

## Form B

Commonwealth of Australia

*Competition and Consumer Act 2010 — subsections 88 (1A) and (1)*

### **AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

#### **1. Applicant**

- A91427
- (a) Name of Applicant:  
Transport Workers' Union of Australia
  - (b) Short description of business carried on by applicant:  
The Applicant is a trade union, registered pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth).
  - (c) Address in Australia for service of documents on the applicant:  
11 Alexandra Place  
Murarrie Qld 4172

#### **2. Contract, arrangement or understanding**

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

**See attached submission**

- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:

**See attached submission**

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

**See attached submission**

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

**See attached submission**

### **3. Parties to the proposed arrangement**

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

**See attached submission**

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

**See attached submission**

### **4. Public benefit claims**

- (a) Arguments in support of authorisation:

**See attached submission**

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

**See attached submission**

### **5. Market definition**

Provide a description of the market(s) in which the goods or services described at 2 (c) 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 submission**

**6. Public detriments**

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

**See attached submission**

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

**See attached submission**

**7. Contract, arrangements or understandings in similar terms**

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, 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 authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

N/A

- (ii) where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

N/A

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

N/A

**8. 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?

N/A

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

N/A

**9. Further information**


- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Adam Carter

Qld Branch Legal Officer

Dated: 5 May 2014

Signed by/on behalf of the Applicant

  
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Peter Biagini – Branch Secretary

# SUBMISSIONS IN SUPPORT OF APPLICATION FOR AUTHORISATION

## The Parties

### The Applicant

1. The Applicant is the Queensland Branch of an organisation of employees that is registered pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth) ('the Act').
2. The Applicant represents owner driver members of the Applicant contracted to provide courier "Pick Up and Deliver" (PUD) transport services to Toll Transport Pty Ltd trading as Toll Priority (a business of Toll Holdings Ltd)
3. The affected owner drivers are eligible for membership of the organisation of employees on the basis that the rules of the union provide that independent contractors, who, if they were employees performing work of the kind which they usually perform as independent contractors, would be employees, are eligible for membership.<sup>1</sup>

### The Counterparty

4. The counterparty is Toll Transport Pty Ltd (ABN:31 006 604 191 ) ('Toll').
5. Toll operates in every State and Territory of Australia.
6. This Application relates only to owner drivers engaged by Toll in Queensland from the Toll Priority Brisbane depot which is located near Brisbane Airport.

## Background

7. The Applicant represents owner driver members. The Applicant has owner driver members across a range of industries, including the air freight courier industry.
8. The Applicant presently has 76 owner driver members engaged by Toll who will be covered by the proposed contract, arrangement or understanding.
9. The proposed contract arrangement or understanding will cover owner drivers working from Brisbane under a proposed "2014 Brisbane Agreement". The 2014 Brisbane Agreement will cover a total of about 80 owner drivers. A list of the names of members (and their corporate or trading names - where applicable) will be supplied separately and the Applicant requests that it not be published.
10. The Applicant's members have sought the assistance of the Applicant to collectively bargain with Toll.

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<sup>1</sup> Rules of the Transport Workers Union, Annexure B (D).

11. On 17 December 2013 the Applicant met with representatives of Toll and indicated its intention to make this Application on behalf of the members.

## **The proposed authorisation**

### **The substantive authorisation**

12. The Applicant seeks authorisation for owner driver members contracted to Toll to engage in collective bargaining with Toll, with the assistance of the Applicant, for the purpose of establishing new contractual arrangements for the supply of air freight courier transport services. The Applicant proposes that the authorisation be given for a 5 year period.
13. The authorisation is limited in scope to:
  - 13.1. Toll's operations in Queensland; and
  - 13.2. owner drivers who are, or who will be, contracted to Toll to supply courier transport services to Toll Transport Pty Ltd trading as Toll Priority from the Brisbane Airport depot.
14. The subject matter of the proposed collective bargaining includes (but is not limited to):
  - 14.1. carriage rates (including the labour component thereof);
  - 14.2. a mechanism for those rates to increase from year to year;
  - 14.3. penalties for services provided outside standard hours;
  - 14.4. increased rates for specialist loads;
  - 14.5. return on investment (profit)
  - 14.6. demurrage rates; and
  - 14.7. equipment, including painting and badging of vehicles.

### **The interim authorisation**

15. The Applicant also seeks interim authorisation to commence collective bargaining while this Application is assessed.
16. If interim authorisation is granted, the Applicant undertakes not to finalise bargaining before the date on which a determination is made in relation to this Application.

## **The Relevant Market - the Air Freight Courier Industry**

17. Toll is a supplier of air freight courier transport services across Australia. Details of its areas of service are shown on its website at <http://www.tollgroup.com/parcel-courier-delivery-services>.

18. The air freight sector of the courier industry has a relatively small number of participants. They include Toll, DHL, TNT Express, Fed Ex, UPS and Startrack.
19. These participants engage either or both independent owner drivers and employed drivers.
20. Toll's delivery fleet consists of mainly owner drivers. There are approximately 80 owner drivers. However it has about 30 employed drivers that work from the Brisbane Aripport. The owner drivers operate their businesses through corporate entities or as sole traders or partnerships.
21. The freight carried by the owner drivers is mainly air freight in the nature of parcels or satchels. A smaller component of the freight delivered is road freight which comes from the other mainland capitals.

### **The equipment**

22. Owner drivers provide transport services to Toll using mainly light commercial vehicles (vans). However some use light trucks up to about 4 tonne.
23. The cost of purchasing a van varies depending on age and size. A new van may cost up to \$45,000.00. Toll requires owner drivers to use vehicles that are either new or no more than two years of age at the commencement of a contract.

### **Entry to and exit from the market**

24. It is relatively easy to enter the market as an owner driver, subject to access to appropriate capital. A person wishing to enter the courier market requires:
  - 24.1. an appropriate drivers' license (car licence);
  - 24.2. sufficient capital or finance arrangements to purchase (or lease) a van or light truck; and
  - 24.3. a basic business structure, including an ABN.
25. There are no other regulatory barriers for entry to the market. However, Toll and its clients require certain checks include police checks.
26. Owner drivers own a single van. Toll has no fleet owner drivers.
27. At the present time, there is a greater supply of owner drivers than demand for their services.
28. Owner drivers are offered terms by the courier company. There is little, if any, negotiation of terms between individual owner drivers and the company. Commonly, the company offers standard terms to the owner driver. The owner driver can accept the terms, or forfeit the opportunity for work.
29. An engagement is generally one of exclusive contract. Owner drivers are generally not free to supply services to alternative courier companies while contracted.

30. Some courier companies require that owner drivers have their van painted in company colours or logos. Toll require owner drivers to have their vehicles painted in a distinctive green colour and marked with a Toll logo.
31. These practices are a mechanism by which suppliers, including Toll, retain exclusive contracts for services among owner drivers. These practices operate to limit owner drivers' ability to enter into a contract and to terminate the contract.
32. Exiting the market, or changing to another courier company, is not difficult compared to other sectors of the transport industry given the relatively low capital outlay to purchase a van.

## Toll and the Affected Owner Drivers

### Operations

33. Toll describes itself on its corporate website as follows:

## Toll Priority Overview

Our broad range of services provides you the flexibility to confidently select a cost effective solution for your needs.

### Door-to-door delivery services

- Same Day - fast, premium solution for urgent parcels and documents that need to be picked up and delivered on the same business day to another capital city or region in Australia.
  - Overnight - shipments are delivered via Toll Priority's unmatched air freighter network to most locations in the morning of the next business day.
  - After Hours & Weekends - offers the flexibility and convenience of pick ups and deliveries arranged outside normal business hours
  - Off Peak - competitively priced road express freight delivery
  - Scheduled - perfect for financial institutions, law firms and retail operations, our scheduled services, sometimes known as Permanent Recurring Services (PRS), have been designed to regularly exchange internal courier bags, envelopes and other products from one location to another
  - Specialised - Toll Priority continues to create new and specialised services for customers and subsequently develop these into products such as dangerous goods, reverse logistics, time and temperature sensitive, highly monitored freight, and secure Hand-to-Hand services.
  - Global - document and parcel express and economy international services to over 220 countries and territories supported by competitive transit times, online tracking and proof of delivery.
34. Toll engages mostly owner-drivers. There are approximately 80 owner drivers contracted to Toll Priority in Queensland based at the Brisbane Airport.
  35. Owner drivers contracted to Toll supply a van and their labour.
  36. Toll offers owner drivers the opportunity to provide courier services for Toll. The rates are set out in a rates schedule.
  37. Toll's daily operation is as follows:



- 37.1. owner drivers have set "runs" which are in a distinct area. A run can cover a number of suburbs.
- 37.2. Owner drivers arrive at the depot at 6.30am and collect the freight they are required to deliver from the dock area.
- 37.3. The freight is sorted, scanned on a portable device, and then loaded into the van.
- 37.4. The deliveries are generally undertaken in the morning hours. When an item is delivered the owner driver obtains a signature on the portable device or leaves the item without signature if there is prior approval from the customer to do so.
- 37.5. Further freight to be delivered is collected from a regional hub. Most deliveries have been made by the mid part of the day.
- 37.6. In the afternoon hours the owner drivers are required to perform pickups. These are advised by means of a run sheet displayed on the portable device and by ad hoc requests relayed on the portable device. Pickups are generally concluded by the late afternoon and the owner driver returns to the depot to off load the freight.
- 37.7. At the completion of the days work the owner driver provides the portable device and all paperwork (PUD sheets and consignment notes) to the company.
38. Toll does not guarantee owner drivers a particular volume of work. Owner drivers are required to be available 48 weeks of the year. However if they are unavailable to provide services for any reason they must give Toll advance notice and seek permission for extended leave.
39. Owner drivers are required to invoice Toll. Owner drivers' earnings are remitted weekly.

#### **Toll contract offers and terms**

40. Toll does not tender for contracts. Rather, the company offers contracts to operators based on reputation and experience.

#### **Remuneration**

41. Remuneration for Toll's owner drivers is based on an hourly rate that is designed to compensate drivers for their labour and the fixed and variable costs associated with the running and maintenance of their vehicle.
42. Owner drivers are generally engaged to provide their services Monday to Friday for a minimum of 8 hours a day. The time engaged need not be continuous.

## **Competitors**

43. Toll has a number of major competitors in Queensland. A list of these competitors is set out at paragraph 18.
44. Toll's major competitors generally have written contractual arrangements with contracted owner drivers.

## **The Proposed Collective Bargaining Process**

45. If the authorisation is granted, the Applicant proposes that the following process be adopted for engaging in collective bargaining in relation to the 2014 Brisbane Agreement.
  - 45.1. all owner drivers contracted to Toll at the date of the authorisation and who would be covered by the 2014 Brisbane Agreement will be offered the opportunity to participate in the collective bargaining process;
  - 45.2. those owner drivers that elect to participate will form the bargaining group;
  - 45.3. the bargaining group will elect a steering committee to oversee the negotiations;
  - 45.4. the steering committee will seek to negotiate with representatives of Toll
46. Any outcome from the proposed negotiations will form a standard contract. Each owner driver will then be able to accept the terms of that contract as the basis for his or her contract with Toll, or to otherwise negotiate terms.
47. If interim authorisation in relation to the 2014 Brisbane Agreement is granted, the Applicant will not seek to conclude terms prior to the application for authorisation being finally determined.

## **The role of the bargaining group**

48. The bargaining group will be responsible for developing proposals for the steering committee to advance on behalf of the bargaining group. The bargaining group will:
  - 48.1. generate proposals;
  - 48.2. respond to counter-proposals from the counterparty;
  - 48.3. approve final proposals.
49. Participation in the bargaining group will be voluntary. Participants will be free to join the bargaining group at any time during the negotiations, and may cease to participate in the bargaining group at any time.
50. New owner drivers accepting work from Toll will be free to join the bargaining group throughout the course of the negotiations.
51. Similarly, members of the bargaining group will be free to accept or reject the final terms of any document resulting from the collective bargaining terms.

52. Members of the bargaining group will make decisions collectively wherever possible, but by majority decision in the event consensus cannot be reached.

### **The role of the Applicant**

53. The Applicant will provide administrative and secretarial support to the bargaining group.
54. Officers of the Applicant will attend negotiations and may speak on behalf of the group.
55. Officers of the Applicant may assist with drafting proposals, amending proposals, providing evidence in support of proposals made by the bargaining group and facilitating negotiations through the provision of secretariat services.

### **Basis of the Application**

56. This Application is made pursuant to section 88(1) of the Competition and Consumer Act 2010, which provides:

*Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant an authorisation to the corporation:*

- a. *to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision or would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45; or*
- b. *to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision or has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45;*

57. The Commission must not grant the application unless satisfied 'in all the circumstances' that the proposed collective bargaining:

*'...would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result'.*

58. As such, the Commission must, taking into account all the circumstances, weigh the likely benefit to the public against the detriment to the public constituted by any lessening of competition.

59. The Commission has held public benefit to mean:

*'...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>2</sup>

60. Similarly, the Commission has held public detriment to mean:

*'... any impairment to the community generally, any harm or damage to the aim pursued by the society including as one of its principle elements the achievement of the goal of economic efficiency.'*<sup>3</sup>

## **The Counterfactual**

61. The Applicant understands that the ACCC, in assessing applications, has regard to what is described as the counterfactual. That counterfactual is arrived at by comparing the public benefit and anti-competitive detriment resulting from the proposed arrangement against the likely situation that will result if the arrangement is not authorised (the 'with or without test').<sup>4</sup>

62. In the present case, the Applicant contends that each of the owner drivers proposing to participate in the collective bargaining has or may express an intention to pursue different contractual arrangements with Toll regardless of the outcome of this Application.

63. As such, the Applicant submits that negotiations with Toll on an individual owner-driver basis are likely to continue in the absence of authorisation.

The Applicant submits that the likely counterfactual is that owner drivers would engage in individual negotiations with Toll. Such individual negotiations would likely result in:

63.1. owner drivers having limited capacity to influence the negotiating outcome;

63.2. the fixing of standard contractual terms by the company;

63.3. the maintenance of bargaining inequality between the owner drivers and Toll.

## **Public Benefit**

64. The Applicant submits there is substantial public benefit in granting the proposed authorisation, on the following bases:

64.1. redress of the substantial imbalance between Toll and owner drivers in the negotiating process;

64.2. transaction cost savings from conducting a single negotiation process;

64.3. maintenance of appropriate minimum standards for the affected owner-drivers; and

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<sup>2</sup> *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR 41-357 at 42677.

<sup>3</sup> *ibid* at 42683.

<sup>4</sup> See for example, ACCC 'Determination – Applications for Authorisation A90964 and A09065', 31 August 2005.

- 64.4. maintenance of written terms of engagement for contractors and resultant greater certainty and enforceability.

### **Redress of bargaining power imbalance**

65. The Applicant submits that there is a substantial imbalance in bargaining power between the owner drivers and Toll. The Applicant submits that this imbalance is driven by the following factors:
  - 65.1. number of owner drivers in the market;
  - 65.2. the exclusive nature of the contracts;
  - 65.3. cost and risk of changing courier company; and
  - 65.4. the lack of negotiating experience of the affected owner drivers.
66. Owner drivers are adverse to changing companies because of the risk associated with having their vehicle out of service and the prospect of failing to secure an alternative contract.
67. Moreover, there is presently within the industry greater supply of owner drivers than demand. As such, owner drivers seeking to negotiate terms are at risk of losing the offer of supply in favour of owner drivers who are prepared to accept the contract on the terms offered.
68. The risks associated with changing companies present a significant barrier to movement within the market and entrench the strong bargaining position of Toll (and other suppliers).
69. The lack of negotiating experience and resources of the affected owner drivers as compared to the resources and experience of Toll further affects that imbalance.
70. In light of the above, it is clear that owner drivers are at a substantial disadvantage in terms of bargaining power.
71. Participation in collective bargaining will streamline the efficiency of the negotiations and produce cost savings to both parties through such efficiencies.
72. The Applicant contends that the imbalance in negotiating power is contrary to the public interest in that it depresses remuneration and conditions in the sector.
73. As such, the Applicant contends that redressing the imbalance promotes the public interest by streamlining negotiations (in that the negotiating environment will be levelled out and more efficient) and by ensuring an appropriate balance between the interests of Toll and the interests of the owner drivers.

### **Transaction cost savings**

74. Each of the affected owner-driver members of the Applicant has or may indicate an intention to try to negotiate new contract terms with Toll.

75. If all affected owner drivers seek to negotiate new contractual terms with Toll there will be a necessary duplication of time and resources. This undoubtedly leads to transactional cost increases when compared to the costs associated with collective bargaining.
76. The ACCC has previously accepted that where transaction cost savings (such as legal and accounting fees) can be passed on to consumers as savings, or which can offset costs that would otherwise be associated with individual negotiations (and thereby prevent increased costs to consumers) such savings can constitute a public benefit.<sup>5</sup>
77. In light of the counterfactual contended for above, the Applicant submits that all parties to the negotiation process are likely to benefit from transaction cost savings associated with the collective bargaining process in the form of legal fees, accounting fees and downtime associated with the physical process of negotiating (i.e., a reduction in the productive use of capital).
78. The Applicant also contends that it is likely that such cost savings will be passed on to consumers as a natural result of competitive pressure within the courier industry. As such, there is a public benefit in the negotiations being conducted collectively.

#### **Maintenance of appropriate minimum standards for contractors**

79. The Applicant contends that it is in the public interest for contractors to have access to appropriate minimum standards.
80. The importance of fair terms and conditions for workers, including contractors, is clearly set out in the terms of other Commonwealth legislation, including the *Fair Work Act 2009* (Cth) ('the FW Act') and the recently enacted *Road Safety Remuneration Act 2012*. The objects of the *Road Safety Remuneration Act 2012* are as follows:

*The object of this Act is to promote safety and fairness in the road transport industry by doing the following:*

- (a) ensuring that road transport drivers do not have remuneration-related incentives to work in an unsafe manner;*
- (b) removing remuneration-related incentives, pressures and practices that contribute to unsafe work practices;*
- (c) ensuring that road transport drivers are paid for their work, including loading or unloading their vehicles or waiting for someone else to load or unload their vehicles;*
- (d) developing and applying reasonable and enforceable standards throughout the road transport industry supply chain to ensure the safety of road transport drivers;*
- (e) ensuring that hirers of road transport drivers and participants in the supply chain take responsibility for implementing and maintaining those standards;*
- (f) facilitating access to dispute resolution procedures relating to remuneration and related conditions for road transport drivers.*

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<sup>5</sup> ACCC Determination 'Applications for Authorisation No A90964 & A90965' 31 August 2005.

81. Allowing the affected owner drivers to collectively bargain will create a fairer negotiating environment, promoting balance between the interests of Toll and the interests of the owner drivers.
82. The Applicant contends that the legislative scheme established by the FW Act and the Road Safety Remuneration Act 2012 clearly evidences a public policy position that supports the establishment of appropriate minimum standards for contractors.
83. The Road Safety Remuneration Act establishes a regime that allows collective bargaining for owner drivers in circumstances where a Road Safety Remuneration Order RSRO is in effect (see section 34). At the time of this Application no RSRO relating to the owner drivers or owner drivers in the courier industry was in effect.

#### **Maintenance of written contractual terms**

84. The Applicant submits that there is public benefit in contractors having written contractual terms.
85. The Applicant submits that written contractual terms increase the degree of certainty between the parties as to the terms and conditions of their contracts. In turn, that is likely to reduce the potential for litigation in respect of owner driver contracts.
86. The Applicant submits that any reduction in the potential for litigation is in the public interest to the extent that it reduces the time and public expense associated with litigation.

#### **Public Detriment**

87. The Applicant submits that three areas of public detriment concern might arise from the application, being:
  - 87.1. lessening of competition between members of the bargaining group;
  - 87.2. restrictions on entry into the market;
  - 87.3. impact on Toll's competitors.

#### **Lessening of competition**

88. The nature of the authorisation sought by the Applicant is that competition between owner drivers will be reduced.
89. The effect of any authorisation will be that owner drivers will collectively bargain for standard terms and conditions where they would otherwise compete against each other on the basis of the terms each individual owner driver is prepared to accept.
90. That arrangement necessarily involves a lessening of competition as between the owner drivers.

91. The ACCC has identified four factors that, if present in any particular case, will reduce the anti-competitive effect of collective bargaining arrangements:
- 91.1. that the current level of competition, between members of the bargaining group, with respect to those terms on which they are seeking to negotiate, is low;
  - 91.2. that participation in the arrangement is voluntary;
  - 91.3. restrictions on the coverage and composition of the bargaining group;
  - 91.4. that no boycott activity is involved.<sup>6</sup>
92. In the present case, the Applicant submits that:
- 92.1. the current level of competition between members of the proposed bargaining group is low. In light of the ease of market entry, imbalance between number of drivers and available work and lack of public tendering processes, owner drivers accept work on a 'take it or leave it' basis. That there is little, if any, competition between the owner drivers proposed to be covered by the arrangement.
  - 92.2. the arrangement is voluntary, and will remain so.
  - 92.3. the authorisation is limited to owner drivers contracted to Toll in Queensland at its Brisbane Airport depot. At the date of this application, there are about 80 such owner drivers;<sup>7</sup>
  - 92.4. there is no boycott activity proposed.

### **Restrictions on entry into the market**

93. The negotiation of standard contracts may have the effect of increasing barriers to entry if the effect of such contracts was that owner drivers were able to lock Toll into long term contracts, thereby reducing the capacity for new market entrants to secure work.<sup>8</sup>
94. However, the Applicant contends that the arrangements affect only one of the larger companies operating within a specific sector (air freight) of the courier market in Queensland. As such, any increase to the barriers to entry is unlikely to affect entry to the market as a whole.

### **Impact on Toll's competitors**

95. The authorisation is limited to owner drivers contracted to Toll in Queensland from its Brisbane depot. At the date of this application, there are about 80 such owner drivers.<sup>9</sup>

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<sup>6</sup> ACCC 'Determination – Applications for Authorisation A90964 and A09065', 31 August 2005.7.12

<sup>7</sup> With the addition of any owner drivers engaged by Toll after the date of this application who elect to join the bargaining group.

<sup>8</sup> ACCC Determination 'Applications for Authorisation No A90964 & A90965' 31 August 2005.



96. Each owner driver is exclusively contracted by Toll.
97. Toll's major competitors are unlikely to be affected by the proposed collective bargaining. Each of Toll's major competitors has in place standard contractual terms covering the subject matter proposed to be covered in the collective bargaining.

#### **Conclusion - Detriment**

98. On the basis of the above, the Applicant submits that the anti-competitive effect of the proposed arrangement is negligible.

#### **Weighing of public benefit against public detriment**

99. The Applicant submits that the potential public detriment is minimal. On that basis, the Applicant contends that the public benefit threshold for approval of the proposed arrangement is low.
100. The Applicant contends that the minimal anti-competitive effects identified above are outweighed by:
  - 100.1. the voluntary nature of the arrangement;
  - 100.2. the lack of negative impact on Toll's competitors;
  - 100.3. the lack of competition between the affected owner-drivers;
  - 100.4. the minimal impact on market entry;
  - 100.5. the benefit of reduced transaction cost; and
  - 100.6. the public benefit of establishing appropriate minimum standards for owner drivers.
101. The public benefits flowing from the authorisation outweigh the minimal impact the proposal will have on competition.
102. The Applicant contends that the application is one that is appropriate for authorisation under the Act.

#### **Transport Workers Union of Australia**

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<sup>9</sup> With the addition of any owner drivers engaged by Toll after the date of this application who elect to join the bargaining group.



**Australian  
Competition &  
Consumer  
Commission**

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17 April 2014

Peter Biagini  
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By email: [Adam.Carter@twuqld.asn.au](mailto:Adam.Carter@twuqld.asn.au); [info@twuqld.asn.au](mailto:info@twuqld.asn.au)

Dear Mr Biagini

### **Fee waiver request – Transport Workers' Union of Australia Queensland Branch**

I refer to your letter of 16 April 2014 to the Australian Competition and Consumer Commission (ACCC) in respect of a proposed application for authorisation to engage in collective bargaining on behalf of a group of owner drivers.

In your letter you have requested that the ACCC grant a fee waiver in respect of the proposed arrangements.

In support of your request, you submitted, among other things, that

- the Transport Workers' Union Queensland Branch (TWU) is a not-for-profit organisation
- Paying the fee would be a significant impost on it
- To many of the owner drivers, contribution to the fee would be a significant expense

Having regard to the above, as a person authorised to assess fee waiver requests for and on behalf of the ACCC, I wish to advise that the application fee to be paid by the TWU has been waived in full. No application fee will apply.

This decision will remain in force for three months, expiring on 17 July 2014.

A copy of this letter should accompany the application for authorisation. The cover letter to the application should mention that a letter from the ACCC regarding a fee waiver is enclosed with the application. The application together with this letter will be placed on the public register at that time.

If the application for authorisation is lodged after the expiry date, a full application fee of \$7500 will apply, unless a subsequent request for a fee waiver is made and ultimately approved by the ACCC.

Should you have any questions, please contact John Rouw on (03) 9290 1402.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Richard Chadwick', with a long horizontal stroke extending to the right.

Dr Richard Chadwick  
General Manager  
Adjudication Branch