



Federal Chamber of Automotive Industries

**Submission on Application by
Australian Amalgamated Terminals Pty Ltd
for Authorisation A91141 & A91142**

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Table of Contents

Executive Summary	1
FCAI	3
AAT	4
Public Detriment	6
Admissions of anticompetitive conduct by Patrick and P&O.....	6
Anticompetitive conduct flowing from creation of and ongoing operation of AAT	8
Examples of exercise of unconstrained market power.....	9
NSW - Port Kembla	11
Relocation to Port Kembla - not in interests of port users	11
FAC increases at Port Kembla.....	12
Queensland - Fisherman Islands Port	13
FAC Charge	14
Contamination charges	15
Alleged public benefits do not flow	16
Efficiencies do not arise.....	16
Barriers to entry not lowered.....	17
Lack of information as to joint venture	18

1 Executive Summary

1.1 The Federal Chamber of Automotive Industries (**FCAI**) provides this submission on the applications by Australian Amalgamated Terminals (**AAT**) for authorisation (**AAT's Applications**). This submission is provided in response to the ACCC's request for submissions by letter of 15 June 2009.

1.2 In summary the FCAI submits that:

- 1.2.1 AAT's automotive port facilities are each a bottleneck monopoly in each relevant State where they operate. AAT exclusively operates the sole automotive port terminal at Port Kembla and Brisbane. There is no alternative, or potential alternative, automotive port terminal at either of these ports. AAT also operates Webb Dock West for the import and sole export of vehicles and the area adjacent to berths 1, 2, 3, and 4 at Flinders Ports in Adelaide which is the facility for all export vehicles through the Port of Adelaide and import overflow.
- 1.2.2 AAT's monopoly automotive port terminals are the only means by which automotive vehicles can be imported to or exported from Australia at these locations. There is no alternate method to discharge or load vehicles from or to a ship. Accordingly, these terminals are an essential part of the international automotive supply chain and accordingly constitute a bottleneck to competition in dependent markets such as automotive stevedoring services, international automotive shipping services and supply of vehicles in Australia.
- 1.2.3 AAT's bottleneck monopoly automotive port terminals are created by the formation and continued existence of AAT. Prior to the formation of AAT there were two competing automotive ports terminals at the relevant ports on the East Coast of Australia, owned and operated by related bodies corporate of the shareholders of AAT - Patrick and P&O.
- 1.2.4 Notwithstanding that, the formation and continued existence of AAT creates and perpetuates bottleneck monopoly AAT's facilities that are not subject to any form of regulation by the ACCC, Essential Services Commission (Vic), Queensland Competition Authority, Independent Pricing and Regulation Tribunal or Essential Services Commission (SA).
- 1.2.5 The unconstrained market power of AAT's bottleneck monopoly automotive port terminals is evidenced by the fact that AAT can and does unilaterally impose significant and material price increases each and every year on users of the terminals.
- 1.2.6 AAT's automotive port facilities are not 'open access' as alleged by AAT, but rather the services are provided on a strict 'take or it or leave it' basis. There is no right or ability to negotiate let alone dispute the terms of access to AAT's terminals enforceable by binding arbitration by an economic regulator.

- 1.2.7 The market power of AAT's bottleneck monopoly automotive port terminals is leveraged into the automotive stevedoring market as evidence by the fact that no independent third party stevedore provides automotive stevedoring services at AAT's automotive port terminals. The sole stevedores that use AAT's automotive port terminals are the related bodies corporate of the shareholders, Patrick and P&O stevedores. Since the creation of AAT in 2002 there has been no new entrant for the provision of automotive stevedoring services thereby creating a duopoly in the provision of automotive stevedoring services.
- 1.2.8 The duopoly in the provision of automotive stevedoring services between Patrick and P&O stevedores, resulting from the leverage of the market power AAT's bottleneck monopoly automotive port terminals, creates a market structure that facilitates collusion in the provision of automotive stevedoring services.
- 1.2.9 The shareholders of AAT have admitted to the Federal Court that their agreement to jointly operate automotive port terminals in Sydney, Melbourne and Brisbane and the creation of AAT is anticompetitive in breach of s.45(2)(a)(ii) and 45(2)(b)(ii) of the *Trade Practices Act*. (*ACCC v. PRK Corporation Pty Ltd* [2009] FCA 715). Therefore, it is beyond doubt that the ongoing existence and operation of AAT in its current form is anticompetitive in breach of the *Trade Practices Act*.
- 1.2.10 The alleged public benefits to justify the continued existence and operation of AAT in its current form are merely unsubstantiated assertions. AAT has not sought to quantify any of the alleged efficiencies arising from the anticompetitive conduct, let alone provide any verification and substantiation of a nature that can be relied upon by the ACCC to give them any weight.
- 1.2.11 Furthermore, the alleged efficiencies from the AAT joint venture that flow to new entrants are either non-existent or simply irrelevant as there has been over the past seven years since the creation of AAT no new entrant to realise and enjoy these efficiencies.
- 1.2.12 In addition, the fact that in the seven years since the creation of AAT in 2002 there has been no independent third party stevedore to use AAT's automotive port terminals is very strong direct evidence that the barriers to entry are not sufficiently low to permit new entry. Therefore:
- (a) AAT's assertion that its existence lowers barriers to entry is false and the alleged benefit does not in fact arise; or
 - (b) even if AAT's assertion that its existence does lower barriers to entry were verified, quantified and substantiated the benefit is of no value as it does not lower barriers to entry to a sufficient level to in fact permit new entry.

- 1.2.13 Accordingly, the ACCC must reject that application for authorisation as no compelling evidence in support of alleged public benefits has been provided to overcome the anticompetitive detriment admitted by Patrick and P&O from the ongoing existence and operation of AAT in its current form, let alone the additional anticompetitive determinant identified above.
- 1.2.14 The only condition of authorisation that could sufficiently address the anticompetitive determinant from the ongoing existence and operation of AAT in its current form is the acceptance by the ACCC of an undertaking in respect of the services provided at each automotive port terminal owned or operated by AAT under section 44ZZA of the *Trade Practices Act*.

2 FCAI

- 2.1 The FCAI is the peak industry body representing vehicle manufacturers and importers of passenger cars, sports utility vehicles, light commercial vehicles and motor cycles in Australia.
- 2.2 A full list of all members of the FCAI is provided at **Attachment 1** to this submission.
- 2.3 Broadly, the logistics chain for imported new motor vehicles involves new vehicles being despatched from the overseas vehicle manufacturers and transported by sea by shipping lines. The shipping lines have arrangements with stevedores to discharge the cargo at the destination port facility. The stevedores have a licence agreement with the facility operator, such as AAT, to use the port facility. The vehicles are unloaded from the vessels by the stevedores. Within three working days, the majority of new vehicles are then transferred to pre-delivery and inspection (PDI) facilities which are either located on or off wharf for preparation of the vehicles for sale. Some vehicles are relocated to longer term storage or delivered direct to dealer.

3 AAT

3.1 AAT's corporate structure is described in section 3.1 of AAT's Submission. AAT states that:

'The AAT shareholders and parties to the AAT Joint Venture are:

- Pizen, the ultimate holding company of which is Asciano.

Asciano is the publicly listed holding company for, inter alia, Patrick. Patrick's business includes stevedoring for container, bulk, automotive and general cargo, as well as ancillary services related to those businesses; and

- POWM [P&O Wharf Management Pty Ltd], owned as to 51% by DP World and as to 49% by KFM Logistics Investments 6 Pty Ltd (**Kaplan Consortium**).

The Kaplan Consortium comprises KFM Diversified Infrastructure and Logistics Fund and Kaplan Equity Limited (together, **Kaplan**), Wilh Wilhelmsen ASA, Kawasaki (Australia) Pty Ltd and management.

DP World's business includes the operation of container terminals and associated services. It also retains a minority stake in POAGS, which provides automotive and general stevedoring services.'

3.2 Patrick and DP World are stevedores. Two parties within the Kaplan Consortium are associated with shipping lines: Wilh Wilhelmsen ASA and Kawasaki (Australia) Pty Ltd (connected to K-Line).

3.3 AAT operates terminals at Port Kembla (New South Wales); Fisherman Islands (Brisbane), Webb Dock West (Melbourne), Outer Harbour (Adelaide) and Bell Bay (Tasmania). AAT leases land from the Port Authority and operates the facility which involves managing the cargo laydown area for the discharge of imported vehicles by the stevedores.

3.4 The following table provides details of the ownership of those facilities and the service providers at those facilities servicing the automotive trade.

Table 1

Port Facilities	Ownership	Management	Stevedore Services	PDI Services
Melbourne Webb Dock West	Port of Melbourne Corporation	AAT	Patrick Automotive and General Stevedores (Patrick) P&O Automotive & General Stevedores (P&O)	Patrick Autocare
Adelaide Outer Harbour	Flinders Ports South Australia	AAT	Patrick P&O	Patrick Autocare
Brisbane Fisherman Islands	Port of Brisbane Corporation	AAT	Patrick P&O	Patrick Autocare CCA (JV Patrick & Mitsui OSK Lines operating within Patrick Autocare)# Prixcar
Port Kembla Port Kembla	Port Kembla Port Corporation	AAT	Patrick P&O	Patrick Autocare CCA (JV Patrick & Mitsui OSK Lines operating within Patrick Autocare)# Prixcar operating but facilities under development AutoNexus under construction* CEVA facility under construction* *not located in the AAT facility
Bell Bay (Tasmania) Port of Bell Bay	Tasports	AAT	Not used for automotive trade	

CCA does not hold any leases with AAT.

3.5 It can be seen from the above table that companies related to shareholders of AAT operate stevedoring services and also operate PDI services at the port facilities operated by AAT. Patrick Autocare and Toll are the two major road and rail operators servicing the automotive trade. For rail, Toll freight forwards using the Patrick owned Pacific National service.

3.6 Of the stevedore companies listed in AAT's Submission, only Patrick and P&O service the automotive trade. That is, only stevedores related to AAT's shareholders service the automotive trade.

- 3.7 In section 4.8 of AAT's Submission, AAT sets out the shipping lines which berth at AAT terminals. Only the shipping lines listed in paragraphs (a), (b), (d) and (f) service the automotive trade being:
- (a) Kawasaki Kisen Kaisha Ltd (related to AAT's shareholders), Mitsui OSK Lines, Nippon Yusen Kaisha Line;
 - (b) ANL Container Line;
 - (c) Wallenius Wilhelmsen Logistics (related to AAT's shareholders);
 - (d) Seaway Agencies Limited.
- 3.8 In section 4.12 of AAT's Submission, AAT refers to operators of PDI services. The FCAI observes that Patrick Autocare and Prixcar Services Pty Ltd are related to AAT's shareholders through their ownership as described in that section of AAT's Submission. They are also the largest operators in the industry. Patrick is currently the only PDI operator which leases facilities on wharf from AAT. However, Prixcar is currently setting up operations at the AAT facility at Port Kembla.
- 3.9 In section 4.9 of AAT's Submission, AAT lists the vehicle manufacturers which export cars to Australia on vessels that berth at AAT terminals. The FCAI observes that AAT has omitted from the list major vehicle importers such as Mitsubishi and Subaru.

4 Public Detriment

- 4.1 The FCAI disputes that the AAT joint venture causes no public detriment as alleged by AAT at the conclusion of section 2 of AAT's Submission. Furthermore, at 8.1 of AAT's Submission AAT states:

"Accordingly, the fact that AAT is making the application does not mean that giving effect to the AAT Joint Venture or otherwise engaging in conduct under, pursuant to or in fulfilment of the AAT Joint Venture would or is even likely to contravene Part IV of the TPA."

Admissions of anticompetitive conduct by Patrick and P&O

- 4.2 Patrick Stevedores Holdings Pty Limited admitted to the Federal Court that it "made and gave effect to an arrangement (namely, the Arrangement) with a competitor, the Seventh Respondent [DP World Australia Limited (Formerly known as P&O Ports Limited)], which contained provisions that:
- they would seek to establish and operate automotive terminals jointly in each of the ports in Sydney, Melbourne and Brisbane; and
 - to that end, they would form an incorporated joint venture which subsequently became known as AAT

The making and giving effect to that arrangement, as at November 2002, had the likely effect of substantially lessening competition in each of the following markets:

- Sydney terminal services market;
- Melbourne terminal services market; and
- Brisbane terminal services market

within the meaning of sub-sections 45(2)(a)(ii) and 45(2)(b)(ii) of the Act."¹

- 4.3 DP World Australia Limited (formerly known as P&O Ports Limited) made an identical admission to the Federal Court.²
- 4.4 Justice Jacobson summarised the relevant anticompetitive conduct as "... an agreement between Patrick and P&O to rationalise automotive terminal infrastructure, including by the formation of a joint venture company to provide automotive terminal services in each of the three ports."³
- 4.5 Therefore the anticompetitive conduct as admitted by Patrick and P&O was to rationalise the automotive terminal services and continue to do so via the creation and ongoing operation of AAT. That is, the ongoing operation of AAT in its current form is giving effect to the anticompetitive agreement that the Federal Court has found to be in breach of the *Trade Practices Act*.
- 4.6 There is no difference between this scenario and the scenario where two competitors agreed to fix prices in 2002 but have continued and continue to charge the same prices in accordance with the 2002 illegal agreement. The competitors are currently giving effect to an illegal agreement made in 2002 in breach of the *Trade Practices Act*.
- 4.7 Furthermore, the express admission of both Patrick and P&O as set out at paragraph 4.2 above is that they would "operate automotive terminals jointly in each of the ports in Sydney, Melbourne and Brisbane" [emphasis added] meaning they would continue into the future to operate terminals jointly. The admission is not limited to actions that only occurred in 2001 - 2002. Rather the admission is of an agreement to future and ongoing conduct.
- 4.8 Therefore, on the admissions of Patrick and P&O the continued operation of AAT is likely to have the effect of substantially lessening competition in breach of section 45 of the *Trade Practices Act*. These are findings of the Federal Court of Australia which the ACCC must accept.

¹ *ACCC v. PRK Corporation Pty Ltd* [2009] FCA 715 at [41] - [42].

² *Ibid* at [43] to [44]

³ *Ibid* at [76]

Anticompetitive conduct flowing from creation of and ongoing operation of AAT

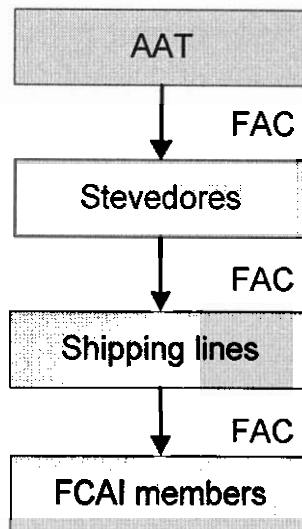
- 4.9 AAT's automotive port facilities are each a bottleneck monopoly in each relevant State where they operate. AAT exclusively operates the sole automotive port terminal at Port Kembla and Brisbane. There is no alternative, or potential alternative, automotive port terminal at either of these ports. AAT also operates Webb Dock West for the import and sole export of vehicles and area adjacent to berths 1, 2, 3, and 4 at Flinders Ports in Adelaide which is the facility for all export vehicles through Port of Adelaide and import overflow.
- 4.10 AAT's monopoly automotive port terminals are the only means by which automotive vehicles can be imported to or exported from Australia at these locations. There is no alternate method to discharge or load vehicles from or to a ship. Accordingly, these terminals are an essential part of the international automotive supply chain and accordingly constitute a bottleneck to competition in dependent markets such as automotive stevedoring services, international automotive shipping services and supply of vehicles in Australia.
- 4.11 AAT's bottleneck monopoly automotive port terminals are created by the formation and continued existence of AAT. Prior to the formation of AAT there were two competing automotive ports terminals at the relevant ports on the East Coast of Australia, owned and operated by related bodies corporate of the shareholders of AAT - Patrick and P&O⁴. The Federal Court found at paragraphs [35] to [40].
- 4.12 Notwithstanding that the formation and continued existence of AAT creates and perpetuates a bottleneck monopoly, AAT's facilities are not subject to any form of regulation by the ACCC, Essential Services Commission (Vic), Queensland Competition Authority, Independent Pricing and Regulation Tribunal or Essential Services Commission (SA).
- 4.13 The unconstrained market power of AAT's bottleneck monopoly automotive port terminals is evidenced by the fact that AAT can and does unilaterally impose significant and material price increases each and every year on users of the terminals.
- 4.14 AAT's automotive port facilities are not 'open access' as alleged by AAT, but rather the services are provided on a strict 'take it or leave it' basis. There is no right or ability to negotiate let alone dispute the terms of access to AAT's terminals enforceable by binding arbitration by an economic regulator.

⁴ Ibid paras [35] to [40]

- 4.15 The market power of AAT's bottleneck monopoly automotive port terminals is leveraged into the automotive stevedoring market as evidenced by the fact that no independent third party stevedore provides automotive stevedoring services at AAT's automotive port terminals. The sole stevedores that use AAT's automotive port terminals are related bodies corporate of its shareholders, Patrick and P&O stevedores. Since the creation of AAT in 2002 there has been no new entrant for the provision of automotive stevedoring services thereby creating a duopoly in the provision of automotive stevedoring services.
- 4.16 The duopoly in the provision of automotive stevedoring services between Patrick and P&O stevedores, resulting from the leverage of the market power at AAT's bottleneck monopoly automotive port terminals, creates a market structure that facilitates collusion in the provision of automotive stevedoring services.

Examples of exercise of unconstrained market power

- 4.17 The unconstrained market power of AAT's bottleneck monopoly automotive port terminals is evidenced by the fact that AAT can and does unilaterally impose significant and material price increases each and every year on users of the terminals.
- 4.18 The fact that the automotive stevedores are related to AAT's shareholders affects the ability of FCAI members to dispute access charges imposed by AAT. As access charges are initially imposed by AAT on those stevedores and then passed down to FCAI members through the shipping lines, the FCAI members cannot rely on the stevedores to dispute those charges for them.
- 4.19 Through its owners, AAT is related to the major stevedores, some of the major shipping lines and the major operators of pre-delivery and inspection (PDI) services for motor vehicles.
- 4.20 Prior to increasing its tariffs AAT does not consult with industry, but rather unilaterally imposes charges. AAT's FACs are imposed on the stevedores which then pass those charges onto the shipping lines which in turn pass those charges onto FCAI members. AAT's licence agreements are with the stevedores which are related to AAT. This chain is shown in the following diagram.



4.21 As the FCAI has no agreement with AAT it has no recourse when AAT increases its FACs. Further, it cannot rely on the stevedores which initially pay the charge to challenge the charge as they are related to AAT.

4.22 In addition, AAT's policy for reviewing tariffs is contained in Appendix C to AAT's Submission. That policy states that:

Three months notice is provided before any new tariff is implemented; and

Notices advising of the new tariff are sent to stevedores and industry bodies as applicable.

4.23 It is the FCAI's experience that, generally, it does not receive three months notice of a new tariff. Rather, generally, if it receives notice, it receives only two months notice. Further, sometimes it does not directly receive notice from AAT, but rather through the shipping lines.

4.24 AAT states in its submission that it 'has not refused access to its terminals to any stevedore at any time'. In the FCAI's experience AAT has threatened to withdraw stevedores' access to terminal services at Fisherman Islands unless FCAI members paid the increased facility access charge (see below). There was no dispute resolution procedure available to the members and members had no option but to pay the charge (under protest).

4.25 On page 2 of the AAT Submission, AAT states that it operates in the context of broader government policies and commercial forces which include 'requirements of independent port authorities with respect to the allocation of port land among port users, to maximise benefits to all port users, and to realise commercial returns for corporatised port authorities'. The FCAI considers that AAT is focused on realising commercial returns rather than maximising benefits to port users. This is shown in the examples below. There are no, or inadequate balances in place between AAT and the importers with respect to the imposition of fees and charges.

- 4.26 On page 4 of the AAT Submission, AAT states that it is 'more efficient and pro-competitive (or at least not any less competitive) than any of the alternative scenarios and unlikely to substantially lessen competition in any relevant market'. The FCAI disputes this. It is difficult to see how one vertically integrated operator of a bottleneck facility can be more efficient and pro-competitive, than for example an independent operator of a true open access facility or two vertically integrated operators of multi-user facilities.
- 4.27 In the following sections of this submission, the FCAI makes comments on the port facilities managed by AAT which FCAI members use.

5 NSW - Port Kembla

Relocation to Port Kembla - not in interests of port users

- 5.1 In section 5.2 of AAT's Submission, AAT states that in 2003 AAT engaged in discussions with Port Kembla Port Corporation (**PKPC**) in relation to the possibility of establishing a multi-user general cargo facility at Port Kembla.
- 5.2 At this time AAT was managing the port facility at Glebe Island at Port Jackson. AAT had entered into a lease with Sydney Ports Corporation in respect of Glebe Island in 2002 with a minimum term of 10 years and a further 5 year option until 2017. The automotive industry planned its operations based on this lease.
- 5.3 In October 2003, the NSW Government announced the 'Ports Growth Plan' which foreshadowed the progressive relocation of car stevedoring from Port Jackson to Port Kembla. The FCAI opposed such a move and made submissions to the NSW Government in response to its inquiry into the Ports Growth Plan opposing the move and advocating the continued use of the Glebe Island Automotive Terminal (**GIAT**) at Port Jackson. The Committee recommended that further investigation be undertaken into the long-term viability of GIAT including the costs and employment impacts of a move to another port such as Port Kembla.
- 5.4 AAT states in section 5.2 of its Submission that the Government's announcement 'indicated that car imports would remain in Port Jackson until at least 2012'. However, as AAT was concerned about 'certainty of future tenure at GIAT', it engaged in discussions with PKPC about moving all of its trade from GIAT to Port Kembla prior to 2012. By the end of 2008 AAT had moved all of its port facility operations to the AAT terminal at Port Kembla.
- 5.5 AAT did not enter into any discussions with port users regarding the suitability of relocating from GIAT to Port Kembla. Nor did the Government consult with industry on the issue of relocating to Port Kembla prior to 2012.
- 5.6 Industry had planned their operations based on the lease arrangements and the Governments announcement that car imports would remain at Port Jackson until at least 2012. The FCAI's preference was to continue to remain at GIAT or, if relocation was necessary, to relocate to Newcastle and establish a non AAT facility, given AAT's control of port facility services at major import locations down the East Coast.

- 5.7 Further, the FCAI is not aware of any feasibility study undertaken on which the decision to relocate the industry to Port Kembla was based. In June 2006, the FCAI engaged a consulting company, Dawson Consulting (International) Pty Ltd, to undertake a comparative assessment of Port Kembla and the Port of Newcastle for the purpose of recommending the most suitable location for the relocation of motor vehicle imports into New South Wales. Dawson Consulting recommended the Port of Newcastle as the preferred relocation option.
- 5.8 AAT's relocation of port facilities from GIAT to Port Kembla shows how AAT is able to act other than in the interests of port users. The automotive industry has incurred significant costs in relocating and incurs increased ongoing overheads and charges (including freight transport costs) as a result of operating out of Port Kembla as opposed to GIAT.
- 5.9 At paragraph 5.2(c) of its Submission, AAT refers to port land which could provide, or potentially provide a terminal handling cars in competition with AAT's Port Kembla terminal. The FCAI observes that:
- (a) The development of additional terminals at Port Kembla is not an option now that substantial investment (including Government funding) has been made developing the AAT facility. Duplicating this substantial investment would not be commercially viable or sensible.
 - (b) The FCAI ceased giving consideration to Newcastle as an alternative port facility due to NSW Government intervention. The NSW Government supported the development of the new facilities at Port Kembla to replace the GIAT. It did not support the development of new port facilities at Newcastle.
 - (c) The FCAI explored possible alternatives to relocating to Port Kembla with the Sydney Ports Corporation and was not offered access to Port Botany due to government intervention.

FAC increases at Port Kembla

- 5.10 Following relocation from Glebe Island the FAC was set at \$2.20 per m³. On 6 January 2009, AAT informed the FCAI that its tariffs were increasing effective 1 March 2009. Under the new tariff schedule the FAC for wheeled vehicles was \$2.50 per m³. That is an increase of 13.6% or \$0.30 per m³. As the average size of a motor vehicle is 13 m³ the charge increased from \$28.60/mv to \$32.50/mv - an increase of \$3.90 per motor vehicle.
- 5.11 This charge was imposed unilaterally and without consultation with port users. There was no explanation for the increase in charges.
- 5.12 The CEO of Port Kembla Port Corporation has confirmed to the FCAI that AAT does not need to seek approval for their price increases, other than that the prices in Port Kembla must be competitive compared to other ports. AAT is the facility operator at the other major Ports, namely Brisbane and Webb Dock

6 Queensland - Fisherman Islands Port

- 6.1 The main facility in Queensland for vehicle import services is the Fisherman Islands Port operated by AAT. This is another bottleneck facility at which AAT operates without competition.
- 6.2 In section 5.3(c) of AAT's Submission, AAT refers to port land in Brisbane that could potentially provide for alternatives to the AAT terminal. However, AAT and the Port of Brisbane have informed the FCAI that there are no alternative facilities in Brisbane to the AAT facility for motor vehicle trade.
- 6.3 AAT has over the past two years exercised its market power at the Fisherman Islands port unilaterally and without any restraint:
- (a) setting non-negotiable terms and conditions of use;
 - (b) increasing the facility access charge for wheeled vehicles by 35% and 37% respectively over the past two years;
 - (c) introducing new charges; and
 - (d) threatening to impound vehicles
 - (e) threatening to prevent stevedores discharging vessels.
- 6.4 The FCAI on behalf of the end users of Fisherman Islands has sought explanations from AAT for the basis of all charges and in particular the large annual increases. AAT has refused to engage in any meaningful or substantive discussions.
- 6.5 There are no other facilities within the Port of Brisbane for car carrier vessels. The closest port to the Fisherman Islands facility is located at Townsville.
- 6.6 Townsville Port is located approximately 1,350km north of Brisbane. It is managed by the Port of Townsville, a statutory Government Owned Corporation. However, Townsville Port is not a substitute for the Fisherman Islands Port because:
- (a) Townsville Port is not equipped to handle the volume of motor vehicle imports currently handled by Fisherman Islands. In 2008 there were approximately 13,490 vehicles imported through Townsville whereas there were approximately 213,430 vehicles imported through Fisherman Islands;
 - (b) there is no PDI facility at Townsville Port;
 - (c) transporting cars from Townsville to Brisbane is difficult and costly. The estimated costs (as supplied by industry experts) of transporting automotive vehicles from Townsville to Brisbane's main market would add a minimum of 40% to each inland move and also add 3-4 days to the supply chain. Moreover, the additional capital investment required to provide car carriers combined with a general shortage of truck drivers limits the practical scope of this option.

- 6.7 As the only supplier of port services for motor vehicles at Fisherman Islands, AAT has the ability to increase charges to whatever levels it chooses and the FCAI members are required to accept those charges.
- 6.8 New charges and increases in current charges for use of Fisherman Islands are unilaterally imposed by AAT. There is no consultation on the charges with the FCAI or its members prior to implementation and the charges are not negotiable. Notification of the charges is often through third parties, for example shipping lines, custom brokers, stevedores and PDI service providers, rather than being notified directly to the FCAI or its members.
- 6.9 Two examples of AAT's conduct in imposing charges at Fisherman Islands are given below - being its conduct in respect of increasing the FAC and imposing the contamination charges.

FAC Charge

- 6.10 An example of AAT exercising its monopoly power to unilaterally increase charges for Fisherman Islands is AAT's recent conduct in increasing the FAC for wheeled vehicles accessing the facility.
- 6.11 As discussed at 4.20 above, AAT's FACs are imposed on the stevedores which then pass those charges onto the shipping lines which in turn pass those charges onto the FCAI members. AAT's licence agreements are with the stevedores, which in most cases are related entities to AAT. As the FCAI (or its members) has no agreement with AAT it has little recourse when AAT increases its FACs. Further, it cannot rely on the stevedores which initially pay the charge to challenge the charge as they are related to AAT.
- 6.12 In July 2007, a shipping line notified the FCAI of an increase in AAT's FAC from \$1 per m³ to \$1.35 per m³ (ie an increase of 35%) for new vehicle imports effective 1 October 2007. On average, a motor vehicle is 13 m³ which means that the charge increased from \$13/mv to \$17.55/mv. AAT explained that this increase was necessary due to land rental costs, rates and taxes, security and labour costs and rental increases from the POB of 11% in May 2007 and 18% in July 2007.
- 6.13 On 26 June 2008 the FCAI was informed by AAT that the FAC for new vehicle imports would increase from \$1.35 per m³ to \$1.85 per m³ (ie an increase of 37%) effective 1 September 2008 with further increases to apply in 2009 and 2010. This resulted in an increase in the charge per motor vehicle from \$17.55/mv to \$24.05/mv. AAT explained that this and the further increases were the result of a rent review undertaken by the POB resulting in a 130% increase in rent for Fisherman Islands to be spread over a three year period.
- 6.14 Since being informed of the increases to the FAC in June 2008, the FCAI has engaged in correspondence and discussions with AAT and the POB regarding those increases to no effect. AAT refuses to negotiate FAC increases.

6.15 When it came into effect in September 2008, the majority of the FCAI members refused to pay the increased FAC charge and instead continued to pay the rate in place prior to 1 September 2008. In some cases the shipping companies covered the increased charge instead. In other cases shipping companies passed through the former rate to the stevedores who had been invoiced the increased rate by AAT. AAT notified stevedores that if it did not receive full payment then AAT would refuse access to Fisherman Islands for the purpose of stevedoring any vessel operated by the shipping companies which had not paid the full FAC. Rather than risk the consequences, importers made payment 'under protest' and continue to do so.

6.16 The following table shows the increases in the FAC at Fisherman Islands over the past two years since the Facility became operational:

Effective Date	Charge	% Increase
21 May 2006	\$1	
1 October 2007	\$1.35	35%
1 September 2008	\$1.85	37%

6.17 The FCAI members have been informed by the POB and AAT that fees are based on market place land valuations. However, when they have asked whether these fees would be reduced if land valuations went down, they have been told an emphatic 'no'.

Contamination charges

6.18 A further example of AAT's conduct in imposing charges is in the implementation of charges arising from seed contamination issues concerning motor vehicle imports.

6.19 In February 2008, AAT informed the FCAI members that it would impose a charge of \$68 plus GST per car for cleaning contaminated cars at Fisherman Islands. The cleaning is undertaken as a consequence of an AQIS inspection where a vehicle is contaminated. The charge is set by the AAT and is not subject to negotiation. The charge is applied at a flat rate regardless of the level of cleaning undertaken. For example, Japanese motor vehicle imports require the removal of external protection only whereas Thai motor vehicle imports require cars to be put on a hoist to enable the cleaning of the engine bay and underbody. The FCAI has requested from AAT a break up of the charges including details as to how long it takes to clean each car, how long to reinspect the cars, the percentage of cars reinspected by AQIS and the percentage of cars requiring further cleaning following reinspection by AQIS. In addition, the FCAI has requested an explanation as to the justification for charging a flat rate regardless of the level of cleaning. AAT has not provided the information requested by the FCAI.

- 6.20 In addition, AAT informed the FCAI members of a Seed Contamination Storage and Handling Charge to be imposed from 1 March 2008. This was a charge of \$15 plus GST levied on all imported motor vehicles from Japan, Thailand and Korea discharged at Fisherman Islands. This charge was applied when AQIS heightened the surveillance requirement on the imports. AAT said that this charge was introduced to cover the additional costs that AAT was incurring due to this issue, including lease costs on additional land, labour costs on moving vehicles and on managing the services of AQIS. It was applied to all imports sourced from Japan, Thailand and Korea regardless of whether the importer had a history of contaminated imports or not or whether the shipment was contaminated or not. The charge was removed on 3 July 2008 in line with AQIS advising that the heightened quarantine surveillance was no longer to be applied to any new car imports.
- 6.21 The charge was imposed without negotiation. AAT was not transparent about the costs that were included in setting the charge. AAT advised the FCAI in discussions that it obtained a 22% profit from the imposition of the fee. The FCAI members were not involved in the cleaning process and had no way of checking whether the vehicles cleaned were contaminated or not. While Prixcar was approved by AQIS to clean contaminated vehicles, cars were only directed through Prixcar when AAT was too busy. AAT controlled the cleaning process, even when some FCAI members' preference was for Prixcar to do the cleaning.

Alleged public benefits do not flow

The alleged public benefits to justify the continued existence and operation of AAT in its current form are merely unsubstantiated assertions. AAT has not sought to quantify any of the alleged efficiencies arising from the anticompetitive conduct, let alone provide any verification and substantiation of a nature that can be relied upon by the ACCC.

- 7.2 Accordingly the ACCC must give very little weight, if any, to the unsubstantiated alleged public benefits put forward by AAT in support of the Application for Authorisation.

Efficiencies do not arise

- 7.3 AAT asserts certain efficiencies arise in section 8.3(a) of the AAT Submission.
- 7.4 However, these alleged efficiencies are not verified, substantiated or quantified. Accordingly, the ACCC must give little if any weight to these unsubstantiated benefits when balancing them against the anticompetitive conduct found by the Federal Court and the anticompetitive conduct resulting from paragraphs 4.9 to 4.16 above.
- 7.5 Further, the FCAI considers that at best these efficiencies if proven are insubstantial.

7.6 Finally, AAT states on page 30 of the Application for Authorisation:

"The efficiencies realised by AAT significantly reduce operating costs, particularly for smaller or new entrant stevedores. Absent AAT, the funding required for large capital expenditure programs would be prohibitive for smaller or new entrant stevedores on an individual basis."

7.7 However, since the creation of AAT in 2002 there have been no new entrants providing automotive stevedoring services from AAT's automotive port terminals. Therefore:

7.7.1 the alleged efficiencies do not in fact exist; or

7.7.2 the effects of leveraging the market power of AAT's bottleneck monopoly automotive terminals into the automotive stevedoring services market are so great that no independent third party stevedore can enter the market meaning the alleged efficiencies would never be realised.

Barriers to entry not lowered

7.8 The fact that in the seven years since the creation of AAT in 2002 there has been no independent third party stevedore to use AAT's automotive port terminals is very strong direct evidence that the barriers to entry are not sufficiently low to permit new entry. Therefore:

7.8.1 AAT's assertion that its existence lowers barriers to entry is false and the alleged benefit does not in fact arise; or

7.8.2 even if AAT's assertion that its existence does lower barriers to entry were verified, quantified and substantiated, the benefit is of no value as it does not lower barriers to entry to a sufficient level to in fact permit new entry.

7.9 Accordingly, the ACCC must disregard these alleged benefits.

7.10 Finally, these public benefits which AAT submits will flow from authorisation are based on the facility being an 'open access facility' (for example see (b) on p30 of AAT's Submission). However, AAT's port facilities are not truly 'open access' as access is provided on a 'take it or leave it basis' as evidenced by the examples above. There is no right or ability to negotiate let alone dispute the terms of access to AAT's terminals enforceable by binding arbitration by an economic regulator.

7.11 In essence AAT offers the services of its bottleneck monopoly automotive terminals to any stevedore who is prepared to accept the unilateral 'take it or leave it' terms imposed by AAT. That is, AAT does not prima facie appear to deny any independent third party the right to use the AAT terminals and therefore describes the access that it provides as 'open access'. However, constructive refusals to supply services can arise from the terms and conditions of use imposed by the monopolist on third party users and whether or not there is any discrimination between the affiliates of the monopolist and third party users.

- 7.12 The fact that in the seven years since the creation of AAT in 2002 there has been no independent third party stevedore to use AAT's automotive port terminals is very strong direct evidence that services to the terminals are not in fact provided on an 'open access' basis.
- 7.13 Open access is generally provided by the alternate methods under Part IIIA of the *Trade Practices Act* namely (i) declaration, (ii) an approved access undertaking or access code by the ACCC pursuant to Division 6 of Part IIIA or (i) services are provided subject to a certified State based access regime. None of these means of providing open access apply to AAT's automotive terminals.

8 Lack of information as to joint venture

- 8.1 In its Applications, AAT describes the conduct for which it seeks authorisation by reference to the shareholders' agreement dated 2 December 2002 between AAT P&O Wharf Management Pty Ltd and Plizen Pty Ltd and related provisions of the constitution of AAT. As the shareholders' agreement and the constitution are confidential, interested parties such as the FCAI are unable to assess the full anticompetitive effect of the joint venture, including verifying whether that conduct is only limited to an exclusionary provision or a substantial lessening of competition. The onus is therefore on the ACCC to satisfy itself that the description of the relevant conduct is complete and accurate as no other party can do that.
- 8.2 In addition, as the ACCC recognises in its letter to AAT of 24 June 2009, the description of the conduct for which AAT seeks authorisation lacks sufficient detail to enable the ACCC or any other party to understand AAT's business or the conduct for which AAT seeks authorisation.
- 8.3 For these reasons the ACCC must give little weight to unsubstantiated assertions by AAT as to the lack of anticompetitive effect arising from the AAT joint venture.

Attachment 1

Members of FCAI

Arqin Motorcycles Pty Ltd	Ateco Automotive Pty Ltd
Audi Australia Pty Limited	Australian Scooter Federation
Bentley Motors	BMW Australia Limited
BRP Australia Pty Ltd	Chrysler Australia, New Zealand & South Pacific Islands
Euro Automotive Group	Federation of Automotive Products Manufacturers
Ford Motor Company of Australia Limited	GM Holden Ltd
Harley Davidson International	Honda Australia Pty Ltd
Honda Australia MPE Pty Ltd	Hyundai Automotive Distributors Australia Pty Ltd
Isuzu Ute Australia Pty Ltd	Japan Automobile Manufacturers Association
Jaguar Land Rover Australia Pty Limited	John Sample Automotive Pty Ltd
Kawasaki Motors Pty Ltd	Kia Australia Pty Ltd
Lexus Australia	Mazda Australia Pty Limited
Mercedes-Benz Australia / Pacific Pty Ltd	Mitsubishi Motors Australia Ltd
N F Importers Pty Ltd	Nissan Motor Company (Australia) Pty Ltd
Paul Feeney Group	Peter Stevens Importers
Peugeot Automobiles Australia	Polaris Sales Australia Pty Ltd
Porsche Cars Australia Pty Ltd	Proton Cars Australia Pty Limited
Renault Cars Australia	Saab Automobile Australia Pty Ltd
Skoda Australia	SsangYong Australia
Subaru (Aust) Pty Limited	Suzuki Australia Pty Limited
Toyota Motor Corporation Australia Limited	Volkswagen Group Australia Pty Ltd
Volvo Car Australia Pty Ltd	Yamaha Motor Australia Pty Ltd