

Gilbert Jewel

From: Grimwade Tim
Sent: Friday, 13 June 2003 10:08 AM
To: Dadd, Amanda; Gregson, Scott; Gilbert Jewel
Subject: FW: Authorisation application (A90837) by AHA (NSW)

fya and public register. Could you also forward to the applicant.

-----Original Message-----

From: Sophie Rigby [mailto:Sophie.Rigby@freehills.com]
Sent: Friday, 13 June 2003 9:53 AM
To: adjudication@accc.gov.au
Cc: breichel@tablimited.com.au; jmadsen@skychannel.com.au; j.walker@necg.com.au; Michael Gray
Subject: Authorisation application (A90837) by AHA (NSW)

Dear Mr Grimwade

Authorisation application (A90837) lodged by the Australian Hotels Association (NSW)

We refer to the AHA's further submission dated 23 May 2003 in relation to the above application.

We attach a copy of a joint written submission by TAB Limited and SKY Channel Pty Limited in response to the AHA's further submission.

Yours faithfully

Michael Gray/Sophie Rigby

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**Submission in response to further
submission by Australian Hotels
Association (NSW) (A90837)**

Tab Limited

and

SKY Channel Pty Limited

Date: 13 June 2003

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Reference

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1 Introduction

This is a joint submission by Tab Limited and SKY Channel Pty Limited (**SKY**) responding to the further submission dated 23 May 2003 by the Australian Hotels Association (**AHA**) following the draft determination dated 26 March 2003 and pre-decision conference of 5 May 2003 in respect of application A90837 by AHA.

This joint submission addresses submissions made by the AHA that:

- (a) the AHA is withdrawing its application to engage in a collective boycott; and
- (b) the Commission should consider granting an interim authorisation pending the implementation of recommendations made by the Dawson Committee.

This submission also identifies a number of factual errors made in the AHA's further submission.

2 Withdrawal of application to collectively boycott

The AHA proposes in its submission to withdraw its application as to collective boycotts.¹

2.1 Significant anti-competitive detriment

The Commission expressed the view that the anti-competitive effect of the proposed collective bargaining arrangements (even absent the collective boycott arrangements) is likely to be of substance.² Tab Limited and SKY submit that the anti-competitive detriment is in fact greater than that found by the Commission and will result in significant inefficiencies, for the reasons set out in their joint submissions dated 23 April 2003,³ 23 October 2002⁴ and the accompanying report by NECG.

The Commission suggested that the anti-competitive effect of the collective bargaining could be limited where the AHA included at least all of the following restrictions on collective bargaining:

- voluntary participation;
- restrictions on the composition and representation of bargaining groups;
- an express prohibition on boycott activity; and
- requirements as to *Trade Practices Act 1974* (Cth) (**TPA**) education of participants.⁶

¹ AHA submission dated 23 May 2003, page 14.

² Draft determination, paragraph 11.59.

³ Pages 2-3.

⁴ Pages 32-33.

⁶ Draft determination, page 37.

The AHA has refused to modify its application to address the concerns raised by the Commission.⁷ In particular, the AHA has failed to accept the critical requirement that restrictions are placed on the composition and representation of bargaining groups. It is apparent that members of the AHA have different and often conflicting interests.⁸ Refusal to accept these restrictions will add to the inefficiency and ineffectiveness of the proposed collective bargaining arrangements.

2.2 No public benefit

The Commission concluded in its draft determination that “there exists very little public benefit demonstrated by the Applicant in relation to the proposed arrangements. ... the information available suggests that any pass through of savings is not guaranteed, is dependent upon competition in each locality and in any event would be marginal or minimal”.⁹ Indeed, as was discussed in the NECG report, not only would the proposed conduct fail to produce public benefits, to the extent that it succeeded in increasing commissions and/or equalising SKY fees, it would actually be likely to create a number of inefficiencies.

The AHA has failed to show how authorisation would result in public benefit, and has refused to commit to passing on any savings to patrons or the racing industry. In fact, the AHA has not succeeded in showing any way in which the racing industry or the public at large would benefit from the arrangements.

2.3 Authorisation test not satisfied

The Commission noted in its draft determination, “the very small public benefit identified by the Applicant is insufficient to outweigh the anti-competitive detriment (albeit limited) associated with restrained collective bargaining ...”¹⁰

Tab Limited and SKY submit that, given the AHA has failed to identify any additional public benefits, and that the AHA has failed to address the Commission’s concerns of anti-competitive detriment, the detriment still clearly outweighs any benefit. The application for authorisation, even as revised by the AHA on 23 May 2003, does not satisfy the relevant test for authorisation.

3 Interim authorisation

The AHA suggests that the Commission should grant interim authorisations to all applications for authorisation for collective negotiation, including the AHA application, pending any legislation enacted pursuant to the recommendations of the Dawson Committee.¹¹

The AHA has assumed that implementation of the Dawson Committee proposals will alter the outcome of its applications. This is not necessarily the case. The

⁷ As shown in the AHA submission dated 23 May 2003, pages 15-16.

⁸ See joint submission by Tab Limited and SKY dated 22 May 2003, page 3.

⁹ Draft determination, page 48.

¹⁰ Draft determination, page 3.

¹¹ AHA submission dated 23 May 2003, page 4.

Dawson Committee recommended procedural changes to authorisation for collective bargaining, ie a notification process should be introduced. The Dawson Committee proposals do not refer to a change in the substance of the test. Indeed, it appears from the report that the Dawson Committee recommends adopting a new notification process while retaining the current public benefit test. The Committee refers to public benefit considerations in the new notification process a number of times, noting that "the ACCC would be able to rely on its public benefit assessment to screen out inappropriate collective bargaining arrangements."¹² The Committee accepted the Commission's submission that market power should form part of the Commission's "assessment of the notification to determine whether the notified conduct would result in a net public benefit."¹³ The relevance of the existing test also appears in the Committee's conclusions on collective bargaining: "a notification process should be provided to assist small business where the collective bargaining may generate public benefit."¹⁴

The AHA has been unable to demonstrate a public benefit and is therefore unable to meet the legal test. Authorisation should not be granted merely on the basis of the AHA's (possibly incorrect) interpretation of the Dawson Committee proposals, which have not yet been embodied even in draft legislation, let alone implemented.

The AHA's submission that the Commission should grant interim authorisation for a number of pending applications is, in any case, entirely inappropriate. Interim authorisation is granted only in exceptional circumstances, and persuasive submissions are usually required in support of any request for an interim authorisation.¹⁵ The Commission has had ample time to give due consideration to the AHA's application and has already issued a draft determination on the application. There is no basis for granting the AHA an interim authorisation, particularly as the implementation of the recommendations remains uncertain.

4 Other comments

The AHA submission contains a large number of factual errors. Many of these have been addressed by Tab Limited and SKY in earlier submissions. Other specific errors and inaccuracies include the following.

- (a) Fox Sports (not Foxtel/Austar) provides competition to SKY in the commercial market. The agreement between SKY and Foxtel is not "aimed at preventing any competition";¹⁶ rather it facilitates access to racing programs in domestic premises (a market where SKY has no independent distribution infrastructure).
- (b) The AHA refers to a US article on the Sherman Act. This article is of questionable relevance to the authorisation process under the TPA.

¹² Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, page 119.

¹³ Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, page 119.

¹⁴ Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, page 121.

¹⁵ ACCC, *Guidelines on authorisation and notification*, 1995, page 9.

¹⁶ AHA submission dated 23 May 2003, pages 1-2.

The article as described is, in any case, not relevant to the AHA's application. The AHA does not meet one of the stated pre-conditions for parties seeking collective negotiation: it is not the case that "each business" involved in the AHA application for authorisation "is a small business in relative and absolute terms"¹⁷.

- (c) *"The TAB will have to "compete" for AHA members services by way of the collective negotiation process".*¹⁸

The hotels already compete to provide Tab Limited with agency services (as confirmed by several speakers at the conference, who complained about competition from other PubTAB agencies in their area). The application for collective bargaining is an attempt to eliminate this competition.

- (d) *"Where there is competition between hotels is in the area of promotional ventures such as a disco or other entertainment or group functions."*¹⁹

Tab Limited and SKY services are also a form of entertainment for patrons, and each hotel decides what mix of entertainment it wishes to offer its patrons.

- (e) *"In the case of TAB they are a "squatter" in the hotels."*²⁰

The hotels choose whether or not to have the Tab Limited and SKY services in their hotels, and can evict these "squatters" at any time. Further, the services draw in patrons and so benefit the entire hotel business (which is obviously why many hotels are so keen to have them).

- (f) The AHA's attempt to argue against detailed data produced by the Australian Bureau of Statistics by reference to a self-selected sample of six (unidentified and unverified) hotels,²¹ out of its membership base of 1635 (ie a sample of 0.4%), is misleading and unreliable. These figures should not be given any weight.

- (g) The AHA submits that turnover fees in shopping centres "*are very different as the tenants occupy the landlord's premises and profit from the landlords infrastructure.*"²²

Members of the AHA are similar to tenants in a shopping centre in that the hotels use and profit from Tab Limited's and SKY's infrastructure.

- (h) *"If collective bargaining is allowed, it is likely that members will continue to supply this type of information which the Association could then use to provide assessments of trading expectations and likely TAB problems in the future.*

If the application fails then the flow of information is likely to dry up."²³

¹⁷ AHA submission dated 23 May 2003, page 2. See joint submission by Tab Limited and SKY dated 23 April 2003.

¹⁸ AHA submission dated 23 May 2003, page 4.

¹⁹ AHA submission dated 23 May 2003, pages 4-5.

²⁰ AHA submission dated 23 May 2003, page 8.

²¹ AHA submission dated 23 May 2003, pages 7-8.

²² AHA submission dated 23 May 2003, page 8.

The information flow to the AHA has no real relevance to the application for authorisation. The AHA does not need authorisation to act as an industry body and circulate industry-wide data. It need only obtain the support and involvement of its own members.

- (i) The AHA states that if the application is not authorised, “industrial action cannot be ruled out in NSW”.²⁴

The AHA’s threat of industrial action, and its inability to control its members, is not relevant to the application for authorisation and is wholly inappropriate in the circumstances.

- (j) The AHA discusses “the literage issue” at some length in its further submission.²⁵

The SKY fee structure is well explained in the previous Tab Limited/SKY submission and the NECG report. The allegations about “economic blackmail” on page 12 of the AHA submission are specifically denied. Further, this passage exemplifies how the AHA fails to distinguish between Tab Limited and SKY, which have separate operations and separate sales forces.

- (k) The AHA makes a number of complaints about the problems associated with maintaining Tab Limited and SKY services and concludes: “*if nothing changes it is expected that many will cease to be a PubTAB agent. Query what they do with their 5 year SKY contract.*”²⁶

The AHA again appears to have overlooked the fact that both the Tab Limited and SKY contracts can be terminated at any time with a relatively short period of notice.

- (l) “*The AHA NSW is already a part of the national market and faces a nation-wide monolith.*”²⁷

Tab Limited is not “a nation-wide monolith”; it operates only in NSW.

- (m) Paragraph 17 of the Baker & McKenzie advice attached to the AHA further submission notes that Baker & McKenzie were “*instructed that TAB only supplies its PubTAB services to those hotels which also take transmission services from SKY.*”

This is incorrect. It is not a condition or requirement of acquiring PubTAB that hotels also acquire SKY (or vice versa).

- (n) Paragraph 19 of the Baker & McKenzie advice attached to the AHA further submission states that “*SKY’s fees are linked to the particular hotels beer literage sales and PubTAB commissions*”.

²³ AHA submission dated 23 May 2003, pages 9-10.

²⁴ AHA submission dated 23 May 2003, page 10.

²⁵ AHA submission dated 23 May 2003, pages 11-12.

²⁶ AHA submission dated 23 May 2003, pages 12-13.

²⁷ AHA submission dated 23 May 2003, page 15.

This is incorrect. SKY's fees are based on bulk beer literage and, if the particular hotel has a PubTAB, then a further fee is applied based on wagering turnover, not PubTAB commissions.

5 Conclusion

The AHA has not demonstrated any public benefits resulting from the proposed arrangements. Indeed the NECG report suggests that public detriments, in the form of inefficiencies, are actually likely to result from the conduct. While withdrawal of the collective boycott will lessen the anti-competitive detriment from the arrangements, the AHA has failed to address the Commission's concern that the collective bargaining will also lead to anti-competitive detriment or the likely inefficiencies deriving from the conduct.²⁸

Tab Limited and SKY submit that the arrangements, even as revised, do not generate a net public benefit and do not satisfy the relevant test for authorisation. The application for authorisation should therefore be denied.

²⁸ AHA submission dated 23 May 2003, pages 15-16 demonstrates the AHA's repeated refusal to modify its application to address the Commission's concerns.