



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation of authorisation

A90769 and substitution by A91082

lodged by

CEMEX Australia Pty Ltd

in respect of

**a cartage allocation system amongst concrete carriers,
known as the Equal Opportunity of Trips System**

Date: 28 May 2008

Commissioners: Samuel
Sylvan
Court
King
Martin
Walker

Authorisation no.: A91082

Public Register no.: C2008/270

Summary

The ACCC proposes to grant authorisation to CEMEX Australia Pty Ltd for the continued operation of a cartage allocation system amongst concrete carriers, known as the Equal Opportunity of Trips System.

The authorisation process

A key objective of the *Trade Practices Act 1974* (the Act) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’. Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The application for revocation and substitution

On 8 February 2008, CEMEX Australia Pty Ltd (CEMEX) lodged an application for revocation of authorisation A90769 and substitution by new authorisation A91082. CEMEX’s application concerns the continued operation of a cartage allocation system amongst concrete carriers, known as the EOT System.

Assessment of proposed arrangements

The ACCC considers that the continued operation of the EOT System has the potential to result in reduced competition between existing concrete carriers.

The ACCC is satisfied that the continuation of the EOT System is likely to result in the public benefit of continued industrial harmony. In particular, the ACCC notes that the EOT System appears to have been effective in addressing the serious industrial unrest which existed in the Perth concrete cartage market prior to 2003.

The ACCC also considers that the continuation of the EOT System is likely to result in some reduction in transaction costs, by removing the need to negotiate cartage on a frequent and individual basis, and reducing the incidence of carrier mediation.

On balance, the ACCC considers the public benefit is likely to outweigh the public detriment.

Proposed decision

The ACCC proposes to revoke authorisation A90769 and grant substitute authorisation A91082 to allow CEMEX continue to operate the EOT System. The ACCC proposes to grant authorisation until 30 June 2013.

Interim authorisation

At the time of lodging the application, CEMEX requested interim authorisation to continue to operate the EOT System. The ACCC granted interim authorisation to the substitute authorisation A91082 on 21 February 2008.

Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

The next steps

The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

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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’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 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.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application 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. 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.
- 1.8 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person to whom the authorisation was granted. The ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (outlined in paragraphs 1.4 to 1.7).

The application for revocation and substitution

- 1.9 On 8 February 2008, CEMEX Australia Pty Ltd (CEMEX) lodged an application for the revocation of authorisation A90769 and the substitution of authorisation A91082 in its place.

1.10 Authorisation A90769 was granted by the ACCC on 3 February 2003 for the operation of a cartage allocation system amongst concrete carriers, known as the EOT System. This authorisation expired on 24 February 2008.

1.11 The substitute authorisation sought by CEMEX is for the continued operation of the EOT System. CEMEX seeks re-authorisation of the EOT System for 10 years.

Interim authorisation

1.12 On 21 February 2008, the ACCC suspended operation of A90769 and granted interim authorisation to A91082 while it considers the merits of the substantive application.

Chronology

1.13 Table 1.1 provides a chronology of significant dates in the consideration of this application.

Table 1.1: Chronology of application for authorisation A91082

DATE	ACTION
8 February 2008	Application for revocation and substitution lodged with the ACCC, including an application for interim authorisation.
21 February 2008	The ACCC granted interim authorisation to allow the continued operation of the EOT System.
13 March 2008	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
8 April 2008	ACCC seeks response from CEMEX in relation to a summary of key points from confidential interested party submissions.
18 April 2008	Submission received from CEMEX in response to a summary of key points from confidential interested party submissions.
21 May 2008	Draft determination issued.

2. Background to the application

2.1 This chapter provides an overview of:

- CEMEX Australia Pty Ltd;
- the pre-mixed concrete industry; and
- the EOT System.

2.2 Further background information on the pre-mixed concrete industry is provided in Chapter 2 of authorisation A90769.

CEMEX Australia Pty Ltd

2.3 CEMEX is a subsidiary of CEMEX S.A.B. de C.V., which is a global building solutions company that produces, distributes, and markets cement, ready-mix concrete, aggregates and related construction materials. CEMEX S.A.B. de C.V. currently has operations in more than 50 countries including the Americas, Europe, Africa, the Middle East, Asia, and Australia.¹

2.4 In August 2007, CEMEX S.A.B. de C.V. acquired the Rinker Group which included the Readymix business (previously owned by CSR Limited). On 1 March 2008, Rinker Australia Pty Ltd changed its name to CEMEX.

2.5 CEMEX currently has 67 pre-mixed concrete delivery trucks in its Perth metropolitan fleet. Of these, 50 trucks are operated by lorry-owner drivers (LODs) and the remaining 17 are company owned and operated trucks.²

The pre-mixed concrete industry

2.6 In its basic form, pre-mixed concrete is a mixture of cement, water, fine aggregates and course aggregates. It can be worked and moulded when it is first mixed, and later hardens into a solid mass.³

2.7 Pre-mixed concrete is mixed at a batching plant to standards specified by a customer. It is then delivered to a construction site at an agreed time, where it must be poured promptly. The Australian Standard, with which CEMEX conforms, recommends that all concrete, including higher quality concrete products,⁴ be poured within 90 minutes of mixing.

2.8 The four largest pre-mixed concrete manufacturers in Perth are: BGC Australia Pty Ltd; Boral Limited; CEMEX Australia Pty Ltd; and Hanson Australia Pty Ltd. The ACCC understands that these four manufacturers have the majority share of the Perth

¹ CEMEX website: http://www.cemex.com/ic/ic_cp.asp, April 2008.

² CEMEX submission, 4 February 2008, p5.

³ Cement, Concrete & Aggregates website: <http://www.concrete.net.au/search.php?category=cement&menu=2>, April 2003.

⁴ CEMEX submission, 11 March 2008, p2.

metropolitan pre-mixed concrete market.⁵ Of the remaining manufacturers, Go Crete Pty Ltd and WA Premix are two of the more significant players.

- 2.9 Most pre-mixed concrete manufacturers use a combination of concrete carriers (company owned trucks and LODs) to transport their product from batching plants to construction sites.
- 2.10 LODs own the truck and chassis they use to deliver pre-mixed concrete. However, CEMEX owns the agitators used to carry the concrete and these are supplied to LODs. The size of the agitator, and therefore the maximum amount of concrete that can be carted, is determined primarily by the size of the truck.
- 2.11 The ACCC understands that pre-mixed concrete takes approximately 6 minutes per m³ to unload, so an average load of 5m³ takes around 30 minutes to unload.
- 2.12 Further discussion on the pre-mixed concrete market is contained in Chapter 6 of this draft determination.

The EOT System

- 2.13 The EOT System is a cartage allocation system amongst concrete carriers, which is intended to equalise work opportunities for LODs.
- 2.14 The system works by allocating concrete carriers with a number of points per load and distance for concrete carted. On a rolling 12 month basis, the system ensures that a carrier's aggregate points are within a specified margin of the Western Australian metropolitan fleet average (the EOT margin).
- 2.15 Under normal circumstances, the calculation of the EOT margin is done at the end of each month. Carriers that are operating above or below the EOT margin are reallocated to a busier or quieter batching plant as necessary.
- 2.16 All trucks within the CEMEX fleet, including company owned trucks and LODs, are subject to the EOT System.
- 2.17 If a carrier's truck is unavailable through no fault of CEMEX, the carrier is allocated a set number of points for this 'missed opportunity'. This means that the carrier's unavailability does not reduce the carrier's aggregate points to the detriment of those who can take up the work when offered. Accordingly, there is an incentive for carriers to accept work, turn up on time and keep their trucks in good working order.
- 2.18 CEMEX submits that one of the key features of the EOT System is its transparency.⁶ CEMEX notes that all LODs see the monthly report and exactly how much work they have been allocated compared to the other LODs in the fleet (but they do not see the remuneration rates of others for that cartage work).

⁵ CEMEX submission, 4 February 2008, p3.

⁶ CEMEX submission, 4 February 2008, p5.

The EOT margin

- 2.19 At the time of granting authorisation A90769 in February 2003, the ACCC understood that the EOT margin was operating at ± 5 per cent of the Western Australian metropolitan fleet average.⁷
- 2.20 In its submission of 11 March 2008, CEMEX indicated that the EOT System was currently operating at a margin of ± 10 per cent.
- 2.21 There was some confusion amongst LODs as to the current EOT margin. Some LODs indicated that the EOT margin was ± 5 per cent, while others believed that it had been operating at ± 10 per cent for some time.
- 2.22 On 18 April 2008, CEMEX clarified that the EOT margin was increased in late 2007, as CEMEX found that ± 5 per cent did not provide adequate flexibility for the EOT System. In particular, LODs were being moved between batching plants too frequently, which CEMEX regarded as inefficient and unnecessary.
- 2.23 CEMEX submits that LODs agreed to the change the EOT margin during a meeting involving representatives of LODs and CEMEX. CEMEX was of the view that the LODs' representatives would communicate the change to the EOT margin to all LODs.⁸
- 2.24 CEMEX submits that there is currently no proposal to change the margin further. Further, if the LODs would prefer the EOT margin to remain at ± 5 per cent CEMEX indicated that it would apply this figure uniformly.⁹

⁷ ACCC authorisation A90769, 3 February 2003, p16.

⁸ CEMEX submission, 18 April 2008, p3.

⁹ Ibid.

3. The application for authorisation

3.1 This chapter outlines the following:

- authorisation A90769; and
- CEMEX's current application for revocation and substitution.

Authorisation A90769

- 3.2 On 3 February 2003, the ACCC granted authorisation to CSR Limited (CSR) and Readymix Holdings Pty Ltd (Readymix) to operate the EOT System for a period of five years.
- 3.3 In 2002, Rinker Australia Pty Ltd acquired the Readymix concrete business from CSR. In August 2007, CEMEX S.A.B. de C.V. acquired the Rinker Group including the Readymix concrete business. On 1 March 2008, Rinker Australia Pty Ltd changed its name to CEMEX Australia Pty Ltd.
- 3.4 In granting authorisation A90769, the ACCC accepted that there were a number of public benefits likely to result from the EOT System, in particular, improved industrial harmony.

CEMEX's application for revocation and substitution

- 3.5 CEMEX seeks to revoke authorisation A90769 and substitute authorisation A91082 in its place. The substitute authorisation sought by CEMEX is for the continued operation of the EOT System.
- 3.6 As the EOT System potentially raises concerns under the anti-competitive conduct provisions of the Act, CEMEX has lodged an application for authorisation with the ACCC.

Parties to the authorisation

- 3.7 CEMEX submits that the application for authorisation is to extend to LODs who may from time to time be subject to the EOT System. This group may change over time.
- 3.8 Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party, or proposed party, to the conduct.

4. Submissions received by the ACCC

- 4.1 On 4 February 2008, CEMEX provided a submission in support of its application for authorisation.
- 4.2 On 20 February 2008, the ACCC sought submissions from 59 interested parties who are potentially affected by the application, including pre-mixed concrete manufacturers, builders, industry associations and government departments.
- 4.3 The ACCC was subsequently contacted by a number of LODs, seeking to make confidential submissions on the authorisation. While LODs generally provided in-principle support for the continuation of the EOT System, they raised a number of concerns about its current operation.
- 4.4 The ACCC also contacted a number of competitors operating in the pre-mixed concrete market in Perth, who made confidential submissions on their cartage allocation systems and operational engagements with LODs.
- 4.5 The ACCC did not receive any public submissions from interested parties.
- 4.6 On 11 March 2008, CEMEX provided a response to various questions raised by the ACCC regarding the operation of the EOT System.
- 4.7 On 18 April 2008, CEMEX submitted a response to a summary of key points from confidential interested party submissions.
- 4.8 The views of CEMEX and interested parties are outlined in the ACCC's evaluation of the EOT System in Chapter 6 of this draft determination.

5. The net public benefit test

- 5.1 Under section 91C of the Act, a person to whom authorisation was granted, or another person on behalf of such a person, may apply to the ACCC for a revocation of the authorisation and the substitution of a new authorisation for the one revoked.
- 5.2 In order for the ACCC to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (as outlined in Chapter 1).
- 5.3 Broadly, under section 91C(7) of the Act, the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.

Application A91082

- 5.4 CEMEX is seeking a substitute authorisation under section 88(1) of the Act, to make and give effect to a contract, arrangement, or understanding a provision of which is, or may be, an exclusionary provision within the meaning of section 45 of the Act.
- 5.5 The relevant test is found in section 90(8) of the Act.
- 5.6 Section 90(8) states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result, or be likely to result, in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

Application of the tests

- 5.7 There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).
- 5.8 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. 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 but the test under section 90(8) of the Act is not so limited.¹⁰
- 5.9 However, the Tribunal has previously stated, regarding the test under section 90(6), that:

[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.

¹⁰ *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.

Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.¹¹

- 5.10 Consequently, when applying either test the ACCC can take most if not all public 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

- 5.11 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning, including:

...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.¹²

- 5.12 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.¹³

Future with-and-without test

- 5.13 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 is sought.¹⁴

- 5.14 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’.

Length of authorisation

- 5.15 The ACCC can grant authorisation for a limited period of time.¹⁵

¹¹ 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.

¹² 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.

¹³ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

¹⁴ 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.

¹⁵ Section 91(1).

Future and other parties

5.16 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
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁷

¹⁶ Section 88(10).

¹⁷ Section 88(6).

6. ACCC evaluation

6.1 The ACCC's evaluation of the EOT System is conducted in accordance with the net public benefit test outlined in Chapter 5 of this draft determination.

The market

6.2 The first step in assessing the effect of the conduct for which the substitute authorisation is sought is to consider the relevant market(s) affected by that conduct.

6.3 In authorisation A90769, the ACCC considered that there were two relevant markets:

- the market for pre-mixed concrete (the concrete market); and
- the market for pre-mixed concrete delivery services, that transport concrete from the point of production to the point of use (the cartage market).

6.4 In its submission of 4 February 2008, CEMEX maintains that these markets remain relevant to the application.

6.5 The ACCC has not received information to change the view that these remain the relevant markets.

6.6 The following discussion is largely based upon the Tribunal's assessment of the concrete and cartage markets in *Re Lamont*,¹⁸ the previous authorisation A90769, and information contained in CEMEX's submissions.

The concrete market

6.7 As noted above, concrete must be placed in its final location within a limited period of time, approximately 90 minutes. As a result of these restrictions, it is important to provide reliable delivery services and high product quality to remain successful in the concrete market.

6.8 The time limitations on the delivery of pre-mixed concrete require manufacturers to operate concrete plants that are located in close proximity to projected markets.

6.9 The key features of the pre-mixed concrete market, as identified by the ACCC in previous determinations and noted by CEMEX in its submission, include:

- several large producers located in the Perth area, each having approximately the same share of the market and together accounting for the largest proportion of market sales;
- competition between these companies; and
- constraint on market entry due to the high costs of acquiring production facilities, raw materials and transport services.

¹⁸ (199) ATPR 41-035.

- 6.10 CEMEX submits that since 2002, the average price of CEMEX pre-mixed concrete has increased. This is due to general cost inflation and the development of higher quality concrete products that have resulted in higher cost inputs.¹⁹

The cartage market

- 6.11 Most major concrete producers engage LODs on a contract basis to deliver pre-mixed concrete to customers. Most LODs are individual operators of a small business that derive a gross income from the cartage rates paid by the concrete producers. They are responsible for bearing their own costs to finance, operate and maintain their trucks.
- 6.12 In some respects, there are advantages for concrete manufacturers employing company drivers; for example, a company has the flexibility of assigning a company driver to perform other operational duties as necessary. Maintaining company owned trucks also allows concrete manufacturers to put its trucks in and out of operation as is necessary to meet market demand.
- 6.13 CEMEX submits that since 2003 it has increased the number of company trucks in its fleet in order to keep pace with the booming Western Australian economy and the consequent increase in demand for building and construction products. The decision to utilise company trucks rather than LODs was intended to take advantage of a number of CEMEX's trucks that were not being utilised in, and could be relocated from, the eastern states of Australia.

The counterfactual

- 6.14 As noted in Chapter 5 of this draft determination, the ACCC applies the 'future with-and-without test' to identify and measure the public benefit and public detriment generated by the proposed conduct,
- 6.15 The EOT System is concerned with the allocation and equalisation of workload.
- 6.16 In relation to the allocation of workload, the ACCC considers that the likely counterfactual would be a situation in which CEMEX continues to operate a 'cab rank' system, whereby queue positions are allocated in sequence to ensure fairness.
- 6.17 In relation to the equalisation of workload, the ACCC considers that the counterfactual would be a situation in which CEMEX attempts to even out workload through cartage rates paid to LODs. The ACCC notes that some competitors operating in the Perth metropolitan market use variations in cartage rates paid to LODs to equalise workloads.

Public detriment

- 6.18 CEMEX submits that the conduct will have no public detriment apart from its potential effect on competition.
- 6.19 The principal public detriment concerns addressed in authorisation A90769 were:
- competition between existing LODs;

¹⁹ CEMEX submission, 4 February 2008, p4.

- availability of substitutes; and
- scope for new entry.

6.20 The ACCC considers that these public detriments are relevant to the current application for authorisation and an assessment of them is set out below.

Competition between existing concrete LODs

- 6.21 CEMEX concedes that there is reduced competition between its existing concrete LODs for work from CEMEX, but believes that this is offset by the efficiency gains. CEMEX states that its LODs are free, subject to the constraints imposed by the switching costs, to compete between themselves for contracts with producers on a periodic basis.
- 6.22 In authorisation A90769, the ACCC considered that competition between existing concrete LODs was restricted at the industry level due to high switching costs that restrict the ability of LODs to move between firms.²⁰ The ACCC considered that the EOT System was likely to result in additional reductions in the level of competition between LODs by reducing their ability to provide differentiated services. The ACCC considers that these views remain valid today.
- 6.23 The EOT System ensures that LODs receive an equal share of available work. This arrangement removes the opportunity for LODs to compete for extra work from CEMEX, for example, by receiving additional work in recognition of providing higher quality customer service.
- 6.24 However, the ACCC considers that any reduction in the quality of customer service of CEMEX's LODs is likely to affect the ability of CEMEX to compete within the concrete manufacturing market. For this reason, it is the ACCC's view that it is in CEMEX's commercial interests to ensure that the EOT System does not impact on its ability to remain competitive with other concrete manufacturers.

Availability of substitutes

- 6.25 The anti-competitive effect of the allocation system is likely to be reduced if CEMEX could engage alternative LODs that operate outside of the EOT System, or LODs could seek work from alternative concrete manufacturers.
- 6.26 In this regard, CEMEX submits that it is unlikely to engage delivery services outside the EOT System and that all CEMEX trucks, including company trucks, are subject to the EOT System.²¹
- 6.27 It is the ACCC's view, therefore, that substitute services that operate outside of the EOT System are unlikely to be engaged by CEMEX in the near future and therefore will not act to reduce the anti-competitive effect of the conduct. Notwithstanding the above, the ACCC notes that CEMEX could amend the EOT System at any time.

²⁰ ACCC authorisation A90769, 3 February 2003, p16.

²¹ CEMEX submission, 4 February 2008, p.

- 6.28 In *Re Lamont*²², the Tribunal found that the cartage market does not allow free competition between all LODs at all yards. Concrete producers adopt a marketing policy of having their delivery trucks painted in a distinctive livery, effectively ‘branding’ the product being delivered. This precludes the use of the truck to deliver concrete made by another producer. The tie of each LOD to one producer is reinforced by the convention that the agitator mounted on the LOD’s truck (without which the truck cannot be used to deliver concrete) is supplied and owned by the concrete producer. Therefore, a LOD is competitively constrained. To enter and participate in the market requires a LOD to only work for one producer, and to adhere to that producer’s requirements. The volume of work a LOD performs predominantly depends on the amount of business the producer wins.
- 6.29 The ACCC notes that the ‘tied’ relationship between concrete manufactures and their independent contractors makes it difficult for both parties to consider the possibility of substitutes, regardless of the operation of the EOT System.

Scope for new entry

- 6.30 In authorisation A90769, the ACCC considered the extent to which the operation of the EOT System may prevent new LODs from competing for work from CEMEX. In general, work allocation systems that create new barriers to entry have the potential to result in significant anti-competitive detriment, by preventing more efficient rivals from entering a market.
- 6.31 In response to the issue of new entry, CEMEX notes that it determines how many LODs it needs and with which it will contract. The existence of the EOT System does not impact significantly on this decision making process. CEMEX considers that this is borne out by the fact that the number and composition of LODs has changed over the years since authorisation A90769.
- 6.32 The ACCC notes that since authorisation A90769, CEMEX has increased the total number of trucks in its fleet from 56 to 67, and that there has been a reduction in the number of LODs during this period from 55 to 50. The ACCC accepts CEMEX’s assertion that the decision to increase the number of trucks in the fleet by taking on additional company trucks, rather than LODs, was based on reasons of cost efficiency.
- 6.33 CEMEX submitted that if it were to further increase the number of trucks in its fleet, this might be done by either additional company trucks or hiring further LODs. The decision as to which option is taken would depend on a range of factors, including the availability of spare company trucks elsewhere at the time.
- 6.34 The ACCC considers that in order to remain competitive with other concrete manufacturers, it is in the commercial interests of CEMEX to ensure that it maintains the most efficient mix of company trucks and independent contractors. Based on the information available, the ACCC does not consider that the operation of the EOT System has led to a reduction in competition by removing the scope for new entry.

²² *Re Lamont* (1990) ATPR 41-035.

ACCC conclusion on public detriments

6.35 The ACCC considers that the continued operation of the EOT System has the potential to result in reduced competition between existing LODs.

Public benefit

6.36 CEMEX submits the EOT System has delivered and will continue to deliver the following public benefits:

- improved efficiencies of operations;
- more effective input into contracts;
- improved industrial harmony;
- environmental benefits; and
- public safety benefits.

Improved industrial harmony

6.37 In support of authorisation A90769, CSR submitted that prior to the advent of the EOT System it had experienced several years of serious industrial unrest in the Western Australian concrete cartage market, culminating in Federal Court action against CSR by a group of independent LODs.²³

6.38 CEMEX submits that the introduction of the EOT System has led to the public benefit of improved industrial harmony and that since authorisation A90769 there have been no industrial stoppages or threats of industrial stoppages. CEMEX submits it no longer has to deal with frequent individual complaints about unfair treatment.²⁴

6.39 The ACCC notes the comments of the Tribunal in *Re Lamont*:

'...in order... to accept that a public benefit exists, the evidence must clearly establish that the granting of authorisation will lead to significantly greater industrial harmony in the future than a likely alternative.'

6.40 The ACCC previously accepted that the introduction of the EOT System had, and was likely to lead to, an improvement in industrial harmony. In particular, the ACCC was of the view that the objective and transparent nature of the EOT System was likely to foster goodwill between parties.²⁵

6.41 The ACCC notes that all LODs provided in-principle support for the continued operation of the EOT System. However, LODs raised a number of concerns with the current operation of the EOT System. The ACCC considers that these concerns are

²³ ACCC authorisation A90769, 3 February 2003, p19.

²⁴ CEMEX submission, 4 February 2008, p11.

²⁵ ACCC authorisation A90769, 3 February 2003, p20.

relevant to the extent that they impact upon industrial harmony and the support of LODs for the continued operation of the EOT System.

6.42 LODs were primarily concerned with:

- whether or not the EOT margin is currently operating at ± 5 per cent or ± 10 per cent, or would be changed in future; and
- the current delay in calculating the monthly equalisation of workload, and the transparency of the EOT System's operation.

The EOT specified margin

6.43 As noted in Chapter 3, there has been confusion amongst LODs as to the EOT margin. In responding to CEMEX's initial submission, all LODs indicated that they were strongly opposed to any change to the EOT margin as such a change would significantly impact upon the viability of their businesses.

6.44 In responding to these concerns, CEMEX submits that there is currently no proposal to change the margin further. If all LODs would prefer that the margin remain at ± 5 per cent, CEMEX indicated that it is willing to apply this figure uniformly.²⁶

6.45 The ACCC is only concerned with the EOT margin to the extent that it impacts upon industrial harmony arising out of the EOT System. The ACCC notes that an increase in the EOT margin would potentially have the effect of allowing CEMEX to allocate work in a more discretionary manner, which would likely encourage increased competition amongst LODs for the allocation of work. Nevertheless, should LODs strongly oppose any change to the EOT margin, this would be a relevant consideration when determining the industrial harmony resulting from the EOT System.

6.46 Given CEMEX's submission that it intends to maintain the EOT margin at a rate of ± 5 per cent, the ACCC accepts that LODs are likely to continue to support the operation of the EOT System, thereby maintaining public benefit associated with industrial harmony.

Monthly calculations and transparency of the EOT System

6.47 The EOT Guidelines state that the EOT will be assessed monthly on a 12 month rolling period.²⁷

6.48 LODs submitted that although the EOT was previously calculated on a monthly basis, it is now calculated in an ad hoc manner and infrequently, the last time being in November 2007. LODs claimed that this was impacting on their confidence in the transparency of the EOT System.

6.49 CEMEX submits that ordinarily the EOT calculation is performed at the end of each month:

²⁶ CEMEX submission, 18 April 2008, p3.

²⁷ Concrete carriers contract, Schedule D – Equal Opportunity of Trips Guidelines, p1.

However, many CEMEX staff who are usually involved in this process have been on annual leave during the past 6 months, and this has contributed to the calculation not being able to be performed since November. However, this does not mean that the EOT System has not been applied during this time: the calculations are performed on the basis of all data since the previous calculation, such that regard has simply been had to a fleet average over a longer period. Furthermore, the Perth market has been very busy during this time: there has been little need to move LODs that are not being given adequate opportunities.²⁸

- 6.50 LODs expressed concern that long delays in the calculation of the EOT have resulted in some LODs having to work up to 12-14 hours per day to meet fleet average. LODs indicated that fluctuations in workload have led to driver fatigue and negatively impacted on cash flow management.
- 6.51 CEMEX considers that how a LOD chooses to manage its opportunities is up to the LOD. CEMEX submits that there have been occasional instances of trucks working 14 hours in a day in the past year. However, the most times any single truck worked more than 11 hours in a day over this period was seven times, and at no stage did this occur on consecutive days.²⁹
- 6.52 CEMEX asserts, and the ACCC accepts, that one of the key features of the EOT System is its transparency. Accordingly, the ACCC considers it crucial for CEMEX to address any issues of transparency (such as regular calculation of the EOT) in order to maintain the support of LODs and in turn, preserve the public benefit associated with continued industrial harmony.

Improved efficiencies of operations

- 6.53 CEMEX submits that there are two main pro-efficiency outcomes that result from the EOT System:
- the EOT System results in a reduction in transaction costs for CEMEX and LODs when negotiating under the arrangement; and
 - the EOT System creates an incentive for LODs to cart full loads.

Reduction in transaction costs

- 6.54 In its submission of 4 February 2008, CEMEX noted that a benefit of the EOT System is that it will save on the costs associated with negotiating with multiple individual LODs by conducting a common negotiation process. The LODs would similarly save on costs associated with advice on legal, financial and other business matters in the course of negotiations³⁰.
- 6.55 CEMEX submits that the references to ‘bargaining group’ and any other collective reference to LODs hired by CEMEX is not a reference to any collective bargaining by the LODs with CEMEX. It is simply the term chosen at that point to describe the

²⁸ CEMEX submission, 18 April 2008, p3.

²⁹ CEMEX submission, 18 April 2008, p3.

³⁰ CEMEX submission, 4 February 2008, p10.

group of persons that contract with CEMEX as LODs, and is not intended to indicate the basis on which those contract negotiations occur. This negotiation and contracting process occurs with each LOD separately.³¹

- 6.56 The ACCC understands that CEMEX uses standard form contracts when engaging LODs and there is limited negotiation with LODs over the terms and cartage rates contained in these contracts.
- 6.57 The ACCC accepts that the use of standard form contracts may result in lower transaction costs for both CEMEX and LODs, particularly where LODs' costs are reduced if they do not need to engage professional services as part of their contract negotiations.
- 6.58 However, it is not clear to the ACCC that there is any direct relationship between the operation of the EOT System and contract negotiations between CEMEX and its LODs. Accordingly, the ACCC does not accept that the EOT System reduces transaction costs in the form of contract negotiations.
- 6.59 In authorisation A90769, the ACCC accepted that the EOT System resulted in reduced transaction costs by:
- removing the need to negotiate cartage on a frequent and individual basis; and
 - reducing the incidence of LOD claims of discrimination and thereby, reducing the cost of mediating with LODs.
- 6.60 CEMEX has not made these submissions in its current application. Notwithstanding this, the ACCC considers that the EOT System is likely to continue to have these effects and for these reasons, is likely to result in some reduction in transaction costs.

Incentive for LODs to cart full loads

- 6.61 CEMEX submits that the EOT System is pro-efficiency as it provides an incentive for LODs to cart full loads. For example, a 5.0m³ truck carrying a 5.0m³ load will earn more points under the system than a 5.6m³ truck carrying 5.0m³. CEMEX submits that such incentives have resulted in a decrease in the delivery costs as a proportion of the final cost of pre-mixed concrete each year since the year ending 31 March 2002.³²
- 6.62 However, the ACCC notes CEMEX's submission of 18 April 2008:
- ...The allocation system applied at each batching plant is similar to a 'cab rank' system: the LODs queue to take jobs from the plant to customers and must accept whichever job is presented to them when they reach the front of the queue. Queue positions are allocated in order to ensure fairness: for example, a LOD who is first in line one day, will be placed last in line the next day.³³*
- 6.63 In discussions with the ACCC, LODs submitted that, aside from the size of a concrete truck, they are unable to determine the amount of concrete carted at any one time. The

³¹ CEMEX submission, 11 March 2008, p1.

³² CEMEX submission, 4 February 2008, p10.

³³ CEMEX submission, 18 April 2008, p1.

amount of concrete and distance travelled is determined by a number of factors, including the nature and location of a job. As such, a LOD is unable to have any real impact on the amount of concrete carted, or the distances they are required to travel.

- 6.64 The ACCC accepts that CEMEX batching plants have their own processes for creating efficiencies by matching job sizes with the capacities of the trucks in their fleet. However, based on the information currently available, it is not clear that these efficiencies are a function of, or related to, the operation of the EOT System. These efficiencies would appear to be achievable regardless of whether or not the EOT System was operating.
- 6.65 The ACCC accepts that it is in the interests of LODs to carry full loads. However, based on the ‘cab rank’ system that currently operates at each of CEMEX’s batching plants, and the current allocation of jobs, it is not clear that LODs have any control over the loads that they carry. Rather, LODs are required to accept the load size that is presented to them when they reach the front of the queue. For this reason, the ACCC does not accept that the EOT System results in the public benefit of an incentive for LODs to cart full loads.

Other public benefit claims

- 6.66 The ACCC’s assessment of CEMEX’s remaining public benefit claims is set out below.

More effective input into contracts

- 6.67 CEMEX submits that the EOT System is likely to deliver the public benefit of allowing LODs to have more effective input into contracts.
- 6.68 LODs submit that they have limited capacity to exercise discretion when negotiating contract terms or cartage utilisation rates, given CEMEX uses standard form contracts. Several LODs indicated that they have limited input into contract negotiations. For example, LODs pointed to the cartage rate to demonstrate that they have been unable to persuade CEMEX to increase it for several years.
- 6.69 Given the use of standard form contracts, and that LODs are not party to collective bargaining arrangements, the ACCC does not accept that the EOT System has resulted in the public benefit of more effective input into contracts.

Environmental benefits

- 6.70 CEMEX submits that as the EOT System guarantees drivers trips, they do not need to wash out their agitators with the same frequency when they return to the batching plant for the next trip. Consequently, the LODs use considerably less water and generate less waste spoil which must be disposed of.
- 6.71 In response to this issue, LODs submitted that the frequency of washing agitators was not impacted by the operation of the EOT System and, in any event, water for washing agitators is continually recycled.
- 6.72 The ACCC accepts that there is a public benefit in the reduction of water usage arising from the washing of agitators. The ACCC notes, however, that water saving techniques would likely remain in the absence of the EOT System, for example through

the continued operation of a roster. Therefore, water usage cannot be described as a benefit resulting from the operation of the EOT System.

Public safety benefits

- 6.73 CEMEX submits that the EOT System eliminates a LOD's perception that they need to speed or otherwise rush their job in order to secure their share of available work. CEMEX claims that the EOT System promotes safer driving and job performance when compared to other arrangements, such as a 'first come, first served' allocation system, resulting in significant safety benefits to both the LODs and the general public.
- 6.74 In discussions with the ACCC, LODs indicated that they would continue to abide by speed limits regardless of whether the EOT System continued to operate. In support of this claim, LODs noted that, regardless of the EOT System, they were concerned about having their driver's licence suspended and could not operate their business without a valid licence.
- 6.75 In authorisation A90769, the ACCC expressed the view that adherence to the law will not necessarily be determined by the cartage allocation arrangements but rather by the professionalism of the individual LODs and CSR's commitment to compliance. For this reason the ACCC 'did not accept that improved compliance with statutory obligations was a public benefit resulting from the proposed collective arrangements.'
- 6.76 The ACCC reiterates its view expressed in authorisation A90769, and therefore does not consider that the operation of the EOT System is likely to result in any significant improvements in public safety.

ACCC conclusion on public benefits

- 6.77 The ACCC considers that the EOT System is likely to result in the public benefits of continued industrial harmony and some reduction in transaction costs.

Balance of public benefit and detriment

- 6.78 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the EOT System is likely to result in a public benefit that will outweigh any public detriment.
- 6.79 In the context of applying the net public benefit test at section 90(8)³⁴ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.³⁵

- 6.80 The ACCC considers that the continued operation of the EOT System has the potential to result in reduced competition between existing LODs.

³⁴ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

³⁵ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] Australian Competition Tribunal 5 at paragraph 22.

- 6.81 The ACCC is satisfied that the continuation of the EOT System is likely to result in the public benefit of continued industrial harmony. In particular, the ACCC notes that the EOT System does appear to have been effective in addressing the serious industrial unrest which existed in the Western Australian concrete cartage market prior to 2003.
- 6.82 The ACCC also considers that the continuation of the EOT System is likely to result in some reduction in transaction costs, by removing the need to negotiate cartage on a frequent and individual basis, and reducing the incidence of mediation with LODs
- 6.83 On balance, the ACCC considers the public benefit is likely to outweigh the public detriment.

Length of authorisation

- 6.84 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 6.85 CEMEX submits that there have only been minor changes in the relevant markets during the five years' operation of authorisation A90769 and on this basis, seeks re-authorisation of the EOT System for 10 years.
- 6.86 The ACCC considers that there have been significant changes in the relevant markets during the operation of authorisation A90769. CEMEX itself notes that there has been a boom in the Western Australian economy and consequently an increase in demand for building and construction products.³⁶
- 6.87 In the absence of more compelling reasons for a longer period of authorisation, the ACCC proposes to grant authorisation to the EOT System for five years.

³⁶ CEMEX Submission, 4 February 2008, pp 4.

7. Draft determination

The application

- 7.1 On 8 February 2008, CEMEX Australia Pty Ltd (CEMEX) lodged an application for the revocation of authorisation A90769 and the substitution by new authorisation A91082.
- 7.2 The substitute authorisation sought by CEMEX relates to the continued operation of a cartage allocation system amongst concrete carriers, known as the Equal Opportunity of Trips System (EOT System).

Statutory test

- 7.3 Pursuant to section 91C(7) of the TPA and for the reasons outlined in this draft determination, the ACCC is satisfied that the proposed revocation and substitution is likely to result in public benefits that outweigh the public detriment constituted by any lessening of competition that would be likely to result from the arrangements.

Conduct for which the ACCC proposes to grant authorisation

- 7.4 The ACCC proposes to revoke authorisation A90769 and grant authorisation A91082 in substitution. The ACCC proposes to grant substitute authorisation until 30 June 2013.
- 7.5 Under the proposed substitute arrangements, CEMEX will continue to operate the EOT System.

Interim authorisation

- 7.6 At the time of lodging the application, CEMEX requested interim authorisation to continue to operate the EOT System. The ACCC granted interim authorisation to the substitute authorisation A91082 on 21 February 2008.
- 7.7 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

- 7.8 The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.