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**FCAI SUBMISSION ON ACCC  
DRAFT DETERMINATION RE  
AAT APPLICATIONS FOR  
AUTHORISATION**

*November 2009*



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- 1 This submission is made on behalf of the Federal Chamber of Automotive Industries (**FCAI**) in response to the ACCC's Draft Determination of 19 October 2009 with respect to Australian Amalgamated Terminal's Pty Limited (**AAT**) applications for authorisation Nos A91141, A91142, A91181 & A91182 (**Authorisations**).
  - 2 FCAI fully endorses the draft conclusions reached by the ACCC in the Draft Determination of 19 October 2009.
  - 3 It appears clear from the Draft Determination that the main users of the services provided by AAT, namely shippers and the ultimate end users (motor vehicle importers), all share and raise the same concerns - AAT's ability and incentive to exploit the market power that it has from exclusive operation of bottleneck monopoly facilities to determine the terms and conditions of the supply of services without any regulatory oversight.
  - 4 Accordingly the FCAI endorses the ACCC's draft conclusions on public detriment of the AAT joint venture set out at paragraphs 4.101 to 4.103 of the Draft Determination:
    - "4.101 The ACCC considers that the AAT's joint venture arrangements have the potential to result in significant public detriment.
    - 4.102. Public detriment may arise if AAT is able to set prices for its services that are substantially above the efficient costs of providing those services. In some ports, AAT is a monopoly provider of automotive terminal services and has the potential to charge monopoly prices.
    - 4.103 Public detriment could also arise should AAT deny access to its terminals to stevedores in competition with its shareholders. The ACCC considers that as a result of its ownership by stevedore shareholders, AAT has an incentive to deny or restrict access to its terminals by third party stevedores."
  - 5 The proposed conditions of Authorisation set out in the Draft Determination seek to impose a level of oversight to address the ability and incentive of AAT to exercise the market power that it has from the exclusive operation of bottleneck monopoly facilities. However, FCAI considers that the proposed conditions of authorisation require some amendment to adequately address the public detriment that the ACCC has found arises from the ongoing operation of AAT.
  - 6 Normally the public detriments that the ACCC has found exist from the ongoing operation of AAT are addressed by undertakings approved by the ACCC under Part IIIA of the *Trade Practices Act*. This part of the *Trade Practices Act* is specifically designed to regulate the services provided by infrastructure such as AAT facilities.
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- 7 Therefore, a simple condition of authorisation to address the public detriment found to exist in this case could be as follows: "AAT must within 6 months of the date of this authorisation have accepted by the ACCC under Division 6 of Part IIIA of the Trade Practices Act an undertaking in respect of each existing automotive terminal."
- 8 However, to ensure that there is no further delay in the implementation of measures to address the public detriment arising from the ongoing operation of AAT a number of changes to the proposed conditions of Authorisation set out in Attachment D to the Draft Determination are proposed below.
- 9 FCAI submits that the changes set out below are the absolute minimum changes required to give effect to the ACCC stated intentions of the proposed conditions of Authorisation at paragraphs 4.111 and 4.113.
- 10 This submission is structured as follows:
- 10.1 FCAI first suggests additional drafting to the proposed conditions of Authorisation to more fully give effect to the way the ACCC seeks to address the significant public detriment that the ACCC has found arises from the ongoing operation of AAT.
  - 10.2 Secondly, the FCAI seeks to comment on the role of port authorities in regulating the conduct of AAT; and
  - 10.3 Finally, FCAI comments on the proposed counterfactuals raised by the ACCC in the Draft Determination.

#### **Express Conditions of Authorisation relating to pricing**

- 11 Paragraph 4.111 of the Draft Determination states:

"To ensure that AAT's joint venture arrangements will deliver a net public benefit over the period of authorisation the ACCC proposes to impose a condition establishing a mechanism for stevedores other than AAT's shareholders to seek access to AAT's terminals. *This condition is intended to reduce or eliminate potential monopoly pricing of AAT's services and is intended to open the door to third party stevedoring competition with access to AAT's services at regulated non-monopoly price and non-price terms and conditions. ... [emphasis added]*".

- 12 However, FCAI submits that the proposed conditions of authorisation do not "reduce or eliminate potential monopoly pricing of AAT's services". Accordingly, FCAI submits that the proposed conditions of Authorisation should contain express provisions to give effect to the ACCC's stated intention.

- 13 The proposed conditions of authorisation effectively require AAT to provide non-discriminatory access to all users. However, non-discriminatory access does not eliminate the ability or incentive for AAT to exploit its monopoly power and set monopoly prices as AAT is effectively vertically integrated. Accordingly, AAT's stevedoring shareholders, whilst having to notionally pay AAT's monopoly price (as would all stevedores) are likely to receive back at least some proportion in the form of returns from AAT<sup>1</sup>. Therefore, AAT's stevedoring shareholders will have a substantial competitive advantage over independent third party stevedores in the form of a lower 'net cost' of use of the AAT terminals, notwithstanding that AAT may comply with the obligation to provide non-discriminatory access.
- 14 Whilst it is arguable that clause 1.1 of the proposed conditions imposes a "price cap" by requiring AAT's services going forward to be provided "on terms no less favourable than what are offered to any User currently .. "(i.e. at the time of the final determination, including price) such a condition, if that is its intended effect, does not ensure the current levels of prices reflect the efficient costs of supplying those services, as is the standard for regulation of infrastructure in Australia. That is, even if clause 1.1 is a "price cap" the condition does not appear to give effect to the ACCC's intention because:
- 14.1 Current fees may not necessarily reflect the efficient cost of supplying the relevant services; and
- 14.2 AAT could continue to increase prices (and/or costs of users in the form of onerous non-price conditions of use) right up to the time of the final determination.
- 15 Accordingly, FCAI submits that the conditions of authorisation must contain express provisions to constrain the *ability* of the AAT to exercise its market power. Suggested additional conditions of authorisation are as follows:

*Clause 1.1(b)*

"Each Reference Tariff must:

- be set so as to generate expected revenue for the relevant service that is no greater than the revenue sufficient to meet the efficient costs of providing the service; and
- include a return on investment commensurate with the regulatory and commercial risks involved in providing the service."

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<sup>1</sup> Under the proposed conditions of Authorisation AAT's shareholders would have an incentive to enter into a "side letter" to vary the distribution of returns from AAT so that they would each receive a 'special dividend' equal to the amount of terminal fees paid by the individual stevedore shareholder. Therefore, it is possible that the stevedore shareholders could in fact receive back 100% of monopoly price that it paid to AAT for use of the terminals.

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*Clause 1.1(c)*

"AAT must provide Port Terminal Services at the Reference Tariff if requested by an Applicant or Terminal End-user."

- 16 Clause 1.2(a)(ii) should be amended to ensure there is maximum transparency in the calculation of Reference Tariffs. Accordingly, FCAI suggests that clause should read: "reference tariffs for each Port Terminal Service together with details sufficient to clearly and unequivocally substantiate the basis for the calculation of the Reference Tariff."
- 17 In addition the powers of the auditor should be expanded so that the auditor can if requested by the ACCC certify whether or not the Reference Tariffs only do recover sufficient revenue to meet the efficient costs of providing the service and appropriate return on investment.
- 18 Until a third party stevedore provides competing services using one of AAT's terminal Clause 1 of the proposed conditions of Authorisation will be of no effect at that terminal. Accordingly, FCAI submits the new proposed clause 1.1(c) above be capable of being relied upon by Terminal End-users , hence the extension of the obligation on AAT to supply the requested services at the Reference Tariff. Therefore, Terminal End-users will be able to keep AAT's pricing practices and increases to levels approximate to efficient costs of supplying the relevant services consistent with Part IIIA of the *Trade Practices Act*.
- 19 To ensure that it is absolutely clear that Terminal End-users can use the dispute resolution procedures to enforce the obligation imposed on AAT by new clause 1.1(c) the definition of "Terminal End-user Dispute" should be amended. As currently drafted such disputes are limited to matters "associated with the provision of Port Terminal Services by AAT *as they relate to Terminal End-users S...*" However, FCAI submits that this qualification "as they relate to Terminal End-users" is both unclear and unnecessary. It is unnecessary and unclear because all terms and conditions imposed by AAT on stevedores relate to Terminal End-users. Accordingly, it should be removed.
- 20 Finally, in relation to disputes FCAI submits that the conditions of Authorisation should mandate that AAT is not permitted to implement any proposed change to a term or condition of use of Port Terminal Services that is the subject matter of an Access Dispute and/or a Terminal End-user Dispute.

**Uncertainty of operation**

- 21 The foundation of Clause 1 of the conditions of Authorisation is the concept of non-discrimination. This concept is implemented by use of:
    - 21.1 The phrase "on terms no less favourable than what are offered to any User" [Clause 1.1]; and
    - 21.2 The term "discriminate" [Clause 1.3(a)].
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- 22 However, there is no further description or definition of the phrase and the term in the conditions of Authorisation. Therefore, FCAI is very concerned that the use of this phrase and term is uncertain and prone to significant and protracted dispute. Such disputes would seriously impede the effectiveness of the conditions of Authorisation to address the identified public detriment arising from the ongoing operation of AAT.
- 23 Furthermore, until such time as there is an Applicant for Port Terminal Services at a particular port the only mechanism in the conditions of Authorisation to constrain the behaviour of AAT is the End-User Dispute process set out in clause 2. However, as there are no express obligations imposed upon AAT by clause 2 as to what is acceptable or unacceptable conduct any End-User Dispute is potentially going to be very difficult to resolve. For example, it is very difficult to see on what basis an arbitrator or expert could determine an End-User Dispute about the non-price terms and conditions of use of Port Terminal Services without a reference point or standard to apply. Under such circumstances is it conceivable that an arbitrator or expert may not be able to determine such a dispute, thereby impeding the effectiveness of the conditions of Authorisation.
- 24 Accordingly FCAI submits that an additional condition of Authorisation should be imposed to expressly address the situation where the conditions of Authorisation are determined at any time throughout the term of the Authorisation to not be effective. Under such a condition the ACCC should have the right, at any time that it determines in its sole discretion that the conditions are not effective, to require AAT within 6 months of the date of a written notice to have accepted by the ACCC under Division 6 of Part IIIA of the *Trade Practices Act* an undertaking in respect of each existing automotive terminal.

#### **Port terminal footprint**

- 25 FCAI submits that the Authorisation should only apply to the services provided by the existing footprints of each Port Terminal. Therefore, any expansion of an existing Port Terminal's footprint should not be the subject of the Authorisation for the same reason as the ACCC has declined to authorise operations at future locations (paragraphs 4.130 to 4.133)

#### **The role of port authorities**

- 26 FCAI submits that port authorities do not provide any effective constraint or check on the AAT's exercise of its market power in setting terms and conditions of supply of relevant services.

As the ACCC notes at paragraph 4.71 of the Draft Determination the relevant port authorities appear to have some role in approving tariffs at the Port of Brisbane and Port Kembla. However, as is clear from the tables of AAT's facility access and stevedore access charges set out at paragraph 4.67 that the greatest increases in charges occur at the Port of Brisbane and Port Kembla. Therefore, prima facie port authorities appear to provide no proper regulatory oversight necessarily required of a bottleneck monopoly. This may in part be explained if AAT shares with port authorities the monopoly rents its extracts from users of its facilities, via the confidential lease payments payable by AAT to port authorities.

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- 28 For these reasons FCAI fully endorses the ACCC's conclusion at paragraph 4.72 that "port authorities may not be in the best position to independently and transparently assess access terms and conditions (including prices)."
- 29 Finally, as the ACCC notes at paragraph 4.72 that "AAT's pricing is in part made up of costs imposed by the port authority, primarily in the form of rental charges.." FCAI submits that AAT should use its best endeavours to ensure that all such costs are as low as possible.

### **The counterfactual**

- 30 At paragraph 4.38 the ACCC states that "In the counterfactual, there could be competition *for the market* between AAT's shareholders and any third party potential terminal operators. This could include competition over price and other terms and conditions of access for stevedores and other terminal users..."
- 31 FCAI submits that *competition for the market* of a bottleneck monopoly is far inferior to standard economic regulation of the services provided by such monopolies, such as Part IIIA of the *Trade Practices Act* or an effective State based access regime.
- 32 Competition for the market for a bottleneck monopoly would require:
- 32.1 A very sophisticated tender process in which future prices and quality of service could be objectively assessed to determine which bidders offer minimised prices charged without compromising quality of service.
  - 32.2 A port authority who was not simply motivated to maximise its return from the lease of the terminals to operators.
  - 32.3 Sophisticated behavioural 'undertakings' to ensure the benefits of the competition for the market of a bottleneck monopoly are passed through to customers and end users.
- 33 Even if these substantive issues could be overcome the FCAI is unaware of any indication let alone evidence that could justify the ACCC including competition for the market as a *likely* counterfactual.
- 34 At paragraph 4.37 the ACCC states that:
- "... in the absence of authorisation, it is more likely that AAT's existing terminals will be operated by one of AAT's individual stevedore shareholders or by an independent party on an exclusive basis or multi-user basis..."

- 35 FCAI does not consider that a valid counterfactual would include AAT's terminals being operated by one of AAT's individual stevedore shareholders. Based upon the material provided to the ACCC in this process and the ACCC's preliminary conclusions on the public detriment arising from the ongoing operation of the AAT joint venture it is very difficult to see how an individual stevedore shareholder would receive informal merger clearance from the ACCC to acquire the other 50% joint venture interest.
- 36 Accordingly, the FCAI submits that the only relevant counterfactuals are:
- 36.1 An individual shareholder selling its 50% joint interest in AAT to an independent third party (probably not an entity with interests in stevedoring).
  - 36.2 AAT's terminals being sold entirely to a third party or third parties.
  - 36.3 The relevant port authorities resuming the lease of respective terminals and operating them on an open access basis.
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