

Final Determination

Application for Authorisation

Lodged by

Australian Hotels Association (NSW)

In respect of

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

Date: 27 June 2003

Commissioners:

Bhojani
Martin
McNeill
Willett

Authorisation no. A90837

Public Register no. C2002/1081

Executive summary

The Application

On 17 July 2002 the Australian Hotels Association (NSW) (“the AHA NSW”, “the Applicant”) lodged an application for authorisation (A90837) with the Commission. By letter dated 13 September 2002 the AHA NSW lodged an amended application for authorisation (“the Application”).

The authorisation process

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

The Act recognises that compliance with the competition provisions of the Act may not always give rise to the most efficient outcome. It therefore allows the Commission to grant immunity from the Act for anti-competitive arrangements or conduct in certain circumstances.

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

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

The proposed arrangements

The AHA NSW is seeking authorisation on behalf of its hotel members to conduct collective bargaining in dealings with Tab Limited in relation to the provision of totalisator (wagering) services (PubTAB) and in dealings with Sky Channel Pty Limited (“Sky Channel”) in relation to the provision of racing broadcast services to AHA NSW members.

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

The AHA NSW also initially sought authorisation to collectively boycott Tab Limited and Sky Channel if negotiations broke down. The collective boycott activity was to take the form of a collective decision by participating hotels to withdraw their services to Tab Limited and Sky Channel. Following the Commission’s draft determination in relation to this application, the AHA NSW advised the Commission that it no longer sought authorisation to engage in collective boycott activity.

Draft determination

The Commission made a draft determination in relation to the AHA NSW's application for authorisation on 26 March 2003 proposing to deny authorisation in respect of the application to collectively bargain with Tab Limited and Sky Channel on behalf of AHA NSW members in relation to the provision of totalisator (wagering) PubTAB and racing broadcast services. The Commission also proposed to deny authorisation in respect of boycott activity by AHA NSW members in the form of a collective decision to withdraw services from Tab Limited and Sky Channel should negotiations break down and do not recommence within seven days.

At the time, the Commission considered that that there existed little public benefit demonstrated by the Applicant in relation to the proposed arrangements.

The Commission also believed that, with collective boycott activity, the proposed arrangements would have had a significant anti-competitive effect but much less where the collective boycott activity was removed and certain restrictions on bargaining put in place.

For these reasons, the Commission proposed to deny authorisation.

In its draft determination, the Commission invited the Applicant to provide further submissions as to public benefits and appropriate conditions that might be imposed on any collective bargaining arrangements in order to limit anti-competitive detriment should it be able to demonstrate further public benefit.

The Commission held a pre-decision conference in relation to its draft determination on 5 May 2003. The Commission also accepted written submissions from interested parties on its draft determination and issues raised at the pre-decision conference. The matters raised in these submissions were considered by the Commission prior to it making this determination.

Assessment of public benefit and anti-competitive detriment

Having now considered all information presented to it since its draft determination, the Commission considers that there exists a net public benefit in relation to the proposed arrangements.

In coming to this view, the Commission has had regard to additional information submitted by the Applicant following the Commission's draft determination.

Specifically, the Commission has considered the Applicant's submission that it:

- no longer sought authorisation in respect of collective boycott activity;
- would refrain from sharing information obtained as part of the collective bargaining process, or the outcome of such a process, with any bargaining groups in other states or territories;
- would develop and implement a dispute resolution system as part of the collective bargaining process; and

- would develop a trade practices compliance program.

The Commission believes that there is likely to be a benefit to the public associated with the proposed arrangements as a result of:

- improved dialogue between the AHA NSW (and its members) and Tab Limited and Sky Channel as a result of collective bargaining and the implementation of a dispute resolution process which is likely to, in turn, minimise any inefficiencies associated with current contractual terms and conditions (including potential inefficiencies in commission and pricing structures); and
- any pass through of gains made by hotels in the form of lower prices to consumers (albeit the Commission believes this is likely to be low).

In relation to anti-competitive detriment, as detailed above, the Commission is of the view that, where collective bargaining arrangements are introduced absent collective boycott activity and with restrictions such as those proposed by the Applicant, there would exist low anti-competitive detriment.

The Commission is of the view that the public benefit associated with the proposed arrangements is likely to outweigh the anti-competitive detriment associated with the arrangements.

For the reasons outlined above, the Commission, in Section 13 of this determination, **grants** authorisation for a period of 5 years.

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1. Introduction

- 1.2. The Australian Competition and Consumer Commission (“the Commission”) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (“the Act”). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.3. The Act recognises that compliance with the competition provisions of the Act may not always give rise to the most efficient outcome. It therefore allows the Commission to grant immunity from the Act for anti-competitive arrangements or conduct in certain circumstances.
- 1.4. One way businesses may obtain immunity is to apply for what is known as an “authorisation” from the Commission. Broadly, the Commission may “authorise” businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.5. The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.6. Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.7. The Act requires that the Commission then issue a draft determination in writing proposing either to grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account any submissions received from interested parties.
- 1.8. The Commission issued a draft determination in relation to application A90837 lodged by the Australian Hotels Association (NSW) (“the AHA NSW”, “the Applicant”) on 26 March 2003 proposing to deny authorisation for the proposed arrangements.
- 1.9. The AHA NSW requested that the Commission convene a pre-decision conference in relation to this matter. This conference was held in Sydney on 5 May 2003. The Commission also accepted written submissions from interested parties until 23 May 2003.
- 1.10. This document is a final determination in relation to application for authorisation A90837 lodged with the Commission by the AHA NSW.

2. The Application

The Application

- 2.1. On 17 July 2002 the AHA NSW lodged an application for authorisation (A90837) with the Commission.
- 2.2. Following a period in which the Commission sought further details and clarification of the arrangements for which authorisation was sought, by letter dated 13 September 2002 from Spier Consulting on behalf of the Applicant, the Applicant lodged an amended application for authorisation.
- 2.3. The Applicant made a further submission in respect of its application for authorisation on 23 May 2003. At this time, the Applicant advised that it no longer sought authorisation to engage in collective boycott activity if negotiations broke down.
- 2.4. The application, made under section 88(1) of the Act,¹ is for an authorisation under that subsection:
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
 - to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 2.5. The AHA NSW seeks authorisation to conduct collective bargaining with Tab Limited in relation to the provision of totalisator (wagering) services (PubTAB) and with Sky Channel Pty Limited (“Sky Channel”) in relation to the provision of racing broadcast services to AHA NSW members.
- 2.6. The application, taking into account the amendments of 13 September 2002 and the Applicant’s submission of 23 May 2003, is hereafter referred to as “the Application”.
- 2.7. The AHA NSW provided three sets of submissions in relation to the Application prior to the Commission’s draft determination. Each submission has been provided by Spier Consulting representing the AHA NSW. These submissions are hereafter referred to as follows:
- The first AHA NSW submission: 16 July 2002
 - The second AHA NSW submission: 13 September 2002
 - The third AHA NSW submission: 13 December 2002

¹ The application has also been considered under the Competition Code.

- 2.8. The Applicant made a further submission to the Commission dated 23 May 2003 after the Commission issued its draft determination.

The Applicant

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

Location of hotel	No. of Members
Metropolitan	586
Regional cities	220
Country	829

- 2.10. The AHA NSW describes itself as a political lobby group seeking change for the benefit of the hotel industry.
- 2.11. The AHA NSW submitted that it comprises of 1414 members who are small (with less than 15 employees), 84 who are medium sized (with between 15 and 70 employees) and 137 who are large (with more than 70 employees).

The Arrangements

Collective bargaining

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

Primary boycott

- 2.13. The AHA NSW also originally sought authorisation for a collective bargaining group represented by the AHA NSW to collectively withdraw services to Tab Limited and Sky Channel, should contractual negotiations break down and not recommence within seven days. As noted above, the Applicant has advised the Commission that it no longer seeks authorisation to engage in collective boycott activity.

Parties to the proposed arrangements

- 2.14. The parties to the proposed arrangements are present and future AHA NSW members. Pursuant to subsection 88(10) and 88(13) of the Act, the authorisation application applies to any collective bargaining group of AHA NSW members, present or future, represented by the AHA NSW, that wish to engage in the proposed arrangements.

- 2.15. AHA NSW member participation in collective bargaining is voluntary. AHA NSW members retain the right to negotiate and enter into individual contracts with Tab Limited and Sky Channel.

Bargaining groups

- 2.16. More than one collective bargaining group may form pursuant to the Application. However, whether more than one collective bargaining group will eventuate and the exact composition of any potential collective bargaining group is not presently known to the AHA NSW.

Issues of certainty

- 2.17. In their submissions,² Tab Limited and Sky Channel noted the importance of certainty regarding the arrangements for which authorisation is sought. In granting (or assessing whether or not to grant) authorisation, the Commission must assess the likely benefits and anti-competitive detriments associated with the proposed arrangements and compare those to the scenario that would exist without the proposed arrangements. It is therefore essential that the arrangements sought to be authorised are described with sufficient particularity and certainty so that proper assessment of the likely public benefits and anti-competitive detriments can be made.
- 2.18. The Commission, as discussed later in this determination, agrees that the proposed arrangements, as set out by the Applicant and described above, are expressed very broadly. This, in turn, affects the Commission's assessment of likely benefit and detriment that might flow from the proposed arrangements.

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

3. Chronology of assessment of the application

Date	Event
17 July 2002	Application lodged.
31 July 2002	Meeting between Commission staff and representatives of the AHA NSW to clarify aspects of its authorisation application and to discuss the background to the application.
6 August 2002	Letter to the Applicant requesting further information by 30 August 2002.
8 August 2002	Letters sent to interested parties inviting submissions in relation to the authorisation application by 6 September 2002.
30 August 2002	Letter received from Freehills, acting for Tab Limited and Sky Channel raising a number of concerns in respect of AHA NSW's application and requesting an extension of time for submission lodgement.
4 September 2002	<p>Letter to Applicant seeking information in response to concerns raised by Tab Limited and Sky Channel, plus additional information, by 13 September 2002.</p> <p>Letter to Freehills advising that concerns of Tab Limited and Sky Channel have been conveyed to AHA NSW for response, and granting extension for submission lodgement until 20 September 2002.</p>
6 September 2002	Meeting between Commission staff and representatives of AHA NSW to discuss the lodgement of amended forms.
10 September 2002	Letter from Freehills outlining further concerns with regard to the Application and seeking extension of time for submission lodgement.
12 September 2002	<p>Letter to Applicant requesting additional information to address concerns raised by Freehills.</p> <p>Letter to Freehills granting extension of 3 weeks from the date of AHA NSW's response to the Commission's letter of 4 September 2002.</p>
13 September 2002	Letter from the Applicant confirming the arrangements for which authorisation was sought and providing amended applications.
17 September 2002	Letter received from application in response to Commission's letter of 6 August 2002 and in response to concerns raised by Tab Limited and Sky Channel in letter from Freehills of 10 September 2002. Amended application forms also enclosed.

18 September 2002	Letter to Freehills enclosing copies of additional information provided by AHA NSW, requesting further information, and confirming that any submission should be provided by 17 October 2002.
23 October 2002	Joint submission received from Tab Limited and Sky Channel.
6 November 2002	Last annexure to the joint submission of Tab and Sky Channel received.
13 December 2002	Third AHA submission received.
26 February 2003	Second submission received from Freehills on behalf of Tab Limited and Sky Channel.
26 March 2003	Draft determination issued.
9 April 2003	Pre-decision conference requested by AHA NSW.
23 April 2003	Written submission lodged by Tab Limited and Sky Channel.
5 May 2003	Pre-decision conference held in Sydney.
22 May 2003	Written submission lodged by Tab Limited and Sky Channel.
23 May 2003	Written submission lodged by AHA NSW.
23 May 2003	AHA NSW notifies the Commission that it no longer seeks authorisation to engage in collective boycott activity if negotiations break down.
23 May 2003	Closing date for written submissions.
13 June 2003	Written submission lodged by Tab Limited and Sky Channel.
27 June 2003	Final determination issued.

4. Background to industry

Hotels, Taverns and Clubs

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

Tab Limited⁴

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

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

⁴ Tab/Sky submission 23 October 2002 at paragraph 3.1

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

Wagering and gaming⁵

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

Totalizators⁶

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

⁵ Tab Limited/Sky Channel submission 23 October 2002 at paragraph 3.2

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

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

- 4.17. Totalizators are the main form of wagering in Australia, comprising approximately 96 per cent of wagering turnover in the year ended 2000-01. Approximately 94.2 per cent of totalizator wagering turnover is “off-course” betting (that is, the customer is not present at a racecourse when placing the bet).
- 4.18. In each state or territory there is one operator, licensed or otherwise, authorised to conduct off-course wagering. These operators are authorised to conduct totalizator wagering, although in many states legislation has recently allowed them to expand into fixed-odds wagering.
- 4.19. Each off-course wagering operator was originally established as a statutory authority of the relevant state or territory and known as the Totalizator Agency Board. However in recent years a number of state and territory governments have corporatised and/or privatised the off-course wagering operators. The following table sets out the status of the off-course wagering operator in each state.

Table 4.1 Off-course wagering operators in Australia

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

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

Wagering and racing⁸

- 4.21. Wagering in Australia is conducted primarily on three codes of racing: thoroughbred racing; harness racing; and greyhound racing. Wagering on other sporting events is relatively new in Australia and, although growing rapidly, comprises only a small proportion of total wagering turnover.
- 4.22. Tab Limited and Sky Channel claim that the predominance of wagering on racing events has resulted in an interdependent relationship developing between the racing industry and the off-course wagering operators in which:
- The racing industry supply the product (that is, stage the races) on which wagering operators conduct betting; and
 - The off-course wagering operators provide the vast majority of the funding for the racing industry.
- 4.23. By way of example, the Tab Limited/Sky Channel submission stated that in respect of the year ended 30 June 2002, Tab Limited paid in excess of \$190 million in fees to the NSW racing industry, which represented in excess of 75 per cent of the total funding of the NSW racing in that period. The Tab Limited/Sky Channel submission further noted that Sky Channel also provided a further proportion of the NSW racing industry's total funding by way of television rights fees.

Regulation of off-course wagering in NSW⁹

Totalizator Act 1997 (NSW)

- 4.24. Off-course wagering in NSW is governed by the *Totalizator Act 1997* (NSW) ("the Totalizator Act") which commenced on 6 March 1998.
- 4.25. Inter alia, the Totalizator Act provides:
- Only the holder of a licence under the Totalizator Act may conduct a totalizator in NSW. This restriction however does not prevent interstate and international wagering operators receiving bets from people in NSW through telephone or Internet accessed wagering accounts.
 - Tab Limited was granted an off-course totalizator licence in consideration of a licence fee of \$303 million and an on-course totalizator licence in consideration of a licence fee of \$5 million. Both licences have a term of 99 years.
 - No other totalizator licence may be issued under the Totalizator Act until March 2013 (other than Tab Limited's totalizator licences and the on-course

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

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

licences granted to racing clubs) unless Tab Limited's licences are cancelled or surrendered.

- Any holder of a totalizator licence (other than racing clubs in respect of their on-course totalizator licence) must have and give effect to commercial agreements with an entity nominated by certain major racing clubs as the "racing industry" for the purpose of the licence. This, in effect, prevents NSW licensed totalizator operators "free riding" on the racing industry. Tab Limited has entered into the "Racing Distribution Agreement" with NSW Racing Pty Limited ("NSW Racing"), the NSW Thoroughbred Racing Board, Harness Racing New South Wales and the Greyhound Racing Authority. The Racing Distribution Agreement commenced on 6 March 1998.

The Racing Distribution Agreement

4.26. The Racing Distribution Agreement essentially provides for the following:

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

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.

Distribution¹¹

4.27. Tab Limited's wagering distribution network comprises:

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

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

PubTABs¹²

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

4.30. The fittings and fixtures within the premises for the PubTAB are provided by the hotel. Tab Limited has the right to approve proposed fittings and fixtures but hotels have general control over the scale and nature of the fittings. As a result, PubTAB outlets differ markedly, from large self-contained rooms to relatively small areas not distinguished from the bar and other areas of the hotel.

4.31. PubTAB operators receive a commission based on turnover of the PubTAB. Commission structure and rates are identical for all PubTAB and ClubTAB outlets. Prior to privatisation, commission was paid to PubTAB and ClubTAB outlets at a rate of two per cent of turnover, regardless of the level of turnover. Commission rates have been revised on three occasions since privatisation. In summary, the changes were:

- In the year ended 30 June 2001, there were a number of PubTAB outlets achieving turnover of less than \$7,500 per week. Tab Limited has advised it was of the view that it was not "economic" for Tab Limited to retain these low turnover outlets on the basis of the then existing commission structure. The commission structure was revised to pay no commission for PubTAB and ClubTAB outlets averaging turnover of less than \$7,500 per week.

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

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

- Commission rates were changed in the new standard form of agreement. Under the new structure, totalizator turnover attracted commission of 1.125 per cent where average turnover was less than \$7,500 per week and 2.125 per cent where average turnover was more than \$7,500 per week. Of the 0.125 per cent increase in commission rates:
 - 0.05 per cent was expressly provided to offset the costs of consumables for the Daily Form Service which hotels and clubs are responsible for under the new agreement.
 - 0.05 per cent was expressly provided to offset an increase in fees for the Sky Channel commercial service. It was expressly stated that this 0.05 per cent would be deducted if there was a reduction in Sky Channel fees.
 - The remaining 0.025 per cent was not expressly attributed.
 - Following a reduction in Sky Channel fees in May 2002, Tab Limited reduced commission rates for PubTABs and ClubTABs by 0.05 per cent with effect from 1 July 2002.
- 4.32. In addition to commissions, Tab Limited advised that it also provides a number of benefits which are not required under the agreement with PubTAB and ClubTAB operators. Tab Limited advised that these benefits include incentive schemes offered on a non-discriminatory basis.
- 4.33. Tab Limited uses a standard form agreement for all PubTAB outlets. This agreement is identical to that used for ClubTABs. Tab Limited advised that it engaged in an extensive consultation process with the AHA NSW in relation to the current terms of the standard form agreements at the time it was revised in 2001.

Sky Channel¹³

- 4.34. Sky Channel is a satellite television broadcaster that telecasts race meetings and other sporting events throughout Australia and internationally. Sky Channel commenced operations in 1986.
- 4.35. Sky Channel has extensive rights to broadcast (in many cases exclusively) Australian thoroughbred, harness and greyhound racing. Sky Channel submitted that it covers more than 100 race meetings per week from around Australia and broadcasts approximately 54,000 individual races each year.
- 4.36. Sky Channel broadcasts to commercial premises, being primarily hotels, clubs and TAB commercial agencies. In most cases, the commercial premises also offer wagering services.

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

- 4.37. Sky Channel submitted that its competitors in offering subscription television entertainment to hotels and clubs include FOX Sports, Austar and various resellers of international satellite channels, including sports channels such as ESPN.
- 4.38. In 1998, Sky Channel commenced operations in residential pay TV as a channel supplier to the pay TV carriers including Austar, Foxtel and Optus. Sky Channel therefore currently creates and distributes two separate services: The “Sky Channel” commercial service, which Sky Channel broadcasts to hotels, clubs and TAB outlets; and the Sky Racing domestic service, which is provided by Sky Channel to the pay TV carriers and supplied by them to residential subscribers.
- 4.39. Sky Channel submitted that the Sky Channel service is part of the entertainment offered by hotels and clubs to their customer. Sky Channel submitted that the service assists in attracting and retaining customers and associated revenue. Sky Channel further submitted that, for hotels and clubs that offer wagering facilities such as PubTABs and ClubTABs, the availability of racing coverage through the Sky Channel service assists in enhancing wagering turnover.
- 4.40. Sky Channel submitted that most hotels acquiring the Sky Channel service have wagering facilities. While the numbers vary, Sky Channel advised that the percentage of hotels and clubs who subscribe for the Sky Channel service and who have a PubTAB or ClubTAB facility is in the order of 90 per cent.
- 4.41. Sky Channel uses standard form contracts for hotels and clubs and the same standard form contract is applied nationally. The standard form contract has been used for many years and the current form has been in use since April 1998.
- 4.42. The standard form contract provides for a nominal five year term and provides that hotels and clubs may terminate at any time within that five year term on six months’ notice.
- 4.43. Sky Channel charges hotels and clubs for the Sky Channel service on the basis of a standard rate card which is publicly available. The same rate card is applied nationally, except in Western Australia where a discount of 25 per cent is applied in recognition of the impact of time zone differences on the value derived by Western Australian hotels and clubs from the service.
- 4.44. Under Sky Channel’s rate card, the fees for the Sky Channel service are determined by reference to the Annual Bulk Beer Litrage and, for those outlets with PubTAB or ClubTAB facilities, wagering turnover. Different scales apply depending upon whether or not the hotel or club has wagering facilities.
- 4.45. The price under the rate card system may be adjusted in accordance with changes in turnover but Sky Channel submitted that, in practice, the fees are fixed at the start of the contract and do not adjust during the contract term other than consumer price index adjustments. Sky Channel further submitted that turnover information is generally only sought at the commencement of the contract term and in support of reductions in fees.

5. Statutory test

- 5.1. Application A90837 was made under subsection 88(1) of the Act to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the Act.¹⁴
- 5.2. In relation to the arrangements that might substantially lessen competition, the Commission may grant authorisation if the test set out at subsection 90(6) of the Act is met, namely:
- the provisions of the subject arrangements would result, or be likely to result, in a benefit to the public; and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, from the proposed arrangements.
- 5.3. Section 88(10) of the Act provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.
- 5.4. Section 88(13) of the Act provides that an application for authorisation for specific arrangements may be expressed to be made also in relation to other arrangements that will be in similar terms. The Application was so expressed. The Commission may grant a single authorisation in relation to all such arrangements.

¹⁴ As discussed previously in this determination, the Applicant originally sought authorisation to also engage in conduct that might constitute exclusionary conduct (collective boycott activity). The Applicant has since advised the Commission that it no longer seeks authorisation in respect of collective boycott activity. As such, the discussion surrounding the proposed arrangements is limited to collective bargaining activity and the associated test as outlined in the Act.

6. Submissions prior to the draft determination

The Applicants

6.1. The AHA NSW provided the Commission with three submissions prior to the release of the draft determination:

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

6.2. The first AHA NSW submission was provided at the same time that AHA NSW lodged its application. The second and third AHA NSW submissions were provided in response either to queries from the Commission or interested parties, or in response to opposing submissions from interested parties.

Public benefits

6.3. In its submissions, the Applicant identified a number of public benefits which it argued would arise from the proposed arrangements. The Applicant submitted that these benefits outweigh any possible public detriment resulting from the arrangements.

6.4. In summary, the following public benefits were claimed by the Applicant on pages 6 and 7 of the first AHA NSW submission:

- Ensuring the viability of small business operations, particularly in rural and regional areas, thus ensuring competition in those areas.
- Assisting the efficiency and competitiveness of small business by:
 - Facilitating the availability of information on operational and pricing issues;
 - Limiting transaction costs in negotiation of supply agreements;
 - Freeing up small business operators to focus on increasing the competitiveness of their business;
 - Fostering industry harmony; and
 - Promotion of equitable dealings in the market.
- Providing countervailing/bargaining power to small business in dealing with large and powerful suppliers.
- Promotion of industry cost savings, potentially resulting in contained or lower prices at all levels in the supply chain.
- Supply of better information to suppliers to permit more informed choices in their dealings with small business.

- Equity in the market.
 - Collective bargaining of a common system is a public benefit.
- 6.5. The Applicant identified the following additional public benefits at page 4 of Attachment 6 of the second AHA NSW submission:
- Allowing presently uneconomic sites to operate because they would be able to better afford the cost of Sky Channel.
 - Building confidence in the product.
 - Allowing more hoteliers to support the NSW racing industry.
 - Greater protection for the public in the area of responsible gambling.
- 6.6. The public benefits claimed by the Applicant are discussed in more detail in Section 11 of this determination.

Anti-competitive detriment

- 6.7. In its submissions, the Applicant does not specify the nature of any possible anti-competitive detriment arising from the proposed arrangements. However, the Applicant does submit that any such detriment would likely be limited because:
- participation in the proposed arrangements by AHA NSW members would be voluntary;
 - Tab Limited would be constrained in any attempt to recoup lost fee revenue (from AHA NSW members) given state government regulation of its retail prices and returns;
 - any collective boycott undertaken by AHA NSW members would only continue for a short period of time; and
 - in light of the current limited competition between AHA NSW members, any anti-competitive effect generated by the proposed arrangements is unlikely to have a material impact on competition in the industry.

Tab Limited & Sky Channel

- 6.8. Tab Limited and Sky Channel made a joint submission to the Commission dated 23 October 2002 opposing the granting of authorisation by the Commission in respect of the application for authorisation of collective bargaining and primary boycotts by the AHA NSW.
- 6.9. As part of its submission, Tab Limited and Sky Channel also submitted an economic analysis conducted by the Network Economics Consulting Group (“NECG”) of the wagering and racing industries in NSW and the likely impact of the proposed arrangements (if authorised) on economic efficiency. The report is hereafter referred to as “the NECG Report”.

- 6.10. Tab Limited and Sky Channel made a supplementary submission dated 26 February 2003.

Submission

- 6.11. Tab Limited and Sky Channel submitted that the terms on which the application for authorisation is made are unclear. Tab Limited and Sky Channel submitted that the AHA NSW had not made clear:
- the member hotels who would participate in any collective bargaining group;
 - the likely outcomes of the proposed arrangements; and
 - the effects on output of the proposed arrangements.
- 6.12. Tab Limited and Sky Channel noted that, in their view, the Application could not be likened to authorisation determinations by the Commission in the dairy farming, chicken growing and other industries because PubTAB commissions are a minor part of hotel income, Sky Channel fees are a minor part of hotel overheads and there is no deregulation, restructuring or transition of an industry to consider. Tab Limited and Sky Channel also submitted that the Application differs from other collective bargaining authorisations because they, the counterparts to the underlying contracts, oppose the arrangements.
- 6.13. In response to the AHA NSW's claims for public benefits, Tab Limited and Sky Channel submitted that any increases in PubTAB commissions or reductions in Sky Channel fees would simply constitute a transfer of income from Tab Limited and Sky Channel to AHA NSW member hotels.
- 6.14. Tab Limited and Sky Channel submitted that such a transfer would be likely to lead to:
- a reduction in the output of wagering services as Tab Limited ceases supplying PubTAB services to some marginal hotels and moves to less efficient channels of distribution;
 - other marginal hotels receiving less advantageous terms from Tab Limited;
 - customers being deprived of access to wagering at preferred outlets or through preferred distribution channels;
 - a reduction in the output of racing coverage as Sky Channel reduces the fees it pays to racing clubs for broadcast rights; and
 - a reduction in racing.
- 6.15. Tab Limited and Sky Channel submitted that the AHA NSW had not explained how any gains accruing to hotels as a result of the proposed arrangements would be passed through to consumers in the way of, for example, price reductions. Tab Limited and Sky Channel submitted that any pass on to consumers is unlikely because prices in the hotel industry are "sticky downwards". Tab Limited and Sky Channel further submitted that, in any event, there is likely to

be little to pass on to consumers because the commissions and fees are a minor part of hotels' total income and overheads and any changes in overall operating revenue or cost as a result of collective bargaining is likely to be minimal.

- 6.16. Tab Limited and Sky Channel submitted that there is no evidence for the reduction in transaction costs claimed by the AHA NSW, either for AHA NSW members or Tab Limited and Sky Channel. Tab Limited and Sky Channel claimed that, on the contrary, the proposed arrangements are more likely to increase transaction costs.
- 6.17. Tab Limited and Sky Channel submitted that the AHA NSW's claims that the proposed arrangements would affect the viability of rural and regional hotels, promote industry harmony, reduce the potential for unconscionable conduct and lead to equity are unsubstantiated.

NECG Report¹⁵

Racing and Wagering

- 6.18. In relation to racing and wagering, NECG submitted that the demand for wagering is likely to be more elastic than demand for total gambling, especially in the long term. NECG submitted that this is particularly the case for those wagers who access the product through hotels and clubs where gaming machines are also located.
- 6.19. NECG submitted that the provision of racing coverage by television has strong complementarities with the provision of wagering on racing and that anecdotal evidence suggests that the provision of television coverage in hotels, clubs and agencies boosts Tab Limited turnover by between 40 and 60 per cent.
- 6.20. NECG noted that hotels account for an increasing proportion of Tab Limited turnover.
- 6.21. NECG submitted that PubTABs and gambling are part of the "entertainment package" that hotels provide to patrons and, as such, make a broad contribution to hotel revenues and profitability. NECG also submitted that Sky Channel is complementary not only to wagering but to beer (or liquor more generally) and food sales in the hotel, as well as other gambling services such as gaming machines. NECG submitted that Sky Channel is an input to the hotel business, not just the PubTAB in the hotel.
- 6.22. NECG said that the current fee structure reflects the dual complementarity of Sky Channel with both hotels sales of liquor (and food) and Tab turnover, with Sky Channel fees tiered in relation to both beer literage and Tab Limited turnover. NECG submitted that this represents efficient pricing.

¹⁵ NECG, AHA(NSW) Application for Authorisation A90837 Economic Report prepared on behalf of Tab Limited and Sky Channel, 23 October 2002.

- 6.23. NECG concluded that Tab Limited and Sky Channel have a degree of exclusivity in the services they distribute. However, NECG argued that given the incentive structures they face and their ability to price discriminate, any adverse consequences on efficiency are minimised.

The application for authorisation

- 6.24. NECG submitted that the future without the proposed arrangements is likely to involve a continuation of current arrangements, whereby Tab Limited and Sky Channel consult with the AHA NSW but ultimately adopt standard terms and conditions which hotels may either accept or reject. NECG submitted that, under this scenario:

- no major economic inefficiencies arise;
- Tab Limited's incentives are likely to expand the quantity of wagering towards the socially efficient level;
- through price discrimination, Sky Channel is able to price in a manner which minimises distortions to allocative efficiency; and
- monopoly profits derived by Tab Limited and Sky Channel will be extracted as a redistribution of surplus from infra-marginal hotels.

- 6.25. NECG submitted that the future with the proposed arrangements would be one of a "bilateral monopoly". NECG postulated that the likely outcome that the AHA NSW would seek from negotiations would be an increase in Tab Limited commissions to hotels and a decrease in Sky Channel fees paid by hotels. NECG submitted that this could result in resources wastage through extensive negotiations – thus increasing transactions costs – and resource wastage through rent-seeking activity.

- 6.26. In relation to the future scenario likely under the proposed arrangements, NECG submitted that it would be likely to have the following impacts:

- increased productive inefficiency as Tab Limited switches to a less efficient pattern of distribution as a result of increased commissions to be paid to hotels;
- possible withdrawal of Tab Limited from marginal hotels as they become unprofitable for Tab Limited – though Tab Limited is of the view that these hotels would be likely to agree to continue on the basis of current standards terms and conditions;
- increases in commissions and decreases in fees are unlikely to have a significant impact on hotel revenues and costs; and
- reduced payments to the NSW racing industry, impacting on the quality and quantity of racing.

- 6.27. NECG also submitted that:
- there is unlikely to be an impact on the marginal cost of beer;
 - there are unlikely to be flow-on benefits to consumers;
 - the viability of small hotels is unlikely to be increased;
 - it will not necessarily be in the interests of hotels collectively to promote the viability of small hotels; and
 - transaction costs will not necessarily be reduced.
- 6.28. NECG concluded that the overall impact of the proposed arrangements would be a transfer of income from one group to another, a reduction in both allocative and productive efficiency and no public benefit.

Other submissions

- 6.29. The Commission sought submissions from a wide range of interested parties.
- 6.30. The following parties provided submissions in support of the AHA NSW's application for authorisation prior to the Commission's draft determination:
- The Leagues' Club Association of NSW Ltd;
 - The Australian Leisure and Hospitality Group; and
 - Australian Hotels Association (Western Australian Branch).
- 6.31. Additionally, the:
- TAB Agents Association of NSW; and
 - Clubs NSW
- lodged submissions in support of the AHA NSW's application for authorisation prior to the release of the Commission's draft determination and specifically agreed with the public benefit and detriment arguments submitted by the AHA NSW.
- 6.32. The New South Wales Thoroughbred Racing Board submitted that it did not oppose the AHA NSW's application for authorisation.
- 6.33. Harness Racing New South Wales ("HRNSW") lodged two submissions in relation to the AHA NSW's application for authorisation, both prior to the release of the Commission's draft determination. In its first submission, HRNSW raised no objection to the collective bargaining arrangements outlined in the AHA NSW's application but did object to the collective boycott arrangements outlined in the AHA NSW's application, on the basis that the arrangements would have a detrimental effect on the harness racing industry. In its second submission, HRNSW altered its previous position and stated that it

does not support, under any circumstances, the application for authorisation lodged by the AHA NSW.

- 6.34. The Queensland Department of Tourism, Racing and Fair Trading (“the Department”) submitted that the Application would not have any direct relevance to the Racing Division of the Department.
- 6.35. Copies of all of the submissions mentioned above are available on the Commission’s Public Register.

7. Draft determination

The Commission's draft determination

- 7.1. The Commission made a draft determination in relation to the AHA NSW's application for authorisation on 26 March 2003 proposing to deny authorisation in respect of the AHA NSW's application to collectively bargain with Tab Limited and Sky Channel on behalf of AHA NSW members in relation to the provision of totalisator (wagering) PubTAB and racing broadcast services. The Commission also proposed to deny authorisation in respect of boycott activity by AHA NSW members in the form of a collective decision to withdraw services from Tab Limited and Sky Channel should negotiations break down and not recommence within seven days.
- 7.2. At the time, the Commission considered that that there existed little public benefit demonstrated by the Applicant in relation to the proposed arrangements.
- 7.3. Having regard to each of the benefits claimed by the Applicant, the Commission believed that the only claim which was supported by the information provided by the Applicant was the possible pass through of negotiated savings to consumers in the form of lower prices for hotel services. The information that was available suggested that any pass through of savings was not guaranteed, was dependent upon competition in each locality and in any event would be marginal or minimal.
- 7.4. In relation to anti-competitive detriment, the Commission formed the view that there was insufficient public benefit to overcome the detriment associated with collective bargaining arrangements and collective boycott activity.
- 7.5. For the above reasons, the Commission proposed to deny authorisation.
- 7.6. In its draft determination, the Commission invited the Applicant to provide further submissions as to public benefits and appropriate conditions that might be imposed on any collective bargaining arrangements should it be able to demonstrate further public benefit. The Commission noted that, for example, it would be likely to consider conditions which:
- restricted, with measurable and objective criteria, the size and composition of collective bargaining groups;
 - restricted the information that may be shared between collective bargaining groups,
 - restricted the involvement of the AHA NSW in collective bargaining; and
 - ensured that participants in collective bargaining groups are made aware of their obligations under the competition provisions of the Act.

Further submissions to the Commission following its draft determination

Pre-decision conference

- 7.7. In accordance with the requirements of section 90A, the Commission afforded the opportunity for a conference (“the pre-decision conference”) before making a final determination in respect of the Application.
- 7.8. On 9 April 2003, the Applicant requested that the Commission convene a pre-decision conference in relation to its draft determination.
- 7.9. The pre-decision conference was convened on 5 May 2003 in Sydney.
- 7.10. A number of members of the AHA NSW made submissions to the Commission in relation to its draft determination. These submissions predominantly focused on individual hoteliers’ experiences in negotiating with Tab Limited and Sky Channel and the profitability/affordability of operating, in particular, Sky Channel broadcasting services.
- 7.11. All of the hoteliers who made oral submissions at the pre-decision conference supported the AHA NSW’s application for authorisation, particularly in relation to collective bargaining arrangements.
- 7.12. Tab Limited and Sky Channel attended the conference but did not make an oral submission.
- 7.13. The minutes from the pre-decision conference are available on the Commission’s public register.

Written submissions

- 7.14. The Commission also accepted written submissions in relation to its draft determination. The Commission received submissions from the following parties in response to its draft determination and issues raised at the pre-decision conference:
 - The Applicant (and two AHA NSW members); and
 - Tab Limited and Sky Channel.
- 7.15. The issues raised in these submissions that are substantially different to those raised by interested parties prior to the Commission’s draft determination (see Section 6 above) are outlined below. Specific issues raised by parties are also discussed in the Commission’s evaluation (see Sections 10 and 11 below).

Australian Hotels Association (NSW)

- 7.16. The AHA NSW provided the Commission with background information in relation to the structure and composition of the AHA NSW and its members.
- 7.17. The AHA NSW submitted that it does not agree with the Commission’s assessment of the public benefits of the Application, as outlined in the Commission’s draft determination.

- 7.18. The AHA NSW submitted that the Commission's observation that the AHA NSW wants to engage in price fixing is incorrect.
- 7.19. The AHA NSW commented on the implications of the recent recommendations contained in the Dawson Report on the *Review of the Competition Provisions of the Trade Practices Act* on collective bargaining applications for authorisation.
- 7.20. The AHA NSW submitted that its view is that there is a public benefit in balancing power in the market unless such conduct seriously lessens competition. The AHA NSW submitted that the proposed arrangements will not lead to anti-competitive detriment, but will instead result in a situation where Tab Limited and Sky Channel will have to compete for AHA NSW member services by way of the collective bargaining process.
- 7.21. The AHA NSW submitted that there would be little, if any, anti-competitive detriment associated with the proposed arrangements. The AHA NSW submitted that competition in the industry is between hotels and clubs rather than between individual hotels. The AHA NSW further submitted that collective bargaining will not force Tab Limited and Sky Channel to deal with it.
- 7.22. The AHA NSW submitted that it accepts that there is some overlap between some of the public benefits claimed in its original submissions (see Section 6 above).
- 7.23. The Applicant submitted that, in aggregate, however, these public benefits outweigh the limited anti-competitive detriment.
- 7.24. The Applicant also submitted that:
- it fears that the Sky fee structure will spread to Foxtel and Austar pay television services;
 - in the case of a dispute, costs to hotels may be considerable, however, any collectively negotiated outcome should have a simple and inexpensive dispute resolution system;
 - if the proposed arrangements are not authorised, the information currently provided by AHA NSW members to Tab Limited (such as liquor trade and turnover) will not continue to be provided;
 - collective bargaining would be cheaper for both organisations as AHA NSW members would save considerable time and expense because they could leave negotiations to the AHA NSW and, similarly, Tab Limited would be likely to make savings because it would reduce the burden on Tab Limited's field staff;
 - if the status quo remains, industrial action cannot be ruled out;
 - hoteliers are opposed to literage calculation systems because it is unrelated to actual PubTAB performance;
 - PubTABs in NSW employ about 1000 people who are paid by hotels not Tab Limited; and

- AHA NSW members have no dispute resolution mechanism in relation to their negotiations with Tab Limited.
- 7.25. The Applicant also advised that it no longer sought authorisation in respect of collective boycott activity should negotiations break down and not recommence within seven days. The Applicant also submitted that it would:
- implement a dispute resolution system similar to that employed by the Australian Dairy Farmers' Federation;
 - develop a trade practices compliance program;
 - seek authorisation for a period of five years; and
 - if authorised, provide the Commission with an annual report on the operation of the collective bargaining scheme.

AHA NSW members

- 7.26. Mr Greg Costello (The Sawtell Hotel) and Mr Colin Waller (The Berry Hotel) are members of the AHA NSW and made further written submissions to the Commission in respect of its draft determination.
- 7.27. Mr Costello and Mr Waller outlined arguments in support of the AHA NSW's Application and experiences specific to their hotels in support of the Applicant's claims of public benefit.

Tab Limited and Sky Channel

- 7.28. Tab Limited and Sky Channel made two further submissions to the Commission in respect of its draft determination and submissions made by the Applicant at the pre-decision conference prior to the closing date for submissions (23 May 2003).
- 7.29. Tab Limited and Sky Channel submitted that, in its draft determination, the Commission had identified that the relationship between Tab Limited and hotels could be characterised by either the supply of distribution services by hotels to Tab Limited or the supply of wagering services by Tab Limited to hotels. Tab Limited and Sky Channel submitted that the relationship is correctly characterised as a supply of services in both directions. Tab Limited and Sky Channel submitted that this characterisation is significant to ensure an appreciation of all of the detriments associated with the proposed arrangements.
- 7.30. Tab Limited and Sky Channel submitted that, in its draft determination, it appeared that the Commission assumed that, in the future without the proposed arrangements, the status quo would prevail with Tab Limited and Sky Channel having market power. Tab Limited and Sky Channel submitted that the Commission formed the view that standard allocative inefficiency losses would be associated with increased prices and reduced output and that consequently the creation of countervailing power would be likely to promote allocative efficiency.

- 7.31. Tab Limited and Sky Channel submitted that the status quo does not involve substantial allocative efficiency losses because Tab Limited is price regulated and Sky Channel is able to price discriminate and maximise utilisation and that the proposed arrangements would have efficiency detriments rather than benefits.
- 7.32. Tab Limited and Sky Channel submitted that if price discrimination is replaced by a flat fee structure, there will be reduced consumption of wagering and Sky Channel as marginal hotels cannot pay a flat price for Sky Channel and Tab Limited and will not find it viable to operate PubTABS in marginal hotels – Tab Limited and Sky Channel submitted that this results in losses to allocative efficiency.
- 7.33. Tab Limited and Sky Channel also submitted that, over the longer term, there will likely be inefficient substitution by Tab Limited away from hotels as a means of distributing wagering services.
- 7.34. Tab Limited and Sky Channel further submitted that there will be a reduction in funding to the racing industry and hence a reduction in output of this public good and reduced consumption of wagering.
- 7.35. Tab Limited submitted that, as it is price regulated, it has no incentive to raise prices and reduce output in order to maximise monopoly profits and that, as such, the potential exercise of any market power which may exist in the future would have serious consequences for allocative efficiency by reason of the conduct of the AHA NSW rather than by the conduct of Tab Limited.
- 7.36. In relation to issues raised at the pre-decision conference, Tab Limited and Sky Channel submitted that the AHA NSW did not raise any new evidence or arguments at the conference to address the anti-competitive detriment or public benefit of the proposed arrangements and, therefore, the application for authorisation should be denied.
- 7.37. In relation to comments made at the pre-decision conference that SP betting may increase in the absence of the proposed arrangements, Tab Limited and Sky Channel submitted that it would be irrational for Tab Limited to reduce commissions and/or for Sky Channel to increase fees to a point where PubTABS are forced to close and wagering is moved away from Tab Limited's business.
- 7.38. Tab Limited and Sky Channel also submitted that not all hotels are small businesses and that each hotel can best represent its own interests in one-on-one negotiations with Tab Limited and Sky Channel.
- 7.39. Tab Limited and Sky Channel made a further submission to the Commission on 13 June 2003. The Commission notes that this submission was lodged after the closing date for submissions. The Commission has considered the issues raised in Tab Limited and Sky Channel's submission in making this determination, however, it notes that, as this submission was lodged after the closing date for submissions, the Applicant was not afforded an opportunity to respond to the issues raised in the submission. The Commission also notes that a number of the issues raised in the submission had previously been brought to the Commission's

attention by Tab Limited and Sky Channel during the formal consultation process.

7.40. An outline of the main issues raised in the submission lodged by Tab Limited and Sky Channel follows.

7.41. Tab Limited and Sky Channel submitted that the AHA NSW has not modified its application to address the concerns raised by the Commission. In this context, Tab Limited and Sky Channel referred to the Commission's view that the anti-competitive impact of the collective bargaining arrangements could be limited where the AHA NSW included restrictions such as voluntary participation, restrictions on the composition and representation of bargaining groups, an express prohibition on boycott activity and requirements relating to trade practices education.¹⁶ Tab Limited and Sky Channel noted that, in particular, the Applicant did not place any restriction on the composition and representation of collective bargaining groups.

7.42. Tab Limited and Sky Channel also submitted that:

- the Applicant has failed to show how authorisation would result in a public benefit;
- the Application does not satisfy the relevant test for authorisation; and
- there is no basis for the AHA NSW's suggestion to grant interim authorisation until the recommendations of the Dawson Committee are implemented.

7.43. Tab Limited and Sky Channel also made a number of submissions in relation to factual errors in the AHA NSW's submission. The Commission has taken account of these submissions in its consideration of this matter where it is appropriate and where the Commission has relied upon the particular information in question in making this determination.

¹⁶ In this regard, the Commission notes that Tab Limited's assertion in relation to the Applicant's "refusal" to modify the Application to address the Commission's concern is not entirely correct. The Commission notes that the AHA NSW is no longer seeking authorisation in respect of collective boycott activity (AHA NSW submission of 23 May 2003). The Applicant has also indicated that it would develop and implement a trade practices compliance program and participation in collective bargaining activity remains voluntary for both AHA NSW members and Tab Limited and Sky Channel. The Commission notes that the Applicant has not proposed to include restrictions on the composition and representation of bargaining groups.

8. Commission assessment - Markets

- 8.1. The Commission's evaluation is in accordance with the statutory tests outlined in Section 5 of this determination. As required by the test, it is necessary for the Commission to assess the likely public benefits and detriments flowing from the proposed arrangements.
- 8.2. Defining the markets affected by arrangements proposed for authorisation assists in assessing public benefit and public detriment from any lessening of competition from the arrangements. However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of this definition.
- 8.3. In its submissions, the Applicant does not specifically address the issue of the relevant markets. While the Tab Limited/Sky Channel submission does touch on the issue of markets, it does not offer a definitive view.
- 8.4. In this matter, the Commission is of the view that it is not necessary to comprehensively define the relevant markets. In this respect, it is the Commission's view that its assessment will not be overly affected by the possible variations in precise market definition.
- 8.5. In considering the issue however, the Commission has identified four related and relevant areas of competition associated with:
- the supply of hotel¹⁷ services to consumers – that is, competition between hotels in the provision of services to consumers;
 - the acquisition of wagering services by hotels – that is, competition between hotels in the acquisition of wagering services;
 - the supply of distribution services by hotels to Tab Limited – that is, competition between hotels in the provision of wagering distribution services to Tab Limited; and
 - the acquisition of pay television services by commercial operators – that is, competition between hotels in the acquisition of pay television services.
- 8.6. In relation to dot points 2 and 3 above, the Commission notes Tab Limited's submissions in relation to the supply "both ways" of distribution services – that is the supply of wagering distribution services by hotels to Tab Limited and the supply of wagering services by Tab Limited to hotels. The Commission notes that this point of differentiation is useful in considering the level of competition between hotels. The Commission notes, however, that the acquisition of wagering services by hotels and the acquisition of distribution services by Tab

¹⁷ Where the context permits, hotels include taverns.

Limited merely consider two sides of a single transaction between hotels and Tab Limited.

Provision of hotel services

- 8.7. On the information available, it would appear that hotels compete with one another (and to a lesser extent with clubs) in the provision of hospitality services to consumers in markets differentiated by geographic location. This proposition was supported by NECG at page 17 of its Report. The boundaries of geographic areas of competition will depend on a number of factors including whether the areas are metropolitan, regional or rural.
- 8.8. NECG further submitted that the market for the supply of hotel services may be differentiated on the basis of product. NECG submitted, for example, that two hotels appealing to a similar type of patron would compete more closely than those catering to different types of patrons. While the Commission agrees that the nature of the product affects the closeness of competition, it is not necessarily convinced that there exist different markets for the supply of different hotel products (for example, up market/sports/casual).
- 8.9. At page 25 of the third AHA NSW submission, the Applicant submitted that the hospitality market is highly competitive and hotels have to compete against clubs, liquor merchants, restaurants and many others.

Wagering and distribution services

- 8.10. It is clear that Tab Limited provides wagering services to hotels (and clubs) in NSW. In this respect, hotels (and clubs) compete, at least to a certain extent, in the acquisition of those services from Tab Limited. The issue of the extent to which acquisition is competitive is discussed at paragraph 10.12 below.
- 8.11. As noted above, the AHA NSW has described the dealings with Tab Limited as member hotels providing a service to Tab Limited. As is described above, the dealings may also be characterised as the acquisition of a service from Tab Limited (albeit the payment for those services is a negative payment in the form of commissions). As discussed previously, the Commission acknowledges that the supply of services is most likely to run both ways but that this characterisation merely highlights two sides of a single transaction.
- 8.12. It is less clear whether or not there exists a high degree of substitution between different means of wagering distribution (for example, clubs, hotels, agencies, telephone). NECG, at page 13 of its Report provided with the Tab Limited/Sky Channel submission of 23 October 2002, submitted that different distribution means are part substitute and part complement for Tab Limited. In this regard, NECG submitted that where the costs of distribution increase in one area (for example, hotels) Tab Limited would be likely to substitute other forms of distribution at least in the medium term. NECG also submitted that, in relation to the downstream supply to consumers, if the product is unavailable through one type of outlet, some consumers will acquire it through another type of outlet, but others will simply forego consumption or find another outlet of the same type.

- 8.13. It is also less clear whether or not there exists a high degree of substitution between different types of gambling products. At page three of its Report, NECG submitted that wagering is one of a range of gambling products available to consumers (including lotteries, poker machines and casinos) and that to some extent, all of these gambling opportunities compete with each other. It went on to submit however, that it seems likely that total demand for gambling is relatively inelastic and substitution between types of gambling is somewhat limited. NECG concluded that there is likely to be long term substitutability between gambling products.
- 8.14. The Productivity Commission has recognised that, in the past, gambling products have not been highly substitutable but that gambling products have converged over time and are becoming more substitutable.¹⁸

Provision of pay TV services to commercial premises

- 8.15. It is clear that Sky Channel provides pay TV services to commercial operators including hotels and clubs. In this respect, hotels (and clubs) compete, at least to a certain extent, in the acquisition of those services from Sky Channel. The extent to which acquisition is competitive is again discussed at paragraph 10.12 below.
- 8.16. It is less clear on the information provided by the parties whether or not there is a high degree of substitution between pay TV services offered to consumers and those offered to commercial operators. It is also unclear on the information provided by the parties whether or not there is a high degree of substitution between the differentiated (in terms of content) pay TV services provided by alternative pay TV service providers (for example, whether sports content competes with movie content). The Commission however tends toward the position that there is not a high level of substitution between sports and movie content. In the current context, the Commission is also of the view that there is unlikely to be a high degree of substitutability between the provision of general sporting coverage and the provision of racing broadcast coverage to commercial premises. The Commission's view in this regard is influenced by what appears to be the high degree of complementarity between wagering and Sky Channel racing broadcasting.

Commission assessment

- 8.17. While the Commission has not formed a definitive view with respect to the relevant markets, the Commission's assessment of the Application relies on the identification of the four areas of competition associated with:
- the supply of hotel services to consumers – that is, competition between hotels in the provision of services to consumers;

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

- the acquisition of wagering services by hotels – that is, competition between hotels in the acquisition of wagering services;
- the supply of distribution services by hotels to Tab Limited – that is, competition between hotels in the provision of wagering distribution services to Tab Limited; and
- the acquisition of pay television services by commercial operators – that is, competition between hotels in the acquisition of pay television services.

9. Commission assessment – The future with or without

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

The future situation without the proposed arrangements

- 9.4. The Applicant has not provided specific submissions in relation to the likely future situation without the proposed arrangements.
- 9.5. At page 2 of the Tab Limited/Sky Channel submission, Tab Limited and Sky Channel submitted that the likely future situation without the proposed arrangements is the current situation or the status quo. At page 20 of the NECG Report, NECG submitted that “*the future without the proposed conduct would likely involve a continuation of current arrangements, whereby Tab Limited and SKY Channel consult with the AHA [NSW] but ultimately adopt a standard terms and conditions which hotels may either accept or reject*”.
- 9.6. The Commission notes that the Applicant may be of the view that, without authorisation, it may be prevented (under the competition provisions of the Act) from contributing to, or having input into, the relationships between individual hotels and Tab Limited/Sky Channel.
- 9.7. The Commission also notes that this would be a departure from past practices where the AHA NSW provided input into contractual terms and conditions between members and Tab Limited/Sky Channel.
- 9.8. The extent to which persons are exposed to the competition provisions of the Act is ultimately a matter for individual parties to assess, however, the Commission is of the view that, up to a point, the AHA NSW providing input into the relationships between its members and Tab Limited/Sky Channel does not necessarily give rise to concerns about possible contraventions of the Act. Certainly, providing input into pricing issues (to the extent that the conduct falls

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

close to that which is prohibited under section 45A of the Act) is more likely to raise concerns, but raising concerns over possibly harsh or unfair terms is clearly less likely to be an issue.

- 9.9. An industry association such as the AHA NSW is, of course, able to represent and assist its members to the extent concordant with the law. This may include providing assistance to members to ensure that they are able to gain access to appropriate legal or financial services, or making representations to major suppliers in relation to issues of concern to members.
- 9.10. Accordingly, the Commission accepts that the most likely situation without the proposed arrangements is the current situation, namely, the continuation of standard form contracts offered by Tab Limited and Sky Limited with limited input from the AHA NSW on terms and conditions from time to time.

The future situation under the proposed arrangements

- 9.11. In its original submissions (prior to the Commission's draft determination), the Applicant expressed the view, that absent the ability to collectively boycott, collective bargaining would have little impact and the public benefits outlined in its submission would be lost.²⁰ In its most recent submission, the Applicant revised its view suggesting that the public benefits will arise from collective bargaining arrangements alone.
- 9.12. The Commission shares this view, which was set out in its draft determination. The Commission formed the view that even where businesses might have a large degree of bargaining power, they may choose to either:
- take part in collective bargaining arrangements; or
 - take into account (to some extent) collective representations of acquirers/suppliers even where they choose not to engage in active negotiation.
- 9.13. The Commission therefore believes that, in authorising the proposed collective bargaining arrangements, the Applicant and its members are more likely to effectively influence the terms and conditions (including price) within contracts between hotels and Tab Limited or Sky Channel than they would without authorisation.

²⁰ See page 7 of the first AHA NSW submission.

10. Commission assessment - Effect on competition

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

Current level of competition

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

Provision of hotel services to consumers

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

Transactions between hotels and Tab Limited & Sky Channel

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

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

Hotels and taverns, especially those in regional NSW, are in a captive position in relation to both TAB services and televised racing services. The situation in NSW is worse than in other States as the TAB and Sky Channel are under the same ownership. Hotels and taverns need the TAB/SKY Channel services otherwise they will lose [sic] out to others such as their hotel and tavern competitors and/or licensed clubs.

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

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

10.9. The Applicant went on to submit that:

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

10.10. At page 6 of the first AHA NSW submission, the Applicant submitted that “*the current system prevents any competitive dynamic in the industry*”.

- 10.11. Tab Limited and Sky Channel, by the NECG Report, accepted that while they consult with the AHA NSW on the terms and conditions of supply, they ultimately adopt standard terms and conditions which hotels may either accept or reject. They also submitted that, while consultation with the AHA NSW has an important influence on the final outcome, it is not strictly a “negotiation” in which the parties agree on the final terms and conditions of supply.
- 10.12. The Commission accepts that both Tab Limited and Sky Channel are in strong bargaining positions vis-à-vis individual hotels (and clubs). This strong position is founded on the limited level of competition in the provision of services offered by Tab Limited and Sky Channel brought about by high barriers to entry (in the case of Tab Limited, very high regulatory barriers).
- 10.13. The Commission accepts that the current level of overt competition between hotels and clubs for the acquisition of wagering services from Tab Limited and pay TV services from Sky Channel is low.
- 10.14. There exists little, if any, choice for hoteliers in terms of suppliers of commercial pay TV racing broadcast services or suppliers of wagering distribution services to hotels. The information available to the Commission suggests that the use of standard form agreements is high and there do not appear to exist significant variations in terms or conditions taking into account changes in supply and demand conditions across regions, demographics or time.
- 10.15. Nevertheless, the Commission believes there are some competitive restraints placed on both Tab Limited and Sky Channel as a result of less overt competition between hotels (and clubs) for the acquisition of services from Tab Limited and Sky Channel.
- 10.16. Even suppliers with higher degrees of monopoly power are influenced by demand forces in the manner in which they set their prices. In effect, this demand is reflective of the competition between customers – that is, how much each customer is willing to pay. This competition does not necessarily manifest itself in robust negotiations but nevertheless exists.
- 10.17. The current levels of consultation with the AHA NSW also provide a degree of restraint upon the activities of both Tab Limited and Sky Channel.
- 10.18. In relation to the wagering services provided by Tab Limited, it may also be argued that Tab Limited is restrained (at least to some extent) by alternative gaming products provided in hotels, clubs or elsewhere.
- 10.19. Given the Commission’s comments at 8.16 in relation to the degree of substitutability between racing and other sports broadcasting, the Commission is of the view that other pay TV services providers provide little competitive constraint on Sky Channel for the purposes of the assessment of the current authorisation application.
- 10.20. Overall, the Commission does believe the level of competition between hotels in their dealings with Tab Limited and Sky Channel is currently low.

Effect on competition

The Applicant's submission

- 10.21. The Applicant did not provide significant discussion on the likely reduction in competition. At page 6 of the first AHA NSW submission the Applicant contends that “*the anti competitive effect is limited and ... the current system prevents any competitive dynamic in the industry*”.
- 10.22. The Applicant further submitted that any such detriment would likely be limited for the following reasons:
- AHA NSW members will not be compelled to participate in the proposed arrangements and will retain the ability to deal with Tab Limited and Sky Channel independently;
 - any attempt by Tab Limited to recoup lost fee revenue (from AHA NSW members) by way of retail price increases is unlikely given that most Tab retail prices, and returns, are regulated by the NSW Government; and
 - any collective boycott undertaken by AHA NSW members would only continue for a short period of time.
- 10.23. Since making this submission, the Applicant has advised the Commission that it no longer seeks authorisation to engage in collective boycott activity. It is assumed that the Applicant's position is that this modification further reduces any anti-competitive effect.
- 10.24. Additionally, the Applicant argued that presently, by virtue of the current system, AHA NSW members typically do not compete against each other. Therefore authorising AHA NSW members to engage in anti-competitive arrangements is unlikely to have any material effect on the level of competition in the industry.
- 10.25. In its submission of 23 May 2003, the Applicant submitted that the proposed arrangements are likely to have little, if any, anti-competitive effect.

Tab Limited/Sky Channel submissions

- 10.26. Tab Limited and Sky Channel submissions in relation to the likely anti-competitive effects of the proposed arrangements appear to be in the context of discussing the public benefits claimed by the Applicant rather than as a separate consideration of the likely detriment related to any lessening of competition.
- 10.27. The Commission also notes that a significant proportion of the anti-competitive detriment discussed by Tab Limited and Sky Channel may be lessened should Tab Limited and Sky Channel be able to voluntarily participate in discussions with collective bargaining groups without the fear of boycott activity.

- 10.28. In summary, and in the context of considering the future with both collective bargaining and collective boycott activity, NECG submitted that the proposed arrangements would:
- essentially create a “bilateral monopoly”,²¹ in which the AHA NSW negotiates the terms and conditions of supply with Tab Limited and Sky Channel on behalf of its members or various groups of members;
 - be likely to result in an increase in PubTAB commissions to hotels and reductions in Sky Channel fees;
 - result in some productive or distribution inefficiency as Tab Limited switches to the use of less efficient patterns of distribution as a result of increased commissions paid to hotels; and
 - result in a transfer of income from Tab Limited to the hotel and an increase in commissions paid to marginal hotels which would render them unprofitable for Tab Limited. As a consequence, Tab Limited would withdraw PubTAB outlets from those marginal hotels and as such a reduction in total consumption of wagering.
- 10.29. NECG however went on to submit that in the short term, marginal hotels will opt out of the collective bargaining arrangements and continue to acquire Tab Limited services on preceding terms. NECG therefore submitted that the effect in the short term would be the redistribution of income from Tab Limited to infra-marginal hotels and the “opting out” of collective bargaining by marginal hotels.
- 10.30. Similarly, NECG submitted that any resulting lowering of Sky Channel fees would ultimately result in some reduction in productive or distribution efficiency and a redistribution of income from Sky Channel to infra-marginal hotels.
- 10.31. NECG also noted the inefficiencies associated with any disruption of trade arising from possible boycott activity, however, the Commission again notes that the Applicant is no longer seeking authorisation of collective boycott activity.

Commission assessment of anti-competitive detriment

- 10.32. The Commission believes that the proposed arrangements are likely to lessen competition in the relevant markets in the following ways:
- lost efficiencies resulting from collusion; and
 - increased potential for collective activity in other areas.

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

Lost efficiencies resulting from collusion

- 10.33. Competition between buyers or sellers ordinarily directs resources to their most efficient or productive use. Where buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses.
- 10.34. This distortion in competition can often result in increased prices to consumers, less choice, lower quality of products or services and increased costs to producers than would otherwise exist.
- 10.35. Pricing is a key component of negotiations between suppliers and buyers. Price competition (that is, the interaction of the price suppliers are willing to accept with that which buyers are willing to pay) will ordinarily direct resources to their most efficient use.
- 10.36. As noted above, agreements between competitors which interfere with the price at which they are willing to supply or acquire goods or services will ordinarily divert resources away from those more efficient uses and towards less efficient uses.
- 10.37. This is the foundation of the principles of competition and as such, Parliament has deemed agreements between competitors as to price to substantially lessen competition in breach of the Act.²²
- 10.38. Generally, collective bargaining arrangements that set the terms (and in particular the price) on which goods or services are supplied or acquired are likely to lessen competition relative to a situation where the acquirers individually negotiate their own terms.
- 10.39. The Applicant submitted that there currently exists little or no competition between hoteliers in their dealings with Tab Limited and Sky Channel. The Applicant therefore submitted that the proposed agreements as to terms (including price) would not affect (or affect to any great extent) the competitive process.
- 10.40. The Commission believes that there currently exists some, albeit low, competition between hotels in their dealings with Tab Limited and Sky Channel and that the proposed arrangements therefore have the potential to give rise to some limited anti-competitive detriment.
- 10.41. The possible anti-competitive effects of agreements as to price include possible resource allocation inefficiencies. That is, suppliers, when faced with artificially lower returns, may choose to direct their resources elsewhere to some extent. The Commission notes Tab Limited and Sky Channel's submission to this effect. The Commission accepts that, should the AHA NSW succeed in negotiating higher commissions or lower Sky Channel fees, there may be some allocative inefficiencies resulting from the proposed arrangements. The Commission,

²² Section 45A of the Act.

however, notes that the extent to which these inefficiencies will occur will depend upon the current prices being efficient.

- 10.42. Generally speaking, the Commission believes that any anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the following features are present:
- the current levels of competition are low (due, for instance, to the structural features of the market);
 - voluntary participation;
 - restrictions on the coverage, composition and representation of bargaining groups; and
 - no boycott activity.
- 10.43. As noted above, the Commission has formed the view that, due to the features of the relevant markets, there currently exists a low level of competition in relation to the acquisition of Tab Limited and Sky Channel services by hotels and the acquisition of distribution services by Tab Limited.
- 10.44. A collective bargaining arrangement is voluntary where members of collective bargaining groups are free to opt out of the negotiations, preferring to negotiate individually. This provides an element of ongoing competition and as such lessens the anti-competitive impact of the arrangements.
- 10.45. The Applicant advised that there would exist opt out procedures for hotels not wishing to participate in collective bargaining.
- 10.46. Collective bargaining agreements that limit the coverage, composition and representation of bargaining groups limit the anti-competitive nature of the arrangements in a number of ways.
- 10.47. First, where the size of bargaining groups is restricted, the anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers or acquirers outside the group.
- 10.48. Second, where bargaining groups are limited in scope (by geography, product range or size, for example) negotiations are able to take into account the specific demand or supply characteristics of those particular businesses. This significantly reduces the anti-competitive effects associated with “one size fits all” negotiations and allows competition between groups to provide the competitive discipline that leads to efficient resource use.
- 10.49. Third, where different bargaining groups have common representation, that common representative can act as conduit between the groups and can significantly reduce the competition that might otherwise exist between those groups.
- 10.50. The Applicant represents a large proportion of the hotel industry in NSW. Information supplied by Sky Channel suggests that in excess of 90 per cent of

hotels acquiring the relevant services are AHA NSW members. The extent of the industry covered by the proposed arrangements is therefore of some concern to the Commission.

- 10.51. The anti-competitive detriment may be further reduced should the Applicant have limited the composition of bargaining groups. The other matters raised at paragraph 10.42 above, however, do mitigate the detriment to some extent, even if only one bargaining group forms.
- 10.52. Aside from the direct costs associated with the disruptive nature of boycott activity, the availability of boycott activity significantly increases the anti-competitive effects of collective negotiations.
- 10.53. Absent boycotts, the other party (in this case, Tab Limited and Sky Channel) has greater discretion over the extent to which they participate in negotiations and therefore, the extent to which terms and conditions (including price) might deviate from those that might be expected to prevail absent the collective arrangements.
- 10.54. As discussed above, following the Commission's draft determination, the Applicant advised the Commission that it is no longer seeking authorisation to engage in collective boycott activity. In the Commission's assessment, this modification significantly reduces the anti-competitive effect of the proposed arrangements.

Opportunity for collective activity

- 10.55. In considering collective bargaining arrangements in the past, the Commission has noted concern that the arrangements may increase the potential for collusive anti-competitive conduct beyond that authorised.
- 10.56. Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The Commission has been concerned that in this environment, there may be an increased likelihood of anti-competitive conduct (beyond that which is authorised) occurring.
- 10.57. The Commission notes that there is no evidence or suggestion that anything other than the proposed arrangements will be discussed. The Commission also notes that the likelihood of such occurring is reduced where participants are made aware of their obligations under the Act.
- 10.58. In this regard, the Commission notes that the AHA NSW's proposal to implement a trade practices compliance program. The Commission encourages such a program to be developed and implemented and suggests that any such program incorporate a trade practices education program designed to inform participants in the collective bargaining process as to their obligations under the provisions of Part IV of Act with a view to ensuring that the conduct of the AHA NSW and its members in collective bargaining activity lies strictly within the bounds of any authorisation.

The Commission's assessment of anti-competitive effect

- 10.59. Having regard to the Commission's assessment of the current level of competition, the ability of participants to "opt out" of the proposed arrangements, the offer to develop and take part in trade practices compliance activities and the withdrawal of proposed collective boycott activity, the Commission is of the view that the proposed arrangements are likely to result in low anti-competitive detriment.

11. Commission assessment - Public benefits

- 11.1. In order to grant authorisation, the Commission must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.

Public benefits claimed by the Applicant

- 11.2. The Applicant submitted that the following public benefits will arise as a result of the proposed collective bargaining arrangements:
- 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 operation 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 of 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; and
 - building confidence in the product.

The Commission's assessment of public benefits

- 11.3. In its draft determination, the Commission noted that it was of the view that a number of the benefits claimed by the Applicant overlapped. The Commission notes that the Applicant acknowledged this in its most recent submission to the Commission. The Applicant, however, has not amended its claimed list of public benefits. When considering each of the public benefits claimed by the AHA NSW, the Commission proposes to address like claims together.
- 11.4. The Commission's assessment of the public benefit and detriment claims submitted by the Applicant focuses heavily on the information received from the Applicant and Tab Limited and Sky Channel but does not expressly refer to any other submissions received from interested parties. However, the Commission is

mindful of the views of other parties who made submissions and has taken these views into account in its consideration of this matter.

Providing countervailing/bargaining power to small business

- 11.5. The Commission accepts that the bargaining power between hotels and Tab Limited and Sky Channel is currently unequal, and that collective bargaining arrangements may reduce this inequality.
- 11.6. The Commission is, however, of the view that the mere creation of countervailing power is not in itself a public benefit. The Commission looks at the outcomes of any proposed change in bargaining power, for example, whether efficiency savings will be realised. These likely outcomes are essential to the net public benefit test.

Efficiency gains through reduction in monopoly pricing

- 11.7. In certain market circumstances, there may exist some argument that where supply of goods or services is controlled by a party with a large degree of market power, some competitive benefit may be generated in certain circumstances from the creation of countervailing power.
- 11.8. In a competitive market, prices are set where supply and demand are in equilibrium. In economic jargon, price is set at the marginal cost of producing an additional unit of product.
- 11.9. Where the supplier, however, has a greater degree of monopoly power, it is more likely to set the level of output at levels lower than it would in a competitive market and this is likely to result in higher prices. Again, in economic jargon, a supplier with a greater degree of market power is likely to set the level of output where its marginal revenue is equal to its marginal cost.
- 11.10. Where prices are higher and output is lower than would occur in a competitive market, consumers are ordinarily worse off. Economic theory also suggests that society as a whole is worse off and there exists a “dead weight loss” associated with under-production.
- 11.11. While the interaction of suppliers and buyers is complex, there may be an argument, in certain market circumstances, that where suppliers with a higher degree of market power meet customers with an increased degree of purchasing power, there is likely to be a shift in prices downwards and an increase in quantity produced.
- 11.12. In effect, the increased bargaining power of the customer may reduce the effective monopoly power of the seller. Further, where the customer has limited market power in the downstream market (in this case the supply of hotel services to consumers) this may well result in a reduction in the “dead weight loss” or inefficiency associated with under-production. While this does not mean that the market will produce the same efficient outcome as a perfectly competitive market, there may exist some efficiency gains.

- 11.13. On the information before it, however, the Commission is not in a position to move from a conclusion as to the existence of an unequal bargaining position to a finding that there currently exists inefficient pricing (as a result of under-production and monopoly pricing). Nor is the Commission able to conclude that any inefficiency would be resolved by collective bargaining. Applicants and interested parties proposing such arguments must demonstrate this to the Commission's satisfaction.
- 11.14. Contrary to the understanding of Tab Limited and Sky Channel (as expressed in their submission in response to the Commission's draft determination), the Commission did not form the view that there existed inefficient pricing resulting from under-production and monopoly pricing. As it did in its draft determination, the Commission remains of the view that such had not been demonstrated on the information available. The Commission notes, however that demonstrating the existence of inefficient pricing as a result of under-production or monopoly pricing may not be an easy task and the lack of demonstration should not be seen as evidence that it does not exist.

Efficiency gains through hotel input into contractual terms and conditions

- 11.15. The Commission is of the view that where applicants can demonstrate that:
- there currently exists a barrier to their effective input into contractual terms and conditions;
 - collective bargaining arrangements could remove some of those barriers; and
 - that the resulting input into contractual terms and conditions could lead to increased efficiencies,
- the Commission may accept such efficiency benefits to be public benefits flowing from proposed collective bargaining arrangements.
- 11.16. In the current circumstances, the Commission accepts the submissions from the Applicant that the unequal bargaining power that exists between hotels and Tab Limited and Sky Channel, the extensive use of standard form contracts and the reluctance to negotiate with individual hotels does give rise to some barriers to effective input into contractual terms and conditions.
- 11.17. The Commission also accepts that collective bargaining arrangements would provide a greater opportunity for hoteliers, through the AHA NSW, to provide input into those contractual terms and conditions. While, as noted above, the AHA NSW may provide a certain degree of legitimate input, the competition provisions of the Act do restrict this to a certain extent.
- 11.18. Turning then to the potential for input into contractual terms and conditions to increase efficiencies. The Commission accepts that this is often hard to demonstrate. Nevertheless, the Commission believes that the Applicant has, in this case, demonstrated some support for such an argument.
- 11.19. In particular, the Commission notes the claims made by the Applicant concerning the basis on which Sky Channel sets its fees to hotels. As discussed

above, Sky Channel sets its fees to hotels based on a hotel's sale of beer (beer literage) and PubTAB turnover. The Applicant provided a number of submissions as to its concern over the appropriateness or efficiency of such a pricing method.

- 11.20. In a submission supporting Tab Limited and Sky Channel's submission, NECG submitted that, in relation to the pricing of Sky Channel services:

“The current fee structure represents the dual complementarity of Sky Channel with both hotel sales of liquor (and food) and Tab turnover. This represents efficient pricing, at least in a 2nd best sense, since it extracts surplus from all potential users by discriminating between them on the basis of the value they receive from the service, while minimising marginal losses in consumption...The pricing approach Sky adopts represents a cost efficient alternative in the face of information and transactions costs constraints. Beer literage provides the best universal and verifiable proxy for the general entertainment value generated by the Sky service.”

- 11.21. The Commission is aware of economic commentary that is of the view that, in industries facing substantial fixed costs but low marginal costs, pricing structures which reflect the value derived from consumption of goods or services may be an appropriate basis for pricing. Such a basis does not represent efficient pricing in a perfectly competitive market (where price is equal to the point where marginal costs of production are equal to marginal benefits of consumption), but *may* represent efficient pricing in certain circumstances.
- 11.22. While the Commission does not comment on the appropriateness of pricing based on the benefits of consumption, it does note that, at least in certain circumstances, the method adopted by Sky Channel does not result in an accurate indication of value derived by hoteliers of racing broadcasting services.
- 11.23. The Commission, on the information available, is of the view that it will not always be accurate or even appropriate to use a crude measure of literage as a proxy for entertainment value derived from racing broadcasting services.
- 11.24. It seems to the Commission that the services offered by hotels differ significantly. While beer literage may be reflective of the entertainment value of a pub dominated by a bar area with racing coverage, it may bear less correlation to a multi-service pub with a focus on bistro dining, for example. Information provided to the Commission also suggests that beer literage will often include consumption of liquor which takes place outside of the hotel. For example, literage includes beer sold in kegs to consumers for consumption off-premises. In this situation, neither the consumer nor the hotel is gaining any value from the provision of racing broadcasting services on the hotel's premises.
- 11.25. As such, the Commission considers that, at least to a certain extent, there are likely to be inefficiencies associated with the current pricing structure adopted by Sky Channel. These inefficiencies may go as far as to discourage innovation,

promotions or business structures that increased beer literage in areas outside the wagering area of a hotel.

- 11.26. The Commission is of the view that, to the extent that a collective bargaining process will assist in eliminating such inefficiencies by encouraging dialogue and agreement on possibly more efficient pricing structures between AHA NSW members and Sky Channel, this represents a benefit to the public.
- 11.27. While the issue of literage appears universal, it also seems to the Commission that issues specific to particular regions, or segments of the hotels market may arise from time to time. Where hoteliers have limited input into contractual terms and conditions, these specific issues may not be taken into account and may give rise to inefficiencies. Again, the extent to which collective bargaining would provide an opportunity for hotels to provide input into terms and conditions with Tab Limited and Sky Channel, such may lead to efficiency gains and as such give rise to public benefits.
- 11.28. In its most recent submission, the AHA NSW proposed to develop and institute a dispute resolution process. The Commission supports this proposal in relation to dealing with disputes arising both within bargaining groups between AHA NSW members and between a bargaining group or groups and Tab Limited and/or Sky Channel, and encourages such a process to be developed. Generally the Commission is of the view that the most effective dispute resolution process is one which is developed in consultation with all parties involved in the bargaining process and is ultimately implemented with the support of those parties. In this instance, the Commission notes the uncertainty with respect to the level of involvement Tab Limited and Sky Channel are likely to have in any bargaining process and therefore in contributing to the formation of a dispute resolution process and indeed the relevant composition of bargaining groups.
- 11.29. Nevertheless, the Commission believes there are merits in developing and implementing a dispute resolution process. The Commission notes that the process agreed to by the Australian Competition Tribunal in its authorisation of the Australian Dairy Farmers' Federation Limited ("ADFF") in respect of collective negotiation by dairy farmers of contractual terms and conditions with dairy processing companies²³ may be a useful starting point for the development of such a process in this instance.
- 11.30. The Commission is of the view that if such a process is developed and implemented it may enhance the public benefits in terms of efficiency gains as a result of input into contractual terms and conditions.
- 11.31. To the extent that any dispute resolution process raises trade practices concerns, it is possible that the concerns may be dealt with through a minor variation to this authorisation.

²³ Application by National Foods Limited [2002] to the Australian Competition Tribunal, 16 August 2002.

Promotion of equitable dealings in the market

- 11.32. The AHA NSW submitted that collective bargaining will strengthen the bargaining power of AHA NSW members and may increase their input into the contracts negotiated with Tab Limited and Sky Channel, thus reducing the likelihood of harsh, unfair or unconscionable contractual terms and producing an outcome more likely to be in the interests of the parties themselves and of the public.
- 11.33. Tab Limited and Sky Channel submitted that the collective bargaining groups likely to emerge if the proposed arrangements were authorised would be dominated by large AHA NSW members. Tab Limited and Sky Channel have also submitted that the AHA NSW's claim that Tab Limited and/or Sky Channel have acted unconscionably is unfounded and that if they were acting unconscionably, it could be dealt with in accordance with the Act with the assistance of the Commission.
- 11.34. In assessing this public benefit claim, the Commission also notes that while Tab Limited and Sky Channel do not generally negotiate individually with AHA NSW members, they have in the past consulted with the AHA NSW on the terms and conditions of supply, thus providing the AHA NSW with some input into the negotiation process.
- 11.35. While the failure to negotiate on the part of a business with significant bargaining power may well be a relevant factor in considering claims of unconscionable conduct, the circumstances of any one matter needs to be considered on a case by case basis. Having considered the information provided by the Applicant in the context of this Application, the Commission is unable at this stage to conclude that Tab Limited and Sky Channel have acted unconscionably in their dealings with hotels. This is not to say that from an efficiency point of view, as discussed above, that there would not exist public benefits flowing from greater hotel input into contractual terms and conditions.

Continued viability of small business operations

- 11.36. The AHA NSW claimed that the proposed arrangements would ensure the continued viability of small business operations (particularly in rural and regional areas), thus ensuring competition in those areas.
- 11.37. Tab Limited and Sky Channel submitted that the AHA NSW provided no evidence that hotels are under threat and no evidence that possible gains from collective bargaining with Tab Limited and Sky Channel would have any impact on viability. Tab Limited and Sky Channel submitted that the proposed arrangements are likely to increase transaction costs for all parties, an outcome which is unlikely to promote small business viability.²⁴
- 11.38. Tab Limited and Sky Channel noted that AHA NSW's claim must rest on expected increases in PubTAB commissions and decreases in Sky Channel fees.

²⁴ The issue of changes to transaction costs is discussed below.

Tab Limited and Sky Channel submitted that PubTAB commissions and Sky Channel fees are a minor and ancillary part of hotel turnover with little impact on hotels' overall operating revenue and costs. Tab Limited and Sky Channel also noted that Sky Channel attracts patrons to hotels and therefore promotes the viability of hotels, for a relatively small fee. Tab Limited and Sky Channel also submitted that in order to address cases of hardship, Sky Channel offers a remote site tariff for isolated hotels in small, rural communities.

- 11.39. In its draft determination, the Commission agreed with Tab Limited and Sky Channel's assertion that the Applicant's claim rests on expected increases in PubTAB commissions and decreases in Sky Channel fees and that these represent a minor part of hotels expenditure and revenue flows. However, in a submission to the Commission since it issued its draft determination, the Applicant submitted that the ABS's statistics in relation to the proportion of hotel income represented by wagering commissions is generalised and may not accurately portray the situation in NSW or at least for all hotels. The AHA NSW gave examples from a number of hotels across NSW with Tab commissions as a proportion of total income ranging from 4.75 per cent to 20 per cent.
- 11.40. The AHA NSW submitted that the costs associated in relation to Tab Limited/Sky Channel charges cannot be dismissed as minimal.
- 11.41. While the Commission acknowledges Tab Limited and Sky Channel's submission that the AHA NSW's examples represent a small sample of hotels in NSW, the Commission is of the view that these figures highlight that there are hotels in situations that are outside of the ordinary.
- 11.42. In its draft determination, the Commission also noted that the claim of increased hotel viability seemed somewhat at odds with the claim by the AHA NSW that the proposed arrangements would promote industry costs savings. In order for industry cost savings to result from the proposed arrangements, small business operators would need to pass on any increased commissions or decreased fees which would appear to limit the potential for such increased revenue to contribute to small business viability.
- 11.43. The Commission, however, acknowledges that any gains hotels may obtain from collective bargaining could be "split" between businesses and consumers (as a pass through in hotel prices).
- 11.44. Regardless, the Commission is of the view that a mere financial transfer between businesses (that is, transfer of money from Tab Limited or Sky Channel to hotels) may not in itself constitute a public benefit. The Commission will rather focus on the outcome of any transfer particularly any improvements in efficiency.

Limiting transaction costs in negotiation of supply agreements

- 11.45. The AHA NSW submitted that collective bargaining with Tab Limited and Sky Channel will lower transaction costs for AHA NSW members who will no longer need to negotiate with Tab Limited and Sky Channel on an individual basis. Additionally, the AHA NSW is of the view that transaction costs savings will accrue to its members because they will no longer need to obtain

professional advice, such as financial, legal or accounting advice, as such advice would be sought by the AHA NSW on behalf of its members. The Commission notes that the AHA NSW has not provided any evidence of the current expenditure of its members on professional advice sought in relation to establishing, renewing or cancelling a contract with Tab Limited and Sky Channel.

- 11.46. Tab Limited and Sky Channel submitted that transaction costs are currently minimised as a result of the use of standard form contracts which were developed in consultation with the AHA NSW.
- 11.47. The Commission observes that AHA NSW's claim in respect of transaction cost savings is somewhat inconsistent with its assertion that Tab Limited and Sky Channel refuse to negotiate with AHA NSW members individually and impose standard form contracts. However, the Commission also notes evidence that Tab Limited and Sky Channel do consult with the AHA NSW and currently engage "field staff" to travel across NSW visiting hoteliers at individual sites.
- 11.48. The Commission also notes copies of correspondence provided to it by the Applicant which outline disputes between individual AHA NSW members and Tab Limited and Sky Channel. This correspondence indicates that in unusual situations (such as during the renovation of a hotel), an individual AHA NSW member may be required to negotiate with Tab Limited and Sky Channel on an individual basis in respect of the terms of renewal of an existing contract. In such cases, the hotel involved may incur extraordinary transaction costs, particularly in respect of the time required to resolve the dispute.
- 11.49. Nevertheless, it remains difficult for the Commission to conclude that a move from standard form agreements, imposed after consultations with the AHA NSW, to a collectively negotiated arrangement would result in transaction cost savings. This is not to say that such a saving could not or would not be realised, but that the Applicant simply has not been able to demonstrate such.

Freeing up small business to focus on competitiveness of their businesses

- 11.50. The Commission is of the view that this benefit essentially relies on the claimed reduction in transaction costs. In this regard, the Commission considers that any associated public benefit has already been considered in the context of a reduction in transaction costs which is discussed above.

Facilitating the availability of information on operational & pricing issues

- 11.51. The AHA NSW submitted that collective bargaining will enhance the efficiency of AHA NSW members by increasing the availability to these business (a significant proportion of which are small businesses) of information relevant to their business, including information about income trends and operating expenses, which will give AHA NSW members an improved understanding of the effect of wider trends upon their businesses, and improve their ability to make better business decisions and identify where efficiencies and cost savings could be obtained. A major industry benefit that would flow from information sharing and transparency would be the ability of the AHA NSW to provide practical advice to operators. With real information sharing on such key factors

as earnings and local betting market performance, the AHA NSW would be able to advise members of the likelihood of venue profitability.

- 11.52. In response to the Applicant's claim, Tab Limited and Sky Channel submitted that details of the standard Tab Limited and Sky Channel contracts and pricing structures are publicly available. Tab Limited and Sky Channel also submitted that they consult with the AHA NSW on issues including changes to contracts and pricing before they are introduced and that the AHA NSW is free to disseminate this information to its members without the need for collective bargaining. Tab Limited and Sky Channel submitted that the AHA NSW has not provided details of how authorisation would improve information sharing or transparency or why the quality of information that it currently collates would improve should authorisation be granted. Tab Limited and Sky Channel submitted that the AHA NSW does not need authorisation to allow it to circulate market information among hotels, organise external legal advice, pool data and provide other support in their dealings with Tab Limited and Sky Channel as none of these acts, of themselves, constitute a breach of the Act.
- 11.53. In a further submission to the Commission since it issued its draft determination, the Applicant also submitted that trading information will not be disclosed to Tab Limited and Sky Channel in the future. In this regard, the Commission also notes that the Applicant submitted that maintaining the flow of information to Tab Limited and Sky Channel is not a direct consequence of the proposed arrangements.
- 11.54. On the basis of the material before the Commission, it would appear that the AHA NSW is presently able to provide its members with the information it claims could be made available as a result of authorisation. Currently, the Applicant is able to consult with its members in relation to a range of operational and pricing issues, including proposed changes to contracts and pricing in respect of supply agreements with Tab Limited and Sky Channel. While authorisation may provide a sense of comfort to the Applicant that such information sharing is beyond the reach of the Act, it is not clear to the Commission how authorisation would improve either the quality of information disseminated by the AHA NSW to its members or the means by which such information is disseminated.
- 11.55. Accordingly, the Commission is not convinced that the proposed arrangements will result in a benefit to the public in the form of facilitating the availability of information on operational and pricing issues to AHA NSW members.

Fostering industrial harmony

- 11.56. The AHA NSW submitted that the proposed arrangements will foster industrial harmony although no evidence was provided in support of this claim.
- 11.57. When considering public benefit claims relating to industrial harmony, the Commission notes the comments of the Australian Competition Tribunal in the ACT Concrete Carters case:

“[I]n order ... to accept that a public benefit exists, the evidence must clearly establish that the granting of authorisation will lead

to significantly greater industrial harmony in the future than a likely alternative.”²⁵

- 11.58. Therefore, in determining the weight to be afforded to arguments of industrial harmony, the Commission must consider likely future industrial relations between the parties with the proposed arrangements and likely future industrial relations between the parties without the proposed arrangements.
- 11.59. The Commission notes the Applicant’s submission that “*if the status quo remains, industrial action cannot be ruled out in NSW*”, however, also notes that such action is likely to give rise to concerns under the Act.
- 11.60. Given the lack of supporting information concerning possible industrial problems (other than claims of potentially illegal collective action), it is difficult for the Commission to conclude that the proposed arrangements would be likely to result in an improvement in industrial harmony.
- 11.61. Accordingly, on the basis of the information available to it, the Commission does not accept that improved industrial harmony is a public benefit likely to arise from the proposed arrangements.

Promotion of industry cost savings

- 11.62. The AHA NSW claimed that collective bargaining promotes industry cost savings and will result in contained or lower prices at all levels in the supply chain.
- 11.63. The Commission is of the view that, to the extent that there is a pass through of benefits gained by hoteliers (in the form of industry cost savings) to consumers (in the form of lower prices or improved quality), the promotion of industry cost savings should be considered a public benefit.
- 11.64. As discussed at paragraph 11.43 the Commission acknowledges that a proportion gains obtained by hotels may be passed on to consumers in the form of lower prices. As discussed at paragraph 11.39, while the Commission acknowledges that the costs and revenues associated with Tab Limited and Sky Channel products may vary as a proportion of total hotel costs and income, the Commission remains of the view that any increase in PubTAB commissions or reduction in Sky Channel fees is unlikely to result in a significant pass through to consumers.

Supply of better information to suppliers

- 11.65. AHA NSW submitted that collective bargaining will enable the AHA NSW to provide Tab Limited and Sky Channel with accurate industry wide information, such as operating cost information, that will enable Tab Limited and Sky Channel to make more informed decisions in their dealings with AHA NSW members.

²⁵ Re Lamont (1990) ATPR ¶41-035, at 51525.

- 11.66. The Commission is of the view that it has dealt with any public benefit arising from the supplying better information to suppliers in “facilitating the availability of information on operational & pricing issues” at paragraphs 11.51 to 11.55 above.

Common system

- 11.67. The Commission understands that, in respect of the claim that “adopting a common system” will result in a public benefit, the AHA NSW is referring to the ability of hotelier to negotiate with Tab Limited and Sky Channel on similar terms to those which Tab Limited and Sky Channel currently negotiate with AHA NSW members.
- 11.68. In this context, the Commission is of the view that this claim is essentially the same as the public benefits claimed in terms of “the promotion of equitable dealings in the market” and “providing countervailing/bargaining power to small business” and is discussed above. The Commission is otherwise unable to attribute any public benefit arguments to a notion of a “common system”.

Build confidence in the product

- 11.69. The AHA NSW submitted that a collective bargaining system would enable the AHA NSW to better endorse Tab Limited and Sky Channel products and would build confidence in those products.
- 11.70. It is not clear to the Commission how the AHA NSW proposes to build confidence in the products. Further, Commission is not convinced that building confidence in wagering or pay TV products is, in itself, a public benefit.

Allow more hoteliers to support the NSW racing industry

- 11.71. The AHA NSW claimed that authorisation of the proposed arrangements would result in hotels receiving greater financial reward for their relationship with Tab Limited and would place hotels in a position where they were better able to afford the cost of Sky Channel and would thus be able to offer wagering to their patrons, particularly in presently uneconomic sites such as small rural hotels. The AHA NSW submitted that this would assist rural residents to enjoy the same accessibility as residents of Sydney and other cities in NSW to wagering services and racing broadcasts.
- 11.72. Tab Limited and Sky Channel argued that transition to a fixed price would most likely lower the cost of Sky Channel to large hotels and increase the cost of Sky Channel to smaller hotels. Further, Tab Limited and Sky Channel submitted that a reduction in the price of Sky Channel fees may render Sky Channel unviable at marginal hotels if it is forced to price below average cost.
- 11.73. The Commission has accepted that the most likely counterfactual is the status quo. In this context, the Commission notes the AHA NSW’s submission that most of its members currently have PubTAB and Sky Channel facilities and that it is an essential element of AHA NSW members’ businesses.²⁶ The

²⁶ Australian Hotel Association (NSW) (2002), *Submission to the Commission*, 16 July 2002, pp. 4-5.

Commission is therefore not convinced that the proposed arrangements would result in a significant increase in the number of hoteliers providing access to wagering facilities and racing broadcasts, and is therefore unlikely to result in an increase in the number of hoteliers supporting the racing industry. Again, in any event, the Commission is not convinced that allowing hotels to support racing and wagering would, in itself, be a public benefit.

Responsible gambling

- 11.74. The AHA NSW is of the view that, should the proposed arrangements be authorised and result in a more open and communicative relationship between the AHA NSW and Tab Limited, it is likely that the AHA NSW and Tab Limited will work cooperatively in respect of responsible gambling monitoring and enforcement.
- 11.75. In assessing this claim, the Commission notes that the *Liquor Amendment (Responsible Gambling) Regulation 2000* requires hoteliers to provide information to patrons on counselling services and the problems caused from excessive gambling, limits the cashing of cheques, places limitation of the payment of prizes by cash, places limitations on gambling-related advertising, prohibits the offering of inducements to gamble and requires hoteliers and certain employees to undertake an approved training course in the responsible conduct of gambling.²⁷
- 11.76. It is the Commission's view that adherence to statutory obligations, such as responsible gambling requirements, is in the public interest. These obligations should be complied with regardless of any authorisation.
- 11.77. In the absence of examples outlining areas in which the AHA NSW and Tab Limited and Sky Channel propose to work cooperatively to enforce and monitor responsible gambling (and a demonstration that such flows from collective bargaining), the Commission is of the view that the proposed arrangements are unlikely to result in the enforcement of responsible gambling measures.

²⁷ New South Wales Department of Gaming and Racing (2000), *Liquor Amendment (Responsible Gambling) Regulation 2000*, Liquor and Gaming Legislation Bulletin, April 2000.

12. Balance of public benefits & anti-competitive detriments

- 12.1. The Commission considers that that there exists public benefit in relation to the proposed arrangements.
- 12.2. Having regard to each of the benefits claimed by the Applicant, the Commission believes that there is likely to be a benefit to the public associated with the proposed arrangements as a result of:
- improved dialogue between the AHA NSW (and its members) and Tab Limited and Sky Channel as a result of collective bargaining and the implementation of a dispute resolution process which is likely to, in turn, minimise any inefficiencies associated with current contractual terms and conditions (including potential inefficiencies in commission and pricing structures); and
 - any pass through of gains made by hotels in the form of lower prices to consumers (albeit the Commission believes this is likely to be low).
- 12.3. In relation to anti-competitive detriment, as detailed above, the Commission is of the view that where collective bargaining arrangements are introduced absent collective boycott activity and with restrictions such as the ability for individual hoteliers to opt out of negotiations at any time, there would exist only a low anti-competitive detriment.
- 12.4. The Commission is of the view that the public benefit associated with the proposed arrangements is likely to outweigh the anti-competitive detriment associated with the arrangements.

13. Determination

The Application

- 13.1. On 17 July 2002 the AHA NSW lodged an application for authorisation (A90837) with the Commission.
- 13.2. Following a period in which the Commission sought further details and clarification of the arrangements for which authorisation was sought, by letter dated 13 September 2002 from Spier Consulting on behalf of the Applicant, the Applicant lodged an amended application for authorisation.
- 13.3. The Applicant notified the Commission that it no longer sought authorisation for collective boycott activity on 23 May 2003.
- 13.4. The amended application was made under section 88(1) of the Act for an authorisation under that subsection:
 - to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
 - to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 13.5. The AHA NSW sought authorisation to conduct collective bargaining with Tab Limited in relation to the provision of totalisator (wagering) services (PubTAB) and with Sky Channel in relation to the provision of racing broadcast services to AHA NSW members.

Statutory test

- 13.6. For the reasons outlined in this determination, the Commission is satisfied that, in all the circumstances, the making of the contracts and the giving effect to the provisions of the arrangements for which authorisation is sought under subsection 88(1) of the Act:
 - would be likely to result in a benefit to the public; and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

Conduct authorised

- 13.7. The Commission therefore **grants** authorisation to application A90837. Authorisation is granted for a period of five years from the date on which the authorisation comes into force.

- 13.8. In particular, the Commission grants authorisation for the AHA NSW to conduct voluntary collective bargaining on behalf of its members with Tab Limited in relation to the provision of totalisator (wagering) services (PubTAB) and with Sky Channel in relation to the provision of racing broadcast services to AHA NSW members. This authorisation extends to the making and giving effect to provisions of agreements that are collectively negotiated between AHA NSW members and Tab Limited and Sky Channel.
- 13.9. Pursuant to subsections 88(10) and 88(13) of the Act, this authorisation applies to any collective bargaining group of AHA NSW members, present or future, represented by the AHA NSW, that wish to conduct collective bargaining as outlined above.

Conduct not authorised

- 13.10. As above, this authorisation is in relation to collective bargaining activity in which participation is voluntary. The authorisation does not extend to, and protection is not afforded to, any collective bargaining arrangement whereby AHA NSW members are compelled to participate in a bargaining group or groups. AHA NSW members retain the right to negotiate and enter into individual contracts with Tab Limited and Sky Channel.
- 13.11. This authorisation does not in any way allow collective boycott activity in the form of a collective decision by two or more AHA NSW members to withdraw services from Tab Limited and Sky Channel or any other conduct which may constitute an exclusionary provision as currently defined under section 45 and 4D of the Act. In this respect, it is a matter of choice for Tab Limited and Sky Channel as to the extent to which they participate in collective bargaining arrangements.

The effective date of determination

- 13.12. This decision is subject to any application to the Australian Competition Tribunal (“the Tribunal”) for its review.
- 13.13. This determination is made on 27 June 2003. If no application for review of the determination is made to the Tribunal, it will come into force on 19 July 2003. If an application is made to the Tribunal, the determination will come into force:
- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
 - where the application is withdrawn – on the day on which the application is withdrawn.