



# SPIER CONSULTING

REGULATORY STRATEGIES & SOLUTIONS

92 JERVOIS STREET DEAKIN ACT 2600  
61-2-6281 2030  
FAX 61-2-6282 5183  
0419 239 755  
spierconsulting@bigpond.com  
ACN 093 621 455

FILE No:	C2002/1081
DOC:	D02/66057
MARS/PRISM:	

Mr T Grimwade  
General Manager Adjudication  
ACCC  
PO Box 1199  
DICKSON ACT 2602

13 December 2002

Dear Mr. Grimwade,

Attached is a further submission on behalf of the AHA (NSW) in relation to its application (A90837) for collective negotiation with TAB Ltd in relation to gambling, broadcasting and related services.

I attach,

1. Comments by AHA flowing from the TAB various submissions.
2. Responses to the issues raised in your letter of 5 November 2002.
3. A synopsis of the results of a survey conducted of AHA (NSW) members.
4. Further material relating to on- going disputes between AHA members and the TAB.

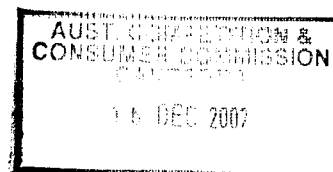
In this submission AHA (NSW) is referred to as the 'AHA' and TAB/SKY is referred to as 'TAB'.

I trust that this assists the ACCC in preparing the draft determination.

I would be happy to provide further information.

Yours truly,

  
HANK SPIER  
Director



## AHA (NSW) APPLICATION FOR AUTHORISATION FOR COLLECTIVE NEGOTIATION – A90837

PART 1 of letter dated 13 December 2000

### SUBMISSIONS BY AHA (NSW) ON COMMENTS BY TAB

The AHA wishes to focus on the future position, and environment of AHA members 'with\_or without' the conduct sought to be authorised, being a test relevant to authorization applications.

The AHA is of the view that the status quo will maintain the current hostility between AHA members and Sky, it will see the continuation of the real disincentive for AHA members to provide additional services for gambling customers, it will continue the situation whereby the AHA is at risk under the Trade Practices Act as, from time to time, the TAB does insist on collective negotiation and further the current sham individual negotiation system is costly and inefficient.

The proposed collective negotiation by the AHA on behalf of its members is likely to overcome or minimize some of these negatives and generally benefit the industry and its customers.

The TAB is arguing that the application is inherently anti competitive and has no public benefit. The TAB is hence arguing for the status quo. The AHA argues that this is in effect defending the one sided position of strength that the TAB has acquired.

The AHA is of the strong view that the status quo is unsustainable for the vast majority of AHA members.

The AHA did not come to the decision to apply for authorization lightly. It did so after a long history of conflict with TAB/SKY, which only looked like getting more intense and protracted. It is also the clear view of AHA members that the AHA should negotiate on their behalf (see survey results) It is not a situation of the AHA seeking an additional role for its own sake.

For grant authorization for collective negotiation the Commission must be satisfied that, in all the circumstances, the proposed arrangement will result, or be likely to result; in a benefit to the public and that the benefit would outweigh the detriment to the public arising from any lessening of competition that would result or be likely to result from the arrangements.

The proposed AHA arrangements will not give rise to any public detriment.

In most cases, AHA members do not compete against each other. Those AHA members that are TAB agents cannot compete on price for TAB services. The TAB sets the prices and related conditions. If they felt that they were more in partnership with TAB, and if hotels were financially rewarded, they may compete on facilities. Currently there is no incentive to do that. In fact the SKY pricing system penalizes the successful.

AHA members need TAB services due to pressure from clients. It amounts to a 'prisoner's dilemma'. It is not profitable but if you do not have it you are in a competitive dilemma. It is like a grocery store without bread.

If collective negotiation were to result in a decrease in fees charged by TAB /SKY to AHA members, an increase in any retail prices by TAB /SKY is unlikely. Most TAB retail prices are regulated by the NSW Government, as are returns

Further the TAB provides a range of services to hotels such as,

- TAB- known as PubTab operations.
- SKY- the telecast of racing.
- CMS – monitoring of gaming machines.
- STATEWIDE JACKPOTTING-of gaming machines.
- KENO- the soon to be introduced numbers game,

all of which the TAB can give with one hand and take away with the other.

The TAB/SKY has recently obtained reductions in what it pays some racing clubs. Despite what the TAB has claimed, that has not been fully passed on to hotels, clubs etc and that is an area where the TAB can absorb any decrease in SKY fees, should that occur. As is the area of uncollected winnings which are kept by the TAB, amounting to approximately \$ 11 million annually.

The current market structure in NSW is that TAB/SKY dominates the gambling industry. The only legalized wagering in NSW hotels is that provided by TAB. In addition the TAB is heavily involved in gaming in that it has the exclusive license to operate the gaming machine CMS computerized information system that acts as the information conduit for the industry. Furthermore TAB is the sole licensee for the statewide linking of gaming machines for jackpots as well as the exclusive licensee of a future keno style numbers game and it is expected that this will soon be made available to hotels and clubs, thereby increasing the TAB influence in the overall gambling industry and by default, the hotel industry.

There is constant speculation that TAB will in the near future move substantially into hotel ownership and will be in direct competition to AHA members. (See AFR, 9 December 2002, back page article) If this is so the TAB will have a major competitive advantage as it will have information about its competitors and their supplier of wagering services will be a major competitor. Will hotels be left with the protection of 'Chinese Walls' within the TAB organization? As has been seen in the petrol and merchant banking industry that fact leads to constant friction and unworkable suspicions. All the more need for a strong role by the relevant trade association.

Hotels are in a highly competitive situation in the hospitality industry and under enormous price pressures. Any changes in SKY fees, including any price reduction, will generally be used to provide better services and facilities. Currently hoteliers who bear most of the on costs spend as little as possible on wagering services in the hotel.

It is interesting to note that in the Golden Casket application (A90853) lodged with the ACCC on 24 November 2002, commission rates are 7 -8 %. Much higher commissions than NSW hotels get from the TAB i.e. approx .1.5%

#### THE PROPOSED ARRANGEMENTS.

It is proposed that the AHA be able to negotiate on behalf of its members or groups of members on TAB/SKY terms and conditions. This would not only relate to fees but other terms and conditions such as the 5 year term of the SKY contract and one sided termination provisions.

These arrangements are dissimilar to those granted authorization in relation to newsagents negotiating with publishers.

The AHA is a democratic organization and its membership is dominated by small regional hotels. Its membership comprises 92% of NSW hotels.

The exact form of any collective negotiations has still to be agreed by AHA members and much will depend on the form of any authorization. It is likely that there will be different categories of members and different arrangements will be sought to be negotiated for each.

As indicated the AHA is a democratic organisation. Its Constitution reflects that culture. There is no compulsion in the Constitution to abide by AHA resolutions. In practice many members who disagree with AHA resolutions do so openly and with no penalty.

The AHA proposes to act as a 'bargaining agent' for its members in their dealings with TAB. The AHA expects to put the views of its members on a collective basis and will seek to alter the current terms and conditions dictated by TAB. The AHA hopes to enter into a partnership relationship with TAB. This will only happen through the auspices of the AHA and not by individual members.

The AHA is of the view that the 'one size fits all' regime dictated by the TAB is both inappropriate and works against the effective operation of the hotel industry in NSW and to the detriment of the customer.

If authorisation is granted the AHA will immediately consult its members canvassing options for new contracts with TAB, when contracts come up for renewal. It may be that the membership will split into one or two bargaining groups or a single bargaining group.

The AHA already has a sub-committee, chaired by a senior vice president that focuses on Sky Channel and TAB issues and that committee would oversee any collective negotiation. This Committee is largely made up of members from regional areas of NSW. See response to ACCC Question 1 in Part 2 of the submission.

If any member or group of members do not want to be part of any bargaining group they are free to opt out and opt back in if they want to. Members will be expected to opt out in writing. No penalty will accrue to any members opting out. If in the unlikely event should more than 25% of any bargaining group opt out; the AHA executive will consult the members to assess whether the collective negotiation process should continue.

It should be appreciated that all this is new to the AHA and some of the rules will need to be worked out once authorisation is granted, within the framework laid down by the ACCC.

in no way can the proposed arrangements be seen as price fixing. The AHA membership will still be a price taker and face a statutory monopoly that is likely to increase its monopoly power over time. The charges for each of the TAB services is applied and determined as follows,

- Sky charges via a rate card determined by TAB,
- CMS for gaming ,via imposed charges that are determined as a minimum by the NSW Government,[ this system was forced onto hotels without consultation ]
- Statewide Jackpotting of gaming machines via a remuneration determined exclusively by TAB.

On the other side of the ledger are TAB commissions that are determined by the TAB.

In any case TAB, when it suits it, deals with the AHA on a collective basis or consults on industry wide issues. It does this where it suits it to do so. It also negotiates collectively with the NSW TAB Agents Association. As well as with interstate TAB's when negotiating Sky fees for their TAB agents in each State and has done for sometime.

Accordingly .collective negotiation by TAB will reflect the reality of some industry conduct already in practice, but will protect the AHA from threat of action under the TPA. Such a threat has been used in the recent past by the TAB when it suited them. This threat was recorded in the minutes of one of the regular meetings between the AHA and TAB dated 18 March 2002.

As has been submitted in previous information provided by the AHA, the TAB has a 'one size fits all' approach to its contracts yet still goes through the sham of so called negotiation with individual hotels. In effect the TAB does not take into account the circumstances of individual hotels but presents the prospects of taking TAB and Sky services on a "take it or leave it" basis. It is the view of the AHA that the only way the concerns of individual hotels can be taken into account is through collective negotiation.

In the *Premium Milk Supply Authorization (2002) ATPR 50-288* the ACCC recognized that any anti competitive detriment may be reduced by a provision for individuals to opt out and negotiate outside collective arrangements. That will certainly be the case in the AHA arrangements. Some large members or chains of hotels may choose that option.

However having regard to the history of dealings between the AHA and TAB the AHA is seeking the authority to collectively boycott the TAB, but only after 7 days after a failure to agree on any negotiations. It is suggested that if any negotiations lead to a withholding of services the AHA is to submit to mediation immediately.

The AHA sees withholding of services as a last resort. However it has happened in Victoria and is an important backdrop to a negotiation process. After all the TAB can withhold services, services for which it has a statutory monopoly. Why not the AHA members? In fact in the recent past TAB have withheld services to the greyhound industry (see article in the BRW, 28 November- 4 December 2002) Sky also withdrew their television service to Victorian hotels, clubs and TAB agencies for a 10 day period in 1996 as a result of a pricing dispute.

In the Dairy Farmers Authorization (2002) ATPR 50-289 the ACCC took the view that strengthening the bargaining power may increase their input into contracts negotiated with processors and reduce the likelihood of harsh and unfair contractual terms. Hence such a reduction is seen as a public benefit.

This view can be seen in the Inghams Authorization (1997) ATPR 50 -245 as well.

It is the practice of TAB to present a standard form contract. The AHA is unaware of cases where an individual hotel has successfully sought amendment to the standard contract. In fact the AHA has provided the ACCC with material where hoteliers have tried unsuccessfully to alter the contract. See also the survey results. This reflects the 'take it or leave it' position that hotels find themselves in.

### SMALL BUSINESS ISSUES

AHA members are largely small businesses. Consequently any cost savings will be of great assistance and intervention by a trade association a great comfort. Regional hotels are always trading in a very parlous situation and at present that is all the more so due to the severe drought. This is on top of floods in some areas of NSW two years ago.

Any savings on transaction costs are a real benefit. As indicated there are currently sham negotiations with individual members.

In the Premium Milk case the ACCC recognized that savings on transaction costs are an outcome generally associated with collective negotiations.

In the Dairy Farmers Authorization the ACCC further recognized that collective negotiation will provide individual members with legal and other professional advice. This is more effective than each member separately obtaining such advice. The authorization will not preclude members seeking individual advice but they will have an option.

It is not only the AHA members that will benefit in the process. As indicated the TAB negotiates collectively or consults short of negotiation when it suits them. This can become the norm.

The TAB should benefit from any collective negotiation process. The TAB will be assisted by the provision of industry wide information to provide guidance on realistic pricing and other issues. The TAB actually seeks to do some of that now but in doing so may leave the AHA exposed. That is unfair to a trade association that is seeking to assist its members and in many cases to assist TAB.

The collective process will bring the AHA and TAB more into a partnership and hopefully overcome the underlying hostility between AHA members and TAB.

It should also save the TAB resources in conducting individual representations, particularly in regional areas.

## OTHER COMMENTS AND OBSERVATIONS

### 1. Agreements and Rate Cards

Much is made in the TAB/SKY submission of the existence and use of “uniform” Agreements and a “standard” rate card. The AHA would query the word ‘agreement’. The AHA does not see that ‘rate card’ as positive nor efficient and certainly not conducive to a negotiated position. Given the “Take it or leave it” attitude of TAB.

### 2. Collective Negotiation Precedent

TAB/SKY ignore the fact that what AHA is seeking is no more than what the other State TABs have in their long standing, collective negotiating arrangement with SKY. This has been the case since the inception of Sky. i.e. individual TAB Agents in say Queensland, do not individually negotiate fees, terms and conditions with SKY, the parent or representative body does (TABQ).



This precedent arrangement between SKY and TAB Agents (in States other than NSW) appears to function satisfactorily and efficiently and contradicts TAB/SKY's stated reasoning for opposing the collective approach being put forward by AHA NSW.

Pubs and Clubs in NSW pay fees to SKY that are on- average 20 percent higher than the fees paid to SKY on a per site basis for TAB Agencies (Australia wide).

One could argue that this better Sky deal for TAB Agents is due to the existence of collective bargaining undertaken by the TAB organizations, and is the very reason for the TAB/SKY opposition to the AHA NSW application for collective negotiations.

### 3. SKY Fees and TAB Commission

TAB/SKY makes much of their fee and commission structures with the underlying inference that they are fair, if not generous.

This perception could be tested via comparison of PubTab SKY fees and TAB commissions pertaining in NSW with those existing in Victoria and Queensland. The fees are lower and the commissioner higher. See also the earlier comments about the fees paid to Golden Casket agents in Queensland.

### 4. Broadcast Rights

The exclusive nature of TAB's ownership of the television rights to Australian racing events is largely avoided in the TAB/SKY submission. The sole radio broadcast of racing events by 2KY is also ignored.

This position results in a monopolistic situation, in that SKY is the sole entity capable of broadcasting the racing events to Pubs, Clubs and TAB agencies. Furthermore, the existence of the exclusive rights contracts, and the staggered expiry dates of the contracts, prevents other potential operators from providing what would otherwise be a competitive telecaster situation to SKY.

SKY's requirement re exclusivity of the racing rights is bound by an expression used in the contracts with race clubs to the effect of "exclusivity of broadcast rights by any means now developed or in the future".

Some attempts have been made in the past to encourage other sources of race broadcast pay TV operators, but unsuccessfully.

### 5. TAB Limited Dominance

A matter that is not obvious from the TAB/SKY submission is the growing influence of TAB Limited on the business affairs of NSW Hoteliers. This matter is evidenced by TAB/SKY having the exclusive rights to provide Hotels with the following:

- SKY Racing Television Coverage and Radio 2KY Coverage.
- TAB Betting Services.
- Gaming Machine Monitoring via CMS-which is mandatory by law for hoteliers.
  
- Gaming Machine Statewide Jackpots
  
- The keno style numbers game of which TAB is the NSW licensee.

The above are not available from any other source because of either exclusive arrangements instigated by SKY (racing rights), or because of licenses vested in TAB by the NSW government at the time of privatization in 1998 i.e. CMS and Statewide Jackpots. In the case of the keno style numbers game, the State Government has provided the TAB with a promissory letter that if that game is introduced then the TAB will be the provider to hotels.

Additionally, each new aspect of service provided by TAB/SKY increases its ability to leverage higher net fees and rates from Hotels given that hotels require these products in order to remain competitive especially with Clubs

The day may also come when hoteliers will be confronted with the prospect, put by TAB of, "if you want a PubTab, you really should consider our Jackpot System"!

### 6. Potential for TAB to Reduce Charges

Also relative to (5 ) above, is that TAB/SKY ignore in their submission, their growing product presence in NSW Hotels and Clubs via SKY, TAB, CMS Jackpotting and the keno style numbers game that should enable them to capitalize on technological advancements, particularly in telecommunications. This will result in rationalized costs for TAB that will in turn result in greater profits.

To avoid this obviation, TAB continually refer to the provision of these services on a "one by one" basis thereby avoiding the prospect of savings and resultant fee reductions for its customers.

In this regard, it is illustrative that the TAB forces hoteliers to open up dedicated bank accounts for PubTab income. TAB must have full access to that account but the hotel must pay all fees and charges.

### 7. SKY Channel's Exclusive Position in Hotels and the Potential for Competition

As detailed above, SKY has achieved virtually exclusive broadcast rights of Australian racing via conditions pertaining in its agreements with all major racing clubs and representative bodies.

The Pay TV component of this arrangement permits SKY, at its sole determination, to pass the racing broadcasts/telecasts on to other network providers (carriers). This is evidenced by the situation that exists in domestic Pay TV, where SKY provides the racing coverage to Optus Vision, Foxtel and Austar for delivery to Australian homes.

The current commercial arrangement between SKY and the domestic Pay TV carriers is such that the Pay carriers receive the racing broadcasts free of charge from SKY. SKY does not pay the race clubs any additional fees for the Pay TV rights, and the domestic subscribers receive the racing programme as part of the "basic" Pay package. Therefore SKY is the loser in this equation as they have to absorb production costs of \$6M (est.) per annum.

In this regard, it is worth noting the statement contained in the recently published TAB Limited 2001/2002 Annual Report, to the effect that "SKY is currently finalizing long-term contracts with major Pay TV carriers that will lead to SKY receiving revenue during the 2003/2004 financial year". (see page 5, under Media Operations).

It is further noted, that SKY contends that it is illegal for Hotels to utilize the domestic Pay TV racing service. There has been long-term speculation as to the sustainability of this opinion amongst industry observers from both a general legal and TPA perspective.

the case of the television racing service delivered to Hotels, Clubs and TABs, SKY has retained the sole delivery option. Assumptions here are:

- that either SKY has not been asked by another carrier for access to the racing product, or
- that SKY has denied any such request.

The simple flow-on effects of this arrangement are that:

- there is no competition to SKY in the provision of telecasts of racing in Hotels, Clubs and TABs, and
- that potential alternative telecasters to Hotels, Clubs and TABs are prevented from providing a competitive service via the exclusivity to the broadcast rights inherent in the SKY contracts with the Australian racing clubs. In other words if they want the product they must get it from SKY.

#### 8. Potential Competitors to SKY in Providing Racing Telecasts to Hotels

The second most popular television network subscribed to by Hotels is Fox Sports.

Fox Sports is privately owned on a 50-50 basis by Publishing and Broadcasting Limited (PBL) and News Limited (News), the previous owners of SKY prior to the sale to TAB Limited in April, 1998.

This Foxtel service to Hotels provides coverage of sporting events including AFL, ARL, Boxing and a myriad of overseas events. Observation of this service quickly leads to the conclusion that Fox Sports are short on product, evidenced by the number of repeats they apply to the events to which they have rights.

Given this position and the fact that Fox Sports have ample spare bandwidth, and therefore spare channels, on their network, it is difficult to imagine that Fox Sports would not benefit commercially from the ability to offer racing telecasts on their hotel/club service and thereby become an alternative to SKY.

This leads to the obvious question: why have Fox Sports not vigorously attempted to secure the racing product from SKY?

Note: SKY provides the Pay TV racing product to Optus Vision, Foxtel and Austar free of charge for use in the domestic service.

One aspect that could be speculated on, is that PBL/News Limited (the previous owners of SKY and now the owners of Fox Sports), and TAB Limited entered into an effective “non compete” arrangement at the time of the purchase of SKY by TAB Limited. This could be structured to prevent Fox Sports from attempting to acquire the racing broadcasts from SKY or to compete with Sky in pursuance of the rights from the racing clubs.

A matter of possible support for this speculation is that since the change of ownership, SKY has been progressively withdrawing from boxing coverage, whilst Fox has proportionally increased their involvement in that sport. This may suggest a “carve-up” of sports between the two hotel networks.

## Summary

- The basis on which SKY has built its racing service, and the protection of its future, relies on the exclusivity provisions in the contracts with racing clubs.
- SKY passes on the racing product to a number of Pay TV carriers for use in Australian homes.
- SKY prevents Hotels from accessing the Pay TV home racing service.
- Other carriers that service Hotels do not offer racing coverage.
- Fox Sports owned by PBL and News is the second biggest carrier in Hotels and, in terms of content, would benefit from having racing in its programming.
- Fox Sport has either not attempted to get the racing product from SKY, or were denied access to the product.
- No other carrier or potential carrier appears to have attempted to obtain the racing product, or has been denied access.
- Consequentially, there is no competition to SKY in the provision of telecasts of racing in Hotels, Clubs and TABs.

## 9. Relationship between Sky fees and TAB commissions.

It appears that there is a clear and deliberate relationship between the amount paid by Hotels for the SKY service and the amount Hotels earn as TAB commission.

The AHA should be able to negotiate both SKY fees and TAB commissions simultaneously with TAB, in order to attempt to attain profitability for the PubTab facility in hotels.

New South Wales is the only State in Australia where Hotels are disadvantaged by having a single company - TAB Limited, that determines both the SKY fees paid by Hotels and the betting commissions paid to Hotels. Yet the TAB /SKY insist on- separate contracts for wagering on- the one hand and broadcasting services on the other.

In this regard the following observations are provided,

- In NSW the two amounts (SKY fees and TAB commissions) are disproportionate to the extent that the best a hotel can expect is that the TAB commission will cover the cost of Sky. It goes without saying that once operating costs are apportioned, the net SKY/TAB operation presents hoteliers with a loss when taken as a stand-alone Hotel enterprise.
- Hotels in other States are “better off” than those in NSW in that pubtab commissions are slightly higher. Having said this, we believe that all TAB head offices employ the same principle of ensuring that pubtab commissions equate as closely as possible to SKY subscription fees thereby making the Hotel based enterprise a net \$0 profit operation.
- SKY employs the strategy of charging Hotels fees that are at best equal to, or as is in most cases, in excess of TAB commissions. This appears to have been SKY’s strategy for some time, certainly since mid 1990’s i.e. prior to the sale of SKY to TAB (1998).
- SKY appears to adopt the following attitudes to Hotels in regard to the pricing of the SKY service:

Hotels receive commissions from respective TAB’s that offset the price charged for the SKY service.

Hotels have the financial wherewithal to withstand the prices charged.

Hotels are forced to subscribe to SKY from a “service to its patrons” perspective.

- Given that these sentiments re pricing strategy were employed before SKY became a wholly owned subsidiary of TAB Limited, it is reasonable to assume that further entrenched control of SKY fees by TAB has occurred since then and that the strategy of striking fees that equal TAB commissions is perpetuated.
- The obvious corollary to this is that TAB Limited and SKY vigorously defends its current powerful and growing position over Hotels and will object to the collective bargaining proposed by the AHA.
- TAB/SKY is substantially exposed to Hotels in satisfying the retail network requirements in NSW. This is amply demonstrated by the statement contained in the TAB/SKY submission to ACCC dated 23 October, (page 7), which reads:

*“As at 30 June, 2002 TAB Limited had a total of 1930 wagering outlets throughout NSW, comprising 336 agencies, 990 PubTabs and 604 ClubTabs. While the total number of outlets has increased by approximately 32% since privatisation, the mix of outlets has also changed substantially with the closure of all TAB owned branches, a rationalization of agencies and a substantial increase in the number of PubTab and ClubTab outlets”.*

Analysis of this status reveals that TAB, in order to reduce overheads, has drastically down sized their retail agency network (shops on the High Street) and equally drastically increased the PubTab network. This has had the effect of increasing TAB’s reliance on Hotels and to a lesser extent Clubs in selling the TAB products in NSW. This position is very much of TAB’s own making.

The prospect of the AHA being in a position to collectively negotiate TAB and SKY rates for Hotels appears to frighten TAB/SKY. Given the reliance on Hotels described above, the prospect of boycott provisions in the form of withdrawn Hotel betting services across NSW is obviously of concern of the TAB.

#### 10. AHA collective bargaining scenario plus proposed calculation of hotel Sky fees.

The following is an example of a possible formula that could be applied to sky fee apportionment in NSW. The ultimate outcome is one for negotiation.

The AHA could follow the model already employed by SKY in their negotiations with the various State TAB's regarding the SKY service in TAB Agencies.

The adoption of this precedent has the following inherent advantages:

- The AHA are proposing a method of collectively negotiating that is already established between SKY and the various TAB's in each State thereby relying on that "precedent".
- In establishing this case, the AHA points out that TAB Agencies, Australia wide, pay SKY fees at a rate approximately 20% below that paid by Hotels in NSW.
- If adopted, and the collective negotiation is approved by the ACCC, the prospect exists for AHA to arrange for coincidental Statewide terms for all Hotel SKY contracts. This would rebalance the current advantage that SKY has, with Hotel contract expiry dates dispersed throughout the year.
- This prospect provides an opportunity to get away from the TAB/SKY imposition of basing SKY fees on Hotel beer literage and reverting to another more fair and logical footing.

One such alternative is to partition the Sky fee between a fixed fee which would be paid by all hotels plus a part of the fee that a particular Hotel pays for SKY based on the TAB turnover achieved in that Hotel, given that there is a more tenable link between SKY and betting, than SKY and beer sales. The secondary result is that this method of setting SKY fees is fair across all categories of AHA membership.

In regard to the possibility of using actual TAB turnover as part of the determinant when calculating SKY fees paid by each Hotel. The following is submitted:



## ^HA - SKY Negotiations

The desired outcome of a collective negotiation between AHA and SKY is that:

- A total annual SKY fee for all NSW Hotels is struck.
- All Hotel agreements with SKY expire simultaneously.
- The SKY fees paid by each Hotel are calculated as a Percentage of actual annual TAB gross sales (turnover).
- In order for AHA negotiators to enter into fee renewal discussions with SKY, the following information would have to be to hand:
  - ✓ The general profitability of Pubtab operations in a wide range of Hotels.
  - ✓ The previous years total SKY fees for all NSW hotels.
  - ✓ The Statewide and individual actual Pubtab gross sales for NSW Hotels.

The basis of striking an acceptable fee for SKY services on behalf of NSW Hotels must be that Hotels are entitled to make a reasonable profit on the combined SKY/TAB facility.

To this end, renegotiated SKY fees will have to be pitched lower than those that currently exist. Alternatively, Pubtab commissions will have to rise. For the benefit of this exercise, assume that the objective is to obtain fairer and more equitable SKY fees.

^ methodology is therefore required to calculate the amount NSW Hotels pay to SKY per annum once the renegotiated Total SKY fees for all NSW Hotels have been negotiated

Example:

THE TOTAL SKY FEE THAT HOTELS PAY SKY WILL BE:  
THE BASE FEE + A MODIFIER BASED ON ACTUAL TAB SALES

Where: (for example)

THE BASE FEE FOR A PARTICULAR HOTEL IS CALCULATED BY DIVIDING SAY, 50 PERCENT OF THE STATEWIDE HOTEL SKY FEE BY THE NUMBER OF HOTELS THAT HAVE THE SKY SERVICE.

THE MODIFIER FOR A PARTICULAR HOTEL IS CALCULATED BY MULTIPLYING THE REMAINING PERCENTAGE OF THE STATEWIDE SKY FEE BY THE PORTION OF THE STATEWIDE TAB TURNOVER ACHIEVED BY THAT HOTEL.

Summary

The above provides a scenario that appears to work elsewhere in the SKY environment (TAB Agencies Australia wide).

The scenario is based on Hotels paying a fee to SKY that is partly calculated on actual TAB sales derived via the telecast of racing events to individual Hotels. This combination of a base fee and a modifier negates the use of otherwise irrelevant influences such as beer sales.

The above also assists AHA in providing a mechanism to negotiate with SKY to revert current SKY Agreements to a common termination date.

Importantly, the prospect of AHA negotiating an annual total Statewide Hotel SKY fee pitches a representative body with expertise and clout against SKY, thereby taking individual Hotels, who are better off spending their time on value creation, out of the scenario.

**^HA (NSW) APPLICATION FOR AUTHORISATION FOR COLLECTIVE  
NEGOTIATION – A90837  
PART 2 of letter of 13 December 2002.**

**AHA (NSW) RESPONSE TO ACCC QUESTIONS**

The following is the AHA ( NSW )response to the issues raised in the ACCC letter of 5 November following the receipt of the TAB/SKY submission of 23 October 2002 .The response takes into account the material supplied by the TAB after that date and as late as 18 November 2002.

**ACCC QUESTION-1**

*“It is likely that a collective bargaining group or groups would consist mainly of, or be dominated by, the large groups or chains of hotels and the infra-marginal hotels. There is no analysis in the application of the effects the conduct would have on the diverse types of hotels that constitute AHA’s members” (Tab/Sky submission, p.18)*

**AHA RESPONSE.**

This is simply not correct. The main concern is for small regional and suburban hotels. The AHA expects some bigger groups or chains to keep open their options of being involved in any collective arrangement.

The AHA sees the proposal primarily of benefit to small hotels, as for infra marginal hotels, they are part of the target group but will not dominate the AHA response nor dominate AHA collective negotiations.

There are AHA house Committees on various issues, including TAB matters. The house committees of the AHA (NSW) are voluntary appointments, taken up by delegates according to their interests and concerns about particular problems being experienced by their sub-branch members.

The current AHA (NSW) house committee on TAB/Sky matters is completely made up of country and suburban hoteliers (and has been so for at least two years), reflecting the fact that it is regional and outer city area hoteliers who are most concerned about waging problems.

The current committee is chaired by Mr Bevan Douglas, Senior Vice-President, who is a family hotelier from Tamworth.

Other members are:

- Mr Bruce Woods, publican of a small country hotel at Largs in the Hunter Valley;
- Mr Paul Dirou, a family hotelier operating a traditional suburban hotel at Petersham in western Sydney;
- Mr Rob Broomham, a Ballina family hotelier operating a medium-size hotel on the Far North Coast.

None of these committee members are group owners or corporate entities – they are all rank-and-file owner/operators within the Association, all running family-owned hotels.

In any case, it is to be stressed that the AHA will still be a price taker from a statutory monopoly that is getting stronger.

## ACCC QUESTION 2

*PubTAB commissions are a minor ancillary part of hotel turnover...an increase in PubTAB commissions is likely to result in fewer hotels supplying PubTAB agency services to Tab or marginal hotels supplying PubTAB agency services on less advantageous terms than at present...Sky Channel fees are a minor ancillary part of hotel overheads..." (Tab/Sky submission, p.22).*

## AHA RESPONSE

The importance of Pub Tab commissions vary from hotel to hotel but they are an important part of most hotels operations. It is accepted that collective negotiations may change the spread of PubTab agency services but that may happen anyway, especially if as suspected TAB move into hotel operations.

Further, to argue that Pub Tab commissions are of little importance is somewhat misleading as one needs to consider SKY Channel charges which in turn are illogically based on the hotel's total beer literage and hence the TAB gets into the very heart of the hotel. It is not a service that is of little moment such as say, window cleaning.

The TAB expects that there will be cross subsidization of its part of hotel PubTab operations by the rest of the hotel with TAB commissions equating with or in most cases , less than, Sky fees.

### ACCC QUESTION 3

*“There is no evidence that the viability of hotels, generally or in rural and regional areas, is under threat, still less that possible gains from collective negotiations with Tab Limited and Sky would have any impact on that viability” (Tab/Sky submission, p.22)*

### AHA RESPONSE

In July 2001, the AHA (NSW) conducted an industry-wide survey of hotels to assess the viability or otherwise of existing PubTAB sites.

In all, 652 hotels responded to the survey. It was the heaviest response of any survey carried out in the industry in recent years, with the response reflecting the concern of members.

(A full copy of the survey form and data results is attached - see Additional Information.)

The findings of the survey were dramatic – 100 per cent of respondents were unsatisfied with the Sky Channel fee levels.

At the same time, 92pc of respondents had not had significant improvements in TAB commission in the past year (meaning nearly all sites were stagnant in betting turnover, while at the same time their broadcast costs continued to rise).

In terms of direct viability, 44pc of respondents replied that PubTAB was not currently economically worthwhile at their hotel.

Some affected publicans wrote additional comments on the survey, indicating that they were only persisting with PubTABs because they were worried about patrons leaving and going to other venues, and also because there were jobs involved with hotel staff being employed in the PubTABs.]

### ACCC QUESTION 4

*“AHA has not provided details about how authorization would improve information sharing and transparency, or why the amount or quality of information would improve as a result of authorization of the proposed conduct” (Tab/Sky submission, p.23).*

## **AHA RESPONSE**

**As part of the collective negotiation process the AHA will improve its information collection processes of member issues relating to their wagering and related operations. Members traditionally have struggled dealing with TAB and will be more than happy to provide more information to AHA if it is negotiating on their behalf.**

**Additionally the TAB has extensive market data through its information systems such as Caste AHA cannot match that at the present and disputes any TAB assertion that adequate protection of this information is via 'Chinese Walls' within the TAB organization.**

**As to transparency, the AHA will be able to collect and publish more about the financial state of its members wagering and gaming operations .It will also be able to present broad and relevant information to TAB in any negotiations.**

**A major industry benefit that would flow from information sharing and transparency would be the ability of the Association to provide practical advice to operators.**

**This would be especially useful in the situation of new intending operators, i.e. hoteliers that are interested in taking up a TAB for the first time.**

**With real information sharing on such key factors such as earnings and local betting market performance, the Association would be able to advise members of the likelihood of venue profitability.**

**At present, intending and current PubTAB operators are given advice only from the TAB; there is no opportunity for input from the industry peak body.**

**This is resulting in significant friction between the TAB and its hotel site operators (because the Association is preventing from providing any useful input).**

**Ironically, in a few cases, it has appeared to the Association that the TAB is actually trying to prevent over-supply by declining to provide further TAB sites in a particular town or district – however, because this is never advised officially, and because the Association is not given the opportunity to help inform the hotelier, the TAB continually gets in conflict with its clients even though it may be the case that the TAB's decision may ultimately have been right.**

An actual example was seen of this recently in Narrabri, a North-West NSW farming town with a number of existing TAB sites (hotel, club and stand-alone agency) and a declining punting market (ie. shrinking population).

An hotelier then requested a further TAB site, and did not meet with success from the TAB.

The following then occurred:

- The Association sought a reason from the TAB for the apparent refusal
- The TAB verbally indicated its decision not to issue a further TAB, but would not comment or assist in providing any further information
- This meant that, even though the Association assumed it was due to over-supply and thus it would have been unwise for the hotelier to proceed (i.e., the AHA (NSW) would probably have agreed with the TAB's decision), it could not provide any explanation to the hotelier
- The hotelier, not being adequately informed by either the TAB or the Association, took personal offence at the decision and it has become a source of friction in that region for the TAB ever since.

A great deal of this conflict between hoteliers and TAB staff is unproductive and unpleasant – and unnecessary, in the Association's view.

This situation surely lacks commonsense – in other industries, such as the newsagency industry and the pharmacy industry, new members are able to get guidance and advice from the relevant peak bodies.

This then prevents the spectre, in those industries, of operators becoming uneconomic, having to close agencies, and causing unemployment in the process.

Commonsense should be allowed similarly in the hotel wagering sector. The AHA (NSW) would – through required transparency and information sharing from all parties, most particularly the TAB – be able to help prepare members for realistic trading conditions.

ACCC QUESTION 5

*Tab and Sky may need to use at least two...contracts (one for each collective bargaining group and the other for non-participants) rather than one standard contract. This will result in an increase to net transaction costs, rather than a decrease as AHA claims” (Tab/Sky submission, pp.23-24).*

## **AHA RESPONSE**

The one standard contract is a smoke screen, TAB still goes through the sham of individual contract negotiations with AHA members.

Under collective negotiation this could all be done via the AHA, just as it does when it negotiates with the various interstate Tab's. There would be separate contracts with non participants in collective negotiations but it is expected that these will be very few and probably involve hotel chains.

## **ACCC QUESTION 6**

*“Freeing up small business operators to focus on increasing the competitiveness of their business...AHA does not proffer any evidence in support of this claimed benefit” (Tab/Sky submission, p.24)*

## **AHA RESPONSE**

Currently there is a lot of AHA member heat and concern about TAB and Sky contracts. Further as they are generally unhappy with the arrangements they do not put much effort into building the wagering business. Even with the other part of the hotel business, the fact that Sky fees are erroneously based on general beer literage puts a dampener on the operations generally.

## **ACCC QUESTION 7**

*“Fostering industry harmony...AHA does not proffer any evidence in support of this claimed public benefit, nor explain how such a benefit could be attained solely as a result of authorization of price fixing and primary boycotts (Tab/Sky submission, p.24).*

## **AHA RESPONSE**

It is incorrect to characterize the proposed arrangements as price fixing. That is not the case in a situation where AHA members will be price takers.



As is seen in Victoria there could be semi industrial action and also action alleging unconscionable conduct. All this is counter productive and is largely caused by TAB processes and a feeling of hopelessness in AHA members.

The TAB even denies that the Franchising Code applies to the agencies. Even if it were correct about the mandatory code it could explore the opportunities of having some code of Fair Dealing for its agencies with mediation processes etc. However that would not fit in with the TAB culture of one fits all and imposed common collective arrangements but done by the supplier.

In the *CSR draft authorization* decision (A90808 –issued on 8 November 2002) the ACCC accepted that industry harmony was a public benefit.

#### ACCC QUESTION 8

“AHA claims that authorization will provide countervailing power to small business in dealing with large and powerful suppliers...AHA has provided no evidence of any likely outcomes which would benefit any party other than the benefits likely to be enjoyed by AHA member hotels” (Tab/Sky submission, p.24).

#### AHA RESPONSE

See the earlier comments and sample of a possible negotiated outcome.

#### ACCC QUESTION 9

*“Sky fees are only one minor component of hotel overhead costs, and PubTAB commissions are only a small part of hotel revenue...it is difficult to see how collective negotiations could promote industry cost savings...or result in contained or lower prices at all levels in the supply chain” (Tab/Sky submission p.25).*

#### AHA RESPONSE

See earlier comments. Further, if this statement is correct it adds to the AHA assertion that there is little or no anti competitive effect in the proposed arrangements.

As to lower prices it is expected that any savings will be passed on as the hospitality market is highly competitive and hotels have to fight clubs, liquor merchants, restaurants and many others.

## ACCC QUESTION 10

“AHA does not require an authorization to provide the types of information and services that it can currently provide as an industry association” (Tab/Sky submission, p.25)

## AHA RESPONSE

That is technically correct but there is always the risk that the conduct is in risk. In any case it is very much part of a collective negotiation process on terms and conditions, without that link it is unlikely that the members would simply provide information for research reasons. After all they already do that for the ABS, ATO and other Government bodies. Members need incentive to provide adequate and regular information.

It is somewhat mischievous for the TAB to say the TPA does not apply as it has raised the specter of action under the Trade Practices Act.

## ACCC QUESTION 11

*“Neither Tab or Sky accepts the allegation that they have dealt with AHA on a ‘one in all in’ basis. Tab and Sky do not insist on collective bargaining with AHA” (Tab/Sky submission, p.26).*

## AHA RESPONSE

The situation of ‘one in all in ‘was demanded by the TAB –see letter. Attachment A

## ACCC QUESTION 12

*“Promotion of equitable dealings in the market – countervailing power...AHA does not give any examples of unreasonable terms except in regard to demands for information that are required as part of Sky’s pricing formula” (Tab/Sky submission p.27).*

## AHA RESPONSE

The AHA is of the view that the TAB contracts are unreasonable, the demands for information is one, the linked issue of Sky fees based on beer literage another, 5 year contract re Sky another, plus the one sided termination provisions and the general refusal to genuinely negotiate with any member who seeks any variation in the contract. Also the fact that SKY can force on a unilateral basis various obligations on a hotel.

## ACCC QUESTION 13

*“A transition to a fixed price would likely lower the cost of Sky to large hotels and increase the cost of Sky to smaller hotels” (Tab/Sky submission, p.29).*

## AHA RESPONSE

That is up to any negotiation.

See earlier comments on an example of an alternative method of pricing. The TAB seems to have little concept of negotiation or flexible arrangements. It can only see issues in black and white, i.e. the current system or a fixed price.

## ACCC QUESTION 14

*“A further public benefit would arise from the Australian Hotels Association (NSW) campaign is greater protection for the public in the area of responsible gambling...AHA has no offered any evidence in support of these claims...” (Tab/Sky submission, p.30).*

## AHA RESPONSE

Following the Productivity Commission Inquiry into Gambling in 2000, the AHA (NSW) moved to establish the nation’s leading problem gambling intervention program, GameChange, which operates at hotel gaming venues across the State.

This work (fully endorsed and supported by the NSW Government) has given the AHA (NSW) insight into measures that work, i.e. measures that provide greater protection for the public.

The first measure that has worked in GameChange (poker machines) is industry education and co-operation.

However, when it comes to wagering, the TAB has never consulted the AHA (NSW) about responsible gambling issues, even though one in every two hoteliers operates a TAB site.

Similarly, the AHA (NSW) has never been assisted by the TAB to ensure operator education and co-operation, through informed management of responsible wagering.

This is despite several offers and overtures made by the Association in recent years, due to its growing resource of specialist counseling and gambling staff.

The second measure that has worked in GameChange is monitoring the performance of operators, and subsequently assessing whether those operators need further education or possibly punitive measures.

For example, the AHA (NSW) can – through GameChange – determine the number of problem gamblers at individual hotel gaming sites, and the extent of remedial action underway.

However, again this has not been possible when it comes to wagering, because the TAB does not appear to monitor problem gambler activity, nor has the TAB ever allowed the AHA (NSW) to assist all concerned by co-operatively developing an open, effective program that ultimately protects the public.

In other words, it is impossible at present to protect the public from a TAB operator who may be allowing questionable bets to persons who may have gambling problems; the TAB is only focused on site performance and its own subsequent income.

The AHA (NSW) believes that responsible gambling monitoring and enforcement would be a major direct benefit from an open and communicative, whole industry relationship between the AHA (NSW) and the TAB.

## CCC QUESTION 15

*You may also wish to comment on the public detriments claimed in the Tab/Sky submission and NECG report, such as:*

*“If [hotels] are able to better exploit the existing base of consumers for their own benefit, even at the expense of the quantity and quality of racing and wagering output, they would likely do so” (NECG report, p.18).*

### AHA RESPONSE

This misunderstands the culture of most hotels. They are in a very competitive situation in regard to recreational expenditure and very dependent on regulars. If they feel exploited they will move hotel or to a club or go home and watch Fox Sports and use phone Tab. It is expected that if hotels felt more comfortable about their wagering agency they would exploit the hotel to get more customers. If the TAB provided some incentive to hotels they would readily respond with better services for customers.

*“... [T]here would...be a longer run negative effect on the funding of the racing industry and consequently on the production and consumption of racing and wagering” (NECG report, p.28)*

### AHA RESPONSE

This does not follow. Any changes that would eventuate from collective negotiation would not be so dramatic as to have that effect. In any case the TAB has not passed on all the savings it made in the new contracts with the racing clubs, so there is some lee way there.

### AHA RESPONSE

*“[T]he net result of...conduct would be...an increase in transaction costs” (NECG report, pp.30-31).*

At the moment both the TAB and the hotelier incur transaction costs. Collective negotiation will minimize that. There will still be some transactions costs with the TAB, but less and in any case it is in a better position to meet such costs as compared with most hotels.

TAB is actively using technology to lower its costs. However that does not translate to hotels. In fact hotels costs, as a result of technology, will either stay the same or more likely increase as TAB loads some of the costs of the technology onto hotels. See the earlier example of the bank account and failure of the TAB to rationalize data communication costs.

*"[T]he proposed conduct is likely to result in net detriments including...reductions in amenity for customers" (Tab/Sky submission, p.2).*

## AHA RESPONSE

The AHA expects that there will be an improvement in customer amenities. In fact members are keen to be more competitive against clubs and other competitors .

AHA (NSW) APPLICATION FOR AUTHORISATION FOR COLLECTIVE  
NEGOTIATION – A90837

PART 3 of letter dated 13 December 2002.

SUMMARY OF SURVEY RESULTS.

THE FOLLOWING IS A SUMMARY OF A SURVEY THAT WAS CARRIED OUT AMONGST NSW AHA MEMBERS EARLIER THIS YEAR. THE SURVEY WAS SOLEY AIMED AT THE SKY ISSUE.

*1. Do you have a written contract with Sky Channel?*

All those who responded had written contract with Sky.

*2. Date first entered into the contract? Has it been renewed?*

Most who responded had had the contract renewed. About 2% had not. Contracts went back as far as 1990 and were renewed every 5 years.

*3. At the last renewal did you try to negotiate any of the terms? If yes, what was the result?*

About 50% indicated that they had tried to re negotiated, most failed to get any changes. A small percentage, 5% were able to get a reduction in fees. This appeared to be as a result of variation in the hotels trading figures.

*4. What have been the changes, if any, in your contract with Sky Channel since you first contracted with them?*

The general response was that either there was no change or increase in fees. No changes in any other terms. A small % had had a decrease in fees.

*7. Was your Sky Channel contract/s negotiated at the same time as the TAB contract? If so, how was it done?*

Some 90 % responded that the contracts were done separately, the rest said it was done simultaneously.

*6. What do you currently pay Sky Channel and what does the TAB pay you?*

The amount clearly depending on sales and commissions but Sky fees varied between \$ 1096 to \$ 3370 per month. TAB commissions varied between \$ 400 per month to \$ 2000 per month.

*7. What are your costs in relation to the TAB area of your establishment, (capital costs incurred to establish the area and your on – going costs)?*

Again this varied but generally costs varied between \$ 2000- \$ 20,000.00 start up costs and around \$ 1500.00 per month overheads.

*8. What % of your literage used for the Sky Channel fee purposes would actually come directly from your TAB operations?*

There was a range of answers, from 20% to 2 %.

*9. What would be the effect on your overall business if you refused to take Sky Channel and / or the TAB?*

The responses varied but generally there would be a significant effect for most .However, a few said that it would have little effect.

*10. Do you see any advantage in the AHA or someone negotiating directly with Sky Channel on behalf of its members?*

All respondents said that they saw an advantage.



1. *Do you have any other comments or suggestions?*

Not all made any comments but those that did made comments unfavorable to the TAB.

ATTACHED FOR ADDITIONAL INFORMATION IS THE RESULTS OF AN EARLIER 2001 AHA-NSW SURVEY. THE ACCC HAS ALREADY SUPPLIED THE ACCC WITH THE RESULTS OF A VICTORIAN SURVEY.

-----