

Our ref: NMMB:DR:181640

Your ref: CB100000458

14 November 2018

Australian Competition & Consumer Commission

Adjudications Branch

Attn: David Hatfield & Simon Bell

GPO Box 3131

CANBERRA ACT 2601

By Email: adjudication@accc.gov.au

Dear David and Simon,

Re: Collective Bargaining Notification CB 100000458 – KIS Transport

We act for Flip Technologies Pty Ltd (**Flip**) and refer to the Notification and your letter of 2 November 2018. This letter contains our client's response to the Notification.

Executive Summary

Flip has no objection to negotiating with KIS Transport Pty Ltd (**KIS**) on behalf of itself and the other named freight brokers (**Notifying Parties**) with respect to the various non-price related terms identified in the Notification.

However, for the reasons set out below, we consider that the Notification is misconceived. Flip also has several concerns with respect to various factual assertions contained in the Notification and these are also addressed below.

1. Background industry context

The domestic freight industry comprises the following key participants:

- *freight providers*. These include freight forwarders (businesses which unload, sort and consolidate the freight of one customer with that of others and then arrange its onward distribution of goods, and who may or may not fulfil the entire freight task themselves) or carriers, who physically pick up and deliver the freight. We use the term "carrier" to describe both freight forwarders and carriers;
- *customers*, being the beneficial owners of the freight which is to be delivered; and

- *freight brokers*, who serve as an intermediary between freight providers (i.e. carriers) and customers.

Typically, freight brokers do not actually carry any freight. Rather, a freight broker seeks to utilise their expertise and relationships to identify the most efficient freight solution for a given customer. The value proposition for a customer depends on a range of factors, including:

- the nature of their freight task (i.e. nature of package size – including variation in size of goods to be freighted);
- the size of the freight task (i.e. the number of consignments per week);
- the frequency of the consignments; and
- the broker's ability to identify the best solution to meet the customer's needs.

Most (if not all) of the time, freight brokers compete with carriers to provide a customer with an ongoing freight solution.

Customers with a regular freight task can choose to streamline their ordering and parcel pricing processes through the use of one of many approaches. While most of these involve logistics software, solutions can range from an excel based solution to a custom developed software solution. There are many software companies which have developed software solutions to assist in the pricing process and the placement of orders.

2. Flip's business

As noted in the Notification, Flip facilitates¹ the provision of a web-based platform to enable freight brokers to offer freight pricing to their customers. However, unlike the example in the Notification, the platform is not analogous to that of booking.com. The platform does not source or gather prices offered by different carriers and offer them to prospective brokers or customers. Unlike booking.com, the platform is not an online marketplace.

Rather, the platform is effectively a software solution which helps customers to perform their role in the transport of freight, having regard to previously agreed rates and carriage terms. Customers who are consigners of goods can arrange the transport of their freight by interfacing with carriers and customers who are freight forwarders or brokers can liaise with both consigners of goods and carriers. The broker negotiates specific rates for its customers and has those rates uploaded onto the platform. The customer then accesses the platform to place orders directly with the carrier, utilising the pre-negotiated rates.

Flip is seeking to offer new licence agreements to freight brokers in the form of a Software as a Service Licence Agreement (**SaaS Agreement**).

3. Market definition

For the purpose of responding to various assertions in the Notification (see section 4 below) we consider it useful to briefly address the question of market definition.

¹ Due to historical contractual arrangements, Flip facilitates the provision of these services to brokers. It is presently seeking to enter into arrangements with the brokers to directly provide these services.

In Flip's submission, there are two relevant functional markets related to the notified conduct. The first market is that in which freight brokers participate. Freight brokers actively pursue customer accounts in the same way that carriers do. Similarly, large customers often approach freight brokers for a proposal at the same time as they approach a carrier. Brokers act as a competitive constraint on carriers and vice versa. As such, Flip submits that the first relevant functional market is a freight carriage market.²

The second market is a global market for the development and licensing of software. This is supported by the fact that, on the supply-side, software solutions can be – and are – regularly developed by existing software producers to target new opportunities across industry sectors globally. Many of the current suppliers of similar products are global software companies.

Further, companies seeking a software solution – whether for logistics or otherwise – can develop the software in-house, or out-source the development task to any number of software developers. Web-sites such as Fiverr, Upwork and Freelancer (among many others) have all been developed to enable small to medium businesses to access the skills necessary to develop software solutions at a cost-effective price.

4. Disputed propositions in the Notification

Flip rejects many of the positive assertions contained in the Notification. Without addressing these exhaustively, we address some of Flip's key concerns below.

Flip rejects the proposition at paragraph 3.1³ that it possesses a monopoly (or virtual monopoly) in any relevant market. The services currently supplied (and intended to be supplied by Flip under the SaaS Agreement) are no different to those supplied via dozens of logistics software products currently available on the market (excluding consideration of alternative solutions, such as Excel or developing a new product). In Flip's submission, Flip does not possess substantial market power in any relevant market.

In the face of these facts, Flip can only speculate as to why the Notifying Parties assert that they are dependent on Flip's services. However, it considers that part of the reason may be less about the services and more about the historical price charged for the services. A recent strategic review of the pricing of the services revealed that the services have been provided to third parties at a significant loss for several years. As a result, it may be the case that Flip's customers' reliance on low pricing (which is loss-making for Flip) and their inability to identify any similarly priced alternative, have led to them incorrectly view their historical good commercial fortune with dependence in a market power sense⁴.

Notwithstanding Flip's position that it is prepared to negotiate in good faith on the basis described above, Flip rejects the suggestion (at paragraph 3.1) that it has ever agreed to collective bargaining or the scope of such bargaining.

Further, to the extent that it is implied, Flip rejects the suggestion (at paragraph 3.2) that it will continue to supply the services until such time as it comes to an agreement on common terms under the SaaS Agreement. Ultimately, a decision to continue to supply the services will depend

² It is submitted that the geographic scope of the market is national, or at least eastern Australia.

³ All paragraph references in this section are references to paragraphs of the Notification

⁴ It is also noted that even if (which is not accepted) the Notifying Parties were dependent on Flip, that does not necessarily lead to a conclusion that Flip possesses market power – it can equally point to the businesses being too small or inefficient to successfully compete in the relevant markets.

on both the parties' acceptance of the definition of the services to be supplied and the price to be paid for those services.

Flip notes the reference (at paragraph 3.3) to one of the rationales for the Notification being that it will enable customers to continue to access affordable freight broking services. Given that the scope of the collective negotiation does not cover price, it is not clear to Flip how the collective negotiation can be relevant to this rationale or deliver the sought-after outcome. In any event, the competitiveness of freight brokers relies on brokers' negotiation of competitive rates from carriers – the SaaS Agreement has no bearing on those negotiations.

Flip rejects the suggestion that FMH's control allows Flip to create artificial market conditions and charge higher prices to unrelated parties. This allegation is both without foundation (i.e. the related parties actually pay more than Flip's unrelated customers – perversely, on far higher volumes), and irrelevant. The drivers of competition in the freight market mean that Flip's conduct would have no impact on competition in any event.

For the reasons discussed above, Flip also rejects the assertion that the collective negotiation could have any impact on price competitiveness with respect to the supply of broking services to customers. Even if the collective negotiations addressed price (which they do not), price competitiveness is a function of the competition in the freight carriage market. The presence – or absence – of these brokers in the market is unlikely to have any bearing on competition.

Flip rejects the assertions at paragraph 9.1 with respect to data security as being without foundation. Flip's internal processes and procedures (and its commitment to compliance with competition law) ensure that sensitive third-party data is secure. Notwithstanding this, Flip is prepared to discuss reflecting this in the SaaS Agreement.

Flip rejects the proposition as to new entry being unlikely (paragraph 9.2). The barriers to freight broking are few and low. To commence business as a freight broker, a business need only to acquire rates from carriers and then offer those to prospective customers. Flip is not aware of carriers refusing to provide rates to new brokers – in fact, doing so would not make sense commercially, as any customer not currently serviced by a carrier would present incremental revenue for that carrier.

Further, it is not clear to Flip how any collective bargaining in relation to the SaaS Agreement would facilitate new entry.

5. Concerns about some of the proposed "common terms"

As noted above, Flip is happy to negotiate with KIS (on its behalf and for the other freight brokers) in relation to non-price matters, including some common terms. Flip also recognises that jointly negotiating some of the non-price terms is far more efficient than separately negotiating those terms with each broker. However, Flip is concerned that several of the proposed common terms are inextricably linked to price.

For example, it is well and good to negotiate standard service level and quality arrangements. However, different levels involve different risks and costs and will have varying degrees of impact on the price of the services supplied under the SaaS Agreement.

Where these terms are negotiated in the absence of price negotiation, this may be a pointless exercise, as subsequent price negotiations may involve parties departing from these terms and seeking to negotiate new terms.

Ultimately, these are commercial issues between the parties, although Flip is concerned about the inefficiency of negotiating some of these terms in a vacuum from price negotiations.

6. No public benefit

As noted above, freight brokers are constrained by both other freight brokers and, more importantly, carriers. As the carriers compete directly with brokers and represent the ultimate input being “brokered” by the freight brokers (given that brokers operate on a “cost plus” model), the carriers are the key constraint on all brokers and the drivers of competition more generally.

Given that the notified conduct relates to a small number of brokers and has no price element, Flip submits that the notified conduct has no competitive impact and no associated public benefit.

Flip rejects the assertion (at paragraph 10) that the continued choice of a number of freight brokers ensures a competitive marketplace. It is unclear to Flip how the collective negotiation of the relevant non-price terms could impact on competition. Further, it is Flip’s submission that neither the presence nor absence of the brokers is likely to have any impact whatsoever on competition for the carriage of freight. As such, Flip submits that there is no public benefit associated with the notified conduct.

7. Section 93AB

Section 93AB of the *Competition and Consumer Act 2010 (Act)* applies to conduct which would either constitute cartel conduct (under s45AD(2) or 45AD(3)(a) or (b) of the Act) or conduct in contravention of s45(1)(a) or (b) of the Act.

Given that the notified conduct is defined to explicitly exclude pricing (see paragraph 3.1 of the Notification) and collective boycotts (see paragraph 2.3 of the Notification), it is not clear how the relevant conduct could fall within s45AD(2) or (3) of the Act. Further, for the reasons set out below, it is also evident, in Flip’s submission, that there could be no contravention of s45(1)(a) or (b) of the Act. In the circumstances, it is not clear how the proposed arrangement is of a kind which is governed by s93AB of the Act.

8. Conclusion

As noted above, Flip has no objection to collectively negotiating at least some of the non-price terms of the SaaS Agreement with the Notifying Parties. However, it remains of the view that the Notification is misconceived.

Yours faithfully

Pointon Partners Pty Ltd

