



Australian  
Competition &  
Consumer  
Commission

# Objection notice

in respect of a collective bargaining  
notification lodged by

**Hertz Australia Pty Limited**

on behalf of a group of car rental  
companies operating at Perth airport

**Date: 16 July 2010**

**Notification no. CB00143**

**Commissioners:**

Schaper  
Kell  
Court  
Dimasi  
Willett

**Public Register no. C2010/447**

## **Summary**

The ACCC issues a final objection notice 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 is satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from such conduct.

Accordingly, collective bargaining notification CB00143 has not, and will not, come into force.

### **The collective bargaining notification process**

Collective bargaining refers to two or more competitors collectively negotiating terms and conditions with a supplier or customer. Without protection, it can raise concerns under the competition provisions of the *Trade Practices Act 1974* (the Act).

Businesses can obtain protection from legal action under the Act for collective bargaining conduct by lodging a notification with the ACCC. Provided the ACCC does not object to the notified conduct, protection commences 14 days after lodgement.

The ACCC will only object to and remove the protection from legal action provided by a collective bargaining notification when it is satisfied that any public benefits from the proposed collective bargaining conduct would not outweigh the public detriments (and substantially lessen competition for notifications that do not concern price fixing or other cartel provisions or exclusionary conduct).

### **The notification**

On 3 May 2010 collective bargaining notification CB00143 was lodged by Hertz on behalf of itself and four other car rental companies, 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) and CLA Trading Pty Ltd trading as Europcar (Europcar). The car rental companies propose to collectively negotiate with Westralia about 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 (the notified conduct).

The collective bargaining notification process is transparent, involving interested party consultation and with relevant documents available from a public register. On this matter, the ACCC has received a number of submissions from Westralia and the car rental company that operates at Perth airport that is not part of the proposed bargaining group, Redspot Car Rentals (Redspot), objecting to the notification.

## **ACCC decision**

Based on the available information the ACCC is satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from such conduct.

The ACCC considers that the proposed collective bargaining arrangements are likely to generate some, albeit limited, public detriment. In particular, regardless of whether collective negotiations are conducted, or what the outcome of those negotiations is, under the proposed arrangements members of the group will be able to share information about issues such as their willingness to pay for car rental facilities at Perth airport.

The exchange of commercially sensitive information such as price, terms and conditions that individual businesses may be willing to accept would reduce the competitive tension between such businesses.

The collective bargaining arrangements may also impact on rental companies outside of the bargaining group. Through having access to shared information in making collective representations to Westralia, group members would have a competitive advantage over any other car rental company, in competing for airport space at Perth airport in the future. Access to this information may also place group members at a competitive advantage in individually making decisions about price, other terms and conditions and levels of service to be offered to customers.

Hertz has argued that the arrangements will produce a public benefit by providing group members with a degree of countervailing power in negotiations with Westralia which will be reflected in them being able to negotiate more favourable terms and conditions and that, given competition at the retail level, this will result in lower prices and improved levels of service for consumers.

The ACCC has generally recognised that collective bargaining may enable members of the bargaining group to achieve more appropriate commercial outcomes through, for example, greater input into contract terms and conditions. This improved input can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their respective business, for example, addressing common contractual problems in a more streamlined and effective manner.

In the past the ACCC has recognised that, given the voluntary nature of collective bargaining arrangements, opportunities for collective bargaining to influence contract terms and conditions will generally only arise if both sides are likely to benefit from collectively negotiating an outcome.

In this notification, Hertz indicated that by engaging in the notified conduct, it hopes to influence the balance of bargaining power between car rental companies within the bargaining group and Westralia, resulting in more favourable terms being negotiated for the car rental companies. It has not been suggested by Hertz that collective bargaining will achieve mutually beneficial outcomes for the car rental companies and Westralia.

The voluntary nature of the arrangements means that, particularly given that the car rental companies are dependant on Westralia if they wish to offer car rental services at

Perth airport, Westralia can elect not to participate, or to participate in collective bargaining but not accept a less favourable outcome than it would achieve through individual negotiation with each member of the group.

This being the case, Westralia would be unlikely to agree to a collectively negotiated arrangement that does not produce mutually beneficial outcomes. Rather, the alternatives available to Westralia, including dealing with the rental companies individually, are likely to be reflected in the terms and conditions of leases and licences negotiated even if Westralia chooses to enter into collective negotiations with the car rental companies.

For these reasons, the ACCC considers that the notified conduct is unlikely to result in the public benefits claimed by the notifying parties but would be likely to result in an anti-competitive detriment.

The ACCC therefore gives notice to Hertz under section 93AC of the Act that the ACCC objects to notification CB00143.

## **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. On 13 May 2010 the ACCC issued a draft objection notice proposing to give notice to Hertz under section 93AC of the Act, objecting to notification CB00143 (the Draft Objection Notice).
- 1.4. The ACCC sought further submissions from the applicant and interested parties in response to the Draft Objection Notice. In accordance with section 93A of the Act, the ACCC also invited the applicant and interested parties to request a conference to discuss the Draft Objection Notice.
- 1.5. Hertz, Westralia and Redspot all provided submissions in response to the draft objection notice. No party requested a conference.

### **Final Objection Notice**

- 1.6. Once the ACCC has all of the relevant information it makes a decision whether to allow the notification to stand or to revoke the protection from legal action provided by the notification.
- 1.7. If the ACCC is satisfied that the likely benefit to the public from the notified conduct would not outweigh the likely detriment to the public from the conduct (and in some cases where it is satisfied that the conduct substantially lessens competition) the ACCC may issue a final objection notice.

## **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. Redspot is the only other car rental company currently operating at Perth airport.
- 2.4. Westralia provides facilities to car rental companies to enable them to operate a car rental business at Perth airport. Facilities include:
  - space for terminal counters
  - car parking bays, also called 'ready bays'
  - space to provide ready bay booths
  - signage that provides directions to car rental counters and ready bay areas.

### **The proposed collective bargaining conduct**

- 2.5. 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.
- 2.6. 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.
- 2.7. 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 ready bays at Perth airport.

- 2.8. No formal 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.
- 2.9. The group does not intend to engage in boycott activity.

### **Previous notification**

- 2.10. 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. Unlike this notification, no competitive tender process was proposed by Mackay Airport. On 7 December 2009 the ACCC issued a decision document not opposing the notification.

### **3. Perth Airport**

- 3.1. Perth airport is serviced by 13 international, 4 domestic and 10 regional airlines.
- 3.2. During 2009, Perth airport facilitated 2.8 million international passenger movements (an increase of 9.0% on the previous year) and 7.3 million domestic passenger movements (an increase of 4.1 % on the previous year).<sup>1</sup>
- 3.3. Westralia intends to conduct significant work on redesigning and upgrading facilities at Perth airport. Westralia intends to consolidate the domestic and international terminals within the International precinct over ten years. To facilitate aviation industry growth including car rental activity in the short to medium term, Westralia submits that it has committed to significant investments to improve airport facilities, including access to and capacity of the domestic car rental ready bay area, improved access between international and domestic terminals via a link road, and construction of Terminal WA.<sup>2</sup>
- 3.4. 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.
- 3.5. 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**

- 3.6. At the time of lodging the application the group members each had licence agreements with Westralia for the purposes of operating their respective businesses at Perth airport. These licences were due to expire on 30 June 2010.
- 3.7. 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 intended to enter into new contractual arrangements with individual car rental businesses from 1 July 2010 for five years.
- 3.8. 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 contained a Draft Car Rental Licence which contained the commercial terms and conditions that Westralia was proposing.
- 3.9. The Request for Proposal offered six on-airport car rental licences with a term of five years from 1 July 2010. The Request for Proposal specified:
  - a base annual fee for a terminal counter
  - base annual fees for ready bay booths

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<sup>1</sup> Westralia Airports Corporation Pty Ltd, Car rental – Request for Proposal, 1 April 2010, at p 3.

<sup>2</sup> Ibid at p 3.

- base annual fees for each ready bay
- a minimum percentage amount of gross turnover
- minimum annual guarantees of the forecast gross turnover fee that a licence holder would need to pay Westralia.

3.10. Interested parties were asked to bid on:

- the number of ready bays they would require
- the number of ready bay booths they would require
- the percentage of gross turnover they would pay
- the amount they would be prepared to pay for premium location terminal counters and ready bays
- the minimum annual guarantees.

3.11. Interested parties were also asked to provide broad company information including company background, ownership and management information, company financial information, ready bay booth design and operational strategies, pricing strategy and marketing strategy.

3.12. On 23 June 2010 Westralia advised the ACCC that pursuant to the Request for Proposal, each of the car rental companies had lodged offers for new car rental licences in accordance with the Request for Proposal.

## **4. ACCC public consultation**

- 4.1. The ACCC sought submissions from interested parties, including Westralia and a competitor of the members of the collective bargaining group.
- 4.2. Westralia and Redspot provided submissions objecting to the notification. Hertz also provided further submissions in response to the submissions received from Westralia and Redspot.
- 4.3. Following the release of the draft objection notice on 13 May 2010 Hertz, Westralia and Redspot all provided further submissions.
- 4.4. Submissions are summarised in the ACCC's assessment of the proposed arrangements in Chapter 5 of this objection notice.
- 4.5. Copies of all publicly available submissions are available from the ACCC's public register and its website at [www.accc.gov.au/CollectiveBargainingRegister](http://www.accc.gov.au/CollectiveBargainingRegister).

## 5. ACCC's assessment

### Public benefit test

5.1. The ACCC assesses collective bargaining notifications by applying the relevant public benefit test set out in the Act. The applicant's notified conduct is expressed 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.

from the notified conduct.

### Market

5.2. 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.<sup>3</sup>

5.3. 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.

5.4. 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.

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

5.6. 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.

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<sup>3</sup>This is consistent with the Australian Competition Tribunal's decision in *Re Media Council of Australia* (1996) ATPR 41-497 at 42,227.

- 5.7. 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 and without test**

- 5.8. 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 notified conduct.
- 5.9. 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.
- 5.10. In its draft objection notice the ACCC considered 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.
- 5.11. As discussed in Chapter 3 of this objection notice, Westralia submits that, pursuant to the Request for Proposal, each of the car rental companies has now lodged offers for new car rental licences in accordance with the Request for Proposal.
- 5.12. Hertz submits that there is still benefit in the group members being able to collectively negotiate with Westralia in relation to possible re-negotiation of licence terms and terms and conditions not covered by the terms of licences.

#### *ACCC view*

- 5.13. The fact that each of the car rental companies have now lodged offers for new car rental licences with Westralia potentially limits the extent to which further negotiations would be engaged in by the car rental companies with Westralia, whether collectively or individually, at least over the life of the proposed collective bargaining arrangements, being three years.
- 5.14. However, there would still be scope for further negotiation between the car rental companies and Westralia, individually or collectively. In particular, variations, or alternatives to the agreements could be negotiated if both Westralia and the car rental company, or companies, in question, chose to do so.
- 5.15. Under the proposed collective bargaining arrangements the car rental companies would be able to make collective representations to Westralia in relation to such negotiations.
- 5.16. As concluded in the draft objection notice, the ACCC considers that the most likely counterfactual to the proposed collective bargaining arrangements would be that any further negotiations, to the extent that they did occur, would, as has been the case to date, be between Westralia and each individual car rental company.

## **Public benefits**

- 5.17. To object to the collective bargaining notification, the ACCC must be satisfied that the likely benefit to the public from the notified conduct would not outweigh the likely detriment to the public from the conduct.
- 5.18. There must also be a nexus between the claimed public benefits and the notified conduct. In other words, the benefit must flow from the notified conduct.
- 5.19. An assessment of the public benefits claimed by Hertz, together with Westralia's and Redspot's responses to those claims, follows.

### *Submissions*

- 5.20. Hertz submits that collective bargaining will provide the group with a degree of bargaining power in their negotiations with Westralia 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 will be prices at, what it considers to be, 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.
- 5.21. 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.
- 5.22. Hertz submits that Westralia has little constraint on its ability to raise prices or otherwise exercise its market power as exemplified by Westralia's 'take it or leave it' approach to the Request for Proposal process.
- 5.23. Hertz submits that the costs and terms proposed in Westralia's Draft Car Rental Licence were a significant departure from the previous 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.
- 5.24. 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 locational 'premiums'. Hertz submits that it would not be competitive or economically efficient for Westralia to extract monopoly rents.
- 5.25. 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 in the form of higher prices and/or reduced access to car rental services.

- 5.26. Hertz submits that the collective bargaining arrangements may be successful in reducing these fees and therefore the car rental companies' marginal cost.
- 5.27. Hertz submits that a collective process involving the same group and the operator of Mackay airport proceeded in an orderly and appropriate fashion and achieved significantly better terms than were initially proposed by the operator. Hertz submits that the result is that consumers of rental car services at Mackay airport will pay less to rent vehicles over the life of the collectively negotiated arrangement than if each group member had negotiated separately with the operator.
- 5.28. Westralia submits that there will be no cost savings passed on to consumers by the group members because the group members will charge what the inelastic airport car rental market can bear in circumstances where car rental supply is restricted by limited airport space. Westralia further submits that 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.
- 5.29. Westralia submits that rather than competition delivering savings to consumers as claimed by the group members, common procurement of scarce resources by competitors will lessen competition between them by removing the ability of the most efficient operators to expose the less efficient operators to higher input costs.
- 5.30. Westralia submits that 'airport fees' or similarly named fees charged by car rental operators are significantly higher than actual fees charged by Westralia as a percentage of gross turnover and that the car rental market at Perth airport is highly concentrated.
- 5.31. As noted in Chapter 3, Westralia conducted a Request for Proposal process to operate car rental businesses at Perth airport. Westralia submits that this process transparently allows applicants to indicate the value they place on having an airport presence, and on particular locations within the airport, through a premium location bid and an operator nominated percentage of airport related turnover. Westralia submits that this process ensures that scarce airport space is put to its highest value use. In particular, Westralia submits that a car rental operator with a lower cost base and/or an offering that consumers are willing to pay more for will be able to outbid a rival car rental operator.
- 5.32. Hertz and Westralia provided a number of further arguments about the issue of whether airport space would be allocated more efficiently under the Request for Proposal or through car rental companies collectively bargaining with Westralia. This issue is discussed further in the ACCC's consideration of the public detriment of the proposed arrangements.
- 5.33. Redspot submits that the base price Westralia is asking for parking bays and rental desks is commensurate with prices charged for similar facilities at other Australian airports.

- 5.34. As noted, in a further submission, Westralia states that the car rental companies have now lodged offers for new car rental licences in accordance with the Request for Proposal. Westralia therefore submits that the collective bargaining notification is futile as there is no longer anything to negotiate and therefore there can be no resulting public benefits.
- 5.35. In response, Hertz submits that there is still benefit in the parties being allowed to negotiate with Westralia as:
- 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 Westralia as a collective bargaining group
  - 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
  - the parties could deal at any time with the manner in which Westralia seeks to exercise discretionary rights under the licences by, for example, adding to, altering or relocating the licensed facilities or varying a licensee's proportion of rates and taxes payable.

*ACCC view*

- 5.36. As noted in the ACCC's assessment of the future with and without test the fact that each of the car rental companies have now lodged offers for new car rental licences in accordance with the Request for Proposal with Westralia does not preclude further negotiation, collectively, or individually, between the parties.
- 5.37. Hertz argues that collective bargaining will provide group members with a degree of countervailing power in negotiations with Westralia which will be reflected in them being able to negotiate more favourable terms and conditions and that, given competition at the retail level, this will result in lower prices and improved levels of service for consumers.
- 5.38. The ACCC has previously recognised, in considering the notification lodged by the same group of car rental companies that are party to the current application in relation to collective bargaining with Mackay Airport, that Mackay Airport has considerable bargaining power in negotiating with each car rental company individually. The ACCC considers the same to be true of Westralia.
- 5.39. There are at best limited substitutes for the leasing and licensing arrangements offered to car rental companies by Westralia. Westralia is the only significant passenger airport in the immediate geographical area and customers commuting through the airport value the convenience of being able to pick up and drop off vehicles at the airport.
- 5.40. While having car rental services available within the airport terminal is an important component of the operation of the airport, a number of car rental companies, including each of the group members, compete to supply these services at Perth airport. Accordingly, while Westralia is dependent on having car rental companies operating within its terminal to some extent, in operating the

airport it is not dependent on any individual car rental company agreeing to operate at the airport.

- 5.41. The greater availability of outside options for Westralia means that it is likely to have considerable bargaining power in negotiating with each car rental company individually about lease and licence terms. This is likely to be reflected in the terms and conditions of leases and licences negotiated by Westralia when dealing with each car rental company separately, and ultimately, in the prices and other terms and conditions under which rental car services are supplied by the car rental companies to airport users.
- 5.42. The ACCC has previously recognised, including in relation to car rental companies collectively bargaining with Mackay Airport, that collective bargaining may enable them to achieve more appropriate commercial outcomes through, for example, greater input into contract terms and conditions.
- 5.43. This improved input can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their business, for example, addressing common contractual problems in a more streamlined and effective manner.
- 5.44. The ACCC has also previously noted that it remains open to the target of any collective bargaining proposal to negotiate with each of the applicants individually if that is its preference. However, collective bargaining arrangements can provide an opportunity for issues of common concern to be given greater consideration if both sides consider it appropriate to do so.
- 5.45. Given the voluntary nature of collective bargaining arrangements, the ACCC has also recognised that opportunities for collective bargaining to influence contract terms and conditions will generally only arise if both sides are likely to benefit from collectively negotiating an outcome.
- 5.46. That is to say, where the target of a proposed collective bargaining group has the option of continuing to deal with members of the group individually, there would be no incentive for the target to agree to a collectively negotiated outcome unless the collectively negotiated agreement was going to achieve a better outcome for it than negotiating individually with each group member.
- 5.47. This more positive outcome for the target could be explicitly reflected in the terms of the commonly negotiated agreement, which may have benefited from the input of the bargaining group facilitating issues of common concern being better addressed, or it could be reflected in greater efficiencies, such as transaction cost savings, in the negotiating process.
- 5.48. In this respect, collective bargaining can in some instances result in the target accepting final contract terms and conditions that are less favourable to the target than it would have achieved through negotiating with each member of the group individually. However, as a general rule, the target of a collective bargaining arrangement would be unlikely to agree to accept less favourable terms than it could have achieved through individual negotiation unless some other element of participating in the arrangement provided the target with an offsetting benefit.

- 5.49. However, Hertz does not argue that the group and Westralia will both benefit from the notified conduct. As noted, Hertz argues that engaging in the notified conduct will provide the group with countervailing power in negotiations with Westralia which will enable the group to extract more favourable terms and conditions which they will pass on to end customers.
- 5.50. Neither Hertz, or any parties that have provided submissions to the ACCC, have provided information that would suggest that this more favourable commercial deal would be as a result of, for example, the collective bargaining process allowing the group and Westralia to identify and achieve greater efficiencies in their respective businesses such as through addressing common contractual problems in a more streamlined and effective manner.
- 5.51. As noted, collective bargaining arrangements can operate successfully where they produce mutually beneficial outcomes for the target and the bargaining group. However, in this case, Westralia has strong viable alternatives to dealing with the collective bargaining group, including dealing with the members of the bargaining group individually. In contrast, if the car rental companies want to provide rental services to customers at Perth airport they have no commercially viable alternative to dealing with Westralia. Given this, the ACCC considers that the car rental companies are unlikely to be able to secure a better deal from Westralia through collective negotiation unless there is an offsetting efficiency or other gain to Westralia that motivates them to offer the car rental companies a better deal.
- 5.52. In this respect, it has not been suggested by Hertz that collective bargaining will achieve mutually beneficial outcomes for the car rental companies and Westralia. Rather, Hertz submits that collective bargaining will allow car rental companies to negotiate more favourable terms and conditions because their bargaining position will be strengthened.
- 5.53. Given the voluntary nature of the arrangements, and particularly, the alternative to collective bargaining open to Westralia, Westralia is unlikely to agree to such an outcome. Rather, the greater availability of outside options for Westralia is likely to be reflected in the terms and conditions of leases and licences negotiated even if Westralia chooses to enter into collective negotiations with the car rental companies.
- 5.54. The viability of these strong alternatives available to Westralia, but not to the car rental companies, would need to change for the proposed collective bargaining arrangement to achieve the outcome Hertz seeks (that is, countervailing power in negotiations with Westralia).
- 5.55. For example, if the car rental companies were able to engage in boycott activity, that is, collectively agreeing not to deal with Westralia unless Westralia accepted the terms and conditions they were offering, then the alternative to dealing with the group open to Westralia would not be as strong. If Westralia faced the threat of withdrawal from the acquisition of airport space by all the members of the bargaining group, the group's bargaining position relative to Westralia would be significantly strengthened and the terms and conditions negotiated would be expected to reflect this.

- 5.56. However, collective boycotts are prohibited under the Act unless notified or authorised. Collective boycotts can have significant anti-competitive effects. In collective negotiation, the right to impose a collective boycott could enable a collective bargaining group to inflict significant commercial damage on those that it negotiates with and cause significant disruption not only for the target, but also for upstream and downstream businesses and ultimately consumers.
- 5.57. Businesses may obtain protection from legal action under the Act for collective boycott conduct by lodging a notification or seeking authorisation. However, given the significant disruption and commercial damage collective boycotts can cause the ACCC is generally very reluctant to allow protection for collective boycott activity without extremely strong justification for the arrangements being provided. In this instance the car rental companies have not sought protection for a collective boycott.
- 5.58. Therefore the ACCC does not consider that the notified conduct is likely to result in the public benefits claimed by Hertz.
- 5.59. The ACCC's assessment in relation to this issue would not change based on whether collective bargaining occurred before or after the Request for Proposal process had been implemented.

### **Public detriments**

- 5.60. The ACCC must assess whether the proposed notified conduct would be likely to result in a detriment to the public that flows from the notified conduct.

### **Effect on allocation of airport space at Perth airport**

#### *Submissions*

- 5.61. Westralia submits that the proposed collective bargaining 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 would not be possible under the collective bargaining arrangements.
- 5.62. Redspot also argues that a competitive tender process is a more efficient mechanism for allocating limited terminal space than through collective bargaining.
- 5.63. Hertz submits that the Request for Proposal process promulgated by Westralia has not been conducted in a manner that would be analogous to the behaviour of a supplier in a competitive market that exhibits allocative efficiencies. Hertz submits that rather Westralia has exhibited behaviour consistent with its bargaining power as a monopolist supplier, and has sought to impose a 'negotiation' process that is the opposite to 'fair, timely and transparent'. Hertz

submits that the group members were not given sufficient time to consider the Request for Proposal and have been pressured to accept Westralia's terms.

- 5.64. Hertz submits that the collective bargaining process proposed remains a competitive negotiating process with any genuinely scarce services likely to be allocated, as between car rental companies wishing to operate at Perth airport, on a competitive basis. Hertz submits that the proposed collective bargaining process is in fact more likely to promote allocative efficiency than the flawed Request for Proposal process. Hertz submits that, in contrast to the Request for Proposal process, the collective bargaining arrangements do not limit the terms and conditions that would be the subject of negotiation with Westralia.
- 5.65. Hertz submits that rather than being 'transparent, timely and fair' involving meaningful levels of negotiation, the majority of terms of the Request for Proposal process have been unilaterally set by Westralia and are not subject to meaningful negotiations or bids. Hertz also submits that the process is asymmetrically 'transparent' as Westralia sees all the prices and terms whereas the car rental companies see nothing of other parties' pricing and have limited ability to negotiate. Hertz submits that the ultimate allocation decision is at Westralia's discretion.
- 5.66. Hertz submits that the implementation of a collective bargaining process does not mean that the process or outcome is not competitive, and ultimately all allocation decisions are at Westralia's discretion. Hertz submits that to the extent that there is scarcity of ready bays or counters, it is ultimately up to any particular car rental operator to demonstrate that it has a superior commercial proposal than another operator.
- 5.67. In response, Westralia submits that Hertz incorrectly characterises the Request for Proposal and that actual bidding behaviour of some car rental companies refutes some of Hertz's analysis of predicted bidding behaviour that led Hertz to conclude that the proposed collective bargaining process would be more likely to promote allocative efficiency than the Request for Proposal.

#### *ACCC view*

- 5.68. In its draft objection notice the ACCC expressed concerns that the proposed arrangements had the potential to damage the integrity of the competitive tender process if the collective bargaining notice came into force while the tender process was still underway.
- 5.69. The ACCC noted that the potential for damage to the Request for Proposal process arose from the information shared either explicitly or implicitly between group members.
- 5.70. The ACCC stated that 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.

- 5.71. The ACCC concluded that the potential 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.
- 5.72. Because the ACCC issued a draft objection notice within 14 days of the notification being received, the proposed collective bargaining arrangements have not, to date, been implemented.
- 5.73. As noted, since the ACCC issued the draft objection notice each of the car rental companies have lodged offers for new car rental licences in accordance with the Request for Proposal.
- 5.74. This does not necessarily eliminate the scope for collective bargaining to occur. In particular, variations, or alternatives to the agreements could be negotiated between Westralia and each car rental company or companies, if the parties chose to do so. However, as discussed in the ACCC's consideration of the public benefits of the proposed arrangements, collective bargaining, in and of itself, will not provide car rental companies with the opportunity to negotiate more favourable arrangements with Westralia unless it results in mutual gains for the car rental companies and Westralia.
- 5.75. As also discussed in the ACCC's consideration of the public benefits of the arrangements, this would be the case regardless of whether collective bargaining occurred before or after the Request for Proposal had been implemented. Although, had collective bargaining occurred before offers pursuant to the Request for Proposal were lodged by the car rental companies the potential public detriment identified by the ACCC in its draft determination as resulting from information sharing, as summarised at paragraphs 5.68 to 5.71, may have been realised.
- 5.76. Therefore, while collective bargaining could potentially influence the outcome of negotiation between car rental companies and Westralia, the ACCC does not consider that collective bargaining, if it did occur, would, in itself, significantly influence Westralia's decisions about how to allocate space at the airport. The voluntary nature of the arrangements would severely limit the influence the collective bargaining group would have over how such space was allocated.
- 5.77. Given that the way in which airport space would be allocated would be unlikely to be significantly influenced by the collective bargaining arrangements, the ACCC has not reached a conclusion about the divergent views expressed by Westralia and Hertz about how airport space can be most efficiently allocated.
- 5.78. However, while negotiations that may take place under collective bargaining are unlikely, in themselves, to significantly impact the allocation of airport space, the collective bargaining arrangements would likely generate some public detriment as a result of:

- future information sharing between group members
- the likely impact of the arrangements on car rental companies outside the bargaining group.

5.79. These issues are discussed below.

### **Future information sharing between group members**

#### *Submissions*

- 5.80. Westralia originally submitted that significant competitive detriment was likely to follow from the applicants starting to collectively bargain even if the notification was subsequently revoked by the ACCC. Westralia submitted that this was because the group was likely to share information about their preferred bidding strategies, valuation and costs. Westralia submitted that this exchange of information alone was likely to facilitate market sharing and damage any future competition and would damage any market participants who are not a party of the collective bargaining notification.
- 5.81. Westralia submitted that an anti-competitive effect of the collective bargaining arrangements may be more likely given coverage of the group. Westralia submitted 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.
- 5.82. Following the release of the draft objection notice Westralia again submits that the arrangements will allow the group members to gain a better knowledge of each other's airport space input costs, provide a broader forum for the industry to share other information about their businesses with each other, and become a de facto market sharing cartel by influencing the allocation of space between the group members at Perth airport.
- 5.83. Redspot submits that in collective bargaining the group members are likely to discuss valuations and competitive intentions, placing Redspot (and Westralia) at a competitive disadvantage.

#### *ACCC view*

- 5.84. While each car rental company has now lodged offers for new car rental licences in accordance with the Request for Proposal, if the collective bargaining arrangements were allowed to proceed, group members would still be able to make common representations to Westralia, either in seeking to vary the terms of agreements, or in relation to other matters.
- 5.85. In doing so, group members would also be able to share commercially sensitive information, intentionally or unintentionally, about their willingness to pay for the car rental facilities, and alternative mechanisms for allocating counter space and parking bays.

- 5.86. While the sharing of such information would be unlikely to impact existing contractual arrangements, it would likely impact on future negotiations between car rental companies and Westralia.
- 5.87. Ordinarily, competitive tension between individual businesses generates price signals which direct resources to their most efficient use. The exchange of commercially sensitive information such as price, terms and conditions individual businesses would be willing to accept would reduce the competitive tension between such businesses.
- 5.88. The potential anti-competitive effect of sharing this information is increased by the small number of potential alternative car rental companies to those in the group. In this respect, the ACCC understands that the group represents five of the largest car rental companies in Australia.
- 5.89. 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. However, in this case, the capacity for such information exchange exists regardless of whether Westralia chooses not to deal with the group.

#### **Impact on competitors outside the bargaining group**

- 5.90. Westralia and Redspot submit that the proposed collective bargaining arrangement will also disadvantage operators who are not part of the group.
- 5.91. Hertz submits that the arrangements do not prevent Redspot bidding as it sees fit for airport space.
- 5.92. Hertz also submits that the current members of the bargaining group have no objection to Redspot joining the group, or to Westralia disclosing to Redspot the commercial terms discussed with members of the bargaining group.

#### *ACCC view*

- 5.93. Generally, collective agreements resulting in long term contracts on agreed prices, terms and conditions can deter entry into an industry by creating an artificial barrier to entry. Similarly, such agreements, where not all businesses currently supplying or acquiring services from the target are party to the agreement, can affect the ability for those outside the agreement to continue to compete to supply or acquire services from the target.
- 5.94. For example, a bargaining group, through negotiating collectively, may be able to provide the target with a volume of business, or a volume of business on such terms, that limits or eliminates the need for the target to seek to supply to or acquire services from businesses outside the group.
- 5.95. While the target would likely only agree to such an arrangement if it was to its commercial advantage to do so, the effect of doing so would be that those outside the bargaining group would be prevented from competing on equal terms with those within the bargaining group to supply to or acquire services from the target.

- 5.96. Alternatively, having negotiated a collective agreement with the majority of the suppliers or acquirers of its services the agreement negotiated could become a de-facto agreement the target applied to all businesses regardless of whether the terms of the agreement suited the needs of those outside the bargaining group.
- 5.97. However, in the current case, given that each car rental company, including Redspot, has now entered into an individual agreement with Westralia, any future variation to agreements with group members resulting from collective negotiation would be unlikely to impact the terms of any agreement between Westralia and Redspot,.
- 5.98. However, the sharing of information between members of the group in itself is also likely to place group members at a competitive advantage to Redspot:
- First, by virtue of having access to shared information in making collective representations to Westralia group members would have a competitive advantage over Redspot, and any other car rental company, in competing for space at Perth airport in the future.
  - Second, access to this information may also place group members at a competitive advantage in individually making decisions about price, other terms and conditions and levels of service to be offered to customers.
- 5.99. Hertz has submitted that to the extent that Redspot is disadvantaged by the arrangements the group members have no objection to Redspot joining the group, or to Westralia providing information about commercial terms discussed with the group to Redspot.
- 5.100. However, the legal protection afforded by the notification would not extend to Redspot joining the collective bargaining group, or to Westralia, or any of the group members, sharing information about their respective commercial dealings with Redspot.

### **Validity of the notification**

#### *Submissions before the draft objection notice*

- 5.101. Prior to publication of the draft objection notice Westralia raised three issues regarding the validity of the notification:
- One or more of the group members (including Hertz) 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(1A) and 93AB(4). In a further submission, Westralia submits that prices should be GST inclusive (s 93AB(4)).
  - 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 (s 93AB(4)(b)).

- 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 (contrary to s 93AB(1A) and 93AB(2)). In those circumstances, Westralia says that the group should apply for authorisation to engage in that conduct.
- 5.102. 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 states that it 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.
- 5.103. 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.
- 5.104. Hertz further submits that Hertz and Thrifty are not currently, nor were they at the time of lodging the notification, related bodies corporate.
- 5.105. 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.
- 5.106. 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.

*The ACCC's draft objection notice*

- 5.107. In its draft objection notice the ACCC expressed the view that, in the circumstances, where the ACCC had decided to issue the draft objection notice, the ACCC was of the view that the notification was valid. Nevertheless, the ACCC expressed the view that it was prepared to receive further information from Hertz, and other interested parties, regarding the validity matters raised by Westralia.

*Submissions in response to the draft objection notice*

- 5.108. Hertz submits that at the time of giving the collective bargaining notice the price for the acquisition of services from Westralia by Hertz and Avis would not exceed \$3m in any 12 month period. Further comment was provided regarding Budget and Thrifty's transactions in a later submission.
- 5.109. Hertz submits that even if aggregation were properly applied to related bodies corporate, it could not be applicable to Avis/Budget or Hertz/Thrifty in this context. Hertz submits that although Avis and Budget have the same holding company, at Perth airport an independent Budget franchisee, Busby Investments Pty Ltd, operates the local Budget car rental operation. Hertz submits that this has been the case for 20 years and the current franchise agreement runs until 2019. Hertz submits that the Avis business at Perth airport is a company owned operation that is distinctly separate to Busby Investments Pty Ltd.
- 5.110. Hertz submits that the acquisition of Dollar Thrifty Automotive Group by Hertz's parent company has not been completed and is subject to regulatory and other approval. Further, Hertz submits that in Australia Thrifty is licensed to the NRMA Motoring and Services Group, a wholly subsidiary of the NRMA. Hertz therefore submits that even if the acquisition were to proceed Hertz and Thrifty would not become related bodies corporate.
- 5.111. Hertz submits that the group members individually assess their respective dealings with various airports and there is no overarching arrangement to collectively negotiate with any particular airports. Hertz submits that this is evidenced by the fact that various of the parties have recently entered into, or are in the process of negotiating, independent agreements with various airports, including Cairns, Darwin, Alice Springs and Launceston.
- 5.112. Westralia submits that the offers made by car rental companies in response to the Request for Proposal indicate that at least one company is almost certain to acquire services from Westralia in excess of \$3 million in any 12 month period of the new licence period.

*ACCC view*

- 5.113. The ACCC is of the view that the notification is valid.
- 5.114. The ACCC notes that Westralia's additional arguments, in response to the draft objection notice, about the \$3 million dollar transaction threshold being exceeded are based on bids provided in response to the Request for Proposal. This notification was lodged prior to such bids being made to Westralia.
- 5.115. Section 93AB(5) of the Act sets out the appropriate test for determining the point in time when a corporation must have reasonable expectations that it will not exceed \$3 million for the acquisition of goods or services under the proposed contract with the target. That point in time is at the time of giving the collective bargaining notification to the ACCC.

5.116. At that time, Hertz and the other group members (as reported by Hertz) have stated that they each had reasonable expectations in this regard at the time the collective bargaining notification was given to the ACCC. See paragraph 5.102 above.

## **Conclusion**

- 5.117. 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.
- 5.118. The ACCC considers that the proposed collective bargaining arrangements are likely to generate some, albeit limited, public detriment. In particular, regardless of whether collective negotiations are conducted, or what the outcome of those negotiations is, under the proposed arrangements members of the group will be able to share information about issues such as their willingness to pay for car rental facilities at Perth airport.
- 5.119. Ordinarily, competitive tension between individual businesses generates price signals which direct resources to their most efficient use. The exchange of commercially sensitive information such as price, terms and conditions that individual businesses may be willing to accept would reduce the competitive tension between such businesses.
- 5.120. The collective bargaining arrangements may also impact on rental companies outside of the bargaining group. Through having access to shared information in making collective representations to Westralia, group members would have a competitive advantage over any other car rental company, in competing for airport space at Perth airport in the future. Access to this information may also place group members at a competitive advantage in individually making decisions about price, other terms and conditions and levels of service to be offered to customers.
- 5.121. Hertz has argued that the arrangements will produce a public benefit by providing group members with a degree of countervailing power in negotiations with Westralia which will be reflected in them being able to negotiate more favourable terms and conditions and that, given competition at the retail level, this will result in lower prices and improved levels of service for consumers.
- 5.122. However, given any such more favourable terms and conditions would be at the expense of Westralia. Given that the voluntary nature of the arrangements mean that Westralia can elect not to participate, or to participate in collective bargaining but not accept any less favourable terms than it would through individual negotiation with each member of the group Westralia would be unlikely to agree to a collectively negotiated arrangement that does not produce mutually beneficial outcomes.
- 5.123. The ACCC is satisfied that the likely benefit to the public from the notified conduct would not outweigh the likely detriment to the public from such conduct.

## **6. Objection Notice**

- 6.1. For the reasons outlined above, the ACCC is satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from such conduct.
- 6.2. The ACCC therefore gives notice to Hertz Australia Pty Limited under section 93AC of the Act that the ACCC objects to notification CB00143.
- 6.3. Collective bargaining notification CB00143 has not, and will not, come into force because the ACCC issued a draft notice in respect of the notification during the prescribed 14 day period, and has now issued a final objection notice revoking the notification.