

Our reference
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Waterfront Place
1 Eagle Street Brisbane QLD 4000
GPO Box 9925 QLD 4001
Tel (07) 3228 9333
Fax (07) 3228 9444
www.corrs.com.au

**CORRS
CHAMBERS
WESTGARTH**
lawyers

26 April 2005

Sydney
Melbourne
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Canberra
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By email: susan.philp@accc.gov.au

Susan Philp
Acting Director, Adjudication
Australian Competition & Consumer
Commission
PO Box 1199
DICKSON ACT 2602

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

Dear Ms Philp

Applications for Authorisation A90964 and A90965 by CSR

We refer to your email of 20 April 2005 attaching for our comment a copy of a submission received from the Department of Employment and Workplace Relations (**the Department**).

We are instructed to respond as follows:

- 1 The Department's primary submission appears to be that the Commission should not grant an interim authorisation where to do so would permanently alter the competitive dynamics of the market. In this regard, the Department appears to be concerned that trade unions, and in particular the Transport Workers' Union (**TWU**) may become involved in negotiating standard conditions at CSR, which the TWU would then seek to apply on an industry-wide basis.
- 2 CSR strongly disagrees with the Department's submission and challenges the central claims made in the Department's submission on the grounds set out below.
- 3 As confirmed in our letter to you of 18 April 2005, the CSR Clay cartage business will not have any trade union involvement in the negotiations.
- 4 The TWU does have a representative involved with the owner drivers contracted to transport bricks and pavers for CSR. However, that role is confined to an advisory role to the owner drivers, and the TWU representative is not directly involved in the negotiations.
- 5 The TWU's involvement with the owner drivers in the bricks and pavers business is a long-standing involvement. It does not arise as a result of the proposed negotiations for a collective agreement. CSR does not recognise the TWU as representing the owner drivers and does not, and will not, deal with the TWU on that basis.
- 6 The Department's submission makes reference to the authorisations obtained by CSR in 1997 for arrangements with owner drivers delivering pre-mixed concrete (**the Readymix business**). The TWU provided an advisory role to the owner

drivers involved in the Readymix business. The TWU filled that role for many years prior to the collective negotiation of the authorised agreement.

- 7 Importantly, CSR is not aware of any evidence to support the Department's concern that the TWU would use a collectively negotiated contract at CSR to seek a standard set of terms and conditions on an industry-wide basis. CSR notes that the Department has not provided any evidence that the Readymix collectively negotiated agreement has been implemented, or sought to be implemented, in any business operating in competition with the Readymix business. CSR is not aware of any other business adopting the contract negotiated in relation to the Readymix business.
- 8 The Department also makes reference to the evidence of the Housing Industry Association to the Senate Economics References Committee Inquiry. In that inquiry the HIA suggested that once a common rate for small contractors was negotiated with a representative large head contractor, the building union could then move to publicise the arrangements as an accepted standard, which it would then seek to impose on the entire industry. Whether or not that concern is legitimate, one must take into account the difference between the small contractors involved in the construction industry, to which the HIA was referring, with the owner drivers providing transportation services to the CSR Bricks and Pavers and Clay businesses.
- 9 The independent contractors supplying cartage services to CSR have very substantial investments in the vehicles used to provide the cartage services. The amount of investment involved has an impact on the terms and conditions, and in particular, the length of contract which CSR will offer those owner drivers. The difference in the nature of vehicles involved, and the different technology employed by those vehicles will also have a potential impact on rates paid and length of contract. These factors can be contrasted with the smaller independent contractors commonly involved in the construction industry and to which the HIA was referring.
- 10 The construction industry contractors are in the main, suppliers of labour with comparatively low levels of investment in plant and equipment. The construction industry contractors are in the main working for a range of prime contractors and not dedicated to a single source of work which is the case with the CSR cartage contractors.
- 11 In considering the Department's submission on the potential for an industry-wide set of terms and conditions, one must ask what industry is being referred to. The services in question are transport services. In CSR's view, there is no prospect that the terms and conditions applicable to independent owners with their own vehicles transporting clay or bricks for CSR in the Brisbane region would have any application whatsoever to cartage contractors transporting fruit and vegetables, perishables or white goods on interstate haulage runs.

If the relevant industry being referred to by the Department is intended to be the industry for cartage of bricks and pavers and clay materials, then again, the particular productivity requirements, market drivers and existing contractual

- arrangements evident amongst downstream market participants, all militate against any industry-wide terms and conditions being applied.
- 12 In setting the rates applicable to the cartage services, CSR will take into account its particular needs in driving productivity gains that are not necessarily reflected in the businesses of its competitors.
- 13 The unique and specific requirements of CSR in negotiating a new cartage contract, coupled with the differing vehicle age and technology profiles being offered by the independent contractors, make an industry-wide application of the CSR contract significantly less likely.
- 14 As stated in our letter to you of 18 April 2005, CSR's competitors employ a range of different cartage arrangements. Both Boral Bricks and Austral Bricks have a mix of company owned trucks and independent contractors delivering their product. The Boral Clay and Austral Clay businesses engage a prime contractor who in turn engages independent sub-contractors.
- 15 The different types of arrangements employed by CSR's competitors, and the involvement of a prime contractor with sub-contracted independent drivers, all militate against the TWU or any other union being able to impose a single set of terms and conditions across the industry.
- 16 It is also instructive that even as between CSR's different businesses, the terms and conditions that are likely to apply as a result of the collective negotiations will differ. The cartage arrangements that applied in the Readymix business will not be relevant to the bricks and pavers business or the clay business. Indeed, CSR does not even expect the terms and conditions (including rates) to be the same as between the Bricks and Pavers business and the Clay business. They are separate businesses with different productivity requirements, contractor profiles and financial profiles.
- 17 If the Commission accepts the Department's submission and effectively thereby prevents the independent contractors from collectively negotiating with CSR, it may indirectly lead to greater union involvement in the representation of independent contractors. That is because the contractors are likely to feel more isolated if they cannot negotiate as part of a collective, and therefore more likely to look for greater support from entities such as the TWU.
- 18 It should also be remembered that the owner drivers are separate legal entities and free to engage the assistance of others (including the TWU) to advise them on their contract negotiations. This right exists whether or not the negotiation is of a collective agreement or individual contracts.
- 19 We also note the Department's statement that in preparing any final submission, it will consider closely CSR's claims of public benefit regarding the likelihood of increased industrial harmony.
- 20 As mentioned in our letter of 18 April 2005, the industrial harmony referred to by CSR is more likely to be harmony as between the independent contractors with a flow-on benefit to CSR. If CSR was forced to negotiate individual contracts, the prospects of differing terms and conditions would be greater and this would

undoubtedly cause friction amongst the owner drivers, particularly given that there are a relatively small number of them involved in these businesses and more likely to discuss the terms and conditions being offered. CSR's claim in relation to industrial harmony is not a claim related to any union involvement or agitation in the process of negotiating a collective agreement.

Please let us know if you wish to discuss any of the matters addressed in this letter. In the meantime, we reiterate that CSR is anxious that an interim authorisation be provided as soon as possible so that negotiations can commence.

Yours faithfully
Corrs Chambers Westgarth

Eddie Scuderi
Partner