

- Allowing presently uneconomic sites to operate because they would be able to better afford the cost of Sky Channel.
- Building confidence in the product.
- Allowing more hoteliers to support the NSW racing industry.
- Greater protection for the public in the area of responsible gambling.

6.6. The public benefits claimed by the Applicant are discussed in more detail in section 12 of this determination.

### **Anti-competitive detriment**

6.7. In its submissions, the Applicant does not specify the nature of any possible anti-competitive detriment arising from the proposed arrangements. However, the Applicant does submit that any such detriment would likely be limited because:

- participation in the proposed arrangements by AHA NSW members would be voluntary;
- Tab Limited would be constrained in any attempt to recoup lost fee revenue (from AHA NSW members) given state government regulation of its retail prices and returns;
- any collective boycott undertaken by AHA NSW members would only continue for a short period of time; and
- in light of the current limited competition between AHA NSW members, any anti-competitive effect generated by the proposed arrangements is unlikely to have a material impact on competition in the industry.

## **7. Summary of Tab Limited & Sky Channel submissions**

- 7.1. Tab Limited and Sky Channel made a joint submission (the Tab/Sky Submission) to the Commission dated 23 October 2002 opposing the granting of authorisation by the Commission in respect of the application for authorisation of collective bargaining and primary boycotts by the AHA NSW.
- 7.2. As part of its submission, Tab Limited and Sky Channel also submitted an economic analysis conducted by the Network Economics Consulting Group (“NECG”) of the wagering and racing industries in NSW and the likely impact of the proposed arrangements (if authorised) on economic efficiency. A summary of the findings of this report is presented below. The report is hereafter referred to as “the NECG Report”.
- 7.3. Tab Limited and Sky Channel made a supplementary submission dated 26 February 2003 (the second Tab/Sky Submission)

### **Submission**

- 7.4. Tab Limited and Sky Channel submitted that the terms on which the application for authorisation are made are unclear. Tab Limited and Sky Channel submitted that the AHA NSW had not made clear:
  - the member hotels who would participate in any collective bargaining group;
  - the likely outcomes of the proposed arrangements; and
  - the effects on output of the proposed arrangements.
- 7.5. Tab Limited and Sky Channel noted that, in their view, the Application could not be likened to authorisation determinations by the Commission in the dairy farming, chicken growing and other industries because PubTAB commissions are a minor part of hotel income, Sky Channel fees are a minor part of hotel overheads and there is no deregulation, restructuring or transition of an industry to consider. Tab Limited and Sky Channel also submitted that the Application differs from other collective negotiation authorisations because they, the counterparts to the underlying contracts, oppose the arrangements.
- 7.6. In response to the AHA NSW’s claims for public benefits, Tab Limited and Sky Channel submitted that any increases in PubTAB commissions or reductions in Sky Channel fees would simply constitute a transfer of income from Tab Limited and Sky Channel to AHA NSW member hotels.
- 7.7. Tab Limited and Sky Channel submitted that such a transfer would be likely to lead to:
  - a reduction in the output of wagering services as Tab Limited ceases supplying PubTAB services to some marginal hotels and moves to less efficient channels of distribution;
  - other marginal hotels receiving less advantageous terms from Tab Limited;

- customers being deprived of access to wagering at preferred outlets or through preferred distribution channels;
  - a reduction in the output of racing coverage as Sky Channel reduces the fees it pays to racing clubs for broadcast rights; and
  - a reduction in racing.
- 7.8. Tab Limited and Sky Channel submitted that the AHA NSW had not explained how any gains accruing to hotels as a result of the proposed arrangements would be passed through to consumers in the way of, for example, price reductions. Tab Limited and Sky Channel submitted that any pass on to consumers is unlikely because prices in the hotel industry are “sticky downwards”. Tab Limited and Sky Channel further submitted that, in any event, there is likely to be little to pass on to consumers because the commissions and fees are a minor part of hotels’ total income and overheads and any changes in overall operating revenue or cost as a result of collective negotiations is likely to be minimal.
- 7.9. Tab Limited and Sky Channel submitted that there is no evidence for the reduction in transaction costs claimed by the AHA NSW, either for AHA NSW members or Tab Limited and Sky Channel. Tab Limited and Sky Channel claimed that, on the contrary, the proposed arrangements are more likely to increase transaction costs.
- 7.10. Tab Limited and Sky Channel submitted that the AHA NSW’s claims that the proposed arrangements would affect the viability of rural and regional hotels, promote industry harmony, reduce the potential for unconscionable conduct and lead to equity are unsubstantiated.

### **NECG Report<sup>15</sup>**

- 7.11. The NECG Report was prepared on behalf of Tab Limited and Sky Channel. A summary of the NECG Report is at Annexure A.

---

<sup>15</sup> NECG, AHA(NSW) Application for Authorisation A90837 Economic Report prepared on behalf of Tab Limited and SKY Channel Pty Limited, 23 October 2002.

## **8. Summary of other submissions**

- 8.1. The Commission sought submissions from a wide range of interested parties.
- 8.2. The following parties provided submissions in support of AHA NSW's application for authorisation:
  - The Leagues' Club Association of NSW Ltd;
  - The Australian Leisure and Hospitality Group; and
  - Australian Hotels Association (Western Australian Branch).
- 8.3. Additionally, the:
  - TAB Agents Association of NSW; and
  - Clubs NSWlodged submissions in support of AHA NSW's application for authorisation and specifically agreed with the public benefit and detriment arguments submitted by AHA NSW.
- 8.4. The New South Wales Thoroughbred Racing Board submitted that it does not oppose the AHA NSW's application for authorisation.
- 8.5. Harness Racing New South Wales ("HRNSW") lodged two submissions in relation to AHA NSW's application for authorisation. In its first submission, HRNSW raised no objection to the collective bargaining arrangements outlined in AHA NSW's application but did object to the collective boycott arrangements outlined in AHA NSW's application, on the basis that the arrangements would have a detrimental effect on the harness racing industry. In its second submission, HRNSW altered its previous position and stated that it does not support, under any circumstances, the application for authorisation lodged by the AHA NSW.
- 8.6. The Queensland Department of Tourism, Racing and Fair Trading ("the Department") submitted that the Application would not have any direct relevance to the Racing Division of the Department.
- 8.7. Copies of all of the submissions mentioned above are available on the Commission's Public Register.

## **9. Commission assessment - Markets**

- 9.1. The Commission's evaluation is in accordance with the statutory tests outlined in section 5 of this draft determination. As required by the test, it is necessary for the Commission to assess and weigh the likely public benefits and detriments flowing from the proposed arrangements.
- 9.2. Defining the markets affected by arrangements proposed for authorisation assists in assessing public benefit and public detriment from any lessening of competition from the arrangements. However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of this definition.
- 9.3. In its submissions, the Applicant does not specifically address the issue of the relevant markets. While the Tab Limited/Sky Channel submission does touch on the issue of markets, it does not offer a definitive view.
- 9.4. In this matter, the Commission is of the view that it is not necessary to comprehensively define the relevant markets. In this respect, it is the Commission's view that its assessment will not be overly affected by the possible variations in precise market definition.
- 9.5. In considering the issue however, the Commission has identified three related and relevant areas of competition associated with:
- the supply of hotel<sup>16</sup> services to consumers – that is, competition between hotels in the provision of services to consumers;
  - the acquisition of wagering services by hotels – that is, competition between hotels in the acquisition of wagering services; and
  - the acquisition of pay television services by commercial operators – that is, competition between hotels in the acquisition of pay television services.

### **Provision of hotel services**

- 9.6. On the information available, it would appear that hotels compete with one another (and to a lesser extent with clubs) in the provision of hospitality services to consumers in markets differentiated by geographic location. This proposition is supported by NECG at page 17 of its report. The boundaries of geographic areas of competition will depend on a number of factors including whether the areas are metropolitan, regional or rural.
- 9.7. NECG further submits that the market for the supply of hotel services may be differentiated on the basis of product. NECG submits, for example, that two hotels appealing to a similar type of patron would compete more closely than

---

<sup>16</sup> Where the context permits, hotels includes taverns.

those catering to different types of patrons. While the Commission agrees that the nature of the product affects the closeness of competition, it is not necessarily convinced that there exist different markets for the supply of different hotel products (for example, up market/sports/casual).

- 9.8. At page 25 of the third AHA NSW submission, the Applicant submits that the hospitality market is highly competitive and hotels have to compete against clubs, liquor merchants, restaurants and many others.

### **Wagering services**

- 9.9. It is clear that Tab Limited provides wagering services to hotels (and clubs) in NSW. In this respect, hotels (and clubs) compete, at least to a certain extent, in the acquisition of those services from Tab Limited<sup>17</sup>. The issue of the extent to which acquisition is competitive is discussed at paragraph 11.12 below.
- 9.10. It is less clear whether or not there exists a high degree of substitution between different means of wagering distribution (for example, clubs, hotels, agencies, telephone, etc.). NECG, at page 13 of its report provided with the Tab Limited/Sky Channel submission of 23 October 2002, submits that different distribution means are part substitute and part complement for Tab Limited. In this regard, NECG submits that where the costs of distribution increase in one area (for example, hotels) Tab Limited would be likely to substitute other forms of distribution at least in the medium term. NECG also submits that, in relation to the downstream supply to consumers, if the product is unavailable through one type of outlet, some consumers will acquire it through another type of outlet, but others will simply forego consumption or find another outlet of the same type.
- 9.11. It is also less clear whether or not there exists a high degree of substitution between different types of gambling products. At page three of its report, NECG submits that wagering is one of a range of gambling products available to consumers (including lotteries, poker machines and casinos) and that to some extent, all of these gambling opportunities compete with each other. It goes on to submit however, that it seems likely that total demand for gambling is relatively inelastic and substitution between types of gambling is somewhat limited. NECG concludes that there is likely to be long term substitutability between gambling products.
- 9.12. The Productivity Commission has recognised that, in the past, gambling products have not been highly substitutable but that gambling products have converged over time and are becoming more substitutable.<sup>18</sup>

---

<sup>17</sup> As noted at paragraph 2.4 the AHA NSW has described the dealings with Tab Limited as member hotels providing a service to Tab Limited. As is described in this paragraph 9.9, the dealings may also be characterised as the acquisition of a service from Tab Limited (albeit the payment for those services is a negative payment in the form of commissions).

<sup>18</sup> Productivity Commission (1999), *Australia's Gambling Industries: Inquiry Report*.

### **Provision of pay TV services to commercial premises**

- 9.13. It is clear that Sky Channel provides pay TV services to commercial operators including hotels and clubs. In this respect, hotels (and clubs) compete, at least to a certain extent, in the acquisition of those services from Sky Channel. The issue of the extent to which acquisition is competitive is again discussed at paragraph 11.12 below.
- 9.14. It is less clear on the information provided by the parties whether or not there exists a high degree of substitution between pay TV services offered to consumers and those offered to commercial operators. It is also unclear on the information provided by the parties whether or not there exists a high degree of substitution between the differentiated (in terms of content) pay TV services provided by alternative pay TV service providers. For example, whether sports content competes with movie content. The Commission however tends toward the position that there is not a high level of substitution between sports and movie content in the current context.

### **Commission assessment**

- 9.15. While the Commission has not formed a definitive view with respect to the relevant markets, the Commission's assessment of the Application relies on the identification of the three relevant areas of competition associated with:
- the supply of hotel services to consumers – that is, competition between hotels in the provision of services to consumers;
  - the acquisition of wagering services by hotels – that is, competition between hotels in the acquisition of wagering services; and
  - the acquisition of pay television services by commercial operators – that is, competition between hotels in the acquisition of pay television services.

## **10. Commission assessment – The future with or without**

- 10.1. The Commission’s evaluation is in accordance with the statutory tests outlined in section 5 of this draft determination. As required by the test, it is necessary for the Commission to assess and weigh the likely public benefits and detriments flowing from the proposed arrangements.
- 10.2. The Commission also uses the “future with-and-without test” established by the Australian Competition Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the arrangements proposed to be authorised.<sup>19</sup>
- 10.3. Under this test, the Commission compares the public benefit and anti-competitive detriment generated by the arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the Commission to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is often referred to as the counterfactual.

### **The future situation with the proposed arrangements**

- 10.4. The Applicant has not provided specific submissions in relation to the likely future situation without the proposed arrangements.
- 10.5. At page 2 of the Tab/Sky submission, Tab Limited and Sky Channel submitted that the likely future situation without the proposed arrangements is the current situation or the status quo. At page 20 of the NECG report, NECG submits that *“the future without the proposed conduct would likely involve a continuation of current arrangements, whereby Tab Limited and SKY Channel consult with the AHA but ultimately adopt a standard terms and conditions which hotels may either accept or reject”*.
- 10.6. The Commission accepts that the most likely situation without the proposed arrangements is the current situation, namely, the continuation of standard form contracts offered by Tab Limited and Sky Limited with limited input from AHA on terms and conditions from time to time.

### **The future situation under the proposed arrangements**

- 10.7. Identifying the likely situation under the proposed arrangements is a little more problematic.
- 10.8. The Application for authorisation concerns two related but separate forms of agreements. The first (collective bargaining) essentially seeks authorisation for agreements between competing hotels to collectively negotiate (through the AHA) terms and conditions with Tab Limited and Sky Channel. The second (collective boycotts) essentially seeks authorisation for agreements between competing hotels to collectively agree not to acquire services from Tab Limited and Sky Channel in circumstances where the collective negotiations break down.

---

<sup>19</sup> See, for example, *Re Australasian Performing Rights Association* (1999) ATPR ¶41-701.



- 10.9. While it is not entirely clear, it nevertheless seems to be the Applicant's position that the collective boycotts are only likely to result after any collective bargaining. It therefore follows that the proposed arrangements do not envisage any collective boycott in the absence of collective bargaining.
- 10.10. Having regard to the forgoing, there would appear to exist two possible situations should authorisation be granted namely:
- the situation where the Commission authorised collective bargaining but not collective boycotts; or
  - the situation where the Commission authorised both collective bargaining and collective boycotts.
- 10.11. Where the Commission authorised collective bargaining but not collective boycotts there exists some uncertainty as to the likely outcome. In granting authorisation, the Commission would not (and could not) require Tab Limited or Sky Channel to take part in negotiations with the AHA NSW. The extent to which collective bargaining by itself altered the status quo would depend on the willingness of Tab Limited and Sky Channel to take part in negotiations or to take notice of collective representation.
- 10.12. In its submission, the Applicant expresses the view that absent the ability to collectively boycott, collective bargaining would have little impact and the public benefits outlined in its submission would be lost.<sup>20</sup>
- 10.13. The Commission is not as pessimistic as the Applicant in this respect. The Commission is of the view that even where suppliers might have a large degree of bargaining power, they may choose to either:
- take part in collective bargaining arrangements; or
  - take into account (to some extent) collective representations of acquirers even where they choose not to engage in active negotiation.
- 10.14. Therefore, while the Commission agrees that absent the ability to engage in collective boycott activity the situation with collective bargaining is less certain, it should not be assumed that collective bargaining by itself would not result in different outcomes to the status quo.
- 10.15. In contrast, where the Commission authorised both collective bargaining and collective boycotts, it is more likely that the future situation with the proposed arrangements would involve greater participation by Tab Limited and Sky Channel in any collective bargaining and more likely to result in different outcomes to the status quo.

---

<sup>20</sup> See page 7 of the First AHA submission.

## **11. Commission assessment - Effect on competition**

- 11.1. As discussed at section 5, the Commission must assess the extent to which the proposed arrangements give rise to detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.

### **Current level of competition**

- 11.2. The Commission must compare the levels of competition in the future with the proposed arrangements and in the future without the proposed arrangements (in this case, the current level of competition).

#### *Current competition in the provision of hotel services to consumers*

- 11.3. The Applicant argues that there generally exists a high degree of competition between hotels (and clubs). This is apparent from the Applicant's position that any lower fees hotels achieve through the proposed arrangements would be passed through to patrons in the form of lower prices for food and beverages and higher levels of service and amenities in hotels.
- 11.4. At page 25 of its report, NECG suggests, however, that savings would not necessarily be passed on to consumers as a result of varied degrees of competition (for example, less competition in certain areas) and licensing restriction on entry. NECG submits that recent experiences in the pass through of excise reductions "*under the new tax system showed a reluctance by hotels to pass through those cost reductions*".
- 11.5. On the information available, the Commission accepts that while the level of competition between hotels may be varied, there generally exists a sound level of competition between hotels and clubs for the provision of services to consumers. This view is in part based on the view that there appears to exist a sound level of price competition between hotels and there exists a high degree of differentiation and competition in relation to services and facilities.
- 11.6. The Commission does however accept that in the short run, there may exist a degree of price 'stickiness' downwards in the goods and services offered by hotels to consumers.

#### *Current competition between hotels in acquiring Tab Limited & Sky Channel services*

- 11.7. The Applicant submits that there currently exists a low level of competition between hotels (and clubs) in the acquisition of services from both Tab Limited and Sky Channel.
- 11.8. At page 2 of the first AHA NSW submission, the Applicant submits that:

*"The essential issue is the power TAB/SKY CHANNEL has over NSW hotels and taverns and how that power is used [or misused] by Sky Channel. Natural efficiencies and freedoms that flow out of a free market are simply suppressed.*

*Hotels and taverns, especially those in regional NSW, are in a captive position in relation to both TAB services and televised racing services. The situation in NSW is worse than in other States as the TAB and Sky Channel are under the same ownership.*

*Hotels and taverns need the TAB/SKY Channel services otherwise they will loose [sic] out to others such as their hotel and tavern competitors and/or licensed clubs.*

*The manifestations of this misuse of market power by TAB/SKY CHANNEL in NSW include,*

- *A take it or leave it attitude to contracts.*
- *Standard form contracts.*
- *Refusal to negotiate.*
- *Refusal to take into account the different commercial circumstance between small an large customers and in particular small customers in regional NSW.*
- *Use of an inappropriate basis for charging, namely literage.*
- *High charges, which have no relationship to commercial reality.*
- *Forcing the customer to meet all establishment and running costs, the result that many make a loss on their gambling operations.*
- *Different terms and conditions between States reflecting different market power relationships rather than different commercial circumstances.*
- *Threats to take away the services, without any compensation for the establishment costs.*
- *Generally using the TAB service as a commercial lever.”*

11.9. The Applicant goes on to submit that:

*“the current situation is such that TAB/SKY CHANNEL unilaterally imposes conditions on AHA members, there is no negotiation on terms and hence any competition between members for the rights...”*”.

11.10. At page 6 of the first AHA NSW submission, the Applicant submits that *the current system prevents any competitive dynamic in the industry.*

11.11. Tab Limited and Sky Channel, by the NECG report, accept that while they consult with the AHA NSW on the terms and conditions of supply, they ultimately adopt standard terms and conditions which hotels may either accept or reject. They submit that while consultation with the AHA has an important influence on the final outcome, it is not strictly a ‘negotiation’ in which the parties agree on the final terms and conditions of supply.

11.12. The Commission accepts that both Tab Limited and Sky Channel are in strong bargaining positions vis-à-vis individual hotels (and clubs). This strong position is founded on the limited level of competition in the provision of services offered by Tab Limited and Sky Channel brought about by high barriers to entry (in the case of Tab Limited, very high regulatory barriers).

11.13. The Commission accepts that the current level of overt competition between hotels and clubs for the acquisition of wagering services from Tab Limited and pay TV services from Sky Channel is low. However, the Commission believes there are some competitive restraints placed on both Tab Limited and Sky Channel as a result of less overt competition between hotels (and clubs) for the acquisition of services from Tab Limited and Sky Channel.

- 11.14. Even suppliers with higher degrees of monopoly power are influenced by demand forces in the manner in which they set their prices (at least where their objective is to maximise profits).
- 11.15. To maximise profit, a business with a higher degree of market power decides how much output to produce based on its understanding of the demand characteristics of its customers. The price per unit of output is determined having regard to the demand by customers. In effect, this demand is reflective of the competition between customers. That is, how much each customer is willing to pay. This competition does not necessarily manifest itself in robust negotiations but nevertheless exists.
- 11.16. The current levels of consultation with the AHA also provide a degree of restraint upon the activities of both Tab Limited and Sky Channel.
- 11.17. In relation to the wagering services provided by Tab Limited, it may also be argued that Tab Limited is restrained (at least to some extent) by alternative gaming products provided in hotels, clubs or elsewhere.
- 11.18. In relation to the pay TV services provided by Sky Channel, it may also be argued that Sky Channel is restrained (at least to some extent) by services offered by other pay TV service providers such as Fox Sports.

**Collective bargaining with or without collective boycotts**

- 11.19. Both the Applicant and Tab Limited/Sky Channel do not appear to directly address the likely anti-competitive effect of the authorisation of collective negotiations in the absence of authorisation for collective boycotts. The parties rather appear to focus on the likely anti-competitive effect of the authorisation of both collective bargaining in combination with collective boycotts.
- 11.20. At page seven of its first submission the Applicant suggested that, absent authorisation of collective bargaining, the benefits said to flow from the proposed arrangements will not be realised. This position would appear to rest on the assumption that absent collective bargaining, the proposed arrangements (that is, collective negotiations by itself) would not alter the respective bargaining positions of suppliers and buyers. This in turn appears to support the position that in the absence of collective boycotts, collective bargaining by itself would have less effect on the competition for the acquisition of services from Tab Limited and Sky Channel.
- 11.21. It is submitted by both the Applicant and Tab Limited/Sky Channel that the authorising of collective boycotts would be more likely to result in Tab Limited and Sky Channel taking part in active negotiations with the collective(s). Failure to do so could result in collective decisions from hotels not to acquire the services and losses for Tab Limited and Sky Channel. In effect, the introduction of collective boycotts to the equation would give collective bargaining groups and therefore hotels, greater bargaining power vis-à-vis Tab Limited and Sky Channel.
- 11.22. The Commission accepts that, absent the threat of collective boycotts, the respective bargaining positions of hotels vis a vis Tab Limited and Sky Channel

are not likely to be greatly effected. In effect, collective bargaining in these circumstances may be considered to be little more than a more formalised (and likely more effective) means of consultation than as currently exists between the AHA NSW and Tab Limited/Sky Channel.

- 11.23. However, as discussed at paragraph 10.14 it should not be assumed that collective bargaining (without collective boycotts) would not result in different outcomes to the status quo. As discussed at paragraph 10.13 both Tab Limited and Sky Channel may choose to either:
- take part in collective bargaining; or
  - take into account (to some extent) collective representations of acquirers even where they choose not to engage in active negotiation.

11.24. The Commission is therefore of the view that:

- any anti-competitive effects of collective bargaining will be much greater where they are accompanied by collective boycotts or the threat of collective boycotts; but;
- even absent collective boycotts, collective bargaining may still have some anti-competitive effect.

#### **The Applicant's submissions as to anti-competitive effect**

11.25. The Applicant does not provide significant discussion on the likely reduction in competition. At page 6 of the first AHA NSW submission the Applicant contends that "*the anti competitive effect is limited and ... the current system prevents any competitive dynamic in the industry*".

11.26. The Applicant further submits that any such detriment would likely be limited for the following reasons:

- AHA NSW members will not be compelled to participate in the proposed arrangements and will retain the ability to deal with Tab Limited and Sky Channel independently.
- any attempt by Tab Limited to recoup lost fee revenue (from AHA NSW members) by way of retail price increases is unlikely given that most Tab retail prices, and returns, are regulated by the NSW Government.
- any collective boycott undertaken by AHA NSW members would only continue for a short period of time.

11.27. Additionally, the Applicant argued that presently, by virtue of the current system, AHA NSW members typically do not compete against each other. Therefore authorising AHA NSW members to engage in anti-competitive arrangements is unlikely to have any material effect on the level of competition in the industry.

#### **Tab Limited/Sky Channel submissions as to anti-competitive effect**

11.28. Tab Limited and Sky Channel submissions in relation to the likely competition effects of the proposed arrangements appear to be in the context of discussing the

public benefits claimed by the Applicant rather than as a separate consideration of the likely detriment related to any lessening of competition. Nevertheless, it is possible to draw the propositions discussed below from their submissions.

- 11.29. At page 21 of the NECG report it is submitted that the effect of the proposed arrangements would be essentially to create a 'bilateral monopoly',<sup>21</sup> in which the AHA negotiates the terms and conditions of supply with Tab Limited and Sky Channel, backed up by the threat of boycotts, on behalf of its members or various groups of members. The result of the negotiations would be likely to be an increase in PubTAB Commissions to hotels and reductions in Sky Channel fees.
- 11.30. At page 22 of its report, NECG submits that the increases in commissions paid to hotels for their PubTAB agencies represents an increase in the cost of distribution via hotels for Tab Limited. NECG note that to some extent Tab Limited may be able to substitute other distribution streams for PubTAB outlets in hotels (for example, clubs, shop-front agencies, telephone and internet wagering) in response to the increased cost of distribution through hotels. NECG submits that to this extent, the result of the proposed arrangements would be some productive or distribution inefficiency as Tab Limited switches to the use of less efficient patterns of distribution.
- 11.31. NECG notes that Tab Limited applies a rate of return requirement on hotel PubTAB outlets, to ensure that individual outlets add to profits. NECG submits that hotels which are just meeting this rate of return represent marginal PubTAB outlets while hotels that exceed this rate of return are 'inframarginal' PubTAB outlets. NECG submits that an increase in commission rates to infra-marginal hotels will simply result in a transfer of income from Tab Limited to the hotel. However, an increase in commissions paid to marginal hotels will render them unprofitable for Tab Limited. NECG submits that the consequence of such an increase in the marginal cost of distribution would be the withdrawal of the PubTAB outlet from those marginal hotels and as such a reduction in total consumption of wagering.
- 11.32. NECG however goes on to submit that in the short term, marginal hotels will opt out of the collective bargaining arrangements and continue to acquire Tab Limited services on preceding terms. NECG therefore submits that the effect in the short term would be the redistribution of income from Tab Limited to infra-marginal hotels and the opt out of collective bargaining by marginal hotels.
- 11.33. Similarly, NECG submits that any resulting lowering of Sky Channel fees would ultimately result in some reduction in productive or distribution efficiency and a redistribution of income from Sky Channel to infra-marginal hotels.
- 11.34. NECG finally notes the inefficiencies associated with any disruption of trade arising from possible boycott activity.

---

<sup>21</sup> NECG note that their reference to monopoly is in the context of a supplier with some degree of market power.

## **Commission assessment of anti-competitive effect**

### *Agreements as to price*

- 11.35. Arrangements that have the purpose or likely effect of fixing, controlling or maintaining the price of goods supplied or acquired are deemed by the TPA<sup>22</sup> to substantially lessen competition. Generally, collective bargaining arrangements that set the terms on which services are acquired are likely to lessen competition relative to a situation where the acquirers individually negotiate their own terms.
- 11.36. The Commission is of the view that even where collective bargaining arrangements are undertaken in dealings with parties with a substantial degree of market power, there still exists some anti-competitive effect.
- 11.37. The possible anti-competitive effects of agreements as to price include possible resource allocation inefficiencies. That is, suppliers, when faced with artificially lower returns, may choose to direct their resources elsewhere to some extent.
- 11.38. In support of this concern, the NECG report submitted that the arrangements would lead to increased productive inefficiency as Tab Limited switched to a less efficient pattern of distribution as a result of increased commissions to be paid to hotels.
- 11.39. The effects of collective bargaining arrangements are, however, likely to be lower where:
- there exist opt-out mechanisms for members;
  - the arrangements do not have industry coverage; and
  - the arrangements set up multiple groups of similar acquirers with independent advisers/representatives.
- 11.40. The Applicant has advised that there would exist opt-out procedures for hotels not wishing to participate in collective negotiations.
- 11.41. The Applicant represents a large proportion of the hotel industry in NSW. Information supplied by Sky Channel suggests that in excess of 90 per cent of hotels acquiring the relevant services are AHA NSW members. The extent of the industry covered by the proposed arrangements is therefore of some concern and enhances the anti-competitive effects of any proposed collective bargaining.
- 11.42. While the Applicant has foreshadowed multiple bargaining groups, it has not provided details of the composition or selection criteria for each of those groups or the extent to which those groups would be commonly represented. This issue is further discussed at paragraphs 11.60, 13.3 and 13.6 below.

---

<sup>22</sup> Section 45A of the TPA.

### *Collective Boycotts*

- 11.43. As discussed above, collective boycotts have the effect of significantly increasing any anti-competitive effect of collective bargaining arrangements.
- 11.44. Further, the inefficiencies caused by collective boycotts are likely to be significant as collective boycotts have the potential to cause significant disruption to business not only those directly effected but downstream and upstream businesses.

### *Opportunity for collective activity*

- 11.45. In considering collective bargaining arrangements in the past, the Commission has noted concern that the arrangements may increase the potential for collusive anti-competitive conduct beyond that authorised.
- 11.46. Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The Commission has been concerned that in this environment, there may be an increased likelihood of anti-competitive conduct (beyond that which is authorised) occurring.
- 11.47. The Commission is of the view that the likelihood of this occurrence and any subsequent effect is lessened where the arrangements are not industry wide. Further, the Commission is of the view that the likelihood is also reduced where participants are made aware of their obligations under the TPA.

### *Countervailing Power*

- 11.48. Much of the Applicant's submission relates to the proposition that the proposed arrangements create a countervailing power to the market strength of Tab Limited and Sky Channel.
- 11.49. As discussed under the Commission assessment of public benefit below, the Commission does not accept that the mere creation of countervailing power in itself is a public benefit. The Commission looks to the outcomes of any creation of countervailing power when considering these issues.
- 11.50. From a competition point of view, however, in certain market circumstances, there may exist some argument that where supply of goods or services is controlled by a party with a large degree of market power, some competitive benefit may be generated in certain circumstances from the creation of countervailing power.
- 11.51. In a competitive market, prices are set where supply and demand are in equilibrium. In economic jargon, price is set at the marginal cost of producing an additional unit of product.
- 11.52. Where the supplier, however, has a greater degree of monopoly power, the supplier is more likely to set the level of output at levels lower than it would in a competitive market and is likely to result in higher prices. Again, in economic jargon, a supplier with a greater degree of market power is likely to set the level of output where its marginal revenue is equal to its marginal cost.



- 11.53. Where prices are higher and output is lower, consumers are ordinarily worse off. Economic theory also suggests that society as a whole is worse off and there exists a “dead weight loss” associated with under-production.
- 11.54. While the interaction of suppliers and buyers is complex, there may exist some arguments, in certain market circumstances that where suppliers with a higher degree of market power meet customers with an increased degree of purchasing power, there is likely to be a shift in prices downwards and an increase in quantity produced.
- 11.55. In effect, the increased bargaining power of the customer may tend to reduce the effective monopoly power of the seller and where the customer has limited market power in the downstream market (in this case the supply of hotel services to consumers) may well reduce the “dead weight loss” or inefficiency associated with under-production. While this does not mean that the market will produce the same efficiencies as a perfectly competitive market, there may exist some efficiency gains.
- 11.56. It therefore may well be argued that an increase in the bargaining power of hotels under the proposed arrangements could lead to some efficiencies which may to some extent lessen any anti-competitive arrangements.
- 11.57. The Commission has not been provided with any arguments addressing whether or not, in the current circumstances, such an effect would be experienced or the extent of that effect. For this reason, the Commission is not prepared to give this effect significant weight.

*Commission view of anti-competitive effect of proposed arrangements*

- 11.58. The Commission’s view in relation to the likely anticompetitive effect of the proposed arrangements, taking into account the matters discussed above, is set out below.
- 11.59. In relation to collective bargaining arrangements and absent collective boycott arrangements, the Commission is of the view that the anti-competitive effect of the proposed arrangements is likely to be of substance.
- 11.60. However, the Commission is of the view that that any anti-competitive effect of the proposed arrangements (that is, collective bargaining only) may be limited where certain restrictions on collective bargaining are employed including:
- voluntary participation;
  - restrictions on the composition and representation of bargaining groups;
  - an express prohibition on boycott activity; and
  - requirements as to TPA education of participants.
- 11.61. In relation to collective bargaining arrangements and including collective boycott arrangements, the Commission is of the view that the anti-competitive effect of the proposed arrangements is likely to be significant.

## **12. Commission assessment - Public benefits**

- 12.1. In order to grant authorisation, the Commission must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.
- 12.2. There must also be a nexus between the claimed public benefits and the arrangements for which authorisation is sought. In other words, the benefit must flow from the proposed arrangements.
- 12.3. AHA NSW submitted that a number of public benefits will be generated by both the proposed collective negotiation and collective boycott arrangements. The Applicant did not identify which public benefit was generated by which form of arrangement (i.e. collective bargaining or collective boycotts) although it did submit that all benefits would be lost in the absence of collective boycotts. An assessment of the public benefits claimed by the Applicant, taking into account the submissions of interested parties, is below.
- 12.4. The Commission considers that a number of these public benefits are similar and therefore, when considering each of the public benefits claimed by AHA NSW, the Commission proposes to address like claims together.
- 12.5. The Commission's assessment of the public benefit and detriment claim submitted by the Applicant focuses heavily on the information received from the Applicant and Tab Limited and Sky Channel but does not expressly refer to any other submissions received from interested parties. However, the Commission is mindful of the views of other parties who made submissions and has taken these views into account in its consideration of this matter.

### **Continued viability of small business operations**

- 12.6. AHA NSW claims that the proposed arrangements would ensure the continued viability of small business operations (particularly in rural and regional areas), thus ensuring competition in those areas.
- 12.7. Tab Limited and Sky Channel submitted that the AHA NSW provided no evidence that hotels are under threat and no evidence that possible gains from collective negotiations with Tab Limited and Sky Channel would have any impact on viability. Tab Limited and Sky Channel submitted that the proposed arrangements are likely to increase transaction costs for all parties, an outcome which is unlikely to promote small business viability.<sup>23</sup>
- 12.8. Tab Limited and Sky Channel noted that AHA NSW's claim must rest on expected increases in PubTAB commissions and decreases in Sky Channel fees. Tab Limited and Sky Channel submitted that PubTAB commissions and Sky

---

<sup>23</sup> The issue of changes to transaction costs is discussed in paragraphs 12.17-12.22 below.

Channel fees are a minor and ancillary part of hotel turnover with little impact on hotels' overall operating revenue and costs. Tab Limited and Sky Channel also noted that Sky Channel attracts patrons to hotels and therefore promotes the viability of hotels, for a relatively minimal fee.

- 12.9. In so far as the Applicant's claim focuses on rural and regional areas, Tab Limited and Sky Channel submitted that to address cases of hardship, Sky Channel offers a remote site tariff for isolated hotels in small, rural communities.
- 12.10. The Commission agrees with Tab Limited and Sky Channel's assertion that the Applicant's claim must rest on expected increases in PubTAB commissions and decreases in Sky Channel fees. However, according to the ABS in 2000-01, commissions from Tab wagering facilities represented around 0.7 per cent of total income for pubs, taverns and bars with gambling facilities in Australia<sup>24</sup>. Therefore the Commission considers that even a substantial increase in PubTAB commissions or a substantial decrease in Sky Channel fees is unlikely to have a significant impact on overall hotel revenues and viability.
- 12.11. In addition, the Commission notes that this public benefit claim is somewhat at odds with the claim by the AHA NSW that the proposed arrangements would promote industry costs savings. In order for industry cost savings to result from the proposed arrangements, small business operators would need to pass on any increased commissions or decreased fees which would appear to limit the potential for such increased revenue to contribute to small business viability.
- 12.12. Accordingly, the Commission is of the view that the proposed arrangements are unlikely to result in a public benefit in the form of the continued viability of small business operations.

#### **Facilitating the availability of information on operational & pricing issues**

- 12.13. AHA NSW submitted that collective negotiations will enhance the efficiency of AHA NSW members by increasing the availability to these business (a significant proportion of which are small businesses) of information relevant to their business, including information about income trends and operating expenses, which will give AHA NSW members an improved understanding of the effect of wider trends upon their businesses, and improve their ability to make better business decisions and identify where efficiencies and cost savings could be obtained. A major industry benefit that would flow from information sharing and transparency would be the ability of the AHA NSW to provide practical advice to operators. With real information sharing on such key factors as earnings and local betting market performance, the AHA NSW would be able to advise members of the likelihood of venue profitability.
- 12.14. In response to the Applicant's claim, Tab Limited and Sky Channel submitted that details of the standard Tab Limited and Sky Channel contracts and pricing structures are publicly available. Tab Limited and Sky Channel also submitted that they consult with the AHA NSW on issues including changes to contracts

---

<sup>24</sup> Australian Bureau of Statistics (2002), *Clubs, Pubs, Taverns and Bars*, Catalogue No. 8687.0, 2000-01.

and pricing before they are introduced and that the AHA NSW is free to disseminate this information to its members without the need for collective negotiations. Tab Limited and Sky Channel submitted that the AHA NSW has not provided details of how authorisation would improve information sharing or transparency or why the quality of information that it currently collates would improve should authorisation be granted. Tab Limited and Sky Channel submitted that the AHA NSW does not need authorisation to allow it to circulate market information among hotels, organise external legal advice, pool data and provide other support in their dealings with Tab Limited and Sky Channel as none of these acts, of themselves, constitute a breach of the TPA.

- 12.15. On the basis of the material before the Commission it would appear that AHA NSW is presently able to provide its members with the information it claims could be made available as a result of authorisation. Currently, the Applicant is able to consult with its members in relation to a range of operational and pricing issues, including proposed changes to contracts and pricing in respect of supply agreements with Tab Limited and Sky Channel. While authorisation may provide a sense of comfort to the Applicant that such information sharing is beyond the reach of the TPA, it is not clear to the Commission how authorisation would improve either the quality of information disseminated by the AHA NSW to its members or the means by which such information is disseminated.
- 12.16. Accordingly, the Commission is not convinced that the proposed arrangements will result in a benefit to the public in the form of facilitating the availability of information on operational and pricing issues to AHA NSW members.

### **Limiting transaction costs in negotiation of supply agreements**

#### *AHA NSW members*

- 12.17. AHA NSW submitted that collective negotiation with Tab Limited and Sky Channel will lower transaction costs for AHA NSW members who will no longer need to negotiate with Tab Limited and Sky Channel on an individual basis. Additionally, AHA NSW is of the view that transaction costs savings will accrue to its members because they will no longer need to obtain professional advice, such as financial, legal or accounting advice, as such advice would be sought by the AHA NSW on behalf of its members. The Commission notes that AHA NSW has not provided any evidence of the current expenditure of its members on professional advice sought in relation to establishing, renewing or cancelling a contract with Tab Limited and Sky Channel.
- 12.18. Tab Limited and Sky Channel submitted that transaction costs are currently minimised as a result of the use of standard form contracts which were developed in consultation with the AHA NSW.
- 12.19. The Commission observes that AHA NSW's claim in respect of transaction cost savings is somewhat inconsistent with its assertion that Tab Limited and Sky Channel refuse to negotiate with AHA NSW members individually and impose standard form contracts. Indeed, Tab Limited and Sky Channel have confirmed that while they consult with AHA NSW on the terms and conditions of supply,