David Grace

From:	David Grace
Sent:	Tuesday, 18 November 2008 1:13 PM
To:	'Malcolm Tuttle'
Subject:	Product and Program Agreement, Bill to amend the Racing Act 2002 (Queensland) and related interstate legislation
Attachments:	133401.pdf

133401.pdf (887 KB)

Mal.

Further to our discussions recently we now enclose the letter of opinion which we are happy to discuss with you and/or the Chairman of Product Co. The original is in the post to you this evening.

We have added some further provisions relating to the interaction of clause 7.4 (c) and 10.1 and 10.2 and the relevance of those provisions to the interpretation of the PPA and the amending legislation and similar related interstate legislation.

Regards

David

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18 November 2008

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Dear Malcolm,

Draft Bill to amend the Racing Act 2002
Product and Program Agreement

We refer to our meetings of 31 October 2008 and 4 November 2008.

We discussed the provisions of the Product and Program Agreement (PPA).
The PPA was made on 9 June 2008 between TABQ, the Queensland Product Race Co Ltd (Product Co) and Queensland Principal Club (your predecessor), Queensland Harness Racing Board and Greyhound Racing Authority. By force of the provisions of the *Racing Act 2002*, Queensland Thoroughbred Racing Board was the body renamed from the Queensland Principal Club as the control body of the thoroughbred code of racing in Queensland and Queensland Racing Limited is the successor of the Queensland Thoroughbred Racing Board by force of provisions of the Racing Act 2002 passed in 2006. By force of those provisions Queensland Racing Limited is entitled to the benefit of clauses and bound by the obligations contained in the PPA to the same extent as if it had been a party to the Agreement at the time of its execution.

In essence, PPA makes provision for, inter alia, the supply of certain information by you to UNiTAB (the successor of TABQ).

PPA runs for a term of 15 years, being the term for which the Race Wagering Licence is granted to UNiTAB pursuant to the *Wagering Act 1998*.

Clause 7.1 of PPA requires Product Co to annually prepare and submit to UNiTAB a draft Queensland Racing Calendar and Queensland Racing Program.

Intellectual Property rights in the Queensland Racing Calendar and Queensland Racing Program under clause 7.3 are vested in Product Co to the extent to which Intellectual Property or rights of confidentiality exist in or in connection with the Queensland Racing Calendar or Queensland Racing Program.

Under clause 7.4 Product Co consents to the use by TABQ (UNiTAB) of the Queensland Racing Calendar and the Queensland Racing Program solely for the conduct of the Race Wagering Business and for the purposes used by TABQ (as it was then) as at 26 May 1999.

Clause 7.4 goes on, in subclause (b) to provide that subject to clause 7.4(c), UNiTAB (then TABQ) must not, without the prior written approval of Product Co:

> *(i) "disclose the Queensland Racing Calendar or the Queensland Racing Program to any third party unless it is necessary or desirable for the conduct of the Race Wagering Business or Existing Purposes;*

(ii) *use the Queensland Racing Calendar or Queensland Racing Program for any purpose other than for the conduct of the Race Wagering Business or Existing Purposes;*

(iii) *publish, broadcast, sell, licence or otherwise deal with the Queensland Racing Calendar or the Queensland Racing Program except to the extent necessary or desirable for the conduct of the Race Wagering Business or Existing Purposes."*

Clause 7.4(d) carves out information that has ceased to be confidential or that is in the public domain as information to which the restrictions apply. This is the clause we think intended to be referred to in clause 7.4(b) as clause 7.4(c). There appears to be no clause numbered clause 7.4(c). But clause 7.4(d) refers back to clause 7.4(b) and the text of the two clauses makes it logical that the reference in clause 7.4(b) to clause 7.4(c) was intended to refer to the next clause which for reasons that are not apparent is numbered clause 7.4(d)

Clause 7.4(e) emphasis the Intellectual Property position by stating that nothing in clause 7.4 gives UNiTAB (then TABQ) an interest in the Intellectual Property subsisting in the Queensland Racing Calendar or the Queensland Racing Program greater than otherwise given by the PPA.

Clause 7.4(f) provides as follows:

> *"for the avoidance of doubt nothing in this Agreement prevents or restricts TABQ using or acquiring the rights to use the Queensland Racing Calendar, Queensland Racing Program, Australian Racing Product, Marketing Rights or any other information or intellectual Property Rights in respect of Racing from any other party in connection with any other business, product or service of TABQ other than the Race Wagering Business or Existing Purpose and TABQ shall have no liability to pay or otherwise compensate any Queensland control body or Product Co for or in respect of such uses".*

The effect of subclause (f) is to permit UNiTAB to acquire any of the information or rights to use specified in the subclause in respect of Racing from any other party in connection with any **other business, product or service....other than the Race Wagering Business or Existing Purpose**. It is evident from the content of clause 7 that it is the intent that, subject to the other provisions of the Agreement of PPA, UNITAB acquires rights to the Queensland Racing Calendar, Queensland Racing Program, Australian Racing Product Marketing Rights in respect of the Race Wagering Business and Existing Purposes from Product Co and any other Racing information from any one else without making payment of any compensation to the Queensland Control Body or Product Co. The reference to the "Australian Racing Product, Marketing Rights or any other information or Intellectual Property rights in respect of Racing" may seem somewhat out of context in clause 7.4 where clause 7 otherwise deals with only the Queensland Racing Program and Queensland Racing Calendar. However what it does is to clarify that where TABQ does acquire rights to use that IP from any other source, it has no liability to pay or otherwise compensate a Queensland control body for in respect of such uses. Clause 9, which otherwise deals with the supply of Australian Racing Product, does not deal with it other than in clause 9.5(a) which deals with alternative means of "supply'- not "use" to which clause 7.4(f) refers.

Clause 7.5 provides an exclusivity regime in the following terms:

(a) Product Co is to be the exclusive supplier to UNiTAB for the Race Wagering Business of the Queensland Racing Calendar and the Queensland Racing Program. (This fits with what we said about clause 7.4(f).)

(b) It prohibits the supply of the Queensland Racing Calendar or the Queensland Racing Program "to any other person for any use directly or indirectly relating to wagering on racing without the prior written consent of TABQ". It then provides the consent is not to be unreasonably withheld where no amount is payable or other consideration or benefit is directly or indirectly received for or in respect of such supply. It then carves out reciprocal supply of Australian Racing information to any Interstate Racing Entities where no amount is payable or other consideration or benefit is directly or indirectly received. Interstate Racing Entities is defined in PPA to mean *"any club, society, association, corporation or body of persons (whether corporate or incorporate) by whatever name called which has been or is established in any jurisdiction in the*

Commonwealth of Australia (other than Queensland) for the purpose of conducting or controlling races of galloping horses, trotting horses or greyhounds or information used in the conduct of such racing and includes any person who conducts or controls such Racing or information used in such Racing.".

This would include the supply of information to corporate bookmakers or to clubs outside of Queensland for the purpose of the conduct of racing galloping horses (as relevant to your code of racing). Again, the carve out for the supply of information to those entities is limited to where no amount is payable or other consideration or benefit is directly or indirectly received.

Subclause (c) permits the provision of Queensland Racing Calendar in Queensland Racing Program to persons specified in Schedule 4 for such part and at such times and purposes as it was provided at 20 May 1999, provided that the provision of that information is for no amount payable or other consideration or benefit, directly or indirectly received. Subclause (c) provided that, if there is a consideration or other benefit received, the Product Fee reduces in accordance with clause 10.2(d) by such amounts as are payable or other considerations or benefits directly or indirectly received.

Clause 10.2 provides that UNiTAB is irrevocably authorised to deduct and set off from the fee payable pursuant to 10.1, relevantly

"(d) the amount calculated in accordance with clause 7.5(c)"

Subclause (d) of 7.5 concludes the clause by requiring Product Co and the Queensland Control Bodies to provide UNITAB on request, information concerning the provision of the Queensland Racing Calendar to any other persons including all terms of any relevant arrangements. This would provide UNiTAB with an effective means of knowing what amount or amounts or consideration is payable so that the 10.2(d) deduction may be made from the Product Fee from an amount or amounts received in respect of the provision of information to others.

However, as 7.5(c) relates only to the provision of information to persons set out in Schedule 4 (other control bodies), that clause does not apply to the provision of the Queensland Racing Calendar or the Queensland Racing Program to other bodies. Rather 7.5(b) applies to that supply.

Clause 9, with the exception mentioned above, deals with similar matters to clause 7 and those provisions are discussed in more detail below.

Clause 10.1 provides for the payment of a fee during the term of the PPA. It sets out various periods in which various amounts are payable. Relevantly, now, it is in the period from the fourth anniversary of the date of privatisation of the TABQ. During the period from that date, a variable amount equal to 39% of the gross Racing Wagering Revenue for the month (or proratered for any part of the month) for which the PPA applies. Then 10.2 (aside from (d) mentioned above) authorises a deduction or an off set from the Product Fee of, inter alia, a Third Party Charge. A Third Party Charge is defined to mean "*the amount of any fee payable or other consideration given by TABQ to obtain the equivalent of the Australian Racing Product and the costs and expenses incurred by TABQ in procuring the equivalent of the Australian Racing Product from a source other than Product Co*".

Clause 1 is quite specific about adjustments to the payment of the fee. In its opening words, it says "Subject to clause10.2....." It does not say "subject to the provisions of clause 7.4(f)" nor does it make it subject to any other clause and it is reasonable, we think, to assume that had it been intended that the fee payable, if it was to be affected by any other specific or general clause of the contract, it would have said so. The fact that the draftsman choose to confine the language of the adjustment to just clause 10.2 and nothing else, lends itself to the proposition that the extent of adjustment rights was to those matters outlined in clause 10.2 and nothing else.

RISA provides Australian Racing Product to UNiTAB. Accordingly, the costs of acquiring the Australian Racing Product from RISA will be deductible as a Third Party Charge from the amount of the Product Fee pursuant to clause 10.2 (c).. That would similarly apply with any other costs of obtaining such information of racing information.

Section 33A of the Racing Administration Act 1998 and Regulation 16 of the Racing Administration Regulation 2005 enables Racing New South Wales, the New South Wales control body for thoroughbred racing, to charge a fee of 1.5% of the wagering turnover that relates to a race or class of races covered by the approval, in respect of the ***publication*** in Australia of a NSW race field

made in the course of wagering operations of a licensed wagering operator. We note that you have said that the NSW Parliament proposes to change the law to refer to "use" and not "publish". If that occurs, it will simplify it if it uses the same terminology as the proposed Queensland Bill.

Proposed amendments to the *Queensland Racing Act 2002* empower Queensland Racing to impose a fee for the ***use*** of information.

Relevantly, clause 113E of the draft Bill authorises the control body to impose a condition that the holder of an authority pay the control body a fee for the ***use*** of Queensland race information for the conduct of the holder's wagering business for the code of racing (the emphasis is ours). Clause 113E(6) of the draft Bill authorises the control body in imposing a condition under subclause 3(a) to take into account any other fees payable to it by the holder of the authority under any agreement between the control body and the holder of the authority. This would mean that in granting UNiTAB an authority, the amount of any fee payable by UNiTAB should take account of the amount payable by UNiTAB under clause 10 of PPA.

You ask as to whether the provision by Racing New South Wales of Australian Racing Product to UNiTAB for a fee, pursuant to New South Wales legislation, entitles UNiTAB, pursuant to clause 10.2(c) of PPA, to deduct the amount paid to Racing New South Wales from the amount of the Product Fee payable under clause 10.1 to Product Co.

On the basis that the New South Wales legislation imposes a charge for the publication of information and not the supply of information, in our view the amount payable is not for the "obtaining" of the Australian Racing Product or the "procuring" of it as provided in the definition of "Third Party Charge" in clause 1.1 of PPA.

The PPA makes express provision in clause 7.1 for the ***supply*** of the Queensland Racing Calendar and in 7.2 for the ***supply*** of the Queensland Racing Program and then after dealing with intellectual property rights in clause 7.3, specifically and separately deals with the permitted ***use*** of that information, then clause 7.5 deals with ***restrictions*** on Product Co's and the Queensland Racing's ***supply*** of information elsewhere.

Amendments to the legislation do not authorise Queensland Racing to impose a charge on the supply of information. Indeed, Queensland Racing does not supply Australian Racing Product to other bodies, rather from what you have instructed us ***RISA supplies*** the information. The legislation imposes a right on Queensland Racing as the control body under the Racing Act for the thoroughbred code of racing in Queensland, to charge a fee for its ***use***. That is, ***RISA*** will charge a ***fee for the supply of information*** but ***Queensland Racing***, pursuant to its rights created by statute, will be empowered to impose a ***charge for its use*** subject to the provisions of clause 113E(6) of the draft Bill mentioned above.

The charge is a new charge and is not one dealt with by PPA. In essence, UNiTAB will not pay twice because pursuant to clause 113E(6) of the draft Bill (assuming legislation in that form or to that effect is enacted in Queensland) will empower you to take account of the fee payable to UNiTAB and, acting fairly, you would deduct from the amount of any fee that you would impose under the Act for the use of that information, the amount payable under PPA for the supply through RISA and use of the Queensland Racing Calendar and Queensland Racing Program.

However any fee paid by UNiTAB to RISA would in our opinion be deductible from the amount payable as the Product Fee as legitimately falling within the definition of a Third Party Charge.

Summary

1. Queensland Racing will be entitled to impose a fee in respect of the ***use*** of Queensland Racing information to any licensed wagering operator (as defined to include:

   "a wagering operator that holds a licence or other authority –

   (a) under the law of a State or foreign Country; or

   (b) issued by a control body, or a principal racing authority of another State or a foreign Country

authorising it to conduct a wagering business."

2. The amount to be charged to UNiTAB in respect of an authorisation to use that information provided under PPA will take account of the amount payable under clause 10.1 of PPA.

3. In our opinion, the amount of the Product Fee payable under 10.1 will not be the subject of any offset or deduction under 10.2 (c) as and by way of a Third Party Charge in respect of monies paid to anyone else for the provision of Australian Racing Product (as defined under the PPA) where that ***fee is not paid for obtaining or procuring*** the amount but rather for ***the use or publication of it*** under legislation empowering that body to charge a fee in respect of the publication or use of that information, as distinct from obtaining or procuring it.

Observation /Discussion

In discussion, the question as to whether an argument that a charge for the right to use or publish information obtained at a cost (obtained or procured or supplied) may be seen as somewhat of semantics, that concern would arise because no party would commercially obtain, procure or have supply of information which did not carry with it the right to use it.

Whilst that may commercially be the intent, where by legislative intervention, Parliaments of States or Territories impose, subsequent to a date of an agreement to supply, a specific legislative provision enabling a charge to be made for the use or publication of that information, in our view, it is proper that the charge be imposed so long as it does not "double dip". The Queensland legislation specifically imposes a carve out for the PPA by requiring you in considering the imposition of a condition on the authority to take account of any other fee payable. That, from a legislative point of view, makes sense and prevents any duplication of cost on UNiTAB. That prevents double dipping from your point of view.

We understand that it is the intent of Parliament that the financial arrangements within Wagering be restructured to provide a benefit to industry through payments raised by the control body pursuant to the amending legislation. Accordingly, it is quite proper that these charges be collected without deduction. They are a charge imposed under statute which alters the way industry is funded by transferring a part of the wagering turnover to the industry control body for the benefit of the industry it serves.

Clause 9 of PPA provides for the supply by Product Co of Australian Racing Product to UNiTAB. A similar regime to clause 7 applies. Clause 9.4 provides that Product Co will be the exclusive supplier of Australian Racing Product to UNiTAB for the use in the Race Wagering Business. Again, it makes that subject to clause 9.5 which provides for the right of UNiTAB to procure Australian Racing Product from alternative sources of supply if Product Co cannot procure the Australian Racing Product it is required to supply to UNiTAB or cannot comply with the requirements of UNiTAB in relation to the format in which UNiTAB requires that information.

Clause 9.5 enables UNiTAB to procure the equivalent of that information from another source and incur a Third Party Charge which in turn will be deducted under clause 10.2 (c) from the amount of the Product Fee payable under clause 10.1. Again, the amount of the Third Party Charges is in respect of the procurement (see the language of clause 9.5(a) and the definition of Third Party Charge – "obtain" and "procuring"). The charges imposed elsewhere are for the publication (New South Wales) (perhaps to become "use" through an amendment to the law) are not for the "supply" or "procuring" or "obtaining" of that information and therefore are not a Third Party Charge for the purposes of the PPA. Hence they are not deductible from the amount of the Product Fee payable under clause 10.1 by reason of anything provided in clause 10.2.

We have looked at some cases in the meaning of the words "supply", "publish" and "use".

Dealing with those in alphabetical order:

- "Publish" is an act of the author surrendering for public use. However, the use of material is not necessarily a publication of it.

  The "ordinary" meaning is "made public,": *Boucicault -v- Chatterton* (1876), 5Ch.D.267, C.A., per Brett, L.J., at page 281.

For a newspaper, it is *considered that "publishing" means* "when and where it is offered to the public by the proprietor." Cozens-Hardy J. in *McFarlane -v- Fulton* [1899] 1Ch. 884 at pages 888 and 889 made these observations and referred to Webster's definition of the word as follows: "*To send forth as a printed work, either for sale or general distribution.*"

To publish racing material for the purpose of *the New South Wales Racing Administration Act*, means the sending of it for sale or other general distribution.

- "Supply" has been considered in a variety of cases. In the context of supply of gas and electricity and water, it has been considered as the point of which the water is made available for consumption (*A-G -v West Gloucestershire Water Co* [1909] 2Ch. 338). Further *in A.G -v- Leicester Corporation* [1910] 2Ch. 359, it was held that "a power to a municipal authority to supply electric energy to customers, does not authorise it to sell or hire out apparatus for the use of the energy; the "supply" is completed at the customer's terminal; the installation of electricity and the provision of fittings is a separate business incidental to the use but not to the supply of energy.

- The term "Use" is described in Johnson's dictionary as "to employ to any purpose". In re *Neuchatel Asphalte Co.'s Trade Market* [1913] 2Ch. 291, Sargant J. said, at page 301: "*I do not think that the fact that a person has improperly said, in the direct or other publication, that A.B. is the proprietor of a trade mark is a 'use' of the trade mark by the person who has made the statement [within the Trade Marks Act 1938]. If he had been authorised by A.B. to make that statement, it would be a 'use' of the trade mark by A.B., but not via the person who* has made the incorrect statement."

This is where the difference lies between "supplying" and "using", and the difference also lies between "supplying" and "publishing". A person might buy a gun but be prohibited from using it without a license. Similarly a person might buy a car but may not have a licence to drive it and therefore might not be able to use it in the sense of drive it because he is not authorised by law to use if for a particular purpose.

Whilst there is a wide definition given to the use of the terms in various legislation, the intention of the PPA in having different paragraphs for "supply" and "use" is consistent with those terms being seen as separate and distinct functions. This is consistent with the above cases.

So where the government enacts a law to enable the imposition of a condition to charge for the use of Racing Materials, that is not a supply and therefore the rights that arise under clause 10.2 to offset Third Party Charges in association with supply or provision will not apply, in our view.

Butterworths Concise Australian Legal Dictionary 2nd Edition, defines "supply" to mean "to furnish or provide. In relation to goods, include supply by way of sale (including re-supply), exchange, lease, hire or hire purchase. In relation to services, "supply" includes to provide, grant, or render services for valuable consideration. In relation to goods and services, it includes donating for promotional purposes." The same dictionary defines "use" as "the right to benefit from" or "to employ or utilize". This again distinguishes supply (a provision for the conferring of rights from using which is an application of something that has been supplied). There is an important and necessary distinction between supply and use. A haulage contractor who hired out vehicles and drivers to another company, to operate solely under the control of that company, was the "user" of those vehicles for the purposes of the *Transport Act 1968* (section 60): *Sykes -v- Millington* [1953] 1Q.B.770.

If you wish to discuss any aspect of the above, please do not hesitate to contact us.

Yours faithfully
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