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Voller, Samuel

From: Voller, Samuel
Sent: Thursday, 5 October 2017 5:42 PM
To: 'Andrew Dunshea'
Cc: Howarth, David; Adams, Shane; Letcher, Heydon; Hudson, Marc
Subject: HPE CM: Albury Taxis - Alleged anti-competitive conduct [SEC=UNCLASSIFIED]
Attachments: Letter to Steele + Co 5 October 2017.pdf

Follow Up Flag: Follow up
Flag Status: Completed

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Dear Andrew,

Please refer to the *attached* correspondence.

Kind regards,

Samuel Voller

Investigator | Enforcement NSW
Australian Competition & Consumer Commission
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The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.



Our ref: CS1045711
Your ref: AD178998
Contact officer: Samuel Voller
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5 October 2017

Mr Andrew Dunshea
Partner
Steele + Co
253 Horwick Street
BATHURST NSW 2795

Dear Mr Dunshea

Re: Albury Taxis - alleged anti-competitive conduct

We refer to your letter dated 29 September 2017.

Thank you for providing the information requested. We note your client's concern at remaining the subject of an ongoing investigation by the Australian Competition and Consumer Commission (ACCC).

The purpose of this letter is to outline the concerns that ACCC holds in respect of the conduct of Albury Radio Taxis Co-operative Society Limited (**Albury Taxis**), and to seek your response to the steps that we consider would likely be sufficient to resolve these concerns.

Summary of ACCC concerns

The ACCC is concerned that the four provisions outlined below are likely to contravene the *Competition and Consumer Act 2010* (Cth) (CCA):

- the fee structure for new non-members of Albury Taxis (**Non-Member Fees Provision**);
- Albury Taxis' decision that it will not accept any new member vehicles where those vehicles are licensed to operate as taxis pursuant to an annual renewable licence (**Membership Limitation Provision**);
- the proposed prohibition on drivers utilising booking applications not endorsed or approved by Albury Taxis (**Application Exclusivity Provision**); and
- the proposed provision requiring network bailee drivers to drive exclusively for Albury Taxis in the Murray NSW region (**Driver Exclusivity Provision**).

A more detailed assessment of our concerns is at **Attachment 1**.

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Relevance of RMS Decision and New Point to Point Transport Legislation

We note that you have previously referred to the decision by the Roads and Maritime Services of NSW (RMS) not to take any further action in respect of a complaint made to it about Albury Taxis' new fees structure under rule 175 of the *Passenger Transport Regulation 2007* (NSW). This regulation ceased to be in force as of 1 September 2017, and no provision equivalent to rule 175 has been enacted.

The CCA applies to Albury Taxis and its members, regardless of any decisions by RMS. Neither the decision by RMS nor the repeal of the *Passenger Transport Regulation 2007* (NSW) affects the operation of the CCA upon the point to point transport industry. Rather, Part IV (Restrictive Trade Practices) of the CCA is likely to be of greater relevance to all taxi network operators in the future as the principal regulation governing the terms on which access to booking services may be granted or denied.

Steps to address the ACCC's concerns

Significant penalties apply where a court determines that a business as engaged in conduct that contravenes competition provisions of the CCA.

The ACCC has a number of enforcement options available, including commencing proceedings against Albury Taxis in the Federal Court, and accepting an undertaking from Albury Taxis under section 87B of the *Competition and Consumer Act 2010* (Cth).

We are considering as a possible enforcement option accepting from Albury Taxis a court-enforceable undertaking in which it agrees to remove these provisions (or not implement any provision not yet enacted) and provide competition law training to Albury Taxis' directors so as to prevent future contraventions of the CCA.

Whether or not an Undertaking will address the ACCC's concerns will depend on the commitments Albury Taxis is prepared to offer and our Commissioner's view on the sufficiency of those commitments.

Minimum terms of any undertaking

We consider any undertaking would need to contain the following elements:

1. **Form of resolution:** the commitments provided by Albury Taxis are to be provided as court-enforceable undertakings to the ACCC, with the undertaking running for a term of at least 5 years;
2. **Admission:** Albury Taxis acknowledges that its conduct is likely to have contravened the CCA;
3. **Undertaking to allow non-discriminatory access to booking service:** Albury Taxis undertakes to address the ACCC's concerns over the restrictions on new vehicle entry by:
 - a. altering its fee structure so as not to discriminate against non-member vehicles; and/or
 - b. allowing new taxis to join Albury Taxis as member taxis, regardless of whether those taxis have annual renewable or perpetual taxi licences; and
4. **Undertaking to remove restrictive provisions on drivers:** Albury Taxis undertakes to remove, or otherwise not implement, in any form, either directly or indirectly, any restriction on:

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- a. drivers within the Albury Taxis Network accepting bookings by any means other than through Albury Taxis, including through other booking applications; and
 - b. drivers providing passenger transport services for any other point to point transport booking service providers, including other taxi networks;
5. **Undertaking to remove Exclusivity Provisions:** Albury Taxis undertakes to remove, or otherwise not implement, in any form, either directly or indirectly :
- a. the Application Exclusivity Provision; and
 - b. the Driver Exclusivity Provision; and
6. **Compliance training:** Albury Taxis will obtain from a suitably qualified professional compliance training in competition law, focusing in particular on sections 45 and 47 of the CCA. Attached is an example of the type of compliance provisions the ACCC has considered suitable in similar circumstances (see **Attachment 2**).

To inform our Commissioners' consideration of next enforcement steps, please indicate whether Albury Taxis would agree to offer undertakings to the ACCC on the terms outlined above by **COB Friday 20 October 2017**.

If you have any further questions in relation to this letter, please contact Samuel Voller on (02) 9230 9171, or by email at samuel.voller@acc.gov.au.

Yours sincerely



David Howarth
Director
Enforcement Group NSW

Detailed concerns

Restrictions on new vehicle entry

In its Special Member Meeting held on 4 August 2016, the members of Albury Taxis voted to implement the Non-Member Fees Provision (Special Resolution 1) and Membership Exclusivity Provision (Special Resolution 2).

We understand that under the current fees structure:

- members pay \$900 per month (\$10,800 annually);
- Mr Neil Connell, a non-member, pays \$1,250 per month (\$15,000 annually);
- all new vehicles, including the WAT owned by Mr Theo Lansdown, are to pay \$30,000 each year in advance plus \$1,250 per month (\$45,000 annually), as well as a fee of 20% of the value of any work deemed to be Albury Taxis 'account work'.

We further understand that all new taxi licences issued under the new point to point transport legislation will be annually renewable licences. We understand that this means that the decision by Albury Taxis not to accept such vehicles as member vehicles permanently limits the number of member vehicles that may operate in the Albury Taxis Network.

This means that all new vehicles proposing to operate within the Albury Taxis Network are required to pay \$34,200 more than member vehicles are required to pay to obtain the same level of access to Albury Taxis' booking service as supplied to member vehicles. We understand that there is currently no competing point to point transport booking service operating in the Albury region.

We consider that the Non-Member Fees Provision, in conjunction with the Membership Limitation Provision, constitute provisions of a contract, arrangement or understanding which together have purpose, or are likely to have the effect, of substantially lessening competition. Our view is that this conduct is likely to constitute a contravention of section 45(2) of the CCA. Further, it is likely that Albury Taxis has been knowingly concerned in the implementation of these provisions, and has given effect to them in the subsequent withdrawal of full access to Albury Taxis' booking service from the vehicle W32 operated by Mr Lansdown.

Application Exclusivity Provision

The minutes of the Albury Taxis General Meeting held on 29 September 2016 show consideration of a new provision to be included in the Network Regulations and Bailment Agreement on the following terms:

B1 Updates to Network Regulations: vehicles/drivers to utilise authorised Network Apps only; Motion: #Drivers within the Albury Taxi Network are not permitted to use any rideshare or taxi booking apps or services other than ones approved by the Network#

PENALTY: Immediate suspension/removal from SmartMove Dispatch system – permanently

Or frame in positive manner

eg Bailee Agreement "I have been informed that I am able only to use technology in the vehicle that is authorized by Albury Taxis Network. Should I be found using other

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technology network access will be denied and may result in dismissal from driving in the Albury Taxis Network

NETWORK REGULATIONS UPDATE TO LIST APPROVED TECHNOLOGY:

GPS, SmartMove Despatch, SmartMove Driver

The minutes note that '[m]embers agreed something to this effect, if able should be included in Network Regulations and Bailee Agreements.' The Bailment Agreement provided to us incorporates this restriction as clause 7 of that document.

We consider that the Application Exclusivity Provision is likely to constitute exclusive dealing in contravention of section 47(1) of the CCA.

By implementing the Application Exclusivity Provision, Albury Taxis is likely to have supplied its booking service to drivers on the condition that drivers will not acquire booking services from a competitor of Albury Taxis, with the purpose or likely effect of substantially lessening competition. This would constitute exclusive dealing under section 47(2) of the CCA.

We note that you have previously highlighted that no other booking applications have yet been put forward for Albury Taxis' consideration, and no driver has yet faced disciplinary action as a result of using an 'unapproved' booking application.

Notwithstanding this, we consider that the implementation of, or agreement to implement, the Application Exclusivity Provision is in any event likely to constitute exclusive dealing under section 47(2) CCA. In the event that a driver was suspended or terminated for contravening the Application Exclusivity Provision, this would constitute a separate instance of exclusive dealing under section 47(3) of the CCA.

We draw to your attention in particular the court-enforceable undertaking given to the ACCC by Standard White Cabs Ltd (trading as Townsville Taxis) in 2014. In that undertaking, Townsville Taxis admitted that its implementation of a similar provision to prevent taxi drivers utilising the booking application known as 'goCatch' was likely to have constituted exclusive dealing in contravention of section 47 of the CCA.

Driver Exclusivity Provision

The minutes of the Albury Taxis Annual General Meeting held on 29 September 2016 show consideration of a new provision to be included in the Network Regulations and Bailment Agreement on the following terms:

*Update to Bailment Agreement and Network Regulations to include exclusivity clause:
Authorised Network Bailee Drivers to work as passenger transport provider exclusive to Albury Taxis Network when bailing in the Murray NSW Region.*

The minutes note that '[m]embers agreed something to this effect, if able should be included in Network Regulations and Bailee Agreements.'

We understand that drivers provide their services to operators and/or Albury Taxis as independent contractors rather than as employees.

We consider that the Driver Exclusivity Provision is likely to constitute an exclusionary provision under sections 4D and 45 of the CCA.

We consider it likely that Albury Taxis has been knowingly concerned in the making of a contract or arrangement, or arriving at an understanding, containing an exclusionary provision. This contract or arrangement was made, or understanding arrived at, between the members of Albury Taxis, who are competitive with one another for the acquisition of the

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passenger transport drivers. The Driver Exclusivity Provision has the purpose of preventing, restricting or limiting the supply of driver services to operators of vehicles from competing point to point transport providers.

We are also concerned that the Driver Exclusivity Provision is likely to substantially lessen competition, and consider that it is likely to constitute exclusive dealing in contravention of section 47(1) CCA.

COMPETITION AND CONSUMER COMPLIANCE PROGRAM

LEVEL 1

[COMPANY NAME] and [DIRECTOR'S NAME] will establish a Competition and Consumer Compliance Program (**Compliance Program**) that complies with each of the following requirements:

Training

1. Within [x] months of this Undertaking coming into effect, and thereafter at least once a year for [x] years, [DIRECTOR'S NAME] will attend practical training focusing on [INSERT: *relevant sections or parts*] of the Competition and Consumer Act 2010 (the **CCA**).
2. [COMPANY NAME] will ensure that the training referred to in paragraph 1 above is administered by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law (**the Trainer**).

Complaints handling

3. Within [x] months of this Undertaking coming into effect, [COMPANY NAME] will develop procedures for recording, storing and responding to competition and consumer law complaints.

Provision of Compliance Program documents to the ACCC

4. [COMPANY NAME] will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than [x years – being the number of years compliance training is required and an additional 2 years following that period].
5. If requested by the ACCC during the period of the Undertaking or [x years - being the number of years compliance training is required and an additional 2 years following that period] [COMPANY NAME] will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
 - 5.1.1. a written statement or certificate from the Trainer who conducts the training referred to in paragraph 1, verifying that such training has occurred; and
 - 5.1.2. an outline of the complaints handling system referred to in paragraph 3.