



Australian  
Competition &  
Consumer  
Commission

# Assessment

Collective bargaining notification

lodged by

**Hertz Australia Pty Limited**

Date: 7 December 2009

Notification no. CB00138

Commissioners:

Samuel  
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Public Register no. C2009/1884

## Summary

The ACCC does not object to the collective bargaining notification lodged by Hertz Australia Pty Limited on behalf of itself and Thrifty, Avis, Budget and Europcar (the applicants). The applicants propose to collectively negotiate with Mackay Airport Pty Ltd (Mackay Airport) the terms and conditions of the acquisition of facilities associated with the provision of rental car services at the Mackay airport (airport terminal and car park space).

### **The collective bargaining notification process**

Collective bargaining refers to two or more competitors collectively negotiating terms and conditions with a supplier or customer. Without protection, it can raise concerns under the competition provisions of the *Trade Practices Act 1974* (the Act).

Businesses can obtain protection from legal action under the Act for collective bargaining conduct by lodging a notification with the ACCC. Provided the ACCC does not object to the notified conduct, protection commences 14 days after lodgement.

The ACCC will only object to and remove the immunity provided by a collective bargaining notification when it is satisfied that any public benefits from the proposed collective bargaining conduct would not outweigh the public detriments (and substantially lessen competition for notifications that do not concern price fixing or other cartel provisions or exclusionary conduct).

### **The notification**

On 11 November 2009 Hertz lodged collective bargaining notification CB00138 for itself and on behalf of Thrifty, Avis, Budget and Europcar. The applicants propose to collectively negotiate with Mackay Airport about the terms and conditions of the acquisition of facilities associated with the provision of rental car services at the airport (including counter space and car park space).

The collective bargaining notification process is transparent, involving interested party consultation and with relevant documents available from a public register. On this matter, the ACCC has received one submission from Mackay Airport objecting to the notification.

### **ACCC's decision**

The ACCC considers that the proposed collective bargaining arrangement may result in some public benefits by providing the applicants with the opportunity to have greater input into their contract terms and conditions. This can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their business, such as for example, addressing common contractual problems in a more streamlined and effective manner.

Given existing competition at the retail level, any benefits to the applicants as a result of collective negotiations are likely to be reflected in lower prices and/or improved quality of service for consumers.

The ACCC considers that the potential for anti-competitive impact is limited, in particular by the alternatives to collective bargaining available to the applicants and Mackay Airport, by the voluntary nature of the arrangement and because the arrangement does not involve potential boycotts.

Importantly, Mackay Airport, who have objected to the notification, can continue to negotiate individually with each car rental company if they wish. Further, the proposed arrangements do not limit the ability of Mackay Airport to tailor collectively negotiated contracts to individual circumstances where appropriate. However, the proposed arrangements provide an opportunity for issues of common concern to be given greater consideration if both sides consider it appropriate to do so.

On the information available, the ACCC is satisfied that the public benefits likely to arise from the notified conduct would outweigh the public detriments. Accordingly, it does not object to the notification.

Protection afforded by the notification commenced on 25 November 2009 and will cease three years from the date of lodgement (10 November 2012). As with any notification, the ACCC may act to remove the immunity afforded by the notification at a later stage should concerns arise.

# 1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the Trade Practices Act 1974 (the Act). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. In the context of the Act, collective bargaining involves two or more competitors agreeing to collectively negotiate terms and conditions (which can include price) with a supplier or a customer (the target or counterparty).
- 1.3. Arrangements will amount to collective boycott where the collective bargaining group agrees not to acquire goods or services from, or not to supply goods or services to, the counterparty unless it accepts the terms and conditions offered by the group.
- 1.4. Collective bargaining and collective boycott arrangements can have a detrimental effect on competition and consumers and are likely to raise concerns under the competition provisions of the Act.
- 1.5. The Act, however, allows businesses to obtain protection from legal action in relation to collective bargaining and collective boycott arrangements in certain circumstances. One way in which bargaining groups may obtain protection is to lodge a collective bargaining notification with the ACCC.
- 1.6. Provided the ACCC does not object to the notified arrangement, protection commences 14 days after lodgement. The immunity from a collective bargaining notification expires three years from the date it was lodged.
- 1.7. The ACCC may object to a collective bargaining notification if it is satisfied that any public benefits from the proposed collective bargaining arrangement would not outweigh the public detriments (and substantially lessen competition for notifications that do not concern price fixing or exclusionary conduct).
- 1.8. The collective bargaining notification process is transparent involving public registers and interested party consultation. Where the ACCC proposes to object, it must first issue a draft objection notice setting out its reasons and providing an opportunity for interested parties to request a conference. If the ACCC issues a draft objection notice before the expiration of the 14 day statutory period, legal protection from the notification does not commence.

## **2. Background**

### **The applicants**

- 2.1. The car rental companies seeking to form the collective bargaining group are five of Australia's largest car rental companies, each with in excess of 100 outlets nationally.

### **Mackay airport**

- 2.2. Mackay airport is a regional airport located approximately 4km from the town of Mackay in Queensland. Mackay airport is serviced by Qantas, Jetstar, Virgin Blue, Tiger Airways and REX.
- 2.3. Until recently Mackay airport was operated by the state government. On 21 November 2008 it was announced that the airport operating company had been sold to a private consortium comprising The Private Capital Group's The Infrastructure Fund which is managed by Hastings, Perron Investments and Westpac Banking Corporation, with Queensland Airports Limited as a specialist advisor. The consortium also has interests in Gold Coast, Townsville and Mount Isa airports. Under the terms of the sale agreement, the consortium operates the airport under a long term lease from the state, which continues to own the land and airport infrastructure.<sup>1</sup>
- 2.4. Facilities operating in the Mackay airport terminal, in addition to airlines servicing the airport, include car rental services, the Eurest Bistro and Bar and two ATMs.
- 2.5. Six car hire firms operate hire booths in the Mackay airport terminal, including the five rental car companies involved in the collective bargaining group as well as Red Spot Rentals.
- 2.6. In addition to the car rental operations located at Mackay airport, a number of car rental companies have outlets in Mackay, including Corefleet Four Wheel Drive Rentals, Smart State Rentals, Acorn Rentals, Ezy Vehicle Rentals, Mackay Car & Truck Rentals Pty Ltd, Busfox, Network Car & Truck Rentals, Extreme Vehicle Hire, Budget and Europcar.

### **The proposed arrangement**

- 2.7. Notification CB00138 was lodged on 11 November 2009 by Hertz on behalf of itself and Thrifty, Avis, Budget and Europcar.
- 2.8. The applicants propose to collectively negotiate lease and licensing agreements with Mackay Airport concerning the terms and conditions of the

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<sup>1</sup> Queensland Government, Ministerial Media Statements. *Treasurer The Honourable Andrew Fraser - Treasurer announces successful sale of Mackay airport. 21 November 2008.*

acquisition of facilities associated with the provision of rental car services at the airport (including counter space and car park space).

- 2.9. The applicants propose to collectively negotiate lease and licence agreement terms and conditions including price, minimum guarantee payments and type and location of facilities.
- 2.10. The applicants are five of the six car rental companies currently operating at Mackay Airport, the other being Red Spot Rentals.

## **Negotiations between the applicants and Mackay Airport**

- 2.11. The applicants each had previous lease and licence agreements with the previous operators of Mackay Airport that expired on 30 September 2009. Hertz states that it received a letter summarising the proposed terms of a new agreement on 15 September 2009 and that Hertz and the other applicants received the proposed replacement agreements, with a commencement date of 1 October 2009, on 25 September 2009.
- 2.12. The applicants state that the costs and terms of the new agreements offered by Mackay Airport differ significantly from previous agreements. In particular, the applicants state that charges have increased significantly.
- 2.13. The applicants submit that the new lease and licence agreements were offered on a take it or leave it basis with little scope for negotiation and a requirement that the agreements be executed within a truncated timeline. To date, the lease and licence agreements proposed by Mackay Airport have not been executed.
- 2.14. The applicants state that they wish to continue their operations at Mackay airport, but on more favourable terms than currently being offered by Mackay Airport and wish to collectively bargain with Mackay Airport to achieve this.
- 2.15. In response, Mackay Airport submits that it has attempted to open negotiations with members of the bargaining group, largely to no avail. Mackay Airport further states that, with one exception, to date no members of the bargaining group have raised issues with regards to the proposed lease and licence terms and conditions with it with sufficient clarity to allow it to specifically identify relevant issues.
- 2.16. Mackay Airport states that Avis and Budget did seek clarification and amendment to the proposed lease and licence agreements on 22 September 2009 and that Mackay Airport responded amending certain terms, which demonstrates its willingness to negotiate terms and conditions.
- 2.17. Mackay Airport contends that, beyond this, there have been no genuine attempts by any member of the proposed bargaining group to negotiate with it.
- 2.18. Mackay Airport also states that it has negotiated with the car rental company that is not a member of the proposed bargaining group, Red Spot Rentals, and that Red Spot Rentals has executed a letter of offer signifying acceptance of

the fundamental terms and conditions of the lease and licence agreement proposed by Mackay Airport.

- 2.19. More generally, Mackay Airport argues that while the proposed lease and licence agreements represent an increase in charges to the applicants the proposed charges represent a fair return for services provided and are in line with charges imposed by other airports.

## **ACCC consultation**

- 2.20. The ACCC sought submissions from interested parties, including Mackay Airport, in relation to the proposed arrangements. Mackay Airport provided a submission objecting to the notification.
- 2.21. The views of the applicants and Mackay Airport are outlined in the ACCC's evaluation of the arrangements in Chapter 3.

## **Important dates**

<b>DATE</b>	<b>ACTION</b>
11 November 2009	Lodgement of collective bargaining notification.
17 November 2009	Public consultation process commenced.
25 November 2009	Closing date for submissions from interested parties.
7 December 2009	ACCC assessment of notified arrangement issued.

## **Public benefit test**

- 2.22. The ACCC may revoke a collective bargaining notification where the relevant test in section 93AC of the Act is satisfied.
- 2.23. For notifications that involve collective boycott, conduct within the meaning of s 45(2)(a)(i) or (b)(i) of the Act (exclusionary provisions), or conduct within the meaning of section 44ZZRD (cartel provisions), or a collective arrangement under which competitors will negotiate prices, the ACCC may object to a collective bargaining notification if it is satisfied:
- that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public.
- 2.24. For notifications that do not involve collective boycotts (or other exclusionary provisions), cartel provisions or price fixing but involve conduct that may otherwise substantially lessen competition within the meaning of s 45(2)(a)(ii) or (b)(ii) of the Act, the ACCC may object to a collective bargaining notification if it is satisfied:
- that in all the circumstances the conduct would, or would likely result in a substantial lessening of competition, and

- the conduct has not resulted or is not likely to result in a benefit to the public or the benefit to the public would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

### **3. ACCC assessment**

#### **Affected markets**

- 3.1. The first step in assessing the notified conduct is to consider the relevant market or markets affected by that conduct.
- 3.2. The applicants submit that services relevant to consideration of the notification are the supply and acquisition of airport terminal and car park space for car rental counters, related car rental facilities and rental vehicle parking at Mackay Airport.
- 3.3. Mackay Airport submits that the vast majority of customers of each of the car rental companies at the airport are drawn from persons commuting to, through and from Mackay via the airport.
- 3.4. Mackay Airport also submits that car rental services are a necessary and fundamental adjunct to the operation of an airport, particularly in regional areas where alternative means of transport are limited.

#### **ACCC view**

- 3.5. The ACCC considers that for car rental companies there is likely to be, at best, limited substitutability between retail space and car parking space offered to them at Mackay airport and that available at other locations. This is because most customers hiring vehicles at the airport are likely to wish to rent a car directly after arriving in Mackay by plane and/or to return a car directly before departing from Mackay by plane. These customers would place significant value on the convenience of being able to pick up and/or return their rental vehicle at the airport.
- 3.6. The ACCC also notes that the operation of a fully functional airport requires car rental operators conducting business at the airport.
- 3.7. Accordingly, for the purpose of assessing this application, the ACCC considers the collective bargaining arrangements may have their most immediate effects in the supply of airport terminal space at Mackay airport to car rental companies.
- 3.8. The ACCC considers that the other area of competition relevant to consideration of proposed arrangements is that for the provision of car rental services to customers at Mackay airport. As noted, the strong consumer preference amongst airport users for hiring cars at the airport limits the competitive constraint that car rental services located elsewhere place on

companies operating at the airport. Accordingly, the terms on which car rental companies acquire leases and licences from Mackay airport are likely to be reflected in the terms on which car rental services are offered to customers at the airport.

- 3.9. The ACCC also notes that if the proposed arrangements impact on the terms on which car rental services are offered to customers at Mackay airport, this also has the potential to affect the extent of the competitive constraint that availability of rental cars places on the airport's pricing decisions regarding other means of accessing the airport. Examples could include on-airport car parking and access to the airport by off-site car park and car rental operators.

### **The future with and without test**

- 3.10. The ACCC uses the 'future-with-and-without test' established by the Australian Competition Tribunal to identify the public benefit and anti-competitive detriment generated by the proposed arrangement.
- 3.11. The ACCC considers that, in the absence of the legal protection afforded by the notifications, the most likely counterfactual to the proposed arrangements would be that each car rental company party to the proposed arrangements would continue to negotiate individually with Mackay Airport.

### **Public benefits**

- 3.12. As noted at paragraphs 2.11 to 2.14, the applicants submit that they were recently offered new lease and licence agreements in the form of standard form contracts on a 'take it or leave it' basis with little scope for negotiation. The applicants state that they wish to continue to operate at Mackay airport but on commercially more favourable terms than currently being proposed by Mackay Airport.
- 3.13. The applicants submit that the proposed collective bargaining arrangement will result in the following public benefits:
- cost saving for rental car service customers as a result of the applicants negotiating more favourable lease and licensing terms which would be passed on to end consumers
  - enhanced tourism through minimising the cost of hiring a car at the airport
  - enhanced competitive constraint on other airports as redressing an imbalance in bargaining power at Mackay airport may encourage other airport operators to approach similar negotiations in a manner more reflective of the potential competitive constraint.
- 3.14. Mackay Airport submits that it is open to negotiating about the terms and conditions of the proposed lease and licence agreements but that none of the applicants have made meaningful attempts to do so. Mackay Airport states that the proposed terms are not out of line with those charged by other airports and

contends that the applicants do not appear to have suggested that the proposed cost increases are out of step with market rates charged by other airports.

- 3.15. Mackay Airport also submits that as providing car rental services is necessary to the operation of an airport there is no imbalance in bargaining power between it and the car rental companies.

#### **ACCC view**

- 3.16. Each of the public benefit arguments submitted by the applicants are essentially variations on the same theme – that collective bargaining will provide them with a degree of bargaining power in negotiations with Mackay Airport that will be reflected in more favourable terms and conditions (for the applicants) being negotiated and passed on to consumers.
- 3.17. Each of the applicants is a large, well resourced company with significant experience in negotiating in a commercial environment. Further, business generated by car vehicle rentals at Mackay airport is only a small proportion of each applicant's overall business.
- 3.18. However, as discussed at paragraphs 3.5 to 3.7, there are at best limited substitutes for the leasing and licensing arrangements offered to car rental companies by Mackay Airport. Mackay Airport is the only significant passenger airport in the immediate geographical area and customers commuting through the airport value the convenience of being able to pick up and drop off vehicles at the airport. In this respect, Mackay Airport submits that car rental companies need to be situated at the airport for the benefit of airline passengers.
- 3.19. While having car rental services available within the airport terminal is an important component of the operation of the airport, a number of car rental companies, including each of the applicants, compete to supply these services at Mackay Airport. Accordingly, while Mackay Airport is dependant on having car rental companies operating within its terminal to some extent, in operating the airport it is not dependant on any individual car rental company agreeing to operate at the airport.
- 3.20. The greater availability of outside options for Mackay Airport means that it is likely to have considerable bargaining power in negotiating with each car rental company individually about lease and licence terms. This is likely to be reflected in the terms and conditions of leases and licences negotiated by Mackay Airport when dealing with each car rental company separately, and ultimately, in the prices and other terms and conditions under which rental car services are supplied by the car rental companies to airport users.
- 3.21. One way in which businesses can seek to redress an imbalance in bargaining power is to bargain collectively. This may enable them to achieve more appropriate commercial outcomes through, for example, greater input into contract terms and conditions.

- 3.22. This improved input can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their business, for example, addressing common contractual problems in a more streamlined and effective manner.
- 3.23. It would still be open for Mackay Airport to negotiate with each of the applicants individually if that is its preference. However, the proposed arrangements provide an opportunity for issues of common concern to be given greater consideration if both sides consider it appropriate to do so.
- 3.24. Further, the proposed arrangements would not limit the ability of Mackay Airport to tailor collectively negotiated contracts to individual circumstances where appropriate or to deal directly with individual car rental companies.
- 3.25. Competitive pressures at the retail level are likely to mean that car rental companies will pass on any reduction in costs as a result of the proposed arrangements in the form of lower prices to consumers and/or improved levels of service or innovation.

### **Public detriments**

- 3.26. Mackay Airport submits that collective negotiation is likely to limit competition between the applicants for space at Mackay Airport. Mackay Airport further argues that if the applicants are permitted to negotiate collectively there will be a significant imbalance in bargaining power favouring the car rental companies.
- 3.27. Mackay Airport also submits that the proposed collective bargaining arrangements will give the bargaining group a competitive advantage over other current, and potential future, providers of car rental services at the airport.

### **ACCC view**

- 3.28. Under collective bargaining arrangements, competitors come together to negotiate terms and conditions, which can include price, with a supplier or customer.
- 3.29. Generally speaking, competition between individual businesses generates price signals that direct resources to their most efficient use. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to inefficiencies. The capacity of new entrants to compete for the rights to undertake the business of existing market participants subject to the collective bargaining agreement also has implications for how competition is affected. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

- 3.30. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies is likely to be more limited where:
- the current level of negotiations between individual members of the group and the proposed counterparties is low
  - participation in the collective bargaining arrangement is voluntary
  - there are restrictions on the coverage or composition of the group
  - there is no boycott activity.

*Current level of negotiations*

- 3.31. Where the current level of individual bargaining between members of a proposed bargaining group and the target business is low, the difference between the level of competition between proposed participants with or without the collective arrangements may also be low.
- 3.32. The applicants submit that they have been offered standard form contracts by Mackay Airport on a take it or leave it basis with little scope for individual negotiation. Mackay Airport submits that the applicants have not sought to engage in any meaningful negotiation about the proposed lease and licence agreements.
- 3.33. The ACCC notes that there has been very little negotiation to date about the lease and licence agreement offered by Mackay Airport. However, the applicants and Mackay Airport have offered differing views about the potential for such negotiation to occur in the future.
- 3.34. In this respect, it is relevant to note that the proposed lease and licence agreements have only recently been offered and are the first that have been offered since operational control of the airport transferred to the current operators.
- 3.35. Accordingly, while it may be the case that the current level of negotiations between each of the applicants individually and Mackay Airport is low, the ACCC considers that it is too early to conclude that more substantive individual negotiations would not take place in the future absent the proposed collective bargaining arrangements.
- 3.36. To the extent that more substantive individual negotiation may take place in the future absent the proposed collective bargaining arrangements the ACCC considers that there is some potential that collective negotiation may reduce competition between the applicants in negotiating with Mackay Airport.
- 3.37. However, the ACCC considers that the potential scope of any reduction in competition through collective bargaining in this instance is limited, having regard to the factors discussed below. In particular, the voluntary nature of the

arrangements and the ability for participants, even where they do participate in the arrangements, to negotiate individual variations to any collectively agreed arrangements.

#### *Coverage or composition of the group*

- 3.38. The ACCC considers that where the size of the bargaining group 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 buyers and/or sellers outside the group.
- 3.39. As discussed at paragraph 3.6, the operation of a fully functional airport requires car rental operators conducting business at the airport. The proposed collective bargaining group comprises five of the six car rental companies currently operating at Mackay airport.
- 3.40. However, the ACCC does not consider that the applicants negotiating collectively will result in an imbalance in bargaining power as submitted by Mackay Airport. As discussed at paragraphs 3.16 to 3.18 there is currently an imbalance in bargaining power between Mackay Airport and each car rental company when negotiating individually. This is because there are at best limited substitutes for the car rental companies for the services Mackay Airport is offering - airport terminal and car park space. In contrast, car rental companies, compete to acquire these services from Mackay Airport.
- 3.41. The proposed negotiating group comprises five of Australia's largest car rental companies and five of the six companies operating at Mackay Airport. Therefore if the applicants were to negotiate as a group the importance to Mackay Airport of negotiating an outcome that provides for the continued operation of members of the group at the airport would increase. This would provide the group with greater bargaining power than each member would have individually. However, it would remain the case that the bargaining group would have limited substitutes for the services provided by Mackay Airport meaning that Mackay Airport would continue to maintain a degree of bargaining power in negotiations.

#### *Voluntary participation*

- 3.42. Participation in the collective bargaining arrangement is voluntary. Each car rental company remains free to negotiate individually with Mackay Airport, or to negotiate variations on any collectively agreed arrangements, at any time.
- 3.43. Similarly, Mackay Airport is free to decide whether to participate in the proposed arrangements or continue to negotiate with each proposed car rental company individually.
- 3.44. Accordingly, the proposed collective bargaining arrangements will only be entered into if both the car rental companies and Mackay Airport consider it is in their best interest to collectively negotiate licence and lease terms.

### *Boycott activity*

- 3.45. The notified conduct does not allow for the applicants to engage in collective boycott activity.

### *Effect on parties outside the bargaining group*

- 3.46. The ACCC notes Mackay Airport's submission that the only car rental company currently operating at Mackay airport that is not party to the proposed arrangements, Red Spot Rental, has already reached agreement about the terms and conditions of a new lease and licence agreement, presumably on terms that are commercially acceptable to it.
- 3.47. Notwithstanding this, there is some possibility that members of the collective bargaining group may be able to negotiate terms that are more commercially favourable than an individual car rental company outside the group seeking to operate at Mackay airport would be able to. To the extent that this does occur, this may confer an advantage to members of the bargaining group in seeking to provide car rental services at the airport.
- 3.48. However, it is also relevant to note that, as discussed above, any benefits to the applicants resulting from the proposed arrangements are likely to have a pro-competitive effect on retail competition between car rental companies at Mackay airport.

## **4. Conclusion**

- 4.1. The proposed collective bargaining arrangement is subject to the tests described in paragraphs 2.22 and 2.24.
- 4.2. The ACCC considers that the proposed collective bargaining arrangement may result in some public benefits by providing the applicants with the opportunity to have greater input into their contract terms and conditions. This can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their business, such as for example, addressing common contractual problems in a more streamlined and effective manner.
- 4.3. Given existing competition at the retail level, any benefits to the applicants as a result of collective negotiations are likely to be reflected in lower prices and/or improved quality of service for consumers.
- 4.4. The ACCC considers that the potential for anti-competitive impact is limited, in particular by the alternatives to collective bargaining available to the applicants and Mackay Airport, the voluntary nature of the arrangement and because the arrangement does not involve potential boycotts.
- 4.5. In this respect, the proposed collective bargaining arrangements will only be entered into if both the car rental companies and Mackay Airport consider it is in their best interest to collectively negotiate licence and lease terms.

Importantly, Mackay Airport, who have objected to the notification, can continue to negotiate individually with each car rental company if they wish.

- 4.6. Accordingly, the ACCC does not object to notification CB00138. Protection from legal action provided by notification CB00138 commenced on 25 November 2009 and will expire three years after the date of lodgement (10 November 2012).
- 4.7. As with any notification, the ACCC may review this notification at a later stage should concerns arise.