



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Application for authorisation

lodged by

Holcim (Australia) Pty Ltd

in respect of

the operation of an allocation system for  
the cartage of mixed concrete

Date: 4 September 2013

Authorisation number: A91377

Commissioners: Sims  
Rickard  
Schaper  
Cifuentes  
Court  
Walker

The ACCC proposes to re-authorise the operation of a cartage allocation system amongst concrete carriers affiliated with Holcim (Australia) Pty Ltd in the Perth metropolitan region. The system is known as the Equal Opportunity of Trips System.

The ACCC proposes to grant authorisation until 31 March 2019, as requested by Holcim.

The ACCC will seek submissions in relation to this draft determination before making its final decision.

## The application for authorisation

1. On 19 June 2013 Holcim (Australia) Pty Ltd (**Holcim**) lodged an application under section 91C(1) of the *Competition and Consumer Act 2010* (the **Act**) with the Australian Competition and Consumer Commission (the **ACCC**) for the revocation of authorisation A91082 and the substitution of authorisation A91377 for the one revoked (re-authorisation).
2. Holcim is seeking re-authorisation to continue to operate its concrete cartage allocation system, which assigns Holcim affiliated concrete trucks to concrete delivery jobs from Holcim's concrete production plants in the Perth metropolitan region. The system is known as the Equal Opportunity of Trips system (the **EOT system**).
3. Holcim is seeking authorisation until 31 March 2019.
4. Upon lodgement of the application, Holcim also requested interim authorisation to enable it to continue to operate the EOT system while the ACCC considers the substantive application. Interim authorisation was granted on 27 June 2013 and will remain in place until it is revoked or the date the ACCC's final determination comes into effect.

## Background<sup>1</sup>

5. The EOT system has been authorised by the ACCC since 2003, most recently in 2008.<sup>2</sup> While ownership of the concrete production plants related to the EOT system has changed a number of times since 2003 the EOT system has been utilised by all of these owners.<sup>3</sup>

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<sup>1</sup> Unless otherwise referenced, all information in this section is taken from Holcim's application and supporting submissions.

<sup>2</sup> On 3 February 2003, the ACCC granted authorisation A90769 to CSR Limited for a period of five years. On 2 July 2008, the ACCC granted authorisation A91082 to CEMEX Australia Pty Ltd for a period of five years.

<sup>3</sup> In 2003, ownership of the Perth concrete plants was transferred from CSR Limited to Rinker Australia Pty Ltd as part of their global de-merger. In 2007, CEMEX S.A.B. de C.V. acquired the Rinker Group and Rinker Australia Pty Ltd became CEMEX Australia Pty Ltd. And in 2009 CEMEX Australia Pty Ltd was acquired by Holcim.

## *Holcim*

6. Holcim supplies quarry products, concrete, and concrete piping products across Australia. Their concrete business also operates under the “Readymix” banner and their piping business also operates under the “Humes” banner.
7. Holcim is one of the four major concrete suppliers in Perth, the others being Boral Limited, Hanson Australia Pty Ltd, and BGC Australia Pty Ltd. There are also a number of smaller suppliers that operate in Perth, including WA Premix and Technically Designed Concrete.
8. Pre-mixed concrete is mixed at a batching plant to standards specified by the customer. It is then delivered to a construction site at an agreed time, where it must be poured promptly. The Australian Standard recommends that all concrete be poured within 90 minutes of mixing.
9. Most pre-mixed concrete producers use a combination of company owned trucks and independent contractors—known as “lorry-owner drivers” (**LODs**)—to transport their product from batching plants to construction sites. Currently, 57 of Holcim’s fleet of 67 trucks are operated by LODs, with the other ten being Holcim’s own trucks operated by company drivers.
10. Generally, LODs own the truck they use to deliver pre-mixed concrete but Holcim supplies, and retains ownership of, the truck’s concrete agitator. The size of the agitator is determined primarily by the size of the truck.
11. Holcim offers contracts to LODs that have a term of six years, which may be extended to ten years. During the period of the contract, the LOD is unable to seek work from other concrete producers as their truck is carrying a Holcim agitator.

## *The EOT system*

12. The EOT System is a cartage allocation system amongst Holcim’s Perth concrete truck fleet (both LODs and Holcim’s company trucks), which is intended to equalise work opportunities for LODs.
13. The system works by allocating concrete carriers with a number of points per load and distance for concrete carted. On a rolling 12 month basis, the system ensures that a carrier's aggregate points are within a specified margin of Holcim’s Western Australian metropolitan fleet average (**the EOT margin**).
14. Under normal circumstances, the EOT margin is calculated at the end of each month. Carriers that are operating above or below the EOT margin are reallocated to a busier or quieter batching plant as necessary.
15. The ACCC understands that the EOT margin is currently  $\pm 5\%$ .
16. All trucks within the Holcim fleet, including company owned trucks and LODs, are subject to the EOT System.
17. If a LOD's truck is unavailable through no fault of Holcim, the LOD is allocated a set number of points for this 'missed opportunity'. This means that the LOD's unavailability does not reduce the carrier's aggregate points to the detriment of those who can take up the work when offered. Accordingly, there is an incentive

for LODs to accept work, turn up on time and keep their trucks in good working order.

18. Holcim submits that one of the key features of the EOT System is its transparency. Holcim notes that all LODs see the monthly report and exactly how much work they have been allocated compared to the other LODs in the fleet (but they do not see the remuneration rates of others for that cartage work).

#### *Changes to the EOT system since the 2008 authorisation*

19. Holcim advises that since the ACCC last considered the EOT system there has been a change to the “Knock Off Roster” that determines which trucks finish early and which stay on for the last jobs of the day. Previously, trucks with the highest number of EOT points knocked off first, allowing trucks with fewer points to take more jobs. However, Holcim submits that this meant trucks that earned fewer points per trip (perhaps because of their size) were regularly working longer days, and for fatigue management purposes the knock off order is now rotated evenly across the fleet.
20. Holcim also notes that it has begun signing LODs to new contracts that do not make specific reference to the EOT system. However, Holcim has clarified that for the period of authorisation, all delivery jobs, whether undertaken by company-owned trucks or LODs on either the new contract type or existing contracts, will be allocated via the EOT system.

## **Submissions received by the ACCC**

21. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
22. The ACCC sought submissions from 18 interested parties potentially affected by this application, including Holcim’s competitors and representatives of the concrete truck drivers.
23. No submissions were received from interested parties.

## **ACCC evaluation**

24. The ACCC’s evaluation of the arrangement is in accordance with the relevant net public benefit tests<sup>4</sup> contained in the Act. In broad terms, the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public including by any lessening of competition that would be likely to result.
25. In order to assess the effect of the arrangement and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.

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<sup>4</sup> Subsection 90(8) and 90(5B). The relevant tests are set out in Attachment A.

## The relevant area of competition

26. Holcim submits the relevant areas of competition are:
- a. the market for pre-mixed concrete; and
  - b. the market for delivery services for pre-mixed concrete to transport it from the point of production to the point of use.
27. The ACCC views that the areas of competition affected by the arrangement are those relating to the production of pre-mixed concrete in Perth and the delivery of pre-mixed concrete in Perth. The ACCC notes that this is consistent with previous determinations relating to the EOT system.<sup>5</sup>

## The future with and without test

28. To assist in its assessment of the arrangement against the authorisation test, the ACCC compares the public benefits and detriments likely to arise in the future where the arrangement is in place against the future in which it is not.<sup>6</sup>
29. Holcim submits that without the EOT system Holcim would have to allocate trucks to concrete production plants, and—at each plant—allocate trucks to delivery jobs via individual negotiations.
30. The ACCC considers that without the EOT system in place Holcim would need to allocate its fleet of trucks to production plants and jobs via negotiations with individual LODs.

## Public benefit

31. 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:
- ...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>7</sup>
32. Drawing on its history with the EOT system, Holcim submits that a number of benefits arise from having the system in place. Specifically:

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<sup>5</sup> A detailed discussion of the relevant markets can be found in the 2008 determination document. Available at: <http://transition.accc.gov.au/content/index.phtml/itemId/810327/fromItemId/401858/display/acccDecision>

<sup>6</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>7</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.

- A better ability to reliably service its customers with the timely supply of pre-mixed concrete, which gives Holcim a competitive advantage over other suppliers in the Perth market.
  - A reduction in industrial disputes between Holcim and LODs. Holcim submits that prior to the introduction of the EOT system in 2000, industrial disputes between truck drivers and Rinker<sup>8</sup> had been frequent and costly, and had culminated in acrimonious Federal Court litigation. Holcim submits that the introduction of the EOT system ended those disputes and has been pivotal in improving relationships with LODs.
  - A reduction in the need to negotiate with individual LODs who feel aggrieved or discriminated against through erroneous perceptions of workload misallocation.
  - The assurance for LODs that the EOT system provides them with the same opportunity to take on delivery jobs from Holcim as every other truck in the fleet, which reduces the potential for perceptions of discrimination.
33. The ACCC considers that the arrangement is likely to result in a number of public benefits.
34. The ACCC considers that the EOT system generates benefits for both Holcim and LODs by providing a transparent mechanism for allocating trucks to concrete production plants, and allocating jobs at those plants. This transparency in decision making reduces the potential for disputes between Holcim and LODs, which in turn reduces the potential for costly negotiations or industrial action.
35. The ACCC considers that the reduction in negotiations and disputes between Holcim and LODs allows for a more efficient and reliable concrete supply chain within Holcim, and improves the service Holcim is able to offer its concrete customers.

## Public detriment

36. 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>9</sup>
37. Holcim submits that the arrangement will not generate any public detriments other than those arising from the potential loss of competition for delivery jobs within the Holcim fleet. Holcim notes that without the EOT system in place, LODs may have a greater incentive to compete for jobs from Holcim.

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<sup>8</sup> Then owner of the concrete production plants, see paragraph 5.

<sup>9</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

38. The ACCC considers that there is a potential for public detriment via a loss of competition between LODs. Particularly that competition between LODs for delivery jobs may reduce costs and increase efficiency.
39. However, the ACCC views that any detriment arising from a lack of competition between Holcim-affiliated LODs would primarily be borne by Holcim, who would be put at a competitive disadvantage in the supply of concrete. As Holcim wishes to maintain operation of the EOT system, the potential detriment from a lack of competition between LODs is presumably not significant.
40. The ACCC does not consider that any other public detriments are likely to result from the proposed arrangement. Since the introduction of the EOT system there have been no complaints made to the ACCC regarding the system, or regarding work allocation by Holcim in general.

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

41. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
42. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result. Specifically:
  - The ACCC considers that the EOT system reduces the potential for costly disputes between Holcim and LODs, thereby improving the reliability and efficiency of Holcim's concrete supply to customers.
  - There is no evidence to suggest that there has been public detriment resulting from reduced competition between LODs for delivery jobs from Holcim.

## **Length of authorisation**

43. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>10</sup> This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
44. The ACCC proposes to grant authorisation until 31 March 2019, as requested by Holcim.

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<sup>10</sup> Subsection 91(1).

# Draft determination

## The application

45. On 7 May 2013 Holcim (Australia) Pty Ltd lodged an application under section 91C(1) of the *Competition and Consumer Act 2010* for revocation of authorisation A91082 and substitution with authorisation A91377 (re-authorisation).
46. In order for the ACCC to re-authorise conduct, the ACCC must consider the application for re-authorisation under the same statutory test as if it was a new application for authorisation under section 88 of the Act. Relevantly, the initial authorisation was made under subsection 88(1) of the Act, to make and give effect to a contract, arrangement, or understanding a provision of which is, or may be, an exclusionary provision within the meaning of section 45 of the Act.
47. Pursuant to the grandfathering provisions in section 177 of the Act, authorisations in force immediately before the commencement of Division I of Part IV (24 July 2009) that contained a cartel provision were automatically extended to cover conduct prohibited under the cartel provisions introduced in Part IV. Accordingly, the relevant tests for consideration of this application for revocation and substitution are set out in subsections 90(5B) and 90(8).
48. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

## The net public benefit test

49. For the reasons outlined in this draft determination, the ACCC is satisfied that the arrangements for which the re-authorisation is sought are likely to result in benefits to the public that would outweigh any detriments to the public including by any lessening of competition that would be likely to result. The ACCC is therefore satisfied that the test in subsection 90(5B) is met.
50. The ACCC is similarly satisfied in all the circumstances that the arrangements are likely to result in such a benefit to the public that the arrangements should be allowed to be given effect to. The ACCC is therefore satisfied that the test in subsection 90(8) is met.
51. The ACCC therefore proposes to revoke authorisation A91082 and grant authorisation A91377 in substitution for the one revoked.
52. The proposed substitute authorisation is to extend to current and future LODs who are part of Holcim's EOT system.
53. This draft determination is made on 4 September 2013.

## **Interim authorisation**

54. At the time of lodging the application, Holcim requested interim authorisation to continue to operate the EOT system while the ACCC considered the substantive application.
55. On 27 June 2013, the ACCC decided under section 91 of the Act to suspend the operation of authorisation A91082 and grant interim authorisation in substitution. 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**

56. The ACCC now seeks submissions from interested parties in relation to this draft determination. 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 - Summary of relevant statutory tests

**Subsection 90(5B)** states that the ACCC must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:

- (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
- (b) that the benefit 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.

**Subsection 90(8)** states that the ACCC shall not:

- make a determination granting:
  - i. an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
  - ii. an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
  - iii. an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
  - iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.