

Supplementary Submission to Queensland
Competition Authority

Australian Amalgamated Terminals Pty Ltd

16 December 2009

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1.0 Executive Summary

The key submissions made by Australian Amalgamated Terminals Pty Ltd (**AAT**) in this Supplementary Submission are:

- (a) The facility as defined by the Federal Chamber of Automotive Industries (**FCAI**) in its amended application is not a *public facility* for the purposes of Part 5 of the Queensland Competition Authority Act 1997 (Qld) (**QCA Act**).
- (b) The *minimum bundle of assets required to provide the relevant services* at the Fisherman Islands Cargo Terminal (**FICT**) includes the leasehold interests that AAT holds and which provide to it exclusive possession of the relevant land. The relevant *facility* includes the leasehold interests in the land held by AAT in respect of the FICT. However, the facility does not include the reversionary interest in the relevant leasehold land which is held by the Port of Brisbane Corporation Limited (**PBC**).
- (c) As such in respect of the key leasehold land, PBC merely holds a reversionary interest in that land. PBC is the landlord and AAT is then entitled to exclusive possession of the land for the term of its leases.
- (d) The approach adopted by the Queensland Competition Authority (**QCA**) in its Statement of Reasons is overly technical and fails to recognise the broader commercial aspects of similar arrangements and the approach that has been adopted by the National Competition Council (**NCC**) and the Australian Competition Tribunal (**Tribunal**) in cases involving Part IIIA of the Trade Practices Act 1974 (Cth) (**TPA**).
- (e) There also appear to be a number of deficiencies in relation to the *service* nominated for declaration by the FCAI. We have also raised these issues in this Supplementary Submission. AAT submits that those deficiencies will need to be further addressed in the event that the QCA determines that the service nominated for declaration is a *candidate service* under the QCA Act.

2.0 Background

On 17 July 2009, the FCAI applied to the QCA under s.77 of the QCA Act and requested that the QCA recommend to the Premier and the Treasurer (the **Ministers**) that the motor vehicle importation service provided at the FICT be declared for the purposes of Part 5 of the QCA Act.

On 15 September 2009, the FCAI provided the QCA with an amended application for the purpose of clarifying the facilities and services to which their application for declaration related.

On 30 September 2009, AAT lodged a submission with the QCA. In its submission, AAT submitted that the FICT was, in strict legal terms, not a *public facility*. Consequently, AAT submitted that the services nominated for declaration by the FCAI could not amount to a *candidate service* for the purposes of the QCA Act.

On 5 November 2009, the QCA published a Statement of Reasons on its website with respect to the preliminary jurisdictional issue. The QCA decided that as the FICT was at least partly owned by a government agency (being PBC) that the FICT satisfied the definition of *public facility* under Part 5 of the QCA Act.

It is understood that the QCA's reasoning was that the land leased to AAT by PBC, as its registered owner, formed part of the relevant *facility* as that term is defined under the QCA Act. It therefore followed, on the QCA's reasoning that the relevant *facility* is legally owned in part by PBC. That part ownership then resulted in the facility being a *public facility* as that term is defined under the QCA Act. Consequently, the service provided by means of that facility was a *candidate service* under the QCA Act.

AAT has raised with the QCA a jurisdictional issue arising from the QCA's decision as published on 5 November 2009. AAT has been invited to provide the QCA with a supplementary submission in respect of this preliminary jurisdictional issue. If the *facility* as identified by the FCAI is not a *public facility*, then the service nominated for declaration cannot under the QCA Act be a *candidate service*.

This Supplementary Submission is provided by AAT to elaborate on its concerns in respect of this preliminary jurisdictional issue under the QCA Act. This Supplementary Submission is to be read together with the original submission of AAT dated 30 September 2009.

3.0 The Facility

In its application to the QCA, the FCAI has stated that the relevant facility is *that area of land at the Port of Brisbane leased by the Port of Brisbane to AAT as the facility operator*.¹

Accepting the FCAI's characterisation of the *facility* the relevant land and leases are as follows:

- (a) Lease FAO on SP 190973, which is over part of Lot 83 on SP 108337;² and
- (b) Lease FBJ on SP 214516, which is over part of Lot 83 on SP 108337.³

We note that the first mentioned lease does not include the area constituting the berths at wharves 1, 2 and 3 (the **wharves**) that directly abut the Brisbane River. Those berths form part of Lot 88 on SP 108337 that is owned by the State of Queensland and is leased in perpetuity to PBC.

In respect of these berth areas, PBC has then granted a non-exclusive licence to AAT to use this area.⁴

This is relevant as it will, in our view, affect at least two of the services sought to be declared by the FCAI, being the:

- berthing of ships containing motor vehicles; and
- discharging of motor vehicles from ships.⁵

AAT submits that those particular services are not actually carried out on the land that has been leased to AAT by PBC.

The area of land covered by lease FAO on SP 190973 was granted to AAT with some existing improvements. These improvements included:

- stormwater drainage; and

¹ See the FCAI Application to the QCA, [2.1].

² This registered lease was referred to as the *2006 Lease* in AAT's previous submission to the QCA.

³ This unregistered lease was referred to as the *2007 Lease* in AAT's previous submission to the QCA.

⁴ The Licence forms Schedule 6 to the Agreement to Lease as referred to in AAT's previous submission to the QCA.

⁵ See paragraph 2.2(b) and (c) of the FCAI submission to the QCA.

- pavements in specific areas to cater for motor vehicle storage.

We note that the PBC referred to these improvements as the "below-surface improvements to the land".⁶

AAT has then invested a significant amount of money to further improve the land that it has leased from the PBC and in doing so it has developed the leased land into the facility that is capable of delivering the services associated with the importation of motor vehicles. These improvements include:

- buildings for cargo storage, amenities, a maintenance garage and office facilities (some of which are then on-licensed and used by the stevedores);
- security systems and IT systems;
- AQIS-approved wash facilities; and
- security fencing.

In addition, AAT makes available for use at the FICT a wide range of other equipment including forklifts, cranes, dock trucks, vans and utilities.

3.1 What is a facility?

Section 70(1) of the QCA provides that the term *facility* includes:

- (a) rail transport infrastructure; and
- (b) port infrastructure; and
- (c) electricity, petroleum or gas transmission and distribution infrastructure; and
- (d) water and sewerage infrastructure, including treatment and distribution infrastructure.

The term *port infrastructure* is then defined to include transport infrastructure relating to ports.⁷

⁶ PBC submission to the QCA dated 30 September 2009.

⁷ See the Schedule to the QCA Act and Schedule 6 to the Transport Infrastructure Act 1994 (Qld).

As the definition of the term *facility* is not expressed to be an exhaustive definition, reference can helpfully be made to that concept as it has been considered and applied in other jurisdictions.

In particular, at the Commonwealth level, there have been a number of decisions by the NCC and determinations by the Tribunal and the Federal Court in relation to the declaration of services for third party access under Part IIIA of the TPA.

Under Part IIIA of the TPA, the term *facility* is not specifically defined.

In *Re Sydney International Airport*,⁸ one of the issues that the Tribunal had to determine was the definition of the relevant facility. In that case, a number of alternative definitions of *facility* were suggested, including the concrete hard stands alone; the passenger and freight aprons adjacent to the international terminal; the combination of the hard stands, aprons and the international terminal together and then the airport as a whole.

The Tribunal decided that the relevant facility included not only the aprons and hard stands but also much of the remaining airport infrastructure. That is, the relevant facility included all of the air-side infrastructure at the International Airport such as the runways, taxiways and terminals, and the related land-side facilities that were integral to the functioning of the air-side services. In coming to this conclusion, the Tribunal held that the relevant *facility* comprised the minimum set of physical assets that were necessary for international aircraft to land at Sydney International Airport, unload and load passengers and freight and depart in a safe and commercially sustainable manner.⁹ That is, a facility would be the *minimum bundle of assets required to provide the relevant services subject to declaration*.¹⁰

We note that the arrangements at the Sydney International Airport are in many respects similar to the arrangements at the FICT. In the case of Sydney International Airport:

- The Commonwealth Government owned the land on which the airport is situated;
- The Commonwealth Government entered into a long-term lease with Sydney Airports Corporation Limited (**SACL**) (50 years, plus a 49 year renewal option) with respect to the airport;

⁸ (2000) 156 FLR 10.

⁹ *Ibid* 41.

¹⁰ *Ibid* 65.

- SACL has had, from 1 July 1998, responsibility for the management of the airport and provided services;
- SACL provides access to the facility to a range of third parties who then provided the vast majority of services at the airport.

Whilst the Commonwealth remained the owner of the land on which Sydney International Airport is situated, there is no doubt that from a commercial perspective SACL was for all intents and purposes considered to be the owner of that facility. The valuable asset that SACL possessed was its leasehold interest in the land and the leased structures on that land that comprise Sydney International Airport.

Similarly, BHP Billiton and Rio Tinto were considered by the NCC to be the owners of certain railway facilities in the Pilbara region of Western Australia.

Fortescue Metals Group Limited and The Pilbara Infrastructure Pty Ltd¹¹ have between them lodged four separate applications with the NCC seeking access to rail infrastructure services in the Pilbara region. The services to which access has been sought are:

- (a) *Mount Newman railway service* – owned and operated by BHP Billiton and related parties;
- (b) *Goldsworthy railway service* – owned and operated by BHP Billiton and related parties;
- (c) *Robe railway service* – owned and operated by Rio Tinto and associated parties; and
- (d) *Hamersley railway service* – owned and operated by Rio Tinto and associated parties.

These railway services were developed in conjunction with port facilities and the relevant mines under various State Agreement Acts that were enacted by the Western Australian Parliament during the 1960s and 1970s. Under each of these State Agreements:

- the State leased land to the relevant mining company for mining operations, mining townships, railway corridors and port facilities;

¹¹ The Pilbara Infrastructure Pty Ltd is a wholly owned subsidiary of Fortescue Metals Group Limited.

- the companies built mining and processing infrastructure, railways and port facilities;
- the companies then mine iron ore and pay royalties to the State;
- the State agreed not to resume the leased land so long as mining operations were in operation; and
- at the termination of the agreements, the State would retain ownership of the fixed infrastructure being the mine facilities, railways, port facilities and townships.¹²

In all of these cases, the NCC considered that BHP Billiton or Rio Tinto were the owners of the relevant facilities, notwithstanding that the State of Western Australia continued to own the underlying land. Again, it is the leasehold interests held by the mining companies that are the valuable assets legally held by them and which are key assets in terms of the relevant facilities.

AAT submits that the issue of who *owns* a relevant facility is of vital importance in this case because of the specific drafting of the QCA Act. It will only be if PBC owns the whole or part of the FICT, that FICT will in terms of the QCA Act be a *public facility*.

We note that under the QCA Act, the owner¹³ of a declared service has certain rights and obligations. In particular:

- (a) the QCA may require the owner (or the operator) of a declared service to give the QCA a draft access undertaking for the service;¹⁴ and
- (b) the owner (being a *responsible person*) must comply with an approved access undertaking given by, or applicable to, the owner.¹⁵

AAT submits that it would be incongruous with the purpose and intent of the QCA Act for these provisions to apply to PBC on the basis that as the landlord it is a part owner of the FICT. This reaffirms that under the QCA Act the better view is that the PBC is not an owner at all of the relevant *facility*.

¹² See in particular the *Iron Ore (Mount Newman) Agreement Act 1964 (WA)*, *Iron Ore (Robe River) Agreement Act 1964 (WA)*, *Iron Ore (Mount Goldsworthy) Agreement Act 1964 (WA)*, and *Iron Ore (Hamersley Range) Agreement Act 1963 (WA)*.

¹³ The term *owner* is defined in the Schedule of the QCA, for a service, to mean the owner of the facility used, or to be used, to provide the service (whether or not the service is a declared service).

¹⁴ Section 133(1) of the QCA Act.

¹⁵ Section 150A of the QCA Act.

3.2 Submission of AAT

AAT submits that the QCA has, in its Statement of Reasons, adopted an incorrect legal interpretation of the term *public facility* rather than adopting a more appropriate purposive approach.

AAT submits that under the relevant leases PBC has leased the land with PBC installed improvements to AAT. At law, a lease usually involves the grant to the lessee of a right to exclusive possession of the land in return for the payment of rent by the lessee.¹⁶ As such, PBC now only has a reversionary interest in the leased land; it is no more than a landlord. All of the infrastructure and equipment necessary for the carrying out of the motor vehicle importation service, being the buildings, gatehouses, sheds, security and IT systems are controlled by AAT. It is AAT's infrastructure and other assets (which include the AAT leasehold interests in the land) which stamps the FICT with the character of a facility for the importation of motor vehicles.

As s.69E of the QCA Act makes clear,¹⁷ Part 5 of the QCA Act is concerned with infrastructure by which services are provided. AAT submits that the motor vehicle importation service is provided by use of the infrastructure that it controls. PBC does not "own" any of the infrastructure that is a distinctive part of providing the motor vehicle importation service.

If it were enough for a reversionary interest in land to constitute a *facility* under the QCA Act, then any infrastructure (private or public) built on any leased State-owned land could be a *public facility* under the QCA Act in relation to which a declaration might be made. Given the definition of *private facility*,¹⁸ it is highly unlikely that this was the intended meaning of the QCA Act.

AAT submits that the *minimum bundle of assets required to provide the relevant services* at the FICT is the leasehold interests that delivers to it exclusive possession of the leased land, any licence rights and the other improvements made by AAT such as the buildings, sheds, security fencing and gatehouse, IT and security systems and car washing facilities. AAT does not need to be the registered freehold owner of the land in order to develop and own the FICT. Therefore, it is the leasehold interest of AAT over the land (which is a recognised form of land tenure, i.e. a relevant interest in the land) and not the reversionary interest in the land (being

¹⁶ *Radaich v Smith* (1959) 101 CLR 209.

¹⁷ Object of Part 5 of the QCA Act.

¹⁸ A private facility is defined in the Schedule of the QCA Act to mean a facility that is not a public facility.

PBC's current interest), that is the essential and valuable land component of the bundle of assets that constitutes the facility.

AAT submits that its approach may be tested in the following example. If AAT decided to sell the FICT facility to a third party it would enter into a commercial sale agreement with the purchaser. PBC would not be a party to that agreement. PBC's key involvement would under the leases be to provide its consent to the assignment of AAT's leasehold interest to the new purchaser and owner of the facility.¹⁹ Therefore, from a commercial standpoint, as PBC would not be considered to be the owner of the FICT they would not be involved as a "seller" of the FICT facility.

AAT submits that construing the term *facility* in this way is consistent with the approach that has been adopted in respect of Part IIIA of the TPA.

3.3 Public facility

The term *public facility* is defined under the QCA Act to mean a facility owned (whether legally or beneficially and whether entirely or in part) by the State or a government agency, and includes a facility owned by a water authority.²⁰

We understand the view expressed by the QCA in its Statement of Reasons is that the FICT is a *public facility* because part of the facility is owned by PBC. AAT accepts that PBC comes within the definition of *government agency* under the QCA Act.

However, AAT makes two submissions on the interpretation to be given to the term *public facility* in this regard, being:

- (a) Firstly, it is the relevant leasehold interest that forms the valuable asset that is part of the minimum bundle of assets that constitute the *facility*. As such, PBC does not "own" any part of the facility; it merely has a reversionary interest in the underlying land; and
- (b) Secondly, when considering what is a facility under the QCA Act, the concept of the facility has to be considered in its totality and not in discrete or severable parts. The reference to the facility being owned *entirely or in part* is not a reference to a discrete asset or physical part of the facility, but rather is a reference to ownership rights in relation to the whole of the facility. AAT submits that under the QCA Act

¹⁹ See clause 8.1 of the 2006 Lease and clause 8.1 of the 2007 Lease.

²⁰ See the Schedule to the QCA Act.

the relevant facility should not be divided into its constituent parts when ascertaining whether it is legally or beneficially owned by a particular party.

4.0 Service definition

It is also noted that FCAI has nominated the following service as being the relevant *candidate service*:

the use of the FI Facility for the purpose of importing motor vehicles, including without limitation:

- (a) *scheduling of ships containing motor vehicles;*
- (b) *berthing ships containing motor vehicles;*
- (c) *discharging motor vehicles from ships;*
- (d) *storing motor vehicles;*
- (e) *moving motor vehicles within the FI Facility;*
- (f) *loading motor vehicles onto car carriers;*
- (g) *transporting motor vehicles to on wharf PDI facilities;*
- (h) *cleaning motor vehicles;*
- (i) *inspecting motor vehicles;*
- (j) *complying with customs and other government requirements in respect of motor vehicles; and*
- (k) *for any other purpose associated with motor vehicles.*²¹

The FCAI's application expressly excludes from this nominated service:²²

- the initial unloading of vehicles from the ship where it is carried out by stevedores; and
- PDI services.

Section 72(1) of the QCA Act defines the term *service* as a service provided, or to be provided, by means of a facility. A number of examples of facilities are then set out. This definition makes clear that a service is something separate and distinct from a facility. However, the

²¹ See the FCAI Application to the QCA, [2.2].

²² Ibid [2.3].

relevant service may consist merely of the use of a facility.²³ The delineation of the relevant facility will therefore prescribe the service or services that are capable of being provided by or through the facility.

With this in mind, AAT submits that there are a number of difficulties posed by the service nominated for declaration by the FCAI.

Firstly, as stated above, as the FCAI has defined the facility as being *that area of land at the Port of Brisbane leased by the Port of Brisbane to AAT*, AAT submits that the scheduling and berthing of ships containing motor vehicles and the discharging of motor vehicles from ships are services not carried on by or with the use of the FICT. The actual berthing of ships and discharging of motor vehicles from the ships occurs on land²⁴ that is owned by the State and leased to PBC in perpetuity. AAT has a non-exclusive licence in respect of that land. The motor vehicles, once discharged from the ships, are stored on the land leased by AAT. However, the actual physical discharge of the motor vehicles occurs on land owned by the State that is leased to PBC and over which AAT has a mere licence.

Secondly, AAT submits that in any case, motor vehicles may only be discharged by a stevedore. As the FCAI has expressly excluded from the nominated service *the initial unloading of vehicles from the ship where it is carried out by stevedores*, AAT questions the utility of paragraph (c) in the nominated service definition.

Thirdly, it is unclear whether the FCAI seeks to have the PDI service provided by Patrick Autocare also included in the nominated service definition. Whilst the FCAI appears to expressly exclude PDI services from the nominated service definition, Patrick Autocare occupies an area of the FICT. Therefore, the FCAI should also clarify this point.²⁵

Finally, the service specified in paragraph (k) is imprecise and unclear and does not, prima facie, constitute a service that is capable of declaration.

4.1 Submission of AAT

AAT submits that if the QCA determines that the relevant facility is a *public facility*, then the FCAI should revise its nominated service definition as it appears to be inconsistent with the relevant factual circumstances.

²³ *Rail Access Corporation v New South Wales Minerals Council Ltd* (1998) 87 FCR 517.

²⁴ Lot 88 on SP 108337.

²⁵ We note that this point was raised by Asciano in its submission to the QCA dated 30 September 2009.