

12 May 2010

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BY EMAIL

Ms Tess Macrae
Adjudication Branch
Australian Competition & Consumer Commission
Level 35 - The Tower - Melbourne Central
360 Elizabeth Street
MELBOURNE VIC 3000

Dear Ms Macrae

Collective bargaining conduct notification CB00143 Response to objections raised by Redspot

We refer to the objections raised by Redspot on 11 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**) and set out our responses below.

Redspot is opposed to the notification and asserts, inter alia that:

- *'it supports a competitive tendering process for airport facilities';*
- *'[the parties to the Notification's] preference is for the allocation of facilities to be awarded on the basis of market share such that the operator with the highest market share is given first choice... and so on'; and*
- *'if an application for immunity were successful, collective discussions between competitors would lessen competition. Collective bargaining with Perth Airport would most likely see Redspot's competitors use their collective market power to interfere with the allocation of facilities and structure of fees payable to avoid any competitive tendering process, to their advantage and to the disadvantage of Redspot. The parties to the collective bargaining application are working to exclude all other operators, including Respot to gain a competitive advantage'.*

Hertz respectfully rejects these assertions and submits that Redspot has fundamentally misunderstood the nature of the collective bargaining process, the extent of immunity that may be conferred and its potential commercial implications for Redspot.

Hertz makes the following points in response:

- Implementation of a collective bargaining process does not mean that the process or outcome is not competitive. It simply provides statutory immunity to enable the named applicants to

engage in a collective bargaining process in response to the WAC RFP. Specifically, it would allow the parties to appoint an independent third party to negotiate, on behalf of the collective bargaining group, the price, term and other conditions at which they seek acquire airport facility services from WAC. Participation in the arrangements is voluntary and WAC is free to decide whether or not to participate in the proposed arrangements or to negotiate with the parties individually. While that process may not be precisely on the terms that WAC is currently seeking to dictate, there is no basis 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 be allocated based on market shares is unfounded. While the existing market shares of the on-airport operators (including Redspot) may provide some proxy for likely individual demand, ultimately, the terms and conditions on which WAC agrees to issue licences will be the outcome of competitive negotiations. Those terms and the volume of services any party seeks to acquire cannot be 'set' or 'dictated' by the members of the collective bargaining group. For example, it may be the case that a premium could potentially still be charged for facilities in premium locations. The purpose of the collective process is simply to redress the considerable imbalance of bargaining power that would otherwise result in monopoly rents being extracted by WAC from rental car operators.
- The allegation that the parties to the collective bargaining power have market power in relation to car rental services has no foundation. The parties in fact compete in a highly competitive car rental market. The only person with market power in this context is WAC.
- There is also no foundation for the allegation that the parties are either seeking to, or have any ability, to procure the exclusion of Redspot from on-airport locations at Perth Airport. We note that Redspot currently has on-airport licences and is entirely free to respond to the RFP and negotiate with Perth Airport for continued access. Nothing in the Notification prevents or restricts Redspot from participating in the negotiation process with WAC or from acquiring services from WAC – it simply allows the parties to the Notification to bargain collectively vis-a-vis WAC. Nothing in the notification provides immunity from otherwise illegal conduct (eg such as seeking to arrange a collective boycott – which could only be implemented through the actions of WAC – under which it was procured that Redspot was denied access to on-airport locations).
- There is no foundation for the allegation that Redspot will be commercially disadvantaged simply because the parties seek to participate in a collective bargaining process. Indeed, it is quite possible that Redspot will indirectly benefit, if the outcome of any collective bargaining process results in a better outcome (more analogous to a competitive outcome) than a position under which WAC is able to maximise monopoly rents. While it is a matter for commercial negotiation between WAC and Redspot, there is no reason why Redspot could not, for example, seek assurances that it would be treated no less favourably than other car rental companies. Given WAC's obvious resistance to any form of collective bargaining, there may in any event be commercial advantages in this case in negotiating independently.

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

Australian Competition & Consumer Commission
12 May 2010

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