

Mr David Hatfield
Director
Adjudication Branch
ACCC

21 January 2009

C/O Ms Sharon Clancy
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Dear Mr Hatfield

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

We refer to your letter of 11 November 2008 to Thies Pty Ltd (**Thies**) in the above matter and to the submission made in Thies' letter of 31 October 2008. Your explanation about the Queensland Competition Code applying to individuals and trade unions is noted. Even if the Application is made under Queensland law and by the Queensland union, the Application cannot be validly made.

We make the following clarifying submissions on behalf of Thies in relation to the question of whether the Application is validly made.

1 Who is applying for authorisation?

The Application appears to seek to have the authorisation (if granted) apply to (1) the union and (2) members of the union who the union asserts are "owner drivers", while engaging in collective bargaining (see for example paragraph 1.4 of the Attachment to the Application).

It is not disputed that the Queensland Competition Code can apply to trade unions. However, the Application has not identified the basis on which the particular union seeking authorisation falls within the application of the Code.

It is not clear whether the Application is being made by the:

- (1) **CFMEU, which has federal registration under the *Workplace Relations Act 1996 (Cth)* (CFMEU).** We note that in the letter from Hall Payne attaching the Application, the named applicant in paragraph 1(a) of Form B refers to the "Construction, Forestry, Mining and Energy Union, Construction and General Division, Queensland" (this is a reference to the CFMEU as a Federally registered corporation); or
- (2) **CFMEU Queensland, originally the State registered union (CFMEUQ) which is a corporation that also holds transitionally registered association status under the *Workplace Relations Act 1996 (Cth)* (CFMEUQ(TRA)) but as separate corporation to the CFMEU.** We note that the CFMEUQ(TRA) is defined as the "Union" in the Attachment to Form B and this term is used throughout those submissions.
- (3) **Neither the CFMEU or the CFMEUQ are registered or incorporated under Queensland law.**

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2 Capacity to make the Application

Even if the Commission accepts that the CFMEU and/or the CFMEUQ have the requisite nexus with Queensland to fall within the scope of application of the Queensland Competition Code (which is not conceded), in our view, the Application has not been validly made in relation to the nominated "owner drivers".

2.1 Capacity to make the Application under TPA or PRA Qld

A union cannot at law, represent persons who are not eligible to be members. The union must have constitutional coverage ie. the *Industrial Relations Act 1999 (Qld)* requires a union to have rules and those rules set out who can be members of the union/who the union can represent. In addition eligibility for membership of a State union is limited by its registered list of callings under the *Industrial Relations Act 1999 (Qld)*. These principles apply under the Australian industrial laws

As noted above, the Application seeks to have the authorisation (if granted) apply to persons who the union asserts, but does not show, are entitled to be members of the union and who the union asserts are "owner drivers" (see for example paragraph 1.4 of the Attachment to the Application). The union has not demonstrated that it has authority to make the Application on behalf of "owner drivers". The union asserts that certain "owner drivers" are entitled to be members where they are independent contractors who, if they were employees, would otherwise be entitled to enrol as members. However, the Application does not address how such people would be eligible to enrol if they were employees.

Truck drivers under the *Industrial Relations Act 1999 (Qld)* (either as employees or independent contractors) are not eligible to enrol as members of either union under the CFMEU's Rules or the CFMEUQ(TRA) (registered under the *Workplace Relations Act 1996 (Cth)*) or as members of the CFMEUQ under its Rules and its list of callings in Queensland. The union/s cannot rely on any authority to represent its members in circumstances where the "owner drivers" it is purporting to represent are not eligible to and therefore legally be able to enrol as members of the union.

Further plant operators are not are not eligible to be members of the CFMEUQ or the CFMEUQ(TRA), either under constitutional coverage or their list of callings.

Further, the CFMEU/CFMEUQ/CFMEUQ(TRA) have not demonstrated that they are otherwise authorised to make the Application on behalf of "owner drivers" who are not members or even if it can represent such people under its Rules, which is denied.

It is submitted that on this basis the Application has not been validly made by the union either on its own behalf or on behalf of its members.

2.2 Further requirements for application for under the TPA

Secondly, even if a union (whichever one it is) can make an application in its own right, and it can enrol the classifications sought to be covered (neither of which in our view is legally possible), the Application must comply with the TPA.

Relevantly, the persons on behalf of whom the Application is made must be corporations. As corporations they cannot at law be a member of any of the unions. As noted in Thiess' letter of 31 October 2008, the union has not provided evidence that it is authorised to make the application on behalf of any corporation. So none of the unions can make an application under the TPA.

Further, under the TPA the Applicant must be a trading corporation. As noted in Thiess' letter of 31 October 2008, the union has not shown any basis on which it is a trading corporation.

3 Who would the authorisation apply to?

We note that an authorisation has effect in relation to other people named in an application as if those people had applied for authorisation. If the Commission accepts that:

- (1) the CFMEU and/or CFMEUQ have the necessary nexus with Queensland for the Queensland Competition Code to apply; and

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- (2) the CFMEU and/or CFMEUQ can bring an application on its own behalf (even where the "owner drivers" it purports to represent are not eligible to enrol as members),

then it is submitted that the Applicant should be required by the Commission to amend its Application to address the issues raised above before the Commission considers the Application and without limiting the above, specifically nominates:

- (a) who is making the Application?
- (b) who is covered by the Application/authorisation if granted?
- (c) what occupation/trades are covered?
- (d) what persons carrying out those occupations/trades are covered and how the unions can lawfully represent them?

In the event that the Commission decides that the Application has been validly made and the Application proceeds, then Thiess reserves its position to take further action.

Please do not hesitate to contact me if you require any clarification in relation to the matters outlined in this letter.

Yours faithfully



per

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