

Our reference
ECS/CSRB9974-9008457

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**CORRS
CHAMBERS
WESTGARTH**
lawyers

31 March 2005

Sydney
Melbourne
Brisbane
Perth
Canberra
Gold Coast

By courier

Mr Scott Gregson
Acting General Manager
Adjudication Branch
Australian Competition and Consumer Commission
470 Northbourne Avenue
DICKSON ACT 2602

Partner
Eddie Scuderi (07) 3228 9319
Email: eddie.scuderi@corrs.com.au

Dear Sir

FILE No:
DOC:
MARS/PRISM

Further Application for authorisation by CSR Building Products Ltd

We act for CSR Building Products Ltd (**CSR**). As you know, we lodged an application for interim authorisation for CSR under cover of our letter of 24 March 2005 in relation to CSR's proposed negotiations with Owner Drivers involved in carting bricks and pavers in the Brisbane area.

We have now received instructions to lodge a further application for authorisation (including interim authorisation) for proposed negotiations between CSR and a different group of owner operators, this time involved in the cartage of raw materials to CSR plants for use in the manufacture of bricks and pavers. The owner drivers operate in and around Brisbane and the quarries situated at Cooroy north of Brisbane.

The attached application for authorisation is similar (but not identical) to the one lodged in relation to the other group of owner drivers.

We are instructed that there is a pressing need to commence negotiations to put a contract in place, hence the need for an interim authorisation.

Application for authorisation

The owner-drivers wish to collectively bargain with CSR.

Because any agreement reached with the owner-drivers may be deemed to substantially lessen competition because of the operation of s 45A of the *Trade Practices Act 1974* (Cth) (**TPA**), CSR seeks an authorisation from the ACCC under s 88(1) of the TPA for such a collective agreement with owner-drivers.

We **attach** a completed Form B, a cheque for \$7,500 (the prescribed application fee), and supporting information for the authorisation.

**AUST. COMPETITION &
CONSUMER COMMISSION
CANBERRA**
- 1 APR 2005

31 March 2005

Australian Competition and Consumer Commission

**Further Application for authorisation by CSR Building
Products Ltd**

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Interim authorisation

Because current arrangements with the owner-drivers are not subject to written agreements, CSR also seeks an interim authorisation under s 91(2) of the TPA to allow it to negotiate with the owner-drivers and reach a provisional agreement, subject to the ACCC's favourable view of its application for authorisation.

CSR is happy to discuss this application with the ACCC further. We invite the ACCC to contact Eddie Scuderi on (07) 3228 9319 if it would like to do so.

We look forward to hearing from the ACCC.

Yours faithfully

Corrs Chambers Westgarth



Eddie Scuderi
Partner

attachments

FORM B

Commonwealth of Australia

Trade Practices Act 1974 — subsection 88(1)

AGREEMENTS AFFECTING COMPETITION APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88(1) of the *Trade Practices Act 1974* for an authorisation under that subsection to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

(PLEASE READ DIRECTIONS AND NOTICE ON BACK OF FORM)

1 (a) Name of applicant:

CSR Building Products Ltd ACN 008 631 356

(See Direction 2 on the back of this Form)

(b) Short description of business carried on by applicant:

Cartage of raw materials for use in manufacture of bricks and pavers

(c) Address in Australia for service of documents on the applicant:

Corrs Chambers Westgarth
Lawyers
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000

2 (a) Brief description of contract, arrangement or understanding and, where already made, its date:

Collective bargaining arrangement with owner-drivers

(c) Names and addresses of other parties or proposed parties to contract, arrangement or understanding:

See attachment

(See Direction 4 on the back of this Form)

3 Names and addresses (where known) of parties and other persons on whose behalf application is made:

See attachment

4 (a) Grounds for grant of authorisation:

See attachment

(b) Facts and contentions relied upon in support of those grounds:

See attachment

(See Notice 1 on the back of this Form)

5 This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the above mentioned contract,

arrangement or understanding.

(a) Is this application to be so expressed?

No

(b) If so, the following information is to be furnished:

(i) the names of the parties to each other contract, arrangement or understanding:

N/A

(ii) the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application:

N/A

(See Direction 5 and Notice 2 on the back of this Form)

6 (a) Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974)?

No

(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

N/A

(c) If so, by whom or on whose behalf are those other applications being made?

N/A

7 Name and address of person authorised by applicant to provide additional information in relation to this application:

Eddie Scuderi

Level 35

Waterfront Place

1 Eagle Street

BRISBANE QLD 4000

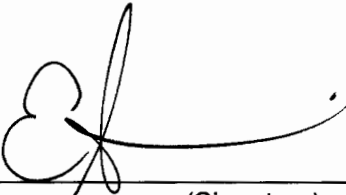
Phone: (07) 3228 9319

Fax: (07) 3228 9444

Email: eddie.scuderi@corrs.com.au

Signed on behalf of the applicant:

Dated 31 March 2005



(Signature)

Eddie Scuderi

(Full Name)

Solicitor for the applicant

(Description)

DIRECTIONS

- 1 Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
- 2 Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
- 3 In item 1(b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
- 4 Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished—
 - (a) in so far as the particulars or any of them have been reduced to writing by lodging a true copy of the writing; and
 - (b) in so far as the particulars of any of them have not been reduced to writing-by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced writing.
- 5 Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the matter in which those contracts, arrangements or understandings vary in their terms from the contract, arrangement or understanding referred to in item 2.

NOTICE

- 1 In relation to item 4, your attention is drawn to subsections 90(6) and (7) of the *Trade Practices Act 1974*, which provide as follows:

"(6) The Commission shall not make a determination granting an authorisation under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct, unless it is satisfied in all the circumstances that the provision of a proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if—

 - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;*
 - (b) the proposed covenant were given, and were complied with; or*
 - (c) the proposed conduct were engaged in,*

as the case may be.

(7) The Commission shall not make a determination granting an authorisation under subsection 88(1), or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding, or in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that 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 or complying with the covenant."
- 2 If an authorisation is granted in respect of a proposed contract, arrangement or understanding the names of the parties to which are not known at the date of this application, the authorisation shall, by subsection 88(14) of the *Trade Practices Act 1974*, be deemed to be expressed to be subject to a condition that any party to the contract, arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.

Attachment to Form B application for authorisation

1 Background

- 1.1 CSR Building Products Ltd (**CSR**) was previously known as Monier PGH Holdings Limited and, before that, Monier PGH Limited. CSR trades as "PGH Bricks & Pavers" in and around Brisbane, Queensland.
- 1.2 CSR contracts with semi-tipper owner-drivers to deliver its raw materials such as clay and shale to factories at Cooroy, Strathpine and Oxley in and around Brisbane. The raw material is then used in the making of building products (bricks, pavers, blocks, pallets, and related products).
- 1.3 The semi-tipper owner drivers are small businesses, typically run by a sole operator or a husband and wife. A significant part of their income is from cartage services performed for CSR.
- 1.4 The semi-tipper owner drivers wish to collectively negotiate with CSR to supply their services to CSR. CSR supports the wish to collectively negotiate, which is why it applies to the ACCC for interim authorisation allowing the owner operators to collectively negotiate with CSR, and for authorisation of the concluded agreement.

2 The proposed agreement

- 2.1 CSR proposes to enter negotiations with the owner operators to make a collective agreement in relation to their delivery of CSR's raw materials from the CSR quarries to CSR's factories.
- 2.2 The proposed agreement will involve:
 - (a) standard rates to be paid by CSR for delivery.
 - (b) a formula for the progressive increases of those rates;
 - (c) prescribed conditions of delivery by the owner operators; and
 - (d) a provision for review of rates based on productivity.
- 2.3 CSR is not seeking an authorisation for making a contract or arrangement or arriving at an understanding containing an exclusionary provision.
- 2.4 At this stage no draft contract for the proposed arrangements exists.

3 Interim authorisation

- 3.1 Current arrangements with the owner operators are not the subject of a written contract as previously written contracts have expired. All parties wish for negotiations to commence as soon as possible, so that an agreement can be finalised as soon as possible.
- 3.2 CSR requests that the ACCC grant an interim authorisation so that:
 - (a) it can collectively negotiate with the owner operators as to the terms of a collective agreement with the owner operators;

- (b) it can reach agreement with the owner operators, expressly subject to the ACCC granting a final authorisation as sought by CSR; and
- (c) it can give effect to that agreement until the ACCC makes a final determination in relation to this application for authorisation.

4 Grounds for grant of authorisation

- 4.1 CSR seeks authorisation on the basis that the public benefit from the proposed agreements will continue to outweigh the (deemed) lessening of competition. CSR sets out the public benefits below.

CSR's prior experience

- 4.2 CSR Limited (CSR's ultimate holding company) has previously applied to the ACCC to authorise similar conduct in relation to lorry owner-drivers delivering pre-mixed concrete in and around Brisbane. On 10 June 2003, the ACCC granted the authorisation sought: authorisation number A90808, public register number C2001/1525 (**2003 authorisation**).
- 4.3 The 2003 authorisation was, in essence, an extension of an authorisation previously made by the ACCC on 9 October 1997: authorisation number A50016.
- 4.4 CSR asks the ACCC to specifically note its determination less than two years ago that the public benefits of a similar arrangement (which are similar to the public benefits CSR submits exist in relation to this arrangement) outweighed the detriment to competition.

Collective bargaining in general

- 4.5 Since the 2003 authorisation, collective bargaining has been favourably viewed by the ACCC and the legislature.
- 4.6 In 2002–2003, a committee chaired by Sir Daryl Dawson AC KBE CB conducted an independent review of the competition provisions of the *Trade Practices Act*. One of the areas specifically considered by the Dawson Committee was the operation of the *Trade Practices Act* as it applied to collective bargaining and small business.
- 4.7 The Dawson Committee's report recommended that a notification process be adopted for collective bargaining by small business, replacing the current authorisation process. In supporting its recommendation, the Dawson Committee noted (p 119):

The [proposed notification] process would have to be confined to small business in negotiation with big business where experience has shown that collective bargaining may do little or no harm to the competitive process and may generate public benefit.

- 4.8 Legislation intended to give effect to this recommendation is included in the *Trade Practices Legislation Amendment Bill (No 1) 2005* (Cth), however the reforms proposed by that Bill will not be enacted in sufficient time for CSR and the owner operators to avail themselves of them.

- 4.9 In July 2004, the ACCC published an “issues paper” about authorising and notifying collective bargaining and collective boycott provisions (**Issues Paper**). CSR has considered the Issues Paper, and notes that its submissions in support of its application for authorisation are broadly consistent with it.
- 4.10 CSR does not submit that these developments, of themselves, lend weight to this particular application. However, CSR submits that these developments indicate that a countervailing public benefit can often be found for the competitive detriment caused by collective bargaining.

Effect on competition

- 4.11 Under s 90(6) of the *Trade Practices Act*, the ACCC must weigh the public benefit of the proposed agreement against “the detriment to the public constituted by any lessening of competition that would result, or be likely to result” from the proposed agreement.
- 4.12 The proposed arrangement between CSR and the owner operators will contravene s 45 of the *Trade Practices Act* as an arrangement substantially lessening competition because of the operation of s 45A, which deems some arrangements to substantially lessen competition.
- 4.13 CSR submits that there is unlikely to be any significant lessening of competition as a result of the proposed arrangement. The proposed arrangement will only apply in relation to 9 owner operators, all of whom currently deliver raw materials for CSR. The proposed arrangement only applies in the Brisbane and Cooroy areas.
- 4.14 Further, CSR competes with others (eg, Boral, Austral, Claypave) in relation to the supply of bricks and pavers to consumers which are made from the raw materials to be carted under the proposed new contract. The proposed arrangement does not directly affect any of CSR’s competitors.
- 4.15 Accordingly, CSR submits that only a limited public benefit is necessary for the ACCC to authorise the proposed arrangement.

Industrial harmony

- 4.16 CSR submits, on the basis of its previous experience, that collective negotiation of standard terms and conditions, including rates, and allowing owner operators to collectively negotiate, will help ensure industrial harmony. If standard form agreements are entered into, and owner operators are allowed to collectively negotiate, the likelihood of industrial stoppages, or threats of stoppages, will be lessened.

Fairness of the negotiating process

- 4.17 As noted above, the owner operators are small businesses, sometimes sole operators. A collective bargaining process will allow the owner operators to collectively bargain and achieve a result that is fair to CSR, each owner operator individually, and to the owner operators collectively.
- 4.18 In CSR’s experience (particularly in relation to pre-mixed concrete lorry owner-drivers), a collective bargaining arrangement, such as the one proposed, is

likely to lead to a fair result to owner operators (leading to a lower likelihood of industrial or legal action over the term of the collective agreement) and CSR.

- 4.19 Importantly, allowing the owner operators to negotiate collectively will allow them to more effectively compete against larger organisations wishing to compete for CSR's cartage requirements.

Efficiency of operations

- 4.20 CSR submits that a collective arrangement with its owner operators would lead to benefits for CSR, as well as the owner operators. Consequently, it is likely that CSR's competitiveness will be improved.

- 4.21 The benefits for CSR are principally:

- (a) standardisation of operations (see clauses 3, 4, and 16 and schedule 4 of the attached confidential draft agreement); and
- (b) improved resource allocations, as a consequence of the standardisation of operations.

- 4.22 A collective arrangement will allow CSR to standardise its operations in relation to all owner operators. All owner operators will be subject to the same terms. This will lead, CSR submits, to improved allocations of CSR's resources.

- 4.23 These benefits cannot be quantified until a final arrangement is reached, however CSR submits that benefits in this regard are likely outcome and an objective of the process.

- 4.24 More efficient operations by CSR are likely to make CSR more competitive in the markets in which it competes, principally the market for the supply of bricks and pavers (and other related goods) to consumers. There is a corresponding public benefit from that increased competition (*cf Trade Practices Act s 2*).

Reduced transaction costs

- 4.25 CSR submits there will be the usual reduction in transaction costs associated with the collective bargaining arrangement (see, *eg*, Issues Paper pp 12–13).

- 4.26 CSR is currently required to negotiate individually with each owner operator. Each agreement must be negotiated and drafted individually. Legal advice is often obtained in relation to matters raised in negotiations. This is a significant transaction cost to CSR that CSR submits will be reduced in a collective bargaining arrangement.

- 4.27 Similarly, the transaction costs for each owner operator are likely to be lower. Instead of each owner operator having to negotiate individually (and incur negotiating, drafting, and advisory costs themselves), their share of the collective costs are likely to be lower than their previous costs.

- 4.28 The lowering of CSR's transaction costs are likely to make CSR more competitive in the markets in which it competes (see paragraph 4.24 above).

5 Term of the authorisation

- 5.1 CSR submits that an appropriate term for the grant of the authorisation is three years. This is the period for which similar authorisations have been granted (see paragraphs 4.2 and 4.3 above).

6 Names and addresses of other parties to the proposed agreement

- 6.1 There are 10 owner operators who wish to collectively bargain with CSR in the circumstances for which CSR seeks interim and final authorisation. Their names and addresses are:

(a) Kevin Alfred Bryer
Kevin A Bryer Nominees Pty Ltd
ABN 38 987 473 270
12 Jarvis Court
Joyner 4500
(07) 38821048

(b) Keith Leslie Messenger
Messenger Contracting
ABN 38 130 272 231
Lot 4 Hughes Road West
Dakabin 4503
(07) 3888 2330

(c) Kenneth John Pocock
Flyteline Pty Ltd
ABN 24 009 953 100
43 Sugars Road
Bellbowrie 4070
(07) 3202 6807

(d) Grahame John Rigby
Rigby Transport
ABN 21 981 138 075
PO Box 2381
Brookside Centre 4053

(07) 3202 6807

(e) Paul David Clarke

Sandax Pty Ltd

ABN 39 034 521 606

204 Bangalow Street

Bridgeman Downs 4053

(07) 3263 9904

(f) Aldo Filiaggi

Torp (No 22) Pty Ltd

ATF The Filiaggi Family Trust

ABN 97 371 620 102

1 Garozzo Street

Boondall 4034

(07) 3265 1125

(g) David Maurice French

French Transport Services Pty Ltd

ABN 88 063 449 070

71A Wildey Street

Raceview 4305

(07) 3288 9666

(h) Lyal Wayne Daniell

Cordeaux Nominees Pty Ltd

ABN 64 117 185 398

6-8 Arline Street

Redbank Plains 4301

(07) 3814 4735

(I) Sam Zerafa

Rathyes Pty Ltd

ABN 94 855 782 150

96 Rogers East Parade West

Everton Park 4053

(07) 3353 3649