

6 July 2010

RIALTO TOWERS 525 COLLINS STREET MELBOURNE  
GPO BOX 769G MELBOURNE VIC 3001 AUSTRALIA  
DX 204 MELBOURNE www.minterellison.com  
TELEPHONE +61 3 8608 2000 FACSIMILE +61 3 8608 1000

## 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 Further submission in response to WAC submission**

We refer to the further submission by Westralia Airport Corporation (**WAC**) on 23 June 2010 in relation to the collective bargaining notification CB00143 (**Notification**).

On behalf of our client, Hertz Australia Pty Ltd (**Hertz**), we respond to WAC's submission (adopting the structure of WAC's submission) as follows:

#### **1. Invalidity of the Notification**

- 1.1 In relation to WAC's submission on the validity of the Notification, sub-sections 93AB(4) and (5) of the *Trade Practices Act 1974* (Cth) (**TPA**) relevantly require that each member of the collective bargaining group has a '*reasonable expectation, at the time of giving the collective bargaining notice*' that the price for the acquisition of the relevant services will not exceed \$3 million per year.
- 1.2 We have previously provided the Commission with data confirming the basis on which each operator had, and continues to have, a 'reasonable expectation' that it will not acquire services from WAC exceeding \$3 million in any 12 month period. WAC seems to suggest that, notwithstanding these 'reasonable expectations' of the rental car operators, that the Commissions must give greater probative weight to WAC's own sales turnover forecasts and that the parties' own turnover estimates are 'overly conservative'.<sup>1</sup>

---

<sup>1</sup> Paragraphs 5 and 6 of WAC's submission

1.3 However, WAC's forecasts of the parties' turnover fees are irrelevant to the question of validity – the test under the TPA requires the party lodging the notification to have the relevant 'reasonable expectation', not the target of the collective bargaining activity.

## 2. Futility of Notification

2.1 Hertz rejects WAC's claim that the Notification is now futile. While it is true that all of the car rental companies submitted RFP responses to WAC, this only came about because of:

- (a) the conduct of WAC in refusing to extend the deadline to allow sufficient time for the Commission to make its decision in relation to the Notification; and
- (b) WAC threatening to evict the operators if they did not lodge individual responses to the RFP.

2.2 This behaviour only serves to further illustrate the ongoing potential for WAC to exercise its bargaining power as a monopolist supplier.

2.3 Importantly, [**Confidential – Restriction of Part Publication Claimed**

]. It is therefore clear that there is still benefit in the parties being allowed to collectively negotiate with WAC. Further:

- (a) immunity would be granted for 3 years, during which time the parties could, at any time, seek to re-negotiate the terms of their licences with WAC as a collective bargaining group;
- (b) the parties could deal at any time in the next 3 years with any terms and conditions not covered by the terms of the licences; and
- (c) the parties could deal at any time with the manner in which WAC seeks to exercise discretionary rights under the licences by, for example, adding to, altering or relocating the licensed facilities or varying a licensee's portion of rates and taxes payable.

2.4 Hertz also notes that any potential competitive detriment claimed by WAC, relating to sharing of information about preferred bidding strategies, would now be incapable of occurring, given that WAC has received the required information under the RFP. Therefore, the degree of public benefit that Hertz needs to demonstrate at this point in order to satisfy the statutory 'net benefit' test is also substantially reduced – even a small public benefit would be sufficient to satisfy the test.

2.5 Moreover, it would set a very unfortunate precedent for a monopolist to effectively subvert a legitimate collective process by inducing sufficient delay to then argue futility, as Hertz submits WAC has done in this case.

## 3. No substantiation of claim to benefits of Notification

3.1 Hertz rejects WAC's contention that the public benefits from the Notification are 'highly speculative' and therefore not sufficient to satisfy the test in the TPA. We refer to our previous submissions on substantial public benefits to be derived from collective bargaining by the operators with WAC, supported by sound economic theory, which should certainly be given due weight by the Commission.

#### **4. Frontier Economics Report of little probative value**

4.1 WAC claims that the Frontier Economics Report is of little probative value for four reasons, which we address in turn below.

*"The report is very narrow in scope"*

4.2 Hertz agrees that the Frontier Economics Report addressed a specific question. No adverse inference should be drawn by the Commission about the scope of the report. Frontier Economics' expert opinion in relation to allocative efficiency was sought in direct response to WAC's assertion that its RFP process would increase allocative efficiency of airport facilities.<sup>2</sup> Asking a specific question that is amenable to economic analysis is a very usual way in which to obtain an expert opinion on a particular point. The broader issue of contrasting the benefits of collective bargaining with the WAC RFP process has been dealt with at length in Hertz' previous submissions, drawing in part on the analysis of the WAC RFP process set out in the Frontier Economics Report.

*"Frontier Economics report supports the Commission's Draft Objection Notice"*

4.3 Hertz does not accept the proposition that the Frontier Economics Report supports the Draft Object Notice in relation to the allocative efficiency issue. Indeed, the Frontier Economics Report confirms, in no uncertain terms, that because of the number of terms and conditions that were fixed in the RFP process, only *limited* efficiency gains were possible, and only in relation to those items that parties could bid on.<sup>3</sup> Even for those terms that the parties can bid on, the nature of the single bid closed tender process has meant that allocative efficiency gains, if any, would be limited.<sup>4</sup> This does not in any way support WAC's claims that its RFP process will result in more efficient outcomes than the proposed collective bargaining process.

*"Invalid characterisation of tender by Frontier"*

4.4 WAC asserts that Frontier Economics invalidly characterises various terms and conditions (set out in section 3.2 of the Frontier Economics Report) as fixed and not subject to negotiation under the RFP process. However, WAC concedes that these terms were predetermined by WAC in advance of the RFP, confirming Hertz' (and Frontier Economics') argument that the RFP had nothing to do with allocative efficiency.

4.5 WAC claims that 'many or all of the terms are already allocatively efficient'<sup>5</sup>, but we submit that the Commission must not accept that minimum terms predetermined by the monopolist provider ahead of the RFP process is in any way allocatively

---

<sup>2</sup> See section 3 of WAC's submission dated 12 May 2010

<sup>3</sup> Section 4 of the Frontier Economics Report

<sup>4</sup> Section 4.2 and 4.3 of the Frontier Economics Report

<sup>5</sup> Paragraph 44 of WAC's submission

efficient. Indeed, WAC claims (at paragraph 44) that '[if] renegotiation of the ready bays was to occur on the basis of operational and allocative efficiency...the ready bays are likely to be located further away from the terminal than they currently are'.<sup>6</sup> WAC therefore concedes that this fixed component of the RFP process is not 'already allocatively efficient'.

4.6 Given that the fixed elements of the RFP were pre-determined by WAC, WAC's only real claim in relation to allocative efficiency is that the process for submitting 'premium bids' for counters and ready bays would reveal the operators' willingness to pay for these facilities and that this so called '*market based mechanism for allocation of facilities would allocate facilities to the companies that valued them the most*'.<sup>7</sup>

4.7 In reality, five of the counters are located together and one further away. Therefore, the single shot blind tender under the RFP in relation to this element, rather than revealing the parties' willingness to pay, is only aimed at WAC extracting as much of a premium as possible from the parties.

4.8 In contrast, a collective bargaining process would have facilitated a process closer in character to an open multi-bid tender (much like a public house auction) and provide the transparency required to reveal which elements are *in fact* (ie. bidders do not have to guess) more highly valued and therefore allocate them on a more efficient basis. The process would allow other matters (for example, relating to the operators' operational efficiency and costs) to be discussed and taken into account. Collective discussions may also reveal other win-win solutions not contemplated in the absence of such transparency – purely by way of example, all operators may agree to take less counter space so that all the counters are located together.

4.9 WAC makes a significant point in its submission about maximising the use of the airport facilities for all users.<sup>8</sup> Therefore, the Commission might well assume that WAC would, from an operational efficiency viewpoint to allocating, want the operator(s) with the highest foot traffic to be the most conveniently located in the airport. However, this is clearly not what the premium component of the RFP is designed to achieve – it is entirely possible that an operator with significantly lower foot traffic could bid a premium in relation to the location of a counter or ready bay (offset by lower turnover fees payable to WAC), and for the operator with the higher footprint and turnover to be located in a less convenient location.

4.10 Finally, as [**Confidential – Restriction of Part Publication Claimed**

], the potential for public benefits to be gained from collective bargaining (vis-à-vis monopoly pricing) by reducing the marginal costs of the car rental companies remains open. These outcomes were achieved in the Mackay airport example and represent an outcome that is unambiguously good for consumers, as it is likely to lead to higher output and lower prices for car rental services.

*"Factors that Frontier claims will raise the price of car rental facilities at Perth Airport"*

<sup>6</sup> Paragraph 44 of WAC's submission

<sup>7</sup> Paragraph 53 of WAC's submission

<sup>8</sup> Paragraphs 40 to 42 of WAC's submission

- 4.11 We reiterate our previous submission that one of the primary purposes of the collective bargaining group is for the parties to have meaningful input into all elements of the services they acquire at Perth Airport, rather than having those terms dictated by a monopoly supplier. By facilitating a degree of countervailing power, the collective bargaining process has the potential to deliver public benefits in the form of more efficient and more favourable outcomes for car rental companies that are closer to the expected outcome from a competitor's market. While the scope of those benefits may arguably have been reduced, it also follows that any claimed potential for anti-competitive detriment must accordingly have been reduced.
- 4.12 WAC claims that Frontier Economics' views do not substantiate the claimed public benefits of collective bargaining lowering prices to consumers. We reiterate our previous submission that the specific design of the WAC RFP process (as a single bid closed tender process with minimum process and turnover based fees) has increased the marginal cost for providers of car rental services at Perth Airport relative to existing licence conditions and will, as a matter of economic theory, increase the final price paid by consumers of car rental services.<sup>9</sup> With respect to the likelihood of benefits being passed through to consumers, Hertz rejects WACs contention that the market for car rental services is not competitive. Hertz considers that there is ample material before the Commission to support a conclusion that car rental services are competitive.
- 4.13 To the extent that future collective bargaining reverses or modifies this outcome (as was the case in the Mackay airport example) through renegotiation of structure and level of pricing or other non-price terms and conditions, public benefits will arise.

## 5. Conclusion

- 5.1 The Notification is not futile simply because individual licences have been entered into. Not only [**Confidential – Restriction of Part Publication Claimed**]:
- (a) immunity would be granted for 3 years, during which time the parties could, at any time, seek to re-negotiate the terms of their licences with WAC as a collective bargaining group;
  - (b) the parties could deal at any time in the next 3 years with any terms and conditions not covered by the terms of the licences; and
  - (c) the parties could deal at any time with the manner in which WAC seeks to exercise discretionary rights under the licences by, for example, adding to, altering or relocating the licensed facilities or varying a licensee's portion of rates and taxes payable.
- 5.2 Hertz submits that it has provided sufficient evidence of net public benefits required to satisfy the statutory test for notification.
- 5.3 We ask that the Commission now make a decision on our client's application, which naturally will have broader significance in relation to collective bargaining processes proposed with monopoly providers of important transport infrastructure generally.

---

<sup>9</sup> Section 5.2 of the Frontier Economics Report

If you have any questions in relation to this submission please do not hesitate to contact myself or Celesti Hodgman of our office.

Yours faithfully  
**MINTER ELLISON**

**Geoff Carter**  
**Partner**

Contact:	Celesti Hodgman Direct phone: +61 3 8608 2474 Direct fax: +61 3 8608 1257
Email:	celesti.hodgman@minterellison.com
Partner responsible:	Richard Murphy/Geoff Carter Direct phone: +61 3 8608 2090
Our reference:	CH RDM 30-6477567

**Confidential – Restriction of Part Publication Claimed**

## Confidential Annexure

**EXCLUDED FROM PUBLIC REGISTER**