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28 February 2003

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By courier

FILE No: C2002/1081-02
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MARS/PRISM:

Dear Ms Dadd

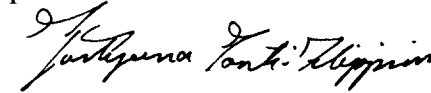
Australian Hotels Association (New South Wales) Authorisation Application A90837

We refer to our letter to you dated 26 February enclosing a joint submission by Tab Limited and SKY Channel Pty Limited (**SKY**) in response supplementary submissions made by Australian Hotels Association (NSW) (**AHA**) dated 13 December 2002, to its application for authorisation A90837.

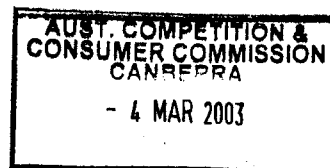
As discussed with you on 25 February 2003, some of the material in the joint submission is subject to claims of confidentiality.

Please find enclosed a masked versions of the joint submission for publication on the public register.

Yours faithfully
Freehills
per:



Justijana Tonti-Filippini
Solicitor



**Submission in response to
supplementary submission dated 13
December 2002 by Australian Hotels
Association (NSW) re application for
authorisation A90837**

Tab Limited

and

SKY Channel Pty Limited

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Reference

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1 Introduction

This is a joint submission by Tab Limited and Sky Channel Pty Limited (**SKY**) responding to the supplementary submission by Australian Hotels Association (**AHA**) dated 13 December 2002 (**the AHA submission**) relating to application A90837.

The joint submission and its annexures address the factual allegations and arguments made in the AHA submission. A failure specifically to address in this document allegations by AHA is not to be taken as any acceptance or acknowledgment of the allegation by Tab Limited or SKY.

1.1 Overview of submission

This joint submission addresses the legal merits of the arguments raised in the AHA submission. Assertions of fact and the economic merits of the arguments proffered in the AHA submission are addressed in the detailed annexures to the joint submission.

The joint submission is structured as follows:

- Brief overview of legal issues raised in the AHA submission and the response of Tab Limited and SKY to those issues.
- An introduction to the detailed annexures to this submission.

1.2 Annexures

The joint submission is supported by two detailed and separate annexures:

- Detailed paper by Tab Limited addressing a number of the factual errors made in the AHA submission. In addition to the matters specifically addressed in this annexure, other factual errors exist in the AHA submission. In respect of many of those, the correct factual position is set out in the joint submission of Tab Limited and SKY dated 23 October 2002 ("**initial Tab Limited/SKY submission**").
- The NECG report on the economic merits of AHA's assertions in the AHA submission.

2 Legal issues raised in the AHA submission

2.1 Arguments as to anti-competitive detriment

Hotels do not compete

The conduct sought to be authorised by AHA is per se illegal. AHA has not shown that the detriment resulting from the conduct will be outweighed by public benefit. At page 3 of the AHA submission, AHA asserts that no anti-competitive detriment will result from authorisation.

AHA claims that no anticompetitive detriment will result from authorisation because AHA members do not compete with one another. This claim contradicts other claims made in the AHA submission, such as those on pages 3 to 4 and 29 of the AHA submission that are made on the basis that hotels do compete with one another. On page 29 of the AHA submission it is stated that hotels compete with each other and with clubs to some degree.

AHA states at pages 3 and 4 of the AHA submission that if the conduct is authorised hotels may compete on facilities (quality). AHA does not explain how authorisation could provide an incentive for competitive rivalry.

It is argued on page 3 of the AHA submission that a reduction in SKY fees (available by virtue of authorisation) will be used to provide better services and facilities. AHA does not articulate how a minor increase in hotel revenue/reduction in costs would translate into lower prices/increased services for patrons, particularly given the differentiated nature of the competition faced by individual hotels.

For the assertions on pages 3 to 4 and 29 of the AHA submission discussed above to be true, hotels must be competitors, and thus some anti-competitive detriment must result from the authorisation. Conversely, if the statements are not true, then the public benefits claimed at pages 3 to 4 and 29 of the AHA submission, in regard to the positive impact of authorisation upon the quality of service provided to gambling patrons by hotels, must be false.

2.2 Public benefits claimed by AHA

In relation to the public benefits claimed to flow from the conduct sought to be authorised by AHA, Tab Limited and SKY refer to pages 21 to 30 of the initial Tab Limited/SKY submission.

Reducing the likelihood of harsh/unreasonable contractual terms

AHA claims that in the Commission's determinations relating to collective negotiation applications in the dairy, newsagency, and chicken growing industries, it was recognised that a reduction in the likelihood of harsh/unreasonable contractual terms, and an improvement in the quality of advice provided to newsagents, dairies and chicken growers, were public benefits likely to result from authorisation. At pages 7 to 8 of the AHA submission, AHA compares its application with these authorisations, and claims that the same public benefits will result from the conduct sought to be authorised for AHA.

The public benefits referred to on pages 7 and 8 by AHA were not cited by the Commission to be of great significance in granting the authorisations in the dairy, newsagency, and chicken growing industries. The dominant public benefits (in context) and factual justification for authorisation stated by the Commission in the chicken growing, dairy and newsagency industries are not relevant or analogous to the current AHA application.

The newsagents' authorisation was fact specific and was granted for a very limited time period. The dairy and chicken growing industry authorisations cited by AHA were ultimately agreed to by the majority of interested parties, and were granted for the dominant purpose of smoothing the transition from a regulated to an unregulated industry. Unlike dairy farmers and chicken growers, AHA members are not making a transition from a regulated to a deregulated industry. In addition the subject matter of the authorised negotiations for dairy farmers and chicken growers related to the entire business of those parties, in highly capital intensive industries. In contrast, PubTAB operations and SKY are a minor and ancillary part of the overall hotel operation, and the required capital commitment from hotels is not large.

In the dairy farmers (ADFF) authorisation, the Commission imposed conditions upon the authorised conduct due to concerns that authorisation may result in a single national milk price. Specifically, farmers collectives were only permitted to comprise farmers from specified regions, so that processing companies were able to source milk from competing regions. Unlike the ADFF, AHA appears to be seeking to negotiate state-wide rates for SKY Channel and PubTAB commissions.

Tab Limited and SKY note that should either of them seek to impose harsh or unreasonable contractual terms upon AHA members, the appropriate remedy lies in other parts of the *Trade Practices Act* and other New South Wales statutes, not in the conduct sought to be authorised.

Improving the quality of advice provided to AHA members

Whilst reiterating its claim in regard to the provision of better advice to hotels as a result of authorisation (at pages 7 and 8), AHA has not provided any evidence that the legal and industry advice that it provides to members will be of a better quality if it is granted authorisation to engage in collective negotiations with Tab Limited and SKY.

Tab Limited and SKY refer to pages 22, 23 and 25 of the initial Tab Limited/SKY submission, and note that legal and industry advice can be provided by AHA in the absence of authorisation, and without breaching the *Trade Practices Act*. Indeed, the AHA did provide legal advice to hoteliers in relation to the adoption of a new standard form PubTAB agreement in 2001.

Industry harmony

Referring to the CSR authorisation, it is asserted at page 25 of the AHA submission that the Commission has previously accepted industry harmony as a public benefit, and that such a benefit will result from the conduct sought to be authorised by AHA.

AHA has provided no evidence that authorisation of price fixing and primary boycotts will lead to industry harmony. By its very nature, this conduct would be more likely to destroy industry harmony.

Further, the CSR authorisation may be distinguished from the AHA's application on the basis that the CSR authorisation involved industrial relations issues and related to concrete truck drivers (independent contractors) whose sole source of income was derived from carting CSR products.

2.3 AHA assertions in regard to price fixing

It is asserted at pages 6 and 24 to 25 of the AHA submission that authorisation will not lead to price fixing. AHA has not shown what mechanisms will be put in place to prevent price fixing from occurring. AHA does not appear to understand the elements of section 45A of the *Trade Practices Act*, as to claim that price fixing will not result from authorisation is to claim that AHA will not engage in conduct that will fix the components of price or price-output dimensions.

The assertion that price fixing will not result from the conduct sought to be authorised is inconsistent with AHA's argument that such conduct will reduce the price of SKY Channel services, and the suggested SKY pricing formula articulated on page 18 of the AHA submission.

2.4 Form of negotiations

AHA states (at page 5) that the form that collective negotiation takes will depend upon the form of authorisation given by the Commission. The onus is on AHA to articulate the particulars of the proposed conduct sought to be authorised under the contract, arrangement or understanding.

Tab Limited and SKY refer to authorisations of collective conduct in the dairy industry in recent years, which required that the terms of the contract, arrangement or understanding, and the limitations placed upon the proposed conduct, be clearly articulated. In the dairy authorisation (ADFF A90782), what could and could not be collectively negotiated, and the composition and demarcation of separate bargaining groups, was also clearly stated. Dairy farmers were not permitted to negotiate as a nation/state-wide collective with dairy processors, and separate, regional bargaining groups were required.

Unlike the ADFF, AHA has not clearly articulated the terms of the proposed contract, arrangement or understanding that is sought to be authorised, the limitations placed upon the proposed conduct, or the composition or existence of separate bargaining groups.

2.5 Other issues

The constitution of bargaining groups

In response to concerns raised in the initial Tab Limited/SKY submission, AHA asserts that if authorisation is granted, bargaining groups will not be dominated by large chains of hotels and infra-marginal hotels (see pages 19 to 20 of the AHA submission).

Tab Limited and SKY note that there is nothing either in the poorly articulated terms of the contract, arrangement or understanding, or in the AHA submission, to show that this would be the case. The constitution of house committees is no safeguard against the domination of the bargaining groups by large chains of hotels and infra-marginal hotels. Indeed, the comments in the AHA's submission that its primary concern is with smaller hotels is inconsistent with its statements

during the 2001 consultation process where in a letter to Tab Limited dated 14 March 2001, the AHA stated "However first and foremost the Association must protect the interests of all of its members – from the largest to the smallest." A copy of that letter is contained in Annexure I to the Tab Limited background paper which forms part of the initial Tab Limited/SKY submission.

Allegations in regard to responsible gambling

AHA asserts that more responsible gambling and better monitoring of problem gambling will be a public benefit that will result from the conduct sought to be authorised. Further, AHA alleges that Tab Limited does and has done nothing to monitor or address responsible gambling and problem gambling, and has not consulted with AHA in regard to these issues. Tab Limited vigorously contends that such contentions are wholly false and, in addition, considers that they are defamatory. These allegations are addressed in more detail and evidence to refute them is provided in the factual corrections annexure to this joint submission.

Tab Limited has requested that AHA withdraw its allegations in regard to responsible gambling and problem gambling (including consenting to the removal of those submissions from the Commission's public register) and that AHA submit a revised document to the Commission omitting the false and defamatory material.

3 Conclusion

Contrary to AHA's representations, the conduct sought to be authorised is significantly different from the status quo. At present, AHA and its members do not collectively boycott and cannot do so without breaching the *Trade Practices Act*. Further, the analogies sought to be drawn with SKY's negotiations with interstate wagering organisations are not correct and not relevant. SKY does not negotiate with individual TAB agency operators in any State.

AHA has not raised any new arguments to counter concerns raised in the initial Tab Limited/SKY submission, or introduced any new evidence in support of the public benefits that it asserts will flow as a result of authorisation.

Tab Limited and SKY reiterate the conclusions contained in the initial Tab Limited/SKY submission, regarding the public benefits and detriments likely to arise in the future with the proposed conduct versus the future without the proposed conduct.

Further comments on the factual errors and assertions of fact made in the AHA submission are provided in the paper by Tab Limited annexed to this joint submission, and in the initial Tab Limited/SKY submission. An assessment of the economic merits of the assertions in the AHA submission is provided in the NECG report annexed to the joint submission.

AHA (NSW) Application for Authorisation

NECG Comments on Spier Consulting Supplementary Submission

1 Introduction

Having reviewed the Spier Consulting Supplementary Submission, filed on behalf of the AHA (NSW), this note provides some comments, particularly pertaining to matters of economics, on the issues raised therein.

As a general comment, we would reiterate the conclusions contained in our Report dated 23 October 2002, regarding the public benefits and detriments likely to arise in the future with the proposed conduct versus the future without the proposed conduct:

"In conclusion, there is no economic basis to justify authorising the AHA (NSW) to engage in collective negotiation and primary boycott activity in relation to Tab Limited commissions and SKY Channel fees. The analysis above has demonstrated that the net result of such conduct would likely be:

- some decrease in productive efficiency associated with any switching to alternative means of distributing Tab Limited's wagering product;
- a transfer of income from Tab Limited and SKY Channel to infra-marginal hotels;
- an increase in transactions costs; and
- a reduction in the output and consumption of racing and wagering in NSW.

Authorisation of mere transfers of income from one group in society to another would reward rent-seeking activity and encourage further wastage of resources in identifying and exploiting further rent-seeking opportunities. Accordingly, such conduct should only be authorised where there are clear public benefits from doing so. In this instance the opposite is likely to be the case. There is no evidence

that the transfer of income to hotels would be passed through to consumers and there are likely to be real public detriments associated with productive inefficiency and under investment in the racing and wagering industry. The goals of economic efficiency and progress will be undermined in the future with the proposed conduct as compared to the future without the proposed conduct." (NECG Report, pp.30-31)

There is nothing in the Supplementary Submission which causes us to change our views in this matter. However, the Submission does display a failure to appreciate the nature and logic of the arguments made in our Report and it is important to ensure that those arguments are properly understood by the Commission. The following sections attempt to deal with the economic issues raised in the Supplementary Submission (and issues conveniently ignored) on a topic by topic, rather than line by line, basis.

2 Allocative Efficiency

In our Report, we argued that despite the exclusivity of Tab Ltd's totalizator licence and SKY Channel's broadcasting rights, the distribution of these services is not characterised by allocative inefficiency, at least in a second best sense, because:

- Tab Ltd is subject to "price" control (a maximum take-out ratio) which encourages it to maximise sales and distribution of their products, as long as additional outlets cover their avoidable costs (to Tab Ltd, including any opportunity costs of lost sales from other outlets); and
- SKY Channel utilises a system of price discrimination, based on PubTAB turnover and beer literage, reflecting the value of the service to individual hotels, in order to maximise sales and returns to its essentially fixed cost service, again subject to individual sites covering the avoidable costs to SKY Channel of supplying that site (which requires a minimum fee).

The subtlety of these arguments appears to be lost in the AHA submission, which takes the position that a "monopoly" supplier necessarily restricts output and distribution. However, this is not the case. Where a monopolist is either subject to price controls (as is the case for Tab Ltd) and/or is able to price discriminate between customers who are unable to engage in arbitrage (as in the case for SKY Channel), this conclusion does not follow.

The AHA submission appears to take the position that all hotels should have some right to a PubTAB and SKY Channel service, regardless of whether that supply covers incremental costs and hence increases allocative efficiency. Such an argument has no basis in economics and no place in justifying an application for authorisation of collective negotiations, which would not guarantee supply in any case.

Furthermore, the AHA submission makes much of claims that combined PubTAB/SKY Channel operations are not profitable on a stand alone basis for most hotels. Regardless of the veracity of this claim, it is strictly irrelevant. There is a complementarity between wagering and hospitality services, such that the hotels sales of food and beverages increase as a result of having PubTAB and SKY Channel services on the premises. This is why hotels are so keen to obtain access to them, even where they are not profitable on a stand alone basis, as the AHA elsewhere admits when it says that these services are essential to meet competition. Tab Ltd also benefits from this complementarity, which has allowed it to increase the distribution of its services through the rationalisation of shopfront premises and agencies and the increased use of hotels and clubs as distribution agents.

As to the likely impact of the proposed conduct on allocative efficiency, the AHA appears to take the view that collective negotiations would not have any adverse impact on allocative efficiency because:

- Members do not compete with each other; and
- Members can opt out of collective negotiations.

As to the first point, we note that this appears to contradict their proposition that reductions in fees and increased commissions will be passed on to hotel patrons through fierce competition for clientele. As discussed in our Report, we believe a correct assessment would be that the degree of competition, in both product and geographic space, varies considerably between hotels, depending on their "closeness", in both dimensions, to adjacent hotels. While it is true that hotels face a degree of competition from other suppliers of hospitality services, particularly clubs, the services they offer are clearly differentiated and are able to sustain significant price differentials.

As to the second point, our analysis clearly takes account of this point. However, we disagree with the AHA's assertion, with no supporting arguments, that the hotels most likely to opt out are the larger chains. Our analysis distinguishes between "marginal" hotels (those paying the minimum SKY fee and/or just meeting Tab Ltd's threshold rate of return for a PubTAB) and "infra-marginal" hotels (those hotels paying higher fees and/or having higher

PubTAB turnover). Only for the latter group is there scope to decrease SKY fees and/or increase PubTAB commissions, by transferring income from SKY Channel and Tab Ltd to the hotels. There is no such scope for the marginal hotels, since any such transfer would result in those hotels not covering their incremental costs and hence they would lose access to the services. Accordingly, it is the latter group of hotels who are most likely to opt out of collective negotiations and accept the standard terms and conditions offered by Tab Ltd and SKY Channel. This is the reason we concluded that in the short run there is unlikely to be any significant allocative inefficiency arising from the proposed conduct.¹

However, in the long run, this is not the case. The racing industry is organised on a not-for-profit basis and is substantially funded by the wagering industry, and to a lesser extent by fees obtained for broadcasting rights, principally from SKY Channel. The quantity and quality of racing is a major factor affecting the attractiveness of the wagering product. As discussed above, as a price regulated exclusive operator of totalizator services, Tab Ltd faces

¹ In its Supplementary Submission, the AHA suggests one possible price scheme for SKY Channel, whereby the total revenue currently derived from hotels would be redistributed according to a formula through which 50 per cent of that revenue would be obtained as a fixed fee from hotels and 50 per cent in proportion to individual hotels PubTAB turnover. The lowest fees currently charged for SKY Channel are less than the minimum fee that would be charged under this proposal, namely $(1/n) \cdot 0.5TR$, where n is the total number of hotels currently receiving SKY and TR is the total revenue received from them. Accordingly, this proposal will necessarily increase the fees charged to marginal hotels. It would also result in a redistribution of fees across infra-marginal hotels because the proposed scheme only reflects one element of "ability to pay" as compared to the current pricing scheme which uses two. If the hotels for whom fees increase were to drop their SKY Channel service, SKY would lose revenue, which would either have to be recouped from the better off infra-marginal hotels or result in lower rights fees being paid to the racing clubs, with repercussions for the quantity and quality of racing, discussed above. More likely, these hotels would continue to accept SKY Channel at the existing lower fee level, still resulting in a shortfall of revenue to SKY with quantitatively smaller but qualitatively similar impacts on infra-marginal fees and/or racing revenues. If the shortfall is recouped from infra-marginal hotels, it is likely that after a number of such iterations the fee structure would return to its current form.

incentives to maximise turnover, which will be promoted by increasing the quantity and quality of racing (to the extent that the increased expenditure is covered by increased revenues). Indeed this is a requirement written into the Racing Distribution Agreement. Hotels do not face the same incentives. PubTAB commissions are a relatively minor part of their income, as demonstrated by the ABS data in our Report, and contrary to assertions made by the AHA. Rather, they can maximise their returns from wagering by increasing the exploitation of a declining pool of wagerers. A transfer of income from the TAB Ltd and SKY Channel to hotels will reduce funding for the racing industry, initially through a reduction in the "Wagering Incentive Fee", calculated at 25 per cent of TAB Ltd's net Wagering Earnings; and subsequently through a reduction in TAB Ltd's revenue and hence the "product fee", as decreased funding to racing reduces the attractiveness of wagering, and a reduction in broadcasting fees that SKY Channel can afford to pay to the racing clubs.² This will reduce the attractiveness of wagering, with adverse impacts for TAB Ltd, but not necessarily for the hotels, who are taking a higher percentage of turnover as commissions and paying less for SKY Channel, albeit on a reduced base of wagerers. In this sense, the hotels, unlike TAB Ltd, are in a position to increase their returns from wagering by "giving less and charging more", clearly an exercise of market power by the suppliers of wagering distribution services, with long run adverse consequences for allocative efficiency.

Finally, the AHA suggests that hotels are treated inequitably compared to pay television services, which currently receive the SKY Racing channel free. This is not a relevant comparison. Just as SKY Channel in hotels promotes wagering and other consumption in the hotel and hence the hotel is prepared to pay for it, so SKY Racing promotes wagering by telephone and over the internet and hence Tab Ltd and other off-course totalizator operators

² The AHA claim that SKY Channel has failed to pass through reductions in rights fees paid to the racing clubs which have recently been achieved. We understand that this reduction, principally in Victoria, reflected some clawing back of large increases in fees paid for rights in previous rounds of contract renewals, which proved to have overvalued those rights. There is no reason to expect such a reduction to be passed through, since it does not affect the incremental cost of supplying an additional outlet with the service. However, fees were in fact reduced for hotels and clubs nationally, as a gesture of goodwill and to honour previous public statements made by senior management, with no expectation that the number of customers would increase.

are prepared to pay for it. Since SKY Racing has been introduced, pay television distributors have found that SKY racing benefits their sales and hence it can be expected that they will be prepared to pay something for it.

3 Transfers of Income

As discussed in our Report, we consider the major short term impact of the proposed conduct will be a transfer of income from Tab Ltd and SKY Channel to the infra-marginal hotels. In itself, this is irrelevant for economic efficiency. In addition, such a transfer is likely to promote the wasteful use of resources in rent seeking activity more generally throughout the economy and in defensive moves to protect rents by those to whom they currently accrue. This is clearly not desirable from the standpoint of economic efficiency.

The test for authorisation is not economic efficiency as such, but “public benefit” and it may be thought that if income is transferred from producers to consumers, this could be seen as a public benefit. The AHA argues that income transferred to hotels will eventually end up in the hands of hotel patrons through improved services and lower prices, resulting from the intense competition between hotels. However, as discussed above, this claim of intense competition contradicts the claim that hotels do not generally compete with each other and hence there will be little impact on competition from the proposed conduct. Moreover, as discussed in our Report, there are good reasons to question whether the transferred income would end up with hotel patrons. It would represent a very small share of hotel income and costs and would have no impact on the marginal cost of beer or food sold by the hotel. Recent experience with excise reductions, which did affect the marginal cost of beer, suggest there is good reason to question the assertion that hotels will pass through their gains to patrons.

4 Productive Efficiency and Innovation

As discussed in our report, to the extent that Tab Ltd is able to substitute other distribution channels for PubTABS, an increase in hotel commissions will likely result in some inefficiency in productive (distribution) efficiency. This argument is uncontested by the AHA.

However, the AHA do suggest that Tab Ltd should pass through (all) the cost saving arising from innovation to hotels. Such a proposition has no basis in the promotion of economic

efficiency. In fact it is quite the reverse. The ability (or expectation) to increase profits is precisely what creates the incentive for firms to innovate. These gains will be passed through to consumers over time as rivals catch up and competition (actual or potential) drives down prices. As the Commission is well aware, the need to provide an incentive to innovate and reduce costs has been a major factor underpinning debate about the appropriate form of price regulation for utilities. Tab Ltd faces a "price cap" (maximum takeout rate) which does provide the necessary incentive for innovation and cost reduction. If that innovation largely accrues as increased profits to Tab Ltd, it is open to the Government to change the price cap. However, with Tab Ltd's exclusive licence being for a limited period, and limited in practice due to the availability to NSW residents of wagering services offered by interstate and overseas operators, they do face some degree of actual and potential competition. Furthermore, where innovation and cost reductions occur at the margin, even a monopolist would be expected to pass through a proportion of cost reductions, but not all of those reductions, in order to maximise profits. Accordingly, where, for example, the incremental cost of servicing an additional PubTAB are reduced, perhaps through lower cost terminals, TAB Ltd will find it profitable to expand its network of PubTAB outlets or continue to maintain PubTAB outlets which do not currently provide TAB Ltd with an adequate return based on the current arrangements. Indeed, Tab Ltd is currently experimenting with just such lower cost (and smaller) terminals suited to smaller outlets.

5 Transactions Costs

The AHA argues that collective negotiation will reduce transactions costs. If this were the case, it would certainly represent a saving in real resources and promotion of economic efficiency, which might represent a public benefit, depending on other likely effects. However, as discussed in our Report, there is no basis for reaching such a conclusion.

Currently Tab Ltd and SKY Channel collect information from individual hotels to determine the viability of proposed new PubTAB outlets, the commissions due to hotels and the SKY Channel fees due. The first of these would still be necessary under any scheme of collective negotiation. The second would also still be required, unless hotels were to receive a flat commission, unrelated to their PubTAB turnover, which would have the effect of reducing the distribution of PubTABs, by making marginal hotels unviable, and eliminating the incentive for hotels to promote wagering. The third of these, which only occurs once every five years when the SKY Channel licence is renewed, would also continue unless a flat fee

was to be introduced, which would have the effect of reducing the distribution of the service and allocative efficiency, as explained in our Report.

What the AHA refers to as “sham” individual negotiations with hotels are not negotiations at all. Tab Ltd and SKY Channel each determine their commissions and fees unilaterally, following discussions with the AHA. The only “negotiations” with individual hotels relate to the collection of data on TAB turnover and beer literage and determining the viability of proposed new outlets (or where there are exceptional circumstances such as major renovations). As discussed above, these costs could only be reduced by introducing flat fees and commissions, at the expense of allocative efficiency.

It is far more likely that transactions costs will increase under the proposed conduct, as arguments over the distribution of rents intensify, both between the AHA and Tab Ltd and between different groups of hoteliers.

6 Conclusion

In conclusion, there is nothing in the supplementary submission made by Spier Consulting on behalf of the AHA (NSW) on 13 December 2002 which provides a justification for the authorisation of the proposed conduct. Our analysis of the likely consequences of that conduct remain the same:

- A transfer of income from Tab Ltd and SKY Channel to the “infra-marginal” (wealthier) hotels;
- Some short term reduction in productive (distribution) efficiency as a result of Tab Ltd switching to less efficient distribution channels;
- An increase in transactions costs; and
- A long term reduction in allocative efficiency caused by the reduction in funding for the racing industry.

Notes on supplementary material lodged by AHA with ACCC in letter from Spier Consulting dated 13 December 2002

The supplementary material contained in the letter from Spier Consulting dated 13 December 2002 contains a number of incorrect statements. This is not an exhaustive response to all of the incorrect assertions of fact in the AHA's material and the fact that an assertion is not specifically addressed in this document does not constitute any acceptance of the correctness of that assertion.

Examples are as follows:

"Further the TAB provides a range of services to hotels such as ... KENO – the soon to be introduced numbers game": page 3.

"TAB is the exclusive licensee of a future keno style numbers game and it is expected that this will soon be made available to hotels and clubs": page 4.

"TAB/SKY having the exclusive right to provide Hotels with the following ... the keno style numbers game of which TAB is the NSW licensee": page 10 (plus an additional reference to a keno style numbers game in the final paragraph of page 10).

Tab Limited does not have any licence to conduct keno or any other numbers game.

Currently in NSW:

- keno in registered clubs is conducted by entities associated with the registered club movement and Jupiters Limited; and
- no licence to conduct keno in NSW hotels has been granted.

At the time of Tab Limited's privatisation, the NSW Government did state that it would not "stand in the way of a hotels numbers game provided it involves Tab Limited". However the nature of any involvement by Tab Limited was not prescribed by the NSW Government.

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“The current market structure in NSW is that TAB/SKY dominates the gambling industry.”: page 4.

Tab Limited does not dominate the gambling industry in NSW. While Tab Limited is the only licensed off-course wagering operator in NSW, wagering comprises only a small proportion of total gambling turnover and revenue in NSW.

As illustrated by the industry information contained on pages 3-6 of the Tab Limited background paper attached to the initial Tab Limited/SKY submission, total wagering turnover and revenue in NSW (both through Tab Limited and bookmakers) are comparable to that of Sky City casino in Sydney (owned by TABCORP) and both pale in comparison to poker machines which comprise about 70-75% of total gambling expenditure in NSW. This dominance of poker machines over other forms of gambling is widely acknowledged and was recognised in the Productivity Commission Report on Australia’s Gambling Industries.¹

The centralised monitoring system is a quasi-regulatory function under which Tab Limited monitors gaming machines in hotels and registered clubs to assist in assessment of gaming machine taxes and to monitor integrity events specified by the Minister. Tab Limited receives a regulated return for the conduct of the centralised monitoring system, with the amount of the fee being determined by the Minister in consultation with the Treasurer and the NSW Independent Pricing and Regulatory Tribunal.² Tab Limited is subject to strict restrictions on the use or disclosure of information obtained through the operation of the centralised monitoring system.

In terms of the statewide linking of gaming machines, as at 24 February 2003:

- Tab Limited had approximately 1,000 gaming machines in NSW registered clubs connected to its linked jackpot products. Tab Limited’s net revenue from these gaming machines is a fixed daily amount per machine, with the amount varying between clubs based on the number of gaming machines which the relevant club agrees to connect to the linked jackpot game; and
- Tab Limited was not operating any linked jackpot games in NSW hotels and had only received approval on 21 February 2003 for a field trial of its first linked jackpot game for NSW hotels.

By comparison, one single registered club, Penrith Panthers currently has in excess of 1100 gaming machines of which approximately 50% are connected to its own in-house linked jackpot system.³

“There is constant speculation that TAB will in the near future move substantially into hotel ownership and will be in direct competition to AHA members.” Page 4.

“... especially if as suspected TAB move into hotel operations”: page 20.

Any suggestion that Tab Limited may acquire hotels, in the near future or otherwise, is purely speculative.

It is also noted that on page 3 of the AHA submission asserts that AHA members are not in competition with each other, while on the next page it asserts that if Tab Limited was to acquire hotels it would be “in direct competition”

¹ See for example Figure 10.1 on page 10.36 of the Productivity Commission Report.

² *Gaming Machines Act 2001 (NSW)* section 134(3).

³ Penrith Panthers use a system supplied by Paltronics Australia Pty Limited to operate its in-house linked jackpot system.

with AHA members (notwithstanding that with the level of AHA membership any hotel purchase would almost certainly involve the purchase of hotels from AHA members).

“Much higher commissions than NSW hotels get from TAB i.e. approx .1.5%”: page 4.

The commission rates paid by Tab Limited to NSW hotels are as set out in Tab Limited’s submissions to the Commission being 2.075% if the hotel has average wagering turnover of more than \$7,500 per week and 1.075% for hotels with average wagering turnover of less than \$7,500 per week.

“Headline” commission rates paid to agents for the distribution of various gambling products does not provide a meaningful basis for comparison as those rates can be influenced significantly by differences in the regulatory regime applicable to different gambling products (e.g. minimum “return to player” requirements, tax rates and other factors affecting the operator’s cost structure such as the regulatory requirement on Tab Limited to have and given effect to commercial arrangements with the NSW racing industry).

“... other terms and conditions such as the 5 year term of the SKY contract and the one sided termination provisions”: page 4.

“The AHA is of the view that the TAB contracts are unreasonable ... 5 year contract re Sky another, plus the one sided termination provisions”: page 27

As illustrated by the sample of the standard form Sky Channel contract attached to the Tab Limited/SKY submission to the Commission:

- while the standard form contract has a headline term of 5 years, either the hotelier or Sky Channel can terminate at any time within that 5 year period by giving 6 months’ notice; and
- the termination provisions of the standard form contract are mutual, except for the provisions relating to breach by the hotelier of its obligations or insolvency of the hotelier which are standard and common.

“CMS for gaming, via charges that are determined as a minimum by the NSW Government [this system was forced onto hotels without consultation]”: page 6.

As set out above, the amount of the fees paid to Tab Limited for the operation of the centralised monitoring system (also known as CMS) is determined by the Minister in consultation with the Treasurer and the NSW Independent Pricing and Regulatory Tribunal.⁴ The amount determined by the Minister is the maximum fee which Tab Limited can charge for the centralised monitoring system, not a minimum fee as asserted in the AHA’s submission.

The decision to require the establishment and operation of a centralised monitoring system and to grant Tab Limited a licence to operate that system was a policy decision made by the NSW Government, not something Tab Limited has imposed.

⁴ Gaming Machines Act 2001 (NSW) section 134(3).

“Statewide Jackpotting of gaming machines via a remuneration determined exclusively by TAB”: page 6.

Tab Limited's linked jackpot products have recently been launched, with its first linked jackpot product commencing operation in NSW registered clubs in a field trial on 30 January 2002 and receiving final approval on 14 October 2002. Currently this is the only linked jackpot product for which Tab Limited has regulatory approval, with another product which Tab Limited aims to provide in both hotels and registered clubs having been in regulatory testing for a considerable time.

Tab Limited's linked jackpot products compete with in-house linked jackpot systems⁵ and with other products designed to increase the attractiveness of gaming machines. Many of these products are supplied by competitors with a large and substantial presence, and a long history, in relation to gaming machines in NSW. For example, approximately 67% of the approximately 100,000 gaming machines in NSW are supplied by Aristocrat⁶.

As a new entrant into this area, Tab Limited is still assessing and defining its pricing strategy to determine what pricing structure and level will gain market acceptance and support. A relatively small number of large registered clubs and hotel groups collectively operate a substantial proportion of the gaming machines in NSW and these venues have and exercise a significant degree of countervailing power. A copy of an article in the Sydney Morning Herald (dated 27 December 2002) in relation to Tab Limited's negotiations with Penrith Panthers, the largest registered club in NSW, confirms Tab Limited's preparedness to negotiate terms in relation to linked jackpots. A copy of that article is attached as Annexure S1.

“[TAB negotiates collectively] with interstate TAB's when negotiating Sky fees for their TAB agents in each state and has done for sometime”: page 6.

SKY contracts with the off-course totalizator operator (whether a privatised entity such as Tab Limited, TABCORP or UniTAB or Totalizator Agency Boards in other States) for the supply of the Sky Channel service to that off-course totalizator operator. Under the terms of these contracts, SKY grants the off-course totalizator operator the right to display Sky Channel in their branches and dedicated wagering agencies, but generally not in PubTAB or ClubTAB outlets where SKY contracts directly with individual hotels and clubs.⁷

Contracts are negotiated on an individual basis with each off-course totalizator operator and the terms (e.g. duration, pricing, renewal options and other matters) vary significantly. SKY regards each of these contracts as strictly confidential.

⁵ Under the *Gaming Machines Act 2001 (NSW)*, NSW hotels and registered clubs can operate linked jackpot systems connecting gaming machines in their own premises. There are a number suppliers of these in-house linked jackpot systems, principally Aristocrat, Paltronics and Mikohn. However only the holder of an inter-hotel linked jackpot licence or an inter-club linked jackpot licence may operate a linked jackpot system which connects gaming machines in different premises. Tab Limited holds the only inter-hotel linked jackpot licence and inter-club linked jackpot licence issued in NSW.

⁶ Source: Aristocrat briefing 22 May 2002.

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“TAB can withhold services, services for which it has a statutory monopoly. In fact in the recent past TAB have withheld services to the greyhound industry (see article in the BRW, 28 November – 4 December 2002). Sky also withdrew their television to Victorian hotels, clubs and TAB agencies for a 10 day period in 1996 as a result of a pricing dispute.”: page 7.

Both of the incidents referred to by the AHA relate to SKY, not Tab Limited. SKY does not have a “statutory monopoly”.

In addition, the AHA appears merely to have extrapolated a paragraph from the article in the BRW referred to by the AHA, without checking the factual background.

- The “withholding of services to the greyhound industry” referred to in fact related only to one greyhound racing club, the NSW NCA. The total coverage of greyhound racing by SKY was unchanged.

The NSW NCA’s rights agreement with SKY expired, with the parties being unable to agree on the terms of a new agreement. As SKY did not have the right to telecast NSW NCA events, SKY substituted coverage of greyhound races conducted by other greyhound racing clubs into timeslots which had previously been allocated to NSW NCA events. The NSW NCA granted its broadcast rights to another television operator (Channel 31). After a few months, the NSW NCA approached SKY again and the parties then entered into a new rights agreement in relation to the telecast of NSW NCA events.

- The incident in 1996 referred to by the AHA occurred before Tab Limited acquired SKY in April 1998.

SKY contracts with the off-course wagering operator for the right to display the Sky Channel service in that operator’s dedicated wagering outlets (i.e. agencies). As hotels and clubs are separate commercial enterprises, SKY traditionally contracts directly with hotels and registered clubs for the display of the Sky Channel service in their premises.⁸

The incident referred to in the AHA submission involved negotiations between TABCORP and SKY to renew the agreement under which TABCORP was granted the right to display the Sky Channel service in TABCORP’s agencies.

TABCORP and SKY had been unable to agree the terms of a new agreement, with the result that TABCORP’s agreement with SKY expired. As Victorian hotels and clubs all contract individually with SKY, the Sky Channel service was not affected at all as a result of the expiration of SKY’s agreement with TABCORP.⁹

As SKY had no contract with TABCORP, SKY ceased to make the Sky Channel service available in TABCorp agencies. Negotiations continued and the parties ultimately reached agreement and the display of the Sky Channel service in TABCorp agencies resumed.

Services to Victorian hotels and registered clubs were totally unaffected by this incident.

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⁹ By contrast to TAB agencies, whose sole business is the provision of wagering distribution services to TABs/off-course totalizator operators, the provision of wagering distribution services is a minor and incidental part of a hotel’s business activities. For hotels, wagering and SKY provide entertainment which assists in attracting and retaining patrons who, in turn, purchase other hotel products and services.

***“TAB/SKY ignore the fact that what AHA is seeking is no more than what the other State TABs have in their long standing, collectively negotiating arrangement with SKY. This has been the case since inception of Sky. i.e. individual TAB Agents in say Queensland, do not individually negotiate fees, terms and conditions with SKY, the parent or representative body does (TABQ).”*: page 8.**

***“The precedent arrangement between SKY and TAB Agents (in States other than NSW) appears to be functioning satisfactorily ...”*: page 9.**

***“The above provides a scenario that appears to work elsewhere in the SKY environment (TAB Agencies Australia wide)”*: page 18.**

There is absolutely no precedent for the arrangements which AHA is seeking to adopt in any of SKY’s previous dealings.

As noted above, SKY negotiates on an individual basis with each off-course totalizator operator (whether a privatised entity such as Tab Limited, TABCORP or UniTAB or Totalizator Agency Boards in other States) for the supply of the Sky Channel service to that off-course totalizator operator.

These contracts are not, as the AHA implies, contracts negotiated with some representative body. Rather it is a contract with a wagering operator to allow that wagering operator for the purpose of its own wagering business.

SKY’s contracts with off-course totalizator operators allow the off-course totalizator operator to display Sky Channel in their dedicated wagering outlets (both outlets which the operator conducts using its own employees and dedicated agencies).

SKY does not contract with individual “TAB agents” in New South Wales or in any other State. In each case SKY’s contract is solely with the off-course totalizator operator.

***“This perception could be tested via comparison PubTab SKY fees and TAB commissions pertaining in NSW with those existing in Victoria and Queensland. The fees are lower and the commissions higher”*: page 9.**

***“Hotels in other States are “better off” than those in NSW in that pubtab commissions are slightly higher.”*: page 14.**

SKY applies a uniform national rate card, with the only exception being Western Australia where a discount is applied due to the impact of time zone differences. There is absolutely no difference between SKY’s basis of charging in New South Wales, Victoria or Queensland.

In terms of PubTAB commissions, the position stated by the AHA in their submission is totally contradictory to the position stated by the AHA in an article by Mr Bevan Douglas published in the AHA’s monthly magazine the “Hotel News” in February 2002 which stated:

“Increased TAB Commissions: ... the new commission rates place NSW PubTAB operators at equal or better rates than hoteliers in other states of Australia.”

A copy of this article is attached as Annexure S2.

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The substantial differences in structure of payments to PubTAB operators in NSW and Victoria makes proper comparison difficult.

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***“This is evidenced by TAB/SKY having the exclusive rights to provide Hotels with ... Radio 2KY coverage”*: page 10.**

Tab Limited acquired 2KY Broadcasters from the NSW Labour Council in April 2001. 2KY Broadcasters provides through-out NSW radio coverage of racing events. The racing radio service is generally available and is not provided specifically only to hotels or other types of premises. Similar racing radio services exist in all other Australian States and Territories, general owned by either the local racing industry or the local off-course totalizator operator.

2KY Broadcasters does not have any exclusive rights to provide radio coverage of racing events. Indeed ABC radio formerly broadcast some racing, particularly in regional areas, and other radio stations (eg. 2SM, 2GB) also include some racing in their broadcast programming. However racing radio is a “niche market” and the extent of public appeal of these broadcasts has proven insufficient to support more than one commercial radio station per State which specialises in racing coverage.

***“This is evidenced by TAB/SKY having the exclusive rights to provide Hotels with ... gaming machine monitoring via CMS which is mandatory by law for hoteliers”*: page 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.

However hotel and registered clubs are free to conduct additional monitoring of gaming machines, for example to provide management information. Many venues have such systems. Tab Limited only operates CMS and does not supply any of these other gaming machine monitoring systems.

***“In this regard, it is illustrative that the TAB forces hoteliers to open up dedicated bank accounts for PubTab income. TAB must have full access to that account”*: page 11.**

The material lodged by the AHA ignores the fact that NSW hotels with PubTAB facilities operate the PubTAB as agent for Tab Limited. Customers placing a bet at a PubTAB do not contract with the hotelier but with Tab Limited. The hotelier acts as Tab Limited's agent to receive bets and collect funds.

Money received by the hotelier in respect of bets, is therefore received by the hotelier as agent for Tab Limited and belongs to Tab Limited – not to the hotelier.

As is common and appropriate practice in circumstances where an agent/bailee holds their principal's money, the terms of the PubTAB agreement require that the money held by hotelier as agent for Tab Limited be deposited

into a separate bank account and not merged with the hoteliers own funds. Failure to impose these obligations would potentially prejudice Tab Limited's entitlement to the funds.

It is for this reason that Tab Limited requires the hotelier to open a separate bank account and that Tab Limited have access to that account. Money received in respect of bets placed at the PubTAB are deposited into that bank account as that money belongs to Tab Limited and not to the hotel.

"The Pay TV component of this arrangement permits SKY, at its sole determination, to pass the racing broadcasts/telecasts on to other network providers (carriers).": page 11.

SKY does not have the sole discretion in this regard.

SKY has long term agreements to provide a dedicated racing channel (currently known as "SKY Racing" to pay television operators including FOXTEL, Optus and Austar for transmission to residential pay television subscribers.

In addition, SKY has certain obligations to make a dedicated racing channel available to pay television operators under agreements with some racing clubs under which SKY is granted broadcast rights and agreements with wagering operators who currently contribute to the costs of producing the pay television service.

"SKY does not pay the race clubs any additional fees for the Pay TV rights": page 11.

This is untrue. Some racing clubs receive fees from SKY in respect of the pay television service. Other clubs are entitled to fees in the event that SKY receives fees for the production of the pay television service.

"SKY contends that it is illegal for Hotels to utilize the domestic Pay TV racing service. There has been long-term speculation as to the sustainability of this opinion amongst industry observers from both a general legal and TPA perspective": page 11.

This comment raises two issues.

Firstly, SKY's agreements with pay television operators only authorise those operators to broadcast SKY Racing to residential premises. The pay television operators are not permitted under those agreements to broadcast or authorise the display of SKY Racing in any commercial premises. Any pay television operator who authorised the display of SKY Racing in a hotel would breach its agreement with SKY. The distinction between the SKY Racing pay television channel and the Sky Channel subscription service is clearly set out in the Sky Channel Pty Limited Background Paper attached to the initial Tab Limited/Sky Submission.

Secondly, there have been a number of instances of hotels in NSW and elsewhere illegally "pirating" either the SKY Channel service or the SKY Racing pay television service. This piracy can occur in a variety of ways, including the use of "pirate smart cards" to obtain unauthorised access to a subscription television service. SKY and the major pay television operators have incurred substantial costs attempting to combat broadcast piracy. Court proceedings have been commenced against a number of hoteliers in respect of broadcast piracy by subscription television operators such as SKY and by law enforcement authorities. Newspaper extracts in relation to broadcast piracy matters are attached an Annexure S4.

SKY is not aware of any credible opinion to the effect that either conduct is legally permissible.

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

...

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

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

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

Fox Sport owned by PBL and News is the second biggest carrier to hotels and, in terms of content would benefit from having racing in its programming.”: pages 12-13.

The insinuation on pages 12-13 of the AHA's submission that there is some form of illegal or improper arrangement between Tab Limited/SKY and any or all of PBL, News or Fox Sports (e.g. for a “carve up” of sports) is totally untrue, defamatory and without any factual basis whatsoever.

The AHA's wild speculation in this regard seems founded on their expressed view that Fox Sports would somehow benefit from carrying racing programming. In espousing this view, the AHA has absolutely no experience in media or broadcasting. The AHA has ignored, and is ignorant of, the marketing, communications and logistical issues which would be involved. For example, SKY's market research suggests that racing viewers prefer the aggregated, multiple meeting racing coverage provided by SKY and may not welcome fragmented racing coverage.

As stated in the original Tab Limited/SKY submission and in the Tab Limited prospectus attached to that submission, in the agreements under which Tab Limited acquired SKY, News and PBL provided Tab Limited with certain undertakings to protect the goodwill which Tab Limited purchased. Those undertakings expire in April 2003 and were entirely normal and legitimate undertakings provided in the context of the purchase of a company for \$260 million.

Those undertakings would not have prevented Fox Sports seeking to acquire from SKY rights to telecast racing events. However Fox Sports has not sought to do so.

SKY is not aware that Fox Sports has “ample spare bandwidth”. Information as to Fox Sports communications capacity is unlikely to be available to the AHA and appears to be further mere speculation.

In relation to boxing, both SKY and Fox Sports provide live pay-per-view coverage of boxing events to hotels and other commercial premises. Contrary to the AHA's assertion, SKY and Fox Sports (and Austar) compete vigorously in relation to boxing coverage, both in terms of programming and price.

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"It goes without saying that once operating costs are apportioned, the net SKY/TAB operation presents hoteliers with a loss when taken as a stand-alone Hotel enterprise": page 14.

As noted in the initial Tab Limited/SKY submission, the average commission paid by Tab Limited in respect of a PubTAB (\$21,514)¹¹ exceeds the average fees payable by a NSW hotelier for Sky Channel (\$15,561 excluding GST) plus direct costs of the PubTAB service (i.e. GST on commission and paper/toner)¹² by more than \$3,000 p.a..

The AHA's submission recognises in numerous places the importance of PubTAB facilities and the Sky Channel service in attracting and retaining customers, who in turn purchase other hotel products (e.g. food, beverages and gaming machines). This is also supported by the experience of Tab Limited and SKY, as well as by the continued demand from hotels, particularly smaller hotels for the services. While the AHA's submission acknowledges these benefits in its assertions that hotels "need" PubTAB and Sky Channel, they are disingenuously ignored by focussing on PubTAB and Sky Channel as a "stand alone hotel enterprise".

¹⁰ In addition to the four events in January/February 2003, SKY has another pay per view boxing event, *Roy Jones Jnr v John Ruiz*, scheduled for March 2003.

¹¹ The average commission of \$21,514 is based on turnover for the year ended 30 June 2002, adjusted for the 0.05% reduction in commission rates which took effect from 1 July 2002.

¹² For the purpose of analysis, Tab Limited adopted the AHA's estimates of paper/toner costs.

***“We believe that all TAB head offices employ the same principle of ensuring that pubtab commissions equate as closely as possible to SKY subscription fees thereby making the Hotel based enterprise a net \$0 profit operation”*: page 14.**

Tab Limited does not attempt to equate PubTAB commissions with Sky Channel fees

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Tab Limited's commission rates are determined on the basis of Tab Limited's business and strategic requirements. The fact that Tab Limited does not adopt this principle, but rather expects that aggregate PubTAB commissions will exceed Sky Channel subscription fees for NSW hotels is clearly evident from the correspondence regarding the discussions between Tab Limited and the AHA regarding the changes to Tab Limited's standard form PubTAB agreement and commission rates. That correspondence is included in Annexure F to the Tab Limited background paper in the initial Tab Limited/SKY submission.

Tab Limited expects that other “TABs” would not adopt the principle asserted by the AHA. This is reinforced by the commission structure applied by TABCORP in Victoria (see Annexure S3) which does not bear any relation to Sky Channel fees.

***“SKY employs the strategy of charging Hotels fees that are at best equal to, or as is in most cases, in excess of TAB commissions. This appears to have been SKY's strategy for some time, certainly since mid 1990's i.e. prior to the sale of SKY to TAB (1998)”*: page 14.**

***“...it is reasonable to assume that further entrenched control of SKY fees by TAB has occurred since then and that the strategy of striking fees that equal TAB commissions is perpetuated”*: page 15.**

The AHA's assertions do not reflect SKY's pricing strategy. Details of SKY's pricing policy and the derivation of the current charging arrangements are set out in the Sky Channel background paper in the initial Tab Limited/SKY submission.

Since Tab Limited acquired SKY, there have only been minor increases in the Sky Channel rate card.¹⁴ Effective from 1 July 2002, SKY reduced its subscription fees by 5% and announced that it would also forego a planned CPI increase of 2.8%. During that period, Tab Limited's wagering turnover through PubTABs has increased significantly.

SKY's pricing formula is intended to reflect the benefits which hotels derive from the Sky Channel service – both in terms of attracting and retaining patrons and in assisting to enhance wagering turnover.

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¹⁴ See chronology on page 6 of the Sky Channel Pty Limited Background Paper attached to the initial Tab Limited/SKY submission.

“In establishing this case, the AHA points out that TAB Agencies, Australia wide, pay SKY fees at a rate approximately 20% below that paid by Hotels in NSW.”: page 16.

“TAB Agents” do not pay any fees to SKY for the Sky Channel service.

SKY contracts with the “TAB”/off-course totalizator operator. It has no contracts with, and receives no fee from, “TAB Agents”.

Off-course totalizator operators nationally pay SKY substantially more than Sky receives from hotels.

AHA survey pages 21, 31-32 and attached survey form.

The AHA survey conducted is said to have been conducted in 2001. The survey is neither independent nor unbiased.

The heading to the survey form states *“The Association needs your urgent assistance for information that will allow a better deal to be negotiated with TAB and Skychannel on your behalf”*. This is inconsistent with a “bona fide” survey and throws considerable doubt on the AHA’s assertion that its current action was not sought or solicited by the AHA.

The summary nature of the survey results provided in the AHA’s submission makes it difficult to assess the information provided.

However there are clear inaccuracies/inconsistencies. For example:

- the AHA states on page 21 that *“Some affected publicans wrote additional comments on the survey, indicating that they were only persisting with PubTABs ... also because there were jobs involved with hotel staff being employed in the PubTABs”*. In large PubTAB operations, the PubTAB commission less Sky Channel subscription fees provides the hotel with substantial net income. Small PubTAB operations do not engage staff specifically for the PubTAB and accordingly removing the PubTAB would have no direct effect on staffing.¹⁵
- the range of commission referred to in the summary (\$400-\$2,000 per month) is significantly understated. Commission paid by Tab Limited to hotels in respect of PubTAB operators in some cases exceed \$180,000 p.a. (\$15,000 per week). About 1/3 of all PubTAB operators receive more than the maximum commission referred to in the AHA’s summary on page 31 of its submission. Given that the AHA states that it received 651 responses, some information provided must have been incorrect.

¹⁵ The only way that staffing in these hotels could be affected by the removal of the PubTAB outlet is if the removal of the PubTAB outlet reduced patronage which had a flow-on impact on the hotel’s other business.

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

***Additionally the TAB has extensive market data through its information systems ... AHA cannot match that at the present and disputes any TAB assertion that adequate protection of this information is via ‘Chinese Walls’ within the organization”*: page 22**

***“The AHA (NSW) would – through required transparency and information sharing from all parties, most particularly the TAB – be able to help prepare members for realistic trading conditions”*: page 23.**

As in other areas of the AHA’s submission, the comments on pages 21-23 ignore the fact that PubTAB outlets are acting as Tab Limited’s legal agent, and as such detailed information in respect of wagering operations is Tab Limited’s information.

The AHA seems to be asserting that it has a legitimate right to substantial information in relation to wagering activities, despite the fact that this is Tab Limited’s information in relation to its own commercial operations, from which trends regarding Tab Limited’s customer base and distribution arrangements can be determined.

***“Ironically, in a few cases, it has appeared to the Association that the TAB is actually trying to prevent over-supply by declining to provide further TAB sites in a particular town or district”*: page 22**

Tab Limited does not limit the number of outlets in specific areas as a policy matter. However each new outlet requires investment by Tab Limited which needs to be commercially justifiable. One consideration in this regard is the proximity of a potential new site to existing PubTAB outlets as merely diverting turnover from one outlet to another has no commercial value to Tab Limited.

***“The situation of ‘one in all in’ was demanded by the TAB – see letter. Attachment A”*: page 26.**

The AHA omitted to provide the Commission with the letter from the AHA to Tab Limited of 13 December 2000, to which the letter from Tab Limited attached to the AHA’s material was responding. A copy of the AHA’s letter to Tab Limited of 13 December 2000 is included as Annexure S5.

Both of those letters form part of the extensive consultation process between Tab Limited and the AHA which occurred over many months in connection with Tab Limited’s adoption on the new standard form agreement for PubTABs and commission rates. Both the contract and the commission rates and structure were publicly endorsed by the AHA.

Other correspondence in relation to that consultation process is set out in Annexure TAB I attached to the Tab Limited background paper which forms part of the initial Tab Limited/SKY submission.

When viewed in proper context, it is clear from the total series of correspondence that Tab Limited had made its own commercial decision that it required a single standard form contract and commission structure for all NSW PubTAB operations.

The AHA's letter to Tab Limited dated 14 March 2001¹⁶ expressly accepted this position stating:

"I stress that the Association values its partnership with TAB, and your request for a 'one in, all in' concept is supported."

AHA RESPONSE in relation to responsible gambling issues: pages 27-28.

Tab Limited is committed to responsible gambling. These comments in the AHA's submission in relation to Tab Limited's approach to responsible gambling are untrue and without foundation.

Tab Limited has an extensive responsible gambling programme. This programme was developed in conjunction with leading academics (Professor Jan McMillen, Director of the Australian Centre for Gambling Research at the University of Western Sydney) and has been approved by the NSW Minister for Gaming and Racing.

Some of Tab Limited's responsible wagering activities relevant to hotels include:

- Tab Limited's detailed responsible gambling policies and a community commitment charter are made available to all PubTAB operators. All hoteliers with PubTAB operations are required under their agreement with Tab Limited to comply with these policies and standards.
- Tab Limited makes available to PubTAB signage and displays promoting the NSW Government "G-Line" gambling counselling service as well as pamphlets (in a variety of languages) in relation to responsible gambling issues to be made available for the public in hotels;
- Tab Limited developed the "Course in TAB Operations", an intensive 3 day introductory training course for people working in TAB Agencies, PubTABs and ClubTABs which has been accredited by the NSW Vocational and Educational Training Board. In 2000, the course was expanded to include responsible gambling issues with a focus on how TAB expected operators to respond to customer concerns. Participants in these courses complete a workbook to enable an assessment of their understanding of the issues raised in the seminar. Courses are generally available on a weekly basis. PubTAB operators are strongly encouraged to send any employees involved in their PubTAB operations to one of these courses. Since 2000, these course have been attended by more than 1,400 hotel staff representing 788 NSW hotels.
- In conjunction with the Australian Centre for Gambling Research at the University of Western Sydney, Tab Limited has developed training materials for use by internal staff and retail operators. This material formed the basis for an on-line manual - Responsible Conduct of Wagering. All PubTAB operators have been advised of the training materials and how to access it via the TAB DFS computer.
- Tab Limited makes regular compliance checks in relation to compliance by hotels with Tab Limited's responsible gambling requirements.
- A formal warning from Tab Limited's Chief Executive, Wagering was published to all PubTABs and ClubTABs in August 2002 clearly stating that failure to comply with responsible gambling requirements may result in termination of the PubTAB/ClubTAB Agreement and potentially other action including criminal charges.

¹⁶ A copy of that letter is contained in Annexure TAB I attached to the Tab Limited background paper which forms part of the initial Tab Limited/SKY submission.

Tab Limited also sponsors Odyssey House, a charitable organisation, funding the provision by Odyssey House of a dedicated specialist counsellor for people with gambling problems.

In addition, Tab Limited has taken a pro-active stance in relation to responsible gambling issues, including through active participation and involvement in a number of committees and organisations dedicated to research into problem gambling and responsible gambling/harm minimisation. These include:

- Tab Limited's managing director is one of 7 representatives on the National Advisory Body on Gambling established and chaired by Senator Vanstone. This body was established as part of the Commonwealth Government's initiative to prevent negative social impacts of gambling and comprises representatives of church and community groups, gambling companies and the national hotels registered clubs associations.
- Tab Limited is a foundation member of the Australian Gaming Council, an organisation established in June 2000 with the primary objective of conducting research into gambling problems and developing and promoting responsible gambling initiatives in conjunction with participants in the gambling industry, governments, community groups, health professionals and counsellors.
- Tab Limited and the AHA are both members of the NSW Gaming Industry Operators Group which focuses on responsible gambling initiatives in NSW.
- Tab Limited has participated in research initiatives with the Australian Centre for Gambling Research at the University of Western Sydney.

In addition to these formal committees and organisations committees, Tab Limited consults with other participants in the gambling industry in relation to responsible gambling issues. For example, in 1998 Tab Limited was invited by the NSW Registered Clubs Association (now ClubsNSW) to participate in a steering committee to develop a responsible gambling programme for NSW registered clubs. Tab Limited participated in that committee, along with representatives of the AHA.

Contrary to the AHA's assertions, Tab Limited has engaged in consultation with the AHA in relation to responsible gambling issues. For example, in September 1999, the AHA's Policy Officer was specifically invited to attend workshop sessions in relation to its responsible gambling programme. In addition, Tab Limited's Responsible Gambling Manager, Public Affairs Manager, and the AHA's Gambling Counsellor have held a number of discussions on responsible gambling issues.

Correspondence attached to the AHA submission

The AHA's submission attaches two letters to Tab Limited from the Newmarket Hotel in Albury and a letter to Tab Limited from the AHA in relation to training seminars but does not attach Tab Limited's response to that correspondence. Copies of those responses are attached as Annexure S6.