

Form G

Commonwealth of Australia
Competition and Consumer Act 2010 — subsection 93 (1)
NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of person giving notice:
(Refer to direction 2)

N98868 Bayswater Car Rental Pty Ltd trading as Bayswater Car Rental (ABN 70 008 711 608) (the **Applicant**).

- (b) Short description of business carried on by that person:
(Refer to direction 3)

The Applicant provides vehicle rental services in New South Wales and Western Australia.

- (c) Address in Australia for service of documents on that person:

Ross Zaurrini
Ashurst Australia
Level 5, 5 Martin Place
Sydney NSW 2000

2. Notified arrangement

- (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

This notification relates to:

- Vehicle rental services supplied by the Applicant; and
- Electronic toll payment services supplied by Roads and Maritime Services (**RMS**) to the Applicant's customers.

- (b) Description of the conduct or proposed conduct:

The Applicant proposes to:

- supply, or offer to supply, rental vehicles to the Applicant's customer;
- supply, or offer to supply, rental vehicles to the Applicant's customer at a particular price; and

- give or allow, or offer to give or allow, a discount, allowance, rebate or credit in relation to the supply of rental vehicles to the Applicant's customer

on the condition that the customer also enters into a contract with RMS for the provision of E-toll services for the rental period (**RMS Contract**).

The Applicant may also refuse to:

- supply, or offer to supply, rental vehicles to the Applicant's customer;
- supply, or offer to supply, rental vehicles to the Applicant's customer at a particular price;
- give or allow, or offer to give or allow, a discount, allowance, rebate or credit in relation to the supply of rental vehicles to the Applicant's customer,

if the Applicant's customer has not acquired, or has not agreed to acquire, an RMS Contract for the rental period (collectively, the **Proposed Conduct**).

RMS will supply the requisite e-tags to the Applicant to enable the RMS Contract to have effect.

Approximately 1400 vehicles in New South Wales will be involved in the Proposed Conduct.

A customer may avoid entering into the RMS Contract by not acquiring the Applicant's services. If the customer does acquire the Applicant's services, the customer can avoid paying fees to the RMS by:

- not driving on toll roads; or
- paying cash for toll charges, where permitted.

3. **Persons, or classes of persons, affected or likely to be affected by the notified conduct**

- (a) Class or classes of persons to which the conduct relates:
(Refer to direction 5)

The Applicant's customers.

- (b) Number of those persons:

- (i) At present time:

30,000

- (ii) Estimated within the next year:
(Refer to direction 6)

30,000

- (c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

N/A

4. Public benefit claims

- (a) Arguments in support of notification:
(Refer to direction 7)

Please refer to the submission in support of this notification at Annexure A.

- (b) Facts and evidence relied upon in support of these claims:

Please refer to the submission in support of this notification at Annexure A.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 8)

Please refer to the submission in support of this notification at Annexure A.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:
(Refer to direction 9)

Please refer to the submission in support of this notification at Annexure A.

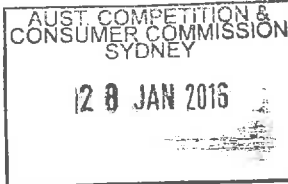
- (b) Facts and evidence relevant to these detriments:

Please refer to the submission in support of this notification at Annexure A.

7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

Ross Zaurrini
Ashurst Australia
Level 5, 5 Martin Place
Sydney NSW 2000
D: +61 2 9258 6840



Dated..... 15/01/16

Signed by/on behalf of the Applicant

.....
(Signature)

Arnold KLUCK
.....
(Full Name)

Bayswater Car Rental Pty Ltd trading as Bayswater Car Rental (ABN 70 008 711 608) (Organisation)

Director
.....
(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Competition and Consumer Act 2010* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.

ANNEXURE A

NOTIFICATION OF EXCLUSIVE DEALING: SUBMISSION TO THE ACCC

This submission is made by Bayswater Car Rental Pty Ltd trading as Bayswater Car Rental (ABN 70 008 711 608) in support of its Notification of Exclusive Dealing dated 28 January 2015.

1. **APPLICANT**

The applicant is Bayswater Car Rental Pty Ltd trading as Bayswater Car Rental (ABN 70 008 711 608) (the **Applicant**).

2. **BACKGROUND**

2.1 **Toll roads in Australia**

Most toll roads in Australia now require cashless payment of tolls. For example, none of Sydney's toll roads accept cash payments.

In lieu of cash payments, all toll road operators accept payment by electronic tag (**e-tag**)¹ or electronic pass (**e-pass**)² which charge a driver's account when they drive through the automated payment lanes.

As all toll road operators in New South Wales, Queensland and Victoria do not permit cash payments, the toll road operators essentially require drivers to have an e-tag, an e-pass or make a payment electronically after using the relevant toll road³ (post-paying the toll incurs additional charges/fees).

The Applicant considers that short term e-passes which are available for purchase by drivers are inconvenient for customers who rent the Applicant's vehicles (**Customers**)⁴ and have the major disadvantage that they may only be used on particular toll roads. For example, certain e-passes may be restricted to use on one toll road (such as the Roam e-pass account) or are restricted to a particular city, such as Sydney (see Roam's Visitor e-pass).

By way of comparison, e-tags have the advantage of being accepted by all toll operators in Australia and are therefore often preferred by toll road users. The e-tag issued by Roads and Maritime Services (**RMS**) is an example of this; it is universally accepted by all current toll road operators in Australia and is suitable for longer periods of use and for Customers who may not know, ahead of time, which toll roads they will be using.

2.2 **Applicant's current arrangements**

The Applicant currently has electronic tags fitted to the windscreens of its vehicles available for rent in Sydney. Those tags are provided by eWay.

If the Customer travels on a toll road, the toll charges are registered to the account of the Applicant when the e-tag is used and, when the car is returned, the Applicant charges the Customer for the tolls used plus a \$10 e-tag fee. The Applicant's e-tag fee is imposed on

¹ An e-tag is affixed to the vehicle and linked to a specific Customer's account. An e-tag is generally used over a longer period than an e-pass. See below.

² An e-pass is generally a shorter term payment solution than an e-tag. An e-pass is aimed at temporary users and is limited to a specific area eg the area around Sydney.

³ If a person drives through an automated payment lane without an e-tag or an e-pass, the car is photographed and identified. The toll operator will then issue the vehicle's registered owner with a toll notice (which includes additional charges levied by the toll road operator). If those charges remain unpaid, an infringement notice will be issued.

⁴ The Applicant's Customers may include corporate customers as well as individuals.

Customers because of the significant administration involved in the Applicant processing the payment of tolls to toll road operators, whenever a Customer uses a toll road during the rental period.

By supplying e-tag services to Customers, the Applicant has taken on the responsibility of collecting tolls from Customers and processing toll payment to toll road operators. This is a significant administrative undertaking for the Applicant – it is not an e-tag supplier and would prefer to focus on its core business, namely, the renting of vehicles to the public.

The Applicant proposes to cease supplying e-tag services to its Customers and instead to outsource to RMS the provision of e-tag services to its Customers.

2.3 **Proposed conduct**

The Applicant proposes to replace its current e-tags with RMS e-tags in 1,400 of its 2,500 vehicles.

The RMS e-tag will be activated when the Applicant's vehicle passes through a toll collection point on a toll road. The toll road operator will automatically bill RMS for the applicable tolls. Under the contract between RMS and the Customer (see 3.2 below), the Customer will authorise RMS to recover the applicable toll, together with a service fee, from the Customer.

To achieve this, the Applicant proposes to offer to supply rental vehicle services to its Customer on the condition that the Customer also enters into a contract with RMS for the provision of E-toll services for the rental period (**RMS Contract**) (the **Proposed Conduct**). This conduct may be construed as exclusive dealing within the meaning of sections 47(6) and/or 47(7) of the *Competition and Consumer Act 2010* (the **CCA**). Therefore, the Applicant is notifying the Australian Competition and Consumer Commission (**ACCC**) of the Proposed Conduct under section 93 of the CCA.

3. **THE PROPOSED CONDUCT**

3.1 **Persons or classes of persons affected or likely to be affected by the notified arrangement**

The Proposed Conduct relates to Customers who acquire vehicle rental services from the Applicant.

The Applicant engages in approximately 70,000 rental transactions per annum. The number of rentals may include multiple rentals by the same individuals and therefore the number of persons affected by the proposed conduct will be less than the total number of rentals per annum.

3.2 **Giving effect to the Proposed Conduct**

The Applicant and RMS propose to enter into an agreement, pursuant to which:

- (a) Customers will be required to enter into the RMS Contract for the provision of RMS E-toll services at the time of entering into their rental agreement with the Applicant. It is proposed that, in practice:
 - (i) A Customer who wishes to rent a vehicle from the Applicant will be required to enter into a rental contract, which will set out the terms and conditions of rental.
 - (ii) The Customer will be required to enter into the RMS Contract, which will set out the terms and conditions under which RMS provides E-toll services to that customer.

- (iii) The Applicant will act as an agent for RMS in respect of the formation of the RMS Contract between RMS and the Customer.
- (iv) The Applicant will refuse to supply a rental vehicle to Customers who do not agree to enter into the RMS Contract.
- (b) RMS will supply the Applicant with e-tags for installation in the Applicant's rental vehicles.
- (c) The Applicant will provide RMS with the Customer's credit card or Visa or MasterCard debit card details.
- (d) RMS will pay the toll road operator for any toll fees incurred by the Customer.
- (e) Under the RMS Contract, the Customer will be required to pay RMS for the tolls incurred. In addition, the Customer must pay a service fee of \$3.30 (inclusive of GST) to RMS for each calendar day that a toll is incurred during the rental period (**Service Fee**). Of this, \$1.10 will be paid by RMS to the Applicant. Relevantly:
 - (i) the Service Fee will not be incurred on days when the Customer does not incur a toll. If the Customer does not use a toll road during the rental period, no Service Fee is charged.
 - (ii) the Service Fee will be explained in the RMS Contract.
- (f) RMS will charge the Customer for any toll charges and Service Fees which are incurred by the Customer during the rental period upon receipt of relevant billing information from the Applicant.

The RMS Contract will clearly outline that the Customer is responsible for the Service Fee and any toll charges (if incurred) and that upon providing their credit card or Visa or MasterCard debit card to the Applicant that the Customer accepts that this information will be passed onto RMS. The RMS Contract will authorise RMS to deduct the relevant charges from the Customer's account.

Additional charges may be imposed on Customers by RMS in limited circumstances. These include:

- (a) a processing fee, if a customer requests that RMS provide a summary of the transactions on the Customer's E-Toll facility;
- (b) a dishonour fee, if the Customer's method of payment is dishonoured; and
- (c) other costs incurred by RMS in enforcing its rights (such as charges imposed on RMS by third parties where the Customer has refused or failed to pay an amount owing under the RMS Contract).

The fees that the Customer may incur will be disclosed to the Customer in the RMS Contract. The Applicant may also elect to display a counter brochure outlining RMS' E-tolling solution (including the relevant fees) at the point of sale.

For the avoidance of any doubt, Customers will not be able to use their own e-tag or e-pass in any of the Applicant's rental vehicles which contain the RMS e-tag.

If a Customer does acquire the Applicant's rental services, that Customer can avoid paying the Service Fee and toll charges by:

- (a) not driving on toll roads; or

- (b) paying cash for the toll charge, where permitted.

Alternatively, a Customer may elect to not rent a vehicle from the Applicant and, instead, acquire services from another rental vehicle company.

3.3 **Service Fees**

The Service Fee imposed by RMS is intended to recover the cost of providing the E-toll services and to account for the supply and installation of the RMS e-tag in the Applicant's vehicles and RMS's maintenance of the E-toll facility. The Applicant considers that this fee is reasonable.

The Service Fee will be divided between RMS and the Applicant (\$2.20 retained by RMS; \$1.10 passed on to the Applicant). Part of the Service Fee will be retained by RMS for:

- (a) supplying the e-tags;
- (b) provision of the service to Customers (including maintaining the website for any inquiries);
- (c) invoicing the Customer;
- (d) processing transactions; and
- (e) maintaining the hardware and software which underpin the system.

Part of the fee will be remitted to the Applicant to cover the cost of:

- (a) installing the e-tag;
- (b) removing the e-tag when the vehicle is sold;
- (c) printing and distributing the amended rental agreement and associated documentation;
- (d) any damage or theft (risk in an e-tag passes to the Applicant when it is installed in the Applicant's vehicle); and
- (e) management of the secure database and transfer of billing data.

4. **MARKET DEFINITION**

The relevant markets potentially affected by the Proposed Conduct are the:

- (a) markets for the supply of vehicle rental services in New South Wales (although the Applicant has operations in WA, it does not intend to fit its WA fleet with RMS tags); and
- (b) national market for the supply of electronic tolling services to motorists.

5. **PUBLIC BENEFITS AND DETRIMENTS**

The Applicant submits that the Proposed Conduct will lead to material public benefits and will be unlikely to lead to any public detriment. In the event that any public detriment may flow from the Proposed Conduct, the Applicant submits that this would be outweighed by the benefit to the public.

5.1 Benefits to the public

The Applicant submits that the Proposed Conduct will lead to the following material public benefits.

Customers

Customers will benefit directly from the Proposed Conduct, relative to the Applicant's existing e-tag arrangements, in the following ways:

(a) **It will be cheaper for the 'average' customer and for 80% of customers.**

The Applicant's 'average' Customer and 80% of the Applicant's Customers will benefit financially from the Proposed Conduct because RMS will charge them less to use its E-tag service than the Applicant currently charges under its existing e-tag arrangements.

The average rental period for each Customer of the Applicant is 5 days and, on average, each Customer uses toll roads on 30% of rental days. This means that the Applicant's 'average' Customer who currently pays a \$10 e-tag fee, plus tolls, will pay \$6.60⁵ plus tolls under the Proposed Conduct. In these circumstances, the Applicant's 'average' Customer will make a saving of \$3.40.

It is also the case that:

- (i) 50% of the Applicant's Customers rent the Applicant's vehicle for 3 days or less. On the basis that each such Customer, on average, will use toll roads on 30% of rental days, this means that 50% of the Applicant's Customers will pay no more than \$3.30⁶ plus tolls under the Proposed Conduct, rather than \$10, plus tolls. That is, 50% of the Applicant's Customers will make a saving of \$6.70 or more per rental transaction, with the Proposed Conduct.
- (ii) 80% of the Applicant's Customers rent the Applicant's vehicle for 9 days or less. On the basis that each such Customer, on average, will use toll roads on 30% of rental days, this means that 80% of the Applicant's Customers will pay no more than \$9.90⁷ plus tolls under the Proposed Conduct, rather than \$10, plus tolls. That is, 80% of the Applicant's Customers will make some saving per rental transaction, with the Proposed Conduct.

(b) **It will be easier and more transparent for customers.**

The Proposed Conduct will be easier to understand and more transparent for the Applicant's Customers than the existing e-tag arrangements the Applicant has in place. Customers will be able to log-in to the RMS portal to view tolls because the RMS solution operates on a pay-as-you-go basis directly between the Customer and RMS.

Under the current e-tag arrangement Customers do not have this ability and this can create "bill shock" at the end of the rental period. This concern will be entirely avoided by the Proposed Conduct.

⁵ Comprised of a \$3.30 Service Fee on each of the two days of the average rental period (5 days) when a toll road is used (rounding 1.5 days up to 2 days).

⁶ Comprised of a \$3.30 Service Fee on the one day of the 3 day rental period when a toll road is used (rounding 0.9 days up to 1 day).

⁷ Comprised of a \$3.30 Service Fee on each of the three days of the 9 day rental period when a toll road is used (rounding 2.7 days up to 3 days).

(c) **It will be quicker for customers.**

Returning the car will be quicker and more efficient with the Proposed Conduct. The Applicant expects the return time at its offices to be halved. This is because, on return of the vehicle, the Applicant's staff must currently login to eWay's website, enter the car registration number and enter the pick-up and check-in dates. This process of 'checking-in' in relation to tolls would be eliminated by the Proposed Conduct.

(d) **It will be fairer for customers.**

The Proposed Conduct is fairer for Customers in the sense that it operates on the user-pays principle. That is, a daily Service Fee is incurred each time a Customer uses a toll road, as an appropriate administration fee charged by RMS for processing tolls and e-tag management.

For example, under the Proposed Conduct, if a Customer uses a toll road once during a rental period, they will pay a single daily Service Fee, that is, \$3.30. Alternatively, if they use a toll road on four separate days during a rental period, they will pay four daily Service Fees, namely, \$13.20.

Under the Applicant's existing e-tag arrangements, on the other hand, Customers are charged a flat fee of \$10 fee for using a toll road during the rental period, regardless of how many times they use a toll road. For example, if a Customer uses a toll road once during a rental period, they will pay a \$10 for the e-tag service provided by the Applicant. A Customer who uses a toll road four times during a rental period will also pay \$10. The existing arrangements are less fair than the Proposed Conduct as those Customers with lower toll road usage subsidise those with higher toll-road usage.

The Applicant moving to per-use e-tag fees is not a viable option. This would increase the administrative burden on it in respect of tolling management and would likely lead to an overall increase in cost which it would need to pass on to Customers in the form of increased fees.

(e) **It will improve customer choice.**

The Applicant's current e-tag arrangements are more expensive, more cumbersome, slower and less efficient than a number of other rental vehicle companies with which it competes as those other companies (including Avis/Budget, Thrifty and Europcar) have made arrangements with RMS equivalent to the Proposed Conduct.

The Applicant considers that providing a cheaper and better e-tag service to its Customers is important to ensuring it remains a viable alternative as a provider of rental vehicle services in New South Wales.

The Applicant

The Applicant's current e-tag arrangements are more expensive, more cumbersome, slower and less efficient for the Applicant and the Customer, relative to outsourcing the administration of e-tags and toll payment to RMS. By supplying e-tag services to Customers, the Applicant has taken on the responsibility of collecting tolls from Customers and processing toll payment to toll road operators. This is a significant administrative undertaking for the Applicant and in the Applicant's view, the current arrangement unnecessarily involves the Applicant in electronic tag management and the tolling process. The Applicant is not an e-tag supplier and would prefer to focus on its core business, namely, the renting of vehicles to the public.

Outsourcing electronic tag management and the tolling process to RMS will generate cost savings for the Applicant, in particular, in the form of reduced labour costs. This results directly from the Applicant not having to devote any significant labour hours to e-tag administration or recovery of tolls from Customers, as that will now be in the hands of RMS.

The Applicant anticipates that the savings it generates from reduced labour costs will be passed on to Customers in the form of reduced vehicle rental rates and/or additional investment in improved services, including better Customer service and improving vehicle choice and quality.

The Applicant also anticipates that introducing the Proposed Conduct will improve relationships with its Customers as a result of that conduct generating the benefits outlined above.

5.2 **Public detriments**

The Applicant submits that the Proposed Conduct will not result in any public detriment.

In particular, the Applicant submits that the Proposed Conduct will not lead to any public detriment in the relevant markets, namely:

- (a) the markets for the supply of rental vehicle services in New South Wales:
 - (i) If Customers do not wish to contract with RMS, they may use other suppliers of vehicle rental services. These alternatives include Dave's Car Rental, All Age Car Rentals, Apollo Car Rental, Britz or any other small rental vehicle suppliers.
 - (ii) The Customer can avoid paying the Service Fee and toll charges to RMS by:
 - (A) not driving on toll roads; or
 - (B) paying cash for the toll charge, where permitted.
- (b) the national market for the supply of electronic tolling services to motorists:
 - (i) The market for the supply of electronic tolling services to motorists is competitive with national competitors to RMS including Transurban, Interlink, ConnectEast, Go-Via, eWay, Flow Tolling and Rivercity Motorway.
 - (ii) The Proposed Conduct will not foreclose RMS's competitors from offering their services. The above companies are able to contract with other rental vehicle companies to provide a tolling solution. With a fleet of only 1400 vehicles impacted by the Proposed Conduct, the Applicant is not a major supplier of vehicle rental services in New South Wales. The Applicant estimates that its share of vehicle rental services in New South Wales is approximately 5%.
 - (iii) Electronic tolling services are not only acquired by rental vehicle companies; they are also acquired by companies supplying taxi services, trucking and logistics services, bus services as well as corporate or Government entities which use "company cars", and private individuals. Competitors of RMS are also still able to provide electronic tolling services to Customers in those industries.

6. **SUMMARY**

The Applicant submits that the ACCC should conclude that the likely public benefits flowing from the Proposed Conduct will outweigh any public detriment. The Applicant submits that the Notification should be permitted to stand.