

CLAYTON UTZ

Submission to Queensland Competition Authority

Australian Amalgamated Terminals Pty Ltd

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Clayton Utz
Lawyers
Level 28, Riparian Plaza 71 Eagle Street Brisbane QLD 4000 Australia
GPO Box 55 Brisbane QLD 4001
T +61 7 3292 7000 F +61 7 3221 9669

www.claytonutz.com

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1.0 Executive Summary

On 17 July 2009, the Federal Chamber of Automotive Industries (**FCAI**) applied to the Queensland Competition Authority (**QCA**) under s.77 of the Queensland Competition Authority Act 1997 (Qld) (**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 Fisherman Islands Cargo Terminal (**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 relates.

This Submission is provided to the QCA by Australian Amalgamated Terminals Pty Ltd (**AAT**) to assist the QCA in its preliminary consideration of the application made by the FCAI.

1.1 Summary of AAT's submission

The key submissions made by AAT are:

- (a) AAT has leased port land from the Port of Brisbane Corporation Limited (**PBC**) for the purposes of operating the FICT. In this regard, AAT provides access to stevedores, Pre-delivery and inspection (**PDI**) operators and other users of the FICT. To provide this level of access to various port users, AAT has invested a substantial amount in improvements to the FICT.
- (b) An application for the declaration of a service for the purpose of third party access is usually made in circumstances where an access seeker has sought access to a particular service and the service provider has either denied access or proposes to grant access, but only on onerous terms and conditions that would make it uneconomic for the access seeker to pursue its access request. In the current circumstances, AAT has not denied granting access to any party to the FICT. In fact, AAT has not received any request from the FCAI or any of its members seeking access to the FICT. As AAT operates the FICT as an open-access facility, it would be more than willing to provide access to any entity that requests access.
- (c) Under Part 5 of the QCA Act, a service that is nominated to be declared for the purposes of third party access must constitute a *candidate service*. A *candidate service* is a service for which the facility used, or to be used, to provide the service is a *public facility*. Because of the terms of the lease arrangements and in light of the substantial investment made by AAT in the facilities at the FICT made pursuant

to those arrangements, AAT submits that the FICT is, in strict legal terms, not a *public facility*. Therefore, the services nominated for declaration by the FCAI cannot amount to a *candidate service* for the purposes of the QCA Act.

- (d) However, even if the FICT were to be considered to be a *public facility*, AAT further submits that the services nominated by the FCAI should not be declared as the relevant access criteria are not, in this case satisfied.

In particular, AAT submits that:

- (i) access (or increased access) to the services(s) would not promote competition in at least one market, other than the market for the service(s);
 - (ii) it would be uneconomic to duplicate only some of the facilities for the service(s); and
 - (iii) access (or increased access) to the service(s) would be contrary to the public interest.
- (e) In any event, it is submitted that the QCA should exercise its discretion under s.80(3)(a) of the QCA Act and recommend that the services not be declared by the Ministers on the basis that the QCA cannot be satisfied that access (or increased access) to the service(s) would be likely to have a substantial effect on a market.
- (f) The application made by the FCAI is misconceived in a number of respects, being:
- (i) It assumes that if the relevant services are declared that its members will be able to refer a dispute to the QCA for resolution (presumably through arbitration under Part 5, Division 5 of the QCA Act). This is not the case. As the FCAI's members do not presently have a direct contractual relationship with AAT they would not have standing to refer a dispute to the QCA;
 - (ii) AAT itself only provides a small number of the total services provided at the FICT;
 - (iii) The FCAI claims that AAT has engaged, and continues to engage in monopoly pricing. Such conduct is said to be evidenced by AAT increasing the relevant Facility Access Charge (**FAC**). The FAC is the access charge payable by stevedores for use of the FICT that is passed

through by the stevedores to the shipping lines and then to the importers of motor vehicles. However, the FCAI's application expressly excludes the services provided by the stevedores in unloading motor vehicles from ships and PDI services. Therefore, AAT queries how the declaration of the service as defined by the FCAI will in practice satisfy the FCAI's pricing concerns.

- (iv) There are already in place open-access arrangements at the FICT under which AAT provides access to port users on a non-discriminatory basis; and
- (v) The increases in the applicable FAC, which have then been passed-through to the FCAI's members, represents a relevant increase in AAT's costs in operating the FICT. These costs reflect the substantial increase in the rental that has been payable by AAT to the PBC, and additional costs that arose from the additional scrutiny of imported motor vehicles by AQIS during the period March and June/July 2008.

2.0 Background

AAT was established in 2002 as a joint venture of Patrick Corporation Limited (**Patrick Corp**), acting through a holding entity (Plzen Pty Ltd (**Plzen**)¹), and P&O Ports Limited (**P&O Ports**), acting through a holding entity (P&O Wharf Management Pty Ltd (**POWM**)). A formal shareholders agreement was entered into by AAT, Plzen and POWM on 2 December 2002.

AAT:

- operates terminal facilities at five Australian ports, including Fisherman Islands; and
- provides services to stevedores and other terminal users on a multi-user, open-access basis to facilitate the loading and unloading of automotive and general cargo.

The FICT is located at Berths 1 – 3 at Fisherman Islands within the Port of Brisbane (the **Port**) with the PBC being the relevant port authority for the Port.²

Included in Schedule 1 are several images depicting various areas within the FICT.

2.1 AAT's commercial arrangements at Fisherman Islands

In relation to the FICT, AAT has operated Berths 1 – 3 at the Port since January 2006. Prior to this time the cargo handled by FICT was largely handled at vertically integrated facilities operated by stevedores on a closed access basis located on the northern bank of the Hamilton Reach of the Brisbane river.

In respect of the FICT, AAT has entered into four agreements with PBC being:

- An Agreement to Lease dated 1 March 2005 (**Agreement to Lease**);
- Two leases, dated 17 August 2006 and 16 July 2007 (respectively being the **2006 Lease** and **2007 Lease**); and
- A Management Agreement dated 7 May 2006 (**Management Agreement**).

¹ Plzen has been ultimately owned by Asciano Limited since mid 2007 following a restructure and spin off and separate listing on the ASX of that company from Toll Holdings Limited, the owner of Patrick Corp.

² See s.5 and Schedule 2 of the Transport Infrastructure (Ports) Regulation 2005 (Qld).

The key elements of each of these agreements are set out below. A diagrammatic representation of the contractual arrangements between the various parties at FICT is also set out in Schedule 2.

Agreement to Lease

The Agreement to Lease was entered into by PBC, AAT, Patrick Corp and P&O Ports. Patrick Corp and P&O Ports agreed to guarantee certain obligations of AAT under the Agreement to Lease and the Lease.³

Under the terms of the Agreement to Lease, PBC agreed, amongst other things, to:

- carry out, at its own expense, specified works, including:
 - construction of new stormwater drainage;
 - construction of pavements in relevant areas to cater for the storage of motor vehicles;
 - demolition of parts of the existing cargo shed, overhead walkway linking the cargo shed to the car park and the straddle garage/workshop and replacing pavements; and
 - removal of existing power outlets for refrigerated containers;⁴
- grant the Lease to AAT;⁵ and
- construct a flyover from the area adjacent to the wharves to the intended vehicle storage area.⁶

Under the terms of the Agreement to Lease, AAT agreed, amongst other things, to:

- carry out, at its own expense, certain works, including the construction of a 6,000 square metre cargo shed, an office, amenities building and workshop for AAT's own operations, substantial facilities for Patrick Autocare (a PDI operator), power

³ Following the restructure of Toll Holdings Limited, the owner of Patrick Corp, and the separate listing of Asciano Limited, Asciano has since mid 2007 guaranteed the obligations of AAT under the lease arrangements.

⁴ Part 2 and Schedule 5 of the Agreement to Lease.

⁵ Part 4 of the Agreement to Lease.

⁶ Clause 17.1 of the Agreement to Lease.

outlets for refrigerated containers, additional site services, site security and landscaping;⁷ and

- to enter into the Lease with PBC.⁸

PBC and AAT also agreed to endeavour to agree within eight weeks from the date of the Agreement to Lease on the amount of the User Charges to be imposed by AAT under the Management Agreement, or a method for calculating the User Charges.⁹

The 2006 and 2007 Leases

The 2006 Lease, commenced on 7 May 2006 and is for a term of 10 years. This lease covers Berths 1 to 3 and land comprising part of the FICT. This Lease permits AAT to use the FICT to operate an automotive and general cargo/container processing facility. AAT operates the FICT as a multi-user facility and provides terminal services to stevedores, PDI operators and other Port users. AAT provides the terminal services on an open-access basis and on non-discriminatory terms in accordance with the Management Agreement entered into by AAT with PBC.

Under the 2006 Lease, the rent payable by AAT to PBC has two components, being:

- the Improvements Rent; and
- Land Rent.

The 2006 Lease provides that during the term of the lease, the Land Rent is subject to review on a number of occasions. The applicable rent may then be adjusted taking into account a valuation of the land being obtained.

The 2007 Lease, commenced on 16 July 2007 and is for a term of approximately 9 years.¹⁰ The demised land is a 1.943 hectare site which is used as an overflow area. This leased area is ancillary to the main automotive and general cargo container processing facility. The 2007 Lease also provides AAT a non-exclusive licence in respect of two parcels of land that adjoin the demised land.

⁷ Part 3 of the Agreement to Lease.

⁸ Part 4 of the Agreement to Lease.

⁹ Clause 18.1 of the Agreement to Lease.

¹⁰ Therefore, the two leases will expire on the same date.

The rent payable under the 2007 Lease is calculated using a similar methodology to that adopted under the 2006 Lease.¹¹

Management Agreement

The Management Agreement was entered into by PBC, AAT, Patrick Corp and P&O Ports on or about 7 May 2006. Patrick Corp and P&O Ports agreed to guarantee certain obligations of AAT under the Management Agreement.¹²

Under the terms of the Management Agreement, AAT is, amongst other things required to:

- provide access to qualified stevedores to the vessels and the area managed by AAT (the wharves and demised land) in accordance with the Stevedore Access Terms;¹³
- provide access to qualified PDI operators who do not sublease part of the demised land and to access the area managed by AAT in accordance with the General Access Terms;¹⁴
- make available appropriate areas of the demised land for the purpose of subleasing to qualified PDI operators in accordance with the General Access Terms;¹⁵
- keep available at all times sufficient areas of the demised land to allow for the discharge and loading of vehicles arriving at, or departing from, the Port and the short-term storage of such vehicles;¹⁶
- ensure that there are appropriate improvements and equipment on the demised land for the handling and processing of vehicles, the handling and storage of break bulk and containerised cargo and to enable the stevedores to process services to vessels in a timely and efficient manner (including IT systems, transport equipment and facilities, and work sheds, amenities and office space);¹⁷

¹¹ See clauses 3.2 and 3.3 of the 2007 Lease.

¹² Following a restructure of Toll Holdings Limited, the owner of Patrick Corp, and the separate listing of Asciano Limited, Asciano has since mid 2007 guaranteed the obligations of AAT under the Management Agreement.

¹³ Clause 4.2(a)(i) of the Management Agreement.

¹⁴ Clause 4.2(b)(i) of the Management Agreement.

¹⁵ Clause 4.2(c)(i) of the Management Agreement.

¹⁶ Clause 4.2(e) of the Management Agreement.

¹⁷ Clause 4.3(a) of the Management Agreement.

- advise PBC of all User Charges, General Access Terms and Stevedore Access Terms prior to their publication;¹⁸
- not change the relevant User Charges (apart from rent charged to sub-lessees) or the General Access Terms without giving PBC at least 14 days written notice;¹⁹
- not change the Stevedore Access Terms without PBC's prior written consent;²⁰
- ensure that the User Charges not exceed the fees, expenses and other charges that would reasonably be expected to be imposed on users having regard to all relevant matters, including certain specified matters;²¹
- not unfairly discriminate between different Users, whether in relation to User Charges, General Access Terms, Stevedore Access Terms or otherwise;²²
- prepare the User Charges (apart from rent charged to sub-lessees), the General Access Terms and the Stevedore Access Terms each year to ensure that a reasonable proportion of cost savings brought about by efficiencies are passed onto the users as appropriate and meet with PBC to discuss each of the User Charges and Access Terms;²³ and
- disclose to PBC, an independent expert or relevant Government Authority full details of how the User Charges are calculated if any Government Authority or user queries, in good faith, the amount of the User Charges (or any component of the User Charges).²⁴

In the event of a dispute arising as between AAT and PBC in relation to the amount of the User Charges (other than the initial User Charges) or the provisions of the General Access Terms or the Stevedore Access Terms, such dispute is to be determined by an economist or

¹⁸ Clause 7.1(a)(i)(B) of the Management Agreement.

¹⁹ Clause 7.1(b) of the Management Agreement.

²⁰ Clause 7.1(c) of the Management Agreement.

²¹ Clause 7.1(d) of the Management Agreement. The specified matters are similar to the matters listed in s.120(1) of the QCA Act as the matters to be considered by the QCA in making an access determination under Part 5, Division 5 of the QCA Act.

²² Clause 7.1(f) of the Management Agreement.

²³ Clause 7.2(a) of the Management Agreement.

²⁴ Clause 7.3 of the Management Agreement.

other appropriately qualified expert as agreed by the parties, or otherwise appointed in accordance with the Management Agreement.²⁵ The appointed expert has the power to change the User Charges, the General Access Terms and the Stevedore Access Terms.²⁶

If the Management Agreement is terminated, then AAT, under clauses 18.1 and 18.2 of the Management Agreement, is obliged to remove all improvements made by it to, or equipment located on the wharves and make good all damage arising from the improvements or their removal. However, in such case, the parties are to meet and discuss whether an agreement can be reached as regards PBC acquiring from AAT the improvements made by AAT to the wharves and the demised land.²⁷ Furthermore, PBC may exercise an option to rent the crane (and other incidental equipment) owned by AAT that is used by AAT at the wharves for a period of up to 12 months.²⁸

2.2 Stevedoring services

Stevedoring services are currently provided at the FICT by Patrick Stevedore Operations Pty Ltd (**Patrick Stevedores**) and P&O Automotive & General Stevedoring Pty Ltd (**POAGS**). AAT does not itself provide any stevedoring services.

On or about 7 August 2006, AAT entered into separate Stevedoring Licence Agreements (**Licence Agreements**) with Patrick Stevedores and POAGS. Under the Licence Agreements, the stevedores have been granted a non-exclusive licence to use the designated area within the FICT for the purposes of carrying out stevedoring operations.²⁹

AAT may also permit other stevedores to access the FICT to conduct stevedoring operations on a non-exclusive basis. The stevedores must not impede or interfere with the activities of other stevedores or users of the FICT and are to cooperate fully with AAT in resolving any disputes with any person regarding the use of the FICT.³⁰

The access charges payable by the stevedores under the Licence Agreements are the rates set out in AAT's Tariff Schedule for the FICT. Whilst there are currently only two stevedores at

²⁵ Clause 7.4(a) of the Management Agreement.

²⁶ Clause 7.4(g) of the Management Agreement.

²⁷ Clause 18.5 of the Management Agreement.

²⁸ Clause 18.3 of the Management Agreement.

²⁹ Clause 2.1 of the Licence Agreements.

³⁰ Clause 2.5 of the Licence Agreements.

the FICT, AAT has not refused access to any stevedore at the FICT. Furthermore, AAT will provide access to any stevedore seeking access to the FICT where the stevedore:

- completes an application form;
- obtains appropriate public liability insurance and provides a copy of the policy to AAT;
- provides to AAT copies of appropriate OH&S risk assessments of tasks expected to be performed at the FICT;
- provides general details of vessels and cargo types the stevedore expects to service to ensure the vessels and cargo can be handled at the FICT; and
- provides credit reference details for credit rating approval purposes.

2.3 PDI services

The PDI operators provide services to the importers of motor vehicles (i.e. FCAI's members). These services include removal of motor vehicles from the wharf, fitting of the compliance plate to the imported vehicles, insertion of the log books into the motor vehicles, fitting of designated accessories, removal of protective wrapping from the motor vehicles, washing motor vehicles as required and making the motor vehicles available for onward transportation.

There are currently three PDI operators providing these services at the FICT or adjacent to it, being Patrick Autocare, PrixCar Services Pty Ltd (**PrixCar**) and Car Compounds Australia (**CCA**). AAT has entered into a lease arrangement with Patrick Autocare for on-wharf processing and has procedural arrangements in place with all of the PDI operators, motor vehicle importers and transport operators for the removal of motor vehicles from the FICT 24 hours a day, seven days a week.

2.4 Ownership of infrastructure at FICT

The land the subject of the Leases which comprise the FICT is owned by PBC and constitutes strategic port land under the Transport Infrastructure Act 1994 (Qld) (**TI Act**). The wharf infrastructure, including Berths 1 – 3, was developed by PBC.

As is required under the Agreement to Lease, AAT has already expended a substantial amount to construct improvements to the FICT, including:

- buildings for cargo storage, amenities, a maintenance garage and office facilities;
- the installation of security systems and IT systems;

- AQIS-approved wash facilities; and
- security fencing for the PDI facilities,

AAT also makes available at the FICT, forklifts, cranes (including the wharf-side crane), dock trucks, vans and utilities.

2.5 Current dispute

AAT understands that the genesis of the current application by the FCAI stems from certain increases made by AAT to the access charge levied by it on the stevedores who access the FICT.

The main User Charge levied by AAT to the stevedores is the FAC. As set out in Section 2.1, under the terms of the Management Agreement, AAT reviews the FAC on an annual basis.

The current FAC for wheeled vehicles is \$1.85 per m³ (as from 1 September 2008). The current AAT Tariff Schedule for the FICT is set out in Schedule 3.

Prior to July 2007 the FAC was \$1 per m³. In July 2007 AAT increased the FAC to \$1.35 per m³. That increase took effect as from 1 October 2007. The reason for this increase in the FAC was two-fold. Firstly, the FAC of \$1 per m³ had been set by AAT in late 2004 and had not been reviewed since that time. Secondly, it coincided with AAT entering into the 2007 Lease and thereby securing the overflow area as an additional and integral lay-down area. As such, the overall rental costs of AAT, in respect of the FICT, increased significantly.

In June 2008 AAT then increased the FAC to \$1.85 per m³. That increase took effect as from 1 September 2008.

The predominant reason for that increase in the FAC was the effect of the increases in the rent payable by AAT under its leases with PBC. Under the terms of its leases, the rent payable by AAT to PBC increased on 6 May 2008 and 6 May 2009. The percentage increases in the rent payable by AAT to PBC between 2006 and 2009 in respect of the FICT are out in Schedule 4.

Market rent reviews are generally conducted by Port Authorities every 2 – 5 years. In 2008 a market rent review was undertaken by PBC. This review resulted in AAT's rent increasing by approximately 134 percent. AAT obtained for its own purposes an independent valuation of the FICT land to check that the PBC proposed rental figures were appropriate. This valuation confirmed the valuation obtained by PBC.

In order to minimise the impact of the flow-on effect of the increase in AAT's rental on Port users, AAT requested that instead of imposing a one-off increase of 134 percent, that PBC

stagger the rental increase over a three year period between 2008 and 2010. In addition to agreeing to AAT's proposal, PBC agreed to a negotiated decrease in the agreed land valuation of 16 percent. AAT estimates that the total savings to all Port users realised as a result of PBC agreeing to AAT's requests was in the order of \$10 million over the relevant three year period. Nevertheless, in 2008, AAT's land and improvements rental increased by approximately 53 percent.

On 1 September 2008 AAT increased the FAC by 37 percent in respect of motor vehicles, 55 percent in respect of containers and 38 percent in respect of general cargo. In accordance with the Management Agreement, the increases in the FAC were notified by AAT to PBC. PBC accepted those increases as being reasonable.

Therefore, the increases in the FAC in 2008 reflected the additional rental costs incurred by AAT in operating the FICT. During this period, AAT's non-rental costs also increased, but these costs changes were based on CPI.

A secondary issue that also impacted upon the access charges to the FICT was the Seed Contamination Storage and Handling Charge (**Contamination Charge**) levied by AAT from 1 March 2008 to June/July 2008 (depending on the origin of the motor vehicles in question).

The Contamination Charge arose from a direction given by AQIS in February 2008 that all motor vehicles imported from Thailand, Korea and Japan be inspected for grass seeds.³¹ As such, all motor vehicles imported from these countries were not permitted to leave the FICT until they had been cleared by AQIS in accordance with its prescribed procedure. This procedure was far more time intensive than the procedures usually adopted.

At this time, the FICT was operating at capacity. Motor vehicles were dwelling at the FICT for between 8 – 11 days instead of the usual 3 days. The FAC only covers use of the cargo lay-down area for up to three days at the FICT. Consequently, with the prior approval of PBC, AAT levied the Contamination Charge. The Contamination Charge represented the additional storage and inspection time required for the clearance of all affected motor vehicles. Cleaning, where required by AQIS, was provided by AAT and was charged separately as only some vehicles required cleaning. Importantly, at no time did AAT prevent or hinder motor vehicle importers or any other port user from utilising alternative solutions. In this respect, during this time PrixCar provided cleaning services to motor vehicle importers as an alternative to the services provided by AAT.

³¹ The AQIS direction (No. 20) is at: <http://www.daffa.gov.au/aqis/import/general-info/ian/07-08>.

As a result of the increases in the FAC, some of AAT's customers refused to pay the increased FAC. In those cases, AAT wrote to the stevedore requesting that payment be made noting that under the relevant Licence Agreement, if the stevedore failed to make a payment within 14 days of an invoice that AAT had the right to refuse further access to the FICT and interest could also be charged on the unpaid amount.³² All outstanding invoices were ultimately paid within the agreed period and no vessels were prevented from discharging cargo.

³² See clause 7.2 of the Licence Agreements.

3.0 Service sought to be declared

The service nominated by the FCAI in its amended application, as being the relevant candidate service, is described as being:

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.*³³
- (Nominated Service).**

The FCAI's application expressly excludes from the Nominated Service:³⁴

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

³³ See the FCAI Application to the QCA, [2.2].

³⁴ Ibid [2.3].

The FCAI has requested that the QCA recommend to the relevant Ministers that the Nominated Service be declared for third party access under Part 5 of the QCA Act.

The FCAI submits that as the FICT is owned by PBC (a company GOC) it is a *public facility* within the meaning of the QCA Act and comes within the definition of *candidate service* capable of declaration under Part 5 of the QCA Act.

3.1 Is the service a candidate service?

The first threshold issue is whether the Nominated Service constitutes a *candidate service* as that term is defined for the purposes of the QCA Act.

A *candidate service* is defined in the Schedule to the QCA Act to mean:

- (a) a service for which the facility used, or to be used, to provide the service is a public facility; or
- (b) a service —
 - (i) for which the facility used, or to be used, to provide the service is a private facility; and
 - (ii) that is declared under a regulation to be a candidate service.

Based on the description of the Nominated Service above, it is clear that there are a number of services that have been sought to be declared, including:

- ship scheduling services;
- ship berthing services;
- motor vehicle discharging/stevedoring services;
- customs inspection services;
- AQIS inspection services;
- motor vehicle cleaning services;
- motor vehicle storage services;
- motor vehicle loading services, being onto car carriers;
- motor vehicle moving services, being within the FICT;

- motor vehicle transportation services, being to the on-wharf PDI facilities; and
- anything else related to the importation of motor vehicles.

As no services have been declared under a regulation to be candidate services, the Nominated Service will constitute a candidate service if the facility that provides the service is a *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.³⁵

Clearly PBC is not the State as that issue is expressly dealt with in s.154(1) of the Government Owned Corporations Act 1993 (Qld) (**GOC Act**).³⁶

However, PBC is a *government agency*.³⁷ However, it is submitted that it is not clear whether the FICT is a *public facility*.

The term *facility* is defined in s.70(1)(b) of the QCA Act to include *port infrastructure*. The term *port infrastructure* is then defined to include transport infrastructure relating to ports.³⁸ In contrast, in Part IIIA of the Trade Practices Act 1974 (Cth) (**TPA**) the term *facility* is not defined, but has been held to be *the minimum bundle of assets required to provide the relevant services subject to declaration*.³⁹

In this regard, whilst the land at the FICT is owned by PBC (as lessor), a significant proportion of the infrastructure or *bundle of assets* at the FICT are in fact owned by AAT and not PBC. Those assets include some of the key assets mentioned in Section 2.4 of this Submission that were acquired or constructed by AAT at the FICT. As such, as discussed in detail in Section 2.1 of this Submission:

- (a) the terms of the 2007 Lease provide that these assets may be bought back by PBC at the expiration of the current terms of those leases if new leases are not offered by PBC to AAT; and

³⁵ See the Schedule to the QCA Act.

³⁶ Section 154 of the GOC Act provides that a GOC in Queensland does not represent, and has never represented the State.

³⁷ The term *government agency* is defined in the Schedule to the QCA Act to mean, amongst other things, a GOC.

³⁸ See the Schedule to the QCA Act and Schedule 6 to the TI Act.

- (b) under the Management Agreement the parties may reach agreement on PBC acquiring from AAT the improvements made by AAT to the land and the rental of AAT's crane upon the termination of the Management Agreement.

Therefore, it is AAT's submission that the FICT cannot properly be held to be a *public facility* under the QCA Act. The QCA Act draws a clear distinction between a *public facility* and a *private facility*. The former connotes public ownership whereas the latter connotes private or non-public ownership.⁴⁰

AAT submits that the FICT is, in strict legal terms, not a *public facility* as that term is defined under the QCA Act. The rights that PBC may exercise over the FICT relate to its role as the port authority and as lessor. In this regard, most sites at Queensland ports comprise land owned by the relevant port authority that is then either leased or licensed to the private sector. All of these facilities would be considered to be private facilities in the ordinary usage of that term. AAT submits that the QCA Act does not mandate any different result. If the FICT were considered to be a *public facility*, then it would be the case that all of the operations at the Port would potentially be public facilities capable of declaration under Part 5 of the QCA Act.

In its application the FCAI states that the FICT is similar to the Dalrymple Bay Coal Terminal (**DBCT**) at Hay Point, which was declared pursuant to s.97 of the QCA Act in March 2001. That is because, as the FCAI asserts, DBCT is owned by DBCT Holdings Pty Ltd (**DBCT Holdings**), a wholly owned Government corporation. The leasehold interest of DBCT Holdings was acquired in September 2001 by DBCT Investor Services Pty Ltd⁴¹ and DBCT Management Pty Ltd⁴² as primary and secondary lessees, respectively.⁴³

AAT notes that in respect of the arrangements at DBCT:

- (a) Ports Corporation of Queensland Limited (**PCQ**), as the relevant port authority, remains the "owner" of the relevant onshore freehold land. That land was leased to DBCT Holdings in September 2001 for a period of approximately 100 years. DBCT Holdings then entered into a sub-lease of the land to DBCT Investor Services.

³⁹ *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10, 65.

⁴⁰ A *private facility* is defined in the Schedule to the QCA Act to mean a facility that is not a public facility.

⁴¹ Formerly BBI (DBCT) Investor Services Pty Ltd.

⁴² Formerly Prime Infrastructure (DBCT) Management Pty Ltd and BBI (DBCT) Management Pty Ltd.

⁴³ See QCA, *Dalrymple Bay Coal Terminal Draft Access Undertaking - Final Decision* (April 2005), Chapter 1.

- (b) The ownership of the relevant buildings, wharves, structures and other improvements at DBCT were severed from the underlying land and transferred by PCQ to DBCT Holdings.⁴⁴

As such, what DBCT Holdings effectively owned included the assets on the land, not the land itself. Therefore, the arrangements at DBCT are quite different to the FICT, as AAT is the "owner" of the facility, as it has possession of the site and it has paid for the improvements that make FICT an operational facility.

However, even if the alternative view is accepted, AAT submits, for the reasons that follow in this Submission, that the Nominated Service should not be declared.

3.2 Provision of the Nominated Service

As stated above and as illustrated in Schedule 2, the Nominated Service includes a number of different services. The only common thread between the relevant services is that they are all presently undertaken at or in connection with the FICT. However, in practice very few of the individual services specified in paragraph 2.2 of the FCAI's application are provided by AAT. Rather, the services are provided by different service providers. This is illustrated in Table 1. As regards the service described in paragraph 2.2(k) of the FCAI's application, AAT considers that description to be too vague, imprecise and uncertain to be a true "service" under the terms of the QCA Act.

Table 1: Service Providers and Services provided

Service	Service Provider	Service acquirer
Ship scheduling	PBC in conjunction with Maritime Safety Queensland (MSQ)	Shipping companies
Ship berthing	<ul style="list-style-type: none"> • PBC • MSQ (pilot) • Tug operators • Linesman 	Shipping companies
Ship discharging services	<ul style="list-style-type: none"> • Patrick Stevedores • POAGS 	Shipping companies
Motor vehicle storage services	AAT	Motor vehicle importers

⁴⁴ See PCQ, *Annual Report 2001/02*, p.41.

Motor vehicle cleaning services	AAT (only when requested by consignee)	Motor vehicle importers
Transporting motor vehicles to on-wharf PDI facilities	Patrick Autocare (other PDI facilities are located off-wharf)	Motor vehicle importers
Motor vehicle moving services (within the FICT) ⁴⁵	AAT	Motor vehicle importers
Motor vehicle loading services (onto car carriers)	PDI operators and Transport operators	Motor vehicle importers
Quarantine services and associated cleaning services	AQIS and AAT	Motor vehicle importers
Customs inspection services	Australian Customs Service	Motor vehicle importers
Motor vehicle transportation services	<ul style="list-style-type: none"> • Patrick • Toll Transport • CEVA logistics • Numerous smaller operators 	Motor vehicle importers

As is illustrated in Table 1, it is the case that at the FICT:

- (a) AAT has only an administrative role in the scheduling of ships. AAT administers ships' arrival schedules in accordance with a protocol adopted by PBC, based on the time of a ship's arrival at the pilot station and the availability of a berth;
- (b) AAT does not participate in the berthing of ships at Berths 1 – 3, other than to provide berth marks for the position of the ship at the berth. The actual berthing of the ship is undertaken by the pilot, tug operators, the linesman and the shipping line;
- (c) Only the two current stevedores discharge/unload the motor vehicles from the ships. AAT itself does not provide that service;

⁴⁵ This service is incidental to the services provided by AAT. AAT moves vehicles within the FICT from time to time for security and related reasons. AAT does not charge any separate fee for this service.

- (d) AAT does not load motor vehicles onto car carrier trucks; and
- (e) The PDI operators are generally responsible for the movement of motor vehicles within the FICT, once discharged from the ship. AAT only moves motor vehicles for efficiency purposes (i.e. to close up the cargo within the FICT to cater for the arrival of new cargo), or if the motor vehicles are required to be inspected or washed and the consignee has requested AAT to provide that service.

This position can be contrasted with the circumstances that usually arise in respect of services that have in the past been declared for third party access under Part 5 of the QCA Act or Part IIIA of the TPA.

In the case of services that have previously been declared under the QCA Act or the TPA, whilst the facility or facilities the subject of declaration may provide a number of different services, each of those services have tended to be provided by the one service provider.

In the case of the services provided at DBCT, the service that has been declared is the *handling of coal at Dalrymple Bay Coal Terminal by the terminal operator*.⁴⁶ That service comprises, amongst other things, unloading, storing, reclaiming and loading of export coal.⁴⁷ The declared services are provided by DBCT Management Pty Ltd (or an entity on its behalf) as the operator of DBCT.

A summary of the services that have previously been declared under Part 5 of the QCA Act and Part IIIA of the TPA is set out in Schedule 5 of this Submission.

⁴⁶ Section 7(2) of the Queensland Competition Authority Regulation 2007 (Qld).

⁴⁷ See the definition of *handling of coal* in s.7(3) of the QCA Regulation.

4.0 Consideration of access criteria

Before the QCA can recommend that a service or services be declared by the Ministers, it must be satisfied the access criteria set out in s.76(2) of the QCA Act have been met. The Ministers must also then be satisfied that all of the access criteria for the service are established prior to deciding to declare a candidate service.⁴⁸

The access criteria are:

- (a) that access (or increased access) to the service would promote competition in at least 1 market (whether or not in Australia), other than the market for the service;
- (b) that it would be uneconomical to duplicate the facility for the service;
- (c) that access (or increased access) to the service can be provided safely;
- (d) that access (or increased access) to the service would not be contrary to the public interest.

In its application, the FCAI submits that each of these criteria are satisfied and on this basis has argued for the declaration of the Nominated Service.

AAT will address each of the relevant declaration criteria below.

4.1 Promotion of competition

Submission of the FCAI

In its application the FCAI refers, in particular, to two cases regarding applications for access to services provided at Sydney Airport,⁴⁹ which are then said to illustrate the interpretation given to the *promotion of competition* criterion by the Australian Competition Tribunal (**Tribunal**) and the Federal Court of Australia.

The FCAI submits that the *promotion of competition* criterion is satisfied in the present case because:

- the FICT is a natural monopoly and AAT exerts monopoly power;

⁴⁸ Section 86(1) of the QCA Act.

⁴⁹ *Re Sydney Airport Corporation Limited* (2000) 156 FLR 10 and *Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) 155 FCR 124.

- access to the Nominated Service is necessary for effective competition in one or more dependent markets; and
- there are no other facilities that could provide the Nominated Service.⁵⁰

The FCAI identifies a number of markets (**dependent markets**) in which competition would be promoted if the Nominated Service was declared. Those identified dependent markets are:

- importation of motor vehicles into Queensland;
- supply of motor vehicles in Queensland;
- acquisition and supply of automotive stevedoring services in Queensland;
- acquisition and supply of shipping services in Queensland; and
- acquisition and supply of PDI services in Queensland.⁵¹

The FCAI submits that access to the Nominated Service is essential so that participants in the dependent markets may be able to compete. As it is said that there is no alternative facility to the FICT, the FCAI then submits that without the use of the FICT, its members would be unable to service their customers in a timely, efficient and cost-effective manner.⁵²

The FCAI further submits that monopoly pricing by AAT has affected the ability of motor vehicle importers to manage their costs within the designated pricing point of the motor vehicle and that this has therefore impacted on the level of competition in the retail market for the supply of motor vehicles vis-à-vis locally manufactured motor vehicles. This in turn, it is submitted, has impacted on the level of competition in the markets for the importation of motor vehicles into Queensland and for the acquisition and supply of automotive stevedoring services, shipping services and PDI services in Queensland.⁵³

With respect to the alleged monopoly power of AAT, the FCAI then submits that AAT has the ability to increase to any level the charges it levies for the supply of the Nominated Service. That is, AAT has the ability to charge, and does charge, a monopoly price for access to the

⁵⁰ See the FCAI Application to the QCA, [5.4].

⁵¹ Ibid [5.5].

⁵² Ibid [5.6].

⁵³ Ibid [5.9].

FICT. Such charges, including increases in those charges, are said to have been unilaterally imposed by AAT without any consultation with the FCAI's members.⁵⁴

The FCAI accepts that the declaration of the Nominated Service will not cause the charges for those services to automatically change or that AAT will not levy additional charges in the future.⁵⁵ However, the FCAI submits that if the Nominated Service is declared, that AAT will no longer be able to unilaterally impose any increase in access charges without the FCAI's members having recourse to the QCA acting as an arbitrator and, it is assumed, determining a lower price for access to the declared services. The FCAI believes that the removal of the ability of AAT to charge monopoly prices will eliminate the existing detrimental impact that high prices have had on competition in the dependent markets identified above.⁵⁶

Submission of AAT

AAT acknowledges the interpretation of the *promotion of competition* criterion in the context of Part IIIA of the TPA. In this regard, as highlighted by the FCAI in its application, the Full Federal Court considered in the case of *Sydney Airport Corporation Limited v Australian Competition Tribunal*,⁵⁷ that it is not necessary for the Court when undertaking this type of inquiry to examine whether a declaration of the service would promote competition. Rather, what is required is a comparison of the future state of competition in the dependent market with a right or ability to use the service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service.

In the earlier access declaration case that focussed on the Sydney International Airport, the Tribunal considered that the notion of promoting competition, in the context of Part IIIA of the TPA, involved the idea of creating the conditions or environment for improving competition from what it would otherwise be. In such a case, the Tribunal considered that if the conditions or environment for improving competition were enhanced, then there was a likelihood of increased competition that would not be trivial.⁵⁸

Therefore, the central idea of the *promotion of competition* criterion is that upon a service being declared, the obtaining of access (or greater access) by an access seeker will facilitate

⁵⁴ Ibid [5.16] - [5.17].

⁵⁵ Ibid [5.22].

⁵⁶ Ibid.

⁵⁷ (2006) 155 FCR 124.

⁵⁸ *Re Sydney Airport Corporation Limited* (2000) 156 FLR 10.

greater competition in the relevant market, not simply that a disgruntled access seeker can then demand the regulator arbitrate a lower price for access to the service.

AAT notes that the definition of the relevant markets will always involve a sophisticated analysis and this will usually be informed by expert economic opinion. AAT has not undertaken such a detailed economic analysis. Therefore, at this stage AAT's comments on this issue are preliminary only but are provided for the purpose of this Submission on the basis that the relevant dependent markets are as identified by the FCAI.

It is AAT's contention that access, resulting from declaration of the Nominated Service, will not promote competition in one or more of the dependent markets. AAT also notes that the ACCC has recently closely considered a number of the dependent markets in the context of an application for authorisation made to it by the FCAI.⁵⁹ In that context, the ACCC's view was that the markets for the provision of PDI services, shipping and transport services relating to vehicle importation and exporting were competitive with there being a number of buyers and sellers present in those markets.⁶⁰ In this respect, AAT disagrees with a large number of the basic contentions made by the FCAI.

Firstly, AAT operates and has always operated the FICT as an open-access terminal. To date, AAT has only received two requests for access to the FICT to provide stevedoring services. Those requests were made by Patrick Stevedores and POAGS who now each provide stevedoring services at the FICT. In addition, FICT has only received three requests for access to the FICT to provide PDI services, being from Patrick Autocare, PrixCar and CCA. All of these entities currently provide PDI services at or adjacent to the FICT. AAT provides access to each of these entities on a non-discriminatory basis. AAT is not aware of any of these entities having raised with it a concern regarding the charges levied by AAT for the provision of access to the FICT. Furthermore, there is capacity at the FICT which is not subject to contracts with stevedores or PDI operators. Therefore, provided a relevant applicant for access could meet the necessary requirements, AAT would be prepared to provide access to additional access seekers on the same terms and conditions that access is currently provided to the existing users.

Secondly, with respect to the increase in the FAC levied by AAT and the one-off contamination charge that was levied by AAT between 1 March 2008 and June/July 2008, those charges were levied by AAT on a reasonable and transparent basis. In terms of the

⁵⁹ Discussed in Section 6.2 of this Submission.

⁶⁰ See Authorisation no. 91023, dated 6 June 2007, [6.115].

increase to the FAC, as outlined in Section 2.5 of this Submission, those increases primarily represented a pass-through by AAT of the increases in rental charges that were then payable by AAT to PBC under the terms of the 2006 Lease and 2007 Lease. But for the intervention of AAT, the FAC levied by it would have increased more substantially and immediately, rather than over the agreed three year period.

Also, when the increases in the access charges are considered on the basis of a rate per standard motor vehicle the effect of the arguments put by FCAI fall away. AAT estimates that the actual increase per vehicle flowing from the increased charges at the FICT on 1 September 2008 have only been approximately \$6.50 per motor vehicle.⁶¹ This amount represents an insignificant proportion of the overall retail price of an imported car. Therefore, AAT rejects the argument that the increase in the access charges could cause imported motor vehicles to be less competitive in the retail motor vehicle market as compared to locally manufactured motor vehicles.

Thirdly, as the FCAI and its members do not have a contractual relationship with AAT for direct access,⁶² AAT questions the veracity of the FCAI's claim that upon the Nominated Service being declared its members would legally under the QCA Act be able to refer a dispute to the QCA for arbitration. As AAT does not have a contractual relationship with any of FCAI's members, it does not have any legal obligation to notify them of any changes to the access charges. In any event, AAT did consult with the stevedores, PDI operators, the FCAI and other Port users as well as PBC (as was required), in relation to all changes made to the access charges. Through this consultation process, AAT explained the need to increase the charges and the expectation that the charges would need to be increased for the period up to 2010 based upon incremental increases each year due to the stepped increase in May 2008. AAT (and PBC) have been open with the FCAI and other parties, within the constraints of the confidentiality obligations that are imposed on AAT under its agreements with PBC.

Finally, AAT does not have the ability to charge "any price" with respect to the provision of access to the FICT. As such, AAT is constrained in two relevant respects. As discussed, in Section 2.1 of this Submission, there is in place a detailed Management Agreement between AAT and PBC which regulates the relevant User Charges that AAT may levy on relevant access seekers. Under the Management Agreement, AAT is required to notify PBC of any proposed change to its access charges or the terms and conditions of access, and may, upon a

⁶¹ A standard motor vehicle is taken to be 13m³.

⁶² However, the FCAI's members do have access to the FICT on an as required basis at the published tariffs for the volume of business handled.

bona fide request, be required to establish the basis on which the applicable access charges were calculated. In this regard, AAT submits that the PBC has already assumed a *de facto* prices oversight role in ensuring that AAT does not unreasonably increase its access charges. There is a comprehensive dispute resolution mechanism contained in the Management Agreement that may be pursued in the event that PBC disagrees with the quantum or nature of the access charges proposed to be levied by AAT on relevant access seekers. To date, AAT has not received any complaint from PBC in relation to the quantum or manner of calculation of the access charges at FICT. As stated above, if AAT had not successfully negotiated with PBC for a delayed increase in its rental under the 2006 and 2007 Leases, the increase in the FAC payable by users would have been much greater and its effect more immediate.

In addition, AAT is constrained economically by the countervailing market power held by the stevedores, PDI operators and shipping lines. AAT is not able to set prices independent of, or unconstrained by, those entities.

4.2 Uneconomical to duplicate

The FCAI submits that the term *uneconomical* in the context of the second criterion should be construed in a social benefit sense, rather than in terms of private commercial interests.⁶³

The FCAI further submits that the assessment of this criterion is concerned with identifying whether a particular facility exhibits natural monopoly characteristics, so that it is capable of meeting likely demand at lower cost than two or more facilities. In this respect, the FCAI submits that port facilities are generally natural monopoly facilities due to the limited availability of suitable sites for deep water ports and the high sunk costs involved in the development and construction of the facilities. As such, the relevant range of output can be served at the lowest cost by a single port facility, rather than two or more facilities providing the same service.⁶⁴

AAT accepts that port facilities do generally exhibit natural monopoly characteristics and that the construction of port infrastructure does involve significant sunk costs. AAT accepts that it may be uneconomic to duplicate the facility for the provision of some, but not all aspects of the Nominated Service at the FICT. In particular, AAT submits that the services that need be provided at the FICT, or otherwise at a portside location will, include stevedoring services, AQIS inspection services and short-term motor vehicle storage services. AAT considers that the other relevant services, being customs inspection services, motor vehicle cleaning services

⁶³ See the FCAI Application to the QCA, [4.2].

⁶⁴ *Ibid* [4.4].

and the PDI services can be provided at alternative facilities and that it would not be uneconomic to develop alternative facilities where those services could be provided. AAT notes that PBC has raised the prospect of a large area of strategic port land at Port West, a riverfront site at Lytton, being set aside for substantial motor vehicle storage and PDI facilities.⁶⁵ Therefore, AAT submits that it may be the case that it would only be uneconomic to duplicate some of the current FICT in terms of providing some, but not all aspects of the Nominated Service.

4.3 Access can be provided safely

AAT accepts that there is no reason why access to the Nominated Service cannot be provided safely.

4.4 Not contrary to the public interest

The FCAI submits that access to the Nominated Service would not be contrary to the public interest on the basis that the other access criteria have been satisfied.⁶⁶ AAT does not agree that all of the previous access criteria are satisfied. Accordingly, AAT submits that the *public interest* criterion is not automatically satisfied.

The term *public interest* is not defined for the purposes of the QCA Act. However, s.76(3) of the QCA Act provides that in considering the *public interest* criterion, the QCA and the Ministers must have regard to the following matters, being:

- (a) the object of Part 5 of the QCA Act;⁶⁷
- (b) legislation and government policies relating to ecologically sustainable development;
- (c) social welfare and equity considerations including community service obligations and the availability of goods and services to consumers;
- (d) legislation and government policies relating to occupational health and safety and industrial relations;

⁶⁵ See Port of Brisbane, *Land Use Plan 2007* p.7: <http://www.portbris.com.au/files/PDF/Final%20LUP2007.pdf>.

⁶⁶ See the FCAI Application to the QCA, [7.1].

⁶⁷ Section 69E of the QCA Act provides that the object of Part 5 is to promote the economically efficient operation of, use of and investment in, infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

- (e) economic and regional development issues, including employment and investment growth;
- (f) the interests of consumers or any class of consumers;
- (g) the need to promote competition; and
- (h) the efficient allocation of resources.

It seems clear that one of the key considerations when considering this criterion is whether a declaration of the Nominated Service would have a positive effect in terms of economic efficiency. The National Competition Council (NCC), has stated that in terms of access under Part IIIA of the TPA, it must be satisfied that the overall costs of declaration do not outweigh the benefits of declaring a service.⁶⁸ In this regard, the NCC has identified the potential gains from the declaration of a service as including lower prices for the service and enhanced competition in related markets leading to improvements in technical, allocative and dynamic efficiency. Whereas the potential costs of a declaration of a service include administrative and compliance costs for businesses and disincentives to investment.⁶⁹

In the present circumstances, AAT submits that since the commencement of the operation of the FICT, there have been effective access arrangements in place that facilitate the environment of open-access on non-discriminatory terms and conditions. AAT submits that the public interest would not be served by imposing upon it and the other entities using the FICT that provide services to access seekers (i.e. stevedores and PDI operators) an additional level of regulation, particularly where the existing arrangements have worked well and there has been no disputation between those entities and AAT.

AAT further submits that the arrangements are not dissimilar to the port arrangements that are in place at other Australian ports, none of which have been declared for third party access purposes. The AAT business model is ground breaking in that it has opened up access to facilities previously operated by vertically integrated stevedoring entities. AAT notes that the FCAI did not seek to gain access to any of those facilities in Australia at that time.

The current matters of complaint raised by the FCAI arise from increases made by AAT to the FAC. As already discussed in this Submission, the primary reason for the increase in the FAC

⁶⁸ NCC, *Declaration of Services: A guide to Declaration under Part IIIA of the Trade Practices Act 1974 (Cth)*, August 2009, [8.7].

⁶⁹ *Ibid* [8.10] - [8.33].

simply reflects the passing on by AAT of the increases in rental charges under the 2006 and 2007 Leases. AAT has not sought to extract a monopoly rent from its customers.

AAT believes that the only reason why the FCAI has sought to have the Nominated Service declared is to enable its members to be able to avail themselves of the arbitration process under Part 5, Division 5 of the QCA Act. The FCAI itself has made this very clear in its application.⁷⁰ AAT considers that it would be inappropriate and contrary to the public interest to declare a service simply for such purpose, particularly where the FCAI's members could not then legally participate in any arbitration process conducted by the QCA under the QCA Act.⁷¹

It is also worth noting, that as discussed in Section 6.2 of this Submission, the ACCC has granted the FCAI, on behalf of its members, two authorisations for the purposes of collectively negotiating terms of access to facilities for the importation/exportation of motor vehicles. However, AAT is not aware of the FCAI or its members having previously sought to negotiate with AAT at any facility in Australia that is operated by AAT.

4.5 Discretion of the QCA

AAT notes that in addition to the access criteria set out in s.76(2) of the QCA Act, that the QCA has a broad discretion under s.80(3)(a) of the QCA Act to recommend that a candidate service not be declared by the Ministers if the QCA is not satisfied that access (or increased access) to the service would be likely to have a substantial effect on a market.

In the circumstances, AAT submits that the QCA, even if it considered that it had jurisdiction to recommend to the Ministers that a relevant service ought to be declared under the QCA Act, that in this instant the QCA should exercise its discretion under s.80(3)(a) of the QCA Act to recommend that the Nominated Service not be declared by the Ministers. AAT submits that the QCA cannot on any reasonable basis be satisfied that access (or increased access) to the Nominated Service would be likely to have a substantial effect on a market. This is because, as discussed in Section 4.1 of this Submission, there are already effective access arrangements in place at the FICT that have facilitated access to all entities that have sought access being provided to the services provided by AAT at the FICT.

In addition, as the access charge for access to FICT constitutes in practical terms an insignificant amount in terms of the retail price of imported motor vehicles, AAT does not

⁷⁰ See the FCAI Application to the QCA, [5.22] - [5.25].

⁷¹ See the discussion in Section 5.2 of this Submission.

consider that declaring the Nominated Service would be likely to have a substantial effect on the retail motor vehicle market or any other market identified by the FCAI.

Furthermore, as the increases in the access charges primarily reflect a pass-through by AAT of the rental increases under the 2006 and 2007 Leases, it is highly unlikely that any access charge determined by the QCA in any arbitration would be different. In this respect, AAT notes that in any potential arbitration, the QCA must take into account, amongst other things, the access provider's legitimate business interests and investment in the facility and the direct costs to the access provider of providing access to the service.⁷²

Therefore, there is no reason to suggest that a declaration of the Nominated Service would have a substantial effect on a market. It is AAT's view that there is already effective competition in the relevant markets and that the terms and conditions, including the price, of access currently provided by AAT at the FICT does not affect the level of competition in those markets.

⁷² See s.120(1)(b) and (f) of the QCA Act.

5.0 Implications of service declaration

The declaration of the Nominated Service will also have a number of flow-on effects. Set out below is a discussion of the key implications.

In summary, it is AAT's submission that the declaration of the Nominated Service will not, *ipso facto*, cause FCAI's members to receive a better price (i.e. a lower price) for the services they currently receive.

5.1 Not all declared services provided by AAT

The service sought to be declared by the FCAI encompasses, prima facie, all of the relevant services provided or that may be provided at the FICT, from the moment a ship is tied up at one of the berths until the imported vehicle is placed on a transport vehicle to be delivered to a car dealer or to an external PDI site.

As is discussed in Sections 2.1 – 2.3 of this Submission, AAT only provides *access services* to stevedores and PDI operators. AAT has not received any complaints from either of the stevedores or any of the PDI operators regarding the provision of access by AAT to the FICT. Furthermore, AAT has not received any request for access to the *access services* from any FCAI member or any other party.

The actual services that are more relevant to FCAI's members, being the unloading of the ships, storage of the vehicles, vehicle cleaning and inspections are undertaken directly by the stevedores, PDI operators, AAT and AQIS. In this regard, AAT has no involvement in the setting of the terms and conditions under which those services are provided unless provided directly by AAT. Furthermore, the FCAI has expressly excluded from the service sought to be declared the initial unloading of motor vehicles from the ships by a stevedore and the PDI services.

5.2 FCAI's members are not access seekers

The FCAI in its application submits that the declaration of the Nominated Service will cause the QCA to potentially play a key role in arbitrating future access disputes that may arise, presumably concerning the prices proposed to be charged by AAT for access at the FICT.

The FCAI submits that:⁷³

Declaration will not mean that the charges for [the] FI Service will automatically change or that AAT will eliminate further charges.

⁷³ See the FCAI Application to the QCA, [5.22] and [5.25].

However, those charges will be able to be challenged by FCAI members rather than being imposed without recourse. There will therefore be an opportunity for FCAI members to seek to remove and eliminate the detrimental effects on competition in the dependent markets brought about by AAT's charges.

...

Declaration will result in a change to the commercial environment with the result that FCAI members will have an opportunity to seek to modify the terms on which it is given access to the FI Service. Increased access as a result of declaration will mean access on different terms and conditions - in particular on a term that if access seekers are unable to agree with AAT on any aspect of access to the FI Service, then an access dispute will arise which, in the absence of a negotiated resolution, can be mediated or arbitrated and determined by the Authority.

At present, the FCAI's members have not entered into any contracts with AAT for access to the FICT, nor has any FCAI member sought access directly to the FICT.

The circumstances when the QCA may refer to mediation or arbitration an access dispute are set out in Part 5, Division 5 of the QCA Act. The QCA may refer to mediation or arbitration an access dispute that is referred to it by an access provider or access seeker in circumstances where:⁷⁴

- the access provider and access seeker can not agree on an aspect of access to a *declared service*; and
- there is *no access agreement* between the access provider and access seeker in relation to the service.

An *access seeker*, for a service, is a person who wants access, or increased access, to the service.⁷⁵ An *access provider*, for a service is the entity that, as an owner, operator or user of the facility used, or to be used, to provide the service (whether or not the service is a declared service) has given, or is able to give, someone else access to the service under an access agreement.⁷⁶

⁷⁴ Section 112(1) of the QCA Act.

⁷⁵ See the Schedule to the QCA Act.

⁷⁶ *Ibid.*

Under s.112 of the QCA Act the QCA is unable to arbitrate an access dispute where there is already an access agreement in place. This is supported by the Explanatory Notes to the QCA Bill when it was enacted in 1997. The relevant Explanatory Notes explain:⁷⁷

Clause 112 provides a mechanism for parties, either the access seeker or access provider, to notify the authority of a dispute in relation to access or the terms of access for a declared services. Where the dispute concerns a service which is already covered by an access agreement, then the parties should rely upon the terms of their agreement.

The term *access agreement* is defined in the Schedule to the QCA Act to mean an agreement:

- (a) between an access provider of a declared service and another person providing for access to the service by the other person that has arisen under Part 5, Division 5 of the QCA Act; and
- (b) that is entered into after the commencement of section 99 (whether it is entered into before or after the service is declared).

If the Nominated Service was to be declared by the Ministers, then the access arrangements that AAT has entered into with the stevedores and the PDI operators would constitute access agreements. However, due to the existence of access agreements between AAT and the stevedores and PDI operators, an aggrieved access seeker (i.e. a stevedore or PDI operator) would not be able to refer a dispute to the QCA. If it was assumed that there were no access agreement between AAT and a relevant stevedore or PDI operator, then only AAT (as the access provider) or the stevedore or PDI operator (as an access seeker) could refer a dispute to the QCA for resolution. Furthermore, as no member of the FCAI has a direct contractual relationship with the AAT, such entities cannot be said to have a *sufficient interest* to be made a party by the QCA to the arbitration of the relevant access dispute.⁷⁸

AAT submits that as the existing stevedores and PDI operators accept the existing access arrangements, it is extremely unlikely that any dispute would be referred in the foreseeable future to the QCA if the Nominated Service was declared by the Ministers. Furthermore, even if in the future AAT proposed to unreasonably increase its access charges, PBC could in such a case refer a dispute to dispute resolution under the terms of the Management Agreement.

⁷⁷ Explanatory Notes, Queensland Competition Authority Bill 1997 (Qld) 28-29.

⁷⁸ See s.116(1)(d) of the QCA Act.

A FCAI member could only refer an access dispute to the QCA under Part 5, Division 5 of the QCA Act, where the member has sought access to a relevant service where AAT is the relevant access provider and the parties are unable to agree to the terms and conditions of access. Those circumstances have not arisen in this case. Furthermore, there is no guarantee that a relevant access seeker would achieve a better outcome by applying to the QCA for the arbitration of the access dispute.

In any case, provided an applicant satisfies AAT of its bona fides and relevant capabilities, then AAT would be prepared to enter into negotiations for an access agreement to provide *access services* at the FICT.

6.0 Other issues

6.1 Federal Court litigation

In its application, the FCAI has referred to the decision of the Federal Court of Australia (Jacobson J) dated 3 July 2009 in *ACCC v PRK Corporation Pty Ltd*,⁷⁹ as the basis for inferring that AAT has acted, and continues to act, as a monopolist charging a monopoly rent and, presumably, taken advantage of its market power in contravention of s.46 of the TPA.

In that case, the ACCC brought proceedings against AAT, its shareholding companies, related companies and certain individuals in relation to the establishment of the AAT Joint Venture. The ACCC claimed that the effect of such conduct was to substantially lessen competition in the terminal services markets in Sydney, Melbourne and Brisbane in contravention of s.45(2) of the TPA. In relation to the effect on competition in the Brisbane terminal services market, the ACCC alleged that the establishment of the joint venture lessened competition because, rather than automotive terminal services being provided to the shipping lines as part of the stevedoring services provided by Patrick and P&O as vertically integrated competitors, those services were then to be provided by a sole entity, AAT. Two respondents settled the proceedings, by agreement, and paid pecuniary penalties as a result of their participation in conduct between about September 2001 and November 2002 which they admitted that, as at November 2002, was likely to substantially lessen competition in three terminal services markets. No admission of purpose or actual adverse effect on competition in any market at any time was made by any respondent.⁸⁰ Proceedings were dismissed by consent without admissions and without any findings of unlawful conduct by any of the remaining eleven respondents, including AAT.

Justice Jacobson's judgment at paragraph 28 records the joint submissions by the ACCC and the two respondents that (at paragraph 80 of the joint submissions):

“... the Commission accepts, for the purpose of these proceedings only, that the objectives of Patrick and P&O in entering the Arrangement were likely to have included increasing efficiencies by gaining access to scarce port land and the superior terminal in each port, and improving utilisation of that land. The increased capacity of the joint venture to invest in infrastructure, due to the increased volume of business, was also harnessed. In this respect, regard was had by Patrick and P&O to the desire of the Sydney Ports Corporation and the

⁷⁹ [2009] FCA 715 (3 July 2009).

⁸⁰ *Ibid*, the Court expressly noted in Orders 4 and 8 that no such admission had been made and the Court made no findings in respect of the actual effect on competition of the conduct in question.

Port of Brisbane Corporation to have one automotive terminal only, with a view to achieving such efficiencies.”

No finding of unlawful conduct was made and no penalty was imposed by the Court on AAT. Rather, the ACCC agreed to consent orders made by the Court on 11 June 2009, that the proceedings against AAT would be dismissed upon AAT applying to the ACCC under s.88 of the TPA for an authorisation in respect of the contractual arrangements the subject of those proceedings.

On 10 June 2009, AAT submitted an application to the ACCC for authorisation under s.88(1) of the TPA to:

- give effect to the AAT Joint Venture as established under the relevant Shareholders Agreement and the provisions of such agreement and the Constitution of AAT; and
- engage in conduct under, pursuant to, or in fulfilment of the AAT Joint Venture.

The application is currently being considered by the ACCC.

No allegation was made that AAT (or any other respondent to the proceedings) had engaged in conduct in contravention of s.46 of the TPA (misuse of market power), nor that AAT has at any time refused to provide access to any bona fide party seeking access to the FICT.

6.2 Current ACCC authorisations

The FCAI has, to date, lodged on behalf of its members two separate applications for authorisation under Part VII of the TPA in respect of certain arrangements relating to the importation and exportation of motor vehicles. A summary of each of these applications for authorisation is set out below.

April 2005 Authorisation

In October 2004, the FCAI applied for authorisation for the FCAI:

- to negotiate the terms and conditions of the supply of area hire services, including the area hire service charge provided by area hire service providers; and
- its members and area hire service providers to enter into and give effect to agreements between the FCAI, its members and individual area hire service providers in respect of the terms of the supply of area hire services, including the area hire service charge, at a specified port.

The area hire services were described as the services supplied by area hire services providers (stevedoring entities) for the provision of facilities for the lay down of motor vehicles prior to, or after shipment, including the provision of storage of motor vehicles for a temporary period at facilities that are proximate to berths.

On 20 April 2005, the ACCC granted the authorisation.⁸¹

June 2007 Authorisation

In December 2006, the FCAI applied for authorisation for the FCAI to:

- coordinate and disseminate its members' views about the development of new facilities for the importation and exportation of motor vehicles into and out of Australia, including liaising with all relevant stakeholders in respect of such facilities; and
- negotiate model terms and conditions for the use of new and existing facilities by its members, including the prices of services provided. The relevant facilities and service providers identified by the FCAI include shipping lines, ports, port facilities managers, stevedores, area hire services, PDI services and land transport.

On 6 June 2007, the ACCC granted an authorisation for a period of five years, but only in respect of the FCAI negotiating model terms and conditions for the use of new and existing facilities provided by port facilities managers and automotive stevedores.⁸²

Notwithstanding these authorisations being granted by the ACCC, AAT is not aware of the FCAI, or any of its members, seeking to negotiate directly with the stevedores or PDI operators for the provision of services at the FICT.

AAT is not surprised by the absence of direct negotiation between the FCAI's members and AAT and stevedores. This outcome was foreshadowed by the ACCC in its authorisation decision.⁸³ As such, AAT considers that by making this application for declaration under the QCA Act, the FCAI has decided to adopt a fresh approach to what it perceives to be an ongoing concern for its members. However, AAT submits that this approach is not supported by the provisions of the QCA Act, and will not be workable in practice.

⁸¹ Authorisation no. A90937, at: <http://www.accc.gov.au/content/index.phtml/itemId/744752/fromItemId/401858>.

⁸² Authorisation no. A91023, at <http://www.accc.gov.au/content/index.phtml/itemId/773363/fromItemId/401858>.

⁸³ Ibid [6.190] and [6.231].

Schedule 1 The FICT



Picture 1 - Photograph of the cargo shed



Picture 2 - Photograph of the temporary motor vehicle storage area



Picture 3 - Photograph of the Berth area at the FICT



Picture 4 - Photograph of the temporary motor vehicle storage area and mobile crane

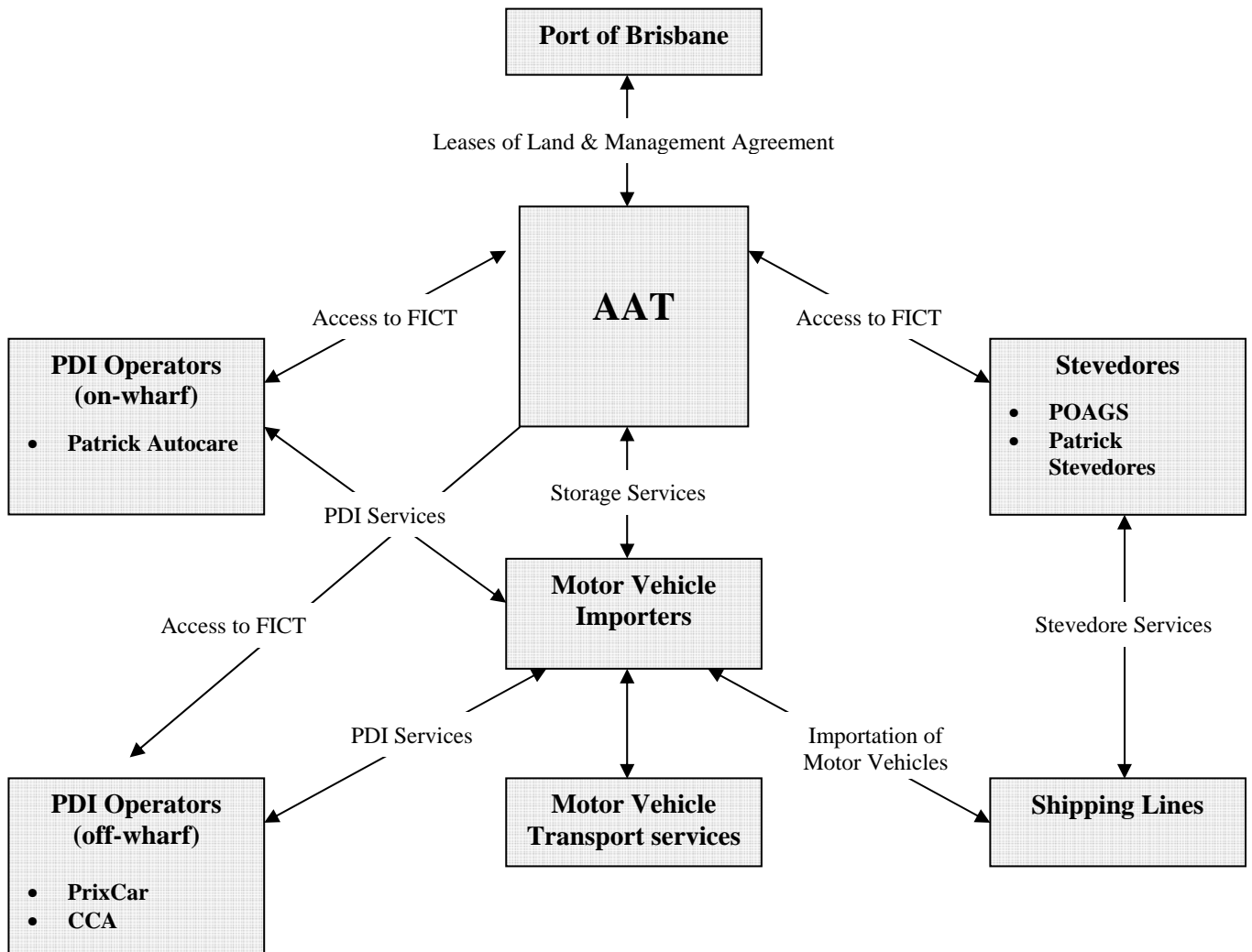


Picture 5 - Photograph of the motor vehicle storage area and the Patrick Autocare on-wharf PDI area



Picture 6 - Photograph of a Car Carrier vessel and the Berth area at the FICT

Schedule 2 Contractual Arrangements



Schedule 3 AAT Tariff Schedule

COMMODITY	AUD
Facility Access Charge	
General Cargo	4.85 per revenue tonne
ISO Containers	63.10 per unit
Wheeled Vehicles	1.85 per m ³
Boats to or from water	1.85 per m ³
on trailers (loaded or landed)	1.85 per m ³
on cradles (loaded or landed)	4.85 per revenue tonne
Heavy Lifts/Project Cargoes; direct delivery to/from road transport under hook	POA
Passenger vessels	POA
Wharf Storage (Import)	
New motor vehicles (< 20m ³)	Day 1 – 3 17.46 Day 4+ 29.28
New motor vehicles (> 20m ³)	Day 1 – 3 41.12 Day 4+ 70.96
Second-hand motor vehicles	Day 1 – 3 41.12 Day 4+ 70.96
Quarantine Services (Motor vehicles)	
Inspection – Passenger	89.00 per unit
Inspection – Commercial	89.00 per unit
Wash – Passenger	78.00 per unit
Wash – Commercial	156.00 per unit
Internal clean – Passenger	47.00 per unit
Internal clean – Commercial	146.00 per unit
Yard Move	42.00 per move
Yard Jump Starts	78.00 per start

Schedule 4 Increases in rent payable by AAT to PBC in respect of the FICT

Year	2007	2008	2009
Percentage increase on previous year	35	53	23

Schedule 5 Services declared under Part 5 of the QCA Act and Part IIIA of the TPA

Service	Effective date of declaration	Access Provider	Access Seeker	Comments
Freight handling services at Sydney International Airport	1/8/1997	Federal Airports Corporation	Australian Cargo Terminal Operators Pty Ltd	Declaration ceased on 31/7/2002.
Freight handling services at Melbourne International Airport	1/8/1997	Federal Airports Corporation	Australian Cargo Terminal Operators Pty Ltd	Declaration ceased on 9/6/1998.
Use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which QR is the railway manager	27/3/1998	QR	Coal miners	Service declared by regulation under s.97 of the QCA Act. Service is declared only while the rail transport infrastructure remains a public facility.
Handling of coal at DBCT by the terminal operator	23/3/2001	DBCT Management Pty Ltd	Coal miners	Service declared by regulation under s.97 of the QCA Act.
Airside services at Sydney Airport	9/12/2005	Sydney Airport Corporation Ltd	Virgin Blue Airlines Pty Ltd	Decision of the Tribunal. Service declared for 5 years.
Services for the transportation of sewerage provided by means of the sewerage reticulation networks and connection to the sewerage reticulation networks	21/12/2005	Sydney Water Corporation Ltd	Service Sydney Pty Ltd	Decision of the Tribunal. Service declared for 50 years.
Use of rail and associated infrastructure on the Tasmanian railway network for the purpose of operating a rail service	2/10/2007	State of Tasmania (owner) Pacific National (operator)	Department of Infrastructure, Energy and Resources	Service declared for 10 years.

Service	Effective date of declaration	Access Provider	Access Seeker	Comments
Use of rail and associated infrastructure comprising the Goldsworthy Railway facility	19/11/2008	Mt Goldsworthy Joint Venture (owner) BHP Billiton Iron Ore Pty Ltd (operator)	The Pilbara Infrastructure Pty Ltd (subsidiary of Fortescue Metals Group Ltd)	Service declared for 20 years. Currently before the Tribunal.
Use of rail and associated infrastructure comprising the Hamersley Railway facility	19/11/2008	Hamersley Iron Pty Ltd (owner) Pilbara Iron Pty Ltd (subsidiary of Rio Tinto Ltd) (operator)	The Pilbara Infrastructure Pty Ltd (subsidiary of Fortescue Metals Group Ltd)	Service declared for 20 years. Currently before the Tribunal.
Use of rail and associated infrastructure comprising the Robe River Railway facility	19/11/2008	Robe River Iron Associates (owner) Pilbara Iron Pty Ltd (operator)	The Pilbara Infrastructure Pty Ltd (subsidiary of Fortescue Metals Group Ltd)	Service declared for 20 years. Currently before the Tribunal.