Master Builders Australia

Submission to the Senate Education and Employment Legislation Committee

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

25 October 2017

MASTER BUILDERS AUSTRALIA

CONTENTS

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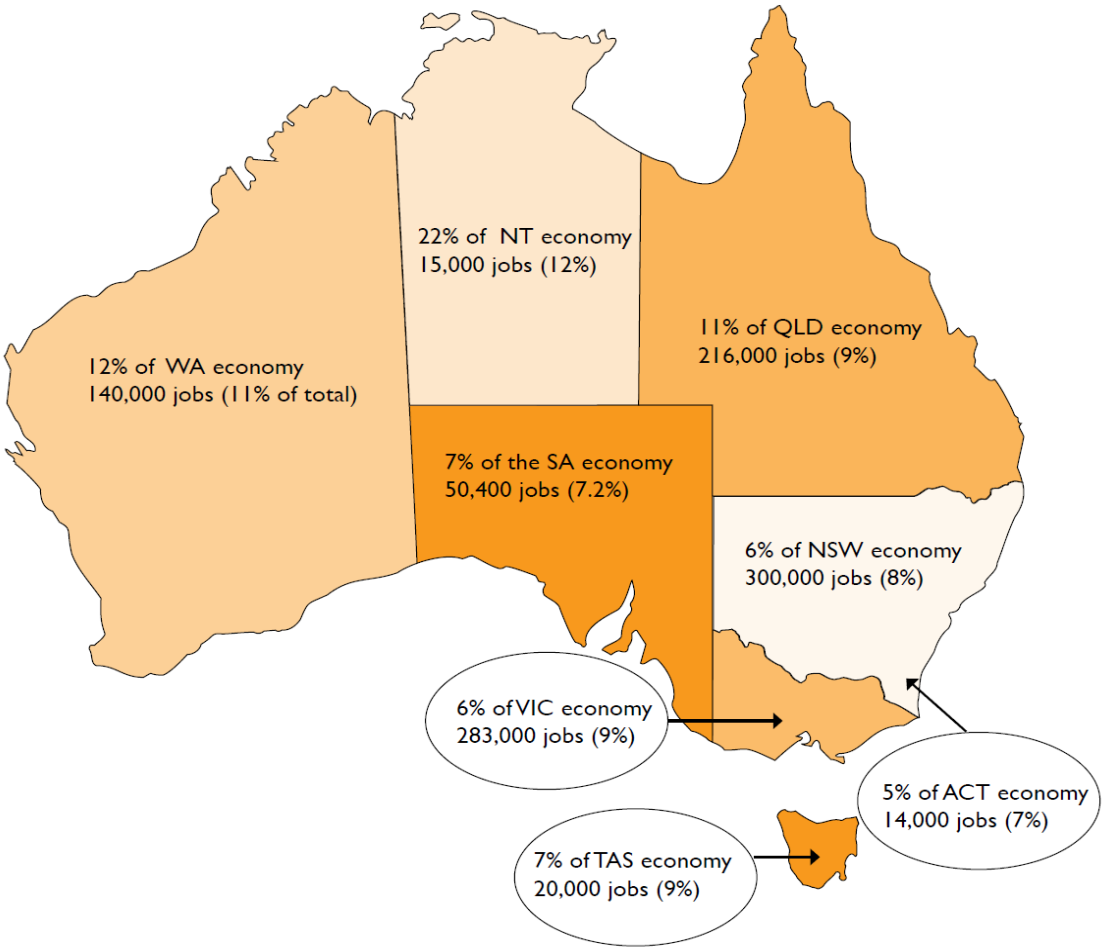
Introduction

1. This submission is made on behalf of Master Builders Australia Ltd.

2. Master Builders Australia (Master Builders) is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders' members are the Master Builder State and Territory Associations. Over 127 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

3. The building and construction industry is an extremely important part of, and contributor to, the Australian economy and community. It is the second largest industry in Australia, accounting for 8.1 per cent of gross domestic product, and around 9 per cent of employment in Australia. The cumulative building and construction task over the next decade will require work done to the value of $2.6 trillion and for the number of people employed in the industry to rise by 300,000 to 1.3 million.



Picture 1: *Representation of the state by state breakdown of the economic and employment contributions attributable to the building and construction industry* (MBA – 2016)

4. The building and construction industry:

   - Consists of over 340,000 business entities, of which approximately 97% are considered small businesses (fewer than 20 employees);
   - Employs over 1 million people (around 1 in every 10 workers) representing the third largest employing industry behind retail and health services;
   - Represents over 8% of GDP, the second largest sector within the economy;
   - Trains more than half of the total number of trades based apprentices every year, being well over 50,000 apprentices; and
   - Performs building work each year to a value that exceeds $200 billion.

Summary of Submission

5. This submission is made to the Senate Standing Education and Employment Legislation Committee ('the Committee') to assist in its inquiry into the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017* ('the Bill').

6. The Bill seeks to amend the:

   - *Fair Work Registered Organisations Act 2009*; ('RO Act')
   - *Fair Work Act 2009;* ('FW Act')
   - *Fringe Benefits Tax Assessment Act 1986;* ('FBT Act')
   - *Income Tax Assessment Act 1997;* ('Income Tax Act') and
   - *Taxation Administration Act 1953* ('Tax Admin Act').

7. Master Builders supports the Bill and the policy outcomes it seeks to achieve. This support, however, is provisionally expressed given the relatively short timeframe we have had to consult with members about a Bill with extensive reach and wide array of potential ramifications.

8. The general basis for this support is, in summary, that the Bill:

   - will give workers, and those who make contributions on behalf of workers, the capacity to know what will happen with monies held on their behalf;
   - will implement several recommendations contained in the Final Report ('Heydon Report') of the *Royal Commission into Trade Union Governance and Corruption* ('Heydon Royal Commission') that arose from circumstances and various case studies that (in the main) arose from within the building and construction industry;
   - will see the Government discharge an election promise to adopt and implement the majority of the Heydon Report recommendations;
   - will establish a cogent and sensible regime of regulation in an area that has hitherto escaped appropriate and clear rules;
   - will boost the levels of transparency and accountability associated with the operation of worker benefits funds and the governance thereof;
   - ensures that income generated from funds held on behalf of employees are returned to those employees or, subject to other criteria, used for purposes that are proper and appropriate;
   - prevents the use of income generated from funds held on behalf of workers to be spent on inappropriate things and for improper purposes;

- establishes appropriate processes to be observed when fund operators make decisions about fund income ensuring decisions are made in the best interest of contributors and do not allow for inappropriate financial gain to either individuals or organisations; and
- will fill a much needed legislative gap that has allowed funds to accumulate hundreds of millions worth of financial reserves and assets with scant regulatory or other necessary (and elsewhere otherwise applicable) financial safeguards.

9. While this submission does not make specific recommendations to amend the Bill as introduced, there are a number of areas in which we do note some uncertainty and recommend improvements in the interests of clarity to assist those affected by the Bill. In the event ongoing consultations with members generate specific recommendations to amend the Bill, Master Builders undertakes to provide them to the Committee should this occur prior to the finalising of the Committee's Final Report.

10. This submission that follows provides a summary of matters relevant to the measures within the Bill from a building and construction industry context. The remainder of the submission deals with the five broad areas of change set out within the Bill.

11. It should be noted that where quotations include words underlined, these are at the authors' initiative for emphasis.

Master Builders & Worker Entitlement Funds

12. It is appropriate to note from the outset that the Master Builders network operates pursuant to a Federated organisational model. Master Builders is the National Office and State and Territory based organisations within the network are their own separate entities holding various types of registered status.

13. The relationship that State and Territory Master Builders organisations have with the various funds operating in their respective jurisdictions are all different. In some circumstances, there is little or no relationship – in other circumstances, the extent of involvement is significant.

14. Where the latter situation exists, the Committee would be aware that these relationships are likely to involve arrangements of the type that may be affected by this Bill. In addition, Officers of the State and Territory based organisations frequently hold roles on boards overseeing various funds.

15. Given the diversity of funds within the sector, their complex operational and financial structures, and the independence maintained by State and Territory Master Builders organisations, Master Builders is not in a position to detail the nuances of any relationship that may exist with the various funds. Nor is it appropriate that we would seek to do so, or have the capacity to do so.

16. Master Builders is, however, cognisant that the provisions of the Bill have the capacity to impact the financial status of some organisations within the Master Builders network.

17. Notwithstanding this, in March 2016 the National Board of Master Builders considered the recommendations for law reform contained within the Heydon Report and resolved unanimously to support those recommendations, subject to consideration and detail of specific legislation giving effect to same if introduced.

18. Master Builders is aware that arrangements between State and Territory organisations and various worker entitlement funds involve the use of income generated from contributions to those funds. This is used to fund training and related arrangements. It also assists with other service providers, such as worker welfare and mental health support.

19. Master Builders understands that the provision of these services are in important part of the sector and that their continued delivery is beneficial to the industry and its participants.

20. It is, however, acknowledged throughout this submission that the above relationships involve entities that have been found to have engaged in conduct and practices giving rise to this Bill and its provisions. That conduct is simply wrong and strongly condemned by Master Builders.

21. Concurrently, it is our view that the overwhelming majority of training and welfare support services are delivered appropriately and that monies allocated to same from funds over which we have influence is utilised efficiently and for their intended purpose. Master Builders believes it is important for the Committee, the Parliament, relevant regulators and this Bill to allow a distinction to be drawn between those entities that do the right thing and those that do not. We do not support measures that would see the good work of the majority cease because of the deliberate and inappropriate conduct of a few and prefer that the law be capable of making that distinction.

22. This is why Master Builders has been a consistent and long standing supporter of measures to improve levels of accountability and transparency within the sector. It is our view that developments such as the re-establishment of the Australian Building and Construction Commission ('ABCC'), the establishment of a Registered Organisations Commission ('ROC'), the passage of Corrupting Benefits laws, will go a long way to driving cultural change in a sector where it is ingrained and institutionalised.

23. All parts of the Master Builders network share this view and understand the importance of achieving necessary cultural change so as to benefit our members, the industry, taxpayers, and the community as a whole. Reforms such as those in the Bill are an important component of, and step towards, achieving positive and lasting outcomes.

Worker Entitlement Funds within the Building and Construction Industry

24. The Explanatory Memorandum notes that the Bill has its genesis in the related recommendations contained within the Final Report of the Heydon Royal Commission[1] which devoted some 1160 pages to the building and construction sector alone. Of the five volumes in the Heydon Report, almost one and a half volumes were specific to the building and construction sector, the conduct of the CFMEU and other building unions, and the various arms of influence that extend throughout the sector.

25. The Heydon Report variously covered what it terms 'relevant entities' that were described as:

[1] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015*

> *"entities separate from a union, such as a fund, organisation, account or financial arrangement, established by a union or union officials for a particular industrial purpose or for the welfare of persons including members of the union".*[2]

26. These relevant entities were further broken down into various groups and categorised in the manner noted in the following extract:

- *"funds established with the primary purpose of funding the election campaign of candidates standing for office in a union. These are often described as 'fighting funds' or 'election funds' and will be referred to as election funds;*
- *funds established for the purpose of funding redundancies for employees in an industry including members of the union (redundancy funds), or funding the payment of other worker entitlements such as sick leave, which may be classed together as worker entitlement funds;*
- *funds established for the purpose of providing training to members of a union or employees more generally (training funds) or providing welfare services (welfare funds);*
- *schemes established to provide insurance, typically sickness and/or accident insurance, to employees in an industry including union members (employee insurance schemes);*
- *industry superannuation funds;*
- *charities established to assist union members and employees more generally (for example, by providing welfare services or drug and alcohol treatment services); and*
- *other generic accounts, associations or funds."*[3]

27. In relation to these types of arrangements, the Royal Commission made a series of observations that sought to capture the myriad of deficiencies that exist giving rise to inappropriate and improper conduct.

> *"One issue is that a number of unions promote forms of enterprise agreements that require employers to make payments to certain relevant entities, such as redundancy funds and employee insurance schemes, in order to generate income for the union that is not, or not properly, disclosed. The problems that arise from these agreements are discussed in more detail in Chapter 6, but the problems include conflicts of interest, breaches of fiduciary duty and possible coercion.*
>
> *Another issue is the lack of transparency concerning the financial relationships between a relevant entity and the union with which it is associated. That issue is addressed in Part B of this Chapter.*
>
> *Other more general problems include the fact that many relevant entities have poor or non-existent governance. Further, a relevant entity can be used in a way that subverts the democratic processes of a union. This can occur where a union official, often a secretary, has control of a relevant entity or 'slush fund' that allows the official to buy influence within the union. These issues are considered in Parts C to F of this Chapter."*[4]

[2] *Ibid Volume 5, p 272*
[3] *Ibid*
[4] *Ibid p 273-274*

28. In considering particular examples of funds canvassed above, the Royal Commission had regard to a number that exist within the building and construction industry. These funds were identified in Chapter Five[5] and mainly concerned 'Worker Entitlement Funds' ('WEFs') that the Heydon Report described as:

> *"funds established for the purpose of funding employee entitlements such as redundancy pay and sick leave. These funds operate primarily in the building and construction industry and are typically established as 'joint ventures' between industry parties, that is a union or unions and an employer organisation or organisations, although some do not involve employer organisations. Most worker entitlement funds are operated by a trustee company, the directors of whom are associated with the industry parties."*

29. WEFs relevant to the sector that attracted considerable scrutiny were:

- Building Employees Redundancy Trust ('BERT;), a redundancy fund covering the Queensland construction industry which is primarily associated with the Construction, Forestry, Mining and Energy Union (CFMEU);
- The Protect Scheme ('Protect'), which operates a redundancy fund for electrical trades employees in Victoria; and
- Incolink, which operates a number of redundancy funds and sick leave schemes for construction industry employees in Victoria and Tasmania.

30. The Australian Construction Industry Trust ('ACIRT') was also named.

31. The Heydon Report noted that funds of this type hold over $2 billion in funds collected from contributions made on behalf of employees in the sector. This comprised of, at 30 June 2015, the following amounts in terms of assets or funds:

- Incolink – almost $1.3 billion;
- ACIRT - $594 million;
- Protect - $245 million;
- BERT - $135 million;
- MERT - $125 million; and
- ACIRT - $67 million.

32. The Heydon Report found that:

> *"Despite their size, worker entitlement funds, unlike superannuation funds, have very little specific legislation regulating their activities."*[6]

33. The deficiencies associated with this lack of regulation included that these funds were not:

- subject to mandatory disclosure requirements;
- required to disclose the commissions and other payments made by the fund to unions and employer organisations; and
- required to disclose the amounts deducted by the funds by way of fees and charges.[7]

[5] *Ibid p 296*
[6] *Ibid p 297-298*
[7] *Ibid p 302-303*

34. Further, it was noted that there is:

- no requirement to explain to workers the circumstances in which they will, or will not, be entitled to a payment from the fund;
- no statutory requirement on worker entitlement funds to provide annual reports or accounts to persons with an interest in the fund; and
- no requirement to treat members, or classes of members, equally.[8]

35. The Heydon Report noted that, particularly with reference to its case studies of BERT, that it was illustrative of:

> "*the potential for worker entitlement funds under current law to give preferential treatment to union members over non-union members with the aim of generating union membership. In circumstances where there is no difference of interest between union and non-union members of the funds, there is no justification for differential treatment.*"[9]

36. The above observations from the Heydon Report are merely a scant summary of what is otherwise comprehensive and forensic analysis of the operation and conduct of such entities.

37. That conduct (even limited to the findings of the Royal Commission and its confined case studies) and the ramifications it has for a sector which is renowned for being home to a lengthy history of industrial disputation and entities that believe they are above the law, are indicative of the broader and more extensive, ingrained and regrettably institutionalised culture that challenges the building industry.

38. Master Builders finds it unpalatable that while Governments have variously sought to implement other measures that deal with the thuggery, unlawful conduct and other behaviours that exist to the detriment of the broader community, the lack of effective regulation has allowed funds such as those cited in the Heydon Report have continued to support (either directly or indirectly) the activities of those who believe their own interests are more paramount the those of the sector or the community.

39. It is extremely disappointing but necessary for Master Builders to observe that the Heydon Report found funds of this type have:

- Funded workers who have engaged in illegal industrial action in circumstances that would otherwise be considered 'prohibited' such as strike pay;
- Allowed their operation to exist to the effect that they are tacitly supporting breaches of Freedom of Association provisions;
- Funded activities under the guise of 'training' or 'worker welfare' in circumstances that were administratively deficient.

40. Master Builders condemns these practices.

41. It is even worse to note the Heydon Report found that monies from various funds have been given to fund otherwise worthy and important services provided by charities regarding broader sector issues of importance, such as mental health. The work performed by such entities, while obviously focussed on important social and

[8] *Ibid p 303*
[9] *Ibid p 303*

community health needs, are significantly undermined when they are associated with funds of this type and/or organisations known to be 'recidivist'.

42. One such example that received significant attention in the Heydon Report was the donation elicited by the CFMEU in NSW from a building industry participant to a mental health entity that maintains a charity status called 'Mates In Construction'.

43. The participant in question (Jianqiu Zhang) was associated a group of companies that operated in the building and construction sector. The participant had a series of interactions with the NSW CFMEU about the use of the union pattern agreement on industry relevant sites. Following these interactions, the union appeared to allow the participant to avoid applying the pattern agreement – a rare outcome for sector workplaces. The Heydon Report noted that:

> *"…the evidence showed that some of Jianqiu Zhang's companies made a number of donations to the CFMEU NSW, or to organisations or people suggested by officers of the CFMEU NSW, between April 2011 and April 2015."* [10]

44. In relation to these 'donations', the NSW CFMEU provided evidence that:

> *"….from the first time he ever met him, Jianqiu Zhang 'always said that, you know, "If the Union requires me to make a donation to assist you with any issue that you think is going to help the industry, well, I will."'*[11]

45. The Heydon Report then noted that these 'donations' were directed to entities including:

> *"…the $30,000 donation on 13 December 2013 was for the purpose of raising funds for Mates in Construction, which is an organisation directed towards suicide prevention in the construction industry."*[12]

46. The above 'donation' was one of several the relevant company had provided to entities including:

- $3000 for overseas students;
- $1500 for 'fighting funds' not described;
- $30,000 for another 'fighting fund' in circumstances described as "*he thought he was asked to seek a donation from his 'leaders'.*"[13]
- $2000 for a union picnic day;
- $30,000 for what was described as 'crane tower safety'; and
- $10,000 for 'Friends of Sinn Fein'.

47. The Royal Commission went on to consider where this money then went in an effort to provide some insight as to its actual and intended purpose. In this respect it found that:

> *"In relation to each of the $30,000 donations about which Yulei Zhou and Brian Parker gave evidence:*
>
> *(a) As to the first amount of $30,000, the ledger records a deposit of $30,000 on 20 March 2013 to the Trading Cheque Account with details of*

[10] *Ibid Volume 3, p 599*
[11] *Ibid, p 604*
[12] *Ibid, p 605*
[13] *Ibid, p 603*

> *'SOUTHPAC MIC'. The inference is that this is the donation for Mates in Construction which Brian Parker was referring to and not the December 2013 donation as he thought. The deposit is recorded as a credit to the 'Contra – General' ledger account. That ledger account also appears to reflect a number of other donations for Mates in Construction around March 2013 and July 2013, totalling $51,300. There is a debit to the 'Contra – General' ledger account recorded on 31 July 2013 for $6,709.09 apparently for a 'TRADING MIC DINNER' and a debit on 13 May 2014 of $44,590.91 with the detail 'MIC', which together total $51,300.55*
>
> *(b) As to the second amount of $30,000, the ledger account records a deposit of $30,000 on 16 December 2013 to the Trading Cheque Account with details 'SPC BUILDING'. The deposit is recorded as a credit to the 'CFMEU Fighting Fund' general ledger account. There is no other obviously relevant ledger entry for expenditure in relation to crane safety programs.*

48. The Heydon Report went on to find that:

> *"On the material available to the Commission, each of the CFMEU NSW, Brian Parker and Yulei Zhou may have committed various offences against the Charitable Fundraising Act 1991 (NSW):*
>
> *(a) The CFMEU NSW may have conducted a fundraising appeal in relation to the Bankstown Fire Tragedy, the appeal for Mates in Construction and the appeal for crane safety without an authority, contrary to s 9. Brian Parker and Yulei Zhou have assisted in those appeals and Brian Parker at least if not Yulei Zhou might reasonably be expected to know that they were conducted without an authority. Accordingly, each may have contravened s 10.*
>
> *(b) In each case, the way in which the monies have been dealt with may have involved contraventions by the CFMEU NSW and/or Brian Parker, as Secretary, of the requirements in s 20 of the Act."*

49. The above findings caused the conduct of the CFMEU NSW to be referred to the relevant local NSW authorities. The Heydon Report noted further examples of donations to 'Mates in Construction' in Queensland.

50. The Heydon Report described the circumstances as follows:

> *"During 2012 and 2013 some employees of Mirvac in Queensland, and some subcontractors with whom they dealt, engaged in a practice under which donations and other payments made to trade unions (for functions, fund raising or charity events) were paid for by Mirvac subcontractors. The subcontractors then recovered the payments from Mirvac by way of false variation claims. In those variation claims the amount paid by the subcontractor was misdescribed as being in respect of work performed by that contractor on a Mirvac job."*

51. And later:

> *Against this, Jason Vieusseux gave evidence in which he denied knowing about or condoning the practice Adam Moore described. He gave evidence that, since 2007, his policy has been that Mirvac employees could attend 'appropriate Union events', which were 'always paid by the business as we were representing Mirvac at those events'. Jason Vieusseux cited events*

> *with a 'safety message' (for example those relating to Mates in Construction and an annual Sydney Safety Dinner) as being 'appropriate' ones for Mirvac staff to attend He said that any union donation or sponsorship payments would not be appropriate. Jason Vieusseux also relevantly said that 'there was absolutely no problem' with money for appropriate union events going through 'Mirvac books' and that 'there are a number of examples since that time where that has occurred'. Jason Vieusseux did not refer to documentary evidence of the examples to which he referred. But his evidence on this point was not challenged in cross-examination.*

52. The Committee might wish to note the range of entities that the above witness evidence classified as '*appropriate union events.*'

53. It is important to for the Committee to note, in addition, that Master Builders is aware that the Heydon Report examination of donations to 'Mates in Construction' caused that organisation to make a series of internal changes to avoid future instances of similar events. One such change was to ensure that no donations offered to them exceeding a certain amount are accepted unless they are satisfied that there are no inappropriate circumstances that have caused that donation to be offered and it is freely given. Master Builders supports such an approach.

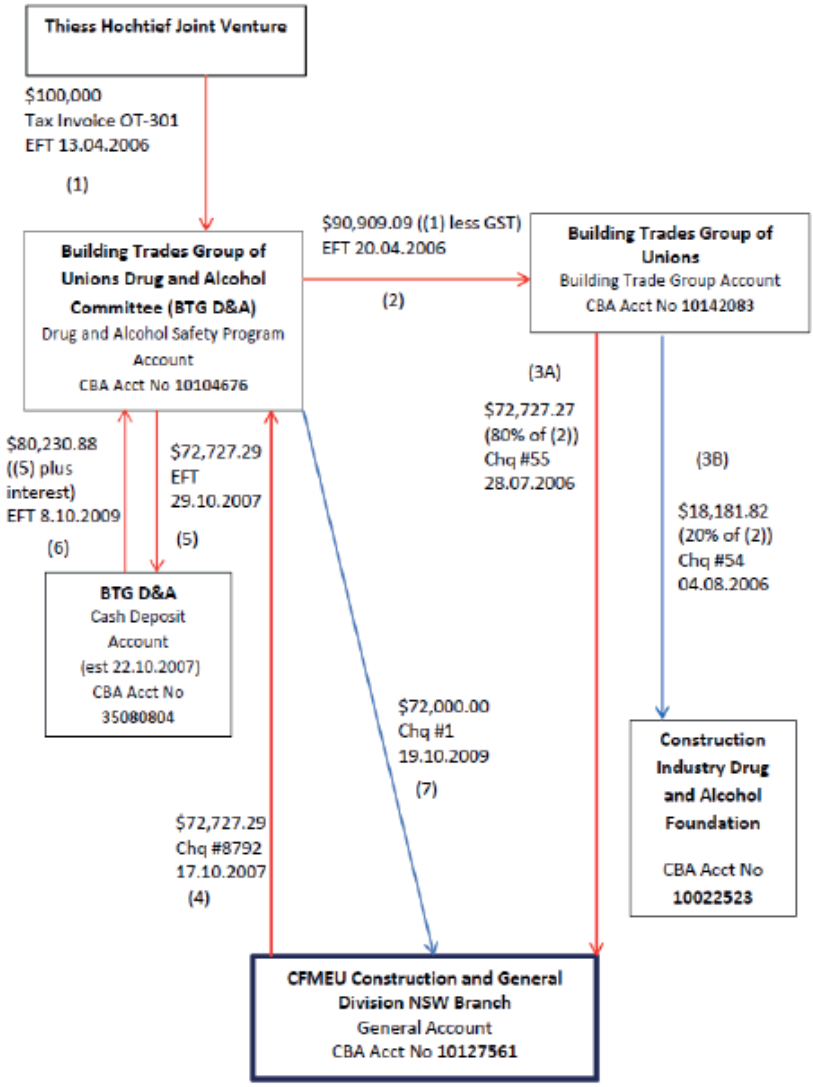
54. The above examples are by no means isolated. The Heydon Report also considered the *Building Trades Group Drug and Alcohol Committee* (BTG D&A Committee) and payments it received noting that:

> *"……payment of $100,000 made in April 2006 by the Thiess-Hochtief Joint Venture carrying out the Epping to Chatswood Rail Link. The payment was made to the BTG D&A Committee. The payment was ostensibly for the purposes of drug and alcohol safety training. In fact, most of the money ended up, after round robins of payments over three years, in the 'fighting fund' of the Construction, Forestry, Mining and Energy Union, Construction and General Division, New South Wales Divisional Branch."*

55. Another example of similar conduct was also considered and summarised by the Royal Commission as:

> *"The second matter examined concerns a clause in CFMEU NSW enterprise bargaining/enterprise agreements (EBAs). Pursuant to that clause, employers made payments to the BTG D&A Committee for the purpose of assisting 'with the provision of drug & alcohol rehabilitation & treatment services / safety programs for the building industry'. From 2004 to 2011 inclusive, employers paid approximately $2.6 million to the BTG D&A Committee pursuant to the clause. Over that time, approximately half of that money was siphoned to the CFMEU NSW and deposited into its general revenue."*

56. The Heydon Report noted the complexities of how monies donated were moved between various accounts described as 'round robins of payments' and these were summarised diagrammatically on page 626 of the Heydon Report as reproduced below.



57. With respect to the $100,000 payment, the Heydon Report concluded that:

> *"The $100,000 payment was not a legitimate payment for the provision of drug and alcohol training to THJV workers by the BTG D&A. The $100,000 payment was not a donation to the CFMEU NSW for safety purposes. The $100,000 payment was a disguised payment to the CFMEU NSW."*

58. One of the other many examples of payments involving entities with 'charity' status revolved around a case study involving the CFMEU ACT Branch.

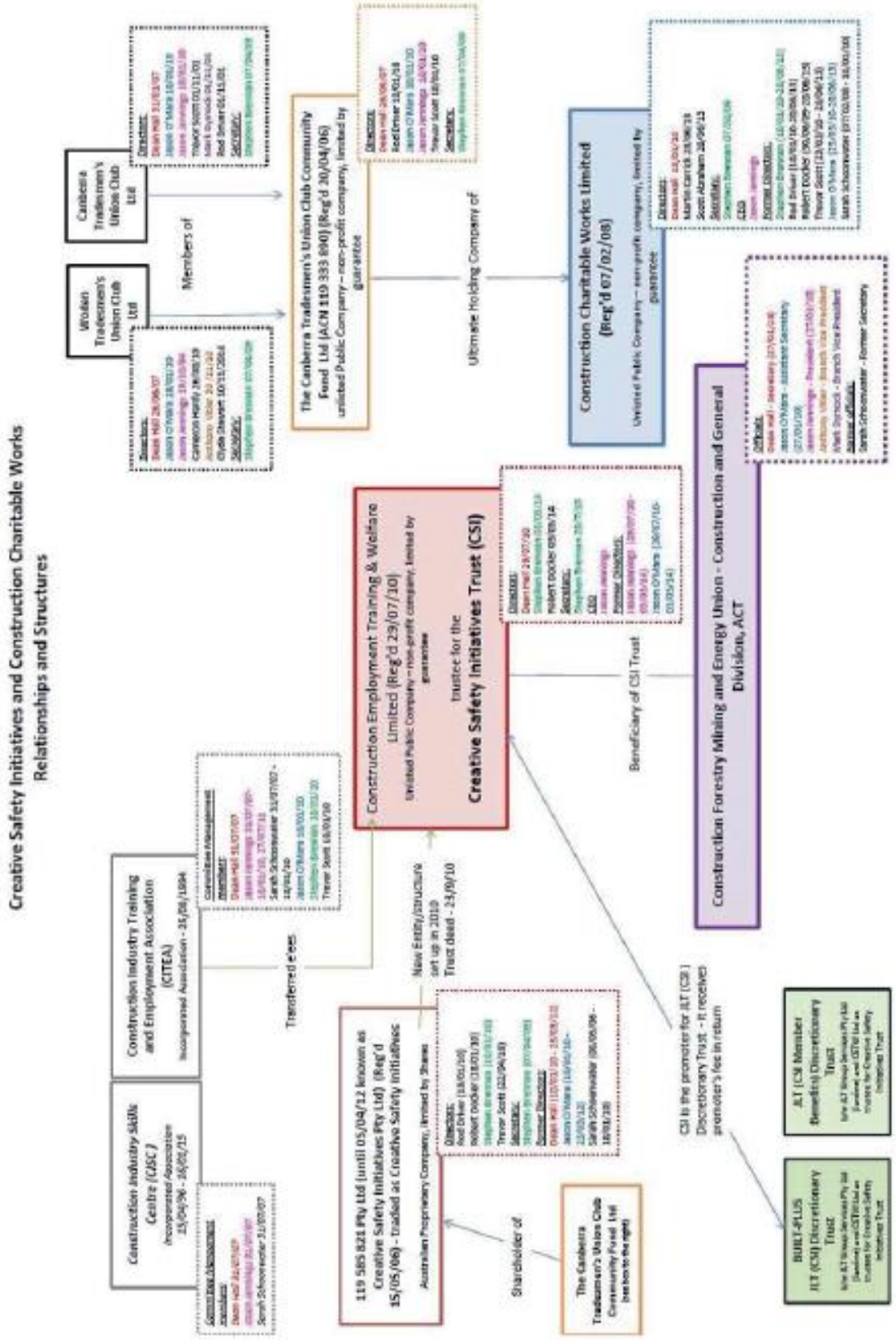
59. Entities associated with the CFMEU ACT included *Construction Employment Training & Welfare Limited* (CETW). CETW is the trustee of the *Creative Safety Initiatives* (CSI) Trust; and *Construction Charitable Works Limited* (CCW), a registered charity.

60. After considering these associated entities, the Royal Commission summarised their operation (and related deficiencies) as:

> *"(a) There have been significant failures of governance by the directors of CETW and CCW, principally Dean Hall*
>
> *(b) CCW's funds have been diverted for non-charitable purposes for the benefit of the CFMEU ACT. By causing or allowing the diversion to occur, Jason Jennings, Dean Hall and JasonO'Mara may have breached their directors' duties to CCW.*
>
> *This issue has been referred to the Australian Charities and Not-for-Profits Commission so that it can give consideration to revoking CCW's registration as a charity.*
>
> *(c) The CFMEU ACT includes various clauses in its pattern enterprise agreement that provide a disguised financial benefit to the union. The inclusion of those clauses has created an environment in which there are inherent conflicts of interest between union officials and the workers they represent and a substantial systemic risk of breaches of fiduciary duty.*
>
> *(d) Owing to uncertainty in the law, no finding is made concerning whether or not the CFMEU ACT may have engaged in third line forcing or exclusive dealing contrary to the competition laws.*
>
> *(e) The Report and the materials obtained by the Commission have been referred to the Australian Federal Police and the ACT Gaming and Racing Commission to investigate the commission of possible criminal offences against the Criminal Code (ACT) and s 65 of the Taxation Administration Act 1999 (ACT) in relation to matters concerning the Gaming Machine Act 2004 (ACT)"*[14]

61. The Heydon Report, once again, attempted to distil the operations of the above entities by reference to diagram. This is reproduced on the following page.

[14] *Ibid p 250-251*


Creative Safety Initiatives and Construction Charitable Works
Relationships and Structures
Canberra Tradesmen's Union Club Ltd
Woden Tradesmen's Union Club Ltd
Members of
The Canberra Tradesmen's Union Club Community Fund Ltd (ACN 119 333 890) (Reg'd 20/04/06)
unlisted Public Company – non-profit company, limited by guarantee
Ultimate Holding Company of
Construction Charitable Works Limited (Reg'd 07/02/08)
Unlisted Public Company – non-profit company, limited by guarantee
Construction Industry Training and Employment Association (CITEA)
Incorporated Association - 31/08/1984
Transferred ees
Construction Employment Training & Welfare Limited (Reg'd 29/07/10)
Limited Public Company – non-profit company, limited by guarantee
trustee for the
Creative Safety Initiatives Trust (CSI)
Beneficiary of CSI Trust
Construction Forestry Mining and Energy Union - Construction and General Division, ACT
Construction Industry Skills Centre (CISC)
Incorporated Association
15/04/96 - 16/01/15
119 585 821 Pty Ltd (until 05/04/12 known as Creative Safety Initiatives Pty Ltd) (Reg'd 15/05/06) - traded as Creative Safety Initiatives
Australian Proprietary Company, limited by Shares
New Entity/structure set up in 2010
Trust dead - 24/09/10
Shareholder of
The Canberra Tradesmen's Union Club Community Fund Ltd (see box to the right)
CSI is the promoter for JLT (CSI) Discretionary Trust - it receives promoter's fee in return
JLT (CSI Member Benefits) Discretionary Trust
BUILT-PLUS JLT (CSI) Discretionary Trust

62. The same chapter of the Heydon Report also detailed the practice of including clauses in enterprise agreements requiring the provision of a form of insurance and the provision of particular training from certain providers.

63. The effect of those clauses was to direct financial payments from employers to certain arrangements from which it reasonable to conclude delivered a commission or other financial benefit to the ACT CFMEU.

64. When questioned about the extent to which these benefits are disclosed to employers and employees, one official stated under evidence:

> *Q. Do you explain to people that there is a financial benefit flowing through from CSI to the CFMEU?*
>
> *A. We don't directly explain the company set-up and how it goes, but Canberra is a small place, everyone knows the CFMEU, everyone knows the training organisation, everyone knows – it's not a secret in the industry.*
>
> *Q. That there is a financial benefit flowing through from CSI to CFMEU?*
>
> *A. No, it's not.*
>
> *Q. It's not a secret?*
>
> *A. No, I don't think so, no*
>
> *Q. It's well known, is it?*
>
> A. I would suggest so, yes.[15]

65. Notwithstanding the above exchange, the Royal Commission noted that:

> *"…the evidence of a number of employer witnesses was to the effect that although employers in Canberra may be aware of a generic relationship between CETW and CFMEU ACT they are not generally aware of the details or the quantum of the financial benefits provided by CETW to the CFMEU ACT, nor of the financial connection between CETW and CCW, nor the financial connection between CETW and JLT.*
>
> *Further, a number of pieces of evidence suggest that the CFMEU ACT is keen to hide, or at least not to disclose, its financial connection with CETW. There is a small CFMEU logo on the CSI website which sits alongside the logos of a number of other organisations. But there is no indication on the CSI website that the organisation is in fact operated for the benefit of the CFMEU. The 2009–2011 strategic plan for CITEA, CISC and CSI records that 'CFMEU connection is seen as a negative by some'. In relation to the JDT arrangements, there are several instances where references to the CFMEU have been deliberately replaced by references to the CETW as trustee for the CSI Trust.199 Articles in the CFMEU magazine state 'Both CSI and CCW are initiatives for the Tradies Group of Clubs and are supported by the ACT Branch of the CFMEU'. But they do not provide any indication that the CFMEU benefits from CSI and CCW."*[16]

66. The circumstances described above are illustrative of the complicated and virtually impenetrable web of relationships between entities that causes monies provided (for what an ordinary person would see being for as training or insurance) actually result in support (either direct or indirect) for unions and registered organisations.

[15] *Ibid p 312*
[16] *Ibid p 312-313*

67. The Heydon Report also exemplified a range of issues surrounding the administration of worker entitlement funds. In Chapter 11 of the Heydon Report, a forensic investigation took place of the operations of Incolink which manages a number of redundancy funds, portable sick leave schemes, income protection insurance schemes and training funds for the construction industry in Victoria in Tasmania. The Heydon Report described the arrangements as follows:

> *"The flow of funds between the various Incolink entities is extremely complex and convoluted. In very broad terms:*
>
> *a) Each of the redundancy funds (i.e. Funds 1, 2, 4 and 5) pay worker benefits and entitlements, as well as incurring ordinary expenditure in administering the funds.*
>
> *b) Fund 1 and Fund 2 also make administration or service grants to other Incolink entities.*
>
> *c) Fund 4 and Fund 5 effectively distribute their income after expenses each year to Fund 1 and Fund 2 respectively as 'distributable capital'.*
>
> *d) Fund 1 also makes annual grants to a training fund, which monies are then distributed to the MBAV and the CFMEU Vic.*
>
> e) *Fund 1 and Fund 2 also make substantial 'grants' of many millions of dollars each year to various unions and industry parties. The two largest recipients of funds are the MBAV and the CFMEU Vic. These grants are paid out of the operating profit of Funds 1 and 2, which includes the 'distributable capital' from Funds 4 and 5, and in years when forfeitures are processed those forfeitures."* [17]

68. And relevantly noted:

> *"Counsel assisting submitted that the Training Fund appears to do nothing except to act as a bank account. Incolink criticised this statement. Incolink submitted that it ignored the background and legal basis for the establishment and operation of the Training Fund."* [18]

69. The Royal Commissioner, however went on to observe that:

> *"It is true that legally the Training Fund is considerably more than a bank account. However, it appears in practice to operate as little more than a bank account."*[19]

The importance of ensuring financial transparency and accountability

70. Master Builders believes it is crucial for the Committee to understand the importance of ensuring monies that filter through to registered organisations or associated entities are appropriately identified and disclosed.

71. The importance of doing so is twofold.

72. *First*, there is the need to ensure that any money provided to a particular entity for a particular purpose is used for the purpose so intended. This is an acute need

[17] *Ibid Volume 4, p 944*
[18] *Ibid p 950*
[19] *Ibid*

given that funds are often extracted via conduct designed to coerce parties to agree to their inclusion in enterprise agreements.

73. Employees, or persons making contributions on behalf of employees, to various funds, are entitled to know how this money (or income arising from the investment of this money) will be used and, importantly, for what it will not be used.

74. Further, where funds are given (usually in good faith) to entities that have 'charity' status, it is offensive to basic community standards to discover funds are not subsequently used for their intended purpose, diverted for improper use, or received as a result of being extracted under coercive circumstance. Such conduct severely and fundamentally undermines the operation and purpose of all charitable organisations and causes disrepute to those involved which is both regrettable and unnecessary.

75. *Second*, income generated from these funds frequently end up supporting, directly or indirectly, the activities of building industry unions. Given the history and conduct of such organisations, the lengthy list of fines and penalties imposed by courts for this conduct, the lack of contrition expressed for that conduct, and the apparent attitude that financial penalties remain "*a cost of doing business".*

76. In other words, funds may end up supporting the ongoing and unrelenting disregard for the law (conduct on which some building unions appear to thrive) and pay for the resulting financial penalties (frequently at the high end).

77. As this Committee would be aware, the conduct of industrial organisations within the building and construction sector has been the subject of many inquiries, reviews and reports. They Heydon Report described this as follows:

> *"The conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court."*[20]

Then further observed:

> *"The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003."* [21]

78. These comments followed from earlier commentary in the Interim Heydon Report[22] which made the following observations about the CFMEU:

> *"The evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law. That evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:*
>
> *(a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;*

[20] *Ibid Volume 5, p 393*
[21] *Ibid*
[22] *Royal Commission into Trade Union Governance and Corruption, Interim Report (2014), Volume 2, p 1008.*

> *(b) officials prefer to lie rather than reveal the truth and betray the union;*
>
> *(c) the reputations of those who speak out about union wrongdoing become the subjects of baseless slurs and vilification."*

79. Noting that additional case studies were undertaken by the Royal Commission subsequent to the Interim Heydon Report, it was found that:

> *"The case studies considered in this Report only reinforce those conclusions"*[23]

And:

> *"The evidence has revealed possible criminal offences by the CFMEU or its officers against numerous provisions of numerous statutes including the Criminal Code (Cth), the Crimes Act 1900 (NSW), the Crimes Act 1958 (Vic), the Criminal Code 1899 (Qld), the Criminal Law Consolidation Act 1935 (SA), the Corporations Act 2001 (Cth), the Charitable Fundraising Act 1991 (NSW) and the Competition Policy Reform (Victoria) Act 1995 (Vic)"*[24]

Further:

> *"The conduct identified in the Commission is not an isolated occurrence. As the list in the previous paragraph reveals, it involves potential criminal offences against numerous laws. It involves senior officials of different branches across Australia."*[25]

And:

> *"Nor is the conduct revealed in the Commission's hearing unrepresentative"*[26]

80. With respect to the CFMEU, the Heydon Royal Commission found that it is home to *"longstanding malignancy or disease"*[27] within the CFMEU and that lawlessness within the union was commonplace, with over 100 adverse court finding against the union since 2000.

81. In the 2015–16 financial year for example, the courts issued $1.826 million in penalties in ABCC related cases. The vast majority were fines against the CFMEU ($1.732 million). The CFMEU have been penalised over $10 million in cases brought by the ABCC[28], the FWBC and their predecessors and building unions generally have been penalised over $12 million in total. Despite this, the conduct continues and the Committee should be aware of the role worker entitlement funds and arrangements play in financing said conduct.

82. Recent ABS data showed the construction industry as dropping to having the second highest number of days lost to industrial action (12,300)[29]. However, this drop is rare given that the sector that consistently held the most days lost of all sectors for numerous quarters of the same data measure.

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[23] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5 p 396*
[24] *Ibid*
[25] *Ibid*
[26] *Ibid*
[27] *Ibid p 401*
[28] *"Latest penalty takes CFMEU fines past $10m mark" Courier Mail, August 4, 2017*
[29] *6321.0.55.001 - Industrial Disputes, Australia, June 2017*

83. The ABCC has approximately 67[30] current proceedings against building unions and industry participants for breaches of the law involving Adverse Action, Unlawful Industrial Action, Coercive Behaviour, and Right of Entry breaches.

84. Federal Court proceedings were launched on 9 August 2017[31] against the CFMEU and two of its representatives for allegedly preventing non-financial union members from working at a Melbourne construction site. The ABCC has alleged that:

- Threats were made by a CFMEU delegate to "shut the whole site down" at the University College project unless a worker became a member of the union in March 2016.
- The delegate had allowed one union member to start work but prevented two other non-financial members from working at the site.
- The delegate approached a worker and said words to the effect: "You can't do any work until you join up with the union" and grabbed a worker's laptop and attempted to pull it from his grasp during a short struggle.
- In May 2016, a CFMEU official threatened a contractor on the project that unless it paid "union rates" it could not continue its contract on the site.

85. On 8 August 2017, the ABCC launched legal action against the CFMEU and one of its officials for allegedly undertaking coercive and adverse action on a site by threatening to set up a picket line.[32] In the Statement of Claim, the ABCC has alleged that:

- A CFMEU organiser threatened to set up a picket line at the construction site in August 2016 if a subcontractor's workers were sent back to work after a work meeting.
- The organiser addressed a meeting of around 500 workers after which approximately 30 to 50 per cent of the workers left the site.
- The action is alleged to contravene the coercion and adverse action provisions of the FW Act.

86. In May 2017, the CFMEU and one of its officials were penalised $86,000 after attempting to force two Brisbane construction workers to join their union or be turned away from the site.

87. The Federal Circuit Court found that the two workers had been told they could not work on an apartment project in January 2016 unless they paid fees to the CFMEU.

88. The court found that a CFMEU delegate had demanded each worker pay $1,290 in union fees. However both workers left after refusing to hand over the money. When a site manager reminded the delegate that workers had a right to not be in a union, the CFMEU official had replied: "*everybody's got to be in the union, this is an EBA site".*

89. In handing down his penalty decision, Judge Jarrett found that the delegate had breached workplace laws by attempting to force the workers to join the union. The CFMEU was penalised $80,000 while the delegate was ordered to pay a total of $6,000

[30] *https://www.abcc.gov.au/compliance-and-enforcement/outcomes-investigations/legal-cases*
[31] *https://www.abcc.gov.au/news-and-media/industry-update/latest-industry-update/court-summary-new-matters*
[32] *Ibid*

90. Judge Jarrett said the penalties reflected: *"the CFMEU's deplorable history of compliance with industrial laws".*[33]

91. On 5 September 2017, a Brisbane landscaping firm was penalised more than $40,000 after it terminated the contract of another company which did not have a CFMEU EBA because it did not want *"trouble"* with the union.[34]

92. The situation giving rise to the penalty occurred in 2014 when a CFMEU official told workers at the waterproofing company they were not allowed to work on a site because their employer did not have a CFMEU EBA. The waterproofing company's contract was then terminated by the company.

93. In the Federal Circuit Court, Judge Vasta said the decision by the Company to terminate the contract was because it *"did not want to have trouble"* with the CFMEU.[35]

94. Judge Vasta said the waterproofing company had been unlawfully discriminated against because it did not have a CFMEU EBA. The company had a valid EBA and a right to work at the site. The Judge[36] said:

> *"It beggars belief that the CFMEU believe that they can act in a manner where they are the ones who dictate who can or cannot work on a construction site."*

95. The court imposed penalties totalling $101,745 for the breaches of the Fair Work Act. The company was penalised $40,800 and its project manager $6,120. The CFMEU was penalised $47,175 and CFMEU site delegate Kurt Pauls $7,650.[37]

96. Judge Vasta[38] went on to say:

> *"This was a very clear and deliberate action to illustrate to [the waterproofing company] that it was the CFMEU who alone decided who worked on that particular site."*
>
> *"It seems that the CFMEU feel that they can usurp Parliament and that they can set the law in this country. There is no place for such an attitude in Australian society."*

97. In May this year, a Senior CFMEU official was ordered to pay the maximum penalty of $10,200 for his conduct on a construction site at Fortitude Valley in 2015.[39]

98. The official admitted in the Federal Circuit Court that when he was asked for his right of entry permit he raised his middle finger and said he didn't need one. When a site manager attempted to record the incident, the Official admitted saying:

> *"Take that phone away or* I'll f***ing bury it down your throat.*"*

99. He then squirted water at the person which struck him in the face, shirt and mobile phone. When another site manager asked the official words to the effect:

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33 Australian Building and Construction Commissioner v Barker & Anor [2017] FCCA 1143 (30 May 2017)
34 Australian Building and Construction Commissioner v Dig It Landscapes Pty Ltd & Ors [2017] FCCA 2128 (5 September 2017)
35 Ibid
36 Ibid
37 Ibid
38 Ibid
39 https://www.abcc.gov.au/news-and-media/latest-news-and-media/judge-orders-maximum-penalty-against-former-queensland-cfmeu-boss

> *"What are you doing here, you are here illegally, why didn't you go through the right channels?"*

The official replied:

> *"I can do what I like."*

100. Also in May this year, the CFMEU and seven of its officials were penalised $277,000 for unlawful conduct which halted work at the $1.2 billion Perth Children's Hospital project.[40]

101. The penalties arose in circumstances where the site was blockaded, one occasion where 400 people prevented a large concrete pour involving 45 trucks. The Court determined that CFMEU officials had organised, incited, and controlled the protest because the head contractor did not agree to a demand for an EBA.

102. Other incidents included a union organised a blockade which prevented 200 workers from entering the site, and a separate blockade where a CFMEU official admitted to attempting to prevent workers from entering the site by physical restraint.

103. In issuing the penalties, the Judge said that senior officials *"clearly provided endorsements to the unlawful action and gave it what might be called a misplaced legitimacy in the minds of the CFMEU members".* Justice Barker also took into account the "*prior extensive history of contraventions on the part of the CFMEU"* in determining the penalties imposed.

104. In April 2017, the Federal Court issue fines of $101,500 against the AMWU, CFMEU and AWU and three of their officials for their involvement in unlawful industrial action at a construction project in Victoria's Latrobe Valley.[41]

105. The unlawful action stopped work at the project for three days in March 2014, continuing on the third day in defiance of orders from the Fair Work Commission that industrial action stop. Whilst the officials contended the stoppages related to safety and therefore did not constitute unlawful industrial action, the Court found that *"[t]hat view was a mistaken one".*

106. The Court found instead that by involving themselves in the action, the officials *"took advantage of the employees' unlawful conduct to strengthen their hands in their negotiations with the companies*".

107. In the judgment, Justice Jessup singled out the CFMEU for what he described as its *"appalling"* prior record of non-compliance with industrial laws.

108. Justice Jessup noted the *"normalisation of contraventions"* by the CFMEU:

> *"has been the subject of comment by Judges on so many previous occasions that any further observation on my part here would amount to little more than stating the obvious*".

109. His Honour continued:

> *"...if there is any union in the industrial universe which should be acutely aware of the importance of understanding the boundaries of lawful conduct*

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[40] *https://www.abcc.gov.au/news-and-media/latest-news-and-media/court-penalises-cfmeu-leaders-277000-perth-children%E2%80%99s-hospital-decision*

[41] *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (The Australian Paper Case) (No 2) [2017] FCA 367 (11 April 2017)*

> *in the prosecution of disputes, it is this one. Self-evidently, it does not care to do so."*

110. The CFMEU was penalised $45,000, the AMWU $25,000 and the AWU $20,000. Officials were penalised a total of $11,500.

111. Also in April 2017, the CFMEU and ten officials were penalised $590,800 for co-ordinated unlawful industrial action across multiple construction projects worth nearly half a billion dollars.[42]

112. The coordinated unlawful action saw workers walk off the job at nine projects, including four hospitals and an aged care centre across Melbourne and Geelong in 2014.

113. The Federal Court decision highlighted that of the various stoppages "*in no instance was there any suggestion of an issue or grievance, specific to the site or workers on it that justified, or even explained, the organisation of the industrial action"*. Instead, the Court found the "*arrogant*" and "*high-handed*" approach of the CFMEU and its officials led to the irresistible inference that the unlawful conduct *"had the explicit object of inflicting commercial harm on* [the contractor]*".*

114. The Court also made comment about the "*transparently groundless invocation*" of workplace safety as a pretext for one of the unlawful stoppages. One official was penalised $7,600 for an "*unjustified and gratuitous*" disruption of work that had *"nothing to do with any issue or grievance which the workers [on site] had".*

115. In March 2017, the CFMEU and ten of its officials were given penalties totalling $242,000 after they blocked construction work on the $80 million Perth International Airport Arrivals Expansion Project. [43]

116. In a majority decision, Justices Rares and Dowsett described the officials' conduct as *"a clear instance of them taking the law into their own hands",* further noting:

> *"The conduct of the CFMEU in this case brings the trade union movement into disrepute and cannot be tolerated".*

117. Recently, during national protest action, a senior union official made the following comments in front of a rally causing public outrage[44] with respect to ABCC inspectors:

> *"Let me give a dire warning to them ABCC inspectors, be careful what you do. You're out there to destroy our lives."*
>
> *"We will lobby their neighbourhoods, we will tell them who lives in that house and what he does for a living, or she, and we will go to their local footy club, we will go to their local shopping centre, they will not be able to show their faces anywhere."*
>
> *"Their kids will be ashamed of who their parents are when we expose all these ABCC inspectors."*

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[42] *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Kane Constructions Case) (No 2) [2017] FCA 368 (11 April 2017)*
[43] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 53, NORTH, DOWSETT AND RARES JJ*
[44] *"CFMEU boss John Setka threatened to expose personal details of ABCC inspectors" Genevieve Alison, Tom Minear and Matthew Johnston, Herald Sun, June 21, 2017*

118. In August 2017, the Federal Court handed down penalties totalling $430,000 for unlawful industrial action taken at the Lady Cilento Children's Hospital and two other Brisbane construction sites.[45]

119. The Court found the actions of CFMEU officials was part of a *"highly coordinated and deliberately orchestrated campaign"* and that the CFMEU had a prior history that "*reveal a lamentable, if not disgraceful, record of deliberately flouting industrial laws*" (and was) "*a recidivist when it comes to contravening industrial laws."*

120. In awarding the penalties, the Court noted that *"it (the CFMEU) continues to thumb its nose at the industrial laws"* and "*the CFMEU's record of past transgressions means that there is no reason to afford it any particular leniency based on its past behaviour."*

121. In 2016, senior building industry union officials reportedly used the words *'We've got to get our hands dirty'* and '*You've got to break a few eggs to make an* omelette' at a union rally where it is alleged a non-union worker suffering a terminal disease was subsequently assaulted by a union official. [46]

122. In March 2016, a case in Queensland found building union officials entered a lunch shed, removed workers food from a fridge, then padlocked the door to the shed saying it was "*only for the use of union members."* [47]

123. In August 2016, the CFMEU in Melbourne was found to have not followed proper right of entry rules and refused to leave when asked. The Judge found this a *"demoralising lack of respect either for the law or their roles as officials". [48]*

124. In April 2016, the CFMEU and 15 union officials in Adelaide were fined for breaching entry laws, coercive conduct, and related breaches. These included unauthorised entry, accessing unsafe areas, becoming physical to force site entry, and coercion to force the flying of a union flag. [49]

125. Building unions are by far the most penalised category of union in Australia and courts have observed, on a more than regular basis, a predisposition for them to break the law. Building unions are more than willing to take advantage of the considerable rights and benefits associated with being a Registered Organisation, however they demonstrate a serial reluctance to do so in a manner where rights are evenly balanced against associated relevant obligations.

126. This is important to note given trade unions in other sectors seem able to operate within existing rules and do not need to engage in illegal behaviour to represent members.

127. Against this backdrop, the following sections deal with each separate schedule and its relevance to the building and construction industry.

Schedule 1 – Financial Management and Accountability

128. Schedule 1 amends the RO Act by implementing a number of new obligations regarding financial management.

[45] *https://www.abcc.gov.au/news-and-media/latest-news-and-media/federal-court-penalises-cfmeu-cepu-430000-unlawful-brisbane-action*
[46] *CUB Dispute: CFMEU boss John Setka urged workers to get 'hands dirty' at rally" Galloway A, Herald Sun, 16 September 2016*
[47] *[2016] FCCA 488 (9 March 2016)*
[48] *[2016] FCA 817*
[49] *[2016] FCA 415 (22 April 2016), [2016] FCA 414 (22 April 2016), [2016] FCA 413 (22 April 2015)*

129. These measures ensure that registered unions and employer organisations have written and binding policies on such things as financial decision making, credit card use, procurement, hospitality and gifts.

130. The nature of the obligations include:

- Definitional changes, relevant to the use of credit cards, reportable loans and reportable grants and donations;
- Changes to reportable loans and grants, and details thereof;
- Additional record keeping obligations, particularly relating to credit cards; and
- The development of policies to improve financial management.

131. The obligations in this Schedule represent the response to recommendations 9, 10, 17 and 39 of the Heydon Report.

132. Master Builders supports the intent of this Schedule and notes that further information to assist those affected would welcomed, per our recommendations at the conclusion of this submission.

Schedule 2 – Regulation of Worker Entitlement Funds

133. Schedule 2 will implement changes to both the FW Act and the RO Act and gives effect to Recommendations 45, 46 and 49 of the Heydon Report.

134. The effect of these changes are that Worker Entitlement Funds will:

- need to ensure contributions are properly invested and managed with a greater focus on transparency;
- require at least one independent voting director on their boards;
- need to be operated by people of good fame and character, and managed 'at arm's length';
- have no choice but to treat union members the same as non-members;
- retain the ability to spend income generated from contribution investments on training and welfare services, subject to various criteria ensuring such expenditure is reasonable, transparent, and made at arm's length; and
- need to provide more information to workers and employers about their operation and the use of monies contributed on their behalf.

135. To ensure these changes are embraced and appropriately implemented, a Worker Entitlement Fund will need to achieve the status of ***registered worker entitlement fund*** to be determined and monitored by the Registered Organisations Commission.

136. Terms of employment arrangements that require payments to particular funds will have no effect if the fund so named is not considered a registered worker entitlement fund.

137. The ROC will oversee new reporting obligations, and monitor ongoing compliance with the law in order to ensure money is used for appropriate purposes and invested responsibly.

138. The policy outcome sought by the changes in this schedule was described in the following manner when introduced:

> *"In short, this Bill will ensure worker entitlement funds are run for workers, not for anyone else. These are basic standards that should apply to people who manage other people's money."*[50]

139. Master Builders supports this outcome. There is an obvious and clear necessity for law reform when regard is hard to the circumstances forming the genesis of related recommendations within the Heydon Report (as canvassed earlier in this submission and forensically dealt with in the five publicly available volumes.)

140. Master Builders notes that the provisions within this schedule enable funds to spend money on training and welfare services for the benefit of workers such as crisis counselling or health checks, subject to clear and transparent rules and decision making processes.

141. As observed earlier in this submission, it is appropriate that the Bill allow a distinction to be drawn between those entities that do the right thing and those that do not. We do not support measures that would see the good work of the majority cease because of the deliberate and inappropriate conduct of a few. We reiterate that Master Builders condemns those who have engaged in inappropriate conduct as noted earlier in this submission and will continue to do so.

142. In addition, the requirements of Schedule 2 will address the major concerns set out in the Heydon Report and ensure that funds are:

- subject to mandatory disclosure requirements;
- required to disclose the commissions and other payments made by the fund to unions and employer organisations;
- required to disclose the amounts deducted by the funds by way of fees and charges;
- required to explain to workers the circumstances in which they will, or will not, be entitled to a payment from the fund;
- required to provide annual reports or accounts to persons with an interest in the fund; and
- required to treat members, or classes of members, equally.

143. Master Builders supports these improvements.

144. In providing this support, we also wish to draw the Committees attention to two related matters of note relevant to this schedule.

145. The first of these is to note that a casual observer could easily consider the requirements of Schedule 2 to represent additional compliance or administrative costs. Master Builders disagrees with that view and urges the Committee to do likewise.

146. The additional requirements that would apply should be considered in the context that the existing regulatory compliance obligations form what is appropriately described as a 'low base'. That is, there are very few existing compliance obligations or regulatory parameters that apply to these funds under current arrangements.

147. As such, the requirements of Schedule 2 would do nothing more bring their compliance obligations to be more in line with those that apply to most other business or similar entities.

[50] *Minister Pitt, Speech, HOR, 19 October 2017*

148. Further, there are significant benefits that would arise from the existence of the additional obligations that would far outweigh (both in a policy sense and a cost/benefit sense) any negatives associated with extra administrative obligations.

149. Master Builders submits that the Committee should consider whether 'red tape' is ought to be a concern to those entities who manage assets and funds worth billions of dollars in circumstances where some do not even provide members with an annual report, schedule of fees, or information as to how and where their contributions are used.

150. We refer again to the Heydon Report that observed:

> *"Despite their size, worker entitlement funds, unlike superannuation funds, have very little specific legislation regulating their activities."*[51]

151. The second matter of note is that the Committee should find that the ROC is the most appropriate regulator to oversee the proposed changes, including the operation of worker entitlement funds.

152. Other regulators conventionally associated with the type of role (such as ASIC and APRA) are simply not as familiar with the internal machinations, operation and organisational structure of registered organisations or their associated entities. The ROC is a specialist regulator with specific powers who knows (for lack of a more eloquent expression) where to look and what to look for.

153. Further, given the inherent link between worker entitlement funds and their relationship to registered organisations, it makes sense for these type of organisations to be dealing with one specialist regulator with whom they are familiar rather than a multitude of different regulators whom may be unable to provide service and information in a tailored and efficient manner.

154. We therefore submit that the Committee should find that the ROC is the appropriate regulator to ensure the obligations of Schedule 2 are met and maintained.

Schedule 3 – Election Payments

155. The provisions within Schedule 3 prohibit terms in workplace agreements and modern awards that would require employees to pay, or employers to deduct, monies from a salary to fund elections held within registered organisations.

156. This is achieved by considering any such term giving effect to the above practice as unlawful.

157. The Heydon Report considered this issue in detail and canvassed a range of options to address the potential that employees were, in effect, given no genuine choice and were essentially forced to make contributions from their earnings to such funds.

158. In doing this, it noted that:

> *".....there is nothing wrong with members of an employee or employer organisation joining together to pool resources to fund a particular candidate or ticket of candidates in an election. However, any steps taken with the effect of legally or practically compelling contributions infringe basic principles of freedom of association."*[52]

[51] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5 p 298*
[52] *Ibid p 282*

159. Master Builders agrees with the above view. The Heydon Report went on to state:

> *"The second option – prohibiting any condition of employment requiring an employee of an organisation to contribute to an election fund – is preferable and could be achieved by an amendment to s 326 of the FW Act. Direct debit arrangements can be a convenient way of employees making genuine contributions to a cause they believe in, provided they are entered into voluntarily and independently of a contract of employment. Accordingly, they should not be prohibited."*[53]

160. The provisions within Schedule 3 achieve the same outcome canvassed above and implement recommendation 43 of the Heydon Report that found:

> *"The Fair Work Act 2009 (Cth) be amended to prohibit any term of a modern award, enterprise agreement or contract of employment permitting an employer to deduct, or requiring an employee to pay, from an employee's salary an amount to be paid towards an election fund."*[54]

161. Master Builders supports the provisions within Schedule 3.

Schedule 4 – Prohibiting coerced payments to employee benefit funds

162. The provisions of Schedule 4 implements recommendation 50 in the Heydon Report by prohibiting the use of coercive conduct to require a person to make payments into a particular employee benefit fund.

163. Master Builders supports the provisions in this schedule. These measures are a logical extension of otherwise already applicable prohibitions and reflect a common sense approach.

164. It has been Master Builders' experience that the types of coercive conduct in the sector are almost entirely always for reasons *other* than those which might be publicly expressed. It is our view that the actual reasons for such conduct often relate to matters that are ancillary to the wages and conditions of employees and usually relevant to the union and/or matters within which they have an interest.

165. One recent example of many evidencing this was dealt with in April 2017, where the CFMEU and ten officials were penalised $590,800 for co-ordinated unlawful industrial action across multiple construction projects worth nearly half a billion dollars.[55]

166. The coordinated unlawful action saw workers walk off the job at nine projects, including four hospitals and an aged care centre across Melbourne and Geelong in 2014. The Federal Court decision highlighted that of the various stoppages:

> "*in no instance was there any suggestion of an issue or grievance, specific to the site or workers on it that justified, or even explained, the organisation of the industrial action"* [56]

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[53] *Ibid p 285*
[54] *Ibid p 286*
[55] *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Kane Constructions Case) (No 2) [2017] FCA 368 (11 April 2017)*
[56] *Ibid at para [11]*

167. Instead, the Court found the "*arrogant*" and "*high-handed*" approach of the CFMEU and its officials led to the irresistible inference that the unlawful conduct *"had the explicit object of inflicting commercial harm on* [the contractor]*".*[57]

168. The Court also made comment about the "*transparently groundless invocation*" of workplace safety as a pretext for one of the unlawful stoppages. One official was penalised $7,600 for an "*unjustified and gratuitous*" disruption of work that had *"nothing to do with any issue or grievance which the workers [on site] had".*[58]

169. The Heydon Report devoted a significant part of its attention to other similar instances where actions available to registered organisations were exploited and misused in an effort to exert general industrial pressure or simply send a signal to the industry or a geographic area about who calls the shots. Many examples of this conduct focussed on the ACT where small boundaries enabled the CFMEU to control or influence a broad range of issues including access to work on projects, tender terms, and other practices such as inappropriate payments to organisers. We refer the Committee to Volume 3 of the Heydon Report for case studies which exemplify such conduct.[59]

Schedule 5 – Disclosable arrangements

170. Schedule 5 sets additional obligations with respect to disclosure arrangements applicable to registered organisations.

171. The provisions centre on the obligations of relevant organisations to disclose financial benefits that they receive (such as commissions) from arrangements made with funds, including insurances. Commissions derived from insurances, for example, is a benefit.

172. It is structured in such a way as to define a disclosable arrangement, the circumstances in which it is to be disclosed, the parties to whom disclosure should be made, and the content of this disclosure. There are new additional obligations including retention of records and options for alternative methods of disclosure, and obligations on the Registered Organisations Commissioner to publish disclosures received.

173. The issue of disclosure was canvassed in the Heydon Report after an examination of the largest worker entitlement fund Incolink (referenced earlier above) and after having navigated through the internal operation of its financial arrangements.

174. Master Builders believes it is appropriate that members of registered organisations are able to ascertain the source of income those organisations receive and how it is used. Transparency and accountability is important and measures that the end are supported.

Recommendations

175. Master Builders recommends that:

- the Committee should find that the Bill be passed;

[57] *Ibid*
[58] *Ibid at para [14]*
[59] *Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 3*

- the ROC or FWO ensure that affected entities are able to access comprehensive information and guidance materials about their new obligations and reporting requirements;
- that consideration be given, in particular, to ensuring those smaller entities affected by the requirements of Schedule 1 have access to clear and simple information;
- the ROC or FWO specifically ensure affected entities are provided with clear information as to the circumstances in which disclosure obligations, in particular, are triggered;
- affected registered organisations and entities have an initial option to provide, on a voluntary basis, information and materials prepared as part of efforts to ensure compliance with the Bill and its requirements, to ROC or FWO in order to receive information as to these efforts will satisfy new requirements and oblgiations;
- the regulations or rules should prescribe a type of form to be adopted when making disclosures;
- the Bill, wherever it is necessary to do so, be structured in such a way as to address and stop circumstances relating to the improper and inappropriate use of fund income as identified in the Heydon Report, while accommodating situations where fund income is used appropriately and to the benefit of those on behalf of whom contributions are made.

176. As noted earlier herein, we undertake to provide the Committee with any specific recommendations for amendment if these arise prior to the finalisation of the Inquiry Report.

Conclusion

177. Master Builders thanks the Committee for the opportunity to provide this submission.

178. We would be pleased to appear before the Committee to provide any additional evidence or information to assist in its inquiry.