Submission to the Royal Commission into Trade Union Governance and Corruption

14 November 2014

Response to Counsel Assisting Submissions






AUSTRALIAN INDUSTRY GROUP

Introduction

The Australian Industry Group (Ai Group) makes this submission in response to Counsel Assisting's submissions (**CA Submissions**) dated 31 October 2014.

Ai Group represents employers in the manufacturing, construction, transport, information technology, telecommunications, food and many other industries.

This submission deals with those aspects of the CA Submissions that relate to matters which have been the focus of recent submissions of Ai Group.

Worker entitlement funds and income protection insurance arrangements

The CA Submissions identify inadequacies in the management and governance of various worker entitlement funds. The submissions reveal that trade unions derive a massive financial benefit from the monies paid into these funds by employers largely without the knowledge of the fund members, i.e. the employees.

On page 502 of the CA Submissions, the Royal Commission is urged to consider making it a condition of pattern bargaining arrangements that there be adequate disclosure of a party's interests in any entity with whom an enterprise agreement requires the employer or employees to deal.

Further on in the Submissions (page 1,295), in the context of enterprise bargaining agreements, Counsel Assisting proposes a related reform:

> "first, an amendment to the *Fair Work Act 2009* to provide that the obligation on parties of 'genuinely trying to reach an agreement' include the requirement that there be full disclosure, in writing, of any direct, or indirect benefit (other than costs savings on the part of an employer) that may be derived by any negotiating party to an enterprise agreement (or any entity in which a negotiating party has an interest) from any term sought in an enterprise agreement (such as the payment and / or receipt of commissions and fees). That disclosure ought also require disclosure of the likely quantum of that benefit and a description of the means by which the benefit will be calculated. Finally, it would be necessary to provide that private obligations of confidentiality do not exempt a person from the requirement of disclosure; …"

These reforms would be worthwhile but we submit that they are inadequate to address the major problems that are occurring with worker entitlement funds and income protection insurance arrangements which need urgent attention. For the reasons set out in our submission of 22 August 2014, we propose that:

1. Significant reforms to governance, reporting and supervision of workers entitlements should be implemented, as detailed on pages 8 and 9 of Ai Group's submission of 22 August 2014.

2. As recommended by the Royal Commission into the Building and Construction Industry (**Cole Royal Commission**), industry-wide pattern agreements should be outlawed through an appropriate amendment to the *Fair Work Act 2009* (**FW Act**). An enterprise agreement which reflects an industry-wide pattern agreement should not be able to be approved by the Fair Work Commission (**FWC**).

3. Industry-wide pattern agreements should also be outlawed through appropriate amendments to the *Competition and Consumer Act 2010* (**CC Act**). These agreements have a major negative effect on competition and commerce and should not be covered by the exemptions in the Act.

4. Protected industrial action in pursuit of bargaining claims for contributions to be made to worker entitlement funds should be outlawed if the relevant funds do not meet stringent governance, reporting and supervision standards. Also, industrial action in pursuit of claims for income protection insurance products should not be permitted if the insurance provider is paying substantial commission or fees to a union or an entity controlled or jointly controlled by a union. This can be achieved through narrowing the definition of a 'permitted matter' in the FW Act to the concept of a matter pertaining to the relationship between an employer and its employees as was the focus of the decision of the High Court of Australia in *Electrolux Home Products Pty Ltd v The Australian Workers Union and Ors* [2004] HCA 40.

5. Enterprise agreement terms requiring payments to worker entitlement funds which do not meet stringent governance, reporting and supervision standards should be 'unlawful terms' under the FW Act, and prohibited from being included in an enterprise agreement. Also, enterprise agreement terms requiring the employer to pay for a particular income protection insurance product should be 'unlawful term' under the FW Act if the insurance provider is paying substantial commission or fees to a union or an entity controlled or jointly controlled by a union.

6. A specific anti-coercion provision should be inserted into the FW Act and the *Building and Construction Industry Improving Productivity Bill 2014* (which is before Parliament) prohibiting coercion of an employer to:

    - contribute to a worker entitlement fund; or

    - purchase insurance products in which a union has a financial interest.

7. The *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* (which the Federal Government recently published in advance form) and State Government Construction Industry Industrial Relations Guidelines should be amended to ensure that the following breach the Code and Guidelines:

- enterprise agreements which reflect an industry-wide pattern agreement;

- enterprise agreement clauses which require payments to worker entitlement funds that do not meet stringent governance, reporting and supervision standards;

- enterprise agreement terms requiring the employer to pay for a particular income protection insurance product breach the Code and Guidelines if the insurance provider is paying substantial commission or fees to a union or an entity controlled or jointly controlled by a union.

8. As recommended by the Cole Royal Commission (Recommendation 171), when bargaining for an enterprise agreement a union should be required to disclose the financial benefits that would be derived by the union from each term of the proposed agreement. A provision along the lines of the following should be included in the FW Act:

> **"Disclosure of interests during bargaining**
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> A bargaining representative for a proposed enterprise agreement, other than an employee or employer covered by the agreement, must disclose in writing to the other bargaining representatives and to the employees covered by the agreement any direct or indirect financial benefit that the bargaining representative would derive from each term of the agreement. Such disclosure must occur as soon as practicable after a relevant term is proposed for the enterprise agreement and before any application is made for a protected action ballot order.
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> > Note: An example is an agreement term which requires that the employer pay for the cost of income protection insurance benefits for employees through a particular insurance provider which provides commission or pays fees to the union. The union would be required to disclose to the other bargaining representatives and to the employees the commission or fees which would be paid to the union"

9. As recommended by the Cole Royal Commission (Recommendation 172), registered organisations that receive income by way of commission, management fees or spotter's fees arising from insurance arrangements established to provide benefits to employees should be required to identify each separate commission or fee in the published accounts for the registered organisation. Similar requirements should apply to all entities controlled or jointly controlled by a registered organisation. The accounts should be published on a publicly accessible website.

Secondary boycotts and related actions

In the CA Submissions, events are detailed whereby trade unions have pressured, and/or attempted to pressure, businesses from acquiring products or services from other businesses with which the trade union has a dispute.

In the context of the 'Boral case', Counsel Assisting has identified deficiencies with the existing legal and regulatory framework in relation to secondary boycotts. Ai Group agrees with this observation.

The CC Act is currently being reviewed by the Competition Policy Review. In its submissions to the Review, Ai Group has recommended that:

- Consistent with a key recommendation of the Cole Royal Commission, the construction industry regulator (FWBC / ABCC) should be given a shared jurisdiction with the ACCC to investigate and prosecute secondary boycotts in the construction industry.

- In addition to the Federal Court, State and Territory Courts should have the jurisdiction to deal with disputes arising under sections 45D, 45DA, 45DB, 45E and 45EA of the CC Act.

- Sections 45E and 45EA of the CC Act should be amended so that these sections expressly include the terms of an enterprise agreement.

- Section 51(2)(a) of the CC Act should be amended to ensure that an enterprise agreement which prevents or hinders a business in acquiring goods or services from, or supplying goods or services to, another business does not fall within the exemption in this section.

- Section 194 of the FW Act should be amended to ensure that clauses in enterprise agreements which prevent or hinder a business in acquiring goods or services from, or supplying goods or services to, another business are "unlawful terms".

- Section 253 of the FW Act should be amended to exclude 'unlawful terms' from the operation of this section and hence prevent courts deciding that they have no jurisdiction to deal with 'unlawful terms' because the Act includes an automatic remedy.[1]

- A procedural right should be given to the ACCC to be notified by the FWC of proceedings for the approval of enterprise agreements which contain restrictions of the kind referred to in sections 45E and 45EA, and that a right be given to the FWBC / ABCC to intervene and make submissions.

[1] See *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108.

Duties of union officers

The CA Submissions proposes further reform to the laws governing trade unions.

On page 1310 of the CA Submissions it is stated that only 6 specified organisations and individuals made submissions on Issues Paper 2. This is not correct. Ai Group filed a detailed submission on 11 July 2014 on this Issues Paper.

In considering reforms to registered organisation laws it is essential to consider that such laws apply to trade unions and to employer associations. Two thirds of the registered organisations in Australia are employer organisations.

Ai Group is a registered organisation which is governed by senior executives and directors of member companies who are elected annually as Councillors by Ai Group's membership. These Councillors serve in a voluntary capacity and are not remunerated for their roles as officers of Ai Group. It is essential that registered organisation laws are fair on officers of registered organisations, like Ai Group's Councillors. It is also essential that registered employer organisations like Ai Group are able to operate efficient businesses and that an unreasonable and unnecessary regulatory burden is not imposed on them. Registered employer organisations operate in very competitive markets for the services which they provide.

Numerous important issues are discussed in our 11 July 2014 submission to the Royal Commission and in our submissions and evidence to three Senate Committee inquiries into registered organisation laws over the past three years.

The *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) was only recently amended to increase the investigation and prosecution powers of the General Manager of the FWC, to tripled the previous maximum penalties for breaches of the Act, and to impose onerous new reporting obligations on registered organisations and their officers. Another Bill is before the Senate to impose further major changes.

We submit that given the recent changes to the RO Act, given the detailed Bill that is before Parliament, and given the three recent Senate Committee inquiries, it is essential that the Royal Commission take the time to fully explore the implications of particular changes to registered organisation laws, before recommending any further changes beyond those that are in the Bill which is before Parliament.