

02 FEB 2017

CANBERRA

Spier Consulting - Legal

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spierconsulting@netspeed.com.au

**Mr David Jones
General Manager
Adjudication Branch
ACCC
PO Box 3131
Canberra City ACT 2601**

31 January 2017

(By hand)

Dear Mr Jones,

BOYCOTT AUTHORISATION APPLICATION

I attach an application for authorisation on behalf of the Australian Hotels Association (AHA) in relation to possible collective boycott by AHA members of DC Payments Australia P/L.

You have previously waived part of the application fee and your letter is attached.

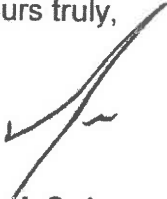
I attach a cheque for \$2500.00.

Attached to the application is the AHA membership list, I ask that that it not be placed on the ACCC Public Register.

In relation to this application I also draw your attention to the submission made on behalf of the AHA by Gadens in response to the ACCC review of the DC Payments /Cashcard acquisition.

Should you wish more please do not hesitate to contact me.

Yours truly,

A handwritten signature in black ink, appearing to read 'Hank Spier', with a long, sweeping horizontal stroke extending to the right.

Hank Spier
Principal

Spier Consulting – Legal

4 Waller Cres, Campbell, ACT, Australia, 02 62812030- 0419 239 755
spierconsulting@netspeed.com.au

Theo,

The following is in response to your email of yesterday , 6 February 2017.

Applicants

As you assume the Applicants are AHA, National Officer on behalf of itself plus each of the AHA State and Territory Branches and AHA members.

Request for exclusion from Public Register.

The Applicants request for exclusion from Public Register.

Apart from Privacy Act issues the concern is that the making public of AHA membership lists exposes members to harassment, blackmail and industrial pressures. The AHA is an employer association and as such gets into industrial disputes. There are sometimes issues with members and customers over losses on poker machines and some degree of anonymity is important.

In relation to the Privacy Act, the membership lists in full would contain the personal information impacting on individuals – personal information as defined under the Privacy Act 1988. The disclosure of such information, without the express consent of individuals, may cause us to be in contravention of the National Privacy Principles in this regard.

Another reason to avoid broad publicity for membership lists is that many suppliers and charities, political parties, media would like to get the lists to canvass, lobby members. That is another reason why such lists are guarded.

In my experience the ACCC has in the past acceded to requests for exclusion from the Public Register to AHA members, newsagents and members of buying groups. In fact, such groups often take the authorisation route rather than notification for that reason.

It appears to the applicants that making membership public does not aid the ACCC in reviewing the application nor does it aid the target. It potentially puts AHA members at risk and even disadvantage.

In this case as a possible boycott is involved there may be some hostility and unnecessary public exposure is a problem.

Interim Authorisation

DC Payments has recently acquired Cashcard without reference to the ACCC. This acquisition took Cashcard merchants by surprise. They had no notice to consider any future position. Had they known more might have given notice to terminate agreements. The ACCC is currently reviewing that acquisition.

As can be expected DC Payments is now seeking to move Cashcard merchants to the DC Payments contracts. The example attached to the Submission is an indication of that. Cashcard merchants are concerned by all this as they are being pressured to enter into contracts that may have UCT issues and also what if the ACCC raises concerns about the acquisition.

Frankly DC Payments should hold off on taking over the Cashcard merchants pending the ACCC decision. The AHA would ideally wish to advise Cashcard merchants not to enter into new DC Payments contracts and continue with the Cashcard contracts and should they expire the hotelier can choose to join DC Payments or not.

As it is DC Payments is saying to Cashcard merchants that as they failed to give written notice the contracts, now DC contracts, are rolled over with no other option.

Public benefit- examples of conduct.

In terms of the example of the DC/Cashcard issue and contract, the Frisco Hotel case should give the necessary information.

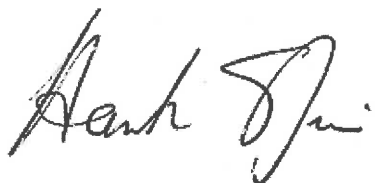
They were issued the DC Payments/ Cashcard novation agreement to sign (with a new 5-year term). The Hotel requested that the new term be amended to simply reflect the remaining balance of the Cashcard agreement (which was a little under 12 months). DC Payments refused to agree to this "status quo" arrangement.

This example, with the email trail, is attached to the Submission that is part of the Application.

Another example is where a contract has run out late 2016 and no formal notice on termination was given and DC Payments are now demanding another 5-year contract and not giving the merchant a chance to seek other providers nor get a shorter term.

See also what is said above on Interim authorisation,

Another issue is that DC Payments appear to treat Cashcard merchants different to say Ezeatm (taken over in 2014) where they let existing contracts run out rather than seek a new contract as they do with Cashcard merchants,

A handwritten signature in black ink, appearing to read "Hank Spier". The signature is fluid and cursive, with the first name "Hank" written in a larger, more prominent script than the last name "Spier".

Hank Spier

Form A

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

EXCLUSIONARY PROVISIONS AND ASSOCIATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of Applicant:
(Refer to direction 2)

A91574

**AUSTRALIAN HOTELS ASSOCIATION (AHA) NATIONAL OFFICE- on
behalf of itself and AHA Branches in all States and Territories and its
members. (THE AHA)**

.....
.....
.....

- (b) Description of business carried on by applicant:
(Refer to direction 3)

Australia -wide trade association for operators of hotels and taverns

.....
.....
.....

- (c) Address in Australia for service of documents on the applicant:

27 Murray Crescent, Griffith ACT 2603

.....
.....
.....

2. Contract, arrangement or understanding

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:

(Refer to direction 4)

The AHA is seeking authorisation for the members of the AHA to be able to, as a group or groups, to boycott from dealing with DC Payments Australia P/L in relation to the supply of ATM services to AHA members. The ACCC has previously granted authorisation for collective bargaining with DC Payments Australia P/L -A91257, dated 20 April 2011. Copy attached.

.....
.....

- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, exclusionary provisions and (if applicable) are, or would or might be, cartel provisions:

(Refer to direction 4)

The AHA and its members seek the application to boycott dealings with DC Payments Australia P/L.

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.....

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

The lease of ATM machines and the operation of such

machines.....
.....
.....
.....

- (d) The term for which authorisation of the provision of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

A period of 5 years

.....
.....

3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

AHA and its members from time to time.

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.....
.....

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:
(Refer to direction 5)

Attached to this Application Form

.....
.....
.....

4. Public benefit claims

- (a) Arguments in support of application for authorisation:
(Refer to direction 6)

.....
.See attached submission
.....
.....

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

.....
See attached submission.....
.....
.....
.....

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) 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 7)

.....
See attached submission
.....
.....
.....

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the contract arrangement or understanding for which authorisation is sought, in particular the likely effect of the contract arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:
(Refer to direction 8)

.....
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See attached submission.

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.....

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

.....
See attached submission.

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.....
.....

7. Contracts, arrangements or understandings in similar terms

- (a) This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding:

- (b) Is this application to be so expressed?

....

NA.....

- (c) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

(Refer to direction 9)

.....
.....
.....

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

(Refer to direction 10)

.....
.....
.....

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

.....
.....
.....
.....

8. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

NA.....

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

.....
.....

- (c) If so, by whom or on whose behalf are those other applications being made?

.....
.....

9. Further information

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

HANK SPIER

Spier Consulting-Legal

4 WALLER CRESCENT CAMPBELL ACT 2612

spierconsulting@netspeed.com.au.....

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.....
.....

Dated.....**31 January 2017**.....

Signed by/on behalf of the applicant



.....
(Signature)

Hank Spier
(Full Name)

Spier Consulting- Legal
(Organisation)

Principal.....
(Position in organisation)

DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

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

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. Where the application is made 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 application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which authorisation is sought.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.
 8. Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed contract, arrangement or understanding. Provide quantification of those detriments where possible.

9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.
10. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, and descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.



Australian
Competition &
Consumer
Commission

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Canberra ACT 2601

GPO Box 3131
Canberra ACT 2601

tel: (02) 6243 1111
fax: (02) 6243 1199

adjudication@accc.gov.au

www.accc.gov.au

Contact officer: Theo Kelly
Contact phone: (02) 6243 1179

9 January 2017

Dear Mr Spier

Fee waiver request

Thank you for your letter of 14 December 2016 and your email of 3 January 2017 to the Australian Competition and Consumer Commission (ACCC) asking that we waive the fee for the AHA's forthcoming application for authorisation.

In particular, you have requested that the fee to be paid in relation to an application for authorisation to be lodged by the Australian Hotels Association (AHA) to engage in a collective boycott of DC Payments be waived in whole.

In support of your request, you submit that:

- The AHA is a not for profit industry association.
- The majority of AHA member hotels are small proprietor owned hotels/taverns.
- Costs, in addition to the fee, will be incurred in lodging the application and the \$7 500 lodgement fee would be unduly onerous on AHA members.

I have considered the information provided and, as a person authorised to assess fee waiver requests for and on behalf of the ACCC, I have decided that the application fee to be paid by the AHA will be waived in part. An application fee of \$2 500 will apply for the application for authorisation to be lodged by the AHA.

This decision will remain in force for a period of three months. The three month period will expire on 9 April 2017.

A copy of this letter should accompany the application for authorisation to be lodged by the AHA. The cover letter to the application should mention that a letter from the ACCC regarding a fee waiver is enclosed with the application. The application together with this letter will be placed on the public register at that time.

If the application for authorisation is lodged by the proposed bargaining group after 9 April 2017, a full application fee of \$7 500 will apply, unless a subsequent request for a fee waiver is made and approved by the ACCC.

If you have any queries in relation to this matter, please contact Theo Kelly on (02) 6243 1179.

Yours sincerely

David Jones
General Manager
Adjudication

**ATTACHMENT TO APPLICATION BY THE AUSTRALIAN HOTEL
ASSOCIATION(AHA) IN RELATION TO PROPOSED COLLECTIVE
BOYCOTT OF DC PAYMENTS AUSTRALIA P/L**

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The Application

This application stems from Application A91513 where the ACCC authorized the AHA and its members to collectively bargain with several suppliers, including **DC Payments Australia P/L**

Essentially this application seeks to make the above authorisation work and deliver public benefits in relation to DC Payments.

Much of what was submitted to the ACCC at the time of authorisation A91513 is still relevant.

The Applicant also seeks an **Interim** authorisation pending a final determination.

The reason being that DC Payments is putting extreme pressure on AHA members and other small businesses, to enter into new agreements flowing from the Cashcard acquisition currently under review by the ACCC.

The Applicants

The Australian Hotels Association (AHA) is an organisation of employers in the hotel and hospitality industry registered under the *Fair Work (Registered Organisations) Act 2009*.

Its diverse membership of more than 5,000 licensed hotel businesses includes pub-style hotels plus three, four and five-star international accommodation hotels located in each state and territory. The size and scope of the Australian hotel industry includes:

- Over 5,000 businesses
- Generating over \$12,000,000,000 economic benefit
- Providing over 270,000 jobs
- Supporting over 50,000 community groups

Australian hotels are often confronted with markets where some participants are capable of exercising a substantial degree of market power that can have the effect of lessening competition. The result is often high prices and poor service outcomes for the business, with consequent disadvantages for consumers.

The Applicant is the AHA National Office and it makes the Application on behalf of each AHA Branch.

The following are the membership numbers for each Branch as at early 2016.

- NSW- 1808
- VIC-966
- SA-518
- TAS-229
- WA-533
- NT-157
- ACT-78
- QLD-802

The AHA aims to be the leading hotel and hospitality industry association providing leadership in representing the interests of members and other stakeholders to the Government and community. It has Branches located in every state and territory and it has a national office located in Canberra to handle national issues.

AHA membership levels vary from Branch to Branch but generally more than 60% of potential members are AHA members. However, there is a constant movement of members joining and leaving the various Branches. In fact, the AHA has to compete with various other trade associations for members.

AHA members are essentially small businesses.

Purpose of the Application

The purpose of A 91513 collective negotiation was to give

the AHA and its Branches and their members more input and cost effectiveness into the competitive process between buyers and suppliers. Especially contractual arrangements.

Authorisation A9513 has, in the opinion of the AHA, worked as well as can be expected. In relation to some suppliers but not all. The AHA has had meaningful input into the contract negotiations with some of the targets of that authorization.

The markets in which the AHA members operate are dominated by supermarket majors in relation to packaged liquor, in relation to in - house consumption members have to compete with many on- licensed restaurants and clubs and drinking at home, also with smoking bans hotels have to fight harder for clientele. In gambling and wagering the competitors are TABs; Clubs, on-race course betting, Bingo, internet gambling and much more. All in all, highly competitive markets and that means AHA members have to be sensitive to cost pressures and get the best deal they can from suppliers. Best deal in terms of price and terms and conditions.

Competition is generally fierce, small retailers often need to band together in buying groups and hence collective bargaining in order to be competitive in the market. Even so, they can never meet the power of players such as the supermarket majors and ATM suppliers but they can seek to bridge the gap.

The counterparty

The counterparty is DC Payments Australia P/L, and now effectively Cashcard as that business has recently been acquired by DC Payments and DC Payments is moving rapidly to absorb Cashcard customers into DC Payments operations.

AHA members have had considerable angst in dealing with DC Payments, now made worse with the acquisition of Cashcard.

The AHA has sought to negotiate with DC Payments but fundamental issues are still outstanding. See letter from Dentons (formerly Gadens) sent to ACCC in relation to the DC Payments /Cashcard acquisition.

We can submit many examples of issues with AHA members and an example is outlined in the attached email exchange submitted by an AHA member.

There are a number of issues the foremost of which is the automatic roll over of contracts for non-negotiable periods.

The AHA is aware that other small business associations have similar concerns.

The AHA is also of the view that some of the terms in the DC Payments contract are in breach of the business to business unfair contract terms legislation.

DC Payments is the largest non-bank supplier of ATM services to small businesses and has been expanding.

It has acquired Cashcard without prior notification to the ACCC, it acquired Ezeatm Ltd recently and now has a total of 11,200 active terminals throughout Australia. This amounts to 1/3 of all ATM's in Australia. There are approx. 32, 220 ATM' in Australia.

It is assumed that the other 2/3 are essentially bank ATM; s. and we would argue operate in a separate market or at least they do not constrain the power of DC Payments in newsagents and small stores in general. It is essential that AHA members are not put in a "take it or leave it" position with non-bank ATM and have the ability to switch. They have the ability not to have an ATM but that would substantially damage their business. With an ATM, they are a competitive force and a vital customer service.

ATM 's supplied by DC payments are located in hotels, newsagents, convenience stores and other small businesses. There are other non -bank competitors but they are small but a boycott by AHA members may assist in allowing more competition between the non-bank ATM suppliers.

DC Payments claims to supply one in five of all ATM's in Australia. If bank ATM; are taken out of the market it is likely to be more like one in three.

The market

It is the view of the of the applicant that the market is the supply of ATM's services to retailers in Australia.

In reality that market can be dissected into two, one being the bank ATM's and the non -bank. It is the latter that is relevant in this application.

The banks have largely vacated the small retailer market and have left that to DC Payments and a few others.

However, should there not be an ATM in small retailers, consumers can usually access nearby bank ATM's.

Anti-competitive detriment

The counterfactual (the future without authorisation) provides the benchmark against which the anti-competitive detriment and public benefits are assessed.

It is our contention that there is no anti-competitive detriment. The conduct if anything is detrimental to those engaged in any boycott. As they will lose the income from the ATM. The public will be able to go elsewhere and eventually the business will be able to get ATM services from another source.

Without trade associations and the consequent collective bargaining/boycott process the market would be far less competitive.

The individual AHA members do not generally compete against each other, as they are generally geographically separated from each other. The main competitor are the supermarket majors and members of other buying groups. The supermarkets often have an ATM, usually from one of the banks.

On the supplier side, AHA members face large monopoly or oligopoly suppliers and hence collective action is vital.

AHA submits that it faces a market structure where suppliers, have substantial power and are able to dictate unfavorable terms and conditions.

If collective negotiation results in a decrease in costs to AHA members, this would be passed on to consumers due to the structure and dynamics of the market.

As there is little scope for a lessening of competition in the market, the public benefit that is incumbent upon the applicants to identify need only

be very minimal in order to outweigh that anti-competitive detriment.

The potential for anti-competitive detriment is further reduced by the following factors:

- members can opt out of any boycott and /or leave the AHA.
- further it is anticipated that not all AHA members that could join the boycott will and hence the power of any boycott may be reduced.

Public benefit

The Commission has in the past accepted that an increase in counter vailing power as a result of collective action by small businesses results in public benefits.

In the 2011 decision A91513, the ACCC stated the following,

1. "The Applicants submit that the Conduct promotes "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 for goods and services provided by AHA members.

2. The ACCC's assessment of the likely public benefits follows.

Transaction cost savings:

3. An individual AHA member negotiating with a supplier will incur transaction costs, such as the time taken to negotiate and from obtaining legal and other expert-advice. The supplier will also incur transaction costs in negotiating with individual customers. Individual negotiations will stop when the costs of continued negotiation outweigh the expected benefits for either party. At this point, it is likely that the contract will not fully capture the potential mutual benefits from trade. It may in fact mean that no negotiation occurs at all and customers are effectively provided with a standard-form contract prepared by a supplier. Collective bargaining is likely to result in public benefits from transaction cost savings, including the sharing of advisor costs for AHA members. By reducing the costs of negotiating for all parties, it is likely that more contractual issues can be addressed, because each party can obtain the benefit from negotiating these issues at less

cost to itself, resulting in more comprehensive and efficient contracts of greater benefit to all parties.

Improved input into contracts:

4. The Applicants submit that most of its members are small businesses and operate in a situation where suppliers have substantial power and are able to dictate unfavourable terms and conditions. The ACCC accepts that, when negotiating with large suppliers, small businesses can be at a disadvantage in terms of resources and experience of negotiating in complex commercial environments. One way in which a small business can seek to redress such disadvantage is to bargain collectively. Collective bargaining may allow for more effective negotiation, where the negotiating parties have a greater opportunity to identify and achieve business efficiencies that better reflect the circumstances of AHA members, in relation to common issues. Collective bargaining is also likely to enable members of the bargaining group to become better informed of relevant market conditions, which is likely to improve their input into contractual negotiations with suppliers to achieve more efficient outcomes.

Public detriment

5. The Applicants submit that the Conduct results in no anti-competitive detriment and that:
 - its members face a market structure where suppliers have substantial market power and can dictate terms.
 - its members do not compete against each other as they are generally geographically separated and generally compete with major supermarkets and members of other buying groups.
6. The ACCC considers that collective bargaining can lessen competition and efficiency in certain circumstances. However, the ACCC considers that the Conduct has resulted in minimal detriment. In relation to the industries and sectors where the listed suppliers operate, the ACCC considers that this is likely to remain the case because:
 - AHA members are unlikely to represent a large proportion of purchasers in many of the sectors involved.
 - Where AHA members do form a more significant proportion of buyers, they are negotiating with monopolist or large multi-national suppliers.

- Participating in the collective bargaining arrangements is voluntary for both AHA members and target suppliers.
- Authorisation is not sought for collective boycott activity.
- There is currently a low level of negotiation on price and terms of supply between many AHA members and target suppliers."

It is the strong contention of the Applicant that in order to obtain the public benefits assumed by the ACCC in 2011 that the threat of a boycott is the only way that it can come about in relation to DC Payments. The negotiation route has been tried but not successful.

Under the non-collective bargaining arrangements, the targets of any collective bargaining sought to be authorised present individual AHA members with standard form contracts that are weighted in favour of the target. These are proffered on a 'take it or leave it' basis. Authorisation, for collective negotiation, if granted, will result in fairer terms and conditions.

However only a boycott threat will ensure that that it is actually achieved.

It is also a public benefit if unfair contract terms are **eliminated.**

Conduct for which Authorisation is sought

The Application seeks authorisation for a collective boycott.

The Commission has in the past indicated that the anti-competitive effect of collective arrangements can be limited in circumstances where:

- the current levels of competition between the group are limited; and
- the collective negotiation process is voluntary.

The collective boycott process for which the AHA and its Branches Divisions are seeking authorisation is

voluntary. Members may elect to opt-out and negotiate individual contracts with the suppliers. Also, membership of AHA itself is voluntary and members move in and out of membership

The suggested process.

The applicant will not engage in boycott activity immediately upon any authorization being granted. It will again seek to negotiate in good faith.

However, the applicant will advise members of the possible boycott avenues and suggest that members hold off entering into any new or revised contracts. This particularly applies to the renegotiation of former Cashcard customers.

If after two weeks there is no satisfactory outcome in negotiations the AHA will advise DC Payments that negotiations will cease and that the AHA will within two weeks advise its members not to deal with DC Payments and to advise DC Payments in writing as soon as practicable that they will not enter into new contracts when that arises.

It is not known how many will be part of the boycott and that will be up to each member and each Branch to assess.

It is proposed that either the AHA National Office advise members on a national basis or individual Branches do so. DC Payments operates nationally so there is no reason why the AHA should not act nationally or on a Branch basis.

The boycott will be reviewed monthly by the AHA and members advised whether to adhere to the boycott. If there is a resolution with DC Payments, the AHA will advise members and then it is up to each member to assess whether they wish to deal with DC Payments or not.

It is the intention of the Applicant that no potential boycott group will be larger than one AHA Branch with the exception of the NSW /ACT Branches.

Final comment

Current outcomes in the markets for ATM services are not consistent with those that would be expected in competitive markets for this service.

There are lengthy periods of delay that continue to occur in finalising the terms and conditions of supply of ATM services by DC Payments. Such delays are not consistent with contract negotiations one would expect in competitive markets. A purchaser would be disinclined to delay settling terms and conditions for the acquisition of services in a competitive market for fear that a rival purchaser would move in quickly and reach agreement with the potential seller.

Collective boycott appears to be the only way to overcome this market failure.

=====

Our reference 36422087
Direct line 9931 4755
Email John.Dalzell@gadens.com

gadens

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Sydney Pty Limited
ABN 69 100 963 308

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gadens.com

30 November 2016

Tim Grimwade
Australian Competition and Consumer Commission
Level 20
175 Pitt Street
Sydney NSW 2000

By email tim.grimwade@accc.gov.au and sean.king@accc.gov.au

Attention: Tim Grimwade and Sean King

Dear Mr Grimwade

DC Payments Australasia Pty Ltd Anti-Competitive Behaviour

We act for the Australian Hotels Association (**AHA**). The AHA is an organisation of employers in the hospitality and liquor industry registered under the *Fair Work (Registered Organisations) Act 2009*. The AHA represents the interests of more than 5,000 members across Australia.

The AHA's mandate includes protecting the interests of its members. The purpose of writing to you is to bring to your attention conduct which is patently unfair and, in our client's view, challenges the interests of a large number of its members.

Recently, the AHA has received numerous complaints from its members about the manner in which the ATM provider DC Payments Australasia Pty Ltd (**DC Payments**) conducts its business. Of particular issue is DC Payments' standard form contract which contains many oppressive obligations and is heavily weighted in favour of DC Payments. The problem has been exacerbated by DC Payments recent acquisition of Cashcard Australia Limited (**Cashcard**). This is addressed below.

DC Payments

DC Payments operates the largest independent ATM network in Australia, controlling roughly one third of all Australian ATMs.¹

Recently, DC Payments has expanded by acquiring Ezeatm Limited (1,325 ATM sites) and Cashcard (3,500 ATM sites). As at 30 September 2016, DC Payments has approximately 11,165 active terminals in Australasia (7,665 excluding Cashcard).² DC Payments is the largest manager of non-bank ATMs in Australia and New Zealand. DC Payments therefore controls a significant market presence.

¹ As at September 2016 – 32,126 ATMs in Australia (<http://www.apca.com.au/payment-statistics/transaction-statistics/cards>)

² DC Payments Australia, Management's Discussion and Analysis of Financial Condition and Results of Operations – Quarter 3, 2016 (30 September, 2016), p. 9

DC Payments – Standard Terms and Conditions

As mentioned above, the AHA has received numerous complaints from its members regarding DC Payments' standard terms and conditions. We have **attached** the Standard form contract and we are instructed to bring to your attention the following clauses (emphasis added):

Clause Number	Clause	Comment
2.1	The Initial Term of this Agreement shall commence on: (a) if the Contracted ATM has not been installed as of the date of signing of this Agreement by DC Payments and shall expire 60 months after the applicable commencement date unless sooner ended as provided under this Agreement. After the Initial Term, this Agreement shall automatically renew for successive 60 month periods under the same terms and conditions provided for herein unless Merchant notifies DC Payments in writing 6 months before the end of the Initial Term or any Renewal Period of Merchant's intent to end the Term at the end of the current initial Term or Renewal Period.	The ATM agreement is often "sold" as a 5 year contract but is in fact a 10 year contract. The Initial Term on the cover sheet to the contract is stated to be 5 years; this is misleading. DC Payments does not provide any reminder to its customers as to when the notice period expires.
3.2	If (regardless of the reason or circumstances of the ending of the Term), Merchant receives (at any time) a bona fide offer from (or wishes to enter an agreement with) another Person or entity (the 'Offer') to provide services similar to the Services at the Premises for any period after the end of the Term, Merchant shall give prompt written notice of the Offer to DC Payments setting forth the specific terms of the Offer. DC Payments shall have the right to enter into an agreement upon the same financial terms and conditions as the said Offer provided, however the Merchant will be obliged to enter into DC Payments' standard form 72 month ATM Agreement . DC Payments shall exercise DC Payments' right by giving Merchant written notice no later than 15 Business Days, after receipt of said written notice of the offer. If Merchant breaches this clause, DC Payments damages will be calculated in accordance with clause 13.1 except that: (a) to determine the average monthly transactions, the last 6 months of the period that DC Payments was processing transactions for the ATM at the Premises shall be used, (b) the multiplier used shall be 72 months and (c) the financial terms of the Offer shall be used to determine expected average monthly revenue.	<i>First Right of Refusal</i> clause. This means that for as long as the Merchant wishes to operate an ATM at its premises, it must use DC Payments as long as DC Payments matches the same "financial terms and conditions" – but not necessarily the same general terms about service, term of agreement, termination rights etc – as its competitors. Failure to offer this opportunity to DC Payments to match the price or failure to then enter into a 6 year contract with DC Payments results in a liquidated damages claim. This is anticompetitive and patently unfair to the Merchants.
5.9	As long as the Merchant is paying a	Unilateral right to increase ATM

Clause Number	Clause	Comment
	security upgrade fee of at least \$0.11 per Transaction, then during the Term DC Payments shall provide all security upgrades to the Contracted ATM mandated by applicable Networks during the Term in consideration of receiving the security upgrade fee. If the Contracted ATM processes an average of less than 225 fee earning transactions per month over any three month period, then DC Payments may increase the per transaction security upgrade fee upon notice to the Merchant. If the security Merchant has not been paying a security upgrade fee of at least \$0.11 per Transaction to DC Payments, the cost of upgrading the Contracted ATM to comply with any upgrades required for the Contracted ATM by applicable Network Rules shall be the responsibility of the Merchant.	security upgrade fee.
11.2	Fees payable under this Agreement may be changed by DC Payments upon written notice to the Merchant. DC Payments shall notify Merchant of any changes (and the proposed effective date of such changes) made to fees to be charged to Merchant in connection with provision of processing Services at least 30 days before the effective day of the change. Certain fees (such as the Cash Loading Fee) may vary by location based on transaction volume, remoteness of location and other site specific factors.	Unilateral right given to DC Payments, but not the Merchant, to change the fees
11.3	Without limiting the general rights to change fees provided for in the prior clause, Merchant agrees that if DC Payments experiences increased costs for: (a) per transaction Network fees, (b) maintenance, (c) security, (d) phone lines or communication lines, or (e) armoured car cash delivery and ATM servicing, then DC Payments shall be entitled to either: (i) decrease the share of the Surcharge payable to Merchant so that the per transaction amount remaining for DC Payments remains the same or (ii) increase the amount of Surcharge charged to cardholders by the amount of the increased costs (and keep such increases for DC Payments' account without sharing with the merchant).	Unilateral right given to DC Payments, but not the Merchant, to change <i>all</i> fees.

DC Payments – Anti Competitive Behaviour

The effect of clauses 2.1 and 3.2 is to impede the ability of AHA's members to bring an end to their commercial arrangements with DC Payments if desired. With respect to clause 2.1 this clause operates such that unless six months' notice is given then the commercial arrangement with DC Payments will automatically rollover for a further 60 months. Practically, there is no reasonable basis for DC Payments to require six months' notice, and we are instructed this clause has been strictly applied against AHA members such that if notice is provided a matter of days or weeks 6 months before the agreement expires, DC Payments strictly enforce the roll-over period as being triggered. This is oppressive and unfair to AHA members, many of which are small businesses who cannot afford to commence litigation to excise themselves from the contract.

With respect to clause 3.2, DC Payments is given an irrevocable the right of first refusal in circumstances where a member wishes to avail itself of a competitor's services. Further, if DC Payments exercises this option the party is forced into a minimum 72 month contract. Failure to comply risks a liquidated damages claim against the Merchant.

It is our view that these clauses seriously diminish competition with DC Payments and hamper the ability of AHA's members to access the open market for ATM providers.

DC Payments – Unfair Contract Terms

As you would be aware on 12 November 2016 the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* came into effect. The amendments will have the practical effect of extending the application of the unfair contract terms provisions in the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*, and the *Australian Competition and Consumer Act 2010 (CCA Act)* such that the provisions apply to small businesses and are therefore applicable to many of AHA's members.

It is our view that the following clauses from DC Payment's standard form contract would offend the amended ASIC Act:

Clause 5.9 affords DC Payments the unilateral right to increase security fees to the Merchant, or to conduct security upgrades at will and subtract the costs of such upgrades from monies owed the Merchant, both without notice. Clause 5.9 does not provide the Merchant any right of negotiation or termination. This is an overt imbalance of power, and is prima facie unfair.

Clause 11.2 affords DC Payments the unilateral right to freely alter any fees under the agreement, without justification or reason. Clause 11.2 does not provide the Merchant any right of negotiation or termination. This is overtly imbalanced, and is not reasonable to protect the interests of DC Payments.

Clause 11.3 affords DC Payments the unilateral right to decrease the share of surcharge monies payable to the Merchant, or to increase the value of the surcharge charged to customers, without proportionately increasing the payment due the Merchant. DC Payments can increase their proportionate share of the surcharge monies if they experience increased costs in maintaining the ATM, however this clause does not affect DC Payments' general right to alter fees contained in Clause 11.2. Clause 11.3 does not provide the Merchant any right of negotiation or termination. This clause is an overt imbalance of power, and would cause financial detriment to the Merchant.

It is clear that these terms:

1. cause a significant imbalance in the parties' rights and obligations under the contract;
2. it is not necessary for the protection of the *legitimate interests* of the party being advantaged (in this case DC Payments); and
3. would cause detriment if DC Payments were to rely upon the term.

Acquisition of Cashcard – Attempted renewal

A significant number of AHA's members are currently in a contractual relationship with Cashcard. Cashcard's standard ATM Placement Agreement (**attached**) contains the following novation clause:

Clause 11.2: Cashcard may novate, or assign or otherwise deal with any of its rights or obligations under this agreement by notice to Merchant and Merchant must, at no cost, immediately execute any documents necessary to give effect to this. Cashcard may subcontract the performance of any of Cashcard's obligations under this agreement at any time and without notice.

Following DC Payments' acquisition of Cashcard, DC Payments is attempting to coerce AHA members contracted with Cashcard, to enter into an *ATM Placement Agreement Upgrade, Renewal and Amendment Agreement (Renewal Agreement)*, a copy of which is **enclosed**. The Renewal Agreement attempts to replace Cashcard as the contracting entity, as well as incorporate the following additional clause (the right of first refusal clause discussed above):

Clause 2: In addition to the terms of the ATM Agreement, Merchant agrees that the following important additional terms are incorporated:

a. Right of First Refusal: If (regardless of the reason or circumstances of the ending of the Term), Merchant receives (at any time) a bona fide offer from (or wishes to enter an agreement with) another Person or entity (the 'Offer') to provide services similar to the Services at the Premises for any period after the end of the Term, Merchant shall give prompt written notice of the Offer to Supplier setting forth the specific terms of the Offer. Supplier shall have the right to enter into an agreement upon the same financial terms and conditions as the said Offer provided, however that Merchant will be obligated to otherwise renew the terms of the ATM Agreement for a Renewal Term of 60 months. Supplier shall exercise Suppliers' right by giving Merchant written notice no later than 15 Business Days, after receipt of said written notice of the Offer. If Merchant breaches this clause, Supplier damages will be calculated in accordance with clause 5.8 except that: (a) to determine the average monthly Cash Withdrawal Transactions, the last 6 months of the period that Supplier was processing transactions for the ATM at the Premises shall be used, (b) the multiplier C used shall be 60 months and (c) the financial terms of the Offer shall be used to determine expected average monthly revenue. Merchant acknowledges that nothing in this clause changes their obligation to source the Services from Supplier during the Term.

As stated above, we are of the view that this clause is oppressive and seriously diminishes competition, and the ability of AHA's members to access the open market for ATM providers. Further there is no contractual right contained in Cashcard's standard ATM Placement Agreement, to allow DC Payments to incorporate additional terms, and impose this agreement.

Also of concern in the Renewal Agreement is the treatment of the "**Initial Contract Period**".

In Cashcard's standard ATM Placement Agreement, the Initial Term of the agreement is 60 months. Clause 5.2 of the Placement Agreement rolls the Initial Period over for an additional period of 12 months unless a party terminates the agreement by giving the other party at least 90 days' notice.

On the front page of the Renewal Agreement, the Initial Period is stated to be 60 months from the time of signing the renewal – however this is usually edited in handwriting to reduce the Initial Period to reflect the period of time for which the Cashcard agreement has already been running.

The Renewal Agreement then goes on to amend the original Cashcard agreement by increasing the Renewal Time from a 12 month rolling extension to a period of a further 60 months, unless terminated by the Merchant by giving 90 days' notice.

This effect of this amendment is not obvious on the face of the Renewal Agreement in which the Right of First Refusal clause set out above is marked as an "*important additional term*" but where this extension of the Renewal Term is not.

AHA is currently attempting to address the aforementioned issues with DC Payments directly on behalf of its members. However, should these discussions not be productive, we would be grateful for the opportunity to meet and discuss DC Payments' conduct with you, with a view to seeking statutory authorisation for AHA's members to engage in a Collective Boycott action against DC Payments.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'J Dalzell', with a long horizontal flourish extending to the right.

John Dalzell
Partner

RESTRICTION OF PULICATION CLAIMED

AHA MEMBERSHIP LIST

Example of DC Payments issues- Frisco Hotel

Hank Spier

From: Barry Beck <bazza.beck@bigpond.com>
Sent: Monday, 28 November 2016 2:06 PM
To: Sean Morrissey
Subject: Re: Acquisition of Cashcard by DC Payments

Please note as at 9.45 am today Security Gaurds removed all cash from my Cash Card machine without any prior warning .

As we have not signed the new agreement with DC payments asper your advice

Not Happy

Barrie Beck

Willow Tree Hotel , Scone

Tel 65459552

Mobile 0412632450

Sent from my iPad

On 21 Nov 2016, at 5:00 PM, Sean Morrissey <Sean.Morrissey@ahansw.com.au> wrote:

Dear Members,

We write to provide you with an update in relation to this ATM matter.

Today the AHA met with DC Payments and raised our concerns regarding what we believe are unfair contract terms within their ATM agreements.

DC Payments have undertaken to give consideration to these matters and provide us with a response by the end of this week.

In the meantime, we recommend that those affected members who have not as yet signed the renewal and amendment refrain from doing so, pending receipt from DC Payments a response to these concerns.

Please note, some members may also have been advised that DC Payments are required to upgrade existing ATM machines – please be advised that these upgrades are a separate matter from the Cashcard acquisition and members may give their consent to the upgrades being undertaken without compromising their position generally regarding the assignment of their agreements from Cashcard to DC Payments.

Should you have any questions, please contact a member of the AHA NSW Legal and Industrial Affairs Department on (02) 8218 1855 or at legal@ahansw.com.au.

Kind regards,

Sean Morrissey
Manager, Legal and Industrial Affairs

<image002.jpg> p: 02 8218 1855 Level 15, Hudson House
d: 02 8218 1843 <image004.jpg> 131 Macquarie Street, <image006.jpg>
m: 0477 002 552 Sydney NSW 2000
f: 02 9281 1857

Sean.Morrissey@ahansw.com.au
ahansw.com.au
Incorporating TAA NSW

From: Sean Morrissey
Sent: Monday, 14 November 2016 4:27 PM
To: Sean Morrissey <Sean.Morrissey@ahansw.com.au>
Subject: Acquisition of Cashcard by DC Payments

Dear Members,

We have been advised that Cashcard, a provider of automatic teller machine services to members, has recently been acquired by another ATM service provider, DC Payments.

Members who have existing agreements with Cashcard will likely be contacted in the coming weeks by DC Payments seeking consent to "roll over" the Cashcard agreement to DC Payments.

The Association has concerns regarding some of the terms contained in the standard "take it or leave it" contract used by DC Payments. The Association is in the process of formally reviewing these contracts and it is anticipated that we will meet with DC Payments to discuss these concerns shortly.

In the circumstances, we strongly recommend that, should you find yourself in the position as referred to above, you contact a member of the AHA NSW Legal and Industrial Affairs Department on (02) 8218 1855 or at legal@ahansw.com.au to review the matter and discuss the range of options available to you.

Kind regards,

Sean Morrissey
Manager, Legal and Industrial Affairs

<image002.jpg> p: 02 8218 1855 Level 15, Hudson House <image006.jpg>
d: 02 8218 1843 <image007.jpg> 131 Macquarie Street,
m: 0477 002 552 Sydney NSW 2000
f: 02 9281 1857

Sean.Morrissey@ahansw.com.au
ahansw.com.au

Hank Spier

From: Luke Noble <luke82noble@hotmail.com>
Sent: Monday, 21 November 2016 9:23 PM
To: legal
Subject: Dc payment

With all this since the upgrade

Has been done to my Atm it spends more time off line then working. What should we do about all the matters with this company. I'm ready to tell them to come collet my faulty machine.

Cheers Luke noble

Sent from my iPhone

Hank Spier

From: Geoff Moulding <geoff@royalhotelbondi.com.au>
Sent: Monday, 23 January 2017 1:55 PM
To: 'Larry Warren'
Cc: Sean Morrissey
Subject: Royal Hotel Bondi - Urgent

Hi Larry,
Once again the ROYAL HOTEL BONDI has been let down by DC Payments
A new machine was installed in the lounge bar 2 weeks ago, and it has never worked.
What is going on?
Can you get this machine up and working. asap
Continual calls to your help desk are to no avail.
Secondly,
Can you send me a copy of my agreement with DC Payments ASAP
Thanks and best regards
Geoff Moulding
Royal Hotel Bondi
0403352725

From: Larry Warren [mailto:LWarren@dcpayments.com.au]
Sent: Friday, 16 December 2016 3:18 PM
To: geoff@royalhotelbondi.com.au
Subject: ATM contact

Hi Geoff,

As a follow up to our discussion just now;

I sent an urgent note to Pravin and the team for an urgent update on what process they have in place to get the issues fixed and once I have a response I will come back to you.

My contact details are below.

Regards,
Larry Warren
NSW ACT State Manager
DC Payments Australasia Pty Ltd
Unit 208, 27 Mars Rd | Lane Cove, NSW, 2066 | Australia
T: +61 (0)2 9438-9007 | M: +61 (0)421 754-161 | F: 02 9420 5810
lwarren@dcpayments.com.au | www.dcpayments.com.au

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DISCLAIMER

Hank Spier

From: New Ivanhoe Hotel <publican@blackheathhotel.com>
Sent: Tuesday, 15 November 2016 2:08 PM
To: Sean Morrissey
Subject: RE: Acquisition of Cashcard by DC Payments

Dear Sean,

Thankyou for the email in relation to the Acquisition of Cashcard by DC Payments.

We had received a contract from DC Payments but have not signed as yet.

The new ATM has been installed and we are being pressured to sign the contract.

Please keep us up to date on the circumstances as they arise.

Regards
Kerrie Ray
0408-637-177

From: Sean Morrissey [mailto:Sean.Morrissey@ahansw.com.au]
Sent: Monday, 14 November 2016 4:27 PM
To: Sean Morrissey
Subject: Acquisition of Cashcard by DC Payments

Dear Members,

We have been advised that Cashcard, a provider of automatic teller machine services to members, has recently been acquired by another ATM service provider, DC Payments.

Members who have existing agreements with Cashcard will likely be contacted in the coming weeks by DC Payments seeking consent to "roll over" the Cashcard agreement to DC Payments.

The Association has concerns regarding some of the terms contained in the standard "take it or leave it" contract used by DC Payments. The Association is in the process of formally reviewing these contracts and it is anticipated that we will meet with DC Payments to discuss these concerns shortly.

In the circumstances, we strongly recommend that, should you find yourself in the position as referred to above, you contact a member of the AHA NSW Legal and Industrial Affairs Department on (02) 8218 1855 or at legal@ahansw.com.au to review the matter and discuss the range of options available to you.

Kind regards,



Sean Morrissey
Manager, Legal and Industrial Affairs



p: 02 8218 1855
d: 02 8218 1843
m: 0477 002 552
f: 02 9281 1857

Level 15, Hudson House
131 Macquarie Street,
Sydney NSW 2000

Sean.Morrissey@ahansw.com.au
ahansw.com.au
Incorporating TAA NSW

WIN A TRIP TO LAS VEGAS

All venues who join on or before the 31 December 2016 will instantly go in the draw for a chance to win a four night package for two to the 2017 Nightclub and Bar Convention in Las Vegas which will be held from 25-31 March 2017. LTPS/16/07704

For further information and inclusions please [click here](#).
Terms and conditions apply.



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Hank Spier

From: Shenanigans <info@shenanigans.com.au>
Sent: Tuesday, 15 November 2016 8:08 AM
To: Sean Morrissey
Subject: RE: Acquisition of Cashcard by DC Payments

We had trouble with DC Payments when we sold our Cessnock pub, and certainly would be happier if we didn't have to use them again, now or in the future, regardless of what you guys arrive at. Is there any other supplier that the AHA would recommend?

Kind regards,
Mike Thomas
Shenanigans - Maitland

From: Sean Morrissey [mailto:Sean.Morrissey@ahansw.com.au]
Sent: Monday, 14 November 2016 4:27 PM
To: Sean Morrissey
Subject: Acquisition of Cashcard by DC Payments

Dear Members,

We have been advised that Cashcard, a provider of automatic teller machine services to members, has recently been acquired by another ATM service provider, DC Payments.

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In the circumstances, we strongly recommend that, should you find yourself in the position as referred to above, you contact a member of the AHA NSW Legal and Industrial Affairs Department on (02) 8218 1855 or at legal@ahansw.com.au to review the matter and discuss the range of options available to you.

Kind regards,

Sean Morrissey
Manager, Legal and Industrial Affairs

p: 02 8218 1855
d: 02 8218 1843
m: 0477 002 552
f: 02 9281 1857

Level 15, Hudson House
131 Macquarie Street,
Sydney NSW 2000

**AHA
NSW**

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Hank Spier

From: Michael Sutherland <msutho@bigpond.net.au>
Sent: Monday, 14 November 2016 4:39 PM
To: legal
Subject: DC payments fedarl bellingen 109164

Hi there

Thanks for the email on DC and cashcard.

For information's sake, I can tell you that we have DC and we dislike them intensely.

They "rollover" at term without consent and bully at every opportunity to threaten legal action.

They unilaterally vary the commission split as well which starts at 50% but goes higher to them at their discretion.

I would caution any operator to explore their contact with DC very carefully.

Regards
Michael Sutherland
Owner
Federal hotel Bellingin