

Draft Determination

Application for Authorisation

Lodged by

Australian Hotels Association (NSW)

In respect of

Collective bargaining on behalf of member hotels in NSW with Tab Limited and Sky Channel Pty Limited in relation to the provision of totalisator (wagering) (PubTAB) and racing broadcast services; and

Boycott activity in the form of a collective decision to withdraw services from Tab Limited and Sky Channel Pty Limited should negotiations breakdown.

Date: 26 March 2003

Authorisation no.	A90837	Commissioners:	Fels
Public Register no.	C2002/1081		Bhojani
			Jones
			McNeill
			Willet
			Martin

Executive summary

The Application

On 17 July 2002 the Australian Hotels Association (NSW) (“the AHA NSW”) lodged an application for authorisation (No. A90837) with the Commission. By letter dated 13 September 2002 the AHA NSW lodged an amended application for authorisation (“the Application”).

The authorisation process

A key objective of the Trade Practices Act 1974 (“the TPA”) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The Act, recognises that competition may not always be in the best public interest. It therefore allows the Commission to grant immunity from the TPA for anti-competitive arrangements or conduct in certain circumstances.

One way businesses may obtain immunity is to apply for what is known as an ‘authorisation’ from the Commission. Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The Commission conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation.

The proposed arrangements

The AHA NSW is seeking authorisation on behalf of its hotel members to conduct collective bargaining in dealings with Tab Limited in relation to the provision of totalisator (wagering) services (PubTAB) and in dealings with Sky Channel Pty Limited (“Sky Channel”) in relation to the provision of racing broadcast services to AHA NSW members. The AHA NSW is also seeking authorisation for collective boycott activity by participant member hotels should collective bargaining break down and not be recommenced within seven days.

Generally speaking, ‘collective bargaining’ describes arrangements where a number of businesses form a group to engage in collective negotiations on the terms of trade (including price) with a supplier or acquirer of goods or services. Absent authorisation, collective bargaining amongst competitors is likely to raise concerns under the competition provisions of the Act.

‘Collective boycotts’ describe agreements between competitors which limit or restrict their dealings with certain persons. In the current context, a collective boycott may include agreements between hotels not to deal with Tab Limited or Sky Channel in certain circumstances. Absent authorisation, collective boycotts involving competitors are likely to raise concerns under the competition provisions of the Act.

Assessment of public benefit and anti-competitive detriment

In its submissions, the Applicant submits that a number of public benefits would arise from both the collective bargaining and collective boycott arrangements.

The Applicant claimed that the public benefits would include: the provision of countervailing market power to hotels; ensuring equitable dealings in the market; limiting transactions costs to hotels and to Tab Limited and Sky Channel; fostering industrial harmony between hotels and Tab Limited and Sky Channel; facilitating information sharing between the parties; and ensuring the viability of small business hotels.

The Applicant submits that these benefits outweigh any possible public detriment resulting from the proposed arrangements.

Having considered the submissions from the Applicant and interested parties, the Commission has formed the view that there exists very little public benefit demonstrated by the Applicant in relation to the proposed arrangements. Having regard to each of the benefits claimed by the Applicant, the Commission believes the only claim which is supported is that there may arise some negotiated savings to hotels and those savings could be passed through to consumers in the form of lower prices for hotel services. However, on the information before it, the Commission formed the view that any pass through of savings would not be guaranteed and in any event would be marginal or minimal.

In relation to anti-competitive detriment, the Commission is of the view the combination of collective bargaining and collective boycotts would result in significant anti-competitive detriment.

However, the Commission formed the view that collective bargaining by itself (i.e. without any boycott attached), where appropriate restrictions as to the nature of collective bargaining were in place, would have limited anti-competitive effect.

However, even in circumstances where the Commission believes the anti-competitive effect of proposed arrangements 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 which would outweigh that detriment.

In this matter, the Commission is of the view that the very small public benefit identified by the Applicant is insufficient to outweigh the anti-competitive detriment (albeit limited) associated with restrained collective bargaining let alone the significant detriment associated with both collective bargaining and collective boycotts.

Draft determination

The Commission therefore proposes, subject to any pre-determination conference requested, to **deny** authorisation to application A90837.

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1. Introduction

- 1.1. The Australian Competition and Consumer Commission (“the Commission”) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (“the TPA”). A key objective of the TPA is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. The TPA, recognises that competition may not always be in the best public interest. It therefore allows the Commission to grant immunity from the TPA for anti-competitive arrangements or conduct in certain circumstances.
- 1.3. One way businesses may obtain immunity is to apply for what is known as an ‘authorisation’ from the Commission. Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.4. The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.5. Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.6. The TPA requires that the Commission then issue a draft determination in writing proposing either to grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account any submissions received from interested parties.
- 1.7. This document is a draft determination in relation to application for authorisation A90837 lodged with the Commission by the Australian Hotels Association (New South Wales)(“the AHA NSW” or “the Applicant”).
- 1.8. Once a draft determination is released, the applicant or any interested party may request that the Commission hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the Commission in response to a draft determination. The Commission will also invite interested parties to lodge written submissions on the draft.
- 1.9. The Commission then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination.

2. The Application

The Application

- 2.1. On 17 July 2002 the AHA NSW lodged an application for authorisation (No. A90837) with the Commission.
- 2.2. Following a period in which the Commission sought further details and clarification of the arrangements for which authorisation was sought, by letter dated 13 September 2002 from Spier Consulting on behalf of the Applicant, the Applicant lodged an amended application for authorisation.
- 2.3. 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 provision within the meaning of section 45 of the TPA;
 - to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the TPA;
 - 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 a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 2.4. The AHA NSW seeks authorisation to conduct collective negotiations with Tab Limited in relation to the provision of totalisator (wagering) services (PubTAB) and with Sky Channel Pty Limited (Sky Channel) in relation to the provision of racing broadcast services to AHA NSW members. The application also seeks authorisation for primary boycott activity in the form of a collective decision to withdraw services from¹ Tab Limited and Sky Channel should the collective negotiations break down and are not recommenced within seven days.
- 2.5. The AHA NSW has provided three sets of submissions in relation to the Application. Each submission has been provided by Spier Consulting representing the AHA NSW. These submissions are hereafter referred to as follows:

¹ The AHA NSW has described their dealings with Tab Limited and Sky Channel as member hotels providing a service to Tab Limited and Sky Channel. It may also be considered the acquisition of a service from Tab Limited and Sky Channel. For the purpose of this draft determination it is not necessary to form a view on the more appropriate characterisation and the text of the draft determination adopts both descriptions.

- The first AHA NSW submission: 16 July 2002
- The second AHA NSW submission: 13 September 2002
- The third AHA NSW submission: 13 December 2002

The Applicant

- 2.6. The AHA NSW is an industry association representing approximately 1635 hotels and taverns in New South Wales. The members of AHA NSW are from metropolitan, regional and rural areas, as detailed below:

	No. of Members
Metropolitan	586
Regional cities	220
Country	829

- 2.7. The AHA NSW describes itself as a political lobby group seeking change for the benefit of the hotel industry.

The arrangements

Collective bargaining

- 2.8. The AHA NSW seeks authorisation to conduct collective contract negotiations on behalf of any group of AHA NSW members (a collective bargaining group) with Tab Limited and Sky Channel in relation to the provision of wagering and/or racing broadcast services. Such contractual negotiations will potentially encompass all aspects of the supply arrangements, including price.

Primary boycott

- 2.9. The AHA NSW also seeks authorisation for a collective bargaining group represented by the AHA NSW to collectively withdraw services to Tab Limited and Sky Channel, should contractual negotiations break down and not recommence within seven days.

Parties to the proposed arrangements

- 2.10. The parties to the proposed arrangements are present and future AHA NSW members. Pursuant to subsection 88(10) and 88(13) of the TPA, the authorisation application applies to any collective bargaining group of AHA NSW members, present or future, represented by the AHA NSW, that wish to engage in the proposed arrangements.
- 2.11. AHA NSW member participation in both collective negotiations and primary boycott activity is voluntary. AHA NSW members retain the right to negotiate and enter into individual contracts with Tab Limited and Sky Channel.

Bargaining groups

- 2.12. More than one collective bargaining group may form pursuant to the Application. However, the exact composition of each potential collective bargaining group is not presently known to the AHA NSW.

Confirmation of proposed arrangements by AHA NSW

- 2.13. The substance of the details set out at paragraphs 2.8 through 2.12 were set out in the Commission's letter of 4 September 2002 to the Applicant and subsequently confirmed by the Applicant in its letter of 13 September 2002 as the arrangements for which authorisation is sought.

Issues of certainty

- 2.14. In their submissions,² Tab Limited and Sky Channel note the importance of certainty regarding the arrangements for which authorisation is sought. In granting (or assessing whether or not to grant) authorisation, the Commission must assess the likely benefits and anti-competitive detriments associated with the proposed arrangements and compare those to the scenario that would exist without the proposed arrangements. It is therefore essential that the arrangements sought to be authorised are described with sufficient particularity and certainty so that proper assessment of the likely public benefits and anti-competitive detriments can be made.
- 2.15. In their submissions, Tab Limited and Sky Channel have raised a number of, what they submit are, critical areas of uncertainty in connection with the application including:
- the possibility of interference with current contracts between Tab Limited or Sky Channel and the individual hoteliers; and
 - the lack of certainty as to the composition of bargaining groups or their precise manner of operation.
- 2.16. The Commission, as discussed later in this draft determination, agrees that the arrangements, as set out by the Applicant and described above, are expressed very broadly. This in turn, affects the degree to which the Commission can be satisfied that net public benefits flow from the proposed arrangements. This issue is further discussed at paragraphs 11.42, 11.60, 13.3 and 13.6.

² Tab Limited and Sky Channel submission 23 October 2002 at paragraph 5.2 through 5.7.

3. Chronology of assessment of the application

Date	Event
17 July 2002	Application lodged.
31 July 2002	Meeting between Commission staff and representatives of the AHA NSW to clarify aspects of its authorisation application and to discuss the background to the application.
6 August 2002	Letter to the Applicant requesting further information by 30 August 2002.
8 August 2002	Letters sent to interested parties inviting submissions in relation to the authorisation application by 6 September 2002.
30 August 2002	Letter received from Freehills, acting for Tab Limited and Sky Channel raising a number of concerns in respect of AHA NSW's application and requesting an extension of time for submission lodgement.
4 September 2002	Letter to Applicant seeking information in response to concerns raised by Tab Limited and Sky Channel, plus additional information, by 13 September 2002. Letter to Freehills advising that concerns of Tab Limited and Sky Channel have been conveyed to AHA NSW for response, and granting extension for submission lodgement until 20 September 2002.
6 September 2002	Meeting between Commission staff and representatives of AHA NSW to discuss the lodgement of amended forms.
10 September 2002	Letter from Freehills outlining further concerns with regard to the Application and seeking extension of time for submission lodgement.
12 September 2002	Letter to Applicant requesting additional information to address concerns raised by Freehills. Letter to Freehills granting extension of 3 weeks from the date of AHA NSW's response to the Commission's letter of 4 September 2002.
13 September 2002	Letter from the Applicant confirming the arrangements for which authorisation was sought and providing amended applications.
17 September 2002	Letter received from application in response to Commission's letter of 6 August 2002 and in response to concerns raised by Tab Limited and Sky Channel in letter from Freehills of 10 September 2002. Amended application forms also enclosed.
18 September 2002	Letter to Freehills enclosing copies of additional information provided by AHA NSW, requesting further information, and confirming that submission should be provided by 17 October 2002.
23 October 2002	Joint submission received from Tab Limited and Sky Channel.
6 November 2002	Last annexure to the joint submission of Tab and Sky Channel received.
13 December 2002	3 rd AHA submission received.
26 February 2003	Second submission received from Freehills on behalf of Tab Limited and Sky Channel.
26 March 2003	Draft determination issued.

4. Background to industry

Hotels, Taverns and Clubs

- 4.1. Hotels, Taverns and Clubs offer differentiated but related services to consumers in New South Wales.
- 4.2. According to the Australian Bureau of Statistics (“ABS”)³ “pubs, taverns and bars” includes hotels, bars and similar organisations predominantly engaged in selling alcoholic beverages for consumption on the premises, or in selling beverages for consumption both on and off the premises (through a bottle shop attached to the premises). The ABS does not include in this category businesses that are mainly engaged in the provision of accommodation, retailing alcoholic beverages solely for consumption off premises or organisations involved in operating licensed clubs.
- 4.3. According to the ABS, there were 1,323 such businesses in New South Wales at the end of June 2001. Pubs, taverns and bars in NSW accounted for 30 per cent of such premises Australia-wide.
- 4.4. The ABS defines “clubs (hospitality)” as those organisations that are mainly engaged in providing hospitality services such as drinking facilities, gambling, meals and other hospitality services to members. The ABS does not include “sport” clubs in this classification. There were 1,223 clubs in New South Wales at the end of June 2001.
- 4.5. According to the AHA NSW, it has 1635 member hotels, of which 586 are located in metropolitan areas, 220 in regional cities and 829 in country areas. AHA NSW also submitted that its members comprise of 137 which would be considered as large (more than 70 employees), 84 medium (between 15 and 70 employees) and 1414 small (less than 15 employees).

Tab Limited⁴

- 4.6. Tab Limited was established in 1964 as the Totalizator Agency Board, a NSW statutory authority constituted under the *Totalizator (Off-Course Betting) Act 1964 (NSW)*, to conduct off-course totalizator wagering in NSW.
- 4.7. In 1997, the NSW Government announced its intention to privatise the Totalizator Agency Board.
- 4.8. On 25 February 1998, the Totalizator Agency Board was corporatised and became Tab Limited, a company registered under Corporations Law, in accordance with the *Totalizator Agency Board Privatisation Act 1997 (NSW)*.

³ Australian Bureau of Statistics (2002), *Clubs, Pubs, Taverns and Bars: 2000-01*, Catalogue No. 8687.0.

⁴ Tab/Sky submission 23 October 2002 at paragraph 3.1

- 4.9. Tab Limited was privatised by way of public float and was listed on the Australian Stock Exchange Limited in June 1998.
- 4.10. In 15 April 1998, immediately prior to privatisation, Tab Limited purchased Sky Channel.
- 4.11. Tab Limited is Australia's largest wagering organisation. It conducts:
- totalizator wagering on Australian and international racing and on the National Rugby League competition;
 - fixed-odds wagering on a range of sporting events including rugby league, cricket, soccer, rugby union, golf, tennis, boxing, Australian Rules football, motor sports and basketball; and
 - fixed-odds wagering on major racing events.

Wagering and gaming⁵

- 4.12. Gambling activities are categorised as either wagering or gaming.
- 4.13. Wagering involves betting on the outcome of live events, primarily racing (thoroughbred, harness and greyhound racing) and sporting events. Wagering is divided into totalizator wagering and fixed-odds wagering.
- 4.14. Other forms of gambling are "gaming". The principal forms of gaming in Australia are the operation of gaming/poker machines, casinos, lotteries, lotto and keno.

Totalizators⁶

- 4.15. A totalizator is one form of wagering, the other being fixed-odds betting (also known as "bookmaking").
- 4.16. Wagering through totalizators is in the form of a "unit" wager (a unit being a multiple of 50c or \$1, depending on the jurisdiction). The operator deducts a percentage of the total units wagered and the remainder is returned as winnings to players in multiples of the unit wagered. Unlike totalisators, bookmakers offer "win" and "place" bets at fixed odds. A gambler can wager any amount above a set minimum and will receive the bookmaker's odds at the time of making the wager. Those odds stand, irrespective of whether the bookmaker alters the odds at a later time.⁷
- 4.17. Totalizators are the main form of wagering in Australia, comprising approximately 96 per cent of wagering turnover in the year ended 2000-01.

⁵ Tab/Sky submission 23 October 2002 at paragraph 3.2

⁶ Tab/Sky submission 23 October 2002 at paragraph 3.3 (unless otherwise noted).

⁷ *Australia's Gambling Industries Inquiry Report – Productivity Commission Report #10 – 26 November 1999 at Box 2,3 at page 2.7.*

Approximately 94.2 per cent of totalizator wagering turnover is “off-course” betting (that is, the customer is not present at a racecourse when placing the bet).

- 4.18. In each State or Territory there is one operator, licensed or otherwise, authorised to conduct off-course wagering. These operators are authorised to conduct totalizator wagering, although in many States legislation has recently allowed them to expand into fixed-odds wagering.
- 4.19. Each off-course wagering operator was originally established as a statutory authority of the relevant State or Territory and known as the Totalizator Agency Board. However in recent years a number of State and Territory Governments have corporatised and/or privatised the off-course wagering operators. The following table sets out the status of the off-course wagering operator in each state:

Table 4.1 Off-course wagering operators in Australia

State	Status of off-course wagering operator
NSW	Tab Limited – a listed public company
Victoria	TABCORP Holdings Limited – a listed public company
Queensland	TAB Queensland Limited – a listed public company
Western Australia	Government Authority
South Australia	Wholly owned subsidiary of TAB Queensland Limited
Tasmania	Government Authority
ACT	Government Authority
Northern Territory	Wholly owned subsidiary of TAB Queensland Limited

- 4.20. The off-course wagering operators can accept off-course wagers from people within the State (through outlets in the relevant State or Territory as well as by telephone or internet) and from people interstate and overseas (through telephone or Internet accessed wagering accounts).

Wagering and racing⁸

- 4.21. Wagering in Australia is conducted primarily on three codes of racing: thoroughbred racing; harness racing; and greyhound racing. Wagering on other sporting events is relatively new in Australia and, although growing rapidly, comprises only a small proportion of total wagering turnover.
- 4.22. Tab Limited and Sky Channel claim that the predominance of wagering on racing events has resulted in an interdependent relationship developing between the racing industry and the off-course wagering operators in which:

⁸ Tab/Sky submission 23 October 2002 at paragraph 3.4 (unless otherwise noted).

- The racing industry supply the product (that is, stage the races) on which wagering operators conduct betting; and
- The off-course wagering operators provide the vast majority of the funding for the racing industry.

4.23. By way of example, the Tab Limited/Sky Channel Submission states that in respect of the year ended 30 June 2002, Tab Limited paid in excess of \$190 million in fees to the NSW racing industry, which represented in excess of 75 per cent of the total funding of the NSW racing in that period. The Tab/Sky Submission further notes that Sky Channel also provided a further proportion of the NSW racing industry's total funding by way of television rights fees.

Regulation of off-course wagering in NSW⁹

4.24. *Totalizator Act 1997 (NSW)*

Off-course wagering in NSW is governed by the *Totalizator Act 1997 (NSW)* which commenced on 6 March 1998. Inter alia, the Totalizator Act provides:

- Only the holder of a licence under the Totalizator Act may conduct a totalizator in NSW. This restriction however does not prevent interstate and international wagering operators receiving bets from people in NSW through telephone or Internet accessed wagering accounts.
- Tab Limited was granted an off-course totalizator licence in consideration of a licence fee of \$303 million and an on-course totalizator licence in consideration of a licence fee of \$5 million. Both licences have a term of 99 years.
- No other totalizator licence may be issued under the Totalizator Act until March 2013 (other than Tab Limited's totalizator licences and the on-course licences granted to racing clubs) unless Tab Limited's licences are cancelled or surrendered.
- Any holder of a totalizator licence (other than racing clubs in respect of their on-course totalizator licence) must have and give effect to commercial agreements with an entity nominated by certain major racing clubs as the 'racing industry' for the purpose of the licence. This, in effect, prevents NSW licensed totalizator operators "free riding" on the racing industry. Tab Limited has entered into the "Racing Distribution Agreement" with NSW Racing Pty Limited ("NSW Racing"), the NSW Thoroughbred Racing Board, Harness Racing New South Wales and the Greyhound Racing Authority. The Racing Distribution Agreement commenced on 6 March 1998.

4.25. *The Racing Distribution Agreement*

The Racing Distribution Agreement essentially provides for the following:

⁹ Tab/Sky submission 23 October 2002 at paragraph 3.5.

- The NSW racing industry is to conduct a minimum number of thoroughbred, harness and greyhound races in NSW each calendar year.
- Tab Limited is to conduct off-course totalizators on a minimum programme of thoroughbred, harness and greyhound races in NSW in each calendar year.
- Tab Limited is to pay the following fees to NSW Racing:
 - a “Product Fee” of 21.64 per cent of Tab Limited’s totalizator revenue from totalizators conducted by Tab Limited under a licence granted under NSW legislation;
 - a “Wagering Incentive Fee” of 25 per cent of the “Wagering Earnings” of Tab Limited in respect of its wagering activities conducted under a licence granted under NSW legislation; and
 - a “Gaming Incentive Fee” of 25 per cent of “Earnings” from the business conducted by Tab Limited under NSW linked jackpots licences, a NSW CMS¹⁰ licence and NSW licences to provide or finance gambling machines.
- NSW Racing, in certain circumstances, has an option to invest in new gaming or wagering businesses which Tab Limited may establish or acquire.

Distribution¹¹

4.26. Tab Limited’s wagering distribution network comprises:

- Agencies;
- PubTAB/ClubTAB;
- Telephone betting (PhoneTAB);
- Internet betting (RaceTAB and SportsTAB); and
- “on course” facilities.

4.27. As at 30 June 2002, Tab Limited had a total of 1930 wagering outlets throughout NSW, comprising 336 agencies, 990 PubTABs and 604 ClubTABs. Tab Limited state that 47 per cent of these outlets are located outside the Sydney metropolitan area.

PubTABs¹²

4.28. A PubTAB is operated in the licensed premises from which the hotel conducts its ordinary business activities and is conducted as an ancillary activity to the main business activities of the hotel.

¹⁰ Under the *Gaming Machines Act 2001* (NSW) all gaming machines in NSW hotels and registered clubs are required to be connected to the authorised centralised monitoring system (CMS) operated by Tab Limited.

¹¹ Tab/Sky submission 23 October 2002 at paragraph 3.6.

¹² Tab/Sky submission 23 October 2002 at paragraph 3.7.

- 4.29. The fittings and fixtures within the premises for the PubTAB are provided by the hotel. Tab Limited has the right to approve proposed fittings and fixtures but hotels have general control over the scale and nature of the fittings. As a result, PubTAB outlets differ markedly, from large self-contained rooms to relatively small areas not distinguished from the bar and other areas of the hotel.
- 4.30. PubTAB operators receive a commission based on turnover of the PubTAB. Commission structure and rates are identical for all PubTAB and ClubTAB outlets. Prior to privatisation, commission was paid to PubTAB and ClubTAB outlets at a rate of 2 per cent of turnover, regardless of the level of turnover. Commission rates have been revised on three occasions since privatisation. In summary, the changes were:
- In the year ended 30 June 2001, there were a number of PubTAB outlets achieving turnover of less than \$7,500 per week. Tab Limited has advised it was of the view that it was not economic for Tab Limited to retain these low turnover outlets on the basis of the then existing commission structure. The commission structure was revised to pay no commission for PubTAB and ClubTAB outlets averaging turnover of less than \$7,500 per week.
 - Commission rates were changed in the new standard form of agreement. Under the new structure, totalizator turnover attracted commission of 1.125 per cent where average turnover was less than \$7,500 per week and 2.125 per cent where average turnover was more than \$7,500 per week. Of the 0.125 per cent increase in commission rates:
 - 0.05 per cent was expressly provided to offset the costs of consumables for the Daily Form Service which hotels and clubs are responsible for under the new agreement.
 - 0.05 per cent was expressly provided to offset an increase in fees for the Sky Channel commercial service. It was expressly stated that this 0.05 per cent would be deducted if there was a reduction in Sky Channel fees.
 - The remaining 0.025 per cent was not expressly attributed.
 - Following a reduction in Sky Channel fees in May 2002, Tab Limited reduced commission rates for PubTABs and ClubTABs by 0.05 per cent with effect from 1 July 2002.
- 4.31. In addition to commissions, Tab Limited advise it also provides a number of benefits which are not required under the agreement with PubTAB and ClubTAB operators. Tab Limited advise these benefits include incentive schemes offered on a non-discriminatory basis.
- 4.32. Tab Limited uses a standard form agreement for all PubTAB outlets. This agreement is identical to that used for ClubTABs. Tab Limited advise that it engaged in an extensive consultation process with the AHA in relation to the current terms of the standard form agreements at the time it was revised in 2001.

Sky Channel¹³

- 4.33. Sky Channel is a satellite television broadcaster that telecasts race meetings and other sporting events throughout Australia and internationally. Sky commenced operations in 1986.
- 4.34. Sky Channel has extensive rights to broadcast (in many cases exclusively) Australian thoroughbred, harness and greyhound racing. Sky Channel submits that it covers more than 100 race meetings per week from around Australia and broadcasts approximately 54,000 individual races each year.
- 4.35. Sky Channel broadcasts to commercial premises, being primarily hotels, clubs and TAB commercial agencies. In most cases, the commercial premises also offer wagering services.
- 4.36. Sky Channel submits that its competitors in offering subscription television entertainment to hotels and clubs include FOX Sports, Austar and various resellers of international satellite channels, including sports channels such as ESPN.
- 4.37. In 1998, Sky Channel commenced operations in residential pay TV as a channel supplier to the pay TV carriers including Austar, Foxtel and Optus. Sky Channel therefore currently creates and distributes two separate services: the "SKY Channel" commercial service, which Sky Channel broadcasts to hotels, clubs and TAB outlets; and the Sky Racing domestic service, which is provided by Sky Channel to the pay TV carriers and supplied by them to residential subscribers.
- 4.38. The Sky Channel service is part of the entertainment offered by hotels and clubs to their customer. Sky Channel submitted that the service assists in attracting and retaining customers and associated revenue. Sky Channel further submitted that for hotels and clubs that offer wagering facilities such as PubTABs and ClubTABs, the availability of racing coverage through the Sky Channel service assists in enhancing wagering turnover.
- 4.39. Sky Channel submitted that most hotels acquiring the Sky Channel service have wagering facilities. While the numbers vary, Sky Channel advised that the percentage of hotels and clubs who subscribe for the Sky Channel service and who have a PubTAB or ClubTAB facility is in the order of 90 per cent.
- 4.40. Sky Channel uses standard form contracts for hotels and clubs and the same standard form contract is applied nationally. The standard form contract has been used for many years and the current form has been in use since April 1998.
- 4.41. The standard form contract provides for a nominal five year term and provides that hotels and clubs may terminate at any time within that five year term on six months' notice.

¹³ Tab/Sky submission 23 October 2002 at paragraph 4.1, 4.2, 4.3 and 4.4.

- 4.42. Sky Channel charges hotels and clubs for the Sky Channel service on the basis of a standard rate card which is publicly available. The same rate card is applied nationally, except in Western Australia where a discount of 25 per cent is applied in recognition of the impact of time zone differences on the value derived by Western Australian hotels and clubs from the service.
- 4.43. Under Sky Channel's rate card, the fees for the Sky Channel service are determined by reference to the Annual Bulk Beer Literage and, for those outlets with PubTAB or ClubTAB facilities, wagering turnover. Different scales apply depending upon whether or not the hotel or club has wagering facilities.
- 4.44. The price under the rate card system may be adjusted in accordance with changes in turnover but Sky Channel submitted that, in practice, the fees are fixed at the start of the contract and do not adjust during the contract term other than consumer price index adjustments. Sky Channel further submitted that turnover information is generally only sought at the commencement of the contract term and in support of reductions in fees.

5. Statutory test

- 5.1. Application A90837 was made under sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA or that might constitute an exclusionary provision within the meaning of section 45.
- 5.2. In relation to the arrangements that might substantially lessen competition, the Commission may grant authorisation if the test set out at sub-section 90(6) of the TPA is met, namely:
 - the provisions of the subject arrangements would result, or 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 result, or be likely to result, from the proposed arrangements.
- 5.3. In relation to the arrangements that might constitute exclusionary provisions the Commission may grant authorisation if the test set out at sub-section 90(8) of the TPA is met namely where it is satisfied that the proposed contract, arrangement or understanding would result or would be likely to result in such a benefit to the public that it should be allowed to be made and given effect to.
- 5.4. In the past, the Australian Competition Tribunal has observed that the tests required by subsections 90 (6) and 90 (8) are, in substance, the same.¹⁴ Accordingly, the Commission will apply the same test in relation to both.
- 5.5. In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements or conduct and the public benefits arising from the arrangements or conduct, weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation, or grant authorisation subject to conditions.
- 5.6. If this is not the case, the Commission may refuse authorisation or, alternatively, in refusing authorisation, indicate to the applicant how the application could be constructed to change the balance of detriment and public benefit so that authorisation may be granted.
- 5.7. Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.
- 5.8. Section 88(13) of the TPA provides that an application for authorisation for specific arrangements may be expressed to be made also in relation to other arrangements that will be in similar terms. The Commission may grant a single authorisation in relation to all such arrangements.

¹⁴ *Re Media Council of Australia (No 2)* (1987) ATPR ¶40-774 at 48,418.

6. Summary of the Applicant's submissions

- 6.1. AHA NSW provided the Commission with three submissions as detailed at paragraph 2.5 namely:
- The first AHA NSW submission: 16 July 2002
 - The second AHA NSW submission: 13 September 2002
 - The third AHA NSW submission: 13 December 2002
- 6.2. The first AHA NSW submission was provided at the same time that AHA NSW first lodged its application. The second and third AHA NSW submissions were provided in response to either queries from the Commission or interested parties, or in response to opposing submissions from interested parties.

Public benefits

- 6.3. In its submissions, the Applicant identifies a number of public benefits which it argues will arise from both the collective negotiation and collective boycott arrangements. The Applicant submits that these benefits outweigh any possible public detriment resulting from the arrangements.
- 6.4. In summary, the following public benefits were claimed by the Applicant on pages 6 and 7 of the first AHA NSW submission:
- Ensuring the viability of small business operations, particularly in rural and regional areas, thus ensuring competition in those areas.
 - Assisting the efficiency and competitiveness of small business by:
 - Facilitating the availability of information on operational and pricing issues;
 - Limiting transaction costs in negotiation of supply agreements;
 - Freeing up small business operators to focus on increasing the competitiveness of their business;
 - Fostering industry harmony; and
 - Promotion of equitable dealings in the market.
 - Providing countervailing/bargaining power to small business in dealing with large and powerful suppliers.
 - Promotion of industry cost savings, potentially resulting in contained or lower prices at all levels in the supply chain.
 - Supply of better information to suppliers to permit more informed choices in their dealings with small business.
 - Equity in the market.
 - Collective negotiation of a common system is a public benefit.
- 6.5. The Applicant identified the following additional public benefits at page 4 of Attachment 6 of the second AHA NSW submission: