

Summary of AAT Undertaking

Background and Objective

On 23 November 2016, the ACCC announced that it would not oppose the acquisition by Qube Holdings Limited (**Qube**) of the 50 per cent shareholding in Australian Amalgamated Terminals Pty Ltd (**AAT**) that it did not already own (the **Transaction**). Following the Transaction, Qube now holds 100% of the shares in AAT.

The ACCC clearance was conditional on an undertaking given by Qube and AAT under section 87B of the *Competition and Consumer Act 2010* (Cth) (the **Undertaking**).

The Undertaking puts in place measures to ensure that AAT does not discriminate against other stevedores or pre-delivery inspection (**PDI**) operators that compete with Qube or its related entities. In a number of cases, the Undertaking replaces similar arrangements that were in place in relation to AAT under an ACCC authorisation approved by the ACCC in 2009.

The Undertaking requires the parties to:

- *ensure that access to AAT terminals is provided in a non-discriminatory manner, including complying with a set of specific Open Access Conditions;*
- *publish and comply with non-discriminatory Berthing Allocation Rules to apply to the allocation of berths to vessels;*
- *meet and report on a set of key performance indicators;*
- *provide for the separation of staff as between Qube and AAT and the protection of any confidential information held by AAT;*
- *comply with a price dispute mechanism, which enables terminal users to dispute any proposed increase in charges for access services and to have such a dispute determined by an independent expert, applying a cost-based, building block model for terminal access charges; and*
- *comply with independent audit, disclosure and reporting obligations in relation to performance under the Undertaking.*

The Undertaking is a publicly available document which is published on the ACCC's website, as well as the AAT website.

Non-discrimination obligations and compliance with Open Access Conditions

The Undertaking puts in place a set of requirements to ensure that AAT does not discriminate between its related stevedoring or PDI operations and other stevedores, PDI operators or their customers when AAT is providing access to AAT terminals.

There are both general and specific rules governing non-discrimination.

The general rules include:

- **Standard licence agreement**

AAT can only supply access services to stevedores that have entered into a licence agreement with AAT (which has the effect of ensuring that there are 'arm's length' contractual arrangements in place between AAT and any related stevedore, including Qube).

- **Non-discrimination and equivalent terms**

AAT must not discriminate between customers (or firms seeking access) and must provide access to customers on no less favourable terms than any other customer, unless the cost of providing access to a customer is higher.

- **Service restriction**

AAT must not itself, supply stevedoring, PDI or mooring services. If AAT provides any other services directly to parties (not covered by the existing terms of any licence) it must not discriminate when doing so.

- **Prevent or hinder access**

AAT must not engage in any conduct for the purpose of preventing or hindering the provision of access services.

As well as these general obligations, the Undertaking includes a number of specific commitments, including:

- **Landside storage**

AAT must not offer a longer period of free landside storage for cargo handled by Qube (or any related PDI operator) than it offers for comparable cargo handled by other stevedores or PDI operators.

- **Storage fees**

If AAT makes an offer to waive storage fees for cargo handled by Qube or a related PDI operator, the waiver must apply equally to all stevedores or PDI operators.

- **Storage terms**

AAT must not offer more favourable storage terms at an AAT terminal for cargo handled by Qube or related PDI operators than for comparable cargo handled by other stevedores or PDI operators.

- **Machinery or equipment**

AAT must offer equitable terms for the use of any machinery or equipment.

- **Receipt and delivery of cargo**

AAT must not discriminate between service providers in relation to any rules about receipt and delivery of cargo (including the allocation of equipment for receiving or delivering comparable cargo).

- **Yard space and laydown**

AAT must not discriminate in the allocation of yard space at a Terminal for laydown. This includes that AAT must not offer superior receival services (including laydown/free time) to customers of Qube or related PDI operators.

- **Port of Brisbane Flyover access**

AAT must provide non-discriminatory access to the Automotive Flyover at the Port of Brisbane to any PDI operator that has facilities accessible from the Automotive Flyover.

Berthing Allocation Rules

AAT must comply with Berthing Allocation Rules, which are generally those rules that applied prior to the Transaction, as amended from time to time. In most cases, these existing Berthing Allocation Rules have been agreed with the relevant port authority.

Subject to any arrangements with port authorities, AAT may vary the Berthing Allocation Rules from time to time if the variation is consistent with the objectives of the Undertaking and follows proper procedure as set out in the Undertaking. There is a process for stakeholders to raise concerns with, or dispute, any variation or a proposed variation of the Berthing Allocation Rules and to have any such dispute independently determined.

Ring-fencing of staff and confidential information

Confidential information

The Undertaking requires AAT to take a number of steps to ensure the protection of any confidential information it obtains from other stevedores or PDI operators through its provision of access services.

The measures in the Undertaking to protect confidential information include that:

- *AAT can only require a terminal user (or an applicant) to provide confidential information if it is reasonably necessary (or is necessary to assess an application or to comply with laws). AAT cannot require a terminal user to provide any confidential information about freight rates, terms and conditions agreed with a customer, terms or duration or renewal of any freight contract, or any specific forecast of freight volumes;*
- *The purposes for which AAT can use confidential information of a terminal user or applicant are specifically defined; and*
- *AAT needs to put in place effective IT systems and security measures to safeguard confidential information.*

To assist its personnel to comply with confidentiality and ring-fencing obligations, AAT must establish and maintain a confidentiality policy.

Ring-fencing of staff

To complement these confidentiality requirements, the Undertaking also requires the ring-fencing of AAT and Qube staff. Unless otherwise approved by the ACCC, AAT staff or contractors involved in scheduling or allocation of berthing times, the provision of access (or operation of AAT equipment or facilities), the negotiation of any access licence agreements or the management of access to the Automotive Flyover (in Brisbane) – cannot also be employees of Qube.

AAT staff who have had access to confidential information of terminal users or applicants also cannot, within six months of ceasing employment with AAT, be re-employed by Qube in a role that involves commercial dealings with shipping lines or other customers acquiring stevedoring or PDI services within an AAT terminal.

Price disputes

The Undertaking continues, and expands, the price dispute process that has been in place at AAT terminals under the earlier ACCC authorisation.

Under the price dispute process, at least 60 business days before the end of a financial year, AAT may undertake a price review and notify a price increase which it considers reasonable and appropriate to apply in respect of the next financial year.

A person who is affected by charges at the terminal (including users, importers, exporters and their representative industry bodies) may then notify a price dispute within 45 business days. A price dispute notified under this process is then referred to an independent expert for resolution, applying pricing principles set out in Schedule 5 of the Undertaking.

The final decision of the independent expert is binding on all parties.

Non-price dispute process

A similar dispute process is also established under Schedule 6 of the Undertaking to deal with disputes relating to non-price issues, including the granting of access, any refusal to grant access or the terms of access. Non-price disputes may also include disputes in relation to whether AAT has complied with the Open Access Conditions or its obligations in relation to confidentiality and ring-fencing.

KPIs

The Undertaking requires AAT to prepare a compliance report every 6 months on its performance against KPIs for each AAT terminal.

The purpose of KPI reporting is to monitor AAT's compliance with its obligations in the Undertaking, including Open Access Conditions, Berthing Allocation Rules, and ring-fencing obligations. The KPIs will not be used to measure the performance of individual Terminal Users. The KPIs are:

- *truck turnaround times;*
- *average yard dwell times (imports and exports);*
- *number of berthing allocation changes;*
- *number of mooring delays;*
- *allocation of berth and short term storage ("first point of rest" areas);*
- *equipment availability;*
- *mechanical breakdown support;*

- *cargo dwell time over free time / long term storage;*
- *any breaches of confidentiality and ring-fencing; and*
- *any complaints raised under dispute processes.*

AAT will publish each compliance report on its website within seven days of providing the report to the ACCC and an auditor. Any confidential information contained in a compliance report that is published on the website may be redacted.

Other compliance and reporting arrangements

As well as reporting on performance against the KPIs in regular compliance reports, the Undertaking puts in place a number of other compliance arrangements:

- ***Annual independent audit***

AAT and Qube must appoint an independent auditor to audit and report on their compliance with this Undertaking each year. The ACCC must approve the independent auditor proposed by AAT and Qube.

- ***Ad hoc independent audit***

In addition to annual audits, and the dispute process, a disputing party may also refer a complaint directly to the independent auditor and request that the auditor carry out an ad hoc audit in relation to the complaint. The costs of the audit will be borne by AAT and Qube, unless the audit does not find that there has been any breach of the Undertaking, in which case costs will be borne by the complainant – which must provide an undertaking to pay those costs at the time of notifying the complaint.

- ***Information provision***

The ACCC may, at any time, direct AAT or Qube to give information. This may include producing documents and materials to the ACCC and attend the ACCC to answer any questions the ACCC may have.

These compliance processes are in addition to the existing statutory investigation and enforcement powers of the ACCC under the CCA.

Review process

After the second anniversary of the Undertaking, and then every five years, the ACCC may undertake a review of the terms of the Undertaking to consider whether any changes are necessary to give effect to the objectives of the Undertaking. The ACCC may invite submissions from interested parties in conducting this review.

Questions regarding the Undertaking

Should you have any questions about the Undertaking, please contact the AAT Compliance Manager
P.O. Box 858, Wynnum, Qld 4178.
Or call Darren Parsons on +61 7 3909 3002

Should you wish to contact the ACCC about the Undertaking, the contact details are below:
Postal address:

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