



PRODUCT DISCLOSURE STATEMENTS FOR RACING SYNDICATES

GUIDELINES FOR PROMOTERS IN NSW

Introduction

Racing NSW acts as Lead Regulator for the Australian Securities & Investment Commission (“ASIC”) in respect of horse racing syndications in NSW.

Racing NSW's role is derived from the *ASIC Corporations (Horse Schemes) Instrument 2016/790* (“Instrument”).

Provided a Promoter meets certain conditions, and for so long as they are met, the Instrument exempts Promoters from certain sections of the *Corporations Act 2001* (Cth). ASIC's *Explanatory Statement for the ASIC Corporations (Horse Schemes) Instrument 2016/790* and *Regulatory Guide 91: Horse breeding schemes and horse racing syndicates* provide useful guidance material in this regard.

An exemption requires in part that a Promoter of a horse racing syndicate undertakes to submit its proposed Product Disclosure Statement (“PDS”) and syndicate agreement for the syndicates which are granted exemption by ASIC to Racing NSW before being issued to the public.

Racing NSW emphasises that it is the Promoter's obligation to comply with the conditions imposed on an Australian Financial Services Licence (“AFSL”) issued to the Promoter. Racing NSW emphasises that Promoters may be liable to investors and potential investors in racing syndicates at common law and by statute for any inaccuracy or omission in a PDS.

The Role of Racing NSW

In reviewing a PDS lodged for approval by a Promoter, Racing NSW will seek to ensure that the PDS contains information specified by both ASIC and Racing NSW. Racing NSW will also seek to satisfy itself that a PDS which invites members of the public to invest in racing syndicates contains sufficient information to enable potential investors to make investment decisions. Racing NSW wishes to emphasise that its staff are not limited, in reviewing a PDS, merely to confirming that the PDS on its face complies with the requirements of both ASIC and Racing NSW.

Although Racing NSW reviews PDS' in order to determine whether they should be approved by Racing NSW, the commercial viability of syndicates and their merits as investments are matters for the Promoter and for potential investors in the syndicate and are not the subject of review by Racing NSW. The items listed in this Guide are not meant to be exhaustive and Racing NSW **does not accept liability for the contents of PDS'**, which remain the responsibility of Promoters. The substantive content requirements of a PDS are governed by the Corporations Act, in particular section 1013C to 1013F. All PDS' must comply with those requirements. Promoters should also refer to ASIC Policy Statement 168 for guidance on what should be listed in a Product Disclosure Statement.

Application for Approval of PDS

Racing NSW will require that a Promoter lodge a standard application for approval of a PDS, in the form made available by Racing NSW to Promoters, before it will review a PDS.

Contents of PDS

In order to comply with the requirements, a PDS must contain the information specified below. The requirements apply in respect of each horse to which the syndicate relates.

- 1 Racing NSW will require evidence that the Promoter holds an AFSL issued by ASIC and is currently placed on the Register of Approved Promoters held by the Lead Regulator. If the Promoter intends using the services of an Approved Authorised Representative for the promotion, Racing NSW will require evidence that the Authorised Representative holds a certificate issued by the ASIC and is currently placed on the Register of Approved Authorised Representatives held by Racing NSW. Racing NSW will require the Authorised Representative to be named in the PDS as the Offeror, and the Promoter referred to as the Promoter.
2. The PDS must indicate that a copy of the PDS has been approved by Racing NSW. The statement must indicate that no responsibility as to the contents of the PDS is accepted by Racing NSW, or any of its officers, employees or agents. Racing NSW requires that Promoters adopt a disclaimer in the following form:

“A copy of this PDS has been approved by Racing NSW. No liability as to the contents of this PDS is taken by Racing NSW, its officers, employees or agents. In particular (but without prejudice to the generality of this disclaimer) Racing NSW does not warrant, and has no responsibility for the commercial merits of the scheme referred to in the PDS, the manner in which the syndicates are operated, or the taxation advantages (if any) to which the scheme may give rise.”
- 3 The PDS must state the full name, address and AFSL number of the Promoter. The PDS must also state the full name, address and ASIC registration number of the Authorised Representative (if applicable).

- 4 The PDS must state the name of the Manager of the syndicate.
- 5 The PDS must contain the purpose of the syndicate, which may include a statement of its business strategy, and/or its management policies.
- 6 The PDS must contain a statement of the number of shares to be issued in the syndicate and a statement of the purchase price for those shares (including GST).
- 7 The PDS must contain details of the fees and costs in relation to the syndicate. This includes, but is not limited to, fees paid by the Promoter or Manager to Trainers, Suppliers etc and costs related to the Promoter's business (e.g. administration and legal costs).
- 8 The PDS must indicate the horses to be acquired under the syndicate, including their name, sire, dam, sex and age; and must include a statement of the past racing performance of the horse/s (if any), and of the performance of the sire and dam of the horse/s (if any) and a statement whether registration has been applied for. The PDS must also contain the name and contact details of each owner of the horse's sire and dam. It may be sufficient to declare the available information from the Australian Stud Book, together with the *conflict of interest disclaimer regarding any financial interest in the Sire or the Broodmare.]
- 9 The PDS should contain information as to the Trainer and stabling of horses acquired by the syndicate, together with a letter stating that the Trainer has agreed to train the horses and a statement of the obligations and expenses which will be incurred by participants in the syndicate.
- 10 The PDS must contain details of any actual or perceived conflict of interest of the Promoter or Manager in relation to the syndicate. This includes, but is not limited to, whether the Promoter, Manager or any of their associates has a beneficial financial interest in the sire or dam. This could take the form of words such as the following (although this should be modified to suit a particular circumstance):

“The Promoter and Manager do not directly influence experts such as Trainers, Veterinarians or Valuers to provide advice which is biased, nor do these experts have any commercial reason to provide advice which is biased.

In an instance when the Promoter, Manager and/or Trainer retains a share in the horse, the share is a commercial investment and the appropriate fees are apportioned to the Promoter, Manager and/or Trainer as they are to all shareholders.

****The Promoter OR The Promoter, Manager or any of their associates declares it has never held a financial or beneficial interest in or held any rights to the Sire or the Broodmare of the Horse subject to this scheme nor are entitled to a free service to the horse's sire.***

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- 11 The PDS must include a statement as to whether the Promoter was entitled to a free service to the sire of the horse the subject of the PDS (see 10 above).
- 12 Racing NSW is aware that a Promoter may receive an administration fee from the Trainer of the horse. When this does occur the Promoter should provide full information in the PDS by disclosing the amount per share that they will receive.
- 13 The PDS must disclose if the Promoter will be the Manager of the horse and the services the Promoter as the Manager will provide. The PDS should also advise that the management of the horse and the applicable fee will only be applicable during the horse's racing career. A new management agreement may be struck for a post racing arrangement at the discretion of the parties.
- 14 The PDS must contain a statement that the Manager will be required to manage the syndicate in accordance with the syndicate agreement and any rules, regulations or guidelines made by Racing NSW (as Lead Regulator) in relation to the Manager or management.
- 15 The PDS must indicate the circumstances in which the horse was acquired by the Promoter and the purchase price in relation to that acquisition. The PDS must also state the passed-in price of the horse (if applicable)
- 16 If the most recent sale of the horse to the Promoter or the most recent sales of the horse have occurred other than at arm's length, Racing NSW requires that the Promoter disclose in the PDS the price at which the horse was last sold between persons who were not associated persons.
- 17 If the participants in the syndicate are to have unencumbered title to the whole of the horse, the PDS must include:
 - a) a copy of the letter (“**Vendor Release Statement**”) from the vendor or auction house confirming that the horse has been devolved to the syndicate or participants in the syndicate with unencumbered title, or confirmation by the Promoter that the Vendor Release Statement will be provided to Racing NSW before or on registration of the syndicate with Racing NSW; and
 - b) a statutory declaration made by the Promoter that:
 - 1) the Promoter has a legally enforceable right to possession of the horse or that the Promoter will, before or on registration of the syndicate with Racing NSW, have a legally enforceable right to possession of the horse; and

- 2) the Promoter will, before or on registration of the syndicate with Racing NSW, ensure that the participants in the syndicate will have unencumbered title to the horse; and
 - c) confirmation that any personal property security interest registered against the title to the horse has been released or will be released and that the Promoter will, before or on registration of the syndicate with Racing NSW, confirm to Racing NSW that the personal property security interest has been released.
- 18 If the participants in the syndicate lease the whole of the horse under a finance lease agreement in a standard form, the PDS must include:
- a) a copy of the standard form of finance lease agreement; and
 - b) a statutory declaration made by the Promoter that the Promoter will, before or on registration of the syndicate with Racing NSW, ensure that participants in the syndicate lease the horse under a finance lease in that standard form.

Note: Racing NSW reserves the right to seek further evidence from the Promoter showing that it is in a position to vest legal or beneficial ownership in each horse to be owned or leased by a syndicate on registration of the syndicate.

- 19 The PDS must contain an undertaking by the Promoter that the Promoter will, within 45 days after:
- a) applications for the minimum number of interests in the syndicate are received; or
 - b) the minimum amount for the syndicate has been raised,

register the syndicate with Racing NSW. However, this step is not required (in the above time) if the time period elapsed since the PDS was approved by the Lead Regulator is under 6 months and shares remain available for sale. In such an instance, an undertaking by the Promoter that it will register the syndicate with the Lead Regulator within 45 days of the sale of the final share in the scheme is required.

- 20 The PDS must contain a notice that a participant in the syndicate may elect to have the horse tested for a prohibited substance under the Australian Rules of Racing, with the cost of testing to be borne by all of the participants (whether or not they have elected to have the horse tested).
- 21 **(Valuations)** If the horse was not purchased through a public auction, the PDS must contain a valuation report. The valuer must be known and must be acceptable to Racing NSW. The valuation report must be prepared not more than 30 days prior to interests in the syndicate being offered to the public. The valuation report must value each horse separately and must disclose the figure that was calculated.

It would generally be sufficient disclosure of the method adopted by the valuer to assess the market value of a horse if, for example, the valuation report indicates whether the valuer has taken into account the pedigree of the horse, its conformation, market conditions, recent sale prices and specifies any other relevant factors which were taken into account.

The valuation report must contain a statement of any financial or other interest of the valuer in the syndicate or the monies to be raised from the offer. Racing NSW requires that the valuation report contain an express statement that it has been prepared for inclusion in a PDS in relation to the offer to the public of an interest in the particular syndicate, and an acknowledgment that it may be relied upon by prospective investors in the syndicate.

- 22 **(Veterinary Certificates)** The PDS must contain veterinary certificates in relation to each of the horses proposed for purchase by the syndicate.

The veterinary certificates must be prepared not more than 30 days prior to interests being offered to the public. The certificates must expressly refer to the purpose of the syndicate and evaluate the fitness of the horses for that purpose. The minimum requirements for the content of the veterinary certificate shall be as set by Racing NSW so as to provide consistent information to potential investors.

The veterinary certificates must contain a statement of any financial or other interest of the veterinarian in the syndicate or the monies raised from the offer.

- 23 The PDS must contain a statement that as at the date of issue of the PDS the Promoter knows of no fact or occurrence which renders any statement contained in the valuation and veterinary certificates materially inaccurate.

- 24 The PDS must include a statement that it contains all information which investors and their advisers would require and reasonably expect to find in the PDS for the purpose of making an informed assessment of the merits of an investment in the syndicate.

- 25 The PDS must set out the expenses incurred by the Promoter in respect of the particular horse or horses to be owned or leased, qualified under specified headings (with the Total of all Expense included) and contain a statement that all expenses incurred by the Promoter will be paid in full when the trust account is closed and for horse services not yet rendered held in a separate account until paid.

- 26 The PDS must contain a statement that application monies received by the syndicate will be held in trust by the Promoters until Racing NSW has registered (or refused to register) the partnership or syndicate and a statement that if the syndicate is not fully subscribed within six months from the date of the approval of the PDS or if Racing NSW refuses to

register the syndicate, all application monies held in trust, together with interest will be returned to applicants within ten business days. This statement is to be inserted in the PDS:

"If the syndicate is not fully subscribed by [insert date] or if Racing NSW refuses to register the syndicate, all application moneys held in trust, together with interest, will be returned to applicants within ten business days"

Racing NSW will monitor registration of the syndicate to ensure that monies are returned to investors if the full subscription condition is not satisfied or the syndicate is not registered within the time period allowed.

- 27 **(Syndication of part interests in horses)** The Instrument provides relief afforded by it only where the promotion results in the participants in the scheme having title to the whole of the horse. What that means is that the interest promoted by the Promoter, together with any interest retained in the horse by the Promoter must total 100%, otherwise the syndicate promoted will be subject to the full managed investment scheme regime of Chapter 5C of the Corporations Act, and cannot be promoted via Racing NSW.

In the case of a part promotion the PDS only needs to relate to the retail promotion and can be for part of the horse provided that the scheme itself relates to the whole of the horse. On registration of a scheme the total number of all the participants must not exceed 50 and the total value of the scheme must not exceed \$500,000.

Where a partnership acquires a part interest in a horse the PDS must contain the agreements or other arrangements which determine the rights of the syndicate and of other part owners of the horse in respect of the management of the horse and in respect of the circumstances under which the horse may be sold or otherwise disposed of.

- 28 The PDS must include details of a "cooling off" regime.
- 29 The PDS must include a statement of risks. It would generally be sufficient (but not limited to) to include in the statement of risks commentary that the horse may become injured, the horse may not become a racehorse, that not all racehorses earn prize money, that insurance when secured may not cover all circumstances, the prospects of a breeding career, and further in the case of a male horse the prospect of being gelded, and other relevant factors which should be taken into account.
- 30 The PDS must include information about the dispute resolution process available to the subscriber.

Number of Members of Syndicate

The Instrument provides that the limit on the number of members of a syndicate is 50.

Racing NSW also draws attention of Promoters to Rule 69 of the Australian Rules of Racing which describes the permitted ownership structures under the Rules.

Rule 69 provides that, a horse shall not be entered or raced except:

- (a) a natural person or a combination of not more than twenty natural persons;
- (b) a syndicate (as defined); or
- (c) a combination of one or more registered syndicates and/or natural persons totalling in all not more than twenty.

Racing NSW Costs in Reviewing PDS

Where syndication structures have become more complex and the value of the horses syndicated has increased significantly, or where a syndicate involves complex questions, Racing NSW may incur costs in reviewing the PDS which are not covered by its standard application fee. In those circumstances, Racing NSW may require that the Promoter reimburse Racing NSW for legal costs and other reasonable expenses incurred in reviewing the PDS. Racing NSW will require these costs to be paid whether or not the PDS is approved. Promoters agree to pay those costs incurred by Racing NSW. Racing NSW emphasises that this requirement will not apply to the significant majority of PDS' lodged for approval by Racing NSW.

Issue of Promoter's PDS

Racing NSW has become aware that in some circumstances syndicate members are not being provided with a copy of the PDS prior to entering into a syndicate agreement. Promoters must ensure that all syndicate members receive a copy of the PDS before executing a syndicate agreement.

Promoters should note that the Application for Approval of a PDS lodged with Racing NSW contains an undertaking to Racing NSW that the Promoter will not circulate any information to prospective syndicate members other than the PDS and any accompanying documents which have been approved by Racing NSW, and that the Promoter will provide Racing NSW with a copy of the PDS and any accompanying documentation in the form in which it was sent to investors.

Review of Stud Book Record

Racing NSW will examine the Stud Book record of a horse which is to be owned by the syndicate. If the horse is ineligible to be registered, Racing NSW will require the Promoter either to attend to the rectification of the defect or to disclose the relevant facts in the PDS. Racing NSW will require that such disclosure indicates that unless the problem is rectified, the horse which is to be owned or leased by the syndicate cannot be registered as a racehorse and, therefore, the promotion may not be approved.

Location of Horses

Racing NSW is of the view that it cannot register a syndicate if horses are not registered as racehorses in Australia. It is implicit in Australian Rule of Racing 69 and in the Syndicate Rules and Regulations that registration of a syndicate by Racing NSW is directed to horses which are to be raced in accordance with the Australian Rules of Racing. Where a horse is located outside Australia and would not be raced in races conducted by any Australian Racing Authority, Racing NSW would be unlikely to approve a PDS in relation to a syndicate relating to the horse. This position is consistent with Racing NSW's primary purpose, which is to promote the interests of the Australian racing industry and/or persons interested in the racing of Australian horses.

Advertising

Racing NSW draws the attention of Promoters to the fact that it exercises an independent discretion in considering whether to approve an advertisement for the purposes of an exemption granted to the Promoter by ASIC. Racing NSW will seek to ensure that advertisements contain no material information not contained in the PDS and that they do not contain information that is misleading, or deceptive, or likely to mislead or deceive. However, an advertisement which satisfies those minimum requirements will not necessarily be approved by Racing NSW. In determining whether to approve an advertisement, Racing NSW will take into account its purpose of promoting horse racing within its jurisdiction. Racing NSW would generally withhold approval of an advertisement which would prejudice the reputation of the racing industry or would adversely affect the confidence of investors in racing syndicates.

PDS in-use notice

Promoters are reminded that as soon as practicable, and in any event within 5 business days after a copy of an approved PDS is first given to someone in a recommendation, issue or sale situation, the Promoter must lodge with ASIC a FS88 PDS in-use notice. This form can be lodged online via the ASIC website.

Conclusion

In considering whether to approve a PDS, Racing NSW will use its best efforts to ensure that the PDS complies with the requirements of both ASIC and Racing NSW. Racing NSW does not, however, have a responsibility to inquire into the financial success or viability of the syndicate and cannot accept liability for the contents of the PDS.

Racing NSW has discretion whether to approve a PDS in a particular case, and will be prepared to consider any submission as to the manner in which it should exercise that discretion on its merits, subject to the requirements of ASIC and Racing NSW. Promoters should recognise, however, that in granting its approval to an offer of interests in a syndicate Racing NSW may look to matters beyond those required by ASIC and Racing NSW. This is consistent with Racing

NSW's particular expertise in the racing industry, with the purposes for which the Lead Regulator function was conferred on Racing NSW and with the need for Racing NSW to satisfy itself that a particular offer or invitation to the public is appropriate for its approval. It is Racing NSW's view that the interests of the racing community and the interests of investors will both be best served by full disclosure by Promoters of information which would be material to potential investors in racing syndicates.
