Proper Regulation and Scrutiny of Registered Organisations and Institutions Will Improve Outcomes

Submission to the Royal Commission into Trade Union Governance and Corruption

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Executive Summary

From at least 1825, specific laws have existed to regulate trade unions, and since the passage of the Conciliation and Arbitration Act 1904 (Cth), registered trade unions and employer organisations have enjoyed unique privileges under Australia’s industrial relations system.

However Australia is no longer the same small economy with a wholly regulated labour market protected by a fixed exchange rate and restrictive immigration policy, with a domestic market insulated by tariffs, trading largely with the countries of the British Empire.

Yet registered organisations and their regulatory and judicial bodies remain enclosed in a protected area of the law, subject to different scrutiny and standards.

This separate system has clearly created a climate that has led some individuals and organisations to judge their own actions by a separate set of standards.

While the IPA is a strong supporter of freedom of association and the right of individuals to join or not to join a union, it believes that office-bearers in registered organisations, who broadly have the same powers and responsibilities as company directors, should be subject to the same rules and penalties.

In particular, the obligation in the Fair Work (Registered Organisations) Act 2009 for registered organisation office-bearers to only discharge duties “in good faith in what he or she believes to be the best interests of the organisation and for a proper purpose” as opposed to “good faith in the best interests of the corporation and for a proper purpose” illustrates the double standards that exist in the current law.

Proper scrutiny must also be applied to the tribunal responsible for overseeing the industrial relations system, the Fair Work Commission.

In order to ensure the ongoing integrity of the workplace relations system and its intuitions, this Royal Commission should apply the following principles to its recommendations:

- Duties imposed on unions and employer organisations and penalties for non-compliance should be the same as those that apply to companies under the Corporations Act 2001;
- If there is to be separate registration and regulation of trade unions and employer organisations, then this role should be undertaken by a designated, independent regulatory body, and not by the Fair Work Commission; and
- A new, specialised appeals body, that is separate to and independent of the Fair Work Commission, should be established, to put an end to partisan arguments about ‘employer versus union’ influence on Commission appointments and decisions as well as ensure more consistent decision making.
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1. Scope

This submission is made in response to the Royal Commission into Trade Union Governance and Corruption’s 19 May 2015 Discussion Paper and Call for Submissions ¹ (Discussion Paper) with a deadline of Friday 21 August 2015.

The purpose of this Discussion Paper is to “discuss possible options for law reform in relation to matters arising out of the Commission’s inquiries” and to “elicit informed opinions from interested parties.”

In particular, this submission notes the Royal Commission’s Terms of Reference that relate to “the adequacy and effectiveness of existing systems of regulation and law enforcement” and that the Discussion Paper also asks for “specific proposals for reform” rather than “ranging broadly over a number of issues.”

In the spirit of this request, rather than involve itself in the minutia of particular workplace relation disputes, or arguments about the role of unions versus that of employer organisations, this submission will limit its proposals to the systemic needs of the workplace relations system.

In particular, in order to ensure the ongoing integrity of the workplace relations system and intuitions, that:

- Duties imposed on unions and employer organisations and penalties for non-compliance should be the same as those that apply to companies under the Corporations Act;

- Penalties for union officials and unions that abuse ‘right of entry permits’ should be enhanced;

- If there is to be separate registration and regulation of trade unions and employer organisations, then this role should be undertaken by a designated, independent regulatory body, and not by the Fair Work Commission; and

- A new, specialised appeals body, that is separate to and independent of the Fair Work Commission, should be established, to put an end to partisan arguments about ‘employer versus union’ influence on Commission appointments and decisions as well as ensure more consistent decision making.

2. Context

In its Discussion Paper, the Royal Commission has noted the changing legislative environment for trade unions in the United Kingdom and Australia throughout the 19th, 20th and 21st centuries.

From at least 1825, specific laws have existed to regulate trade unions, and since the passage of the Conciliation and Arbitration Act 1904 (Cth), registered trade unions and employer organisations have enjoyed unique privileges under Australia’s industrial relations system.

However, over the last 111 years the world, and Australia in particular, has changed.

We are no longer the same small economy with a wholly regulated labour market protected by a fixed exchange rate and restrictive immigration policy, with a domestic market insulated by tariffs, trading largely with the countries of the British Empire.

In today’s economic environment there is significant international competition for people, commodities, products and whole businesses.

Notably, the development of national corporations law over the last 25 years has set new benchmarks for the men and women that run entities with significant financial resources, employment responsibilities and market power.

In fact, since the passage of the Howard Government’s Work Choices legislation in 2005, it is now the Australian Constitution’s ‘corporations power’, rather than the ‘conciliation and arbitration power’, that allows Australian government to make workplace relations laws.

While there is now, as a consequence, a very strong argument to plan a wholesale move away from a conciliation and arbitration system-inspired workplace relations system with special registration and regulation of trade unions, employer organisations and labour tribunals, the IPA recognises that this is probably not within the scope of this Royal Commission.

This submission also acknowledges that while there are significant differences between the policies of Australia’s political parties in relation to the scope and form of labour market regulation, for now these parties appear to agree that there remains a need for a separate system of registration and regulation for unions and employer organisations.

However, as long as a separate regulatory system for employer and employee organisations, with its complementary set of workplace relations laws and tribunals, is deemed necessary, organisational office-bearers should be held to the same standards of behaviour expected of company directors.

This principle must also apply to the relevant regulatory organisations, predominantly the Fair Work Commission.
3. Similar Treatment under the Corporations Act

The Discussion Paper notes the significant role of unions in the industrial relations system, and that “the issues with which this Commission has been concerned to date arise from the conduct of certain union officials and leaders who disregard their legal obligations and duties.”

The IPA has previously taken an interest in this issue and in 2012 made a submission to the Senate Inquiry into the Gillard Government’s Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012. ²

The IPA’s contention at the time, that registered organisations should be subject to the same compliance obligations and remedies that apply to corporations, holds true in 2015.

Unions are not small, volunteer associations comprised of people who share a similar hobby or interest who choose to meet together to share their beliefs in their spare time.

Many unions are multi-million-dollar business operations with control of significant assets, a large number of employees and substantial industrial and political influence. They also enjoy significant privileges under the law.

According to the Regulation Impact Statement (RIS) for the Fair Work (Registered Organisations) Amendment Bill 2014, ³ of the 112 registered organisations listed with the Fair Work Commission, at least 60% of employee organisations (and 29% of employer organisations) have assets with a value of over $5 million, with 35% of employee organisations enjoying assets worth over $20 million.

The RIS estimates that 4,700 individuals hold office in registered employee organisations while 1,600 individuals hold office in employer organisations, and that 90% of members across all organisations (employee and employer) are members of ‘large’ unions (i.e. with assets to the value of over $2 million).

The Discussion Paper has set out a number of areas in which registered organisation office-bearers under the existing Registered Organisations Act 2009 (ROA) are not held to the same standards of behaviour as corporations under the Corporations Act (CA).

These examples include (but are not restricted to):

- Approved auditors of financial accounts need not be registered with ASIC (ROA Regulations, Regulation 4), and Corporations Act-equivalent independence and audit rotation requirements (Divisions 3 and 5 of Part 2M.4 of the CA) do not apply;

- The limitation of statutory duties to that of financial management (ROA section 283);


³ http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5289
• An obligation to act in good faith in what he or she believes to be the best interests of the organisation and for a proper purpose (ROA section 286) as opposed to good faith in the best interests of the corporation and for a proper purpose (CA section 181);

• The maximum civil penalty for breaches of duties by officers is equivalent to $10,200 (ROA section 306) whereas under the Corporations Act similar breaches may attract a maximum penalty of $200,000 (CA section 1317G);

• Registered organisation officers that make a reckless or intentionally dishonest breach of their duties have not committed a criminal offence (ROA sections 286, 287 and 288 vs CA section 184);

• Registered organisations are not prohibited from indemnifying their officers against civil penalties for breaching duties (CA section 199);

• Unlike under the Corporations Act, where company directors must disclose material personal interests in the affairs of the company and excuse themselves from meetings that consider these matters with failure to comply considered a criminal offence (CA sections 191 and 195), registered organisation officers are not subject to equivalent rules or penalties; and

• There is nothing equivalent to the Corporations Act provision that allows a member or officer to take the organisation and its office-bearers to court on behalf of that organisation (CA sections 236 and 237).

In December 2014 the IPA published a report into the state of legal rights in Australia 4 which found that of the 262 provisions in federal law that breach legal rights, 43 of these applied to companies, their directors and agents, while just 2 applied directly to union officials, with a further 18 applying to both.

The disregard that some union office-bearers have shown for the law, and for the interest of their members – which has already surfaced at this Royal Commission – suggests a deep-seated belief that there is one set of laws and standards for unions, and another for everybody else.

Any company or group of companies, which displayed the same attitude towards the law, to its employees, or to the interests of its shareholders would be rightly shouted down in the court of public opinion.

It is the existence of a separate system of regulation, with lesser penalties for non-compliance, that reinforces this belief.

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3.1. Transport Workers Union Submission – Should Unions be Regulated At All?

The Discussion Paper also highlighted a Transport Workers’ Union of Australia (TWU) submission which claimed that ‘entirely different regulatory systems need to be established for unions,’ that ‘control and regulation of the union be in the hands of the members’ and that problems should be ‘managed within the movement without the need for the imposition of wholly inappropriate legalisms.’

While the Discussion Paper went on to point out that registered organisations are not unincorporated associations – and even if they were, in some states obligations on unincorporated organisations are similar to those imposed on corporations, and additionally that unions enjoy significant privileges including tax exempt status and right of entry powers – it nonetheless posed the question ‘Should the officers of trade unions be subject to statutory regulation at all?’

This self-centred TWU submission again illustrates how some unions see themselves as above the law with no obligation to comply with the standards that other organisations accept without question.

3.2. Recommendations

a) In response to the Royal Commission’s Questions for Discussion 30-39, duties imposed on registered organisation office-bearers, and penalties for non-compliance, should be equal to those that apply under the Corporations Act.

b) In response to the Royal Commission’s Question for Discussion 33, the maximum penalty for an officer breaching his or her duties should be applied based on the seriousness of a particular breach, rather than the size of an organisation. A serious breach by an officer of a small organisation is still a serious breach.

c) In response to the Royal Commission’s Question for Discussion 29, the officers of trade unions should be subject to statutory regulation – as should the officers of employer organisations – and these regulations should be the same as those that apply to corporations.
4. Misuse of and Entitlement to Hold Right of Entry Permits

The Discussion Paper noted the statutory right that union officials enjoy to enter private workplaces to investigate alleged occupational health and safety breaches and “for the purpose of holding discussions.”

This statutory right represents permission to enter a workplace without a search warrant and is a significant privilege under workplace relations and occupational health and safety law.

For many employers and employees a visit by union officials can be a confronting experience, especially given their power to inspect and copy documents.

It is a matter of the gravest concern that the rules surrounding the administration of the current ‘fit and proper person’ test that applies to people granted these permits, do not prevent people with significant criminal convictions, or people who have previously abused this privilege, from obtaining and holding these permits.

The Discussion Paper also highlighted that at least one union is a repeat offender and that the Federal Court in 2015 had even allowed the Fair Work Commission to issue a permit to union organisers that had failed the current ‘fit and proper person’ test.

In its submission to the Productivity Commission Inquiry into the Workplace Relations Framework earlier this year, the Chamber of Commerce and Industry Western Australia ⁵ noted that there are no formal standards of behaviour expected of unions exercising right of entry powers and suggested that right of entry permit holders should be subject to a Code of Conduct with penalties including permit suspension to apply in the event of a breach.

4.1. Recommendations

In response to the Royal Commission’s Questions for Discussion 46-53:

- Individuals with significant criminal records should neither be granted right of entry permits, nor be entitled to retain them;

- Individuals must agree to a criminal history check when applying for a permit and declare any pending criminal charges;

- Unions with a consistent record of disobeying right of entry rules should be prohibited from being granted right of entry permits for a fixed period; and

- Given that the concept of a ‘conditional’ right of entry permit for someone that has failed the ‘fit and proper person’ test defeats the purpose of applying the test, this practice should be specifically disallowed.

5. Separate the Regulation and Registration of Unions and Employer Organisations from the Judicial Body that Hears Disputes

The Discussion Paper noted that “the regulation of organisations is overseen principally by the General Manager of the Fair Work Commission” who is “appointed by the Governor-General on the nomination of the President of the Fair Work Commission.”

However, while the General Manager is nominally responsible for the regulation and registration of registered organisations (the Fair Work Commission itself also has a designated role in registration and deregistration) he/she is also responsible for Commission administration, conducting research and writing reports.

Unsurprisingly, the lines of authority and accountability are far from clear.

According to the *Fair Work Act 2009* ⁶, the General Manager’s first listed role is to “assist the President in ensuring that the FWC performs its functions and exercises its powers” and “has power to do all things necessary or convenient to be done for the purpose of performing his or her functions” (section 657).

One section of the Act makes it clear that the President may give a direction to the General Manager (section 582) but another specifies areas in which the General Manager is not required to comply (section 658).

The separate, but related, *Fair Work (Registered Organisation) Act 2009* ⁷ goes into some detail about the General Manager’s responsibilities but itself notes in section 5, which covers Parliament’s intentions in enacting the Act, that “decisions made under this Act may be subject to procedures and rules (for example, about appeals) that are set out in the Fair Work Act.”

In other words, there is a designated officer that is held out to be responsible for the regulation of registered organisations, that officer is at the same time separate to, but part of the administration of the judicial tribunal, subject to the directions of the President of this tribunal unless they are not, but dependant on the support of the President to be appointed in the first place.

It is little wonder that the immediate past General Manager didn’t appear to have the time to investigate the serious allegations in the Craig Thomson affair before his own appointment to the Commission the month before being due to testify to a Senate Estimates hearing. ⁸

Clearly this unique set-up with its blurred lines between active participant, regulator, staff member, administrator and Commissioner, is the worst of both worlds.

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While the Abbott Government’s *Fair Work (Registered Organisations) Amendment Bill 2014*, which is currently before the Senate, attempts to create a separate Registered Organisations Commission, it does not go far enough in creating a stand-alone Registered Commission with the sole power to register and deregister organisations.

Even the ACTU in its November 2013 submission to the Senate Inquiry into the 2013 *Registered Organisation Bill* which opposed the passage of this Bill, pointed out that if it were passed, some responsibilities would remain with the Fair Work Commission.

Given the financial resources, industrial and political powers of some registered organisations, the body that is responsible for their registration, administration, adherence to the law and potential deregistration must be given the status and independence to do its job properly.

The lines of authority and accountability between government, unions, employer organisations and the tribunal need to be made clear, and each of these bodies should be wholly separate.

The independence of the judicial tribunal should also be sacrosanct.

### 5.1. Recommendations

a) In response to the Royal Commission’s Questions for Discussion 4-5, in order to ensure that the lines of responsibility and accountability are clear, and to improve standards and behaviour, all functions to do with the registration, administration, compliance and deregistration of registered organisations should be transferred to a single, stand-alone authority, along the lines of the Australian Securities and Investment Commission.

b) In response to the Royal Commission’s Question for Discussion 6, the new regulator should be given information gathering and investigatory powers along the lines of the Australian Securities and Investment Commission, including the power to require answers under oath, seek warrants and seize documents, with penalties for non-compliance similarly structured.

### 5.2. Referral of Retained Registration Powers

The Discussion Paper also discussed the separate federal and state administrative regimes that allow registered organisation branches with similar sounding names to report to different regulatory agencies.

Given some of the testimonies at the Royal Commission about trade union membership and financial practices, this lack of transparency is far from ideal.

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9 http://www.actu.org.au/media/290634/ACTU%20submission%20on%20Fair%20Work%20Registered%20Organisations%20Amendment%20Bill%202013.pdf
The Discussion Paper highlighted that in 2009, the New South Wales, Queensland, South Australian and Tasmanian governments, when referring industrial relations legislative powers to the Commonwealth, specifically excluded regulation of employer and employee organisations from this referral.

5.3. Recommendations

In response to the Royal Commission’s Questions for Discussion 1-3, in order to maximise transparency and noting the new, national workplace relations system, the states should refer any remaining legislative powers in relation to the registration, de-registration and regulation of registered organisations to the Commonwealth.

Paragraph 16 of the Discussion Paper states that the Commission will not “limit itself to considering options for reform canvassed in this Discussion Paper” and also that interested parties should not “feel confined to addressing only those matters raised in the paper.”

To this end, this submission wants to highlight a commitment to give “active consideration to the creation of an independent appeal jurisdiction” in relation to the Fair Work Commission, which was made in the Federal Coalition’s Workplace Relations Policy, 10 that was released in May 2013 and suggest that the Royal Commission consider this matter in its Final Report.

Workplace Relations Minister Senator Eric Abetz wrote to stakeholders in late 2013 asking for feedback on the implementation of this commitment, particularly on the form of alternative appeal processes.

However since then, and despite some newspaper articles to the contrary, this subject appears to have disappeared from mainstream public debate.

As noted earlier, there is clearly a cultural problem inside the Australian workplace relations system borne of a self-contained and insular approach to organisations, personnel and institutions.

Arguments about how many union or employer organisation officials are appointed to the Fair Work Commission, and ongoing assertions of Commissioner bias when making decisions, have no equivalent in other judicial bodies in the country, whether they be the High or Federal Courts, State Supreme Courts or other judicial tribunals.

It is likely that the background of Commission members, the labyrinthine structure of the Commission itself and the insular approach to appeals that contributes to this perception.

In a June 2015 policy paper about the influence of the trade union movement on Australian politics, *Unions in Labor – a Handbrake on Reform*, 11 the IPA found that of the 44 members of the Fair Work Commission, 22 have an employment background in a trade union and at least two others (Vice President Adam Hatcher and Commissioner Leigh Johns) have had direct past involvement with the ALP.

This paper also observed the creation in 2013 by the Gillard Government of two new ‘Vice Presidents’, who appear to have been slotted into the Commission to rank above the two existing Vice Presidents who were regarded as ‘Howard Government appointees’ and a number of reported instances of the sidelining of Commissioners with a non-union background from participating in major decisions.

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According to its own website 12, the Commission has a remarkably top-heavy judicial structure consisting of:

- One President;
- Two Vice Presidents;
- Two Vice Presidents styled as Deputy Presidents;
- Eight Senior Deputy Presidents;
- Eight Deputy Presidents; and
- Twenty two Commissioners.

Not only are there almost more Presidents and Deputies than there are ordinary Commissioners, but there are also, styled as “Additional Members”:

- Four additional Deputy Presidents (the Presidents and Deputy Presidents of the South Australian and Tasmanian Industrial Relations Commission);
- Two additional Commissioners (one a Commissioner of the New South Wales Industrial Relations Commission and the second a Commissioner of the South Australian Industrial Relations Commission); and
- Five “Expert Panel Members.”

The President himself, former ACTU Assistant Secretary Iain Ross, also serves as a Federal Court judge and part-time judge of the ACT Supreme Court.

Some Commission work is also done by specially appointed conciliators, though an exchange in Senate Estimates on 3 June 2013 between the FWC General Manager and then Opposition Senator Eric Abetz revealed that while the Commission had appointed 26 conciliators it refused to say who they were, including in the subsequent answer to the Question on Notice, for the reason that they were employed as public service staff. 13

Workplace relations judicial bodies, their structure and responsibilities matter. They make decisions that have a real and lasting effect on wages and conditions and the ability of businesspeople to earn an income and manage a business.

The claim by the ACTU in its submission to a Senate Committee Inquiry on the Fair Work (Registered Organisations) Amendment Bill 14 that “the federal industrial relations system

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was built on a foundational compact between organised labour and government” is as good a summary as any of the unions’ sense of ownership.

In order to build confidence in an organisation that should always be beyond reproach, a new specialised body needs to be established to hear Fair Work Commission appeals.

The current approach to internal appeals, which is unsurprisingly buried in technicalities, is that decisions of Commission members may be appealed to a Commission Full Bench and that reviews of single member or Full Bench decisions by the Federal Court or the High Court (referred to as judicial review) are limited to matters of jurisdictional error. A recent Federal Court decision 15 illustrates how complex this process can be.

The current President of the Fair Work Commission, Justice Iain Ross, in a submission to the current Productivity Commission Inquiry into the Workplace Relations Framework 16 noted that for certain cases “there is no right to appeal,” that the Commission enjoys “broad discretion” about the right to appeal, that in unfair dismissal cases the Commission “must not” grant permission to appeal “unless it is in the public interest to do so” and that the public interest test is not satisfied “simply by the identification of an error.”

Former Fair Work Commissioner Brendan McCarthy in a submission to the Productivity Commission inquiry 17 asserted that the role of FWC in relation to the setting of minimum workplace standards was more akin to ‘legislating’ rather than ‘regulating’ – a role that Mr McCarthy felt the FWC was ill-suited to perform because it was “not sufficiently accountable” for its decisions.

While Mr McCarthy, who was a Commissioner for thirteen years, listed a number of reasons for the FWC’s lack of accountability he observed that:

- “Full Bench decisions cannot be appealed or in any other way reviewed other than the limited capacity for judicial review of whether the FWC has undertaken the tasks required of it”; and

- “Judicial reviews of FWC Full Bench decisions are very limited. Essentially if the FWC asks the right questions but gets the wrong answers it cannot be overturned.”

It is little wonder that some employer organisations have expressed dissatisfaction with current FWC appeal processes.

The major position against changing these appeal mechanisms was expressed by the Law Council of Australia (LCA) in the Winter 2014 edition of its Chapter III Newsletter 18 when it claimed that:

- “The current appeal mechanisms have existed in essentially the same terms since 1988, during which time the relevant legislation has otherwise been amended and re-enacted. There are no reasons why the appeal mechanisms now need to be changed.”

• The Federal Court “has a supervisory role over the Fair Work Commission” and “does not strictly hear appeals but rather has power to determine whether the FWC has fallen into jurisdictional error.” The LCA believes the current situation “limits the circumstances by which a matter can be further ‘appealed’ giving greater certainty and finality.”

• The LCA opposed the introduction of a NSW-style Court of Appeal because such a new body would “undermine the standing of the FWC” and that it could be “portrayed as being taken to enable Parliament or the Executive to appoint tribunal members that they prefer to favour a particular outcome (or ideological position) or in the expectation that such appointees will override decisions of members appointed by previous Executives.”

• If there were to be a change, the LCA suggested expanding the Federal Court’s jurisdiction to “permit it to correct errors of law.”

The LCA’s position on a new appeals tribunal is consistent with its 2012 advocacy against the creation by the Gillard Government of two new Vice President positions, though it should be noted that this didn’t prevent the LCA President from accepting one of the two new Vice President positions in 2013.

However these concerns were comprehensively addressed in the Australian Mines and Metals Association’s (AMMA) March 2015 submission to the Productivity Commission Inquiry which went into some detail about the approach to appeals taken in the United States with its National Labor Relations Board, the United Kingdom with its Employment Appeals Tribunal and New Zealand with its Employment Court.

These examples suggest that separating an appeals jurisdiction from the Fair Work Commission but keeping a level of employment law expertise would not be impossible for Australia.

Just because a problem wasn’t fixed yesterday doesn’t mean it can’t be fixed today. It is more important to get the system right, and ensure that all stakeholders can have confidence in the judicial body, than it is to maintain existing structures.

6.1. Recommendation

In response to the Royal Commission’s invitation for organisations to address matters outside of the questions posed in the discussion paper, a new appeals body outside of the current Fair Work Commission should be created. This should ideally take the form of a specialist ‘NSW Court of Appeal-style’ or ‘UK Employment Appeals Tribunal equivalent’ appellate tribunal.


7. Other Attitudes to a Revised Appeals Jurisdiction

In the United Kingdom, appeals against Employment Tribunal decisions are heard by a separate Employment Appeal Tribunal \(^{22}\) including if a person believed the tribunal:

- Got the law wrong;
- Didn’t apply the correct law;
- Didn’t follow the correct procedures and this affected the decision;
- Had no evidence to support its decision; and
- Was unfairly biased towards the other party.

These terms are hardly radical.

In an opinion piece in *The Australian* in February 2014, \(^{23}\) AMMA claimed growing industry concerns about “the quality and consistency of commission decisions and failures to properly accept long-standing precedents” before giving recent examples relating to unfair dismissal and mandatory drug testing.

AMMA went on to say in this article that an independent body consisting of “experienced industrial lawyers” to deliver “clearer and more consistent industrial decision making” would be preferred.

It expanded on this argument in its March 2015 Productivity Commission submission.

The Victorian Employers’ Chamber of Commerce and Industry in its submission to the Productivity Commission Inquiry \(^{24}\) said that:

- “[T]he development of case law generated by FWC has become highly subjective, inconsistent and in need of genuine, proper and impartial review” highlighting examples of uncertainties on topics including what can be included in agreements, unfair dismissals, and employee drug testing;
- “The Commission appears unwilling or unable to be able to provide employers with necessary consistency and uniform application of precedent regarding particular issues, particularly around whether an employer can proceed with confidence to dismiss an employee who has deliberately accessed pornography in the workplace or ignored safety directions.”
- It supports “an external appeals jurisdiction capable of reviewing and overturning (or approving) first instance decisions” and “We further note such a system has worked successfully in the courts at State level (for example the Supreme Court

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\(^{22}\) [https://www.gov.uk/courts-tribunals/employment-appeal-tribunal](https://www.gov.uk/courts-tribunals/employment-appeal-tribunal)


appeal jurisdictions across the country) and would lend itself easily to the industrial tribunal framework."

Other retail associations have also previously expressed support for a separate appellate jurisdiction.²⁵

8. Reduced Union Membership But Not Influence

Unions have significant powers to directly influence workplace relations proceedings in the Fair Work Commission, bargain with employers about workplace agreements, enter private workplaces for industrial relations or occupational health and safety purposes, and select candidates for the Australian Parliament.

However, while union powers and influence are as strong as they ever have been, and while their influence on the Australian Labor Party is as strong as ever, their level of representation in the community is significantly lower today than it was in decades past.

The Discussion Paper noted that trade union membership had fallen from 46% of the workforce in 1986 to only 17% of the workforce in 2013, with the percentage of private sector employees who are a member of a union now only 12%.

In fact there are now more Australians that are a member of a football club (804,480 as of July 2014) than there are private sector full-time employees that are members of a trade union (759,000 as of June 2013).

In a June 2015 policy paper, Unions in Labor – a Handbrake on Reform, the IPA observed that:

- Only 7% of the Australian population is a member of a trade union;
- Of the 26 members of the ALP National Executive, 19 are current or former trade union officials;
- Half of all Federal ALP MPs and Senators have previously held a paid position in a trade union and more than half of the ALP’s frontbench are former union officials;
- Of the 44 members of the Fair Work Commission, 22 have an employment background in a trade union and at least two others (Vice President Adam Hatcher and Commissioner Leigh Johns) have had direct involvement with the ALP; and
- Trade unions have had significant influence over ALP policy decisions, especially in relation to boosting union powers, the building and construction industry, privatisation, and manufacturing assistance.

A September 2014 internal memorandum of the Australian Mines and Metals Association set out in detail some of the concerns held by some employers about the Fair Work Commission including:

- The behind the scenes role played by Commission President Iain Ross in the creation of the new Vice President posts;

• The appointment to the Commission between 2009 and 2013 of former ALP parliamentary candidate and Transport Workers Union Legal Officer Adam Hatcher as one of the new Vice Presidents, former ACTU National Secretary Jeff Lawrence as a Deputy President, former ACTU Senior Industrial Officer Michelle Bissett and Shop Distributive and Allied Employees Association National Industrial Officer John Ryan and former NSW ALP President / Electrical Trades Union Secretary Bernie Riordan as Commissioners;

• The appointment to the Commission in 2011 of former Australian Services Union official and serving Fair Work General Manager Tim Lee notwithstanding the slow rate of progress under his tenure of the investigation into the Health Services Union; and

• The appointment to the Commission in 2013 of former ALP parliamentary candidate and head of the abolished Australian Building and Construction Commission (ABCC) Leigh Johns, who admitted retaining his ALP membership for five months after his ABCC appointment.

Former Commissioner Brendan McCarthy in his March 2015 Productivity Commission submission also alluded to concerns he had expressed to President Iain Ross about the “narrow base” of Commission members selected to oversee significant cases.

Through political association with one of Australia’s two major parties (the Australian Labor Party) and applying political pressure to the other one (the Liberal Party of Australia) the trade union movement has successfully defended its privileged position in spite of its rapidly declining membership.

Judicial appointments, whether state or federal, are not judged on the basis of previous occupations or who they are likely to favour in a given dispute. The fact that these lists abound when stakeholders discuss the Fair Work Commission suggests that there is a significant problem with its structure and the way it goes about its business.
Conclusion

The structure of Australia’s workplace relations system, its institutions, and their ongoing accountability, are important components of the nation’s prosperity.

It is a significant flaw in the system, that office-bearers of registered organisations are not held to the same standards of behaviour as directors of corporations, along with knowledge that you are likely to be judged on potential transgressions by former colleagues.

There is no doubt that a lack of proper scrutiny is a breeding ground for arrogance.

The attitude of major system participants also seeps into the processes of the major judicial body, the Fair Work Commission, which is largely comprised of former registered organisation office-bearers.

In order to improve the culture, we need to take partisan politics out of the system. In order to take partisan politics out of the system, we need to ensure that participants are properly scrutinised.

In a significant feature article in the *Australian Financial Review* on 2 April 2013 which detailed some of the comings and goings of recent years, 30 journalist Aaron Patrick noted that “unlike regular judges who are paid to interpret the law, members of the commission are often required to decide on questions which come down to personal judgement. The commission is regularly asked to assess the value of an individual or a group’s work, and balance the opposing interests of employers and employees.”

The Productivity Commission’s *Workplace Relations Framework Inquiry Issues Paper* 31 noted that “Australia appears to give more weight than other Anglo Saxon countries to elaborate rules about WR processes and, most particularly, to the centralised determination of wages and conditions for many employees. This then requires a complex legal and institutional structure that is distinctive to Australia.”

If the Royal Commission recommends, and the Australian Parliament implements, the changes suggested in this submission, there is a good chance that the behaviour of registered organisations and their office-bearers will improve considerably.

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