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Mr James Grapsas
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Dear Mr Grapsas

ASIC CLASS ORDER [CO 02/319] – HORSE RACING SYNDICATES ("the Class Order ")

Thank you for the opportunity to respond to the ASIC consultation paper 242 'Remaking ASIC class orders on horse racing syndicates and horse breeding schemes' relating to Class Order [CO 02/319] horse racing syndicates.

Racing Australia makes a submission on behalf of the following Principal Racing Authorities (PRAs) in their capacity as Lead Regulators:

- Racing NSW
- Racing Victoria
- Thoroughbred Racing South Australia
- Racing Queensland
- Racing and Wagering Western Australia
- Tasracing
- Thoroughbred Racing Northern Territory
- Canberra Racing Club

ASIC poses six questions to which we respond as follows:

B1Q1 Do you agree with this proposal? If not, please give reasons.

Racing Australia agrees with the proposal subject to the various issues canvassed below.

B1Q2 Are there any practical problems associated with our proposal? If so, please give details.

Yes. By way of explanation, there are two general types of schemes:

i. A scheme where the promoter continues as manager of the horse/scheme and continues to benefit from the scheme. As such, the promoter plays an active part in the day to day management of the horse, almost to the exclusion of the syndicate members.

ii. A scheme where the promoter essentially ceases any involvement once the horse is syndicated and doesn't continue to benefit from the scheme. In such circumstances the syndicate members appoint a manager and for all intents and purposes, the syndicate then proceeds to function as a normal syndicate/partnership under the Rules of Racing.

Clearly the first scheme described above should be monitored for the racing life of the horse to ensure that the syndicate members and their interests are properly dealt with by the promoter. However, in the case of the second scheme where the promoter is no longer involved, we query the need for ongoing monitoring, particularly in circumstances where the promoter ceases to have any rights/obligations. For all intents and purposes, the syndicate has ceased to be a managed investment scheme. Any issues that arise are issues between co-syndicate members as would occur in respect of a normal syndicate under the Rules of Racing.

We emphasise the distinction between the abovementioned schemes. As the proposed Class Order (and the current Class Order) is drafted, the obligations on the promoter as to reporting, bank accounts etc. continue for the racing life of a horse. It is our view that the Class Order should deal with the distinction. It seems incongruous that a promoter would be subject to continued reporting requirements in circumstances whether that promoter has no control or involvement in the horse and, more critically, no right to obtain details required for reporting. Further, if a promoter was required to continue to report on such horses, it would result in significant additional costs for syndicate members for no additional benefit to those syndicate members.

In this vein, we note that the wording of the Class Order has changed from "any syndicate agreement" to "the syndicate agreement". Given that not all of the promoters have syndicate agreements, especially those that fall into the second scheme, we suggest that the original wording continue unless there are compelling reasons for a change.

- **Draft Instrument, Page 9**

A further practical problem connected to the reporting requirements of the Class Order is the requirement for the promoter or manager to submit "accounting records", namely a profit/loss account and statement of assets/liabilities, for each financial year.

Whilst we strongly agree that a promoter and manager must continue to satisfy SCHEDULE C of the existing Class Order by correctly recording and explaining the transactions and financial position of each scheme, we propose that the mandatory requirement to submit accounts for each scheme with the Lead Regulator after each financial year be relaxed to a requirement of an "as-needs" basis only. As it stands, the mandatory requirement to submit accounts for each scheme means that some Lead Regulators are required to accept and review between 500 and 700 profit/loss accounts and statement of assets/liabilities each financial year. This requirement places a significant burden on resources for the Lead Regulators.

Therefore, we propose an amendment to the wording of the draft Instrument to as follows:

- Part 2-Exemption, 5 Registration relief
  The role of the manager
  (5)(c) The manager of the horse racing syndicate must:

    i. Keep accounting records that correctly record and explain the transactions and financial position of the horse racing syndicate and that would enable financial statements to be prepared in respect of the horse racing syndicate from time to time;

    ii. In respect of each financial year, prepare financial statements in respect of the horse racing syndicate;

iii. If the Lead Regulator makes a written request to the manager to lodge a copy of the financial statements in respect of the horse racing syndicate, lodge the copy of the financial statements with the Lead Regulator within 14 days ~~Lodge the financial statements in respect of the horse racing syndicate with the lead regulator within 90 days after the end of each financial year~~;

iv. If ASIC makes a written request to the manager to lodge a copy of the financial statements in respect of the horse racing syndicate, lodge the copy of the financial statements with ASIC within 14 days;

v. Open and maintain a separate account with an Australian bank in respect of the horse racing syndicate that must be used for the deposit and payment of all moneys relating to the operation of the horse racing syndicate.

In addition to the above proposal, we propose the following inclusion of a mandatory requirement for promoters to submit annual accounts relating to the promoter's business operation:

- Part 2-Exemption, 6 Conditions

  i. Keep accounting records that correctly record and explain the transactions and financial position of the promoter and that would enable financial statements to be prepared in respect of the promoter from time to time;

  ii. In respect of each financial year, prepare financial statements in respect of the promoter;

  iii. Lodge the financial statements in respect of the promoter with the Lead Regulator within 90 days after the end of each financial year;

  iv. If ASIC makes a written request to the promoter to lodge a copy of the financial statements in respect of the promoter, lodge the copy of the financial statements with ASIC within 14 days;

- **Draft Instrument, Page 11**

A further problem relates to the requirement of the participants in the horse racing syndicates to have unencumbered title to the whole of the horse racing syndicate. This can suggest that a promoter must provide unencumbered title to the whole (100%) of the horse, rather than just the portion for sale by the promoter.

It is a common occurrence for a promoter and trainer to (for example) purchase a horse at 50% each. In these circumstances, if the trainer does not intend to offer his or her share publically, then it is unlikely that the trainer's portion will satisfy the definition of a managed investment scheme. However, as the 50% purchased by the promoter will be offered to the public, the promoter's portion is likely to be a managed investment scheme.

Therefore, we propose an amendment to the wording of the draft Instrument to as follows:

- Part 2-Exemption, 6 Conditions
  (8) The promoter must, before or on registration of the horse racing syndicate with the Lead Regulator, ensure that either:

  (a) the participants in the horse racing syndicate have unencumbered title to the whole of the scheme offer ~~horse racing syndicate horses~~; or

(b) the participants in the horse racing syndicate lease the whole of the scheme offer ~~horse racing syndicate horses~~ under a finance lease agreement in standard form.

Further, we do identify some practical problems in relation to a few points in the proposal, as set out below.

- **Page 15, 36 (g)**

Have in place adequate arrangements for resolving complaints and disputes received by the lead regulator about the conduct of the promoter, the manager or the operation of horse racing syndicates;

While PRAs make every effort to address complaints and to assist in the resolution of disputes, they do not have the power to "resolve" disputes, as those terms are commonly construed. For example, a court of competent jurisdiction, such as a State Supreme Court, "resolves" a dispute by issuing a judgment. The PRAs do not have such a power. In this respect, we also note that ASIC would have difficulties with "resolving" a dispute (as opposed with taking action to sanction breaches of the Corporations Act).

Consequently, we believe it of the greatest importance that 36 (g) be reworded to reflect what actions the PRAs can take so that participants are fully aware of their recourse in the event of a dispute. Accordingly, we respectively suggest that the wording of 36 (g) be as follows:

Have in place adequate arrangements for dealing with complaints received by the lead regulator about the conduct of the promoter, the manager or the operation of horse racing syndicates;

- **Page 14 (36) and 18 (37 and 38)**

The PRAs support the introduction of a memorandum of understanding to assist with the co-regulatory regime. The PRAs assume that the memorandum of understanding would include a central point of contact within ASIC for all Lead Regulators and an articulation of the processes for ASIC to deal with queries and reports from Lead Regulators, so as to ensure consistency in advice given and processes enacted both by ASIC and the Lead Regulators.

Further, the timeframe for production of annual reports should be workable and practical for all Lead Regulators.

- **Page 17, 44 (c) and (d)**

In practice, the disclosure of contact details of each owner of the horse's sire and dam will be extremely difficult to obtain in some circumstances. This requirement should be replaced with a detailed declaration regarding 'conflict of interest'. The declaration could explain in what circumstances a conflict should be declared such as when the promoter has any connection to the horse's sire and dam, and whether any inducements or incentives were (or will be) provided such as free services to stallion etc.

- **Page 18, 44 (i)**

Should include the administration and legal costs (and other business-related costs) forming part of the promoter's *profit margin*.

- **Page 18, 44 (j)**

Racing Australia recommends the following amendment:

"A notice that a potential purchaser may elect to have a horse tested for anabolic androgenic steroid ~~or other performance enhancing substances~~, with the cost of testing to be borne by all potential purchasers, including the prospective purchasers who did not agree to the testing."

The above amendments are quite critical.

- First, the prohibition in the Rules of Racing is in respect of anabolic **androgenic** steroids.

- Second, a horse cannot be simply generally tested for "other performance enhancing substances" as that is not how the prohibited substances regime functions under the Australian Rules of Racing. In this respect, there are a number of substances that are prohibited at any time while a horse is **being trained by a licensed person** but the wider focus of the Australian Rules of Racing are prohibited substances that are present on race day. As such, a substance that is present in the horse's system on the day of purchase is not necessarily a prohibited substance if not present in the horse's system on race day. Further, the cost to test for all substances that could be potentially prohibited is extremely exorbitant and there are logistical and policy impracticalities associated with certified analytical laboratories conducting such screening.

B1Q3 What benefits do you consider will result from the proposal? If possible, please quantify these benefits.

Yes, there are substantial benefits which are outlined and substantiated in the consultation papers such as:

- Significantly increased costs since the inception of the Class Order in the purchase, breaking-in, pre-training, training and spelling of a racehorse. By way of illustration, in 2002-2003 the average price of a yearling at horse auctions in Australia was approximately $41,000 whilst the average price of a yearling in 2012-13 had risen to $70,000 representing an increase of nearly 60%. In addition, initial add-on costs that are all included in the share price have increased with inflation (e.g. insurance, transport, and veterinary).

- The $250,000 cap for the total value of the scheme severely restricts purchasing choices and opportunities for approved syndicators at the main yearling sales.

- Increased costs of buying a horse and its consequential training and husbandry costs since the inception of the Class Order

- Increased costs could be ameliorated by purchasers acquiring a smaller percentage share than the current minimum of 5%

- The increase may lead to an increase in participation by small and cost sensitive owners due to greater affordability

- Commonly prospective owners sign with syndicators with an intention to purchase a 5% and 10% share, but when completing the paperwork later advise that one or more friends or family members wish to share the experience and the cost of horse ownership with them. The syndicator having not calculated this number finds that proposed scheme now exceeds the limit of 20 persons, requiring cancellation of that client's purchase or not being able to fulfil their wishes to include others.

B1Q4 Are there any additional costs associated with the implementation of this proposal? If possible please quantify these costs.

An additional cost would come with the administration of the syndicates particularly in relation to cost associated with preparing the proposed annual report – Page 16, 36(l). This could be alleviated by the proposal canvassed by Racing Australia of a modified offer document for Trainers licensed under the Rules of Racing, that being the LHIS (Limited Horse Investment Scheme.)

We request, regardless of whether an annual report is a requirement by a lead regulator, that the proposal of the LHIS be revisited taking into account the benefits outlined in earlier submissions. In any event, if an annual report is still required to be lodged by the lead regulators then clarity is sought as to the timing for lodgement of the annual report with ASIC.

B1Q5 Are there situations that would not fall within our proposed changes to the terms of the relief in [CO 02/319] that should be covered? If so, please give details.

No apart from the issues Racing Australia raises and comments on in B1Q2.

B1Q6 Is any transition period required? If so please give details of the length required and reasons.

No. Racing Australia does not see the necessity for a transition period and believes that the revised Class Order should commence on the sunset date of 1 October 2016. With the proposal being formalised in March 2016 the Lead Regulators believe that there is ample time for a transition to the revised Class Order.

Again, thank you for the opportunity to make a submission to Consultation Paper 242. Racing Australia has greatly appreciated the thorough and open consultation which ASIC has engaged in over the past 9 months and the courtesies extended to Lead Regulators regarding timelines.

Kind regards

Peter McGauran
Chief Executive Officer