DISCUSSION PAPER

OPTIONS FOR LAW REFORM

19 May 2015

PURPOSE

The purpose of this Discussion Paper is to raise certain possible law reform proposals for debate and to elicit opinions from interested persons and organisations. The identification of a particular possibility should not be taken to indicate that it will be adopted.

SUBMISSIONS

Submissions are requested from interested individuals and organisations.

Submissions will be made public unless the person making the submission requests that it not be made public and the Royal Commission considers it should not be made public. That will usually only occur for reasons associated with fairness or where there is a possibility of harm being suffered by the person who made the submission.

Submissions should be made by **Friday 21 August 2015**, preferably electronically, to submissions@turc.gov.au, otherwise in writing to GPO BOX 2477, Sydney NSW 2001.

TABLE OF CONTENTS

1 INTRODUCTION

1. A core part of the Commission's role is to make recommendations arising out of its inquiries. Indeed the Letters Patent issued by the Governor General specifically direct the Commissioner to make any recommendations arising out of his inquiry the Commissioner considers appropriate.[1]

2. The Commissioner's Interim Report made a number of recommendations for referral of material to relevant regulatory and prosecutorial bodies.[2] However, given that the Commission's hearings and investigations were not complete at the time of the delivery of the Interim Report, it was thought undesirable to reach final conclusions or make recommendations as to law reform in the Interim Report.[3]

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 funding of union elections; (3) relevant entities; and (4) the duties on union officials.

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.

5. The publication of the Interim Report and the hearings and investigations carried on by the Commission to date have exposed a number of areas where it may be thought that reform is necessary and desirable.

6. In very broad terms the areas for possible reform fall into a number of categories:

   - where there is no, or no adequate, regulation;

     For example, the operation of some relevant entities (within the meaning of the Commission's terms of reference) fall outside the jurisdiction of the General Manager of the Fair Work Commission.

[1] Letters Patent issued on 13 March 2014 by the Governor-General (Interim Report, Vol 2, Appendix 1, p 1716).

[2] Interim Report, Vol 1, pp 30–36.

[3] Interim Report, Vol 1, p 4 [11].

- where the existing law is unclear or needs amendment;

  For example, it is unclear whether the prohibition in s 190 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) on the use of union funds for use in union election campaigns applies to election campaigns conducted in relation to other unions.

- where there is regulation but it is being ignored or flouted.

  For example, while there are clear statutory and legal rules about the need for union officials to avoid conflicts of interest these rules are not always observed. Likewise there are clear rules prohibiting the use of threatening conduct or extortion but these rules are not always observed either.

1.1 PURPOSE OF THE PAPER

7. The purpose of this paper is to *discuss* possible options for law reform in relation to matters arising out of the Commission's inquiries.

8. It is necessary to stress one key point at the outset. The identification of a particular possibility should not be taken to indicate that it will be adopted. The goal is simply to elicit informed opinions from interested parties. Does a particular possibility have drawbacks? Does it have unpredictable consequences for other areas of the law? Should it be qualified? Should it be developed further? Should it be rejected altogether? Should other possible recommendations not developed in the Discussion Paper be considered? The Commission would be grateful if it could obtain answers to these questions, for they may help ensure that the Final Report does not fall into error.

9. Before considering the structure of this paper it will be helpful to make some comments concerning the terms of reference pursuant to which the Commission is constituted.

10. The Commission's terms of reference are in some senses broad. For example, they are not confined by reference to geography, time or industry. On the other hand, the terms of reference are not entirely open-ended. Rather, the terms of reference proceed on the assumption that employee associations (ie trade unions) will remain an important part of the industrial landscape and that their basic functions and responsibilities under the *Fair Work Act* 2009 (Cth) and the general law will remain.

11. The issues which the Commission has considered to date do not arise from the conduct of union members. Nor do they arise from the existence of unions themselves, which play, and for a long time have played, a significant part in the industrial relations system, as the ensuing discussion in this paper explains. Rather, the issues with which this Commission has been concerned to date arise from the conduct of certain union officials and leaders who disregard their legal obligations and duties. Many of the options considered in this Discussion Paper arise out of consideration of their conduct.

1.2 STRUCTURE OF THE PAPER

12. The balance of the paper is divided into nine chapters.

13. Chapter 2 sets out some general background concerning the existing regulation of trade unions in Australia, and their role in Australia. These are important contextual matters which necessarily inform any discussion of law reform concerning the governance of trade unions.

14. Chapters 3 to 10 identify eight main topics for possible law reform. The structure of those chapters is largely the same. Each raises for consideration a number of potential issues or problems with the existing law. Following the identification of an issue there is discussion concerning possible law reform solutions. Following the discussion there are specific questions for discussion upon which the Commission seeks submissions from interested parties.

15. On the whole the questions for discussion comprise specific proposals for reform rather than being open-ended policy questions. The reason for this approach is that submissions are more likely to assist in formulating policy where they are directed to specific reform ideas rather than ranging broadly over a number of issues. This approach also allows interested parties more easily to criticise, critique or suggest improvements to possible law reform ideas.

16. This does not mean that the Commission will limit itself to considering only options for reform canvassed in this Discussion Paper. Nor should interested parties feel confined to addressing only those matters raised in the paper. For one thing, the Commission's factual inquiries are still ongoing. For another, there may be ideas which have been missed. However, the Discussion Paper is intended to set what at this stage appears to be the broad framework for law reform options under consideration by the Commission.

17. In identifying the matters for discussion, regard has been had to the submissions received by the Commission from interested parties during 2014.

18. 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 which overlap with matters arising out of the Commission's inquiries. These inquiries include:

- the Competition Policy Review conducted by Professor Ian Harper (**Harper Review**);
- the Financial System Inquiry conducted by Mr David Murray AO;
- the Productivity Commission's current inquiry into the Workplace Relations Framework; and
- a number of Senate and other parliamentary committee inquiries into proposed legislation in the industrial relations area.

2 BACKGROUND

19. The chapter considers some important matters of background that are relevant to questions of trade union governance.

2.1 HISTORY OF TRADE UNION REGULATION IN AUSTRALIA

20. Trade unions have a long and complex history in Australia. For the purposes of this Discussion Paper it is necessary only to recount some of the more critical points in terms of legal regulation.[4]

2.1.1 British settlement to Federation

21. The starting point is English law at the time of British settlement in Australia. In Britain at the turn of the 19th century, the *Combination Acts* of 1799 and 1800 attached criminal liability to combinations of workmen for any purpose relating to their employment. 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. As a result, the following year legislation was passed (**1825 Act**) 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'.

22. The upshot of the 1825 Act, which applied to the Australian colonies by virtue of the *Australian Courts Act* 1828 (Imp), was that trade unions were not illegal

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

associations by statute.[5] Later cases also made clear that, despite some statements to the contrary,[6] they were not illegal associations at common law.[7]

23. 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.[8] Further, as in Britain, each of the Australian colonies and thus States had master and servant laws which imposed criminal sanctions on employees who breached their contracts of employment.[9] 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.[10] A consequence was that in general no civil action would lie against a member of trade union who misappropriated trade union property. Further, in the majority of cases, there was no criminal offence committed either.[11]

24. Clearly, this placed trade unions and their members in a precarious position. The position of trade unions in Britain was substantially improved in 1871 with the enactment of the *Trade Union Act* 1871 (UK) (the **1871 Act**). 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 (s 3). 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 1871 Act provided that that nothing in the Act would enable a court to entertain any legal proceeding with the object of enforcing certain agreements.

25. In addition to these reforms, the legislation introduced a system of registration whereby 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

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[5] 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 Portus, p 89.

[6] *Hilton v Eckersley* (1855) 6 El & Bl 47 at 53 per Crompton J [119 ER 781].

[7] *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 and 58.

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

[9] See Portus, pp 90–93 for discussion of the application of those laws.

[10] *Hilton v Eckersley* (1855) 6 El & Bl 47 [119 ER 781]; *Hornby v Close* (1867) LR 2 QB 53.

[11] See Portus, pp 15–16.

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: 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: s 11.

(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: s 12.

(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.

26. The 1871 Act, as amended by the *Trade Union Act* 1876 (UK), was fairly quickly adopted in each of the Australian colonies that became States.[12] However, apart from in New South Wales, few trade unions appear to have bothered to obtain registration under these Acts.[13]

27. In 1875, the United Kingdom Parliament enacted the *Conspiracy and Protection of Property Act*, which among other things removed criminal liability for conspiracy to do acts in contemplation or furtherance of a trade dispute and for breaches of contract by an employee.[14] Similar legislation was later enacted in all of the Australian colonies except New South Wales.[15]

28. 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, and were capable of being registered. Registration conferred some benefits on a union, although the precise legal consequences of registration under the State Acts were somewhat

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[12] *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).

[13] See Smith and Rawson, p 48.

[14] Ewing, p 11.

[15] *Conspiracy and Protection and 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).

obscure: was the registered trade union a body corporate, a 'quasi-corporation' or simply an unincorporated association with some characteristics of a body corporate?[16] The internal affairs of registered trade unions were subject to a limited degree of regulation, but unregistered trade unions were entirely unregulated.

2.1.2 Development of industrial arbitration

29. Operating in parallel with these British developments was the development in Australia from the 1890s onwards of two forms of legislative regulation of industrial conditions – wages boards and compulsory industrial arbitration.[17]

30. Wages boards, which operated principally in Victoria and Tasmania, fixed wages in certain industries. Trade unions had no direct part in such a system. However, they played a critical role in the compulsory industrial arbitration systems which were successively established in Western Australia, New South Wales, the Commonwealth, Queensland and South Australia. Under these systems, registered trade unions could enter into collective agreements with employers or associations of employers. More importantly, registered trade unions could submit industrial disputes for compulsory arbitration to the relevant industrial court which would make an award which would become binding on the parties but also on other employers and employees in the same industry.

31. In 1904, the Commonwealth Parliament enacted the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), which among other things, 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, and 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.

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[16] 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.

[17] See generally Portus, ch 8.

32. With the growth and development of the compulsory arbitration systems, trade unions inevitably came under greater regulation:

> '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 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.'[18]

33. Over time, both at the State and Commonwealth level legislation was introduced regulating the activities of trade unions registered under relevant industrial legislation.[19] 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.

2.1.3 Move away from industrial arbitration: 1980s onwards

34. During the 1980s and 1990s there was a shift by the Federal Labor Government away from compulsory industrial arbitration toward enterprise bargaining – that is, towards agreements between employees or unions and individual employers.[20] That trend was continued by the Coalition Government first with changes to the *Industrial Relations Act* 1988 (Cth) in 1996 and ultimately with the 'Work Choices' legislation in 2006 which decoupled the Federal industrial relations system from the 'conciliation and arbitration' power in the Commonwealth *Constitution*.

35. More significantly, the 'Work Choices' legislation expanded considerably the scope of the Commonwealth industrial relations system by applying Commonwealth law

[18] Portus, p 182.

[19] For a summary of the developments from 1900 to the 1950s, see Portus, pp 182–202.

[20] See Creighton and Stewart, pp 34–42 [2.49]–[2.56].

to all employees employed by trading or financial corporations.[21] The consequence was to diminish very significantly the importance and application of the traditional State-based industrial relations systems.

36. Subsequently, the Federal Labor government introduced the *Fair Work Act* 2009 (Cth) (***Fair Work Act***). Although that Act differs in many respects from the 'Work Choices' 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.[22] The result is that in those States, subject to certain exceptions largely confined to various public sector employees, all employees are subject to federal industrial relations regulation under the *Fair Work Act*.[23]

37. Despite the demise of the traditional industrial arbitration systems from the 1980s onwards, 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.

2.2 COMMONWEALTH STATUTORY FRAMEWORK

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

2.2.1 *Fair Work (Registered Organisations) Act* 2009 (Cth)

39. Under the *RO Act*, 'federally registrable' associations of employees or employers or enterprise associations are eligible to apply for registration as an 'organisation'.

40. An association of employees is 'federally registrable' if it is a constitutional corporation or some or all of its members are 'federal system employees': s 18B.

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[21] 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).

[22] *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).

[23] See Creighton and Stewart, p 50 [2.78] for a general summary of the excepted classes.

Tracking through the numerous tortured definitions, a 'federal system employee' includes an employee employed or usually employed by (a) a trading, financial or foreign corporation, (b) the Commonwealth or 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.

41. 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 *RO Act*, which in this respect was substantially identical to the *RO Act*, was upheld by the High Court in *The Work Choices Case*.[24]

42. Further, as a result of the referral of powers mentioned in paragraph 36 above, the definition of 'federal 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. The consequence is that most employees in Australia are 'federal system employees'.

43. An organisation registered under the *RO Act* is a body corporate (ie a separate legal entity) which has certain rights, powers and liabilities eg the ability to own property, to sue and be sued: *RO Act*, s 27. Most, if not all, trade unions in Australia operating federally are organisations under the *RO Act*, and are therefore subject to the provisions of the *RO Act*.

44. The *RO Act* regulates organisations in a number of ways. In very broad terms:

- Chapter 5 prescribes and regulates the rules of organisations;
- Chapter 6 concerns membership of organisations;
- Chapter 7 provides for democratic control of organisations through elections;
- Chapter 8 imposes a range of reporting and accounting requirements on organisations; and
- Chapter 9 regulates the conduct of officers and employees of organisations and branches of organisations.

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

45. Under the *RO Act*, the regulation of organisations is overseen principally by the General Manager of the Fair Work Commission (**FWC**). The General Manager of the FWC (the **General Manager**) is a separate statutory office appointed by the Governor-General on the nomination of the President of the FWC for a period not exceeding 5 years: *RO Act*, ss 656, 660. The FWC itself is a body consisting of a President, two Vice Presidents, an unspecified number of Deputy Presidents and Commissioners and six expert panel members. FWC members are appointed by the Governor-General, and hold office until aged 65.

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

46. The *Fair Work Act* confers a number of significant rights and privileges on registered employee organisations.

47. *First*, employee organisations are critical participants in the enterprise bargaining system established by the *Fair Work Act*.

48. In essence, the enterprise bargaining system allows employees of an employer to bargain in good faith with their employer for terms and conditions which are 'better off overall' than if the relevant modern award applied to the employees. Although the decision to bargain is usually consensual, in certain circumstances, such as where a majority of employees would like to bargain with their employer and as a consequence the FWC makes a 'majority support determination' (*Fair Work Act*, s 237), an employer can be forced to bargain for an enterprise agreement. In such a case, the employer will be forced to negotiate with the purpose of agreeing on an enterprise agreement even though the employer is content with the modern award.

49. 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 'Work Choices' legislation, trade unions have a distinct role in that process.

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

51. 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.

52. In practice, unions play a central role in negotiating enterprise agreements.

53. Employee organisations are also automatically parties to 'greenfields agreements' which are enterprise agreements covering new enterprises: *Fair Work Act*, s 172.

54. *Secondly*, union officials also have extremely broad 'right of entry' powers under the *Fair Work Act*, the *Work Health and Safety Act* 2011 (Cth) and State and Territory OH&S laws.

55. Section 512 of the *Fair Work Act* allows the FWC, 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.

56. Subject to certain conditions and limitations, an entry permit holder is permitted to enter premises to investigate suspected contraventions of the *Fair Work Act* (s 481), to hold discussions with workers whose industrial interests the permit holder's organisation is entitled to represent (s 484) and to exercise powers conferred by State or Territory OH&S laws (s 494). Whilst on the premises, the permit holder may inspect anything relevant to a suspected contravention and inspect and make copies of any record or document on the premises that is directly relevant to the suspected contravention.

57. In effect, union officials who hold an entry permit are authorised to act in a manner akin to police officers in relation to industrial and OH&S 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.

58. The *Work Health and Safety Act* 2011 (Cth) contains similar provisions to the *Fair Work Act*. It allows a union official who has completed relevant safety training and who holds an entry permit under the *Fair Work 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 and also to consult and advise workers on health and safety matters.

59. *Thirdly*, employee organisations have broad standing rights to apply to the FWC to vary, revoke or make a modern award, to commence proceedings seeking a civil remedy or to appear before the FWC on behalf of a member: *Fair Work Act*, ss 158, 540, 596.

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

60. It is apparent from the above summary that in considering possible reforms to the *RO Act* two matters should be kept in mind.

61. *First*, the *RO Act* as it currently stands regulates both employee and employer organisations. Further, for the most part the *RO Act* draws no distinction between the two. Accordingly, proposals for reform arising out of problems in union governance must take into account the fact that unless a division is to be drawn in the *RO Act* between the regulation of employee organisations on the one hand and employer organisations on the other, changes to the *RO Act* will also apply to employer organisations.

62. *Secondly*, not all organisations, whether employee organisations or employer organisations, are the same size with 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 it may impose a significant cost on a smaller employee or employer association. As at 11 May 2015, there are 111 registered organisations, of which 46 are unions and the remaining 65 are employee organisations or enterprise associations.[25] However, registered trade unions are considerably larger than registered employer organisations. Based on the most recent annual public returns available on the FWC website, as at 2013 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 46 registered trade unions were larger in terms of members than the largest employer organisation, the Master Builders Association of Victoria.

2.3 STATE STATUTORY FRAMEWORK

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

[25] Based on information available at http://www.fwc.gov.au/registered-organisations/find-registered-organisations.

2.3.1 New South Wales, Queensland, South Australia and Western Australia

64. In these States, the equivalents of the 1871 Act have been repealed and there is no legislation that regulates trade unions as such.[26] Instead, as under the *RO Act*, provision is made for the registration of industrial organisations or associations of employees and employers.[27] Registration confers separate legal personality on the State-registered organisation.

65. In addition, certain privileges under State industrial relations legislation are conferred on State-registered organisations of employees eg right of entry powers, and rights to negotiate and enter collective or enterprise agreements.

66. 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.[28] In New South Wales, Queensland and Western Australia there is, to varying degrees, regulation similar to that which existed under the *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.[29]

2.3.2 Tasmania

67. Tasmania has a hybrid model. The *Trades Unions Act* 1889 (Tas), which is based on the 1871 Act, remains in force although it is largely obsolete: only 4 trade unions are currently registered.[30] 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 *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.

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[26] In New South Wales and South Australia, the provisions of the 1871 Act which 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.

[27] *Industrial Relations Act* 1996 (NSW), Parts 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.

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

[29] *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.

[30] 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: Smith and Rawson, p 48.

68. However, in addition, Part V of the *Industrial Relations Act* 1984 (Tas) provides for the registration of employee or employer associations as 'organisations'. 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 including 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.

2.3.3 Victoria

69. Prior to 1996, Victoria also adopted the hybrid model currently adopted in Tasmania: the *Trade Unions Act* 1958 (Vic), based on the 1871 Act, regulated trade unions directly, and Part 12 of the *Employee Relations Act* 1992 (Vic) provided for the 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.[31] Consequently, the only current Victorian legislation regulating trade unions is the *Trade Unions Act* 1958 (Vic). As is the case with Tasmania, few trade unions are registered under that Act.[32]

2.4 ROLE OF TRADE UNIONS IN AUSTRALIA

70. As noted in paragraph 13 above, any consideration of law reform in relation to union governance must have regard to the role of unions in modern Australia. That role is a critical background circumstance against which any proposals for law reform must be assessed.

2.4.1 Role in assisting members and improving society

71. 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

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

[32] 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: as of May 2015, there were only 26 registered organisations.

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 campaigns for better conditions including equal pay for women, increases in the minimum wage, long service leave and occupational health and safety laws.

72. These improvements in social conditions were largely achieved at a time of high trade union membership. That rate has consistently fallen over the last three decades from 46% in 1986[33] to only 17% in 2013.[34] As at 2013, only 12.0% of private sector employees were members of a union, compared with 41.7% of public sector employees.[35]

73. 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 can 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 provide pastoral care and more general assistance to members.

2.4.2 Commercial role

74. However humble the beginnings of the trade union movement, it is clear that many modern trade unions are large and complicated commercial enterprises.[36] Large unions, such as those named in the Commission's Terms of Reference, receive significant revenue from commercial agreements such as management fees and commissions. They operate complex commercial structures. They have large numbers of staff. They operate across multiple jurisdictions. The funds which certain unions have established are even more complex: incorporated associations, unincorporated associations, trusts and various corporate entities.

75. Despite this commercial role, a trade union is exempt from income tax, provided the trade union incurs its expenditure and pursues its objectives principally in

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[33] ABS, August 1996, *Trade Union Members Australia* (ABS Catalogue No 6325.0).

[34] ABS, June 2014, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013* (ABS Catalogue No 6310.0).

[35] ABS, June 2014, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013* (ABS Catalogue No 6310.0).

[36] 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.

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.[37] 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 (eg membership and subscription fees, donations by members) do not constitute income of the association.[38] However, unless the association has tax exempt status, money received from external sources (eg grants, sponsorships, third party commissions) is treated as assessable income and subject to tax. The tax exempt status which is afforded to trade unions has the consequence that the substantial non-member derived revenues which modern trade unions generate are not subject to tax.

2.4.3 Statutory role in industrial relations system

76. The statutory role of trade unions in the State and Commonwealth industrial relations systems has already been discussed: see paragraphs 46–59, 65 and 68 above. In short, trade unions and their officials currently occupy a privileged position in Australia's industrial relations systems.

2.4.4 Political role

77. Another important contextual aspect when considering trade union governance is the political power and influence exercised by trade unions. The deep historical ties between the 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. 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.

78. However, apart from these general institutional ties, unions play an important role in the selection of ALP representatives for State and Federal Parliament. This role can be most easily seen in relation to the ALP selection of Senators for Federal Parliament.

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

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

79. While the precise details vary between States depending on the ALP Rules of the particular branch, in summary the State Secretary of a union affiliated with the ALP is in a position pursuant to the ALP Rules to influence the conduct of the State Conference, which in turn selects the ALP candidates for the Senate for that State.

80. The starting point is that section 7 of the *Constitution* provides among other things that:

> 'The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.'

81. The number of senators for each state has been increased on a number of occasions, most recently to 12 by the *Representation Act* 1983 (Cth). Except at an election following a double dissolution, 6 senators are elected from each State at each half-Senate election held every 3 years. There are also two Senators for each of the ACT and NT elected every general election.

82. In practice, under the existing provisions of the *Commonwealth Electoral Act* 1918 (Cth) almost all electors at a Senate election vote 'above the line' meaning they vote in accordance with a group voting ticket determined in advance by registered political parties or voting groups.

83. Further, the majority of electors vote for one of the major political parties, being the ALP or one of the Coalition parties. The practical reality is that at each half-Senate election the first 2 or 3 Senate candidates chosen by the ALP and the Coalition in each State are invariably elected to the Senate, as are the first candidates chosen by the ALP and the Coalition in each of the ACT and NT.

84. The role that unions have in selecting the ALP candidates can be seen by reference to the rules of the various branches of the ALP. In the following discussion reference will be made to the ALP Victorian Branch rules dated May 2014 (**ALP (VIC) Rules**). However similar observations may be made, with due alteration for details, in respect of the rules of other ALP branches.

85. Rule 5.1 of the ALP (VIC) Rules provides that the party shall consist of 'affiliated Trade Unions and individual members.'

86. Rule 6.3.1 provides that the State Conference shall consist of delegates elected by and from members of each Federal Electorate Assembly (membership delegates), delegates appointed by affiliated unions (union delegates), the Leader and Deputy

Leader of the ALP in the two houses of the Victorian Parliament and two persons elected by and from the Victorian members of the Federal Parliamentary ALP.

87. Rule 6.3.2 provides:

> 'There shall be 300 membership and 300 union delegates to State Conference, in accordance with the formula provided in Schedule A1.'

88. Schedule A1 sets out a process to determine the number of delegates which each may represent each affiliated trade union. While the procedure is somewhat complicated, in substance the total number of delegates an affiliated union can appoint depends on the number of members of the affiliated union. There is then a division into the 'small unions group' – ie unions with few members – and a balance which are referred to as large unions.

89. Subject to certain affirmative action requirements, the selection of the union affiliated delegates is a matter for the rules of the union. Invariably they will be selected by the union State Secretary and executive. The consequence is that the officials of large trade unions exercise substantial voting power at the State Conference.

90. Rule 18 deals with selections for public office. Rule 18.1 provides:

> 'Subject to any direction of State Conference, the Administrative Committee shall arrange for the selection of Party candidates throughout Victoria for the senate, the House of Representatives, the Legislative Assembly, the Legislative Council and for municipal office.'

91. Rule 18.5 provides that for the Senate the selection of candidates is made by the Public Office Selection Committee.

92. Rule 8.4 provides that the State Conference shall select a Public Office Selection Committee of 100 members and makes further provisions in respect of the conduct of the said committee.

93. The result is that through the rules of the ALP, the State Secretaries of large affiliated trade unions exercise substantial voting power at ALP State Conferences and play a very significant role in determining the composition of the Australian Senate.

94. Whilst there have been calls by some within the ALP for changes to the party's existing structures,[39] these are not matters within the Commission's Terms of Reference. Nor is it a matter for the Commission to opine on whether these arrangements are good or bad for the ALP and the general body politic. Rather, they are simply matters of political fact which necessarily inform any analysis of union governance.

[39] See eg, Sen J Faulkner, 'Public Pessimism, Political Complacency: Restoring Trust, Reforming Labor', Revesby Workers' Club, 7 October 2014; J Massola, 'Kevin Rudd breaks silence to call for "full democratisation" of the ALP and warn of union thuggery', *The Sydney Morning Herald*, 11 March 2015.

3 REGULATION OF UNIONS

95. This chapter addresses possible reforms concerning the regulation of unions generally.

3.1 DUAL STATE AND COMMONWEALTH REGULATION

96. As discussed in Chapter 2, each jurisdiction other than Victoria has current legislation providing for the registration of associations of employees and associations of employers as organisations, and the regulation of those organisations. The regulation imposed on registered organisations varies, sometimes considerably, between jurisdictions.

97. The existence of multiple regulatory regimes governing organisations operating at Commonwealth and State level has the potential to generate unnecessary legal complexity, potential confusion for members of organisations and the public alike, and additional compliance burdens on an organisation.

98. To take a common situation, a union registered at the Commonwealth level under the *RO Act* will commonly have a number of State branches which are separately registered organisations under the relevant State legislation applicable to the division or branch. As a result, branches of the same national union in different States may be subject to different regulatory requirements. Further, the branches will be 'reporting units' for the purposes of the *RO Act* as a result of which the branch may be required to comply with the reporting requirements of both State and Commonwealth law.[40] Moreover, as a consequence of the existence of a number of separate legal entities, the relationships between a national union and its various branches, and among its branches, can be very difficult to determine. There are usually separate accounts prepared for different branches with a complex web of loans and debt forgiveness arrangements. Third parties dealing with the union are left in a somewhat uncertain position.

[40] In New South Wales and South Australia the potential for overlapping regulation in relation to newly registered organisations is eliminated or at least significantly reduced by the relevant legislation drawing a distinction between State-registered organisations which are organisations or branches of organisations registered under the *RO Act* (which are not generally subject to State regulation) and those that are not registered under the *RO Act* (which are subject to State regulation): see *Industrial Relations Act 1996* (NSW), Parts 4 and 5 of Chapter 5; *Fair Work Act 1994* (SA), Parts 2 and 3 of Chapter 4. Cf the position in Queensland and Western Australia.

99. For example, the national Construction, Forestry, Mining and Energy Union (**CFMEU**) is an organisation registered and regulated under the *RO Act*. The national union has a branch entitled 'Construction, Forestry, Mining and Energy Union, Construction and General Division, New South Wales Divisional Branch' which is a reporting unit for the purposes of the *RO Act* and is required to lodge accounts with the General Manager. This divisional branch has no separate legal existence.[41] However, there is another branch of the CFMEU entitled 'Construction, Forestry, Mining and Energy Union (New South Wales Branch)' which is separately registered under the *Industrial Relations Act* 1996 (NSW). This branch is a separate legal entity and is required to lodge accounts with the New South Wales Industrial Registrar. Similar arrangements exist in respect of the NSW Branch of the Electrical Trades Union of Australia and the Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**).

100. The potential for overlapping State and Commonwealth laws is nothing new. The potential problems were identified as long ago as 1969 in the decision of the Commonwealth Industrial Court in *Moore v Doyle*.[42] In 1974 the Sweeney Report sought to address some of the issues,[43] but the problems still remain.[44]

101. The existence of multiple regulatory regimes governing registered industrial organisations was readily explicable at a time when each State had its own fully-functioning industrial relations system, and it was necessary for unions with State-based employees to be registered as an industrial organisation under the relevant State legislation. However, with the shift to a largely national based industrial relations system the rationale for the existence of separate State-based regimes governing industrial organisations is less apparent. It is true that some employees are still within the State-based industrial relations system (largely public sector employees). It is true that this necessitates the continued existence of some State-registered organisations. But given that the vast bulk of Australian employees are covered by the *Fair Work Act* it is difficult to see why it should be necessary to have different regimes regulating registered organisations at the State and Commonwealth level.

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

[42] (1969) 15 FLR 59 (FC).

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

[44] For a general discussion of the issues associated with dual registration see Creighton and Stewart, pp 674–680.

102. There are obvious advantages in having uniformity of State and Commonwealth laws in relation to the registration, regulation and de-registration of employer and employee associations eg simplicity, certainty, reduced burden of regulation and efficiency. In general, uniform regulation of a subject matter in Australia has taken one of three forms. The first is where the Commonwealth has legislative power in relation to the subject matter and legislates to 'cover the field'. The second involves the adoption by respective State Parliaments of uniform (or almost uniform) laws. The third involves the States referring powers to the Commonwealth as has occurred under the *Corporations Act* 2001 (Cth) (***Corporations Act***). Although in 2009 New South Wales, Queensland, South Australia and Tasmania referred a broad range of legislative powers concerning industrial relations to the Commonwealth, regulation of employer and employee associations was explicitly excluded from the reference.[45] In relation to the subject matter under consideration, either of the second and third options would be a possibility. The third would ensure great uniformity; the second would allow States greater flexibility.

103. On the other hand, uniformity is not always desirable nor is it always practicable to achieve. Some States may have genuine reasons for preferring one form of regulation over another. In addition, it is likely that achieving national agreement in relation to the regulation of employer and employee associations would be difficult.

Questions for discussion:

1. Is it desirable and practicable for the Commonwealth and States to adopt uniform laws in relation to the registration, de-registration and regulation of registered organisations, akin to the *Companies Codes*?

2. Is it desirable and practicable for the States to refer legislative power to the Commonwealth in relation to the registration, de-registration and regulation of registered organisations, similarly to what has occurred in relation to companies under the *Corporations Act*?

3. What, if any, other changes to State and Commonwealth laws are desirable and practicable to achieve greater uniformity of laws concerning the registration, de-registration and regulation of registered organisations?

[45] *Industrial Relations (Commonwealth Powers) Act* 2009 (NSW), s 3(1) (paragraph (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) (paragraph (m) of the definition of 'State subject matter').

104. In the balance of the Discussion Paper, the focus is on the governance and regulation of employee organisations under the *RO Act*.[46] This is for four reasons. The first is that the Commission's Terms of Reference identify, non-exhaustively, five specific unions for consideration, each of which is an organisation registered under the *RO Act*. It is therefore sensible to spend most time considering that Act. The second is that considering the relevant law in each of the seven jurisdictions becomes unmanageable for the purpose of a discussion paper such as this. The third is that the *RO Act* has the greatest coverage. Fourthly, apart from possibly the *Industrial Relations Act* 1999 (Qld), the *RO Act* is the most detailed legislation so it is convenient to consider it in detail.

3.2 THE REGULATOR

3.2.1 Who is the appropriate regulator of organisations registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth)?

105. The regulation of organisations registered under the *RO Act* is largely, but not completely, entrusted to the General Manager of the FWC (the **General Manager**).

106. At present, the General Manager has a dual role. The General Manager's primary function is to assist the President of the FWC in ensuring that the FWC performs its functions and exercises its powers: *Fair Work Act*, s 657(1). The FWC's functions and powers are primarily adjudicative and concern substantive industrial relations matters eg resolving unfair dismissal claims, settling industrial disputes, conducting reviews of modern awards and approving enterprise agreements. In this role the General Manager is subject to the direction of the President of the FWC, subject to certain limits: *Fair Work Act*, ss 582, 658.

107. In addition to this role, the General Manager has statutory functions under the *RO Act* in relation to the regulation of registered organisations. These functions are separate from the FWC's adjudicative tasks, although the General Manager remains under the direction of the President of the FWC. Although the vast bulk of the regulation of organisations is entrusted to the General Manger, the FWC proper also has a role in registering (s 20) and deregistering (s 28) organisations, in relation to the amalgamation of organisations (s 53 ff) and in relation to changes in certain aspects of the rules of organisations (ss 157–158).

[46] As noted in paragraph 61 above, any consideration of these matters necessarily also involves consideration of the governance and regulation of employer organisations under the *RO Act*.

108. There is currently a bill before the House of Representatives entitled the *Fair Work (Registered Organisations) Amendment Bill 2014 [No 2]* (**ROC Bill**) which contains provisions providing for the creation of a separate Registered Organisations Commission to exercise most, but not all, of the powers currently reposed in the General Manager of the FWC. A bill in the same form was previously passed by the House of Representatives but rejected by the Senate in March 2015.

109. There are a number of arguments which can be made in support of having an independent regulator of organisations registered under the *RO Act*. One obvious point is that the current division of responsibility between the General Manager and the FWC adds complexity to the existing law and is apt to confuse the public about the functions of the FWC. In addition, the fact that the General Manager has a range of other tasks means that the regulation of organisations may be given a lower priority than other tasks.

110. Another point is that appointments to the FWC regularly give rise to claims of bias by both sides of politics: appointments are regularly described as 'union friendly' or 'employer friendly'. Irrespective of whether those claims have substance or not, a regulator which is publicly regarded as not being impartial risks losing legitimacy and public confidence. Arguably, therefore, the body regulating registered organisations should be free from any suggestion that it is biased and therefore structurally it should be financially independent from the FWC.

111. A single standalone regulator is also arguably better placed to combat widespread governance problems within registered organisations and to enforce the existing laws.

112. One argument against the creation of a separate Registered Organisations Commission as currently proposed in the ROC Bill is that it would leave a number of regulatory functions concerning registered organisations with the FWC eg the registration, deregistration and amalgamation of organisations. Separating only some of the regulatory functions from the FWC would lead to the existence of two independent regulators which could lead to considerable practical and administrative problems.[47]

113. However, these problems could be solved by transferring *all* regulatory functions to a single standalone authority, as is the case in respect of companies registered

[47] Australian Council of Trade Unions, Submission to the Senate Standing Legislation Committee on Education and Employment, 22 November 2013, p 10.

under the *Corporations Act*, which are regulated by the Australian Securities and Investments Commission (**ASIC**).

114. If it is thought desirable to establish a single independent regulator, an obvious further issue arises: who should be the regulator? One solution is a separate Registered Organisations Commission. Another possibility is for ASIC to be given responsibility.

Questions for discussion:

4. Should there be a single statutory regulator of organisations registered under the *RO Act*, separate and independent from the FWC?

5. If the answer to Question 4 is yes, should a separate regulator be established, or should ASIC or some other existing body be the regulator?

3.2.2 Powers and resources of the regulator

115. At present, the powers of the General Manager in relation to the conduct of inquiries and investigations are relatively confined: see Part 4 of Chapter 11 of the *RO Act*. In summary, as part of investigations conducted under s 331 of the *RO Act*, the General Manager (or authorised delegate) may by written notice require certain persons to give information, produce documents or answer questions relating to matters relevant to the investigation.

116. There is no power to require the answers to be given under oath or affirmation: cf s 19 of the *Australian Securities and Investments Commission Act* 2001 (Cth) (***ASIC Act***). Further, the powers generally only apply in respect of certain limited officers and employees (or former officers or employees) or auditors of a reporting unit (see ss 335, 335A): cf *ASIC Act*, s 19. The penalties for not complying with a notice are minimal. The maximum penalty is a $5,100 fine (s 337): cf the maximum 2 years' imprisonment for a similar contravention under s 63 of the *ASIC Act*. There is no ability to seek a warrant from a Court to seize books or documents: cf *ASIC Act*, s 36. Further, the investigatory powers apply only in relation to an investigation: cf *ASIC Act*, s 30 which allows ASIC to inspect books and documents of a company for the purpose of ensuring compliance by a company with the *Corporation Act*.

117. The ROC Bill currently before the House of Representatives proposes that the new Registered Organisations Commission be given information gathering and investigatory powers based on the powers conferred on ASIC under Part 3 of the

ASIC Act. Given the similar role which is occupied by ASIC and the General Manager, this proposal appears to have obvious merit.

Question for discussion:

6. What, if any, additional information gathering and investigatory powers should be conferred on the General Manager (or other regulator of organisations registered under the *RO Act* as the case may be)?

3.3 RECORD-KEEPING REQUIREMENTS

118. One recurring theme in the Commission's inquiries to date, particularly in relation to the case studies concerning the Health Services Union and the NSW Branch of the Electrical Trades Union but not limited to those case studies, is the absence of proper records of committee of management meetings. In a number of cases, contested allegations have been made about what occurred at meetings, including whether certain conduct was approved by the relevant governing body. Minutes of the meetings either do not exist or are unclear about what had actually occurred. Parts of minutes now said to be erroneous were confirmed at later meetings without being corrected. The Commission has also heard evidence that certain matters have not been recorded in the minutes at the direction of the union Secretary.

119. Of course, deficiencies in record-keeping are not confined to registered organisations. Trust and company minutes can be equally defective. However, in respect of registered organisations, problems in minute keeping would seem to be widespread. One possible reason for this is that, compared with the board of directors of a company, the committee of management of a registered organisation is more heavily involved in the day-to-day running of a registered organisation. The result is that considerably more decisions are taken at committee of management meetings than are taken at company board level, and the decisions are often ones in relation to which there are no other records. Another possible reason is that there may be confusion about what matters should be recorded in the minutes.

120. There are a number of possible steps which could be taken to help improve record-keeping in registered organisations. One option would be to require organisations

to have rules requiring minutes of management committee meetings to be kept[48] and providing for the matters which should be minuted. Some organisations already have such rules, but requiring such rules would help remove any confusion.

121. Another solution would be to require digital audio records of committee of management meetings to be maintained, so that minutes could more easily be prepared and in the event of a dispute arising about what occurred at a meeting the recording could be listened to. Whilst in the past this would have posed considerable inconvenience and expense, modern technology would allow this to occur fairly cheaply and easily.

122. It must be accepted that neither of the options mooted above currently apply in respect of companies. Further, if either option were adopted, accommodation would need to made in respect of sensitive or privileged discussions. For example, it would be inappropriate to require detailed minutes to be taken of discussion concerning a registered organisation's prospects in pending or anticipated litigation.

Question for discussion:

7. Should provision be made in the *RO Act* with respect to the obligations of registered organisations to make and keep minutes of committee of management meetings? If so, what form should any amendments take?

3.4 ACCOUNTING AND REPORTING REQUIREMENTS

123. The *RO Act* imposes certain reporting obligations on organisations and accounting and reporting obligations on 'reporting units'. Where an organisation is not divided into branches, the organisation is also a reporting unit. Where an organisation is divided into branches, each branch is a separate reporting unit.

3.4.1 Reporting requirements of organisations and branches: section 237 statements

124. Section 237 of the *RO Act* requires organisations and branches of organisations to lodge with the FWC each financial year a statement showing relevant particulars in relation to each loan, grant or donation of an amount exceeding $1,000 made *by*

[48] The ROC Bill proposes to require registered organisations to have rules providing for the keeping of minute books which record proceedings and resolutions of meetings of committees of management of an organisations and its branches: cl 19 of Sch 2.

the organisation. Such a statement may be inspected at the FWC, but only by a member of the organisation.

125. The scope of the payments contained in a s 237 statement is very limited. For example organisations registered under the *Industrial Relations Act* 1999 (Qld) are required to collect and disclose substantially more information than is required to be disclosed in a s 237 statement, including information concerning credit card and cab charge account spending by officers of an employee organisation; political spending by an organisation; gifts, hospitality and other benefits given and received by employees or officers of an organisation; and remuneration received by the 10 most highly paid officials of an organisation: see generally Part 12 of Chapter 12 of the *Industrial Relations Act* 1999 (Qld).

126. In addition, s 237 statements are limited to certain payments made *by* organisations. As discussed in more detailed in Chapter 9 of this Discussion Paper, there are important public policy reasons why payments made *to* organisations should be disclosed. In short, disclosure can shine a light on and help identify illegal, corrupt or inappropriate payments made to organisations eg payments by employers to union officials in return for favourable treatment at the expense of union members. The importance of transparency and disclosure also militates in favour of public disclosure of s 237 statements.

127. An argument against amendments to s 237 to require public disclosure of payments to registered organisations is that disclosure already occurs under the *Commonwealth Electoral Act* 1918 (Cth). Under that Act, 'associated entities' (which, broadly speaking, are bodies associated with a registered political party) must lodge annual returns with the Australian Electoral Commission. Among other things, those returns currently require disclosure of certain information in relation to payments made to an associated entity which exceed $12,400. However, not all registered organisations or even trade unions are 'associated entities' for the purposes of the *Commonwealth Electoral Act* 1918 (Cth). Further, the reasons which support disclosure under the *RO Act* are arguably considerably broader than those which support disclosure under the *Commonwealth Electoral Act* 1918 (Cth), and would justify a payment threshold well below $12,400.

Questions for discussion:

8. What amendments, if any, should be made to the scope of disclosures required by s 237 of the *RO Act*? In particular, should an organisation and its branches be required to lodge information with the General Manager disclosing payments over a specified threshold (eg $1,000) made to organisation or branch?

9. Should s 237 statements be made available to the public?

3.4.2 Reporting and audit requirements of reporting units

128. Reporting units are required to keep proper financial records, prepare a general purpose financial report each financial year, and prepare an operating report each financial year: *RO Act*, ss 252–254. The financial report must be audited by an 'approved auditor': s 256.

129. 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 *RO Act*. The full report must also be presented to a general meeting of members of the reporting unit and subsequently be lodged with the FWC.

130. There are a number of potential issues with the existing reporting and audit requirements. For one thing, the reports submitted to FWC are generally unhelpful in establishing the actual sources of funds of organisations. In respect of audits, an 'approved auditor' need not be an auditor registered with ASIC: see reg 4 of the *Fair Work (Registered Organisations) Regulations* 2009 (Cth). In addition, although certain limited persons are excluded from being auditors (see the definition of 'excluded auditor' in s 6 of the *RO Act*) the detailed auditor independence requirements which apply to company auditors (see Division 3 of Part 2M.4 of the *Corporations Act*) and the audit rotation requirements which apply in respect of listed companies (Division 5 of Part 2M.4 of the *Corporations Act*) do not apply.

131. Having regard to the compliance burdens which additional auditor independence and auditor rotation requirements may impose, it may not be appropriate to apply such requirements to all registered organisations. However, arguably requirements of this kind are appropriate for large organisations.

Questions for discussion:

10. What changes, if any, should be made to the reporting requirements of reporting units under the *RO Act*?

11. What changes, if any, should be made to the audit requirements of organisations? Should auditors be required to be registered with ASIC under the *Corporations Act*? Should additional auditor independence requirements be introduced analogous to those under the *Corporations Act*? Should some or all registered organisations be subject to auditor rotation requirements?

3.4.3 Penalties for non-compliance with reporting and accounting requirements

132. Various of the reporting and accounting requirements under the *RO Act* are civil penalty provisions: see s 305(2)(w)–(zg). The current penalty for breach of any of those provisions is $51,000 for a body corporate and $10,200 in any other case: s 306. These civil penalties apply more generally throughout the *RO Act* for a range of other contraventions.

133. The application of a uniform penalty regime across the whole range of substantive contraventions is arguably inappropriate. Further, the penalties for non-compliance are arguably too low to act as a meaningful incentive for compliance.

Question for discussion:

12. What changes, if any, should be made concerning the penalties for contraventions of the accounting and record keeping provisions of the *RO Act*?

3.4.4 Disclosure: remuneration of officers and payments to related parties

134. Currently, registered organisations and their branches are required to have rules requiring the:

(a) disclosure by officers of the organisation or branch of remuneration paid to the officer by a related party in connection with the performance of the officer's duties, or paid because the officer is a member of a board and the officer is a member of the board only because of the officer's position in the organisation or branch or the officer was nominated to the position by the organisation or branch (s 148A(1), (3));

(b) disclosure to members of remuneration paid to the five most highly paid officers of the organisation or branch (s 148A(4)); and

(c) disclosure to members of certain payments made to related parties (s 148C).

Section 148D allows the General Manager of FWC to grant an organisation an exemption from complying with s 148C if the General Manager is satisfied that, among other things, special circumstances exist in relation to the organisation that mean that the rule is too onerous.

135. There are a number of potentially problematic issues with the scope of the current provisions.

136. *First*, the General Manager has no ability to enforce these provisions in the rules, nor is there any independent statutory requirement that this information be disclosed to members. Having regard to these deficiencies, the current ROC Bill proposes to replace the existing disclosure provisions in ss 148A and 148C with a new Part 2A of Chapter 9 which would contain provisions imposing a direct statutory disclosure obligation on officers and organisations similar to those under ss 148A and 148C: see cl 166 of Sch 2 of the ROC Bill. The ROC Bill contains a provision similar to s 148D: see proposed s 293H. Contravention of these provisions would give rise to potential civil penalties.

137. *Secondly*, s 148C is limited to the disclosure of 'payments', not other benefits provided to third parties (eg free use of union employees). Further, it is limited only to payments made *to* related parties by an organisation or branch, not *by* related parties to an organisation or branch. In addition, it excludes the disclosure of payments made to related parties where the amount has been deducted from the remuneration payable to an officer or employee (eg direct debit regimes). In circumstances where the payments are never made to the officer or employee, and where the officer or employee may have little, if any, ability to negotiate to ensure the payments are not made to a related party, it is arguable that such payments are effectively payments from union funds and should be disclosed as such, rather than as remuneration received by an employee.

138. *Thirdly*, ss 148A and 148C of the *RO Act* rely in part on the defined term 'related party'. The current definition of related party in s 9B of the *RO Act* includes entities controlled by an organisation, the officers of organisations and their spouses and relatives (including the relatives of spouses). Control has the same meaning as in the *Corporations Act.* This definition would not appear to cover entities which are not necessarily controlled by an organisation (or an officer of the organisation, their spouses or relatives), but where a registered organisation nevertheless has a material interest in the entity or vice versa, or where a registered

organisation has the ability to nominate a substantial number of directors, but not necessarily more than 50%.

Questions for discussion:

13. Should contraventions of the requirements in ss 148A and 148C of the RO Act be made civil penalty provisions, rather than simply being contained in the rules of an organisation?

14. What changes, if any should be made to the scope of disclosures required by ss 148A and 148C (or equivalent civil penalty provisions)? In particular, should s 148C be expanded to payments made *by* related parties to an organisation?[49]

15. What changes, if any, should be made to the definition of 'related party' in s 9A of the RO Act?

16. Is s 148D, or a similar provision, necessary and appropriate?

17. Should an organisation be required to lodge with the General Manager of the FWC (or other regulator as the case may be) information disclosed pursuant to requirements of the kind in ss 148A and 148C? If so, should the information be publically available?

3.5 USE OF UNION FUNDS

3.5.1 Use of union funds in union election campaigns

139. Section 190 of the *RO Act* prohibits an organisation or branch from using or allowing its property to be used to help a candidate against another candidate in action for an office or position.

140. One issue concerning s 190 is whether s 190 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**). In Chapter 2.2 of the Interim Report, the Commission expressed the view that as a matter of statutory construction the broad construction of s 190 was clearly preferable.[50] This was based on an analysis of the text and the

[49] See also Question 68, p 97.

[50] Interim Report, Vol 1, Chapter 2.2, pp 64–65.

mischief to which s 190 was directed. The issue is whether s 190 should be clarified.

Question for discussion:

18. Should s 190 of the *RO Act* be amended to read as follows:

> 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.

3.5.2 Use of union funds as political donations or for political expenditure

141. Unions currently make substantial political donations to the ALP or its candidates. Given the links between trade unions and the ALP this is unsurprising.

142. However, donations are capable of being used by senior officials in a union as a way of establishing patronage, exercising influence, or obtaining agreement from ALP parliamentary representatives to adopt a particular legislative course. The members of the union as a whole rarely formally approve the use of union funds for political purposes; normally it is a matter for the executive.

143. For considerable periods in Australian history, unions in a number of Australian jurisdictions have been restricted from making political donations or incurring political expenditure either at all or unless political donations were paid from a separate fund which contained voluntary contributions by members collected for the specific purpose of making political donations or incurring political expenditure.

144. The restrictions can be traced to the House of Lords' decision in *Osborne v Amalgamated Society of Railway Servants*.[51] That decision had the effect of preventing trade unions registered under the 1871 Act from using their funds for political purposes. Later decisions in England extended the case to apply to unregistered trade unions as well.[52] *Osborne* was followed in New South Wales in respect of unions registered under the *Trade Union Act* 1881 (NSW)[53] and in Western Australia in respect of unions registered under the *Trade Unions Act* 1902

[51] [1910] AC 87.

[52] *Wilson v Scottish Typographical Association* 1912 SC 534. A majority of the High Court in *Williams v Hursey* (1959) 103 CLR 30 concluded that *Wilson* was wrongly decided.

[53] *Allen v Gorton* (1918) 18 SR (NSW) 202.

(WA) and the *Industrial Arbitration Act* 1912 (WA),[54] but was held not to be applicable to unions registered under the *Commonwealth Conciliation and Arbitration Act*.[55] Following the decision in *Osborne* the British Parliament enacted the *Trade Union Act* 1913 (UK). By that Act trade unions could expend money for political objects, but subject to two restrictions. First, the furtherance of political objects needed to be approved as an object of the union at a ballot by a majority vote of members. Secondly, payments in furtherance of the political objects were to be made out of a separate fund, no member could be forced to contribute to the separate fund and contributions to the funds could not be made a condition of admission to the union. The United Kingdom still retains similar legislation.[56]

145. Equivalent legislation to the *Trade Union Act* 1913 was enacted in New South Wales in 1918 and it remained in force in New South Wales under different names until it was repealed by the State Labor Government in 1996.[57] Western Australia introduced similar legislation in 1995[58] but it was relatively short-lived: the Gallop Labor Government repealed the legislation in 2002.[59] During its short period of operation, a challenge was made to the constitutional validity of the legislation on the basis that it infringed the implied freedom of political communication. The Full Court of the Supreme Court of Western Australia rejected the challenge.[60] Queensland enacted similar legislation in 1997 but it was repealed in 1999.[61]

146. Given that the eligibility rules for a registered organisation must not discriminate between persons on the basis of political opinion (*RO Act*, s 142), and that members can (and commonly do) join solely to obtain the benefit of the valuable services the union provides, there is an argument that it is inappropriate for the leadership of a union to use what can loosely be described as 'members' funds' to make political donations to a party which some members may not support. Should the majority be able to force a minority to contribute funds to a political party that

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[54] *True v The Australian Coal and Shale Employees Federation Union of Workers WA Branch* (1949) 51 WALR 73.

[55] *Williams v Hursey* (1959) 103 CLR 30. For discussion of the position in other Australian states see Portus, pp 238–240.

[56] *Trade Union and Labour Relations (Consolidation) Act* 1992 (UK), s 71.

[57] *Industrial Arbitration (Amendment) Act* 1918 (NSW), s 17; *Industrial Arbitration Act* 1940 (NSW), s 107; *Industrial Relations Act* 1991 (NSW), s 434.

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

[59] *Labour Relations Reform Act* 2002 (WA).

[60] *Registrar of the Western Australian Industrial Relations Commission v CEEEIPP* [1999] WASCA 170.

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

the minority do not support? Arguably, the UK solution provides maximum freedom of choice, by allowing those members who wish to make contributions to do so but not compelling those who are unwilling.

147. There is however a cogent argument that unions should be free to spend their members' dues (and other revenue) on whatever lawful purpose the officers of the union for the time being determine. The officers are democratically accountable to the members and if the majority of members are unhappy with the decisions taken concerning political donations, the officers can be voted out of office at the next election. In this respect, unions should be just like corporations and other legal persons and not be restricted in using their funds for political purposes.

Questions for discussion:

19. Should there be restrictions on the use of an organisation's funds for the purpose of making political donations or incurring political expenditure? If so, what form should those restrictions take?

20. Should funds to be used by an organisation for the purpose of making political donations or incurring political expenditure be made from a separate fund containing voluntary contributions raised specifically for political purposes?

3.6 CONDUCT OF UNION ELECTIONS

148. In the course of its inquiries, the Commission considered the conduct of a number of election funds. The policy issues concerning the operation of those funds are considered in Chapter 6. A related, yet discrete, issue is the conduct of union elections more generally.

149. The *RO Act* contains a number of provisions concerning elections for office in registered organisations. Principally, the Act requires the rules of an organisation to contain certain provisions. For example, the rules must provide terms of office for officers of no more than 4 years without re-election (s 145(1)) and the rules must provide for the election of officer holders either by a direct voting system (by secret postal ballot) or a collegiate electoral system: ss 143(1)(a), 144(1).

150. In addition to these rules requirements, s 183 requires each election for an office in an organisation or branch of an organisation to be conducted by the Australian Electoral Commission, unless an exemption is in force under ss 182(1), 183 and 186. Under s 186, an organisation may apply to the General Manager of the FWC for an exemption. The General Manager may give an exemption only where

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 organisations and in a manner that will afford voting members an adequate opportunity for voting without intimidation: s 186.

151. In 2014, the Commission received a number of submissions about whether s 186 remains appropriate and whether any amendments to that provision are desirable. Both the Australian Industry Group and the CFMEU submitted that no change to s 186 was appropriate, and that the exemption system allows organisations to cost-effectively conduct their own elections in accordance with the requirements of the legislation.[62] 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 provisions of the law relating to registered organisations'.[63] It was also argued that the current regime is 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 on unions with exemptions to produce a post-election report as the AEC is required to do.[64] In short, the submission was made that the current system allows a complete lack of independent scrutiny in respect of elections.

Questions for discussion:

21. Should ss 182(2), 183 and 186 (and consequently ss 184 and 185) of the *RO Act* be repealed?

22. If the answer to the previous question is "No", should there be a requirement for an organisation with an exemption under s 186 to lodge a report with the General Manager (or other regulator of organisations as the case may be) setting out how the election was conducted?

23. Should s 186 be amended to include a requirement that the General Manager (or other regulator of organisations as the case may be) is satisfied that the organisation is not in breach of other requirements of the Act such as disclosure, reporting and auditing requirements?

[62] Submission by the Construction, Forestry, Mining and Energy Union in response to Issues Paper No 3 'Funding of Trade Union Elections', 1 August 2014, p 1; Submission of Australian Industry Group Issues Papers 1–3, 11 July 2014, p 11.

[63] Masters Builders Australia, Submission on Funding of Trade Union Elections, 11 July 2014, pp 2 and 4.

[64] Stuart Vaccaneo, Submission Paper 3: Royal Commission into Trade Unions, p 1.

3.7 WHISTLEBLOWERS

152. During the course of public hearings the Commission has heard evidence of a general unwillingness on the part of individuals to report criminal activity within trade unions, for fear of reprisal, threats and slander.[65] In addition, the evidence before the Commission thus far suggests the existence of a culture of fear in some unions concerning disclosure, the aim of which is to deter individuals from disclosing illegal, immoral or illegitimate practices.

153. The impact of such a culture warrants a discussion of potential reform. In June 2014, the Commission called for submissions into the adequacy of current protections for trade union 'whistleblowers'[66] and hosted 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.

154. Discussed below are potential areas for reform in respect of the protected disclosure regime which exists in the *RO Act*. That regime seeks to protect persons who make certain disclosures about suspected breaches of the *RO Act* or *Fair Work Act*.

3.7.1 Class of persons who can make a protected disclosure

155. Under the *RO Act*, a protected disclosure can only be made if the discloser falls within the categories outlined in section 337A(a). The effect of this provision is that only existing officers, employees or members of a registered organisation, or branch of an organisation, can make a protected disclosure.

156. This class is arguably too narrow.[67] For example, at the very least it would seem appropriate to allow former officers, employees and members of a registered organisation to make a protected disclosure. It would also seem sensible to permit protected disclosures from persons contracting for goods and services, or otherwise dealing, with a registered organisation. It may also be appropriate to allow any member of the public to make a protected disclosure, at least where the disclosure concerns a suspected criminal offence.

Question for discussion:

[65] See eg Stephen Fontana, witness statement, 12 September 2014, para 41.

[66] Issues Paper 1: Whistleblower Protections, 13 June 2014.

[67] Compare the class under *Corporations Act*, s 1317AA(1) and *Public Interest Disclosure Act* 2013 (Cth), s 69.

24. What, if any, amendments should be made to the class of persons who can make a protected disclosure specified in s 337A(a) of the *RO Act*? In particular, should s 337A(a) of the *RO Act* be amended to include:

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

    (b) a former employee of an organisation, or of a branch of an organisation;

    (c) a former member of an organisation, or of a branch of an organisation;

    (d) a person contracting for the supply of services or goods, or otherwise dealing with an organisation or a branch of an organisation, or an employee or officer of such a person;

    (e) any member of the public, at least where the disclosure involves a suspected criminal offence?

3.7.2 Class of persons entitled to receive a protected disclosure

157. Section 337A(b) of the *RO Act* also limits the individuals that are able to receive a protected disclosure to:

    (a) a member, the General Manager or member of staff of the FWC;

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

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

158. Comparatively, s 69 of *Public Interest Disclosure Act* 2013 (Cth) allows protected disclosure to any person, other than a foreign public official. In the context of corporations, s 1317AA(2) of the *Corporations Act* 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.

159. A particular issue on which the Commission received conflicting submissions in response to its Issue Paper is whether State or Federal police officers should be entitled to receive a protected disclosure, or at least some protected disclosures.[68] Certainly, it would seem inappropriate for State or Federal police to receive protected disclosures concerning conduct which does not involve a suspected criminal offence.

[68] See eg Joel Silver, Submission to issues Papers 1-3, p 3; Stephen Fontana, witness statement 12 September 2014, paras 67-69; NSW Police Force, Submission to Issues Paper 1: Whistleblower Protections.

Question for discussion:

25. What, if any, changes should be made to the class of person entitled to receive a protected disclosure under s 337A(b)? In particular, should current and former officers or employees of an organisation or branch of an organisation be entitled to receive a protected disclosure? Should State and Federal police be authorised to receive protected disclosures under the *RO Act* involving suspected criminal offences?

3.7.3 Remedies for adverse action

160. Currently, it is a criminal offence for a person to victimise a person who makes a protected disclosure: s 337C. However, the current maximum penalty for an individual convicted of this offence is only 25 penalty units (currently $4,250) or 6 months imprisonment or both. Arguably these penalties are ineffective to provide an actual deterrent. In comparison, under the *Public Sector Disclosure Act* 2013 (Cth) the penalty for reprisal action is imprisonment for 2 years, or a fine of 120 penalty units or both.

161. In addition to criminal liability, a person who suffers damage (the **victim**) as a result of a contravention of s 337C may take action to recover compensation. However, there is no specific provision made for reinstatement of a victim whose employment is terminated as part of reprisal action. Such a person may have a right to reinstatement under the unfair dismissal provisions of the *Fair Work Act* but it may be appropriate to make specific provision for reinstatement orders. Other remedies might include mandatory injunctions or an apology.[69]

162. In addition to these remedies, it may be appropriate to amend s 212 and/or s 215 of the *RO Act* with the effect that a person convicted of an offence against s 337C is disqualified from holding office or being involved in the management of a registered organisation.

Questions for discussion:

26. Should the penalties in s 337C(6) be increased? If so, what is an appropriate penalty for victimisation?

27. Should a person who contravenes s 337 be disqualified from holding office or otherwise being involved in the management of an organisation or branch of an organisation?

[69] See *Public Sector Disclosure Act* 2013 (Cth), s 15.

28.	Should a victim be entitled to seek reinstatement of employment, an injunction to restrain adverse conduct and an apology?

4 REGULATION OF UNION OFFICIALS

163. This chapter considers possible reforms concerning the duties, qualifications and privileges of union officials.

4.1 DUTIES OF UNION OFFICERS TO THEIR UNION

164. The Interim Report considered a number of case studies raising important issues about the scope and effectiveness of the existing law concerning the duties of union officers to their unions.[70] Those issues are considered below.

4.1.1 No statutory regulation of union officers?

165. Prior to the release of the Interim Report, the Transport Workers' Union of Australia (**TWU**) made detailed submissions to the Commission about the existing regulation of trade union officials.

166. In short, those submissions argued that trade unions, unlike corporations, are not-for-profit organisations which operate democratically: 'a union is a collective which is the expression of the majority of its members'.[71] According to the submission, once this critical difference between a corporation and trade union is recognised 'it 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.'[72] The submissions went on to state that

> 'it has always been the case that unions have combined both to advance the interests of the [sic] their members as a whole and to maintain standards and impose regulations upon each other as a means of ensuring that the problems which the Commission has sought to identify are managed within the movement without the need for the imposition of wholly inappropriate legalisms.'[73] (emphasis added)

[70] Interim Report, Vol 1, Chapters 3.3, 3.4, 3.5 and 5.2.

[71] Interim submissions on behalf of the Transport Workers' Union of Australia, 14 November 2014, p 17 [70].

[72] Interim submissions on behalf of the Transport Workers' Union of Australia, 14 November 2014, p 17 [70] (emphasis added).

[73] Interim submissions on behalf of the Transport Workers' Union of Australia, 14 November 2014, p 17 [72].

167. This submission was made in support of a broad submission that there was no need for greater regulation of trade unions and their officials.[74] But it was also made in support of an even broader submission that 'the fundamental difference between union and corporation … means that entirely different regulatory systems need to be established for unions.'[75]

168. The submissions did not specify the 'entirely different regulatory systems' which should be established for unions. However, it would appear from the 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 in the same way as the local unincorporated sporting club. Although the submissions did not expressly state as much, the TWU's submissions appear 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 1871 Act.

169. The TWU's submissions thus raise a threshold question. Should union officers be subject to statutory regulation at all?

170. Apart from the arguments made in the TWU's submissions, 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 1980s onwards the original justification for such regulation no longer exists: see the historical account in Chapter 2.1. On the other hand, there are obvious arguments which can be made in favour of maintaining statutory regulation of the duties of union officers backed by appropriate sanctions which can be sought by an independent regulator.

171. *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. In addition, the ability of an independent regulator to seek the imposition of penalties avoids the problem of enforcement. At general law, a union officer's duties are owed to the union itself, so that only the union can take action to enforce those duties. The reality is that the prospect of civil action by a union against an officer of the union whilst that officer is in charge of the union is remote.

172. *Secondly*, a union registered under the *RO Act* is not unincorporated. By force of s 27 of that Act a registered union is a body corporate, has perpetual succession, is

[74] Interim submissions on behalf of the Transport Workers' Union of Australia, 14 November 2014, p 15 [61].

[75] Interim submissions on behalf of the Transport Workers' Union of Australia, 14 November 2014, p 8 [22].

capable of owning and dealing with property in its own name and suing and being sued. Similar provisions have existed federally since 1904. By virtue of a registered union's independent legal existence,[76] its members are not liable for the union's debts, unless they independently agree to indemnify the union.[77] With the benefits of incorporation come the burdens of increased regulation on those who conduct the affairs of the organisation.

173. *Thirdly*, associations which 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*.[78] In South Australia, there are criminal penalties for officers of incorporated associations who breach their duties to act with reasonable diligence, not to misuse information and not to misuse their position.[79] In 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.[80]

174. *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 unincorporated association and its members. The members of the typical unincorporated association, such as a sporting or social club, a religious organisation or a political party, join for reasons unconnected with their immediate livelihoods. In contrast, most workers join a union because the union provides, in return for the membership dues paid, services that are critical to the workers' livelihoods. In the main, union officers are in the business of service delivery in a critical area of workers' lives.

175. In addition, perhaps unlike the committee members of the local bowling club, union officers occupy an important position of trust and confidence in a critical aspect of the financial affairs of their members ie their employment. They are fiduciaries

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[76] *Williams v Hursey* (1959) 103 CLR 30 at 52.

[77] *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.

[78] *Associations Incorporation Reform Act* 2012 (Vic), ss 83–85.

[79] *Associations Incorporation Act* 1985 (SA), s 39A.

[80] *Associations Incorporation Act* 2009 (NSW), ss 32–33.

and have general law duties analogous to those of company directors.[81] In addition, many trade unions in modern Australia are large organisations with substantial assets. Union officers have control of substantial sums of what can loosely be described as 'members' money'. Control of someone else's money can create a strong temptation to misapply it.

176. *Fifthly*, the statutory rights and privileges conferred on trade unions and their officials under the *Fair Work Act* (see Chapter 2.2.2 above) arguably justify stringent statutory regulation. The statutory right of entry powers conferred on union officials, which have existed in Federal law since 1973, are a serious encroachment upon liberty.[82] Entering on another's premises, disturbance of the lawful activities taking place there, inspecting and making copies of documents found there – these are activities which the common law has long held unlawful unless carried out pursuant to a judicial warrant or court order.[83] In addition to these privileges, trade unions have the additional privilege of tax exempt status (see Chapter 2.4.2 above). This too arguably generates a public interest in regulation of unions and their officials.

Question for discussion:

29. Should the officers of trade unions be subject to statutory regulation at all?

4.1.2 Duties of union officers to their union: corporate governance model

177. The existing provisions of the *RO Act* are based in part on the provisions of the *Corporations Act* regulating company directors.[84]

178. However, there are at least six critical differences between the *RO Act* and the *Corporations Act* in this area:

(a) The statutory form of the fiduciary and common law 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: *RO Act*, s 283.

(b) The statutory duty upon the officers of a registered organisation in s 286 of the *RO Act* to act in good faith is only to act in good faith *in what they believe to be* in the

[81] See Interim Report, Vol 1, Chapter 2.1, pp 41–45.

[82] *Daralston v Parker* (2010) 189 FCR 1 at [44].

[83] *Entick v Carrington* (1765) 19 How St Tr 1030; *Coco v The Queen* (1994) 179 CLR 427.

[84] See the analysis in Interim Report, Vol 1, Chapter 2.1, pp 45–53.

interests of the organisation, rather than objectively in the best interests of the organisation: cf *Corporations Act*, s 181.

(c) The civil penalties in relation to breaches by the officers of registered organisations are dramatically lower than corresponding breaches by company directors.

(d) Unlike company directors, the officers of a registered organisation are not subject to possible criminal penalties for dishonest breaches of statutory fiduciary duties.

(e) Unlike the position in respect of company directors, there are no provisions in the *RO Act* which prohibit a registered organisation from indemnifying its officers for civil penalties imposed for breach of duty.

(f) The *RO Act* does not contain provisions equivalent to ss 191–196 of the *Corporations Act* which require the disclosure by company directors of material personal interests, and restrict the directors of public companies from voting on matters in which they have material personal interests.

179. It should be emphasised that apart from the last point, 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.

4.1.3 Appropriateness of corporate model

180. Before addressing these six specific differences, there is a more general question: is it appropriate to regulate the officers of registered organisations in the same or similar way as officers of companies?

181. The argument advanced by the TWU in its submissions 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. The argument is that this difference in purpose, and the difference in functions between trade union officers and company directors, means that different rules are needed for trade union officers.

182. The ACTU has previously advanced this argument in more detail in its submissions to the Senate Standing Legislation Committee on Education and Employment concerning the *Fair Work (Registered Organisations) Amendment Bill* 2013:

> '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 of regulating unions … Corporate regulation of course is directed towards the protection of the economic interests of investors and creditors (and, to an extent, consumers), and serves a different purpose than 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. Union are different to 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 that union members have in their union and its activities are 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.'[85]

183. An alternative point of view is that whilst there are differences between the role of union officers and company directors, none of those differences justify a less restrictive form of statutory regulation. Like company directors, trade union officials are fiduciaries and have general law duties analogous to those of company directors. The argument that union members have an interest in their union which is less significant than the interest of a shareholder in a company is weak: in the case of union members, the interest is their livelihoods. Further, many modern unions in fact operate as large commercial operations with substantial assets and very significant revenue: even if their *end* may be to benefit the members, the *means* employed in large measure to attain that end are not distinct from those employed by conventional businesses aiming at maximum profits. As unions fall in number, control of unions and union funds has increasingly been concentrated in the hands of relatively few officials. This makes stringent statutory regulation all the more important. Moreover, union officials have significant statutory

[85] Australian Council of Trade Unions, Submission to the Senate Standing Committee on Education and Employment, 22 November 2013, pp 5–6.

powers which company directors do not have. As discussed above, senior trade union officials are also capable of directly wielding substantial political power. Misconduct by a trade union official may therefore have the potential of affecting not only many workers, but also third parties and indeed the broader political process. There is therefore, arguably a substantial public interest in keeping union officers to at least as high a standard of honesty, diligence and accountability as company directors.

Question for discussion:

30. Should the officers of registered organisations be subject to a regulatory regime which is substantially different from that which applies to company directors? If so, what form should that regime take?

4.1.4 Section 283, *Fair Work (Registered Organisations) Act* 2009 (Cth)

184. Section 283 and the other provisions in Part 2 of Chapter 9 of the *RO Act* were originally introduced to the *Workplace Relations Act* 1996 (Cth) in 2002 by the Howard Government in *Workplace Relations (Registration and Accountability of Organisations) Act* 2002 (Cth).

185. The intention of those responsible for drafting s 283 is somewhat difficult to ascertain. It limits the scope of the *statutory* duties imposed by ss 285–288 of the *RO Act*. But these statutory duties are *in addition* to the existing equitable and common law duties imposed on union officers, which are not limited only to financial management decisions but extend across the entire field of possible activity by union officers.

186. There are several reasons that support the enactment in statutory form of existing general law duties. They include the following:

(a) Enactment of statutory duties clarifies and simplifies the law.

(b) Civil or criminal penalties for breach of the statutory duties indicate society's disapproval of conduct in breach of duty, act as a deterrent and encourage the proper performance of the general law duties.

(c) The ability of an appropriate regulator to take action for breach of the statutory duties further encourages the proper performance of the general law duties.

187. Given these reasons, it would seem arguable that the only purpose of s 283 is to make the officers of registered organisations less accountable and less likely to be

subject to sanction for their breaches of duty in relation to non-financial matters. Apart from the fact that it can be difficult to draw a clear distinction between decisions related to financial management and decisions which are not related to financial management, there is no immediately obvious reason for this difference in treatment.

Question for discussion:

31. Should s 283 of the *RO Act* be repealed? Alternatively, should the meaning of the phrase 'related to the financial management of the organisation or branch' be clarified or expanded?

4.1.5 Good faith duty

188. Section 286 of the *RO Act* obliges an officer of an organisation to exercise his or her powers and discharge his or her duties in good faith in what *he or she believes is* in the bests interests of the organisation and for a proper purpose. The effect of the italicised words is that an officer of a registered organisation would only ever breach the duty in s 286 if he or she did not subjectively believe that what he or she was doing was in the best interests of the organisation ie if the official was intentionally dishonest or perhaps reckless. The italicised words have the further consequence that proof of a contravention of s 286 will require proof that the officer did not have a particular subjective belief – in practical terms, a considerable challenge.

189. Under s 181 of the *Corporations Act* the duty of a company director is not merely to be honest and not reckless. The director must act in good faith in what *is* in the best interests of the company. This was not always the case.[86] Is there a justification for the difference in treatment between union officers and company directors?

190. In the first place, there is a question about what is meant by the 'best interests of the organisation' in s 286. The Commission is not aware of authority expounding the meaning of those words specific to s 286, but in relation to s 181 of the *Corporations Act*, which s 286 is clearly modelled upon, the 'best interests of the company' does not mean the best interests of the company as a commercial entity distinct from the members as a whole. Applying those cases, the duty imposed by s 286 may be rephrased as a duty to act in what the officer thinks is in the best interests of the members as a whole.

[86] See the authorities cited in Interim Report, Vol 1, Chapter 2.1, pp 48–49.

191. Thus, it is not immediately apparent why there should be any difference between the standards of conduct required by company directors and union officers in respect of the members which they represent. Both stand in a fiduciary position. Both act for the benefit of the members. Both have the ability to affect adversely the interests of their members. In the case of union officers, this ability is very substantial, with the interest at stake being members' livelihoods. In respect of employer organisations, the interests at stake are less significant but the general point remains.

192. One could seek to justify the difference by asserting that the members of 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. 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 objectively the best interests of the organisation. While there is some force in such an argument, the same point can be made in relation to company directors. In cases where members of a company have competing interests, the duty to act in the best interests of the company requires directors to act fairly between the various classes of member.[87]

Question for discussion:

32. Should s 286 of *RO Act* be amended by deleting the words 'what he or she believes to be'?

4.1.6 Civil penalties

193. Currently the maximum civil penalty which can be imposed on an officer for a breach of the duties imposed by ss 285–288 is 60 penalty units, which is equivalent to $10,200.[88] This may be contrasted with s 1317G(1) of the *Corporations Act* which imposes a maximum civil penalty of $200,000 for equivalent breaches of directors' duties.[89] Arguably the existing penalties under the *RO Act* are simply too low either to mark society's disapproval of the conduct

[87] *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.

[88] A body corporate which 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 $51,000.

[89] A body corporate which is involved in a breach of a director's duty is subject to a maximum civil penalty of $1,000,000 (ie 5 times the penalty imposed on an individual).

involved or to act as an effective deterrent of the conduct and consequently inadequate to protect members.

194. The current ROC Bill proposes amending the penalties for breach of s 285–288 to provide for a maximum penalty of 1,200 penalty units (currently $204,000) for 'serious contraventions', and 100 penalty units (currently $17,000) for all other breaches by officers.[90] The definition of serious contravention is modelled on s 1317G(1) of the *Corporations Act* and means a contravention which materially prejudices the interests of the organisation or branch, or members of the organisation or branch, or the members of the organisation or branch, or materially prejudices the ability of the organisation or branch to pay its creditors, or is otherwise serious. The maximum proposed penalty of 1,200 penalty units for breach by an officer ($204,000) would bring the penalty roughly in line with the $200,000 maximum penalty payable by company directors for breaches of their equivalent duties. (Although it is not directly within the Commission's Terms of Reference it may be appropriate for consideration to be given to amending the penalties in s 1317G of the *Corporations Act* so that those penalties are specified in terms of penalty units, rather than being a fixed sum.)

195. It may be accepted that some employee and employer organisations are run solely by volunteers for the benefit of their members, and that the imposition of substantial civil penalties on officers of those organisations might deter individuals from taking up office in such organisations. However, on the other hand, there are many employee organisations which have many millions of dollars in assets and where the officers are paid hundreds of thousands of dollars in salary. In relation to officers of those organisations, a maximum penalty of $10,200 is insubstantial and is unlikely to act as much of a deterrent.

196. One option to address this difference would be to have differential penalties based on the size of the organisation with smaller maximum penalties for the officers of 'small organisations' and larger maximum penalties for the officers of 'large organisations'.

197. There are difficulties with such an approach. How would size be determined? It may be inappropriate simply to assess the value of the organisation's assets. An employee organisation with a large number of low paid employee members may have relatively limited assets, but misconduct by the officers of the organisation may have a profound effect on a substantial number of members. At the same

[90] As is standard in Commonwealth criminal law, it is proposed that bodies corporate which are involved in contraventions are subject to 5 times the relevant penalty imposed on an individual.

time, it may be inappropriate simply to consider the number of members of the organisation, given that a small organisation could have very substantial assets. Further, drawing a distinction based on size would not address what may be thought to be a distinction between volunteer officers and paid officers. In addition, drawing a line between 'small' and 'large' organisations could lead to arbitrary and irrational distinctions. Depending on the circumstances an officer of a 'small organisation' may be much more morally culpable than an officer of a 'large organisation'.

198. An alternative is to have a single penalty regime for all organisations. The justification for this approach is that the pecuniary penalties specified in the legislation are the *maximum* penalties payable. A court imposing a penalty has a broad discretion in the level of penalty which is payable for the breach of an officer's duty. The size of the organisation both in terms of assets and members, and whether the officer in question is a volunteer or paid, would be highly relevant matters in determining the level of penalty. This is what already occurs in relation to corporations under the *Corporations Act*, which vary widely in size and may have a combination of unpaid and paid directors.

199. A third option, which is the approach adopted in the current ROC Bill, is to draw a distinction between serious and non-serious breaches of duty, with different maximum penalties for the two classes of breach. This is a distinction already drawn by s 1317G of the *Corporations Act*. It is an approach which seeks to alleviate concerns 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. Under this type of differential scheme, officers who are honest and act diligently would have little to fear. Those officers who are dishonest or reckless do not deserve protection. Consistently with this reasoning, it may be appropriate that the concept of a 'serious breach' of duty includes any breach which is considered dishonest by the standards of ordinary persons.

Question for discussion:

33. What changes, if any, should be made to the penalties for contravention of ss 285–288 of the *RO Act*? In particular, should the penalties be increased? Further, or alternatively, should the maximum penalty depend on the seriousness of a breach or the size or nature of the organisation in question?

4.1.7 Criminal penalties

200. Currently, there are no provisions in the *RO Act* making an intentionally dishonest and reckless breach of ss 286, 287 and 288 a criminal offence. This is to be contrasted with the position in respect of company directors: see *Corporations Act*, s 184. Submissions made by Boral Ltd (**Boral**) to the Commission argued that provisions equivalent to s 184 of the *Corporations Act* should be introduced in the *RO Act*.[91] This suggestion has been taken up by the current government in the ROC Bill which proposes the introduction of a new s 290A of the *RO Act* modelled on s 184 of the *Corporations Act.* In substance, it would expose an officer of a registered organisation who intentionally dishonestly or recklessly breaches his or her statutory duties under ss 286–288 to criminal sanctions.

201. In this context, there can be no serious argument that the introduction of criminal penalties for intentionally dishonest and reckless breaches of ss 286–288 will deter honest individuals from volunteering to work for employee or employer organisations. Any provision based on s 184 of the *Corporations Act* would only apply to those individuals who are intentionally dishonest (ie subjectively dishonest) or reckless in their breaches of fiduciary duty. Most would agree that there is no place for such persons in the conduct of employee or employer organisations. Further, s 184 of the *Corporations Act* 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.

202. The alternative point of view, which has previously been advanced by the ACTU,[92] is that the criminal offences created by s 184 of the *Corporations Act* are in fact inappropriate vis-à-vis corporations and accordingly should not be extended to registered organisations. The ACTU has argued that on this issue 'it is the regulation of corporations, not registered organisations, that is out of step.'[93]

Question for discussion:

34. Should the *RO Act* be amended by introducing a new section modelled on s 184 of the *Corporations Act* which makes an officer of an organisation or branch criminally liable for an intentionally dishonest or reckless breach of the fiduciary duties and duty of honesty in ss 286–288 of the *RO Act*?

[91] Boral Law Reform Submission, pp 34–35. See also Written Submissions of the State of Victoria, 28 October 2014, p 75 [24.28].

[92] Australian Council of Trade Unions, Submission to the Senate Standing Legislation Committee on Education and Employment, 22 November 2013, pp 17–30.

[93] Australian Council of Trade Unions, Submission to the Senate Standing Legislation Committee on Education and Employment, 22 November 2013, p 28.

4.1.8 Indemnity for civil and criminal penalties

203. Currently, there are no provisions of the *RO Act* which prohibit organisations exempting or indemnifying their officers for breach of duty, or fines incurred during their activities. Such provisions are found in ss 199A–199C of the *Corporations Act* in relation to company directors. Section 199A prohibits a company exempting or indemnifying a company director or officer from various liabilities. Contravention is a criminal offence, the maximum fine for which is a rather meagre 5 penalty units ($850) for a contravention by an individual and 25 penalty units ($4,250) for a contravention by a body corporate.

204. The principle behind ss 199A–199C of the *Corporations Act* is relatively 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 such penalties are unlikely to have much of a deterrent effect.

205. Arguably the same policy argument applies at least as strongly to officers of registered organisations who in addition to owing duties to their organisations owe a number of duties to third parties. For example, if an officer of a registered organisation is subject to a civil penalty for contravention of a prohibition in relation to right of entry permits but is indemnified for that penalty, the deterrent effect of the penalty is substantially lessened if not extinguished. Similarly if a union official fined for contempt is indemnified by the union.

Question for discussion:

35. Should the *RO Act* be amended to include provisions prohibiting an organisation or branch indemnifying an officer of the organisation for fines or penalties imposed on the officer for conduct in connection with the organisation or branch? If so, what penalties should be imposed for contravening such a prohibition?

4.1.9 Disclosure of material personal interests

206. Section 191(1) of the *Corporations Act* requires a company director 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 a relevant exception applies. Failure to comply is a criminal offence.

207. At present the *RO Act* does not contain a provision equivalent to s 191 of the *Corporations Act*. Instead, s 148B of the *RO Act* requires that the rules of an organisation or branch of an organisation must require officers to disclose material personal interests in a matter that relates to the affairs of the organisation or branch

that the officer or his or her relative acquires. Any failure by an officer to comply with these rules is a matter for the members of the organisation. The General Manager has no ability to compel disclosure, nor are they able to bring proceedings to penalise an officer of an organisation who fails to comply.

208. Nor does the *RO Act* contain a provision equivalent to s 195 of the *Corporations Act*. Section 195(1) of the *Corporations Act* provides that a director of a public company who has a material personal interest in a matter being considered at a directors' meeting must not be present while the matter is being considered and must not vote on the matter, unless a relevant exception applies. Failure to comply is a criminal offence.

209. The ROC Bill currently before the House of Representatives proposes to replace s 148B with direct statutory disclosure obligations: see proposed s 293C. However, it proposes to reduce the scope of the existing s 148B by limiting the disclosure to only those officers of an organisation whose duties related to the financial management of the organisation or branch. Further, it proposes to exclude the requirement to disclose material personal interest which an officer's relatives have. In addition, it adds exemptions for disclosure similar to those which exist under the *Corporations Act*. The ROC Bill also proposes to introduce a provision similar to s 195 of the *Corporations Act* which restricts an officer of an organisation who has a material personal interest in a matter that relates to the affairs of the organisation from being present at any deliberation or voting in relation to matter: proposed s 293F.

Questions for discussion:

36. Should s 148B of the *RO Act* be replaced with a provision similar to s 191 of the *Corporations Act*? If so, who should be required to make disclosure? What, if any, exceptions should apply?

37. Should a provision similar to s 195 of the *Corporations Act* be introduced to the *RO Act*, either in respect of all or a subset of registered organisations? If so, what, if any, exceptions should apply?

4.1.10 Enforcement of officers' duties by members

210. As was discussed briefly in the Interim Report,[94] the duties owed by an officer of a registered organisation are owed to the organisation itself, not the members. At

[94] Interim Report, Vol 1, Chapter 2.1, pp 54–55 [49]–[50].

present, a member of an organisation can in theory apply to the General Manager of the FWC under s 310(1) to be authorised to bring civil penalty proceedings against the organisation. However, the Commission is not aware that the General Manager has previously granted such an authorisation. Nor does the provision provide any guidance for when the General Manager should grant an authorisation. In addition, the provision is framed in terms of a discretion rather than a duty. Thus, the prospect of member action under s 310(1) is somewhat theoretical.

211. The absence of any real mechanism by which union members can take action on behalf of the union has the result that a union officer (eg the Secretary) may breach his or her duty to the union, but no action is 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 plaintiff to bring any action would be the union itself and whilst the union official remains in office there is little or no prospect of that occurring.

212. A possible solution[95] to this problem would be to introduce provisions similar to ss 236 and 237 of the *Corporations Act* which would enable a member of an organisation, or a sufficiently interested person, to apply to the Supreme Court or Federal Court for leave to bring proceedings on behalf of an organisation. Under those provisions the Court must grant leave if satisfied that certain conditions, which are intended to operate as safeguards to frivolous or vexatious claims, are established. Applying these provisions to registered organisations, a Court would only grant leave if satisfied of certain conditions eg that it is probable that the organisation would not bring the proceeding itself, that the member is acting in good faith and that there is serious question to be tried. If leave were granted, then the proceedings would be brought and continued in the name of the organisation.

213. In its submission on this topic, Boral also submitted that if provision was made for this kind of 'derivative action', provision would need to be made concerning the costs of any such action.[96] Section 329 of the *RO Act* provides that a person who is a party to a proceeding arising under the Act must not be ordered to pay costs incurred by any other party to the proceeding unless the person instituted the proceeding vexatiously or without reasonable cause. Boral submitted that union members are unlikely to have the financial capacity to bring an action on behalf of the organisation if the members had to fund the proceeding themselves. Boral further submitted that this could be alleviated by introducing a provision

[95] On this topic see State of Victoria's Response to Issues Papers 1–4, pp 20–21; Boral Law Reform Submission, pp 43–44.

[96] Boral Law Reform Submission, pp 43–44.

equivalent to s 242 of the *Corporations Act* allowing the Court to order the applicant's costs to be paid by the organisation or by a party to the proceeding (eg an officer of the organisation).

Questions for discussion:

38. Should provisions equivalent to ss 236 and 237 of the *Corporations Act* be introduced in respect of organisations registered under the *RO Act*?

39. If so, should specific provision be made with respect to the costs of any derivative action brought?

4.2 QUALIFICATIONS OF PERSONS FOR OFFICE

214. Section 215 of the *RO Act* provides that a person convicted of certain 'prescribed offences' 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 5 years ago (or such other reduced period as may be appointed by the Federal Court), or the person obtains leave of the Federal Court. There is no prescribed sanction for a person who continues to act in the office after being convicted, although the Federal Court can make orders to give effect to a declaration that a person is not eligible or has ceased to be an officeholder.

4.2.1 Meaning of 'office'

215. 'Office' is currently defined in s 9 of the *RO* Act as follows:[97]

> '(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;

[97] See also s 12 of the *Fair Work Act* which contains an analogous definition of office in an industrial organisation.

(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 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.

(2) In this Act, a reference to an ***office*** in an association or organisation includes a reference to an office in a branch of the association or organisation.

216. As can be seen the definition is complex. In submissions to the Commission dated 26 August 2013, Master Builders Australia noted the following about the scope of the definition:

> 'This definition provides that an organisation's board members, voting members or trustee hold an office for the purposes of the RO Act. However, the further scope of the persons who are eligible to hold an office is contingent upon the manner in which the rules of an organisation are expressed. For example, appointed staff who determine policy will only hold an office in the statutory sense if the rules of the organisation expressly provide that they are entitled to exercise that function. Consequently, if an

organisation's rules do not cover these persons in the sense set out in s9(1)(c) or s9(1)(d) they would not hold an office, and may be able to manage or control a registered organisation even if they have been convicted of certain offences.'[98]

217. The submission went on to argue that the definition of office should be clarified to include any person involved in the management or control of a registered organisation.

218. At first glance, there would seem to be some merit to such a proposal. By way of comparison, the definition of officer of a corporation in s 9 of the *Corporations Act* lists a number of specified positions but also 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).'

Question for discussion:

40. What amendments, if any, should be made to the definition of 'office' in s 9 of the *RO Act*? In particular, should the definition include any person who is involved in the management and control of an organisation or branch, or in accordance with whose instructions or wishes the officers of the organisation or branch are accustomed to act?

4.2.2 Scope and effect of disqualification

219. The scope of prescribed offences for which a person will be disqualified is relatively narrow. The definition in s 212 is 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

[98] Master Builders Australia, Submission on Strengthening Corporate Governance of Industrially Registered Organisations – Introducing a New Fit and Proper Person Test, 26 August 2013, p 10 [4.7].

(b) an offence against section 51, 72, 105, 185, 191, subsection 193(2), section 194, 195, 199 or subsection 202(5); 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.'

220. The offences referred to in paragraph (b) concern election-related conduct.

221. Given that the current *RO Act* and equivalent State enactments create few, if any, criminal offences in relation to the formation, registration or management of an association or organisation, paragraph (c) of the definition is largely redundant. For example, under the current provisions of the *RO Act* a person found to have contravened ss 285–288 of the *RO Act* and against whom a pecuniary penalty has been imposed (eg a person found to have breached his or her fiduciary duties in relation to the financial management of an organisation and who has been required to pay the maximum pecuniary penalty) would still be entitled to hold office within the organisation, because the person would not have been convicted of an offence.

222. Paragraphs (a) and (d) of the definition are also fairly confined. For example, an officer of an organisation who has been convicted of criminal contempt on numerous occasions would still be entitled to be elected as an officer. Criminal trespass is not included within the list of prescribed offences.

223. In this context, Master Builders Australia made a submission to the Commission that in addition to the existing disqualification regime, an additional 'fit and proper person test' should be introduced as a qualification for person intending to stand for office in a registered organisation.[99] The submission contemplated a candidate providing the FWC with a declaration attesting to certain matters including that he or she was a person of 'good character'.

224. A difficulty with imposing a 'fit and proper person' test as a ground for qualification of persons standing for office in registered organisations is that it would require someone (presumably the General Manager or other regulator) to make that assessment before every election for office in an organisation. Such a

[99] 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.

regime would be likely to be time-consuming and expensive. However, failure to satisfy a 'fit and proper person' test may be suitable as a ground for disqualification: see the discussion in the immediately following section.

225. At present, the *RO Act* does not provide for the consequences of a person who is disqualified from continuing to participate in the management or control of a registered organisation. In contrast, s 206A(1) of the *Corporations Act* specifies that a disqualified person who continues to act commits a criminal offence.

Questions for discussion:

41. What changes, if any, should be made to the definition of 'prescribed offence' in s 212 of the *RO Act*?

42. What, if any, additional grounds of *automatic* disqualification should be added to s 215? For example, should it be a ground of automatic disqualification that a civil penalty is imposed against an officer of a registered organisation for a breach of ss 285–288 of the *RO Act*?

43. Should provisions be introduced making it a criminal offence for a disqualified person to be involved in the management or control of a registered organisation?

4.2.3 Banning notices and orders

226. Section 215 concerns the *automatic* disqualification of persons as officers of a registered organisation.

227. Another possible mechanism for dealing with officers of registered organisations who breach their duties to their organisations or otherwise engage in inappropriate conduct is for the relevant regulator to be given a power in certain circumstances either to:

(a) Issue a *banning notice* to a person, the effect of which is to disqualify the person holding office within a registered organisation for the period specified in the notice; or

(b) Apply to a State Supreme Court or Federal Court for a *banning order* against a person, the effect of which is to disqualify the person holding office within a registered organisation for the period specified in the order.

228. Such powers already exist in respect of corporations. Under ss 206C–206EEA of the *Corporations Act*, ASIC has the power to apply to a State Supreme Court or

the Federal Court for orders disqualifying persons from acting as a director of a company in certain circumstances eg repeated contraventions of the *Corporations Act* or contraventions of certain civil penalty provisions. Under s 206F of the *Corporations Act*, ASIC also has the power to issue a banning notice of up to 5 years where the person concerned has been an officer of 2 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. Before making such an order, ASIC must give the person an opportunity to be heard on why the order should not be made.

229. Currently, the General Manager of the FWC currently has no equivalent powers.

230. The current ROC Bill proposes to introduce a new s 307A to the *RO Act* which would allow the regulator to apply to the Federal Court for an order disqualifying a person from holding office in a registered organisation: cl 209 of Sch 2. It is proposed that the Federal Court may make such an order if the person has contravened a civil penalty provision and the Court is satisfied that the disqualification is justified.

231. The ACTU has previously argued that such a provision is 'ill suited to regulation of registered organisations'.[100] The thrust of the argument appears to be that there are certain civil penalty provisions imposed on officers of registered organisations under the *RO Act* which should not lead to disqualification.[101] They include:

- An officer knowingly or recklessly making false or misleading statements about membership or resignation (ss 175, 176);
- An officer knowingly or recklessly making false or misleading statements in relation to the accounts or financial statements provided to members (s 267); and
- An officer knowingly or recklessly failing to comply with a court order (ss 299, 300).

232. An alternative point of view is that these are the kinds of contraventions which should lead to the prospect of disqualification: the first two contraventions are species of fraud and the third is contempt. The Commission's inquiries to date

[100] Australian Council of Trade Unions, Submission to the Senate Standing Legislation Committee on Education and Employment, 22 November 2013, p 32.

[101] Australian Council of Trade Unions, Submission to the Senate Standing Legislation Committee on Education and Employment, 22 November 2013, pp 32–33.

suggest that there is a particular problem with union officials deliberately disobeying court orders. Accordingly it is arguable that any disqualification regime applying to officers of registered organisations would need to include contempt, either as a ground for automatic disqualification or as a ground for the regulator to seek disqualification. That is, any disqualification regime should not be limited merely to contraventions of civil penalty provisions as is currently contemplated by the ROC Bill; rather any such disqualification regime should arguably be enlivened by any egregious or repeated flouting of the law. However, the more general point raised by the ACTU's argument – that any disqualification regime in respect of registered organisations would need to be tailored to the duties and activities of officers of registered organisations – is sound.

Questions for discussion:

44. Should the General Manager (or other regulator of organisations as the case may be) have the ability to apply to a court (eg State Supreme Court) for an order disqualifying a person from holding office in an organisation for a specified period? If so, in what circumstances should the court be empowered to make such banning orders (eg if the Court is satisfied that the person is not a fit and proper person to be in control of a registered organisation)?

45. Further, or in the alternative, should the General Manager (or other regulator of organisations as the case may be) have the power to issue a banning notice, the effect of which is to disqualify a person from holding office in a registered organisation for a period specified in the notice? If so, in what circumstances should the regulator be entitled to issue a banning notice?

4.3 RIGHT OF ENTRY PERMITS

233. As discussed in Chapter 2.2.2 above, in order to exercise statutory rights of entry, union officials must have a right of entry permit issued by the FWC. In order to obtain a permit, it is necessary for the FWC to be satisfied that an applicant is a 'fit and proper person': *Fair Work Act*, s 512.

234. The Commission's inquiries thus far have revealed a number of potential problems with the existing regulation of right of entry permits. These include misuse of permits by union officials, false declarations being made to the FWC by applicants for permits, and the holding of permits by individuals with significant criminal convictions.

4.3.1 Misuse of right of entry permits

235. There are already laws which deal with the misuse of permits. In particular, s 500 of the *Fair Work Act* prohibits a permit holder from intentionally hindering or obstructing any person or otherwise acting in an improper manner. There is also a similar provision in s 146 of the *Work Health and Safety Act* 2011 in respect of Work Health and Safety permits. However, the penalties for contravention of these provisions are relatively slight: a maximum civil penalty of 60 penalty units ($10,200) for a contravention of s 500 and a $10,000 penalty for a contravention of s 146.

236. Further, abuse of right of entry permits by some union officials is widespread. For example, at the end of 2014, White J gave judgment in a proceeding taken by the Director of the Fair Work Building Inspectorate against officials of the CFMEU for contravening s 500. White J observed:

> 'Since 1999, the CFMEU has had penalties imposed on it by a court on numerous occasions. Many of the court decisions involved multiple contraventions. Of particular relevance presently is that before 1 March 2014, the CFMEU and/or its employees have been dealt with for contraventions of right of entry provisions on 13 occasions, involving some 40 separate contraventions. In addition, since the subject contraventions, Mansfield J in *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047 (delivered on 2 October 2014) (*DFWBI v Cartledge*), imposed penalties on the CFMEU and its employees in respect of seven different contraventions of s 500 of the FW Act committed on 19 and 20 March 2014. 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. It also indicates that deterrence must be a prominent consideration in the fixing of penalties in the present cases.'[102]

Questions for discussion:

46. Should the penalties for misuse of a right of entry permit be increased?

47. What, if any, other changes should be made to the *Fair Work Act* concerning right of entry permits to ensure permits are not misused?

[102] *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432 at [77].

4.3.2 Entitlement to hold right of entry permit

237. The current system for obtaining right of entry permits appears to have some significant limitations.

238. In applying for a permit, applicants are not required to agree to a criminal history check. The declaration which applicants are required to make is limited to only certain specified matters: cf s 513(1)(g) of the *Fair Work Act* which in addition to the specified matters requires the FWC to take into account any other matters which the FWC considers relevant. There is no requirement to disclose pending criminal charges or proceedings against the person under the *Fair Work Act* or the *RO Act*.[103] The application form contains no general declaration by the person applying for the permit that he or she is a person of good fame and character.

239. In terms of the substantive requirements for obtaining a permit, concern has been raised that the 'fit and proper person' is insufficient to ensure that persons with a criminal record are not granted right of entry permits. The current law is that a criminal conviction is not necessarily a bar to a finding that a person is a fit and proper person to hold a permit: see s 513. 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.[104] Similarly, in June 2013, the FWC granted a right of entry permit to another CFMEU official despite two convictions for intentional damage or destruction of property.[105] Permits have also been issued by the FWC to organisers with convictions for social security fraud.[106]

240. In addition, the FWC has ruled that it is not required to take into account the poor record of certain union's compliance with the right of entry regime. In May 2014, the FWC rejected an argument that it was obliged to take into account the CFMEU's poor record of compliance with the rules around right of entry permits.[107] In addition, the Full Federal Court has held that the FWC may issue

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[103] See Application for a right of entry permit – Construction, Forestry, Mining and Energy Union-Construction and General Division, WA Divisional Branch [2015] FWC 3057.

[104] 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.

[105] Construction, Forestry, Mining and Energy Union of Workers [2013] FWCD 2887 (14 June 2013).

[106] Health Services Union-Queensland Branch [2015] FWC 18.

[107] Construction, Forestry, Mining and Energy Union [2014] FWCD 1169 (15 May 2014).

under s 515 'conditional' permits to organisers who fail the fit and proper person test.[108]

Questions for discussion:

48. What, if any, changes should be made to ss 512–515 of the *Fair Work Act*?

49. Should ss 512 and 513 of the *Fair Work Act* be amended to require the FWC to consider an employee organisation's past compliance with the right of entry regime when considering whether or not to grant a right of entry permit?

50. Should s 513 be amended to require the FWC to take into account additional matters when assessing whether a person is a fit and proper person?

51. Should s 514 be amended to prevent persons with certain criminal convictions being entitled to obtain a right of entry permit?

52. Should s 515 be amended to prevent 'conditional' permits being granted to persons who fail the 'fit and proper person' test?

53. What, if any, changes should be made to the application process by which persons may apply to hold a right of entry permit under the *Fair Work Act*?

[108] *Maritime Union of Australia v Fair Work Commission* [2015] FCAFC 56.

5 RELEVANT ENTITIES

5.1 INTRODUCTION

241. As contemplated by the Commission's Terms of Reference, a significant part of the Commission's inquiries to date have focused on certain union-associated funds, organisations and accounts. These entities are described in the Commission's Terms of Reference as 'relevant entities', and it is therefore convenient to adopt that description.

242. The relevant entities examined to date have included the following broad classes of fund:

- fighting funds;
- election funds;
- redundancy funds;
- insurance funds;
- training funds;
- superannuation funds; and
- other generic funds.

243. Problems specific to particular classes of funds, and possible solutions to these specific problems, are considered in other chapters of this Discussion Paper:

(a) Chapter 6 addresses issues concerning election funds.

(b) Chapter 7 considers redundancy, insurance and training funds under the heading 'Employee Benefits Funds'.

(c) Chapter 8 examines specific matters concerning union-associated superannuation funds.

(d) Chapter 9 addresses a recurring problem largely, but not entirely, associated with fighting and other generic funds, namely the making and taking of 'corrupting benefits'.

5.2 GENERAL REGULATION OF RELEVANT ENTITIES

244. The purpose of this Chapter is to discuss briefly whether, either in addition to or instead of the proposals considered in Chapters 6–9, there is scope for amending the *RO Act* to introduce laws regulating relevant entities generally. While the problems considered in Chapters 6–9 vary there are two recurring issues: (a) lack of governance and (b) lack of transparency in relation to the relationships between a relevant entity and the union or union officials with which it is associated.

245. In order to consider whether there are possible methods of addressing these issues on a general basis, it is necessary to first consider the existing regulation of relevant entities. Generally speaking, there are two classes of law that may apply.

246. The first class consists of the respective laws that govern the specific legal structure employed, such as:

(a) the *Corporations Act* in respect of companies registered under that Act;

(b) the State-based trustee legislation and the common law of trusts in respect of trusts;

(c) the *Superannuation (Industry) Supervision Act* 1993 (Cth) and the common law of trusts in respect of superannuation funds;

(d) the State-based incorporated associations legislation and the common law in respect of incorporated associations;

(e) the common law in respect of unincorporated associations; and

(f) the common law concerning banker and customer in respect of bank accounts.

247. The second class of laws consists of the *RO Act* (or other State-based industrial relations Acts) to the extent that the provisions in that Act (or those Acts) are relevant.

248. It is immediately apparent that the laws within the first class vary widely, ranging from those which impose very significant regulation (eg laws regulating corporate superannuation funds) to those which impose almost no regulation at all (eg laws concerning the operation of bank accounts). Practically speaking any general reform to the governance of relevant entities would need to be made by amendment to the *RO Act*.

249. There would seem to be at least four methods of seeking to address the governance and transparency issues identified in respect of relevant entities.[109]

250. The *first* option would involve introducing provisions to the *RO Act* that impose 'minimum governance standards' on relevant entities. This could be achieved by:

(a) Introducing a definition of 'relevant entity' (or 'associated entity'[110]) to the *RO Act*, which could be based in part on the definition of 'relevant entity' in the Commission's Terms of Reference;

(b) Requiring relevant entities to have certain rules governing the affairs of the entity;

(c) Imposing certain minimum duties on the officers or other persons in control (collectively, **the controllers**) of a relevant entity including duties of honesty and diligence;

(d) Imposing certain minimum accounting and reporting obligations on the controllers of a relevant entity, including the preparation of an annual report; and

(e) Requiring the annual report and any other relevant financial documentation to be filed with the General Manager to be made available to the members of the organisation associated with the relevant entity, and possibly the public.

251. There are potential problems with such an approach. First, it is questionable whether simply imposing more regulation will necessarily solve the problems identified by the Commission. Many of the governance problems identified by the Commission in its inquiries concern relevant entities which are already subject to high levels of regulation. Imposing minimum governance standards on these entities may achieve little. Secondly, in order for the legislation to accommodate the range of legal forms which relevant entities take the regulatory requirements would need to be fairly general and the more general the requirements the more likely they are to be flouted, ignored or ineffective. Thirdly, there are obvious compliance burdens with such regulation.

252. The *second* option would be to require all relevant entities to disclose publicly their links with associated unions and union officials. This could be achieved by:

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[109] For discussion of options generally, see Written Submissions of the State of Victoria, 28 October 2014, pp 34–36.

[110] The term 'associated entity' probably provides a more useful description.

(a) Introducing a definition of 'relevant entity' (or 'associated entity') to the *RO Act*, which could be based in part on the definition of 'relevant entity' in the Commission's Terms of Reference;

(b) Requiring the controllers of relevant entities to lodge with the General Manager (or other regulator of registered organisations as appropriate) a publicly available report disclosing the relevant entity's association with any registered organisation or its officials. For example, the report could require disclosure of payments made to registered organisations and their officials and related parties, payments made to the relevant entity by a registered organisation or its officials or related parties and the reasons for such payments.

253. The *third* option is a variant of the first option. Rather than seeking to impose minimum governance standards on *all* relevant entities, such standards could be imposed on only those kinds of entity which have limited existing regulation.[111] Principally this would involve regulation of relevant entities which are (a) unincorporated associations or (b) funds or bank accounts operated by persons associated with a registered organisation.

254. The *fourth* option is not to introduce any broad ranging regulation of relevant entities at all, but to adopt specific measures targeting particular classes of relevant entity, such as those considered in Chapters 6–9.

Questions for discussion:

54. What, if any, amendments should be made to the *RO Act* concerning the general governance and regulation of 'relevant entities'?

55. Should the *RO Act* be amended to impose minimum governance standards on all, or a sub-class, of relevant entities? If so, what standards should be imposed?

56. Should the *RO Act* be amended to impose certain disclosure requirements on all, or a sub-class, of relevant entities? If so, what disclosure requirements should be imposed?

[111] See Written Submissions of the State of Victoria, 28 October 2014, pp 35–36.

6 UNION ELECTION FUNDS

255. Chapter 4 of the Interim Report examined a number of funds established for the primary purpose of funding the election campaigns of candidates standing for office in a union (**election funds**).

256. Although election funds are structured in a number of ways they all involve members, officers or employees of a union (**contributors**) contributing money to a fund controlled by a number of individuals who either hold elected positions within the union or aspire to do so.

257. The Interim Report identified a number of key issues in relation to the use and operation of election funds by various unions.[112] In short:

(a) There is generally insufficient disclosure of the sources of revenue for election funds both to contributors and to voters in union elections.

(b) There is generally 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) In a number of cases, it is questionable whether contributors' decisions to contribute are truly voluntary, particularly where contributions are automatically deducted pursuant to the terms of contributors' employment contracts with the union.

(e) 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.

(f) There appears to be a lack of governance and record-keeping in relation to a number of union election funds.

258. Possible solutions to deal with these issues are discussed below.

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[112] See Interim Report, Vol 1, Chapter 4.1, pp 516–517.

6.1 DIRECT DEBIT ARRANGEMENTS ASSOCIATED WITH ELECTION CAMPAIGNS

259. Of the issues listed in paragraph 258 one distinct issue is whether the contributions made by contributors to union election funds are truly voluntary. There is, of course, nothing wrong with members of employee or employer organisations joining together to pool resources to fund a particular candidate or ticket of candidates in an election. However, any measures or steps taken with the effect of compelling contributions would infringe principles concerning freedom of association.

260. One measure which raises particular issues is 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 pursuant to the terms of the employees' employment contracts. The employees never see these amounts: they are paid directly from the funds of the organisation to the election fund. Further, employees rarely have the ability to negotiate for the non-inclusion of the relevant terms in their employment contracts: they are mandated by the current management of the organisation. Having regard to these matters, arguably such arrangements are akin to a convenient mechanism by which the incumbent officers of an organisation can divert the organisation's funds for election purposes. Any direct diversion of an organisation's funds for election purposes is prohibited by s 190 of the *RO Act*. There is thus an argument that direct debit arrangements for election purposes should be prohibited. Certainly there would be public concern if a large private sector employer had a standard term of its employment contract requiring employees to make contributions from their wages to a particular political party.

261. Ending such arrangements would not impede the employee continuing to make contributions if he or she wished; the only difference would be that the employee would be voluntarily making the payment. In other words ending such arrangements might facilitate the voluntariness of the contribution.

262. On the other hand, direct debit arrangements may be seen as a convenient way of employees making genuine contributions to a cause they believe in. A more targeted measure to overcome problems concerning voluntariness of contributions is to prohibit terms being included in union employment contracts which require contributions to be made to an election fund. Employees could still make their own independent arrangements, including by way of direct debit from their bank accounts, to fund election campaigns.

Question for discussion:

57. Should a new section 190A be introduced to the *RO Act* making it unlawful for:

(a) any person to agree to receive or deduct from another person's salary or wage a regular payment; and/or

(b) any employment contract between a person and an organisation, or branch of an organisation, to contain a term requiring the person to make a regular payment;

to be used, directly or indirectly, for the purposes of campaigning in connection with an election for an office in an organisation, or branch of an organisation registered under the *RO Act*?

6.2 REGULATED UNION CAMPAIGN ACCOUNTS

263. Apart from the issue about voluntariness of contributions, the other issues concerning union election funds largely concern transparency of donations and expenditure in connection with union election campaigns, general governance and record-keeping in relation to elections funds and the lack of clarity about the status of contributions to an election fund.

264. The fundamental premise of the *RO Act* is that unions and other registered organisations should be controlled democratically: *RO Act*, Chapter 7. Part of that democratic control involves elections for office and other positions: Part 2 of Chapter 7.

265. As discussed in Chapter 2.4, office holders in trade unions are capable of wielding substantial power, not only in relation to their members but in the broader political environment. In addition, they exercise important statutory powers under the *Fair Work Act*. As such there is arguably a significant *public* interest in ensuring free and fair trade union elections.

266. It is generally accepted that an important element of a free and fair election process is ensuring that voters in the election are fully informed about the sources of funds and the expenditure incurred in election campaigns. To this end, at both State and Commonwealth level, legislation has been introduced that attempts to regulate political donations and expenditures in State and Federal elections.[113] The

[113] See eg, *Commonwealth Electoral Act* 1918 (Cth), Part XX; *Electoral Act* 1992 (ACT), Pt 14; *Election Funding, Expenditure and Disclosures Act* 1981 (NSW); *Electoral Act 2002* (Vic), Ch 12; *Electoral Act* 1907

legislation varies between jurisdictions but there are common elements. These include:

- caps on the amount of political donations which can be made to candidates and parties;
- 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;
- a requirement that donations be paid into, and expenditure be paid out of, specially established campaign accounts; and
- laws requiring the disclosure of political donations and political expenditure.

267. Arguably, not all of these requirements are appropriate in respect of elections for office in registered organisations. For one thing, additional regulatory burdens have a compliance cost. For another, caps on the amount of donations and expenditures are probably unnecessary. However, adopting some of these measures, with suitable adaptations, would be one way of tackling the transparency issues identified in paragraph 258 above. For example, transparency would be considerably increased by the introduction of laws requiring the disclosure of political donations made and electoral expenditure paid in respect of union elections, and laws prohibiting the making of indirect political donations (ie donations made by a person through a number of entities for the purpose of disguising the source of the funds).

268. In addition, requiring political donations and political expenditure in respect of union elections to be paid into and out of separately established campaign accounts, and making provision for the regulation, operation and distribution of such accounts, may also address some of the other problems identified in paragraph 258. Rather than union election funds being operated through a multitude of different legal structures with different governance requirements, election funds would need to be operated through regulated campaign accounts with a single set of rules designed to give clarity to contributors and voters and ensure appropriately high levels of governance and record-keeping.

269. A concern with the introduction of such laws is that they may have the potential to engage the freedom of political communication which is implied from the *Constitution*. The effect of the cases which have recognised that freedom is that State or Commonwealth laws which effectively burden the freedom of political

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(WA), Pt VI. Until recently, Queensland had very detailed election funding laws, but these were substantially repealed under the former Newman Government: see *Electoral Act* 1992 (Qld), Part 11.

communication, either in terms, operation and effect and which are not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative government prescribed by the *Constitution* are invalid. At the end of 2013, the High Court in *Unions NSW v New South Wales*[114] held that certain provisions of the New South Wales laws concerning political donations in connection with State elections were invalid. One of the effects of the invalid laws was to prohibit political donations in connection with NSW State elections by persons who were not individuals on the NSW electoral roll.

270. Although there are significant differences between union elections and State elections, in considering potential reforms in this area it would be necessary to consider carefully that decision and other cases to ensure that any provisions introduced to the *RO Act* were consistent with the implied freedom of political communication.

271. Set out below is a more concrete proposal which attempts to bring together the elements discussed in paragraphs 268–269 above on which the Commission seeks comment.

Donations and expenditure in connection with elections for office in an organisation or branch of an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth)

Regulated campaign accounts

[Comment: The intention behind (1) to (7) would be to ensure that all donations and electoral expenditure in connection with elections for office in a registered organisation or branch are channelled through regulated campaign accounts which are subject to certain disclosure requirements.]

(1) It is unlawful for any person to make a payment for ***electoral expenditure*** in connection with an ***election***, unless the payment is made from:

(a) a regulated campaign account for a ***candidate*** for the election; or

(b) a regulated campaign account for a ***ticket of candidates*** for elections which elections include the election.

(2) A regulated campaign account is to be a separate bank account with a bank, credit union, building society or other entity prescribed by the regulations.

[114] (2013) 304 ALR 266.

(3) A regulated campaign account for a candidate for an election shall be in the name of the ***official agent*** of the candidate who shall be authorised to operate the account, and the candidate shall not be authorised to operate the account.

(4) A regulated campaign account for a ticket of candidates for elections shall be in the name of the official agent of the ticket of candidates who shall be authorised to operate the account, and none of the candidates shall be authorised to operate the account.

(5) Only the following payments may be made into a campaign account for a candidate for an election (or ticket of candidates for elections):

(a) payments made by the candidate (or one or more of the candidates on the ticket); and

(b) ***donations*** received by the official agent of the candidate (or ticket of candidates).

(6) Only the following payments may be paid out of a campaign account for a candidate for an election (or ticket of candidates for elections):

(a) payments made for the purpose of electoral expenditure in connection with the election of the candidate (or the elections of the ticket of candidates); and

(b) payments made in accordance with (13).

Donations for union election campaigns

(7) It is unlawful for any person to receive a donation in connection with an election unless the donation is received by the official agent of a candidate or ticket of candidates.

[Comment: The effect of (7) in connection with the proposed definition in paragraph (b) of ***donation*** *would be to prohibit indirect donations in connection with elections for office in registered organisations.]*

(8) Upon receiving a donation in connection with an election, an official agent for that election must immediately:

(a) in the case of a donation of money – pay or transfer the money to a regulated campaign account held in the official agent's name;

(b) in the case of a donation being a gift in kind – provide the ***donor*** with a written acknowledgement of the gift in kind in the form prescribed by the regulations.

Disclosure requirements

(9) Within the ***pre-election disclosure period*** for an election, each official agent for an election shall file a report with the relevant authority in accordance with the prescribed form stating:

(a) the total payments made into the regulated campaign account;

(b) the total value of donations received;

(c) the total number of donors;

(d) for donations of money exceeding $1,000, the date the donation was made, the value of the donation and the name and address of the donor;

(e) for donations being gifts in kind, the date the donation was made, the nature of the donation, the estimated market value of the donation and the name and address of the donor; and

(f) the total electoral expenditure paid to date.

[Comment: The purpose of requiring pre-election disclosure would be to allow, as fully as practicable, voters in elections to be informed of the sources of candidate's funds and their expenditure prior to voters casting their votes. The Commission invites submissions about whether pre-election disclosure is appropriate and if so, when that disclosure should occur and the form it should take.]

(10) There is no requirement to file such a report where at the end of the ***pre-election disclosure period***:

(a) the total payments made into the regulated campaign account are less than $5,000;

(b) the total donations received are valued at less than $5,000; and

(c) the total electoral expenditure paid is less than $5,000.

[Comment: Pre-election disclosure may be administratively onerous for less well-resourced candidates. It may therefore be appropriate to exempt less well-resourced candidates from any such requirements.]

(11) The relevant authority shall publish the reports so received on its website within 2 business days of receipt.

(12) Within 28 days after the declaration of the result of the election, or elections as the case may be, each ***official agent*** shall file a report in the prescribed form with the regulator:

(a) annexing a statement of the regulated campaign account;

(b) stating the information specified in (9) as at 21 days after the declaration;

(c) stating all electoral expenditure incurred as at 21 days after the declaration; and

(d) the balance of the campaign account.

(13) Not more than 60 days after the time appointed by (12), each official agent for an election shall distribute any surplus in a regulated campaign account pro-rata in proportion to the donations made to the account and any payments made to the account by a candidate or candidates.

(14) Subject to a contrary intention:

candidate means a person nominated as a candidate for an election for an office in an organisation, or branch of an organisation, or a person who proposes or intends to so nominate.

election means an election for an office in an organisation, or branch of an organisation, and includes a future or prospective election.

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.

donation means a gift, including a gift in kind, made:

(a) to or for the benefit of a candidate or a ticket of candidates; or

(b) to or for the benefit of an entity or other person (not being a candidate or ticket of candidates), 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, a donation or to incur electoral expenditure, or

(ii) to reimburse the entity or person for making, directly or indirectly, a donation or incurring electoral expenditure.

donor means a person who makes a ***donation***.

gift in kind includes the provision of a service (other than genuine volunteer service) for no consideration or inadequate consideration.

official agent means:

(a) in respect of a candidate for an election, the candidate or such other person appointed by the candidate;

(b) in respect of a ticket of candidates for elections, the person appointed by a majority of the candidates on the ticket.

pre-election disclosure period in respect of an election means a period beginning 14 days before the last day on which votes may be cast in the election and ending 7 days before the last day on which votes may be cast in the election.

ticket of candidates means a group of two or more persons nominated as candidates for elections for two or more offices in an organisation, or branch of an organisation, or a group of two or more such persons who propose to so nominate.

Question for discussion:

58. What, if any, amendments should be made to the *RO Act* concerning the funding of elections for office in organisations registered under the *RO Act*? In particular, should provisions similar to those set out above be introduced to the *RO Act*? If so, what form should those provisions take?

7 EMPLOYEE BENEFIT FUNDS

272. A number of unions promote forms of enterprise agreement which require employers to make payments on behalf of employees to a fund or scheme established for the purpose of:

(a) paying superannuation benefits (**superannuation funds**);

(b) paying redundancy benefits (**redundancy funds**);

(c) arranging income protection, sickness, accident or similar insurance (**employee insurance schemes**); or

(d) providing other benefits to employees (eg training).

273. These funds or schemes commonly have financial and other links with the union negotiating the enterprise agreement. Collectively these funds or schemes, excluding superannuation funds, can be referred to as **employee benefit funds**. It is convenient to exclude superannuation funds from the definition because superannuation funds raise specific issues which are conveniently addressed separately: see Chapter 8. It is also convenient to label the sub-class of employee benefit funds which pay benefits or entitlements, rather than providing services such as training, as **worker entitlement funds**.

274. The chapter considers two main issues concerning employee benefit funds: (a) lack of governance and supervision and (b) conflicts of interest.

7.1 GOVERNANCE AND SUPERVISION

275. Together employee benefit funds hold billions of dollars in assets or products designed to be used or held for a specific purpose to benefit employees. To take but some examples:

- As at 31 July 2014, the Australian Construction Industry Redundancy Trust held approximately $537 million in members' funds with annual growth of around 20% since 1994.[115]

[115] ACIRT Annual Report 2014, p 3.

- The BERT funds considered by the Commission in the Interim Report held over $100 m of assets as at 30 June 2013.[116]
- The Protect Severance Scheme considered by the Commission held assets in excess of $245 million as at 30 June 2013.[117]

276. Despite the size of the sector, employee benefit funds, unlike superannuation funds, are not subject to specific legislation regulating their activities. The main relevant laws are summarised below.

7.1.1 Fringe benefits tax exemption for 'approved worker entitlement funds'

277. The *Fringe Benefits Tax Assessment Act* 1986 (Cth) provides a limited form of regulation in respect of 'approved worker entitlement funds'. In substance, s 58PA of the *Fringe Benefits Tax Assessment Act* 1986 provides that benefits paid by employers to an 'approved worker entitlement fund' are not subject to fringe benefits tax. A fund is entitled to apply to the Commissioner of Taxation to be approved as an 'approved worker entitlement fund' if it satisfies certain basic governance requirements specified in s 58PB(4) of the *Fringe Benefits Tax Assessment Act* 1986. Although these provisions do not impose any direct regulation on worker entitlement funds, the fact that the tax exemption is conditional on these requirements may impose a practical limit on the activities of some worker entitlement funds.

7.1.2 Existing regulation of redundancy funds

278. Redundancy funds make up a substantial part of the class of employee benefit funds. The usual structure of a redundancy fund is relatively simple: pursuant to the standard union enterprise agreement, employers make contributions to a corporate entity which acts as a trustee of a trust established to make redundancy and other payments to employees of the employers.

279. Redundancy funds would ordinarily be subject to the governance and product disclosure requirements of the *Corporations Act* relating to managed investment schemes and to entities providing financial services. However, ASIC Class Order C0 02/314 excludes redundancy funds and certain other employee benefit funds from the operation of a number of key provisions of the *Corporations Act*. In summary, the Class Order excludes persons operating a scheme by which employers make contributions to fund a scheme 'where the primary objective of

[116] Interim Report, Vol 1, Chapter 5.2, p 789 [25].

[117] Interim Report, Vol 1, Chapter 5.3, p 861 [16].

the scheme is to fund redundancy entitlements and other entitlements incidental to employment, for employees of the employers' from:

- the requirement under s 911A to hold an Australian financial services licence;
- the requirement under s 601ED to register the scheme as a managed investment scheme;
- the requirements under ss 992A and 992AA not to engage in unsolicited hawking of financial products or managed investment schemes; and
- the product disclosure requirements under Part 7.9 of the *Corporations Act*.

280. The result is that the regulation of redundancy funds is that which is ordinarily applicable to companies and trusts. For example, provided the terms of the trust so permit, funds are entitled to discriminate between union members and non-union members when providing benefits to members and they are entitled to make distributions to persons who are not members (eg unions, employers).

7.1.3 Existing regulation of employee insurance schemes

281. Another substantial class of employee benefit schemes is that of employee insurance schemes.

282. There are a number of ways such schemes can be structured. One type of scheme involves employers becoming members of a separately established entity which is controlled or associated with a union. Upon becoming a member of the entity, the employers are required to make contributions to the entity in respect of their employees. The entity then arranges insurance cover for the employees, usually by way of a group or master insurance policy provided by a commercial insurer. An example of this structure was that adopted by CIPQ considered in Chapter 5.2 of the Interim Report.

283. Another type of structure involves employers making contributions to a scheme agent who then provides the contributions, or a part of them, to another entity which holds a group insurance policy with a recognised commercial insurer. An example of this kind of structure was considered in Chapter 5.3 of the Interim Report.

284. In general, entities engaged in the business of providing insurance in Australia or engaged in any business incidental to such business are subject to prudential regulation by the Australian Prudential Regulation Authority (**APRA**) pursuant to

either the *Insurance Act* 1973 (Cth) or the *Life Insurance Act* 1995 (Cth) depending on the kind of insurance offered. However some types of insurance business are not subject to prudential regulation. In particular, the following types of business are excluded from prudential regulation under both the *Insurance Act* 1973 (Cth) and the *Life Insurance Act* 1995 (Cth):[118]

(a) business in relation to benefits provided by a trade union for its members or their dependants;

(b) business in relation to the benefits provided for its members or their dependants by an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act* 2009; and

(c) business in relation to a scheme or arrangement under which superannuation benefits, pensions or payments to employees or their dependants (and not to any other persons) on retirement, disability or death are provided by an employer or an employer's employees or by both, wholly through an organisation established solely for that purpose by the employer or the employer's employees or by both.

285. The breadth of these exclusions is that the entities operating employee insurance schemes are ordinarily not themselves subject to prudential regulation by APRA. Further, although ordinarily entities involved in the group purchase of insurance products would be subject to financial services licensing requirements under the *Corporations Act* and possibly also to the provisions of that Act regulating managed investment schemes, ASIC has issued Class Order Co 08/1 which excludes group purchasing bodies from these regulations provided certain conditions are satisfied.[119]

286. The justification for the exclusion is ASIC's view that compliance with the relevant requirements of the *Corporations Act* would be disproportionately burdensome. Given the substantial sums of money involved in union operated schemes (eg the Protect scheme considered in Chapter 5.3 of the Interim Report) that is questionable.

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[118] See the exclusions in paragraphs (d)–(f) of the definition of 'insurance business' in s 3 of the *Insurance Act* 1973 (Cth) and the exclusions in s 12(3) of the *Life Insurance Act* 1995 (Cth) in relation to 'life insurance business'.

[119] See Australian Securities and Investments Commission, *Group purchasing bodies for insurance and risk products*, Regulatory Guide 195, June 2010.

7.1.4 Issues with existing regulation of employee benefit funds

287. The Commission's inquiries to date – see Chapters 5.2, 5.3 and 7.2 of the Interim Report – suggest that the governance of employee benefits funds is often poor or non-existent and that in a number of cases funds are used for improper purposes. This is not a new phenomenon. The Gyles and Cole Royal Commissions identified a number of problems with trade-union associated redundancy funds and income protection schemes.[120]

288. There are a number of possible options to seek to address the governance problems identified.

289. One option would be revoke or amend the relevant ASIC Class Orders referred to above so as to subject the relevant entities to existing legal regulation under the *Corporations Act* that would apply but for the exemption created by the Class Orders.

290. Another option in the context of employee insurance schemes would be to consider amending the definitions of 'insurance business' and 'life insurance business' in the *Insurance Act* 1973 (Cth) and the *Life Insurance Act* 1995 (Cth) respectively, the consequence of which would subject certain relevant entities to prudential regulation under the auspices of APRA.

291. A third option would be to amend s 58PB(4) of the *Fringe Benefits Tax Assessment Act* 1986 (Cth) to impose different or additional governance conditions for the tax exemption provided by s 58PA of that Act.

292. A more broad-ranging option is that advocated by the Australian Industry Group (**AIG**). That organisation made a submission to the Commission outlining what it considered to be a number of 'inappropriate practices' of worker entitlement funds and 'entities wholly or jointly controlled by unions which offer insurance products'.[121] These included:

- distributions from redundancy funds of surpluses to unions and employer association sponsors of funds rather than to employees;

[120] New South Wales, Royal Commission into Productivity in the Building Industry in New South Wales, *Final Report* (1992), Vol 7, p 109; Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 10 (Reform – Funds).

[121] Australian Industry Group, Submission to the Royal Commission into Trade Union Governance and Corruption concerning Issues Paper 4: Relevant Entities, 22 August 2014, pp 3–5.

- redundancy funds making payments to fund members in circumstances where members are not genuinely redundant;
- the use of funds contributed to redundancy funds to pay employees who are on strike; and
- redundancy funds discriminating against non-union members by only providing certain benefits to union members.

293. The AIG submitted that given these inappropriate practices, which were first identified in the Cole Royal Commission but were left unaddressed and have since that time worsened, specific legislation similar to the superannuation laws, to be called the *Worker Entitlement Funds (Governance, Reporting and Supervision) Act*, should be introduced regulating worker entitlement funds and 'entities wholly or jointly controlled by unions which offer insurance products'.[122]

294. The submission contained a detailed list of recommendations for inclusion in such special legislation.[123] These included:

- Provisions imposing duties on directors, trustees or officers of worker entitlement funds and entities wholly or jointly controlled by unions which offer insurance products;
- A 'fit and proper person' test for directors, trustees and officers and procedure for the removal of persons who fail the test;
- Regulatory oversight of 'worker entitlement funds' by APRA;
- Reporting obligations to APRA;
- A prohibition on redundancy funds distributing any amount to a member other than for the purpose of genuine redundancy;
- A prohibition on redundancy funds making distributions to sponsoring unions and employers associations other than the payment of reasonable Board fees to directors;
- A prohibition on redundancy funds making payments to employees who are taking industrial action;
- A prohibition on funds discriminating between union members and non-union members when providing any fund benefits;

[122] Australian Industry Group, Submission to the Royal Commission into Trade Union Governance and Corruption concerning Issues Paper 4: Relevant Entities, 22 August 2014, pp 3, 7–9 and 12.

[123] Australian Industry Group, Submission to the Royal Commission into Trade Union Governance and Corruption concerning Issues Paper 4: Relevant Entities, 22 August 2014, pp 8–9.

- Statutory privacy protections for information relating to contributing employers and fund members;
- A prohibition on commissions, management fees, spotter's fees or similar payments being made to sponsoring unions or employer associations by insurers or brokers in respect of insurance products;
- A prohibition on persons employed by funds carrying on union business;
- A prohibition on funds paying unions for recruiting new members; and
- Penalties for breach of the Act, modelled on the *Corporations Act*.

295. Given the amounts of money currently under management in worker entitlement funds and the value of insurance products held by employee insurance schemes, separate prudential regulation of employee benefit schemes is worthy of detailed consideration.

Questions for discussion:

59. Should ASIC Class Order CO 02/314 be revoked or amended?

60. Should ASIC Class Order CO 08/1 be revoked or amended?

61. Should amendments be made to the definition of 'insurance business' and/or 'life insurance business' in the *Insurance Act* 1973 (Cth) and the *Life Insurance Act* 1995 (Cth) respectively so as bring employee benefits funds providing or purchasing insurance cover within APRA's regulatory oversight?

62. Should amendments be made to the conditions of exemption in s 58PB(4) of the *Fringe Benefits Tax Assessment Act* 1986 (Cth)?

63. Should specific legislation be introduced which subjects some or all employee benefit funds to independent governance, supervision and reporting requirements overseen either by ASIC, APRA or another regulator? If so, what requirements should be imposed?

7.2 CONFLICTS OF INTEREST

296. The Commission's inquiries to date have disclosed a number of examples where enterprise agreements negotiated by a union contain provisions requiring employers to make contributions to particular worker entitlement funds in which

the union has a pecuniary interest. This is not a new phenomenon: the Cole Royal Commission identified the problem more than a decade ago.[124]

297. The income flowing to unions creates a powerful incentive for unions to include provisions in enterprise agreements requiring employers to contribute to particular funds, or purchase particular products, from which unions derive a benefit. This has several potential consequences. First, it can induce unions to engage in coercive conduct to compel employers to contribute to funds, or purchase products, from which unions will derive a benefit. The Universal Cranes case study, considered in Chapter 8.7 of the Interim Report is an example. Secondly, it presents a conflict of interest. Unions are the default bargaining representatives for their members under the *Fair Work Act*. In that role they have a duty to act in the best interest of members in negotiating the enterprise agreement. Given the benefit to the union, there is a great incentive for the union to act contrary to the interest of the employees and be unwilling to negotiate with the employer concerning the relevant terms of the enterprise agreement.

298. There are at least six possible ways these issues could be resolved.

299. *First*, s 172 and/or s 194 of the *Fair Work Act* could be amended to prevent enterprise agreements containing terms requiring employers to make payments to employee benefit funds *at all*. The logic behind this option is simple. If the substantial income flowing to unions from employee benefits funds is a driver of coercive conduct and a source of conflicts of interest in enterprise bargaining then eliminating employee benefit funds from the permitted matters in an enterprise agreement should alleviate the problem. Employees who wish to obtain income protection or sickness insurance can do so by purchasing a commercial product available in the market. Similarly, in respect of redundancy pay: for the first time the *Fair Work Act* provides for mandatory redundancy pay (s 119) and there are numerous existing redundancy funds which workers who would like additional redundancy pay can contribute to.

300. *Secondly*, s 172 and/or s 194 of the *Fair Work Act* could be amended to prevent enterprise agreements containing terms (a) requiring employers to make payments to specific employee benefit funds or to purchase products provided by such funds, or (b) requiring employers to make payments to a fund or scheme with reference to a specific employee benefit fund or product provided by such a fund (eg 'The

[124] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 10 (Reform – Funds).

employer must effect an insurance policy the terms, conditions and benefits of which must be equal or better than that provided by "U-Plus"').

301. This option would still allow an enterprise agreement to require an employer to make contributions to a fund which provides specific benefits, but the benefits would need to be set out in the agreement. By allowing the employer a choice as to the particular fund to which contributions would be made, the conflict of interest problems identified and the potential for coercive conduct may be reduced.

302. The *third* option is similar to the second, but would allow a particular employee benefit fund to be specified as a default fund, to which contributions would be made by the employer in the absence of an election by the employer or employee.

303. The *fourth* option would be to prohibit terms requiring employers to make payments to employee benefits funds other than to approved employee benefit funds. An approved employee benefit fund would be a fund which complies with certain governance requirements eg being an 'approved worker entitlement fund' under the *Fringe Benefits Tax Assessment Act* or being a fund which is subject to regulation by APRA and/or ASIC.

304. *Fifthly*, s 172 and/or s 194 of the *Fair Work Act* could be amended to prohibit enterprise agreements specifying particular employee benefits funds and also prohibit the specification as a default of employee benefit funds in which a union or union official negotiating an enterprise agreement has a direct or indirect pecuniary interest, or from which the union or its officials derives a benefit. For this option to be effective it is likely there would need in addition to be disclosure by the union bargaining representative as per the sixth option discussed below.

305. The *sixth* option is not to make any changes as to the permitted matters in respect of enterprise agreements, but require a union bargaining representative when negotiating an enterprise agreement to disclose the nature and quantum of any interest which the union, its officials or related parties has in any proposed employee benefit fund. One obvious question about such a proposal is what the consequence would be if the bargaining representative failed to disclose its interest. One possibility is that any term negotiated by the bargaining representative in breach of the duty of disclosure would be of no effect. This would however significantly disadvantage the employees concerned.

Questions for discussion:

64. Should amendments be made to ss 172 and/or 194 of the *Fair Work 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;

(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?

65. Should an employee organisation bargaining for an enterprise agreement be required to disclose financial benefits, whether direct or indirect, that would be derived by the employee organisation from the terms of a proposed enterprise agreement? If so, what should the consequences be if an employee organisation breaches the disclosure requirements?

8 SUPERANNUATION FUNDS

306. 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. This is because of the institutional links between trade unions and industry superannuation funds. In most cases, half the members of the board of an industry superannuation fund are nominated by unions and the other half nominated by employers. Industry superannuation funds pay substantial sums to the unions with which they are associated including directors' fees, reimbursement of director's expenses, office rental, advertising expenses and sponsorship. To take one example, for the 2007 to 2014 financial years, TWUSUPER paid in excess of $6 million to the TWU and its branches.[125]

307. However, the unique nature of superannuation, namely that it is compulsory, raises issues which do not arise in respect of employee benefit funds.

8.1 CHOICE OF SUPERANNUATION FUND IN ENTERPRISE AGREEMENTS

308. Employees in Australia are generally able to make a choice as to their superannuation fund. However, employees employed under a collective agreement, enterprise agreement, State award or State agreement are not always entitled to choose their superannuation fund. It remains lawful for such agreements and awards to mandate the fund to which employers must make contributions: *Superannuation Guarantee (Administration) Act 1992* (Cth), ss 32C(6), (6A), (6B), (7) and (8).

309. As the case studies considered in Chapters 6.2 and 6.3 of the Interim Report illustrate, these provisions deny a number of employees employed under an enterprise agreement or State award freedom of choice.

310. 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). Subsequent to finalisation of the Interim Report but before its publication, the Financial System Report Final Inquiry (the **Murray Report**) was released. It included, among other things, a recommendation that these provisions

[125] Interim Report, Vol 1, Chapter 6.2, p 929 [57].

of s 32C, and others which deny employees the ability to have choice of fund, should be repealed.[126]

311. Although the Commission received submissions prior to the publication of the Interim Report from the TWU concerning choice of superannuation fund,[127] those submissions did not address the critical question: why should some, but not other, employees be denied choice of superannuation fund? The conclusion of the Murray Report was that there was no good reason. The Commission invites any interested party to make submissions to the contrary, so that the Commission can properly be informed of the arguments in favour of maintaining the status quo.

Question for discussion:

66. Why should ss 32C(6), (6A), (6B), (7) and (8) of the *Superannuation Guarantee (Administration) Act* 1992 (Cth) not be repealed?

8.2 DEFAULT SUPERANNUATION FUND CLAUSES IN ENTERPRISE BARGAINING AGREEMENTS

312. Separate from the question of choice of superannuation fund is whether unions 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. On the one hand, preventing the union specifying a particular fund as a default would reduce the problems of potential coercion and conflicts of interest. On the other, superannuation is compulsory and the particular industry superannuation fund with which the union is associated may provide a good return for members. It is often said that industry superannuation funds have performed well in comparison with retail superannuation funds.

Question for discussion:

67. What, if any, amendments should be made to ss 172 and/or 194 of the *Fair Work Act* concerning the permissible terms in an enterprise agreement in relation to superannuation funds?

[126] Commonwealth, Financial System Inquiry Final Report, November 2014, pp 131–132.

[127] Interim submissions on behalf of the Transport Workers' Union of Australia, 14 November 2014, pp 24–30 [103]–[119]. The TWU's contentions were examined in Interim Report, Chapter 6.2, pp 925–928 [50]–[55].

9 CORRUPTING BENEFITS

9.1 INTRODUCTION

313. Throughout the Commission's enquiries to date, two interrelated factual scenarios have reared their heads repeatedly. They have taken different guises, occurred at different times and at different places, but they raise common issues:

1. An employer makes, offers or agrees to make, a payment or payments to a union, union official or to a relevant entity, or otherwise confers a benefit on such a person in order:

   (a) to achieve 'industrial peace';

   (b) to avoid other expressly or impliedly threatened conduct by a union or union official which if it occurred would be detrimental to the employer (eg unlawful bans, pickets or unlawful industrial action); or

   (c) to obtain a benefit for the employer at the expense of the employer's workers or at the expense of one of the employer's competitors.

2. A union official on behalf of himself or herself, the union or a relevant entity obtains or solicits a payment or payments, or other benefit, from an employer in return for which the union official promises:

   (a) that there will be 'industrial peace';

   (b) not to engage in threatened conduct which if it occurred would be detrimental to the employer; or

   (c) to exercise the union official's powers in such a way as to confer a benefit on the employer at the expense of the employer's workers or the employer's competitors.

314. The characterisation of such payments depends on the specific circumstances arising in each case. In some circumstances at least such payments can be described as 'bribes', others as 'secret commissions' and others still as 'blackmail money'. However, it is convenient for present purposes to give all such payments or benefits the broader label, 'corrupting benefits': cf *Criminal Code* (Cth), s 142.1.

315. The giving and taking of such benefits is not a new phenomenon. For example, the Cole Royal Commission identified the problem particularly with respect to the purchase of 'casual tickets' on building sites in Western Australia whereby a builder would make payments to a union in the hope of avoiding impliedly threatened unlawful industrial action.[128]

316. There are a number of problems with the seeking and making of corrupting benefits, which are usually, but not always, in the form of payments of money. In some circumstances, the making of a payment will increase the cost of an employer doing business, and consequently act as a drain on competitiveness and ultimately lead to higher prices for consumers. Where a payment is made to the union or union official to forego a legitimate demand of members, the members of the union will be disadvantaged to the benefit of the employer and the union or union official.

317. More generally, the seeking and making of such payments has a tendency to foster a culture within the unions which seek, and employers which make, such payments which is antithetical to the rule of law. Threatening and bullying behavior by union officials is rewarded. Likewise, anti-competitive behavior by employers. Genuine safety and industrial issues are ignored to the advantage of union officials and employers. In certain circumstances, payments can also lead to the entrenchment of the power of certain union officials at the expense of union members: see, eg, the situation concerning the Australian Workers' Union – Workplace Reform Association.

9.2 EXISTING LAWS PROHIBITING CORRUPTING BENEFITS

318. There are existing laws which attempt to deal with the solicitation and making of corrupting benefits.

9.2.1 Blackmail and extortion

319. Where a union official demands a payment 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.[129] Apart from the criminal

[128] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 3, p 207; Vol 7, pp 237–238, 245–246, 311–312; Vol 9, pp 219–225.

[129] *Criminal Code* 2002 (ACT), s 342; *Crimes Act* 1900 (NSW), s 249K; *Criminal Code* (NT), s 228; *Criminal Code* (Qld), s 415; *Criminal Law Consolidation Act* 1935 (SA), s 172; *Criminal Code* (Tas), s 241; *Crimes Act* 1958 (Vic), s 87; *Criminal Code* (WA), ss 397–398.

consequences, 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 person loss (eg making a payment) may be civilly liable for damages.[130] However, such civil cases are 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 intimidator.

9.2.2 Secret commissions

320. In other circumstances the payment may be a secret or corrupt commission.

321. Each of the States and Territories have laws criminalising the giving or taking of what are variously described as secret commissions, corrupt commissions or corrupt benefits.[131] Unfortunately, the laws differ from jurisdiction to jurisdiction but a typical example is s 266(1) of the *Criminal Code* (Tas) which provides:

> '(1) Any person who –
>
> (a) corruptly gives or agrees to give, or offers to an agent, or to any other person on his behalf; or
>
> (b) being an agent, corruptly solicits, receives, obtains, or agrees to accept for himself or any person other than his principal –
>
> any gift or consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to the same, is guilty of a crime.'

322. A common, but not universal, feature of these provisions is that they apply to 'agents' who receive rewards as an inducement to do some act in the 'principal's affairs or business' contrary to the agent's duty. Depending on the jurisdiction involved, there are potential difficulties applying these provisions to union officials, but in some circumstances at least the solicitation of the payment by a union official in breach of his or her fiduciary duty could give rise to criminal

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[130] *Rookes v Barnard* [1964] AC 1129 at 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* (2nd ed, OUP, 2010), pp 157–158.

[131] *Criminal Code* 2002 (ACT), s 357; *Crimes Act* 1900 (NSW), s 249B; *Criminal Code* (NT), s 236; *Criminal Code* (Qld), ss 442B–BA; *Criminal Law Consolidation Act* 1935 (SA), ss 149–150; *Criminal Code* (Tas), s 266(1); *Crimes Act* 1958 (Vic), s 176; *Criminal Code* (WA), ss 529–530.

liability under these provisions. Likewise the payment by an employer may give rise to criminal liability on the part of the employer.

323. In terms of civil remedies, the solicitation of payments by a union officer which involve a breach of the officer's fiduciary duty, such as where the payment is made to the union to achieve industrial peace but the payment finds its way to the union official rather than the union, will expose the officer to claims for compensation, or to an obligation to account.[132] However, at general law an action for breach of fiduciary duty must be taken by the union itself and given that the union official involved may be in charge of the union the prospect of swift action being taken by the union is limited. Where the employer induces the union official to breach his or her fiduciary duty, or knowingly assists the union official to breach his or her fiduciary duty as part of a dishonest and fraudulent scheme, the employer may be civilly liable to the union.[133]

9.2.3 Other relevant laws

324. In cases where the benefit is provided pursuant to an anti-competitive agreement between the employer and the union/union official the employer may be civilly liable under the *Competition and Consumer Act* 2010 (Cth).

9.2.4 Inadequacy of existing laws

325. The existing laws governing what have been described as 'corrupting benefits' given to and taken by union officials are arguably unsatisfactory in a number of respects. In the first place the laws concerning secret commissions differ significantly between jurisdictions and are not well suited to application to the officers of the registered organisations. A second point is this. Notwithstanding the existing criminal laws the Commission's inquiries indicate that such payments continue to be sought and made. This raises for consideration whether additional legal measures are needed to try to eliminate the giving and receiving of corrupting benefits.

[132] See generally Interim Report, Vol 1, Chapter 2.1, pp 43–44 [18].

[133] See generally Interim Report, Vol 1, Chapter 2.1, pp 44–45 [19]–[20].

9.3 DISCLOSURE OF BENEFITS MADE TO UNIONS, UNION OFFICIALS AND RELATED ENTITIES

326. One obvious mechanism for discouraging the making and receiving of corrupting benefits is increased disclosure in relation to payments to unions, union officials and related parties. As the Final Report of the Cole Royal Commission observed:

> '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.'[134]

327. General issues concerning disclosure are discussed in detail in Chapter 3. In relation to this matter, the Cole Royal Commission recommended in the context of the building industry that registered organisations lodge a statement showing, in relation to each donation exceeding $500, the amount of the donations, the purpose for which the donation was made and the name and address of the person who made the donation: Recommendation 145. It was also recommended that clients, head contractors and subcontractors notify the regulator of any demand or request to make a donation exceeding $500 to be made to or at the direction of a registered organisation or an official, employee, delegate or member of a registered organisation: Recommendation 147. It was proposed that failure to comply with a disclosure requirement would result in potential civil penalties of up to $100,000 for a body corporate and $20,000 otherwise.

328. Whilst disclosure by registered organisations may be useful, such disclosure could easily be circumvented by the employer making the payments to a relevant entity rather than a union itself. Any disclosure requirements would therefore need to also apply to relevant entities.

Question for discussion:

68. Should registered organisations, and any relevant entities, be required to disclose publicly information in respect of all payments made to them exceeding a monetary threshold?

[134] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1, p 132.

9.4 CRIMINAL LIABILITY FOR MAKING OR RECEIVING CORRUPTING BENEFITS

329. In addition to disclosure, another way to combat the problems associated with corrupting benefits may be to introduce specific legislative provisions outlawing the giving or receiving of benefits which corrupt union officials, with significant penalties both for employers who make such benefits and for persons who solicit or receive such benefits.

330. Such laws could be modelled on existing Commonwealth criminal laws. Section 70.2 of the *Criminal Code* (Cth) prohibits the bribery of foreign public officials with severe penalties for those convicted. In essence, a person who provides a benefit to another person which is not legitimately due to that other person, and which is made with the intention of influencing a foreign public official in the conduct of that official's duties in order to obtain an advantage which is not legitimately due, is guilty of an offence. An individual found guilty of the offence is liable to imprisonment for 10 years, or a fine not exceeding 10,000 penalty units (currently $1.7 million). A body corporate found guilty of the offence is liable to a fine which is the greater of (a) 100,000 penalty units (currently $17 million), (b) where the value of the benefit can be determined, 3 times the value of the benefit, and (c) where the value of the benefit cannot be determined, 10% of the annual turnover of the body corporate.

331. A provision in a related field is s 142.1 of the *Criminal Code* (Cth). That provision prohibits the giving and receiving of corrupting benefits in relation to Commonwealth public officials. In relation to giving a corrupting benefit, unlike s 70.2, s 142.1 requires that the provision of the benefit be made 'dishonestly'. But it is not necessary to establish that the benefit was made with an intention to influence a Commonwealth public official in relation to the official's duty. It is enough to establish that the receipt or expectation of the receipt would 'tend to influence' the Commonwealth public official in the exercise of the official's duties.

332. A possible approach would be to adopt and adapt those provisions, and the State enactments concerning secret and corrupt commissions, to the present context. If such provisions were adopted fairness may require the introduction of a specific defence to a person who gives or receives a benefit under duress. It may also be appropriate to have a mechanism by which regulatory approval can be obtained in advance of the making of certain legitimate payments. A statutory provision which may accommodate these matters is set out below for consideration:

Corrupting benefits given to or received by officers or employees of organisations registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth)

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) corruptly to exercise the officer or employee's duties to the organisation or branch or its members as a whole; or

(ii) corruptly to exercise 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 organisation or branch, including its affairs or members, 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.

Receiving a corrupting benefit

(2) A person is guilty of an offence if:

(a) the person:

(i) requests, whether expressly or impliedly and whether by threats or otherwise, a benefit for himself, herself or another person; or

(ii) receives or obtains a benefit for himself, herself or another person; or

(iii) agrees to receive or obtain a benefit for himself, herself or 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 person):

(i) corruptly to exercise the officer or employee's duties to the organisation or branch or its members as a whole; or

(ii) corruptly to exercise 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 organisation or branch, including its affairs or members, to the person providing or agreeing to provide the benefit 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.

Defences

(3) A person does not commit an offence against (1) if:

(a) the provision, offer of the provision, or promise of the provision of the benefit is approved by the relevant authority under (5); or

(b) the person establishes on the balance of probabilities that:

(i) the benefit was first demanded by another person;

(ii) the demand was made with menaces; and

(iii) immediately after the demand was made the person informed the relevant authority of the demand and gave the relevant authority all reasonable assistance in all of the circumstances.

(4) A person does not commit an offence against (2) if:

(a) the request, receipt, obtaining or agreement to receive or obtain the benefit is approved by the relevant authority under (5);

(b) the person establishes on the balance of probabilities that:

(i) the benefit was first offered by another person;

(ii) the offer was made with menaces; and

(iii) immediately after the offer was made the person informed the relevant authority of the demand and gave the relevant authority all reasonable assistance in all of the circumstances.

(5) On written application to the relevant authority being made, the relevant authority may in writing authorise future conduct which but for this subsection would constitute an offence against subsection (1) or (2).

(6) The relevant authority must not grant an authorisation under subsection (5) unless:

(a) the written application for the relevant authority contains the prescribed information; and

(b) the relevant authority is satisfied, having regard to the value of the benefit, the circumstances in which it is proposed to be made, the purpose for which the benefit is proposed to be made, and the measures in place to ensure that the proposed purpose is fulfilled, that the benefit is legitimate.

(7) For the avoidance of doubt, for the purposes of subsections (3)(b) and (4)(b), reasonable assistance may, in all the circumstances, include engaging in conduct which, but for subsection (8), would involve an offence against subsection (1) or (2).

(8) A person does not commit an offence against subsection (1) or (2) for any act done as part of providing reasonable assistance to the relevant authority under subsections (3)(b) and (4)(b).

(9) An offence against subsection (1) or (2) 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.

(10) An offence against subsection (1) or (2) 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.

(11) 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.

333. If provisions along these lines were thought appropriate, it may also be appropriate to consider whether civil remedies should be available to a person who has suffered loss as a result of a contravention of such provisions. For example, suppose an employer made a payment to a union official in return for promises by the union official to exercise the union official's right of entry powers in relation to one of the employer's competitors inappropriately. In such circumstances it may be appropriate to entitle the employer's competitor to sue the employer or the union official for any loss suffered.

Questions for discussion:

69. Should specific legislation be introduced making it a criminal offence for a person to give or receive a corrupting benefit payment to an organisation, an officer of such an organisation, or a related party of such an organisation? If so, should the legislation take the form of the draft provisions set out above?

70. Should specific legislation be introduced allowing a person who has suffered loss as a result of the giving or taking of a corrupting benefit to recover damages for the loss caused?

10 BUILDING AND CONSTRUCTION

334. Over the last 30 years there have been at least 5 Royal Commissions touching upon the conduct of unions in the building and construction industries: the 1982 Winneke Royal Commission, the 1984 Costigan Royal Commission, the 1992 Gyles Royal Commission, the 2003 Cole Royal Commission and the present Commission. Each of the previous inquiries has pointed to systemic unlawful and corrupt conduct within the building and construction industry. Chapter 8 of the Interim Report arguably suggests that little has changed.

335. The previous Royal Commissions and the material considered in the Interim Report suggest that there is within the Australian building and construction industry a systemic culture of lawlessness and defiance of the law. Such a culture threatens productivity, established freedoms and the rule of law more generally. A systemic culture arguably requires systemic reforms to root out unlawful conduct.

10.1 RESTORING THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION?

336. A lot has been said and written about the Australian Building and Construction Commission (**ABCC**). There have been at least three inquiries concerning it: one inquiry conducted by the Hon Murray Wilcox QC commissioned in 2008 (the **Wilcox Report**) and two inquiries by the Senate Education and Employment Committee at the end of 2013 and in March 2014. There have been numerous public statements about it and the merits and demerits of its 'restoration'. Set out below is a summary of the key background.

10.1.1 Background

337. The Cole Report identified widespread disregard of court and tribunal orders, use of inappropriate industrial power, hundreds of cases of lawlessness and a culture of intimidation within the construction industry.[135] The report recommended that an Australian Building and Construction Commission be established with powers to monitor, investigate and enforce industrial law in connection with building and construction: Recommendations 177–180.

[135] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 1 pp 6 [17] and 155.

338. Those recommendations were implemented by the Howard Government in the *Building and Construction Industry Improvement Act* 2005 (Cth) (***BCII Act***). The *BCII Act* established the ABCC to monitor, investigate and enforce breaches by participants in the building industry of federal industrial law. In addition, the *BCII Act* prohibited unlawful industrial action, coercion and discrimination in connection with the building industry.[136] Controversially, the ABCC was also given the power to compel witnesses to give evidence or provide documents or face up to six months' imprisonment.[137]

339. In 2008, the Labor Government commissioned a report by the Hon Murray Wilcox QC into the transition process for the building and construction industry to the new Fair Work regime.[138] The Wilcox Report recommended that the power to require witnesses to give evidence be retained, albeit drastically curtailed and subject to a 5 year sunset period: recommendations 3 and 4. The report also 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 *Fair Work Act* would apply: recommendation 2.

340. In 2012, the Gillard Government introduced the *Fair Work (Building Industry) Act* 2012 (Cth) (***FWBI Act***) which replaced the former Howard Government's *BCII Act*. The *FWBI Act* abolished the ABCC and replaced it with the Fair Work Building Industry Inspectorate (**FWBII**). The *FWBI Act* also followed the recommendations in the Wilcox Report and removed the industry specific prohibitions on unlawful industrial action, coercion and discrimination.

341. The *FWBI Act* also significantly curtailed the compulsory examination powers available. Under the *FWBI Act*, an examination notice is not issued by the Director of the FWBII. Instead it must be issued by a designated presidential member of the AAT: s 45. Further, there is an 'Independent Assessor' who can 'turn off' the operation of the compulsory examination powers for particular projects: s 39. Finally, there is a sunset provision by which the powers will cease to exist from 1 June 2015 onwards: s 46. At the time of writing this Discussion Paper, Parliament had agreed to extend the existing powers for an additional 2 years to 1 June 2017, but that change had not yet received the Royal Assent.

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[136] *Building and Construction Industry Improvement* Act 2005 (Cth) ss 36, 37, 43–44, 45, 46.

[137] *Building and Construction Industry Improvement* Act 2005 (Cth) s 52(1).

[138] M Wilcox QC, *Transition to the Fair Work Act for the Building and Construction Industry*, March 2009.

342. Reversing the changes introduced by the *FWBI Act* and reinstating the ABCC were key objectives for the Coalition during the 2013 election. The Coalition introduced the *Building and Construction Industry (Improving Productivity) Bill* 2013 (**BCIIP Bill**) to Parliament in November 2013, which passed in the House of Representatives but is yet to achieve passage of the Senate. The BCIIP Bill is intended to 'substantially replicate' the *BCII Act* and reestablish the ABCC.[139] The BCIIP Bill is more ambitious than the *BCII Act* in some areas, extending the ABCC's remit to the transport and supply of goods to building sites to prevent the distribution process being used to disrupt work.[140]

10.1.2 Submissions received

343. During 2014, the Commission received a number of submissions to the effect that the abolition of the ABCC in 2012 was a mistake and lawlessness in the construction industry remains an ongoing problem.

344. The State of Victoria supported the reinstatement of the ABCC.[141] The State of New South Wales raised concerns about alleged criminal activity in the building and construction industry,[142] and submitted that the introduction of the ABCC reduced construction costs for major infrastructure projects by 11%.[143] New South Wales supported the re-introduction of the ABCC as a potential solution to this problem.[144]

345. Boral submitted that the CFMEU had engaged in an orchestrated illegal campaign against Boral for over 20 months and was impervious to injunctions, the risk of contempt findings, damages or civil penalties. Boral submitted that its experience illustrates that the existing law and enforcement procedures are inadequate to combat the misuse of union power.[145] Boral called for the reinstatement of the ABCC to respond to these problems.[146]

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[139] Explanatory Memorandum, Building and Construction Industry (Improving Productivity) Bill 2013 (Cth), p 50.

[140] Note that this does not extend to manufacturing. See Explanatory Memorandum, Building and Construction Industry (Improving Productivity) Bill 2013 (Cth), p 12.

[141] Written submissions of the State of Victoria, 28 October 2014, p 71.

[142] New South Wales Government Submission, August 2014, [3.12]–[3.13].

[143] New South Wales Government Submission, August 2014, [1.12].

[144] New South Wales Government Submission, August 2014, [3.7]–[3.11].

[145] Boral Law Reform Submission, p 1.

[146] Boral Law Reform Submission, p 5.

346. The ACTU did not make submissions to the Commission. However, in their 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. The ACTU submitted to the Productivity Commission that in the five quarters since the abolition of the ABCC for which the ABS has released data, the rate of disputation in the industry has been below the ABCC-era average three times (in December 2012, June 2013, and September 2013) and above it twice (in September 2012 and March 2013).[147] The ACTU submissions to the Productivity Commission did not address the problem of lawlessness in the construction industry.

10.1.3 Real questions for debate

347. For the purposes of this Discussion Paper, it is important to focus on the central policy issues for debate concerning the ABCC, rather than attempting to canvass exhaustively every topic which has been the subject of submission and contention over the years. These central issues may be distilled into five specific questions.

348. The *first* question is whether there should be a separate body whose role is to investigate and enforce the *Fair Work Act* and other relevant industrial laws in connection with building industry participants. Both the Cole Report and Wilcox Report supported the existence of such a separate body, as did the Howard and Gillard Governments which respectively adopted those reports.

349. The *second* question, which only arises if the first question is answered in the affirmative, is what such a separate body should be called. Although this issue is largely symbolic, the current terminology is arguably confusing. The Fair Work Building Industry Inspectorate is routinely, but wrongly, referred to as Fair Work Building and Construction. Contrary to what the name suggests, it is an entity entirely separate from the FWC.

350. The *third* question is what investigatory and information gathering powers the body (or bodies) charged with the enforcement of the *Fair Work Act* and other relevant industrial laws in connection with the building industry should have. This question arises whether or not there should be an ABCC.

351. Those who have opposed the ABCC, and its 'revival', have argued that its coercive investigatory powers – which essentially consisted of the power to issue an

147 ACTU Submission to the Productivity Commission Public Infrastructure Inquiry, p 22.

examination notice to require the production of documents or to require a person to answer questions on oath – were excessive.[148] Supporters of this view argue that the previous powers of the ABCC and the powers proposed for the ABCC in the BCIIP Bill go further than the powers of, for example, the Australian Competition and Consumer Commission (**ACCC**), and that the 'checks and balances' in the present Act are necessary.

352. Aspects of apparent concern include the abrogation of the privilege against self-incrimination in respect of examinations conducted under the Act, the absence of judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (***ADJR Act***) of the decision to issue an examination notice, and the application of coercive powers in respect of what are almost entirely civil contraventions.

353. The opposing view is that, in truth, the powers are no more coercive than those possessed by other regulators charged with investigating and enforcing Commonwealth law, such as ASIC and the ACCC. The privilege against self-incrimination is routinely expressly abrogated in connection with investigations by Commonwealth regulatory authorities, including in respect of breaches of the *RO Act*.[149] As to the absence of judicial review under the *ADJR Act*, judicial review is still available under s 39B of the *Judiciary Act* 1903 (Cth). Coercive powers in respect of civil contraventions are commonplace: ASIC, the ACCC, the General Manager of the FWC and the Commissioner of Taxation all possess such powers.

354. The *fourth* question is whether there should be specific industrial laws that apply only in respect of building industry participants.

355. The *fifth* question, which is related to the fourth, is whether there should be higher penalties that apply in respect of contraventions of existing industrial laws within the building industry.

356. The principal argument against differential treatment is that it is discriminatory. The contrary argument is that discrimination exists not only in treating differently things which are alike but also in treating alike things which are different. If there is a difference between conduct in the building industry and conduct in other

[148] A convenient source of many of the criticisms is G Williams and N McGarrity, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *AJLL* 244.

[149] See eg, *Australian Securities and Investments Act* 2001 (Cth), s 68; *Competition and Consumer Act* 2010 (Cth), s 155(7); *Fair Work (Registered Organisations) Act* 2009 (Cth), s 337(4).

industries then it may not be appropriate to treat the building industry in the same way as other industries.

357. In its submissions to the Commission, Master Builders Australia made the following submission:

> 'The CFMEU has a long history of prior contraventions of the workplace standards established by various industrial relations statutes. Most of the contraventions have occurred within the Construction and General Division of the CFMEU. An historical pattern of unlawful behaviour is demonstrated by the 107 court judgments against building unions chartered by Masters Builders in the table shown at Attachment A to this submission.'[150]

358. The judgments attached spanned a 10 year period from 2003 to 2013. The submission went on to argue that the 'CFMEU's record of behavior suggests there is a culture of non-compliance with industrial laws within the organisation, particularly in its dealing within the construction industry'. Arguably, such a culture would justify 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 BCIIP Bill seeks to do, simply reflects the fact that there are real differences between the construction industry and others.

Questions for discussion:

71. Should there be a regulatory body, separate from the Office of the Fair Work Ombudsman, tasked with the role of investigating and enforcing the *Fair Work Act* and other relevant laws in connection with the building industry participants? If so, what should that body be called?

72. What investigatory and information gathering powers should be possessed by the body with the role of investigating and enforcing the *Fair Work Act* (and possibly other relevant laws) in connection with building industry participants?

73. Should there be specific industrial laws that apply only in respect of building industry participants (eg laws prohibiting unlawful pickets)?

[150] Master Builders Australia, Submission to the Royal Commission into Trade Union Governance and Corruption on Duties of Union Officials, 11 July 2014, p 2.

74.	Should the penalties for contravention of industrial laws by building industry participants (eg coercion, unlawful industrial action) be greater than those which currently apply under the *Fair Work Act*?

10.2 CONDUCT IN BREACH OF COURT ORDERS

359. From time to time, courts can grant and have granted injunctive relief restraining the carrying out of certain unlawful conduct in connection with the building industry. On a number of occasions, the CFMEU and its officers have flouted these injunctions. Although a number of contempt proceedings have been brought successfully against the CFMEU, such proceedings are costly, lengthy and the penalties imposed appear to pose no meaningful deterrent.

360. In a society governed by the rule of law, there must exist a mechanism by which court orders can be speedily enforced. The public interest in enforcing court orders is particularly great where the orders are injunctions to restrain unlawful pickets, secondary boycotts, and other blockades in respect of building sites. The Boral case study considered by the Commission suggests that the current system of enforcing court orders to restrain unlawful conduct on building sites is fundamentally defective.

361. One possible solution would be to adapt existing police 'move on' powers to allow police to move on any person at a site in respect of which an injunction has been made for a period no longer than the period of the injunction. Any person who refused to comply with such a 'move on' order would commit an offence punishable either by a substantial fine or term of imprisonment. Conviction would be an automatic ground for disqualification from office in a registered organisation.

362. A similar solution would be to introduce legislation allowing a police officer to read out a court order prohibiting a picket, boycott or ban of a building site and calling upon the persons to disperse. Any person still present at the site within a specified period after that time (eg 15 minutes) would commit an offence, subject to establishing that they had a legitimate and lawful purpose of being at the premises at the time. The offence would be punishable by a substantial fine or term of imprisonment. Again, conviction for such an offence would be an automatic ground for disqualification from office in a registered organisation.

Question for discussion:

75. Should Commonwealth legislation be introduced for the more effective enforcement of injunctions and other court orders granted to restrain unlawful conduct by building industry participants? If so, what form should that legislation take?

10.3 SECONDARY BOYCOTTS

363. The Interim Report considered two case studies concerning secondary boycotts contrary to ss 45D and 45E of the *Competition and Consumer Act* 2010 (Cth) (***Competition and Consumer Act***). In brief, s 45D prohibits two persons acting in concert from hindering or preventing a third person trading with a fourth person, where the purpose and effect or likely effect is to cause substantial loss or damage to the business of the fourth person. Section 45E prohibits certain arrangements which indirectly lead to a secondary boycott.

364. 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. In particular, the Boral case study 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. Boral estimated that it suffered losses of between $8–$10 million up until June 2014 and that its market share fell from 35–40% in the 2011–2013 financial years to 9% in the 2014 financial year as a result of the secondary boycott orchestrated by the CFMEU.[151]

10.3.1 Penalties

365. The Boral and Universal Cranes case studies suggest that the existing penalties for contravention of ss 45D and 45E are ineffective deterrents. The maximum penalty is $750,000 in respect of a body corporate and $500,000 in respect of a person who is not a body corporate.

366. In respect of other anti-competitive contraventions by bodies corporate, the maximum penalty is the *greater* of:

(a) $10,000,000;

[151] Interim Report, Vol 2, Chapter 8.2, pp 1055 [121] – [122].

(b) if the Court can determine the value of the benefit that the body corporate has obtained that is reasonably attributable to the contravention – 3 times the value of that benefit; and

(c) if the Court cannot determine the value of that benefit – 10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the contravention occurred.

367. Arguably, those penalties should apply equally to breaches of ss 45D and s 45E. Such a recommendation was made in the Harper Review.[152]

Question for discussion:

76. Should the penalties for breaches of ss 45D and 45E of the *Competition and Consumer Act* be brought into line with the penalties for other contraventions of Pt IV of that Act?

10.3.2 Cartel conduct

368. The Interim Report considered the application of the cartel provisions of the *Competition and Consumer Act* in respect of the CFMEU's conduct concerning Boral and concluded that the CFMEU may have contravened those provisions.[153]

369. Boral, however, submitted that the cartel provisions of the *Competition and Consumer Act* should be clarified to remove any existing doubt that cartel conduct includes breaches of ss 45D and 45E of the Act engaged in for the 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.[154]

370. The operation of the current cartel provisions of the *Competition and Consumer Act* is complex. The Harper Review recommended substantial amendments to the current provisions.[155] 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.

[152] Commonwealth, Competition Policy Review, *Final Report* (March 2015), Recommendation 36.

[153] Interim Report, Vol 2, Chapter 8.2, pp 1093–1100.

[154] Boral Law Reform Submission, p 3.

[155] Commonwealth, Competition Policy Review, *Final Report* (March 2015), Recommendation 27 and p 503 ff.

Question for discussion:

77. In principle, should secondary boycott conduct engaged in for a market sharing purpose be proscribed cartel conduct for the purposes of the *Competition and Consumer Act*?

10.3.3 Requirements on competitors of target of secondary boycott

371. 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 'target' of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target.[156]

372. 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. In some circumstances such conduct could involve a misuse of market power, but not invariably.

373. Rather than introducing a blanket prohibition on knowing supply by a competitor, another option would be to prevent knowing supply unless the competitor had first notified the ACCC of the circumstances of the secondary boycott.

Question for discussion:

78. Should the *Competition and Consumer Act* be amended to prohibit a person (A) in competition with the target of a secondary boycott (C) supplying a product or service to another person (B) in substitution for a supply by C where A knows (or reasonably suspects) that B's decision to substitute is part of a secondary boycott against C (**knowing supply**)? Alternatively, should persons in competition with the target of a secondary boycott be prevented from knowing supply unless they have first notified the ACCC (or appropriate regulator) of their knowledge of the secondary boycott?

[156] Boral Law Reform Submission, pp 2 and 11.

10.3.4 Appropriate regulator to enforce secondary boycott provisions

374. Another problem with the current regulatory regime is that the ACCC is generally unwilling or unable to investigate and prosecute breaches of the secondary boycott provisions. One of the recommendations of the Harper Review was that the ACCC should pursue secondary boycott cases with increased vigour.[157] As adverted to in the Interim Report, there may be a number of root causes for lack of enforcement.[158] Whatever the causes, the fact is that most secondary boycotts arise in the industrial relations sphere and involve trade unions. Arguably, the ACCC is not best placed to investigate such contraventions.

Question for discussion:

79. Which regulatory authority should investigate and prosecute secondary boycott contraventions? What information gathering and investigatory powers are needed by the regulator to achieve those functions?

10.4 RICO

375. In its submissions to the Commission, Boral submitted that consideration ought to be given to the introduction in Australia of laws based on the United States *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § 1961 et seq (**RICO**) to combat the CFMEU's activity on Melbourne building sites. From time to time, there have been statements to like effect by some media commentators concerning illegal activity in the building and construction industry.

10.4.1 What is RICO?

376. The RICO regime is a system of regulation of 'racketeering' based on United States anti-trust law. In 1968, acting on concerns expressed by the Kefauver Committee, the United States Senate Select Committee on Improper Activities in the Labour or Management Field recommended the introduction of legislation to prevent the investment of unlawfully derived money in lawful enterprises. Two pieces of legislation were initially proposed. The first amended United States anti-trust laws to make the investment of unreported income unlawful. The second piece of legislation was enacted as Part IX of the *Organized Crime Control Act* of 1970 and became what is now known as the RICO statute.

[157] Commonwealth, Competition Policy Review, *Final Report* (March 2015), Recommendation 36.

[158] Interim Report, Vol 2, Chapter 8.2, p 1107 [247(d)].

377. In very broad terms, the scheme of RICO is as follows. Pursuant to 18 U.S.C. § 1962 it is unlawful for any person:

(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;

(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 such enterprise's affairs through a 'pattern of racketeering activity' or collection of an unlawful debt;

(d) to conspire to do any of the things mentioned in paragraphs (a)–(c).

378. A 'pattern of racketeering' requires at least two acts of 'racketeering activity' the last of which is within 10 years of a previous act.[159] 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.[160] An 'enterprise' includes a partnership, corporation, association, union or 'group of individuals associated in fact although not a legal entity'.[161] The penalties for breaching RICO provisions tend to be more severe than the penalties for breaching the equivalent offence at a State level.

379. A person who violates the prohibitions in 18 U.S.C. § 1962 is liable to criminal and civil penalties. Criminal conviction under RICO gives rise to a maximum penalty of 20 years' imprisonment.[162] In addition, the legislation permits a person injured by reason of a RICO violation to sue to recover treble the damages sustained.[163] The Courts also have broad power to restrain further RICO violations, including ordering divestment of assets, prohibition of engaging in the activities of an enterprise and the dissolution and reorganisation of an enterprise, making due

[159] 18 U.S.C. § 1961(5).

[160] 18 U.S.C. § 1961(1).

[161] 18 U.S.C. § 1961(4).

[162] 18 U.S.C. § 1963(a).

[163] 18 U.S.C. § 1964(c).

provision for the rights of innocent persons.[164] In addition, the Attorney-General may designate a civil RICO case as one of 'general public importance' following which the case is expedited.[165]

380. These provisions have been used, with some success, to pursue organisations as diverse as the Hell's Angels Motorcycle Club, the Catholic Church, the Gambino Crime Family, the Los Angeles Police Department and Major League Baseball.

10.4.2 Adoption in Australia?

381. The Costigan Royal Commission into the Ship Painters and Dockers Union examined the potential for RICO provisions to be adopted in Australia in the context of the union movement.[166] The Costigan Report made the following observations on the adoption of RICO provisions in Australia:

> 'Whilst the adoption of this law in Australia would require careful consideration and not merely blind imitation, it is my view that it is an essential step to be taken in combating organised crime in this country. There are difficulties arising out of the Federal Constitution of this country. The interstate trade and commerce power is the obvious head of power. It is the head of power on which U.S. Congress has acted. However these difficulties are no more severe than they are in the United States. Ideally if the terms of the legislation could be agreed, the matter should be the subject of joint action by the Commonwealth and the several States in the same fashion as company and securities law has been enacted.'[167]

382. It may be noted that the corporations power (s 51(xx) of the *Constitution*) is now commonly relied upon in support of Commonwealth legislation and may be viewed more amply than it was in 1984.

383. In its submissions to the Commission, Boral argued that the introduction of RICO-style legislation may be suitable to respond appropriately to organisations which abuse their power through illegal means.[168] Boral submitted:

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[164] 18 U.S.C. § 1964(a).

[165] 18 U.S.C § 1966.

[166] Commonwealth, Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, *Final Report* (1984).

[167] Commonwealth, Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, *Final Report* (1984), Vol 3, p 229.

[168] Boral Law Reform Submission, p 11.

> 'The CFMEU's control over building sites in Melbourne allows it to illegitimately coerce suppliers and builders not to contract freely with the union's chosen enemies.
>
> The legal avenues currently available to combat illegal union activity have not proven effective to deter unions prepared to act in defiance of the existing laws and legal sanctions.'[169]

384. There are substantial arguments against the introduction of RICO-style laws. Opponents of RICO provisions are critical of the vague wording of the statute. Concepts like 'pattern' do not lend themselves easily to definition, suggesting something more than isolated or intermittent incidents of the proscribed behavior. Likewise 'enterprise' is a vague concept.

385. Apart from the breadth of the RICO statute, there are already existing State and Commonwealth laws directed at combatting organised crime, which was the primary reason for the introduction of the RICO statute in the United States. For example, the Commonwealth and States have a variety of provisions enabling the confiscation of the proceeds of crime and the making of 'unexplained wealth orders'.[170]

10.4.3 Consideration

386. The introduction of RICO-style laws to Australia would be a significant step requiring detailed and careful consideration. Thus far, the Commission has only received limited submissions on the topic. The Commission invites interested persons to make submissions on this topic.

Question for discussion:

80. Is there a need for Australia to adopt RICO-style laws to combat unlawful activities in the building and construction industry, or more generally? If so, what form should those laws take?

19 May 2015

[169] Boral Law Reform Submission, p 11.

[170] *Proceeds of Crime Act* 2002 (Cth); *Confiscation of Criminal Assets Act* 2003 (ACT); *Criminal Assets Recovery Act* 1990 (NSW); *Criminal Property Forfeiture Act* (NT); *Criminal Proceeds Confiscation Act* 2002 (Qld); *Criminal Assets Confiscation Act* 2005 (SA); *Crime (Confiscation of Profits) Act* 1993 (Tas); *Confiscation Act* 1997 (Vic); *Criminal Property Confiscation Act* 2000 (WA).