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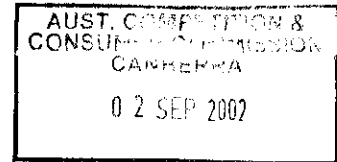
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30/8/02

30 August 2002

Your ref C2002/1080
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Attention: Amanda Dadd

Mr Tim Grimwade
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602



By post & fax (02 6243 1199)

Dear Mr Grimwade

Authorisation A90837 lodged by Australian Hotels Association (NSW)

We act for TAB Limited (**TAB**) and SKY Channel Pty Ltd (**SKY**).

We have been given copies of your letters dated 8 August 2002 addressed to our clients, together with an application for authorisation to the Australian Competition and Consumer Commission on behalf of the Australian Hotels Association (NSW) (the **AHA**). As we understand the position, the AHA seeks authorisation under section 88(1) of the *Trade Practices Act 1974* (**the Act**) to:

- collectively negotiate on behalf of certain "AHA members" with suppliers of TAB and SKY services; and
- collectively boycott TAB and SKY in certain circumstances.

The ACCC has requested our clients to provide a written submission regarding the likely public benefits and the effects on competition of the arrangements for which authorisation is sought.

We are instructed to raise the following matters in relation to the application:

1 Identification of the parties

The application is made using "Form B" in Schedule 1 to the *Trade Practices Regulations*. The AHA has not completed questions 2(b) or 3 of the Form nor does it provide details of the identities of the other parties to the proposed contract, arrangement or understanding elsewhere in its application.

Our clients infer that the other parties to the proposed contract, arrangement or understanding comprise some, but not all, of the members of the AHA. It is our understanding that the current membership of the AHA covers a wide spectrum, from small businesses to large corporations with multi-million dollar annual profits, and accordingly the identity of relevant parties is material information.

It is also not clear whether authorisation is sought in relation to future members of the AHA and, if so, the mechanism by which those new members would join in the collective process.

2 Particularisation of contract, arrangement or understanding

In response to question 2(a) on Form B, the AHA asserts that particulars of the relevant contract, arrangement or understanding are detailed in the submission.

However, apart from disclosing that:

- individual AHA members would be free to negotiate separate terms and conditions with TAB or SKY; and
- primary boycott activity would be permitted in the event negotiations break down and are not recommenced within 7 days,

the AHA submission does not provide any particulars of the relevant contract, arrangement or understanding. Further, neither the responses to Form B nor the submission sufficiently particularise the provisions within the proposed contract, arrangement or understanding that may substantially lessen competition nor the provisions that may constitute an “exclusionary provision”.

In addition, neither the responses to Form B nor the submission indicate the process by which collective negotiation will occur nor the procedure for an AHA member to ‘opt out’ of the collective process and negotiate individually.

Our clients cannot properly respond to the ACCC until satisfactory details of the proposed contract, arrangement or understanding are provided by the applicant. Furthermore, those details (when provided) may give rise to separate or different interests between our clients, and our clients are entitled to know which of their respective interests are affected before making submissions to the ACCC.

3 Requirements under the Act

Section 88(1) of the Act allows the ACCC to authorise a contract, arrangement or understanding where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision or would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45.

The authorisation tests for contracts, arrangements or understandings with a provision with the purpose or effect of substantially lessening competition, or with an exclusionary provision, are set out in section 90. In respect of the application for collective bargaining, section 90(6) requires the ACCC to be satisfied that the relevant provision of the proposed contract, arrangement or understanding “...would result, or be likely to result, in a benefit to the public” and further that “...that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result”. In respect of the application to conduct primary boycotts, section 90(8) requires the ACCC to be satisfied that the exclusionary provision of the proposed contract, arrangement or understanding

would “...result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed”.

In effect, sections 90(6) and 90(8) require the ACCC to examine the causal relationship between the relevant provisions of a proposed contract, arrangement or understanding and the benefits and detriments resulting from those provisions. The ACCC has sought submissions from our clients in relation to this issue.

Because the present application gives no substantive details of the proposed contract, arrangement or understanding, and does not particularise the provisions requiring authorisation, it is very difficult for our clients to assess the application at this stage and make any submission in relation either to its likely public benefits or in relation to possible competitive effects resulting from the proposed contract, arrangement or understanding. It is not even clear from the application whether the AHA is in fact seeking to have the TAB/SKY services broadly available at a lower price, or whether the AHA wishes to restrict access to those services thereby promoting what it describes as “...competition between members for those rights” (see page 3 of the submission).

Our clients wish to make a written submission to the ACCC regarding any alleged public benefits and the effects on competition of a contract, arrangement or understanding between the AHA and certain persons allowing collective bargaining and primary boycotts, but our clients are presently constrained from doing so because the arrangements for which authorisation is sought have not been particularised with sufficient or reasonable detail.

4 Formal defects

Regulation 7 of the *Trade Practices Regulations* requires an application to be made in accordance with the relevant form in Schedule 1 to the regulations.

As noted above, the application is made using “Form B” in Schedule 1 to those Regulations.

In our view there appear to be a number of formal deficiencies in the application made by the AHA. First, Form B does not relate to “exclusionary provisions” as defined by section 4D of the Act, and as such it is not the correct form for the AHA to lodge in respect of its proposed collective boycott activity. Secondly, the answers to questions 1(a), 2(a), 2(b) and 3 of the Form are currently deficient, and this deficiency materially affects our clients’ ability to make a submission to the ACCC.

5 Conclusion

The following aspects of the application are of concern to our clients and prejudice their ability to make a written submission to the ACCC at this stage:

- 1 the application does not properly identify the parties to the proposed contract, arrangement or understanding;
- 2 the application does not identify the contract, arrangement or understanding requiring authorisation, the relevant provision(s) therein that may substantially lessen competition, nor the relevant provision(s) therein that may constitute an “exclusionary provision”. Furthermore, the application does not indicate whether authorisation is sought in respect of

- future AHA members, the process by which collective negotiations will occur nor the procedure for an AHA member to 'opt out' of that process;
- 3 the lack of detail in the application is such that it is very difficult to make any assessment as to the public benefits and the effects on competition of the relevant provision(s) in the proposed contract, arrangement or understanding; and
 - 4 the incorrect use of Form B in respect of collective boycott activity, and the apparent failure to properly complete portions of Form B which are relevant to the application for collective bargaining.

Some or all of these matters may also be of concern to the ACCC.

Accordingly, we are instructed to request the ACCC to require the applicant to resubmit its application, using the proper Forms and containing proper details and particulars of both the parties and the proposed contract, arrangement or understanding. If the ACCC has already taken this course, or if the AHA has provided further information which would assist our clients to assess the likely public benefits and effects on competition of the arrangements for which it seeks authorisation, would you please let us know as soon as possible.

Obviously, in light of the matters raised above, we also request that the timeframe for provision of our clients' written submissions be extended to a reasonable date after the date when the applicant re-submits its application.

Finally, so that we may advise our clients, we would be grateful if you would notify us immediately if the ACCC does not propose to require the AHA to resubmit its application and instead intends to proceed to make a determination based on the application in its current form.

In view of the serious issues raised, we would be grateful for your response before 6 September 2002.

Yours faithfully

FREEHILLS



SG Michael Gray/Rebecca Davies
Partners

