



11 Coolidge Wynd
Macleod Victoria 3085

Tel/Fax: (03)94593350

Mobile: 0411400312

Email: info@competitioneconomics.com.au

29 July 2007

Mr S Chisholm,
Adjudication Branch,
Australian Competition and Consumer Commission,
GPO Box 3131
Canberra ACT 2601

Dear Mr Chisholm

Re: CMPA application for authorisation A91047

At the pre-decision conference on the above application the Transport Workers Union (TWU) raised a number of concerns about the detail of the proposed Owner Drivers Contract. The CMPA agreed to meet with the TWU and discuss these issues.

That meeting was held on Friday 27 July. At the meeting the CMPA provided the TWU with the attached document responding to its concerns. The majority of these responses were accepted by the TWU. The outstanding issues are whether the payment required of an owner driver under clause 67 is excessive and could constitute a penalty and the placement of the Small Business Commission in the list of alternative dispute resolution should be advanced. Two other issues raised at the meeting but not in the submission to the Commission are also outstanding.

The result of the meeting was that both parties are agreeable to continuing dialogue on the issue as experience in its use develops. This may see some later amendments but at the moment there are no changes to the document.

If you have any queries regarding the CMPA response to the TWU Please do not hesitate to contact me.

Yours sincerely,

Lindsay Coombs

**CMPA Response to the TWU submission to the
Australian Competition and Consumer Commission
Pre-Determination Conference: 17 July 2007**

**CMPA Owner Driver Model Contract:
Application for Authorisation A91047**

Overview

The CMPA notes that the TWU submission relates to the provisions of the Owner Driver model contract and that no submission has been made on the major contract. The replies provided therefore relate to only the Owner Driver model contract.

In its submissions the TWU has concentrated on compliance with the Owner Drivers and Forestry Contractors Act 2005 (the act), and the Code of Practice (the code) contained in the regulations to that act and pays little attention to the need to deal with commercial reality and other legislation including the Construction Industry Security of Payment Act, the Trade Practices Act and common law. It also concentrates on the terms of the contract rather than the general benefits and/or detriments of the agreement to prepare and publish the contract referred to in the application.

Much of the submission seems to be trying to pressure the CMPA to move to adopt the Transport Industry Council model contract. The Council is well aware of the CMPA's view that its model is not suitable for this industry and has supported the development of this industry specific contract. In its oral submissions the TWU supported this position also but the written submission gives no credence to this approach. The CMPA does not want to engage in a comparison with the TIC model but in some replies this has been unavoidable.

Rather than dealing with the broad allegations made and then the specific concerns listed the CMPA will deal with both together.

In each specific issue raised the TWU finishes with "The TWU submits this is detrimental to the public interest in that it is inconsistent with the provisions and the spirit and intention of the ODFCA and the Code of Practice. The TWU submits that this detriment outweighs any public benefit." or some similar wording. The CMPA believes that all issues in its contract are consistent with the provisions of the act, the code and other relevant legislation.

The code in most of its provisions merely provides guidance as to what may be unconscionable conduct but does not provide certainty. There is very little in it that sets mandatory conduct to be followed. The CMPA has taken note of the guidance and applied it as well as it can to this industry noting that much of the content relates to "conduct" in negotiations of, and application of, a contract and not to the wording of a contract in itself.

The CMPA cannot guarantee that in negotiating contracts or complying with a contract individuals will not breach the unconscionable conduct provisions of the act or similar provisions in the Trade Practices Act 1974 but has made all endeavours to ensure signatories are aware of the need to consult the code. Clause 11 of the contract, if unamended by negotiating parties, states "The supplier and cartage contractor agree to abide by any code of practice applicable to the services provided under this contract." Code of practice is defined as "... a mandatory code of practice that applies to the performance of the work required by this contract and includes a code made under Part 3 of the Owner Drivers Act."

Specific Issues

<p>The TWU has no objection in principle to the use of model contracts by participants in the owner driver industry and to the authorisation by the ACCC of those model contracts.</p>	<p>The CMPA notes that the ACCC is not asked to authorize the “contract” but to authorise “an agreement to prepare and publish” the contract.</p>
<p>The TWU objects to the use of model contracts and authorisation by the ACCC where those model contracts are inconsistent with the <i>Owner Drivers and Forestry Contractors Act 2005 (ODFCA)</i>, the Code of Practice and the spirit and intent of this legislation.</p>	<p>Subject to the response above, the CMPA agrees with this clause but denies that anything in its contracts are inconsistent with the act or the code or the spirit and intent of the act and code or any other legislation.</p>
<p>The TWU considers that the public detriment arising from the use and authorisation of the CMPA model contract outweighs any public benefit.</p>	<p>The CMPA considers that the public benefit arising from the agreement to prepare and publish the contract provide the public benefits set out in its original submission and that nothing raised by the TWU shows any detriment from that agreement.</p>
<p>The TWU notes that there are important public benefits to be derived from the enactment of the ODFCA and the Code of Practice, namely an improvement in the viability and prosperity of owner driver businesses.</p>	<p>The CMPA believes that its contract will assist the in promoting improvements in the business practices of both parties to the contract. Whether there is an improvement in the prosperity of owner drivers businesses will depend ultimately upon the effort they put into their businesses and not on any legislation.</p>
<p>The TWU submits that the use of the CMPA model contract will restrict the ability of owner drivers operating in this industry sector to negotiate fair and reasonable contracts. This will have a detrimental impact on the viability of the businesses of these owner drivers and will thwart the intention of the ODFCA and the Code of Practice.</p>	<p>The CMPA contract is purely voluntary and does not restrict the ability of any supplier or owner driver to negotiate another contract if the feel it is restricting their ability to negotiate fair and reasonable conditions. However the contract does leave open to negotiation the central elements of a contract and does not prevent any clause being amended.</p>
<p>1. Complex Model Contract</p>	
<p>The TWU considers that the CMPA model contract is unnecessarily complex.</p>	<p>The CMPA can only state that it believes that its contract is in plain English in describing what are in fact complex delivery situations and a complex relationship between suppliers and owner drivers. The Owner Drivers contract as stated in our original submission covers not only the requirements of the act and the code but the chain of responsibility in transport legislation and the provisions of the Construction Industry Security of Payments Act. (CISPA)</p>

<p>The ODFCA was designed to help owner drivers to conduct more prosperous business.</p>	<p>Neither the agreement nor the contract affect this in any way</p>
<p>One of the ways it does this is by providing owner drivers with information and resources which are in plain English and readily understood, used and applied.</p>	<p>All resources required to be provided by the act are required to be provided under the contract. In fact the contract allows for the provision of a copy of the code which is not required by the act.</p>
<p>The inability to understand, use and apply model contracts will inhibit the ability of owner drivers to negotiate a fair contractual outcome.</p>	<p>The CMPA believes that its contract in plain English. It is also purely voluntary and does not restrict the ability of any supplier or owner driver to negotiate another contract if they feel it is restricting their ability to negotiate fair and reasonable conditions. The contract leaves open to negotiation the central elements of a contract and does not prevent any clause being amended except those required by law. The CMPA believes that owner drivers employed in this industry will have no problem in understanding and using its contract. To date no problems have been reported by members or owner drivers.</p>
<p>The TWU submits this is detrimental to the public interest in that it is inconsistent with the provisions and the spirit and intention of the ODFCA and the Code of Practice. The TWU submits that this public detriment outweighs any public benefit.</p>	<p>The CMPA believes that all issues in its contract are consistent with the provisions of the act and code and other relevant legislation and that consequently there is no public detriment involved.</p>
<p>2. Regular Rate Review</p>	
<p>The CMPA model contract does not provide for the regular review of rates.</p>	<p>The contract requires parties to stipulate an agreed time period when rates will be reviewed. That period is to be set out in Item 8 of Annexure B.</p>
<p>Clause 6 of the CMPA model contract provides that rates may be reviewed in exceptional circumstances at the request of either party.</p>	<p>In full Clause 6 states: “The supplier shall pay the cartage contractor at the rate set out in Item 8. If the termination date is greater than 365 days from the date on which the supplier signs the Formal Instrument of Agreement the rates shall be reviewed at the time stated in Item 8. In exceptional circumstances either the supplier or the cartage contractor may request a review of the rates and the other party shall not unreasonably refuse that request.” What has been quoted by the TWU is the exceptional circumstance part of the clause</p>

	<p>which is designed to allow for review at other than the agreed period.</p> <p>The default date for termination of the contract has been set at 365 days after the signing of the Formal Instrument of Agreement. If this is not varied by the parties a new contract would be signed yearly and rates would have to be agreed again.</p>
<p>Section 14 of the ODFCA provides that rates and cost schedules must be reviewed by the Minister in consultation with industry at least every 12 months.</p>	<p>The contract requires that “rates” be reviewed ie the actual amounts to be paid. The rates and cost schedules issued by the Minister do not specify actual costs or rates to be paid. The Transport Industry Council is aware of the view of the CMPA that none of the rates and cost schedules issued by the Minister are appropriate to this industry. The CMPA advises members to issue the rates and cost schedule relating to 12 Tonne Rigid Vehicle (GVM) (3 axle) as guidance but that may not be appropriate for the 20 to 30 Tonne vehicles used in this industry.</p> <p>What the minister does in issuing Rates and Costs schedules is only a calculating guide for rates which will be agreed between the parties to an agreement.</p>
<p>The purpose of this requirement is to ensure that the rates negotiated by owner drivers continue to reflect an adequate return.</p>	<p>Given the fact that the rates and cost schedules cover only average costs for some vehicles they do not provide any assistance in ensuring that rates negotiated by owner drivers reflect an adequate return. It is up to the owner driver to determine his/her costs with the aid of the schedule and negotiate from there.</p>
<p>The Code of Practice (clause 12(d)) provides that contracts must provide for rates to be regularly and systematically reviewed and that failure to do so may constitute unconscionable conduct.</p>	<p>As stated above clause 6 and Item 8 provide for such review.</p>
<p>The TWU submits that the failure to provide for the regular and systematic review of rates is detrimental to the public interest in that it is inconsistent with the provisions and spirit and intention of the ODFCA and the Code of Practice. The TWU submits that this public detriment outweighs any public benefit.</p>	<p>The CMPA believes that the regular review of rates required by the contract is appropriate and that all issues in its contract are consistent with the provisions of the act and code and other relevant legislation and that consequently there is no public detriment involved.</p>

<p>3. Changes to the ODFCA by Parliament</p>	
<p>The CMPA model contract incorporates provisions directly from the ODFCA but does not contain any requirement for clauses to be up- dated to reflect changes made by Parliament to the Act.</p>	<p>Both contracts currently involved in this application rely on law as currently enacted and the CMPA has tried to write special provisions into the contract rather than rely on statements such as “in accordance with section x of the act” as does the Transport Industry Council model contract. The CMPA believes that it is beneficial to parties to have the provisions before them rather than having to find and refer to other documents. Whichever way the issue is dealt with signatories may not be aware of changes in the legislation to which the clause refers or which deals with an issue required by changing legislation particularly where amendments are made in a completely different act. Eg the act is being amended by the “Outworkers and Contractors Legislative Amendments Bill”.</p> <p>Whichever approach is taken signatories will generally have to be advised of the changes. When legislative changes are made the parties can change provisions of the contract under clause 146 so as to comply with the changes.</p>
<p>Clause 14(c) of the CMPA model contract provides that instead of giving notice, the hirer may pay the owner driver an amount calculated in accordance with Schedule D of the contract.</p>	<p>See above response.</p>
<p>Schedule D sets out the current provisions of section 22 of the ODFCA.</p>	<p>See above response.</p>
<p>Section 22 of the ODFCA will soon be amended by the <i>Outworkers and Contractors Legislation Amendment Bill</i>. This Bill is currently under consideration by the Victorian Parliament.</p>	<p>See above response.</p>
<p>The Bill changes the payment in lieu of notice provisions. It provides for owner drivers subject to finance to be paid their fixed costs (rather than their variable costs) and owner drivers not subject to finance to be paid their other fixed costs.</p>	<p>See above response.</p>
<p>Owner drivers who enter into the CMPA model contract in its current form will be significantly disadvantaged if their contract is</p>	<p>See above response.</p>

<p>terminated and they opt to receive payment in lieu of notice.</p>	
<p>The TWU submits that this is detrimental to the public interest in that it is inconsistent with the provisions and spirit and intention of the ODFCA and the Code of Practice. The TWU submits that this public detriment outweighs any public benefit.</p>	<p>The CMPA believes that all issues in its contract are consistent with the provisions of the act, the code and other relevant legislation and that consequently there is no public detriment involved.</p>
<p>4. Shifting Balance</p>	
<p>The CMPA model contract shifts the balance strongly in favour of hirers to the detriment of owner drivers. The CMPA model contract is overly prescriptive, leaving little room for owner drivers to negotiate a fair agreement. For example:</p>	<p>The CMPA believes that its contract in plain English. It is also purely voluntary and does not restrict the ability of any supplier or owner driver to negotiate another contract if the feel it is restricting their ability to negotiate fair and reasonable conditions. The contract leaves open to negotiation the central elements of a contract and does not prevent any clause being amended except those required by law. The CMPA believes that owner drivers employed in this industry will have no problem in understanding and using its contract. To date no problems have been reported by members or owner drivers.</p>
<p><u>Clause 38(d): Delivery Drivers:</u></p> <ul style="list-style-type: none"> - Owner drivers must provide a list of each delivery driver to perform work under the contract. - Owner drivers are required to notify any change 10 working days prior to the change and the change can only occur if approved by the hirer. - No explanation is provided of the circumstances in which hirers can withhold their approval. (There is no requirement that hirers cannot unreasonably withhold approval) 	<p>Such a list is also required by the TIC model contract. The only difference is that the CMPA contract specifies a time in which notice is to be given in a change to the list of drivers.</p> <p>Clause 38 of the contract lists the requirements of drivers. The CMPA does not believe that it is necessary to say that approval will be withheld if these requirements are not met.</p>
<p><u>Clauses 40 to 43: Owner Driver Absence</u></p> <ul style="list-style-type: none"> - These clauses set out the requirements for absence of owner drivers. - They require 4 weeks notice of intention to be absent and provide that the hirer may refuse consent if the absence would cause a significant disruption to the hirer's business. "Significant" disruption 	<p>"Significant" is a word that falls into the same category as the word "substantial" when used in the Trade Practices Act and the courts have consistently refused to give a precise definition to the word. What is significant will vary from business to business and will depend on the circumstances at the time an</p>

<p>is not defined.</p> <ul style="list-style-type: none"> - Owner drivers should be able to use approved substitute drivers so that there is no significant disruption to the hirer's business. 	<p>event occurs.</p> <p>Clause 40 of the contract specifically states "During that period the cartage contractor may provide the service by using a substitute driver."</p>
<p><u>Clause 43: Sickness:</u></p> <ul style="list-style-type: none"> - If the owner driver cannot drive the vehicle because of sickness, disability or other urgent cause, the owner driver must give notice to the hirer. - "Notice" is not defined so it is not clear how much notice an owner driver is required to give if he cannot work because of illness or some other urgent cause. 	<p>Notice is specifically not defined as the circumstances involved may vary widely. If the Owner Driver was to have elective surgery it would be expected that a significant period of notice could be given. If the Owner Driver wakes up with the flu immediate notice would obviously be expected.</p>
<p><u>Clause 63: Damage to Equipment:</u></p> <ul style="list-style-type: none"> - Owner drivers must indemnify hirers for the cost of repair or replacement of communications equipment damaged by the owner driver or any employee or sub-contractor of the owner driver. - Damage is not defined. Is the owner driver liable for accidental damage or negligent damage or for both? 	<p>The property of the supplier is in the possession of the owner driver or an employee and they are responsible for the safety of such equipment. The clause specifically allows coverage of both accidental and negligent damage. There is no prohibition on the supplier waiving the right to claim damages in either event.</p>
<p><u>Clauses 99 to 114: Payment of Owner Drivers</u></p> <ul style="list-style-type: none"> - It is not clear whether the CMPA model contract provides for payment of owner drivers in accordance with the Code of Practice. 	<p>The payment provisions in the contract are those set out in the CISP. While it is debatable whether Owner Drivers are covered by the CISP the CMPA has chosen to incorporate procedures required by that act to Owner Driver payments. This sets out a procedure for claim and payment in stipulated periods. In the event that the Owner Driver does not produce and invoice the procedures allow for the supplier to calculate the amount payable and pay the Owner Driver.</p>
<p><u>Clause 67: Appearance of Vehicle:</u></p> <ul style="list-style-type: none"> - Under the CMPA model contract, hirers have a right to stand down a vehicle which does not meet the requirements of appearance until the vehicle meets the required standard. 	

<p>resolution processes. While clause 138(d) refers to mediation, it seems "lost" amongst the other dispute settlement clauses and could be easily overlooked by owner drivers.</p>	<p>previously the contract covers numerous issues. Where there is a dispute on payment the provisions of the CISP apply. Other issues may require different dispute resolution mechanisms and the range from which one can be chosen seems fair and reasonable in the circumstances.</p>
<p>The mediation provisions should be given a more prominent place in the dispute resolution clause in order to make it absolutely clear that owner driver disputes can be referred to the Small Business Commissioner for mediation.</p>	<p>The CMPA does not accept that the contract gives one procedure more prominence than another. The Small Business Commissioner has seen the contract and at his suggestion to clarify his coverage the words "or this contract" were included in clause 138 (d). The Commissioner made no request to give his role more prominence.</p>
<p>The TWU submits that this is detrimental to the public interest in that it is inconsistent with the provisions and spirit and intention of the ODFCA and the Code of Practice. The TWU submits that this public detriment outweighs any public benefit.</p>	<p>The CMPA believes that all issues in its contract are consistent with the provisions of the act, the code and other relevant legislation and that consequently there is no public detriment involved.</p>
<p>Conclusion</p>	
<p>The TWU requests that the ACCC reconsider its approval in principle to the CMPA's application for authorisation of its model contract on the basis that the public detriment outweighs the public benefit.</p>	<p>As stated authorization is for the arrangement to prepare and publish certain contracts. The contract as such are not authorized.</p>
<p>The TWU submits that the CMPA model contract is inconsistent with the provisions and the spirit and intention of the Owner Drivers and Forestry Contractors Act 2005 and the Code of Practice.</p>	<p>The CMPA believes that all issues in its contract are consistent with the provisions of the act, the code and other relevant legislation.</p>
<p>The TWU submits that the CMPA model contract will have a detrimental impact on owner drivers involved construction material processing sector of the transport industry and this in turn has the potential to impact adversely on the Victorian economy.</p>	<p>The CMPA does not accept that the contract will have the effect claimed and experience to date has provided nothing to support the submission. In the CMPA's view even if the submissions were accepted it is difficult to see how it can be argued that any detrimental effect on drivers would or could "impact adversely on the Victorian economy."</p>
<p>The CMPA be provided with an opportunity to re-draft its model contract so that it reflects the spirit and intention and provisions of the <i>Owner Drivers and Forestry Contractors Act 2005</i> and the Code of Practice.</p>	<p>The CMPA believes that all relevant issues in its contract reflects the spirit and intention and provisions of the act and the code and other relevant legislation and sees no need to redraft its contract.</p>