargaining notification.
- 2.11 As set out in our letter dated 6 August 2012, each of the Member parties identified in HRA's notification already has an agreement in place under which it is required to supply audio and vision rights to Sky Channel. Those agreements each continue for a number of years and expire at different times. A number of the agreements will also post-date the period of immunity applied for by HRA (e.g. the agreement with Harness Racing NSW expires in 2019).
- 2.12 Given these existing contractual obligations, it is not clear how HRA proposes to make a "*mixed program of racing content from the various notifying parties*" available to other acquirers. The rights owned by a number of the notifying parties have already been granted to Sky Channel and, unless those agreements are terminated, will not be available. In this situation, it is not clear how the public benefit claimed by HRA would *in fact* be delivered. This significantly undermines the basis of HRA's notification.

**Competition with other racing codes**

- 2.13 HRA's letter states that "*collective bargaining ... will increase the potential for competition between the notifying parties and suppliers of content for other codes of racing, principally thoroughbred and greyhound racing*". This appears to be based on a view that collective bargaining will enable the notifying parties to *increase* their prices for the supply of audio and vision rights which will, in turn, strengthen the ability of harness racing to compete with other codes.
- 2.14 Sky Channel considers that increased competition would usually lead to a *decrease* in prices rather than an *increase* as anticipated by HRA. This suggests that it may not be an increase in competition that is either the intention, or likely result, of the notified conduct. This is particularly the case, given the acknowledgement that some other codes compete not by requiring an *increase* in fees, but rather by acquiring air time. It is also not apparent to Sky Channel the basis on which HRA is suggesting that the harness racing associations should be entitled to an increase in prices (or indeed an increase in broadcasting exposure), in each case potentially at the expense of more popular racing codes.
- 2.15 While it may be the case that greater broadcasting exposure would lead to increased popularity, it is not clear why this would be more efficient, involve greater public benefits or would indeed be a more commercially compelling proposition for Sky Channel than broadcasting other racing codes that are currently more popular. In this regard, there are limited parallels that can be drawn with the situation in Sweden (where weather prevents thoroughbred racing for much of the year) or France (where there is no greyhound racing). The fact that particular sports may be popular in one country does not provide any basis for suggesting that the sport should get more television coverage in other countries.
- 2.16 As set out above, much of HRA's letter appears to proceed on the view that the existence of one major broadcaster of harness racing audio and vision rights (in this case Sky Channel) itself means that competition would be enhanced, and public benefits generated, by removing competition between 90% of the suppliers of harness racing rights. Sky Channel does not agree with this view.

***Coordination of scheduling***

- 2.17 Sky Channel also disagrees with the assertion in HRA's letter that "*collective bargaining will enable coordination at a national level, reducing congestion at popular times and enabling greater pre-race presentation and analysis*".
- 2.18 Sky Channel invests significant time and effort each year engaging, both through the annual "Sky Coverage Workshop" and through continuous and daily dialogue, with relevant stakeholders (including suppliers and wagering operators) in relation to broadcasting matters. These matters include presentation issues, viewer enhancements, developments, proposed innovations and scheduling constraints. This involves significant balancing of different considerations across the various racing codes.
- 2.19 Given the significant level of engagement and coordination by Sky Channel that already exists (and is essential to enable Sky Channel, as broadcaster, to deliver content from over 80,400 thoroughbred, greyhound and harness races from 230 Australian and 270+ international tracks), it is not at all clear that this would be enabled or enhanced by the notified conduct.
- 2.20 Accordingly, Sky Channel does not agree that this is a public benefit (or even a particular benefit to Sky Channel) that would arise from the notified conduct.
- 2.21 [Confidential]

***The impact of price increases for harness racing rights***

- 2.22 As set out on page 56 of the attached 2011 Tabcorp Investor Day presentation ("**TID Presentation**") (**Attachment 2**):
- (a) Sky Channel has made significant investments in infrastructure, and incurs significant costs, to enable the delivery of content to residential homes and public venues. Those costs include the acquisition of broadcasting rights from over 500 venues (both domestic and international), communications technology costs (e.g. fibre and satellite links from both domestic and international tracks), production and employee costs, and distribution costs; and
- (b) approximately 88% of these costs are fixed or output critical. This means that, in order to provide any service, Sky Channel must recover those costs from customers.
- 2.23 This cost structure also means that any increase in fees which result from the notified conduct would need to be passed on, most likely as an increase in customer subscription fees. Even if it were appropriate for Sky Channel to seek to recover these costs by reducing the fees payable for rights for other racing codes (which Sky Channel disputes), this would not be easy given the existence of current contracts with many of those suppliers.
- 2.24 Sky Channel submits that any proposed increase in fees – which is the clear objective of the collective bargaining notification – must be assessed in the context of this clear public detriment.

***Supply of content to customers***

- 2.25 In its submission, HRA states that "*Sky Channel's exploitation of such rights [i.e. audio and vision rights] is limited to supply of content to Tabcorp customers*", with the apparent suggestion that the notified conduct would make the audio or vision rights more widely available.

2.26 This statement is factually incorrect. As set out on page 56 of the TID Presentation, Sky Channel makes audio and vision rights available through a number of channels, including:

- (a) pay television to homes throughout Australia, through Foxtel and Austar;
- (b) radio, through various stations Australia wide;
- (c) various retail wagering agencies throughout the country; and
- (d) hotels, clubs and pubs throughout the country (whether or not these venues have any wagering associated with them).

None of these channels is limited to Tabcorp customers.

2.27 In addition, Sky Channel makes vision available on the Internet through its Media Centre service (which features live streams of Sky Racing 1 and Sky Racing 2 online). The Media Centre service is available via [www.skyracing.tv](http://www.skyracing.tv). There is no requirement to be a Tabcorp customer to access the Media Centre service. Further, as of 3 October 2012, the Media Centre service is being offered on a free trial basis to people who register with Sky Channel through Sky Channel's online registration process. Sky Channel currently anticipates that the Media Centre will remain free to access until early 2013. After this time customers may be required to pay for a subscription to continue to access the Media Centre. The online streams are also available to Tabcorp wagering customers through Tabcorp's wagering websites.

2.28 In addition, Sky Channel makes (on commercial terms) streams of Sky Racing 1 and Sky Racing 2 available to other wagering operators who may then make such vision available to their customers.

2.29 Accordingly, it is not, as apparently suggested by HRA, a public benefit of the notified conduct that audio and / or vision content will become available to non-Tabcorp customers in circumstances where that content is not currently available to those customers.

### 3 Conclusion

3.1 Sky Channel considers that there are likely to be little, if any, benefits (either to the public or to Sky Channel) that will result from the proposed conduct. The appointment of HRA as agent or any collective bargaining will not remove the practical need for Sky Channel to engage individually with each provider in relation to a range of broadcasting and technology matters (e.g. capability of equipment at various Members' tracks to provide vision to Sky Channel).

3.2 If the Commission has any further questions, Sky Channel would be pleased to assist.

Yours sincerely



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Encl

# Attachment 1

[*Confidential*]

## **Attachment 2**

### **Tabcorp Investor Day Presentation**

Please refer to:

[http://www.tabcorp.com.au/resources.ashx/mediareleases/605/downloadableVersion/7A31761E41ADEFD27F8E5C9FB2EE0001/12\\_October - Investor day presentation.pdf](http://www.tabcorp.com.au/resources.ashx/mediareleases/605/downloadableVersion/7A31761E41ADEFD27F8E5C9FB2EE0001/12_October_-_Investor_day_presentation.pdf)