ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION

REMARKS BY DYSON HEYDON AC QC COMMISSIONER

OPENING SESSION THURSDAY 23RD APRIL 2015

This Royal Commission was established by Letters Patent issued on 13 March 2014. Equivalent Letters Patent were thereafter issued by the Governor (or Administrator) of each of the States. On 30 October 2014 the Terms of Reference were amended in two respects. The deadline for delivery of the Report was extended from 31 December 2014 to 31 December 2015. And a new Term of Reference was added. It required and authorised inquiry into: "Any criminal or otherwise unlawful act or omission undertaken for the purpose of facilitating or concealing any conduct or matter mentioned in paragraphs (g)-(i)". New South Wales, Queensland and Tasmania have made corresponding amendments to the Letters Patent each had earlier issued. Counsel assisting and persons affected filed substantial written submissions from 31 October 2014 and in waves throughout November and December. The last of these was received on 11 December. The last day on which oral evidence was received at a public hearing was 28 October. But a directions hearing was conducted on 13 November 2014 to deal with the consequences of a belated decision by the solicitors for one important witness to cease to act for him – a decision which was neither fully nor satisfactorily explained. Oral argument took place on 26 November. Oral argument, together with the reception of testimonial and documentary evidence, also took place on 28 November. Additional confidential hearings took place in December. On 15 December an Interim Report was delivered.

It may be convenient for observers of the Commission's work to be reminded of what was not dealt with in the Interim Report, and what was.

The extension of the time for reporting on 30 October 2014 afforded an opportunity to make further factual inquiries in 2015. It was therefore decided not to make any recommendations in the Interim Report for legislative reform until those factual inquiries had been undertaken. Those inquiries, which have included numerous confidential hearings, interviews with potential witnesses and aggrieved persons, the issuing of hundreds of notices to produce and witness summonses, and the analysis of the documents produced, have been pursued energetically ever since the Interim Report was completed. They will continue to be pursued energetically for the balance of this year. Indeed, some of the submissions advanced on behalf of

affected persons urged the importance of utilising the extension of the reporting date to give those persons and the Commission an opportunity for a more leisurely and fully informed consideration than would have been possible last year of whether or not the current legal regime is satisfactory. (See, eg, submissions advanced by TWU, 26/11/14, pp 5-6.)

In 2014, in the period of nine months which elapsed before the Interim Report, the Commission conducted over 40 case studies. The case studies illustrated particular issues and themes thrown up by the Terms of Reference. In large measure the Interim Report comprised analyses of some, but not all, of these case studies. But for a variety of reasons the Interim Report did not take all of those case studies to a conclusion.

One group of case studies not dealt with in the Interim Report concerned issues connected with Ms Katherine Jackson's role in the Health Services Union. Ms Jackson is a person who has attracted strong support. She has also attracted bitter criticism. Anyone sufficiently interested in the role of Ms Jackson to observe events at the Commission carefully and to read the whole Interim Report would have noticed direct references to the following matters of fact, or to material from which they could be inferred.

Her solicitor submitted that she was not well enough to give instructions in relation either to the submissions of counsel assisting or to those which might be made on her behalf. (See Jackson WS 14/11/14 para 2.)

Further, Ms Jackson is respondent in proceedings in the Federal Court of Australia in a case named *Health Services Union v Jackson*, VID 1042/2015.

The submissions of the HSU, Ms Jackson and counsel assisting were all to the effect that certain allegations against Ms Jackson ought not to be dealt with in the Interim Report. Among other things, they said that the allegations raised in the Commission overlapped with the allegations raised in the Federal Court proceedings. They further reasoned that it would be an unproductive use of the Commission's limited resources to investigate and determine the same issues as would be investigated and determined in the Federal Court. (See submissions of the Health Services Union, 14/11/14, para 6(a) and (b); submissions on behalf of Katherine Jackson, 14/11/14, para 103; submissions of counsel assisting in chief, 14/11/14, Ch 1.1 para 81, Ch 12.3 para 75 and Ch 12.4 paras 8, 58 and 67.)

The Interim Report accepted these submissions. (See Interim Report Ch 1 para 7 and Ch 8.2 para 152.) It is true that not all issues affecting Ms Jackson are being dealt with in the Federal Court proceedings. But it was thought convenient for the Commission to deal with all issues together, rather than in two stages – one, in 2014, dealing with issues other than Federal Court issues, the second a year later, dealing with those of the Federal Court issues which it seemed useful to scrutinise.

It should be noted that the decision was not made on the ground that there would be any contempt of court in taking a different course. The relevant law in relation to how the proceedings of Royal Commissions can amount to contempt of court may be summarised very generally as follows. It may be, and will often be, a contempt of court to make findings about conduct which is the subject of pending criminal proceedings before those criminal proceedings have ended. However, a Royal Commission may carry out investigations and make findings about issues which arise in pending civil proceedings not involving jury trials provided the conduct of the Royal Commission is not prejudicial to them. By "prejudice" is meant "a substantial risk of serious injustice": *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 99 per Mason J. See also at 100 (non-jury trial). In that case Gibbs CJ gave the following examples of prejudice at 58-59: conducting the inquiry in public in such a way as to "deter witnesses from coming forward to give evidence" in the civil proceedings, or behaving in such a way as to "influence the evidence that the witnesses will give". Mason J gave as an example conduct by the Commission putting pressure on a party to compromise or abandon its case: at 100. It is not enough that there is a risk of inconsistent findings. No suggestion was made that there was any risk of contempt of court in the present circumstances. However, from the point of view of economy – economy of time, economy of resources, economy of effort – there is much to be said for Royal Commissions abstaining from parallel inquiries. That is so at least where the civil proceedings seem likely to finish within a reasonable time or a time before the end of the Royal Commission. When that happens, the Royal Commission can take advantage of the evidence generated by and the findings made in the civil proceedings. If the civil proceedings are delayed, it may be necessary for the Commission to investigate and report on the issues. None of the dangers described above appear to have any reality in relation to Ms Jackson. There is no doubt that the decision of the Federal Court will rest on the independent views of the trial judge, quite uninfluenced by the opinions of the Commission.

Further, issues affecting Ms Jackson are to some extent interlinked with issues affecting others, like Mr Peter Mylan, Mr Michael Williamson, Mr Craig Thomson and the HSU No 1 Branch. Indeed counsel for Mr Mylan also submitted that no findings should be made against him in the Interim Report in view of the existence of civil proceedings between him and the union, to be heard in May 2015. (See 28/1/14 T:60.34-38.)

It was also thought convenient to deal with these issues at the same time as the issues affecting Ms Jackson – not separately.

There is a further difficulty relating to the HSU. Mr Thomson has been involved in criminal proceedings relating to his conduct as an HSU official. Those proceedings have come to an end. But they ended insufficiently early to permit the Commission to inquire into his position. There are also civil proceedings against him which are not yet resolved. In the course of this year it will be necessary to consider whether, and if so to what extent, findings should be made about Mr Thomson.

Whether, and how far, issues affecting Ms Jackson and Mr Thomson should be dealt with in the Final Report will depend on circumstances as they unfold during the year. The submissions in chief of counsel assisting explicitly left that matter open in relation to Ms Jackson (Ch 1.1 para 81). As matters stand, there seems no reason to doubt that *Health Services Union v Jackson* will be heard and disposed of before 31 December 2015. It is less clear whether the civil proceedings against Mr Thomson will be heard and disposed of before 31 December 2015. Whether or not these events happen, the desirability of dealing with some or all of the issues affecting Ms Jackson is something to be considered later this year. It may be necessary to debate the matter, for the submissions of Ms Jackson's solicitor opposed that course (WS 14/11/14, paras 102 and 104-107). However, it must be stressed that the issues affecting Ms Jackson should be dealt with unless good cause is shown for a contrary course.

There are other groups of case studies not dealt with in the Interim Report.

One concerns the evidence of Mr Andrew Zaf about the conduct of officers of the Victorian Branch of the Construction & General Division of the Construction, Forestry, Mining and Energy Union ("CFMEU"). A very short time before the Interim Report was completed, material came to the Commission's attention which requires investigation before findings can be

made. Time did not permit that investigation to be carried out before the Interim Report was published (Interim Report Ch 8.11).

The Interim Report did not deal with certain conduct alleged against Mr Michael Ravbar, Mr David Hanna, Mr Jade Ingham and Mr Chad Bragdon. They are officials of the Queensland Branch of the Construction & General Division of the CFMEU. The conduct allegedly took place on the Brooklyn on Brookes project in Fortitude Valley, Brisbane. Two of those persons were respondents to proceedings in the Federal Circuit Court. The CFMEU submitted that for that reason no finding should be made. In part that submission was accepted. And since, to the extent that it was not accepted, the CFMEU had not made submissions on the substance of the matter, it was decided that it was fairer not to deal with the issue at all until the status of the Federal Circuit Court proceedings became clearer and, if necessary, the missing submissions had been made (Interim Report Ch 8.8).

The Interim Report deals at some length with what is known as the Cbus leak to the CFMEU. Senior employees of Cbus, a superannuation fund, leaked certain private information of members of Cbus to Mr Brian Parker, the Secretary of the New South Wales Branch of the Construction & General Division of the CFMEU. The information was delivered to the Lidcombe office of the Union by Ms Lisa Zanatta (Senior Adviser – Member Relationships, Workplace Distribution) with the knowledge and consent of at least Ms Maria Butera (Executive Manager). The Interim Report did not reach any conclusion about the role of Mr Atkin, the Chief Executive Officer of Cbus, to whom Ms Butera directly reported. It is understood that on 29 October 2014 the board of Cbus resolved to appoint Mr Graeme Samuel AC (former Chair of the Australian Competition and Consumer Commission, as it is now known) and Mr Robert van Woerkom to conduct to conduct a Governance Review in relation to various matters including the preservation of privacy. (See Outline of Submissions of United Super Pty Ltd as Trustee for Cbus, 14/11/14, paras 3(3), 35(8), 44 and 47.) It was decided that it was desirable for the Commission to conduct further investigation into various questions. How did Ms Butera and Ms Zanatta come to behave as they did? What steps should have been taken to prevent that behaviour? What role, if any, was played by the "culture" at Cbus? That investigation could be assisted by the work of the Samuel Governance Review. (See Interim Report Ch 8.3, particularly paras 289 and 306.)

The Cbus leak may be connected with an alleged "industrial campaign". Lis-Con Concrete Constructions Pty Ltd and Lis-Con Services Pty Ltd have alleged that a campaign has

been conducted against them by certain officers of the Queensland Branch of the Construction & General Division of the CFMEU. The officers are Mr Michael Ravbar, Mr Peter Close, Mr Greg McLaren and Mr Bud Neiland. Counsel assisting and counsel for the CFMEU submit that there is insufficient evidence to support adverse findings against the CFMEU or its officers. Counsel for the Lis-Con companies very strongly disputes that submission. Since the Cbus leak is allegedly connected with the campaign, and the Commission's examination of the Cbus leak has not concluded, it was decided to postpone the resolution of the "industrial campaign" issue. (See Interim Report Ch 8.12.)

There is another case study on which work is incomplete. It concerns dealings between certain CFMEU officials, Mr George Alex and executives working for companies apparently associated with Mr Alex. Mr Alex appears to be the principal behind labour hire companies which supply casual labour to building contractors. These companies have features consistent with their operation as "phoenix" companies. The features of "phoenix" companies include the following. One by one, they go into liquidation. Each liquidation appears to leave workers with unpaid entitlements. The liquidated company is then succeeded by a new company with a similar name destined for the same fate as its successors. The CFMEU opposes casual labour. The CFMEU professes concern for workers whose entitlements are put at risk. Why, then, has the CFMEU entered into enterprise bargaining agreements with companies apparently associated with Mr Alex? It was not possible to complete an examination of this state of affairs in 2014 for the following reasons. On 18 September 2014, a summons was issued requiring Mr Alex's attendance to give evidence on 23 September. On 22 September his solicitor stated he was unwell, and unable to attend on 23 September. He was excused from attendance until 3 October. On 23 September and 1 October respectively a signed medical report and an affidavit were provided to the Commission. In those documents a general practitioner of medicine said that Mr Alex was not fit to give evidence. The general practitioner had said that it would not be possible for Mr Alex to give evidence until around 22 November. It was contemplated that a further medical examination by a forensic psychiatrist would take place on 8 October. On 2 October it was decided to excuse Mr Alex from attendance until 23 October. On 16 October, Mr Alex's solicitor stated that Mr Alex would appear on 23 October. By then, however, there was insufficient time to complete the case study in 2014.

The Final Report will also deal with some matters relating to the Maritime Union of Australia, the Australian Workers Union (concerning Chiquita Mushrooms) and the HSU Victoria No 1 Branch under the secretaryship of Ms Diana Asmar.

A reading of the Interim Report will reveal that the progress of the Commission's investigations in 2014 was impeded by false testimony; delays in document production; document destruction or removal; and reluctance to cooperate even on the part of persons hostile to alleged misconduct.

On 9 April 2014, at the opening session of the Commission, certain provisions of the *Royal Commissions Act* 1902 (Cth) were identified. In the light of those provisions three matters were pointed out.

First, it was pointed out that it was important for evidence to be truthful. Quite a number of witnesses were truthful – both those in union ranks and those outside them. This was the more impressive because some of them had a lot to lose by their frankness and honesty. Yet there were clear examples of admitted perjury (Ms Zanatta – Interim Report, Ch 8.3, Annexure B). There were clear examples of probable perjury (Ms Butera – Interim Report, Ch 8.3, Annexure A). And many witnesses testified dishonestly, or recklessly, indifferently to whether the testimony was true or false. That is, their evidence was deceitful. What was their motive? In some cases it was self-interest: to conceal their own misconduct. In others it was a sense of loyalty to a union: to conceal the misconduct of that union's officials. One former trade union official critical of this position described it as taking "a shot for the cause" (24/9/14 T:297.2-4). His counsel described it as "taking a bullet for the union" (24/10/14 T:1049.6-9). No doubt loyalty is a virtue. It may seem to a witness that it is virtuous and heroic to take a shot for the cause. But in this context the relevant duties of witnesses lie in two directions. One relevant duty rests not on false loyalty to the union, but on true loyalty to the law and to civic duty. True loyalty to a union does not extend to committing crimes under the delusion that this advances its real interests. The many legitimate and meritorious aspects of the union cause are tainted and polluted by perjury, not nourished by it. The other relevant duty of witnesses is to themselves. For it is *their* evidence. It is *they* who have to live with themselves and their consciences for the rest of their lives if their evidence is unsatisfactory. It is *their personal duty* to search their recollections with diligence, summon up their powers of careful and accurate expression and adhere unswervingly to proper standards of testimonial honesty. To fail in that duty is to let themselves down. Unions do not give evidence. They have no consciences. They do not have personal duties of care, diligence and veracity. But witnesses do.

On 9 April 2014, it was also pointed out that documents called for by Notices to Produce should be produced. In fact they were sometimes not produced by unions (eg Interim Report, Ch

8.6, paras 7-17). It is true, though, that the unions, at least most of the time, admittedly sometimes after pressure, generally achieved substantial compliance with Notices to Produce. Tribute should be paid as well to what might be called third party recipients – the many government departments, banks and other commercial organisations, large and small, who coped conscientiously with their tedious and time-consuming duty to comply with many Notices to Produce, often at short notice.

A third matter pointed out on 9 April 2014 was that documents potentially relevant to the inquiry should be preserved and not destroyed. In fact, as early as two and a half months later, one union deliberately deleted a large number of emails in the period 23-25 June 2014. (See Interim Report, Ch 8.6, paras 19-76.) This was done despite three in-house solicitors being aware of what was happening. The Interim Report declined to find that the conduct of the relevant officers was reckless. But it did find that their conduct involved a substantial lack of care and concern for the processes of the Commission. Further, the same union instructed an employee to "remove any incriminating or unpalatable material" from certain files which had been requested by a lawyer, thereby possibly keeping from view matters which could have been relevant. (See 2/10/14 T:491.32-33; Interim Report, Ch 8.6, paras 77-213.)

All the above conduct hampered, or may have hampered, the Commission. It was also hampered by the fact that on occasion important witnesses volunteered to assist by providing particular documents, only to fail to do this once they had left the witness box, or to supply nothing but irrelevant or out-of-date material (Interim Report Ch 5.3, paras 37-43).

So far the matter has been approached from the point of view of the legal and moral duties of witnesses and of persons who have been or may be served with Notices to Produce, and the more general duty to comply with promises made. But even if those duties are put on one side, it is important for affected persons to appreciate that conduct of the kind just described may – not must – count adversely against them or unions with which they are connected. The lies of a witness can affect credit. But those lies can also permit adverse inferences to be drawn on substantive issues. The same is true of the destruction or non-production of documents. These activities are not only illegal and immoral but foolish. They can be self-defeating.

There is one other factor which has hampered the Commission. Quite a number of persons with firsthand knowledge of conduct falling within the Terms of Reference (particularly paras (f)-(j)) have proved very reluctant to cooperate. They are reluctant even though they

disapprove of the conduct in question. So far as those persons are connected with businesses which depend on unionised employees, they fear commercial damage. But those persons, and even persons within the union movement itself, also often fear violence against themselves or their families. For example, it is plain that Mr Jimmy Kendrovski, an associate of Mr Alex, was assaulted in jail three days before he gave evidence and that he feared for the safety of himself, his wife and his children if he gave truthful evidence. (See 1/9/14, T:105.41-106.16 and 107.9-30.) It is nonetheless the duty of people placed under such pressures to cooperate with the Commission. In the long run it is in their self-interest too. The carrying out of criminal or coercive conduct in future can only be eliminated if those who have been its victims in the past describe their experiences.

There was a controversy, or non-controversy, about the procedure by which testimony was received by the Commission. That procedure was regulated by paras 43-50 of Practice Direction 1 ("PD1"). In essence that procedure in standard instances operates as follows. It may be illustrated by assuming that on a given issue counsel assisting desires to call Witness A, and in due course it turns out that a person, who may be called Witness B, disagrees with Witness A. The procedure is that counsel assisting calls Witness A. Witness A then gives evidence in chief, usually by providing a written statement but also orally. Relevant documents are tendered through Witness A. But a person who wishes to challenge Witness A in reliance on Witness B does not do so at that stage. A person who wants Witness B to be called can arrange for counsel assisting to do that later. This will generally depend on that person indicating that Witness B wishes to give evidence contradicting, qualifying or adding to the evidence of Witness A. A person wishing to cross-examine normally has to indicate the points on which it is desired to cross-examine Witness A, why that cross-examination should take place, and why Witness B's evidence should be before the Commission. Thus cross-examination will not normally be permitted unless Witness B is available to give evidence. Once the cross-examination of Witness A has taken place, if counsel assisting decides to call Witness B, Witness B's statement will be admitted. Witness B's legal representatives may then examine Witness B on any relevant topics not dealt with by counsel assisting. Other persons who are permitted to cross-examine then (usually those whose interests will be advanced if Witness A is accepted) may do so. Finally, counsel assisting may re-examine Witness B.

Some say that they see this procedure as having the disadvantage that an allegation made by Witness A is not instantly dealt with by cross-examination. Those critical of Witness A, it may be said, cannot immediately nail the lie. On the other hand, the procedure has advantages. It

ensures that Witness A will not be cross-examined unless it is clear how far Witness A's evidence is in issue and unless evidence will be called to support the attacks of the cross-examiner. This saves a great deal of time. It forces cross-examiners to concentrate attention on what is actually in issue, and nothing else. It dissuades them from merely destructive or captious cross-examination unsupported by evidence. No-one familiar with the procedure could rationally think that the evidence in chief of Witness A would inevitably be accepted. That is because it is obvious that cross-examination of it on the basis of what Witness B's position is, and the response to it by Witness B considered in the light of cross-examination of Witness B, might well cut down or nullify completely what Witness A said.

It is well-known that the years 2001-2003 witnessed a Royal Commission into the Building and Construction Industry presided over by the Hon T R H Cole, AO, RFD, QC. A practice direction to the effect of PD1 was issued. It was described as "the Second Practice Note" (see the Cole Royal Commission Report, vol 2, paras 55-57). The Second Practice Note was challenged in *Kingham v Cole* [2002] FCA 45. Particular attention was paid to para 12 of the Second Practice Note. It provided for the following regime after a witness had been examined by counsel assisting:

> Persons other than Counsel Assisting will not be permitted to cross-examine such witness unless and until they have provided to Counsel Assisting a signed statement of evidence advancing material contrary to the evidence of that witness. Any person providing such a statement will be called by Counsel Assisting and asked to adopt that statement and will be examined by Counsel Assisting.

The Federal Court of Australia (Heerey J) rejected the challenge. The Court said (at [12]):

> [Paragraph] 12 on its face seems rationally and reasonably related to the efficient performance of the obligations of the Commissioner. Paragraph 12 is a means of ascertaining whether or not an applicant has demonstrated a sufficient interest in challenging the evidence of a particular witness. Further, a statement under par 12 will alert the Commissioner and all others concerned as to the true extent of factual disputes and thus promote the efficient resolution of those disputes. In a large and complex administrative enquiry where there is no equivalent to the pleadings and particulars used in civil litigation, the par 12 procedure has an obvious utility.

This reasoning applies equally to PD1.

PD1 was issued on 26 March 2014, very soon after the Commission began its work. The next day, on 27 March 2014, the Commission wrote to a particular union (as well as four other unions) offering to meet its representatives to discuss the conduct of the Royal Commission and

address any matters of concern. The Commission received no reply to that letter to the particular union.

Paragraph 3 of PD1 states:

> Where the Commissioner thinks it appropriate, he may dispense with or vary these practices and procedures, and any other practices or procedures that are subsequently published or adopted.

But despite the fact that the merits (or at least the demerits) of PD1 were ventilated from time to time in the media, no application, whether by correspondence or in hearings by any person authorised to appear was ever made to dispense with or vary the aspects of PD1 described above in relation to any particular evidence.

It is true that criticism of the procedure was made on 7 July 2014 in a hearing. But the criticism was not material to any application made on that occasion. Indeed, in the end the criticism seemed to be withdrawn. The criticism was voiced by counsel for the union to whom the letter of 27 March had been sent. That counsel developed an application framed in the following terms:

> The Royal Commission makes it plain that the [union] has been denied an opportunity to test or challenge the evidence to be called as provided for in [PD1], and that no conclusions adverse to the interests of the [union] should be drawn about the truth or reliability of any such evidence until the [union] or those adversely [affected] have had an opportunity to test and contradict it.

This application rested on a completely false premise. It could not accurately be said that the union for whom that counsel appeared had "been denied an opportunity to test or challenge" any evidence. And the proposition that a body which has the task of making findings of fact should not reach a conclusion until all the relevant evidence has been heard, tested and contradicted is an unremarkable one. All that could be said was that the time for testing and challenging the evidence had been postponed, and that even that postponement could have been avoided if an application had been made to dispense with or vary that postponement.

This application, however, was withdrawn. That was because, as counsel for the union said in the course of debate about the application, it had been stated that no adverse conclusion would be drawn against the union until it and others adversely affected had had an opportunity to

meet the evidence they disagreed with (7/7/14, T:7.16-19). To repeat, that is an utterly unremarkable proposition familiar to any rational observer of a body like a Royal Commission.

It remains the case that if any person authorised to appear before the Commission considers that in the particular circumstances the testimonial regime established by PD1 would work an injustice, that person may make an application for a dispensation or variation under para 3 of PD1.

In final address prominence was given to several interconnected complaints – that some issues were insufficiently investigated, that it was wrong to draw adverse inferences from the failure of unions to offer witnesses to rebut particular allegations, that too few witnesses were called, that those who were called were insufficiently tested, and that counsel assisting was unbalanced, attending only to particular theories and not to the evidence. These complaints must be rejected. Any interested person who was not satisfied with the evidence of a witness called by counsel assisting was at liberty to draw to the attention of counsel assisting the existence of contradictory witnesses, or witnesses who could present a fuller picture, and, after pursuing the procedures in PD1, to cross-examine the supposedly unsatisfactory witness. Interested persons often did this. The steps suggested in final address might be necessary where there was no person opposing the version put by the witness called by counsel assisting. They were quite unnecessary where there was an opposing person who was legally represented, as there almost always was. Counsel assisting was responding in a balanced way to what seemed to flow from the evidence, not to theories generated independently of it. This point was made in the Interim Report (Ch 5.2 para 224). But in view of the prominence of the complaints in final address it is desirable to repeat it.

The practice of counsel assisting described above – calling witnesses whom interested persons wanted to be called – will doubtless continue. Interested persons should invoke it if, on reflection, they feel that it would be responsible and appropriate to do so.