CHECK AGAINST DELIVERY

ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION

PRELIMINARY HEARING – THURSDAY 23 APRIL 2015

COUNSEL ASSISTING STATEMENT

On Monday the Commission will commence its public hearings for 2015.

It is also just over 12 months since the Commission's first preliminary hearing, on 9 April 2014.

In these circumstances, today's preliminary hearing presents an opportunity to do at least two things.

First, to take stock and review the Commission's activities to date.

Secondly, to set out in overview the likely course of the Commission's main activities from now until the end of the year, most particularly with regard to the law reform and policy issues that will engage the Commission during the balance of this year.

SUMMARY OF THE COMMISSION'S ACTIVITIES TO DATE

Activities to the end of 2014

To begin with, a recap. Last year was a busy one for the Commission.

As at 10 December 2014 the Commission had:

- sat on 16 days in private hearings and on 60 days in public hearing;
- received in public hearings evidence from 239 witnesses and interviewed a great many more potential witnesses;

- conducted public hearings in Sydney, Melbourne, Brisbane and Perth;
- issued 687 notices to produce;
- published issues papers on the funding of trade union elections, the protections available to whistleblowers, the duties of union officials and relevant entities;
- received and reviewed many thousands of documents, including accounting and financial records. A great deal of material received was put into evidence, most of it on a non-confidential basis. Other material remains confidential and is under scrutiny by the Commission staff;
- consulted with numerous stakeholders, including law enforcement agencies, employment and workplace relations departments and tribunals, representatives of the union movement, academics and industry and employer representatives[1]. Representatives of the Commission held meetings with stakeholders in all States and Territories of the Commonwealth; and
- organised an Academic Dialogue, attended by distinguished academics from various universities including the Australian National University, Melbourne University Law School, Charles Sturt University and the University of Technology.

Following completion of the public hearings, and after receiving detailed submissions from all parties, on 15 December 2014 the Commissioner delivered an Interim Report to the Governor General. The Interim Report comprised two volumes and 1817 pages.

Relevant entities or "slush funds"

Turning to some of the matters investigated during 2014, the Commission's terms of reference required it to investigate two categories of issue: (1) relevant entities (also known as slush funds), and (2) conduct on the part of union officials.

Looking at these two categories of issue in order, during 2014 the Commission investigated a wide range of different union-associated funds including generic, fighting, income protection, redundancy, superannuation and training funds.

[1] Interim Report, Volume 2, p1801-2.

Generic funds

Generic funds are funds established by union officials for a variety of purposes. The Commission investigated five generic funds in detail during 2014: the Australian Worker's Union – Workplace Reform Association, Industry 2020, Building Industry 2000 Plus Limited, IR21 Limited and the Transport, Logistics, Advocacy and Training Association.[2]

Often funds such as these operate in the shadows. Their controllers set them up, and maintain them, quite separately from the union.

Because the funds are separate from the union their financial activities and accounts are not included in the union's accounts and are not examined by the union's auditors. Nor is there any or adequate disclosure of the funds' activities to union members.

The fact that union resources are used for the benefit of such funds can mean that the officials controlling such funds are doing so in conflict of interest: put simply, such officials are acting for the benefit of the fund, not for the benefit of the union or its members.

To make matters worse, the assets of the funds can be deployed by their controllers for their own personal benefit or advancement.

Particular issues identified in the Interim Report as arising from these generic funds include:

- fundraising is undertaken using union resources, without payment or recompense to the union;[3]
- fundraising may be effected using unlawful and unconventional means;[4]
- the assets of the funds are deployed to advance the interests - including the political aspirations - of those who control them;[5] and
- frequently there is no or no adequate record keeping and proper processes are not followed.[6] For example, directors or shareholders' meetings are not held or not minuted, and transactions are effected by cash.

[2] Interim Report, Volume 1, Part 3.

[3] See eg Interim Report, Volume 1, pp 331 [4], 344 [36], 373 [107], (re Industry 2020); 445 [40] (re IR21).

[4] Interim Report, Volume 1, p 74 [3].

[5] See eg the discussion of Industry 2020 in the Interim Report, Volume 1, pp 331 [4]; 363 [73], 366 [88]; 382 [137].

Fighting funds

Another category of slush fund is fighting or election funds.

Fighting funds are established by union officials for the purpose of paying expenses associated with union campaigns.

Eight fighting funds were investigated by the Commission in detail during 2014.[7]

Many such funds give rise to similar governance issues as those associated with generic funds, as set out above.[8]

In addition, particular issues associated with fighting funds include:

- members contributions are not truly voluntary[9];
- the funds give an unfair advantage to incumbents[10];
- in numerous instances investigated by the Commission candidates benefitting from such funds closed their eyes to the sources, propriety and legality of such benefits and disclaimed responsibility for the funding of their own campaigns on the basis of ignorance[11];
- in some cases persons controlling a fund sought to regularise and correct its records years after the event and only after scrutiny from the Commission[12];
- controllers of the funds can decline to return members' contributions, even when those contributions have not been spent[13]; and

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[6] See eg Interim Report, Volume 1, pp 74 [4], 387 [4], 394 -396 (re Building Industry 2000 Plus Ltd); 496-499 (re Transport, Logistics, Advocacy and Training Association).

[7] Interim Report, Volume 1, Part 4.

[8] Interim Report, Volume 1, p 516 - 517; and see eg pp 654 (Team Fund); 757 [38] (SDA Fighting Fund).

[9] Interim Report, Volume 1, pp 635 [13] – 637 [17] (Team Fund).

[10] Interim Report, Volume 2, p 517.

[11] Interim Report, Volume 1, pp 583 [166], 695 [53], 700 [69] (Our HSU); 598 [213] (FAAA elections); 739 - 742 (Diana Asmar).

[12] Interim Report, Volume 1, p 653 [67] (Team Fund).

[13] Interim Report, Volume 1, pp 757-760 (SDA Fighting Fund).

- controllers establish funds using inappropriate structures.[14]

Other funds

Issues arising in respect of other relevant entities include:

- union members having a lack of choice in relation to superannuation funds[15];
- unfair and preferential treatment of union members[16]; and
- poor governance on the part of the management of the entities.[17]

Conduct of union officials

Turning to the second category of issue raised by the terms of reference, the Royal Commission is also required by its terms of reference to investigate unlawful or improper conduct on the part of union officials.

Some of the issues relating to this topic canvassed in the public hearings during 2014 include that union officials may have:

- deliberately disregarded and flouted the law[18];
- used blackmail[19] and extortion[20] for the purposes of achieving industrial ends;
- committed other criminal offences, such as the making of death threats[21] and the issuing of false invoices and conspiracy[22];

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[14] Interim Report, Volume 1, p 673 [44] (Officers' Election Fund).

[15] Interim Report, Volume 1, p 939 [83].

[16] Interim Report, Volume 1, pp 823 – 829.

[17] Interim Report, Volume 1, pp 845 – 847.

[18] Interim Report, Volume 2, pp 1008, 1105.

[19] Interim Report, Volume 2, pp 1017, 1100-1105.

[20] Interim Report, Volume 2, pp 1466 – 1475.

[21] Interim Report, Volume 2, Ch 8.4, see in particular pp 1304-5.

[22] Interim Report, Volume 1, pp 237 – 251.

- engaged in contraventions of the boycott and cartel provisions of the *Competition and Consumer Act* 2010 (Cth)[23];

- taken action to convince senior employees of Cbus secretly to hand over private information of Cbus members, then subsequently misused that information[24];

- organised and engaged in industrial action in deliberate defiance of orders made by the Fair Work Commission and the Federal Circuit Court of Australia; and

- procured the payment of monies by companies for the purposes of obtaining industrial peace.[25]

The Commission's activities during first months of 2015

The Commission's activities during the first months of 2015 have continued on a number of fronts.

First, the Commission has been involved in the establishment the TURC Police Task Force, with officers drawn from the AFP, and the police forces of New South Wales, Victoria and Queensland.

The Task Force is independent of the Commission and operates under its own command. At the same time it will work in conjunction with and in support of the Commission.

Secondly, considerable work has been done in preparation for the impending public hearings.

During the last few months this has work included:

- obtaining a significant volume of further documents and information;

- interviewing potential witnesses;

- conducting private hearings; and

- continuing to sift and review the extensive material that was collected during 2014.

Thirdly, the Commission has commenced the process of considering its policy recommendations.

[23] Interim Report, Volume 2, pp 1078 – 1100.

[24] Interim Report, Volume 2, Ch 8.3.

[25] Interim Report, Volume 1, pp 974, 988.

This process is at an early stage. Nevertheless it may be of assistance to address this third aspect of the Commission's work in more detail.

POLICY AND LAW REFORM

In addition to its investigative role, the Commission is specifically required under its terms of reference to make recommendations in relation to the conclusions which may be drawn from its inquiries.

Indeed the formulation of recommendations concerning policy and law reform will be among the Commission's most important, difficult and lasting tasks.

At least two matters make it difficult at present to express any concluded view as to what submissions might ultimately be made concerning the Commission's recommendations on law reform issues: (1) the public hearings will continue this year and new factual material is likely to emerge; and (2) the important process of consultation with interested or affected persons will also continue.

At the same time, given the amount of material now gathered by the Commission, and the number and variety of issues canvassed in the public hearings and the Interim Report, it is time to start to draw the threads together.

If nothing else, it should be possible at this early stage to start to identify possible areas of concern and to outline the next steps as the Commission works towards its conclusion.

This should assist those interested in being involved in the policy process to identify the issues the Commission presently sees as being on the table.

It may also assist with initiating a calm and sensible debate about the subject matter, and the form, of the Commission's final recommendations.

Putting the activities of unions in broader context

How then does one start to make sense of the mass of material which has now been assembled?

One way to begin is to examine a number of points that may not yet have emerged clearly.

An inquiry such as this inevitably focuses to some extent on problems. A Royal Commission is usually established in response to a policy or other problem identified by the government of the

day. The Commission's attention is directed to a specific problem or category of problem by its terms of reference. This Commission is no different in that sense.

But it is important not to focus exclusively on problem areas.

One of the privileges of working in this Commission has been the opportunity to speak with union officials who have dedicated their working lives to advancing the interests of their members in an honest and conscientious way.

Further, it needs to be recognised that unions provide many important benefits to their members.

Among other things unions seek better, safer and fairer working conditions for their members – and for that matter for other workers who are not union members but enjoy the same benefits. Unions can recover wages or other entitlements when employers have failed to pay them. They investigate and remedy safety issues in the workplace – an important matter calling for constant vigilance.

Unions can provide valuable services in other ways, some of which are not always recognised.

Take the following two examples, neither of which have been identified in the submissions advanced by unions to date in this Commission, or not in any direct way.

First, unions can play an important role in what might be described as pastoral care.

A union member in trouble has a friend and ally in the union. The member's difficulties may not be industrial – they could relate to personal matters, or health. The point is, the worker is not alone; he or she has someone to turn to for advice and support.

Secondly, unions play an important role in what might be described as access to justice.

A union can provide its members – individually or collectively – with legal advice and, if necessary representation, in relation to workplace issues.

A union member may not be able to obtain legal representation without this help from the union.

The point of these observations is that in considering what submissions might be made in respect of the Commission's recommendations, it is important not to be confined by the two problem areas identified in the terms of reference.

Rather, it is important to step back and look at those two problem areas in context.

Setting this out in more detail, the broader context encompasses at least four areas: historical, statutory, commercial and political. Each of these will be considered separately.

The historical context. While groups or organisations of workers have existed in various guises for many hundreds of years, the union movement as it is understood today emerged in the mid to late nineteenth century. Prior to that time the ability of workers to participate in collective action was limited by both common law and statute.

Take first the position in Britain. In 1799 and 1800 the Parliament of the United Kingdom, perhaps influenced by the French Revolution,[26] introduced the *Combination Acts* which prohibited collective action by workers to protect or improve their workplace interests.[27]

The common law prohibitions on the restraint of trade and conspiracy impeded collective action by workers.

Also, in Britain master and servant laws were strictly enforced, including by criminal sanctions against employees who breached their contracts of employment. In the years 1858 to 1875 there were on average 10,000 prosecutions per annum under these laws in England and Wales alone.[28]

At about this time the situation in Britain began to change. In 1868 the Trade Union Congress (TUC) met for the first time, attended by 34 delegates representing 118,367 unionists.[29] Three years later the *Trade Union Act* 1871 was passed. It provided among other things that the objects of a trade union were not to be regarded as unlawful merely because they were in restraint of trade.

By 1873 the TUC comprised 132 delegates, representing 750,000 members. In 1875 the United Kingdom Parliament passed the *Conspiracy and Protection of Property Act*, which among other things removed criminal liability for a conspiracy to do acts in contemplation or furtherance of a trade dispute and for breaches of contract by an employee.[30]

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[26] M Pittard and R Naughton *Australian Labour and Employment Law*, LexisNexis Butterworths, 2015 (Pittard and Naughton) [16.3].

[27] B Creighton and A Stewart, Labour Law, The Federation Press, 5th ed, 2010 (Creighton & Stewart) at [2.09].

[28] K D Ewing *Trade Unions, the Labour Party and the Law,* Edinburgh University Press, 1982 (Ewing), p 4.

[29] Ewing, pp 9-10.

[30] Ewing, p11.

By this stage, in the United Kingdom, as Ewing observed:

> Trade union leaders could rightly feel that a great victory had been won. Within a period of 10 years not only was the legal position of the unions consolidated and improved, but the TUC had arrived as a political institution which wielded political power and which could expect an audience, if not yet participation, in the corridors of power. [31]

Similar developments to those outlined above were taking place in Australia. Legislative provisions similar to those contained in the *Trade Union Act* 1871 were introduced in each of the colonies.

In 1904 the Federal Parliament passed the *Commonwealth Conciliation and Arbitration Act*, which, among other things, established a Court of Conciliation and Arbitration with powers to resolve interstate industrial disputes.

In 1927 the ACTU was formed.

Over the following years the trade union movement campaigned for many reforms to workplace laws. These included campaigns with regard to working hours, equal pay for women, occupational health and safety, long service leave and holiday loadings. Under the leadership of Albert Monk the ACTU supported an end to the White Australia policy and the "populate or perish" program by which millions of migrants came to this country in the post War years. Under the leadership of Bob Hawke the ACTU campaigned for many important economic and other reforms, including in relation to resale price maintenance.

In 1983 the Hawke Labor Government initiated the Accord between the ACTU and the ALP.

In approximately the late 1980's the ACTU participated in a restructure of the union movement, which ultimately resulted in some 300 smaller unions being reorganised into about 20 'super' unions.

At the same time membership of unions has been declining both in Australia and in other countries. In 1990 unions represented approximately 40.5% of the workforce. Unions now represent about 17% of the workforce overall, and in the private sector only about 12%.[32]

[31] Ewing, p11.

[32] Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, August 2013.

Thus on the one hand there are fewer unions and they now represent a much lower proportion of the workforce. On the other hand, union power is now concentrated in the hands of a small number of unions – and their leadership.

The statutory context. Unions play an important role in the industrial relations system in this country, as defined and regulated by the *Fair Work Act 2009* (Cth) and its related Federal and State legislation.

To take a few examples of unions' statutory functions:

- unions are critical participants in the enterprise bargaining system established by the *Fair Work Act*. Pursuant to s 176, an employee organisation (ie a trade union) is generally automatically a bargaining representative for a proposed enterprise agreement (that is not a 'greenfields agreement'). Provided they do so in good faith, unions have every right to bargain hard and sensibly. Their members expect nothing less.

- union officials have broad and important powers pursuant to the 'right of entry' provisions (see s 512 of the *Fair Work Act*).

This Commission is not required by its terms of reference to investigate or report into the broad industrial relations system established by the *Fair Work Act* and its related legislation.

The commercial context. Some of the submissions received by the Commission have asserted that unions are materially different from corporations on the basis that unions are not-for-profit organisations conducted for the benefit of their members.

However, as the above discussion reveals, whatever the first unions may have been in the nineteenth century, unions are now large business enterprises. They receive significant revenue: not just membership subscriptions, but other revenue such as management fees and commissions. They operate complex commercial structures. They have large numbers of staff. They operate across multiple jurisdictions and encompass multiple disciplines. The union and its officers may be regulated by various sets of different rules: at national, divisional and branch level. The funds which certain unions have established are even more complex: incorporated associations, unincorporated associations, trusts and various corporate entities.

The fact that unions have many of the features of complex commercial enterprises has contributed to the rise of what might be described as professional union managers.[33] Union officials have long since ceased to be persons who come from the shop floor, serve in the union for a few years, and then return to their regular trade or calling. Rather, union officials are often persons who see activity as a professional union official as a career or calling in itself – or as a stepping stone to further office.

The rise of the professional union manager can have risks associated with it. The Commission has seen instances of union officials deploying union resources to entrench their own position[34]; for example, on the evidence before the Commission, the former HSU National Secretary Michael Williamson deployed tactics such as instituting legal proceedings against rivals in order to advance and entrench his position. And as already noted, one issue with fighting funds is that they can give an unfair advantage to incumbents.

On the other hand the reality is that unions are now large commercial and complicated commercial enterprises.[35] Their officials need considerable experience and training. Among other things they need to be conversant with an array of statutory and legal regulation. One could not reasonably expect anyone other than a person with such experience and training to take over the running of a large union.

The political context. What might be described as the political context is also important.

This has been a theme behind many of the issues already examined by the Commission.

By way of background, the Australian Labor Party (ALP) was established because working people realised that it was not sufficient merely to band together to achieve reforms in individual workplaces – they wanted a voice in the political process[36].

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[33] R R S Tracey "The Legal Approach to Democratic Control of Trade Unions", (1985) 15 Melb U L Rev 177 (Tracey) at 179.

[34] See also Tracey at 179; see also Geoffrey Wood "Trade Unions and Theories of Democracy" in Mark Harcourt and Geoffrey Wood (ed) *Trade Unions and Democracy*, Manchester University Press, 2004 (Harcourt and Wood) at 23 – 24.

[35] See Tracey at 179.

[36] See eg *Willams v Hursey* (1959) 103 CLR 30 at 59 – 60. See also re the similar position in Britain, Harcourt and Wood at p 65.

A union which is affiliated with the ALP has very specific and wide-ranging powers under the ALP's rules.

In practical terms, a union's power is concentrated in the hands of the secretary of that union.

It follows that the secretary of a union affiliated with ALP has power well beyond his or her union – the secretary may be in a position to wield great power in terms of the selection of political candidates and the promotion of particular policies.

Of course, it is no part of this Commission's terms of reference to look into the structure or policies of the ALP.

However, it is squarely within this Commission's terms of reference to understand whether union officials have acted in breach of their duty to their members.

To take some examples, addressed in the Interim Report:

(1) As already noted, the Interim Report examined a number of slush funds in depth, including the problems with governance and conflicts of interest. But one needs to go deeper – why are such funds established in the first place? One answer is proffered in the Interim Report – because to do so gives those who control these funds a platform within which to pursue their political interests.

(2) Likewise, take union membership. The Interim Report looked at overstatement of union membership numbers. Why is it in the interests of the union to exaggerate the number of its members? The answer is because it gives persons who stand at the apex of the particular union an opportunity to exert greater power within a major political party.[37]

A number of questions for the Commission arise from this. Is there a pattern of senior union officials involving themselves in political issues to such an extent that they are in conflict with the duties they owe to members? Is that part of the reason for the issues which the Commission has identified to date in the Interim Report? And if so, what recommendations could be made about it?

The distinction between changing the law and improving enforcement of existing law

When talking about law reform it is important to draw a distinction between two kinds of situation: -

[37] Interim Report, Vol 2, p 1647 [65].

First, where there is no or defective regulation. In this situation the law reformer's task is to determine whether new laws should be introduced and, if so, in what form.

Secondly, where there is regulation, but it is being flouted or ignored. In this situation there are already existing applicable laws, but they are not being enforced. In this situation the law reformer's task is to work out what has to be done to ensure that laws are obeyed.

It is not easy to draw a sharp distinction between these two kinds of reforms.

Take the case of some of the "slush funds" referred to above. Often such funds are established and operated entirely separately from the unions – indeed in some ways that is the whole point.

One task for this Commission will be to consider whether recommendations as to law reform should be made in relation to such funds, and if so the form of such recommendation.

There are at least two ways of approaching this issue.

One approach would be to recommend that new provisions be introduced into the *Fair Work Act* or related legislation which specifically regulate the establishment and maintenance of such funds.

Another approach would be to characterise the problem in a different way – on this approach the real problem is that when certain union officials deploy union resources to raise money for slush funds, or otherwise act for the benefit of the fund rather than the members, they are in a position of conflict between their self-interest and their fiduciary duties to the union.

Seen in this way the issue is not about a lacuna in the current system of regulation. The problem is that the existing general law and statutory prohibitions on conflicts of interest are not being observed, nor enforced. Perhaps that is because they are not well understood.

This approach also recognises that some fundraising activities may be entirely reasonable and benign. It goes without saying that Australians are free in their own time to support whatever political party they choose.

As appears from the above, if recommendations are made concerning the regulation of fighting funds those recommendations could relate to the introduction of new forms of regulation, or to ensuring that existing regulations concerning conflicts of interest are observed and enforced, or to some mixture of the two.

Other areas of reform under consideration by the Commission include the following.

Enterprise agreements. The Interim Report has considered in various places enterprise agreements which include provisions requiring employers to contribute to particular funds or purchase particular products from which unions derive a benefit.

There are at least two potential problems with enterprise agreements being used for fund-raising in this way: (1) it could increase the prospects of unions exerting improper pressure on employers to enter into a particular form of agreement; and (2) there is a risk that the union official negotiating or concluding the agreement is in a situation in which there is a conflict between his or her duties to the members, on the one hand, and to the union or other fund receiving the benefit of the payment, on the other.

The range of possible recommendations on this topic includes the following:

- *First*, change the law so that enterprise agreements cannot include provisions requiring certain specific payments or the acquisition of particular products.

  One way of achieving this would be to recommend changes to the *Fair Work Act* to exclude redundancy funds, income protection products or other similar funds or products as 'matters' that are permitted for inclusion in enterprise agreements. If recommendations were made to this effect it might also be appropriate to make recommendations concerning the person making the payments – as to which see further below.

- *Secondly*, change the law so that enterprise agreements cannot include provisions requiring certain specific payments or the acquisition of particular products, other than as a default.

- *Thirdly*, change the law so that enterprise agreements cannot include provisions requiring certain specific payments or the acquisition of particular products, other than as a default and, in addition, change the law so that such payments or products cannot relate to funds or products in which the union negotiating the enterprise agreement has an interest or from which the union derives a benefit.

- *Fourthly*, continue to permit enterprise agreements to include provisions requiring certain specific payments or the acquisition of particular products but only if the enterprise

agreement clearly discloses to any employee bound by the agreement the nature and quantum of the payment.

- *Fifthly*, do nothing and leave the current position unchanged.

Corrupting payments. Payments made in respect of enterprise agreements are a two way street. So far the emphasis has been on the recipient of beneficiary of the payment. What about the person making the benefit, namely the employer? That person may be as culpable as the payee.

If recommendations were to be made concerning penalties to be imposed on unions for seeking such payments, corresponding penalties might need to be considered in respect of the employers who make them.

Union officers. Mention has already been made of the obligations and duties on union officers. It may be worth considering recommendations designed to shore up these obligations.

Matters for consideration include:

- should the statutory form of the fiduciary and common law duties imposed on the officers of registered organisations continue to be limited to only those powers and duties related to the 'financial management' of the organisational branch (*Fair Work (Registered Organisations) Act*, section 283)?

- next, at present the statutory duty of the officers of registered organisations is only to act in good faith in what the officer believes to be in the interests of the organisation. Should this be amended such that the obligation is to act in what is objectively in the best interests of the organisation?

Other changes to the current laws under consideration by the Commission include the following:

- should the statements which unions are required to provide pursuant to section 237 of the *Fair Work Act* be more detailed and contain additional information, and should such statements be available to the public?

- should section 190 of the *Fair Work (Registered Organisations) Act* be amended to make clear that it prohibits an organisation or branch rendering assistance to one candidate over another in an election for an office or position in a different organisation or branch.

ENFORCEMENT OF EXISTING LAWS

Much of the foregoing has dealt with instances where the existing law is insufficient or defective.

However the Commission's investigations to date reveal particular and acute problems when it comes to enforcement of law.

The Interim Report discusses many instances in which union officials have acted in defiance of the law.

Indeed there are express findings to this effect in the Interim Report. For example, it is stated in the Interim Report that the evidence indicates that a number of CFMEU officials 'seek to conduct their affairs with a deliberate disregard for the rule of law.'[38]

The effect of that evidence is further summarised in the Interim Report as follows:

> That evidence is suggestive of the existence of pervasive and unhealthy culture within the CFMEU, under which:
>
> (a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving objectives of particular officials;
>
> (b) officials prefer to lie rather than reveal the truth and betray the unions;
>
> (c) the reputations of those who speak out about a union wrong doing became the subject of baseless slurs and vilification.[39]

As noted above, the Interim Report was delivered to the Governor General on 15 December 2014. Since then there have been further relevant developments.

To take some examples, on 17 March 2015, Justice Tracey delivered a decision concerning the activities of various officials of the CFMEU on sites in Victoria.[40]

The evidence before Justice Tracey involved officials of the CFMEU blockading various Grocon sites in Melbourne. One witness was the driver of a minibus who attempted to drive out of the blockaded area. As it happened the driver was suffering from cancer at the time. The witness described persons surrounding his van yelling out abuse and punching the windscreen.

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[38] Interim Report, Volume 2, p 1008 [4].

[39] Interim Report, Volume 2, p 1008 [5].

[40] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 225.

In particular, the witness recounted seeing John Setka, at that time an Assistant Secretary of the Victoria-Tasmania Divisional Branch of the CFMEU's Construction and General Division punching the windscreen of his van and shouting, "I hope you die of your cancer".

Tracey J specifically accepted the evidence of the witness to the effect that Mr Setka used foul and abusive language and punched his windscreen.[41] It is one thing for there to be robust language on a building site. It is another for a senior union official to shout, "I hope you die of your cancer" to a person suffering the disease.

Tracey J concluded that John Setka and a number of other officials of the CFMEU had, among other things, engaged in coercion in contravention of section 348 and 355 of the *Fair Work Act*.[42]

To take another example, Chapter 8.9 of the Interim Report deals with the CFMEU's treatment of Fair Work Building Inspectors. One case study concerned events at the Ibis Hotel in early May 2014.[43]

It was noted in the Interim Report that proceedings had been brought by the Director of the Fair Work Building Industry Inspectorate against John Perkovic and others for breach of section 500 of the *Fair Work Act* 2009 (Cth) and that those proceedings were at that time pending in the Federal Court.[44]

Since the Interim Report was delivered, on 23 December 2014 Justice White gave judgment in those proceedings.[45] Justice White concluded that the breaches alleged by John Perkovic and others had been made out.

In the course of delivering his reasons Justice White described the CFMEU's record of non-compliance with industrial legislation as "dismal".[46]

Justice White went on to observe:

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[41] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 225 at [192].

[42] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 225 at [265] – [266].

[43] Interim Report, Volume 2, pp 1495 – 1500.

[44] Interim Report, Volume 2, p 1525.

[45] *Director of Fair Work Building Inspectorate v Stephenson* [2014] FCA 1432.

[46] *Director of Fair Work Building Inspectorate v Stephenson* [2014] FCA 1432 at [76].

> Since 1999, the CFMEU has had penalties imposed on it by a court on numerous occasions. Many of the court decisions involved multiple contraventions. Of particular relevance presently is that before 1 March 2014, the CFMEU and/or its employees have been dealt with for contraventions of right of entry provisions on 13 occasions, involving some 40 separate contraventions. In addition, since the subject contraventions, Mansfield J in *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047 (delivered on 2 October 2014) (*DFWBI v Cartledge*), imposed penalties on the CFMEU and its employees in respect of seven different contraventions of s 500 of the FW Act committed on 19 and 20 March 2014. The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry. It also indicates that deterrence must be a prominent consideration in the fixing of penalties in the present cases.[47]

To take a third example, following a lengthy trial the CFMEU was found guilty of various charges of contempt. On 31 March 2014 Cavanough J published his reasons on penalty,[48] which included the following observations:

> I regard these contempts as exceptionally serious. So much so that they warrant explicit classification as criminal contempts, perhaps for the first time in the Australian industrial context. I have already explained why I consider these contempts to be so serious. In short, they were highly contumacious. They were also highly visible and highly memorable. The Court must visit the defiance of the CFMEU with a penalty which will not only adequately respond to the scale of the defiance but also act as a general and specific deterrent. No fines of the level previously imposed could do that.

On 24 October 2014 the Victorian Court of Appeal rejected the CFMEU's appeal from this decision.[49]

On 23 February 2015 the High Court rejected the CFMEU's application for special leave to appeal from the decision of the Court of Appeal.[50]

Next, on 26 February 2015 the Director of Fair Work Building and Construction gave evidence to the Education and Employment Legislation Committee to the effect that there are currently 72 officials of the CFMEU before the Courts.[51]

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[47] *Director of Fair Work Building Inspectorate v Stephenson* [2014] FCA 1432 at [77].

[48] *Grocon Constructors (Victoria) Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2014] VSC 134, [201].

[49] *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261.

[50] [2015] HCATrans 24.

[51] See FWBC media release 27 February 2015.

These officials include the National Secretary, five State Secretaries and seven Assistant Secretaries. The officials are facing some 403 alleged breaches of workplace laws. Of course, it is yet to be seen if any of these breaches are proved.

Lastly, the Interim Report considers the progress of the litigation involving the CFMEU and Boral, and in particular the CFMEU's appeal from a decision of Derham AsJ in the Victorian Supreme Court.[52]

On 19 December 2014 the Victorian Court of Appeal handed down its decision, rejecting the CFMEU's appeal from the decision of Derham AsJ.[53]

CONCLUSION

No reasonable person could consider this a satisfactory state of affairs.

No reasonable or fair minded person would regard it as fair or appropriate that certain union leaders defy the law and do as they please. The problem is not with union members. It is not with unions themselves, which play an important part in the industrial relations system and have done so for a long time.

It is a problem with some union officials.

Indeed the evidence and findings of the Commission to date can be distilled into at least this proposition: some union leaders disregard their legal obligations and duties.

One task for the Commission and those assisting it in the coming year will be to formulate recommendations that seek to address this.

What kind of recommendations might be made? There are various possibilities.

Here is one such possibility: increase the civil penalties which may be imposed for contraventions of sections 285 – 288 of the *Fair Work (Registered Organisations) Act*, to bring those penalties into line with the penalties which can be imposed under the *Corporations Act*.

Currently the maximum civil penalty which can be imposed for a breach of duty by a union officer is 60 penalty units, which is equivalent to $10,200.[54]

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[52] Interim Report, Volume 2, pp 1108 – 1115.

[53] [2014] VSCA 348.

In contrast, section 1317G of the *Corporations Act* imposes a maximum civil penalty of $200,000 for equivalent breaches of directors' duties.

However imposing civil penalties, even increased ones, may not be an adequate response. A well-resourced union can just pay the fine. Also fining the union penalises the members, not the official who actually engaged in the wrong doing.

Here then is a second possibility: introduce banning orders, pursuant to which persons would be disqualified from holding any office in a union.

At present section 215 of the *Fair Work (Registered Organisation) Act* provides in certain circumstances that a person convicted of certain offences is ineligible to be a candidate, or to be elected, to an office in an organisation.

However this comes into play only if there has been a conviction in respect of a particular offence.

The corresponding provisions under the Corporations Act in respect of company officials have wider application. For example, under sections 206C to 206EEA of the *Corporations Act*, ASIC has the power to apply to a State Supreme Court or Federal Court for orders disqualifying persons from acting as a director in certain circumstances.[55] Such circumstances include that the person has engaged in repeated contraventions of the *Corporations Act*.

The General Manager of the Fair Work Commission currently has no such power. Thus one possibility in terms of recommendation would be that an application for a disqualifying order could be made if the union official has been found by a Court to have engaged in contraventions of the *Fair Work Act* or to have been in contempt of Court orders. It would then be up to the Court to consider the length of any banning order or any conditions which might be imposed.

It should be emphasised that these are just possibilities at this stage. The Commission will issue in the next few weeks a detailed discussion paper canvassing these and many more possible recommendations.

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[54] See *Fair Work (Registered Organisations) Act* 2009 (Cth) section 306(1)(b); and see *Crimes Act* 1914 (Cth) s4AA(1)

[55] See *Re HIH Insurance Ltd (in prov liq); ASIC v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483 at [56] (and see on appeal *Adler v ASIC* (2003) 46 ACSR 504; [2003] NSWCA 131; see also *Rich v ASIC* (2004) 220 CLR 129; [2004] HCA 42 at [48]).

The discussion paper will be issued at this early stage to ensure that all persons who wish to do so will have an opportunity to make their own submissions.

A number of persons have already made written submissions to the Commission on policy issues, for which the Commission is grateful. These submissions will be taken into account in the Commission's policy process.

Apart from the policy process, as already noted public hearings will commence next Monday, 27 April 2015. Hearings will take place concerning the ETU, then the TWU, the latter commencing on 11 May 2015. At this stage it is likely that hearings into the CEPU will commence in the week starting 18 May 2015. Hearings into the CFMEU are expected to occupy June 2015. Further hearings will be scheduled in due course and witness lists published in the usual manner.

Finally, some points concerning the Commission's legal team. I am pleased to inform you that Sarah McNaughton SC and Richard Scruby have both been appointed counsel assisting and will be working at the Commission this year.

I would also like to acknowledge the professionalism and hard work of all the solicitors, junior counsel assisting and staff working at the Commission over the last year.

May it please the Commission.