



Determination

Application for Authorisation

lodged by

the Federal Chamber of Automotive Industries on behalf of its members

in relation to collective bargaining by motor vehicle suppliers with area
hire service providers.

Date: 20 April 2005

Authorisation no. A90937

Public Register no. C2004/1678

Commissioners:

Samuel
Martin
Willet
King
Smith

Executive Summary

On 21 October 2004, the Federal Chamber of Automotive Industries (the FCAI), on behalf of its members, lodged an application for authorisation (A90937) with the Australian Competition and Consumer Commission (the ACCC).

The proposed arrangements

The FCAI, on behalf of its members, seeks authorisation:

- for the FCAI to negotiate the terms and conditions of the supply of area hire services, including the area hire service charge, provided by area hire service providers and
- for the FCAI, its members and area hire service providers to enter into and give effect to agreements between the FCAI, its members and individual area hire service providers in respect of the terms of the supply of area hire services, including the area hire service charge, at a specified port.

Assessment of benefits and detriments

Generally, the ACCC considers collective bargaining agreements which set uniform terms and conditions (including charges) are likely to lessen competition. However, in this instance, the ACCC considers that there are a number of industry specific factors and features of the proposed arrangements which will serve to mitigate the effect on competition of the proposed arrangements. These features include:

- the market for area hire service is concentrated and has high barriers to entry
- there are currently no substitutes for area hire service providers
- participation in the proposed arrangements would be voluntary for all parties and
- the proposed arrangements do not include boycott activity.

The ACCC also considers that area hire service providers will continue to maintain a high degree of control over any contract negotiations (including the area hire service charge) with or without the proposed collective bargaining arrangements.

The ACCC considers that the proposed arrangements will result in some public benefit. In particular, the ACCC considers that, to the extent the proposed collective bargaining arrangements provide efficiencies through improving the input of FCAI members into contracts the proposed arrangements would be likely to generate a public benefit. The ACCC also considers that the proposed arrangements are likely to result in some cost savings which, given competitive pressures within the industry, are likely to be passed on to consumers.

Consequently, the ACCC concludes that the public benefits likely to result from the proposed arrangements will outweigh the anti-competitive detriment.

Determination

The ACCC therefore grants authorisation to application A90937 for a period of five years.

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1 Introduction

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.3 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this. The TPA requires that the ACCC then issue a draft determination in writing proposing either to grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.4 Once a draft determination is released the FCAI, or any interested party, may request that the ACCC hold a conference. A conference is generally called by a party dissatisfied with the ACCC's decision and provides interested parties with the opportunity to put oral submissions to the ACCC. The ACCC will also invite written submissions on the draft.
- 1.5 The ACCC then reconsiders the application taking into account the comments made at the conference and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment the ACCC may grant authorisation. If not, the authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefits and decrease the detriment.

2 Industry background¹

The automotive industry in Australia

- 2.1 According to data provided by the FCAI approximately 900,000 new motor vehicles are sold in Australia each year, of which approximately 360,000 are produced domestically. Total revenues from the sale of motor vehicles in Australia are approximately \$27 billion per year, of which motor vehicles manufactured locally² account for approximately \$17 billion.
- 2.2 The Australian motor vehicle industry employs approximately 55,000 people, of which approximately 26,000 are directly employed by the four local motor vehicle manufacturers which equates to around six percent of Australia's total manufacturing employment.
- 2.3 According to Austrade figures, the automotive industry is Australia's sixth largest exporter and contributes nearly \$5 billion a year to the Australian economy, an amount which has almost doubled in the past six years. Austrade note that a significant amount of this growth is attributable to vehicle sales to Saudi Arabia, United Arab Emirates, Kuwait, Republic of Korea, USA and New Zealand.

The FCAI

- 2.4 The FCAI is the peak industry organisation representing the automotive industry in Australia, its membership includes:
- Domestic motor vehicle manufacturers: Holden, Mitsubishi, Ford and Toyota.
 - Motor vehicle importers: Alfa Romeo, Audi, Bentley, BMW, Chrysler-Jeep, Citroen, Daihatsu, Ferrari, Fiat, Honda, Hyundai, Jaguar, Kia, Land Rover, Lexus, Maserati, Mazda, Mercedes-Benz, Mini, MG, Nissan, Peugeot, Porsche, Proton, Renault, Rolls-Royce, Rover, Saab, Subaru, Suzuki, Volkswagen and Volvo.
 - Motor cycles: Aprilia / Moto Guzzi, BMW, Ducati, Harley Davidson / Buell, Honda, MPE, Kawasaki, Polaris, Suzuki and Yamaha.
 - Other organisations: Federation of Automotive Products Manufacturers and Japan Automobile Manufactures Association.

The Australian stevedoring industry

- 2.5 Stevedoring services cover a wide range of activities such as loading and unloading of cargoes onto and off vessels, provision of storage facilities, maintenance and repositioning cargoes onto other vessels. Stevedoring is increasingly becoming part

¹ Information in this section is sourced from the FCAI, Austrade, BRW, Patrick Corporation and the ACCC Container Stevedoring Monitoring Report.

² There are four companies which manufacture motor vehicles in Australia: Holden Ltd, Toyota Australia Pty Ltd, Ford Motor Company of Australia Ltd and Mitsubishi Motors Australia Ltd.

of a vertically integrated transport logistics chain. In addition to stevedoring, the two major stevedores P&O Ports Ltd (P&O Ports) and Patrick Stevedore Holding Pty Ltd (Patrick) offer road and rail transport services.

2.6 There are four segments of the Australian stevedoring industry:

- container stevedoring, the loading and unloading of containerised cargoes
- bulk stevedoring, the movement of bulk commodities such as minerals and grains across the wharves
- break-bulk or general stevedoring, the loading and unloading of cargoes such as steel coils, and paper pulp which cannot easily be transported in containers and
- automotive stevedoring, the loading and unloading of vehicles.

2.7 In terms of volume, bulk stevedoring represents the largest component of the industry, but in terms of value of cargo processed through ports, container stevedoring represents by far the largest component of stevedoring. By contrast, automotive and general stevedoring represent small sectors of the stevedoring industry. The stevedoring firms P&O Ports and Patrick participate in container, general and automotive stevedoring, but not in bulk stevedoring.

2.8 Australian stevedoring companies lease berth space from the relevant port authority. Typically, the lease arrangements that underpin access to berth space are exclusive and long term ranging from 20 to 40 years which can provide a significant barrier to potential new entrants into all categories of stevedoring, including automotive (or area hire services), conducted within a port precincts. There are a number of features of Australian ports which make the introduction of competition into the Australian stevedoring market, including automotive stevedoring market, more difficult than other equivalent industries including:

- port facilities are often natural monopoly facilities due to the limited availability of suitable sites for deep water ports and the high sunk costs of provision of port infrastructure such as berths and channels
- there is no large single port in Australia, instead there are several medium sized ports
- there is limited inter-port competition due to the large distances between ports and relatively high land transport costs
- there is limited substitutability between automotive stevedoring and other forms of stevedoring such as container stevedoring. Transportation of vehicles in containers may result in excessive damage and require significantly more handling
- the incumbent automotive stevedores offer a national service which is likely to offer advantages to shipping lines and
- over the past few years, Australian container terminals located at the major capital city ports have experienced significant growth in the level of container throughput and there may be emerging capacity issues in this sector. Currently this has added pressure to the automotive stevedoring sector in growing

competition with container operators for limited port site resources. Similarly, automotive stevedores face urban encroachment of port land with increasing opportunity costs for land use, especially in Sydney.

2.9 On the other hand, factors that may facilitate entry into the automotive stevedoring sector include:

- there are less capital outlays required to invest in the automotive stevedoring sector than others
- there are less economies of scale since the function is reasonably labour intensive and it is also unlikely that there are significant economies of scope, particularly with jointly processing vehicles and containers and
- some ports such as the Port of Fremantle and Port of Adelaide provide common user berths to third party stevedores. The Port of Brisbane Authority has established a third party access regime for the newly established Australian Amalgamated Terminals (AAT) facility.

Area hire service providers

2.10 As mentioned, in Australia, there are two primary providers of the specific stevedoring services addressed in the FCAI's application (the provision of area hire services), each of which has approximately half the Australian stevedoring market³:

P&O Ports⁴ are, by volume, the fourth largest port services and container-handling business in the world, and the biggest in terms of the number of ports in which they operate. P&O Ports have 84 facilities in 19 countries and have three divisions in Australia, the largest of which is their ports division.⁵

Patrick⁶ have been operating in Australian ports since 1919 and are Australia's largest stevedore provider.⁷

2.11 Area hire services may also be provided by Toll Holdings Pty Ltd (Toll)⁸ and AAT, which is a joint venture company jointly owned by Patrick and P&O Ports.

³ BRW, 11-17 November 2004 (pg 72)

⁴ P&O was recently ranked Australia's 3rd largest transport company and 133rd overall in the BRW top 1000 rankings for 2003-2004.

⁵ BRW, 11-17 November 2004 (pg 72)

⁶ Patrick was recently ranked Australia's 6th largest transport company and 187th overall in the BRW top 1000 rankings for 2003-2004 (BRW, November 2004).

⁷ www.patrick.com.au

⁸ Toll was ranked Australia's 4th largest transport company and 60th overall in the BRW top 1000 rankings for 2003-2004 (BRW, November 2004).

Motor vehicle importing and exporting facilities

- 2.12 The FCAI submits that whilst Australia has harbour and port facilities in many of its capital and provincial cities, only a limited number of these have the capacity to handle the import and export of motor vehicles. Some of these ports only have a single supplier of stevedoring services with none having more than two. Table 1⁹ provides a snap shot of those ports that do have the capacity to handle motor vehicles:

Table 1: Movement of motor vehicles through Australian Ports 2003/4

| Port | Stevedore | MV Imports | MV Exports |
|--------------|--------------------|----------------|----------------|
| Melbourne | Toll, Patrick | 154,819 | 87,804 |
| Darwin | P&O Ports, Patrick | 7,474 | 0 |
| Adelaide | P&O Ports, Patrick | 23,227 | 34,608 |
| Sydney | AAT* | 164,125 | 0 |
| Brisbane | P&O Ports, Patrick | 134,934 | 3,842 |
| Fremantle | P&O Ports, Patrick | 48,435 | 99 |
| Townsville | P&O Ports | 8,212 | 0 |
| Total | | 541,226 | 126,353 |

* AAT is a facilities manager, which is a joint venture between P&O Ports and Patrick

Area hire services and charges

- 2.13 According to the FCAI the precise terminology used to describe *area hire services* and the *area hire service charge* varies across ports around Australia, however, for the purposes of this determination, they will be referred to as, and mean:

Area hire services: are the services supplied by area hire services providers (stevedoring companies) for the provision of facilities for the lay down of motor vehicles prior to, or after shipment, including the provision of storage of motor vehicles for a temporary period at facilities proximate to berths.

The area hire service charge: is the charge levied for area hire services on shipping lines by area hire service providers. The area hire service charge is then passed onto FCAI members by the shipping lines (i.e. the charge is not levied directly on FCAI members).

- 2.14 According to the FCAI the exact nature of the components of the area hire service charge are not well known, however, it is purported by the area hire service providers to include costs such as land rent, rates and taxes and the costs of improvements to the land.
- 2.15 It is also noted that some Port Authorities, such as Fremantle, provide area hire services at 'common user' berths however the FCAI application does not extend to negotiations with Port Authorities.

⁹ Information summarised from the FCAI's submission in support of its application for authorisation.

3 The FCAI application and supporting submission

- 3.1 On 21 October 2004, the FCAI, on behalf of its members, lodged an application for authorisation (A90937) with the ACCC.
- 3.2 The application was made pursuant to section 88(1) of the TPA for an authorisation under that subsection:
- a) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA and
 - b) to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 3.3 A copy of the FCAI's application and their submission in support is available from the public register maintained by the ACCC. The main issues are outlined below.

The proposed arrangements

- 3.4 The FCAI, on behalf of its members, seeks authorisation:
- for the FCAI to negotiate the terms and conditions of the supply of area hire services, including the area hire service charge provided by area hire service providers and
 - for the FCAI, its members and area hire service providers to enter into and give effect to agreements between the FCAI, its members and individual area hire service providers in respect of the terms of the supply of area hire services, including the area hire service charge, at a specified port.
- 3.5 The FCAI state that the terms and conditions to be negotiated with area hire service providers will include:
- the maximum level of the area hire service charge
 - the components included in the area hire service charge
 - how adjustments are to be made to the level of the area hire service charge
 - how the area hire service charge is to be imposed, collected and reviewed
 - liability for loss and damage
 - dispute resolution procedures and
 - other standard terms and conditions.

- 3.6 The FCAI submit that there are a number of important features of the proposed arrangements including:
- FCAI members may either accept the optional terms negotiated by the FCAI (that is, expressly ‘opt in’), or negotiate their own individual terms with area service providers
 - if an FCAI member elects to accept the optional terms negotiated by the FCAI in respect of the area hire services provided by a service provider at a port, then that service provider is bound to supply the services on the agreed terms
 - the FCAI will negotiate a pricing model which sets out the cost components with each service provider at each port and
 - the FCAI and its members have not applied for, and do not intend to engage in, any collective boycott activity.
- 3.7 The FCAI state that they propose to negotiate these terms and conditions in respect of each port which imports and exports motor vehicles into Australia, from time to time.

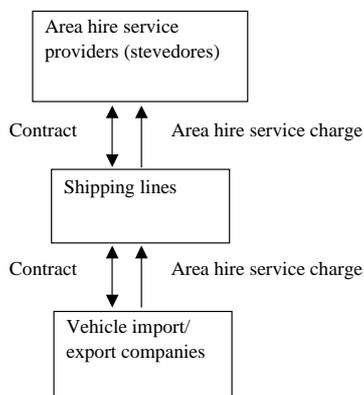
The FCAI’s submission in support of its application

The current arrangements

- 3.8 According to the FCAI the current arrangements between shipping lines, area hire service providers and FCAI members, which is depicted in Diagram 1, involves the negotiation of a contract between the shipping line and the area hire service provider which is likely to include an obligation for payment of a charge for area hire services. The FCAI submits that an amount is then passed on to its members as an ‘area hire service charge’, by the shipping lines.
- 3.9 The FCAI claims that the significant aspect of this relationship is that there is no direct contractual relationship between its members, who ultimately pay the area hire service charge, and the area hire service provider.

Diagram 1

Contractual relationships relating to supply of area hire services



The charge for area hire services

- 3.10 As mentioned above, the area hire service charge is an amount which is levied upon the shipping line by the area hire service provider for the use of their area hire services. The FCAI claim that the total cost of area hire services for exporters and importers of motor vehicles in Australia is between \$16 and \$18 million per year. The FCAI submit that the area hire service charge is different from other fees charged by area hire service providers and it is not expressly provided for in the contracts which exist between area hire service providers and shipping lines.
- 3.11 The FCAI submit that they have a number of concerns with the manner in which the area hire service charge is applied and administered including:
- there is no consistency in the term used to describe the area hire service charge or the amount charged by the area hire service providers across Australian ports
 - FCAI members have no input into or ability to negotiate changes in the level of the area hire service charge
 - there is little incentive for shipping lines and area hire service providers to negotiate the amount of the area hire service charge as the FCAI member is the party which ultimately pays the charge
 - it is the shipping lines, not the FCAI member that determines which wharf and stevedore is used to service a vessel and provide the area hire service
 - it is difficult for FCAI members to determine the components of the area hire service charge
 - FCAI members are not satisfactorily notified of increases in the area hire service charge and
 - under the existing contractual arrangements in Australia, it is not possible for FCAI members to seek any remedies or to negotiate the level of fees and charges or the type of services.

Limited bargaining power

- 3.12 The FCAI submits that its members are in an unfavourable bargaining position compared to area hire service providers as:
- the market for the provision of area hire services, in Australia, has high barriers to entry, is highly concentrated and
 - there is no direct contractual relationship between area hire service providers and FCAI members.

Counterfactual claimed by the FCAI

- 3.13 The FCAI claim that the current situation, which includes minimal negotiation by any party in relation to the area hire service charge, is not workable in the long run. Accordingly, the FCAI submits that the likely counterfactual is a situation in which each of its member motor vehicle importers and exporters individually negotiates area hire service charges, with each area hire service provider, at each port in Australia.

Public benefits claimed by the FCAI

- 3.14 The FCAI submit that significant public benefits, both economic and non-economic, will flow from the proposed conduct.

Transaction cost savings

- 3.15 The FCAI submits that the proposed arrangements would lead to transaction cost savings such as:
- legal, accounting and other advisor charges may be reduced by between \$300,000 - \$350,000 each per year, across the industry
 - administrative costs may be reduced by \$500,000 if a single negotiator were utilised
 - area hire services providers have indicated that they could potentially save up \$50,000 in negotiation costs
 - the FCAI estimates that shipping lines would have cost savings of approximately \$50,000 - \$100,000 and
 - the introduction of an effective dispute resolution process would result in cost savings for all parties.
- 3.16 The FCAI claim that the highly competitive market for the retail sale of motor vehicles would ensure that these transaction cost savings were passed through to consumers in the form of lower prices and/or additional services.

Improved industry information

- 3.17 The FCAI notes that the proposed arrangements are likely to result in the inclusion of a break down of the individual cost components that constitute the overall area hire service charge in contracts. The FCAI considers that this would provide its members with an understanding of the cost involved in such a charge and therefore allow them to better anticipate potential increases.
- 3.18 The FCAI also consider that having a single entity negotiating with area hire service providers at ports around Australia would provide for greater consistency and uniformity in the application of relevant industry terms. This, the FCAI claims, would have the effect of improving the capacity for industry participants to compare services provided by area hire services providers at different ports as well as enabling more informed decision-making to be undertaken by all industry participants.

Introduction of standard terms and conditions

- 3.19 The FCAI submit that the creation of a direct contractual arrangement between its members and area hire service providers will reduce inefficiencies created by contractual uncertainty which have, in the past, lead to misunderstandings and disputes.

Improvement in bargaining position of vehicle importers/exporters

- 3.20 The FCAI claim that the proposed arrangements would ensure that issues relevant to its members, in relation to access and costs of area hire services, would be addressed in negotiations with the area hire service providers. The FCAI submit that this would occur through an increase in bargaining power for its members.

Improved competition in the motor vehicle industry

- 3.21 The FCAI claim that, for the most part, its members work on 7 to 10 year plans. The FCAI submits that an integral part of that planning is for its members to be able to forecast future costs with a high degree of certainty. The FCAI submits that when its members are faced with such unexpected cost increases, consumers often bear those costs as the motor vehicle supplier is forced to save costs by removing, or charging more for, accessories and other 'extras'.
- 3.22 The FCAI claims that, to the extent negotiations with area hire service providers have the effect of limiting unexpected increases in costs or provide its members with advanced notice of an increase in such costs, the proposed arrangements will provide a public benefit. Such a benefit, the FCAI claim, would be twofold in that consumers would be able to access cheaper motor vehicles and the industry as a whole would be more competitive.

Enhancement of the national interest

- 3.23 The FCAI claim that by increasing the efficiency with which the supply of area hire services occurs, and by preventing unexpected or uncontrolled increases in the level of the area hire service charge, the Australian motor vehicle industry as a whole would benefit and the international perception of Australia as an importer and exporter would also improve.

Potential anti-competitive detriments of the proposed arrangements

- 3.24 The FCAI submit that any potential anti-competitive detriment which may arise out of the proposed conduct would be minimal and would be outweighed by the public benefits. In addition, the FCAI submit that any potential anti-competitive effects of the proposed arrangements would be mitigated by the following features:
- acceptance of the negotiated terms and conditions by FCAI members would be voluntary
 - FCAI members would be free to negotiate their own terms and conditions with area service providers at any time and
 - the FCAI and its members do not propose to engage in any collective boycott activity.

4 Interested party submissions

- 4.1 The ACCC sought submissions from a wide range of interested parties and those received are summarised below. Complete copies of all submissions are available on the ACCC's public register and on its website.

Australian Amalgamated Terminals

- 4.2 AAT submit that, essentially they support the FCAI's application for authorisation. However, AAT state they have no contractual relationship with the FCAI or its members but that its customers are the stevedores who provide general stevedoring and motor vehicle stevedoring services to their customers, the shipping lines.
- 4.3 AAT submit that they have approached the FCAI with an offer to clarify any issues they may have in relation to the cost of providing area hire charges. AAT submits that these costs are affected by factors such as rent, rates, taxes, maintenance and security and are, for the most part, beyond AAT's control.
- 4.4 AAT claim that there is little scope for the FCAI and its members to obtain a significant reduction in AAT's area hire service charge and, in any event, the amount of any saving would not in itself be significant compared to the average cost of a motor vehicle.

Patrick Corporation

- 4.5 Patrick submits that they have no objection to the FCAI authorisation, however, they make the following observations in relation to the application:
- Patrick has no contractual relationship with members of the FCAI, rather, Patrick contracts with shipping lines to which they provide services.
 - Patrick passes on the cost of accessing the land it uses to provide these services to the shipping line which may then pass those costs on to its users.
 - Patrick is of the view that there is limited capacity for it to reduce these costs and any reduction would be small in comparison the cost of a motor vehicle.

Fremantle Port Authority

- 4.6 The Fremantle Port Authority (Fremantle Port) submits that it currently applies wharfage charges for cargo that is loaded from or unloaded onto Fremantle Ports' wharfs and this charge is invoiced to the shipping lines or their agents. Fremantle Port submits that the wharfage charge is a fixed non-negotiable fee based on the cost of providing and maintaining the wharfs.
- 4.7 Fremantle Port note that, where cargo such as motor vehicles are unloaded at common user berths, it provides free storage at the common user stacking areas for the first four working days after which a weekly rental rate is negotiated with the cargo handlers.

Submissions on the draft determination

- 4.8 The ACCC issued a draft determination on 23 March 2005 and requested submissions from interested parties and the applicant. The ACCC received two submissions on the draft determination. **Port Kembla Port Corporation** expressed that they have no concerns with the FCAI being granted authorisation. The other interested party requested that their submission remain confidential.

5 Statutory provisions

- 5.1 Application A90937 is made under subsection 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA.
- 5.2 In assessing an application made under subsection 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA, the relevant test that the FCAI must satisfy for authorisation to be granted is outlined in subsection 90(6) of the TPA.
- 5.3 Under subsection 90(6) of the TPA, the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.4 In deciding whether it should grant authorisation, the ACCC must examine the anti-competitive aspects of the arrangements or conduct and the public benefits arising from the arrangements or conduct, weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the ACCC may grant authorisation.
- 5.5 Public benefit is not defined by the TPA. However, the Australian Competition Tribunal (the Tribunal) has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹⁰
- 5.6 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹¹

¹⁰ *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42677

¹¹ *ibid* at 42683

- 5.7 In weighing up the public benefit and anti-competitive detriment generated by proposed arrangements for which authorisation has been sought the ACCC also applies the ‘future with-and-without test’ established by the Tribunal.
- 5.8 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as ‘the counterfactual’.
- 5.9 Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.
- 5.10 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.

6 ACCC assessment – Relevant markets

- 6.1 The first step in assessing the public benefits and anti-competitive detriments of the proposed arrangements for which authorisation is sought is to consider the relevant market(s) in which those arrangements occur.
- 6.2 The ACCC may use market analysis to identify and measure the public benefit and anti-competitive detriment resulting from arrangements for which authorisation has been sought. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of the defined market.

Submissions on the relevant markets

- 6.3 In its application the FCAI does not specifically address the issue of the relevant market(s). The FCAI does, however, make the following general comments in relation to some possible market features:
- port facilities are often natural monopolies
 - the market for the provision of area hire services in Australia is highly concentrated
 - exporters and importers of motor vehicles have no substitutes for the services provided by a port or by stevedores
 - the retail market for the sale of motor vehicles in Australia is highly competitive
 - Australia's contribution to the international automotive market has increased significantly over the past ten years and has the opportunity to continue to grow and
 - a substantial amount of Australian motor vehicles are imported.

ACCC assessment of the relevant markets

- 6.4 The ACCC is of the view that whilst it is not necessary to definitively identify all the relevant markets, it is important for the ACCC's assessment of the application to define general market parameters in order for it to assess the public benefits and detriments, particularly the anti-competitive effects, of the proposed arrangements.
- 6.5 In this instance, the ACCC has identified one primary area of competition and two further areas of competition that it considers may be relevant to the FCAI application. These are:
- the supply of area hire services in Australian ports and
 - the Australian and international markets for the sale of motor vehicles.
- 6.6 Some of the characteristics of these markets considered relevant to the ACCC's assessment of this application are set out below.

The supply of area hire services in Australian ports

- 6.7 The ACCC is of the view that the primary area of competition which relates to the current application is the market for the supply of area hire services in Australian ports. The ACCC considers that the market in which these services are supplied has a number of significant features including:
- high barriers to entry
 - being highly concentrated in Australia with most ports limited to one or two providers of area hire services and
 - having no substitutes for FCAI members.
- 6.8 The ACCC notes that the number of existing port facilities in Australia, and the establishment of new port facilities, is limited by factors such as government regulation, high sunk costs and the availability of a suitable site (deep water, transport infrastructure).
- 6.9 The ACCC is of the view that a historical consequence of these limitations has been that the incumbent stevedores have established significant advantages which serve to limit the establishment of new competition in the market for the provision of area hire services. This, the ACCC considers, has resulted in a concentrated market for the supply of area hire services at Australian ports.
- 6.10 In addition, the ACCC considers that as the FCAI application expressly relates to the negotiation by the FCAI with area hire service providers and does not propose to extend to any other service provided by a stevedore, shipping line, port owner or operator; the primary area of competition relevant to the application occurs amongst area hire services providers in Australian ports.

The Australian and international markets for the sale of motor vehicles

- 6.11 The ACCC considers that the Australian and international markets for the sale of motor vehicles are relevant to the FCAI application insofar as the proposed arrangements provide cost savings for importers and exporters of motor vehicles (FCAI members) which are ultimately passed on to consumers.
- 6.12 The ACCC considers that the Australian and international markets for the sale of motor vehicles are characterised by many large, well resourced participants. Four of these participants manufacture and sell motor vehicles within Australia while a further thirty-six import motor vehicles into Australia.
- 6.13 The ACCC is of the view that new entrants into these markets face high barriers to entry due to the capital costs involved with designing, manufacturing, distributing and retailing motor vehicles against well established incumbents.

7 ACCC assessment- Future with-or-without

- 7.1 As stated in section 5, the ACCC applies the ‘future with-or-without test’ established by the Tribunal to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.
- 7.2 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is referred to as the counterfactual.

Submissions on the counterfactual

- 7.3 In its application, the FCAI submits that the likely counterfactual is not the situation which currently exists but instead one where its members negotiate directly with area hire service providers. That is, if the ACCC does not grant the FCAI authorisation to engage in the proposed arrangements, the FCAI claims that its members will no longer merely accept the area hire service charge that is passed on to them by shipping lines (from area hire service providers) but instead they will seek to negotiate the charge directly with the area hire service providers.
- 7.4 The ACCC notes that whilst neither AAT nor Patrick specifically address the issue of the counterfactual in their submissions, both confirmed that they currently have no contractual relationship with the FCAI or its members and neither indicated that that situation would change if the proposed arrangements were not authorised.

ACCC consideration of the counterfactual

- 7.5 The ACCC considers that, absent of the authorisation, there appears to be little incentive for area hire service providers to change their current practice of passing area hire service costs on to shipping lines which they would then pass on to FCAI members.
- 7.6 Further, the ACCC considers that the costs likely to be incurred by FCAI members in negotiating changes to area hire charges are likely to discourage members from initiating such negotiations. This is because, in the absence of a collective arrangement, the commercial justification for companies individually negotiating this input cost (the cost of area hire services), in comparison with the potential efficiency gains (from collective negotiations), is lessened.
- 7.7 In view of this and based on the on information before it, the ACCC considers that the likely counterfactual if the authorisation is not granted is a situation in which many FCAI members will continue to have no direct contractual relationship with their area hire service providers. The ACCC notes that commercial justification for individual negotiations will vary across FCAI members such that, for some, limited negotiations may occur.

8 ACCC assessment- Effect on competition

- 8.1 Section 88 of the TPA allows the ACCC to grant immunity from legal action for parties to engage in certain anti-competitive conduct which may include collective bargaining.
- 8.2 As discussed in section 5, the ACCC must assess the extent to which the proposed arrangements give rise to any detriments. Specifically, the ACCC must assess the detriment to the public constituted by any lessening of competition flowing from the proposed arrangements.
- 8.3 In general terms, collective agreements to negotiate terms and conditions (including charges) for independent businesses covered by that agreement are likely to lessen competition relative to a situation where each business individually negotiates their own terms and conditions. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

The FCAI's submission on anti-competitive effect

- 8.4 The FCAI submit that there is minimal scope for the proposed arrangements to have any anti-competitive effect, however, were any to arise, they would be mitigated by the following the features of the proposed arrangements:
- it would be voluntary for FCAI members to accept any terms or conditions, negotiated with area hire service providers
 - FCAI members would retain the capacity to negotiate on an individual basis and
 - FCAI members do not propose to collectively withdraw the acquisition of area hire services from providers (otherwise know as collectively boycotting) if negotiations are unsuccessful.

ACCC assessment of anti-competitive detriment

- 8.5 In assessing the likely anti-competitive effect of the proposed arrangements, the ACCC considered the following three potential anti-competitive effects:
1. Lost efficiencies resulting from collusion
 2. Reduced scope for new market entry
 3. Increased potential for collective activity beyond that authorised.

1. *Lost efficiencies resulting from collusion*

- 8.6 A major feature of most collectively negotiated agreements is an agreement as to the (generally common across the bargaining group) price of acquiring a good or service or the price to be paid to a group.
- 8.7 Competition between buyers or sellers ordinarily directs resources to their most efficient or productive use. Where buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses.
- 8.8 This distortion in competition can often result in increased prices to consumers, less choice, lower quality of product or services and increased costs to producers than would otherwise exist.
- 8.9 This is the foundation of the principles of competition and, as such, Parliament has deemed agreements between competitors as to price to substantially lessen competition in breach of the TPA.¹²
- 8.10 Aside from price, businesses compete on issues such as quality, service and other terms of trade. Just as price agreements stifle competition on price, non-price agreements can stifle competition in areas such as quality and service.
- 8.11 In its past consideration of collective bargaining arrangements the ACCC has accepted that where collective bargaining results in an increased price being paid to the bargaining group, or reduced competition on other terms of supply, and where there is capacity for any such increase to be passed on in the form of higher prices, less choice, or lower quality of products offered to consumers, this could constitute an anti-competitive detriment. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 8.12 The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the following four features are present:
- the current level of competition, between members of the bargaining group, with respect to those terms on which they are seeking to negotiate, is low
 - participation in the proposed arrangements is voluntary
 - there are restrictions on the coverage and composition of the bargaining group and
 - there is no boycott activity.

¹² Section 45A of the TPA

- 8.13 With respect to these four features, as they relate to the proposed arrangement, the ACCC notes the following:

Competition between FCAI members absent of the authorisation

- 8.14 Generally, the ACCC considers that competition between FCAI members in the market for the sale of motor vehicles, a market in which they would primarily compete, would be vigorous and would promote efficient outcomes. However, the ACCC considers that competition between FCAI members for the acquisition of those services on which they are seeking immunity to collectively negotiate, namely the acquisition of area hire services from area hire service providers, would be considerably less vigorous if it exists at all.
- 8.15 The ACCC considers that, based on the information before it, the lack of competition between FCAI members for the acquisition of area hire services' is primarily the result of FCAI members not negotiating contract terms and conditions directly with area hire service providers but rather being charged for such services through a third party (shipping line).
- 8.16 Consequently, the ACCC considers that the proposed arrangements are unlikely to have a detrimental effect on the level of competition amongst FCAI members for the acquisition of area hire services.

Voluntary participation in the proposed arrangements

- 8.17 As noted, the proposed arrangements will be voluntary and will operate on an 'opt in' basis. That is, FCAI members (and the area hire service providers) would not be compelled to participate in the proposed arrangements were they to be authorised. Consequently, were authorisation to be granted, the parties would remain free to either:
- continue their current arrangements
 - negotiate individual contracts or
 - negotiate new arrangements under the collective bargaining authorisation.
- 8.18 FCAI members who consider that they may be able to negotiate a more commercially attractive arrangement with an area hire service provider, either by variations to the collective agreement, or through negotiating individually, will remain free to do so.
- 8.19 Further, the ACCC is of the view that collectively negotiated contracts will only be agreed and implemented where both FCAI members and area hire service providers consider it in their commercial best interest to do so. That is to say, the proposed arrangements will only be entered into where both parties to the proposed

arrangement consider that they will generate sufficient efficiency gains to offset any inefficiency which may otherwise result from the collectively negotiated contracts.

Coverage and composition of the bargaining group

- 8.20 Generally, the ACCC is of the view that the size and scope of a collective bargaining group should be limited, or the group divided into smaller parts, where it is proposed that all, or a majority of, members of a particular supply or acquiring group are likely to be a party to collective negotiations. The ACCC considers where the size of bargaining groups is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers outside the group.
- 8.21 In this instance, whilst it is not proposed that the bargaining group be divided into smaller, discrete groups, there are a number of industry features and characteristics of the proposed arrangements that will limit the need for such a requirement, including:
- the provisioning of area hire services constitutes a relatively small portion of Patrick and P&O Ports' operations when compared to their main business of providing container stevedoring services
 - FCAI members have no alternative suppliers of area hire services
 - the proposed arrangements will be offered on an opt-in basis and those FCAI members who elect not to adopt collectively negotiated outcomes will provide some competition to those that do elect to opt-in
 - it is not proposed that, if the collective bargaining fails to provide a satisfactory outcome, FCAI members will collectively boycott area hire service providers and
 - the strong position of area hire service providers and their ability to choose whether or not to enter a collective bargaining arrangement with the FCAI.

Boycott activity

- 8.22 It is not proposed that any collective boycott activity occur. While there are circumstances in which the ability to boycott may in itself generate a net public benefit, more generally, collective boycotts can significantly increase any anti-competitive effects of collective bargaining arrangements. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.
- 8.23 In light of the limited competition between FCAI members, the voluntary nature of the arrangements and the lack of boycott activity, the ACCC considers the anti-competitive detriment generated by lost efficiencies resulting from collusion as a consequence of the proposed arrangements is likely to be minimal.

2. *Reduced scope for new market entry*

- 8.24 The capacity for new entrants to compete for the rights to undertake the business of existing market participants subject to a collective agreement also has implications for how competition in the market is affected.
- 8.25 In this instance, the presence of collective arrangements may serve to increase the barriers to entry if parties were to enter long term contracts which satisfied the area hire service needs of FCAI members and the capacity for new entrants to access such services from area hire service providers. However, the potential anti-competitive effects of the proposed arrangements should be considered in light of a number of other factors, in particular the pre-existing barriers to entry into both the motor vehicle importing and exporting industries, and the stevedoring industry.

Pre-existing barriers to entry

- 8.26 As mentioned in section 6, the ACCC considers that entry into the stevedoring industry and more specifically the market for the supply of area hire services is limited by a number of existing barriers to entry including: access to existing port facilities in Australia; and well established incumbents with significant market share.
- 8.27 The ACCC considers that barriers to entry into the industry for exporting of motor vehicles are likely to be equally as significant with high sunk costs and well established incumbents acting to inhibit potential new entrants.
- 8.28 Comparatively, however, the ACCC is of the view that the market for importing motor vehicles into Australia would have lower barriers to entry and is, of the three markets, the most likely to attract new entrants.
- 8.29 The ACCC considers that as the relevant industries, and especially the market for the provision of area hire services, already have significant existing barriers to entry, the proposed arrangements will not, in themselves, act to restrict other providers wishing to enter any of those markets, from doing so. That is to say that any potential new entrants are unlikely to find that the proposed arrangements would make it more difficult for them to enter any of these markets than is currently the case. In addition, the capacity of large incumbent providers of area hire services to promote their services, for example by cross subsidisation gained from the provision of other stevedoring services, unaffected by the proposed collective arrangements.
- 8.30 Rather, the ACCC considers that, if the proposed arrangements are successfully negotiated between the FCAI and the area hire service providers, this may encourage new entrants into market for importing motor vehicles, as those entrants are likely to benefit from cheaper access to an important link in their supply chain.
- 8.31 Further, the ACCC considers that as there are no apparent restrictions on joining the FCAI, other than being a manufacturer or supplier of motor vehicles, any new

entrant into the motor vehicle importing or exporting markets could become a party to the proposed arrangements.

3. *Increased potential for collective activity beyond that authorised*

- 8.32 In considering collective bargaining arrangements in the past, the ACCC has noted concern that such arrangements may increase the potential for collusive anti-competitive conduct.
- 8.33 Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The ACCC has been concerned that in this environment, there may be an increased likelihood of anti-competitive conduct (beyond that which is authorised) occurring.
- 8.34 The ACCC notes that the likelihood of collusive activity beyond that authorised is reduced where participants are made aware of their obligations under the TPA, as is generally the case in the ACCC's consideration of applications for authorisation.
- 8.35 The ACCC notes however that there is no evidence to suggest that any conduct that may raise concerns under the TPA, other than that for which authorisation is sought, is intended to be discussed by the consenting parties to the application.
- 8.36 With respect to collective boycotts, as noted, authorisation has not been sought for any such activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.

Conclusion on anti-competitive effect of the proposed arrangements

- 8.37 For the reasons outlined above, the ACCC considers that any anti-competitive detriment generated by the proposed arrangement is likely to be minimal.

9 ACCC assessment - Public benefits

- 9.1 In order to grant authorisation to the proposed collective bargaining arrangements, the ACCC must be satisfied that those arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.
- 9.2 There must also be a nexus between the claimed public benefits and the proposed arrangements for which authorisation is sought. In other words, the benefit must flow from the proposed arrangements.
- 9.3 The FCAI submits that granting authorisation allowing it, on behalf of its members, to collectively negotiate contract terms and conditions with area hire service providers will result in a number of benefits to the public.

Potential cost savings

- 9.4 The FCAI submits that there will be some cost savings from allowing its member to bargain collectively. They state that the proposed arrangements would lead to transaction cost savings for their members, the area hire service providers and shipping lines. The FCAI claims that these savings would be in the form of reduced legal, accounting and other advisors' fees and would result primarily from fewer and more direct negotiations between the parties along with lower administration costs.
- 9.5 Further, the FCAI submits that the highly competitive market for the retail sale of motor vehicles would ensure that any transaction cost savings were passed through to consumers in the form of lower prices or additional services.
- 9.6 In considering previous applications for authorisation, the ACCC has noted that transaction costs may well be lower in implementing a collective bargaining agreement involving a single, or small number, of negotiating processes than where the acquirer or supplier must negotiate and implement agreements with every business with which it deals. Where these savings, such as legal and accounting fees, are likely to be passed on in the form of lower prices to consumers, the ACCC has accepted that this would constitute a public benefit.
- 9.7 However, in circumstances where, absent of authorisation, standard form contracts, with limited individual negotiations providing for variations to standard terms, are likely to be employed, significant transaction cost savings are unlikely to result from collective negotiations. Even where limited variations are permitted there is likely to be little additional negotiating cost involved in doing so compared to a situation where a comprehensive collective agreement is entered into.
- 9.8 Under the existing arrangements negotiations in relation to the area hire service charge occur between area hire service providers and shipping lines. It is understood that under these arrangements there are limited, if any, direct dealings between the FCAI's members and area hire service providers in the negotiation of

this charge. Given the limited nature of dealings between the parties the ACCC considers that negotiation costs are, if anything, likely to increase under the proposed collective arrangement. For example, under the proposed arrangement there will be a need to establish and implement a negotiation process between FCAI members and the area hire service providers as such a process does not currently exist.

- 9.9 The ACCC does however accept that there is also the potential for some cost reductions in the form of administration and dispute resolution cost savings. The ACCC considers that, whilst the FCAI members may not currently directly negotiate with area hire service providers, they are nonetheless likely to incur costs associated with administration of area hire charges, as well as other costs associated with resolving disputes in relation to these charges. The ACCC considers that, to the extent that the proposed arrangements provide for a single or uniform administration system and assist in reducing or resolving disputes, there is the potential for some costs savings relative to a situation where each FCAI member incurred those costs separately.
- 9.10 Further, the ACCC considers that, given competitive pressures in both the national and international market for the sale of motor vehicles, it is likely that the FCAI's members would pass the benefits of these cost savings on to consumers in some form, for example by way of lower prices and/or improved services.
- 9.11 The ACCC does, therefore, accept that, overall, a public benefit is likely to arise, although the ACCC does not consider the magnitude of any such savings is likely to be significant.

Improvements in contractual terms and conditions

- 9.12 The FCAI submits that the proposed arrangements will:
- improve the transparency and consistency of information flow between area hire service providers and FCAI members
 - facilitate improved participation by FCAI members in the negotiation of area hire charges and
 - provide improvements in contractual certainty in relation to changes to area hire arrangements.
- 9.13 The FCAI submits that these improvements will result in more efficient outcomes, the benefits of which will be passed on to consumers.

Improvements in information

- 9.14 The FCAI submits that the proposed arrangement will provide greater transparency with regards to the components of the area hire service charge. They submit that this will provide their members with an understanding of the costs included in the

charge and thus allow them to better anticipate potential increases. The FCAI also submits that greater consistency and uniformity in the application of relevant industry terms would allow industry participants to compare services provided by area hire services providers thus enabling more informed decision-making.

- 9.15 Collective negotiation arrangements are often proposed as a means of addressing, or at least improving, instances of information asymmetry. Information asymmetry occurs where one party to an exchange has access to information that is not available at any cost to the other party, where that information affects the costs of the uninformed party. The ACCC considers that the circumstances presented by the FCAI do not amount to true information asymmetry – submissions from both AAT and Patrick include offers to clarify issues in relation to the components of the area hire service charge suggesting that this information is available to FCAI members.
- 9.16 The ACCC accepts that it would be useful for the FCAI and its members to have both an improved understanding of the components of the area hire service charge and an enhanced uniformity in the use of industry terminology. The ACCC also accepts that access to such information is likely to result in more efficient outcomes, for example by facilitating informed decision-making as to resource allocation.
- 9.17 However, having considered the information provided to it, the ACCC is not satisfied that this information is currently unavailable to the FCAI and its members. Accordingly, the ACCC does not place weight on the potential public benefits of this outcome as being a result of the authorisation.

Facilitating participation in the negotiation of area hire charges

- 9.18 As outlined above, under current arrangements FCAI members generally do not participate in negotiations between area hire service providers and shipping lines in relation to the area hire service charge. The FCAI claim that the proposed arrangements would ensure that issues relevant to its members, for example access and costs of area hire services, would be addressed in negotiations with the area hire service providers. The FCAI submit that this improved participation will result in the development of efficient, cost-reflective pricing for the area hire services provided by area hire service providers. The FCAI claims that the competitive nature of the motor vehicle industry would ensure that these savings were passed on to consumers.
- 9.19 The ACCC notes that the area hire service is a necessary component of the business activities of an importer or exporter of motor vehicles. To the extent that the current arrangements exclude participation by FCAI members, either due to the high cost of individual negotiation or through a perceived lack of bargaining power, it is likely that the area hire charge will not be reflective of allocative efficiency. This is because the current party responsible for negotiating the charge (shipping lines) has a lesser incentive to negotiate a mutually beneficial outcome than may otherwise have been achieved if negotiations were conducted between

the providers of area hire services and the acquirers of area hire services (importers and exporters of motor vehicles).

- 9.20 Therefore, the ACCC considers that, to the extent the proposed collective bargaining arrangements improve the effectiveness of input by FCAI members into contracts, this would be likely to generate a public benefit.

Improvements in contractual certainty

- 9.21 The FCAI submit that the creation of a direct contractual arrangement between its members and area hire service providers will reduce inefficiencies created by contractual uncertainty which have, in the past, lead to misunderstandings and disputes. The FCAI claims that, to the extent negotiations with area hire service providers have the effect of limiting unexpected increases in costs or provide its members with advanced notice of an increase in such costs, the proposed arrangements will provide a public benefit. Such a benefit, the FCAI claims, would be twofold in that consumers would be able to access cheaper motor vehicles and the industry as a whole would be more competitive.
- 9.22 Patrick and AAT have, however, submitted that the costs associated with area hire services are, by and large, beyond the control of the area hire service provider. Patrick and AAT state that it is necessary for them to pass on any increases in their own costs to shipping companies, and ultimately therefore FCAI members. Patrick and AAT consider that direct collective negotiations between FCAI members and the area hire service providers are unlikely to alter this practice.
- 9.23 The ACCC considers that, to the extent that the proposed arrangements result in improved transparency and notice of increases in the cost of area hire services, efficiency improvements are likely to result. The ACCC considers that, to the extent that these efficiency gains are reflected in consumer pricing or more generally through competitive improvements in the motor vehicle industry, the proposed arrangement are likely to generate a public benefit.

Enhancement of the national interest

- 9.24 The FCAI claims that by increasing the efficiency with which the supply of area hire services occurs, and by preventing unexpected or uncontrolled increases in the level of the area hire service charge, the Australian motor vehicle industry as a whole would benefit and the international perception of Australia as an importer and exporter would also improve.
- 9.25 The ACCC considers that the issue of increased efficiencies from FCAI members collectively bargaining with area hire service providers providing a public benefit has been considered earlier in this section.

10 Balance of public benefits and detriments

10.1 The ACCC considers collective bargaining agreements which set uniform terms and conditions are likely to lessen competition. However, the ACCC considers that there are a number of industry specific factors and features of the proposed arrangements which will serve to mitigate the effect on competition of the proposed arrangements.

Industry specific factors

- The market for area hire services is concentrated and has high barriers to entry.
- There are no substitutes for area hire services.
- The current level of competition, between FCAI members, with respect to those terms on which they are seeking to negotiate, is low.

Features of the proposed arrangements

- Participation in the proposed arrangements would be voluntary for all parties.
- The proposed arrangements would be accessible to new entrants into the motor vehicle industry.
- The proposed arrangements would only affect a small part of the area hire service providers business.
- The proposed arrangements do not include boycott activity.

10.2 The ACCC also considers that for the reasons outlined in this determination, area hire service providers will continue to maintain a high degree of control over any contract negotiations (including the area hire service charge) with or without the proposed collective bargaining arrangements.

10.3 The ACCC considers that the proposed arrangements will result in some public benefit. In particular, the ACCC considers that, to the extent the proposed collective bargaining arrangements provide efficiencies through improving the input of FCAI members into contracts, including improving transparency and notice of increases in the cost of area hire services, the proposed arrangements would be likely to generate a public benefit.

10.4 Additionally, the ACCC considers that the proposed arrangements are likely to result in some cost savings which, given competitive pressures within the industry, are likely to be passed on to consumers.

10.5 Consequently, following consideration of the arguments advanced by the FCAI and interested parties, the ACCC concludes that the public benefits likely to result from the proposed arrangements will outweigh the anti-competitive detriment.

11 Determination

The application

- 11.1 On 21 October 2004, the Federal Chamber of Automotive Industries (the FCAI), on behalf of its members, lodged an application for authorisation (A90937) with the Australian Competition and Consumer Commission (the ACCC).
- 11.2 The application was made pursuant to section 88(1) of the *Trade Practices Act 1974* (the TPA) for an authorisation under that subsection:
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA and
 - to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 11.3 Specifically, the FCAI, on behalf of its members, seek authorisation for:
- the FCAI to negotiate the terms and conditions of the supply of area hire services, including the area hire service charge provided by area hire service providers, and
 - the FCAI, its members and area hire service providers to enter into and give effect to agreements between the FCAI, its members and individual area hire service providers in respect of the terms of the supply of area hire services, including the area hire service charge, at a specified port.
- 11.4 The FCAI state that the terms and conditions to be negotiated with area hire service providers will include:
- the maximum level of the area hire service charge
 - the components included in the area hire service charge
 - how adjustments are to be made to the level of the area hire service charge
 - how the area hire service charge is to be imposed, collected and reviewed
 - liability for loss and damage
 - dispute resolution procedures and
 - other standard terms and conditions.

Statutory test

- 11.5 For the reasons outlined in this determination, the ACCC is satisfied that in all the circumstances the making of the contracts and the giving effect to the provisions of the proposed arrangements for which authorisation is sought under subsection 88 (1) of the TPA:
- would be likely to result in a benefit to the public and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

Conduct authorised

- 11.6 In relation to application A90937 and pursuant to section 88 of the TPA, the ACCC grants authorisation:
- to allow the FCAI, on behalf of its members, to negotiate the terms and conditions of supply of area hire services provided by area hire service providers, including the area hire service charge and
 - for the FCAI, its members and area hire service providers to enter into and give effect to agreements between the FCAI, its members and individual area hire service providers in respect of the terms of supply of area hire services at a specified port including the area hire service charge.
- 11.7 The nature of the collective bargaining arrangements that might ultimately be entered into are a matter for negotiation between the FCAI, its members and area hire service providers are not bound to the FCAI's proposed framework.
- 11.8 The ACCC grants authorisation for a period of five years from the date this determination comes into effect. In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is actually made eventuate in practice and the appropriateness of the authorisation in the current market environment.

Conduct not authorised

- 11.9 Nothing in this determination permits the making of any contract, arrangement or understanding containing an exclusionary provision as defined in section 4D of the TPA (otherwise known as a collective boycott).
- 11.10 The ACCC considers that to the extent that the FCAI, its members or any other party to whom immunity is provided by the authorisation, act outside of the authorised arrangements they will not have protection from the TPA in so doing.

Effective date of the determination

- 11.11 This decision is subject to any application to the Australian Competition Tribunal for its review.
- 11.12 This determination is made on 20 April 2005. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 12 May 2005. If an application is made to the Tribunal, the determination will come into force:
- a) where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
 - b) where the application is withdrawn – on the day on which the application is withdrawn.