Determination

Application for Authorisation

lodged by

CSR Limited

in relation to the collective negotiation of owner/drivers' contracts in Queensland

Date: 10 June 2003

Authorisation No:	A90808	**Commissioners:**
		Fels
		Bhojani
		Jones
Public Register No:	C2001/1525	Martin
		McNeill
		Willett

Executive Summary

On 29 October 2001, CSR Limited (CSR) lodged application A90808 with the Commission seeking authorisation to make and give effect to a contract, arrangement or understanding with each of its independent contractors. These contractors deliver pre-mixed concrete by road for CSR from plants producing pre-mixed concrete in South-East Queensland. The arrangements concern the collective negotiation of the terms and conditions under which CSR's independent carriers will operate and will also establish a formula for cartage rates.

Arrangements between competitors that have the purpose or likely effect of fixing, controlling or maintaining the price of goods supplied or acquired are deemed by the *Trade Practices Act 1974* (the Act) to substantially lessen competition and therefore contravene section 45 of the Act. Generally, collective bargaining arrangements that set uniform fees to independent providers participating in the proposed arrangements are likely to lessen competition relative to a situation where each provider individually negotiates its own rates of payment.

Application A90808 – Collective Bargaining Arrangements

CSR has submitted that the public benefits of improved industrial harmony, improved fairness of the negotiating process, improved compliance with statutory requirements and improved operating efficiencies will arise as a result of the conduct sought to be authorised.

Essentially, this authorisation seeks to continue the immunity gained from authorisation A50016, granted to CSR on 9 October 1997. This authorisation expired on 31 October 2001. The current application seeks authorisation for giving effect to, and the continued operation of, the contracts formed in 1997. According to CSR, some of these contracts were for a period of ten years. The current application claims the same conduct and the same benefits, and CSR has indicated that there is no current intention to negotiate a different form of standard contract.

Interim authorisation was granted on 7 November 2001 in respect of application A90808.

Commission Considerations

Although the Commission is concerned that conduct for which authorisation is sought is likely to reduce competition to some extent at the carrier level, the Commission notes that there are some features of the proposed arrangement that, when coupled with certain structural features of the market, are likely to limit the anti-competitive detriment of the conduct for which authorisation is sought. These features include:

i) the fact that collective negotiations are confined to CSR and its concrete carriers meaning that competition between participants in the downstream concrete market shall be less affected by the proposed collective arrangement than might otherwise be the case;

ii) the existence of some scope for new entry in the cartage market given sufficient cost incentives; and

iii) the pre-existing limited level of competition between carriers in the cartage market along with the likelihood of some continued competition between CSR engaged carriers regarding truck size and efficiency.

The Commission therefore concludes that the anti-competitive detriment of the arrangements for which authorisation is sought is likely to be very limited.

The Commission also accepts that there are public benefits resulting from the collective negotiations. In particular, the Commission considers that the collective negotiations will result in, or are likely to result in, greater efficiency of operations (such as through lower transaction costs).

Consequently the Commission concludes that the public benefits likely to result from the collective arrangements will outweigh the anti-competitive detriment.

The Commission therefore, at section 7 of this determination, **grants** authorisation with respect to A90808 for five years.

Abbreviations

Act	*Trade Practices Act 1974* (Cth)
ACT Concrete Carters case	*Re Lamont* (1990) ATPR 41-035
Owner-drivers/ independent contractors/ carriers	Independent contractors engaged by CSR Limited for the purpose of carting pre-mixed cement
Commission	Australian Competition and Consumer Commission
Competition Code	*Competition Policy Reform (Qld) Act 1996*
CSR	CSR Limited
TWU	Transport Workers' Union
Tribunal	Australian Competition Tribunal, formerly the Trade Practices Tribunal
VCC Association	Victorian Concrete Carters Association

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1. Introduction

1.1 The Australian Competition and Consumer Commission ("the Commission") is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* ("the Act"). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

1.2 The Act, recognises that, in some circumstances, competition may not be consistent with the most efficient outcome. It therefore allows the Commission to grant immunity from the Act for anti-competitive arrangements or conduct in certain circumstances.

1.3 One way parties may obtain immunity is to apply for what is known as an 'authorisation' from the Commission. Broadly, the Commission may 'authorise' parties to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

1.4 The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

1.5 Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

1.6 The Act requires that the Commission then issue a draft determination in writing proposing either to grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account any submissions received from interested parties.

1.7 Once a draft determination is released, the applicant or any interested party who is dissatisfied with the draft determination may request that the Commission hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the Commission in response to a draft determination. The Commission will also invite interested parties to lodge written submissions on the draft.

1.8 The Commission then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination.

Statutory test

1.9 The Act provides that the Commission may only grant authorisation where the public benefit test in section 90 of the Act is satisfied. In this instance, CSR has sought authorisation under subsection 88 (1) of the Act, and the relevant tests are those found in 90 (6) and 90 (7).

1.10 Under sub-section 90 (6) of the Act, the Commission may grant authorisation to a proposed contract, arrangement or understanding, other than an exclusionary provision, if it is satisfied that:

- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
- this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.

1.11 Sub-section 90(7) of the Act provides that the Commission shall not make a determination granting authorisation to an existing contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of a contract, arrangement or understanding has resulted, or is likely to result, in a benefit to the public; and
- that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

Application A90808

1.12 On 29 October 2001, CSR Limited (CSR) lodged application A90808 with the Commission. The application was made under section 88(1) of the Act for authorisation to make and give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act[1].

1.13 CSR seeks authorisation enabling it and its independent concrete cartage contractors to make, and give effect to, contracts, arrangements or understandings, that will be collectively negotiated and will establish the terms and conditions under which CSR's independent carriers will operate. This agreement will also establish a formula for cartage rates.

1.14 CSR and its carriers are currently operating under the arrangements for which authorisation is sought. In 1997, the Commission found that these arrangements would be likely to result in a net public benefit and granted authorisation until 31 October 2001 (A50016).

1.15 On 7 November 2001, the Commission granted interim authorisation to CSR in respect of application A90808 for the period during which the merits of the application are assessed. In particular, the Commission granted interim authorisation for:

1. Those entities which, as independent contractors, are from time to time engaged in the business of the delivery by road of pre-mixed concrete for CSR from plants producing pre-mixed concrete within Queensland ('the

[1] This application has also been considered an application under the Competition Code.

Carriers') to enter from time to time into contracts, arrangements or understandings between themselves and with CSR as to the rates and conditions for delivery by road transport of pre-mixed concrete for CSR from plants producing pre-mixed concrete in Queensland.

2. *The Carriers, collectively through representatives appointed by the Carriers, from time to time, to enter into negotiations with CSR as to the said rates and conditions.*

3. *The Carriers and CSR, from time to time, to enter into and give effect to contracts, arrangements or understandings with each other whereunder:*

(a) *CSR offers the Carriers standard and agreed rates and conditions for the delivery by Carriers by road transport of pre-mixed concrete from CSR plants situated within Queensland; and*

(b) *the Carriers agree to undertake the delivery by road transport of pre-mixed concrete upon such standard and agreed rates and conditions.*

Draft determination

1.16 On 6 November 2002, the Commission issued a draft determination proposing to grant authorisation to the application. Interested parties were invited to call a pre-determination conference. No such conference was called. In addition, the Commission invited interested parties to make submissions on the draft determination. One submission was received from Phillips Fox, acting on behalf of a number of owner-drivers. This submission is discussed at section 5 of this determination.

2. Background

The pre-mixed concrete industry

2.1 A number of firms operating in the market for delivered pre-mixed concrete currently use independent contractors to provide some or all of their required delivery services. As a result, delivery services are an important input to production of delivered pre-mixed concrete, the cost of which averages approximately 18 to 25 per cent of the total cost of delivered pre-mixed concrete.

2.2 The delivery service involves transporting pre-mixed concrete from its point of mixing to a final destination (for example, a building site), and off-loading at the final destination. For technical reasons pre-mixed concrete must be placed at its final destination within 90 minutes of mixing. Hence, mixing plants are located to serve local markets, and most delivery services would involve a round trip of less than three hours.

2.3 The main feature which distinguishes independent contractors – referred to in this market as 'owner-drivers' – from employees is that independent contractors own the truck and chassis used in the delivery service for pre-mixed concrete whereas the truck and chassis used by an employee are supplied by the firm. Owner-drivers are generally also responsible for painting the truck with the colours/logos of their employers. However the agitator (mixing container in which pre-mixed concrete is transported) is supplied to both owner-drivers and employees by the firm. The size of the agitator which can be fitted to a chassis, and therefore the volume of concrete that can be transported in each load, will depend primarily on the size of the truck.

2.4 Owner-drivers will usually work for only a single firm at any time – this is generally attributed to the switching costs (for example, repainting the truck) which would be incurred by a driver who shifted between firms.

2.5 Employment relations with independent contractors have also tended to be fairly stable – the duration of employment contracts is often matched with the length of truck life (maximum of about 10 years), and in some instances 'closed yard' arrangements initiated by unions have restricted entry to the market for delivery services at particular locations (for example, Canberra in the 1980s).

2.6 Payments to owner-drivers for delivery services are determined by the number and volume of deliveries, and the distance travelled for each delivery. In negotiating with firms, owner-drivers have generally been represented by a state-wide representative body – either a trade union (for example, the Transport Workers' Union has represented independent contractors in NSW) or another type of representative body (for example, the Queensland Road Transport Association which formerly represented independent contractors in Queensland). Rates of payment to owner-drivers therefore appear to have been uniform within each state. Employee drivers have also been represented

in negotiations over award conditions by the state body of the Transport Workers' Union.

2.7 In most local markets for delivered pre-mixed concrete there are only a small number of firms operating, and the market is most often dominated by several large firms (for example, CSR, Boral and Pioneer in the Brisbane market). The small number of firms operating in each market has meant that issues relating to the extent of competition in those markets have been raised on a number of occasions.

Previous relevant decisions

2.8 The Commission and the Australian Competition Tribunal (the Tribunal) have dealt with a number of applications for authorisation dealing with conduct in similar terms to application A90808 (collective negotiation by concrete carters).

Victorian Concrete Carters' Association

2.9 On 10 January 1977 the Commission denied authorisation to the Victorian Concrete Carters Association (the VCC Association) which had applied for authorisation of arrangements which would enable owner-drivers to negotiate as a single body with producers of pre-mixed concrete to establish uniform rates of remuneration and conditions of engagement. In effect, the arrangements would regulate, on an industry-wide basis, the rates and conditions pursuant to which the owner-drivers would carry pre-mixed concrete for the producers.

2.10 The applicant argued that if the agreements were not granted authorisation then the Transport Workers' Union (TWU) would simply instigate industrial action to secure the conditions.

2.11 The Commission accepted the applicant's general argument that the negotiation of industrial agreements between representatives of owner-drivers and the company engaging them largely removes the possibility of exploitation of individual drivers and contributed to industrial harmony by providing the owner-drivers with countervailing power in the negotiating process, resulting in a substantial public benefit.

2.12 However, the Commission distinguished between negotiations of rates by a group of owner-drivers with the company that engages them and the negotiation of uniform rates across the whole industry. In respect of industry-wide negotiations, the Commission took the view that the detriment to competition was not outweighed by the benefits which accrued from them. The Commission consequently denied authorisation.

2.13 The VCC Association appealed this decision to the then Trade Practices Tribunal (now called the Australian Competition Tribunal). The Tribunal set aside the Commission's decision and granted authorisation[2]. The Tribunal

[2] Victorian Concrete Carters Association (1976-1977) ATPR 15-663

concluded that the presence of the TWU as an alternative negotiating force on behalf of the concrete owner-drivers pointed to the reality that in the absence of the authorisation, the TWU would assume full representation of the owner-drivers and would ensure the maintenance of industry-wide rates and conditions.

2.14 The Tribunal also rejected the Commission's claim that a refusal of authorisation would lead to an abandonment of industry-wide rates.

2.15 Following the Tribunal decision the Commission received a series of applications for authorisation by various cartage and road transport associations and unions. These applications generally entailed the setting of rates and conditions upon which owner-drivers engaged in the cartage of concrete or other goods would be employed. Based on the Tribunal decision the Commission authorised approximately 18 such agreements from 1979 to 1984.

ACT Concrete Carriers Association

2.16 On 12 October 1988 the Commission denied authorisation to an application lodged by Mr David Lamont on behalf of the owner-drivers in the pre-mixed concrete industry in the Australian Capital Territory and Queanbeyan area. Authorisation was sought for proposed arrangements for negotiation and arbitration of rates for cartage of pre-mixed concrete in the ACT and Queanbeyan.

2.17 As in the VCC Association's application 13 years earlier, the applicants claimed that the industrial harmony arising from the authorisation amounted to a significant public benefit.

2.18 The Commission considered that the likely detriment to competition arising from the proposed arrangement was quite significant for two reasons. Firstly, the arrangement would set the delivery charge across the whole industry in the ACT region. Secondly the arrangement would operate in an environment with limited new entry by owner-drivers.

2.19 The applicant submitted that industrial harmony, resulting from owner-drivers being provided with countervailing power in the negotiating process, was a substantial public benefit arising from the conduct.

2.20 The Commission noted that industrial harmony is a matter which can constitute a substantial public benefit in certain circumstances however, the Commission concluded that in light of limited evidence of a reduction in disputes, the claimed public benefits were not sufficient to outweigh the detriments, including the detriment mentioned above.

2.21 The applicant appealed this decision to the Tribunal. On 13 July 1990 the Tribunal[3] upheld the Commission's decision to deny authorisation to the agreement.

[3] *Re Lamont* (1990) ATPR 41-035

2.22 The Tribunal, reversing its earlier position in the VCC Association's case, found that although industry harmony was a public benefit to be taken into account, it accepted the Commission's argument that industry harmony was a nebulous concept and rather fragile. The Tribunal held that in order to accept that a public benefit existed the evidence must clearly have established that authorisation would lead to significantly greater industry harmony in the future than the likely alternative. The Tribunal was not convinced that without authorisation significant long-term industry disharmony would be a necessary outcome. Another factor in the Tribunal's reasoning was the presence of significant barriers to entry in the concrete carters market in the ACT.

Authorisation A50016 - Queensland

2.23 On 9 October 1997 the Commission granted conditional authorisation to CSR in relation to collective negotiation of owner/driver contracts in Queensland for a period of four years. The conditional authorisation came into effect on 31 October 1997 and was in the following terms:

The carriers are hereby authorised to enter from time to time into contracts, arrangements or understandings between themselves and with CSR as to the rates and conditions for delivery by road transport of pre-mixed concrete for CSR from plants producing pre-mixed concrete in the area.

The carriers are hereby authorised collectively through representatives appointed by the carriers from time to time, to enter into negotiations with CSR as to the said rates and conditions.

The carriers and CSR are each hereby authorised from time to time to enter into and give effect to contracts, arrangements or understandings with each other whereby:

- *CSR offers the carriers standard and agreed rates and conditions for delivery by the carriers by road transport of pre-mixed concrete from CSR plants situated within the area; and*

- *The carriers agree to undertake the delivery by road transport of pre-mixed concrete upon such standard and agreed rates and conditions.*

Nothing in this authorisation permits:

The making of any contract, arrangement or understanding containing an exclusionary provision as defined in s 4D of the Trade Practices Act 1974; or

Without limiting the generality of the foregoing, the making of any contract, arrangement or understanding containing any provision, substance or effect of which would be to prevent or limit CSR and any carrier or carriers negotiating and agreeing upon variations to the standard and agreed rates and conditions in respect of particular jobs such as on-site plants or otherwise as special circumstances might require.

2.24 In its consideration of application A50016, the Commission found that there were two important characteristics that distinguished the application from that of the ACT Concrete Carters Association:

- firstly, the arrangements were not industry-wide, involving all suppliers of concrete at the producer level, but only involved CSR and its carriers; and

- secondly, entry of carriers to the market for the supply of their services is controlled by CSR and not by the carriers, or their association, or union (in this case the TWU).

2.25 The Commission concluded that the contract was anti-competitive because it discouraged carriers from competing between themselves, even with the acknowledgment that competition between carriers will always be limited because of the nature of the work. However, the fact that the contract was not industry-wide, and did not involve the carriers (or their representatives) determining numbers of carriers in the market, decreased the anti-competitive effect of what was proposed.

2.26 In relation to public benefits, the Commission found there was potential for carriers to be exploited as they are 'locked in' to CSR because it owns the agitators, controls the truck numbers, 'owns' the customers and the trucks are painted in CSR colours. The Commission concluded that allowing the carriers to come together was likely to improve the fairness of the contract negotiation process.

2.27 The Commission also concluded that proposed arrangements were likely to result in continued industry harmony and increased incentives for carriers to improve their productivity. It was also considered that transaction costs would be lower than if CSR were required to negotiate individually with each of its carriers. Given the frequency of transactions between CSR and its carriers and the number of carrier contracts there would be a sizeable reduction in transaction costs.

2.28 The Commission found that these benefits would in turn allow CSR to be more competitive, promoting a flow of benefit to the community generally, through lower concrete and construction costs. Accordingly, the Commission granted authorisation for a period of four years.

3. The Application

Application A90808

3.1 Application A90808 is seeking authorisation for the collective negotiation of contracts between CSR and the independent contractors who deliver pre-mixed concrete by road for CSR from plants producing pre-mixed concrete in South-East Queensland, in the same terms as Authorisation A50016.

3.2 The contracts cover a range of matters and set out the respective rights and obligations of CSR and the carriers. In particular, the contracts:

- include a formula for establishing the cartage rate for carriers and will include allowances for labour, ownership, overhead and running costs;
- detail methods of calculation and payment of cartage rates;
- provide carriers with the security of long term contracts; and
- specify rights and obligations with respect to:
  - delivery hours;
  - transfer between plants;
  - compliance with statutory requirements;
  - suitability of vehicles;
  - communication equipment;
  - provision of a mixer;
  - maintenance of mixers and vehicles;
  - painting of mixer;
  - manning of vehicles;
  - training;
  - dispute procedures;
  - occupational health and safety;
  - cartage allocation;
  - storage of carriers equipment; and
  - environment protection and pollution control.

3.3 In its application, CSR specifies that the persons who will be a party to the contracts, arrangements or understandings with CSR are independent contractors engaged, from time to time, by CSR for the delivery by road of pre-mixed concrete for CSR from plants producing pre-mixed concrete within South-East Queensland. CSR advises that the number and identity of the relevant independent contractors may change over time.

3.4 In a letter dated 17 December 2002, CSR informed the Commission that Readymix Holdings Pty Limited (Readymix) is, or may become, a party to the proposed contracts or arrangements due to the possible demerger of its heavy building materials business in Australia and the United States.

3.5 In the event that the demerger occurs, CSR anticipates that the concrete cartage business will be conducted by Readymix as a subsidiary of Rinker Group Limited.

3.6 Pursuant to subsection 88 (6) of the Act, an authorisation granted by the Commission to CSR has the same effect as if it were also an authorisation in the same terms to every other person named in the application as a party, or proposed party, to the proposed contract or arrangement.

3.7 Subsection 88 (10) allows the Commission to express an authorisation to apply to a person who becomes a party to the proposed contract or arrangement at a time after it is made.

3.8 The Commission considers that the effect of CSR's letter dated 17 December 2002 is essentially to amend its application so as to name Readymix as either:

- a party to the proposed contract or arrangement; or
- a person who may become a party to the proposed contract or arrangement at a time after it is made.

3.9 The Commission considers this amendment to be very minor. The Commission believes that it will not affect in any way the balance of public benefit and detriment discussed above. The Commission notes that nothing in this authorisation will compel Readymix or any other person to make or give effect to the contracts or arrangements authorised

4. Applicant's Submission

Application A90808

4.1 In its submission supporting the Application, CSR contended that one of the reasons for this application is to ensure that it is possible to continue to give effect to contracts entered into under Authorisation A50016, some of which lasted for a period of ten years.

4.2 CSR submitted that allowing independent contractors to negotiate as a combined body with CSR will result in the benefits outlined below. The information italicised below is drawn from CSR's submission.

Industrial Harmony

CSR claimed that allowing collective negotiation of standard terms and conditions including rates would lead to industrial harmony. Since the standard form agreements were collectively negotiated and entered into, there have been no industrial stoppages or threats of stoppages.

Fairness of the negotiating process

CSR claimed that collective negotiation by the carriers would deliver a fair result to all of the carriers and would avoid any possibility of unfair treatment arising from the inequality of bargaining strength. The collective negotiation of the contract by the carriers did in fact lead to a fair result, as is evidenced by the lack of industrial dispute over the term of the contract or its operation.

It is also important to note that the contract has delivered to the carriers significant improved earnings as compared with the arrangements that preceded the contract. This fact, and the effect of the contract on CSR's business and the savings to customers of CSR are dealt with in more detail below in the section on efficiency of CSR's operations.

Compliance with statutory requirements

When considering CSR's application for the Current Authorisation, the Commission formed the view that the provision by CSR of a safety net payment under the cartage rate formula in the standard form contract to allow carriers to comply with legal requirements relating to road worthiness, safety, environmental protection and pollution control, could equally be achieved by individual level contracts as opposed to the collectively negotiated contracts for which authorisation was sought. Despite that view, the fact remains that the safety net and cartage rate formula has allowed carriers to comply with those requirements.

Efficiency of operations

CSR submitted in its application for the Current Authorisation that the collectively negotiated standard contract would increase efficiency and competitiveness through:

- *increases in average volume of concrete carted, standardisation of operations and improved resource allocation*

- *reduction in transaction costs*

CSR also submitted that these benefits would have the flow-on effect of reducing the average cost of delivery services which would make CSR more competitive in the market place.

CSR is pleased to confirm that:

- *the incentive-based cartage rate formula in the standard form contract has led to increases in the average volume of concrete carted by the carriers which has simultaneously reduced the cost of delivery services for CSR, thereby making it more competitive, and increased the income to the independent carriers as compared to the income earned under the previous arrangements; and*

- *the average volume carried by independent carriers prior to the contract in South-East Queensland was 4,286m^3 per annum as compared to 5,884m3 per annum since the contract was entered into. This has significantly improved earnings to those carriers covered by the contract.*

The efficiencies gained through the incentive based cartage rate contract have allowed CSR to pass on savings to customers. Again, CSR asks the Commission to take into account the benefits that have flowed from the standard from contract when considering this application for authorisation.

4.3 CSR submitted that the collectively agreed terms and conditions contain financial incentives for independent contractors to increase the volume of pre-mixed concrete carried by each independent contractor so as to reduce the average cost of supply to end users, resulting in significant cost savings and enabling CSR to be more competitive.

4.4 CSR identified the Commission's stated concern regarding the role of the TWU and the potential for industry wide effects resulting in increased public detriment as a factor in limiting the existing authorisation to a four year period. The TWU addressed this concern, stating that their role would be limited to advisory and secretarial services and would not extend to negotiations. CSR confirmed that the TWU has had a very limited role, and submits that the Commission ought to now issue an authorisation for a sufficient period to cover the contracts.

4.5 CSR considered that the public benefit flowing from the proposed contract, arrangement or understanding will outweigh the detriment (if any).

5. Submissions from interested parties

5.1 The Commission sought submissions from a range of interested parties including the Department of Industrial Relations, Local Government Association of Queensland, Queensland Transport, the Transport Workers Union, Pioneer, Excel Concrete, Cement and Concrete Association of Australia, and the owner-drivers currently working for CSR. A response was received by the legal representative of some owner drivers, Phillips Fox, indicating an intention to lodge a submission. The consultation period was extended to 11 March 2002, at which stage the Commission was advised that no submission would be forthcoming. No other submissions were received.

Following the draft determination

5.2 The Commission again sought submissions from a range of interested parties in relation to the draft determination. One submission was received from Phillips Fox, acting on behalf of 42 owner-drivers. A copy of this submission may be obtained from the Commission's Public Register. A summary of the main issues raised by Phillips Fox is provided below.

5.3 Phillips Fox submitted that the owner-drivers it represents question some aspects of the public benefit claims made by CSR, but support the granting of authorisation regardless.

5.4 The concerns of these owner-drivers related to CSR's claims as to countervailing power, efficiency of operations and industrial harmony. These concerns are discussed in detail, where relevant, in section 6 of this determination.

5.5 The concerns expressed by Phillips Fox appear to relate largely to CSR's introduction of a fleet of 8 wheel trucks (as distinct from the 6 wheel trucks owned and operated by the drivers represented by Phillips Fox). Phillips Fox submitted that the means by which this fleet was introduced has raised issues related to contract law and to the unconscionable conduct and misleading and deceptive provisions of the Act. These concerns are currently the subject of legal action, and are discussed generally in section 6 of this determination.

Applicant's response to the submission from Phillips Fox

5.6 CSR responded to the concerns raised by Phillips Fox in a submission dated 24 February 2003. CSR contended that the concerns were not related to the issues of public detriment or public benefit currently before the Commission and noted that the owner drivers are not seeking denial of authorisation. Further, CSR denied the allegation that it had engaged in unconscionable conduct.

5.7 CSR also provided the Commission with a report prepared by Professor Neville Norman, who was engaged to advise CSR on the economic issues related to the matter. Broadly, this report supports the conclusions reached by the Commission in its draft determination.

6. Commission Evaluation

Future With-and-Without Test

6.1 The Commission's evaluation is in accordance with the statutory tests outlined in the Introduction to this determination. As required by the tests, it is necessary for the Commission to assess and weigh the likely public benefits and detriment flowing from the arrangements for which authorisation is sought.

6.2 In doing so, the Commission applies the "future with-and-without test" established by the Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the arrangements for which authorisation is sought.[4]

6.3 Under this test, the Commission compares the public benefit and anti-competitive detriment that the proposed conduct would generate in the future if authorisation is granted with the benefits and detriment generated if authorisation is not granted.

6.4 An important element of this comparison is the determination of the 'future with' the arrangements for which authorisation is sought and the 'future without' those arrangements. The future without the arrangements is also referred to as the 'counterfactual'.

6.5 The counterfactual provides the benchmark against which anti-competitive detriment and public benefits are assessed. In order to assess the impact of the proposed arrangements on competition, it is necessary to identify the market features that affect competition. These features are discussed below.

6.6 Broadly, the Commission considers that if authorisation is granted, contracts between owner-drivers and CSR will be collectively negotiated. If authorisation is not granted, the Commission considers that contracts between owner-drivers and CSR are likely to be negotiated on an individual basis.

The Relevant Markets

6.7 As discussed previously, the Commission and the Tribunal have considered a number of similar applications for authorisation with respect to collective negotiations between pre-mix concrete producers and independent cartage contractors.

6.8 In the ACT Concrete Carters case the Tribunal found that, in relation to collective negotiation in the concrete cartage market, there are two relevant markets, namely:

- the market for pre-mixed concrete (the concrete market); and

[4] See, for example, *Re Australasian Performing Rights Association* (1999) ATPR 41-701.

- the market for delivery services for pre-mixed concrete to transport it from the point of production to the point of use (the cartage market)[5].

6.9 The following discussion is largely based upon the Tribunal's assessment of the concrete and cartage markets and their relevant features. The Commission has not received information to suggest that the relevant markets are different or that circumstances have changed in respect of the current application.

The Concrete Market

6.10 The market for pre-mixed concrete involves the mixing of concrete in a batching plant to standards specified by a customer and its delivery at an agreed time to a construction site where it will be poured promptly. For technical reasons pre-mixed concrete must be placed in its final location within 90 minutes of mixing, and preferably sooner. Due to these restrictions, reliable delivery services and product quality are important to success in the market.

6.11 The time limitation on concrete restricts the distance that pre-mixed concrete can be transported from the plant that produces it. Pre-mixed concrete plants are designed and located to suit the projected market for pre-mixed concrete within delivery distance limitations.

The Cartage Market

6.12 Major concrete producers adopt the general practice of engaging carriers on a contract basis to deliver pre-mixed concrete to customers using their own delivery vehicles. Most carriers are individual small business owners who derive a gross income from the cartage rates paid by the concrete producers and the volume of concrete delivered. They are responsible for bearing their own costs to finance and operate their trucks.

6.13 In some respects there may be advantages to concrete companies employing company drivers – there is greater flexibility for the company in that it can direct an employee driver to undertake tasks in addition to the cartage of concrete. It also enables the company to lay-up trucks if there is a downturn in demand or to put on trucks when there is increased demand. Further, it gives the company a perspective as to the costs of operating a concrete truck.

6.14 The disadvantage of having company drivers is that the company is responsible for the upkeep and depreciation of the truck. A new truck costs in excess of $100 000. Although there is not the same flexibility with carriers, the company is not responsible for the maintenance and depreciation of the truck.

6.15 In the ACT Concrete Carters case, the Tribunal found that the cartage market does not allow free competition between all carriers for work at all yards. Concrete producers adopt a marketing policy of having their delivery trucks painted in a distinctive livery, effectively 'branding' the product being delivered. This precludes the use of the truck to deliver concrete made by

[5] *Re Lamont* (1990) ATPR 41-035, at 51521

another producer. The tie of each carrier to one producer is reinforced by the convention that the agitator mounted on the carrier's truck (without which the truck cannot be used to deliver concrete) is supplied and owned by the concrete producer. Therefore, a carrier is competitively constrained. To enter and participate in the market requires a carrier to only work for one producer, and to adhere to that producer's requirements. The volume of work a carrier preforms predominantly depends on the amount of business the producer wins.

Collective negotiation

6.16 CSR is seeking authorisation for the collective negotiation of contracts with independent carriers who deliver pre-mixed concrete by road for CSR from plants producing pre-mixed concrete in South-East Queensland. Specifically, CSR is seeking authorisation to enable it to offer independent carriers standard and agreed delivery rates and conditions.

6.17 Arrangements that have the purpose or likely effect of fixing, controlling or maintaining the price of goods supplied or acquired are deemed by the Act to substantially lessen competition and therefore contravene section 45 of the Act. Generally, collective bargaining arrangements that set uniform fees to independent providers participating in the arrangements are likely to lessen competition relative to a situation where each provider individually negotiates its own rates of payment.

Effect on competition

6.18 The Commission considers that there are some features of the collective negotiation arrangements and structural features of the market that are likely to limit the anti-competitive detriment of the collective negotiation.

Competition between existing concrete suppliers

6.19 Where collective agreements between competitors on rates of payment or supply conditions are industry-wide the scope for competition is lessened across all firms in an industry. The Commission is of the view that there may be significant detriment to competition from an industry-wide agreement, which may ultimately result in higher prices for end consumers.

6.20 The Commission notes that the collective agreements in this case are specific to CSR. While the arrangement will result in a lessening of competition between carriers engaged by CSR, it is the Commission's view that there is still scope for inter-firm competition between CSR and the other participants in the pre-mixed concrete market. It is the Commission's view that inter-firm competition is likely to limit the ability of any group of CSR carriers to raise prices above levels that would exist without the arrangements.

Availability of substitutes

6.21 The anti-competitive detriment resulting from collective agreements may also be reduced through the availability and use of substitutes. In this context CSR could potentially use the concrete cartage services of independent carriers engaged by other concrete companies or employ drivers to operate company owned trucks.

6.22 The Commission notes that the nature of the concrete cartage market is such that each carrier can only provide their services to one firm at a time. This is due to the requirement that their truck be painted in the firm's colours, and the arrangement whereby the agitator is supplied by the firm. In addition, due to the design of concrete trucks the scope for carriers to do other cartage work is limited.

6.23 Consequently a considerable degree of the carriers' capital investment is specific to contracting to a particular company. Therefore, the scope for competition between carriers to service different concrete companies is limited.

6.24 The Commission understands that CSR does not maintain and operate an extensive fleet of company owned trucks in South-East Queensland. Further the Commission also understands that new vehicles cost in excess of $100 000.

6.25 It is therefore the Commission's view that the short-term ability of CSR to introduce substitute concrete carters, and thereby reduce the anti-competitive effect of the collective agreement, is limited.

Scope for new entry

6.26 The capacity for new entrants to compete for the rights to undertake the business of existing market participants subject to a collective agreement also has implications for how competition in the market is affected by the collective arrangements. Collective arrangements that create barriers to entry will generally result in a greater anti-competitive detriment than collective agreements that do not impede entry.

6.27 Difficulties faced by new carriers entering the concrete cartage market include the capital investment requirements, which are tied once committed, and acquiring a contract with a concrete producer. Collective negotiation between carriers and concrete producers resulting in long term contracts may further reduce the likelihood of new carriers entering the concrete cartage market.

6.28 The Commission notes that CSR itself determines whether or not it will contract with new carriers and therefore whether entry is possible. This is contrasted with the application considered by the Commission and the Tribunal for the ACT Concrete Carriers Association (see paras 2.16 to 2.22). In that case entry was controlled by the TWU with the acquiescence of the pre-mixed concrete companies and the Commission commented that the detriment to competition resulting from the proposed collective bargaining arrangement was likely to be significant.

6.29 Whilst the Commission considers that there are barriers to entry to the concrete cartage market including the existence of long term contracts that may be the result of collective negotiations, it is also of the view that there is scope for new entry by independent contractors or employee drivers engaged by CSR given sufficient cost incentives. This scope for new entry provides some limitation to the anti-competitive detriment of the collective arrangements.

Nature of the collective bargaining agreement

6.30 The Commission notes that competition between carriers in the cartage market is already presently limited because of the nature of the work and market features including the matters outlined above that have the effect of tying carriers to a single concrete producer.

6.31 While it may be that the scope for competition over rates of payment to carriers engaged by CSR may be restricted by collective negotiation arrangements, CSR argues that the arrangement will continue to provide incentives for carriers to compete on truck size. In this regard the Commission accepts that the incentive based cartage rate formula in the standard form contract has led to increases in the average volume of concrete carted by the carriers resulting in reduced cost of delivery service for CSR.

Summary

6.32 Collective bargaining arrangements that set uniform fees to independent providers participating in the arrangements are likely to lessen competition relative to a situation where each provider individually negotiates its own rates of payment.

6.33 However, the Commission considers that that there are a number of features of the proposed collective negotiations and structural features of the relevant markets that are likely to limit the anti-competitive detriment of the collective negotiation. These features include:

- the fact that collective negotiations are confined to CSR and its concrete carriers meaning that competition between participants in the downstream concrete market shall be less affected by the proposed collective arrangements than might otherwise be the case;
- the existence of some scope for new entry in the cartage market given sufficient cost incentives; and
- the pre-existing limited level of competition between carriers in the cartage market along with the likelihood of some continued competition between CSR engaged carriers regarding truck size and efficiency.

6.34 Further and more generally, the Commission considers that the anti-competitive detriment of collective negotiation arrangements is likely to be lower where certain factors, such as a low level of competition (due to structural features such as those identified above) or the restricted coverage of the negotiations, are present. In this regard, the Commission notes that, as outlined above, the level of competition between carriers in the relevant markets is currently low. Further, the Commission notes that the collective negotiations will be restricted to negotiations between CSR and its carriers, and that other firms (including large firms such as Boral and Pioneer) will not be involved.

6.35 In light of the above, the Commission considers that the impact of the conduct for which authorisation is sought upon competition in the relevant market is likely to be very limited.

Public Benefits

6.36 To grant authorisation the Commission must be satisfied that any anti-competitive detriment is outweighed by the benefit to the public arising from the proposed conduct. CSR submitted that the following public benefits are likely to arise from the conduct for which authorisation is sought:

- Fairness of the negotiating process – countervailing power;
- Efficiency of operations;
- Compliance with statutory obligations; and
- Industrial harmony.

Fairness of the negotiating process – countervailing power

6.37 In its submission CSR has sought to rely upon public benefits arising as a result of improved fairness of the negotiation process. In the context of collective negotiation in the concrete cartage market, this public benefit was previously recognised by the Commission in the application for authorisation lodged by the Pre-mixed Concrete Manufacturers Association of Queensland (A2564).

6.38 Arguments based on countervailing power essentially relate to a change in the power relativities of the parties to a proposed agreement. An increase in countervailing power, raised in the authorisation context, typically involves one party attempting to improve its bargaining position relative to another, for example through a collective negotiation. The Commission does not accept that a mere change in the amount of countervailing power is, in itself, necessarily a public benefit. Rather, the Commission will focus on the circumstances of each case and the likely outcomes resulting from the change in bargaining position flowing from the proposed arrangements for which authorisation is sought. It is these likely outcomes that are essential to the net public benefit test. Generally the Commission would accept an argument about increasing countervailing power as a public benefit where it is satisfied that enhancing that power would benefit the broader community, for example, if a likely result of increasing a party's countervailing power was the lowering of prices for consumers.

6.39 For the reasons discussed above, the Commission considers that the relevant carriers are largely locked into working exclusively for CSR. Individual carriers' negotiating power is not very strong: during an industry downturn there is less demand for their services, and even in the case of a modest upturn, concrete companies have the capacity to buy additional trucks or to put on the road trucks that they have laid up. It is only in the case where there is an industry upturn and the company chooses not to put additional trucks into service or engage additional carriers that the negotiating strength of carriers is likely to increase.

6.40 The Commission notes that under the Act it is unlawful for companies to engage in unconscionable conduct. These provisions are designed to help small businesses that find themselves victims of harsh or unfair behaviour by larger parties with which they have a commercial relationship. Section 51AC of the Act prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services.

6.41 It is important to note that authorisation cannot provide any party with immunity from the unconscionable conduct provisions of the Act.

6.42 The Commission notes the submission of Philips Fox to the effect that in the course of negotiating the standard form contracts in 1995, CSR sought to exploit the imbalance in bargaining power between it and the owner-drivers. Phillips Fox claimed that the overall public benefit recognised by the Commission in its draft determination over-stated the public benefit likely to arise from any improved fairness of the negotiation process. Further, Phillips Fox has submitted that the Commission should impose a condition requiring CSR to treat its owner-drivers in an equitable manner when negotiating contractual terms. The imposition of conditions is considered further at paragraphs 6.78 – 6.80 of this determination.

6.43 In its submission dated 24 February 2003, CSR denied these claims and stated that in its view Phillips Fox had failed to establish that the imposition of conditions by the Commission would be justified. In particular, it appears to be CSR's view that the arrangements satisfy the net public benefit test and do not require the imposition of conditions aimed at increasing public benefit.

6.44 The Commission notes that carriers cannot easily switch between concrete suppliers should harsh or unfair contractual terms be imposed upon them. However, the authorisation would, if granted, allow carriers to continue to come together to negotiate which may increase the input of carriers into the contract they enter with CSR and may also reduce the likelihood of them being treated unfairly or exploited.

Efficiency of operations

6.45 CSR has submitted that the collective negotiation will lead to increased efficiencies. It is the Commission's view that there are four possible aspects of increased efficiency:

- increases in average volume of concrete carted;
- reduction in transaction costs;
- standardisation of operations; and
- improved resource allocation.

6.46 CSR has submitted that significant cost savings can be achieved by increasing the volume of concrete carted by each carrier. Accordingly, CSR proposes to include financial incentives in the collectively negotiated contracts which will encourage carriers to increase cartage volume. It is the Commission's view that such incentives, such as linking the term of the contract to the cartage

capacity of the truck, are likely to increase efficiencies by reducing the average cost of delivery services.

6.47 The Commission notes the submission from Phillips Fox on behalf of 42 owner drivers, which suggests that the introduction of a fleet of 8 wheel trucks has disadvantaged certain existing owner-drivers. In particular, Phillips Fox submitted that certain owner-drivers have not been encouraged to increase cartage volume nor provided with the opportunity to do so. The Commission understands that this concern is currently the subject of legal action.

6.48 Transaction costs in negotiating a collective bargaining agreement may be lower where a firm is able to negotiate a single firm-wide agreement, rather than separate agreements for all individual contractors.

6.49 The Commission accepts that transaction costs arising from negotiations as contemplated in the current application are likely to be lower than if CSR had to negotiate separately with each carrier. There may also be savings to carriers who, if they had to negotiate with CSR on an individual basis, may separately engage their own legal, financial and accounting advice. The development and use of collectively negotiated standard form contracts by the parties is likely to ensure that important contractual terms and conditions are dealt with consistently and may reduce costs associated with drafting and interpreting these agreements. The Commission accepts that a reduction in transaction costs is a public benefit that is likely to result from the proposed collective arrangements.

6.50 CSR has also argued that the proposed conduct will lead to higher levels of business efficiency through the standardisation of operational practices, in particular through concessions by the carriers for partial reductions in allowances paid for minimum cartage and waiting time. However, in this instance CSR has not provided evidence to support this claim and the Commission does not accept this as a public benefit flowing from the collective negotiation.

6.51 CSR has also claimed increased efficiencies through improved resource allocation. In the circumstances it is the Commission's view that CSR has not provided evidence demonstrating that such a public benefit would arise as a result of the collective negotiation. Accordingly the Commission does not accept this as a public benefit flowing from the collective negotiation.

Compliance with statutory requirements

6.52 In support of application A50016, CSR claimed that collectively negotiated contracts would ensure that carriers have the financial capacity and knowledge (through training) to comply with statutory requirements (including maintenance and roadworthiness of vehicles, health and safety issues and insurance). CSR submitted that carriers currently adopted varying procedures in relation to complying with statutory regulations, and that the uniform procedures in the proposed agreement would facilitate compliance.

6.53 CSR submitted that, despite the Commission's view that the benefit could be obtained by individual level contracts rather than collectively negotiated

contracts, the safety net payment under the cartage rate formula in the standard form contract allows carriers to comply with legal requirements relating to roadworthiness, safety, environmental protection and pollution control.

6.54 The Commission has previously considered that there are really two elements in this argument. The first relates to the submission that the current contract and collective bargaining process facilitates compliance with legislation. The second is that the negotiated rate incorporates financial provisions to allow drivers to comply with their statutory obligations, including proper maintenance of their vehicles.

6.55 The Commission accepts that where legal obligations are specified in contracts there may be an increased incentive for carriers to meet their statutory obligations. However, the Commission considers that satisfactory compliance with statutory requirements would also be likely to be achieved by individually negotiated contracts with carriers. Further, the Commission notes that compliance with legal obligations is mandatory and expects that such compliance can and should occur. Consequently, the Commission does not accept this as a public benefit resulting from the collective arrangements.

Industrial harmony

6.56 CSR has argued that the proposed conduct will enable the parties to achieve industrial harmony through the equality of treatment of carriers.

6.57 The Commission notes here the comments of the Tribunal in the ACT Concrete Carters case:

> ' … in order … to accept that a public benefit exists, the evidence must clearly establish that the granting of authorisation will lead to significantly greater industrial harmony in the future than a likely alternative.'[6]

6.58 In determining the weight to be afforded to arguments of industrial harmony, the Commission must therefore consider likely future industrial relations between the parties with the proposed conduct and likely future industrial relations between the parties without the proposed conduct.

6.59 The Commission has previously accepted that in some circumstances collective agreements are likely to promote industrial harmony and reduce the need for litigation. In reaching this view however, the Commission noted that collective negotiation was not the only mechanism by which the benefit of industrial harmony could be achieved (Steggles Limited A30183 and Inghams Limited A90595). In order for the Commission to accept such a benefit, it must be evidenced that the collective negotiation would, or would be likely to, lead to improved industrial harmony when compared to the likely situation without collective negotiation.

[6] Re Lamont (1990) ATPR 41-035, at 51525

6.60 In similar circumstances to the present application for authorisation, the Commission has accepted that maintaining equity in rates of payment and terms of employment would be likely to improve industrial harmony relative to a situation where each carrier had different rates of payment or terms of employment (CSR Limited (Qld) A50016). It was the Commission's view that disputes may arise from perceptions of unequal treatment of different workers within and across firms and that such dissatisfaction may manifest itself as lower levels of discretionary effort on the job, or by engaging in industrial disputes.

6.61 The Commission is aware that, historically, industrial disputes have arisen between CSR and its contract carriers where there has been an actual or perceived inequity in the treatment of carriers. For example, the Commission understands that in 1998 an industrial dispute arose between CSR and its carriers in WA following changes made by CSR to the system of allocating cartage opportunities to its carriers. Similarly, it is understood that in 2001 a dispute arose in South-East Queensland between CSR and its carriers regarding allegations of preferential treatment being given by CSR to certain carriers.

6.62 It is clear from its submission that CSR believes that collective negotiation has led to improved industrial harmony when compared to alternative arrangements. CSR claimed in their submission that "[s]ince the standard form agreements were collectively negotiated and entered into, there have been no industrial stoppages or threats of stoppages."

6.63 The Commission notes the submission from Phillips Fox that purported to contradict this claim. Phillips Fox referred to the litigation mentioned above. The Commission accepts that, in some circumstances, litigation may be *prima facie* evidence of industrial discord. However, this will not always be the case.

6.64 Further, the Commission notes that Phillips Fox did not seek the denial of authorisation, or the revocation of interim authorisation, and so it appears that the owner drivers represented by Phillips Fox accept the overall benefits of collective bargaining.

6.65 Having regard to the submissions from CSR and Phillips Fox, the Commission is not convinced that it has been presented with sufficient evidence to conclude that the conduct for which authorisation is sought will provide greater industrial harmony.

Transport Workers Union

6.66 In its determination of Authorisation 50016, the Commission noted that the TWU would provide advice and secretarial services to the committee of carriers in their negotiation with CSR. While the Commission considered that this role was appropriate, it noted that it would be concerned if that position was to change and the union set standard conditions on an industry-wide basis. The Commission considered that this would increase the likely anti-competitive detriment of the collective bargaining arrangements.

6.67 CSR submits that the TWU has not sought to negotiate any terms and conditions with CSR and has had a very limited role in providing advice and secretarial services to carriers since the previous authorisation was granted.

Conclusion

6.68 As stated previously, the Commission considers that the collective bargaining arrangements in the terms proposed by CSR are likely to have a detrimental effect on competition. In particular, the Commission is concerned that the collective negotiation is likely to reduce competition at the carrier level. The Commission notes however that there are some features of the collective negotiation and structural features of the market which are likely to limit the anti-competitive detriment of the collective negotiation. Accordingly, the Commission does not consider that the arrangement is likely to result in significant anti-competitive detriment.

6.69 The Commission accepts that there are public benefits resulting from the collective negotiation. In particular, the Commission considers that the collective negotiation will result in, or is likely to result in, improved operational efficiencies through a reduction in transaction costs and improved industrial harmony.

6.70 Consequently, following consideration of the submissions by CSR, and the information before it, the Commission concludes that the public benefits likely to result from the collective arrangements will outweigh the anticompetitive detriment. The Commission notes however that this authorisation does not compel any party to participate in collective bargaining arrangements and that this authorisation does not preclude any party from developing alternative arrangements.

6.71 Furthermore, as indicated above, collective bargaining potentially has an anti-competitive effect. While, as indicated above, the Commission is satisfied that in this case the conduct generates a public benefit outweighing any public detriment, the inherent nature of the conduct suggests that it is appropriate to issue a time-limited authorisation so as to allow the Commission to review the impact of the authorisation at a future date. The Commission therefore proposes to grant authorisation for five years.

6.72 The Commission notes that, notwithstanding that this authorisation will protect the entry into and giving effect to contracts covered by this determination, it is the Commission's view that this protection only lasts during the term of the authorisation and not the term of the contracts that may be entered into under the protection of the authorisation. Accordingly it is the Commission's view that the immunity conferred by the authorisation will cease upon the expiry of this determination.

Exclusionary Provisions

6.73 Exclusionary provisions, sometimes referred to as primary boycotts, are agreements between persons in competition with each other which have the *purpose* of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes

of persons. Such agreements are a *per se* contravention of section 45 of the Act, that is, no assessment as to the effect on competition is required in respect of this type of conduct.

6.74 An agreement amongst competitors to share available work is more likely to amount to a primary boycott where the *purpose* of the arrangement is to prevent, limit, or restrict the supply of goods or services. An example of this may be an agreement that a service provider will not work at particular times, thereby restricting the supply of that party's services to its consumers. In contrast a system that ensures or facilitates the supply and availability of services, for example a medical roster designed to ensure the provision of medical services after hours and/or on weekends, does not have the proscribed purpose to prevent, limit, or restrict the supply of medical services.

6.75 While a work allocation system that prevents, limits, or restricts the provision of services may be a breach of the Act, it may also give rise to a net public benefit and therefore be authorisable under section 88 of the Act.

6.76 In its submission dated 24 February 2003, CSR requested that the Commission include in its determination a paragraph as to the conduct that is not protected by this authorisation.

6.77 The Commission does not consider it necessary to include a specific paragraph in the form suggested by CSR. Rather, it has elected to include general information about exclusionary provisions, in light of the above discussion, to guide parties as to the conduct that is not authorised by this determination.

Conditions

6.78 As noted above, Phillips Fox submitted that the authorisation should be subject to a condition requiring CSR to treat its owner-drivers in an equitable manner when negotiating contractual terms.

6.79 Where the Commission is concerned that there may be some uncertainty about whether, in the circumstances, the public benefit outweighs the public detriment, the Commission may be able to impose conditions aimed at reducing this uncertainty.

6.80 In this instance, however, the Commission is of the view that there is no uncertainty as to the existence of the net public benefit arising from the arrangements for which authorisation is sought. Accordingly, the Commission considers that it is not necessary to impose any condition on this authorisation.

7. Determination

Application A90808

7.1 On 29 October 2001 CSR Limited (CSR) lodged application A90808 with the Australian Competition and Consumer Commission (the Commission).

7.2 The application was made under subsection 88 (1) of the *Trade Practices Act 1974* (the Act) to make or give effect to make or give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act (Form B, Schedule 1 of the Trade Practices Regulations 1974).

7.3 Broadly, authorisation was sought to engage in the collective negotiation of contracts between CSR and the independent contractors who deliver pre-mixed concrete by road for CSR from plants producing pre-mixed concrete in South-East Queensland. This conduct was previously the subject of an authorisation (A50016) that expired on 31 October 2001.

7.4 Interim authorisation in relation to the conduct was granted by the Commission on 7 November 2001, and will cease when this determination comes into effect.

Statutory test

7.5 For the reasons outlined in section 6 of this determination, the Commission concludes that, subject to the terms and conditions set out below, in all the circumstances, the arrangements for which application A90808 is seeking authorisation:

- are likely to result in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

7.6 The Commission therefore **grants** authorisation to CSR under section 88 (1) of the Act and the Competition Code in respect of the proposed arrangements that are the subject of application A90734. Authorisation is granted for a period of five years.

Conduct that is authorised

7.7 The carriers are authorised to enter into collective negotiations with CSR through representative/s appointed by the carriers from time to time, as to the rates and conditions for delivery by road transport of pre-mixed concrete for CSR from plants producing pre-mixed concrete in South East Queensland.

7.8 The carriers and CSR are each authorised from time to time to enter into and give effect to contracts, arrangements or understandings with each other whereby:

- CSR offers the carriers standard and collectively negotiated rates and conditions for delivery by the carriers by road transport of pre-mixed concrete from CSR plants situated within the area; and

- the carriers agree to undertake the delivery by road transport of pre-mixed concrete upon such standard and collectively negotiated rates and conditions.

7.9 This authorisation also applies to future independent contractors of CSR in South-East Queensland.

7.10 The Commission notes that this authorisation does not compel any party to participate in collective bargaining. CSR and carrier participation in any collective bargaining arrangement is entirely voluntary.

Conduct that is not authorised

7.11 This authorisation is limited to the conduct outlined above. Without limiting what is not authorised, the Commission notes that, in particular, nothing in this authorisation permits:

- The making of any contract, arrangement or understanding containing an exclusionary provision as defined in s 4D of the Trade Practices Act 1974 (as outlined at paragraphs 6.73 and 6.74 of this determination);
- Collective decisions to withhold the supply of cartage services to CSR, or collective decisions as to the allocation of work; and
- without limiting the generality of the foregoing, the making of any contract, arrangement or understanding containing any provision, the substance or effect of which would be to prevent or limit CSR and any carrier or carriers negotiating and agreeing upon variations to the standard and agreed rates and conditions in respect of particular jobs such as on-site plants or otherwise as circumstances might require.

Conclusion

7.12 This determination is made on 10 June 2003. Pursuant to section 101 of the Act, a person dissatisfied with this determination may apply to the Australian Competition Tribunal for its review. An application for review must be made within 21 days of the date of this determination; that is, on or before 1 July 2003.

7.13 If an application is made to the tribunal, the determination will come into force:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or

- where the application is withdrawn – on the day on which the application is withdrawn.