



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Murray Billing Transport & Ors

in respect of

collective bargaining

with Boral Resources Ltd Melbourne

Date: 13 April 2017

Authorisation number: A91572

Commissioners: Sims
Rickard
Court
Featherston

Summary

The ACCC proposes to grant authorisation for five and a half years to Murray Billing Transport and current and any future concrete cartage businesses, operating four or more trucks, to collectively bargain with Boral Resources Ltd, Concrete Division, Melbourne (Boral) to deliver Boral concrete within the Melbourne metropolitan area.

The ACCC will seek submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

The application for authorisation

1. On 22 January 2017 Murray Billing Transport lodged application A91572 with the Australian Competition and Consumer Commission (ACCC) under subsection 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the Act) on behalf of itself and current and any future concrete cartage businesses that operate four or more trucks (the applicants) seeking authorisation for collective bargaining.¹
2. The applicants seek authorisation for concrete cartage businesses that operate four or more trucks that are contracted to Boral Resources Ltd, Concrete Division, Melbourne (Boral) to engage in collective bargaining with Boral for the purpose of giving ongoing effect to an established concrete cartage agreement (the agreement).
3. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Act. 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.²

The applicants

4. Murray Billing Transport is a concrete cartage business currently contracted to deliver Boral concrete in the Melbourne metropolitan region.
5. Murray Billing Transport is seeking authorisation on behalf of itself and eight current, and any future, concrete cartage businesses operating four or more trucks delivering Boral concrete in the Melbourne metropolitan region and which are fitted

¹ Murray Billing Transport also sought authorisation for collective boycott (A91571). On 6 April 2017 application A91571 for authorisation of a collective boycott was withdrawn by the applicant.

² Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

with a concrete agitator owned by Boral.³ The applicants cannot source work elsewhere because their vehicles are equipped with a Boral owned and branded agitator.

6. Approximately 90 concrete cartage businesses currently contract to Boral in the Melbourne metropolitan region. Sixty per cent of these businesses operate three or fewer trucks and have CCA immunity to bargain with Boral through the operation of the Victorian *Owner Drivers and Forestry Contractors Act 2005* (ODFCA).
7. The remaining 40 per cent of businesses operate fleets of four or more trucks and are outside the scope of the ODFCA and therefore need to negotiate individual concrete cartage agreements with Boral or apply for authorisation to collectively bargain.
8. The applicants intend to appoint negotiating agents to act on their behalf when negotiating with Boral. These negotiating agents will include representatives from affected concrete cartage businesses.

The conduct

9. Boral and concrete cartage businesses established the agreement in 2014. The agreement operates for five years with options to extend for an additional two years and then an additional one year.
10. The applicants seek authorisation to engage in collective bargaining with Boral for the purpose of giving ongoing effect to the established agreement, which includes six-monthly cartage rate reviews.
11. The authorisation sought would not compel any party to participate in collective bargaining if it did not wish to do so.

Submissions

12. 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 Boral and a number of interested parties potentially affected by the application for authorisation.
13. No public submissions were received.

³ The application listed nine businesses on whose behalf the application was made:

- Archangel Transport Pty Ltd
- CN Cartage Pty Ltd
- Carda Transport Pty Ltd
- Direct Concrete Line Pumping Pty Ltd
- Fralto Pty Ltd
- Hartnett Pty Ltd
- Murray Billing Transport
- Paplini Pty Ltd
- Weston Transport Pty

The applicant later advised that the application for authorisation was made on behalf of all relevant concrete cartage businesses contracted to Boral.

ACCC assessment

14. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests⁴ contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would, or is likely to outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
15. In order to assess the effect of the proposed conduct and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.
16. The ACCC has taken into account:
 - a. the application and submissions received from the applicants
 - b. information available to the ACCC from its consideration of previous collective bargaining matters
 - c. the likely future without the conduct for which authorisation is sought.⁵ The ACCC considers that without the proposed conduct it is likely that each concrete cartage business with four or more trucks would need to negotiate aspects of the existing agreement with Boral individually, and businesses with three trucks or fewer would continue to collectively bargain with Boral under the ODFCA
 - d. the relevant areas of competition likely to be impacted by the conduct, namely competition among relevant concrete cartage businesses to supply concrete cartage services in the Melbourne metropolitan area. The ACCC considers that concrete cartage businesses carrying Boral owned and branded agitators are likely to have limited bargaining power in this area of competition
 - e. concrete cartage businesses with four or more trucks and Boral can decide whether or not to participate in the conduct at any time (i.e. collective bargaining is voluntary such that parties can choose not to participate in collective bargaining unless they wish to do so)
 - f. the applicants have requested authorisation for five and a half years and if the applicants want the arrangement to continue after this time, they will need to apply for re-authorisation.

Public benefits

17. The ACCC considers that the conduct is likely to result in the following public benefits.

Transaction cost savings

18. An individual concrete cartage business negotiating with Boral will incur transaction costs, such as the time taken to negotiate and legal or other expert advice costs. Boral will also incur transaction costs in negotiating with multiple individual businesses as well as businesses that can collectively bargain under the ODFCA.

⁴ Subsections 90(6), 90(7), 90(5A) and 90(5B) of the Act.

⁵ For more discussion, see paragraphs 5.20-5.23 of the ACCC's *Authorisation Guidelines*, available on the ACCC website - <https://www.accc.gov.au/publications/authorisation-guidelines-2013>

19. Collective bargaining is likely to result in public benefits from transaction cost savings, including the sharing of advisor costs, for the concrete cartage businesses and Boral. By reducing the costs of negotiating for all parties, it is likely that more contractual issues can be addressed, because each party can obtain the benefit from negotiating these issues at less cost to itself, resulting in more comprehensive and efficient contracts of greater benefit to all parties.
20. These savings are likely to continue to be reflected in the price consumers pay for the delivery of concrete in the Melbourne metropolitan area.

Improved input into contracts

21. The majority of concrete cartage businesses providing services to Boral are small businesses. The ACCC accepts that, when negotiating with large counterparties, small businesses can be at a disadvantage in terms of resources and experience of negotiating.
22. One way in which small businesses can seek to redress such disadvantage is to bargain collectively. In this case, collective bargaining may allow for more effective negotiation between the eligible concrete cartage businesses and Boral. Collective bargaining is also likely to enable members of the bargaining group to become better informed of relevant market conditions. This is likely to improve the input that concrete cartage businesses have in contractual negotiations with Boral to identify and achieve more efficient outcomes and therefore to negotiate improved contracts.

Public detriments

23. The ACCC considers that in some cases collective bargaining could lessen competition and efficiency because it involves competitors agreeing on terms. However, the ACCC considers that the collective bargaining conduct in this case is likely to result in limited public detriment for the following reasons:
 - a. Participation in the bargaining group by concrete cartage businesses is voluntary. Businesses can elect to participate in collective bargaining, negotiate variations on the outcomes or negotiate without regard to the collective agreement, as best reflects their circumstances.
 - b. Boral's participation in collective bargaining is also voluntary; it does not have to negotiate with the collective bargaining group unless it wishes to do so.

Balance of public benefit and detriment

24. For the reasons outlined in this draft determination, the ACCC is satisfied that the conduct is likely to result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition likely to result.
25. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met and the ACCC proposes to grant authorisation for the conduct.

Length of authorisation

26. The Act allows the ACCC to grant authorisation for a limited period of time.⁶ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the public 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.
27. The applicants seek authorisation for five and a half years, until the end of 2022.
28. The agreement between concrete cartage businesses and Boral commenced on 14 November 2014. Assuming the options to extend the agreement are exercised, the agreement will end on 13 November 2022.
29. The ACCC proposes to grant authorisation for five and a half years until the end of 2022.

Draft determination

The application

30. On 22 January 2017 Murray Billing Transport, on behalf of itself and current and any future concrete cartage businesses with four or more trucks, lodged authorisation application A91572 with the ACCC. The application was made using Form B, Schedule 1, of the *Competition and Consumer Regulations 2010*.
31. The applicants seek authorisation to enable current and any future concrete cartage businesses that operate four or more trucks to engage in collective bargaining with Boral for the purpose of giving ongoing effect to an established concrete cartage agreement.
32. The applicants seek authorisation of these arrangements as they may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.
33. Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

34. 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 proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

⁶ Subsection 91(1).

Conduct for which the ACCC proposes to grant authorisation

35. The ACCC proposes to grant authorisation to engage in collective bargaining with Boral for the purpose of giving ongoing effect to an established concrete cartage agreement.
36. This draft determination is made on 13 April 2017.

Further submissions

37. The ACCC will now seek further submissions from the applicants and interested parties. In addition, the applicants or interested parties may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.