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LAWYERS

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BY EMAIL

Ms Tess Macrae
Adjudication Branch
Australian Competition & Consumer Commission
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Dear Ms Macrae

Collective bargaining conduct notification CB00143
Response to objections raised by Westralia Airports Corporation

We refer to the objections raised by the Westralia Airports Corporation (**WAC**) on 7 May 2010 to the collective bargaining notification CB00143 lodged by our client, Hertz Australia Pty Ltd (**Hertz**) on behalf of itself and Avis, Budget, Thrifty and Europcar (**Notification**).

Our client rejects WAC's position that the application for notification is invalid, or that there will be no net benefit arising from the proposed conduct. We have responded to each of WAC's objections, in the order raised in its correspondence, below.

1. Competitive benefits and detriments

WAC submits that if the collective bargaining notification is permitted to stand that '*it will be harmed by being unable to implement a new licence regime that allocates the facilities in an economically efficient manner or by way of auction between the car rental companies*'.

Hertz categorically rejects WAC's submission on this point. As a monopolist supplier of airport facility services at Perth Airport, there is little constraint on WAC's ability to increase prices or otherwise exercise market power in its negotiations with individual car rental companies. While WAC is dependant on having car rental companies at Perth Airport, it is not dependent on any individual company agreeing to operate at the airport. WAC therefore has considerable bargaining power in negotiating individually with the parties.[1] As a monopolist in the provision of airport facility services at Perth airport, WAC's submission therefore amounts to a complaint that collective bargaining will reduce its ability to extract monopoly rents from its acquirers. The extraction of such rents would clearly not be a competitive, nor economically efficient, outcome.

[1] This is exemplified by WAC's current Request for Proposal. We have been separately advised by each party to the Notification that WAC's 'new licence regime' seeks to impose 'minimum' fees, plus locational 'premiums', of approximately **double** those currently levied for the provision of its airport facility services.

To the contrary, as stated in the Notification,[2] the proposed collective bargaining conduct is inherently pro-competitive, and will generate significant net public benefits. In particular, collective bargaining will provide the parties with a degree of bargaining power in their negotiations with WAC that is likely to be reflected in more favourable terms and conditions being negotiated by the parties. Collective bargaining is a way of redressing this imbalance to enable the parties to achieve commercial outcomes that are more analogous to those which would be achieved in a competitive market.[3]

The competitive benefits likely to be achieved under the Notification are consistent with those recognised by the Commission in its previous Assessment of collective bargaining conduct notified by car rental companies with the monopolist airport facility services provider at Mackay Airport (CB0000138) (**Mackay Airport Notification**).[4]

2. $3m transactional limit

WAC asserts that the Notification is invalid as:

(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 terms 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.*

Hertz rejects both of these assertions.

First, Hertz denies that it will necessarily acquire services in excess of $3m per annum from WAC under the new Car Rental Licence. Sub-sections 93AB(4) and (5) of the TPA relevantly require that a corporation have a *reasonable expectation, at the time of giving the collective bargaining notice* that the price for the acquisition of the relevant services from WAC will not exceed $3m in any 12 month period. Hertz has a reasonable expectation that this is the case on the basis that:

- it currently pays WAC significantly less than $3m per annum in relation to the relevant airport facility services; and
- the increased fees proposed by WAC under the current Request for Proposal would not exceed $3m in any 12 month period.

Similarly, we have been independently advised by Avis, Budget, Thrifty and Europcar that they each have a reasonable expectation that the price for the acquisition of the relevant services from WAC will not exceed $3m in any 12 month period.

Secondly, WAC's assertion that *'for the purposes of s93AB(4) the Commission must aggregate the sum of the prices for the supply of services [between related bodies corporate]'* is incorrect. There is

[2] See Notification Annexure 3 paragraphs 3.7-3.19.
[3] Mackay Airport Notification, paragraphs 3.19 to 3.21.
[4] Mackay Airport Assessment, paragraphs 3.21-3.25.

simply nothing in Part VII Division 2 of the TPA (or its associated Regulations or Form GA) that requires, or even permits, such aggregation. To the contrary:

- sub-section 93AB(4) itself expressly refers to the price for the supply to or acquisition from the target by '*the corporation*' (singular) who is party to the notification application. A 'corporation' is relevantly defined in section 4 as being distinct from its parent and sibling entities, *viz*: '*a body corporate that is a trading corporation formed within the limits of Australia... **or** is the holding company of [that body corporate]*';

- if the TPA intended that such aggregation occur, this would have been made express in Part VII Division II, consistent with provision made in other Parts of the TPA. For example, within Part IV Division 1 (Cartels), section 44ZZRC expressly deems related bodies corporate of a contracting party to be party to the relevant contract.

We also note that, in any event, Hertz and Thrifty are not currently, nor were they at the time of lodging the Notification, related bodies corporate.

3. 'Overarching arrangement' for multiple collective bargaining arrangements

WAC appears to claim that the Notification is invalid, and the parties must seek *authorisation* for the proposed collective bargaining arrangements. In essence, this assertion is made on the basis that:

- '*there is evidence if an overarching arrangement to make collective bargaining notifications to more than one Australian airport (evidenced by the Mackay and Perth airport notifications)*'; and

- *'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."'*

Hertz submits that WAC's submissions on invalidity are incorrect as a matter of both fact and law.

First, Hertz rejects the assertion made by WAC that there is an 'overaching agreement' between the parties to collectively bargain with multiple Australian airports. There is simply no such arrangement between the parties. Each party is entitled to determine whether it wishes to pursue a collective negotiation strategy in relation to any supplier of airport facility services, or any other goods or services, on a case by case basis. The fact that the parties have previously collectively negotiated with Mackay Airport is not evidence of the kind asserted in WAC's objection. It would be a perverse result if parties who have previously collectively bargained with one supplier were precluded from ever collectively bargaining with any other supplier by virtue of a prevailing notification in respect of unrelated conduct.

Secondly, WAC's assertion that Part VII Division 2 of the TPA prohibits multiple notifications of collective bargaining conduct in respect of a number of identified targets is also incorrect. The text from the Explanatory Memorandum to which WAC refers provides guidance to the interpretation of sub-section 93AB(7). That sub-section specifically relates to the permitted identities of the *participants* to the collective bargaining arrangements, and not the targets. Read in context in its entirety, the relevant passage of the Explanatory Memorandum does not seek to prohibit multiple notifications by the same or similar parties in respect of a number of identified targets. Rather, it disapproves of negotiations between a fluid group of participants (eg. members of an industry association) and unidentified targets, such that the participants in the collective bargaining group (ie. the parties benefitting from the immunity) would not be readily identifiable under the notification. Hertz' interpretation is also consistent with:

- the *ACCC Guide to Collective Bargaining Notifications*, which states: '*The collective bargaining notification process is not available for broadly described groups whose members are not specifically identified*', and '*[Examples] It is not possible to use broad descriptions such as 'the current and future members of the [industry association]. The [industry association] could however consider seeking an authorisation*';[5] and

- the practice of the Commission in applying the collective bargaining provisions, in respect of which numerous notification applications that identify a number of targets have been permitted to stand.[6]

Accordingly, WAC's assertion that '*the notification regime is inappropriate if more than one target is contemplated*' is simply incorrect in its application to the present case.

4. Public benefits and detriments

WAC asserts that:

(a) *The proposed arrangement is likely to result in price distortions and economic detriment*

(b) *The arrangement fails two of the Commission's key measures of public detriment: (i) current levels of negotiations between individual members of the group and the proposed counterparty is low; and (ii) there are restrictions on the coverage or composition of the group*

(c) *there will be no cost savings passed on to consumers*

(d) *there is no substantiation of the benefits arising*

Hertz rejects each of these assertions.

In relation to (a) above, Hertz denies that the proposed collective bargaining arrangements would result in any of the distortions or detriment alleged. Again, the essence of WAC's submission on this point appears to be that collective bargaining would reduce its ability to extract monopoly rents from potential acquirers. Rather, as stated in the Notification, Hertz does not believe that the proposed conduct will have any adverse effect on competition in any relevant market. To the contrary, consistent with the Commission's Assessment of the Mackay Airport Notification,[7] by providing the parties with a degree of bargaining power in their negotiations with a monopolist supplier, the proposed conduct will in fact provide an efficient mechanism to achieve commercial outcomes that are more analogous to those which would prevail in a competitive market. Moreover, consistent with the outcomes recognised by the Commission in the Mackay Airport Notification,[8] the potential for competitive detriment from the collective bargaining arrangements is limited. This is because:

- participation in the collective bargaining arrangement is voluntary. Each of the Parties are free to negotiate their leases and licences with WAC individually and WAC is free to decide whether or not to participate in the proposed arrangements or to negotiate with the Parties individually. In other words, to adopt the Commission's terminology in the Mackay Airport Notification, WAC '*can continue to negotiate individually with each car rental company if*

[5] *ACCC Guide to Collective Bargaining Notifications*, page 8.
[6] See for example *BFC Stores Pty Ltd & Ors – Collective Bargaining Notifications CB00009*-CB00056; *Clubs NSW – Collective Bargaining Notifications CB00057 & CB00058*; *PaintRight Ltd – Collective Bargaining Notifications CB00081-CB00137*; *Australian Independent Records Labels Association Ltd – Collective Bargaining Notifications CB00059-CB00066 and CB00073-CB00080.*
[7] Mackay Airport Notification paragraphs 3.19-3.25.
[8] Mackay Airport Notification, page 2.

they wish. Further the proposed arrangements do not limit the ability of [WAC] to tailor collectively negotiated contracts to individual circumstances where appropriate. However, the proposed arrangements provide an opportunity for issues of common concern to be given greater consideration if both sides consider it appropriate to do so';[9]

- the proposed arrangement does not involve potential boycotts; and
- the proposed conduct will not distort demand, create barriers to entry or otherwise harm competition in any market.

In relation to (b) above, WAC appears to assert that the proposed collective bargaining arrangements will result in anti-competitive detriment on the basis that it is currently in negotiations with each party to the Notification, and that there would be no restrictions on the coverage or composition of the collective bargaining group. WAC states: '*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*'. In response to this assertion, Hertz denies that the current negotiation process with WAC is consistent with that which would occur under a competitive market mechanism. As outlined above, WAC currently wields a significant degree of bargaining power in its individual negotiations with each car rental company, with little constraint on its ability to raise prices or otherwise exercise market power. This is exemplified in:

- WAC's current Request for Proposal, under which its proposed Car Rental Licence which contains *minimum* fees (and demands for locational 'premiums') which are substantially in excess of those currently levied for the provision of the airport facility services; and
- WAC's exemplification of a 'take it or leave it' approach in its purported negotiations. In particular, we have been independently advised by each party to the Notification that, in response to each party independently indicating that it wishes to collectively bargain, WAC has issued a letter demanding that each provide a plan to *vacate* the facilities under negotiation, by 21 May 2010.

In any event, to adopt the terminology of the Commission in its Assessment of the Mackay Airport Notification, the potential scope of any reduction in competition through collective bargaining is limited having regard to the '*voluntary nature of the arrangements and the ability for participants even where they do participate in the arrangements, to negotiate individual variations to any collectively agreed arrangements*'.[10] Finally, the proposed bargaining group is in fact restricted to the parties (the same parties recognised by the Commission as a 'restricted' bargaining group in the Mackay Airport Notification).[11]

In relation to (c) above, retail markets for the provision of rental car services are highly competitive. Accordingly, it is likely that any cost savings achieved in the collective bargaining process would be passed on to downstream consumers. This principle has previously been recognised by the Commission in its Assessment of the Mackay Airport Notification, where it stated: '*Given existing competition at the retail level, any benefits to the applicants as a result of collective negotiations are likely to be reflected in lower prices and/or improved quality of service for consumers*'.[12]

Finally, in relation to (d) above, Hertz rejects WAC's assertion that the Notification fails to substantiate that there will be benefits arising from the proposed conduct. Analogous to the findings of the Commission in the Mackay Airport Notification, the notified conduct is likely to result in benefits as follows:

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[9] Mackay Airport Notification, page 2.
[10] Mackay Airport Notification, paragraphs 3.36-3.37.
[11] Mackay Airport Notification, paragraphs 3.38-3.41.
[12] Mackay Airport Notification, page 1. See also paragraphs 3.8, 3.20, 3.48 and 4.3

- a redressing of the imbalance of negotiating power between the service acquirers and the monopolist supplier, allowing the identification and achievement of greater efficiencies in the negotiating process, and the negotiation of terms more analogous to the commercial outcomes which could be achieved in a competitive market; and

- 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.[13] Conversely, in the absence of collective bargaining, and in an economic climate where tourism revenues are soft, the parties would be unable to absorb the significant cost increases sought by WAC. The parties would be passing on the increased costs substantially or in their entirety to end consumers of rental car services.

If you have any questions in relation to this notification or require any further information, please do not hesitate to contact Celesti Hodgman of our office.

Yours faithfully
MINTER ELLISON

Geoff Carter
Partner

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[13] Mackay Airport Notification, paragraphs 3.16 and 3.25.