AUSTRALIAN COMPETITION TRIBUNAL

Application by Independent Contractors Australia

[2015] ACompT 1

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| Citation: | Application by Independent Contractors Australia [2015] ACompT 1 |
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| Review from: | Australian Competition and Consumer Commission Authorisation |
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| File number: | ACT 3 of 2014 |
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| Tribunal: | **MANSFIELD J, pRESIDENT**  **RC DAVEY, MEMBER**  **R STEINWALL, MEMBER** |
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| Date of decision: | 21 January 2015 |
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| Catchwords: | **TRADE PRACTICES** – application for review of a determination to authorise collective bargaining – standing of the applicant – whether applicant has a “sufficient interest” – the applicant is a membership-based not for profit association and is a general representative of small business and independent contractors – the authorisation is geographically confined and authorises limited conduct – the applicant does not have members who would be affected by the authorisation – the applicant does not have any actual commercial interests which are or may be affected by the authorisation |
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| Legislation: | *Associations Interpretation Act 1981* (Vic)  *Trade Practices Act 1974* (Cth)  *Country Fire Authority Act 1958* (Vic)  *Fair Work Act 2009* (Cth)  *Gas Pipelines Access (South Australia) Act 1997* (SA) |
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| Cases cited: | *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28 cited  *Application by Wylie Steel Pty Ltd for review of grant of authorisation to Broken Hill Pty Co Ltd* [1980] ATPR 40-170 referred to  *Broken Hill Pty Ltd v Trade Practices Tribunal* (1980) 47 FLR 385 cited  *Re Application by PK Wakeman for a review of the Determination of the Australian Competition and Consumer Commission in relation to the Alliance Agreement* [1998] ACompT 1 cited  *Re Application by Michael Jools, President of the New South Wales Taxi Drivers Association* [2005] ACompT 4 cited  *Re Qantas Airways Ltd* [2003] ACompT 4 cited  *United Firefighters Union of Australia v Country Fire Authority* (2014) 218 FCR 210 referred to  *Re Queensland Cooperative Milling Association Ltd (Proposed Merger)* (1976) 8 ALR 481 referred to  *Telstra Corporation v Australian Competition Tribunal* [2009] FCAFC 23 referred to  *Re Application by Orica IC Assets Ltd; re Moomba to Sydney Gas Pipeline (No 2)* [2004] ACompT 2 cited  *Re Telstra Corporation* [2001] ACompt 1 distinguished |
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| Date of hearing: | Heard on the papers |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL | act 3 of 2014 |

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| RE: | APPLICATION FOR REVIEW OF AUSTRALIAN COMPETITION AND CONSUMER COMMISSION AUTHORISATION A91427 UNDER S 101 OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) |
| BY: | INDEPENDENT CONTRACTORS AUSTRALIA  Applicant |

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| JUDGES: | MANSFIELD j, PRESIDENT  RC DAVEY, MEMBER  R STEINWALL, MEMBER |
| DATE OF ORDER: | 21 JANUARY 2015 |
| WHERE MADE: | ADELAIDE |

THE TRIBUNAL DETERMINES THAT:

1. Combined Small Business Alliance of WA (Inc) is refused leave to intervene in the application.
2. The application by Independent Contractors Australia to review the Authorisation of the Australian Competition and Consumer Commission A91427 is refused.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL | ACT 3 OF 2014 |

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| RE: | APPLICATION FOR REVIEW OF AUSTRALIAN COMPETITION AND CONSUMER COMMISSION AUTHORISATION A91427 UNDER S 101 OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) |
| BY: | INDEPENDENT CONTRACTORS AUSTRALIA  Applicant |

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| tribunal: | mansfield j, PRESIDENT  rC davey, MEMBER  r steinwall, MEMBER |
| DATE: | 21 JANUARY 2015 |
| PLACE: | ADELAIDE |

**REASONS FOR DECISION**

# INTRODUCTION

1. On 3 November 2014, Independent Contractors Australia (ICA), a membership-based not for profit association incorporated under the *Associations Incorporation Act 1981* (Vic), applied to the Australian Competition Tribunal (the Tribunal) pursuant to s 101 of the *Competition and Consumer Act 2010* (the CC Act) to review a determination of the Australian Competition and Consumer Commission (the ACCC) of 16 October 2014 (the Authorisation) given on the application of the Transport Workers Union of Australia Queensland Branch (TWUQB) on behalf of its owner drivers.

# THE AUTHORISATION

1. By the Authorisation, the ACCC authorised TWUQB until 30 October 2017 and its current and future owner drivers who it represented to collectively bargain over certain terms and conditions with Toll Transport Pty Ltd (Toll Transport) for the purpose of establishing new contractual arrangements for the supply of air freight courier transport services at the Toll Priority Brisbane Depot (the Depot) near the Brisbane Airport. TWUQB made that application on 5 May 2014 under s 88(1A) and s 88(1) of the CC Act. It had 76 current owner driver members at that time.
2. The ACCC considered that the proposed collective bargaining conduct was likely to result in public benefits that would outweigh the likely public detriment constituted by any lessening of competition. The ACCC Summary of the Authorisation pointed out that the Authorisation concerned only the contractual rights for the supply of air freight courier transport services to Toll Transport by TWUQB owner drivers at that location, and did not relate to other dealings of Toll Transport or of its parent company Toll Holdings Ltd with the Transport Workers Union generally.
3. In short, the Authorisation recorded that the collective bargaining conduct, in the view of the ACCC, is likely to result in transaction costs savings for owner drivers and for Toll Transport at or from that Depot by allowing them to address common contractual issues in a more streamlined and effective manner, and it also noted that collective bargaining may also lead to more effective negotiations between the owner drivers and Toll Transport and may allow the members of the bargaining group to become better informed about relevant market conditions. The ACCC also concluded that the proposed collective bargaining is likely to result in limited public detriment, because the proposed arrangements are voluntary, as Toll Transport does not have to participate in the negotiations and owner drivers may also opt out of the negotiations or leave the collective bargaining group at any time and may deal individually with Toll Transport.
4. The Authorisation does not extend to matters relating to owner drivers who may have elected not to participate in the collective bargaining arrangements, or to any interaction with competing providers of transport services to Toll Transport at the Depot or otherwise, or with other drivers.
5. The Authorisation authorises collective bargaining which includes, but is not limited to, the following matters:

* carriage rate (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.

1. By its terms, the Authorisation became effective only if no application was made to the Tribunal by 7 November 2014 to review it. The Authorisation has not therefore come into effect yet. However, an interim authorisation given on 22 July 2014 in terms of the Authorisation was given by the ACCC and remains in place, at least until this application to the Tribunal is determined.

# ICA’S BUSINESS AND CONCERNS

1. The following emerges from the application of ICA as amended by leave given on 10 November 2014.
2. It is asserted that, but for the Authorisation, the conduct which it authorises would constitute collective bargaining in contravention of the CC Act, as it would amount to unlawful cartel behaviour.
3. ICA represents small businesses and independent contractors who are also small businesses. That includes delivery truck owner drivers, who fall within both the categories of small businesses and independent contractors. Those it represents include owner drivers of delivery trucks of the type covered by, or affected by the Authorisation and cooperative organisations that engage the services of owner drivers.
4. ICA contends that, having made a submission to the ACCC in opposition to the proposed authorisation, the Authorisation should not have been made for one or more of the following reasons:
5. the TWU, or TWUQB, was not found to be a trading corporation so that the ACCC erred in granting the authorisation to TWUQB;
6. TWU and Toll Transport have engaged in “what may be found to be criminal conduct in a conspiracy to interfere in the business operations of the competitors of Toll Transport”, and that the ACCC failed to take adequate notice of, or to give adequate weight to, that behaviour and “the potential for its replication following” the Authorisation;
7. the ACCC failed to take notice of the potential for collective boycotts that the TWU is likely to impose, under the pretext of acting in accordance with a collective bargaining authorisation; and
8. no probative evidence of a public benefit was submitted to the ACCC, and the authorisation therefore having been made in the absence of evidence does not meet the legal requirements to enable it to have been made.

Consequently, ICA seeks to have the Authorisation set aside and the application of TWUQB to the ACCC refused.

1. It says that on the material, the ACCC by failing to take adequate notice of, or to give adequate weight to “what may be found to be corrupt and anti-competitive behaviour of the trade union movement generally and to the behaviour of the TWU and Toll specifically”, in fact increased the likelihood of collective boycotts being orchestrated by the TWU with resultant detriment to the economy; and also, as a consequence, increased the risk of adverse outcomes by a reduction of competition itself contributing to a public detriment.
2. Finally, and alternatively, ICA says that a collective bargaining arrangement with Toll Transport might be authorised only if there is no involvement of the TWU or other trade union organisations and that any such organisation does not have access to the coercive powers granted by the Fair Work Act coordinating any collective bargaining.
3. Its application contains detailed factual assertions of the facts it relies upon, and details of its contentions. They are set out below.

# THE LEGISLATION AND PROCEDURAL STEPS

1. Part VII, Div 1 of the CC Act contains the relevant provisions under which the ACCC might have granted the authorisation. It is empowered to do so under s 88(1A) in respect of cartel provisions, upon application by or on behalf of a corporation, and under s 88(1) to grant such an authorisation upon application by or on behalf of a corporation in respect of other provisions which may contravene s 45 of the CC Act. Although nothing turns upon it, the Tribunal notes that s 88(11) enables the authorisation to apply to or in relation to future parties, relevantly in the present context those owner drivers who may during the period of the Authorisation become members of the TWUQB.
2. Section 90(5A) provides:

(5A) [**Proposed cartel provision: authorisation should benefit public]** 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 provisions were given effect to.

That is frequently called the net public benefits test. It is similarly expressed in s 90(5B), s 90(6) concerning applications made under s 88(1), and in s 90(7) also concerning applications made under subs 88(1) of the CC Act.

1. As the brief description of the Authorisation and of the ACCC’s reasons for it set out above indicates, the ACCC expressed itself as being appropriately so satisfied.
2. The right to seek review of such a decision by the Tribunal is expressed in Pt IX of the CC Act. Relevantly, although ICA is not an applicant for Authorisation, it is entitled to apply to the Tribunal for a review of the Authorisation under s 101(1). Section 101(1AA)(b) then provides that if the Tribunal is satisfied that ICA has a sufficient interest, it must review the determination.
3. Having regard to the fact that the Authorisation was granted on the basis of the ACCC’s assessment of the net public benefits test, and to s 101(1AA)(b), the Tribunal gave directions on 10 November 2014 on three matters:
4. the way in which a potential intervener might intervene in the hearing and determination of the review application;
5. how the status of the applicant might be determined, that is whether the Tribunal should be satisfied that ICA has a sufficient interest to oblige the Tribunal to review the Authorisation; and
6. the timetable for the preparation and presentation of evidence for the hearing of the review application, in the event that the Tribunal determined to proceed with it or that the Tribunal was satisfied that ICA had a sufficient interest, so that it was obliged to proceed with it.
7. Any proposed intervener was required to apply to the Tribunal for leave to intervene by 17 November 2014, together with supporting material. Each of ICA, the TWUQB and the ACCC were given the opportunity to file any responsive material and submissions. The Tribunal indicated that it would resolve any such application on the written material.
8. In relation to the status of ICA, it was given until 17 November 2014 to file and serve its proposed evidence and other material and submissions, and the TWU and the ACCC were given the opportunity to file and serve responsive material or submissions. Again the Tribunal indicated that it would address the question whether it was satisfied that ICA had a sufficient interest in the application on the written material, unless it considered that an oral hearing was desirable, and it also gave to the parties the opportunity to apply for an oral hearing. The TWUQB did make such an application for an oral hearing on that issue. The Tribunal addresses that request later in these reasons for its decision.
9. On 14 November 2014, Combined Small Business Alliance of WA (Inc) (CoSBA) applied to the Tribunal to “join” the application for review of ICA.
10. The Tribunal notes that no other person or entity applied for leave to intervene in the application to review the authorisation made by ICA. Toll Transport did not itself apply to do so.

# WHETHER COSBA SHOULD BE PERMITTED TO INTERVENE IN THE APPLICATION

1. CoSBA’s application is very short. It is in letter form and relevantly reads:

[CoSBA] hereby seeks leave to join the ICA appeal on ACCC – 3/2014. We have read the ICA appeal document attached and support the submissions made in the document.

1. CoSBA filed no other supportive material and made no other submission, notwithstanding the opportunity given to it to do so by the directions made on 10 November 2014. ICA took no position on CoSBA’s application, and made no submission in relation to it.
2. Both the TWUQB and the ACCC made brief written submissions opposing CoSBA’s application to intervene in the application by ICA.
3. Section 109(2) of the CC Act enables the Tribunal, upon such conditions as it thinks fit, to permit a person to intervene in proceedings before the Tribunal. In the absence of any submissions as to the proper application or exercise of that power, it is obviously appropriate to be guided by the observations of Goldberg J as President of the Tribunal in *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28 especially at [35] and [54] (*Re Fortescue*).
4. Consequently, in considering the application of CoSBA, the Tribunal proceeds on the basis that there is no “sufficient” or “real and substantial” interest requirement, and that the discretion to grant leave to intervene is not limited by the introduction or application of such expressions. As Goldberg J said in that case, an applicant for leave to intervene under s 109(2) should be able to establish some connection with, or interest in, the subject matter of the proceeding which is beyond that of “merely an officious bystander”. Obviously, the nature and extent of such connection or interest will vary from case to case. But it is important to consider the extent to which the proposed intervenor has indicated that it can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the application or the submissions to be made by them, as well as considering how the proposed intervenor might be affected by the Authorisation or the outcome of the application to the Tribunal.
5. At this point, CoSBA has not indicated that it intends to, or can, add in any meaningful way to the evidence adduced before the ACCC, or the evidence proposed to be adduced on this application by ICA or by the parties before the ACCC. Moreover, it has not indicated that it intends to, or can, enhance the submissions proposed to be made by ICA as foreshadowed in its application, or as considered by the ACCC.
6. Although CoSBA appears to be an organisation of a similar type and with similar objectives to ICA, there is nothing to indicate that its operations extend beyond Western Australia. Indeed, from its name, it may be inferred that its operations are confined to Western Australia.
7. Having regard to the terms upon which it has expressed its support for the position taken by ICA, and in particular that it has not indicated either an intention to, or a capacity to, provide any meaningful or relevant evidence to the Tribunal beyond that which ICA might adduce, or that it intends to, or has the capacity to, adduce any significant submissions in support of the orders which ICA seeks beyond those which ICA proposes to adduce, in the Tribunal’s view, it is not appropriate to accede to CoSBA’s application. Accordingly, to the extent that CoSBA’s letter of 14 November 2014 is intended to be an application by CoSBA for leave to intervene, the application is presently rejected. Generally, that would not be intended to exclude CoSBA from applying, at a later point, in the conduct of the proceedings to make such submissions as it may wish to make, provided it is shown that they add in a material way to the prospect of the Tribunal reaching an appropriate decision or determination on the application of ICA. However, as appears below, the Tribunal is not satisfied that ICA has a sufficient interest for it to be permitted to maintain the review application, so that issue will not arise.

# DOES ICA HAVE A SUFFICIENT INTEREST TO SATISFY S 101(1AA)(b)

## The Meaning of “Sufficient Interest”

1. Since the decision of the Trade Practices Tribunal in *Application by Wylie Steel Pty Ltd for review of grant of authorisation to Broken Hill Pty Co Ltd* [1980] ATPR 40-170 (*Re Wylie Steel*), the expression “sufficient interest” has been considered by the Tribunal on several occasions. At that time, s 101(1) was structurally a little different from its present form, but nevertheless incorporating the expression that the Tribunal be satisfied that the applicant for review have a sufficient interest.
2. The Tribunal (Lockhart J, Deputy President and J Shipton and M Brent, Members) addressed a series of preliminary points, including whether the applicant had a sufficient interest to enable it to apply to review the decision of the Trade Practices Commission authorising The Broken Hill Pty Co Ltd to acquire the shares in another entity under the then s 88(9) of the *Trade Practices Act 1974* (Cth). The Tribunal at 42,344B said:

It is not necessary to define the various categories of persons who may have a “sufficient interest”; but they include a person who establishes that his business interests or prospects could be adversely affected by the proposed merger.

And at 42,345B it added:

… the Tribunal must be satisfied that the applicant, not being the applicant for the authorisation, has made out a prima facie case that it has a “sufficient interest”. The test is not an unduly high one. If it were, it may involve determining the very questions that will loom large in the hearing on the merits of the determination including the allegations of Wylie Steel to which we have referred. These are hardly matters that fall for determination at this stage. If it emerges during the course of the hearing that the applicant in truth may not have a “sufficient interest” the Tribunal may then review the *locus standi* of the applicant and consider the future course of the application for review.

1. In that case the applicant, as an importer, stockist and dealer in steel products in Australia established prima facie that it had a sufficient interest to bring the application.
2. The Federal Court of Australia in *Broken Hill Pty Ltd v Trade Practices Tribunal* (1980) 47 FLR 385 set aside that decision, but on grounds related to the other preliminary points. Bowen CJ at 395 expressly referred to the passages quoted above on “sufficient interest” and said he would not disagree with those statements or the Tribunal’s approach. Franki J at 397 said that the Tribunal’s approach on that topic “was not wrong”. The other member of the Full Court, Brennan J, did not need to comment on that aspect: see at 413.
3. In *Re Application by PK Wakeman for a review of the Determination of the Australian Competition and Consumer Commission in relation to the Alliance Agreement* [1998] ACompT 1; (1999) ATPR 41-675 (*Re Wakeman*), the Tribunal (von Doussa J, Acting President and R Davey and M Starrs, Members) declined the invitation, based upon the asserted analogy with the concept of locus standi or sufficient interest to bring civil proceedings to challenge or review an administrative decision, to apply a stronger test. Such decisions were said by the Tribunal to be “helpful but not decisive”. However, it said that the purpose of the threshold requirement of “sufficient interest” is to act as a filter to ensure that the review procedure is not misused or abused. Von Doussa J explained that because of its role as a filter the existence of a sufficient interest ensures unmeritorious or vexatious claims are not pursued. Thus, his Honour said, a person who had no interest in the determination of the ACCC beyond that of any other member of the public, and who merely sought to pursue a point of principle on intellectual or emotional grounds, would not satisfy the threshold. By reference to the ACCC processes in considering an application for an authorisation, in particular in s 90A(12) where an “interested person” is one who the ACCC considers has a “real and substantial interest”, his Honour suggested that s 101(1AA)(b) means that a “sufficient interest” must be at least real and substantial.
4. That arguably more stringent test was not adopted in *Re Application by Michael Jools, President of the New South Wales Taxi Drivers Association* [2005] ACompT 4; (2005) 189 FLR 456; (2005) ATPR 42-071 (*Re Jools*). The President of the Tribunal, Goldberg J at [35] pointed out that the process of reasoning in drawing the content of the expression “a sufficient interest” from the procedures imposed in the ACCC under ss 89, 90 and 90A when considering whether to grant an authorisation are not found in ss 91A, 91B and 91C dealing with minor variations, and revocation, of authorisations.
5. It is fair to observe that the qualitative content of “a sufficient interest” should not depend on the character of the ACCC decision sought to be reviewed. Section 101(1AA) does not provide any mandate for such a distinction. In fact, as subcl 101(1AA)(b) is an alternative to subcl 101(1AA)(a) which broadly encompasses all ACCC decisions under Div 1 of Pt VII, the contrary would be the case. It is also noted that Goldberg J in *Re Jools* at [37] observed that whilst *Re Wylie Steel* established that a person whose business interests or prospects could be adversely affected would have a “sufficient interest”, the Tribunal there did not make the potential impact on business interests or prospects a necessary element of a sufficient interest.
6. Finally, although the decision to permit a person to intervene in an application under s 109(2) is of a different character, it is the suggestion of the learned author of Competition And Consumer Law (Thomson Reuters, Looseleaf at [10.890], pp 251-2205) that the measure of what an applicant for leave to intervene must demonstrate is a related question. The observations of the Tribunal in *Re Fortescue*, and in *Re Qantas Airways Ltd* [2003] ACompT 4;(2003) ATPR 41,972 at [9] (*Re Qantas*) may therefore also provide guidance.
7. In *Re Qantas*, the Tribunal (Goldberg J, President and GF Latta and DK Round, Members) noted that s 109(2) does not expressly impose a “sufficient interest” test, and that the competing contentions were that the proposed intervenor needed to show “a real and substantial interest” or that it needed to show only “a sufficient interest”. The Tribunal said at [7] that leave to intervene should be given, “whether the test be a real and substantial interest, a sufficient interest, or an interest which needs to be sufficient to justify the cost and the inconvenience of an extra party …”. It is implicit in that observation that the test expressly imposed by s 101(1AA)(b) of a sufficient interest imposes, in some degree at least, a lesser burden than the “real and substantial” test which appears to have been applied in the particular circumstances considered in *Re Wakeman*.
8. The proper starting point is, of course, the words of the relevant provision, namely s 101(1AA)(b). There is no reason why their ordinary meaning should be refined by their context, either in Pt IX Div 1 of the CC Act or in the CC Act generally. The observations of the Tribunal in *Re Jools* explain why it is not appropriate to interpret those words as meaning something equal to, or greater than, a real and substantial interest.
9. They are words which impose a filter on the capacity of a person who is not the applicant to the ACCC for authorisation or the variation or revocation of authorisation to seek review. Obviously, there will be parties whose commercial interests will be directly affected by an ACCC decision under Div 1 of Pt VII and who were not the applicant to the ACCC. There will be other cases where the interest of the person seeking review will be less direct or less immediate or of a different character. This is one such case.
10. In such cases, the Tribunal may need to consider whether the interest asserted is one that is sufficient to warrant putting those involved in the review to the time, effort and expense that a review involves.
11. That may involve considering:
12. whether the person seeking to review the ACCC decision made representations to the ACCC; presented evidentiary material to the ACCC; or intends to present fresh or different evidentiary material to the Tribunal, and if so why it was not presented to the ACCC;
13. the character of the asserted interest, and the extent to which that interest is or may be affected by the ACCC decision;
14. the nature and extent of the factual material proposed to be presented on the review; and
15. the nature of the submissions proposed to be presented on the review, and in some limited circumstances the nature and strength of the matter or matters sought to be raised.

## ICA contentions on standing

1. ICA’s statement of facts and contentions (in its amended application) starts with seven asserted “facts” although some are really submissions. Putting aside matters that are really submissions or are raised in the “Contentions” section of that document, the asserted facts are:
2. Toll [presumably Toll Transport rather than Toll Holdings] admits under oath to engaging in anti-competitive behaviour, with the specific collusion of TWU; and
3. each owner driver, the subject of the ACCC Authorisation, presently has a contract for service with Toll Transport.
4. Obviously (1) is a general factual conclusion rather than the evidentiary material on which it is based. In respect of (2), that also does not contain details of the basis for that assertion or any documentary material to support it.
5. There are five Contentions, as follows:
6. TWU [presumably TWUQB] is not a trading corporation
7. The submission implicitly accepts that the trading activities of TWUQB, if not peripheral to its main business and if “substantial and not significant”, may support a finding that it is a trading corporation, and therefore a “corporation” as defined in s 4 of the CC Act. Reference is made to *United Firefighters Union of Australia v Country Fire Authority* (2014) 218 FCR 210 at [25]-[102] where the Court addressed whether the Country Fire Authority established under the *Country Fire Authority Act 1958* (Vic) is a “constitutional corporation” under the *Fair Work Act 2009* (Cth), in particular at [39]-[40] and the cases there referred to.
8. ICA says that the ACCC did not decide that TWUQB is a trading corporation, although it referred to earlier determinations where the “TWU successfully sought to represent independent businesses”. It says that the status of the TWU or TWUQB, also was not addressed in those determinations.
9. ICA says the Tribunal would have to decide whether TWUQB is a trading corporation, and so it would need to examine its financial records. It concludes on this topic:

And in its review of those financial records, the tribunal should differentiate between legal and tainted incomers, and as a matter of public policy, it should not include any incomes that are mingled with or tainted by illegality.

Applicant request orders for summons on TWU; requiring production of financial records of the TWU, and for TWU senior management to attend, provide documents and give evidence.

1. Counterparty Behaviour
2. ICA indicates that it “submits” extracts from the transcripts of the Royal Commission Into Trade Union Governance and Corruption (Royal Commission) from the public hearing “TWUSUPER/TEACHO (Day 3)” as evidence of the “tendency of both TWU and Toll to engage in uncompetitive behaviour to the public detriment”. It asserts that that evidence shows the existence of a deed between Toll and TWU which, in effect, requires TWU to impose onto Toll’s competitors the same operating inefficiencies as “found in Toll’s business”. A brief extract of the evidence of a Toll officer is quoted, and the deed is said to oblige the TWU to “conduct audits, wage inspections or other compliance measures” on Toll’s transport competitors.
3. That material is said to show a tendency to engage in anti-competitive behaviour, and to support an inferential finding that the TWUQB and Toll or Toll Transport have that intention.
4. Not Constrained to One Market
5. ICA submits that the Authorisation, and four other specified authorisations given to the TWU or TWUQB between 2009 and 2012 will enable the TWU to promote its significance to generate new memberships and so increase its revenue, not only in the “courier delivery market”. The asserted consequence is that the “negative impact on efficiency, costs and competition” from the Authorisation will “flow through industries inexorably” and the combined actions of Toll and the TWU subvert enterprise bargaining and create a defacto industry-wide cost base. It says that also undermine specific inefficiencies that may be generated by creative and effective management of individual enterprises. There will therefore be a consequential detriment to competitors and to consumers.
6. No Evidence Provided
7. ICA contends that there was no evidence on which the ACCC could have been satisfied that the conduct permitted by the Authorisation would result, or be likely to result, in a benefit to the public, so it could not have formed the judgment prescribed by s 90(5A) of the CC Act.
8. It says TWUQB presented no evidence of costs savings, and the ACCC could not simply assume and so could not have been satisfied that a specific form of contract negotiation would “inevitably” produce measurable savings, and in any event could not infer that any such savings would outweigh the “considerable detriment to the public of implementing” the Authorisation. The detriment is identified (from the Royal Commission evidence referred to) as “raising standards across the industry”, and so increasing costs to Toll’s competitors.
9. Reference is made to the observations of the Tribunal in *Re Queensland Cooperative Milling Association Ltd (Proposed Merger)* (1976) 8 ALR 481 at 511; *Re Qantas* at 156 and *Telstra Corporation v Australian Competition Tribunal* [2009] FCAFC 23; (2009) 175 FCR 201.
10. Futility Determination
11. The short contention is that as there are existing agreements between the individual driver operators and Toll, the Authorisation is futile and it cannot generate any public benefit, at least not any that outweigh the public detriments. It is said the existing agreements “do not expire for some time”.
12. On 17 November 2014, ICA provided a written response to the issue raised at the directions hearing on 10 November 2014 as to its status. That response will be considered in detail in conjunction with the submissions of the TWUQB and the ACCC. Those submissions were duly filed in accordance with the directions.
13. The response of ICA referred to particular material. Apart from reference to cases and to earlier ACCC determinations, that material is the evidence given to the Royal Commission also referred to in its amended application and noted above.
14. ICA also filed an affidavit of Dr Tui McKeown of 19 December 2014, the real purpose of which is to produce the financial report of TWUQB for the year ending 30 December 2013, and earlier authorisations of the ACCC given to TWUQB to which reference is made in its submissions.

## Consideration

1. Apart from the material referred to by ICA, and the Authorisation itself, TWUQB has filed an affidavit of Adam Carter which annexes the webpages of ICA headed “Who or What is ICA” and “Union Bosses Collusion”.
2. The latter does not assist directly in assessing the status of ICA. It refers to ICA having lodged formal objection to Toll colluding with the TWU. It is noted that in much of the material “Toll” is used by ICA to encompass Toll Transport and other related companies, and TWU is referred to sometimes more widely than TWUQB.
3. The former document is consistent with the general description of ICA set out above.
4. TWUQB says that ICA does not have a sufficient interest in the Authorisation because there is no evidence (and that it is not positively asserted by ICA) that its members include any owner drivers who perform work at or from the Depot for Toll Transport, or even that it has any members who presently would wish to do so. Even if it did, TWUQB says the appropriate persons with sufficient interest to review the Authorisation are the owner drivers themselves and not the association.
5. A careful examination of the material provided by ICA confirms those factual propositions. That is, there is no basis for the Tribunal to be satisfied ICA has any members who are owner drivers who presently, or who wish to, perform work at or from the Depot for Toll Transport. The highest ICA puts its position is that its members in the future might include either an owner driver or a company employing owner drivers who may wish to perform such work.
6. The Tribunal does not consider that ICA therefore, either directly or indirectly through a member (either an employer company or an individual owner driver or drivers), has any actual commercial interests which are or may be affected by the Authorisation.
7. That, of course, is not the end of the consideration. As ICA’s submission of 17 November 2014 indicates, its primary position is that it has standing as an industry body with a special interest in the Authorisation.
8. It is, of course, clear that a body such as ICA is, or may be, recognised either at a regional or State or Commonwealth level as an appropriate source of information and input on the development or review of policy or legislation. The objects, constitution, membership and past activities of such a body may contribute to the reasons for such recognition. It is also obvious, as ICA recognises, that the policy and legislative settings for the ACCC and for the Tribunal in relation to the Authorisation or its review are prescribed by the CC Act. The application for review, if it proceeds, will involve the application of the CC Act provisions to the relevant facts. It will not involve the policy setting for the CC Act or its amendment.
9. The Tribunal does not, however, accept the TWUQB contention that ICA as an association representing the interests of its members cannot have a sufficient interest in the Authorisation or its review. In *Re Jools*, the New South Wales Taxi Drivers Association through its President satisfied the Tribunal that it had a sufficient interest as a representative body to maintain its review application in the particular circumstances. It was there found that the Authorisation could have a direct and significant effect on its taxi driver members’ capacity to work, and that that association could represent their interests. The Tribunal recognised there the need to focus on the particular decision under review, the particular legislative provisions, and the particular representative role of the association in relation to the decision sought to be reviewed: cf *Re Application by Orica IC Assets Ltd; re Moomba to Sydney Gas Pipeline (No 2)* [2004] ACompT 2 in which the Tribunal determined that certain membership-based not for profit incorporated Victorian associations were not “adversely affected” by a ministerial decision under the *Gas Pipelines Access (South Australia) Act 1997* (SA).
10. In this matter, ICA as a public policy advocate on behalf of independent contractors and small businesses, including owner drivers of transport vehicles, identifies its particular interest as follows:

The matter before the Tribunal goes to the key issues in competition policy, namely the right of individuals to operate in an economy with fair, free and open competition. [ICA] is and has long been recognised as a public policy advocacy association that advocates for the rights of self-employed people to conduct their business in a truly competitive free market. [ICA] has long been recognised by governments across Australia as a “stakeholder”.

1. Unlike the circumstances in *Re Jools*, there are no particular matters the subject of the Authorisation which are said directly to affect any member or members of ICA. The geographically confined nature of the Authorisation, the limited conduct which it authorises, and the entitlements of Toll Transport and of any owner driver or drivers not to participate in the authorised conduct is not said to impact in any way upon ICA’s members.
2. The material referred to by ICA asserts the general, but does not address the particular. As the ACCC has pointed out in its contentions, ICA’s concern about other unlawful conduct such as unlawful collective boycotts, about the asserted tendency of TWUQB and/or Toll Transport to engage in other anti-competitive conduct, and about the risk of the ACCC being asked to authorise and then authorising other collective bargaining arrangements in other markets in which either TWUQB or Toll Transport operate, are not concerns which can properly arise from the review of the Authorisation in the present circumstances as ICA has not shown it has any members who, at present or even prospectively, might be affected by the particular conduct authorised. The Authorisation does not provide a foundation for immunity from any other unauthorised anti-competitive conduct which the CC Act prohibits.
3. The fact specific and limited nature of the Authorisation means that it, or any review of it by the Tribunal, would not have any precedential effect in the sense of setting any industry benchmark: cf *Re Telstra Corporation* [2001] ACompT 1. It is not necessary to decide whether there may be other circumstances in which ICA may have a sufficient interest in reviewing any other authorisation in relation to collective bargaining between TWUQB and Toll Transport (or similar entities) where it is concerned about the flow-on effects of such an authorisation. As indicated, the present circumstances do not give it that interest.
4. As noted, ICA has not satisfied the Tribunal that it has any members whose commercial or other interests may be affected by the conduct authorised by the Authorisation. Its claimed interest merely as a general representative of small business and independent contractors is not, in the view of the Tribunal, a sufficient interest so that the review should be allowed to continue.
5. In the light of that view, it is not necessary for the Tribunal to comment in detail about the merits of ICA’s proposed contentions. However, there are a few observations to be made about those contentions and the material proposed to be relied on.
6. ICA’s submission of ICA of 17 November 2014 really reaffirms the view that ICA’s concerns are more about policy than the implementation of policy. The Authorisation does not affect the general rights of its members to negotiate prices for their services with their customers or to set their own operating standards. The evidence of Toll at the Royal Commission is not said to relate directly to the dealings between Toll Transport and TWUQB at and in relation to the Depot. It does not appear that it tends to establish any conduct specifically relating to those dealings. The assertion that there is “aggressive expansion of its coverage” by TWU, and that there is history that TWU will leverage one authorisation into another (an example is asserted from the other authorisations referred to) also does not establish any conduct specifically relating to those dealings. Whilst ICA says it is the only spokesperson for owner drivers and small business who can make representations without fear of retribution from TWUQB, it does not say in this instance that it has any members who are owner drivers or small businesses who do provide, or who have provided in the relevant past, or who may in the proximate future provide, services in the transport of goods to or from the Depot.
7. The review by the Tribunal of an authorisation decision of the ACCC is a merits review. To suggest (as certain of the points raised in the amended application do) that the ACCC failed to properly assess the extent of the public detriment by the conduct the subject of the Authorisation, or that the ACCC had no sufficient foundation for being satisfied about the existence or extent of the public benefit by the authorised conduct does not necessarily support a conclusion that such benefit or detriment does not exist. Those are issues the Tribunal would have to consider, on the material before the Tribunal, if the review were to proceed. The same comment applies to the criticism proffered that the ACCC does not have power to grant the Authorisation because TWUQB is not a trading corporation. The financial statements to 31 December 2013 of TWUQB do not clearly support that proposition, and if the review were to proceed, other material is also likely to inform the conclusion of the Tribunal.
8. However, such comments really indicate why the Tribunal’s focus in this and other matters is upon the applicant and whether it has a sufficient interest, rather than on the apparent merits of its case. There may nevertheless be cases where the apparent merits of the case might be put into the scales when assessing sufficient interest. The Tribunal does not do so in this matter.

# CONCLUSION

1. For the reasons given:
2. CoSBA is refused leave to intervene in the application; and
3. the Tribunal is not satisfied that ICA has a sufficient interest in the application to review the Authorisation.
4. Consequently, the application to review the Authorisation is refused.
5. The Tribunal notes that, by reason of s 42 of the CC Act, the extent to which this decision involves determining a question of law as to the proper scope and operation of s 101(1AA(b), its reasons are those of the President and to the extent that this decision involves the application of the law its reasons are those of the Tribunal as constituted.

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| I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Mansfield, President and RC Davey and R Steinwall, Members. |

Associate:

Dated: 21 January 2015