



Australian
Competition &
Consumer
Commission

Draft Objection notice
in respect of a notification lodged by

Hertz Australia Pty Limited

Date: 13 May 2010

Notification no. CB00143

Commissioners:

**Samuel
Kell
Schaper
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Dimasi
Walker
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Public Register no. C2010/447

Summary

This is a Draft Objection Notice issued by the ACCC regarding the collective bargaining notification lodged by Hertz Australia Pty Limited (Hertz), on behalf of a group of car rental companies, for negotiations with Westralia Airports Corporation Pty Ltd (Westralia) concerning the price, terms and other conditions at which the car rental companies will acquire airport facility services (car parks and counter space) at Perth airport.

For the reasons set out in this document, the ACCC considers that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the conduct.

The ACCC has moved quickly to issue the Draft Objection Notice in order to prevent collective negotiations from taking place that may jeopardise the competitive tender process currently being run by Westralia for the allocation of car rental facilities at Perth airport.

The ACCC will now undertake more detailed public consultation on the public benefit and anti-competitive detriment of the arrangements before concluding its assessment of this matter.

1. The collective bargaining notification process

- 1.1. Businesses can obtain protection from legal action under the *Trade Practices Act 1974* (the Act) for collective negotiation, including associated collective boycotts, that would otherwise contravene the Act, by lodging a collective bargaining notification with the ACCC.
- 1.2. Once lodged, protection for any contravention of the Act occurring by reason of the notified conduct commences 14 days after lodgement unless the ACCC issues a Draft Objection Notice within that 14 day period.

Draft Objection Notice

- 1.3. Where the ACCC forms the view that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the conduct, it may commence the objection process contained in section 93AC of the Act. This involves the ACCC issuing a Draft Objection Notice advising the applicant and interested parties that the ACCC intends to object to the collective bargaining notification.
- 1.4. When the ACCC issues a Draft Objection Notice it will invite the applicant and interested parties to lodge submissions in response to the Draft Objection Notice. The ACCC will also, in accordance with section 93A of the Act, invite the applicant and interested parties to request a conference to discuss the Draft Objection Notice. Parties will have 14 days from a date (no earlier than the date the notice is issued) fixed by the ACCC to advise the ACCC if they want it to convene a conference. The conference, if requested, must be held within 30 days.

- 1.5. This document is a Draft Objection Notice in respect of notification CB00143 lodged by Hertz on 3 May 2010.

Final Objection Notice

- 1.6. Once the ACCC has all of the relevant information it will make a decision whether to allow the notification to stand or to revoke the immunity from legal action provided by the notification.
- 1.7. If the ACCC concludes that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the conduct the ACCC will issue a Final Objection Notice.
- 1.8. A Final Objection Notice, if issued, will take effect on the 31st day after the ACCC gives the notice or on a later date specified in writing by the ACCC.

Collective bargaining notification allowed to stand

- 1.9. If the ACCC is satisfied that the public benefit that has resulted or is likely to result or would result or be likely to result from the collective bargaining conduct will outweigh the public detriment that has resulted or is likely to result or would result or be likely to result, the ACCC will allow the collective bargaining notification to stand. The ACCC will inform the applicant and all interested parties that the collective bargaining notification has been allowed to stand.

2. Proposed arrangements

The collective bargaining group

- 2.1. The members of the proposed collective bargaining group (the group) are:
 - Hertz Australia Pty Limited (Hertz)
 - Kingmill Pty Ltd trading as Thrifty Car Rental (Thrifty)
 - WTH Pty Ltd trading as Avis Australia (Avis)
 - Budget Rent a Car Australia Pty Ltd (Budget)
 - CLA Trading Pty Ltd trading as Europcar (Europcar)
- 2.2. 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.
- 2.3. All members of the group operate car rental businesses at Perth airport. Redspot Car Rentals (Redspot), which commenced operating at Perth airport in August 2008, is not a member of the collective bargaining group. Redspot is a car rental company with locations on and off-airports across Australia.

The proposed collective bargaining conduct

- 2.4. The participants propose to collectively negotiate with Westralia in relation to the acquisition of airport facility services at Perth airport. The airport facilities include car parks and counter space at the international and domestic terminals of Perth airport.
- 2.5. The proposed collective bargaining arrangements entail the group collectively retaining an independent third party (to be appointed) to negotiate on their behalf the price, term and other conditions at which the car rental companies will acquire airport facility services at Perth airport from Westralia.
- 2.6. The type of terms and conditions of the licences expected to be negotiated in the collective bargaining arrangement include price, term, minimum annual guarantee payments, type and location of facilities, and, in particular, the licence fees for car parks (known as 'ready bays') at Perth airport.
- 2.7. No dispute resolution process between the members of the group is proposed because each participant will be at liberty to withdraw from the collective bargaining process. Dispute resolution between the group and Westralia during the collective bargaining process is proposed to be by way of mediation followed, if necessary and appropriate, by arbitration or expert determination. The dispute resolution process between the group and Westralia during the term of the arrangements is a matter to be negotiated.
- 2.8. The group does not intend to engage in boycott activity.

3. Perth Airport

- 3.1. Perth airport is serviced by 13 international, four domestic and ten regional airlines.
- 3.2. Six car hire firms operate hire counters in the Perth airport domestic and international terminals, including the five car rental companies involved in the collective bargaining group, as well as Redspot.
- 3.3. In addition to the car rental operations located at Perth airport, a number of car rental companies have outlets in the suburbs surrounding the airport.

Request for Proposal process

- 3.4. The group members each have licence agreements with Westralia for the purposes of operating their business at Perth airport. These licences are due to expire on 30 June 2010.
- 3.5. On 12 March 2010, Westralia called for initial expressions of interest in relation to participation in a Request for Proposal process to operate car rental businesses at Perth airport. Through this process, Westralia intends to enter into new contractual arrangements with individual car rental businesses from 1 July 2010 for five years.
- 3.6. The group members each individually responded to the invitation by 18 March 2010. Westralia then issued such a Request for Proposal on 1 April 2010 calling on each party to lodge a proposal with Westralia to operate an on-airport car rental business at Perth airport. The Request for Proposal

contains a Draft Car Rental Licence which contains the commercial terms and conditions that Westralia is proposing.

4. Previous notifications

- 4.1. On 11 November 2009, Hertz lodged a collective bargaining notification CB00138 on behalf of the same car rental companies. The group sought to collectively bargain with Mackay Airport Pty Ltd (Mackay Airport) in relation to the terms and conditions of the acquisition of facilities associated with the provision of car rental services at the airport. No competitive tender process was proposed by Mackay Airport. On 7 December 2009 the ACCC issued a decision document not opposing the notification.

5. ACCC public consultation

- 5.1. Summaries of Hertz's supporting submission and submissions from interested parties are provided below.
- 5.2. Copies of all publicly available submissions are available from the ACCC's public register and its website at www.accc.gov.au/CollectiveBargainingRegister.

Applicant's submission in support of proposed arrangements

- 5.3. In summary, Hertz submits that:
 - Westralia is proposing to increase licence fees significantly and the group wishes to continue their operations at Perth airport but on commercially more favourable terms than those proposed
 - increases in licence fees would be passed on substantially or in their entirety to end consumers of car rental services
 - Westralia is effectively a monopoly provider of airport facility services and collective bargaining will provide the group with a degree of bargaining power in their negotiations with Westralia. Hertz submits that this is likely to be reflected in more favourable terms and conditions being negotiated by the group, which will be passed on to consumers in the form of lower prices and/or improved levels of service or innovation.
- 5.4. Hertz does not believe that the conduct will have any adverse affect on competition in any relevant market. Hertz's submissions on the public benefits associated with the collective bargaining conduct are discussed below.
- 5.5. Hertz provided a further submission responding to Westralia's submission.

Submissions from interested parties

- 5.6. The ACCC received submissions from Westralia and Redspot.

5.7. In summary, Westralia submits that:

- if the collective bargaining notification is to stand unchallenged Westralia will be harmed by being unable to implement a new licence regime that allocates the facilities (counter space and parking bays) in an economically efficient manner by way of competitive tender between the car rental companies
- significant competitive detriment is likely to follow from the group members starting to collectively bargain once the immunity afforded by the collective bargaining notification commences, even if the notification is subsequently revoked by the ACCC. Westralia submits that this is because the group is likely to, at an early stage, share information about their preferred bidding strategies, valuation and costs, which is likely to damage future competition and participants who are not a party to the collective bargaining notification
- the proposed arrangement is likely to result in price distortions and economic detriment by interfering with the competitive tender process. Westralia argues that the competitive tender process efficiently allocates scarce airport terminal space to the user that values it the most through a transparent and fair market based pricing mechanism, and requires independent bidding by the group members.

5.8. Westralia submits that an anti-competitive effect of the collective bargaining may be more likely given that there is already negotiation between Westralia and the group members and that the group covers a large proportion of the markets for car rental services in Australia and car rental services at any airport.

5.9. Westralia submits that there will be no cost savings passed on to consumers by the group members as they will charge what the inelastic airport car rental market can bear in circumstances where car rental supply is restricted by limited airport space.

5.10. Westralia submits that Hertz's application is invalid on the basis that some of the group members' transactions with Westralia exceed \$3 million in any 12 month period, some of the group members are part of the same parent company and the group has an overarching intention to lodge collective bargaining notifications in relation to the acquisition of services at more than one Australian airport.

5.11. Redspot submits that before Redspot commenced on-airport operations Australian airports were reserved for the major international brands. Redspot submits that the barriers to entry were and remain high.

5.12. Redspot supports a competitive tender process for airport licences and facilities. Redspot submits that the group members are not prepared to negotiate on, pay a premium or compete for the counter space site they currently hold, preferring allocation on the basis of market share.

5.13. Redspot submits that the collective bargaining would lessen competition and result in the group members interfering with the Request for Proposal process and in the allocation of facilities and structure of fees, and excluding all other car rental companies.

5.14. The views of Hertz, Westralia and Redspot are discussed in more detail in the following section.

6. ACCC's assessment

Public benefit test

6.1. The ACCC assesses collective bargaining notifications by applying the relevant public benefit test set out in the Act. The applicant's collective bargaining notification is expressed to be given in relation to a cartel provision and therefore the ACCC is required to assess the notification in accordance with the test contained in section 93AC(1) of the Act. That section states that the ACCC may issue an Objection Notice if it is satisfied that:

- any benefit to the public that has resulted or is likely to result or would result or be likely to result,

does not, or would not outweigh

- the detriment to the public that has resulted or is likely to result or would result or be likely to result.

Market

6.2. The ACCC is of the view that whilst it is not necessary to definitively identify all the relevant markets, it is important for the ACCC's assessment of the notification to define general market parameters in order for it to assess the public benefits and detriments of the proposed arrangements.¹

6.3. Hertz submits that the relevant markets are the market for the supply of airport terminal space at Perth airport to car rental companies and the market for the provision of car rental services to customers at Perth airport.

6.4. 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 Perth airport and that available at other locations. This is because many customers hiring vehicles at the airport are likely to want to rent a car directly after arriving in Perth by plane and/or to return a car directly to the airport before departing from Perth 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.

6.5. The ACCC also notes that the operation of a fully functional airport requires car rental operators conducting business at the airport.

6.6. Accordingly, for the purposes of assessing this application, the ACCC considers the collective bargaining arrangements may have their most immediate effects in the supply of airport terminal space (including counter space and car parks) at Perth airport to car rental companies.

¹This is consistent with the Australian Competition Tribunal's decision in *Re Media Council of Australia* (1996) ATPR 41-497 at 42,227.

- 6.7. The ACCC considers that the other area of competition relevant to the consideration of the proposed arrangements is that for the provision of car rental services to customers at Perth airport. As noted, the 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.

The future with or without test

- 6.8. The ACCC uses the ‘future-with-and-without-test’ established by the Australian Competition Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the proposed arrangements.
- 6.9. Under this test, the ACCC compares a future in which the collective bargaining conduct, the subject of the collective bargaining notification, occurs with a future in which that conduct does not occur.
- 6.10. The ACCC considers that, in the absence of the legal protection afforded by the notification, 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 Westralia.

Public benefits

- 6.11. In assessing a collective bargaining notification, the ACCC must be satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the conduct.
- 6.12. There must also be a nexus between the claimed public benefits and the conduct which is outlined in the collective bargaining notification. In other words, the benefit must flow from the proposed arrangements.
- 6.13. An assessment of the public benefits claimed by Hertz, together with Westralia’s and Redspot’s responses to those claims, follows.

Submissions

- 6.14. Hertz submits that collective bargaining will provide the group with a degree of bargaining power in their negotiations with Perth airport that is likely to be reflected in more favourable terms and conditions being negotiated by the group. Hertz hopes that the product of the negotiations are prices at commercially realistic and reasonable levels. Hertz submits that given the competitive pressures at the retail level, any reduction in costs as a result of the proposed arrangements are likely to be passed on to consumers in the form of lower prices and/or improved levels of service or innovation.
- 6.15. Hertz submits that the costs and terms proposed in the Draft Car Rental Licence are a significant departure from the current terms. Hertz submits that Westralia is seeking significant fee increases for the licensing of the facilities and is calling on the group members to offer an additional amount (premium bid) for facilities in premium locations.

- 6.16. Hertz submits that Westralia has considerable bargaining power in negotiating individually with the group members. This is because while Westralia is dependent on having car rental companies at Perth airport, it is not dependent on any individual company agreeing to operate at the airport.
- 6.17. Hertz submits that in the absence of collective bargaining, and in an economic climate where tourism revenues are soft, the group members would be unable to absorb the significant cost increases sought by Westralia. Hertz submits that the group members would be passing on the increased costs substantially or in their entirety to end consumers of car rental services.
- 6.18. Westralia submits that the group has failed to substantiate that there will be benefits arising from the proposed conduct the subject of the notification.
- 6.19. Westralia submits that there will be no cost savings passed on to consumers by the group members as they will charge what the inelastic airport car rental market can bear in circumstances where car rental supply is restricted by limited airport space. The group members' ability 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.
- 6.20. In a further submission, Hertz submits that because Perth airport is a monopoly supplier of counter space and parking bays, there is little constraint on Westralia's ability to increase prices or otherwise exercise market power in its negotiations with individual car rental companies. Hertz submits that this is exemplified by Westralia's Request for Proposal process seeking to impose 'minimum' fees plus a doubling of the locational 'premiums' levied. Hertz submits that it would not be competitive or economically efficient for Westralia to extract monopoly rents.
- 6.21. Hertz submits that collective bargaining is a way of enabling the parties to achieve commercial outcomes that are more analogous to those which would be achieved in a competitive market.

ACCC view

- 6.22. The ACCC accepts that Westralia has an effective monopoly at Perth airport. However, the ACCC considers that car rental services are an essential element of the airport's service to customers. The group members represent large car rental companies operating in Australia and at Australian airports. The ACCC considers that there would be few alternative car rental service providers submitting tenders for a significant number of ready bays outside of the group members.
- 6.23. The value of car rental counter space and parking bays is likely to vary depending on their location, for example, because of its proximity to: the terminal - in the case of parking bays; and arrival and departure gates - in the case of counter space. Different locations are likely to be valued differently by different car rental companies.
- 6.24. The ACCC considers that in these circumstances, a competitive tender process may offer a more efficient mechanism for allocating scarce terminal space than a collective bargaining arrangement. In addition the outcome of the competitive

tender is likely to be that the facilities, including premium counter and car park space, will be allocated to the car rental companies that value them the most.

- 6.25. Based on the information currently before the ACCC, the ACCC does not accept that the proposed collective bargaining conduct will, in this context, provide a more efficient outcome than the Request for Proposal process.

Public detriments

- 6.26. The ACCC must assess the extent to which the proposed collective bargaining conduct is likely to give rise to a detriment to the public that flows from the proposed arrangements.

Submissions

- 6.27. Hertz submits that participation in the arrangements is voluntary. Should one of the group members choose to withdraw from the collective bargaining arrangement and negotiate individually with Westralia they may do so at any time and Westralia is free to decide whether or not to participate in the proposed arrangements or to negotiate with the parties individually.
- 6.28. Hertz submits that the collective negotiations by the group are only in relation to their acquisition of airport facility services. Hertz submits that the collective negotiation in no way affects the group members competing in the supply of their services or in any other market.
- 6.29. Hertz submits that the collective bargaining group is restricted to the five named companies, which limits any potential anti-competitive effect of the arrangements.
- 6.30. Hertz does not consider that the conduct will distort demand, create barriers to entry or otherwise harm competition in any market.
- 6.31. Hertz advises that the conduct will not involve collective boycott activity.
- 6.32. Westralia 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 counter space and parking bays in an economically efficient manner by way of an auction between the car rental companies.
- 6.33. Westralia submits that significant competitive detriment is likely to follow from the applicants starting to collectively bargain once the immunity from the collective bargaining notification comes into effect, even if the notification is subsequently revoked by the ACCC. Westralia submits that this is because the group is likely to, at an early stage, share information about their preferred bidding strategies, valuation and costs. Westralia submits that this exchange of information alone is likely to damage any future competition and would damage any market participants who are not party of the collective bargaining notification.
- 6.34. Westralia submits that the proposed arrangement is likely to result in price distortions and economic detriment. Westralia submits that the Request for Proposal process efficiently allocates scarce airport terminal space to the user who

values it most through a transparent and fair market based pricing mechanism. Westralia submits that this process requires independent bidding by the group members, which will not be possible under the collective bargaining arrangements. Westralia submits that the proposed collective bargaining arrangement will also disadvantage operators who are not part of the group.

- 6.35. Westralia submits that an anti-competitive effect of the collective bargaining arrangements may be more likely given the current level of negotiation between Westralia and the group members and the coverage of the group.
- 6.36. Westralia submits that the group members have a high level of interaction with Westralia having operated at the airport for many years and, since March 2010, Westralia has gone to substantial lengths to consult and negotiate with car rental companies to ensure that the terminal space allocation process is fair, timely and transparent.
- 6.37. Westralia submits that the group makes up a substantial proportion of the market for car rental services in Australia and an even larger proportion of the markets for car rental services at any airport. Westralia submits that it cannot be said that membership by these large car rental companies restricts the coverage of the group in any meaningful way.
- 6.38. Redspot submits that before it commenced its on-airport operations, Australian airports were reserved for the major international car rental companies. Redspot submits that the barriers to entry were and remain high due to the high financial thresholds and concentration of market power in the five international brands. Redspot submits that its entry has stimulated competition in the market for car rental in airports.
- 6.39. Redspot supports a competitive tender process. Redspot submits that the group members are not prepared to negotiate on, pay a premium or compete for the desk space they currently hold. Redspot submits that the group members' preference is for the allocation of facilities to be awarded on the basis of market share, with the car rental company with the largest market share given first choice and so on.
- 6.40. Redspot submits that the collective bargaining would lessen competition and result in the group members using their collective market power to interfere with the allocation of facilities and structure of fees payable to avoid any competitive tendering process. Redspot submits that the group are working to exclude all other operators, including Redspot, to gain a competitive advantage, as indicated by their actions at Perth airport and Mackay airport.
- 6.41. In a further submission, Hertz reaffirms its previous submissions and rejects Westralia's assertion that the notification fails to substantiate that there will be benefits arising from the proposed conduct. Hertz also submits that it appears that Westralia is concerned that collective bargaining would reduce its ability to extract monopoly rents from potential acquirers. Hertz submits that the arrangements will not have any adverse impact on competition and will in fact provide an efficient mechanism to achieve commercial outcomes that are more analogous to those in a competitive market. Hertz denies that the Request for

Proposal process is consistent with that which would occur under a competitive market mechanism.

6.42. Hertz submits that Westralia has little constraint on its ability to raise prices or otherwise exercise its market power. Hertz submits that this is exemplified by:

- the inclusion of minimum fees and demands for location premiums, in the proposed Car Rental Licence, which are substantially in excess of those currently levied
- Westralia's 'take it or leave it' approach to the Request for Proposal process. In particular each group member has advised Hertz that, in response to each party independently indicating that it wishes to collectively bargain, Westralia has issued a letter demanding that each provide a plan to vacate the facilities under negotiation, by 21 May 2010.

6.43. Hertz responded to Redspot's submission making the following points:

- Implementation of a collective bargaining process does not mean that the process or outcome is not competitive. While the process may not be precisely on the terms Westralia is currently seeking to dictate, there is no basis, in Hertz's view, for concluding that a process that includes a collective bargaining group is not a competitive process or will not result in competitive outcomes.
- The allegation that facilities would as a result of collective bargaining be allocated based on market share is unfounded. While the existing market shares of the on-airport companies may provide some proxy for likely individual demand, ultimately the terms and conditions on which Westralia agrees to issue licences will be the outcome of competitive negotiations. The terms and any volume of services any party seeks to acquire cannot be set by the group.
- The allegation that the group members have market power in relation to car rental services has no foundation. The group members compete in a highly competitive car rental market.
- There is no foundation for the allegation that the parties are either seeking, or have any ability, to exclude Redspot from locating at Perth airport. Redspot is not prevented from participating in the negotiation process or from acquiring services from Westralia. The group is simply allowed to bargain collectively vis-à-vis Westralia.
- There is no foundation for the allegation that Redspot will be commercially disadvantaged because the parties seek to participate in a collective bargaining process. It is possible that Redspot will indirectly benefit if the outcome of collective bargaining is a more competitive outcome. Redspot is free to seek assurance from Westralia that it will be offered no less favourable terms than the group. Given Westralia's resistance to the collective bargaining, there may be commercial advantages in negotiating independently.

ACCC view

- 6.44. The ACCC is concerned that the proposed arrangements have the potential to damage the integrity of the competitive tender process if the collective bargaining notice comes into force while the tender process is still underway.
- 6.45. The potential for damage to the Request for Proposal process arises from the information shared either explicitly or implicitly between group members.
- 6.46. There is a risk that in the course of discussing appropriate terms and fees, the group members may either intentionally or unintentionally reveal information regarding their willingness to pay for the car rental facilities to each other. In addition, the parties may discuss an alternative mechanism for allocating counter space and parking bays. Because the group members can commence such discussions as soon as the notice comes into force, the damage to Westralia's Request for Proposal process could be realised soon after that time.
- 6.47. The anti-competitive effect of the proposed collective bargaining conduct on the Request for Proposal process is heightened by the small number of potential alternative car rental companies to those in the group. The ACCC understands that the group represents five of the largest car rental companies in Australia. The ACCC accepts that Westralia requires car rental businesses to be located at the airport and that its choice of car rental companies outside of the group members is limited.
- 6.48. The voluntary nature of collective bargaining conduct, for both the members of the group and the target, often limits the detriment associated with the arrangement. In this case, while Westralia can choose to deal with the group or not, the ACCC is concerned that discussion among group members about the terms and conditions of the Request for Proposal process, which would receive statutory protection if the notification was allowed to stand, will jeopardise the competitiveness of the Request for Proposal regardless of Westralia's ability to choose not to deal with the group.
- 6.49. Based on the information currently before it, the ACCC considers that, in the context of the current tender process, the potential anti-competitive detriment arising from the collective bargaining may be significant. The ACCC will undertake a more detailed consultation on this issue before reaching a final view.
- 6.50. The ACCC accepts that there is uncertainty regarding the outcome of any collective bargaining arrangements however the ACCC remains concerned that the arrangements could impact negatively on other parties to the Request for Proposal process, notably Redspot. In particular, the ACCC is concerned the collective bargaining arrangement could put Redspot and/or other parties to the Request for Proposal process at a competitive disadvantage. As mentioned above, any adverse impact on bidders outside of the group members has the potential to occur soon after the notice comes into force.

Validity of the notification

Submissions

- 6.51. In addition to these submissions, Westralia raised three matters regarding the validity of the notification. Firstly, Westralia submits that one or more of the group members do not qualify for the protection of collective bargaining notification because they will acquire services from Westralia in excess of \$3 million in any 12 month period, contrary to s 93AB(4). Secondly, Westralia submits that the ACCC must aggregate the sum of the transactions conducted with Westralia for Avis and Budget, as they are wholly owned subsidiaries of the same ultimate parent company. Similarly, Westralia submits, Hertz and Thrifty will shortly be wholly owned subsidiaries of the same ultimate parent company. Finally, Westralia submits that there is also evidence that the group has an overarching intention to lodge collective bargaining notifications in relation to the acquisition of services at more than one Australian airport. In those circumstances, Westralia says that the group should apply for authorisation to engage in that conduct.
- 6.52. In response, Hertz denies that it will necessarily acquire services in excess of \$3 million per annum from Westralia under the new Car Rental Licence. Hertz submits that its reasonable expectation is based on Hertz currently paying Westralia significantly less than \$3 million per annum in relation to the relevant airport services, and the increased fees proposed by Westralia under the Request for Proposal would not exceed \$3 million per annum. Hertz has been independently advised by the other group members that they each have a reasonable expectation that the price for the acquisition of the relevant services from Westralia will not exceed \$3 million in any 12 month period.
- 6.53. Hertz submits that nothing in Part VII Division 2 of the Act (or its associated regulations or Form GA) requires or permits the aggregation of the transactions between related bodies corporate. Hertz submits that sub-section 93AB(4) refers to the acquisition from the target by 'the corporation', where a corporation is defined in section 4 as being distinct from its parent and sibling entities. Further, Hertz submits that if the Act intended for such aggregation to occur, this would have been made express in Part VII Division 2, consistent with other provisions made in other parts of the Act.
- 6.54. Hertz further submits that Hertz and Thrifty are not currently, nor were they at the time of lodging the notification, related bodies corporate.
- 6.55. Hertz rejects that there is an overarching agreement between the parties to collectively bargain with multiple Australian airports. Hertz submits that each party is entitled to determine whether it wishes to pursue a collective bargaining strategy in relation to any supplier of airport facilities, or any other goods or services, on a case by case basis.
- 6.56. Hertz submits that the text from the Explanatory Memorandum provides guidance on the interpretation of sub-section 93AB(7), specifically that it relates to the permitted identities of the participants to the collective bargaining arrangements but not the target.

ACCC view

- 6.57. In the present circumstances, where the ACCC has decided to issue this Draft Objection Notice, the ACCC's initial view is that the notification is valid. Nevertheless, the ACCC is prepared to receive further information from Hertz, and other interested parties, regarding the validity matters raised by Westralia.

Conclusion

- 6.58. Having regard to the claims made by Hertz and the issues raised by interested parties, the ACCC is satisfied at this time that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the conduct.
- 6.59. In particular, the ACCC considers that, rather than facilitating an efficient mechanism for negotiating with Westralia, the proposed collective bargaining conduct is likely to undermine the integrity of the Request for Proposal process.
- 6.60. Because the group members can commence such discussions as soon as immunity takes effect, the damage to Westralia's Request for Proposal process could be realised soon after the notification comes into effect.
- 6.61. Interested parties now have an opportunity to provide submissions on the public benefits and anti-competitive detriments of the arrangements.

7. Draft Objection Notice

- 7.1. For the reasons outlined above, the ACCC considers that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the conduct.
- 7.2. The ACCC therefore proposes, subject to any pre-decision conference requested under section 93A of the Act, to give notice to Hertz Australia Pty Limited under section 93AC of the Act that the ACCC objects to notification CB00143. Section 93A requires the ACCC to invite the corporation who gave the notification or other interested persons to request a conference in relation to the Draft Objection Notice, by giving a conference notice. If the ACCC gives a conference notice within 14 days from the day the notification was given to the ACCC, the collective bargaining group will not receive the statutory protection afforded by the notification.

Next steps

- 7.3. Once the ACCC has all of the relevant information it will make a decision whether to:
- allow the notification to stand, or
 - issue a Final Objection Notice.

- 7.4. If the ACCC concludes that the public benefit likely to result from the collective bargaining conduct will outweigh the anti-competitive detriment the notification will be allowed to stand. The ACCC will inform the applicant and all interested parties that the collective bargaining notification has been allowed to stand.
- 7.5. On the other hand, if the ACCC concludes that the public benefit likely to result from the collective bargaining conduct will not outweigh the anti-competitive detriment the ACCC will issue a Final Objection Notice.
- 7.6. Any Final Objection Notice issued by the ACCC will take effect on the 31st day after the ACCC gives the notice or on a later date specified in writing by the ACCC.