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To Adjudication Branch
Australian Competition and Consumer Commission
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Re A91514 Transport Workers' Union of Australia SA/NT – submission
Objection to granting of authorization to engage in collective bargaining

Date 12 November 2015

From Ken Phillips
Executive Director
Independent Contractors Australia

Dear Sir,

Independent Contractors Australia (ICA) objects to the granting of an authorization to the Transport Workers Union of Australia SA/NT to engage in collective bargaining with Toll Transport Pty Ltd on behalf of the owner-driver members of the TWU who are contracted to Toll.

We are aware that the closing date for submissions was 20 October 2015, but we lodge this objection nonetheless.

1. Basis of objection
We lodge our objection to this application (A91514);

- On the grounds that the TWU and Toll are not fit and proper organisations to be granted authority to collectively bargain given the past admissions of anti-competitive collusion.
- In addition we submit that s93 of the Competition and Consumer Act prohibits the ACCC from accepting and considering, let along granting a collective bargaining application by a union.

2. Prior objection to Toll–TWU
By way of background, on 24 July 2014 we lodged an objection to authorization A91427 Transport Workers' Union of Australia-TWU on the following grounds :

> ICA objects on the basis that Toll and the TWU have been involved in collusive behaviour for the purposes of harassing Toll's competitors and as such both Toll and the TWU have jointly been engaged in anti-competitive behaviour to the detriment of the public good. On this basis both the TWU

and the Toll are not fit and proper organizations to be granted authorization to engage in collective bargaining.

The evidence of the anti-competitive collusive behaviour is contained in the transcripts of the Royal Commission into Trade Union Governance and Corruption, Public Hearing On Thursday, 3 July 2014 at 10am found here: http://www.tradeunionroyalcommission.gov.au/Transcripts/Documents/Evidence3July2014/TURC_Day0003_140703_TWU.PDF

We lodge our objection to this application (A91514) on the same grounds—namely, that the TWU and Toll are not fit and proper organisations to be granted authority to collectively bargain given the past admissions of anti-competitive collusion.

We note and accept that:

- The ACCC rejected our objection to A91427 on the grounds that the TWU–Toll collusive behaviour evidenced above was 'not relevant' to the collective bargaining application. (However we argue that the behaviour is relevant. The issue is the use by the TWU of its power under the Fair Work Act to enter a business and inspect its books. TWU and Toll collude to use this power to spy on Toll's competitors. The TWU uses industrial muscle to force Tolls competitors to adopt Toll's work practices, regardless of the inefficiencies these might bring to Toll's competitors. The fact of the Toll-TWU evidenced in the Commission being a secret agreement there can be no confidence that there are no secret agreements in relation to this application (A91514).)
- We sought to appeal the ACCC's decision to the Federal Court but were denied standing.
- Separately to the collective bargaining application, the ACCC undertook a detailed investigation into the Royal Commission evidence of TWU–Toll collusion (as above) and concluded that there was no breach of Competition Law on the basis that Toll did not exercise sufficient market power.

3. Subsequent developments

In a speech to the Law Council on 14 August 2015, ACCC Chairman Rod Sims expressed concern about unions and companies colluding to manipulate/control markets, saying that this does not give unions or "businesses cooperating with them a licence to seek to regulate markets". In this context Mr Sims specifically referred to the Toll–TWU collusion. Mr Sims flagged increased activity by the ACCC to watch and review such union–company collusion.

We submit that in considering 'market power' in relation to collective bargaining the ACCC should assess and consider not only the company (in this case Toll) but also the market power exercised by the union (in this case the TWU). We submit that the TWU exercises considerable and dominant market power over the transport markets in which it operates. It does this by creating arrangements with some companies in the market and then seeks to force those same arrangements on other companies by harassing or damaging those companies. Through this mechanism the TWU exercises power over which companies can operate in the transport markets in which the TWU is active. The TWU thus controls the market but it appear to escape the sanction or even the oversight of competition law.

We further note that the Royal Commission into Union Corruption has recently received submissions from legal counsel recommending that criminal charges proceed against union officials and company executives who have been involved in secret payments and deals. Although the Toll–TWU collusion has not specifically so far been cited in relation to possible criminal charges (to our knowledge) the collusion between them involved secret or hidden payments.

We submit that, based on the foregoing, the ACCC should suspend applications for collective bargaining between the TWU and Toll until such time as:

- The Royal Commission into Union Corruption has delivered its final report, whether or not that report makes adverse findings (criminal or otherwise) against Toll and/or the TWU, and that the ACCC subsequently review its approach to Toll–TWU collective bargaining applications.
- The ACCC has further developed its approach to union collective bargaining given Rod Sims' comments of 14 August and, in particular, has given due consideration to the market power exercised by the TWU.

4. s.93 versus s.88 of the Competition and Consumer Act 2010

We note that the TWU has made application under s.88 (1A)/88 (1) of the Competition and Consumer Act 2010. We submit that such application under this section is in conflict with s.93 of the Act that prohibits unions making collective bargaining applications and, as such, s.88 collective bargaining applications should be disallowed by the ACCC, including this application by the TWU (A91514).
If such applications under s.88 are deemed not to be illegal by the ACCC on whatever technical grounds may be determined, we submit that the acceptance of such s.88 applications is, at minimum, a breach of the clear intent of Parliament as evidenced in *Hansard* when s.93 was considered and passed. We explain below.

To summarise the situation of the application by the TWU

- s.93 of the Act has, since 2006, prohibited unions from making collective bargaining applications under competition law.
- The TWU made application instead under s.88 (general authorization processes) but this section of the Act (see below) makes no reference to collective bargaining.
- It is assumed that unions have been able to make (and have made?) applications under s.88 in the past (ie: before the 2006 TPA amendments designed to create easy collective bargaining authorization came into being).
- The 2006 TPA, however, specifically bans unions from making applications for collective bargaining. The parliament made it clear that unions could apply for other (more complex) authorizations, but that parliament had the clear intent to ban unions from making collective bargaining applications.
- Underpinning the ban was the principle that employment-related matters should not be handled under the TPA, as there is another body and set of processes to handle this. That is, that the provisions and processes of the TPA were (and are) not developed to handle, nor are capable of handling, employment-type matters.

4.1 Overview and summary of the development of the law in relation to authorisations

- The 1974 TPA had an authorization process of a general nature. It was expensive and complex to apply.
- The Dawson review of the TPA (2003) picked up on the small business sector's frustration at their inability to bargain collectively with large firms.
- Dawson recommended an easier authorization process specifically for collective bargaining, but only for small business. Further, Dawson recommended that this easier collective bargaining authorization not cover employment matters.
- The 2006 amendments to the competition Act implemented Dawson's recommendations, creating a specific, small business collective bargaining authorization process. Consistent with excluding employment matters from this collective bargaining authorization, unions were specifically excluded from making application or having anything to do with the process.
- s.88 was not (it seems) amended specifically to make it consistent with s.93 (that is, by having a clause disallowing unions from making collective bargaining applications). s.88 still remained available to unions for other authorizations. Dawson and the parliament anticipated this. However, the intent of the law is clear. Collective bargaining applications should be made under s.93. The use of s.88 for collective bargaining applications is the use of a technical 'hole' in the Act that thwarts the intent of the law. The legitimacy of s.88 when used for this purpose is, we submit, dubious.

ICA submits that the use of s.88 by the TWU (or any unions) to make collective bargaining applications and the allowance of the use of s.88 is, in effect, a breach of the competition laws and should not occur.

ICA contends that the intention of the law in banning unions from making collective bargaining applications is clear, specific and unambiguous. The evidence is found in the review of the competition law (Dawson Review 2003) which recommended the small business collective bargaining process and in the parliamentary speeches and debates of the day on the issue.

4.2 The Dawson Report

The Dawson Report (see C1 Collective Bargaining, Chapter 7) explained the provisions of the existing 1974 TPA in this way:

> However, collective bargaining is constrained by the Act. Section 45 prohibits collusive conduct in the form of contracts, arrangements or understandings having the purpose or effect of substantially lessening competition. (emphasis added by ICA) Section 45A(1), in effect, deems a price fixing agreement to be in breach of section 45. Accordingly, any agreement between competitors to fix, control or maintain prices for goods or services is prohibited regardless of its purpose or effect on competition. Sections 45A(2) and 45A(4) provide joint ventures and joint buying groups with a limited exception from the per se prohibition imposed by section 45A(1), but section 45 continues to apply so that any pricing arrangements are still prohibited if they substantially lessen competition. (C1)

The Report explains how employment matters are exempt from the TPA:

> Section 51(2)(a) exempts collective bargaining, for example by trade unions, in relation to remuneration, conditions of employment, hours of work or working conditions of employees. (C1)

In making the recommendation to create an easier collective bargaining process for small business, the Dawson Report explains why employment matters should be excluded from that process:

> The general exemption provided in the Act for collective bargaining and collective agreements on employment conditions does not provide an appropriate precedent for small business. Collective bargaining between employees and employers is subject to detailed regulation under industrial relations legislation which has developed over many years. If small business were granted a general exemption from the Act, it would operate without the checks and balances governing collective bargaining under industrial law. (Emphasis added by ICA) (C1)

In other words, Dawson wanted to make it clear that collective bargaining under employment law was something quite different to collective bargaining under commercial (competition) law, that the two should be kept separate and distinct, and that no cross-over between the two should occur.

4.3 Hansard speeches about the 2006 Act

The intent of the 2006 TPA Bill was well stated.

The Explanatory Memorandum to the Bill (C2) said:

> The collective bargaining notification scheme will be available for any small business, including an independent contractor, which meets the necessary requirements. However, in line with the clear demarcation, acknowledged and supported by the Dawson Review, between the regulation of business relationships and employment relationships, it is not envisaged that the collective bargaining provisions would be used to pursue matters affecting employment relationships. (Emphasis added by ICA) (C2 Schedule 3 from page 55)

and

> Subsection 93AB(9**)** provides that a purported collective bargaining notice is not a valid notice if it is given, on behalf of the corporation, by a trade union, an officer of a trade union or a person acting on the direction of a trade union. (C2 page 59)

The reason for the exclusion of unions was further stated in the Second Reading Speech to the Bill (C3 17 February 2005). The speech, in effect, gave a direction to the ACCC not to allow collective bargaining applications by unions on the grounds that the process should not be used to progress employee issues. In fact, such applications are invalid.

> In considering public benefit and detriment, the ACCC will have particular regard to the government's intention that the collective bargaining provisions not be used to pursue matters affecting employment relationships. The act is for

> the promotion of competition and fair trading and the provision of consumer protection, not the pursuit of employee entitlements. This is further reinforced by an amendment which makes a notification invalid if it is lodged on behalf of a small business by a trade union, its officers or a person acting on the direction of the trade union. (C3 Page 10-11)

The exclusion of unions was not without controversy and criticism. Senators Hutchinson and Conroy were particularly vocal.

Senator Hutchins said in the Senate debate:

> This bill denies small businesses and independent contractors the right to be represented by trade unions. In short, it denies them the choice to collectively bargain with a trade union as their agent. I would like to go into some detail on this bill before considering how it uniquely disadvantages lorry owner-drivers by denying them the choice to be represented by the Transport Workers Union… (C4 page 10)

Senator Conroy said

> I invite any speaker but particularly—through you, Mr Acting Deputy President—Senator Brandis to give us a philosophical basis for this particular clause. The proposed section 93AB(9) will have a particularly adverse impact on small businesses in the transport industry. (C8 page 116)

> I make no apology whatsoever: as a former official of the Transport Workers Union, I am proud to stand here today and participate in this debate on behalf of small businesses in the transport sector. On average, one-third of the members of my union are small businesses—independent contractors. It is perfectly legitimate for them to want to associate, to want to engage the union to negotiate on their behalf. But no, it has to be some spiv lawyer. It cannot be a union. It is an ideological obsession. (C8 Page 117)

Several speakers on the government side provided answers to Senator Conroy's query.

Christopher Pearce MP (Parliamentary Secretary to the Treasurer and responsible for carriage of the Bill in the House of Representatives) explained the reasons for the exclusion of unions on the 10 March 2005. In particular, he made the point that the exclusion of unions for collective bargaining did not prevent unions from being involved in authorization on other matters, presumably under s.88:

> I turn to collective bargaining. In considering public benefit and detriment arising from proposed collective bargaining arrangements, the ACCC will have particular regard to the government's intention that the collective bargaining provisions not be used to pursue matters affecting employment relationships.
>
> The Trade Practices Act is for the promotion of competition and fair trading and the provision of consumer protection, not the pursuit of employee entitlements.

> This is further reinforced by the amendment to the bill which makes a notification invalid if it is lodged on behalf of a small business by a trade union, its officers or a person acting on the direction of the trade union.
>
> This will ensure that employment relationships continue to be regulated through workplace relations legislation and not trade practices legislation. The new notification process is aimed at straightforward arrangements involving small businesses and a single target. Unions may appropriately continue to apply for authorisation of more complex arrangements—for example, those involving multiple targets. (Emphasis added by ICA) (C5 Page 16)

This makes it clear that the intention of the Act was (and is) to prevent unions making collective bargaining application under competition laws. Further, that unions could make application for other matters (presumably under the general authorization processes of s.88) but only for other matters. It is reasonable and logical to conclude that the intention of the Act is that s.88 not be used for collective bargaining applications as this would obviously circumvent the intention of the Act to exclude unions from collective bargaining applications and authorizations as clearly intended under s.93.

The reason behind the exclusion of unions was (again) stated clearly by Andrew Robb MP for the government:

> The amending legislation makes it clear that the collective bargaining process allows for third parties to give a collective bargaining notice on behalf of a group of small businesses. This, of course, as the member for Hunter made clear, would be relevant to rural producers who may wish to bargain through the structure provided by a single industry body, and it may be relevant to cooperatives in appropriate circumstances. But there are no limits on how many groups any one agent can act on behalf of and there are no restrictions on agents acting for groups in different industries. The only requirement in the bill is that a collective bargaining notice cannot be given by an agent on behalf of a group if the members of the group could have given the notice on their own behalf.
>
> Trade unions will be unable to notify a collective bargaining arrangement on behalf of small businesses, consistent with the Dawson review recommendations and acknowledged by the Dawson review. It is clear that it is based on the understanding within the Dawson review that clear demarcation must be made between the regulation of business and employment relationships (emphasis added by ICA)—a clearly logical demarcation which was not acknowledged by the member for Hunter and should have been. This bill gives effect to that clearly logical demarcation between the regulation of business and employment relationships. (C6 Page 44)

5. The intent of the (collective bargaining) law: Personal responsibility in a market economy

ICA submits that the reasons for the demarcation between business and employment regulation cut to the heart of achieving effective competition in market economies.

Under employment law and regulation, collective bargaining, boycotts (strikes) and collective price-fixing (of wages and entitlements) are all legal within the rules and regulations laid down under employment laws (currently the *Fair Work Act*). Those laws (generally) remove individual employees from sanctions and responsibility related to the (wage) price-fixing process and so on.

However, commercial/business law is quite different, both in its ordinary understanding by the lay-person and in the specifics of commercial and competition law. Under commercial and competition law, the principle holds that the 'business' is entirely responsible for its actions. In the case of small businesses, the individual owning and running the business is invariably liable and personally responsible for his or her actions. This is particularly so for sole traders and partnerships (two-thirds of small business structures). For small business people operating under corporate structures or trusts (one-third of small businesses) the corporate veil offers only limited isolation from personal liability for actions (in comparison to larger businesses). This is very much the case for independent contractors, which is the category into which owner-drivers fall and which the TWU seeks to represent.

The uniqueness of being an independent contractor (owner-driver) is that individuals are responsible for their actions. If they breach competition law, they are responsible and subject to sanction. This is what it means to be an individual who engages in commerce. There are benefits but also responsibilities. Without the responsibilities associated under law with engaging in commerce, fraud, exploitation, misrepresentation and so on become rife. Trust in commerce diminishes, resulting in harm to everyone in the community. In societies operating under the rule of law, individual responsibility is a key to social success. So too does individual responsibility apply under the rule of law for commercial activity.

In seeking to represent self-employed, independent contractors (owner-drivers included) ICA stands by this principle. As self-employed people we must accept our responsibilities under commercial and competition law. It is a primary part of ICA's policy and advocacy stance. Perhaps counter-intuitively, this works to strengthen the position of self-employed people in the economy.

The Deputy Commissioner for Small Business at the ACCC, Dr Michael Schaper, explains that, between 1974 (the introduction of the TPA) and 1995, competition laws did not apply to most small businesses. (C7 PowerPoint slide #17). Further, that the application of competition laws to small businesses represents 'a giant laboratory experiment'. However, the experiment seems to have had some success for small business people. Since 1995 the number of small and medium-sized businesses in Australia has more than doubled and the proportion of micro-businesses has grown from 80 per cent of the number of businesses to 84 per cent. (C7 PowerPoint slides #18 &19). On this simple analysis, competition law could be seen as a benefit to small business people. What the competition laws most specifically do is make the persons running businesses responsible for their actions in the supply of goods and services.

ICA submits that if there are benefits to be derived for small business people by making them subject to competition law, the principles of the law need to apply in a consistent manner. Herein is a justification for prohibiting unions from being involved in, or making application for, collective bargaining under the competition laws.

If an independent contractor (owner-driver) wishes to seek the benefits of collective bargaining under competition law, it is important that they also have and accept the responsibilities that go with being under competition law. Those responsibilities should not be diminished or diverted. Further, the responsibilities should be tied to the commercial contracts involved.

In the case and example of the owner-drivers seeking to bargain collectively with Toll, it is the driver/s themselves who have the contract/s with Toll. Those contracts are individual in nature. The drivers seek to get together collectively to negotiate with Toll. The ACCC can authorize that. In seeking to ensure that responsibilities, as well as benefits, accrue with the collective bargaining process, it is important (as a matter of principle and practice) that the collective bargaining authorization is given to each and every named owner-driver.

This is reflected in the intent and the effect of the exclusion of unions under the collective bargaining authorization process. If unions were to be allowed to be the, or a, party to the collective bargaining process, the union itself becomes a party to the process, yet the union does not have a contract with the other party (in this instance, Toll). That is, the responsibilities that are tied to engaging in commerce through commercial contracts become diverted or diminished. The union (TWU) controls, directs and/or influences the collective bargaining processes and outcomes, yet does not have a contract with the other party (Toll) and bears no responsibility. The owner-drivers have their responsibilities diminished, diverted or at least confused in the process. This is to the detriment of competition law and the consequent public good.

This reasoning (above) expands on the explanation of Dawson that

> If small business were granted a general exemption from the Act, it would operate without the checks and balances governing collective bargaining under industrial law. (C1)

And in line with the 2006 TPA amendments, Explanatory Memorandum that

> … the clear demarcation, acknowledged and supported by the Dawson Review, between the regulation of business relationships and employment relationships, it is not envisaged that the collective bargaining provisions would be used to pursue matters affecting employment relationships. (C2 Schedule 3 from page 55)

Under employment law the collective bargaining process is well regulated. The union represents employees and the union does not have a contract with the employer. But there are ‘checks and balances’ within the employment regulations. And the scope of collective bargaining under employment regulations is constrained and narrowed to employment issues only.

By comparison, collective bargaining under competition law has potentially much wider scope than collective bargaining under employment regulations. Therefore the principle should apply of ensuring that responsibilities are unambiguously tied to the contract/s in play (in our example, between Toll and the owner-drivers). The competition laws and processes in relation to collective bargaining (under the 2006 TPA) are much simpler (and are intended to be) than employment collective bargaining, but do not have the checks and balances of employment regulation. Hence

there is logic behind the exclusion of unions under the TPA collective bargaining process.