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7 May 2010

Tess Macrae
Adjudication Branch, Australian Competition and Consumer
Commission
By email Tess.Macrae@acc.gov.au

Dear Tess

Hertz Australia Pty Limited collective bargaining notification

We refer to the purported notification made by Hertz Australia Pty Ltd (**Hertz**) on 3 May 2010 of proposed collective bargaining conduct (**Purported Notification**). The Purported Notification applies for immunity from cartel laws for the major providers of airport car rental services in Australia, Avis/Budget, Hertz/Thrifty and Europcar (**Car Rental Majors**). The proposed conduct is the collective negotiation by Car Rental Majors with Westralia Airports Corporation (**WAC**) for counter space and car parks at Perth Airport.

WAC's position is that the collective bargaining notification must not stand and that the application for notification is invalid. In addition, there will be no net benefit arising from the proposed conduct.

Collective Bargaining Notification must not stand

WAC submits that if the Collective Bargaining Notification is to stand unchallenged it will be harmed by being unable to implement a new licence regime that allocates the facilities in an economically efficient manner by way of an auction between the car rental companies. **[C-i-C start]**

[C-i-C end]

In addition, significant competitive detriment is likely to follow from the applicants starting to collectively bargain even if the notification is subsequently cancelled by the Commission. This is because the applicants are likely to, at an early stage, share information about their preferred bidding strategies, valuations and costs. This exchange of information alone is likely to damage any future competition and

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would damage any market participants who are not party of the Collective Bargaining Notification.

Invalid Application

WAC asserts that:

- i. AVIS and Hertz do not qualify for the protection of collective bargaining notification because they will each acquire services in excess of \$3M pa in any 12 month period of the 5 year term of the new Car Rental Licence.
- ii. For the purposes of s93AB(4) the Commission must aggregate the sum of the prices for the supply of services to:
 - a. AVIS and Budget as they are wholly owned subsidiaries of the same ultimate parent company; and
 - b. Hertz and Thrifty as they will shortly be wholly owned subsidiaries of the same ultimate parent company.

The onus is upon the applicants to satisfy the Commission that the relevant statutory thresholds are not exceeded. Based on the confidential table provided to the Commission this morning the Commission cannot proceed to assess the applications on the basis of the Consent Forms which states "the total value of the transactions conducted with Westralia Airports Corporation Pty Ltd will not exceed \$3 million." The Commission must satisfy itself that there is a reasonable basis for the assertions that the \$3 million per annum threshold is not exceeded in any 12 month period over the next 5 years and the provisions of s93AB(4) are adhered to.

Outline of submissions

WAC opposes the Purported Notification on the following bases:

1. **Notification invalidity:** Hertz and another of the Car Rental Majors fail to meet the statutory qualifications for collective bargaining notification. Therefore the Purported Notification is invalid. They fail to meet the statutory qualifications because:
 - a. **\$3,000,000 limit breached:** forecast revenue data indicates that neither Hertz nor Avis/Budget can reasonably expect to make contracts for space at Perth Airport with WAC that will not exceed \$3,000,000 in any 12 month period (subsections 93AB(1A) and 93AB(4)). This is the case on a standalone basis for Hertz and Avis but is abundantly clear when the value of contracts for Avis / Budget and Hertz / Thrifty are combined (subsection 93AB(4)(b)) to reflect the corporate group ownership structures; and
 - b. **more than 1 'target':** there is evidence of an overarching arrangement to make collective bargaining notifications to more than one Australian airport (evidenced by the Mackay and Perth airport notifications) and collective bargaining cannot be notified for arrangements that anticipate that the group

will collectively bargain with more than one party (TPA, subsections 93AB(1A) and 93AB(2)).¹

2. **No net benefit from proposed conduct:** The ACCC cannot be satisfied on the facts that any benefit to the public resulting or likely to result from the proposed conduct would outweigh the detriment to the public that would result or be likely to result from the proposed conduct. Therefore the ACCC must give an objection notice to Hertz. The reasons why there will be no net benefit are:

- a. **The proposed arrangement is likely to result in price distortions and economic detriment.** WAC's preferred process allocates scarce airport terminal space through a transparent and fair market based pricing mechanism. This market based pricing mechanism maximises efficiency by ensuring that scarce airport space is put to its highest value use. This requires independent bidding by the car rental companies. The proposed arrangement does not allow independent bidding and disadvantages operators who are not party to it. If pursued prices will be distorted and scarce airport space will not be put to its highest value use resulting in economic detriment.
- b. **The arrangement fails two of the Commission's key measures of public detriment.** The Commission considers that the anti competitive effect of collective bargaining arrangements are likely to be limited where (Mackay Decision at p11):

- i. current levels of negotiations between individual members of the group and the proposed counterparty is low.

Arrangement fails: The parties to the Collective Bargaining Notification have been operating at both the domestic and international terminals at Peth Airport for many years. Since March 2010 WAC has gone to substantial lengths to consult and negotiate with rental car companies to ensure that the Terminal Space Allocation Process is fair, timely and transparent.

- ii. there are restrictions on the coverage or composition of the group

Arrangement fails: The Car Rental Majors make up a substantial proportion of the market for car rental services in Australia and an even larger proportion of a market for car rental services at any airport. It cannot be said that membership by these large car rental companies restricts the coverage of the group in any meaningful way

¹ The Explanatory Memorandum to the legislative changes introducing the collective bargaining notification regime makes this interpretation clear (at p60), the notification regime is inappropriate if more than one target is contemplated:

If parties wish to seek immunity for a variety of similar arrangements with a variety of targets, the authorisation process with its longer time frame is the appropriate process.

- c. **There will be no cost savings passed on to consumers as claimed by the Car Rental Majors.** The ability for the Car Rental Majors to charge fees above those charged by off airport car rental providers will be unchanged by any reduction in the costs of airport terminal space. The Car Rental Majors will charge what the inelastic airport car rental market can bear in circumstances where car rental supply is restricted by limited airport space. It is very likely therefore that the Car Rental Majors will to the extent possible seek to reduce their input costs without passing these cost reductions onto Australian consumers.
- d. **The Car Rental Majors have failed to substantiate that there will be benefits arising.** The Car Rental majors have failed to substantiate that there will be any benefits arising from the proposed cartel immunity. The mere assertions made by Hertz are insufficient to satisfy the ACCC that there will be net benefits arising from the proposed conduct.

Yours sincerely



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