



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Transport Workers' Union of Australia Queensland Branch

in respect of

collective bargaining with Hanson Construction Materials Pty Ltd

Date: 7 November 2012

Authorisation number: A91331

Commissioners: **Sims**
 Schaper
 Rickard
 Court
 Dimasi
 Walker
 Willett

Summary

The Australian Competition and Consumer Commission (ACCC) proposes to grant authorisation for five years to the Transport Workers' Union of Australia Queensland Branch and owner-drivers that it represents to bargain collectively over certain terms and conditions with Hanson Construction Materials Pty Ltd. The interim authorisation granted by the ACCC on 12 September 2012 continues to apply.

Next steps

The ACCC will now seek further submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

The Applicant and application for authorisation

1. On 22 August 2012, the Transport Workers' Union of Australia Queensland Branch (the TWU Qld), lodged authorisation application A91331 with the ACCC under sections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the Act).
2. The TWU Qld seeks authorisation on behalf of existing and future owner truck drivers in Queensland who are contracted to Hanson Construction Materials Pty Ltd (Hanson) to engage in collective bargaining with Hanson.¹
3. The TWU Qld seeks authorisation for five years, for collective bargaining over matters including:
 - cartage rates (including the 'labour component')
 - a mechanism for those rates to increase from year to year
 - penalties for carrying outside standard hours
 - increased rates for specialist loads
 - return on investment
 - demurrage rates and
 - equipment, including painting and badging of prime movers.
4. The TWU states that it is not proposing any collective boycott activity under the arrangement.
5. On 12 September 2012 the ACCC granted interim authorisation to enable TWU Qld to start negotiations, on condition that the TWU Qld and bargaining group members will not enter into any contracts, arrangements or understandings before the ACCC makes a final determination in this matter.
6. The ACCC can authorise anti-competitive conduct such as collective bargaining if it is satisfied that the likely public benefits of the conduct will

¹ The TWU Qld states the negotiations relate to the 2012 Country Contract (which has expired) and any agreements which replace the South East Queensland 7mt Concrete Carriers Agreement 2010 (see paragraph 16).

outweigh the likely public detriment constituted by any lessening of competition.² Further details regarding the TWU's application for authorisation can be found on the ACCC's Public Register.³

7. Hanson is a concrete company that is part of the international Heidelberg Cement Group. It is one of Australia's largest concrete businesses along with businesses such as Boral, Holcim, Adelaide Brighton and Barro.
8. Hanson has operations across Australia that it says include more than 55 quarries and more than 225 concrete plants. It states that it carries out more than 70,000 concrete deliveries Australia-wide per month. In Queensland, Hanson operates about 30 concrete-making plants in Brisbane and on the Gold Coast and 27 plants in the regions.
9. The TWU Qld submits that Hanson is one of more than a dozen businesses supplying pre-mix concrete in Queensland⁴. It says these include:
 - Boral
 - Holcim
 - Hymix
 - Neilsens
 - Pioneer North Queensland
 - Nucon/ Nucrush
 - Mansell
 - Mt Cotton Concrete
 - Q-Crete
 - Slack's
10. The TWU Qld submits there is a market for concrete-cartage services (essentially, for the service of getting concrete slurry from a mixing plant to a construction site, by truck), whose participants include independent owner-drivers and employee drivers. The TWU Qld states that owner-drivers are separate corporate entities and generally own just one truck each, with only a few owning more than one.
11. The applicant submits that most of Hanson's Queensland drivers are contracted owner-drivers and not employees.
12. Pre-mix concrete suppliers offer owner-drivers work, usually under standard-form contracts that are essentially exclusive. The TWU Qld submits that, currently, owner-driver supply exceeds demand.
13. The TWU Qld submits that vehicles are configured specifically for the transportation of pre-mixed concrete. Owner-drivers supply a truck (a six or

² The ACCC's *Guide to Authorisation* (available from the ACCC website) has more details regarding the ACCC's authorisation process.

³ www.accc.gov.au/content/index.phtml/itemId/1076105/fromItemId/278039

⁴ Some of the businesses nominated by the TWU as competing with Hanson are related entities or part of larger groups. For example, Pioneer North Queensland and Hymix are connected to Hanson and Mt Cotton Concrete is part of the Barro Group.

eight-wheel prime mover), which needs to have an 'agipack' or fitting able to take a concrete 'agitator' (concrete bowl, frame and gears).

14. The TWU Qld submits that concrete suppliers typically provide owner-drivers with an agipack and its installation and that once fitted with an agipack, vehicles are not readily adaptable to other forms of haulage.
15. The TWU Qld further submits that concrete suppliers often require that the owner-drivers' trucks are painted in the concrete company's colours and/ or logos.
16. The TWU Qld stated that Hanson contracts with about 160 owner-drivers in Queensland, divided into those working in South-East Queensland and those working in 'Country Queensland' – being about:
 - 70 Country Queensland owner-drivers (of whom, 34 were TWU Qld members) traditionally covered by a 'Country Contract' and
 - 90 South East Queensland owner drivers (of whom, 54 were TWU Qld members) covered by a 'South East Queensland 7mt Concrete Carriers Agreement 2010'.⁵
17. The TWU Qld stated that, the most recently negotiated contract for country drivers was the 2003 Country Contract which has expired. Many of its members are now 'off-contract' and that the application for authorisation was prompted by a request from owner-drivers for assistance as they had been unable to negotiate contractual terms with Hanson in relation to the '2012 Country Contract'.
18. The TWU Qld states that, if the ACCC did not grant authorisation, the owner-drivers would continue current individual dealings with Hanson. In the TWU Qld's view, this would involve Hanson continuing to offer fixed standard terms.

Consultation and issues raised by Hanson

19. On 28 August 2012 the ACCC invited submissions on the application from 26 potentially interested parties, including Hanson and other concrete suppliers, industry representative bodies and Queensland and Australian Government departments.
20. Hanson questioned the validity of the application on the basis that it did not engage natural persons as owner drivers; but rather entered into contractual relationships with corporations. As background to the issue, the TWU stated, that most owner drivers in the sector operate their businesses through corporate entities.

⁵ On 7 September the TWU Qld revised the number of member owner-drivers to be covered by the proposed contracts, arrangements or understandings from 113 as set out in the application lodged on 22 August 2012 to 88 (possibly subject to further change), as some drivers had resigned from the TWU Qld, stopped working with Hanson or were identified as 'employed drivers'.

21. The ACCC responded to Hanson, among other things, that the ACCC considered that:

- where the TWU Qld application referred to owner-drivers, this term included the corporate entities that individual drivers used to contract with Hanson and
- the TWU Qld had identified the likely composition of the bargaining group, such that the ACCC could assess and make a determination on the application
- overall, the TWU Qld had sought authorisation for voluntary conduct and
 - authorisation removes a competition law impediment to the formation of a collective bargaining group but
 - in situations where parties are authorised to engage in conduct that is voluntary on both sides, it is up to each party to decide whether it is in its individual commercial interests to participate.

22. Hanson's representatives verbally responded that, in light of the ACCC's response, it did not wish to make any further submissions at that time.

23. The ACCC did not receive any other submissions.

ACCC evaluation

Information considered by the ACCC

24. In its evaluation of this application, the ACCC has taken into account:

- Information received from the TWU Qld and Hanson⁶
- information available to the ACCC regarding similar previous matters⁷
- the likely future alternative to the proposed conduct.⁸ In particular, the ACCC considers that the likely alternative is that the owner-drivers will not engage in the proposed conduct but will individually seek to negotiate with Hanson (which is likely to offer a 'standard' contract, such as the '2012 Country Contract')
- the relevant areas of competition likely to be affected by the proposed conduct. Primarily, competition amongst drivers to provide concrete-cartage services to concrete companies in Queensland; and, secondly, the supply of pre-mix concrete to customers⁹
- the five year authorisation period requested and

⁶ Please see the ACCC's Public Register for more details, including a list of parties consulted.

⁷ The ACCC has recently granted authorisation to enable owner-drivers related to the concrete cartage industry A91249 TWU Qld and Q-crete Premix (2011) and also the TWU to engage in collective bargaining for owner-drivers for the supply of car carrying services A91310 TWU and CEVA (2012).

⁸ For more discussion see paragraphs 5.38-5.40 of the ACCC's *Guide to Authorisation*.

⁹ The area of competition for cartage-services is consistent with previous ACCC decisions, including A91249 TWU Qld and Q-crete Premix (2011).

- that the TWU Qld is not proposing to engage in collective boycott activity and participation will be voluntary for TWU Qld members and Hanson.

ACCC assessment of public benefits and detriments

Benefits

25. The ACCC accepts that an owner-driver's short-term capacity to shift supply of its services between carriers is limited. They are in practice engaged exclusively and face costs for switching between customers temporarily or permanently (such as surrendering agitators and re-branding trucks) and for exiting the concrete sector (altering their agipack-fitted trucks so they can take other loads or seeking to sell their trucks to exit trucking).
26. The ACCC considers that the collective bargaining arrangement is likely to result in public benefits from transaction cost savings (including in contract administration) for owner-drivers and Hanson, due to a single negotiation rather than a series of individual negotiations.
27. A single negotiation will also result in improving the level of input owner-drivers have in their negotiations with Hanson. This can provide a mechanism for more efficient outcomes on issues including, rates, standards and equipment as well as the timing and delivery of services.

Detriments

28. The ACCC considers that the proposed collective bargaining conduct is likely to result in little if any public detriment, as:
 - participation is voluntary for both owner-drivers and Hanson and does not include collective boycott activity. Relevantly, if Hanson does not wish to negotiate with the owner-drivers as a group, it may choose not to do so.
 - membership of the collective bargaining group is limited to current and future owner-drivers that supply driving services to Hanson. It does not extend to, for example, Hanson's employee drivers and does not include owner-drivers with other concrete businesses.
 - Hanson competes with other Queensland based suppliers of pre-mix concrete including large suppliers such as Boral and Holcim and there is unlikely to be a substantial lessening of competition in the supply of concrete cartage services for customers in Queensland.
29. The ACCC also notes that in March 2011 it authorised a TWU-assisted owner-driver bargaining group to negotiate with a rival Queensland concrete supplier Q-Crete (at time of this application 10 owner-drivers were involved). The ACCC does not at this stage consider that the level of coverage of the Queensland concrete-cartage sector by authorised collective bargaining arrangements raises any competition concerns.

Balance of benefits and detriments

30. On balance, the ACCC considers that the proposed collective bargaining is likely to result in a benefit to the public and that this benefit would outweigh the detriment to the public due to any lessening of competition that is likely to result from the collective bargaining.

Length of authorisation

31. The ACCC considers it is appropriate to grant authorisation for the time requested, that is five years.

Draft determination and interim authorisation

Draft determination

32. For the reasons set out in this draft determination, the ACCC is satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) of the Act are met.¹⁰ Accordingly, under sections 88(1A) and 88(1) of the Act, the ACCC proposes to grant authorisation A91331 to the TWU Qld and owner drivers contracted to Hanson to bargain collectively with Hanson, for five years, over matters including:

- cartage rates (including the 'labour component')
- a mechanism for those rates to increase from year to year
- penalties for carrying outside standard hours
- increased rates for specialist loads
- return on investment
- demurrage rates and
- equipment, including painting and badging of prime movers.

33. Under section 88(10) of the Act, authorisation would also extend to future owner-drivers contracted with Hanson's Queensland operations.

34. This draft determination is made on 7 November 2012.

Conduct not proposed to be authorised

35. The proposed authorisation does not extend to any collective boycott activity.

Interim authorisation

36. The TWU Qld requested the ACCC grant interim authorisation under section 91 of the Act, to start but not conclude negotiations with Hanson. On 12 September 2012 the ACCC granted interim authorisation on condition that the TWU Qld and/ or the bargaining-group members do not enter into any contracts, arrangements or understandings before the ACCC makes a final determination in this matter.

¹⁰ See Attachment A

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

Further submissions

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

Attachment A

Sections 90(5A) and 90(5B) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of section 90(5A) 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 were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Sections 90(6) and 90(7) 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 in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of section 90(6) 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 was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.