



**HALL
PAYNE
LAWYERS**

27 January 2009

ACCC
PO Box 10048
Adelaide Street Post Office
BRISBANE QLD 4000

Attention: Sharon Clancy

sharon.clancy@accc.gov.au

FORWARDED BY EMAIL

Dear Ms Clancy,

Re: CFMEU (Q) Application for Authorisation (A91103)

We refer to the above and **enclose** herewith:

1. further submissions on the Construction, Forestry and Mining and Energy Industrial Union of Employees, Queensland.

If you have any questions in relation to this matter, please do not hesitate to contact the writer.

Yours faithfully
HALL PAYNE LAWYERS

CC – Jason Stein
jstein@qld.cfmeu.asn.au

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Our Reference
CM:3710132

Your Reference
C2008/1626

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APPLICATION FOR AUTHORIZATION A91103

FURTHER SUBMISSIONS OF THE APPLICANT

1. INTRODUCTION

- 1.1 The Union makes the following further submissions in response to requests for further information by the ACCC and to the third party submissions.

2. INFORMATION REQUESTED BY THE ACCC

How many members does the Queensland branch of the CFMEU currently have?

- 2.1 The total membership of the CFMEU as at November 2008 is 10,294. This number comprises a number of membership classes which are categorised according to industry sectors. The vast majority of these members are not affected by the application as they are not engaged in callings that are not directly linked to the earthmoving sector. As noted in the original submissions, currently 24 owner-drivers are members of the Union.

Further details about proposed collective bargaining process

- 2.2 The Union anticipates the likely collective bargaining process, should the authorization be granted, is as follows.
- (a) Owner driver members will nominate an earthmoving contractor with whom at least some of the members wish to collectively bargain. Those owner driver members of the Union who wish to collectively bargain with the nominated contractor will meet:
- (i) to discuss the terms and conditions they would like to negotiate with the nominated contractor; and
 - (ii) to appoint a committee of 3 to 5 owner drivers to undertake the negotiations with earth moving contractors.

The Union does not expect that all owner driver members would participate in all collective bargaining negotiations. For example, where a member takes the view that there is little prospect of the member performing work for the contractor (for example, because the

contractor and the member each specialize in different segments of the earthmoving market), it is unlikely to want to participate in the collective bargaining process.

When and how an earthmoving contractor target will be advised of the identity of all members of the collective bargaining group?

- (b) The participating owner drivers will invite the nominated contractor to engage, on a voluntary basis, in collective negotiations. The identity of the participating owner drivers would be formally communicated in writing to the nominated contractor early in the process (although this information is likely to be provided to the contractor on a commercial-in-confidential basis to protect parties being the subject of discrimination as a result of being involved in collective bargaining). The Union and its members recognise that a contractor will need to know the parties with whom it is negotiating. Unless all the parties agreed otherwise, any resulting agreement would bind only the nominated contractor and the participating members whose identities have been communicated to the contractor.
- (c) If the nominated contractor agrees to participate in collective bargaining, the negotiating committee and the contractor will enter into negotiations. The negotiating committee would provide reports to the other participating owner drivers throughout the negotiations.

How often negotiations are proposed to take place?

- (d) The frequency of negotiations will likely to depend on the nature of the relevant work. For example, it is possible that there may be one-off negotiations to agree the terms and conditions of work applicable to a single project. In other cases, there may be negotiations to agree the terms and conditions on which members will perform work for that contractor for a period of time. What is an appropriate period of time in such cases would be the subject of agreement between the parties.

Proposed role of the Union

- (e) Throughout the process, the Union will assist owner driver members through the provision of negotiation training, administrative and communication support, formulation and drafting of claims, drafting of agreed terms, economic and industry research and organizational

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support. The Union will also make available physical resources to enable meetings to be convened. The Union will assist to facilitate negotiations. Owner driver members will be responsible for the conduct and settlement of negotiations with contractors.

Whether all work carried out by members of the group for an earthmoving contractor target will be subject to the collectively negotiated rates, terms and conditions?

2.3 The content and scope of any resultant agreement will, of course, depend on concurrence of the parties. The scope of the work covered and the entities bound by the agreement would need to be clearly specified in the agreement. Thus, it is entirely possible for specific types or classes of work to be included in, or excluded from, a proposed agreement.

Whether different rates, terms and conditions are proposed to be negotiated according to factors such as the duration and complexity of the job, the material to be transported or the experience of the owner driver?

2.4 The Union anticipates that any resulting agreement will accommodate and reflect the varying factors that influence the commercial relationship between the parties. It would be impractical and restrictive to adopt an inflexible approach. The proposed process is a voluntary one: if a party (including the contractor) takes the view that the proposed agreement does not adequately address a relevant factor, it can simply withdraw from the process.

Process to be followed if an earthmoving contractor decides not to deal with the collective bargaining group, or if collective negotiations commence but an agreement cannot be reached

2.5 In the event that a contractor decides not to collectively bargain, or engages in collective negotiations but agreement cannot be reached, then the current status quo will continue to apply. All owner drivers will be free to perform work for the contractor and the contractor will be free to deal with any owner driver (member or not) that it chooses. The Union and its members are aware that no collective boycott behavior is permitted, and indeed have no intention to engage in such conduct. In any event, even if the Union and its members did intend to engage in a collective boycott (which is not the case), the ease of entry into the earth-moving services market (ie, the ease with which new, non-Union owner drivers can enter the market) and the relatively few owner driver members of the Union mean that such conduct would be ineffective.

2.6 The Union and its members hope and expect contractors to participate in collective bargaining not because of any threat of boycott activity, but because collective bargaining will produce positive and productive outcomes for all parties that provide an incentive for contractors to participate.

Basis on which the Union does not envisage a significant increase in membership if the authorization is granted

2.7 The Union does not envisage a significant increase in membership if the authorization is granted for a number of reasons.

(a) The Union has realistic expectations about the outcomes of collective bargaining. The process is voluntary, which means that contractors will only participate if they perceive it to be of benefit to themselves. While the Union and its members think that there are real gains that can be realized through an improved negotiation process that would result from collective bargaining, the market power of the member owner drivers will be tightly constrained by the ability of contractors to refuse to collectively bargain and instead rely on in-house capacity, non-member owner-drivers and dealing individually with member owner drivers. As such, while the Union thinks collective bargaining will lead to better outcomes for member owner drivers, it does not expect it to result in member owner-drivers securing "monopoly" (or even supra-competitive) outcomes.

(b) Further, the Union is aware that many benefits obtained by collective bargaining are likely to be passed on to non-member owner drivers. The voluntary nature of the process means that it will lead only to outcomes regarded as beneficial by all parties. Contractors are likely to offer non-member owner drivers similar terms to those collectively negotiated, so as to secure the same benefits in their dealings with other owner drivers. Non members are thus likely to be able to "free-ride" on the benefits obtained by collectively bargaining members, which reduces the incentive to join the Union.

(c) Other organizations may seek and obtain similar authorizations from the ACCC. For example, in its submissions with respect to the Union's application, the TWU has already indicated that it may seek an authorization for its members to collectively bargain. Other, non-

union entities could also seek an authorization. This would mean owner drivers would have a choice of organizations which they can join to be able to engage in collective bargaining.

- (d) The decision of whether or not an individual chooses to join a union is complex and is usually based on a broad range of factors. By their nature of being independent contractors, many owner drivers are likely to regard membership of a union as inconsistent with their individualistic philosophy.

3. OTHER ISSUES RAISED IN THRID PARTY SUBMISSIONS

- 3.1 The Union does not intend to respond to each third party submission individually, but makes these further submissions in response to issues raised by third parties.

Whether any improvement in conditions for owner drivers must indicate a lessening of competition

- 3.2 A number of third party submissions appear to assume that the earthmoving services is currently characterized by perfect competition, with the result that any improvement in terms or conditions collectively negotiated by owner drivers must indicate a lessening of competition. The Union submits this view is incorrect.
- 3.3 The earthmoving services market is not currently characterized by perfect competition. This is for at least two reasons:
 - (a) there is an imbalance of bargaining power in favour of the earthmoving contractors (refer to paragraphs 2.1-2.24 of the original submissions); and
 - (b) the transaction costs of each contractor and each owner driver individually negotiating suggests the current level of contract negotiation (which in the Union's experience is virtually zero) is too low (refer to paragraphs 2.18-2.24 and 4.6(a) of the original submissions).
- 3.4 It is accordingly wrong to conclude the current position is producing a perfectly competitive outcome. Moreover, for the reasons noted above in these further submissions and paragraph 4.6(a) of the original submissions,

the authorization will not provide owner drivers with significant market power and thus the ability to extract supra-competitive outcomes. The Union does hope and expect, however, that collective bargaining will reduce negotiation costs and allow negotiations to occur. In these circumstances, collective bargain is likely to produce a more efficient outcome than the present arrangements.

Public versus private benefits

3.5 Similarly, a number of third party submissions assume that any benefits gained by owner drivers from collective negotiations are private benefits and thus not to be weighed as public benefits for the purposes of assessing the application. However, the Union has not submitted that the benefits gained by owner drivers are public benefits. Rather, it submits that the improvement in the negotiation *process* and the improved ability of owner drivers to have input into the contractual arrangements governing their work¹ (which is likely to lead to more efficient outcomes), improved safety and enhancing the viability of efficient businesses are public benefits likely to result from the authorized conduct.

Safety

- 3.6 A number of submissions acknowledge that safety is a genuine issue in the industry, but argue that the ACCC, when assessing the authorization, should ignore the ability of collective bargaining to improve safety. The rationale for ignoring safety issues is that safety is being addressed, or is better addressed, in other ways. The Union submits this is an incorrect approach, and that the ACCC should properly consider the potential for collective bargaining to improve safety.
- 3.7 First, the fact that other initiatives are addressing an issue does not change the question the ACCC must consider: is the proposed conduct likely to result in a public benefit? The ACCC cannot simply ignore the question because other initiatives are, to some degree, dealing with the same issue.
- 3.8 Second, collective bargaining is likely to complement other safety initiatives in at least two ways. First, it will allow contractors and owner drivers efficiently

¹ Refer to ACCC determination of authorisation A91064, dated 12 December 2007, at paragraphs 5.45-5.46.

to discuss how to implement practices recommended or mandated by other safety initiatives. Second, the tight focus of collective negotiations on the south east Queensland earthmoving sector may allow the identification and implementation of safety measures relevant to that sector not identified in broader and necessarily more general road and haulage safety initiatives.

Existing legal protections

3.9 Reference is made in some submissions to existing legal protections for owner drivers such as the *Trade Practices Act 1974* (Cth) and the *Independent Contractors Act 2006* (Cth). However, the Union still submits that collective bargaining is likely to produce public benefit. This is because:

- (a) The protections provided by such legislation is narrowly focused on issues such as whether a contract is harsh or unfair, or whether there has been misleading or unconscionable conduct. It does not capture efficiency issues more generally. The advantage of collective bargaining is that it allows greater input into the contract-making process, which is likely to produce a more efficient outcomes.
- (b) Collective bargaining will complement such legislative protections, by providing a process that will reduce the prospect of a contract being unfair or conscionable, and thus reducing the prospect of the need for costly enforcement of the legislation.

Nature of application and corporate status of the Union

3.10 As clarified in the letter from Hall Payne to the ACCC dated 15 January 2009, the Union is the Construction Forestry Mining and Energy, Industrial Union of Employees, Queensland.

3.11 As set out in paragraph 3.1 of the original submissions, the Union applies for authorization on behalf of owner driver members. The application is made both under the *Trade Practices Act 1974* (Cth) (**Act**) and the Competition Code of Queensland (**Code**).

3.12 Incorporated owner drivers are clearly trading corporations (and hence "corporations") for the purposes of the Act. Thus, to the extent the application applies to incorporated owner drivers and is made under the Act, it is

irrelevant that the Union is not a trading corporation. This is because s88(1) of the Act permits authorizations to be made by or on behalf of a corporation.

- 3.13 The Union was registered pursuant to the *Industrial Conciliation and Arbitration Act 1961-1982* (Qld). It is from this registration that the Union obtains its status as a body corporate. This registration is continued by the *Industrial Relations Act 1999* (Qld)². Schedule 1 to these Further Submissions is a copy of the Union's certificate of registration dated 16 April 2006. The Union is accordingly "incorporated or registered under the law" of Queensland for the purposes of s8(1) of the *Competition Policy Reform Act 1996* (Qld). Moreover, by reason of its representation of persons working within Queensland, the Union is a person otherwise connected with Queensland for the purposes of that section. It is also evident that owner drivers undertaking work in southeast Queensland will be persons carrying on business within, or otherwise connected with, the jurisdiction.

Membership and demarcation issues, and terms of any authorisation

- 3.14 The application seeks authorization for owner drivers to collectively bargain in relation to earthmoving services in the commercial and civil construction sectors in south-east Queensland (paragraph 3.1 of the original submissions) only. The Union is no stranger to the construction industry in south east Queensland, so is well placed to provide support and assistance to owner drivers wishing to collectively bargain
- 3.15 Further, the application is focused on the earthmoving in the construction industry – not on transport more widely. The application does not represent an attempt by the Union to move beyond its traditional area of operation.
- 3.16 Moreover, the Union is not aware of any attempts by any other union (or other party) to seek to allow collective bargaining by earthmoving owner drivers. Accordingly the Union does not perceive the application as likely to give rise to demarcation disputes.
- 3.17 The Union does note the uncertainty as to whether owner drivers may validly become members of the Union. The Union submits, however, that whether or not owner drivers may formally become members does not affect the

² See s. 727 of the *Industrial Relations Act 1999* (Qld).

substantive issues regarding the application and whether the Union, in the light of its knowledge of the south-east Queensland construction industry and its history in representing earthmoving owner drivers, is an appropriate body to facilitate collective bargaining by owner drivers.

3.18 To prevent any uncertainty regarding membership eligibility from affecting the application, the Union proposes the following.

- (a) The Union is providing services to support and facilitate collective bargaining to the owner drivers who have formally engaged the Union to provide such services³. In this regard, the Union will provide the ACCC with written confirmation from the 24 owner drivers listed in Annexure A to the original submissions that they have authorized the Union to make the current application on their behalf.

- (b) The Union submits and formally requests that the authorisation be granted in terms of allowing owner drivers who have engaged the Union to provide them with services to support and facilitate collective bargaining by such owner drivers. References to owner driver members of the Union in the original submissions and earlier in these further submissions should thus be read as references to owner drivers who have engaged the Union to provide them with services to support and facilitate collective bargaining by such owner drivers.

³ So there can be no doubt as to the Union's capacity to act on a fee for service basis, a resolution is presently before the Union's State Management Committee to modernise the Union's objects.

Schedule 1

[Form 15

Industrial Conciliation and Arbitration Act 1961 - 1982

(Section 55, Regulation 13)

Certificate of Registration of an Industrial Union

I hereby certify that on the thirtieth day of June, one thousand nine hundred and eighty-two, The Amalgamated Society of Carpenters, Joiners, Bricklayers and Plasterers of Australasia, Union of Employees, Queensland was, at Brisbane, in the State of Queensland, registered by that name under the *Industrial Conciliation and Arbitration Act 1961 - 1982* as an Industrial Union of Employees.

Dated at Brisbane, in the State of Queensland, this thirtieth day of June, 1982.

(Sgd.) C.G. HANCOCK,
Industrial Registrar.

* Title altered to "Amalgamated Society of Carpenters, Joiners, Bricklayers, Plasterers, Painters and Decorators of Australasia, Union of Employees, Queensland" on 3 February 1994.

(Sgd.) M.J. CALLEN,
Industrial Registrar.

*Title altered to "The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland" on 29 January 1998.

(Sgd) E.C. EWALD,
Industrial Registrar

I HEREBY CERTIFY that this is a true and correct copy of the Certificate of Registration of The Amalgamated Society of Carpenters, Joiners, Bricklayers and Plasterers of Australasia, Union of Employees, Queensland which was registered as an Industrial Union of Employees on 30 June 1982 and whose title was altered to "Amalgamated Society of Carpenters, Joiners, Bricklayers, Plasterers, Painters and Decorators of Australasia, Union of Employees, Queensland" on 3 February 1994 and whose title was further altered to "The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland" on 29 January 1998 and whose registration is continued under the Industrial Relations Act 1999.

Dated at Brisbane 18 April 2006.

