

Form G

Commonwealth of Australia
Competition and Consumer Act 2010 — subsection 93 (1)
NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) **Name of person giving notice:**
(Refer to direction 2)

N98278 Hitachi Construction Machinery (Australia) Pty Ltd ACN 000 080 179
(Hitachi)

- (b) **Short description of business carried on by that person:**
(Refer to direction 3)

Hitachi is an Australian subsidiary of a Japanese industrial conglomerate. For the purposes of this notification, Hitachi is engaged in the business of manufacturing, distributing, selling and servicing vehicles and machinery and related spare parts for the construction and mining industries, and is constructing a warehouse in Western Australia for that purpose.

Hitachi is also involved in joint ventures with other companies for the business activities described above. For the purposes of this notification, these comprise companies trading as Bell Equipment (**Bell**), John Deere and John Deere Construction Equipment (**John Deere**) both of which are involved in construction and engineering services.

- (c) **Address in Australia for service of documents on that person:**

c/o Tony Roccisano
McCullough Robertson Lawyers
Level 10,
66 Eagle Street,
Brisbane,
Queensland 4000

2. Notified arrangement

- (a) **Description of the goods or services in relation to the supply or acquisition of which this notice relates:**

Hitachi is constructing a new warehouse at lots 16 and 17 Allen Road, Forrestdale, W.A. It will initially include a branch workshop, office

building, warehouse and staff amenities building, and at a later stage a mining assembly building and manufacturing building will be added. To accomplish this, it needs to engage a construction contractor to construct these buildings. It has issued a Request for Tender (**RFT**) for this purpose and has concluded its negotiations with its preferred tenderer.

One of the conditions of the RFT and the related construction contract is that the successful tenderer must ensure that all mobile construction plant that the contractor uses at the site to carry out this construction work are branded Hitachi, Bell or John Deere.

Bell and John Deere are companies unrelated to Hitachi but each of them is party to a distribution agreement with Hitachi. Arguably such a relationship on one construction does not consequently require this notification to be made. However, Hitachi believes in a cautious approach and that to make this notification is the appropriate thing to do for the purposes of meeting its legal compliance obligations.

- (b) Description of the conduct or proposed conduct:

Background

See (a) above.

Notified conduct

See (a) above.

Hitachi has been very transparent in providing for this stipulation in the RFT and its draft contractual documentation. This express stipulation in the works' outsourcing arrangements is no different from an in-house self-supply by Hitachi, i.e., contracting with a contractor on the basis contemplated by the arrangements here is no different from Hitachi using such equipment in a self-supply situation, or outsourcing the operation of such equipment if owned by Hitachi, to perform the works and related contracts contemplated by the RFT.

It is arguable that it is only on a very strict and technical reading of sections 47(6) and 47(7) of the *Competition and Consumer Act 2010 (CCA)* (when read with a very broad interpretation of the definition of 'services' in section 4 of the CCA), that if Hitachi engages the contractors here on the condition that the contractor(s) also use the stipulated branded equipment related to Hitachi, then Hitachi is engaging in exclusive dealing.

While Hitachi does not consider that this is the correct view - Hitachi is the customer here and further considers the clear purpose of the relevant provisions is to prohibit the tying of separate products, rather than

prohibiting the use of designated equipment in a one-off sub-contract arrangement, which equipment the employer would use anyway on a self-supply – Hitachi is notifying the proposed conduct as the more cautious course of action.

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

(a) Class or classes of persons to which the conduct relates:
(Refer to direction 5)

BGC Construction Pty Ltd ACN 008 783 248 (**BGC**), the contractor who was ultimately engaged by Hitachi, and possibly some of that contractor’s subcontractors which it engages to assist it in the construction works. It is arguable that those tenderers who participated in the RFT were slightly affected but participated in the process voluntarily in the knowledge that the RFT contained such a stipulation.

(b) Number of those persons:

(i) At present time:

The tenderers who participated in the RFT are Spaceframe Buildings, Firm Construction, BGC, ADCO, Broad Construction, McLeish & Matthews. Two other tenderers withdrew from the tender for unrelated reasons.

The subcontractors that BGC is anticipated to engage, and who are expected to potentially be affected by this conduct are:

<u>Earthworks</u> RMA Civil Ltd AEG Ltd GMF Ltd
<u>Hydraulics</u> Sanwell Triple T
<u>Mechanical</u> B&E Fire Ltd
<u>Electrical</u> TES Ltd Lindquist Ltd
<u>Passenger Hoist</u> Southwell
<u>Fire</u> B&E Fire National Fire
<u>Steel</u> Fremantle Steel
<u>Louvres</u> Arcadia

(ii) Estimated within the next year:

(Refer to direction 6)

See 3(b)(i) immediately above.

(c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

See below:

- Spaceframe Buildings, 225 Queensport Road North, Murrarie QLD 4172
- Firm Construction, 181 York Street Subiaco, Western Australia 6008
- BGC, 20 Walters Drive, Osborne Park, WA 6017
- ADCO, Lvl 2/ 7 -9 West St, North Sydney, NSW 2060
- Broad Construction, 202 Pier Street, Perth WA 6000
- McLeish & Matthews, 94 Ewing Street, Welshpool, WA 6106
- RMA Engineers, 1/37 Boundary Street, South Brisbane QLD 4101
- AEG Ogden, AEG Ogden Asia Pacific Headquarters, GPO Box 1040, Brisbane Qld 4001
- GMF Contractors, 306 Victoria Road, Malaga WA 6090
- Sanwell, 35 Division St, Welshpool WA 6106
- Triple T Contract Pty Ltd, 105 Adams Rd, Mariginiup, 6065
- B&E Fire Protection and Mechanical Services, 70 Howe Street, Osborne Park WA 6017
- TES Electrical, 18 Hammond Road, Cockburn Central, WA 6164
- Lindquist Electrical Services, PO Box 21, Stebbing Rd, Maddington WA 6109
- Rechenburg, 2/36 Curzon St Tennyson, Brisbane, 4105
- Kones Lifts, 33 Abernethy Road Belmont , Perth WA 6104
- Southwell Lifts and Hoists, 36 Edward Street, Camden NSW 2570
- B&E Fire, 70 Howe Street, Osborne Park WA 6017
- National Fire Solutions, 12 Davison Street Maddington Perth WA 6109
- Freemantle Steel, 115 Prinsep Road, Jandakot WA 6164
- Arcadia Energy Australia, 235 Edward Street, Brisbane, QLD, 4000

4. Public benefit claims

(a) Arguments in support of notification:

(Refer to direction 7)

See 2(b) above.

The stipulated requirement in the RFT and related contracts reflect what would be the case in a self-supply by Hitachi and where the use of such equipment is necessary to execute the relevant works successfully. The sub-contractors are not customers in the traditional sense but more akin to suppliers with Hitachi being the customer. The arrangements are also like an outsourcing where the contractor is asked to work designated assets with its own personnel. Further, the use of the relevant John Deere and Bell plant and equipment removes any issues it has about the relevant plant and equipment to execute the works being fit for purpose or inefficient. It leads to greater efficiencies in terms of time and cost for Hitachi and helps to remove execution risk in the development and completion of the works for the benefit of the underlying business.

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

None in addition to the facts already described above.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) 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 8)

- (a) Hitachi considers that the relevant market for goods and services concerned notified conduct is the Western Australian market for sale of construction plant and equipment.

This is a very big market worth, in supply terms, A\$250m annually (Hitachi's own approximation). To the extent the notified conduct has any effect, it is truly de minimis.

- (b) In any event, there is no adverse effect on the market. In particular, the arrangements are akin to a self supply situation.

6. Public detriments

- (a) **Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:**

(Refer to direction 9)

See 5(b) above

There is no public detriment as a result of the notified conduct.

(b) Facts and evidence relevant to these detriments:

Hitachi does not believe there are any public detriments. It is, however, worth reiterating:

- (a) The stipulation in the RFT and related contracts is consistent with how Hitachi would perform the works on a self-supply.
- (b) Potential contractors were not compelled to bid into the RFT in the first place. They have bid in on the basis of the stipulation voluntarily. The same applies with regard to any sub-contractors.
- (c) Market economics are unaffected. The contractual stipulation was always a condition of the RFT. There is no market distortion.

7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:**

Tony Roccisano,
Special Counsel,
McCullough Robertson Lawyers,
Level 11,
66 Eagle Street
Brisbane,
QLD 4000
Phone (07) 3233 8962

Dated 21 May 2015

Signed by/on behalf of the applicant



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(Signature)

Tony Roccisano
(Full Name)

McCullough Robertson Lawyers
(Organisation)

Special Counsel
(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

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. If the notice is given 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 notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Competition and Consumer Act 2010* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.