

12 November 2012

Dr Richard Chadwick  
General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

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Dear Richard

## ATA NSW – complaint about QUBE Notification N96205

### Introduction

I am writing to you on behalf of the Australian Trucking Association of New South Wales (ATA NSW).

The ATA NSW is concerned about a recent notification lodged with the Australian Competition and Consumer Commission (ACCC) by QUBE Logistics (Aust) Pty Limited (QUBE). The ATA NSW believes that the conduct the subject of the notification will result in significant public detriments in NSW, which far outweigh any potential public benefits.

### Background

QUBE is an operator of a number of empty container parks in Sydney.

On 15 May 2012, QUBE advised its NSW customers that it had appointed a company called Containerchain Pty Ltd (Containerchain) “to help to improve the visibility and exchange of information at (its) empty container park”. In reality, QUBE contracted with Containerchain to introduce a booking system for empty containers.

As a result of this arrangement, all trucking companies which deliver empty containers to, or remove empty containers from, QUBE’s empty container parks have to book the movement through Containerchain and pay Containerchain a fee of \$6.50 for each booking.

On 13 July 2012, the ATA NSW wrote to the ACCC to complain that QUBE had introduced, and that three of QUBE’s competitors (ie MT Movements, TYNE-ACFS Port Botany and TYNE Containers St Peters) were proposing to introduce, an identical booking fee of \$6.50 for empty containers.

ATA NSW's concern was that none of the empty container parks had sought to notify the ACCC of conduct which appeared, in our view, to constitute a clear contravention of section 47(6) of the *Competition and Consumer Act 2010 (CCA)*. We were also concerned about possible collusion given that four competitors had all decided to introduce a new and identical booking fee of \$6.50 for empty containers at roughly the same time.

In our letter, we asked the ACCC to immediately:

- commence an investigation into the conduct of QUBE and the proposed conduct of MT Movements, TYNE-ACFS Port Botany and TYNE Containers St Peters in relation to the introduction of empty container booking fees through Containerchain;
- write to MT Movements, TYNE-ACFS Port Botany and TYNE Containers St Peters to advise them not to introduce their booking fee as such conduct would constitute a clear and blatant breach of section 47(6) of the CCA; and
- commence a broader investigation into the conduct of operators of empty container parks in Sydney to ascertain whether these operators may have engaged in illegal cartel conduct in relation to the introduction of a booking system for empty container movements.

The ACCC declined to investigate the matter on the basis that the ACCC:

- did not believe the conduct constituted third line forcing based on the reasoning in the *Castlemaine Toohey's case*<sup>1</sup> and
- believed that there was insufficient evidence of potential collusion.

While we did not understand the ACCC's reasoning in relation to the *Castlemaine Toohey's case* (which appeared to us not to apply to the conduct in question), we were heartened by the fact that the ACCC had written to the empty container park operators to encourage each of them to lodge a notification.

#### **ACCC should review the Notification**

ATA NSW believes that for a number of reasons the ACCC should commence an in-depth review of the conduct the subject of the notification.

First, we believe that QUBE's notification application is inadequate in terms of explaining the details of the proposed conduct. Indeed, QUBE's submission is very light on relevant detail. For example, QUBE makes no mention of the costs of making each booking or how the booking system will operate in practice. Furthermore, QUBE does not explain such relevant issues as:

- how the fee of \$6.50 per empty container movement has been calculated;
- how and why the fee of \$6.50 will be divided between QUBE and Containerchain;

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<sup>1</sup> *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* (1986) 162 CLR 395 -

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1986/72.html?stem=0&synonyms=0&query=castlemaine%20tooheys>

- why the booking fee will be 20% high in Sydney than the fee being imposed in Melbourne; and
- what profits QUBE and Containchain will be making from the imposition of the booking fee.

Second, we are concerned that a number of claims made by QUBE in its submission are simply wrong. For example, at paragraph 6 of Attachment A to its Notification, QUBE claimed that “no public detriments are occasioned by the notified conduct”. ATA NSW rejects the claim that the imposition of a new fee of \$6.50 on every empty container movement to and from QUBE’s empty container parks will not result in significant public detriment. It is quite clear that the imposition of such a large fee of \$6.50 on every empty container movement to and from a QUBE facility will significantly increase the costs of moving containers and that these costs will inevitably be passed, through the supply chain, to the end consumer. This public detriment will rise significantly when every other Sydney-based empty container park decides to introduce such an identical booking fee.

ATA NSW cannot understand how QUBE can claim that the notified conduct will not result in any public detriment when they must have known that the ACCC itself found<sup>2</sup> that booking fees introduced in Melbourne resulted in a range of public detriments:

*The ACCC considers that the notified conduct is likely to result in public detriments in the form of a potential reduction in flexibility for container transport operators, and an increase on cost to access the empty container parks.*

Third, ATA NSW rejects the claims by QUBE in paragraph 2 of Attachment A to its application that the current notification should be allowed to stand because of similarities between it and the booking system introduced in Melbourne (which the ACCC considered and allowed to stand).

In our view, it is not the similarities between the applications which is relevant, but rather, the similarities between the markets and industry structure in each of the affected ports where the booking fees is being proposed which is relevant.

In this regard, ATA NSW believes that the differences between the Port of Melbourne and each of the relevant markets the subject of the current notification is so significant that the ACCC must conduct a fresh assessment of the effect of the notified conduct in each location. Indeed, in our view there are simply too many significant differences between the relevant markets for broad generalisations to be made about the effect of the notified conduct based on the Melbourne notification.

For example, ATA NSW does not believe that there are serious supply chain bottlenecks in Sydney or any of the other relevant ports, as was the case in Melbourne. For example, there are not the same problems with lengthy truck queues outside empty container parks in Sydney, as in Melbourne.

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<sup>2</sup> *Statement of Reasons in respect of notifications lodged by Port Melbourne Containers Pty Ltd, et. al*, dated 26 August 2011 - <http://www.accc.gov.au/content/index.phtml/itemId/990479/fromItemId/977921/display/acccDecision>.

Furthermore, the trucking market is much more fragmented in Sydney than it is in Melbourne. There are a greater number of smaller truck operators in Sydney, including a higher number of single truck operators. In this regard, the ATA NSW notes the ACCC's finding in relation to the Melbourne notification that:

*The cost of staging containers for a single truck operation appear high, however the majority of empty container trucks are part of larger fleets with central fleet controllers.*

In our view, given the highly fragmented nature of the market for the movement of empty containers by road in Sydney, "staging"<sup>3</sup> is likely to have a much more profound effect on the financial viability of smaller trucking companies than was the case in Melbourne. For this reason alone, the ACCC should conduct an in-depth review of the notified conduct.

### **Conclusion**

ATA NSW believes that the ACCC should commence an in-depth review of the QUBE notification due to the fact that likely benefits to the public from the conduct will not outweigh the likely detriments to the public arising from the conduct.

ATA NSW would appreciate it if the ACCC could confirm whether it will be conducting an in-depth review of the QUBE notification. In the event that the ACCC decides to conduct an in-depth review, ATA NSW would be proposing to lodge a more detailed submission concerning the notification.

If you have any questions about this letter please call me on (02) 8086 2005.

Yours sincerely



Michael Terceiro  
Competition and Consumer Lawyer  
Terceiro Legal Consulting

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<sup>3</sup> Staging is defined at footnote 13 of the ACCC's decision (cited at footnote 1 above) as - "a process whereby containers pass through a container transport operator's depot rather than proceeding directly from 'Point A' to 'Point B'. For example, empty containers may pass through a container transport operator's depot after being collected from an importer, rather than being transported directly from the importer's premises to the empty container park."