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DC Payments Australasia Pty Ltd

Submission to ACCC

**Australian Hotels Association - Application for
Authorisation (A91574)**

14 March 2017

1. INTRODUCTION

On 2 February 2017, the Australian Hotels Association (**AHA**) lodged an application seeking authorisation and interim authorisation for the members of the AHA to be able to engage in "collective boycott" of DC Payments Australasia Pty Ltd (**DC Payments**) in relation to the supply of ATM services to AHA members (**AHA Application**).

On 16 February 2017, DC Payments made a submission to the ACCC which sought to correct certain factual inaccuracies in the AHA Application (**Initial Submission**).

On or about 24 February 2017, the AHA withdrew its application for interim authorisation. The AHA's substantive application for authorisation remains on foot.

DC Payments opposes the AHA Application and submits that the ACCC should reject it, for the reasons provided in this Submission.

This Submission:

- (a) outlines the statutory test in the *Competition and Consumer Act 2010* (Cth) (**CCA**) which applies to an application for authorisation of collective boycott activity and the guidance provided by the ACCC regarding its assessment of such applications (see section 2);
- (b) provides additional background information (to that contained in the Initial Submission) regarding:
 - (i) DC Payments (see section 3);
 - (ii) the ATM industry in Australia and the relevant market for assessing the AHA Application, which DC Payments submits is the market for the supply of access to cash or equivalent payment methods to consumers in Australia (see section 4); and
 - (iii) the competitiveness of the relevant market, including the vigorous competition faced by DC Payments in the supply of ATM deployment services to merchants, and the countervailing power of merchants arising from their bypass alternatives (see section 4);
- (c) describes the protracted negotiations between DC Payments and the AHA in the period between November 2016 until the date of this Submission, in the context of which:
 - (i) DC Payments has sought to address the concerns raised by the AHA [c-i-c] [c-i-c]; and
 - (ii) [c-i-c] [c-i-c] (see section 5);
- (d) identifies the lack of clarity in the AHA Application regarding the applicants and conduct for which authorisation is sought (see section 6); and
- (e) describes the future with and without the conduct for which authorisation is sought, against which the AHA Application must be assessed (see section 7);
- (f) provides detail regarding the applicants' failure to demonstrate a net public benefit, including the lack of any real public benefits, and lack of regard to the likely public detriments (see section 8); and
- (g) concludes that the ACCC should not authorise the conduct as described (see section 9).

2. **RELEVANT STATUTORY TEST AND ITS APPLICATION TO THE AHA AUTHORISATION**

The relevant statutory test to be applied to an authorisation application relating to collective boycott activity is contained in section 90(8) of the CCA and requires the ACCC to determine whether in all the circumstances, the public benefits are such that the conduct should be authorised. In practice, the test requires a balancing of public benefits and detriments, but does not limit consideration of detriments to those constituted by a lessening of competition.

The application of this test was considered by the Australian Competition Tribunal (**ACT**) in *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] A CompT 2, where the ACT stated:

"[74] As we noted earlier, the statutory test (in s 90(8) of the Act) relevant to whether a collective boycott authorisation should be granted requires that there be "such a benefit to the public ...", appropriately to be regarded as meaning a net benefit to the public -- that is, benefits to the public sufficient to outweigh any detriments to the public from granting an authorisation.

[75] The Tribunal previously has adopted an expansive view of what constitute benefits and detriments. That is, they have been taken to include anything which either increases or decreases, respectively, the well-being of members of society which would or might arise as a consequence of, for example, authorising particular commercial arrangements (in the current matter, authorising collective boycotts). Particular emphasis is placed on positive or negative consequences for the achievement of the goal of maximising economic efficiency (including dynamic efficiency leading to economic progress). The Tribunal also has adopted a definition of "the public" which would include all members of society in all their roles -- for example, as investors, shareholders or workers as well as consumers, and also as people incidentally affected by market outcomes. Moreover, it also has taken the view that, by and large, there should be no differences in the weight attached to benefits or costs, irrespective of who are the beneficiaries or who bear the detriments. We accept and adopt all of those perspectives."

Having regard to the ACCC's Guide to Authorisation¹ and guidance provided in previous authorisation determinations, the AHA, in seeking authorisation to engage in collective boycott activity, must adequately and clearly articulate:

- (a) the conduct for which authorisation is sought, including the size and coverage of the boycott group, and scope of activities;
- (b) the "future with" the conduct for which authorisation is sought (ie its foreseeable outcome) and "future without" the conduct;
- (c) the public benefits of the conduct – only those public benefits which arise (or have a real chance of arising) as a result of the boycott activity (and not merely arising from the collective bargaining activity already authorised pursuant to ACCC Authorisation Determination A91513) are to be taken into account; and
- (d) any public detriments (including but not limited to those which relate to a lessening of competition).

The onus is on the AHA to demonstrate that the public benefits are sufficiently substantial and outweigh any public detriments, substantiated by credible evidence. In this context, the ACCC has indicated that it will give more weight to benefits which flow through to the

¹ The current guidelines were published on 1 July 2013 and are available at:
<http://www.accc.gov.au/publications/authorisation-guidelines-2013>

broader community and are sustained over time, than cost savings accruing to one or a few firms.²

For the reasons outlined in this Submission, DC Payments submits that the AHA has not satisfied the relevant statutory test for authorisation of collective boycott activity.

3. **DC PAYMENTS**

3.1 **Corporate overview**

DC Payments is a subsidiary of DirectCash Payments ULC. (formerly DirectCash Payments Inc.), a full-service provider of innovative ATM products and services, with operations in the UK, Canada, Mexico, New Zealand and Australia.

On 6 January 2017, DirectCash Payments Inc was acquired by Cardtronics Holdings Limited (**Cardtronics Holdings**). In addition to the jurisdictions in which DC Payments operates, Cardtronics Holdings also has operations in the USA, Spain, Portugal, Germany, Puerto Rico and South Africa. DC Payments is now an indirect, wholly owned subsidiary of Cardtronics plc. (**Cardtronics**).

Cardtronics, the world's largest non-bank ATM operator, places ATMs with merchants of all sizes including regional and national Fortune 500 retailers throughout the United States, the United Kingdom, Canada, Mexico, Germany and Poland. Cardtronics' financial services customer roster includes many of the largest banks and credit unions in the world, companies who leverage Cardtronics' surcharge-free ATM branding and surcharge-free network opportunities to better serve their customers and members. Cardtronics owns/operates approximately 190,000 ATMs across its network.

Cardtronics' stock is publicly traded under the ticker symbol CATM on the NASDAQ stock market.

3.2 **Cashcard Acquisition**

On 30 September 2016, DC Payments acquired First Data Corporation's "Cashcard" ATM business, including relevantly all of First Data's existing ATM contracts with merchants and financial institutions, pursuant to which it deploys and/or operates ATMs, certain vendor contracts and associated assets. Further details regarding the Cashcard Acquisition were provided in the Initial Submission.

3.3 **DC Payments' Australian operations**

DC Payments' head office is located in Melbourne, and it has office and warehouse locations in each of Sydney (where it currently maintains two offices), Brisbane and Perth and warehouse/storage facilities in each of Darwin and Adelaide. It currently employs around 168 people across Australia.

DC Payments is a fully integrated ATM terminal provider and offers a complete suite of ATM services from ATM deployment and maintenance, to transaction processing, reporting and settlement. Its services include ATM installation, transaction processing, system monitoring, on-site maintenance, software upgrades, staff training and help desk support.

DC Payments supplies these services to merchants in various industries in Australia. Its customers include (but are not limited to) convenience stores, service stations, bars, pubs, clubs, hotels, restaurants, retail stores and grocery stores, among others. DC Payments has a suite of standard form ATM Agreements, on which it offers to supply

² Ibid, pp61-62.

services to merchants. In November 2016, DC Payments adopted a revised suite of standard form ATM Agreements, which had been amended taking into account the commencement of the Small Business Unfair Contract Terms Regime.

In order to enable it to supply ATM services to its customers, DC Payments has numerous contracts in place with a wide variety of suppliers including without limitation transaction processing providers, armoured car providers, vault cash suppliers (financial institutions), telecommunications providers, ATM hardware and software manufacturers, logistics and freight companies, and many small contractors located across Australia in the areas in which DC Payments provides services but does not maintain its own fleet of technicians for service and repair. DC Payments also maintains a significant investment in parts and inventory.

3.4 **DC Payments' services to merchants in the hospitality industry**

DC Payments has contracts on foot with a large number of hotels, clubs, and pubs (with ATMs deployed in approximately 950 hotel/club/pub sites) and approximately 1650 gaming venues across Australia – accounting for around 34% of sites in which DC Payments' has deployed ATMs.³ The contracts with these sites have varying expiry dates (among other differences). DC Payments believes that a significant proportion of its hotel, club, pub and gaming customers are likely to be members of the AHA.

In addition to existing contracts with AHA members, at any given time, DC Payments is in negotiations with merchants in relation to the deployment of ATMs in new or existing sites. Merchants in the hospitality industry (who are members or prospective members of the AHA) represent a very significant proportion of contestable business for DC Payments – we note that the AHA has indicated in its application that its membership includes over 5000 licensed hotel businesses.

4. **RELEVANT MARKET AND COMPETITIVE DYNAMICS**

4.1 **Overview**

The AHA contends that the relevant market is "the supply of ATM's services to retailers in Australia", and then goes on to "dissect" that market further into a "bank" and "non-bank" market, and assert that in that market, its members:

"...face large monopoly or oligopoly suppliers and hence collective action is vital. AHA...faces a market structure where suppliers have substantial market power and are able to dictate unfavourable terms and conditions."

DC Payments submits that it is not a monopoly or oligopoly supplier, nor does it have substantial market power that enables it to dictate unfavourable terms and conditions to customers, for the reasons provided in this section.

In brief:

- (a) DC Payments considers that the relevant market is broader than that contended by the AHA, and encompasses not only financial institutions' ATMs and independent ATM deployers, but also EFTPOS (including EFTPOS cash out) and other electronic/emerging digital payment methods. These other payment methods provide an important competitive constraint on the supply ATM transaction services, and DC Payments considers that the relevant market is now more appropriately defined as a **broader market for the supply of access to cash or equivalent payment methods to consumers**, which is highly competitive.

³ Figures as at 9 February 2017.

- (b) even if the ACCC were to consider the AHA Application in the context of a narrower field of competition, focusing on the supply of ATM deployment services to the hospitality merchant segment, it remains the case that DC Payments does not have a substantial degree of market power because:
 - (i) DC Payments is subject to vigorous competition from a range of independent ATM deployers; and
 - (ii) merchants (including those in the hospitality industry) have countervailing power, arising from their ability to acquire ATM deployment services from a range of independent ATM deployers on alternative terms.

4.2 **ATM Industry**

The Australian ATM system was established in the early 1970s. It operates through a network of bilateral interchanges between the major financial institutions and industry aggregators for smaller institutions, providing ubiquitous access for all cardholders at all ATMs. The ATM clearing system rules are managed through the industry self-regulatory payments body, the APCA.

The Australian ATM system consists of two distinct types of ATM owners:

- (a) financial institutions (relevantly, a recent RBA report estimated that around 40% of financial institutions' ATMs are located in branches, with the remaining 60% located off-site, including high traffic venues such as shopping centres, supermarkets, service stations, on-street etc); and
- (b) independent ATM deployers.

As at 31 December 2015, 31,661 ATMs were deployed in Australia.⁴ ATMs owned by independent deployers account for a greater proportion of ATMs than financial institutions' ATMs; however, financial institutions' ATMs account for a significantly greater proportion of all ATM transactions.

The table below shows that in 2015, approximately 55% of Australian ATMs were independently owned, but accounted for less than 25% of withdrawals and 10% of balance enquiries.

⁴ DirectCash Payments Inc. Annual Information Form for the fiscal year ended 31 December 2015, at 24, citing the APCA website as a source. According to more recent figures from the Australian Payments Clearing Association (APCA), as at June 2016, there were 32,156 ATMs in Australia. See: <http://www.apca.com.au/payment-statistics/transaction-statistics/atm-and-eftpos>

Table 1: ATM Activity by Type of Owner⁵

	Number ATMs July 2015	of Number withdrawals 2014/15 (millions)	of Number balance enquiries 2014/15 (millions)	of Transactions per machine per day
Financial institutions	13,876	510.4	139.1	128
% of total	45	75	90	
Independent deployers	17,295	168.9	15.3	29
% of total	55	25	10	
Total	31,171	679.3	154.4	73

4.3 ACCC's previous findings on market definition and competitive dynamics

In its consideration of previous transactions and authorisations in the ATM industry, the ACCC has had regard to the following relevant markets:

- (a) local markets for the supply of ATM transaction services to ATM cardholders,⁶ or local markets for consumer cash dispensing through ATMs,⁷ (**Local ATM Transactions Services Markets**); and
- (b) a national wholesale market for the deployment and operation of ATMs, or a national market for ATM deployment to merchants,⁸ (**National ATM Deployment Market**).

Relevantly, the ACCC has also made the following findings in relation to the above markets:

Local ATM Transactions Services Markets

- (i) there is a large number of players in this market (including banks and financial institutions);⁹

⁵ "The ATM System since the 2009 Reforms" by Flood, D. and Mitchell, S., (of the Payments Policy Department of the RBA), *Reserve Bank of Australia Bulletin*, March Quarter 2016, 31, available at: <http://www.rba.gov.au/publications/bulletin/2016/mar/pdf/bu-0316-4.pdf>, at 33. Note that a small number of ATMs that carry financial institutions' branding, but are owned or operated by an independent deployer, are recorded in data for independent deployers; other similar arrangements are recoded under financial institutions.

⁶ See

- ACCC Determination A91312 (in relation to the *Application for Authorisation lodged by the Australian Bankers' Association in respect of a proposal to reduce ATM fees in selected very remote Indigenous communities*, 8 November 2012, available at: <http://registers.accc.gov.au/content/index.phtml/itemId/1056046/fromItemId/401858> (**ABA Authorisation**);
- ACCC Determination A91119 in respect of the Application for authorisation lodged by Cashcard Australia Limited and Bank of China (Australia) Limited in respect of a 'Feesmart' joint venture agreement between participating financial institutions not to charge each other's cardholders direct fees for ATM withdrawals, 4 June 2009, available at: <http://registers.accc.gov.au/content/index.phtml/itemId/859314/fromItemId/401858> (**Feesmart Authorisation**); and
- ACCC Determinations A91175-A91177 in respect of the Application for authorisation lodged by Cuscal Limited, National Australia Bank Limited and rediATM network members in respect of rediATM network direct charging arrangements and ATM deployment arrangements, 27 January 2010, available at: <http://registers.accc.gov.au/content/index.phtml/itemId/886398/fromItemId/401858> (**rediATM Authorisation**).

⁷ See ACCC's informal review of Customers Limited's proposed acquisition of ATM Solutions Australasia Pty Limited, completed on 21 February 2007, available at: <http://registers.accc.gov.au/content/index.phtml/itemId/781174/fromItemId/751043>.

⁸ Ibid.

- (ii) customers have demonstrated a willingness to manage their transactions to minimise charges¹⁰, however, search costs (relative to the fees charged by ATM operators) limit the extent to which consumers will be prepared to 'shop around' outside their immediate geographical area when undertaking ATM transactions;¹¹
- (iii) the following alternative means of payment may serve as an effective substitute to an ATM transaction:¹²
 - (A) the ability to pay by EFTPOS, credit card or other means (where available);¹³
 - (B) customers making a purchase from a retailer in many cases have the opportunity to pay by EFTPOS and, when doing so, the option of making an, albeit sometimes limited, cash withdrawal from their account;
- (iv) there are low barriers to entry and expansion.¹⁴

National ATM Deployment Market

- (i) ATMs are deployed and operated by a range of large and small financial institutions who also provide account services and issue ATM cards, as well as by independent ATM deployers who do not offer banking account services or issue ATM cards – ie the market includes large and small financial institutions and independent ATM deployers;
- (ii) many large financial institutions, and other ATM operators, have a national network of ATMs, while other particularly smaller, financial institutions deploy ATMs over smaller geographical regions reflecting the more limited scope of their customer base of account holders – ie the suppliers include those with a national network of ATMs, as well as smaller suppliers with a presence in particular geographical regions;
- (iii) merchants have strong countervailing power in negotiating their supply contracts (primarily due to the number of alternative deployers in the market);¹⁵ and
- (iv) barriers to entry and expansion are low.¹⁶

4.4 DC Payments' submissions regarding the relevant markets

DC Payments considers that the market definitions previously adopted by the ACCC, as described above, are too narrow - the market has evolved significantly since the ACCC's previous decisions in 2002, 2003 and 2007. In particular, there has been:

⁹ See ACCC's informal review of Customers Limited's proposed acquisition of ATM Solutions Australasia Pty Limited, at: <http://registers.accc.gov.au/content/index.phtml/itemId/781174/fromItemId/751043>.

¹⁰ Ibid.

¹¹ See Feesmart Authorisation (ACCC Determination A91119) and rediATM Authorisation (ACCC Determinations A91175-A91177).

¹² Ibid.

¹³ Note also that in the ACCC's informal review of Customers Limited's proposed acquisition of ATM Solutions Australasia Pty Limited, at: <http://registers.accc.gov.au/content/index.phtml/itemId/781174/fromItemId/751043>, the ACCC found that "EFTPOS is available as a substitute for 'convenience' transactions".

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

- (a) **a significant increase in the number of deployed ATMs, and the number of transactions carried out on bank ATMs**, with around 60% of cash withdrawals conducted at a cardholder's "home" bank ATM¹⁷.
- (b) **a significant decrease in the use of cash (coinciding with a significant increase in the use of electronic payment systems, including credit card, payWave, Tap & Go and other technologies at merchant premises)**.

DC Payments considers that over the past 5-10 years, there has been a significant shift in consumer behaviour with respect to payments for goods and services, with consumers increasingly opting to use electronic forms of payment, particularly payment cards, instead of cash. This trend has accelerated in recent years with the widespread use of contactless card payments (particularly for low value transactions) and availability of tap-and-go infrastructure, and is expected to continue with the recent introduction of digital wallets and smartphone payment services. These developments point to the increasing substitutability between cash, card and other electronic or digital forms of payment.

- (c) **a significant increase in the use of EFTPOS devices at merchants' premises (including EFTPOS cash out facilities)**. The number of EFTPOS terminals in Australia has been steadily increasing in the past decade. In 2005, there were 518,532; in 2010 there were 712,434; and as at June 2016 there were 934,001¹⁸. In August 2016, EFTPOS cash-out withdrawals comprised around 28% of cash withdrawals by volume.¹⁹ EFTPOS cash-out is available at major supermarkets, large retailers (such as KMART and BigW) and food chains (eg McDonald's), Australia Post and an increasing number of smaller merchants.

These developments are reflected in the ATM Taskforce Report on Transparency and Competition, in which the Treasury and Reserve Bank of Australia stated that:²⁰

"The ATM market is part of the broader market for accessing cash (and making payments more generally) and obtaining account balances. For instance, most consumers have access to cash through eftpos cash-outs and their own bank's branch network, and for the purpose of making a transaction cash can be supplanted by some form of card payment. Most consumers can obtain their account balances from sources such as telephone or internet banking (including via mobile phones), as well as through their own bank's branches. Also, customers of many financial institutions can conduct banking business at Australia Post offices. All of these channels compete directly with ATMs and should be borne in mind when examining competition in the ATM market."

An assessment that focuses solely on ATM deployment or transaction services via ATMs (or, even more narrowly, on independent ATM deployment) will not accurately reflect the level of competition faced by DC Payments. DC Payments considers, therefore, that the relevant market is now more appropriately defined as a **broader market for the supply of access to cash or equivalent payment methods to consumers**.

DC Payments acknowledges that large financial institutions tend to not deploy their ATMs in gaming venues and pubs/ hotels/ clubs, for reputational reasons. Nevertheless, DC Payments faces competition from financial institutions in the relevant market (which is

¹⁷ Source: RBA, data from <http://www.rba.gov.au/statistics/tables/> , see" Payments System – ATM Cash Withdrawals – C4", for August 2016.

¹⁸ Source: RBA, data from <http://www.rba.gov.au/statistics/tables/> , see" Point of Access to the Australian Payments System", for June 2016.

¹⁹ Source: RBA, see data from www.rba.gov.au/statistics/tables/ in "Payments System – ATM Cash Withdrawals – C4", for August 2016 and "Debit Card Statistics – C5", for August 2016.

²⁰ Reserve Bank of Australia, *ATM Taskforce Report on Transparency and Competition* (20 June 2011), http://banking.treasury.gov.au/content/reports/atm_transparency/downloads/atm_transparency.pdf

broad than the supply of ATM deployment services to gaming venues and pubs/ hotels/ clubs):

- (a) in its supply of ATM deployment services to merchants in other customer segments (including convenience stores, service stations, supermarkets, shopping centres, cafes/restaurants, and utilities); and
- (b) in respect of the supply of ATM transaction services to cardholders, nearby financial institution ATMs (this is acknowledged by the AHA in the AHA Application).

On a broader market definition, DC Payments faces significant competition both from other independent ATM deployers and ATMs deployed by financial institutions, as well as the above-mentioned alternative methods of obtaining access to cash and payment technologies.

However, for completeness, DC Payments notes that even if the ACCC were to consider the AHA Application in the context of a narrower field of competition, focusing on the supply of ATM deployment services to the hospitality merchant segment, it remains the case that DC Payments is subject to competitive constraint from several large independent ATM deployers and a large number of small independent ATM deployers, as detailed below.

4.5 **DC Payments faces vigorous competition from other ATM deployers and does not have a substantial degree of market power**

AHA states in the AHA Application that:

"On the supplier side, AHA members face large monopoly or oligopoly suppliers and hence collective action is vital. AHA...faces a market structure where suppliers have substantial market power and are able to dictate unfavourable terms and conditions."

DC Payments is not a monopoly or oligopoly supplier, nor does it have substantial market power that enables it to dictate unfavourable terms and conditions.

As at 31 January 2017, DC Payments' fleet consisted of 10,943 ATMs deployed across Australia. This equates to approximately one third of ATMs deployed in Australia. ATM fleets of financial institutions, other large independent ATM deployers and small independent deployers account for the remaining two thirds of ATMs deployed in Australia.

The table below lists the major ATM deployers operating in Australia, which compete with DC Payments in the deployment of ATMs to merchants and the supply of ATM transaction services to cardholders:

Table 2: Major ATM Deployers²¹

Financial Institutions	Large Independent ATM Deployers
CBA and Bankwest	BankTech/ CashConnect
Westpac and St George	Next Payments
NAB (rediATM)	Cashpoint Payment Solutions
ANZ	Stargroup
Suncorp	
Bendigo Bank	
BOQ	
Citibank	
Credit unions, building societies and other financial institutions – rediATM network (administered by Cuscal)	

In addition to the above competitors, there are many small independent ATM deployers, which own one or a few ATMs, and deploy those machines at merchant sites in particular geographic locations (**Small IADs**). These Small IADs collectively account for more than 1,300 ATMs.

While Small IADs do not compete with DC Payments in respect of multi-ATM or multi-site deployment to larger merchants, they exert considerable enduring pressure on DC Payments in respect of sites in particular geographic locations, as they typically have very low overhead costs and can offer a tailored, personalised offering.

Specifically, in the Gaming merchants and the Pub/Hotel/Club segments in which AHA members operate, DC Payments faces competition from the following competing independent ATM deployers:

- (a) **Banktech / CashConnect**, with over 2,500 ATMs deployed in hotels and clubs across Australia;
- (b) **Next Payments**, with approximately 1,080 ATMs in its fleet;
- (c) **Cashpoint Payment Solutions**, with an estimated 500 ATMs in its fleet;
- (d) **Stargroup Limited**, with an estimated 365 ATMs in its fleet; and
- (e) for small merchants requiring a single ATM, a number of small independent ATM deployers.

AHA members who do not wish to acquire ATM deployment services from DC Payments are able to acquire those services from the above competing independent ATM deployers, and are able to readily bypass DC Payments.

The AHA has indicated to DC Payments in the context of negotiations (discussed in more detail in section 5 below) that some of the above ATM deployers (including relevantly Banktech, Next Payments and Cashpoint) have "adopted" the AHA NSW's standard form ATM Agreement and are willing to supply customers on the terms of that agreement.

²¹

In this table, we have included ATM Deployers who have more than 350 ATMs.

It is therefore erroneous to suggest that AHA members are "put in a 'take it or leave it' position" and do not have the ability to switch. Not only do they have the ability to switch to other ATM deployers at the expiry of their existing contracts, but they have the ability to switch to large ATM deployers who are willing to offer services on the AHA's standard for ATM Agreement.

It is clear that merchants, including those in the hospitality segment, are able to bypass DC Payments, and that this is a source of countervailing power. This is consistent with the ACCC's previous findings that merchants have strong countervailing power in negotiating their supply contracts with ATM deployers, primarily due to the number of alternative deployers in the market.

For completeness, DC Payments submits that barriers to entry and expansion in the supply of ATM deployment services are low, consistent with the ACCC's findings in relation to ATM markets in the context of earlier transactions and authorisations. The threats of new entry and expansion further constraint DC Payments' ability and incentive to offer unfavourable or uncompetitive terms to merchants.

The fact that DC Payments faces these competitive pressures is evidenced by the fact that its commissions / rebates paid to merchants on a per withdrawal basis have, on average, increased consistently year on year since 2012 (effectively eroding DC Payments gross revenue margin).

These outcomes are consistent with those that would be expected in a competitive market, and contradict any suggestion that DC Payments has a substantial degree of market power, leading to higher prices and poor service outcomes, with consequent disadvantages for consumers.

5. **NEGOTIATIONS BETWEEN THE AHA AND DC PAYMENTS**

DC Payments has been in protracted negotiations with the AHA since November 2016 in relation to concerns raised by the AHA regarding DC Payments standard form ATM Agreement. These negotiations remain on foot.

The AHA first approached DC Payments on 21 November 2016 and indicated that it had concerns with several clauses in DC Payments' standard form ATM Agreements, which it regarded as "patently unfair".

DC Payments engaged with the AHA in good faith, in the appreciation that the AHA represents a substantial proportion of its existing and prospective customer base, with a view to addressing its concerns. This is notwithstanding that:

- (a) the AHA does not have authority to determine whether a term is "unfair" or not – only a Court or Tribunal can make such a determination, based on a comprehensive assessment of all relevant circumstances;
- (b) the AHA's assertions related to DC Payments' 'old' terms (ie those which preceded the amended suite of ATM Agreements which DC Payments had introduced having regard to the commencement of the Small Business Unfair Contract Terms Regime on 12 November 2016); and
- (c) when the AHA first approached DC Payments, the AHA was not authorised to collectively boycott DC Payments, nor had it submitted the AHA Application.

[c-i-c] [c-i-c]

The negotiations so far reflect the outcomes one might expect in a competitive market – that is two counterparties meaningfully negotiating, with concessions and compromises made along the way. Importantly, these outcomes have been achieved without the AHA

being authorised to engage in collective boycott - clear evidence that the AHA Application is not justified and ought to be rejected.

6. LACK OF CLARITY REGARDING APPLICANTS AND CONDUCT FOR WHICH AUTHORISATION IS SOUGHT

The AHA Application is entirely unclear as to who the applicants are and how the "collective boycott" referred to in the application will work. DC Payments submits that the ACCC should not authorise the conduct as described.

Specifically, the AHA Application is unclear regarding:

- exactly who the applicants are;
- who will be conducting negotiations with DC Payments;
- who will determine whether there is a "satisfactory outcome" or whether a "collective boycott" should be instituted;
- what outcomes would not be satisfactory; and
- who may participate in boycott arrangements.

The membership of the AHA is not disclosed. The AHA's Application states that "AHA members are essentially small businesses". This is not correct. For example, the membership is described on the AHA NSW website as including small owner-operated hotels and bars and large multi hotel groups. Australian Leisure and Hospitality Group is a member of the AHA. It operates approximately 300 licensed venues and on no view could it be regarded as a small business. The make-up of the membership of the AHA goes directly to the issue of whether there is any imbalance in bargaining power. The information supplied by the AHA does not permit the ACCC to make any informed assessment of that issue.

The Application is confusing as to the potential participants in possible boycotts. For example, in the section of the AHA Application titled "The suggested process", after acknowledging that "it is not known how many will be part of the boycott", the AHA suggests that "the AHA National Office may advise members on a national basis" but then goes on to say that its intention is that "no potential boycott group will be larger than one AHA Branch with the exception of the NSW/ACT Branches". There is no indication as to what may constitute a boycott group. In these circumstances the application for interim authorisation should be assessed by the ACCC on the basis that it would permit all members of the AHA across Australia to "boycott" DC Payments.

The description of the proposed arrangement which would constitute a "boycott" is also quite unclear. In the Form A, the conduct is described as a "boycott from *dealing with DC Payments in relation to the supply of ATM services* to AHA members". Other parts of the AHA Application refer to concerns relating to "new agreements flowing from the Cashcard acquisition". In "The suggested process" section of the AHA Application, the AHA states that it intends to suggest that:

- "members hold off entering into any new or revised contracts"; and
- if "there is no satisfactory outcome in the negotiations", "*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."

Correspondence provided to DC Payments by its customers, as well as correspondence provided by the AHA to DC Payments directly, suggests that the AHA is already engaging in the conduct for which it is seeking authorisation. For example, in an email sent on 21

November 2016 addressed to undisclosed members, Sean Morrissey of the NSW branch of the AHA directed members "who have not as yet signed the renewal and amendment [agreement to] refrain doing so..."²².

It is unclear whether:

- the AHA National Branch will be conducting negotiations for all the AHA Branches or if it is anticipated different state branches within the AHA may have different objectives requiring DC Payments to conduct multiple negotiations for the AHA's varying member groups;
- the determination of whether the outcome of any negotiations conducted by the AHA National Branch or one of its State branches will be deemed to be successful by the AHA National Branch or some other body; and
- for example, it is intended that the authorisation would permit AHA members who have unexpired contracts with DC Payments to agree with each other to cease dealing with DC Payments.

Clearly, collective breach of contract is not something that can be authorised by the ACCC, but the AHA Application is quite confusing in this regard. [c-i-c] [c-i-c]

DC Payment submits that the description in the AHA Application of the provision of a contract, arrangement or understanding (ie the boycott) is so uncertain that it cannot be authorised.

7. THE FUTURE WITH AND WITHOUT

Given the lack to clarity in the AHA Application, as outlined above, it is extremely difficult to postulate a "future with" the conduct. However, one plausible possibility (given the manner in which the AHA has conducted negotiations with DC Payments to date) is that:

- (a) the AHA will issue a directive to its members to not deal with DC Payments because one or more of its demands (however fanciful) is not satisfied;
- (b) DC Payments will lose prospective customers who are AHA members and existing customers who may choose to not renew their contracts with DC Payments. Given the breadth of AHA membership, this may be a significant proportion of DC Payments' customer base;
- (c) some customers may not appreciate that the AHA's directive to not deal with DC Payments does not override their contractual obligations, and may cease performing their obligations under their ATM Agreements with DC Payments, resulting in breach of contract and associated consequences (including potentially damages and legal costs);
- (d) other associations or merchant groups are likely to insist that DC Payments deal with them on alternative terms rather than DC Payments' standard form terms, given the 'AHA precedent';
- (e) with the introduction of different terms for different merchant groups, the efficiencies that DC Payments derives from contracting on standard terms will be eroded;

²² See email from Sean Morrissey to undisclosed "Members", dated 21 November 2016, which was enclosed in the AHA Application.

- (f) DC Payments will incur increased costs associated with training sales reps and customer service staff about rights and obligations under different contracts, and there may be quality implications (eg from a customer service consistency perspective). DC Payments will also incur legal costs associated with pursuing contract breaches, if the circumstances in paragraph (c) above eventuate;
- (g) if DC Payments loses a substantial proportion of its prospective and existing customer base, its average costs will increase, and it may look to recoup these costs by increasing surcharges or reducing the proportion of surcharge payable to merchants.

The "future without" can be taken as the status quo. Relevantly:

- (a) DC Payments will offer to customers ATM services on its current standard form terms (as amended from time to time);
- (b) [c-i-c]
- (c) [c-i-c] and
- (d) AHA members (and other customers) who do not wish to deal with DC Payments on its standard form terms can seek to negotiate with DC Payments or contract with Banktech/Cash Connect, Next Payments, Cashpoint Payment Solutions, Stargroup or another independent ATM deployer.

8. THE APPLICANTS HAVE FAILED TO DEMONSTRATE A NET PUBLIC BENEFIT FOR COLLECTIVE BOYCOTT CONDUCT GIVEN COMPETITIVE ALTERNATIVES

8.1 No evidence to substantiate the AHA's alleged public benefits

As the ACCC is aware, the AHA is currently authorised to collectively negotiate with DC Payments (pursuant to ACCC Authorisation A91513) and has been doing so. The AHA is able to conduct those collective negotiations on behalf of its members and inform its members of the outcome of those negotiations. Those members can then decide whether to contract with DC Payments or with an alternative supplier.

It appears, although as we note above it is not clear, that what the AHA is now seeking is authorisation:

- (a) to instruct its members not to acquire ATM services from DC Payments; and
- (b) for the members to agree with each other not to acquire services from DC Payments.

Assuming this is the intent, as noted in the Initial Submission and above, AHA members who do not wish to acquire ATM deployment services from DC Payments are able to acquire those services from the following independent ATM deployers, and thus bypass DC Payments:

- (a) Banktech / CashConnect;
- (c) Next Payments;
- (d) Cashpoint Payment Solutions;
- (e) Stargroup Limited; and
- (f) for small merchants requiring a single ATM, a large number of small independent ATM deployers.

As noted above, the AHA has informed DC Payments that at least some of the above independent ATM deployers are already offering services based on the AHA NSW ATM standard form agreement. [c-i-c] [c-i-c]

It is clear that AHA members, by its own admission, can currently acquire ATM deployment services from other ATM deployers on the terms of the AHA's pro forma contract if they wish to contract on those terms. In these circumstances there is no justification for any collective boycott of DC Payments. There are no meaningful public benefits that would outweigh the anti-competitive detriment of a collective boycott by customers of a supplier operating in a competitive market.

The only public benefits on which the AHA relies in support of the Application are those in the "Public benefits" section of the AHA Application. Those benefits are the public benefits accepted by the ACCC in its earlier decision granting authorisation to the AHA to collectively bargain with various suppliers:

- (a) transaction cost savings; and
- (b) improved input into contracts.

There is, however, a considerable difference between the AHA having "improved input into contracts" and the AHA insisting that its standard form contract must be adopted. The latter is not a public benefit because AHA members can already enter into contracts on those terms with other ATM deployers.

[c-i-c] [c-i-c]

Furthermore, the AHA asserts that it cannot achieve the alleged "benefits" without the threat of a collective boycott. This is a broad assertion, without any factual basis – as described above in section 5, DC Payments has been forthcoming in negotiations with the AHA, and has sought to address the AHA's concerns regarding DC Payments' pro forma agreements. There is nothing to suggest that the AHA would be able to secure improved terms and conditions if the AHA Application was authorised.

Finally, to the extent that any benefits are said to arise for AHA members, the AHA has not demonstrated how such benefits might flow through to the broader community and be sustained over time, rather than accruing to AHA members. DC Payments submits that to the extent any such benefits exist, they ought to be given little weight.

8.2 Failure to take into account likely public detriments

The AHA Application is silent on potential public detriments associated with the conduct for which it seeks authorisation, despite the fact that it is well understood that collective boycott conduct is likely to lead to competitive harm.

The scope of the proposed conduct, as unclear as it is, is very broad and the size of the potential boycott group is very large. As noted above in section 7, there is a real chance that in the "future with" the conduct for which authorisation is sought, the following public detriments will arise:

- (a) **Damage to DC Payments** – DC Payments will lose prospective customers and existing customers who may choose to not renew their contracts with DC Payments, which may constitute a significant proportion of its customer base, with a corresponding impact on its revenue and profitability;
- (b) **Confusion for customers and potential breach / damages actions:** some customers may not appreciate that the AHA's directive to not deal with DC Payments does not override their contractual obligations, and may cease performing their obligations under their ATM Agreements with DC Payments,

resulting in breach of contract and consequent legal action (and associated consequences, including potentially damages and legal costs); and

(c) **Flow on effects (significant detriment and disruption to DC Payments, as well as potential price and quality implications for its customers and cardholders):**

- (i) other associations or merchant groups are likely to insist that DC Payments deal with them on alternative terms rather than DC Payments' standard form terms, given the 'AHA precedent';
- (ii) with the addition of contract variations for different merchant groups, the efficiencies that DC Payments derives from contracting on standard terms will be eroded;
- (iii) DC Payments will incur increased costs associated with training sales reps and customer service staff about rights and obligations under different contracts, and there may be quality implications (eg from a customer service consistency perspective). DC Payments may also incur additional legal costs if customers cease performing their legal obligations under their existing contracts in response to directives by the AHA to "not deal with DC Payments";
- (iv) if DC Payments loses a substantial proportion of its prospective and existing customer base, its average costs will increase, and it may look to recoup these costs by increasing surcharges or reducing the proportion of surcharge payable to merchants; and
- (v) A collective boycott by the AHA (including the outcomes described above) will have a negative impact on DC Payments' business projections, return on capital investment, suppressing future investment in Australia.

The AHA has failed to address any of the above detriments in the AHA Application.

8.3 **The AHA has not demonstrated that public benefits are sufficiently substantial and outweigh any public detriments**

The AHA has failed to demonstrate that the claimed public benefits are sufficiently substantial and outweigh any public detriments.

The AHA has:

- (a) not adduced any evidence to show that there is a real chance of improved market outcomes as a result of the collective boycott authorisation (particularly compared to the status quo, given DC Payments' willingness to address the AHA's concerns), or the claimed public benefits (as distinct from those that might be said to arise from collective negotiation); and
- (b) failed to take into account the likely public detriments, including the adverse impact on DC Payments and implications for its customers and cardholders in the longer term.

9. **THE ACCC SHOULD NOT AUTHORISE THE CONDUCT AS DESCRIBED**

DC Payments submits that the ACCC should not authorise the conduct as described in the AHA Applications because:

- (a) the AHA has failed to adequately and clearly articulate:

- (i) the conduct for which authorisation is sought, including the size and coverage of the boycott group, and scope of activities;
 - (ii) the "future with" the conduct for which authorisation is sought (ie its foreseeable outcome) and "future without" the conduct;
 - (iii) the public benefits of the conduct (as distinct from public benefits arising from the collective bargaining activity authorised pursuant to ACCC Authorisation Determination A91513);
- (b) there is a real chance that the conduct for which authorisation is sought (loosely defined, as it is) is likely to result in public detriment; and
- (c) there is no evidence to suggest that the alleged public benefits are sufficiently substantial and outweigh the public detriments.

Ashurst Australia