The HR Nicholls Society Inc.

Reforming Australia's Industrial Relations

The Hon Dyson Heydon AC QC
Royal Commission on Trade Union
Governance & Corruption
GPO Box 2477
Sydney NSW 2001

6/112 Millswyn St
South Yarra
Victoria 3141

29 October 2014

Dear Mr Heydon

On behalf of the HR Nicholls Society I am enclosing for the consideration of the Royal Commission a submission relating in particular to the following points of the Commission's terms of reference:

(e)(i) *the extent to which persons represented by employee associations are protected from any adverse effects or negative consequences arising from matters associated with, or related to, the existence of relevant entities or activities relating to their establishment or operation;* and
(j) *the adequacy and effectiveness of existing systems of regulation and law enforcement.*

The HR Nicholls Society believes that in a modern society there is no intrinsic imbalance in bargaining power between employers and employees and the regulation of workplace relations should be minimal. That is in the interests of both sides and in maximising economic growth for the economic and social benefit of the nation.

However, the Fair Work Act and the Fair Work Commission (FWC) established under that Act provide an extensive regulation of relations between employers and employees and also of the capacity of unions to be involved in such relationships. Through the legislation and its interpretation advantages are conferred upon trade unions which are unnecessary and unjustified particularly having regard to the small proportion of the work force which are union members. Some details of these advantages are set out in the attached submission.

Importantly, this situation establishes an environment in which unions are able to exploit advantages available to them at a cost to employers and through them to the community at large. Such exploitation can be achieved by either threatening to disrupt the activity of businesses unless concessions are made to unions and their members or by initiating claims with the FWC which seek working arrangements favourable to unions but which add to business costs or prevent improvement in efficiency. This situation is not only highly undesirable economically. It also creates an environment of bargaining of pros and cons under a regulatory arrangement that is open to differing interpretations. This inevitably opens the way to one or other form of corruption.

The Royal Commission has already identified "criminal conduct which includes widespread instances of physical and verbal violence, cartel conduct, secondary boycotts, contempt of court and other institutional orders, and the encouragement of others to commit these contempts". It is submitted that these have adverse implications from both a legal and economic perspective and that these occurrences would either not happen or would happen to a much lesser extent under minimal regulatory arrangements.

In this regard we believe that the Royal Commission should consider giving more attention than appears so far to be the case to the adverse economic implications of the existing regulatory arrangements. The provision in the terms of reference to "the adequacy and effectiveness of existing

systems of regulation" seems relevant. It is recognised that the Commission is not expected to undertake a comprehensive economic review of the regulations, which we understand is to be referred to the Productivity Commission. However, the identification of restrictive practices in the labour market indicates that adverse economic implications exist. The Society recommends that the Royal Commission draw attention to this in its report.

In sum, we recommend that the Royal Commission identify in its report that there are both legal and economic reasons for having a much smaller extent of regulations and one that does not provide advantage to either unions or employers.

Des Moore
HR Nicholls Society

THE EFFECT OF REGULATION ON UNION GOVERNANCE AND CORRUPTION

HR Nicholls Society Inc.

Outline

1. These submissions are filed on behalf of the HR Nicholls Society – a not-for-profit organization that stands for the principle that in a modern society there is no intrinsic imbalance in bargaining power between employers and employees and the regulation of workplace relations should be minimal.

2. As an interested party in the Australian labour market and the governance of trade unions, the HR Nicholls Society wishes to make submissions that relate to the following points of this Honourable Commission's terms of reference:

   (e)(i) *the extent to which persons represented by employee associations are protected from any adverse effects or negative consequences arising from matters associated with , or related to, the existence of relevant entities or activities relating to their establishment or operation;* and

   (j) *the adequacy and effectiveness of existing systems of regulation and law enforcement.*

Changes to the Regulatory Model

3. The Fair Work Commission (FWC) was established under Chapter 5 of the *Fair Work Act 2009* (the Act) and is the primary regulatory body for officials of trade unions.[1]

4. Consistent with its terms of reference, the Royal Commission has identified "criminal conduct which includes widespread instances of physical and verbal violence, cartel conduct, secondary boycotts, contempt of court and other

[1] Pursuant to the *Fair Work (Registered Organisations) Act 2009*

institutional orders, and the encouragement of others to commit these contempts".[2]

5. While it is important to shine a light on this corrupt behaviour, it is submitted that such corruption stems – at least in part – from structural factors derived from legislative advantages that are conferred upon trade unions[3] through the Act and this requires redress. The operative legislation allows significantly increased regulation of relations between employers and employees and also of the capacity of unions to be involved in such relationships.

6. The Act provides trade unions with privileges that the ordinary individual or private entity does not enjoy. Similarly, the FWC is a vehicle more accessible for trade unions to implement their agendas. For example, section 596 of the Act allows a member of a registered organisation to appear before the FWC as of right, but a lawyer or paid agent representing an individual or private entity may only appear with the permission of the FWC.

7. More practical examples of how legislative preferential treatment has led to the kind of corruption that this Honourable Commission has been charged with investigating, are found in an analysis of the:

   a. Collective Bargaining Regime; and
   b. Right of Entry Regime.

8. It is submitted that the Act has created a quasi-monopoly for trade unions in these regimes. That monopoly has been exploited by trade union officials and led to them engaging in corrupt action. It also leads to the operation of restrictive trade practices in the labour market; practices which are prohibited to corporations under competition law.

Collective Bargaining Regime

[2] Letter from the Commissioner to the Federal Attorney-General, 2 October 2014, p2.

[3] And, in many cases, employer organisations.

9. Part 2-4 of the Act governs Enterprise Agreements. Under the current Act, Enterprise Agreements are the only method by which employees and employers can agree to vary the terms of employment set down by a small number of industry-based "modern awards".[4] Accordingly, employers and employees seeking to agree terms and conditions which suit the requirements of the workplace and workforce must engage in a collective bargaining process.

10. Collective bargaining inherently favours unions for obvious reasons. However, the collective bargaining scheme in the Act further entrenches the role of unions in the following ways:

    a. A registered union is treated by default as the bargaining representative for its members: s176;
    b. Only unions can enter into greenfields agreements: s53(2);
    c. Unions can bring proceedings in FWC once covered by agreement; and
    d. Unions have standing to institute court proceedings on behalf of their members: s 539.

11. Part 3-3 of the Act governs Industrial Action, allowing for trade unions to engage in protected industrial action, as deemed by the FWC, to achieve a stronger bargaining position for members. The Act provides immunity for any participant in such industrial action from any resulting legal recourse that might otherwise be available to affected parties – as long as the procedural requirements have been satisfied at the FWC. The FWC orders whether industrial action is protected taking into account isolated criteria, rather than taking a long-term approach to the history and future of the workplace. Any strike action taken by employees is a breach of contract. While it is conceded that, on occasion, such action may arise out of necessity (i.e. to address issues of

[4] Leaving aside the rarely used "individual flexibility arrangements". It is beyond the scope of this submission to analyse why these are rarely used, but it seems clear that two significant reasons are that they lack certainty for employers because employees can cancel them on short notice, and, at least in unionized workplaces, trenchant opposition to their use by unions.

health and safety), immunity for such action should not be granted by the FWC based on subjective criteria as is currently provided for in the Act.

12. In practical terms, trade unions are the only entities that are in a position to take advantage of this legislative framework. The immunity provision is easily enlivened by trade unions given their ready access to the FWC and knowledge of the Act. Both the technicalities involved in arranging a ballot of workers, which is required before protected industrial action in support of enterprise agreement negotiations, and the practical resources required, are beyond the resources of individuals or small groups of employees.

13. With the benefit of this immunity, it has unsurprisingly led to the kind of corrupt industrial action that is the basis of this Honourable Commission's investigation.

14. It is submitted that these provisions of the Act operate on the false premise that employment contracts require special legislation to protect the fairness of their formation. To impose regulations on employers to meet, consider, and bargain with trade unions in good faith, implies that to deregulate such a process would lead to negotiations being entered into in bad faith.

15. Common law principles governing contracts are already in place to remedy the danger of potential David and Goliath situations. Principles such as undue influence, misrepresentation, unfair terms and the availability of injunctive relief – as well as legislative provisions such those found in the *Australian Consumer Law* and anti-discrimination legislation – have long been sufficient to protect consumers and contractors alike. These broad ranging remedies sufficiently protect employment contracts in a deregulated system and would continue to do so like any other class of contract. Further, the existing court system is conferred with the requisite power to adjudicate disputes arising from these provisions, rather than requiring a specialist employment tribunal such as the FWC.

16. The notion that an employee/employer contracting position is inherently imbalanced at the negotiating table is misconceived and has been too readily accepted without critical analysis. By way of example, the latest ABS Labour Mobility Survey shows that in the 12 months to February 2013, 61% of the 11.5 million employed in the labour industry left their job voluntarily. Of those that left within 12 months of starting, 31% left due to unsatisfactory working conditions, while a further 31% left to obtain a better job or conditions.[5]

17. Sample statistics such as these show the flexibility and control that employees have in their marketplace. The argument that there is an imbalance of bargaining power fails to take into account the competitive environment in which employers operate in modern day economies. A fully competitive market does not allow for employers to force wages down or impose "unfair" conditions, else their workforce would simply leave.

18. Regulation, if any, should be aimed at facilitating efficient contracting between employers and employees directly. The benefit of this is to create a more immediate state of trust and security in the workplace resulting in a higher quality of work and job satisfaction.

19. Collective bargaining can only be justified if it can be shown to be in the public interest. The authorisation of such bargaining under legislation implies official approval of the process, which has greater potential than individual bargaining to lead to wage increases not justified by productivity gains and to involve a process ending with higher unemployment. Historical evidence indicates that bodies responsible for making decisions on a case-by-case basis are not equipped to make judgements about the capacity of the economy to experience aggregate wage adjustments.

<u>Right of Entry Regime</u>

[5] ABS Labour Mobility Survey (ABS 6209.0), current to 18 September 2014.

20. Part 3-4 of the Fair Work Act governs the rights of holders of right of entry permits. A permit holder may enter a work premises to conduct interviews and inspect and copy documents on 24-hour's notice.[6]

21. Permit holders may exercise this right as long as they can assert that they "reasonably suspect" a contravention of an industrial instrument has occurred, or is occurring[7] in relation to one of its members on the work premises. The burden of proof is on the permit holder to show a reasonable suspicion[8], however this may be satisfied by something as simple as receiving a complaint from a union member.

22. The FWC may, on application by an organisation, issue a permit to an official of the organisation if the FWC is satisfied that the official is a fit and proper person to hold the entry permit.[9]

23. The Act lists the qualification matters that the FWC is to take into account when deciding whether an official is a fit and proper person.[10] The *Fair Work Bill Explanatory Memorandum 2008* (EM) says that these qualification matters are intended to ensure that only appropriate persons are conferred with the significant rights to access premises conferred by this Part.[11]

24. However, the EM is silent as to why there is an inherent legislative bias under this Part, restricting applications to be made only by trade unions.

25. It is submitted that this favourable treatment conferred upon trade unions has created an unfair monopoly for their officials. Any worker that is not a member of a trade union does not and can not enjoy the same rights as those that are members.

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[6] s 504
[7] s481(3)
[8] s481(3)
[9] s 512.
[10] s 513.
[11] cl 2041 of the EM.

26. Take, for example, a teenage construction worker who is employed on a residential work site. The site has no union presence and the worker has no knowledge of his entitlements. Under the Act, if the worker was subjected to a breach of his workplace entitlements, no support person (be it a parent, friend or relative) of his would have the right to enter the workplace to conduct interviews or inspect documents in regards to the suspected breach. This leaves a vulnerable worker at a legislative disadvantage as compared to members of trade unions. There is no public interest in this differentiation.

27. It is submitted that this unfair monopoly is one example of added privileges that has led to trade unions engaging in the kind of corrupt behaviour that this Honourable Commission has been charged with investigating.

28. The FWC does have powers in relation to rights of entry permits to impose conditions; suspend; revoke; make orders about future issue of permits to individuals; any other order it considers appropriate taking into account fairness between the parties.[12] Further, the Act creates an offence for any permit holder that intentionally hinders or obstructs any person, or otherwise acts in an improper manner.[13] This is a civil remedy provision that allows for a maximum penalty for an organisation of $51,000.

29. It has been shown that that these limited penalties for corrupt conduct are not enough to deter organisations from engaging in unlawful behaviour. By way of example, the CFMEU recently received the heaviest fines in union history as a result of unlawful conduct of its members at Grocon construction sites in August-September 2012.[14] While this penalty was not imposed as a result of right of entry contraventions, the fine of $1.25 million seems to have done little to curb the CFMEU's unlawful action or that of its members[15]. In that case Cavanough J found it to be common ground that the CFMEU has "substantial

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s 505(2)

[13] s 500.

[14] *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2014] VSC 134

[15] An example as recently as the decision in *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047 show that penalties previously imposed on the CFMEU have not resulted in a forceful enough deterrence to prevent multiple contraventions of section 500.

financial means" to meet fines of this kind, with net assets valued at over $50 million.[16]

30. Given the time that has now passed since the implementation of the right of entry provisions, and the sheer number of permits granted[17], trade unions can be assumed to have a sound understanding of the permit qualifications and the significant rights that come attached. Trade unions ought be held to a higher standard of accountability given this knowledge and the persistent contraventions allowing regulators to impose a heavier range of remedies.

31. While the object of Part 3-4 includes balancing the right of occupiers of premises and employers to go about their business without undue inconvenience[18], the practical outcome has resulted in the balance of convenience falling well outside of the employer. Employers yield to union demands to avoid the potentially stifling conduct that trade unions are able to impose, and are able to do so with great efficiency. Speaking for employers of labourers, Executive Director of Policy at the Australian Mines and Metals Association, Scott Barklamb, has said that "*Australian employers . . . have to make pragmatic decisions on what is possible and cost effective, and in too many cases flaws and imbalances in our workplace relations system force employers into agreeing to less than optimal outcomes.*"[19] Similarly, a spokesman for Australian Builders has referred to stalling tactics available to trade unions left employers with an "*industrial gun held to their heads.*"[20]

Preferential Treatment leads to Corruption

32. Officials of trade unions have an unfair advantage through the above discussed provisions of the Act and the operation of the FWC to, among other things:

    a. Enter work premises;

[16] Ibid at [188]
[17] Over 3,500 currently valid alone according to the FWC website at date of drafting.
[18] s480(c)
[19] "*Business rails against call to 'just say no' to unions*", Annabel Hepworth and Ewin Hannan, The Australian, January 30, 2014.
[20] Ibid.

b. Disrupt work performance;
c. Institute proceedings on behalf of its members;
d. Force parties into regulated bargaining; and
e. Engage in protected industrial action.

33. These are privileges that the ordinary private citizen or entity does not enjoy. They lead to distorted incentives which can lead to union officials obtaining benefits for themselves or for the union in preference to the members they are supposed to represent.[21]

34. It has been said that *"individual agreements [have become] virtually impossible; and it is thanks to that right's removal that ACTU secretary Dave Oliver can proclaim unions "represent about 60 per cent of the workforce", although union membership is barely one-fourth that."*[22] In fact, there has been a decline in union membership to less than 15 per cent of private sector employees, with 90 percent of businesses having no employees with union members.

35. It is therefore hard to find justification for why trade unions enjoy the legislative benefits that they do. There is no substantive public interest justification for reducing the capacity of employees and employers to themselves determine the major components of employment agreements.

36. Productivity and market forces, rather than legislative regulation should govern working conditions and bargaining outcomes. Individual employees are increasingly able to either bargain for themselves or obtain advice from the many employment and legal agencies, associations, and government inspectorates rather than be limited to registered organisations.

[21] Without wishing to comment on specific matters before the Royal Commission, the allegations that in 2003 a significant payment was made by the Peter MacCallum Institute to the Health Services Union in a purported compromise of a back pay claim would, if proven, be a clear example of these kinds of incentives operating.

[22] *"It's only fair that Gillard shares blame for return to lawless ways"*, Henry Ergas, *The Australian*, February 17, 2014.

37. These submissions do not suggest that trade unions have no role but, rather, that employees have more control than is broadly accepted, as well as a larger than ever choice with regard to advisers and helpers. Any regulatory system should treat all employees and employers equally. In such circumstances trade unions should cease to be given preferential treatment in legislation and industrial tribunals. These submissions do not address all areas of the current regulatory system that are of concern to the HR Nicholls Society;[23] rather they are intended to highlight the principle that minimal regulation would lead to minimal advantages to be seized upon by union officials and therefore minimal chance of corruption.

ROBERT O'NEILL
Joan Rosanove Chambers

ANDREW DENTON
Aickin Chambers

24 October 2014

[23] In particular, while they may not fall strictly within the terms of reference, matters such as the determination of the minimum wage which are subject to regulation and which amount to a restrictive practice in the labour market