

Royal Commission in Trade Union Governance and Corruption

Submissions: Toll Holdings Limited

Dated 13 November 24

1. INTRODUCTION

- 1.1 Toll Holding Limited (**Toll**) has cooperated with and will continue to cooperate with the Royal Commission in Trade Union Governance and Corruption.
- 1.2 Toll respectfully seeks to make Submissions responding to the Counsel Assisting Submissions: of 31 October 2014 (**C A Submissions**).
- 1.3 Toll will in these Submissions, refer to the C A Submissions by page number and paragraph number, as appropriate.
- 1.4 In these Submissions, Toll will limit its responses to the following:

OVERVIEW OF SUBMISSION¹

TWUSUPER: Chapter 6.2²

TEACHO: Chapter 7.2³

ENTERPRISE AGREEMENT: Chapter 19.5⁴

2. EXECUTIVE SUMMARY

- 2.1 There's no suggestion in the C A Submission that any witness called by or on behalf of Toll, or representing the interests of Toll, has given other than fulsome and truthful evidence to the Royal Commission.
- 2.2 As Toll understands the C A Submissions it is not suggested that Toll, its directors, officers servants or agents have been engaged in unlawful conduct.
- 2.3 The C A Submissions concerning TWUSUPER: Chapter 6.2⁵ similarly do not assert *unlawful conduct* or indeed impropriety in the enterprise bargaining negotiations in which Toll had been engaged concerning the bargaining for freedom of choice in superannuation. Whilst the C A Submissions conclude that freedom of choice on the present state of the law and industrial practice is constrained, there is no suggestion, and with respect there can be no suggestion, that Toll, its directors, officers and employees acted other than in compliance with the law.
- 2.4 It is suggested with respect to TEACHO,⁶ that "*payment by Toll for the benefit of the TWU in return for officials and employees of the TWU exercising their statutory powers in a certain*

¹ C A Submissions pp 1-21

² C A Submissions pp 507-59

³ C A Submissions pp 533-555

⁴ C A Submissions pp 1293-1295

⁵ C A Submissions pp 507-520

⁶ C A Submission p547 Para 49

way, in the absence of a reasonable suspicion of contravention (semble: by Toll's competitors) and in an unlawful way." Toll denies unlawful conduct or impropriety and addresses this concern in detail at Paragraph 4.7 and following below.

2.5 Further to the above, in the section styled "ENTERPRISE AGREEMENT" the C A Submission⁷ identified two specific possible options for reform⁸. Toll does not wish to be heard in opposition to these proposed reforms. Toll's position remains that it will endeavour to comply with the law and acceptable industrial practice as applies from time to time.

3. TWUSUPER: Chapter 6.2

3.1 Toll respectfully seeks to categorize the C A Submissions under Chapter 6.2⁹ as dealing with what can be described colloquially as two iterations of *principles in collision*.

3.2 Firstly, the issues surrounding the linkage between a Trade Union linked superannuation fund with enterprise bargaining negotiations.

3.3 Secondly, the extent to which, in collective bargaining, there is (under the current law) the flexibility for complete freedom of choice as is exemplified by the references to the evidence concerning the Toll employee, Mr Paul Bracegirdle.

3.4 The rhetorical question becomes: the extent to which freedom of choice of funds is or ought to be impugned by collective agreement bargaining? Collective bargaining defers to the wishes of the majority of employees; sometimes to the detriment of the minority. Toll negotiated 3 month window during which Mr Bracegirdle could exercise free choice by nominating a preferred complying superannuation fund, as referred to at paragraphs 3.10 and 3.14 below.

3.5 The further complication is, of course, the circumstances in which the preferred superannuation fund is a fund sponsored by, and with links to, a Trade Union and in this particular circumstance the linkage between TWU and TWUSUPER. That is to say, the benefits, including financial benefits, derived by the Trade Union from that linkage.

3.6 It is axiomatic that under the *Superannuation Guarantee (Administration) Act 1992* (Cth) the superannuation fund to which a contribution is paid must be a *complying superannuation fund*. TWUSUPER is a complying fund.

3.7 There is a major premise: the circumstances in which Toll negotiated the bargain with respect to superannuation is not remarkable; the bargain struck is lawful and common. With respect, it is not suggested, and can not be suggested that Toll has acted unlawfully or improperly having regard the legal regime and the industrial context in which the events under consideration occurred. There is no doubt, and this is common in enterprise bargaining across a spread of industries, that pressure including industrial pressure, is applied to respondent employers such as Toll to pay mandated employer contributions to a Trade Union sponsored fund.

3.8 As the evidence concerning Mr Bracegirdle reveals, in collective bargaining considerable pressure is applied so as to inhibit complete freedom of choice by requiring the collective Enterprise Agreement to mandate provisions which, expressed broadly, nominate the Trade

⁷ C A Submission pp 1293-1295

⁸ C A Submission p 1295-Para 10

⁹ C A Submission pp 507-519

Union sponsored fund as the sole choice. Whether or not this is the preferred outcome is the matter for debate.

- 3.9 Toll, in the case of Mr Bracegirdle, participated in the bargaining processes including in circumstances where Mr Bracegirdle was, himself, a bargaining agent.¹⁰
- 3.10 The evidence revealed¹¹ that Toll Holdings, including through the office of Mr Sloan, facilitated the bargaining processes. Toll supported Mr Bracegirdle including in an attempt to bargain so as to afford Mr Bracegirdle's freedom of choice by reference to a *site agreement*.¹²
- 3.11 Further it is conceded; "Mr Bracegirdle was kept apprised of the progress of the negotiations by Mr Sloan including with respect to the "window" clause"¹³.
- 3.12 The CA Submissions refer, in some detail, to the involvement of the TWU in the negotiations concerning Mr Bracegirdle.¹⁴ Counsel Assisting concludes that Mr Bracegirdle "was still effectively shut out of the bargaining processes and was unable to exercise a right to nominate a superannuation fund of his choosing"¹⁵. If so, this was not as a consequence of Tolls actions or omissions.
- 3.13 Toll makes no submission as to the efficacy of, or the appropriateness of, amounts paid from TWU Super to the TWU¹⁶
- 3.14 Toll, under the present law and bargaining regime, bargained for an Enterprise Agreement on a collective basis. Collectively the outcome was a preference for the TWU nominated fund TWUSUPER. Toll, as the evidence reveals, had no in-principle objection to Mr Bracegirdle having a more complete, or less inhibited, freedom of choice. As indicated, Toll supported Mr Bracegirdle's application for a site agreement¹⁷; and for a window in which Mr Bracegirdle could exercise a free choice¹⁸. It is in the nature of bargaining that preferred outcomes are not always achieved and there remains an overriding and discrete business need to bring such bargaining to conclusion

4. TEACHO: Chapter 7.2

- 4.1 Counsel Assisting, in contextualizing this aspect of the Inquiry, wrote: "*a particular focus of this chapter is the arrangements between TWU and Toll regarding TEACHO. That case study is a lens through which to examine the appropriateness of a Union demanding*

¹⁰ C A Submissions p509-Paras 9 and 10

¹¹ C A Submissions p 509-Para 11 and following

¹² C A Submissions p 512-Paras 24 and 25

¹³ C A Submission p 514-Para 30-32

¹⁴ C A Submissions pp 509-515 Paras 10 - 33

¹⁵ C A Submissions p 519-Para 50

¹⁶ C A Submission pp 515-516 paras 34-38

¹⁷ C A Submissions p 513-Para 25

¹⁸ C A Submission p 514 Para 30-32

*the inclusion of requirements in agreements that make it mandatory for an employer to make contributions to third parties, in which the union or its officials have an interest*¹⁹

- 4.2 The Transport Education Audit Compliance Health Organization (**TEACHO**) replaced the Transport Industry Training Education and Industrial Rights Fund (**TEIR Fund**)²⁰
- 4.3 It is significant that the contributors to the proceeding TEIR Fund included Toll's competitors Westgate, Linfox, Startrack Express, TNT and of course, Toll.²¹ There is no contest that the contributions made to the TEIR Fund by the named entities were in consequence of bargaining towards enterprise agreements for each of those respondent companies. It can be said; again expressed colloquially, that the mandating of such contributions was the cost of getting "the deal done"²²
- 4.4 As has been noted the respondent companies (including Toll) having paid the training levy, did not engage in overseeing the disbursement of funds accreted under the TEIR Fund arrangements²³.
- 4.5 As is indicated by Counsel Assisting, TEACHO was incorporated and then formerly registered on the 7 March 2009²⁴. It is apparent that TEACHO, a company limited by guarantee, was incorporated to redress certain deficiencies in the disbursement and indeed aggregation (and non-disbursement) of funds by the administrators of the TEIR Fund.
- 4.6 The intention was to render the objects of TEACHO *express*²⁵ and to ensure industry representation, in addition to Trade Union representation, on the board of governance²⁶. Toll's representative became Mr Eric (Tony) Wilks: Group General Manager Industrial Relations, as has been noted,²⁷ Mr Wilk's replaced Mr. Shaun Mooney as Toll's representative.
- 4.7 Whist Counsel Assisting suggests that the level of engagement of the board of directors of TEACHO is of concern²⁸ from the point of view transparency and efficacy the TEACHO arrangements were an improvement on those applicable to the TEIR Fund.
- 4.8 The evidence is, and the fact is, that Toll does not shy away from the contention that its primary motive in contributing to the TEACHO fund was "*to get the deal done*"..."*to achieve industrial peace*..."²⁹. The evidence that "*TEACHO would engage in projects aimed at*

¹⁹ C A Submission p 533 Para 4

²⁰ C A Submission p 533-Para 1

²¹ C A Submission p 534-Para 10

²² see in this context the C A Submission p 542-Para 39

²³ C A Submission pp 534-538 - Paras 10 to 25

²⁴ C A Submission p 537-Para 20 – see too p 539-Para 26

²⁵ C A Submission p 539-Para 28

²⁶ C A Submission p 540-Para 29

²⁷ C A Submission p 540-Para 29

²⁸ C A Submission p 541-Para 34

²⁹ C A Submission p 542 Para 39 quoting the evidence of Mr Damian Sloan

*improving safety and compliance across the transport industry*³⁰ is not controverted. What is controverted by Counsel Assisting is whether or not TEACHO does a good job; whether the transport companies get value for their money.

- 4.9 Toll's involvement in TEACHO was the subject of what is referred to as a "side deal "at Page 543 of the Transcript³¹. The contentions of Counsel assisting include: *"the nature of those arrangements means that they may take on the character of a payment by Toll for the benefit of TWU in return for officials and employees of TWU exercising their statutory powers in a certain way, in absence of a reasonable suspicion of contravention (by Tolls competitors) and in an unlawful way. That is one of the main vices of this arrangement"*.³²
- 4.10 Toll submits that Counsel Assisting's characterization of these arrangements is overstated. While certain payments contemplated under the "side deal" might encourage TWU officials to exercise their audit functions, there is no suggestion that the audit (if undertaken) would be undertaken in an unlawful manner, would involve any less objectivity than any other audit or would have any pre-ordained outcomes. At its worst, it might be thought to have encouraged audits to be undertaken but Toll submits that there is nothing untoward in audits being undertaken, as this audit work is likely to encourage adherence to appropriate levels of safety within the transport industry. Compliant companies had nothing to fear from an audit. Further, the "side deal" was struck in circumstances where Toll and Toll's competitors were then presently subject to Awards and Enterprise Agreements containing extensive obligations concerning the same subject matter, namely work health and safety.
- 4.11 Mr Sloan, for Toll, gave direct evidence, and it is respectfully submitted entirely honest evidence, as to Toll's understanding as to how provisions of the, so called, side deal would operate in practice. Toll's intention can be derived from the direct evidence given principally by Mr Sloan. The intention was *"to level the playing field... to raise safety standards of its (Toll's) competitors..."* To create the circumstances whereby *"Toll was not the only company making payments to TEACHO"*.³³
- 4.12 Clause 4 of the side deal records explicitly an intention to ensure *"that during the Term at least 4 of the transport operators (Toll's competitors) have agreed to make contributions to TEACHO in an amount commensurate with Toll's contribution (relative to the size of the size of the other operators)"*.³⁴
- 4.13 With respect, the proposition that Toll sought to be satisfied that it would not be the only transport company which made TEACHO contributions seems to have been accepted by Counsel Assisting. Toll was prepared to, and did, make a money contribution to TEACHO on terms that the TWU would actively seek similar contributions from Tolls' competitors. Counsel Assisting has noted that such an arrangement raises a number of issues for consideration.
- 4.14 One such question arising is whether or not the "side deal" substantially lessens competition, and that question has been referred to the Australian Competition and

³⁰ C A Submission p 543-Para 39

³¹ C A Submission p 543 and following from paragraph 41 to 44 the terms of the "side deal" are quoted

³² C A Submission p 547-Para 49

³³ C A Submissions p 546 Para 45

³⁴ C A Submission p 544-Para 44

Consumer Commission.³⁵ As noted at paragraph 4.10 above, Toll and its competitors were already subject to safety obligations under Awards and Enterprise Agreements similar in content to that contained in the "side deal". Toll respectfully submits that the arrangement had neither the purpose nor the effect or likely effect of substantially lessening competition between transport companies. If any audits were undertaken of a competitor's business (and Toll is not aware of any such audits), such an audit would be directed to examining whether the audited company was complying with appropriate safety standards, as required by law or other industrial prescription. Such a legal compliance measure can not be interpreted to have an anti-competitive purpose or effect, as all companies are expected to comply with the law and competition should be directed to the merits of each company's transport services, in terms of its price, quality, timeliness, customer service, etc.

- 4.15 It might be contended that such audits (if undertaken) could cause some level of disruption to a competitor's business. However, there is no evidence that such was the case. Moreover the arrangements, if honoured, in terms, by TWU would not be disruptive if Toll's competitors were legally compliant and if not legally compliant, it is desirable that the competitors became so. In this manner, the occupational health and safety playing field would be levelled: such is a good public policy outcome in that it ensures that competition on the merits is not be achieved at the expense of public safety. It is important to reiterate that the arrangements were intended to result "in improving safety and compliance across the transport industry"³⁶
- 4.16 It is true that the arrangements contemplate that the TWU, in the ordinary discharge of its *office* as a Regulator will encourage Toll's competitors to comply with standards required by law with respect to safety, including under then current and applicable Awards and Enterprise Agreements. Counsel Assisting, as indicated, inquires as to whether the "side deal", in consideration for "TWU exercising those statutory powers in a certain way..."³⁷ is problematic? There is nothing in the *side deal* which obliged TWU to engage in activities or functions other than in accordance with the law.
- 4.17 Protected industrial action which, as has been noted, can be "robust" is a licence to bring considerable pressure and even harm to bear on a counterparty.³⁸ That said there is no, or no conclusive, evidence the TWU in fact acted inappropriately in consequence of the "side deal". Further, there is a public interest in facilitating activities consistent with the TEACHO objects of vocational, occupation health and safety and industrial law training³⁹.
- 4.18 Counsel Assisting commented in some detail as to the efficacy of the training under the TEACHO arrangements⁴⁰. In this respect regard might be had to the frank evidence to the Royal Commission by Toll's representatives. It was noted that the "Toll Passport"⁴¹ is superior when compared with the TEACHO *bluecard*. In the following paragraph⁴² Mr

³⁵ C A Submission p 548 Para 51

³⁶ C A Submission p 543-Para 39

³⁷ C A Submission p 547-Para 49

³⁸ C A Submission p 3 Para 7

³⁹ C A Submission p 539-Para 28

⁴⁰ C A Submissions pp 551-555-Para 59-76

⁴¹ C A Submission p 552-Para 62

⁴² C A Submission p 552 Para 63

Sloan's evidence is again referred to, namely that the Toll contribution to TEACHO was a cost of doing an industrial deal. The circumstances were such that TEACHO was a cost readily payable if the alternative be prolonged industrial action of a kind permitted by the current law and industrial practice. Similar evidence was given by Mr William Potter the National Learning and Development Manager at Toll⁴³.

5. ENTERPRISE AGREEMENTS: Chapter 19.5

- 5.1 The Toll Submission in this respect can be briefly put. Toll will continue to endeavor to comply with current law and accepted industrial practice.
- 5.2 Toll does not object to the reforms purposed at **C A Submission p 1295-Para 10**.



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⁴³ C A Submission p 552-Para 65