



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

## Applications for authorisation A90964 and A90965

lodged by

**CSR Building Products Limited**

*in relation to collective bargaining between its contracted owner-drivers  
in the Brisbane area*

**Date: 3 August 2005**

**Commissioners:**

Samuel  
Sylvan  
King  
McNeill  
Smith  
Willet

**Authorisation no.** A90964 & A90965

**Public register no.** C2005/598  
C2005/547

## **Executive Summary**

On 29 March 2005, CSR Building Products Limited (CSR Building Products) lodged an application for authorisation (A90964) with the ACCC on behalf of a group of consenting lorry owner-drivers (brick carters) providing cartage services for CSR Building Products' bricks and pavers from CSR Building Products' production facilities to building sites in the Brisbane area.

On 1 April 2005, CSR Building Products lodged a second application for authorisation (A90965) with the ACCC on behalf of a different group of consenting owned-drivers (clay carters) providing cartage services for raw materials between CSR Building Products' quarries and its factories in the Brisbane area.

### **The proposed arrangements**

CSR Building Products is seeking authorisation to enable collective negotiations with brick carters and clay carters in relation to:

- standard rates to be paid by CSR Building Products for delivery
- a formula for the progressive increases of those rates and
- prescribed conditions of delivery by the brick carters or clay carters.

In addition under A90965, CSR Building Products proposes to collectively negotiate a provision for review of rates based on productivity with its clay carters.

### **Assessment of benefits and detriments**

The ACCC considers collective bargaining agreements which set uniform terms and conditions are likely to lessen competition. The ACCC considers however, that there are a number of features of the proposed collective bargaining arrangements which may serve to mitigate the potential anti-competitive detriment, including:

- participation in the proposed arrangements is voluntary
- the proposed arrangements only affect a small number of owner-drivers
- the proposed arrangements are specific to a single contracting firm and
- the proposed arrangements do not include boycott activity.

Consequently, the ACCC considers that the potential anti-competitive detriment that may arise from the proposed collective bargaining arrangements is likely to be minimal.

The ACCC considers that the proposed arrangements will result in some public benefit. In particular, the ACCC considers that, to the extent the proposed collective bargaining arrangements provide efficiencies by improving the input of owner-drivers in the terms and conditions of their cartage contracts with CSR Building Products, the proposed arrangements would be likely to generate a public benefit.

Additionally, the ACCC considers that the proposed arrangements are likely to result in transaction cost savings which, given competitive pressures in the market for bricks, pavers and related products, are likely to be passed on to consumers.

Consequently, the ACCC concludes that the public benefits likely to result from the proposed arrangements will outweigh the anti-competitive detriment.

### **Draft Determination**

The ACCC proposed to grant authorisation to application A90964 for a period of five years and to A90965 for a period of three years.

## TABLE OF CONTENTS

<b>1</b>	<b>Introduction .....</b>	<b>1</b>
	Applications A90964 and A90965 .....	1
	Interim Authorisation .....	2
<b>2</b>	<b>Background to the application .....</b>	<b>3</b>
	Company Background .....	3
	Previous collective bargaining authorisations granted to CSR .....	3
<b>3</b>	<b>The application and supporting submission .....</b>	<b>5</b>
	The proposed arrangements .....	5
	Term of the authorisation .....	6
	Interim authorisation .....	6
	CSR Building Products Ltd's submission in support of its application .....	6
<b>4</b>	<b>Interested party submissions.....</b>	<b>8</b>
	Australian Government Department of Employment and Workplace Relations .....	8
	Australian Government Department of Transport and Regional Services.....	8
	Queensland Government Department of Industrial Relations .....	9
	Flyteline Pty Ltd.....	9
<b>5</b>	<b>Statutory provisions .....</b>	<b>10</b>
<b>6</b>	<b>The relevant markets and the counterfactual .....</b>	<b>12</b>
	ACCC assessment of the relevant market(s).....	12
	The future with-or-without test .....	13
<b>7</b>	<b>ACCC assessment – Effect on competition .....</b>	<b>15</b>
	ACCC assessment of anti-competitive detriment .....	15
	Conclusion on anti-competitive effect of the proposed arrangements.....	19
<b>8</b>	<b>ACCC assessment – Public benefits .....</b>	<b>21</b>
	Reduced transaction costs .....	21
	Efficiency of operations .....	22
	More effective input into contracts .....	22
	Improved industrial harmony .....	23
	Submission in respect of potential public detriments.....	24
	Conclusion on the Public Benefits .....	24
<b>9</b>	<b>Balance of public benefits and detriments .....</b>	<b>25</b>
<b>10</b>	<b>The draft determination .....</b>	<b>26</b>

# **1 Introduction**

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. Broadly, the ACCC may 'authorise' businesses 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.
- 1.3 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this. The TPA requires that the ACCC 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 ACCC will take into account any submissions received from interested parties.
- 1.4 Once a draft determination is released the applicant, or any interested party, may request that the ACCC hold a conference. A conference is generally called by a party dissatisfied with the ACCC's decision and provides interested parties with the opportunity to put oral submissions to the ACCC. The ACCC will also invite written submissions on the draft.
- 1.5 The ACCC then reconsiders the application taking into account the comments made at the conference and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment the ACCC may grant authorisation. If not, the authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefits and decrease the detriment.

## **Applications A90964 and A90965**

- 1.6 On 29 March 2005, CSR Building Products Ltd (CSR Building Products), applied for authorisation A90964 on behalf of a group of consenting lorry owner-drivers (brick carters) who deliver bricks, pavers and related items manufactured by CSR Building Products, to customers in the Brisbane area. The application for authorisation seeks to allow these brick carters to collectively negotiate the terms and conditions of their contracts with CSR Building Products.

- 1.7 On 1 April 2005, CSR Building Products lodged a second application for authorisation (A90965) on behalf of a group of consenting semi-tipper owner-drivers (clay carters) who provide cartage services for the raw materials (clay and shale) used in the manufacture of CSR Building Products' bricks and pavers in the Brisbane area. Application A90965 also seeks to allow the clay carters to collectively negotiate the terms and conditions of their contracts with CSR Building Products. For the purposes of this draft determination the clay carters and brick carters may be commonly referred to as the *owner-drivers*.

#### **Interim Authorisation**

- 1.8 As part of its application for authorisation, CSR Building Products also applied for interim authorisation for applications A90964 and A90965 to allow the bargaining groups identified in the applications (clay carters and brick carters) to begin negotiations with CSR Building Products. On 27 April 2005, the ACCC granted conditional interim authorisation.

## **2 Background to the application<sup>1</sup>**

### **Company Background**

#### *CSR Ltd*

- 2.1 The applicant, CSR Building Products, is a subsidiary of CSR Ltd, which is one of Australia's leading manufacturing companies with operations throughout Australia as well as in Asia and New Zealand. CSR Ltd was established in 1855 and has been a publicly listed company since 1887. CSR Ltd's three core business areas are building products (the largest of CSR Ltd's businesses), aluminium and sugar.
- 2.2 According to its 2004 Annual Report, CSR Ltd's overall net profit for that year was \$160.2 million, with building products accounting for \$81.3 million of that profit. CSR Ltd manufacture and supply a wide range of building products including plasterboard, fibre cement, lightweight concrete products, insulation products, roof tiles, bricks and pavers.

#### *CSR Building Products Ltd*

- 2.3 CSR Building Products operates ten brick and paver production plants in Australia and New Zealand under the trading name PGH Bricks and Pavers. These facilities produce approximately 415 million bricks and pavers annually. Bricks and pavers produced at these facilities are mostly used in the construction of new dwellings. PGH Bricks and Pavers sell 69 per cent of their bricks and pavers for use in the construction of new dwellings, with the remainder used for alterations or additions to existing dwellings, and commercial uses<sup>2</sup>.
- 2.4 CSR Building Products' market share for bricks and pavers in the Queensland, New South Wales and South Australia is estimated at between 31 and 40 per cent<sup>3</sup>. In the Brisbane region, CSR Building Products' market share is estimated at 30 per cent while its major competitors Boral Ltd (Boral) and Austral Bricks Pty Ltd (Austral) have estimated market shares of 25 and 32 per cent respectively<sup>4</sup>. CSR Building Products operates three production plants in the Brisbane area at Cooroy, Oxley and Strathpine.

### **Previous collective bargaining authorisations granted to CSR**

- 2.5 In 1997 CSR Ltd applied for, and was granted, authorisation A50016 to allow a group of concrete carting owner-drivers (concrete carters) operating in Queensland to collectively negotiate the terms and conditions of their cartage contracts with CSR Ltd.

---

<sup>1</sup> Information in this section is sourced from CSR Ltd's 2004 annual report and other information provided by CSR

<sup>2</sup> <[http://www.csr.com.au/csr/facts/default.asp?fact=Facts\\_BricksPavers.htm](http://www.csr.com.au/csr/facts/default.asp?fact=Facts_BricksPavers.htm)>

<sup>3</sup> *ibid*

<sup>4</sup> Further information provided to the ACCC by CSR Building products on 18 April 2005

- 2.6 In its assessment of the application the ACCC noted that the collective bargaining arrangements may lessen competition between carriers, as against a situation where each contract was negotiated individually, but that such detriment was likely to be decreased as the arrangements applied only to CSR Ltd and its carriers rather than to the entire industry, and that trade union involvement would be limited to an advisory role.
- 2.7 The ACCC considered that the proposed arrangements were likely to result in some public benefit by maintaining industrial harmony, providing greater fairness in the negotiation process, providing incentives for carriers to improve productivity and allowing for a reduction in transaction costs. The ACCC considered that these public benefits were likely to outweigh the potential detriments of the collective bargaining arrangements and granted authorisation, on a number of conditions, for a period of four years.
- 2.8 In 2001, CSR Ltd applied for authorisation A90808 under the same terms as authorisation A50016. As with authorisation A50016, the ACCC concluded that, while the collective bargaining arrangements could be expected to result in some lessening of competition relative to a situation where contracts were negotiated separately, there were a number of features of the proposed arrangements and a number of structural features of the relevant markets that were likely to limit the anti-competitive detriment.
- 2.9 The ACCC again considered that the proposed collective bargaining arrangements were likely to generate some public benefit, particularly from an improved operational efficiencies stemming from a reduction in transaction cost and an improvement in industrial harmony.
- 2.10 Consequently, the ACCC determined that the potential public benefit was likely to be sufficient to outweigh the potential anti-competitive detriment and granted authorisation for a period of five years.

### **3 The application and supporting submission**

- 3.1 On 29 March 2005, CSR Building Products lodged an application for authorisation (A90964) with the ACCC on behalf of a group of consenting lorry owner-drivers (brick carters) providing cartage services for CSR Building Products' bricks and pavers from CSR Building Products' production facilities to building sites in the Brisbane area.
- 3.2 On 1 April 2005, CSR Building Products lodged a second application for authorisation (A90965) with the ACCC on behalf of a different group of consenting owned-drivers (clay carters) providing cartage services for raw materials between CSR Building Products' quarries and its factories in the Brisbane area.
- 3.3 The authorisation applications were made pursuant to section 88(1) of the TPA 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 may have the likely effect, of substantially lessening competition within the meaning of section 45 of the TPA and*

*to give effect to a provision of a contract, arrangement or understanding where the provision has, or may have, the effect of substantially lessening competition within the meaning of section 45 of the TPA.*

- 3.4 Copies of the applications and CSR Building Products' submission in support are available from the public register maintained by the ACCC. The main issues are outlined below.

#### **The proposed arrangements**

- 3.5 CSR Building Products is seeking authorisation to enable collective negotiations with brick carters and clay carters in relation to:
- standard rates to be paid by CSR Building Products for delivery
  - a formula for the progressive increases of those rates and
  - prescribed conditions of delivery by the brick carters or clay carters.
- 3.6 In addition under A90965, CSR Building Products proposes to collectively negotiate a provision for review of rates based on productivity with its clay carters.

### **Term of the authorisation**

- 3.7 CSR Building Products is seeking authorisation for application A90964 for a period of five years while they are seeking authorisation for A90965 for a period of three years.

### **Interim authorisation**

- 3.8 CSR Building Products also applied for interim authorisation for applications A90964 and A90965 to allow the brick carters and clay carters to begin negotiations with CSR Building Products. On 27 April 2005, the ACCC granted conditional interim authorisation.

### **CSR Building Products Ltd's submission in support of its application**

#### *Background*

- 3.9 CSR Building Products claims that the consenting owner-drivers are small businesses, typically run by a sole operator or a husband and wife who derive a significant part of their income from cartage services performed for CSR Building Products. CSR Building Products submits that these consenting owner-drivers wish to collectively negotiate with them over the terms and conditions of their cartage services.

#### *Effect on competition and public benefits*

- 3.10 CSR Building Products submits that there is unlikely to be any significant lessening of competition as a result of the proposed arrangement as it will only apply to nine clay carters and thirteen brick carters, all of whom currently provide cartage services for CSR Building Products. CSR Building Products further notes that the proposed arrangements will only apply to the Brisbane area.
- 3.11 CSR Building Products notes that it competes with others suppliers of bricks and pavers to consumers, most notably Austral and Boral, and the proposed arrangements does not directly affect any of their competitors. CSR Building Products claims that, by that very fact, only a small public benefit is necessary for the ACCC to authorise the proposed arrangement.
- 3.12 CSR Building Products submits that the proposed collective bargaining arrangements will result in a number of public benefits. These include:
- improved efficiency of operations
  - reduced transaction costs
  - improved industrial harmony and
  - greater fairness in the negotiation process

- 3.13 CSR Building Products' submission in relation to the effects on competition and public benefits of the proposed arrangements will be considered further as a part of the ACCC's assessment in section 9 and 10 of this draft determination.

## **4 Interested party submissions**

- 4.1 The ACCC sought submissions from a wide range of interested parties and those received are summarised below. Complete copies of all submissions are available on the ACCC's public register and on its website.

### **Australian Government Department of Employment and Workplace Relations**

- 4.2 On 18 April 2005, the Australian Government Department of Employment and Workplace Relations (DEWR) lodged a submission opposing a grant of interim authorisation due to its concerns over the possible detrimental market effect of Trade Union involvement in the collective negotiations of independent contractors. DEWR stated their concerns that Trade Union involvement may be used to set an industry standard rate for cartage services.
- 4.3 On 29 April 2005, DEWR submitted further concerns relating to CSR Building Products applications for authorisation. These concerns included:
- a lack of supporting evidence from CSR Building Products to support its claim that the proposed arrangements would help maintain the state of industrial harmony
  - a lack of supporting evidence from CSR Building products as to how it would derive benefits from standardising its transport operations or how the standardisation would be achieved and
  - concerns that the benefits that may flow from the above mentioned standardisation may be at least partially offset by a reduction in competitiveness from the proposed collective bargaining arrangements.
- 4.4 DEWR also claimed that individual contract negotiations with the owner-drivers would provide greater scope for future contract rate rises to be linked to productivity improvements when compared to a group productivity clause that CSR Building Products is seeking as part of application for authorisation A90965.

### **Australian Government Department of Transport and Regional Services**

- 4.5 The Australian Government Department of Transport and Regional Services (DOTARS) submits that it supports the proposed collective bargaining arrangements. DOTARS states that it agrees with the public benefits submitted by CSR Building Products and notes that the proposal may assist less skilled owner-drivers to negotiate fairer outcomes. DOTARS also notes that it considers that, given the limited nature of the groups involved, the conduct is unlikely to significantly alter the competitive balance of the industry as a whole.

## **Queensland Government Department of Industrial Relations**

- 4.6 The Queensland Government Department of Industrial Relations (QDIR) submits that, in general, some arrangements between independent contractors and the businesses contracting their services are structured in a way such that, where the independent contractor has limited bargaining power, they have the effect of creating a dependent relationship beyond the reach of industrial instruments and employment legislation.
- 4.7 QDIR states that it is concerned that, if granted, authorisations A90964 and A90965 may be used to:
- impose a single set of terms and conditions on owner drivers
  - legitimise the treatment of persons that are effectively employees as independent contractors by virtue of the fact that it has received authorisation from the ACCC and
  - allow CSR Building Products to avoid the transaction costs associated with dealing with independent contractors while still referring to them as independent contractors.

## **Flyteline Pty Ltd**

- 4.8 Flyteline Pty Ltd (Flyteline) is a business that provides cartage services for CSR Building Products and is a party to the proposed collective bargaining arrangements. Flyteline states that it supports the CSR Building Products' application to allow owner-drivers to collectively negotiate the terms and conditions of their contracts with the CSR Building Products.

## 5 Statutory provisions

- 5.1 Applications A90964 and A90965 are made under section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA.
- 5.2 In assessing an application made under section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA, the relevant test that CSR Building Products must satisfy for authorisation to be granted is outlined in subsection 90(6) of the TPA.
- 5.3 Under subsection 90(6) of the TPA, the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition 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.
- 5.4 In deciding whether it should grant authorisation, the ACCC must examine the anti-competitive aspects of the arrangements or conduct and the public benefits arising from the arrangements or conduct, weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the ACCC may grant authorisation.
- 5.5 Public benefit is not defined by the TPA. However, the Australian Competition Tribunal (the Tribunal) has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>5</sup>
- 5.6 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>6</sup>

---

<sup>5</sup> *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42677

The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9, 16 May 2005

<sup>6</sup> *ibid* at 42683

- 5.7 In weighing up the public benefit and anti-competitive detriment generated by proposed arrangements for which authorisation has been sought the ACCC also applies the 'future with-and-without test' established by the Tribunal.
- 5.8 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as 'the counterfactual'.
- 5.9 Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.
- 5.10 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.

## **6 The relevant markets and the counterfactual**

- 6.1 The first step in assessing the public benefits and anti-competitive detriments of the proposed arrangements for which authorisation is sought is to consider the relevant market(s) in which those arrangements occur.
- 6.2 The ACCC may use market analysis to identify and measure the public benefit and anti-competitive detriment resulting from arrangements for which authorisation has been sought. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of the defined market.

### **ACCC assessment of the relevant market(s)**

- 6.3 Whilst the ACCC is of the view that it may not be necessary to definitively identify all the relevant markets, it is important for the ACCC's assessment of the application to define general market parameters so that it can assess the public benefits and detriments, particularly the anti-competitive effects of the proposed arrangements.
- 6.4 In considering this application, the ACCC has identified two areas of competition that may be relevant to its assessment, a primary area of competition and a secondary area of competition. The ACCC considers that the primary area of competition affected is likely to be:
- the supply of relevant cartage services in the Brisbane region
- 6.5 The secondary area of competition that is likely to be affected by the proposed arrangements is likely to be:
- the supply of bricks, pavers and related products to end users in the Brisbane region.

### *The supply of relevant cartage services in the Brisbane region*

- 6.6 Whilst this draft determination is considering two separate applications for authorisation (A90964 and A90965) and these separate applications relate to separate collective bargaining arrangements, the ACCC considers that, as both collective bargaining groups provide a similar service in a similar geographic region it is reasonable to consider that they operate in the broader market for the supply of cartage services in the Brisbane region.
- 6.7 The ACCC considers that this area of competition is likely to have a number of features which may be relevant to its assessment, including:
- a large number of participants relative to the size of the proposed bargaining groups

- the potential for substitution from other areas of the transport industry (provided that the vehicles used do not require substantial modification)
- relatively low barriers to entry

*The supply of bricks, pavers and related products to end users in the Brisbane region*

- 6.8 The ACCC considers that the price of cartage services is likely to affect the cost of building supplies. Any cost associated with cartage is likely to be factored into the price that end users pay for the products themselves, and any increase in the cost of cartage services is likely to have an impact on the price of bricks, pavers and related products.
- 6.9 The ACCC considers that the features of this relevant market are likely to be:
- several large producers located in the Brisbane area (CSR Building Products, Boral Ltd, Austral Bricks), each having roughly the same share of the market, account for the largest proportion of sales in the market
  - competition between these firms and
  - market entry is likely to be constrained, to a large extent, by the high cost of acquiring production facilities, raw materials and transportation services.

**The future with-or-without test**

- 6.10 As stated in section 5, the ACCC applies the ‘future with-or-without test’ established by the Tribunal to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.
- 6.11 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is referred to as the counterfactual.
- 6.12 In identifying the likely counterfactual situation, that is the situation without authorisation, the ACCC is mindful of the information provided to it which suggests that negotiations between the owner-drivers and CSR Building Products, along similar lines to those for which authorisation is sought, have been on-going for some time. However, given that such conduct, were it to continue, would be likely to raise concerns under the TPA it is unlikely that, absent of authorisation, the owner-drivers would continue to collectively negotiate with CSR Building Products in the future.
- 6.13 Consequently, the ACCC considers that the likely counterfactual for both A90964 and A90965 is a situation where CSR Building Products would negotiate with each owner-driver individually, with the owner-drivers having some limited input into

the terms and conditions of such contracts. The ACCC considers it likely that owner-drivers will continue to be offered relatively standard form terms and conditions and that CSR Building Products is likely to maintain a strong bargaining position in any contract negotiations.

## **7 ACCC assessment – Effect on competition**

- 7.1 Section 88 of the TPA allows the ACCC to grant immunity from legal action for parties to engage in certain anti-competitive conduct which may include collective bargaining.
- 7.2 As discussed in section 5, the ACCC must assess the extent to which the proposed arrangements give rise to any detriments. Specifically, the ACCC must assess the detriment to the public constituted by any lessening of competition flowing from the proposed arrangements.
- 7.3 In general terms, collective agreements to negotiate terms and conditions for independent businesses covered by that agreement are likely to lessen competition relative to a situation where each business individually negotiates their own terms and conditions. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 7.4 CSR Building Products submits that the proposed arrangements are likely to result in only a minimal lessening of competition. CSR Building Products claims that the small size of the bargaining groups, the restriction of the arrangements to the Brisbane region and the presence of competitors in the market for bricks and pavers will serve to limit the potential for any anti-competitive detriment to arise.

### **ACCC assessment of anti-competitive detriment**

- 7.5 In assessing the potential detriment of the proposed arrangements, the ACCC proposes to consider the following for possible anti-competitive effects:
  - 1. Lost efficiencies resulting from collusion
  - 2. Reduced scope for new market entry
  - 3. Increased potential for collective activity beyond that authorised.
- 1. *Lost efficiencies resulting from collusion*
- 7.6 A major feature of most collectively negotiated agreements is an agreement as to the (generally common across the bargaining group) price of acquiring a good or service or the price to be paid to a group.
- 7.7 Competition between buyers or sellers ordinarily directs resources to their most efficient or productive use. Where buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses.
- 7.8 This distortion in competition can often result in increased prices to consumers, less choice, lower quality of product or services and increased costs to producers than would otherwise exist.

- 7.9 This is the foundation of the principles of competition and, as such, Parliament has deemed agreements between competitors as to price to substantially lessen competition in breach of the TPA.<sup>7</sup>
- 7.10 Aside from price, businesses compete on issues such as quality, service and other terms of trade. Just as price agreements stifle competition on price, non-price agreements can stifle competition in areas such as quality and service.
- 7.11 In its past consideration of collective bargaining arrangements the ACCC has accepted that where collective bargaining results in an increased price being paid to the bargaining group, or reduced competition on other terms of supply, and where there is capacity for any such increase to be passed on in the form of higher prices, less choice, or lower quality of products offered to consumers, this could constitute an anti-competitive detriment. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 7.12 The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the following four features are present:
- the current level of competition, between members of the bargaining group, with respect to those terms on which they are seeking to negotiate, is low
  - participation in the proposed arrangements is voluntary
  - there are restrictions on the coverage and composition of the bargaining group and
  - there is no boycott activity.
- 7.13 With respect to these four features, as they relate to the proposed arrangement, the ACCC notes the following:

*Competition between owner-drivers absent of the authorisation*

- 7.14 Generally, the ACCC considers that collective bargaining arrangements of the type proposed in CSR Building Products' application will lessen competition relative to the counterfactual, that is, the situation where the collective bargaining arrangements do not exist. The extent of any anti-competitive detriment caused by this lessening of competition will depend on the pre-existing level of competition between members of the bargaining group.
- 7.15 In this instance the ACCC is of the view that, whilst there is currently some competition between owner-drivers for contracts with CSR Building Products, as

---

<sup>7</sup> Section 45A of the TPA

described in the ACCC's consideration of the counterfactual in section 7, the level of this competition is likely to be relatively low in the sense that the owner-drivers are likely to:

- be offered relatively standard form contracts
- have limited individual bargaining power and
- have little scope for varying the terms and conditions of these contracts.

7.16 Consequently, the ACCC considers that the proposed arrangements are unlikely to impact significantly upon the existing level of bargaining.

*Voluntary participation in the proposed arrangements*

7.17 The ACCC notes that the parties to the proposed arrangements (the owner-drivers) have all expressed their willingness to participate in the collective bargaining groups. The ACCC is of the view that collectively negotiated contracts will only be agreed and implemented where both the owner-drivers and CSR Building Products consider it in their commercial interest to do so. That is to say, the proposed arrangements will only be entered into where both parties to the proposed arrangement consider that they will generate sufficient efficiency gains to offset any inefficiency which may otherwise result from the collectively negotiated contracts.

*Coverage and composition of the bargaining group*

7.18 The ACCC considers where the size of bargaining groups is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers outside the group.

7.19 In this instance it is not proposed that the bargaining groups be divided into smaller, discrete groups, as the bargaining groups are already sufficiently small (13 brick carters and nine clay carters) and will engage in negotiations with a single firm in the Brisbane area. The ACCC considers that these features of the proposed arrangements are likely to mitigate the need to divide the bargaining groups.

7.20 As noted in paragraph 4.2, the ACCC received a submission from DEWR raising concerns of the potential anti-competitive effect of the proposed arrangements.

7.21 Specifically, DEWR raised concerns relating to the potential detrimental market effect of Trade Union involvement in the collective negotiations of independent contractors. DEWR stated in its submission that Trade Union involvement in a collective bargaining process may have the effect of producing an industry-wide price for cartage services.

7.22 The ACCC generally considers that the potential for a collective bargaining arrangement to generate an anti-competitive detriment would be greatly increased

where the arrangement had the effect of setting a common price for goods or services on an industry-wide basis.

7.23 The ACCC notes that the proposed collective bargaining arrangements have a number of features which are likely to lessen the possibility of this occurring. These features include:

- participation in the proposed arrangements is voluntary on the part of both CSR Building Products and the owner-drivers
- the number of owner-drivers affected is small (thirteen brick carters and nine clay carters) and does not involve any broader industry participation
- the proposed arrangements are specific to a single firm and
- the extent to which any potential price rise can be passed on will be lessened by competition in downstream markets

7.24 To the extent to which Trade Union involvement would lead to broader industry impacts, this may raise further concerns, however, in this instance the role of the Trade Unions is limited. Consequently, the ACCC considers that any additional anti-competitive detriment arising due to the involvement of Trade Unions is likely to be small.

#### *Boycott activity*

7.25 It is not proposed that any collective boycott activity occur. While there are circumstances in which the ability to boycott may in itself generate a net public benefit, more generally, collective boycotts can significantly increase any anti-competitive effects of collective bargaining arrangements. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA as a result of this proposed authorisation.

## **2. *Reduced scope for new market entry***

7.26 The capacity for new entrants to compete for the right to undertake the business of existing market participants subject to a collective agreement also has implications for how competition in the market is affected. Collective negotiations between parties resulting in agreed prices and other terms and conditions, and entry into long term, common, agreements may reduce the likelihood of entry into the relevant markets.

7.27 In this instance, the presence of collective arrangements may serve to increase the barriers to entry if parties were to enter long term contracts which satisfied the cartage needs of CSR Building Products and the broader market for cartage services. However, the potential anti-competitive effects of the proposed arrangements should be considered in light of a number of other factors, in particular, the pre-existing barriers to entry to the market for cartage services.

### *Pre-existing barriers to entry*

- 7.28 The ACCC considers that, while the cost of obtaining the equipment needed to supply cartage services are likely to be low, a barrier to entry may arise if, in order to compete for the supply of such services, a potential participant needed to obtain a long-term contract. To the extent that such a contract may be more difficult to obtain in the presence of a collective bargaining arrangement, there is the potential for this barrier to entry to be increased.
- 7.29 In this instance, the ACCC notes that the proposed collective negotiations will take place between two small groups of owner-drivers and CSR Building Products. The ACCC considers that, while the proposed arrangements may, to some extent, reduce the scope for new entrants to obtain a contract with CSR Building Products, they are unlikely to have the effect of significantly increasing the barriers to entry to the market for cartage services as they are likely to affect only a small proportion of this market.
- 7.30 Consequently, the ACCC considers that the proposed collective bargaining arrangements will not significantly increase barriers to entry in the relevant market. Any anti-competitive detriment that may arise is likely to be minimal.

### **3. *Increased potential for collective activity beyond that authorised***

- 7.31 In considering collective bargaining arrangements in the past, the ACCC has noted concerns that such arrangements may increase the potential for collusive anti-competitive conduct beyond that authorised.
- 7.32 In particular the ACCC considers that the potential anti-competitive effects of the proposed arrangements may be increased where the arrangement require the competitors meet, share information and discuss pricing.
- 7.33 The ACCC notes that the likelihood of collusive activity beyond that authorised is reduced where participants are made aware of their obligations under the TPA, as is generally the case in the ACCC's consideration of applications for authorisation.

### **Conclusion on anti-competitive effect of the proposed arrangements**

- 7.34 The ACCC considers collective bargaining agreements which set uniform terms and conditions are likely to lessen competition. The ACCC considers however, that there are a number of features of the proposed collective bargaining arrangements which may serve to mitigate the potential anti-competitive detriment, including:
- the current level of competition, between owner-drivers, with respect to those terms on which they are seeking to negotiate, is unlikely to be significantly changed
  - participation in the proposed arrangements is voluntary

- the proposed arrangements only affect a small number of owner-drivers
- the proposed arrangements are specific to a single contracting firm
- the proposed arrangements do not include boycott activity and
- the proposed arrangements are unlikely to significantly alter the pre-existing barriers to entry to the market for cartage services in the Brisbane area.

7.35 Consequently, the ACCC considers that the potential anti-competitive detriment that may arise from the proposed collective bargaining arrangements is likely to be minimal.

## **8 ACCC assessment – Public benefits**

- 8.1 In order to grant authorisation to the proposed collective bargaining arrangements, the ACCC must be satisfied that those arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.
- 8.2 There must also be a nexus between the claimed public benefits and the proposed arrangements for which authorisation is sought. In other words, the benefit must flow from the proposed arrangements.
- 8.3 CSR Building Products submits that granting authorisation allowing the nominated groups of owner-drivers to collectively negotiate contract terms and conditions with CSR Building Products will result in a number of benefits to the public. The ACCC will consider these as well as any other benefits that it considers may be relevant to its assessment.

### **Reduced transaction costs**

- 8.4 CSR Building Products submits that, under the proposed collective bargaining arrangements, the transaction costs associated with its negotiations with owner-drivers are likely to be lower. CSR Building Products also submits that the owner-drivers are likely to realise transaction cost savings when negotiating as a collective.
- 8.5 In considering previous applications for authorisation, the ACCC has noted that transaction costs may well be lower in implementing a collective bargaining agreement involving a single, or small number, of negotiating processes than where the acquirer or supplier must negotiate and implement agreements with every business with which it deals. Where these savings, such as legal and accounting fees, are likely to be passed on in the form of lower prices to consumers, the ACCC has accepted that this would constitute a public benefit.
- 8.6 The ACCC considers that, absent authorisation, owner-drivers are likely to engage in limited negotiations with CSR Building Products. To the extent that these owner drivers seek legal, financial or other business advice in the course of these negotiations, there is scope for a single process of collective negotiations to reduce the cost to the negotiating group as a whole.
- 8.7 The ACCC also considers that a reduction in transaction costs may arise inasmuch as CSR Building Products save on the cost associated with multiple individual negotiations by conducting a single negotiation process with the proposed collective bargaining groups.
- 8.8 Therefore, the ACCC considers that some transaction cost savings are likely to result from the proposed arrangements when compared to the counterfactual

situation where each owner-driver is required to negotiate their contracts individually. To the extent that such savings do arise, the ACCC considers that competitive pressures in the market for bricks, pavers and related products are likely to ensure that at least some of these cost savings are passed on to consumers.

### **Efficiency of operations**

- 8.9 The ACCC considers that, while the proposed arrangements may enable CSR Building Products to standardise its operations in relation to its owner-drivers, it is unlikely that CSR Building Products, who are likely to maintain a high degree of bargaining power with or without authorisation, could not achieve some reasonable form of standardisation in the absence of a collective bargaining arrangement. The ACCC therefore accepts that any additional scope for standardisation created by virtue of the proposed collective bargaining arrangements is likely to be minimal.
- 8.10 As such, the ACCC considers that some efficiency gains may occur but that these are unlikely to represent anything more than a marginal increase over that which is likely to occur under the counterfactual. The ACCC considers that competition in the market for bricks, pavers and related products is likely to ensure that any such efficiency gains are passed on to consumers, either in the form of improved services, or reduced prices for building products.
- 8.11 Consequently, the ACCC accepts that a public benefit is likely to arise insofar as the proposed collective arrangements may allow CSR Building Products to improve the efficiency of its operations. The ACCC considers however, that any such benefit is likely to be minimal.

### **More effective input into contracts**

- 8.12 An increase in bargaining power, raised in the authorisation context, typically involves a group of smaller businesses attempting to improve their bargaining position relative to another, generally larger, business through a collective arrangement.
- 8.13 The ACCC does not consider a mere change in bargaining power is, in itself, a public benefit. Rather, the ACCC focuses on the likely outcomes resulting from the change in bargaining positions as a consequence of the proposed arrangement for which authorisation is sought. It is these likely outcomes which are essential to the net public benefit test.
- 8.14 The ACCC recognises that there is a combination of factors which, in some circumstances, result in smaller businesses having little bargaining power compared with larger businesses.
- 8.15 In this case, the ACCC considers that, under the likely counterfactual, owner-drivers are likely, to some extent, to negotiate the terms and conditions of their cartage contracts with CSR Building Products. The ACCC considers that the

proposed collective bargaining arrangements may alter this situation, giving the owner-drivers greater scope to negotiate their terms and conditions.

- 8.16 To this extent, and to the extent that owner-drivers utilise an increase in bargaining power effectively in contractual negotiations, the ACCC considers that proposed arrangements may provide some scope for efficiency gains in this respect. The ACCC considers that were such efficiencies occur, it is likely that competitive pressures in the market for bricks, pavers and related products will result in at least some of these gains being passed on to consumers, either in the form of lower prices or improved services.
- 8.17 The ACCC also considers that, where each party involved in a process of collective negotiations supports conducting such negotiations, there are likely to be efficiency gains for those involved. The ACCC considers that, as both CSR Building Products and the owner-drivers support the proposed arrangements, it is likely that they will gain some efficiencies from the process.
- 8.18 The ACCC therefore considers that some public benefit may arise by virtue of the proposed arrangements allowing owner-drivers more effective input into their contract negotiations with CSR Building Products.

#### **Improved industrial harmony**

- 8.19 CSR Building Products submits that, on the basis of its previous experience, allowing owner-drivers to collectively negotiate the terms and conditions of their cartage contracts will help ensure industrial harmony. CSR Building Products notes that its contracted owner-drivers each perform the same type of work using the same type of vehicles, CSR Building Products considered that, were it to differentiate between individual owner-drivers in relation to rates or conditions, there is a real prospect of industrial disharmony amongst the group, which would impact adversely on CSR Building Products and its customer base.
- 8.20 The ACCC has previously accepted that, where collective negotiations provide for equitable treatment of the negotiating parties, and to the extent that this promotes greater industrial harmony when compared to the likely counterfactual, that a public benefit will be achieved. The ACCC notes that, where it can be demonstrated that a grant of authorisation will assist in avoiding industrial disharmony, a benefit may arise insofar as it may prevent inefficiencies that may be caused by disharmony, such as a disruption in the supply of a given product.
- 8.21 In this instance however, the ACCC considers that CSR Building Products has not established that, absent authorisation, there is a real prospect of industrial disharmony occurring, or that the proposed arrangements will prevent such a situation from arising. The ACCC therefore considers that the state of industrial harmony is unlikely to be effected by the proposed arrangements and, as a consequence, does not consider that the arguments put forward by CSR Building

Products would result in a public benefit above that which would occur in the absence of authorisation.

### **Submission in respect of potential public detriments - Queensland Department of Industrial Relations**

- 8.22 In its submission, QDIR has noted that, by authorising owner drivers to engage in collective bargaining, CSR Building Products may be able to impose a single set of terms and conditions on owner drivers and may also avoid the transaction costs associated with dealing with independent contractors while still referring to them as independent contractors. QDIR has expressed concern that some arrangements between independent contractors and the businesses contracting their services may have the effect of creating a dependent relationship beyond the reach of industrial instruments and employment legislation. In this respect, QDIR is concerned that a grant of authorisation may legitimise the treatment of persons that are effectively employees as independent contractors.
- 8.23 The ACCC however is of the view that the matters identified by QDIR are matters unrelated to arrangements for which authorisation has been sought. In particular, the ACCC is of the view that, irrespective of its decision in this matter, owner-drivers are likely to be engaged by CSR Building Products as independent contractors. Further under the existing arrangements CSR Building Products is able to impose a single set of terms and conditions should it wish to do so. This ability will be unaffected by a grant of authorisation.

### **Conclusion on the Public Benefits**

- 8.24 The ACCC considers that the proposed collective bargaining arrangements are likely to generate a public benefit above that of the counterfactual. The ACCC considers that these benefits will arise from:
- transaction cost savings from conducting a single negotiation process and
  - efficiencies gained from allowing owner-drives greater input into their cartage contracts.

## **9 Balance of public benefits and detriments**

- 9.1 The ACCC considers collective bargaining agreements which set uniform terms and conditions are likely to lessen competition. The ACCC considers however, that there are a number of features of the proposed collective bargaining arrangements which may serve to mitigate the potential anti-competitive detriment, including:
- the current level of competition, between owner-drivers, with respect to those terms on which they are seeking to negotiate, is low
  - participation in the proposed arrangements is voluntary
  - the proposed arrangements only affect a small number of owner-drivers
  - the proposed arrangements are specific to a single contracting firm
  - the proposed arrangements do not include boycott activity and
  - the proposed arrangements are unlikely to significantly alter the pre-existing barriers to entry to the market for cartage services in the Brisbane area.
- 9.2 Consequently, the ACCC considers that the potential anti-competitive detriment that may arise from the proposed collective bargaining arrangements is likely to be minimal.
- 9.3 The ACCC considers that the proposed arrangements will result in some public benefit. In particular, the ACCC considers that, to the extent the proposed collective bargaining arrangements provide efficiencies by improving the input of owner-drivers in the terms and conditions of their cartage contracts with CSR Building Products, the proposed arrangements would be likely to generate a public benefit.
- 9.4 Additionally, the ACCC considers that the proposed arrangements are likely to result in transaction cost savings which, given competitive pressures in the market for bricks, pavers and related products, are likely to be passed on to consumers.
- 9.5 Consequently, following consideration of the arguments advanced by CSR Building Products and interested parties, the ACCC concludes that the public benefits likely to result from the proposed arrangements will outweigh the anti-competitive detriment.

## **10 The draft determination**

### **The applications**

- 10.1 On 29 March 2005, CSR Building Products lodged an application for authorisation (A90964) with the ACCC on behalf of a group of consenting lorry owner-drivers (brick carters) providing cartage services for CSR Building Products' bricks and pavers from CSR Building Products' production facilities to building sites in the Brisbane area.
- 10.2 On 1 April 2005, CSR Building Products lodged a second application for authorisation (A90965) with the ACCC on behalf of a different group of semi-tipper owned-drivers (clay carters) providing cartage services for raw materials between CSR Building Products' quarries and its factories in the Brisbane area.
- 10.3 The applications seek:
- 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 TPA and
  - to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 10.4 Specifically, CSR Building Products is seeking the authorisations to allow its brick carters and clay carters to act collectively in:
- negotiating the terms and conditions of their cartage contracts with CSR Building Products
  - negotiating standard rates to be paid by CSR Building Products for delivery
  - negotiating a formula for the progressive increases of those rates and
  - negotiating prescribed conditions of delivery by the brick carters or clay carters.
- 10.5 In addition, under application for authorisation A90965, CSR Building Products proposes to collectively negotiate a provision for review of rates based on productivity with its clay carters.

### **Statutory test**

- 10.6 For the reasons outlined in this draft determination, the ACCC is satisfied that in all the circumstances the making of contracts and the giving effect to the provisions

of the proposed arrangements for which the authorisations are sought under section 88(1) of the TPA:

- would be 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.

**Proposed authorised conduct**

10.7 In relation to applications for authorisation A90964 and authorisation A90965 and pursuant to section 88(1) of the TPA, the ACCC proposes to grant authorisation to allow the clay carters and brick carters named in these applications to act collectively in:

- negotiating the terms and conditions of their cartage contracts with CSR Building Products
- negotiating standard rates to be paid by CSR Building Products for delivery
- negotiating a formula for the progressive increases of those rates and
- negotiating prescribed conditions of delivery by the brick carters or clay carters.

10.8 The ACCC also proposes to grant authorisation to CSR Building Products, to allow the clay carters named in application for authorisation A90965 to collectively negotiate a provision for review of their rates based on productivity.

10.9 The ACCC proposes to grant authorisation to application A90964 for a period of five years from the time the final determination is granted. The ACCC also proposes to grant authorisation to application A90965 for a period of three years from the time the final determination is granted.

10.10 In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is actually made eventuate in practice and the appropriateness of the authorisation in the current market environment.

10.11 The ACCC considers that to the extent that the CSR Building Products, or any other party to whom immunity is provided by the proposed authorisation, acts outside of the authorised arrangements or does not comply with the authorisation, they will not have protection from the TPA in so doing.