



**Australian
Competition &
Consumer
Commission**

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5 September 2012

Philip Copeland
Principal
Copeland Workplace Law
13 Bermagui Crescent
BUDDINA QLD 4575

By email: phil@copelandlaw.com.au

Dear Mr Copeland

**Transport Workers' Union of Australia Queensland Branch – application
for authorisation A91331**

I refer to the application for authorisation that the Transport Workers' Union Queensland Branch lodged with the Australian Competition and Consumer Commission on 22 August 2012 (TWU application), your letter of 4 September 2012 to me and earlier emails with John Rouw and Marie Dalins.

On behalf of your client, Hanson Construction Materials Pty Ltd (Hanson), you have expressed concerns about the TWU application, which is for proposed voluntary collective bargaining.

Authorisation provides statutory protection from court action for conduct, as proposed in an authorisation application, that might otherwise raise concerns under the competition provisions of the *Competition and Consumer Act 2010* (the Act), if parties were to go on to engage in that conduct. That is, authorisation removes a competition law impediment to the formation of a collective bargaining group.

The TWU Queensland Branch (the applicant) has sought authorisation for the following proposed conduct, which it considers might raise concerns under the Act:

- Owner drivers would be invited to participate in a bargaining group
- The group would invite Hanson to negotiate with it
- No boycott activity is proposed – that is, the applicant is not seeking authorisation for owner drivers to agree as a group to refuse to deal with Hanson if it does not wish to negotiate with the group.

The ACCC has received and assessed many authorisation applications for collective bargaining conduct where both sides of bargaining is voluntary (including that no boycott activity was proposed) and it is up to each party to decide whether it was in their individual commercial interests to participate in collective negotiations, as authorised, or engage in individual negotiations. In a number of cases where the ACCC has granted authorisation, parties may and in fact have declined to participate in collective negotiations.

You specifically state that Hanson does not engage any individuals as owner drivers but rather engages corporations. You submit, among other things, that in this matter the ACCC can only issue an authorisation for the applicant to bargain collectively on behalf of individuals it has named and authorisation would provide no legal protection to any corporations. (Note the reference to 'employed by Hanson' in Ms Dalins' email from 3 September 2012 was inadvertent; it should have read 'on behalf of owner drivers who contract with Hanson'.)

For the purposes of accepting, assessing and making a determination on this authorisation application, the ACCC considers the following:

- That the applicant has validly lodged an application for authorisation for the applicant and current and future owner drivers who contract with Hanson for carting concrete to collectively bargain with Hanson;
- Applications for authorisation made under the Act are treated as being made under the relevant Competition Codes, including in Queensland (the Code). As a result, any authorisation granted can cover individuals, trade unions, and corporate entities;
- In the TWU application, the applicant expressly stated that individual owner drivers working in the concrete-cartage industry operate their businesses through corporate entities (see, for example, paragraph 28 of the TWU application);
- That where the TWU application refers to owner drivers, this term includes the corporate entities that individual drivers use to contract with Hanson;
- That under s88(6) of the Act and the Code, an authorisation would cover the applicant and every other person named or referred to in the application (and, pursuant to s88(10), an authorisation can apply to future parties where expressed as such);

- That the applicant has sought authorisation for a bargaining group open to the voluntary participation of all owner drivers contracted to or who will be contracted to Hanson in Queensland (not just TWU members);
- That the TWU application has provided a list of the number and location (depot) of the most likely initial participants in the bargaining group, being TWU members (who operate their businesses through corporate entities, as noted above); and
- In any event, Hanson should be able to readily identify the owner drivers' corporate entities with whom it contracts for concrete cartage in Queensland. According to your 4 September 2012 letter, Hanson has no cartage contracts with natural persons, so Hanson can assume that the TWU application will provide protection from legal action for the applicant and all current owner drivers contracting with Hanson through their respective corporate entities and any future owner drivers who wish to contract with Hanson for concrete cartage in Queensland.

You state that Hanson requires 'some certainty' in relation to the owner drivers' corporate entities to be involved in the bargaining group.

The TWU application covers collective bargaining by the applicant and all owner drivers who contract or will be contracted to Hanson to cart concrete, whether these drivers engage in the proposed conduct as natural persons or through corporate entities.

Our understanding from the TWU's application is that it wishes to use negotiations to arrive at a standard-form contract. If the TWU's negotiations with Hanson are successful, each owner driver would then have a choice whether to use the resulting standard form to contract with Hanson or negotiate other terms directly with Hanson. As noted above, participation by each owner driver is voluntary.

Given the application covers all owner drivers who contract with Hanson, the voluntary nature of the bargaining group and the ability for future parties to participate in the group, no certainty can be provided on the number of owner drivers who will ultimately choose to participate in the bargaining group.

In practical terms, it is common for the ACCC to accept authorisation applications where the applicants outline the characteristics of proposed bargaining group members and therefore the likely general future composition of the bargaining group, without identifying or being able at the time of application to be able to identify every eventual member of such a group. This is inherent to proposals for voluntary conduct.

The ACCC considers that the applicant in this matter has identified (named or referred to) the likely composition of the bargaining group, to the ACCC and to interested parties, including Hanson. This allows Hanson and other interested parties to make submissions on the likely benefits and detriments of the proposed collective bargaining conduct and for the ACCC to assess and make a determination on the application.

If you would like to discuss this issue in more detail, or are unclear about any of the points I have made, please feel free to contact me on (02) 6243 1132 and we can make a time to discuss these issues. You can also contact John Rouw on (03) 9290 1402.

Yours sincerely

A handwritten signature in blue ink, consisting of a stylized initial 'R' followed by a long horizontal line extending to the right.

Dr Richard Chadwick
General Manager
Adjudication Branch