

# CHRISTOPHER LEVINGSTON & ASSOCIATES

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Our ref: CHL 140JF4

1 November 2014

The Registrar,  
Australian Competition Tribunal.  
Federal Court Registry,  
Level 17  
Law Courts Building  
Queens Square, Sydney  
NSW 2000

Dear Registrar,

## APPLICATION TO TRIBUNAL FOR REVIEW

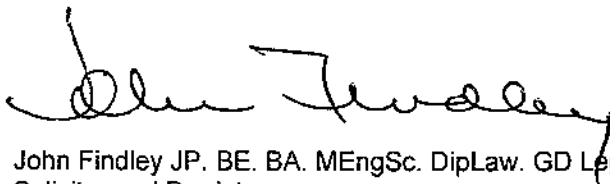
**Re: Application for authorisation lodged by Transport Workers' Union of Australia Queensland Branch on behalf of owner drivers in respect of collective bargaining with Toll Transport Pty Ltd for services at the Toll Priority Brisbane depot.**

This application is made pursuant to Competition and Consumer Act s101.

Please find enclosed 6 copies of the application and a copy in electronic format on a CD Rom.

Yours faithfully

**CHRISTOPHER LEVINGSTON & ASSOCIATES**



John Findley JP. BE. BA. MEngSc. DipLaw. GD Legal Prac.  
Solicitor and Barrister



MEMBER OF  
THE LAW SOCIETY  
OF NEW SOUTH WALES

Distribution;

- Australian Competition Tribunal: 6 copies plus CDROM
- Independent Contractors Association;
  - Lacey (1) , Phillips (1), Committee (1)
- Christopher Levingston and Associates
  - Principal Solicitor (1), File (1)

## Evidence Items.

The following materials are referenced in the Application and will be provided in hard copy on the instruction of the Tribunal.

1. ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION, Public Hearing 3 July 2014- TWUSUPER/TEACHO (Day 3) TEACHO MFI#1—Volume 1—Tab 1—pages 1–18  
<http://www.tradeunionroyalcommission.gov.au/Transcripts/Documents/Evidence3July2014/teacho-tab1-redacted.pdf>
2. ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION 3 July 2014 Public hearing Transport Workers Union; Transcript of public hearing—3 July 2014 [PDF 1MB]  
[http://www.tradeunionroyalcommission.gov.au/Transcripts/Documents/Evidence3July2014/TURC\\_Day0003\\_140703\\_TWU.PDF](http://www.tradeunionroyalcommission.gov.au/Transcripts/Documents/Evidence3July2014/TURC_Day0003_140703_TWU.PDF)
3. *Hoch v. The Queen* (1988) 165 CLR 292 at 294
4. List of some State Government Codes introduced to combat union and business anti-competitive cartel behaviour.

### NSW

Implementation Guidelines to the New South Wales Code of Practice for Procurement: Building and Construction

[http://www.industrialrelations.nsw.gov.au/biz\\_res/oirwww/pdfs/NSW%20Implementation%20Guidelines%20Building%20and%20Construction.pdf](http://www.industrialrelations.nsw.gov.au/biz_res/oirwww/pdfs/NSW%20Implementation%20Guidelines%20Building%20and%20Construction.pdf)

### VICTORIA

[New construction industry Code to strengthen compliance](#)

<http://www.premier.vic.gov.au/media-centre/media-releases/11116-new-construction-industry-code-to-strengthen-compliance.html>

[Construction code compliance](#)

<http://www.dtf.vic.gov.au/Infrastructure-Delivery/Construction-code-compliance>

### QUEENSLAND

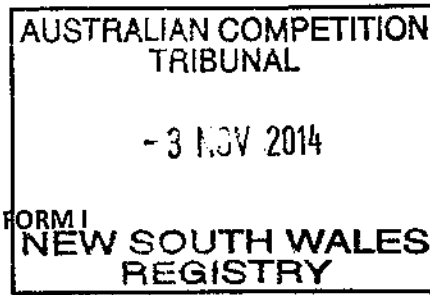
[Building and construction industry guidelines](#)

<http://www.justice.qld.gov.au/fair-and-safe-work/industrial-relations/codes-of-practice-and-guidelines/building-and-construction-industry-guidelines>

[Implementation Guidelines to the Queensland Code of Practice for the Building and Construction Industry](#)

[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0018/201393/Guidelines.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0018/201393/Guidelines.pdf)

5. ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION, 3 July 2014—Public hearing TEACHO MFI#1 Volume 1—bundle of documents TEACHO MFI#1—Volume 1—Tab 1—pages 1–18 [PDF 2.3MB]  
<http://www.tradeunionroyalcommission.gov.au/Transcripts/Documents/Evidence3July2014/teacho-tab1-redacted.pdf>
6. *Re Queensland Cooperative Milling Association Ltd (Proposed Merger)* [1976] 8 ALR 481
7. *Re Qantas Airways Limited* [2004] ACompT 9
8. *Australian Gas Light Company v Australian Consumer Commission* (2003) ATPR 41-996, at 154
9. *Telstra Corporation Ltd v Australian Competition Tribunal* [2009] FCAFC 23



ACT 3/2014

(subregulation 20(1))

## APPLICATION TO TRIBUNAL FOR REVIEW

**Re: 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 (The Application).**

1. I, Independent Contractors Association, (Incorporation Number (Victoria): [A0050004U]), hereby apply to the Australian Competition Tribunal pursuant to section 101 of the Competition and Consumer Act 2010 (CCA) for a review of the determination of the Australian Competition and Consumer Commission dated the sixteenth day of October 2014 (Commission file no. Authorisation number: A91427) (the Determination).

2. (a) I was not the applicant for the authorization to which the determination relates.

(b) My interest in the determination is as follows:

Independent Contractors Association (ICA), represents small businesses and independent contractors who are also small businesses. Delivery truck owner drivers are small businesses and independent contractors.

Parties represented by ICA include owner drivers of delivery trucks of the type affected by the Determination and cooperative organizations that engage the services of owner drivers.

ICA made submissions to the ACCC in respect of the application by Transport Workers Union for approval of cartel conduct by businesses contracting with Toll for the supply of their courier services.

3. I am dissatisfied with the determination of the Commission in the following respects:

ICA submits that the behavior contemplated in the Application is cartel behavior; CCA s44ZZRD and thus requires authorisation or it is an illegal activity.

TRANSPORT WORKERS UNION being a trade union is prohibited from making an application, CCA s93AB(9). Accordingly, ICA submits that there has been no valid notification made, hence ACCC may not make the Determination for want of jurisdiction.

ICA submits that the TRANSPORT WORKERS UNION has previously and is presently engaged in coercive and anti-competitive activities, as verified by evidence taken under oath in the Royal Commission into Trade Union Governance and Corruption. These activities by TRANSPORT WORKERS UNION are to the detriment of small businesses, independent contractors and the economy generally.

**In addition:**

ICA submits that the TRANSPORT WORKERS UNION and Toll have engaged in to what may prove to be criminal conduct in their conspiracy to interfere in the business operations of the competitors of Toll. That conduct was revealed in evidence taken under oath in Royal Commission into Trade Union Governance and Corruption. It is contrary to public policy to endorse illegal action. The Determination has failed to take adequate notice of or to give adequate weight to this behavior and the potential for its replication in other markets following the Determination.

ICA submits that in making the Determination ACCC has failed to take notice of the potential for collective boycotts that the TRANSPORT WORKERS UNION are likely to impose under the pretext of acting in accordance with a collective bargaining authorisation. Such boycotts are frequently used trade union tactics. ICA submits, are likely to be used by the TRANSPORT WORKERS UNION to enforce union membership onto independent contractors who would become unable to bid for work from an employer in whose operations the TRANSPORT WORKERS UNION has established a presence as a negotiator. These tactics are also employed in the building industry, where collusive trade union and employer conduct prevents small businesses and independent contractors from participating in construction projects. This has had the effect of increasing construction costs and the consequent public detriment.

ICA submits that no probative evidence of a public benefit has been submitted to the ACCC and accordingly, the Determination being made in the absence of evidence, ACCC does not discharge its the legal obligations, making the finding void.

4. The determination that I am seeking from the Tribunal is as follows:

I seek orders to the following effect: The Determination be overturned and the application refused on the grounds that TRANSPORT WORKERS UNION being a trade union is prohibited from making an application, CCAct s93AB(9). Accordingly there has been no valid notification made, hence ACCC may not make the Determination for want of jurisdiction.

ICA prays that the Tribunal take judicial notice *per Evidence Act s144* of the proceedings of the Royal Commission into Trade Union Governance and Corruption and together with the first order requested or in the alternative find:

- That in making the purported Determination, the ACCC has failed to take adequate notice of or give adequate weight to corrupt and anti competitive behavior of the trade union movement generally and to the behavior of TRANSPORT WORKERS UNION and Toll specifically, and
  - in so failing the ACCC has increased the likelihood of collective boycotts being orchestrated by the TRANSPORT WORKERS UNION with resultant detriment to the economy, and

- in so failing the ACCC has increased the risk of adverse outcomes by a reduction of competition, itself contributing to a public detriment, and
- in so failing the ACCC has increased the risk of adverse outcomes by permitting the TRANSPORT WORKERS UNION to impose inefficiencies of one business (for example Toll) onto other businesses, contributing to a public detriment, or
- In the alternative; ICA seeks the Tribunal to find that collective bargaining with Toll may be capable of being approved if there is no involvement of TRANSPORT WORKERS UNION or other trade union organizations,
  - and that any organisation that is not a trade union or does not have access to the powers of entry and document inspection granted by legislation may coordinate the collective bargaining,
  - and that the ACCC discharges its duty to affirmatively find there are benefits and detriments arising from the Determination and to properly weigh these to confirm a net benefit arises.

5. Particulars of the facts and contentions upon which I intend to rely in support of the application for review, and a statement of the issues as I see them, are attached.

6. My address for service for the purpose of regulation 21 of the Competition and Consumer Regulations 2010 is

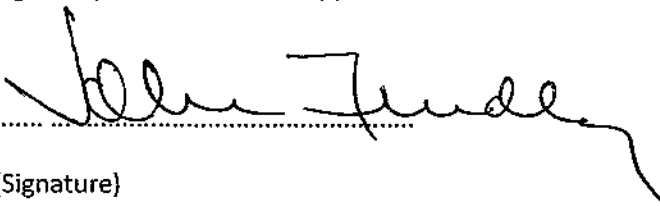
Christopher Levingston and Associates,

Level 1, 73 York Street,

Sydney 2000.

Dated this third day of November 2014.

Signed by/on behalf of the applicant

  
.....

(Signature)

John Findley, solicitor for the Applicant.

Christopher Levingston and Associates.

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## **Applicants statement of Facts and Contentions**

### **FACTS**

- i. The Applicant TRANSPORT WORKERS UNION is a trade union.
- ii. The parties (or some of them) purportedly represented in the Determination by TRANSPORT WORKERS UNION are corporations.
- iii. Toll admits under oath to engaging in anti-competitive behavior, with the specific collusion of TRANSPORT WORKERS UNION.
- iv. The collusive practices of employers and trade unions in the construction industry has lead State Governments to make laws to restrain the spread of these practices. The Determination contains no constrains to prevent TRANSPORT WORKERS UNION from leveraging the Determination to other markets.
- v. No objective evidence of public benefit has been offered.
- vi. Each owner driver, the subject of the Determination, presently has a contract for service with Toll.

## CONTENTIONS

### 1. No Notification.

ICA submits that there was no valid notification to ACCC.

Trade Unions are prohibited from making applications CCAct s93AB(9).

*COMPETITION AND CONSUMER ACT 2010 - SECT 93AB*

*Notice is invalid if given by union etc. on behalf of the corporation*

*(9) A notice given by a corporation under subsection (1) is not a valid collective bargaining notice if it is given, on behalf of the corporation, by:*

*(a) a trade union; or*

*(b) an officer of a trade union; or*

*(c) a person acting on the direction of a trade union.*

Accordingly, ICA submits that in being a trade union TRANSPORT WORKERS UNION is prohibited from making an application and thus there has been no valid notification made. Accordingly ACCC may not make the Determination for want of jurisdiction.

The ACCC papers withhold details of the owner drivers purportedly represented by TRANSPORT WORKERS UNION, thus ICA is unable to check if those owner drivers are or are not corporations as defined in the CCA.

*COMPETITION AND CONSUMER ACT 2010 - SECT 4*

*"corporation" means a body corporate that:*

*(a) is a foreign corporation;*

*(b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;*

*(c) is incorporated in a Territory; or*

*(d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).*

The TRANSPORT WORKERS UNION submission states *"the owner drivers operate their businesses through corporate entities or as sole traders or partnerships"*.

ICA submits that there is a strong possibility that at least some of the 76 owner drivers purportedly represented by TRANSPORT WORKERS UNION are in fact corporations as defined for the *Competition and Consumer Act 2010 - SECT 4*, accordingly the prohibition in *Competition and Consumer Act 2010 - SECT 93AB(9)* is triggered.

ICA further submits, the *ex post facto* removal from the application of those parties who are corporations does not make an invalid application valid. It is the application and its details at the time of the Determination that is to be examined at law.



## 2. Counterparty Behavior.

ICA submits extracts from the transcripts of ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION, Public Hearing 3 July 2014- TWUSUPER/TEACHO (Day 3) as evidence of tendency of both TRANSPORT WORKERS UNION and Toll to engage in uncompetitive behavior to the public detriment.

ICA prays that the Tribunal take judicial notice per Evidence Act s144 of the proceedings of that Royal Commission. This evidence at the Royal Commission has revealed the existence of a deed between Toll and TRANSPORT WORKERS UNION, which in effect, requires TRANSPORT WORKERS UNION to impose onto Toll's competitors the same operating inefficiencies as found in Toll's business.

ICA submits that the common law tests for admission of tendency (*Hoch*<sup>1</sup>) are met and that the evidence taken under oath at the Royal Commission provides "the basis for the admission of similar fact and/or propensity" . The Royal Commission finds on the evidence under oath by Damian James Sloan, Toll's senior legal counsel, workplace relations and safety:

*"Often, Toll's standards come at a price of being uncompetitive in many situations so Toll looks to find ways in which it can help level the playing field"*<sup>2</sup>

*"Q. Toll's intention, ..., was to level the playing field, if I can put it that way, by causing some of its competitors to incur the sorts of expenses Toll was incurring?"*

*A. I'd certainly endorse the phrase "levelling the playing field", and I think that the corollary to that is that they would start to incur those expenses, but we would prefer to look at it as raising the standards across the industry. If we raised standards, then necessarily our relative competitive position would be improved."*<sup>3</sup>

*The deed: "stipulates that the union will conduct audits, wage inspections or other compliance measures of "a transport competitor" and .... the new TEACHO Deed stipulated five transport competitors"*<sup>4</sup>

ICA submits that this evidence of actually engaging in anti-competitive behavior should lead a reasonable finding by a reasonable decision maker of a tendency to engage in anti-competitive behavior, and that it should be conclusive of the strongest of probabilities of that intention.

ICA submits that such behavior can only result in adverse economic outcomes.

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<sup>1</sup> Mason CJ, Wilson and Gaudron JJ in *Hoch v. The Queen* (1988) 165 CLR 292 at 294) : " The basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency by reason that it reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged."

<sup>2</sup> ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION Public Hearing - TWUSUPER/TEACHO (Day 3) Page 157 Line 38

<sup>3</sup> Ibid Page 157 Line 13

<sup>4</sup> Ibid Page 216 Line 30

### 3. Not Constrained to One Market.

ICA submits that TRANSPORT WORKERS UNION, in possession of the Determination, will leverage the Determination to other markets.

ICA prays that the Tribunal take judicial notice per Evidence Act s144 of the Victorian Code of Practice for the Building and Construction Industry, the New South Wales Code of Practice for Procurement: Building and Construction, the Queensland Code of Practice for the Building and Construction Industry. Governments introduced these codes in an attempt to counter the collusive practice of trade unions and large employers engaging in anti-competitive behavior.

ICA submits that the TRANSPORT WORKERS UNION will promote the Determination to other businesses and not necessarily within the courier delivery market, as a means for TRANSPORT WORKERS UNION to generate fees and recruit members.

ICA submits that negative impact on efficiency, costs and competition that arise from the Determination will flow through industries inexorably.

ICA submits that the combined actions of Toll and TRANSPORT WORKERS UNION subverts enterprise bargaining and creates a defacto industry wide cost base. This undermines efficiencies that may be generated by creative and effective management of individual enterprises.

The inevitable consequence of such marketing efforts, if ACCC permits them will be to the detriment of competition and to the detriment of consumers.

It is incumbent on the applicant for approval of cartel behavior, to provide evidence to show approval of the behavior is constrained to one market. It is not open to the ACCC to make such a finding in the absence of evidence.

ICA prays that the Tribunal take judicial notice per Evidence Act s144 of evidence in the ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION, [3 July 2014—Public hearing TEACHO MFI#1 Volume 1—bundle of documents TEACHO MFI#1—Volume 1—Tab 1—pages 1–18 \[PDF 2.3MB\]](#)

This bundle of documents presents evidence of Mr. Tony Sheldon using office in the TRANSPORT WORKERS UNION to collect money in the form now colloquially described as a slush fund. Evidence demonstrates Mr. Tony Sheldon established and operated the slush fund, without oversight or the knowledge of the TRANSPORT WORKERS UNION.

ICA submits this is further evidence of institutional misbehavior by TRANSPORT WORKERS UNION and its senior officials. The ability of trade unions to extort money from employers or to engage in a conspiracy with employers to the detriment of union members, competition and prices generally are matters of grave concern and to facilitate such behavior by the Determination is contrary to public policy.

#### 4. No Evidence Provided.

There is no material before the Commission upon which it can be satisfied that any claimed public benefit from the Notification is likely to arise.

TRANSPORT WORKERS UNION has presented no evidence of cost savings, thus it is impossible for ACCC to assess savings and the legal burden of demonstrating a likely public benefit has not been met.

(3A) If:

- (a) a corporation has notified the Commission under subsection (1) of conduct or proposed conduct described in section 44ZZW, subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d); and
- (b) the Commission is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment to the public from the conduct or proposed conduct;

*the Commission may give the corporation a written notice stating that the Commission is so satisfied.*

It is beyond the powers of ACCC to assume that a specific form of contract negotiation will inevitably produce savings of a particular magnitude.

ACCC must be "satisfied" that the benefit exists and that the benefit outweighs the likely detriment to the public. Without examination of the specific contract negotiation processes, it is not possible to be satisfied that there are benefits or in the alternative, if there are benefits, that those are of sufficient magnitude as to outweigh the considerable detriment to the public of implementing the Determination.

The detriments, at minimum, are those described in sworn evidence at the Royal Commission;

*"I'd certainly endorse the phrase "levelling the playing field", and I think that the corollary to that is that they would start to incur those expenses, but we would prefer to look at it as raising the standards across the industry. If we raised standards, then necessarily our relative competitive position would be improved"<sup>5</sup>*

There is no evidence, nor can the ACCC acting within its authority, assume that "raising the standards across the industry" is a necessary or desirable social objective, nor that such a raising of standards would be a public benefit.

On the other hand, in that sworn evidence Tolls concede that competitors would incur additional operating expenses. Prima facie, it appears that a net detriment to the public would result from the Determination.

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<sup>5</sup> ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION, Public Hearing - TWUSUPER/TEACHO (Day 3)

**The degree of “satisfaction” required.<sup>6</sup>**

*[We note the sections of TPA cited here are substantially the same as those of the CCA, including the section numbers]*

**COMPETITION AND CONSUMER ACT 2010 - SECT 90**  
**Determination of applications for authorisations**

*(5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:*

- (a) that the provision would result, or be likely to result, in a benefit to the public;*
- and (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:*
  - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and*
  - (ii) the provision were given effect to.*

The ACCC must be “affirmatively” satisfied that a public benefit is likely to result, would result, or would be likely to result as from the collective bargaining notice

The focus of the Courts and the Tribunal is, generally, on the degree of satisfaction - of what is likely to result if the notified conduct takes place.

The meaning of “likely to result” has been examined in detail. In *Re Queensland Cooperative Milling Association Ltd (Proposed Merger)*<sup>7</sup> where the Tribunal looked at the meaning of “likely to result” in terms of whether a substantial public benefit was likely to result from the merger authorization as required by s90 of the TPA.

The Tribunal observed that: *“[w]e are to be concerned with probable effects rather than with possible or speculative effects. Yet we accept the view that the probabilities with which we are concerned are commercial or economic likelihoods which may not be susceptible of formal proof.”*<sup>8</sup>

The meaning of “likely to result” was also addressed by the Tribunal in *Re Qantas Airways Limited*<sup>9</sup> in the context of s 90 of the TPA. In that case, Qantas and Air New Zealand had sought a review of the ACCC's refusal to grant an authorization under s88(1) of the TPA. The Tribunal held that:

*“for a benefit or detriment to be taken into account, we must be satisfied that there is a real chance, and not a mere possibility, of the benefit or detriment eventuating. It is not enough that*

<sup>6</sup> Follows DLA Phillip Fox arguments in *Hertz*

<sup>7</sup> [1976] 8 ALR 481.

<sup>8</sup> Above at 511.

<sup>9</sup> [2004] ACompT 9.

*the benefit or detriment is speculative or a theoretical possibility. ...we must be satisfied that the benefit or detriment is such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect and must be sufficiently capable of exposition (but not necessarily quantitatively so) rather than "ephemeral or illusory".*<sup>10</sup>

In *Re Qantas Airways Limited*<sup>11</sup> the Tribunal also relied on French J's consideration of the phrase "likely to have the effect" in the context of s50 of the TPA<sup>12</sup>. His Honour concluded that "likely to have the effect" referred to a significant finite probability or a "real chance or possibility" rather than "more probable than not" or a "mere possibility." Notably, the Tribunal had no issue in applying this interpretation of s50 to the phrase "likely to result" in s90<sup>13</sup>.

Sections 93AC(1) and (2) of the TPA provide that the ACCC may issue an objection notice if it is "satisfied" of certain factors (relating to public benefit and detriment of a collective bargaining notification).

The TPA does not define "satisfy" (comment: nor does CCA). However, the term as used in other parts of the TPA has been considered by the Australian Competition Tribunal and Federal Court. These interpretations of the provision apply unless a contrary intention is found to apply. It is a "fundamental rule of construction" that a statute should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that Statute. Therefore s 93AC should be construed so as to give the same meaning to the word "satisfy" as it is given in other parts of the TPA.

In the context of Part XIC of the TPA, the Australian Competition Tribunal held, in *Re Telstra Corporation Limited* that to be satisfied requires "affirmative" satisfaction.

This was reiterated by the Full Court of the Federal Court in *Telstra Corporation Ltd v Australian Competition Tribunal*<sup>14</sup>. The Full Court constructed s 152AT such that the ACCC must be "positively" satisfied of certain things before it can grant an exemption.

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<sup>10</sup> Above at 156.

<sup>11</sup> [2004] ACompT 9.

<sup>12</sup> *Australian Gas Light Company v Australian Consumer Commission* (2003) ATPR 41-996, at 154.

<sup>13</sup> *Re Qantas Airways Limited* [2004] ACompT 9 at 155.

<sup>14</sup> [2009] FCAFC 23

## **5. Futility of Determination.**

The Determination is futile as the delivery drivers and Toll successful agreements in place. These agreements do not expire for some time.

As Toll and the individual driver operators have reached agreements, the collective bargaining notification is futile.

Accordingly, there can be no public benefits now flowing from the notification and the Commission can only conclude that the public benefits do not and cannot outweigh the public detriment.