



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Transport Workers' Union of Australia
Queensland Branch
on behalf of owner drivers

in respect of

collective bargaining with Toll Transport Pty Ltd
for services at the Toll Priority Brisbane depot

Date: 16 October 2014

Authorisation number: A91427

Commissioners:
Sims
Rickard
Schaper
Cifuentes
Court
Featherston
Walker

Summary

The ACCC grants authorisation until 31 October 2017 to the Transport Workers' Union of Australia Queensland Branch and the current and future owner drivers it represents to collectively bargain over certain terms and conditions with Toll Transport Pty Ltd for the purpose of establishing new contractual arrangements for the supply of air freight courier transport services at the Brisbane Airport depot.

The Transport Workers Union Queensland Branch (the Applicant) sought authorisation to allow it and 76 owner driver members to engage in collective bargaining with Toll Transport Pty Ltd (Toll Transport). The proposed collective bargaining relates to the supply of air freight courier transport services by the owner drivers at the Toll Priority Brisbane depot, which is located near Brisbane Airport.

On the basis of the information before it, the ACCC considers that the collective bargaining conduct is likely to result in public benefits that would outweigh the likely public detriment constituted by any lessening of competition.

In particular, the ACCC considers the collective bargaining conduct is likely to result in transaction cost savings for owner drivers and Toll Transport by allowing them to address common contractual issues in a more streamlined and effective manner. Collective bargaining may also lead to more effective negotiation between the owner drivers and Toll Transport and allow the members of the bargaining group to become better informed about relevant market conditions.

Balanced against this, the proposed collective bargaining is likely to result in limited public detriment. Importantly the proposed arrangements are voluntary, Toll Transport does not have to participate in the negotiations and owner drivers may opt out of the negotiations or leave the collective bargaining group at any time and deal individually with Toll Transport.

In the course of its consideration of this matter, concerns were raised with the ACCC by interested parties about evidence provided by Toll Holdings Limited (Toll Transport's parent company), concerning its arrangements and other dealings with the Transport Workers Union, at the *Royal Commission Inquiry into Trade Union Governance and Corruption*. The ACCC considers that these matters are not relevant to its assessment of this application. This matter involves a group of TWU Qld member owner drivers engaged by Toll Transport to provide air freight courier transport services at the Toll Priority Brisbane Depot. Authorisation has only been sought in respect of contractual arrangements for the supply of those services by those drivers at that location.

The authorisation granted by the ACCC does not extend to matters relating to:

- owner drivers who have elected not to participate in the collective bargaining arrangements
- any interaction with competing providers of transport services or with other drivers.

The application for authorisation

1. On 5 May 2014, the Transport Workers' Union of Australia Queensland Branch (the Applicant) lodged application A91427 with the ACCC under subsection 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the CCA). The Applicant also requested interim authorisation to commence collective bargaining while the ACCC is considering the substantive application.
2. The Applicant sought authorisation for owner driver members contracted to Toll Transport Pty Ltd (Toll Transport) to engage in collective bargaining with Toll Transport, with the assistance of the Applicant, for the purpose of establishing new contractual arrangements for the supply of air freight courier transport services. The application only relates to owner drivers engaged by Toll Transport to provide air freight courier transport services at the Toll Priority Brisbane depot, which is located near Brisbane Airport.
3. The Applicant has sought authorisation for three years,¹ for collective bargaining over matters including:
 - carriage rates (including the 'labour component');
 - a mechanism for those rates to increase from year to year;
 - penalties for services provided outside standard hours;
 - increased rates for specialist loads;
 - return on investment;
 - demurrage rates; and
 - equipment, including painting and badging of vehicles.
4. The Applicant submits that the proposed collective bargaining will redress the substantial imbalance between Toll Transport and owner drivers in the negotiating process and ensure the maintenance of appropriate minimum standards for the affected owner drivers.
5. Toll Transport initially opposed the granting of interim authorisation; however it withdrew its opposition on 24 June 2014 subsequent to the Applicant reducing the period of authorisation sought from five to three years. Toll Transport indicated that it would not be making any further submissions in relation to this application for authorisation.
6. On 22 July 2014, the ACCC issued a draft determination proposing to grant authorisation for three years to the Applicant and the owner drivers it represents to collectively bargain over certain terms and conditions with Toll Transport for the purpose of establishing new contractual arrangements for the supply of air freight courier transport services (Draft Determination).

¹ The Applicant's initial application requested authorisation for a period of five years but this was amended to three years on 24 June 2014.

7. The ACCC also granted interim authorisation to enable the Applicant to commence collective bargaining until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.
8. No conference was requested in relation to the Draft Determination.

Collective bargaining

9. In the context of competition law, 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. Groups of businesses may sometimes appoint a representative, such as an industry association, or in some cases a union, to assist them in the bargaining process.
10. The CCA requires businesses to act independently of their competitors when making decisions about pricing and other terms and conditions of trade. By engaging in collective bargaining participants are at risk of breaching the CCA. Authorisation of collective bargaining is a transparent process by which the ACCC may grant protection from legal action where it is satisfied in all the circumstances that the proposed collective bargaining arrangement is likely to result in a public benefit that would outweigh the likely detriment to the public arising from any lessening of competition.
11. The ACCC has authorised small businesses to engage in collective bargaining across a range of industries including dairy farming, chicken growing, milk vending, newsagents, hoteliers, freelance journalists and concrete carting.

Background

Transport Workers Union of Australia (TWU)

12. The Transport Workers' Union (TWU) is a national organisation registered pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth). The TWU has branches in Queensland (the Applicant), New South Wales, Victoria/Tasmania, South Australia/Northern Territory and Western Australia. It has a sub-branch in the Australian Capital Territory.
13. As noted, the Applicant is the Queensland branch of the TWU. 76 owner driver members are currently contracted to provide courier "pick up and deliver" transport services to Toll Transport (trading as Toll Priority) and are to be covered by the proposed collective bargaining arrangements. The owner drivers are small businesses contracted to Toll Transport on an exclusive basis, including through the branding of their vehicles.

The Toll Group

14. Toll Holdings Limited (the Toll Group) has approximately 40,000 employees over a network of 1,200 sites in more than 50 countries. It provides integrated logistics. Toll Transport Pty Ltd (Toll Transport) is a member of the Toll Group and provides air freight

courier transport services across Australia. The application for authorisation relates only to owner drivers engaged by Toll Transport at the Toll Priority Brisbane Depot.

Royal Commission Inquiry into Trade Union Governance and Corruption

15. In February 2014 the Australian Government announced the establishment of a Royal Commission to inquire into alleged financial irregularities associated with the affairs of trade unions.² The TWU and the Toll Group have appeared before the Royal Commission to provide evidence concerning their dealings.

Consultation

16. Following the release of the Draft Determination the ACCC received public submissions from the Combined Small Business Alliance of WA (CoSBA WA), the Independent Contractors of Australia (ICA), and Christopher Game.
17. These submissions noted with concern the evidence provided by Toll Group to the Royal Commission concerning arrangements entered into with the TWU. In particular concerns were raised that the Toll Group and TWU had previously engaged in collusive behaviour for the purposes of harassing competitors of the Toll Group. The submissions opposed the grant of authorisation.
18. In responding to these concerns the Applicant has denied that the TWU has engaged in anticompetitive behaviour, and has submitted that the allegations before the Royal Commission are not relevant to the ACCC's assessment of the likely public benefits and detriments arising from the proposed collective bargaining arrangements. In responding to the submissions the Applicant has noted the limited scope of the proposed collective bargaining conduct (being limited to a group of owner drivers at a single company site in metropolitan Brisbane) and the voluntary nature of the proposed conduct.
19. Submissions received following the Draft Determination are discussed further below. Copies of public submissions may be obtained from the ACCC's website: www.accc.gov.au/authorisationsregister.

² <https://www.pm.gov.au/media/2014-02-10/royal-commission-trade-union-governance-and-corruption>

ACCC evaluation

20. The ACCC's evaluation of the Conduct is in accordance with the relevant net public benefits tests³ contained in the CCA.

21. In its evaluation of A91427, the ACCC has taken into account:

- a. the application and submissions by the Applicant and interested parties;⁴
- b. information available to the ACCC from its consideration of previous matters;⁵
- c. the likely future without the proposed conduct for which authorisation is sought.⁶ In particular, the ACCC considers that absent the proposed conduct each owner driver would be likely to continue to individually contract with Toll Transport with limited scope for them to negotiate variations to the contract terms offered;
- d. the relevant areas of competition likely to be affected by the proposed conduct. Primarily, competition amongst drivers to supply air freight courier transport services in South East Queensland; and, secondly, the supply of freight services to customers.
- e. the three year authorisation period sought.

Public benefit

22. Public benefit is not defined by the CCA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it 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.⁷

23. Generally, competition can be relied upon to deliver the most efficient market arrangements. In circumstance where there are market failures (for example, high transaction and bargaining costs, market power or information asymmetries),⁸ regulation and/or restrictions on competition may deliver efficient outcomes.

ACCC View

24. Small businesses (such as the owner drivers covered by the proposed conduct) can seek to engage in collective bargaining in order to address imbalances in bargaining power that have, or may, lead to inefficient outcomes. Collective bargaining by small

³ Subsections 90(5A), 90(5B), 90(6) and 90(7) of the CCA.

⁴ Please see the ACCC's Public Register for more details
<http://registers.accc.gov.au/content/index.phtml/itemId/6031>

⁵ Please see Transport Workers' Union of Australia Queensland Branch A91331 for concrete cartage services.

⁶ For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

⁷ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

businesses can generate benefits to the public by improving the efficiency of the bargaining process and negotiated arrangements. These benefits are most often achieved by reducing the time and costs associated with establishing contractual arrangements (transaction costs) and overcoming information asymmetries.

25. Applied here, the ACCC considers that the proposed collective bargaining is likely to result in some public benefits including:

- a. **Transaction cost savings:** The collective bargaining arrangement is likely to result in public benefits from transaction cost savings (including legal and expert advisor costs) for owner drivers and Toll Transport by allowing them to address common contractual issues in a more streamlined and effective manner. Sharing transaction costs will enable more of the potential benefits of the parties negotiating improved terms with each other to be exploited, thus making both parties better off.
- b. **Improved input into contracts:** the owner drivers providing services to Toll Transport are small businesses. The ACCC accepts that when negotiating with large suppliers small businesses can be at a disadvantage, in terms of the resources and experience of negotiating in complex commercial environments. As has been noted, one way in which a small business can seek to redress such disadvantage is to bargain collectively. Under the current proposal, collective bargaining may allow for more effective negotiation between the owner drivers and Toll Transport. Where the negotiating parties have a greater opportunity to identify and achieve business efficiencies, for example on issues relating to rates, standards and equipment as well as the timing and delivery of services. Collective bargaining is also likely to enable members of the bargaining group to become better informed of relevant market conditions, which is likely to improve their input into contractual negotiations with Toll Transport to achieve more efficient contracts.

Public detriment

26. Public detriment is also not defined by the CCA but the Tribunal has given the concept a wide ambit, including:

...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.⁹

⁸ This *refers* to a situation where one party has more or better information than another in a transaction. This imbalance can lead to a situation where the party who knows less accepts or offers different terms than they otherwise would, leading to inefficient outcomes.

⁹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

ACCC View

27. The ACCC considers that the Conduct is likely to result in limited public detriment for the following reasons:

- a. there is currently limited competition between owner drivers for the supply of their air freight courier transport services to Toll Transport, particularly with respect to those terms on which they are seeking to negotiate, as there is little, if any, negotiation of terms between individual owner drivers and Toll Transport;
- b. the proposed counterparty, Toll Transport, does not have to negotiate with the collective bargaining group; and
- c. owner drivers are able to opt out of the negotiations or leave the collective bargaining group at any time and deal individually with Toll Transport.

Scope of authorisation

28. In the Draft Determination the ACCC proposed to authorise the TWU's Queensland Branch and 76 owner drivers providing freight courier transport services to Toll Transport at the Toll Priority Brisbane depot to engage in collective bargaining with Toll Transport. In considering the application for authorisation the ACCC noted the limited scope of the proposed conduct. In particular, the proposed conduct is limited to those owner drivers who are or will be contracted to Toll Transport to supply courier transport services from Toll Transport's Brisbane Airport depot.

29. Following the release of the Draft Determination concerns were raised with the ACCC that the Toll Group and TWU had engaged in collusive behaviour for the purposes of harassing competitors of the Toll Group. These parties opposed the grant of authorisation on the basis that this conduct was evidence that the Toll Group and TWU were not fit and proper organisations. In response the Applicant has submitted that the matters before the Royal Commission are not relevant to the ACCC's assessment of the proposed collective bargaining arrangements and has noted that the proposed collective bargaining conduct is both limited in its scope and voluntary for both owner drivers and Toll Transport.

30. While noting the concerns that have been raised, the ACCC considers that these matters are not relevant to its assessment of this application. This matter involves a group of TWU Qld member owner drivers engaged by Toll Transport to provide air freight courier transport services at the Toll Priority Brisbane Depot. Authorisation has only been sought in respect of contractual arrangements for the supply of those services by those drivers at that location.

31. The authorisation granted by the ACCC does not extend to matters relating to:

- owner drivers who have elected not to participate in the collective bargaining arrangements
- any interaction with competing providers of transport services or with other drivers.

Balance of public benefit and detriment

32. For the reasons outlined in this determination, the ACCC is satisfied that the proposed collective bargaining arrangements are 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.
33. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

Determination

34. Application A91427 was made using Form B, Schedule 1 of the *Competition and Consumer Regulations* 2010. The application was made under sections 88 (1) and 88 (1A) of the CCA.
35. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination. A draft determination was released by the ACCC on 22 July 2014.

The net public benefit test

36. For the reasons outlined in this determination, the ACCC considers 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.¹⁰ Accordingly, the ACCC is satisfied that the tests in subsections 90(5A), 90(5B), 90(6) and 90(7) of the CCA are met.

Conduct for which the ACCC grants authorisation

37. The ACCC grants authorisation A91427, to the Transport Workers Union (Queensland Branch) and those TWU member owner drivers contracted (or to be contracted) to Toll Transport Pty Ltd (trading as Toll Priority) to engage in collective bargaining with Toll Transport Pty Ltd in relation to terms and conditions for the purpose of establishing new contractual arrangements for the supply of air freight courier transport services.
38. Authorisation is limited to those TWU member owner drivers who are or will be contracted to Toll Transport Pty Ltd to supply courier transport services at Toll Transport Pty Ltd's Brisbane Airport depot.
39. Collective bargaining will include (but is not limited to) the following matters:
- carriage rates (including the 'labour component');
 - a mechanism for those rates to increase from year to year;
 - penalties for services provided outside standard hours;

¹⁰ Subsections 90(5A), 90(5B), 90(6) and 90(7), set out in Attachment A.

- increased rates for specialist loads;
- return on investment;
- demurrage rates; and
- equipment, including painting and badging of vehicles.

40. Authorisation is granted until 31 October 2017.

41. Authorisation does **not** extend to matters relating to:

- owner drivers who have elected not to participate in the collective bargaining arrangements
- any interaction with competing providers of transport services or with other drivers.

Date authorisation comes into effect

42. This determination is made on 16 October 2014. If no application for review of the determination is made to the Australian Competition Tribunal, the determination will come into force on 7 November 2014.

Interim authorisation

43. At the time of lodging the application, the Applicant requested interim authorisation in order to be able to commence collective bargaining with Toll Transport Pty Ltd before the ACCC issues a final determination.

44. On 22 July 2014, the ACCC granted interim authorisation under section 91 of the CCA to enable the Transport Workers Union (Queensland Branch) and its owner driver members to engage in the conduct described above. 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.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- (a) the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- (b) that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- (a) the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- (b) that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.