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Governance and Corruption

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Final Report

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REPORT

Volume 5

Royal Commission into Trade Union Governance and Corruption

CHAPTER 1

INTRODUCTION

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A – INTRODUCTION

1. This Volume of the Report is devoted to recommendations in relation to law reform.

2. The Interim Report made a number of recommendations for referral of material to relevant regulatory and prosecutorial bodies.[1] Volume 1 of this Report lists a number of further referrals. The Interim Report, however, did not reach any final conclusions or make recommendations as to law reform. That was because the Commission's hearings and investigations were not complete at the time of the delivery of the Interim Report.[2]

3. Prior to the publication of the Interim Report, the Commission released a series of Issues Papers seeking submissions as to law reform on a number of specific topics: (1) the protection available to whistleblowers; (2) the duties of union officials; (3) the funding of union elections; and (4) relevant entities. The Commission received a total of 37 submissions in relation to these Issues Papers from a range of interested persons and general law reform submissions from governments, unions and employers.

4. At that time, the Commission's factual inquiries were at a preliminary stage. It was not possible to canvass all of those areas where law reform might be desirable.

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[1] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 30-36.

[2] See Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, p 4 [11].

5. On 19 May 2015, the Commission issued a more comprehensive discussion paper titled 'Options for Law Reform' (**Discussion Paper**).[3] The Discussion Paper tried to elicit informed opinions from interested parties on a range of potential law reform options and their desirability. It also tried to elicit the views of interested persons in respect of whether there were other areas of law reform that the Commission had not explored, but which should be considered. The Commission received a total of 20 submissions (including confidential submissions) from various government agencies, employer and union related parties. All of them were taken into account in formulating the recommendations for law reform set out below.

6. It is of some significance that the Commission did not receive submissions from the Australian Council of Trade Unions (**ACTU**) after it made a decision to boycott the Commission in 2014.[4] The ACTU's decision not to engage in policy debate was unfortunate because it meant that the Commission was not provided directly with the views of Australia's peak union body on matters affecting its members. However, the Commission has had detailed regard to various submissions made by the ACTU to a range of Parliamentary and other inquiries.

[3] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform*, 19/5/15.

[4] Letter from the Australian Council of Trade Unions to the Royal Commission into Trade Union Governance and Corruption dated 23 June 2014.

7. Consistently with the theme of the Discussion Paper, this Volume of the Report endeavours to consider possible law reform options in the following way. First it identifies a potential problem with the existing legal and regulatory framework exposed by the Commission's inquiries. Then it analyses:

(a) whether its cause is a lack of, or insufficient, regulation, and whether it requires the introduction of new laws or amendments to existing provisions;

(b) whether existing laws are not sufficiently clear to address the problem or require amendment to better reflect their original intent; and

(c) whether existing laws, while appropriately targeted towards the problem, are being ignored or insufficiently enforced.

8. The Discussion Paper also made two key points, which should be repeated here.

(a) While broad, the terms of reference assume that employee associations (that is trade unions) will continue to remain an important part of the industrial landscape, and their basic functions and responsibilities under the *Fair Work Act* 2009 (Cth) and the general law will remain.

(b) Unions have historically achieved much for their members, and for society more broadly. Some of those achievements are discussed below. The matters for law reform identified

below do not arise out of the conduct of members. Nor do they arise out of the existence of unions per se. Rather, they arise out of the conduct of some union officials and the employers that deal with them.

B – STRUCTURE OF VOLUME

9. This Volume of the Report is divided into the following ten Chapters:

Chapter 1 Introduction

Chapter 2 Regulation of Unions

Chapter 3 Regulation of Union Officials

Chapter 4 Corrupting Benefits

Chapter 5 Regulation of Relevant Entities

Chapter 6 Enterprise Bargaining

Chapter 7 Competition Issues

Chapter 8 Building and Construction

Chapter 9 Rights of Entry

Chapter 10 Reform of the *Royal Commissions Act* 1902 (Cth)

10. In addition, there are two Appendices. Appendix 1 contains certain model legislative provisions for consideration. The purposes of drafting these was merely to assist in understanding the reasons underlying the proposals for reform. No claim whatsoever is made that they represent satisfactory legislative drafting. Model provisions have not been provided in relation to every recommendation made, only those where a level of detail is necessary to understand the recommendation. Appendix 2 sets out a list of the various submissions received by the Commission in relation to policy and reform issues.

11. Each Chapter deals with a number of issues, or problems, with the existing law on the same broad theme. Following identification of the issue or problem there is consideration of possible solutions having regard to submissions received:

(a) in response to the Discussion Paper;

(b) in response to the Issues Papers;

(c) from affected parties in relation to particular case studies; and

(d) from other parties in relation to policy issues raised by the Commission more generally.

12. Regard has also been had to the public submissions made to, issues papers released by, and the draft and final reports of a number of other inquiries which have been, or are being, conducted into issues that overlap with or complement matters arising out of the Commission's inquiries. These inquiries include:

(a) the Competition Policy Review;[5]

(b) the Financial System Inquiry;[6]

(c) the Productivity Commission Inquiry into the Workplace Relations Framework;[7] and

(d) a number of Senate committee and other parliamentary committee inquiries into proposed legislation in the industrial relations area.

13. Following analysis of the various arguments, there is a recommendation for reform. A summary of each recommendation is contained in a box at the end of the relevant section. Some recommendations are more technical than others, and it may be necessary in some cases to refer to the discussion concerning that recommendation. A complete list of recommendations can be found in Volume 1 of this Report.

14. The balance of this Chapter sets out some important matters of background that inform questions of trade union governance.

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[5] Competition Policy Review, *Final Report* (March 2015).

[6] Financial System Inquiry, *Final Report* (December 2014).

[7] The Australian Government Productivity Commission Inquiry into the Workplace Relations Framework Inquiry Report was handed to the Australian Government on 30 November 2015. At the time of writing this report, that Inquiry Report had not been released by the Government. Regard has been had, in this Report, to the draft report released in August 2015.

C – HISTORY OF TRADE UNION REGULATION IN AUSTRALIA

15. A basic appreciation of the history of trade union regulation in Australia is relevant to understanding the role of unions in Australia's industrial and political framework. That role necessarily underpins law reform concerning union governance. Set out below is a summary, not intended to be comprehensive, of key developments in terms of legal regulation.[8]

British settlement to Federation

16. In *CFMEU v North Goonyella Coal Mine Pty Ltd*,[9] Logan J referred to the *Tolpuddle Martyrs' Case*[10] and the public outrage which followed that case involving the prosecution of farm workers who swore an oath to organise themselves to prevent the reduction of their wages. He said that these factors provided:[11]

> the inception of a movement which gradually throughout the 19th century led to the recognition by the British parliament and then by colonial parliaments here of trade unions as lawful organisations.

17. Whether or not that is so, the history of trade unions in Australia starts in English law at the time of British settlement in Australia. In Britain

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[8] See generally J H Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958); K D Ewing, *Trade Unions, the Labour Party and the Law* (Edinburgh University Press, 1982); D W Smith and D W Rawson, *Trade Union Law in Australia* (2nd ed, Butterworths, 1985), chs 3-9; J V Orth, *Combination and Conspiracy: A Legal History of Trade Unionism 1721–1906* (Clarendon Press, 1991); B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010) chs 2, 20. See also Submissions of the Transport Workers' Union, 14/11/14, pp 8-15.

[9] [2013] FCA 1444.

[10] *R v Lovelass* (1834) 6 Car & P 595; 172 ER 1380.

[11] [2013] FCA 1444 at [30]-[31].

at the turn of the 19th century, the *Combination Acts* of 1799[12] and 1800[13] attached criminal liability to combinations of workmen for any purpose relating to their employment.[14] The consequence of those laws was effectively to outlaw any form of trade union. The 1800 Act was repealed in 1824 but the repeal coincided with considerable industrial violence and unrest.[15] As a result, the following year the *Combination of Workmen Act* 1825 (**1825 Act**) was passed which had the effect of reinstating some, but not all, of the restrictions on combination. The legislation expressly legalised agreements between workmen as to the wages and working hours they would accept. However, it expressly criminalised acts of interference with an employer or employee by way of 'threats', 'intimidation' or 'by molesting or in any way obstructing another'.

18. The upshot of the 1825 Act was that trade unions were not illegal associations by statute.[16] The 1825 Act applied to the Australian colonies by virtue of the *Australian Courts Act* 1828 (Imp). Later

[12] *An Act to Prevent Unlawful Combinations of Workmen* 1799 (39 Geo 111 c 81).

[13] *An Act to Prevent Unlawful Combinations of Workmen* 1800 (39 and 40 Geo 111 c 106).

[14] See J V Orth, *Combination and Conspiracy: A Legal History of Trade Unionism 1721–1906* (Clarendon Press, 1991), pp 43-67.

[15] B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [2.10].

[16] See *Williams v Hursey* (1959) 103 CLR 30 at 61-62 per Fullagar J. It appears that there was little enforcement in Australia of the restrictions in the 1825 Act, which were progressively repealed in the Australian colonies from 1878 onwards: see J H Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958), p 89.

cases also made it clear that, despite some statements to the contrary,[17] they were not illegal associations at common law.[18]

19. However, at common law union members could be liable for criminal conspiracy if they induced members to strike in breach of their contracts of employment.[19] Further, as in Britain, each of the Australian colonies and thus after Federation the States had master and servant laws which imposed criminal sanctions on employees who breached their contracts of employment.[20] In addition, the objects of a trade union were commonly, although not invariably, held to be in restraint of trade, with the result that the rules of the trade union and any trusts set up for the holding of property were unenforceable in court.[21] A consequence was that in general no civil action would lie against a member of trade union who misappropriated trade union property.[22] Further, in the majority of cases, there was no criminal offence committed either.[23]

20. Clearly, this placed trade unions and their members in a precarious position. The position of trade unions in Britain was substantially

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[17] See, eg, *Hilton v Eckersley* (1855) 6 El & Bl 47 at 53; 119 ER 781 at 784.

[18] *Hornby v Close* (1867) LR 2 QB 53; *R v Stainer* (1870) LR 1 CCR 230; *Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25 at 39, 42, 46, 51, 58.

[19] *R v Bunn* (1872) 12 Cox 316.

[20] See J H Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958), pp 90-93 for discussion of the application of those laws.

[21] See *Williams v Hursey* (1959) 103 CLR 30 at 61-62 per Fullagar J referring to *Hilton v Eckersley* (1855) 6 El & Bl 47; 119 ER 781 and *Hornby v Close* (1867) LR 2 QB 53.

[22] See D W Smith and D W Rawson, *Trade Union Law in Australia* (2nd ed, Butterworths, 1985), p 15.

[23] See J H Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958), pp 15-16.

improved in 1871 with the enactment of the *Trade Union Act* 1871 (UK). That legislation provided that the purposes of any trade union should not, merely by reason of being in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.[24] However, the obvious consequence of this provision would have been to render the rules of a trade union enforceable between the members on the basis of contract and could have resulted in courts being required to enforce agreements to strike or boycott. As a result, s 4 of the *Trade Union Act* 1871 (UK) provided that nothing in the Act would enable a court to entertain any legal proceeding with the object of enforcing certain agreements.

21. In addition to these reforms, the legislation introduced a system of registration. Under it the property of a registered trade union was vested in trustees and the trustees were entitled to bring or defend any action concerning the property, rights or claims to property of the trade union. The legislation regulated the affairs of registered trade unions in a number of important respects:

    (a) The trustees of a registered trade union were not liable to make good any deficiency in the funds of the union, but were liable only for the money actually received on account of the union.[25]

[24] *Trade Union Act* 1871 (UK), s 3.

[25] *Trade Union Act* 1871 (UK), s 10.

(b) The treasurer and other officers of a registered trade union were liable to account to the trustees or members, which account was required to be audited.[26]

(c) Officers and members were made criminally liable for the fraudulent misapplication of the funds of the union for any purpose other than those specified in the rules of the trade union.[27]

(d) A trade union could not be registered unless it had certain rules including rules as to the purposes of the trade union, the investment of funds and the annual or periodical audit of accounts.

22. The *Trade Union Act* 1871 (UK), as amended by the *Trade Union Act* 1876 (UK), was fairly quickly adopted in each of the Australian colonies that became States.[28] However, except in New South Wales, few trade unions appear to have obtained registration under these Acts.[29]

23. In 1875, the United Kingdom Parliament enacted the *Conspiracy and Protection of Property Act* 1875 (UK), which among other things removed criminal liability for conspiracy to do acts in contemplation or

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[26] *Trade Union Act* 1871 (UK), s 11.

[27] *Trade Union Act* 1871 (UK), s 12.

[28] *Trade Union Act* 1876 (SA); *Trade Union Act* 1881 (NSW); *The Trade Unions Act* 1884 (Vic); *Trade Unions Act* 1886 (Qld); *Trades Unions Act* 1889 (Tas); *Trade Unions Act* 1902 (WA).

[29] See D W Smith and D W Rawson, *Trade Union Law in Australia* (2nd ed, Butterworths, 1985), p 48.

furtherance of a trade dispute and for breaches of contract by an employee.[30] Similar legislation was later enacted in all of the Australian colonies except New South Wales.[31]

24. The overall result was that at the time of Federation (or shortly thereafter in the case of Western Australia), trade unions in Australia were similar to their British cousins. Trade unions were legal in all Australian States. They were capable of being registered. Registration conferred some benefits on a union. However, the precise legal consequences of registration under the State Acts were somewhat obscure. Was the registered trade union a body corporate? Was it a 'quasi-corporation'? Or was it simply an unincorporated association with some characteristics of a body corporate?[32] The internal affairs of registered trade unions were subject to a limited degree of regulation, but unregistered trade unions were entirely unregulated.

Development of industrial arbitration

25. Operating in parallel with these British developments was the development in Australia from the 1890s onwards of two forms of

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[30] See K D Ewing, *Trade Unions, the Labour Party and the Law* (Edinburgh University Press, 1982), p 11.

[31] *Conspiracy and Protection of Property Act* 1878 (SA); *Conspiracy and Protection of Property Act* 1889 (Tas); *Employers and Employès Act* 1891 (Vic); *Conspiracy and Protection of Property Act* 1900 (WA); *Trade Union Act* 1915 (Qld).

[32] The seminal case was *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426. See the discussion in E Sykes, 'The Legal States of Trade Unions' (1956) 2(2) *SLR* 271; M Pittard, 'A personality crisis: the Trade Union Acts, State registered unions and their legal status' (1979) 6 *Mon LR* 49.

legislative regulation of industrial conditions – wages boards and compulsory industrial arbitration.[33]

26. Wages boards, which operated principally in Victoria and Tasmania, fixed wages in certain industries. Trade unions had no direct part in such a system.[34] However, they played a critical role in the compulsory industrial conciliation and arbitration systems which were successively established in Western Australia, New South Wales, the Commonwealth, Queensland and South Australia. In these jurisdictions, registered trade unions could submit industrial disputes for compulsory conciliation and arbitration to the relevant industrial court. That court could settle industrial disputes within the court's jurisdiction by overseeing agreed settlements, making non-binding recommendations and making awards that would become binding on the parties but also, depending on the scope of a dispute and on the jurisdiction, on other employers and employees in the same industry.[35] A valid award created rights and obligations in the employees bound by the award which derived their force from statute. However, the award did not form part of the employees' contracts of employment.[36] It was not possible for employers and employees to contract validly on terms that were less favourable than the award. Under these systems, registered trade unions could also enter into collective or industrial

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[33] See generally J H Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958), ch 8.

[34] See B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [2.31].

[35] See generally J H Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958), ch 10; B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [2.45]-[2.48], [11.01].

[36] See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

agreements with employers or associations of employers, although this was not the main focus of the systems.[37]

27. In 1904, the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) was enacted. Among other things it established a Commonwealth Court of Conciliation and Arbitration with the power to resolve interstate industrial disputes. Part V of that Act provided for the registration of organisations being associations of employers or associations of employees with more than 100 employees. Registered organisations received the benefits of separate legal personality. They became entitled to certain privileges in relation to industrial disputes. One of these privileges was the capacity to submit industrial disputes in which an organisation was interested to the Commonwealth Court of Conciliation and Arbitration. Another was the capacity to be represented before the Court in the hearing and determination of any industrial dispute in which the organisation was interested.

28. With the growth and development of the Federal and various State compulsory arbitration systems, trade unions inevitably came under greater regulation:[38]

> The arbitration system recognizes the institution of trade unionism and gives it important rights. To the extent that it does so it must take away rights of the individual employee. In such circumstances the only protection which can be given the employee is the imposition of various restrictions on trade unions to protect the interests of individual members from unfair union action. The motives behind the restrictions are twofold – the protection of the interests of the individual member and the

[37] J H Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958), pp 117-124.

[38] J H Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958), p 182.

> protection of the public interest to ensure that an association which has been given power by the state does not act in a way contrary to the interests of the state.

29. Over time, both at the State and Commonwealth level legislation was introduced regulating the activities of trade unions registered under relevant industrial legislation.[39] In short, increased regulation was the price to be paid for the rights and privileges conferred on registered trade unions under the industrial relations legislation. There was no requirement on a trade union to be registered but there was an obvious incentive to do so.

30. The *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) survived for over 80 years, finally being replaced by the *Industrial Relations Act* 1988 (Cth).

Move away from industrial arbitration: 1990s onwards

31. Initially, the *Industrial Relations Act* 1988 (Cth) was little more than a consolidation of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth).[40] However, during the 1990s there was a shift by the Federal Labor Government away from compulsory industrial arbitration toward enterprise bargaining – that is, towards agreements between unions and individual employers on an enterprise basis.[41] The shift towards enterprise bargaining was formalised by the *Industrial*

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[39] For a summary of the developments from 1900 to the 1950s, see J H Portus, *The Development of Australian Trade Union Law* (Melbourne University Press, 1958), pp 182-202.

[40] See B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [2.44].

[41] See B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [2.49]-[2.56].

Relations Reform Act 1993 (Cth). The trend was continued by the Coalition Government from 1996. First, there were further amendments to the *Industrial Relations Act* 1988 (Cth) in 1996 (renamed the *Workplace Relations Act* 1996 (Cth)). Ultimately the WorkChoices legislation was enacted in 2006.[42]

32. The WorkChoices legislation decoupled the Federal industrial relations system from the 'conciliation and arbitration' power in the Commonwealth *Constitution*. More significantly, it expanded considerably the scope of the Commonwealth industrial relations system by applying Commonwealth law to all employees employed by trading or financial corporations.[43] The consequence was to diminish very significantly the importance and application of the traditional State-based industrial relations systems.

33. Subsequently, the Federal Labor government introduced the *Fair Work Act* 2009 (Cth). Although that Act differs in many respects from the WorkChoices legislation, it still seeks to regulate industrial relations on a national basis. In addition, in 2009 each of the States other than Western Australia referred certain powers to the Commonwealth concerning industrial relations.[44] The result is that in those States, subject to certain exceptions largely confined to various public sector

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[42] *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth).

[43] From 1996, Victorian employees were also subject to Commonwealth law after Victoria referred legislative power in relation to industrial relations to the Commonwealth: *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic).

[44] *Industrial Relations (Commonwealth Powers) Act* 2009 (NSW); *Fair Work (Commonwealth Powers) Act* 2009 (Vic); *Fair Work (Commonwealth Powers) and Other Provisions Act* 2009 (Qld); *Fair Work (Commonwealth Powers) Act* 2009 (SA); *Industrial Relations (Commonwealth Powers) Act* 2009 (Tas).

employees, all employees are subject to federal industrial relations regulation under the *Fair Work Act* 2009 (Cth).[45]

Changes to unions and union regulation from late 1980s onwards

34. In combination with changes to the industrial relations landscape, during and following the late 1980s there were considerable changes to the number and structure of unions as a result of legislative changes and direction from the ACTU:[46]

(a) At 30 June 1986, the Australian Bureau of Statistics (**ABS**) reported a total of 326 trade unions in Australia.[47] 200 of those unions (61.3%) had less than 2,000 members. Eight unions had more than 80,000 reported members each, together accounting for 30.7% of trade union members. There were 146 unions registered under Commonwealth law reflecting 81% of total reported trade union membership.[48]

(b) By 30 June 1996, the ABS reported a total of 132 trade unions in Australia. 76 of those unions (57.5%) had less than 2,000 members. 12 unions had over 100,000 members each

[45] See B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [2.78] for a general summary of the excepted classes.

[46] B Creighton and A Stewart, *Labour Law* (5th ed, Federation Press, 2010), [20.59].

[47] Australian Bureau of Statistics, 30 June 1986, *Trade Union Statistics, Australia* (ABS Catalogue No 6323.0), p 1.

[48] Australian Bureau of Statistics, 30 June 1986, *Trade Union Statistics, Australia* (ABS Catalogue No 6323.0), pp 1, 2, 5. The membership figures are total members as opposed to financial members.

together accounting for 71.2% of union members.[49] There were 46 unions registered under Commonwealth law reflecting 86% of total reported trade union membership.[50]

35. The reduction of the number of unions and the creation of 'super unions' through amalgamation led, among other things, to the increased concentration of power in the hands of union officials. At the same time there was an increase in the complexity of the day-to-day operations of those amalgamated unions.

36. At the same time, as a result of a range of complex factors including substantial changes in the structure of the economy, union membership began to decline significantly:

(a) In August 1986, the ABS reported that 46% of Australia's employees were trade union members.[51]

(b) By August 1996, that figure reported by the ABS had dropped to 31%, with 24% union membership in private sector employment and 55% union membership in the public sector.[52]

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[49] Australian Bureau of Statistics, 30 June 1996, *Trade Union Statistics Australia* (ABS Catalogue No 6323.0), pp 5, 7, 9-10. The membership figures are total members as opposed to financial members.

[50] Australian Bureau of Statistics, 30 June 1996, *Trade Union Statistics Australia* (ABS Catalogue No 6323.0), p 13.

[51] Australian Bureau of Statistics, August 1996, *Trade Union Members Australia* (ABS Catalogue No. 6325.0), p 5.

[52] Australian Bureau of Statistics, August 1996, *Trade Union Members Australia* (ABS Catalogue No. 6325.0), pp 5-6.

(c) In August 2006, 20% of employees were trade union members. A higher proportion of public sector employees were trade union members (43%) than private sector employees (15%).[53]

(d) As at August 2014, only 15% of employees were trade union members. 11.1% of private sector employees (996,700) were trade union members, compared with 39.5% (573,400) of public sector employees.[54]

37. There were also significant changes from the 1990s onwards to the way registered unions were regulated. Registered unions at both State and Commonwealth level had long been subjected to various forms of regulation concerning their rules, elections for office with the union and accounting. However, during the 1990s various State legislatures introduced provisions imposing statutory duties on union officials similar to those imposed on company directors: New South Wales introduced such duties in 1991,[55] Western Australia in 1995[56] and Queensland in 1997.[57]

38. At the Commonwealth level, equivalent duties were first introduced in 2002 when the *Workplace Relations Amendment (Registration and*

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[53] Australian Bureau of Statistics, August 2006, *Employee Earnings, Benefits and Trade Union Membership* (ABS Catalogue No. 6310.0), p 5.

[54] Australian Bureau of Statistics, August 2014, *Characteristics of Employment, Australia* (ABS Catalogue No. 6333.0), data cube 16 (table 16.1), released 27/10/15.

[55] *Industrial Relations Act* 1991 (NSW).

[56] *Industrial Relations Legislation Amendment and Repeal Act* 1995 (WA).

[57] *Industrial Organisations Act* 1997 (Qld).

Accountability of Organisations) Act 2002 (Cth) introduced Schedule 1B to the *Workplace Relations Act* 1996 (Cth).

39. Despite the demise of the traditional industrial arbitration systems from the 1990s onwards, and the changes to unions, trade unions still possess a number of significant rights and privileges under both Commonwealth and State laws. The current statutory framework regulating trade unions in the various jurisdictions is outlined below.

D – PRESENT COMMONWEALTH STATUTORY FRAMEWORK

40. At the Commonwealth level, there are two relevant pieces of legislation: the *Fair Work (Registered Organisations) Act* 2009 (Cth) (**FW(RO) Act**) and the *Fair Work Act* 2009 (Cth) (**FW Act**). In essence, the FW Act provides for the registration of employee associations (that is, trade unions) and employer associations as 'organisations'. It also contains provisions regulating such organisations. Among other things, the FW Act confers certain rights and powers on employee organisations and their officials.

Fair Work (Registered Organisations) Act 2009 (Cth)

41. The FW(RO) Act is largely based on Schedule 1B of the *Workplace Relations Act* 1996 (Cth).

42. Under the FW(RO) Act, a 'federally registrable' association of employees or employers or an enterprise association is eligible to apply for registration as an 'organisation'.[58]

43. An association of employees is 'federally registrable' if it is a constitutional corporation (i.e. a trading, financial or foreign corporation) or some or all of its members are 'federal system employees'.[59] A 'federal system employee' is defined as a 'national system employee' within the meaning of that term in the FW Act or an independent contractor who, had he or she been an employee, would be a 'national system employee'.[60] In turn, a 'national system employee' includes an employee employed or usually employed by (a) a constitutional corporation, (b) the Commonwealth or a Commonwealth authority, (c) a person who employs or usually employs flight crew officers, maritime workers or waterside workers in connection with interstate trade or commerce, or (d) an employer who carries on activity in a Territory.[61]

44. By these techniques the legislation bases itself at least on the Commonwealth legislative powers conferred by ss 51(i), (xx), (xxxix) and 122 of the *Constitution*. The constitutional validity of the predecessor to the FW(RO) Act, which in this respect was substantially

[58] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 18.

[59] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 18B.

[60] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 6.

[61] *Fair Work Act* 2009 (Cth), ss 13, 14.

identical to the FW(RO) Act, was upheld by the High Court in *The WorkChoices Case*.[62]

45. Further, as a result of the referral of powers mentioned in paragraph 33 above, the definition of 'national system employee' also includes employees employed by other entities in those referring States (eg sole traders, partnerships), except (to varying degrees in each State) certain public sector and local government employees.[63]

46. The consequence is that most employees in Australia are 'federal system employees' for the purposes of the FW(RO) Act.

47. An organisation registered under the FW(RO) Act is a body corporate. That is, it is a legal entity with separate legal personality. It has certain rights, powers and liabilities e.g. the ability to own property, to sue and be sued.[64] Most, if not all, trade unions in Australia operating federally are organisations registered under the FW(RO) Act (or one of its predecessors), and are therefore subject to the provisions of the FW(RO) Act.

48. The FW(RO) Act regulates organisations in a number of ways. In very broad terms:

(a) chapter 2 concerns the registration and cancellation of registration of organisations;

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[62] *New South Wales v Commonwealth* (2006) 229 CLR 1 at [309]-[327].

[63] *Fair Work Act* 2009 (Cth), ss 30C, 30D, 30H, 30M, 30N, 30S.

[64] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 27.

(b) chapter 3 deals with the amalgamation and withdrawal from amalgamation of organisations;

(c) chapter 4 sets out provisions dealing with the ability of organisations to represent particular persons;

(d) chapter 5 prescribes and regulates the rules of organisations;

(e) chapter 6 concerns membership of organisations;

(f) chapter 7 provides for democratic control of organisations through elections;

(g) chapter 8 imposes a range of reporting and accounting requirements on organisations; and

(h) chapter 9 regulates the conduct of officers and employees of organisations and branches of organisations.

49. Under the FW(RO) Act, the regulation of organisations is overseen principally by the General Manager of the Fair Work Commission. The General Manager of the Fair Work Commission is a separate statutory office. The holder is appointed by the Governor-General on the nomination of the President of the Fair Work Commission for a period not exceeding five years.[65] The Fair Work Commission itself is a body consisting of a President, two Vice Presidents, an unspecified number of Deputy Presidents and Commissioners and six expert panel

[65] *Fair Work Act* 2009 (Cth), ss 656, 660.

members.[66] Fair Work Commission members are appointed by the Governor-General, and hold office until aged 65.[67]

Rights of employee organisations under the *Fair Work Act* 2009 (Cth)

50. Apart from the benefit of separate legal personality conferred by the FW(RO) Act, the FW Act confers a number of significant rights and privileges on registered employee organisations.

Participation in enterprise bargaining

51. *First*, employee organisations are critical participants in the enterprise bargaining system established by the FW Act.

52. In essence, the enterprise bargaining system requires employees (through their bargaining representatives) and their employers to bargain in good faith for terms and conditions of an enterprise agreement. Any agreement that is ultimately made must result in the employees to whom it is to apply being 'better off overall'[68] than the relevant modern award that covers them (and which would apply to them but for the existence of the enterprise agreement).[69] Together

[66] *Fair Work Act* 2009 (Cth), s 575(2).

[67] *Fair Work Act* 2009 (Cth), s 629. Expert panel members hold office for a period specified in their instrument of appointment, and the period must not exceed five years: s 629(4).

[68] *Fair Work Act* 2009 (Cth), s 186(2)(d). The Fair Work Commission may, in exceptional circumstances, approve an enterprise agreement where it does not pass the 'better off overall test' if the approval would not be contrary to the public interest: *Fair Work Act* 2009 (Cth), s 189.

[69] See *Fair Work Act* 2009 (Cth), ss 47, 48, 52, 53 in relation to when a modern award and enterprise agreement cover and apply to an employer, their employees and a registered organisation.

with the National Employment Standards contained in the FW Act, modern awards set the minimum safety net for employees' terms and conditions within the Commonwealth industrial relations system.

53. The decision to commence bargaining is usually consensual. But in certain circumstances, such as where a majority of employees would like to bargain with a reluctant employer and as a consequence the Fair Work Commission makes a 'majority support determination',[70] an employer can be required to engage in bargaining and in so doing to comply with good faith bargaining requirements, even where the employer's preference is that its employees' terms and conditions be covered by a modern award. However, the good faith bargaining requirements do not require the making of concessions or the reaching of agreement on the terms that are to be included in an enterprise agreement.[71]

54. As will be apparent from the above summary, 'good faith bargaining' is critical to the content of enterprise agreements. Contrary to the position under the previous 'WorkChoices' legislation, trade unions have a distinct role in that process.

55. Pursuant to s 176 of the FW Act, an employee organisation is the *default* bargaining representative for a proposed enterprise agreement (that is not a 'greenfields agreement') if an employee to be covered by

[70] *Fair Work Act* 2009 (Cth), s 237.

[71] *Fair Work Act* 2009 (Cth), s 228(2). For the tortured results that arise from being compelled genuinely to negotiate but not being required to make concessions, see *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576 and *APESMA v Peabody Energy Australia Coal Pty Ltd* [2015] FWCFB 1451.

the proposed agreement is a member of the employee organisation and the employee organisation is entitled to represent the employee's industrial interests in respect of the work to be covered by the agreement.

56. An employee who is a union member may appoint someone other than the union to be his or her representative, but so long as there is one union member who has not appointed someone else, the union will be a bargaining representative and will therefore play a role in determining the content of an enterprise agreement.[72] The union will also be entitled to give written notice to the Fair Work Commission that it wishes to be covered by the agreement. That coverage must be noted by the Fair Work Commission in its decision to approve the agreement.[73]

57. In addition, employers who wish to engage employees in a genuinely new enterprise may bargain with an employee organisation for a 'greenfields agreement'. Such an agreement may be made at any time after bargaining commences between an employer and any employee organisation that they agree to bargain with, and which is entitled to represent the industrial interests of the employees who will be covered by the agreement.[74]

[72] *Fair Work Act* 2009 (Cth), s 176.

[73] *Fair Work Act* 2009 (Cth), ss 183, 201.

[74] *Fair Work Act* 2009 (Cth), ss 172(4), 182(3).

Right of entry powers

58. *Secondly*, union officials also have extremely broad 'right of entry' powers under the FW Act, the *Work Health and Safety Act* 2011 (Cth) and State and Territory work health and safety laws.

59. Section 512 of the FW Act allows the Fair Work Commission, on the application of an organisation, to issue an entry permit for an official of the organisation if the Commission is satisfied that the official is a 'fit and proper person to hold the entry permit'. Although this provision is not limited to the officials of employee organisations, so that in theory the officials of employer organisations could be granted a right of entry permit, the rights conferred on a permit holder in effect limit the holders of permits to trade union officials.

60. Subject to certain conditions and limitations, an entry permit holder is permitted to enter premises to investigate suspected contraventions of the FW Act,[75] to hold discussions with workers whose industrial interests the permit holder's organisation is entitled to represent[76] and to exercise powers conferred by State or Territory work health and safety laws.[77] Whilst on the premises, the permit holder may inspect anything relevant to a suspected contravention of a modern award, enterprise agreement, workplace determination or Fair Work Commission order, and inspect and make copies of any record or

[75] *Fair Work Act* 2009 (Cth), s 481.

[76] *Fair Work Act* 2009 (Cth), s 484.

[77] *Fair Work Act* 2009 (Cth), s 494.

document (other than a 'non-member record') on the premises that is directly relevant to the suspected contravention.[78]

61. The *Work Health and Safety Act* 2011 (Cth) contains provisions which are similar to the FW Act. It allows a union official who has completed relevant safety training and who holds an entry permit under the FW Act to apply for a Work Health and Safety Permit. In general terms, that permit allows the holder to enter premises to inquire into suspected contraventions of the *Work Health and Safety Act* 2011 (Cth) and also to consult and advise workers on health and safety matters. Similar rights of entry are provided under State and Territory work health and safety laws.[79]

62. In effect, union officials who hold an entry permit are authorised to act in a manner in some ways akin to police officers in relation to industrial and work health and safety laws. However, in fact their powers exceed those of the police in at least one respect: unlike police officers they do not need a search warrant obtained from a court prior to entering premises and examining documents stored there. In addition, permit holders are not required to provide advance notice of entry where it relates to inquiries into suspected contraventions of work health and safety laws.

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[78] *Fair Work Act* 2009 (Cth), s 482.

[79] *Work Health and Safety Act* 2011 (ACT); *Work Health and Safety Act* 2011 (NSW); *Work Health and Safety (National Uniform Legislation) Act* 2011 (NT); *Work Health and Safety Act* 2011 (Qld); *Work Health and Safety Act* 2012 (SA); *Work Health and Safety Act* 2012 (Tas); *Occupational Health and Safety Act* 2004 (Vic).

Rights in relation to awards

63. *Thirdly*, employee organisations have broad standing rights to apply to the Fair Work Commission to vary, revoke or make a modern award,[80] to commence proceedings in the Federal Court or Federal Circuit Court seeking a civil remedy[81] or to appear before the Fair Work Commission on behalf of a member.[82]

General observations concerning possible reform of the *Fair Work (Registered Organisations) Act* 2009 (Cth)

64. It is apparent from the above summary that in considering possible reforms to the FW(RO) Act two matters should be kept in mind.

65. *First*, for the most part the FW(RO) Act draws no distinction between employer and employee organisations. Accordingly, any changes to the FW(RO) Act must take this into account.

66. *Secondly*, not all organisations, whether employee organisations or employer organisations, are the same size. Not all have the same level of resources. Thus, whilst a change in the law may not impose much of a regulatory burden on a large trade union such as the CFMEU or the AWU, it may impose a much greater burden on a smaller employee or employer association.

[80] *Fair Work Act* 2009 (Cth), s 158.

[81] *Fair Work Act* 2009 (Cth), ss 539-540.

[82] *Fair Work Act* 2009 (Cth), s 596.

67. As at 3 December 2015, there are 109 registered organisations, of which 47 are unions. The remaining 62 are employer organisations or enterprise associations.[83] However, registered trade unions are considerably larger than registered employer organisations. Based on the 2013 annual public returns provided to the Fair Work Commission, there were just over 2 million members of registered trade unions, compared with just under 100,000 members of registered employer organisations. Further, almost half of the 47 registered trade unions were larger in terms of members than the largest employer organisation, the Master Builders Association of Victoria.

E – PRESENT STATE STATUTORY FRAMEWORK

68. Each State has legislation that regulates trade unions to varying degrees. Although the legislation varies between States there are three general patterns of regulation.

New South Wales, Queensland, South Australia and Western Australia

69. In these States, the equivalents of the *Trade Union Act* 1871 (UK) have been repealed and there is no legislation that regulates trade unions as such.[84] Instead, as under the FW(RO) Act, provision is made for the registration of industrial organisations or associations of employees

[83] Based on information available at Fair Work Commission website, Registered Organisations http://www.fwc.gov.au/registered-organisations/find-registered-organisations accessed 3/12/15.

[84] In New South Wales and South Australia, the provisions of the *Trade Union Act* 1871 (UK) that excluded trade unions from the restraint of trade doctrine have been re-enacted: *Industrial Relations Act* 1996 (NSW), ss 303-305; *Fair Work Act* 1994 (SA), s 137.

and employers.[85] Registration confers separate legal personality on the State-registered organisation. In terms of numbers:

(a) As at August 2014, there were 45 registered employee organisations (unions) and 43 registered employer associations in New South Wales.[86]

(b) As at 30 June 2015, there were 27 employee organisations (unions) and 19 employer organisations registered in Queensland.[87]

(c) As at 30 June 2015, there were 28 employee associations (unions) and 11 registered employee associations registered under South Australian legislation.[88]

(d) As at 30 June 2015, there were 43 employee industrial organisations (unions) and 18 registered employer industrial organisations registered in Western Australia.[89]

70. Certain privileges under State industrial relations legislation are conferred on State-registered organisations of employees, for example,

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[85] *Industrial Relations Act* 1996 (NSW), Part 3 of Chapter 5; *Industrial Relations Act* 1999 (Qld), Chapter 12; *Fair Work Act* 1994 (SA), Chapter 4; *Industrial Relations Act* 1979 (WA), Division 4 of Part II.

[86] New South Wales Government, Policy Submission, August 2014, pp 15-16.

[87] Queensland Industrial Relations Commission, *Annual Report 2014-2015*, (September 2015), pp 19-20.

[88] Industrial Relations Commission of South Australia, *Annual Report 2014-2015*, (September 2015), pp 27-32.

[89] Western Australian Industrial Relations Commission, *Annual Report 2014-2015*, (September 2015), p 11.

right of entry powers, and rights to negotiate and enter collective or enterprise agreements with respect to employees who are otherwise not covered by the federal system.

71. State-registered organisations are also subject to regulation. The precise regulation varies between States. In South Australia, regulation is limited largely to certain matters concerning rules of an organisation and the preparation of accounts.[90] In New South Wales, Queensland and Western Australia there is, to varying degrees, regulation similar to that which exists under the FW(RO) Act and in general involves regulation of the rules of organisations, the election and duties of officers of those organisations and reporting and accounting requirements.[91]

Tasmania

72. Tasmania has a hybrid model. The *Trades Unions Act* 1889 (Tas), which is based on the *Trade Union Act* 1871 (UK), remains in force. But it is largely obsolete. In 2015, only four trade unions are registered under the *Trades Unions Act* 1889 (Tas).[92] Trade unions that are registered have at least some attributes of separate legal personality and are subject to the regulation (albeit fairly limited) imposed by the

[90] *Fair Work Act* 1994 (SA), ss 124-125, 128.

[91] *Industrial Relations Act* 1996 (NSW), Part 4 of Chapter 5; *Industrial Relations Act* 1999 (Qld), Parts 3–12A of Chapter 12; *Industrial Relations Act* 1979 (WA), ss 62, 69-70, 74-80.

[92] Letter from the Solicitor-General of Tasmania to the Solicitor Assisting the Commission dated 14 May 2015. The Act has never been highly utilised. Smith and Rawson report that at the end of 1981, there were 18 unions registered under the *Trades Unions Act* 1889, most of which were very small: D W Smith and D W Rawson, *Trade Union Law in Australia* (2nd ed, Butterworths, 1985), p 48.

Trades Unions Act 1889 (Tas). Trade unions which are not registered remain as unincorporated associations (unless they are incorporated under some other legislation) and are not subject to any specific regulation.

73. However, in addition, Part V of the *Industrial Relations Act* 1984 (Tas) provides for the registration of employee or employer associations as 'organisations'.[93] Unlike the legislation in New South Wales, Queensland, South Australia and Western Australia, registration does not confer separate legal personality on a registered organisation. However, it does confer a number of benefits on the organisation under the Tasmanian industrial relations system. These benefits include the right to appear before the Tasmanian Industrial Relations Commission, the right to enter into industrial and enterprise agreements and the right of its officers to enter premises. Registered organisations must comply with certain minor requirements in relation to rule changes and amalgamations but regulation does not otherwise affect them.

Victoria

74. Prior to 1996, Victoria also adopted the hybrid model currently adopted in Tasmania. The *Trade Unions Act* 1958 (Vic), based on the *Trade Union Act* 1871 (UK), regulated trade unions directly, and Part 12 of the *Employee Relations Act* 1992 (Vic) provided for the

[93] As at 3 December 2015, there were 29 employee associations (i.e. unions) and 25 employer associations formally registered under the *Industrial Relations Act* 1984 (Tas): a list of registered organisations is available on the Tasmanian Industrial Relations Commission website, http://www.tic.tas.gov.au/registered_organisations/employee_orgs, and http://www.tic.tas.gov.au/registered_organisations/employer_organisations, accessed 3/12/15.

recognition of employee and employer associations with consequent benefits for the purposes of the then Victorian industrial relations system. However, in 1996 Victoria referred most of its powers concerning industrial relations to the Commonwealth and Part 12 of the *Employee Relations Act* 1992 (Vic) was repealed.[94] Consequently, the only current Victorian legislation regulating trade unions is the *Trade Unions Act* 1958 (Vic). As is the case in Tasmania, few trade unions are registered under that Act.[95]

F – ROLES OF TRADE UNIONS IN AUSTRALIA

75. As noted in paragraph 15 above, any consideration of law reform in relation to union governance must have regard to the roles and significance of unions in contemporary Australia.

Role in assisting members and improving society

76. There can be little doubt that during the course of the 20th century, trade unions in Australia helped improve the working conditions not only of their members, but of workers more generally. The ACTU, formed in 1927 as a 'peak body' for Australian trade unions, was involved along with individual unions and their members in numerous successful campaigns for better conditions including equal pay for

[94] *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic).

[95] As at November 1995, there were 25 organisations registered under the Act: see Victorian Government Printer, Scrutiny of Acts and Regulations Committee Redundant and Unclear Legislation, *Review of Trade Unions Act 1958*, November 1995, pp 5-6. The Committee reviewing the Act recommended that it be repealed, but the recommendation was not implemented. Nevertheless, the Act is still little utilised. Information provided to the Commission by the Victorian Government indicated that as at May 2015 there were only 26 organisations registered under the Act.

women, increases in the minimum wage, long service leave and occupational health and safety laws.

77. These improvements in broader social conditions were largely achieved at a time of high trade union membership. As noted in paragraph 36 above, the proportion of trade union membership in Australia has consistently fallen over the last three decades from 46% in 1986 to only 15% in 2014.[96] Notwithstanding declining membership, modern trade unions continue to provide a number of valuable benefits to their members. They seek better, safer and fairer working conditions for their members. They help to recover wages and other entitlements when employers have failed to pay them. They can investigate and help remedy safety issues in the workplace. They can assist members in litigation, and fund it. They can provide pastoral care and more general assistance to members.

78. The officials in charge of unions thus play an important role in the lives of their members. They occupy a position of considerable trust. They are in charge of substantial sums of money which is not their own.

Commercial role

79. Despite the humble beginnings of the trade union movement, it is clear that many modern trade unions are large and complicated commercial

[96] Australian Bureau of Statistics, August 2014, *Characteristics of Employment, Australia* (ABS Catalogue No. 6333.0), data cube 16 (table 16.1), released 27/10/15.

enterprises.[97] Evidence given before the Commission has shown that large unions, such as those named in the Commission's Terms of Reference, receive significant revenue from commercial agreements concerning insurance schemes, redundancy funds and training funds. They operate complex commercial structures. They have large numbers of staff. They operate across multiple jurisdictions. The funds which certain unions have established, and which they and their officials administer, are even more complex in structure: incorporated associations, unincorporated associations, trusts and various corporate entities.

80. Even if a trade union carries on commercial activities, it is exempt from income tax, provided the trade union incurs its expenditure and pursues its objectives principally in Australia, complies with all of the substantive requirements of its governing rules and applies its income and assets solely for the purposes for which the trade union was established.[98] Under ordinary principles of taxation law, funds contributed by members of a not-for-profit association to the association for the common benefit of the members (for example, membership and subscription fees, donations by members) do not

[97] See eg, R R S Tracey, 'The Legal Approach to Democratic Control of Trade Unions' (1985) 15 *MULR* 177 at 179; M Christie, 'Legal Duties and Liabilities of Federal Union Officials' (1986) 15 *MULR* 591 at 592; A Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model' (2000) 13 *AJLL* 1 at 12-13.

[98] *Income Tax Assessment Act* 1997 (Cth), s 50-15. Similar exemptions apply in respect of employee and employer associations registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth). The other main classes of entity which have tax exempt status are registered charities, education and health institutions, and sporting and cultural associations.

constitute income of the association.[99] However, unless the association has tax exempt status, income received from external sources (for example, grants, sponsorships, third party commissions) is treated as assessable income and subject to tax.

81. The tax exempt status which is afforded to trade unions has the consequence that the substantial revenues which modern trade unions generate from sources other than their members are not subject to tax. The privilege of tax exempt status afforded to trade unions is one justification for the interest of the Commonwealth in proper union governance and financial accountability.

Statutory role in industrial relations system

82. The statutory role of trade unions in the State and Commonwealth industrial relations systems has already been discussed: see paras 50-63, 70 and 73 above. In short, registered trade unions and their officials occupy a privileged position in Australia's industrial relations systems. As has already been noted, the right of entry powers conferred on trade union officials are extremely broad, exceeding those of the police in some respects. The granting of the various statutory privileges justifies proper legislative measures to safeguard the interests of those affected by those privileges and the general public interest.

[99] This is so-called 'mutuality principle'. In essence it is based on the idea that an organisation cannot derive income from itself.

Political role

83. The final contextual aspect that must be borne in mind is the political power and influence exercised by the officials of trade unions. The deep historical ties between the trade union movement and the Australian Labor Party (**ALP**) are well-known, the latter emanating from the former at the turn of the twentieth century. Those institutional ties remain strong today. Union affiliation fees and union donations are a core part of ALP funds. Union loans can be another source of help. A person who is eligible to join a union must be a financial member of a union if he or she wishes to become a member of the ALP.

84. Apart from these general institutional ties, union officials play an important role in the selection of ALP representatives for State and Federal Parliament. Through the various rules of the ALP, the Secretaries of large affiliated trade unions exercise substantial voting power at ALP State Conferences, and have a very significant role in determining the composition of the Australian Senate[100] and State and Federal Parliaments more generally.

85. Why is this relevant to union governance? It is relevant because, given the substantial political power that is capable of being exercised by trade union officials, there is a heightened public interest in maintaining safeguards against any form of corruption by trade union officials and those employers with whom they deal.

[100] See Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform*, 19/5/15, pp 19-20.

CHAPTER 2

REGULATION OF UNIONS

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A – INTRODUCTION

1. This Chapter concerns law reform in relation to the regulation of unions generally.

2. A number of the case studies considered by the Commission have identified or exposed serious failures in the governance and financial management of a number of unions. Among other things, the case studies considered disclosed:

   (a) misappropriation of union funds by senior union officials and/or employees;

   (b) failures by committees of management properly to oversee the activities of union secretaries;

   (c) failures by committees of management to scrutinise union finances, either properly or at all;

   (d) a lack of internal accounting and audit processes to detect the misappropriation of union funds or other irregularities;

   (e) the failure of external accounting and audit processes to detect the misappropriation of funds;

(f) a lack of, or unawareness about, union policies dealing with financial matters;

(g) misuse of credit cards by union officials;

(h) bullying, intimidation and victimisation of those opposed to the interests of the union Secretary; and

(i) failures in record-keeping.

3. More generally, a number of the case studies revealed an unhealthy culture within many unions whereby a longstanding union Secretary, often with an extremely autocratic leadership style, develops a cult of personality and the committee of management becomes little more than a rubber stamp. In the Health Services Union (**HSU**) and the National Union of Workers (**NUW**), New South Wales Branch this culture developed to such a point that those in charge of the union treated the union's money as if it were their own.

4. The remainder of the Chapter is concerned with broad scale reforms to union governance and regulation to seek to address these issues. More specific reforms concerning the duties of union officials are considered in Chapter 3 of this Volume.

5. The remainder of the Chapter is divided into seven parts.

(a) Part B examines the desirability and practicality of uniform laws throughout Australia governing the registration, de-

registration and regulation of registered employee and employer organisations: see paragraphs 7-22.

(b) Part C asks which body, or bodies, should be responsible for regulating organisations registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth) (**FW(RO) Act**) and what investigatory and enforcement power that body, or those bodies, should have: see paragraphs 23-61.

(c) Part D concerns a range of measures to improve the financial accountability of registered organisations: see paragraphs 62-131.

(d) Part E deals with record-keeping: see paragraphs 132-145.

(e) Part F examines measures to improve the protections for whistleblowers: see paragraphs 146-179.

(f) Part G considers the use of union funds, in particular for purposes associated with promoting a cause or causes of a union Secretary: see paragraphs 180-192.

(g) Part H deals briefly with the conduct of union elections: see paragraphs 193-200.

6. The Commission received a range of submissions in relation to these issues in response to the Issues Papers, the Discussion Paper and more

generally.[1] The balance of the Chapter refers to a number of these submissions in the course of discussing the issues raised. For reasons of brevity, not every submission received is referred to.

B – DUAL STATE AND COMMONWEALTH REGULATION

7. One overarching issue affecting the regulation of unions is the existence of multiple State and Commonwealth regulatory regimes.

8. As discussed above in Chapter 1 of this Volume, each State other than Victoria has legislation providing for the registration of associations of employees or employers as organisations, and the regulation of those organisations. The regulation imposed on registered organisations varies, sometimes considerably, between jurisdictions.

9. The problems and complexity that are created by the existence of multiple regulatory regimes can be illustrated by consideration of the NUW, New South Wales Branch:

   (a) The NUW is an organisation registered under the FW(RO) Act. That union has a New South Wales branch which is a reporting unit for the purposes of the FW(RO) Act (**Federal branch**). It has no separate legal existence.[2]

   (b) At the same time, the NUW, New South Wales Branch is registered as an employee organisation under the *Industrial*

[1] A list of the submissions received can be found in Appendix 3 to this Volume of the Report.

[2] See *Williams v Hursey* (1959) 103 CLR 30; *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620.

Relations Act 1996 (NSW) (**State-registered branch**). This is a separate legal entity which is a body corporate, incorporated by the law of New South Wales.

(c) The State-registered branch and the Federal branch have substantially the same members and the same officers. The two branches, and their officers, are subject both to regulation under the FW(RO) Act and the *Industrial Relations Act* 1996 (NSW). All funds are held for the benefit of the State-registered branch and the Federal branch jointly.

(d) However, there are separate State and Federal rules of the branch, which differ in important respects. There are also different requirements under the FW(RO) Act and the *Industrial Relations Act* 1996 (NSW) as to the content of the rules. Section 154D of the FW(RO) Act currently requires the rules of a federally-registered organisation or a branch of that organisation to have certain rules concerning financial training. There is no such requirement in the *Industrial Relations Act* 1996 (NSW).

(e) Further, there are different duties imposed on officers under the FW(RO) Act and the *Industrial Relations Act* 1996 (NSW).

10. These complex arrangements, stemming from the existence of dual State and Commonwealth regulation, are far from unique to the NUW, New South Wales Branch. In fact, they are extremely common.[3]

11. The potential for overlapping and conflicting State and Commonwealth laws is not new. The problems were identified in 1969 in *Moore v Doyle*.[4] In 1974, the Sweeney Report sought to address some of the issues.[5] But the problems remain. In New South Wales and South Australia, the potential for overlapping regulation in relation to *newly* registered organisations is reduced by the relevant legislation drawing a distinction between, on the one hand, State-registered organisations that are organisations or branches of organisations registered under the FW(RO) Act (which are not generally subject to State regulation) and, on the other hand, those that are not registered under the FW(RO) Act (which are subject to State regulation).[6]

12. It is possible that some of the problems will decline over time. There has been a shift to a largely national industrial relations system. But transitional arrangements were put in place to ensure that State-registered organisations that previously represented employees within the State industrial relations systems could continue to do so in the new Federal industrial relations system. Currently, a number of State-registered organisations are 'transitionally recognised associations'.[7]

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[3] See Schedule 1A to the *Fair Work (Registered Organisations) Regulations* 2009 (Cth) for a list of State-registered organisations with federally-registered counterparts.

[4] (1969) 15 FLR 59.

[5] Committee of Inquiry on Co-ordinated Industrial Organisations, *Report* (1974).

[6] See *Industrial Relations Act* 1996 (NSW), Parts 4 and 5 of Ch 5; *Fair Work Act* 1994 (SA), Parts 2 and 3 of Ch 4. Contrast the position in Queensland and Western Australia.

[7] See *Fair Work (Registered Organisations) Act* 2009 (Cth), Sch 1.

The consequence of being a 'transitionally recognised association' is that the State-registered organisation is regarded as a Federal organisation for the purposes of the FW Act.[8] Thus, it is able to continue to represent its members in the Federal industrial relations system. Transitional recognition expires on 1 January 2017, although it can be extended by up to two years in certain circumstances.[9] State-registered organisations can apply for permanent recognition as a 'recognised State-registered association' but only if they do not have a 'federal counterpart'.[10] The overall result is that after 1 January 2019 many State-registered organisations with a federal counterpart will have a considerably reduced role in representing the industrial interests of members.[11] Consequently some State-registered organisations may cease to exist.

13. However, it is not clear that this will occur. And there will remain State-registered unions with coverage of public sector employees that remain covered by State industrial laws.

14. The Commission received a number of submissions about whether it was desirable and practicable to have a single set of rules in relation to the registration, deregistration and regulation of registered organisations throughout Australia.[12] The Discussion Paper raised two

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[8] *Fair Work (Registered Organisations) Act* 2009 (Cth), Sch 1, cl 3.

[9] *Fair Work (Registered Organisations) Act* 2009 (Cth), Sch 1, cl 6; *Fair Work (Registered Organisations) Declaration* 2010.

[10] *Fair Work (Registered Organisations) Act* 2009 (Cth), Sch 2.

[11] See generally the discussion in B Creighton and A Stewart, *Labour Law* (Federation Press, 5th ed, 2010), pp 679-680.

[12] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, pp 9-10; Associate Professor Louise Floyd Law Reform Submissions, 21/8/15, p 1 referring to L Floyd, 'The Fair Work Act's forgotten issues' (2010) 33 *ABR* 1; Institute of Public

ways this could occur: by the States adopting uniform laws or by the States referring their powers to the Commonwealth. The third way – that the Commonwealth could unilaterally enact legislation 'covering the field' – is not possible given the current constitutional basis of the FW Act and the FW(RO) Act.

15. Apart from the submission received by the Employment Law Committee of the Law Society of New South Wales the submissions received were largely in favour of harmonisation of the various existing regimes.

16. The Committee did not support uniformity on the ground that in its perception there were insufficient benefits to be achieved.[13] It argued that any attempt to establish uniform laws would not be easy. Further, the introduction of uniform provisions would mean that New South Wales registered organisations operating only in the State or without a counterpart Federal body would be exposed to more regulation in their internal affairs. Yet, the argument ran, there is no evidence that the regulatory regime applicable to them under the State legislation is seriously deficient. The Committee also argued that it was undesirable and unlikely that State governments would refer their powers over the regulation of State registered industrial organisations to the Commonwealth. It submitted that any referral of powers would be

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Affairs Law Reform Submissions, pp 11-12; Housing Industry Association Pty Ltd Law Reform Submissions, 21/8/15, p 7; Master Builders Australia Law Reform Submissions, 21/8/15, p 5; Law Society of New South Wales, Employment Law Committee Law Reform Submissions, 21/8/15, pp 1-4.

[13] Law Society of New South Wales, Employment Law Committee Law Reform Submissions, 21/8/15, pp 1-4.

likely to create additional complexity for the administration of registration, deregistration and regulation.

17. If past practice is a guide, it may be accepted that it is unlikely that the States would refer their powers concerning the regulation of employer and employee associations to the Commonwealth. Although in 2009, New South Wales, Queensland, South Australia, Tasmania and Victoria each referred a broad range of legislative powers to the Commonwealth, regulation of employer and employee associations was explicitly excluded from the reference.[14] And this was at a time when all of those States and the Commonwealth had Labor governments.

18. Further, given the continued existence of State-based industrial relations systems, there will be a continued need for organisations to be recognised under State-based industrial relations systems.

19. However, it is difficult to accept the proposition that a single set of rules governing registration, deregistration and regulation of employee and employer organisations could lead to additional complexity. To the contrary, this would simplify the very complex existing legislative frameworks. In terms of cost and efficiency, the referral of powers to the Commonwealth would have the very significant advantage that there would be a single statutory regulator with supervision of registered organisations throughout Australia rather than the

[14] *Industrial Relations (Commonwealth Powers) Act* 2009 (NSW), s 3(1) (para (m) of definition of 'excluded subject matter'); *Fair Work (Commonwealth Powers) and Other Provisions Act* 2009 (Qld), s 3(1) (same); *Fair Work (Commonwealth Powers) Act* 2009 (SA), s 3(1) (same); *Industrial Relations (Commonwealth Powers) Act* 2009 (Tas), s 3(1) (same); *Fair Work (Commonwealth Powers) Act* 2009 (Vic), s 3(1) (para (m) of the definition of 'State subject matters').

multiplicity of current regulatory authorities. Uniform laws would have other obvious advantages including certainty of regulation and a reduced burden of regulation on dual registered organisations.

20. Whilst accepting the practical difficulties of implementing any uniform scheme of regulation within Australia, it is considered that the potential benefits justify the States and Commonwealth giving consideration to implementing a national regime in relation to the registration, deregistration and regulation of industrial organisations of employees and employers.

Recommendation 1

Commonwealth and State governments give consideration to adopting a national approach to the registration, deregistration and regulation of employee and employer organisations, with a single regulator overseeing all such organisations throughout Australia.

21. The balance of this Volume of the Report focuses on the governance and regulation of organisations registered under the FW(RO) Act. The reasons for this approach were explained in the Discussion Paper. *First*, the Terms of Reference identify, non-exhaustively, five specific unions for consideration, each of which is an organisation registered under the FW(RO) Act. It is therefore sensible to focus on that Act. *Secondly*, it is unmanageable to deal with the law in every jurisdiction. This Report is already long and dealing with each jurisdiction separately would make it even longer. *Thirdly*, the FW(RO) Act has the greatest coverage of members. *Fourthly*, apart from perhaps the

Industrial Relations Act 1999 (Qld), the FW(RO) Act is the most comprehensive.

22. However, this Volume does draw on existing State laws as useful points of reference and comparison. Further, many of the recommendations have equal force and application to the regulation of State-registered organisations.

Recommendation 2

State governments give consideration to the recommendations concerning the *Fair Work (Registered Organisations) Act* 2009 (Cth) with a view to implementing, where appropriate, those recommendations in State legislation governing State-registered organisations.

C – REGISTERED ORGANISATIONS REGULATOR

23. There are two foundational issues in relation to the regulation of employee and employer organisations under the FW(RO) Act. Who should regulate registered organisations? That entity (or entities) is referred to below as the **registered organisations regulator**. What powers and resources should the registered organisations regulator have to investigate and enforce the FW(RO) Act?

The current registered organisations regulator: General Manager of the Fair Work Commission

24. Currently, the regulation of organisations under the FW(RO) Act is entrusted, albeit not completely, to the General Manager of the Fair Work Commission (the **General Manager**).

25. The General Manager's primary function is to assist the President of the Fair Work Commission in ensuring that the Fair Work Commission performs its functions and exercises its powers.[15] The Fair Work Commission's functions and powers are primarily adjudicative and concern substantive industrial relations matters. These include, for example, resolving unfair dismissal claims, settling industrial disputes, conducting reviews of modern awards and approving enterprise agreements. The General Manager is subject to the direction of the President, both generally and in relation to particular matters.[16] The President may delegate this power to a Vice President or a Deputy President.[17]

26. In addition to this role, the General Manager has statutory functions under the FW(RO) Act in relation to the regulation of registered organisations. The General Manager's regulatory functions are separate from the adjudicative functions of the Fair Work Commission.

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[15] *Fair Work Act* 2009 (Cth), s 657(1).

[16] *Fair Work Act* 2009 (Cth), s 582(2). The General Manager is not required to comply with a direction by the President that is inconsistent with the General Manager's performance of functions or exercise of powers under the *Public Governance, Performance and Accountability Act* 2013 (Cth) or the *Public Service Act* 1999 (Cth) in relation to the Fair Work Commission: s 658.

[17] *Fair Work Act* 2009 (Cth), s 584(1).

However, the General Manager remains subject to a direction of the President, either generally or in relation to a specific matter.

27. Although the vast bulk of the regulation of organisations is entrusted to the General Manager, the Fair Work Commission proper has a role in registering[18] and deregistering[19] organisations, in relation to the amalgamation of organisations,[20] and in relation to changes to certain aspects of the rules of organisations.[21]

An independent standalone registered organisations regulator

28. Since 2013, the current Federal government has attempted to introduce legislation providing for the creation of a separate 'Registered Organisations Commission' and transferring most of the General Manager's current regulatory functions concerning registered organisations to the Registered Organisations Commission.[22] Three attempts have been made. Each has failed. The most recent attempt to create a Registered Organisations Commission was the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), which was defeated in the Senate on 17 August 2015.

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[18] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 20

[19] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 30.

[20] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 53.

[21] *Fair Work (Registered Organisations) Act* 2009 (Cth), ss 157, 158.

[22] *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), *Fair Work (Registered Organisations) Amendment Bill* 2014 (Cth) and the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth).

29. The Discussion Paper invited submissions about whether there should be a single statutory regulator of organisations, separate and independent from the Fair Work Commission, and if so, who that regulator should be.

30. Most of the submissions received on this issue were in favour of a statutory regulator separate from the Fair Work Commission.[23] For example, the Institute of Public Affairs submitted:[24]

> …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.

31. The case against was put by the Shop Distributive and Allied Employees' Association (**SDA**) who submitted that to remove the regulatory function from the Fair Work Commission would:[25]

> …be to weaken the authority of the FWC and diminish the necessary trust and confidence between the FWC and organisations of employers and employees under the federal system.

32. In its submission to an inquiry by the Senate Education and Employment References Committee in relation to the *Fair Work*

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[23] Associations Forum Pty Ltd Law Reform Submissions, 4/9/15, p 2; Master Builders Australia Law Reform Submissions, 21/8/15, p 8; Australian Industry Group Law Reform Submissions, 21/8/15, p 4; Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 11; Boral Law Reform Submissions, 2015 (received 27/8/15), p 9; Associate Professor Louise Floyd Law Reform Submissions, 21/8/15, p 2; Institute of Public Affairs Law Reform Submissions, August 2015, p 11.

[24] Institute of Public Affairs Law Reform Submissions, August 2015, p 11.

[25] Shop, Distributive & Allied Employees Association Law Reform Submissions, 27/8/15, para 24.

(Registered Organisations) Amendment Bill 2014 [No 2] (Cth) the Australian Council of Trade Unions (**ACTU**) submitted that:[26]

> There is absolutely no basis for suggesting that there is any institutional limitation inherent in the present regulatory structures. The General Manager, as the investigative authority, is functionally distinct from the remainder of the Fair Work Commission. Neither the fact that the General Manager's appointment is made by government on the nomination of the President of the Commission, nor the fact that the General Manager has administrative as well as investigative functions, is remarkable or objectionable. For example, similar provisions apply to the appointment and role of the CEO of the Australian Crime Commission. A bare assertion that the formal institutional arrangements impacted [sic] the efficacy of the HSU investigations is insufficient to justify the evisceration of the General Managers [sic] regulatory powers and, moreover, is simply incorrect.

33. There are in fact several strong arguments in favour of establishing an independent regulator separate from the Fair Work Commission.

34. *First*, there are no apparent reasons why the General Manager of the Fair Work Commission, which is an adjudicative body, should also have the responsibility of regulating registered organisations and investigating breaches of the FW(RO) Act. Contrary to the SDA's submission, it is not apparent how removing the regulatory functions from the General Manager would in any way weaken the authority of the Fair Work Commission or diminish 'trust and confidence' between the Fair Work Commission and organisations of employers and employees. Contrary to the ACTU's submission, the General Manager is not analogous to the Chief Executive Officer of the Australian Crime Commission. The Chief Executive Officer is the head of a single

[26] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), 30/6/15, p 18.

regulator with a single focus. The General Manager's administrative and regulatory tasks have no real connection.

35. *Secondly*, the current regulatory regime is apt to confuse the public about the role of the Fair Work Commission, which is essentially adjudicative. The review of the FW Act in 2012 noted that it would be appropriate to consider changes to the law to make clear the difference between the functions of the Fair Work Commission (then Fair Work Australia) 'as a tribunal and as an administrator overseeing registered organisations'.[27]

36. *Thirdly*, the fact that the General Manager has a range of other important tasks in relation to the Fair Work Commission has the potential for the regulation of organisations, and for investigations and inquiries, to be given a lower priority. This is evidenced by the fact that, prior to the series of well-publicised incidents involving the HSU, Fair Work Australia (as the Fair Work Commission was then called) gave little attention and devoted little resources to enforcing regulatory compliance.[28] Although the General Manager now has a separate Regulatory Compliance Branch, this is only one of four branches of the General Manager.

37. *Fourthly*, conducting inquiries and investigations into possible contraventions of the law is time and resource intensive. To meet criteria of transparency and accountability, it is better to have a

[27] Department of Education, Employment and Workplace Relations, *Towards more productive and equitable work places: an evaluation of the Fair Work legislation* (2012), p 250.

[28] See KPMG, *Process Review of Fair Work Australia's investigations into the Health Services Union* (2012), pp 3, 27.

separate entity, with a separate budgetary allocation, to conduct that work rather than for a general budgetary allocation to be made to the Fair Work Commission which allocation must also cover the core adjudicative functions of the Commission.

38. *Fifthly*, enforcing the FW(RO) Act requires expertise in relation to registered organisations. It is therefore sensible to have staff who are dedicated to dealing with issues concerning registered organisations.

39. *Sixthly*, appointments to the Fair Work Commission regularly give rise to claims of bias by both sides of politics. Appointees are regularly described as 'union friendly' or 'employer friendly'. Whether those claims have substance or not, a regulator that is not regarded as impartial risks losing legitimacy and public confidence. The current position whereby the President may give the General Manager a direction, including a direction in relation to a particular case, is accordingly not appropriate. The regulator should be free of the suggestion of political bias.

40. A good argument against the creation of a separate Registered Organisations Commission, as proposed in the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), is that a number of regulatory functions concerning registered organisations would remain the responsibility of the Fair Work Commission, including the registration, deregistration and amalgamation of organisations. The

ACTU submitted, in respect of an earlier iteration of the Bill, that it was:[29]

> unconvinced that there is any necessity to establish a new statutory office to regulate Registered Organisations […] it seems counter intuitive to split the existing functions of a regulator in two and re-allocate staff across different agencies to achieve reform in this area.

41. Several readily apparent difficulties can arise out of a dual regulatory model including inefficiency, duplication and information sharing problems.

42. However, this problem could be resolved by transferring *all* regulatory functions to a single stand-alone authority. That is the case in respect of companies registered under the *Corporations Act* 2001 (Cth). They are regulated by the Australian Securities and Investments Commission (**ASIC**). The relevant functions currently reposed in the Fair Work Commission proper, such as the registration of organisations, are largely administrative in nature. To the extent that the Commission's functions may be considered judicial they should be reposed in a Chapter III court, such as the Federal Court or the Federal Circuit Court.

43. In relation to whether a separate regulator should be established, or whether ASIC or some other existing body should be appointed as the relevant regulator, a number of possibilities were canvassed in the submissions:

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[29] Australian Council of Trade Unions, Submissions to the Senate Standing Legislation Committee on Education and Employment on the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 10.

(a) The Institute of Public Affairs submitted that a separate regulator should be established 'along the lines of the Australian Securities and Investment Commission'.[30]

(b) The Associations Forum Pty Ltd submitted that the regulator for registered organisations should be the Australian Charities and Not-for-Profits Commission, on the basis that:[31]

> [t]he [Australian Charities and Not-for-Profits Commission] looks after tax-exempt mutual[s], and ROs are mutuals that currently pay no tax. Further, [the Australian Charities and Not-for-Profits Commission] has been recently set up with modern systems for good governance and compliance.

(c) Boral supported the proposal under the most recent bill for the Registered Organisations Commission being appointed as the separate statutory regulator. But Boral submitted that it should operate within the existing Office of the Fair Work Ombudsman.[32]

(d) Master Builders Australia supported the establishment of an independent Registered Organisations Commission to be headed by a Registered Organisations Commissioner.[33]

(e) Associate Professor Floyd did not support ASIC being appointed the regulator but submitted that 'Australia should

[30] Institute of Public Affairs Law Reform Submissions, August 2015, p 11.

[31] Associations Forum Pty Ltd Law Reform Submissions, 4/9/15, p 2.

[32] Boral Law Reform Submissions, 2015 (received 27/8/15), p 10.

[33] Master Builders Australia Law Reform Submissions, 21/8/15, p 7.

adopt a new, separate and independent regulator for the regulation of trade unions'.[34]

44. It is not recommended that regulatory functions concerning registered organisations be transferred to ASIC. Transferring the regulatory functions to an existing regulator would defeat many of the main advantages (for example, transparency and accountability of funds, efficiency, expertise) achieved by removing the functions from the General Manager. Further, ASIC already has a range of responsibilities in relation to the regulation of corporations and concerning financial services. Transferring regulatory functions in respect of registered organisations to ASIC risks a lack of focus on ASIC's core responsibilities as well as a lack of focus in relation to the regulation of registered organisations.

45. Nor it is recommended that ASIC be given partial responsibility for regulating registered organisations. This is for the reasons identified in the previous paragraph, as well as the practical and administrative difficulties that are likely to arise from having two regulators.

46. For example, a number of problems would be likely to arise if ASIC were given the power to investigate 'serious contraventions' of the FW(RO) Act, but the General Manager retained the role, and its current powers, to investigate other contraventions.[35] In many investigations, the seriousness of an allegation is not apparent until the investigation has already commenced. Also, an allegation may seem

[34] Associate Professor Louise Floyd Law Reform Submissions, 21/8/15, p 2.

[35] This is the regulatory model currently proposed by the Australian Labor Party: 'Fact Sheet: Better Union Governance', released 7/12/15, p 1.

innocuous in isolation but in conjunction with other allegations or a course of conduct, its seriousness may take on a different complexion. In particular, an action or course of conduct which is carried out on a systemic basis may be serious, even if a single instance of such conduct is not.

47. Yet on the proposed model, ASIC would have no power to commence an investigation unless it determined it was serious. Thus, there is a potential for a waste of time and expertise involved in the transfer of investigations from the General Manager to ASIC. At present, ASIC staff does not necessarily have experience concerning the affairs of registered organisations. The proposed model would be likely to duplicate qualified personnel at both regulators. Moreover, ASIC has very limited visibility into the affairs of registered organisations. Although the General Manager should share information with ASIC, to avoid ASIC staff duplicating the work of the staff of the General Manager, in practice, ASIC's investigation power is likely to be limited to cases where a matter has been referred to ASIC by the General Manager. In addition, confining ASIC's power to cases of 'serious contraventions' invites legal arguments to be made that ASIC did not have the power to conduct an investigation, because the investigation did not concern a 'serious contravention' of the FW(RO) Act. Another difficulty is that, as discussed below, there is currently a very broad 'derivative use' immunity that applies to materials obtained in any investigation by the General Manager. If that 'derivative use' immunity were retained, it would severely prejudice ASIC's ability to bring civil or criminal proceedings following an investigation by the General Manager.

Recommendation 3

All regulatory functions of the General Manager and the Fair Work Commission insofar as they apply to registered organisations under the *Fair Work (Registered Organisations) Act* 2009 (Cth) be transferred to a new Registered Organisations Commission. The Registered Organisations Commission should be an independent stand-alone regulator. The structure of the Australian Securities and Investments Commission may provide a useful legislative model.

48. Subsequent recommendations refer to the generic registered organisations regulator, rather than the Registered Organisations Commission. This is to emphasise that the subsequent recommendations are not dependent on the acceptance of Recommendation 3.

Resources of the registered organisations regulator

49. In order to conduct its functions, the registered organisations regulator must be properly resourced with a separate budgetary allocation.

Recommendation 4

The Commonwealth government ensure that the registered organisations regulator is properly resourced to carry out its functions, with a separate budget for which it is accountable.

Powers of the registered organisations regulator

50. In addition, the regulator must have sufficient information-gathering, investigatory and enforcement powers to enable it to carry out its functions. The powers reposed in ASIC provide a useful comparison.

51. The current powers of the General Manager in relation to conducting investigations and inquiries are set out in Part 4 of chapter 11 of the FW(RO) Act. These powers are confined in a number of significant respects.

52. *First*, the General Manager may generally only conduct inquiries or investigations into limited aspects of the FW(RO) Act.[36] Specifically, inquiries and investigations may only be conducted into whether:

(a) Part 3 of chapter 8 of the FW(RO) Act, which deals with the accounts and audit of registered organisations, or the reporting guidelines or regulations made under that Part, is being complied with;

(b) the rules of a reporting unit[37] 'relating to its finances or financial administration' are being complied with; or

(c) a civil penalty provision has been contravened.

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[36] The General Manager also has the power to conduct an investigation in certain other limited circumstances: see *Fair Work (Registered Organisations) Act* 2009 (Cth), ss 332-334.

[37] Where an organisation is not divided into branches, the reporting unit is the whole of the organisation. Where an organisation is divided into branches, each branch is a reporting unit: see *Fair Work (Registered Organisations) Act* 2009 (Cth), s 242.

53. It is unclear what is meant by the rules of a reporting unit 'relating to its finances or financial administration'. For example, does this include rules concerning the conduct of officers (for example, training requirements, disclosure of material personal interests) that may affect the reporting unit's finances? More significantly, the General Manager cannot conduct an inquiry or investigation into whether a criminal offence, such as the offence under s 190 of the FW(RO) Act relating to the use of an organisation's funds, has been committed. This may be contrasted with ASIC's power to conduct investigations where it has reason to suspect that there may have been a contravention of the corporations legislation (other than certain minor excluded provisions).[38]

54. *Secondly*, the General Manager (or authorised delegate) may require persons to give information, produce documents, or answer questions relating to matters relevant to an investigation. But there are limits on the General Manager's powers.

(a) Unlike ASIC,[39] the General Manager has no power to require the answers to be given under oath or affirmation. The penalty for giving false or misleading information to the General Manager is minimal. The maximum penalty for an individual is a fine of 30 penalty units (currently $5,400).[40]

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[38] *Australian Securities and Investment Commission Act* 2001 (Cth), s 13(1)(a).

[39] Cf *Australian Securities and Investments Commission Act* 2001 (Cth), s 19(2). See also, *Competition and Consumer Act* 2010 (Cth), s 155 in relation to the Australian Competition and Consumer Commission.

[40] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 337(1)(b), (c).

(b) These powers only apply in the first instance to certain limited officers and employees (or former officers and employees) or auditors of a reporting unit.[41] It is not until the General Manager has first sought the information from those persons, that the General Manager can seek information from other persons. The ACTU has sought to justify this approach on the basis that the 'first line of investigation should … be the persons who are most likely to have the information the regulator seeks'.[42] It has also submitted that 'it is almost inconceivable that any person' outside the limited group of officers and employees (or former officers and employees) or auditors could 'provide any information of value to investigators'.[43] Both of these submissions are remarkably unimaginative. Banks, telecommunication companies and third party suppliers can all provide highly useful information to investigators. To take one simple example, an investigation into possible inappropriate use of a union credit card will often begin by an examination of the credit card statements. The best way of obtaining such records is to seek their production from the credit card supplier. Further, the consequence of the current arrangements is that a person under investigation will often be the person to whom the request for information or documents will be made or will

[41] Cf *Australian Securities and Investments Commission Act* 2001 (Cth), s 19(1) which applies to any person.

[42] Australian Council of Trade Unions, Submissions to the Senate Education and Employment Committee on the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), 30/6/15, p 14.

[43] Australian Council of Trade Unions, Submissions to the Senate Education and Employment Legislation Committee on the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 35.

otherwise be 'tipped off' at a very early stage of the investigation. The ACTU have also asserted that the General Manager has, under s 335(2)(b) of the FW(RO) Act, a greater power than ASIC to require certain persons to access documents on the regulator's behalf and supply them to the regulator.[44] This is not correct in two respects. First, what s 335(2)(b) in fact does is to empower the General Manager to require a person to produce documents in that person's custody or control or to which that person has access. Secondly, ASIC has a power to require a person to give ASIC 'all reasonable assistance' in connection with an investigation which includes the power to require a person to produce documents to which they have access.

(c) The maximum penalties for not complying with a notice are minimal. The maximum penalty is a fine of 30 penalty units (currently $5,400).[45] This may be contrasted with a maximum fine of 100 penalty units (currently $18,000) or 2 years' imprisonment, or both, for a similar failure under the *Australian Securities and Investments Commission Act* 2001 (Cth).[46]

(d) Unlike ASIC,[47] the General Manager has no general power to inspect a registered organisation's books and records for the

[44] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee on the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), 30/6/15, p 14.

[45] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 337.

[46] *Australian Securities and Investments Commission Act* 2001 (Cth), s 63.

[47] *Australian Securities and Investments Commission Act* 2001 (Cth), s 28(b), 30.

purposes of ensuring compliance with the FW(RO) Act. That power would be useful in conducting 'random audits' of registered organisations to ensure proper accounting practices are being carried out.

(e) Unlike ASIC,[48] the General Manager has no power to seek a warrant from a court to seize books or documents.

55. *Thirdly*, although the FW(RO) Act abolishes the privilege against self-incrimination so that a person cannot refuse to give information, produce a document or answer a question on the ground that to do so might incriminate the person or expose the person to penalty, the Act creates:

(a) a broad 'direct immunity' in relation to documents produced;[49] and

(b) an even broader 'derivative use' immunity that prevents '*any information, document or thing obtained as a direct or indirect consequence* of giving the information, producing the document or answering the question' from being used against the person in a criminal proceeding (other than in relation to failing to answer) or proceeding for a penalty.[50]

56. The latter, particularly having regard to the words 'direct *or indirect* consequence', is a significant fetter on any proceeding being

[48] *Australian Securities and Investments Commission Act* 2001 (Cth), ss 35-37.

[49] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 337(5)(a).

[50] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 337(5)(c).

commenced subsequent to an investigation. There were equivalent provisions in the *Australian Securities Commission Act* 1989 (Cth). But they were repealed in 1992 after they caused serious difficulties in criminal prosecutions[51] and the same difficulties apply in relation to proceedings for a penalty. Without the derivative use immunity, the direct immunity in relation to documents is of limited utility. On its own the direct immunity has the consequence that if documents are produced by a person in relation to an investigation, they cannot be used against the person. Yet, subject to the possibility that the documents have been lost or have been destroyed in a 'clean up', the documents could be obtained again, either by subpoena in a proceeding for a civil penalty or in relation to a criminal offence, by the police obtaining and executing search warrants.

57. In addition to these limitations on the General Manager's investigatory powers, the General Manager has limitations on its enforcement powers:

(a) Although the General Manager may investigate whether 'rules of a reporting unit relating to its finances or financial administration' have been contravened, the General Manager can only take action under s 336 if the General Manager is satisfied that the *reporting unit* has contravened the rule. If so satisfied, the General Manager may issue a notice to a

[51] See Explanatory Memorandum to *Corporations Legislation (Evidence) Amendment Bill* 1992 (Cth), pp 1-2. See Joint Statutory Committee on Corporations and Securities, 'Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law' (1991), [3.1.5]; Sofronoff P, 'Derivative use immunity and the investigation of Corporate wrongdoing' (1994) *10 QUTLJ* 122 at 129-130, 134, Australian Law Reform Commission *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Interim Report 127, 3/8/15), [12.96]-[12.97].

reporting unit 'requesting that *the reporting unit* take specified action' to rectify a contravention,[52] and the Federal Court may make appropriate orders to ensure that the reporting unit complies with the General Manager's request.[53] The consequence is that where the rule is one that requires a particular officer to do something, rather than a reporting unit (for example, undertake training, disclose material personal interests), the General Manager has no power under s 336 to do anything about a breach of such a provision. The General Manager could seek a bare declaration of breach but there would rarely be any public interest in doing so given the time and expense involved.

(b) Unlike ASIC,[54] the General Manager has no power to accept an 'enforceable undertaking'. ASIC has the power to accept an 'enforceable undertaking' from a person in relation to any of ASIC's powers or functions. Breach of the undertaking allows ASIC to apply to a Court for immediate relief.

58. The *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth) provided for information-gathering and investigatory powers to be given to the proposed Registered Organisations Commission based on the powers conferred on ASIC under Part 3 of the *Australian Securities and Investments Commission Act* 2001 (Cth).

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[52] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 336(2)(a). Breach of the rules is not a civil penalty provision or criminal offence so the other options available to the General Manager under s 336 do not apply.

[53] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 336(4), (5).

[54] *Australian Securities and Investments Commission Act* 2001 (Cth), s 93AA.

As noted above, that Bill was rejected by the Senate on 17 August 2015.

59. Submissions made to the Commission by the Australian Chamber of Commerce and Industry,[55] Master Builders Australia[56] and Boral[57] supported the amendments proposed in the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth). The Institute of Public Affairs submitted that the:[58]

> …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.

60. On the other hand, the ACTU has rejected the suggestion that the regulator should have powers similar to those of ASIC.[59] A number of its submissions have been examined above. A number of its other submissions proceed on the basis that conferring on the Registered Organisations Commissions powers similar to ASIC could only be intended to 'spook' or 'intimidate' members or registered organisations or to engage in 'state sanctioned harassment'.[60] There is nothing to

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[55] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 12.

[56] Master Builders Law Reform Submissions, 21/8/15, p 7.

[57] Boral Law Reform Submissions, 2015 (received 27/8/15), p 5.

[58] Institute of Public Affairs Law Reform Submissions, August 2015, p 11.

[59] Australian Council of Trade Unions, Submission to the Senate Committee on Education and Employment Legislation Committee on the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, pp 34-36; Australian Council of Trade Unions, Submission to the Senate Committee on Education and Employment Legislation Committee on the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), 30/6/15, pp 13-17.

[60] Australian Council of Trade Unions, Submission to the Senate Committee on Education and Employment Legislation Committee on the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), 30/6/15, pp 14-15.

suggest that ASIC, or any other regulator, engages in any of these practices. And there is nothing to suggest that the regulator of registered organisations would do so either.

61. A more compelling point that the ACTU has made is that many of the investigations currently conducted by the General Manager may not reveal any contravention of the law but reveal a need for an organisation or reporting unit to improve its practices.[61] That is no doubt correct. That strongly supports a grant to the regulator of registered organisations of a power to accept enforceable undertakings. However, it provides no reason why the regulator of registered organisations should not have an appropriately balanced range of powers to deal with all eventualities to ensure that it can deal effectively with unlawful conduct.

Recommendation 5

Sections 330 and 331 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended to allow the registered organisations regulator to make inquiries and conduct investigations as to whether criminal offences contrary to the *Fair Work (Registered Organisations) Act* 2009 (Cth) have occurred. The meaning of the 'rules of a reporting unit relating to its finances or financial administration' be clarified to include any rules concerning officers or employees that may have a direct or indirect effect on the finances or financial administration of a reporting unit.

[61] Australian Council of Trade Unions, Submission to the Senate Committee on Education and Employment Legislation Committee on the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 34.

Recommendation 6

The registered organisations regulator have information-gathering and investigative powers similar to those conferred on the Australian Securities and Investments Commission. In particular, the registered organisations regulator be given a general power to inspect the books and records of an organisation for the purpose of ensuring compliance with the *Fair Work (Registered Organisations) Act* 2009 (Cth).

Recommendation 7

Amendments be made to the *Fair Work (Registered Organisations) Act* 2009 (Cth) to amplify the existing enforcement powers of the registered organisations regulator. In particular:

(a) ss 336(1) and 336(2)(a) be amended to clarify that the registered organisations regulator may take action in relation to breaches of rules by persons other than a reporting unit; and

(b) the registered organisations regulator have a power to accept an enforceable undertaking.

D – FINANCIAL ACCOUNTABIILITY

62. This part of the Chapter considers a range of possible reforms to assist in improving the financial accountability of registered organisations.

The Discussion Paper raised a number of questions about this topic[62] and the Commission received a broad range of submissions in response.[63]

Training of officers and employees

63. In 2012, the former Labor government introduced, in the *Fair Work (Registered Organisations) Amendment Act* 2012 (Cth), a number of amendments to the FW(RO) Act which sought to improve union governance. One of the significant reforms was the introduction of s 154D to the FW(RO) Act. That section relevantly provides:

> (1) The rules of an organisation or branch of an organisation must require each officer of the organisation or the branch (as the case may be) whose duties include duties (***financial duties***) that relate to the financial management of the organisation or the branch (as the case may be) to undertake training:
>
> (a) approved by the General Manager under section 154C; and
>
> (b) that covers each of the officer's financial duties.

64. Section 154C enables the General Manager to approve training if satisfied that the training covers one or more of the duties of officers of organisations and branches that relate to the financial management of

[62] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform*, 19/5/15, ch 3.4 (Questions 8-17).

[63] Australian Industry Group Law Reform Submissions, 21/8/15, pp 4-6; Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, pp 12-15; Associations Forum Pty Ltd Law Reform Submissions, 4/9/15, p 3; Boral Limited Law Reform Submissions, 2015 (received 27/8/15) pp 10-13; Master Builders Australia Law Reform Submissions, 21/8/15, pp 10-16; Victoria Police Law Reform Submissions, 10/9/15, pp 33-34; Woden Contractors Pty Ltd Law Reform Submissions, 24/8/15, pp 12-13.

organisations or branches. The training must be completed within six months after the person begins to hold office.

65. The goal of the provision is laudatory. But there are three main problems with the drafting.

66. *First*, s 154D imposes no direct obligation. It only creates a requirement as to the content of the rules. The General Manager's powers to enforce the rules are limited. As discussed above,[64] the General Manager does not have a power to take action under s 336 in relation to breaches of rules by persons other than the reporting unit itself. Thus, if an officer fails to undertake training, the General Manager cannot presently take action to remedy that failure (other than seeking a bare declaration, which as explained does little to serve the public interest).

67. *Secondly*, s 154D does not apply to any employees of the union. As the case study concerning the NUW, New South Wales Branch illustrates, employees of an organisation can have a significant degree of control over union finances. It is important that employees of an organisation that are involved in the finances or the financial administration of that organisation are also required to undertake training.

68. *Thirdly*, it is not clear that s 154D applies to all members of the committee of management of an organisation or branch. It is essential that all members of the committee of management have such training.

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[64] Paragraph 57.

69. Recommendation 7, if implemented, would alleviate the third problem. The first and second problems would be alleviated by amendments to the wording of s 154D.

70. However, amending s 154D would create other problems. Rule changes are costly and time consuming both for the organisations and branches involved and for the General Manager. An easier solution would be to repeal s 154D and replace it with a direct statutory obligation on officers to complete approved training. Given the protective purpose of the section, it does not seem appropriate to impose a monetary penalty on an officer who fails to complete the required training within the prescribed six months. Nor is it appropriate to penalise the organisation or branch for the officer's failure to complete training.

71. Instead, the registered organisations regulator should be empowered to disqualify a person who does not complete the required training from acting as an officer of an organisation or branch for a period of up to two years, provided that:

(a) the registered organisations regulator is satisfied that the person has not completed the required training; and

(b) the registered organisations regulator has provided the person with an opportunity to show cause why the person should not be disqualified.

72. In relation to employees required to undertake the training, there should be an obligation upon the Secretary, or other person with day-

to-day control of the organisation or branch, to ensure that those employees complete the training within six months after commencing employment at the organisation. A similar disqualification process should be available in relation to a Secretary who fails, without reasonable excuse, to ensure that relevant employees have conducted approved training.

Recommendation 8

Section 154D of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be repealed and replaced with a statutory provision requiring:

(a) all members of the committee of management of an organisation or branch, and all officers whose duties relate to the financial management of the organisation or branch, to undertake approved training; and

(b) the Secretary of an organisation or branch to ensure that employees of the organisation or branch involved with the finances or financial administration of the organisation or branch complete approved training.

The registered organisations regulator's power to conduct inquiries and investigations should include contraventions of this statutory provision. Contravention by a person of the statutory obligations should entitle the registered organisation regulator to disqualify the person from acting as an officer of an organisation or branch for a period of up to two years.

Requirements to have financial policies

73. Another reform introduced by the *Fair Work (Registered Organisations) Amendment Act* 2012 (Cth) was the introduction of s 141(1)(ca) which required each organisation to have rules requiring:

> …the organisation and each of its branches to develop and implement policies relating to the expenditure of the organisation or the branch (as the case may be).

74. Again, although this obligation is laudatory its ineffectiveness was demonstrated in the NUW, New South Wales branch case study. Consistently with the statutory requirement, the federal rules of the NUW contained the following:[65]

> The Union and its branches shall have in operation appropriate policies relating to the expenditure of the organisation and each branch.

75. The rule, which is in accordance with 'model rules' published by the Minister for Workplace Relations,[66] provides no guidance on the types or kinds of 'appropriate policies' and even whether they should be in writing. In fact, there was no evidence that the New South Wales branch of the federal union had adopted any formal or written policies concerning expenditure.

[65] NUW National Rules, NUW MFI-13, 5/11/15, r 14E.

[66] Guidelines Containing Model Rules Under the *Fair Work (Registered Organisations) Act* 2009 (Cth), March 2013, Gazette C2015G00378.

76. Developing and adopting financial policies is a basic good governance measure. The Report to the ACTU Executive by the Independent Panel on Best Practice for Union Governance recommended that:[67]

> Unions should develop a comprehensive documented set of policies and procedures governing the management of union funds, and consolidate it into an appropriate policies and procedures manual.

77. The recommendation went on to recommend that unions develop policies covering a total of 14 topics including:[68]

(a) how financial decisions are to be made and reported;

(b) the levels of authority or delegated authority of various persons and bodies;

(c) the establishment, operation and governance of any subsidiary or other entity related to the union;

(d) major procurements and the review of major costs areas and significant supply and service contracts on an annual basis;

(e) basic market testing by seeking at least two quotations for smaller but still substantial purchases;

(f) hospitality and gifts;

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[67] Independent Panel on Best Practice for Union Governance, *Report to ACTU Executive to Invite Comment and Discussion,* March 2013, p 6.

[68] Independent Panel on Best Practice for Union Governance, *Report to ACTU Executive to Invite Comment and Discussion,* March 2013, pp 6-7.

(g) the issuance and use of, and accountability for, credit cards; and

(h) employment and remuneration of officers and staff.

78. The law in Queensland provides a useful comparison to the FW(RO) Act. Section 553A of the *Industrial Relations Act* 1999 (Qld) imposes a statutory obligation on Queensland-registered organisations to have a policy, complying with the requirements prescribed in regulations, in relation to a number of specific topics. The topics are:

(a) decision-making concerning financial matters;

(b) authorisation and delegations relating to the organisation's spending;

(c) the organisation's credit cards;

(d) the organisation's contracting activities;

(e) travel and accommodation;

(f) spending on, and receipt of, entertainment and hospitality;

(g) gifts;

(h) how complaints about financial matters are dealt with; and

(i) matters relating to the financial management or accountability of the organisation prescribed under a regulation.

79. Breach of the obligation is an offence carrying a maximum penalty of 85 penalty units (currently equivalent to $10,013).

80. Having regard to the importance of organisations adopting proper financial policies, it is recommended that the Queensland legislative model be adopted and adapted to organisations and branches or organisations registered under the FW(RO) Act. Contravention should attract a civil penalty, rather than be a criminal offence. In addition, organisations and branches should be required to review their policies on a regular basis (say every four years to reflect the term of office in many organisations) and to lodge a copy of their current policies with the registered organisations regulator.

Recommendation 9

Section 141(1)(ca) of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be repealed. A new civil penalty provision be introduced requiring organisations and branches to adopt, in accordance with their rules, policies binding on all officers and employees concerning financial management and accountability.

The required policies should include policies concerning financial decision-making, receipting of money, levels of authorisation of expenditure, credit cards, procurement, hospitality and gifts, the establishment, operation and governance of related entities and any other matter prescribed by regulations.

Organisations or branches should be required to review their policies every four years and to lodge a copy of their current policies with the registered organisations regulator.

Financial disclosure requirements by organisations and branches

81. Another measure to improve financial accountability is to increase the disclosure of financial information to members and the public. For example, if members of the New South Wales branch of the NUW had known that hundreds of thousands of dollars were being spent annually on credit cards, it may have prompted more questions to be asked.

82. At present, the FW(RO) Act achieves financial disclosure in three main ways.

83. The *first* way is through 's 237 statements'. Section 237(1) of the FW(RO) Act obliges organisations (and branches of organisations, where an organisation is made up of branches) to lodge with the Fair Work Commission (within 90 days of the end of each financial year or such longer period as the General Manager allows) a statement that identifies relevant particulars in relation to each loan, grant or donation of an amount exceeding $1,000 made by an organisation. The s 237 statement must be signed by an officer of the organisation or branch.[69] The statement is not publicly available, but may be inspected by a member of the organisation or branch concerned during office hours.[70]

84. The *second* way is through annual financial reports.

85. Part 3 of chapter 8 of the FW(RO) Act provides for a number of obligations on 'reporting units' in relation to financial records,

[69] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 237(2).

[70] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 237(4).

accounting and auditing. Where an organisation is not divided into branches, the reporting unit is the whole of the organisation. Where an organisation is divided into branches, each branch is a reporting unit.[71]

86. At present, reporting units are required to prepare a general purpose financial report annually.[72] The report must be prepared in accordance with the Australian Accounting Standards and reporting guidelines issued by the General Manager under s 255. Currently, pursuant to the reporting guidelines all reporting units are required to apply the Tier 1 reporting requirements. Further, the current reporting guidelines require that the report must contain certain declarations by the committee of management and must be signed by a 'designated officer' within the meaning of s 243 of the FW(RO) Act.[73]

87. In addition to the general purpose financial report, the committee of management must prepare an operating report.[74] The financial report must be audited by an 'approved auditor'.[75] Following the audit, the reporting unit must provide a full report to members free of charge consisting of the auditor's report, the financial report and the operating report, or provide a concise report in accordance with s 265 of the FW(RO) Act. The full report must also be presented to a general

[71] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 242.

[72] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 253.

[73] A 'designated officer' is an officer of the reporting unit who, under the rules of the reporting unit, is responsible (whether alone or with others) for undertaking the functions necessary to enable the reporting unit to comply with Part 3 of Ch 8 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

[74] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 254.

[75] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 257.

meeting of members of the reporting unit[76] and subsequently be lodged with the Fair Work Commission.[77]

88. The *third* way is through a number of provisions requiring organisations and branches to have rules requiring the organisation and branch to disclose certain information to their members. These provisions were introduced by the *Fair Work (Registered Organisations) Amendment Act* 2012 (Cth) and commenced operation on 1 January 2014. In summary:

(a) Section 148A(4) requires organisations to have rules requiring the disclosure to members of the organisation of the identity of the five officers who have the largest 'relevant remuneration'.[78] For each of those officers, the rules must also require the disclosure of (a) either the actual amount of the officer's relevant remuneration *or the information specified in the rules* as being 'considered by the organisation' to be an appropriate disclosure[79] and (b) certain information in relation to non-cash benefits provided to the officer.[80]

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[76] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 266.

[77] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 268.

[78] 'Relevant remuneration' is defined as the remuneration paid to the officer by the organisation plus any relevant remuneration disclosed to the organisation by the officer pursuant to s 148A(1) of the *Fair Work (Registered Organisations) Act* 2009 (Cth). That subsection requires the rules to require the officer to disclose to the organisation remuneration paid to the officer (a) as a member of a Board or (b) by a related party of the organisation, in connection with the performance of the officer's duties.

[79] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 148A(6).

[80] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 148A(7).

(b) Section 148A(5) requires branches of organisations to have similar rules, but they need only identify the two officers who have the largest 'relevant remuneration'.[81] The information that must be disclosed is the same as in the case of organisations.

(c) Section 148B requires organisations and branches to have rules requiring the disclosure to members of the organisation and its branches of material personal interests disclosed by the officers.[82] Those obligations are examined in Chapter 3 of this Volume.

(d) Section 148C requires organisations and branches to have rules requiring the organisation or branch to disclose payments made by the organisation or branch to a related party.[83] Those obligations are examined in Chapter 5 of this Volume.

89. Apart from issues that arise in relation to ss 148B and 148C (which are considered in Chapters 3 and 5 of this Volume respectively), there are a number of problematic issues with the present financial disclosure regime.

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[81] 'Relevant remuneration' is defined as the remuneration paid to the officer by the branch plus any relevant remuneration disclosed to the organisation by the officer pursuant to s 148A(2) of the *Fair Work (Registered Organisations) Act* 2009 (Cth). That subsection requires the rules to require the officer to disclose to the branch remuneration paid to the officer (a) as a member of a Board or (b) by a related party of the branch, in connection with the performance of the officer's duties.

[82] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 148B.

[83] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 148C.

90. *First*, s 237 statements, the apparent purpose of which is to provide more detailed information concerning loans, grants and donations than appears in the annual reports are only available to a member upon request to the General Manager. In contrast, the annual reports are freely available online.

91. *Secondly*, there is no requirement that s 237 statements be audited. Nor is there any requirement that the s 237 statements be approved by the committee of management, although that may occur in practice.

92. *Thirdly*, understanding union accounts requires a high degree of financial literacy. Further, most union accounts are very lengthy and complex. Disclosures of financial remuneration and related party transactions are invariably buried deep within the document. Accordingly, they are of limited value.

93. *Fourthly*, s 148A has a number of problems:

(a) It does not actually require the rules to disclose the remuneration of the relevant officers, but permits a rule that allows for disclosure of information that the branch considers appropriate disclosure.

(b) Most unions and branches satisfy the current requirement by including a note to the annual financial statements. However, the Commission observed numerous financial reports for the 2014 financial year which simply did not include the disclosure required by the rules.

(c) The only consequence of an organisation or branch failing to include the required disclosure is that the General Manager may, ultimately,[84] issue a notice to the relevant organisation or branch to comply with the rule. If the branch or organisation fails to comply, the General Manager can commence action in the Federal Court to make orders to require the branch or organisation to comply.[85] However, such proceedings are expensive, and in all likelihood time consuming, and there is no civil penalty for failing to comply.

(d) The obligation of the organisation or branch to disclose 'relevant remuneration' depends on the obligation of the officer under the rules required by ss 148A(1) and 148A(2) to disclose remuneration received from related parties and others. As has been previously discussed, the General Manager presently has no ability to enforce the rules made in accordance with those subsections as they are rules requiring a person other than a 'reporting unit' to do something.

94. *Fifthly*, the scope of the financial disclosures is limited. The legislation in Queensland provides a useful comparison. Division 2A of Part 12 of chapter 12 of the *Industrial Relations Act* 1999 (Qld) requires Queensland registered industrial organisations to keep a number of 'registers'. The required registers are registers of:

[84] See *Fair Work (Registered Organisations) Act* 2009 (Cth), s 336(2)(a).

[85] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 336(5).

(a) gifts, hospitality and other benefits given and received;[86]

(b) political expenditure in excess of $10,000;[87]

(c) credit card and cab charge expenditure, including copies of credit card statements;[88] and

(d) loans, grants and donations in excess of $1,000.[89]

The registers must be kept for seven years and are available to the public for inspection.[90] Further, they must be published for two years either on the organisation's website or on the website of the Queensland Industrial Relations Commission.[91] Breach of these requirements is a civil remedy provision.[92]

95. Further, s 237 does not require disclosure of 'in kind' benefits such as the provision of free services. Another limitation is that the s 237 statements only require disclosure of loans, grants and donations made *by* the organisation or branch, not loans, grants and donations made *to* an organisation or branch. This issue is discussed in detail in Chapter 4 of this Volume.

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[86] *Industrial Relations Act* 1999 (Qld), s 557A.

[87] *Industrial Relations Act* 1999 (Qld), s 557B.

[88] *Industrial Relations Act* 1999 (Qld), s 557C.

[89] *Industrial Relations Act* 1999 (Qld), s 557E.

[90] *Industrial Relations Act* 1999 (Qld), ss 557H-557I.

[91] See *Industrial Relations Act* 1999 (Qld), ss 557F, 655A.

[92] *Industrial Relations Act* 1999 (Qld), ss 557H, 557F.

96. *Sixthly*, although s 237 and the sections imposing obligations to prepare and lodge financial reports are civil penalty provisions, the penalties for contraventions of these provisions by a branch are imposed on the organisation as a whole,[93] rather on than the particular officers responsible for the contravention. Thus, the failure by one branch properly to comply with its obligations could lead to a civil penalty being imposed against the whole organisation in circumstances where the branch operates autonomously. To avoid this consequence, it may be appropriate to impose civil penalties on 'designated officers'[94] of a reporting unit if they fail to take all reasonable steps to ensure compliance by the reporting unit with its financial obligations under the FW(RO) Act.[95]

97. Having regard to the deficiencies identified above, it is recommended that a self-contained financial disclosure regime be introduced to the FW(RO) Act as a new division of Part 3 of chapter 8. That regime would be designed to supplement the existing provisions concerning annual financial reports by requiring reporting units to prepare a number of short separate 'financial disclosure statements' dealing with discrete topics, similar to the existing s 237 statement. The financial disclosure statements should be approved by the committee of management of the reporting unit, and signed by the Secretary and financial compliance officer.[96]

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[93] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 305(3).

[94] Currently defined in s 243 to mean an officer of a reporting unit who under the rules of the reporting unit is responsible for undertaking the functions necessary to enable the reporting unit to comply with Part 3 of Chapter 8.

[95] See *Corporations Act* 2001 (Cth), s 344(1).

[96] See paras 102-109 below.

98. As is currently the position in relation to s 237, failure to lodge the financial disclosure statements within the prescribed period should be a civil penalty provision. Civil penalties should also apply to designated officers who knowingly or recklessly make a false statement in a financial disclosure statement.

99. The financial disclosure statements should include a statement in relation to:

(a) Loans, grants and donations, including in-kind donations, made *by* the reporting unit exceeding $1,000 (including a series of payment or in-kind benefits that together exceed $1,000). This would replace the existing s 237 statements.

(b) Remuneration of the highest paid officers of a reporting unit. The detail required should be similar to that currently required by s 148A but in addition should require the amount and a breakdown of the remuneration to be disclosed. Further, the provision should make clear that organisations must disclose the highest remunerated officers taking into account remuneration paid by branches. Currently, some organisations only disclose the remuneration of officers who are paid by the organisation rather than a branch.

(c) Credit card and charge card expenditure by officers of the reporting unit, including the credit card statements themselves.

100. Chapter 4 of this Volume considers an additional financial disclosure statement relating to donations and other payments made *to* an organisation or branch.

101. To ensure members have easy access to this information, the financial disclosure statements should be publicly available on the Regulator's website.

Recommendation 10

A new division dealing with financial disclosures by 'reporting units' to their members be introduced to Part 3 of Chapter 8 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) to replace and strengthen existing provisions concerning financial disclosure. The regime would require 'reporting units' to lodge audited financial disclosure statements with the registered organisations regulator on discrete topics, including (a) loans, grants and donations by the reporting unit, (b) remuneration of officers and (c) credit card expenditure.

Civil penalties should apply to reporting units that fail to comply with their obligations under the regime. Further, civil penalties should also apply to officers who knowingly or recklessly make a false statement in a financial disclosure statement.

Recommendation 11

Officers with responsibility for ensuring compliance by a reporting unit with its financial obligations under the *Fair Work (Registered Organisations) Act* 2009 (Cth) be subject to civil penalties if they fail to take all reasonable steps to ensure the reporting unit complies with its financial obligations.

Internal compliance and audit

102. A particular problem in the case studies concerning the HSU and the NUW was the lack of any officer *at the union*, other than the Secretary, who was responsible for ensuring that the finances of the union were being managed in accordance with the law and the rules and policies of the union.

103. Although external auditing is very important[97] it is generally limited to expressing an opinion about whether an entity's financial report is prepared, in all material respects, in according with the relevant financial reporting framework.[98] There are a number of inherent limitations to an external audit that mean that even the most professionally conducted independent audit cannot pick up all cases of fraud.[99] Under the Australian auditing standards, '[t]he primary

[97] See paras 110-131 for recommended changes to the external auditing provisions of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

[98] See Auditing and Assurance Standards Board, Auditing Standard ASA 200, cll 3, 11.

[99] A fact recognised in the auditing standards: see Auditing and Assurance Standards Board, Auditing Standard ASA 200, cll A45-A52.

responsibility for the prevention and detection of fraud rests with both those charged with governance of the entity and management'.[100]

104. The result is that proper *internal* compliance and financial controls are critical to preventing corruption and misappropriation of funds.

105. To address this issue, it is recommended that reporting units be required to appoint a financial compliance officer with responsibility:

(a) for ensuring that the reporting unit complies with the provisions of the FW(RO) Act and the regulations concerning financial administration and the financial policies of the reporting unit;

(b) to report regularly to the committee of management, and any finance committee that exists, concerning the finances of the reporting unit, and in particular to report any irregularities or deficiencies in compliance with the provisions identified in (a) to the committee of management;

(c) together with the Secretary (or other person appointed under the rules of the reporting unit) to prepare the annual accounts and deal with external accountants and auditors;

(d) together with the Secretary to sign the reporting unit's financial disclosure statements;[101] and

[100] Auditing and Assurance Standards Board, Auditing Standard ASA 240, cl 4.

[101] See Recommendation 10 above.

(e) to oversee and supervise staff who occupy positions of responsibility in relation to the financial affairs of the reporting unit.

106. The requirement to appoint an officer should be a statutory requirement rather than a required rule. The first reason is that rule changes are costly and time consuming to implement. The second reason is that a direct statutory obligation is easier to enforce and more likely to be complied with. The financial compliance officer should be appointed directly by the committee of management, having regard to the character, experience, and any relevant financial training and qualifications of the individual. Failure to appoint such an officer within a three month period, and to notify a change of officer within one month should be a civil penalty provision.

107. Given the varying sizes of registered organisations and the fact that some organisations are run largely by volunteers, it is not appropriate to mandate legislatively any minimum qualification or training, or that the person holding office be an employed officer. The financial compliance officer could be an existing officer of the reporting unit, who took on the role of finance compliance officer in addition to his or her existing duties. The object of this proposal is to ensure that there is at least one officer of the reporting unit *in addition to, and sufficiently independent of*, the Secretary who is aware of and responsible for financial management.

108. It is critical that the financial compliance officer be different from the Secretary to avoid a repeat of the situation that arose in the operation of

the HSU and the NUW, New South Wales branch whereby the Secretary was effectively solely in charge of the finances.

109. The financial compliance officer should be subject to a statutory obligation to report any reasonably suspected breach of the FW(RO) Act or regulations or reporting guidelines made under it in relation to financial administration, or any of the reporting unit's financial policies or rules concerning finances to the committee of management. Contravention should be a civil penalty provision. Such reports should be recorded in the minutes.

Recommendation 12

All reporting units be required to appoint a financial compliance officer with responsibility for ensuring compliance by the reporting unit with its financial obligations under the *Fair Work (Registered Organisations) Act* 2009 (Cth), regulations and reporting guidelines and the reporting unit's financial policies and rules concerning finances. The financial compliance officer must be separate and independent from the Secretary. The compliance officer be subject to a statutory obligation to report any reasonably suspected breaches to the committee of management.

External auditing

110. As noted above, external auditing is also extremely important. The failure of the auditors to detect the substantial misappropriation of funds in the HSU Vic No 3 Branch and the NUW, New South Wales branch raises a number of questions about the efficacy of the existing

system. In addition, the financial reports for a number of branches and organisations reveal that the same auditor has audited the branch or organisation over many years.

111. The Discussion Paper identified a number of potential issues with the existing audit requirements under the FW(RO) Act.[102]

112. One issue identified in the Discussion Paper was the absence of any requirement that auditors of reporting units be registered with ASIC.[103] Currently, audits must be conducted by 'approved auditors'. An 'approved auditor' is any person who is a member of CPA Australia, The Institute of Chartered Accountants in Australia or the Institute of Public Accountants and holds a current Public Practice Certificate.[104] However, a person whose registration as an auditor has been suspended under the *Corporations Act* 2001 (Cth) is not an approved auditor while the suspension is in force.

113. In contrast, company auditors must be registered with ASIC.[105] In order to be registered, company auditors must have certain academic qualifications and professional competency standards. They must also satisfy ASIC that they are capable of performing the duties of an auditor and otherwise be 'fit and proper'.[106] The *Corporations Act* 2001 (Cth) also contains detailed provisions in relation to the power of

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[102] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform,* 19/5/15, pp 31-32.

[103] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform,* 19/5/15, pp 31-32; q 11.

[104] *Fair Work (Registered Organisations) Regulations* 2009 (Cth), r 4.

[105] See *Corporations Act* 2001 (Cth), s 324BA.

[106] *Corporations Act* 2001 (Cth), s 1280.

the Companies Auditors and Liquidators Disciplinary Board, on the application of ASIC, to cancel or suspend the registration of a registered auditor.[107]

114. Some submissions to the Commission advocated requiring auditors of registered organisations to be registered with ASIC.[108] On the other hand, Master Builders Australia submitted that prima facie no change in qualifications were required.[109]

115. One difficulty with requiring all auditors of registered organisations to be registered company auditors is that there are considerably fewer registered company auditors than persons with the currently prescribed accounting qualifications. It is therefore likely that requiring auditors to be registered company auditors would increase, perhaps substantially, the cost of compliance on reporting units.

116. At the same time, the absence of (a) any requirement that the persons auditing reporting units must be 'fit and proper' and (b) any ability on the part of the registered organisations regulator to seek to prevent a person from auditing an organisation, are serious defects in the current legislative regime.

117. The Australian Labor Party has proposed that auditors of reporting units should be registered either with the Fair Work Commission or be

[107] *Corporations Act* 2001 (Cth), s 1292 and following.

[108] Associations Forum Pty Ltd Law Reform Submissions, 4/9/15, p 3; Boral Law Reform Submissions, 2015 (received 27/8/15) p 10.

[109] Master Builders Australia Law Reform Submissions, 21/8/15, p 11.

a registered auditor.[110] It appears to be proposed that the Fair Work Commission would not register a person as an auditor unless, in addition to the current qualifications, the person is of 'good character'.

118. There is considerable merit to this approach. However, rather than having two parallel regimes it is recommended that it be a requirement that all auditors of reporting units must be registered with the registered organisations regulator. The reason is that the registered organisations regulator should have a power to prevent inappropriate persons from auditing reporting units (for example persons who are not fit and proper or have failed to carry out the duties of an auditor) and the most convenient way of achieving this is if all auditors are required to be registered and the registered organisations regulator has the power to suspend or cancel registration. Registered company auditors would automatically be entitled to be registered with the registered organisations regulator. Persons who are not registered company auditors would need to satisfy the existing qualifications, and in addition satisfy the regulator that they are fit and proper persons to conduct an audit of a reporting unit.

119. A second issue identified in the Discussion Paper concerning auditors was the lack of stringent auditor independence requirements that currently apply in relation to company auditors.[111] Currently a person cannot audit a reporting unit if they are an 'excluded auditor'.[112] Similarly, a firm cannot audit a reporting unit if a member of the firm

[110] Australian Labor Party, 'Fact Sheet: Better Union Governance', released 7/12/15, p 2.

[111] *Corporations Act* 2001 (Cth), Part 2M.4, Div 3.

[112] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 256(3), (5).

is an excluded auditor.[113] Contravention of these restrictions exposes an individual to a maximum civil penalty of 60 penalty units ($10,800) and a body corporate to a maximum civil penalty of 300 penalty units ($54,000). Persons are excluded auditors if they are:[114]

> (a) an officer or employee of the reporting unit or the organisation of which the reporting unit is a part; or
>
> (b) a partner, employer or employee of an officer or employee of the reporting unit or the organisation of which the reporting unit is a part;
>
> (c) a liquidator in respect of property of the reporting unit or the organisation of which the reporting unit is a part; or
>
> (d) a person who owes more than $5,000 to the reporting unit or the organisation of which the reporting unit is part.

120. As will be apparent, the definition of excluded auditor is very narrow. A person who is a former officer or employee of the reporting unit would not be excluded. Nor would a partner, employer or employee of such a person. Nor would a person who has a close personal or financial relationship with an officer or employee of the reporting unit.

121. In contrast, the *Corporations Act* 2001 (Cth) has extremely detailed provisions dealing with auditor independence.[115]

122. It is not recommended that those provisions be copied in their entirety in respect of reporting units. For one thing, some of the provisions are extremely complex and consequently not easy to follow. However, the *Corporations Act* 2001 (Cth) does have a general exclusion that applies

[113] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 256(4), (6).

[114] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 6.

[115] See *Corporations Act* 2001 (Cth), Part 2M.4, Div 3.

where an auditor is in a 'conflict of interest situation', which will exist where, because of the circumstances:[116]

(a) the auditor is not capable of existing objective and impartial judgment in relation to the conduct of the audit; or

(b) a reasonable person, with knowledge of all of the relevant facts and circumstances, would conclude that the auditor is not capable of exercising objective and impartial judgment in relation to the conduct of the audit.

123. It would seem appropriate if the definition of 'excluded auditor' included a person in that position, as well as including persons referred to in paragraph 120.

124. The Discussion Paper also raised the issue of whether the auditor rotation requirements in the *Corporations Act* 2001 (Cth) should be applied to some or all organisations.[117] Division 5 of Part 2M.4 of the *Corporations Act* 2001 (Cth) imposes rotation requirements on auditors of listed companies in an attempt to promote further auditor independence. The auditor rotation requirements provide that:[118]

(a) an individual who has played a significant role in the audit of a listed company (for example the lead auditor or review auditor) for 5 successive financial years must wait at least 2

[116] *Corporations Act* 2001 (Cth), s 324CD.

[117] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform,* 19/5/15, pp 31-32.

[118] *Corporations Act* 2001 (Cth), s 324DA.

financial years before again playing a significant role in the audit of the company;

(b) an individual must not play a significant role in the audit of a listed company for more than 5 out of 7 successive financial years.

125. Auditor rotation assists in ensuring auditor independence. But it can also lead to additional cost to reporting units where the incoming auditor has less experience in relation to the particular reporting unit and may need time to develop specialised knowledge. The Discussion Paper raised for discussion whether, having regard to the potential compliance burdens for small organisations, auditor rotation requirements should only be applied to large organisations.[119] The Commission received few submissions on that topic, although Master Builders Australia did not believe there was merit in placing different audit requirements based on size measured by turnover or some other financial indicator.[120]

126. One difficulty with imposing differential requirements is determining an appropriate definition of a large organisation. Another relevant matter is that for smaller organisations whose finances are less complex the costs involved in using a new auditor will be relatively small. The reporting units that are most likely to incur additional compliance costs for auditor rotation are those reporting units which have the most complex finances. In other words, the regulatory burden

[119] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform*, 19/5/15, pp 31-32.

[120] Master Builders Australia Law Reform Submissions, 21/8/15, p 11.

is unlikely to be lessened substantially if reduced requirements are imposed on smaller organisations.

127. On balance, it is recommended that the existing auditor rotation requirements for listed companies be applied to all reporting units, irrespective of size. This reform is supported by the Australian Labor Party.[121]

128. A final issue is whether there should be changes to the existing penalties for contraventions by auditors.

129. Currently, an auditor who:

(a) accepts appointment, or continues to act, whilst being an excluded auditor;[122] or

(b) makes a statement in a report that is knowingly or recklessly false or misleading;[123] or

(c) fails to report suspected breaches of the FW(RO) Act or the reporting guidelines to the General Manager, in circumstances where the auditor is of the opinion that the matter cannot be dealt with by a comment in the report or by reporting the matter to the committee of management;[124]

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[121] Australian Labor Party, 'Fact Sheet: Better Union Governance', released 7/12/15, p 2.

[122] *Fair Work (Registered Organisations) Act* 2009 (Cth), ss 256(3), 256(7).

[123] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 257(10).

[124] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 257(11).

is subject to a maximum civil penalty of 300 penalty units ($54,000) if the auditor is a body corporate or 60 penalty units ($10,800) otherwise.

130. By way of comparison:

(a) Contravention of various auditor independence requirements under the *Corporations Act* 2001 (Cth) are criminal offences with the maximum penalty for an individual of 6 months imprisonment or a fine of 25 penalty units ($4,500) or both.[125] The maximum penalty for a body corporate is 125 penalty units ($22,500).[126]

(b) Under the *Corporations Act* 2001 (Cth) there is requirement to notify ASIC in writing if the auditor has reasonable grounds to suspect a contravention of the *Corporations Act* 2001 (Cth) and either (a) the contravention is a significant one or (b) the contravention is not significant and the auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors.[127] An individual who contravenes this requirement commits a criminal offence, the maximum penalty for which is 50 penalty units ($9,000) or imprisonment for 1 year, or both.[128]

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[125] See, for example, *Corporations Act* 2001 (Cth), Sch 3, item 116CA, 116CC, 116CE, 116DA, 116EA, 116FA, 116FC.

[126] *Corporations Act 2001* (Cth), s 1312(1).

[127] *Corporations Act* 2001 (Cth), s 311.

[128] *Corporations Act* 2001 (Cth), Sch 3, item 105.

The maximum penalty for a body corporate is 250 penalty units ($45,000).[129]

131. Thus, in terms of monetary penalties the existing penalties under the FW(RO) Act are *higher* than those under the *Corporations Act* 2001 (Cth). Further, because the penalties under the FW(RO) Act are civil penalties rather than criminal offences they are easier to obtain in court. Accordingly, it is not recommended that the existing civil penalties under the FW(RO) Act be made into criminal offences. Rather, the maximum civil penalties should be increased to 200 penalty units for contraventions by individuals and 1000 penalty units for contraventions by bodies corporate. The reason for the recommended increase is that the existing penalties appear to have had little effect at encouraging auditors to perform their functions. Further, a *maximum* fine of $10,800 for an auditor is, objectively, very low. Consideration should be given to increasing the penalties under the *Corporations Act* 2001 (Cth).

Recommendation 13

Auditors of reporting units be required to be registered with the registered organisations regulator. A person be entitled to be registered if the person is either (a) a registered company auditor or (b) if the registered organisations regulator is satisfied that the person has the required accounting qualifications and is a fit and proper person. The registered organisations regulator be empowered to suspend or cancel registration if satisfied that the person is (a) not a fit and proper person or (b) has failed to comply with the duties of an auditor under the *Fair Work (Registered Organisations) Act* 2009 (Cth).

[129] *Corporations Act 2001* (Cth), s 1312(1)

Recommendation 14

In order to improve auditor independence:

(a) The definition of 'excluded auditor' be expanded to include a broad class of individuals who may lack independence including any person in a 'conflict of interest situation'.

(b) The auditor rotation requirements of the *Corporations Act* 2001 (Cth) be applied to auditors of all reporting units.

Recommendation 15

The existing civil penalty provisions for contraventions by auditors be retained. However, the maximum penalty for an individual be increased from 60 penalty units to 200 penalty units, with the maximum penalty for a body corporate being 1,000 penalty units.

E – RECORD-KEEPING REQUIREMENTS

Minutes of committee of management meetings

132. A theme emerged from the Commission's inquiries, particularly in relation to the HSU and the NSW Branch of the Electrical Trades Union (**ETU**).[130] In a number of cases:

[130] See Vol 2, chs 3.1, 5.1, 5.2 of this Report.

(a) there was an absence of records of committee of management meetings;

(b) contested allegations were made about what occurred at meetings, including whether certain conduct was approved by the relevant governing body;

(c) parts of minutes said to be erroneous were confirmed at later meetings without being corrected; and

(d) certain matters had not been recorded in the minutes at the direction of the union Secretary.

133. Although registered organisations are required to keep a number of records, including its membership register[131] and financial records[132] for a minimum period of seven years, there is no requirement in relation to the keeping of minutes. Nor is there any requirement in s 141 of the FW(RO) Act that the rules of an organisation must require minute books to be kept.

134. The Discussion Paper invited submissions about whether provision should be made in the FW(RO) Act with respect to the obligations of registered organisations to make and keep minutes of committee of management meetings, and if so, what form any amendments should take. The Discussion Paper also made reference to the fact that the *Fair Work (Registered Organisations) Bill* 2014 [No 2] (Cth) included

[131] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 230(1)(a).

[132] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 252.

a provision to amend s 141(1)(b)(ii) of the FW(RO) Act to include a requirement that rules of an organisation must provide for:[133]

> (iia) the keeping of minute books in which are recorded proceedings and resolutions of meetings of committees of management of the organisation and its branches.

135. A number of submissions were received on this topic. Regard was also had to submissions on this topic in the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth) and its predecessors.

136. There were few cogent arguments against some kind of legislative requirement that registered organisations keep minutes of committee of management meetings.

137. In submissions to the inquiry by the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), the Australian Nursing and Midwifery Federation submitted that the requirement was too onerous, and that sensitive matters were often deliberately not recorded.[134] A blanket requirement to keep minutes would encourage a lack of transparency with more 'off the record discussions' and consequently reduced accountability.

138. The flaw in that submission is the assumption that any provision would be highly prescriptive about the matters that should be recorded. A

[133] *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), Sch 2, item 19.

[134] Australian Nursing and Midwifery Federation, Submission to the Senate Education and Employment References Committee Inquiry into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), January 2014, p 5.

requirement to keep minutes recording the proceedings and resolutions of committee of management meetings should not prove too onerous.

139. In its submissions to the same inquiry, the ACTU pointed out that there is no comparable provision in the replaceable rules contained in the *Corporations Act* 2001 (Cth) requiring companies to keep minutes.[135] That is true but misleading. The reason there is nothing in the replaceable rules is because s 251A creates a number of statutory obligations on all companies to keep minutes. Breach of s 251A is a criminal offence of strict liability carrying a maximum penalty of 10 penalty units ($1,800), or 3 months imprisonment or both.[136]

140. There are obvious reasons why registered organisations should make and keep minutes of committee of management meetings. Committees of management make numerous operational and financial decisions. It is therefore essential that the meetings in which those decisions are taken are properly recorded.

141. In addition or as an alternative to keeping minutes, the Discussion Paper raised whether registered organisations should be required to keep digital audio recordings of committee of management meetings to avoid the disputes that have arisen in relation the HSU and the ETU. This option is not preferred for a number of reasons. *First*, it is overly prescriptive and is not a requirement imposed on companies. *Secondly*, as noted in the submission of the Employment Law

[135] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee Inquiry into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 17.

[136] *Corporations Act* 2001 (Cth), Sch 3, item 71.

Committee of the Law Society of New South Wales, this method is open to interference by the person with control of the recording device. *Thirdly*, requiring an audio recording, as opposed to written minutes, might inhibit the free flow of discussion at meetings.

142. As to the form which a requirement to keep minutes should take, the Victorian Automobile Chamber of Commerce made the important point that rule changes are costly and time consuming for registered organisations:[137]

> While in principle VACC is not opposed to this requirement, VACC found during the process of drafting rule changes to satisfy the former government's amendments, many of our rules required multiple rewrites because they were drafted decades ago. VACC's Constitution and Rules already address this matter and, if further change is required, it will be a further time consuming and costly process. Our rules require an extraordinary meeting of members (EGM) to endorse rule changes. Notification and postage alone to all members is costly and, having had two EGMs in 2013, members are fatigued with the process and somewhat suspicious of ongoing changes to the Constitution and Rules.

143. A simpler and easier way of requiring organisations and branches to keep minutes is to impose a direct statutory obligation to keep minutes – along the lines imposed under s 251A of the *Corporations Act* 2001 (Cth). In order to ensure compliance, the provision should be a civil penalty provision.

144. In addition, registered organisations and branches should be required to keep documents and papers that are necessary to understand the minutes. Commonly, minutes of committee of management meetings record resolutions or decisions, particularly in relation to financial

[137] Victorian Automobile Chamber of Commerce, Submission of the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), 30/6/15, p. 6.

matters, that are incapable of being understood without reference to these documents. These documents may already be required to be kept under s 252 of the FW(RO) Act, but it is considered desirable to make this explicit.

Recommendation 16

A new civil penalty provision be introduced to the *Fair Work (Registered Organisations) Act* 2009 (Cth) requiring organisations and branches to make and keep minutes recording the proceedings and resolutions of committee of management meetings. Documents and papers that are necessary to refer to in order to understand the effect of the minutes also be kept. The documents be retained for a minimum of 7 years. The minutes and associated documents be available upon request by members of the organisation free of charge.

Financial records

145. Currently, s 252 of the FW(RO) Act requires reporting units to keep certain financial records for a minimum period of seven years. However, there are no consequences for a reporting unit that fails to comply with these obligations. There seems no reason why this provision, like the other record keeping requirements imposed by s 230 of the FW(RO) Act, should not be a civil penalty provision.

Recommendation 17

The obligation to keep financial records in s 252 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended to be made a civil penalty provision.

F – WHISTLEBLOWERS

Background

146. A substantial impediment to preventing corruption in many unions is the culture of intimidation and bullying that exists in relation to whistleblowers. Those who report corruption and illegality are ruthlessly vilified and attacked.

147. The Commission heard and saw numerous examples from different unions of what happens to those who report corruption and inappropriate practices or more generally are opposed to the current leadership of the union.

148. The Commission heard a substantial amount of evidence about the treatment meted out to various whistleblowers and to persons who became unpopular with those running the union on other grounds.

149. Some of that evidence is summarised in Appendix A.

150. It is little wonder that individuals within many trade unions are extremely reluctant to speak out about illegal, immoral or inappropriate practices. The evidence before the Commission discloses a significant culture of fear in some unions.

151. It is unlikely that this culture can be eradicated while ever there are all powerful union secretaries. However, providing strong legal protection for whistleblowers may go at least some way to addressing the issues.

152. In June 2014, the Commission called for, and received a number of, submissions into the adequacy of current protections for trade union 'whistleblowers.'[138] It organised an academic dialogue on 28 July 2014 as part of its policy consultation process at which the issue of protection for 'whistleblowers' was one of the topics for discussion. Counsel assisting made detailed submissions on the topic in 2014.[139] The Commission received further submissions on the topic in response to the Discussion Paper which canvassed potential areas for reform in respect of the protected disclosures regime which currently exists in the FW(RO) Act.[140] Those submissions underpin the discussion below.

Existing protected disclosure regime

153. Part 4A of chapter 11 of the FW(RO) Act is entitled 'Protection for Whistleblowers'.

154. Section 337A defines circumstances when a disclosure of information by a person ('the discloser') qualifies for protection. There are numerous requirements that apply:

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[138] Issues Paper 1: Whistleblower Protections, 13/6/14; See Chamber of Commerce and Industry WA Submission in response to Issues Paper 1: Whistleblower Protections, 11/7/14; New South Wales Police Force Submission in response to Issues Paper 1: Whistleblower Protections, 11/7/14; Carolyn Summers Submission in response to Issues Paper 1: Whistleblower Protections undated (received 20/8/14); Kylee Brehaut Submission in response to Issues Paper 1: Whistleblower Protections, 1/9/14; Stuart Vaccaneo, Submission in response to Issues Paper 1: Whistleblower Protections, undated (received 14/7/14).

[139] Submissions of Counsel Assisting, 31/10/14, ch 19.2.

[140] Australian Industry Group Law Reform Submissions, 21/8/15, p 7; Associate Professor Louise Floyd Law Reform Submissions, 21/8/15, p 3, Attachment E; Master Builders Australia Law Reform Submissions, 21/8/15, p 21-24; Victoria Police Law Reform Submissions, 10/9/15, pp 17-20.

(a) The discloser must be an officer, employee or member of an organisation or branch.

(b) The disclosure must be made to one of:

(i) a member, the General Manager or member of staff of the Fair Work Commission;

(ii) the Director or an inspector of the Fair Work Building Inspectorate; or

(iii) a member of staff of the Office of the Fair Work Ombudsman.

(c) The discloser must give the person's name before making the disclosure.

(d) The discloser must have reasonable grounds to suspect the information indicates that the organisation or branch, or an officer or employee of the organisation or branch, has or may have contravened the FW Act or the FW(RO) Act.

(e) The discloser makes the disclosure in good faith.

155. Section 337B provides that if a person makes a disclosure that qualifies for protection, the person is not subject to any civil or criminal liability for making the disclosure. Nor can any contractual or other remedy or right be exercised against the person.

156. In addition to this protection, s 337C creates a criminal offence of victimising a whistleblower. In broad terms, a person must not intentionally cause, or intentionally or reckless threaten to cause, detriment to a person because the person made a disclosure that qualifies for protection. Officers and employees of an organisation involved in a contravention of s 337C by the organisation are also criminally liable. The maximum penalty is 25 penalty units ($4,500) or imprisonment for 6 months, or both.

157. Section 337D provides a victim with a right to compensation for damage suffered as the result of victimisation.

158. Below, recommendations are made in relation to three main aspects of the regime. They are (1) the class of persons who can make a protected disclosure, (2) the class of persons who can receive a protected disclosure and their obligations in dealing with a protected disclosure and (3) the remedies available for adverse action.

Persons who can make a protected disclosure

159. The class of persons who can make a protected disclosure is too narrow. Consistently with the *Public Interest Disclosure Act* 2013 (Cth)[141] – which allows current and *former* public officials to make a disclosure – *former* officers, employees and members of a registered

[141] See *Public Interest Disclosure Act* 2013 (Cth), s 69.

organisation should be permitted to make a protected disclosure. Numerous submissions were made in support of this approach.[142]

160. The disclosure regime in the *Corporations Act* 2001 (Cth) allows disclosure by a person who has a contract for the supply of services or goods to company, or an employee of such a person. Consistently with this disclosure regime, protected disclosures should be permitted from persons contracting for goods or services, or otherwise dealing, with a registered organisation or branch. Again, a number of submissions were made in support of this approach.[143]

161. Should the class of persons who can make a protected disclosure be extended to members of the public generally, or members of the public but only in relation to suspected criminal offences? Both Master Builders Australia[144] and Australian Industry Group opposed the expansion of the whistleblower provisions to include the public. Ai Group submitted that:[145]

> [s]uch extremely wide whistleblower protections do not currently apply under other relevant laws such as the *Corporations Act* 2001 and the *Public Interest Disclosure Act* 2013.

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[142] Victorian Government, Submission in Response to Issues Papers, August 2014, p 13-15; Master Builders Australia Law Reform Submissions, 21/8/15, p 21; Victoria Police Law Reform Submissions, 10/9/15, p 17; Australian Industry Group Law Reform Submissions, 21/8/15, p 7.

[143] Victorian Government, Submission in Response to Issues Papers, August 2014, p 13-15, 23; Master Builders Australia Law Reform Submissions, 21/8/15, p 21; Victoria Police Law Reform Submissions, 10/9/15, p 17; Australian Industry Group Law Reform Submissions, 21/8/15, p 7.

[144] Master Builders Australia Law Reform Submissions, 21/8/15, p 21.

[145] Australian Industry Group Law Reform Submissions, 21/8/15, p 7.

162. Victoria Police submitted that if the class of protected disclosers was extended to members of the public making a disclosure about a suspected criminal offence, it would be necessary to extend the scope of the subject matters about which a disclosure can be made.[146] Further, Victoria Police submitted that:[147]

> [t]here are some offence provisions in the Registered Organisations Act, but they do not relate to the types of criminal activities identified by Victoria Police that involve trade unions, their officials or officers, such as the making and receiving of corrupt payments, fraud offences, blackmail and coercion and drug offences.

163. It is not recommended that the class of persons who can make a protected disclosure be expanded to include members of the public generally, or specifically in relation to criminal offences. Insofar as a member of the public has a complaint that involves criminal conduct, the criminal law can be invoked to provide members of the public with protection.

Recommendation 18

The categories of persons who can make a protected disclosure under s 337A(a) of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be expanded to include:

(a) a former officer, employee or member of an organisation or branch; and

(b) a person contracting for the supply of goods or services, or otherwise dealing with an organisation or branch of an organisation (or an officer or employee of an organisation or branch on behalf of the organisation or branch); and

(c) an officer of employee of a person mentioned in (b).

[146] Victoria Police Law Reform Submissions, 10/9/15, p 18.

[147] Victoria Police Law Reform Submissions, 10/9/15, p 19.

Persons entitled to receive a protected disclosure

164. Section 26 of the *Public Interest Disclosure Act* 2013 (Cth) allows a protected disclosure to *any* person, other than a foreign public official. In the context of corporations, s 1317AA(1) of the *Corporations Act* 2001 (Cth) permits ASIC, a company's auditor, a director, secretary or senior manager of the company, or a person authorised by the company to receive a protected disclosure.

165. A particular issue about which the Commission received conflicting submissions is whether State or Federal police officers should be entitled to receive a protected disclosure, or at least some protected disclosures.[148]

166. In response to the question about whether State and Federal police should be authorised to receive protected disclosures under the FW(RO) Act, Victoria Police submitted that:[149]

> Since the Registered Organisations Act primarily relates to industrial law, it may not be appropriate to make amendments to the Registered Organisations Act provisions extending the types of conduct that is protected to cover criminal offences, particularly those contrary to state law. However, as indicated above, conduct that relates to breaches of the Registered Organisations Act and the Fair Work Act may also be information about possible criminal conduct.

[148] See, for example, Joel Silver Submission in response to Issues Papers, undated (received 14/7/14), p 3; New South Wales Police Force Submission in response to Issues Paper 1: Whistleblower Protections, 11/7/14; Victoria Police Law Reform Submissions, 10/9/15, p 18.

[149] Victoria Police Law Reform Submission, 10/9/15, p 18.

167. Victoria Police also submitted that:

(a) Under s 335C(2)(b) of the Fair Work (Registered Organisations) Act 2009 (Cth) the General Manager or staff of the FWC may refer information acquired in the course of an investigation about criminal conduct to the Australian Federal Police or other state or territory police forces, provided 'disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth or a State or Territory';[150] and

(b) it may not be appropriate for Victoria Police to receive disclosures in its own right, but through an effective referral mechanism.[151]

168. In a similar vein, Master Builders Australia submitted that the single regulator for registered organisations should receive the relevant disclosures and that, if those disclosures reveal criminal conduct, the regulator should refer the matters to the police.[152]

169. The NSW Police Force submitted that:[153]

> It is not appropriate for NSW Police Force officers to be named recipients to receive protected disclosures under the Act as police are primarily concerned with investigating complaints of criminal conduct and should

[150] Victoria Police Law Reform Submissions, 10/9/15, p 18.

[151] Victoria Police Law Reform Submissions, 10/9/15, p 19.

[152] Master Builders Australia Law Reform Submissions, 21/8/15, p 22.

[153] New South Wales Police Force Submission in response to Issues Paper 1: Whistleblower Protections, 11/7/14.

not deal with complaints about possible breaches of the Act (unless they involve allegations that a crime or other offence has been committed).

170. What about even broader disclosures? As noted, under the *Public Interest Disclosure Act* 2013 (Cth), disclosures are permitted to any third party, except foreign public officials. This would include, for example, journalists.

171. The Australia Labor Party has announced that, in relation to registered organisations, it proposes to extend the existing protections so that whistleblowers will be protected from adverse action if they disclose 'to any third party (including the media), as long as they first raised the matter with one of the Fair Work Regulators and the union itself'.[154] To limit whistleblower protections to situations where the whilstleblower is first required to notify the union would deprive the whilstleblower provisions of any real value.

172. In the context of public sector disclosures there is arguably a real need to allow protected disclosures to be made to persons other than government or statutory authorities. In many cases, there may be a real risk that, if information adverse to government is disclosed to a government authority, the relevant agency will do nothing about it because it will not want to embarrass the government.

173. However, that risk is reduced in the context where the information disclosed concerns the conduct of registered organisations and their officials and the persons receiving protected disclosures are

[154] Australian Labor Party, 'Fact Sheet: Better Union Governance', released 7/12/15, p 3.

independent statutory authorities.[155] In the context of registered organisations, expanding the class of persons to include the media also risks increasing the chance of defamatory or exaggerated claims being made as part of the internal disputes within trade unions.

174. Rather than extending the class of persons who can receive a protected disclosure, it is recommended that additional measures be introduced to safeguard against the possibility of regulatory inaction or information leakage. To that end, it is recommended that, in accordance with similar provisions in the *Public Interest Disclosure Act* 2013 (Cth)[156] the regulatory authorities permitted to receive a protected disclosure be subject to an obligation to undertake an investigation in relation to a protected disclosure within a prescribed time period.

Recommendation 19

The *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended to require the regulatory authorities entitled to receive a protected disclosure to investigate the disclosure within a specified period.

Remedies for adverse action

175. There are a number of defects with the existing remedies available for adverse action taken against whistleblowers.

[155] This is another matter that reinforces the need for an independent regulator of registered organisations.

[156] See *Public Interest Disclosure Act* 2013 (Cth), Pt 3.

176. *First*, despite submissions to the contrary from the Ai Group[157] and Master Builders Australia,[158] the criminal penalties for breach of s 337C are too low. In comparison, the maximum penalty for reprisal action taken against a person who makes a protected disclosure under the *Public Interest Disclosure Act* 2013 (Cth) is imprisonment for two years, or a fine of 120 penalty units ($21,600) or both. The Australian Labor Party has proposed to increase the penalties under the FW(RO) Act to match the penalties available under the *Public Interest Disclosure Act* 2013 (Cth).[159] This is a sensible reform.[160]

177. *Secondly*, the offence under s 337C of the FW(RO) Act (and also the *Corporations Act* 2001 (Cth)) is considerably narrower in scope than the offence of taking or threatening reprisal action under the *Public Interest Disclosure Act* 2013 (Cth). Section 337C should be replaced with the broader offence of taking or threating reprisal action.

178. *Thirdly*, currently a person who engages in adverse action against a whistleblower (for example, a Secretary or officer of an organisation) can still continue to hold office. Persons who victimise whistleblowers have no place in managing registered organisations. Section 212 of the FW(RO) Act should be amended to provide that a person convicted of

[157] Australian Industry Group Law Reform Submissions, 21/8/15, p 7.

[158] Master Builders Australia Law Reform Submissions, 21/8/15, p 23.

[159] Australian Labor Party, 'Fact Sheet: Better Union Governance', released 7/12/15, pp 2-3.

[160] See also Chamber of Commerce and Industry WA Submission in response to Issues Paper 1: Whistleblower Protections, 11/7/14, p 3.

an offence against s 337C is automatically disqualified from holding office in an organisation or branch of an organisation.[161]

179. *Finally*, as was noted in the Discussion Paper, there is, in contrast with the *Public Interest Disclosure Act* 2013 (Cth),[162] no specific provision made for reinstatement of a victim whose employment is terminated as part of reprisal action, nor is there a provision entitling the court to give appropriate mandatory injunctions to prevent reprisal action. Through a complex set of provisions of the FW Act, a person whose employment was terminated as a result of making a protected disclosure may be entitled to seek a remedy under the general provisions of the FW Act concerning 'adverse action', including reinstatement.[163] However, it is recommended to put the issue beyond any doubt. It is also recommended to adopt the broad remedial provisions found in the *Public Interest Disclosure Act* 2013 (Cth).

Recommendation 20

Section 337C of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be repealed and replaced with a provision in similar terms to s 19 of the *Public Interest Disclosure Act* 2013 (Cth) prohibiting reprisal action against whistleblowers. This would lead to an increase in the existing maximum penalty for reprisal to two years' imprisonment, or a fine of 120 penalty units, or both.

[161] See Australian Industry Group Law Reform Submissions, 21/8/15, p 7; Master Builders Australia Law Reform Submissions, 21/8/15, p 23; Chamber of Commerce and Industry WA Submission in response to Issues Paper 1: Whistleblower Protections, 11/7/14, p 4.

[162] See ss 15 (injunctions, apologies and other orders) and 16 (reinstatement).

[163] *Fair Work Act* 2009 (Cth), ss 340(1)(a), 341(1)(b), 341(1)(c), 341(2), 342(1), 539(1), 545(1), 545(2)(c).

Recommendation 21

The definition of 'prescribed offence' in s 212 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended so that a person convicted of an offence against s 337C is automatically disqualified from holding office in an organisation or branch.

Recommendation 22

Provisions similar to ss 15 and 16 of the *Public Interest Disclosure Act* 2013 (Cth) be enacted to enable a whistleblower who is the victim of reprisal action to obtain a mandatory injunction, an apology or an order of reinstatement to employment.

G – USE OF UNION FUNDS

180. The ability of a union Secretary to promote his or her own personal causes through the use of union funds – for example, by carrying on defamation proceedings against a challenger, donating funds to a faction in another union, or by donating funds to a political party – is another matter which can contribute to corruption and anti-democratic outcomes within unions.

Use of union funds in union election campaigns

181. Section 190 of the FW(RO) Act prohibits an organisation or branch from using or allowing its property to be used to help a candidate against another candidate in an election for an office or position.

182. One issue concerning s 190 is whether it only prohibits an organisation or branch rendering assistance to one candidate over another in an election for an office or position *in that organisation or branch* (the **narrow construction**), or whether it applies also to a *different* organisation or branch (the **broad construction**).

183. In Chapter 2.2 of the Interim Report, the view was expressed that, as a matter of statutory construction, the broad construction of s 190 was clearly preferable.[164] As was noted in the Interim Report:[165]

> Parliament could easily have inserted words of limitation to confine the reach of s 190. It did not.

184. Further, it was noted it was desirable to amend s 190 to provide as follows:[166]

> An organisation or branch commits an offence if it uses, or allows to be used, its property or resources to help a candidate against another candidate in an election under this Part *(in respect of any organisation or branch)* for an office or position.

185. The submissions to the Commission generally supported the amendment to s 190 proposed in the Interim Report.[167] However, the

[164] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014) Vol 1, ch 2.2, pp 64-65.

[165] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 2.2, p 64 [15].

[166] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 2.2, p 65.

[167] Association Forum Pty Ltd Law Reform Submissions, 4/9/15, p 3; Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 16; Master Builders Australia Law Reform Submissions, 21/8/15, p 16.

Employment Law Committee of the Law Society of New South Wales was against any amendment.[168]

Recommendation 23

Section 190 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended to prohibit an organisation or branch using, or allowing to be used, its property or resources to help a candidate in an election for office in any registered organisation or branch.

This recommendation is reflected in the model legislative provisions in Appendix 1 of this Volume of the Report.

Use of union funds as political donations or for political expenditure

186. The Discussion Paper raised for consideration whether restrictions should be placed on the use of an organisation's funds for the purposes of making political donations or incurring political expenditure, and in particular whether organisations should be required to make political donations or expenditure only from a separate fund containing voluntary contributions raised from members specifically for political purposes.[169]

[168] Law Society of New South Wales, Employment Law Committee Law Reform Submissions, 21/8/15, pp 4-5.

[169] The Discussion Paper traced briefly the history in Australia of restricting trade unions from making political donations, at least unless the donation was made out of a separate fund to which no member of the union could be required to contribute: Discussion Paper, pp 35-36.

187. The reasons for raising this issue were twofold. *First*, political donations are capable of being used by senior officials in a union, particularly the union Secretary, to establish patronage and influence. The dangers associated with an 'all powerful' union Secretary have already been discussed. *Secondly*, given that the eligibility rules for registered organisations must not discriminate between persons on the basis of political opinion,[170] and that many individuals join a union not to engage in political activities but to obtain better working conditions, arguably individual members should decide whether to contribute funds to a political party, rather than the union executive.

188. Some submissions were in favour of restricting the use of funds for political purposes.[171] Master Builders Australia[172] advocated a system similar to that which applies in the United Kingdom, whereby trade unions can expend money for political objects but only if:

(a) the furtherance of political objects is approved as an object of the union at a ballot by a majority of members; and

(b) payments in furtherance of political objects are made out of a separate fund, no member can be forced to contribute to the separate fund and contributions to the fund cannot be made a condition of membership.[173]

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[170] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 142(1)(d).

[171] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 17; Master Builders Australia Law Reform Submissions, 21/8/15, pp 17-18.

[172] Master Builders Australia Law Reform Submissions, 21/8/15, pp 18-19.

[173] *Trade Union and Labour Relations (Consolidation) Act* 1992 (UK), s 71. These restrictions originated in the *Trade Union Act* 1913 (UK), which followed the decision of the

189. On the other hand, the Associations Forum Pty Ltd submitted that it was up to the elected officials of an organisation to decide to expend money in the furtherance of political objects.[174]

190. Despite the attractiveness of the United Kingdom model in preventing union members being compelled to contribute money to a political cause they do not support, there are several matters that militate against adopting similar legislation federally.

191. In the first place, although restrictions similar to those that currently apply in the United Kingdom have been enacted previously in a number of Australian States,[175] restrictions of this kind have not been applied to organisations registered under Commonwealth legislation. Secondly, as the Discussion Paper noted, there is a cogent argument that registered organisations, just like corporations and other legal persons, should be free to spend their funds for political purposes. The officers of such organisations are democratically accountable to the members and, if the majority of members are unhappy with the decisions taken concerning political donations and expenditure, the officers can be voted out of office at the next election. Thirdly, there may be arguments that the United Kingdom model infringes the freedom of political communication which has been implied from the *Constitution*. In relation to this point, although in 1999 the Full Court of the Supreme Court of Western Australia rejected this argument in

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House of Lords in *Osborne v Amalgamated Society of Railway Servants* [1910] AC 87 preventing trade unions registered under the *Trade Union Act* 1871 (UK) from using their funds for political purposes.

[174] Associations Forum Pty Ltd Law Reform Submissions, 4/9/14, p 3.

[175] See the legislation cited in Discussion Paper, p 36.

relation to similar Western Australian legislation,[176] there has been considerable development in the law on this topic in the years since.

192. Having regard to the competing arguments, no recommendation is made in relation to this topic.

H – CONDUCT OF UNION ELECTIONS

193. A critical part of the FW(RO) Act is chapter 7 concerning elections for office in registered organisations. The rules of a registered organisation must provide for:

(a) terms of office for officers of no more than four years without re-election;[177] and

(b) the election of office holders either by a direct voting system (by secret postal ballot) or a collegiate electoral system.[178]

194. In addition to these required rules, s 182 of the FW(RO) Act requires each election for an office in an organisation or branch to be conducted by the Australian Electoral Commission, unless an exemption is in force under ss 182(2), 183 and 186. Pursuant to s 186 of the FW(RO) Act an organisation may apply to the General Manager for an exemption. The General Manager may give an exemption only where

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[176] *Registrar of the Western Australian Industrial Relations Commission v The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch* [1999] WASCA 170.

[177] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 145(1).

[178] *Fair Work (Registered Organisations) Act* 2009 (Cth), ss 143(1)(a), 144(1).

satisfied that the rules of the organisation comply with the requirements of the Act in relation to the conduct of elections and that elections will be conducted under the rules of the organisation and in a manner that will afford voting members an adequate opportunity for voting without intimidation.[179]

195. In 2014 and 2015, the Commission received a number of submissions about whether s 186 remains appropriate, and whether any amendments to that provision are desirable. Both the Ai Group and the CFMEU submitted that no change to s 186 was appropriate, and that the exemption system allows organisations to conduct their own elections in a cost-effective way in accordance with the requirements of the legislation.[180] The CFMEU submission concluded that '[t]here is no valid reason from the perspective of the Union and the members it represents, to alter a system that is working effectively.'[181]

196. Other submissions received, however, argued that the current regime was defective. Master Builders Australia supported the current regime but subject to an additional requirement that the exemption should not be available to a registered organisation that has breached 'any of the provisions of the law relating to registered organisations.'[182] Stuart Vaccaneo, a former Executive Vice-President of the Queensland District Branch of the Mining and Energy Division of the CFMEU,

[179] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 186.

[180] Slater & Gordon on behalf of Construction, Forestry, Mining and Energy Union Submission in Response to Issues Paper 3: Funding of Trade Union Elections, 1/8/14, p 1; Australian Industry Group, Submission in Response to Issues Papers 1-3, 11/7/14, p 11.

[181] Slater & Gordon on behalf of Construction, Forestry, Mining and Energy Union Submission in Response to Issues Paper 3: Funding of Trade Union Elections, 1/8/14, p 39.

[182] Master Builders Australia Submission in Response to Issues Paper 3: Funding of Trade Union Elections, 11/7/14, pp 2, 4.

argued that the current regime was inappropriate because of the absence of provisions dealing with how unions with exemptions handle complaints about the conduct of elections, and the absence of any requirement for unions with exemptions to produce a post-election report as the AEC is required to do.[183] In short, the submission was made that the current system allows a complete lack of independent scrutiny in respect of elections. The Employment Law Committee of the Law Society of New South Wales submitted that the exemption provisions should be repealed, but if this is not done, then the requirement to provide a post-election report should be extended to the alternative person who conducts the election.[184]

197. Subsequently to the receipt of submissions in 2015, there have been considerable developments in relation to this topic. On 30 October 2015, Chris Enright, Director of the Regulatory Compliance Branch, acting on behalf of the General Manager of the Fair Work Commission, revoked the exemption granted to the Queensland District Branch of Mining and Energy Division of the CFMEU which had been granted in 1996 and remained in force since that time.[185] That decision canvassed a number of matters including the history and operation of the exemption in s 186. At the time of writing this Report, the decision is subject to appeal to the Fair Work Commission.

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[183] Stuart Vaccaneo Submission in Response to Issues Paper 3: Funding of Trade Union Elections, undated (received 11/7/14), p 1.

[184] Law Society of New South Wales, Employment Law Committee Law Reform Submissions, 21/8/15, p 6.

[185] *Queensland District Branch of the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union* [2015] FWCD 7109.

198. In light of that decision and the pending appeal, it is not considered appropriate to make any recommendations concerning the repeal of ss 182(2), 183 and 186 (and consequently ss 184 and 185) of the FW(RO) Act. If the appeal is unsuccessful, then arguably the processes for revocation of an exemption under the FW(RO) Act are capable of operating effectively, subject to the matter identified immediately below. If the appeal is successful, then there may be a range of matters that Parliament would need to give consideration to concerning the conduct of union elections. These are not the only possibilities.

199. However, an important matter noted in the decision referred to above was the following:[186]

> Elections conducted by organisations or branches with AEC exemptions are not subject to review by any external body. Essentially, the only review mechanism for AEC exemptions is the power to revoke in s 186(2) of the [FW(RO) Act].

200. If the exemption in s 186 is to remain it is desirable that the FW(RO) Act be amended to require an organisation or branch that has been granted an exemption to lodge a report with the Registered Organisations Commission, similar to the report required to be lodged by the Australian Electoral Commission under s 197. This will at least ensure that there is some oversight of elections conducted by organisations and branches.

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[186] *Queensland District Branch of the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union* [2015] FWCD 7109 at [12].

Recommendation 24

No recommendation is made to repeal ss 182(2), 183–186 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) at this time. On the assumption that those sections remain, that Act be amended to require an organisation or branch that has an exemption under s 186 to lodge a report with the registered organisations regulator after the completion of an election conducted pursuant to the exemption. The report should include details about how the election was conducted, whether any complaints were received and how those complaints have been addressed.

APPENDIX A

Mark Hardacre

1. Michael Williamson was for some years General Secretary of the HSU NSW Branch. By all accounts he was a domineering and powerful individual who wielded significant influence over others and was an autocratic and authoritarian leader.

2. The evidence of Mark Hardacre about Michael Williamson's treatment of him and Katrina Vernon following the 1995 HSU NSW Union elections was particularly confronting both in the ruthlessness of Michael Williamson's treatment of them and the lengths to which he went to seek to remove from the Union Mark Hardacre and Katrina Vernon - elected officials he felt were opposed to his interests.

3. The background to the 1995 elections is as follows. Mark Hardacre and Katrina Vernon ran on a ticket in opposition to Michael Williamson in the 1995 HSU NSW election.[1] Michael Williamson was ultimately elected State Secretary. Michael Williamson's candidates for the offices of Assistant Secretary were defeated and Mark Hardacre and Katrina Vernon were each elected Assistant Secretary.[2]

[1] Hardacre MFI-1, 16/6/14, p 19.

[2] Mark Hardacre, witness statement, 16/6/14, paras 127-140.

4. Thereafter commenced a campaign of bullying, isolation and terror directed towards Mark Hardacre and Katrina Vernon, apparently spearheaded by Michael Williamson.

5. Mark Hardacre gave evidence that, inter alia:

(a) Mark Hardacre and Katrina Vernon were seated in a 'demeaning' work environment, and were denied benefits to which the outgoing officers were entitled – including to a car and office. Following the election, the outgoing Assistant Secretaries were immediately hired as consultants and kept their cars and offices. In that way, in effect, they kept their jobs as de facto Assistant Secretaries;[3]

(b) Mark Hardacre and Katrina Vernon were isolated, at the direction of Michael Williamson, were not given any work, and were denied access to the weekly Labor Council delegation and to the ALP Annual Conference held annually in the Sydney Town Hall;[4]

(c) Katrina Vernon ultimately suffered from a breakdown and successfully bought a workers' compensation claim against the Union;[5]

(d) Katrina Vernon was made redundant from the Union on the basis of a report Michael Williamson had commissioned

[3] Mark Hardacre, witness statement, 16/6/14, para 37; Hardacre, 16/6/14, T:543.14-23.

[4] Mark Hardacre, witness statement, 16/6/14, paras 37-40.

[5] Mark Hardacre, witness statement, 16/6/14, para 41.

which recommended that one or both Assistant Secretary positions be abolished. Mark Hardacre gave evidence to the effect that this report was contrived and engineered to achieve this outcome. Mark Hardacre said that he saw a document on a photocopying machine which revealed that Katrina Vernon was paid a redundancy payment of $88,000. Mark Hardacre described this as 'one way [Michael] Williamson removed his opponents.'[6] Michael Williamson approached Mark Hardacre about leaving the Union in exchange for a substantial amount of money, but he declined. After Katrina Vernon left, Mark Hardacre was isolated and had no-one to talk to. Mark Hardacre said that this treatment persisted for the balance of his four year term. He said of his experience:[7]

> It was total containment and isolation. I could not get out of the office to visit Union Members. [Michael] Williamson would arrange for the organisers to go out there to members saying that [Katrina] Vernon and I were useless in our roles as executive officials because we were never out with members. [Michael] Williamson had direct supervision and control over those officers and he also put this proposition to the State Council, which fully supported him.

(e) Executive Council meetings were held once a month on Mondays, and the Council meetings the following Wednesday were 'very daunting' for Mark Hardacre as '[n]ormally [he] would be set up to have to explain [his] conduct.' He gave evidence that at these meetings he would be accused of breaching union rules, allegations which he would have to answer because the next step would be removal from his

[6] Mark Hardacre, witness statement, 16/6/14, para 47.

[7] Mark Hardacre, witness statement, 16/6/14, para 54.

office. On one occasion Michael Williamson moved a motion against him for being defiant in breach of the Union rules. He had to get legal support to fight those charges from the Council.[8]

6. In 1999 Mark Hardacre was again part of a ticket contesting the HREA elections. In the middle of the election campaign, Mark Hardacre, his wife and three others (two of whom were on Mark Hardacre's ticket) were sued in defamation. Mark Hardacre and his wife each had to pay about $20,000 to meet the legal costs they incurred and had to borrow against their house to do so. The proceedings were eventually settled.[9]

7. Michael Williamson won that election in 'one of the biggest union landslides in history.'[10] Mark Hardacre gave evidence that he still has concerns about how Michael Williamson won the election, and noted that it was normal to get about 300 or 400 votes in each day but that on one day during the 1999 elections, some 2,500 votes came in which was unheard of. Mark Hardacre also gave evidence about a printing press purchased by the HREA in 1999 to which no-one but Michael Williamson and Cheryl McMillan had access. He is not aware of whether ballot papers were printed off for the 1999 elections but is aware that there were occasions on which people were recorded as having voted twice without correction.[11]

[8] Mark Hardacre, witness statement, 16/6/14, para 58.

[9] Mark Hardacre, 16/6/14, T:560.33.

[10] Mark Hardacre, witness statement, 16/6/14, para 83.

[11] Mark Hardacre, witness statement, 16/6/14, paras 83, 85.

8. Michael Williamson ruthlessly bullied Mark Hardacre and Katrina Vernon, and used the members' funds to do so (by commencing legal proceedings against them with members' money and paying out substantial amounts of money to remove his enemies from the Union).[12]

Katrina Hart

9. More than a decade after Mark Hardacre's experience, Katrina Hart, the President of one of HSU NSW's largest sub-branches, was similarly marginalised by those whose conduct she questioned.

10. Intercepted phone calls tendered to the Commission demonstrated that Michael Williamson, who was at this point on leave because of serious allegations concerning his conduct – conspiring with senior officers of the union to defeat Katrina Hart's requests for transparency and accountability.[13]

Officers and employees of Victoria No. 1 Branch

11. In 2013, in yet another branch of the troubled HSU, allegations of bullying and intimidation of whistleblowers again resurfaced, this time concerning the Victoria No. 1 Branch under the control of Diana Asmar and her General Manager, Kimberley Kitching. The Commission heard from a number of witnesses: Leonie Flynn,[14] Peggy

[12] See Christopher Brown, witness statement, 29/8/14, para 96-97.

[13] Hayes MFI-1, 26/9/14, T:3:28-30; Hayes MFI-2, 26/9/14, T:11.19-21.

[14] Leonie Flynn, witness statement, 25/8/14, paras 16-100, 202-207.

Lee[15] and Robert McCubbin. Each spoke of the conduct of Diana Asmar and her supporters when they raised concerns about misconduct by branch officers and employees.

Brian Fitzpatrick

12. The adverse consequences that affect whistleblowers was not limited to the HSU. The CFMEU's treatment of persons who gave evidence to the Commission is a case in point. Many of these persons were made the subject of false and irrelevant accusations and character slurs. In relation to its own officers those who speak out are marginalised and abused. Brian Fitzpatrick is a case in point.[16]

13. Brian Fitzpatrick was employed by the NSW Branch of the CFMEU for some 25 years as both an organiser, or coordinator of teams of organisers.[17] In March 2013 Brian Fitzpatrick discovered that companies operated by George Alex (see Chapter 7.2 which examines the relationship between George Alex and the CFMEU in detail) had not been paying employees their entitlements.[18]

14. After making enquiries and following the matter up with George Alex, On 27 March 2013, Brian Fitzpatrick received a telephone call from

[15] Pik ki (Peggy) Lee, witness statement, 25/8/14, paras 41, 60-64, 84-92.

[16] See Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.5.

[17] Brian Fitzpatrick, witness statement, 14/7/14, para 9.

[18] Brian Fitzpatrick, witness statement, 14/7/14, para 44.

Darren Greenfield, another organiser of the NSW Branch of the CFMEU threatening to kill him and telling him that he was 'dead.'[19]

15. When the matter was reporting to Brian Parker, he responded with indifference and the matter was not properly or promptly investigated.

16. On 12 April 2013, a Committee of Management meeting was held at which a discussion took place, not about the death threat, but about a union official calling the police about another official.[20] Brian Fitzpatrick had been invited to attend the meeting as a visitor, but was told to leave the room during the relevant discussion.[21]

17. In and after May 2013 Brian Fitzpatrick continued to pursue George Alex about his outstanding entitlements to workers. Thereafter followed a sustained campaign within the NSW Branch to force Brian Fitzpatrick out of the Union. He was demoted and many of his responsibilities were taken away.[22] He was vilified and threatened with dismissal.[23] He was eventually offered an amount in the order of $300,000 to leave the Union.[24] Brian Fitzpatrick agreed to leave the union with 12 months' pay and a car after being persuaded by a long-

[19] Brian Fitzpatrick, witness statement, 14/7/14, para 61.

[20] Fitzpatrick MFI-1, 15/7/14, Vol. 1, p 27.

[21] Brian Fitzpatrick, 15/7/14, T:33.4-8.

[22] Brian Fitzpatrick, 15/7/14, T:37.39-41.

[23] Brian Fitzpatrick, witness statement, 14/7/14, p 179; Fitzpatrick MFI-I, 15/7/14, p 229.

[24] Brian Fitzpatrick, witness statement, 14/7/14, para 117.

time union representative based in Melbourne, Frank O'Grady, to do so.[25]

Jose 'Mario' Barrios

18. The treatment of Jose 'Mario' Barrios is also noteworthy. He was summoned to give evidence to the Commission and was compelled by law to attend and answer questions about a matter that he had reported to the police.

19. Mario Barrios had not sought out the Commission and was not working with it. Nevertheless, Brian Parker (the most senior CFMEU officer in New South Wales) branded Mario Barrios as a 'dog' who he wanted to 'bash'. He said that that everyone in the Union now hated him, because he had given honest answers under compulsion.[26]

David Hanna

20. David Hanna was the President of the CFMEU Queensland Construction Workers' Divisional Branch and President of the Construction and General Division of the CFMEU. He resigned from these positions effective 30 July 2015.[27] In the evidence heard by this

[25] Fitzpatrick MFI-1, 15/7/14, pp 232-237.

[26] Evidence in relation to the experience of Mario Barrios is set out in the Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.5, paras 28-48.

[27] David Hanna, 18/9/15, T:645.26-36. See CFMEU's annual returns for 2014 available at https://www.fwc.gov.au/documents/documents/organisations/registered-orgs/105N/105n-AR2014-75.pdf.

inquiry, he is the most senior union official to have fallen out with his union. Before the BLF Qld merged with the CFMEU Qld, he was the State Secretary of the BLF. After the merger he was President of the CFMEU.

21. The findings about the conduct of David Hanna in respect of Cornubia House are set out at Chapter 8.1 of Volume 4 of this Report. His role in the destruction of CFMEU and BLF documents is described in Chapter 8.2 of Volume 4 of this Report.

22. Separately to the evidence before the Commission about Cornubia House, David Hanna gave evidence about the circumstances in which he left the Union.

23. Michael Ravbar is and was at all relevant times the Secretary of the CFMEU Construction and General Division, Queensland Northern Territory Divisional Branch and Secretary of the CFMEU Industrial Union of Employees, Queensland.

24. In 10 June 2015 Michael Ravbar laid charges against David Hanna in accordance with the CFMEU Construction and General Rules.[28] Michael Ravbar alleged that David Hanna had, in or about April 2015, engaged in 'gross misbehaviour' and 'gross neglect of duty' by, inter alia, procuring $3,000 from certain employers to the BLF Charity Foundation Pty Ltd for the purpose of the BLF Charity making payments to assist with IVF treatment for the partner of a CFMEU organiser.

[28] CFMEU DD MFI-26, 20/10/15, pp 3-6.

25. On 19 June 2015, a motion was circulated among the members of the CFMEU National Executive Committee to appoint a person to investigate the subject matter of the charges against David Hanna with a view to the preparation of a report to the National Executive Committee.[29] Leo Skourdoumbis was appointed, and conducted an investigation and reported to the CFMEU National Executive.

26. Leo Skourdoumbis concluded in his report that he believed that David Hanna had acted in a seriously inappropriate manner. He stated that in his view it was appropriate, at the least, for David Hanna to be censured and reprimanded.[30] David Hanna resigned from the Union on 30 July 2015. He addressed the circumstances of his resignation in his evidence in the following excerpt:[31]

> …at the time when that report come [sic] out, the relationship between myself and Michael Ravbar was past the word of toxic, if there could be another – you know, it was – you know, we wouldn't be able to continue together. You know, I wouldn't be able to refrain myself around him, so I had a view for best interests of the Union – I also had some, you know, health issues with my back, so I took the view, in the best interests of the Union and for my own health and family that I would resign and I did so.

27. David Hanna also gave evidence about a discussion he had with Leo Skourdoumbis during the investigation in which Leo Skourdoumbis says '[t]hose National officials, Michael O'Connor included, they want you looked after in whatever way possible.'[32]

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[29] CFMEU DD MFI-26, 20/10/15, pp 9, 16-18.

[30] CFMEU DD MFI-25, 16/10/15, p 7.

[31] David Hanna, 22/9/15, T:95.31-39.

[32] Document Disposal Case Study MFI-5, 22/9/15.

28. David Hanna gave evidence about the importance of being 'looked after' by the National officials, saying:[33]

> My understanding from the discussions that I had before giving my resignation was that no-one would stand in my way from finding other employment. The issue – when you work for a Union and you leave, whether you leave on good terms or bad terms, if you leave on good terms, you normally – you know, you're not too stressed about finding another job, but when you leave on bad terms, and particularly in Queensland, with the terms – the hatred between Michael and I, I underline "hatred", it would be very hard for me to have continued employment in Queensland. So I wanted to ensure that no-one would stand in my way for other employment. I wasn't guaranteed employment but it was certainly that no-one would – you wouldn't be on the black-ban list.
>
> Q. What does that mean, the black-ban list?
>
> A. That, you know, every time you go for a job, "You're too hot to handle. We don't want you", you know.
>
> Q. Did you understand that when you left, the National officials still wanted to look after you in whatever way possible?
>
> A. In terms of – yes, in terms of whatever way possible, like, if I was having problems with Michael standing in my way of getting a job, that they would have talks.

29. David Hanna's evidence about the 'black-ban list' and his belief that it was within Michael Ravbar's power to stop him obtaining employment in Queensland after his career with the Union is illuminating. It explains why many officials and employees are reluctant to blow the whistle on corruption for fear of leaving the Union on 'bad' terms.

[33] David Hanna, 22/9/15, T:96.5-29.

Jimmy Kendrovski

30. Jimmy Kendrovski was a part owner of Elite Access Scaffolding (NSW) Pty Ltd. He was called to the Commission to give evidence about payments by companies associated with George Alex to Brian Parker and Darren Greenfield of the CFMEU NSW (see Chapter 7.2 of Volume 3 of this Report).

31. At the time he gave evidence before the Commission, Jimmy Kendrovski was serving a custodial sentence. In his evidence he said that he was the victim of an assault in gaol after he had been served with his summons and shortly prior to the day appointed for him to give evidence.[34]

32. During his evidence Jimmy Kendrovski showed signs of significant discomfort. When he was asked questions about whether he had seen union officials receive cash payments there were often lengthy pauses, sometimes combined with a lowering of his head towards his lap.

33. He refused to comment on whether the aggressor had said anything to him about him giving evidence to the Commission, and explained that refusal by saying 'because I have a wife and three kids outside on their own and I just can't comment on that'.[35]

34. At one point in his evidence, in answer to a question about whether he felt unable to give truthful evidence because of the recent assault on

[34] Jimmy Kendrovski, 1/9/14, T:105.13.

[35] Jimmy Kendrovski, 1/9/14, T:106.6.

him, Jimmy Kendrovski said 'I am being as truthful as I can.'[36] When later asked to explain that answer, he said that he was telling the Commission and counsel assisting as much as he truthfully could having regard to the fears for his safety and that of his family.[37] The examination then continued as follows:[38]

> Q: If you didn't have those fears, might you be saying something else?
>
> A: I can't comment.
>
> Q: Do I take it from that, that the answer is, "Yes"?
>
> A: I just can't comment. If you were in my position, where I am at the moment – I can't comment on that.

35. It was apparent that Jimmy Kendrovski was, due to concerns over his safety and that of his family, unable to provide the Commission with truthful answers to the questions he was being asked in relation to what he had seen and heard in relation to the payment of the cash withdrawn for 'union payments'.

36. Thus Jimmy Kendrovski did not give truthful evidence before the Commission out of fear for him and his family's safety.

Paul Sinclair

37. Paul Sinclair was the Assistant Secretary of the ETU NSW, a position he had held since July 2007. Since July 2011 he also held the elected

[36] Jimmy Kendrovksi, 1/9/14, T:106:16.

[37] Jimmy Kendrovski, 1/9/14, T107.18.

[38] Jimmy Kendrovski, 1/9/14, T:107.24-30.

position of Organiser in the Electrical Division of the CEPU NSW.[39] Paul Sinclair gave evidence that he had been a member of the ETU NSW for 28 years, and a member of the Officers' Fund for 25 years.[40] His duties included being the minute taker for all of the minutes of Council meetings.

38. On 27 April 2015 and 5 June 2015 Paul Sinclair gave evidence before the Commission, predominately concerning his recollection of whether the ALP Loan was discussed at the State Council meeting in December 2010. Contrary to every other member of the State Council's recollection, he did not recall, and nor did he record, the ALP Loan being discussed at the meeting.[41]

39. In connection with the topics covered in the ETU NSW case study, issues arose concerning the expenditure of the ETU NSW's election fund – the Officers' Fund. Paul Sinclair was one of the trustees of the Officers' Fund and a signatory to the account. Paul Sinclair gave evidence that at every election (held quadrennially), the Officers' Fund invited him to run on its ticket.[42]

40. On 5 June 2015 Paul Sinclair gave evidence that three days prior to his giving evidence, he had ceased to be a member of the Officers Fund[43] because the Officers Fund had withdrawn support for him to run on its

[39] Paul Sinclair, witness statement, 27/4/15, para 4.

[40] Paul Sinclair, 5/6/15, T:855.11.

[41] Paul Sinclair, witness statement, 27/4/14, paras 33-34.

[42] Paul Sinclair, 5/6/15, T:855.16-17.

[43] Paul Sinclair, 5/6/15, T:854.31.

ticket.[44] He gave evidence that his reputation around the office had changed 'significantly' since the earlier occasion on which he gave evidence before the Commission.[45] Specifically he gave evidence as follows:[46]

> Q. So has your reception around the office or your dealings with people around the office changed since you gave evidence before the Commission?
>
> A. Significantly.
>
> Q. In what respect?
>
> A. They don't – I no longer get allocated any work. I don't get communicated. No-one talks to me – or rarely talks to me.
>
> Q. Has that been a dramatic change – before you gave evidence and after you gave evidence?
>
> A. Most definitely.
>
> Q. When you say you're not being allocated work, what do you mean by that?
>
> A. Well, the responsibilities I had before I was invited, or, well, before I was called to this hearing was that I had my responsibilities as the Assistant Secretary in regards to the day-to-day operations, running of the office, the likes of that. I don't get involved or I'm not involved in any of those decision-making processes now. I effectively sit in my office.
>
> Q. Has that been the case since you gave evidence to this Commission on 27 April 2015?
>
> A. Yes.
>
> Q. Was the change sudden?
>
> A. Yes.

[44] Paul Sinclair, 5/6/15, T:854.34, 854.37-39.

[45] Paul Sinclair, 5/6/15, T:855.42-45.

[46] Paul Sinclair, 5/6/15, T:855.42-857.21.

Q. Is this the position: before you gave evidence you were performing your duties in the ordinary way that you had done for many years?

A. Correct.

Q. And then, after you gave evidence, there was a sudden change?

A. Yes.

Q. Have you made any protest or complaint to anyone about this?

A. Who am I going to talk to?

Q. Is the answer no, you haven't made any complaint or protest?

A. As I said, who am I going to talk to? You know, I was replaced – I don't know – some three weeks ago now: I'm no longer required to attend the Executive meetings; no longer required to take the minutes of the Executive meetings. They will take their own minutes in future. That was the decision of the Secretary. I have no control over that.

Q. You are the Assistant Secretary, are you not?

A. I am until at least the declaration of the 2015 ballot.

Q. Are you going to stand as Assistant Secretary in the impending elections?

A. As I sit here today, I've made no firm decision about my future. I have up until the second week in July to make that decision.

Q. But if you did stand for Assistant Secretary, you would have to do it, as it were, on your own?

A. Correct.

Q. Using your own resources?

A. Correct.

Q. Will you have any access to moneys in the Officers Fund account?

A. I've made a request for the reimbursement of that money. No decision had been made as yet.

41. Paul Sinclair agreed that it was probably a fair summation to say that he was being 'frozen out'.[47]

42. Paul Sinclair is no longer the Assistant Secretary of the ETU, NSW Branch. As a consequence of the ETU NSW Branch election held in August 2015, Paul Sinclair was succeeded by Dave McKinley.[48]

Katherine Jackson

43. The most controversial and well-known whistleblower of misconduct by union officials is Katherine Jackson. Whatever else may be said about Katherine Jackson (see Chapters 5.1 and 5.2), she exposed corruption on the part of Michael Williamson and Craig Thomson, and suffered adverse treatment because of that.

44. For example, after commenting publicly on allegations against Craig Thomson for misuse of his credit card, Katherine Jackson awoke two days later to a shovel on her doorstep.[49]

45. She was the subject of all sorts of verbal abuse, including obscene and racist abuse, and a deluge of media articles making allegations against her. This was a powerful demonstration of the extent to which whistleblowers who expose serious corruption may be the subject of reprisals of many sorts from their opponents in the organisation, and supporters of those whose conduct the whistleblowing has exposed.

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[47] Paul Sinclair, 5/6/15, T:858:22.

[48] ETU, *ETU & CEPU Quadrennial Election Results*, http://www.etunsw.asn.au/general-trade-manufacturing-and-mining/etu-cepu-quadrennial-election-results, accessed 10/12/15.

[49] Katherine Jackson, witness statement, 18/6/14, para 196.

46. The problems that have plagued the HSU in recent years have been extensively documented in Chapter 5.2 of Volume 2 of this Report. That chapter considers the lawless culture in which misappropriation and corruption by Michael Williamson, Craig Thomson and Katherine Jackson was allowed to flourish.

Robert Kernohan

47. Robert Kernohan was a member of the AWU Vic who was appalled by the making of redundancy payments to Bruce Wilson and others while they were under internal investigation for fraud. He made attempts to uncover other abuses within the AWU. He went to the police about his fraud allegations. He began to experience being treated with silence, being elbowed or nudged in corridors, receiving abusive anonymous telephone calls, having his office trashed, receiving hate mail and other unpleasant experiences.[50]

[50] See Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 3.2, pp 233-236, paras 289-294.

CHAPTER 3

REGULATION OF UNION OFFICIALS

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A – INTRODUCTION

1. This Chapter considers the regulation of union officials.

2. As appears from the discussion in this Chapter, a number of the case studies considered by the Commission raised significant issues about the scope and effectiveness of the existing law concerning the duties of union officers. For example, the existing law appears to have done nothing to prevent the apparent egregious misappropriations of NUW assets through abuse of credit cards and the like which Derrick Belan, his brother and their niece may have perpetrated.[1] The same is true of the unrelated misappropriations of HSU assets carried out through many techniques by Michael Williamson, Craig Thomson and Katherine Jackson. It is also true of the misappropriations of TWU assets via the wrongful acquisition of expensive cars and a false claim to redundancy which may have been organised by James McGiveron and Richard Burton. That apparent misappropriation, which TWU officials may have approved, though carried out within a very short period of time, was large: over $600,000. Further, the existing law did not stop Dean Mighell, Branch Secretary of the Victorian Divisional Branch of the Electrical Energy and Services Division of the CEPU, from wasting union funds in litigation against his political enemies which may have been in abuse of process.

3. The balance of the Chapter is divided into three parts.

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[1] See Report, Vol 2, ch 4.

4. The first part, which is the largest, examines the duties of union officials to their union. It examines the following issues:

(a) whether the officers of trade unions should be subject to statutory duties and, if so, what statutory duties they should be subject to;

(b) the appropriate penalties for breach of statutory duties by officers of registered organisations;

(c) whether it is appropriate to impose criminal penalties for the most egregious breaches of duty by officers of registered organisations;

(d) the indemnification of officers of registered organisations for penalties imposed personally on officers;

(e) the disclosure of material personal interests by officers of registered organisations; and

(f) the remedies available to members of a registered organisation to enforce the duties imposed on officers of the organisation.

5. The second part deals with the statutory duties of union officers and employees in relation to obeying court orders.

6. The third part deals with the disqualification of persons from holding office in a registered organisation.

B – DUTIES OF UNION OFFICERS TO THEIR UNION

Statutory duties of union officers

7. A threshold question that arose out of detailed submissions made to the Commission by the TWU is whether the officers of trade unions should be subject to statutory regulation at all.

8. In short, those submissions argued that trade unions, unlike corporations, are not-for-profit organisations that operate democratically: 'a union is a collective which is the expression of the majority of its members'.[2] According to the TWU submission, once this critical difference between a corporation and trade union is recognised:[3]

> [I]t becomes apparent that the *control and regulation of the union be in the hands of the members* rather than placed in the hand of regulators, governments and others who are not members of the union.

9. This submission was made in support of the proposition that there was no need for greater regulation of trade unions and their officials.[4] This in turn was made in support of an even broader submission that the 'fundamental distinction between union and corporation … means that entirely different regulatory systems need to be established for unions.'[5]

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[2] Submissions of the TWU, 14/11/14, para 70.

[3] Submissions of the TWU, 14/11/14, para 70 (emphasis added).

[4] Submissions of the TWU, 14/11/14, para 61.

[5] Submissions of the TWU, 14/11/14, para 22.

10. The 'entirely different regulatory systems' which need to be established for trade unions were not specified in the TWU submission. However, it may be inferred from the TWU's earlier submission that the 'control and regulation of the union be in the hands of the members' that the TWU envisaged no external regulation at all, leaving the members of the union to regulate themselves. Although not expressly stating as much, the TWU's submission appears to envisage a return to the early years of the 20th century when trade unions were subject to minimal regulation under the Australian equivalents of the *Trade Union Act* 1871 (UK).

11. Those who are opposed to statutory regulation of trade unions and their officials often suggest that particular regulation would be inconsistent with Australia's international legal obligations under the International Labour Organisation (**ILO**) Convention (No 87) concerning Freedom of Association and Protection of the Right to Organise.[6] However, there are at least two difficulties with that argument. *First*, ILO Convention No 87, like any other treaty that has not been expressly implemented by Parliament, does not form part of Australian law.[7] *Secondly*, the ILO has recognised the right of States to enact statutory provisions in relation to trade unions that are eligible to become registered and which obtain a range of benefits by virtue of registration.[8] Further, the ILO has also recognised the ability of States

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[6] San Francisco, 9 July 1948 ([1974] ATS 3). Australia ratified the convention on 28 February 1973 and it entered into force for Australia on 28 February 1974.

[7] See, eg, *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; *Minster for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287, 298, 303-304, 315.

[8] See International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (International Labour Office, 5th (revised) ed, 2006), para 306.

to enact measures for the protection of members and measures of supervision over administration to prevent abuses and protect the members of the trade union from mismanagement of their funds.[9]

12. Another argument in favour of abandoning statutory regulation of trade unions officers is that given the substantial changes in Australia's industrial relations system from the 1990s onwards the original justification for that regulation no longer exists.

13. Contrary to the TWU's argument, there are clear and convincing arguments in favour of maintaining statutory duties upon trade union officers backed by appropriate sanctions that can be requested by an independent regulator.

14. *First*, the existence of an appropriate statutory sanction acts as an incentive for union officers to comply with their existing general law duties to their members. Australian courts, drawing an analogy between the officers of trade unions and directors of companies, have repeatedly held that union officers are fiduciaries[10] and have general law duties analogous to those owed by company directors.[11] While the scope of these general law duties has not been exhaustively stated, the general law duties on union officers include:

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[9] See International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (International Labour Office, 5th (revised) ed, 2006), paras 369, 489.

[10] *Carling v Platt* (1953) 80 CAR 283 at 292-293 per Dunphy J (dissenting), 306-7 per McIntyre J; *Allen v Townsend* (1977) 31 FLR 431 at 483 per Evatt and Northrop JJ; *Stephenson v Squires* (unreported, Federal Court of Australia, Sweeney J, 19 June 1980); *Jess v Scott* (1984) 3 FCR 263 at 287 per Gray J (FC); *Ludwig v Harris* (1991) 30 FCR 377 at 379 per Beaumont J (Black CJ agreeing); *Robertson v State Public Sector Services Federation* (1993) 49 IR 356 at 363 per French J.

[11] *Allen v Townsend* (1977) 31 FLR 431 at 483-484 per Evatt and Northrop JJ.

(a) a duty to avoid a conflict of interest between the officer's interest and duty;[12]

(b) a duty not to make any secret profit out of the officer's position;[13]

(c) a duty to exercise the officer's powers bona fide and for a proper purpose;[14] and

(d) a duty to exercise the officer's powers for purposes honestly and reasonably believed to be in the best interests of the members of the union as a whole.[15]

15. In addition, the ability of an independent regulator to seek the imposition of penalties helps meet the problem of enforcement. Generally,[16] a union officer's duties are owed to the union itself, so that the union is the proper plaintiff to take action to enforce those duties.[17] The practical reality is that the prospect of civil action by a

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[12] *Carling v Platt* (1953) 80 CAR 283 at 292-293 per Dunphy J (dissenting), 306-7 per McIntyre J.

[13] *Carling v Platt* (1953) 80 CAR 283 at 292-293 per Dunphy J (dissenting), 306-7 per McIntyre J.

[14] *Allen v Townsend* (1977) 31 FLR 431 at 483-487 per Evatt and Northrop JJ.

[15] *Ludwig v Harris* (1991) 30 FCR 377 at 379 per Beaumont J (Black CJ agreeing).

[16] *Carling v Platt* (1953) 80 CAR 283 at 292-293 per Dunphy J (dissenting), 306-7 per McIntyre J; *Allen v Townsend* (1977) 31 FLR 431 at 483 per Evatt and Northrop JJ; *Stephenson v Squires* (unreported, Federal Court of Australia, Sweeney J, 19 June 1980); *Jess v Scott* (1984) 3 FCR 263 at 287 per Gray J (FC); *Ludwig v Harris* (1991) 30 FCR 377 at 379 per Beaumont J (Black CJ agreeing); *Robertson v State Public Sector Services Federation* (1993) 49 IR 356 at 363 per French J.

[17] *Bailey v Krantz* (1984) 55 ALR 345 at 356; *Tanner v Darroch* (1986) 12 FCR 235 at 253. See generally, *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189.

union against an officer of the union whilst that officer is in charge of the union is remote.

16. *Secondly*, a union registered under the FW(RO) Act is an incorporated body. By force of s 27 of the FW(RO) Act a registered union is a body corporate, has perpetual succession, is capable of owning and dealing with property in its own name and is capable of suing and being sued. Similar provisions have existed federally since 1904. By virtue of a registered union's independent legal existence,[18] its members are not liable for the union's debts, unless they independently agree to indemnify the union.[19] With the benefits of incorporation come the burdens of increased regulation on those who conduct the affairs of the organisation.

17. *Thirdly*, associations that are incorporated under State law are subject to legal regulation not dissimilar to that applying to corporations. In Victoria, the office holders of incorporated associations are subject to duties very similar to those imposed on directors of companies under the *Corporations Act* 2001 (Cth).[20] In South Australia, there are criminal penalties for officers of incorporated associations who breach their duty to act with reasonable care and diligence, their duty not to misuse information and their duty not to misuse their position.[21] In

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[18] *Williams v Hursey* (1959) 103 CLR 30 at 52.

[19] *Salomon v Salomon & Co* [1897] 2 AC 22. It has been said that trade unions are not endowed with 'one of the main benefits of incorporation – limited liability': A Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model' (2000) 13 *AJLL* 1 at 13. However, this misunderstands the concept of limited liability. The liabilities of a corporation are not limited. Rather, it is the members of the corporation whose liability to contribute to the corporation is limited.

[20] *Associations Incorporation Reform Act* 2012 (Vic), ss 83-85.

[21] *Associations Incorporation Act* 1985 (SA), s 39A.

New South Wales, there are criminal penalties for committee members of an incorporated association who dishonestly misuse their position or information obtained as a committee member.[22] Thus, even if registered employee organisations were thought to be analogous to small incorporated associations, it would be expected their officers would be subject to statutory regulation.

18. *Fourthly*, there are important differences between the relationship among the officers of a trade union and their members and the relationship among the officers of the typical incorporated association and its members. Union officers occupy an important position of trust and confidence vis-à-vis their members, particularly in relation to an area critical to a member's financial affairs – employment. In addition, many trade unions in modern Australia are large organisations with substantial assets. Union officers have control of substantial sums of 'members' money'. Control of someone else's money can create a strong temptation to misapply it. This supports the need for statutory regulation of union officers.

19. *Fifthly*, the statutory rights and privileges conferred on registered employee organisations and their officials under the FW Act[23] justifies stringent statutory regulation. As one commentator has put it: '[U]nions have traditionally accepted this level of regulation as the

[22] *Associations Incorporation Act* 2009 (NSW), ss 32-33.

[23] See Chapter 1 of this Volume.

price to be paid for the substantial benefits that they have obtained from participation in the formal industrial relations framework.'[24]

20. *Sixthly*, in addition to these privileges, trade unions have the additional privilege of tax exempt status.[25] This too generates a significant public interest in regulating trade unions and their officers.

21. The majority of submissions received by the Commission in relation to this issue did not cavil with the proposition that the officers of registered employee organisations should be subject to statutory regulation. The more controversial question, as discussed below, is the appropriate model for that regulatory framework.

Appropriateness of corporate governance model for trade unions: submissions received

22. The central tenet in the submissions advanced by the TWU, summarised above, is that there is a 'fundamental difference' between companies and trade unions, the former being formed solely to make a profit and the latter being formed solely to benefit their members. A related tenet is that there is a difference in functions between trade union officers and company directors. The argument is that this difference in purpose and function means that the regulatory regime that applies to union officers must be different from that which exists under the *Corporations Act* 2001 (Cth) in relation to company directors.

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[24] A Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model' (2000) 13 *AJLL* 1 at 2.

[25] See Chapter 1of this Volume, paras 80-81.

23. A similar submission was made by the SDA. The SDA submitted that attempting to equate registered organisations and corporations 'evinces unawareness of the history character and purposes for which organisations are registered and conducted.'[26] The submission went on:[27]

> The elements of trust and responsibility are (to say the least) not less for officials of registered organisations than for directors of companies but they are different.

24. The ACTU advanced this argument in more detail in its submissions to the Senate Education and Employment Legislation Committee concerning the *Fair Work (Registered Organisations) Amendment Bill* 2013:[28]

> A trend in the mode of regulation of registered unions in Australia is to attempt to adopt some elements of corporate regulation into the scheme for regulating unions … Corporate regulation of course is directed toward the protection of the economic interests of investors and creditors (and, to an extent, consumers), and serves a different purpose than [sic] the protection of the interests of union members.
>
> There are some aspects of good governance that are universal (such as honesty, openness and accountability) and some lessons have been learned from regulation (including self-regulation) of other types of entity.
>
> While the rhetoric of 'regulate unions like corporations' has some superficial appeal, in reality it is based on a false-equivalence [sic]. Unions are different to [sic] corporations (and to charities and clubs) and Australia rightly regulates each type of entity differently.
>
> Unions do not believe that it is appropriate that unions be regulated in the same way as corporations because the nature of the rights and interests

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[26] Shop, Distributive and Allied Employees Association Law Reform Submissions, 27/8/15, para 25.

[27] Shop, Distributive and Allied Employees Association Law Reform Submissions, 27/8/15, para 26.

[28] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee on the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, pp 5-6.

> that union members have in their union and its activities are [sic] not the same as the economic interests that shareholders have in companies.
>
> We also not [sic] that in corporate regulation, the regulatory regime, investigatory powers and maximum penalties need to be sufficient to cover all types of corporations, including the largest multi-billion businesses and largest and most complicated corporate structures and transactions. In contrast, registered organisations are relatively small, simple organisations with non-commercial purposes.

25. The ACTU made a similar submission to the Senate Education and Employment Legislation Committee reporting on the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2]:[29]

> The policy objective of regulating Registered Organisations like corporations becomes increasingly problematic the further the analogy is pressed.
>
> Most corporations are formed for the purpose of generating profit. The members of such a corporation are its shareholders – persons or indeed other corporations that invest their finances in the hope and expectation of a financial return. The obligation upon company directors to act in the best interests of the corporation and its members is an obligation directed to prudent financial management and commercial risk assessment so as to guard against members [sic] funds or return on investment being compromised through careless business decisions or, in an extreme case, fraud. The reasons corporations are regulated the way they are regulated is because they have significant economic power in financial markets, in asset holdings and in the labour market – they directly determine citzens [sic] financial fortunes.

26. On the other hand, a number of other submissions were received which supported a corporate governance model being applied to the officers of registered organisations.[30] Boral, for example, submitted that the

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[29] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), 30/6/15, p 19.

[30] See, eg, Housing Industry Association Pty Ltd Law Reform Submissions, 21/8/15, pp 4-6; Institute of Public Affairs Law Reform Submission, August 2015, pp 6-8; Grace Collier Submission in response to Issues Paper 2: Duties of Union Officials, 10/7/14; Associations Forum Pty Ltd Law Reform Submissions, 4/9/15, p 1 (Grace Collier submitted that trade union officials should have higher and greater obligations to members than the directors of publicly listed companies have to their shareholders); Carolyn Summers Submission in

role that union officials play within trade unions is analogous to that played by directors within corporations and there should be a harmonisation of union officials' duties with those of company directors.[31]

Appropriateness of corporate governance model: consideration

27. It is obvious that there is a strong analogy between the officers of registered organisations and company directors. The analogy has already been drawn, repeatedly, in the case law.[32] Both manage the affairs of a corporate organisation. Both are responsible for acting in the best interests of the members of the organisation. Both may be described, in a practical sense, as being in charge of other people's money, with all the responsibilities and temptations that arise from that state of affairs. Both are fiduciaries.

28. The real issue is the extent to which the analogy is inapt. Accordingly, there is considerable danger when considering possible changes to the duties of unions officers with reference to a 'corporate governance model' of adopting a broad 'all or nothing approach' without having

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response to Issues Paper 2: Duties of Union Officials, undated (received 20/8/2014), p 3 (Carolyn Summers submitted that the fiduciary duties of executive members of a committee of management should be defined similarly to those of a company director); Boral Law Reform Submissions, 2015; Victoria Police Law Reform Submissions,10/9/15, p 26; Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 18 (the Australian Chamber of Commerce and Industry submitted that officers of trade unions be subject to statutory regulation and existing regulation be strengthened with regard to transparency and disclosure obligations); Institute of Public Affairs Law Reform Submissions, August 2015, p 2; New South Wales Government, Policy Submission, August 2014, p 2.

[31] Boral Law Reform Submissions, 2014, p 1; Boral Law Reform Submissions, 2015, pp 9, 14.

[32] See the cases cited in footnote 10 above.

regard to the detail. An approach that denies the equivalence of unions and companies and then concludes therefore there should be no changes to the statutory duties imposed on union officers is an illogical and unthinking approach. It is necessary to consider carefully the differences between the current statutory duties imposed on the officers of registered organisations and those imposed on company directors.

29. The main statutory duties on officers of registered organisations are set out in Parts 2 and 3 of Chapter 9 of the FW(RO) Act. Those provisions replicate the duties introduced into the *Workplace Relations Act* 1996 (Cth) in 2002 by the *Workplace Relations (Registration and Accountability of Organisations) Act* 2002 (Cth).

30. The duties in Part 2 are based very heavily on the equivalent duties imposed on company directors by the *Corporations Act* 2001 (Cth). However, there are some critical differences. Those critical differences, which are discussed further below, are as follows:

(a) The statutory form of the duties imposed on the officers of registered organisations is limited to only those powers and duties related to the financial management of the organisation or branch.[33]

(b) The statutory duty upon the officers of a registered organisation to act in good faith is only to act in good faith *in*

[33] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 283. This limitation does not appear in the *Corporations Act* 2001 (Cth). Statutory duties are also imposed on certain Commonwealth officials by the *Public Governance, Performance and Accountability Act* 2013 (Cth) in similar terms to those set out in the *Corporations Act* 2001 (Cth): see ss 25-29. The duties in the *Public Governance, Performance and Accountability Act* 2013 (Cth) are not limited in the way as those in the *Fair Work (Registered Organisations) Act* 2009 (Cth).

what they believe to be in the interests of the organisation, rather than in what is objectively the best interests of the organisation.[34]

(c) The maximum civil penalties in relation to breaches by the officers of registered organisations are smaller to a very remarkable degree than the corresponding maximum civil penalties for breaches by company directors. The maximum civil penalty that may be imposed on an officer of a registered organisation for breach of the statutory duties under ss 285-288 of the FW(RO) Act is $10,800. The maximum civil penalty that may be imposed on a company director for equivalent conduct is $200,000.

(d) Officers of a registered organisation are not subject to possible criminal penalties for dishonest breaches of their statutory duties. The directors of companies are.[35]

(e) In contrast to the position under the *Corporations Act* 2001 (Cth), there are no provisions of the FW(RO) Act prohibiting a registered organisation from indemnifying its officers for civil penalties imposed for breach of duty.

(f) The FW(RO) Act does not contain provisions equivalent to ss 191-196 of the *Corporations Act* 2001 (Cth) which require the disclosure by company directors of material personal interests, and restrict the directors of public companies from

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[34] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 286. Compare *Corporations Act* 2001 (Cth), s 181.

[35] *Corporations Act* 2001 (Cth), s 184.

voting on matters in which they have material personal interests. As noted in Chapter 2, s 148B of the FW(RO) Act does require organisations to have rules requiring the disclosure of certain material personal interests.

31. There is an important point that should be emphasised immediately. Apart from the matter identified in paragraph 30(f), where there are certain differences between private and public companies, the additional requirements that apply in respect of companies apply to all companies whether for profit or not-for-profit, whether big or small. That is, the directors of small companies (often persons related by blood or marriage) and the (many) directors of companies having not-for-profit and charitable purposes are all subject to the increased penalties and the possibility of criminal sanctions.

Are union officers subject to the duties in the *Corporations Act* 2001 (Cth)?

32. Before analysing in more detail the differences between the duties imposed on the officers of registered organisations under the FW(RO) Act and the duties imposed on officers of companies under the *Corporations Act* 2001 (Cth), there is a preliminary point.

33. In *Health Services Union v Jackson (No 4)*,[36] Tracey J, accepting the argument of the HSU, expressed the view that the officers of trade unions were subject to the provisions in ss 180-182 of the *Corporations Act* 2001 (Cth). If this were correct, the debate about the

[36] [2015] FCA 865.

differences between the FW(RO) Act and the *Corporations Act* 2001 (Cth) would be academic.

34. His Honour's reasoning[37] was that ss 180-182 (and for that matter ss 183-184) of the *Corporations Act* 2001 (Cth) apply to 'officers' of a 'corporation'. 'Corporation' is defined to include 'any body corporate (whether incorporated in this jurisdiction or elsewhere)'. By operation of s 27 of the FW(RO) Act, registered organisations are bodies corporate. 'Officer' is defined to include a person who makes, or participates in making, decisions that affect the whole, or a substantial part of the business of the corporation. Accordingly, senior officers of a trade union would be 'officers' of a 'corporation'.

35. However, it appears that Tracey J was not taken by the HSU to s 190A of the *Corporations Act* 2001 (Cth). That section provides that Division 1 of Part 2D.1 of the *Corporations Act* 2001 (Cth), which includes ss 180-184 of the *Corporations Act* 2001 (Cth):

> does not apply to an act or omission by a director or other officer or employee of a corporation that is a registrable Australian body unless the act or omission occurred in connection with:
>
> (a) the body carrying on business outside its place of origin; or
>
> (b) an act that the body does or proposed to do outside its place of origin; or
>
> (c) a decision by the body whether or not to do or refrain from doing outside its place of origin.

36. 'Registrable Australian body' includes a body corporate which is not a company, an exempt public authority or a corporation sole.[38] An

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[37] [2015] FCA 865 at [55]-[59].

[38] *Corporations Act* 2001 (Cth), s 9.

organisation registered under the FW(RO) Act is thus a 'registrable Australian body'. The 'place of origin' of a body registered under the FW(RO) Act is the place of the body's incorporation, which would presumably be Australia.[39]

37. Accordingly, it would seem that the effect of s 190A is that the duties in ss 180-184 of the *Corporations Act* 2001 (Cth) only apply to conduct of the officers of a registered organisation if the conduct occurs in connection with:

(a) the carrying on of business by registered organisation outside Australia;

(b) an act that the registered organisation does or proposes to do outside Australia; or

(c) a decision by the registered organisation whether or not to do or refrain from doing something outside of Australia.

38. Some registered organisations will not do anything outside Australia, in which case the duties in the *Corporations Act* 2001 (Cth) will not apply. However, some other registered organisations – for example, the Maritime Union of Australia – may engage in a variety of conduct outside of Australia. In those cases, the officers of the organisation would be subject to ss 180-184 of the *Corporations Act* 2001 (Cth) and in particular criminal liability pursuant to s 184.

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[39] An alternative may be the State where the head office of the organisation is located.

Meaning of 'officer'

39. An initial issue is the scope of the persons subject to statutory duties contained in ss 285-288 of the FW(RO) Act. Those duties are confined to 'officers' of registered organisations and the branches of registered organisations.

40. 'Officer' is defined in s 6 of the FW(RO) Act as a person who holds an 'office' in an organisation or branch. 'Office' is currently defined in s 9 of the FW(RO) Act as follows:[40]

> (1) In this Act, ***office***, in relation to an organisation or a branch of an organisation means:
>
> (a) an office of president, vice president, secretary or assistant secretary of the organisation or branch; or
>
> (b) the office of a voting member of a collective body of the organisation or branch, being a collective body that has power in relation to any of the following functions:
>
> (i) the management of the affairs of the organisation or branch;
>
> (ii) the determination of policy for the organisation or branch;
>
> (iii) the making, alteration or rescission of rules of the organisation or branch;
>
> (iv) the enforcement of rules of the organisation or branch, or the performance of functions in relation to the enforcement of such rules; or
>
> (c) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(i) and (iv), other than an office the holder of which

[40] See also *Fair Work Act* 2009 (Cth), s 12 which contains an analogous definition of 'office' in an industrial organisation.

participates only in accordance with directions given by a collective body or another person for the purpose of implementing:

(i) existing policy of the organisation or branch; or

(ii) decisions concerning the organisation or branch; or

(d) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(ii) and (iii); or

(e) the office of a person holding (whether as trustee or otherwise) property:

(i) of the organisation or branch; or

(ii) in which the organisation or branch has a beneficial interest.

41. This definition of 'office' is also relevant when considering the circumstances in which a person will be disqualified from holding 'office' in a registered organisation.[41]

42. In submissions to the Commission in response to the Issues Paper, Master Builders Australia drew attention to the fact that appointed staff who determine policy will not hold 'office' unless the rules of the organisation expressly provide that they are entitled to exercise that function.[42] They argued that the definition of 'office' should be clarified to include any person involved in the management or control of a registered organisation.

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[41] See para 167 and following.

[42] Master Builders Australia Submissions in response to Issues paper 2: Duties of Union Officials, 11/7/2014, Attachment B, Submission on Strengthening Corporate Governance of Industrially Registered Organisations – Introducing a New Fit and proper Person Test, 26/8/13, p 10.

43. In contrast, the Australian Industry Group was opposed to any amendment to the definition of 'office' stating that any such amendment would create 'numerous complications', although the submission did not state what the numerous complications were.[43] It also submitted that officers are typically elected and are appropriately differentiated from unelected employees.[44] This submission suggested that the definition of 'office' ought not to be expanded to unelected employees of a registered organisation.

44. The difficulty with excluding unelected officials from the definition of 'officer' is that, as was stated in the March 2013 report to the ACTU Executive by the Independent Panel on Best Practice for Union Governance:[45]

> … employees of a union or branch may have decision-making roles and responsibilities despite the fact that such employees have no voting rights.

45. The Independent Panel reflected this fact by making a number of governance recommendations with reference to both officers of a registered organisations but also relevant employees with decision-making responsibilities.[46]

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[43] Australian Industry Group Law Reform Submissions, 21/8/15, p 8.

[44] Australian Industry Group Law Reform Submissions, 21/8/15, p 8.

[45] Independent Panel on Best Practice for Union Governance, *Report to the ACTU Executive to Invite Comment and Discussion*, March 2013, p 54.

[46] Independent Panel on Best Practice for Union Governance, *Report to the ACTU Executive to Invite Comment and Discussion*, March 2013, pp 53-56.

46. By way of comparison, the definition of 'officer' of a corporation in s 9 of the *Corporations Act* 2001 (Cth) in addition to number of specified positions (for example, director, secretary) includes a person:

> (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
>
> (ii) who has the capacity to affect significantly the corporation's financial standing; or
>
> (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation).

47. Thus, the definition focuses on substance, rather than form. It is important to capture in the definition of 'office' those senior employees who, although not elected, in fact have management roles and decision-making responsibilities within a registered organisation or a branch of a registered organisation and thus to ensure that they are also held to the same levels of accountability as elected officers. It is recommended that the definition of 'office' be amended to include additional provisions capturing such persons.

48. A further proposal which has been put forward to the Commission is to the effect that the definition of office should be deleted and a definition of 'officer' inserted. In this respect it has been submitted that that the definition of an officer be based on 'an objective assessment of the position, responsibilities and role held'.[47] The current definition of 'office' seems to address the responsibilities and roles and this submission seems to overlook that a definition of 'officer' is already set out in s 6 of the FW(RO) Act.

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[47] Associations Forum Pty Ltd Law Reform Submission, 4/9/15, p 5.

Recommendation 25

The definition of 'office' in s 9 of *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended to include, in addition:

(a) an office of financial compliance officer of the organisation or branch;

(b) an office of a person who makes, or participates in making, decisions that affect the whole or a substantial part, of the organisation or branch;

(c) an office of a person who has the capacity to affect significantly the financial standing of the organisation or branch; and

(d) an office of a person in accordance with whose instructions or wishes the members of the committee of management of the organisation or branch are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the organisation or branch).

Limitation of statutory duties to those in relation to financial management

49. Section 283 of the FW(RO) Act provides as follows:

> This Part [ss 282–293] only applies in relation to officers and employees of an organisation or a branch of an organisation to the extent that it relates to the exercise of powers or duties of those officers and employees related to the financial management of the organisation or branch.

Section 283 was originally introduced to the *Workplace Relations Act* 1996 (Cth) in the *Workplace Relations (Registration and*

Accountability of Organisations) Act 2002 (Cth) and has remained unchanged.

50. Submissions received from Master Builders Australia, the Associations Forum and the State of Victoria supported the repeal of s 283 of the FW(RO) Act.[48] The Employment Law Committee of the Law Society of New South Wales neither supported nor opposed the suggestion that s 283 be repealed.[49] However, the Committee submitted that there was no need for any definition of 'financial management' in s 283.[50]

51. Several issues arise in relation to this section.

52. *First*, the section confuses the operation of the statutory duties imposed by ss 285-288 of the FW(RO) Act and the general law duties that are owed by officers of registered organisations.

53. Section 283 limits the scope of the *statutory* duties imposed by ss 285-288 of the FW(RO) Act. However, subject to one exception, these statutory duties are expressly stated[51] to be in addition to the existing equitable and common law duties imposed on the officers of registered organisations. The exception is that the statutory 'business judgment rule' defence in s 285(2) of the FW(RO) Act is also a defence to the equitable and common law duties to take reasonable care.

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[48] Submissions of the Government of Victoria, 28/10/14, p 38; Master Builders Australia Law Reform Submissions, 21/8/15, p 26; Associations Forum Pty Ltd Law Reform Submission, 4/9/15, p 4.

[49] Law Society of New South Wales, Employment Law Committee Law Reform Submissions, 21/8/15, p 8.

[50] Law Society of New South Wales, Employment Law Committee Law Reform Submissions, 21/8/15, p 8.

[51] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 291.

54. The general law duties – a number of which are collected in paragraph 14 above – are almost identical to the statutory duties. Yet the general law duties are not limited to powers and duties 'related to the financial management' of the registered organisation, but extend across the entire field of possible activity by officers of the organisation.

55. It is thus very difficult to understand what legitimate purpose s 283 of the FW(RO) Act could be thought to have. There are a several reasons why general law duties may be enacted in statutory form. They include the following:

(a) Enactment of statutory duties simplifies the law and makes the law able to be more easily understood.

(b) Penalties (whether civil or criminal) for breach of the statutory duties indicate society's disapproval of the conduct in breach of duty.

(c) Penalties (whether civil or criminal) for breach of the statutory duties act as a deterrent and encourage the proper performance of the general law duties.

(d) The ability of an independent statutory regulator to take action further encourages the performance of the general law duties.

56. The inclusion of s 283 of the FW(RO) Act serves none of these purposes. Rather, it would seem that its only purpose is to prevent officers of registered organisations from being exposed to action by an

independent regulator in relation to certain types of breaches of duty. The obvious implication is that breaches of duty by officers in relation to matters other than those 'in relation to financial management' are unimportant.

57. *Secondly*, there is no definition of 'financial management' set out in the FW(RO) Act. On a narrow view, only decisions about the actual management of the finances of a registered organisation are caught by the section. That would give the statutory duties in ss 285-288 of the FW(RO) Act a fairly restricted operation. On a broader view, decisions that have an effect, whether direct or indirect, on the finances of a registered organisation will be caught. On the current drafting of s 283, one difficulty with the broader construction is that if it were accepted it would tend to render s 283 otiose because many decisions will have an effect on an organisation's financial position.

58. The problems with the current provision were exposed in the Industry 2020, Building Industry 2000 and IR 21 case studies considered in 2014.[52] Submissions by counsel assisting were to the effect that the conduct by union officers in deciding to host certain events as Building Industry 2000 (in the case of the CFMEU), Industry 2020 (in the case of the AWU) or IR21 events (in the case of the NUW) rather than as union events was conduct in relation to the financial management of the union.[53]

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[52] Royal Commission into Trade Union and Governance, *Interim Report* (2014), Vol 1, chs 3.3, 3.4, 3.5 respectively.

[53] Royal Commission into Trade Union and Governance, *Interim Report* (2014), Vol 1, ch 3.3, p 377 [124]; ch 3.4, p 419 [103]; ch 3.5, pp 474-475 [123].

59. However, counsel for Cesar Melhelm argued that conduct in deciding to host certain events as Industry 2020 events rather than AWU events was not conduct 'in relation to the financial management' of the AWU. The submission was to the effect that a decision about how to raise funds was not in relation to the management of funds.[54] Given the uncertainty, the Interim Report did not make any findings as to whether conduct of this nature was or was not 'in relation to financial management'. However, the uncertainty illustrates that reform of s 283 of the FW(RO) Act is desirable.

60. *Thirdly,* conduct by officers which may have no direct relation to the financial management of the organisation may have a very significant financial effect on its financial position. For example, the conduct of union officials which amounts to contraventions of laws or breach of court orders may lead to the imposition of significant penalties or fines for contempt. The legal costs of proceedings defending this conduct and the imposition of fines and penalties could substantially diminish the assets of the relevant union. It seems peculiar that union officers' statutory duties to the union should not extend to conduct that has an adverse financial effect on the union.

61. *Fourthly,* conduct by officers which has no relation to the financial management of the union may be such an egregious breach of fiduciary duty that there is a public interest in the officer being liable to pay a penalty so as to deter future wrongdoing by other officers. For example, a union official who uses his or her position to obtain a personal benefit (for example, the provision of free building work)

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[54] See Royal Commission into Trade Union and Governance, *Interim Report* (2014), Vol 1, ch 3.3, p 383 [138].

which could not be obtained by the union arguably cannot breach s 287 of the FW(RO) Act because the officer's conduct does not relate to the financial management of the union. Although, depending on the particular circumstances, it may be that the official is criminally liable for receiving a secret commission, that will not always be the case.

62. *Fifthly*, the statutory duties imposed on officers of State registered organisations in New South Wales, Queensland and Western Australia, are not limited to matters relating to financial management:

(a) In New South Wales,[55] officers are subject to criminal penalties for acting dishonestly in the exercise of their powers or the discharge of their duties, with an intention to defraud. They are also subject to criminal penalties for breaches of the equivalent of s 287 of the FW(RO) Act up to a maximum of 100 penalty units. There is no provision equivalent to s 283.

(b) In Queensland,[56] officers of State registered organisations are subject to very substantial criminal liability, including imprisonment for up to five years and a penalty of 3,091 penalty units ($340,010), for breaches of the duties equivalent to those imposed by ss 285 and 286 of the FW(RO) Act. There is no provision equivalent to s 283 of the FW(RO) Act.

(c) In Western Australia,[57] 'financial officials' of State registered organisations are subject to duties equivalent to those

[55] *Industrial Relations Act* 1996 (NSW), ss 267-268.

[56] *Industrial Relations Act* 1999 (Qld), ss 527-528.

[57] *Industrial Relations Act* 1979 (WA), s 74.

imposed by ss 285, 287 and 288 of the FW(RO) Act. 'Financial officials' are officers of the organisation entitled to participate directly in the financial management of the organisation. There is no provision equivalent to s 283 of the FW(RO) Act.

63. For the reasons above, it is recommended that s 283 of the FW(RO) Act be repealed to bring the statutory duties on the officers of registered organisations into line with the duties imposed on those officers by the general law.

Recommendation 26

Section 283 of *Fair Work (Registered Organisations) Act* 2009 (Cth) be repealed to align the statutory duties of officers of registered organisations with their general law duties.

Good faith duty

64. Section 286 of the FW(RO) Act imposes a duty of good faith on officers of registered organisations. This section provides that:

> **286 Good faith—civil obligations**
>
> (1) An officer of an organisation or a branch must exercise his or her powers and discharge his or her duties:
>
> (a) in good faith in *what he or she believes to be* the best interests of the organisation; and
>
> (b) for a proper purpose.

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

[Emphasis added]

65. The effect of the italicised words is that an officer of a registered organisation could only ever breach the duty in s 286(1)(a) of the FW(RO) Act if the officer did not subjectively believe that what he or she was doing was in the best interests of the organisation.[58] The italicised words have the further consequence that proof of a contravention of s 286(1)(a) of the FW(RO) Act will require proof that the officer did not have a particular subjective belief. Except in egregious cases, that will often pose a considerable practical challenge. It may arise in relation to some of the expenditures made by Derrick Belan on himself at the cost of the NUW when those expenditures come to be fully investigated.[59]

66. The comparable duty under s 181(1) of the *Corporations Act* 2001 (Cth) obliges officers of a corporation to exercise their powers and discharge their duties 'in good faith in the best interests of the corporation' and 'for a proper purpose'. Significantly, the language does not include the words 'what he or she believes to be'.

67. The language of s 181(1), the structure of the *Corporations Act* 2001 (Cth) and the section's legislative history[60] point inexorably to the conclusion that the statutory duty is not satisfied merely because an officer has a subjective belief that what was done was in the best

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[58] See, eg, *General Manager of the Fair Work Commission v Thomson (No 3)* [2015] FCA 1001 at [27], [39], [47].

[59] See Report, Vol 2, ch 4.

[60] See *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis, October 2015, looseleaf), [8.065], [8.065.6], [8.070.3].

interests of the corporation. During the Parliamentary debates concerning the introduction of s 181(1) of the *Corporations Act* 2001 (Cth), the Labor opposition successfully amended the *Corporate Law Economic Reform Program Bill* 1998 (Cth) to remove the additional words that are presently contained in s 286 of the FW(RO) Act in order to turn a subjective test into an objective test.[61] There are many cases to the effect that the section imports an objective standard that has regard to what a comparable person having the same knowledge and skills as the officer would reasonably have done in the circumstances.[62]

68. However, more recently some confusion has been sown in this area, particularly by the decision in *Bell Group Ltd (in liq) v Westpac Banking Corporation*, where a range of different views were expressed about the equivalent *general law* duty on directors. At first instance, Owen J expressed the view that the general law duty to act in the best interests of the corporation has both subjective and objective elements, that it is largely subjective but that there may be a breach of duty even if the director believes it is in the best interests of the corporation if it is a decision no reasonable director could judge to be in the bests in the corporation.[63] On appeal, a variety of views were expressed. Lee AJA indicated that the general law duty would usually be satisfied if the

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[61] Commonwealth, Senate, *Parliamentary Debates (Hansard)*, 13 October 1999, pp 9622-9624 (Senator Conroy).

[62] See, eg, *ASIC v Sydney Investment House Equities Pty Ltd* (2008) 69 ACSR 1 at 12 [34], 14 [41] per Hamilton J; *Mernda Developments Pty Ltd v Alamanda Property Investments No 2 Pty Ltd* (2011) 86 ACSR 277 at 286 [32]-[33] per curiam (VCA); *Re Idylic Solutions Pty Ltd* [2012] NSWSC 1276 at [1487] per Ward J; *ASIC v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342 at [612] per Murphy J. See generally, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis, October 2015, looseleaf), [8.065], [8.065.6], [8.070.3], [8.100] and [8.140].

[63] *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 38 WAR 1 at [4619].

director subjectively thought the decision was in the best interests of the corporation, but there would be a breach if the conduct was plainly unreasonable or irrational.[64] Drummond AJA, at the same time as approving Owen J's conclusion, said that the test was purely subjective.[65] Carr AJA appeared to accept Owen J's conclusion.[66]

69. An obvious reason for adopting the wording of s 181(1) of the *Corporations Act* 2001 (Cth) rather than the wording of s 286(1) of the FW(RO) Act was stated more than 130 years ago by Bowen LJ:[67]

> Bona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational.

70. A similar point was made by the Companies and Securities Advisory Committee when it was asked by the Minister for Financial Services and Regulation to review s 181(1)(a) of the *Corporations Act* 2001 (Cth) after its enactment. The Committee stated:[68]

> The language of s 181(1)(a) is consistent with the common law test of acting in the best interests of the company, which contains an objective element. A subjective belief, while necessary, does not suffice. By contrast, the original formulation, namely "in good faith in what they believe to be in the best interests of the corporation", may have permitted directors to act on the basis of eccentric or irrational beliefs. This purely subjective test would therefore be inappropriate.

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[64] *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 at [923].

[65] *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 at [1988]-[1995].

[66] *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 at [2795]-[2796].

[67] *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 at 671.

[68] Companies and Securities Advisory Committee, *Report to the Minister for Financial Services and Regulation on Sections 181 and 189 of the Corporations Law*, October 2000, p 2.

71. Various submissions to the Commission in relation to this issue support the removal of the purely subjective test currently found in the FW(RO) Act.[69]

72. One significant argument in support of the difference between s 286 of the FW(RO) Act and the analogous duty in s 181 of the *Corporations Act* 2001 (Cth) is that registered organisations, particularly trade unions, have a range of different and possibly competing interests and that it would not be possible for officers to act so as to promote the interests of all of the members.[70] Accordingly, it would often not be possible to make any assessment of what was *objectively* in the best interests of the organisation, and so inappropriate to impose a duty on the officers of registered organisations to act in what is *objectively* the best interests of the organisation.

73. Master Builders Australia submitted, in effect, that in the context of industrial organisations an objective approach to s 286 of the FW(RO) Act is unworkable and that s 286 of the FW(RO) Act should be repealed in its entirety and replaced with a statutory rendering of a fiduciary's duties.[71]

74. There is considerable force to the argument that an assessment of what is in the best interests of an organisation is not readily susceptible of a single objective answer. There is less force to the argument that this is more of a problem in relation to industrial organisations. For example

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[69] Associations Forum Pty Ltd Law Reform Submission, 4/9/15, p 5; Housing Industry Association Pty Ltd Law Reform Submissions, 21/8/15, pp 4-5; Boral Law Reform Submissions, 2014, pp 28-29; Boral Law Reform Submissions, 2015, p 15.

[70] Master Builders Australia Law Reform Submissions, 21/8/15, pp 26-27.

[71] Master Builders Australia Law Reform Submissions, 21/8/15, pp 26-27.

there are many cases where the directors of a company will have to make decisions balancing the competing interests of different classes of members. In such cases, the duty to act in the best interests of the company (which ordinarily means the members as a whole) requires directors to act fairly between the various classes of member.[72] The general law in relation to trade union officials is to the same effect.[73]

75. An approach that balances the need to avoid a purely subjective standard at the same as recognising the difficulties of a court imposing what it thinks to be in the best interests of the organisation is to require the officer's belief to be held honestly and reasonably. This is the general law formulation of the duty on union officers,[74] and is consistent with the cases that have interpreted s 181(1) of the *Corporations Act* 2001 (Cth) referred to above.[75] Under this test, it is not enough that the officer holds a particular view. It must be a view which a person in the same position as the officer, having the same knowledge and skills, could reasonably have formed.

Recommendation 27

Section 286(1)(a) of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended by inserting the words 'honestly and reasonably' before the word 'believes'.

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[72] *Mills v Mills* (1938) 60 CLR 150 at 164 per Latham CJ; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 835 per Lord Wilberforce.

[73] *Allen v Townsend* (1977) 31 FLR 431 at 486 per Evatt and Northrop JJ.

[74] *Ludwig v Harris* (1991) 30 FCR 377 at 379 per Beaumont J (Black CJ agreeing).

[75] See the cases cited in footnote 62 above.

Civil penalties for breach of statutory duties

76. The duties created by ss 285-288 of the FW(RO) Act are civil penalty provisions.[76] The consequence is that the General Manager of the FWC may apply to the Federal Court for the imposition of a pecuniary penalty for contravention of those provisions.

77. Presently, the maximum penalty for a contravention of a civil penalty provision is 300 penalty units for a body corporate and 60 penalty units 'in any other case'.[77] Currently, a penalty unit is $180.[78] Consequently, the current maximum penalty that can be imposed on an officer of a registered organisation for breach of one of the duties in ss 285-288 of the FW(RO) Act is $10,800.[79]

78. This penalty may be contrasted with s 1317G(1) of the *Corporations Act* 2001 (Cth) which imposes a maximum civil penalty of $200,000 for contraventions of the equivalent directors' duties that:

(a) materially prejudice the interests of the corporation, or its members; or

(b) materially prejudice the corporation's ability to pay its creditors; or

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[76] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 305.

[77] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 306.

[78] *Crimes Act* 1914 (Cth), s 4AA. From 1 July 2018, the amount is subject to annual CPI indexation.

[79] A body corporate that is involved in a contravention by an officer of an organisation (which obviously cannot be the organisation itself) is subject to a maximum civil penalty of 300 penalty units, which is equivalent to $54,000.

(c) is serious.

No pecuniary penalty is payable if the contravention does not fall within one of those three classes.

79. The difference between the maximum penalties is stark. The directors of not-for-profit companies are subject to a maximum possible penalty of $200,000 for breach of their duties. Yet the officers of a registered trade union are subject to a maximum penalty of only $10,800 for the same conduct.

80. Since 2013, the current Federal government has attempted three times to introduce legislation increasing the maximum penalties for breach of ss 285-288 of the FW(RO) Act.[80] The most recent attempt to increase the penalties was set out in the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), which was introduced to the House of Representative on 19 March 2015. On 17 August 2015 the Senate negatived the Bill. That Bill proposed amending the penalties for breach of ss 285-288 of the FW(RO) Act to provide for a maximum penalty of:

(a) 1,200 penalty units (currently $216,000) for a 'serious contravention' of those sections; and

[80] *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), *Fair Work (Registered Organisations) Amendment Bill* 2014 (Cth) and the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth) have each proposed increasing the maximum pecuniary penalties for breach of ss 285-288 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

(b) 100 penalty units (currently $18,000) for all other breaches of those sections by officers.[81]

81. A 'serious contravention' was defined in the Bill[82] as a contravention that:

(a) materially prejudices the interests of the organisation or branch, or members of the organisation or branch; or

(b) materially prejudices the ability of the organisation or branch to pay its creditors; or

(c) is serious.

The definition of serious contravention was based on s 1317G(1)(b) of the *Corporations Act* 2001 (Cth).

82. More recently, the Australian Labor Party has, notwithstanding its repeated opposition to the various Bills referred to above, adopted a policy that, subject to one important matter, is very similar to the current government's proposal. The Australian Labor Party's policy is to increase the existing penalties to $216,000 for serious breaches by *paid* officers of their statutory duties. A 'serious' breach will include a breach that 'materially prejudices' the interest of the organisation or its

[81] See *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), Sch 2, Part 1, items 149-162.

[82] See *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), Sch 2, Part 1, item 4.

members.[83] The important distinction is, of course, that the increased penalties will only apply to *paid* officials of the organisation.

83. The Commission received a number of submissions supporting the introduction of higher penalties for breaches of ss 285-288 of the FW(RO) Act.[84]

84. The MUA however, has argued (although not in submissions to the Commission) that the increase in penalties proposed by the Federal government is 'manifestly unfair'.[85] The ACTU has also argued that the proposed maximum penalties are 'excessive'.[86] It has also criticised the fact that because the proposed maximum penalties in relation to registered organisations are expressed in terms of penalty units, the proposed maximum penalty in relation to breaches by officers of registered organisations is in fact *greater* than those penalties imposed on company directors.[87] It has also argued that the

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[83] Australian Labor Party, 'Fact Sheet: Better Union Governance', released 7/12/15, pp 1-2.

[84] Boral Law Reform Submissions, 2015, p 18; Master Builders Australia Law Reform Submissions, 21/8/15, p 28; Grace Collier Submission in response to Issues Paper 2: Duties of Union Officials, 10/7/2014, p 2; Institute of Public Affairs Law Reform Submissions, August 2015, pp 6-7.

[85] Maritime Union of Australia, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill 2013* (Cth), 22/11/13, p 9.

[86] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 17.

[87] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 16; Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), 30/6/15, p 11.

proposed definition of 'serious contravention' is not well-suited to registered organisations and is, in part, circular.[88]

85. The Australian Industry Group had previously expressed concerns similar to the ACTU. They suggested that there be a maximum civil penalty of 200 penalty units (or $36,000) for an individual who contravenes ss 285-288 of the FW(RO) Act.[89]

86. The various submissions raise two main issues. *First*, should the civil penalties for breach of ss 285-288 be increased? *Secondly*, if so, should the civil penalties be brought in line with the penalties imposed on directors of corporations? If not, how else should the existing maximum penalties be altered?

87. In relation to the first issue, it is difficult to see how, objectively, a *maximum* penalty of $10,800 imposes much of a deterrent to officers who breach their duties, or is much of a punishment. It must be recalled that courts rarely, if ever, impose the *maximum* penalty. By way of comparison, the secretaries of many large unions are paid in excess of $150,000 per year, with some – such as Michael Williamson and Katherine Jackson – paid well in excess.

88. Of course, it is true that a union or other registered organisation that suffers damage as a result of a breach of statutory duty may seek to

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[88] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 17.

[89] Australian Industry Group, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), pp 14-15.

recover that damage from the officer.[90] But the recovery of compensation is directed at restoring the union or registered organisation to the position it should have been in, rather than seeking to punish the wrongdoer and seeking to deter further wrongdoing.

89. Put shortly, the existing civil penalties under the FW(RO) Act for breaches of ss 285-288 of the FW(RO) Act are manifestly inadequate to act as an effective deterrent. They are manifestly inadequate to protect members of organisations from improper conduct by officers. They are manifestly inadequate to mark society's disapproval of the conduct concerned. They are utterly derisory. They should be increased. It must be remembered that the present suggestion is only that the maximum possible penalty be increased. The amount of penalty actually awarded in each case will be determined by a court after close consideration of all relevant facts.

90. The leads to the second issue. Should the penalties be aligned generally with those in the *Corporations Act* 2001 (Cth)?

91. There appear to be two main, and interlinked, arguments why the penalties should not mirror those in the *Corporations Act* 2001 (Cth).

92. The first is that registered organisations are different from corporations and that it is therefore not appropriate for the penalties to be the same. The main relevant differences identified by the ACTU are:[91]

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[90] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 307.

[91] See the extracts from the submissions quoted in paras 24-25 above.

(a) Corporations are formed for the purpose of generating profit and the reason that they are regulated is because they can directly determine the 'financial fortunes' of members. In contrast, unions are not formed to generate profit for members and the interests of union members in their union are different from the financial interests of shareholders in their company;

(b) The *Corporations Act* 2001 (Cth) needs to cover the whole range of corporations including multi-billion dollar businesses. In contrast, registered organisations are 'relatively small, simple organisations with non-commercial purposes'.

93. The second argument is that, unlike corporations, many employee and employer organisations are run solely by volunteers for the benefit of members, and the imposition of substantial penalties on officers of those organisations might deter individuals from taking up office in such organisations.

94. The first argument does not withstand scrutiny.

95. *First*, not all companies are formed to generate profit. There are a number of not-for-profit companies, companies having charitable purposes and mutual companies limited by guarantee which are not directed to deriving profit for their members. Yet they are all subject to the same regulation under the *Corporations Act* 2001 (Cth).

96. *Secondly*, far from all registered organisations are 'relatively small, simple organisations'. Large national unions, such as the CFMEU, MUA and the AWU, have substantial assets. They have many

thousands of members. They operate branches across different jurisdictions. They employ large numbers of employees. They generate tens of millions in membership dues annually. They generate millions in commercial enterprise and agreements with third parties. They are trading corporations in the constitutional sense. They are big businesses.

97. *Thirdly*, whilst the interest that union members have in their union is *different* from the interest that shareholders have in a company it is no less important. Arguably it is more important. In the main, workers join a union because the union provides, in return for the membership dues paid, many services that are essential to the workers' livelihoods and working conditions and some services that are beneficial for workers who fall on evil days. Union officials are fiduciaries. They must act for the benefit of the members.

98. The second argument does not fare much better.

99. *First*, the penalties are only available for wrongdoing. Honest and diligent officers have nothing to fear. In relation to the possibility of liability for negligence, s 285(2) of the FW(RO) Act provides a very broad business judgment defence.

100. *Secondly*, the penalties are *maximum* penalties, not minimum penalties.

101. *Thirdly*, many employee organisations at least are not run by volunteers but by officers who receive substantial salaries.

102. *Fourthly*, not-for-profit and charitable corporations can also be run by volunteers. It is has not been suggested to the Commission that the

obligations under the *Corporations Act* 2001 (Cth) have had a chilling effect on the charity and not-for-profit sector.

103. *Fifthly*, officers of State registered organisations in Queensland are already subject to criminal penalties of up to 5 years imprisonment or a penalty of $340,010 for breaches of the duties equivalent to those in ss 285-286 of the FW(RO) Act. It was not suggested that this penalty had deterred honest individuals from participating in the affairs of Queensland registered organisations.

104. In short, the distinctions between corporations and registered organisations are, in relation to the question of civil penalties, either false or employed to lead to misleading conclusions. Registered organisations are not the same as corporations. But in determining what maximum civil penalties should be available for breaches of the same duties there is no relevant difference.

105. Further, any residual concern about the effect of substantial penalties can be accommodated by adopting a differential maximum penalty regime.

106. One type of regime would be to have different maximum penalties depending on the size of the organisation. However, as noted in the Discussion Paper, there are considerable practical difficulties with such an approach.[92]

107. The other type of regime is to have different maximum penalties depending on the gravity of the contravention involved. Such a regime

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[92] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform*, 19/5/15, p 53.

should alleviate any remaining concern that officers of organisations would be unduly deterred from standing for office by the potential for heavy penalties being imposed for honest and trivial breaches of duty.[93] This differential regime is the approach in the *Corporations Act* 2001 (Cth) and is the current approach proposed by the Federal government.

108. The differential regime proposed by the Australian Labor Party, which only applies higher penalties to *paid* officers, is not recommended. Why should an unpaid officer who misappropriates funds be automatically subject to a lesser maximum penalty? An unpaid officer who dishonestly misappropriates a substantial amount of members' funds may be deserving of a substantially greater penalty than a paid officer who negligently wastes a much smaller amount. Furthermore, whether or not an officer is paid is merely one matter that should be considered the gravity or seriousness of the conduct involved. It is recommended that this be left to the courts to determine on a case by case basis.

109. At this point, two criticisms of the proposals in the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth) should be discussed.

110. The first criticism, made by the ACTU, is that the government's current proposals will mean that the officers of registered organisations are subject to *greater* penalties than company directors. That is so for two reasons. *First*, because the proposed amendments to the FW(RO) Act are made with reference to 'penalty units' rather than a fixed

[93] See Master Builders Australia Law Reform Submissions, 21/8/15, p 28.

amount of $200,000, officers of a registered organisations are subject to potentially greater penalties. *Secondly*, under the *Corporations Act* 2001 (Cth), unless the breach of duty falls into one of the relevant classes of more serious contravention, the director is not liable to any penalty. In contrast, under the proposed reforms to the FW(RO) Act, officers will be subject to a maximum penalty of 100 penalty units for contraventions of ss 285-288 of the FW(RO) Act that are not serious.

111. The second criticism, made by the ACTU and the Australian Industry Group, is that the definition of 'serious contravention' (set out in para 81 above) is inappropriate. The ACTU's submission to the Senate Education and Employment Legislation Committee on the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth) (which is relevantly identical to the most recently rejected Bill) on this topic was as follows:[94]

> [T]he provision does not translate well into the sphere of regulating registered organisations. The first limb ("a serious contravention is … a contravention that materially prejudices the interests of the organisation or branch, or the members of the organisations or branch") is problematic because its function in the *Corporations Act* is to address conduct which impinges in the capacity of the company to achieve profit for the company and deliver a financial return to shareholders (i.e. "members" of the Company). These are not the bases of association that underpins unionism. The second limb ("a serious contravention is … a contravention that materially prejudices the ability of the organisation or branch to pay its creditors") has little relevance where registered organisations are under no general obligation to generate profit or indeed remain solvent. The third limb is [sic] ("a serious contravention is … a contravention that is serious") is circular in this context given the result and function the definition serves – is the necessary implication the legislature intends to impose penalties of 100 or 500 penalty units for contraventions that a Court would not regard as serious?

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[94] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 17.

112. There is considerable force to the ACTU's first criticism, so far as it goes. There is no obvious justification for subjecting the officers of registered organisations to *greater* maximum penalties than officers of corporations.

113. However, an obvious solution to the different maximum penalties is to amend the *Corporations Act* 2001 (Cth) so that the civil penalties in s 1317G are not made with reference to a fixed amount. The maximum amount of $200,000 in s 1317G(1) of the *Corporations Act* 2001 (Cth) has remained unchanged since 2002. Since 2002, the value of a penalty unit has increased from $110 to $180 largely reflecting increases in the consumer price index. Most penalties in Commonwealth legislation are fixed with reference to penalty units.

114. In relation to the criticism about the two levels of penalty proposed under the FW(RO) Act, the ACTU's criticism also has force. If a court does not consider the contravention 'serious' it is unlikely that the court will impose a penalty anywhere close to 100 penalty units. Further, it is precisely in relation to this kind of conduct (non-serious breaches) that the registered organisations regulator would be expected not to commenced proceedings but to use its proposed power to obtain an enforceable undertaking.

115. The ACTU's criticisms of the definition of 'serious contravention' are less cogent. The first and second limbs are perfectly capable of ready application to registered organisations. The policy proposed by the Australian Labor Party recognises this in respect of the first limb. Further, the third limb in substance is not circular. Instead, it means that if the Court concludes that a contravention is serious for reasons other than those specified in the first and second limbs the Court may

impose a civil penalty. A contravention might be serious for a number of reasons, for example:

(a) because the contravention was dishonest, reckless or grossly negligent;

(b) because the contravention was negligent and led to significant loss or damage to the organisation; or

(c) because a particular contravention was part of a repeated pattern or course of conduct.

116. Rather than seeking to state prescriptively the circumstances when a contravention may be serious it is considered better to leave the matter to the courts to determine on a case by case basis.

Recommendation 28

The civil penalties for contravention of ss 285-288 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be substantially increased. A distinction should be drawn between a 'serious contravention' and other contraventions. The maximum penalty for a 'serious contravention' should be 1,200 penalty units (currently $216,000) with no penalty for a contravention that is not a 'serious contravention'. No distinction should be drawn between paid officers and volunteers. 'Serious contravention' should be defined as proposed in the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth).

Consideration also be given to amending the *Corporations Act* 2001 (Cth) to specify the maximum penalty for breaches of directors' duties by reference to 1,200 penalty units rather than the fixed amount of $200,000.

Criminal penalties for breach of statutory duties

117. A further important difference between the duties under the FW(RO) Act and the *Corporations Act* 2001 (Cth) relates to the sanctions for breach of these duties. Unlike the position under s 184 of the *Corporations Act* 2001 (Cth), there are no provisions in the FW(RO) Act that make dishonest or reckless breaches of ss 286, 287 or 288 of the FW(RO) Act a criminal offence. The maximum penalty for an officer who is convicted of an offence under s 184 of the *Corporations Act* 2001 (Cth) is five years imprisonment or 2,000 penalty units ($360,000) or both.[95]

118. Since 2013, the current Federal government has attempted three times to introduce provisions to the FW(RO) modelled on s 184 of the *Corporations Act* 2001 (Cth).[96] The most recent attempt was set out in the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth). That bill proposed the introduction of a new s 290A to the FW(RO) Act. In substance, the proposed amendment would expose an officer of a registered organisation who intentionally or recklessly breaches his or her statutory duties under ss 286-288 of the *Corporations Act* 2001 (Cth) to criminal sanctions. On 17 August 2015 the Bill was defeated in the Senate.

119. Although the Commission did not receive many submissions on this topic, all those received supported the introduction of criminal

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[95] *Corporations Act* 2001 (Cth), Sch 3, item 30.

[96] *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), *Fair Work (Registered Organisations) Amendment Bill* 2014 (Cth) and the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth) have each proposed the introduction of criminal penalties.

penalties for certain breaches of statutory duties by officers of registered organisations.[97]

120. However, in its submission in response to the Issues Papers, the Australian Industry Group expressed its view that it was not necessary to introduce criminal offences into the FW(RO) Act.[98] A number of reasons were given:

(a) Criminal liability for recklessness was too great a burden on the many unpaid volunteers who are officers of registered organisations.

(b) Criminal offences would operate as a major disincentive to existing voluntary officers of registered organisations continuing in their roles, and would deter other people from holding office.

(c) There are existing criminal law offences (for example, fraud and theft) that already apply.

[97] Boral Law Reform Submissions, 2015, pp 22-23; Master Builders Australia Law Reform Submissions, 21/8/15, pp 28-29; Joel Silver, Submission in Response to Issues Papers, undated (received 14/7/14), p 7.

[98] Australian Industry Group, Submissions in Response to Issues Papers 1-3, 11/7/14, p 10.

121. In its submissions in relation to the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), the ACTU said in relation to proposed s 290A:[99]

> Whilst we recognise that the conduct that would amount to breaches of the proposed duties are sufficiently serious to attract criminal sanctions, we question whether the amendments would add any value to the existing legal framework.

122. The ACTU went on to make two arguments. First, that it was 'self evident that there is no parallel between the nature of the power exercised by corporations and the power exercised by unions'[100] and hence if criminal penalties were appropriate for corporations they are not appropriate for unions. Secondly, the ACTU argued that the criminal offences created by s 184 of the *Corporations Act* 2001 (Cth) are in fact inappropriate vis-à-vis corporations and accordingly should not be extended to registered organisations. In short, the ACTU argued that 'it is the regulation of corporations, not registered organisations, that is out of step.'[101]

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[99] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 18.

[100] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 20.

[101] Australian Council of Trade Unions, Submission to the Senate Standing Legislation Committee on Education and Employment on the *Fair Work (Registered Organisations) Amendment* Bill 2013, 22/11/13, p 28.

123. The ACTU again advanced this submission in response to the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth):[102]

> We have made the case in previous submissions that specialised statutory offences for conduct that is already punishable by the criminal law is an entirely unnecessary addition to the Act, that the corresponding provisions in the Corporations Act have been likewise criticised.

124. The submission continued:[103]

> The matters concerning the HSU provide concrete evidence that that [sic] such criminal matters are capable of being pursued using criminal law. It is true that the penalty of $25,000 plus a compensation order of $5,650 ultimately imposed upon Thomson after his appeal was less than that which might have been expected by some observers. This is because only theft charges survived the appeal. The findings on the charges of obtaining a financial advantage by deception were set aside on appeal essentially because the Police [sic] had incorrectly particularised the "financial advantage"…

125. The last point in the ACTU's submission immediately highlights one of the weaknesses in relying solely on specific State law criminal offences. The State laws dealing with fraud and theft are highly complex. For example, in New South Wales,[104] there are different offences with differing elements of larceny, larceny by a bailee, larceny by a servant, embezzlement by a servant and fraud. The offences differ between jurisdictions. The existence of a standalone general criminal offence for serious breaches of officers' duties can be a useful weapon in punishing and deterring wrongdoing.

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[102] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), 30/6/15, p 12.

[103] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), 30/6/15, p 12.

[104] *Crimes Act* 1900 (NSW), ss 116, 125, 156, 157, 192E.

126. A further argument by the ACTU against the introduction of criminal penalties has been put thus:[105]

> In relation to companies, the public sector regulator ASIC has not been much attracted to the use of criminal proceedings. No doubt the very high standards of proof attaching to such proceedings have been a factor in this.

127. This argument is not made out factually. Statistics provided to the Commission by ASIC in relation to prosecutions for offences against s 184 of the *Corporations Act* 2001 (Cth) show that since 2002, ASIC has instituted 102 criminal prosecutions, 79 of which resulted in the offence being proved. Of these 79 successful prosecutions, there were 45 in which a term of imprisonment was imposed.

128. The argument that the imposition of criminal penalties would operate as a major disincentive for individuals to act in employer or employee organisations must also be rejected.

129. There can be no serious suggestion that the introduction of criminal penalties for dishonest or reckless breaches of ss 286-288 of the FW(RO) Act will deter honest and diligent individuals from volunteering to participate in employee or employer organisations. Under the *Criminal Code* (Cth) 'recklessness' requires the accused to be aware of a substantial risk of a result or circumstance occurring, and

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[105] Independent Panel on Best Practice for Union Governance, *Report to the ACTU Executive to Invite Comment and Discussion*, March 2013, p 31. See also Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 27.

in the circumstances known to the accused it must be unjustifiable to take that risk.[106] That is a relatively demanding standard.

130. Further, any provision based on s 184 of the *Corporations Act* 2001 (Cth) would only apply to those individuals who are dishonest or reckless in their breaches of duty. Most rational observers would agree that there is no place for dishonest or reckless persons in the affairs of registered organisations. Significantly, s 184 of the *Corporations Act* 2001 (Cth) does not apply in relation to an officer's duty to take due skill and care, so that persons who are merely negligent (even grossly negligent) cannot be criminally liable.

131. Overall, it is recommended that provisions modelled principally on s 184 of the *Corporations Act* 2001 (Cth) be introduced into the FW(RO) Act. As s 184(1) of the *Corporations Act* 2001 (Cth) is currently drafted, it is not clear what, if anything, the word 'intentionally' adds in the phrase 'intentionally dishonest', particularly when regard is had to the fact that under the *Criminal Code* (Cth), dishonesty usually means dishonest according to the standards of ordinary people, and known by the defendant to be dishonest according to the standards of ordinary people.

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[106] *Criminal Code* (Cth), s 5.4.

Recommendation 29

The *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended by introducing a new s 290A that imposes criminal liability on officers of registered organisations or branches who dishonestly or recklessly breach the statutory duties imposed on them by ss 286-288 of the *Fair Work Registered Organisations Act* 2009 (Cth).

The section be modelled principally on s 184 of the *Corporations Act* 2001 (Cth), except that the reference in s 184(1) to 'intentionally dishonest' should be replaced by 'dishonest'. The maximum penalty should be the same as that under the *Corporations Act* 2001 (Cth), being 2,000 penalty units ($360,000) or five years' imprisonment, or both.

Indemnity for civil and criminal penalties

132. In a relatively recent decision concerning the imposition of civil penalties against CFMEU officials for contraventions of right of entry provisions, Flick J noted in relation to the penalty to be imposed on the individuals concerned that:[107]

> A penalty, if it were to be paid or reimbursed by an employing union, would cease to act as a deterrent to the contravening "*individual*". An "*individual*" so reimbursed could act with impunity in full knowledge that his employing union conferred what could be seen as a licence for him to continue his past transgressions.

133. Accordingly, Flick J made an order requiring the CFMEU officials concerned to pay the penalties imposed for contraventions of the FW Act personally.

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[107] *Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998 at [26].

134. In a subsequent decision, Jessup J refused to make such an order in relation to another CFMEU official on the basis that such an order would be difficult to enforce.[108]

135. Currently, there are no provisions in the FW(RO) Act that prohibit organisations exempting, indemnifying or reimbursing their officers for penalties imposed for breach of duty or other contraventions of the FW Act or the FW(RO) Act or for fines incurred during their activities undertaken into connection with the registered organisation. The consequence of such reimbursement is that penalties imposed on individual have no deterrent effect.

136. Provisions prohibiting companies indemnifying their officers for liabilities are found in ss 199A-199C of the *Corporations Act* 2001 (Cth).[109] Section 199A of the *Corporations Act* 2001 (Cth) prohibits a company exempting or indemnifying a company director or officer from various liabilities, including pecuniary penalties for breach of duty. Contravention of s 199A of the *Corporations Act* 2001 (Cth) is a criminal offence of strict liability.[110] The maximum fine is a paltry five penalty units ($900) for a contravention by an individual and 25 penalty units ($4,500) for a contravention by a body corporate.[111] Section 199B of the *Corporations Act* 2001 (Cth) prevents a company from paying insurance premiums for an insurance contract against a liability arising out of conduct involving a wilful breach of duty in

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[108] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1173 at [37]-[40].

[109] For consideration of the scope of these provisions see P Herzfeld, 'Still a troublesome area: Legislative and common law restrictions on indemnity and insurance arrangements effected by companies on behalf of officers and employees' (2009) 27 *C&SLJ* 267.

[110] *Corporations Act* 2001 (Cth), s 1311(1), (5), (6).

[111] *Corporations Act* 2001 (Cth), s 1311(1), (5).

relation to the company, or a contravention of ss 182 or 183 of the *Corporations Act* 2001 (Cth). It too is an offence of strict liability, with a similar paltry penalty.[112] Section 199C of the *Corporations Act* 2001 (Cth) provides that nothing in ss 199A or 199B authorises anything that would otherwise be unlawful and anything the purports to indemnify or insure a person against a liability is void to the extent it contravenes ss 199A or 199B.

137. The principle behind ss 199A-199C of the *Corporations Act* 2001 (Cth) is straightforward. If company directors are entitled to be indemnified for civil penalties imposed on them for breach of their duties to the company or for other breaches the penalties will not have much of a deterrent effect, particularly where the directors in question, or other directors sympathetic to them, control the board.

138. Clearly, as Flick J pointed out, the same policy argument applies in the context of registered organisations. If an officer of a registered organisation subject to a civil penalty for contravention of a provision of the FW Act or the FW(RO) Act can have the benefit of an indemnity, the deterrent effect of the penalty is substantially lessened if not extinguished. Similarly, if an official fined for contempt is indemnified by the union no consequences are felt personally by the official. More generally, members' funds should not be used, whether directly or indirectly, to pay for breaches of the law by union officials.

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[112] *Corporations Act* 2001 (Cth), Sch 3, item 34.

Recommendation 30

New s 293A be introduced to the *Fair Work (Registered Organisations) Act* 2009 (Cth) prohibiting an organisation or a branch of an organisation (or any related entity of the organisation or branch including any State registered organisation or branch) from indemnifying, paying or reimbursing an officer of the organisation or branch for any fine or civil penalty imposed on the officer for conduct in connection with the organisation or branch.

The provision may usefully be based on ss 199A-199C of the *Corporations Act* 2001 (Cth). Contravention should be a criminal offence of strict liability. An organisation that contravenes the provision should be subject to a maximum penalty of 500 penalty units ($90,000) and every officer involved in a contravention should be subject to a maximum penalty of 100 penalty units ($18,000). Consideration should be given to reviewing the penalties under ss 199A and 199B of the *Corporations Act* 2001 (Cth).

Disclosure of material personal interests of officers

139. The FW(RO) Act was amended in 2012[113] to introduce new obligations in s 148B of the FW(RO) Act in relation to the disclosure of material personal interests by officers of organisations. Section 148B of the FW(RO) Act came into operation on 1 January 2014.

140. Relevantly, s 148B of the FW(RO) Act requires that the rules of a registered organisation or branch of a registered organisation must require:

[113] *Fair Work (Registered Organisations) Amendment Act* 2012 (Cth).

(a) disclosure by each officer of the organisation (or branch) to the organisation (or branch) of any material personal interest in a matter than relates to the affairs of the organisation (or branch) that the officer has or acquires, or a relative of the officer has or acquires;[114] and

(b) disclosure to the members of the organisation (or branch) of any interests disclosed by officers under the rules.[115]

141. This provision was introduced by an Australian Labor Party government as part of its response to the well-publicised misconduct by officers within the HSU. The requirement of officers to disclose material personal interests has obvious sense. It is important that those who are making decisions in an organisation or branch are aware of any matters that may potentially influence others in the decisions they make.

142. Section 148B of the FW(RO) Act differs in a number of respects from a provision in the *Corporations Act* 2001 (Cth) which is comparable but not equivalent. Section 191(1) of the *Corporations Act* 2001 (Cth) requires a director of a company who has a material personal interest in a matter that relates to the affairs of the company to give the other directors notice of the interest, unless one of the various exceptions in s 191(2) applies. Directors are permitted to give standing notice of an

[114] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 148B(1), (2).

[115] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 148B(4), (5).

interest.[116] Contravention of s 191(1) is a criminal offence, punishable by imprisonment for three months, or ten penalty units or both.[117]

143. The obvious differences between s 148B of the FW(RO) Act and s 191(1) of the *Corporations Act* 2001 (Cth) include the following.

(a) Disclosure under s 148B of the FW(RO) Act applies to all 'officers', whereas s 191(1) of the *Corporations Act* 2001 (Cth) applies only to directors.

(b) Disclosure under s 148B of the FW(RO) Act must be made to the organisation or branch (it is not clear to whom disclosure is in fact made), and any disclosure of material personal interests to the organisation or branch must then be made to members. Disclosure under s 191 of the *Corporations Act* 2001 (Cth) only requires disclosure to the directors, not to the members.

(c) Under s 148B of the FW(RO) Act an officer must disclose material personal interests of relatives.

(d) Contravention of s 191(1) of the *Corporations Act* 2001 (Cth) is a criminal offence. In contrast, the mechanisms for external enforcement of the rules that must be established by s 148B of the FW(RO) Act in relation to the disclosure of interests by officers are limited. As explained in Chapter 2 of

[116] *Corporations Act* 2001 (Cth), s 192.

[117] *Corporations Act* 2001 (Cth), Sch 3, item 32.

this Volume,[118] the ability of the General Manager to enforce rules requiring an individual to do anything is limited.

144. The last matter substantially undermines the effectiveness of the disclosure requirements.

145. The *Fair Work (Registered Organisations) Bill* 2013 (Cth) would have recast the disclosure obligations on officers as a civil penalty provision (with a maximum penalty of 1,200 penalty units for a serious contravention and 100 penalty units otherwise).[119] However, the Senate Education and Employment Legislation Committee recommended, after considering the submissions of a number of parties, that disclosure should only be required of those officers whose duties relate to the financial management of organisations.[120] The Senate committee was persuaded that:[121]

> …the disclosure regime in relation to material personal interests proposed by the bill may create unnecessary administrative burdens for officers, some of whom are volunteers. The bill should be amended to ensure that the disclosure regime in the bill is consistent with the requirements in the *Corporations Act 2001*.

146. The Senate Committee was also persuaded that the disclosure requirement should have a list of exceptions similar to those in s 191(2) of the *Corporations Act* 2001 (Cth), and not require the disclosure of the material personal interests of an officer's relatives.

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[118] See Chapter 2 of this Volume, para 57.

[119] *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), Sch 2, Part 1, item 166 (s 293C).

[120] The Senate, Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment* Bill 2013, December 2013, pp 10-11.

[121] The Senate, Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment* Bill 2013, December 2013, p 10.

147. The most recent form of the Bill – the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] – limits the proposed duty to disclose to only those officers of an organisation whose duties relate to the 'financial management' of the organisation or branch.[122] The Bill also contains exceptions similar to those found in s 191(2) of the *Corporations Act* 2001 (Cth). It does not require the disclosure of the material personal interests of an officer's relatives.

148. A balance clearly needs to be struck. On the one hand, there are the objectives of transparency and disclosure. On the other hand there is the possibility of a regime imposing too great an administrative burdens on individuals in registered organisations. Bearing this is mind, it would seem prudent for the disclosure regime to have the following features:

(a) There should be a requirement on an officer of an organisation or branch (i) who is a member of the committee of management or (ii) whose duties relate to financial management to disclose material personal interests which they have or acquire that relate to the affairs of the organisation or branch.

(b) The duty to disclose should also extend to material personal interests which the relatives of an officer have or acquire that relate to the affairs of the organisation or branch. A particular problem within some trade unions – for example, the HSU

[122] *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), Sch 2, Part 1, item 166 (s 293C).

(the Williamsons) and the NUW (the Belans) – is that the union is run, at least in part, as a 'family affair'.

(c) The disclosure should be made to the committee of management of the organisation or branch. Officers should be permitted to give 'standing disclosures' in similar terms to those proposed in s 293D of the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2]. Exceptions to the obligation to disclose based on s 191(2) of the *Corporations Act* 2001 (Cth)[123] should also be permitted.

(d) An officer that fails to disclose should be subject to a civil penalty. The proposed penalties in the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] seem excessive having regard to the purpose of disclosure, and the fact that officers are under statutory obligations under ss 286-288 of the FW(RO) Act. Further, it does not seem necessary to draw a distinction in this respect between serious and non-serious contraventions. A maximum civil penalty of 100 penalty units ($18,000) seems appropriate.

(e) The organisation or branch should be required to record disclosures made by officers in the minutes of the committee of management.

[123] See proposed s 293C(4) of the *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth).

Recommendation 31

Section 148B of the *Fair Work (Registered Organisations)* Act 2009 (Cth) be repealed and replaced with a civil penalty regime that, broadly speaking, requires officers of registered organisations and branches of registered organisations to disclose material personal interests that they, or their relatives, have or acquire in relation to the affairs of the organisation or branch. Key features of a suggested regime are set out in the body of the report. Consideration should also be given to increasing the penalty for contravention of s 191 of the *Corporations Act* 2001 (Cth).

Requirement of officers in a position of conflict not to participate in decision-making

149. Subject to certain exceptions, s 195(1) of the *Corporations Act* 2001 (Cth) makes it an offence for directors of a public company who have a disclosable[124] personal interest in a matter that is being considered at a director's meeting to be present at the meeting while that matter is being considered, or to vote on the matter. There are two exceptions: (1) the non-interested directors may give the director approval, or (2) ASIC may grant approval. The offence is one of strict liability.[125] The maximum penalty is a paltry five penalty units.[126]

150. Section 195(1) of the *Corporations Act* 2001 (Cth) seeks to protect the members of a public company by seeking to ensure that those directors who have a potential relevant conflict of interest in a matter are not

[124] That is, a personal interest that must be disclosed under s 191.

[125] *Corporations Act* 2001 (Cth), s 195(1B).

[126] *Corporations Act* 2001 (Cth), Sch 3, item 33.

involved in decision-making. The same rationale applies in respect of employer and employee organisations.

151. The *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth) proposed to introduce a new s 293F equivalent to s 195 of the *Corporations Act* 2001 (Cth). Subject to the question of penalty, it is recommended that the provision be adopted (albeit amended to include any disclosable material personal that an officer's relative has). The maximum proposed penalty in the Bill was 1,200 penalty units for a serious contravention and 100 penalty units otherwise. Having regard to the purpose of s 195(1), which is to seek to avoid more serious breaches of duty such as the duties set out in ss 286-288 of the FW(RO) Act, the proposed penalty appears excessive. A maximum penalty of 100 penalty units is more appropriate.

Recommendation 32

A provision similar to s 195 of the *Corporations Act* 2001 (Cth) be introduced to the *Fair Work (Registered Organisations) Act* 2009 that, in broad terms, prevents officers of an organisation or branch who have a disclosable material interest in a matter from being present during any deliberation, or being involved in any decision, about the matter. The provision should be a civil penalty provision with a maximum penalty of 100 penalty units.

Enforcement of officers' duties by members

152. There is authority that generally union officers owe their duties to the union itself, rather than to the members as a whole.[127] Of course, in some circumstances union officials will owe additional duties to a sub-class of members, and as discussed in Volume 4, Chapter 10.2 of the Report, there are some circumstances in which union officials owe duties to the members as a whole. The consequence of the general rule is that the union may be regarded as the proper plaintiff to bring any proceeding against an officer for breach of his or her fiduciary duties. When the union is the proper plaintiff a member of the union who endeavoured to sue an officer on behalf of an organisation would, unless one of the narrow exceptions to the so-called 'rule in *Foss v Harbottle*'[128] applied, fail.[129]

153. In relation to the statutory duties, a registered organisation may bring a proceeding seeking compensation as a result of an officer's breach of statutory duty.[130] In addition, pursuant to s 310(1) of the FW(RO) Act, the General Manager of the FWC or 'some other person authorised in writing by the General Manager' may bring civil penalty proceedings in relation to conduct in contravention of the civil penalty provisions of the Act (which relevantly includes officers' duties) or a proceeding to recover compensation for the organisation. This means that, at least in

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[127] *Carling v Platt* (1953) 80 CAR 283 at 292 per Dunphy J (dissenting), 306 per McIntyre J; *Scott v Jess* (1984) 3 FCR 263 at 287 per Gray J. Cf *Allen v Townsend* (1977) 31 FLR 431 at 483 per Evatt and Northrop JJ.

[128] *Foss v Harbottle* (1846) 2 Hare 461; 67 ER 189.

[129] See *Bailey v Krantz* (1984) 55 ALR 345 at 356 per Gray J; *Tanner v Darroch* (1986) 12 FCR 235 at 253 per Gray J.

[130] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 310(3).

theory, a member could apply to the General Manager of the FWC under s 310(1) of the FW(RO) Act to be authorised to bring civil penalty proceedings against an officer who has breached duties to the organisation. However, s 310(1) of the FW(RO) Act does not provide any guidance for when the General Manager should grant authorisation and the provision is framed in terms of a discretion rather than a duty. The Commission is not aware that the General Manager has granted an authorisation.

154. A further difficulty arises. Section 329 of the FW(RO) Act states that a person who is a party to a proceeding in a matter arising under the FW(RO) Act must not be ordered to pay costs unless the person instituted the proceedings vexatiously or without reasonable cause. Thus, even if a member was granted authorisation under s 310(1) of the FW(RO) Act, a member will not be able to recover the legal costs of commencing proceedings.

155. The result is that currently the members of registered organisations have extremely limited avenues of recovering from the organisation compensation for breaches of officers' duties. The absence of a mechanism by which members can take action on behalf of a registered organisation has an undesirable consequence. That consequence is that even if a powerful officer of an organisation (for example, the secretary) may breach his or her duty to the registered organisation, no action may be taken against that officer, either at all or not until a long time after the conduct occurred when it will be more difficult to establish what occurred. This is because the proper person to bring any action will be the registered organisation itself and whilst the officer remains in office there is little or no prospect of that occurring. Even

after the officer has left, legal action is not certain against the former officer, who may have close associations with the other officers of the organisation.

156. The conduct of the committee of management of the NUW NSW in releasing its former secretary, Derrick Belan, from liability is a good example of the unlikelihood of a union taking against a former secretary, unless forced to by bad publicity.

157. Submissions to the Commission suggested that a possible solution[131] to this problem would be to introduce provisions similar to ss 236 and 237 of the *Corporations Act* 2001 (Cth) enabling a 'derivative action' to be commenced i.e. an action commenced by a member of the organisation on behalf of the organisation.

158. Sections 236 and 237 of the *Corporations Act* 2001 (Cth) enable a member, former member, person entitled to be a member, officer or former officer of a company to apply to the Supreme Court or Federal Court for leave to bring a proceeding on behalf of an organisation. The Court *must* grant leave if satisfied that certain conditions, which operate as safeguards against frivolous or vexatious claims, are established.[132] A proceeding is then commenced in the name of the registered organisation.

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[131] On this topic see Victorian Government, Submission in Response to Issues Papers, August 2014, pp 20-21; Boral Law Reform Submission, 2015, pp 43-44.

[132] *Corporations Act* 2001 (Cth), s 237(2).

159. Applying these provisions by analogy to registered organisations, a Court would only grant leave if satisfied that:

(a) it is probable that the organisation would not otherwise bring the proceedings;

(b) the applicant is acting in good faith;

(c) there is a serious question to be tried;

(d) allowing the application is in the best interests of the registered organisation; and

(e) appropriate notice has been given to the registered organisation.

160. Master Builders Australia has expressed support for provisions of this nature, provided the class of persons who could bring the application is limited to a current or former member.[133] It would also seem appropriate that a current or former officer of the organisation, or one of its branches, should be able to seek leave to take action.

161. In its submissions, Boral raised an issue about costs. Boral submitted that if provision was made for this kind of 'derivative action', provision would need to be made concerning the costs of the action as union members bringing the action on behalf of the organisation are unlikely to have the financial capacity to fund the proceeding

[133] Master Builders Law Reform Submission, 21/8/15, p 31.

themselves.[134] Boral further submitted that this problem could be alleviated by introducing a provision equivalent to s 242 of the *Corporations Act* 2001 (Cth) allowing the Court to order the applicant's costs to be paid by the organisation or by a party to the proceeding (for example, an officer of the organisation). Master Builders Australia agreed with this proposal.[135]

Recommendation 33

New provisions, modelled on ss 236-242 of the *Corporations Act* 2001 (Cth), be introduced to the *Fair Work (Registered Organisations) Act* 2009 (Cth) allowing a current or former member or current or former officer of a registered organisation or branch of the organisation to apply to a State Supreme Court or the Federal Court for leave to bring, or intervene in, a proceeding on behalf of a registered organisation.

C – STATUTORY DUTIES IN RESPECT OF COURT ORDERS

The problem

162. One important matter that arose in relation to the Boral and Hindmarsh case studies concerning the CFMEU was conduct undertaken by union officials in breach of court orders and orders of the Fair Work

[134] Boral Law Reform Submission, 2014, pp 43-44; Boral Law Reform Submissions, 2015, pp 26-27.

[135] Master Builders Australia Law reform Submission, 21/8/15, p 31.

Commission. In the Interim Report, the following view was expressed in respect of the CFMEU's conduct in relation to Boral:[136]

> A legal system which does not provide swift protection against the type of conduct which Boral alleges it has suffered at the hands of the CFMEU, and which does not have a mechanism for the swift enforcement of court orders, is fundamentally defective. The defects are so great as to make it easy for those whose goal is to defy the rule of law. The defects reveal a huge problems for the Australian state and its numerous federal, State and Territory emanations. The defying of the Victorian Supreme Court's injunctions for nearly two years, and the procedural history outlined above, will make the Australian legal system an international laughing stock. A new form of 'sovereign risk' is emerging – for investors will not invest in countries where their legal rights receive no protection in practice. At least so far as the courts are concerned, it may be appropriate for consideration to be given to procedures which ensure the swift determination of contempt applications, complemented where necessary by appropriate court rules and legislation.

Remedies under the *Fair Work (Registered Organisations) Act* 2009 (Cth)

163. As discussed in Chapter 2.1 of the Interim Report and in more detail in Chapter 8.3 of Volume 4 of this Report, Part 3 of Chapter 9 of the FW(RO) Act contains various provisions[137] prohibiting officers and employee of organisations from knowingly or recklessly contravening, or being involved in a contravention of, orders made by the Federal Court or the Fair Work Commission under the FW Act or the FW(RO) Act. Breach is a civil penalty provision. The maximum penalty is 60 penalty units ($10,800).

164. There are two obvious defects in the current regime.

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[136] Royal Commission into Trade Union Governance Corruption, *Interim Report* (2014), Vol 2, ch 8.2, pp 1114-1115.

[137] *Fair Work (Registered Organisations) Act* 2009 (Cth), ss 297-303.

165. *First*, there is a lacuna in the provisions because they do not capture orders made by the Federal Circuit Court, which is empowered to grant a variety of orders under the FW Act.

166. *Secondly*, the penalties are far too low. It is fundamental to Australia's legal system that court orders be obeyed. The obvious purpose of Part 3 of Chapter 9 of the FW (RO) Act is to penalise officers and employees who fail to obey court orders, and to deter future breaches. The maximum penalties for breach of the provisions in Part 3 of Chapter 9 should be increased to 1,200 penalty units ($216,000) to align with the recommendations in Chapter 2 concerning the increase in penalties in relation to other breaches of officers' duties. Since every knowing or reckless contravention of a court order is serious, it is not recommended that there be any distinction between serious and non-serious contraventions.

Recommendation 34

The provisions in Part 3 of Chapter 9 of the *Fair Work (Registered Organisations Act* 2009 (Cth) (ss 297-303A) concerning breach of orders be amended to include orders made by the Federal Circuit Court.

Recommendation 35

The maximum penalty for breach of the provisions in Part 3 of Chapter 9 of the *Fair Work (Registered Organisations Act* 2009 (Cth) be increased to 1,200 penalty units.

D – DISQUALIFICATION OF UNION OFFICERS

Existing disqualification regime

167. The current disqualification regime for officers of registered organisations is set out in Part 4 of Chapter 7 of the FW(RO) Act (ss 210-220). It is relatively limited. The key provision is s 215 of the FW(RO) Act which relevantly provides:

(a) A person 'convicted of a prescribed offence' is ineligible to be a candidate, or to be elected, or to hold an 'office' in an organisation, unless the conviction and any term of imprisonment was more than five years ago (or such other reduced period as may be determined by the Federal Court under ss 216 or 217 of the FW(RO) Act), or the person obtains leave of the Federal Court under ss 216 or 217 of the FW(RO) Act.

(b) Where a person who holds an 'office' in an organisation is 'convicted of a prescribed offence', the person ceases to hold office 28 days after the conviction, unless the person obtains leave of the Federal Court under ss 216 or 217 of the FW(RO) Act.

168. Although there is an automatic disqualification in s 215(2) of the FW(RO) Act upon conviction for a prescribed offence, there is no prescribed sanction for a person who continues to act in the office after automatic disqualification takes effect. However, the Federal Court can grant a declaration that a person has ceased to hold an office in an

organisation,[138] and make such orders as it considers appropriate to give effect to a declaration that a person is not eligible or has ceased to be an officeholder.[139]

169. 'Prescribed offence' is defined in s 212 of the FW(RO) Act as follows:

> (a) an offence under a law of the Commonwealth, a State or Territory, or another country, involving fraud or dishonesty and punishable on conviction by imprisonment for a period of 3 months or more; or
>
> (b) an offence against section 51, 72, 105, 185, 191, subsection 193(2), section 194, 195, 199 or subsection 202(5);[140] or
>
> (c) any other offence in relation to the formation, registration or management of an association or organisation; or
>
> (d) any other offence under a law of the Commonwealth, a State or Territory, or another country, involving the intentional use of violence towards another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property.

170. However, this is cut down by s 213 of the FW(RO) Act, which relevantly provides that:

> (a) a person is not 'convicted of a prescribed offence' if the person is convicted summarily of one of the offences mentioned in para (c) of the definition; and
>
> (b) a person is not 'convicted of a prescribed offence' referred to in para (d) of the definition unless the person was sentenced to a term of imprisonment for the offence and the person

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[138] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 215(5).

[139] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 219(1).

[140] These provisions all relate to the conduct of elections of registered organisations.

served, or is serving, a term of imprisonment or the sentence was suspended.

Defects in the current regime

171. One obvious lacuna in the current provisions in the FW(RO) Act is that there is no prescribed consequence for a person who continues in an office after disqualification. In contrast, s 206A(1) of the *Corporations Act* 2001 (Cth) specifies that a person who is disqualified from managing corporations and continues so to act commits a criminal offence of strict liability. The maximum penalty is 50 penalty units or imprisonment for one year, or both.[141] Given the gravity of the conduct this is surprisingly low. An equivalent provision should be introduced into the FW(RO) Act. The maximum penalty should be increased to 100 penalty units or imprisonment for two years, or both.

172. The Commission received a range of submissions identifying a number of defects, apart from this lacuna, with the current disqualification regime under the FW(RO) Act.[142]

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[141] *Corporations Act* 2001 (Cth), Sch 3, item 49.

[142] Australian Industry Group Law Reform Submissions, 21/8/15, pp 8-9; Boral Law Reform Submissions, 2015, pp 19-21; Housing Industry Association Law Reform Submissions, 21/8/15, p 8; Master Builders Australia Law Reform Submissions, 21/8/15, p 23.

173. One defect is that the list of prescribed offences is relatively narrow, with the result that officers of registered organisations who have committed significant criminal offences can still continue to hold office. For example, the definition of 'prescribed offence' does not include:

(a) contempt of court or other administration of justice offences;

(b) the offence of trespass to land or any other offences relating to entry onto premises;

(c) indictable offences not involving dishonesty, for example the cartel provisions in the *Competition and Consumer Act* (2010) (Cth) or obstructing a Commonwealth public official under s 149.1 of the *Criminal Code* (Cth); or

(d) blackmail or extortion offences under State law, which do not necessarily involve fraud or dishonesty.[143]

174. It is anomalous that the definition of prescribed offence does not include a general category of serious offence. It is recommended that the definition of prescribed offence should be amended to include any offence under a law of the Commonwealth, State or Territory punishable on conviction by a maximum penalty of imprisonment for life or a period of 5 years or more.

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[143] See for example *Crimes Act* 1958 (Vic), s 87; *Crimes Act* 1900 (NSW), s 249K; and *Criminal Code* (Qld), s 359. See for example, analysis in the Interim Report in relation to the *Crimes Act* 1958 (Vic): Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.2, p 1100; analysis in relation to *Criminal Code* (Qld), s 359, Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.7, pp 1475-1476.

175. *Secondly*, at present, para (c) of the definition of 'prescribed offence' is largely redundant. The current FW(RO) Act creates few, if any, offences that would fall within that paragraph. An officer of a registered organisation found to have breached his or her statutory duties under ss 285-288 of the FW(RO) Act and who has been required to pay a civil penalty would still be entitled to hold office within the organisation, because there is currently no criminal offence for breaching any of these provisions.

176. *Thirdly*, a number of submissions to the Commission raised concerns that trade union officials who have had their right of entry permits revoked or denied on the basis that they are not fit and proper persons for the purposes of s 512 of the FW Act nevertheless continue to be involved in a management or decision-making or other official role for a trade union.[144]

177. *Fourthly*, there is no mechanism under the current provisions of the FW(RO) Act to disqualify officials who repeatedly act in contravention of the FW Act, particularly the provisions that relate to right of entry privileges conferred upon trade union officials.

178. Overall, a key defect of the current regime is that the FW(RO) Act only provides for *automatic* disqualification. Naturally enough for an automatic disqualification regime, it is confined to circumstances where an officer is convicted of certain offences. The consequence, amongst other things, is that officers of organisations who repeatedly contravene civil penalty provisions of the FW Act, the FW(RO) Act

[144] Housing Industry Association Pty Ltd Law Reform Submission, 21/8/15, p 8; Master Builders Australia Law Reform Submissions, 21/8/15, pp 32-33.

and court orders made in relation to such provisions, are still entitled to hold office within a registered organisation. Examples of repeated contraventions of the law in the building and construction industry, particularly by officers of the CFMEU, are considered in Chapter 8 of this Volume.

Options for reform: 'fit and proper person' qualification

179. One reform option was suggested by Master Builders Australia. It proposed that in addition to the existing disqualification regime, an additional 'fit and proper person test' should be introduced as a qualification for persons intending to stand for office in a registered organisation.[145] As part of this regime, a candidate for office would provide the Fair Work Commission with a declaration attesting to certain matters including that he or she was a person of 'good character'.

180. Registered organisations act through their officers. The officers of employee organisations have significant statutory rights and privileges. They play an important part in the fabric of Australian politics. Their role as fiduciaries requires them to maintain the highest standards of propriety. It is therefore right that the officers of registered organisations should be seen to be 'fit and proper'.[146]

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[145] Master Builders Australia, Submission on Strengthening Corporate Governance of Industrially Registered Organisations – Introducing a New Fit and Proper Person Test, 26 August 2013, pp 11-13, attachment B to the Master Builders Submission in response to Issues Paper 2: Duties of Union Officials, 11/7/2014.

[146] See Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 11, p 100.

181. However, imposing a 'fit and proper' person test as a ground for *qualification* for office, as opposed to disqualification from office, would have a number of difficulties. Chiefly it would require an assessment to be made, presumably by the regulator, of the fitness for office of a person in advance of a person taking up office. Apart from anything else, such a requirement would be administratively burdensome and expensive not only for the regulator, but also for registered organisations and persons standing for office. It is not recommended.

Options for reform: banning orders

182. Rather than imposing a qualification requirement for officer of organisations, an alternative would be to amend the current *disqualification* regime in the FW(RO) Act to allow the relevant regulator to make an application to a court for an order banning a person from holding office in a registered organisation or branch for a period of time.

183. These powers exist in the *Corporations Act* 2001 (Cth) in respect of company directors. Pursuant to ss 206C-206EEA of the *Corporations Act* 2001 (Cth), ASIC has the power to apply to a State Supreme Court or the Federal Court for orders disqualifying a person from managing a corporation for a period the Court thinks just. ASIC may apply in a range of circumstances including where:

(a) a declaration has been made that the person has contravened a civil penalty provision;[147] or

(b) the person has at least twice been an officer of a body corporate that has contravened the *Corporations Act* 2001 (Cth) while the person was an officer and each time the person failed to take reasonable steps to prevent the contravention;[148] or

(c) the person has at least twice contravened the *Corporations Act* 2001 (Cth) while the person was an officer of a body corporate.[149]

184. In addition to the ability to apply to a court for a banning order ASIC also has the power under s 206F of the *Corporations Act* 2001 (Cth) to issue a banning notice of up to five years if certain conditions are met.[150] Before issuing such a notice, ASIC must give the person an opportunity to be heard on why they should not be disqualified.[151]

185. Submissions to the Commission on this topic were generally in support of the introduction of a provision allowing the regulator to apply for a

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[147] *Corporations Act* 2001 (Cth), s 206C.

[148] *Corporations Act* 2001 (Cth), s 206E(1)(a)(i).

[149] *Corporations Act* 2001 (Cth), s 206E(1)(a)(ii).

[150] Namely, where the person concerned has been an officer of two or more corporations and whilst the person was an officer, or within 12 months after the person ceased to be an officer, the corporations were wound up because they were unable to pay their debts.

[151] *Corporations Act* 2001 (Cth), s 206F(1)(b).

banning order.[152] The State of Victoria submitted that there should be the ability to disqualify officials who have 'consistently or seriously ignored his or her legal obligations'.[153]

186. The *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth) proposed the introduction of a new s 307A to the FW(RO) Act which would have allowed the relevant regulator to apply to the Federal Court for an order disqualifying a person from holding office in a registered organisation. It was proposed that the Federal Court could make such an order if the person had contravened a civil penalty provision and the Court was satisfied that the disqualification was justified.[154]

187. The ACTU previously argued that the provision proposed was 'ill suited to regulation of registered organisations'.[155] The thrust of the argument appears to be that there are certain civil penalty provisions imposed on officers of registered organisations under the FW(RO) Act that should not lead to disqualification including:[156]

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[152] Boral Law Reform Submissions, 2015, pp 19-21; Australian Industry Group Law Reform Submissions, 21/8/15, p 8; Master Builders Australia Law Reform Submissions, 21/8/15, pp 34-35; State of Victoria Submissions in Response to Issues Papers, August 2014, p 21.

[153] State of Victoria Submissions in Response to Issues Papers, August 2014, p 21.

[154] *Fair Work (Registered Organisations) Amendment Bill* 2014 [No 2] (Cth), item 209.

[155] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, p 32.

[156] Australian Council of Trade Unions, Submission to the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill* 2013 (Cth), 22/11/13, pp 32-33.

(a) an officer knowingly or recklessly making false or misleading statements about membership or resignation (ss 175, 176 of the FW(RO) Act);

(b) an officer knowingly or recklessly making false or misleading statements in relation to the accounts or financial statements provided to members (s 267 of the FW(RO) Act); and

(c) an officer knowingly or recklessly failing to comply with a court order (ss 299, 300 of the FW(RO) Act).

188. These are precisely the kinds of contraventions that should lead to the prospect of disqualification: the first two contraventions are species of fraud and the third is contempt. The Commission's inquiries have revealed a worrying and recurring phenomenon, particularly within the CFMEU, of union officials deliberately disobeying court orders or causing the union to disobey court orders. Officials who deliberately flout the law should not be in charge of registered organisations.

189. Subject to specific situations where the registered organisations regulator should be entitled to disqualify an officer because of certain easily verifiable objective matters,[157] it is preferable that the power to ban be conferred on a court. *First*, any decision by the regulator would be subject to judicial review and the reviewing court would be able to review the jurisdictional facts supporting the regulator's decision. In practice, this would often lead to increased delays, cost and expense. *Secondly*, the judicial process provides a greater safeguard against the

[157] See Chapter 2, recommendation 8 of this Volume.

possibility of the power being misused. *Thirdly*, ASIC only has the power to issue a banning notice in limited circumstances.

190. Having regard to the problems identified by the Commission, the Federal Court should be permitted to make an order disqualifying a person from holding an office within a registered organisation or branch if:

(a) the person:

(i) has or has been found to have contravened a civil remedy provision of the FW Act, or a civil penalty provision of the FW(RO) Act or the *Work Health and Safety Act* 2011 (Cth);

(ii) has been found liable for contempt;

(iii) has been at least twice an officer of a registered organisation that has, or has been found to have, contravened a provision of the FW Act or the FW(RO) Act or has been found liable for contempt while the person was an officer and each time the person failed to take reasonable steps to prevent the contravention or the contempt;

(iv) has, or has been found to have, at least twice contravened a provision of the FW Act or the FW(RO) Act; or

(v) is otherwise not a fit and proper person to hold office within a registered organisation or branch; and

the Court is satisfied that the disqualification is justified.

Recommendation 36

The definition of 'prescribed offence' in s 212 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended to include an offence under a law of the Commonwealth, a State or Territory, or another country, which is punishable on conviction by a maximum penalty of imprisonment for life or 5 years or more.

Recommendation 37

The *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended to make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold an office. The offence should be an offence of strict liability with a maximum penalty of 100 penalty units or imprisonment for two years, or both.

Recommendation 38

The *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended by inserting a new provision giving the Federal Court jurisdiction, upon the application of the registered organisations regulator, to disqualify a person from holding any office in a registered organisation for a period of time the court considers appropriate. The court should be permitted to make such an order if the conditions set out in paragraph 190 are satisfied.

CHAPTER 4

CORRUPTING BENEFITS

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A – INTRODUCTION

1. Paragraph (h) of the Terms of Reference required the Commission to inquire and report into:

> any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party.

2. A number of case studies examined whether such payments or benefits had been made. In particular:

(a) Chapter 3.2 of the Interim Report considered the legality of payments made by Thiess to the Australian Workers' Union Workplace Reform Association Inc.

(b) Chapter 1 of Volume 2 of the Report examines payments totalling $3,200,000 by a number of employers in the maritime industry at the direction or request of the Maritime Union of Australia (**MUA**) or its officials. These included payments made to the MUA, payments made to a separate entity established by officials of the MUA and also a payment to a political candidate, who happened to be the Assistant Secretary of the Western Australian Branch of the MUA. The

Chapter concludes that the payments were not made by employers completely voluntarily for legitimate purposes. They were made to secure industrial peace from, or to keep favour with, the MUA. In some cases the payments had to be made repeatedly.

(c) Chapter 6.2 of Volume 3 of the Report deals with Halafihi Kivalu, who was formerly a senior official and long-term employee of the ACT Branch of the Construction, Forestry, Mining and Energy Union (**CFMEU**). During the course of hearings in Canberra in July 2014, Halafihi Kivalu conceded receiving approximately $100,000 from two employers. He contends that these payments were gifts. Following his giving evidence a number of other employers came forward and made allegations concerning payments that they had made to Halafihi Kivalu. After the hearings Halafihi Kivalu was charged. The matter is presently before the criminal courts of the ACT. Accordingly no conclusions were expressed in this Report concerning the lawfulness of Halafihi Kivalu's conduct.

(d) Chapter 7.2 of Volume 3 deals with the affairs of George Alex and Darren Greenfield. The principal issue addressed in Chapter 7.2 is whether cash payments were made to Darren Greenfield, an organiser with the CFMEU NSW, for favouring businesses associated with George Alex and Joseph Antoun. During 2013 regular cash withdrawals of $2,500 were made from a bank account held by a scaffolding business called 'Elite'. These payments were referred to

within Elite as 'Union payments'. A substantial body of documentary evidence, principally text messages between George Alex and others, demonstrates that cash payments in the amount of $2,500 were made by George Alex and Joseph Antoun to Darren Greenfield.

(e) Chapter 7.3 of Volume 3 of the Report deals with donations and enterprise agreement. The central issue in this Chapter is whether the CFMEU NSW improperly obtained or managed donations from various companies. It has been found that a number of persons including persons within the CFMEU NSW may have committed a number of criminal offences against the *Charitable Fundraising Act* 1991 (NSW). This Report and all relevant materials have been referred to the Minister ministering the *Charitable Fundraising Act* 1991 (NSW) in order that consideration be given to conducting an inquiry pursuing to Division 1 of Part 3 of that Act into all of the CFMEU NSW's practices concerning charitable fundraising.

(f) Chapter 7.4 of Volume 3 of the Report examines the payment in 2006 by the Thiess Hochtief Joint Venture operating the Epping to Chatswood Rail Project of $100,000 to the Building Trades Group Drug & Alcohol Committee. In truth, this was a disguised payment to the CFMEU NSW. The finding is that the payment may have been a secret commission in contravention of s 249B of the *Crimes Act* 1900 (NSW).

(g) Chapter 8.1 of Volume 3 of the Report makes findings that in 2013, David Hanna, then Secretary of the Builders' Labourers' Divisional Branch of the CFMEU in Queensland, received free work and materials in relation to his house at Cornubia from Adam Moore and Mathew McAllum, then employees of Mirvac. The finding made is that each of David Hanna, Adam Moore and Mathew McAllum may have committed criminal offences against the *Criminal Code* 1899 (Qld).

(h) Chapter 10.2 of Volume 4 of the Report makes findings that in 2010, the Australian Workers' Union (**AWU**) Vic Branch and Cleanevent entered into an arrangement pursuant to which Cleanevent would make a payment of $25,000 per annum for three years to the AWU, in exchange for the AWU's agreement to extend the operation of a Workchoices-era enterprise agreement beyond its nominal expiry date. The agreement to make the payment was recorded in a side letter that was not disclosed to the National Office of the AWU or to Cleanevent employees. The finding made was that Cesar Melhem and the AWU may have committed criminal offences of soliciting corrupt commissions in contravention of s 176 of the *Crimes Act* 1958 (Vic).

(i) Chapter 10.3 of Volume 4 of the Report concerns an agreement by the Thiess John Holland joint venture to make payments of $100,000 per year plus GST to the AWU Vic Branch over the life of a road construction project. The payments were made in accordance with falsified invoices

that disguised the payments as being in respect of services that were, for the most part, not delivered by the AWU Vic Branch. The finding made was that Cesar Melhem and the AWU, and John Holland Pty Ltd and Julian Rzesniowiecki, may have committed criminal offences in relation to corrupt commissions in contravention of s 176 of the *Crimes Act* 1958 (Vic).

(j) Chapter 10.5 of Volume 4 of the Report concerns three payments made by ACI of about $160,000 between 2003 and 2005 described as being made in respect of 'Paid Education Leave', and further payments of $5,400 between 2008 and 2012 described as being made in respect of 'Membership yearly fees'. Findings are made in respect of the former payments that Cesar Melhem and the AWU, and Mike Gilhome, may have committed criminal offences in relation to corrupt commissions in contravention of s 176 of the *Crimes Act* 1958 (Vic).

(k) Chapter 10.6 of Volume 4 of the Report concerns six payments of $4000 made to the AWU in 2003-2004 by Chiquita Mushrooms. The finding was that these payments may have been corrupt commissions procured by Frank Leo and the AWU and offered by Chiquita Mushrooms in contravention of s 176 of the *Crimes Act* 1958 (Vic).

3. These case studies – which involved different unions in different states at different times – throw up two recurring and often overlapping patterns of conduct:

(a) A person – usually an employer of workers – makes, offers or agrees to make a payment or provide a benefit to a union, union official or to an entity associated with a union, in order:

(i) to avoid expressly or impliedly threatened conduct by a union or union official which, if it occurred, would be harmful to the person; or

(ii) to obtain a favour for the person in connection with the union's affairs.

(b) A union official obtains or solicits a payment or other benefit for himself or herself, or the union or an entity associated with the union, in return for which the union official agrees:

(i) not to engage in threatened conduct which if it occurred would be detrimental to the person – usually an employer – from whom the payment is obtained or solicited; or

(ii) to provide the person making or agreeing to the payment or benefit with a favour in connection with the union's affairs.

4. The legal characterisation of such payments or benefits given or received depends on the particular circumstances of the case. Some can be described, at least in ordinary language, as 'bribes', others as 'secret commissions', others as 'blackmail money', others still as payments for industrial peace.

5. These payments all have a tendency to 'corrupt' a union official, in the sense that they have a tendency to cause a union official to exercise improperly the official's duties and powers, or have a tendency to cause a union official to act unlawfully. For the purposes of this Chapter, it is convenient to describe all such payments and benefits as 'corrupting benefits'. Commonly, the benefit will be in the form of a payment of money. However, particularly in the construction industry, benefits can be provided in kind, such as the provisions of free building work or materials.

Reasons for outlawing corrupting benefits

6. At this point, it is worth summarising briefly a number of reasons why a democratic society claiming to be governed by the rule of law should adopt measures that seek to eliminate the giving and receiving of corrupting benefits.

7. *First*, the making of corrupting payments increases the cost of employers and other persons doing business, which consequently:

   (a) where the cost of the payment is simply passed on, leads to an increase in prices for consumers; or

   (b) where the cost of the payment cannot be passed on, acts as competitive disadvantage for the business making the payment.

   These payments are inherently anti-competitive.

8. *Secondly*, corrupting benefits undermine the proper performance by union officials of their duties and responsibilities.

9. *Thirdly*, such payments reward and can entrench the power of dishonest union officials.

10. *Fourthly*, the seeking and making of corrupting benefits fosters a particular culture within the unions and their officials that seek, and the employers and their executives that confer, such benefits. It is a culture that is antithetical to the rule of law. Threatening and bullying behaviour by union officials is rewarded. Genuine safety and industrial issues are ignored to the advantage of employers. The payments reinforce a culture of unlawfulness within unions. They reinforce an attitude that union officials are above the law. They reinforce equivalent perversity amongst employers and their executives. If unchecked, the culture comes to taint and impact the wider society. Corruption becomes more normal in business to business dealings, in the dealings of business with bureaucrats, in the dealings of business with politicians, and in the dealings between citizens and institutions capable of conferring desirable privileges and positions like educational institutions and employers. Corruption distorts markets. It makes money, not work or talent, the passport to success. It may even creep into the dealings of litigants with courts. Eventually it pollutes every business, social and personal relationship.

B – EXISTING LAWS REGULATING CORRUPTING BENEFITS

11. Several existing legal provisions attempt to deal with the solicitation and making of corrupting benefits. The provision of a payment or

benefit might in some circumstances give rise to a fraud-type criminal offence such as obtaining financial advantage by deception. However, the main relevant criminal laws are those concerning blackmail and secret commissions. There are also relevant rules of civil law.

Blackmail and extortion

12. Each State and Territory has legislation outlawing blackmail or extortion. For present purposes these are synonymous.[1] Although that legislation varies between jurisdictions, in substance it criminalises the making of an unwarranted demand with menaces. Thus, where a union official demands a payment or other benefit with menaces, which may include an express or implied threat of adverse action, the union official may commit the criminal offence of blackmail or extortion, if the demand is unwarranted.

13. Apart from the criminal liability, there is also considerable overseas authority that a person who threatens to do an unlawful act and thereby intimidates another into doing some act which causes that other person loss (e.g. making a payment) may be civilly liable for damages for the tort of two-party intimidation.[2] It does not appear to have been resolved whether such an action is available in Australia, although in

[1] *Criminal Code* 2002 (ACT), s 342 (blackmail); *Crimes Act* 1900 (NSW), s 249K (blackmail); *Criminal Code* (NT), s 228 (blackmail and extortion); *Criminal Code* (Qld), s 415 (extortion); *Criminal Law Consolidation Act* 1935 (SA), s 172 (blackmail); *Criminal Code* (Tas), s 241 (blackmail); *Crimes Act* 1958 (Vic), s 87 (blackmail); *Criminal Code* (WA), ss 397–398 (demanding property with threats with intent to extort or gain).

[2] *Rookes v Barnard* [1964] AC 1129 at 1182-1183 and 1205; *D & C Builders v Rees* [1966] 2 QB 617 (CA) at 625; *Huljich v Hall* [1973] 2 NZLR 279 at 285. See generally H Carty, *An Analysis of the Economic Torts* (OUP, 2nd ed, 2010), pp 157-158.

2014 the Victorian Court of Appeal reaffirmed the existence of the tort of three-party intimidation in Australian law.[3] Even if such a civil action for two-party intimidation did exist in Australia, instances of litigation are likely to be relatively uncommon: a person intimidated into making a payment or conferring a benefit is usually unlikely to have the inclination to commence legal action against the person doing the intimidating.

Secret or corrupt commissions

14. Each of the States and Territories have laws criminalising the giving or taking of what are variously described as secret commissions, corrupt commissions, corrupt benefits, corrupt rewards or bribes.[4] Until 2000, there was also a separate *Secret Commissions Act* 1905 (Cth) but that was repealed and replaced with more modern provisions dealing with 'corrupting benefits' in the *Criminal Code* (Cth).[5] However, the provisions in the *Criminal Code* (Cth) only deal with bribery of Commonwealth public officials and foreign public officials.

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[3] *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2014) 318 ALR 107 at [59] (VCA).

[4] *Criminal Code* 2002 (ACT), ss 356-357 (bribes and corrupting benefits); *Crimes Act* 1900 (NSW), s 249B (corrupt commissions or rewards); *Criminal Code* (NT), s 236 (secret commissions); *Criminal Code* (Qld), ss 442B–BA (secret commissions); *Criminal Law Consolidation Act* 1935 (SA), ss 150 (bribes); *Criminal Code* (Tas), s 266(1) (secret commissions); *Crimes Act* 1958 (Vic), s 176 (secret commissions); *Criminal Code* (WA), ss 529–530 (corrupt rewards).

[5] For an overview of the reasons for this change, see the Explanatory Memorandum to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences)* Bill 1999 (Cth).

15. Unfortunately, the laws differ from jurisdiction to jurisdiction. Maximum penalties range from 3 years in the Northern Territory to 21 years in Tasmania.

16. The laws in New South Wales, Queensland, Victoria and Western Australia are similar. They apply in respect of 'agents'. A typical example is s 249B of the *Crimes Act* 1900 (NSW), which relevantly provides:

> **249B Corrupt commissions or rewards**
>
> (1) If any agent corruptly receives or solicits (or corruptly agrees to receive or solicit) from another person for the agent or for anyone else any benefit:
>
> (a) as an inducement or reward for or otherwise on account of:
>
> (i) doing or not doing something, or having done or not having done something, or
>
> (ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person,
>
> in relation to the affairs or business of the agent's principal, or
>
> (b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent's principal,
>
> the agent is liable to imprisonment for 7 years.
>
> (2) If any person corruptly gives or offers to give to any agent, or to any other person with the consent or at the request of any agent, any benefit:
>
> (a) as an inducement or reward for or otherwise on account of the agent's:

(i) doing or not doing something, or having done or not having done something, or

(ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person,

in relation to the affairs or business of the agent's principal, or

(b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent's principal,

the firstmentioned person is liable to imprisonment for 7 years.

17. In some circumstances, a union official will be an 'agent' within the meaning of the statutes.[6] The solicitation or receipt of the payment by a union official which would tend to cause the official to exercise his or her duties improperly may give rise to criminal liability under these provisions. Likewise, the payment by an employer may give rise to criminal liability on the part of the employer.

18. Turning to civil remedies, the solicitation or receipt of bribes or secret commissions by a union officer involving a breach of the officer's fiduciary duty will expose the officer to claims for compensation, or to an obligation to account, and in some circumstances also an obligation to hold the bribe or commission on trust for the fiduciary's principal.[7] Where an employer induces a union official to breach his or her fiduciary duty, or knowingly assists the union official to breach his or

[6] See *R v Gallagher* [1986] VR 219 (CA); *R v Gallagher* (1987) 29 A Crim R 33 (CA).

[7] See generally *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [188]-[193], [569]-[584] per curiam.

her fiduciary duty as part of a dishonest and fraudulent scheme, the employer may be civilly liable to the union.[8]

Overseas approach

19. It is also useful to summarise briefly the approach taken to corrupting benefits in some comparable foreign jurisdictions.

20. Both New Zealand[9] and Canada[10] have similar laws to those in the Australian jurisdictions outlawing blackmail/extortion and secret commissions.

21. Until relatively recently, the United Kingdom had laws similar to those in the various Australian jurisdictions. Blackmail was, and still is, outlawed by s 21 of the *Theft Act* 1968 (UK). Bribery of public officials was prohibited by the *Public Bodies Corrupt Practices Act* 1889 (UK). And *The Prevention of Corruption Act* 1906 (UK) prohibited the giving and receiving of secret commissions to 'agents' in very similar terms to the current laws applying in the various Australian jurisdictions.

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[8] See generally Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 2.1, pp 44–45 paras 19–20 and particularly *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 (FC) at 356-357 [242]-[246] per curiam and *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 (CA) at [3], [6], [140] (Leeming JA, Barrett, Gleeson JJA agreeing).

[9] *Secret Commissions Act* 1910 (NZ); *Crimes Act* 1961 (NZ), s 237 (blackmail).

[10] *Criminal Code* (Can), ss 346 (extortion), 426 (secret commissions).

22. However, in 2010, the United Kingdom dramatically reformed its bribery laws introducing a single Act, the *Bribery Act* 2010 (UK), to deal with bribery in both the private and public sector. That Act commenced from 1 July 2011 and repealed both the *Public Bodies Corrupt Practices Act* 1889 (UK) and *The Prevention of Corruption Act* 1906 (UK). A significant justification was that the existing criminal laws had not been seriously updated for over a century, were complex and potentially difficult to apply.

23. The *Bribery Act* 2010 (UK) introduced two general bribery offences. Broadly speaking, one involved bribing another person and the other involved receiving a bribe. In general terms, the legislation abandoned the previous model of requiring an agent and principal relationship in favour of a model based on an intention to induce the improper exercise of a 'relevant function or activity'. The expression 'relevant function or activity' is defined broadly and includes functions in connection with business or employment or performed by or on behalf of a body of persons.

24. The United States too has a variety of general laws prohibiting blackmail, extortion and bribery. In addition, the United States has specific provisions intended to prevent corrupt payments by employers to 'labor organizations'.

25. The *Taft-Hartley Act*[11] makes it a crime, among other things, for an employer:

> to pay, lend, or deliver or agree to pay, lend, or deliver, any money or other thing of value –
>
> … (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce…

26. There are a number of exceptions to the prohibition including payments or other benefits:

(a) to a person who is also employed by the employer for work done by that person;

(b) in satisfaction of a judgment or settlement;

(c) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business;

(d) deducted from the wages of employees in payment of membership dues of the labor organization, provided that the employer has a written assignment of the wages from the employee; and

(e) to a variety of trust and worker entitlement funds.

[11] 29 USC § 186(a).

27. It is also a crime for any official of a 'labor organization' to request, demand, receipt or accept or agree to do so any payment from an employer that would be unlawful.

28. The maximum penalties under the statute are:

(a) in respect of payments or benefits whose value does not exceed $1,000 – a $10,000 fine or imprisonment for one year, or both;

(b) in respect of payments or benefits whose value exceeds $1,000 – a $15,000 fine or imprisonment for five years, or both.

C – INADEQUACY OF EXISTING LEGAL FRAMEWORK

29. On the basis of the case studies referred to above, the existing criminal laws do not appear to operate as much of a deterrent to employers giving and union officials taking bribes, secret commissions and other unlawful payments, particularly in the building and construction industry. The cases studies considered are spread over time and place and involve a range of unions. They do not involve a rogue union official or employer, or even a rogue union.

30. Rather, history appears to be repeating itself:

(a) In 1982, the Winneke Royal Commission found that Norman Gallagher, the Secretary of the Australian Building Construction Employees and Builders' Labourers Federation

(**BLF**) and State Secretary of the Victorian Branch of the BLF, and various other officials of the BLF had received secret commissions in the form of work done, and materials provided, in relation to the construction of various beach houses.[12] Norman Gallagher was subsequently tried and convicted,[13] as were a number of building developers who had provided the work and materials. On the findings in Volume 4 of this Report, there are clear factual similarities between those events and the construction of a house for David Hanna, the Secretary of the BLF in Queensland.

(b) The 1992 Gyles Royal Commission found a number of corrupt or improper payments made by employers and others to officials associated with the New South Wales Branch of the Building Workers' Industrial Union.[14]

(c) In 2003, the Cole Royal Commission also identified several instances of employers making improper payments to or at the direction of unions which were described as donations.[15] In many instances donations were made to maintain industrial harmony or achieve industrial objectives. These donations

[12] Royal Commission into the Activities of the Australian Building Construction Employees' and Builders' Labourers' Federation, *Report* (1982), pp 31-36, 246-251, 274-275.

[13] His first conviction was overturned by the Victorian Court of Appeal and a new trial was ordered: *R v Gallagher* [1986] VR 219. At his second trial, he was convicted again, and his application for leave to appeal against conviction was dismissed: *R v Gallagher* (1987) 29 A Crim R 33 (CA).

[14] See Royal Commission into Productivity in the Building Industry in New South Wales, *Report of the Hearings Part II Illegal Activities* (1992), ch 2, pp 37-68.

[15] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 9, pp 221-228.

were either made for the direct benefit of the union (for example, for the purposes of a union picnic day[16]) or for the benefit of a third party (for example, a bereavement fund for families of deceased workers or a charity[17]). Some of these payments were disguised through the use of false invoices and false contracts. The Cole Royal Commission also identified the purchase of 'casual tickets' on building sites in Western Australia whereby a builder would make payments to a union for 'casual tickets' in the hope of avoiding impliedly threatened unlawful industrial action.[18] Payments for 'casual tickets' were payments to a union notionally to pay for persons to join the union in circumstances where the persons had not joined the union. Again, there are parallels with the matters considered in Chapters 10.2 and 10.9 of Volume 4 of this Report.

31. Why has the existing legal framework not proved especially effective at deterring corrupting benefits? There are several reasons.

32. *First*, the substantive criminal laws relating to secret commissions differ significantly between jurisdictions both in terms of the elements of the offence and the penalties. Moreover, the substantive criminal

[16] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 9, pp 226-227; Vol 13, pp 239-250, 253-254.

[17] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 9, p 204; Vol 13, p 262.

[18] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 3, p 207; Vol 7, pp 237–238, 245–246, 311–312.

laws in many jurisdictions do not apply well to officers of registered organisations.

33. One issue is that the provisions in many jurisdictions turn on the identification of an 'agent' and 'principal' and the principal's 'affairs or business'. Although these terms are capable of application to registered organisations, they are not well suited to that purpose. Further, a union official may be at the same time an agent for the union, an agent for the members of the union as a whole, and an agent for some sub-class of the members of the union.[19] This can lead to confusion as to who the official's principal is for the purposes of a charge, and the scope of the principal's 'affairs or business'.

34. Another difficulty is that there is a conflict of authority between Victoria and Queensland on the one hand[20] and New South Wales and Western Australia on the other[21] about the meaning of the word 'corruptly' in the various sections. In the latter two jurisdictions, it has been said that in addition to the payment being made or received with various mental elements, the payment must be 'corrupt' according to ordinary concepts. That adds further complexity to the operation of the provisions.

[19] *R v Gallagher* [1986] VR 219 (FC).

[20] *R v Gallagher* [1986] VR 219 (FC); *R v Nuttall* [2010] QCA 64.

[21] *R v Turner* (2001) 25 WAR 258; *Mehajer v R* [2014] NSWCCA 167.

35. Another complexity with the provisions was highlighted in Victoria Police's submissions in response to the Discussion Paper:[22]

> … [T]o establish an [sic] SC [secret commission] offence, it is necessary for the agent to receive the SC without the authority of the principal. For example, where union officials, particularly at senior ranks, receive gifts and benefits from companies, it could be a possible defence that this was not 'secret', as everyone at the 'union' received a benefit.

36. Where the official is an agent for the member or a sub-class of the members, there may also be complexities if it is alleged that some, but not all of the members, were aware of the payment.

37. *Secondly*, the investigation of blackmail, extortion and secret commission offences is inherently difficult. Blackmailers do not report their crimes to police. Nor, generally, do those being blackmailed. They fear the repercussions that will occur if they report the matter to authorities. Both those who pay and those who receive secret commissions have an interest in keeping the payment secret. Further, there is a general culture of silence within many unions which means that individuals fear reporting corruption. Without individuals who are willing to assist the police, it is difficult for prosecutions to be instituted.

38. Further, as Victoria Police noted in its submissions to the Commission:[23]

> There is also a large disincentive for companies who have been coerced into making corrupt payments, as the price of industrial peace, to come

[22] Victoria Police Law Reform Submissions, 10/9/15, p 15, para 1.2.14.

[23] Victoria Police Law Reform Submissions, 10/9/15, p 16, para 1.2.2.

> forward and take action against the union or union official who have demanded the payment. When companies take such action, it takes a long time before any penalties are meted out to those responsible. Companies take pragmatic decisions to succumb to demands made, rather than face costly and prolonged civil proceedings or continuous work stoppages.

39. *Thirdly*, employers and unions are adept at disguising corrupt payments or benefits as membership fees, donations or payments for services. Chapters 7.4, 10.2, 10.3, 10.5, 10.7, 10.8, 10.9 and 10.10 provide useful examples. Again, this adds to the challenge of investigating and prosecuting existing criminal laws. Currently, the *Fair Work (Registered Organisations) Act* 2009 (Cth) (**FW(RO) Act**) does not require unions to disclose separately donations and other payments made by employers to the union. Trade unions which are affiliated with a registered political party are presently required to lodge annual returns with the Australian Electoral Commission disclosing payments from persons, where the total amount received is in excess of $13,000.[24]

40. *Fourthly*, traditionally at least there appears to have been a reluctance on the part of police to become involved with 'industrial relations' matters.

41. *Fifthly*, particularly in the construction industry where delays or stoppages to a project can have a financially crippling effect, and can have it almost instantaneously, the cost to a business of making a payment to a union or union official will often be much less than the cost of refusing to make the payment. Accordingly, in the absence of any real likelihood that the business will be exposed to a criminal

[24] See *Commonwealth Electoral Act* 1918 (Cth), s 314AEA. The disclosure threshold specified in the legislation is $10,000 but it increases each year with inflation.

penalty, or will suffer damage to its reputation if the payment is exposed, it is in the business's commercial interests to make the payment to the union or union official.

D – REFORM TO EXISTING LEGAL FRAMEWORK

42. The problems are longstanding. They are inherently intractable. There is no 'victim' to complain. There is every incentive to preserve secrecy. It is naïve to think that there is an easy or obvious solution to the problem of corrupting benefits. Some of the matters identified in the previous section invite broader reform, particularly in the context of the building and construction industry. Law reform in that area is considered in Chapter 8 of this Volume.

43. Below, three more targeted reforms are considered. In summary, it is recommended that:

(a) Registered organisations and branches be required to disclose certain payments made to them.

(b) A Commonwealth corrupting benefits offence in relation to officers of registered organisations be enacted.

(c) Employers be prohibited from making any payments to an employee organisation excluding certain limited classes of payment.

Disclosure of benefits made to registered organisations

44. One relatively simple mechanism that may help to discourage the making and receiving of corrupting benefits is increased disclosure in relation to payments to unions. As was observed in the Final Report of the Cole Royal Commission:[25]

> Union representatives would be less likely to suggest or promise that industrial unrest or some other adverse consequence would be averted if a 'donation' is made to the union if they know that such donations must be included in statements of the organisation that might be scrutinised by a third party. Clients and contractors would be more likely to resist inappropriate demands for payments if they know that such payments will come to the attention of a regulatory body.

45. The Discussion Paper sought submissions on whether registered organisations, and any relevant entities, should be required to disclose publicly information in respect of all payments to them exceeding a monetary threshold.

[25] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1, p 132.

46. In their submissions to the Commission, both the Australia Industry Group and Master Builders Australia supported recommendations 145 and 147 of the Final Report of the Cole Royal Commission.[26] Those recommendations were as follows:[27]

> **Recommendation 145**
>
> The Building and Construction Industry Improvement Act require registered organisations, as soon as practicable after the end of each financial year, to lodge with the Industrial Registrar a statement showing the following particulars in relation to each donation exceeding $500 received by the organisation during that financial year:
>
> (a) the amount of the donation;
>
> (b) the purpose for which the donation was made; and
>
> (c) the name and address of the person who made the donation.
>
> **Recommendation 147**
>
> The Building and Construction Industry Improvement Act require clients, head contractors and subcontractors to promptly notify the Australian Building and Construction Commission of any request or demand that a donation exceeding $500 be made to, or at the direction of, a registered organisation or an official, employee, delegate or member of a registered organisation.

47. Recommendation 148 was that substantial civil penalties apply where it is proved that a person failed to comply with their disclosure obligations.

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[26] Australian Industry Group Law Reform Submissions, 21/8/15, p 11; Master Builders Australia Law Reform Submissions, 21/8/15, pp 44-45

[27] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1, pp 132-3.

48. Despite supporting a provision requiring the disclosure of donations, the Australian Industry Group argued strongly that it was not appropriate to require public disclosure of all payments made to registered organisations above a monetary threshold. It argued that this put employer organisations at a competitive disadvantage if they had to disclose their pricing or payments made under commercially sensitive agreements.[28]

49. Another related argument is that disclosure of all payments to registered organisations would be administratively burdensome. For example, if the disclosure threshold was set too low, it would require disclosure of many membership contributions to an organisation. Further, if organisations were required to disclose all payments the usefulness of the disclosure for exposing inappropriate payments would be limited.

50. On the other hand, the obvious difficulty with any proposal to limit disclosure to donations only is that, as various case studies considered by the Commission demonstrate, unions and employers have a proclivity to disguise what are truly donations as membership payments for persons who are not members or payments for services that are never provided or that are provided at an inflated price or that are undesired.

51. The Australian Labor Party has recently announced its policy in relation to 'Better Union Governance' which includes the reduction of the disclosure threshold under the *Commonwealth Electoral Act* 1918

[28] Australian Industry Group Law Reform Submissions, 21/8/15, pp 11-12.

(Cth) from $13,000 to $1,000. It is not clear, but it would appear to involve disclosure by registered political parties as well as entities associated with those parties (which would include many but not all trade unions) of all payments made to them over $1,000. Discussion here of that proposal would go well beyond the Commission's Terms of Reference.

52. However, a $1,000 threshold appears sensible at least in relation to loans, grants and donations. Having regard to the consideration identified in paragraph 49, it is recommended that a higher disclosure threshold be imposed for payments other than loans, grants or donations. The disclosure should be in the form of a financial disclosure statement considered in Chapter 2.

Recommendation 39

The *Fair Work (Registered Organisations) Act* 2009 (Cth) be amended to require reporting units to lodge an audited financial disclosure statement (see Recommendation 10) providing details in respect of (a) loans, grants and donations (including in-kind donations) made to reporting units in excess of $1,000 and (b) other payments made to reporting units in excess of $10,000.

Corrupting benefits offence in relation to officers of registered organisations

53. The Discussion Paper raised for consideration the introduction of Commonwealth criminal provisions outlawing the giving or receiving of benefits that corrupt union officials, with significant penalties both for those who give such payments and those who solicit such

payments.[29] A suggested possible approach was to adapt, to the particular context of registered organisations, State laws concerning secret and corrupt commissions along with existing Commonwealth criminal laws prohibiting the bribery of foreign public officials[30] and the giving and receiving of corrupting benefits in relation to Commonwealth public officials.[31]

54. Given the widely varying State criminal laws concerning secret commissions, and the potential complexities identified with applying those laws to officers of registered organisations, it is recommended that the Federal Parliament enact a standalone corrupting benefits provision in the *Fair Work Act* 2009 (Cth)[32] in relation to officers of registered organisations. As with current laws, the provision would criminalise both the giving of a corrupting benefit and the soliciting or receiving of a corrupting benefit. The provision would ensure that there is a uniform, clear and relatively simple regime applying throughout Australia.

55. What penalty for contravention would act as an effective deterrent? Having regard to the size of some of the companies involved in making corrupting payments, it would have to be substantial. The penalties for those who bribe foreign public officials provide a useful guide. An individual found guilty of the offence is liable to imprisonment for ten

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[29] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper - Options for Law Reform*, 19/5/15, p 98.

[30] See, eg, *Criminal Code* (Cth), s 70.2.

[31] See, eg, *Criminal Code* (Cth), s 142.1.

[32] It would seem appropriate to include the provision in a new Part 3-7 of the *Fair Work Act* 2009 (Cth).

years, or a fine not exceeding 10,000 penalty units (currently $1.8 million). A body corporate found guilty of the offence is liable to a fine which is the *greater* of:[33]

(a) 100,000 penalty units ($18 million);

(b) where the value of the benefit provided can be determined, three times the value of the benefit; and

(c) where the value of the benefit provided cannot be determined, ten percent of the annual turnover of the body corporate.

56. In the Discussion Paper, it was suggested that it might be appropriate to introduce a specific defence to a person who gives or receives a benefit under duress. Further reflection suggests that that is unnecessary. The general defence of duress available under the *Criminal Code* (Cth) would apply.[34]

57. In drafting any such offence, it would be prudent, given the divergence as to its meaning in the existing authorities, to avoid using the word 'corruptly' in the elements of the offence, and to state expressly what fault element is required to establish the offence. A provision for consideration is set out in Appendix 1 to this Volume of the Report.

[33] *Criminal Code* (Cth), s 70.2(5).

[34] *Criminal Code* (Cth), ss 2.2(2), 10.2.

Recommendation 40

Legislation be enacted amending the *Fair Work Act* 2009 (Cth) to include a provision criminalising the giving or receiving of corrupting benefits in relation to officers of registered organisations, with a maximum term of imprisonment of ten years.

This recommendation is reflected in the model legislative provisions in Appendix 1 to this Volume of the Report.

Prohibition on payments by employers to employee organisations or their officials

58. Introducing disclosure requirements and improving the clarity of existing criminal laws are measures which are unlikely, on their own, to have a significant effect in discouraging or preventing the giving and taking of corrupting benefits. The provision of corrupt payments and other benefits by employers to unions or union officials has been a recurring problem in Australia that has been identified by successive Royal Commissions over more than 30 years. It is insidious. It is immensely damaging. Not only is the criminal activity involved longstanding. It is also clandestine because both employers and union officials have an interest in keeping it quiet.

59. A broader approach is recommended which takes account of these facts.

60. Seeking simply to prohibit payments made or received with a particular intention has consequent difficulties of investigation and

proof. Instead it is recommended that, subject to certain exceptions, all payments by employers to a relevant union or officials of that union be outlawed. The employers covered are those employing persons who:

(a) are members of the relevant union and whose industrial interests the union is entitled to represent; or

(b) are entitled to be members of the relevant union and whose industrial interests the union is entitled to represent.

61. What are the justifications for this approach? They include the following:

(a) History shows that there has been a particular problem of employers giving bribes and secret commissions to unions and union officials. The material before the Commission shows that that problem is continuing.

(b) Even with a clearer corrupting benefits provision, the difficulties of investigation and proof will remain.

(c) Outside certain specific categories of payment there are few, if any, legitimate reasons why employers should make payments to unions or union officials.

(d) A blanket prohibition (except for certain categories of payment) will be easier to police and enforce.

62. It is recommended that the prohibition be a criminal offence, albeit with a lower penalty than the corrupting benefits offence. The corrupting benefits offence would be available where it can be shown that a person, which may be someone other than an employer, has intended to bribe or obtain a favour from a union official, or where an official solicits a bribe. The prohibition on employer payments would not require any proof of an intention to bribe. Accordingly, a lower penalty is appropriate.

63. Obviously, there would need to be categories of permissible payment or benefit. The *Taft-Hartley Act* in the United States, considered above, provides a useful starting place. In principle, the categories of permissible benefits in the Australian union context would include:

(a) deductions from employee wages to pay membership dues for persons who are genuinely members of the union (i.e. have already signed up to be members of the union);

(b) genuine wage claim payments i.e. payments to a union receiving the payment solely as agent for a group of employees in settlement of a claim or dispute between the employees and the employer;

(c) payments to a union to be used solely for a charitable or benevolent purpose;

(d) genuine payments for goods or services provided by the union in the ordinary course of business at the prevailing market price; and

(e) payments made pursuant to a court order, judgment or award.

There may be other categories of legitimate payment.

64. It would also be necessary to adopt strict safeguards to ensure that employers and unions could not circumvent the restrictions, for example, by disguising a bribe as a charitable donation which finds its way into union coffers.

65. Currently, reporting units are required to include a note in their annual general purpose financial report concerning their wage claims activity for the year.[35] However, given that unions are collecting money on behalf of workers it would seem appropriate that there be additional accounting requirements similar to those imposed in relation to trust accounts.

66. Similarly, there is current legislation in many States and Territories regulating the collection of charitable monies, and preventing the person collecting the monies from misusing it.[36] However, Chapter 7.3 of this Report identified numerous possible breaches of the relevant New South Wales legislation by the CFMEU. It may, therefore, be prudent to introduce to the FW(RO) Act provisions dealing with how charitable monies are dealt with by registered organisations.

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[35] This is as a consequence of the reporting guidelines issued under s 255 of the FW(RO) Act: see Fair Work Commission, *Reporting guidelines for the purposes of section 253*, 13/6/14, pp 7-8.

[36] *Charitable Collections Act* 2003 (ACT); *Charitable Fundraising Act* 1991 (NSW); *Collections Act* 1966 (Qld); *Collections for Charitable Purposes Act* 1939 (SA); *Collections for Charities Act* 2001 (Tas); *Fundraising Appeals Act* 1998 (Vic); *Charitable Collections Act* 1946 (WA).

67. It is not intended to deal comprehensively or prescriptively with the safeguards that would need to be introduced. Rather, it is intended simply to raise for consideration the proposition that safeguards would be needed.

Recommendation 41

Legislation be enacted amending the *Fair Work Act* 2009 (Cth) making it a criminal offence for an employer to provide, offer or promise to provide any payment or benefit to an employee organisation or its officials. Certain legitimate categories of payment should be permitted, subject to strict safeguards. An equivalent criminal offence should apply to any person soliciting, receiving or agreeing to receive a prohibited payment or benefit. A two year maximum term of imprisonment should apply to the commission of these offences.

This recommendation is reflected in the model legislative provisions in Appendix 1 to this Volume of the Report.

CHAPTER 5

REGULATION OF RELEVANT ENTITIES

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A – INTRODUCTION

1. A significant part of the Commission's inquiries in 2014, and to a lesser extent in 2015, focused on what were described in the Terms of Reference as 'relevant entities'. In broad terms, these are entities separate from a union, such as a fund, organisation, account or financial arrangement, established by a union or union officials for a particular industrial purpose or for the welfare of persons including members of the union. Although it may be more accurate to describe these entities as 'associated entities', it is convenient to adopt the terminology used in the Terms of Reference.

2. The class of relevant entities may be divided broadly into sub-classes. These include:

   (a) funds established with the primary purpose of funding the election campaign of candidates standing for office in a

union. These are often described as 'fighting funds' or 'election funds' and will be referred to as **election funds**;

(b) funds established for the purpose of funding redundancies for employees in an industry including members of the union (**redundancy funds**), or funding the payment of other worker entitlements such as sick leave, which may be classed together as **worker entitlement funds**;

(c) funds established for the purpose of providing training to members of a union or employees more generally (**training funds**) or providing welfare services (**welfare funds**);

(d) schemes established to provide insurance, typically sickness and/or accident insurance, to employees in an industry including union members (**employee insurance schemes**);

(e) industry superannuation funds;

(f) charities established to assist union members and employees more generally (for example, by providing welfare services or drug and alcohol treatment services); and

(g) other generic accounts, associations or funds.

3. Several potential issues can arise in relation to relevant entities.

4. One issue is that a number of unions promote forms of enterprise agreements that require employers to make payments to certain

relevant entities, such as redundancy funds and employee insurance schemes, in order to generate income for the union that is not, or not properly, disclosed. The problems that arise from these agreements are discussed in more detail in Chapter 6, but the problems include conflicts of interest, breaches of fiduciary duty and possible coercion.

5. Another issue is the lack of transparency concerning the financial relationships between a relevant entity and the union with which it is associated. That issue is addressed in Part B of this Chapter.

6. Other more general problems include the fact that many relevant entities have poor or non-existent governance. Further, a relevant entity can be used in a way that subverts the democratic processes of a union. This can occur where a union official, often a secretary, has control of a relevant entity or 'slush fund' that allows the official to buy influence within the union. These issues are considered in Parts C to F of this Chapter.

B – DISCLOSURE OF FINANCIAL RELATIONSHIPS BETWEEN UNIONS AND RELEVANT ENTITIES

7. Problems can arise when unions, or particular union officials, operate accounts or entities separate from the union. One problem is the potential for misappropriation of funds. A good example of this occurring is the payment of funds from the Health Services Union to the National Health Development Account by Katherine Jackson.[1] Another problem is that, unless there is proper disclosure, the existence of relevant entities reduces the accountability and transparency of the

[1] See Vol 2, ch 5.2 of this Report.

union's finances, and has the potential to concentrate power in the hands of a few union officials at the expense of the committee of management.

8. Some provisions in the *Fair Work (Registered Organisations) Act* 2009 (Cth) (**FW(RO) Act**) seek to ensure proper accountability and transparency of related party transactions.

9. The first provision is s 253. It requires that the general purpose financial accounts prepared by reporting units[2] must comply with the Australian Accounting Standards. Those standards include standards requiring:

(a) the preparation of consolidated financial statements;[3]

(b) the disclosure of interests in other entities;[4] and

(c) related party disclosures.[5]

10. One problem revealed by the financial reports considered during the course of public hearings was that many were not prepared on a consolidated basis. They provided only the most basic of information about related party transactions. Often the relationships between a

[2] As discussed in Chapter 2, a 'reporting unit' is a registered organisation (if the organisation is not divided into branches) or a branch of a registered organisation.

[3] Australian Accounting Standards Board, *AASB 10: Consolidated Financial Statements,* July 2015.

[4] Australian Accounting Standards Board, *AASB 12: Disclosure of Interests in Other Entities,* August 2015.

[5] Australian Accounting Standards Board, *AASB 124: Related Party Disclosures,* July 2015.

union and trusts controlled by the union were not disclosed at all. The income from the trust was simply included in miscellaneous income.

11. To ensure that the financial reports are as useful as possible, it is recommended that consideration be given, in consultation with the Australian Accounting Standards Board, to amending the FW(RO) Act to require:

(a) reporting units to prepare their financial reports on a consolidated basis (i.e. the reporting unit report on a consolidated basis including its controlled entities); and

(b) reporting units to prepare separate financial statements for their controlled entities.

12. The second measure in the FW(RO) Act that seeks to ensure proper accountability and transparency of related party transactions is s 148C, which was introduced in 2012. It requires the rules of an organisation and branch to require disclosure to the members of either or both of the following:

(a) the amount of each payment made by the organisation or branch to a 'related party' or a 'declared person or body'; or

(b) the total amount of the payments made by the organisation or branch to a 'related party' or a 'declared person or body'.

13. As a practical matter, most reporting units will comply with these obligations by including the relevant related party disclosures in their

annual financial reports. As a result, there appears to be considerable overlap between the requirements of the accounting standards and s 148C. Further, breach of the rules required by s 148C has no financial consequence. In contrast, failure by a reporting unit to prepare its general purpose financial report in accordance with the accounting standards as required by s 253 is a civil penalty provision.[6] Accordingly, there would seem to be little point to s 148C. To the extent that it were thought that the Australian Accounting Standards were inadequate, the General Manager is empowered to issue reporting guidelines specifying information that must be contained in the financial reports.[7] It may be appropriate for s 148C of the FW(RO) Act to be repealed.

Recommendation 42

Consideration be given, in consultation with the Australian Accounting Standards Board, to amending the *Fair Work (Registered Organisations) Act* 2009 (Cth) to require reporting units to prepare consolidated financial statements, as well as separate financial statements for the reporting unit's controlled entities. Consideration also be given to repealing s 148C of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

C – REGULATION OF RELEVANT ENTITIES GENERALLY

14. As noted in the Discussion Paper, there are generally two classes of law that may apply to regulate a relevant entity.

[6] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 305.

[7] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 255.

15. The first class consists of the respective laws that govern the specific legal structure employed, such as:

(a) the *Corporations Act* 2001 (Cth) in respect of companies registered under that Act;

(b) trustee legislation in each State or Territory and equitable principle in in respect of trusts;

(c) the *Superannuation (Industry) Supervision Act* 1993 (Cth) and equitable principle in respect of superannuation funds;

(d) the financial services provisions of the *Corporations Act* 2001 (Cth) and the provisions of the *Insurance Act* 1973 (Cth) in respect of employee insurance schemes;

(e) incorporated associations legislation in each State or Territory in respect of incorporated associations; and

(f) common law and equitable principles concerning contract and equitable principles concerning trusts in respect of unincorporated associations.

16. The second class of laws consists of the FW(RO) Act (or other State-based industrial relations legislation) to the extent that the provisions in that Act (or those Acts) are relevant.

17. It is apparent that the laws within the first class vary so widely – from those that impose very significant regulation to those which impose

almost no regulation at all – that any general reform to the governance of relevant entities would be extremely difficult. It would risk being either too onerous or largely pointless. Accordingly, this Chapter focuses on the regulation of three specific classes of relevant entity. They are:

(a) election funds;

(b) worker entitlement funds; and

(c) employee insurance schemes.

D – ELECTION FUNDS

18. The Commission examined a number of election funds in a range of unions throughout 2014 and 2015. In 2014, Chapter 4 of the Interim Report was devoted to seven different election funds in a range of unions.[8] In 2015, the Commission considered election funds established by the National Union of Workers New South Wales Branch (**NUW NSW**)[9] and the Electrical Trades Union New South Wales Branch.[10]

19. Election funds can be formally structured in a number of ways. But election funds all involve officers or employees of a union

[8] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, Part 4.

[9] Vol 2, ch 4 of this Report.

[10] Vol 2, ch 3.1 of this Report. This fund was mentioned during the course of the Commission's hearings in 2014 as funds from it were transferred to the TWU Team Fund: Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 4.4, pp 640-646.

(**contributors**) contributing money to a fund controlled by one or more individuals who hold elected office within the union or aspire to do so. The primary purpose of the election fund is to fund future election campaigns for offices within the union. However, as a result of the fact that in many unions contested ballots are uncommon, money in the fund tends to accumulate and be used for other purposes.

20. The Interim Report identified a number of key problems in relation to the use and operation of election funds by various unions.[11] In summary:

(a) There is commonly insufficient disclosure of the sources of revenue for election funds both to contributors and to voters in union elections.

(b) There is commonly insufficient disclosure of the activities and expenditure of election funds to contributors and to voters in union elections.

(c) There is a lack of clarity in the legal status of contributions to an election fund and the entitlement (if any) which contributors have to the money in the fund.

(d) Money is used for purposes unconnected with the purpose for which the election fund was formed, with little knowledge of or oversight over the use of the money.

[11] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 4.1, pp 516-517.

(e) In a number of cases, it is questionable whether contributors' decisions to contribute are truly voluntary, particularly where contributions by union employees are automatically deducted pursuant to the terms of contributors' employment contracts with the union.

(f) Incumbent union officers are able to entrench their positions by the establishment of a substantial election fund, funded through the use of automatic payroll deductions, conferring a disproportionate advantage on incumbents, over and above the benefit of incumbency itself.

(g) There appears to be a lack of governance and record-keeping in relation to a number of union election funds.

21. The election fund operated in connection with the NUW NSW Branch[12] provides a useful example of the problems. That campaign fund was funded by deductions from the wages of union officials. Transfers were made from the NUW NSW Branch to an account styled the 'Derrick Belan Team Account' from which withdrawals were made, despite there being no contested election at the Branch between 2002 and 2014. Payments made from the campaign funds instead went to fund the costs of a breakaway union in Queensland, a car for Derrick Belan, and unidentified cash withdrawals. Following closure of the account, the balance was withdrawn, and further deductions on account of campaign fund contributions from union staff were eventually kept in cash in Derrick Belan's personal possession. They were not

[12] Vol 2, ch 4, paras 165-207.

accounted for in any way. There was no constitutive document explaining the purposes and setting out the rules of the fund. There were no records of any oral agreement dealing with those matters. It was unclear whether the arrangements were to be seen as contractual, agency or trust arrangements.

22. These problems with election funds have the potential to affect adversely the democratic processes of the union. In many unions, employees of the union are compelled to contribute to an election fund, which in practice is commonly controlled by the Secretary. Over time the Secretary accumulates a substantial war chest that the Secretary can use to further his or her influence within the union. The election fund thus operates to reinforce the power and influence of the current Secretary. Further, because of the lack of transparency and oversight associated with election funds, members of the union do not know who is funding a particular candidate in an election and where the candidate's allegiances may lie as a result of funds received.

Prohibition of any compulsion on employees to contribute to an election fund

23. As was noted in the Discussion Paper, there is nothing wrong with members of an employee or employer organisation joining together to pool resources to fund a particular candidate or ticket of candidates in an election. However, any steps taken with the effect of legally or practically compelling contributions infringe basic principles of freedom of association.

24. As to legal compulsion, s 326 of the *Fair Work Act* 2009 (Cth) (**FW Act**) prohibits certain unreasonable payments and deductions from an employee's salary that are for the benefit of the employer, or a party related to the employer. Given that the employer is the union, and the election fund is (deliberately) not related to the union, the provision is unlikely to prohibit terms requiring union employees to make payments to an election fund.

25. A further problem with any arrangement by which employees of the union are legally required to contribute to an election fund arises from s 190 of the FW(RO) Act. Any direct diversion of an organisation's funds for the purposes of the election of a particular candidate is outlawed by s 190. Yet, if the current management of an organisation mandates in employment contracts between the union and its employees that some part of the employees' salaries must be paid to the election fund, then the management have achieved indirectly what they cannot do directly. By the use of their powers, the union officials have caused the union to enter into a particular contract providing for a benefit to be provided to an election fund. Arguably, this is an improper exercise of powers to achieve a result that is prohibited by s 190, and would be a breach of the official's duties under ss 286 and 287 of the FW(RO) Act.

26. In its submissions to the Commission, the Shop, Distributive & Allied Employees Association (**SDA**) attacked this reasoning on the basis that the funds diverted were not the organisation's funds, but the wages of the employee.[13] However, this ignores that the union officials

[13] Shop, Distributive & Allied Employees Association Law Reform Submissions, 27/8/15, para 19.

negotiating with the employee have a power to influence, if not set, those wages and it is the union officials who have caused the union to enter into a particular contract the practical effect of which is to divert union funds to an election fund via the device of a payment to the employee.

27. The Discussion Paper canvassed two measures to address these issues. One was prohibiting the use of direct debit and other similar arrangements whereby contributions are automatically deducted from the salary or wages payable to the employees of an organisation. The other was prohibiting any condition of employment requiring an employee of an organisation to contribute to an election fund.

28. The SDA attacked both options on the basis that such measures would prevent employees of registered organisations from making contributions to a mutual fund for the re-election of those employees.[14] The proposals were said to be a 'denial of the right of employees identified by reference to their membership in or employment by a registered organisation of employees'.[15] The submission continued that the proposals if enacted:[16]

> could be reasonably seen to mark the first step in a successive legislative progression to banning all employers from transacting any deductions authorised by any employees where those deductions are to be made to a trade union of which they are members.

[14] Shop, Distributive & Allied Employees Association Law Reform Submissions, 27/8/15, para 14.

[15] Shop, Distributive & Allied Employees Association Law Reform Submissions, 27/8/15, para 14.

[16] Shop, Distributive & Allied Employees Association Law Reform Submissions, 27/8/15, para 15.

29. These submissions proceed on a false premise. There was,[17] and is, no suggestion that employees should be prohibited from contributing to a mutual fund. Rather, the suggestion is that measures should be implemented to seek to ensure voluntariness of contributions.

30. The second option – prohibiting any condition of employment requiring an employee of an organisation to contribute to an election fund – is preferable and could be achieved by an amendment to s 326 of the FW Act. Direct debit arrangements can be a convenient way of employees making genuine contributions to a cause they believe in, provided they are entered into voluntarily and independently of a contract of employment. Accordingly, they should not be prohibited.

31. Apart from legal compulsion, there is also the question of practical compulsion. Often a contribution is voluntary as a matter of theory, but an employee is left with little, if any, real choice. It will be a rare union employee, who is presented on the first day of a work with a form by the union Secretary asking for regular contributions to the 'fighting fund' and who is told that everyone else contributes to the fighting fund, who does not agree to make contributions.

32. Section 344(e) of the FW Act deals with this issue to some extent by preventing an employer from exerting 'undue influence' or 'undue pressure' on an employee in relation to a decision by the employee to agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work. However, that provision only protects against 'undue' pressure which appears to

[17] See Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform*, 19/5/15, para 259.

connote inappropriate, excessive or disproportionate pressure.[18] The difficulty with amending this provision so that it refers only to 'influence' or 'pressure' is that it would arguably stop any solicitation of payments by employees to an election fund, thereby potentially outlawing election funds altogether. The preferable solution concerning practical compulsion is to introduce basic governance requirements for election funds. If election funds are operated properly, and not used for the personal benefit of particular union officials, the prospect of practical compulsion is likely to be considerably reduced.

Recommendation 43

The *Fair Work Act* 2009 (Cth) be amended to prohibit any term of a modern award, enterprise agreement or contract of employment permitting an employer to deduct, or requiring an employee to pay, from an employee's salary an amount to be paid towards an election fund.

Basic regulation of election funds

33. Apart from the issue of voluntariness of contributions, the other problems previously identified have the potential to affect adversely the democratic governance of unions. As discussed in Chapter 1, office holders in employee organisations are capable of exercising substantial power, not only in relation to their members but in the broader political environment. In addition, they exercise substantial statutory powers under the FW Act. Accordingly, there is a significant

[18] See *Australian Federation of Air Pilots v Jetstar Airways Pty Ltd* [2014] FCA 15 at [13].

public interest in ensuring free and fair elections within employee organisations (and for that matter employer organisations), ensuring that there is no possibility of corruption or undue influence arising from donations and electoral expenditure, and ensuring that election funds are not misused.

34. It is generally accepted that an important element of a free and fair election process is that voters in the election are fully informed about the sources of funds and the expenditure incurred in election campaigns. Legislation has been introduced at both State and Commonwealth levels that attempts to regulate political donations and expenditures in State and Commonwealth elections.[19] The legislation varies between jurisdictions but there are common elements. These include:

(a) caps on the amounts of political donations which can be made to candidates and parties;

(b) caps on the amount of political expenditure which can be made by candidates, parties and third parties, usually during a period prior to the election;

(c) a requirement that donations be paid into, and expenditure be paid out of, specially established campaign accounts; and

[19] See eg, *Commonwealth Electoral Act* 1918 (Cth), Part XX; *Electoral Act* 1992 (ACT), Part 14; *Election Funding, Expenditure and Disclosures Act* 1981 (NSW); *Electoral Act* 2002 (Vic), Part 12; *Electoral Act* 1907 (WA), Part VI. Until relatively recently, Queensland had detailed election funding laws, but these were substantially repealed under the former Newman Government: see *Electoral Act* 1992 (Qld), Part 11.

(d) requirements that political donations and political expenditure be publicly disclosed.

35. Not all of these requirements are appropriate in respect of elections for officers in registered organisations. On the present evidence, there is no obvious need for caps on the amounts of donations and expenditures. However, some of the measures, with adaptations, would assist in tackling the various issues identified above.

36. The Discussion Paper set out a possible regime which would have required all donations and electoral expenditure in connection with elections for office in a registered organisation or branch to be channelled through regulated campaign accounts.[20] Those accounts would have been subject to certain operating and disclosure requirements designed to inform contributors and voters, and ensure appropriate minimum levels of governance. The effect of the proposal was indirectly to regulate and improve the governance of election funds, which are currently operated through a multitude of different legal structures, by requiring them to be operated through regulated campaign accounts. At the same time it would have improved the transparency and accountability of union elections.

37. A difficulty with the proposal identified in the Discussion Paper was that by seeking indirectly to regulate election funds by requiring all donations and electoral expenditure to pass through regulated campaign accounts, a range of reporting and administrative requirements (for example, disclosure of donations and expenditure)

[20] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper Options for Law Reform*, 19/5/15, ch 3.5, pp 34-37.

would also have been imposed on individual candidates and groups of candidates in elections for registered organisations. While those requirements may be necessary in State and Commonwealth elections, arguably they could have a disproportionately burdensome effect on individual candidates in elections for office in a registered organisation. In some ways, those requirements could have had the perverse effect of discouraging individual candidates from standing against well-resourced incumbents.

38. More recently, the Australian Labor Party has proposed subjecting union elections managed by the Australian Electoral Commission to the same electoral funding laws in relation to the disclosure of donations and electoral expenditure as apply to Federal elections.[21] The proposal would require any entity, however constituted, associated with candidates in such elections to disclose publicly the total value of payments made, receipts and debts each year, and the particulars of debts and donations, exceeding the disclosure threshold. Candidates would also be required to make similar disclosures. The proposal also envisages a reduction in the current disclosure threshold from $13,000 to $1,000.

39. This proposal rightly recognises the importance of transparency in elections in registered organisations. One weakness with the proposal is that, as discussed in Chapter 2 of this Volume, a number of elections in registered organisations are not conducted by the Australian Electoral Commission because the organisation or branch has an exemption under s 186 of the FW(RO) Act. Another issue is the same

[21] Australian Labor Party, *Fact Sheet: Better Union Governance*, released 7/12/15, p 3.

as the one discussed above i.e. the disclosure requirements, particularly if the disclosure threshold were reduced to $1,000, may be disproportionately burdensome and adversely affect individual candidates.

40. The Commission favour a more limited approach, which is to:

(a) focus on the existing problems with election funds (however constituted) and subject them to minimum governance requirements, and ensure that both contributors and voters are aware of their activities; and

(b) consult with registered organisations and their members about the effects of broader disclosure requirements on candidates.

41. More specifically, it is recommended that election funds (however constituted) associated with a registered organisation or branch of such an organisation be regulated as follows:

(a) Election funds that meet certain minimum requirements should be entitled to be registered.

(b) Among the requirements to be satisfied in order to be registered, there must be a document setting out how the election fund is to operate, the purposes for which the fund may be used, and the circumstances in which contributors are entitled to a return or refund of their contributions.

(c) A registered election fund must also have a separate bank account (an election account) maintained solely to receive contributions made for the purpose of funding current or future election campaigns and to pay electoral expenditure in connection with elections for office in a registered organisation or branch.

(d) Election funds that are not registered would not be permitted to receive election donations or make electoral expenditure in connection with elections for office in any registered organisation or branch.

(e) Registered election funds would be required to lodge regular returns with the registered organisations regulator disclosing the activities of the election account, including donations and expenditures. Those returns would be available to contributors to the fund and also to members of the organisation or branch with which the election fund is associated.

42. One issue raised in the Discussion Paper was whether laws regulating the funding of elections in registered organisations have the potential to collide with the freedom of political communication which is implied from the *Constitution*.

43. The content of that freedom was recently recast by four members of the High Court in *McCloy v State of New South Wales*.[22] In that case it

[22] (2015) 325 ALR 15.

was said that the test to be applied in deciding whether a law is invalid for infringing the freedom was as follows:[23]

(a) Question 1 is – does the law effectively burden the freedom of political communication on governmental and political matters in its terms, operation or effect? If 'no', then the law does not exceed the implied limitation and the enquiry as to validity ends.

(b) If 'yes' to question 1, question 2 is – are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? If the answer to question 2 is 'no', then the law exceeds the implied limitation and the enquiry as to validity ends.

(c) If 'yes' to question 2, question 3 is – is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what was described as 'proportionality testing' to determine whether the restriction which the provision imposes on the freedom is justified. The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

[23] (2015) 325 ALR 15 at [2] per French CJ, Kiefel, Bell and Keane JJ.

(i) suitable – as having a rational connection to the purpose of the provision;

(ii) necessary – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and

(iii) adequate in its balance – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be 'no' and the measure will exceed the implied limitation on legislative power.

44. Applying this test, it is difficult to see how imposing certain minimum governance requirements on election funds, and requiring those election funds to disclose their activities to contributors and members of the organisation could be thought effectively to burden the freedom of political communication on governmental and political matters. However, on the High Court's existing authorities almost every law will fail the test set out in question 1 above.

45. In relation to the test in question 2, the purposes of:

(a) improving governance of election funds; and

(b) improving transparency in relation to donations and election spending in connection with elections in registered organisations;

are properly regarded as being legitimate. Among other things, improved governance seeks to avoid the misuse of funds. Increased transparency seeks to avoid the possibility of undue influence or corruption in elections by shining a light onto the flow of money from election funds to candidates, and from persons to election funds to candidates.

46. As to the test in question 3, it is considered that the model identified above is a suitable, necessary and balanced way of addressing the problems identified.

Recommendation 44

Provisions be introduced into the *Fair Work (Registered Organisations) Act* 2009 (Cth) concerning the registration of election funds in relation to elections for office in registered organisations or their branches. In order to be registered, election funds should be required to meet certain minimum governance standards, operate a separate bank account for election donations and expenditures, and report annually in relation to the operation of that account. Unregistered election funds should not be permitted to receive election donations or make electoral expenditures in connection with elections for office in any registered organisation or branch.

This recommendation is reflected in model legislative provisions in Appendix 1 to this Volume of the Report.

E – WORKER ENTITLEMENT FUNDS

47. As defined in paragraph 2(b) above, worker entitlement funds are funds established for the purpose of funding employee entitlements such as redundancy pay and sick leave.

48. These funds operate primarily in the building and construction industry and are typically established as 'joint ventures' between **industry parties**, that is a union or unions and an employer organisation or organisations, although some do not involve employer organisations. Most worker entitlement funds are operated by a trustee company, the directors of whom are associated with the industry parties.

49. The Commission considered some worker entitlement funds in detail, including:

(a) the Building Employees Redundancy Trust (**BERT**) Fund, a redundancy fund covering the Queensland construction industry which is primarily associated with the Construction, Forestry, Mining and Energy Union (**CFMEU**);[24]

(b) the Protect Scheme, which operates a redundancy fund for electrical trades employees in Victoria;[25] and

(c) Incolink, which operates a number of redundancy funds and sick leave schemes for construction industry employees in Victoria and Tasmania.[26]

50. There are a number of other such funds. For example, the Australian Construction Industry Trust (**ACIRT**) is a large redundancy fund for construction industry employees in New South Wales.

51. The basic structure of these funds is typically as follows:

(a) Pursuant to enterprise agreements negotiated with a particular union, employers make regular payments on behalf of workers into a particular worker entitlement fund.

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[24] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 5.2, pp 777-852.

[25] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 5.3, pp 853-896.

[26] Vol 4, ch 11 of this Report.

(b) The fund will commonly provide a financial benefit to the industry parties. As a result the union negotiating enterprise agreements will have a strong incentive to require the employer to make contributions to a particular fund.

(c) Under the rules of the relevant fund, employees will be entitled to receive certain benefits (for example, sick leave or redundancy pay) if certain conditions are satisfied.

(d) The rules of the fund will be set out in a trust deed entered into between the corporate trustee and the industry parties. These trust deed can be, and often is, amended from time to time.

52. Collectively, worker entitlement funds in the construction industry hold around $2 billion in assets under management:

(a) As at 30 June 2015, Incolink managed in excess of $714 million in investment assets in its various redundancy funds with worker entitlements of $577 million.[27]

(b) As at 30 June 2015, ACIRT had total assets of $594 million.[28]

(c) The Protect Severance Scheme considered in the Interim Report held assets in excess of $245 million as at 30 June 2013.[29]

[27] Vol 4, ch 11, para 3 of this Report.

[28] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), p 1.

(d) The BERT funds considered in the Interim Report held over $130 million in assets as at 30 June 2013.[30]

(e) As at 31 July 2015, the Metal and Electrical Redundancy Trust (**MERT**) held over $125 million in assets.[31]

(f) As at 30 June 2015, the Contracting Industry Redundancy Trust (**CIRT**) held over $67 million in assets.[32]

53. Despite their size, worker entitlement funds, unlike superannuation funds, have very little specific legislation regulating their activities. The main relevant laws are summarised below.

Regulation under *Corporations Act* 2001 (Cth)

54. As noted above, most worker entitlement funds are operated by corporate trustees. They will be subject to the ordinary provisions of the *Corporations Act* 2001 (Cth) regulating companies. They will also be subject to the terms of the trust deed. However, subject to the possible effect of the *Fringe Benefits Tax Assessment Act* 1983 (Cth) discussed below, there is no restriction on the terms of the trust deed. Many worker entitlement funds – ACIRT being a notable exception – distribute the profit of the funds to industry parties.

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[29] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, p 861.

[30] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, p 789.

[31] Mechanical and Electrical Redundancy Trust (MERT) Annual Report for the year ended 30/6/15, p 13.

[32] CIRT Redundancy Scheme, 2015 Members Annual Report, p 6.

55. A worker entitlement fund is generally considered a managed investment scheme under the definition in s 9 of the *Corporations Act* 2001 (Cth), and an interest in the fund is a financial product for the purposes of Chapter 7 of the *Corporations Act* 2001 (Cth).[33] Further, subject to any relief by way of class order, a worker entitlement fund would ordinarily be required to be registered under s 601ED of the *Corporations Act* 2001 (Cth).

56. Thus, subject to any relief by way of class order:

(a) Pursuant to s 601ED a worker entitlement fund would need to be registered, and the corporate trustee would need to hold an Australian Financial Services Licence (**AFSL**). Together, this would subject the corporate trustee of the fund to a range of additional requirements including:

(i) requirements to have a compliance plan and compliance committee;

(ii) capital requirements;

(iii) audit requirements;

(iv) an obligation to maintain certain competence requirements and ensure that its representatives were adequately trained and competent; and

[33] *Corporations Act* 2001 (Cth), s 764A(1)(b), (ba).

(v) a requirement to ensure responsible officers are of good fame and character.

(b) Sections 992A and 992AA, which contain prohibitions on the hawking of certain financial products and interests in a managed investment scheme, would apply.

(c) The corporate trustee, as an AFSL holder, would be required to provide a variety of disclosures under Part 7.7 of the *Corporations Act* 2001 (Cth). In addition, Part 7.9 of the *Corporations Act* 2001 (Cth) would apply, requiring among other things a Product Disclosure Statement (**PDS**) to be provided to persons acquiring an interest in the fund before they acquire their interests.

57. However, Class Order [CO 02/314] made by the Australian Securities and Investments Commission (**ASIC**) exempts worker entitlement funds from these requirements. More particularly, that class order exempts 'a person who operates or promotes' a certain type of scheme from the operation of ss 601ED, 992A, 992AA and Part 7.9 of the *Corporations Act* 2001 (Cth), and the requirement to hold an AFSL. The type of scheme referred to is one which involves:

> [m]aking offers for the issue of an interest in, or making recommendations to acquire an interest in, or making offers to arrange the issue of interests in, or operating a scheme to which employers may make, or are required by an award or agreement to make, contributions where the primary objective of the scheme is to fund redundancy entitlements and other entitlements incidental to employment, for employees of the employers

58. The class order is due to terminate on 1 October 2016. Recently, ASIC released a consultation paper indicating that it proposed to remake

Class Order [CO 02/314] to extend its relief until 1 October 2017 pending the release of this Final Report.[34] That consultation paper usefully summarised the history of the class order:[35]

> Relief was initially provided on an interim basis on 25 May 2000, pending a public consultation process and finalisation of our approach to regulating such funds. After considering preliminary comments, we formed the view that the regulation of these funds may be an issue of law reform rather than through the use of ASIC powers, and relief continue pending Government consideration of the issue.

Fringe benefits tax exemption

59. Worker entitlement funds are subject to a kind of regulation pursuant to provisions of the *Fringe Benefits Tax Assessment Act* 1986 (Cth).

60. Employer contributions to a worker entitlement fund may be 'fringe benefits' within the meaning of the *Fringe Benefits Tax Assessment Act* 1986 (Cth).[36] If so, unless an exemption applies, the employer paying the contributions will be liable to pay Fringe Benefits Tax (**FBT**). At the same time, when a worker receives a payment from the fund, the payment may be taxed in the worker's hands as ordinary income or as an employment termination payment. To avoid the possibility of double taxation, s 58PA of the *Fringe Benefits Tax Assessment Act* 1986 (Cth) provides that an employer contribution will be exempt from

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[34] Australian Securities and Investments Commission, *Consultation Paper 238: Remaking ASIC class order on employee redundancy funds: [C0 02/314]*, 4 September 2015, p 8 [15]-[16].

[35] Australian Securities and Investments Commission, *Consultation Paper 238: Remaking ASIC class order on employee redundancy funds: [C0 02/314]*, 4 September 2015, p 8 [14].

[36] Although at least in some circumstances the contributions may not be fringe benefits: *FCT v Indooroopilly Children Services (Qld) Pty Ltd* (2007) 158 FCR 325 (FC) at [36]-[38] per Edmonds J (Stone and Allsop JJ agreeing).

FBT if the contribution is made to an 'approved worker entitlement fund'.

61. A fund may apply to the Commissioner of Taxation to be approved as an 'approved worker entitlement fund' provided the fund satisfies certain basic governance requirements and the fund's constituting documents limit the uses to which contributions to the fund and the income of the fund may be used.[37]

62. Thus, although these provisions do not impose any direct regulation on worker entitlement funds, the fact that the FBT exemption is contingent on satisfying the requirements in the *Fringe Benefits Tax Assessment Act* 1986 (Cth) imposes a form of practical regulation on many worker entitlement funds.

Problems with existing regulation

63. There are a number of problems with the existing regulatory framework surrounding worker entitlement funds.

64. *First*, the startling consequence of Class Order [CO 02/314], which was initially intended to operate as an interim measure, is that worker entitlement funds are not subject to any mandatory disclosure requirements. For example:

[37] See *Fringe Benefits Tax Assessment Act* 1986 (Cth), s 58PB(4).

(a) There is no requirement on worker entitlement funds to disclose the commissions and other payments made by the fund to unions and employer organisations.

(b) There is no required disclosure of the amounts deducted by the funds by way of fees and charges.

(c) There is no requirement to explain to workers the circumstances in which they will, or will not, be entitled to a payment from the fund.

65. Further, there is no statutory requirement on worker entitlement funds to provide annual reports or accounts to persons with an interest in the fund.

66. *Secondly*, another consequence of Class Order [CO 02/314] is that the entities operating worker entitlement funds are not subject to the requirement in s 601FC(1)(d) of the *Corporations Act* 2001 (Cth) to treat members[38] (for example, workers) who hold interests of the same class equally and those who hold interests of different classes fairly. The BERT case study illustrates the potential for worker entitlement funds under current law to give preferential treatment to union members over non-union members with the aim of generating union membership.[39] In circumstances where there is no difference of interest between union and non-union members of the funds, there is no justification for differential treatment.

[38] Meaning persons who have a right to benefits produced by the scheme: *Corporations Act* 2001 (Cth), s 9.

[39] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 5.2.

67. *Thirdly*, apart from ACIRT, worker entitlement funds invariably distribute the income generated on contributions received to industry parties (for example, unions and employer organisations) to be used for purposes they see fit.

68. There are a number of reasons why this is a problem.

69. One reason is that there is an inherent unfairness in taking contributions paid by employers on behalf of employees, generating substantial income from those contributions, and then distributing the money to other persons in circumstances where many employees will never receive the benefit, either directly or indirectly, of the income generated. The point is starkly illustrated by the submission by ElecNet (Aust) Pty Ltd (**ElecNet**), the trustee of the Protect Severance Scheme, that:[40]

> Approved worker entitlement funds, such as Protect, do not share the purpose of managed investment schemes: producing maximum financial benefits for members of the scheme. Their aim is to protect workers' entitlement to ensure workers' financial security when faced with the insolvency of employers and cycles in the economy. *Workers have no entitlement to financial benefits above the return of amounts contributed to the fund for them by their employer*.

It may be accepted that the purpose of a worker entitlement fund is to secure the payment of entitlements. Consequently such funds might prudently adopt a risk adverse investment strategy. However, it does not follow that, because the generation of income is not the purpose of the fund, workers should not be entitled to any return which is made on the contributions. In fact, it is contrary to the underlying premise of

[40] ElecNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), p 13 (emphasis added).

such a fund – to operate solely for the benefit of employees – that the income should be used to benefit others.

70. It is also worth making the point that apart from 'genuine redundancy accounts',[41] most so-called redundancy funds are not limited to making a payment in circumstances of genuine redundancy: workers (or their estates) are commonly entitled to a benefit when they cease employment, retire, reach a particular age or die. Thus, the contributions paid by employers are, in effect, a deferred entitlement of the employees on whose behalf the contributions are made. The consequence of the circumstances revealed in ElecNet's submission is that worker entitlements are subject to the effect of inflation, thereby reducing their value in real terms, whilst all returns generated from those entitlements are skimmed off to be used by unions and employer organisations.

71. Another problem is that the very substantial revenue flows to unions generate significant conflicts of interest and potential breaches of fiduciary duty on the part of unions and union officials negotiating enterprise agreements. The reasons for this are dealt with at length in earlier Volumes of this report.[42] In short, the union and union officials owe a duty to act in the interests of union member employees when negotiating enterprise agreements. At the same time, there is a

[41] These are accounts established by funds which are only paid out in case of a genuine redundancy. Unlike many other payments made to a worker in consequence of termination of employment, 'genuine redundancy payments' are tax-free up to a certain amount: see *Income Tax Assessment Act* 1997 (Cth), ss 83-170, 83-175 and TR 2009/2.

[42] See Vol 3, chs 6.6 (CFMEU ACT), chs 7.1, 7.6 (CFMEU NSW), Vol 4, ch 10.4 (AWU, Paid Education Leave), for a discussion of the problems, not limited to redundancy or other worker entitlement funds.

significant potential and incentive for the union to act in its own interests to generate revenue.

72. The substantial revenue flows to unions also lead to a greater potential for coercive conduct by unions who seek to compel employers in enterprise negotiations to contribute to funds from which the union will derive a financial benefit. Circumstances in which this has occurred are explored in the case studies relating to Universal Cranes[43] and the ACT CFMEU.[44]

73. *Fourthly*, as explained in detail in the Chapter of this Report concerning Incolink,[45] although on a proper construction of s 58PB of the *Fringe Benefits Tax Assessment Act* 1986 (Cth) 'approved worker entitlement funds' are not permitted to distribute income to persons other than to the employers who make contributions and the employees on whose behalf those contributions are made, many 'approved worker entitlement funds' avoid this limitation in practice.[46] They do this by treating the income generated in a prior financial year as capital, and they then distribute the capital to industry parties.

74. The Commissioner of Taxation has given his imprimatur to this state of affairs. On one view the Commissioner is adopting an open interpretation of an ambiguous statutory provision. The preferable

[43] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.7.

[44] See Vol 3, ch 6.3 of this Report.

[45] Vol 4, ch 11 of this Report.

[46] ElecNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), pp 11-12.

view is that the Commissioner is maladministering the law. Either way, the law needs clarification.

75. *Fifthly*, the absence of any requirement for one or more independent directors on the board of directors of companies operating worker entitlement funds can lead to significant deadlocks where, as is commonly the case, unions and employer organisations have equal representation. The deadlock in the board of BERT provides a good example of the dysfunctional results that can arise in the absence of independent directors.[47]

76. *Sixthly*, although the *Fringe Benefits Tax Assessment Act* 1986 (Cth) has the effect of imposing some minimum governance requirements on worker entitlement funds, these requirements are by no means comprehensive. For example, there is no requirement that directors and managers involved in the fund be of good fame and character.[48] Another example is that, as exemplified in the Chapter concerning Incolink,[49] the absence of legislative provisions dealing specifically with the forfeiture of workers' interests leads in practice to the substantial forfeiture of entitlements.

77. *Seventhly*, it is not usual to impose indirect regulation on an entity through taxation legislation such as the *Fringe Benefits Tax Assessment Act* 1986 (Cth).

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[47] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 779-780.

[48] Cf *Corporations Act* 2001 (Cth), s 913B(3)-(4).

[49] Vol 4, ch 11 of this Report.

Options for reform: submissions

78. Many of the problems identified are not new. The Final Report of the Cole Royal Commission made a number of recommendations concerning redundancy funds, including recommendations that:[50]

> Surpluses in redundancy funds either be credited to the employee members' accounts to be payable only in the event of redundancy or, if funds held are sufficient to meet redundancy obligations, used to reduce any contributions required. The distribution of surpluses in accordance with this recommendation should be a prerequisite for a redundancy fund being prescribed as a fund exempt from fringe benefits tax.
>
> Legislation be enacted to implement a uniform system of financial reporting, external auditing, actuarial assessment and annual reporting to a prudential authority for redundancy funds. The systems presently applying for superannuation and long service leave funds should be points of reference. Documents produced, in compliance with the legislation, be public documents. Compliance with those requirements should be a prerequisite for a redundancy fund being prescribed as a fund exempt from fringe benefits tax.

79. The Discussion Paper invited submissions on three possible options for reform. They were:

(a) revocation or amendment of Class Order [CO 02/314];

(b) amendment of the conditions in s 58PB(4) of the *Fringe Benefits Tax Assessment Act* 1986 (Cth); and

(c) introduction of specific legislation subjecting worker entitlement funds to governance, supervision and reporting requirements overseen by an appropriate regulator.

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[50] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 10, ch 13, pp 287-288, recommendations 168-170.

80. The Commission received helpful submissions on these issues from Australian Industry Group, ACIRT, Master Builders Australia and ElecNet, along with broader submissions from Incolink. Submissions were also received from BERT Pty Ltd, but they were later withdrawn. Given that withdrawal, those submissions are not referred to.

81. Neither ACIRT nor ElecNet supported the revocation of Class Order [CO 02/314], which would require worker entitlement funds to be regulated as managed investment schemes and corporate trustees operating the funds to hold AFSLs. In short, ElecNet submitted that this would impose unnecessary governance and administrative burdens without any compensating advantage.[51]

82. ACIRT's submission adopted a more nuanced view. It, like ElecNet, argued that requiring redundancy funds to comply with all of the requirements of Chapters 5C and 7 of the *Corporations Act* 2001 (Cth) would result in funds having to incur additional expense without additional benefit to members.[52]

83. However, it supported improved disclosure by redundancy funds. In particular, ACIRT submitted that redundancy funds should be required to provide the following information to members and participating employees:[53]

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[51] ElecNet Law Reform Submissions, undated (received 21/8/15), pp 12-14.

[52] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), p 6.

[53] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), p 4.

(a) Information similar to, but not as detailed as, that required to be included in a Product Disclosure Statement including:

(i) information about the nature of the redundancy fund;

(ii) significant risks and benefits associated with the fund;

(iii) costs and amounts payable by way of fees;

(iv) commission and other payments made by the fund (if any) including payment to employer organisations and trade unions;

(v) general information about tax implications; and

(vi) information about how other information can be obtained.

(b) Information about the governance arrangements of the fund's governing entity.

(c) An up-to-date copy of the fund's constituting documents to be provided on the fund's website.

(d) The fund's most recent financial statements, including any auditor's report, to be provided on the fund's website.

84. ACIRT also noted that it is not possible in the context of a redundancy fund to enrol members on an application form attached to a PDS before contributions are received.[54]

85. As to the terms of s 58PB of the *Fringe Benefits Tax Assessment Act* 1986 (Cth), ACIRT did not believe there were grounds for making any amendment to the provision.[55] The Australian Industry Group submitted that the 'current FBT exemption is very important to employers and Ai Group does not see a need for any changes to the exemption.'[56] ElecNet submitted that, given that the directors of the trustees of employee benefit funds are already subject to specific duties and obligations under the *Corporations Act* 2001 (Cth), it was neither necessary nor appropriate to impose further conditions upon them under the *Fringe Benefits Tax Assessment Act* 1986 (Cth).[57]

86. In relation to the broader question of specific statutory regulation of employee benefit funds, the Australian Industry Group submitted that its earlier proposals, referred to in the Discussion Paper,[58] should be adopted. Those proposals called for the introduction of specific legislation similar to the superannuation laws, to be called the *Worker Entitlement Funds (Governance, Reporting and Supervision) Act* containing:

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[54] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), p 7.

[55] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), p 8.

[56] Australian Industry Group Law Reform Submissions, 21/8/15, p 10.

[57] ElecNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), p 17.

[58] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper Options for Law Reform*, 19/5/15, pp 86-87 [294].

(a) provisions imposing duties on directors, trustees and officers of worker entitlement funds;

(b) a 'fit and proper person' test for directors, trustees and officers and a process for the removal of persons who fail the test;

(c) regulatory oversight of worker entitlement funds by the Australian Prudential Regulation Authority (**APRA**), including reporting obligations to APRA;

(d) a prohibition on redundancy funds distributing any amount to a member other than for the purpose of genuine redundancy;

(e) a prohibition on redundancy funds making distributions to a sponsoring union and employer associations other than the payment of reasonable fees to directors;

(f) a prohibition on redundancy funds making payments to employees who are taking industrial action;

(g) a prohibition on funds discriminating between union members and non-union members when providing any fund benefits;

(h) statutory privacy protection for information relating to contributing employers and funds members;

(i) a prohibition on persons employed by funds carrying on union business;

(j) a prohibition on funds paying unions for recruiting new members; and

(k) penalties for breach of the legislation, modelled on the *Corporations Act* 2001 (Cth).

87. ElecNet's submission rejected the Australian Industry Group's proposals. It submitted that the proposals appear to be directed at protecting workers' contributions from potential fraud, and that it was not aware of any such behaviour.[59] A 'fit and proper person' test, it was argued, would be more onerous than the existing 'good fame and character' test that would apply to worker entitlement funds, but for Class Order [CO 02/314].[60] ElecNet dismissed the possibility of a conflict of interest, arguing that there was no evidence that 'members of employee benefit funds are suffering *any financial detriment*' as a result of conflicts of interest.[61] That submission is difficult to understand. Clearly at least some employees are worse off by reason of the fact that they do not receive income on their contributions which is instead distributed, in part, to trade unions.

88. ACIRT noted that given that 'employee entitlement funds now hold around $2bn in assets … some degree of regulation may be appropriate and even inevitable.'[62] For that reason it is accepted that there should be some specific regulation of funds. In those circumstances it saw

[59] ElecNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), p 19.

[60] ElecNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), p 20.

[61] ElecNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), p 21 (emphasis added).

[62] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), p 2.

reduced managed investment and financial services type regulation as appropriate.[63] It was argued that it would not be appropriate to impose the same level of regulation as on superannuation funds. ACIRT argued that APRA would not be an appropriate regulator as the product was in the nature of a managed investment rather than in the nature of a product regulated prudentially by APRA.[64] ACIRT supported the introduction of standards for redundancy funds, including:[65]

(a) a requirement for an audit committee, and for the accounts to audited by an independent auditor;

(b) a requirement for clear delegations of authority and delineation of the respective roles of staff and officers; and

(c) a requirement for a sound management framework.

Options for reform: consideration

89. In 2003, Commissioner Cole noted the following in his Final Report:[66]

> Redundancy funds have matured throughout Australia to become a significant component of the industry's financial structure. Approximately $500 million is currently under management yet they function without any prudential control. The repercussions would be enormous should any of

[63] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), p 8.

[64] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), p 8-9.

[65] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), p 4.

[66] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 10, ch 13, p 288.

> these funds diminish or collapse for reasons of mismanagement, misappropriate or abuse. The opportunity for any of these events to occur is manifest.

90. In the 12 years since that report, worker entitlement funds (principally but not exclusively redundancy funds) in the construction industry have grown fourfold to around $2 billion. Having regard to the size of the sector alone, prudence requires reconsideration of the current regulatory environment. Combined with the problems identified above, there is a compelling case for legislative reform.

91. The retention of Class Order [CO 02/314] after its sunset date is inappropriate. It was designed as an interim measure pending broader reform. It is in the interests of workers and employers that worker entitlement funds be subject to certain mandatory disclosure requirements. Having regard to the importance of the securing of contributions by funds, officers and staff of entities operating worker entitlement funds should, at a minimum, be persons of good fame and character. At the same time, there is force in the arguments advanced that revoking the Class Order and subjecting worker entitlement funds to the full requirements of Chapter 5C and 7 of the *Corporations Act* 2001 (Cth) would amount to excessive regulation.

92. The current provisions of the *Fringe Benefits Tax Assessment Act* 1986 (Cth) also require amendment. For one thing, s 58PB(4)(d) needs clarification.[67] More generally, it is not appropriate to impose de facto regulation through the *Fringe Benefits Tax Assessment Act* 1986 (Cth).

[67] See Vol 4, ch 11 of this Report.

93. The preferable course is as follows:

(a) Introduce specific legislative provisions governing worker entitlement funds, either in the *Corporations Act* 2001 (Cth) or in a standalone Act.

(b) The legislation should entitle worker entitlement funds to apply to ASIC to become registered, and contain a prohibition on any person conducting or operating an unregistered worker entitlement fund which has more than a minimum number of members (say 50).

(c) A worker entitlement fund ought not be entitled to be registered unless the entity operating the fund, its officers and staff and the constituting documents (for example, the trust deed) of the fund satisfy specified criteria. In order to remain registered a fund would need to:

(i) comply with its constituting documents and provide annual audited reports to ASIC;

(ii) adopt appropriate governance and capital adequacy policies; and

(iii) ensure its officers and staff meet continuing training and competence requirements.

(d) Registered funds should also be required to provide specified disclosure:

(i) to contributing employers before a contributing employer begins to make payments to the fund; and

(ii) to members as soon as practicable after a contributing employer begins to make payments to the fund on their behalf.

Registered funds should also provide ongoing disclosure of relevant changes to the constitution or operation of the fund. Annual reports should be provided to members and contributing employers, and be made publicly available.

(e) The reference to 'an approved worker entitlement fund' in s 58PA of the *Fringe Benefits Tax Assessment Act* 1986 (Cth) should be replaced by reference to a registered worker entitlement fund, and s 58PB should be repealed. The fringe benefits tax exemption would still exist but it would require the fund to remain registered.

(f) The legislation should exclude registered worker entitlement funds from the operation of Chapters 5C and 7 of the *Corporations Act* 2001 (Cth): they would instead be subject to the specific legislative provisions. Accordingly, Class Order [CO 02/314] should be revoked as unnecessary.

94. The reason for selecting ASIC as the reporting agency is that, although worker entitlement funds have some characteristics similar to insurance and superannuation funds – which are subject to detailed prudential regulation by APRA – a worker entitlement fund is more akin to a managed investment. Further, at least at this time, there does not appear to be any demonstrated need for the very detailed prudential control which is imposed on insurers and general superannuation funds.

95. The precise terms of the criteria with which registered worker entitlement funds would be required to comply should be a matter for consultation. However, the following elements should be part of any scheme:

(a) Officers and staff of the entity managing a registered worker entitlement fund should be required to be persons of good fame and character. This requirement is imposed on all holders of an AFSL. It is a basic good governance requirement.

(b) Corporate trustees of registered worker entitlement funds should be required to have a minimum number of independent directors. A number of redundancy funds already do this. Again, this is a basic governance measure directed to avoiding deadlocks, and conflicts of interest.

(c) The disclosure requirements should require disclosure of all fees charged to a member's account, along with a summary of

the circumstances in which a member will or will not be entitled to a payment.

(d) The legislation should prohibit a fund discriminating as to the benefits provided between persons of the same class. In particular, a fund should not be permitted to discriminate solely on the ground that a person is or is not a union member.

(e) Registered worker entitlement funds should be subject to the conditions presently stated in s 58PB(4) of the *Fringe Benefits Tax Assessment Act* 1986 (Cth), subject to clarification that prior year income cannot be distributed other than for the prescribed purposes. After the payment of necessary expenses to manage the fund (which would include reasonable directors' fees) all of the money of the fund should be used solely for the purposes of benefiting employees, or if there are surplus funds, returning those funds to employer contributors. It is true that this will prevent redundancy funds from making payments to unions and employer organisations, which could use the money for legitimate purposes such as training and welfare. However, unions and employer organisations can and do establish separate training and welfare funds that receive separate levy contributions under enterprise agreements. The interest in avoiding conflicts of interest and possible coercion as well as improving financial transparency requires that funds not make any payment to a union or employer organisation (or a related entity), other

than for the payment of reasonable directors' fees or reasonable expenses in administering the fund.

(f) The legislation should deal specifically with the forfeiture of interests in a registered worker entitlement fund.[68] The provisions applying to lost and forfeited superannuation accounts should provide a useful guide.

Recommendation 45

Legislation, either standalone or amending the *Corporations Act* 2001 (Cth), be enacted dealing comprehensively with the governance, financial reporting and financial disclosures required by worker entitlement funds. The legislation should provide for registration of worker entitlement funds with the Australian Securities and Investments Commission, and contain a prohibition on any person carrying on or operating an unregistered worker entitlement fund above a certain minimum number of persons. Key recommended features of the legislative scheme are explained at paragraphs 93 and 95 above.

Recommendation 46

In consequence of the enactment of the above legislation, Class Order [CO 02/314] not be extended. In further consequence, s 58PB of the *Fringe Benefits Tax Assessment Act* 1986 (Cth) be repealed and the fringe benefits tax exemption in s 58PA(a) be amended to refer to registered worker entitlement funds.

[68] See Vol 4, ch 11 of this Report.

F – EMPLOYEE INSURANCE SCHEMES

Introduction

96. During 2014 and 2015, the Commission considered the operation of a number of employee insurance schemes associated with particular trade union branches.[69] These employee insurance schemes are common throughout the building, construction and manufacturing industries in Australia.

97. Commonly, the scheme will consist of the following elements:

(a) Employers, pursuant to a clause in a union-negotiated enterprise agreement, pay premiums for income protection or other insurance to a commercial insurance broker, or to a common fund that remits the premiums to a commercial insurance broker. The insurance broker will have an AFSL.

(b) The insurance broker remits the premium, less a commission, to a commercial insurer. The insurer usually provides insurance cover by way of a group insurance policy covering all of the workers declared by the various employers.

(c) The broker pays part of the commission to the union as a fee for promoting the scheme in enterprise agreements.

[69] Royal Commission into TradeUnion Governance and Corruption, *Interim Report* (2014), Vol 1, chs 5.2 and 5.3; Vol 3, chs 6.6 and 7.6 and Vol 4, ch 11 of this Report.

98. For present purposes, the significant issue exposed by the evidence is that the unions involved in the income protection insurance schemes examined by the Commission often received very substantial commissions that were not disclosed properly, if at all, to the participants (both employers and employees) involved in the schemes. What changes, if any, are needed to the laws regulating the operation of such schemes to ensure adequate disclosure?

Existing regulation

99. As with worker entitlement funds, entities involved in the group purchase of insurance products or in the promotion of such schemes would ordinarily be subject to the financial services licensing requirements under the *Corporations Act* 2001 (Cth), particularly insofar as those provisions apply to the provisions of financial product advice, and possibly also the provisions concerning managed investment schemes.

100. As is the case in relation to worker entitlement funds, there is a class order, Class Order [CO 08/1], exempting group purchasing bodies from this regulation provided the conditions in the class order are satisfied.[70] Relevantly, relief is provided for a body that arranges for the issue of insurance or for a person to be covered by an existing insurance policy, provided either (a) the person is independent and received no financial benefit for arranging insurance (subject to limited exceptions) or (b) arranging the cover is incidental to another

[70] See Australian Securities and Investments Commission, *Group purchasing bodies for insurance and risk product*, Regulatory Guide 195, June 2010.

relationship between the body and the persons to be covered by the insurance. In addition, in order to be entitled to relief under the class order the group purchasing body must, as soon as practicable after it has reason to believe that a person will receive financial services, provide disclosure of any payments the body will receive from the issuer of the insurance product or any person arranging the product.

101. The Class Order therefore may provide relief for a worker entitlement fund that receives employer insurance premiums and uses those contributions to purchase insurance coverage for its members.

102. However, as explained earlier in Chapter 7.6 of Volume 3 concerning Coverforce, a trade union promoting a particular insurance scheme to employers in return for commission will often not be entitled to rely on Class Order [CO 08/1] because they will not be a group purchasing body,[71] nor will they satisfy the conditions for relief.

103. Further, as the analysis concerning Coverforce demonstrates, in the usual case it is unlikely that the trade union will be merely providing a referral service. This is because the union will do more than merely refer the employer to the relevant insurance broker or insurer: it will actively seek to agree upon a particular insurance product with the employer, in return for which the union will receive an undisclosed commission. In truth, in these circumstances unions are akin to insurance brokers.

104. Consequently, the union will either need an AFSL or will need to be an authorised representative of the holder of an ASFL. In either case, the

[71] Although a union may be if it is the holder of policy.

trade union, or the AFSL holder which the union represents, will be subject to a range of disclosure requirements under Chapter 7.7 of the *Corporations Act* 2001 (Cth) (concerning the provisions of Financial Services Guides) and Chapter 7.9 of the *Corporations Act* 2001 (Cth) (concerning Product Disclosure Statements).

105. Thus, in many cases, if the existing laws under the *Corporations Act* 2001 (Cth) were applied, there would be disclosure of the remuneration and benefits received by trade unions in connection with employee insurance schemes.

106. The difficulty is that the provisions of Chapter 7 of the *Corporations Act* 2001 (Cth) are extremely complex and consequently difficult to enforce and apply. Further, Financial Services Guides and Product Disclosure Statements are often very lengthy and complex documents with critical information buried in a mass of detail.

107. In the Discussion Paper, submissions were invited on whether Class Order [CO 08/1] should be revoked or amended. ElecNet submitted that it should not be revoked, on the basis that it would not be economical for most group purchasing bodies to obtain an AFSL or register a management investment scheme.[72] The Class Order extends well beyond union associated employee insurance schemes. For example, it applies to sporting associations and clubs purchasing group insurance for players and members.

108. Having regard to the broad scope of Class Order [CO 08/1], it is not appropriate to revoke or amend it.

[72] ElecNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), pp 15-16.

109. The more suitable course is to introduce, whether by legislation or regulation, provisions specifically dealing with disclosure to employers of the nature and quantum of the pecuniary benefits received (including amounts that can reasonably be expected to be received) by unions from the operation of employee insurance schemes. The quantum should include both the total amount received, but also the proportion of the payment made by the employer that will be received by the union. The benefits disclosed should include:

(a) direct cash payments to the union;

(b) direct cash payments to an entity related to the union or at the direction of the union, or to any entity where the money, or part of it, is eventually paid to the union;

(c) other financial benefits provided to the union, such as the payment of insurance premiums on the union's behalf;

(d) other financial benefits provided to an entity related to the union, or to any entity where the value of the financial benefit, or part of it, is transferred to the union; and

(e) financial benefits provided solely to union members (for example, ambulance or health benefits).

The disclosure should be short, simple and would capture any form of commission or fees.

Recommendation 47

Amendments be made to Chapter 7 of the *Corporations Act* 2001 (Cth), or relevant regulations, requiring specific disclosure by registered organisations of the direct and indirect pecuniary benefits obtained by them in connection with employee insurance products. The detail and mechanism should be a matter of consultation. In broad terms, the provisions should require:

(a) a branch of a registered organisation, and an officer of a branch of a registered organisation,

(b) that arranges or promotes a particular insurance product providing cover for employees of an employer, or refers an employer to a person who arranges or provides such a product (whether in enterprise bargaining or otherwise),

(c) to disclose in writing to the employer in no more than two pages the nature and quantum of all direct and indirect pecuniary benefits that the branch or any related entity receives or expects to receive, or which are available only to the branch's members, from the issuer of the product, or any arranger or promoter, or any related entity.

110. It is important to emphasise that the disclosure envisaged by Recommendation 47 is separate from any disclosure that occurs as part of enterprise bargaining. Disclosure in that context is addressed in the following Chapter of the Report.

CHAPTER 6

ENTERPRISE AGREEMENTS

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A – INTRODUCTION

1. This chapter examines certain issues concerning enterprise agreements thrown up by the Commission's inquiries.

2. The first issue was identified in Chapter 5.[1] Many unions promote forms of enterprise agreements that require employers to make payments to certain funds, such as redundancy funds or other worker entitlement funds, training funds, welfare funds and superannuation funds in order to generate income for a union. For convenience these funds, other than superannuation funds, are described in this Chapter as **employee benefit funds**. There are similar clauses requiring contributions to be made in respect of particular employee insurance schemes.

3. These clauses can give rise to actual and potential conflicts of interest, breaches of fiduciary duty and the potential for coercion. Part B of this Chapter considers the most effective means of combatting these problems.

[1] See Chapter 5, paras 4, 71-72 of this Volume of the Report.

4. The second issue concerns clauses in enterprise agreements that require superannuation contributions to be paid to a particular superannuation fund. This issue is discussed in Part C of this Chapter.

5. The third, and final, issue considered in the Chapter is pattern bargaining.

6. A number of the issues considered in this chapter were raised in the Commission's Discussion Paper. Relevant submissions were received from various parties, and are referred to below where appropriate.

B – TERMS REQUIRING CONTRIBUTIONS TO EMPLOYEE BENEFIT FUNDS OR EMPLOYEE INSURANCE SCHEMES

Introduction

7. The Commission's inquiries have disclosed a number of examples of enterprise agreements negotiated by a union containing provisions requiring employers to make contributions to a particular employee benefit fund or employee insurance scheme in which the union has a pecuniary interest.[2] This is not a new phenomenon. The Cole Royal Commission identified the problem more than a decade ago.[3] The means by which the union benefits varies from case to case but may

[2] See Vol 3, chs 6.6, 7.4 and 7.6 and Vol 4, ch 11 of this Report. See also Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, chs 5.2, 5.3, 6.2.

[3] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 10.

include the payment of directors' fees, commissions, trust distributions or grants.

8. The income that flows to unions from the operation of these terms has several potential consequences.

9. *First*, it may induce a union, and its officials and employees, to engage in coercive conduct to compel employers to contribute to a fund from which the union derives a benefit, or to agree to terms in an enterprise agreement requiring such contribution. The Universal Cranes case study provides an example of such conduct.[4]

10. *Secondly*, the income creates an actual or potential conflict of interest, and can lead to breaches of fiduciary duty by union officials.[5] The U-Plus/Coverforce and CSI case studies are examples of how such conflicts arise.[6]

11. *Thirdly*, the predominance of clauses that benefit particular unions is likely to diminish competition. Coercive conduct taken by employee organisations to secure such clauses in enterprise agreements is akin to the types of conduct prohibited by the exclusive dealing provisions in the *Competition and Consumer Act* 2010 (Cth).

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[4] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.7.

[5] See Volume 4, ch 10.2 of this Report for an explanation of why union officials and unions owe fiduciary duties to the members of the union on whose behalf they act in enterprise bargaining.

[6] See Volume 3, chs 6.6, 7.6 of this Report.

12. The Discussion Paper considered a number of means by which these problems could be addressed. These are considered further below. As already noted, these issues are not new. In the context of the building and construction industry, the Cole Royal Commission recommended that:[7]

> … there be full disclosure, in writing, of any direct or indirect financial benefit that may by derived by any negotiating party to an industrial agreement from any term sought in the enterprise bargaining agreement, such as commissions or other income.

13. The *Building and Construction Industry Improvement Act* 2005 (Cth) was enacted to implement around 120 of the Cole Royal Commission's 212 recommendations. This recommendation was not adopted.

Submissions received in response to the Discussion Paper

14. As noted, the Discussion Paper sought comment in relation to a number of proposed measures to address the problems identified above. Those measures included amendments to ss 172 and/or 194 of the *Fair Work Act* 2009 (Cth) (**FW Act**) prohibiting an enterprise agreement from containing terms requiring employers to make payments:

    (a) to any employee benefit fund;

    (b) to a specific employee benefit fund, or to a fund or scheme with reference to a specific employee benefit fund;

[7] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 10, ch 14, p 319, recommendation 171.

(c) to a specific employee benefit fund other than as a default;

(d) to an employee benefit fund in which an employee organisation or official of an employee organisation negotiating an enterprise agreement has an interest or from which the employee organisation or its officials derives a benefit; or

(e) to any employee benefit fund which is not an approved employee benefit fund.

15. The Discussion Paper also addressed whether there should be a requirement for employee organisations bargaining for an enterprise agreement to disclose financial benefits, whether direct or indirect, that would be derived by the employee organisation from the terms of a proposed enterprise agreement, and the consequences of any breach of that requirement.

16. The Australian Construction Industry Redundancy Trust (**ACIRT**),[8] ElecNet (Aust) Pty Ltd in its capacity as trustee of the Protect Severance Scheme Submissions (**Protect**),[9] Master Builders Australia,[10] the Australian Chamber of Commerce and Industry,[11] and

[8] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), pp 9-10.

[9] ElectNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), pp 17-21.

[10] Master Builders Australia Law Reform Submissions, 21/8/15, pp 42-43.

[11] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, pp 29-30.

the Australian Industry Group[12] each made submissions regarding the issues referred to above.

17. ACIRT and Protect submitted that terms requiring employers to make payments to *any employee benefit fund*, *a specific fund* or *a fund other than as a default* should not be prohibited from inclusion in enterprise agreements because these funds provide a number of benefits to employees such as reliable access to funds in the event of employer insolvencies, which in turn results in less dependence on the welfare system and greater financial security for employees.[13]

18. Protect submitted that such a prohibition would effectively shift the risk of conflicts of interest to employers. Because of the transitory nature of employment in the building and construction industry in particular and the high risk of employer insolvency, Protect submitted that there would be 'little or no benefit to employees or employers' from prohibiting access to such funds.[14]

19. Moreover, Protect submitted that the suggestion that unions should not receive benefits from the income generated by employee entitlement funds misunderstands how those funds work, because, it said, there

[12] Australian Industry Group Submissions in Response to Issues Paper 4: Relevant Entities, 22/8/14, pp 6, 12-13.

[13] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), pp 9-10; ElectNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), pp 17-21.

[14] ElectNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), p 19.

would be administrative difficulties in managing funds so that income from them was invested and allocated to member accounts.[15]

20. On the other hand, ACIRT submitted that it is inappropriate for unions to derive a benefit other than for reasonable director's fees.[16] It did not support the concept of restricting inclusion of terms in enterprise agreements nominating particular funds outright, but supported the concept of approved funds and disclosure requirements.[17] Master Builders Australia took a similar stance, supporting 'disclosure rather than prohibition' and that 'there should remain the ability for any approved benefits fund to be nominated as a default fund in an enterprise agreement'.[18]

21. The Australian Industry Group submitted (in the context of recommending that there should be a separate Act regulating worker entitlement funds) that enterprise agreement terms requiring payments to funds that do not meet stringent governance, reporting and supervision standards should be included as unlawful terms within s 194 of the FW Act.[19] It also submitted that terms requiring an employer to pay for a particular income protection insurance product should be unlawful if the insurance provider is paying substantial commissions or fees to a union or an entity controlled or jointly

[15] ElectNet Pty Ltd Law Reform Submissions, undated (received 21/8/15), pp 11-12.

[16] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), p 10.

[17] Australian Construction Industry Redundancy Trust Pty Ltd Law Reform Submissions, undated (received 31/8/15), pp 10-11.

[18] Master Builders Australia Law Reform Submissions, 21/8/15, pp 43-44.

[19] Australian Industry Group Submissions in Response to Issues Paper 4: Relevant Entities, 22/8/14, p 6.

controlled by a union.[20] It further submitted that a specific anti-coercion provision should be inserted into the FW Act prohibiting coercion of an employer to contribute to an employee entitlement fund.[21] In addition, it argued that unions should be required to disclose financial interests derived from the terms of any enterprise agreements.[22]

Options for reform

22. The Commission has considered a number of options for dealing with the problems identified earlier in this Chapter. Two observations may be made at the outset. *First*, it is not suggested that clauses requiring payments to employee benefit funds, or employee insurance schemes, should be prohibited. *Secondly*, it is unlikely that any single mechanism will avoid all of the problems already identified.

23. Having regard to the various competing submissions, three reforms to the FW Act are recommended.

24. The *first* is to require an organisation that is a bargaining representative to disclose all financial benefits, whether direct or indirect, that would or could reasonably be expected to be derived by the organisation, an officer of the organisation or a related entity as a direct or indirect

[20] Australian Industry Group Submissions in Response to Issues Paper 4: Relevant Entities, 22/8/14, p 9.

[21] Australian Industry Group Submissions in Response to Issues Paper 4: Relevant Entities, 22/8/14, p 6.

[22] Australian Industry Group Submissions in Response to Issues Paper 4: Relevant Entities, 22/8/14, p 12.

consequence of the operation of the terms of a proposed enterprise agreement. This would include fixed payments such as commissions and directors fees as well as discretionary payments such as trust distributions and grants.

25. Disclosure is a basic first step to avoid the conflicts of interest discussed above. Further, it seeks to ensure that employees who are asked to vote for an enterprise agreement are properly informed about its effect.[23]

26. The duty of disclosure should extend to all employees proposed to be covered by the agreement. The disclosure should be made in a written document which contains specified information about the nature and quantum of the pecuniary benefits. The disclosure document should be short (for example, no more than 2 pages), simple and easy for a layperson to understand.[24] The disclosure document should be provided to the employer and all other bargaining representatives in the first instance and then form part of the material to which employees are given access prior to voting on the agreement pursuant to s 180(2) of the FW Act. The disclosure document should also be required to be annexed to the enterprise agreement that is lodged with the Fair Work Commission so that new employees are aware of the benefits flowing to an employee (or employer) organisation.

27. As noted in Chapter 7.6, the CFMEU argued that a duty of disclosure would be ungainly and make bargaining more complicated than it

[23] See *Fair Work Act* 2009 (Cth), s 180(5).

[24] The information provided should be similar to that discussed in Chapter 5, para 109 of this Volume.

already is. The proposed disclosure should not be particularly onerous for organisations, particularly given the pattern nature of many enterprise agreements.

28. The *second* recommendation is to amend s 194 of the FW Act to make unlawful any term of an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund (other than a superannuation fund)[25] providing for, or for the payment of, employee entitlements, training or welfare unless the fund is:

(a) a registered worker entitlement fund; or

(b) a registered charity.

This would include worker entitlement funds, training funds and welfare funds.

29. The purpose of this recommendation is to reduce further the potential for conflicts of interest and for coercion by ensuring that contributions made to various funds intended to benefit employees are made to entities that are subject to a degree of regulation. Registered worker entitlement funds are discussed in Chapter 5, and are proposed to be subject to regulation by ASIC. The practical consequence is that training and welfare funds nominated in enterprise agreements would need to be registered charities and subject to the oversight of the Australian Charities and Not-for-Profits Commission.

[25] The reasons for excluding superannuation funds is that s 194(h) of the *Fair Work Act* 2009 (Cth) already deals with unlawful terms in relation to superannuation funds.

30. The *third* recommendation is to introduce a specific civil remedy provision prohibiting a person from organising or taking (or threatening to organise or take) any action, other than protected industrial action, with intent to coerce an employer to pay amounts to a particular employee benefit fund, superannuation fund or employee insurance scheme. The reason for recommending this specific prohibition is that it is questionable whether the existing prohibitions on coercion in the FW Act capture coercion which occurs outside the enterprise bargaining process. Thus, s 343 of the FW Act prohibits action done with an intent to coerce a person to exercise a 'workplace right' in a particular way. A 'workplace right' includes participating in the process of making an enterprise agreement.[26] Accordingly, action done to coerce an employer to agree to a particular term of an enterprise agreement requiring contributions to a particular employee benefit fund is prohibited. However, it is doubtful whether action taken outside the enterprise bargaining process, for example, as part of seeking to come to a 'side deal' between employer and union, would be caught. The maximum penalty should be the same as for the other forms of coercion.

31. The ongoing situation should be monitored to assess whether further legislative reforms are required. Should there be a continuation of the present position where unions derive substantial disguised income from largely unregulated funds and schemes, it may be necessary to consider a broader prohibition on permissible terms of enterprise agreements.

[26] *Fair Work Act* 2009 (Cth), s 341(2)(e).

Recommendation 48

The *Fair Work Act* 2009 (Cth) be amended to require an organisation that is a bargaining representative to disclose all financial benefits, whether direct or indirect, that would or could reasonably be expected to be derived by the organisation, an officer of the organisation or a related entity as a direct or indirect consequence of the operation of the terms of a proposed enterprise agreement. A short, simple and clear disclosure document should be provided to all employees before they vote for an enterprise agreement.

Recommendation 49

Section 194 of the *Fair Work Act* 2009 (Cth) be amended to make unlawful any term of an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund (other than a superannuation fund) providing for, or for the payment of, employee entitlements, training or welfare unless the fund is:

(a) a registered worker entitlement fund (see Recommendation 45); or

(b) a registered charity.

Recommendation 50

A new civil remedy provision be added to the *Fair Work Act* 2009 (Cth) prohibiting a person from organising or taking (or threatening to organise or take) any action, other than protected industrial action, with intent to coerce an employer to pay amounts to a particular employee benefit fund, superannuation fund or employee insurance scheme.

C – SUPERANNUATION FUNDS

Mandatory superannuation fund clauses

32. The potential for coercive conduct and conflicts of interest in enterprise bargaining identified in respect of employee benefit funds also exists in respect of superannuation funds. Examples of this may be found in the case studies examining TWU Super[27] and LUCRF.[28]

33. Employees in Australia are generally entitled to choose their superannuation fund. However, employees employed under a collective agreement, enterprise agreement, State award or State agreement are not always able to choose their superannuation fund. It

[27] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 6.2.

[28] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 6.3.

remains lawful for such agreements and awards to mandate the fund to which employers must make contributions.[29]

34. In the Interim Report, the view was expressed that there were strong reasons to repeal s 32C(6)(d) and (h) of the *Superannuation Guarantee (Administration Act)* 1992 (Cth).[30] After the Interim Report was finalised but before its publication, the Final Report of the Financial System (**the Murray Report**) was released. It included, among other things, a recommendation that these provisions of s 32C, and others that deny employees the ability to have a choice of fund, be repealed.[31] The Government response to the Murray Report agreed to the repeal of these provisions.[32]

35. The Murray Report concluded that there was no good reason why some, but not other, employees should be denied a choice of superannuation fund. The Commission invited any interested party to make submissions to the contrary so that the Commission could be properly informed of the arguments in favour of maintaining the status quo.

36. Only two submissions were made identifying arguments in favour of maintaining the status quo.

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[29] *Superannuation Guarantee (Administration) Act* 1992 (Cth), ss 32C(6), (6A), (6B), (7), (8).

[30] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 6.1, p 898; ch 6.2, p 943.

[31] Commonwealth, Financial System Inquiry, *Final Report*, November 2014, pp 131-132, Recommendation 12.

[32] Australian Government, *Improving Australia's financial system: Government response to the Financial System Inquiry*, 20/10/15, p 14.

37. The Australian Industry Group submitted that:[33]

> In Ai Group's experience, the main argument here is that employees in effect express their choice of fund when they vote to approve the agreement. The existing provisions are supported by many employers as administration costs are reduced.

38. The Retail Employees Superannuation Trust submitted that there would be a number of adverse impacts associated with the removal of the relevant sections of the *Superannuation Guarantee (Administration) Act* 1992 (Cth) including:[34]

(a) potential transitional issues meaning that employers could be required to make two payments for an employee. That is not an argument against, but it is an argument for consequential amendments to the FW Act to avoid such an outcome;

(b) time and cost spent by employers administering employees' individual fund choices;

(c) additional compliance and audit costs;

(d) employers having to act as de facto advisers to assist an employee's choice; and

(e) reduction in the size of funds leading to a loss of the benefits of scale, in turn leading to erosion of employee benefits, including higher fees and less favourable insurance.

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[33] Australian Industry Group Law Reform Submissions, 21/8/15, p 11.

[34] Retail Employees Superannuation Trust Law Reform Submissions, 20/8/15, pp 2-4.

39. The Retail Employees Superannuation Trust[35] further submitted that employees do not tend to exercise a choice of fund even where they have the right to do so and if employees wished to have the ability to exercise a choice of fund, it would be open to them to engage their union representatives to negotiate suitable choice of fund rules in their enterprise agreement. Accordingly, it was submitted that the removal of the statutory provisions is unnecessary.

40. The arguments raised concerning the burden of administrative costs to employers in administering employee default fund choices are increasingly less relevant for the reasons identified in the Murray Report.[36] Additionally, suggestions that strong industry funds are more likely to act in the interests of workers than commercial funds provided no reason for forcing employees to participate in those funds if they wish their money to be managed elsewhere.[37]

41. Other arguments against allowing choice of fund for all Australian employees are outweighed by the benefits choice provides such as increased competition and member engagement in the superannuation system.

42. Two other arguments require consideration. The first is the contention that the proposed amendments are unnecessary because employees are

[35] Retail Employees Superannuation Trust Law Reform Submissions, 20/8/15, pp 2-4.

[36] Commonwealth, Financial System Inquiry, *Final Report*, November 2014, p 320.

[37] As to which, see Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 6.2, pp 926-927.

effectively exercising choice by voting for an enterprise agreement,[38] or because it is open to them to raise their choice of fund requirements during negotiations for an enterprise agreement. A related notion is that the proposed amendments are unnecessary because many employees do not, in fact, exercise their choice of fund rights.

43. These arguments are unsound. As to the first, the need for the tyranny of the majority to prevail has not been established. Further, not every employee votes on an enterprise agreement. In particular, employees that commence employment on existing enterprise agreements, or on greenfields agreements, will not have an opportunity to vote or to raise any concerns regarding their choice of fund. As to the second, the reality is that some employees do wish to exercise a choice in relation to their super fund. The stories of Peter Bracegirdle[39] and Katherine Coles[40] are examples of some that did, for sound reasons.

44. In short, none of the arguments made against freedom of choice are compelling.

[38] A similar argument was put forward by the TWU in relation to its industry fund: see Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 6.2, p 925.

[39] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 6.2 (TWU Super Case Study).

[40] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 6.3 (LUCRF Case Study).

Recommendation 51

Sections 32C(6), (6A), (6B), (7) and (8) of the *Superannuation Guarantee (Administration) Act* 1992 (Cth) be repealed, and all other necessary amendments be adopted to ensure all employees have freedom of choice of superannuation fund.

Default superannuation fund clauses

45. The Discussion Paper raised for consideration whether unions (or indeed other bargaining representatives) should be able to negotiate for terms in an enterprise agreement which specify a specific default superannuation fund with financial links with the union negotiating the agreement. The potential for conflicts of interest and coercion are similar to those considered in Part B. It is considered that Recommendations 48 to 50 sufficiently address these issues.

D – PATTERN BARGAINING

Introduction

46. The CFMEU ACT case study[41] revealed the operation in Canberra of what one CFMEU organiser referred to as 'the system'[42]: a process by which the major contractors in a sector of the industry agree to identical enterprise agreements, and the rest of the contractors are then

[41] See Chapter 6, and in particular Chapters 6.3, 6.4, 6.5.

[42] Lomax MFI-8, 7/10/15, p 8.4.

told that this is the industry enterprise agreement and that they need to sign it. The agreements contain terms that confer financial benefits on the CFMEU, and 'jump up' clauses that require subcontractors to pay CFMEU enterprise agreements rates. Contractors who refuse to sign are targeted by the CFMEU in different ways, by abuse of rights of entry provisions, by using audit clauses in an existing enterprise agreement, and by applying similar pressure to builders to engage only 'preferred contractors'.[43]

47. None of the contractors who signed up to CFMEU enterprise agreements who gave evidence said that they had particular desire to do so. Most said they felt they did not have any practical choice.[44] But once they sign up, contractors tend to encourage the CFMEU to apply such pressure to their competitors. The repeated instruction from one participant in the bricklaying industry to a CFMEU official to 'hammer' a bricklayer without an enterprise agreement and who was charging lower prices is an example.[45] Encouragement of this nature occurs because the contractors who sign up to CFMEU enterprise agreements cannot compete with those who do not have such agreements.

48. The CFMEU's position in Canberra was summed up by the comment of an organiser, in the presence of the Branch Assistant Secretary, to an

[43] Similar arrangements featured in evidence before the Cole Royal Commission: Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1, pp 27-28.

[44] See for example Elias Taleb, 13/7/15, T:25.15-20; Pietro Marcantonio, witness statement, 16/7/15, para 7; Pietro Marcantonio, 16/7/15, T:321.21-322.4, 334.1-32; Adam McEvilly, witness statement, 29/7/15, para 6; Horace Watt, 30/7/15, T:1582.3-16, 1584.6-8.

[45] Lomax MFI-6, 7/10/15.

industry participant: 'without the EBA, you won't be doing any work on commercial sites'.[46]

49. The above features of the CFMEU conduct in the ACT are not confined to that Branch of the union. For example, the Universal Cranes[47] case study involved similar issues.

50. The 'system' has many unsatisfactory features. Some are dealt with by the existing law. Some (such as the benefits that flow to the CFMEU under pattern enterprise agreements and anti-competitive aspects) are dealt with in some of the recommendations to this report.

51. A fundamental part of the 'system' is industry wide pattern bargaining. This is not a matter prohibited under the existing law. Nor was it considered in the Discussion Paper. The Commission has considered whether to make recommendations on this topic. Stopping industry wide pattern bargaining would go a long way towards redressing the unsatisfactory aspects of the construction industry referred to above. However, for the reasons discussed in what follows, no recommendation is made. This is not an endorsement of pattern bargaining, but merely a recognition that abolishing it per se is too radical a solution to the above problems.

[46] O'Mara MFI-3A, 8/10/15, pp 3.23-4.4.

[47] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, Ch 8.7.

Current provisions relating to pattern bargaining

52. Section 412(1) of the FW Act defines pattern bargaining as a course of conduct by a bargaining representative for two or more proposed enterprise agreements (covering separate employers) whereby an endeavour is made to have common terms included in those enterprise agreements. However, s 412(2) provides that conduct falls outside the definition of pattern bargaining if the relevant bargaining representative 'is genuinely trying to reach an agreement'.

53. Whether a bargaining representative is genuinely trying to reach agreement with a particular employer for the purposes of s 412(2) depends on a number factors including whether the bargaining representative is:

(a) demonstrating a preparedness to bargain for the agreement taking into account the individual circumstances of that employer, including in relation to the nominal expiry date of the agreement;

(b) bargaining in a manner consistent with the terms of the agreement being determined as far as possible by agreement between that employer and its employees; and

(c) meeting the good faith bargaining requirements.[48]

[48] *Fair Work Act* 2009 (Cth), s 412(3).

54. To engage in pattern bargaining is not prohibited by the FW Act. The only consequences are as follows:

(a) Industrial action taken in support of an enterprise agreement in respect of which a bargaining representative is engaging in pattern bargaining cannot be protected industrial action.[49] That action can therefore be the subject of a stop order under s 418 of the FW Act as well as an action for common law remedies.

(b) The Federal Court and Federal Circuit Court also have the power to grant injunctive relief in respect of such action.[50]

History of legislative attempts to address pattern bargaining

55. Pattern bargaining was considered in some detail by the Cole Royal Commission. It identified that, in areas of high union density within the building and construction sector, the process of enterprise bargaining contemplated by *Workplace Relations Act* 1996 (Cth) had been 'effectively circumvented and displaced by pattern bargaining leading to pattern agreements'.[51] The Cole Royal Commission

[49] *Fair Work Act* 2009 (Cth), s 409(4).

[50] *Fair Work Act* 2009 (Cth), s 422.

[51] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1, pp 27-28.

recommended that pattern bargaining in the construction industry be prohibited.[52]

56. The Cole Royal Commission summarised the deleterious effects that pattern bargaining has on productivity outcomes, and its fundamental inconsistency with the shift to enterprise bargaining that was introduced by the Keating Government (and which has been continued under the FW Act):[53]

> One form of centralised wage and condition fixation has been replaced by another. Initiative is stifled; the scope for creativity is denied. The reforms introduced by successive Governments, to make agreements struck at enterprise level the principal instruments whereby terms and conditions of employment are established, are circumvented and negated. The results have been detrimental to both workers and employers, to the industry and to the national economy.
>
> The unions and the major contractors which negotiate pattern agreements perceive it to be in their best interests to adopt this method of determining wages and conditions in the industry. They have the economic and industrial strength to enforce their wishes on workers and their employers. Unless pattern bargaining is prohibited by legislation it will continue to be the principal means by which many important terms and conditions of employment are determined in the commercial sector of the industry.

57. An attempt to implement this recommendation was defeated in the Senate.

58. In the ACT (and NSW) building and construction industry, pattern agreements are sought by the CFMEU in each of the major trades. Consistently with this, in 2014 the Productivity Commission noted in its Draft Report on the Workplace Relations Framework that pattern

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[52] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Recommendation 2, Vol 1, p 28.

[53] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1, p 28.

bargaining was 'rife' in Australia's construction industry.[54] However, there is no evidence suggesting that pattern bargaining is a systemic problem outside the construction industry.

59. The Productivity Commission stated that:[55]

> Pattern bargaining is problematic where it is imposed by a party with excessive leverage. If pursued on a mutually convenient basis by employer and union, it can also be seen as a form of anti-competitive conduct. Moreover, as also noted by some participants, pattern bargaining can conflict with the WR system's goal to develop agreements that reflect the circumstances of the enterprise and its employees…
>
> *… it is not per se, the presence of common features across bargaining agreements that is problematic, but the extent to which those common outcomes reflect the excessive power of one party over another, and an unwillingness to allow negotiation of some different set of conditions*. (emphasis added)

60. The Productivity Commission also noted that in some circumstances pattern agreements may not be disadvantageous or coercive but desirable for both parties as they can reduce the costs of negotiating enterprise agreements, reduce risk in large projects and provide guidance for smaller enterprises.[56] In industries that exhibit a truly competitive market, and low barriers to entry, 'the existence in negotiations of very similar proposals from either side is unlikely to represent the adverse aspect of pattern bargaining that should concern public policy'.[57] The Productivity Commission indicated that it is

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[54] Commonwealth of Australia, Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report*, August 2015, p 561.

[55] Commonwealth of Australia, Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report*, August 2015, pp 561-562.

[56] Commonwealth of Australia, Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report*, August 2015, p 561.

[57] Commonwealth of Australia, Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report*, August 2015, p 563.

interested in exploring a 'nuanced approach' to pattern bargaining which discriminates between pattern agreements where the negotiations are genuine and those that are imposed through excessive leverage, and has asked for further feedback on that topic pending its final report.[58]

Options for reform – pattern bargaining

61. The comments of Commissioner Cole quoted above aptly describe some of the problems with the type of pattern bargaining engaged in by the CFMEU in the ACT. It undermines the point of the collective bargaining provisions in the Act: that is, to facilitate bargaining at the enterprise level. Such concerns are exacerbated by evidence that in at least one case there were significant doubts about whether pattern enterprise agreements lodged by the ACT CFMEU with Fair Work Australia were approved by employees of the companies in question.[59]

62. Is the answer then to prohibit pattern bargaining? One difficulty with abolishing pattern bargaining entirely is that some forms of pattern bargaining may be less insidious than that adopted in the ACT building and construction industry and can in some cases even be advantageous. One example might be a multi-enterprise agreement in respect of a major project. One would hesitate to impose on employers and employees arbitrary obligations that their agreements be different

[58] Commonwealth of Australia, Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report*, August 2015, p 562.

[59] See Vol 3, ch 6.3, paras 287-289, 299 (MPR Scaffolding).

simply for the sake of difference, or in the belief that such difference necessarily creates productivity gains.

63. The true evil is an inequality of bargaining power that can lead to anti-competitive and unproductive outcomes, as when a powerful union like the CFMEU presses for the same outcomes across an industry or range of employers within an industry.

64. In the circumstances, no amendments to the existing provisions under the FW Act relating to pattern bargaining are proposed.

CHAPTER 7

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A – INTRODUCTION

1. This Chapter examines a range of issues in relation to the *Competition and Consumer Act* 2010 (Cth). They arise out of the case studies considered in 2014 and 2015.

2. A number of case studies revealed possible anti-competitive conduct on the part of unions, and in particular the Construction, Forestry, Mining and Energy Union (**CFMEU**).

   (a) The Boral case study, considered in Chapter 8.2 of Volume 2 of the Interim Report, disclosed possible secondary boycott and cartel conduct by the CFMEU in Victoria.

   (b) The Universal Cranes case study, considered in Chapter 8.7 of Volume 2 of the Interim Report revealed instances of possible secondary boycott conduct by the CFMEU in Queensland.

   (c) The CFMEU ACT case studies revealed instances in which the CFMEU placed pressure on contractors within the industry to set prices for the supply of services that conformed to the prices set by contractors with CFMEU enterprise agreements (**EBAs**) (prices which were set to

accommodate the pay terms and conditions allowed for in those EBAs). Chapter 6.5 of Volume 3 of the Report considers whether such conduct amounted to seeking an arrangement or understanding having the purpose or effect of fixing, controlling or maintaining the price for services in contravention of the cartel provisions of the *Competition and Consumer Act* 2010 (Cth).[1]

(d) The CFMEU ACT case studies also revealed instances of pattern EBAs containing provisions requiring employers to procure training for their employees provided by a particular training authority operated for the benefit of the union, or to obtain income protection insurance for employees with an particular provider. Chapter 6.6 of Volume 3 of the Report considers whether this conduct amounted to possible contraventions of the exclusive dealing provisions in s 47 of the *Competition and Consumer Act* 2010 (Cth).

(e) The Chiquita Mushrooms case study, which is dealt with in Chapter 10.6 of Volume 4 of the Report, revealed instances of AWU EBAs containing provisions limiting the procurement of contract labour by an employer to an identified provider, in circumstances in which the employer received advice that such a clause may contravene s 45E of what was then the *Trade Practices Act* 1974 (Cth).

[1] No findings were made in relation to these issues because on 1 September 2015 the Australian Competition and Consumer Commission commenced an investigation of this conduct. It is continuing. However, the evidence before the Commission does provide useful background for a consideration of the policy issues addressed in this Chapter.

3. Many of these competition law issues that have arisen have arisen in the context of the building and construction industry. However, competition laws are of general application. This Chapter takes the approach of considering the proper scope of the *Competition and Consumer Act* 2010 (Cth) as it relates to employment matters generally. Some of the recommendations, however, address particular problems in the building and construction industry by reference to the recommendations made in Chapter 8 of this Volume.

4. The balance of the Chapter is divided into two parts. Part B deals with a number of issues concerning secondary boycotts. Part C concerns anti-competitive conduct in relation to enterprise bargaining.

B – SECONDARY BOYCOTTS

Introduction

5. The Boral and Universal Cranes case studies considered in the Interim Report raise a number of issues concerning the scope and effectiveness of the current provisions preventing secondary boycotts and conduct that indirectly leads to a secondary boycott, being ss 45D and 45E of the *Competition and Consumer Act* 2010 (Cth) respectively.[2]

6. The terms and operation of ss 45D and 45E are considered fully in Chapter 8.2 of the Interim Report concerning Boral. Both ss 45D and

[2] Related provisions also considered in the section include *Competition and Consumer Act* 2010 (Cth), ss 45DA (secondary boycotts for the purpose of causing substantial lessening of competition), 45DB (boycotts affecting trade or commerce), 45EA (giving effect to provisions contravening s 45E).

45E and their related provisions are excepted from the operation of the exclusion in s 51(2)(a) of the *Competition and Consumer Act* 2010 (Cth). That paragraph excludes contracts, arrangements or understandings relating to remuneration, conditions of employment, hours of work or working conditions of employees from the operation of the anti-competitive provisions of Part IV of the *Competition and Consumer Act* 2010 (Cth). The scope of this exclusion is considered further in section C below.

7. The Boral case study, in particular, demonstrated the ability of trade unions with significant member density across a particular industry to inflict substantial damage by disrupting the processes of distribution and supply to the target company, in contravention of ss 45D and 45E. It raised a number of issues,[3] which were canvassed in the Discussion Paper.[4]

(a) Do the existing penalties for contravention of the secondary boycott provisions provide an effective deterrent against the relevant conduct, particularly when compared with penalties for other contraventions of Part IV of the *Competition and Consumer Act* 2010 (Cth)?

(b) Should secondary boycotts undertaken for a market sharing purpose be explicitly outlawed as cartels?

[3] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.2, pp 1106-1108.

[4] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform,* Chapter 10.3, 19/5/15, pp 110-116.

(c) Should competitors of secondary boycott targets be precluded from dealings which take advantage of the boycott?

(d) Should competitors of a secondary boycott target, or other market participants, be required to report secondary boycott conduct?

(e) Is the ACCC the appropriate regulator for investigation and enforcement of secondary boycott contraventions involving trade unions?

8. No submissions have been received from any unions in relation to these issues. The submissions of the ACTU in relation to the Harper Review and the Productivity Commission have been considered. In the main, those submissions take the position that:

(a) Both ss 45D and 45E of the *Competition and Consumer Act* 2010 (Cth) are the products of flawed policy and should be repealed.

(b) If not, ss 45E, 45EA and 51(2)(a) of the *Competition and Consumer Act* 2010 (Cth) should be amended to exempt the 'bargaining, making and approval of enterprise agreements or proposed enterprise agreements'.[5]

[5] Australian Council of Trade Unions, Competition Policy Review: ACTU Response to the Draft Report, November 2014, p 13; Australian Council of Trade Unions, Submissions to the Inquiry into the Workplace Relations Framework, March 2015, p 26.

Penalties

9. Both the Boral and Universal Cranes case studies suggest that the existing penalties for contravention of ss 45D and 45E of the *Competition and Consumer Act* 2010 (Cth) are ineffective to deter conduct which has the potential to cause very substantial loss and has a substantial anti-competitive effect.

10. The maximum penalty is $750,000 in respect of a body corporate. Individuals are immune from pecuniary penalties in respect of contraventions of the secondary boycott provisions.[6]

11. In respect of other anti-competitive contraventions by bodies corporate, the maximum penalty is the greater of:[7]

    (a) $10,000,000;

    (b) if the Court can determine the value of the benefit that the body corporate has obtained that is reasonably attributable to the contravention – three times the value of that benefit; and

    (c) if the Court cannot determine the value of that benefit – ten per cent of the annual turnover of the body corporate during

[6] *Competition and Consumer Act* 2010 (Cth), s 76(1A)(a), (2). *Competition and Consumer Act* 2010 (Cth), s 45DC also precludes action being taken against members or officers of organisations of employees under *Competition and Consumer Act* 2010 (Cth), ss 77 and 82, except in a representative capacity in respect of organisations that are not bodies corporate.

[7] *Competition and Consumer Act* 2010 (Cth), s 76(1A)(b).

the period (the turnover period) of 12 months ending at the end of the month in which the contravention occurred.

12. The Competition Policy Review recommended that those penalties should apply equally to breaches of ss 45D and 45E of the *Competition and Consumer Act* 2010 (Cth), observing that there 'no reason' why the maximum breaches should be lower than those for other breaches of the competition law.[8] Submissions to the Commission by the Australian Competition and Consumer Commission (**ACCC**), Australian Industry Group, Master Builders Australia and the Australian Chamber of Commerce and Industry all supported this approach.[9] The ACCC observed that secondary boycott activity can have a significant anti-competitive impact on markets in a similar manner as contraventions of other Part IV provisions.[10]

13. The Australian Government supported this recommendation in its response to the Competition Policy Review and is to draft legislation to increase the maximum penalties for breach of the secondary boycott provisions to the same levels as those applying to other breaches of the competition law.[11] The same recommendation in relation to ss 45E

[8] Competition Policy Review, *Final Report*, March 2015, p 68, recommendation 36.

[9] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 3; Australian Industry Group Law Reform Submissions, 21/8/15, p 13-14; Master Builders Australia Law Reform Submissions, 21/8/15, p 47; Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 44.

[10] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 3.

[11] Australian Government, Response to the Competition Policy Review, 24/11/15, p 29.

and 45EA has been noted, pending the outcome of the Productivity Commission Review of the Workplace Relations Framework.[12]

14. The conduct exhibited in the case studies considered by the Commission shows there is a real need for an effective deterrent against secondary boycott conduct. There is no principled reason why the penalties for contravention of the secondary boycott provisions should be less than those that apply to the other provisions in Part IV of the *Competition and Consumer Act* 2010 (Cth).

Recommendation 52

The *Competition and Consumer Act* 2010 (Cth) be amended so that the penalties for breaches of ss 45D, 45DB, 45E and 45EA are the same as those that apply to other provisions of Part IV of that Act.

Secondary boycotts engaged in for a market sharing purpose

15. The Interim Report considered the application of the cartel provisions of the *Competition and Consumer Act* 2010 (Cth) in respect of the CFMEU's conduct concerning Boral and concluded that the CFMEU may have contravened those provisions.

16. Boral, however, submitted that the cartel provisions of the *Competition and Consumer Act* 2010 (Cth) should be clarified to remove any existing doubt that cartel conduct includes breaches of ss 45D and 45E of the *Competition and Consumer Act* 2010 (Cth) engaged in for the

[12] Australian Government, Response to the Competition Policy Review, 24/11/15, p 30.

purpose of determining that a particular competitor or competitors will or will not supply a particular customer or customers, ie, cartel conduct would include secondary boycott conduct engaged in for a market sharing purpose.[13] These submissions are addressed in further detail below.

17. The operation of the current cartel provisions of the *Competition and Consumer Act* 2010 (Cth) is complex. The Competition Policy Review recommended substantial amendments to the current provisions. Those amendments specifically refer to market allocation conduct as being cartel conduct, although they do not specifically address the situation where the market allocation conduct is engaged in by a person who is not a competitor of the market participants. The overriding principle expressed in the Harper review, however, was that the cartel provisions should operate in respect of conduct between competitors.[14]

18. The Commission received a number of submissions on this topic.

19. The Australian Chamber of Commerce and Industry supported the inclusion of the secondary boycott prohibitions within the proscription of cartel conduct. However, it submitted, noting the complexity of the current provisions and the amendments recommended in the

[13] That may involve engagement of other related provisions, for example *Competition and Consumer Act* 2010 (Cth), s 45DA.

[14] Competition Policy Review, *Final Report,* March 2015, pp 58-59, recommendation 27; pp 363, 365.

Competition Policy Review, that care should be taken in drafting the provisions to avoid the risk of unintended consequences.[15]

20. Master Builders Australia agreed in principle with such a proposal but submitted that the design of the prohibition must be carefully crafted to ensure that it does not affect those who are unknowingly involved in secondary boycott conduct.[16]

21. Boral referred to evidence before the Commission to the effect that the ban imposed by the CFMEU caused an understanding with Boral's customers, firstly that they would not acquire concrete from Boral, and secondly that they would be allocated a particular class of suppliers, being CFMEU-approved suppliers.[17] Boral submitted that an understanding of this nature is sufficient to engage the cartel provisions in ss 44ZZRF and 44ZZRG of the *Competition and Consumer Act* 2010 (Cth). However, it said that to guard against uncertainties around the competition requirement in s 44ZZRD of the *Competition and Consumer Act* 2010 (Cth), the definition of cartel conduct should expressly include conduct in contravention of ss 45D or 45E of the *Competition and Consumer Act* 2010 (Cth), where that conduct can be shown to be for a market sharing purpose.[18] It argued that the relevant purpose would involve determining that particular competitors will or will not supply a particular customer or customers (and presumably vice versa).

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[15] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 44.

[16] Master Builders Australia Law Reform Submissions, 21/8/15, p 47.

[17] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.2, p 1098.

[18] Boral Law Reform Submissions, 2015, p 54.

22. Boral argued that the advantages of this extension are the increased penalties available, the ability to impose penalties on individuals, the possibility of criminal sanctions, the availability of additional investigative powers in respect of criminal conduct and the immunities available to parties which will encourage them to come forward.[19]

23. The ACCC observed that secondary boycott conduct does not generally involve contracts, arrangements and understandings between competitors, and hence that the conduct does not readily fit within the concept of a cartel.[20] It may be taken that the ACCC does not recommend an extension of the cartel conduct proscriptions to embrace secondary boycott conduct engaged in for a market purpose.

24. However, the ACCC discussed the recommendation in the Competition Policy Review that a concerted practice prohibition be introduced to s 45 of the *Competition and Consumer Act* 2010 (Cth) restricting concerted practices by persons with other persons that have the purpose, effect or likely effect of substantially lessening competition.[21] The Competition Policy Review recommended such a provision in the context of considering the existence and scope of price signalling prohibitions, but recommended a provision of more general application to replace those prohibitions.[22] It did not, however, recommend that the concerted practice provision be included within the cartel

[19] Boral Law Reform Submissions, 2015, p 55.

[20] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 4.

[21] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 4, citing Competition Policy Review, *Final Report*, March 2015, p 372, recommendation 29.

[22] Competition Policy Review, *Final Report*, March 2015, pp 370-371, recommendation 29.

prohibitions, on the basis that criminal sanctions should be reserved for contracts, arrangements and understandings between competitors.[23]

25. The ACCC made a further submission in relation to the scope of ss 45D, 45DA and 45DB of the *Competition and Consumer Act* 2010 (Cth), all of which provide for a dual purpose and effect/likely effect test for the conduct proscribed under those sections. An affected person must establish that the relevant conduct was 'engaged in for the purpose, *and* would have or be likely to have the effect, of' causing substantial loss and damage, causing substantial lessening of competition, or hindering trade and commerce between Australia and overseas. The ACCC submits that these provisions create a high threshold, whereas other provisions in Part IV of the *Competition and Consumer Act* 2010 (Cth) require a purpose *or* effect/likely effect test.[24]

26. Examining the question of whether secondary boycott conduct can be brought within the cartel positions is complicated by the recommendations of the Competition Policy Review. Substantial changes to the cartel provisions were recommended to simplify their language and also to incorporate the exclusionary provisions legislation to the extent that that is not incorporated in the existing cartel provisions in the *Competition and Consumer Act* 2010 (Cth).

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[23] Competition Policy Review, *Final Report*, March 2015, p 372, recommendation 29.

[24] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 7; Section 46 is, of course, one provision which requires the establishment of purpose. Section 45E is another. However, even that provision does not require the establishment of purpose and effect/likely effect.

27. The Australian Government, in its response to the Competition Policy Review, has supported the recommendations in respect of the cartel conduct provisions.[25] Exposure draft legislation is to be developed for consultation with the public and the states and territories. It is not clear from the Government's response whether it adopts the preference in the Competition Policy Review that the proscriptions on cartel conduct are to be limited to conduct involving firms who are actual or likely competitors.

28. What is evident from the legislation proposed in the Competition Policy Review is that there is a requirement that each of the relevant cartel provisions in the legislation operate to affect the conduct of one party to the contract, arrangement or understanding by reference to a competitor, which must be a competitor of the first party.[26] The secondary boycott provisions do not fit readily into the definition of cartel conduct, under either the existing or the proposed versions of the legislation, if the intention is to catch only the arrangement or understanding between the union and the market participant. Moreover, it would appear to be contrary to the policy position reached by the Competition Policy Review.

29. But for the reasons set out in Chapter 8.2 of the Interim Report, there is no reason why the cartel provisions would not apply to multi-party arrangements or understandings pursuant to which each of the competitor parties reached a consensus on the basis of communications

[25] Australian Government, Response to the Competition Policy Review, 24/11/15, pp 23-24.

[26] See Competition Policy Review, *Final Report*, March 2015, pp 58-59, recommendation 27; Appendix A, s 45B.

with the instigator of the arrangement or understanding.[27] In particular, several of the proposed cartel provisions recommended by the Competition Policy Review concern matters such as restricting the output of supply or acquisition, or allocating supply and/or acquisition within a market, that would catch conduct of the type engaged in by the CFMEU in relation to the Boral dispute and in the Australian Capital Territory building industry, affecting as they did a number of potential customers for the supply of building materials and services.

30. For the purpose of ensuring that arrangements of that nature are caught by the cartel provisions, it is recommended that it be made explicit in the legislation that to prove the existence of an arrangement or understanding, it is not necessary to establish that there be communication between each of the parties to the arrangement or understanding, merely that they hold the same understanding. This is probably already the law, but an amendment would increase clarity. It would probably be necessary to make an amendment to the same effect in relation to s 45.

31. A provision mechanism of this kind makes it unnecessary to consider the alternative suggested by the ACCC concerning the proposed proscription on concerted conduct.

32. The final matter for consideration is the operation of the purpose and effect/likely effect test in s 45D(1)(b) of the *Competition and Consumer Act* 2010 (Cth). There does not appear to be any principled

[27] See Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.2, p 1097-1098, citing *Australasian Meat Industry Employees Union v Meat & Allied Trades Federation of Australia* (1991) 32 FCR 318 at 330.

reason why the bar for contravention of that section should be higher. That is particularly so where there may be no real difference as a matter of practicality between whether conduct is undertaken for the relevant purpose and whether it is likely to have such an effect, as those questions are necessarily interrelated.[28] The same reasoning applies to ss 45DA and 45DB of the *Competition and Consumer Act* 2010 (Cth).

Recommendation 53

The *Competition and Consumer Act* 2010 (Cth) be amended to clarify that to prove the existence of an arrangement or understanding, it is not necessary to establish that there be communication between each of the parties to the arrangement or understanding, merely that they hold the same understanding.

Recommendation 54

Sections 45D(1)(b), 45DA(1)(b) and 45DB(1) of the *Competition and Consumer Act* 2010 (Cth) be amended to provide that those sections are contravened where the conduct is engaged in for the purpose, or would have or be likely to have the effect, of causing the consequence identified in those sections.

Restraint on competitors of secondary boycott target

33. In its submissions to the Commission, Boral argued that the current secondary boycott provisions were potentially defective in that there was no specific provision making it unlawful for the competitors of the

[28] *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331 at 346 per Deane J.

'target' of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target. It supported an amendment to the *Competition and Consumer Act* 2010 (Cth) so that a competitor commits an offence if it engages in knowing supply. It says that a specific offence directed at this conduct will act as a better deterrent and create clarity and ease of prosecution, and ultimately operate to destroy the effectiveness of boycott activity.[29]

34. On one view, there is nothing wrong with competitors of a target taking advantage of the target's disadvantaged position caused by the boycott. Provided the target's competitors do nothing to encourage or facilitate the boycott, they should be at liberty to take advantage of their competitor's disadvantage. However, at least in some circumstances a competitor's decision to supply in substitution for the target will facilitate the prolongation of the boycott and have an anti-competitive purpose. For example, in order to ensure the boycott remains for as long as possible the competitor may increase production to fill additional orders from acquirers who are ordinarily accustomed to acquire goods from the target, or reduce its prices to secure customers. In some circumstances such conduct could involve a misuse of market power, but not invariably.

35. The ACCC did not support the extension of the secondary boycott provisions to capture indirect involvement in a contravention by a competitor of the target.[30] In its view, the effect of ss 75B and 76 of the *Competition and Consumer Act* 2010 (Cth) is that third parties that

[29] Boral Law Reform Submissions, 2015, pp 63-64.

[30] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 4.

are knowingly concerned in or a party to anti-competitive conduct are currently within the scope of the Part IV contraventions.[31]

36. The Australian Chamber of Commerce and Industry advocated the middle ground. It makes the point that the conduct that is sought to be addressed involves the application of considerable duress upon the parties involved. While conduct of third parties perpetuating the conduct of the unions in this regard is to be condemned, care should be taken to foster behaviour that sees such conduct reported to the regulator, and that the focus should be on encouraging competitors to come forward with evidence of boycott conduct, rather than discouraging them.[32] The Australian Chamber of Commerce and Industry therefore supported a recommendation that would see persons in competition with a secondary boycott target being prevented from knowing supply unless they have notified the ACCC of their knowledge of the boycott.[33]

37. Master Builders Australia also favoured this option. It says that a notification requirement will cause the least operational disruption but will provide the ACCC with information on which it may take action.[34]

38. In considering this issue it is necessary to seek to strike a balance between ensuring that market participants are not unduly restricted in

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[31] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 4.

[32] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 46.

[33] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 47.

[34] Master Builders Australia Law Reform Submissions, 21/8/15, p 47.

the market, and ensuring that union conduct that is fundamentally destructive to competition is not allowed to proceed unhindered. The Commission is not aware of any evidence of competitors of a boycott target actively assisting in the perpetuation of the boycott. In the absence of knowing involvement and assistance in boycott conduct by a competitor within the meaning of s 75B of the *Competition and Consumer Act* 2010 (Cth), there is no real warrant for introducing a penalty on competitors for conduct that falls short of the requirements of that section.

39. However, to require a competitor with knowledge of the existence of a boycott to notify the relevant regulator before trading brings clear investigative benefits. Additionally, the knowledge that the competitor must notify before there can be any supply or acquisition offers protection against any reprisals for reporting the conduct. Accordingly, the second option strikes the right balance. Contravention of such a provision should be a civil penalty provision. In order to make out a contravention, it should be necessary to prove that the competitor was aware of all of the elements of the primary boycott contravention,[35] and engaged in a transaction with that knowledge and while the contravention was proceeding.

[35] *Yorke v Lucas* (1985) 158 CLR 661.

Recommendation 55

The *Competition and Consumer Act* 2010 (Cth) be amended to provide that a person in competition with the fourth person referred to in ss 45D or 45DA must not knowingly engage in supply or acquisition of services to or from any third persons referred to in those sections with knowledge of the contravention by the first and second persons without first notifying the Australian Competition and Consumer Commission. Contravention of the provision should be a civil penalty provision.

General obligation to report boycott activity?

40. A number of submissions argued that there should be a broader obligation to report secondary boycott activity.

41. The Australian Chamber of Commerce and Industry recommended imposing a positive obligation to report secondary boycott behaviour on persons approached to enter into an agreement arrangement or understanding that contravenes ss 45D or 45E of the *Competition and Consumer Act* 2010 (Cth).[36]

42. Boral made a similar submission in relation to both competitors and suppliers/customers that are involved in secondary boycott activity.[37] It submitted that, over the course of the ban on its products, Boral's customers likely feared repercussions if they were seen to be acting

[36] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 46.

[37] Boral Law Reform Submissions, 2015, pp 63-64.

against the CFMEU.[38] It argued that there should be direct obligations and consequences for industry participants that fail to provide evidence to the ACCC, subjecting those who fail to report secondary boycott conduct to the same civil penalties as those that are involved in contraventions of Part IV of the *Competition and Consumer Act* 2010 (Cth).

43. Boral contended that such an obligation would be consistent with the policy approach adopted in other areas of Australian law where conduct is difficult to detect by conventional law enforcement means, such as the obligation on market participants to report suspected breaches of the Australian Securities Exchange market integrity rules,[39] or the obligation to report suspicious transactions to Australian Transaction Reports and Analysis Centre under s 41 of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth).[40]

44. Further, Boral submitted that encouragement could also be offered to market participants to whom threats are made to participate in secondary boycotts if the immunity policy presently implemented by the ACCC for cartel conduct were extended to secondary boycotts.[41]

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[38] Boral Law Reform Submissions, 2015 (received 27/8/15), pp 56-58.

[39] *ASIC Market Integrity Rules (ASX Market)* 2010 (Cth), rule 5.11.1, penalty for breach of which is $20,000.

[40] Boral Law Reform Submissions, 2015 (received 27/8/15), pp 59-60. The maximum penalty for contravention of s 41 of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) is $100,000 for a body corporate and $20,000 for a person other than a body corporate: s 175(4) and (5).

[41] Boral Law Reform Submissions, 2015 (received 27/8/15), pp 60-62.

45. It is not recommended that a general obligation to report secondary boycott activity be imposed for these reasons.

(a) In relation to individuals who are suppliers/customers and are involved in the boycott, such persons are already likely to be liable under s 45E of the *Competition and Consumer Code Act* 2010 (Cth). Imposing a reporting obligation on them is unlikely to have much effect. However, owing to the difficulties of investigation in relation to secondary boycott conduct, consideration might usefully be given by the ACCC as to whether its immunity policy should extend to secondary boycott conduct.

(b) In relation to individuals who are suppliers/customers who are approached but refuse to be involved in a boycott, imposing a penalty on them unless they report the boycott is a disproportionate and potentially unfair result.

(c) The previous recommendation deals with competitors who have knowledge of the boycott.

Recommendation 56

The Australian Competition and Consumer Commission give consideration to whether its immunity policy in respect of the cartel provisions could usefully be extended to secondary boycott conduct and conduct indirectly leading to a secondary boycott.

Appropriate regulator

46. A final problem with the current regulatory regime is that the ACCC's record of prosecuting breaches of the secondary boycott provisions is not extensive when compared with other contraventions of Part IV of the *Competition and Consumer Act* 2010 (Cth).

47. One of the recommendations of the Harper Review was that the ACCC should pursue secondary boycott cases with increased vigour:[42]

> Some industry organisations, especially in building, construction and mining, believe that public enforcement of the secondary boycott provisions is inadequate, a point emphasised in the Interim Report of the Royal Commission into Trade Union Governance and Corruption. Timely and effective public enforcement serves as a deterrent to boycott activity and needs to exist both in regulatory culture and capability. The Panel believes that the ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law.

48. The Australian Government, in its response to the Harper review, supported this recommendation.[43]

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[42] Competition Policy Review, *Final Report*, March 2015, p 67.

[43] Australian Government, Response to the Competition Policy Review, 24/11/15, p 29.

49. As adverted to in the Interim Report, there may be a number of root causes for lack of enforcement.[44] They might include difficulties in obtaining documentary evidence, lack of co-operation of witnesses who may fear repercussions from giving evidence, the potential overlap between the roles of a number of regulators and difficulties in ensuring compliance with court orders made in relation to secondary boycott conduct. Whatever the causes, the fact is that many secondary boycotts arise in the industrial relations sphere and involve trade unions. The ACCC may not be the best placed, or best resourced, institution to investigate such contraventions.

50. The Commission received a number of submissions in response to the Discussion Paper advocating the view that the building and construction industry regulator be given concurrent jurisdiction in relation to the investigation of boycott conduct.[45]

51. In particular, Boral argued that enforcement of the secondary boycott provisions requires a regulator with industrial expertise and a proactive approach to investigation of anti-competitive union conduct within the building and construction industry.[46] Boral agreed with Master Builders Australia that, because secondary boycott conduct is often accompanied by other unlawful conduct such as coercion and adverse action in breach of the FW Act, it is practical and appropriate for there

[44] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.2, p 1107.

[45] Australian Industry Group Law Reform Submissions, 21/8/15, pp 13-14; Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 47; Boral Law Reform Submissions, 2015, pp 65-67; Master Builders Australia Law Reform Submissions, 21/8/15, p 48.

[46] Boral Law Reform Submissions, 2015, p 65.

to be means of investigating and enforcing all contraventions by the same regulator.[47] Master Builders Australia submitted that the building industry regulator should have concurrent jurisdiction with the ACCC as this will assist with timely enforcement and enable material gathered in the course of a building industry investigation to be used in relation to a range of contraventions. It submitted that the jurisdiction of the building industry regulator should be confined to secondary boycott conduct within the definition of 'building work' under the proposed *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth).[48]

52. The ACCC did not make a submission on whether it should remain as the role regulator charged with enforcement of the secondary boycott provisions. However, it submitted that secondary boycott and anti-competitive conduct are 'enforcement priorities' for the ACCC.[49] It pointed to the impediments to gathering evidence in relation to contraventions of the secondary boycott provisions.[50] It suggested a number of improvements to its investigative powers, which suggestions are considered in Chapter 8 of this Volume.

53. It has not been suggested that the ACCC should share its jurisdiction in relation to secondary boycott conduct with the Fair Work regulators in general. Nor is there any evidence suggesting that that is necessary. However, there is evidence that the building and construction industry

[47] Boral Law Reform Submissions, 2015, p 67.

[48] Master Builders Australia Law Reform Submissions, 21/8/15, p 48.

[49] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 5.

[50] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 5.

requires more active regulation in relation to secondary boycotts, as it does in relation to many other instances of unlawful conduct. The need for a separate regulator is addressed in Chapter 8 of this Volume.

54. There are two arguments supporting a grant to the ACCC and the proposed ABCC of concurrent power over secondary boycott conduct in relation to building and construction.

(a) First, the ACCC does not appear to be well resourced to address secondary boycott conduct. Much of the impediment appears to arise from there being very few reports of boycott conduct made to the ACCC, and difficulties in investigation.

(b) Secondly, the ABCC would be well placed to deal with boycott conduct that occurs primarily in the building and construction industry, because of its specialist involvement in that industry, and because boycott conduct often involves, or is accompanied by, conduct that contravenes the FW Act and other related legislation that is not within the jurisdiction of the ACCC.

55. The latter consideration is a powerful one. There are obvious efficiencies in a single regulator investigating and prosecuting a number of contraventions arising from the one course of conduct. Moreover, it is likely that in the course of investigating other, readily apparent conduct such as blockades or right of entry contraventions, boycott conduct might come to light. That is an advantage that the ACCC would not have.

56. The Productivity Commission in its draft report concerning the Workplace Relations Framework gave preliminary support to the

shared regulatory approach. However, it suggested that while both the building and construction regulator and the ACCC should have investigatory functions, the ACCC should retain the enforcement function.[51] It reserved its position pending receipt of further submissions. For the reasons set out above, it will often occur that secondary boycott conduct coincides with contraventions of the FW Act and other industrial laws. To that end, it would seem to promote efficiency for the building industry regulator to have responsibility for enforcement of secondary boycott contraventions within the scope of its jurisdiction.

57. By the same token, it is necessary for the ACCC to have concurrent power, both because of its expertise in investigating breaches of competition laws and because of the prospect of boycott provisions occurring outside of the building industry jurisdiction of the ABCC. Cooperation and consultation between the two regulators would obviously be necessary.

58. Finally, the recommendation in the Competition Policy Review that the ACCC report on complaints, investigations and outcomes of secondary boycott activity is sensible, particularly as it will enable continued monitoring of what, if any, changes are necessary to the ACCC's investigatory powers.

[51] Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report*, August 2015, pp 781-3.

Recommendation 57

The building and construction industry regulator have concurrent power with the Australian Competition and Consumer Commission to investigate and enforce secondary boycott conduct, and conduct indirectly leading to a secondary boycott, in contravention of the *Competition and Consumer Act* 2010 (Cth).

Recommendation 58

The Australian Competition and Consumer Commission and the building and construction industry regulator report to the responsible Minister and publish the results of all complaints and investigations made concerning, and proceedings to enforce, the secondary boycott provisions on an annual basis.

C – ANTI-COMPETITIVE CONDUCT IN ENTERPRISE BARGAINING

Introduction

59. Section 51(2)(a) of the *Competition and Consumer Act* 2010 (Cth) operates to exclude the operation of much of Part IV in respect of employment terms and conditions. It provides:

> (2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:
>
> (a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees.

60. On its face, the exclusion is very broad. The policy rationale for excluding conduct in the labour market from the operation of competition laws is that the particular features of the labour market, and in particular the traditional inequality of bargaining power as between employers and employees, warrant permitting what is prima facie anti-competitive conduct to avoid undesirable consequences such as wage suppression, poor workplace health and safety and insecurity of contract.

61. However, in light of the case studies identified above, in which enterprise agreements included provisions that were likely to offend ss 45E and 45EA, or s 47, or the cartel provisions in Part IV of the *Competition and Consumer Act* 2010 (Cth), it is necessary to consider whether such conduct should be exempted from the operation of that Act. The policy justification for permitting price fixing, third line forcing or other exclusive dealing in the context of an enterprise agreement, particularly when there is only an indirect relationship between that conduct and the terms and conditions of employment of union members, is not readily apparent.

62. There are two main issues:

(a) Should s 51(2)(a) or other provisions of the *Competition and Consumer Act* 2010 (Cth) be amended?

(b) Alternatively, should provision be made in the FW Act precluding anti-competitive arrangements in the context of enterprise agreements?

Discussion

63. As noted in Chapter 6.6 of Volume 3, the scope of s 51(2)(a) is uncertain. A great deal of that uncertainty has been created by the decision of the Full Court of the Federal Court in *Australian Industry Group v Fair Work Australia*[52] which held that an enterprise agreement is not a contract, arrangement or understanding within the meaning of the *Competition and Consumer Act* 2010 (Cth), and therefore is not capable of offending s 45E of the Act.[53]

64. Much of that reasoning rests on the notion that as a creature of statute, an enterprise agreement is not a consensual arrangement of the type comprehended by the *Competition and Consumer Act* 2010 (Cth),[54] and in any event, not one *with* an organisation of employees for the purposes of s 45E. Presumably this is because, as a single or multi-enterprise agreement, the agreement applies to an organisation where the organisation is covered by the agreement,[55] but the agreement itself is made between the employer and employees.[56]

65. There is an obvious superficiality to those conclusions, which were not the product of detailed reasons (or in fact any reasons other than mere assertion), when regard is had to the fact that an enterprise agreement

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[52] (2012) 205 FCR 339.

[53] *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339 at [72].

[54] *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339 at [22]-[23].

[55] *Fair Work Act* 2009 (Cth), ss 52(1), 53(2), 201(2).

[56] *Fair Work Act* 2009 (Cth), ss 172(2)(a), 172(3)(a). That reasoning does not apply to greenfields agreements, which must be between the employer and the union: ss 172(2)(b), (3)(b).

is the product of bargaining, employee organisations are commonly bargaining representatives in negotiating such agreements, an enterprise agreement operates to bind employee organisations covered by it, and an enterprise agreement can contain terms governing the relationship between employers and employee organisations.[57]

66. Further, applying the reasoning of the Full Court to s 51(2)(a) would appear to narrow significantly the scope of the provision in an unsatisfactory manner: if enterprise agreements are not contracts, arrangements or understandings for the purposes of the *Competition and Consumer Act* 2010 (Cth), the exception would not apply to them notwithstanding that they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.

67. An alternative reading of s 51(2)(a) is that it operates in respect of 'any act done in relation to … the remuneration, conditions of employment, hours of work or working conditions of employees' regardless of whether those acts relate to a contract, arrangement or understanding as defined in the *Competition and Consumer Act* 2010 (Cth). On that reading, s 51(2)(a) would apply to conduct leading to the inclusion of terms in an enterprise agreement, provided the inclusion could be said to be in relation to remuneration etc. However, as noted in Chapter 6.6 of Volume 3, a weakness in this argument is that in relation to the prior version of s 51(2)(a) a majority of the Full Court of the Federal Court held that the phrase 'act done' had a limited meaning and did not include an act such an entering into an agreement.[58] It was as a result

[57] *Fair Work Act* 2009 (Cth), ss 51, 52, 53, 172(1)(b).

[58] *Ausfield Pty Ltd v Leyland Motor Corp of Australia Ltd* (1977) 30 FLR 477 at 481-482.

of this decision that s 51(2)(a) was amended to make specific reference to a 'contract, arrangement or understanding'.

68. Further, the Full Court of the Federal Court in *Adamson v New South Wales Rugby League Club Limited*[59] suggested that the section is limited to contracts, arrangements or understandings pertaining to employment conditions. At first instance, Hill J had concluded that the provision was directed at agreements or arrangements or acts done in relation to them, but only to the extent that those agreements or arrangements or provisions in them relate to employee conditions.'[60]

69. The Competition Policy Review considered that s 51(2)(a) was problematic insofar as it removed from the operation of Part IV provisions in awards and enterprise agreements that place restrictions on employers engaging contract labour or on acquiring identified goods or non-labour services. The Competition Policy Review recommended that ss 45E and 45EA should be amended so that they expressly apply to awards and industrial agreements, except to the extent they deal with the remuneration, conditions of employment, hours of work or working conditions of employees.[61] It was accepted that the addition of the qualifier would necessitate amendment to s 51(2)(a). The Australian Government noted this recommendation, on the basis that it was presently being considered as part of the

[59] (1991) 31 FCR 242 at 263.

[60] *Adamson v New South Wales Rugby League Ltd* (1991) 27 FCR 535 at 551.

[61] Competition Policy Review, *Final Report*, March 2015, p 69, recommendation 37.

Productivity Commission Review of the Workplace Relations Framework.[62]

70. For its part, the Productivity Commission has released a draft report in its inquiry into the Workplace Relations Framework. At a broad level, the draft report adhered to the notion that the industrial relations system should be separate from competition regulation, for reasons of efficiency as well as policy: the burden of subsuming employment agreements and arrangements within the notification and authorisation provisions of the *Competition and Consumer Act* 2010 (Cth) would create significant compliance costs.[63] The Productivity Commission observed:[64]

> While the Productivity Commission considers that the reach of competition laws should not be further expanded into the employment space, there is a case for increasing the prominence of competition policy principles in the framework of the WR system itself. Exclusion from competition laws should not preclude WR regulation being informed by principles of competition and efficiency — especially as this would also improve the consistency of regulations across labour and product markets, while still remaining separate. … A standalone WR framework that holistically accommodates these competing goals is preferable to a chimeric approach that attempts to shoehorn provisions from the CCA into WR issues.

71. Addressing the proposal of the Competition Policy Review that the scope of ss 45E and 45EA be extended to include awards and enterprise agreements, the Productivity Commission expressed the preliminary view that concerns related to competitive constraints imposed by enterprise agreements are better addressed by the

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[62] Australian Government, Response to the Competition Policy Review, 24/11/15, p 30.

[63] Productivity Commission Inquiry into the Workplace Relations Framework: *Draft Report* August 2015, pp 776-777.

[64] Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report* August 2015, p 778.

mechanism of ss 186(4) and 194 of the FW Act which precludes approval of an EBA that contains an unlawful term. It considered that broader alterations such as amendments of the *Competition and Consumer Act* 2010 (Cth) could create unintended consequences,[65] and would require the ACCC to involve itself in the workplace relations system which could lead to unnecessary duplication.[66]

Conclusions

72. There is force to the views expressed by the Productivity Commission insofar as it suggests that conduct in relation to enterprise bargaining which has an anti-competitive effect or purpose is often more easily dealt with in the FW Act. Ordinarily, particular anti-competitive practices can be outlawed more easily, and with a lower risk of unintended consequences, by amending s 194 of the FW Act to make certain anti-competitive terms unlawful. The effect would be to prevent such terms from being included in enterprise agreements.

73. One such example is the draft recommendation of the Productivity Commission that terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the

[65] Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report* August 2015, p 779.

[66] Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report* August 2015, p 780.

FW Act.[67] The CFMEU ACT cases studies highlighted the anti-competitive nature of these clauses.

74. However, as a consequence of the decision in *Australian Industry Group v Fair Work Australia*[68] the interplay between competition law and industrial relations laws is now unclear. It is necessary for legislation to clarify that interaction.

75. It is considered that the simplest solution is simply to reverse the effect of the decision, and to amend the *Competition and Consumer Act* 2010 (Cth) to make explicit that:

(a) an enterprise agreement under the FW Act is a contract, arrangement or understanding for the purposes of the *Competition and Consumer Act* 2010 (Cth); and

(b) an enterprise agreement that applies to an employer and an employee organisation under the FW Act is a contract, arrangement or understanding that an employer has with the organisation of employees for the purposes of s 45E of the *Competition and Consumer Act* 2010 (Cth).

76. This largely mirrors the approach suggested in the Competition Policy Review, although it does not recommend any changes to s 51(2)(a) itself on the ground that the legislature has already determined that

[67] Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report*, August 2015, p 733.

[68] (2012) 205 FCR 339.

conduct in contravention of s 45E is not subject to the exclusion in s 51(2)(a).

Recommendation 59

The *Competition and Consumer Act* 2010 (Cth) be amended to make explicit that:

(a) an enterprise agreement under the *Fair Work Act* 2009 (Cth) is a contract, arrangement or understanding for the purposes of the *Competition and Consumer Act* 2010 (Cth); and

(b) an enterprise agreement that applies to an employer and an employee organisation under the *Fair Work Act* 2009 (Cth) is a contract, arrangement or understanding that an employer has with the organisation of employees for the purposes of s 45E of the *Competition and Consumer Act* 2010 (Cth).

CHAPTER 8

BUILDING AND CONSTRUCTION

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A – INTRODUCTION

1. A great deal of the evidence before the Commission concerned the activities of unions with coverage of workers in the building and construction industry, and in particular the Construction, Forestry, Mining and Energy Union (**CFMEU**). The conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court.[1]

2. The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission[2] in 2003. The Winneke Royal Commission found numerous corrupt payments and bribes being taken by members of the Builders

[1] Report, Vols 3 and 4; Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.

[2] Royal Commission into the Building and Construction Industry, *Final Report* (2003).

Labourers Federation (**BLF**).[3] The Gyles Royal Commission found widespread illegal behaviour within the construction industry in New South Wales, including theft, extortion, secret commissions and improper and irregular payments.[4] The Cole Royal Commission made similar findings but not limited to New South Wales.[5]

3. The continuing corruption and lawlessness that has been revealed during the Commission suggests a need to revisit, once again, the regulation of the building and construction industry.

4. The remainder of the Chapter is divided into six parts.

   (a) Part B deals with the CFMEU, whether it should be deregistered, and other available legislative options for dealing with its culture.[6]

   (b) Part C provides a brief overview of the recent legislative history concerning the regulation of the building and construction industry.[7]

   (c) Part D addresses the arguments for and against the existence of a separate regulator for the building and construction industry.[8]

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[3] Royal Commission into the Activities of the Australian Building Construction Employees' and Builders' Labourers' Federation, *Report* (1982), pp 31-36, 246-251, 274-275.

[4] Royal Commission into Productivity in the Building Industry in New South Wales, *Report of the Hearings Part II: Illegal Activities* (1992), Vol 4.

[5] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1, pp 5-17.

[6] See paras 5-44.

[7] See paras 45-68.

(d) Part E considers what information gathering and investigatory powers should be available to the regulator in relation to the building and construction industry.[9]

(e) Part F addresses whether industry specific industrial laws are necessary for the building and construction industry.[10]

(f) Part G deals with proposals to introduce laws to Australia similar to the United States *Racketeer Influenced and Corrupt Organizations Act*,[11] commonly known as RICO.[12]

B – THE CFMEU

5. The activities of the CFMEU have been examined in many of the Chapters in this Report (see Volumes 3 and 4) and in the Interim Report.[13] It is appropriate to make more detailed comments here.

6. In the Interim Report the following comments were made:[14]

> The evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law.

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[8] See paras 69-112.

[9] See paras 113-155.

[10] See paras 156-193.

[11] *Racketeer Influenced and Corrupt Organizations Act*, 18 USC §§ 1961–1968.

[12] See paras 194-210.

[13] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, pt 8.

[14] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.1, p 1008.

That evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:

(a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;

(b) officials prefer to lie rather than reveal the truth and betray the union;

(c) the reputations of those who speak out about union wrongdoing become the subjects of baseless slurs and vilification.

7. The case studies considered in this Report only reinforce those conclusions.

8. The evidence has revealed possible criminal offences by the CFMEU or its officers against numerous provisions of numerous statutes including the *Criminal Code* (Cth), the *Crimes Act* 1900 (NSW), the *Crimes Act* 1958 (Vic), the *Criminal Code* 1899 (Qld), the *Criminal Law Consolidation Act* 1935 (SA), the *Corporations Act* 2001 (Cth), the *Charitable Fundraising Act* 1991 (NSW) and the *Competition Policy Reform (Victoria) Act* 1995 (Vic).

9. The conduct identified in the Commission is not an isolated occurrence. As the list in the previous paragraph reveals, it involves potential criminal offences against numerous laws. It involves senior officials of different branches across Australia.

10. Nor is the conduct revealed in the Commission's hearing unrepresentative. Appendix A to this Chapter is a table prepared by Commission staff providing details of 147 successful proceedings taken against building industry participants for breaches of industrial laws and contempt in the period from 2000–2015. In part, it is based

on a regularly updated schedule of cases prepared by the Director of the Fair Work Building Industry Inspectorate that is commonly provided to the Federal Court for the purposes of determining the appropriate penalty to impose in relation to contraventions of industrial law by building industry participants.[15] It is also based on a similar schedule attached to submissions to the Commission received from Master Builders Australia.[16]

11. In an attempt to be comprehensive, Commission staff have supplemented those schedules with other publicly available decisions. Of course, it is not possible to assert that Appendix A captures every relevant decision.

12. However, it does paint a picture of repeated contraventions by the CFMEU and its officials. Of the 147 cases in the list, 109 involve findings of breaches of the law or court orders by the CFMEU or its officials. It points to both repeated unlawful conduct in the building and construction industry, and by the CFMEU in particular.

13. Numerous judges have commented on the repeated contraventions of the law by the CFMEU and its disregard for the law.

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[15] See, e.g., *Director of the Fair Work Building Inspectorate v Stephenson* (2014) 146 ALD 75 at [76] per White J; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at [104] per Tracey J; *Director of the Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672; *Director of the Fair Work Building Inspectorate v Bragdon (No 2)* [2015] FCA 998 at [20] per Flick J.

[16] Master Builders Australia, Submission in response to Issues Paper 2: Duties of Union Officials, Attachment A, 11/7/2014.

14. The concept of the rule of law has been described as an anathema to the CFMEU.[17] One judge has made the following observations about the union:[18]

> There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts.

15. Another has observed:[19]

> The Director provided a schedule of the occasions on which the CFMEU has been dealt with by courts for non-contraventions of industrial legislation. It is fair to describe the CFMEU record as dismal.
>
> Since 1999, the CFMEU has had penalties imposed on it by a court on numerous occasions. Many of the court decisions involved multiple contraventions. … The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry.

16. Yet another has stated:[20]

> The pattern of contravention which emerges from material such as this has been the subject of comment by the court on a number of occasions. The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised.

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[17] *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at [103] per Tracey J.

[18] *Director, Fair Work Building Industry Inspectorate v Myles* [2014] FCCA 1429 at [45] per Burnett J.

[19] *Director of the Fair Work Building Industry Inspectorate v Stephenson* (2014) 146 ALD 75 at [76]-[77] per White J.

[20] *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1173 at [29] per Jessup J.

17. There are many other statements of judges recording the CFMEU's dismal record of compliance with industrial laws.[21]

18. In 2014, the Productivity Commission recorded as summary of penalty proceedings brought by the relevant building industry regulators since 2005, disclosing 169 proceedings, 131 of which were brought against unions, and of those 108 were brought against the CFMEU.[22]

19. Apart from non-compliance with industrial laws, there have been numerous successful proceedings against the CFMEU or its officials for breaches of court orders or contempt of court.[23] Moreover, some

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[21] *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2008] FCA 466 at [13]-[14] per Gyles J and the cases referred to therein; *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61 (FCA) at [44] per Tracey J; *Williams v Construction, Forestry, Mining and Energy Union and Maters (No 2)* (2009) 182 IR 327 (FCA) at [29] per Jessup J; *Draffin v Construction, Forestry, Mining and Energy Union & Ors* (2009) 189 IR 145 (FCA) at [92] per Goldberg, Jacobson and Tracey JJ; *Cozadinos v Construction, Forestry, Mining and Energy Union & Ors* [2011] FMCA 284 at [18] per Reithmuller FM; *Hogan v Jarvis* [2012] FMCA 189 at [20] per Burnett FM; *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846 at [35] per Collier J; *Director of the Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014 at [46] per Gordon J; *Cozadinos v Construction, Forestry, Mining and Energy Union* [2013] FCA 1243 at [43] per Tracey J; *Director of the Fair Work Building Industry Inspectorate v McDonald* [2013] FCA 1431 at [73] per Barker J; *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2)* (2014) 241 IR 288 at [201] per Cavanough J; *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 353 at [96]-[97] per Tracey J; *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 226 at [58]-[59] per Tracey J; *Director, Fair Work Building Industry Inspectorate v Cradden* [2015] FCA 614 at [22], [27] per Logan J.

[22] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 530.

[23] See for example: *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 226; *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2015] FCA 453 and *Director of the Fair Work Building Industry Inspectorate v Cartledge (No 2)* [2015] FCA 851; *Grocon Constructors (Victoria) Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* (2014) 241 IR 288; *Brookfield Multiplex FSH Contractor Pty Ltd v McDonald* [2013] FCA 1380; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry,*

senior officials of the union apparently see no difficulty with breaching court orders. According to press reports, this is the case with John Setka, the State Secretary Victorian Branch of the Construction and General Division of the CFMEU.[24]

20. In public hearings in 2014, Michael Ravbar, State Secretary of the Queensland and Northern Territory Branch of the Construction and General Division of the CFMEU, was shown video footage of industrial disruptions involving the CFMEU on a Hindmarsh site in Brisbane. He gave the following evidence:[25]

> Q. You have no issue, do you, as the Divisional Branch Secretary, with officials of the CFMEU engaging in activities in the kind which I saw on that footage, despite orders having been made injuncting that sort of activity?
>
> A. At the end of the day, I don't have a problem with that, no. If the decision had been made of the workforce not to return to work, if they wanted to send a protest, if they wanted to send a message back to the company that they're not happy, I don't think that – I think that people have a right, whether it's the official or the workers that he is with, to send a message back to the company. These disputes are very robust in the construction industry and there is always a little bit of emotion and passion in it, but you've got to look at the circumstances of how this all came about. It was certainly set up by the company.

Mining and Energy Union [2012] FCA 966; *Alfred v Construction, Forestry, Mining and Energy Union (No 2)* [2011] FCA 557; *Bovis Lend Lease Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2009] FCA 650; and *BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2001] FCA 336.

[24] Matt Johnston, *CFMEU pledges to continue militant operation*, The Australian (online), 25/5/13, http://www.theaustralian.com.au/news/cfmeu-pledges-to-continue-militant-operation/story-e6frg6n6-1226650517166, accessed 4/12/15.

[25] Michael Ravbar, 6/8/14, T: 347.25-39. Incidentally, the last sentence of the answer was untrue.

21. These comments are entirely antithetical to the rule of law. As Merkel J once observed:[26]

> The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes … it also requires that parties comply with the orders made by the courts in determining those disputes.

22. The conduct of the CFMEU officials considered by the Commission echoes the findings of previous Royal Commissions. Among the findings in the Final Report of the Cole Royal Commission was the following:[27]

> Underlying much of the conduct of unions, and in particular the CFMEU, is a disregard or contempt for the law and its institutions, particularly where the policy of the law is to foster individualism, freedom of choice or genuine enterprise bargaining. Overwhelmingly, industrial objectives are pursued through industrial conduct, rather than reliance on negotiation or the law and legal institutions.

23. There is a longstanding malignancy or disease within the CFMEU. One symptom is regular disregard for industrial laws by CFMEU officials. Another symptom of the disease is that CFMEU officials habitually lie rather than 'betraying' the union. Another symptom of the disease is that CFMEU officials habitually show contempt for the rule of law.

24. What can be done to cut out the malignancy and cure the disease?

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[26] *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2000] FCA 629 at [79].

[27] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1, p 11, para 22.

Deregistration of the CFMEU

25. One way of combatting the disease would be to deregister the CFMEU.

26. There are two ways in which the CFMEU could be deregistered: (1) by using the procedure in s 28 of the FW(RO) Act or (2) by special legislation.

27. In relation to the first possibility, s 28 permits an organisation or person interested, or the Minister for Employment, to apply to the Federal Court to cancel the registration of an organisation. There are a number of grounds upon which an application can be made. They include the following:

    (a) the organisation's conduct has prevented or hindered the achievement of Parliament's intention in enacting the FW(RO) Act or of an object of the FW(RO) Act or the *Fair Work Act* 2009 (Cth) (**FW Act**);[28]

    (b) the organisation, or a substantial number of the members of the organisation or of a section or class of members of the organisation, has engaged in industrial action (other than protected industrial action) that has prevented, hindered or interfered with the activities of a 'federal system employer';[29] or

[28] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 28(1)(a).

[29] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 28(1)(b).

(c) the organisation or a substantial number of the members of the organisation or of a section or class of members of the organisation, has or have failed to comply with court orders made under the FW Act.[30]

28. Cancellation of registration is not automatic once a ground is made out. The Federal Court has a fairly wide discretion.[31] But it cannot cancel an organisation's registration if it considers that it would be unjust to do so having regard to the degree of gravity of the matters raised and the action which has been taken against the organisation in relation to those matters.

29. Deregistration under the FW(RO) Act would have a number of consequences, including the following:

(a) the CFMEU would cease to be a body corporate, although it would not cease to be an unincorporated association;[32]

(b) the CFMEU and its members would not be entitled to the benefit of any modern award, order of the Fair Work Commission or enterprise agreement that bound the CFMEU or its members;[33]

[30] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 28(1)(d).

[31] See *Fair Work (Registered Organisations) Act* 2009 (Cth), ss 28(3), 28(4), 29.

[32] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 32(a).

[33] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 32(c).

(c) the CFMEU would no longer be a default bargaining representative in relation to the negotiation of enterprise agreements;[34] and

(d) right of entry permits held by CFMEU officers would automatically expire.[35]

30. Deregistration under the FW(RO) Act would *not* have the consequence that the Commonwealth would acquire the CFMEU's property.[36]

31. The second possibility is for the Commonwealth Parliament to enact specific legislation cancelling the registration of the CFMEU. There is precedent for such action. In 1986, the Commonwealth Parliament enacted the *Builders Labourers' Federation (Cancellation of Registration) Act* 1986 (Cth) and the *Builders Labourers' Federation (Cancellation of Registration – Consequential Provisions) Act* 1986 (Cth). Those enactments had the effect of cancelling the registration of the Australian Building Construction Employees' and Builders Labourers' Federation, and providing for the consequences of cancellation. The constitutional validity of the legislation was upheld by the High Court.[37]

32. Both the Gyles Royal Commission and the Cole Royal Commission addressed the question whether the CFMEU or its predecessors should

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[34] *Fair Work Act* 2009 (Cth), s 176.

[35] *Fair Work Act* 2009 (Cth), s 516.

[36] *Fair Work (Registered Organisations) Act* 2009 (Cth), s 32(g). Cf Vol 3, ch 7.5, paras 73-75.

[37] *Australian Building Construction Employees' & Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88.

be deregistered. Commissioner Gyles recommended that the Building Workers Industrial Union (New South Wales Branch) be deregistered,[38] but that recommendation was not adopted. Commissioner Cole did not recommend cancellation of the CFMEU's registration.[39]

33. For the reasons that follow, no recommendation is made to cancel the registration of the CFMEU.

34. *First*, in the main, it is the conduct of the officers of the CFMEU, not its members, that is unlawful. It must be emphasised that a registered organisation, just like a company or any other corporate body, can only act by its human agents. Cancelling the registration of the whole union may have a disproportionate effect on union members who have not been involved in illegal activity.

35. *Secondly*, deregistration under the FW(RO) Act is a costly and lengthy process.

36. Further, there is a real possibility that the CFMEU and Maritime Union of Australia (**MUA**) will seek to amalgamate in the near future. Amalgamation would forestall cancellation of registration under the FW(RO) Act because the effect of amalgamation is that the CFMEU would cease to exist as a registered organisation. As a result, it is likely that the deregistration mechanism under the FW(RO) Act would prove ineffective.

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[38] Royal Commission into Productivity in the Building Industry in New South Wales (1992), *Final Report*, Vol 7, p xii.

[39] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 11, pp 95-96.

37. Of course, if amalgamation did occur, special legislation could be enacted to deal with the transfer of members and assets and seek, in some way, to prevent the existing CFMEU culture being replicated in the new organisation. However, such legislation would not, in terms, involve the cancellation of the CFMEU's registration because, as already noted, it would have ceased to exist. Rather, it would inevitably need to deal with the former officers of the CFMEU who had transferred to the new organisation. And even if the CFMEU did not amalgamate with the MUA, deregistration would not prevent its current officials organising a new and equally dangerous union, just as the CFMEU rose up out of the ashes of the BLF.

38. All of these matters point to the conclusion that any targeted action to combat the culture of the CFMEU should focus on the officials of the union.

Legislative disqualification of officers

39. Chapter 3 of this Volume examines and recommends legislative reforms to permit the registered organisations regulator to apply to the Federal Court for an order disqualifying persons from holding office in a registered organisation or branch. That recommendation, if accepted, would apply generally to all officers of registered organisations and branches.

40. However, to deal with the particular cultural problems within the CFMEU, Commonwealth and State Parliaments could enact legislation prohibiting a class of CFMEU officials determined by the Parliament

from holding any office in any registered organisation or branch for a specified period of time.

41. Such a law would recognise that an organisation can only act by its officers and that the culture within an organisation is created in large part by its officers. It would:

(a) protect the members of the CFMEU and the public more generally by disqualifying persons whom the Parliament determined were not fit and proper persons to be running organisations that have the range of statutory privileges conferred upon registered organisations; and

(b) in particular, seek to protect the members of the CFMEU and the public from the consequences of the culture of disregard for the law within the CFMEU by focusing on those in control of the CFMEU rather than on the membership of the union.

42. An argument might be made that the legislation would, if enacted, be an exercise of judicial power, and therefore constitutionally invalid. As the law presently stands, such an argument could only be available in relation to such legislation enacted by the Commonwealth Parliament.

43. However, the Privy Council rejected an argument of that kind when considering similar legislation from Ceylon.[40] In that case, legislation was enacted disqualifying persons found by a Commission of Inquiry

[40] *Kariapper v Wijesinha* [1968] AC 717.

to have engaged in bribery from holding parliamentary office. It was argued that the legislation was an exercise of judicial power, being the imposition of punishment or a bill of pains and penalties. The Privy Council rejected those arguments, emphasising the difference between punishment for criminal guilt and discipline for the purpose of protection.[41]

44. The Privy Council's reasoning has been approved in the High Court on a number of occasions.[42] More generally, the distinction between punishment and disqualification for the protection of the public is well-recognised in other areas of the law.[43]

Recommendation 60

For the purpose of seeking to combat the culture of disregard for the law within the CFMEU, consideration be given to the enactment of special legislation disqualifying those officers of the CFMEU that Parliament considers are not fit and proper persons from holding office in any registered organisation or branch for a specified period.

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[41] *Kariapper v Wijesinha* [1968] AC 717 at 732-738 per Sir Douglas Menzies (for the Board).

[42] *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 537-538 per Mason CJ; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [118] per Gummow J (Hayne J agreeing); *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at [17] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; *Duncan v New South Wales* (2015) 89 ALJR 462 at [49]-[51] per curiam.

[43] See, eg, *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 201-202 per curiam.

C – BACKGROUND TO THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION

45. Parts D and E of this Chapter concern the Australian Building and Construction Commission and consider the merits and demerits of its 'restoration'.

46. The two main issues for consideration are as follows:

(a) Is there a need for a separate industrial regulator specific to the building and construction industry? This is considered in Part D.

(b) What information gathering and investigatory powers should the industrial regulator of the building and construction industry have? This is an issue which arises irrespective of the answer to the previous question. This is considered in Part E.

47. In order to understand these key issues, it is necessary to set out some brief background.

The Cole Royal Commission

48. The Cole Royal Commission handed down its First Report on 5 August 2002. That report recommended the establishment of an interim body to 'monitor conduct, to investigate and, if appropriate, facilitate proceedings to ensure adherence [in the building and construction industry] to industrial, criminal and civil laws' pending the delivery of

the Commissioner's Final Report.[44] The Interim Building Industry Taskforce was established in 2002 on the basis of this recommendation. It was a separate unit within the Department of Employment and Workplace Relations. The Interim Building Industry Taskforce became a permanent taskforce in March 2004.

49. The Final Report of the Cole Royal Commission made findings of widespread breaches of industrial law, disregard of court and tribunal orders, inappropriate use of industrial power, many examples of lawlessness and a culture of disregard for the law within the construction industry.[45] It was recommended that an Australian Building and Construction Commission be established with powers to monitor, investigate and enforce industrial law in connection with the building and construction industry.[46]

The *Building and Construction Industry Improvement Act* 2005 (Cth)

50. To implement those recommendations, the Coalition Government introduced the *Building and Construction Industry Improvement Act* 2005 (Cth). It established a separate, industry specific regulator, the Australian Building and Construction Commission (**ABCC**). The

[44] Royal Commission into the Building and Construction Industry, *First Report*, (2002), para 12.

[45] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1, pp 5-13.

[46] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1, pp 156-157, recommendations 177-180.

regulator was given powers to monitor, investigate and enforce industrial law in connection with building and construction.[47]

51. In addition, the *Building and Construction Industry Improvement Act* 2005 (Cth) imposed substantial civil penalties for:

(a) unlawful industrial action, including bans, limitations or restrictions on the performance of building work, or failures or refusals to attend for or perform building work;[48]

(b) coercion in relation to the engagement of employees or contractors and/or the duties those employees or contractors are to perform; or to make, vary or terminate an enterprise agreement; or to nominate or pay to a specified superannuation fund;[49] and

(c) discrimination in connection with the building industry.[50]

52. Some found it controversial that the Commissioner was given compulsory examination powers enabling him or her, upon forming a belief on reasonable grounds that a person had information or a document relevant to an investigation, to compel witnesses to give evidence or provide documents.[51] Failure to comply was a criminal

[47] *Building and Construction Industry Improvement Act* 2005 (Cth), s 10.

[48] *Building and Construction Industry Improvement Act* 2005 (Cth), ss 36-38.

[49] *Building and Construction Industry Improvement Act* 2005 (Cth), ss 43-44, 46.

[50] *Building and Construction Industry Improvement Act* 2005 (Cth), s 45.

[51] *Building and Construction Industry Improvement Act* 2005 (Cth), s 52(1).

offence with a maximum penalty of six months imprisonment,[52] although a court could impose a fine instead of up to 30 penalty units in respect of an individual and 150 penalty units in respect of a body corporate.[53] It was not an excuse for a person to refuse to comply on the ground that it might incriminate that person or expose that person to a penalty.[54] However the information, evidence or document produced was not admissible except in proceedings for failure to comply with the requirement, giving false information or obstructing an investigating officer.[55]

53. The Commissioner was also empowered to appoint Australian Building and Construction Inspectors,[56] who were, together with the Commissioner, empowered to enter premises to investigate, inter alia, breaches of building laws.[57]

54. In addition, the *Building and Construction Industry Improvement Act* 2005 (Cth) empowered the Minister for Employment and Workplace Relations to issue a 'building code' setting out standards of behaviour that were to be observed in relation to building work carried out by building contractors that were constitutional corporations or involving a Commonwealth or Territory project.[58]

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[52] *Building and Construction Industry Improvement Act* 2005 (Cth), s 52(6).

[53] *Crimes Act* 1914 (Cth), s 4B.

[54] *Building and Construction Industry Improvement Act* 2005 (Cth), s 53(1).

[55] *Building and Construction Industry Improvement Act* 2005 (Cth), s 53(2).

[56] *Building and Construction Industry Improvement Act* 2005 (Cth), s 57.

[57] *Building and Construction Industry Improvement Act* 2005 (Cth), s 59.

[58] *Building and Construction Industry Improvement Act* 2005 (Cth), s 27.

Changes by the Labor Government

55. In 2008 the Labor Government commissioned the Hon Murray Wilcox QC to prepare a report on matters related to the creation of a Specialist Division for building and construction work within the Inspectorate of Fair Work Australia.[59] The report was premised on the policy position of the Australian Labor Party at the time which was to abolish the ABCC and replace it with a 'Specialist Division of Fair Work Australia'.

56. The Wilcox Report recommended that ABCC be replaced by a semi-autonomous Building and Construction Division of the Office of Fair Work Ombudsman.[60] It was also recommended that the power to require witnesses to give evidence be retained, though very substantially curtailed and subject to a five year sunset period.[61] In addition, the report recommended the repeal of the building industry specific prohibitions on unlawful industrial action, coercion and discrimination on the basis that the general prohibitions in the FW Act would apply.[62]

57. On 1 July 2009 the FW Act came into effect, replacing the *Workplace Relations Act* 1996 (Cth). The FW Act amalgamated government

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[59] M Wilcox QC, *Transition to the Fair Work Act for the Building and Construction Industry*, March 2009.

[60] M Wilcox QC, *Transition to the Fair Work Act for the Building and Construction Industry*, March 2009, p 6, recommendation 1.

[61] M Wilcox QC, *Transition to the Fair Work Act for the Building and Construction Industry*, March 2009, pp 6-7, recommendations 3-4.

[62] M Wilcox QC, *Transition to the Fair Work Act for the Building and Construction Industry*, March 2009, p 6, recommendation 2.

agencies that administered the workplace relations system into two new regulatory bodies: the Fair Work Commission and the Fair Work Ombudsman.

58. In 2012, the Labor Government introduced legislation[63] changing the name of the *Building and Construction Industry Improvement Act* 2005 (Cth) to the *Fair Work (Building Industry) Act* 2012 (Cth) (**FW(BI) Act**) and making significant amendments.

59. The amendments included abolishing the ABCC and replacing it with the Fair Work Building Industry Inspectorate (**FWBII**)[64] headed by the Director of the FWBII. The FWBII is commonly, but incorrectly, referred to as Fair Work Building & Construction or FWBC. The recommendation in the Wilcox Report that the FWBII be a semi-autonomous part of the Fair Work Ombudsman was rejected.

60. However, other recommendations in the Wilcox Report were accepted. The industry specific prohibitions on unlawful industrial action, coercion and discrimination were removed from the FW(BI) Act. The effect was to reduce dramatically the penalties available for unlawful industrial action, coercion and discrimination within the building industry. Prior to the changes, the maximum penalties available under the *Building and Construction Industry Improvement Act* 2005 (Cth) for these contraventions in relation to building industry participants were 1,000 penalty units (then $110,000) for bodies corporate and 200 penalty units (then $22,000) for individuals. Under the FW Act, the

[63] *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act* 2012 (Cth).

[64] *Fair Work (Building Industry) Act* 2012 (Cth), s 9.

maximum penalties were only 300 penalty units (then $33,000) for bodies corporate and 60 penalty units (then $6,600) for individuals.

61. Further, there was a significant curtailing of the compulsory examination powers. The penalties for non-compliance and the abrogation of the privilege against self-incrimination remained. However, under the FW(BI) Act, an examination notice cannot be issued by the Director of the FWBII. Instead, it must be issued by a designated presidential member of the Administrative Appeals Tribunal, on application by the FWBII supported by affidavit setting out in some detail the grounds of the application.[65] The examination notice must not be issued unless the Administrative Appeals Tribunal presidential member is satisfied, inter alia, that other methods of obtaining the information, documents or evidence have been attempted and are unsuccessful, or are inappropriate.[66]

62. Further, there is an 'Independent Assessor' who can 'turn off' the operation of the compulsory examination powers for particular projects.[67] Finally, there is a sunset provision by which the powers will cease to exist from 1 June 2017 onwards.[68]

[65] *Fair Work (Building Industry) Act* 2012 (Cth), s 45.

[66] *Fair Work (Building Industry) Act* 2012 (Cth), s 47(1).

[67] *Fair Work (Building Industry) Act* 2012 (Cth), ss 36B, 39.

[68] *Fair Work (Building Industry) Act* 2012 (Cth), s 46.

The proposed return to the ABCC

63. The present Federal Government introduced the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) to Parliament in November 2013. The Bill passed the House of Representatives but was rejected by the Senate on 17 August 2015.

64. The *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) was intended 'substantially [to] replicate' the *Building and Construction Industry Improvement Act* 2005 (Cth) and re-establish the ABCC with its earlier powers.[69]

65. The *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) tried to expand the coverage of the *Building and Construction Industry Improvement Act* 2005 (Cth) by expanding the definition of 'building work' to include the transport or supply of goods to be used in work covered by the definition, directly to building sites (including any resources platform) where the work is being or may be performed.[70] The expanded definition was designed to prevent indirect disruption of onshore and offshore projects by interfering with supply of materials.[71] That expanded definition was not intended to pick up the manufacture of materials.[72]

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[69] Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), p 50.

[70] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 6(e).

[71] Commonwealth, *Parliamentary Debates (Hansard)*, House of Representatives, 14 November 2013, p 265 (Hon Christopher Pyne).

[72] Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), p 6, para 12.

66. The Bill also contained provisions creating an offence of unlawful picketing[73] and restoring the higher penalties that had previously applied in relation to unlawful industrial activity by building industry participants. Other aspects of the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) will be addressed further below.

Office of the Fair Work Ombudsman and Fair Work Inspectors

67. Finally, by way of background, it is useful to briefly refer to some of the powers exercised by Fair Work Inspectors. The reason is that Fair Work Building Inspectors, who are appointed by the Director of the FWBII, have the same powers as Fair Work Inspectors, albeit limited to 'building matters', which are matters involving 'building industry participants'.[74]

68. Fair Work Inspectors are appointed by the Fair Work Ombudsman and form part of the Office of the Fair Work Ombudsman.[75] Very broadly, Fair Work Inspectors are charged with investigating possible breaches of the FW Act and 'fair work instruments' (for example, modern awards and enterprise agreements). Among their powers, Fair Work Inspectors have the power to require a person to produce records or documents.[76] An individual who fails, without reasonable excuse, to comply is subject to a maximum civil penalty of 60 penalty units

[73] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 47(2).

[74] *Fair Work (Building Industry) Act* 2012 (Cth), s 59C.

[75] *Fair Work Act* 2009 (Cth), s 700.

[76] *Fair Work Act* 2009 (Cth), s 712; see also s 709(d).

(currently $10,800), and a body corporate is subject to a maximum civil penalty of 300 penalty units (currently $54,000).[77] It is not an excuse that production of the document may tend to incriminate the person or expose the person to penalty.[78]

D – A SEPARATE, INDUSTRY SPECIFIC, REGULATOR

Introduction

69. All federal governments since 2005, of both political persuasions, have supported the existence of a separate body charged with a role of investigating and enforcing industrial laws in connection with participants in the building and construction industries. As set out in section C above, there have been significant policy disagreements about (a) what that body should be called, (b) how it should be constituted, (c) what the scope of its jurisdiction should be and, most significantly, (d) what its powers should be.

70. Given that limited degree of political consensus, it might be thought somewhat academic to consider the issue of whether there should be a separate, industry specific regulator. Submissions received from the State of New South Wales,[79] the State of Victoria,[80] Boral,[81] the Australian Industry Group,[82] the Australian Chamber of Commerce

[77] *Fair Work Act* 2009 (Cth), ss 539, 546.

[78] *Fair Work Act* 2009 (Cth), s 713(1).

[79] Submissions of the Government of Victoria, 28/10/14, pp 70-71.

[80] New South Wales Government, Policy Submission, August 2014, pp 6-8.

[81] Boral Law Reform Submissions, 2015, p 50.

[82] Australian Industry Group Law Reform Submissions, 21/8/15, pp 12-13.

and Industry,[83] the Housing Industry Association[84] and Master Builders Australia[85] were all strongly in favour of the retention of an industry specific regulator and the restoration of the ABCC.

71. The ACTU, CFMEU and AMWU did not make submissions on this issue to the Commission. However, each has put forward submissions to various inquiries, particularly in relation to the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), vigorously advocating the abolition of an industry specific regulator. Those submissions are considered below.

Submissions opposing a separate regulator

72. The argument against an industry specific regulator was put by the ACTU in its submissions to the Senate Standing Legislation Committee on Education and Employment. The ACTU takes the position that the imposition of special laws affecting workers in the construction industry is both unnecessary and discriminatory.[86] The ACTU made the point that, because the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) does not in terms

[83] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, pp 31-40.

[84] Housing Industry Association Pty Ltd Law Reform Submissions, 21/8/15, pp 8-10.

[85] Master Builders Australia Law Reform Submissions, 21/8/15, p 45.

[86] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 4, para 8.

address criminal conduct, but rather industrial activity, it cannot be justified by criminal conduct occurring within the industry.[87]

73. The ACTU's submission goes on to state:[88]

> There is no need for a specialist statutory regulator for the building and construction industry. The creation of the ABCC in 2005 was the first time in Australian history that an industry-specific industrial inspectorate had been legislated into existence by the Federal Parliament. The existence of such an inspectorate is undesirable and unnecessary. The *Fair Work Act 2009* … constitutes an adequate and appropriate framework for the regulation of industrial relations in Australia, including with respect to promoting and securing compliance with industrial laws.

74. It contended that the Fair Work Ombudsman established under the FW Act has broad investigative powers and 'has proven to be an active and well-resourced agency that has carried out its functions in an effective and impartial manner'.[89]

75. The ACTU further submitted:[90]

> The ABCC, as it existed under the former BCII Act [*Building and Construction Industry Improvement* Act 2005 (Cth)], distinguished itself by the aggressive, coercive and biased manner in which it carried out its activities. It focused overwhelmingly on the investigation and prosecution of workers and trade unions, thus failing in its primary obligation as a

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[87] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 4, para 10.

[88] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 5, para 11.

[89] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 5, para 11.

[90] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 5, para 12.

> regulator to enforce the law impartially. It did very little to address the significant and widespread issues in the building industry such as the underpayment or non-payment of wages and entitlements, occupational health and safety issues or sham contracting.

76. The ACTU also argued that there was no credible evidence that the existence of the ABCC led to improved productivity in the construction industry nor was there any evidence that its reintroduction would improve productivity.[91] Related to this point, in submissions to the Productivity Commission Public Infrastructure Inquiry, the ACTU submitted that the rate of industrial disputation does not appear to have increased since the abolition of the ABCC.[92] Whilst these submissions may be more directed towards the argument against 'restoring' the ABCC's coercive powers, they also appear to be directed towards the proposition that a dedicated regulator has not achieved results.

77. A further limb of the ACTU's opposition related to the inefficiencies of maintaining two separate regulators administering and enforcing the same legislation. It submitted to the Productivity Commission Inquiry into the Workplace Relations Framework that:[93]

> Another and perhaps more glaring issue of inefficiency and waste is the fact that there are two separate and separately funded, statutory agencies enforcing one set of industrial laws – the FWO and the FWBC. Although the FWBC is confined in its role to laws applying to 'building work' as defined, its statutory mandate is in virtually identical terms to that of the FWO.

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[91] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 5, para 13.

[92] Austrailan Council of Trade Unions, Submission to the Productivity Commission Public Infrastructure Inquiry, p 22.

[93] Australian Council of Trade Unions, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework, p 348.

78. The ACTU also contended that:[94]

> the FWBC has made a policy decision not to perform that role [securing 'the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work']... Instead, in relation to the enforcement of employee entitlements under industrial instruments, the FWBC has outsourced this responsibility to the FWO to perform and has done that on the basis that the FWO is better equipped to carry out this work... The effect of this 'policy' decision by the FWBC not to secure and enforce employee entitlements but to abdicate that responsibility to the FWO makes the case for disbanding the FWBC and allowing the FWO to function as the sole federal labour inspectorate even more compelling.
>
> …
>
> The continued existence of the FWBC amounts to unnecessary duplication and inefficiency. There is no reason for a second agency to exist for the construction industry. Nor is there any doubt that the FWO has the capacity, powers and resources to carry out all of its function in the construction industry along with every other industry. The FWBC should be disbanded and its operation absorbed into the FWO.

79. The CFMEU submitted to the Senate Standing Legislation Committee on Education and Employment that principles of equal treatment before the law demand that there be no separate regulator for the building industry and no accompanying laws directed at the participants of that industry.[95] The CFMEU also submitted that a statistical analysis of the ABCC's investigations and prosecutions

[94] Australian Council of Trade Unions, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework, pp 348-350.

[95] CFMEU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, pp 1-2, paras 1.6-1.7.

revealed it to be biased against the conduct of unions and workers.[96] It stated:[97]

> The fact that the overwhelming majority of the ABCC's investigations concerned the alleged conduct of trade unions or union members/workers was not accidental. It was the result of a policy decision of the ABCC to direct their resources toward union-related matters.

80. The CFMEU also asserted bias on the part of the FWBII.[98] The CFMEU referred to one decision of the AIRC and one of the Federal Court apparently critical of the manner in which the ABCC undertook its investigations.[99] It characterised the reintroduction of an industry-specific inspectorate as 'the continuation of flawed policy' that 'abandoned the fundamental purpose for which labour inspectorates are established – the protection and enforcement of workers' rights in the workplace.'[100]

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[96] CFMEU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, pp 7-8, paras 4.1-4.2, 4.7-4.8.

[97] CFMEU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 7, para 4.3.

[98] CFMEU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 7, paras 4.8-4.9 and p 10, para 4.17.

[99] CFMEU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 8, paras 4.10-4.11.

[100] CFMEU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 19, para 9.2.

81. The AMWU made submissions similar to those of the CFMEU.[101]

Consideration

82. The main arguments against an industry specific regulator seem to be these. *First*, there is no need for an industry specific regulator. *Secondly*, there are inefficiencies in having an industry specific regulator. *Thirdly*, the ABCC was, and the FWBII is, biased against unions and union officials. *Fourthly*, it is discriminatory to have an industry specific regulator. Each of these arguments is addressed below.

Need

83. One consideration which supports the need for an industry specific regulator is the high level of unlawful conduct in the industry. This is demonstrated by Appendix A to this Chapter. The sustained and entrenched disregard for both industrial and criminal laws shown by the country's largest construction union further supports the need. Given the high level of unlawful activity within the building and construction sector, it is desirable to have a regulator tasked solely with enforcing the law within that sector.

84. The suggestion that the need for specific industrial regulation cannot be justified by criminal conduct occurring within the industry is misplaced in a number of respects. It ignores the fact that a lot of the

[101] AMWU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), November 2013, p 7, paras 29-35.

criminal conduct for which unions and union officials are responsible arises in the context of breaches of industrial laws (either because it occurs in the course of contravening industrial laws, or because it constitutes a criminal contempt of orders of a court restraining contraventions of industrial laws) and out of a culture of defiance of all laws. It also ignores the ability of a dedicated industrial regulator to assist police, through referrals and information sharing, in combatting criminal activity within the industry.

85. Another matter that is often advanced for the restoration of the ABCC is that it led to productivity improvements. If that could be established, that would be a significant matter supporting the existence of an industry specific regulator.

86. Various economic reports by Independent Economics, previously Econtech, have been advanced in support of the proposition that the introduction of the Building Industry Taskforce and the ABCC led to increased aggregate productivity in the construction industry. However, a 2007 version of those reports was heavily criticised in the Wilcox Report[102] and later reports have been criticised by others, including the ACTU.[103]

87. The various claims and counter claims were considered by the Productivity Commission Public Infrastructure inquiry report which is

[102] M Wilcox QC, *Transition to the Fair Work Act for the Building and Construction Industry*, March 2009, p 46.

[103] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, pp 5-14.

the most comprehensive analysis available to the Commission on this topic at the time of writing.[104]

88. One measure of productivity considered by the Productivity Commission was Australian Bureau of Statistics data on the number of working days lost due to industrial action per 1,000 workers.[105]

89. Relevantly for present purposes, the Productivity Commission concluded, having regard to the days lost measure for the construction industry over time that 'a direct connection of lower industrial disputes to the operations of the ABCC appears highly plausible'[106] and 'on balance, it is likely that the ABCC reduced industrial disputes'.[107] The report also noted that days lost 'nearly doubled after the establishment of [FWBII], although again one-off events may have contributed to this'.[108]

90. The report also noted that compared with all industries generally, there was a considerably higher number of days lost due to industrial disputation within the construction industry.[109] Those figures are also confirmed by the Australian Bureau of Statistics data presented in the

[104] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, pp 498-551 and appendix 1.

[105] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, pp 535-541.

[106] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 537.

[107] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 538.

[108] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 538.

[109] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, pp 536-537.

Productivity Commission's draft report concerning the Workplace Relations Framework, which shows that from 2001–2013, the construction industry had the highest average number of days lost to industrial action of any industry, and from 2010–2014 had the second highest number, being second to coal mining.[110] However, the Productivity Commission did note in its Public Infrastructure report that the number of industrial disputes in the construction industry has substantially declined since the very high rates of the 1970s and 1990s,[111] and further that on the basis of the data from the Australian Bureau of Statistics, 'set against the size of the construction industry, the apparent economic impacts of industrial disputes are very low'.[112]

91. However, the report also noted that the days lost measure is unlikely to capture the full costs to businesses from industrial activity for a variety of reasons including:[113]

(a) the data from the Australian Bureau of Statistics does not include industrial actions such as work-to-rule, go-slows, partial work bans or secondary boycotts (nor does it distinguish between protected and unprotected industrial action);

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[110] Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report*, August 2015, pp 661 and 665.

[111] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 535.

[112] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 536.

[113] See Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, pp 538-544; Productivity Commission Inquiry into the Workplace Relations Framework, *Draft Report*, August 2015, pp 666-670.

(b) the data only includes a dispute if it amounts to 10 or more working days lost, the result being that some brief work stoppages among large workforces, or longer stoppages by a small number of employees (not causing a stoppage of all work on a project) might not be counted in the data;

(c) the cost of industrial action is not necessarily proportionate to the working days lost, particularly on a construction site where a short delay in relation to a time critical step will have a substantial productivity effect on the whole site;

(d) threats of action and aborted action are not reflected in the statistics yet they may have a substantial productivity cost; and

(e) much of the construction industry, particularly dwelling construction, is not affected by industrial action.

92. In terms of the claims concerning economic modelling of the productivity gains, the Productivity Commission's conclusions were as follows:[114]

> [N]otwithstanding the likelihood that the [Building Industry Taskforce] and the ABCC had net positive productivity and cost impacts, the degree to which their impacts did, or even reasonably could, show up as large improvements in aggregate construction industry productivity is another matter. …
>
> The Commission's view is that given the case studies, industry surveys and other micro evidence, there is no doubt that local productivity has

[114] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 543.

> been adversely affected by union (and associated employer) conduct on some building sites, and that the [Building Industry Taskforce]/ABCC is likely to have improved outcomes. However, when scrutinised meticulously, the quantitative results provided by [Independent Economics] and others do not provide credible evidence that the [Building Industry Taskforce]/ABCC regime created a resurgence in *aggregate* construction productivity or that the removal of the ABCC has had material aggregate effects. Indeed, the available date suggests that the regime did not have a large aggregate impact.
>
> This is neither surprising, nor inimical to the need for further reform. By its nature, it is hard to isolate numerically the effects of workplace arrangements, including industrial relations, from all the other factors shaping workplace productivity, especially given small and inadequate datasets and statistical noise.

93. The report went on to explain how a 5% productivity improvement in the non-dwelling building sector – what was described as 'an extremely positive outcome' – would be nearly indiscernible in the *aggregate* productivity numbers.[115]

94. The overall findings of the report in relation to productivity were summarised in this way:[116]

> [T]he more stringent IR regime commencing with the establishment of the Building Industry Taskforce … is likely to have increased productivity for parts of the industry, but these effects cannot be robustly identified for the entire industry.

95. These findings, particularly those in relation to the effect of the ABCC on industrial disputes, support the continued existence of a separate industry regulator on productivity grounds. So, too, do the case studies and survey results considered in the Wilcox Report:

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[115] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 544.

[116] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 495.

(a) Comparisons put forward by Grocon Pty Ltd and Woodside Energy Limited, both of which compared major projects undertaken before the commencement of the *Building and Construction Industry Improvement Act* 2005 (Cth) and after, showed a marked reduction in lost time due to industrial disputation.[117]

(b) Survey results obtained by an employer body indicated that the perceptions of a significant number of industry participants were that there had been improvements in industrial harmony and productivity since the commencement of the *Building and Construction Industry Improvement Act* 2005 (Cth), that this was in part attributable to the presence of an industry watchdog, and that it was important that there be an industry monitor to ensure that workers and employers behave suitably,[118] which accorded with the views expressed by those with whom Mr Wilcox had consulted anecdotally.[119]

96. Moreover, the logic of events indicates that the conduct of unions in imposing blockades and work stoppages has a negative influence on

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[117] Grocon compared the QV Project in central Melbourne over 1999-2002 (86/1156 working days lost to industrial disputation) and the AXA project over 2005-2007 (1/556 working days lost to industrial disputation), and Woodside compared the LNG Train 4 Project over 2001-2004 (254,460 man hours lost due to industrial action, 17 stoppages of 2 days or more, 10 AIRC applications) and the LNG Train 5 project over 2005-2008 (27,424 man hours lost due to industrial action, 3 stoppages of 2 days or more, 4 AIRC applications): M Wilcox QC, *Transition to the Fair Work Act for the Building and Construction Industry*, March 2009, pp 48-49, para 5.62.

[118] M Wilcox QC, *Transition to the Fair Work Act for the Building and Construction Industry*, March 2009, pp 49-54.

[119] M Wilcox QC, *Transition to the Fair Work Act for the Building and Construction Industry*, March 2009, p 54.

productivity. When a union official causes employees to stop work, or blocks supply of goods or delivery of services to a construction site, work on the site is not done in accordance with the project works schedule. The Commission heard evidence of the means by which delay and disruption on building sites can cost the project a lot of money, for example, disruption of a simple concrete pour on a relatively small project can cost in the vicinity of $10,000-$15,000.[120] The costs associated with acceleration of works to overcome delays may also be high.[121] Once such occasions (should they occur over a period of a single day or several days) are multiplied in accordance with the course of conduct that the unions have adopted, the impact on productivity for individual projects, and the building and construction industry, is obvious. Moreover, delays are likely to result in damage to the commercial reputation of the contractor, with an impact on future work opportunities. In that context, the pressure on the contractor to agree to terms and conditions in enterprise agreements that may not be economically efficient is high.[122] Indeed, if industrial disruption had no effect on the productivity of a building project and therefore its bottom line, there would be little point in the unions engaging in it.

97. Having regard to all of the available material, the argument that there is no need for an industry specific regulator cannot be sustained.

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[120] See Vol 3, ch 6.3, para 152.

[121] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 539.

[122] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 538.

Efficiency

98. The ACTU's contention that the existence of an industry specific regulator leads to inefficiencies is also unsustainable.

99. There is no suggestion that the Fair Work Ombudsman exercises its functions concurrently with the FWBII.

100. Further, a separate industry specific regulator is likely to obtain substantial expertise and familiarity with the industry. An appropriate, though not perfect, analogue is the separation of the police force into squads addressing different areas of criminal conduct. Specialist expertise is likely to encourage efficiency.

101. Moreover, having a building and construction industry regulator that is separate from the Office of the Fair Work Ombudsman ensures financial and operational independence in relation to the building and construction industry regulator's investigation and enforcement objectives. It also promotes transparency and accountability of public funds if there is a separate body devoted to a particular sector.

102. Finally, a well-resourced separate regulator can assist in efficient dispute resolution and enforcement outcomes. The evidence before the Wilcox inquiry was to the effect that during the time of the ABCC,

inspectors could attend sites within an hour of notification of a dispute, and the dispute would be resolved soon thereafter.[123]

Bias

103. The third issue that has been raised is that the ABCC was, and the FWBII is, biased in its enforcement of industrial laws against unions.

104. The material said to support this contention consists of:[124]

(a) statements by members of the Australian Industrial Relations Commission and judges which are said to be heavily critical of the way the ABCC conducted proceedings; and

(b) statistics showing that more proceedings were commenced by the ABCC against unions than against employers.

105. The first category of material is very slight. One observation relied upon was made in an *ex tempore*, and unpublished, decision.[125] In the two other cases relied upon, the ABCC was successful or partially

[123] Productivity Commission *Inquiry Report: Public Infrastructure*, No 71, 27 May 2014, Vol 2, p 550; M Wilcox QC, *Transition to the Fair Work Act for the Building and Construction Industry*, March 2009, p 14, para 3.24.

[124] CFMEU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, pp 7-8; AMWU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), November 2013, paras 29-35.

[125] *Lovewell v O'Carroll* (Spender ACJ, QUD 427/2007, transcript, 8 October 2008).

successful.[126] None of the statements comes even close to establishing the existence of an anti-union bias on the part of the ABCC.

106. The second category of material is also unpersuasive. The fact that the ABCC commenced more proceedings against unions than employers does not establish that the ABCC was in fact biased. A consideration of the published annual reports of the ABCC and the FWBII discloses a high level of success of proceedings brought by both regulators. That is suggestive of proceedings being brought with a proper basis.

107. In any event, concerns about the conduct and independence of the building industry regulator can be addressed by independent oversight. The Commonwealth Ombudsman has an express oversight role in relation to the investigative powers of the FWBII. It was proposed that the Commonwealth Ombudsman have a role in overseeing the exercise of the ABCC's powers in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth). If there is a concern about the independence of the regulator in other respects, the oversight role of the Ombudsman could be expanded. There is no material presently available that would suggest that this is necessary.

Discrimination

108. The final issue is an argument that having a separate regulator for the building and construction industry is discriminatory. The short answer to this argument is that the essence of discrimination lies not only in 'the unequal treatment of equals', but also 'in the equal treatment of

[126] *Re Martino* [2007] AIRC 717; *Duffy v Construction, Forestry, Mining and Energy Union* [2008] FCA 1804.

those who are not equals' where the different treatment or unequal outcome is not the product of a relevant distinction.[127] Specialised treatment of a particular industry is not a novel concept: different areas of the financial services industry, for example, are subject to specialised laws and the supervision of a specialised regulator. Many professions are, likewise, subject to specialised laws that govern the manner in which their work is undertaken. It is not necessary to demonstrate in detail the public interest in that state of affairs. In the case of the building and construction industry, the justifications for special treatment have already been advanced.

Conclusions

109. For the reasons above, it is recommended that there continue to be a separate industry-specific regulator for the building and construction industry. The reasons advanced also support its retention as an independent regulator, and not simply as part of the Office of the Fair Work Ombudsman.

110. Apart from the large question about the regulator's powers which is discussed in the following section, there are two issues that should briefly be touched upon.

111. The first issue is the name of the regulator. This is largely a symbolic issue. The current situation where the FWBII is commonly but incorrectly referred to as Fair Work Building & Construction is somewhat confusing, and wrongly suggests to the public and the

[127] See, eg, *Austin v Commonwealth* (2003) 215 CLR 185 at [118].

industry that the regulator is connected with the Fair Work Commission. For the purposes of this Report, the regulator will simply be referred to as the 'building and construction industry regulator'.

112. The second issue is the regulator's jurisdictional scope. That turns largely on the definition of 'building work' in the FW (BI) Act.[128] Currently, that definition excludes domestic or home building, but otherwise covers the whole of civil and commercial construction, including the construction of infrastructure. As noted above, the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) proposed to expand that definition to include the transporting or supplying of goods directly to building sites. Having regard to the circumstances that affected Boral, this seems a sensible extension. It would ensure that the regulator can deal with attempts to disrupt the supply of materials to a building project which would have the effect of disrupting work on the site. The legislation should explicitly state that 'building work' does not include the manufacturing of building materials, other than on-site.

Recommendation 61

There should continue to be a building and construction industry regulator, separate from the Office of the Fair Work Ombudsman, with the role of investigating and enforcing the *Fair Work Act* 2009 (Cth) and other relevant industrial laws in connection with building industry participants.

[128] See *Fair Work (Building Industry) Act* 2012 (Cth), s 5.

E – COMPULSORY INVESTIGATORY AND INFORMATION GATHERING POWERS

Introduction

113. The second of the key issues is what investigatory and information gathering powers should be capable of being exercised by the building and construction industry regulator.

114. The powers proposed for the ABCC under the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) amounted to an entitlement to require the production of documents or to require a person to answer questions on oath. The differences between the existing powers of the Director of the FWBII and the powers proposed under the *Building and Construction Industry (Improving Productivity) Bill* 2013 are summarised in paragraphs 55-56 above.

115. The questions that arise are whether the proposed powers are necessary, whether they are excessive, and whether there are adequate safeguards against misuse.

116. Concerns expressed include the abrogation of the privilege against self-incrimination in respect of examinations, the absence of judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) of the decision to issue an examination notice, and the application of coercive powers in respect of what are almost entirely civil contraventions.

Compulsory examination powers of other regulators

117. In order to place the various submissions identified below in some context, it is convenient to set out some analogous provisions empowering other regulators to exercise compulsory information-gathering powers.

Australian Securities and Investments Commission

118. Sections 19 and 30 of the *Australian Securities and Investments Act* 2001 (Cth) provide as follows:

> **19 Notice requiring appearance for examination**
>
> (1) This section applies where ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate, under Division 1.
>
> (2) ASIC may, by written notice in the prescribed form given to the person, require the person:
>
> (a) to give to ASIC all reasonable assistance in connection with the investigation; and
>
> (b) to appear before a specified member or staff member for examination on oath and to answer questions.
>
> **30 Notice to produce books about affairs of body corporate or registered scheme**
>
> (1) ASIC may give to:
>
> (a) a body corporate that is not an exempt public authority; or
>
> (b) an eligible person in relation to such a body corporate;

> a written notice requiring the production to a specified member or staff member, at a specified place and time, of specified books relating to affairs of the body.

119. Failure to comply with requirements under the above provisions is an offence carrying penalties of 100 penalty units ($18,000) or imprisonment for two years, or both.[129]

120. The power to issue a notice under s 19 of the *Australian Securities and Investments Act* 2001 (Cth), which may require the production of documents, may only be exercised where the Australian Securities and Investments Commissions (**ASIC**) has reason to suspect that there may have been a contravention, and that the target of the notice can give information relevant to the investigation of that suspected contravention.[130] There is an entitlement to legal representation at an examination,[131] but an ASIC examiner is empowered to exclude legal representatives from the examination in some circumstances.[132] The privilege against self-incrimination is abrogated to the extent of the requirement to produce a record or give evidence, save that the person may before giving an answer or signing a record claim the privilege, with the consequence that the answer is not admissible in evidence against the person in criminal proceedings, or proceedings for a penalty, other than a proceeding in respect of falsity of the statement or record.[133]

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[129] *Australian Securities and Investments Act* 2001 (Cth), s 63.

[130] *Australian Securities and Investments Act* 2001 (Cth), s 13.

[131] *Australian Securities and Investments Act* 2001 (Cth), s 23.

[132] *Australian Securities and Investments Act* 2001 (Cth), s 22; *Collard v Australian Securities and Investments Commission (No 3)* (2008) 252 ALR 353 at [39].

[133] *Australian Securities and Investments Act* 2001 (Cth), s 68.

121. There is no express provision entitling a person, other than a lawyer,[134] to refuse to answer questions on the basis of legal professional privilege, but consistently with well-established legal principles it has been held that a person may refuse to answer a question on the basis of legal professional privilege.[135] There is no express provision entitling the recipient of a notice to have it set aside.

Australian Competition and Consumer Commission

122. Section 155 of the *Competition and Consumer Act* 2010 (Cth) relevantly provides:

> **Power to obtain information, documents and evidence**
>
> (1) Subject to subsection (2A), if the Commission, the Chairperson or a Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act … a member of the Commission may, by notice in writing served on that person, require that person:
>
> (a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any such information;
>
> (b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or
>
> (c) to appear before the Commission, … at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

[134] *Australian Securities and Investments Act* 2001 (Cth), s 69.

[135] *AWB Ltd v Australian Securities and Investments Commission* (2008) 216 FCR 577.

123. The evidence may be required to be given on oath.[136] Failure to comply with a notice is an offence punishable by a fine of 20 penalty units or 2 years imprisonment, or both.[137] The privilege against self-incrimination is abrogated to the extent of the requirement to produce a record or give evidence, save that the person may before giving an answer or signing a record claim the privilege, with the consequence that the answer is not admissible in evidence against the person in criminal proceedings, or proceedings for a penalty, other than a proceeding in respect of falsity of the statement or record.[138]

124. It is an excuse to refuse compliance with a notice on the basis of legal professional privilege or Cabinet secrecy.[139] There is no express provision allowing legal representatives to appear at examinations, but as a matter of practice representation is permitted by officers of the Australian Competition and Consumer Commission (**ACCC**).

Commissioner of Taxation

125. The Commissioner of Taxation has power to require a person to give information, to attend and give evidence or to produce any documents in the person's custody and control for the purposes of the administration or operation of a taxation law.[140] Failure to comply with the requirement is a criminal offence.[141] Penalties increase

[136] *Competition and Consumer Act* 2010 (Cth), ss 155(3), (3A).

[137] *Competition and Consumer Act* 2010 (Cth), s 155(5), (6A).

[138] *Competition and Consumer Act* 2010 (Cth), s 155(7).

[139] *Competition and Consumer Act* 2010 (Cth), ss 155(7A), (7B).

[140] *Taxation Administration Act* 1953 (Cth), Schedule 1, Division 353-10.

[141] *Taxation Administration Act* 1953 (Cth), ss 8C, 8D.

depending on the number of previous offences and range between 20 penalty units for a first offence and 50 penalty units and/or 12 months' imprisonment, where more than 2 offences have been committed.[142]

Australian Prudential Regulation Authority

126. The Australian Prudential Regulation Authority (**APRA**) has similar powers under ss 55, 62C, 81 and 115 of the *Insurance Act* 1973 (Cth). Failure to comply with these provisions is a criminal offence with maximum penalties ranging from 3 months to 6 months imprisonment.[143]

Superannuation

127. Similarly, a range of regulators have similar information gathering powers under ss 269 and 270 of the *Superannuation Industry (Supervision) Act* 1993 (Cth). Failure to comply is a criminal offence with a maximum penalty of 30 penalty units.[144]

General Manager of the Fair Work Commission

128. Finally, as already noted in Chapter 2 of this Volume, the General Manager has compulsory information gathering powers under s 335(2) of the FW(RO) Act. It is a criminal offence to fail to comply with a requirement under s 335(2), with a maximum penalty of 30 penalty

[142] *Taxation Administration Act* 1953 (Cth), s 8E.

[143] See *Insurance Act* 1973 (Cth), ss 56, 62D, 82 and 115.

[144] *Superannuation Industry (Supervision) Act* 1993 (Cth), s 285.

units in respect of an individual, and 150 penalty units in respect of a body corporate.

129. Some of the powers identified above are exercisable by the relevant regulator in the ordinary administration of the relevant legislation. Most are exercisable in relation to suspected contraventions of the legislation that attract only civil consequences.[145] For example, other than the cartel provisions, all of the anti-competitive prohibitions in Part IV of the *Competition and Consumer Act* 2010 (Cth) have only civil consequences.

Submissions

Submissions in support of compulsory investigation powers

130. The Australian Chamber of Commerce and Industry supported examination powers being vested in the ABCC that reflect the strength of those exercised under the *Building and Construction Industry Improvement Act* 2005 (Cth).[146] It supported the use of examination powers to issue notices and enforce failures to comply with notices, noting compulsory powers are widely used by many Government agencies, such as the ACCC, APRA, ASIC and the Commissioner of

[145] Although many contraventions of the corporations legislation are offences: see for example *Corporations Act* 2001 (Cth), ss 184, 1308-1311, 1021A-P.

[146] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 36.

Taxation.[147] The HIA made a similar submission,[148] as did Master Builders Australia.[149]

131. The Australian Chamber of Commerce and Industry contended that the 'continuation of information gathering powers is even more important than was the case at the time of the finalisation of the Wilcox Report'.[150] It referred to the Australian Building and Construction Commission Report on the Exercise of Compliance Powers,[151] findings of the Interim Building Industry Taskforce,[152] and the Wilcox Report, to the effect that:

(a) There is a need for compulsory powers due to the unwillingness of many industry participants to be seen to co-operate with the regulator for fear of retribution (for example, black banning of contractors that were known to have assisted the ABCC).

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[147] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 38.

[148] Housing Industry Association Pty Ltd Law Reform Submissions, 21/8/15, p 10, para 5.20.

[149] Master Builders Australia, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 30, paras 18.2-18.3.

[150] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 39.

[151] Australian Building and Construction Commission, 'Report on the Exercise of Compliance Powers by the Australian Building and Construction Commission' (1 October 2005 to 30 September 2008), p 6.

[152] *Upholding the law – One Year On: Findings of the Interim Building Industry Taskforce,* 25/3/2004, p 13.

(b) The exercise of compulsory examination powers by the ABCC led to a number of successful penalty proceedings.

(c) Recent instances of threatening and intimidatory behaviour towards Fair Work Building Inspectors by officials of the CFMEU demonstrates the need for strong compulsory investigative powers.[153]

132. The ACCC provided submissions in relation to its experiences as a regulator, citing substantial barriers to assembling probative evidence in respect of secondary boycott conduct.[154] It referred to the reluctance of a number of witnesses to secondary boycott activity to provide information to the ACCC, even in response to a notice under s 155 of the *Competition and Consumer Act* 2010 (Cth), due to fear of reprisal. It also referred to the fact that the low level of penalty for non-compliance with the notice creates an incentive for some bodies to conceal evidence sought under s 155 rather than expose themselves to much higher penalties for the contraventions that evidence might establish. The submission noted:[155]

> The difficultly [sic] in establishing a contravention, coupled with the low fines, particularly for a corporation, creates a situation where a business may have significant incentives to impede an investigation into alleged anti-competitive conduct. In some situations, the commercial damages [sic] that may be done to a business that complies with a section 155 notice will outweigh the low fines that might be imposed for non-compliance.

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[153] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.9.

[154] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 5.

[155] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), pp 6-7.

133. The ACCC advocated greater protection for whistleblowers in relation to secondary boycott conduct and the improved ability to compel compliance with information gathering powers, including appropriate sanctions for non-compliance.[156]

134. Boral submitted that its experience with the CFMEU illustrates that the existing law and enforcement procedures are inadequate to combat the misuse of union power. A key issue it faced during the CFMEU secondary boycott was the willingness of Boral witnesses to provide evidence and supporting documents in relation to the ban to Boral or the ACCC. Boral indicated that its customers voiced concerns about the consequences for their businesses if they were seen by the CFMEU to be cooperating voluntarily in Boral's proceedings, but that the customers ultimately did give evidence under compulsion to both the ACCC and this Commission.[157] Based on this experience, Boral submitted that the specialist regulator should have equivalent compulsory powers.

135. Master Builders Australia submitted that before the ABCC was in place there were a number of instances in which complaints were withdrawn due to fear of the ramifications that might occur if the complaint was pursued.[158] Master Builders Australia supported the powers intended to be conferred on the restored ABCC under the

[156] Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15), p 5.

[157] Boral Law Reform Submissions, 2015, p 51.

[158] Citing the Commonwealth of Australia Building Industry Taskforce '*Upholding the Law – Findings of the Building Industry Taskforce',* September 2005, p 11, Master Builders Australia, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, pp 30-31, para 18.3.

Building and Construction Industry (Improving Productivity) Bill 2013 (Cth), observing in particular that the penalties proposed for non-compliance are less than those for equivalent provisions under the *Australian Securities and Investments Commission Act* 2001 (Cth)[159] and that the procedure for referral of the exercise of examination powers to the Commonwealth Ombudsman was an appropriate safeguard.[160]

Submissions against compulsory investigation powers

136. The ACTU put forward strong opposition to the reintroduction of enhanced compulsory information gathering powers in its submission to the Senate Standing Legislation Committee on Education and Employment.[161] It contended that such powers have no place in the enforcement of industrial laws; that they infringe rights of privacy and property; and the right to silence, as well as statutory rights to protection of personal information.[162] The ACTU asserts that:[163]

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[159] *Australian Securities and Investments Commission Act* 2001 (Cth), s 63; Master Builders Australia, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 31, para 18.6.

[160] Master Builders Australia, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 31, para 18.8.

[161] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 23, para 76.

[162] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 23, para 77.

[163] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 24, para 78.

> The public interest favours keeping these types of powers out of the industrial arena to ensure that, insofar as the powers are directed towards workers (as they have been overwhelmingly in Australia), they do not impinge upon the exercise of industrial rights, like the right to associate, organise and take collective action.

137. The ACTU contended that the powers are similar to those available in connection with investigation of terrorist activity.[164] This contention will be examined further below.

138. Finally, the ACTU objected to the removal of 'safeguards' against the exercise of the powers currently reposed in the FWBII, including the requirement to make an application to the Administrative Appeals Tribunal for issue of an examination notice and the provision for 'switching off' the examination powers for certain projects.[165]

139. The CFMEU contends that the industrial jurisdiction does not warrant the introduction of coercive powers in the same way as other areas of the law, in that they do not raise matters of national security, fraud on the public revenue, serious corruption or criminality or public safety. Rather, the CFMEU contends that the public interest favours keeping the powers out of the industrial arena to ensure that there is no prejudice to the exercise of industrial rights. The CFMEU also asserts

[164] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 23, para 77.

[165] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 24, para 80.

that the Fair Work Ombudsman has operated effectively without such coercive powers as are proposed and that they are unnecessary.[166]

140. The CFMEU's submission also referred to statistics concerning the number of compulsory examination notices issued by the ABCC. In the period from 1 October 2005 to 30 April 2011, 204 notices were issued, of which 138 were issued to employees, 54 to management and 10 to union officials.[167] It may be noted in passing that these figures do not suggest that the ABCC targeted union officials in exercising its compulsory powers. Moreover, on these figures, more than 25% of notices were issued to employers.

141. The AMWU also asserts that coercive powers to obtain evidence should be reserved to serious criminal and terrorist activity, and in those cases a warrant would be required. The AMWU asserts that the effect of the coercive powers suggested in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) is to confer judicial powers on an investigative body.[168]

142. George Williams and Nicola McGarrity, of the Gilbert + Tobin Centre of Public Law, also put forward a submission to the Senate Standing Legislation Committee on Education and Employment in relation to

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[166] CFMEU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 15, para 7.2-7.4.

[167] CFMEU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 9, paras 4.12-4.13.

[168] AMWU, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), November 2013, p 10, para 40-42.

the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth). The submission attached a previously published article concerning the investigation powers reposed in the ABCC.[169] The submissions referred to a 'range of concerns' about the nature and scope of the powers reposed in the ABCC. The concerns expressed were, in summary:

(a) The power to obtain evidence pursuant to s 52 of the *Building and Construction Industry Improvement Act* 2005 (Cth) was too broad, limited only by the discretion of the ABCC as to what may be relevant to an investigation. This allowed the powers to be used in aid of a fishing expedition or roving inquiry.[170]

(b) The other limit to the power to require provision of evidence was the proper subject of an investigation, which was also at the discretion of the ABCC. A case was referred to in which the ABCC's decision to investigate and prosecute unions and their officials rather than the employer was criticised.[171]

(c) Sections 52(7) and 53 of the *Building and Construction Industry Improvement Act* 2005 (Cth) overrode the privilege against self-incrimination and the operation of secrecy laws

[169] Williams, G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244.

[170] Williams, G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244 at 256.

[171] *Lovewell v O'Carroll*, (unreported, QUD 427/2007, transcript, 8/10/2008) per Spender ACJ, cited in Williams, G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244 at 257-258.

and the public interest, without any identified justification.[172] The broad range of potential targets for compulsory examination may have exposed innocent witnesses to contravention of laws and obligations that might not have been adequately safeguarded by the immunities and indemnities provided for under ss 53(2) and 54 of the *Building and Construction Industry Improvement Act* 2005 (Cth).[173]

(d) The penalties for non-compliance with a notice under s 52 of the *Building and Construction Industry Improvement Act* 2005 (Cth) were unjustifiably harsh (the example used was a union official who objected to being compelled to give evidence against his colleagues on principle).[174]

(e) There were insufficient checks on the exercise of the ABCC's discretion to issue a s 52 notice under the *Building and Construction Industry Improvement Act* 2005 (Cth). The authors contend that ASIO is subject to greater oversight in the exercise of its investigatory powers,[175] and said that there

[172] Williams, G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244 at 258-259.

[173] Williams, G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244 at 261-262.

[174] Williams, G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244 at 263-264.

[175] Williams, G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244 at 265.

is no prospect for review of a decision to issue a s 52 notice other than under s 75(v) of the Constitution.[176]

(f) The powers of the ABCC were not the same as those available to the ACCC under s 155, because s 155 provides excuses for production for legal professional privilege and cabinet documents, and judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) is available in respect of the issue of a s 155 notice by the ACCC. Moreover, the scope of operation of the compulsory powers reposed in the ABCC are broader than those reposed in the ACCC.[177]

Assessment

143. The material available in relation to the degree of lawlessness in the building and construction industry and the material put forward in the submissions provide a strong case for the building industry regulator to have information gathering powers that are equal to those of other major statutory regulators.

144. A number of submissions spoke of the reluctance of industry participants to approach authorities or to be seen to be assisting them. Having regard to the conduct of the CFMEU in particular in relation to contractors they disagree with, it is not difficult to consider such a

[176] Williams, G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244 at 266.

[177] Williams, G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244 at 270-272.

reluctance to be justified. The culture of silence within many unions has already been discussed in Chapter 2.

145. The submissions of the ACCC are particularly compelling in this regard. It is a regulator with years of experience in the carriage of investigations involving compulsory examination powers. Suggestions that it, or other regulators, overreach or abuse those powers are rare. Its account of its experiences of persons willing to expose themselves to a penalty for non-compliance at the expense of reprisal, or of exposing the underlying contraventions, suggests that criminal penalties for non-compliance are required.

146. A number of points may be made in relation to the opposition to compulsory information gathering powers. It is worth noting that many of the claims made in opposition are legally exaggerated or misleading or utterly unrealistic. That immediately casts some suspicion on the bona fides of some of those opposing compulsory examination powers.

147. *First*, it has not been explained how the exercise of such powers in pursuit of a legitimate investigative purpose would prejudice the exercise of industrial rights. Many employees of banks, insurers, or other corporations might be made subject to the compulsory powers of other regulators, if their activities fall within the scope of an investigation.

148. *Secondly*, the need to address serious instances of disregard of industrial laws justifies the use of some coercive powers that necessarily infringe on rights of privacy and protections against self-

incrimination. Valuable evidence may be acquired by obtaining documents and answers in compulsory examinations. The operation of the immunity and use/derivative use immunity provisions in the proposed legislation[178] give ample protection to individuals required to comply with compulsory notices. Indeed, for reasons discussed below,[179] they give so much protection that their usefulness is undermined.

149. *Thirdly*, contrary to a number of submissions, there is no abrogation of other privileges such as legal professional privilege or public interest immunity unless expressly stated or necessarily implied in the legislation.[180] Consistently with the approach in a number of cases, there is nothing in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) that would operate to abrogate those privileges.[181] However, to avoid any doubt, it is recommended this be expressly stated.

150. *Fourthly*, concerns about the breadth of the regulator's discretion to issue notices are misplaced and betray an ignorance of the breadth of the powers exercised by ASIC, the ACCC, APRA, and the Commissioner of Taxation. In addition, any concerns are not best addressed by introducing complexities to the process of evidence

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[178] See *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) cll 102(2), (3), 103, 104.

[179] See paras 154-155.

[180] *R v Associated Northern Collieries* (1910) 11 CLR 738 at 748; *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 at 553, 560 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

[181] See, eg, *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543; *AWB Ltd v Australian Securities and Investments Commission* (2008) 216 FCR 577

gathering. An appropriate control for the exercise of compulsory examination powers is to continue oversight of the issue of notices by the Ombudsman, as comprehended by cll 64 and 65 of the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth). That is consistent with the position in relation to the powers of other regulators.

151. *Fifthly*, the complaint that decisions to exercise compulsory examination powers are not subject to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) is also misplaced. An obsessive fascination with this Act is largely the pursuit of academics. A decision to issue an examination notice by the Commissioner of the ABCC would be reviewable in the Federal Court under s 39B of the *Judiciary Act* 1903 (Cth) for 'jurisdictional error'. Applied to administrative decision-makers, that is an extremely broad concept.[182] It is very difficult to see any difference in the grounds upon which a decision by the Commissioner of the ABCC could be challenged under s 39B and under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). One difference is that if that Act applied, a person who was issued with an examination notice could ordinarily require reasons to be given about why the power was exercised.[183] Although the reasons would not have to disclose certain information,[184] those reasons could prejudice any investigation being conducted. A requirement for reasons can be used as a deliberate method of engendering delay fuelled by litigation about the adequacy of the reasons – delay during which the conduct investigated may cause

[182] See *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

[183] *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 13.

[184] *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 13A.

massive damage to business of a kind which it is very difficult to recover. Further, Parliament has taken a general policy decision to exclude all decisions under workplace legislation from the scope of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)[185] and to create specialised avenues for legal proceedings.

152. *Sixthly*, any comparison with the powers exercised by ASIO is misleading: while some of the powers exercised by officers of ASIO are analogous to those considered here,[186] many are far more invasive of private rights and require greater oversight, namely the issue of a warrant. These powers include the powers of entry, search and seizure, personal searches, computer access and the use of listening devices.[187] In respect of suspected terrorism offences, the powers are even more extreme, extending to the power to require a person to attend immediately for questioning and to detain persons for questioning up to a continuous period of 168 hours (7 days).[188] It is obviously important for there to be oversight by an issuing authority for the exercise of powers of this nature.

153. By contrast, the powers exercised by regulators in respect of primarily civil contraventions are less intrusive. Further, the compulsory examination powers conferred upon ASIC, the ACCC, APRA, the Commissioner of Taxation and the General Manager of Fair Work Commission (see paragraphs 118-129 above) do not require an issuing

[185] *Administrative Decisions (Judicial Review) Act* 1977 (Cth), Sch 1(a).

[186] See, for example, *Australian Security Intelligence Organisation Act* 1979 (Cth), s 23.

[187] See generally *Australian Security Intelligence Organisation Act* 1979 (Cth), Part III Division 2.

[188] See, for example, *Australian Security Intelligence Organisation Act* 1979 (Cth), ss 34D-34S.

authority to approve the exercise of those powers. The pre-condition of an issuing authority is usually reserved for search warrants, telecommunications intercept warrants and surveillance device warrants which are far more intrusive than being required to answer questions. There is a need for some oversight of the exercise of those powers but the need for an issuing authority is not made out.

154. One further matter that should be addressed is the scope of the use/derivative use immunity provisions in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth). As presently drafted, those provisions extend to the giving of information and answers and also production of records and documents, and the derivative use aspect of the immunity extends to information obtained as a direct or indirect consequence of giving an answer or producing a document in response to a notice.[189] It is not necessary for the person to whom a notice is issued to first claim the privilege against self-incrimination for the immunity to operate.

155. Cognate provisions in relation to the compulsory powers of ASIC and the ACCC limit the immunity conferred so that they apply only to the answers given or information provided in response to notices.[190] The immunity under these provisions does not extend to documents and there is no derivative use restriction. Those provisions are more limited

[189] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 102(2)(b).

[190] Compare *Australian Securities and Investments Commission Act* 2001 (Cth) s 68, which is limited to the provision of information and signing a record and provides that the privilege must be claimed before the immunity operates; and s 155(7) of the *Competition and Consumer Act* 2010 (Cth), which is limited to provision of information or answering a question and operates only in respect of criminal proceedings. Neither provision gives a derivative use immunity.

in scope because immunities expressed in broader terms were found to have the practical effect that the material obtained as a result of the exercise of compulsory powers was useless.[191] Balanced against that consideration is a concern that, if there is no immunity, the regulator is not encouraged to form a judgment as to whether the exercise of compulsory powers is reasonably necessary, and an attendant risk that the general law protection against self-incrimination will be unnecessarily abused.[192] In the context in which the building and construction industry regulator operates, it is appropriate that there be a use immunity limited to the individual recipient of the notice, and applicable only to answers or information given under compulsion. There is no warrant for that immunity to extend to documents in the possession of the individual which were obtained or created when the recipient of the notice was under no compulsion. Extending the use immunity to documents would unnecessarily curtail the investigative powers of the building and construction industry regulator in a manner unnecessary for the protection of the rights of the individual concerned.

[191] See Joint Statutory Committee on Corporations and Securities, '**U**se Immunity Provisions in the Corporations Law and the Australian Securities Commission Law' (1991) [3.1.5]; Sofronoff P, 'Derivative use immunity and the investigation of Corporate wrongdoing' (1994) 10 QUTLJ 122 at 129-130, 134, Australian Law Reform Commission *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Interim Report 127, 3/8/15), [12.96]-[12.97].

[192] *Re an application under the Major Crime (Investigative Powers) Act 2004* **(**2009) 198 Crim R 305, [155]–[156] per Warren CJ.

Recommendation 62

Legislation be enacted conferring the building and construction industry regulator with compulsory investigatory and information gathering powers equivalent to those possessed by other civil regulators. The powers set out in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) appear appropriate in this regard.

Recommendation 63

There should be oversight by the Commonwealth Ombudsman of the powers exercised by the building and construction regulator in the manner provided for in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth).

Recommendation 64

Consideration be given to redrafting the use/derivative use immunity provisions in clauses 102 and 104 of the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) to provide protections equivalent to those available in relation to the powers exercised by the Australian Securities and Investments Commission.

F – INDUSTRY SPECIFIC INDUSTRIAL LAWS

Issues

156. Determining that there should be a building and construction industry regulator leaves for consideration what laws that regulator should enforce. It has been suggested that a further option for combatting lawlessness in the building and construction industry is the introduction of specific provisions directed at conduct that frequently occurs on building sites (such as picketing and other unlawful industrial action) and greater penalties for contravention of other unlawful industrial activities (such as coercion) than are presently applicable under the FW Act.

157. The argument against these measures is that they discriminate against building and construction industry participants. The argument for them is that the culture of lawlessness that exists in the building and construction industry differentiates that industry from other employment areas. The existence of that culture justifies differential treatment, either by introducing specific laws concerning building action or having higher penalties. For example, picketing – which may be an actionable nuisance at common law – is considerably more prevalent in the construction industry than in other industries. It may be argued that to prohibit certain pickets in the building industry, as the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) endeavoured to do, simply reflects the fact that there are real differences between the building and construction industry and others.

158. It is convenient, for the purposes of discussion, to refer to the existing provisions under the FW Act prohibiting coercion and unlawful industrial action, as well as the provisions that were proposed in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth).

Current position

159. Under the FW(BI) Act, the Director of the FWBII has the function of commencing proceedings to enforce 'designated building laws and safety net contractual entitlements' in relation to building industry participants.[193] The designated building laws include the FW Act and the *Independent Contractors Act* 2006 (Cth).

160. The Director is also empowered to intervene in such proceedings commenced by others.[194] However, the Director is precluded from commencing or continuing proceedings where the parties to the proceedings (ordinarily, employees and employers or organisations) have settled their claims in the proceedings.[195]

161. The FW Act contains a number of civil remedy provisions prohibiting coercion. More specifically, a person must not organise or take, or threaten to take, any action against another person with intent to coerce the other person, or a third person:

[193] *Fair Work (Building Industry) Act* 2012 (Cth), s 10(d).

[194] *Fair Work (Building Industry) Act* 2012 (Cth), ss 71-72.

[195] *Fair Work (Building Industry) Act* 2012 (Cth), ss 73-73A.

(a) to exercise or not exercise, or propose to exercise or not exercise, a 'workplace right' or to exercise or propose to exercise a 'workplace right' in a particular way;[196]

(b) to 'engage in industrial activity';[197] or

(c) to employ or not employ a particular person, or to engage or not engage a particular independent contractor.[198]

162. In addition, a person must not discriminate against an employer on the basis of coverage of employees by particular industrial instruments.[199]

163. The maximum penalty for contravention of these prohibitions is 60 penalty units (currently $10,800) for a contravention by an individual and 300 penalty units (currently $54,0000) for a contravention by a body corporate.[200]

164. The FW Act also deals with industrial action. Division 2 of Part 3-3 of the FW Act (ss 408-416A) deals with 'protected industrial action'. For industrial action to be protected, a number of formal steps must be complied with. In particular, in relation to industrial action by employees organised or engaged in for the purpose of supporting claims in relation to a proposed enterprise agreement, there must a

[196] *Fair Work Act* 2009 (Cth), s 343(1). Workplace right is defined very broadly in s 341. This prohibition does not apply to 'protected industrial action': s 343(2).

[197] *Fair Work Act* 2009 (Cth), s 348. Engage in industrial activity is defined in s 347.

[198] *Fair Work Act* 2009 (Cth), s 355.

[199] *Fair Work Act* 2009 (Cth), s 354(1). This prohibition does not apply to protected industrial action: s 354(2).

[200] *Fair Work Act* 2009 (Cth), ss 539, 546(2).

ballot of employees approving the industrial action.[201] No action lies under any law in relation to industrial action that is protected industrial action unless the action has involved or is likely to involve personal injury, wilful or dangerous destruction of property or taking of property.[202]

165. Industrial action that is not protected is dealt with as follows:

(a) The effect of s 417(1) is that industrial action that is organised or engaged in during the pendency of an enterprise agreement or workplace determination is unlawful. The maximum penalty is 60 penalty units (currently $10,800) for a contravention by an individual and 300 penalty units (currently $54,000) for a contravention by a body corporate.[203] In addition, the Federal Court or Federal Circuit Court is empowered to grant an injunction to restrain the conduct on the application of persons including an employer or a person affected by the industrial action.[204]

(b) Where industrial action is otherwise not protected industrial action, the Fair Work Commission is empowered to make stop orders in respect of threatened, impending or probable industrial action or industrial action which is actually taking place on the application of a person affected by the industrial

[201] *Fair Work Act* 2009 (Cth), s 409(2).

[202] *Fair Work Act* 2009 (Cth), s 415.

[203] *Fair Work Act* 2009 (Cth), ss 539, 546(2).

[204] *Fair Work Act* 2009 (Cth), ss 417(3), s 539, item 14, column 2.

action.[205] The Fair Work Commission must, as soon as practicable, determine an application for a stop order with two days after the application is made, and if it is not able to do so, must make an interim stop order.

(c) Contravention of a stop order or an interim stop order is unlawful. The maximum penalty is 60 penalty units (currently $10,800) for a contravention by an individual and 300 penalty units (currently $54,0000) for a contravention by a body corporate.[206]

(d) If the persons subject to the stop orders do not comply with the stop order, the Federal Court or Federal Circuit Court may grant an injunction on the application of a person affected by the contravention.[207] However, exceptionally, no compensation order may be made under s 545 of the FW Act for a contravention of a stop order.[208]

Proposed industry-specific provisions

166. In summary, the industry-specific prohibitions that were proposed in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) are as follows.

[205] *Fair Work Act* 2009 (Cth) ss 418-419.

[206] *Fair Work Act* 2009 (Cth), ss 539, 546(2).

[207] *Fair Work Act* 2009 (Cth), s 421(1).

[208] *Fair Work Act* 2009 (Cth), s 421(4).

167. *First*, a civil penalty provision was proposed against organising or engaging unlawful industrial action,[209] defined to mean industrial action that is not protected industrial action.[210] Industrial action was defined in a similar way, and with similar exclusions, as in ss 19(1), (2) of the FW Act.[211] Protected industrial action was defined in the same way as in the FW Act, except that action in relation to a proposed enterprise agreement is not protected industrial action if the action is engaged in concert with, or if the organisers include, persons who are not 'protected persons'. In substance, protected persons are persons, including a union that is a bargaining representative and its officers, with an interest in the particular enterprise agreement.

168. The proposed maximum penalty for unlawful industrial action was 1,000 penalty units ($180,000) for contravention by a body corporate, and 200 penalty units ($36,000) for contravention by an individual. A court would also be able to award compensation to a person affected by the contravention.[212]

169. *Secondly*, the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) proposed a civil penalty provision against unlawful picketing.[213] The same remedies were proposed in respect of this provision as in relation to unlawful industrial action.

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[209] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 46.

[210] Defined in cll 7 and 8 respectively.

[211] One difference was that under the Bill the onus of proving that action was taken by an employee for safety reasons was on the employee.

[212] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 81.

[213] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 47.

170. The *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) also contained provisions enabling the grant of an injunction restraining unlawful industrial action and unlawful picketing.[214]

171. The principal practical differences between these provisions and the restrictions on unlawful industrial action under the FW Act are fourfold. *First*, the 'two step' process in the FW Act of first obtaining a 'stop order' is replaced with an outright prohibition on unlawful industrial action. *Secondly*, in all cases an injunction is available to restrain unlawful industrial action conduct without first obtaining a 'stop order'. *Thirdly,* the penalties for unlawful industrial action are much higher than those under the FW Act. *Fourthly*, there is a specific prohibition against unlawful picketing.

172. *Thirdly*, the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) proposed a series of civil penalty provisions against coercion and discrimination. The coercion provisions each cover conduct undertaken by a constitutionally-covered entity[215] that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a constitutionally covered entity, that consists of advising, encouraging or inciting, or action taken with intent to coerce:[216]

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[214] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 48.

[215] Defined in clause 5 to mean a corporation, the Commonwealth or a Commonwealth or Territory body, or an organisation for the purposes of the FW(RO) Act.

[216] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 51.

(a) A person to employ or engage or not employ or engage persons as building employees or contractors or to allocate duties and responsibilities to those persons;[217]

(b) A building employee or employer to nominate or pay to a particular superannuation fund;[218]

(c) A person to agree or refuse to make, vary or terminate a building enterprise agreement.[219]

173. Clause 55 of the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) proposed to prevent the taking of action against a building employer because building employees are or are proposed to be covered by a particular industrial instrument.

174. Each of the above provisions were subject to compensation orders and pecuniary penalties of up to 1,000 penalty units for a body corporate and 200 penalties units for an individual.[220]

175. *Fourthly*, the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) provided for a Building Code, defined in cl 34(1) as a code of practice, issued by the relevant Minister, that is to be complied with by persons (being corporations, persons undertaking work in a Territory or Commonwealth place, or the Commonwealth) in respect of building work. The intention of the provision is to continue

[217] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 52.
[218] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 53.
[219] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 54.
[220] *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), cl 81.

the present regime pursuant to which standards are set in relation to building industry participants who undertake Commonwealth funded building work.[221]

Submissions

Submissions supporting introduction of industry-specific laws

176. In submissions to the Commission, the Australian Industry Group,[222] Boral[223] and Master Builders Australia[224] strongly supported the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth). They asserted that (a) the current laws are not effective in preventing coercion of contractors to sign up to costly and inflexible industrial arrangements or to contract only with subcontractors that are on union agreements, and (b) the current penalties for unlawful conduct are manifestly inadequate.

177. The Australian Chamber of Commerce and Industry supported proposed increases in the penalties for contravention of industrial laws for building industry participants.[225] It submitted that the penalties

[221] Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), p 3. The present Building Code was made under *Fair Work (Building Industry) Act 2012* (Cth), s 27(1) and commenced operation on 1/2/2013. An account of the history of the Building Codes implemented by the Commonwealth and in various States and Territories is set out in the Cole Report: Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 7, ch 3, pp 51-54, 57-58.

[222] Australian Industry Group Law Reform Submissions, 21/8/15, p 12.

[223] Boral Law Reform Submissions, 2015, p 51.

[224] Master Builders Australia Law Reform Submissions, 21/8/15, p 46.

[225] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 40.

must be set at an appropriate level to act as an effective deterrent, 'taking into consideration the vast capacity of liable employee organisations to incur a monetary penalty at little overall or relative cost'.[226]

178. The Housing Industry Association also supported industry specific laws.[227] It referred to the number of cases before the Fair Work Commission and the Federal Court, and the evidence before the Commission, as demonstrating the need for such laws. It argued these laws are necessary to address the economic impact of large scale and targeted pickets on the building industry and also the general community. It contended that these laws send a message that what is happening in the building and construction industry is unacceptable.[228]

179. Master Builders Australia submitted to the Senate Standing Committee on Education and Employment that a prohibition on picketing is necessary to combat what has become a regular tactic of the CFMEU and the MUA, in particular, community pickets which are nominally unassociated with a particular union, so that orders binding the unions will not affect the picketers.[229] It added that the reverse onus provisions in s 57 of the *Building and Construction Industry*

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[226] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 41-42.

[227] Housing Industry Association Pty Ltd Law Reform Submissions, 21/8/15, p 10, para 5.22.

[228] Housing Industry Association Pty Ltd Law Reform Submissions, 21/8/15, p 10-11, paras 5.23-5.25.

[229] Master Builders Australia, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 23-28, paras 16.5, 16.8-16.23.

(Improving Productivity) Bill 2013 (Cth) would assist in controlling unlawful pickets.[230]

180. Master Builders Australia also relied on research from Independent Economics in support of its submission to the Senate Standing Committee on Education and Employment.[231] In that paper Independent Economics observed that the Cole Report found that head contractors will often accede to union demands and settle proceedings for reasons of commercial expediency. The outcome of this is that the FWBII is prevented from enforcing the law in circumstances in which the employer elects to settle proceedings. The Law Council of Australia expressed concern about ss 73 and 73A of the *Fair Work (Building Industry) Act* 2012 (Cth) upon their introduction, asserting in a media release that the provisions 'give precedence to the interests of private litigants over the application and enforcement of Australian law' and 'significantly erode the regulator's independent regulatory role' and adding that the provisions were likely to cause a significant waste of taxpayer money from discontinuance of investigations and litigation when private parties settle disputes related to unlawful conduct in the building industry.[232] The Australian Mines and Metals Association expressed similar concerns.[233]

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[230] Master Builders Australia, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 29, para 17.7.

[231] Independent Economics, Economic Analysis of Building and Construction Industry Productivity: 2013 Update, 26/8/13, attachment A to Master Builders Australia, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13.

[232] Law Council of Australia, Media Release: 'Law Council raises concerns about dilution of building and construction industry regulator's role' 8 March 2012, http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1205--

Submissions opposing industry-specific laws

181. The ACTU submitted to the Senate Standing Committee on Education and Employment that it opposes the creation of special and more stringent laws in relation to industrial action by workers in the building and construction industry.[234] It contended that the FW Act comprehensively regulates and restricts the ability of workers and unions to take industrial action, and provides employers with adequate means to restrain industrial action outside the protections regime.[235] It argued that the proposed changes in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) are 'unnecessary and unjustifiable', because there is no evidence to suggest that industrial disputation in the building industry has materially increased since the ABCC was abolished.[236] The CFMEU, relying on the Wilcox report, made a similar submission.[237]

Law%20Council%20raises%20concerns%20about%20dilution%20of%20building%20and%20construction%20industry%20regulators%20role.pdf, accessed 10/12/15.

[233] Australian Mines and Metals Association, Submission to the Senate Standing Legislation Committee on Education and Employment's inquiry into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), November 2013, p 33, paras 176-177. This possibility was also averted to in the Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14, Vol 2, p 503.

[234] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 19.

[235] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 20.

[236] See paragraph 76 above.

[237] CFMEU, Submission to the Senate Standing Legislation Committee on Education and Employment's inquiry into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 13.

182. The ACTU[238] and the CFMEU[239] both contended that there is no justification for imposing higher penalties on workers by reference to the industry in which they are employed. They disputed any special economic importance that warrants such treatment of the building and construction industry, and said that provisions in the FW Act permitting termination of protected industrial action where there is a risk of economic harm are adequate protections. The ACTU contended that the maximum penalties proposed in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) are grossly disproportionate to the public harm occasioned by unprotected industrial action.[240]

183. The ACTU (supported by the CFMEU in this regard) opposes the removal of laws preventing commencement or continuation of proceedings that have been settled as between private parties. It suggests that there is no benefit in subjecting parties to multiple proceedings or in permitting a regulator to seek penalties where the parties to the conduct do not consider that course to be necessary or desirable. It characterises the ability of the regulator to pursue

[238] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 22.

[239] CFMEU, Submission to the Senate Standing Legislation Committee on Education and Employment's inquiry into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 14.

[240] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 23.

proceedings independently of settlement as contrary to the resolution of disputes or fostering industry relationships.[241]

184. The CFMEU and AMWU both submitted that the proposed prohibition on unlawful industrial action has the potential to catch conduct that is taken in relation to legitimate occupational health and safety risks, and is contrary to the policy of ensuring safe workplaces.[242] The CFMEU submitted that the prohibition of unlawful pickets has the potential to catch conduct that is not unlawful at common law and action that is motivated by a lawful purpose, thus imposing on the rights of freedom of assembly and of speech.[243]

Conclusions

185. There is an obvious need for laws that ensure an effective deterrent against unlawful conduct. In an environment where union officials openly acknowledge that they will take industrial action to achieve the union objectives without regard to whether that action might break the laws governing protected and unprotected industrial action, there is a

[241] Australian Council of Trade Unions, Submission to the Senate Education and Economics Legislation Committee into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 25.

[242] CFMEU, Submission to the Senate Standing Legislation Committee on Education and Employment's inquiry into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 11; AMWU, Submission to the Senate Standing Legislation Committee on Education and Employment's inquiry into the *Building and Construction Industry (Improving Productivity) Bill* 2013, November 2013, p 6, paras 20-21.

[243] CFMEU, Submission to the Senate Standing Legislation Committee on Education and Employment's inquiry into the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth), 22/11/13, p 17.

need for laws that expressly address what is prohibited conduct and provide strong penalties for contravention of them.

186. There is, however, merit in uniformity of substantive industrial laws, even where there is a need for specific regulatory enforcement.

187. Subject to certain matters, the building specific industrial laws proposed in the *Building and Construction Industry (Improving Productivity) Bill* 2013 (Cth) are very similar to those established by the FW Act. This suggests that rather than having separate legislation governing building industry participants, the provisions of the FW Act should apply to building industry participants, but that amendments to the FW Act are necessary to deter unlawful conduct within the building and construction industry. General amendments to the FW Act in relation to coercion to contribute to superannuation funds and worker entitlement funds are dealt with in Chapter 6 of this Volume.

188. One matter is the substantial difference in penalties. It is apparent from the matters canvassed in section B and D above that the present penalties are an ineffective deterrent to unlawful conduct on the part of the construction unions, and judicial officers have noted that the CFMEU appear to regard financial penalties as simply a business cost like any other. That suggests that higher maximum penalties could not be considered disproportionate to the harm caused by unlawful industrial action and coercion, particularly when the selection of particular penalties from case to case are subject to the usual judicial discretion. Rather, it suggests that the penalties in the FW Act for coercion and breaches of ss 417 and 421 should be substantially increased. It is recommended that they be increased to 1,000 penalty

units for bodies corporate and 200 penalty units for others. There are strong arguments that even these penalties are too low, and that the increase should be much greater. Perhaps it is best to observe what effect the recommended penalties have, assuming the legislature adopts them.

189. A second matter is whether picketing is caught by the FW Act. The definition of 'industrial action' in s 19(1) of the FW Act is broad, and is arguably sufficient to include, in s 19(1)(b), action to disrupt a worksite including by means of a picket: it involves 'a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee.' However, the authorities on this point are uncertain. The Full Court of the Federal Court in *Davids Distribution Pty Ltd v National Union of Workers*[244] held that picketing by a union did not fall within the provision unless it was directed by and to the work of the employees engaged in the picket. The reasoning seemed to be focused on the possibility that if picketing could be 'industrial action', it could in turn be 'protected industrial action' which would have a prejudicial effect on the community at large. That decision has been distinguished on more than one occasion (perhaps unsurprisingly, when the number of different forms that picketing may take are considered).[245] However, the provision under consideration in some authorities distinguishing *Davids Distribution Pty Ltd v National Union of Workers* concerned

[244] (1999) 91 FCR 463 at [52].

[245] *Transfield Construction Pty Ltd v AMWU* [2002] FCA 171; *Saint-Gobain Warehousing Pty Ltd v NUW* (2006) 158 IR 80 at [10]-[13]; *Cahill v Construction, Forestry, Mining and Energy Union (No 2)* (2008) 170 FCR 357 at [51]-[52]; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 170 at [57]-[59]. See also *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Laing* (1998) 89 FCR 17 at 32.

contraventions of the prohibition on unlawful action under the *Building and Construction Industry Improvement Act* 2005 (Cth), which contained an express provision defining unlawful industrial action as action undertaken by an organisation.[246]

190. Picketing involving obstruction and besetting is tortious at common law.[247] It is highly anomalous if Fair Work Commission cannot stop that kind of tortious industrial conduct when it can make stop orders under s 418 in relation to other types of industrial action. Again, rather than having special building industry legislation, the FW Act should deal specifically with industrially motivated picketing.

191. The third matter is that under the *Building and Construction Industry Improvement Act* 2005 (Cth) industrial action is prohibited without the need first to obtain a stop order from the Fair Work Commission. As a matter of common sense, it is likely that a direct prohibition on industrial action in the building and construction industry would have more effect. Short work stoppages and blockades can have a significant economic effect on construction projects, and there may be cases where employers are unable to obtain a stop order in sufficient time to prevent damaging industrial action. However, the materials and submissions before the Commission do not enable any view to be reached about that matter.

192. One final matter that deserves consideration is the powers of the building and construction industry regulator to maintain enforcement

[246] *Building and Construction Industry Improvement Act* 2005 (Cth), ss 36-37.

[247] See *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463 at [68]-[72].

proceedings. Whether that power should be constrained according to whether separate proceedings concerning private individuals are settled raises two issues. The first is the need for finality in litigation. The second is the need for an appropriate regulatory response to unlawful conduct. In the present context, it is important for the regulator to be able independently to maintain enforcement proceedings in relation to unlawful conduct without being subject to the private concerns of those affected by the conduct. It can be observed that other regulators, including Fair Work Inspectors,[248] the General Manager of the Fair Work Commission,[249] ASIC,[250] and the ACCC[251] are empowered to seek pecuniary penalties while affected persons are entitled to seek compensation in respect of the same contraventions. None of those regulators are prevented from maintaining proceedings for pecuniary penalties following settlement of proceedings concerning the affected persons.

[248] Under s 539 of the FW Act.

[249] Under s 310 of the FW(RO) Act.

[250] Under ss 12GBC and 12 GF of the *Australian Securities and Investments Commission Act* 2001 (Cth), ss 1315, 1317J of the *Corporations Act* 2001 (Cth),

[251] Under ss 77 and 82 of the *Competition and Consumer Act* 2010 (Cth).

Recommendation 65

The building and construction industry regulator continue to investigate and enforce the *Fair Work Act* 2009 (Cth) and other existing designated building laws. The power of the building and construction industry regulator to commence and maintain enforcement proceedings should not be constrained according to whether any other proceedings in respect of the same conduct have been settled. Accordingly, ss 73 and 73A of the *Fair Work (Building Industry) Act* 2012 (Cth) should be repealed.

Recommendation 66

The *Fair Work Act* 2009 (Cth) be amended:

(a) to increase the maximum penalties for contraventions of ss 343(1), 348 and 355 (coercion) and ss 417(1) and 421(1) (prohibited industrial action) to 1,000 penalty units for a contravention by a body corporate and 200 penalty units otherwise; and

(b) to provide that picketing by employees or employee associations is 'industrial action', and to deal specifically with the consequences of industrially motivated pickets.

G – RICO

193. Submissions to the Commission by Boral in 2014 and statements by various media commentators suggested that, in order to combat unlawful activity in the building and construction industry, consideration ought to be given to the introduction of laws similar to

the United States *Racketeer Influenced and Corrupt Organizations Act*,[252] commonly known as **RICO**. The Discussion Paper sought further submissions on the topic.

What is RICO?

194. Enacted by Congress in 1970, RICO was introduced as Title IX of the *Organized Crime Control Act* of 1970 to seek to combat organised crime by preventing the investment of unlawfully derived money in lawful enterprises.

195. In very broad terms, the scheme of RICO is as follows.

196. It is unlawful for any person:[253]

(a) who has received any income through a 'pattern of racketeering activity' or through the collection of an unlawful debt to use or invest that money to acquire, establish or operate any 'enterprise' engaged in, or the activities of which affect, interstate or foreign commerce;

(b) through 'a pattern of racketeering activity' or through collection of an unlawful debt to acquire or maintain any interest or control in any enterprise engaged in, or the activities of which affect, interstate or foreign commerce;

[252] *Racketeer Influenced and Corrupt Organizations Act*, 18 USC §§ 1961–1968.

[253] *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § 1962.

(c) employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce to conduct or participate in the conduct of that enterprise's affairs through a 'pattern of racketeering activity' or collection of an unlawful debt; or

(d) to conspire to do any of the things mentioned in paragraphs (a)–(c).

197. A 'pattern of racketeering' requires at least two acts of 'racketeering activity' the last of which is within ten years of a previous act.[254] The definition of 'racketeering activity' is expansive and includes numerous offences including, among other things, murder, kidnapping, bribery, extortion, fraud, illegal gambling and obstruction of justice.[255] An 'enterprise' includes a partnership, corporation, association, union or 'group of individuals associated in fact although not a legal entity'.[256]

198. A person who violates the RICO prohibitions is liable to criminal and civil penalties. Criminal conviction under RICO gives rise to a maximum penalty of 20 years' imprisonment.[257] United States courts also have broad power to restrain further RICO violations, including ordering divestment of assets, prohibition of engaging in the activities

[254] *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § 1961(5).

[255] *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § 1961(1).

[256] *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § 1961(4).

[257] *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § 1963(a).

of an enterprise and the dissolution and reorganisation of an enterprise, making due provision for the rights of innocent persons.[258]

199. In addition, the legislation permits a person injured by reason of a RICO violation to sue to recover treble the damages sustained.[259] The jurisdiction to hear a civil RICO claim is broad, and is not dependant on an anterior conviction for violation of the criminal statute. The plaintiff must show that there was a pattern of racketeering activity contrary to RICO and that the activity injured the plaintiff in its business or property.[260]

200. In addition, the Attorney-General may designate a civil RICO case as one of 'general public importance' following which the case is expedited.[261]

Adoption in Australia?

201. Boral submitted that like legislation should be introduced in Australia.[262] The reasoning put forward was that legislation like RICO

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[258] 18 USC § 1964(a). For example, civil preventative orders have been made in RICO suits preventing defendant union officials from holding union office, participating in union rallies, influencing union affairs and prohibiting association between corrupt union officials and union members: *United States v Local 560 (IBT)* 974 F 2d 315 at 342, 344 (3d Cir 1992).

[259] *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § 1964(c).

[260] *Sedima SPRL v Imrex Co Inc* 473 US 479 at 488-95, 479 (1985). The authorities are to the effect that recovery on the basis of § 1962(a) or (b) requires proof that the harm was caused by the establishment, operation or investment in the enterprise as opposed to the racketeering activity, recovery on the basis of § 1962(c) requires proof of harm caused by the racketeering activity: see E T Phillips et al, 'Racketeer Influenced Corrupt Organisations' (2015) 52 *Am Crim L Rev* 1507 at 1553-1554.

[261] *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § 1966.

[262] Boral Law Reform Submissions, 2015, p 70.

would provide a substantial deterrent to participants in enterprises who engage in racketeering activity by, among other things, providing more severe penalties and expedited hearing dates.

202. Further, the submission outlined the procedural benefits of the legislation such as preventative orders, divestiture of assets and a maximum penalty of 20 years' imprisonment.

203. In contrast, Master Builders Australia urged caution in recommending that such legislation be implemented without proper research being undertaken on the broader effect it would have on the country.[263]

204. The RICO legislation was introduced in the United States due to a perceived inadequacy in their criminal and civil laws to address serious organised crime. In particular, the legislation was intended to collect numerous acts of criminal organisations under a single legislative umbrella.[264] Australia's journey to address systemic crime, corruption and lawlessness has proceeded down a different path.[265] Among various pieces of Commonwealth and State legislation, the Australian Crime Commission (**ACC**) is a national statutory authority given the task of combatting serious and organised crime.

205. The genesis of the ACC lies in the inquiries and recommendations of a number of Royal Commissions, in particular the Costigan Royal

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[263] Master Builders Australia Law Reform Submissions, 21/8/15, pp 48-49, para 84.

[264] Pub L No 91-452, 84 Stat 922 (1970); *United States v Irizarry* 341 F 3d 273 at 292 n 7 (3rd Cir 2003); *Atlas Pile Driving Co v Dicon Fin Co* 886 F 2d 986 at 990 (8th Cir 1989).

[265] Though the differences are primarily of degree: see the discussions in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [25]-[29] and *State of South Australia v Totani* (2010) 242 CLR 1 at [37].

Commission into the Federated Ship Painters and Dockers Union. The final report of the Costigan Royal Commission recommended that, appropriately adapted, the RICO Act be implemented in Australia.[266] The consequence was not the introduction of the RICO Act, but the establishment of the National Crime Authority.[267]

206. The National Crime Authority was superseded by the ACC which was established on 1 January 2003. One of the key differences between the functions of the two bodies was that the ACC would have access to investigatory powers in order for it to carry out both its criminal intelligence and its investigatory roles.[268] The ACC combined the functions of the National Crime Authority, the Australian Bureau of Criminal Intelligence and the Office of Strategic Crime Assessments.

207. The ACC operates to provide a channel of information sharing between the relevant Government agencies to combat organised crime.[269] Once an investigation is undertaken, the matters and evidence collated is then provided to the appropriate Government

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[266] Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, *Final Report* (1984), Vol 3, pp 166, 174, 229.

[267] See *National Crime Authority Act* 1984 (Cth); Explanatory Memorandum, *National Crime Authority Bill* 1983 (Cth).

[268] Explanatory Memorandum, Australian *Crime Commission Establishment Bill* 2002 (Cth). Those powers are contained in *Australian Crime Commission Act* 2002 (Cth), Part 2, Divisions 1A and 2.

[269] *Australian Crime and Commission Act* 2002 (Cth), ss 7-7C. Section 7B(2) stipulates that the members of the ACC Board includes the Commissioner of the Australian Federal Police, the Chief Executive Officer of Customs, the Chairperson of ASIC, the Director-General of Security under the *Australian Security Intelligence Organisation* Act 1979 (Cth), the head of each State and Territory Police Force and the Commissioner for Taxation.

agency.[270] The offences and the resulting penalties are governed by the particular legislation under which the offence arises.

208. In addition, the *Proceeds of Crime Act* 2002 (Cth) enables orders to be made for the freezing and forfeiture of property that forms part of the proceeds of criminal conduct, and for the making of pecuniary penalty orders in respect of benefits derived from the commission of an offence.[271] Cognate legislation is in place in many States and Territories.[272]

209. Having regard to the existing framework of legislation, it is not recommended that RICO-style laws be adopted in Australia. The ACC already exists to seek to combat serious and organised crime through intelligence gathering and investigation. Further, the adequacy of existing criminal laws and penalties to deter criminal conduct by union officials and employers dealing with them has been considered in other parts of this Volume. Boral submitted that the ability to sue for treble damages under the RICO legislation was a powerful incentive for private parties to bring actions against unions.[273] However, treble

[270] *Australian Crime and Commission Act* 2002 (Cth), s 12(1).

[271] The power to make such orders is engaged, in the main, by commission of indictable offences from which a benefit is derived, or serious offences, defined in s 338 to include contraventions of the cartel provisions of the *Competition and Consumer Act* 2010 (Cth), various other specified offences, and indictable offences punishable by more than three years' imprisonment involving unlawful conduct causing or intended to cause a benefit to persons or a loss to the Commonwealth of at least $10,000: see *Proceeds of Crime Act* 2002 (Cth), ss 15B, 17-19, 47-49.

[272] See *Criminal Assets Recovery Act* 1990 (NSW); *Criminal Property Forfeiture Act* (NT); *Criminal Proceeds Confiscation Act* 2002 (Qld); *Criminal Assets Confiscation Act* 2005 (SA); *Serious and Organised Crime (Unexplained Wealth) Act* 2009 (SA); *Crime (Confiscation of Profits) Act* 1993 (Tax); *Confiscation Act* 1997 (Vic); *Criminal Property Confiscation Act* 2000 (WA).

[273] Boral Law Reform Submission 2015, p 70.

damages statutes have not found favour with Australian legislatures, at least since the early days after Federation. Finally, the extremely broad scope of application of a RICO-type statute[274] means that its enactment would have effects well beyond the building and construction industry.

[274] Objects of civil RICO applications have included environmental and other protest groups, tobacco manufacturers, health funds, and police services: see E T Phillips, et al, 'Racketeer Influenced Corrupt Organisations' (2015) 52 *Am Crim L Rev* 1507 at 1559-1566.

APPENDIX A

BUILDING & CONSTRUCTION INDUSTRY LITIGATION 2000-2015[1]

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
1.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1173 (penalty)	Mitcham train station, VIC	Union (CFMEU)	Action taken or threatened with intent to coerce another person to engage in industrial activity.	Liability uncontested.	Pecuniary penalties amounting to $55,125: • $22,500 and $26,250 against the CFMEU (for 2 contraventions of s 348 FW Act); • $3,000 and $3,375 against Myles (for 2 contraventions of s 348 FW Act).

[1] Legislation Key:

- BCII Act – *Building and Construction Industry Improvement Act* 2005 (Cth) (replaced by *Fair Work (Building Industry) Act* 2012 (Cth))
- FW Act – *Fair Work Act* 2009 (Cth)
- TPA – *Trade Practices Act* 1974 (Cth) (repealed and replaced by the *Competition and Consumer Act* 2010 (Cth))
- WR Act – *Workplace Relations Act* 1996 (Cth) (repealed and replaced by *Fair Work Act* 2009 (Cth))

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
2.	*Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1125 (liability)	La Scala, North Melbourne, VIC Yarra Street, North Melbourne, VIC	Union (CFMEU)	Adverse action (freedom of association) Coercion to employ or engage a particular person or independent contractor, or to allocate/designate particular duties or responsibilities.	Liability uncontested.	CFMEU and Edwards found to have contravened ss 346 and 355 of the FW Act – penalties to be determined. Respondents also to pay compensation to the employer in the amount of $18,084.
3.	*Director, Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 668; 147 ALD 373 (liability) [2015] FCA 998 (penalty)	Seventh Street, Mascot, NSW	Union (CFMEU)	Contravention of right of entry provisions: Failure to produce entry permit for inspection when requested. Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner, when exercising right of entry.	Liability contested.	Declarations and pecuniary penalties amounting to $272,500: • $20,000 against Bragdon (for 1 contravention of s 497 FW Act, 2 contraventions of s 500 FW Act, and 2 contraventions of s 503(1) FW Act); • $27,500 against Kong (for 1 contravention of s 497 FW Act, 3 contraventions of s 500 FW Act, and 2 contraventions of s 503(1) FW Act); • $225,000 against the

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
				Misrepresentation(s) concerning rights of entry.		CFMEU (for contravention of ss 497, 500 and 503 FW Act by reason of s 793 FW Act).
4.	*Director, Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672 (penalty)	Wheatstone Liquefied Natural Gas, Onslow, WA	Union (CFMEU)	Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner, when exercising right of entry.	Liability uncontested.	Pecuniary penalties amounting to $24,000: • $4,000 against Upton (for contraventions of s 500 of the FW Act on 2 occasions); • $20,000 against the CFMEU (for contraventions of s 500 of the FW Act on two occasions).
5.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry Mining and Energy Union* (No 2) [2015] FCA 199 (liability) (No 3) [2015]	Central Apartments, Darwin, Northern Territory	Union (CFMEU)	Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner, when exercising right of entry. Action taken or threatened with intent to coerce another person to engage in industrial activity.	Liability contested.	Pecuniary penalties amounting to $45,600: • $6,000 against Pearson (for contravening s 500 FW Act); • $4,600 against Olsen (for contravening s 500 FW Act); • $35,000 against CFMEU (for contravening s 348 FW Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	FCA 845 (penalty)					
6.	*Director, Fair Work Building Industry Inspectorate v Cradden* [2015] FCA 614 (penalty)	Common Ground Project Site, QLD	Union (CFMEU)	Coercion in relation to enterprise agreements.	Liability partially contested.	Declarations and pecuniary penalties amounting to $555,000: • $30,000 against Cradden (for 6 contraventions of s 44 BCII Act); • $40,000 against Myles (for 4 contraventions of s 44 BCII Act); • $30,000 against O'Brien (for 6 contraventions of s 44 BCII Act); • $20,000 against Davis (for 4 contraventions of s 44 BCII Act); • $25,000 against Cummins (for 5 contraventions of s 44 BCII Act); • $400,000 against the CFMEU (for contraventions of s 44 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
7.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 (penalty)	Bald Hills Wind Farm Project, VIC $400 million	Union (CFMEU)	Adverse action (workplace right). Coercion to employ or engage a particular person or independent contractor, or to allocate/designate particular duties or responsibilities. Attempting to exercise OHS law right of entry without a permit.	Liability uncontested as per earlier determination in related case (*Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 226)	Pecuniary penalties amounting to $109,500: • $102,500 against the CFMEU (for 3 contraventions of s 340(1)(a) FW Act and 4 contraventions of s 355(a) FW Act); • $7,000 against Stephenson (for 1 contravention of s 494 FW Act and 1 contravention of s 355(a) Act).
8.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 353	Work site in Hawthorn, VIC	Union (CFMEU)	Coercion (freedom of association). Adverse action (workplace right). Action taken or threatened with intent to coerce another person to engage in industrial activity.	Liability contested for second respondent.	Pecuniary penalties amounting to $43,000: • $28,500 against the CFMEU (for contraventions of s 343 FW Act); • $8,250 against Berardi (for contraventions of ss 340, 343 and 348 FW Act); • $6,000 against Reardon (for 1 contravention of s 343 FW Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
9.	*Director, Fair Work Building Industry Inspectorate v Merkx* [2015] FCA 316	Royal Adelaide Hospital, SA	Employees	Industrial action prior to nominal expiry date of enterprise agreement.	Liability uncontested.	Pecuniary penalties amounting to $22,000 (22 employee respondents ordered to pay $1,000 each for contravening s 417 of the FW Act)
10.	*Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 225 (liability) [2015] FCA 1213 (penalty)	Myer Emporium Site, Lonsdale Street, VIC McNab Site, McNab Avenue, Footscray, VIC	Union (CFMEU)	Coercion to employ or engage a particular person or independent contractor, or to allocate/designate particular duties or responsibilities. Action taken or threatened with intent to coerce another person to engage in industrial activity.	Liability contested.	Pecuniary penalties amounting to $147,500: • $95,000 against CFMEU (for multiple contraventions of ss 348 and 355 of the FW Act on); • $19,750 against Setka (for multiple contraventions of ss 348 and 355 of the FW Act and 1 contravention of s 346); • $14,500 against Reardon (for multiple contraventions of ss 348 and 355 of the FW Act); • $3,000 against Christopher (for multiple contraventions of ss 348 and 355 of the FW Act); • $7,000 against Spernovasilis

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						(for multiple contraventions of ss 348 and 355); • $3,500 against Oliver (for multiple contraventions of ss 348 and 355 of the FW Act); • $5,250 against Edwards (for multiple contraventions of ss 348 and 355 of the FW Act); • $1,000 against Stephenson (for multiple contraventions of ss 348 and 355 of the FW Act); • $2,000 against Johnson (for multiple contraventions of ss 348 and 355 of the FW Act).
11.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 226 (contempt) (penalty)	Bald Hills Wind Farm Project, VIC $400 million	Union (CFMEU)	Contempt of court: Breach of court order Breach of undertaking.	Liability uncontested.	Pecuniary penalties amounting to $125,000: • $100,000 against the CFMEU (for two charges of contempt for not complying with an undertaking); • $25,000 against the CFMEU (for not complying with court order to file affidavit material). •

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
12.	*Director, Fair Work Building Industry Inspectorate v Stephenson* (2014) 146 ALD 75; [2014] FCA 1432 (penalty)	Construction projects in Adelaide, SA	Union (CFMEU)	Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner, when exercising right of entry.	Liability uncontested.	Pecuniary penalties amounting to $205,100: • $4,000 against Stephenson (for 2 contraventions of s 500 FW Act); • $1,000 against Smart (for 1 contravention of s 500 FW Act); • $3,800 against Bolton (for 2 contraventions of s 500 FW Act); • $1,100 against Vitler (for 1 contravention of s 500 FW Act); • $800 against Huddy (for 1 contravention of s 500 FW Act); • $4,000 against McDermott (for 1 contravention of s 500 FW Act); • $800 against Jarrett (for 1 contravention of s 500 FW Act); • $1,100 against Sloan (for 1 contravention of s 500 FW Act); • $3,500 against Pitt (for 1

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						contravention of s 500 FW Act); • $5,000 against Perkovic (for 1 contravention of s 500 FW Act); • $180,000 against the CFMEU (for all the officials' contraventions of s 500 FW Act).
13.	*Director, Fair Work Building Industry Inspectorate v Robko Construction Pty Ltd* [2014] FCCA 2257 (liability) (No 2) [2015] FCCA 177 (penalty)		Employer	Contravention of a provision of the National Employment Standards. Employer dismissed (threatened to dismiss) an employee in order to engage the individual as an independent contractor.	Liability contested.	Pecuniary penalties amounting to $39,600: • $33,000 against Robko Constructions Pty Ltd (for contraventions of ss 44 and 358 FW Act) • $6,600 against Robbins (for contraventions of ss 44 and 358 FW Act). Robko Constructions Pty Ltd ordered to pay $1,164.14 to employee affected.
14.	*Director, Fair Work Building Industry*	Building construction site at	Union (CFMEU)	Permit holder(s) intentionally hindered or obstructed another	Liability uncontested.	Pecuniary penalties amounting to $152,600:

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	Inspectorate v Cartledge [2014] FCA 311 (interim injunction) [2014] FCA 1047 (penalty) [2015] FCA 453 (contempt of court) (No 2) [2015] FCA 851 (penalty for contempt of court)	50 Flinders Street, Adelaide, SA		person, or otherwise acted in an improper manner, when exercising right of entry. Contempt of court.		• $6,000 against O'Connor (for 2 contraventions of s 500 FW Act); • $9,000 against Pitt (for 2 contraventions of s 500 FW Act); • $3,000 against Cartledge (for 1 contravention of s 500 FW Act); • $4,000 against Bolton (for 1 contravention of s 500 FW Act); • $600 against Stephenson (for 1 contravention of s 500 FW Act); • $130,000 against the CFMEU (for officials' contraventions of s 500 FW Act). $12,000 against O'Conner for acting in contempt of a court order.
15.	*Director of Fair Work Building Industry Inspectorate v Luka Tippers &*	Essence Apartments, Park Street, Melbourne, VIC	Employer	Contravention of a term(s) of an enterprise agreement. Contravention of a	Liability uncontested.	Pecuniary penalties amounting to $10,000: • $8,000 against Luka Tippers & Excavation Pty Ltd (for

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	Excavation Pty Ltd [2014] FCCA 1459 (penalty)			provision of the National Employment Standards. Adverse action (workplace right). Adverse action (freedom of association).		contraventions of ss 50, 44, 340(1)(a) and 346 FW Act); • $2,000 against Maric (for contraventions of ss 50, 44, 340(1)(a) and 346 FW Act).
16.	*Director, Fair Work Building Industry Inspectorate v Robko Construction Pty Ltd* [2014] FCCA 1017 (liability) *(No.2)* [2014] FCCA 1328 (penalty)		Employer	Contravention of term of modern award. Failure to comply with compliance notice.	Liability contested.	Pecuniary penalties amounting to $21,420: • $17,850 against Robko Construction Pty Ltd (for contravention of ss 45 and 716 of the FW Act); • $3,570 against Robbins (for contravention of ss 45 and 716 of the FW Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
17.	*Director, Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd* [2014] FCCA 721 (liability) (No 2) [2015] FCCA 2129 (penalty)	Edmund Barton Building Project, Canberra, ACT	Employer	Adverse action (freedom of association).	Liability contested.	Pecuniary penalties amounting to $32,000: • $25,000 against Baulderstone Pty Ltd (for contravention of s 346 FW Act); • $3,500 against Razlog respondent (for contravention of s 346 FW Act); • $3,500 against Kidman respondent (for contravention of s 346 FW Act).
18.	*Grocon Constructors (Victoria) Pty Ltd v Construction, Forestry, Mining and Energy Union* *(No 2)* (2014) 241 IR 288; [2014] VSC 134 (liability and penalty) *Construction, Forestry, Mining and Energy Union*	Emporium and McNab Construction sites, VIC	Union (CFMEU)	Criminal contempt of court	Liability contested.	$1.15 million against CFMEU for being in criminal **contempt** of a court order.

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	v Grocon Constructors (Victoria) Pty Ltd; Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd [2014] VSCA 261 (appeal)					
19.	*Brookfield Multiplex Engineering and Infrastructure Pty Ltd v McDonald* [2014] FCA 389 (penalty)	Mundaring Water Treatment Plant, WA	Union (CFMEU)	Adverse action (freedom of association). Action taken or threatened with intent to coerce another person to engage in industrial activity. Industrial action prior to nominal expiry date of enterprise agreement.	Liability uncontested.	Pecuniary penalties amounting to $123,000: • $21,000 against McDonald (for contraventions of s 346 FW Act, s 348 FW Act and contraventions of s 417 FW Act); • $7,000 against Molina (for contraventions of s 346 FW Act, s 348 FW Act and s 417 FW Act); • $95,000 against the CFMEU (for contraventions of s 346 FW Act, s 348 FW Act and s 417 FW Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
20.	*Brookfield Multiplex FSH Contractor Pty Ltd v McDonald* [2014] FCA 359 (penalty)	Fiona Stanley Hospital Project, WA	Union (CFMEU)	Action taken or threatened with intent to coerce another person to engage in industrial activity. Industrial action prior to nominal expiry date of enterprise agreement.	Liability uncontested.	Pecuniary penalties amounting to $61,000: • $9,500 against McDonald (for 1 contravention of s 348 FW Act and 1 contravention of s 417 FW Act); • $3,500 against Pallott (for 1 contravention of s 348 FW Act and 1 contravention of s 417 FW Act); • $48,000 against the CFMEU (for a contravention of s 348 FW Act and 1 contravention of s 417 FW Act). CFMEU agreed to pay $250,000 in compensation for losses arising from statutory breaches.
21.	*Director, Fair Work Building Industry Inspectorate v McDermott* (2014) 140 ALD 337; [2014] FCA 160	Harris Scarfe construction project, SA	Union (CFMEU)	Coercion to employ or engage a particular person or independent contractor, or to allocate/designate particular duties or responsibilities.	Liability uncontested.	Pecuniary penalties amounting to $17,820: • $1,320 against McDermott (for 1 contravention of s 355 FW Act); • $16,500 against the CFMEU (for 1 contravention of s 355 FW Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	(penalty)					
22.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 126	Construction site at 901 William Street, Northbridge, WA	Union (CFMEU)	Action taken or threatened with intent to coerce another person to engage in industrial activity.	Liability uncontested.	Pecuniary penalties amounting to $35,640: • $5,940 against McDonald (for 3 contraventions of s 348 FW Act); • $29,700 against the CFMEU (for 3 contraventions of s 348 FW Act).
23.	*Director, Fair Work Building Industry Inspectorate v Linkhill Pty Ltd* (No 7) [2013] FCCA 1097 (liability) (No 8) [2014] FCCA 225 (appeal) (No 9) [2014] FCCA 1124 (penalty)	384-386 Flinders Lane, Melbourne, VIC	Employer	Misrepresented employment as an independent contracting arrangement (a contract for services).	Liability contested.	Pecuniary penalties amounting to $313,500: • 18 contraventions of s 900 of the WR Act; • 77 contraventions of s 357 of the FW Act; • Contravening an enterprise agreement.

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	[2015] FCAFC 99 (penalty appeal)					
24.	*Director, Fair Work Building Industry Inspectorate v Myles* [2013] FCCA 2229 (liability) [2014] FCCA 1429 (penalty)	Work site at 123 Albert Street, Brisbane, QLD	Union (CFMEU and BLF)	Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner, when exercising right of entry.	Liability contested.	Pecuniary penalties amounting to $38,500: • $4,950 and declaration against Myles (for 1 contravention of s 500 FW Act); • $4,950 and declaration against Pearson (for 1 contravention of s 500 FW Act); • $2,200 and declaration against Treadaway (for 1 contravention of s 500 FW Act); • $26,400 against the CFMEU (for 1 contravention of s 500 FW Act).
25.	*Director, Fair Work Building Industry Inspectorate v McDonald*	Citic Pacific Sino Iron Ore Mine, Karratha, WA	Union (CFMEU and CFMEUW)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $193,600: • $17,600 against McDonald (for 2 contraventions of s 38 BCII Act);

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	[2013] FCA 1431 (penalty)					• $88,000 against the CFMEU (for 2 contraventions of s 38 BCII Act); • $88,000 against the CFMEUW (for 2 contraventions of s 38 BCII Act).
26.	*Brookfield Multiplex FSH Contractor Pty Ltd v McDonald* [2013] FCA 1380 (**contempt**) (penalty)	Fiona Stanley Hospital Project, WA	Union (CFMEU)	Contempt of court order.	Liability uncontested.	$40,000 against McDonald for contempt of a court order.
27.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCCA 2130 (penalty)	Brisbane Convention and Exhibition Centre, QLD Construction site at 123 Albert Street, Brisbane, QLD Multi-level car park at	Union (CFMEU and BLF)	Unlawful industrial action.	Liability uncontested.	$55,500 pecuniary penalty against the CFMEU and BLF (jointly and severally) (for 1 contravention of s38 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
		Brisbane Airport, QLD $140 million				
28.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014 (penalty)	Peninsula Link Project, VIC Southern Link Upgrade, VIC Alliance Project, VIC $759 million	Union (CFMEU)	Unlawful industrial action. Coercion in relation to engagement of building employees and building contractors.	Liability uncontested.	Pecuniary penalties amounting to $230,000: • $155,000 against the CFMEU (for 3 contraventions of s 43 BCII Act); • $11,000 on Doyle (for 1 contravention of s 43 and 1 contravention of s 38 BCII Act); • $29,000 on Stephenson (for 3 contraventions of s 43); • $24,500 on Powell (for 2 contraventions of s 43); • $5,000 on MacDonald (for 1 contravention of s 43 and 1 contravention of s 38); • $3,000 on Benstead (for 1 contravention of s 38); • $2,500 on John Parker (for 1 contravention of s 38).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
29.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 981 (penalty)	Florey Neuroscience Institute at the Austin Hospital, Heidelberg, VIC $119 million	Union (CFMEU)	Industrial action prior to nominal expiry date of enterprise agreement.	Liability uncontested.	Pecuniary penalties amounting to $15,000: • $12,500 against the CFMEU (for 1 contravention of s 417 FW Act); • $2,500 against Beattie (for 1 contravention of s 417 FW Act).
30.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846 (penalty)	Translation Research Institute Project, QLD Queensland Institute of Medical Research Centre Project, QLD Carrara Stadium Project, QLD $150 million	Union (CFMEU and CEPU)	Coercion in relation to enterprise agreements. Coercion in relation to engagement of building employees and building contractors.	Liability uncontested.	Pecuniary penalties amounting to $119,000: • $99,000 against the CFMEU (for contravening ss 43(1)(b) and 44 BCII Act); • $20,000 against the CEPU (for 1 contraventions of s 43(1)(b) BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
31.	*Director, Fair Work Building Industry Inspectorate v Buildpower Pty Ltd* [2013] FCCA 1037 (liability) (No 2) [2013] FCCA 2236 (penalty)	Building sites in VIC	Employer	Contravention of the Australian Fair Pay and Conditions Standard.	Liability contested.	Pecuniary penalties amounting to $39,660: • Buildpower Pty Ltd ordered to pay $33,000 in compensation to Mr Alcantara (for contraventions of ss 182 and 226 WR Act, and s 546 FW Act); • $6,600 against Slabbert (for contraventions of ss 182 and 226 WR Act, and s 546 FW Act).
32.	*Director, Fair Work Building Industry Inspectorate v Zion Tiling Pty Ltd* [2013] FCCA 769 (liability) [2013] FCCA 1288 (penalty)	WA	Employer	Contravention of a provision of the National Employment Standards. Contravention of term of modern award. Breach of obligation to maintain employee records. Failure to comply with compliance notice.	Liability contested.	Pecuniary penalties amounting to $23,740: • $19,800 against Zion Tiling Pty Ltd (for 1 contraventions of ss 44, 45, 535 and 716 FW Act) • $3,960 against Tae Young Yoon (for contraventions of ss 44, 45, 535 and 716 FW Act). • Zion and Yoon ordered to pay $6,000 compensation to Mr Choi

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
33.	*Director of Fair Work Building Industry Inspectorate v Giovanni Italiano* [2013] FCCA 530 (penalty)	VIC	Employer	Contravention of a provision of the National Employment Standards.	Liability uncontested.	Pecuniary penalties amounting to $9,300: • $1,800 against Italiano (for contravention of s 44 FW Act) • Italiano ordered to pay Mr Gerges $7,500 in compensation for losses
34.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 515 (penalty)	Ashwood Chadstone Gateway Project, VIC Other St Hilliers construction sites in VIC: Ararat prison; Watsonia Military Camp; Carlton apartment and social housing project; Canterbury housing	Union (CFMEU)	Coercion in relation to engagement of building employees and building contractors.	Liability uncontested.	Pecuniary penalties amounting to $115,000: • $84,000 against the CFMEU(for 8 contraventions of s 43 BCII Act); • $10,500 against Beattie (for 2 contraventions of s 43 BCII Act); • $9,500 against Berardi (for 2 contraventions of s 43 BCII Act); • $4500 against Theodorou (for 1 contravention of s 43 BCII Act); • $3500 against Bell (for 1 contravention of s 43 BCII Act); • $3000 against Pitt (for 1

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
		complex $365.8 million				contravention of s 43 BCII Act).
35.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FMCA 160 (penalty)	Royal Melbourne Institute of Technology site, VIC $25 million	Union (CFMEU)	Action taken or threatened with intent to coerce another person to engage in industrial activity.	Liability uncontested.	CFMEU ordered to pay a pecuniary penalty of $10,000 for contravening s 348 of the FW Act.
36.	*Director, Fair Work Building Industry Inspectorate Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2013] FCA 82	West Werribee Dual Water Supply Project, VIC $40 million	Union (AMWU)	Coercion to employ or engage a particular person or independent contractor, or to allocate/designate particular duties or responsibilities.	Liability contested.	Concerns that s 355 had been breached resulted in an injunction against AMWU from: • Preventing or hindering access to and egress from the site; • Counselling, procuring, encouraging or persuading any person not to enter the site; • Counselling, procuring, encouraging or persuading any person not to work at the

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						site.
37.	*Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2012) 271 FLR 7; [2012] FMCA 946 (first instance) [2013] FCAFC 53 (appeal) *(No 2)* [2013] FCCA 1255 (penalty)	Peninsula Project, Burswood, WA $700 million	Union (CFMEU and CFMEUW)	Industrial action prior to nominal expiry date of collective agreement/ workplace determination.	Liability contested.	Pecuniary penalties amounting to $7,260: • $3,300 against the CFMEU (for 1 contravention of s 494(1) WR Act); • $3,300 against the CFMEUW (for 1 contravention of s 494(1) WR Act); • $660 against McDonald (for 1 contravention of s 494(1) WR Act).
38.	*Director, Fair Work Building Industry Inspectorate v Sutherland* (Unreported, FCCA,	Gold Coast Hilton Hotel, QLD Wintergarden shopping precinct, Brisbane,	Union (CFMEU and CEPU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $65,000: • $50,000 against the CFMEU (for 2 contraventions of s 38 BCII Act); • $15,000 against the CEPU (for 1 contravention of s 38

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	BRG1008/2011, Burnett J, 19 July 2013) (penalty)	QLD $700 million				BCII Act).
39.	*Lend Lease Project Management Construction (Australia) Pty Ltd v Construction, Forestry, Mining and Energy Union* *(No 5)* [2012] FCA 1144 (injunction application) *(No 6)* [2012] FCA 1273	Gold Coast University Hospital, QLD $1.76 billion Supreme and District Courts, Brisbane, QLD $570 million	Union (CFMEU and CEPU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $590,000: • $550,000 against the CFMEU and CEPU (jointly and severally liable) payable to Lend Lease (for 1 CEPU contravention of s 38 BCII Act and 12 CFMEU contraventions of s 38 BCII Act); • $6,450 against Pearson (for 4 contraventions of s 38 BCII Act); • $6,450 against Vink (for 2 contraventions of s 38 BCII Act); • $4,300 against O'Doherty (for 2 contraventions of s 38 BCII Act); • $7,750 against Hanna (for 6 contraventions of s 38 BCII Act);

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						• $6,450 against Jarvis (for 4 contraventions of s 38 BCII Act); • $6,450 against Olsen (for 2 contraventions of s 38 BCII Act); • $2,150 against Malone (for 1 contravention of s 38 BCII Act).
40.	*Director of Fair Work Building Industry Inspectorate v Supernova Contractors Pty Ltd* [2012] FMCA 935 (penalty)	QLD	Employer	Misrepresented employment as an independent contracting arrangement (a contract for services).	Liability uncontested.	Pecuniary penalties amounting to $11,880: • Supernova Contractors Pty Ltd ordered to pay $9,900 for contravening s 357 FW Act; • Long ordered to pay $1,980 for contravening s 357 of FW Act.

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
41.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2012] FMCA 916 (penalty)	Rosso Apartments, Carlton, VIC	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $25,000: • $7,500 against Hudson (for one contravention of s 38 BCII Act); • $17,500 against the CFMEU (for one contravention of s 38 BCII Act by reason of vicarious liability for the conduct of Hudson).
42.	*Radisich v McDonald* [2012] FMCA 919 (penalty)	Herdsman Business Park Project, WA	Union (CFMEU)	Unlawful industrial action. False or misleading statement about the obligation/need to be (or not to be) a member of an industrial association or about the requirement to disclose membership status.	Liability uncontested.	Pecuniary penalties amounting to $34,980: • $6,380 against McDonald (for 1 contravention of s 790(1) WR Act and 1 contravention of s 38 BCII Act); • $28,600 against the CFMEU (for 1 contravention of s 790(1) WR Act and 1 contravention of s 38 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
43.	*Helal v Brookfield Multiplex Ltd* [2012] FCA 653 (penalty)	Southbank One project, VIC $100 million	Union (CFMEU)	Coercion in relation to engagement of building employees and building contractors.	Liability uncontested.	CFMEU ordered to pay a pecuniary penalty of $30,000 for contravening s 43(1) BCII Act.
44.	*Director, Fair Work Building Industry Inspectorate v Mates* [2012] FMCA 475 (penalty)	81 Lorimer Street, Docklands, VIC $5 million	Union (CFMEU)	Adverse action (freedom of association).	Liability uncontested.	$3,500 pecuniary penalty against Mates (for 2 contraventions of s 346 FW Act).
45.	*Australian Building and Construction Commissioner v Christopher* [2012] FMCA 589 (penalty)	RMIT Building Re-development, 379-405 Russell Street, Melbourne, VIC $25 million	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	$20,000 pecuniary penalty against the CFMEU (for 1 contravention of s 38 of BCII Act.

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
46.	*Australian Building and Construction Commissioner v Bollas* [2012] FCA 484	Penders Grove Primary School, VIC	Union (CFMEU)	Misrepresentation about another person's obligation to engage in industrial activity.	Liability uncontested.	$2,000 pecuniary penalty against Bollas (for 1 contravention of s 349(1)(a) FW Act).
47.	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2012] FCA 189 (penalty)	Caroline Springs Square Shopping Complex, VIC $30 million	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	$50,000 pecuniary penalty against the CFMEU (for contravening s 38 of the BCII Act).
48.	*Hogan v Jarvis* [2012] FMCA 189 (penalty)	Gold Coast University Project, QLD $1.76 billion	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $46,860: • $36,300 and declarations against the CFMEU (for 1 contravention of s 38 BCII Act); • $7,260 and declarations against Jarvis (for 1 contravention of s 38 BCII Act);

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						• $3,300 and declarations against Temoho (for 1 contravention of s 38 BCII Act).
49.	*Cozadinos v Construction, Forestry, Mining and Energy Union* [2012] FCA 46 (liability) (2013) 231 IR 278; [2013] FCAFC 8 (appeal) [2013] FCA 1243 (penalty)	Epsom Shopping Centre, Bendigo, VIC $10 million	Union (CFMEU)	Coercion in relation to enterprise agreements.	Liability contested.	$20,000 pecuniary penalty against the CFMEU (for contravening s 44 of the BCII Act).
50.	*Australian Building & Construction Commissioner v Doyle* (Unreported, FMCA, Turner FM,	Safeway Beaconsfield, VIC $7 million	Union (CFMEU)	Failure to comply with right of entry provisions: Failure to produce entry permit for inspection when requested.	Liability uncontested.	Pecuniary penalties amounting to $26,000: • $6,500 against the CFMEU (referable to 1 contravention of s 497 FW Act); • $6,500 against the CFMEU (referable to 1 contravention

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	MLG859/2010, 5 October 2011) *Lukies v Doyle* (Unreported, FMCA, Burchardt FM, MLG1502/2010, 14 December 2011)			Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner. Attempting to exercise OHS law right of entry without a permit. Misrepresentation(s) concerning right of entry.		of s 500 FW Act); • $13,000 against the CFMEU (referable to 1 contravention of each of ss 756 and 768 of the WR Act.
51.	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)* [2011] FCA 1518 (penalty)	140 William Street, Perth, WA $40 million	Union (CFMEU)	Unlawful industrial action. Coercion in relation to enterprise agreements.	Liability partially contested.	Pecuniary penalties amounting to $231,000: • $154,000 and declarations against the CFMEU (for 4 contraventions of s 38 BCII Act); • $38,500 and declarations against the CFMEU (for 1 contravention of s 44 BCII Act); • $30,800 and declarations

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						against McDonald (for 4 contraventions of s 38 BCII Act) • $7,700 and declarations against McDonald (for 1 contravention of s 44 BCII Act).
52.	*United Group Resources Pty Ltd v Calabro* *(No 5)* (2011) 198 FCR 514; [2011] FCA 1408 (liability) *(No 6)* [2012] FCA 431 (application to amend orders) *(No 7)* (2012) 203 FCR 247; [2012] FCA 432 (penalty)	Pluto LNG Project, WA $15 billion	Employees	Unlawful industrial action. Industrial action prior to nominal expiry date of enterprise agreement. Contravention of an order.	Liability contested.	Pecuniary penalties ordered against respondents: • $1,300 (wholly suspended) for each day the respondents breached s 38 of BCII Act and ss 417 and 421 FW Act; • $1,200 (wholly suspended) for each day the respondents breached s 38 of BCII Act and s 421 of FW Act; • $1,100 (wholly suspended) for each day the respondents breached s 38 of BCII Act and s 417 of FW Act; • $1,000 (wholly suspended) for each day the respondents breached s 38 of BC II Act; • $300 for two respondents who breached s 417 and 421 FW Act (but not s 38 of the

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						BCII Act).
53.	*Australian Building and Construction Commissioner v Gray* [2011] FMCA 919 (penalty)	ANZ Docklands Project, VIC $600 million	Union (CEPU)	Action taken or threatened with intent to coerce another person to engage in industrial activity.	Liability uncontested.	$10,000 pecuniary penalty against the CEPU (for 1 contravention of s 348 of the FW Act).
54.	*Director, Fair Work Building Industry Inspectorate v Abbott* (*No 5)* (2011) 211 IR 267; [2011] FCA 950 (liability) (2012) 209 FCR 448; [2012] FCAFC 178 (successful appeal in relation to Upton and CFMEU)	North West Shelf LNG Plant, WA $27 billion	Employees Union (CFMEU) – successfully appealed	Unlawful industrial action. Industrial action prior to nominal expiry date of collective agreement/workplace determination. Failure to comply with an order of an Australian Industrial Relations Commissioner. Failure to comply with the terms of a Union Collective Agreement.	Liability contested by the majority of respondents	Pecuniary penalties ordered against 117 employee respondents for contravening s 38 BCII Act, s 496(1) WR Act and two union collective agreements (some respondents ½ suspended).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	(*No 6)* [2013] FCA 942 (penalty)					
55.	*Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union* [2011] FCA 949 (penalty)	Pluto LNG Project, WA $15 billion	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $85,800: • $71,500 against the CFMEU (for 2 contraventions of s 38 BCII Act); • $14,300 against McDonald (for 2 contraventions of s 38 BCII Act).
56.	*White v Benstead* [2011] FMCA 920 (penalty)	Preston Pump Station, VIC $17 million	Union (CFMEU)	Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner, when exercising right of entry. Misrepresentation(s) concerning right of entry.	Liability uncontested.	Pecuniary penalties amounting to $13,000: • $10,000 against the CFMEU (for 1 contravention of each of ss 500 and 503 FW Act); • $2,000 against Benstead (for 1 contravention of s 500 FW Act); • $1,000 against Beattie (for 1 contravention of s 503 FW Act).
57.	*Australian Building and Construction*	The Crescent Dee Why, NSW	Union (CFMEU)	Permit holder(s) intentionally hindered or obstructed another	Liability uncontested.	Pecuniary penalties amounting to $12,500:

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	Commissioner v Mitchell [2011] FMCA 622 (penalty)			person, or otherwise acted in an improper manner, when exercising right of entry.		• $2,500 against Mitchell (for 1 contravention of s 500 FW Act); • $5,000 against the CFMEU (for 1 contravention of s 500 FW Act); • $5,000 against the CFMEU (NSW) (for 1 contravention of s 500 FW Act).
58.	*Gregor v Construction, Forestry, Mining and Energy Union* [2011] FMCA 562 (penalty)	Tullamarine Construction Project, VIC $65 million	Union (CFMEU)	Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner, when exercising right of entry.	Liability uncontested.	Pecuniary penalties amounting to $6,000: • $5,000 against the CFMEU (for 1 contravention of s 767(1) WR Act); • $1,000 against Travers (for 1 contravention of s 767(1) WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
59.	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2011] FCA 810 (penalty) [2012] FCAFC 44 (appeal) [2012] FCA 966 (**contempt**)	Commercial Office Tower, 915 Hay Street, Perth, WA Queens Riverside Project, Perth, WA	Union (CFMEU)	Unlawful industrial action.	Liability contested.	Pecuniary penalties amounting to $150,000: • $120,000 against the CFMEU (for 3 contraventions of s 38 BCII Act); • $17,000 against McDonald (for 2 contraventions of s 38 BCII Act); • $13,000 against Buchan (for 3 contraventions of s 38 BCII Act). $150,000 against the CFMEU and McDonald for contempt: • $100,000 against the CFMEU (for contempt of court on two occasions); • $50,000 against McDonald (for contempt of court on two occasions). Pecuniary penalties amounting to $50,000: • $40,000 against the CFMEU (for 2 contraventions

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						contravention of s 44 BCII Act); • $10,000 against McDonald (for 2 contraventions of s 44 BCII Act).
60.	*Australian Building and Construction Commissioner v Graauwmans* (Unreported, FMCA, Riley FM, MLG912/2011, 16 April 2012) (penalty)	Barwon Heads Bridge Project, VIC $23 million	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $35,000: • $5000 against Graauwmans and declaration (for 1 contravention of s 38 BCII Act); • $30,000 against the CFMEU Vic Branch and declaration (for 1 contravention of s 38 BCII Act).
61.	*Gregor v Construction, Forestry, Mining and Energy Union; Cozadinos v Construction, Forestry, Mining and Energy Union*	Royal Children's Hospital, Melbourne, VIC Myer Project site Docklands,	Union (CFMEU)	Unlawful industrial action. Coercion in relation to engagement of building employees and building contractors.	Liability uncontested.	Pecuniary penalties amounting to $415,000: • $85,000 against the CFMEU (for 3 contraventions of s 38 BCII Act); • $5,000 against Reardon (for 1 contravention of s 38 BCII

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	[2011] FCA 808 (penalty)	VIC ANZ Project site, Docklands, VIC Merchant Project site Docklands, VIC Montage Project site Docklands, VIC Olsen Project site South Yarra, VIC Robin Project site Docklands, VIC $2.4 billion				Act); • $10,000 against Hudson (for 2 contraventions of s 38 BCII Act); • $5,000 against McLoughlin (for 1 contravention of s 38 BCII Act); • $5,000 against Christopher (for 1 contravention of s 38 BCII Act); • $218,000 against the CFMEU (for 7 contraventions of s 43 BCII Act); • $17,000 against Hudson (for 3 contraventions of s 43 BCII Act); • $17,000 against Washington (for 4 contraventions of s 43 BCII Act); • $12,000 against Christopher (for 3 contraventions of s 43 BCII Act); • $7,000 against Setka (for 2 contraventions of s 43 BCII Act); • $17,000 against Spernovasilis (for 4 contraventions of s 43

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						BCII Act); • $17,000 against Reardon (for 4 contraventions of s 43 BCII Act).
62.	*Alfred v Construction, Forestry, Mining and Energy Union* [2011] FCA 556 (unlawful industrial action) *(No 2)* [2011] FCA 557 (**contempt**)	Melbourne Wholesale Fruit, Vegetable and Flower Market, VIC	Union (CFMEU)	Unlawful industrial action. Coercion in relation to enterprise agreements.	Liability uncontested.	Pecuniary penalties amounting to $250,000: • $100,000 and declarations against the CFMEU (for 1 contravention of each of ss 38 and 44 BCII Act); • $150,000 against the CFMEU for **contempt**.
63.	*Cozadinos v Construction, Forestry, Mining and Energy Union* [2011] FMCA 284 (penalty)	EastLink Freeway, VIC $2.5 billion	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $37,500: • $30,000 against the CFMEU (for 1 contravention of s 38 BCII Act); • $5,000 against Powell (for 1 contravention of s 38 BCII Act); • $2,500 against Tadic (for 1 contravention of s 38 BCII

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						Act).
64.	*Heyman v Construction, Forestry, Mining and Energy Union* [2011] FMCA 145 (penalty)	Royal Children's Hospital, Melbourne, VIC $1 billion	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $41,000: • $30,000 against the CFMEU (for 1 contravention of s 38 BCII Act); • $6,000 against Washington (for 1 contravention of s 38 BCII Act); • $5,000 against Hudson (for 1 contravention of s 38 BCII Act).
65.	*White v Construction, Forestry, Mining and Energy Union* [2011] FCA 192 (penalty)	Geelong, Southern Link and Monash projects, VIC $455.8 million	Union (CFMEU)	Unlawful industrial action. Coercion in relation to engagement of building employees and building contractors.	Liability uncontested.	Pecuniary penalties amounting to $170,000: • $105,000 against the CFMEU (for 1 contravention of ss 38 and 43 BCII Act); • $13,000 against Edwards (for 1 contravention of ss 38 and 43 BCII Act); • $5,000 against Graauwmans (for 1 contravention of ss 38 and 43 BCII Act); • $8,000 against Hill (for 1 contravention of ss 38 and 43

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						BCII Act); • $5,000 against Long (for 1 contravention of ss 38 and 43 BCII Act); • $5,000 against Murphy (for 1 contravention of ss 38 and 43 BCII Act); • $11,000 against Powell (for 1 contravention of ss 38 and 43 BCII Act); • $5,000 against Reardon (for 1 contravention of ss 38 and 43 BCII Act); • $5,000 against Stephenson (for 1 contravention of ss 38 and 43 BCII Act); • $8,000 against Tadic (for 1 contravention of ss 38 and 43 BCII Act).
66.	*Lovewell v Pearson* [2011] FMCA 102 (penalty)	Rivers Point Apartments, Brisbane, QLD $19 million	Union (BLF)	Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner, when exercising right of entry.	Liability uncontested.	Pecuniary penalties amounting to $21,000: • $4,500 against Pearson (for 1 contravention of s 767(1) WR Act); • $16,500 against the BLF (for 1 contravention of s 767(1) WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
67.	*White v Powell* (Unreported, FMCA, Burchardt FM, 16 June 2011) (penalty)	Monash Freeway upgrade site, Chadstone, VIC	Union (CFMEU)	Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner, when exercising right of entry.		$5,000 against Powell (for contravening s 767(1) of the WR Act).
68.	*Radisich v Molina* *(No 2)* [2011] FMCA 66 (liability) *(No 3)* [2012] FMCA 419 (penalty)	Coles-Myer Regional Distribution Centre at Horrie Miller Driver, Perth Airport, WA $120 million	Union (CFMEUW and CFMEU)	False or misleading statement about the obligation/need to be (or not be) a member of an industrial association.	Liability contested.	Pecuniary penalties amounting to $9,240: • $660 and declarations against Molina (for 1 contravention of s 790(1)(a) WR Act); • $3,960 and declarations against the CFMEUW (for 1 contravention of s 790(1)(a) WR Act); • $4,620 and declarations against the CFMEU (for 1 contravention of s 790(1)(a) WR Act).
69.	*Flynn v Construction, Forestry, Mining and Energy Union*	Flinders University Drive, Bedford Park, SA	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $45,000: *Flynn:* • $17,000 against the CFMEU

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	Mathers v Construction, Forestry, Mining and Energy Union [2011] FMCA 32 (penalty)	$10 million				(for 2 contraventions of s 38 BCII Act); • $3,000 against Feehan (for 2 contraventions of s 38 BCII Act). *Mathers:* • $20,000 against the CFMEU (for 1 contravention of s 38 BCII Act); • $5,000 against Feehan (for 1 contravention of s 38 BCII Act).
70.	*Gregor v Berardi* [2010] FMCA 805 (penalty)	Residential Development, Hawthorn, VIC	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $30,000: • $5,000 and declarations against Berardi (for 1 contravention of s 38 BCII Act); • $25,000 and declarations against the CFMEU (for 1 contravention of s 38 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
71.	*Wotherspoon v Construction, Forestry, Mining and Energy Union* [2010] FMCA 786 (penalty)	Walter and Eliza Hall Institute, VIC	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $27,500: • $22,500 and declaration against the CFMEU (for 1 contravention of s 38 BCII Act); • $2,500 and declaration against Reardon (for 1 contravention of s 38 BCII Act); • $2,500 and declaration against Hudson (for 1 contravention of s 38 BCII Act).
72.	*White v Construction, Forestry, Mining and Energy Union* [2010] FMCA 693 (penalty)	Alto Apartment Building, St Kilda, VIC $45 million	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $46,200: • $38,500 and declarations against the CFMEU (for 1 contravention of s 38 BCII Act); • $7,700 and declarations against McLoughlin (for 1 contravention of s 38 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
73.	*Gregor v Setka* [2010] FMCA 690 (liability) *Setka v Gregor* [2011] FCAFC 64 (bias recusal application) *(No 2)* [2011] FCAFC 90 (appeal)	ANZ Docklands site, VIC $20 million	Union (CFMEU)	Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner, when exercising right of entry.	Liability contested.	$3,000 against Setka (for 1 contravention of s 767 WR Act).
74.	*Hardwick v Australian Manufacturing Workers' Union* (2010) 198 IR 312; [2010] FCA 818 (penalty)	Patricia-Baleen Gas Plant, Gippsland, VIC $100 million	Union (CFMEU, AMWU, AWU and CEPU)	Coercion in relation to enterprise agreements.	Liability uncontested.	Pecuniary penalties amounting to $67,500: • $9,000 against the CFMEU (for 1 contravention of s 44(1) BCII Act); • $3,500 against John Parker (for 1 contravention of s 44(1) BCII Act); • $15,000 against the AMWU (for 1 contravention of s 44(1) BCII Act); • $5,000 against Warren (for 1 contravention of s 44(1) BCII

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						Act); • $14,000 against the AWU (for 1 contravention of s 44(1) BCII Act); • $6,000 against Lee (for 1 contravention of s 44(1) BCII Act); • $11,000 against the CEPU (for 1 contravention of s 44(1) BCII Act); • $4,000 against (for 1 contravention of s 44(1) BCII Act).
75.	*Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] FCA 754	West Gate Bridge Project, VIC $240 million	Union (CFMEU, AMWU)	Coercion in relation to enterprise agreements. Coercion in relation to engagement of building employees and building contractors. Unlawful industrial action.	Liability contested.	Pecuniary penalties amounting to $1,325,000: • $858,000 against the CFMEU ($535,000 for 8 contraventions of s 43 BCII Act, $247,000 for 9 contraventions of s 44 BCII Act, $76,000 for 2 contraventions of s 38 BCII Act); • $71,000 against Powell ($45,000 for 4 contraventions of s 43 BCII Act, $21,000 for 5 contraventions of s 44 BCII

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						Act, $5,000 for 1 contravention of s 38 BCII Act); • $71,000 against Stephenson ($45,000 for 5 contraventions of s 43 BCII Act $16,000 for 5 contraventions of s 44 BCII Act, $10,000 for 1 contravention of s 38 BCII Act); • $298,000 against the AMWU ($185,000 for 3 contraventions of s 43 BCII Act, $78,000 for 4 contraventions of s 44 BCII Act, $35,000 for 1 contravention of s 38 BCII Act); • $27,000 against Mavromatis ($14,000 for 2 contraventions of s 44 BCII Act, $7,000 for 1 contravention of s 43 BCII Act, $6,000 for 1 contravention of s 38 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
76.	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2010] FCA 784 *(No 2)* [2010] FCA 977 (penalty hearing) [2011] FCAFC 29 (appeal against penalty)	City Square Project, WA	Union (CFMEU)	Unlawful industrial action.	Liability contested.	Pecuniary penalties amounting to $48,000: • $40,000 and declarations against the CFMEU (for 1 contravention of s 38 BCII Act); • $8,000 and declarations against McDonald (for 1 contravention of s 38 BCII Act).
77.	*Darlaston v Parker* (2010) 189 FCR 1; [2010] FCA 771 (liability) *(No 2)* [2010] FCA 1382 (penalty)	St Patrick's Estate, NSW $5 million	Union (CFMEU and CFMEU NSW)	Contravention of right of entry provisions: Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner. Permit holder failed	Liability contested.	Pecuniary penalties amounting to $50,500: • $15,000 and declarations against the CFMEU (for 7 contraventions of ss 758(3) and 767(1) WR Act); • $15,000 and declarations against the CFMEU NSW (for 7 contraventions of ss 758(3) and 767(1) WR Act);

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
				to comply with reasonable request of the occupier to comply with an occupational health and safety requirement that applies to the premises.		• $8,000 and declarations against Brian Parker (for 2 contraventions of s 758(3) and 1 contravention of s 767(1) WR Act); • $2,500 and declarations against Hanlon (for 1 contravention of s 758(3) WR Act); • $7,500 and declarations against Mitchell (for 1 contravention each of ss 758(3) and 767(1) WR Act); • $2,500 and declarations against Kera (for 1 contravention of s 758(3) WR Act).
78.	*Jenkinson v Carter* [2010] FMCA 462 (penalty)	Johnson Road, Heathroad, QLD	Union (CFMEU)	Contravention of right of entry provisions: Permit holder(s) intentionally hindered or obstructed another person, or otherwise acted in an improper manner. Misrepresentation(s)	Liability uncontested.	$8,800 against Carter ($5,500 for 1 contravention of s 767 WR Act and $3,300 for 1 contravention of s 768 WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
				concerning right of entry.		
79.	*Wotherspoon v Construction, Forestry, Mining and Energy Union* [2010] FMCA 184	Monash Freeway, VIC $204 million	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $31,000: • $25,000 against the CFMEU (referable to 1 contravention of s 38 BCII Act); • $5,000 against Stephenson (referable to 1 contravention of s 38 BCII Act); • $1,000 against Slater wholly suspended (referable to 1 contravention of s 38 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
80.	*Wotherspoon v Construction, Forestry, Mining and Energy Union* [2010] FCA 111 [2011] FCA 158 (penalty)	Docklands projects and Royal Children's Hospital, Melbourne, VIC $1 billion	Union (CFMEU and CEPU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $110,000: • $48,250 against the CFMEU (for 3 contraventions of s 38 BCII Act); • $36,250 against the CEPU (for 2 contraventions of s 38 BCII Act); • $8,500 against McLoughlin (for 2 contraventions of s 38 BCII Act); • $5,000 against Spernovasilis (for 2 contraventions of s 38 BCII Act); • $5,000 against Gray (for 2 contraventions of s 38 BCII Act); • $4,500 against Christopher (for 2 contraventions of s 38 BCII Act); • $2,500 against Hudson (for 1 contravention of s 38 BCII Act).
81.	*Cozadinos v Construction, Forestry, Mining and Energy Union*	Caulfield Grammar School, VIC	Union (CFMEU)	Unlawful industrial action. Coercion in relation to	Liability uncontested.	Pecuniary penalties amounting to $45,000: • $40,000 against the CFMEU

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	[2010] FCA 48 (penalty)	$6.8 million		engagement of building employees and building contractors.		($20,000 for 1 contravention of s 38 BCII Act and $20,000 for 1 contravention of s 43 BCII Act); • $5,000 against Mates ($2,000 for 1 contravention of s 38 BCII Act and $3,000 for 1 contravention of s 43 BCII Act).
82.	*Stuart v Automotive Food Metals Engineering Printing and Kindred Industries Union* (Unreported, FCA, North J, VID484/2009, 28 August 2009) (penalty)	Maryvale Pulp Mill project, VIC $280 million	Union (AFMEPKIU)	Coercion in relation to enterprise agreements.		Pecuniary penalties amounting to $30,000: • $25,000 and declarations against the AFMEPKIU (referable to 1 contravention of s 44 BCII Act); • $5,000 and declarations against Dodd (referable to 1 contravention of s 44 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
83.	*Wilson v Nesbit* (2009) 195 IR 399; [2009] FCA 1574 (penalty)	QLD	Union (CFMEU)	Coercion in relation to enterprise agreements.	Liability uncontested.	Pecuniary penalties amounting to $49,000: • $40,000 and declarations against the CFMEU (for 1 contravention of s 44 BCII Act); • $9,000 and declarations against Nesbit (for contravention of s 44 BCII Act).
84.	*Gregor v Construction, Forestry, Mining and Energy Union* [2009] FMCA 1266 (penalty)	Bialik College, Hawthorn, VIC	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $8,500: • $7,500 and declarations against the CFMEU (for 1 contravention of s 38 BCII Act); • $1,000 and declarations against Berardi wholly suspended (for 1 contravention of s 38 BCII Act).
85.	*John Holland v Construction, Forestry, Mining and Energy Union*	Tullamarine Airport project, Melbourne,	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	$23,000 and declarations against the CFMEU (for 2 contraventions of s 38 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	[2009] FMCA 1248 (penalty)	VIC				
86.	*Stuart v Construction, Forestry, Mining and Energy Union* [2009] FCA 1119 (penalty) (2010) 269 ALR 49; [2010] FCAFC 65 (appeal)	Police and Law Courts Complex, Morwell, VIC $39 million	Union (CFMEU)	Unlawful industrial action. Coercion in relation to enterprise agreements.	Liability uncontested.	Pecuniary penalties amounting to $25,000: • $25,000 and declarations against the CFMEU (for 1 contravention of s 44 BCII Act and 1 s 38 contravention); • Declarations against Corbett (for 1 contravention of each of ss 44 and 38 BCII Act).
87.	*Cruse v Construction, Forestry, Mining and Energy Union* [2009] FCA 787 (penalty)	133 Southbank Boulevard, Melbourne, VIC	Union (CFMEU)	Unlawful industrial action.	Liability partially contested.	Pecuniary penalties amounting to $15,000: • $10,000 and declarations against the CFMEU (for 1 contravention of s 38 BCII Act); • $5,000 and declarations against Washington (for 1 contravention of s 38 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
88.	*Alfred v Construction, Forestry, Mining and Energy Union* [2009] FMCA 613 (liability) *(No 2)* [2009] FMCA 1003 (penalty) [2011] FCAFC 13 (appeal)	Portico Plaza, Toongabbie, NSW	Union (CFMEU and CFMEU NSW)	Coercion (freedom of association).	Liability contested.	Pecuniary penalties amounting to $28,600: • $13,000 against the CFMEU (for 1 contravention of s 789 WR Act); • $13,000 against the CFMEU NSW (for 1 contravention of s 789 WR Act); • $2,600 against Manna (for 1 contravention of s 789 WR Act).
89.	*Hogan v Riley* (2009) 231 FLR 267; [2009] FMCA 269 (first instance) (2010) 182 FCR 126; [2010] FCAFC 30 (appeal) *(No 2)* (2010) 200	National Convention Centre, Canberra, ACT $30 million	Employer	Person(s) refused or unduly delayed a permit holder entitled to enter the premises.	Liability contested.	Pecuniary penalties amounting to $12,000: • $10,000 and a declaration against Iqon for 3 contraventions of s 767(3) WR Act; • $1,000 and a declaration against Byatt for 1 contravention of s 767(3) WR Act; • $1,000 and a declaration against Riley for 1

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	IR 311; [2010] FMCA 760 (remitter)					contravention of s 767(3) WR Act; • A declaration against fourth respondent breach for 1 contravention of s 767(3) WR Act.
90.	*Cruse v Construction, Forestry, Mining and Energy Union* (2009) 182 IR 60; [2009] FMCA 236 (penalty)	Yarra Arts Site, Southbank, Melbourne, VIC $120 million	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $38,500: • $27,500 and declarations against the CFMEU (for 1 contravention of each of s 38 BCII Act and EBA); • $11,000 and declarations against McLoughlin ½ suspended (for 1 contravention of each of s 38 BCII Act and EBA).
91.	*Cozadinos v Dempster* [2009] FMCA 265 (penalty)	World Trade Centre, VIC $200 million	Union (CFMEU)	Coercion (freedom of association). False or misleading statement about the obligation/need to be (or not be) a member of an industrial association or about the	Liability uncontested.	Pecuniary penalties amounting to $2,000: • $1,000 and declarations against Dempster (for 1 contravention of s 789 WR Act); • $1,000 and declarations against Henry (for 1

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
				requirement to disclose membership status.		contravention of s 790 WR Act).
92.	*Cozadinos v Construction, Forestry, Mining and Energy Union* (Unreported, FMCA, Burchardt FM, MLG624/2009, 22 February 2010)	Westfield Shopping Centre, Doncaster, VIC $400 million	Union (CFMEU)	Industrial associations acting, or threatening to act, against employees (freedom of association).		Pecuniary penalties amounting to $7,000: • $6,000 against the CFMEU (referable to 1 contravention of s 797(3)(a) WRA); • $1,000 against Ioannidis (referable to 1 contravention of s 797(3)(a) WRA).
93.	*Cozadinos v Construction, Forestry, Mining and Energy Union* (Unreported, FMCA, Burchardt FM, MLG516/2009, 22 February 2010)	Westfield Shopping Centre, Doncaster, VIC $400 million	Union (CFMEU)	False or misleading statement about the obligation/need to be (or not be) a member of an industrial association or about the requirement to disclose membership status.	Liability uncontested.	Pecuniary penalties amounting to $7,000: • $6,000 against the CFMEU (for 1 contravention of s 790 WR Act); • $1,000 against Salta (for 1 contravention of s 790 WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
94.	*Wotherspoon v Brown* (Unreported, FMCA, Burchardt FM, MLG362/2009, 5 November 2009) (penalty)	Hickory Development site, Flemington, VIC		Industrial associations acting, or threatening to act, against employees (freedom of association). False or misleading statement about the obligation/need to be (or not be) a member of an industrial association or about the requirement to disclose membership status.		$4,000 pecuniary penalty against Robert Brown ½ suspended (referable to 1 contravention of each of ss 790 and 797(3) WR Act).
95.	*Cozadinos v Australian Workers Union* (Unreported, FMCA, Burchardt FM, MLG390/2009, 25 August 2009) (penalty)	Maryvale Pulp Mill, VIC $280 million	Union (AWU and CEPU)	Unlawful industrial action.		Pecuniary penalties amounting to $30,500: • $8,750 and declarations against the AWU (referable to 2 contraventions of s 38 BCII Act); • $1,750 and declarations against Lee (referable to 2 contraventions of s 38 BCII Act); • $8,000 and declarations against the CEPU (referable to 1 contravention of s 38 BCII Act);

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						• $1,500 and declarations against Mooney (referable to 1 contravention of s 38 BCII Act); • $8,750 and declarations against the AMWU (referable to 1 contravention of s 38 BCII Act); • $1,750 and declarations against Dodd (referable to 1 contravention of s 38 BCII Act).
96.	*Keene v Automotive Food Metals Engineering Printing and Kindred Industries Union* (Unreported, FMCA, Burchardt FM, MLG331/2009, 25 August 2009) (penalty)	Maryvale Pulp Mill, VIC $280 million	Union (AMWU)	Unlawful industrial action.		Pecuniary penalties amounting to $7,000: • $5,800 and declarations against the AMWU (referable to 1 contravention of s 38 BCII Act); • $1,200 and declarations against Dodd (referable to 1 contravention of s 38 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
97.	*Stuart v Australian Workers Union* (Unreported, FMCA, Burchardt FM, MLG339/2009, 25 August 2009) (penalty)	Maryvale Pulp Mill, VIC $280 million	Union (AWU)	Unlawful industrial action.		Pecuniary penalties amounting to $8,000: • $6,700 and declarations against the AWU (referable to 1 contravention of s 38 BCII Act); • $1,300 and declarations against Lee (referable to 1 contravention of s 38 BCII Act).
98.	*John Holland Pty Ltd v Benstead* [2009] FMCA 1065	VIC	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	$25,000 against the CFMEU (for 2 contraventions of s 38 BCII Act).
99.	*Williams v Construction, Forestry, Mining and Energy Union* (2009) 179 IR 441; [2009] FCA 223 (liability) *(No 2)* (2009) 182	372 Darebin Road, Alphington, VIC	Union (CFMEU)	Coercion in relation to engagement of building employees and building contractors.	Liability contested.	Pecuniary penalties amounting to $42,500: • $35,000 (reduced from $100,000) against the CFMEU (for 2 contraventions of s 43 BCII Act); • $7,500 (reduced from $15,000) against Mates (for 2

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	IR 327; [2009] FCA 548 (penalty) [2009] FCAFC 171 (appeal)					contraventions of s 43 BCII Act).
100.	*Bovis Lend Lease Pty Ltd v Construction, Forestry, Mining and Energy Union* [2009] FCA 194 (liability) *(No 2)* [2009] FCA 650 (**contempt**) (penalty)	New Royal Children's Hospital site, VIC	Union (CFMEU)	Contempt of court order.	Liability contested	$75,000 ordered against the CFMEU for contempt of court order.
101.	*Stuart v L.U. Simon Builders Pty Ltd* [2009] FCA 107 (penalty)	Aquavista site, Docklands, VIC	Employer	Discrimination against employer in relation to industrial instruments.	Liability uncontested.	$55,000 and declarations against LU Simon ½ suspended (for 2 contraventions of s 45 BCII Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
102.	*Cahill v Construction, Forestry, Mining and Energy Union* *(No 3)* (2009) 178 IR 89; [2009] FCA 52 (liability) [2009] FCA 1040 (penalty) (2010) 269 ALR 1; [2010] FCAFC 39 (appeal) [2010] HCATrans 324 (special leave disposition)	Mount Street, Heidelberg, VIC	Union (CFMEU)	Coercion in relation to engagement of building employees and building contractors.	Liability contested.	On appeal, upholding first instance, $85,500 comprising of: • $75,500 and declarations against the CFMEU (for 3 contraventions of s 43 BCII Act); • $10,000 and declarations against Mates (for 3 contraventions of s 43 BCII Act).
103.	*Cozadinos v Construction, Forestry, Mining and Energy Union* [2008] FMCA 1591 (liability) [2009] FMCA	Deakin University, Geelong Campus, VIC	Union (CFMEU)	Unlawful industrial action. Industrial action prior to nominal expiry date of collective agreement/ workplace determination.	Liability contested.	Pecuniary penalties amounting to $9,600: • $5,000 and declarations against the CFMEU (for 1 contravention of s 38 BCII Act) and other declarations (for 1 contravention of s 494 WR Act);

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	272 (penalty)					• $4,600 and declarations against Johnston (for 1 contravention of s 38 BCII Act) and other declarations (for 1 contravention of s 494 WR Act).
104.	*Stuart v Australian Workers Union* (Unreported, FMCA, FM Burchardt, MLG1179/2008, 25 August 2009) (penalty)	Maryvale Pulp Mill, Maryvale Road, Morwell, VIC $280 million	Union (AWU and CEPU)	Unlawful industrial action.		Pecuniary penalties amounting to $29,500: • $8,750 and declarations against the AWU (referable to 1 contravention of s 38 BCII Act); • $1,750 and declarations against Lee (referable to 1 contravention of s 38 of the BCII Act; • $8,000 and declarations against the CEPU (referable to 1 contravention of s 38 BCII Act); • $1,500 and declarations against Mooney (referable to 1 contravention of s 38 BCII Act);

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						• $8,000 and declarations against the AMWU (referable to 1 contravention of s 38 BCII Act); • $1,500 and declarations against Dodd (referable to 1 contravention of s 38 BCII Act).
105.	*Alfred v Quirk* [2008] AIRC 781 (liability) PR985044 (penalty)	Hansen Yunken Pty Limited worksite, 28 Castle Hill Road, Castle Hill, NSW $6 million	Union (CFMEU)	Abuse of right of entry.	Liability contested.	Penalties imposed for abusing right of entry under s 770 of the WR Act: • Suspended order suspending federal permit of Quirk for 1 month (for abuse of ROE under s 770 WR Act); • Suspended order to provide further opportunity for further evidence and submissions.

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
106.	*Duffy v Construction, Forestry, Mining and Energy Union* [2008] FCA 1804 (liability) *(No 2)* [2009] FCA 299 (penalty)	University Hill, Plenty Road, Bundoora, VIC $5 million	Union (CFMEU)	Unlawful industrial action.	Liability contested.	$5,500 pecuniary penalty against the CFMEU (for 1 contravention of s 38 BCII Act).
107.	*Radisich v Buchan* [2008] AIRC 896 (penalty)	Armadale Shopping Centre site,WA Parliament Place site, WA Q-Con's Condor Towers site, WA	Union (CFMEU)	Abuse of right of entry.	Liability contested.	Penalties imposed for abusing right of entry under s 770 of the WR Act: • Federal permit of Buchan suspended for 3 months with further 2 month suspension in the event of a further breach; • Federal permit of Molina suspended for 2 months with further 1 month suspension in the event of a further breach; • All CFMEU (C&G Div, WA Div Branch) permits subject to condition not to enter with McDonald except in certain circumstances;

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						• A written direction be given to McDonald by the CFMEU that he is not to purport to rely on any right of entry under the WR Act when he holds no right of entry permit.
108.	*Alfred v Primmer* *(No 2)* (2008) 221 FLR 54; [2008] FMCA 1476 (liability) [2009] FMCA 158 (penalty)	Kiama High School Re-development Project, NSW	Union (CFMEU and CFMEU NSW)	Industrial association(s) advised, encouraged, incited, or coerced a person (the head contractor) into taking a prohibited action against an independent contractor.	Liability contested.	Pecuniary penalties amounting to $23,500: • $10,000 and declarations against the CFMEU (for 2 contraventions of s 800(1)(a) WR Act); • $10,000 and declarations against the CFMEU NSW (for 2 contraventions of s 800(1)(a) WR Act); • $3,500 and declarations against Primmer (for 2 contraventions of s 800(1)(a) WR Act).
109.	*Alfred v Wakelin* *(No 1)* [2008] FCA 1455 (CFMEU)	Lake Cowal gold mine, NSW	Union (CFMEU, AWU and AWU NSW)	Unlawful industrial action. Industrial action prior to nominal expiry date	Liability uncontested by CFMEU.	Pecuniary penalties amounting to $64,100: • $8,000 against the CFMEU (for 1 contravention of s 38

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	(No 2) [2008] FCA 1543 (AWU) *(No 4)* [2009] 180 IR 335; FCA 267 (AWU)			of certified agreement/award.		BCII Act); • $1,100 against Wakelin (for 1 contravention of s 38 BCII Act); • $28,000 and declarations against the AWU (for 2 contraventions of each of s 38 BCII Act and EBA) and other declarations (for 2 contraventions of s 170MN WR Act); • $18,000 and declarations against the AWU NSW (for 2 contraventions of s 38 BCII Act); • $9,000 and declarations against O'Connor (for 2 contraventions of each of s 38 BCII Act and EBA) and other declarations (for 2 contraventions of s 170MN WR Act).
110.	*Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* *(No 2)* [2008]	CSL Parkville, VIC $5 million	Union (CFMEU)	Coercion (freedom of association). False or misleading statement about the obligation/need to be	Liability contested.	Pecuniary penalties amounting to $30,775: • $24,775 and declarations against the CFMEU (for 1 contravention of each of ss

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	FMCA 1015 (liability) *(No 3)* [2008] FMCA 1435 (penalty) [2011] FCA 56 (appeal)			(or not be) a member of an industrial association or about the requirement to disclose membership status.		789 and 790 WR Act); • $6,000 and declarations against Deans ½ suspended (for 1 contravention of each of ss 789 and 790 WR Act).
111.	*Australian Building and Construction Commissioner* [2008] AIRC 1140 (liability) *Office of Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 118; [2008]	Mount Panorama Resort site, Bathurst, NSW	Union (CFMEU)	Abuse of right of entry.	Liability contested.	Suspended order suspending Lane's federal permit for 4 months (for contravening s 770 WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	AIRCFB 898 (appeal) *Re Australian Building and Construction Commissioner* [2009] AIRC 868 (penalty)					
112.	*Standen v Feehan* (2008) 175 IR 297; [2008] FCA 1009 (liability) *(No 2)* (2008) 177 IR 276; [2008] FCA 1574 (penalty)	Halifax Street, SA $3 million	Union (CFMEU)	Engaging in prohibited conduct when exercising right of entry.	Liability contested.	$1,300 and declarations against Feehan (for 1 contravention of s 285E WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
113.	*Stuart-Mahoney v Construction Forestry Mining and Energy Union* (2008) 177 IR 61; [2008] FCA 1426	Police and Law Courts Complex, Morwell, VIC $39 million	Union (CFMEU)	Unlawful industrial action. Coercion in relation to engagement of building employees and building contractors	Liability partially contested.	Pecuniary penalties amounting to $63,000: • $55,000 and declarations against the CFMEU ($35,000 referable to 1 contravention of s 43 BCII Act, $20,000 referable to 1 contravention of s 38 BCII Act); • $8,000 and declarations against John Parker wholly suspended ($6,000 referable to 1 contravention of s 43 BCII Act, $2,000 referable to 1 contravention of s 38 BCII Act).
114.	*Cruse v Construction Forestry Mining and Energy Union* [2008] FCA 1267 (liability) (No 2) [2008]	Iluka Murray Basin Development Project, VIC $270 million	Union (CFMEU)	Coercion in relation to enterprise agreements. False or misleading representation about a person's obligation to join and industrial association.	Liability contested.	Pecuniary penalties amounting to $4,000: • $4,000 against the CFMEU (referable to 1 contravention of s 170NC WRA) and declarations (referable to 1 contravention of s 298SC WRA); • Declarations against Fry (referable to 1 contravention

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	FCA 1637 (penalty)					of each of ss 170NC and 298SC WRA).
115.	*Temple v Powell* (2008) 169 FCR 169; [2008] FCA 714 (penalty)	Ravensthorpe site, WA	Union (CFMEU and CFMEUW)	Unlawful industrial action. Industrial action prior to nominal expiry date of certified agreement/award.	Liability uncontested.	Pecuniary penalties amounting to $35,000: • $18,000 against the CFMEU ($12,000 for 1 contravention of s 38 BCII Act, $5,000 for 1 contravention of s 178 WR Act and $1,000 for 1 contravention of s 170MN WR Act); • $12,000 against the CFMEUW (for 1 contravention of s 38 BCII Act); • $3,500 against Powell ($2,500 for 1 contravention of s 38 BCII Act, $1,000 for 1 contravention of s 170MN WR Act); • $1,500 against McDonald (for 1 contravention of s 170MN WR Act).
116.	*Cahill v Construction,*	Herald and Weekly Times	Union (CFMEU)	Organisation made claim or took action (or	Liability uncontested.	Pecuniary penalties amounting to $4,000:

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	Forestry, Mining and Energy Union [2008] FCA 495 (penalty)	Building, VIC		threatened action) against employer for payments in relation to periods of industrial action. pay.		• $4,000 against the CFMEU (for 3 contraventions of s 187AB(1) WR Act); • Declarations against Setka and Tadic (for 2 contraventions each of s 187AB(1) WR Act).
117.	*Hadgkiss v Aldin* (2007) 164 FCR 394; [2007] FCA 2068 (penalty)	New Metro Rail City Project – Package F from Perth to Mandurah, WA	Employees	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $845,200 ($568,800 suspended): • $9,000 (each) and declarations against 84 respondents 2/3 suspended (for 1 contravention of s 38 BCII Act); • $1,000 (each) and declarations against 64 respondents ¾ suspended (for 1 contravention of AIRC order); • $7,500 (each) and declarations against 3 respondents ¾ suspended (for 1 contravention of s 38 BCII Act); • $900 (each) and declarations against 3 respondents 2/3

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						suspended (for 1 contravention of AIRC order).
118.	*Draffin v Construction, Forestry, Mining and Energy Union* [2007] FCA 2011 (Walton) [2009] FCA 243 (CFMEU) [2009] FCAFC 120 (appeal)	Brunswick Police Station, VIC $5.5 million	Union (CFMEU)	Coercion in relation to engagement of building employees and building contractors. Discrimination against employer in relation to industrial instruments. Industrial associations acting against employers (freedom of association). The head contractor acted against a subcontractor, for a prohibited reason (freedom of association).	Liability uncontested.	Pecuniary penalties amounting to $132,750: • $50,000 against Walton ½ suspended for 1 contravention of s 45 BCII Act, and 1 contravention of s 298K(2)(d) WR Act); • $52,750 against the CFMEU (for 1 contravention of s 43 BCII Act, 1 contravention of s 45 BCII Act, and 1 contravention of s 298P WR Act); • $10,000 and declarations against Oliver ½ suspended (for 1 contravention of s 43 BCII Act, 1 contravention of s 45 BCII Act, and 1 contravention of s 298P WR Act); • $10,000 against Benstead ½ suspended (for 1 contravention of s 43 BCII Act, $1,250 for 1

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						contravention of s 45 BCII Act, and 1 contravention of s 298P WR Act) and declarations (for 1 contravention of each of ss 45 BCII Act and 298P WR Act); • $10,000 against Allen ½ suspended (for 1 contravention of s 43 BCII Act, 1 contravention of s 45 BCII Act, and 1 contravention of s 298P WR Act) and declarations (for 1 contravention of each of ss 45 BCII Act and 298P WR Act).
119.	*Cruse v Construction, Forestry, Mining and Energy Union* [2007] FMCA 1873 (penalty)	Mineral Sand Separation Plant, VIC	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $42,000: • $35,000 and declarations against the CFMEU (for 1 contravention of each of s 38 BCII Act and EBA); • $7,000 and declarations against Stewart ½ suspended (for 1 contravention of each of s 38 BCII Act and EBA).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
120.	*Carr v Communications, Electrical, Electronic, Engineering, Information, Postal, Plumbing and Allied Services Union of Australia* [2007] FMCA 1526 (penalty)	Electrical industry, TAS	Union (CEPU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $19,800: • $11,000 and declarations against the CEPU (for 1 contravention of s 38 BCII Act); • $8,800 and declarations against Harkins (for 1 contravention of s 38 BCII Act).
121.	*Australian Building and Construction Commission v McLoughlin* (2007) 165 IR 369; [2007] AIRC 717 (penalty)	Cecil Street site, VIC Yarra Arts Melbourne Recital Centre Project, VIC St Leonard's College, Brighton East, VIC Bourke Street, Docklands,	Union (CFMEU)	Abuse of right of entry.	Liability contested.	Federal permit of McLoughlin suspended for two months and made subject to the condition that the permit holder undertake training (for contravening s 770 WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
		VIC				
122.	*A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2007] FCA 1047 (liability) [2008] FCA 466 (penalty)	Sunrise Apartments, Market Street, Wollongong, NSW $16 million	Union (CFMEU)	Coercion in relation to enterprise agreements.	Liability contested.	Pecuniary penalties amounting to $7,300: • $5,500 and declarations against the CFMEU (for 1 contravention of s 170NC WR Act); • $1,800 and declarations against Lane (for 1 contravention of s 170NC WR Act). The CFMEU was also ordered to pay damages of $23,000 plus interest.
123.	*Alfred v Lanscar* (2007) 167 IR 320; [2007] FCA 1001 (penalty)	Avenue Apartments, ACT	Union (CFMEU)	Industrial action or discriminatory action against independent contractors (freedom of association).	Liability uncontested.	Pecuniary penalties amounting to $12,000: • $10,000 and declarations against the CFMEU (for 2 contraventions of ss 298S(2) WR Act); • $2,000 and declarations against Lanscar (for 2 contraventions of ss 298S(2) WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
124.	*Furlong v Australian Workers Union* (2007) 162 IR 171; [2007] FMCA 443 (penalty)	Mineral Sands Separation Plant, Burgins Road, Hamilton, VIC	Union (AWU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $56,000: • $40,000 against the AWU ½ suspended (for 1 contravention of each of s 38 BCII Act and s 178 WR Act); • $4,000 against Lee (for 1 contravention of s 38 BCII Act); • $4,000 against Lambe (for 1 contravention of each of s 38 BCII Act and s 178 WR Act); • $4,000 against Brown (for 1 contravention of each of s 38 BCII Act and s 178 WR Act); • $4,000 against Watkins (for 1 contravention of each of s 38 BCII Act and s 178 WR Act).
125.	*Hadgkiss v Construction, Forestry, Mining and Energy Union* *(No 3)* [2007] FCA 87 (liability) *(No 4)* [2007]	Fairy Meadow site, North Gate Apartments, Wollongong, NSW $23 million	Union (CFMEU)	False or misleading representation about a person's obligation to join and industrial association.	Liability contested.	On remitter from appeal, pecuniary penalties amounting to $35,250: • $15,000 and declarations against the CFMEU (for 4 contraventions of s 298SC(c) WR Act); • $15,000 and declarations

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	FCA 425; (2007) 161 IR 338 (penalty) [2008] FCAFC 22 (appeal) *(No 5)* [2008] FCA 1040 (remitted penalty) [2009] FCAFC 17 (appeal)					against the CFMEU NSW (for 4 contraventions of s 298SC(c) WR Act); • $1,250 and declarations against Casper (for 1 contravention of s 298SC(c) WR Act); • $4,000 and declarations against Lane (for 3 contraventions of s 298SC(c) WR Act).
126.	*Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730 (penalty)	Holiday Inn Burswood Casino, Perth, WA	Union (CFMEU)	Secondary boycotts for the purpose of causing substantial loss or damage.	Liability uncontested.	Pecuniary penalties by consent amounting to $100,000: • $50,000 and declarations against the CFMEU (for 3 contraventions of s 45D TPA); • $50,000 and declarations against the CFMEUW (for 3 contraventions of s 45D TPA); • Declarations against McDonald (for 3 contraventions of s 45D TPA);

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						• Declarations against Buchan (for 2 contraventions of s 45D TPA); • Declarations against Powell (for 1 contravention of s 45D TPA).
127.	*Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union (No 4)* (2006) 164 IR 375; [2006] WASC 317 (penalty)	Metro City Rail Project, Melbourne, VIC	Union (CFMEU)	Unlawful industrial action.	Liability uncontested.	Pecuniary penalties amounting to $150,000: • $90,000 against the CFMEU (for 18 contraventions of s 38 BCII Act); • $30,000 against the CFMEUW (for 5 contraventions of s 38 BCII Act); • $30,000 against Joseph McDonald (for 16 contraventions of s 38 BCII Act).
128.	*Hadgkiss v Sunland Constructions Pty Ltd* [2006] FCA 1566 (penalty)	QLD	Union (CFMEU) Employer	False or misleading representation about a person's obligation to join and industrial association. Employer dismissed	Liability uncontested by Sunland Constructions. Liability contested by	$25,300 comprising of: • $6,000 and declarations against the CFMEU (for 1 contravention of s 298SC(c) WR Act); • $3,000 and declarations

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	Hadgkiss v Construction, Forestry, Mining and Energy Union (2007) 158 FCR 193; [2007] FCA 346 (liability) *Hadgkiss v Construction, Forestry, Mining and Energy Union* (2007) 162 IR 385; [2007] FCA 524 (penalty)			employee for a prohibited reason (freedom of association).	CFMEU.	against the CFMEU QLD (for 1 contravention of s 298SC(c) WR Act); • $300 against Oskam (for 1 contravention of s 298SC(c) WR Act); • $15,000 and declarations against Sunland ($12,000 for 1 contravention of s 298K WR Act and $3,000 for 1 contravention of s 298SC(c) WR Act); • $1,000 and declarations against Eshraghi (for 1 contravention of s 298SC(c) WR Act).
129.	*Ponzio v B & P Caelli Constructions Pty Ltd* [2006] FCA 1221 (penalty) (2007) 158 FCR 543; [2007]	Concept Blue, 336 Russell Street, Melbourne, VIC	Union (CFMEU) Employer	Organisation made claim or took action (or threatened action) against employer for payments in relation to periods of industrial action. Payments made or accepted in relation to	Liability uncontested.	On appeal, pecuniary penalties amounting to $11,000: • $6,000 against Caelli wholly suspended (for 1 contravention of s 187AA WR Act); • $5,000 and declarations against the CFMEU (for 1 contravention of s

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	FCAFC 65 (appeal)			periods of industrial action.		187AB(1)(a) WR Act and 3 contraventions of s 187AB(1)(b) WR Act); • declarations against Crnac and Spernovasilis (for 1 contravention each of s 187AB(1)(a) WR Act and 3 contraventions of s 187AB(1)(b) WR Act).
130.	*Ponzio v Maxim Electrical Services (Vic) Pty Ltd* (2006) 152 IR 347; [2006] FCA 579 (penalty)	Concept Blue, 336 Russell Street, Melbourne, VIC	Employer	Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	$900 pecuniary penalty against Maxim (for 1 contravention of s 187AA WR Act).
131.	*Martino v Construction, Forestry, Mining and Energy Union* (Unreported, Magistrates Court of Victoria (Industrial Division), Hawkins, 10 May	Footscray, VIC (Buildcorp site).	Union (CFMEU)	Coercion in relation to enterprise agreements.	Liability uncontested.	Pecuniary penalties amounting to $13,950: • $13,500 against the CFMEU (for 1 contravention of s 170NC WR Act); • $450 against Maher (for 1 contravention of s 170NC WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	2006. (penalty)					
132.	*Carr v Automotive Food Metals Engineering Printing and Kindred Industries Union* [2005] FCA 1802 (penalty)	Queensbury and Swanston Streets, Carlton, VIC (Austin site) Victoria Parade and Powlett Streets, East Melbourne, VIC (Tribeca site)	Union (AMWU)	Coercion in relation to enterprise agreements.	Liability uncontested.	Pecuniary penalties amounting to $27,400: • $25,000 and declarations against the AMWU (for 6 contraventions of s 170NC WR Act); • $1,000 and declarations against Mulipola (for 5 contraventions of s 170NC WR Act); • $600 and declarations against Eiffe (for 1 contravention of s 170NC WR Act); • $400 and declarations against Thomas (for 1 contravention of s 170NC WR Act); • $400 and declarations against Mansour (for 1 contravention of s 170NC WR Act).
133.	*Pine v Casello Constructions Pty Ltd* [2005] FCA 1854	Concept Blue, 336 Russell Street, Melbourne, VIC	Employer	Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	Declarations against Casello (for 1 contravention of s 187AA WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	(penalty)	Three Towers, Melbourne, VIC				
134.	*Furlong v Maxim Electrical Services (Aust) Pty Ltd* [2005] FCA 1518 (Pratt) *(No 2)* [2006] FCA 740 (Maxim) *(No 3)* [2006] FCA 1705 (CEPU)	Concept Blue, 336 Russell Street, Melbourne, VIC	Employer Union (CEPU)	Organisation made claim or took action (or threatened action) against employer for payments in relation to periods of industrial action. Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	Pecuniary penalties amounting to $3,500: • Declarations against Pratt (for 1 contravention of s 187AA WR Act and 2 contraventions of EBA); • $1,750 against Maxim (for 1 contravention of s 187AA WR Act) and declarations (for 1 contravention of EBA); • $1,750 against the CEPU (for 1 contravention of s 187AB(1)(b) WR Act) and declarations (for 1 contravention of EBA).
135.	*Lisette Pine v Expoconti Pty Ltd* (2005) 147 IR 246 [2005] FCA 1434 (penalty)	Concept Blue, 336 Russell Street, Melbourne, VIC Bio 21 project	Employer	Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	Declarations against Expoconti (for contraventions of s 187AA WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
		at the University of Melbourne, VIC				
136.	*Pine v Multiplex Constructions (Vic) Pty Ltd; Cruse v Multiplex Limited* [2005] FCA 1428 (Multiplex) [2007] FCA 2015 (CFMEU) (2008) 172 FCR 279; [2008] FCAFC 179 (appeal)	Concept Blue, 336 Russell Street, Melbourne, VIC	Employer Union (CFMEU)	Organisation made claim or took action (or threatened action) against employer for payments in relation to periods of industrial action. Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	Pecuniary penalties amounting to $6,500: • $4,000 against Multiplex (for 187AA WR Act); • $2,500 against the CFMEU (for 2 contraventions of s 187AB WR Act); • declarations against Thorson (for 2 contraventions of s 187AB and 1 contravention of s 187AA WR Act).
137.	*Ponzio v D and E Air Conditioning Pty Ltd* [2005] FCA 964 (penalty)	Concept Blue, 336 Russell Street, Melbourne, VIC Victoria Towers,	Employer	Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	Declarations against D and E (for 1 contravention of s 187AA WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
		Southbank, VIC Freshwater Place, Southbank, VIC Nolan Towers, VIC				
138.	*Ponzio v Firebase Sprinkler Systems Pty Ltd* [2005] FCA 733 (penalty)	Concept Blue, 336 Russell Street, Melbourne, VIC	Employer	Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	Declarations against Firebase (for 1 contravention of s 187AA WR Act).
139.	*Pine v Austress Freyssinet (Vic) Pty Ltd* [2005] FCA 583 (penalty)	Concept Blue, 336 Russell Street, Melbourne, VIC	Employer	Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	$800 and declarations against Austress (for multiple contraventions of s 187AA WR Act).
140.	*Alfred v Walter Construction Group Limited* [2005] FCA 497	Wollongong Sewage Treatment Plant, NSW	Union (CFMEU)	Coercion in relation to enterprise agreements.	Liability uncontested.	$7,500 and declarations against the CFMEU (for 3 contraventions of s 170NC WR Act).

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	(penalty)					
141.	*Pine v Seelite Windows & Doors Pty Ltd* [2005] FCA 500	Concept Blue, 336 Russell Street, Melbourne, VIC	Employer	Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	Declarations against Seelite (for 1 contravention of s 187AA WR Act).
142.	*Ponzio v BVM Builders Pty Ltd* [2005] FCA 238 (penalty)	Concept Blue, 336 Russell Street, Melbourne, VIC	Employer	Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	$200 against BVM (for 1 contravention of s 187AA WR Act).
143.	*Hadgkiss v Blevin* [2004] FCA 697 (liability) [2004] FCA 917 (penalty)	Clifton Apartments, NSW $12 million	Union (CFMEU)	Industrial associations acting against employers (freedom of association).	Liability contested.	Pecuniary penalties amounting to: • $5,500 against the CFMEU (for 1 contravention of s 298P(3) WR Act); • $1,100 against McGahan (for 1 contravention of s 298P(3) WR Act); • $1,100 against Blevin (for 1 contravention of s 298P(3) WR Act); • $1,093.43 against the respondents (CFMEU, McGahan and Blevin jointly and severally) for loss of wages;

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
						• $193.63 against the CFMEU (refund of union fees).
144.	*Alfred v Automotive Food Metals Engineering Printing and Kindred Industries Union* (20153071/03/2) (penalty)	Shoalhaven District Hospital, NSW	Union (AMWU)	Coercion in relation to enterprise agreements.	Liability uncontested.	$2,000 pecuniary penalty against the AMWU (for 1 contravention of s 170NC WR Act).
145.	*Clarke v Baulderstone Hornibrook Pty Ltd* [2003] FCA 1426 (penalty)	Woodside Towers Project, Perth, WA $250 million	Employer	Payments made or accepted in relation to periods of industrial action.	Liability uncontested.	$1,000 pecuniary penalty against Baulderstone Hornibrook (for 1 contravention of s 187AA WR Act).
146.	*Hamberger, Employment Advocate v Construction, Forestry, Mining and Energy Union*	Museum of Tropical Queensland, QLD	Union (CFMEU and BLFQ)	Industrial associations acting against employers (freedom of association).	Liability contested.	On appeal, pecuniary penalties amounting to $12,750: • $3,000 and declarations against the CFMEU (for 1 contraventions of s 298P(3) WR Act);

	CASE NAME & CITATION	PROJECT & VALUE	UNION/ EMPLOYER	NATURE OF CONDUCT	LIABILITY	PENALTY
	(2000) 103 IR 249; [2000] FCA 1923 (liability) [2002] FCA 585 (penalty) (2003) 127 FCR 309; [2003] FCAFC 38 (appeal)					• $5,000 and declarations against the BLF QLD (for 2 contraventions of s 298P(3) WR Act); • $1,500 and declarations against McHugh (for 2 contraventions of s 298P(3) WR Act); • $750 and declarations against Ravbar (for 2 contraventions of s 298P(3)(a) and 298P(3)(b) WR Act).
147.	*BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining & Energy Union* [2000] FCA 1853 (liability) [2001] FCA 336 (**contempt**) (penalty)	Tower, Elouera, West Cliff, Appin and Cordeaux Collieries, Illawarra, NSW	Union (CFMEU)	Contempt of court for the breach of a Federal Court injunction for enforcement of s 127 (stop strike) order.	Liability contested	$200,000 against the CFMEU for contempt of court, and costs on an indemnity basis.

CHAPTER 9

RIGHTS OF ENTRY

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A – INTRODUCTION

1. This chapter recommends reforms to the existing law relating to rights of entry under the *Fair Work Act* 2009 (Cth) (**FW Act**) and *Work Health and Safety Act* 2011 (Cth).[1]

2. The use of rights of entry occurs predominately in the building and construction industry. Consistently with this, most of the difficulties with the existing regime thrown up by case studies considered by the Commission have considered the conduct of the CFMEU. These

[1] Since 2011 there has been a legislative 'harmonisation' of work health and safety legislation in Australia. The model legislation is contained in the *Work Health and Safety Act* 2011 (Cth). That model legislation has been enacted in State legislation, with slight modifications that do not affect the position in relation to rights of entry, in all states except Victoria and Western Australia. This Chapter, for convenience, will address itself to the Commonwealth Act. The recommendations are intended to apply also to corresponding legislation in all states and territories.

difficulties concern conduct that may be classified in the following way:

3. *First*, permit holders deliberately ignoring legislative requirements. Examples of conduct of this kind are found in Chapter 8.9 of the Interim Report[2] and Chapter 8.3 of Volume 4 of this Report.[3] They include permit holders entering sites without giving proper notice, without showing permits and for the purpose of intimidating industry participants. So also are there examples in the ACT CFMEU case study of officials deliberately taking action not authorised under rights of entry provisions (such as blocking a concrete truck or swinging off handrails) and aggressive, intimidatory behaviour towards occupiers.[4] A different kind of disregard for the law in this area is described in Chapter 9 of the Interim Report,[5] which concerned obtaining right of entry permits under false pretences.

4. *Secondly*, permit holders abusing, intimidating, and treating with contempt inspectors appointed under the FW Act and *Fair Work (Building Industry) Act* 2012 (Cth). The conduct of CFMEU officials towards an inspector under the latter Act described in Chapter 8.9 of the Interim Report[6] is an example. The conduct of the current Secretary of the ACT Branch of the CFMEU described in Chapter 6.3

[2] See Royal Commission into the Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.9.

[3] See Report, Vol 4, ch 8.3, para 94.

[4] See Report, Vol 3, ch 6.3 (A & P Leemhuis and Claw case studies).

[5] Royal Commission into the Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 9.

[6] See Royal Commission into the Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.9.

of Volume 3 of this Report is an example of similar conduct towards an inspector appointed under the FW Act.

5. *Thirdly*, the use of rights of entry under the *Work Health and Safety Act* 2011 (Cth) for purposes foreign to the purposes for which they exist: in particular, to apply industrial pressure to participants in the industry. The ACT CEPU and ACT CFMEU case studies provided a number of examples of this conduct.[7] These case studies concern the use of rights of entry as a means to apply industrial pressure and control worksites.

6. There is some similarity between this conduct and conduct considered in the TEACHO case study last year.[8] That involved an arrangement between Toll Group and the TWU pursuant to which the TWU agreed, in return for payments of money and Toll's agreement to an EBA, to exercise rights of entry on premises operated by Toll's competitors. The arrangement contemplated an abuse of statutory rights of entry: those rights were to be exercised for the purposes of providing an advantage to one competitor over another. In the ACT CFMEU case studies, rights of entry were in part used for the same purpose. Industry participants that have CFMEU enterprise agreements cannot compete against those that do not. They expect the CFMEU to stop that competition. Applying industrial pressure through the exercise of rights of entry is one method of doing so.

[7] Report, Vol 2 ch3.2 and Vol 3 ch 6.3.

[8] See Royal Commission into the Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 7.2.

7. Under the existing law, most of the unsatisfactory conduct in the above categories is already prohibited. However, the existing law is not a sufficient deterrent to such conduct. Chapter 8 of this Volume refers to a number of judgments of the Federal Court in which judges have remarked on the lengthy record of contraventions for which the CFMEU has been penalised.

8. Appendix A to Chapter 8 of this Volume contains details of these, and other, such cases. They cannot be regarded as the only instances of such conduct. They are merely the instances that have proceeded to final judgment. The attitude of the CFMEU may be thought to be encapsulated by the remarks of one organiser in the Victorian Branch to a builder: 'Forget about the law'.[9]

9. The question arises as to why conduct of this kind keeps occurring. At some level, the answer must be that is a result of a prevailing culture or attitude in the CFMEU. It is not possible to legislate to require the CFMEU to adopt any particular culture or attitude. However, some of the recommendations in other Chapters of this Report are aimed at curbing unsatisfactory practices that stem from that culture. For example, Chapter 5 of this Volume includes recommendations that attempt to curb one of the incentives for ignoring or abusing rights of entry in order to apply industrial pressure: the large financial benefits that flow to the CFMEU under pattern enterprise agreements. The recommendations in the present Chapter focus directly on the statutory provisions dealing with rights of entry.

[9] Leigh Chiavaroli, MFI-1, 8/7/14, pp 4.12-16, 5.13-14.

10. The present Chapter recommends reforms in the following categories:

(a) Reforms which increase deterrence: increasing penalties for contraventions of rights of entry provisions and preventing unions from indemnifying officials in respect of them. These reforms are directed at all three of the categories of conduct referred to above.

(b) Reforms which build on existing requirements that attempt to ensure that only persons of appropriate character hold right of entry permits. These reforms also are directed at all three of the categories of conduct referred to above.

(c) Reforms which restrict the circumstances in which holders of rights of entry can access sites for safety reasons. These reforms are directed at conduct in the third category referred to above.

(d) Reforms which oblige officials to leave work sites when inspectors are present and investigating possible breaches of industrial or work health and safety laws. These reforms are directed at conduct in the second category referred to above.

11. Before turning to the recommendations, it is convenient to discuss the legislative regimes under which rights of entry are exercised.

12. Rights of entry make lawful what would otherwise be a trespass. They effect a significant erosion of common law rights.[10] Those common law rights have a very long lineage. Statutory rights of entry do not. Prior to 1973 a right of entry onto a work site was a matter of tribunal discretion in that it was available only if conferred under a federal award. This changed with the insertion of s 42A in the *Conciliation and Arbitration Act* 1904 (Cth) in 1973. Since that time, statutory rights of entry have continued in existence, but their nature and content has been the subject of frequent change.[11] The position is similar in respect of rights of entry under work health and safety legislation. These first emerged in New South Wales the early 1980s, with the conferral of certain rights of inspection in the company of independent inspectors.[12] Since that time rights of entry for health and safety reasons have been the subject of frequent change. The first emergence of independent rights for union officials was in the mid-1990s.[13]

13. The rights of entry schemes are statutory privileges conferred on unions and their officials for the benefit of union members. These rights are not in any sense immutable, but rather the opposite. Proposals to reform them should be seen in this context. There is much to be said for the abolition of rights of entry, if only because they give such great powers against private landowners, and because they

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[10] *Maritime Union of Australia v Fair Work Commission* [2015] FCAFC 56 at [14] per North, Flick and Bromberg JJ

[11] There is a discussion of this provision and other aspects of the history of rights of entry in W Ford, 'Being There: Changing Union Rights of Entry under Federal Industrial Law' (2000) 13 *AJLL* 1 at 2.

[12] *Occupational Health and Safety Act* 1983 (NSW), s 31.

[13] *Occupational Health and Safety Act* 1983 (NSW), ss 31AG–31AP (inserted by *WorkCover Legislation Amendment Act* 1995 (NSW)).

have been so widely abused. However, this Report neither recommends their abolition nor proposes to make out any case for doing so.

14. The existing law contains two separate but overlapping rights of entry schemes: one under the FW Act and one under the *Work Health and Safety Act* 2011 (Cth).[14] The most significant element of overlap is that the holder of a permit under work health and safety legislation cannot exercise rights under that legislation unless he or she also has a permit under the FW Act.[15] Thus, revocation of a permit under the FW Act has the effect of preventing the exercise of rights of entry under the *Work Health and Safety Act* 2011 (Cth).

15. The objects of the scheme in the FW Act are set out in s 480, which provides:

> **Object of this Part**
>
> The object of this Part is to establish a framework for officials of organisations to enter premises that balances:
>
> (a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:
>
> (i) this Act and fair work instruments; and
>
> (ii) State or Territory OHS laws; and

[14] And other Acts: see footnote 1, above.

[15] *Fair Work Act* 2009 (Cth), s 494(1).

(b) the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and

(c) the right of occupiers of premises and employers to go about their business without undue inconvenience.

16. The statement that the object of the provisions is to 'balance' the matters set out in paragraphs (a), (b) and (c) tells one only that none of those matters is to be disregarded completely in interpreting the Act. As with many such legislative statements of objective, it is of limited utility. Balances can be struck in different ways. To see what the balance in Part 3-4 of the FW Act is, one needs to look at the particular provisions that strike it and not at s 480.

17. The recommendations that follow to a large extent take for granted an understanding of the substance of the rights of entry schemes in the FW Act and in the *Work Health and Safety Act* 2011 (Cth). Particular provisions are referred to where appropriate.

B – RECOMMENDATIONS TO INCREASE DETERRENCE

18. These recommendations concern both rights of entry under the FW Act and rights of entry under the *Work Health and Safety Act* 2011 (Cth).

19. Both Acts contain restrictions and prohibitions the contravention of which can result in the imposition of a penalty. They are, for the most part, set out in Divisions 3 and 4 of the FW Act. The maximum penalties imposed under the Act are the same for all provisions in these Divisions. They are 60 penalty units (presently $10,800) for an

individual and 300 penalty units for a body corporate (presently $54,000).[16]

20. Section 146 of the *Work Health and Safety Act* 2011 (Cth) prohibits the holder of a permit under that Act from intentionally and unreasonably delaying, hindering or obstructing any person or disrupting any work at a workplace or otherwise acting in an improper manner in the exercise of rights under that Act. The maximum penalty imposed is $10,000. There is a corresponding provision in s 500 of the FW Act dealing with the exercise of rights by permit holders under that Act.

21. In order to have a deterrent effect, penalties need to be set at a level that will dissuade a potential wrongdoer from engaging in the contravening conduct and which will discourage recidivist behaviour.

22. As referred to above, the CFMEU in particular has been found to have an 'attitude of indifference' in relation to right of entry laws.[17] Further, the sheer volume of cases involving breaches of the right of entry provisions set out in Appendix A to Chapter 8 of this Volume is overwhelming. These are merely the cases that have proceeded to judgment. It may safely be inferred that they are but a sample of a much broader range of unsatisfactory conduct in connection with rights of entry.

23. One example in the evidence before the Commission of officials acting 'otherwise acting in an improper manner' within the meaning of s 500

[16] *Fair Work Act* 2009 (Cth), ss 539(2) and 546.

[17] *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432 at [77] per White J.

of the FW Act was the FWBC case study[18]. Six CFMEU officials attended the Ibis Hotel site in Adelaide and exercised rights of entry. The CFMEU officials did not provide rights of entry permits when requested to do so.[19] Instead of producing permits as required by the legislation, when the permits were requested John Perkovic, a CFMEU organiser, flew into a harangue of abuse and threatening behaviour towards one of the inspectors. Subsequent to the Commission's hearings, proceedings were brought against John Perkovic for breach of s 500 of the FW Act. The penalty imposed was $5,000.[20] He was not the only CFMEU official fined for acting improperly on that day.[21] The penalty imposed does not reflect the seriously offensive and obstructive behaviour the constituted the contravention, or to provide any deterrent against future conduct. That is not a criticism of the decision, but rather a criticism of the penalties that are applicable under the current legislative regime within the framework of which the penalty had to be selected.

24. This 'attitude of indifference' and the number of rights of entry breaches in recent times indicates that the existing penalties under the FW Act for breaches of Part 3-4 of the FW Act are inadequate to act as an effective deterrent. The maximum penalties should be increased. The existing penalties for contravention of s 146 of the *Work Health*

[18] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.9.

[19] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.9, para 9.

[20] *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432 at [155].

[21] See *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432 at [155].

and Safety Act 2011 (Cth) should be increased in line with the penalties under the FW Act.

25. Submissions to the Commission supported an increase in penalties.[22] Boral suggested that the penalties be increased to 1,000 penalty units and Master Builders Australia submitted that the penalties should be in line with the former *Building and Construction Industry Improvement Act* 2005 (Cth).[23]

26. What is involved in setting the appropriate penalties is to some extent a very impressionistic judgment. But it seems plain that the present penalties do not have a sufficient deterrent effect. On balance, it is recommended that a maximum penalty of 1,000 penalty units for individuals be adopted (currently, $180,000).

27. The same penalty should be adopted for a contravention of s 146 of the *Work Health and Safety Act* 2011 (Cth). Consideration should be given to expressing penalties under that Act (and, to the extent possible, in corresponding state and territory legislation) in penalty units, not dollars.

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[22] Boral Law Reform Submissions, 2015, pp 29-30; Master Builders Australia Law Reform Submissions, 21/8/15, pp 35-36; Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, p 24; Institute of Public Affairs Law Reform Submissions, August 2015, p 4.

[23] Section 49 of the *Building and Construction Industry Improvement Act* 2005 (Cth) provided that the maximum penalty for a 'Grade A' civil penalty provision' was 1,000 penalty units for a body corporate (currently this would equate to $180,000) or otherwise 200 penalty units (currently this would equate to $36,000).

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The civil penalties for contravention of Part 3-4 of the *Fair Work Act* 2009 (Cth) be increased. The maximum penalty be increased to 1,000 penalty units (currently $180,000).

The maximum penalty for contravention of Part 7 of the *Work Health and Safety Act* 2011 (Cth) be set at $180,000. Consideration also be given to expressing penalties in the *Work Health and Safety Act* 2011 (Cth) in terms of penalty units rather than dollar amounts.

Indemnification of officers for breaches of the right of entry regime

28. Another issue which has arisen in submissions to the Commission is that of indemnification of officers for breaches of the right of entry scheme. The consequence of such reimbursement is that penalties imposed on individuals have no deterrent effect.

29. Reforms of the *Fair Work (Registered Organisations) Act* 2009 (Cth) in connection with this topic have been recommended in Chapter 3 of this Volume of the Report. These reforms, if implemented, would prevent the indemnification of permit holders for penalties imposed under either the FW Act or *Work Health and Safety Act* 2011 (Cth).[24]

30. There is thus no need for a further recommendation on this topic.

[24] And other work health and safety legislation: see footnote 1, above.

Recommendations regarding the issue, retention and revocation of permits

31. These recommendations concern issues as to character, fitness and propriety of persons who are permit holders. These recommendations arise only in relation to the FW Act. That is because, as has been explained, holding a permit under the FW Act is a precondition to a permit holder under the *Work Health and Safety* Act 2011 (Cth) exercising rights under that Act. It is thus sufficient if matters of this kind are assessed only under the FW Act.

32. The reason recommendations of this kind have been made is in a sense similar to the recommendations regarding increasing penalties. If there is widespread disregard of the law by persons holding permits, one way to address that is to take steps to ensure that more appropriate persons are allowed to be issued and retain permits.

33. The Discussion Paper raised a number of questions and invited submissions in relation to issues of this kind.[25] Some of the submissions received in response are discussed below. It is convenient to proceed by discussing:

(a) the existing law regarding applications for right of entry permits under the FW Act;

(b) recommended reforms to permit qualification matters;

[25] Royal Commission into Trade Union Governance and Corruption, *Discussion Paper – Options for Law Reform*, 19/5/15, pp 64-67.

(c) recommended reforms regarding continuous disclosure;

(d) recommended reforms regarding conditional permits; and

(e) other possible reforms not recommended.

Aspects of the existing law regarding applications for permits

34. In order to obtain a permit, the Fair Work Commission must be satisfied that the applicant is a 'fit and proper person to hold the entry permit'.[26]

35. In determining whether an official is a fit and proper person to hold the entry permit, the Fair Work Commission must have regard to the permit qualification matters set out in s 513 of the FW Act, which are as follows:

> (1) In deciding whether the official is a fit and proper person, the FWC must take into account the following ***permit qualification matters***:
>
> (a) whether the official has received appropriate training about the rights and responsibilities of a permit holder;
>
> (b) whether the official has ever been convicted of an offence against an industrial law;
>
> (c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:
>
> (i) entry onto premises; or
>
> (ii) fraud or dishonesty; or

[26] *Fair Work Act* 2009 (Cth), s 512.

(iii) intentional use of violence against another person or intentional damage or destruction of property;

(d) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official;

(e) whether a permit issued to the official under this Part, or under a similar law of the Commonwealth (no matter when in force), has been revoked or suspended or made subject to conditions;

(f) whether a court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law, has:

(i) cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; or

(ii) disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;

(g) any other matters that the FWC considers relevant.

36. There is a volume of case law in relation to the application and interpretation of the fit and proper person test and ss 512 and 513 of the FW Act. The question of whether a person is a fit and proper person requires an assessment of the relevant personal characteristics of the individual concerned and must be applied by reference to the suitability of the person to hold a right of entry permit.[27]

37. Section 514 of the FW Act specifies when the Fair Work Commission must not issue a right of entry permit. This is essentially limited to circumstances where a suspension or revocation of a right of entry permit has been ordered or imposed by another body or a court in

[27] See discussion in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union-Construction and General Division, Queensland Northern Territory Divisional Branch* [2015] FWCFB 6035 at [6] and the authorities referred to therein.

relation to that permit holder. This means that the Fair Work Commission has a very broad discretion to determine whether an applicant is a fit and proper person to hold an entry permit (taking into account the matters set out in s 513 of the FW Act).

38. Conditional permits are provided for in s 515 of the FW Act. Section 515 allows the Fair Work Commission to impose conditions on a permit when it is issued. In determining whether to impose conditions the Fair Work Commission is required to take into account the permit qualification matters set out in s 513 of the FW Act.[28]

39. Once issued, right of entry permits are valid for a period of three years or until the official ceases to be an official with the organisation that applied for the permit. [29]

40. Section 508 of the FW Act also allows the Fair Work Commission to restrict the rights that are exercisable under Part 3-4 of the FW Act if either the organisation or the official has misused those rights.

Recommendations regarding permit qualification matters

41. At first blush the permit qualification matters set out in s 513 of the FW Act are extensive. However, there are important things that are not specified in this list.

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[28] *Fair Work Act* 2009 (Cth), s 515(2).

[29] *Fair Work Act* 2009 (Cth), s 516. This is subject to the Fair Work Commission's powers to revoke or suspend a right of entry permit: *Fair Work Act* 2009 (Cth), s 510.

42. *First*, s 513 omits numerous categories of conduct which are highly relevant to an assessment of whether a person is a fit and proper person to hold a permit. The list does not include:

(a) Convictions for indictable offences not involving dishonesty. For example, offences under the cartel provisions in the *Competition and Consumer Act* (2010) (Cth) and offences for obstructing a Commonwealth public official under s 149.1 of the Schedule of the *Criminal Code* (Cth);[30]

(b) Findings of contempt of court or breach of court or tribunal orders;

(c) Convictions for offences for hindering or obstructing public officials in the performance of their functions;[31]

(d) Whether the person, or any other person, has ever been ordered to pay damages or compensation in relation to action taken by the official in connection with their role as official;

(e) Whether the person has ever been found not to be a fit and proper person for the purposes of the FW Act, any state or territory industrial law or any work health and safety law;[32]

[30] It is to be noted that Division 3 of Part VIIC of the *Crimes Act* 1914 (Cth) also applies, which means that in certain circumstances, the applicant is not required to disclose spent convictions. For some offences convictions are spent after 5 years.

[31] See for example, s 149.1 of the *Criminal Code* (Cth), discussed in Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.9.

(f) Whether the person has provided false or misleading information in an application for a permit under the FW Act, any state or territory industrial law or any work health and safety law; and

(g) Whether the person is otherwise of good fame and character.

43. These are matters which ought to be relevant to whether a person is fit and proper to hold a right of entry permit. It is recommended that these matters, too, be included as permit qualification matters.

44. The *second* matter to which s 513 does not refer concerns training. Although 'appropriate training' is a permit qualification matter, there is no specification in relation to the content or frequency of such training. In a recent decision concerning the CFMEU, the Fair Work Commission raised the issue of training and noted that there was no evidence of: [33]

> ...constructive efforts by the CFMEU and the CFMEUQ to ensure that its officials comply with the requirements of industrial laws ... I am not aware of any disciplinary action taken against officials who have been found to contravene industrial laws.

[32] Section 510 of the *Fair Work Act* 2009 (Cth) requires a permit to be revoked or suspended in such a circumstance. It appears to be an oversight that this is not already a permit qualification matter.

[33] *The Construction, Forestry, Mining and Energy, Industrial Union of Employees, Queensland* [2015] FWC 4544 at [30].

45. In *Director of the Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672, Gilmour J made comments in relation to the CFMEU's training in relation to rights of entry:[34]

> The CFMEU submits that … the CFMEU's training makes it clear that his conduct fell below the standards required by right of entry permit holders. I do not know what this training consists of but whatever it is it needs to be bolstered because history suggests that it is observed in the breach.

46. These remarks are supported by the cases set out in Appendix A to Chapter 8 of this Volume. The right of entry provisions are subject to change. They are not simple to understand. Proper training ought to be an essential pre-requisite to being a permit holder, but presently what constitutes proper training is not specified.

47. Additional training for permit holders is likely to increase compliance with right of entry laws by increasing awareness of the relevant provisions, rights and obligations.

48. It is recommended that there should be:

(a) an obligation to undertake right of entry training annually;

(b) a requirement at the very least for this training to have been undertaken in the 12 months preceding an application for each new right of entry permit; and

(c) an obligation that the training that is undertaken be approved by the Fair Work Commission, to ensure that there is a

[34] *Director of the Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672 at [71].

satisfactory minimum standard of training that adequately addresses the rights and obligations of the permit holders.

49. The Commission received submissions that suggested that other matters be added to the list of permit qualification matters. One was the history of compliance of the organisation that is applying for the permit.[35] The cases set out in Appendix A to Chapter 8 of this Volume indicate that this would be a relatively onerous obligation for the CFMEU. There is something to be said for the view that this should be included as a permit qualification matter. The union is the applicant for the permit. A permit holder acts on behalf of the union when exercising rights conferred by that permit. As Gyles J has observed, '[u]ltimately, union officials will act in accordance with the policies of the union'.[36]

50. However, on balance, the better view is that it is not appropriate to include something of this kind as a permit qualification matter. *First*, there is nothing that would prevent the conduct of the organisation from being taken into account in the exercise of the discretion to issue a permit under s 512. That discretion is enlivened once the Fair Work Commission is satisfied that an individual is a fit and proper person. But, once enlivened, there is no reason, in the exercise of that discretion, why the conduct of the organisation applying for the permit may not be taken into account.

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[35] Boral Law Reform Submissions, 2015 (received 27/8/2015), pp 39-43, 81.

[36] *A & L Silvestri Ltd v Construction Forestry Mining and Energy Union* [2008] FCA 466, 60 AILR 100-853, cited with approval in *Darlaston v Parker (No 2)* [2010] FCA 1382 at [24].

51. *Secondly*, traditionally assessments of whether the person is a fit and proper person has required only an assessment of the individual's characteristics and the conduct of the union is not considered a relevant matter.[37] The question of whether a person is fit and proper depends upon an assessment of that person, and not the organisation to which he or she belongs.

52. *Thirdly*, such matters plainly can be taken into account under s 508, which confers power on the Fair Work Commission to restrict rights of entry exercisable by an organisation or its officials if the Commission is 'satisfied that the organisation, or an official of the organisation, has misused those rights'.

Recommendation 68

Section 513 of the *Fair Work Act* 2009 (Cth) be amended to include additional permit qualification matters. The additional permit qualification matters are set out in the model legislative provisions in Appendix 1 to this Volume of the Report.

Recommendation 69

A new provision be inserted into *Fair Work Act* 2009 (Cth) which requires permit holders to complete *approved* right of entry training annually in relation to the rights and responsibilities of permit holder.

This recommendation is reflected in the model legislative provisions in Appendix 1 to this Volume of the Report.

[37] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union-Construction and General Division, Queensland Northern Territory Divisional Branch* [2015] FWCFB 6035 at [22].

Recommendations regarding disclosure obligations

53. The process of obtaining a right of entry permit requires the relevant registered employee organisation to apply for the right of entry permit on behalf of its official. The application form contains declarations to be signed by both the proposed permit holder and the registered organisation. This 'form F42' addresses the matters set out in s 513 of the FW Act.

54. Although the prescribed form sets out the matters that need to be addressed, other than an obligation in the *Fair Work Commission Rules* 2013 to provide documentation confirming that training has been completed, there is no statutory obligation to disclose the other permit qualification matters.

55. The consequence of this is that there is no penalty for failing to disclose a matter which the Commission must take into account under s 513 of the FW Act. In this respect, the offence under s 136.1 of the *Criminal Code* (Cth) may be available if it is considered that the omission makes the statement misleading. However, without an express obligation to disclose, practical difficulties in ensuring compliance arise. For example, in order for a prosecution of that offence to succeed, a prosecutor must demonstrate that the person knew that the matter ought to have been disclosed or was recklessly indifferent to that. A clear obligation to disclose avoids this potential complexity.

56. Boral made a submission that 'show cause' provisions should be inserted into s 513 which operated to reverse the onus to the applicant to establish that he or she was a fit and proper person in certain circumstances.[38] However, s 513 as it stands appears to have this effect.

57. There is a need for ongoing assessment of fitness and propriety. Permits are issued for three year periods. If permit qualification matters arise during that three year period which have the result that the person is not a fit and proper person to hold a permit, then there is no good reason that person should continue to hold a permit. Whether a permit qualification matter or matters have that result is a matter that should be left to the Commission. But the Commission will be in no place to make any assessment without an obligation to bring such matters to its attention.

58. Thus, it is recommended that an obligation be introduced into the FW Act to disclose permit qualification matters, and to make this obligation a continuous one throughout the period in which the permit is held. This would permit the Fair Work Commission to assess not only whether a permit should be issued but also whether it should be retained.

59. This obligation should rest with both the organisation and the official. There should also be civil penalties for failing to comply with this obligation.

[38] Boral Law Reform Submissions, 2015, pp 27-50.

60. A consequential recommendation is to amend s 510 of the FW Act to require the Fair Work Commission to suspend or revoke an entry permit where events have occurred since the permit was first issued that mean that the permit holder is no longer a fit and proper person to hold an entry permit.

61. Further, s 510 should also be amended so that a failure to complete the annual training the subject of Recommendation 69 above will result in the Fair Work Commission being obliged to suspend or revoke a permit.

Recommendation 70

A new provision 512A be inserted into the *Fair Work Act* 2009 (Cth) which creates an obligation on both a registered organisation and an applicant for a right of entry permit to disclose the permit qualification matters. Significant penalties should be imposed for failing to comply with this section.

This recommendation is reflected in the model legislative provisions in Appendix 1 to this Volume of the Report.

Recommendation 71

Section 510 of the *Fair Work Act* 2009 (Cth) be amended so that it requires a right of entry permit to be suspended or revoked by the Fair Work Commission if:

(a) an official has failed to complete approved training; or

(b) a new permit qualification matter has arisen which means the official is no longer a fit and proper person.

This recommendation is reflected in the model legislative provisions in Appendix 1 to this Volume of the Report.

Recommendations regarding conditional permits

62. As set out above, under s 515 of the FW Act, the Fair Work Commission can issue a right of entry permit subject to conditions. The effect of this provision is that a person who is not otherwise considered a fit and proper person to be issued with a right of entry permit, may be issued with a right of entry permit subject to certain conditions.

63. The Full Court in *Maritime Union of Australia v Fair Work Commission* [2015] FCAFC 56 held that the effect of s 515 was to allow the Fair Work Commission to impose a condition on a permit that would allow a person, otherwise not considered to be a fit and proper person to hold a permit, to become (by imposition of the conditions) a fit and proper person. The effect of this section appears

to be antithetical to the fit and proper person test set out in s 512 of the FW Act.

64. Submissions to the Commission were in favour of revoking conditional permits altogether.[39] This at first blush may seem appealing, however, it is appropriate that the Fair Work Commission be entitled to restrict the rights to be exercised under Part 3-4. This assists in achieving the objects of the Part.

65. However, s 515 of the FW Act should be clarified so that conditional permits can *only* be issued to persons who are considered, without the imposition of conditions, to be a fit and proper person to hold a permit.

Recommendation 72

Section 515 of the *Fair Work Act* 2009 (Cth) be amended by inserting at the end of subsection (1) the words 'to a fit and proper person'.

Possible reforms not recommended

Criminal History

66. There is no current obligation on officials applying for permits to consent to a criminal history check. Submissions to the Commission

[39] Institute of Public Affairs Law Reform Submissions, August 2015, p 9; Master Builders Australia Law Reform Submissions, 21/8/15, p 38; Boral Law Reform Submissions, 2015 (received 27/8/2015), p 49.

are in support of applicants being required to consent to criminal history checks.[40]

67. While the idea seems sensible, logistical difficulties arise with implementing this kind of requirement in practice. *First,* the obligation to obtain the criminal history check will fall onto either the official, the applying organisation or the Fair Work Commission. There are obvious difficulties with the organisation or Fair Work Commission obtaining the check. Privacy issues arise as the information is classed as 'sensitive information' under the *Privacy Act* 1988 (Cth). As such the information must be stored, collected and used in accordance with the *Privacy Act* 1988 (Cth).

68. *Secondly,* the criminal history check may disclose offences which are not relevant such as traffic offences, minor drug offences or other minor offences. Understandably an individual may not want this information to be disclosed to his or her employer.

69. *Thirdly,* the additional cost and delay in obtaining these results will yield little observable benefit, in that the criminal history check should theoretically disclose any relevant offences which ought to have already been disclosed by the applicant in the application process.

70. For these reasons it is not recommended that criminal history checks be obtained in relation to right of entry applications.

[40] Institute of Public Affairs Law Reform Submissions, August 2015, p 9; Victoria Police Law Reform Submissions, 10/9/15, pp 27-29.

Automatic disqualification

71. As set out above, s 514 of the FW Act sets out when the Fair Work Commission must not issue a right of entry permit.

72. This is essentially limited to the circumstance where another right of entry permit has been refused, revoked or suspended. Although s 513 of the FW Act requires the Fair Work Commission to take into account certain convictions, s 513 does not bar a finding that a person with a criminal conviction is a fit and proper person – that is, it does not prevent the Fair Work Commission from issuing a permit to a person that has criminal convictions.

73. As set out in the Discussion Paper, there have been instances where officials who have convictions have nevertheless been found to be fit and proper persons to hold a right of entry permit.[41]

74. Submissions made to the Commission were to the effect that persons with criminal convictions should not be permitted to hold right of entry permits.[42] The effect of the submissions is that the presence of a

[41] For example one CFMEU official had his right of entry permit renewed in April 2015 despite a finding by a Federal Magistrate that he had coerced subcontractors on a concreting project into joining the CFMEU and a conviction for giving false evidence to the Cole Royal Commission: Transcript of hearing, Sydney, March 23, 2015, Application for a right of entry permit – Application by Construction, Forestry, Mining and Energy Union-Construction and General (RE2014/284); *Alfred v CFMEU* [2009] FMCA 613. In June 2013, the Fair Work Commission granted a right of entry permit to another CFMEU official despite two convictions for intentional damage or destruction of property: *Construction, Forestry, Mining and Energy Union of Workers* [2013] FWCD 2887 (14 June 2013). Permits have also been issued by the FWC to organisers with convictions for social security fraud: *Health Services Union-Queensland Branch* [2015] FWC 18.

[42] Boral Law Reform Submissions 2015, p 49; Institute of Public Affairs Law Reform Submissions, August 2015, p 9.

criminal conviction should act as an automatic disqualification from holding a right of entry permit.

75. It is not recommended that a criminal conviction amount to an automatic bar to a finding that a person is a fit and proper person to hold an entry permit. However, as set out in recommendation 68 above additional types of convictions ought to be taken into account for the purposes of determining whether a person is a fit and proper person to hold an entry permit.

Places for workplace discussions

76. Submissions to the Commission also raised additional issues, including:

(a) the 2013 amendments to the FW Act including the amendment that nominated the lunch room as the default room for union officials to hold discussions; and

(b) the Fair Work Commission's ability to deal with disputes in relation to the frequency of visits to premises for rights of entry.

77. The Australian Chamber of Commerce and Industry submission to the Commission dealt with the amendments made by the *Fair Work Amendment Act* 2013 (Cth) which allowed union officials entering for discussion purposes to have these discussions in the lunch room as the default venue. The Australian Chamber of Commerce and Industry argue that this is inappropriate as it does not allow non-members rights

to not participate but rather puts them in a situation where non-members could not enjoy their 'lunch breaks without being harassed by permit holders'.[43] The recent statistics show that 89% of private sector workers are not union members – so it is not unreasonable to infer that discussions in a lunch room will often allow the union access to a large number of non-union members. The Australian Chamber of Commerce and Industry submission supported the amendments to the right of entry regime that were initially proposed in the *Fair Work Amendment Bill* 2014 (namely to remove this default position). The Bill has passed but without the amendments to the right of entry regime.

78. The Commission has not inquired into these issues. Further, the Productivity Commission into the Workplace Relations Framework has considered these issues. And on 3 December 2015 the current Government introduced the *Fair Work Amendment (Remaining 2014 Measures) Bill* 2015 (Cth) which proposes amendments to the FW Act that addresses these issues. As such, it is not necessary to make recommendations on this topic.

C – RIGHTS OF ENTRY UNDER THE *WORK HEALTH AND SAFETY ACT* 2011 (CTH)

79. Safety on work sites is paramount. No rational person would dissent from that view. It does not follow from that view, and it is not presently the law, that union officials should be permitted untrammelled access to work sites to ensure that they are safe. To say

[43] Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015, pp 23-24.

that safety is paramount merely begs the question of how it should be regulated.

80. A discussion of many of the relevant legislative provisions in place under the *Work Health and Safety Act* 2011 (Cth) is contained in Chapter 6.3 of Volume 3 of this Report. For present purposes it is necessary to draw attention to only some of those provisions.

81. Section 117 of the *Work Health and Safety Act* 2011 (Cth) imposes the only two pre-requisites[44] for the exercise of a right of entry without notice. Section 117 provides:

> (1): A WHS entry permit holder may enter a workplace for the purpose of inquiring into a suspected contravention of his Act that relates to, or affects, a relevant worker.
>
> (2): The WHS entry permit holder must reasonably suspect before entering the workplace that the contravention has occurred or is occurring.

82. Section 117(1) requires that the entry must be for a particular purpose – namely the purpose of inquiring into a suspected contravention of the *Work Health and Safety Act* 2011 (Cth). That is a requirement the satisfaction of which will in most cases be impossible to monitor.

83. Section 117(2) requires that the permit holder must reasonably suspect that a contravention of the *Work Health and Safety* 2011 (Cth) has occurred or is occurring. This requirement, also, will often not be difficult to satisfy for reasons explored more fully in Chapter 6.3 of Volume 3 of this Report. In summary, those reasons are as follows. The safety standards in the *Work Health and Safety Act* 2011 (Cth) Act

[44] Over and above holding permits under the *Work Health and Safety Act* 2011 (Cth) and *Fair Work Act* 2009 (Cth).

and *Work Health and Safety Regulations* 2011 (Cth) are expressed in very general terms. When this is combined with the dynamic nature of construction work, it is not difficult to form a suspicion that a breach is occurring or has occurred on busy construction sites. Concrete pours are examples of situations where it is unlikely to be difficult to find a sufficient basis to satisfy s 117(2). But it is these very situations that are likely to be targeted in attempts to abuse the provisions of the Act because site visits at these times are likely to cause maximum disruption and expense.

84. There is also another point. The requirement in s 117(2) relates to past breaches, with no temporal limitations. In one sense that is understandable: it is hard to set a precise time limit by which a breach may cease to be the source of a potential hazard. But the result is that s 117(2) would permit a union official to 'save up' breaches for the purposes of visiting a site when the exercise of a right of entry would be most disruptive. That is what, according to one of the CFMEU officials, was done in relation to a concrete pour on a site in Canberra.[45]

85. Rights of entry under the *Work Health and Safety Act* 2011 (Cth) are the only rights of entry that can be exercised without prior notice. The element of surprise that the exercise of these rights involves can be a powerful industrial tool. The CFMEU visit to the Milin Builders' site on Moore Street, discussed in Chapter 6.3 of Volume 3 of this Report, was akin to a military style raid. It was planned and co-ordinated. It commenced with an organiser telephoning CFMEU headquarters in

[45] See the discussion of the Milin Builders Moore Street Site in Vol 3, ch 6.3 of this Report; Lomax MFI-3, 7/10/15.

Canberra and announcing 'they're attempting to set up a pump, so we – we're all down here, gonna have a bit of fuckin' crack'.[46]

86. It is this element of surprise, combined with the ease with which rights may be exercised, at that very time they are likely to be most disruptive, that make them extremely fertile ground for abuse. The present legislative regime might be acceptable if union officials could be trusted not to abuse it. It has been said:[47]

> The right to be on site must to some extent be taken on trust. In this case, what I regarded as a somewhat flimsy but legitimate workplace health and safety concern was made out, but the legislative scheme will quickly fall into disrepute if those who seek to abuse it are not appropriately dealt with.

87. The ACT CFMEU and CEPU case studies strongly suggest that the trust that underpins the rights conferred on permit holders has been abused. The scheme has fallen into disrepute in the sense that participants in the industry in the ACT believe that the CFMEU exercises its rights of entry to apply industrial pressure, and in particular pressure to seek to ensure that all industry participants are signed up to CFMEU EBAs. For example, a scaffolder, in the course of explaining why he agreed to sign a CFMEU EBA, said that he felt that if he didn't the CFMEU would 'maybe go around the builders saying, recommending to use someone else or finding safety issues for

[46] O'Mara MFI-1, 3/9/15.

[47] *Director, Fair Work Building Industry Inspectorate v Myles* [2014] FCCA 1429 at [27] per Judge Burnett.

an excuse to get on to sites'.[48] There was other evidence to similar effect.[49]

88. The threat made by the Secretary of the ACT Branch of the CFMEU to the principal of a building company in 2014 spells out the approach adopted:[50]

> 'If you don't sign up [to a CFMEU EBA], you will find you can't get access to a cement pour, there will be trades you can't access – you won't be able to build … there will be all sorts of authorities and officials visiting to check you over and close you down'.

89. Statements such as this indicate that a perception that the CFMEU uses safety as an industrial tool is well justified.

90. There were examples of these apprehensions in other case studies. Part of the strategy implemented by the Thiess John Holland Joint Venture on the Eastlink Project (one of the AWU case studies) was to avoid non-working delegates because of their tendency to 'create often bogus safety issues'.[51] In the Maritime Employees Training Fund case study,[52] an employer was prepared to make large payments to a union controlled training fund because of a fear that fictitious industrial issues ('fabricating issues that are maybe not really there'),[53] some of which were related to safety, would be raised.

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[48] Bernardo da Silva, 30/7/15, T:1525.10-12.

[49] Clive Arona, 15/7/15, T:190.15-22.

[50] Milin MFI-1, 22/7/15.

[51] Stephen Sasse, 12/10/15, T:39.38.

[52] Report, Volume 5, ch 1.

[53] Guido Bressani, 29/9/14, T:65.17-18.

91. Concerns from industry participants of this kind are rationally based. The conduct of officials in the case studies referred to above reveals a lack of motivation by genuine safety concerns and defeats the purpose for which rights of this kind are conferred.

92. The solution this Chapter recommends[54] is that entry without 24 hours' notice only be permissible in circumstances where a permit holder has a reasonable concern (a) that there has been or is contravention of the Act and (b) that that contravention gives rise to a 'serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard'.

93. The requirement of a 'reasonable concern' that workers are exposed to a 'serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard' is already contained in other provisions of the *Work Health and Safety Act* 2011 (Cth). This recommendation therefore will not unduly complicate the legislative scheme. It makes use of an existing requirement familiar to permit holders because it is the requirement that must be met before they have an entitlement under s 118(1)(e) of the *Work Health and Safety Act* 2011 (Cth) to warn workers of the existence of such a risk. Further, it is this requirement that needs to be satisfied before a worker is entitled to cease work or before a health and safety representative is entitled to instruct a worker to stop work or before an inspector is entitled to issue a prohibition notice.[55]

[54] In conjunction with the other recommendations referred to in this Chapter.

[55] See *Work Health and Safety Act* 2011 (Cth) s 68(2)(a)(ii), s 84, s 195(1)(a).

94. If implemented this recommendation will assist in curbing abuse of rights of entry under the *Work Health and Safety Act* 2011 (Cth). It maintains a right to enter premises immediately but only if a sufficiently serious safety issue has arisen.

95. The recommendation raises two questions: does it go far enough in curbing abuse or does it go too far in restricting rights of entry?

96. The answer to the first question cannot be known with certainty. The recommendation, if implemented, may be open to the same kind of abuse as presently exists. That is because a view might be taken by permit holders that all safety issues on a busy construction site involve serious risks emanating from an immediate or imminent exposure to a hazard. Such a view would be wrong: the recommendation adopts an existing legislative category that recognises that only some safety issues are sufficiently serious to require that work stop. However, the potential abuse of this recommendation, if implemented, is not something that can be judged in advanced. It may be that it does not go far enough to curb abuse. Time will tell whether it does not and whether rights of entry should be further controlled. This recommendation takes a cautious approach in recognition of the paramount importance of safety.

97. As to the second question, the recommendation does not go too far in the restrictions it proposes. The regulation of safety is, presently, not merely or primarily a matter for union officials holding permits. It is primarily the responsibility of the person conducting a business or

undertaking (**PCBU**).[56] Responsibilities are placed on the workers themselves.[57] Health and safety representatives have various rights under the Act, including rights of inspection and rights to require workers to stop work without notice.[58] Health and safety representatives are frequently union delegates. Inspectors have more extensive powers. To allow immediate entry to a work site only in the circumstances now recommended is highly unlikely to jeopardise the safety of workers.

98. It is necessary to remember that this recommendation still allows rights of entry to be exercised on 24 hours' notice in respect of safety issues that fall short of the more serious level identified in the Act. A PCBU given written notice of an intention to exercise rights in 24 hours' time would be unlikely to ignore the notice if the issues in it required attention. To do so might involve the PCBU deliberately and flagrantly breaching duties imposed by the *Work Health and Safety Act* 2011 (Cth). That may be taken as unlikely in any event but it is all the more unlikely if the PCBU knows that the union official is likely to return to the site in 24 hours to inspect the safety issue.

99. It is for the above reasons that this recommendation has been made.

[56] *Work Health and Safety Act* 2011 (Cth), ss 19 – 26.

[57] *Work Health and Safety Act* 2011 (Cth), s 28.

[58] *Work Health and Safety Act* 2011 (Cth), s 68, s 85.

Recommendation 73

Section 119 of the *Work Health and Safety Act* 2011 (Cth) and the equivalent provisions of the equivalent State Acts be repealed and replaced with new ss 119 and 119A which provide that prior written notice of entry is to be provided except where the permit holder has a reasonable concern that (a) there has been or is contravention of the Act and (b) that contravention gives rise to a 'serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard'.

This recommendation is reflected in the model legislative provisions in Appendix 1 to this Volume of the Report.

Burden of proof

100. One further change is recommended to the *Work Health and Safety Act* 2011 (Cth). Section 481(3) of the FW Act provides that the burden of proving that the permit holder has a suspicion of a contravention that is reasonable lies on the person asserting that fact. The *Work Health and Safety Act* 2011 (Cth) should be amended to remove any doubt that that is also the position in respect of the exercise of rights of entry under that Act.

Recommendation 74

The *Work Health and Safety Act* 2011 (Cth) be amended so as to make it clear that the burden of proving that a permit holder has a suspicion that is reasonable for the purposes of s 117(2) or a concern that is reasonable for the purposes of s 119A lies with the person asserting that fact.

Compulsory reports

101. Submissions by Victoria Police raised the issue of whether reports should be submitted when occupational health and safety laws are used to gain a right of entry. Victoria Police suggested that the filing of such reports may assist in determining whether this right of entry is being legitimately deployed.[59] Submissions by Boral also support such reports being prepared and submitted. It was submitted that in addition, the filing of such reports would assist occupiers and employers in identifying and addressing occupational health and safety issues.

102. The current requirements for identifying suspected safety breaches in notices given under s 119 of the *Work Health and Safety Act* 2011 (Cth) are not onerous. If there is a genuine safety issue, these notices, together with consultation between permit holder and site representative should be sufficient to identify what suspected breaches are in issue and proposals to fix it. Further documentation is not necessary from this point of view.

103. The ACT CFMEU case studies suggest that extensive site reports are prepared by the CFMEU frequently, perhaps particularly where the site visit was hostile. The reports are not prepared to assist the PCBU in rectifying safety issues: the preparation of such reports is not done on an urgent basis or with a view to attempting to provide useful assistance in addressing safety issues. The preparation of the reports

[59] Victoria Police Law Reform Submission, 10/9/15, p 30.

appears to be more for the purpose of assisting the CFMEU in defending the site visit at some later stage if necessary.

104. There is a case for requiring such reports to be provided to the PCBU or to the relevant authority. On balance, however, this may impose an unnecessary administrative burden on all concerned without improving safety. It is open to site representatives to prepare similar reports if they wish or to request reports from the union.

D – NUMBER OF OFFICIALS ACCESSING WORKPLACES

105. Another issue that requires reform concerns the number of officials who enter a site at any one time. Presently the legislation imposes no limit. In the FWBC case study six officials accessed an Adelaide site simultaneously.[60] In the CFMEU ACT case studies in Chapter 6.3 of this Report, there were also examples of between 4 and 6 officials arriving on sites for no sensible explanation.[61]

106. The fact that a troop of officials arrives on a site in purported exercise of rights of entry is prima facie evidence that the visit has an ulterior purpose. Officials who gave evidence in the CFMEU ACT case studies could give no convincing explanation for why so many of them were required. There is none except to apply industrial pressure. Conduct of this kind exploits a loophole in the present legislation.

[60] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.9.

[61] See Report, Vol 3, ch 6.3, Milin Builders Moore Street, A & P Leemhuis and Claw Constructions Flemington Road case studies.

107. Access by two officials to a site at any one time is sufficient to investigate a suspected contravention of either the FW Act or the *Work Health and Safety Act* 2011 (Cth).

Recommendation 75

The *Fair Work Act* 2009 (Cth) and *Work Health and Safety Act* 2011 (Cth) and the equivalent State Acts be amended to prohibit the exercise of rights of entry by more than two permit holders of the same organisation on the one workplace at the same time.

E – OFFICIALS AND INSPECTORS

108. The CFMEU ACT and FWBC case studies contained examples of inappropriate conduct by union officials towards inspectors appointed under the FW Act and *Fair Work (Building Industry) Act* 2012 (Cth). Reference has already been made to the conduct of CFMEU officials towards an inspector under the latter Act described in Chapter 8.9 of the Interim Report[62] and to the conduct of the current Secretary of the ACT Branch of the CFMEU described in Chapter 6.3 of Volume 3 of this Report.

109. The existing law contains prohibitions on conduct of this kind.[63] However, a more effective way to prevent confrontations, improve safety and reduce the capacity of rights of entry to be used to apply

[62] See Royal Commission into the Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.9.

[63] For example, *Criminal Code* (Cth), s 149; *Work Health and Safety Act* 2011 (Cth), ss 188, 190.

industrial pressure, is to require that permit holders leave a site within a reasonable time if directed to do so by an inspector.

110. Inspectors appointed under the FW Act, *Work Health and Safety Act* 2011 (Cth) and *Fair Work (Building Industry) Act* 2012 (Cth) have far more extensive powers of investigation than do union officials.[64] They are better placed to judge both questions of health and safety and questions of whether there have been contraventions of the FW Act or fair work instruments. They do not require the continuing presence of permit holders to assist them in the performance of their duties. The case studies above show that the continuing presence of permit holders can have the opposite effect. If an inspector wants a permit holder to leave a site, that should be a sufficient reason for that occur. It should be a civil penalty offence to fail to comply with such a request.

[64] See, for example, *Work Health and Safety Act* 2011 (Cth) Division 3 of Part 9; *Fair Work Act* 2009 (Cth), ss 706 – 712; *Fair Work (Building Industry) Act* 2012 (Cth) s 59C.

Recommendation 76

The *Fair Work Act* 2009 (Cth) be amended so that permit holders exercising rights under s 482 or s 483 of that Act must leave a site within a reasonable time if requested to do so by a Fair Work Inspector or Fair Work Building Industry Inspector who is on the site. Further, the *Work Health and Safety Act* 2011 (Cth) and equivalent State Acts be amended so that permit holders exercising rights under those Acts must leave a site within a reasonable time if requested to do so by an inspector who is on the site.

Consequential amendments be made to:

(a) confer powers on Fair Work Inspectors, Fair Work Building Industry Inspectors and inspectors under the *Work Health and Safety Act* 2011 (Cth) to make the above requests; and

(b) create civil penalty offences for failure to comply with such requests.

CHAPTER 10

REFORM OF THE *ROYAL COMMISSIONS ACT* 1902 (CTH)

Subject	Paragraph
A – INTRODUCTION	1
B – POWERS UNDER THE *ROYAL COMMISSIONS ACT* 1902 (CTH)	4
C – SERVICE	7
D – PENALTIES	20
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A – INTRODUCTION

1. At a federal level, Royal Commissions are governed by the *Royal Commissions Act* 1902 (Cth).

2. Previous analyses, such as the comprehensive review by the Australian Law Reform Commission (**ALRC**)[1] and the Final Report of the Royal Commission into the Building and Construction Industry[2] (**the Cole Royal Commission Report**), have included recommendations for reform in relation to the powers of Royal Commissions.

3. This Chapter considers some specific practical suggestions for reform which have arisen from the particular experiences of this Royal Commission. Suggestions for reform are made not only in relation to the *Royal Commissions Act* 1902 (Cth) but also the legislation governing the use of surveillance devices.

B – POWERS UNDER THE *ROYAL COMMISSIONS ACT* 1902 (CTH)

4. Part 2 of the *Royal Commissions Act* 1902 (Cth) confers a variety of powers on federal Royal Commissions, including powers to summons witnesses, compel the production of documents, apply for search warrants, and issue warrants for the arrest of witnesses who fail to appear in response to summonses. Persons who fail to attend, produce documents, or be sworn or give evidence are liable to penalties. Part 3 of the *Royal Commissions Act* 1902 (Cth) sets out additional offences and penalties relating to false or misleading evidence, destruction of documents, interference with witnesses and contempt. These provisions are largely replicated in analogous legislation of States and Territories, but this Chapter will address the Federal provisions only.

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[1] Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework,* ALRC Report 111 (October 1999), ch 11.

[2] Royal Commission into the Building and Construction Industry, *Final Report* (2003) Vol 2, ch 8.

5. Two issues that have been of some concern to this Royal Commission, because of their impact upon efficiency, effectiveness and cost, relate to service of documents and the penalties for non-compliance with certain provisions of the *Royal Commissions Act* 1902 (Cth).

6. For the reasons set out below, it is recommended that the *Royal Commissions Act* 1902 (Cth) be amended to address these two issues.

C –SERVICE

7. The combined effect of the *Royal Commissions Act* 1902 (Cth) and the *Royal Commissions Regulations* 2001 (Cth) is that *all* summonses to appear and/or produce documents and notices to produce must be personally served in order to be enforceable.[3] Personal service means handing the document to the person or, if on tender of the document to the person the person refuses to accept it, putting it down in the person's presence after the person has been told of the nature of the document; or, where the addressee is a corporation, by handing it to a person who is apparently an officer of that entity and above the age of 16 years at the addressee's registered office or principal place of business.[4]

8. However, personal service of *every* summons and notice to produce is an impractical, expensive and unnecessary requirement, especially when it involves service on institutional recipients, or recipients who

[3] *Royal Commissions Act* 1902 (Cth), ss 2(3A), 3(1), 3(2), 6AA(3) require service 'as prescribed', and s 6B(1) provides consequences for non-compliance with s 2. *Royal Commissions Regulations* 2001 (Cth), r 6 sets out the prescribed manner of service for the purposes of these provisions.

[4] *Royal Commissions Regulations* 2001 (Cth), r 6.

are the subject of a number of notices to produce over time and who are legally represented.

9. The service requirements of the *Royal Commissions Act* 1902 (Cth) have not always been this burdensome. When the legislation was first enacted, the penalties for non-compliance with a summons could be enforced 'whether the summons [was] served personally or by being left at [the addressee's] usual place of abode'.[5]

10. The service requirements for Royal Commissions that are imposed by the current form of the *Royal Commissions Act* 1902 (Cth) are more burdensome than those which are prescribed for most courts and other investigative bodies.

11. In most civil jurisdictions, personal service is generally required for originating processes, subject to some exceptions which will be outlined below. However, once proceedings have been commenced, subsequent documents may generally be served by way of 'ordinary service'.[6] Ordinary service may be effected by sending a document via post addressed to the recipient at his or her address for service (or, in some instances, last known business or personal address) or such other mechanisms as may be directed by the Court.

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[5] *Royal Commissions Act* 1902 (Cth) as made, s 5. The provision in that form was repealed by the *Royal Commissions Amendment Act* 1982 (Cth).

[6] *High Court Rules* 2004 (Cth), r 9.01.5; *Federal Court Rules* 2011 (Cth), r 10.31; *Court Procedures Rules* 2006 (ACT), r 6420; *Supreme Court Rules* 1987 (NT), r 6.06; *Uniform Civil Procedure Rules* 2005 (NSW), r 10.5; *Uniform Civil Procedure Rules* 1999 (Qld), r 112; *Supreme Court Civil Rules* 2006 (SA), r 68; *Supreme Court Rules* 2000 (Tas), r 144; *Supreme Court (General Civil Procedure) Rules* 2015 (Vic), r 6.07; *Rules of the Supreme Court* 1971 (WA), O 72, r 5.

12. Even when personal service is generally required for an originating process or other particular category of document, the rules of most Courts prescribe exceptions in certain circumstances. Common exceptions include where a solicitor accepts service on behalf of the party to be served,[7] and where the parties agree to an alternative method of service.[8]

13. Similarly, other investigatory bodies are permitted to use methods of service which are more practical and convenient than personal service in a variety of circumstances. For example, r 7(1)(a)(ii) of the *Australian Crime Commission Regulations* 2002 (Cth) specifically provides that, where personal service of a summons is not 'practicable', service may be effected by methods including leaving the summons with another person at the last known or usual place of residence or business of the addressee, or by sending a copy by registered post or certified mail to those addresses or the last known or usual postal address. Pursuant to s 108 of the *Independent Commission Against Corruption Act* 1988 (NSW), service of a document on a person may be effected by leaving it at, or by sending it by pre-paid post to, the residential or business address of the person last known to

[7] *High Court Rules* 2004 (Cth), r 9.01.1(a); *Federal Court Rules* 2011 (Cth), r 10.22; *Court Procedures Rules* 2006 (ACT), r 6464; *Supreme Court Rules* 1987 (NT), r 6.08; *Uniform Civil Procedure Rules* 2005 (NSW), r.10.13; *Uniform Civil Procedure Rules* 1999 (Qld), r 115; *Supreme Court Civil Rules* 2006 (SA), r 67(1)(c); *Supreme Court Rules* 2000 (Tas), r 134; *Supreme Court (General Civil Procedure) Rules* 2015 (Vic), r 6.09; *Rules of the Supreme Court* 1971 (WA), O 9 r 1(2).

[8] *Federal Court Rules* 2011 (Cth), r 10.28; *Court Procedures Rules* 2006 (ACT), r 6463; *Supreme Court Rules* 1987 (NT), r 6.13; *Uniform Civil Procedure Rules* 2005 (NSW), r 10.6; *Uniform Civil Procedure Rules* 1999 (Qld), r 119; *Supreme Court Rules* 2006 (SA), r 67(1)(d); *Supreme Court (General Civil Procedure) Rules* 2015 (Vic), r 6.14; *Rules of the Supreme Court* 1971 (WA), O 9 r 3.

the person serving the document. Similar rules apply for the Australian Competition and Consumer Commission.[9]

14. Where there is no specific provision for a method of service within a piece of legislation,[10] subsection 28A(1) of the *Acts Interpretation Act* 1901 (Cth) provides a general mechanism as follows:

> For the purposes of any Act that requires or permits a document to served on a person, whether the expression 'serve', 'give' or 'send' or any other expression is used, then the document may be served:
>
> (a) on a natural person:
>
> (i) by delivering it to the person personally; or
>
> (ii) by leaving it at, or by sending it by pre-paid post to, the address of the place of residence or business of the person last known to the person serving the document; or
>
> (b) on a body corporate – by leaving it at, or sending it by pre-paid post to, the head office, a registered office or principal office of the body corporate.

15. The case for amendment of the provisions of the *Royal Commissions Act* 1902 (Cth) requiring personal service is made even more compelling by the huge volume of documents that a modern commission of inquiry generates and dispatches.

16. For example, in this Commission, over the period of about twenty months, more than 2000 notices to produce were issued to various recipients located all around Australia. In the vast majority of cases,

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[9] *Competition and Consumer Regulations* 2010 (Cth), r 12(3). By contrast, s 19 of the *Australian Securities and Investments Commission Act* 2001 (Cth) does not require that a notice be served at all, merely that it be 'given' to the recipient, thus attracting s 28A(1) of the *Acts Interpretation Act* 1901 (Cth).

[10] *Acts Interpretation Act* 1901 (Cth), s 28A(2).

the notices were addressed to sizeable entities such as banks, government departments, companies and trade unions. A significant number of these entities received multiple notices to produce over time, as investigations progressed and more issues came to light. Furthermore, in many cases, the notices were attended to by in-house counsel, legal officers or external legal representatives. Of the relatively few individuals who were issued with notices to produce, many were assisted by legal representatives (some of whom also acted for related entities).

17. Additionally, over 500 summonses to appear and give evidence were issued to various individuals. Again, many recipients had legal representation, some of whom were closely acquainted with the Commission's proceedings. A small number of people received more than one summons, such as those who had been released from further attendance in 2014, who were then required to appear in 2015 after the term of the Commission was extended and some new fields of inquiry opened up.

18. Of course, there are circumstances where personal service remains desirable and appropriate. That is particularly so where a recipient of a notice to produce or summons is an individual with whom a Commission has previously not been in contact. It is important, in such cases, to ensure that the notice comes to the recipient's attention by means of personal service. It is also important to ensure that personal service is effected if there is a concern that a person might seek to avoid or evade compliance with a summons or notice to produce.

19. It should also be noted that serious consequences may flow from non-compliance, both for recipients and the efficient workings of Royal Commissions.[11] As such, it is desirable that appropriate steps be taken to ensure that summonses and notices are received. However, as observed above, these competing factors may be accommodated by retaining a general requirement of personal service but introducing exceptions.

Recommendation 77

The *Royal Commissions Act* 1902 (Cth) be amended to dispense with the requirement for personal service of a summons or notice to produce in circumstances where:

(a) a solicitor accepts service on behalf of the addressee;

(b) the addressee agrees to an alternative method of service; or

(c) (in relation to a notice to produce only) the addressee has been served with a notice to produce previously by the Royal Commission in question, whether that notice was effected personally or otherwise.

D – PENALTIES

20. Another recommendation for reform arises out of the marked inadequacy of existing penalties for a number of offences, including a

[11] The penalties which may flow from non-compliance will be considered in more detail in Part D below.

failure to comply with summonses or notices to produce issued under the *Royal Commissions Act* 1902 (Cth).[12]

21. A person who fails, without reasonable excuse, to attend a hearing or produce documents or things in response to notices issued pursuant to s 2 of the *Royal Commissions Act* 1902 (Cth), commits an offence which is punishable by a maximum penalty of $1,000 or imprisonment for six months.[13] Similarly, a person who refuses to be sworn or to make an affirmation, or to answer any relevant question asked by a Commissioner or legal practitioner assisting or appearing before a Royal Commission, commits an offence and is liable for the same penalty.[14]

22. Over a decade ago, these penalties were described as 'inadequate' in the Cole Royal Commission Report.[15] Having regard to the penalties which could be imposed by other investigative bodies at that time,[16]

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[12] There are also a number of penalties which may be imposed where a witness has been interfered with in some manner, which will not be considered here.

[13] *Royal Commissions Act* 1902 (Cth), ss 3(1), 3(2), 3(4).

[14] *Royal Commissions Act* 1902 (Cth), ss 6 and 6FA.

[15] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 2, ch 4, p 44.

[16] The penalties now available for non-compliance with compulsory powers exercised by other regulators are set out in Chapter 8 of Volume 5 of this Report. For example, failure to comply with notices issued by Australian Securities & Investments Commission carries a penalty of 100 penalty units ($18,000) or imprisonment for two years, or both: s 63 of the *Australian Securities and Investments Act* 2001 (Cth). Failure to comply with a notice issued by the Australian Competition and Consumer Commission notice is an offence punishable by a fine of 20 penalty units ($3,600) or two years' imprisonment, or both: ss 155(5), (6A) of the *Competition and Consumer Act* 2010 (Cth). Penalties for non-compliance with information gathering requirements issued by the Australian Taxation Office range between 20 penalty units ($3,600) for a first offence and 50 penalty units ($9,000) and/or 12 months' imprisonment: ss 8E, 8G of the *Taxation Administration Act* 1953 (Cth). Failure to comply with notices issued by the Australian Crime Commission carries a penalty of five years or 200 penalty units ($36,000), or both: ss 21A, 30 of the

the report recommended that the *Royal Commissions Act* 1902 (Cth) be amended to increase the penalty for failure or refusal to attend when summonsed, failure or refusal to answer questions and failure or refusal to provide documents to at least five years' imprisonment or a $20,000 fine.[17] Despite this recommendation, the penalties in the *Royal Commissions Act* 1902 (Cth) remain unchanged.

23. The power to impose penalties of imprisonment in addition to monetary penalties was introduced in 1983, but since that time the maximum term of imprisonment has not altered from six months.[18]

24. The monetary penalties have remained unchanged for a considerably longer period of time. In fact, once the rate of inflation is taken into consideration, it is apparent that the current value of those penalties is very much less than it was initially.

25. Pursuant to ss 5 and 6 of the *Royal Commission Act* 1902 (Cth) as originally enacted, any person appearing as a witness who refused to be sworn or make an affirmation, or to answer any question put to him or her, was liable to a penalty 'not exceeding fifty pounds'. According to an inflation calculator managed by the Reserve Bank of Australia,

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Australian Crime Commission Act 2002 (Cth). Failure to comply with information gathering requirements issued by the New South Wales Independent Commission Against Corruption attracts penalties of between 20 and 50 penalty units ($2,200 to $5,500) or imprisonment for six months to two years, or both: ss 82, 83, 86 of the *Independent Commission Against Corruption Act* 1988 (NSW).

[17] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 2, ch 4, p 44.

[18] *Royal Commissions Amendment Act* 1982 (Cth), s 4.

the value of £50 in 1902 would be equivalent to $6,746.63 in 2014 (the most recent year for which relevant data is held).[19]

26. The fines were increased to £500 in 1912[20] which has since only been amended to reflect the introduction of decimal currency in 1966, when the penalty became $1000.[21] However, this change did not affect the value of the fine, and so effectively there has been no increase of the penalty since 1912. According to the inflation calculator managed by the Reserve Bank of Australia, the value of £500 in 1912 would be equivalent to $57,174.86 in 2014.[22] This illustrates that non-compliance with an exercise of a Royal Commission's coercive power was, at the time of enactment and within the first decade thereafter, considered to be an extremely serious offence. The current value of the penalty has been seriously eroded by inflation. Legislative amendment is clearly necessary.

Recommendation 78

The *Royal Commissions Act* 1902 (Cth) be amended to increase the penalties for a failure to comply with a summons to attend, a failure to comply with a notice to produce, a failure to be sworn or answer questions, and a failure or refusal to provide documents to at least a maximum penalty of two years' imprisonment or a fine of 120 penalty units, or both.

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[19] http://www.rba.gov.au/calculator/annualPreDecimal.html as accessed on 4 December 2015.

[20] *Royal Commissions Act* 1912 (Cth), ss 4, 6.

[21] *Statute Law Revision (Decimal Currency) Act* 1966 (Cth), sch 1.

[22] http://www.rba.gov.au/calculator/annualPreDecimal.html as accessed on 4 December 2015.

27. The reason for selecting two years' imprisonment is that this is consistent with the penalties available for failure to comply with notices issued by the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission. The number of penalty units has been determined having regard to s 4B of the *Crimes Act* 1914 (Cth).

E – SURVEILLANCE DEVICES LEGISLATION

28. Various Commonwealth and State Acts make provision for the use of surveillance devices and surveillance device evidence. Each of the Commonwealth, New South Wales, Victoria and Western Australia has an Act entitled the *Surveillance Devices Act.*[23] Queensland's legislation is called the *Police Powers and Responsibilities Act* 2000 (Qld).

29. Save for some particular points of detail, the regime for obtaining approval for the use of a surveillance device,[24] and the dissemination and use of surveillance device evidence and information in relation to such evidence, is broadly the same under each of the Commonwealth, New South Wales, Victorian and Queensland Acts. None of these Acts authorise a Royal Commission to seek, obtain or issue a warrant to use surveillance devices. Further, none *expressly* provide that a Royal

[23] *Surveillance Devices Act* 2004 (Cth); *Surveillance Devices Act* 2007 (NSW); *Surveillance Devices Act* 1999 (Vic); *Surveillance Devices Act* 1998 (WA).

[24] A surveillance device is defined in the Commonwealth, New South Wales, Victorian and Queensland Acts to mean a data surveillance device, a listening device, an optical surveillance device or a tracking device, or a combination of two or more such devices. In the Western Australian Act, a data surveillance device is not included.

Commission may be informed about, receive or use surveillance device evidence.

30. In part because a Royal Commission is not expressly provided for in the legislation, the means by which surveillance device evidence can be made available to and used by a Royal Commission is unnecessarily complex.

31. Under the Commonwealth Act, protected information obtained by a law enforcement officer or agency from the use of a surveillance device may be provided by that officer to a Royal Commission and dealt with by a Commission pursuant to a combination of provisions including s 45(5)(a), read with ss 45(3), 45(7)(b), 47 and 48. Amongst other things, those provisions permit use, communication, and admission into evidence of protected information where *necessary* for the investigation of a relevant offence or the making of a report on the outcome of an investigation. This is just one example of the problems in this legislation. This test is poorly crafted and difficult to apply in practice. It unnecessarily limits the circumstances under which the information can be made available to a Royal Commission.

32. This is only one of the issues which make it desirable for there to be legislative reform. It is important to ensure the permissibility of reception and use of surveillance device evidence in matters of public importance, which it may be assumed are those matters which are the subject of a Royal Commission, are clearly and properly available.

33. The regime described above can be compared to the clear regime established by the *Telecommunications (Interception and Access) Act*

1979 (Cth). That regime deals with the interception of telecommunications. Under it, 'the Minister'[25] may declare a Commonwealth Royal Commission to be an 'eligible Commonwealth authority' for the purposes of the *Telecommunications (Interception and Access) Act* 1979 (Cth) if satisfied that it is likely to inquire into matters that may involve the commission of a prescribed offence.[26] State Royal Commissions are not included in this regime.

34. The *Telecommunications (Interception and Access) Act* 1979 (Cth) regime also operates by way of a general statutory prohibition with legislated exceptions. However, it works more sensibly than the *Surveillance Devices Act* 2004 (Cth) with respect to a Royal Commission. The *Telecommunications (Interception and Access) Act* 1979 (Cth) generally prohibits lawfully intercepted information from being communicated, used, recorded, or being given as evidence in a proceeding.[27] A series of exceptions then provides for dealing and communication in certain specified situations. Relevantly, a Commonwealth Royal Commission which has been declared by the Minister to be an eligible Commonwealth authority may receive lawfully intercepted information[28] if the information relates or appears to relate to the commission of a relevant offence[29] in relation to an

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[25] Relevantly, the Attorney General: see Administrative Arrangements Order C2015Q00007, 9/7/15.

[26] *Telecommunications (Interception and Access) Act* 1979 (Cth), s 5AA. A 'prescribed offence' is defined in s 5 to include an offence punishable by a period of at least 3 years' imprisonment.

[27] *Telecommunications (Interception and Access) Act* 1979 (Cth), s 63.

[28] *Telecommunications (Interception and Access) Act* 1979 (Cth), s 68(da).

[29] A 'relevant offence' includes a prescribed offence to which a prescribed investigation relates in the case of an eligible Commonwealth authority: see subsection (ba) of the definition of relevant offence in s 5. A 'prescribed investigation' means an investigation

eligible Commonwealth authority. The Commonwealth Royal Commission is permitted to communicate lawfully intercepted information if it is for a permitted purpose,[30] which includes an investigation that the Commonwealth Royal Commission concerned is conducting in the course of the inquiry it is commissioned to undertake, or a report on such an investigation.[31]

35. Further, the information may be used in an exempt proceeding, which is defined to include a proceeding of an eligible Commonwealth authority.[32]

36. As can be seen, by contrast with the *Surveillance Devices Act* 2004 (Cth), under the *Telecommunications (Interception and Access) Act* 1979 (Cth) there is a more realistic and practical threshold test before a Royal Commission may be provided with information obtained from an interception. The test provides that information can be communicated to a Royal Commission where it 'relates or appears to relate to the commission of a relevant offence' that is the subject of its investigations. This test is clearly more practical and appropriate to the investigative functions of a Royal Commission than the test of necessity.

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that the Commonwealth Royal Commission is conducting in the course of the inquiry it is commissioned to undertake: see subsection (ba) of the definition of prescribed investigation in s 5.

[30] *Telecommunications (Interception and Access) Act* 1979 (Cth), s 67(2).

[31] See subsection (ba) of the definition of 'permitted purpose' in s 5 of the *Telecommunications (Interception and Access) Act* 1979 (Cth).

[32] *Telecommunications (Interception and Access) Act* 1979 (Cth), ss 5B(ha), 74.

37. It is recommended that a thorough review be undertaken of the *Surveillance Devices Act* 2004 (Cth) as it relates to Royal Commissions with a view to amending it appropriately.

Recommendation 79

The provisions relating to the reception and use of surveillance device evidence in the *Surveillance Devices Act* 2004 (Cth) in relation to Royal Commissions be reviewed.

APPENDIX 1

MODEL LEGISLATIVE PROVISIONS

***FAIR WORK ACT* 2009 (CTH)**

Section 510

When the FWC must revoke or suspend entry permits

Recommendation 71

(1) The FWC must, under this subsection, revoke or suspend each entry permit held by a permit holder if it is satisfied that any of the following has happened since the first of those permits was issued:

(a) the permit holder was found, in proceedings under this Act, to have contravened subsection 503(1) (which deals with misrepresentations about things authorised by this Part);

(b) the permit holder has contravened section 504 (which deals with unauthorised use or disclosure of information or documents);

(c) the Information Commissioner has, under paragraph 52(1)(b) of the *Privacy Act* 1988, found substantiated a complaint relating to action taken by the permit holder in relation to information or documents obtained under section 482, 483, 483B, 483C, 483D or 483E;

(d) the permit holder, or another person, was ordered to pay a pecuniary penalty under this Act in relation to a contravention of this Part by the permit holder;

(e) a court, or other person or body, under a State or Territory industrial law:

(i) cancelled or suspended a right of entry for industrial purposes that the permit holder had under that law; or

(ii) disqualified the permit holder from exercising, or applying for, a right of entry for industrial purposes under that law;

(f) the permit holder has, in exercising a right of entry under a State or Territory OHS law, taken action that was not authorised by that law,

(g) the permit holder has not completed the approved annual training in accordance with s 515A;

(h) additional permit qualification matters (not known or disclosed in the original application) have occurred or been discovered which result in the permit holder no longer being a fit and proper person to hold a right of entry permit.

(2) Despite subsection (1), the FWC is not required to suspend or revoke an entry permit under paragraph (1)(d) or (f) if the FWC is satisfied that the suspension or revocation would be harsh or unreasonable in the circumstances.

(3) Subsection (1) does not apply in relation to a circumstance referred to in a paragraph of that subsection if the FWC took the circumstance into account when taking action under that subsection on a previous occasion.

Minimum suspension period

(4) A suspension under subsection (1) must be for a period that is at least as long as the period (the ***minimum suspension period***) specified in whichever of the following paragraphs applies:

(a) if the FWC has not previously taken action under subsection (1) against the permit holder—3 months;

(b) if the FWC has taken action under subsection (1) against the permit holder on only one occasion—12 months;

(c) if the FWC has taken action under subsection (1) against the permit holder on more than one occasion—5 years.

Banning issue of future entry permits

(5) If the FWC takes action under subsection (1), it must also ban the issue of any further entry permit to the permit holder for a specified period (the ***ban period***).

(6) The ban period must:

(a) begin when the action is taken under subsection (1); and

(b) be no shorter than the minimum suspension period.

512A Obligation to disclose information

Recommendation 70

In relation to an application under s 512 any permit qualification matter relevant to the application must be disclosed to the FWC by both the official and the organisation:

(a) at the time the application is lodged;

(b) if the permit qualification matter arises after the application has been lodged, then within 7 days of the matter arising;

(c) if the permit qualification matter arises after the permit has been issued, then within 14 days of the matter arising.

Note: This section is a civil remedy provision. The maximum penalty is 100 penalty units.

513 Considering application

Recommendation 68

(1) In deciding whether the official is a fit and proper person, the FWC must take into account the following ***permit qualification matters***:

(a) whether the official has completed approved permit holder training, within 12 months preceding the date of the application;

(b) whether the official has ever been convicted of an offence against an industrial law;

(c) whether the official has ever been found to have acted in contempt of court or in breach of the orders of a court or industrial body;

(d) whether the official has ever been convicted of offences for hindering or obstructing

public officials in the performance of their functions;

(e) whether the official has ever been convicted of an indictable offence with a maximum penalty of imprisonment for life, or a term of five years or more, against a law of the Commonwealth, a State, a Territory or a foreign country;

(f) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:

(i) entry onto premises; or

(ii) fraud or dishonesty; or

(iii) intentional use of violence against another person or intentional damage or destruction of property;

(g) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official;

(h) whether the official, or any other person, has ever been ordered to pay damages or compensation to any person in relation to action taken by the official in connection with their role as an official;

(i) whether a permit issued to the official under this Part, or under a similar law of the Commonwealth (no matter when in force), has been revoked or suspended or made subject to conditions;

(j) whether a court, tribunal or other person or body, under a State or Territory industrial law or a State or Territory OHS law, has:

(i) cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; or

(ii) disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;

(k) whether the official has provided false or misleading information or made a false or misleading statement in relation to an application for a permit under this Part or under a State or Territory industrial law or State or Territory OHS law;

(l) whether the official has ever been found not to be a fit and proper person for the purposes of this Act or any other State or Territory industrial law or State or Territory OHS law;

(m) whether the person is otherwise of good fame and character;

(n) any other matters that the FWC considers relevant.

(2) Despite paragraph 85ZZH(c) of the *Crimes Act* 1914, Division 3 of Part VIIC of that Act applies in relation to the disclosure of information to or by, or the taking into account of information by, the FWC for the purpose of making a decision under this Part.

515A Approved Permit Holder Training

Recommendation 69

(1) The General Manager may approve permit holder training by:

(a) an organisation; or

(b) a peak council; or

(c) a body or person the General Manager is satisfied has appropriate skills and expertise to provide training;

if the General Manager is satisfied that the training covers the rights, responsibilities and obligations of permit holders under Part 3-4 of this Act.

(2) If the approval is made in writing, the approval is not a legislative instrument.

(3) An official that is a permit holder under this Part is required to undertake training approved by the General Manager under section 515A(1) annually.

Note: Failure to complete approved permit holder training will result in the FWC revoking or suspending an entry permit until such time as approved permit holder training has been completed.

PART 3-7 – INDUSTRIAL PAYMENTS

Recommendation 40

536A Corrupting benefits in relation to organisations

Giving a corrupting benefit

(1) A person (the ***first person***) is guilty of an offence if:

(a) the first person:

(i) provides a benefit to another person; or

(ii) causes a benefit to be provided to another person; or

(iii) offers to provide, or promises to provide, a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the receipt, or expectation of the receipt, of the benefit would tend to influence an officer or employee of an organisation or a branch of an organisation (who may be the other person):

(i) to exercise improperly the officer or employee's duties to the organisation or branch, or the members of the organisation or branch; or

(ii) to exercise improperly any power conferred on the officer or employee under the *Fair Work Act* 2009 or *Fair Work (Registered Organisations) Act* 2009; or

(iii) to provide a favour in connection with the affairs of the organisation or branch, including the affairs of the members of the organisation or branch, to the first person or a related entity of the first person, where the recipient has:

(A) no legitimate entitlement to the favour; or

(B) a legitimate entitlement to the favour, but otherwise has no reasonable expectation that the favour will be provided; and

(c) the first person intends, knows or believes that the receipt or expectation of the receipt of the benefit will have a result specified in one or more of subparagraphs (b)(i), (b)(ii) and (b)(iii).

(2) For the avoidance of doubt, the fault element for paragraph (1)(b) is that specified in paragraph (1)(c).

Receiving a corrupting benefit

(3) A person (the ***first person***) is guilty of an offence if:

(a) the first person:

(i) requests from another person (the ***second person***), whether expressly or impliedly and whether by threats or otherwise, a benefit for himself, herself or another person; or

(ii) receives or obtains from the second person a benefit for himself, herself or another person; or

(iii) agrees to receive or obtain a benefit for himself, herself or another person from the second person; and

(b) the receipt, or expectation of the receipt, of the benefit would tend to influence an officer or employee of an organisation or a branch of an organisation (who may be the first person):

(i) to exercise improperly the officer or employee's duties to the organisation or branch or the members of the organisation or branch; or

(ii) to exercise improperly any power conferred on the officer or employee under the *Fair Work Act* 2009 or *Fair Work (Registered Organisations) Act* 2009; or

(iii) to provide a favour in connection with the affairs of the organisation or branch, including the affairs of the members of the organisation or branch, to the second person or a related entity of that person, where the recipient has:

(A) no legitimate entitlement to the favour; or

(B) a legitimate entitlement to the favour, but otherwise has no reasonable expectation that the favour will be provided; and

(c) the first person:

(i) intends that the receipt or expectation of the receipt of the benefit of the benefit will have a result specified in one or more of subparagraphs (b)(i), (b)(ii) and (b)(iii); or

(ii) knows or believes that the second person intends or believes that the receipt or expectation of the receipt of the benefit will have a result specified in one or more of subparagraphs (b)(i), (b)(ii) and (b)(iii).

(4) For the avoidance of doubt, the fault element for paragraph (3)(b) is specified in paragraph (3)(c).

Penalty

(5) An offence against subsection (1) or (3) committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.

(6) An offence against subsection (1) or (3) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:

(a) 100,000 penalty units;

(b) if the court can determine the value of the benefit that the body corporate, and any related party, has obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence – 3 times the value of that benefit;

(c) if the court cannot determine the value of that benefit – 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

Definition

(7) In this section, favour means every type of advantage, whether lawful or unlawful, and includes a person doing or not doing something whether the thing is lawful or unlawful, or causing or influencing another person to do or not do something whether the thing is lawful or unlawful.

536B Payments by employers to employee organisations

Recommendation 41

(1) Subject to subsection (2), a person (the ***first person***) is guilty of an offence if:

(a) the first person:

(i) provides a benefit to another person; or

(ii) causes a benefit to be provided to another person; or

(iii) offers to provide, or promises to provide, a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the benefit is provided, offered or promised to an employee organisation (the ***designated organisation***) or to an officer or employee of the designated organisation; and

(c) the first person or a related entity of the first person:

(i) employs a person who is member of the designated organisation and whose industrial interests the designated organisation is entitled to represent; or

(ii) employs a person who is entitled to be a member of the designated organisation and whose industrial interests the designated organisation is entitled to represent.

(2) Subsection (1) does not apply if:

(a) the benefit is a ***membership payment***; or

(b) the benefit is a ***wage claim payment***; or

(c) the benefit is a ***charitable donation***; or

(d) the benefit is a payment for goods or services at the prevailing market price in the ordinary course of business of the designated organisation; or

(e) the benefit is made in accordance with an order, judgment or award.

(3) Strict liability applies to paragraphs (1)(b) and (c).

(4) A person commits an offence if the person requests, receives, obtains or agrees to receive or obtain a benefit that is prohibited to be made by subsection (1).

(5) An offence against subsection (1) or (4) is punishable on conviction by imprisonment for not more than 2 years, a fine not more than 500 penalty units, or both.

(6) In this section:

charitable donation means a payment made to an employee organisation or an officer or employee of an employee organisation solely for a charitable or benevolent purpose;

employee organisation includes a branch of an employee organisation;

membership payment means a payment deducted from the wages of a person who has agreed in writing to become a member of an employee organisation in payment of membership fees to the employee organisation;

wage claim payment means a payment to an employee organisation solely as agent for one or

more employees in settlement of a genuine claim that the employee has in connection with that employee's employment.

FAIR WORK (REGISTERED ORGANISATIONS) ACT 2009 (CTH)

190 Organisation or branch must not assist one candidate over another

Recommendation 23

An organisation or branch commits an offence if it uses, or allows to be used, its property or resources to help a candidate against another candidate in an election under this Part (in respect of any organisation or branch) for an office or position.

Chapter 7, Part 2A – Funding of Elections

Recommendation 44

199A Definitions

(1) Subject to a contrary intention, in this Part:

candidate means a person nominated as a candidate for an election for an office in an organisation, or branch of an organisation.

election means an election for an office in an organisation, or branch of an organisation.

election fund means:

(a) an entity which is a company, body corporate, trust, fund or association (whether incorporated or not);

(b) a purpose of which is, or which in practice operates, to raise funds to fund, support or

promote the election of a candidate or ticket of candidates at an election or elections, or the election of a person or group of persons in a future election or elections within a particular organisation or branch of an organisation.

electoral expenditure means expenditure for or in connection with promoting or opposing, directly or indirectly, the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.

election donation means a gift, including a gift in kind, made:

(a) for a purpose that includes the purpose of funding, supporting or promoting the election of a candidate or ticket of candidates at an election or elections, including the election of a person or group of persons in a future election or elections; or

(b) to or for the benefit of an entity or person, the whole or part of which was used or is intended to be used by the entity or person:

(i) to enable the entity or person to make, directly or indirectly, an election donation or to incur electoral expenditure, or

(ii) to reimburse the entity or person for making, directly or indirectly, an election donation or incurring electoral expenditure.

contributor means a person who makes an election donation.

gift includes a loan made which is proposed or intended not to be repaid.

gift in kind includes the provision of a service (other than genuine volunteer service) for no consideration or inadequate consideration.

registered election fund means an election fund registered under s 199B.

unregistered election fund means an election fund that is not a registered election fund.

199B Registered election funds

Recommendation 44

(1) An election fund may apply to the Registered Organisations Commission to be registered under this section.

(2) The Registered Organisations Commission must register an election fund under this section if and only if:

(a) there exists a document setting out:

(i) how the election fund is to operate;

(ii) the purposes for which the fund may be used, and the organisation or branch of an organisation with which the fund is associated; and

(iii) the circumstances in which contributors are entitled to a return or refund of money paid to the election fund;

(b) at least two persons have agreed to act as the official agents for the election fund; and

(c) the election fund has an account established in accordance with (3) (***election account***).

(3) The election account must:

(a) be a separate account with a bank, credit union, building society or other entity prescribed by the regulations; and

(b) be in the name of the election fund and must be authorised to be operated only by the official agents of the election fund.

199C Operation of election accounts

Recommendation 44

(1) A registered election fund must not make any payment for electoral expenditure other than from the election account of the fund.

(2) Every election donation received by a registered election fund must immediately be:

(a) in the case of a donation of money – paid or transferred into the election account of the fund;

(b) in the case of a donation being a gift in kind – receipted in a form prescribed by regulation.

(3) Only the following payments may be made into an election account of a registered election fund:

(a) election donations;

(b) interest, refunds of tax or charges and other like income; and

(c) payments of a class prescribed by regulation.

(4) Only the following payments may be made out of an election account of a registered election fund:

(a) payments for electoral expenditure;

(b) refunds of amounts to contributors in accordance with the rules governing the operation of the election fund;

(c) bank fees, taxes, charges and other like expenses; and

(d) payments of a class prescribed by regulation.

(5) A person must not do, or fail to do, any act with an intention of achieving a result in contravention of (1), (2), (3) or (4).

Maximum civil penalty: 100 penalty units.

199D Reporting requirements of registered election funds

Recommendation 44

(1) Within 60 days after the end of each financial year, the official agents of a registered election fund must lodge with the Registered Organisations Commission a report in the prescribed form, containing the following information:

(a) the total payments made into and out of the election account of the registered election fund during the financial year;

(b) the total value of election donations received;

(c) the total number of contributors;

(d) for election donations of money exceeding $1,000 from a single person (including a number of payments each of which is less than $1,000 but which in total exceed $1,000), the date or dates the election donation was made, the value of the election donation and the name and address of the contributor;

(e) for election donations being gifts in kind, the date the election donation was made, the nature of the election donation, the estimated market value of the election donation and the name and address of the contributor; and

(f) the total value of electoral expenditure paid;

(g) the total number of recipients of electoral expenditure; and

(h) for payments of electoral expenditure exceeding $1,000 to a single recipient (including a number of payments each of which is less than $1,000 but which in total exceed $1,000), the date the payment was made, the value of the payment, the name and address of the recipient and the purpose of the electoral expenditure.

Maximum civil penalty: 100 penalty units.

(2) The reports lodged with the Registered Organisations Commission in relation to a registered election fund shall be available to be inspected by:

(a) contributors to the election fund; and

(b) members of the organisation or branch with which the election fund is associated.

199E Unregistered election fund must not receive election donations or make electoral expenditure

Recommendation 44

(1) It is unlawful for any unregistered election fund that is a person to:

(a) receive an election donation; or

(b) make a payment for electoral expenditure.

Maximum civil penalty: 100 penalty units.

(2) It is unlawful for any person acting on behalf of an unregistered election fund that is not a person to:

(a) receive an election donation; or

(b) make a payment for electoral expenditure.

Maximum civil penalty: 100 penalty units.

WORK HEALTH AND SAFETY ACT 2011 (CTH)

119 Notice of entry other than for serious and imminent threat

Recommendation 73

(1) Subject to section 119A, before entering a workplace under this Division, a WHS entry permit holder must give notice of the proposed entry and the suspected contravention to:

(a) the relevant person conducting a business or undertaking; and

(b) the person with management or control of the workplace.

(2) The notice must:

(a) be written; and

(b) include the following:

(i) the full name of the WHS entry permit holder;

(ii) the name of the union that the WHS entry permit holder represents;

(iii) the section under the Act which the WHS entry permit holder is proposing to enter the workplace;

(iv) the name and address of the workplace proposed to be entered;

(v) the date and time of the proposed entry;

(vi) the particulars of the suspected contravention to which the notice relates; and

(c) contain a declaration stating:

(i) that the union is entitled to represent the industrial interests of a worker who carries out work at the workplace proposed to be entered and is a member, or eligible to be a member, of that union; and

(ii) the provision in the union's rules that entitles the union to represent the industrial interests of that worker; and

(iii) that the suspected contravention relates to, or affects, that worker.

(3) The notice must be given during usual working hours at that workplace at least 24 hours, but not more than 14 days, before the entry.

119A Notice of entry for serious and imminent threat

Recommendation 73

(1) A WHS entry permit holder may enter a workplace for the purpose of inquiring into a suspected contravention of this Act where the WHS entry has a reasonable concern that:

(a) a contravention of this Act has occurred or is occurring; and

(b) that contravention gives rise to a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

(2) The burden of proving that the above concerns are reasonable lies on the person asserting those facts.

(3) A WHS entry permit holder must, as soon as is reasonably practicable after entering a workplace under this section, give notice of the entry and the suspected contravention, in accordance with subsection 119(2).

(3) A WHS entry permit holder must not enter a workplace before giving written notice except in accordance with this section.

WHS civil penalty provision.

Maximum penalty — $180 000.

APPENDIX 2

POLICY SUBMISSIONS RECEIVED

A – SUBMISSIONS IN RESPONSE TO DISCUSSION PAPER – OPTIONS FOR LAW REFORM

1. Associate Professor Louise Floyd Law Reform Submissions, 21/8/15.

2. Associations Forum Pty Ltd Law Reform Submissions, 4/9/15.

3. Australian Chamber of Commerce and Industry Law Reform Submissions, August 2015.

4. Australian Competition & Consumer Commission Law Reform Submissions, undated (received 20/8/15).

5. ACIRT Law Reform Submissions, undated (received 31/8/15).

6. Australian Industry Group Law Reform Submissions, 21/8/15.

7. Boral Law Reform Submissions, 2015.

8. ElecNet (Aust) Pty Ltd (Protect) Law Reform Submissions, undated (received 21/8/15).

9. Financial Services Council Law Reform Submissions, 24/8/15.

10. Housing Industry Association Pty Ltd Law Reform Submissions, 21/8/15.

11. Incolink Law Reform Submissions, 20/8/15.

12. Independent Contractors Australia Law Reform Submissions, 27/10/15.

13. Institute of Public Affairs Law Reform Submissions, August 2015.

14. Law Society of New South Wales, Employment Law Committee Law Reform Submissions, 21/8/15.

15. Master Builders Australia Law Reform Submissions, 21/8/15.

16. Retail Employees Superannuation Trust, Industry Super Law Reform Submissions, 20/8/15.

17. Shop, Distributive & Allied Employees Association Law Reform Submissions, 27/8/15.

18. Victoria Police Law Reform Submissions, 10/9/15.

19. Woden Contractors Pty Ltd Law Reform Submissions, 24/8/15.

20. Confidential submission.

B – SUBMISSIONS IN RESPONSE TO ISSUES PAPERS: GENERAL SUBMISSIONS

21. Australian Industry Group, Submission in Response to Issues Papers 1-3, 11/7/14.

22. Boral Law Reform Submissions, 2014.

23. Fair Work Building Industry Inspectorate Policy Submission, 27/8/14.

24. HR Nicholls Society Inc, Policy Submission, 24/10/14.

25. Joel Silver Submission in Response to Issues Papers, undated (received 14/7/14).

26. New South Wales Government, Policy Submission, August 2014.

27. Queensland Attorney-General and Minister for Justice, Submission in Response to Issues Papers, 21/8/14.

28. Victorian Government, Submission in Response to Issues Papers, August 2014.

C – SUBMISSIONS IN RESPONSE TO ISSUES PAPER 1: PROTECTIONS AVAILABLE TO WHISTLEBLOWERS

29. Carolyn Summers Submission in response to Issues Paper 1: Whistleblower Protections, undated (received 20/8/14).

30. Chamber of Commerce and Industry WA Submission in response to Issues Paper 1: Whistleblower Protections, 11/7/14.

31. Kylee Brehaut Submission in response to Issues Paper 1: Whistleblower Protections, 1/9/14.

32. New South Wales Police Force Submission in response to Issues Paper 1: Whistleblower Protections, 11/7/14.

33. Stuart Vaccaneo, Submission in response to Issues Paper 1, Whistleblower Protections, undated (received 14/7/14).

D – SUBMISSIONS IN RESPONSE TO ISSUES PAPER 2: DUTIES OF UNION OFFICIALS

34. Associate Professor Louise Floyd Submission in response to Issues Paper 2: Duties of Union Officials, 8/7/14.

35. Associations Forum Pty Ltd Submission in response to Issues Paper 2: Duties of Union Officials, 11/7/14.

36. Carolyn Summers Submission in response to Issues Paper 2: Duties of Union Officials undated (received 20/8/14).

37. Grace Collier Submission in response to Issues Paper 2: Duties of Union Officials, 10/7/14.

38. Master Builders Australia Submission in response to Issues Paper 2: Duties of Union Officials, 11/7/14.

39. Stuart Vaccaneo Submission in response to Issues Paper 2: Duties of Union Officials, undated (received 11/7/14).

E – SUBMISSIONS IN RESPONSE TO ISSUES PAPER 3: FUNDING OF TRADE UNION ELECTIONS

40. Carolyn Summers Submission in Response to Issues Paper 3: Funding of Trade Union Elections, undated (received 20/8/14).

41. Master Builders Australia Submission in Response to Issues Paper 3: Funding of Trade Union Elections, 11/7/14.

42. Slater & Gordon on behalf of Construction, Forestry, Mining and Energy Union Submission in Response to Issues Paper 3: Funding of Trade Union Elections, 1/8/14.

43. Stuart Vaccaneo Submission in Response to Issues Paper 3: Funding of Trade Union Elections, undated (received 11/7/14).

F – SUBMISSIONS IN RESPONSE TO ISSUES PAPER 4: RELEVANT ENTITIES

44. Australian Industry Group Submissions in Response to Issues Paper 4: Relevant Entities, 22/8/14.

45. Carol O'Donnell Submissions in Response to Issues Paper 4: Relevant Entities, 17/8/14.

46. Carolyn Summers Submissions in Response to Issues Paper 4: Relevant Entities, undated (received 20/8/14).

47. Master Builders Australia Submissions in Response to Issues Paper 4: Relevant Entities, 19/8/14.

G – 2014 SUBMISSIONS WHICH INCLUDE POLICY SUBMISSIONS

48. Submissions of the Australian Industry Group, 14/11/14.

49. Submissions of BERT Pty Ltd, 13/11/14.

50. Submissions of the Government of Victoria, 28/10/14.

51. Submissions of the HSU NSW Branch, 14/11/14.

52. Submissions of Jo-Ann Davidson, 14/11/14.

53. Submissions of Katherine Jackson, 14/11/14.

54. Submissions of the Hon. John Hogg, 13/11/14.

55. Submissions of Toll Holdings, 13/11/14.

56. Submissions of the TWU, 14/11/14.

57. Submissions of TWUSuper, 14/11/14.