



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

The Construction Material Producers Association

in respect of

**an agreement to develop and
publish standard form contracts**

Date: 29 August 2007

Commissioners: Samuel
Sylvan
King
Martin
Smith
Willett

Authorisation no.: A91047

Public Register no.: C2007/819

Summary

The ACCC grants authorisation to the Construction Material Producers Association to enable it to develop and publish standard form contracts for its members to use when contracting with owner drivers and with contractors for certain Victorian government authorities or private principals.

The authorisation is granted on condition that:

- the CMPA engages an independent consultant (who was not involved in the development of the owner drivers contracts), with experience in small business contracts, to undertake a review of the owner drivers contract between 6 to 12 months after the owner driver contract is implemented. This review must consider whether, when looking at the experience of implementing the owner driver contract, the contract can be improved and/or simplified, taking into account the views of interested parties, including the CMPA, relevant owner drivers and the Transport Workers Union; and
- the CMPA must respond to any recommendations made by the review in good faith, and report to the ACCC on the outcomes of the review and the actions taken by the CMPA in response to the review.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

The CMPA's application for authorisation

On 5 April 2007, the Construction Materials Producers Association (CMPA) lodged application for authorisation A91047 with the ACCC. The CMPA has sought authorisation to agree to develop and publish two types of standard form contracts for use by its members. These standard form contracts are for its members when contracting with:

- certain contractors for State government authorities or private principals, for the supply of construction materials; and
- owner drivers for the transport of construction materials.

ACCC assessment

Anticompetitive detriments

The ACCC considers that the arrangements will only give rise to limited anti-competitive detriments due to:

- the competition remaining from suppliers who are not members of the CMPA;
- the use of the standard form contracts is voluntary for CMPA members; and
- there are no default values for the key competitive provisions of the contracts, such as price and minimum hours of work, so these are left open for negotiation.

The ACCC notes that concerns were raised by interested parties that the owner drivers contract was unnecessarily complex and may operate to the detriment of owner drivers in Victoria in some circumstances.

Public benefits

The ACCC considers that the conduct relating to the supply contract will result in public benefit as a result of greater certainty in legal relationships, transaction cost savings and enhanced compliance with legislative requirements.

The ACCC considers that, relative to the counterfactual situation where the CMPA's members would have to negotiate contracts on an individual basis, the owner drivers contracts are likely to lead to some reduction in transaction costs.

Overall, the ACCC considers that the public benefits arising from the arrangements relating to the supply contract are likely to outweigh any public detriments that may arise.

On balance, with the condition set out below, the ACCC is satisfied that the public benefit generated by the agreement by members of the CMPA to develop the owner drivers contract will outweigh the public detriment.

Determination

Authorisation is granted for the Construction Material Producers Association to develop and publish standard form contracts for its members to use when contracting with owner drivers and with contractors for certain Victorian government authorities or private principals on condition that:

- the CMPA engages an independent consultant (who was not involved in the development of the owner drivers contracts), with experience in small business contracts, to undertake a review of the owner drivers contract between 6 to 12 months after the owner driver contract is implemented. This review must consider whether, when looking at the experience of implementing the owner driver contract, the contract can be improved, taking into account the views of interested parties, including the CMPA, relevant owner drivers and the Transport Workers Union; and
- the CMPA must respond to any recommendations made by the review in good faith, and report to the ACCC on the outcomes of the review and the actions taken by the CMPA in response to the review.

The ACCC grants authorisation to the CMPA for a period of five years.

On 2 May 2007, the ACCC granted interim authorisation for the CMPA to make available the standard form owner driver contract for its members to be able to use as a starting point for negotiating contracts with owner drivers. The ACCC decided to extend interim authorisation to the remaining aspects of the CMPA's application on 20 June 2007. Interim authorisation continues to be in force until this determination takes effect.

Contents

- 1. Introduction.....1**
- 2. Background.....3**
- 3. The application and ACCC consultation.....6**
- 4. The net public benefit test.....10**
- 5. ACCC assessment.....12**
 - The market..... 12
 - The factual and counterfactual.....12
 - ACCC assessment of the CMPA’s application.....13
 - Anticompetitive detriments 14
 - Public benefits 15
 - Balance of benefits and detriments 18
- 6. Determination.....20**

1. Introduction

Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act 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 Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’. The ACCC may ‘authorise’ businesses to engage in such conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3 The ACCC conducts a public consultation process when it receives 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.
- 1.4 Applicants may, at the time of lodging an application for authorisation, also seek interim authorisation. If granted, interim authorisation protects the arrangements for which authorisation is sought from legal action under the relevant provisions of the Act while the ACCC considers and evaluates the merits of the application.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied.
- 1.8 However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

The application for authorisation

- 1.9 On 5 April 2007, the Construction Materials Producers Association (CMPA) lodged application for authorisation A91047 with the ACCC.

- 1.10 The CMPA has sought authorisation to agree to develop and publish two types of standard form contracts for use by its members. These standard form contracts are for its members when contracting with:
- certain contractors for State government authorities or private principals, for the supply of construction materials; and
 - owner drivers for the transport of construction materials.
- 1.11 The CMPA sought authorisation for a period of ten years and also sought interim authorisation for these arrangements.
- 1.12 On 2 May 2007, the ACCC granted interim authorisation for the CMPA to make available the standard form owner driver contract for its members to be able to use as a starting point for negotiating contracts with owner drivers. The ACCC decided to extend interim authorisation to the remaining aspects of the CMPA's application on 20 June 2007. Interim authorisation continues to be in force until this determination takes effect.

2. Background

The Construction Material Producers Association

- 2.1 The CMPA represents small businesses operating in the construction materials industry in Victoria. The CMPA has approximately 100 member businesses comprising quarry owners and operators, and approximately a further 100 associate members, including parties who supply goods and services to members, such as industry consultants and other industry suppliers.
- 2.2 The CMPA states that its purpose is to, amongst other things, represent its members in their dealings with government, promote the viability of the industry and to assist members in delivering cost savings.

Construction material industry – Australia

- 2.3 Broadly, the construction material industry involves the extraction and processing of raw materials from quarries. These raw materials include sand, gravel, crushed rock and clay which are processed for supply mainly to the building and construction industry (for use in concrete, cement, bricks and tiles) but also for use in agriculture and industrial processes.
- 2.4 The revenue for the quarrying aspect of the industry was approximately \$1.8 million in 2005-06 and the industry employed over 2,700 people.¹
- 2.5 There are a small number of highly integrated businesses that own quarrying operations, pre-mixed concrete, concrete products, cement and asphalt manufacture operations in addition to substantial truck fleets. The three main companies are Boral, Readymix and the Hanson Group, who account for around 70% of the Australian market.²
- 2.6 There are numerous smaller companies, including the members of the CMPA and, while the extent of vertical integration within those businesses is less pronounced, it still frequently extends to ownership of both quarries and pre-mixed concrete plants. These smaller operators are often concentrated in particular regional areas.
- 2.7 Given the nature of the product, opportunities for product differentiation are limited with competition generally based on price. In addition, a key factor of the industry is geographic location as the great bulk of the construction materials mined in Australia are used domestically in capital cities and large provincial centres of Australia. It is important to develop extraction sites close to major demand centres or processing facilities to reduce transport costs to key buying locations.

¹ Ibisworld Industry Report, *Construction Material Mining n.e.c. in Australia*

² *ibid*

- 2.8 All Australian states are involved in the industry with the major producers (of crushed rock) being Queensland with approximately 42% of national production and Victoria with 33%.³

Construction Material Industry – Victoria

- 2.9 The Victorian construction materials industry is characterised by the same three large businesses as the national industry (Boral, Readymix and the Hanson Group) along with additional smaller businesses in operation. The Victorian production of quarry material in 2005/2006 was approximately 46 million tonnes with a total value in excess of \$500 million of which the CMPA claims that its members account for approximately 25%.⁴
- 2.10 The production of crushed and broken rock in Victoria is from approximately 860 quarries⁵, mainly concentrated about the greater Melbourne area⁶.

Relevant Legislation

- 2.11 The initial submission by the CMPA, and submissions made by interested parties, has raised several pieces of legislation that are relevant to this application for authorisation, as they regulate the operation of owner drivers in Victoria.

Owner Drivers and Forestry Contractors Act 2005 (Vic)

- 2.12 Many CMPA members contract owner drivers to either carry out or supplement their cartage requirements. Historically, many of these arrangements have not involved the use of written contracts. However, since 1 May 2007, the *Owner Drivers and Forestry Contractors Act 2005 (Vic)* requires that owner drivers and their hirers (including CMPA members) specify their agreement in the form of a written contract. This legislation has been a significant motivating factor in the CMPA developing the owner drivers standard form contract.
- 2.13 In his second reading speech to the Victorian Legislative Assembly, Mr Rob Hulls MLA, Minister for Industrial Relations stated, “This bill seeks to ameliorate the situation of owner-drivers and forestry contractors, while maintaining healthy and competitive industries. The bill tackles the key issue of information imbalance between the contracting parties. There is a clear market failure in that owner-drivers and forestry contractors have a lack of adequate and accurate information about the reality of the commercial relationship they are proposing to enter. There is limited understanding among these small business people of the true costs of running the business. The result of this information imbalance is ill-informed and poor business decisions making, leading to low and unsustainable levels of incomes.”

³ *ibid*

⁴ Applicant’s submission, 5 April 2007

⁵ Victorian Department of Primary Industries, *Victoria’s mineral, petroleum and extractive industries 2005/06 statistical review*

⁶ Ibisworld Industry Report, *Construction Material Mining n.e.c. in Australia*

The Victorian Building and Construction Industry Security of Payment Act 2002 (Vic)

- 2.14 The *Victorian Building and Construction Industry Security of Payment Act 2002 (Vic)* was introduced in Victoria to allow for a more rapid processing of progress claims under building contracts or sub-contracts and contracts for the supply of goods or services in the building industry.
- 2.15 The process was designed to ensure cash flow to businesses in the building industry, without parties getting tied up in lengthy and expensive litigation or arbitration.

Chain of Responsibility legislation – including the Road Safety Act 1986 (Vic) and the Road Safety (Vehicles) Regulations 1999 (Vic)

- 2.16 The Chain of Responsibility legislation in Victoria serves to extend the general liability for road transport infringements along the supply chain and up and down the corporate chain of command. The approach is designed to target those ultimately responsible for on-road breaches, rather than pursue the traditional 'soft targets' on the roadside such as the driver or operator.

Independent Contractors Act 2006 (Cth)

- 2.17 The Australian Government Department of Employment and Workplace Relations discussed the *Independent Contractors Act 2006 (Cth)* in its submission. This Act came into effect on 1 March 2007. It was introduced to provide independent contractors with greater flexibility in how they run their business and to better protect the rights of independent contractors. However, while the Independent Contractors Act does have an affect on certain State laws regulating independent contractors, the department noted that it specifically provides that it does not affect the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*.

3. The application and ACCC consultation

- 3.1 On 5 April 2007, the CMPA lodged an application for authorisation with the ACCC to develop and publish a number of standard form contracts.
- 3.2 The CMPA has developed two standard form contracts for use by its members and proposes developing a number of further similar contracts. These contracts can be separated into two categories based on the industry participants at whom they are targeted, namely *Supply to contractors for Victorian government authorities or private principals* ('the Supply Contracts') and *Owner drivers* ('the Owner Drivers Contract').
- 3.3 The CMPA notes that while it will recommend the use of the forms to its members, they are intended for guidance only and there will be no compulsion to use them or to use them unamended.

Supply contracts

- 3.4 The CMPA provided a draft standard form contract with its application which it anticipates will be used for contracts that exceed \$80,000 in value (major contract) between its members and contractors for VicRoads. The CMPA proposes developing further major contracts of a similar type for use between its members and contractors for other bodies such as local government, water supply and railway authorities in Victoria, or private principals.
- 3.5 The CMPA also proposes developing future standard form contracts for use between the same parties with a value of between \$10,000 and \$80,000 (minor contract). The CMPA submits that the minor contracts would essentially be a 'cut down' version of the major contracts.

Owner drivers

- 3.6 The CMPA provided a draft standard form contract with its application which it anticipates will be used for contracts between its members and their contracted Owner drivers.
- 3.7 It is relevant to note that this standard form contract has been developed in response to the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, which requires that owner drivers have written contracts with their hirers. This legislation came into force on 1 December 2006, with a 6 month transitional period for ongoing arrangements ending on 1 May 2007.

CMPA's submission in support

- 3.8 The CMPA submits that both standard form contracts will provide a greater degree of certainty to an industry which will assist in reducing the possibility of disputes by providing a commonly agreed resolution mechanism.
- 3.9 The CMPA also submits that the standard form contracts will result in reduced transaction costs. In particular, the CMPA submits that, in the absence of standard form contracts, each of its members will have to produce their own contracts. The CMPA also claims that having a single contract with terms that are well known by both parties

will result in greater efficiency for the industry as a whole and not just for CMPA members.

- 3.10 In addition, the CMPA claims that the owner driver contract will assist its members and their contracted owner drivers in complying with legislative requirements such as, the *Chain of Responsibility legislation*, the *Victorian Building and Construction Industry Security of Payment Act 2002 (Vic)* and, in particular, the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*.
- 3.11 The CMPA submits that the standard form contracts may generate some anti-competitive effects. In particular, as there are few existing alternatives to the proposed contracts, there is a risk that they may become the industry standard. However, the CMPA argues that as the contracts merely construct an order of responsibility and operations of the contractor and the supplier but leave the major competitive issues open for negotiation, such detriments are less likely to arise.
- 3.12 In addition, the CMPA states that use of the contracts is voluntary and CMPA members are free to develop their own contracts as individual companies.

ACCC consultation prior to the draft determination

- 3.13 The ACCC sought submissions from a variety of interested parties that may potentially be affected by the authorisation. None of these parties identified any issues with the proposed conduct and none opposed the granting of interim authorisation. Responses were received from the following interested parties:
- The Victorian Government Department of Innovation, Industry and Regional Development provided information regarding the *Owner Drivers and Forestry Contractors Act 2005 (Vic)* and noted that the Transport Industry Council encourages various transport industry sectors to develop and promote their own model agreements.
 - Cement Concrete and Aggregates Australia did not object to the application, but noted its concern that a level playing field is maintained between all competitors in the aggregates industry.
 - The Australian Government Department of Employment and Workplace Relations noted that the *Independent Contracts Act 2006 (Cth)* does not currently override the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, but a review will be undertaken in 2007.
 - VicRoads noted that the application does not impact on the way in which its own contract works are administered.
 - Readymix, making no comment on the application, but requesting to be kept informed with its progress.
- 3.14 The ACCC also consulted with the Transport Workers Union and the Australian Trucking Association, to obtain the views of representatives of owner drivers.
- 3.15 The views of these interested parties are set out in chapter 5 of this determination.

ACCC consultation following the draft determination

Pre-decision conference

- 3.16 The ACCC held a pre-decision conference in relation to its draft determination on 17 July 2007. The pre-decision conference was held at the request of the Transport Workers Union, and was attended by representatives of the CMPA, the Transport Workers Union and Cement, Concrete and Aggregates Australia. A record of the proceedings at the pre-decision conference is available on the public register on the ACCC website.
- 3.17 At the pre-decision conference the Transport Workers Union submitted that it was supportive of the development of standard form contracts for owner drivers transporting construction materials for members of the CMPA. However, the Transport Workers Union was concerned that the standard form contracts developed by the CMPA possibly detracted from the public policy aims of the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*. In short, the Transport Workers Union's key concerns were that the CMPA owner drivers contract:
- is unnecessarily complex;
 - fails to provide for a regular review of rates, contradictory to the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*;
 - does not provide for amendments to the *Owner Drivers and Forestry Contractors Act 2005 (Vic)* to be incorporated into the contracts;
 - shifts the balance of power in favour of hirers, at the expense of owner drivers; and
 - does not provide sufficient emphasis on mediation as a form of dispute resolution.

Further submissions by the CMPA and the Transport Workers Union

- 3.18 The CMPA provided a submission to the ACCC on 30 July 2007, responding to the concerns raised by the Transport Workers Union at the pre-decision conference. In this submission, the CMPA noted that a subsequent meeting had been held with the Transport Workers Union to discuss the owner drivers contract.
- 3.19 The CMPA advised that, as a result of this meeting, the outstanding issues with the Transport Workers Union related to discussion of the role of the Victorian Small Business Commissioner in the owner drivers contract and whether the payment required of an owner driver in the event a vehicle as a result of its appearance constituted an unlawful penalty⁷. The CMPA indicated its willingness to continue discussions to resolve these matters with the Transport Workers Union.

⁷ The Code of Conduct prescribed by the Owner Drivers and Forestry Contractors Regulations 2006 (Vic) prohibits a hirer from including a term in a contract which requires the making of a payment which is in the nature of a penalty.

3.20 The Transport Workers Union provided an additional submission to the ACCC on 7 August 2007. In this submission the Transport Workers Union reiterated its concerns that the owner drivers contract, as presently drafted by the CMPA, was unnecessarily complex and contains ambiguous terms which do not assist the parties to negotiate fair contractual arrangements. The Transport Workers Union noted that “some of their members who are engaged in this industry are having difficulties in understanding certain aspects of the CMPA model contract and have had to obtain professional advice”.⁸

⁸ TWU submission to the ACCC, 7 August 2007

4. The net public benefit test

- 4.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.
- 4.2 The CMPA lodged application for authorisation A91047 under section 88(1) of the Act to make and give effect to 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 Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 4.3 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or 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 result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application of the tests

- 4.4 The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.⁹
- 4.5 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.¹⁰
- 4.6 Consequently, given the similarity of wording between section 90(6) and 90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Definition of public benefit and public detriment

- 4.7 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

⁹ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

¹⁰ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

...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.¹¹

4.8 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...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.¹²

Future with-and-without test

4.9 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.¹³

4.10 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’.

Other matters

4.11 The ACCC can grant authorisation for a limited period of time.¹⁴

4.12 The Act also allows the ACCC to grant authorisation subject to conditions.¹⁵

4.13 Finally, applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future;¹⁶ and/or
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁷

¹¹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

¹² Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

¹³ Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

¹⁴ Section 91(1).

¹⁵ Section 91(3).

¹⁶ Section 88(10).

¹⁷ Section 88(6).

5. ACCC assessment

- 5.1 The ACCC's evaluation of the CMPA's proposed arrangements is in accordance with the net public benefit test outlined in chapter 4 of this determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments which may flow from the proposed arrangements.

The market

- 5.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 5.3 In this regard, the ACCC considers that the area of competition that is likely to be affected by the proposed conduct would be the supply of construction material from quarries in Victoria. This would include both the quarry businesses that produce the construction material and the truck owners which supply transport services.
- 5.4 In relation to the quarrying aspects of the industry, the ACCC understands that it is characterised by three large vertically integrated competitors, which supply approximately 70% of Australia's construction materials¹⁸, with the remainder supplied by numerous smaller operations.
- 5.5 The ACCC understands that the larger operators are located predominately in the major metropolitan areas, in particular, the greater Melbourne area¹⁹, but also operate additional quarries across the state. Many of those smaller operations are located in regional centres, with some also located in the greater Melbourne area.
- 5.6 Further, the ACCC understands that while it can be relatively costly to establish a quarry and there are licensing and permit requirements, the barriers to entry are not high. In addition, there is little competition from either interstate or overseas.
- 5.7 In relation to the transport aspect of the industry the ACCC understands that it is characterised by many small operators (the CMPA estimates up to 700) that generally own and operate their own trucks.

The factual and counterfactual

- 5.8 As noted in section 4 of this determination, in order to identify and measure the public benefit and public detriment generated by the proposed conduct, the ACCC applies the 'future with-and-without test'.
- 5.9 Under this test, the ACCC compares the public benefit and anti-competitive detriment likely to be 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'.

¹⁸ Ibisworld Industry Report, *Construction Material Mining n.e.c. in Australia*

¹⁹ *ibid*

Owner drivers contracts

- 5.10 In relation to the owner driver contracts, the ACCC notes the existence of other model contracts available to owner drivers, in particular, the model contract released by the Transport Industry Council of Victoria (TIC)²⁰.
- 5.11 The CMPA has submitted that the TIC model contract is not generally suitable for owner drivers transporting construction materials. For example, the CMPA model contract covers additional clauses designed to ensure compliance with the *Chain of Responsibility legislation*. The ACCC considers that, while the TIC model contract may be used as a starting point for negotiation, a degree of individual negotiation would still be required between the hirer and the owner driver.
- 5.12 For these reasons, the ACCC considers that the relevant counterfactual (that is the situation without authorisation) would likely be one in which the CMPA's members and their contracted owner drivers develop contracts on an individual basis.

Supply contracts

- 5.13 In relation to the supply contracts, the ACCC considers that the likely counterfactual would be a situation in which the CMPA's members and the contractors to whom they supply would either continue with their existing arrangements or develop individual contracts. The applicant submits that these current arrangements have often been limited to order forms or even oral orders, which has led to situations where there has been confusion regarding the specifications of the materials required.

ACCC assessment of the CMPA's application

- 5.14 In order to grant authorisation to the CMPA's proposed arrangements, the ACCC must be satisfied that they would result in a benefit to the public that outweighs any detriment to the public that may arise.
- 5.15 The CMPA has sought authorisation to develop and publish a number of standard form contracts. It is proposed that these contracts would be distributed to members of the CMPA for use between them and their contracted owner drivers or with contractors for Victorian government authorities to whom they supply construction materials.
- 5.16 It is relevant to note that it is the decision by the CMPA to make available for use the standard forms which is the relevant conduct that may raise concerns under the Act. As a result, any authorisation granted would be for the agreement by the CMPA to make those standard form documents available for use rather than for the actual documents themselves or any contracts signed based on these standard form documents.

²⁰ The Transport Industry Council of Victoria is a Victorian Government Statutory Authority established by section 55 of the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*

- 5.17 It follows that the ACCC is required to assess whether the CMPA's proposal to make the standard form contracts available for use produces a net public benefit.
- 5.18 Naturally such an assessment will involve consideration of the standard form contracts themselves as they serve to communicate the outcome of any authorised agreement by the CMPA to its members.

Anticompetitive detriments

- 5.19 The ACCC notes the CMPA's submission that its agreement to make the standard form contracts available for use does have the potential to generate anticompetitive detriments. In particular, the CMPA submits that the agreement to use standard form contracts may have the effect of becoming the standard by which parties operate and may therefore reduce the scope for negotiation on terms and conditions between the parties.

Default provisions

- 5.20 The ACCC is of the view that given the apparent absence of written contracts in the industry at present (at least amongst CMPA members), it is possible that the standard form contracts would form the basis of future contractual negotiations for a large proportion of the CMPA's members. The ACCC considers that to the extent this does occur and results in the provisions of the contracts becoming accepted as industry standard, this may generate an anticompetitive outcome.
- 5.21 The ACCC notes that both the owner driver contract and the supply contract contain a number of default provisions. That is, the contracts contain a number of provisions that have default figures where the parties do not, for whatever reason, agree an alternative. Generally, these default provisions relate to matters such as insurance amounts (i.e. 'If no amount is stated \$10,000,000') and indemnity amounts, the inclusion of which are less likely to raise competition concerns.
- 5.22 However, a number of the default provisions do relate to aspects of the contracts pertaining to the amount paid by CMPA members to those parties with whom they are negotiating. For example, Annexure C of the Supply Contract has a 'If nothing is stated \$50 per hour or part thereof for delays of greater than 30 minutes' default provision for 'Waiting time for delays in unloading caused by contractors'. Similarly, Clause 68 of the owner driver contract contains a 'If nothing is stated \$200 per day' default provision for 'Damages payable to supplier for stood down vehicles'.
- 5.23 For the most part, the default provisions provide guidance in relation to less contentious matters such as timeframes within which payments should be made and amounts of liability cover. That is, they do not cover those aspects of the standard form contracts which are likely to generate the greatest competition concerns, such as payment rates and/or minimum hours of work.
- 5.24 While it may be that the default provisions are included for guidance purposes, the ACCC considers that where dollar amounts of this type are included in

standard form contracts they are less likely to be points of negotiation between the parties and may therefore reduce competition.

Reduced innovation

- 5.25 A further potential anticompetitive detriment which may arise from the proposed contracts is that they may reduce the incentive for the parties to innovate. That is, agreeing to include standard provisions in contracts, such as dispute resolution or payment mechanisms, may reduce the incentive for the negotiating parties to consider more efficient processes that might better suit their own individual circumstances.

Mitigating factors

- 5.26 While the proposed standard form contracts may raise some competition concerns, any detriments are likely to be mitigated by certain features of the contracts and of the industry.
- 5.27 The ACCC notes that as the CMPA's members make up 25% of the Victorian construction materials industry, there will continue to be significant competition outside of the proposed arrangements.
- 5.28 In addition, as use of the standard form contracts will be voluntary for CMPA members, they will be free to alter the standard form contracts to suit their own needs or develop their own contracts. Further, the intended counterparties to the contracts (the owner drivers and government authorities) are free to develop their own contracts and not to use the CMPA's contract.
- 5.29 Overall, therefore, the ACCC considers that while the proposed arrangements may give rise to some public detriment, it is unlikely to be significant.

Public benefits

- 5.30 The CMPA submits that both the supply contract and the owner driver contract will provide a number of public benefits including greater certainty, reduced transaction costs and improved compliance with Victorian legislation.

Greater certainty regarding legal relationships

Submissions received

- 5.31 The CMPA submits they will provide a greater degree of certainty to an industry which has, in the past, been characterised by verbal contracts and handshake agreements. The CMPA submits that benefits are likely to arise from having greater certainty of legal relationships, particularly for the contractors for Victorian government authorities where written contracts are not required by law. The CMPA also submits that the standard form contracts will assist in reducing the possibility of disputes by providing a commonly agreed resolution mechanism.

- 5.32 With respect to the owner drivers contract, the Transport Workers Union has submitted that the standard form contract that has been developed by the CMPA is unnecessarily complex and, as a result, does not provide greater certainty. In addition, the Transport Workers Union suggests that this may result in a shift in bargaining power away from owner drivers (contrary to the intentions of the *Owner Drivers and Forestry Contractors Act 2005*).
- 5.33 In response, the CMPA has stated that it believes that the owner drivers 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.”²¹ With respect to shifting the balance of bargaining power, the CMPA responded that its owner driver contract “is 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.”²² The CMPA has also indicated that it would be open to further discussions with the Transport Workers Union, with a view to improving the standard form contract over time.

ACCC's view

- 5.34 With respect to the supply contracts, the ACCC considers that it is more likely that written contracts will be entered into if a pro-forma exists for the construction materials industry, and that the terms and conditions will be more commonly understood by the parties. Accordingly, the supply contracts are likely to generate public benefit.
- 5.35 With respect to the owner drivers contract, the ACCC notes the concerns of the Transport Workers Union, and agrees that a written contract that is not easily understandable for the parties will not create additional certainty of legal relationships, compared to the counterfactual, in which the parties negotiate all of the contractual terms. The ACCC considers that the owner drivers contract is likely to generate some public benefit.

Reduced transaction costs

Submissions received

- 5.36 The CMPA further submits that the standard form contracts will result in reduced transaction costs by removing the need for each individual CMPA member to negotiate their own contract which could otherwise contain very similar provisions to the standard form contract.
- 5.37 The Transport Workers Union has submitted, in relation to the owner drivers contract, that “some of their members who are engaged in this industry are

²¹ CMPA supplementary submission to the ACCC, 30 July 2007

²² *ibid*

having difficulties in understanding certain aspects of the CMPA model contract and have had to obtain professional advice”²³.

ACCC's view

- 5.38 The ACCC accepts that, for the supply contracts, relative to the counterfactual situation where the CMPA's members would have to negotiate contracts on an individual basis, the reduction in transaction costs is likely to arise.
- 5.39 The ACCC considers that, the owner driver contracts will also give rise to a reduction in transaction costs; however, this will be limited by any need for owner drivers to obtain independent professional advice regarding the contract, as such advice is likely to be also required in the counterfactual, where individual contracts are negotiated.

Improved compliance with Victorian legislation

Submissions received

- 5.40 The CMPA claims that the Owner Driver contract will also assist its members and their contracted owner drivers in complying with legislative requirements such as, the *Chain of Responsibility legislation*, the *Victorian Building and Construction Industry Security of Payment Act 2002 (Vic)* and, in particular, the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*.
- 5.41 The Transport Workers Union raised a number of issues relevant to this public benefit at the pre-decision conference. In particular, the Transport Workers Union submitted that the CMPA standard form contract fails to provide for a regular review of rates and potentially required owner drivers to pay penalties to hirers in cases where the vehicle was stood down, contradictory to the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*. The Transport Workers Union also submitted that the CMPA standard form contract does not provide sufficient emphasis on mediation as a form of dispute resolution.
- 5.42 In response to the concerns regarding compliance with the *Owner Drivers and Forestry Contracts Act 2005 (Vic)*, the CMPA submitted that both of these issues were covered in the standard form contract. The standard form contract provides for the hirer and the owner driver to negotiate an agreed time period when rates will be reviewed, where the duration of the contract exceeds 365 days. In relation to the potential penalties, the CMPA submitted that, for circumstances where a vehicle is stood down due to its appearance, the amount of damages is to be negotiated in the preparation of the contract. In signing the contract, both parties should be aware of any legal constraints or obligations.
- 5.43 The CMPA has also submitted that mediation and access to the Victorian Small Business Commissioner as means of dispute resolution are set out in the standard form contract. The CMPA has indicated that it is open to further discussion with the Transport Workers Union as to whether these provisions

²³ Transport Workers Union submission to the ACCC, 7 August 2007

require greater prominence so that the hirers and owner drivers are aware of their availability.

ACCC's view

- 5.44 The ACCC notes that the CMPA has submitted that the owner drivers contract will assist in compliance with the *Chain of Responsibility legislation*, the *Victorian Building and Construction Industry Security of Payment Act 2002 (Vic)* and, in particular, the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*. The ACCC considers that this generates public benefit.
- 5.45 However, to the extent that the owner drivers contract remains difficult to understand for owner drivers, and the implementation of the owner drivers contracts may lead to a shift in the balance of bargaining power towards the CMPA members, the ACCC considers that the owner drivers contract may not be consistent with the policy intentions of the Victorian Parliament as set out in the Minister for Industrial Relations second reading speech, as quoted above in Chapter 2.
- 5.46 Accordingly, the ACCC considers that, the owner drivers contract is likely to deliver some public benefit as a result of improving compliance with government legislation.

ACCC's conclusion on public benefits

- 5.47 The ACCC considers that the standard form supply contracts are likely to generate public benefit from increased certainty of legal relationships and reduced transaction costs.
- 5.48 The ACCC considers that, relative to the counterfactual situation where the CMPA's members would have to negotiate contracts on an individual basis, the owner drivers contracts are likely to lead to some reduction in transaction costs, and are likely to result in some public benefit from increased certainty in legal relationships and improved compliance with legislation.

Balance of benefits and detriments

- 5.49 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit that will outweigh any public detriment.

The supply contracts

- 5.50 For the reasons outlined above, with respect to the supply contracts, the ACCC considers that while the proposed arrangements may raise some competition concerns, they are likely to be outweighed by the public benefits of the proposed arrangements.

The owner driver contracts

- 5.51 The ACCC considers that public detriments generated by the agreement to develop the owner drivers contract are unlikely to be significant, particularly because the use of the standard form contract is voluntary for the members of the CMPA and owner drivers. However, the ACCC notes the concerns regarding the complexity of the standard form contract.
- 5.52 On balance, and subject to condition, the ACCC is satisfied that the public benefit generated by the agreement by members of the CMPA to develop the owner drivers contract will outweigh the public detriment.

Length of the authorisation

- 5.53 The ACCC generally considers it appropriate to grant authorisation for a limited period of time. While the CMPA has sought authorisation for a period of 10 years, the ACCC prefers to have the opportunity to review an authorisation (especially for new arrangements) within a reasonable period of time. This is particularly the case in these circumstances, given the concerns identified by the Transport Workers Union. The ACCC therefore grants authorisation for a period of five years.

Future contracts

- 5.54 The ACCC notes that the CMPA has sought authorisation to develop a number of future contracts. In particular, the CMPA proposes developing a 'major' contract (\$80,000 +) for use between its members and bodies such as contractors for local government, water supply and railway authorities in Victoria. The CMPA also proposes developing contracts for use between the same parties with a value of between \$10,000 and \$80,000 (minor contract).
- 5.55 The ACCC notes again that while any authorisation granted would not be for the standard form contracts themselves; those contracts do form an important part of the arrangements as they serve to communicate the outcome of any authorised agreement by the CMPA to its members.
- 5.56 The ACCC would be reluctant therefore to provide a 'blank cheque' authorisation for the CMPA to develop and produce future standard form contracts where their form and content were unknown although the ACCC does consider that any potential detriment from doing so would be quite low.
- 5.57 The applicant has undertaken to provide the ACCC with copies of the future contracts that are developed for use with contractors for local government, water supply and railway authorities in Victoria. If the ACCC considers that a future standard form contract is likely to change the balance of public benefits and detriments set out in this assessment by, for example, including default provisions for payment rates and/or minimum hours of work, it can review any authorisation that it has granted.

6. Determination

6.1 On 5 April 2007, the Construction Materials Producers Association (CMPA) lodged an application for authorisation A91047 with the Australian Competition and Consumer Commission (the ACCC).

6.2 Application A91047 was made using Form B, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the *Trade Practice Act 1974* (Act) to:

to make and give effect to 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 Act.

6.3 In particular, the CMPA has sought authorisation to agree to develop and publish standard form contracts for use by its members with certain contractors for Victorian government authorities or private principals and individual owner drivers.

The net public benefit test

6.4 For the reasons outlined in this determination, and subject to the condition below, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

6.5 The ACCC therefore **grants** authorisation to application A91047 **on condition that:**

- the CMPA engages an independent consultant (who was not involved in the development of the owner drivers contracts), with experience in small business contracts, to undertake a review of the owner drivers contract between 6 to 12 months after the owner drivers contract is implemented. This review must consider whether, when looking at the experience of implementing the owner driver contract, the contract can be improved and/or simplified, taking into account the views of interested parties, including the CMPA, relevant owner drivers and the Transport Workers Union; and
- the CMPA must respond to any recommendations made by the review in good faith, and report to the ACCC on the outcomes of the review and the actions taken by the CMPA in response to the review.

Conduct for which the ACCC grants authorisation

6.6 The proposed authorisation is in respect of the agreement by the CMPA to develop and publish standard form contracts for use by its members with certain contractors for Victorian government authorities or private principals and individually contracted owner drivers in the same or similar form to those provided with the application.

6.7 The ACCC notes that the conduct assessed in this determination, and for which authorisation is proposed to be granted, relates to the development and dissemination of standard form contracts. Such an authorisation would not

extend to the contracts that are entered into using the standard form contracts, and the ACCC does not endorse, or propose to authorise, such contracts.

6.8 The ACCC grants authorisation to the CMPA for a period of five years.

Date this determination comes into effect

6.9 This determination is made on 29 August 2007. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 20 September 2007.