

# Clubs Australia – Application for collective bargaining authorization

**Further Submission** to Initial Submission of 30 September 2013

15 January 2014

This further submission is made in response to the Draft Determination by the Australian Competition and Consumer Commission (“**ACCC**”) to approve the application by Clubs Australia (“**CA**”) to undertake collective bargaining on behalf of its members in relation to the supply of automated teller machines (“**ATMs**”).

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## 1. Summary of Draft Decision

The ACCC has determined that in all the circumstances it is satisfied that the granting of a right of collective bargaining to CA on behalf of its members (the “**Proposed Conduct**”) is likely to result in a Public Benefit that would outweigh any Public Detriment in the form of a lessening of competition.

The Public Benefit identified by the ACCC comprises:

- Transaction Cost savings; and
- Greater input into contracts for Clubs

The ACCC does not accept that approval of the Proposed Conduct will result in anything more than minimal Public Detriment on the basis that Club Australia’s members only represent (in so far as is applicable to the supply of ATMs), a ***small proportion of purchasers*** and that any detriment will be further limited by:

- The voluntary nature of the arrangements;
- The absence of boycott activity;
- The current low level of negotiations between many Club members and suppliers.

With respect to the supply of ATMs to Clubs, it is submitted that the reasoning underpinning the ACCC’s decision is not supported by the objective evidence and that in all the circumstances, the ACCC could not be satisfied that the Public Benefit would outweigh the Public Detriment.

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## 2. Public Detriment

### (A). ATM Market

The ACCC, in relation to the supply of insurances, collective licenses for public performance and broadcast, ATMs and energy services has stated at paragraph 92 that:

*“the Proposed Conduct is likely to result in minimal public detriment because Club’s Australia members comprise a relatively small proportion of purchasers [for these markets] “*

Whilst it is accepted that it may be numerically correct to state that the total number of ATMs deployed to CA members represents a small proportion of the total number of ATMs deployed across Australia, reliance on such evidence alone belies the importance of the market segment to which CA members actually belong.

Substantial differences exist between the profitability of different market segments within the overall ATM Market. ATMs deployed within clubs traditionally produce higher volumes of withdrawal transactions, thereby increasing the profitability of those sites compared to say, a convenience store where transaction volumes are lower as a result of transaction volumes being driven by more ad hoc customer requirements.

From an ATM deployment perspective, CA members would best be considered to belong to the Gaming and Wagering Market or at least the Gaming and Wagering segment of the ATM market which also includes hotels, casinos and racecourses. Of this market (or market segment), CA members comprise a substantial proportion of purchasers.

It is noted that none of the other Gaming and Wagering market participants enjoy the benefit of the Proposed Conduct in relation to the acquisition of ATM services and as such the granting of approval of the Proposed Conduct would have a distorting effect on competition within the Gaming and Wagering Market.

It is further submitted that the granting of approval will also be likely to have the effect of lessening competition between ATM Suppliers. As previously submitted (30 September 2013), the ATM supply market is a highly competitive environment with over eighteen (18) active deployers and operators.

The granting of a right of collective bargaining to such a large proportion of target customers is likely to result in more favorable terms being secured for less competitive sites while maintaining the right of already competitive sites to seek even greater concessions from suppliers. Consequently, the Gambling and Wagering segment of the ATM market would be unfairly distorted in favour of CA members and consequently suppliers are likely to see their terms of trade substantially compromised, their ability to invest in development and service improvements reduced, staff reductions increase and increasing cost pressures leading to an overall reduction in local competitors.

The fact that CA members comprise a high proportion of purchasers within a highly competitive supplier market entirely contradicts the situation assumed to exist by the ACCC and must therefore invite the opposing conclusion to be drawn that the Proposed Conduct would be likely to result in a Public Detriment by lessening competition.

#### **(B). Additional Protections**

The additional protections relied on by the ACCC in the form of the voluntary nature of participation in the Proposed Conduct and the absence of a request for approval for boycott activity are in our opinion, merely illusory. Clubs Australia is recognised as one of the most powerful lobby groups in Australia, exerting significant influence over its members. It would not be unreasonable to expect that CA, in its role of representing the interests of its members, will make recommendations to its members where it considers advantageous supplier arrangements exist.

Such recommendations would presumably favor those arrangements which align with the 'Public Interest' benefits expressed by CA in its application to flow from the Proposed Conduct. Therefore, unless a CA member already enjoys independent negotiating power, they would be likely to rely on the collective bargaining power wielded by CA.

CA has expressed, and the ACCC appears to have accepted, that the majority of CA members do not enjoy independent negotiation powers. Accordingly, it could reasonably be assumed that a large proportion of CA members will therefore avail themselves of the Proposed Conduct. Consequently, in order to remain competitive, suppliers would also be forced to participate in such collective negotiations to secure CA endorsement or otherwise risk appearing to offer its services on sub-optimal terms.

It is not suggested that CA in taking such actions would in any way be acting contrary to either the law or its role to best represent the interests of its members. Rather, the issue is raised to highlight that in such circumstances, the concept of voluntary participation by CA members or suppliers may be more theoretical than practical and accordingly the ACCC's assertion at paragraph 85 that bargaining groups are only likely to arise where "*it is in the best interests of all parties to a negotiation*" is keenly disputed.

### **3. Public Benefits**

It is submitted that the Public Benefits relied on by the ACCC in support of its determination cannot be established on the available evidence and/or otherwise do not outweigh the Public Detriment in any event.

#### **(A). Transaction Costs**

As previously highlighted, the exchange of one standard agreement for already existing standard agreements is unlikely to translate into additional Transaction Costs savings. In addition, both the voluntary nature of such arrangements and the right of suppliers to seek

variation of such a 'standard agreements' would also count against CA members realising any actual Transactional Cost savings.

We reiterate our previous submissions that the terms of supply for ATMs are generally standard and consistent with those for the supply of any generally available commercial equipment and are consequently, by and large, uncontroversial.

It was also noted that those contractual conditions proposed to be the 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 equally would not generate any Public Benefit through the granting of a right of collective bargaining.

Finally, as to the issue of price, as a rule ATM supply agreements do not involve a payment from CA members for services but rather usually provide for the sharing of revenue derived from the payment of the direct charge fee charged to cardholders via rebate payments from suppliers. The level of the rebate payable will reflect commercial considerations 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. As these aspects are already the subject of significant negotiation between CA members and suppliers, no further Public Benefit over and above the current state would be gained by the granting of the Proposed Conduct.

## **(B). Input into Contracts**

At paragraph 42, the ACCC commented:

*"Clubs Australia submits that "manifestly unfair contractual terms and conditions" often arise when individual clubs negotiate with large scale or monopoly suppliers, and that there is little power for individual clubs of any size to negotiate customised supply agreements with suppliers."*

At paragraph 24, the ACCC notes that subscription broadcast services, wagering services and electronic gaming machines *"are supplied largely by monopoly suppliers or large global companies"*.

On the basis of these findings, it must be concluded that no additional public benefit in the form of **Input into Contracts** would be enjoyed by granting the Proposed Conduct as it relates to the supply of ATMs, as such services are not provided by monopoly suppliers or large global companies.

Further, the alleged public benefit in the form of "cost saving and efficiencies" identified by the ACCC to be derived from CA member's increased input into contracts, are in our submission already captured within the identified benefit of Transactional Costs and therefore do not constitute any additional public benefit.

Accordingly, to the extent that any additional cost savings can be achieved through additional input into contracts, such savings are only likely to be achieved at the expense of the profitability of suppliers. It is submitted that such a result would be anti-competitive where such benefit was derived solely from the formal authorisation of what would otherwise be prohibited conduct and therefore constitutes a public detriment.

## 4. Additional Considerations

### **(A). Insufficient comparison with similar applications**

It is submitted that insufficient weight has been given to the previous comparison (contained within the previous submissions dated 30 September 2013) between the application of Clubs Australia and that filed on behalf of the Australian Hotels Association (AHA) Application A912527.

In view of the obvious similarities in the content and orders sought between the applications of the AHA and CA, it is important to distinguish the substantially different circumstances underpinning each application.

The main ambition of the application of the AHA was targeted against competitors who 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 its member clubs compete with other market participants and each other, however none of these other market participants have authorised or naturally occurring collective bargaining advantages. It is clearly evident therefore that the application of AHA and CA do not share the same underlying ambition of 'leveling the playing field' in a market of dominant competitors and the application by CA, therefore in reality seeks to secure commercial advantage over the target suppliers rather than addressing any true competitive imbalances.

### **(B). Enhancement in the supply of goods and services by clubs to consumers.**

It is noted at paragraph 49 that the ACCC has requested further information regarding how any alleged cost savings may or may not be passed through to consumers, for example in the form of reduced fees for the use of ATMs within clubs. We are unable to comment on these issues absent the provision of further comments from CA. Nonetheless, we do make the following observations:

First, should no further submission be provided by CA on this issue, the ACCC must draw the inference that such benefits are not likely to be realised. Second, due to the varying nature of clubs, it is unlikely that such benefits, to the extent they actually exist (which is not conceded), would be uniform across all clubs and therefore it would be impossible to

monitor or assess whether such benefits had in fact been realised. Finally, due to the rebate nature of ATM supply agreements, clubs are already able to negotiate lower access fees for members without the approval of the Proposed Conduct, although it is conceded that such benefits are likely to be the expense of club ATM revenues rather than those of their suppliers.

## 5. Conclusion

In conclusion therefore, it is submitted that, in so far as relates to the supply of ATMs, there is little to no public benefit to be gained by granting approval for the Proposed Conduct and that to the extent that such benefit does exist, it exists solely in the form of Transactional Cost saving.

As standard agreements are already used by suppliers of ATMs and CA members have significant input into the commercial aspects of such agreements by virtue of the competitive nature of the ATM supplier market (and particularly the Gaming and Wagering segment), any additional public benefit to be derived in the form of Transactional Cost savings and efficiencies over and above the current state would be nominal at best.

By comparison, substantial risk of public detriment in the form of a lessening of competition and market distortion exist if the Proposed Conduct is granted. Such approval would place CA members in an unfairly advantageous position to other participants of the Gaming and Wagering Market who do not currently enjoy such aggregated buying power and would therefore be unable to compete as efficiently. Any benefit enjoyed by CA members would therefore presumably correspond to a disadvantage of equal proportions accruing to the other market participants.

In addition, the effect of creating a large aggregated buying group who comprise a high proportion of purchases within a specific market segment against a background of a highly competitive supplier market, would be likely to result in suppliers seeing their terms of trade substantially compromised, their ability to invest in development and service improvements reduced, staff reductions increase and cost pressures rising, leading to an overall reduction in local competitors and therefore constitutes further public detriment.

Finally, the additional protections relied on by the ACCC and the potential for cost saving to ultimately be passed on to actual club members are in our submission theoretical at best and would in reality offer no protection at all. The application by CA in comparison to similar applications by other members of the Gaming and Wagering segment do not seek to address existing competitive imbalances amongst competitors but rather seeks to secure commercial advantage over the target suppliers.

In all the circumstances, it is submitted that the application should be rejected.