

Application for Authorisation

Hertz, Avis, Thrifty and Budget

Date: 25 August 1999

Authorisation No:
A90687

File No:
C1999/41

Commissioners:
Fels
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Jones
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Martin

7. Conclusions

The Commission is not satisfied, in all the circumstances, that the proposed conduct would result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public constituted by the lessening of competition arising from the proposed conduct.

For the reasons outlined above, the Commission dismisses the application.

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1. The application

1.1. Introduction

On 19 May 1999 the Commission received an application for authorisation from Hertz Australia Pty Ltd on behalf of itself and WTH Pty Ltd (trading as Avis Australia), Budget Rent A Car Australia Pty Ltd, and Kingmill (Australia) Pty Ltd (trading as Thrifty Car Rental).

The application was made under s. 88(1) of the *Trade Practices Act 1974* (“the Act”) and seeks authorisation for the applicants to negotiate collectively the following aspects of car rental concession agreements at Sydney Airport with Sydney Airports Corporation Limited (SACL):

- clauses 5.18 and 5.19 of the proposed Car Rental Desk Site Licence relating to SACL’s fair pricing policy and the ability of the applicants to pass on increased costs resulting from the proposed new charging system at Sydney Airport; and
- the number and location of parking bays allocated by SACL to the applicants.

The applicants submitted that collective “negotiations must include both matters as the former cannot be considered unless in the context of the services provided” (submission, page 7).

The applicants also want the ability, through the application, to agree between themselves not to purchase car rental concessions from SACL should they be unable to reach a mutually acceptable agreement on the issues. That is, to collectively boycott SACL.

1.2. Background to application

The applicants currently provide car rental services at Sydney Airport. They have desk sites in the international and domestic terminals and varying numbers of “ready bays” in the international and domestic terminal car parks. Together, they account for almost 70 per cent of the Australian car rental market. They account for the vast majority of rentals originating from Sydney Airport, although there are a small number of off-airport operators (eg Red Spot, Network, etc) that also provide car rental services.

In April 1999 SACL invited tenders for the provision of car rental services at Sydney Airport for a further five years. The tender documents propose a number of changes from current operations, including:

- An increase in the number of on-airport operators from 4 to 6;
- An increase in the number of off-airport operators from 4 to 10;
- A change in the way in which the Minimum Guaranteed Amount (MGA) payable to SACL is calculated;

- Provision for SACL to levy the operator either the MGA tendered by them or 10 per cent of their airport rental revenue, whichever is the greater;
- A requirement for operators to charge the same for rentals originating at the airport as they charge at metropolitan Sydney outlets (SACL's so called fair pricing policy);
- An increase in the price of ready bays of approximately 70 per cent in the first year; and
- The re-location of domestic terminal "ready bays" (ie where customers collect their car from) to the eastern car park.

The changes to the charging system are of concern to the applicants because they believe they will result in substantial increases. SACL disputes this. The main elements are detailed below:

Item	Current system	Proposed system
Turnover fee	5% of airport rental revenue	10% of airport rental revenue
Desk space in international terminal	Charged at approximately \$1200 per square metre	Included in turnover fee
Desk space in domestic terminals	To be negotiated with QF/AN	To be negotiated with QF/AN
Parking ready bays	Priced at 85% of \$15 - the 1993 daily rate for casual parking	First 45 bays (30 domestic and 15 international) included in turnover fee. Each additional bay at 80% of casual daily rate (\$27 now), rising to 100% of casual daily rate by end of lease.
Access fee	\$165,000 per annum	No longer applicable

Source: SACL

SACL's fair pricing policy was introduced in 1990 as a result of perceptions by airport users that goods and services at the airport were "expensive". The policy seeks to ensure that prices at the airport are no higher than either manufacturers recommended retail prices or the lowest price charged by any comparable retail outlet in Sydney for goods or services of a similar type or quality. It submitted that "the policy is applied to retail and food outlets within the Terminal and a similar principle has been applied to the letting of space in International Terminal Buildings (rents charged are comparative to fringe Sydney central business district buildings)". The underlying implication is that if prices charged by SACL to concession holders are similar to those the concession holder would face in a fringe CBD location then the concession holder should charge customers prices similar to that it would charge at a fringe CBD location.

Subsequent to the application being lodged, SACL modified its tender documents. Of direct relevance to the application are the following changes:

- removal of clauses 5.18 and 5.19; and
- a decision to keep ready bays in the western car park instead of relocating them to the eastern car park.

These two changes would appear to address the concerns of the car rental companies and remove the basis for dispute between the two parties.

2. Submissions

A complete copy of each non-confidential submission is contained on the Public Register. A copy of each confidential submission is contained on the Commission's confidential register. A summary of the principle points is provided below.

2.1. The applicants

The applicants submitted that authorisation was warranted because the public benefits would more than outweigh any anti-competitive detriment from the proposed conduct. They argued that the fair pricing clauses were economically inefficient because it prevented them from passing the true cost of providing car rental services at Sydney Airport on to the consumer of those services and would result in a cross subsidy within their operations. They also argued that the relocation of ready bays and increased charge for ready bays would damage their businesses and cause consumer detriment. For example, users would have to walk further to collect cars and a decrease in the number of ready bays would increase the cost of operation (by requiring more frequent movement of vehicles and more staff to move them) which would have to be passed on to consumers. The applicants submitted that SACL had refused to amend its tender documents in relation to these two matters and that the only way to achieve the objectives would be through collective negotiation and threat of a collective boycott.

The applicants provided the Commission with confidential financial information concerning the profitability of rental car operations at Sydney Airport in support of their application.

Following changes made by SACL to the tender documents as described in section 1, the applicants were invited to make a further submission. They chose not to do so.

2.2. Other submissions

Submissions were received from SACL, Brisbane Airport Corporation, Ansett Australia, Board of Airline Representatives in Australia (BARA), Melbourne Airport and Perth International Airport.

SACL opposed the application. It submitted that there are no public benefits arising from the proposal; the fair pricing policy protects consumers from unreasonable prices at the airport; and that the relocation of ready bays was required to facilitate better public transport access (eg improved taxi and bus pick up and drop off arrangements). It subsequently submitted that airport operators raised safety issues associated with the proposed rearrangement of public transport arrangement and that the proposals had to be deferred, thus enabling car rental companies to remain in the western car park.

BARA and Ansett submitted that SACL possesses substantial market power in its dealing with airport operators.

In general, airport operators argued that it is reasonable to price car parking spaces on an opportunity cost basis; the application may disadvantage potential new entrants such as National and Europcar; and that revised charging arrangements may actually assist the smaller operators.

3. Statutory criteria

Application A90687 was made under s.88(1) of the Act and seeks authorisation for the applicants to make, and give effect to, an arrangement or agreement which may have the effect of substantially lessening competition.

Section 88(1) of the Act enables the Commission to grant authorisation for agreements which would, or might have the effect of substantially lessening competition.

The statutory test which the Commission must apply in considering whether or not to grant authorisation to the proposed arrangement is set out in s.90(6) of the Act. Section 90(6) provides that in considering an application for authorisation the Commission shall not make a determination granting an authorisation unless it is satisfied, in all the circumstances, that the proposed conduct would result, or be likely to result, in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result.

Should the benefit to the public (or expected benefit to the public) outweigh the anti-competitive aspects, the Commission may grant authorisation or grant authorisation subject to conditions.

If that is not the case, the Commission may refuse authorisation or alternatively, in refusing authorisation, indicate to the applicants how the application could be restructured to change the balance of detriment and public benefit so that authorisation may be granted.

4. Draft Determination

On 28 July 1999 the Commission issued a Draft Determination proposing not to grant authorisation. It provided a copy of the Draft Determination to interested parties and gave them until 12 August 1999 to request a pre-decision conference. No such request was received and no further submissions were received.

5. The Commission's assessment - competitive effect

5.1. Market definition

The first step in assessing the competitive effects and the public benefit/detriment of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.

Markets generally

Section 4E of the Trade Practices Act states that a market for goods or services includes other goods or services that are substitutable for, or otherwise competitive with, the first goods or services¹. The courts have established that both demand and supply side substitution must be taken into account in determining the relevant market. *QOMA*² is often cited when seeking to explain how markets are defined:

A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them... Within the bounds of a market there is substitution between one product and another and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive... Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance and cost and price incentives.

It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction?

In establishing the market boundaries, the Commission seeks to include all those sources of closely substitutable products, to which consumers would turn in the event that the firm attempted to exercise market power. The Commission looks at both the demand and supply side of the market and defines up to four different dimensions:

- geographic market - which may be local, state, national or international depending on where trade occurs;
- product market - based on whether products are close substitutes for one another;
- functional market - defines at what level the conduct in question occurs, eg retail or wholesale;
- temporal market, ie - what period of time does the analysis apply to? The next two years? The next ten?

¹ The Commission identifies the relevant market by determining the smallest area over which a profit maximising monopolist would impose a "small but significant and non-transitory increase in price" (SSNIP), or equivalent exercise of market power. By including all substitution possibilities, the process of market definition identifies all the sources of competition that effectively constrain the price and output decisions of the relevant entities. Market definition is not an end in itself but rather a tool of analysis. The market must be defined only to the extent necessary to determine the effect of the proposed conduct on competition.

² *Re Queensland Co-op Milling Association Ltd & Defiance Holdings Ltd* (1976) ATPR 40-012.

If market boundaries are too narrow so that actual or potential sources of competition are excluded then the proposed conduct will appear to have greater anti-competitive effect than is actually the case. On the other hand, the market may be defined too widely to include products or geographic areas that are not close substitutes. In such circumstances the anti-competitive effects of the proposed conduct will appear to be weaker than they actually are.

The Commission's view

The Commission is of the view that the requirements of people renting cars at the airport are sufficiently different from users of other transport modes that the degree of substitutability is low. For example, while a rental car may be used by a business traveller who needs to travel to and from the city for a meeting as a substitute for a taxi, it is a relatively poor substitute. Hiring a rental car under such circumstances requires the traveller (normally from inter-state) to drive in an unfamiliar city, find parking, pay additional car parking costs and spend additional time in doing so. A taxi would be far more efficient in terms of both time and money. Conversely, while a traveller needing to travel to, say, four widely spread places in Sydney may be able to use public transport, the time and cost may be inefficient compared to renting a car. The Commission accepts that there may be some instances where the degree of substitutability is high, but it believes these are a minority.

With respect to the geographic market, the Commission believes it is greater than just Sydney Airport. The fact that off-airport operators exist and people are prepared to leave the airport before obtaining a rental car illustrates that substitution between on-airport and off-airport locations is possible. However, the size of the geographic market would appear to be limited to central and southern Sydney. For example, a traveller is most unlikely to get off a plane, travel to Gosford to rent a car and then drive to Hornsby or Chatswood. However, it is feasible for a traveller to get off a plane, catch a taxi or courtesy bus to Botany, Kingsford or Randwick even to pick up a rental car before continuing his/her journey to Hornsby.

While the Commission considers the market to be limited to rental cars within a relatively small geographic area within Sydney, it has not undertaken a detailed analysis of the market as the outcome of the application is not dependent on a precise definition in light of changes made by SACL to its tender specifications.

5.2. Effect on competition

The applicants views

The applicants argued that there would be minimal impact on competition because the proposed arrangement would enable them to price services according to the true cost of providing those services. It would also enable them to cease any cross subsidy in their operations between on-airport and off-airport rentals. This would enable them to price off-airport rentals according to market forces at the specific location. Thus they would be able to compete more effectively in off-airport rentals.

The applicants also submitted that the proposal would disadvantage them in relation to other transport modes at the airport, thus decreasing the level of inter-modal competition.

The Commission's view

The Commission has not addressed the potential anti-competitive effects of collective negotiation to remove the fair pricing clauses as it is no longer relevant.

In relation to the location and number of ready bays, the Commission is concerned that the proposed conduct involves the four main car rental companies and none of the other market participants. To permit collective negotiation in relation to the number and location of ready bays may well lead to the applicants obtaining the best located bays at the expense of potential new entrants. It may also help them entrench their market positions by securing a greater number of bays at the expense of new entrants. This would significantly reduce the ability of new entrants to compete.

While it may be argued that new entrants could compete by providing off-airport rentals, the Commission is not convinced that this would be in the best interests of the consumer. A greater number of on-airport operators should increase the level of competition at the airport and if the incumbents do not have (in their view) sufficient bays on-airport they may operate off-airport rentals as well.

The threat of a collective boycott by the applicants would, in the Commission's opinion, be of some concern to SACL. While it is a monopoly supplier of airport facilities, it also needs car rental companies operating on the airport to satisfy its customers' expectations. SACL argued that there is an expectation amongst travellers, particularly international travellers, that major international car rental operators would be at Sydney Airport. The applicants submitted that Sydney Airport represents a substantial proportion of the car rental business in Australia and that it is essential for the major franchises to operate at the airport. This would appear to confirm the view put by SACL that travellers expect the major car rental firms to be at the airport.

The Commission concludes that the proposed conduct may lead to a lessening of competition.

6. The Commission's assessment - public benefits

The Act requires the Commission to assess whether the public benefit arising from the proposed conduct outweighs any detriment that may arise from the conduct.

6.1. Claims made in submissions

The Commission has considered the claimed public benefit and detriment in the two broad areas of concern to the applicants.

Fair pricing policy

As noted in section 1, SACL has removed this requirement from the tender documents. Thus any public benefits claimed to arise from removing it have already been achieved and could not be attributed to collective negotiation in the future. The Commission concludes, therefore, that there are no public benefits arising from collective negotiation to remove the fair pricing clauses. Since SACL has removed these clauses, it is not necessary for the Commission to assess the public benefit or otherwise of a fair pricing policy.

While the decision by SACL to delete the fair pricing clauses from its tender documents has negated the need for the Commission to examine the matter closely, it would have reservations about granting authorisation to a collective negotiation arrangement for such a purpose.

Location of ready bays

As noted in section 1, SACL has decided to keep the domestic terminal ready bays in the western car park instead of relocating them to the eastern car park. The ready bays will be located on both the ground and first floor of the car park, thus giving the companies space on both arrival and departure levels. The additional distance from the domestic terminals over current arrangements is minimal. While the overall number of bays available to rental car companies will be lower, the Commission considers that there will not be any decrease in public benefit as any reduction arising from less rental bays will be offset by a corresponding increase arising from more bays being made available to the general public.

The Commission considers that SACL has adequately addressed the concerns of the rental car companies. It can see no public benefits arising from permitting the companies to collectively negotiate the location and number of ready bays given the changes made by SACL.

6.2. Conclusion on public benefit

The Commission concludes that there are no public benefits arising from the proposed conduct. It has reached this view on the basis that the two issues the applicants wanted addressed via authorisation of collective negotiation with SACL have been removed by SACL in its amended tender documents.

