



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

GPO Box 9879 CANBERRA ACT 2601

Mr Scott Gregson
A/g General Manager
Adjudication Branch
Australian Competition and Consumer Commission
By fax: (02) 6243 1211

Dear Mr Gregson

I refer to your letter of 7 July 2005 to Dr Peter Boxall, Secretary of the Department of Employment and Workplace Relations, seeking comments regarding the collective bargaining authorisation applications (A90973 and A90974) lodged by the Tasmanian Forest Contractors Association Ltd (TFCA). The Secretary has asked me to respond on his behalf.

The Department is supportive of authorisation for collective bargaining arrangements in the public interest. However, we remain concerned about this particular arrangement proposed by the TFCA, in terms of its likely public benefits and detriments. In this context, I refer you to the attached final Departmental submission regarding the substantive TFCA applications. This follows our 20 July 2005 submission regarding the TFCA's request for interim authorisation.

I trust this will be of assistance to the Commission in its consideration of the TFCA applications.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Anna Clendinning', written in a cursive style.

Anna Clendinning
Assistant Secretary
Strategic Policy Branch
Workplace Relations Policy Group

/o August 2005



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

GPO Box 9879 CANBERRA ACT 2631

**Submission regarding applications for authorisations A90973 and A90974
lodged by the Tasmanian Forest Contractors Association Ltd**

Agreements affecting competition - Application for Authorisation A90974

The TFCA has sought authorisation on behalf of its member forest contractors to allow them to collectively negotiate, within contracting groups, the terms and conditions of contracts for the provision of forest contracting services (including silviculture, harvesting and transport) to five Tasmanian wood companies: Gunns Ltd; Forestry Tasmania; Forest Enterprises Australia Ltd; Rayonier Ltd; and Norske Scog.

Under the *Trade Practices Act 1974* (TP Act), the onus is on the applicant to satisfy the ACCC that the arrangement will result in benefits to the public which outweigh any detriments in terms of a lessening of competition. The Department makes the following observations in respect of the likely public detriments and benefits of the arrangement.

Public detriment

There are a number of aspects of the proposed arrangement which signal public detriment in terms of reduced competition.

Large aggregate size of bargaining units with common industry representation.

The arrangement could collectively cover all TFCA members across the three main segments of the Tasmanian forest contracting industry, silviculture, harvesting and transport. The TFCA claims to have 'strong membership levels', with its members responsible for '85 per cent of the total wood flows produced by forest contractors within Tasmania.' While the TFCA contemplates forming ten discrete bargaining units, the common involvement of the TFCA in the establishment of these bargaining units and their ongoing administration, as well as the potential for direct TFCA involvement in negotiation activities, increases the potential for standard contracts across much of the industry, with associated anti-competitive detriment.

Composition of bargaining units restricted to current and future TFCA members.

The likely consequence of this restriction would be that the TFCA members would be able to collectively negotiate more commercially attractive terms and conditions than their non-member competitors, who would be excluded from the arrangement. This may impact on the longer term viability of non-members, and consequently, upon their ability to compete with TFCA members.

Authorisation is sought for a lengthy ten year period.

The TFCA has requested this lengthy period of authorisation in an attempt to secure collectively-negotiated long term contracts for their members. The ACCC has previously

indicated¹ that longer-term arrangements may reduce potential for competition by 'locking-in' supply and acquisition decisions and creating barriers to entry for new businesses. In this case, such anti-competitive effects could be further compounded because the arrangement would extend to all major acquirers of forest contract services. On the other hand, those effects could be mitigated by: the proposed bargaining units extending to include future unnamed contractor members; and the presence of existing structural barriers to entry associated with large fixed capital cost requirements in machinery and equipment.

Public benefit

In the submission supporting its applications, the TFCA argues that a number of public benefits would be likely to flow from the proposed arrangement.

Improved OH&S standards for forest contractors and their employees.

The TFCA argues that cost pressures on forest contractors under existing arrangements are forcing them to 'cut corners' when it comes to occupational health and safety (OHS). Anecdotal accounts of non-compliance with the *Workplace Health and Safety Act 1995 (Tas)* and the State-based *Forest Safety Code 2002* are presented as evidence of this claim.

The Department does not believe that authorisation of a collective bargaining arrangement represents an appropriate policy response to identified problems of OHS.

The Tasmanian Government has primary responsibility for OHS matters within Tasmania, including administration of the *Workplace Health and Safety Act 1995 (Tas)* and the *Forest Safety Code 2002*. Difficulties in relation to OHS performance in the forest contracting industry would more appropriately be addressed by the industry in collaboration with Workcover Tasmania.

The Australian Government's role in OHS matters is in the promotion of injury prevention and best OHS practice. The Government is initiating the development of the National OHS Strategy and encouraging its adoption by all Australian governments and peak employer and employees bodies. For the first time in Australia, this Strategy establishes an integrated approach to strive for workplaces to be free from work-related death, injury and disease. In particular, targets have been set for significant reductions in the rate of work-related deaths and injuries.

In its response to the Productivity Commission's inquiry into National Workers' Compensation and OHS Frameworks, the Australian Government undertook to establish the Australian Safety and Compensation Council. The new body will comprise representatives from each State and Territory government, as well as the Australian Government, along with employer and employee representatives. The ASCC will establish a national approach to workplace safety and workers compensation which currently does not exist in Australia. The ASCC's main role will be to coordinate research and provide policy advice to the Workplace Relations Ministerial Council – which comprises the Federal Workplace Relations Minister and State and Territory counterparts. The ASCC will be a key forum for greater national discussion and coordination while respecting states' jurisdictions over workplace safety and workers compensation. Most importantly, the ASCC will provide the perfect setting for the promotion of greater consistency and uniformity amongst the various jurisdictions. As with its predecessor, the National Occupational Health and Safety Commission, legislation is to be

¹ Authorising and notifying collective bargaining and collective boycott issues paper; ACCC; July 2004

introduced in the spring sitting of Parliament which will enable the ASCC to declare national OHS standards and codes of practice.

The Department believes that the aforementioned measures constitute an appropriate Commonwealth policy response on OHS concerns but that authorisation for the TFCA's proposed collective bargaining/boycott arrangements would not. Granting the TFCA application could improve forest contractors' profitability, but would provide no guarantee of improved OHS performance. In addition, granting authorisation on the ground of improved OHS outcomes could encourage other groups to argue for the authorisation of anti-competitive arrangements because competition is inducing them to lower OHS standards.

Increased retention of skilled workers and improved training for new employees.

The TFCA argues that financial pressures under existing arrangements make it difficult for forest contractors to retain employees and to offer traineeships.

The Department does not believe that authorisation of a collective bargaining arrangement represents an appropriate policy response to identified problems of skilled or unskilled labour shortages or limited access to traineeships or apprenticeships within an industry. The Department believes that such issues should instead be addressed through targeted policies and programmes.

The Government has already implemented a range of initiatives designed to address skill shortages, including: legislative reforms to ensure a more flexible workplace relations system which rewards skills while discouraging inflationary wage outcomes; enhancing the responsiveness of education and training to future skill needs; encouraging vocational education and training in schools; increasing the availability of new apprenticeships; and facilitating the entry of skilled migrants into Australia. The Department is happy to provide the Commission with further details of these initiatives upon request.

Reduced transaction costs from conducting negotiations as a group.

The arrangement proposed by the TFCA seeks to introduce a rates matrix methodology similar to that previously relied upon in the industry during the 1980s, as well as a specifically designed rate indexing model, a methodology for determining diesel fuel surcharge, and a methodology for lining up seasonal short-term silviculture contracts.

It is not immediately apparent to the Department that this will necessarily result in reduced transactions costs when compared to current tendering arrangements. In this context, we note the submission of Norske Skog that its harvesting and transport contracts were recently reviewed and renewed for a period of five years. The Department recognises, however, that the Commission's assessment of this claim of public benefit will necessitate detailed analysis of a range of technical pricing issues.

Improvements in social wellbeing for forest contractors.

The TFCA relies on anecdotal evidence and unreferenced research to support this claimed benefit. The ACCC has previously stated that it requires 'strong and credible evidence that claimed public benefits are likely to flow', and that 'general statements about possible or likely benefits will not be given much weight unless supported by factual material.'²

² *Re Howard Smith Industries Pty Ltd* (1977), ATPR 40-023, at 17,334.

Improvements in the viability of the timber industry in Tasmania.

The ACCC has previously indicated that it 'requires clear evidence of the viability of efficient small businesses being jeopardised, and that allowing those small businesses to bargain collectively will go some way towards ensuring their continued viability.'³ It is the Department's submission that the TFCA has failed to make out such a case.

The TFCA application contains evidence of strong market conditions in the downstream softwood and hardwood markets. This would be expected to feed into strong demand for forest contracting services. *Ceteris paribus*, this would be expected to translate into future rate increases for forest contractors. The TFCA has not presented any evidence of abuse of market power or unconscionable conduct by any of the five major wood companies, which might allow the wood companies to extract rents from forest contractors.

The fact that the TFCA has not presented clear evidence to suggest a threat to the viability of the industry also casts doubt on the relevance of the other 'hardship-based' public benefit claims advanced by the TFCA. In any case, as the Department has argued above, authorisation is not an appropriately targeted policy response to the identified issues of CHS non-compliance, labour/training shortages, regional development etc.).

Exclusionary provisions - Application for Authorisation A90973

The TFCA has sought authorisation to allow its members to engage in collective boycotts (A90973). Under the TP Act, the onus is on the applicant to demonstrate that the conduct will result in benefits to the public such that it should be allowed to occur. The Department makes the following observations in respect of the likely public benefit/detriment arising from such conduct.

Public detriment

The ACCC has previously stated that 'when engaging in collective bargaining, the right to impose a collective boycott on a party to whom the collective bargaining unit is negotiating could operate in a similar way to the right to strike in the context of industrial relations. In the context of the commercial supply of goods and services, such a right could enable a collective bargaining unit to inflict significant commercial damage on those with whom they negotiate. As such, collective boycott activity can have significant economic consequences, not only for the business the target of the collective boycott, but for other downstream and upstream businesses and the economy as a whole.'⁴ The Department agrees with this general assessment of the damaging effects of boycotts. Collective boycotts, particularly those that are widespread in nature, can cause extensive damage to businesses, the economy and the labour force.

In this particular case, a refusal by TFCA member contractors to supply any of the five major wood companies could cause significant damage to the Tasmanian timber industry, threatening valuable export contracts, productivity, efficiency, international competitiveness and ultimately jobs. The Department recognises that, in mitigation, the collective boycott is set down in the TFCA submission as a 'last resort' mechanism, to be adopted only after a five month negotiation period has expired and a subsequent 28 day mediation period has been

³ Authorising and notifying collective bargaining and collective boycott issues paper, ACCC; July 2004

⁴ Authorising and notifying collective bargaining and collective boycott issues paper, ACCC; July 2004

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exhausted. The Department is also aware that the ACCC has previously granted conditional authorisation for a boycott arrangement involving chicken meat growers (A40093 and A90931) which was similarly specified to follow expiration of a six month negotiation period and 28 day mediation period.