

they ultimately adopt standards terms and conditions which hotels may either accept or reject.

- 12.20. However, the Commission notes copies of correspondence provided to it by the Applicant which outline disputes between individual AHA NSW members and Tab Limited and Sky Channel. This correspondence indicates that in unusual situations (such as during the renovation of a hotel), an individual AHA NSW member may be required to negotiate with Tab Limited and Sky Channel on an individual basis in respect of the terms of renewal of an existing contract. In such cases, the hotel involved may incur extraordinary transaction costs, particularly in respect of the time required to resolve the dispute.<sup>25</sup>
- 12.21. In the absence of unusual circumstances, and as a result of Tab Limited and Sky Channel's adoption of a standard form contract, the transaction costs currently incurred by AHA NSW members in their dealings with Tab Limited and Sky Channel would appear to be limited.
- 12.22. In this context, it is difficult for the Commission to conclude that collective bargaining by AHA NSW on behalf of its members would result in any reduction in transaction costs of AHA NSW members and perhaps the opposite effect.

*Tab Limited and Sky Channel*

- 12.23. AHA NSW submitted that collective representation of AHA NSW members will remove the need for Tab Limited and Sky Channel to allocate significant resources to conducting individual negotiations with AHA NSW members, particularly in regional areas.
- 12.24. In response, Tab Limited and Sky Channel submitted that the proposed arrangements would actually result in an increase in net transaction costs rather than a decrease as claimed by the AHA NSW, as Tab Limited and Sky Channel would have to prepare at least two contracts (one for hotels involved in collective negotiations and one for hotels who choose to "opt-out").
- 12.25. The Commission agrees that collective negotiation, on a voluntary basis, would appear to have the potential to increase the number of supply contracts required to be developed by Tab Limited and Sky Channel when compared to the current situation in which only one contract is used. Consequently, collective negotiation by AHA NSW, on behalf of its members, with Tab Limited and Sky Channel may increase the transaction costs incurred by Tab Limited and Sky Channel.
- 12.26. In conclusion, it is not clear to the Commission that collective negotiation will result in lower transaction costs for either AHA NSW members or Tab Limited

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<sup>25</sup> Time savings resulting from the proposed conduct are more appropriately addressed in relation to the applicant's claim that the proposed arrangements will liberate small business operators to focus on increasing the competitiveness of their businesses, as discussed in paragraphs 12.27-12.31 below.

and Sky Channel. Indeed, it appears that collective negotiation may have the opposite effect on Tab Limited and Sky Channel, who may need to develop a range of contracts to replace their current standard form contract. Accordingly, the Commission does not accept that transaction cost savings is a public benefit likely to arise from the proposed arrangements.

### **Freeing up small business to focus on competitiveness of their businesses**

- 12.27. AHA NSW claims that the proposed arrangements will liberate small business operators to focus on increasing the competitiveness of their businesses, although little evidence is provided in support of this claim.
- 12.28. Tab Limited and Sky Channel submitted that collective negotiations will not benefit small business operators with any greater time with which to focus on increasing the competitiveness of their business.
- 12.29. In assessing this public benefit claim, the Commission notes copies of correspondence provided to it by the Applicant which outline disputes between individual AHA NSW members and Tab and Sky. As discussed in paragraph 12.20 above, this correspondence indicates that in extraordinary circumstances, an individual AHA NSW member may be required to invest a not insignificant amount of time in resolving a dispute with Tab Limited and Sky Channel.
- 12.30. To the extent that collective negotiation will reduce the need for individual hotels to devote substantial time to resolving disputes with Tab Limited and Sky Channel, the Commission accepts that the proposed arrangements is likely to liberate small business operators to focus on other aspects of their businesses, which may lead to increased competitiveness. However, given that substantial time expenditure by individual AHA NSW members on dealings with Tab Limited and Sky Channel would appear to be currently limited to dispute resolution, it is likely that the extent to which the claimed public benefit will arise is likely to be limited.
- 12.31. Accordingly, the Commission is of the view that there exists very little, if any, public benefit in the form of freeing up small business operators to focus on increasing the competitiveness of their businesses.

### **Fostering industrial harmony**

- 12.32. AHA NSW submitted that the proposed arrangements will foster industrial harmony although no evidence was provided in support of this claim.
- 12.33. When considering public benefit claims relating to industrial harmony, the Commission notes the comments of the Australian Competition Tribunal in the ACT Concrete Carters case:

*“... in order ... to accept that a public benefit exists, the evidence must clearly establish that the granting of authorisation will lead to significantly greater industrial harmony in the future than a likely alternative.”<sup>26</sup>*

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<sup>26</sup> Re Lamont (1990) ATPR ¶41-035, at 51525.

- 12.34. Therefore in determining the weight to be afforded to arguments of industrial harmony, the Commission must consider likely future industrial relations between the parties with the proposed arrangements and likely future industrial relations between the parties without the proposed arrangements.
- 12.35. Given the lack of evidence concerning possible industrial problems in New South Wales in these areas, it is difficult for the Commission to conclude that the proposed arrangements would likely to result in an improvement in industrial harmony.
- 12.36. Additionally, as submitted by Tab Limited and Sky Channel, the very nature of the proposed arrangements, in the form of collective boycott, is likely significantly disrupt industry harmony.
- 12.37. Accordingly, on the basis of the information available to it, the Commission does not accept that improved industrial harmony is a public benefit likely to arise from the proposed arrangements.

### **Promotion of equitable dealings in the market**

- 12.38. This public benefit is also referred to in its submissions as *Equity in the Market* and *providing countervailing/bargaining power to small business* by the Applicant.
- 12.39. AHA NSW submitted that collective negotiation will strengthen the bargaining power of AHA NSW members and may increase their input into the contracts negotiated with Tab Limited and Sky Channel, thus reducing the likelihood of harsh, unfair or unconscionable contractual terms and producing an outcome more likely to be in the interests of the parties themselves and of the public.
- 12.40. Tab Limited and Sky Channel submitted that many members of the AHA NSW are large and complex businesses and the collective bargaining groups likely to emerge if the arrangements were authorised would be dominated by these members. Tab Limited and Sky Channel also submitted that AHA NSW's claim that Tab Limited and/or Sky Channel have acted unconscionably is unfounded. Further, Tab Limited and Sky Channel submitted that if they were acting unconscionably, it could be dealt with in accordance with the TPA with the assistance of the Commission. Finally, Tab Limited and Sky Channel submitted that the AHA NSW has not provided any evidence that the outcomes of the proposed arrangements would benefit any party other than AHA NSW members.
- 12.41. In assessing this public benefit claim, the Commission notes that while Tab Limited and Sky Channel do not generally negotiate individually with AHA NSW members, they do consult with AHA NSW on the terms and conditions of supply, thus providing AHA NSW with some input into the negotiation process.
- 12.42. While the failure to negotiate on the part of a business with significant bargaining power may well be a relevant factor in considering claims of unconscionable conduct, the circumstances of any one matter needs to be considered. The parties have not provided any information to support claims that

Tab Limited and Sky Channel's conduct in respect of their dealings with AHA NSW members have been unconscionable.

### **Promotion of industry cost savings**

- 12.43. AHA NSW claimed that collective negotiations promote industry cost savings and will result in contained or lower prices at all levels in the supply chain.
- 12.44. In response, Tab Limited and Sky Channel submitted that as Sky Channel fees and PubTAB commissions are only minor parts of hotel overheads and revenue respectively, that collective negotiations are unlikely to promote industry costs savings of any significance or result in lower prices.
- 12.45. Tab Limited and Sky Channel also argued that there is no basis for expecting that any gains to hotels would be passed through in lower prices or improved service to patrons.
- 12.46. Tab Limited and Sky Channel submitted that the proposed arrangements would be likely to increase the cost of wagering services by forcing Tab Limited to use less efficient distribution channels.
- 12.47. The Commission is of the view that, to the extent that there is a pass through of benefits gained by hoteliers (in the form of industry cost savings) to consumers (in the form of lower prices or improved quality), the promotion of industry cost savings should be considered a public benefit.
- 12.48. The Commission notes, however, that in this instance, the pass through of benefits to consumers is likely to be small, regardless of whether hotels pass on only a proportion of their cost savings or the savings in their entirety.
- 12.49. According to the ABS, commissions from PubTAB wagering facilities represented around 0.7 per cent of total income for pubs, taverns and bars with gambling facilities in Australia in 2000-01.<sup>27</sup> The Commission is of the view that even a substantial increase in PubTAB commission is unlikely to have a significant impact on overall hotel revenues, and pass through to consumers will be small.
- 12.50. In addition, the Commission notes that this public benefit claim is at odds with the claim by the AHA NSW that the proposed arrangements would improve the viability of small business. In order for improved viability to be a result of the proposed arrangements, small business operators would need to retain any benefits gained through collective negotiation (in terms of lower prices for Sky Channel access and/or increased commissions for the provision of PubTAB wagering services).
- 12.51. Having regard to the above, the Commission is of the view that any benefit associated with a pass through to consumers in the form of marginally reduced

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<sup>27</sup> Australian Bureau of Statistics (2002), *Clubs, Pubs, Taverns and Bars*, Catalogue No. 8687.0, 2000-01.

prices of hotel services is not guaranteed and in any event would constitute only a very small public benefit.

### **Supply of better information to suppliers**

- 12.52. AHA NSW submitted that collective negotiation will enable AHA NSW to provide Tab Limited and Sky Channel with accurate industry wide information, such as operating cost information, that will enable Tab Limited and Sky Channel to make more informed decisions in their dealings with AHA NSW members.
- 12.53. Tab Limited and Sky Channel submitted that the AHA NSW does not require authorisation to provide this information.
- 12.54. In response to the AHA NSW's claim that Tab Limited and Sky Channel will be assisted by the proposed arrangements through the provision of industry wide information to provide guidance on realistic pricing and a national approach to dealings with the industry, Tab Limited and Sky Channel submitted that they currently have access to all necessary information required in setting efficient prices. Tab Limited and Sky Channel submitted that this information is obtained from publicly available data and regular consultations with the AHA NSW, hotels and other industry participants and that Tab Limited and Sky Channel are not suffering from an information asymmetry.
- 12.55. In the absence of any evidence supporting the claim that Tab Limited and Sky Channel do not have access to necessary or quality information, and noting the submission from Tab Limited and Sky Channel that suggested that they do have access to all necessary information, the Commission has formed the view that the supply of better information to suppliers is not a public benefit that flows from the proposed arrangements.

### **Common system**

- 12.56. AHA NSW submitted that while Tab Limited and Sky Channel currently adopt standard contracts across the industry in New South Wales and enjoy the increased business efficiencies arising from such an approach, AHA NSW members are not able to assume a similar negotiating strategy and are thus disadvantaged.
- 12.57. Tab Limited and Sky Channel submitted that Tab Limited's business is highly regulated and that the most efficient way of monitoring and maintaining standards in the conduct of its wagering business is for Tab Limited to use standard form contracts. Tab Limited and Sky Channel also submitted that these contracts cannot be more onerous than in other states, because they are available only in NSW.
- 12.58. In relation to Sky Channel contracts, Tab Limited and Sky Channel submitted that, given the number of Sky Channel customers, standard form contracts Australia-wide are the only efficient way to contract. Tab Limited and Sky Channel noted that in the Application, it is not suggested that differences in the terms and conditions of the Sky Channel contracts are warranted in any area other than price.

- 12.59. Tab Limited and Sky Channel submitted that they do not insist on collective bargaining with the AHA NSW, however, they have consulted with the AHA NSW on a number of issues including proposed changes to contracts.
- 12.60. The Commission understands that, in respect of the claim that adopting a “common system” will result in a public benefit, the AHA NSW is referring to the ability of hotelier to negotiate with Tab Limited and Sky Channel on similar terms to those which Tab Limited and Sky Channel currently negotiate with the AHA NSW members.
- 12.61. In this context, the Commission is of the view that this claim is essentially the same as the public benefits claimed in terms of “the promotion of equitable dealings in the market” and “providing countervailing/bargaining power to small business” and is discussed at paragraphs 12.38 to 12.42. The Commission is otherwise unable to attribute any public benefit arguments to a notion of a “common system”.

#### **Build confidence in the product**

- 12.62. AHA NSW submits that a collective bargaining system would enable AHA NSW to better endorse the Tab Limited and Sky Channel products and would build confidence in the products.
- 12.63. It is not clear to the Commission how the AHA NSW propose to build confidence in the product and, further, Commission is not convinced that building confidence in wagering or pay TV products is a public benefit.

#### **Allow more hoteliers to support the NSW racing industry**

- 12.64. AHA NSW claims that authorisation of the proposed arrangements would result in hotels receiving greater financial reward for their relationship with Tab Limited and would thus place hotels in a position where they were better able to afford the cost of Sky Channel and would thus be able to offer wagering to their patrons, particularly in presently uneconomic sites such as small rural hotels. This would assist rural residents to enjoy the same accessibility as residents of Sydney and other cities in New South Wales to wagering services and racing broadcasts.
- 12.65. Tab Limited and Sky Channel argued that transition to a fixed price would most likely lower the cost of Sky Channel to large hotels and increase the cost of Sky Channel to smaller hotels. Further, Tab Limited and Sky Channel submitted that a reduction in the price of Sky Channel fees may render Sky Channel unviable at marginal hotels if it is forced to price below average cost.
- 12.66. The Commission has accepted that the most likely counterfactual is the status quo. In this context, the Commission notes the AHA NSW’s submission that most of its members currently have PubTAB and Sky Channel facilities and that it is an essential element of AHA NSW members’ businesses.<sup>28</sup> The Commission is therefore not convinced that the proposed arrangements would

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<sup>28</sup> Australian Hotel Association (2002), *Submission to the Commission*, 16 July 2002, pp. 4-5.

result in a significant increase in the number of hoteliers providing access to wagering facilities and racing broadcasts, and is therefore unlikely to result in an increase in the number of hoteliers supporting the racing industry. Again, in any event, the Commission is not convinced that allowing hotels to support racing and wagering would necessarily be a public benefit

### **Responsible gambling**

- 12.67. AHA NSW is of the view that should the proposed arrangements be authorised and result in a more open and communicative relationship between the AHA NSW and Tab Limited, it is likely that AHA NSW and Tab Limited will work cooperatively in respect of responsible gambling monitoring and enforcement.
- 12.68. In assessing this claim, the Commission notes that the *Liquor Amendment (Responsible Gambling) Regulation 2000* requires hoteliers to provide information to patrons to provide information to patrons on counselling services and the problems caused from excessive gambling, limits the cashing of cheques, places limitation of the payment of prizes by cash, places limitations on gambling-related advertising, prohibits the offering of inducements to gamble and requires hoteliers and certain employees to undertake an approved training course in the responsible conduct of gambling.<sup>29</sup>
- 12.69. It is the Commission's view that adherence to statutory obligations, such as responsible gambling requirements, is in the public interest. These obligations should be complied with regardless of any authorisation.
- 12.70. In the absence of examples outlining areas in which the AHA NSW and Tab Limited and Sky Channel propose to work cooperatively to enforce and monitor responsible gambling (and a demonstration that such flows from collective bargaining), the Commission is of the view that the proposed arrangements are unlikely to result in the enforcement of responsible gambling measures.

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<sup>29</sup> New South Wales Department of Gaming and Racing (2000), *Liquor Amendment (Responsible Gambling) Regulation 2000*, Liquor and Gaming Legislation Bulletin, April 2000.

### **13. Balance of public benefits & anti-competitive detriments**

- 13.1. The Commission considers that that there exists very little public benefit demonstrated by the Applicant in relation to the proposed arrangements.
- 13.2. Having regard to each of the benefits claimed by the Applicant, the Commission believes the only claim which is supported by the information provided is the possible pass through of negotiated savings to consumers in the form of lower prices for hotel services. As noted above, 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.
- 13.3. In relation to anti-competitive detriment, as detailed above, the Commission is of the view that:
- the combination of collective bargaining arrangements and collective boycott activity would be likely to result in significant anti-competitive detriment which would not be outweighed by the marginal public benefit flowing from the proposed arrangements;
  - absent collective boycott activity, the proposed collective bargaining, without the imposition of conditions (including in relation to the composition of bargaining groups) would result in anti-competitive detriment of substance which would not be outweighed by the marginal public benefit flowing from the proposed arrangements; and
  - where collective bargaining arrangements were introduced absent collective boycott activity and with restrictions (including in relation to the composition of bargaining groups), the Commission is of the view that there would exist anti-competitive detriment, albeit limited, but nevertheless sufficient to form the view that such would not be outweighed by the marginal public benefit flowing from the proposed arrangements.
- 13.4. For the above reasons, the Commission proposes to deny authorisation.
- 13.5. An opportunity for further submissions and the calling for a pre-decision conference will be made prior to a final determination being made. This may provide the Applicant with an opportunity to provide additional information supporting public benefits that might flow from the proposed arrangements.
- 13.6. The Applicant is also invited to provide submissions as to appropriate conditions that might be imposed on any collective bargaining arrangements should it be able to demonstrate further public benefit. For example, the Commission is likely to consider conditions which:
- restrict, with measurable and objective criteria, the size and composition of collective bargaining groups;
  - restrict the information that may be shared between collective bargaining groups,
  - restrict the involvement of the AHA NSW in collective bargaining; and



- ensure that participants in collective bargaining groups are made aware of their obligations under the competition provisions of the TPA.
- 13.7. In recent years, the Commission has considered a number of applications for authorisation in respect of collective bargaining arrangements and has granted authorisation for a number of those applications, including those lodged in relation to chicken growers, dairy farmers and sugar cane growers.
- 13.8. The Commission has also made public submissions to the *Dawson Review*<sup>30</sup> recommending a notification process in relation to collective bargaining arrangements by small business in their dealings with businesses with a substantial degree of market power.
- 13.9. Having regard to the Commission previous consideration of collective bargaining, it is apparent that the Commission accepts that in certain circumstances, collective bargaining arrangements are in the public interest. The Commission must, however, consider each application for authorisation on its merits and it is incumbent on applicants to satisfy the Commission that the likely public benefits will outweigh any anti-competitive detriment.
- 13.10. In past authorisations, applicants have demonstrated, and the Commission has accepted, public benefits including those associated with reduced transaction costs, transition to a deregulated market, and promotion of equitable dealings or industrial harmony. For the reasons detailed in this draft determination, the Commission is, however, of the view that the Applicant has failed (except to a very limited extent) to demonstrate the existence of these or other public benefits.
- 13.11. In contrast to a number of past authorisations, the Commission is of the view that in this matter, the Applicant has failed to identify sufficient public benefit to outweigh the anti-competitive detriment. Even in circumstances where the Commission believes the anti-competitive effect of proposed arrangements or conduct may be limited, it is still incumbent on the Applicant to identify and the Commission to be satisfied that there exists public benefits associated with the proposed arrangements or conduct which would outweigh that detriment.

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<sup>30</sup> The Federal Government's *Review of the Competition Provisions of the Trade Practices Act 1974*.

## 14. Draft determination

### The Application

- 14.1. On 17 July 2002 the AHA NSW lodged an application for authorisation (No. A90837) with the Commission. By letter dated 13 September 2002 the Applicant lodged an amended application for authorisation.
- 14.2. The amended application (hereafter referred to as the Application) was made under section 88(1) of the TPA for an authorisation under that subsection:
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provisions within the meaning of section 45 of the TPA and to give effect to those provisions;
  - to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA and to give effect to those provisions.
- 14.3. The Application sought authorisation to conduct collective bargaining with Tab Limited in relation to the provision of totalisator (wagering) services (PubTAB) and with Sky Channel in relation to the provision of racing broadcast services to AHA NSW members. The application also seeks authorisation for collective boycott activity in the form of a collective decision to withdraw services to Tab Limited and Sky Channel should the collective bargaining break down and not be recommenced within seven days.

### Statutory test

- 14.4. For the reasons outlined in this draft determination, the Commission is **not** satisfied that in all the circumstances the making of the contracts and the giving effect to the provisions of the arrangements for which authorisation is sought under subsection 88 (1) of the TPA:
- would be likely to result in a benefit to the public; and
  - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.
- 14.5. The Commission is also **not** satisfied that, in all the circumstances, the proposed arrangements for which authorisation is sought under subsection 88 (1) of the TPA in respect of provisions which may be exclusionary provisions would be likely to result in such a benefit to the public that it should be allowed to be made and given effect to.

### Draft determination

- 14.6. The Commission therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to **deny** authorisation to application A90837.

## Annexure A – Summary of the NECG Report

### *Racing and Wagering*

NECG submitted that total demand for gambling is relatively inelastic<sup>31</sup> and that substitution between different types of gambling is limited. However, NECG argued that the majority of gamblers may be considered “social” gamblers, as such, there is scope for these gamblers to switch between wagering and other forms of gambling. This suggests that the demand for wagering is likely to be more elastic than demand for total gambling, especially in the long term. NECG submitted that this is particularly the case for those wagerers who access the product through hotels and clubs where gaming machines are also located.

NECG submitted that the public good characteristics of wagering and racing<sup>32</sup> have been noted by racing industry legislation and the *Racing Distribution Agreement*, which provide for the pooling of Tab expenditures by all wagerers and require that a proportion of Tab Limited earnings from wagering are paid to the NSW racing industry. NECG noted that these racing organisations are non-profit and that all income is reinvested into the racing industry.

NECG submitted that Tab Limited’s “price” in terms of the take out rate on totalisators is regulated and is set to a maximum of 25 per cent on any particular totalisator and a maximum of 16 per cent across all totalisators in a 12 month period.

NECG submitted that the provision of racing coverage by television has strong complementarities with the provision of wagering on racing and that anecdotal evidence suggests that the provision of television coverage in hotels, clubs and agencies boosts Tab Limited turnover by between 40 and 60 per cent.

NECG noted that hotels account for an increasing proportion of Tab Limited turnover as noted in the table below.

Distribution of Tab Limited outlets and turnover: 1998 and 2002

|             | Share of turnover (%) |              |                 |              | Number of outlets |              |                 |
|-------------|-----------------------|--------------|-----------------|--------------|-------------------|--------------|-----------------|
|             | <i>Hotels</i>         | <i>Clubs</i> | <i>Agencies</i> | <i>Other</i> | <i>Hotels</i>     | <i>Clubs</i> | <i>Agencies</i> |
| <b>1998</b> | 18                    | 13           | 49              | 20           | 586               | 371          | 508             |
| <b>2002</b> | 24                    | 15           | 42              | 19           | 990               | 604          | 336             |

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<sup>31</sup> Elasticity (in the context of demand and price) refers to the degree to which demand increases or decreases in response to a change in price.

<sup>32</sup> NECG suggested that racing, in relation to the demand for wagering, has public good characteristics and problems of non-excludability. NECG submits that a public good is characterised by the absence of opportunity costs in consumption, that is, if one person wagers on a race, this does not prevent another person from wagering on the same event. Furthermore, NECG argued that it is difficult to exclude people from consuming the product for the purpose of wagering.

NECG submitted that PubTABS and gambling are part of the “entertainment package” that hotels provide to patrons and, as such, make a broad contribution to hotel revenues and profitability. NECG also submitted that Sky Channel is complementary not only to wagering but to beer (or liquor more generally) and food sales in the hotel, as well as other gambling services such as gaming machines. NECG submitted that Sky Channel is an input to the hotel business, not just the PubTAB in the hotel.

NECG said that the current fee structure reflects the dual complementarity of Sky Channel with both hotels sales of liquor (and food) and Tab turnover, with Sky Channel fees tiered in relation to both beer literage and Tab Limited turnover. NECG submitted that this represents efficient pricing, since it extracts surplus from all potential users by discriminating between them on the basis of the value they receive from the service, while minimising marginal losses in consumption. NECG submitted that while profits are maximised, losses to allocative efficiency are minimised, subject to the commercial constraints of the business.

NECG submitted the follow table, illustrating the sources of income from hotels with gambling facilities Australia wide as noted below.

Australian Hotels with Gambling Facilities, Income: 2000-01<sup>33</sup>

| Source of income                       | \$M           | %            |
|--|---------------|--------------|
| On premises beverage sales             | 2174.9        | 28.5         |
| Off premises beverage sales            | 2431.6        | 31.8         |
| <i>Total beverage income</i>           | <i>4606.5</i> | <i>60.3</i>  |
| Net takings from poker/gaming machines | 4658.5        | 21.7         |
| Commissions for poker/vending machines | 395.5         | 5.2          |
| Commissions from Tab                   | 53.4          | 0.7          |
| Commissions from Keno                  | 13.9          | 0.2          |
| <i>Total gambling income</i>           | <i>2121.3</i> | <i>27.8</i>  |
| Meals and food                         | 642.7         | 8.4          |
| Accommodation                          | 122.1         | 1.6          |
| Vending machine commissions            | 42.7          | 0.6          |
| Catering commissions/concessions       | 1.9           | -            |
| Rent, leasing and hiring               | 22.2          | 0.3          |
| Other sales of goods and services      | 50.1          | 0.7          |
| Other income                           | 31.0          | 0.4          |
| <i>Total income</i>                    | <i>7640.5</i> | <i>100.0</i> |

<sup>33</sup> Source: Australian Bureau of Statistics, *Clubs, Pubs, Taverns and Bars: Australia, 2000-01*, Catalogue No. 8687.0, Table 1.2.

NECG noted that an increasing proportion of hotels' income is from gambling, but that this is mainly from gaming machines rather than from wagering.

NECG submitted that if wagering services are unavailable through one type of outlet, some consumers will acquire it through another type of outlet, and others will simply forego consumption.

NECG submitted that there are no large sunk costs associated with hotels procuring Tab Limited wagering and Sky Channel broadcasting services.

NECG concluded that Tab Limited and Sky Channel have a degree of exclusivity in the services they distribute. However, NECG argued that given the incentive structures they face and their ability to price discriminate, any adverse consequences on efficiency are minimised.

#### *The application for authorisation*

NECG noted the public benefit test applied by the Commission in assessing authorisation applications and the Australian Competition Tribunal's application of the "future with and without test". NECG submitted that the Tribunal emphasises improvements in economic efficiency and progress and the associated increases in total community welfare. NECG submitted that a transfer of resources, or income, from one group of society to another does not represent an increase in economic efficiency as there is neither an increase in total welfare nor a saving in real resources. NECG also submitted that proposals that involve transfers often reward rent-seeking<sup>34</sup> and that this, in turn, reduces efficiency – both because it leads a wasteful use of resources in seeking rents and leads to defensive investments being made by those whose interests would be harmed.

NECG submitted that the future without the proposed arrangements is likely to involve a continuation of current arrangements, whereby Tab Limited and Sky Channel consult with AHA NSW but ultimately adopt standard terms and conditions which hotels may either accept or reject. NECG submitted that, under this scenario:

- no major economic inefficiencies arise;
- Tab's incentives are likely to expand the quantity of wagering towards the socially efficient level;
- through price discrimination, Sky Channel is able to price in a manner which minimises distortions to allocative efficiency; and
- monopoly profits derived by Tab Limited and Sky Channel will be extracted as a redistribution of surplus from infra-marginal hotels.

NECG submitted that the future with the proposed arrangements would be one of a "bilateral monopoly". NECG postulated that the likely outcome that the AHA NSW would seek from negotiations would be an increase in Tab Limited commissions to hotels and a decrease in Sky Channel fees paid by hotels. NECG submitted that this could result

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<sup>34</sup> NECG refers to rent seeking as "the search for opportunities to make one party better off at the expense of another party with no resulting gain in social income".

in resources wastage through extensive negotiations – thus increasing transactions costs – and resource wastage through rent-seeking activity.

In relation to the future scenario likely under the proposed arrangements, NECG submitted that it would be likely to have the following impacts:

- increased productive inefficiency as Tab Limited switches to a less efficient pattern of distribution as a result of increased commissions to be paid to hotels;
- possible withdrawal of Tab Limited from marginal hotels as they become unprofitable for Tab Limited – though Tab Limited is of the view that these hotels would be likely to agree to continue on the basis of current standards terms and conditions;
- increases in commissions and decreases in fees are unlikely to have a significant impact on hotel revenues and costs; and
- reduced payments to the NSW racing industry, impacting on the quality and quantity of racing.

NECG also submitted that:

- there is unlikely to be an impact on the marginal cost of beer;
- there are unlikely to be flow-on benefits to consumers
- the viability of small hotels is unlikely to be increased;
- it will not necessarily be in the interests of hotels collectively to promote the viability of small hotels; and
- transactions costs will not necessarily be reduced.

NECG concluded that the overall impact of the proposed arrangements would be a transfer of income from one group to another, a reduction in both allocative and productive efficiency and no public benefit.