



# Determination

Application for authorisation A91589

lodged by

the Transport Workers Union of Australia  
SA/NT Branch

to

collectively bargain on the  
terms and conditions for the  
supply of freight courier and haulier  
services in Whyalla, South Australia

Date: 23 November 2017

Authorisation number: A91589

Commissioners: Schaper  
Court  
Featherston

## Summary

The ACCC has decided to grant authorisation for owner drivers who are contracted to Toll to collectively bargain with Toll, with assistance from the TWU, to establish an agreement for the supply of freight courier and haulier services from and within Whyalla, South Australia.

The collective bargaining group will presently include up to 6 owner drivers in the Whyalla region.

The ACCC grants authorisation until 15 December 2022.

## The application for authorisation

1. On 27 June 2017, the Transport Workers Union of Australia SA/NT Branch (the **TWU**) lodged application for authorisation A91589 with the ACCC.
2. The TWU seeks authorisation for its owner driver members to collectively bargain with Toll Transport Pty Ltd (**Toll**) regarding the supply of freight courier and haulier services from and within Whyalla, South Australia for a period of five years. On 5 October 2017, the TWU clarified that application for authorisation A91589 includes drivers providing haulier services as well as freight courier services.<sup>1</sup>
3. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the **Act**).<sup>2</sup> In this instance, the TWU seeks authorisation for the proposed collective bargaining conduct because it may involve a cartel provision or a provision that may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
4. The TWU also requested interim authorisation to enable it to commence collective bargaining with Toll while the ACCC is considering the substantive application.
5. The ACCC granted interim authorisation on 3 August 2017.<sup>3</sup> Interim authorisation does not extend to the TWU and Toll finalising any agreements before the ACCC makes a decision on the substantive application. Interim authorisation remains in place until it is revoked or the date that the final determination comes into effect.
6. On 27 September 2017, the ACCC issued a draft determination<sup>4</sup> proposing to grant authorisation. A conference was not requested in relation to the draft determination.

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<sup>1</sup> Further detail regarding this clarification is set out in the Applicant's amended application available on the [ACCC's public register](#).

<sup>2</sup> The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Detailed information about the authorisation process is available in the ACCC's [Authorisation Guidelines](#).

<sup>3</sup> For further information see below paragraphs **Error! Reference source not found.** to **Error! Reference source not found.** and the ACCC's interim authorisation decision dated 3 August 2017, which is available on the ACCC's [authorisations public register](#).

<sup>4</sup> Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

## The conduct

7. The TWU seeks authorisation for its owner driver members who are contracted to Toll to collectively bargain with Toll, with assistance from the TWU, to establish an agreement for the supply of freight courier and haulier services from and within Whyalla, South Australia.
8. In particular, the TWU seeks to collectively bargain with Toll on terms and conditions such as:<sup>5</sup>
  - a. carriage rates (including the labour component thereof)
  - b. a mechanism for those rates to increase from year to year
  - c. penalties for services provided outside standard hours
  - d. equipment, including painting and badging of vehicles
  - e. classification of work
  - f. supply and fitting of communications equipment
  - g. right to assignment of work
  - h. supply of work uniforms, and
  - i. dispute settlement procedure.
9. The TWU proposes the following collective bargaining process:<sup>6</sup>
  - a. The TWU will invite all owner drivers currently contracted to Toll, including any future owner drivers who become contracted to Toll, to join the bargaining group, including drivers who are not members of the TWU. Participation in the bargaining group will not require TWU membership.
  - b. The bargaining group will elect a single representative. The bargaining group will also generate proposals for the representative to discuss and advance with Toll representatives.
  - c. The TWU will provide administrative and secretarial support to the bargaining group by attending negotiations and may speak on behalf of the group as well as assist with drafting proposals.
  - d. Any outcome from the collective bargaining will form a standard form agreement. Each owner driver will then be able to accept this standard form contract as the basis for his or her contract with Toll or to otherwise negotiate terms.
10. The bargaining group will make decisions collectively (wherever possible) or by majority decision.<sup>7</sup>

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<sup>5</sup> Submission from the TWU received on 27 June 2017, para 15.

<sup>6</sup> Submission from the TWU received on 27 June 2017, paras 54 to 56, 58, and 64 to 66.

11. Participation in the collective bargaining group will be voluntary and owner drivers will be free to join or leave the bargaining group at any time during the negotiations.<sup>8</sup> Members of the bargaining group will also be free to accept or reject any final contract terms resulting from the collective bargaining with Toll.<sup>9</sup>
12. The TWU submits that the proposed collective bargaining conduct is necessary to address the owner drivers' significant disadvantage in negotiations with Toll due to factors such as Toll's size and vast resources, the owner drivers' lack of negotiating experience, the exclusive nature of their contracts with Toll, and the ease of entry in the owner driver market.<sup>10</sup> The TWU also submits that significant transaction cost savings are likely to arise from the proposed conduct.<sup>11</sup>

## Background

### The applicant

13. The TWU is an employee organisation registered as a trade union under the *Fair Work (Registered Organisations) Act 2009* (Cth).<sup>12</sup> The TWU has around 6,000 members in South Australia and the Northern Territory, including owner drivers across a range of industries.<sup>13</sup>

### The owner drivers

14. The application for authorisation is made on behalf of owner drivers who are contracted to provide courier 'pick-up and deliver' services as well as haulier services to Toll from and within Whyalla, South Australia.<sup>14</sup>
15. The provision of courier services require owner driver to own an appropriate vehicle such as a van and drive it to deliver freight for logistics companies such as Toll.<sup>15</sup> The provision of haulier services involves the operation of larger trucks.<sup>16</sup> The TWU submits that owner drivers contracted to Toll are offered terms that are unilaterally set by Toll and that owner drivers are generally not free to supply services to other courier companies while contracted to Toll.<sup>17</sup>
16. The TWU submits that remuneration for owner drivers is based on an hourly rate designed to compensate drivers for their labour and the costs associated with the running and maintenance of their vehicle.<sup>18</sup> The TWU further submits that owner

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<sup>7</sup> Submission from the TWU received on 27 June 2017, para 63.

<sup>8</sup> Submission from the TWU received on 27 June 2017, paras 59 to 60.

<sup>9</sup> Submission from the TWU received on 27 June 2017, paras 56 and 62.

<sup>10</sup> Submission from the TWU received on 27 June 2017, para 76.

<sup>11</sup> Submission from the TWU received on 27 June 2017, paras 86 to 90.

<sup>12</sup> Submission from the TWU received on 27 June 2017, para 1.

<sup>13</sup> <http://www.twusant.com.au/>.

<sup>14</sup> Submission from the TWU received on 27 June 2017, para 2.

<sup>15</sup> Submission from the TWU received on 27 June 2017, paras 29 and 40.

<sup>16</sup> See Supplementary submission from the TWU received on 5 October 2017.

<sup>17</sup> Submission from the TWU received on 27 June 2017, paras 31 to 36.

<sup>18</sup> Submission from the TWU received on 27 June 2017, para 50.

drivers are generally engaged to provide their services from Monday to Friday for a minimum of 9-10 hours per day and that owner drivers are required to be available 48 weeks of the year.<sup>19</sup>

17. The TWU estimates that the proposed agreement will cover up to approximately 6 owner drivers,<sup>20</sup> of whom 3 are currently members of the TWU.

## The target

18. Toll provides freight transport services across Australia. Toll is a subsidiary of Toll Holdings Limited, an integrated logistics company operating in over 50 countries globally.

## Other ACCC authorisations

19. The ACCC has previously authorised two other applications for authorisation lodged by the TWU regarding collective bargaining between owner drivers and Toll:

- Authorisation A91514 involved an application for owner drivers contracted to Toll to collectively bargain with Toll on new terms and conditions for the supply of freight courier services to the 'Toll Priority' business from Toll Priority depots at Adelaide CBD and Adelaide Airport. The ACCC granted this application for authorisation on 4 February 2016 for three years.<sup>21</sup>
- Authorisation A91427 involved an application for owner drivers contracted to Toll to collectively bargain with Toll on new terms and conditions for the supply of air freight courier services at the Toll Priority depot near Brisbane Airport. The ACCC granted this application for authorisation on 16 October 2014 for three years.<sup>22</sup>

20. Further, on 21 June 2017, the TWU lodged application for authorisation A91588 for its owner driver members to collectively bargain with Toll regarding the supply of freight courier services to Toll IPEC from and within the metropolitan Adelaide region. At the same time as this final determination, the ACCC has also released a final determination granting authorisation in Application A91588 for five years.<sup>23</sup>

## Consultation

21. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.

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<sup>19</sup> Submission from the TWU received on 27 June 2017, paras 44 and 51.

<sup>20</sup> Submission from the TWU received on 27 June 2017, para 9.

<sup>21</sup> Further information regarding this application for authorisation is available on the ACCC's [authorisations public register](#).

<sup>22</sup> Further information regarding this application for authorisation is available on the ACCC's [authorisations public register](#).

<sup>23</sup> Further information regarding this application for authorisation is available on the ACCC's [authorisations public register](#).

22. The ACCC sought submissions from interested parties potentially affected by this application for authorisation, including the relevant owner-driver members of the TWU, Toll, competitors to Toll, and various government and industry bodies.
23. Prior to the draft determination, the ACCC did not receive any submissions from interested parties. In particular, Toll did not raise any objections to the interim authorisation request and did not provide any comment regarding the TWU's substantive application for authorisation.
24. Following the ACCC's draft determination, the ACCC again did not receive any submissions from interested parties. Toll also did not provide any comment regarding the TWU's clarification that the scope of the application includes drivers providing both freight courier and haulier services in Whyalla, South Australia.

## **ACCC assessment**

25. On 6 November 2017, a number of amendments to the Act came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the Act. Pursuant to section 183(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the Act as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the Act as amended.
26. Pursuant to subsections 90(7) and 90(8) of the Act,<sup>24</sup> the ACCC must not make a determination granting authorisation in relation to conduct unless it is satisfied in all the circumstances that the conduct would result or be likely to result in a benefit to the public and that benefit would outweigh the detriment to the public that would result or be likely to result from the conduct.
27. In order to assess the effect of the proposed collective negotiations and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and compares the likely future with and without the proposed conduct.

## **Relevant areas of competition**

28. The ACCC considers that these relevant areas of competition are:
  - a. competition amongst owner drivers to supply freight courier and haulier services from and within Whyalla, South Australia, and
  - b. competition amongst logistics companies to supply freight courier and haulier services to customers from and within Whyalla, South Australia.
29. The TWU submits that the main requirements to the supply of freight courier and haulier services are a valid driver's licence and sufficient capital to purchase or lease an appropriate vehicle.<sup>25</sup> The TWU further submits that, once contracted to a logistics company, owner drivers are averse to changing companies and that there

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<sup>24</sup> As the proposed conduct involves a cartel provision, the alternative test under sub-section 90(7) does not apply.

<sup>25</sup> Submission from the TWU received on 27 June 2017, paras 25 to 27.

is presently a greater supply of owner drivers in the industry than there is demand for their services.<sup>26</sup>

30. There are a number of logistics companies supplying freight courier and haulier services to customers nationally, including Toll, DHL, TNT, Fed Ex, UPS and Startrack.<sup>27</sup>

## Future with and without

31. The ACCC compares the public benefits and detriments likely to arise in the future if the proposed conduct occurs, against the future in which the proposed conduct does not occur.
32. Without the proposed conduct, the TWU submits that it is likely that owner drivers would individually negotiate with Toll, which would be likely to result in owner drivers having limited capacity to influence the standard contract terms offered by Toll and the maintenance of bargaining inequality between Toll and the owner drivers.<sup>28</sup>
33. The ACCC considers that the likely future without the proposed conduct is likely to involve individually agreed contracts between the owner drivers and Toll. The ACCC accepts that, without any collective bargaining, it is likely that individual owner drivers will have limited ability to negotiate variations to the standard terms offered by Toll.

## Public benefit

34. Public benefit is not defined in the Act. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>29</sup>

35. The ACCC considers that transaction cost savings and improved input into contracts by owner drivers are likely to result from the proposed conduct. The ACCC's assessment of the likely public benefits follows.

## Transaction cost savings

36. The ACCC accepts that there are transaction costs associated with contracting. These transaction costs can be lower where a collective negotiation process is employed rather than a series of individual negotiation processes.
37. In this instance, without the proposed collective bargaining conduct, drivers seeking different terms and conditions to what Toll offers as part of a standard form contract would need to individually negotiate and agree with Toll. Such individual agreements are likely to lead to higher transaction costs for both owner drivers and

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<sup>26</sup> Submission from the TWU received on 27 June 2017, paras 77 and 78.

<sup>27</sup> Submission from the TWU received on 27 June 2017, para 19.

<sup>28</sup> Submission from the TWU received on 27 June 2017, para 74.

<sup>29</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

for Toll, including both the time and expense of conducting negotiations as well as the time and expense associated with legal and other expert advisors.

38. By reducing the transaction costs associated with negotiations for all parties, it is likely that collective bargaining will result in more contractual issues being addressed, because each party can obtain the benefit from negotiating these costs at less cost to itself, resulting in more comprehensive and efficient contracts.
39. The ACCC therefore considers that the proposed collective bargaining conduct is likely to result in public benefits from transaction cost savings, including the sharing of legal and other expert advisor costs, for both the owner drivers and Toll.

### **Improved input into contracts**

40. The owner drivers are self-employed or operate small businesses. The ACCC recognises that, when negotiating with large counter parties such as Toll, individuals and small businesses can be disadvantaged due to various factors including fewer resources, information asymmetries, and less negotiating experience.
41. Collective bargaining provides a means to coordinate the bargaining group members to identify and deal with common contractual issues in a more effective and streamlined manner. For example, the TWU proposes for the bargaining group to collectively develop proposals (and responses to any counter-proposals) for a bargaining representative to advance with Toll on behalf of the bargaining group,<sup>30</sup> which would allow individual owner drivers in the group to leverage the negotiating expertise of the group.
42. In this way, collective bargaining may enable individual members to become more informed and engaged participants in negotiations, improving their input into contract negotiations with Toll. This improved input may lead to terms of supply that better reflect their circumstances, resulting in more efficient outcomes.
43. The ACCC therefore considers that the proposed collective bargaining conduct is likely to result in public benefits from improving the owner drivers' input into their contracts with Toll.

### **Public detriment**

44. Public detriment is also not defined in the Act. The Australian Competition Tribunal has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>31</sup>

### **Lessening of competition between drivers**

45. The ACCC considers that the potential for collective bargaining to lessen competition between owner drivers supplying freight courier and haulier services in Whyalla is likely to be small for the following reasons.

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<sup>30</sup> Submission from the TWU received on 27 June 2017, para 54.

<sup>31</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- a) there is currently limited competition between owner drivers for the supply of freight courier and haulier services in Whyalla, particularly in relation to the contract terms on which the drivers seek to collectively bargain with Toll, as Toll generally offers standard term contracts to owner drivers with little individual negotiation.
- b) the proposed collective bargaining will be voluntary for both the owner drivers and for Toll. Owner drivers will be free to join or leave the bargaining group at any time, to negotiate variations to any collectively agreed outcomes, or to negotiate individually with Toll as suits their needs. The proposed collective bargaining arrangements also do not place any obligation on Toll to negotiate with the bargaining group.

46. In light of these mitigating factors, the ACCC considers that the proposed conduct is not likely to result in any significant public detriment from the lessening of competition between owner drivers or logistics companies in the supply of freight courier and haulier services from and within Whyalla.

## **Balance of public benefit and detriment**

47. Broadly, the ACCC must not grant authorisation for proposed conduct involving a cartel provision unless it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit and that public benefit will outweigh any likely public detriment.

48. For the reasons outlined in this final determination, the ACCC is satisfied that the proposed conduct is likely to result in public benefits from transaction cost savings and improved input into contracts, and that these would outweigh any public detriment, including from any lessening of competition.

49. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

## **Length of authorisation**

50. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>32</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

51. In this instance, the TWU seeks authorisation for five years.<sup>33</sup> The ACCC considers the proposed period of authorisation is appropriate and grants authorisation for five years.

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<sup>32</sup> Subsection 91(1).

<sup>33</sup> Submission from the TWU received on 27 June 2017, para 13.

# Determination

## The application

52. Application A91589 was made using a Form B, under subsections 88(1A) and (1) of the Act seeking authorisation to engage in proposed conduct to which certain provisions of Part IV of the Act would or might apply.<sup>34</sup>
53. Authorisation is sought for owner drivers who are contracted to Toll to collectively bargain with Toll, with assistance from the TWU, to establish an agreement for the supply of freight courier and haulier services from and within Whyalla, South Australia.

## The net public benefit test

54. For the reasons outlined in this determination, the ACCC is satisfied pursuant to subsections 90(7) and 90(8) of the Act that, in all the circumstances, the conduct for which authorisation is sought is likely to result in a public benefit and that public benefit will outweigh any likely public detriment, including any detriment constituted by a lessening of competition.

## Conduct which the ACCC authorises

55. The proposed conduct may contain a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.<sup>35</sup>
56. The ACCC grants authorisation A91589 for the TWU's owner driver members who are contracted to Toll to collectively bargain with Toll, with assistance from the TWU, to establish an agreement for the supply of freight courier and haulier services from and within Whyalla, South Australia.
57. Under section 88(10) of the Act, the ACCC extends the authorisation to all owner drivers contracted to Toll, including owner drivers who are not a member of the TWU and to any future owner drivers who become contracted to Toll in the supply of freight courier and haulier services from and within Whyalla, South Australia.
58. The ACCC grants authorisation for a period of five years until 15 December 2022.

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<sup>34</sup> As noted in paragraph 25, changes to the authorisation provisions of the Act came into effect on 6 November 2017 that apply to applications for authorisation under consideration at or after that date, including changes to the authorisation provisions in Division 1 of Part VII of the Act. Pursuant to section 183(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the Act as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are, which is treated as an applications for authorisation under subsection 88(1) of the Act as amended.

<sup>35</sup> The reference to "within the meaning of section 45 of the Act" includes the making and/or giving effect to a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect of substantially lessening competition. As former s4D of the Act on Exclusionary Provisions has been repealed pursuant to the amendments referenced above, references to exclusionary provisions have been excluded from the description of the proposed conduct.

## **Date authorisation comes into effect**

59. This determination is made on 23 November 2017.
60. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into effect on 15 December 2017.
61. The interim authorisation granted on 3 August 2017 remains in force until revoked or the date this determination comes into force.