

# Equestrian Australia Limited Notification N98410

## Issues Paper

### Purpose

On **30 July 2015**, EA lodged a notification with the Australian Competition and Consumer Commission (ACCC). The ACCC is currently assessing that notification. To help the ACCC in this process, the ACCC is proposing to hold a public forum to give interested parties an opportunity to talk about their views on the notification. The purpose of this issues paper is to give you some information about the notification and explain the framework under which the ACCC is reviewing the notification ahead of the forum.

### Background

#### What is the ACCC?

The ACCC is an independent Commonwealth statutory authority. One of our key roles is to enforce the *Competition and Consumer Act 2010* (the Act). Amongst other things, the Act prohibits a range of conduct which would damage or reduce competition to the detriment of Australian consumers.

#### What is a notification?

In some circumstances, it is possible for people to get protection from legal action even though they would be engaging in conduct which would otherwise be illegal under the Act. Lodging a 'notification' with the ACCC is one way of doing this.

The notification process is not available for all the conduct prohibited by the Act. However, one type of conduct that can be notified is 'third line forcing'.

In broad terms, third line forcing involves a person (A) supplying or offering to supply goods or services to another person (B) on condition that Person B acquires particular goods or services from a third person (C). A refusal by A to supply goods or services to B because B will not agree to acquire goods and services from C is also third line forcing.

#### What is the ACCC's role in assessing notifications?

A third line forcing notification **automatically** provides legal protection 14 days after it is lodged.

However, the ACCC can, at any time, revoke a third line forcing notification and, thereby, remove the protection from legal action provided by the notification. The ACCC can only do so if it is satisfied that the likely public benefits would not outweigh the likely public detriments from the conduct (section 93(3A)).

### The notification lodged by EA

The notification lodged by EA relates to possible third line forcing conduct by EA. The legal protection from the notification took effect on 13 August 2015.

The notification protects EA from legal action for engaging in third line forcing conduct insofar as EA supplies equestrian sports event services (Event Services) to owners and/or riders of equestrian sports horses who are members of EA (Entrants), on condition that horses have been vaccinated against the Hendra virus. In other words, on the condition that the owner/rider of the horse has acquired the Hendra virus vaccine from another person.

Amongst other things, the ACCC understands that EA administers equestrian sports in Australia in relation to eight internationally recognised equestrian disciplines, Eventing, Show Jumping, Dressage, Carriage Driving, Show Horse, Vaulting, Endurance and Para-equestrian, and one national discipline, Show Horse.

EA submits that official EA events are organised on EA's behalf through various local and state based organising committees, constituted by volunteer members. EA submits that while it does not have a general rule or policy that relates to the vaccination status of horses, it encourages Organising Committees to take measures to manage biosecurity risks in accordance with the "Horse Venue Biosecurity Workbook" published by Animal Health Australia.

To the extent that each relevant organising committee is acting as an agent for EA, they will have protection under the notification if they choose to impose the condition based on a biosecurity risk assessment. If applied, this condition would only relate to horses that have recently resided, or transited through a Hendra endemic area (Northern NSW and Queensland) within a specified period.

## **Issues relevant to the ACCC's assessment of the notification**

### ***Public benefits***

When assessing the likely public benefits we will consider whether vaccination against the Hendra virus will increase what may otherwise be considered an unsatisfactorily low rate of vaccination. This may be because a person making a decision whether to vaccinate their horse does not face the full potential costs or impacts of not vaccinating. While they will likely weigh up the costs/risks and consequences of vaccinating or not vaccinating for them and their horse, they will not typically bear the potential costs and impacts on others, such as the risk of other horses contracting the Hendra virus from their horse (were it to contract the virus) and/or the risk of other people (most likely vets) contracting the virus. There might also be other consequences such as the cost or inconvenience incurred if all attendees at an event were quarantined due to a participating horse testing positive to the Hendra virus.

In these circumstances, it is likely that left to themselves, individuals (and hence in aggregate, 'the market') will undertake a level of vaccination that is lower than a socially desirable level.

Similarly, a problem can occur when the benefits of widespread vaccination (namely significantly reduced risk of contracting a virus) are not limited to those that have vaccinated their horses. Individuals may have an incentive to not vaccinate their horse in the hope or expectation that most other people do vaccinate their horses and they will still enjoy the benefits of reduced health risk. However, if enough people decide not to vaccinate on that basis, the broader benefits of widespread vaccination can be compromised.

A number of the people that have provided submissions claim that requiring Hendra vaccination to participate in EA events will not result in public benefits because it is unnecessary since there are few (if any) recorded cases of horse to horse transmission (particularly at equestrian events) and that horse to human transmission can be prevented by the use of full Personal Protective Equipment.

The notified conduct primarily seeks to address the perceived risk of exposure to the Hendra virus from participating in an EA event. The impact of this perceived risk might be seen in a number of ways.

Some potential event participants may not attend events unless they have sufficient confidence that the risk of contracting the virus is acceptably low.

Similarly, some veterinarians may refuse to attend and enable events to proceed unless they have sufficient confidence that the risk of contracting the virus is acceptably low.

Some event organisers may need to significantly increase the entry fees for events to cover the additional cost of insuring the risk that event attendees and participants and/or their horses may contract the Hendra virus. Or event organisers may be unable to insure such a risk and therefore be unable to run certain events or require very significant waivers of liability from entrants.

It is important to remember that even if the risk of contracting the Hendra virus for people and horses is perceived to be low, the consequences are typically severe for those affected (such as death and/or long term illness); and consequently the overall risk may be high from a liability/insurance perspective.

In their submission to us, EA says that the conduct will result in the following public benefits:

- Improved protection of public and occupational health and safety of persons attending events
- Improved protection of the health and safety of horses
- Improved control of the spread of the Hendra virus
- Contribution to the preservation of Australia's biosecurity
- Preservation of the integrity of the Australian equestrian sports system
- Preservation or enhancement of Australia's international reputation with respect to equestrian sports and their administration and with respect to responsible control of infectious and fatal disease generally
- Mitigation of upward pressure on costs of insurance for equestrian sports organisations, relevant veterinarians and owners of equestrian sports horses
- Avoidance of a significant disincentive for individuals to participate on Organising Committees as a result of increased risk of uninsured liability
- Mitigation against a significant disincentive for equine veterinarians to provide professional services at events (at all or without indemnification against any legal liability).

A number of submissions have been provided by veterinarians and event organisers in support of the notification, claiming similar benefits. In summary, these parties say that:

- For a number of reasons it is not easy or quick to diagnose whether a horse has the Hendra virus, so in these circumstances requiring horses to be vaccinated before participating in an event, reduces the risk that people or horses may contract the virus
- Equine vet numbers are small and dwindling and the number of vets willing to attend an unvaccinated sick horse is decreasing because of the risk of exposure
- Vaccination is the single most effective way of reducing the risk of Hendra virus in horses (quoting Biosecurity Queensland and NSW Department of Primary Industries)
- Horse owners that choose not to vaccinate their horse not only potentially affect themselves but also every person that comes into contact with that horse

- Vets are at risk of being prosecuted either because of accidental poor choices or lack of knowledge with some vets currently being prosecuted because of their handling of Hendra cases
- The only way to protect staff and businesses is not to attend unvaccinated horses
- Equestrian Australia has an obligation to keep horses, competitors, volunteers and the general public safe
- They are concerned at the liability, cost and welfare implications associated with a suspected case of Hendra at an event
- Event organisers should be able to decide to minimise the risk of the above by only accepting Hendra vaccinated horses at events.

The ACCC is interested to better understand from interested parties the extent to which the conduct notified by EA is likely to result in public benefits.

### ***Public detriments***

When assessing third line forcing notifications, the ACCC must also consider the potential public detriments. These may relate either to:

- the impact the notified conduct is likely to have on competition in relevant markets, or
- non-competition related detriments.

### **Possible competition related detriments**

In this instance, the relevant markets would appear to be those for the supply of:

- Event Services that qualify competitors for national and international competitions; veterinarian services; and vaccination against the Hendra virus.

It is not clear to the ACCC how the notified conduct would reduce competition in the market for the provision of equestrian event services that qualify competitors for national and international competition, since EA is the only provider of such events and this is not changed by the notification.

Given that the notified conduct does not specify that event attendees acquire vaccination services from particular veterinarians, it is not clear how the notified conduct could have a significant impact on competition in the market for the provision of veterinarian services.

Similarly, the notified conduct does not specify that event attendees must acquire a particular Hendra virus vaccine, so it unclear how it could have a significant impact on competition in the market for the provision of Hendra virus vaccines. The ACCC recognises that there is currently only one provider of a Hendra virus vaccine and that it is unlikely another provider will emerge but importantly, the notified conduct does not discourage that potential competition from occurring.

### **Other possible detriments**

Many interested parties have raised concerns that vaccination is resulting in significant numbers of adverse reactions ranging from preventing horses from competing in upcoming events through to lameness or other conditions that prevent horses from ever competing again, sterility or even death.

Submissions have expressed concern at the significant cost of vaccination – particularly where parties consider it, at best, unnecessary and, at worst, potentially harmful.

As noted above, the ACCC will have regard to non-competition related detriments. However, as a competition regulator, the ACCC will rely on the expertise of the Australian Pesticide and Veterinary Medicines Authority (the APVMA) on issues related to the safety and efficacy of the Hendra vaccine.

The APVMA is the government authority responsible for the assessment and registration of pesticides and veterinary medicines.

The APVMA has recently approved registration of the Hendra vaccine. The ACCC understands that before granting registration the APVMA was satisfied that the vaccine—used in accordance with the approved instructions on the label—would:

- not be an undue hazard to the safety of people exposed to it during its handling or people using anything containing its residues; and
- not be likely to have an effect that is harmful to human beings; and
- not be likely to have an unintended effect that is harmful to animals, plants or things or to the environment.
- would be effective

The APVMA has an ongoing role in monitoring feedback about adverse reactions to the animal vaccines it has registered. The APVMA assesses this information to ensure those products continue to be safe and effective and may take regulatory action if it determines that it may no longer be satisfied. The APVMA website indicates that certain side effects may be expected and are typical of many vaccines. The ACCC understands that the APVMA presently remains satisfied with the vaccine's registration.

The ACCC understands that the vaccination condition of entry to an event will only be imposed if supported by a biosecurity risk assessment consistent with the Horse Venue Biosecurity Workbook published by Animal Health Australia.

The ACCC is interested to better understand from interested parties the extent to which the conduct notified by EA is likely to result in public detriments.

## **Next steps**

The ACCC invites interested parties to comment on the public benefits and detriments likely to result from the notified conduct at the upcoming forum. The forum is to be held on 14 October 2015, in Brisbane between 2 and 4 pm.

Parties wishing to attend the forum need to register online before 2 October 2015 – please register by following this link to the ACCC Consultation Hub - <https://consultation.accc.gov.au/>

The ACCC will confirm the exact location of the forum shortly after registrations close.

Having taken account of the notification and subsequent information provided by EA, along with the issues raised in submissions from interested parties and at the forum, the ACCC will make a decision on whether the benefits of the notified conduct are likely to outweigh the detriments.

If the ACCC considers the likely benefits outweigh the likely detriments, it will allow the notification to continue. If the ACCC considers the likely benefits will not outweigh the likely detriments, it will issue a draft notice proposing to revoke this notification and consult further on that decision before making a final assessment.

At this stage the ACCC expects to be in a position to make a decision on this notification in November/December 2015 – but this will depend on the nature and timing of issues raised by interested parties and responses from EA.