ANNUAL RON McCALLUM DEBATE

FREE TO ASSOCIATE?

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It is a pleasure to be part of a debate named in honour of Professor Ron McCallum, who has made such a huge contribution to workplace relations and the law in Australia. I look forward to hearing Ron's insights a little later.

The broad topic of the debate today is whether employees and employers are free to associate in Australia?

My broad view on this is generally "Yes". Under the *Fair Work Act* and the *Fair Work (Registered Organisations) Act*, unions, employer associations and their members have very comprehensive rights and protections. For example, unions have strong bargaining rights and wide rights to enter workplaces. Despite the ongoing push by unions for more rights, the existing rights are generous compared to those in place in most other countries, including comparable countries like the UK and the USA.

Also, the former Labor Federal Government submitted a number of comprehensive reports to the ILO setting out why the *Fair Work Act* complies with relevant ILO conventions, including Convention 87 and 98 which deal with freedom of association, the right to organise and collective bargaining. No doubt this remains the view of the current Government.

Even though my broad view is that employees and employers are free to associate in Australia, this does not mean that there are not threats to freedom of association which need to be addressed.

Tonight I would like to address three threats to freedom of association which are particularly topical given the Heydon Royal Commission and the Productivity Commission Inquiry into the Workplace Relations Framework.

However, before talking about these, it is important to reinforce the point that freedom of association in the Australian context means freedom to belong to a union or employer association, and freedom not to belong.

Some people conveniently forget about the second limb, which is equally as important as the first.

Employees and employers need to be free to join unions and employer associations if they wish, but it is up to unions and employer associations to convince them to join and remain members through providing high quality services at reasonable prices. The propping up of organisations through inappropriate clauses in enterprise agreements and inappropriate revenue sources are a threat to freedom of association.

The three threats to freedom of association that I want to address tonight are:

1. The very substantial and inappropriate revenue flows to unions from insurance companies which offer substandard and grossly overpriced income protection insurance products;

2. The distribution of surpluses in industry redundancy funds; and

3. Union encouragement clauses in enterprise agreements.

1. Income protection insurance

Several unions, including the CFMEU and CEPU, have negotiated very lucrative commission arrangements with insurance companies that offer income protection insurance products.

Few people would argue that unions should be prohibited from developing commercial products and offering these products in a free market, but this is not what is occurring with income protection insurance:

1. The insurance products are grossly overpriced – up to 5 times the cost of what companies could purchase equivalent insurance for.

2. The insurance products offer less generous benefits to employees than insurance products that employers could purchase at a fraction of the cost.

3. A large percentage of the premium paid by employers (up to 1/3 of the premium) goes straight back to the relevant union as a commission, resulting in millions of dollars of revenue to unions each year from money contributed by employers. Some union branches now receive up to a third of their total funding from income protection insurance arrangements. In effect, this funding is coming from employers.

4. Unions misuse the enterprise bargaining laws to coerce employers to purchase this overpriced and substandard insurance by insisting that enterprise agreements contain clauses requiring that income protection insurance be purchased from the particular insurance providers they have relationships with.

These arrangements represent a threat to freedom of association because the arrangements are not in the interests of union members. The insurance is not as beneficial to employees as other products on the market. Also, if employers were not forced to pay inflated prices for income protection insurance, many would use these funds to provide other benefits to their employees such as higher wage increases.

Over the long run, it is also likely that the arrangements will also prove to not be in the interests of unions.

2. Redundancy fund surpluses

A second threat to freedom of association is the distribution of construction industry redundancy fund surpluses to unions and some State-based employer associations.

A large proportion of enterprise agreements in the construction industry require that employers contribute about $80 a week to specified redundancy funds. This amount has nothing to do with any calculation of reasonable redundancy benefits for employees. It is simply an amount that has been arrived at through unions claiming higher and higher redundancy contributions with each bargaining round.

At the end of each year, each redundancy fund determines what surplus revenue it has. With the exception of the Australian Construction Industry Redundancy Trust which distributes excess funds exclusively to the employee fund members, the other redundancy funds in the construction industry distribute surpluses back to the sponsoring unions and employer associations which are represented on their Boards.

Again the amounts are very significant; millions of dollars a year which has been contributed by employers to provide benefits to their employees is being transferred to unions.

As Commissioner Cole said in the final report of the Royal Commission into the Building and Construction Industry:

> *"Those administering the funds appear to have lost sight of the fundamental premise that employer contributions are to fund redundancy entitlements. It follows that contributions, and returns on investments of the fund, should be held by the fund and distributed only for the purpose of paying redundancy entitlements.*
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> *If funds were used only for the purposes for which they were established, contributions could be reduced – thus reducing building costs – or benefits to employees could be increased."*

Since Commissioner Cole made these findings in 2003, the situation has not been addressed and the problems have worsened.

Once again, these arrangements represent a threat to freedom of association because the arrangements are not in the interests of union members as highlighted by Commissioner Cole.

Once again, in the long run, it is also likely that the arrangements will prove to not be in the interests of unions. Any union that thinks its survival is best ensured through securing a large proportion of its revenue from inappropriate sources, including employers, is kidding itself.

Sooner or later these issues will be addressed through legislative changes and the financial challenges that will face organisations which have gone down this path, rather than focussing on providing the best services to their members, will be of their own making.

The Heydon Royal Commission is shining a very bright and very important light on these inappropriate revenue flows and there is no doubt that some strong recommendations will be made to address these problems in the final report at the end of this year. Surely this time no Government will be able to ignore the need for change

3. Union encouragement clauses

The third threat to freedom of association that I want to mention is union encouragement clauses in enterprise agreements. An example of this is the clause in a CEPU / NECA Victorian pattern agreement which states:

> *'Union membership shall be promoted by the Employer to all prospective and current Employees'.*

Prior to the *Fair Work Act*, these clauses had been held to be "objectionable provisions" on the basis that they were inconsistent with the freedom of association provisions of the *Workplace Relations Act*. There were very good reasons for this.

These clauses require the employer to encourage its employees to join and remain a union member. If the employer fails to do so, it faces penalties of up to $51,000 for breaching the enterprise agreement.

Encouragement by an employer cannot be seen in the same light as encouragement by any other party. If an employer encourages an employee to do something, an employee is far more likely to respond given the employment relationship which exists.

Ai Group challenged the legality of these clauses in the Full Federal Court case of *Australian Industry Group v Fair Work Australia* ("the ADJ Contracting Case") in 2012. Unfortunately, the Court held that the clauses are not unlawful under the *Fair Work Act*.

Just because they are not currently unlawful, does not mean that they are appropriate. Just because they have been held to not meet the definition of an "objectionable provision" under the Act, does not mean that they are not highly objectionable. The reasons why the clauses are inconsistent with an employee's right not to join a union are obvious. These clauses are a threat to freedom of association and need to be outlawed.

As I said earlier, it is up to unions and employer associations to convince employees and employers to join and remain members of their organisations through providing high quality services at reasonable prices. The propping up of organisations through inappropriate clauses in enterprise agreements and inappropriate revenue sources are a threat to freedom of association.

Conclusion

In Ai Group's submissions to the Heydon Royal Commission and to the Productivity Commission Inquiry into the Workplace Relations Framework, Ai Group has proposed a detailed plan of legislative amendments and other reforms to address these threats to freedom of association.

We intend to keep working hard until these problems are comprehensively addressed.