

Product and Program Agreement and Race Fields Legislation

Issue

To determine what course of action to follow in respect to the advice from Cooper Grace Ward that UNITAB has not got a right to pass through to QR any fees that they incur in assessing Australian Race Fields information for the purpose of wagering.

Background

On 18 November 2008, David Grace of Cooper Grace Ward wrote to QR following meetings and a request for advice on the following “whether the provision by Racing NSW of Australian Racing Product to UNITAB for a fee, pursuant to NSW legislation, entitles UNITAB, pursuant to clause 10.2© of PPA, to deduct the amount paid to Racing NSW from the amount of the Product payable under clause 10.1 to Product Co.”

Under the PRA QR took responsibility to provide to UNITAB the Australian race fields information and in the event that a charge was made by another jurisdiction for Australian race fields information then the charge would be deducted by UNITAB from the product and program fee payable by UNITAB to QR .The advice provided turned on the distinction between the right of having access to race fields information and the right to use that information for wagering purposes .Specifically the advice is that the clause which allows UNITAB to deduct a charge relates only to the right of access to information , not to the right to use that information for wagering purposes. HENCE as the charge is for the use of information for wagering purposes, it was concluded that UNITAB had no right to deduct it against the product and program fee.

The letter was discussed at the QR board meeting and it was decided that the matter concerned Product Co and was referred to it for action. Initially Product Co decided not to pursue the matter but then decided that given the financial size of the issue the matter needed to be resolved. Accordingly it was resolved to write to the Department of Racing and asked to clarify what was the intention of the Government in writing the Product and Program Agreement in the specific case of clause 10. Tony Hanmer, in his capacity of Product Co chair wrote an undated letter to the Executive Director of Racing. The request sought the Government’s view in relation to:

- “(a) commercial intent of the agreement when first drafted in 1999, and
- (b) The implications/effect on the agreement due to the recent introduction of race information legislation”

Given the very general nature of the request for advice which did not refer to the specific issue in dispute, it is not surprising that we received back on 28 May 2009 a very general letter which referred to the issue of whether the race fields fee charged by QR was in addition to the product and program fee (which was not the issue of concern) or could be offset and ended up suggesting that it was a matter for the strategic consideration of QR. This was discussed at the last meeting of Product Co and it was agreed that we should go back and obtain more specific advice. However, subsequent to that meeting Tony Hanmer advised that the Grace Cooper Ward letter was not directed to Product and no further action was proposed to be taken.

Assessment

It is considered highly advisable to resolve this matter given that it raises issues of a substantial financial and strategic nature. To do nothing opens the Board to the accusation that it acted to favour UNITAB at the substantial cost of the industry and possible leaves open the members of the board to legal action by members of the racing industry.

At the same time it is accepted that to reject the offsetting of race fields fees by UNITAB against the product and program agreement will raise a major issue with UNITAB and adversely affect our relationship. The suggested next step is to undertake what has been commenced and obtain the advice of the government on its intention in regard to clause 10. Given the history of the product and program

agreement and the lack of focus at that time on the distinction between rights to access and rights to use it is quite likely that they will confirm that the intention was to cover both rights or possibly only the right to use (it would be better for QR that it only covered right to use as right to access would allow UNITAB to offset the RISA fees which it has not done to date).

Discussion has taken place with Mike Kelly who requested that any letter be very particular about the issue and that it be written to the Minister for Racing to facilitate a whole of government response.

Recommendation

It is recommended that a letter be drafted by management to issue to the Minister for Racing seeking to clarify the specific intention of the government in drafting section 10 of the PPA.

Michael Lambert
Director
23 June 2009