Clubs Australia – Application for collective bargaining authorisation

Submission

30 September 2013

This submission is made following the decision by the Australian Competition and Consumer Commission (**ACCC**) to approve the application by Clubs Australia (**CA**) for interim authorisation to undertake collective bargaining on behalf of its members in relation to the supply of automated teller machines (**ATMs**).

Executive Summary

A key objective of the Australian Competition and Consumer Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service. Caution should be taken whenever consideration is given to granting approval of any right inconsistent with this objective.

Collective bargaining arrangements may assist in the facilitation of efficiencies and competition in certain limited circumstances such as may occur where arrangements involve only a small proportion of participants and have the effect of 'levelling the playing field'. In already competitive markets, the use of collective bargaining can have a detrimental effect on competition and give rise to abuses of market power and undue influence.

The application by Clubs Australia is made for the benefit of its total 6,500 strong membership who are, by Clubs Australia's own admission, in direct competition with each other.

The application fails to identify any issues of anti-competitive behaviour between these market participants and those aspects which the application does claim to address are either not applicable or irrelevant to the ATM industry or appear otherwise motivated by parochial commercial interests.

CA has failed to discharge its onus to establish the requisite public interest arising from the granting of the application as compared to the counterfactual. It appears that the only difference between the existing and future proposed states is the level of market power CA members would enjoy against suppliers.

In summary, there is no proper basis for the granting of the application by Clubs Australia for collective bargaining as it relates to the ATM industry.

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1. Need for Interim Approval

CA relies on the impending commencement of the National Gambling Reform Act 2012 (Cth) (the **Act**) on 1 February 2014 as the basis for their application for Interim Authorisation in order to allow its member clubs to "*revise and renew*" their current ATM supply contracts to ensure they are compliant with the Act.

We note that the application by CA (6 August 2013) was made prior to the recent Federal election. The Coalition have made a number of statements in the lead up to the election to suggest that the Act is likely to be repealed and the issue returned to the jurisdiction of the States and Territories. CA has acknowledged as much by noting on their website that "***The Coalition's policy will eliminate the levy, return responsibility for land-based gambling regulation to the states and territories where it should be, and direct funding to counselling programs essential to the treatment of problem gamblers".***

Therefore and as a consequence of the recent political changes, the imperative of impending legislation relied on by CA is now largely irrelevant and no longer warrants the making of an Interim Authorisation.

Further, at a practical level, the scale of changes necessary to ensure compliance with the Act has meant that suppliers and customers alike have already begun to undertake such compliance activities. Changes include undertaking regulatory impact assessments and analysis, updating impacted operations, updating communications, developing business requirements for changes to core and surrounding systems; implementing system changes; undertaking changes to customer service tools, implementing helpdesk changes and training, and providing technical and process support systems. The industry's proactive response to these matters further reduces the need for the making of the Interim Authorisation.

Finally, the introduction of the Act itself would not require CA members to either "***revise or renew"*** their ATM supply agreements as alleged. Agreements of ATM suppliers as a rule include obligations to comply with relevant laws and many would also contain identified processes for amendment of the agreement in the event of a change of laws. Even in the absence of such provisions, the parties remain entitled to agree to vary any agreement as they choose without the need for regulatory intervention.

2. Application - General

CA has submitted a wide ranging application for approval to undertake collective bargaining activities on behalf of it members. CA proposes to exercise such powers through the implementation of its own standard form contracts and direct negotiation with various suppliers of goods and services. The operations of the relevant target suppliers are broad and encompass wagering services, electronic gaming, intellectual property license holders broadcast services, energy services, ATM operators and insurance providers (the **Application**). That the challenges identified by CA are uniform across this broad and diverse group of target suppliers appears at least doubtful.

In support of the Application, CA notes *"this application to be akin to that of Australian Hotels Association (AHA) Application A912527 which was granted authorization for 5 years . . . ".* The public benefit allegedly served by the granting the Application includes (i) fairer and more efficient contracts negotiated with service providers; (ii) transactional costs savings and (iii) improvements in the level and cost of services provided by clubs to consumers.

A. Australian Hotels Association Application

Despite the obvious similarity in the content between the applications of the AHA and CA, it is important to distinguish the substantially different circumstances underpinning each application.

The application by the AHA noted that members did not generally compete against each other, that the main ambition of the application was targeted against competitors who by their nature already had collective bargaining advantages (such as the supermarket majors and buying group members). The AHA sought, through the aggregation of their buying power to compete against these dominant players.

The application of CA by comparison acknowledges that whilst member clubs compete with other market participants such as hotels and restaurants, *"Clubs, . . . offer a differentiated product as they are not for profit entities which are member-based and community oriented which reduces the level of competition with other entities."* [p11 Application – emphasis added].

CA also acknowledged that *". . .competition does exist between clubs that are in close proximity to each other. This is evidenced by strong levels of promotion, continuing efforts by clubs to differentiate and improve their services and facilities and by competitive pricing of products".* [p11 Application - emphasis added].

It is evident that the application of AHA and CA do not share the same underlying ambition of 'levelling the playing field' in a market of dominant competitors. Rather, CA suggests that the ability to undertake collective bargaining *"will provide greater opportunity for clubs to have input into contract terms and conditions and to achieve more efficient commercial outcomes"* [p3 Application].

The purposes set out above are consistent with CA's commercial role to "*ensure viable business and regulatory conditions for the licensed clubs industry"* [CA Website]. The Application appears to aim more at securing commercial advantages (over the target suppliers) rather than at addressing any true competitive imbalances.

B. Manifestly Unjust Contracts

CA claims that many of its members are subject to contracts with "*manifestly unfair contractual terms and conditions"* with suppliers. CA claims that in many cases, suppliers will offer clubs standard form contracts with minimal opportunity for negotiation. To resolve this situation, CA proposes that it will undertake *"collective bargaining arrangements predominantly through the use of standard contracts and direct negotiation".* [emphasis added]

Specialised products have special contract terms associated. This is true for the ATM industry as well. Each ATM supplier has further developed unique service offerings, and a variety of unique service offerings, to meet the differing needs of customers. That a negotiation that is based on contract terms that have been developed not by the expert in the area, the ATM supplier, but by a third party, will lead to better outcomes must be doubted by anyone with experience in specialised contract negotiations.

The portrayal of CA members as passive price takers is not consistent with the experience of negotiating with CA members for the supply of ATMs. It is not "*market power considerations rather than different commercial circumstances"* as CA claims that have led to a variety of contractual and commercial arrangements in the ATM industry but specific product and industry conditions.

First, the terms relevant to the supply of an ATM are generally standard and consistent with those for the supply of any commercial equipment and are consequently, by and large uncontroversial. It is therefore important to distinguish between the ability and the need to undertake negotiation.

Secondly, most of the contractual conditions proposed to be subject to collective negotiation, namely settlement discounts, product development, joint advertising and marketing and distribution, are not matters relevant to the supply and operation of ATMs and therefore no public benefit can be gained by the granting of the right of collective bargaining with respect to same.

Finally, the issue of price, which is to be subject to collective negotiation, is in the context of ATMs highly contingent on commercial factors. Unlike standard supply agreements which require the payment of a fee for goods or services, the majority of ATM supply agreements provide for the sharing of revenue derived from the payment of the direct charge fee charged to cardholders for using the ATM. This revenue share is traditionally reverted to the club in the form of a rebate payment.

The level of rebate payable will reflect commercial considerations and may include aspects such as the term of the agreement, the inclusion of any minimum transaction levels, the components of supply to be included (i.e. cash facilities, first and second line maintenance and the like), the costs of installation and removal and any commitments of exclusivity.

The ATM supply market is a highly competitive environment with over 18 active deployers and operators. Industry evidence suggests that over the course of many years, the fees paid by ATM suppliers to customers have consistently and substantially increased. Drivers of this condition include new entrants into the supply market which has resulted in increased competition for customers together with the increasing sophistication of customers (and clubs in particular) in their procurement practices. In view of these factors, no supplier in practice could decline to negotiate on these most relevant and important terms of trade.

The combination of these factors has therefore led to the creation of an efficient and competitive ATM market and it is difficult to see how the granting of a right of collective bargaining to a large proportion of target customers, which is likely to result in more favourable terms being secured for less competitive sites, encouraging similar applications by other customer segments and disrupting the balance of market power with suppliers, could have anything other than a negative impact.

C. Reduced Transaction Costs

CA claims that *"Transactional cost savings will be achieved as member clubs acquire better information and negotiating skills, pool their resources or outsource some of the functions that generate transaction costs".*

Firstly, it has to be said in opposition to this proposition that the sharing of information amongst competitors in any market by its very nature is anti-competitive.

Further, the transactional cost savings are in no way substantiated and are savings only likely to be gained at the expense of supplier returns which would have a detrimental effect on competition within the ATM supplier market by reducing each supplier's ability to invest in product development, staff resources or differentiate the terms of their supply.

Finally, as noted above, such savings are not the effect of a more competitive market but would be enjoyed by any party who was granted a similarly dominant market position as sought by CA.

D. Enhancement in the supply of goods and services by clubs to consumers

CA claims that due to its members status as not for profit organizations *"any benefit resulting from improved trading terms"* will be passed on to consumers in the form of enhanced service standards and facilities.

The concept of "*enhanced service standards and facilities"* appears rather not specific enough to support the notion of public interest. Unfortunately, CA provides no evidence as to the likely quantum to be achieved and it is therefore impossible to ascertain whether any return is likely to be achieved at all. Further, that nature of any investment must clearly be relevant to determining whether it is in the public interest.

Every organisation has different risk tolerances, return objectives, and liquidity needs and not-for-profit organisations are no different. It does not naturally follow that as a not for profit organisation any investment of revenue must be in the public benefit. For example, a club may use such returns to acquire a competitor club. Whilst on the one hand this may be argued to represent a public benefit by securing asset growth in the pursuit of that organisation's goals, it may equally be classified as a public detriment through the resulting reduction in competition and denial of the pursuit of the alternative goals of the acquired organisation. Therefore, in the absence of specifics of the type, nature and level of *"enhanced service standards and facilities"* to be gained, this allegation of public benefit is impossible to assess.

3. Public Interest

The concept of public interest has been described as: *'…a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern'*. [1979 report on the then draft Commonwealth Freedom of Information Bill by the Australian Senate Committee on Constitutional and Legal Affairs]

The definition of public interest relied on by CA being *". . . anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements . . . the achievement for the economic goals of efficiency and progress."* is so broad as to provide no useful insight into those factors which should rightfully be considered in any assessment of what constitutes public interest.

The meaning of the term has been considered by Australian courts in various contexts and the Supreme Court of Victoria has offered the following: *"The interest is therefore the interest of the public as distinct from the interest of an individual or individuals…"[DPP v Smith 1991 1 VR 63 at 75]*

Individual interests may fall into a number of categories including private interests, which concern the objectives of a particular individual or individuals or parochial interests, which concern the interests of a small or narrowly defined group of people. It logically follows that if an interest falls within either of these categories they will not constitute a Public Interest.

As it relates to ATM suppliers, the Application by CA and the purported benefits of greater input into contractual terms, reduced transaction costs and an increased ability to invest in "*enhanced service standards and facilities*" are merely commercial benefits accruing to a narrowly defined group of people (CA members). As such they are best classified as parochial interests and as such cannot constitute a public interest.

4. Public Detriment

CA states that it *". . . does not believe that the proposed collective bargaining arrangements will not result in any public detriment",* however CA provides no discussion or evidence to support this statement.

The granting of approval to undertake collective bargaining would create a potential 6500 strong member buying group, a position not enjoyed by any other customer group in the ATM market. It appears almost certain that this would unfairly distort the existing market in favour of CA members and give rise to conditions which could favour less competitive CA members and without proper governance, prejudice target suppliers.

The ACCC is currently engaged in an investigation of Australia's grocery industry where accusations of supplier bullying and unconscionable conduct have been raised due to the grossly inequitable position of market power between major supermarket retailers and suppliers. Within that market, suppliers are alleged to have seen their terms of trade substantially compromised, local manufacturing at lowest historical levels, high levels of redundancy and unemployment resulting from supplier cost pressures and an overall reduction in local competition.

The granting of approval of the application by CA would in all likelihood have a similarly distorting effect on the ATM supplier market and is likely to result in an attrition of current ATM suppliers, reduced incentive to invest in product improvements, greater incentive to cut costs (including jobs) and an overall reduction in performance and reliability.

5. Counterfactual

The Application does not expressly address the relevant counterfactual – that is the state of affairs if the approval is not granted.

CA alleges the counterfactual is for the continued use of standard contracts and limited participation in negotiations. In any future state, CA itself intends to continue to use standard form contracts and undertake direct negotiation, with the key difference being that CA would be entitled to exercise the collective power of its 6500 members against individual target suppliers.

6. Conclusion

The application by CA should be denied on the basis that it:

- Fails to identify a fundamental threat to competition within the relevant market.
- Fails to distinguish between the different issues affecting CA members and the broad nature of target suppliers against who the Application is sought.
- Seeks to rely on the approval granted in favour of the AHA, without establishing the same underlying competitive threats warranting the granting of such an approval.
- Seeks to create unique buying conditions not enjoyed by other similar target customers in the ATM market, by bringing the combined power of its 6500 member base to bear in its negotiations with suppliers.
- Offers a future state which is not materially different from the counterfactual other than as to the market power enjoyed by CA members.
- Will likely lead to public detriment in the form of the destabilisation of the already efficient and competitive ATM Market.

CA has a valuable role to play to "*ensure viable business and regulatory conditions for the licensed clubs industry"* [CA Website] through facilitating the exchange of information, ensuring its members have access to appropriate legal and/or financial services, or even making representations to major suppliers in relation to issues of concern to members. Such involvement however can be achieved *without* the need for authorisation.