

CHECK AGAINST DELIVERY

ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION

HEARING – TUESDAY 19 MAY 2015

COUNSEL ASSISTING STATEMENT

Today's short hearing has two purposes.

The first purpose is to announce the release by the Commission of its discussion paper on policy issues.

The discussion paper will be published on the Commission's website today. It will also be provided in hard copy to various interested persons and entities.

The second purpose of today's hearing is to provide an overview of the discussion paper – its scope, content and basic approach.

To begin with, some background. On 23 April 2015 the Commission held a preliminary hearing. An overview was given of the likely course of the Commission's main activities until the end of the year, most particularly with regard to law reform and policy.

On that occasion it was also observed that many of the issues which have occupied the Commission to date have arisen not because of any defect in the current laws, but rather because those laws are not being complied with or enforced.

In this regard it was said that on the evidence before the Commission to date the real problem is not with union members. Nor is the problem with the existence of unions themselves – unions have for over a century played an important part in the industrial relations system in this country and there is no suggestion that this will stop.

Rather, the heart of the problem is that some union leaders or officials simply disregard their legal obligations and duties.

The discussion paper to be released by the Commission today expands and elaborates upon these themes.

The purpose of the discussion paper is to assist the Commission in formulating and making its recommendations on policy issues. This Commission is specifically required under its terms of reference to make recommendations arising out its inquiries.

One essential step in the process of formulating and making final recommendations is to consult as widely as possible, so that ideas can be challenged, tested, refined and reconstructed – or for that matter abandoned.

The discussion paper continues the Commission's process of consultation. As its name suggests, the purpose of the paper is to elicit discussion. The paper sets out a range of policy proposals and options over a wide range of areas. It does not argue for any one position. It does not urge a preference for one proposal over another. Nor does it contend that any particular proposal should necessarily be implemented.

Rather, the discussion paper proceeds as follows. First, each of the succeeding chapters after Chapter 2 raises for consideration potential issues or problems. The chapter then considers possible law reform solutions for those problems. It then sets out specific questions in respect of which the Commission seeks discussion and submission.

More particularly, the discussion paper comprises ten chapters.

Chapter 1 is devoted to introductory matters.

Chapter 2 describes the history of trade unions in Australia and elsewhere. It also discusses the current role of trade unions in the industrial relations system in this country. These are important contextual matters which inform any discussion of law reform concerning the governance of trade unions.

Chapter 3 deals with the regulation of unions. A number of important policy issues are raised. One relates to dual state and commonwealth regulation. At present there are multiple regulatory regimes governing organisations operating at commonwealth and state level. The question is: do

these multiple regimes have the potential to create unnecessary legal complexity and confusion for members of organisations and the public alike? Or should the multiple regimes be preserved?

Another issue considered relates to the appropriate regulator of organisations registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). Should there be a separate Registered Organisations Commission or similar single independent regulator?

Chapter 4 deals with the regulation of union officials. It considers some of the arguments for and against the duties owed by the officials to their organisations being made comparable to the obligations on directors under the *Corporations Act*. This includes consideration of whether criminal penalties should be imposed for breach of officers' duties.

This chapter also includes consideration of the introduction of banning orders for persons who have engaged in egregious or repeated breaches of the law.

The question of right of entry permits is also considered in Chapter 4. In particular there is a discussion of whether changes should be made in relation to what the Fair Work Commission should take into account in considering whether or not to grant an individual a right of entry permit.

Chapter 5 deals with relevant entities within the meaning of the terms of reference. It raises various questions for discussion, including whether amendments should be made to the *Fair Work (Registered Organisations) Act 2009* (Cth) concerning the general governance and regulation of relevant entities, including with respect to imposing minimum governance standards.

Chapter 6 deals with union election funds. The Interim Report noted that the creation and maintenance of slush funds for the purpose of funding union elections has given rise to various governance and other issues. Chapter 6 looks at ways of tackling this.

In particular Chapter 6 looks at a possible statutory regime for the purposes of regulating the funding of union elections. A number of possible provisions are set out in detail.

These possible provisions are designed to improve transparency in relation to the funding of elections: union members are entitled know who is funding which ticket.

If provisions of this kind were to be implemented they would comprise a complete revamp of the current regime for the funding of union elections. The ad hoc, murky and secretive funding arrangements this Commission has examined to date would become a thing of the past.

Chapter 7 deals with employee benefit funds and discusses governance and supervision issues and conflicts of interest.

Chapter 8 deals with superannuation funds including choice of superannuation funds in an enterprise agreement.

Chapter 9 discusses corrupting benefits. This is an important topic. It affects not only unions but those who make payments to unions.

This Commission has received evidence or information concerning arrangements pursuant to which payments are made by employers to unions, sometimes for significant sums.

Of course, there may be occasions when such payments are entirely proper. And often payments travel under labels which suggest the payment is legitimate – labels such as sponsorship or membership or training.

The concern arises when on close analysis the true purpose of an employer making a payment of this kind is unclear, whatever the label. In some cases there is a suspicion that the real reason money is changing hands is to curry favour or seek industrial peace.

Chapter 9 of the discussion paper addresses this issue. It notes that there are various existing laws relevant to this kind of problem, including laws in relation to blackmail, extortion and the payment of secret commissions.

However these laws are at a level of generality and vary from State to State. They are not directed to the specific issue which this Commission has encountered. And the fact that the Commission is continuing to see such issues suggest the current laws are not effective or adequate.

Accordingly, in Chapter 9 there is a proposal for the introduction of specific legislative provisions prohibiting the giving or receiving of corrupting benefits. If introduced the new statutory regime would apply to employers who make such payments as well as to the unions or union officials who received them. It is suggested that penalties for the making and receiving of such payments

should be very large: an employer corporation which committed an offence under these proposed provisions would be punishable by a fine of up to 100,000 penalty units.¹

Chapter 10 deals with building and construction. Among other things it considers the vexed question of whether the Australian Building and Construction Commission or a similar entity should be reintroduced.

Chapter 10 also looks at the question of union officials and others engaging in conduct in breach of Court orders. This was an issue considered in some detail in the Interim Report, where it was noted:

The Byzantine complexity of the law of contempt, and its ineffectiveness to deter secondary boycott conduct by a trade union, is amply demonstrated by the contempt proceedings commenced by Grocon and Boral in the Victorian Supreme Court.²

Chapter 10 considers among other things how enforcement of Court orders could be facilitated. In particular it seeks views on whether in order to simplify and speed up enforcement of Court orders it might be appropriate to introduce legislation allowing a police officer to read out a court order prohibiting a picket, boycott or ban of a building site and calling upon the persons to disperse. Any person still present at the site within a specified period after that time (eg 15 minutes) would commit an offence, subject to establishing that he or she had a legitimate and lawful purpose of being at the premises at the time. Conviction for such an offence would among other things be a ground of disqualification from office in a registered organisation.

Of course, such a provision could have no operation in the context of, or so as to impede or prevent, the conduct of a peaceful and lawful industrial dispute. The proposal contemplates such a provision becoming operational only where a Court order has already been made specifically prohibiting the activity and where the Court order is being flouted or ignored.

As noted above, the purpose of this discussion paper is to generate debate concerning the policy issues canvassed in the paper.

Submissions from all and any interested persons are welcome – including members of the public.

¹ See discussion paper at paragraph 332. A penalty unit is currently valued at \$170 (see *Crimes Act 1914* (Cth) s4AA).

² Interim Report, Volume 2, Chapter 8.2, p1107, paragraph 247(d)

Such submissions need to be provided to the Commission in writing by 21 August 2015, so as to ensure that they can be considered and taken into account by the Commissioner prior to the delivery of the final report.

The Discussion Paper is available online at www.tradeunionroyalcommission.gov.au. Submissions can be made, preferably electronically, to submissions@turc.gov.au or, in writing, to GPO Box 2477, Sydney NSW 2001.