

Your ref: A91103

David Hatfield
Director
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

Dear Mr Hatfield

Application for authorisation (A91103) for collective negotiations by owner drivers with earthmoving contractors in South East Queensland

I write to you on behalf of the members of the Queensland Trucking Association Ltd (QTA). The QTA is the principal trucking/road freight association in Queensland with members servicing all sectors of the urban, regional and long distance freight industry.

On behalf of the QTA I make the following submissions with respect to the application by the Construction, Forestry, Mining and Energy Union (**Union**) for authorisation for collective negotiations by owner drivers with earthmoving contractors in South East Queensland (**the Application**).

1 Does the Union represent sufficient interests to satisfy the requirements of Division 1 of Part VII of the *Trade Practices Act 1974*?

1.1 The Application is made by the Union, however, it is the Transport Workers' Union of Australia (Queensland branch) (**TWU**) that represents the industrial interests of transport and storage workers, including the interests of owner drivers. The membership of the TWU includes workers involved in transport and other work in connection with driving and transport. As a result, the TWU, not the Union, has a better understanding of the issues that face the industry, not only from its members' direct perspective, but from having been involved in the industry for over 100 years.

1.2 The Union therefore is purporting to make representations on behalf of a significant number of owner drivers based on what the Union says are the interests of a small number of their members. In those circumstances, it is submitted that the Union cannot satisfy the Commission that the proposed arrangement will result or be likely to result in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result or be likely to result from the arrangements.

2 General Observations regarding the Application for Authorisation

- 2.1 The Union makes a number of sweeping assertions of fact followed by a number of conclusions which it equally asserts are based in fact. This is despite the absence of any supporting evidence contained within the Application. Such allegations and unsupported conclusions appear throughout the Application. These unsupported assertions of fact make it difficult for the QTA to address all of the matters required to be considered under Div 1 of Part VII of the *Trade Practices Act 1974 (the Act)*.
- 2.2 The Commission cannot be satisfied the proposed arrangement will result or be likely to result in a benefit to the public. Further, the Commission cannot be satisfied that any benefit from the proposed arrangements will outweigh the detriment to the public constituted by any lessening of competition that would result or be likely to result from the arrangements.
- 2.3 Paragraph 1.1 of the Application asserts that most owner drivers operate very small businesses, typically run by a husband and wife or as a sole trader. It is asserted by the Union that the majority of these businesses are proprietary companies, with the minority being either in partnership or unincorporated sole traders. The Application then goes on to make assertions regarding the assets held by these types of businesses. The Union has made no reference to an industry profile or other study or research upon which they have based their assertions.
- 2.4 With respect to paragraph 1.3, the Union estimates there are approximately 500 to 1,000 owner drivers at any one time operating in the Brisbane area. The Union itself in its footnote to paragraph 1.3 concedes that obtaining a precise estimate is difficult. The Union has given no indication as to the manner in which it calculated its estimate of 500 to 1,000 owner drivers. As a result, the Union cannot identify the relevant 'market' in which these owner drivers operate and therefore satisfy the Commission as required by Div 1 of Part VII of the Act.
- 2.5 It is the experience of the QTA that tip truck owner drivers operate extensively outside the civil and commercial construction industry. For example, tip truck owner drivers contract extensively across Queensland in the following areas: local authorities, quarrying, grain and mineral movement.
- 2.6 In paragraph 1.4, the Union asserts that numerous owner drivers have expressed concern regarding their working entitlements and conditions, and their lack of ability to negotiate with customers. We don't know over what period of time these expressions of concern have been made or by how many owner driver members. We do know that the concerns have been confined to those owner drivers who are members of the Union, but not what percentage. There is no evidence that these concerns are reasonable or otherwise support the Application.

- 2.7 At paragraph 2.7 the Union suggests that drivers are limited in the geographical areas they service as a result of, among other things, insurance requirements. There is no evidence of the 'typical' cover provided by insurers to owner drivers. In any event, the Union concedes that owner drivers can operate outside the alleged permitted radius simply by notifying their insurer.
- 2.8 In paragraph 2.12 the Union asserts that operators are entering the relevant market from as far away as Tasmania. It cannot, therefore, reasonably be suggested that if the existing rates being negotiated are not competitive, people would be travelling from interstate to take advantage of what is obviously a strong and competitive market.
- 2.9 In paragraph 2.21 the Union asserts that there is no negotiation over price. This is not accepted, and as noted above is unsupported by any evidence. In paragraph 2.15 the Union says that in certain circumstances a principal contractor will call for tenders regarding the provision of earthmoving services and compete against one another on factors including cost. Then in some situations the earthmoving company will engage owner drivers. In this situation the same healthy competition between owner drivers will apply, albeit less formally. And like all competition, it will be affected by the amount of the tender, the current situation in terms of supply and demand and other relevant factors. It is the experience of the QTA that the manner in which owner drivers in the construction industry are engaged is consistent with the engagement process in all other sectors of the freight industry.
- 2.10 At paragraph 2.24 the Union says that owner drivers are invariably price takers and that the earthmoving companies hold all bargaining power. Again, this is not accepted and the statement is unsupported by any evidence. However, as with many competitive markets, owner drivers can and do reject unreasonable terms which force companies to negotiate, particularly when demand is high. In our experience, there has been for some time, and there remains, a critical shortage of heavy vehicle drivers in the Queensland.

3 Grounds for grant of authorisation

- 3.1 The CFMEU says that the Act recognises that collective bargaining may produce public benefit. With respect, this is not the correct starting point from which to assess the Application. Authorisation is required because the proposed conduct would be, or might be, exclusionary or would have the purpose, or would have, or might have the effect, of substantially lessening competition.
- 3.2 Owner drivers are independent contractors and as such are businesses and should not be subject to regulation that is, for all intents and purposes, industrial in nature. Owner drivers, like all businesses, are already subject to externally imposed restrictions and protections, such as those contained within the Act.

- 3.3 It is universally accepted that the defining point of being an independent contractor occurs when an individual earns his or her living through the commercial contract instead of the employment contract. Whether an employment or a commercial contract exists when transactions occur has important public policy implications.
- 3.4 Commercial law and associated regulations have as their central objective the prevention of collusive activity that controls markets and creates price manipulation. Employment law and associated regulations have as their central objective the facilitation of collusive activity in a defined area that enables price manipulation to occur (wages). The two forms of regulation operate in direct opposition to each other.
- 3.5 The Union is proposing that the Commission treat part of a commercial contract as an employment contract and subject it to employment type regulation. In other words, commercial law and regulation is corrupted to enable collusion and price-fixing to be applied to a commercial contract.
- 3.6 Being a 'business' has the advantage that profit can be made and the disadvantage that risk exists. By comparison, employees are protected from business type risk but lose the advantages of business type profit. The Union's proposal would result in taking one element of the owner driver's business and applying industrial relations control, thus confusing the two forms of regulation and damaging business and free economic activity, and thereby destroying a key indicator of being an independent contractor – namely, 'risk'.
- 3.7 The effect is to restrict competition as it pigeon holes owner drivers. The risk is that the collectively negotiated prices become the maximum. This in turn, at best, props up the lower end of the market, at the expense of the higher achievers. This is to the detriment of the industry as a whole. The proposal distorts the free operation of the transport market, thus damaging all operators, including owner drivers.
- 3.8 It is of concern to the QTA that the Union's proposed arrangement will apply to present and future members of the Union. Inevitably and understandably, the Union will use the authorisation obtained as a means to increase its membership. Accordingly, if the Application is successful, the effect on competition in this market will be more far reaching, as collusive bargaining activity is likely to increase, thereby further reducing competition in the market.

4 Legislative approach

- 4.1 Current legislative protections exist with respect to independent contractors such as owner operators. These protections exist within the *Independent Contractors Act 2006 (Cth)*, the *Trade Practices Act 1974* and in Queensland within the unfair contracts jurisdiction of the *Industrial Relations Act 1999*. Similar protections exist in other States and Territories¹.

¹ See for example *Industrial Relations Act 1996 (NSW) Part 9 Division 3*

- 4.2 These protections have been enacted by the Federal and State parliaments in recognition of the fact that, from time to time, principal contractors will act unconscionably. The remedies available to owner drivers under the above legislation are, in our submission, sufficient to provide adequate protection to owner operators in circumstances in which principal contractors are acting unfairly.

5 Initiatives of the National Transport Commission

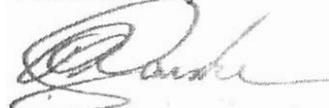
- 5.1 At paragraph 4.12 the Union alleges that existing prices cause owner drivers to break road laws and commit other unsafe practices. It is, of course, very easy to allege that pricing has a detrimental impact on safety. There are a significant number of issues that impact on safety in the trucking industry, pricing being but one of them.
- 5.2 Safety in the transport industry has been at the forefront of policy debate and consideration in Australia for some years. The industry through its representatives, including the TWU, has been critically involved in the research, discussions, negotiations and outcomes of this policy debate.
- 5.3 As you may be aware, the National Transport Commission (NTC) with the cooperation of the majority of the States and Territories has rolled out a raft of road safety reforms aimed at the transport industry. A majority of States and Territories have recently legislated to tighten regulation of the chain of responsibility in the transport sector and the NTC's commitment to further reform is clear.
- 5.4 The NTC recognises that safety in the transport industry has many facets and is a complex issue that requires a multi-faceted approach. The National Transport Plan as approved by the Australian Transport Council (ATC) is currently conducting a review of driver pay methods, working conditions and career structures to develop recommendations to address safety issues. The NTC was requested to review this issue, and to provide advice on a system which will assist in addressing safety issues related to driver remuneration and payment methods.
- 5.5 On July 25 2008, Federal, State and Territory transport ministers requested that the NTC provide a report to the ATC meeting scheduled for 7 November 2008 on this issue. The NTC will be assisted in this process by industry experts including the Hon Lance Wright QC, former president of the NSW Industrial Relations Commission, and Professor Michael Quinlan, an OH&S expert from the University of NSW.
- 5.6 The scope for this project is:
- (a) to review the current payment methods and rates of pay for both employee drivers and owner-drivers;
 - (b) to examine the impact of driver remuneration and payment methods on safety risks and outcomes within the heavy vehicle transport industry;

- (c) to examine how Chain of Responsibility obligations can be applied in this area; and
 - (d) to develop legislative recommendations to improve safety outcomes.
- 5.7 The NTC will provide a report to Transport Ministers on 7 November 2008 with possible options to address any link through regulation.
- 5.8 As is illustrated above, the issue of safety and remuneration is being closely examined by the Federal Government.
- 5.9 An attempt to rely on safety issues as a key component of the Union's Application is, in our view, misguided and does not properly represent the initiatives currently under consideration from a whole of industry perspective. It would be, in our submission, improper for the Commission to give any weight to a safety argument in circumstances in which the issue is receiving consideration at the highest levels of government and reform is imminent.
- 5.10 Further, it is simplistic for the Union to suggest that the conduct of principal contractors with respect to pricing has a direct relationship to the election of an owner driver to commit an unsafe act. The Union has provided no evidence that in this particular market pricing has had an impact on safety.

6 Conclusion

- 6.1 The QTA objects to the Application for the reasons outlined in this submission.
- 6.2 The onus is on the Union to satisfy the Commission that the legislative requirements for the granting of the Application have been met. It is submitted that the Union has failed to furnish any evidence to support its Application and the Commission cannot be satisfied that an appropriate case for the granting of the Application has been made out.
- 6.3 It is further submitted that the granting of the Application will in fact reduce competition in the market for the reasons outlined above.

Yours faithfully



Peter Garske
Chief Executive Officer
Queensland Trucking Association Ltd