

# ‘FOR THE UNION MAKES US ... RICH?’: PREVENTING TRADE UNION CORRUPTION IN LAW AFTER THE HEALTH SERVICES UNION SAGA

JOEL SILVER\*

*While uncommon, corruption amongst Australian trade union officials is nevertheless well documented and notorious. How the law responds to corruption has become the subject of renewed debate, due to allegations against several former officials of the Health Services Union, in particular Craig Thomson and Michael Williamson. This article argues in favour of revising the provisions describing officials’ duties in the federal Fair Work (Registered Organisations) Act 2009 (Cth) — the law which regulates trade unions — to more closely resemble their sister provisions in the Corporations Act 2001 (Cth). It contends that corrupt officials are best dealt with under specific ‘disloyalty’ offences, as opposed to generic property crimes (such as fraud or obtaining by deception). It also addresses a number of other potential weaknesses in the present legislative scheme.*

## I INTRODUCTION

The Commonwealth law that governs the internal affairs of employer, employee and enterprise associations is the *Fair Work (Registered Organisations) Act 2009* (Cth) (‘the *Registered Organisations Act*’). This Act is to associations — employer organisations and trade unions<sup>1</sup> — in many respects what the *Corporations Act 2001* (Cth) is to corporations, in so far as

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\* LLB (Hons) (Melb), GDLP (Leo Cussen Institute), Australian Lawyer and Officer of the Supreme Court of Victoria. This article is based upon an essay originally completed as part of the Melbourne Law Masters subject ‘LAWS70385 Corporate and White Collar Criminal Law’. The author wishes to thank subject co-ordinator Professor Stuart P Green and the anonymous referee for their feedback. Any errors or omissions are those of the author.

<sup>1</sup> Rather than referring to those three legislative categories, the Fair Work Commission’s register of organisations only distinguishes between ‘employer organisations’ and ‘trade unions’; as seen in the ‘List of registered organisations’ maintained on its website: Fair Work Commission, List of Registered Organisations (17 July 2013) <<http://www.fwc.gov.au/index.cfm?pagename=regorgslist>>.

it covers matters such as registration,<sup>2</sup> duties of officers,<sup>3</sup> whistleblower protections,<sup>4</sup> and access to records and information.<sup>5</sup> Indeed, because trade unions cannot be registered with the Australian Securities and Investments Commission ('ASIC'),<sup>6</sup> the *Registered Organisations Act* is often described as a law solely of relevance to the trade union movement.

The civil obligations of officials and directors under the respective Acts are outlined in four nearly identical 'civil penalty' provisions first included in the former *Corporations Law* under the 1999 Corporate Law Economic Reform Program ('CLERP').<sup>7</sup> However, while the *Corporations Act* provides that intended or reckless violations of those duties may amount to a criminal offence, the *Registered Organisations Act* — except in draft form<sup>8</sup> — has never so provided. The effective distinction thereby drawn between trade unions and corporations has been questioned in recent years, in the light of the significant allegations of corruption levelled against officials of the Health Services Union ('HSU').

The HSU faced intense scrutiny throughout the term of the 43<sup>rd</sup> Australian Parliament (2010–13). Specifically, its former National Secretary, Craig Thomson, elected as the Member for Dobell in 2007 and 2010, was questioned over alleged abuses of his former office. A Fair Work investigation into the HSU National Office, despite criticisms made of it, played a key role in this.<sup>9</sup> Had Thomson been found guilty of a criminal offence, he would have been constitutionally disqualified from serving in Parliament,<sup>10</sup> which would have led to a by-election in his seat. In the likely

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<sup>2</sup> Under the *Corporations Act* s 119, '[a] company comes into existence as a body corporate at the beginning of the day on which it is registered', while ss 26 and 27 of the *Registered Organisations Act* make clear that, upon registration as an organisation, an association gains the legal personality ordinarily acquired through incorporation (eg, the right to be sued or be sued, perpetual succession, to purchase property).

<sup>3</sup> *Registered Organisations Act* ch 9; *Corporations Act 2001* (Cth) ch 2D.

<sup>4</sup> *Registered Organisations Act* ch 11, pt 4A; *Corporations Act 2001* (Cth) ch 9, s 9.4AAA.

<sup>5</sup> *Registered Organisations Act* s 280; *Corporations Act 2001* (Cth) s 198F.

<sup>6</sup> *Corporations Act 2001* (Cth) s 116.

<sup>7</sup> *Corporate Law Economic Reform Program Act 1999* (Cth) sch 1, ss 180-190; originally in s 82 of the *Corporations Act 1989* (Cth) ('*Corporations Law*'), now part of the *Corporations Act 2001* (Cth). Prior to 1999, the former s 232 of the *Corporations Law* contained equivalent duties. This same model is used in the *Commonwealth Authorities and Companies Act 1997* (Cth).

<sup>8</sup> Workplace Relations (Registered Organisations) Bill 2001 (Cth) s 277.

<sup>9</sup> Senate Standing Committees on Education, Employment and Workplace Relations, *Report of the Delegate to the General Manager of Fair Work Australia: Investigation into the National Office of the Health Services Union under Section 331 of the Fair Work (Registered Organisations) Act 2009* (28 March 2012) ('*National Office Report*').

<sup>10</sup> *Australian Constitution*, s 44.

event that Dobell would have been won by a Liberal Party candidate, this would have caused deadlock in the House of Representatives, resulting in an early general election. Although that scenario did not eventuate, Thomson resigned from the parliamentary Labor Party in April 2012 (while supporting the Labor government on motions of confidence and supply), and in January 2013 was arrested to face charges in Victoria.<sup>11</sup>

The HSU case is a rare example of alleged institutional corruption in an Australian trade union. Trade union leaders have in the past been more commonly associated with ‘lower end’ misdeeds. The 40 convictions of John Setka (Victorian Secretary of Construction, Forestry, Mining and Energy Union) on charges which included using indecent language, assault, and trespass<sup>12</sup> are a case in point. Nevertheless, the HSU matter shows that corruption *can* and *does* occur at a union’s highest levels; crimes can be committed within the body against its interests. The question posed by this article is: does Australian law make adequate provision for such ‘higher end’, white collar misconduct?

Attempting to find an answer leads to many more questions. The first part of this article presents an overview of ‘higher end’ misconduct in trade unions. The article then discusses the mixed civil-criminal provisions established under CLERP. These provisions are contrasted with overlapping general law criminal offences, with an emphasis on their different normative bases, a factor that very much determines what conduct falls within their scope. The standard of care owed both by corporate non-executive directors and union non-official executives are considered, in the context of examining how misconduct is pursued under Australia’s industrial relations framework.

To describe this topic as ‘politically charged’ would be an understatement, and indeed the strength of the arguments upon it, perhaps more than on any other topic, may be influenced by individual readers’ political persuasions. However, it is not the purpose of this article to argue that more trade union officials should be gaoled, or that the civil penalties regime in the *Registered Organisations Act* is a failure. Rather, it argues that the HSU saga has exposed serious gaps in the laws applicable to union officials, and that, without reform, those gaps will continue to be exploited.

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<sup>11</sup> Kate McClymont, ‘Craig Thomson Arrested by Fraud Squad’, *The Sydney Morning Herald* (online), 31 January 2013 <<http://www.smh.com.au/opinion/political-news/craig-thomson-arrested-by-fraud-squad-20130131-2dmnn.html>>.

<sup>12</sup> John Ferguson and Pia Akerman, ‘Rap Sheet Reveals 60 Charges for Would-Be Union Boss John Setka’, *The Australian* (online), 29 August 2012 <<http://www.theaustralian.com.au/national-affairs/rap-sheet-reveals-60-charges-for-would-be-union-boss-john-setka/story-fn59niix-1226460322445>>.

## II DEFINING 'CRIMINAL BREACH' OF LOYALTY TO A UNION

### A *Historic Unionist Misconduct*

While the alleged misconduct in the HSU may be unique in its scale, it is not entirely without precedent. Several trade unions have been used by their officials to facilitate criminal or other corrupt activity. Three unions are worth mentioning: the Builders Labourers Federation ('BLF'); the Federated Ship Painters and Dockers Union; and the Australian Workers Union ('AWU'). The affairs of the first two were the subject of investigation by separate Royal Commissions.

Corruption in the BLF concerned several officials, most notably its General Secretary, Norman Gallagher, who wielded a 'special position of influence ... within the building industry, and [had a] capacity to turn that influence to the disadvantage of major builders'.<sup>13</sup> Developers curried favour with the BLF by providing clandestine benefits, notably improvements to beach houses owned by BLF officials.<sup>14</sup> A 'false billing technique' was used whereby work was performed by subcontractors on existing projects, who concealed the arrangement by charging fees to the primary project developers. Gallagher himself obtained \$160 000 in benefits between 1975 and 1980,<sup>15</sup> and had charges of corruptly receiving secret commissions recommended against him.<sup>16</sup>

The Commission into the Federated Ship Painters and Dockers Union — dubbed 'the most powerful criminal organisation in Melbourne in the 1970s'<sup>17</sup> — was established to determine the extent of illegal activities engaged in by the union and its membership.<sup>18</sup> Along with more gruesome issues (15 murders and 23 attempted killings were linked to the union), the Commission examined the Federation's involvement in facilitating so-called 'bottom of the

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<sup>13</sup> Commonwealth and Victoria, Royal Commission into the Activities of the Australian Building Construction Employees' and Builders Labourers' Federation, *Report* (1982) 244 [3].

<sup>14</sup> *Ibid* 31 [1.1], 34 [1.6].

<sup>15</sup> *Ibid* 33 [1.5], 38 [1.8], 79 [2.1].

<sup>16</sup> *Ibid* 274 [1(a)]; see *Crimes Act 1958* (Vic), s 176.

<sup>17</sup> Elissa Hunt, 'Painters and Dockers Union was Linked to a String of Murders in Melbourne in 1970s Trials', *Herald Sun* (online), 18 December 2012 <<http://www.heraldsun.com.au/news/law-order/painters-and-dockers-union-were-linked-to-a-string-of-murders-in-melbourne-in-1970s-trials/story-fnat7dag-1226536360779>>.

<sup>18</sup> Commonwealth and Victoria, Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, *Final Report* (1984) vol 1, 81 [5.002].

harbour' tax evasion.<sup>19</sup> With the assistance of a 'promoter', entities liable to pay company tax transferred all assets, except profits, to a new entity. Those remaining funds were loaned to third parties — often associated with the Federation — who then used the funds to purchase the stripped entity from its original owners. This round robin transaction allowed owners to realise their full, pre-tax profits,<sup>20</sup> with all record of the arrangement sent to the 'bottom of the harbour' with the original entity.<sup>21</sup> If and when tax authorities tracked the entity down, further investigation was deterred by the violent reputation of the Federation.<sup>22</sup>

The allegations concerning the AWU largely involved a Perth-based entity, the 'AWU Workplace Reform Association' ('the Association'), controlled by its then Victorian and West Australian branch secretaries, Bruce Wilson and Ralph Blewitt respectively. The allegations concerned up to \$1 million in misappropriated funds.<sup>23</sup> Established in 1992, on legal advice given by Slater & Gordon partner Julia Gillard (Wilson's then girlfriend), the Association was the beneficiary of an agreement with Thiess Contractors. Thiess paid for the AWU's co-operation on a West Australian government-funded project in order, as a former official described it, to 'buy industrial peace' — much as Gallagher and the BLF had done.<sup>24</sup>

Under this arrangement, Thiess made monthly payments for over two years to the Association, whose bona fides it had failed to investigate.<sup>25</sup> A Federal Court file reportedly indicates that other construction firms had also made payments to the Association.<sup>26</sup> The Association was purportedly established

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<sup>19</sup> Robert Williams, 'Crime and Corruption in Australia' (1986) 1 *Corruption and Reform* 101; see also Trevor Boucher, *Blatant, Artificial and Contrived — Tax Schemes of the 70s and 80s* (Australian Tax Office, 2010) chs 39–43.

<sup>20</sup> Commonwealth and Victoria, Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, *Interim Report No 4* (1982) vol 1, 71.

<sup>21</sup> Commonwealth and Victoria, above n 19, 81 [5.003]; see also 94 [5.028]–[5.030].

<sup>22</sup> Williams, above n 19, 103.

<sup>23</sup> Steve Lewis, 'Witness Says He Was Approached by a Builder over Payment for Reno', *Herald Sun* (online), 11 February 2013 <<http://www.heraldsun.com.au/news/national/witness-says-he-was-approached-by-a-builder-over-payment-for-reno/story-fncynkc6-1226574905765>>.

<sup>24</sup> Andrew Burrell, 'We Put \$300,000 in AWU Slush Fund, says Bruce Wilson's Brother-in-Law Joe Trio', *The Australian* (online), 22 December 2012 <<http://www.theaustralian.com.au/news/investigations/we-put-300000-in-awu-slush-fund-says-bruce-wilsons-brother-in-law-joe-trio/story-fng5kxvh-1226542152787>>.

<sup>25</sup> *Ibid.*

<sup>26</sup> Hedley Thomson, 'Detectives Intend to Execute Search Warrant to Retrieve a Legal File Concerning Bruce Wilson', *The Australian* (online), 20 February 2013 <<http://www.theaustralian.com.au/news/investigations/detectives-intend-to-execute-search-warrant-to-retrieve-a-legal-file-concerning-bruce-wilson/story-fng5kxvh-1226581489264>>.

as a re-election ‘slush fund’ for certain AWU officials, but was apparently used for Wilson and Blewitt’s personal benefit. In particular, \$92 722.30 went towards a 1993 house purchase in Fitzroy, Melbourne, made in Blewitt’s name.<sup>27</sup> No proceeds of the 1996 sale of the house were returned to the AWU.<sup>28</sup> Some cash, allegedly withdrawn by Blewitt, was buried in the garden of his Perth home.<sup>29</sup> The existence of other recipient entities has also been reported, including the ‘AWU Members Welfare Association (No 1) Account’ (into which more than \$100 000 was deposited),<sup>30</sup> and the ‘Construction Industry Fund’, which held up to \$60 000, including a \$20 000 payment from Thiess, and other funds shifted from the Association after Wilson’s ousting.<sup>31</sup>

The common thread in these three scenarios is that they involved union officials using their positions to make unlawful or corrupt personal gains, both through cheating the union itself, and through using the trappings of office to cheat and bully others.

## **B The Health Services Union**

Although the issues at the HSU are sometimes referred to as the ‘Thomson saga’<sup>32</sup> in the media, this term inaccurately conveys the impression that Craig Thomson acted alone. For while Thomson — who was National Secretary of the HSU from 2002 to 2007, and before that, NSW Assistant Secretary between 1999 and 2002 — is arguably the most prominent figure in the affair, his activities have resulted in the scrutiny of other HSU leaders, notably Michael Williamson.

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<sup>27</sup> Steve Lewis and Ian McPhedran, ‘They’re Out to Get PM, Says Her Ex Union Lover’, *Herald Sun* (online), 22 August 2012 <<http://www.heraldsun.com.au/news/national/theyre-out-to-get-pm-says-her-ex-union-lover/story-fndo317g-1226455274192>>.

<sup>28</sup> Hedley Thomas, ‘How Robert McClelland Led Pursuit in Union Funds Scandal’, *The Australian* (online), 14 July 2012 <<http://www.theaustralian.com.au/national-affairs/how-robert-mcclelland-led-pursuit-in-union-funds-scandal/story-fn59niix-1226425771932>>

<sup>29</sup> Pia Akerman, ‘AWU Files Bruce Wilson and Ralph Blewitt Come Clean on Dirty Money’, *The Australian* (online), 29 November 2012 <<http://www.theaustralian.com.au/news/investigations/bruce-wilson-and-ralph-blewitt-come-clean-on-dirty-money/story-fng5kxvh-1226526151502>>.

<sup>30</sup> Hedley Thomas and Pia Akerman, ‘Whistleblower Wayne Hem Alerted AWU’s National Secretary to \$5000 Payment to Julia Gillard’, *The Australian* (online), 14 November 2012 <<http://www.theaustralian.com.au/news/investigations/whistleblower-wayne-hem-alerted-awus-national-secretary-to-5000-payment-to-julia-gillard/story-fng5kxvh-1226516225346>>.

<sup>31</sup> Hedley Thomas, ‘Bruce Wilson’s Exit Didn’t End AWU Fraud’, *The Australian* (online), 26 November 2012 <<http://www.theaustralian.com.au/news/investigations/bruce-wilsons-exit-didnt-end-awu-fraud/story-fng5kxvh-1226523852732>>.

<sup>32</sup> Ean Higgins, ‘HSU Charges Tipped to Include Craig Thomson’, *The Australian* (online), 20 October 2012 <<http://www.theaustralian.com.au/national-affairs/hsu-charges-tipped-to-include-craig-thomson/story-fn59niix-1226499631849>>.

According to the Fair Work investigation, during Thomson's tenure, the HSU National Office 'objectly failed to have adequate governance arrangements in place to protect union members' funds against misuse'.<sup>33</sup> The bulk of misconduct found has been attributed to Thomson himself, and has caused a total approximate loss of \$500 000.<sup>34</sup> The identifiable instances of misconduct by Thomson are: his misdirection of HSU resources in his capacity as National Secretary (that is, for a purpose, often personal and unauthorised by the national executive), and his inappropriate expenditure on his HSU-issued credit cards, including the cash withdrawal facility.<sup>35</sup> In no particular order, this expenditure included:

- Charges to escort agencies, plus associated costs, including call charges to hotel rooms (for calls made to agencies),<sup>36</sup> and parking and taxi charges incurred in proximity to agencies.<sup>37</sup>
- The cost of staying at high-priced hotels when travelling (including \$880 for one night at Melbourne's Grand Hyatt).<sup>38</sup>
- Considerable dining and entertainment expenses.<sup>39</sup>
- The cost of flights purchased in his wife's name on 14 occasions, on 13 of which they travelled together.<sup>40</sup>
- The cost of establishing an HSU National Office facility in Sydney without national executive permission, due to his move there in late 2005. (The HSU continued to lease its original Melbourne office).<sup>41</sup>
- The cost of employing two HSU staff to work solely on his campaign for Dobell,<sup>42</sup> both of whom received HSU credit cards for working expenses.<sup>43</sup>

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<sup>33</sup> Fair Work Australia, 'Statement: Outcome of HSU National Office Investigation' (Press Release, 7 May 2012) 2.

<sup>34</sup> See *National Office Report*, above n 9, ch 21 at [6], where 181 violations of both the Rules of the HSU and *Registered Organisations Act* were identified, of which 156 are attributed to Thomson (98 specifically under the Act). Relevant provisions of the Act are considered below.

<sup>35</sup> *Ibid* ch 5 [172]–[173].

<sup>36</sup> *Ibid* ch 6 [6].

<sup>37</sup> *Ibid* ch 5 [587]–[590]; see also [109]–[110], [118].

<sup>38</sup> *Ibid* [861]–[862]; other examples are available at [1095].

<sup>39</sup> *Ibid* [1099]; see also ch 6 [459].

<sup>40</sup> *Ibid* ch 6 [541].

<sup>41</sup> *Ibid* ch 5 [614], [645], [626].

- The cost of diverting HSU funds into the ‘Coastal Voice’ community group, a front used by Thomson to build his profile in Dobell.<sup>44</sup>
- Campaign costs in Dobell, including the cost of his office and a campaign bus.<sup>45</sup> Of note is that, while the national executive of the HSU gave no consideration to the Dobell expenditure (as documented), such consideration did occur in relation to the Victorian division of La Trobe.<sup>46</sup>
- HSU donations to several Central Coast organisations, including sponsorship of the Central Coast Rugby League,<sup>47</sup> and payment to ‘Dads in Education’ and the ‘Central Coast Convoy for Kids’.<sup>48</sup>

Of course, Thomson is not the only HSU official accused of misconduct. Fair Work also investigated the Victoria No 1 Branch,<sup>49</sup> following allegations that the then-President Pauline Fegan had breached her fiduciary duties.<sup>50</sup> Fegan had arranged the purchase of \$147 361 worth of promotional items (such as pens and badges) from ‘Urban Giftware’, an entity operated by her domestic partner Phillip Grima.<sup>51</sup> Despite these related party transactions, it is unclear whether Fegan had disclosed her interest in the business, although the investigation found insufficient evidence of wrongdoing by her.<sup>52</sup> Also under scrutiny were Branch Secretary Jeff Jackson, and Assistant Secretary Shaun Hudson (who is not discussed here). On three occasions in 2008, Jackson had instructed the branch office manager to process \$5000 ‘back payments’ to him

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<sup>42</sup> Ibid ch 4 [35], [61], [69], [74], [116].

<sup>43</sup> Ibid ch 5 [380]; see also ch 7 [440].

<sup>44</sup> Ibid ch 4 [351], [417].

<sup>45</sup> Ibid [126], [142]–[147].

<sup>46</sup> Ibid [201]. This seems to indicate that the national executive made a conscious decision regarding which electorate would benefit from their efforts, rather than delegating that function to the National Secretary.

<sup>47</sup> Ibid [549]–[561].

<sup>48</sup> Ibid [586]–[590], [610]–[616].

<sup>49</sup> Senate Standing Committees on Education, Employment and Workplace Relations, *Report of the Delegate to the General Manager of Fair Work Australia: Investigation into the Victoria No 1 Branch of the Health Services Union under section 331 of the Fair Work (Registered Organisations) Act 2009* (23 December 2011) (‘Victoria No 1 Branch Report’). The first incarnation of the branch merged with the Victoria No 3 and NSW branches to form HSU East Branch on 24 May 2010, and was re-established when the Federal Court ordered that branch’s disbanding on 21 June 2012; see generally *Brown v Health Services Union* (2012) 205 FCR 548.

<sup>50</sup> *Victoria No 1 Branch Report*, above n 49, [1].

<sup>51</sup> Ibid 73–5.

<sup>52</sup> Ibid 81–3.



(totalling \$15 000); in reality, these were an unauthorised additional salary.<sup>53</sup> Proceedings were instigated against Jackson by the branch for the unauthorised payments, resulting in a Deed of Agreement for repayment.<sup>54</sup>

The most colourful allegations, however, concern Michael Williamson, and centre on his long tenure as General Secretary of the NSW branch, and, following its merger with Victoria No 1 and No 3 branches, of the East branch. (He held that position from 1995 to 2012, having been Assistant Secretary from 1987 to 1995).<sup>55</sup> In that time, more than \$20 million in questionable payments were made to suppliers of the union, without any tendering taking place or contract being formed, including \$5 million to companies operated by the Williamson family. In addition, \$1.5 million were spent on purchasing and renovating a warehouse, then used by Williamson's son (also an HSU official) as a commercial rehearsal studio.<sup>56</sup> United Edge, a company of which Williamson owned a third, received \$4.7 million over four years for IT services provided to the branch, which operated rent free from the branch office.<sup>57</sup> Another company, Communigraphix, held a \$700 000 per annum contract to produce the branch magazine, and in exchange is alleged to have paid for secret credit cards in the names of both Williamson and Craig Thomson.<sup>58</sup> For these and other allegations, Williamson has been charged with 50 offences under NSW law.<sup>59</sup>

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<sup>53</sup> Ibid 50.

<sup>54</sup> Ibid 55. As an aside, Thomson alleged to Fair Work investigators that this settlement was instead to repay escort charges to a 'Keywed Pty Ltd' incurred on a union credit card by Jackson (in reality the charges appeared on Thomson's card). This was shown to be false; see *National Office Report*, above n 9, ch 1 [168], ch 5 [354], ch 6 [17].

<sup>55</sup> Until 2003, the NSW branch was known as the 'Health and Research Employees' Association of NSW'; Williamson was also President of the HSU National Office (2003–12), and of the federal Australian Labor Party (for 2009–10).

<sup>56</sup> Kate McClymont, 'HSU: \$20 Million of Dubious Spending, Report Finds', *The Sydney Morning Herald* (online), 24 July 2012 <<http://www.theage.com.au/opinion/political-news/hsu-20-million-of-dubious-spending-report-finds-20120723-22kmi.html>>.

<sup>57</sup> Ibid.

<sup>58</sup> Ean Higgins, 'Police Raid Health Services Union Headquarters in Corruption Probe', *The Australian* (online), 2 May 2012 <<http://www.theaustralian.com.au/news/nation/police-raid-health-services-union-headquarters-in-corruption-probe/story-e6frg6nf-1226344371153>>.

<sup>59</sup> Ean Higgins, 'Ex-HSU Boss Michael Williamson Faces 28 New Charges', *The Australian* (online), 31 October 2012 <<http://www.theaustralian.com.au/news/nation/hsus-williamson-faces-28-new-charges/story-e6frg6nf-1226507245605>>; Ean Higgins, 'Ex-HSU Boss Michael Williamson Faces Two New Charges', *The Australian* (online), 9 April 2013 <<http://www.theaustralian.com.au/news/nation/ex-hsu-boss-michael-williamson-to-face-two-new-charges/story-e6frg6nf-1226615574516>>.

### III CORRUPTION AND THE *REGISTERED ORGANISATIONS ACT*— CIVIL PENALTIES

#### A Overview

The ‘higher-end’ misconduct engaged in by some trade union officials is subject to federal and state laws and civil and criminal sanctions.

Union officials are subject to statutory duties under the *Registered Organisations Act*, based on those that bind company directors and officers under the *Corporations Act*, although the penalties to which union officials are subject are significantly less severe.<sup>60</sup> The statutory duties are fourfold, comprising two mandatory and two prohibitive duties.<sup>61</sup> The mandatory provisions require their subjects to act:

- (1) with the degree of care and diligence which a reasonable person would exercise;
- (2) ‘in good faith in the best interests’ of the entity, and for a ‘proper purpose’;

Under the prohibitive provisions a person must not, improperly use either

- (3) their position; or
- (4) information obtained through their position

for the purpose of gaining ‘an advantage for themselves or someone else’, or causing ‘detriment’ to the entity

As to their interpretation, the common language of the two laws, as well as the lack of case law concerning those sections of the *Registered Organisations Act*,<sup>62</sup> means that the manner in which a union official is required to execute and fulfil his or her duties will be informed by authority and jurisprudence developed in the application of the *Corporations Act*.

<sup>60</sup> An individual offender, under ss 306–7 of the *Registered Organisations Act*, is faced with a \$2200 maximum pecuniary penalty, compared to \$200 000 under s 1317G(1) of the *Corporations Act*; see also *Crimes Act 1914* (Cth) s 4AA.

<sup>61</sup> See *Registered Organisations Act* ss 285–8; *Corporations Act 2001* (Cth) ss 180–3.

<sup>62</sup> The HSU investigations were only the second to take place since the introduction of the CLERP provisions; see Additional Estimates, Evidence to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 15 February 2012, 9 (Bernadette O’Neill, General Manager of Fair Work Australia).

## **B Meaning of ‘Care and Diligence’**

A corporate officer’s first duty under CLERP is to exercise their powers and discharge their duties ‘with the degree of care and diligence a reasonable person would exercise’ if they:

- (a) were an officer of an entity in that entity’s circumstances; and
- (b) occupied their office, and had the same responsibilities within the entity.<sup>63</sup>

The duty has been observed to be not unlike common law negligence in how it is assessed,<sup>64</sup> the applicable standard being determined by context and circumstances. For a company, the relevant context includes the type, size and nature of the enterprise it is engaged in, its constitution, the composition of its board, and the distribution of work between the board and other officers.<sup>65</sup> However, the applicable standard will also depend on the officer’s particular role,<sup>66</sup> along with the individual’s particular skills and knowledge. That does not mean that a higher order of negligence is required for a breach to occur.<sup>67</sup>

By contrast, the duties of a non-executive officer, with the possible exception of a company’s non-executive chairman, do not generally extend beyond financial matters. For example, seven non-executive directors of James Hardie Industries (including the chairwoman, Meredith Hellicar) were held to have breached their duties when a misleading statement was issued about the sufficiency of funds in the company’s asbestos victims’ compensation fund.<sup>68</sup> John Greaves, the non-executive chairman of collapsed phone company One.Tel was judged — having regard to his responsibility for the finance and audit committee,<sup>69</sup> his accounting background, and his receipt of a \$50 000 remuneration not paid to the company’s other non-executive directors. Taking these factors into account, he was said to have an ‘enhanced’ responsibility — that of keeping the board informed of the company’s financial status (this duty being in addition to ordinary directors’ own ‘continuing obligation’ in that

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<sup>63</sup> *Registered Organisations Act* s 285(1); *Corporations Act 2001* (Cth) s 180(1).

<sup>64</sup> LexisNexis, *Ford’s Principles of Corporations Law* (at February 2012) [8.340].

<sup>65</sup> *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 125 (Tadgell J), referred to in LexisNexis, *Australian Corporation Law Principles & Practice* (at April 2012) [3.2A.0050].

<sup>66</sup> In companies, their actual responsibilities are particularly to executive officers, such as the Chief Executive; see *ASIC v Rich* (2009) 236 FLR 1, [7206] (Austin J).

<sup>67</sup> See *Vines v ASIC* (2007) 73 NSWLR 451, 476 (Spigelman CJ).

<sup>68</sup> *ASIC v Hellicar* (2012) 86 ALJR 522.

<sup>69</sup> *ASIC v Rich* (2003) 174 FLR 128.

respect).<sup>70</sup> Arguably, the respective union equivalents of non-official executives and non-official presidents are to be held to this same standard.

Additionally, as is also the case under the *Corporations Act*'s 'business judgment rule', an alleged breach can be disproved if an official can demonstrate that their 'judgment', which was made 'in respect of a matter relevant to the operations' of the union, fulfilled the four criteria specified in section 285(2) of the *Registered Organisations Act*.<sup>71</sup>

### C Meanings of 'Good Faith' and 'Proper Purpose'

The second CLERP duty comprises two independent obligations, both of which must be fulfilled.<sup>72</sup> There are, however, differences between the *Corporations Act* and the *Registered Organisations Act* in this respect. Under the former, a director or officer must exercise power and discharge duties:

(a) in good faith in the best interests of the corporation; and

(b) for a proper purpose.<sup>73</sup>

By contrast, the wording of (a) above in the *Registered Organisations Act* refers to an official acting 'in good faith in *what he or she believes to be* the best interests of the organisation'.<sup>74</sup> These additional words — found in the draft CLERP legislation<sup>75</sup> — make the applicable test subjective, rather than objective as in the *Corporations Act*.<sup>76</sup> Lord Greene MR confirms, in this context, that 'good faith' is defined by what the relevant official considers, '*not what a court may consider*', is in the best interests of the organisation.<sup>77</sup> Under the *Registered Organisations Act*, the 'good faith' requirement is breached only if an official *deliberately* acts in the *knowledge* that the action is not in the union's best interests.<sup>78</sup> This important distinction appears not to

<sup>70</sup> Ibid 129.

<sup>71</sup> See also *Corporations Act 2001* (Cth) s 180(2). The meaning of 'judgment' is discussed in *ASIC v Adler* (2002) 168 FLR 253, [453] (Santow J).

<sup>72</sup> See generally William Heath, 'The Corporations Law, Section 181: A Two-Edged Sword' (2000) 18 *Companies and Securities Law Journal* 377; see also *Chameleon Mining NL v Murchison Metals Ltd* [2010] FCA 1129, [110]; *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109, 137 (Ipp J), which indicates the equitable duty to act for a proper purpose is separate from good faith.

<sup>73</sup> *Corporations Act 2001* (Cth) s 181.

<sup>74</sup> *Registered Organisations Act* s 286 (emphasis added).

<sup>75</sup> Corporate Law Economic Reform Program Bill 1998 (Cth) sch 1, s 181.

<sup>76</sup> *Australian Corporation Law Principles & Practice*, above n 65 [3.2A.0065].

<sup>77</sup> Ibid [3.2A.0060]; *Re Smith & Fawcett Ltd* [1942] 1 All ER 542, 543 (Lord Greene MR).

<sup>78</sup> *Australian Corporation Law Principles & Practice*, above n 65 [3.2A.0070].

have been appreciated by the Fair Work investigation into the HSU National Office.<sup>79</sup>

Unlike the preceding limb, the requirement for officials to act for a ‘*proper purpose*’ is identical under both laws, and is interpreted with reference to case law on discretionary power and collateral or improper purposes.<sup>80</sup> As fiduciaries, directors and officials do not have unlimited, arbitrary power, and must exercise their power only to the end for which it was conferred.<sup>81</sup> This means that even a wide power, such as power over the ‘whole management government and control’ of a company or organisation (absent an explicit provision in its constitution or rules to the contrary) must be exercised for a proper purpose, and not, for example, for a director’s self-interest.<sup>82</sup> To draw an example from the Fair Work report, Thomson argued that an item in the HSU National Office budget — with the general label ‘travelling and accommodation’ — gave him an unrestricted discretion to spend on dining and entertainment (an argument which, unsurprisingly, was rejected).<sup>83</sup>

In the event that a conflict arises between the interests of the organisation and the official (or where there is a ‘real or substantial possibility’ of one arising), the official must avoid promoting his or her own interest.<sup>84</sup> This is complicated where multiple purposes — some proper, some improper — exist. The question then becomes whether the ‘substantial purpose’ of an action was improper.<sup>85</sup> For example, the directors of the Advance Bank authorised a campaign against several board candidates, which included engaging a marketing firm to contact all shareholders, and a letter from the chairman backing the status quo.<sup>86</sup> While corporate funds can be used for internal elections, the Court held that the expenditure had to be reasonable, and the election material had to be related to corporate policy, rather than being of an emotive, personal, or misleading nature.<sup>87</sup> While the directors had

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<sup>79</sup> Several findings of the *National Office Report* regarding s 286(1) of the *Registered Organisations Act* do not include the words ‘in what he believed to be’ in restating the section: see *National Office Report*, above n 9, Findings 41, 59, 65.

<sup>80</sup> See *ASIC v Adler* (2002) 168 FLR 253, [735]–[736] (Santow J); *Australian Corporation Law Principles & Practice*, above n 65 [3.2A.0070].

<sup>81</sup> *Ford’s Principles of Corporations Law*, above n 64 [8.200]; see *Mills v Mills* (1938) 60 CLR 150, 185 (Dixon J); *Ngurli Ltd v McCann* (1953) 90 CLR 425, 438–9 (Williams ACJ, Fullagar and Kitto JJ).

<sup>82</sup> *Hannes v MJH Pty Ltd* (1992) 7 ACSR 8.

<sup>83</sup> *National Office Report*, above n 9, ch 6 [626]–[633].

<sup>84</sup> *ASIC v Adler* (2002) 168 FLR 253, [387] (Santow J).

<sup>85</sup> *Australian Corporation Law Principles & Practice*, above n 65 [3.2A.0115]; see *Chameleon Mining NL v Murchison Metals Ltd* [2010] FCA 1129, [676].

<sup>86</sup> See generally *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464.

<sup>87</sup> *Ibid* 485 (Kirby P).

acted in good faith, their substantial purpose — that of seeking their own reelection — was improper, and they were ordered to reimburse the bank.<sup>88</sup> In the trade union context (albeit under now-repealed laws), the authorisation of such expenditure has been found to be improper,<sup>89</sup> but only if it occurred during an official ‘election period’.<sup>90</sup> This finding led Kirby P (as he then was) to reflect that, in interpreting the *Corporations Law*, ‘great care must be taken in applying, out of context, the decisions reached in the industrial relations sphere. Its peculiarities are notorious’.<sup>91</sup> However, the subsequent harmonisation of organisational and corporate rules in this area means that this issue is probably moot.

### **D Meaning of ‘Impropriety’**

The third and fourth CLERP duties both relate to abuse of position, and are therefore particularly relevant to the examples discussed. The prohibitions common to the *Corporations Act* and the *Registered Organisations Act* provide that officials and employees ‘must not *improperly*’ use:

- their position; or
- information obtained because they hold, or did hold, their position, either to:
  - (a) gain an advantage for themselves or someone else; or
  - (b) cause detriment to the organisation or another person.<sup>92</sup>

The *Registered Organisations Act* differs from the *Corporations Act* in that while a director or officer of a company is, under the latter Act, prohibited from causing ‘detriment to the corporation’, the former Act contains a broader prohibition against the causing of detriment ‘to the organisation or to another person’.<sup>93</sup>

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<sup>88</sup> Ibid; see also commentary in *Australian Corporation Law Principles & Practice*, above n 65 [3.2A.0115].

<sup>89</sup> *Scott v Jess* (1984) 3 FCR 263.

<sup>90</sup> *Tanner v Maynes* (1985) 7 FCR 432, 455 (Keeley J dissenting).

<sup>91</sup> *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464, 479 (Kirby P).

<sup>92</sup> *Registered Organisations Act* ss 287–8; *Corporations Act 2001* (Cth) ss 182–3.

<sup>93</sup> These words are also included in the *Commonwealth Companies and Authorities Act 1997* (Cth) ss 25–6; see also Corporate Law Economic Reform Program Bill 1998 (Cth) sch 5, s 11.

These duties are breached, whenever the use of a position or of information is ‘improper’. The meaning of ‘improper’ is objective in that it:

consists in a breach of the standards of conduct ... expected of a person in the position of the... offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case...<sup>94</sup>

Conduct engaged in for an improper purpose (as discussed above) can also satisfy this criterion, and includes acts that the officer ‘knows or ought to know that he has no authority to do’.<sup>95</sup> Indeed, it has been held that failures to act for a ‘proper purpose’, as discussed above, may violate this duty.<sup>96</sup>

If impropriety is proven, it is immaterial whether the intended advantage was gained, or the detriment caused, since the purpose alone is sufficient.<sup>97</sup> For instance, if a person acts in a transaction through which that person, or a person to whom they owe a duty, stands to gain an advantage, the failure to make adequate disclosure may alone constitute an improper use of position.<sup>98</sup> Similarly, a director who has transferred corporate money into a personal account, ostensibly because it was in the company’s best interest to do so, has improperly used his or her position, given that the director knew that doing so was outside the scope of his or her authority.<sup>99</sup>

It seems that, for the purpose of these duties, any transaction will amount to gaining an ‘advantage’ or causing ‘detriment’, even if it were to satisfy a legitimate financial obligation, or where the balance sheet of the entity is unchanged on a net basis.<sup>100</sup> For instance, an advantage was found to be gained by a director who facilitated payment of a debt that was owed to another company, without having disclosed that its sole owners were himself and his wife.<sup>101</sup> In another matter, a director of a corporate trustee, in

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<sup>94</sup> *R v Byrnes* (1995) 183 CLR 501, 514–5 (Brennan, Deane, Toohey and Gaudron JJ).

<sup>95</sup> *Ibid*; see also *Doyle v ASIC* (2005) 227 CLR 18, 29 (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ).

<sup>96</sup> *Chameleon Mining NL v Murchison Metals Ltd* [2010] FCA 1129, [676].

<sup>97</sup> *Chew v The Queen* (1992) 173 CLR 626 (Mason CJ, Brennan, Gaudron, McHugh JJ); see also *Australian Corporation Law Principles & Practice*, above n 65 [3.2A.0095]; *Southern Resources Ltd v Residues Treatment and Trading Co Ltd* (1990) 56 SASR 455, 478 (Jacobs ACJ, Prior and Mullighan JJ), which suggests insider trading need not bear fruit for misuse of information to be proven.

<sup>98</sup> *ASIC v Adler* (2002) 168 FLR 253, [458] (Santow J); *Australian Corporation Law Principles & Practice*, above n 65 [3.2A.0095].

<sup>99</sup> See *R v Cook; Ex parte Director of Public Prosecutions (Cth)* (1996) 130 FLR 354.

<sup>100</sup> *Ford’s Principles of Corporations Law*, above n 64 [9.282.6].

<sup>101</sup> *R v Donald* [1993] 2 Qd R 680.

authorising the sale of assets from a family trust to a new entity (albeit at full value) — and thus avoiding an anticipated claim from a creditor — was said to have gained an advantage by ‘being able to carry on the business which employed him under a fresh corporate structure unimpeded by the claim’. Indeed, because the sale was for an improper purpose, the fact that full value was obtained was irrelevant to the director breaching his duty.<sup>102</sup> In light of these decisions, it would not be unreasonable to suggest that Jeff Jackson’s actions in directing to himself payment of additional salary from HSU funds would amount to a similar, improper use of position.

Different views have been expressed as to what amounts to a ‘use of information’ (in contrast to a ‘use of position’), in the corporate context. At a minimum, it corresponds to the fiduciary duty of confidentiality, applicable to ‘that type of information which equity would restrict a director from using to his personal profit’.<sup>103</sup> On this view, a director who assisted other companies in their dealings with the former customers of his or her own company (which had ceased trading) would engage in a contravention.<sup>104</sup> The broader view is that the duty applies to all information, whether it is of direct (as above) or indirect value. For example, it applied to a director who, knowing his company was to be liquidated, proceeded to change its name and register a second company in the original name, which was then used to carry on his business. The ‘information’ there was the risk of liquidation, a fact not in itself of great commercial value, but which did allow him to embark on a course of action that he would not have otherwise taken.<sup>105</sup>

Given that the provision seems designed to protect commercially significant information — a great quantity of which a trade union is unlikely to have — there are conceivably fewer situations in which it could be invoked under the *Registered Organisations Act* than under the *Corporations Act*. One example, however, is a union’s membership data, which could be valuable in the marketing of industry-specific products, and also in fighting a union ‘turf war’. For instance, during the 1990s, the HSU’s NSW branch,<sup>106</sup> largely through the efforts of Craig Thomson, engaged in a concerted effort to gain representation of psychologists, at the expense of the rival Public Service Association (‘PSA’). An order of the NSW Industrial Relations Commission

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<sup>102</sup> *Jeffree v NCSC* (1989) 15 ACLR 217.

<sup>103</sup> *Australian Corporation Law Principles & Practice*, above n 65 [3.2A.0100]; *Rosetex Co Pty Ltd v Licata* (1994) 12 ACSR 779, 783 (Young J).

<sup>104</sup> See generally *Rosetex Co Pty Ltd v Licata* (1994) 12 ACSR 779.

<sup>105</sup> See *McNamara v Flavel* (1988) 13 ACLR 619.

<sup>106</sup> Then known as the Health and Research Employees’ Association.



excluded the HSU from the field.<sup>107</sup> Had that not occurred, the HSU could conceivably have obtained a PSA membership list from a sympathetic official, giving the HSU direct access to PSA members, and thus possibly causing the PSA to lose membership. Another example of valuable information held by a trade union might concern union contracts for services. Mention was earlier made of purchases from Urban Giftware by the HSU Victoria No 1 Branch, which was a related party of the then-President Pauline Fegan. If Fegan had provided ‘inside information’ that gave Urban Giftware (and by extension her partner) an advantage in a tender process, that could be considered a misuse of union information. Likewise, had Communigraphix tendered for the annual contract to produce HSU East’s magazine (which did not occur), Michael Williamson could have misused union information by giving Communigraphix an advantage in the tender process. Both these examples, in the author’s view, would more appropriately be classified as misuses of position, but they do show, in theory, that unions have valuable information for the purpose of this particular duty.

## IV CRIMES — COMMON LAW AND CORPORATE

### A Overview

The previous section considered the duties applicable to union officials, and corporate directors and officers, under both the *Registered Organisations Act* and the *Corporations Act*. While the corporate and union contexts differ, the base behaviour to which the two laws respond is broadly similar.

Where the two laws differ is in the area of criminality. While the *Corporations Act* contains specific criminal provisions for directors and officers who engage in serious breaches of their duties,<sup>108</sup> those provisions were left out of the *Registered Organisations Act*. The effect of this omission is that, while a crime committed internally against a corporation can be dealt with *specifically* as a ‘criminal violation of financial trust’,<sup>109</sup> factually similar offences occurring in a union context can be dealt with only under the general criminal law.

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<sup>107</sup> See *Public Service Association (NSW) v Health and Research Employees’ Association (NSW)* (1996) 92 IR 122; *Health and Research Employees’ Association (NSW) v Public Service Association (NSW)* (1997) 92 IR 158.

<sup>108</sup> *Corporations Act 2001* (Cth) s 184.

<sup>109</sup> As termed in Donald R Cressey, *Other People’s Money: A Study in the Social Psychology of Embezzlement* (Patterson Smith Publishing Corporation, 2<sup>nd</sup> ed, 1973) 11.

Consequently, allegedly corrupt union officials have faced prosecution for a range of offences under the general criminal law. Norm Gallagher of the BLF, for instance, was charged with ‘corruptly receiving secret commissions’.<sup>110</sup> Craig Thomson is facing 154 charges of theft, obtaining financial advantage by deception, and dishonestly obtaining property by deception in Victoria.<sup>111</sup> Michael Williamson faces 50 charges in NSW, including charges of fraud, money laundering, publishing misleading statements (in respect of his wife’s company), and hindering an investigation.<sup>112</sup>

This discussion considers the criminal breaches of duty established under CLERP, on the one hand, and the state criminal laws that apply to corrupt union officials on the other. Although the state criminal laws provide a viable alternative to specific offences, their object is not to punish a misuse of authority, or a betrayal of trust. Rather they penalise a broad class of unacceptable acts, within which such behaviour may fall. What might be thought of as the specific ‘immorality’ of *betraying* a trade union, in the author’s view, is not addressed by general criminal laws, and is therefore left unpunished.

### **B Crimes under CLERP**

The criminal provisions contained in the *Corporations Act* are largely the same as their civil counterparts, save for the inclusion of a mens rea element. Simply put, a violation of those duties will be criminal if it was *intentional* or *reckless*.

Where directors or officers fail (a) to act in good faith in the best interests of the corporation, and (b) to act for a proper purpose, they will commit an offence if their action or inaction was either:

- (a) reckless; or
- (b) intentionally dishonest.<sup>113</sup>

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<sup>110</sup> *Crimes Act 1958* (Vic) s 176.

<sup>111</sup> ‘Charge Sheet and Warrant to Arrest (Execution Copy)’ served on Craig Robert Thomson under the *Magistrates’ Court Criminal Procedure Rules 2009*, signed 30 January 2013 and 5 February 2013 <<http://michaelsmithnews.typepad.com/files/complete-craig-thomson-charge-sheet-and-warrant-to-arrest-20130206.pdf>>.

<sup>112</sup> Higgins, above n 59.

<sup>113</sup> *Corporations Act 2001* (Cth) s 184(1); defined in the *Criminal Code Act 1995* (Cth) sch 1 div 5.

By contrast, the provisions relating to misuse of position and information refer to *dishonesty* rather than impropriety. That is to say, directors or officers must dishonestly use their position, or information obtained through it:

- (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
- (b) recklessly as to whether the use may result in they or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.<sup>114</sup>

It is important that ‘dishonesty’, defined objectively, be specifically proven for a charge to be made out. For instance, a director who failed to disclose an interest in two companies, and then participated in board decisions facilitating two lease agreements with them, was found to have acted dishonestly, having intended to gain an advantage for the companies.<sup>115</sup>

### C State Laws

State criminal laws, as applicable to the case studies referred to in this article, do not apply specifically to the examples of disloyalty discussed here, but to a broad range of behaviour, which may not include all forms of officials’ misconduct.

It is appropriate to commence discussion with Victoria and NSW, where the charges against Craig Thomson and Michael Williamson have been laid. The criminal law in these States, as also in South Australia, follows the common law, with property offences based on now-repealed provisions of the *Theft Act 1968* (UK).<sup>116</sup> All have a ‘basic’ theft offence — a dishonest appropriation of property with the intention to permanently deprive the rightful owner of it<sup>117</sup> — plus a range of offences concerning obtaining property through deception or fraud. In Victoria and NSW, a person who ‘by any deception dishonestly

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<sup>114</sup> *Corporations Act 2001* (Cth) ss 184(2)–(3).

<sup>115</sup> *Kwok v The Queen* (2007) 175 A Crim R 278; *Ford’s Principles of Corporations Law*, above n 64 [9.288].

<sup>116</sup> *Theft Act 1968* (UK) c 60, s 15, as repealed by the *Fraud Act 2006* (UK) c 35, sch 1; see Department of Parliamentary Services (Cth), *Bills Digest*, No 105 of 1999–2000, 24 November 1999, ‘Theft, Fraud, Bribery and Related Offences’; see also Model Criminal Law Officers Committee, *Model Criminal Code Report: Chapter 3 — Theft, Fraud, Bribery and Related Offences* (Standing Committee of Attorneys-General, 1995).

<sup>117</sup> *Theft Act 1968* (UK) c 60, s 1; *Criminal Law Consolidation Act 1935* (SA) s 134; *Crimes Act 1958* (Vic) s 72; *Crimes Act 1900* (NSW) s 134.

obtains' (as opposed to 'appropriates') the property of another is guilty of an offence.<sup>118</sup> Offences applicable to obtaining 'financial advantage' are similarly worded. The criminal law in NSW, but not Victoria, also includes causing 'financial disadvantage'.<sup>119</sup> South Australia groups the notions of gain and loss together under the heading of 'Deception', an offence which requires only that the deceit lead to a 'benefit' being accumulated *or* detriment being incurred.<sup>120</sup> Interestingly, the United Kingdom has since abandoned the 'obtaining by deception' approach in favour of specific offences including fraud by abuse of position, fraud by false representation, and dishonestly obtaining services.<sup>121</sup>

Similar offences, albeit using the language of 'stealing', are used in the Australian criminal code jurisdictions. In Queensland and Western Australia, stealing is defined as 'fraudulently' taking or converting 'anything capable of being stolen'. A person is guilty of the offence if the person acted with the requisite intent — for instance, the intent to permanently deprive the owner of the relevant goods.<sup>122</sup> If the property is money, any intention to repay is considered irrelevant to whether or not the crime was committed.<sup>123</sup> Likewise, it is immaterial that a person has a 'special interest' in the property taken, including as a lessee, a joint owner, or that the person is a 'director or officer of a corporation or company or society who are the owners of it'.<sup>124</sup> Tasmania utilises similar terminology, for example, in relation to the offence of 'stealing by misappropriation' (which consists of persons dishonestly using money they have received contrary to directions that were given).<sup>125</sup> However, the Tasmanian code also contains a number of offences that respond to particular situations, such as conversion of trust property,<sup>126</sup> and fraudulent misappropriation of corporate property.<sup>127</sup>

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<sup>118</sup> *Crimes Act 1958* (Vic) s 81; *Crimes Act 1900* (NSW) pt 4AA ('Fraud'), ss 192C, 192E.

<sup>119</sup> *Crimes Act 1958* (Vic) s 81; *Crimes Act 1900* (NSW) pt 4AA ('Fraud'), ss 192B, 192E. The NSW Act also includes causing 'financial disadvantage', as distinct from a botched attempt to gain an advantage that only causes a disadvantage.

<sup>120</sup> *Criminal Law Consolidation Act 1935* (SA) s 139.

<sup>121</sup> *Fraud Act 2006* (UK) c 35, ss 1–5.

<sup>122</sup> *Criminal Code Act 1899* (Qld) sch 1 s 391; *Criminal Code Act Compilation Act 1913* (WA) sch 1 s 371.

<sup>123</sup> *Criminal Code Act 1899* (Qld) sch 1 s 391(2)(f); *Criminal Code Act Compilation Act 1913* (WA) sch 1 s 371(2)(f).

<sup>124</sup> *Criminal Code Act 1899* (Qld) sch 1 s 396; *Criminal Code Act Compilation Act 1913* (WA) sch 1 s 376.

<sup>125</sup> *Criminal Code Act 1921* (Tas) sch 1 s 231.

<sup>126</sup> *Ibid* s 260.

<sup>127</sup> *Ibid* s 261.

### **D A Moral and Practical Comparison**

It would be incorrect to suggest that a corrupt trade union official does not commit any of the above State crimes, since the charging of Thomson and Williamson clearly attests to the contrary. Upon an examination of their normative bases, however, it becomes clear that those State crimes are of a rather different nature from the corporate crimes (in that they stem from different ‘moral’ or ‘pre-legal’ notions), raising questions as to the desirability of the status quo.

Offences such as theft or stealing, however labelled, reflect at their core a social norm — a distinct moral objection to the taking of the property of others. Not all activities which fall foul of this moral norm will necessarily be unlawful (for example, if I mistakenly take a coat from a cupboard, mistaking it for my own, its owner may perceive it as a moral theft, but, being unintended, it may not be a *legal* theft).<sup>128</sup> Likewise, those offences labelled as fraud reflect a similar normative consensus against ‘deception’ — that is, against communicating untruths to others, intending such untruths to be believed.<sup>129</sup> Normative rules aimed at certain types of behaviour do not supply the basis only for criminal offences. Fiduciary duties — and like provisions in the *Corporations Act* — also have a corresponding basis: a normative duty of loyalty,<sup>130</sup> and a duty also to act in a beneficiary’s best interests.<sup>131</sup> Laws which penalise breaches of duty are thus reflecting, at some level, a moral norm against disloyalty.

The relevance of this is that the civil duties contained in the *Corporations Act*, and the criminal provisions related to them, do not specifically aim to prevent or punish acts of ‘stealing’ or ‘deception’, although that may be the practical effect of their application. Instead, they are intended as a deterrent to those who, being in a position of trust and confidence, would abuse such trust. That is partly why the *Corporations Act* has its own loyalty-based criminal provisions, which apply more generally to the management of entities, rather than to the use of property. For instance, Rodney Adler, having arranged the round-robin purchase of HIH Insurance shares using funds from a subsidiary (in an attempt to inflate the company’s share price), pleaded guilty to failing to act in good faith. His actions showed ‘an appalling lack of commercial morality’<sup>132</sup> in that he put his own interests above those of his company,

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<sup>128</sup> Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 89–90.

<sup>129</sup> *Ibid* 76, 153.

<sup>130</sup> *Ibid* 103.

<sup>131</sup> *Ibid* 99.

<sup>132</sup> *R v Adler* (2005) 53 ACSR 471, 477 (Dunford J).

though he did not steal or obtain property by deception. Likewise, one might argue that officials in the HSU dishonestly misused their positions by exceeding their authority. It is hard to characterise Thomson's expenditure of HSU funds in his campaign for Parliament as meeting the criteria for a property offence, although it certainly occurred for an improper purpose. In that sense, the general criminal law does not respond directly to his behaviour.

Of course, there are other benefits to including the CLERP offences in the *Registered Organisations Act*. Reckless as well as intended acts may fall within the scope of the CLERP offences, though they would not be classifiable as fraud or theft. Similarly, given that modern trade unions are national bodies — having been so since amalgamation under the Hawke Government, when the minimum membership for registration of a trade union was increased from 1000 to 10 000 (originally proposed as 20 000), leading to the demise of many smaller, state-based unions<sup>133</sup> — it makes sense that laws applicable to their officials should be uniform. Having a federal investigative agency (the General Manager of Fair Work) investigating civil violations of federal law parallel to any enquiry by state bodies (namely, the police forces) into criminal conduct has been shown by the HSU investigations to be unnecessary and inefficient.

While it well may be, as one commentator has suggested, that 'we can all be held liable for fraud or misappropriation of somebody else's money' under state crimes,<sup>134</sup> that is not the basis of the CLERP offences. Their subject is not misappropriation or fraud, but disloyalty and abuses of trust and confidence. They are relational, not general, offences.

## V COMPARING PENALTIES

Distinct from the appropriateness of civil compared to criminal provisions is the issue of the penalties available to courts that wish to punish union officials found guilty of corruption. Although the *Corporations Act* and the *Registered Organisations Act* impose common duties, there are important differences between the civil penalties available under the two statutes.

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<sup>133</sup> *Industrial Relations Legislation Amendment Act 1990* (Cth) s 12; see also Commonwealth, *Parliamentary Debates*, Senate, 23 August 1990, 2079 (Senator Peter Cook, Minister for Industrial Relations). See generally Kevin Morgan, 'Union Malaise Owes Much to Hawke Amalgamations', *The Australian* (online), 7 June 2012 <<http://www.theaustralian.com.au/national-affairs/opinion/union-malaise-owes-much-to-hawke-amalgamations/story-e6frgd0x-1226386738662>>.

<sup>134</sup> Joellen Riley's contribution in 'The Question', *The Sydney Morning Herald* (online), 16 June 2012 <<http://www.smh.com.au/opinion/the-question-20120615-20f3f.html>>.

The same categories of penalty are available for violations of a civil penalty provision in both laws, including pecuniary penalty orders,<sup>135</sup> compensation orders,<sup>136</sup> and other orders such as injunctions.<sup>137</sup> However, while disqualification orders can be made under the *Corporations Act*,<sup>138</sup> no similar express power exists under the *Registered Organisations Act*, although automatic disqualification was intended as a consequence of a pecuniary penalty (being a ‘prescribed order’) under the 2002 Bill.<sup>139</sup> If, however, a person is convicted of a ‘prescribed offence’ they thereby become ineligible to run for or hold office in an organisation. The person ceases after 28 days from conviction to hold any positions held at the time of conviction (subject to appeal).<sup>140</sup> A ‘prescribed offence’ is defined as including any offence under the laws of the ‘Commonwealth, a State or Territory, or another country, involving fraud or dishonesty and punishable on conviction by imprisonment for a period of 3 months or more’.<sup>141</sup>

A significant difference between the two laws is the maximum pecuniary penalty a court can impose. However, a recent rise in the value of penalty units from \$110 to \$170,<sup>142</sup> combined with amendments to the *Registered Organisations Act* in 2012,<sup>143</sup> has, to the extent of those increases, narrowed the divide. Under the *Corporations Act*, a maximum penalty of \$200 000 can be ordered,<sup>144</sup> while the ceiling under the *Registered Organisations Act* is significantly lower, at 60 penalty units for an individual (\$10 020 total).<sup>145</sup> This represents a significant increase from the previous 20 penalty units (or \$2200, based on \$110 penalty units).<sup>146</sup>

Regardless of this change, it is not clear why misdeeds in the union context are treated more leniently than in the corporate sphere. After all, both are betrayals of the entities’ members — for the corporation, its owners and

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<sup>135</sup> *Registered Organisations Act* s 306; *Corporations Act 2001* (Cth) s 1317G.

<sup>136</sup> *Registered Organisations Act* s 307; *Corporations Act 2001* (Cth) ss 1317H–1317HB.

<sup>137</sup> *Registered Organisations Act* s 308; *Corporations Act 2001* (Cth) s 1324.

<sup>138</sup> *Corporations Act 2001* (Cth) s 206C.

<sup>139</sup> Workplace Relations (Registration and Accountability of Organisations) Bill 2002 (Cth) ss 221–8.

<sup>140</sup> *Registered Organisations Act* s 215.

<sup>141</sup> *Registered Organisations Act* s 212.

<sup>142</sup> *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) sch 3 s 7 amending the *Crimes Act 1914* (Cth).

<sup>143</sup> *Fair Work (Registered Organisations) Amendment Act 2012* (Cth).

<sup>144</sup> *Corporations Act 2001* (Cth) s 1317G(1).

<sup>145</sup> *Registered Organisations Act* s 306; the value of a penalty unit is defined by the *Crimes Act 1914* (Cth) s 4AA.

<sup>146</sup> *Registered Organisations Act* s 306, later amended by the *Fair Work (Registered Organisations) Amendment Act 2012* (Cth).

shareholders, and for unions, their paid membership — and the normative moral bases of both offences are fundamentally the same. Of course, one might argue, as the report of the Australian Council of Trade Unions' Independent Panel on Best Practice for Union Governance ('ACTU Panel') seems to,<sup>147</sup> that the goal of such provisions is to only deter, not punish, those who would engage in misconduct. This is disagreeable. Penalties also exist to penalise, particularly in cases like the present, where proverbial 'teeth' are required to deal with genuine offenders. Indeed, unless it raises the amount that an official can be fined, there is a real risk that the civil penalties regime will be perceived by law enforcement agencies as imposing overly lenient penalties, leading to more criminal prosecutions than are necessary.

## VI OFFENCES OVER OBLIGATIONS?

Putting to one side the strengths and weaknesses of the civil penalties regime, the suggested inclusion of criminal provisions for officials in the *Registered Organisations Act* remains contentious. In the view of the ACTU Panel, there is no justification for 'cluttering the statute books with further, likely ineffective criminal sanctions'.<sup>148</sup> The assumptions supporting this conclusion are, however, questionable:

We subscribe to the view that the greatest disinfectant is sunlight. Appropriate disclosure of practice and policies is likely to do more to prevent any malpractice than shiploads of punitive sanctions for breach of standards. Where people are moved to embark on actual, deliberate dishonesty, fear of the already applicable criminal law as to fraud or of the many civil proscriptions will not reliably hold them back.<sup>149</sup>

While the emphasis on prevention has merit, particularly in encouraging good conduct and discouraging poor conduct — such as an official's self-payment of excessive remuneration<sup>150</sup> — it ignores the possibility that misconduct nevertheless occurs, and thus says nothing about how the perpetrators should be treated. This is problematic for those who argue that the purpose of criminal law is not to deter, but to punish unacceptable conduct. Even if it is said to deter wrongdoing, research suggests that the public shame of even a

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<sup>147</sup> See generally Independent Panel on Best Practice for Union Governance (Australian Council of Trade Unions), *Report to ACTU Executive to Invite Comment* (2013) ('ACTU Panel Report').

<sup>148</sup> *Ibid* 5.

<sup>149</sup> *Ibid* 14.

<sup>150</sup> *Ibid* 43–5.



potential prosecution, for a professional, may be more effective than a monetary penalty (whether or not charges are brought).<sup>151</sup>

A more relevant point is the Panel's observation that ASIC has 'not been much attracted' to the use of criminal proceedings.<sup>152</sup> Unfortunately, this statement is somewhat dishonest. A search of the ASIC website uncovers an abundance of media releases referring to prosecutions in which ASIC has taken part.

Alternatively, it may be argued that ASIC's preference to utilise the civil penalties regime illustrates a lack of faith in the criminal provisions.<sup>153</sup> This again is overly simplistic. It is true, as the Panel suggested, that the criminal offences require a higher standard of proof than do the civil penalty provisions.<sup>154</sup> But to suggest that this alone is why ASIC has a preference for civil penalties is a gross generalisation. Like the police, ASIC does not pursue each report of misconduct under the criminal law. To employ the criminal law in every instance would be highly arbitrary, leading to an overly severe — and frankly unfair — response in many cases. Indeed, where an investigation has potential criminal implications, ASIC does consult with the Commonwealth Director of Public Prosecutions ('CDPP') on how the matter should proceed.<sup>155</sup> Which option is appropriate in a given situation is a matter of policy. After all, not all breaches of duty are comparable to those of a Rodney Adler or a Michael Williamson.

This comparison, one might suggest, raises another question: why should only these particular persons — a company director and a union official — face such offences? This goes to what might be called a 'public interest' argument. Both owe the same essential fiduciary duty to those who have reposed in them a 'substantial confidence', trusting these fiduciaries to act on their behalf.<sup>156</sup> It could be argued, on this basis alone, that all fiduciary relationships should be backed up by criminal law. However, these particular relationships — as between a company's shareholders and directors, and a union's membership

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<sup>151</sup> See Dan M Kahan and Eric A Posner, 'Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines' (1999) 42 *Journal of Law and Economics* 365.

<sup>152</sup> *ACTU Panel Report*, above n 147, 31.

<sup>153</sup> For a discussion on the blurring of the boundaries between civil and criminal behaviour in the corporate sphere, see Neil Andrews, 'If the Dog Catches the Mice: The Civil Settlement of Criminal Conduct under the Corporations Act and the Australian Securities and Investments Act' (2003) 15 *Australian Journal of Corporate Law* 1.

<sup>154</sup> *ACTU Panel Report*, above n 147, 31.

<sup>155</sup> Michelle Welch, 'Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice' (2009) 33 *Melbourne University Law Review* 908, 916–20.

<sup>156</sup> *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 141–2 (Dawson J).

and its officials — are distinct from other fiduciary relationships. In company or union relationships, the beneficiaries are a public class, and the fiduciaries may be responsible for quite vast sums (the HSU National Office, for instance, had revenue of over \$2 million for 2007–08).<sup>157</sup> What sets them apart, and therefore warrants additional protections, is their fundamentally ‘public character’. The dual civil–criminal model established by CLERP recognises this, and affords such relationships a necessarily greater level of protection. The CLERP model, it should be noted, also applies to Commonwealth public servants.<sup>158</sup>

Consistency is also a consideration. While it is undoubtedly true that ‘unions are not like corporations’,<sup>159</sup> there is a real question as to why, in cases where an official and director have engaged in practically identical misconduct, with similar intentions, the legal response differs depending on whether the *victim* entity was a trade union or a corporation. Why one should face a more severe punishment than the other is less than clear.

Another argument, to which the ACTU Panel makes reference,<sup>160</sup> is that the vast majority of union officials are law-abiding, and therefore it is unnecessary to establish further criminal offences. Of course, the same argument can be made about many criminal offences. The vast majority of Australians are unlikely to kill their neighbours, loot their houses, or force them into non-consensual sexual acts, so why should that behaviour be criminalised? This argument should sound no less absurd in a union context. Simply because certain behaviour is an aberration does not mean it should be treated any less harshly.

The HSU saga may well be an aberration among trade unions, but the inclusion of offences for officials in the *Registered Organisations Act* would not change that. Officials would not be charged with an offence for all breaches of duty. Criminal charges would be reserved for serious violations where *mens rea* can be proven to the higher evidentiary standard of ‘beyond reasonable doubt’,<sup>161</sup> rather than on the balance of probabilities.<sup>162</sup>

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<sup>157</sup> *National Office Report*, above n 9, ch 8 [67].

<sup>158</sup> *Commonwealth Authorities and Companies Act 1997* (Cth) s 26.

<sup>159</sup> See Dave Oliver’s (Secretary of the Australian Council of Trade Unions) contribution in ‘The Question’, *The Sydney Morning Herald* (online), 16 June 2012 <<http://www.smh.com.au/opinion/the-question-20120615-20f3f.html>>. See also Anthony Forsyth, ‘Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model’ (2000) 13 *Australian Journal of Labour Law* 1.

<sup>160</sup> *ACTU Panel Report*, above n 147, 12.

<sup>161</sup> See *Evidence Act 1995* (Cth) s 141; *Criminal Code Act 1995* (Cth) sch 1 s 13.2.

<sup>162</sup> *Evidence Act 1995* (Cth) s 140.

If this results in the provisions being underutilised, that should be seen as a positive — much like a fire alarm protected by glass because its activation has not been required — rather than as a sign of ineffectiveness. Such laws should be available, in the hope that the circumstances requiring their use will never arise.

## VII CIVIL PENALTIES AND ‘NON-OFFICIAL’ UNION EXECUTIVES

An aspect of the HSU investigations that has largely passed without discussion is the standard of care owed by ‘non-official’ union executives, who occupy positions analogous to corporate non-executive directors.

In the Fair Work report, Michael Williamson is quoted as saying that his role as HSU National President was purely honorary. He felt no obligation to participate in the administration of the National Office — particularly given that he was based in NSW, while the National Office was in Victoria; he also noted that he did not sit on the Finance Committee.<sup>163</sup> Instead, his role, for which he earned \$20 000 annually, involved the chairing of meetings but no supervision of the executive.<sup>164</sup> Unsurprisingly, this was met with criticism from Fair Work, which concluded that he should have actively supervised Craig Thomson, and acted to establish proper policies for credit card issuance and expenditure.<sup>165</sup>

Although Williamson is probably a poor representation of such ‘honorary’ officials, it is worthwhile considering the role of union executives who do not participate in the daily running of the union, particularly in regard to their duty to exercise a ‘reasonable’ level of care and diligence.<sup>166</sup> As mentioned above, the duties of corporate non-executive directors are generally limited to financial matters, with the exception of the non-executive chairman, whose further duties often reflect that person’s particular skills and expertise. Williamson’s argument is accordingly weak, given not only his analogous role as ‘non-official’ President, but also his considerable experience in operating a union branch (analogous to the accounting background of John Greaves at One.Tel).

An official’s duty to exercise care and diligence requires that they do so as a *reasonable person* would if they were (a) ‘an officer of an organisation... *in*

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<sup>163</sup> *National Office Report*, above n 9, ch 11 [4].

<sup>164</sup> *Ibid* ch 11 [9].

<sup>165</sup> *Ibid* ch 20 [126], [173]–[175].

<sup>166</sup> *Registered Organisations Act* s 285(1).

*the organisation's circumstances*', and (b) 'occupied the office held by, and had the same responsibilities within the organisation ... as the officer'.<sup>167</sup> This emphasis on context means that, compared to non-executive directors, non-official union executives may argue that they are under no 'continuing obligation' to monitor a union's finances, beyond attending executive meetings. Particularly in federal unions, there are chairs at the table that are provided solely for representative purposes (so that groups, in particular state branches and constituent organisations, have a voice). For example, 14 representatives from branches sit on the National Executive of the AWU, as against eight members who hold official positions including those of Secretary, President, Assistant Secretary and Vice-President.<sup>168</sup> Certainly, the Fair Work report into the HSU National Office seems to indicate that members of its National Executive and its Finance Committee did not actively monitor Craig Thomson's activities, although whether they could have done so is another matter.

Certainly, it seems that Parliament's intention in adopting the corporate language in the *Registered Organisations Act* was to bring the standard of care of union officials into line with that of company directors.<sup>169</sup> However, because a non-executive official's duties are subjective to the organisation itself (depending on who it represents and what activities it engages in), and because union executives function differently from a corporate board, their obligations may be less strict than those of directors. Nevertheless, assuming that they have been given access to all relevant information (which was not the case in the HSU), it would be hard to fathom an official not having read at least some of it, if not out of curiosity, then because its contents are the subject of discussion at a given meeting.

Whether this is desirable is a question which concerns the practical role of a union executive; in particular, it would be relevant to ask whether it is an actual committee of management, or a forum that merely provides representation to constituent groups. While that would no doubt be an interesting discussion, it is one best left to another occasion.

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<sup>167</sup> Ibid (emphasis added).

<sup>168</sup> *National Executive*, Australian Workers' Union <<http://www.awu.net.au/national-executive>>.

<sup>169</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 4 April 2001, 26344 (Tony Abbott, Minister for Employment, Workplace Relations and Small Business).

## VIII AUSTRALIA'S INDUSTRIAL RELATIONS INSTITUTIONS AND MISCONDUCT INVESTIGATIONS

It is worthwhile considering the role that Australia's industrial relations institutions play in investigating misconduct. In particular, the Fair Work investigation into the National Office of the HSU, conducted by the General Manager of Fair Work, faced significant public criticism. Fair Work President Ian Ross lamented that, despite their separate operations, the General Manager's investigation had 'significantly damaged the [Fair Work] Tribunal's reputation'.<sup>170</sup>

The main criticisms made of the Fair Work investigation were two-fold. First, although the lead investigator believed otherwise,<sup>171</sup> the public perception was that the process had taken an inordinate amount of time. Craig Thomson himself noted this,<sup>172</sup> having had questions about his integrity left unanswered in the public domain for almost four years, something which caused an avoidable level of personal distress. The observation was made by Opposition Leader Tony Abbott in early 2012 that:

The Fitzgerald Royal Commission in Queensland went for well under three years, [as did] the Wood Royal Commission in NSW [into police corruption] ... the Cole Royal Commission into the building industry, just 18 months; I fail to see why this investigation is taking so long.<sup>173</sup>

As the General Manager of Fair Work herself noted,<sup>174</sup> the investigation into the HSU was only the second undertaken since the commencement of the

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<sup>170</sup> Michelle Grattan and Jessica Wright, 'No Evidence of "Interference" in HSU Inquiry, Says Fair Work President', *The Age* (online), 28 May 2012 <<http://www.theage.com.au/opinion/political-news/no-evidence-of-interference-in-hsu-inquiry-says-fair-work-president-20120528-1zdu7.html>>. The creation of Fair Work saw two previously separate agencies, the Australian Industrial Relations Commission, and the Australian Industrial Registry, becoming separate divisions of a single body.

<sup>171</sup> Ehssan Veiszadeh, 'Nassios Defends HSU Investigation Delay', *Herald Sun* (online), 22 August 2012 <<http://www.heraldsun.com.au/news/breaking-news/nassios-satisfied-with-hsu-investigation/story-e6fir7kf-1226455604869>>.

<sup>172</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 21 May 2012 (Craig Thomson). Discussing why he had made no public statement to that point, Thomson stated 'that is something that I probably regret in hindsight. I did not realise that this was going to go [for] four years'.

<sup>173</sup> Tony Abbott, Leader of the Opposition, 'Q&A Session' (Speech delivered at the National Press Club, Canberra, 31 January 2012) <<http://www.tonyabbott.com.au/News/tabid/94/articleType/ArticleView/articleId/8548/QA-Session--The-National-Press-Club-of-Australia-Canberra.aspx>>.

<sup>174</sup> Additional Estimates, Evidence to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 15 February 2012, 9 (Bernadette O'Neill, General Manager of Fair Work Australia).

relevant provisions of the *Registered Organisations Act* in 2002. The National Office investigation began as an ‘inquiry’ on 6 April 2009 (under the former Industrial Registry), and continued from 1 July under the Fair Work General Manager. It then made the transition to an ‘investigation’ on 26 March 2010.<sup>175</sup> The final report was completed two years later on 28 March 2012.

One can question, given the relatively few opportunities it had had to gain experience, whether Fair Work had the expertise to run such an investigation, compared to ASIC, which is more regularly engaged in such processes. Indeed, it does not seem from the credentials of the lead Fair Work investigators, Terry Nassios and Ailsa Carruthers — both long-serving members of the Industrial Registry — that they had any specific experience relevant to running a quasi-criminal investigation (although their findings are not being questioned here). Such concerns were expressed in the process review of the National Office investigation which was conducted by KPMG (commissioned by the General Manager, who in announcing it acknowledged that the investigation had taken ‘an unreasonably long time’),<sup>176</sup> which found that, throughout most of the investigation, the investigators continued to fulfil their ‘business as usual’ responsibilities.<sup>177</sup> This raises further questions about whether adequate resources were dedicated to the investigation.

The second major criticism relates to the Fair Work General Manager’s dealings with State police and the CDPP. In particular, requests for co-operation from Victoria and NSW Police were refused by Fair Work on the basis of legal advice that it needed an express power of ‘referral’ to provide such co-operation, and also because Fair Work had no jurisdiction over state matters.<sup>178</sup> This position, said to be based on unpublished advice from Corrs Chambers Westgarth Lawyers and the Australian Government Solicitor,<sup>179</sup> is not only perplexing, but dangerous. It would suggest that, absent an express power, no government agency may deal with police, in effect needing the Parliament’s permission to do so. It is unfortunate that the government

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<sup>175</sup> *National Office Report*, above n 9, ch 1 [52], [80], [104].

<sup>176</sup> KPMG, *Process Review of Fair Work Australia’s Investigations into the Health Services Union* (2012) 4; Additional Estimates, above n 174.

<sup>177</sup> KPMG, above n 176, 29.

<sup>178</sup> Freedom of Information Disclosure Log, 26 August 2011, Letter from Lee T of FWA to Watson J A of Fraud & Cybercrime Squad NSW Police, Fair Work Australia <[http://www.fwa.gov.au/documents/FOI/FOI\\_request\\_documents03.pdf](http://www.fwa.gov.au/documents/FOI/FOI_request_documents03.pdf)>; Freedom of Information Disclosure Log, 22 March 2012, Further correspondence from Detective Sergeant Tyquin of Vic Police Fraud and Extortion Squad <[http://www.fwa.gov.au/documents/FOI/FOI\\_documents\\_2012-8-9.pdf](http://www.fwa.gov.au/documents/FOI/FOI_documents_2012-8-9.pdf)>; Answer to Question on Notice EW1072\_12 to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 15 February 2012 (Agency — Fair Work Australia).

<sup>179</sup> Answer to Question on Notice EW1072\_12, above n 178.

responded to this by subsequently including an express power of referral within the Act,<sup>180</sup> rather than rejecting the suggestion entirely (at least to the extent that dealings with police are prohibited without such a provision). It is perplexing, however, as a matter of consistency, that this power of referral was expressly included in ASIC's legislation.<sup>181</sup>

Fair Work also misunderstood the CDPP's role within the *Registered Organisations Act*. The Act does provide for action in the case of contraventions (for example, the making of threats, electoral interference, and the obstructing of auditors), which Fair Work can investigate, and refer to the CDPP 'for action in relation to possible criminal offences'.<sup>182</sup> Fair Work seemed to believe, however, that the possibility of 'criminal offences' was to be determined under general criminal law by the CDPP.<sup>183</sup> The CDPP subsequently did what Fair Work felt it could not; it provided the findings to state police.<sup>184</sup>

It may be appropriate for a specialist body such as Fair Work to co-ordinate misconduct investigations in the industrial relations sphere. However, the irregularity with which it did so, and the evident difficulties of the HSU investigation, seem to indicate that, compared to an ASIC investigation in the corporate sphere, such an arrangement would simply be inefficient. Allocating the enforcement and investigation functions of Fair Work to a separate, specialised body, for example the 'Registered Organisations Commission' which the Coalition proposes, is unlikely to change this.<sup>185</sup> Although union regulation may have its peculiarities, it is not intellectually impenetrable to the outside world. The Commonwealth might consider shifting the function to a general misconduct body, such as the Australian Crime Commission (perhaps renamed as the 'Crime and Misconduct Commission', as its equivalent in Queensland is called), which retains the proper expertise.

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<sup>180</sup> *Fair Work (Registered Organisations) Amendment Act 2012* (Cth) sch 1 s 23.

<sup>181</sup> *Australian Securities and Investments Commission Act 2001* (Cth) s 18(2).

<sup>182</sup> *Registered Organisations Act* s 336(2); CDPP, 'Fair Work Australia' (Media Release, 4 April 2012) <<http://www.cdpp.gov.au/Media/Releases/20120404-Fair-Work-Australia.aspx>>.

<sup>183</sup> Fair Work Australia, 'Statement: Outcome of HSU National Office Investigation' (Press Release, 7 May 2012) 2.

<sup>184</sup> CDPP, 'Fair Work Australia Report' (Media Release, 3 May 2012) <<http://www.cdpp.gov.au/Media/Releases/20120503-Fair-Work-Australia-Report.aspx>>.

<sup>185</sup> Tony Abbott (Leader of the Opposition), 'The Coalition's Plan for Better Transparency and Accountability of Registered Organisations' (Press Release, 28 April 2012).

## IX CONCLUSION

The HSU–Thomson saga has exposed gaping holes in how Australian law responds to higher end, white-collar misconduct by trade union officials. Although the penalties available under the law have been raised, the *Registered Organisations Act* remains flawed with respect to officials' duties, and must be brought into line with the *Corporations Act*.

Trade union officials, like directors, are not incorruptible, and are in a position to abuse the trappings of office (although it is increasingly hard to do so). It is naïve to suggest that some 'alternative' solution, such as an inter-union grievance mechanism,<sup>186</sup> or greater disclosure, is the appropriate response to such behaviour. A corrupt trade unionist should face the same penalties, civil or criminal, as would a corporate director or public servant, had they been engaged in exactly the same conduct. As it stands, corrupt officials are treated unnecessarily leniently, a practice that must end. The Coalition parties' commitment to amending the law in this regard after the 2013 election is a welcome development.

That corrupt behaviour may be rare or isolated is no defence to the inadequacies of the *Registered Organisations Act*. Although civil penalties, for the most part, are an adequate response to misconduct, criminal provisions are needed to punish particularly gross violations of duty. Such violations must be dealt with directly as acts of disloyalty, and not under the same provisions that bind petty criminals. Like directors and public servants, trade union officials hold a form of public office; if anything, the democratic structure of trade unions makes them even stronger candidates for that status. Those to whom they are ultimately responsible are vulnerable to their misconduct, and merit strong protection. The public has an interest in ensuring that such misconduct is appropriately punished.

Industrial relations will always be a contentious area in Australian politics. It is important, however, that ideological divisions do not see individuals who, for all intents and purposes, have engaged in a corrupt enterprise treated more lightly because their victim was a particular entity. A miscreant is a miscreant, whether their job is that of a trade union official or a corporate director, and the punishment for misconduct should be the same for both. The HSU saga, beyond its political ramifications, represents a fundamental failing of the *Registered Organisations Act*, a failing that can easily be remedied with the proven formula of the *Corporations Act*.

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<sup>186</sup> Ewan Hannan, 'HSU Prompts Union Watchdog', *The Australian* (online), 27 July 2012 <<http://www.theaustralian.com.au/national-affairs/industrial-relations/hsu-prompts-union-watchdog/story-fn59noo3-1226436191550>>.