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29 July 2011

Mr Andrew Kelly  
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Dear Andrew

## AUSTRALIAN STANDARDBRED BREEDING PANEL REPORT

Firstly, let me commend Harness Racing Australia (HRA) for releasing this report for consultation. It contains many exciting ideas and activities which, if adopted, will enhance the breed, the sport and the harness racing industry in Australia.

However, it will not surprise you to learn that the NZSBA is seriously concerned about two proposals in the consultation paper. They are the proposed:

1. **Import Fee** – A \$1,500 **additional** fee for imported fillies and mares aged 4 years old and under, and, a \$5,000 **additional** fee for all imported colts and geldings. For stays under 90 days the fee is \$250. Estimated revenue to HRA is A\$1.7 million.
2. **Imported Semen Foal Registration Fee** – fees, **additional** to the standard foal registration fee, of A\$500 and A\$250 for the registration of colts and fillies respectively conceived with imported semen. Estimate revenue to HRA is A\$350,000.

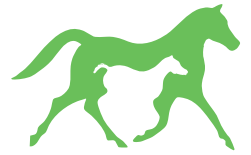
The revenue raised is to be applied to a new A\$2 million scheme administered by HRA to subsidise stallion service fees for Australian race winning mares bred to Australian-based stallions.

### Impact on New Zealand exports to Australia

There are two key markets:

- As at today 771 horses were exported since 1 August 2010 permanently to Australia. (Forty eight others did the round trip for racing.) Actual sales prices are unknown but an average of \$18,000 is not an unreasonable assumption with many sales in the \$7,000 to \$20,000 range. Some are over \$100,000. This gives an approximate value of exports of NZ\$15 million.





- Over 1,250 individual serves of chilled fresh semen were exported to Australia by six studs, four in Canterbury and two in Auckland. Assuming a 60 percent conception rate we have estimated the retail invoiced value of these exports at about A\$4.5 million.

The New Zealand and Australian harness racing sport and industries have had a close, competitive and cooperative relationship for over a century. From the earliest days New Zealand bred stallions and mares have had free and unfettered access to the Australian market. We have shared our triumphs and our low points. The New Zealand breeding industry and racing nursery has always been very important to Australia. Today, as the Panel's paper notes 13 percent of starters are NZ-bred, providing 15 percent of the winners.

Australian harness racing needs to have enough horses to service your 15,000 races per year. Equine Influenza a few years ago had a big impact on the foal crop and current racing stock (NSW particularly). Australian trainers have found a ready supply of up and going horses in New Zealand. Currently, an Australian owner can land and race a nice NZ C1 or C2 horse for A\$15,000 to \$25,000, if they can find one! Currently it costs \$5,000 to airfreight a horse to Australia's East Coast, plus the Australian GST on the landed value. Generally there is at least one agent involved claiming a commission of 10 percent plus.

There are at least three formal grounds against which this proposal could be evaluated. I am confident that HRA has had the appropriate advice on them before releasing the proposal for consultation.

### **Lessening of competition**

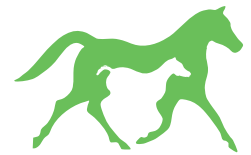
We think that there are arguments that may be made that this proposal is an arrangement to substantially lessen competition in the Australian market for the sale of going race horses and in the stallion semen market.

While it may not be a purpose of the scheme an effect, or likely effect, of it will be to meaningfully reduce competition in the 'going' horse market. One sub-section of the market (i.e. the going NZ horse market) now has a barrier imposed so as to favour other parts of that market (i.e. Australian bred horses). A Perth trainer comparing equivalent horses, one based in Victoria and one in New Zealand, will now be asked to pay A\$5,000 more to acquire the New Zealand horse, which is likely to effect competition. Firstly, Australian market prices will increase and secondly, quality New Zealand horses will not be available to that trainer on a level playing field.

Similarly the Panel's paper estimates that total net Australian breeding fees are A\$16 million per annum. It is unclear from the paper if this includes the A\$4 million paid by Australian breeders to NZ studs. We assume it is leaving Australian domestic studs with \$12 million of revenue. If the Imported Semen Registration Fee has the intent or the effect of reducing exported semen from NZ studs by say \$2 million that is in our view a substantial effect and a reduction in competition.

### **Closer Economic Relations Treaty (CER)**

In its heyday thirty years ago CER was the world's most advanced free-trade agreement and today it is still pretty special. The Commonwealth of Australia and the Government of New Zealand subscribed to the treaty and entrenched it in law, particularly in the Customs Acts of both countries. Its intent was free unconstrained trade between our two countries:



*CONSCIOUS of their longstanding and close historic, political, economic and geographic relationship;*

*RECOGNISING that the further development of this relationship will be served by the expansion of trade and the strengthening and fostering of links and co-operation in such fields as investment, marketing, movement of people, tourism and transport;*

*RECOGNISING also that an appropriately structured closer economic relationship will bring economic and social benefits and improve the living standards of their people;*

*MINDFUL that a substantive and mutually beneficial expansion of trade will be central to such a relationship;*

*RECOGNISING that a clearly established and secure trading framework will best give their industries the confidence to take investment and planning decisions having regard to the wider trans-Tasman market;*

*BEARING IN MIND their commitment to an outward looking approach to trade; etc*

Any animal born in Australia or New Zealand or any products derived from animals in either country are 'goods' under CER. In layman's terms, as we understand it, Article 4 of CER provides that if goods were free of tariffs on 1 January 1983 then they remain free of tariffs forever. New tariffs cannot be imposed.

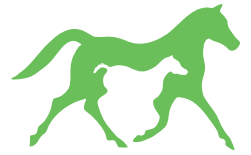
We believe that this proposal from HRA imposes a 'defacto tariff' using HRA's status as a federal body and the statutory rule-making powers of its constituent members. As such these proposed fees may be in breach of the CER treaty. These fees have the characteristics of a tariff; imposed upon the Australian purchasers of overseas race horses upon entry into Australia so as to favour the Australian breeding industry with the effect of harming the New Zealand harness racing industry. Nothing more, nothing less.

Buying and selling horses between our two countries is no different from buying and selling between neighbours. In fact we are neighbours. In this case there is a willing Australian buyer and a willing New Zealand seller, both of whom believe the trade is beneficial, and have done so for decades. The idea that Australian racing needs protecting from the New Zealand product may be common among some large breeders, stallion owners and the studs, but it is just plain wrong. Similarly, while it may be appealing to some to take the easy way out and resort to taxation of Trans-Tasman trade to subsidise Australian breeders, it also is just plain wrong.

### **Fee for service, levy or tax?**

Australia's constitutional frameworks are complicated and to some extent beyond our resources to explore fully. However, a fee such as this looks like a tax, smells like a tax and most probably is a tax. The Import Fees and the Semen Registration fees look to us like taxes being imposed on one group of Australian harness owners or breeders (i.e. those buying a New Zealand horse and those breeding to a NZ-based sire) so that it can fund another group (Australian breeders sending mares to Australian-based stallions) using statutory powers given to the controlling racing bodies for entirely different purposes.

NZSBA is aware that HRA is an association incorporated in the ACT, its members being the harness controlling bodies and others, such as key clubs across the states. Most of the state controlling bodies are established under a state statute discharging public functions, within



which each has statutory powers to charge fees for services provided. None seem, on a quick look, to have a general power to tax.

In the recent past the industry had the experience of exploring the boundaries of HRNZ's powers to impose a fee, unrelated to services rendered, on industry participants. As you are aware our Court of Appeal ruled such a fee was a tax (HRNZ was a statutorily recognised body discharging a public function without explicit taxing authority) and therefore ultra vires. [*HRNZ v. Kotizkas & Canterbury Standardbred Breeders*, CA172/03 17 December 2004.]

So, from our experience and research we are of the opinion that the Import Fee and the Imported Semen Registration Fee may be an unlawful tax, notwithstanding Australia's differing jurisprudence. The fees do not fall within any of the well-recognized descriptions of fees or charges which stand outside the concept of a tax. It is not a fee for a service rendered; it is not a charge for the acquisition or use of property; and it is certainly not a fine or penalty. Moreover, it has the characteristics of an excise or tariff; it is imposed upon the purchasers of horses and their agents who will incur in this cost in the ordinary course of business. [*Australian Tape Manufacturers Association Ltd v Commonwealth* ("Blank Tapes Levy case") [1993] HCA 10; (1993) 176 CLR 480 (11 March 1993)]

## Conclusion

NZSBA has no doubt that the intent of the proposal is to favour Australian breeders and Australian-based stallions by discriminating against Australians who wish to deal with NZ studs and racehorse owners. The purpose of the new fees is to deter Australian owners from buying New Zealand horses and breeding to New Zealand based stallions.

NZSBA wishes to register a serious protest and objection to these proposals because of their anti-competition intent and purpose. The proposals directly impact \$20 million of trade between New Zealand and Australia.

NZSBA will be consulting our regional affiliates, members and studs. We will be following up on CER with the relevant NZ government ministers and officials.

Yours sincerely

Kiely Buttell  
Executive Manager

### Copies:

Hon. Craig Foss, Minister for Racing

Hon. Simon Power, Minister of Commerce

Hon. Tim Grosser, Minister of Trade

Amy Adams, MP, Selwyn

Pat O'Brien, Chairman Harness Racing New Zealand

Michael Stiassney, Chairman New Zealand Racing Board

Cleland Murdoch, Chairman, New Zealand Standardbred Breeders' Assn Inc