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Ms Joanne Palisi
Director
Merger & Adjudication Coordination & Strategy Branch
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

19 June 2013

Dear Ms Palisi

Holcim (Australia) Pty Ltd application for revocation and substitution of Authorisation No A91082

Application for revocation and substitution

Holcim (Australia) Pty Ltd is applying for revocation of Authorisation No A91082, granted in favour of CEMEX Australia Pty Ltd (**CEMEX**) on 2 July 2008, and substitution of a new authorisation for its pre-mixed concrete cartage allocation system among independent contractors in Perth, Western Australia (**Conduct**). CEMEX was acquired by Holcim Limited in 2009 and is now known as Holcim Australia (**Holcim**).

Please find enclosed:

- a Form FC for revocation and substitution of Authorisation No A91082;
- confidential supporting submissions; and
- a non-confidential version of the supporting submissions.

Payment of the prescribed lodgement fee of \$2,500 will follow shortly.

Application for interim authorisation

As the ACCC is aware, Authorisation No A91082 will expire on 30 June 2013. We appreciate that the ACCC may not determine the application for revocation and substitution until after this date.

In light of this, and because Holcim wishes to continue to operate the authorised allocation system, Holcim also seeks interim authorisation for the Conduct from 30 June 2013 until the ACCC finally determines the application for revocation and substitution.

We make the following submissions in support of interim authorisation:

- the Conduct is relatively innocuous and carries significant public benefits (detailed in the enclosed submissions);
- interim authorisation would maintain the status quo in the relevant markets, which is important, given that the authorised allocation system has been in operation now for over 10 years;

- the relevant markets and other circumstances are largely the same as they were when Authorisation No A91082 was granted; and
- if interim authorisation were denied, Holcim would be forced to implement, at short notice, a new and possibly temporary regime for pre-mixed concrete cartage allocation. This would involve significant cost which might ultimately need to be passed on to purchasers of pre-mixed concrete.

In these circumstances, we submit that interim authorisation is appropriate. We look forward to receiving the ACCC's decision in this regard as soon as possible, and in any event before 30 June 2013.

Confidentiality

Holcim's supporting submissions contain commercially sensitive data and personal information of concrete truck drivers. Pursuant to section 89(5) CCA, Holcim requests that the ACCC exclude that information from the public register under section 89(5A) CCA. Accordingly, Holcim requests that the ACCC place only this letter, the Form FC and the non-confidential version of the supporting submissions on the public register.

If the ACCC requires any further information, please do not hesitate to contact me.

Yours sincerely



Hans Fuchs

Executive General Manager Concrete
Holcim (Australia) Pty Ltd

Form FC

Commonwealth of Australia

Competition and Consumer Act 2010 — subsection 91C (1)

APPLICATION FOR REVOCATION OF A NON-MERGER AUTHORISATION AND SUBSTITUTION OF A NEW AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 91C (1) of the *Competition and Consumer Act 2010* for the revocation of an authorisation and the substitution of a new authorisation for the one revoked.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of applicant:
(Refer to direction 2)

A91377

Holcim (Australia) Pty Ltd ACN 099 732 297

- (b) Description of business carried on by applicant:
(Refer to direction 3)

Production and supply of concrete and quarry products for building and construction (including pre-mixed concrete).

- (c) Address in Australia for service of documents on the applicant:

Holcim (Australia) Pty Ltd
Level 8, 799 Pacific Highway
Chatswood NSW 2067
Facsimile: +61 2 9412 6601
Attention: Hans Fuchs
Executive General Manager Concrete
Telephone: +61 2 9412 6600
hans.fuchs@holcim.com

2. Revocation of authorisation

- (a) Description of the authorisation, for which revocation is sought, including but not limited to the registration number assigned to that authorisation:

Authorisation No A91082 in relation to the operation of a cartage allocation system for CEMEX Australia Pty Ltd (acquired by Holcim Limited in 2009 and now known as Holcim Australia) pre-mixed concrete among independent contractors in Perth, Western Australia.

- (b) Provide details of the basis upon which revocation is sought:

The authorisation is due to expire on 30 June 2013 and there have been some minor changes in the circumstances relevant to the authorisation, of which the ACCC should be made aware. The applicant wishes to maintain the immunity conferred by the authorisation by revoking it and substituting a new authorisation which takes account of current conditions.

3. Substitution of authorisation

- (a) Provide a description of the contract, arrangement, understanding or conduct whether proposed or actual, for which substitution of authorisation is sought:

(Refer to direction 4)

A cartage allocation system for Holcim Australia pre-mixed concrete, which is intended to ensure that there are no significant discrepancies between the average load sizes relative to the capacity of each truck in Holcim Australia's Perth metropolitan fleet and the average lead time for trips undertaken by each truck in that fleet.

Further details are set out in the attached submissions.

- (b) Description of the goods or services to which the contract, arrangement, understanding or conduct (whether proposed or actual) relate:

Pre-mixed concrete and pre-mixed concrete delivery services.

Further details are set out in the attached submissions.

- (c) The term for which substitute authorisation of the contract, arrangement or understanding (whether proposed or actual), or conduct, is being sought and grounds supporting this period of authorisation:

A term of 6 years on the grounds set out in the attached submissions.

4. Parties to the contract, arrangement or understanding (whether proposed or actual), or relevant conduct, for which substitution of authorisation is sought

- (a) Names, addresses and description of business carried on by those other parties to the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct:

This application is for the authorisation to also extend to independent contractors who may from time to time be subject to the cartage allocation system described above. This group may change over time.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

(Refer to direction 5)

See attached submissions.

- (c) Where those parties on whose behalf the application is made are not known - description of the class of business carried on by those possible parties to the contract or proposed contract, arrangement or understanding:

See attached submissions.

5. Public benefit claims

- (a) Arguments in support of application for substitution of authorisation:

See attached submissions.

(See Direction 6 of this Form)

- (b) Facts and evidence relied upon in support of these claims:

See attached submissions.

6. Market definition

Provide a description of the market(s) in which the goods or services described at 3 (b) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

See attached submissions.

(See Direction 7 of this Form)

7. Public detriments

- (a) Detriments to the public resulting or likely to result from the substitute authorisation, in particular the likely effect of the conduct on the prices of the goods or services described at 3 (b) above and the prices of goods or services in other affected markets:

See attached submissions.

(See Direction 8 of this Form)

- (b) Facts and evidence relevant to these detriments:

See attached submissions.

8. Contracts, arrangements or understandings in similar terms

This application for substitute authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings (whether proposed or actual) that are, or will be, in similar terms to the abovementioned contract, arrangement or understanding

- (a) Is this application to be so expressed?

No.

- (b) If so, the following information is to be furnished:
- (i) description of any variations between the contract, arrangement or understanding for which substitute authorisation has been sought and those contracts, arrangements or understandings that are stated to be in similar terms:

Not applicable.

(See Direction 9 of this Form)

- (ii) Where the parties to the similar term contract, arrangement or understanding(s) are known - names, addresses and description of business carried on by those other parties:

Not applicable.

(See Direction 5 of this Form)

- (iii) Where the parties to the similar term contract, arrangement or understanding(s) are not known— description of the class of business carried on by those possible parties:

Not applicable.

9. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

No.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable.

- (c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

10. Further information

- (a) Name, postal address and telephone contact details of the person authorised by the parties seeking revocation of authorisation and substitution of a replacement authorisation to provide additional information in relation to this application:

Hans Fuchs
Executive General Manager Concrete
Holcim (Australia) Pty Ltd
Level 8, 799 Pacific Highway
Chatswood NSW 2067
Telephone: +61 2 9412 6600
hans.fuchs@holcim.com

Dated 19 June 2013

Signed by/on behalf of the applicant



(Signature)

Hans Fuchs.
(Full Name)

Holcim Australia Pty Limited
(Organisation)

Executive General Manager Concrete.
(Position in Organisation)

DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1 (b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding, or the relevant conduct, in respect of which substitute authorisation is sought.
4. In completing this form, provide details of the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, in respect of which substitute authorisation is sought.
 - (a) to the extent that the contract, arrangement or understanding, or the relevant conduct, has been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that the contract, arrangement or understanding, or the relevant conduct, has not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing; and
 - (c) If substitute authorisation is sought for a contract, arrangement or understanding (whether proposed or actual) which may contain an exclusionary provision — provide details of that provision.
5. Where substitute authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
6. Provide details of those public benefits claimed to result or to be likely to result from the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, including quantification of those benefits where possible.
7. Provide details of the market(s) likely to be affected by the contract, arrangement or understanding (whether proposed or actual), in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for substitute authorisation.
8. Provide details of the detriments to the public, including those resulting from the lessening of competition, which may result from the contract, arrangement or understanding (whether proposed or actual). Provide quantification of those detriments where possible.
9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

NON-CONFIDENTIAL



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Non-confidential submissions in support of Holcim (Australia)
Pty Ltd's application for revocation and substitution of
Authorisation No A91082

19 June 2013

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1. BACKGROUND

On 2 July 2008, the Australian Competition and Consumer Commission (**ACCC**) granted CEMEX Australia Pty Ltd (**CEMEX**) authorisation No A91082 under section 88 of the *Trade Practices Act 1974* (Cth), now the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Current Authorisation**).¹ CEMEX was acquired by Holcim Limited in 2009 and is now known as Holcim Australia (**Holcim**).²

The Current Authorisation allows Holcim to operate a pre-mixed concrete cartage allocation system known as the 'Equal Opportunity of Trips' system, which is intended to ensure that there are no significant discrepancies between the average load sizes relative to the capacity of each truck in Holcim's Perth metropolitan fleet and the average lead time for trips undertaken by each truck in the fleet (**EOT System**). The EOT System is described in further detail in paragraph 4.1 below.

The Current Authorisation was granted for a period of 5 years and is due to expire on 30 June 2013. Prior to the Current Authorisation, the EOT System was covered by authorisation A90769, granted by the ACCC on 3 February 2003.

There have been some minor changes in the circumstances relevant to the Current Authorisation, of which the ACCC should be made aware. Holcim wishes to maintain the immunity conferred by the Current Authorisation by revoking it and substituting a new authorisation which takes account of current conditions.

The ACCC has previously considered the EOT System and the relevant markets in authorisation A90769 (**2003 Determination**) and in its 2008 determination of the Current Authorisation (**2008 Determination**).

Some of the material from the 2008 Determination and CEMEX's application is necessarily replicated in this application. It has been updated to reflect relevant changes in the markets.

2. SUMMARY

There have been the following minor changes to the EOT System since the 2008 Determination:

- a decrease in the number of company trucks owned and operated by Holcim in the Perth metropolitan area, as opposed to trucks owned and operated by independent contractors; and
- amendments to the operation of Holcim's "knock-off roster" (ie, the times at which trucks finish work each day),

as further described in paragraph 3.2.

All existing independent contractors and employee drivers currently participate in the EOT System. The EOT System is incorporated into each of Holcim's existing contracts with its independent contractors in the Perth metropolitan area (**Current Contracts**), the latest expiry of which is the end of March 2019. Holcim is in the process of introducing new cartage contracts (**New Contracts**), but at the present time all truck drivers currently in Holcim's Perth metropolitan fleet are operating under the Current Contracts.

¹ This followed Rinker Australia Pty Ltd's (subsequently acquired by CEMEX) application for revocation of authorisation A90769 (which expired on 24 February 2008) and the substitution of authorisation A91082 in its place.

² Holcim's ready-mixed concrete products operate under the READYMIX trademark.

The New Contracts do not make reference to the EOT System. However, Holcim currently has no intention of ceasing to operate the EOT System (including in relation to drivers on New Contracts) in relation to its Perth metropolitan fleet between now and the expiry of all of its Current Contracts.

Holcim submits that the above-mentioned changes have not and will not adversely affect the significant public benefits of improved operational efficiencies and improved industrial harmony that result from the EOT System.

Holcim submits that these benefits are sufficient to justify the grant of the authorisation sought as they significantly outweigh any perceived detriments.

3. **MARKETS**

As noted by the ACCC in the 2003 Determination, the 2008 Determination and by the Australian Competition Tribunal (formerly the Trade Practices Tribunal) in similar circumstances,³ there are two markets in the Perth metropolitan area relevant to this application:

1. the market for pre-mixed concrete; and
2. the market for delivery services for pre-mixed concrete to transport it from the point of production to the point of use.

The ACCC considered these markets in the 2003 Determination and the 2008 Determination. This section provides an outline of the markets and any relevant changes in them since the 2008 Determination.

3.1 **The pre-mixed concrete market**

The pre-mixed concrete market involves mixing concrete in a batching plant and delivering it at an agreed place and time where it will be poured promptly. For technical reasons, pre-mixed concrete must reach its destination within 90 minutes of mixing. Thus, reliable delivery services are critical (the market for these services is dealt with below). [COMMERCIALY SENSITIVE INFORMATION REMOVED]

As a result of these restrictions, producers (including Holcim) have batching plants located around Perth, designed and located to suit the market and their customers.

Key features of the pre-mixed concrete market, as identified by the ACCC in its 2008 Determination⁴ and which continue to apply today, include:

- several large producers located in the Perth area, each having approximately the same share of the market and together accounting for the largest proportion of market sales;
- competition between these companies; and
- market entry constrained by the high cost of acquiring production facilities, raw materials and transport services.

The Perth metropolitan concrete market consists of four major companies - Boral Limited, Hanson Australia Pty Ltd, BGC Australia Pty Ltd and Holcim - and a few smaller

³ In *Re Lamont* (1990) ATPR 41-035 at 51521.

⁴ ACCC Determination of Authorisations A90964 and A90965 for CSR Building Products Limited (CSR Building Products Determination) at 6.9.

businesses, particularly WA Premix, Technically Designed Concrete (**TDC**), and Go Crete Pty Ltd (the latter being owned by Boral Limited).

[COMMERCIAL SENSITIVE INFORMATION REMOVED]

3.2 **The cartage market**

Many producers of pre-mixed concrete, including Holcim, engage independent contractors, or 'lorry-owner drivers' (**LODs**), to deliver the concrete using their own delivery vehicles. The independent contractors are generally, for business purposes, small proprietary companies. Their income comes from the cartage rates from concrete producers and from the volume of concrete delivered. They bear the costs of financing, operating and maintaining their trucks.

As noted by the ACCC in the 2003 Determination, 2008 Determination and by the Tribunal in *Re Lamont* (1990) ATPR 41-035, the cartage market does not allow free competition between all carriers for work at all yards.

Each carrier of pre-mixed concrete is effectively tied to a producer because it is required to have its delivery truck painted in a distinctive livery, effectively "branding" the product being delivered. This precludes the use of the truck to deliver concrete made by another producer. The agitator mounted on the truck (without which the truck cannot be used to deliver concrete) is also generally supplied and owned by the producer. As a result, most carriers can only work for one producer at a time and the volume of work they get depends largely on that producer; they are, therefore, competitively restrained.

There are two types of carriers in the market: LODs and company employee drivers. In some respects, there are advantages for concrete manufacturers employing company drivers. For example, it enables greater flexibility for the company in terms of assigning company drivers to perform other operational duties as necessary.⁵ It also enables concrete manufacturers to put their company owned trucks in and out of operation as is necessary to meet market demand. However, the company is then responsible for the maintenance and depreciation of the truck.

Relevantly, the ACCC has identified the following features of a cartage services market as applicable to its assessment of competition:

- a large number of participants relative to the size of the proposed bargaining groups; and
- relatively low barriers to entry.

Holcim uses mostly LODs to provide its delivery services: currently, 57 of its 67 delivery trucks in the Perth metropolitan area are owned and operated by LODs. The other 10 are company trucks. Holcim estimates that some of its competitors in this market use significantly lower proportions of LODs, instead mostly using trucks operated by company employees.

[COMMERCIAL SENSITIVE INFORMATION REMOVED]

⁵ Any other operational duties/tasks performed by Holcim employee drivers are separate from the operation of the EOT System, which is exclusively for the transportation of pre-mixed concrete from batching plants to customers. Employee drivers may perform a variety of additional tasks, mainly in relation to the operation of the batching plants.

Holcim has reduced the number of its company trucks and replaced them with LODs during this period. Holcim made this decision due to capital constraints and the increased maintenance costs associated with an aging company fleet.

During this period Holcim has also made amendments to its "knock-off roster" (ie the times at which trucks finish work each day). Previously, trucks were knocked-off in accordance with their EOT points (highest to lowest). In some cases, this meant that trucks with the lowest points were working longer days on a more regular basis. Accordingly, for fatigue management, Holcim has now established a rotating roster whereby trucks knock-off in accordance with their fleet numbers.

LODs own the truck and chassis they use to deliver the pre-mixed concrete. Company employee drivers use a truck and chassis owned by the company. To transport concrete, the truck and chassis must also be fitted with an agitator, which is the mixing container in which pre-mixed concrete is transported. In the majority of cases the agitator is owned by and supplied to LODs and company employee drivers by Holcim. However, some LODs own and supply their own agitators.⁶

The size of the agitator, and hence the amount of concrete that can be transported, is determined primarily by the size of the truck. Holcim's Current Contracts require an LOD to provide a truck that will transport at least 5.4m³ (but less than 5.8m³). Beyond that, it is up to the LOD to choose the size of the truck, and Holcim will supply an appropriate agitator.⁷

The duration of the Current Contracts between Holcim and each LOD is initially 6 years, with options to extend to up to 10 years (which generally also matches the effective and economic length of truck life).⁸

4. DESCRIPTION OF THE CONDUCT

4.1 The conduct

The EOT System forms part of each Current Contract that Holcim has with an LOD in the Perth metropolitan area, the latest of which is due to expire at the end of March 2019. As noted above, Holcim is in the process of introducing New Contracts that do not make reference to the EOT System. However, at the present time all truck drivers currently in Holcim's Perth metropolitan fleet are operating under the Current Contracts. Holcim currently has no intention of ceasing to operate the EOT System (including in relation to drivers on New Contracts) in relation to its Perth metropolitan fleet between now and the expiry of all of its Current Contracts.

The intention of the EOT System is that there be no significant discrepancies between the average load sizes relative to capacity of each truck in Holcim's Perth metropolitan fleet, and the average lead time for trips undertaken by each truck in that fleet.

In brief, the EOT System is concerned with equalising work opportunities for LODs and does not address the equalisation of income for LODs. It remains up to the LOD to decide whether he or she will take maximum advantage of the work opportunities available under the EOT System. The system applies and allocates jobs to both LODs and company trucks.

The system works by allocating a number of points per load and distance. On a rolling 12 month basis, the system ensures that a carrier's aggregate points are within a specified

⁶ Holcim is now also entering contracts where the LOD owns the agitator.

⁷ For completeness, the 8 wheel version of this contract requires that the truck transport at least 7.0m³.

⁸ Holcim's New Contracts are for a period of 10 years.

margin of the Western Australian metropolitan fleet average. If a carrier is outside the specified margin, they will be reallocated to a busier or quieter batching plant as required. The use of a margin ensures that carriers are not reallocated unless it is necessary.

To minimise efficiency losses to Holcim, if a carrier's truck is unavailable through no fault of Holcim (eg, the LOD declines an allocation), the carrier is allocated a 'missed opportunity' of a set number of points. This means that the carrier'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 incentive for carriers to accept work, turn up on time and keep their trucks in good working order.

Once the utilisation for the fleet has been calculated by Holcim (which occurs every three months), the applicable cartage rates are then determined across the fleet. There is no opportunity provided for LODs to negotiate collectively the cartage rates for their LOD contracts.

As previously noted in CEMEX's 2008 application, one of the key features of the EOT System is its transparency: 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).

Benefits to Holcim of the EOT System

The major benefit to Holcim is its ability to better service its customers with timely supply of pre-mixed concrete in the most efficient way.

Before the EOT System was negotiated in 2000, in support of authorisation A90769, Rinker Australia Pty Ltd (subsequently acquired by CEMEX) submitted that it had experienced several years of serious industrial disputes with its LODs, culminating in acrimonious Federal Court litigation and losses through inefficient and unreliable delivery arrangements. The EOT System has ended those disputes and been pivotal in improving relationships with LODs.

The EOT System has also assisted in making Holcim more competitive, since it can serve its customers more reliably and efficiently than its competitors in the Perth market. That would not be possible without the LODs' trust in the fairness and transparency of the EOT System, which Holcim considers the LODs have.

Holcim also benefits significantly through not having to negotiate daily with individual LODs who might otherwise feel aggrieved or discriminated against through erroneous perceptions of misallocation.

Benefits to LODs of the EOT System

The EOT System does not guarantee LODs a minimum level of work. Instead, it guarantees access for all LODs to such work as is available from Holcim in a non-discriminatory and transparent way. It also allows LODs to choose whether or not to take up the work opportunities offered by Holcim - the work is there for LODs should they wish to accept it, and they know that they will not be favoured or discriminated against except in accordance with the EOT System.

4.2 Relevant parties

Parties to the conduct

Holcim identifies the following parties to the conduct:

Name	Address	Business
Holcim Australia Pty Ltd	Level 8, 799 Pacific Highway, Chatswood NSW 2067	Production and supply of concrete and quarry products for building and construction (including pre-mixed concrete)
Carriers currently subject to Holcim's EOT System in the Perth metropolitan area	See Attachment A	Transport and delivery of pre-mixed concrete

Persons on whose behalf this application is made

This application is made on behalf of the persons listed in the table above.

In addition, the application is for authorisation extending to independent contractors who may from time to time be subject to the cartage allocation system. This group may change over time.

Persons affected by the conduct

In addition the parties listed in the table above, Holcim expects that the following parties might be affected by the conduct:

Name	Address	Business
BGC Concrete (BGC Concrete Australia Pty Ltd)	Level 6, 18 Mount Street, Perth WA 6000	Home building, construction of commercial buildings, manufacture and supply of building and construction materials (including pre-mixed concrete), and investment in WA property
Boral Concrete (Boral Limited)	Level 39, AMP Centre, 50 Bridge Street, Sydney NSW 2000	Production and supply of building and construction materials (including pre-mixed concrete)
Hanson Australia Pty Ltd	123 Burswood Road, Burswood WA 6100	Production and supply of aggregates, concrete products, clay bricks, pre-mixed concrete and asphalt
WA Premix	Corner Canton Road and Panton Road, Greenfields WA 6210	Production and supply of pre-mixed concrete

Name	Address	Business
Go Crete Pty Ltd (owned by Boral Limited)	35 Mandarin Road, Maddington WA 6109	Production and supply of pre-mixed concrete
Technically Designed Concrete (TDC)	33 Miquel Road, Bibra Lake WA 6163	Production and supply of pre-mixed concrete
End users of pre-mixed concrete	Various	Various

5. SUBMISSIONS IN SUPPORT OF THE APPLICATION

5.1 The effect of the conduct on competition

Holcim submits that the conduct will have no public detriment apart from its potential effect on competition.

The ACCC considered the effect of this conduct on competition in the 2008 Determination. This section provides an outline of the effects and any relevant changes since the 2008 Determination.

Competition between existing concrete carriers

The high costs of switching between producers mean that competition between concrete carriers for access to carriage work from different producers is restricted. In the 2003 Determination, the ACCC considered that the EOT System reduced competition in certain areas between concrete carriers. It considered that the system reduced the carriers' ability and incentive to provide differentiated services in order to obtain additional cartage work, giving the example of customer service. The ACCC considered that these views remained the same for the purposes of its 2008 Determination. It did, however, balance the efficiency arguments against this (discussed below).

Holcim concedes that there may be reduced competition between its drivers for work from Holcim, but considers that this is offset by the efficiency gains. Carriers are free, subject to the constraints imposed by the switching costs associated with a change of principal, to compete between themselves for contracts with producers on a periodic basis.

Moreover, in its 2008 Determination, the ACCC considered that any reduction in the quality of customer service was likely to affect the ability of CEMEX to compete within the concrete manufacturing sector.⁹ Consistent with this approach, Holcim confirms that it is in Holcim's commercial interests to ensure that the EOT System does not impact on its ability to remain competitive with other concrete manufacturers.

Scope for new entry

The ACCC's view in the 2003 Determination was that the EOT System does not create any significant new barriers to entry. Holcim itself determines how many carriers it needs and with which it will contract. In addition, all Holcim trucks in the Perth metropolitan area, including the company trucks, are subject to the system.

This is demonstrated by the fact that the number and composition of LODs has changed over the years since both the 2003 Determination and the 2008 Determination (as set out above).

⁹ ACCC Authorisation A91082, 2 July 2008, p13.

In order to remain competitive with other concrete manufacturers, it is in the commercial interests of Holcim to ensure that it maintains the most efficient mix of company trucks and independent contractors. This is supported by the ACCC's 2008 Determination, where it considered that the operation of the EOT System has not led to a reduction in competition by removing the scope for new entry.¹⁰

5.2 The public benefits from the conduct

Holcim submits that the EOT System has delivered and will continue to deliver a number of public benefits. Holcim considers that these public benefits continue to be significant and outweigh any potential detriments flowing from the conduct.

Improved efficiencies of operations

The ACCC has previously noted that the anti-competitive effect of a collectively negotiated agreement constituted by lost efficiencies is more likely to be limited where:¹¹

- the current level of competition between members of the bargaining group is low;
- participation in the proposed arrangements is voluntary;
- there are restrictions on the coverage and composition of the "bargaining group"; and
- there is no boycott activity.

The current level of competition between carriers is already low, both because of the restrictions discussed above and because the EOT System has been in operation now for over 10 years.

Although all Holcim trucks in the Perth metropolitan area, including the company trucks, are subject to the system, all carriers have individually chosen to contract with Holcim; they do not need to do so.

As noted above, there is no opportunity for LODs to negotiate the terms of their contracts with Holcim collectively. The negotiation and contracting process occurs with each LOD separately, depending on those LODs whom Holcim chooses to contract with. Accordingly, the coverage and composition of those LODs whom Holcim contracts with on an individual basis is restricted.

The EOT System is primarily designed to avoid inefficiencies resulting from boycott activity by carriers and other industry disharmony, and has done so since its inception.

In addition, Holcim submits that both its transaction costs and those of LODs are lower when negotiating under the arrangement. In its 2008 Determination, the ACCC accepted that the use of standard form contracts may result in lower transaction costs for both CEMEX and LODs, particularly where LODs' costs are reduced if they do not need to engage professional services as part of their contract negotiations.¹²

In its 2003 Determination and 2008 Determination, the ACCC accepted that the EOT System resulted in reduced transaction costs by:

- removing the need to negotiate cartage on a frequent and individual basis; and

¹⁰ ACCC Authorisation A91082, 2 July 2008, p14.

¹¹ CSR Building Products Determination at 7.12.

¹² ACCC Authorisation A91082, P.18.

- reducing the incidence of LOD claims of discrimination and thereby, reducing the cost of mediating with LODs.¹³

Holcim submits that the EOT System will continue to have these effects.

Improved industrial harmony

As noted by the ACCC in its 2003 Determination, prior to the advent of the EOT System, Rinker Australia Pty Ltd (subsequently acquired by CEMEX) experienced several years of serious industrial disputes, including Federal Court action. As previously submitted, Holcim and the carrier representatives consider that the revised allocation arrangements have been a vital part of achieving the current industrial harmony.

In the 2003 Determination and the 2008 Determination, the ACCC accepted that the revised arrangements had and were likely to continue to lead to improvements in industrial harmony, particularly because of the objective and transparent nature of the EOT System.¹⁴ The arrangements under the EOT System have continued to result in industrial harmony; since the 2008 Determination, there have been no industrial stoppages or threats of industrial stoppages. Holcim no longer has to deal with frequent individual complaints about unfair treatment.

5.3 **Appropriate period for authorisation**

For the reasons stated, Holcim submits that the ACCC should grant the substitute authorisation.

Holcim notes that there have been only minor changes in the relevant markets during the 5 years' operation of Authorisation A91082. On this basis, and to coincide with the latest expiry of the Current Contracts at the end of March 2019, Holcim submits that an appropriate authorisation period is 6 years.

¹³ ACCC Authorisation A91082, p.18.

¹⁴ ACCC Authorisation A91082, p.17.

ATTACHMENT A

HOLCIM CONCRETE CARTAGE CONTRACTORS IN PERTH METROPOLITAN AREA

[COMMERCIALY SENSITIVE INFORMATION REMOVED]