

AUSTRALIAN HOTELS ASSOCIATION (NSW) ("AHA")

-v-

SKY CHANNEL PTY LIMITED ("SKY")

MEMORANDUM

1. This memorandum is intended to be a brief summary of the conclusions I have tentatively reached following an initial conference with Messrs Spier, Miller and Christopher and the opportunity to review a detailed draft advice prepared by my instructing solicitors and forwarded to me on 22 August 2002.
2. Before I express a concluded opinion regarding the issues upon which my advice has been sought, I would like to have the opportunity to discuss this memorandum, and my instructing solicitors' draft advice in conference with my instructing solicitors, Mr Spier and one or more representatives of AHA.

Part IV of the *Trade Practices Act* ("the Act")

3. While I agree with the substance of the advice in paragraphs 23-46 of my instructing solicitors' memorandum, there may be other causes of action based upon breaches of s.46 and s.47 of the Act warranting detailed consideration.
4. Although AHA is not privy to the contracts between Sky and each of the subscription television service providers, such as Foxtel, Optus and Austar ("Pay TV operators"), it is likely that each of the contracts contains a provision effectively prohibiting an operator to which Sky provides Sky Channel from re-supplying Sky Channel as part of its package of subscription television services to any licensed hotel, registered club or other similar body for viewing by patrons in a public area. Such a restriction upon re-supply explain the basis for a licensed hotel which subscribes, for example, to Foxtel, not being permitted to have access to Sky Channel when it makes Foxtel available for viewing by its patrons in a public area. Conversely, I am instructed, Sky Channel may

be viewed as part of the Foxtel package of services in a private hotel room or in private accommodation occupied by a hotelier at the hotel.

5. What follows is predicated upon AHA being able to establish the existence of a contractual restriction to this effect.
6. The economic justification for the imposition of this restriction upon re-supply is that Sky wants to reserve for itself the ability to negotiate directly with licensed hotels, registered clubs and similar venues for the delivery of Sky Channel for viewing by patrons in public areas. It does not want to have to compete with Pay TV operators in this regard.

services to these venues. Hence, it is able to charge a discretionary price for the provision of Sky Channel, quantified in whatever manner it thinks fit, and to engage in the kinds of overbearing conduct aptly summarised by my instructing solicitors in paragraph 40 of their draft advice.

8. Moreover, it appears from paragraph 17 of my instructing solicitors' draft memorandum, that TAB Limited ("TAB"), which is Sky's holding company, has imposed a condition upon the members of AHA that it will only supply its Pub TAB services to a hotel which has agreed to take Sky Channel from Sky. This tying arrangement reinforces Sky's ability to extract a monopoly rent for the service, derived from its status as a sole provider of Sky to these venues. It increases the extent to which a licensed hotel must be a "price taker" for these services, because to refuse to acquire these services on Sky's terms would mean giving up Pub TAB as well.
9. In my opinion, all of this raises a substantial issue whether the imposition by Sky upon each of the Pay TV operators of a condition restricting the extent to which each of them may re-supply Sky Channel to hotels (and registered clubs) involves an unlawful taking advantage of market power within s.46 of the Act, exclusive dealing within s.47 of the Act and/or an exclusionary provision or an agreement having the purpose or effect of substantially lessening competition within s.45 of the Act.

10. That AHA or any of its members was not a party to any of the relevant contracts containing this restriction would not prevent any of them instituting proceedings in the Federal Court of Australia for an injunction under s.80 of the Act restraining the parties to the contract from giving effect to this restriction on the basis it was unlawful as contravening a relevant provision in Part IV of the Act, and/or seeking a declaration of its invalidity pursuant to s.163A of the Act. In those proceedings, AHA (and/or its members) would be the applicant and Sky, together with each of the Pay TV operators would be the respondents.
11. Before I deal with the legal basis for the proceedings, I should express my emphatic agreement with my instructing solicitors' opinion that the proceedings would be substantial, as Sky and each of the Pay TV operators would be respondents. I do not doubt they would be vigorously contested by Sky, although it is open to conjecture whether any of the Pay TV operators would necessary oppose the relief sought in the proceedings. It may be each of them would be glad to see the end of this restriction.

s.46 of the Act

12. The elements of this provision were summarised in paragraph 24 of my instructing solicitors' draft memorandum. In my opinion, there are good prospects of persuading the Federal Court that the market should relevantly be defined as the market for the provision of live television broadcasting of racing services or perhaps live broadcasting of racing services (embracing both television and radio). For its part, Sky would argue for a wider market, such as the provision of live sports broadcasting, or perhaps sports broadcasting generally (whether live or recorded), or even entertainment.
13. While litigation over this issue is likely to take many days, I think a court would prefer a narrower market definition.
14. Next, Sky would content that even in a market that was narrowly defined, Sky did not possess a substantial degree of market power because of the countervailing power of the Pay TV operators with which it dealt. It would portray itself as a mere content provider, dependent upon each of the Pay TV operators being willing to acquire its

channel and pointing to the financial strength of the entities which control operators such as Foxtel and Optus.

15. While I can only express a preliminary opinion upon this, my understanding of the economics of pay television is that the operators are desperate for content and that Sky Channel is a vital if not essential resource. Nor am I persuaded that, for the purpose of competition analysis, the market should be confined to the functional level at which Sky and each of the Pay TV operators deal with each other. A broader definition of the market, embracing customers such as members of the AHA and/or even residential end users is preferable. The undoubted fact is Sky's conduct to date is redolent of a party possessing substantial, if not monopoly, power.
16. The next question is whether, by imposing this restriction, Sky would be regarded by the court as having taken advantage of its market power.
17. While precise tests for determining whether a party has taken advantage of its market power is still the subject of debate in the courts, I consider a court would find there was relevant connection between the existence of market power in Sky and its imposition of this restriction upon Pay TV operators. That it was able to impose this restriction on each of the Pay TV operators suggests an exercise of market power. Moreover, it is unlikely that Sky could have, or would have, imposed such a restriction in a competitive market for the reason that it is difficult to see how it was in the commercial interests of any of the relevant Pay TV operators to submit to such a condition.
18. The final, and most important issue, is whether Sky's conduct in imposing the condition was for a purpose prohibited by s.46(1) of the Act.
19. In my opinion, the conclusion is open, if not probable, that the condition was imposed for the purpose of deterring or preventing each of the pay TV operators from competing with Sky for the provision of Sky Channel to public venues, hotels, registered clubs and similar outlets. Absent that restriction, Sky would no longer be able to extract the prices and otherwise engage in the conduct of which AHA and its members complain.

20. Support for these tentative conclusions is to be found in the decision of the Federal Court (first instance and on appeal) in ASX Operation Pty Limited -v- Pont Data Australia Pty Limited (1990) 27 FCR 460; see also at first instance per Wilcox J at (1990) 21 FCR 385. While I do not propose to summarise the facts or the reasoning in this case, which is well known to my instructing solicitors, it seems to provide a relatively close analogy.
21. The next question is whether this restriction may also contravene s.47(1) of the Act as constituting unlawful exclusive dealing.
22. s.47(2) of the Act relevantly provides as follows:

"A corporation engages in the practice of exclusive dealing if the corporation:

(a) supplies, or offers to supply, goods or services ...

on the condition that the person to whom the corporation supplies, or offers or proposes to supply, the goods or services ...

(f) in the case where the corporation supplies or would supply goods or services, will not re-supply the goods or services to any person, or will not, or will not except to a limited extent, re-supply the goods or services:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons;

...".

23. s.47(10) provides, in effect, that this prohibition upon exclusive dealing does not apply unless the engaging by the corporation of that conduct, or in that conduct and other conduct of the same or of similar kind, has the purpose, effect or likely effect of substantially lessening competition.

operators to the effect that the pay TV operator would not supply Sky Channel to hotels, registered clubs or similar venues save to the extent they offered Sky Channel only for viewing in non public areas could fall within s.47(2)(f) of the Act. The matter is not free from doubt or argument as a recent decision of the Federal Court in ACCC -v-

29. Before leaving this aspect, I should refer to s.51(3) of the Act upon which Sky (as the owner of the copyright in the racing broadcasts) will rely to justify the contractual restriction. It relevantly provides, in effect, that the imposing of, or giving effect to, a condition of a license granted by the owner of copyright does not constitute a contravention of certain provisions in Part IV of the Act, to the extent that the condition relates to the work in which the copyrights subsists.
30. The meaning of this exception is unclear: however, whatever it means, it expressly provides no immunity for a contravention of s.46 of the Act.
31. Subject to what I have already said, I agree with paragraphs 54-86 of my instructing solicitors' draft memorandum.
32. I also agree with their analysis of a possible cause of action based on s.51AC of the Act. For all the reasons which they give, this may provide particular members of the AHA with a potential cause of action against Sky. That said, the most recent decision of the Full Federal Court in relation to s.51AC, namely, C.G. Berbatis Holdings Pty Limited -v- Australian Competition and Consumer Commission (2001) 185 ALR 555 suggests that mere opportunistic behaviour by a party which has a superior bargaining position need not be regarded as unconscionable dealing.
33. In that case, the Full Court overturned a finding by the trial judge of unconscionable conduct where, as a condition of renewing a lease, a landlord demanded of its tenant that it should forego a claim for compensation against the landlord. When the demand was made, the lease was nearing expiration and the tenant would have been unable to sell its business if the lease had not been renewed. The Full Court held that the fact the tenant had little choice but to submit to the landlord's demands did not entail a conclusion it was under any special disability, or that the landlord's conduct in all the circumstances was unconscionable.
34. I should emphasise there is a real question whether this case was correctly decided. On 31 May 2002, the High Court of Australia granted the Australian Competition and Consumer Commission special leave to appeal from this decision of the Full Court,

indicating in the course of argument that there may be difficulties with the legal reasoning of the Full Court.

35. So far as the general strategy urged by my instructing solicitors in the concluding paragraphs of their draft advice is concerned, I agree with the approach that they recommend. However, as I mentioned in conference, I think they should consider making a complaint to the ACCC concerning the contractual restriction as between Sky and each of the Pay TV operators. If Sky became aware that the ACCC was, or might be, interested in the validity of that condition, negotiations between AHA and Sky could thereby be enhanced.
36. I look forward to discussing the contents of this memorandum in conference with my instructing solicitors, Mr Spier and representatives of the AHA as soon as possible.

JEFFREY S HILTON S.C.
SELBORNE CHAMBERS'
27 AUGUST 2002

Submission

to

**Australian Competition
and Consumer Commission**

lodged by

Colin Waller, Licensee of Berry Hotel

on behalf of

Australian Hotels Association (NSW)

in respect of

Collective bargaining on behalf of member hotels in NSW with Tab
Limited and Sky Channel Pty Ltd 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 Ltd should
negotiations breakdown.

Date: 13th May 2003
Authorisation No: A90837
Public Register No: C2002/1081

Australian Safeway Stores Pty Limited (2001) FCA 861 especially at paragraph 970 indicates.

25. Assuming there were such a condition, the next question is whether its imposition had the purpose, effect or likely effect of substantially lessening competition which, according to s.47(13)(b), should be read as a reference to competition in any market in which either Sky or any of the pay TV operators compete, or but for the restriction, would compete.
26. In my opinion, it is strongly arguable that the effect of imposing the condition is to sterilise the potential competition with Sky for the provision of Sky Channel to major customers such as hotels and registered clubs who requiring the service of viewing by their patrons in public areas. Absent that restriction, the pay TV operators would compete with Sky, and with each other, for the provision of this service as part of their respective packages of subscription television services. Sky would then be faced with the commercial decision whether to continue providing this service directly to end users in competition with the operators, or whether to retire from the market and instead negotiate with each of the pay television operators for the supply of Sky Channel on an unrestricted basis, at a price which reflected the ability of those operators to provide this service to end users who were able to broadcast the service in public areas. Inevitably, this is likely to increase the amount of competition in the market and reduce the extent to which any party could continue to engage in the kinds of price gouging and other over bearing activities in which Sky currently engages.
27. Again, in ASX Operation Pty Limited -v- Pont Data Australia Pty Limited supra, the Full Court upheld the trial judge's finding that, in an analogous context, there was a substantial lessening of competition by reason of an imposition of a condition analogous to the present restriction.
28. Given my conclusion that s.47 may well apply, it is unnecessary to address the prohibitions s.45 of the Act, as it is probably excluded from relevant operation by reason of s.45(6) of the Act.

- The TAB through its monopolistic policy has been able to reduce its number of outlets or agencies but increased its number of individual accounts through 'E' betting and phone accounts – this reduces number of patrons at hotels.
- By the provision of phone accounts and 'E' bets (the only customers who now visit the hotel are those who enjoy the overall entertainment, camaraderie or social aspects of the hotel – social – punters.
- No statistics were provided on the number of female phone accounts or the number of punters who merely walk into a TAB outlet, place a bet and walk out. In real terms this would be approximately 30% of the TAB/Sky traffic generated by the TAB/Sky facility.
- The market place / public obtain a free service from hotels.
- TAB's conflict re acquisition of hotels then basing their fee on literage. In other words they know the competitors literage sales of any hotel they may acquire.

THE CURRENT SKY FEE IS BASED ON THE ABILITY TO PAY – NOT ON THE COST OF PRODUCING THE SERVICE, PLUS A REASONABLE RETURN.

DOES TRADE PRACTICES ACT COVER THIS FORM OF PRICING BY A MONOPOLY??? – NO ALTERNATIVE TO SKY TELECAST.

MOST OTHER COMMUNICATION INDUSTRIES (TELSTRA) HAVE REDUCED COSTS TO CONSUMERS OVER THE REVIEW PERIOD ie: 1998 – 2002.

- The TAB now has additional income from advertising, selling of race day promotions and fees for any ancillary promotions such as fights.
- The current costing using literage / TAB turnover does not take into account customers who are loyal to the hotel prior to the TAB/Sky being introduced and remained loyal customers during the TAB/Sky agency.
- To use the literage as the basis for the Sky fee is totally onerous and would not take into account the 90% of customers whom wouldn't give a damn if the races weren't shown.
- **PROTECTING OUR GOODWILL**
- Contrary to the TAB / ACCC opinion this is not an issue of TAB versus hotel's profits but an issue of hotels protecting customer base, providing a service and maintaining a hotel's goodwill.

- Hotels in NSW have been around 150 years and gambling has been around since first settlement.
TAB has only been around since 1950.
Hotels have always serviced customers' gambling needs prior to the TAB's incorporation ie: bookmaking or S.P.
- History of racing and punting in Berry – commenced in 1861 – with the then Publican, Mr J Howard, the legal promoter / bookmaker of races at the 'convincing grounds', 7 Mile Beach.
- Berry Hotel enjoyed an 80% increase in TAB turnover as recently as 1991 (CW takeover date).
The reason – SP operating ceased?? or CW's good promotions or both??
- Our goodwill is **family** orientated and in country towns one tries to package a service which will please as many as possible. TAB = 90% + males. 50% of TAB punters do not use any other service at hotel.
- If you lose one customer through not having a TAB facility the rest of his family who may not gamble may also leave the premise to be with their family member at the competition down the road – the club.
- TAB did not disclose how many hotels have SKY without a TAB and if their rates are also based on literage. It is understood less than five hotels have SKY without a TAB.
- Manipulation of market pricing by SKY. If you close for a year or two you are then offered a "new attractive deal" to return to TAB / SKY. Refer Bridge Hotel Nowra – who closed their agency for approximately 2 years before being offered a new cheaper deal.

COST OF HOME BETTING versus COMMERCIAL PubTAB ACCOUNT

• **HOME BETTING COSTS:**

<u>AUSTAR (country)</u>	12 mnth	24 mnth
	\$	\$
Connection	96	50
Monthly Fee (all programs)	<u>46</u>	<u>46</u>

FOXTEL \$50 connection
 \$20 monthly

OR USE:

RADIO have TAB line ie: server TP6 \$10 per month

HOW DOES SKY CHARGE THEIR OWN AGENCIES? (who don't sell beer)

COMPARE ABOVE COST TO THE INDIVIDUAL (\$50-80 per month) TO A COMMERCIAL ACCOUNT (\$1,200 plus per month for SKY fee only).

Two hotel agencies in our sub branch of 22 hotels have given up their agency in the past 5 years?

RE COMPETITION

- At start we had a franchise ie: one for area (no competitors)
Berry Hotel >>>> catchment Berry / Kangaroo Valley = 3,000 pax.
NOW same area has 4 agencies (with another one about to join)
ie: 2 clubs, 2 hotels plus 'E' bet and phone account increase.
- Berry Hotel's initial investment (in 1991) was made on EXCLUSIVITY, POTENTIAL and EXISTING MARKETS.
- Operators in 90% of regional areas over the past 5 years experienced negative TAB growth – due to regional economics – demographics – additional outlets – phone – 'E' bet.
- Are hotels the consumers, as we don't CHARGE our patrons.
Consumers – don't produce.
Retailers – charge a price for goods or services.
- Agents / Franchisee – usually have designated areas or accounts – newsagents kept their exclusivity to areas. TAB agencies, for whatever reason, have been open to competition. The initial 500 PubTABS had exclusive areas prior to 1998.
- WHY DOESN'T TAB OPEN THEIR OWN OR SECOND AGENCIES – IN HIGH YIELD AREAS? (Answer: WOULD NOT BE VIABLE.)
- Any increase in TAB agencies was not noted for the ACCC's information.

TRADE PRACTICE BREACHES

- MAKING PRODUCT INACCESSIBLE TO SMALL COUNTRY PUNTERS
- CREATING NON-COMPETITIVE OR VIABLE MARKETS (by introducing new outlets and encouraging 'E' betting etc.)
- EXPANDING OUTLETS – by 52% reducing country pub turnover – in some cases – 60%. (refer Cootamundra)
- UNCONSCIONABLE CONDUCT – refer attached letters re: Signing TAB / Sky contracts – threats to open more agencies – cut off signal if contracts not signed.
- UNREASONABLE TRADE PRICE FIXING (based on ability to pay not cost plus reasonable return.).

Thank you for your consideration.

Yours faithfully



Colin Waller – Licensee / Partner

ADDENDUM TO BERRY HOTEL'S SUBMISSION TO ACCC

Date: 13TH May 2003
 Authorisation No: A90837
 Public Register No: C2002/1081

- **SKY fees paid by the Berry Hotel over the last 5 years:**

		MONTHLY	YEARLY
April	1998	\$1,091	\$13,092
August	2000	\$1,144	\$13,728
June	2002	\$1,255	\$15,060
Feb	2003	\$1,359)	
May	2003	\$1,344)	\$15,924

- **TAB Commission – received by Berry Hotel:**

For year	1998	\$24,790
	2000	\$18,349
	2001	\$19,601
	2002	\$21,408

1998 Commission \$24,790 less SKY fee \$13,092 = \$11,698

2002 Commission \$21,408 less SKY fee \$15,060 = \$ 6,348

ie: THIS GROSS RETURN / CHARGE BY TAB/SKY HAS ALMOST HALVED
SINCE 1998

Note the above figure does not include other operating costs such as wages, rent, promotions, supply of equipment etc incurred by the hotel.

- **Other information attached:**

- UNCONSCIONABLE CONDUCT – THREATS
(refer attached correspondence)
- February 2003 – TAB Report showing Berry Hotel Sales / Ranking
- February 2003 – TAB Commission Statement – with consumable charges
- SKY Channel – Charge Rates Sheet showing combination of literage and TAB turnover. Literage rate is approximately 2/3 (66%) of final TAB/Sky charge.

ADDENDUM TO BERRY HOTEL's SUBMISSION TO ACCC

Date: 13TH May 2003
Authorisation No: A90837
Public Register No: C2002/1081

Monthly SKY fees paid by the Berry Hotel over the last 5 years:

April	1998	\$1,090.67
August	2000	\$1,144.06
June	2002	\$1,255.45
Feb	2003	\$1,359.46
May	2003	\$1,344.52

TAB Commission:

Other information: