

Australian Competition and Consumer Commission

**Pre-decision conference in relation to its Draft
Determination regarding the application for
authorisation lodged by the Australian Hotels
Association (NSW) (A90837)**

Angel Place, Sydney

10.00am, 5 May 2003

Minutes

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The conference commenced at 10:00 am on Monday 5 May 2003. The main points raised during the conference are outlined below. The notes are taken in summary form and are not verbatim.

A List of attendees is at **Attachment A**.

INTRODUCTION

Jennifer McNeill (Australian Competition and Consumer Commission)

- Commissioner McNeill opened the conference and welcomed attendees to the conference.
- Commissioner McNeill advised that she had been appointed by the Chairman of the Australian Competition and Consumer Commission (the Commission) to represent the Commission at this conference.
- Commissioner McNeill introduced Commission staff attending the conference.
- Commissioner McNeill summarised the relevant provisions of the *Trade Practices Act 1974* (the Act), the authorisation process, the arrangements for which authorisation has been sought and the Commission's draft determination proposing to deny authorisation to the arrangements.
- Commissioner McNeill detailed the nature of the conference and the procedures that would be followed. Commissioner McNeill advised that the conference was requested by the Australian Hotels Association (NSW) (AHA NSW) and for this reason, AHA NSW would be called first to speak. Commissioner McNeill advised that thereafter other speakers would be given the opportunity to make a submission.
- Commissioner McNeill advised that any questions to other parties must go through her and she would exercise discretion as to whether or not the questions would be put. Parties may choose to answer or not to answer questions.
- Commissioner McNeill advised that staff would make a record of the conference and that all parties would receive a copy of the record and it would be placed on the public register.
- Commissioner McNeill advised that she could not make a final decision today. She advised that she would have to report back to the Commission and it will be the whole Commission that makes the final determination in respect of this matter.

SPEAKERS

John Thorpe (President, AHA NSW)

- Mr Thorpe said that the AHA NSW has 1635 members who come from both metropolitan and country areas.
- Mr Thorpe said that the majority of AHA NSW members are from country areas and that all members provide a range of services, one of which is wagering.

- Mr Thorpe said that in providing wagering services and obtaining racing broadcasting, AHA NSW is faced with monopoly suppliers (Tab Limited and Sky Channel). Mr Thorpe noted that Tab Limited owns Sky Channel and Radio 2KY.
- Mr Thorpe said that originally, hotels were given PubTABs in an attempt to eradicate SP betting. Mr Thorpe said that SP betting avoids taxes and does not pass on funds to the racing industry.
- Mr Thorpe said that only in New South Wales are Tab Limited and Sky Channel the same entity.
- Mr Thorpe said that the Commission should focus on competition and that this is not a situation in which there is competition because hoteliers are not faced with a choice.
- Mr Thorpe said that there is competition in the provision of hospitality services.
- Mr Thorpe noted the Commission's consideration of public benefits to consumers in its draft determination and suggested that all of the AHA NSW's members are members of the public and are consumers.
- Mr Thorpe said that the Commission must deal with two separate issues. One, is there competition? And two, are the 980 hoteliers who have PubTAB outlets part of the public?
- Mr Thorpe said that AHA NSW members do not agree with the Commission's draft determination. Mr Thorpe noted that the Commission made its decision before the recommendations in the Dawson report were released. Mr Thorpe noted that Dawson recommended collective bargaining including withholding supply for small businesses.
- Mr Thorpe said that AHA NSW members are small businesses in both relative and absolute terms.
- Mr Thorpe said that there is a public in balancing bargaining power and noted that collective negotiation alone will not force Tab Limited to "come to a deal" with AHA NSW members.
- Mr Thorpe outlined the benefits the AHA NSW have claimed in their submissions to the Commission.
- Mr Thorpe said that the tourism industry does not receive as much government assistance as other industries (for example, coal and dairy).
- Mr Thorpe concluded that the AHA NSW believes that the public benefit outweighs the anti-competitive detriment and said that the AHA NSW will provide a further submission to the Commission.

Colin Waller (Hotelier – South Coast, AHA NSW member)

- Mr Waller said that there are now four or five wagering agencies in each town and that revenues are declining as a result.

- Mr Waller said that two thirds of the fee paid by hoteliers to Sky Channel is based on literage, however, events run by hotels such as discos, ladies auxiliary meetings and other outside events have nothing to do with the provision of Tab and Sky facilities yet they contribute to literage.
- Mr Waller said that the better run that a pub is, the more that pub has to pay to Tab in fees.
- Mr Waller said that even though PubTAB and Sky Channel are not affordable, hoteliers cannot turn it off because hotels have built up loyalty with their patrons and have made a massive investment in providing PubTAB (for example, 18 televisions and 2.5 staff in Mr Waller's hotel).
- Mr Waller said that he would welcome the opportunity to develop a more female-oriented product with Tab and Sky, but that that type of partnership is not viable at the moment.
- Mr Waller said that, while he does not necessarily agree with the striking aspect of the application, he supports the AHA NSW in their application to collectively bargain with Tab Limited.
- Mr Waller said that many country patrons engage in social gambling, with maximum bets of \$2-3 and that the public has a right to be able to continue doing so. Mr Weller said that the gaming industry is in decline and that the reduction has largely come about as a result of home-betting (for example, e-bet and phone-bet).
- Mr Waller said that, as a result, even though his hotel is in the top 30 per cent of hotels in terms of commissions, he is still considering giving up his hotel's PubTAB service.

Colin Lyons (Hotelier – Wagga Wagga, AHA NSW member)

- Mr Lyons said that many hotels (that cannot afford PubTABs) are in very small towns and that residents of these small towns cannot watch local racehorses race because they cannot afford to get to a hotel with a PubTAB facility.
- Mr Lyons said that the only way that PubTAB and Sky Channel will be made available to hotels in small towns is by AHA NSW talking to Tab Limited on behalf of AHA NSW members. Mr Lyons said that, if this occurs, people in country towns will be able to access a facility that people in cities take for granted.
- Mr Lyons said that the public benefit resulting from this would be enormous and that there is no public detriment (because the hotels currently do not have Tab facilities and therefore cannot boycott).
- Commissioner McNeill noted that there is a differential scale in place which distinguishes between small and large businesses (according to hotel turnover, etc) and asked why this was not sufficient to make PubTABs available to smaller hotels.

- Mr Lyons said that the Sky Channel fee would have to decrease significantly in order to allow access to wagering. Mr Lyons said that the current fee (which is around two per cent of turnover or around \$800 per month) would destroy small hotels.
- Mr Lyons said that the fee would have to decrease more than ten per cent.
- Commissioner McNeill asked why Mr Lyons is confident that a more significant fee reduction (say, 50 per cent) would result from the collective bargaining process.
- Mr Lyons said that he is not confident that this would be the case but that without the AHA NSW collectively negotiating, they have no chance.

Brad Shields (Hotelier – Cootamundra, AHA NSW member)

- Mr Shields recounted his own experiences as an example of what is happening in the hotel industry.
- Mr Shields said that Tab have acted in contradiction with their original submissions to hoteliers.
- Mr Shields said that in 1998 there was one Tab agency and one PubTAB in the town in which he runs his hotel. Tab invited hoteliers and club owners to make applications for PubTAB and ClubTAB licences. Mr Shields said that in the document issued at the time, Tab said that it did not seek to divert sales from existing Tab outlets. Mr Shields said that Tab granted two further licence applications at that time and the Tab agency closed.
- Mr Shields said that outlets were then advised that it was not viable to have three PubTABs in the region and one operator handed back the PubTAB licence on the understanding that no other licences would be granted.
- Mr Shields said that the PubTABs were viable when there were only two outlets.
- Mr Shields said that in 2000, Tab opened a third PubTAB outlet and in 2001 two further outlets were opened.
- Mr Shields said that this meant that there were five PubTAB outlets within 800 metres.
- Mr Shields said that, while Tab made the representation that they would not direct funds from existing profitable operations, that is exactly what has happened. Mr Shields said that turnover has decreased by 50 per cent, resulting in decreased commissions, but the Sky Channel fee has not decreased. Mr Shields said that Tab Limited acts with little regard to existing agents.
- Mr Shields said that if Tab Limited reduced the fee for Sky Channel or increased commissions, then PubTABs would be able to be run at (at least) breakeven point.

- Mr Shields said that hotels are the hubs of small towns and that more profitable or viable hotels means that hoteliers can send more money on entertainment for people in those towns.
- Mr Shields said that hotels do not respond satisfactorily when dealing with hoteliers on a one-to-one basis.

Lyn Humphreys (Hotelier – Oatley, AHA NSW member)

- Ms Humphreys said that hotels provide a variety of services such as accommodation, racing, food and beverages and that employment and the level of service provision is directly related to profitability.
- Ms Humphreys said that it is not sustainable to use the profits from one area of the hotel to subsidise the losses from other operations in the hotel.
- Ms Humphreys said that business owners are always looking for competitive prices and savings (regardless of the size of savings) and that when dealing with Tab and Sky, there is no alternative source for hoteliers.
- Ms Humphreys said that hoteliers want to be in partnership with Tab and Sky and that, at the moment, there is no benefit in hoteliers promoting Tab/Sky services and wagering.
- Ms Humphreys said that Tab Limited has indicated they do not want to deal with hotels with wagering sales that are below \$7500.
- Ms Humphreys said that, for country hoteliers, the future without authorisation is not promising.

Michael Grant (Hotelier – Forbes, AHA NSW member)

- Mr Grant submitted that he supported the submission from Mr Shields and that he had experienced a similar situation in Forbes where the introduction of three additional Tab outlets reduced income by 50 per cent and employment has decreased as a result.

Greg Costello (Hotelier – Sawtell, AHA NSW member)

- Mr Costello said that individual hoteliers are not able to bargain with a monopoly such as Tab Limited.

Pat Kerr (Hotelier – Wagga Wagga, AHA NSW member)

- Mr Kerr submitted that hotels do not have a choice when it comes to obtaining wagering licences and broadcasting services.
- Mr Kerr said that it is not appropriate to use a “one size fits all” approach for hotels in metropolitan and country areas.
- Mr Kerr said that hoteliers want to provide a “total package” to patrons and therefore must be able to negotiate with suppliers and must have a choice as to what entertainment is provided.

- Mr Kerr said that there is a substantial per square metre cost associated with the provision of wagering services.
- Mr Kerr said that forgoing wagering would be to the detriment of both the racing industry and the tourism industry.
- Commissioner McNeill asked Mr Kerr whether, without authorisation, there would be an increase in SP betting and a decrease in PubTAB outlets.
- Mr Kerr said that there would be. Mr Kerr said that, in the Hunter region, that outcome has been discussed as a possibility.

Bevan Douglas (Hotelier – Tamworth, Senior Vice President AHA NSW)

- Mr Douglas said that as Chairman of the Tab/Sky sub-committee he has been contacted by hoteliers from across NSW in relation to this matter.
- Mr Douglas said that hoteliers provide food, beverage, wagering, racing, entertainment and accommodation services and that hoteliers cannot afford to cross-subsidise service provision.
- Mr Douglas said that, in many communities, hotels are the only places for people in the community to go for entertainment. Mr Douglas said the hotel patrons attend hotels and that there is a degree of loyalty between hotels and patrons.
- Mr Douglas said that the Sky Channel fee is based on the ability of an hotelier to pay rather than the cost of production. Mr Douglas said that this is inappropriate and that good managers are forced to pay more for the service.
- Mr Douglas said that hoteliers do not want to turn wagering and broadcasting services off but that hoteliers may be forced to because they cannot afford them.
- Mr Douglas said that the relationship between hotels and Tab patrons has significantly deteriorated.
- Mr Douglas referred to the Commission's draft determination which talked about breaking bargaining groups up. Mr Douglas said that the AHA NSW is the only organisation that could do this effectively.

Bruce Woods (Hotelier – Hunter Valley, AHA NSW member)

- Mr Woods said that Tab/Sky are one entity and that 1100 hotels do not have PubTABs. Mr Woods said that hotels that do not have PubTABs cannot afford to pay for Sky Channel.
- Mr Woods said that AUSTAR supplies sports channels for \$200 per month.
- Mr Woods said that the scale of fees for Sky Channel should be tailored to the small country hotel.
- Mr Woods said that Tab Limited used to pay for printing, etc., but now individual hoteliers must print everything themselves.

- Mr Woods said that he would like the Commission to authorise the proposed arrangements until the recommendations contained in the Dawson report are implemented.

Bob Horne (Hotelier – Central Coast, AHA NSW member)

- Mr Horne said that dairy farmers sought authorisation from the Commission for collective negotiation and were successful (and received government assistance).
- Mr Horne said that the last time the AHA NSW attempted to negotiate with Tab there was effectively a large reduction in commissions because of the cost of consumables (which decreased the commissions from 2.07 to 1.85 per cent).
- Mr Horne asked whether, where collective bargaining is not permitted, the AHA NSW can apply with the Commission to have the current agreement between AHA NSW and Tab “outlawed”.
- Commissioner McNeill said that the Commission does not have the ability to outlaw contracts. Commissioner McNeill noted that where contracts raise unconscionable conduct concerns there are prohibitions on such conduct in the Trade Practices Act.
- Commissioner McNeill also said that, in relation to the successful authorisation application from dairy farmers, there are a number of characteristics of the application and authorisation that distinguish it from the application lodged by the AHA NSW.
- Mr Horne said that the AHA NSW may be willing to break up into smaller bargaining groups. Mr Horne asked whether this would have any impact on the Commission’s evaluation.
- Commissioner McNeill said that the Commission is only able to look at the conduct put before it. Commissioner McNeill said that the anti-competitive effects of smaller bargaining groups would be different to those outlined in the draft determination and that this would change the assessment. Commissioner McNeill said, however, that the precise impact of the assessment could not be known until such arrangements were put to the Commission by the AHA NSW.

Commissioner McNeill (ACCC)

- After consultation with Tab and Sky representatives, Commissioner McNeill said that Tab and Sky Channel would not be making a submission to the Commission but are reserving the right to respond to written submissions made by the AHA NSW in the future.

Brendan McCoy (Hotelier – Newcastle, AHA NSW member)

- Mr McCoy said that AHA NSW profitability must be increasing significantly.
- Mr McCoy discussed issues surrounding commission payments.

General discussion

- Mr Waller said that the number of hotels with PubTAB outlets has increased from 586 (in 1998) to 990 and that the number of Tab agencies has decreased from 508 to 336.
- Mr Waller said that there is an inconsistency in Sky being able to send a signal to individual households for \$50 per month and the charge to hotels for the same signal of \$1200 per month.
- Mr Waller said that the fee for Sky Channel has increased consistently.
- Mr Thorpe said that breaking up into smaller bargaining groups will not work because each group will be unaware of what is going on in other regions.
- Commissioner McNeill asked why a single state-wide bargaining group is so important.
- Mr Thorpe said that the AHA NSW would agree to smaller regional groups if there were smaller regional groups for Sky. Mr Thorpe said that the Industrial Relations Commission sees it as appropriate to deal with the AHA NSW on a state-wide basis.
- Commissioner McNeill asked if there is an inconsistency between Mr Thorpe's submissions that the Sky Channel fee should not be linked to beer literage and should be a set fee and Mr Lyons' submission that small hotels cannot afford a one size fits all fee.
- Mr Thorpe said that it may be that city hoteliers pay a set fee.
- Mr Waller said that, in a normal marketplace, cost is based on the cost of production plus a reasonable return. Mr Waller said that provision of pay television services to individuals is \$50 per month and to hotels is \$1200 per month. Mr Waller said that this does not make sense.
- Mr Douglas said that the AHA NSW made an application to the Commission in relation to misuse of market power and unconscionable conduct and that these issues were not properly considered by the Commission.
- Mr Douglas said that it is difficult for individual hoteliers to bargain with Tab and Sky because Sky Channel contracts are for five years and Tab contracts are on a month by month basis.
- Commissioner McNeill summarised the Commission's understanding of the public benefits claimed by the AHA NSW in their application and supporting submission.
- Mr Thorpe agreed with the Commission's understanding in relation to the public benefits.
- Mr Douglas said that, in relation to the promotion of equitable dealings, negotiation on the basis of fees would result in fairer dealings.

- In relation to promotion of industry cost savings, Mr Thorpe said that it would be likely that businesses would pass on any cost savings from the negotiation process.
- In relation to the public benefit associated with building confidence in the product, Mr Thorpe said that hoteliers need to be able to “return to the table” in order to have confidence in the Sky and Tab products.
- In relation to responsible gambling, Mr Thorpe said that legislative governance is very strong and that hoteliers are already encouraging responsible gambling.

Michael Elliott (Hotelier – Jindabyne, AHA NSW member)

- Mr Elliott said that the ability to negotiate with Tab Limited affects the tourism industry. Mr Elliott said that 60 per cent of people in the Snowy Mountains earn income from tourism.
- Mr Elliott said that if Tab outlets close because they are not viable, there will be nowhere for the public to go.
- Mr Elliott said he is not permitted to have a Tab and therefore cannot afford to keep Sky Channel. Mr Elliott said that racing has an historical significance in the Snowy Mountain region.

Commissioner McNeill (ACCC)

- Commissioner McNeill thanked participants and advised that the Commission would consider the matters raised prior to forming a final decision. Commission McNeill welcomed further written submissions prior to Friday 23 May 2003.
- Commissioner McNeill advised that Commission Staff would prepare a summary of the conference and would provide copies to attendees.
- The conference concluded at 1.00pm.