



**Issues Paper**

**Declaration of Vehicle Import Services  
at Fisherman Islands**

**November 2009**

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## SUBMISSIONS

Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (the Authority). Submissions are therefore invited from interested parties concerning the application by the Federal Chamber of Automotive Industries to the Authority on 17 July 2009. This application seeks to have the Authority recommend to the Ministers (the Premier and Treasurer) that certain motor vehicle import services at Fisherman Islands be declared under Part 5 of the *Queensland Competition Authority Act 1997*.

Written submissions should be sent to the address below. While the Authority does not necessarily require submissions in any particular format, it would be appreciated if two printed copies are provided together with an electronic version on disk (Microsoft Word format) or by e-mail. Submissions, comments or inquiries regarding this paper should be directed to:

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The **closing date** for submissions is 11 December 2009.

### Confidentiality

In the interests of transparency and to promote informed discussion, the Authority would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available. It would also be appreciated if two copies of each version of these submissions (ie the complete version and another excising confidential information) could be provided. Again, it would be appreciated if each version could be provided on disk. Where it is unclear why a submission has been marked “confidential”, the status of the submission will be discussed with the person making the submission.

While the Authority will endeavour to identify and protect material claimed as confidential as well as exempt documents (within the meaning of the *Freedom of Information (FOI) Act 1989*), it cannot guarantee that submissions will not be made publicly available. As stated in s187 of the *Queensland Competition Authority Act 1997* (the QCA Act), the Authority must take all reasonable steps to ensure the information is not disclosed without the person’s consent, provided the Authority is satisfied that the person’s belief is justified and that the disclosure of the information would not be in the public interest. Notwithstanding this, there is a possibility that the Authority may be required to reveal confidential information as a result of an FOI request.

### Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at the Brisbane office of the Authority, or on its website at [www.qca.org.au](http://www.qca.org.au). If you experience any difficulty gaining access to documents please contact the office (07) 3222 0555.

Information about the role and current activities of the Authority, including copies of reports, papers and submissions can also be found on the Authority’s website.

**PREAMBLE**

The Federal Chamber of Automotive Industries (FCAI) has asked the Authority to declare motor vehicle import services at the Fisherman Islands facility (Port of Brisbane) for the purposes of third party access.

If the Authority recommends declaration, and this is accepted by the Premier and Treasurer, the terms and conditions of access to these services may be independently regulated by the Authority.

In forming a view on whether to recommend declaration, the Authority must be satisfied that:

- (a) access would promote competition in at least one market other than the market for the service;
- (b) it would be uneconomical to duplicate the facility for the service;
- (c) access can be provided safely; and
- (d) access is not contrary to the public interest.

Submissions are sought on FCAI's application by 11 December 2009. The Authority welcomes comments on any aspect of the application where matters of particular interest are identified in this Issues Paper. The Authority requests that submissions address the assessment criteria.

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## **1. INTRODUCTION**

### **1.1 FCAI Submission**

On 17 July 2009, FCAI lodged an application which requested that the Authority recommend that the motor vehicle import services provided at the Fisherman Islands (FI) facility be declared by the Ministers (the Premier and the Treasurer) for the purposes of Part 5 of the *Queensland Competition Authority Act 1997* (the QCA Act), which relates to access to services. On 15 September 2009, FCAI provided further information on the facilities and services to which its application relates.

The application made by FCAI arises out of its concern that Australian Amalgamated Terminals (AAT) is exercising market power at the FI facility. FCAI stated (sub. p.1) that AAT has exercised its market power over the past two years by unilaterally and without any restraint:

- (a) setting non-negotiable terms and conditions of use;
- (b) increasing the facility access charge for wheeled vehicles by 35% and 37% respectively over the past two years;
- (c) introducing new charges;
- (d) threatening to impound vehicles; and
- (e) threatening to prevent stevedores discharging vessels.

In its application, and clarifying submission, FCAI defined the facility to which its declaration request relates as the area of land at the Port of Brisbane leased by Port of Brisbane Corporation (PBC) to AAT, as the facility operator. In this context, it is noted that the strip of land adjacent to wharfs 1, 2 and 3 (forming part of Lot 88 SP108337), is State land and leased to PBC in perpetuity.

FCAI also stated that the services for which declaration is sought relate to the use of the FI facility for the purpose of importing motor vehicles and includes, 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.

### **1.2 Authority's Consideration**

On 22 October 2009, the Authority formed the view that motor vehicle import services at Fisherman Islands are a candidate service for the purposes of Part 5 of the QCA Act.

The Authority must recommend to the Ministers that a candidate service be declared if it is satisfied that all of the following access criteria in s.76 of the QCA Act are satisfied:

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

The Ministers must also be satisfied about the access criteria in deciding whether or not to accept the Authority's recommendation.

In considering whether access (or increased access) to the services is in the public interest, the Authority and the Ministers must also take into account the following matters:

- (a) the objectives of Part 5 of the QCA Act, namely, to promote the economically efficient operation of, use of and investment in, the infrastructure used to provide the service with the effect of promoting effective competition in upstream and downstream markets;
- (b) legislation and government policies which relate to ecologically sustainable development, occupational health and safety and industrial relations;
- (c) social welfare and equity considerations;
- (d) economic and regional development issues, including employment and investment growth;
- (e) the interests of consumers;
- (f) the promotion of competition; and
- (g) the efficient allocation of resources.

The Authority may recommend that a candidate service be declared only if it is satisfied that all of the access criteria have been met. However, even in such a case, it is open to the Authority to recommend that a candidate service not be declared if the Authority:

- (a) is not satisfied that access (or increased access) to the service would be likely to have a substantial effect on a market; or
- (b) considers the request was not made in good faith or is frivolous (s. 80(3)).

The Authority may recommend that only part of the service be declared.

#### *The Authority's approach to the application*

The FCAI application is the first application received by the Authority under the declaration provisions of Part 5 of the QCA Act.

However, these provisions are not dissimilar to the declaration provisions contained in Part IIIA of the *Trade Practices Act* (TPA). Given this, there is substantial legal precedence on the treatment of access applications by the National Competition Council (NCC), the Australian Competition Tribunal and the Federal Court.

Accordingly, the matters raised in this Issues Paper draw on a guide to declaration published by the NCC as well as relevant interpretation issues provided in judicial decisions.

*Scope of the Services for which declaration is sought*

FCAI's application lists a series of components which it states constitute the FI service (see section 1.1 above).

The Authority can recommend that Ministers declare all of the services that are subject to a request for declaration, or that part of a service (which itself constitutes a service) be declared.

**In respect of the scope of FCAI's declaration request, the Authority seeks comments on:**

- **Whether the FI service (as described at paragraph 2.2 of FCAI's application) can be provided solely by use of the FI facility (as described at paragraph 2.1 of FCAI's application) or whether additional facilities are used (e.g. the State land relating to wharfs 1, 2 and 3 leased to PBC in perpetuity)? What effect (if any) does this have on the application of the access criteria?**
- **Given FCAI's inclusive definition of vehicle import services, are there other services which, despite not being explicitly listed by FCAI, form part of vehicle import services?**
- **Should the Authority only recommend declaration of part of the FI service and, if so, which part(s)?**

## 2. ACCESS CRITERIA: UNECONOMICAL TO DUPLICATE

The Authority must be satisfied that ‘it would be uneconomical to duplicate the facility for the service’ (s.76(2)(b) of the Act).

### *Natural Monopoly*

With respect to this criterion, the issue of whether or not the facility is a ‘natural monopoly’ is important.

The key characteristics of a natural monopoly are the presence of significant economies of scale and/or economies of scope in the production of the relevant service or services, the existence of substantial fixed (or capital) costs and relatively low variable (or operating) costs. This makes it economically efficient for only one facility to service likely demand. In such situations, the development of another facility to provide the service would amount to a wasteful use of the community’s resources. Put simply, a facility is a natural monopoly where it is capable of meeting likely demand at a lower cost than two or more facilities.

Accordingly, if the FI facility is a ‘natural monopoly’, it is likely that it would be uneconomical to duplicate. In the event that the FI facility is not a ‘natural monopoly’, it would have to be confirmed that it would be uneconomic to develop a separate facility to provide the relevant service.

FCAI’s application (sub. p. 12) stated that, generally, port facilities are natural monopolies due to the limited availability of suitable sites for deep water ports and the high sunk costs in the development and construction of such facilities. On this basis, FCAI considered the Fisherman Islands facility to be a natural monopoly where the relevant range of output could be served at lowest cost by this single facility rather than two or more port facilities providing the same service.

**The Authority seeks comments on:**

- **whether or not all (or some) of the vehicle import services provided by the Fisherman Islands facility exhibit ‘natural monopoly’ characteristics; and**
- **whether the FI facility’s capacity is sufficient to meet the forecast demand for the facility’s services and, if not, whether there is any scope to increase the facility’s current capacity economically.**

### *Duplication of FI Facility*

If the Authority concludes that the FI facility is not a ‘natural monopoly’, it would have to be confirmed that a separate facility to provide the relevant service would be uneconomic to develop.

FCAI submitted that they are unaware of any available port land providing vessel access that would enable the FI Facility to be duplicated. They noted that the closest ports to the FI facility are Townsville Port and Port Kembla. In each case, FCAI listed reasons why these ports were unsuitable as duplicates for providing vehicle import services (or a portion of these services) at the FI facility (FCAI application, pp: 8-9).

**The Authority seeks comments on:**

- **whether there is any available port land on which the FI facility could be duplicated; and**
- **whether alternatives exist to the FI facility for motor vehicle imports (e.g. Port Kembla, Hamilton etc) and whether they can satisfy the demand for the vehicle import services at FI (either in their current configuration or with expansions).**

### 3. ACCESS CRITERIA: PROMOTION OF COMPETITION

The Authority must be satisfied that ‘access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service’ (s.76(2)(a) of the Act).

Since the criterion specifically states that promoting competition is considered in markets **other** than the market for the service, this criterion requires an evaluation of whether the other markets are separate from the market for the service. Economic separability is a necessary condition for markets to be considered separate.

FCAI identified the following dependent markets in its submission:

- (a) the market for the importation of motor vehicles into Queensland;
- (b) the market for the supply of motor vehicles in Queensland;
- (c) the markets for the acquisition of and supply of automotive stevedoring services in Queensland;
- (d) the markets for the acquisition and supply of shipping services in Queensland; and
- (e) the markets for the acquisition and supply of PDI services in Queensland.

FCAI stated that access to the FI service is essential to compete in these markets in Queensland.

**The Authority seeks stakeholders' comments on the following:**

- **Are the markets identified by FCAI separate from the market for motor vehicle import services?**
- **Are there any additional markets, other than those identified by FCAI, which may be impacted by the declaration of motor vehicle import services, e.g. retail sales of motor vehicles in Queensland?**

*Market power*

The degree to which access (or increased access) promotes competition will depend in part on whether the service provider can exert market power to adversely affect competition in another market. The NCC states that:

*If a service provider has market power, and the ability and incentive to use that power to adversely affect competition in a dependent market, declaration would be likely to improve the environment for competition (p.37).*

FCAI submitted that AAT has both the ability and the incentive to exercise market power, including by:

- (a) setting non-negotiable terms and conditions of use;
- (a) increasing the facility access charge by over 35% in the last two years; and
- (b) introducing new charges such as those arising from seed contamination.

In addition, in its submission to the ACCC’s authorisation inquiry, the FCAI questioned whether the formation of AAT had achieved the claimed efficiencies and stated that:

*...since the creation of AAT in 2002 there have been no new entrants providing automotive stevedoring services from AATs automotive port terminals. Therefore:*

*7.7.1 the alleged efficiencies do not in fact exist; or*

7.7.2 the effects of leveraging the market power of AAT's bottleneck monopoly automotive terminals into the automotive stevedoring services market are so great that no independent third party stevedore can enter the market meaning the alleged efficiencies would never be realised<sup>1</sup>.

FCAI concluded that, since there have been no independent third party stevedores using AAT's facilities since its inception in 2002, this is strong direct evidence that the barriers to entry are not sufficiently low enough to permit new entry.

**The Authority seeks stakeholders' comments on the following:**

- **Does AAT have the ability or incentive to exercise market power in the dependent market? Has it used market power in dependent markets in the past?**
- **Are there other factors in the market for stevedoring services that may limit the entry of new stevedores irrespective of access to terminal facilities?**
- **Will access (or increased access) promote competition in another market? If yes, how?**

*Existing access regime in place*

Separately, FI facility is operated on what is described by AAT as an 'open access regime'. Information on AAT's website states that<sup>2</sup>:

*Any stevedore or PDI operator may apply to have access to the site to service their customers. The access is on a non-discriminatory basis so that all parties are provided services to the same level.*

*Stevedores or PDI operators seeking access can apply through AAT who will provide a stevedore licence or PDI sub-lease to approved applicants. Tariffs are published and are available to all parties seeking access to the site. The tariff will be displayed at the site and are published below. Within the stevedore licence, dispute resolution procedures are provided to enable parties to resolve any issues that may arise.*

Where the existing access obligations operating at FI are effective in providing access to the services, the benefits of declaring vehicle import services at FI may be limited. The Authority would therefore be interested in stakeholder comments on the operation of AAT's existing regime and how or whether declaration of vehicle import services would promote competition given the existing regime.

**The Authority seeks stakeholders' comments on the following:**

- **Is the 'open access regime' at the FI facility effective in providing access to access seekers on a non-discriminatory basis? How will declaration of vehicle import services promote competition given the existing regime?**
- **If the existing access regime has been effective in promoting competition in another market, what certainty is there that this outcome would persist into the future? Are there any limitations or guarantees that the existing arrangements will not change in the event that an independent third party stevedore seeks and/or obtains access to the facility?**

*ACCC Authorisation Draft Determination*

At the same time that the Authority is considering FCAI's declaration application, the Australian Competition and Consumer Commission (ACCC) is also considering a request from AAT to authorise the agreements and related arrangements of the joint venture between DP

<sup>1</sup> FCAI's Submission on AATs Application for Authorisation (p. 17); accessed from [www.accc.gov.au](http://www.accc.gov.au)

<sup>2</sup> [www.aat.au.biz](http://www.aat.au.biz) ; accessed 15 October 2009

World Australia Ltd. (formerly P&O Wharf Management Ltd.) and Asciano (formerly Plzen Pty Ltd) that resulted in the formation of AAT.

On 19 October 2009, the ACCC proposed to grant conditional authorisation to the AAT joint venture for 5 years<sup>3</sup>. The proposed conditions of authorisation would, in effect, result in an enforceable access undertaking, albeit under Part VII of the TPA. The ACCC draft determination includes the terms of such an undertaking which, *inter alia*, would require that AAT:

- (a) develop a mechanism for stevedores to seek access to AAT's terminals; and
- (b) provide end-users with a dispute resolution process.

**The Authority seeks stakeholders' comments on whether the ACCC draft determination regarding the AAT joint venture should influence the Authority's review of FCAI's declaration request.**

#### *Materiality Threshold*

The access criterion in the QCA Act regarding increased competition broadly mirrors that in Part IIIA of the TPA. However, Part IIIA stipulates that access or increased access to the service must promote a 'material' increase in competition in at least one market, other than the market for the service.

While the access criterion under s.76(2)(a) of the QCA Act does not have a materiality test for promoting competition in another market, materiality is discussed elsewhere. Specifically, s.80(3)(a) of the QCA Act, states that the Authority may recommend that a candidate service not be declared by the Ministers if the Authority is not satisfied that access (or increased access) to the service would be likely to have a substantial effect on a market.

**The Authority seeks stakeholders' comments on whether access needs to promote a 'material' increase in competition, or is any increase in competition sufficient to satisfy this criterion, with materiality to be considered separately under s.80?**

<sup>3</sup> Documentation can be found at [www.accc.gov.au](http://www.accc.gov.au), Authorization no.: A91141, A91142, A91181 & A91182

**4. ACCESS CRITERIA: SAFE PROVISION OF THE SERVICE**

The Authority must be satisfied that the service can be provided safely.

In considering this criterion, key matters appear to include whether:

- (a) there are relevant safety regulations which will apply to the service in circumstances where access is granted to third parties; and
- (b) the terms and conditions of access can adequately deal with any safety issues.

This is similar to the equivalent criteria in the TPA that access to a service must be able to be provided without undue risk to human health or safety.

The FCAI submitted that it is unaware of any reason why access to the FI facility cannot be provided safely.

AAT also noted that there is no reason why access to the nominated service cannot be provided safely.

**The Authority seeks stakeholders' comments on the following:**

- **How health and safety issues are managed under the current provision of services?**
- **Are there any potential health and safety risks associated with declaration of the service?**
- **Are there any pre-qualifications for safety standards for existing users of the facility? If so, who determines these standards and who assesses compliance with those standards?**

## 5. ACCESS CRITERIA: ACCESS IN THE PUBLIC INTEREST

The Authority must be satisfied that access to the service would not be contrary to the public interest. This criterion does not require that the Authority be satisfied that declaration would be in the public interest; rather, the Authority needs to be satisfied that declaration is not contrary to the public interest, a somewhat lesser test.

The criteria under the QCA Act are similar to the criteria under the TPA, though there are some differences in public interest matters to be taken into account under each regime (see **Table 1**).

**Table 1: Public interest considerations under the QCA Act and the TPA**

<i>QCA Act</i>	<i>TPA</i>
the object of Part 5, namely, to promote the economically efficient operation of, use of and investment in, the infrastructure used to provide the service with the effect of promoting effective competition in upstream and downstream markets	none
legislation and government policies relating to ecologically sustainable development	ecologically sustainable development
social welfare and equity considerations including community service obligations and the availability of goods and services to customers	social welfare and equity considerations, including community service obligations
legislation and government policies relating to occupational health and safety and industrial relations	government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity
economic and regional development issues, including employment and investment growth	economic and regional development, including employment and investment growth
the interests of customers or any class of customers	the interests of consumers generally or of a class of consumers
the need to promote competition	the competitiveness of Australian businesses
the efficient allocation of resources	the efficient allocation of resources

The NCC states in its declaration guide that consideration of this criterion does not include a revisitation of the issues considered under the other declaration criteria. Instead, the NCC draws on its conclusions made in relation to those other criteria. For example:

*...where the Council has concluded that access will promote a material increase in competition in one or more dependent markets, this will give rise to benefits that should be included in the assessment of criterion (f). Similarly where access will aid in avoiding duplication of a facility that exhibits natural monopoly characteristics, this too will lead to benefits that are appropriately considered under criterion (f)[p.65].*

FCAI indicated that, in their view, where the other access criteria are satisfied, there is a presumption that access, or increased access, to the services provided by the FI facility would be in the public interest.

**The Authority seeks stakeholders' comments on the following:**

- **What are the costs and benefits of access? In particular, what are the estimated financial costs if vehicle import services at FI are declared?**
- **If declaration is (or is not) in the public interest, please discuss reasons why. Do the costs of declaration outweigh the benefits, taking into account s.76(3)?**

## 6. THE AUTHORITY'S DISCRETION

While the Authority must have regard to the impact on other markets under the declaration criteria, there is a separate requirement that the Authority must consider when making a recommendation on declaration in s.80(3). This requirement provides, *inter alia*, that the Authority may decide to not recommend declaration if it “is not satisfied that access (or increased access) to the service would be likely to have a substantial effect on a market.”

The requirement in s.80(3) is not restricted to another market, unlike the requirement in s.76(2)(a).

**The Authority seeks stakeholders' comments on how it should assess FCAI's application with respect to the separate requirements in s.76(2)(a) and s.80(3).**

The Authority may also recommend that a candidate service not be declared by the relevant ministers if the Authority considers the request was not made in good faith or is frivolous (s.80(3)(b)).

**The Authority seeks comments from FCAI and other parties on matters relevant to its discretion under s.80(3) to not recommend that vehicle import services be declared.**