



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Application for revocation and substitution of authorisation**

**lodged by**

**Australian Hotels Association Divisions**

**in respect of**

**collective bargaining on behalf of current and future members  
with a number of suppliers across a range of industries**

**Date: 3 March 2011**

**Commissioners:** Samuel  
Kell  
Schaper  
Court  
Dimasi  
Walker  
Willett

**Authorisation no.:** A91257

**Public Register no.:** C2010/955

## Summary

The ACCC is proposing to authorise the Australian Hotels Association's Divisions to collectively bargain on behalf of members with a number of providers of wagering, broadcast and collective licensing services. The ACCC is proposing to grant authorisation for five years.

The AHA Divisions have sought an expanded authorisation to permit collective bargaining with a large number of suppliers across a broad and open ended range of goods and services. The ACCC is not proposing to grant authorisation to this aspect of the AHA's proposal.

The ACCC has granted interim authorisation to allow the AHA Divisions to continue to engage in the arrangements previously authorised by the ACCC in 2006 (A90987) while the current application is being considered.

On 25 October 2010, the Australian Hotels Association Divisions in Victoria, Western Australia, South Australia, Tasmania, Northern Territory, New South Wales, Australian Capital Territory and Queensland (AHA Divisions), on behalf of their current and future members, lodged application A91275 for revocation and substitution of A90987 with the ACCC (application for re-authorisation). Previous authorisation A90987 was granted on 1 March 2006 and will expire on 31 March 2011.

The AHA Divisions seek to bargain on behalf of their current and future members with providers of wagering and broadcasting services, and suppliers of poker machines, wine, beer, spirits, soft drink, energy, advertising, cigarettes, insurance, confectionary, catering, communication, superannuation, banking, music, accommodation, employment providers, training providers, accounting, auditing, IT services and security. The AHA Divisions also seek authorisation to collectively bargain on behalf of members with unidentified counterparties. The collective bargaining arrangements sought will cover price, terms of supply, settlement discounts, product development, joint advertising and marketing, and distribution.

The 2006 authorisation is limited to collective bargaining by the AHA Divisions with wagering and broadcast service providers. In this application the AHA Divisions seek to extend the collective bargaining arrangements to a significantly larger number of providers in a broad and open ended range of markets.

The ACCC considers that the proposed collective bargaining arrangements are likely to deliver benefits to the public by providing a mechanism to improve the input of AHA members into price and non-price contract terms. The ACCC considers that the arrangements are likely to give rise to transaction cost savings and that they have the potential to result in enhancements in the supply of goods and services by hotels.

The ACCC is satisfied that any anti-competitive detriment arising from the existing collective bargaining arrangements involving the providers of wagering and broadcast services, together with new collective bargaining arrangements proposed for the collective licensing of sound recordings and public performances, is likely to be minimal. Accordingly, the ACCC proposes to authorise these arrangements.

However, in relation to the authorisation application more broadly, the ACCC is concerned that the proposal to extend the arrangements to participants in a broad and open ended range of markets may result in more significant anti-competitive detriment. Each of these markets

will have unique features, and given that the AHA represents about 75% of hoteliers nationwide, in some markets the AHA's members may represent a large proportion of purchasers such that their aggregation of buying power may result in anti-competitive harm. The ACCC has not been provided with information that would allow it to assess the likelihood of, or weight to be placed on, the anti-competitive detriments arising in these markets. Further, in the absence of an appropriate framework governing the selection and inclusion of new counterparties (being those currently unidentified by the AHA Divisions), the ACCC is unable to assess the likelihood of anti-competitive harm.

Accordingly the ACCC proposes to grant authorisation to the AHA Divisions in Victoria, Western Australia, South Australia, Tasmania, Queensland, the Australian Capital Territory and the Northern Territory to collectively bargain on behalf of their members with providers of wagering services, providers of broadcasting services and providers of collective licensing services.

The ACCC proposes to grant authorisation for five years.

The ACCC also grants interim authorisation for the AHA Divisions to continue to engage in collective bargaining as provided for by authorisation A90987. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

The ACCC would welcome further information from the applicant and interested parties in relation to likely effect of the collective bargaining arrangements in the markets relevant to the proposed expanded authorisation. In particular the ACCC invites submissions addressing the likely anticompetitive detriment arising from the aggregation of the AHA members bargaining power in these markets. The ACCC would also welcome submissions from the AHA Divisions on an appropriate framework governing the selection and inclusion of new counterparties.

The applicants or any interested party may also request a conference be held to make oral submissions on the draft determination.

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# 1. The application for revocation and substitution

- 1.1. On 25 October 2010, the Australian Hotels Association Divisions in Victoria, Western Australia, South Australia, Tasmania, Northern Territory, New South Wales, Australian Capital Territory and Queensland (AHA Divisions) lodged an application under section 91C(1) of the *Trade Practices Act 1974* (TPA) for the revocation of authorisation A90987 and the substitution of authorisation A91257 for the one revoked.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the Act). The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in **Attachment A**.
- 1.4. The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution for the one revoked (re-authorisation). In order for the ACCC to re-authorise conduct, the ACCC must consider the application for re-authorisation in the same manner as it would consider an application for initial authorisation under section 88 of the Act.
- 1.5. Relevantly, the initial authorisation was made under section 88(1) of the TPA to make and give effect to 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 TPA.<sup>1</sup>
- 1.6. A chronology of the significant dates in the ACCC’s consideration of this application is contained in **Attachment B**.

## The applicants

- 1.7. The Australian Hotels Association (AHA) is an organisation of employers registered under the *Workplace Relations Act 1996* with over 5000 members spanning hotels, pubs, taverns, city bars, international standard accommodation hotels and resorts. It has divisions located in every state and territory. Membership is voluntary, with a constant movement of members joining and leaving the various Divisions.

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<sup>1</sup> On 24 July 2009, amendments to the TPA, contained in the *Trade Practices Amendment (Cartel Conduct & Other Measures) Act 2009*, commenced operation. All authorisations in effect on that date, including authorisation A90987, were deemed to provide statutory protection from legal action under the cartel provisions (section 88(1A)) of the TPA.

- 1.8. The main objective of the AHA is to promote and protect the rights and interests of licensed hospitality industry businesses. It aims to be the leading hotel and hospitality industry association providing leadership in representing the interests of members and other stakeholders to the Government and community.
- 1.9. According to the AHA<sup>2</sup> there are 6,407 hotels in Australia. The state and territory breakdown is:

QLD	1100
NSW	2000
ACT	120
VIC	1400
TAS	310
SA	630
NT	127
WA	720

- 1.10. The AHA notes that around 75% of hotels in Australia are members of the AHA. The total industry value added by Australia's accommodation business is \$4.7749 billion or 0.5% of Australia's gross domestic product. The total industry value added by Australia's entire hotel industry is close to 1% of Australia's gross domestic product.<sup>3</sup>
- 1.11. The table below outlines information provided by the AHA Divisions on the percentage of hotels in each state or territory that are members of the AHA.

	WA	SA	TAS	VIC	NT	QLD	NSW	ACT
approximate %	78	85	70	44	79	80	76	75

## The proposed conduct

- 1.12. The AHA Divisions seek to bargain on behalf of their current and future members with a broad and open ended range of counterparties including those authorised under the existing authorisation namely wagering and broadcasting service providers and those sought to be authorised by this application including providers of poker machines, wine, beer, spirits, soft drink, energy, advertising, cigarettes, insurance, confectionary, catering, communication, superannuation, banking, music, accommodation, employment, training, accounting, auditing, IT services and security. A list of the proposed targets is at **Attachment C**.<sup>4</sup> The AHA Divisions also seek to bargain not only with the counterparties identified in the application but with as yet unidentified counterparties.

<sup>2</sup> Australian Hotels Association / Australian Bureau of Statistics – AHA website [www.aha.org.au/about.html](http://www.aha.org.au/about.html)

<sup>3</sup> ibid

<sup>4</sup> A full copy of the application may be found by following the links to this matter on the ACCC website at [www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister).

- 1.13. The AHA Divisions seek re-authorisation for a period of five years.
- 1.14. The AHA Divisions propose to negotiate on behalf of their current and future members with a range of counterparties in relation to the following terms and conditions:
- price of product
  - terms of supply
  - settlement discounts
  - product development
  - joint advertising and marketing
  - distribution.
- 1.15. The AHA Divisions advise that the proposed negotiation process will be voluntary and will:
- include a dispute resolution process for any disputes which may arise between individual members and the goods and service providers; and
  - be conducted by committees elected by the members of each state/territory Division of the AHA.
- 1.16. As occurs under the existing authorisation, the AHA proposes that the negotiating committees will comprise representatives of different types of hotels (possibly one country hotel, one large metropolitan hotel and one small metropolitan hotel) and representatives from the relevant AHA Division.
- 1.17. The AHA also notes that it operates by way of its Divisions and that it is the Divisions that will form the collective bargaining groups under the proposed arrangements. The AHA has not sought authorisation to form a national or cross-border collective bargaining group.<sup>5</sup>

## **Other parties**

- 1.18. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct. In this case the AHA Divisions seek to extend the authorisation to any current or future members of the AHA Divisions.

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<sup>5</sup> AHA further submission in support of application A91257 received 14 December 2010.

## Interim authorisation

- 1.19. Authorisation A90987 is due to expire on 31 March 2011. Pursuant to section 91 of the Act the ACCC considers it appropriate to suspend the operation of A90987 and to grant interim authorisation to the application in substitution (A91257). The interim authorisation granted by the ACCC permits the AHA Divisions to continue to engage in collective bargaining as previously provided for by authorisation A90987.

<b>AHA Division</b>	<b>Service Provider</b>
Victoria	Tabcorp Holdings Ltd, Sky Channel Pty Ltd
Western Australia	Racing and Wagering Western Australia, Sky Channel Pty Ltd
South Australia	Unitab Ltd, Sky Channel Pty Ltd
Tasmania	Tote Tasmania Pty Ltd, Sky Channel Pty Ltd
Northern Territory	Unitab Ltd, Sky Channel Pty Ltd

- 1.20. Interim authorisation does not permit the AHA Divisions to engage in collective bargaining as proposed by the expanded arrangements.
- 1.21. The ACCC's interim authorisation will enable the status quo to continue while the ACCC is considering the current application for re-authorisation. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## 2. Background to the application

### Existing authorisation

- 2.1. On 1 March 2006, the ACCC granted authorisation (A90987) for the AHA Divisions in Victoria, Western Australia, South Australia, Tasmania and Northern Territory to collectively bargain on their own behalf and on behalf of their members, with the following service providers of wagering and/or broadcasting services:

<b>AHA Division</b>	<b>Service Provider</b>
Victoria	Tabcorp Holdings Ltd, Sky Channel Pty Ltd, Racing Victoria Ltd, ThoroughVision Pty Ltd
Western Australia	Racing and Wagering Western Australia, ThoroughVision Pty Ltd, Sky Channel Pty Ltd
South Australia	Unitab Ltd, Sky Channel Pty Ltd, ThoroughVision Pty Ltd
Tasmania	Tote Tasmania Pty Ltd, Sky Channel Pty Ltd, ThoroughVision Pty Ltd
Northern Territory	Unitab Ltd, Sky Channel Pty Ltd, ThoroughVision Pty Ltd

### Assessment of previous application

- 2.2. The ACCC considered that the arrangements gave rise to a public benefit in that:

- allowing the AHA Divisions to engage in collective negotiations with wagering and broadcasting service providers may provide a greater opportunity for hotels to provide input into contract terms and conditions, to achieve more efficient commercial outcomes; and
- hotels were likely to pass on at least some benefits of more favourable deals 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.

- 2.3. The ACCC considered that the anti-competitive detriment generated by the proposed arrangements was limited by the following:

- the level of competition between hotels being unlikely to be significantly affected
- the arrangements being voluntary for all parties and able to be accessed by future AHA members
- the arrangements not including collective boycott activity.

- 2.4. The application was granted subject to a number of conditions. Broadly, these conditions provide that:
- A negotiating committee must not comprise of members from more than one state/territory AHA Division.
  - 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 other states/territories.
- 2.5. Authorisation was granted for a period of five years. This authorisation expires on 31 March 2011.
- 2.6. In 2008, the Australian Hotels Association Divisions in Victoria, Western Australia, South Australia, the Northern Territory and Tasmania sought to vary authorisation A90987. The variation proposed to add the New South Wales Division of the AHA and its nominated targets, being Tabcorp Holdings Limited and Sky Channel Pty Ltd, to the authorised arrangements.
- 2.7. The ACCC granted the minor variation on 12 November 2008.

### **Differences between the existing authorisation and the current application**

- 2.8. The current application seeks to:
- include the AHA Divisions in Queensland and the ACT in the collective bargaining arrangements;
  - extend the range of counterparties with whom individual AHA Divisions may collectively bargain (see Attachment C); and
  - extend the range of goods and service providers to as yet unidentified goods and service providers.

### 3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by applicants in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

#### The AHA Divisions' supporting submission

- 3.2. Broadly, the AHA Divisions submit that existing collective bargaining arrangements have improved the ability of AHA members to have meaningful input into contract terms and have improved the cost effectiveness of the competitive process between AHA members and suppliers. The AHA Divisions submit the broader collective bargaining arrangements will foster both economies of scale and of aggregated power in the market.
- 3.3. The AHA Divisions submit there is no public detriment. The AHA Divisions submit that traditionally, AHA members do not generally compete against each other as they are geographically separate. The main competitors are supermarket majors and members of other buying groups. The AHA Divisions submit that by aggregating their buying power members can compete against the dominant players such as supermarkets when purchasing goods and services and this also gives suppliers in the various industries an alternative source of demand.

#### Interested party submissions

- 3.4. The ACCC sought submissions from 242 interested parties potentially affected by the application, including government departments and peak body organisations relevant to the industries sought to be covered by the conduct.
- 3.5. A summary of the public submissions received from interested parties follows. The submissions are grouped into three categories: those that support authorisation of the conduct; those that neither support nor oppose authorisation of the conduct; and those that oppose authorisation of the conduct.

#### *Submissions supporting authorisation*

- 3.6. The **Australian Performing Rights Association (APRA)** supports the application and submits that its experience in dealing with the AHA Divisions has been a positive and constructive process and has resulted in the formulation of a number of APRA licence schemes that generally have been acceptable to the membership of both parties. APRA submits that its ability to consult and negotiate with industry bodies such as the AHA Divisions results in transaction efficiencies.
- 3.7. **Nightlife Music Video** supports the application submitting that it assists in raising the hotel industry's awareness of, and compliance with, its music licensing obligations.

*Submissions that neither support nor oppose authorisation*

- 3.8. Both the **Distilled Spirits Council of Australia** and **AON Corporation** do not object to the application for authorisation.
- 3.9. The **Queensland Department of Employment, Economic Development and Innovation** does not object to the authorisation provided that the conduct does not breach any requirements of the *Queensland Gaming Machine Act 1991*.

*Submissions opposing authorisation*

- 3.10. **Austar** submits that the claimed public benefits are illusory and can be achieved without the authorisation and further that competition between the AHA Divisions' members with respect to subscription television will be diminished and will result in higher prices for entertainment, food and beverages to consumers.
- 3.11. **British and American Tobacco Australasia (BATA)** submits that there will be no transaction costs savings and no increased competition in the retail market as a result of the proposed conduct.
- 3.12. **Coopers Brewery (Coopers)** submits that it would result in unfairness in light of the imbalance between it and the AHA Divisions given its position in the market compared with the size of the potential bargaining group formed by the AHA Divisions.
- 3.13. **Fosters Group (Fosters)** submits that the application does not establish that the proposed collective bargaining conduct would result in a net public benefit. Fosters submits that it appears unlikely that the collective bargaining arrangements would: achieve greater wholesale price savings such that retail competition would be enhanced; increase the level of input the AHA members would have into key terms of wholesale liquor supply; or generate any transaction costs savings greater than other buying or banner groups.
- 3.14. **Fox Sports Venues (FSV)** submits that there is no evidence that the claimed public benefits will arise and the size of the potential bargaining group is likely to reduce competition in the supply of hospitality related services. FSV submits that the proposed collective bargaining is unlikely to achieve any more equitable dealings or result in any substantial savings in transaction costs but will lead to increased transaction costs for FSV.
- 3.15. **Lion Nathan National Foods (National Foods)** submits that there would be reduced competition between AHA members which would result in considerable public detriment and that there would be no material increase in the ability of AHA members to obtain efficient supplies of products and generally the public benefits claimed would not flow from the authorisation.
- 3.16. The views of the AHA Divisions and interested parties are further outlined in the ACCC's evaluation of the collective bargaining arrangements in Chapter 4 of this draft determination. Copies of public submissions may be obtained from the ACCC's website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) by following the links to this matter.

## 4. ACCC evaluation

- 4.1. Broadly under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.
- 4.2. The ACCC's evaluation of the proposed conduct is in accordance with the test(s) found in:
- sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
    - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
    - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.
  - sections 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
    - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
    - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- 4.3. For more information about the tests for authorisation and relevant provisions of the Act, please see **Attachment D**.

## The relevant areas of competition

- 4.4. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant areas of competition affected by that conduct.
- 4.5. The AHA Divisions submit the relevant areas of competition are the supply of hotel, tavern, accommodation establishments and restaurant services to the public; the acquisition by hotels, taverns, accommodation establishments and restaurants of goods and services; and the supply by various suppliers of goods and services to hotels, taverns, accommodation establishments and restaurants.
- 4.6. At the retail level, members of the AHA Divisions supply alcohol to consumers for either on-site or off-site consumption, along with other products such as soft drinks, tobacco products and confectionery. Some members who sell alcohol for on-site consumption also offer gambling (via poker machines) and wagering services. Some members also supply services such as food and hotel accommodation.
- 4.7. The AHA members also acquire alcohol, energy, advertising, poker machines, cigarettes, soft drinks, insurance, confectionery and communication services. Because these suppliers will be the targets of the collective bargaining arrangements, the markets for the acquisition of these goods and services will be directly affected by the proposed arrangements. The AHA Divisions submit that the wholesale markets feature a concentration of market power among a small number of traders, for example, in the acquisition of wholesale liquor the AHA members compete with Coles and Woolworths.
- 4.8. The AHA Divisions submit that the level of competition between its members is low with most competition occurring between other buying groups, supermarkets, licensed convenience stores, clubs and restaurants.
- 4.9. With respect to the AHA Divisions' application, the ACCC considers that the following areas of competition may be relevant to its assessment of the proposed conduct.

### *The acquisition of goods and services from commercial operators.*

- 4.10. The AHA Divisions propose to collectively negotiate the terms and conditions governing the acquisition of a broad range of inputs by their members. The AHA has identified the following sectors as being relevant to its proposal:
- wine, beer and spirits suppliers – direct suppliers
  - wine beer and spirits - wholesalers
  - energy
  - advertising
  - poker machines
  - cigarettes
  - soft drinks
  - insurance

- confectionary
- communication services
- catering supplies
- superannuation
- music
- accommodation
- employment providers
- training
- banking
- auditors/accountants
- IT services; and
- security.

4.11. In addition to these broad sectors and future parties within these sectors, the AHA Divisions have also sought authorisation to collectively bargain with providers of subscription television services, providers of wagering services, media companies and business brokers.

4.12. The ACCC notes that the goods and services identified by the AHA span diverse markets, each with unique features in terms of both supply and demand. The ACCC recognises that for some of these markets, for example subscription television services, competition between the service providers may be limited by geographic constraints and the substitutability of the content offered. For example Sky Channel is the exclusive provider of broadcast services for thoroughbred racing in Australia, while general sporting coverage is provided to the AHA's members by Austar and Fox Sports Venues. The Austar service is available in rural areas of New South Wales, Victoria, Queensland, and South Australia and to all areas in the Northern Territory and Tasmania. General sporting coverage in Western Australia and metropolitan Sydney (including Newcastle and the Central Coast), Canberra (including Queanbeyan), Melbourne, Brisbane and Adelaide is provided by Fox Sports Venues. Some markets also have restrictions, including restrictions imposed by legislative regimes, which limit participation by suppliers, for example wagering services and collective licensing services.

4.13. The significance of the AHA members in each of these markets has not been identified by the AHA other than to note that in its view the suppliers (counterparties) have substantial power and are able to dictate unfavourable terms and conditions<sup>6</sup>. The AHA has however also identified that while some of these counterparties are large or able to otherwise dominate in a market, some of the proposed counterparties are small.

4.14. The ACCC notes that in some of the affected markets AHA members will compete with a wide range of other businesses for the acquisition of the relevant goods and

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<sup>6</sup> AHA submission in support of application A91257 received 25 October 2010

services. While the AHA has not provided data addressing this issue the ACCC considers that AHA members are likely to represent a small proportion of purchasers in some of the affected markets.

- 4.15. The ACCC also considers however that in some circumstances the AHA's members are likely to represent a greater proportion of purchasers. The effect on the areas of competition of the AHA's proposal will therefore vary between markets.
- 4.16. The ACCC notes that the applicant has provided a limited assessment of these markets in support of its application. This has made it difficult for the ACCC to assess the likely competitive constraints on the bargaining groups.

#### *Competition in the supply of services by hotels and others to consumers.*

- 4.17. Members of the AHA Divisions supply alcohol to consumers for off-site and on-site consumption, along with allied products such as soft drinks, confectionery and tobacco products. Some members also supply (on-site) poker machine gaming services and wagering and entertainment services.
- 4.18. The AHA Divisions submit that in the market for the retail supply of packaged liquor they compete in a market dominated by the large supermarkets. They submit that for on-site consumption they compete with many licenced restaurants and clubs.
- 4.19. The ACCC notes that in *ACCC v Liquorland*<sup>7</sup>, the Federal Court found the main competition for retail liquor merchants was other liquor merchants within a certain radius. The ACCC considers that venues where drinking takes place may have a wider catchment area but would still compete with other drinking venues in that area.
- 4.20. The ACCC considers that hotels are likely to compete with one another and, in some respects to a lesser degree, with a range of other market participants (including clubs and licensed restaurants and cafes) in the provision of hospitality services to consumers in markets differentiated by geographic location. The ACCC notes that hotels may seek to offer a differentiated product to that offered by some of these participants (e.g. up-market, sports or casual), which may affect the closeness of competition. The ACCC considers that this area of competition is relevant to its consideration of the AHA Divisions' public benefit claims.

## **The counterfactual**

- 4.21. The ACCC applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.<sup>8</sup>
- 4.22. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with

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<sup>7</sup> *ACCC v Liquorland (Australia) Pty Ltd* [2006] FCA 826 at [797-798]

<sup>8</sup> *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

- 4.23. The AHA submits that the counterfactual is for members to seek to bargain individually with suppliers. The AHA contends that in this environment it is more likely that their members will enter into largely standard form contracts with the various service providers.
- 4.24. National Foods and Fosters however have submitted that absent the authorisation, AHA members will still be able to participate in banner or buying groups for the supply of liquor for sale for off-site consumption. It is the view of National Foods and Fosters that the AHA’s members will continue to achieve benefits from collective buying through these alternatives without the need for authorisation.
- 4.25. The ACCC notes that the AHA currently represents its members in discussions with APRA (negotiation of license schemes offered by APRA to classes of licensees). In its submission the AHA has submitted that a benefit of authorisation is to provide protection from legal challenge, noting that collective discussions have occurred but that targets can use the risk of breaching the Act as a bargaining tactic in their dealings with the AHA.
- 4.26. The ACCC notes that an industry association such as the AHA can assist in negotiations, for example by ensuring its members have access to appropriate legal and/or financial services. The AHA can also make representations to major suppliers in relation to issues of concern *without* the need for authorisation.
- 4.27. The ACCC considers that, absent authorisation, AHA members are likely to seek to negotiate with suppliers on an individual basis. This may mean members are offered standard form contracts and have limited input into the development of the terms and conditions.

## Public benefit

- 4.28. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>9</sup>
- 4.29. The AHA Divisions submit the collective bargaining arrangements have delivered and will continue to deliver public benefits, as follows:
  - the promotion of equitable dealings and industry harmony.
  - transaction cost savings from a single association representing many small businesses.
  - protection from legal challenge provided by the authorisation.

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<sup>9</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

- increased competition in the retail market.
- 4.30. The ACCC considers the claimed benefits can be summarised as follows:
- greater input into contracts
  - transaction costs savings
  - enhancements in the supply of goods and services by hotels.
- 4.31. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

### **Greater input into contracts**

- 4.32. Generally, one way in which small businesses can seek to redress an imbalance in bargaining power is to bargain collectively. This may allow small businesses to achieve competitive parity with larger businesses, enabling them to achieve more appropriate commercial outcomes through, for example, greater input into contract terms and conditions.
- 4.33. The AHA Divisions submit that the proposed collective bargaining arrangements will reduce the likelihood of contract terms and conditions that are unfair or unreasonable to hoteliers which may arise when faced with oligopoly or monopoly suppliers.
- 4.34. However, National Foods submits that AHA members do not face oligopoly or monopoly suppliers and National Foods is not able to dictate terms and conditions as there are multiple competing suppliers to whom AHA members could switch.
- 4.35. BATA submits that negotiations for the placement of tobacco vending machines tends to be venue specific and dependant upon geographic, demographic and economic factors and therefore collective negotiations are unlikely to result in any greater input into contract terms.
- 4.36. The ACCC accepts that there may be an imbalance in bargaining power between individual hotels and some suppliers. In cases where suppliers are in a position to offer standard form contracts, with little opportunity for input, collective bargaining arrangements may enable the AHA members to achieve increased input into contracts and to the extent that negotiations lead to efficiency gains, this would give rise to a public benefit.
- 4.37. The ACCC notes that some suppliers may already negotiate with individual AHA members, in which case, given the voluntary nature of the proposed collective bargaining arrangements, there may be no change to those negotiating arrangements.

### **Transaction costs savings**

- 4.38. Generally, there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiating process is utilised, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. The ACCC considers that to the extent that these transaction cost savings do arise they are likely to constitute a public benefit.

- 4.39. The AHA Divisions submit that transaction costs savings will be achieved by the acquisition of better information and negotiation skills and by the AHA members pooling their resources or in some cases outsourcing some of the functions that generate transaction costs to the AHA Divisions.
- 4.40. FSV submits that authorisation is unlikely to result in any significant transaction costs savings and that such costs savings are already achieved by the use of standard form contracts. They submit that the authorisation will simply result in increased transaction costs for FSV because it will be required to prepare different contracts for AHA members and non-members for each bargaining group in each of the geographical regions in which it operates.
- 4.41. Fosters submits that there are mechanisms in place in liquor markets, such as pricing groups and banner groups, that already minimize transaction costs and that it is difficult to identify the transaction cost savings that would be generated by the AHA Divisions also providing these services. Fosters also state that direct bargaining with AHA members is likely to continue and collective bargaining with AHA Divisions may result in simply adding another layer of negotiation to the negotiation process and will consequently increase transaction costs.
- 4.42. National Foods also submits that transaction costs savings are achieved by the use of standard form contracts which are already in place and that transaction costs savings are already achieved through buying and banner groups.
- 4.43. Nightlife Music Video submits that collective negotiations will not necessarily prove any more beneficial because its product is fully scalable and tailored to suit individual needs and budgets and is therefore more suited to direct negotiation with individual AHA members. However, Nightlife Music Video also submits that the proposed collective bargaining arrangements bring with it a negotiating environment that promotes the legitimate exploitation of music copyright and diminishes the capacity for piracy to occur and the illegal use of copyright material to flourish.
- 4.44. BATA submits that it is likely that members will continue to engage in separate negotiations with BATA for the supply of vending machines and therefore the conduct will not give rise to transaction costs savings.
- 4.45. APRA submits that its ability to consult and negotiate with industry bodies such as the AHA Divisions results in transactional efficiencies.
- 4.46. The ACCC considers that generally transaction costs can be lower where a single negotiating process is employed, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. The ACCC notes that some suppliers and individual members may wish to continue to negotiate individually. However, some suppliers and members may wish to negotiate collectively and this may give rise to transaction costs savings. To the extent that transaction cost savings arise they constitute a public benefit.

## **Enhancement in the supply of goods and services by hotels**

- 4.47. The AHA Divisions submit that they expect the collective bargaining process to result in more favourable terms of trading for their members. The AHA Divisions submit that as hotels operate in a competitive market a significant proportion of any benefits from improved trading terms will be passed onto consumers in the form of enhanced service standards and facilities.
- 4.48. Austar submits that it already consults with the AHA Divisions about licensed venues' needs in formulating its standard agreement and therefore the benefits claimed by the AHA Divisions are illusory and can be achieved without the authorisation.
- 4.49. FSV submits that competition between AHA members would be reduced because their key input costs across a broad range of industries would be harmonised. The ACCC recognises that the collective bargaining arrangements may result in AHA members moving to a common decreased cost structure for some standard inputs, however, the AHA members will continue to compete on quality and the combination or assortment of goods and services offered by AHA members.
- 4.50. Fosters submits that in its experience to the extent that collective negotiations may provide the bargaining group with access to volume discounts AHA members are unlikely to pass through cost savings to consumers at least in relation to on-premises liquor sales where, in Fosters' submission, costs savings are regularly retained by hotel operators or invested in other aspects of the venue. The ACCC notes that to the extent that hotel operators are able to achieve cost savings which may be invested in other aspects of their business there is potential for that investment to promote rivalry amongst hotels in the form of enhanced service standards and facilities.
- 4.51. The ACCC notes that in some markets, collective negotiations may provide the bargaining group with access to volume discounts that may not be available through individual negotiation. The ACCC considers that to the extent such cost savings are passed through to consumers as either lower prices or enhanced services, benefits to the public will arise.

## **ACCC conclusion on public benefits**

- 4.52. The ACCC accepts that the collective bargaining arrangements are likely to result in the following public benefits:
- improved input into pricing and non-pricing contract terms resulting from an improved bargaining position of AHA members
  - transaction cost savings
  - enhancements in the supply of goods and services by hotels.

## **Public detriment**

4.53. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>10</sup>

4.54. Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions, which can include price, with a supplier or customer.

4.55. The AHA Divisions submit that the collective bargaining arrangements will result in no public detriment.

4.56. In assessing the potential detriment of the proposed collective bargaining arrangements, the ACCC has considered the following three possible anti-competitive effects which are likely to occur in the primary areas of competition:

- reduced economic efficiencies
- increased potential for collective activity beyond that authorised
- effect on competitors outside the collective bargaining arrangement.

## **Reduced economic efficiencies**

4.57. In its past consideration of collective bargaining arrangements, the ACCC has accepted that where collective bargaining results in an increased price being paid to the bargaining group, or in this case a decrease in the price being paid to parties supplying the group, or reduced competition on other terms of supply, this could constitute an anti-competitive detriment. There is also capacity for any such increases to be passed on in the form of higher prices, less choice, or lower quality of products offered to consumers.

4.58. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. This is often referred to as allocative efficiency. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to allocative inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

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<sup>10</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.59. In the existing authorisation, the AHA Divisions are authorised to collectively bargain with a narrow range of suppliers including Tabcorp Holdings Ltd, Sky Channel Pty Ltd, Racing and Wagering Western Australia, Unitab Ltd, ThoroughVision Pty Ltd, Tote Tasmania and Racing Victoria.
- 4.60. In the current application the AHA Divisions seek to significantly broaden the range of suppliers to include suppliers of alcohol, energy, advertising, poker machines, cigarettes, soft drinks, insurance, confectionary, communication services, catering supplies, superannuation, music, accommodation, employment providers, training, banking, auditors/accountants, IT services and security.
- 4.61. Where proposed collective bargaining arrangements involve only a small proportion of participants in relevant markets, there is likely to be little risk of anti-competitive detriment. Where this is not the case, the ACCC considers the anti-competitive effects of collective bargaining arrangements are likely to be limited when the following four features are present:
- the current level of negotiations between individual members of the group and the proposed counterparties on the matters to be negotiated is low
  - participation in the collective bargaining arrangement is voluntary
  - there are restrictions on the coverage and composition of the bargaining group
  - there is no boycott activity.
- 4.62. With respect to these four features as they relate to the AHA Divisions' proposed collective bargaining arrangements, the ACCC notes the following:

*Current level of negotiation between AHA members and suppliers*

- 4.63. Where the current level of individual bargaining between members of a proposed bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.
- 4.64. The AHA submits that its members are generally offered standard form contracts.
- 4.65. Some interested parties have submitted that individual negotiations with the AHA's members are currently undertaken and are a necessary feature of their product.<sup>11</sup> These negotiations are in relation to venue specific matters such as marketing and promotional support, product placement, equipment and equipment support, rebates and discounts. These parties have argued that switching costs for venues are comparatively low and that competition for venues is fierce between suppliers.
- 4.66. The ACCC is concerned that the proposed arrangements may dampen the current level of negotiation between individual AHA members and some of the counterparties. However the ACCC also accepts that the level of negotiation between the AHA's members and some of the counterparties, for example the providers of wagering services, broadcast services and collective licensing services, in the absence of authorisation is likely to be low.

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<sup>11</sup> See submissions provided by British American Tobacco Australasia 23 December 2010; Fosters Group 2 December 2010; Lion Nathan National Foods 25 November 2010.

4.67. As noted previously, the goods and services identified by the AHA as being matters for collective negotiation under the expanded authorisation span diverse markets, each with unique features in terms of both supply and demand. The ACCC notes that the applicant has provided a limited assessment of these markets in support of its application. This has made it more difficult for the ACCC to assess the likely impact of the proposed arrangements on the current level of negotiations between individual members of the proposed collective bargaining groups and the counterparties.

#### *Voluntary participation in the collective bargaining arrangements*

4.68. The AHA has noted that the proposed collective bargaining arrangements are voluntary. AHA members may opt out of the collective bargaining process at any time and negotiate individually with the relevant supplier. Suppliers may also choose not to participate in collective negotiations with the AHA Divisions and may choose to negotiate with AHA members individually.

4.69. Fosters has however submitted that the scale of the bargaining groups is such that there would be a commercial imperative for counterparties to participate in the collective negotiations. The ACCC notes that the proposed arrangements could result in a potentially significant increase in bargaining power for a group relative to that of the counterparty, such that participation in the negotiation process by a counterparty is less likely to be voluntary.

4.70. As noted previously, the goods and services which are the subject matter of the expanded authorisation span diverse markets, each with unique features in terms of both supply and demand. The ACCC accepts that there is a risk that for some of these markets the introduction of the proposed AHA collective bargaining groups may result in anti-competitive outcomes. The ACCC has not been provided with information which would allow it to assess the likelihood of or weight to be placed on such outcomes in the affected markets.

#### *Size/composition of bargaining group*

4.71. The ACCC considers that where the size of bargaining groups is restricted, any 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 outside the group.

4.72. The AHA Divisions submit that collective negotiations will be conducted by committees elected by the members of each state/territory Division of the AHA.

4.73. On the basis of the information provided by the AHA Divisions the ACCC understands that the negotiating committees will take the following forms:

- a negotiating committee may comprise representatives of different types of hotels (possibly one country hotel, one large metropolitan hotel and one small metropolitan hotel) and representatives from the relevant AHA Division; or
- all members of an AHA Division may constitute a negotiating committee.

4.74. The size/composition of the bargaining group will be limited through the formation of State/Territory based negotiating committees. The AHA Divisions however

represent a large proportion of the hotel industry in each state and territory. Information provided by the AHA Divisions indicates that AHA membership ranges from 44% to 85% in each state or territory (see paragraph 1.11).

- 4.75. Fosters submits that the scale of the proposed collective bargaining groups could effectively facilitate the aggregation of the majority of the sector's buying power in each state and territory and would have the consequence of enabling the AHA Divisions to bargain on behalf of large corporate pub groups and international hotel chains.
- 4.76. In its submission Coopers notes that it is a small brewery with a market share of less than 4% of the national beer volume. Coopers submits that there would be no fairness in allowing negotiations between it and a bargaining group potentially controlling over 90% of the on-premises beer market.
- 4.77. As noted, the ACCC recognises that in some of the affected markets AHA members will compete with a broad range of other businesses for the acquisition of the relevant goods and services. The ACCC also recognises that in some of the affected markets participation on the supply-side is restricted – for example broadcast services, wagering services and collective licensing services. The aggregation of the buying power of the AHA members in these markets relative to that of the supplier is less likely to result in significant anti-competitive detriment.
- 4.78. However, the ACCC is concerned that in some of the affected markets the AHA's members could represent a significant proportion of purchasers. The ACCC is concerned that the aggregation of the buying power of AHA members in these markets may result in anti-competitive detriment.
- 4.79. As noted previously, the applicant has provided a limited assessment of these markets affected by the proposed arrangements in support of its application. This has made it more difficult for the ACCC to assess the likely competitive constraints on the bargaining groups.

#### *Boycott activity*

- 4.80. Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because a party, faced with the threat of withdrawal of supply/acquisition, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.
- 4.81. The AHA Divisions have not applied for authorisation to engage in collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the Act.

#### **Increased potential for collective activity beyond that authorised**

- 4.82. The exchange of certain information among competitors, particularly in relation to prices, fees and costs, may facilitate collusion or otherwise reduce competition, resulting in increased prices or reduced quality and availability of goods or services. Outcomes of this nature are associated with significant public detriment.

- 4.83. Nonetheless, the ACCC accepts that to some degree, information sharing is an inherent aspect of collective bargaining because in order to collectively negotiate terms and conditions with a supplier or customer, the members of a collective bargaining group must discuss their desired outcomes from negotiations and how these can best be achieved. It is difficult to imagine a collective bargaining arrangement that does not involve some form of information sharing between the members of the particular collective bargaining group.
- 4.84. The ACCC notes that the likelihood of collusive activity beyond that authorised is reduced where participants are made aware of their obligations under the Act and where the arrangements are not industry wide.
- 4.85. The ACCC notes that under the existing authorisation, the AHA Divisions proposed that members be reminded of their obligations under the Act each time they commenced collective negotiations and that a trade practices compliance program be implemented. The ACCC considers that such a program assists in ensuring that the conduct of the AHA Divisions and its members in the collective bargaining arrangement lies strictly within the terms of the authorisation.

#### **Effect on businesses outside the arrangements**

- 4.86. BATA submits that the proposed collective bargaining arrangements are likely to lessen competition in the supply of tobacco products to consumers in that the AHA members' main competitors are likely to be geographically proximate small retail outlets with little bargaining power. The ACCC considers that to the extent that the collective bargaining arrangements enable AHA members to source and supply goods and services at lower prices or on better terms then the impact is likely to be pro-competitive and in the absence of predatory pricing will produce a public benefit.
- 4.87. FSV and National Foods submit that concentrated buying power may lead to the AHA Divisions and AHA members choosing to deal with fewer suppliers and this may result in a decrease in the range of products sold by AHA members and therefore result in a reduction in choice of goods and services available to consumers. The ACCC considers that the buying choices made by hotels will be driven to an extent by consumer demand and it is likely that hotels will continue to purchase those goods and services for which there is consumer demand. In this regard, voluntary collective bargaining arrangements do not prevent negotiations between individual hotels and suppliers to meet demand.
- 4.88. National Foods submits that an increase in bargaining power of AHA members will lead to structural changes in the retail market for hotel services with AHA members forming one large oligopoly supplier. The ACCC notes, however, that the conduct sought to be authorised does not permit AHA members to collude in relation to the goods and services they supply to consumers.

#### **ACCC conclusion on public detriments**

- 4.89. In conducting its authorisation assessment the ACCC is required to form a view on the level of public detriment arising as a result of the arrangements for which

authorisation has been sought. On balance the ACCC is concerned that the proposed arrangements could result in a reduction in economic efficiency.

- 4.90. In particular the ACCC is concerned that the expanded authorisation may dampen the current level of negotiation between individual AHA members and some of the counterparties. The ACCC is also concerned that the expanded arrangements could potentially result in a significant increase in bargaining power for a group relative to that of the counterparty, such that participation in the negotiation process by a counterparty is less likely to be voluntary. The ACCC is particularly concerned that in some circumstances the AHA's members could represent a greater proportion of purchasers such that the aggregation of the buying power of AHA members in these markets may result in anti-competitive detriment.
- 4.91. As noted previously, the goods and services which are the subject matter of the expanded authorisation span diverse markets, each with unique features in terms of both supply and demand. The ACCC accepts that there is a risk that for some of these markets the introduction of the proposed AHA collective bargaining groups may result in anti-competitive outcomes.
- 4.92. Balanced against this the ACCC accepts that the level of anti-competitive detriment likely to arise as a result of negotiations between the AHA's members and the counterparties providing wagering and broadcast services and collective licensing services is more likely to be low.

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

- 4.93. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the collective bargaining arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.94. In the context of applying the net public benefit test in section 90(8)<sup>12</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>13</sup>
- 4.95. On balance, for the reasons outlined above, the ACCC considers that the net public benefit test is likely to be satisfied in relation to the markets the subject of the existing authorisation. This includes some additional counterparties identified in the application. The ACCC is also satisfied, given its understanding of the relevant market, that the net public benefit test is likely to be satisfied in relation to collective bargaining between the AHA Divisions and APRA and the Phonographic Performance Company of Australia (PPCA).
- 4.96. However, the ACCC is not satisfied that the net public benefit test has been met in respect of the remaining expanded arrangements. As noted, the goods and services which are the subject matter of the expanded authorisation application span diverse

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<sup>12</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>13</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

markets, each with unique features in terms of supply and demand. The ACCC has not been provided with information that would allow it to assess the likelihood of, or weight to be placed on, the anti-competitive detriments arising in these markets.

4.97. Accordingly, the ACCC proposes to grant authorisation to permit the AHA Divisions in Victoria, Western Australia, South Australia, Tasmania, Queensland, the Australian Capital Territory and the Northern Territory to collectively bargain on their own behalf and on behalf of their members, with the following service providers of wagering and/or broadcasting services and collective licensing services:

- Tabcorp Holdings Ltd
- Unitab Ltd
- ACTTAB Limited
- WA TAB
- Centrebet International Limited
- Sportsbet Pty Ltd
- Sky Channel Pty Ltd
- Premier Venue Entertainment Pty Ltd (Fox Sports Venues)
- Austar Entertainment Pty Ltd
- Australasian Performing Rights Association
- Phonographic Performance Company of Australia Limited

4.98. The AHA Divisions have also sought authorisation to collectively bargain with as yet unidentified counterparties. The ACCC is unable to assess the potential impact of these proposed collective bargaining arrangements in the absence of the markets and their relevant features having been identified. Accordingly, the ACCC is not proposing to grant authorisation in respect of future counterparties.

4.99. The ACCC would welcome further information from the AHA Divisions and interested parties in relation to the likely effect of the collective bargaining arrangements in the markets relevant to the proposed expanded authorisation. In particular the ACCC invites submissions addressing the likely anticompetitive detriment arising from the aggregation of the AHA members bargaining power in these markets. The ACCC would also welcome submissions from the AHA Divisions on an appropriate framework governing the selection and inclusion of new counterparties.

#### *Liquor Stax Australia Pty Ltd A91237*

4.100. In October 2010 the ACCC granted authorisation to Liquor Stax Australia Pty Ltd (A91237). Under this arrangement Liquor Stax proposed to collectively bargain on behalf of a group of around 200 small businesses operating liquor merchants and hotels with 60 suppliers of various goods and services.

4.101. A key factor for the ACCC in granting this authorisation was the relatively small size of the bargaining group. The ACCC did note, however, that a change to the composition of the Liquor Stax bargaining group may result in a material change in

circumstances altering the balance of benefit and detriment. In such circumstances the ACCC may consider revocation of the authorisation under section 91B of the Act.

## **Length of authorisation**

- 4.102. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>14</sup> The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 4.103. In this instance, the AHA Divisions seek authorisation for five years.
- 4.104. The ACCC proposes to grant authorisation to permit collective bargaining by the AHA Divisions on behalf of members with providers of broadcasting services, wagering services and collective licensing services for five years.

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<sup>14</sup> Section 91(1).

## 5. Draft determination

### The application

- 5.1. On 25 October 2010, the AHA Divisions lodged an application for the revocation of authorisation A90987 and the substitution of authorisation A91257 for the one revoked.
- 5.2. Application A91257 was made under section 91C(1) of the TPA. Relevantly, the initial authorisation was made under subsection 88(1) of the TPA.
- 5.3. In particular, the individual AHA Divisions seek authorisation to engage in collective negotiations on behalf of their current and future members with a range of service providers including wagering and broadcasting services, poker machines, wine, beer, spirits, soft drink, energy, advertising, cigarettes, insurance, confectionary, catering, communication, superannuation, banking, music, accommodation, employment providers, training providers, accounting, auditing, IT services and security.
- 5.4. Section 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The net public benefit test

- 5.5. For the reasons outlined in Chapter 4 of this draft determination the ACCC considers that in all the circumstances collective bargaining by the AHA's members with those counterparties providing wagering and broadcast services is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements. The ACCC is therefore satisfied that the tests in sections 90(5A), 90(5B), 90(6), and 90(7) are met.

The ACCC therefore **proposes to revoke** authorisation A90987 **and grant** authorisation A91275 in substitution.

### Conduct for which the ACCC proposes to grant authorisation

- 5.6. The ACCC proposes to revoke authorisation A90987 and grant authorisation A91275 in substitution.
- 5.7. The ACCC proposes to grant authorisation under section 91C(4) of the Act to the AHA Divisions to conduct collective negotiations on behalf of their current and future members with providers of wagering services, broadcasting services and collective licensing services in relation to:
  - the terms and conditions, including fees, for the provision of wagering and broadcasting services and
  - any necessary future amendments or adjustments to those terms and conditions

The collective negotiations are to be conducted by the AHA's Divisions. The collective bargaining groups formed by the Divisions will not comprise members from more than one state/territory Division.

5.8. The service providers with whom the AHA Divisions are authorised to collectively bargain are:

- Tabcorp Holdings Ltd
- Unitab Ltd
- ACTTAB Limited
- WA TAB
- Centrebet International Limited
- Sportsbet Pty Ltd
- Sky Channel Pty Ltd
- Premier Venue Entertainment Pty Ltd (Fox Sports Venues)
- Austar Entertainment Pty Ltd
- Australasian Performing Rights Association
- Phonographic Performance Company of Australia Limited.

5.9. The ACCC proposes to grant authorisation for five years.

5.10. Further, the proposed authorisation is in respect of the collective bargaining arrangements as they stand at the time authorisation is granted. Any changes to the collective bargaining arrangements during the term of the proposed authorisation would not be covered by the proposed authorisation.

5.11. This draft determination is made on 3 March 2011.

5.12. The attachments to this determination are part of the draft determination.

### **Conduct not proposed to be authorised**

5.13. The ACCC proposes to deny authorisation to the AHA Divisions to collectively bargain on behalf of their members with providers of poker machines, wine, beer, spirits, soft drink, energy, advertising, cigarettes, insurance, confectionary, catering, communication, superannuation, banking, music, accommodation, employment providers, training providers, accounting, auditing, IT services and security.

5.14. The ACCC also proposes to deny authorisation to the AHA Divisions to collectively bargain on behalf of their members with unidentified counterparties.

## Interim authorisation

- 5.15. Authorisation A90987 is due to expire on 31 March 2011. Pursuant to section 91 of the Act the ACCC considers it appropriate to suspend the operation of A90987 and to grant interim authorisation to the application in substitution (A91257).
- 5.16. The interim authorisation granted by the ACCC permits the AHA Divisions to continue to engage in collective bargaining as previously provided for by authorisation A90987 only.

AHA Division	Service Provider
Victoria	Tabcorp Holdings Ltd, Sky Channel Pty Ltd
Western Australia	Racing and Wagering Western Australia, Sky Channel Pty Ltd
South Australia	Unitab Ltd, Sky Channel Pty Ltd
Tasmania	Tote Tasmania Pty Ltd, Sky Channel Pty Ltd
Northern Territory	Unitab Ltd, Sky Channel Pty Ltd

- 5.17. Interim authorisation does not permit the AHA Divisions to engage in collective bargaining as proposed by this draft determination. Interim authorisation does not permit the AHA Divisions to engage in collective bargaining as proposed by the expanded arrangements.
- 5.18. The ACCC's interim authorisation will enable the status quo to continue while the ACCC is considering the current application for authorisation. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## Further submissions

- 5.19. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

## **Attachment A — the authorisation process**

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

## **Attachment B — chronology of ACCC assessment for application A91257**

The following table provides a chronology of significant dates in the consideration of the application by the AHA Divisions.

<b>DATE</b>	<b>ACTION</b>
25 October 2010	Application for revocation and substitution lodged with the ACCC.
24 November 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
17 December 2010	Submission received from the AHA Divisions in response to interested party submissions
23 December 2010	Further Submissions received from interested parties
6 January 2010	AHA Divisions respond to further submissions from interested parties
3 March 2011	Draft determination issued.

## **Attachment C — List of proposed targets**

1. 121 Employment
2. A4E Australia
3. ABC
4. ACT TAB
5. ActewAGL
6. AGL
7. Ainsworth Game Technology
8. Amarda
9. American Express International Inc
10. Amtek
11. Andale Beer Dispensing Equipment
12. Angove Family Winemakers
13. ANZ
14. AON Corporation Australia
15. Aristocrat Technologies
16. Aruze Gaming Australia
17. Aurora
18. Austar for Business
19. Australian Capital Tourism
20. Australian Liquor Marketers
21. Australian Performing Rights Association (APRA)
22. BankWest
23. Bepoz Retail Solutions
24. BGA
25. Bidvest Hospitality Supplies
26. Bistec
27. Bitch Brewing
28. BOC Gases
29. British American Tobacco Australia
30. Brown-Forman Australia
31. Butt Free Australia
32. Bytecraft Systems
33. Campbell Page

34. Canberra Convention Bureau
35. Capital 3
36. Capital Linen
37. Capitol Chilled Foods Australia Pty Ltd (Canberra Milk)
38. Cashcard Australia
39. CDS Gourmet Foods
40. CEJ Promotions
41. Centrebet
42. Check Inn Systems
43. Coca Cola Amatil (Aust) Pty Ltd
44. Colliers
45. Commonwealth Bank of Australia
46. Constellation Wines Australia
47. Coopers Brewery
48. Cripps Nubake
49. CRS Australia
50. Customers ATM
51. Daiquiri King
52. De Bortoli Wines
53. Diageo Australia
54. Distilled Spirits Industry Council of Australia (Inc)
55. Drinkwise
56. Ebet Gaming Systems
57. Empire Liquor
58. Employers Mutual
59. Energy Action
60. Energy Australia
61. Europcar
62. Expedia Australia Pty Ltd
63. Fairfax
64. First Degree Commercial Refrigeration
65. Flight Centre
66. Fonterra
67. Fosters Group
68. Fox Sports Venues

69. Franklyn Scholar
70. Global Coffee Solutions
71. Global Gaming Industries
72. Good Nuts
73. H & L Australia
74. Hill Equipment
75. Hobart Media Centre
76. Host Plus
77. Hostec International
78. Hotel Liquor Wholesalers
79. IGT
80. Imperial Tobacco Australia Pty Ltd
81. Independent Brands Australia
82. Independent Distillers (Aust) Pty Ltd
83. Independent Gaming
84. Inn Quest Australia
85. Intrust Super Fund
86. Intuit
87. Island 2 Island Beverage Company
88. James Richardson Group
89. Jasol Australia
90. Job Support Inc
91. Jones Lang Lasalle Hotels
92. Keycard ATM
93. Knight Frank
94. Konami Australia Pty Ltd
95. Lastminute.com.au (Australia) Pty Ltd
96. Link Solutions
97. Lion Nathan National Foods
98. Liquor Marketing Group
99. Little Creatures Brewing
100. Macmont Gaming Supplies
101. Macquarie Broadcasting
102. MAX Employment
103. Maximum Gaming

104. MBF
105. ME Bank
106. Meat & Livestock Australia
107. Mint
108. MTC Work Solutions
109. MYOB
110. Myriad Group
111. NAB
112. Nespresso Professional
113. Nestle Professional
114. Network Gaming
115. News Limited
116. Nightlife Music Video Pty Ltd
117. Oakley Textiles
118. OAMPS Insurance Brokers
119. Options Wine Merchants
120. Optus
121. Origin Energy
122. ORS Employment Solutions
123. Page Seager Lawyers
124. Perks
125. Perod Ricard Australia
126. PFD Foodservice
127. Philip Morris
128. PPCA
129. Premium Beverages
130. Racing & Wagering Western Australia
131. Retail Systems Australia
132. SA Liquor Distributors
133. Samuel Smith & Son
134. Sanyo Office Machines Pty Ltd
135. Schweppes Australia
136. SCI Workforce Employment Service
137. Shuffle Master
138. Sky Channel

139. Snack Brands Australia
140. Southern Cross
141. Sportsbet
142. St George Bank
143. Support Staff
144. Sydney Employment Development Services
145. Synergy
146. Tabcorp
147. Tas Hotel and Catering Supplies
148. Tasgas
149. Tasmanian Polytechnic
150. Taylors Wines
151. Telcoblue
152. Telstra
153. The Smith's Snackfood Company
154. Thirst!
155. Top Cut Food Industries
156. TOTE Tasmania
157. Tourism Australia
158. Tourism NSW
159. Trans Tasman Energy Group
160. Trusonic
161. Unitab Ltd
162. United Innkeeper Association (Thirsty Camel)
163. Vectron Systems
164. Vinatero
165. Vintek
166. Vittoria Coffee
167. WA TAB Agents' Association Inc
168. Wage Easy Payroll
169. Westpac Banking Corporation
170. WIN TV
171. Wotif
172. Xcelerate Employment Services

# Attachment D — the tests for authorisation and other relevant provisions of the Act

## Competition and Consumer Act 2011

### Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
  - (a) make a determination in writing granting such authorization as it considers appropriate; or
  - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision would result, or be likely to result, in a benefit to the public; and
  - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
    - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
    - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
  - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to

the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

- (a) make a determination granting:
  - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
  - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
  - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
  - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
  - (i) a significant increase in the real value of exports;

- (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

## Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.<sup>15</sup>

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>16</sup>

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

## Conditions

The Act allows the ACCC to grant authorisation subject to conditions.<sup>17</sup>

## Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future<sup>18</sup>

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<sup>15</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>16</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

<sup>17</sup> Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>19</sup>

## **Six- month time limit**

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>20</sup>. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

## **Minor variation**

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.<sup>21</sup> The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.<sup>22</sup>

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the arrangements.

## **Revocation; revocation and substitution**

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.<sup>23</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>24</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>25</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>26</sup>

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<sup>18</sup> Section 88(10)

<sup>19</sup> Section 88(6)

<sup>20</sup> Section 90(10A)

<sup>21</sup> Subsection 91A(1)

<sup>22</sup> Subsection 87ZD(1)

<sup>23</sup> Subsection 91B(1)

<sup>24</sup> Subsection 91B(3)

<sup>25</sup> Subsection 91C(1)

<sup>26</sup> Subsection 91C(3)