

# Transport Workers' Union of Australia

## SA/NT Branch



24 September 2015

ACCC Adelaide Office  
GPO Box 922  
Adelaide SA 5001

Email: N/A



To whom it concerns

### Re: Application for Authorisation

The Transport Workers Union of Australia (TWU) SA/NT Branch acknowledges receipt of correspondence from the ACCC dated 14 September 2015 regarding our application for fee waiver.

In relation to the subject, please see attached Form B, Application for Authorisation.

Please contact Mr Edward Lawrie (TWU SA/NT Branch Industrial Lawyer) on 08 8346 4177 or at [edward.lawrie@twusant.com.au](mailto:edward.lawrie@twusant.com.au) if you require any further information in relation to this waiver application or in relation to the substantive application which will be filed shortly.

Yours Sincerely

**Ray Wyatt**  
Branch Secretary  
Transport Workers' Union of Australia  
South Australia and Northern Territory Branch



**Australian  
Competition &  
Consumer  
Commission**

Our Ref: C2015/31  
Contact Officer: Tanya Hobbs  
Contact Phone: 02 6243 1029

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Canberra ACT 2601  
23 Marcus Clarke Street  
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14 September 2015

Mr Ray Wyatt  
Branch Secretary  
Transport Workers' Union of Australia  
South Australia and Northern Territory Branch

By email: [edward.lawrie@twusant.com.au](mailto:edward.lawrie@twusant.com.au)

Dear Mr Wyatt

### **Fee waiver request**

I refer to your letter of 7 September 2015 to the Australian Competition and Consumer Commission (ACCC) in respect of a proposed application for authorisation. In your letter you have requested that the ACCC grant a fee waiver in respect of the proposed arrangements.

In particular, you have requested that the fee to be paid in relation to an application for authorisation to be lodged by the Transport Workers' Union of Australia, South Australia and Northern Territory Branch (TWU SA/NT) be waived in whole.

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

- the TWU SA/NT is a not-for-profit organisation, and
- the proposed application is to be lodged on behalf of a number of parties and for each of these parties to make a contribution towards the fee would constitute 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 TWU SA/NT has been waived in whole. No application fee will apply with respect to the application for authorisation to be lodged by TWU SA/NT.

This decision will remain in force for a period of three months. The three month period will expire on 11 December 2015.

A copy of this letter should accompany the application for authorisation to be lodged by TWU SA/NT. 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 by TWU SA/NT after 11 December 2015, 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 queries in relation to this matter, please do not hesitate to contact Tanya Hobbs on 02 6243 1029.

Yours sincerely

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

Dr Richard Chadwick  
General Manager  
Adjudication

## Form B

Commonwealth of Australia

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

RECEIVED

25 SEP 2015

AUST COMPETITION & CONSUMER  
- ADELAIDE

### 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.

*(Strike out whichever is not applicable)*

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

#### 1. Applicant

(a) Name of Applicant:

A91514

*Transport Workers Union of Australia SA/NT Branch*

(b) Short description of business carried on by applicant:

*(Refer to direction 3)*

*The Applicant is a Trade Union as registered pursuant to the Fair Work (Registered Organisations) Act 2009 (Cth)*

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

*25 Chief St Brompton SA 5007*

#### 2. Contract, arrangement or understanding

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

*See attached submissions.*

- (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 submissions.*

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

*See attached submissions.*

- (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 submissions.*

### **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 submissions.*

- (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.*

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

- (a) Arguments in support of authorisation:

*See attached submissions.*

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

*See attached submissions.*

### **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):

*(Refer to direction 7)*

*See attached submissions.*

### **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:

*(Refer to direction 8)*

*See attached submissions.*

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

*See attached submissions.*

**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:

Edward Lawrie

Industrial Lawyer for the TWU SA/NT Branch

Dated: 24 September 2015

Signed by/on behalf of the applicant



Edward Flint Lawrie  
Industrial Lawyer



# SUBMISSIONS IN SUPPORT OF APPLICATION FOR AUTHORISATION

## The Parties

### The Applicant

1. The Applicant is an employee organisation known as the Transport Workers' Union of Australia SA/NT Branch as 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 South Australia from the various Toll Priority depot's (Adelaide CBD and Adelaide 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 72 owner driver members engaged by Toll who will be covered by the proposed contract, arrangement or understanding as authorised.
9. The proposed contract arrangement or understanding will cover owner drivers working from and within metropolitan Adelaide under a proposed "2015 SA Agreement". The 2015 SA Agreement will cover a total of about 92 owner drivers. If required, 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 the Counterparty.
11. Since March 2014 the Applicant and its members have met with representatives of the Counter Party with respect to its (the Applicant's) intention to make this Application on behalf of the members.

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

## **The proposed authorisation**

### **The substantive authorisation**

12. The Applicant seeks authorisation for owner driver members contracted to the Counterparty to engage in collective bargaining with the Counterparty, with the assistance of the Applicant, for the purpose of establishing new contractual arrangements for the supply of freight courier transport services.
13. The Applicant proposes that the authorisation be given for a 5 year period.
14. The authorisation is limited in scope to:
  - 14.1. Toll's operations in South Australia; and
  - 14.2. owner drivers who are, or who will be, contracted to the Counter Party to supply courier transport services to Toll Transport Pty Ltd trading as Toll Priority from the various South Australian Toll Priority depot's.
15. The subject matter of the proposed collective bargaining includes (but is not limited to):
  - 15.1. carriage rates (including the labour component thereof);
  - 15.2. a mechanism for those rates to increase from year to year;
  - 15.3. penalties for services provided outside standard hours;
  - 15.4. equipment, including painting and badging of vehicles.
  - 15.5. Classification's of work;
  - 15.6. Supply and fitting of Communications expense if/when required;
  - 15.7. Right to assignment of work;
  - 15.8. Supply of work uniforms;
  - 15.9. Dispute settlement procedure.

### **The interim authorisation**

16. The Applicant also seeks interim authorisation to commence collective bargaining while this Application is assessed.
17. 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**

18. The Counterparty is a supplier of 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>.
19. The freight sector of the courier industry has a relatively small number of participants. They include Toll, DHL, TNT Express, Fed Ex, UPS and Startrack.
20. These participants engage either or both independent owner drivers and employed drivers.



21. Toll's delivery fleet consists of mainly owner drivers. There are approximately 35 owner drivers. The owner drivers operate their businesses through corporate entities or as sole traders or partnerships.
22. 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**

23. Owner drivers provide transport services to the Counterparty using mainly light commercial vehicles (vans). This includes document exchange permanent, overnight freight and permanent recurring services (DX).
24. The cost of purchasing a van varies depending on age and size. Nonetheless, there is a requirement for new drivers to have a vehicle that is less than 12 months old upon commencement of work with Toll Priority. A new van may cost up to \$60,000.00.

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

25. 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:
  - 25.1. an appropriate drivers' license (car licence);
  - 25.2. sufficient capital or finance arrangements to purchase (or lease) a van; and
  - 25.3. a basic business structure, including an ABN.
26. There are no other regulatory barriers for entry to the market. However, the Counterparty and its clients require certain checks including police checks.
27. Owner drivers own a single van. There are no drivers who have a fleet.
28. At the present time, there is a greater supply of owner drivers than demand for their services.
29. Owner drivers are offered terms by the Counterparty. 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.
30. An engagement is generally one of exclusive contract. Owner drivers are generally not free to supply services to alternative courier companies while contracted.
31. Some courier companies require that owner drivers have their van painted in company colours or logos. The Counterparty requires owner drivers to have their vehicles painted in a distinctive green colour and marked with a Toll logo. This is paid for by Toll Priority.
32. These practices are a mechanism by which suppliers, including the Counterparty, 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.
33. 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

34. 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.

35. The Counterparty engages mostly owner-drivers. There are approximately 90 owner drivers contracted to the Counterparty within South Australia.

36. Owner drivers contracted to the Counterparty supply a van and their labour.

37. The Counterparty offers owner drivers the opportunity to provide courier services for the Counterparty. The rates are set out in a rates schedule annexed to each contract.

38. The Counterparty's daily operation is as follows:

- 38.1. owner drivers have set "runs" which are in a distinct area. A run can cover a number of suburbs.
- 38.2. Owner drivers arrive at the depot at 6.30am and collect the freight they are required to deliver from the dock area.
- 38.3. The freight is sorted, scanned on a portable device, and then loaded into the van.
- 38.4. 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.
- 38.5. Most deliveries have been made by the mid part of the day.
- 38.6. 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 and sort the freight.

- 38.7. At the completion of the day's work the owner driver provides the portable device and all paperwork (PUD sheets and consignment notes) to the Counterparty.
39. 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 the Counterparty advance notice and seek permission for extended leave.
40. Owner drivers are required to invoice the Counterparty.
41. Owner drivers' earnings are remitted weekly.

### **The Counterpart's contract offers and terms**

42. The Counterparty does not tender for contracts.
43. Rather, the company offers contracts to operators based on reputation and experience.

### **Remuneration**

44. Remuneration for 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.
45. Owner drivers are generally engaged to provide their services Monday to Friday for a minimum of 9-10 hours a day. The time engaged need not be continuous.

### **Competitors**

46. The Counterparty has a number of major competitors in SA. A list of these competitors is set out at paragraph 18.
47. The Counterparty's major competitors generally have written contractual arrangements with contracted owner drivers.

### **The Proposed Collective Bargaining Process**

48. If the authorisation is granted, the Applicant proposes that the following process be adopted for engaging in collective bargaining in relation to the 2015 Agreement.
- 48.1. all owner drivers contracted to the Counterparty at the date of the authorisation and who would be covered by the 2015 Agreement will be offered the opportunity to participate in the collective bargaining process;
- 48.2. those owner drivers that elect to participate will form the bargaining group;
- 48.3. the bargaining group will elect a steering committee to oversee the negotiations;
- 48.4. the steering committee will seek to negotiate with representatives of the Counterparty.
49. Any outcome from the proposed negotiations will form a standard contract.

50. Each owner driver will then be able to accept the terms of that contract as the basis for his or her contract with the Counterparty, or to otherwise negotiate terms.
51. If the interim authorisation in relation to the 2015 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**

52. 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:
- 52.1. generate proposals based on owner driver discussions;
  - 52.2. compile a log of claims consisting of the generated proposals;
  - 52.3. respond to counter-proposals from the counterparty;
  - 52.4. approve final proposals.
53. Participation in the bargaining group will be voluntary.
54. 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.
55. New owner drivers accepting work from the Counterparty will be free to join the bargaining group throughout the course of the negotiations.
56. 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.
57. 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**

58. The Applicant will provide administrative and secretarial support to the bargaining group.
59. Officers of the Applicant will attend negotiations and may speak on behalf of the group.
60. 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**

61. 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;*

62. 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'.*

63. 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.

64. 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>*

65. 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**

66. 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>

67. 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 the Counterparty regardless of the outcome of this Application.

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

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

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

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

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

<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.

## **Public Benefit**

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

- 69.1. Amending of the substantial imbalance between the Counterparty and owner drivers in the negotiating process;
- 69.2. Transaction cost savings from conducting a single negotiation process;
- 69.3. Maintenance of appropriate minimum standards for the affected owner-drivers;
- 69.4. Maintenance of written terms of engagement for contractors and resultant greater certainty and enforceability.
- 69.5. Increased safety to the travelling public by ensuring that quality owner drivers remain engaged by the Counterparty.

## **Redress of bargaining power imbalance**

70. The Applicant submits that there is a substantial imbalance in bargaining power between the owner drivers and the Counterparty. The Applicant submits that this imbalance is driven by the following factors:

- 70.1. The size of the Counterparty;
- 70.2. The vast resources available to the Counterparty;
- 70.3. Number of owner drivers in the market;
- 70.4. The ease of entering the owner driver market;
- 70.5. The exclusive nature of the contracts;
- 70.6. Cost and risk of changing courier company; and
- 70.7. The lack of negotiating experience of the affected owner drivers.

71. Owner drivers are adverse to changing companies because

- 71.1. Of the risk associated with having their vehicle out of service;
- 71.2. The cost associated with rebranding vehicles; and
- 71.3. The prospect of failing to secure an alternative contract.

72. Moreover, there is presently within the industry greater supply of owner drivers than demand.

73. 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.

74. The risks associated with changing companies present a significant barrier to movement within the market and entrench the strong bargaining position of the Counterparty.

75. The lack of negotiating experience and resources of the affected owner drivers as compared to the resources and experience of Counterparty further compounds the imbalance.

76. Based on the above, it is evident that owner drivers are at a significant disadvantage in terms of bargaining power when negotiating contractual terms on an individual basis with the Counterparty.
77. An authorisation to collectively bargain will:
- 77.1. Streamline the efficiency of the negotiations between owner drivers and the Counterparty; and
  - 77.2. Produce cost savings to both owner drivers and the Counterparty through such efficiencies.
78. The Applicant submits that the imbalance in bargaining power is contrary to the public interest as the resultant imbalance negatively depresses remuneration and conditions at work for owner drivers. Furthermore, the depressed rate of remuneration would negatively affect job security and the ability of the profession to attract (and retain) the safest drivers.
79. As such, the Applicant contends that redressing the imbalance promotes the public interest by increasing safety on our roads, streamlining negotiations (in that the negotiating environment will be levelled out and more efficient) and by ensuring an appropriate balance between the interests of the Counterparty and the interests of the owner drivers.

#### **Transaction cost savings**

80. By having streamlined negotiations, there are significant savings with respect to time and resources.
81. In the absence of an authorisation for streamlined negotiations, each owner driver of the Counterparty would need to engage in individual negotiations with Toll.
82. If all owner drivers seek to negotiate new contractual terms with the Counterparty there will be a necessary and significant duplication of time and resources.
83. This undoubtedly leads to increased transactional costs for the Counterparty and decreased productivity for both the owner drivers and Toll.
84. Inherently, individual negotiations will incur significantly more cost to the Counterparty and the industry when compared to collective bargaining.
85. 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>
86. In light of the counterfactual contended for above, the Applicant submits that all parties to the negotiation process will 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).
87. 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.

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

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

88. The Applicant contends that it is in the public interest for contractors to have access to appropriate minimum standards.
89. 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 Road Safety Remuneration Act 2012.
90. 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.*

91. Authorising owner drivers to collectively negotiate will create a fairer bargaining environment by promoting balance between the interests of the Counterparty and the interests of the owner drivers.
92. The Applicant contends that the legislative scheme established by the Fair Work Act 2009 (Cth) and the Road Safety Remuneration Act 2012 (Cth) clearly articulates a public policy position that supports the establishment of appropriate minimum standards for contractors.
93. The Road Safety Remuneration Act establishes a regime that recognises the connection between safety and remuneration and allows collective bargaining for owner drivers in circumstances where a Road Safety Remuneration Order RSRO is in effect (see section 34).
94. 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**

95. The Applicant submits that there is public benefit in contractors having written contractual terms.
96. 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 promote job security, attract the best drivers to the profession and reduce the potential for litigation in respect of owner driver contracts.



97. 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**

98. The Applicant submits that there is potential for the lessening of competition between members of the bargaining group.

99. The nature of the authorisation sought by the Applicant is that competition between owner drivers will be reduced.

100. 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.

101. That arrangement inherently involves a lessening of competition between the owner drivers.

102. The ACCC has identified four factors that, if present in any particular case, will reduce the anti-competitive effect of collective bargaining arrangements:

102.1. 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;

102.2. that participation in the arrangement is voluntary;

102.3. restrictions on the coverage and composition of the bargaining group;

102.4. that no boycott activity is involved.<sup>6</sup>

103. In the present case, the Applicant submits that:

103.1. The current level of competition between members of the proposed bargaining group is low.

The arrangement is voluntary, and will remain so.

103.2. The authorisation is limited to owner drivers contracted to Toll in South Australia in the Metropolitan Adelaide area. At the date of this application, there are about 35 such owner drivers;<sup>7</sup>

103.3. there is no boycott activity proposed.

## **Conclusion - Detriment**

104. 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**

105. The Applicant submits that the potential public detriment is minimal at worst.

106. The Applicant submits that any potential public detriment is greatly outweighed by the potential benefits of an authorisation to bargain collectively. Notwithstanding this, the Applicant submits that the potential minimal anti-competitive effects identified above are mitigated and offset by:

<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.

- 106.1. the voluntary nature of the arrangement;
  - 106.2. the lack of negative impact on Toll's competitors;
  - 106.3. the lack of current competition between the affected owner-drivers;
  - 106.4. the minimal impact on market entry;
  - 106.5. the benefit of reduced transaction cost;
  - 106.6. the benefit of increased certainty and job security;
  - 106.7. the public benefit of establishing appropriate minimum standards for owner drivers; and
  - 106.8. the public benefit of increased safety for the travelling public.
107. The public benefits flowing from the authorisation outweigh the minimal impact the proposal will have on competition.
108. The Applicant contends that the application is one that is appropriate for authorisation under the Act.

**Transport Workers Union of Australia**