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speech

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CRIPPLING UNIONS: Abbott's anti-worker agenda
Address by ACTU Assistant Secretary Tim Lyons to Chifley Research Centre
Wednesday, 29 October 2014, Melbourne

HOLD THE FRONT PAGE. LIBERAL GOVERNMENT ESTABLISHES ROYAL COMMISSION INTO TRADE UNIONS.

The Heydon Royal Commission into Trade Unions, like its predecessors, is a deeply, irrevocably political exercise.

Every Liberal PM since Billy McMahon has had at least one Royal Commission into trade unions[1] and I suspect all that stopped McMahon was that he just wasn't PM long enough to get around to it.

Malcolm Fraser on the other hand had two for good measure. Having a Royal Commission into unions is now apparently just something Coalition Governments do.

WHY WOULD THEY DO THAT?

It's no secret that the Liberal Party does not like unions. We are both a class and a political enemy.

Strong unions increase the share of national prosperity flowing to labour, and organised workers are a powerful social force in support of polices like progressive taxation and the provision of public services from that tax revenue including public healthcare and education.

That significant numbers of important unions are ALP affiliates completes the picture.

Trade Unionists formed the ALP on the understanding that political activity is necessary to achieve those aspirations of working people which could not be achieved industrially.

In contrast the Liberal Party formed to present a unified front for the interests of capital; and they have been in opposition to us since they formed.

BUT AREN'T THEY DOING IT FOR THE WORKERS?

Nobody believes that the government has established the Royal Commission into Trade Union Governance and Corruption in the interests of union members.

Nobody believes that the Prime Minister, the Attorney-General, or the Employment Minister wish to see stronger, more effective unions.

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[1] Royal Commission on the activities of the Federated Ship Painters and Dockers Union (1980-1984); Royal Commission into the activities of the Australian Building Construction Employees' and Builders Labourers' Federation (1981-1982); Royal Commission into the Building and Construction Industry (2001-2003); Royal Commission into Trade Union Governance and Corruption (2014-)

Our movement's old friend Peter Reith illustrates the point. "There was a time when..... the union movement really did provide services to the benefit of members" he wrote earlier this year, "but those days are largely gone".[2]

And when were these days? Well, never it turns out. Way back in 1985, in his first year in Federal politics, Hansard records Reith attacking the ACTU, complaining about high wages, and, yes, decrying the particular perfidy of the building unions.

Reith's line is nothing more than rhetorical bait and switch. There has never been a time where Reith – or his counterparts in the Liberal Party – were willing to make their peace with unions.

THEY'RE REFINING THEIR STRATEGY AND BROADENING THEIR ATTACK

Their rhetoric may have stayed the same[3], but Liberal Governments do seem to have learned from their experience of previous Royal Commissions.

Enough of the relatively innocuous titles – Commissions into the activities of a particular union or industry.[4] Why miss the opportunity to associate trade unions with corruption every time the Royal Commission is talked about, written about or googled?

Worried you might inadvertently catch the "wrong" people (sort of like ICAC in NSW, or the Costigan Royal Commission)? Draft your terms of reference accordingly.

Determined to go bigger than just one industry at a time? This time name every union that's been reported in the media in the last 12 months.

Not getting the impact you were hoping for? Extend the Royal Commission and its terms of reference for another twelve months, whether or not the Commissioner asks for more time.

BUT WHY DOES THIS MATTER?

Surely if the union movement were "clean" we would have nothing to fear from this Royal Commission? Surely the conduct examined by the Commission so far justifies the Royal Commission?

No. The reality is that the terms of reference for the Royal Commission and the resources deployed in furtherance of its aims predetermine the inevitable response of Government.

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[2] Peter Reith, 'Inquiry shows Labor must clean up union links', *Sydney Morning Herald,* 23 June 2014. Available at: http://www.smh.com.au/comment/inquiry-shows-labor-must-clean-up-union-links-20140623-zsirc.html#ixzz3HJRNpVLZ

[3] Announcing the Cole Royal Commission in 2001, Howard said that "honest workers and decent unions deserve a clean industry". Announcing the Heydon Royal Commission in 2014, Abbott said, "I think we owe it to honest workers and honest unionists to ensure that these organisations are as clean as they can be".

[4] C.f. the inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme.

WHAT ON EARTH DO YOU MEAN?

The terms of reference provide the focus of the inquiry.

The focus of the Royal Commission operates to exclude; and it operates to magnify.

What are we to make of what hasn't been pursued? Where is the "sword that will cut both ways" of which the Government spoke?[5] There has been evidence concerning the involvement of firms run by persons with very serious criminal records in the construction industry. Some of these firms appear to "phoenix" as a standard mode of operation. These firms are sub-contractors on projects run by much larger firms, and in some cases major publicly-listed firms. And yet no investigation appears to have been mounted as to why and how the head contractors allow such subbies to gain and maintain work on their jobs.

Employers have been summonsed by the Commission to provide evidence about unions and unionists. About having to do things they didn't want to do. I cannot recall an example where counsel assisting has questioned their veracity or their motives. Suggestions of corporate misbehaviour have been treated with incredulity or as irrelevant to the terms of reference, and the evidence not received.[6]

The magnifying effects of focus affect the perception of prevalence. Or what has been referred to by the Liberals as "widespread" allegations. It is oft-repeated. And as such, in some quarters it has become accepted shorthand for describing matters raised in the Commission. But let's think about what widespread really means.

More than half of women experience discrimination during pregnancy, parental leave or when returning to work[7].

Forty percent of the Australian workforce is employed in insecure work.[8]

One in four Australian employees – over 2 million workers – are casual employees, with no job security and no right to paid leave, even when they get sick.[9]

A worker is seriously injured or killed every 6 minutes in the industries the CFMEU covers.[10]

I would say that all of these things are widespread.

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[5] Abbott, T. et al, 'Joint Press Conference with the Attorney-General and Minister for Employment, Parliament House, Canberra', Transcript, 10 February 2014, available: https://www.pm.gov.au/media/2014-02-10/joint-press-conference-attorney-general-and-minister-employment-parliament-house

[6] See for example most recently, Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Transcript of Proceedings,* 28 October 2014, p.1109-1114, available: http://www.tradeunionroyalcommission.gov.au/Transcripts/Documents/Evidence28October2014/Transcript28OctoberCFMEU.PDF

[7] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report* (2014) 27.

[8] Independent Inquiry Into Insecure Work, *Lives on Hold: Unlocking the Potential of Australia's Workforce* (2012) 14.

[9] *Ibid.*

[10] CFMEU, *Comcare: Cheaper For Employers, More Dangerous For Workers* (2014). Available at: http://www.standupspeakoutcomehome.org.au/news/comcare-cheaper-employers-more-dangerous-workers#sthash.SEyH06Ky.dpuf)

Most unions have had no contact with the Royal Commission whatever. Even in unions directly targeted, a minority of Branches have been involved.

Unions, like the rest of society, are not immune from people doing the wrong thing.

I suspect that if you threw $50 million and coercive powers at eight corporations in Australia that had recently been reported negatively in the media, you would find wrongdoing; but probably not the same breathless conclusion that it was widespread.

BUT SURELY WE CAN ALL AGREE WHAT IS AND ISN'T LAWFUL AKA YOU HAVE NOTHING TO FEAR

In his opening remarks, the Commissioner assured us that the "terms of reference do not assume that it is desirable to abolish trade unions."[11] I found it as about as reassuring as the Prime Minister's comments that "good unions have nothing to fear".[12]

Subsequently, the proceedings have unfolded in a manner that reveals little or no sympathy for the purpose of trade unionism. The overall tenor of the evidence adduced to date does not fill me with confidence that Counsel Assisting's Submissions will fairly reflect the valuable role unions have and continue to play in our community, let alone in our economy. I smell a fundamental clash of world-view.

DO YOU HAVE ANYTHING SPECIFIC TO BACK UP THAT RHETORIC?

What are we to make of it, for example, when Counsel Assisting is openly contemptuous of the idea that people might do something out of solidarity as he was when cross-examining a former official?[13] Solidarity makes perfect, intuitive sense to me. In the absence of understanding solidarity, the Commission views conduct through the prism of competition law; cartels and collusion.

In fact, one thing that unions have always tried to do, and still try and do everywhere, is to take wages and conditions out of competition. Ideally, this means firms compete on the basis of service, innovation and productivity and not on the basis of labour costs. Unions must attempt to organise across industries and sectors, otherwise the wages and other standards will inevitably be undermined by firms paying less. And it is not just the labour economics text books that set this out. In the *Metal Trades Case* of 1935[14] the High Court firmly stablished a principle in

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[11] Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Opening Remarks,* 9 April 2014. Available at: http://www.tradeunionroyalcommission.gov.au/Hearings/Pages/OpeningRemarks.aspx

[12] Latika Bourke, 'Royal commission into union corruption: Abbott says 'good' unions have nothing to fear', *ABC News,* 14 March 2014. Available at: http://www.abc.net.au/news/2014-03-14/abbott-denies-war-against-unions-in-royal-commission/5320414

[13] Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Transcript of Proceedings,* 18 April 2014, 105. http://www.tradeunionroyalcommission.gov.au/Transcripts/Documents/TURC-Hearing-18August2014.PDF

[14] Metal Trades Employers Association and Ors v Amalgamated Engineering Union and Ors (1935-36) 54 CLR 387

relation to Awards that a union has a direct and legitimate concern in maintaining and protecting standards of wages and conditions generally.

I fear that much of the underlying approach of the Commission is informed by an assumption that collective power, union power, is de-facto illegitimate, to be tolerated at the margins, if at all.

But, unionism is inherently about power. Weber's definition of power is as good as any: "power is the ability to get your way even in the face of opposition."[15]

The essential message of trade unionism is that workers are entitled to a measure of power of their work and therefore over their lives. That informs nearly everything we do.

A union with no power is of not much use to anybody. When people decry union power, what they actually mean is that workers should never have their view prevail over their employer's, and have no real voice against capital in politics.

An employer who has agreed to something they would rather not have (for example to contribute to an industry entitlements or insurance fund) may complain. As some have under oath in this Royal Commission.

But in itself, this is evidence of nothing more than organised workers having some power to get their way. We could produce any number of groups of members who would, if they had their way, have better wages and more secure jobs. The fact they agreed to something different doesn't make the actual agreement illegitimate, it's just a reflection of power and circumstance.

The achievement of collective goals does, not unusually, regularly involve employers agreeing to things that they would rather not. And so what? As Eugene Debs put it, the question raised by unionism is not what a paternalist employer may decide to do, but rather "what can we do for ourselves?"[16]

The Commission's questioning of employers – why they would contribute to a training fund, why they would sign up to industry superannuation funds, why they would buy insurance products other than in the commercial market – implicitly assumes that they are rolling over in the face of an illegitimate exercise of power.

But it is not wrongdoing. It is not corruption. It is bargaining.

Matters also appear to be proceeding on the basis that unions looking to build institutions to support members or bargaining about anything more than wages and hours, is de-facto problematic. Again, this ignores the international experience: globally, unions are involved in bargaining for and delivering, a huge range of collective services or social insurances in pensions, healthcare, unemployment insurance, training, and financial services.[17]

The Royal Commission's focus on superannuation is a good example. Questions asked in the Commission seem to reflect an assumption that there is an inherent conflict in union involvement in superannuation funds, and that this conflict means bargaining should be restricted in some way.

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[15] Max Weber, *The Theory of Social and Economic Organization, 1964.* New York, NY: Free Press.
[16] Eugene Debs, 'What Can We Do For Working People?', *Locomotive Firemen's Magazine,* April 1890, 14.4.
[17] OECD, OECD GUIDELINES FOR PENSION FUND GOVERNANCE, 5 June 2009, available: http://www.oecd.org/pensions/private-pensions/34799965.pdf

In doing so, the Royal Commission "forgets" the history of superannuation in Australia.

From the late 1970's Unions, led by the ACTU pushed for a universal, fully vested and portable superannuation as an economic right, and as deferred wages – that is, workers' money. This saw the creation of a third pillar of national retirement incomes policy (along with private savings and the pension).

Until then, superannuation in the private sector was the preserve of elites – coverage was less than 40% of workers and largely limited to higher paid, white collar managerial staff. Even the schemes that did exist generally lacked accountability transparency, portability and full vesting. Those schemes that did exist were defined benefit schemes that served only those lucky enough to work a long career at an individual company.

Superannuation was not given, it was won. Won on the job, often by bitter disputation and spread through the Award system in often hotly contested arbitrations (and completed more than a decade later via legislation). And it took power to win it. Union members had to be able to get their way even in the face of bitter opposition. In short there was an industrial contest.

To give one example, a large retail employer, during a dispute over contributions to a new industry superannuation fund that involved strikes and lockouts of thousands claimed that it was nothing less than an attempt by unions to control investment markets. They also noted that they couldn't give superannuation to the storemen, as if they did, next thing the clerks and shop-assistants would want it too. [18]

The focus on industry superannuation – and the bargaining that delivers superannuation outcomes for workers – is consistent with the longstanding antipathy of the Liberal side of politics. It reminds me of the views expressed by then Opposition Leader John Howard, who, in a parliamentary debate around superannuation payable under the Accord, called industry superannuation a "Chicago-style protection racket"[19].

Super has given security in retirement to millions of Australians they would otherwise not have.

Given this history of consistent opposition to superannuation in general and industry superannuation in particular, you will forgive my scepticism that agitation around super in the context of the Royal Commission is nothing more than an old fight in a new ring.

Unions are collective, industrial, campaigning, political organisations of workers. Fierce debates exist within the union movement about how best to organise, and how best to bargain. The debates are fought out in political contests of ideas, including through contested elections.[20]

A failure to appreciate the nature of contests – as the Commission may have in relation to a number of elections it has interrogated – will inevitably mean that the Commission draws the wrong conclusions. It means they will not question the credibility or motivations of complainants who have lost out in those political contests.

If the commission sees the role of elected union officials and elected committees of management, mostly volunteers, as akin to the shallow gene pool appointments to corporate

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[18] Position Statement by Woolworths (Victoria) Limited, Asia Pacific Journal of Human Resources, 17/2:30-31 1979

[19] Hansard, *Transcript of Proceedings,* 25 November 1985, 3566.

[20] It is a requirement of the *Fair Work (Registered Organisation) Act 2009* that the Australian Electoral Commission conduct all elections for office in registered organisations, unless granted an exemption.

boards, they will misunderstand the challenges of union governance. The challenges the movement has been working to address since it convened the Independent Panel on Best Practice for Union Governance, and since it supported the previous government's changes to the Registered Organisations Act, and since it rolled out training to nearly 4,000 people in 18 months.

There is a clear prohibition against using union members money to benefit one candidate over another in a union election – and it should be enforced vigorously. But fundraising to participate in the political process is not unlawful, nor should it be.

WE KNOW WHERE THIS WILL END

This week Counsel Assisting the Royal Commission, Jeremy Stoljar SC, will make closing submissions – his take on the evidence presented so far. The findings of fact he thinks the Commissioner should make; findings limited by the focus of the terms of reference.

And he will make closing submissions on the policy recommendations he believes will address the problems he has defined. Recommendations and problems shaped by the world view that underpins the project.[21]

I think it is safe to assume that when these submissions morph into an interim report, and then a final report, a Bill or Bills to enact 100% of the Commissioners recommendations will be presented to the Parliament.

I also have little doubt that most of these recommendations will be inconsistent with the concept of free, independent, member-controlled trade unions with the ability to win for workers.

CONCLUSION

This Royal Commission into Trade Unions, like those that preceded it, is about getting new ammunition to fight old battles. What is really being fought about, or more correctly fought about again via proxy, are age old political economy questions about the legitimacy of unions and collective action.

It is sometimes difficult to remember in Australia, but in most of the developed world (ex the US whose virus we seem to have caught) unions are accepted as a "basic ingredient of liberal-capitalism"[22].

Unions may be complained about, but they are accepted even by conservatives and business. No less a figure than JS Mill opposed "laws against combinations of workmen" and held that "trade

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[21] Australian Law Reform Commission (ALRC) (2009) *Royal Commissions and Official Inquiries: Discussion Paper*, Canberra, ALRC, p. 45. Available: http://www.alrc.gov.au/sites/default/files/pdfs/publications/DP75.pdf

[22] Cohen, J. "Happy Labor Day. Are Unions Dead? An interview with Rich Yeselson, labour strategist and expert, 31 August 2014, available: http://www.newrepublic.com/article/119272/labor-day-are-unions-dead-interview-rich-yeselson

unions, far from being a hindrance to a free market for labour, are the necessary instrumentality of that free market".[23]

Indeed, in his seminal work *The Great Transformation*, economic historian Karl Polanyi demonstrated that the emergence of unions (and working-class political parties) where an organic and near universal response to laissez-faire and industrialisation.[24]

Unions are part of the natural order of things.

But in Australia, our political debate is dominated by more doctrinaire form of liberalism – at least as far as the labour market goes.[25]

In this view collective action is collusion, it's coercion, it's unfair and an illegitimate exception to what is otherwise the operation of the law. We hear more echoes of Hayek and his language of "prejudice or at least bias"[26] against unions than we do of Mill.

Here, we have no such real acceptance of unionism, however grudging. In in important ways the Royal Commission risks being of a piece with that zeitgeist.

As well as having some of the most invasive laws around the operation of unions in the developed world, we have amongst the most restrictive regime around bargaining and industrial action.

In *The Wealth of Nations*, Adam Smith said that "we have no Acts of Parliament against combining to lower the price of work; but many against combining to raise it".[27]

Today, we have minimum wages at least, but laws against combining effectively to raise wages remain all too common.

In almost all circumstances we restrict bargaining to the level of the individual enterprise, where most of the world, consistent with international conventions, allows bargaining at industry, sector or national level as well.

Our law "is not designed to recognise or respect the right to strike..... [its] premise..... is that industrial action is illegitimate for all intents and purposes, except for bargaining impasses."[28] On the right to strike, perhaps it is enough to refer to a current UK Conservatives plan to 'toughen up' strike laws.

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[23] King and Yanochik, "John Stuart Mill and the economic rationale for organized labor", *American Economist*, (2011), available: http://www.freepatentsonline.com/article/American-Economist/270809862.html

[24] Karl Polyani, *The Great Transformation: The Political and Economic Origins of Our Time* (1944).

[25] *Gittins, R. "Abbott's choice: competition v cronies", 20 October 2014, available: http://www.rossgittins.com/2014/10/abbotts-choice-competition-v-cronies.html*

[26] Richardson, "Hayek on Trade Unions", *CEP Discussion Paper*, London School of Economics (1993), available: http://eprints.lse.ac.uk/20935/1/Hayek_on_Trade_Unions_Social_Philosopher_or_Propagandist.pdf?origin=publication_detail

[27] Adam Smith, *The Wealth of Nations,* 1776, 1(8)[12].

[28] Shae Mc Crystal, The Right to Strike in Australia, Federation Press (2010) page195

If enacted, UK law on quorum and other matters in relation to strike ballots would closely reflect the Fair Work Act written by the ALP.[29]

Establishing this Royal Commission was part of a State and Federal conservative agenda which includes legislation restricting or removing rights in relation to organising, industrial action, right of entry, public campaigning, political action and expenditure, litigation, access to arbitration and the right to be self-governing[30].

An agenda that would undermine collective bargaining, further restrict the right to strike, and functionally remove organising rights in workplaces.[31]

The agenda is aimed at making unions weaker, poorer, and slower; and ultimately, making us less effective and less appealing to members.

A union is not a law firm, an advisory service, a help-desk or a labour inspectorate like the Fair Work Ombudsman (although we regularly perform some of those roles along the way). It is not about "insurance"[32] or "services"[33].

We are about building permanent institutions that are capable of changing workers lives, and our country for the better.

And we will not be distracted by this Royal Commission.

*** ENDS ***

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[29] See, for example, http://www.theguardian.com/politics/2014/jul/09/nut-strike-ballots-time-limited-says-cameron

[30] See, for example: *Election Funding, Expenditure and Disclosures Amendment (Restrictions on Political Donations) Bill 2014 (NSW); Industrial Relations Amendment (Dispute Orders) Bill 2012 (NSW); Industrial Relations (Public Sector Conditions of Employment) Act 2011 (NSW); Industrial Relations Amendment (Industrial Organisations) Act 2012 (NSW); Public Service and Other Legislation Amendment Bill 2012 (QLD), Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Bill 2012 (QLD); Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill 2013 (QLD); Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013 (QLD); Workplaces (Protection from Protestors) Bill (2014) (TAS); Summary Offences and Sentencing Amendment Act 2014 (VIC)*

[31] These are some of the proposals put forward in the *Fair Work Amendment Bill 2014,* which is currently before the Senate, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5174

[32] Senator Abetz, Hansard, *Transcript of Proceedings,* 14 May 2014, 2549, available: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=insurance%20AuthorSpeakerReporter%3Aabetz%20Dataset%3Ahansards,hansards80%20Decade%3A%222010s%22%20Year%3A%222014%22;rec=0;resCount=Default

[33] Peter Reith, 'Inquiry shows Labor must clean up union links', *Sydney Morning Herald,* 23 June 2014. Available at: http://www.smh.com.au/comment/inquiry-shows-labor-must-clean-up-union-links-20140623-zsirc.html#ixzz3HJRNpVLZ