



Australian
Competition &
Consumer
Commission

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: 20 April 2011

Commissioners: Schaper
Dimasi
Willett

Authorisation no.: A91257

Public Register no.: C2010/955

Summary

The ACCC has granted authorisation to the Australian Hotels Association's Divisions to collectively bargain on behalf of members with a number of providers of wagering services, subscription broadcasting services, licensing of the public performance and communication rights in musical works, licensing of the broadcast, communication or performance of protected sound recordings or music video clips, accommodation booking services and suppliers of electronic gaming machines. The ACCC has granted authorisation for five years.

The ACCC has granted interim authorisation to allow the AHA Divisions to continue to engage in the arrangements previously authorised by the ACCC (A90987) until such time as this determination decision takes effect.

On 25 October 2010, the Australian Hotels Association Divisions in Victoria, Western Australia, South Australia, Tasmania, the Northern Territory, New South Wales, the 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 Australian Competition and Consumer Commission (ACCC). Previous authorisation A90987 was granted on 1 March 2006 and expired on 31 March 2011.

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

Draft determination

In its March 2011 draft decision the ACCC proposed to grant authorisation to permit the AHA Divisions to collectively bargain on behalf of their members with providers of wagering services, subscription broadcasting services, licensing of the public performance and communication rights in musical works and the licensing for the broadcast, communication or performance of protected sound recordings or music video clips. The ACCC proposed to grant authorisation for five years.

The ACCC did not propose to grant authorisation to the other elements of the AHA Divisions proposal (outlined above).

Amendment

On 30 March 2011 the AHA Divisions amended the application for authorisation. The revised proposal seeks authorisation for the AHA Divisions to bargain on behalf of their current and future members with a number of providers of wagering services, subscription broadcasting services, licensing of the public performance and communication rights in musical works and the licensing for the broadcast, communication or performance of

protected sound recordings or music video clips and accommodation booking services, as well as a number of suppliers of gaming machines.

In revising the application the AHA Divisions withdrew their request for authorisation as it applied to the providers of wine, beer, spirits, soft drink, energy, advertising, cigarettes, insurance, confectionary, catering services, communication services, superannuation, banking, employment providers, training providers, accounting services, auditing services, IT services and security services. The AHA Divisions also withdrew their application for authorisation to permit collective bargaining with unidentified counterparties.

ACCC assessment

The ACCC considers that, in all the circumstances, the proposed collective bargaining is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment. In particular the ACCC considers that the proposed collective bargaining arrangements are likely to result in improved input into contractual terms by AHA members, some transaction cost savings and some enhancements in the supply of goods and services by hotels.

The ACCC considers that the proposed arrangements are likely to result in minimal public detriment. The ACCC considers that any detriment which may arise is likely to be mitigated by the voluntary nature of the arrangements and the fact that the arrangements do not involve collective boycott conduct. It will also be lessened by the low level of bargaining which would ordinarily take place between members and large suppliers.

Accordingly, the ACCC has granted authorisation to permit the AHA Divisions in New South Wales, 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 a number of providers of wagering services, subscription broadcasting services, collective licensing of the public performance and communication rights in musical works, collective licensing of the broadcast, communication or performance of protected sound recordings or music video clips, accommodation booking services and suppliers of electronic gaming machines.

Authorisation is granted until 30 June 2016.

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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, the Northern Territory, New South Wales, the 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.¹
- 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.
- 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

¹ 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.

hospitality industry association providing leadership in representing the interests of members and other stakeholders to the Government and community.

- 1.9. According to the AHA² 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.³

- 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. In its October 2010 application the AHA Divisions proposed 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, suppliers of poker machines, wine, beer, spirits, soft drink, energy, advertising, cigarettes, insurance, confectionary, catering services, communication services, superannuation, banking, music, accommodation booking services, employment providers, training providers, accounting services, auditing services, IT services and security services.
- 1.13. The AHA Divisions also sought authorisation to collectively bargain on behalf of members with unidentified counterparties.
- 1.14. The AHA Divisions sought re-authorisation for a period of five years.

² Australian Hotels Association / Australian Bureau of Statistics – AHA website www.aha.org.au/about.html

³bid

- 1.15. The AHA Divisions proposed 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.
- 1.16. 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.
- 1.17. 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.
- 1.18. 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.⁴

The amended conduct

- 1.19. In their submission of 30 March 2011 responding to the draft determination the AHA Divisions noted that they had reconsidered the list of nominated counterparties. The AHA Divisions withdrew their request for authorisation as it applied to the providers of wine, beer, spirits, soft drink, energy, advertising, cigarettes, insurance, confectionary, catering services, communication services, superannuation, banking, employment providers, training providers, accounting services, auditing services, IT services and security services. The AHA Divisions also withdrew their application for authorisation to permit collective bargaining with unidentified counterparties.
- 1.20. Under their revised arrangements the AHA Divisions are proposing to conduct collective negotiations with a number of specified counterparties, being:
- providers of wagering services
 - providers of electronic gaming machines

⁴ AHA further submission in support of application A91257 received 14 December 2010.

- providers of collective licenses for the public performance and communication rights in musical works
- providers of collective licenses for the broadcast, communication or performance of protected sound recordings or music video clips
- providers of accommodation booking services
- providers of subscription broadcast services.

1.21. The evaluation set out in this determination only assesses the AHA Divisions revised proposal.

Other parties

1.22. 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.

Interim authorisation

1.23. Authorisation A90987 expired 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.

Under interim authorisation the AHA's Divisions are permitted to collectively bargain on their own behalf and on behalf of their members, with the following service providers of wagering and/or broadcasting services:

AHA Division	Service Provider
New South Wales	Tabcorp Holdings Ltd, Sky Channel Pty Ltd
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

1.24. 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:

AHA Division	Service Provider
New South Wales ⁵	Tabcorp Holdings Ltd, Sky Channel Pty Ltd
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.

⁵ On 12 November 2008 A90987 was varied to include the New South Wales Division of the AHA with its proposed counterparties of Tabcorp Holdings Ltd and Sky Channel Pty Ltd in the authorised arrangements.

- 2.4. The application was granted subject to a number of conditions. Broadly, these conditions provided 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 expired 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.

3. Submissions received by the ACCC prior to the draft determination

- 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. 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. A summary of the public submissions received from interested parties prior to the release of the ACCC's draft determination follows.
- 3.5. 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.
- 3.6. **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.
- 3.7. Both the **Distilled Spirits Council of Australia** and **AON Corporation** do not object to the application for authorisation.
- 3.8. 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*.

- 3.9. **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.
- 3.10. **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.
- 3.11. **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.
- 3.12. **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.
- 3.13. **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.
- 3.14. **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.
- 3.15. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) by following the links to this matter.

4. The Draft Determination

- 4.1. On 3 March 2011 the ACCC issued its draft determination responding to the AHA Divisions' request to revoke authorisation A90987 and to replace it by substitute authorisation A91257.
- 4.2. In the draft determination the ACCC proposed to grant authorisation to permit the AHA Divisions to collectively bargain on behalf of their members with providers of wagering services, subscription broadcasting services, collective licensing of the public performance and communication rights in musical works and the collective licensing for the broadcast, communication or performance of protected sound recordings or music video clips. The ACCC proposed to grant authorisation for five years.
- 4.3. The ACCC did not propose to grant authorisation to the remaining elements of the AHA Divisions proposal (outlined in paras 1.12 and 1.13 above). The ACCC concluded that it had 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 the broader areas of competition affected by the AHA Divisions' proposal.

Submissions received following the draft determination

- 4.4. The ACCC sought submissions commenting upon its draft determination 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. A summary of the public submissions received from interested parties follows.
- 4.5. **Tabcorp** noted the position set out by the ACCC in its draft determination and its earlier correspondence, it did not otherwise comment upon the ACCC's proposed authorisation decision.
- 4.6. **Fosters Group** noted the ACCC's proposed decision but did not provide further comments addressing the AHA's proposed arrangements.
- 4.7. **Fox Sports Venues (FSV)** noted the potential for the proposed arrangements to adversely impact/distort competition and the potential for the bargaining groups to inappropriately share information obtained in the course of their negotiations. FSV noted that the AHA Divisions had not provided sufficient information to support their application. FSV also noted that a number of competitors to its services were not nominated by the AHA as proposed counterparties. FSV noted that if the conduct were to be authorised the ACCC should seek to ensure that the arrangements remain voluntary and that the AHA's members do not seek to collectively boycott a supplier that elects not to negotiate with the collective bargaining group.
- 4.8. **Austar** noted its previous dealings with the AHA and submitted that the claimed public benefits are illusory and can be achieved without authorisation. It also noted that collective bargaining would reduce competition between the AHA's members for subscription television services. Austar also noted that the arrangements are focussed on the AHA licensed venue members and should not apply to the in-room

subscription services offered by Austar and other parties not nominated by these arrangements (eg FOXTEL Management Pty Ltd).

- 4.9. **Lion Nathan National Foods** (National Foods) noted that it agreed with the ACCC's proposed decision to decline authorisation to the expanded arrangements. National Foods noted the potential for the arrangements to result in distortions to competition.

The amended conduct

- 4.10. In their submission of 30 March 2011 responding to the draft determination the AHA Divisions noted that they had reconsidered the list of nominated counterparties. The AHA Divisions withdrew their request for authorisation as it applied to the providers of wine, beer, spirits, soft drink, energy, advertising, cigarettes, insurance, confectionary, catering services, communication services, superannuation, banking, employment providers, training providers, accounting services, auditing services, IT services and security services. The AHA Divisions also withdrew their application for authorisation to permit collective bargaining with unidentified counterparties.
- 4.11. Under their revised arrangements the AHA Divisions are proposing to conduct collective negotiations with a number of specified counterparties, being:
- providers of wagering services
 - providers of electronic gaming machines
 - providers of collective licenses for the public performance and communication rights in musical works
 - providers of collective licenses for the broadcast, communication or performance of protected sound recordings or music video clips
 - providers of accommodation booking services
 - providers of subscription broadcast services.
- 4.12. The views of the AHA Divisions and interested parties as they apply to the revised arrangements are further outlined in the ACCC's evaluation of the collective bargaining arrangements in Chapter 5 of this determination. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) by following the links to this matter.

5. ACCC evaluation

- 5.1. 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.
- 5.2. 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:
 - o 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
 - o 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:
 - o 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
 - o 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.
- 5.3. For more information about the tests for authorisation and relevant provisions of the Act, please see **Attachment C**.
- 5.4. The ACCC's evaluation of the AHA Divisions revised arrangements follows.

The relevant areas of competition

- 5.5. 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.
- 5.6. 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.
- 5.7. 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.
- 5.8. 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.
- 5.9. 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.

- 5.10. The AHA Divisions propose to collectively negotiate the terms and conditions governing the acquisition of a range of inputs by their members. Under its revised arrangements, the AHA is proposing to conduct collective negotiations with the following counterparties:
- providers of wagering services
 - providers of electronic gaming machines
 - providers of licenses for the public performance and communication rights in musical works
 - providers of licenses for the broadcast, communication or performance of protected sound recordings or music video clips
 - providers of accommodation booking services
 - providers of subscription broadcast services.
- 5.11. The ACCC recognises that for some of these areas of competition, for example subscription television services for sporting events, competition between the service providers may be limited to some extent by geographic constraints and the substitutability of the content offered. For example Sky Channel and ThoroughVision provide subscription broadcast services for thoroughbred racing in Australia, while a broader subscription sporting broadcast service 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. Subscription services for 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 totaliser wagering services.

- 5.12. The AHA has submitted that in its view the suppliers (counterparties) have substantial power and are able to dictate unfavourable terms and conditions⁶.
- 5.13. The ACCC notes that in some of the affected areas of competition AHA members will compete with a wide range of other businesses for the acquisition of the relevant goods and services and are likely to represent a small proportion of purchasers.
- 5.14. 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.

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

- 5.15. 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) electronic gaming machines, as well as wagering and entertainment services.
- 5.16. 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

- 5.17. 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.⁷
- 5.18. 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 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'.

⁶ AHA submission in support of application A91257 received 25 October 2010

⁷ *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.

- 5.19. 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.
- 5.20. The ACCC notes that the AHA currently represents its members in discussions with APRA (negotiation of licence schemes offered by APRA to classes of licensees). The AHA Divisions also represent their members in discussions with other proposed counterparties, for example Austar. 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.
- 5.21. 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.
- 5.22. 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

- 5.23. 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.⁸
- 5.24. 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 and
 - increased competition in the retail market.

⁸ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

- 5.25. 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.
- 5.26. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Greater input into contracts

- 5.27. 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.
- 5.28. 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.
- 5.29. Tabcorp considers that pubs and clubs are important participants in the supply of its wagering services. Tabcorp notes that it takes into account the position of individual clubs and pubs, as well as the AHA, in developing contracts. Tabcorp does not consider that its contracts are offered on a 'take it or leave it' basis.
- 5.30. 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.
- 5.31. 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

- 5.32. 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.
- 5.33. 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.

- 5.34. 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.
- 5.35. APRA submits that its ability to consult and negotiate with industry bodies such as the AHA Divisions results in transactional efficiencies.
- 5.36. 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

- 5.37. 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.
- 5.38. 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.
- 5.39. 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.
- 5.40. The ACCC also considers 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. The ACCC considers that enhancements in services standards and facilities are of benefit to the public.

ACCC conclusion on public benefits

- 5.41. The ACCC accepts that the collective bargaining arrangements are likely to result in the following public benefits:
- improved input into contractual terms
 - transaction cost savings
 - enhancements in the supply of goods and services by hotels.

Public detriment

5.42. 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.⁹

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

5.44. 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

5.45. 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.

5.46. In the 2006 authorisation (A90987), the AHA Divisions were 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.

5.47. In the revised application the AHA Divisions seek to bargain on behalf of their current and future members with a number of providers of wagering services, subscription broadcasting services, licensing of the public performance and communication rights in musical works, licensing of the broadcast, communication or performance of protected sound recordings or music video clips, accommodation booking services and suppliers of electronic gaming machines.

5.48. 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.

5.49. The ACCC recognises that under the revised arrangements the AHA Divisions' members will compete with other businesses for the acquisition of the relevant goods or services. The ACCC also recognises that, in some of the affected areas of competition, participation on the supply-side is restricted – for example totaliser

⁹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

wagering services. The aggregation of the buying power of the AHA members in these areas of competition relative to that of the supplier is unlikely to result in significant anti-competitive detriment.

- 5.50. The ACCC also 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.
- 5.51. 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

- 5.52. 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.
- 5.53. The AHA submits that its members are generally offered standard form contracts.
- 5.54. The ACCC accepts that the level of negotiation between individual AHA members and the proposed counterparties in the absence of authorisation is likely to be low.

Voluntary participation in the collective bargaining arrangements

- 5.55. 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.
- 5.56. Collective bargaining is voluntary where members of the collective bargaining group are free to choose not to participate in the collective negotiations if they prefer to negotiate individually. This provides an element of ongoing competition and as such lessens the anti-competitive impact of the arrangements. Where participation is voluntary, those businesses who consider that they will be able to negotiate a more commercially attractive arrangement individually are free to do so. Consequently, incentives for businesses to compete on price, to innovate, or to improve their quality of service are not reduced to the extent that they otherwise might be.
- 5.57. In its submission Austar has noted that the arrangements should not apply to the in-room subscription services offered by Austar and other parties not nominated by these arrangements (eg FOXTEL Management Pty Ltd). The ACCC notes that the authorisation of collective bargaining arrangements does not compel any party to participate in the collective bargaining process. Nor does it impact on any other arrangements between the parties unless the parties so choose.

- 5.58. The ACCC notes that participation in the current collective bargaining arrangements is voluntary for both the AHA's members and the proposed counterparties. Individual AHA members remain free to negotiate directly with a counterparty, if that is their, or the counterparty's wish and collectively negotiated contracts will only be entered into where both the individual AHA member and the relevant counterparty consider it to be in their best commercial interest to do so.

Size/composition of bargaining group

- 5.59. 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.
- 5.60. The AHA Divisions submit that collective negotiations will be conducted by committees elected by the members of each state/territory Division of the AHA.
- 5.61. On the basis of the information provided by the AHA Divisions the ACCC understands that the negotiating committees may 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.
- 5.62. FSV has submitted that the bargaining groups proposed by the AHA are too broad and have the potential to expand to cover the entire hotel or hospitality industry in a relevant state or territory. FSV submits that the AHA's members have sufficient countervailing power absent the proposed arrangements.
- 5.63. The ACCC notes that the size and 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. According to the AHA, membership ranges from 44% to 85% of hotels in each state or territory (see paragraph 1.11). On balance the ACCC considers that the aggregation of the buying power of the AHA members in many of the affected areas of competition, relative to that of the supplier, is unlikely to result in significant anti-competitive detriment.

Boycott activity

- 5.64. 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.
- 5.65. 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

- 5.66. 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.
- 5.67. 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.
- 5.68. 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.
- 5.69. 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

- 5.70. FSV submits 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.

ACCC conclusion on public detriments

- 5.71. 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.
- 5.72. The ACCC considers that the proposed collective bargaining arrangements are likely to result in minimal public detriment, in particular
- the aggregation of the buying power of the AHA members in many of the affected areas of competition, relative to that of the supplier, is unlikely to result in significant anti-competitive detriment.
 - the current level of negotiations between individual AHA members and many of the large suppliers is low

- participation in the collective bargaining arrangement for both AHA members and the proposed counterparties is voluntary and
- there is no boycott activity.

Balance of public benefit and detriment

5.73. 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.

5.74. In the context of applying the net public benefit test in section 90(8)¹⁰ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹¹

5.75. 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 affected by the revised arrangements. In particular the ACCC considers that the proposed collective bargaining arrangements are likely to result in improved input into contractual terms by AHA members, some transaction cost savings and some enhancements in the supply of goods and services by hotels.

5.76. The ACCC considers that the proposed conduct is likely to result in minimal public detriments. The ACCC considers that any detriment which may arise is likely to be mitigated by the voluntary nature of the arrangements and the fact that it does not involve collective boycott conduct. It will also be lessened by the low level of bargaining which would ordinarily take place between members and large suppliers.

5.77. Accordingly, the ACCC proposes to grant authorisation to permit the AHA Divisions in New South Wales, 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 providers of wagering services, subscription broadcasting services, licensing of the public performance and communication rights in musical works, licensing of the broadcast, communication or performance of protected sound recordings or music video clips, accommodation booking services and suppliers of electronic gaming machines:

- Tabcorp Holdings Ltd
- Unitab Ltd
- ACTTAB Limited
- WA TAB
- Centrebet International Limited

¹⁰ 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.

¹¹ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

- 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
- Aristocrat Technologies Australia Pty Ltd
- IGT (Australia) Pty Limited
- Konami Australia Pty Ltd
- Expedia Australia Pty Ltd
- Wotif.com Holdings Limited.

Length of authorisation

- 5.78. The Act allows the ACCC to grant authorisation for a limited period of time.¹² 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.
- 5.79. In this instance, the AHA Divisions have sought authorisation for five years.
- 5.80. The ACCC proposes to grant authorisation until 30 June 2016.

¹² Section 91(1).

6. Determination

The application

- 6.1. On 25 October 2010, the Australian Hotels Associations Divisions in New South Wales, Victoria, Western Australia, South Australia, Tasmania, Queensland, the Australian Capital Territory and the Northern Territory (the AHA Divisions) lodged an application for the revocation of authorisation A90987 and the substitution of authorisation A91257 for the one revoked. Application A91257 was amended by the AHA Divisions on 30 March 2011.
- 6.2. Application A91257 was made under section 91C(1) of the *Trade Practices Act* 1974.¹³
- 6.3. 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 providers of wagering services, subscription broadcasting services, licensing of the public performance and communication rights in musical works, licensing of the broadcast, communication or performance of protected sound recordings or music video clips, accommodation booking services and suppliers of electronic gaming machines.

The net public benefit test

- 6.4. For the reasons outlined in Chapter 5 of this determination the Australian Competition and Consumer Commission (ACCC) considers that in all the circumstances collective bargaining by the AHA Divisions' members with the nominated counterparties 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 **revokes** authorisation A90987 **and grants** authorisation A91275 in substitution.

Conduct for which the ACCC grants authorisation

- 6.5. The ACCC grants 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, subscription broadcasting services, licensing of the public performance and communication rights in musical works, licensing of the broadcast, communication or performance of protected sound recordings or music video clips, accommodation booking services and suppliers of electronic gaming machines in relation to:
- price of product

¹³ The *Trade Practices Act* 1974 was renamed the *Competition and Consumer Act* (2010) from 1 January 2011.

- terms of supply
- settlement discounts
- product development
- joint advertising and marketing
- distribution.

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.

6.6. 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
- Aristocrat Technologies Australia Pty Ltd
- IGT (Australia) Pty Limited
- Konami Australia Pty Ltd
- Expedia Australia Pty Ltd
- Wotif.com Holdings Limited.

6.7. The ACCC grants authorisation until 30 June 2016.

6.8. 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.

6.9. This determination is made on 20 April 2011.

6.10. The attachments to this determination are part of the determination.

Interim authorisation

- 6.11. Authorisation A90987 expired on 31 March 2011. On 3 March 2011 the ACCC granted interim authorisation under section 91 of the Act suspending the operation of A90987 and to granting interim authorisation to the application in substitution (A91257).
- 6.12. 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.

Under interim authorisation the AHA's Divisions are permitted to collectively bargain on their own behalf and on behalf of their members, with the following service providers of wagering and/or broadcasting services:

AHA Division	Service Provider
New South Wales	Tabcorp Holdings Ltd, Sky Channel Pty Ltd
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

- 6.13. 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.

Date authorisation comes into effect

- 6.14. This determination is made on 20 April 2011. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 12 May 2011.

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.

DATE	ACTION
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.
21 March 2011	Submissions received from interested parties commenting upon the ACCC's draft determination.
30 March 2011	Application for authorisation amended by the AHA Divisions.
20 April 2011	Determination issued.

Attachment C — 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.¹⁴

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.¹⁵

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.¹⁶

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 future¹⁷

¹⁴ *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.

¹⁵ *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.

¹⁶ Section 91(3).

¹⁷ Section 88(10)

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁸

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation¹⁹. 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.²⁰ 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.²¹

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.²² The ACCC may also review an authorisation with a view to revoking it in certain circumstances.²³

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.²⁴ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.²⁵

¹⁸ Section 88(6)

¹⁹ Section 90(10A)

²⁰ Subsection 91A(1)

²¹ Subsection 87ZD(1)

²² Subsection 91B(1)

²³ Subsection 91B(3)

²⁴ Subsection 91C(1)

²⁵ Subsection 91C(3)