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To Adjudication Branch
Australian Competition and Consumer Commission
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Re A91427 Transport Workers' Union of Australia – submission
Objection to granting of authorization to engage in collective bargaining

Date 25 July 2014 (amended from objection lodged 23 July 2014)

From Ken Phillips
Executive Director
Independent Contractors Australia

Independent Contractors Australia (ICA) objects to the granting of an authorization to the Transport Workers Union of Australia 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.

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 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

The transcripts contain evidence from Toll's senior legal counsel, workplace relations and safety, Damian James Sloan.

In evidence, Sloan explains that Toll pays \$150,000 a year to a 'training' company entirely owned by the TWU. \$50,000 per year of that amount is subject to written undertakings that state:

"The Union will conduct audits, wage inspections or other compliance measures of a Transport Competitor during each of the years 2011, 2012, 2013." (p153 par1)

The 'measures' are to be against a:

"... transport operator which is in direct competition with Toll and identified as one by Toll" (p153 par12)

Further that:

"The Union will conduct audits, wage inspections or another compliance measures of a minimum of 5 Transport Competitors during each of the years 2013, 2014, 2015, 2016 and 2017 ..." (p161)

And

"In deciding what prosecutions, audits or other compliance measures are taken by the Union, the Union has agreed to have regard to any concerns raised by Toll as to practices in

the industry.” (p155 par 1)

In addition

“The Union must prepare a report for Toll as to the progress and status of any prosecutions ... and the findings of audits ... and the steps the Union has taken or intends to take to ensure future compliance” (p155 par 23)

In summary, the evidence given by Toll’s senior legal counsel is an admission that Toll is paying the TWU large sums of money on the express requirement that the TWU use its powers under industrial relations laws to harass competitors of Toll.

Toll’s objective was and is to impose the same costs on its competitors that Toll incurred. The transcript states:

“Toll considered that it was at a competitive disadvantage ... It wanted a level playing field. It wanted Toll’s competitors to incur the same costs that Toll was incurring.” (p156)

The transcripts can lead to an allegation suggesting that Toll, at least, and possibly the TWU considered the arrangement (under a written ‘Deed’) to be potentially illegal or at least ‘shady’ and at the margins of the law. This allegation can be made because the transcripts state that the arrangement was done as a Deed rather than being contained in an Enterprise Bargaining Agreement (under industrial relations law) because Toll did not want the Deed to be public. The Deed included strict confidentiality clauses to which both Toll and the TWU agreed.

It is the submission of Independent Contractors Australia that Toll and the TWU should both be investigated for breach of Australian competition laws with a view to possible prosecution.

ICA submits that the evidence shows that Toll and the TWU have used the cover of industrial relations law and arrangements to engage in anti-competitive conduct. If the Australian Competition and Consumer Commission chooses not to investigate and prosecute, the ACCC should, at minimum, deny the TWU rights to engage in collective bargaining under competition law.

Based on the evidence, ICA submits that the TWU and Toll have demonstrated that they do engage in anti-competitive behaviour in relation to employees (under industrial relations laws). On this basis it should be expected that the TWU and Toll will engage in anti-competitive behaviour if granted collective bargaining rights under competition law. The risk is too great for the ACCC to take.

On balance we submit that the public detriment would significantly outweigh any arguable potential public good.