

## LAW, POLITICS AND IDEOLOGY: THE REGULATORY RESPONSE TO TRADE UNION CORRUPTION IN AUSTRALIA

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### I INTRODUCTION

Corruption has emerged as a significant problem within Australian trade unions over the last decade. The issue leapt into the newspaper headlines in 2011 following the emergence of details of corrupt conduct by senior officials of the Health Services Union ('HSU'). As well as the instituting of various civil and criminal proceedings against those officials, the HSU scandal paved the way for a series of regulatory interventions which are still unfolding at the time of writing. The then Labor Government responded with legislative amendments in 2012 to impose more stringent rules on office-holders of registered organisations<sup>1</sup> in relation to financial management and disclosure. Following the September 2013 election, the new Coalition Government quickly sought to implement its policy commitments to further increase governance and accountability standards for Australian unions. The Fair Work (Registered Organisations) Amendment Bill (Cth)<sup>2</sup> ('FWRO Amendment Bill') was not passed into law for another three years. In the meantime, however, the Coalition established a Royal Commission into Trade Union Governance and Corruption. Its final report, released in December 2015, provided: a broader evidentiary base for the Government's agenda (including findings of 'widespread' corruption among Australian unions); an endorsement of many of the measures which formed part of the FWRO Amendment Bill; and a blueprint for yet more legislative changes, which the Coalition adopted in its 2016 election policy. A number of those proposals are contained in the Fair Work Amendment (Corrupting Benefits) Bill 2017 (Cth) ('Corrupting Benefits Bill'), now before Parliament.

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1 The term 'registered organisations' is used to refer to federally-registered trade unions and employer associations under the *Fair Work (Registered Organisations) Act 2009* (Cth) ('FWRO Act'). This article focuses predominantly on the legislation's application to unions.

2 Although several versions of this Bill were introduced into Parliament between 2013 and 2016, they will be referred to generically as the FWRO Amendment Bill throughout this article.

This article seeks to analyse and assess these various regulatory responses to trade union corruption. In doing so, it attempts to establish the extent of the problem which these new laws are intended to address, and to determine whether they are therefore necessary or, as many critics of the Royal Commission and the Coalition's agenda contend, simply part of an 'ideological attack' on trade unions. Part II of the article considers the HSU scandal, the Gillard Government's 2012 legislation and the Coalition's 2013 election policy. Part III moves on to discuss the Abbott Government's establishment of the Royal Commission in early 2014, and highlights the Commission's key findings and recommendations. Part IV examines the changes implemented by the *Fair Work (Registered Organisations) Amendment Act 2016 (Cth)* ('*FWRO Amendment Act*'), and the further reforms to union regulation which the Turnbull Government is now pursuing. Then, in Part V, the article presents evidence from sources other than the Royal Commission on the extent of union malfeasance, as a prelude to drawing conclusions on the necessity or otherwise of the regulatory response (including consideration of the extent to which it has been ideologically motivated). Part VI sets out some final observations.

First, a very brief explanation of the regulatory framework within which Australian unions operate is required.<sup>3</sup> The *Fair Work (Registered Organisations) Act 2009 (Cth)* ('*FWRO Act*') maintains the traditional approach<sup>4</sup> of subjecting federally registered unions to fairly high levels of regulation, including of their internal affairs and governance, as the price for various rights and privileges which unions have under that legislation and under the *Fair Work Act 2009 (Cth)* ('*FW Act*').<sup>5</sup> The *FWRO Act* includes detailed provisions governing (for example) the registration, rules, elections, members' rights, financial management and accountability, amalgamation and deregistration of registered unions.<sup>6</sup> In turn, those unions have corporate status (and other rights) under the *FWRO Act*,<sup>7</sup> while the *FW Act* provides them with rights in respect of collective bargaining, participation in industrial tribunal proceedings on behalf of members, and entry to workplaces for enforcement and recruitment purposes.<sup>8</sup> While the range of benefits attaching to registered status has contracted since the conciliation and arbitration era,<sup>9</sup> it remains the case that Australian unions are

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3 For further detail see Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016) ch 24; Marilyn J Pittard and Richard B Naughton, *Australian Labour and Employment Law* (LexisNexis Butterworths, 2015), ch 16.

4 See, eg, DW Smith and DW Rawson, *Trade Union Law in Australia: The Legal Status of Australian Trade Unions* (Butterworths, 2<sup>nd</sup> ed, 1985); Peter Punch, *Australian Industrial Law* (CCH Australia, 1995) chs 17–20. See also Kathryn Cole (ed), *Power, Conflict and Control in Australian Trade Unions* (Pelican Books, 1982); see especially chs 10–11.

5 Stewart et al, above n 3, 814–16.

6 See *ibid* ch 24.

7 See, eg, *FWRO Act* s 27 (providing that a registered organisation is a body corporate with perpetual succession, which can own property, and sue or be sued in its registered name).

8 See Stewart et al, above n 3, ch 25, 866–74.

9 Malcolm Rimmer, 'Unions and Arbitration' in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004) 275.

subject to ‘a quite extraordinary level of external control over [their] constitution and governance’.<sup>10</sup>

## II THE HSU SCANDAL AND LABOR/COALITION RESPONSES

### A Corruption within the HSU

The initial trigger for the greatly increased focus on union regulation in recent years was the series of revelations of misuse of credit cards, misappropriation of union funds and other forms of corruption on the part of former HSU National Secretary Craig Thomson, former General Secretary of the union’s NSW Branch Michael Williamson, and later, former HSU Victoria No 3 Branch Secretary Kathy Jackson.<sup>11</sup> Thomson’s subsequent position as a federal Labor MP, and the Gillard Government’s continuing reliance on his support between 2010 and 2013,<sup>12</sup> ensured that the salacious details of his alleged credit card misuse were widely reported from 2011.<sup>13</sup> Williamson’s transgressions included directing lucrative union contracts to companies in which he, family members or friends had interests, and paying himself an extraordinarily high union salary.<sup>14</sup> Jackson, originally acting as a ‘whistleblower’ in respect of Thomson and Williamson’s misconduct, was later exposed as having engaged in extensive credit card abuse and misuse of union funds for personal expenses including shopping and travel.<sup>15</sup>

A range of legal consequences arose from the corrupt actions of these three senior HSU officials. Following an extensive investigation by the Office of the General Manager of Fair Work Australia (‘FWA’), civil proceedings were instituted against Thomson for breaches of the statutory duties applicable to union officials.<sup>16</sup> Ultimately he was ordered to pay \$80 050 in civil penalties and \$378 180 in compensation to the union.<sup>17</sup> While Thomson was also convicted of theft and obtaining property by deception in the Victorian Magistrates Court, the setting aside of many (but not all) of these convictions by the County Court on appeal ensured that he avoided a jail term.<sup>18</sup> On the other hand, Williamson was

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10 Stewart et al, above n 3, 815; see also 819–20.

11 For a detailed account see Brad Norington, *Planet Jackson: Power, Greed and Unions* (Melbourne University Press, 2016).

12 Joel Silver, ‘“For the Union Makes Us ... Rich?”: Preventing Trade Union Corruption in Law after the Health Services Union Saga’ (2013) 18 *Deakin Law Review* 127, 128–9.

13 See, eg, Kate McClymont, ‘Thomson: New Credit Card Claims’, *The Sydney Morning Herald* (Sydney), 9 September 2011. There had been earlier reports, for example Mark Davis, ‘MP Accused of Credit Card Rort: Union Credit Card Paid for Brothels, Election Campaign’, *The Sydney Morning Herald* (Sydney), 8 April 2009.

14 Norington, above n 11, 3, 107–12, ch 10.

15 *Ibid* chs 9, 18.

16 *FWRO Act* ss 285–8: duty of care and diligence, duty to act in good faith and in the best interests of the organisation, and duties not to use one’s position or information for improper purposes. See Stewart et al, above n 3, 854–7.

17 *General Manager of the Fair Work Commission v Thomson* [No 4] [2015] FCA 1433.

18 See ‘Thomson Guilty of “Highest Order Breach of Trust”: Magistrate’, *Workplace Express* (online), 25 March 2014 <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=52170](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=52170)>; *DPP (Vic)*

sentenced to over seven years' imprisonment (with a non-parole term of five years) following convictions for defrauding the union of around \$1 million.<sup>19</sup> As for Jackson, in civil proceedings brought by the HSU in which it was determined that she had breached the *FWRO Act* duties, she was ordered to repay the union approximately \$1.4 million (plus costs and interest of up to \$1.2 million).<sup>20</sup> A criminal case against Jackson was continuing at the time of writing.<sup>21</sup>

## B Labor's 2012 Legislation

The events within the HSU posed a predicament for the Labor Government of Prime Minister Julia Gillard. Although needing Thomson's support to remain in government, Labor had to respond to the growing media attention and public concern about union corruption. Then Workplace Relations Minister Bill Shorten took a number of steps from April 2012. First, the Minister instigated proceedings under section 323 of the *FWRO Act* to have the HSU East Branch placed into administration on the basis that it had ceased to exist or function effectively.<sup>22</sup> On 21 June 2012, the Federal Court appointed an administrator, with the effect that Jackson was removed from her position (along with all other elected officers of HSU East).<sup>23</sup> Secondly, the Government introduced legislation to enhance the regulatory framework for registered organisations. The *Fair Work (Registered Organisations) Amendment Act 2012* (Cth) imposed new requirements, since repealed, upon unions to amend their rules to require officials to disclose material personal interests (including those of their relatives) relevant to the running of the union, as well as any related party transactions (*FWRO Act*, sections 148B–148C). Union rules also had to provide for the annual disclosure to members of the remuneration, including board fees and non-cash benefits, of the union's five highest paid officials (and the two highest paid in each branch) (section 148A). Maximum penalties for breaches of the *FWRO Act*'s civil penalty provisions were increased from \$11 000 to \$33 000 (sections 305–6). The Minister explained the rationale for all of these changes as follows: 'conduct by a

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*v Thomson* [2014] VCC. Note also 'Thomson Misled Parliament on Use of HSU Credit Card: Inquiry', *Workplace Express* (online), 17 March 2016 <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54327](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54327)>; 'Parliament Reprimands Craig Thomson', *Workplace Express* (online), 5 May 2016 <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54476](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54476)>.

19 This sentence was upheld on appeal in *Williamson v The Queen* [2015] NSWCCA 250.

20 *Health Services Union v Jackson [No 4]* (2015) 108 ACSR 156. Jackson's appeal was dismissed as incompetent on the basis of her status as an undischarged bankrupt: see *Jackson v Health Services Union* [2015] FCAFC 188.

21 See 'Police Charge HSU's Jackson', *Workplace Express* (online), 31 August 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54846](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54846)>; 'HSU's Jackson to Face Committal Hearing', *Workplace Express* (online), 24 January 2017 <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55277](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55277)>; Emma Younger, 'Kathy Jackson: Police to Lay More Charges Against Former HSU Boss, Court Told', *ABC News* (online), 31 March 2017 <<http://www.abc.net.au/news/2017-03-31/police-to-lay-more-charges-against-former-hsu-boss-kathy-jackson/8405174>>.

22 Ean Higgins and Milanda Rout, 'Shades of the BLF ... Bill Shorten Plans to Sack Health Union Bosses', *The Australian* (online), 27 April 2012 <<http://www.theaustralian.com.au/national-affairs/shades-of-the-blf-bill-shorten-plans-to-sack-health-union-bosses/news-story/c9d8c2249b5920453b43206ea177360a>>.

23 *Brown v Health Services Union* (2012) 205 FCR 54. These proceedings had been taken over by the new leadership of the HSU, with the Minister remaining involved as intervener.

small number of officials in some parts of one organisation has dented public confidence in all registered organisations in this country'.<sup>24</sup> Thirdly, Labor's 2012 amendments also addressed deficiencies that had arisen in the FWA General Manager's investigation into the HSU. An external report by KPMG, commissioned by FWA, subsequently established that the investigation had taken too long for reasons such as the inadequacy of the General Manager's Office case management system and lack of resources.<sup>25</sup> Minister Shorten's legislation gave the General Manager increased investigatory powers, but required the Office to act more quickly when notified of possible contraventions of the *FWRO Act* (chapter 11 part 4).<sup>26</sup>

### C The Coalition's 2013 Election Policy

Labor's measures to improve union governance standards did not go nearly far enough for the Tony Abbott-led Coalition Opposition. Its policy for the 2013 federal election proposed further changes to the FWRO Act, to help 'stamp out the union rip offs, rorts and corruption that has [sic] flourished over recent years'.<sup>27</sup> The reforms included: increasing maximum penalties for serious breaches of union financial disclosure and accountability rules (including up to five years' imprisonment and fines of \$340 000 for individual officials); and establishing a new Registered Organisations Commission ('ROC') to oversee union regulation, inform union members about their rights and deal with complaints from members.<sup>28</sup> The ROC would be 'a genuinely independent watchdog with real powers',<sup>29</sup> and was considered necessary due to the Fair Work Commission ('FWC')<sup>30</sup> having 'failed to do its job' in this area.<sup>31</sup> The Coalition also promised a judicial inquiry into union malfeasance, primarily to examine allegations of former Prime Minister Gillard's involvement (as legal adviser) in the misappropriation of funds from an Australian Workers'

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24 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2012, 6462 (Bill Shorten, Minister for Employment and Workplace Relations).

25 KPMG, 'Process Review of Fair Work Australia's Investigations into the Health Services Union' (Report, 17 August 2012) 4–5.

26 In addition, a Regulatory Compliance Branch ('RCB') was formed within FWA to support the General Manager in carrying out registered organisations functions: Chris Enright and Bill Steenson, 'The Picture of Compliance: Unions and Employer Associations, Now and in the Future' (Paper presented at Eighth Biennial Australian Labour Law Association Conference, Melbourne, 4 November 2016) 6.

27 Liberal-National Coalition, *The Coalition's Policy to Improve the Fair Work Laws* (Policy Document, May 2013) 21. Mr Abbott explained further: 'The days of running a trade union with a credit card and brown paper bag are over'. See 'ABCC and ROC on Early Abbott Agenda', *Workplace Express* (online), 31 July 2013 <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=51060](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=51060)>.

28 Liberal-National Coalition, *The Coalition's Policy for Better Transparency and Accountability of Registered Organisations* (Policy Document, July 2013).

29 *Ibid* 5.

30 From 1 January 2013, FWA was renamed as the FWC, with the General Manager's Office continuing to have oversight of registered organisations' compliance with the FWRO Act: *Fair Work Amendment Act 2012* (Cth) sch 9.

31 'Long List of Changes but No Real Surprises in Coalition's IR Policy', *Workplace Express* (online), 9 May 2013 <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=50433](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=50433)>.

Union ('AWU') related fund in the early 1990s.<sup>32</sup> The commitments relating to registered organisations formed part of the Coalition's broader industrial relations policy, which outlined some fairly moderate amendments to the *FW Act* – pending a wholesale review of the system of workplace regulation by the Productivity Commission.<sup>33</sup>

### III THE COALITION GOVERNMENT ACTS: THE TRADE UNION ROYAL COMMISSION

#### A Foundations and Premises of the Royal Commission

Upon coming to office in September 2013, the Abbott Government moved quickly to introduce the FWRO Amendment Bill into Parliament:<sup>34</sup> 'to ensure as far as possible, that registered organisations are regulated in the same way as companies and directors'.<sup>35</sup> It was argued in support of the Bill that:

The level of non-compliance with the reporting obligations [ie, around 20 per cent of registered organisations failing to submit their financial reports on time], combined with the findings of the FWC investigations into the HSU, demonstrate that the existing regulation of registered organisations is not sufficiently strong to protect members' interests, particularly in relation to financial management.<sup>36</sup>

However the Government faced considerable difficulty in getting legislation through the Senate, where a group of cross-bench Senators held the balance of power. It was therefore not until after the July 2016 election, which resulted in a differently-composed Senate, that the re-elected Turnbull Government was able to secure passage of the FWRO Amendment Bill (as discussed in Part IV below).

The more significant action on union corruption in the Coalition's first term of government came in the form of the Trade Union Royal Commission

32 Mark Skulley, 'Judicial Inquiry into AWU Cold Case if Coalition Wins Election', *The Australian Financial Review* (online), 23 August 2013 <<http://www.afr.com/news/policy/industrial-relations/judicial-inquiry-into-awu-cold-case-if-coalition-wins-election-20130822-j0h2n>>; see also Norington, above n 11, 175–6.

33 Liberal-National Coalition, *Policy to Improve the Fair Work Laws*, above n 27.

34 'New Watchdog, Higher Penalties, Under RO Bill', *Workplace Express* (online), 14 November 2013 <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=51660](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=51660)>. Another key part of the Coalition's reform agenda was to re-establish the Howard-era regulator for the construction industry, the Australian Building and Construction Commission ('ABCC'), through the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) (introduced into Parliament on 14 November 2013). This legislation, too, was not passed until late 2016; see also Part V(A) and (C) below. See also Emma Goodwin, 'Building on Shifting Sands: From the *Fair Work (Building Industry) Act 2012* (Cth) to the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)' (2014) 27 *Australian Journal of Labour Law* 97.

35 Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2013 (Cth) 10. The suitability of corporate-style regulation for trade unions is not considered in this article. For discussion of this issue see Anthony Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model' (2000) 13 *Australian Journal of Labour Law* 28; Rosalind Read and Zachary Smith, 'Regulation of Trade Unions in Australia: Is There Any Need for Corporate Style Regulation?' (Paper presented at Seventh Biennial Australian Labour Law Association Conference, Sydney, 14 November 2014); Silver, above n 12; Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Final Report* (December 2015) vol 5, 157–71, 193–200.

36 Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2013 (Cth) 6.

(‘TURC’). In late 2013, the Government indicated that its proposed judicial inquiry into the AWU would take the form of a Royal Commission into union ‘malfeasance’.<sup>37</sup> Then, in early 2014, following extensive media reports of new allegations of corruption and kickbacks in the commercial construction industry, the Government stated that there would be a Royal Commission into union corruption (Prime Minister Abbott noting that this is ‘a form of judicial inquiry’).<sup>38</sup> The establishment of TURC and its Terms of Reference were announced on 10 February 2014, the Prime Minister stating that it would:

inquire into alleged financial irregularities associated with the affairs of trade unions [and the operation of union ‘slush funds’] ...

This will not be an inquiry into trade unionism or the day to day activities of honest trade union officials.

Instead, it will address increasing concern arising from a wide range of revelations and allegations involving officials of unions establishing and benefiting from funds which have been set up for purposes which are often unknown and frequently unrelated to the needs of their members.<sup>39</sup>

TURC was then formally established by Letters Patent issued on 13 March 2014, with former High Court judge Dyson Heydon AC QC appointed as Royal Commissioner. The Terms of Reference required inquiry into two principal areas:<sup>40</sup>

- First, misconduct on the part of union officials, including any illegal or unprofessional conduct in order to procure an advantage; any bribe, secret commission, other unlawful payment or benefit arising from contracts, arrangements or understandings between an official/organisation and any other party; and any illegal conduct by an official in relation to a ‘relevant entity’ (that is, a separate entity established by a union or its officials, including what are often described as ‘slush funds’).
- Secondly, the governance arrangements of separate entities, the circumstances in which funds had been procured for them from third parties, and the effects of the operation of these entities on union members.

The Terms of Reference specifically nominated five unions for investigation: the HSU, Australian Workers’ Union (‘AWU’), Construction, Forestry, Mining and Energy Union (‘CFMEU’), Communications, Electrical and Plumbing Union (‘CEPU’), and Transport Workers Union (‘TWU’). However, TURC’s inquiries

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37 ‘Government Confirms It Is Planning Royal Commission into Union Misconduct’, *Workplace Express* (online), 16 December 2013 <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=51850](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=51850)>.

38 Dan Oakes, ‘CFMEU Officials Accused of Taking Kickbacks from Labour Hire Firm Lack Group’, *ABC News* (online), 10 February 2014 <<http://www.abc.net.au/news/2014-02-10/union-officials-accused-of-taking-bribes-from-labour-hire-firm/5248242>>; Nick McKenzie, Richard Baker and Ben Schneiders, ‘Bribery, Dirty Deals Rife in Building Industry’, *The Sydney Morning Herald* (online), 28 January 2014 <<http://www.smh.com.au/national/bribery-dirty-deals-rife-in-building-industry-20140127-31j0a.html>>.

39 Tony Abbott, George Brandis and Eric Abetz, ‘Joint Media Release: Royal Commission into Trade Union Governance and Corruption’ (Media Release, 10 February 2014).

40 Commonwealth, *Final Report*, above n 35, vol 1, 18–21.

were not limited to those unions; for example, the National Union of Workers ('NUW') was also subject to significant scrutiny.<sup>41</sup> On the first day of almost two years of hearings, 9 April 2014, Commissioner Heydon sought to reassure the union movement that TURC's Terms of Reference were 'not hostile to unions' and nor did they 'assume that it is desirable to abolish trade unions [or] to curb their role to the point of insignificance'.<sup>42</sup> Instead, there was an assumption of the 'desirability of unions having legitimate functions within the law'.<sup>43</sup> The Government also made clear from the outset that unlawful employer conduct would come under scrutiny.<sup>44</sup> However, the extensive media reports over the course of TURC's hearings were overwhelmingly dominated by accounts of the evidence being given about corruption and financial irregularities within (or involving) unions.<sup>45</sup>

### B Key Findings of the Royal Commission

TURC was originally required to deliver its final report by 31 December 2014. In October 2014, the Government extended the reporting deadline to 31 December 2015 and expanded TURC's Terms of Reference to allow closer examination of allegations of criminal conduct against several unions and other parties.<sup>46</sup> An Interim Report was released by the Government on 19 December 2014,<sup>47</sup> followed by Commissioner Heydon's Final Report on 30 December 2015.<sup>48</sup> It began by making some general observations based on TURC's case studies of the six unions referred to above:<sup>49</sup>

The case studies examined have revealed widespread misconduct that has taken place in every polity in Australia except for the Northern Territory. There is little that is controversial about the underlying facts. Almost all of the underlying facts

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41 Ibid vol 1, 8.

42 Anna Patty and Anne Davis, 'Inquiry Is Not Out to Abolish Trade Unions, Says Dyson Heydon', *The Sydney Morning Herald* (Sydney), 10 April 2014, 9.

43 Quoted in 'Inquiry Not about Crushing Unions: Royal Commissioner', *Workplace Express* (online), 9 April 2014 <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=52215](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=52215)>. See also Commonwealth, *Final Report*, above n 35, vol 1, 18–19.

44 'Royal Commission Will Hold Employers to Account: Abetz', *Workplace Express* (online), 13 March 2014 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=52132](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=52132)>.

45 See, eg, Nick Toscano and Anna Petty, 'Cesar Melhem Cut Deal to Drive Down Workers' Pay, Royal Commission Hears', *The Age* (online), 28 May 2015 <<http://www.theage.com.au/victoria/cesar-melhem-cut-deal-to-drive-down-workers-pay-royal-commission-hears-20150528-ghbqrj.html>>; ABC, 'Claims of Intimidation and Corruption at the Union Royal Commission', *7.30*, 4 September 2015 <<http://www.abc.net.au/7.30/content/2015/s4306632.htm>>; Stephanie Smail, 'Trade Union Royal Commission: Former CFMEU President Admits He Cannot Justify Destroyed Paperwork Claims', *ABC News* (online), 24 September 2015 <<http://www.abc.net.au/news/2015-09-24/trade-union-royal-commission-former-cfmeu-president-dave-hanna/6801082>>.

46 Joanna Mather, "'Criminal Activity' Extends Probe', *The Australian Financial Review* (Sydney), 8 October 2014. A federal police taskforce commenced operation in early 2015, to assist TURC in this work and to conduct its own investigations: see Commonwealth, *Final Report*, above n 35, vol 1, 24–5.

47 Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Interim Report* (December 2014). For discussion, see Louise Floyd and Michael Gold, 'Jimmy Hoffa: Alive, Well and Living in Australia? The Kennedy Legacy and Australian Labour Law Reform' (2015) 49 *The International Lawyer* 21.

48 Commonwealth, *Final Report*, above n 35, vols 1–5.

49 On TURC's adoption of the 'case study technique', see *ibid* vol 1, 47–51.

have been established by admissions to the Commission, incontrovertible documents, decisions of courts and tribunals or well-corroborated testimony. There has been financial misconduct by two AWU State Secretaries in Western Australia in the mid-nineties, Bruce Wilson and Ralph Blewitt. ... A State Secretary of the AWU in Victoria ..., Cesar Melhem, has been responsible for numerous actions favouring the interests of the union over the members which may be breaches of legal duty. Two TWU WA State Secretaries, James McGiveron and Richard Burton, in 2012–2013 depleted union funds to the extent of over \$600 000 in relation to what may have been the unauthorised purchase of expensive cars and the arrangement of an unauthorised redundancy. ... In the HSU a number of State or National Secretaries (Michael Williamson, Katherine Jackson and Craig Thomson) have used union funds for their own purposes. ... In the Victorian CFMEU the State Secretary, John Setka, and the Assistant State Secretary, Shaun Reardon, may have committed blackmail. In Queensland the State Secretary for the Builders' Labourers' Federation of Queensland (BLF), David Hanna, may have fraudulently made additions to his house. He, together with the Queensland State Secretary of the CFMEU, Michael Ravbar, together with various officials and employees participated in massive destruction of potentially relevant documents. ... The State Secretary of the Electrical Division of Victorian CEPU, Dean Mighell, and the President, Gary Carruthers, used union funds on litigation commenced in what may have been an abuse of process. In New South Wales the state secretary of NUW NSW, Derrick Belan, his brother Nick Belan, an organiser, and their niece, an employee, Danielle O'Brien, and possibly others, may have misappropriated union funds.<sup>50</sup>

This quote conveys the tenor of TURC's central findings in respect of these six unions, which were detailed in volumes 2–4 of the Final Report.<sup>51</sup> In volume 1, Commissioner Heydon further articulated his overall views based on the evidence presented to TURC, indicating that misconduct was 'not the work of a few rogue unions, or a few rogue officials' but rather was 'deep-seated'.<sup>52</sup> He went so far as to suggest that:

It would be utterly naïve to think that what has been uncovered is *anything other than the small tip of an enormous iceberg*. ... [I]t is clear that in many parts of the world constituted by Australian trade union officials, there is room for louts, thugs, bullies, thieves, perjurers, those who threaten violence, errant fiduciaries and organisers of boycotts.<sup>53</sup>

Commissioner Heydon added that several themes emerged from the evidence he had examined, forming the 'sinister picture ... of the union concerned not with its role as the instrument through which to protect the interest of its members but with self-interest'.<sup>54</sup> Those themes included:<sup>55</sup>

- The propensity of some unions to create false records (eg, false invoices to disguise employer-union payments), and an insufficiency or absence of proper corporate records. Clear, accurate records are required to

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50 Ibid vol 1, 8–9.

51 See also *ibid* vol 1, 25–7, 83–113. Space does not permit a more extensive consideration of TURC's findings, or the evidence on which they were based. In addition, this article does not address Commissioner Heydon's findings in respect of union misconduct on building sites (*ibid* vol 1, 10–11; vols 3, 4), nor his recommendations in relation to the construction industry (*ibid* vol 5, ch 8).

52 *Ibid* vol 1, 12.

53 *Ibid* vol 1, 12–13 (emphasis added).

54 *Ibid* vol 1, 33.

55 *Ibid* vol 1, 27–33.

ensure that auditors and officials have a transparent view of the union's activities.

- The failure of union branch committees of management to take a sufficiently strong position in response to the conduct of certain officials (eg, in the case of Jackson and the HSU). Committees of management must not act as a 'rubber stamp' for the union leadership, but must be strong and efficient to ensure proper governance and expenditure of members' money.
- The payment of large sums of money by employers to a number of unions in the context of bargaining for enterprise agreements, compromising the duty of officials to serve their members' interests (eg, the AWU's receipt of \$25 000 per year from Cleanevent Pty Ltd, as part of an arrangement to extend a sub-standard enterprise agreement under which workers missed out on award penalty rates).
- The false inflation of membership numbers (eg, to increase union representation at Australian Labor Party conferences, or to facilitate payments to the union from employers).

TURC made 93 referrals of individuals and organisations to police and other authorities, for investigation of various potential criminal offences and civil breaches under federal, state and territory laws.<sup>56</sup> Among the more notable referrals were those of Jackson to Victoria Police for consideration of charges of obtaining property and financial advantage by deception; former AWU Victorian Secretary Cesar Melhem (now a state Labor MP) to Victoria Police for possible charges of corrupt commission, false accounting and other offences; and numerous CFMEU officials to NSW Police and the Queensland Director of Public Prosecutions for potential corrupt commission charges.<sup>57</sup>

### C The Royal Commission's Main Recommendations

Volume 5 of the TURC Final Report outlined 79 law reform recommendations.<sup>58</sup> These included an endorsement of the Coalition's proposal to establish a specialist agency to oversee and enforce the regulation of registered organisations, the ROC, with similar powers to the Australian Securities and Investments Commission ('ASIC').<sup>59</sup> This responded to the perceived limitations of the FWC General Manager's oversight of registered organisations matters, and the confusion between this enforcement-focused role and the FWC's dispute resolution functions.<sup>60</sup> Many of Commissioner Heydon's recommendations were intended to raise the financial management and accountability standards applicable to trade unions, and impose tougher penalties for *FWRO Act* breaches. For example:

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56 Ibid vol 1 app 2.

57 Ibid vol 1, app 2.

58 Ibid vol 1, app 1, vol 5.

59 Ibid vol 5, 53–74 (Recommendations 3–7); the ROC's powers would include the ability to investigate whether criminal breaches of the *FWRO Act* had occurred (Recommendation 5).

60 Ibid vol 5, 57–9.

- specified union officials would be required to undertake financial management training (or face disqualification from office for up to two years);<sup>61</sup>
- existing rules dealing with financial disclosure (*FWRO Act*, chapter 8 part 3) would be replaced with stronger requirements in respect of loans, grants or donations of over \$1000, credit/charge card expenditure, and the remuneration of a union or branch's highest paid officers;<sup>62</sup>
- civil penalties for breach of the statutory duties of union officials<sup>63</sup> would be substantially increased, from a maximum of \$10 800 to \$200 000, and criminal liability would attach in cases of dishonest or reckless breaches of these duties (with penalties of up to \$360 000 and five years' imprisonment);<sup>64</sup>
- unions and branches would be required to maintain records of management committee meetings for at least seven years;<sup>65</sup> and
- the obligation of officials to disclose material personal interests, introduced by Labor in 2012, would be replaced by a more stringent set of requirements that includes disclosure also of the interests of an officer's relatives in matters relating to the running of the organisation.<sup>66</sup>

Further recommendations of TURC sought to address other forms of impropriety on the part of unions and their officials which had emerged from the evidence. These included recommendations to:

- prohibit a union from indemnifying or paying an official for any fine or civil penalty imposed on him/her for conduct in connection with the union;<sup>67</sup>
- expand the range of offences which may lead to disqualification of an official from holding union office under *FWRO Act* sections 210–20 (presently, this is focused on serious offences involving fraud, dishonesty or the intentional use of violence or damage to property; Commissioner Heydon's proposal would add to this offences relating to contempt, trespass, blackmail and extortion, and breaches of civil remedy provisions of the *FWRO Act* and *FW Act*);<sup>68</sup>

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61 Ibid vol 5, 75–8 (Recommendation 8), proposing amendment of *FWRO Act*, s 154D.

62 Ibid vol 5, 83–93 (Recommendation 10); civil penalties would apply for failure to meet the new financial obligations (Recommendation 11).

63 See *FWRO Act* ss 285–8: duty of care and diligence, duty to act in good faith and in the best interests of the organisation, and duties not to use one's position or information for improper purposes; Stewart et al, above n 3, 854–7.

64 Commonwealth, *Final Report*, above n 35, vol 5, 176–207 (Recommendations 26–9, including recommendations relating also to the content of the duties); and see 218–22 (Recommendation 33, dealing with enforcement of the duties through proceedings instigated by union members or former members).

65 Ibid vol 5, 106–11 (Recommendation 16); maintenance of financial records as required by *FWRO Act* s 252 would become a civil penalty provision (Recommendation 17).

66 Ibid vol 5, 210–16 (Recommendation 31), proposing repeal and replacement of *FWRO Act* s 148B.

67 Ibid vol 5, 207–10 (Recommendation 30).

68 Ibid vol 5, 225–36 (Recommendations 36–8).

- clarify that union resources must not be used, not only to support candidates in an election in that union (*FWRO Act* section 190), but in *any* registered organisation or branch;<sup>69</sup>
- create two new criminal offences under the *FW Act*: the first, relating to the giving to, or receiving of, ‘corrupting benefits’ involving a union official (ie, payments with a tendency to cause the official to exercise their duties or powers improperly, or to act unlawfully)<sup>70</sup> – and the second, covering the provision or offer by an employer of any payment to a union or its officials (with exceptions for payments such as legitimate settlement of wage claims on behalf of members, or payments for charitable purposes);<sup>71</sup> and
- require a union bargaining representative for an enterprise agreement<sup>72</sup> to disclose any financial benefits that the union (or an official) would derive under the agreement.<sup>73</sup> This would enable employees to be aware, when voting on an agreement, of any side deals under which payments are made to union funds that may have compromised the outcomes for employees under the agreement – such as the AWU/Cleanevent example.

Finally, several recommendations were made to improve the regulation of separate entities or union slush funds. Commissioner Heydon noted that various unions establish these funds for purposes including the re-election campaigns of incumbent office-holders, funding redundancies and other entitlements of members, training and welfare services, employee insurance schemes, industry superannuation, and charitable causes.<sup>74</sup> It was observed that problems can arise from the operation of these separate entities or funds, such as the potential for misappropriation of union funds as in the case of Jackson’s payment of HSU funds to the ‘National Health Development Account’, which included funds obtained as part of settlement of an underpayment claim on behalf of members employed at the Peter MacCallum Cancer Centre.<sup>75</sup> Other concerns about union slush funds included ‘conflicts of interest, breaches of fiduciary duty and possible coercion’, as well as ‘the lack of transparency concerning the financial relationships between a relevant entity and the union with which it is associated’.<sup>76</sup> TURC identified a lack of clarity in the current regulatory arrangements for separate entities or funds, with two classes of laws potentially applicable: first, laws covering the specific legal structure through which the

69 Ibid vol 5, 124–6 (Recommendation 23).

70 Ibid vol 5, 237–66 (Recommendation 40), proposing a maximum penalty of ten years’ imprisonment for this offence.

71 Ibid vol 5, 266–70 (Recommendation 41), proposing a maximum penalty of two years’ imprisonment.

72 See *FW Act* pts 2–4.

73 Commonwealth, *Final Report*, above n 35, vol 5, 328–39 (Recommendation 48; see also Recommendation 49).

74 Ibid vol 5, 272–3.

75 See also ibid vol 2, ch 5.2; Norington, above n 11, 181–9. Many other examples of conflicts of interest and ‘blurring’ of union and separate funds were considered by TURC, including the ‘Creative Safety Initiatives Trust’ and ‘Construction Charitable Works Ltd’ operated by the CFMEU ACT Branch: Commonwealth, *Final Report*, above n 35, vol 1, 93; vol 3, ch 6.6.

76 Commonwealth, *Final Report*, above n 35, vol 5, 274.

entity or fund is established, such as the *Corporations Act 2001* (Cth) (*'Corporations Act'*), state or territory legislation governing trustees or incorporated associations, and common law/equitable principles; and secondly, the *FWRO Act* or state equivalents.<sup>77</sup>

Commissioner Heydon focused his recommendations in this area on union election funds, worker entitlement funds and employee insurance schemes, making the following reform proposals:

- amendment of the *FW Act* 'to prohibit any term of a modern award, enterprise agreement or contract of employment permitting an employer to deduct, or requiring an employee to pay, from an employee's salary an amount to be paid towards an election fund' (to overcome the problem of 'practical compulsion' to contribute to such funds within some unions);<sup>78</sup>
- introduction of 'basic governance requirements for election funds' under the *FWRO Act*, including registration, a separate bank account for election donations and expenditures, and annual reporting on the operation of that account (to prevent misuse of funds and ensure free and fair union elections);<sup>79</sup>
- subjecting worker entitlement funds (such as those operating in the construction industry with around \$2 billion under management) to new governance, reporting and disclosure requirements, under the *Corporations Act* or standalone legislation – and requiring these funds to be registered with ASIC;<sup>80</sup> and
- amending chapter 7 of the *Corporations Act* to require specific disclosure by unions of any direct and indirect pecuniary benefits they obtain in relation to employee insurance products.<sup>81</sup>

The Coalition Government responded to the TURC Final Report by committing to implement its recommendations through 'stronger and more effective legislation to deal with the lack of accountability and transparency in registered organisations'.<sup>82</sup>

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77 Ibid vol 5, 277–9. It should be noted that as many union funds are run separately from union or branch accounts, they are not covered by the accounting and auditing requirements in *FWRO Act* ch 8 pt 3.

78 Ibid vol 5, 286. See also vol 5, 279–86 (Recommendation 43).

79 Ibid vol 5, 286. See also vol 5, 286–95 (Recommendation 44).

80 Ibid vol 5, 295–320 (Recommendation 45; see also Recommendation 46).

81 Ibid vol 5, 321–6 (Recommendation 47).

82 Senator Michaelia Cash, Minister for Employment, quoted in Prime Minister, Attorney-General and Minister for Employment, 'Release of the Final Report into Trade Union Governance and Corruption', (Joint Press Conference, Sydney, 31 December 2015).

## IV THE COALITION'S LEGISLATIVE REFORMS TO ADDRESS UNION CORRUPTION

### A The 2016 Legislation

As discussed earlier in this article, implementation of the Coalition's 2013 election policy through the FWRO Amendment Bill was frustrated by the Senate between 2013 and 2016. Several versions of the Bill were rejected over this period, including in a special sitting of Parliament in April 2016 which also saw the Building and Construction Industry (Improving Productivity) Bill 2016 (Cth) voted down by the Senate. This provided the trigger for Prime Minister Turnbull to call a double dissolution election for 2 July 2016, which (again as noted earlier) provided the Government with a more workable Senate.<sup>83</sup> This ultimately led to the passage of both Bills in late November 2016, although with significant amendments arising from concessions to various cross-bench Senators.<sup>84</sup> The FWRO Amendment Bill was passed on 22 November, and received royal assent two days later.

The major change effected by the *FWRO Amendment Act* was to provide for the establishment of the ROC, headed by a Registered Organisations Commissioner (the Government has appointed Mr Mark Bielecki, formerly of ASIC, as the Commissioner).<sup>85</sup> The ROC commenced operation on 1 May 2017, with its powers taking effect the following day.<sup>86</sup> As explained earlier in the article, the ROC has taken over certain functions under the *FWRO Act* previously performed by the FWC General Manager's Office. These include the conduct of registered organisation elections (section 189); oversight of financial accounts and records and members' access thereto (sections 233–7, 272–9); and the exercise of powers to carry out investigations into the financial management of unions and branches, including wider evidence-gathering powers (chapter 11, part 4). The ROC is housed within the Office of the Fair Work Ombudsman ('FWO'), with staff transferred over from the FWC (and some FWO staff).<sup>87</sup> Several registered organisations functions continue to be carried out by the FWC,

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83 Phillip Coorey, 'One Nation Boosts Govt's Chances on IR Bills', *The Australian Financial Review* (online), 10 October 2016 <[www.afr.com/news/politics/one-nation-boosts-govts-chance-on-ir-bill-20161009-gryhh5](http://www.afr.com/news/politics/one-nation-boosts-govts-chance-on-ir-bill-20161009-gryhh5)>.

84 Laura Tingle, 'IR Bills Important Marker for the PM', *The Australian Financial Review* (Sydney), 22 November 2016; David Marin-Guzman, 'Michaelia Cash's Concessions on Australian Building and Construction Commission', *The Australian Financial Review* (online), 30 November 2016 <[www.afr.com/news/explainer-what-is-left-of-the-australian-building-and-construction-commission-20161129-gt0ihe](http://www.afr.com/news/explainer-what-is-left-of-the-australian-building-and-construction-commission-20161129-gt0ihe)>.

85 'ASIC's Bielecki to Lead ROC', *Workplace Express* (online), 18 April 2017 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55554](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55554)>.

86 'May Day Start for ROC', *Workplace Express* (online), 21 April 2017 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55569](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55569)>.

87 'Minister Confirms 17 FWC Staff to Transfer to ROC', *Workplace Express* (online), 22 November 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55141](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55141)>. See also *FWRO Act* ch 11 pt 3A; 'Budget Confirms FWC Cuts as Hybrid ROC Takes Shape', *Workplace Express* (online), 10 May 2017 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&selkey=55628](https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=55628)>.

including those relating to registration, amalgamation, rules, deregistration and union right of entry.<sup>88</sup>

Other significant features of the *FWRO Amendment Act* included:

- more stringent obligations upon union officials to disclose related party transactions, material personal interests and certain remuneration arrangements (new part 2A of chapter 9, *FWRO Act*) – these requirements include disclosure of board appointments or related party payments arising through an official’s union position (sections 293B–293BB), disclosure of the remuneration levels of the five highest-paid union/branch officials, as well as relevant non-cash benefits (section 293BC), processes for managing decision-making where material personal interests have been disclosed (sections 293C–293F), and disclosure of transactions involving related parties (with an exception for payments on ‘arm’s length terms’) (section 293G);<sup>89</sup>
- substantially higher civil penalties (up to \$216 000 for individuals; \$1 080 000 for bodies corporate) in respect of ‘serious’ breaches of the statutory duties of officials under sections 285–8 of the *FWRO Act*<sup>90</sup> (see also new section 290A which imposes criminal liability if a serious breach is engaged in recklessly or with intentional dishonesty, with maximum penalties of up to \$360 000 and/or five years’ imprisonment);
- enabling the Federal Court to disqualify an official for breaches of a civil penalty provision of the *FWRO Act* (eg, the statutory duties), if the disqualification is justified (new section 307A); and
- increased protections for union ‘whistleblowers’ (new part 4A of chapter 11, *FWRO Act*) – these provisions were inserted as part of an agreement with cross-bench Senators to secure passage of the *FWRO Amendment Act*, under which the Government also committed to extend whistleblower protections to the corporate and public sectors by 30 June 2018.<sup>91</sup>

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88 Fair Work Commission, *Registered Organisations Commission* (11 August 2017) <<https://www.fwc.gov.au/registered-organisations/new-registered-organisations>>; ‘New Regime Requires Registered Organisations to Deal with Two Regulators’, *Workplace Express* (online), 16 December 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55224](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55224)>. Union rights of entry to workplaces are regulated under pts 3–4 of the *FW Act*; overseeing union officials’ entry permits and resolving right of entry disputes form a significant part of the FWC’s work. Although this framework of regulation was considered by TURC (see Commonwealth, *Final Report*, above n 35, vol 5, ch 9), space does not allow any more than passing consideration of right of entry in this article.

89 See also s 293J requiring the preparation and submission of ‘officer and related party disclosure statements’ and ss 293K–293M requiring officials whose duties relate to financial management to undertake approved training.

90 ‘Serious contraventions’ include those which materially prejudice the interests of the union/branch or its ability to pay its creditors: *FWRO Act* s 6.

91 Michelle Grattan, ‘Deal on Whistleblowers Wins First Double-Dissolution Bill’, *The Conversation* (online), 22 November 2016 <[www.theconversation.com/deal-on-whistleblowers-wins-first-double-dissolution-bill-69176](http://www.theconversation.com/deal-on-whistleblowers-wins-first-double-dissolution-bill-69176)>. See also Commonwealth, *Final Report*, above n 35, vol 5, 112–24.

## B The Coalition's Further Reform Proposals

During the 2016 election campaign, the Coalition announced that it would implement 48 of the 79 TURC recommendations if re-elected.<sup>92</sup> The specific proposals mentioned in the Coalition's policy included:<sup>93</sup>

- allowing the courts to ban union officials from holding office where they repeatedly break the law;
- clarifying the obligations of officials to put the interests of their members before their own, to declare financial benefits received, and to deal properly with conflicts of interest;
- prohibiting 'corrupting benefits' (defined as 'payments between an employer and a union that are not covered by legitimate exemptions'), and requiring disclosure to employees of any legitimate payments between the two (see further below);
- enabling the courts to place unions/branches in administration or deregister them if they become dysfunctional or are no longer serving their members' interests; and
- introducing new sanctions for deliberate falsification of union membership records.

The policy also outlined a further measure which had not formed part of the TURC recommendations: the introduction of 'a new public interest test for mergers of registered organisations, which will allow relevant matters to be taken into account, such as the organisations' history of compliance with workplace laws'.<sup>94</sup> This proposal appears to be intended to prevent a proposed amalgamation between the CFMEU and the Maritime Union of Australia, two strong and industrially militant unions.<sup>95</sup> Following the election, the Government indicated that the legislation implementing its policy commitments on registered organisations would be introduced into Parliament in 2017.<sup>96</sup>

## C Fair Work Amendment (Corrupting Benefits) Bill

The Corrupting Benefits Bill, brought before Parliament on 22 March 2017, seeks to implement the third element of the Coalition's 2016 election policy (as

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92 James Massola, 'Federal Election 2016: Turnbull Government to Ban Corrupt Payments from Business to Unions', *The Sydney Morning Herald* (online), 17 June 2016 <<http://www.smh.com.au/federal-politics/federal-election-2016/federal-election-2016-turnbull-government-to-ban-corrupt-payments-from-business-to-unions-20160617-gplld6.html>>.

93 Liberal-National Coalition, *The Coalition's Commitment to Fairness and Transparency in Workplaces* (Policy Document, June 2016); see also 'Coalition to Outline Plan to Outlaw Covert Sweetheart Deals', *Workplace Express* (online), 16 June 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54610](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54610)>; 'Coalition to Make 'Corrupting Benefits' Unlawful', *Workplace Express* (online), 17 June 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54611](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54611)>.

94 Liberal-National Coalition, *The Coalition's Commitment to Fairness*, above n 93.

95 'Coalition Targets MUA-CFMEU Nuptials', *Workplace Express* (online), 21 June 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54620](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54620)>.

96 'Heydon Legislation Next Year; Roberts Sees Secret Royal Commission Volume', *Workplace Express* (online), 20 October 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55021](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55021)>.

discussed above).<sup>97</sup> The Bill proposes to insert new Part 3-7 in the *FW Act*, creating new criminal offences relating to the giving, receiving or soliciting of a corrupt benefit (ie, a benefit intended to influence a registered organisations officer/employee to perform their functions improperly or to gain an illegitimate advantage); and the provision of a cash or in kind benefit by an employer to a union (and the receipt of such a benefit). Certain kinds of payments would be excluded from liability for the latter offence, including payments for the benefit of employees and payments at market value for goods or services received by a union from an employer. The Bill also proposes to introduce a range of new disclosure requirements which employers and unions must comply with when informing employees before they vote on a proposed enterprise agreement (any ‘beneficial terms’ must be disclosed to employees, ie, terms of an agreement through which a union will obtain a financial benefit, directly or indirectly). When introducing the Bill into Parliament, the Prime Minister stated that: ‘secret deals have the real potential to corrupt union leaders, corrupt employers and seriously disadvantage workers. They are wrong. They need to be outlawed, and this is exactly what this bill will do’.<sup>98</sup>

## V ANALYSIS OF THE COALITION’S REGULATORY RESPONSE: NECESSITY V IDEOLOGY

### A Introduction

When the FWRO Amendment Bill was first introduced into Parliament on 14 November 2013, the Government focused largely on the HSU scandal as the justification for setting:

a suitably high standard for the governance and regulation of registered organisations. [The Bill] responds to the legitimate concerns of members of registered organisations and the community as a result of the shocking behaviour of certain [HSU] officials. Only those officers who do the wrong thing have anything to lose from these changes.<sup>99</sup>

A review of union governance for the Australian Council of Trade Unions (‘ACTU’) in 2013 observed that the conduct of HSU officials had been ‘very damaging’. However, a concern was also expressed that the HSU episode had presented a ‘misleading’ picture to the world of union officers and employees, ‘nearly all [of whom] are honest and behave appropriately in their stewardship of union funds’.<sup>100</sup>

On the re-introduction of the FWRO Amendment Bill to Parliament on 31 August 2016, the Prime Minister stated the case for reform as follows:

97 See also the TURC recommendations on which this policy commitment was based: above nn 65–71 and accompanying text.

98 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 March 2017, 2752 (Malcolm Turnbull, Prime Minister).

99 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 2013, 276 (Christopher Pyne, Minister for Education and Leader of the House).

100 Independent Panel on Best Practice for Union Governance, ‘Report to ACTU Executive to Invite Comment and Discussion’ (March 2013) 12.

the evidence heard by [TURC] has made it abundantly clear that the [HSU] officials' behaviour was not an isolated instance.

The final report of the Royal Commission outlines many appalling examples of misconduct in unions, together with many employers with which they deal. ...

No one ... can deny that there is a serious problem that needs to be urgently addressed. This conduct will continue unless something is done to stop it.<sup>101</sup>

The next parts consider the validity of the Government's rationale for its regulatory response to union corruption, beginning with an attempt to assess the scale of that problem, and moving onto consideration of the extent to which the reforms have an ideological purpose. This is followed by an evaluation of the necessity of the TURC recommendations, the *FWRO Amendment Act* and the further reforms being pursued by the Government.

## B Union Corruption in Australia: The Extent of the Problem

Although union membership levels have fallen considerably in Australia since the 1980s (with only 15.6 per cent of the workforce union members in 2016),<sup>102</sup> unions continue to play a significant role in the workplace relations system.<sup>103</sup> The combined membership of the 45 federally registered unions as at 2015 was 1 959 152 members, and these organisations had aggregate assets of \$1 588 784 861 and revenue of \$900 519 982 (79 per cent coming from subscription fees and 21 per cent from other income).<sup>104</sup> Approximately 4700 individuals held office in registered unions as at 2014.<sup>105</sup> The Government acknowledged, in the context of the changes proposed in the *FWRO Amendment Bill*, that:

It is expected that the majority of registered organisations operate with acceptable governance arrangements ... However, *there is little information available to confirm how prevalent non-compliance and maladministration is among officials of registered organisations.*<sup>106</sup>

What else is known about the extent of union corruption in Australia, beyond the findings of TURC?<sup>107</sup> Prior to the Thomson/HSU case, the FWC had undertaken only one inquiry since it assumed investigatory powers over registered organisations in the early 1980s.<sup>108</sup> Until the HSU corruption scandal, staff within the FWC and stakeholders considered the General Manager's office

101 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2016, 86 (Malcolm Turnbull, Prime Minister).

102 Australian Bureau of Statistics, *Characteristics of Employment, Australia*, Catalogue No 6333.0 (August 2016).

103 See, eg, Stewart et al, above n 3, 184–7.

104 Enright and Steenson, above n 26, 4–5, noting also that there were 66 employer associations, making a total of 111 federally registered organisations (and taking into account branches or divisions within these organisations, around 400 'reporting units') overseen by the General Manager of FWC.

105 Explanatory Memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013 (Cth)* 8.

106 *Ibid* 13 (emphasis added).

107 It is acknowledged that the following discussion reveals only the extent of union corruption or mismanagement that has been publicly exposed. Due to the secretive nature of much corrupt activity, it is not possible to establish (empirically) the true scale or extent of corruption within Australian trade unions.

108 Enright and Steenson, above n 26, 2.

to be a ‘registry’ rather than a ‘regulator’ for registered organisations.<sup>109</sup> Senior FWC officials explain further that:

Some organisations were not capable of compliance and were seriously non-compliant but because the FWC largely dealt with the matters lodged or coming to its attention, what was going on outside of that was largely unknown and off our radar.<sup>110</sup>

However, the HSU episode (including the criticisms of FWC’s investigation into Thomson)<sup>111</sup> led to a major shift in regulatory approach based on educating registered organisations to encourage voluntary compliance with *FWRO Act* requirements; auditing of compliance levels; and enforcement action where appropriate.<sup>112</sup>

Since the formation of the Regulatory Compliance Branch (‘RCB’) within FWC in 2012,<sup>113</sup> 29 formal inquiries and investigations into registered organisations have been completed (mostly involving unions rather than employer associations).<sup>114</sup> These have resulted in several successful Federal Court proceedings, with orders for significant penalties and compensation.<sup>115</sup> For example, the Musicians’ Union of Australia was found to have breached the accounting and auditing requirements in part 3 of chapter 8 of the *FWRO Act*.<sup>116</sup> Proceedings were commenced alleging similar contraventions by the Australian Nursing Federation, Western Australia (‘WA’) Branch (these were ongoing at the time of writing).<sup>117</sup> The FWC also investigated allegations of:

- unauthorised use of union funds in the Tasmanian Branch of United Voice (contraventions were found but FWC did not bring proceedings);<sup>118</sup>
- irregularities in the reported membership numbers of the CEPU Communications Division (including allegations that numbers were reported in multiples of 5 000 between 2011 and 2013, and the exact

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109 Ibid 2, 4.

110 Ibid 4; see also Read and Smith, above n 35, 24, asserting that the ‘General Manager of the [FWC] has not been an active regulator, and has arguably slept on their rights to enforce’ the *FWRO Act*.

111 See above n 25 and accompanying text.

112 Fair Work Commission, ‘Annual Report 2015–16: Continuing Momentum’ (2016) 89. This is a ‘preventative compliance’ approach to enforcement of the kind adopted by the FWO in recent years; see, eg, John Howe, Tess Hardy and Sean Cooney, ‘The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO’s Activities from 2006–2012’ (Report, Centre for Employment and Labour Relations Law, University of Melbourne, July 2014).

113 See above n 26 and accompanying text.

114 Note that from 1 May 2017, the ROC assumed responsibility for these inquiries and investigations (including those already commenced by the FWC): see, eg, ‘ROC Gets Rolling with Investigation of Two State Union Branches’, *Workplace Express* (online), 30 May 2017 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55697](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55697)>.

115 Enright and Stenson, above n 26, 10. See also Fair Work Commission, ‘Annual Report 2015–16’, above n 112, 90, 93–5.

116 See *General Manager of the Fair Work Commission v Musicians’ Union of Australia* [2016] FCA 302, where the Federal Court imposed penalties of \$76 500 on the union and \$17 000 on its former general secretary for their repeated contraventions over a five-year period.

117 Fair Work Commission, ‘Annual Report 2015–16’, above n 112, 94.

118 Ibid 93.

same overall membership numbers were provided for 2014 and 2015);<sup>119</sup> and

- alleged failure by the Flight Attendants' Association of Australia ('FAAA') International Division to declare related party transactions in financial reports over several years.<sup>120</sup>

Court proceedings were commenced against the former FAAA International Division Secretary for approving the union's back-payment to him of around 13 weeks' annual leave, allegedly breaching the duties in sections 285 and 287 of the *FWRO Act*.<sup>121</sup> The FWC also instigated Federal Court action against the TWU, alleging failure to maintain accurate membership records in Queensland, New South Wales and the Australian Capital Territory, in breach of the *FWRO Act* record-keeping requirements and the obligation to remove non-financial members from records.<sup>122</sup>

Of course, referrals from TURC provided a further considerable source of registered organisations activity for the RCB of FWC. Described as 'an unprecedented body of work' by those undertaking it, this took the form of: 'a total of 30 referrals to the General Manager of the FWC, concerning 16 current and former officials from eight separate trade unions; and dealing with matters covering a 10-year period'.<sup>123</sup> The FWC's actions arising from these referrals included:

- commencement of civil penalty proceedings against two former secretaries of the TWU WA Branch, for breaches of the *FWRO Act* duties in respect of the purchase of two vehicles and obtaining benefits through a union redundancy policy<sup>124</sup> – in April 2017, the Federal Court

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119 'FWC Challenges "Extraordinary" CEPU Membership Numbers', (Workforce, No 20133, Thomson Reuters, 15 June 2016) 1.

120 Fair Work Commission, 'Annual Report 2015–16', above n 112, 95; see also Enright and Steenson, above n 26, 14–15.

121 'Annual Leave Payout Was Above Board, Says Union Leader', *Workplace Express* (online), 29 June 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54648](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54648)>.

122 'TWU Should Have Purged 21 000 "Members": FWC', *Workplace Express* (online), 29 June 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54646](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54646)>.

123 Enright and Steenson, above n 26, 16 (citations omitted); see also Fair Work Commission, 'Annual Report 2015–16', above n 112, 91. In addition to these referrals of civil matters, TURC referrals to criminal law enforcement bodies have led (for example) to multiple fraud charges against former NUW NSW Branch Secretary, Derrick Belan, and the union's former accounts manager, Danielle O'Brien (including allegations of misuse of union credit cards on personal items, shopping and holidays, and issuing of false invoices): David Marin-Guzman, 'Former NUW Boss Derrick Belan Faces Fraud Charges', *The Australian Financial Review* (online), 18 November 2016 <<http://www.afr.com/news/policy/industrial-relations/former-nuw-boss-derrick-belan-faces-fraud-charges-20161117-gss69c>>; see also David Marin-Guzman, 'Ex-National Union of Workers Boss Derrick Belan's Botox and Rent Charged as "IT"', *The Australian Financial Review* (online), 2 January 2017 <<http://www.afr.com/news/policy/industrial-relations/exnational-union-of-workers-boss-derrick-belans-botox-and-rent-charged-as-it-20170101-gtkks8>>.

124 'Commission Steers TWU "Ute-Gate" Case to Federal Court', *Workplace Express* (online), 11 August 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54779](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54779)>.

imposed penalties on the two officials, effectively requiring the repayment to the union of the improper benefits;<sup>125</sup>

- investigations into various matters relating to former AWU Victorian Branch Secretary Cesar Melhem, including whether he breached the *FWRO Act* duties of officials in his dealings with Cleanevent and failed to maintain proper financial records.<sup>126</sup>

Following investigation, the FWC indicated it would not proceed with further action against two former officials of the CFMEU Construction and General Division NSW Branch, in relation to the operation of an entity known as the Committee to Defend Trade Union Rights Pty Ltd, the corporate trustee of the Defend Trade Union Rights Trust.<sup>127</sup>

It is clear from the above discussion that non-compliance with various *FWRO Act* obligations has occurred within a wider range of unions than those which were the subject of examination by TURC. The extent to which this amounts to a picture of union corruption on the scale described by Commissioner Heydon is, nevertheless, open to question. As mentioned earlier in the article, the Royal Commissioner considered the union malfeasance he found to be ‘the small tip of an enormous iceberg’.<sup>128</sup> The magnitude of the FWC’s regulatory activity over the last five years (excluding the TURC referrals) reveals this to be an exaggeration.<sup>129</sup> It may also be that the more proactive and vigilant approach of the RCB since 2012 identified similar levels of non-compliance with financial reporting and other requirements under the *FWRO Act* to those that were occurring previously, but had gone undetected. At the same time, it is important to note that this new approach led to considerable improvement in registered organisations’ compliance, with on-time lodgement of financial returns increasing from 80 per cent in 2011–12 to 96.3 per cent in 2014–15.<sup>130</sup>

However, it remains necessary to consider whether the ‘tip’ of Commissioner Heydon’s iceberg – along with the other instances of union non-compliance

125 *General Manager of the Fair Work Commission v McGiveron* [2017] FCA 405.

126 ‘FWC GM’s Probe Targets Former AWU Leader’, *Workplace Express* (online), 29 November 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55163](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55163)>. In relation to another significant AWU matter considered by the Royal Commission, in March 2017, WA police charged a former official with fraud offences relating to the 1990s slush fund which precipitated the establishment of TURC (see above nn 32 and 37 and accompanying text): ‘Police Charge Former AWU Official Ralph Blewitt’, *Workplace Express* (online), 17 March 2017 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55451](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55451)>.

127 ‘FWC Won’t Pursue Former CFMEU NSW Leaders’, *Workplace Express* (online), 16 August 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54795](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54795)>.

128 See above n 53 and accompanying text.

129 See also Peter Punch, ‘Royal Commission into Trade Union Governance and Corruption: Just a Political Exercise? Or “Shining a Bright Light” into Trade Union Misbehaviour? Or Inter Alia, Some Things of Enduring Value?’ (Paper presented to the Industrial Relations Society of New South Wales, 12 April 2016) describing Commissioner Heydon’s conclusions on the scale of union corruption as ‘simply not justified by any objective measure’: at 6.

130 Enright and Stenson, above n 26, 21. See also Fair Work Commission, ‘Annual Report 2014–15: New Approaches to Workplace Relations’ (2015) 117–20; ‘Registered Organisations Almost Fully Compliant: FWC’, *Workplace Express* (online), 29 October 2015 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=53945](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=53945)>; Fair Work Commission, ‘Annual Report 2015–16’, above n 112, 97.

investigated by the FWC in recent years – warrant the regulatory response which has followed. In other words, are the Coalition Government's measures in the *FWRO Amendment Act* and the Corrupting Benefits Bill necessary, or are they part of a broader ideological attack on the Australian union movement?

### C Examining the 'Anti-Union Ideology' Argument

The TURC findings have provided the evidentiary basis for the Government's reform agenda in relation to registered organisations and, as noted earlier, many of its recommendations dovetailed neatly with the measures which ultimately formed part of the *FWRO Amendment Act*. The ACTU had chosen from the outset not to engage with the Royal Commission, alleging that 'the inquiry was a Coalition-inspired "witch hunt" and "biased" and "prosecuting a partisan, ideological agenda"'.<sup>131</sup> In his final report, Commissioner Heydon dismissed the notion that TURC had been 'an attack on unions'<sup>132</sup> and asserted that:

neither the Terms of Reference, nor any finding in this Report, affects in any way the ability of persons freely to engage in collective bargaining; to organise representation through, and be represented by, unions; freely to associate including association by creating, promoting and carrying on unions and union activities; and to participate in democratic union elections.<sup>133</sup>

It was also noted that TURC's inquiries had been 'directed to both sides of any corrupt transaction', and that 'a number of the case studies have investigated wrongdoing on the part of specific employers and their executives. Findings have been made that quite a number of them may have engaged in criminal conduct'.<sup>134</sup> However, Commissioner Heydon's claims to impartiality had been severely damaged during the course of the Royal Commission, with allegations of political bias levelled against him after he accepted an invitation to speak at a Liberal Party fundraising event.<sup>135</sup> The Royal Commissioner ruled against an application by the ACTU and several unions that, for this reason, he should step down from his position on the ground of apprehended bias.<sup>136</sup>

Several commentators have also argued that TURC was simply an ideological, anti-union exercise. For example, Ackland suggested that there is 'a common theme' running through TURC and the many Royal Commissions into trade union activities which preceded it: 'greater oversight of the activities of union leaders, the criminal nature of some of their activities and the creation

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131 Norington, above n 11, 292.

132 Commonwealth, *Final Report*, above n 35, vol 1, 75.

133 *Ibid* vol 1, 19.

134 *Ibid* vol 1, 20–1.

135 Norington, above n 11, 281.

136 Dyson Heydon, *Reasons for Ruling on Disqualification Applications*, 31 August 2015 <<https://www.tradeunionroyalcommission.gov.au/Hearings/Documents/2015/Evidence31August2015/ReasonsforRulingonDisqualificationApplicationdated31August2015.pdf>>. See also Louise Floyd, 'Much Ado about Nothing: Why Accepting an Invitation Did Not Make Dyson Heydon AC QC Appear Biased' (2016) 90 *Australian Law Journal* 38.

of new statutory regulatory powers'.<sup>137</sup> Schofield-Georgeson went some way further, describing Commissioner Heydon's recommendations as:

a steamroller approach to industrial democracy and basic human rights, such as the right to collectively bargain and the freedom of association. ...

If these recommendations become law, union-busting in the 21<sup>st</sup> century will resemble a dim likeness of the Combination Acts from early 19<sup>th</sup> century Britain. Like that legislation, these recommendations propose subjecting union officials to criminal as well as increased quasi-criminal sanctions.<sup>138</sup>

That kind of sentiment considerably over-states the argument. Then ACTU Assistant Secretary, Tim Lyons, put the position somewhat more persuasively in late 2014 when he contended that:

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

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

In this view collective action is collusion, it's coercion, it's unfair and an illegitimate exception to what is otherwise the operation of the law.<sup>139</sup>

Developing this line of argument further, it might be contended that the holding of a Royal Commission is another instrument through which the state seeks to curb union power – along with more direct interventions of the kind we have seen from Coalition governments in Australia previously. Notably, the Howard Government pursued a strong anti-union agenda between 1996 and 2007 through a combination of: direct legislative measures to constrain union organisation and capacity to represent members in the workplace (especially the 2005 'Work Choices' legislation);<sup>140</sup> an aggressive assault on union power in the

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137 Richard Ackland, 'The Only Surprise in Heydon's Trade Union Report Is Its Lack of Rhetorical Flourish', *The Guardian* (online), 4 January 2016 <<https://www.theguardian.com/commentisfree/2016/jan/04/the-only-surprise-in-heydons-trade-union-report-is-its-lack-of-rhetorical-flourish>>. The previous inquiries included: the Sweeney Royal Commission into alleged payments to maritime unions in the mid-1970s; the Costigan Royal Commission into the Federated Ship Painters and Dockers Union and the Winneke Royal Commission into the Australian Building Construction Employees' and Builders Labourers' Federation in the early 1980s; the Gyles Royal Commission into the building industry in NSW in the early 1990s; and the Cole Royal Commission into the Building and Construction Industry in the early 2000s. On the latter see Stewart et al, above n 3, 1004; Jim Marr, *First the Verdict: The Real Story of the Building Industry Royal Commission* (Pluto Press, 2003).

138 Eugene Schofield-Georgeson, 'Corporate-Style Regulation of Unions Won't Defeat Corruption', *The Conversation* (online), 8 January 2016 <<https://theconversation.com/corporate-style-regulation-of-unions-wont-defeat-corruption-52759>>. See also Shalailah Medhora, 'Royal Commission Changes an Unfair Burden on Unions, Warns Academic', *The Guardian* (online), 11 January 2016 <<https://www.theguardian.com/australia-news/2016/jan/11/royal-commission-changes-an-unfair-burden-on-unions-warns-academic>> (citing Professor Ron McCallum).

139 Tim Lyons, 'Crippling Unions: Abbott's Anti-worker Agenda' (Speech delivered at the Chifley Research Centre, Melbourne, 29 October 2014) (citation omitted).

140 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth); see Anthony Forsyth and Carolyn Sutherland, 'From "Uncharted Seas" to "Stormy Waters": How Will Trade Unions Fare under the Work Choices Legislation?' (2006) 16 *Economic and Labour Relations Review* 215.

maritime industry;<sup>141</sup> and various policy mechanisms to restrict union influence in other sectors (eg, funding requirements for universities, the federal building and construction code, and public sector bargaining guidelines).<sup>142</sup> This reform agenda had clear ideological foundations in ‘a particularly virulent form of neoliberalism’, as Cooper and Ellem have put it, clothed in ‘the rhetoric of the individual and choice’.<sup>143</sup> They also identified parallels with the anti-union laws and policies of the Thatcher Government in Britain in the 1980s, observing that: ‘the central mission of the [Howard] government was in line with neoliberalism elsewhere: to reduce union power and drive the individualization of the employment relationship’.<sup>144</sup>

The ‘New Labour’ Government which held office from 1997 to 2010 essentially retained the restrictive anti-union legislation of the Thatcher period,<sup>145</sup> with the addition of a fairly moderate and ineffective statutory collective bargaining procedure.<sup>146</sup> This maintenance of the Thatcherite order has arguably paved the way for the implementation, by the Cameron/May Government, of legislation that, according to Bogg, ‘reflects a highly authoritarian strand of Conservative ideology which, rather than being *neo-liberal*, is *anti-liberal* in its orientation’.<sup>147</sup> The *Trade Union Act 2016* (UK) includes new restrictions on industrial action, picketing and the right to protest; limits on union organisational rights in the public sector; and investigative/penal powers for the regulator of trade union administrative affairs (the Certification Officer (‘CO’)) – in short, ‘a bold, ambitious and comprehensive attack on trade union freedoms’.<sup>148</sup>

It could not be said that Australia’s Coalition Government has engaged in the same kind of ‘attack’ on the *legal rights* of trade unions since 2013. Certainly,

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141 Helen Trinca and Anne Davies, *Waterfront: The Battle That Changed Australia* (Transworld Publishing, 2000).

142 John Howe, ‘“Money and Favours”: Government Deployment of Public Wealth as an Instrument of Labour Regulation’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 167, 174–82.

143 Rae Cooper and Bradon Ellem, ‘The Neoliberal State, Trade Unions and Collective Bargaining in Australia’ (2008) 46 *British Journal of Industrial Relations* 532. See also Rae Cooper et al ‘Anti-unionism, Employer Strategy and the Australian State, 1996–2005’ (2009) 34 *Labor Studies Journal* 339; Jill Murray, ‘Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law’ (2006) 35 *Industrial Law Journal* 343.

144 Cooper and Ellem, above n 143, 532. On the Thatcher-era legislation, see, eg, Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Clarendon Press, 1993) ch 9; Chris Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890–2000* (Princeton University Press, 2005) ch 5.

145 Howell, above n 144, ch 6; see also Keith Barlow, *The Labour Movement in Britain from Thatcher to Blair* (Peter Lang, 2<sup>nd</sup> ed, 2008).

146 *Trade Union and Labour Relations (Consolidation) Act 1992* (UK) sch A1. See Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing, 2009); Gregor Gall, ‘The First Ten Years of the Third Statutory Union Recognition Procedure in Britain’ (2010) 39 *Industrial Law Journal* 444; John Bowers, Michael Duggan and David Reade, *The Law of Industrial Action and Trade Union Recognition* (Oxford University Press, 2<sup>nd</sup> ed, 2011).

147 Alan Bogg, ‘Beyond Neo-liberalism: The Trade Union Act 2016 and the Authoritarian State’ (2016) 45 *Industrial Law Journal* 299, 300 (emphasis in original); see generally Damien Cahill, *The End of Laissez-Faire? On the Durability of Embedded Neoliberalism* (Edward Elgar, 2014).

148 Bogg, ‘Beyond Neo-liberalism’, above n 147, 303; see also 313–21.

the Coalition has adopted a hard-line posture in public sector bargaining,<sup>149</sup> and continued the efforts of the Howard Government to reduce the influence of the CFMEU in the construction industry.<sup>150</sup> There have been minimal proposals to impose new conditions on the taking of protected industrial action<sup>151</sup> and union rights of entry,<sup>152</sup> but these have not yet been legislated.<sup>153</sup> The Government has shown little appetite for broader workplace reform of the kind recommended by the Productivity Commission in late 2015, such as: removing the award and minimum wage-setting functions from the FWC; creating a new statutory instrument to encourage workplace bargaining in small-medium enterprises; and reducing award penalty rates in the café, retail and hospitality sectors.<sup>154</sup> Embarking on that path carries clear political risks:<sup>155</sup> the Coalition has been on much safer ground focusing predominantly on union governance. Lyons' contention (above) is that this, too, is founded on neoliberalism – and that it is designed to weaken the collectivist strength which unions offer to workers. That may well be one of the long-run effects of TURC, the *FWRO Amendment Act* and the further reforms which the Government is now set to implement. So the 'anti-union ideology' critique is valid, but only in part: it ignores the fact that union corruption has been demonstrated to exist, even if not at the level portrayed by Commissioner Heydon, and requires a regulatory response of some kind.

#### D Evaluating the Regulatory Response: What is Necessary, What is Not?

What, then, among the TURC recommendations<sup>156</sup> and the Coalition Government measures<sup>157</sup> can be said to be *necessary* to address the problem of union corruption? First, a tightening of the regulation of union financial affairs is

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149 Sue Williamson, Michael O'Donnell and Cameron Roles, 'Bargaining over Australian Public Service Cuts: Do Forcing Strategies Work?' (2016) 27 *Economic and Labour Relations Review* 46.

150 *Building and Construction Industry (Improving Productivity) Act 2016* (Cth); see above n 34. See also *Code for the Tendering and Performance of Building Work 2016* (Cth); *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (Cth).

151 Fair Work Amendment (Bargaining Processes) Bill 2014 (Cth).

152 Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (Cth); see also 'Unions' Right of Entry in Coalition Sights', *Workplace Express* (online), 4 August 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54758](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54758)>.

153 Note, however, provisions in the *Fair Work Amendment Act 2015* (Cth) relating to bargaining for greenfields agreements and protected action ballot orders, discussed in Anthony Forsyth, 'Industrial Legislation in Australia in 2015' (2016) 58 *Journal of Industrial Relations* 372, 373–4.

154 Productivity Commission, 'Workplace Relations Framework' (Inquiry Report No 76, 30 November 2015); see Forsyth, 'Industrial Legislation in Australia', above n 153, 378–81.

155 Ewin Hannan, 'Election 2016: Coalition Silent on Promised Productivity Commission Response', *The Australian Financial Review* (online), 29 June 2016 <<http://www.afr.com/news/policy/industrial-relations/election-2016-coalition-silent-on-promised-productivity-commission-response-20160629-gpugle>>. It should also be noted that the Coalition made election commitments to *improve* protections for vulnerable workers in response to high-profile cases of exploitation: see Liberal-National Coalition, *The Coalition's Policy to Protect Vulnerable Workers* (Policy Document, May 2016); Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) (now before Parliament). See also Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29 *Australian Journal of Labour Law* 78.

156 See Part III(C) above.

157 See Part IV.

warranted to address the types of misconduct which occurred within the NUW NSW Branch and the HSU. In respect of the latter, Commissioner Heydon found that ‘misappropriation and deceit’ on the part of several senior officials ‘flourished in a culture then pervasive at the HSU. Senior management operated with a sense of complete entitlement in respect of the use of members’ money. They lacked any scruple and they operated without proper control or supervision’.<sup>158</sup> The TURC recommendations implemented in the *FWRO Amendment Act*, including much stronger disclosure obligations, are a proportionate response to address blatant HSU-style corruption. So too is the Government’s further proposal to introduce new penalties for falsifying union membership records. All of these measures will also assist in ensuring that unions implement good governance practices (such as financial management training and retention of records) which prevent future corruption.

Secondly, it is clear that the previous regime of penalties was insufficient to deter many union officials from engaging in illicit practices. TURC’s proposed increases in civil penalties and the introduction of criminal liability for serious *FWRO Act* breaches, now legislated through the 2016 amendments, signal an appropriate elevation of the importance attached to compliance with union office-holders’ legal obligations. On the other hand, several other proposed consequences of non-compliance with the law require a little more scrutiny. As noted earlier, Commissioner Heydon recommended an expansion of the grounds which could lead to an official’s disqualification from holding office (this formed part of the Coalition’s 2016 election policy). The proposed inclusion of contempt, blackmail and *FWRO Act* breaches<sup>159</sup> is justified, but the extension of disqualifying grounds to include breaches of the *FW Act* goes further than is necessary. Certain *FW Act* contraventions may already be taken into account for other purposes, such as determining whether a union official is a ‘fit and proper person’ to obtain a right of entry permit under parts 3–4 of the legislation, and whether such a permit should be revoked or suspended.<sup>160</sup> Commissioner Heydon also proposed that unions be prohibited from indemnifying officials for penalties arising from union-related conduct. Again, some ‘over-reach’ is evident here – for example, this prohibition would prevent a union from paying a civil penalty imposed on a union official for involvement in the taking of unlawful industrial action under the *FW Act*.<sup>161</sup> However, the equivalent *Corporations Act* provision prohibits indemnities only in relation to directors’ breaches of their statutory duties under that legislation (not broader breaches of the law).<sup>162</sup> Similarly, the proposed prohibition in the union context should only apply to penalties for *FWRO Act* breaches.

Thirdly, Commissioner Heydon’s proposals to regulate – in fact, to criminalise – ‘corrupting benefits’ and other union-employer payments are justified in light of examples exposed by TURC. These included the transactions

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158 Commonwealth, *Final Report*, above n 35, vol 1, 89.

159 Now enacted as s 307A of the *FWRO Act*: see Part IV(A) above.

160 *FW Act* ss 510(1), 513(1).

161 See, eg, *FW Act* ss 417, 421.

162 *Corporations Act* s 199A(2)(b).

between the AWU and Cleanevent, and the payment to the AWU by Thiess John Holland (the joint venturer on Melbourne's EastLink Tunnel project) of \$110 000 per year over the three-year project, disguised by false invoicing practices.<sup>163</sup> The problem that these practices highlight is the propensity for union officials to act in their own or their organisation's interests – rather than the best interests of the workers they purport to represent or on whose behalf they are bargaining. Commissioner Heydon's recommendation for mandatory disclosure to members of financial benefits a union will derive under an enterprise agreement would also assist in addressing that concern. It is necessary to ensure that not only direct financial payments, but also arrangements that (for example) facilitate union access to employees for organisational and membership purposes, are covered by these disclosure obligations. Union members have the right to know if such arrangements have been struck in the context of agreement negotiations, particularly if the outcomes for workers are compromised under the agreement.<sup>164</sup> Those kind of arrangements would likely be captured by the proposed new disclosure requirements in the Corrupting Benefits Bill.<sup>165</sup> More generally, although the Bill's proposed criminal offences in respect of the giving or receiving of corrupt benefits or payments are a necessary step, concerns have been raised by both union and employer groups about some aspects of these proposals. For example, Australian Industry Group considered that the main new offence provisions included some uncertain concepts (such as 'illegitimate advantage'), and were modelled on federal offences relating to bribery of foreign officials instead of those applicable to bribery of public officials. The lower maximum penalties for the latter type of offences were thought to be more appropriate than the Bill's proposed maxima for breaches of the new corrupting benefit offences (10 years' imprisonment and/or a \$900 000 fine for an individual, and \$4.5 million for a body corporate).<sup>166</sup>

Fourthly, there is a strong case for imposing clearer and more consistent regulation of separate entities/union slush funds, to address conflicts of interest and prevent the misappropriation of union funds (as demonstrated by Jackson's

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163 Commonwealth, *Final Report*, above n 35, vol 1, 26.

164 It has been suggested that this has occurred in respect of some agreements negotiated by the Shop, Distributive and Allied Employees Association and employers in the retail and fast food sectors (although the union rejects these allegations): see, eg, Ben Schneiders, 'Workers Deserve Better Than Shameful Coles Deal with Shop Union', *The Sydney Morning Herald* (online), 31 May 2016 <<http://www.smh.com.au/business/workplace-relations/workers-deserve-better-than-shameful-coles-deal-with-union-20160531-gp8ayj.html>>; Ben Schneiders and Royce Millar, 'Shopped Out', *The Sydney Morning Herald (Good Weekend)* (Sydney), 3 September 2016, 10; 'Shop Union Pledges Tougher Approach after Coles Debacle', *Workplace Express* (online), 30 August 2016 <[https://www.workplace-express.com.au/n106\\_news\\_selected.php?selkey=54842](https://www.workplace-express.com.au/n106_news_selected.php?selkey=54842)>.

165 See Part IV(C) above.

166 Ai Group, Submission No 7 to Senate Education and Employment Legislation Committee, *Inquiry into the Fair Work Amendment (Corrupting Benefits) Bill 2017*, 10 April 2017, 5–6. Ai Group also highlighted the potential for the proposed new offence relating to provision of cash/in kind benefits to a union, to cover innocuous matters such as an employer association providing a meal or small gift to a union official: 8–9. A Senate Committee recommended changes to the Bill to address these concerns: Senate Education and Employment Legislation Committee, Parliament of Australia, *Fair Work Amendment (Corrupting Benefits) Bill 2017 [Provisions]* (May 2017).

operation of the HSU's National Health Development Account, among other examples considered by TURC).<sup>167</sup> The current regulatory approach is piecemeal, and largely depends on the particular legal structure adopted to create the relevant fund. Commissioner Heydon's proposals for minimum governance standards and annual reporting requirements for union election funds, in particular, are sound and would increase transparency for the contributors to these funds and (more importantly) those voting in union elections. So too would his proposal to prohibit unions from using their funds to support candidates in other unions' elections. However, the proposed prohibition of award, agreement or contract terms permitting deductions from a union employee's salary towards an election fund unduly intrudes on arrangements that are in most instances freely agreed to between the parties involved.

Finally, there is the question of the appropriate body to oversee union regulation. In the United Kingdom context, Bogg warns that the recent changes to the role of the Certification Officer ('CO'), including the power to initiate investigations rather than waiting for a complaint from a union member, 'have the potential to transform the CO from a neutral independent officer discharging largely administrative functions into a coercive and interventionist instrument of the State'.<sup>168</sup> The same risk may arise from the establishment of the ROC under the *FWRO Amendment Act* in Australia. Unions have just cause for concern about the creation of a new state agency with a remit focused squarely on their internal affairs – especially given that another regulatory body already polices their activities in the construction industry (the ABCC). Overall, though, the shift to the ROC is a necessary change: the investigatory and compliance functions relating to registered organisations have always been an odd fit within the FWC, which is primarily a dispute resolution and adjudicative body. An alternative would have been to house these functions within the corporate regulator,<sup>169</sup> but ASIC does not have the knowledge of the industrial relations context that is required to effectively oversee registered organisations. Locating the ROC within the FWO, a regulator focused on workplace relations enforcement, is the best outcome. That said, it will be critical to ensure that the ROC does not develop into a partisan, anti-union state agency (as has been suggested in respect of the ABCC and its predecessor,<sup>170</sup> with a specific legislative amendment recently enacted to ensure that it carries out its functions 'in a reasonable and proportionate manner' having regard to all categories of participants in the building industry)<sup>171</sup>.

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167 See above n 73 and accompanying text.

168 Bogg, 'Beyond Neo-liberalism', above n 147, 320; see also Stephen Cavalier and Richard Arthur, 'A Discussion of the Certification Officer Reforms' (2016) 45 *Industrial Law Journal* 363.

169 Commonwealth, *Final Report*, above n 35, vol 5, 60–3; see also 'Corporate Watchdog Has Role in Union Regulation: Labor', *Workplace Express* (online), 7 December 2015 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54074](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54074)>.

170 See, eg, 'FWBC Had Collateral Purpose for Prosecuting National Secretary: CFMEU', *Workplace Express* (online), 26 May 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54538](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54538)>; 'CFMEU Accuses FWBC of Smear Campaign', *Workplace Express* (online), 28 July 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54733](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54733)>.

171 *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) s 16(2).

## VI CONCLUSION

For all its faults, the [Heydon Royal Commission] did find systematic bad behaviour that dominated the running of entire union organisations. This could hardly be dismissed as a few rotten apples here or there.<sup>172</sup>

This quote, from Norington's excellent account of the HSU saga, reflects the key conclusion of this article: that although ideological motives cannot be discounted, the Coalition Government's establishment of TURC and legislative measures to increase standards of accountability within Australia's unions have for the most part been *necessary*. This conclusion was reached following a detailed examination of the evolution of the union corruption problem since the HSU scandal broke in 2011, Labor's legislative response in 2012, the Coalition's 2013 election policy, the main findings and recommendations of the Royal Commission, the Government's registered organisations legislation (finally passed in late 2016), last year's election commitments and (finally) the Corrupting Benefits Bill. The overall necessity of the regulatory response was also identified through an attempt to assess the *extent* of union malfeasance, scrutiny of the 'anti-union ideology' counter-argument, and an evaluation of several key aspects of the reform program.

In the course of that evaluation, some aspects of the TURC recommendations and the Government's regulatory response were highlighted as going further than is necessary to address the problem of union corruption. Two more items can be added to that list from the Coalition's 2016 election policy. First, the proposal to empower the courts to deregister a union or place it into administration where it has become dysfunctional or is no longer serving the members' interests seems very open-ended. Deregistration is an extreme step,<sup>173</sup> and any new grounds upon which this could occur should be tied to a demonstrated and serious failure to comply with the new framework of legal obligations to prevent union corruption. Existing arrangements facilitating the placing of a 'dysfunctional' union into administration seemed to work well in the HSU case in 2012,<sup>174</sup> and therefore need not be changed. Secondly, the proposed new test for union amalgamations – allowing consideration of past compliance with workplace laws on the part of the would-be merger participants – is simply opportunistic on the Government's part. This did not form any part of the TURC recommendations, and again, the amalgamation of registered organisations is already closely regulated.<sup>175</sup> Following the intensive wave of union mergers from the late 1980s,<sup>176</sup> amalgamations have recently re-emerged as another strategy to counter union

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172 Norington, above n 11, 292.

173 The existing *FWRO Act* grounds for cancellation of an organisation's registration (see ch 2 pt 3; see especially s 28) are discussed in Stewart et al, above n 3, 832–5.

174 See above nn 22–3 and accompanying text.

175 *FWRO Act* ch 3 pt 2; see Stewart et al, above n 3, 839–42.

176 Stewart et al, above n 3, 835–7; Kerrie Hose and Malcolm Rimmer, 'The Australian Union Merger Wave Revisited' (2002) 45 *Journal of Industrial Relations* 525.

membership decline.<sup>177</sup> The Coalition's proposal should be viewed in that context.

Union decline also provides a necessary back drop for unions to consider the question of corruption and their role in addressing it. With the continuing fall in union membership levels, especially in the private sector,<sup>178</sup> the union movement is already battling negative public perceptions – especially among younger workers, for many of whom trade unions may appear like a relic of the past.<sup>179</sup> Unions do not need those negative perceptions reinforced by the taint of corruption. It is therefore not in their interests to seek to 'explain away' the problem.<sup>180</sup> Unions could instead recognise that their credibility, and consequent community support, will be enhanced by 'calling out corruption'<sup>181</sup> – and taking positive steps to improve internal governance standards. In the post-HSU and TURC era, this will mean adopting a 'best practice' approach to compliance with the new regulatory framework for registered organisations.

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177 See above n 95 and accompanying text; 'AMWU and United Voice Considering Amalgamation', *Workplace Express* (online), 19 February 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54232](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54232)>; 'Full Steam Ahead for Three-Way Merger', *Workplace Express* (online), 14 December 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55219](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55219)>. For a critical perspective see Tim Lyons, 'The Urge to Merge: Notes on a Decision Making Framework for Union Consolidation' (Policy Paper, Per Capita, March 2016).

178 See above n 102 and accompanying text.

179 On Australian union responses to these (and many other) challenges, see, eg, Amanda Tattersall, *Power in Coalition: Strategies for Strong Unions and Social Change* (Cornell University Press, 2010); 'New Plan for Unions to Staunch Membership Collapse', *Workplace Express* (online), 11 February 2016 <[https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=54207](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54207)>; Tim Lyons, 'The Labour Movement: My Part in Its Downfall', *Meanjin* (Melbourne), Spring 2016, 87; Ken McAlpine and Sarah Roberts, 'The Future of Trade Unions in Australia' (Paper presented at the AIRAANZ Conference, Canberra, 9 February 2017).

180 See, eg, 'ACTU Leader Declares TURC a Failure; Unions Still Have Standing' (Workforce No 20101, Thomson Reuters, 23 May 2016) 1. See the critique of the ACTU's response to the Heydon Royal Commission in Norington, above n 11, 292–3.

181 Norington, above n 11, 293. See also Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2014 (Cth) xvi; David Peetz, 'Sorting Out the Gems From the Dung in the Royal Commission on Union Corruption', *The Conversation* (online), 29 April 2016 <<https://theconversation.com/sorting-the-gems-from-the-dung-in-the-royal-commission-on-union-corruption-57202>>.