



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Application for authorisation**

**lodged by**

**Construction, Forestry, Mining & Energy,  
Industrial Union of Employees, Queensland (CFMEU Qld)**

**in respect of**

**collective negotiations by current and future owner drivers  
with current and future acquirers of earthmoving services in south-east Queensland**

**Date: 5 February 2009**

**Authorisation no.: A91103**

**Public Register no.:C2008/1627**

**Commissioners:** Samuel  
Kell  
Schaper  
Court  
Dimasi  
Martin  
Willett

# Summary

The ACCC proposes to grant conditional authorisation to owner drivers in south-east Queensland, who have engaged the Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland (CFMEU Qld) to provide them with services to support and facilitate collective bargaining, to collectively negotiate with earthmoving contractors, including the 16 businesses identified in attachment A to this draft determination, operating in the commercial and civil construction sectors in south-east Queensland, for a period of five years.

## **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 application for authorisation**

On 6 October 2008 the CFMEU Qld lodged application for authorisation A91103 with the ACCC. On 27 January 2009 the CFMEU Qld amended its application. It seeks authorisation, for a period of five years, for owner drivers in south-east Queensland, who have engaged the CFMEU Qld to provide them with services to support and facilitate collective bargaining (referred to as ‘participating owner drivers’), to collectively negotiate with earthmoving contractors in relation to the terms, prices and conditions of the earthmoving services provided by the owner drivers to the earthmoving contractors in the commercial and civil construction sectors in south-east Queensland. At present, CFMEU Qld represents 24 such owner drivers. The CFMEU Qld’s application seeks authorisation for current and future participating owner drivers to collectively negotiate with current and future acquirers of earthmoving services.

## **Public benefit**

The ACCC is satisfied that that the proposed arrangements are likely to provide participating owner drivers in south-east Queensland with a greater opportunity to provide input into terms and conditions with associated efficiency gains.

## **Public detriment**

The ACCC considers that there are several features of the proposed arrangements which limit the potential detriment. In particular, the difference in the level of competition amongst owner drivers with or without collective bargaining is likely to be small. Additionally, the proposed arrangements do not involve collective boycott conduct.

The ACCC considers that the current coverage of the bargaining group with its 24 members is limited, but notes the potential for the group to increase in size. The target businesses are likely to face more pressure to negotiate with the group if it grows to represent a more significant proportion of owner drivers in the industry.

## **Draft determination**

Overall, the ACCC considers that in all the circumstances, and subject to the condition below, 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.

The ACCC therefore **proposes to grant** authorisation, for a period of five years, to application A91103 **on condition that**

- CFMEU Qld will, on an annual basis, provide the ACCC with:
  - the number of current participating owner drivers
  - details of any collective bargaining group including the group's current membership
  - the identity of any targets approached by a collective bargaining group which are not identified in Attachment A to this draft determination.

## **The next steps**

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

# Contents

<b>1. INTRODUCTION</b> .....	<b>1</b>
AUTHORISATION .....	1
THE APPLICATION FOR AUTHORISATION .....	1
CHRONOLOGY .....	2
<b>2. BACKGROUND</b> .....	<b>3</b>
THE APPLICANT .....	3
THE APPLICATION FOR AUTHORISATION .....	3
THE PROPOSED ARRANGEMENTS .....	3
THE INDUSTRY – OWNER DRIVERS AND EARTHMOVING SERVICES.....	5
<b>3. SUBMISSIONS RECEIVED BY THE ACCC</b> .....	<b>7</b>
THE APPLICANT .....	7
INTERESTED PARTIES .....	7
<b>4. THE NET PUBLIC BENEFIT TEST</b> .....	<b>9</b>
<b>5. ACCC EVALUATION</b> .....	<b>11</b>
THE MARKET.....	11
THE COUNTERFACTUAL .....	12
PUBLIC BENEFIT.....	13
ACCC conclusion on public benefits .....	16
PUBLIC DETRIMENT.....	16
ACCC conclusion on public detriments.....	21
BALANCE OF PUBLIC BENEFIT AND DETRIMENT .....	21
IDENTITY OF OWNER DRIVERS.....	22
OTHER SIMILAR APPLICATIONS .....	23
LENGTH OF AUTHORISATION.....	23
<b>6. DRAFT DETERMINATION</b> .....	<b>24</b>
THE APPLICATION .....	24
THE NET PUBLIC BENEFIT TEST .....	24
CONDUCT FOR WHICH THE ACCC PROPOSES TO GRANT AUTHORISATION.....	24
CONDUCT NOT PROPOSED TO BE AUTHORISED .....	25
FURTHER SUBMISSIONS .....	25
<b>ATTACHMENT A</b> .....	<b>26</b>

## Abbreviations

ACCC	Australian Competition and Consumer Commission
the Act	<i>Trade Practices Act 1974</i>
CCF	Civil Contractors Federation
CFMEU Qld	Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland
the Code	Queensland Competition Code
HIA	Housing Industry Association
ICA	Independent Contractors of Australia
MBQ	Master Builders Queensland
QTA	Queensland Trucking Association Ltd
participating owner drivers	owner drivers who have engaged the CFMEU Qld to provide them with services to support and facilitate collective bargaining
Thiess	Thiess Pty Ltd
TWUA	Transport Workers Union of Australia

# 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.

## The application for authorisation

- 1.8. On 6 October 2008 the Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland (CFMEU Qld) lodged application for authorisation A91103 to enable its current and future owner driver members to collectively negotiate with earthmoving contractors the terms and conditions of earthmoving services.
- 1.9. On 27 January 2009 the CFMEU Qld amended its application such that it no longer concerned owner driver members of the CFMEU Qld but rather owner drivers who have engaged the CFMEU Qld to provide them with services to support and facilitate collective bargaining by such owner drivers (referred to as ‘participating owner drivers’).

## The validity of the application

- 1.10. A number of interested parties queried the validity of the CFMEU Qld's application for authorisation.
- 1.11. The CFMEU Qld's application has been made under both the Trade Practices Act and the *Queensland Competition Code* (the Code). The Code contains direct equivalents of Parts IV and VII (including the authorisation provisions) of the Trade Practices Act. The Code applies to individuals in Queensland, including trade unions and applications for authorisation under the Code can be made by individuals, including trade unions. To this extent, the ACCC considers the application for authorisation by the CFMEU Qld has been validly lodged.
- 1.12. By way of further clarification, the CFMEU Qld's application is for authorisation and is not a collective bargaining notification. Accordingly, s 93AB(9) of the Trade Practices Act which restricts a trade union from lodging a collective bargaining notification, does not apply in this instance.

## Chronology

- 1.13. A chronology of significant dates in the consideration of this application is below.

DATE	ACTION
6 October 2008	Application for authorisation lodged with the ACCC.
31 October 2008	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
14 November 2008	CFMEU Qld advised that it would not be able to respond to interested parties' submissions until 13 January 2009.
15 January 2009	CFMEU Qld requested a further extension until 27 January 2009 to respond to interested parties' submissions.
27 January 2009	Submission received from the CFMEU Qld in response to interested party submissions.
5 February 2009	Draft determination issued.

## **2. Background**

### **The applicant**

- 2.1. The CFMEU Qld has around 10 000 members. It is a component part of the national Construction, Forestry, Mining & Energy, Industrial Union of Employees (CFMEU).
- 2.2. The CFMEU is a trade union representing construction workers around Australia. It has over 200 000 members including bricklayers, carpenters, plasterers, painters, crane drivers, steel fixers, construction labourers and trades assistants. The CFMEU represents workers in building and civil construction, local and state governments, off-site manufacturing, furniture establishments, quarries, housing and the crane industry.
- 2.3. The constitution of the CFMEU Qld allows owner drivers to be members of the CFMEU Qld on the basis that they perform work, as independent contractors, of a kind which, if they were employees, would make them eligible to become members of the CFMEU Qld.

### **The application for authorisation**

- 2.4. On 6 October 2008 the CFMEU Qld lodged application for authorisation A91103 with the ACCC. The CFMEU Qld confirmed its correct name on 15 January 2009. On 27 January 2009 the CFMEU Qld amended its application.
- 2.5. The CFMEU Qld has applied for authorisation to allow participating owner drivers to collectively negotiate with earthmoving contractors in relation to the terms, prices and conditions of the earthmoving services provided by the owner drivers to the earthmoving contractors in the commercial and civil construction sectors in south-east Queensland. At present, the CFMEU Qld represents 24 such owner drivers.
- 2.6. The CFMEU Qld's application seeks authorisation for current and future participating owner drivers, to collectively negotiate with current and future acquirers of earthmoving services.
- 2.7. The CFMEU Qld seeks authorisation for five years.

### **The proposed arrangements**

- 2.8. The CFMEU Qld proposes that the collective bargaining process will be as follows:
  - Participating owner drivers will nominate an earthmoving contractor with whom at least some of the owner drivers wish to collectively bargain.
  - Those participating owner drivers who choose to engage in the collective bargaining process will meet:
    - to discuss the terms and conditions they would like to negotiate with earthmoving contractors
    - to appoint a committee of 3 to 5 owner drivers to undertake the negotiations with earthmoving contractors.

- The participating owner drivers will invite the nominated earthmoving contractor to engage, on a voluntary basis, in collective negotiations. If the nominated earthmoving contractor agrees to participate in collective bargaining, the negotiating committee and the earthmoving contractor will enter into negotiations.
  - The identity of the participating owner drivers will be formally communicated in writing, generally on a commercial-in-confidence basis, to the nominated contractor. Any agreement resulting from a collective negotiation will bind only the nominated earthmoving contractor and the participating owner drivers whose identities have been communicated to the earthmoving contractor.
  - The negotiating committee would provide reports to the other participating owner drivers throughout the negotiations. The owner drivers will be responsible for the conduct and settlement of the collective negotiations.
- 2.9. Throughout the process, the CFMEU Qld will assist the participating owner drivers through the provision of negotiation training, administrative and communication support, formulation and drafting of claims, drafting of agreed terms, economic and industry research and organisational support. It will also make available physical resources to enable meetings to be convened. The CFMEU Qld will also assist to facilitate negotiations.
- 2.10. Items proposed to be collectively negotiated include:
- rates of pay
  - terms of payment (seeking a reduction from the current industry standard payment in 90 days, which causes cash flow burdens for small owner drivers)
  - minimum safety standards and measures to enhance safety
  - minimum engagement/payment per day
  - allowances for delays in traffic and poor on-site management
  - city rates and regional rates.
- 2.11. The CFMEU Qld advises that the frequency of the negotiations will be determined by the nature of the relevant work. Some collective negotiations may concern terms and conditions applicable to a single project whereas others may seek to establish the terms and conditions under which owner drivers will perform work for that earthmoving contractor for a period of time. The nature and scope of the work covered by the agreement will be clearly specified in the collectively negotiated agreement.
- 2.12. The CFMEU Qld advises that the proposed negotiation process is voluntary and each owner driver and each earthmoving contractor will independently make decisions regarding whether or not to participate in the process or to adopt any collectively negotiated terms and conditions.
- 2.13. The CFMEU Qld submits that it does not expect that all owner drivers will participate in all collective negotiations. For example, an owner driver may decide not to participate in a negotiation if they consider they have little prospect of performing work for the target earthmoving contractor.

- 2.14. The CFMEU Qld advises that in the event that a earthmoving contractor chooses not to negotiate with the bargaining group, or if collective negotiations commence but an agreement cannot be reached, the current status quo will continue to apply.

### **The industry – owner drivers and earthmoving services**

- 2.15. An integral part of the construction industry is the provision of earthmoving services. Earthmoving services are provided by independent owner drivers contracting with earthmoving companies as well as employee drivers of earthmoving companies.
- 2.16. Owner drivers use their trucks to pick up and deliver materials from and to (predominantly) commercial and civil construction sites. The materials are loaded into the truck at one site and tipped at another site as directed by an earthmoving contractor. An owner driver may travel 500 km or more on a standard day. Materials that are carted include gravel, dirt, rocks and other demolition materials.
- 2.17. Owner drivers generally operate body trucks, which can carry a maximum of 22.5 tonnes, or truck and trailer combinations, which can carry a maximum of 50 tonnes.
- 2.18. Owner drivers generally configure their truck and/or trailer in order to specialise in carrying a particular type of material. For example, the vast majority of trucks and trailers used for general cartage have aluminium bodies, as their relatively light-weight allows the truck to haul a greater payload. In contrast, steels trucks or trailers are restricted to smaller payloads due to their weight, but are preferred for heavy materials such as rocks or small machinery that would damage an aluminium body. While large trucks can carry more material, small trucks are more manoeuvrable and may be more suitable for smaller or obstructed sites. The main materials in which an owner driver may specialise are quarry products (e.g. dirt, sand and crushed materials), rock, concrete, steel and asphalt.
- 2.19. Most owner drivers operate small businesses which typically take the form of partnerships or sole traders. Generally these businesses are made up of one worker (being the owner driver) and one body truck or one truck and trailer combination.

### **Contracting between owner drivers and earthmoving companies**

- 2.20. Owner drivers typically undertake work for earthmoving contractors on a job-by-job basis. A job could take as little as a few hours or as long as several months. Some jobs are based on an hourly hire arrangement while other jobs are contract based.
- 2.21. Generally, earthmoving contractors maintain a “book” of owner drivers that they regularly use. The earthmoving contractor checks that the owner driver is licensed and that their truck is registered, insured and has satisfied any appropriate mechanical checks. Generally, owner drivers provide earthmoving contractors with the specifications of their truck and trailer so the earthmoving contractor knows the carrying capacity of the truck. Then, when the earthmoving contractor has work that requires a truck that matches the truck specifications, the earthmoving contractor may call the owner driver and offer the job. An earthmoving contractor may telephone an owner driver as close as the day before a job.

- 2.22. The ACCC understands that typically there is no negotiation between the owner driver and the earthmoving contractor over the price and terms on which the owner driver will provide the service. The earthmoving company tells the owner driver how much it is willing to pay. If the owner driver is not prepared to work for the offered rate, they decline the job.
- 2.23. There is a set of common terms which, in practice, are assumed to apply to all jobs. These terms provide:
- the owner driver is hired on a daily basis at a rate of pay fixed by the earthmoving contractor (within the industry this is known as the ‘daily hire’)
  - the owner driver is to have (and pay for) public liability, compulsory third party and comprehensive insurance
  - the owner driver is responsible for any loss of the load and any loss or damage caused on the road
  - the owner driver must comply with the directions of the earthmoving contractor
  - the load is ordinarily loaded by the earthmoving contractor
  - liability for damage caused to the truck by the loading of the material ordinarily lies with the earthmoving contractor.
- 2.24. Formal payment terms vary between earthmoving contractors. The ACCC understands that 90 day payment terms are common.

### 3. Submissions received by the ACCC

#### The applicant

- 3.1. The CFMEU Qld provided a supporting submission with its application for authorisation and has since provided additional information in response to the issues raised by interested parties.
- 3.2. The CFMEU Qld submits that over the past few years, several of its owner driver members have expressed concern to it regarding their working entitlements and conditions, and their lack of ability to negotiate with customers. It considers that the proposed collective bargaining arrangements will deliver a range of public benefits including fairness in the negotiation process, transaction cost savings, improved safety and enhanced viability of small business. The CFMEU Qld does not consider that the proposed collective bargaining arrangements will result in a significant lessening of competition.

#### Interested parties

- 3.3. The ACCC sought submissions from 49 interested parties potentially affected by the application, including the 24 owner drivers, the 16 target earthmoving contractors, a number of industry associations and several government departments. A summary of the public submissions provided by interested parties follows.
  - **Civil Contractors Federation (CCF)** opposes the CFMEU Qld's application. The CCF considers that the CFMEU Qld's proposed arrangements will generate an anti-competitive detriment and will not result in a public benefit.
  - **Commerce Queensland** queries the validity of the CFMEU Qld's application and opposes the proposed arrangements. Commerce Queensland considers that if the collective bargaining group can achieve a significant increase in rates, then it is possible that the effects of the arrangements may extend beyond south-east Queensland and to other industries which engage owner drivers. Commerce Queensland also questions the public benefits claimed by the CFMEU Qld.
  - **Greenies Tippers Pty Ltd** supports the establishment of a minimum rate (with additional payments based on load type and night work) and 45 day payment terms. This will enable owner drivers to repair, replace or renew equipment.
  - **Housing Industry Association (HIA)** opposes the proposed arrangements and noted that if authorisation is granted, competition in the relevant market will be extinguished and replaced with the equivalent of a collective workplace agreement for owner-drivers. The HIA considers that the CFMEU Qld has not demonstrated sufficient public benefit to outweigh the public detriment associated with the lessening of competition.
  - **Independent Contractors of Australia (ICA)** opposes the application on the basis that the CFMEU Qld is not a party to the commercial transactions to be negotiated which will result in blurred and questionable lines of accountability. It is also concerned that the application applies to future members of the CFMEU Qld. The ICA

considers that the CFMEU Qld seeks to restrict the operation of an effective market and questioned the public benefit claim made by the CFMEU Qld concerning road safety.

- **Master Builders Queensland (MBQ)** is opposed to the CFMEU Qld's application and considers that it will disrupt legitimate commercial arrangements and competition. It questions the public benefit claims made by the CFMEU Qld.
- **Queensland Trucking Association Ltd (QTA)** objects to the CFMEU Qld's application. The QTA is concerned that the proposed collective bargaining arrangements will result in commercial contracts being treated as employment contracts. It is also concerned that the application applies to future members of the CFMEU Qld. The QTA questions the public benefit claims made by the CFMEU Qld concerning road safety.
- **Thiess Pty Ltd (Thiess)** queries the validity of the CFMEU Qld's application and opposes arrangements which it claims limit or reduce competition in the building and construction industry.
- **Transport Workers Union of Australia (TWUA)** which advised that, while it supports the ability of independent contractors (owner drivers) in the transport industry to collectively bargain with contracting companies such as earthmoving contractors, it does not support the CFMEU Qld's application because it will create an unstable industrial landscape that may give rise to demarcation disputes between the TWUA and the CFMEU over the representation of owner drivers.

3.4. The views of the CFMEU Qld and interested parties are discussed in more detail in the ACCC's evaluation of the proposed collective bargaining arrangements in Chapter 5 of this draft determination. Copies of public submissions are available from the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)) by following the 'Public Registers' and 'Authorisations Public Registers' links.

## 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.

### Application A91103

- 4.2. The CFMEU Qld lodged application for authorisation A91103 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.<sup>1</sup> 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.<sup>2</sup>
- 4.5. 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

- 4.6. 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:

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<sup>1</sup> *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.

<sup>2</sup> *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.<sup>3</sup>

4.7. 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.<sup>4</sup>

## **Future with-and-without test**

4.8. 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.<sup>5</sup>

4.9. 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 and conditions**

4.10. The ACCC can grant authorisation for a limited period of time.<sup>6</sup>

4.11. The Act also allows the ACCC to grant authorisation subject to conditions.<sup>7</sup>

## **Future and other parties**

4.12. 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<sup>8</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>9</sup>

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<sup>3</sup> 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.

<sup>4</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>5</sup> 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.

<sup>6</sup> Section 91(1).

<sup>7</sup> Section 91(3).

<sup>8</sup> Section 88(10).

<sup>9</sup> Section 88(6).

## 5. ACCC evaluation

- 5.1. The ACCC's evaluation of the proposed collective bargaining arrangements is in accordance with the net public benefit test outlined in Chapter 4 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the proposed collective bargaining 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.

#### *Product market*

- 5.3. The CFMEU Qld submits that the relevant market is that for earthmoving services. It notes that the nature of a construction project determines the extent to which earthmoving services are required which in turn influences the supplier of those services. For example, most earthmoving for construction of residential buildings is undertaken by the builder, although owner drivers are used on occasion. For commercial and civil projects, the developer/project owner will generally appoint a principal contractor to undertake the construction, who will then call for tenders regarding the provision of earthmoving services. Individual owner drivers are too small to participate in such tenders. If the successful tenderer does not have enough trucks to undertake the work itself, it will engage owner drivers as independent contractors to provide the required services.
- 5.4. Some interested parties query the scope of the product market proposed by the CFMEU Qld. The HIA submits that the work of earthmoving contractors in south-east Queensland is not confined to, or even predominantly focussed on, pure commercial and civil construction work. The CCF submits that earthmoving services may also include excavation and other associated civil works. The QTA notes that tip truck owner drivers operate extensively outside the civil and commercial construction industry in areas such as local authorities, quarrying, grain and mineral movement.

#### *Geographic market*

- 5.5. The CFMEU Qld advises that an owner driver's insurance policy typically covers them within a radius of 150 km from the place the truck is garaged. For a Brisbane-based owner driver, this radius takes in areas between Ipswich to Bribie Island and down to the Gold Coast. The CFMEU Qld submits that while owner drivers can operate outside of this 150 km radius, they must notify their insurers before doing so. Additionally, owner drivers face geographic limitations on how far away from their base they can profitably provide services.
- 5.6. In response, the CCF submits that the geographic operating radius of an owner driver varies from operator to operator depending on the insurance policy they have purchased. The CCF and the TWUA also question whether identifying south-east Queensland as a geographic market is sufficiently clear or practical.

5.7. In this instance, the ACCC is of the view that it is not necessary to comprehensively define these markets. The ACCC considers that its assessment will not be significantly affected by variations in precise market definition. The ACCC proposes to adopt the market definition put forward by the CFMEU Qld for the market for the provision of earthmoving services in south-east Queensland.

#### *Market features*

5.8. The CFMEU Qld estimates that there are approximately 500 to 1000 owner drivers operating at any one time in the Brisbane area, of which it currently represents 24.

5.9. While the CFMEU Qld estimates that around 5 per cent of trucks and drivers involved in earthmoving in the Brisbane area are employed by earthmoving companies, with the remainder being owner drivers, the CCF submits that a substantial proportion (between 30 and 50 per cent) of truck drivers on construction sites in south-east Queensland are employees of civil construction or transport companies.

5.10. The CFMEU Qld submits that it is not difficult to enter the earthmoving services market. A potential entrant requires only a truck licence and sufficient capital to purchase or hire a truck and cover initial outlays such as insurance and fuel to manage cash flow issues. The CFMEU Qld submits that set up costs range from \$10 000 (to buy a small second-hand truck) to \$400 000 (to buy a new larger truck). The CFMEU Qld advise that when demand is strong for earthmoving services in south-east Queensland, it is not uncommon for owner drivers from other regions of Queensland or from interstate to move into the area and compete for work with the local owner drivers. It claims that large projects in south-east Queensland have attracted owner drivers from as far away as Tasmania.

5.11. Similarly, the CFMEU Qld considers that it is not difficult to exit the market as the capital equipment may be sold.

5.12. The CCF agrees that owner drivers can and do enter and exit the market relatively easily.

5.13. The CFMEU Qld submits that there are approximately 16 large earthmoving companies operating in south-east Queensland.

### **The counterfactual**

5.14. As noted in Chapter 4 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the ‘future with-and-without test’.

5.15. In the absence of authorisation, it appears unlikely that participating owner drivers would collectively negotiate contracts with earthmoving companies operating in south-east Queensland. Without authorisation, the ACCC would expect that the status quo will continue and CFMEU Qld member owner drivers would negotiate on an individual basis with an earthmoving company. The ACCC notes that in reality, the extent to which a contract between an owner driver and an earthmoving company is negotiated may be limited and it may well be that an owner driver will be offered standard terms and conditions, including rates of pay on a take it or leave it basis.

5.16. On this basis, the counterfactual with respect to the proposed collective bargaining arrangements appears to be the situation in which each CFMEU Qld member owner driver individually agrees to the terms and conditions of their contract with an earthmoving company.

## **Public benefit**

5.17. The CFMEU Qld submits that the proposed collective bargaining arrangements will deliver the following public benefits:

- fairness in the negotiating process
- transaction cost savings
- improved safety
- enhancing the viability of efficient businesses.

5.18. Several parties, including Commerce Queensland, the ICA and the TWUA question the public benefit claims made by the CFMEU Qld. Commerce Queensland and the ICA suggest that there are alternative avenues for achieving the potential benefits identified by the CFMEU Qld. The TWUA considers that the potential benefits associated with the proposed arrangements will accrue to the owner drivers and so will be a private benefit, rather than a public benefit.

5.19. An assessment of the public benefits claimed by the CFMEU Qld follows.

## **Fairness in the negotiating process**

### *Submissions*

5.20. The CFMEU Qld submits that the ability of owner drivers to have meaningful input into their conditions of work is limited because an individual owner driver does not have the bargaining power to bring an earthmoving contractor to the negotiating table.

5.21. In response, the MBQ submitted that the CFMEU Qld's application appears to deny the nature of commercial contracting and bargaining position. The HIA submitted that fairness is subjective and negotiations do not necessarily become fairer simply because they are collective rather than individual.

5.22. Additionally, the CCF, HIA, ICA, MBQ and the QTA noted the existence of a variety of both federal and state legislation which is intended to offer protection and relief from unfair contracts. This legislation includes the *Independent Contractors Act 2006* (Cth), the *Workplace Relations Act 1996* (Cth), the *Building and Construction Industry Improvement Act 2005* (Cth) and the *Building and Construction Industry Payments Act 2004* (Qld). Further, a National Code of Practice for the Construction Industry was introduced in 1997. The CCF also noted the role of the Office of the Australian Building and Construction Commissioner.

5.23. In response, the CFMEU Qld submits that the legal protections for owner drivers provided by these pieces of legislation is focused on issues such as whether a contract is harsh or unfair, or whether there has been misleading or unconscionable conduct, rather than

allowing greater input into the contract negotiation process in the first instance with a view to producing more efficient outcomes.

#### *ACCC view*

- 5.24. Arguments based on increasing bargaining power relate to a change in the power relativities of the parties to the proposed collective agreement. A mere change in the amount of bargaining power is not in itself a public benefit. Rather, the ACCC will consider the likely outcomes resulting from the change in bargaining position arising from the proposed collective bargaining arrangements.
- 5.25. The ACCC considers that collective bargaining arrangements can result in benefits to the public by facilitating improvements in the level of input a party has in their contractual negotiations. This improved input provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses, for example by addressing common contractual problems in a more streamlined and effective manner.
- 5.26. The enhanced level of input into the negotiation process results from:
- the relatively greater bargaining power of the collective (achieved through the aggregation of their influence in the negotiation)
  - improving the individual's access to information and resources
  - providing a mechanism through which productive contractual discussions between the collective and their target(s) can be achieved.
- 5.27. In the context of the CFMEU Qld's application for authorisation, it would appear that the relative positions of individual owner drivers and earthmoving companies limits the capacity of owner drivers to have effective input into contract terms and conditions.
- 5.28. The ACCC considers that the collective bargaining arrangements are likely to provide greater opportunity for owner drivers, through their representative committee, to provide input into contract terms and conditions. To the extent that this leads to efficiency gains, it gives rise to a public benefit.

#### **Transaction cost savings**

##### *Submissions*

- 5.29. The CFMEU Qld submits that negotiations between individual owner drivers and earthmoving companies are not practical or economical due to the associated transaction costs. It considers that the proposed collective bargaining arrangements provide a process by which the costs of negotiation, such as the cost of obtaining financial and legal advice, can be shared across participating owner drivers and reduced for earthmoving companies.
- 5.30. In response, the HIA agreed that a process for sharing the costs of negotiations across participating owner drivers is likely to benefit the owner drivers however, the HIA does not consider this to be a public benefit. The HIA submitted that it is by no means clear that an earthmoving contractor would save time or cost in negotiations with the CFMEU Qld for a collective agreement, in comparison with the time and cost they would spend on negotiations with any number of single owner drivers.

### *ACCC view*

- 5.31. Generally, there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiating process is employed, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. The ACCC considers that to the extent that these transaction cost savings do arise they are likely to constitute a public benefit.
- 5.32. The information available to the ACCC suggests that owner drivers are generally offered standard form contracts with little scope to vary terms and conditions. However, there may still exist costs associated with entering into such contract in the form of professional advice or obtaining the information necessary to make an informed choice. A collective may be able to consolidate and share such costs. In this case, the ACCC notes that the CFMEU Qld will provide advice and secretariat support to the bargaining group.
- 5.33. The ACCC considers that any transaction cost savings arising from the proposed collective bargaining arrangements are likely to be relatively small.

### **Improved safety**

#### *Submissions*

- 5.34. The CFMEU Qld submits that the economic pressure placed on owner drivers by the low rates of pay offered by earthmoving contractors, combined with the inability of owner drivers to negotiate improved rates of pay and other conditions, increases the risk of owner drivers cutting maintenance costs below safe levels, working too long hours (and so driving whilst tired) and otherwise engaging in practices that endanger not only the owner driver but also other members of the public. The CFMEU Qld also considers that the proposed collective bargaining arrangements may facilitate the identification, implementation and discussion of safety measures with particular relevance to the south east Queensland earthmoving sector.
- 5.35. In response, the HIA, ICA, MBQ and the QTA submitted that while safety issues are important and need to be addressed, there are more appropriate ways to achieve improvements, including through the work of road and work safety authorities.

### *ACCC view*

- 5.36. The ACCC agrees that workplace safety is an important issue. The ACCC recognises that safe working practices in the trucking industry are likely to benefit the public at large.
- 5.37. As noted above, the ACCC does accept that the proposed collective bargaining arrangements would provide greater opportunity for owner drivers, through their representative committee, to provide input into contract terms and conditions. To the extent that this leads to the development and implementation of work conditions that improve the safety of the earthmoving services sector, it gives rise to a public benefit.

### **Enhancing the viability of efficient businesses**

## *Submissions*

- 5.38. The CFMEU Qld submits that the proposed collective bargaining process will improve the level of information available to owner drivers regarding industry developments and provide greater certainty to owner drivers and earthmoving contractors regarding the terms and conditions of work. In turn, owner drivers and earthmoving contractors will be able to make better informed decisions regarding resource allocation, including whether to enter or exit the market or to purchase additional equipment.
- 5.39. In response, the CCF, HIA and the MBQ did not agree that the proposed arrangements will enhance the viability of efficient business. The CCF submitted that the viability of the construction industry is dependent on a variety of complex and interrelated factors which include skill shortages, industrial harmony and the regulatory environment which are not affected by the proposed collective bargaining arrangements. The HIA considers that the proposed arrangements will protect inefficient firms and suppress competition. The MBQ submitted that certainty in terms and conditions of work is only meaningful if the work is actually performed. The MBQ noted that the use of independent contracting arrangements delivers efficiencies associated with flexibility, appropriate financial incentives and reduced administration. The MBQ considers that the proposed arrangements are likely to diminish these efficiencies.

## *ACCC view*

- 5.40. As noted above, the ACCC does accept that the proposed collective bargaining arrangements are likely to provide greater opportunity for owner drivers, through their representative committee, to provide input into contract terms and conditions. This outcome in itself may provide owner drivers with greater confidence with respect to business planning and achieving efficiencies, which may have a positive influence on business viability.

## **ACCC conclusion on public benefits**

- 5.41. The ACCC is satisfied that the proposed arrangements are likely to provide participating owner drivers in south-east Queensland with a greater opportunity to provide input into terms and conditions with associated efficiency gains.

## **Public detriment**

- 5.42. In the context of the Trade Practices Act, collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions (which can include price) with a supplier or customer. A group of business may sometimes appoint a representative, such as an industry association, to act on its behalf in the negotiations.
- 5.43. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

## Submissions

- 5.44. The CFMEU Qld submits that the proposed arrangements are unlikely to result in a significant lessening of competition. The CFMEU Qld considers that the proposed arrangements will not increase barriers to entry to the relevant market because they will not lead to owner drivers entering into long-term contracts with earthmoving contractors.
- 5.45. Interested parties submit a range of concerns about the potential impact of the proposed arrangements.
- 5.46. The CCF, Commerce Queensland, the HIA, the ICA and the QTA raise concerns about the impact of the proposed arrangements on price. For example, the CCF, Commerce Queensland, the HIA and the QTA note the potential for the collectively negotiated terms and conditions, and particularly price, to be adopted industry-wide. The HIA is concerned the proposed collective bargaining arrangements will lead to a standard term being included in collective agreements under the Workplace Relations Act between the CFMEU Qld and earthmoving contractors (as employers) requiring the earthmoving contractor to engage only those owner drivers who are parties to the CFMEU Qld collective bargaining agreement.
- 5.47. The CCF considers that the standardisation of contracts under the proposed arrangements would remove flexibility and the incentive to be innovative.
- 5.48. The MBQ and the HIA raise concern that owner drivers are required to be CFMEU Qld members in order to participate in the proposed collective bargaining arrangements. The HIA considers that this may be a small barrier to entry for some owner drivers.
- 5.49. The HIA questions the voluntary nature of the arrangements. It considers that earthmoving contractors will not enter negotiations unless they are forced to do so. Given this, the HIA submits that the CFMEU Qld must believe that it has the ability to bring earthmoving contractors to the negotiating table. The HIA submits that while the CFMEU Qld has not applied for authorisation of collective boycott conduct, it is important to acknowledge the wider role of the CFMEU Qld in such matters.
- 5.50. Commerce Queensland, the HIA and the QTA note the potential for the collective bargaining group to increase in size. The CCF, the HIA and the TWUA submit that the success of the arrangements will attract more members to the CFMEU Qld. The TWUA considers that the CFMEU Qld will obtain an unfair advantage over the TWUA with respect to attracting new members, which would lead to industrial unrest and demarcation disputes between the unions. The TWUA also considers that the proposed arrangements will create an unfair commercial advantage for CFMEU Qld members.

### *ACCC view*

- 5.51. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements is likely to be more limited where the following four features are present:
- the current level of negotiations between individual members of the group and the proposed counterparties on the matters to be negotiated is low

- participation in the collective bargaining arrangements is voluntary
- there are restrictions on the coverage and composition of the bargaining group
- there is no boycott activity.

*Current level of negotiations between individual owner drivers and earthmoving companies*

- 5.52. Where the current level of individual bargaining between members of a proposed bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.
- 5.53. The CFMEU Qld submits that owner drivers are currently offered standard oral contracts by earthmoving contractors on a ‘take it or leave it’ basis with little, if any, scope to vary the terms or conditions of their supply of earthmoving services to earthmoving companies.
- 5.54. While there appears to be some opportunity for individual owner drivers to reject unreasonable terms and engage in negotiations with earthmoving contractors when demand for services is high, in general the ACCC considers that the level of bargaining between individual owner drivers and earthmoving contractors is low.
- 5.55. Given this, the ACCC considers that the difference in the level of competition amongst owner drivers with or without the collective bargaining arrangements is likely to be small.
- 5.56. The situation between owner drivers and those unidentified earthmoving companies that may be the target of the proposed collective bargaining arrangements in the future is less clear. It is possible that there may be a greater level of negotiation between individual owner drivers and unidentified future earthmoving companies, particularly if those earthmoving companies have relatively less bargaining power, as may be the case with a new entrant.

*Voluntary participation in the collective bargaining arrangements*

- 5.57. The CFMEU Qld advise that participation by both owner drivers and the earthmoving companies in the collective negotiation process is voluntary. It submits that:
- owner drivers may opt out of the collective negotiation process at any time and negotiate individually with earthmoving companies
  - earthmoving companies may choose whether to participate in the collective bargaining process or continue to deal with owner drivers on an individual basis.
- 5.58. The extent to which the proposed collective bargaining arrangements are genuinely voluntary for all parties is critical to the ACCC’s assessment of the CFMEU Qld’s application for authorisation.
- 5.59. The ACCC notes interested parties’ concerns that the CFMEU Qld’s involvement in the proposed arrangements may increase the pressure faced by the target businesses to negotiate with the collective bargaining group. This is particularly as the CFMEU Qld is a trade union.

- 5.60. The involvement of the CFMEU Qld in the proposed arrangements is a relevant consideration in the ACCC's assessment of the application for authorisation.
- 5.61. The ACCC notes interested parties' concerns that the proposed collective bargaining arrangements could lead to the standardisation of terms and conditions across the industry, with higher prices and reduced flexibility.
- 5.62. The ACCC considers that the target businesses are under no obligation to participate in negotiations and should negotiations commence, the target businesses are able to opt out of the negotiations at any time. In particular, the target businesses are not compelled to agree to terms, including price, they do not consider are acceptable. They are free to continue with their existing arrangements. In this regard it is relevant to note that the ACCC did not receive any concerns about the proposed arrangements from any of the currently identified target businesses.
- 5.63. The ACCC recognises that the voluntary participation of earthmoving contractors could be different if the size of the bargaining group was larger. At present, the group has 24 members while there are between an estimated 500 – 1000 owner drivers in south-east Queensland. The ACCC considers that the target businesses will face more pressure to negotiate with the group if it grows to represent a more significant proportion of owner drivers in the industry.
- 5.64. The CFMEU Qld submits that the group is unlikely to grow significantly for the following reasons:
- the voluntary nature of the arrangements for earthmoving contractors lessens the possibility that collective negotiations will actually take place
  - if collective negotiations do take place and are thought to be beneficial by earthmoving contractors, then earthmoving contractors are likely to offer all owner drivers similar terms to those collectively negotiated in order to secure similar benefits in all their dealings with owner drivers
  - owner drivers may have a choice of collective bargaining arrangements if similar applications for authorisation are lodged by other trade unions
  - many owner drivers may be philosophically opposed to joining a trade union.
- 5.65. The ACCC notes that the role of the CFMEU Qld is to provide secretariat services as well as acting in an advisory role. As a consequence, the target will negotiate directly with owner drivers, on behalf of other owner drivers, rather than the union.
- 5.66. The ACCC also notes that while owner drivers may have the ability to exert pressure on the target business by individually withdrawing, or threatening to withdraw, earthmoving services, this possibility exists with or without authorisation, and with or without the involvement of the CFMEU Qld.
- 5.67. There are many reasons why an individual owner driver may choose to withdraw services. In general, such decisions when made individually are unlikely to raise trade practices issues. In the context of collective bargaining, a collective boycott occurs when a group of competitors agree not to acquire goods or services from, or not to supply goods or services to, a business with whom the group is negotiating, unless the business accepts the terms

and conditions offered by the collective bargaining group. The issue of collective boycott is addressed in paragraphs 5.72 – 5.75.

#### *Size/composition of bargaining group*

- 5.68. The ACCC considers that where the size of bargaining groups is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and to the competition provided by those suppliers outside the group.
- 5.69. Under the CFMEU Qld's proposal, the bargaining group is limited to participating owner drivers. At present, there are 24 such owner drivers out of approximately 500 – 1000 and the CFMEU Qld submitted that they represent less than 10 per cent of the estimated total number of owner drivers in the Brisbane area. The CFMEU Qld does not anticipate a significant increase in membership of the bargaining group should authorisation be granted. The CFMEU Qld considers that the presence of non-participating owner drivers (both within south-east Queensland and Australia-wide) as well as the ability of earthmoving contractors to expand/establish in-house earthmoving capacity, will constrain the bargaining group in its negotiations with earthmoving contractors.
- 5.70. The ACCC considers that the current membership of the group is such that owner drivers outside the bargaining group currently present a significant and genuine alternative to the group and as such, are likely to impose a real competitive constraint on the group in its dealings with earthmoving companies. This is also likely to mean that the terms and conditions negotiated by the group will not become industry wide.
- 5.71. The ACCC notes the potential for the proposed collective bargaining group to become larger over time should owner drivers join the CFMEU Qld in the future. As noted in paragraph 5.40, if the bargaining group grows to represent a more significant proportion of owner drivers in the industry, it is likely that the target businesses will face more pressure to negotiate with the group.

#### *Boycott activity*

- 5.72. Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because the target, faced with the threat of withdrawal of supply, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.
- 5.73. Collective boycotts can also significantly disrupt downstream and upstream businesses. The Tribunal has found that collective boycotts have the potential to inflict significant damage upon the target of the boycott, its employees, consumers and, also, the boycotters themselves.<sup>10</sup> The Tribunal considered that the threat of a boycott – even without it ultimately being engaged in – is likely to come at a high cost to society.
- 5.74. The ACCC considers that collective boycotts can significantly increase the potential anti-competitive effects of collective bargaining arrangements and it is unlikely to allow protection from legal action to such conduct in most cases.

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<sup>10</sup> *VFF Chicken Meat Growers' Boycott Authorisation* [2006] AcompT9 at paragraph 442.

5.75. In this case, the CFMEU Qld has not applied for authorisation to engage in collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the Act. Additionally, if such conduct did occur, the ACCC would investigate.

### **ACCC conclusion on public detriments**

5.76. The ACCC considers that there are several features of the proposed arrangements which limit the potential detriment. In particular, the difference in the level of competition amongst owner drivers with or without collective bargaining is likely to be small. Additionally, the proposed arrangements do not involve collective boycott conduct.

5.77. The ACCC considers that the current coverage of the bargaining group with its 24 members is limited, but notes the potential for the group to increase in size. The target businesses are likely to face more pressure to negotiate with the group if it grows to represent a more significant proportion of owner drivers in the industry.

### **Balance of public benefit and detriment**

5.78. 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.

5.79. In the context of applying the net public benefit test at section 90(8)<sup>11</sup> of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>12</sup>

5.80. The ACCC is satisfied that that the proposed arrangements are likely to provide participating owner drivers in south-east Queensland with a greater opportunity to provide input into terms and conditions with associated efficiency gains.

5.81. The ACCC considers that there are several features of the proposed arrangements which limit the potential detriment. In particular, the difference in the level of competition amongst owner drivers with or without collective bargaining is likely to be small. Additionally, the proposed arrangements do not involve collective boycott conduct.

5.82. The Act allows the ACCC to grant authorisation subject to conditions.<sup>13</sup> Generally, the ACCC may impose conditions to ensure that the net public benefit test is met or continues to be met over the proposed period of authorisation.

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<sup>11</sup> 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.

<sup>12</sup> Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

<sup>13</sup> Section 91(3).

- 5.83. In this instance, the ACCC notes the potential for the size of the bargaining group to grow and for the bargaining group to deal with unidentified targets in the future. The ACCC is concerned that these possibilities may impact on whether the arrangements are genuinely voluntary for earthmoving contractors. An earthmoving contractor's ability to choose whether or not to deal with the bargaining group is likely to be more limited as the bargaining group becomes larger. Future unidentified targets, such as new entrants, may be limited in their ability to choose whether to deal with the bargaining group or not.
- 5.84. The ACCC considers that a condition is required to enable the ACCC to be satisfied that the collective bargaining arrangements continue to be genuinely voluntary for earthmoving contractors over the course of the authorisation.
- 5.85. Therefore, to ensure that the net public benefit will be maintained over the length of the authorisation the ACCC proposes to grant authorisation subject to the following condition:
- CFMEU Qld will, on an annual basis, provide the ACCC with:
    - the number of participating owner drivers
    - details of any collective bargaining group including the group's current membership
    - the identity of any targets approached by a collective bargaining group which are not identified in Attachment A to this draft determination.
- 5.86. The ACCC notes the TWUA's submission that if authorisation is granted, the ACCC should impose a condition that the authorisation not become effective until such time as the ACCC has considered any application that may be made by the TWUA and/or the TWUA (Qld) for an authorisation for members of the TWUA to also engage in similar activity to that being proposed by the CFMEU Qld application.
- 5.87. The ACCC's role in the authorisation context is to assess the application before it on its merits, according to the net public benefit test. Should the TWUA lodge an application for authorisation, the ACCC will assess it accordingly.
- 5.88. Sections 91(B) and 91(C) of the Act enable the ACCC to review an authorisation if it is satisfied that:
- the authorisation was granted on evidence or information that was materially false or misleading
  - a condition of authorisation has not been complied with or
  - there has been a material change of circumstances since the authorisation was granted. A 'material' change of circumstances is one that has 'an impact or likely impact upon public benefits and/or detriment'.
- 5.89. In assessing whether a material change of circumstances has occurred in the context of CFMEU Qld's proposed authorisation, the ACCC will pay particular attention to whether there has been a change in the voluntary nature of the arrangements for earthmoving contractors.

## **Identity of owner drivers**

- 5.90. The ACCC notes the ICA's concern that the identity of the individual members of the bargaining group is not available on the public register. This information was excluded from the public register at the discretion of the ACCC. The ACCC considers that an individual's membership status of a trade union is personal information. The ACCC may, at its discretion, exclude personal information from the public register to ensure compliance with Privacy Act requirements.
- 5.91. For an assessment of the CFMEU Qld's proposed arrangements to be undertaken, it is the size of the bargaining group that is important, rather than the identity of its members.
- 5.92. However, the identity of the members of the bargaining group is important in the context of a negotiation. A target business must know exactly who it is dealing with. For this reason, the ACCC expects that at the point of first contact between the collective bargaining group and a target business, the identity of the members of the collective bargaining group will be disclosed to the target business.

### **Other similar applications**

- 5.93. The MBQ and the TWUA have suggested that the ACCC may receive further applications for authorisation of collective bargaining arrangements involving independent contractors in the commercial building trades.
- 5.94. In response, the ACCC notes that any application for authorisation will be considered on its merits, according to the net public benefit test.

### **Length of authorisation**

- 5.95. 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.
- 5.96. CFMEU Qld seeks authorisation for five years.
- 5.97. The ACCC considers that it is appropriate to grant conditional authorisation for a period of five years.

## 6. Draft determination

### The application

- 6.1. On 6 October 2008 the Construction, Forestry, Mining and Energy Union, Construction and General Division, Qld (CFMEU Qld) lodged application for authorisation A91103 with the Australian Competition and Consumer Commission (the ACCC).
- 6.2. Application A91103 was made using Form B Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 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.
- 6.3. In particular, the CFMEU Qld seeks authorisation for owner drivers who have engaged the CFMEU Qld to provide them with services to support and facilitate collective bargaining (referred to as ‘participating owner drivers’) to collectively negotiate with earthmoving contractors in relation to the terms, prices and conditions of the earthmoving services provided by the owner drivers to the earthmoving contractors in the commercial and civil construction sectors in south-east Queensland. At present, CFMEU Qld represents 24 of these owner drivers. The CFMEU Qld’s application seeks authorisation for current and future participating owner drivers to collectively negotiate with current and future acquirers of earthmoving services.

### The net public benefit test

- 6.4. For the reasons outlined in Chapter 5 of this draft 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 **proposes to grant** authorisation, for a period of five years, to application A91103 **on condition that:**
  - CFMEU Qld will, on an annual basis, provide the ACCC with:
    - the number of current participating owner drivers
    - details of any collective bargaining group including the group’s current membership
    - the identity of any targets approached by a collective bargaining group which are not identified in Attachment A to this draft determination.

### Conduct for which the ACCC proposes to grant authorisation

- 6.6. The ACCC proposes to grant authorisation, for a period of five years, to participating owner drivers in south-east Queensland to collectively negotiate with earthmoving contractors, including the 16 businesses identified in attachment A to this draft

determination, operating in the commercial and civil construction sectors in south-east Queensland.

6.7. This draft determination is made on 5 February 2009.

### **Conduct not proposed to be authorised**

6.8. The proposed authorisation does not extend to any collective decision by current or future participating owner drivers to engage in collective boycott activities.

### **Further submissions**

6.9. 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.

## **Attachment A**

### **Target earthmoving contractors**

1. Timms Haulage
2. Byrne Earthmoving Pty Ltd
3. APA Tippers Pty Ltd
4. Rockin' Haulage Pty Ltd
5. Lantrak Pty Ltd
6. Coastal Tipper Hire Pty Ltd
7. Coast 2 Coast Earthmoving Pty Ltd
8. D&M Plant Hire Pty Ltd
9. Greenies Tippers Pty Ltd
10. North Brisbane Truck Hire
11. Bulk Granite Haulage Pty Ltd
12. Thiess Pty Ltd
13. Boral Construction Materials Ltd
14. Torque Haulage Pty Limited
15. Peter Munns Holdings Pty Ltd
16. Tims Holdings Pty Ltd