
**SUBMISSION TO THE
QUEENSLAND
COMPETITION AUTHORITY**

on

'Candidate Service' Issue

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1 Background

- 1.1 On 22 October 2009, the Queensland Competition Authority (**Authority**) determined that the vehicle import service (**FI Service**) at the Fisherman Islands Facility (**FI Facility**) is a candidate service for the purpose of Part 5 of the *Queensland Competition Authority Act (1997)* (**QCA Act**).
- 1.2 Almost two months subsequent to the Authority's decision, Australian Amalgamated Terminals (**AAT**) provided a further submission in response to the Authority's decision on the candidate service matter. The basis upon which the the Authority can consider this submission is unclear. Furthermore, the Authority has failed to clearly identify the power pursuant to which it purports to subsequently reconsider its decision.
- 1.3 The Federal Chamber of Automotive Industries (**FCAI**) submits that the Authority has no power to reconsider its decision. Without prejudice to this position the FCAI provides the following submission which addresses AAT's supplementary submissions on the candidate service issue, in addition to its submissions on service definition contained in those submissions.

2 Candidate Service

- 2.1 The Authority has correctly determined that the vehicle import service at the FI Facility which FCAI seeks to be declared is a candidate service.
- 2.2 FCAI submits that:
 - 2.2.1 it is clear that the FI Service is a 'candidate service' for the purpose of Part 5 of the QCA Act as the Port of Brisbane Corporation (**PBC**) owns at least part of the facility that provides the FI Service;
 - 2.2.2 AAT's references in its submissions to cases under Part IIIA of the TPA are erroneous in the context of the QCA Act which unlike Part IIIA has a requirement that the service be a 'candidate service'; and
 - 2.2.3 the provisions of the QCA Act which AAT points to which impose rights and obligations on the owner, alternatively impose those obligations on the operator. It is likely that if the FI Service is declared those provisions will apply to AAT as the operator of the service. In any event, contrary to AAT's submissions it would not be incongruous with the purpose and intent of the QCA Act for those provisions to apply to PBC.

- 2.3 As the Authority correctly states in its Statement of Reasons:
- 2.3.1 'candidate service' is defined relevantly to mean 'a service for which the facility used, or to be used to provide the service is a public facility' (Schedule to QCA Act);
 - 2.3.2 'public facility' is defined relevantly to mean 'a facility owned (whether legally or beneficially and whether entirely or in part) by the State or a government agency' (Schedule to QCA Act);
 - 2.3.3 the PBC stated in its submission of 30 September 2009 that it is the owner and lessor of land from which AAT conducts its business at Fisherman Islands and that the facility used in providing the service comprises both the land and below ground improvements owned by the Corporation and the above ground improvements, machinery and plant and equipment owned by AAT;
 - 2.3.4 the PBC is a 'government agency' where government agency is defined to mean, among other things, a government owned corporation (Schedule to QCA Act);
 - 2.3.5 accordingly, the FI Facility is at least partly owned by a government agency and satisfies the definition of 'public facility'. Further, the FI Service satisfies the definition of a 'candidate service'.
- 2.4 While AAT might hold a ten year lease of the terminal at Fisherman Islands (commencing in May 2006) ¹, PBC holds title to the land. It is clear from PBC's submission that PBC owns the land, the wharf, the berth-pocket and the below-surface improvements to the land.² These are significant components of the FI Facility and the FI Service.
- 2.5 It is also clear from the *Transport Infrastructure Act* 1994 that PBC is the owner of the port land at Fisherman Islands and has oversight for the activities that take place at the FI Facility. PBC is required by the *Transport Infrastructure Act* to 'make land available for the establishment, management and operation of effective and efficient port facilities and services in its port by other purposes' (s275(b)(i)) and to provide or arrange for the development and use of 'its strategic port land at Fisherman Islands, for local commercial activities' (s275(f)(ii)).

¹ AAT's submission to the ACCC on its application for authorisation dated 10 June 2009, p18.

² PBC's submission of 30 September 2009, p1.

- 2.6 Further, under the lease with AAT, PBC imposes a number of obligations on AAT in connection with the operation of the terminal. Those obligations include that AAT must:
- 2.6.1 advise PBC prior to publishing user charges, general access terms and stevedore access terms;
 - 2.6.2 provide PBC 14 days written notice if there are any changes to user charges (apart from rental charged to sub-lessees) or general access terms;
 - 2.6.3 obtain prior written consent from PBC before changing stevedore access terms; and
 - 2.6.4 disclose to PBC's CEO details of how charges are calculated, and meet with PBC annually to discuss the user charges, general access terms and stevedore access terms.³
- 2.7 A 'facility' under Part 5 of the QCA Act may consist of different assets and have a number of different owners. References in the QCA Act to 'owner' must be taken to include 'owners'. Section 32 of the *Acts Interpretation Act 1954 (Qld)* provides that in an Act words in the singular include plural. AAT's submission (pp10-11) that under 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 is incorrect. There is nothing in the Act that requires this and the reference in the definition of 'public facility' to 'owned (whether legally or beneficially and whether entirely or in part)' can mean either ownership of a discrete asset or physical part of the facility or ownership rights in respect of the whole of the facility.
- 2.8 Accordingly, the FI Service satisfies the definition of a 'candidate service' and is subject to Part 5 of the QCA Act.

References to Part IIIA cases erroneous

- 2.9 In its supplementary submission, AAT refers to two matters under Part IIIA of the Trade Practices Act 1974 (Cth) (TPA) in an attempt to show that PBC is not the owner of the FI Facility. AAT seeks to draw analogies with the Sydney International Airport⁴ case and the applications for declaration of BHP Billiton and Rio Tinto railways in the Pilbara of Western Australia. It asserts that in those cases notwithstanding that the Commonwealth (in the case of Sydney Airport) or the State of Western Australia (in the

³ AAT's submission to ACCC Application for Authorisation of AAT, 10 June 2009.

⁴ (2000) 156 FLR 10.

case of the Pilbara railways) owned the land, it was considered that the entities with the leasehold interests were the owners of the relevant facilities.

- 2.10 It is erroneous to draw analogies with these Part IIIA cases. As there is no requirement in Part IIIA that the facility to be declared be a public facility, there was no need in those matters to determine whether the Commonwealth was in fact the owner of all or part of the facilities. Since s44B of the TPA defines the 'provider' of a service as the entity that is the owner or operator of the facility that is used (or to be used) to provide the service, it did not matter whether the holder of the leasehold interest was considered the owner or operator of the facility as in either case it could be considered to be the provider of the service and accordingly subject to the provisions of Part IIIA.

Provisions referring to 'owner'

- 2.11 In its supplementary submission (p8), AAT points to provisions in the QCA Act which it submits show that under the QCA Act the owner of a declared service has certain rights and obligations and 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 part owner of' the FI Facility. The provisions which AAT points to also refer to the operator of the declared service. It is likely that as the operator of the declared service those provisions will apply to AAT rather than PBC.
- 2.12 The first provision AAT points to is s133 which provides that the Authority may require the owner or operator to give the Authority a draft access undertaking for the service. Section 133A of the QCA Act sets out criteria for choosing the entity to give the draft access undertaking where the owner and operator of a declared service are different entities. Those criteria include the extent to which each entity is able to provide access to the service and the extent to which each entity is able to give effect to an access undertaking for the service. These provisions suggest that should the Authority require a draft access undertaking for the service, it is likely to request AAT as the operator of the declared service to give that undertaking, rather than PBC. This is because it is likely that AAT is in a better position as operator to provide access to the service.
- 2.13 The other provision referred to by AAT is s150A which provides that a responsible person must comply with an approved access undertaking given by, or applicable to, the responsible person. 'Responsible person' is defined in the Schedule relevantly as 'the person to whom the undertaking applies as owner or operator of the relevant service'. As it is likely that AAT will be requested to give the undertaking, it is likely that AAT will be the responsible person referred to in s150A.

- 2.14 FCAI further observes that the key provisions in the QCA Act which facilitate access to declared services refer to 'access provider' rather than 'owner'. FCAI refers for example to:
- 2.14.1 Section 99 which provides that an access provider of a declared service must, if required by an access seeker, negotiate with the access seeker for making an access agreement relating to the service; and
 - 2.14.2 Section 112 which enables an access provider or access seeker to notify the authority of an access dispute thus invoking the mediation and arbitration provisions for access disputes in Division 5 of Part 5.
- 2.15 'Access provider' is defined as 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'. The access provider is generally the entity (or entities) which controls use of the facility. In this case, AAT is the access provider.
- 2.16 In any event, FCAI observes that the object of Part 5 of the QCA Act 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. It is difficult to see how it would be incongruous with the purpose and intent of the Act for the QCA Act provisions referring to the owner of a declared service to apply to PBC.

3 Service Definition

- 3.1 FCAI provides the following response to AAT's submissions in respect of the service definition in section 4 of its supplementary submissions.
- 3.2 AAT points out that the area of land leased by the PBC to AAT does not include the area constituting the berths at wharves 1, 2 and 3 that directly abut the Brisbane River. Rather, those berths form part of Lot 88 on SP 108337 that is owned by the State of Queensland and leased in perpetuity to PBC. PBC has granted AAT a non-exclusive licence to AAT to use that area.
- 3.3 FCAI hereby amends its definition of the facility in paragraph 2.1 of its application for declaration to:
- 'The Fisherman Islands facility to be covered by the application is that area of land at the Port of Brisbane over which AAT holds a lease or licence from Port of Brisbane Corporation. The foot print of the leased or licensed land may vary from time to time.'

- 3.4 AAT questions the utility of paragraph (c) of the service definition in paragraph 2.2(c) of FCAI's application since FCAI has excluded from the nominated service the initial unloading of vehicles from the ship where it is carried out by stevedores. Paragraph (c) includes in the service definition 'discharging motor vehicles from ships'. That paragraph is not intended to capture the work undertaken by stevedores, but rather activities in the discharge process where AAT has involvement. An example of this is AAT determining where automotive vehicles are placed on the facility during discharge.
- 3.5 AAT requests clarification of whether FCAI seeks to have the PDI service provided by Patrick Autocare included within the nominated service definition. As set out in paragraph 2.3 of its application for declaration, the FI Service does not extend to PDI services. Accordingly, the PDI service provided by Patrick Autocare is not included within the nominated service definition.
- 3.6 Finally, FCAI disputes that the service specified in paragraph 2.2(k) of the service definition is imprecise and unclear and does not prima facie constitute a service that is capable of declaration. The service sought to be declared is the use of the FI Facility for the purpose of importing motor vehicles. Paragraphs (a) to (k) set out for the avoidance of doubt what is included in that service definition. Whether something is 'for any other purpose associated with motor vehicles' is clearly capable of being ascertained.