



TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED
ABN 64 009 686 097

RJG1272
2 November 2009

Ms Joanne Palisi
Director
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Dear Ms Palisi

~~PRIVATE AND CONFIDENTIAL~~

BB
5.11.09

I refer to the draft determination recently published by the ACCC in relation to AAT's applications for authorisation (**Draft Determination**).

Conditions in addition to dispute resolution

We are generally pleased with the idea of a dispute resolution procedure (DRP) being established to allow end-users like Toyota Australia to have their grievances aired and considered on an impartial basis. However, the DRP is inherently reactionary in nature, and we would like to see some measures introduced to prevent issues arising. The DRP currently puts the onus on the end-users to raise an issue only once a dispute has arisen; given our past experience with AAT, we think it is important that the Draft Determination also contains obligations on AAT to engage in reasonable commercial conduct to avoid disputes arising.

As outlined in our previous correspondence to the ACCC, one of Toyota Australia's biggest concerns with AAT has been the way in which AAT has often arbitrarily increased facility access charges, doing so on a 'take it or leave it' basis. We believe that AAT could not sustain these price increases if it operated in a competitive market-place. Accordingly, *in addition to* the DRP, Toyota Australia requests that a condition be added to the ACCC's final determination that requires AAT to give 6 months written notice of any price increases directly to its end-users, together with an explanation justifying the increases. This would allow end-users to raise concerns with the price increases using the DRP prior to their implementation.

Comments on the DRP

As stated above, we are generally pleased with the concept of the DRP, however, we have a number of suggestions for making the DRP more workable for end-users and more effective in ensuring AAT is subject to scrutiny to ensure it does not engage in anti-competitive conduct. These suggestions are summarised below:

Retrospective operation: the DRP is currently drafted to only apply to AAT conduct that occurs after the date of the authorisations. We feel strongly that the DRP should be made available to resolve disputes in relation to AAT's conduct prior to the date of the authorisation. For example, Toyota Australia (and the automotive end-users generally) has been uncomfortable about the price increases that have been, and are proposed to continue to be levied at Fisherman's Island, and it would be sensible and appropriate to be able to use the DRP to resolve these issues.

Status quo clause: we request that the DRP has a 'status quo' clause under which changes or decisions of AAT that are made the subject of a dispute be suspended while the DRP takes place. For example, if a price increase proposed by AAT was challenged under the DRP, the price increase should not take effect unless and until it is agreed under the DRP. If the result of the DRP is that the price increase *is* applied, then this can apply retrospectively to the date it had been proposed to be introduced by AAT.

Non-discrimination: Toyota Australia has experienced situations where AAT has refused to unload Toyota shipments because of a price increase being disputed by Toyota Australia. We would like the DRP to have a provision that specifically prohibits AAT from engaging in this sort of conduct or discriminating against an end-user on the basis of a complaint being brought under the DRP.

Length of process: we are concerned with the length of time it can take for a dispute to be dealt with under the DRP. By their nature, issues at the ports often need to be urgently resolved especially where there are goods being held up at AAT ports. On that basis, we think the time periods for and between each step in the DRP should be shortened. Perhaps it would also be worth having an alternative escalation mechanism for disputes that need to be urgently resolved, with shorter time periods.

Escalation to CEO: it will sometimes not be practical for end-users to have matters escalated to the CEO, so perhaps this section of the DRP could be changed to include senior managers being authorised to make decisions on behalf of the parties.

Appointment of mediators: we are concerned that the DRP allows AAT to propose 3 possible mediators. This could potentially lead to biased decisions in favour of AAT. We would like to suggest an alternative mechanism in which both AAT and the end-user nominate a mediator. If they fail to agree on the mediator, the ACCC or an independent third party could appoint a mediator that both parties are obliged to accept.

Regularity of reporting: the reporting procedure requires AAT to annually provide to the ACCC a summary of the disputes that were subject to the DRP in the previous year. We think this should be made tighter so that AAT must inform the ACCC within 30 days of any complaint being reported to the ACCC. We think this will have the positive effect of making AAT feel like they are under close and continuing regulatory scrutiny.

Confidentiality of dispute reports: the DRP currently proposes to place all dispute reports (which include comprehensive details of the disputes, including costs) on the public register. It is quite likely that the matters subject to the disputes will contain commercially sensitive information both to AAT and end-users. Toyota Australia requests that this be changed so that only the bare details of the disputes are published (e.g name of complainant and the dates disputes are opened and closed).

FCAI: Toyota Australia requests that the definition of "Terminal End-User" specifically includes the FCAI, as it is important that the FCAI can raise concerns regarding industry-wide issues through the DRP. We think the dispute resolution procedure should specify that the FCAI can bring a complaint (and use the dispute resolution procedure) on behalf of car importers and exporters (currently this is not clear).

'Terminal End-user Dispute': we believe that the definition of 'Terminal End-User Disputes' in the DRP needs to be broadened so that it includes any complaint brought by an end-user.

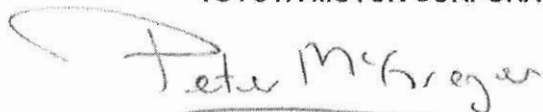
Interaction with port-specific dispute resolution procedures: Toyota Australia requests that the DRP overrides the dispute resolution procedures in AAT's agreements with some ports. It is important that AAT is subject to a consistent dispute resolution procedure across all of its ports. Having different procedures in different ports would be confusing and inefficient, and potentially AAT could be subject to less scrutiny in some ports than others. In addition, having different procedures in different ports would be unworkable in the event that an end-user or AAT wanted to raise a complaint in relation to an issue that existed across all of AAT's facilities nationally.

Down-stream enforcement: given that the DRP only binds AAT, and not some of its related parties in the supply chain between AAT and end-users like Toyota (such as the stevedores), we request that the DRP contain a requirement that AAT ensures that the results of any dispute under the DRP are carried down the supply chain to the end-user. For example, if Toyota Australia disputed a price increase, and the result of the DRP was that the proposed

price increase would not be applied, it would be unfair and defeat the purpose of the DRP if a stevedore then applied this price increase to Toyota Australia.

If you have any questions in relation to this letter, please contact Raph Goldenberg on (03) 9647 4543. We would also be happy to meet with the ACCC to discuss these issues further.

Yours faithfully
TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED

A handwritten signature in cursive script that reads "Peter McGregor". The signature is written in dark ink and is positioned above a horizontal line.

PETER MCGREGOR
DIVISIONAL MANAGER