

Compliant ACCC turns blind eye to bargaining rorts

Judith Sloan, The Australian, June 23, 2015

Thank god the Australian Competition & Consumer Commission sorted out the meaning of fresh when it comes to bread bought from supermarkets. It was really a big deal that was causing serious harm to consumers — or not.

And where would we be if the ACCC were not keeping a watch on pesky door-to-door salespersons? It just doesn't bear thinking about. But when it comes to really big stuff that produces serious economic losses caused by profoundly anti-competitive conduct involving registered trade unions, the ACCC just runs a mile.

What's a secondary boycott between friends? Why should the ACCC care that a business can be hurt commercially, even sent broke, by an illegal secondary boycott? The ACCC will cite difficulty in getting evidence or potential witnesses being uncooperative, notwithstanding the sweeping powers in the legislation to compel witnesses to answer questions.

We have a body that is there to protect the best interests of consumers and to foster competition, but simply finds it too difficult to investigate egregious instances of anti-competitive behaviour if it involves trade unions.

To be sure, there are some carve-outs for unions in the Competition and Consumer Act. Under section 51(2)(a), contracts, understandings or arrangements that relate to remuneration, conditions of employment, hours of work or working conditions of employees are specifically excluded from the purview of the ACCC.

But there are two important employment-related categories of conduct that are covered by the act. These are secondary boycotts and trading restrictions in industrial agreements.

Before I deal with these two issues, it is worthwhile reviewing an extraordinary decision handed down by the ACCC last week. The facts of the case became public knowledge as a result of hearings at the Royal Commission into Trade Union Governance and Corruption.

The Transport Workers Union had set up slush fund with the title TEACHO, Transport Education Audit Compliance Health Organisation Limited — yes, I know that title makes no sense but I guess that's part of the story's point.

One of the biggest road freight companies, Toll Holdings, donated \$150,000 a year to TEACHO, in part to "provide training for Toll's employees and contractors with respect to general compliance measures (including log book compliance and occupational health and safety)". Why Toll wouldn't provide that training itself is another story.

But here's the kicker: part of the deal with Toll Holdings was that the TWU would "conduct audits, wage inspections or other compliance measures of one or more competitors of Toll". That's right — Toll was paying the TWU to make trouble for the company's competitors.

But according to the ACCC, there was nothing to see. This cosy arrangement did nothing to affect competition in the road freight industry because Toll Holdings didn't command a sufficiently large share of the market, as defined by the ACCC.

Actually, the 7 per cent figure that the ACCC quotes as Toll's share takes into account all freight moved by road, including by lots of mum and dad operators. For Toll, however, the market is much more narrowly defined and relates to locked-in contractors with the big supermarkets and the like. On that basis, Toll's share is large and its competitors are quite small in number.

In its pathetic explanation of why the deal between Toll and the TWU was just fine as far as the ACCC was concerned, the following sentence was rather sheepishly added: “The ACCC has previously taken action with respect to alleged anti-competitive conduct involving unions.” Really? Just take a look at the ACCC’s response to the secondary boycott directed at Boral Resources (Vic) by the Construction Forestry Mining and Energy Union.

Following on from Boral’s refusal to agree to stop supplying Grocon, a company with which the CFMEU has been in constant dispute, the union implemented every trick in the book to damage Boral’s business.

The ACCC just refused to act. There wasn’t any evidence; the evidence was too hard to get. That the company handed over a full dossier of facts and the matter was before the Supreme Court of Victoria on several occasions were seen as beside the point for the ACCC. It was well over a year before the ACCC finally decided to institute proceedings in the Federal Court.

And the ACCC’s inaction doesn’t end there. You just have to look at union enterprise agreements to realise they are replete with anti-competitive provisions, but the ACCC shows no interest, even though it would be possible to intervene.

Examples include:

- Restrictions on the use of contractors
- Employment of contractors through a nominated company controlled by the union.
- Income protection insurance to be purchased from a company affiliated to the union.
- Nomination of a single superannuation fund affiliated to the union.

The ACCC just sits back and instead worries about the veracity of online restaurant reviews.

Then there is the mother of all anti-competitive arrangements, in which unions do favourable deals with companies on the condition that the deal is not offered to their competitors.

This is the case with the Shoppies’ arrangement with the big supermarkets (in exchange for quasi-compulsory union membership). It was the case when a competitor of Cleanevent (mentioned in the royal commission) sought the same deal from the AWU but was refused.

And there was the case in which the ACCC allowed the TWU to misuse the collective bargaining provisions of the act to rope in owner-drivers contracted to Toll Holdings. (The owner-drivers were invited to become TWU members.) Notwithstanding that these provisions were never intended for this use, the ACCC was more than happy to oblige.

For unions to get away with doing sweetheart deals with employers — which harm consumers, taxpayers and the economy — a number of preconditions have to line up.

And one of these is a compliant ACCC that simply turns a blind eye to outrageous anti-competitive conduct.

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