



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation A91589

lodged by

the Transport Workers Union of Australia
SA/NT Branch

to

collective bargain on the
terms and conditions for the
supply of freight courier services
in Whyalla, South Australia

Date: 27 September 2017

Authorisation number: A91589

Commissioners:

Schaper
Court
Featherston

Summary

The ACCC proposes to grant authorisation for owner drivers who are contracted to Toll to collectively bargain with Toll, with assistance from the TWU, to establish a '2017 Toll Whyalla Agreement' for the supply of freight courier services from and within Whyalla, South Australia.

The ACCC proposes to grant authorisation for five years.

The ACCC granted interim authorisation on 3 August 2017 for the TWU to commence collective bargaining with Toll, which will remain in place until the ACCC's final determination comes into effect or until revoked by the ACCC.

The ACCC is seeking submissions on this draft determination before making its final decision.

The application for authorisation

1. On 27 June 2017, the Transport Workers Union of Australia SA/NT Branch (the **TWU**) lodged application for authorisation A91589 with the ACCC. The TWU seeks authorisation for its owner driver members to collectively bargain with Toll Transport Pty Ltd (**Toll**) regarding the supply of freight courier services from and within Whyalla, South Australia for a period of five years.
2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the **Act**).¹ In this instance, the TWU is seeking authorisation for the proposed collective bargaining conduct because it may involve a cartel provision or a provision that may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
3. The TWU also requested interim authorisation to enable it to commence collective bargaining with Toll while the ACCC is considering the substantive application. The ACCC granted interim authorisation on 3 August 2017.² Interim authorisation does not extend to the TWU and Toll finalising any agreements before the ACCC makes a decision on the substantive application.

The conduct

4. The TWU seeks authorisation for its owner driver members who are contracted to Toll to collectively bargain with Toll, with assistance from the TWU, to establish a '2017 Toll Whyalla Agreement' for the supply of freight courier services from and within Whyalla, South Australia.

¹ The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation, the ACCC must first issue a draft determination. Detailed information about the authorisation process is available in the ACCC's [Authorisation Guidelines](#).

² For further information see below paragraphs 60 to 62 and the ACCC's interim authorisation decision dated 3 August 2017, which is available on the ACCC's [authorisations public register](#).

5. In particular, the TWU seeks to collectively bargain with Toll on terms and conditions such as:³
 - a. carriage rates (including the labour component thereof)
 - b. a mechanism for those rates to increase from year to year
 - c. penalties for services provided outside standard hours
 - d. equipment, including painting and badging of vehicles
 - e. classification of work
 - f. supply and fitting of communications equipment
 - g. right to assignment of work
 - h. supply of work uniforms, and
 - i. dispute settlement procedure.
6. The TWU proposes the following collective bargaining process:⁴
 - a. The TWU will invite all owner drivers currently contracted to Toll, including any future owner drivers who become contracted to Toll, to join the bargaining group, including drivers who are not members of the TWU. Participation in the bargaining group will not require TWU membership.
 - b. The bargaining group will elect a single representative. The bargaining group will also generate proposals for the representative to discuss and advance with Toll representatives.
 - c. The TWU will provide administrative and secretarial support to the bargaining group by attending negotiations and may speak on behalf of the group as well as assist with drafting proposals.
 - d. Any outcome from the collective bargaining will form a standard form '2017 Toll Whyalla Agreement'. Each owner driver will then be able to accept this standard form contract as the basis for his or her contract with Toll or to otherwise negotiate terms.
7. The bargaining group will make decisions collectively (wherever possible) or by majority decision.⁵
8. Participation in the collective bargaining group will be voluntary and owner drivers will be free to join or leave the bargaining group at any time during the negotiations.⁶

³ Submission from the TWU received on 27 June 2017, para 15.

⁴ Submission from the TWU received on 27 June 2017, paras 54 to 56, 58, and 64 to 66.

⁵ Submission from the TWU received on 27 June 2017, para 63.

⁶ Submission from the TWU received on 27 June 2017, paras 59 to 60.

Members of the bargaining group will also be free to accept or reject any final contract terms resulting from the collective bargaining with Toll.⁷

9. The TWU submits that the proposed collective bargaining conduct is necessary to address the owner drivers' significant disadvantage in negotiations with Toll due to factors such as Toll's size and vast resources, the owner drivers' lack of negotiating experience, the exclusive nature of their contracts with Toll, and the ease of entry in the owner driver market.⁸ The TWU also submits that significant transaction cost savings are likely to arise from the proposed conduct.⁹

Background

The applicant

10. The TWU is an employee organisation registered as a trade union under the *Fair Work (Registered Organisations) Act 2009* (Cth).¹⁰ The TWU has around 6,000 members in South Australia and the Northern Territory, including owner drivers across a range of industries.¹¹

The owner drivers

11. The application for authorisation is made on behalf of owner drivers who are contracted to provide courier 'pick-up and deliver' transport services to Toll from and within Whyalla, South Australia.¹²
12. Owner drivers own a single vehicle and drive it to deliver freight for logistics companies such as Toll.¹³ The TWU submits that owner drivers contracted to Toll are offered terms that are unilaterally set by Toll and that owner drivers are generally not free to supply services to other courier companies while contracted to Toll.¹⁴
13. The TWU submits that remuneration for owner drivers is based on an hourly rate designed to compensate drivers for their labour and the costs associated with the running and maintenance of their vehicle.¹⁵ The TWU further submits that owner drivers are generally engaged to provide their services from Monday to Friday for a minimum of 9-10 hours per day and that owner drivers are required to be available 48 weeks of the year.¹⁶

⁷ Submission from the TWU received on 27 June 2017, paras 56 and 62.

⁸ Submission from the TWU received on 27 June 2017, para 76.

⁹ Submission from the TWU received on 27 June 2017, paras 86 to 90.

¹⁰ Submission from the TWU received on 27 June 2017, para 1.

¹¹ <http://www.twusant.com.au/>.

¹² Submission from the TWU received on 27 June 2017, para 2.

¹³ Submission from the TWU received on 27 June 2017, paras 29 and 40.

¹⁴ Submission from the TWU received on 27 June 2017, paras 31 to 36.

¹⁵ Submission from the TWU received on 27 June 2017, para 50.

¹⁶ Submission from the TWU received on 27 June 2017, paras 44 and 51.

14. The TWU estimates that the proposed '2017 Toll Whyalla Agreement' will cover up to approximately 6 owner drivers,¹⁷ of whom 3 are currently members of the TWU.

The target

15. Toll provides air freight and courier transport services across Australia. Toll is a subsidiary of Toll Holdings Limited, an integrated logistics company operating in over 50 countries globally.

Other ACCC authorisations

16. The ACCC has previously authorised two other applications for authorisation lodged by the TWU regarding collective bargaining between owner drivers and Toll:

- Authorisation A91514 involved an application for owner drivers contracted to Toll to collectively bargain with Toll on new terms and conditions for the supply of freight courier services to the 'Toll Priority' business from Toll Priority depots at Adelaide CBD and Adelaide Airport. The ACCC granted this application for authorisation on 4 February 2016 for three years.¹⁸
- Authorisation A91427 involved an application for owner drivers contracted to Toll to collectively bargain with Toll on new terms and conditions for the supply of air freight courier transport services at the Toll Priority depot near Brisbane Airport. The ACCC granted this application for authorisation on 16 October 2014 for three years.¹⁹

17. Further, on 21 June 2017, the TWU lodged application for authorisation A91588 for its owner driver members to collectively bargain with Toll regarding the supply of freight courier services to Toll IPEC from and within the metropolitan Adelaide region. At the same time as releasing this draft determination, the ACCC has released a draft determination proposing to grant authorisation to Application A91588 for five years.²⁰

Consultation

18. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process. The ACCC sought submissions from interested parties potentially affected by this application for authorisation, including the relevant owner-driver members of the TWU, Toll, competitors to Toll, and various government and industry bodies.

19. Toll did not raise any objections to the interim authorisation request and did not provide any comment regarding the TWU's substantive application for authorisation. The ACCC also did not receive any submissions from any other interested parties.

¹⁷ Submission from the TWU received on 27 June 2017, para 9.

¹⁸ Further information regarding this application for authorisation is available on the ACCC's [authorisations public register](#).

¹⁹ Further information regarding this application for authorisation is available on the ACCC's [authorisations public register](#).

²⁰ Further information regarding this application for authorisation is available on the ACCC's [authorisations public register](#).

ACCC assessment

20. The ACCC's assessment of the proposed conduct is carried out in accordance with the relevant net public benefit test contained in the Act. In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the proposed conduct would outweigh the likely detriment to the public constituted by any lessening of competition.
21. The ACCC is often asked to authorise collective bargaining arrangements. Collective bargaining refers to an arrangement under which two or more competitors come together to negotiate terms and conditions, which can include price, with a supplier or a customer.
22. Under the Act, except in certain limited circumstances, businesses are required to act independently of their competitors when making decisions about pricing and other terms and conditions of business, so collective bargaining conduct may breach the Act.
23. However, bargaining collectively, rather than on an individual basis, can generate public benefits by improving the efficiency of the bargaining process and negotiated arrangements. These benefits are achieved by lowering the transaction costs associated with putting supply arrangements in place, increasing input into contracts, and reducing information asymmetries.

Relevant areas of competition

24. To assess the effect of TWU's proposed collective bargaining conduct, the ACCC identifies the relevant areas of competition likely to be impacted by the proposed conduct.
25. The ACCC considers that these relevant areas of competition are:
 - a. competition amongst owner drivers to supply freight courier services from and within Whyalla, South Australia, and
 - b. competition amongst logistics companies to supply freight courier services to customers from and within Whyalla, South Australia.
26. The TWU submits that the main requirements to the supply of freight courier services are a valid driver's license and sufficient capital to purchase or lease an appropriate vehicle.²¹ The TWU further submits that, once contracted to a logistics company, owner drivers are averse to changing companies and that there is presently a greater supply of owner drivers in the industry than there is demand for their services.²²
27. There are a number of logistics companies supplying freight courier services to customers nationally, including Toll, DHL, TNT, Fed Ex, UPS and Startrack.²³

²¹ Submission from the TWU received on 27 June 2017, paras 25 to 27.

²² Submission from the TWU received on 27 June 2017, paras 77 and 78.

²³ Submission from the TWU received on 27 June 2017, para 19.

Future with and without

28. To assist in its assessment of the proposed conduct against the authorisation test, the ACCC compares the likely future with the conduct for which authorisation is sought and the likely future without the conduct the subject of the authorisation. The ACCC will compare the public benefits and detriment likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
29. Without the proposed conduct, the TWU submits that it is likely that owner drivers would individually negotiate with Toll, which would be likely to result in owner drivers having limited capacity to influence the standard contract terms offered by Toll and the maintenance of bargaining inequality between Toll and the owner drivers.²⁴
30. The ACCC considers that the likely future without the proposed conduct is likely to involve individually agreed contracts between the owner drivers and Toll. The ACCC accepts that, without any collective bargaining, it is likely that individual owner drivers will have limited ability to negotiate variations to the standard terms offered by Toll.

Public benefit

31. The Act does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.²⁵

32. The ACCC considers that the proposed conduct is likely to result in the following public benefits:
- a. transaction cost savings, and
 - b. improved input into contracts.

Transaction cost savings

33. The ACCC accepts that there are transaction costs associated with contracting. These transaction costs can be lower where a collective negotiation process is employed rather than a series of individual negotiation processes.
34. In this instance, without the proposed collective bargaining conduct, drivers seeking different terms and conditions to what Toll offers as part of a standard form contract would need to individually negotiate and agree with Toll. Such individual agreements are likely to lead to higher transaction costs for both owner drivers and for Toll, including both the time and expense of conducting negotiations as well as the time and expense associated with legal and other expert advisors.
35. Individual negotiations will stop when the costs of continued negotiation outweigh the expected benefits for either party. By reducing the transaction costs associated

²⁴ Submission from the TWU received on 27 June 2017, para 74.

²⁵ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

with negotiations for all parties, it is likely that collective bargaining will result in more contractual issues being addressed, because each party can obtain the benefit from negotiating these costs at less cost to itself, resulting in more comprehensive and efficient contracts.

36. The ACCC therefore considers that the proposed collective bargaining conduct is likely to result in public benefits from transaction cost savings, including the sharing of legal and other expert advisor costs, for both the owner drivers and Toll.

Improved input into contracts

37. The owner drivers are self-employed or operate small businesses. The ACCC recognises that, when negotiating with large counter parties such as Toll, individuals and small businesses can be disadvantaged due to various factors including fewer resources, information asymmetries, and less negotiating experience.
38. Collective bargaining provides a means to coordinate the bargaining group members to identify and deal with common contractual issues in a more effective and streamlined manner. For example, the TWU proposes for the bargaining group to collectively develop proposals (and responses to any counter-proposals) for a bargaining representative to advance with Toll on behalf of the bargaining group,²⁶ which would allow individual owner drivers in the group to leverage the negotiating expertise of the group.
39. In this way, collective bargaining may enable individual members to become more informed and engaged participants in negotiations, improving their input into contract negotiations with Toll. This improved input may lead to terms of supply that better reflect their circumstances, resulting in more efficient outcomes.
40. The ACCC therefore considers that the proposed collective bargaining conduct is likely to result in public benefits from improving the owner drivers' input into their contracts with Toll.

Public detriment

41. The Act does not define what constitutes a public detriment. In this regard the Tribunal has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.²⁷

Lessening of competition between drivers

42. The ACCC considers that the potential for collective bargaining to lessen competition between owner drivers supplying freight courier services is likely to be small for the following reasons:
- a) there is currently limited competition between owner drivers for the supply of freight courier services, particularly in relation to the contract terms on which the drivers seek to collectively bargain with Toll, as Toll

²⁶ Submission from the TWU received on 27 June 2017, para 54.

²⁷ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

generally offers standard term contracts to owner drivers with little individual negotiation.

- b) the proposed collective bargaining will be voluntary for both the owner drivers and for Toll. Owner drivers will be free to join or leave the bargaining group at any time, to negotiate variations to any collectively agreed outcomes, or to negotiate individually with Toll as suits their needs. The proposed collective bargaining arrangements also do not place any obligation on Toll to negotiate with the bargaining group.

43. In light of these mitigating factors, the ACCC considers that the proposed conduct is not likely to result in any significant public detriment from the lessening of competition between owner drivers or logistics companies in the supply of freight courier services from and within Whyalla.

Balance of public benefit and detriment

44. For the reasons outlined in this draft determination, the ACCC is satisfied that the proposed conduct is likely to result in a public benefit that would outweigh the likely public detriment constituted by any lessening of competition that would be likely to result.

45. Accordingly, the ACCC proposes to grant authorisation.

Length of authorisation

46. The Act allows the ACCC to grant authorisation for a limited period of time.²⁸ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

47. The TWU seeks authorisation for five years.²⁹ The ACCC considers the proposed period of authorisation is appropriate and proposes to grant authorisation for five years.

Draft determination

The application

48. Application A91589 was made using a Form B, under subsections 88(1A) and (1) of the Act. Authorisation is sought for owner drivers who are contracted to Toll to collectively bargain with Toll, with assistance from the TWU, to establish a '2017 Toll Whyalla Agreement' for the supply of freight courier services from and within Whyalla, South Australia.

49. Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

²⁸ Subsection 91(1).

²⁹ Submission from the TWU received on 27 June 2017, para 13.

The net public benefit test

50. For the reasons outlined in this draft determination, the ACCC is satisfied pursuant to sections 90(5A), 90(5B), 90(6), and 90(7) of the Act that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the proposed conduct.

Conduct which the ACCC proposes to authorise

51. The ACCC proposes to grant authorisation for the TWU's owner driver members who are contracted to Toll to collectively bargain with Toll, with assistance from the TWU, to establish a '2017 Toll Whyalla Agreement' for the supply of freight courier services from and within Whyalla, South Australia.
52. Under section 88(10) of the Act, the ACCC proposes to extend the authorisation to all owner drivers contracted to Toll, including any future owner drivers who become contracted to Toll, for the supply of freight courier services from and within Whyalla, South Australia.
53. The ACCC proposes to grant authorisation for five years.
54. This draft determination is made on 27 September 2017.

Interim authorisation

55. At the time of lodging the application, the TWU also requested an urgent interim authorisation to commence collective bargaining while the ACCC considers the substantive application.
56. The ACCC granted interim authorisation under subsection 91(2) of the Act on 3 August 2017 for the TWU to commence collective bargaining with Toll. The interim authorisation does not extend to the TWU and Toll finalising any agreements before the ACCC makes a decision on the substantive application.
57. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Next steps

58. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the TWU or an interested party may request that the ACCC hold a conference to discuss the draft determination.