Submission to the Federal Government's Competition Policy Review

Independent Contractors Australia

November 2014

Incorporated Victoria No A0050004U
ABN: 54 403 453 626
www.independentcontractors.net.au
PO Box 13103 Law Courts 8010 Vi

Submission to the Federal Government's Competition Policy Review
17 November 2014

Independent Contractors Australia is pleased to have the opportunity to have input into the Federal Government's Competition Policy Review. This submission responds to the Competition Policy Review Draft Report of September this year and is in three parts.

ICA

a) Proposes a broadened and deepened understanding of what 'Competition Policy' actually means and what it should target.
b) Expresses concern about the corruption of competition policy due to industrial relations laws and practices, and proposes remedies.
c) Responds to some of the specific items raised in the Draft Report.

1. Overview

In this competition review, ICA's interest and concerns relate primarily to the ways in which industrial relations laws and practices intrude into and corrupt the intent and purpose of competition laws, thereby distorting a properly functioning free market for all Australians. ICA would go so far as to say that Australia suffers from wide-scale corruption in this respect. Our alleged 'free' market is not free.

The Competition Policy Review Draft Report of September this year in part considers this issue (that is, industrial relations corrupting competition) and recognizes that there is a problem. However, we believe that the analysis of this is only cursory at best. The most the Draft Report does is make recommendations in relation to technical and procedural matters to do with secondary boycott issues. The Draft Report does, however, invite further submissions, which indicates that the Review Panel has an interest in the matter. ICA responds to that invitation.

ICA has a primary interest in this issue. ICA's reason for being is to act as an advocate for the right of people to be self-employed independent contractors. Independent contractors are a breed of workers that can be found around the world. They are not employees but are 'businesses of one', individuals who earn their livings by utilizing the commercial contract as opposed to the employment contract. They are regulated by commercial/competition laws and not industrial relations laws.

Where industrial relations laws and practices intrude into, override or otherwise corrupt commercial and competition laws and practices, the consequence is that

independent contractors are stripped of their ability and right to be self-employed, to be their own boss, to be a business of one. ICA's purpose is to defend the right of self-employed, independent contractors to be self-employed—hence our heightened interest.

Part A
We propose a larger view of 'competition policy'

ICA believes that competition policy is too narrowly focused. We propose a broader view if competition policy is to be understood and addressed within the context of current society and how the economy functions.

2. A larger view expanding beyond just 'consumers'

The Draft Report places competition principles within the framework identified in the Hilmer Report (1993) stating, "The Panel endorses competition policy that focuses on making markets work in the long-term interests of consumers."

ICA submits, however, that it is time that the core stated focus of competition laws should not simply be a narrow idea of consumer interest, although this should remain. The focus needs to be broadened. The reality is that self-employed people (some 2 million individuals in Australia) are businesses. Yes, as individuals, they are also consumers. But as businesses they have a vital interest in how competition laws impact on their business-to-business situation as the laws also impact on their business-to-consumer situation. Further, self-employed people—as businesses of one—are in entirely a consumer-like situation. They face all the vulnerabilities and exposures to unfair, corrupt practices as do consumers. Seen through this prism, the core purpose of competition laws should be viewed and stated in a broader context.

That is, competition policy should focus on making markets work in the long-term interests of business-to-business competitiveness as well as the long-term interests of consumers. Such a broader stated view of competition policy sends a louder signal to the public and to individuals undertaking business about what competition policy is supposed to do. In particular, it sends a strong signal to individuals who are businesses of one that their right to exist and to be in business is a core policy intent of competition laws.

3. The larger social context; 'Class warfare' should be disbanded as a policy parameter

For most of the last 100 years, the perception of social structures, economic development and politics has been dominated by a central view that these things are driven by class warfare, primarily a 'worker versus bosses' war. The current Australian competition laws largely 'look through' and 'neutralise' this class warfare notion by making it clear that 'consumers' are primary. However, the current laws were also born in a period where ideas of class warfare still dominated. As a consequence, 'employment' matters have been specifically excluded from the competition laws. This is explained in the Competition Policy Review Draft Report as follows:

> 3.13
> The negotiation of employment terms and conditions (remuneration, conditions of

> employment, hours of work or working conditions of employees) has always been excluded from most of the competition law provisions of the CCA by paragraph 51(2)(a). The reason for that exclusion is that the negotiation and determination of employment terms and conditions is governed by separate regulatory regime, currently contained in the *Fair Work Act 2009* The policy rationale is that labour markets are not in all respects comparable to other product or service markets. As a general principle, the Panel agrees with that view.

ICA submits, however, that this process of 'employment exclusion' has facilitated and enabled the extension of employment laws and processes to override competition laws to the point that competition laws have been heavily corrupted. The competition laws are not working as intended.

To understand this further it is helpful to place competition policy within a social, economic and political context that cleans the slate of ideas of class warfare. This is particularly applicable and relevant to the nature of Australian society, as it could be argued that Australian society is significantly 'classless'.

ICA submits that the 2012 publication *Why Nations Fail* (by D Acemoglu and J Robinson, published Random House Inc) provides a context in which such a "clean slate" approach to competition policy can be considered beyond notions of class-consciousness.

Why Nations Fail offers the thesis that through the annals of human history it is possible to grasp which policies and institutions enable human development and which, by contrast, crush human development. *Why Nations Fail* observes that for a social group to succeed it first needs a strong central authority (government) that can enforce laws. But, with that in place, two directions are possible, one positive the other negative.

- On the negative, 'extractive' institutions are created or arise in which 'elites' gain control enabling them to 'extract' the resources of the society (human, capital, natural, etc.) for their own private benefit.
- On the positive, 'inclusive' institutions are created in which all of the resources of the society, in particular human, can be developed and in which individuals are able to retain ownership and control of the value that they themselves are able to create.

Why Nations Fail says:

> "Inclusive economic institutions that enforce property rights, create a level playing field, and encourage investments in new technologies and skills are more conducive to economic growth than extractive economic institutions that are structured to extract resources from the many by the few and that fail to protect property rights or provide incentives for economic activity".

It is within this context that ICA believes Australian competition policy should be viewed. Australia is only a 'lucky country' because we have, as a society, a long tradition of creating inclusive institutions and working to prevent extractive institutions. This is central to understanding why Australia has a strong economy with a comparatively very wide distribution of wealth throughout society.

Competition policy plays a central and vital role in this. The government institutions that enforce competition policy are a key inclusive institution that also protect against the development of extractive institutions.

4. Self-employed, independent contractors and inclusive institutions

The strength and vitality of the small business sector in any society provides a key indicator of the strength and vitality of inclusive institutions in that society. In Australia the small business sector is strong but could and should be stronger. Competition policy should further work in this direction.

The key to understanding small business is that a small business is not a mini version of a big business. The traditional idea of a 'business' is of a command-and-control 'employment' management pyramid in which 'managers' organize the business through employees and in which employees and (employee) managers are removed from the business–risk equation. In small business, however, the person who runs the business (the self-employed individual) *is* the business and takes on board all the risk personally. That is, the self-employed person is the true 'business' because he or she personally and individually takes on risk.

Further, it has long been accepted that small business is the big driver of an economy. This is so because the small business individual takes on risk and therefore has to act entrepreneurially to succeed or even survive. But this idea rarely has policy substance (beyond politicians' media releases!) For economic success to occur it is inclusive institutions that will best enable small business activity. This should be a focus of competition policy and law.

However, the employment exclusions of competition law create confusion and corruption as to the purpose of competition law and act to create extractive institutions. This requires a fix. Referring again to the Competition Policy Review Draft Report, it states:

> 3.13
> The reason for that exclusion is that the negotiation and determination of employment terms and conditions is governed by a separate regulatory regime, currently contained in the *Fair Work Act 2009* The policy rationale is that labour markets are not in all respects comparable to other product or service markets As a general principle, the Panel agrees with that view.

ICA disagrees with the view of the Panel as underlined in the sentence above. It may be that 'labour markets' may not be comparable to other products or services, but this is only valid when 'labour' is engaged through the 'employment' contract—that is, for employees.

Independent contractors are not employees. Independent contractors are entirely engaged through the commercial contract. Consequently ICA states that independent contractors provide labour in a way that is entirely comparable to other products or services. As such, independent contractors are entitled to, and must be afforded, the protections available under competition policy and law, just as consumers are protected. Similarly, independent contractors must be subject to the same responsibilities under competition law to which any business is subjected.

General recommendation:

- ICA submits that there should be clear understandings in competition policy and law that recognizes the twin issues of protection for, and responsibilities of, independent contractors as small businesses.
- More specifically, competition policy and law should state clearly that independent contractors are regulated under competition law and not industrial relations law. On this issue it should be clear at law that competition law overrides industrial relations law.

Part B
The corruption of competition policy by industrial relations

5. Unions as extractive institutions

Again referring to the Competition Policy Review Draft Report, it states:

> 3.13
> The reason for that exclusion is that the negotiation and determination of employment terms and conditions is governed by separate regulatory regime, currently contained in the *Fair Work Act 2009* … As a general principle, the Panel agrees with that view.

However, the Draft Report also expresses a concern that employment law and practice are intruding into competition law:

> However, it appears to be lawful under the Fair Work Act to make awards and register enterprise agreements that place restrictions on the freedom of employers to engage contractors or source certain goods or non-labour services.
> It is desirable that the apparent conflict be resolved. The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour, if they choose.

As stated earlier, the Draft Report only expresses its concern in relation to secondary boycott provisions and looks to strengthen those provisions and seeks suggestions as to what and how. ICA believes, though, that a much harder line should be taken. In reality the secondary boycott provisions amount to a useless joke through which lawyers drive legal trucks enabling those who seek to corrupt competition laws to do so.

There is, in ICA's view, anti-competitive, collusive and even criminal behaviour occurring between opportunistic large businesses in Australia and similarly opportunistic large trade unions in Australia. Under the mask and pretence of a public relations driven 'employer–employee war' there is wide-scale manipulation of markets by unions in collusion with large businesses.

This is happening most specifically in the construction, transport, cleaning and other industry sectors. The collusion, price manipulation and competitive destruction processes it involves are not random or isolated. They are the very fabric and structure

upon which much of business at the ‘big end of town’ is conducted in Australia. It is Australia’s most significant systemic corruption problem and it needs to be addressed, attacked and stopped.

The evidence of this is mounting in the current Royal Commission into union corruption. What is being witnessed is the accumulation of evidence of union officials extracting massive amounts of money from their union sources, mainly via contributions from large business, and being deposited into secret accounts for the use and control of union officials. The publicity around this so far has focused on the bad behaviour of individual ‘bad’ union officials. However, what is coming to light is in fact an unpeeling of an onion of stinking, systemic corruption of competition principles and laws. It is this that requires a policy response beyond that of the mere prosecution of individuals.

One of the more dramatic pieces of evidence is that produced by the giant transport company Toll. Toll has admitted in evidence to the Royal Commission that it had, and has, a secret agreement with the Transport Workers Union. The agreement requires Toll to pay in the order of $150,000 a year to the TWU on the condition that the TWU use its powers under industrial relations laws to harass and intimidate named competitors of Toll to force those competitors on to the same cost structures under which Toll operates.

There are those in the business community, including many industry associations, who excuse the behaviour of the businesses making these sorts of payments. They claim that the payments from businesses to unions occur under duress, that the businesses are victims of union intimidation and should not be blamed, that union officials and unions need to be prosecuted to stop such behaviour. But such claims are excuses that must be ignored.

Take a simple analogy. If a person is drunk driving a car, crashes and kills someone, the drunk is prosecuted and faces jail. A drunk will be ignored if he claims in court as a defence that his drinking ‘mates’ made him drink or that advertising forced him to drink. In a just society individuals are held liable for their actions.

So must it be with union–business corruption. The payment of monies by businesses to unions or union officials should be seen and treated for what it is—corruption. This is not something that should be outlawed under industrial relations laws but rather outlawed under competition laws. The problem is not an industrial relations problem but a corruption of competition problem.

The payment of monies, either through ‘brown paper bags’, or into union or union-controlled funds (that may have the appearance of being ‘legal’) is the evidence of the problem, not the problem itself. What’s occurring is that businesses pay unions with the purposes of a ‘return’. That return is that unions will either not harass the businesses or will harass the businesses’ competitors. This is only possible because industrial relations activity is ‘excluded’ from competition laws.

What has occurred in Australia is that unions have ceased to be simply representatives of employees but have become ‘extractive’ institutions. Unions are structured in such a way that, by being astute and aggressive players of internal union politics,

individuals become ‘elites’. They obtain positions of power so that they are able to extract the value of union members’ funds for their personal use—usually the furthering of their personal power!

By making use of the broader political power of the union movement, these union ‘elites’ have been able to leverage power with larger Australian business. Through the use of harassment and intimidation they offer a ‘service’ to selective and compliant businesses. That service involves the harassment of competitors to the benefit of compliant or ‘friendly’ businesses.

This is not a problem of Australian unions as such. It is a problem of human nature as identified by *Why Nations Fail*. If an institution (unions) obtains special elite privilege in a society, it will conspire with other institutions (businesses) to create a network of privilege. This is how extractive institutions are formed and sustain themselves.

The real problem we have in Australia is that this extractive process has not been recognized for what it is. It has been allowed to develop and flourish in most significant part because union power under industrial relations laws has not been confined to the industrial relations arena, but has been allowed to roll over, dominate and usurp competition law.

6. ICA’s main recommendation

The Draft Report focuses on many technical areas of the application of current competition policy and laws. ICA comments below on some of the recommendations in a supportive manner. The Draft Report expresses some concerns about the exclusion of industrial relations from competition laws. ICA submits that those concerns are significantly underweighted.

ICA recommends as follows:

- That the exclusion of industrial relations matters from competition laws should be entirely revisited and reviewed.
- That, as a matter of competition principle, competition law should take priority over industrial relations matters and that industrial relations laws and practices should be specifically banned from intruding into competition law and practices. Such prohibitions and restrictions under industrial relations law should occur through the vehicle of competition law.
- That in applying the principle of competition supremacy, that specific items of behaviour should be banned. For example, that an industrial agreement between a union and a business cannot contain provisions that require a third party either to have an industrial agreement or to have a particular type of industrial agreement.
- That payment from a business to a union, union official or union-controlled fund should be illegal under competition law and be subject to criminal sanctions. (This would not prevent employees making direct payments to a union or union-controlled fund.)
- That, where an agreement or practice between a business and a union has the intent or the effect of harassing or intimidating a competitor or limiting competition, that the agreement or practice be illegal and that the union officials and company mangers or personnel who agreed to, authorized or

otherwise allowed an agreement or practice to occur, be personally subject to criminal sanction.

ICA makes these recommendations because ICA wishes to see the closing down of the extractive institutions that have developed in Australia as we have described them earlier. Further, ICA wishes to ensure that competition policy and laws are effective in enabling inclusive institutions. This is how independent contractors specifically and the community in general will have an improved ability to engage in business, create wealth and maximize wealth distribution.

Part C
Specific Recommendations in response to the Draft Report

7. Small Business Remedies

Draft Recommendation 49 states

— Small business access to remedies

The ACCC should take more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not priority for public enforcement.

The Panel invites views on whether there should be specific dispute resolution scheme for small business for matters covered by the CCA.

Resourcing of the ACC should allow it to test the law o a regular basis to ensure that the law is acting as deterrent to unlawful behaviour.

ICA response

The proposed unfair contract protections and the operations of existing State-based small business commissioners as well as the proposal for a federal Small Business and Family Enterprise Ombudsman have done much and should do more to 'level the playing field' for small business. Wherever possible, disputes involving small business people should be referred to the small business commissioners by the ACCC. ICA agrees that the ACCC has an important role mainly in the testing of the law where needed.

8. Cartel conduct

Draft Report under 3.5 states

Cartel conduct between competitors is anti-competitive in most circumstances and should be prohibited per se. The Panel supports the intent of the cartel conduct prohibitions, including the combined criminal and civil sanctions that are imposed.

ICA response

As discussed at length above, ICA submits that the evidence is overwhelming that there are unions in Australia who are active organizers and players in cartel behaviour. They do this under the legal mask of being excluded from competition law because of their alleged representation of employees. There are major and minor businesses in Australia that actively collude with unions to use the unions' exclusion protection for the purposes of organizing cartel behaviour. In this respect, unions and union officials should be seen as economic players who should be subject to

competition laws and subject to significant sanctions for any involvement in cartel behaviour.

9. Collective Bargaining

The Draft Report states

> Draft Recommendation 50 — Collective bargaining
> The CCA should be amended to introduce greater flexibility into the notification process for collective bargaining by small business. One change would be to enable the group of businesses covered by a notification to be altered without the need for a fresh notification to be filed (although there ought to be a process by which the businesses covered by the notification from time to time are recorded on the ACCC's notification register).
>
> The ACCC should take actions to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses.

ICA Comment

ICA strongly supports the right of small businesses to seek from the competition regulator the ability to bargain collectively. However, ICA has major concerns about how that right has been usurped and used by unions as part of their process of corrupting competition law and processes. Further, there should be no secrecy or confidentiality surrounding the allocation of collective bargaining authority. ICA has concerns that, at the moment, the ACCC withholds in some instances the names of small businesses and individuals who have been granted collective bargaining authority. If it is in the public interest that a collective bargaining authority be granted, it must equally be in the public interest that the public should have easy access to knowledge of the parties granted collective bargaining authority.

ICA recommends that:

- An application for and authority to collective bargaining should require the names of all parties to the application and authority to be fully and publicly disclosed.
- That authority to bargain collectively should only be granted to parties who have direct commercial arrangements. Third parties (for example, bargaining agents) should not 'own' the collective bargaining authority.
- Unions should not be granted collective bargaining authority.

10. Government subject to competition laws.

The Draft Report states

> "The Panel considers that the anti-competitive conduct provisions of the CCA should reach beyond unincorporated enterprises and government businesses to cover government activities which have trading or commercial character including, in particular, procurement. … legislative frameworks and government policies binding the public or private sectors should not restrict competition.
>
> The Panel believes the focus of competition policy should be widened beyond public monopolies and government businesses to encompass the provision of government services more generally."

Recommendations

governments should promote consumer choice when funding or providing goods and services and enable informed choices by consumers;

the model for government provision of goods and services should separate funding, regulation and service provision, and should encourage a diversity of providers;

government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership;

ICA comment

ICA strongly welcomes, supports and endorses this recommendation of the Draft Report.

Within the themes of this submission concerning 'extractive' and 'inclusive' institutions, it must be recognized that government institutions will have a natural tendency to become 'extractive'. It is one of the dilemmas of government. Being 'all powerful', governments will behave as any large organization will behave when great power exists. They will drift into becoming 'extractive' no matter how noble their intent! To guard against this, government institutions should be subject to the same laws that apply to all in society. Government institutions should be subject to the same competition laws that apply to the community in general.