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Your reference
C2005/546 and C2005/597

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26 May 2005

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E-MAILED
27/5/05

Attention: Scott Gregson

Dear Mr Gregson

CSR Building Products Ltd - Application for Authorisations A90964 and A90965

Thank you for your letter of 11 May 2005 seeking further information and attaching various submissions.

Response to request for further information

In your letter of 11 May, you have sought further information on three issues. Those issues and CSR's response are as follows:

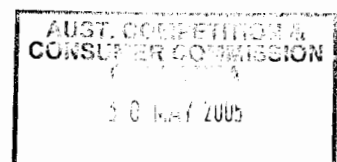
Issue 1

You have asked for an estimate of the cost involved in establishing a cartage business for both the clay and brick cartage owner/drivers.

The cost for establishing an owner/driver business to service CSR's clay business varies according to the nature and age profile of the truck and equipment being purchased.

A minimum establishment cost for an contract cartage operation to service the CSR clay business would be in the vicinity of \$120,000. The higher end estimated cost would be \$350,000. The higher end of the scale would involve the purchase of a new prime mover, new trailer, retractable tarp and relevant accessories.

Similarly, the establishment cost for an contract cartage business servicing CSR's bricks and pavers' business will vary according to the nature of the vehicle and other equipment being purchased. Some contractors for example, have elected to purchase larger vehicles capable of carrying up to 16 pallets of bricks/pavers and those vehicles utilise their own forklift, whereas others use smaller vehicles without a forklift component.



The estimated range of establishment costs for a contractor wishing to service the bricks and pavers' business would be \$100,000 to \$350,000 dollars depending on the equipment profile selected by the contractor.

Issue 2

You have asked how clay and brick cartage owner/drivers have negotiated their contracts in the past.

In the past, the owner/drivers have nominated one of their number to represent them in negotiations. Negotiations have taken place with the representative and information has been relayed to the other cartage truck owners by that representative. At the conclusion of negotiations with the owner representative, the terms were offered by CSR to each of the other cartage contractors on an individual basis.

In the case of the bricks and pavers' business the contractor representative was supported by a representative of the TWU who acted in an advisory capacity. There has not been any previous TWU involvement in the contract process for CSR's clay business.

Issue 3

You have asked whether the terms and conditions of past contracts were open to negotiation by the owner/drivers.

The terms were open for negotiation.

Submissions

Thank you for providing us with copies of submissions received from various parties. We note that those submissions are largely supportive of the applications for authorisation.

However, CSR would like to respond to the submissions from the Queensland Department of Industrial Relations (the IR Department) and the submission from the Commonwealth Department of Employment and Workplace Relations (the WR Department). . CSR's response to those submissions is set out below.

CSR's response to the Queensland Department of Industrial Relations' submission

- 1 The IR Department's submission seems to be founded on the premise that the cartage contractors are in fact really employees and that CSR is using the authorisation applications to bolster its position that they are not employees.

 To suggest that CSR has applied for these authorisations to support the case that the contractors are not employees ignores the fact that the contractors have been operating as independent contractors for many years before these applications for authorisation were made. It also ignores the fact that it is not CSR alone making these applications; they have the support and consent of each of the relevant contractors.
- 2 The granting of authorisations will not have any real bearing on whether or not these contractors constitute employees or independent contractors. Any debate on that issue (should it ever become relevant, and it hasn't to date) will be determined on the basis of well established indicia as part of a legal question.

The relevant indicia take into account a number of factors fundamental to the nature and manner of performance of the working relationship. An authorisation to protect collective negotiation, is not fundamental to the nature and manner of performance of the working relationship.

It is worth noting by way of comparison that the Commonwealth Workplace Relations Act, 1996, provides for certified agreements covering a group of employees, where the agreement has effectively been collectively negotiated, as well as Australian Workplace Agreements which are between the employer and an individual. In both cases, the nature of the agreements and how they were negotiated do not affect the status of the worker as an employee.

- 3 Most importantly, the independent contractors in question are not employees because they do not work in a manner indicative of an employment relationship. Nothing in the authorisations, if granted, will change those factors and indeed, the contracts arising from the collective negotiations are likely to contain provisions that deal with work performance matters in ways that are clearly indicative of the independent contractor relationship under the relevant legal test.

- 4 The IR Department also asserts that the proposed arrangement “would allow uniform terms and conditions to be imposed on persons via an agreement similar in form and substance to an industrial instrument”.

No terms and conditions will be imposed. They will be negotiated. The purpose of the authorisation is to allow the independent cartage contractors to collectively negotiate a new contract.

- 5 The IR Department has also submitted that “the arrangement allows a company to avoid the transaction costs of dealing with its workers as independent contractors, while simultaneously maintaining that they are independent contractors”. It is indeed hoped that the transaction costs of dealing with a group of cartage contractors as a collective through a bargaining representative will be less than the transaction costs involved in negotiating contracts with individual independent contractors.

Whilst lower transaction costs will be a benefit to CSR, it will also be a benefit to the independent contractors who, if forced to negotiate individually, would need to bear the legal, administrative and management time costs individually. CSR’s capacity to pay transaction costs is greater than the capacity of the independent contractors. We would therefore have thought that allowing the contractors to spread the transaction costs across the group of contractors would be a factor in support of the application for authorisation rather than a matter of concern.

- 6 The IR Department also asserts that “the ACCC should be particularly cautious when the applicant for the authorisation is not the group of independent contractors themselves nor their representative association, but the company upon which they primarily rely for their incomes”.

CSR identified the need for an authorisation to protect the independent contractors and itself. CSR is the party making the application and is bearing the

cost of so doing. However, it has the support of the independent contractors who have all signed a form consenting to the application being made on their behalf. That form has previously been submitted to the Commission.

The IR Department's submission also ignores the purpose and effect of section 76 of the Trade Practices Act. The IR Department's submission, if accepted, would act as an impediment to the making of authorisation applications by those best placed to do so where appropriate.

- 7 CSR also submits that the matters raised by the IR Department are not relevant to the test to be applied by the Commission in an application for authorisation. In any event, if the contracts ultimately negotiated are unfair to the contractors, as the IR Department itself recognises, the contractors have a legal means of redress.

CSR's response to the submission made by the WR Department

- 8 The WR Department seeks to diminish the force of CSR's submission regarding industrial harmony on the basis that CSR is not able to demonstrate that industrial disharmony would follow in the absence of collective bargaining, and on the basis that CSR has not been threatened by industrial disharmony if the contractors were required to negotiate individually.

CSR and the contractors have been operating on the basis that collective negotiation will be the process by which a new contract will be struck. The contractors have not been threatened with the prospect of individual contract negotiations (with the possibility of different terms applying as between contractors). In the circumstances, it is not surprising that there has not been a threat of industrial action; both the contractors and CSR favour a collective negotiation.

- 9 The WR Department seeks to play down the effect that different terms and conditions would have on the industrial landscape if individual contracts were pursued, instead of a standard form of collective agreement. This ignores the fact that CSR is dealing with a small group of long term contractors, who perform the same services with the same types of vehicles and equipment, and who operate from the same plants. The reality is that differential terms and conditions as between contractors will become quickly known by the contractors and is unlikely to make for a good working environment. The degree of disquiet amongst the contractors if differential terms and conditions are applied is likely to be high, given the significant investment that they have each made in their vehicles and other equipment.
- 10 The WR Department also asserts that the "likely benefits in terms of increased competitiveness flowing from greater technical efficiency at CSR through standardisation of operations would be likely to be at least partially offset by a reduction in competitiveness from higher rates...and reduced scope for achievement of productivity gains"

26 May 2005

Australian Competition and Consumer Commission

**CSR Building Products Ltd - Application for Authorisations
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CSR is not aware of the basis for these claims by the WR Department but it can assure the Commission that the prime objectives of the proposed collective agreements are to improve CSR's competitiveness and productivity .in the relevant downstream markets.. If CSR did not believe this was possible, or if it believed that a collective agreement were more likely to constrain its ability to compete effectively in downstream markets, it would certainly not be embarking on the course of collective negotiations.

- 11 CSR also notes that the WR Department's concerns are not shared by another Commonwealth Department, the Department of Transport and Regional Services, which supports the applications and "agrees that the public benefits submitted by CSR are likely to flow from the proposed arrangements".

If you wish us to expand on any of the matters addressed in this correspondence, please do not hesitate to contact the writer.

We confirm that the contents of this letter may be placed on the public register.

Yours faithfully

Corrs Chambers Westgarth

A handwritten signature in black ink, appearing to be 'Eddie Scuderi', with a long horizontal stroke extending to the right.

Eddie Scuderi
Partner