

**Australian Competition
&
Consumer Commission**

PRE-DECISION CONFERENCE

Minutes

**Authorisation A91047
lodged by the Construction Material Producers Association**

17 July 2007

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-determination conference but a summary of the matters raised. A copy of this document will be placed on the ACCC's public register.

**Pre-Decision Conference: Authorisation A91047 lodged by the Construction
Material Producers Association**

17 July 2007
Level 35, The Tower
360 Elizabeth Street
Melbourne Central
Melbourne VIC 3000

Attendees:

Australian Competition and Consumer Commission

Stephen King
Commissioner

Scott Gregson
General Manager – Adjudication

Shane Chisholm
Assistant Director – Adjudication

Construction Material Producers Association

Mark Wagner
Construction Material Producers Association Member

Sarah Andrew
Construction Material Producers Association Secretariat

Lindsay Coombs
Competition Economics Services

Transport Workers Union

Bill Noonan
Branch Secretary

Jenny Baker

Eugene Richards

Cement Concrete and Aggregates Australia

John Turton
Manager Premixed Concrete and Extractive Industries

Conference commenced: 2:00PM

Introduction

Commissioner King welcomed attendees, made some introductory remarks outlining the purpose of the conference, declared the pre-decision conference open and invited Mark Wagner, on behalf of the Construction Material Producers Association (CMPA), to make an opening statement.

Opening Statements

Mark Wagner, Member, CMPA, stated that the CMPA had sought authorisation to develop and publish two standard form contracts, one for supply of construction materials and the other for contracting with owner drivers. Mr Wagner noted that the owner drivers contract had been developed to assist quarry owners to comply with the *Owner Drivers and Forestry Contractors Act 2005 (Vic)* ('the ODFC Act'). Mr Wagner stated that the ODFC Act encourages the formation of written contracts, with a model contained in the Act which the CMPA considers to not be specific enough for their industry, and that their standard form contract was designed to ease business costs.

Mr Wagner noted that a driver was likely to work for a number of members of the CMPA, and renegotiation with each member was burdensome and costly, with the standard form contract providing clarity to the legal position.

Mr Wagner considered that the standard form contracts for owner drivers were also seeking to assist in making the industry safe and responsible, as the CMPA members could be liable through Chain of Responsibility legislation, and the standard form contracts would address issues that were specific to the "heavy end of the industry" involved in the transportation of construction materials.

Mr Wagner concluded by saying that for these reasons the CMPA had decided to "bite the bullet" and spent time and effort to develop the standard form contracts.

Commissioner King asked Bill Noonan, on behalf of the Transport Workers Union, if he wished to address the conference.

Bill Noonan stated that the Transport Workers Union was not opposed to the idea of the development of standard form contracts, and noted that he and the TWU had been involved in these matters involving quarries for many years. Mr Noonan stated that he considered the key principles coming from the recently implemented ODFC Act to be access to low cost dispute resolution procedures and the development of written contracts that could be understood by the "ordinary man". Mr Noonan noted that, in the past, the TWU had been involved in circumstances where large groups of drivers had signed up to written contracts that they did not fully understand, which they then regretted when disputes arose.

Mr Noonan noted the Transport Industry Council's (TIC) formation and considered that its decisions are important in this area as it represents industry groups and unions, and makes its decisions by consensus. Mr Noonan noted that the TIC's model contract was aimed at catering for all parts of the transport industry. Mr Noonan considered that any industry specific model contract should likewise be easily understandable for owner drivers. Mr Noonan raised concerns over whether the CMPA contracts were as "plain English" as they could be and whether they best reflected the ODFC Act or its spirit.

Mr Noonan noted the study completed before the ODFC Act was passed, undertaken by Industrial Relations Victoria, which commented on the information imbalance between owner drivers and their hirers. For this reason, he considered that it would be important for the CMPA/TWU to conduct information sessions for owner drivers on several provisions of the contract, for example, access to the Small Business Commissioner and the Victorian Civil and Administrative Tribunal for mediation or decision.

Mr Noonan then noted that the ODFC Act was designed to overcome concerns of unconscionable conduct, which may be an issue with standard form contracts. The ODFC Act had sought to overcome this by allowing groups of owner drivers to appoint the TWU as a collective bargaining agent. Mr Noonan then asked Jenny Baker to set out the TWU's views in further detail.

Jenny Baker summarised a written submission from the Transport Workers Union for the attendees (see attachment for detail).

Commissioner King asked John Turton, on behalf of Cement Concrete and Aggregates Australia (CCAA), if he wished to address the conference.

John Turton indicated that the CCAA did not wish to make an opening statement to the conference.

Commissioner King opened the conference for discussion and invited Mark Wagner to respond to the issues raised by the TWU.

Mark Wagner responded by stating that the standard form contract had been considered by both Industrial Relations Victoria and the Officer of the Small Business Commissioner and no substantial issues had been raised. Mr Wagner noted that not everybody will ever agree with the standard form contract that is put together. Mr Wagner then moved to a couple of specific points, noting that the CMPA would be likely to respond in writing at a later time. With respect to the issue of changes to the list of agreed delivery drivers, Mr Wagner noted that the clause was designed to protect the hirer in cases such as where the substitute driver did not have the relevant licence.

Jenny Baker clarified that the TWU's concern was that there was no requirement for the hirer to act "reasonably" in rejecting proposed driver changes, unlike the requirements in the TIC's model contract.

Mark Wagner then noted that it was not the CMPA's intention to shift the balance of power to its members and, as there had not been written contracts in the past, in his view it was unlikely that there was a balance of power to shift. Mr Wagner noted that other issues, such as the revision of payment rates, were covered in the standard form contract, but were contained in the schedule. Mr Wagner supported that the arrangements involving verbal contracts were out of control, but considered that the issues raised by the TWU were not necessarily relevant to the ACCC's considerations, as they did not go to whether the arrangements were anti-competitive.

Commissioner King clarified the role of the Commission in assessing the application for authorisation and noted that the Commission would consider all public benefits and detriments, not just those relating to competition issues. Commissioner King noted that

the issues raised by the TWU would be likely to be considered by the Commission in assessing whether the arrangements give rise to the public benefits claimed by the CMPA.

Mark Wagner then advised that the CMPA would be happy to discuss the terms and conditions with the TWU but that they were keen to resolve this issue so that the standard form contracts could be rolled out to members. Mr Wagner noted that further amendments could be made to the standard form contracts under the terms of the authorisation proposed to be granted by the ACCC in its draft determination.

Bill Noonan agreed that a model contract was a good idea and noted that he wanted this model contract to be a basis for other industries. Mr Noonan noted that there were problems associated with both verbal contracts and written contracts that were difficult to understand and that the TWU was seeking the middle ground between these.

John Turton noted that any agreed contract was likely to have an impact more broadly across the industry and that the CCAA would continue to be interested in how this issue progresses so that it could provide relevant advice to its members.

Commissioner King then called for any further comments. No further comments were made. Commissioner King then closed the conference by noting that the ACCC would be providing a further opportunity for parties to make written submissions in respect of its draft determination by 31 July 2007. Commissioner King also noted that the ACCC would be writing to those who attended the conference to provide a record of the conference, which would also be placed on the ACCC's public register.

Conference closed: 3:00PM