

Form G
Commonwealth of Australia
Competition and Consumer Act 2010 – subsection 93(1)
NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission (**ACCC**): Notice is hereby given, in accordance with subsection 93(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of the CCA in which the person giving notice engages or proposes to engage.

Confidential information in this notification is identified in blue text. The notifying party requests that this information be excluded from the public register.

Notifying party

CPB Contractors Pty Limited ACN 000 893 667/ ABN 98 000 893 667
Level 18, 177 Pacific Highway, North Sydney, NSW 2060, Australia
T: [REDACTED]
E: [REDACTED]
Contact: [REDACTED]

Documents may be served on the notifying party at the above registered address or to the above email address in accordance with the *Competition and Consumer Regulations 2010* (Cth).

Details of the notified conduct

This notification relates to exclusive dealing conduct. The notified conduct described below does not have the purpose and will not have the likely effect of substantially lessening competition.

Background

CPB Contractors¹ (the notifying party) is the Australasian construction company of the CIMIC Group. CPB Contractors focuses on work across all key sectors of the construction industry, including roads, rail, tunnelling, defence, building and resources infrastructure. CPB Contractors and its competitors are called **project contractors** in this notification.

CPB Contractors does not self-perform the majority of its project work. The majority of the work is performed by subcontractors. CPB Contractors engages subcontractors to carry out work that often falls within the ambit of the Heavy Vehicle National Law (**HVNL**), including subcontractors that indirectly or directly engage Heavy Vehicle services suppliers (these subcontractors are called **Heavy Vehicle Subcontractors** in this notification).

Under the HVNL, Heavy Vehicle Subcontractors and CPB Contractors (i) must ensure, so far as is reasonably practicable, the safety of Heavy Vehicle Subcontractors' transport activities relating to heavy vehicles and must eliminate or minimise public risks; and (ii) must ensure conduct does not directly or indirectly cause or encourage the driver of a heavy vehicle to contravene the HVNL or a speed limit, or cause or encourage another business, including another business in the chain of responsibility, to contravene the HVNL.

Due to those obligations, CPB Contractors currently requires tenderers, as part of tender applications to perform project work for CPB Contractors, to submit management plans if the subcontractor engages a Heavy Vehicle over 4.5t in weight.

¹ See here: <https://www.cpbcon.com.au/en/our-company/about-cpb-contractors>.

The notified conduct

CPB Contractors proposes to insert into its pre-tender documents and subcontracting agreements with Heavy Vehicle Subcontractors an annual audit requirement. Heavy Vehicle Subcontractors will be required to acquire an annual audit by an independent auditor to certify that the Heavy Vehicle Subcontractor's management plan has sufficient controls to ensure the Heavy Vehicle Subcontractor will comply with its obligations under the HVNL, and that the controls are, in fact, being implemented (**preferred auditor condition**).

To participate in CPB Contractors' tendering processes for the award of HVNL service contracts, Heavy Vehicle Subcontractors will need to obtain auditing services from a specified list of auditors maintained by CPB Contractors. Due to the challenges of identifying appropriate auditors, CPB has identified a list of nine auditors with the requisite quality, knowledge, skill and experience to ensure that management plans are appropriately scoped and implemented. The currently preferred auditors are the following:

Preferred auditors
KJ Transport Consultants
Castor Audit & Advisory Australia
HV Consulting Services
QSTA
RFH Consulting
Four Point Five
Zenergy Group
David Harrison
STAC

The list of preferred auditors will not be exhaustive or limited. CPB Contractors will permit Heavy Vehicle Subcontractors to nominate and acquire services from other auditors with whom they have a prior relationship and/or who can demonstrate that they are of similar quality, knowledge, skill and experience to the initially selected preferred auditors.

Any Heavy Vehicle Subcontractor who does not acquire auditing services from a preferred auditor will not be permitted to tender for CPB Contractors' project work.

The proposed conduct will commence in or around October 2020 and is anticipated to continue on an ongoing basis.

Rationale for the notified conduct

CPB Contractors has recognised that some Heavy Vehicle Subcontractors prepare a management plan for the purpose of meeting tender requirements but go no further. The management plan is not implemented and consequently contraventions of the HVNL may occur.

Through the notified conduct, CPB Contractors is seeking to ensure that all Heavy Vehicle Subcontractors have a management plan and system in place which outlines the controls they have to ensure their obligations under the HVNL is being discharged – and that those management

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plans (and the systems and processes put in place to manage the hazards and risks associated with heavy vehicle activities) are robust and implemented. Safety is the primary consideration.

The selection of skilled auditors is intended to avoid risks such as fraudulent activity by Heavy Vehicle Subcontractors and auditors. CPB Contractors has compiled an initial list of nine preferred auditors following an assessment process whereby auditors are assessed for their quality knowledge, skill and experience in Heavy Vehicle compliance. This is because, in Australia, the Heavy Vehicle auditing market segment is not significantly regulated and any person could potentially refer to themselves as an auditor of Heavy Vehicles.

Affected parties

The number of Heavy Vehicle Subcontractors that could potentially be affected by the notified conduct is around 2,000-7,000.

The number of auditors that could potentially be affected by the notified conduct is around 100-200.

Competition assessment

Application of the CCA

Subsections 47(6) and (7) of the CCA provide that third line forcing occurs when a supplier of "goods" or "services" imposes a condition requiring a counterparty to also acquire "goods" or "services" from a particular, unrelated third party (or refuses to supply "goods" or "services" because the counterparty will not agree to that condition). Subsection 47(10) of the CCA provides that third line forcing is only prohibited if it has the purpose or likely effect of substantially lessening competition.

Those provisions of the CCA are potentially applicable to the notified conduct because CPB Contractors intends to impose a condition on Heavy Vehicle Subcontractors that specifies the preferred auditors from which they must acquire auditing services for their HVNL management plans and systems, and CPB Contractors will not supply the right to tender for CPB Contractors project work unless the Heavy Vehicle Subcontractors do so.²

Market definition

For the purposes of this notification, the notifying party considers that the relevant areas of competition are:

- the supply of Heavy Vehicle subcontracting services to project contractors in New South Wales and Australia; and
- the supply of auditing services to Heavy Vehicle Subcontractors in New South Wales and Australia.

The ACCC does not need to precisely define any relevant market in order to assess the notified conduct, because no competition concerns could arise on any market definition.

The notified conduct does not have an anti-competitive purpose

The preferred auditor condition is focused on compliance with the HVNL, the minimisation of public risks and (above all) safety. CPB Contractors has identified that the best means of achieving this

² CPB Contractors granting a right to tender to be able to subcontract to CPB Contractors may be categorised as a supply of "services" (see section 4(1) of the CCA, as interpreted in *Obeid v ACCC* [2014] FCAFC 155).

goal, in a proportionate and not overly prescriptive manner, is to include the preferred auditor condition in its agreements with Heavy Vehicle Subcontractors.

No anti-competitive effects arise from the notified conduct

The notifying party considers that no plausible competition concerns arise from the notified conduct and it could not substantially lessen competition in any market.

There is no prospect that either suppliers of Heavy Vehicle subcontracting services or auditors seeking to supply auditing services of the relevant type could be materially foreclosed or significantly excluded from the relevant areas of competition identified above by the preferred auditor condition.

Heavy Vehicle subcontracting services

It is important to note that the notified conduct does not result in any material change in CPB Contractors' tendering practices with Heavy Vehicle Subcontractors. There is a current obligation to have a management plan in place and the future obligation *a/so* to have that management plan audited annually for compliance purposes will be added.

If any Heavy Vehicle Subcontractor is unwilling or unable to comply with the preferred auditor condition, CPB Contractors is only one of a large number of project contractors offering a broad range of project development and contracting services to public and private sector clients in a wide range of industries in New South Wales (and Australia).³ Within those industry segments, there are a very large number of subcontracting opportunities for Heavy Vehicle Subcontractors offered by John Holland, Lendlease, Laing O'Rourke, Hutchinson, Probuild, Nexus, Fulton Hogan, BMD Constructions, Downer EDI, ADCO, BGC, Richard Crookes, Built, Watpac and many others.

As such, even assuming a Heavy Vehicle Subcontractor considered that they could not comply (or was unwilling to comply) with the preferred auditor condition and chose not to tender for CPB Contractors' project work, there are a very large number of other projects and project contractors that such a Heavy Vehicle Contractor could service.

Auditing services

With respect to the supply of auditing services, the preferred auditor condition can result in no material foreclosure for the following reasons.

There are no quantitative limits on the number of preferred auditors (only qualitative limits based on auditors' quality, skill, knowledge and expertise (etc.)). CPB Contractors seeks only to ensure that all preferred auditors have the requisite skills to perform the required auditing tasks.

As such, any auditor could propose him/herself as a preferred auditor and CPB Contractors would add them to the list of preferred auditors (subject to their quality, skill, knowledge, expertise (etc.)). Any Heavy Vehicle Subcontractor could propose an auditor as a preferred auditor in the same way.

Even assuming CPB Contractors did not add a potential auditor to the list of preferred auditors, the opportunities for the supply of auditing services of this type are substantial (including to the very large number of Heavy Vehicle Subcontractors active in New South Wales and Australia, which are active on the very large number of projects of the types addressed above).

³ Relevant industries and project types that require Heavy Vehicle subcontracting services include non-residential construction services; residential construction services; non-building construction services; road and bridge construction services (and others).

As at 30 June 2019, there were over 2,000 Heavy Vehicle operators in New South Wales and over 7,000 Heavy Vehicle operators in Australia, the vast majority of which would not be affected by the preferred auditor condition.⁴

Public benefits

The notified conduct:

- will improve public safety and the safety of workers in the Heavy Vehicle transport industry and related industries;
- will encourage the implementation of robust safety management systems; and
- furthers the aims of the National Heavy Vehicle Regulator, i.e. that businesses in the transport chain influence others to improve the safety of their activities.

Public detriments

The notifying party does not consider that any public detriment could arise from the notified conduct.

Contact details of relevant market participants

Although the notifying party does not consider it necessary given the very low risk of a contravention of the CCA arising from the notified conduct, contact details for market participants could be provided on request.

Declaration by notifying party

The undersigned declares that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned is aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).

Signature of authorised person



(Print) Name of authorised person



Position of authorised person

Group Manager, Safety & Health

This sixth day of October 2020

⁴ <https://www.nhvr.gov.au/files/201911-1120-nhvr-2018-19-annual-report-web.pdf>.