



ATM Industry Reference Group

Pre- Determination Conference

Application for Authorisation, A91381

Submission of the ATM Industry Reference Group

7 February 2014

Introduction

1. The Commission could not be satisfied on the available evidence that the application as it relates to supply of ATM's to Clubs Australia (CA) members should be granted. The ATM Industry Reference Group (AIRG) makes no comment on the application as it relates to other supplier groups.
2. The AIRG relies on its own submissions dated 16 January 2014 together with those of the Confidential Party dated 30 September 2013 and 15 January 2014.
3. The Commission was in error in its Draft Determination in finding:
 - a) CA Members represented only a small proportion of ATM purchasers;
 - b) accepting that the granting of the application would result in any Public Benefit;
 - c) finding that no material public detriment existed and that any detriment which did exist would be limited by:
 - i. The voluntary nature of the arrangements;
 - ii. The absence of boycott activity;
 - iii. The current low level of negotiations between club members and suppliers.
 - d) Determining that such Public benefit existed that it outweighed any corresponding Public detriment.
4. The Commission was drawn into error in part by the indiscriminate nature of the application in seeking uniform orders against a disparate group of suppliers. The failure of the application to identify with sufficient particularity those benefits and detriments relevant to each supplier arrangement has the potential to be misleading in its effect.

Market

5. The Commission determined that where CA members comprise a small proportion of purchasers the Proposed Conduct is likely to result in minimal public detriment **[See Para 92 Draft Determination]**. The Commission also accepted that where CA members comprised a large proportion of purchasers, no detriment would arise where the corresponding suppliers comprised large monopolistic organisations.
6. Australia has over 30 deployers of ATMs that provide 29,500 ATMs in Australia, of which over half are provided by independent or non-bank ATM operators. Of the ATMs provided the independent ATM industry, approximately 25% are located in clubs. Therefore, by any measure CA members are not a small proportion of purchasers. **[See AIRG Submissions dated 16 January 2014 paragraph 20-30]**.
7. Further, the AIRG submits that CA members would best be considered, from an ATM perspective, as part of the Gaming and Wagering market and of this market or market segment, CA members would comprise an even higher proportion of purchasers.
8. Accordingly, contrary to the ACCC's previous finding, CA members comprise more than a small proportion of purchasers within an already competitive industry. Therefore, based on the ACCC's own assessment the granting of the authorisation in such circumstances must result in a public detriment.

Public Benefit

9. The AIRG submits that either no additional Public benefit would accrue from the granting of the application, or in the event such public benefit is accepted, it is not sufficient to outweigh the corresponding public detriment.

10. The application alleges that approval of the application would result in Transactional Cost Savings and enable clubs to have greater input into contracts leading to **efficient commercial outcomes**. It is also submitted by CA that “Clubs are *likely* to pass on the benefits of fairer and more efficient contracts negotiated with Service providers” **[p3 para 4 Application by CA]**
11. In the cover correspondence to the Application dated **6 August 2013**, which appears to deal specifically with the ATM industry, the point is again made by CA that the Public Benefit sought to be achieved is the passing on of resulting transactional savings to club patrons.
12. Submissions by both the ATM Industry Reference Group and the Confidential party both question the validity of such claims of public benefit both as to the likely quantum of such benefit and the form such benefit to members is likely to take. **[See Confidential Party submission 30/9/13 p 5 para 2D, submission 15/1/14 p3-4]**
13. The Commission has also sought further particulars about such alleged benefits and to date no additional evidence has been submitted in support of such claims. In the circumstances, the ATM Industry Reference Group (AIRG) submits that a negative inference must be drawn in respect of such Public Interest claims. **[See Draft Determination para 49] [See Confidential Party submission 15/1/14 p5 para 4B]**
14. In terms of claims of public benefit arising from clubs having greater input into contracts, reference is made to further submissions of the Confidential party who acknowledge the distinction already accepted by the Commission between the positions faced by clubs against large scale monopoly suppliers as opposed to multiple suppliers in a highly competitive industry.**[See Confidential Party submission 15/1/14 p4 para 3B]**. Unless otherwise advised by the Commission, the AIRG will consider this aspect as irrelevant to any determination of the application in regards to the supply of ATMs.
15. The AIRG accepts that Transactional cost savings have traditionally been accepted by the Commission as a relevant public benefit. Standard contracts, however are already used by ATM suppliers and the current application has not identified how the development of a further ‘standard’ contract would add further public benefit, particularly where use of such standard contract is voluntary.
16. The AIRG submits that the terms of ATM contracts are largely uncontroversial and that there exist sufficient competition amongst the 30 providers within the ATM industry to stimulate competitive negotiations. The application has never identified those aspects of any ATM agreements which are “manifestly unfair”. Further, it has never been identified why such “manifestly unfair” terms were accepted by CA members and what, if any mitigating actions were sought to be taken.
17. As noted by Lockhart J in Re. Media Counsel of Australia (No.2)[1987] ATPR 40-774 at 48,419 “The Tribunal [Commission] must consider all the circumstances that relate to the public benefit including how the proposed arrangement is likely to operate in practice so as to give rise to Public benefit”.
18. Similar concerns are raised in the submissions of Tabcorp where the view is expressed in respect of the alleged protections of voluntary participation and that the conduct not involve collective boycott activity that “These are . . . critical aspects of the Application, and THL would have significant concerns if these features were not fully reflected in Club’s Australia’s conduct.” **[20 September 2013, p2]**. The AIRG submits that such alleged protections are illusory and directs the Commission’s attention to the submissions of the Confidential Party on this issue. **[See Confidential Party submission 15/1/14 p3 para 2B]**
19. In the absence of any detail from CA as how they will exercise such powers in practice, such as what form the process for developing such standard agreements will take, how they intend to invite contributions and ensure fairness to all parties and how they intend to promote voluntary involvement and guard against boycott activity (sanctioned or not), the granting of the application on the basis of such vague and unsubstantiated claims would be unsound.

Public Detriment

20. A number of Public detriments have been identified by both the AIRG and the Confidential party in addition to that arising from the granting of the application in circumstances where CA members represent more than a small proportion of purchasers within an already competitive market.
21. The introduction of a buying group for ATM services within the Gaming and Wagering market (and beyond) where none currently exist is likely to result in more than minimal public detriment, and would in all likelihood result in significant market distortions for suppliers and CA competitors alike in favour of CA members. **[See Confidential Party Submissions dated 15 January 2014 p 2]**
22. Such a situation can be contrasted against a similar application filed by the Australian Hotels Association who successfully demonstrated a requirement for aggregated buying power to compete with direct competitors who already enjoyed such benefits. The ATM Industry reference Group submits that the current application by Clubs Australia (CA) does not identify similar challenges on behalf of its members.
23. The AIRG also considers that creation of a powerful buying group representing thousands of CA members is likely to result in significant pressure being applied to the margins of ATM deployer's which is likely to:
 - a) make the market less attractive to new entrants or existing participants;
 - b) Reduce the ability of ATM deployers to withstand market and economic fluctuations and therefore lead to a number of deployers exiting the market resulting in a lessening of competition. **[See AIRG submission p 3; p5]**
 - c) reduce the incentive and ability of ATM deployers to invest in innovation.

Conclusion

24. The Competition and Consumer Act 2010 sets out prohibitions on certain commercial conduct. Any exception should therefore only be granted in exceptional circumstances. The AIRG submits that no such circumstances exist in the current application.
25. No opposing response has been submitted by the applicant to any of the submissions made by either the ATM Industry Reference Group or the Confidential Party and consequently the Commission is entitled to rely on the arguments advanced and conclusions drawn in those submissions.
26. The Commission could not be satisfied that the application discharges the onus required to establish that any public benefit outweighs the detriment to the public resulting from the lessening of competition, when considered in respect of the ATM Industry.

Findings and Orders Sought

27. The ACCC find that there is no public benefit that would outweigh the detriment to the public by the granting of the authorisation in respect of ATM Suppliers.
28. The ACCC dismiss the application A91381 sought against ATM.