Questions on Notice from Senator McKenzie – *Fair Work Amendment (Corrupting Benefits) Bill*

1(a) The ACTU expresses concern that the proposal goes further than the Royal Commission recommendations. Is the ACTU of the view that the Royal Commission recommendations should be adopted exactly as proposed?

No, it is not our view that the Royal Commission recommendations should be adopted exactly as proposed. Our relevant concern, as explained in our submission, is that proposed sections 536D(1)(b)(iii) and 536(2)(b)(iii) target conduct without reference to whether or not that conduct has any connection to a union's affairs and whether or not it has any connection to a person acting or purporting to act in their capacity as an officer or employee of a union. This clearly extends the scope of the provision beyond the Royal Commission's proposal and, further, departs from the drafting model otherwise adopted for the offences, being the bribery offences contained in the *Criminal Code.*

1(b) (If yes) Would the ACTU recommend that the Government adopt the maximum penalties for corrupting benefits proposed by the Royal Commission, namely maximum penalties of $18 million for unions or employers who make or receive such payments?

It is unnecessary for us to answer this question given our response above.

2(a) On the subject of "revenue raising" this raises an issue as to what the primary role of unions in bargaining should be. Does the ACTU see the role of its member unions as being to act as fiduciaries in the interests of employees, or to also act as commercial enterprises seeking revenue streams?

Union officials in a general sense have fiduciary duties. To this end, we do not dispute the characterisation of those duties in paragraph 14 Volume 5 of the Report of the Royal Commission. None of the duties expressed there are incompatible with a properly functioning democratic union seeking to negotiate terms in an enterprise agreement that provide some financial benefit to the union.

2(b) Does this mean that unions are in essence acting like for- profit businesses in seeking revenue raising activities?

No.

3. *Do you believe there could be a potential for conflicts of interest if a union is negotiating with an employer on behalf of employees but at the same time also arranging for revenue raising with the employer, if the revenue raising arrangement is not disclosed to the employees?*

Yes. Our concern in relation to those proposals is a technical one, in that it is unreasonable to require disclosure of matters that may be beyond the knowledge of the Branch of the union involved in bargaining for the agreement.

4. *What of a situation in which an individual union official stands to gain a benefit as a result of dealings with an employer with whom that individual is negotiating on behalf of members? Could this give rise to the potential for conflicts of interest?*

Yes.

5. *The ACTU suggests that outlawing such payments is "politically partisan." Does this mean that the ACTU believes that such payments from employers to unions are used to make donations to the Labor Party, the Greens or other political parties whose views align with those of the particular union?*

No. Our comment in our submission was the Bill included "new strict liability offences that are misuses of the criminal law for politically a partisan purpose of restricting union revenue raising." It says nothing of our belief about how any union funds from any source are expended on donations to political parties. We lack the information necessary to form such a belief.

The point is that the Bill includes, at Division 3 of Schedule 1, provisions that criminalise the transfer of cash or in kind benefits without any requirement to prove a state of mind in association with that transfer. It targets payments not because they are corrupting in any way, but because they are made to or via unions. It contains sweeping regulation making powers to specify new categories of such transfers that will, by force of such regulation, become criminal. In circumstances where the union movement is opposed to many of the current Government's policies, and has engaged in successful and high profile third party campaigning in support of its alternative agenda, the Government's motives are assumed to be to reduce the resources of unions in an effort to make such future campaigning activities less visible.

6. *The Heydon Royal Commission uncovered numerous examples of payments from employers to unions that are members of the ACTU. For example the MUA received payments of over $3*

million in return for industrial peace, the AWU received over $1.3 million for industrial peace and deals that favoured employers over workers and the CFMEU received over $400,000 in exchange for giving contractors construction work, including the phoenix companies of underworld figure George Alex. Does the ACTU dispute the fact that these payments were made? Does the ACTU think payments such as these should continue to be made?

The question does not adequately summarise the findings of the Royal Commission "case studies". The Committee should be mindful of the Royal Commission's own characterisation of its processes in this regard:

> "The public has an interest in knowing what conclusions this Commission has reached. The case study technique enables the scrutiny of the reasoning process from evidence to ultimate finding. This would have been undermined if the results had been kept secret.
>
> Further, while the Commission was deeply conscious of the fact that a finding as to possible criminal or inappropriate conduct could adversely affect a person's reputation, the fact is that a reasonable onlooker would appreciate the many important differences between finding of a Royal Commission and, for example, a determination of guilt in a criminal court.
>
> Many of these have previously been identified above, but at the risk of repetition, they can be summarised. A Royal Commission is an administrative inquiry. A finding of a Royal Commissioner is an expression of opinion, not a determination of legal rights. A Royal Commission does not and cannot engage in an inquiry of the kind carried out by a criminal court. Hence a finding of this Royal Commission on breach does not rise above an opinion that the person 'may' have engaged in criminal conduct."[1] (emphasis added)

For the above reasons, and the fact that there have been referrals for investigations in relation to some of these matters, we express no view about the Royal Commission's opinions.

7(a) The ACTU expresses a view that the Bill would not allow certain payments to be made to unions. For example, the ACTU states that requests for payment of unpaid wages for non-current employees would be outlawed. On what basis is the ACTU of the view that such payments are not required under a Commonwealth, State or Territory law, as permitted by the Bill?

The Bill prohibits payments not only to unions but also to any persons a union "requests or directs" such payment be made to[2]: these persons (among others) are defined as *prohibited beneficiaries.* This prohibition restricts the capacity for the unions to request that underpayments to former employees be rectified. Because these members are not current employees, payments for their benefit are not captured by the exemption in section 536F(3)(b). Further, it would be difficult to characterise such payments as made "under or in accordance with a law of the Commonwealth, or the law of a State or Territory" where the terms of settlement and Deeds of release that are invariably entered into as a

[1] At page 57
[2] S.536F(5)(d)

condition for payment are clear in expressing that payments are made without admission of any liability in return for a promise under seal not to issue or continue legal proceedings.

7(b) The ACTU also states that payment of settlements "that benefit the union directly" would not be allowed. On what basis would a payment of settlement funds be for the benefit of the union but not for the benefit of employees, for which payments are permitted by the Bill?

In any case where an industrial instrument is breached (for example, there is a failure to abide by the terms of an enterprise agreement requiring consultation) and the union is seeking (separately to any compensatory orders for the benefit of the employees) under s. 546(3)(b) of the *Fair Work Act* that the penalties be paid to it. See for example *QR Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150. Even if such a claim were settled before judgement in the precise terms as the court ordered in that example, both the employer and the unions would face criminal prosecution.

7(c) I note that the Health Services Union – or an account controlled by the HSU – received a settlement from the Peter McCallum Institute for unpaid entitlements for HSU members. This payment was notorious for going to an account controlled by Kathy Jackson rather than to the members. Does the ACTU believe that greater clarity in the law would be desirable to ensure that when unions collect monies owed to members that these payments actually go to members?

Unions are required, by section 253(2)(c) and 253(4) of the *Fair Work (Registered Organisations) Act* to comply with reporting guidelines. Those provisions are enforceable by civil penalties, which have recently been increased. The reporting guidelines require unions to produce separate financial reports on "Recovery of wages activity", consistent with Australian Accounting Standards, which detail how much money is received and how it is distributed[3]. The civil trial regarding the events concerning Ms Jackson to which the question relates were concluded well before Government's recent overhaul of the *Fair Work (Registered Organisations) Act* passed the Parliament. The Government evidently had no difficulty with the level of transparency required by those provisions and we concur. The issue of whether the actions of Ms Jackson were criminal is yet to be determined by Courts, and we decline to comment on the specifics of the allegations against her. Speaking generally, our view is that any union official who is proven to have appropriated monies due to the union's members for their personal benefit should be heavily penalised. We believe that such appropriate penalties are readily available under the existing law.

[3] See paragraph 26 of the Reporting Guidelines: https://www.fwc.gov.au/documents/documents/organisations/reporting_guidelines/s253-reporting-guidelines-fourth-edition.pdf

7(d) The ACTU also states that payment of settlements for former employees would not be permitted. Why would the union receive such payments, rather than them being made to the relevant former employees?

See our answer to question 7(a) above.

Questions on Notice from Senator McKenzie – *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill*

8 Do you agree that it is desirable that parties and the Commission be spared the time and expense involved in responding to the 4 yearly review of modern awards, as is currently required by the Fair Work Act when it was put in place in 2009 by the Labor Government?

Yes, however we concur with the Government and the other parties that the present 4 yearly review should be permitted to run to its conclusion.

9(a) In your written submission to this Committee you argue that the Bill which abolishes that never-ending review will now require each application to vary an award to be dealt with a Full Bench by default, including quite minor matters such as resolving ambiguities and correcting errors. However, doesn't the Bill deal with that under new paragraph 616(3D)(a) of the Fair Work Act which will allow the President of the Commission the discretion to direct a single Commissioner to vary an award in certain circumstances?

Yes, the Bill creates a new default Rule and the capacity to depart from it by way of Presidential direction.

9(b) And those circumstances include dealing with minor matters, such as updating names of employers (s.159), or removing ambiguities and correcting errors (s.160)?

Yes.

10 In your written submission you also argue that the current review should be completed, which the Bill allows, but should allow the Commission to review multiple awards at the same time, and each award be reviewed more than once for different purposes.

Yes, we do, for the reasons we express in our submission. Our concern is to ensure that all matters forming part of the present 4 yearly review are permitted to run to conclusion.

11. In your submission, you state that the current bargaining framework "provides a number of clear procedural rules" that were "designed to deliver substantive fairness". Do you think that policy objective is being met by the current procedural rules in the Fair Work Act – do they operate fairly?

The question does not provide a fair summary of the point, which was:

> "The existing provisions of the Act do contain a number of procedural requirements, but it is important to appreciate that the procedural requirements are not arbitrary but in fact serve a purpose. The policy goals of the bargaining framework include ensuring that process of bargaining is inclusive, fair and well informed. In serving those goals, the legislature had a choice: – to simply state that the process needed to be fair and leave the bargaining parties entirely to their own devices as to the process which should be followed; or, alternatively, provide a number of clear procedural rules so as to narrow the scope for discretionary decision making and misunderstanding. The latter course was adopted and the procedural rules that were developed were designed to deliver substantive fairness in the majority of cases. Simply put, they are safeguards which serve to promote the policy goals."[4]

We elaborated on the point in our evidence to the public hearing:

> "To pick up on what Professor Stewart was saying, the real issue here ought to be to fix the actual cases where there are problems, and do not pare back the whole thing. The rider should be more along the lines of what Professor Stewart was proposing, because, as we point out in our submission, you have a choice when you frame a regulation around this that is all about ensuring people get adequate information and the opportunity to be represented and all get to have their say. You can put that sentence together and have everybody out there wondering what exactly it means, including a troop of employers saying, as they often do, 'Don't give us these discretionary sorts of descriptive tests; just tell us in black and white what we have to do, so we can tick off the checklist and know we've complied.' Legislatures and regulators often create prescriptive requirements, so you can adopt a tick-a-check-box approach, which are designed to meet the policy objectives of ensuring that fairness and opportunity to participate in the majority of cases. As the procedural safeguards have a bigger substantive role to play, we are very concerned that what you are opening the door to here is going much further than fixing minor and technical problems."[5]

[4] At page 6.
[5] At page 20 of the draft Hansard for 12 April.

Between 26 May 2012 and 25 May 2015 the Fair Work Commission dealt with 19,763 applications for the approval of enterprise agreements and approved 94.4% (18,656) of them[6]. We believe that the policy objectives are being met by the procedural requirements in the majority of cases.

12. Do you think that these rules have been applied in an overly technical way by the Commission in some cases?

No.

13. (4YR) Do you think the system is fair if an enterprise agreement that has been voted in favour by a majority of employees, and has likely taken many months to negotiate, should be unable to be approved by the Commission, in the following situations:

(a) the inclusion of additional materials that are stapled with a Notice of Employee Representational Rights; or

We believe that the policy objectives are being met by the procedural requirements in the majority of cases. We would consider it unfortunate if the mere presence of a staple was the sole cause of a particular agreement not being approved. To our knowledge, that has never occurred. Even if it had occurred that would not lead to us adopting the view that the *system* is not fair, which is the proposition put by the question.

In any event, the decision that has become referred to as the infamous "staple case" did not actually turn on the presence of staple. Should the Committee care to read it, it is available by following this link. As the Commission observed in that case, the decision turned on a factual dispute as to what the purported Notice of Employee Representational Rights actually was. In the event, the evidence of the employer's witness for the hearing contradicted the evidence given in an earlier statutory declaration and was not believed by the Commission. As the Commission pointed out, "s.174(1A) is not to be construed so as to preclude an employer from providing additional material to its employees at the same time as the Notice is given to them. Subsection 174(1A) is directed at the form and content of the Notice. It does not require the Notice to be provided in isolation and to construe the provision in that way would produce some absurd results".[7] The presence or absence of a staple is entirely irrelevant.

[6] "General Manager's Report into developments in making enterprise agreements under the *Fair Work Act 2009* (Cth): 2012-2015. Available online: https://www.fwc.gov.au/documents/sites/admingmreporting/gm-amr-2015.pdf

[7] At [67]

(b) the inclusion of the employer's company logo or letterhead on a Notice of Employee Representational Rights;

We believe that the policy objectives are being met by the procedural requirements in the majority of cases. If a particular agreement was rejected on the basis of this entirely preventable error, that result would not lead to us adopting the view that the *system* is not fair, which is the proposition put by the question. We add that ordinarily, in cases where unions are involved in bargaining, the union would alert the employer to the irregularity and a new notice would immediately be issued.

(c) employees being requested to approve a proposed enterprise agreement on the 21st day after the last Notice was given, rather than at least 21 days after the day on which the last Notice was given;

We believe that the policy objectives are being met by the procedural requirements in the majority of cases. If a particular agreement was rejected on the basis of this entirely preventable error, that result would not lead to us adopting the view that the *system* is not fair, which is the proposition put by the question. We add that the specification of time limits for various points in the bargaining process leading up to approval (or certification) of an agreement have been features of the federal industrial relations system for a considerable time. Ordinarily, in cases where unions are involved in bargaining, the union would alert the employer to the irregularity and a new voting date would be immediately issued.

(d) minor changes to the text of the Notice that had no relevant effect on the information that was being communicated in it (for example, the Notice may say to contact a particular person in the human resources department rather than 'contact your employer').

We believe that the policy objectives are being met by the procedural requirements in the majority of cases. If a particular agreement was rejected on the basis of this entirely preventable error, that result would not lead to us adopting the view that the *system* is not fair, which is the proposition put by the question. We add that ordinarily, in cases where unions are involved in bargaining, the union would alert the employer to the irregularity and a new notice would immediately be issued.

14. Is it fair that because of these minor defects employers and workers are forced to go back to a ballot again?

It is fair to the majority of users of the system. The examples may well be regarded as unfortunate outcomes for the parties engaged in the relevant bargaining, albeit entirely preventable ones. In

addition, conducting a ballot a second time is rather minor consequence and one we suspect would be comparable in its resource demands to preparing an application seeking that the Commission exercise the discretion conferred by the Bill to overlook the relevant errors.

15. *Do you accept that the changes proposed by this Bill actually improve fairness in the agreement making process by ensuring that employees will be able to enjoy the benefits of a new enterprise agreement, including pay rises, despite minor technical issues?*

No. Introducing substantial flexibility in the regulatory scheme to remedy the effects of entirely preventable errors involves risks that outweigh the benefits of formulating procedural requirements that aim to meet the policy objectives in the majority of cases. The proposed amendments go too far, and confuse the exception with the rule. Further, as Professor Stewart pointed out to the Committee, the test for "disadvantage" focusses on the wrong issue.

Question taken on Notice from Senators Cameron and Marshall – *Fair Work Amendment (Corrupting Benefits) Bill*

> ***Senator CAMERON:*** *What if a worker is killed in the construction industry, which is not uncommon, unfortunately, and the union makes a claim on the employer that the employer should set up a trust fund for the kids?*
>
> *Would that be legitimate, or would that be a corrupting benefit?*
>
> ***Mr Clarke:*** *It would depend on whether the trust fund was structured in a way that met the requirements of the provision of the tax act that is referred to here—a passing-around-the-hat type arrangement.*
>
> ***Senator CAMERON:*** *Say it is legitimate under the tax act; that is not the issue for me. The issue is whether it is legitimate for a union to make that claim on an employer and whether this bill outlaws that.*
>
> ***Mr Clarke:*** *There may be ways to do it depending on how it is structured, but I cannot confidently tell you either way. I think it is fraught with risk.*
>
> ***Senator MARSHALL:*** *Could you come back with that too? I know that the act is broader than just division 2, but I come back to 'the defendant does so with the intention of influencing a registered organisations officer'. I think that is key. Setting up a trust fund with the intention of influencing an officer, as opposed to setting it up to support a family, is one thing, but there may be other elements. Luckily I am not a lawyer in life, so I do not have to understand all the particular clauses and how they intersect, but you are, so you might be able to give us some advice about why you think that might fall foul of the act specifically.*

Mr Clarke: *Yes. I am not in a position to do that on my feet today, I am afraid.*

Senator MARSHALL: *No, of course not.*

A claim of the type referred to by Senator Cameron would not, on our analysis, involve a contravention of the provisions of Division 2 of Schedule 1 of the Bill. This is because the claim made against the employer is accompanied by an intention to influence the employer, not an in intention to influence a "registered organisations officer or employee".

Such a claim would however likely involve a contravention of section 536F in Division 3 of Schedule 1 of the Bill, if the employer concerned still employed a person who was a member of the union who pressed the claim. This is because:

(a) Either or both of:
   (i) the establishment of the trust fund for the explicit purpose of benefiting the children;
   (ii) the placement of any monies in that fund
   Would fall within the description of a "cash or in kind benefit" for the purposes of section 536F(4).

(b) The employer would, at the least, be *promising* to provide that benefit to another person (the children) in response to the union's claim, for the purposes of section 536F(1)(b).

(c) The children are "prohibited beneficiaries" for the purposes of section 536F(1)(c) because they are, under section 546F(5)(d), persons to "to whom the organisation…requests or directs the defendant to provide a cash or in kind payment".

(d) The payment cannot be described as falling within any of the exemptions described in section 536F(3). In particular, the exemption in paragraph (c) thereof, which we were unable to express a concluded view on in the course of the hearing, is inapplicable. Generally speaking, the deductible gifts and contributions there referred to are limited to public funds of a particular character or identity[8].

In addition, there would likely be a contravention of section 536G in the above circumstance, because the union has requested the benefit for the children and the provision or the promise of the provision of that benefit would be an offence under section 536F, as demonstrated above.

[8] See Subdivision 30B and section 30.16 of the *Income Tax Assessment Act 1997*.