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Mr T Grimwade  
General Manager  
Adjudication  
ACCC  
PO Box 1199  
DICKSON ACT 2602

23 MAY 2003

Dear Mr Grimwade,

## **AHA APPLICATION FOR AUTHORISATION – A 90837**

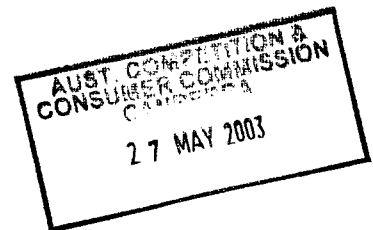
I attach a further submission by the AHA (NSW) in relation to its application for authorisation for collective negotiation with TAB Ltd.

Also attached is a separate submission from an AHA (NSW) member, Mr Colin Waller.

Should you wish any more information please do not hesitate to contact me.

Yours truly,

  
HANK SPIER



**AHA APPLICATION FOR AUTHORISATION FOR  
COLLECTIVE NEGOTIATION WITH TAB/SKY-A90837**

**POST PRE DECISION CONFERENCE SUBMISSION BY AHA  
(NSW)**

The AHA (NSW) consists of 1635 members, 586 metropolitan and 1049 regional members. The overwhelming number are small businesses.

AHA (NSW) members strive to provide a full range of hospitality services, including wagering facilities.

The Association represents its members on many matters on a collective basis and in particular on industrial relations matters.

The Association is part of the AHA (National) but this application is by the NSW State body only.

In relation to wagering Association members face a company that has a statutory monopoly in relation to wagering and a commercial monopoly in relation to the racing broadcasts.

That monopoly is TAB Ltd who in turn owns SKY Channel and Radio 2KY.

SKY Channel operates nationally but only in NSW is the TAB and SKY one organisation. Even so SKY has a monopoly nationally on TV race broadcasting. Foxtel and Austar provide racing broadcasts for home use but they in turn get the programs from SKY and are not allowed to provide racing programs to hotels and clubs etc, even though Foxtel/ Austar do provide other sporting programs to hotels etc.

In the draft decision the ACCC indicates that Foxtel provides competition to SKY. That is not the case. As indicated above Foxtel re transmits SKY broadcasts and agreements between the two are aimed at preventing any competition. The same applies to Austar. SKY makes sure that its monopoly is not weakened in any way.

AHA members have had a long running grievance with the TAB/SKY on its treatment of them, including its charging regime.

The Association has, in the past, suggested to the TAB that the AHA (NSW) represent its members in dealing with TAB but the TAB threatened using the Trade Practices Act against the Association. That is why the Association applied for authorisation.

The Association also looked at the issue of taking legal action under section 51 AC of the TPA (unconscionable conduct) and also the agreement between SKY and Foxtel/ Austar that prevents members from having an alternative source of racing broadcasts.( possible section 45 and 46 conduct ) However, these avenues were too expensive and too uncertain. Maybe the ACCC should look at these issues as they are beyond the resources of small businesses.

Attached for the information are copies of legal advice obtained by the AHA (NSW).

In a well known US article on collective negotiation the small businesses are called "Lilliputian." ( *The Sherman Act's Unintended Bias against Lilliputians ; Small Players' Collective Action as a Counter to Relational Market Power.* Warren Grimes, *Anti Trust Law Journal*, Vol 69, Issue 1, 2001)

AHA members know how they feel.

The same article gives the following likely market pre conditions for parties seeking collective negotiation are,

- Each business is a small business in relative and absolute terms.

- They confront substantial and enduring market power.
- This market power cannot easily or reasonably be countered by means short of collective action

The AHA can only agree.

The AHA (NSW) does not agree with the ACCC assessment of the public benefits of its application as outlined in the Commissions draft decision of 26 February 2003.

The Commission decision says that the AHA (NSW) wants to engage in price fixing. That is not correct. The AHA (NSW) wants to negotiate. The TAB price fix and leave no room for negotiation.

AHA members would like to know why they are different from primary producers and quasi unionists, where authorisation for collective negotiation has been granted by the ACCC.

It is noted that **Golden Casket Agents** have to date not succeeded in their application for collective negotiation. Does that mean that unless you are politically sensitive primary producers or quasi unionists you have little chance?

The case is often put that groups, such as primary producers, are going through a period of transition to a more competitive market and hence the authorisations.

In the case of the TAB the AHA (NSW) would welcome a transition to a more competitive market. However the transition from a State owned monopoly to the TAB today, is a transition to a private monopoly and not a transition to a competitive market structure. The AHA was of the view that National Competition Policy was about freeing up markets and weakening monopolies – simply a transfer of monopoly power but losing the altruistic culture of State ownership.

Whilst the AHA (NSW) is pleased to continue the authorisation process, one option for it will be to withdraw this application and wait for the Dawson changes. Importantly, the onus will then be on the ACCC.

The Association feels that the ACCC have put a very high onus on the AHA, even though anti competitive detriment is low. Also the role of trade associations is specifically recognised by the Dawson Committee. Not to mention the Committee's inclusion of boycotts in its collective negotiation model. The Commissions draft decision appears to want to weaken the role of the AHA, as a grass roots, voluntary membership body, even though it faces a State wide monopoly.

The ACCC draft decision was issued before the publication of the Dawson Committee Report and the Federal Governments response to that Report. An important recommendation of that Report was the issue of collective negotiation.

No doubt the ACCC will be considering the implications of the Dawson Report on its operations including applications for authorisation for collective negotiation, such as ours. It may be that the ACCC should grant interim authorisation to such applications, pending any legislation coming from Dawson. Such an approach would also provide some wider experience of the collective negotiation process.

However the AHA (NSW) will not be persisting with its boycott application - see later in this submission.

In addition, the Dawson recommendation on exclusionary provisions, i.e. primary boycotts, will no longer make such conduct the heinous conduct the ACCC appears to view it as.

In considering collective negotiation, the Association's view is that it is a public benefit to balance power in the market place, unless such conduct seriously lessens competition. In this instance what is proposed will not lead to an anti competitive detriment, in fact the Association sees the opposite. The TAB will have to "compete" for AHA members services by way of the collective negotiation process and as such may encourage some members to opt out of any such process by offering a better deal than to the bargaining group.

The AHA (NSW) is of the view that any collective negotiation on behalf of its members will have little if any detrimental effect on competition but will have public benefits

There is currently no competition in relation to TAB/SKY services. It is totally in the control of TAB/SKY.

The competitive dynamics in the industry is not between hotels as they have largely the same costs but between hotels and clubs, hotels and taverns and hotels and liquor stores. Where there is competition between hotels is in the area of promotional ventures such as a disco or other entertainment or group functions. Ironically TAB/SKY indirectly discourages such competitive ventures due to the hotel wide literage component of the SKY fees.

Abandonment of the literage concept alone will provide competitive flexibility for hotels and put them in a better competitive situation vis a vis clubs and taverns.

Furthermore, in relation to any anti competitive detriment, any collective negotiation cannot force the monopolist to deal with the small business group. However, we hope that it is the interests of the TAB to deal with us. In Commission's draft decision you are optimistic in that regard. Time will tell.

### **The application.**

The Association believes that the following public benefits will result, directly or indirectly, from the collective negotiation proposed by the AHA (NSW),

- Ensuring the continued viability of small business operations, particularly in rural and regional areas, thus ensuring competition in those areas;
- Assistance to the efficiency and competitiveness of small business, by:
  - **Facilitating the availability of information on operational and pricing issues.**
  - **Limiting transaction costs in negotiation of supply agreements**

- **Freeing up small business operators to focus on increasing the competitiveness of their businesses**
  - **Fostering industry harmony**
  - **Promotion of equitable dealings in the market;**
- **Providing countervailing/bargaining power to small business in dealing with large and powerful suppliers;**
  - **Promotion of industry cost savings, potentially resulting in contained or lower prices at all levels in the supply chain;**
  - **Supply of better information to suppliers to permit more informed choices in their dealings with small business.**
  - **Allowing hotels to continue to support the NSW racing industry, particularly country racing.**
  - **Building confidence in the product.**

The AHA accepts that there is overlap between some of the public benefits.

The AHA view is that in aggregate these public benefits outweigh the very limited, if any, anti competitive detriment.

The AHA sees little or no anti competitive conduct in any of the three markets outlined in the draft determination.

The AHA main concern is being authorised to collectively negotiate on behalf of its members in relation to the provision of racing broadcasting services.

However as TAB owns SKY the Association was of the view that any collective negotiation has to involve wagering services as well.

### **Further information and comments.**

It is not proposed to repeat what was said in the various submissions nor the very well attended pre decision conference but provide the following further or expanded material/comments.

1. The ACCC in its draft determination states- "According to the ABS commissions in Pub TAB wagering facilities represent about 0.7% of total income for pubs, taverns and bars...."

The Australian Bureau of Statistics (ABS) figure of 0.7pc of hotel income represented by wagering commission is very generalized and does not accurately portray the situation in New South Wales, particularly the situation of country hoteliers.

The following examples show the actual importance of TAB commission to PubTAB sites in NSW, i.e. that the percentage is much higher in reality.

#### **Hotel 1- (Murray River)**

Av. TAB commission income per week: \$220  
Av. Total hotel income per week: \$1050  
TAB commission thus represents 20pc of this hotel's total weekly income.

#### **Hotel 2- (North-West NSW)**

Av. TAB commission income per week: \$100  
Av. Total hotel income per week: \$2100  
TAB commission thus represents 4.75pc of this hotel's total weekly income.

#### **Hotel 3- (Mid-North Coast)**

Av. TAB commission per week: \$650  
Av. Total hotel income per week: \$9600  
TAB commission thus represents 6.75pc of this hotel's total weekly income

#### **Hotel 4- (Central West NSW)**

Av. TAB commission per week: \$50  
Av. Total hotel income per week: \$875  
TAB commission thus represents 5.75pc of this hotel's total weekly income.



### **Hotel 5-(Hunter Valley)**

Av. TAB commission per week: \$265

Av. Total hotel income per week: \$4025

TAB commission thus represents 6.5pc of this hotel's total weekly income.

### **Hotel 6- (South Coast)**

Av. TAB commission per week: \$200

Av. Total hotel income per week: \$1750

TAB commission thus represents 11.25pc of this hotel's total weekly income.

The above figures relate only to TAB commission.

When one adds the SKY Channel costs to the above, that will in most cases double the cost and the % of turnover. The costs incurred by hoteliers in relation to TAB/SKY charges cannot be dismissed as minimal.

2. What would happen to many rural/ regional hotels if the current situation continued and the SKY fee structure spread to Foxtel/Austar.

The Association is fearful of the SKY fee structure spreading to Foxtel and Austar. Neither of these has the same market power of TAB but if the TAB/SKY structure stays others will see it as legitimate and follow.

It may be argued by some that the literage component is no different to turnover fees in shopping centres. It is submitted that these are very different as the tenants occupy the landlord's premises and profit from the landlords infra structure.

In the case of TAB they are a "squatter" in the hotels.

3. Even though the TAB has standard form contracts it still goes through a sham of negotiation with hotels.

The TAB contends that a negotiated outcome would add to costs as distinct from the current one fits all standard form contract.

This contention is somewhat misleading as the TAB does go through the process of so called negotiation and has field representative for that purpose.

Importantly the literage component means that there is on going contact with each member hotel and an on going information flow. Not only does this issue because constant disputes it also put extra burdens on the hotels and collection costs on the TAB/SKY.

4. In the case of a dispute, what does that cost the hotel?

This will be on a case by case basis but if lawyers and accountants are used the costs are considerable.

Any collectively negotiated outcome should have a simple and inexpensive dispute resolution system and furthermore the Association can stand in the shoes of the member in relation to some disputes.

5. What information that the AHA does not get now from members that will be facilitated if collective negotiation is allowed.

Historically there has been a reluctance by hoteliers (as individual small business operators) to disclose trading information, such as liquor trade and TAB turnover.

Small hotels are notoriously poorly informed about the industry and anything that helps to overcome that must be seen as being positive.

But members of the AHA (NSW) have been so concerned about the TAB/SKYChannel situation that they have recently been most forthcoming with such details, because they can see the need for the Association - as a peak body – to obtain mass data to use on their behalf.

If collective bargaining is allowed, it is likely that members will continue to supply this type of information which the Association could then use to provide assessments of trading expectations and likely TAB problems in the future.

If the application fails then the flow of information is likely to dry up.

It is accepted that this benefit is not a direct consequence of collective negotiation, it is indirect, yet real.

This is one of the important benefits that the Association sees emerging from a collective negotiation process – being able to obtain information from its own members **and** from the TAB, in order to overall provide appropriate advice to members.

*6. The collective negotiation path, is it cheaper?*

The collective negotiation path would be cheaper for both organizations.

AHA (NSW) members would save considerable time and expense because they could leave negotiations to the Association as the representative peak body.

Similarly, TAB Limited would likely make major savings, because it would not require its current burden on its own field staff, who have to travel around the State visiting hoteliers at their individual sites to do on-the-spot negotiations.

Given that TAB Limited has a constant cost reduction attitude to its own operation (e.g. as previously demonstrated on its consumables and race form changes), it would be of great saving to TAB Limited to be able to reduce or eliminate its field staff cost by simply doing its negotiations collectively through its head office. The TAB is constantly seeking to utilize technology to cut its costs.

See also point 3 above.

**7. In Victoria there have been boycotts between SKY and hotels. Could similar issues arise in NSW?**

A 'strike' situation, similar to that which occurred in Victoria between AHA Victoria and SKY Channel, is less likely to arise in New South Wales. The Victorian situation amounted to a boycott of SKY. In fact the AHA (NSW) was surprised at the time that the ACCC did not get involved.

The Victorian situation has not occurred in NSW because the AHA (NSW) observed the Victorian experience, learned from it, and resolved from the outset to apply formally through the ACCC and follow the correct channels.

The Association has never set out to cause an industrial dispute, cause problems for TAB Limited, or cause problems for the public.

The purpose for the AHA (NSW) in seeking approval from the ACCC was to seek a legitimate, reasonable authority for dealing with real problems affecting the future of the wagering sector, particularly the wagering sector in rural and regional NSW.

However, if the status quo remains industrial action cannot be ruled out in NSW as the Association is less likely to be able to hold the line.

**8. The legal advice the AHA (NSW) obtained from Senior Counsel on the unconscionable conduct issue and the Foxtel/ SKY contract.**

These advices are attached.

**9. The literage issue, the impact of that on the better managed hotels, does it hinder its competitive spirit as SKY gets part of the proceeds even where it has nothing to do with wagering.**

One of the most persistent complaints from hoteliers related to TAB/SKY Channel is the use of the literage system and the way that this is actually implemented by TAB field staff.

Hoteliers oppose the literage calculation system because it is unrelated to actual TAB performance (this is a view shared by the Association, which believes SKY Channel rates should be linked to a real performance indicator, such as betting ticket sales).

The use of literage for wagering purposes is unpleasant for hoteliers, because literage figures are confidential business data for any hotel.

The act of having to give this data to, or allow breweries to provide it to a third party (TAB Limited) is an abhorrent practice for the average hotelier.

The reason is that literage figures are highly sensitive – these indicate the trading position of a hotel and are usually only known to the hotelier and his accountant.

Hotels operate in a competitive market, so it is obvious that a hotelier will be against giving any information which may become known to competitors, etc (the TAB may claim security of information, but the best safeguard is surely not to have the information out at all).

TAB Limited will submit that no hotelier is forced to provide literage figures, but this not true in the actual event.

When a hotelier declines to provide data, or declines to provide permission for TAB Limited to seek these figures from the breweries, the TAB staffer simply moves the hotel into an even more exorbitant SKY Channel pricing bracket.

The TAB staffer then tells the hotelier that the hotelier cannot be moved back to a lower pricing bracket without “proof” being provided.

The hotelier is, of course, then left with little choice but to provide confidential data in order to avoid a greater financial penalty.

This method is probably regarded by TAB Limited as no more than gamesmanship – however, the Association regards it as tantamount to economic blackmail.

The practice is so widespread (ie. complained about to the Association by virtually every member with a PubTAB) that the Association believes it to be standard operating procedure at TAB Limited.

By way of example even if the hotel supplied kegs to a football team for after a match that is part of the literage that is used to calculate the SKY fees. Many more similar examples can be submitted.

#### 10. Viability of hotels having Pub TAB

An AHA (NSW) survey of members conducted after the ACCC draft determination indicated that the average weekly trading loss for PubTAB hotels was around \$900. This was said by hoteliers to be a direct result of having a Pub TAB.

The hotels are in a “prisoner’s dilemma” situation as they wish to provide Pub TAB facilities as part of their package of services to the community and hence have persisted- until now.

However if nothing changes it is expected that many will cease to be a PubTAB agent. Query what they do with their 5 year SKY contract?

#### 11. Data on the positive impact on the economy of wagering especially in rural/regional areas.

The Association conducted a survey of members after the ACCC draft determination on number of issues, including employment. The result was that the typical PubTAB employs on average 1.2 positions per week.

That means that the PubTAB’s in NSW employ about 1000, all paid for by the hotels, not the TAB.

#### 12. What negative effects can be expected in rural communities if the current situation persists?

See the above comments about employment.

In addition the average Pub TAB spends at least \$2000 annually to support local racing. This is about \$1-2 million annually across the State.

This money is drying up as the situation of an average weekly trading loss persists.

As stated earlier the ACCC has authorized collective negotiation by primary producers and by quasi unionists. Yet not AHA hotels. Maybe it would be easier if you saw the members as **not gambling** establishments but as TAB/SKY franchisees.

The Association believes that members who have a PubTab agency are covered by the Franchise Code but the TAB says otherwise. If the members were covered by the Code we would at least have a dispute resolution mechanism. This would at least give Association members a way to mediate the issue. However unless the ACCC pursues the Code issue the AHA would have to take legal action to clarify the Code issue and that the AHA cannot afford ,as no doubt the TAB will vigorously resist.

In fact any collective negotiation process should build in such a process and the Association see this as an additional and important public benefit to those already outlined in this and other submissions.

### 13. Efficiency effects.

In its submission of 23 April 2003 TAB/SKY appears to accept the public benefits of hotels as a means of distributing wagering services and the contribution of hotels to the funding of the racing industry.

It argues that any changes in the SKY pricing structure will threaten these benefits.

The Association disagrees with this negative assessment and in any case it is issues such as that that can be the subject of any collective negotiation and not the unilateral system that exists today.

The Association would agree with those public benefits and would strive to maintain them.

### **THE AHA (NSW) APPLICATION**

Following the ACCC draft decision, helpful discussions with Commission staff and the pre decision conference, the Association has had sometime to consider what has been suggested and proposes the following,

➤ **The Association withdraw the application as to collective boycotts**, however, reserves the right to reapply if a non boycott system does not work. The Association may eventually invoke any post Dawson collective negotiation notification mechanism.

It is noted that the Dairy Farmers collective negotiation authorization is not fully working, with at least one processor refusing to engage in collective negotiation. Despite the wishes of the dairy farmers supplying the processor.

➤ **All AHA (NSW) members will constitute the the bargaining group.** It was suggested by the ACCC that the AHA (NSW) members break up into smaller bargaining groups.

The AHA does not regard that as practical. The AHA (NSW) regards all its members as having “shared interests The AHA NSW is already a part of the national market and faces a nation –wide monolith. Unlike dairy farmers AHA members can only deal with the TAB which is solely based in metropolitan Sydney and not local processing plants. The relevant market here is technology driven and hence highly centralized.

➤ That a senior office holder **officeholder of the AHA (NSW) convene the collective negotiation** Committee. However, the convener will only be able to report to those members who join the bargaining group and not to the whole membership.

The ACCC draft decision suggested that the **role of the AHA (NSW) be limited**. The Association does not see that



as practical. Also the Dawson Committee has put a different complexion on this issue.

➤ **That information not be shared between any bargaining groups** in other State or Territories, including the outcome of any collective negotiations. Any outcome of any collective negotiations will be provided to the ACCC on a confidential basis.

➤ **That all AHA members be entitled to join the bargaining group.** The ACCC has suggested that perhaps larger members be excluded from any collective negotiation. The AHA does not agree. The power of the TAB is such that no one can get a better deal.

The Association is aware of some large members seeking to get the TAB/SKY to pass on savings obtained by TAB/SKY in its contracts with racing clubs. They failed.

In any case AHA membership is per hotel /publican and not the beneficial owner of the hotel.

➤ **That any member can opt out** of the collective negotiation group.

➤ **Mediation.** A dispute resolution system along the lines of that agreed to by the Tribunal in the Dairy Farmers authorization be implemented as part of the collective negotiation scheme.

➤ **That the AHA (NSW) develops a TPA compliance program.** Hopefully with ACCC assistance the Association can develop a model for small business non primary producer bodies that are involved in collective negotiation.

➤ **That the authorization operates for 5 years.**

➤ **That the AHA (NSW) provide the ACCC with an annual report** on the operation of the collective negotiation scheme.

