



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation A91514

lodged by

Transport Workers Union of Australia SA/NT Branch

in respect of

collective bargaining with
Toll Transport Pty Ltd

Date: 4 December 2015

Authorisation number: A91514

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston

Summary

The ACCC proposes to grant authorisation to the Transport Workers Union of Australia South Australia/Northern Territory Branch and its current and future owner-driver members working from and within metropolitan Adelaide to negotiate collectively with Toll Transport Pty Ltd to establish new contracts for freight courier services. The ACCC proposes to grant authorisation for three years.

The ACCC has decided to grant interim authorisation to enable the parties to commence collective bargaining before the ACCC has issued a final determination. The ACCC grants interim authorisation on the basis that no contracts will be entered into until the ACCC issues its final determination.

The ACCC now seeks submissions on this draft determination before making its final decision.

The application for authorisation

1. On 25 September 2015, the Transport Workers Union of Australia South Australia/Northern Territory Branch (the TWU SA/NT) applied for authorisation under s 88(1A) and (1) of the *Competition and Consumer Act 2010* (the CCA)¹ for itself and its 'owner-driver' members working from and within metropolitan Adelaide to collectively bargain with Toll Transport Pty Ltd (Toll Transport), trading as Toll Priority, in respect of contractual arrangements with Toll Transport for the supply of freight courier transport services from Toll Transport's various South Australian depots by the owner-driver members ('the Conduct'). The TWU SA/NT seeks authorisation for three years.²
2. The TWU SA/NT also requested interim authorisation to enable it to start collective bargaining with Toll while the ACCC is considering its substantive application.
3. The TWU SA/NT states that it is an employee organisation registered pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth) and that it represents self-employed owner-driver members of its organisation contracted to provide courier 'pick up and deliver' transport services to Toll Transport. Toll Transport is part of the Toll Group (Toll Holdings Ltd), an Australian-based, Asia Pacific-region logistics provider owned by Japan Post.
4. The TWU SA/NT advises that currently about 70 member owner drivers are engaged by Toll Transport and work from and within metropolitan Adelaide.³ The TWU SA/NT estimates that in the area Toll Transport may engage about 90 drivers overall, some of whom are not TWU SA/NT members.⁴ The TWU SA/NT submits that alternative providers to Toll Transport include DHL, Fed Ex, Star Track, TNT Express and UPS.

¹ The application has also been considered as an application under the Competition Code.

² See 20 October 2015 email from the TWU SA/NT at <http://registers.accc.gov.au/content/index.phtml/itemId/1189961/fromItemId/278039/display/application>

³ On 15 October 2015 the TWU SA/NT provided a list of 73 individual proposed bargaining-group members.

⁴ The ACCC notes that in 2014 the TWU's Queensland Branch proposed a similarly sized bargaining group, of 76 members, for negotiations with Toll Transport related to its Brisbane depot. See determination for application A91427, 16 October 2014.

5. The TWU SA/NT submits that, currently, Toll Transport offers contracts to the drivers and there is little, if any, negotiation of terms between individual owner drivers and Toll Transport. It further submits that, commonly, Toll Transport offers standard terms to the driver, who can accept them or forfeit the opportunity to take work.
6. The TWU SA/NT proposes to collectively bargain with Toll Transport in respect of a range of terms that include but are not limited to:
 - carriage rates (including the labour component)
 - a mechanism for those rates to increase from year to year
 - penalties for services provided outside standard hours
 - equipment, including painting and badging of vehicles
 - classifications of work
 - ‘Supply and fitting of Communications expense if/ when required’
 - right to assignment of work
 - supply of work uniforms and
 - dispute settlement procedure.
7. The TWU SA/NT submits that all relevant owner drivers will be offered the opportunity to participate in the collective bargaining process and those who elect to participate will form the bargaining group. The TWU SA/NT submits that relevant owner drivers will be free to join or leave the bargaining group at any time and will be free to accept or reject the final terms of any agreement resulting from the bargaining. The TWU SA/NT does not seek authorisation in respect of collective boycott activity.⁵

Consultation

8. 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 invited submissions on the TWU SA/NT’s application from parties including Toll Transport, alternative suppliers to Toll Transport and organisations representing contractor and other businesses. Copies of all public submissions are available from the ACCC’s public register.⁶

⁵ TWU SA/NT *Submissions in support of application for authorisation*, accompanying Amended Application 15.10.2015, paragraph 103.3, available at <http://registers.acc.gov.au/content/index.phtml/itemId/1189961/fromItemId/278039/display/application>

⁶ <http://registers.acc.gov.au/content/index.phtml/itemId/1189961/fromItemId/278039/display/submission>

Toll Holdings Ltd

9. Toll Holdings Ltd responded (including on behalf of wholly owned subsidiaries) that it had no objections to authorisation, including interim authorisation, and had no other comments to make.

Independent Contractors Australia

10. Independent Contractors Australia (ICA) objects to the ACCC granting authorisation on two grounds.
11. First, ICA submits that the Transport Workers Union and Toll are not fit and proper organisations to be granted authority to collectively bargain, on the basis of alleged 'past admissions of anti-competitive collusion'.⁷ In this regard, ICA raises concerns that the TWU creates 'arrangements with some companies in the market and then seeks to force those same arrangements on other companies by harassing or damaging those companies'.⁸
12. Second, ICA submitted that section 93 of the CCA prohibits the ACCC from accepting, considering, and ultimately granting a collective bargaining application by a union. The ACCC understands ICA's objection to be made on the following basis:
 - Section 93AB of the CCA provides for the notification of collective bargaining but also provides that such a notification cannot be lodged by a union (section 93AB(9)).
 - The fact collective bargaining notifications under s 93AB cannot be lodged by a union reflects a legislative intention to exclude employment matters from the scope of the CCA, including the authorisation provisions.
 - Accordingly, it should not be open to the TWU SA/NT to seek authorisation in respect of the Conduct.

ACCC views

13. The ACCC has carefully considered the ICA's objections.
14. In respect of the first objection about alleged broader conduct, the ACCC notes that the authorisation sought is limited to collective bargaining by the TWU SA/NT and its owner drivers with Toll Transport for the purpose of establishing new contractual arrangements in respect of Toll Transport's South Australian depots. Any authorisation granted would not extend to conduct beyond this, including conduct by the TWU SA/NT in relation to businesses other than Toll Transport. In particular, any authorisation would not extend to matters relating to owner drivers who chose not to participate in the collective bargaining arrangements; or to any

⁷ ICA submitted that evidence of such behaviour is contained in transcripts of the Royal Commission into Trade Union Governance and Corruption. See ICA Submission to the ACCC of 12 November 2015 at 2. <http://registers.acc.gov.au/content/index.phtml/itemId/1189961/fromItemId/278039/display/submission>

⁸ ibid

conduct by the TWU SA/NT (or any other organisation) in respect of suppliers of transport services other than Toll Transport.

15. In respect of ICA's second objection about authorisation applications featuring unions, the collective bargaining notification process commenced in 2007 to provide a quicker and simpler alternative to authorisation for small businesses seeking to obtain legal protection for collective bargaining.
16. Not all collective bargaining conduct is eligible for notification.⁹ Nor can collective bargaining notifications be lodged by unions, as provided in section 93AB(9).
17. The operation of section 88 and the other provisions relating to the authorisation process are not subject to the same limitations as collective bargaining notifications. Should a person not be able to (or not wish to) notify collective bargaining under section 93AB(9) of the CCA, there is nothing to preclude it from seeking authorisation under section 88.¹⁰
18. Accordingly, trade unions are able to seek legal protection for collective bargaining through the authorisation process.
19. The ACCC has assessed the TWU SA/NT's current application accordingly.

ACCC assessment

20. The ACCC's assessment of the Conduct is in accordance with the relevant net public benefits tests contained in the CCA.¹¹ The ACCC has taken into account:
 - the application and submissions received from the applicant, Toll Transport and ICA
 - information available to the ACCC from its consideration of previous matters¹²
 - the likely future without the Conduct for which authorisation is sought.¹³ The ACCC considers that without the Conduct it is likely that each owner driver would negotiate separately with Toll Transport with limited scope for them to negotiate variations to the contract terms offered
 - the relevant areas of competition likely to be impacted by the Conduct: namely competition among drivers to supply freight courier services in and

⁹ For example, the collective bargaining notification process cannot be used where legal protection is sought:

- for more than three years
- in respect of a relevant contract which exceeds \$3 million in any 12 month period
- for 'umbrella' type agreements, for example, where it would cover negotiations with a number of targets or arrangements covering several bargaining groups or
- for future unidentified businesses.

¹⁰ See the ACCC's *Guide to collective bargaining notifications*, 2011 at 9.

¹¹ Subsections 90(5A), 90(5B), 90(6) and 90(7) of the CCA.

¹² See, in particular, determination for the TWU Queensland application, A91427, 16 October 2014.

¹³ For more discussion, see paragraphs 5.20-5.23 of the ACCC's *Authorisation Guidelines*.

around Adelaide; and the supply of freight services to customers in and around Adelaide

- that the TWU SA/NT has requested authorisation for three years and
- that the TWU SA/NT is not proposing collective boycotts; and owner drivers and Toll Transport can decide whether or not to participate in the Conduct at any time.

Public benefits

21. The ACCC considers that the Conduct is likely to result in the following public benefits.

Transaction cost savings

22. An individual driver negotiating with Toll Transport will incur transaction costs, such as the time taken to negotiate and perhaps legal and other expert-advice costs. Toll Transport will also incur transaction costs in negotiating with individual drivers. Individual negotiations will stop when the costs of continued negotiation outweigh the expected benefits for either party. At this point, it is likely that the contract will not fully capture the potential mutual benefits from trade. It may in fact mean that no negotiation occurs at all and the owner drivers are effectively provided with a standard-form contract prepared by Toll Transport (which is what TWU SA/NT submits is currently the case).

23. Collective bargaining is likely to result in public benefits from transaction cost savings, including the sharing of advisor costs, for the owner drivers and Toll Transport. 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.

Improved input into contracts

24. The self-employed owner drivers providing services to Toll Transport are small businesses. The ACCC accepts that, when negotiating with large counterparties, individuals and small businesses can be at a disadvantage in terms of resources and experience of negotiating.

25. One way in which 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. 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 the input of owner drivers into contractual negotiations with Toll Transport to identify and achieve more efficient outcomes.

Public detriments

26. The ACCC considers that in some cases collective bargaining could lessen competition and efficiency. However, the ACCC considers that the collective bargaining Conduct in this case is likely to result in limited public detriment for the following reasons:

- There is currently limited competition between owner drivers for the supply of their freight courier transport services to Toll Transport in and around Adelaide, particularly with respect to those terms on which they are seeking to negotiate. This is because Toll generally offers standard term contracts to owner drivers and there is little or no negotiation of terms between individual owner drivers and Toll Transport.
- Participation in the bargaining group by owner drivers is voluntary. Owner drivers 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.
- Toll Transport does not have to negotiate with the collective bargaining group and there is no collective boycott conduct proposed.

Balance of public benefit and detriment

27. 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.

28. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met and the ACCC proposes to grant authorisation to the Conduct.

Length of authorisation

29. The TWU SA/NT has sought authorisation for three years, which would be the life of an agreement with Toll Transport.

30. The ACCC proposes to grant authorisation for three years.

Draft determination

31. The TWU SA/NT lodged an application for authorisation under subsections 88 (1A) and (1) of the CCA, for the Conduct as described in paragraph 1 above. It has sought authorisation for provisions that might otherwise be cartel provisions and / or might have the purpose or effect of substantially lessening competition. Subsection 90A(1) of the CCA requires that, before determining an application for authorisation, the ACCC shall prepare a draft determination.

The net public benefit test

32. For the reasons outlined in this draft determination, the ACCC considers, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the Conduct is likely to result in a public benefit that would outweigh any likely public detriment, including the detriment constituted by any lessening of competition likely to result.

Conduct which the ACCC proposes to authorise

33. The ACCC proposes to grant authorisation under sections 88(1A) and (1) of the CCA and the Competition Code for three years to enable the TWU SA/NT and its owner-driver members working from and within metropolitan Adelaide to collectively bargain with Toll Transport Pty Ltd (Toll Transport), trading as Toll Priority, in respect of contractual arrangements with Toll Transport for the supply of freight courier transport services from Toll Transport's various South Australian depots by the owner-driver members.¹⁴

34. This draft determination is made on 4 December 2015.

Interim authorisation

35. The TWU SA/NT also requested interim authorisation to enable it to commence collective bargaining while the ACCC is considering the substantive application. Interim authorisation allows an applicant to engage in all or part of the conduct for which authorisation is sought before the ACCC has issued a final determination. The TWU SA/NT undertakes not to finalise bargaining before the ACCC makes a final determination.

36. The ACCC has decided to grant interim authorisation to enable the collective bargaining to commence immediately. The ACCC notes that:

- For the reasons identified in this draft determination, the Conduct appears likely to result in public benefit that would outweigh any likely public detriment.
- Granting interim authorisation is unlikely to permanently alter the competitive state of the market if the ACCC later denied final authorisation. The TWU SA/NT will not finalise any agreements under the interim authorisation.
- Toll Transport supports the granting of interim authorisation and there is unlikely to be harm to any party if interim authorisation is granted.

37. Interim authorisation does not cover the making or entering into of any contracts.

38. Interim authorisation will be in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

¹⁴ Under section 88 (10) of the CCA, the ACCC can extend authorisation to future parties.

Next steps

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