



**SPIER CONSULTING**  
REGULATORY STRATEGIES & SOLUTIONS

FILE No:
DOI
MARS/PRISM:

**Dr R Chadwick  
General Manager  
Adjudication  
ACCC  
PO Box 3131  
CANBERRA CITY ACT 2601**

**5 September 2008**

Dear Sir,

**APPLICATION FOR A MINOR VARIATION.**

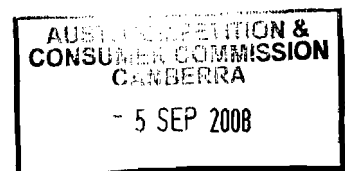
Attached is the Application for minor variation to Authorisation A90987 recently discussed with your staff.

The Application is lodged on behalf of the AHA Divisions in Victoria, WA, SA, NT and Tasmania.

Thank you to you and your staff for your assistance to date.

Yours truly,

**Hank Spier  
Director**



**Form FA**

Commonwealth of Australia

*Trade Practices Act 1974 — subsection 91A (1)*

**APPLICATION FOR MINOR VARIATION OF A NON-MERGER  
AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 91A (1) of the *Trade Practices Act 1974* for the minor variation of an authorisation.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

**1. Applicant**

- (a) Name of applicant:  
*(Refer to direction 2)*

A90987

**AUSTRALIAN HOTELS ASSOCIATION DIVISIONS IN VICTORIA,  
WESTERN AUSTRALIA, SOUTH AUSTRALIA, , TASMANIA , NORTHERN  
TERRITORY.....**  
.....

- (b) Description of business carried on by applicant:  
*(Refer to direction 3)*

**TRADE ASSOCIATION FOR THE HOSPITALITY  
INDUSTRY.....**  
.....

- (c)Address in Australia for service of documents on the applicant:

**LEVEL 5, 8 QUAY STREET , SYDNEY NSW  
2000.....**  
.....

**2. Minor variation of authorisation**

- (a) Description of the contract, arrangement or understanding, or the relevant conduct, for which authorisation was granted, including, but not limited to, the registration number assigned to that authorisation (the original authorisation):

**Collective negotiation by AHA on behalf of their current and future members with service providers of broadcasting and wagering providers in relation to terms and conditions , including fees, for the provision of wagering and broadcasting services.**

**ACCC AUTHORISATION A90987- dated 1 March 2006.**

- (b) Provide a description of the goods or services that relate to the authorisation for which variation is sought:

**Wagering and Race Broadcasting Services.....**  
.....

- (c) Provide details of the variation for which authorisation is sought, including but not limited to identification of differences between the contract, arrangement or understanding, or the relevant conduct, that was originally authorised and the contract, arrangement or understanding, or the relevant conduct, for which a minor variation of authorisation is sought:  
*(Refer to direction 4)*

**To add to the authorisation the NSW Division of the AHA and its nominated targets, being TabCorp Holdings Limited, Sky Channel P/L, and ThoroughVision P/L.....**  
.....  
.....

- (d) Facts and evidence relied upon in support of the claim that the variation is a minor variation:

**The NSW AHA Division was granted authorisation for collective bargaining with wagering and broadcasting service providers in June 2003(A90837). It was the precursor of the multi State AHA authorisation The NSW Authorisation has expired and it is appropriate that all the Divisions now be joined in the same authorisation in relation to the same conduct..**

**However the Divisions are all separate entities and any collective bargaining is expected to be done on a Divisional basis. This was the basis of the authorisation which involved the Victorian, WA ,SA NT and Tasmanian Divisions..**

**The Divisional AHA representative will negotiate on behalf of the Divisional members.....**  
.....

**3. Parties to the contract, arrangement or understanding (whether proposed or actual), or conduct, for which variation of authorisation is sought**

- (a) Names, addresses and description of business carried on by those other parties to the contract, arrangement or understanding, or the relevant conduct:

**AHA DIVISIONS IN VICTORIA, WESTERN AUSTRALIA, SOUTH AUSTRALIA, TASMANIA AND NORTHERN TERRITORY.**

**C/ LEVEL 5, 8 QUAY STREET SYDNEY NSW 2000**

**TRADE ASSOCIATIONS.....**

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

*(Refer to direction 5)*

.....  
.....  
.....  
.....

- (c) Where those parties on whose behalf the application is made are not known - description of the class of business carried on by those possible parties to the contract or proposed contract, arrangement or understanding:

**.HOTELS AND TAVERNS.....**  
.....  
.....

**4. Public benefit claims**

- (a) Provide submissions regarding the effect of the minor variation upon the public benefits resulting or likely to result from the original authorisation:

**Will consolidate the AHA collective bargaining authorisations to cover the whole of the AHA Division and members which want to collectively negotiate with wagering and broadcasting service providers..on a Divisional basis.....**  
.....

*(See Direction 6 of this Form)*

- (b) Facts and evidence relied upon in support of these claims:

.....  
**See**  
**submission....attached.....**  
.....  
.....

**5. Market definition**

Provide a description of the market(s) in which the goods or services described at 2 (b) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

**Markets.**

- **the supply of hotel 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.

For market analysis see Authorisations A90987, A90837.

.....  
 .....  
 (See Direction 7 of this Form)

**6. Public detriments**

- (a) Provide submissions regarding the effect of the minor variation upon the detriments to the public resulting or likely to result from the original authorisation, in particular the likely effect of the conduct on the prices of the goods or services described at 2 (b) above and the prices of goods or services in other affected markets:

**Nil- see submission**,.....  
 .....  
 (See Direction 8 of this Form)

- (b) Facts and evidence relied upon in support of these claims:

.....  
**See submission attached**.....  
 .....  
 .....

**7. Further information**

- (a) Name, postal address and telephone contact details of the person authorised by the applicant to provide additional information in relation to this application:

**Hank Spier-**  
**Spier Consulting P/L**  
**92 Jervois Street Deakin ACT 2600**  
**0262812030.**  
**0419239755**.....  
**spierconsulting@netspeed.com.au**.....  
 .....  
 .....

Dated..... **5 September 2008**.....

Signed on behalf of the applicant



.....

(Signature)

....**Hank Spier**.....

(Full Name)

.....**Spier Consulting P/L**.....

(Organisation)

.....**Director**.....

(Position in Organisation)

## **DIRECTIONS**

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1 (b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding, or the relevant conduct, in respect of which the authorisation is sought.
4. In completing this form, provide details of the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, in respect of which minor variation of authorisation is sought.

In providing these details:

- (a) to the extent that the contract, arrangement or understanding, or the relevant conduct, has been reduced to writing — provide a true copy of the writing; and
  - (b) to the extent that the contract, arrangement or understanding, or the relevant conduct, has not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing; and
  - (c) If minor variation of authorisation is sought for a contract, arrangement or understanding (whether proposed or actual) which may contain an exclusionary provision — provide details of that provision.
5. Where minor variation of an authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
  6. Provide details of the likely effect of the minor variation upon those public benefits considered to result or to be likely to result from the original authorisation, including quantification of those effects where possible.
  7. Provide details of the market(s) likely to be affected by the contract, arrangement or understanding (whether proposed or actual), in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.
  8. Provide details of the likely effect of the minor variation upon those detriments to the public, including those resulting from the lessening of competition, which may result from the original authorisation. Provide quantification of these effects where possible.



SPier CONSULTING

REGULATORY STRATEGIES & SOLUTIONS

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**Attachment to Form FA.**

**SUBMISSION TO ACCC**

**RE MINOR VARIATION TO A 90987- COLLECTIVE BARGAINING  
BY AUSTRALIAN HOTELS ASSOCIATION.**

**Background.**

The Application for Minor variation seeks to join the NSW Division of the AHA in the authorisation for collective bargaining with providers of wagering services and broadcasting services.

Authorisation A 90987, covers most AHA Divisions except NSW and Queensland. NSW was not included as it already had authorisation and Queensland as they did not need to collectively bargain with the service providers.

NSW was the test case for a non quasi unionist and non primary producer collective bargaining authorisation. That being the case it was not tractable for all the AHA Divisions to apply when NSW did.

Once the NSW precedent had been established then the other Divisions sought a similar authorisation for most other AHA Division.

In granting the NSW Authorisation in 2003 the ACCC concluded,

*"The Commission considers that that there exists public benefit in relation to the proposed arrangements.*

*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).*

*In relation to anti-competitive detriment..., 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.*

*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 arrangement"s.'*

The conduct sought to be authorised in each case is the same, albeit targets for collective bargaining vary in some jurisdictions.

The public benefit rationale for the NSW Decision and the multi Division decision are largely the same.

### **The competition dynamic.**

The applicants submit that the four relevant areas of competition are:

- the supply of hotel 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 totalisator – that is, competition between hotels in the provision of wagering distribution services to state/territory providers; and
- the acquisition of pay television services by commercial operators – that is, competition between hotels in the acquisition of pay television services.

The applicants further submit that there is strong competition for custom between hotels that are in close proximity. This is evidenced by strong levels of promotion, continuing efforts by hotels to differentiate and improve their services and facilities and by competitive pricing of products.

Further there is strong competition between nearby hotels for the provision of wagering distribution services.

The lack of variations in terms and conditions of contracts between AHA members indicates the low level of competition between hotels in the acquisition of services from the service providers or the supply of service to service providers.

Manifestations of this include: unilateral imposition of terms and conditions in contracts; take it or leave it attitude to contacts; refusal by service providers to negotiate; refusal to take into account the differing circumstances between members (e.g. different sizes, locations); use of inappropriate basis for charging (namely literage) and the differing terms and conditions between states reflecting different market power considerations rather than different commercial circumstances.

In terms of competition generally the applicants note that there are currently high legislative barriers to entry and these are likely to continue. Also wagering service providers have statutory protection against competition. Further, the applicants submit that overall the anti competitive detriment of the proposed arrangements will be limited and any anti competitive detriment that could arise will be limited by the proposed safeguards, namely:

- AHA members will not be forced to participate in the proposed arrangements;
- AHA members will be fully informed of the implications of the proposed arrangements and their obligations under the Trade Practices Act;
- AHA members will continue, if they so choose, to be in a position to negotiate directly with the service providers; and

- any attempt by totalizers to recoup lost revenue will be limited because retail prices and returns are regulated by Government.

The AHA claimed previously and claims now that the following public benefits for the collective bargaining arrangements,

- improving quality standards;
- continued viability of small business;
- providing countervailing/bargaining power;
- savings in transactions costs;
- provision of expert advice;
- increased hoteliers input into contracts;
- introduction of a dispute resolution process and
- promotion of equitable dealings in the market.

In its decisions the ACCC accepted some of these public benefits but rejected others.

### **The existing authorisation.**

#### **Parties to the arrangements**

The parties to the proposed arrangements are present and future AHA Division members.

Set out below are the parties that will be providing services and with which negotiations are proposed to be conducted:

#### **Service providers by State/territory**

Victoria	TABCORP Holdings Ltd, Sky Channel TVN, Racing Victoria Ltd
Western Australia	Racing and Wagering Western Australia, TVN, Sky Channel
South Australia	Sky Channel, UNITAB Ltd (SA TAB Pty Ltd), TVN
Tasmania	TOTE Tasmania Pty Ltd, Sky Channel, TVN
Northern Territory	Sky Channel, UNITAB Ltd, TVN

## **The conduct**

Members of each of the specified Divisions of the AHA seek to collectively negotiate with parties nominated in the Table above. The negotiations would cover:

- the terms and conditions, including fees, for the provision of totalisator (wagering) services and racing broadcasting services; and
- any necessary future amendments or adjustments to those terms and conditions.

The members of each state/territory Division of AHA are to elect a committee of members who would conduct the negotiations with each of the nominated parties on behalf of members of the Division. The Negotiating Committees will comprise a broad cross section of members. The state/territory executive of each Division will provide assistance to the committee. As necessary the Committees will seek outside advice from professionals such as accountants and lawyers.

Should an AHA member choose not to be a party to the proposed arrangements the member will inform the state/territory executive and the name will be formally noted. A member may opt out at any stage of the negotiating process.

In addition as indicated previously, the AHA Divisions will ensure that:

- collective bargaining groups will only comprise hotels acquiring the particular services from the specified provider;
- each member and the specified parties is aware members are free to negotiate individual contracts;
- each AHA member is aware of their obligations under the Trade Practices Act; and
- the collective bargaining process will not include collective boycotts.

## **Balance of public benefit and public detriment**

In its determination in relation to A90987 the ACCC considered that overall, the proposed collective bargaining arrangements have the potential to result in some anti-competitive detriment.

In particular, the ACCC was concerned about the extent of industry coverage by the proposed arrangements and the potential for the negotiating committees in each state/territory to share information obtained through the collective negotiation process.

The ACCC considered that while the proposed collective bargaining arrangements have the potential to result in some anti-competitive detriment, there were a number of mitigating features of the arrangement including:

- the current level of competition between hotels is unlikely to be significantly affected
- the arrangements are voluntary for all parties and may be accessed by future AHA members
- the arrangements do not include collective boycott activity.

The ACCC considered that the proposed collective bargaining arrangements were likely to result in some benefit to the public. In particular:

- the proposed collective bargaining arrangements will provide greater opportunity for hotels to provide input into contract terms and conditions, to achieve more efficient commercial outcomes and
- hotels are likely to pass on at least some benefits of any more efficient contracts negotiated with service providers as a result of collectively bargaining, in the form of improvements in the level of service provided by hotels to consumers.

However, the ACCC conceded that it is difficult to precisely determine the magnitudes of the public benefit and detriment and there is some uncertainty about whether the public benefit outweighs the public detriment. In cases such as this the ACCC may consider whether it is possible to grant authorisation subject to conditions aimed at reducing the anti-competitive detriment or increasing the public benefit to ensure that the public benefit outweighs the anti-competitive detriment of the proposed arrangement.

However the ACCC has decided to grant authorisation subject to the following conditions:

**Condition C1**

A negotiating committee must not comprise of members from more than one state/territory AHA Division.

**Condition C2**

Negotiating committees formed within each state/territory are not permitted to share or discuss information obtained through the course of engaging in collective bargaining negotiations with other negotiating committees formed in

**The proposed minor variation.**

It is proposed that NSW AHA Division be added to the authorisation. Its collective bargaining targets would be **TabCorp Ltd, Sky Channel and TVN P/L**. All current targets in A90987.

The same terms and conditions apply as in the current authorisation.

In the view of the Applicants this changes very little. NSW Division has until recently has an authorisation, albeit for TAB Ltd (TabCorp) only, having the same effect.

NSW has had success with its authorisation and was able to negotiate an outcome of a long running dispute on a collective basis. NSW wants to continue its ability to act collectively. Its relevant contracts do not expire for a little while but issues arise from time to time under the contract and preparatory talks will occur in any lead up to new contracts.

To have all the authorised arrangements under the same authorisation is a beneficial outcome as it will lead to consistent action by the AHA Divisions. It is also far more cost effective than split applications.

The public benefits recognised by the ACCC continue and are in fact enhanced.

It is submitted that the variation to A90987 is minor, it actually maintains a status quo .There is no obvious detriment in addition to the very low detriment the ACCC found in both the initial NSW authorisation or A90987.

Nothing of importance has really changed since 2003 and 2006, except the fact that the ACCC has authorised joint venture arrangements between Tab Corp and TVN which makes collective bargaining even more necessary for hoteliers.

### **The future**

**A 90987**- expires on 3 March 2011. It is currently proposed that the parties to any varied authorisation will approach the ACCC for a revocation and substitution of the authorisation for a further 5 year period.

**AHA.**

**AUGUST 2008.**