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Dear Honorable Member

I refer to the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill) and the Bill's explanatory memorandum. I refer to the Bill's explanatory memorandum, the Bill's second reading speech and the Bill's second reading speech to the ACT Legislative Assembly.

Dear Honorable Member

Re. Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019

I refer to the Committee's correspondence of 16 September 2019 regarding the Bill's explanatory memorandum, the Bill's second reading speech and the Bill's second reading speech to the ACT Legislative Assembly. I refer to the Bill's explanatory memorandum, the Bill's second reading speech and the Bill's second reading speech to the ACT Legislative Assembly.

As a result of the Committee's correspondence, the Bill's explanatory memorandum, the Bill's second reading speech and the Bill's second reading speech to the ACT Legislative Assembly.

With regard to BERT's claim that its governance arrangements are acceptable, the Royal Commission into the Governance of the Australian Industry Group (the Royal Commission) has found that BERT's governance arrangements are not acceptable. The Royal Commission has recommended that the Australian Industry Group implement the governance arrangements set out in the Royal Commission's Interim Report. The Royal Commission has also recommended that the Australian Industry Group implement the governance arrangements set out in the Royal Commission's Final Report.

The Honorable Royal Commission's findings in relation to BERT's governance arrangements are set out in the Royal Commission's Interim Report, Attachment A, as set out in the Royal Commission's Interim Report. The Royal Commission's Interim Report is available on the Royal Commission's website.

The Royal Commission's findings in relation to BERT's governance arrangements are set out in the Royal Commission's Interim Report, Attachment B. The Royal Commission's Interim Report is available on the Royal Commission's website.

The BERT Committee has not implemented the governance arrangements recommended by the Royal Commission. The Royal Commission has recommended that the Australian Industry Group implement the governance arrangements set out in the Royal Commission's Interim Report. The Royal Commission has also recommended that the Australian Industry Group implement the governance arrangements set out in the Royal Commission's Final Report.

Yours faithfully

Stephen Smith
Honorable Member

ATTACHMENT A

Corporations Act 2001 (Cth) granted to employee redundancy funds by ASIC Class Order CO 02/314 remains appropriate.

B – THE BASIC STRUCTURES EXPLAINED

9. In the following portions of this Chapter the basic structures of each of BERT, BEWT, CIPQ and QCTF are explained.
10. Following this, there will be a more detailed analysis of each of the issues just identified.

BERT

11. BERT was incorporated in 1989.⁴
12. Broadly speaking, the shareholders of BERT represent members of each side of the employer and trade union camps operating in the construction industry in Queensland.
13. As a result of a series of trade union amalgamations, the identity of the trade union shareholders of BERT has changed over time. Until earlier this year, there were three union shareholders – the CFMEU, the Builders Labourers' Federation (**BLF**) and the Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**). As a result of a merger between the BLF and the CFMEU in Queensland, there are now only two shareholders,

⁴ BERT Examination Book, Vol 1, p 1.

the CFMEU and CEPU. The former holds three shares and the latter one.⁵

14. On the employer side of the BERT equation sits the Queensland Major Contractors' Association. It holds four shares in BERT.⁶
15. Under BERT's constitution, the Queensland Major Contractors' Association is entitled to appoint four directors to the board, and the CFMEU and CEPU between them are entitled to appoint an additional four directors.⁷
16. BERT was established as a trustee company, and more particularly, to act as trustee in respect of an employee redundancy fund called the BERT Fund.
17. As a result of various changes made to the fringe benefits tax legislation, the shareholders of BERT thought it desirable to establish a second employee redundancy fund. That fund was established, and is called the BERT Fund No.2.
18. The BERT Fund continues to operate because it received a substantial volume of funds to hold on behalf of employees prior to the creation of the BERT Fund No.2. However as from the date of creation of the BERT Fund No.2, employer contributions towards employee redundancy accounts have been paid into the BERT Fund No.2 alone.

⁵ BERT Examination Book, Vol 1, p 8.

⁶ Constitution of B.E.R.T. Pty Limited ACN 010 917 281 (as amended on 20/07/2012), p 5.

⁷ Constitution of B.E.R.T. Pty Limited ACN 010 917 281 (as amended on 20/07/2012), p 12.

19. BERT Fund No.2 is an 'approved worker entitlement fund' under s 58PB(2)(a) of the FBT Act. The benefit which flows from that designation is that employers may make qualifying payments into BERT Fund No.2 under an industrial instrument, and the payments will be exempt from fringe benefits tax under s 58PA of the FBT Act.
20. BERT is the trustee of both the BERT Fund and the BERT Fund No.2. Each trust fund has its own trust deed.⁸ BERT provides a distinct set of financial statements for each trust.⁹
21. Apart from various clauses in the BERT Fund No.2 in order to deal with the Fringe Benefits Tax issues that justified its creation, the terms of each trust deed are substantially the same.
22. The redundancy trusts have operated in the following way:
 - (a) under the terms of various enterprise bargaining agreements between employers of construction workers in Queensland and the CFMEU or CEPU, employers are obliged to pay a dollar amount per employee into the BERT Fund No.2;¹⁰
 - (b) BERT is obliged to hold those monies on trust on the terms set out in the trust deed for the BERT Fund No.2;¹¹

⁸ BERT Examination Book, Vol 1, pp 34-119.

⁹ For example see BERT Examination Book, Vol 1, pp 140-163.

¹⁰ For a list of contribution rates see BERT Examination Book, Vol 1, p 26.

¹¹ BERT Examination Book, Vol 1, p 77.

- (c) under the terms of the trust deed, the principal sum that is paid into the fund for each employee is credited to a redundancy account in the name of that employee. With each payment into the fund for a particular employee, that employee's redundancy account balance increases;
 - (d) BERT is permitted to make payments out of a member's redundancy account in one of a number of limited circumstances described in the trust deed. In short, payments out to members are permitted in the event of their becoming redundant or in one of a number of other specified circumstances;¹²
 - (e) BERT has power to invest the members' money;
 - (f) none of the income earned by BERT through that investment is credited to the members' redundancy accounts;
 - (g) instead, the income of the fund falls to be distributed to BERT's shareholders – that is the CFMEU, CEPU and the Queensland Major Contractors' Association.
23. There is an agreement between the shareholders which regulates the way in which they will deal with the net income of BERT. This agreement is called the 'Sponsors' Deed'.

¹² BERT Examination Book, Vol 1, p 34 at 56 and p77 at 99.

24. The Sponsors' Deed¹³ (as amended over time) provides, among other things, that:
- (a) the shareholders, referred to in this deed and in other places as the 'Sponsors', acknowledge that distributions from the BERT Fund to the Sponsors are intended to be applied for the provision of welfare or related assistance for workers in the construction industry or their dependents, and for other initiatives agreed upon by the Sponsors for the benefit of the construction industry;
 - (b) distributions in favour of the Sponsors from the BERT Fund must be dealt with in a manner jointly agreed upon by the Queensland Major Contractors' Association and the unions;¹⁴
 - (c) to facilitate that process, the Queensland Major Contractors' Association and the unions must nominate three persons each to sit on an Advisory Committee, which must meet to advise and recommend to the Sponsors the use to which each of the distributions are to be applied;¹⁵
 - (d) until the Advisory Committee unanimously agrees on the recommendations to be made to the Sponsors, and all Sponsors accept those recommendations, the distributions from the BERT Fund in favour of the Sponsors must be

¹³ BERT Examination Book, Vol 1, p 120.

¹⁴ BERT Examination Book, Vol 1, p 120, at p 123, clause 2.1.

¹⁵ BERT Examination Book, Vol 1, p 120, at p 123, clauses 2.2 and 2.3.

deposited by way of non-interest bearing, repayable on call, loans to the BERT Fund.¹⁶

25. As trustee of the two trusts, BERT is responsible for the management and custodianship of significant sums of money. Although no longer receiving contributions from employers since the commencement of the BERT Fund No.2, the original BERT Fund still holds assets in excess of \$30 million as at 30 June 2013.¹⁷ In large measure, this sum represents amounts held in members' accounts that were paid into the BERT Fund prior to the establishment of the BERT Fund No.2. As for the BERT Fund No.2, as at 30 June 2013 it held over \$14 million in cash and had managed funds of some \$88 million.¹⁸
26. The BERT Fund No.2 made a net profit of \$6.372 million in the financial year ended 30 June 2013.¹⁹ That net profit, together with various forfeited benefits, was subsequently transferred out of the Bert Fund No.2 and paid into the Bert Fund. The sum so transferred was \$7.09 million.²⁰
27. That sum was then 'distributed' out of the BERT Fund to the Sponsors as contemplated by the BERT Fund No.2 Trust Deed²¹ and the Sponsors' Deed. It was then immediately lent back by the Sponsors to

¹⁶ BERT Examination Book, Vol 1, p 120, at p 123, clause 5.1.

¹⁷ BERT Examination Book, Vol 1, p 142.

¹⁸ BERT Examination Book, Vol 1, p 154.

¹⁹ BERT Examination Book, Vol 1, p 155. (Rounded to the nearest \$1,000).

²⁰ BERT Examination Book, Vol 1, p 159. (Rounded to the nearest \$10,000).

²¹ BERT Examination Book, Vol 1, p 77.

BERT as contemplated by clause 5 of the Sponsors' Deed.²² These transactions are effected by way of book entries in the accounts of the BERT Fund. No monies are actually transferred.

28. As a consequence of these distributions to Sponsors and loans back by the Sponsors to BERT over the years, as at 30 June 2013 BERT owed the Sponsors some \$26.7 million.²³
29. This amount of \$26.7 million is referred to in the accounts of the BERT Fund as the 'Welfare Fund'. This is somewhat confusing. In fact, there is no separate account or trust deed in respect of this Welfare Fund. It is merely a large pool of money held by BERT to the order of the Sponsors.
30. From time to time the Sponsors agree upon how portions of those monies are to be spent. When this occurs, the quantum of the BERT Fund's liability to the Sponsors in respect of the loan reduces correspondingly.
31. The position is that the profits of the BERT Fund ultimately sit in the BERT Fund, but outside the money held in each member's redundancy account, to be dealt with by BERT in accordance with the directions of the Sponsors. Many members of the BERT Fund will never come to enjoy the use of those funds, either directly or indirectly. This is so even though their own money is being used to generate this income.

²² BERT Examination Book, Vol 1, p 120 at 123.

²³ BERT Examination Book, Vol 1, p 142.

32. At present the operations of BERT Fund No.2 do not require the issue of a product disclosure statement to prospective members of the fund. This is because eligible employee redundancy funds have an exemption under ASIC Class Order CO 02/314.

BEWT

33. BEWT was incorporated in 2004 by the sponsors of BERT – that is the CFMEU, CEPU and the Queensland Major Contractors’ Association.²⁴ It is the trustee of the Building Employees Welfare Trust.
34. Under the terms of the enterprise bargaining agreements that exist between the CFMEU and some contractors operating in the construction industry in Queensland, contractors agree to pay an amount per employee into the BEWT Welfare Trust.²⁵
35. Under clause 4 of the Trust Deed for the BEWT Welfare Trust,²⁶ BEWT may apply all or any part of the contributions it receives to an entity that BEWT determines will benefit the welfare of the construction industry. An example is an entity which will use the funds to assist or advance education and training in the construction industry.
36. As with the BERT scheme, there exists a Sponsors’ Deed in respect of the BEWT Welfare Trust.²⁷ That Sponsors’ Deed contains provisions

²⁴ BERT Examination Book, Vol 1, pp 166-172.

²⁵ For a list of contribution rates see BERT Examination Book, Vol 1, p 26.

²⁶ BERT Examination Book, Vol 1, p 201 (at p 213, clause 4).

²⁷ BERT Examination Book, Vol 1, pp 244-252.

substantially the same as those that appear in the BERT Sponsors' Deed.

37. The BEWT Welfare Trust was, in fact, established for the purpose of generating funds in an amount that would approximately cover the annual tax liabilities of BERT.

38. The reasons underlying the establishment of BEWT were explained by its financial director (Mr Shenfield) and the solicitor who worked on the establishment of BEWT (Mr Peterson) in a voluntary recorded interview conducted on 30 July 2014.²⁸ Mr Peterson said:

[C]an I just explain then the corollary to that, and that is that you talked about BEWT. The reason why BEWT came into existence, because there was a very open regular discussion with the tax office through this process. When the original BERT fund operated, it operated on the basis that annually its income was applied to the sponsors to the fund, which were tax exempt, and the sponsors to the fund had all signed what was called a sponsor's deed, which meant they immediately returned all the money that they were receiving back to the deed on the basis that it would then get applied for what were industry purposes, or for purposes for the benefit of the industry, and that meant that 100 per cent of the income of the fund was available each year to do that.

The requirement that was imposed upon BERT No. 2 was that it had to - it couldn't pay its income in that manner. It had to effectively achieve compliance with the requirements of 58PB. It had to accumulate its income each year and, on the tax office point of view, that's a very good outcome, because it's a trust that gets then taxed at effectively the top possible rate of tax. It gets subjected to tax on any assessable income at the highest marginal rate of tax. So it was pointed out to the tax office that in one sense by helping industry out by allowing a mechanism which would allow the funds a viable operation, it nonetheless caused a significant tax leakage, because it would now (indistinct) notionally of the income that was derived would be attributed to income tax.

So a separate fund was established, which was designed, in the beginning at least, to make up the shortfall to say the contributions are to be made to

²⁸ Transcript of Private Interview, John Shenfield, 30/7/14, T:6.4-7.7.

this so that the amount available for application - the benefit of the industry - would be - that which would have been lost to the taxation was now being made up because contributions were being made to what was called the BEWT fund and there were tax rulings that were obtained at the time, and I don't know whether they've ever been refreshed again, but there were tax rulings from the ATO to confirm that the contributions that were made to either or both of these funds would not incur any fringe benefits tax liability to employers.

So employers would know that they could make their contributions to these funds and know that by doing so they would not be themselves exposed to tax and the BERT fund No. 2 knew that it would be exposed to tax on its income and it would know that the income from the BEWT fund would not be subject to tax if it made the full distributions in the year that it was intended to make.

Mr Peterson was then asked:²⁹

So were the amounts to go to the BEWT fund calculated to effectively either equal or approximate the amount of income tax that BERT fund No. 2 had to pay?

Mr Peterson responded:³⁰

I think the short answer to that is more or less. I wasn't involved in the calculation of exactly what the figure was. It was certainly -

The intention was to do that. By what accounting (indistinct) or - I don't know the formula that somebody used to come up with that figure, but I suspect it was - I know that was the intention.

39. The whole of the contributions into the BEWT Welfare Fund, less administrative expenses incurred by it, are distributed by BEWT to BERT. The amount distributed for the financial year ended 30 June 2013 was \$3.664 million.³¹ BERT's recorded tax liabilities for that

²⁹ Transcript of Interview, John Shenfield, 30/7/14, T:7.7-11.

³⁰ Transcript of Interview, John Shenfield, 30/7/14, T:7.13-22.

³¹ BERT Examination Book, Vol 1, p 259.

year (which were to be paid using these funds from BEWT) were of the order of \$2.7 million.³²

Construction Income Protection Ltd

40. CIPQ is a corporation that manages a portable sick leave and income protection insurance scheme. Its shareholders are the CFMEU, CEPU and the Master Builders Association.³³

41. Many enterprise bargaining agreements entered into by the CFMEU with employers in the construction industry in Queensland oblige the employers to provide sick leave and income protection insurance for their employees through CIPQ and to pay CIPQ the necessary premiums.

42. In the financial year ended 30 June 2013, CIPQ received employer contributions totaling \$13 million and paid insurance premium expenses totaling \$11.5 million, leaving it with a gross profit of approximately \$1.5 million.³⁴

43. CIPQ's accounts then record a total expenditure of some \$1.22 million dollars, leaving it with a profit before tax of approximately \$352,000, and a net profit after tax of about \$244,000.³⁵

³² BERT Examination Book, Vol 1, p 143 and 155.

³³ BERT Examination Book, Vol 1, p 281 at 290.

³⁴ BERT Examination Book, Vol 3, p 1350.

³⁵ BERT Examination Book, Vol 3, p 1350.

QCTF Pty Ltd

44. QCTF was incorporated in 1996.³⁶ It carries on business using the trading name ‘the BERT Training Fund’.

45. Its shareholders are the CFMEU, CEPU and the Queensland Major Contractors’ Association (that is the Sponsors of BERT and shareholders of BEWT).³⁷

46. The objects of the QCTF as found in its trust deed are to:

generally foster promote encourage advance and assist in the acquisition and enhancement of the knowledge, skills, training and education (both theoretical and practical) of those persons employed in or otherwise providing services in and to the Construction Industry within the State of Queensland and also to foster, promote, encourage, advance, assist organisations involved in such training and educational activities.³⁸

47. The QCTF is entirely dependent upon financial grants for its survival. In very large measure, its funds come from grants made to it by BERT. Thus the monies that the QCTF receives for the BERT Training Fund come predominantly from an entity which has precisely the same set of shareholders as the QCTF.

48. In the financial year ended 30 June 2013, BERT paid \$3.842 million to the QCTF for the BERT Training Fund.³⁹

³⁶ BERT Examination Book, Vol 1, p 265.

³⁷ BERT Examination Book, Vol 1, pp 271-272.

³⁸ BERT Examination Book, Vol 1, p 311 at 315, clause 3.3.

³⁹ BERT Examination Book, Vol 1, p 387.

49. The vast majority of that sum was, as is explained later, paid out to the CFMEU, BLF and CEPU (that is the union shareholders of BERT and the QCTF) for training programs they wished to pursue. Most of the money is not paid out for the training of existing BERT or union members.

C – PARTICULAR ISSUES OF CONCERN: PAYMENTS MADE TO STRIKING WORKERS

50. Earlier in this Interim Report reference was made to the fact that the trust deed for the BERT Fund No.2 contains provisions limiting the trustee's power to pay sums out of a member's account to the member.

51. In August 2012 there was a dispute between the Queensland Major Contractors' Association and the union shareholders of BERT as to whether the clause permitted payments to be made out of the BERT Fund No.2 in favour of employees who were participating in strike action at the Queensland Children's Hospital in Brisbane. Those employees were not being paid, because it is illegal for an employer to pay a worker undertaking industrial action.⁴⁰ Some employees were seeking to have monies paid out of their BERT members' account on the grounds of 'financial hardship'.

52. The BERT board was deadlocked on the question, and the BERT management structure did not contain any mechanism for resolution of the problem. As a result, at least Mr Ravbar and perhaps other union

⁴⁰ See s 474 of the *Fair Work Act* 2009 (Cth).

directors of BERT took matters into their own hands and procured the General Manager of BERT to proceed to make the payments.

The trust deed as it then stood

53. At the relevant time clause 29 of the BERT Fund No.2 Trust Deed provided:⁴¹

So long as to do so is not inconsistent with the FBT Requirements, a Benefit is payable upon a claim being made by the Member if the Member has otherwise satisfied the requirements of the industrial instrument having application to the member in respect of his or her entitlement to claim that Benefit and:

- (a) retires from the work force on or after obtaining the age of 55 years;
- (b) suffers financial hardship and provides to the Trustee documentary evidence satisfactory to it that **the member has been unemployed for at least four weeks;**
- (c) dies;
- (d) becomes Totally Permanently Disabled;
- (e) is made Redundant and the Member makes a claim within 56 days of termination of employment;
- (f) permanently leaves the construction industry; or
- (g) permanently leaves Australia. (emphasis added)

⁴¹ Supplemental Deed – BERT fund No 2 signed November 2004, 31/10/14, p 4; Redundancy Fund Trust Deed dated 22 December 2003, 31/10/14, p 23.

54. All members of the BERT Board in and after August 2012 knew the precise terms of this clause.
55. The provisions of the FBT Act are also relevant. That is because payments under clause 29 may not be made where to do so would be inconsistent with, inter alia, s 58PB. The FBT Act sets out a regime by which a fund is entitled to be endorsed by the Commissioner of Taxation as an ‘approved worker entitlement fund’. The requirements of eligibility imposed by the FBT Act include that:
- (a) under the fund’s constitutive documents, payments from contributions to the fund are to be made only for the purposes listed in s 58PB(4)(c) of the FBT Act. These purposes are:
 - (i) to pay worker entitlements to persons in respect of whom contributions are made, or to pay death benefits to dependants (within the meaning of the *Income Tax Assessment Act 1997* (Cth)) or legal personal representatives (within the meaning of that Act) of those persons;
 - (ii) to make investments to generate income from the assets of the fund;
 - (iii) to reimburse contributors who have paid entitlements directly to persons in respect of whom contributions are made;
 - (iv) to return contributions to contributors;

- (v) to pay, for the benefit of a person in respect of whom contributions are made, an employment termination payment (within the meaning of the *Income Tax Assessment Act 1997* (Cth)) into a complying superannuation fund (within the meaning of section 45 of the *Superannuation Industry (Supervision) Act 1993* (Cth)), a complying approved deposit fund (within the meaning of section 47 of the *Superannuation Industry (Supervision) Act 1993* (Cth)) or a retirement savings account (within the meaning of the *Retirement Savings Accounts Act 1997* (Cth));
- (vi) to transfer contributions to another approved worker entitlement fund;
- (vii) to pay the reasonable administrative expenses of the fund;
- (viii) to pay amounts to a contributor's external administrator that would otherwise be payable as mentioned in subparagraph (iii) or (iv) to the contributor; and
- (ix) to pay interest on, or to repay, money lent to the fund;

- (b) under the fund's constitutive documents, payments from income of the fund are to be made only for the purposes listed in s 58PB(4)(d) of the FBT Act. These purposes are:
 - (i) a purpose mentioned in s 58PB(4)(c)(ii) to (ix) set out above;
 - (ii) to make payments to contributors to the fund; and
 - (iii) to make payments to other persons where the payment is specified in subsection (5).

Rumours of the strikers' claims

56. In late August 2012, Anthony Hackett, President of the Queensland Major Contractors' Association, received an email from Mr Steve Abson. Mr Abson was one of the BERT directors that had been appointed to that position by the Queensland Major Contractors' Association.

57. The email from Mr Abson was principally directed to Bill Wallace, the General Manager of BERT. In that email Mr Abson said that it had come to his attention that some 19 applications for hardship payments had been made by workers at the Queensland Children's Hospital project who were involved in industrial disputation with Abigroup. Mr Abson confirmed Mr Wallace's prior advice that before any such applications were considered, he would obtain independent legal advice on the interpretation of the BERT Trust Deed in considering such applications. Mr Abson stated that the advice should also

consider the ‘downstream legal and reputational consequences’ of any decisions made in relation to the claims.⁴²

58. When Mr Hackett received this email he was extremely concerned. He considered it raised significant reputational issues for BERT. As he saw it, the workers who were making the claims were not unemployed. They were simply on strike. It did not make sense to him that they should ‘get paid for something they’d elected to do’.⁴³ Not only was he concerned that any payment might be potentially illegal given that the prohibition on payments to workers engaged in industrial action, but he also thought it was immoral.⁴⁴
59. John Crittall, the Director of Construction and Policy of the Master Builders’ Association in Queensland, also came to hear that striking workers had made claims on the BERT Fund. The report he received was that CFMEU delegates at the hospital site were informing the workforce that, even though they were on strike, they would soon be able to access money out of the BERT Fund.⁴⁵
60. Mr Crittall then rang Mr Wallace and said that he had heard this news. He said to Mr Wallace that it would be a horrendous outcome for striking workers to receive BERT pay. He said ‘we will never get the blokes back if they’re getting paid’.⁴⁶ He added that the BERT Fund was a redundancy fund and the workers were not redundant, but

⁴² BERT Examination Book, Vol 5, p 1769.

⁴³ Anthony James Hackett, 5/08/14, T:132.6-7.

⁴⁴ Anthony James Hackett, 5/8/14, T:132.15-16.

⁴⁵ John McClintock Crittall, 5/8/14, T:175.45-176.7.

⁴⁶ John McClintock Crittall, 5/8/14, T:176.19-20.

instead were on strike, and there was a huge difference between redundancy and strike. Mr Crittall told Mr Wallace he could not pay striking workers. Mr Wallace said he would get legal advice and ‘do whatever I have to do’.⁴⁷

Legal advice received by BERT

61. The legal advice that Mr Wallace had indicated he would obtain for BERT was furnished on 27 August 2013 by Jim Peterson, a partner at McCullough Robertson, solicitors. The advice was set out in an email of that date addressed to Mr Wallace.⁴⁸
62. Mr Peterson advised that the question of whether the striking workers could be paid on the grounds of financial hardship turned on the interpretation of clause 29(b), and in particular, whether the worker could be said to be ‘unemployed’. Mr Peterson observed that the term ‘unemployed’ was not defined in the deed, and after some analysis, expressed a view to the effect that BERT could **not** justify making the payments under clause 29(b) if the member was in an employer-employee relationship.
63. The conclusion arrived at by Mr Peterson was, with respect, incontestably correct. Whatever be the breadth of the term ‘unemployed’ in some contexts, in the context of the trust deed it could not sensibly be construed to extend to a person who was, in fact, employed by an employer but unlawfully refusing to attend work when required.

⁴⁷ John McClintock Crittall, 5/8/14, T:176.29-30.

⁴⁸ BERT Examination Book, Vol 5, p 1804.

64. The position therefore, was that BERT's own lawyers, following their retainer by BERT's own General Manager, had advised BERT that the payments could not be made.

Board meeting on 30 August 2012: deadlock

65. Following receipt of the legal advice, and on 28 August 2012, Mr Wallace sent an email with a view to calling an extraordinary meeting of the board of directors of BERT to discuss the strikers' claims.⁴⁹
66. One Queensland Major Contractors' Association director who was unable to attend the meeting on such short notice was Hugh Morrison. He sent an email on the evening of 28 August 2013 to Mr Wallace and others stating that unless the company had received advice to the contrary, his decision remained that no payment would be made, and he saw no point in a special meeting to discuss the matter given the information that was already to hand.⁵⁰
67. In any event, a meeting of some of the directors of the BERT Board proceeded at 7.35am on 30 August 2012. Mr Wallace was in attendance as General Manager. Also in attendance were Greg Simcoe (BLF appointed director), Peter Fitzgerald (Queensland Major Contractors' Association), Peter Close (CFMEU), Mr Ravbar (CFMEU), Brad O'Carroll (CEPU) and Chris Stanley (Contractors' Association).

⁴⁹ BERT Examination Book, Vol 5, p 1771.

⁵⁰ BERT Examination Book, Vol 5, p 1770.

68. The minutes of that meeting⁵¹ record that the views of Mr Morrison set out in his email of 28 August were confirmed and noted. There then followed some debate. No agreement being reached as to how the strikers' claim should be handled. Reference was made to the McCullough Robertson advice that BERT had received. The union appointed directors of BERT said that they had received different legal advice.
69. During the course of the meeting, and at about 7.55am, a group of 17 workers in their work clothes walked into the board room and started to ask why their hardship payments were not being processed. As Mr Stanley described in his evidence, this was a 'complete interruption of the conduct of the board and I took offence at ... what appeared to be an attempt to exert undue influence on the decision making of the board'.⁵²
70. Mr Ravbar denied instigating this incident.⁵³ Indeed Mr Wallace gave evidence that Mr Ravbar endeavoured to make the 17 workers depart.⁵⁴ But it is reasonable to infer that one or more of the union directors other than Mr Ravbar, or a CFMEU delegate whom Mr Wallace had told of the meeting, Mr Fluro,⁵⁵ had informed the strikers of the precise time of the BERT board meeting, and had orchestrated their attendance at that particular time that morning.

⁵¹ BERT Examination Book, Vol 5, p 1773.

⁵² Christopher Robert Stanley, 5/8/14, T:161.20-23.

⁵³ Michael John Ravbar, 6/8/14, T:361.6-14.

⁵⁴ Bill Wallace, 22/9/14, T:22.31-36.

⁵⁵ William James Wallace, 22/9/14, T:22.46-23.4.

71. Mr Stanley considered that the conduct of the meeting had been compromised and, as a result, he and Mr Fitzgerald left the meeting. As the minutes of that meeting record, the departure of the employer directors meant there was no quorum. The meeting concluded without any resolution as to how the strikers' claims would be dealt with.

Numerous discussions between Mr Ravbar and Mr Wallace after the board meeting

72. Mr Ravbar spoke to Mr Wallace after the board meeting. He had made it clear on 'numerous' occasions during the course of 30 August 2012 that he thought the strikers should get their money.⁵⁶

'Advice' obtained by the CFMEU

73. As noted above, the minutes of the board meeting of 30 August 2012 recorded the union appointed directors as saying they had received their own contrary legal advice.

74. Although no record of that advice was tabled at that meeting, on 30 August 2012 Hall Payne, solicitors, sent a letter of advice to Mr Ravbar.

75. In that letter Hall Payne made a number of observations in relation to clause 29 of the trust deed. Some observations were made about certain matters being 'arguable', and the point was made that one section of the *Social Security Act* 1991 (Cth) supported an argument that workers were 'unemployed' even if they were, in fact, employed

⁵⁶ Michael John Ravbar, 6/08/14, T:364.14-24.

and on strike. But at no point in that advice did Hall Payne express the view that, on the proper construction of clause 29 of the deed, it was appropriate for BERT to make the payments. With respect, the letter had the air of advice given by solicitors to a long-standing client who was in an untenable position, as the solicitors knew in their heart of hearts, but were seeking to let down gently. The CFMEU submitted that Mr Ravbar 'held a view based on legal advice from Hall Payne that the payments should be made'.⁵⁷ If he held that view, it cannot have been based on the Hall Payne letter. It gave no advice to that effect.

76. Another difficulty with the letter was that Hall Payne had not even been provided with a copy of the deed they were construing. Hall Payne noted this in their letter. They put an express caveat to their advice with a statement that it was possible that there were other terms of the deed that might have an impact on the analysis.

77. The position, therefore, was that while BERT itself had received direct advice from its own lawyers that the payments could not be made, the CFMEU had only obtained a qualified advice from Hall Payne in which supposedly arguable points against the McCullough Robertson opinion had been noted.

Mr Wallace reports he is going to make the payments

78. Later that same day Mr Wallace spoke with Mr Stanley on the telephone and said he had decided to pay the claims and that he was

⁵⁷ CFMEU submissions in reply, 21/11/14, Part 5.2, para 9.

going to do so on the basis of ‘past practice’. Mr Wallace informed Mr Stanley that he would be advising all directors of this in an email.

79. Mr Stanley then sent Mr Morrison an email (at 2.43pm on 30 August 2012) to inform him of what he had been told.⁵⁸

80. Shortly afterwards, and at 2.50pm on 30 August 2012, Mr Wallace sent the following email to the BERT directors:⁵⁹

At the request of the Chairman and the union directors I issue the following. As a result of this morning’s Board meeting that was unable to resolve the matter, I inform all directors that the legal opinion has not been accepted by the Board and I attach the union directors[’] contrary opinion which has also not been accepted by the Board. Accordingly we have no alternative other than to observe the custom and practice that has been followed by the fund for many years and process the claims. I await the boards [sic] advice in regard to future resolution of hardship payments.

Mr Wallace gives Mr Hackett an assurance

81. At some point around this time Mr Hackett responded by telephoning Mr Wallace and debating the legality and propriety of making the payments. At the end of that discussion, Mr Wallace agreed that he would get further legal advice, and that he would not make the payments without giving further notice.⁶⁰ There is some disagreement between Mr Hackett and Mr Wallace as to the precise timing of this call – Mr Wallace thinks that the call took place before he sent his email at 2.50pm.⁶¹

⁵⁸ BERT Examination Book, Vol 5, p 1776.

⁵⁹ BERT Examination Book, Vol 5, p 1778.

⁶⁰ Anthony James Hackett, 5/8/14, T:136.10-17.

⁶¹ Wallace, 22/9/14, T:29.

Mr Wallace makes the payments

82. Mr Wallace proceeded to process the claims and arrange for them to be paid during the course of the afternoon of 30 August 2012. He did this notwithstanding the fact that he knew the BERT board was deadlocked on the issue. He did it notwithstanding that there had been no resolution passed to pay any of the strikers' claims. He did it notwithstanding the fact that he knew that BERT's own lawyers had advised that it did not have power to make the payments. He did it notwithstanding his promise to Mr Hackett not to make the payments without giving further notice.

83. Some 20 claims by striking workers, almost all of whom were members of the CFMEU, were paid out by BERT on 30 August 2012. A total sum in excess of \$60,000 was paid out to workers who were undertaking illegal strike action.⁶² In the process they were delaying the completion of a facility for the provision of health services to sick children. The strike had the potential to cause millions of dollars of losses.⁶³ Given these circumstances it is unclear why these strikers were thought appropriate candidates for hardship payments out of BERT, even if the trustee had discretion to make the payments (which it did not).

84. Mr Wallace can only have taken the extraordinary step of processing the payments because he had been placed under enormous pressure from Mr Ravbar and perhaps the other union directors. He was

⁶² BERT Examination Book, Vol 4, pp 1425-1768.

⁶³ The strike lasted approximately nine weeks – John McClintock Crittall, 5/8/14, T:175.42-43.

reluctant to accept this proposition when examined. However his behaviour is not capable of any other explanation in light of the circumstances which were known to him and others at the time. That behaviour involved ignoring, or failing to find out about, other possibilities – a consideration of the Hall Payne advice by the company’s lawyers; retention of another firm; retention of appropriate counsel; or seeking judicial advice. It is unsatisfactory that although by 2012 Mr Wallace had been the General Manager of a large trust company for seven years, he was ignorant of the fact that it was possible for the trustee company to get advice from the Supreme Court of Queensland as to which course it should take, pursuant to s 96 of the *Trusts Act 1973 (Qld)*. He apparently continues to remain unaware of that facility, with its characteristics of relative cheapness and speed, coupled with complete protection for a trustee who follows the judicial advice.

85. The explanation for his decision that he proffered at the time was ‘custom and practice’. He proffered it again in evidence. Unsurprisingly, it emerged from his examination that there was no custom and practice in relation to making payments in circumstances where the board was deadlocked, the employer representative sponsors were in disagreement with the union representatives and the company’s lawyers had positively advised that the payments were not authorised under the trust deed. The so-called ‘custom and practice’ comprised only two isolated instances, one involving a payment to striking workers long ago, and the other concerning a payment to some flood victims.⁶⁴ Neither of those two cases had the features that confronted

⁶⁴ Wallace, 22/9/14, T:32.11-26.

Mr Wallace on 30 August 2012. The only possible precedent was the first. But a single instance cannot amount to a ‘custom’ or a ‘practice’. The payment to the striking workers had not been made in defiance of the trustee’s legal advice.⁶⁵

86. On 30 August 2012 Mr Wallace had to deal with a number of union appointed directors, including in particular, Mr Ravbar, who ‘communicated the strength of his views’ to the effect that the strikers should be paid.⁶⁶ As the email itself records, and as Mr Ravbar admitted, Mr Ravbar and the other union directors had asked Mr Wallace to send it.⁶⁷

87. It was Mr Ravbar and the other union appointed directors who procured, induced and caused Mr Wallace to act as he did.

Knowledge of Mr Ravbar and others at this time

88. At the time of procuring, inducing and causing Mr Wallace to make the payments on 30 August 2012, Mr Ravbar and the other union appointed directors, along with Mr Wallace, knew each of the following things:

- (a) the BERT board had not resolved to pay the claims;
- (b) the BERT directors appointed by the Queensland Major Contractors’ Association had expressed the strong view that

⁶⁵ Wallace, 22/09/14, T:35.34-38.

⁶⁶ Michael Ravbar, 7/8/14, T:445.25-27.

⁶⁷ Michael Ravbar, 7/8/14, T:445.46-446.6.

the claims not be paid, and that as a result, the board was deadlocked;⁶⁸

- (c) BERT had sought legal advice as to its powers, and the advice provided to BERT by its own lawyers was that it could not make the payments;
- (d) the advice the CFMEU had sought and obtained did not contain a clear statement of opinion that BERT had power to make the payments, did no more than identify a series of arguable propositions, and was, in any event, qualified in circumstances where the author of the advice had not even seen the trust deed;
- (e) there was, therefore, a serious question, yet to be resolved, as to whether BERT had the power to make the payments to the strikers, and whether the making of such payments would constitute a breach of trust by BERT;
- (f) in these circumstances, it was wrong for Mr Wallace to process the payments, and he should have been discouraged from doing so.

89. Notwithstanding their knowledge of each of these matters, at least Mr Ravbar and perhaps the other union directors took positive action calculated to encourage Mr Wallace to make the payments, and Mr Wallace proceeded to make those payments.

⁶⁸ Michael Ravbar, 7/8/14, T:447.4-19.

90. During his examination Mr Ravbar said that the strikers ‘shouldn’t be penalised for a dispute that’s not theirs and it’s their money’.⁶⁹ He said that it was the workers’ money and ‘they’re entitled to get it’.
91. When it was then put to him that the money was in fact held by the trustee of a trust on the terms of the trust, Mr Ravbar had this to say: ‘You can play the corporate angle but at the end of the day it’s their money. It’s a workers’ entitlement fund for redundancy purposes’.⁷⁰
92. It is clear that Mr Ravbar’s position, maintained in the witness box, was that he was comfortable with the payments being made, regardless of whether or not the trust deed permitted it. This is but one of many examples of a very common phenomenon: a view by CFMEU officials that their conduct is above the law and that the end justifies the means.
93. At one point he said in the witness box that he was happy for Mr Wallace to make the payments on the basis that to do so would be consistent with ‘custom and practice’. However, when Mr Ravbar was asked about this custom and practice, and whether it involved making payments out on hardship grounds to workers who were on strike, or on other bases, Mr Ravbar said ‘I don’t administer the fund ... I wouldn’t have a clue’.⁷¹
94. In these circumstances Mr Ravbar, cannot have had, and did not have, any genuinely held belief that there existed a custom and practice that permitted Mr Wallace to make the payments. Nor, indeed, was there

⁶⁹ Michael Ravbar, 6/8/14, T:364.20-21.

⁷⁰ Michael Ravbar, 6/8/14, T:364.28-30.

⁷¹ Michael Ravbar, 6/8/14, T:365.22-25.

any relevant custom or practice. Even if there had been, it could not prevail over clause 29(1)(b) of the trust deed.

Mr Hackett writes to Mr Wallace seeking undertakings

95. Following on from his conversation with Mr Wallace of earlier that day, and in ignorance of the fact that Mr Wallace had actually proceeded to make the payments to the strikers', Mr Hackett sent to Mr Wallace a letter dated 30 August 2012.⁷²
96. In that letter Mr Hackett expressed grave concerns over Mr Wallace's decision to consider making the hardship payments to strikers. He noted, correctly, that any hardship the applicants were experiencing was as a result of their decision to withdraw their labour rather than work as they could and should. Mr Hackett instructed Mr Wallace to defer any decision until such time as the board of BERT was satisfied that the Fund, the directors and Mr Wallace had complied with the law and their duties and obligations.
97. In this letter Mr Hackett confirmed what Mr Wallace had indicated in their prior telephone call, namely that Mr Wallace had agreed to reconsider the matter. Mr Hackett, on behalf of the Queensland Major Contractors' Association, sought an undertaking from Mr Wallace by 10am on 31 August 2012 that (a) he not take any step to implement payment before such time as the matter could be formally addressed at a BERT board meeting and subject to appropriate briefing papers being first provided as described above, and (b) in any event, BERT not

⁷² Hackett MFI-1, Letter to William Wallace from Anthony Hackett dated 30 August 2012.

make any hardship payment without first giving the Queensland Major Contractors' Association 7 days' notice in writing.

Mr Hackett learns the payments have been made

98. On the morning of 31 August 2012 Mr Wallace sent Mr Hackett an email in response to his letter of 30 August 2012 seeking the undertakings, advising that 'the claims have been processed via the bank and cannot be stopped'.⁷³
99. Mr Hackett responded to that email later on the morning of 31 August 2012.⁷⁴ In that email Mr Hackett referred to the conversation of the previous day in which Mr Wallace had said he would reconsider the matter. Mr Hackett expressed his surprise in the email that Mr Wallace had nevertheless made the payments. Mr Hackett said he was very disappointed in what had occurred.
100. In the same email Mr Hackett went on to indicate that, in his view, it was now all the more important that Mr Wallace provide the undertakings that had been sought in the letter of 30 August 2012 in respect of any further claims for payment.
101. The result of the actions of Mr Wallace and the union directors of BERT was to cause the Queensland Major Contractors' Association to experience an increase in lack of trust towards the Fund, and for members of the Queensland Major Contractors' Association to fear for

⁷³ Hackett MFI-1, Email to Anthony Hackett from William Wallace dated 31 August 2012.

⁷⁴ BERT Examination Book, Vol 5, p 1780.

the future income of the funds.⁷⁵ As Mr Hackett put it, if employers could not trust the management of the BERT business, why would they put their funds into BERT?⁷⁶

Variation to deed and policy

102. Following this incident, disputes continued at board level about the appropriateness of making payments of the kind that had been made by Mr Wallace. A working party (comprising a number of the board members) was formed to consider and report to the board on the matter.

103. On 13 November 2012, the members of the working party met and considered a suggestion that the fund require any applicant seeking a financial hardship payment to provide evidence from their employer that the applicant was employed and was not involved in industrial action.⁷⁷

104. The union appointed directors would not agree to this proposal. The issue then remained unresolved throughout 2012 and almost all of 2013.⁷⁸ Eventually, by December 2013, a ‘solution’ (of sorts) was agreed upon.

105. That solution came in two parts.

⁷⁵ Anthony James Hackett, 5/8/14, T:143. 12-26.

⁷⁶ Anthony James Hackett, 5/8/14, T:143.30-34.

⁷⁷ BERT Examination Book, Vol 5, p 1822.

⁷⁸ See for example BERT Examination Book, Vol 5, p 1854.

106. First, the BERT submissions advise that the following changes have been approved by the board of BERT and are acceptable to the Commissioner of Taxation, but have not yet been accepted by the Sponsors.⁷⁹ Clause 29 (b) of the trust deed was amended. The qualifying words ‘the member has been unemployed for at least four weeks’ were deleted, with the result that the sub-clause provided for financial hardship payments to be made where the trustee had received ‘evidence satisfactory to it’.⁸⁰

107. Secondly, the fund’s hardship payment claim form was amended to provide, relevantly:⁸¹

Payment will be made where a member of the trust is experiencing financial hardship, provided that the financial hardship has not been directly caused by actions taken by the member.

108. It may be inferred from the deplorably vague language in which these changes have been expressed that they reflect, in effect, a capitulation by the directors of BERT who had been appointed by the Queensland Major Contractors Association. The most likely explanation for such a capitulation is that these directors appreciated that the interminable stalemate was unacceptable (leaving as it did the trust in a state of constant indecision), and that it was better for there to be some resolution of the matter, even if it was to be on terms they did not desire.

⁷⁹ BERT submissions, 13/11/14, para 34.

⁸⁰ BERT Examination Book, Vol 1, p 99.

⁸¹ BERT Examination Book, Vol 5, p 1891.

109. There are a number of serious problems with the 'solution' described above.
110. One problem is that the new pre-condition set out in the hardship claim form (that is, that the hardship is not directly caused by the members action) does not find expression in the trust deed. A true precondition to eligibility for payment would have to be set out in the deed.
111. An associated problem is that, in the absence of any meaningful qualifying criteria in clause 29 (b) of the trust deed, the financial hardship ground is now expressed in terms which introduce substantial uncertainty. Payments may be made where the member 'provides to the trust deed documentary evidence satisfactory to it'. What does this actually mean? The provision has become a vehicle for future debate, stalemate, and ongoing uncertainty.
112. The same is true of the 'qualifying criteria' set out in the amended hardship payment claim form. The question of whether a particular financial hardship has been 'directly caused by actions taken by the member' is one that, in many cases, could be debated for years.
113. If the objective of this 'solution' was to provide for each side (that is, the employers and unions respectively) room for debate on each application, the parties will need to be mindful of an important matter that was overlooked by them in 2012. That matter is the fact that clause 29 effectively provides that no payment may be made to a member if to do so would be inconsistent with the FBT Requirements. As earlier submitted, an ex gratia payment to a striking worker would not be consistent to those requirements.

Conclusions

114. BERT may have breached the terms of the trust deed by paying out monies to the striking workers on or about 30 August 2012 in two respects.
115. First, a hardship payment could not be made to a person who was, in fact, employed by an employer but unlawfully refusing to attend work when required. Such a payment fell outside the scope of clause 29(c) of the trust deed.
116. Secondly, no payment could be made under clause 29 where to do so was inconsistent with the requirements of the FBT Act – and more particularly, where a payment was made for a purpose other than that set out in s 58PB of that Act. BERT has submitted⁸² that hardship payments which comply with clause 29(b) of the trust deed fall within the purpose set out in s 58PB(4)(c)(i) of the FBT Act on the basis that they are payments of ‘worker entitlements to persons in respect of whom contributions are made’. That may be true, but the term ‘worker entitlements’ cannot include a payment which the worker has no entitlement to receive.
117. At least Mr Ravbar and perhaps the other union appointed directors may have procured and induced BERT to commit this breach of trust. He and perhaps they may have encouraged and pressured Mr Wallace to make the payments in the face of legal advice from the company’s own lawyers and a deadlocked board. Mr Wallace would not have made the payments if all directors, acting as they should have, directed

⁸² Letter from BERT to Commission, 14/8/14; BERT submissions 13/11/14, para 38.

him to withhold payments until such time as the propriety of the proposed payments had been determined. Mr Wallace said that he was ‘under pressure from the board but they did not pressure me into making those payments, either side’.⁸³ Of course the employer’s side did not pressure him. Why would he, an experienced trust manager, have made the payments in breach of trust and in breach of his duty to his employer unless he had been subjected to pressure? Both Mr Wallace’s performance over those days and his evidence about that performance were deeply unsatisfactory.

118. Mr Ravbar and perhaps the other union appointed directors to the BERT board may have acted in breach of various duties owed to BERT in their capacities as directors of the company.
119. First, they may have breached their fiduciary and statutory duties (s 181 of the *Corporations Act 2001* (Cth)) to exercise their powers and discharge the duties in good faith in the best interests of BERT and for a proper purpose.
120. On the present state of the authorities there is some debate as to whether directors can breach the duty of good faith under s 181 if the law objectively considers that what the directors did was improper, even if the directors subjectively believed they were acting in the company’s best interests, or whether instead the section will only be contravened where a director deliberately engages in conduct, knowing that it is not in the company’s best interests or for a proper purpose.⁸⁴

⁸³ William James Wallace, 22/9/14, T:37.19-22.

⁸⁴ See Chapter 2.1, para 34 of this Interim Report.

121. For the purposes of this case study the outcome of that debate is immaterial. This is because, having regard to each of the facts and circumstances known to the directors at the time,⁸⁵ it cannot sensibly be suggested that any of them genuinely believed that it was in BERT's interests for the payments to be made.
122. A director's claim that he or she acted honestly is to be assessed by reference to the surrounding circumstances.⁸⁶ In the present case each director must have known of the existence of a real risk that, if the payments were made, BERT would be acting in breach of trust. So much is obvious from the fact of the company's own legal advice, and the fact there had been no authoritative determination to the contrary.
123. The lack of good faith on the part of Mr Ravbar, and perhaps the other union appointed directors, is demonstrated by the fact that they encouraged Mr Wallace to make the payments in the face of that knowledge.
124. The powers of directors' may be exercised only for the purpose for which they were conferred and not for any collateral or improper purpose. This is to be determined by reference to the substantial purpose of the exercise of the power and on an objective basis.⁸⁷
125. In this case the union appointed directors exercised their influence over Mr Wallace for the purpose of ensuring that the striking workers got

⁸⁵ See paragraph 88 above.

⁸⁶ *Grimaldi v Chameleon Mining NL (No 2); Chameleon Mining NL v Murchison Metals Ltd* (2012) 200 FCR 296.

⁸⁷ *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd; Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72.

paid. They were seeking to secure benefits for workers, and prepared for BERT to take the risk that the payments were improper.

126. For these reasons Mr Ravbar and perhaps the other union appointed directors may not have exercised their powers in good faith or for a proper purpose, and thereby contravened s 181 of the *Corporations Act* 2001 (Cth) and the corresponding fiduciary duty.
127. Further, these same directors may have breached their fiduciary and statutory duty (s 182 of the *Corporations Act* 2001 (Cth)) not to use their position improperly to gain an advantage for themselves or someone else or cause detriment to BERT.
128. Impropriety is established by a breach of the standards of conduct which would be expected of a person in the position of the director or officer, by a reasonable person with knowledge of the duties, powers and authority of the position and the circumstances of the case.⁸⁸
129. Given their knowledge of the relevant circumstances and the duties they held to ensure that BERT acted consistently with its obligations as trustee, it may have been improper for the union directors to encourage Mr Wallace to make the payments in order to gain an advantage for the striking workers. No reasonably minded person with knowledge of these matters would expect the union appointed directors to behave as they did.
130. In addition, and for the same reasons, the union appointed directors of BERT may also have breached their common law and statutory

⁸⁸ *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285.

obligation (s 180 of the *Corporations Act 2001* (Cth)) to exercise their powers and discharge their duties with a degree of care and diligence that a reasonable person would exercise if they were a director of BERT and occupied the office, and had the same responsibilities as they had. No reasonably competent director in their position, armed with the information available to them, could have acted as they did.

131. Mr Ravbar and the other union appointed directors may have committed offences under section 184 of the *Corporations Act 2001* (Cth), in that their breaches of the duties of good faith and the like as set out in the previous paragraph were ‘dishonest’ or ‘reckless’.
132. As to dishonesty, the better view appears to be that dishonesty for the purposes of s 184 is to be judged according to the standards of ordinary, decent people.⁸⁹
133. In light of the material circumstances known to them at the time these directors were aware, at the time they were putting pressure on Mr Wallace, that they were acting wrongfully and in a way that exposed BERT to claims of wrongdoing by employers. They could not seriously have thought otherwise given the facts and circumstances known to them. Ordinary, decent people would regard such behaviour – that is, deliberately doing something that one knows to be wrong - as dishonest. Further and in any event, it is plainly conduct that is capable of being characterised as ‘reckless’.
134. Bill Wallace may have committed a breach of the duties he owed as General Manager under his contract of employment with BERT in a

⁸⁹ *Krecichwost v R* (2012) 88 ACSR 339; *SAJ v R* (2012) 269 FLR 390 at [126].

manner meriting his dismissal. He may also have committed breaches of ss 180, 181, 182 and 184 of the *Corporations Act 2001* (Cth).

135. It is recommended that this Interim Report and any other relevant materials be referred, pursuant to s 6P of the *Royal Commissions Act 1902* (Cth) and every other enabling power, to the Australian Securities and Investments Commission in order that consideration may be given to whether Michael Ravbar should be charged with and prosecuted for breaches of his duty as an officer contrary to s 184 of the *Corporations Act 2001* (Cth), and whether a civil penalty proceeding should be commenced and carried on against Michael Ravbar for contraventions of ss 180, 181 and 182 of the *Corporations Act 2001* (Cth).

D – PARTICULAR ISSUES OF CONCERN

Unfair and preferential treatment of union members

136. Another feature of the BERT scheme is that the monies held by BERT and described as the ‘Welfare Fund’ are applied to certain welfare programs that are available only to members of the CFMEU, BLF and CEPU and their families.
137. The monies paid out by BERT to these welfare programs represent the income earned by BERT on the BERT members’ redundancy monies. However some of those BERT members are excluded from participating in the welfare programs their own monies fund on the ground that they are not union members.

138. In circumstances where the BERT members' funds are being used to generate the financial resources to fund the welfare programs, there is no proper basis for excluding those members from those programs on the ground that they are not union members. The BERT submissions assert that it is the Sponsors (via their advisory committee) rather than BERT or BERT's board, who make determinations about how and where the distributions of the financial resources to fund the welfare programs are to be made.⁹⁰ Counsel assisting's point stands.
139. The exclusionary provisions exist for the sole purpose of assisting the CFMEU and the CEPU to increase their membership base. It is inappropriate for officers of the union, such as Mr Ravbar and others, to cause the BERT scheme to be manipulated in this way.
140. The welfare programs from which BERT fund members are excluded unless they join the CFMEU or CEPU are many and varied. They include the following:
- (a) CONVERGE – this is a workers' assistance program that provides confidential, professional and free counselling. According to the BERT website, it is available to 'all financial members of the BLF, CFMEU and Plumbers' Union along with their immediate family members';
 - (b) PFG Financial Services and Financial Planning – PFG Financial Services provides financial planning advice to members of the BLF, CFMEU and Plumbers' Union;

⁹⁰ The BERT submissions, 13/11/14, para 41.

- (c) Travel insurance – free travel insurance is available to persons provided they are financial members of the BLF, CFMEU and Plumbers’ Union. The travel insurance covers such persons and their family members when going more than 250km from home for 14 days within Australia or 28 days overseas;
- (d) Funeral benefits – financial members of the BLF, CFMEU and Plumbers’ Union are covered by a funeral benefit of \$10,000 in the event of death of either the member, the members’ wife, husband or de facto or the members’ dependent children up to the age of 16;
- (e) Child care – child care payments are made on a discretionary basis for financial members of the BLF, CFMEU and Plumbers’ Union whose partner dies and who have children aged up to 13 years of age or dependents of the members;
- (f) Dental benefits – all financial members of the BLF, CFMEU and Plumbers’ Union are covered for accidental damage to teeth which occurs outside of working hours. The benefit is also available to immediate family members of those union members;
- (g) Ambulance benefit – CFMEU members in the Northern Territory are covered for ambulance travel costs outside working hours.

141. The fact that these various welfare programs are available to union members, regardless of whether they are also members of the BERT Fund, means that some union members get to enjoy benefits from these welfare programs notwithstanding the fact that they have contributed nothing to the raising of funds required to support the programs.
142. These arrangements are inequitable and indefensible.
143. The preferential treatment of union members appears to have had its roots in the establishment of the BERT Fund in the late 1980's. Whatever questionable justification may have been advanced for the preferential treatment of some members in prior decades, none presently exist.
144. The Queensland Major Contractors' Association is acutely aware of this and has fought hard to effect change.
145. Mr Hackett gave evidence that, over the last few years, and during his tenure as President of the Queensland Major Contractors' Association, he has become aware of this inequality and has asked for changes to be made. The Queensland Major Contractors' Association are opposed to any benefits that are not uniformly available to all paid up members of BERT. This point was made at a meeting of the BERT directors on 4 December 2013.⁹¹
146. The issue was followed up on 30 January 2014 where, at a Sponsors meeting, Mr Hackett said that the Queensland Major Contractors'

⁹¹ BERT Examination Book, Vol 5, p 1892 at 1896.

Association would be advising their appointed directors of BERT to only support future new benefits to BERT members only.⁹²

147. The unions have staunchly resisted making any changes so as to permit all BERT members to enjoy the benefits of the welfare programs that their own funds finance.
148. The Queensland Major Contractors' Association has sought to deal with the issue by indicating it will oppose the introduction of any new benefits, or the renewal of any existing benefits program upon its expiry, unless the benefits are available to all BERT members. Each welfare program is financed only for a finite term and, if it is to continue beyond that term, new funding and other arrangements need to be made. The Queensland Major Contractors' Association will not permit BERT to participate in such new arrangements unless the programs are amended so as to enable all BERT members to participate in them.
149. There is a simple reason why the union officials who are appointed to the BERT Board want to maintain this prejudicial treatment of some BERT members. They want more people to become members of their union. One of the ways they seek to achieve this is to advertise to potential members that, if they join the union, they are able to participate in the welfare programs funded by BERT. They use BERT as a 'selling point'.⁹³

⁹² BERT Examination Book, Vol 5, p 1899.

⁹³ Christopher Robert Stanley, 5/8/14, T:165.18-39.

150. The CFMEU Queensland website provides ample evidence of this fact. Under the heading ‘membership benefits’, readers of the website are told that by being a financial member of the CFMEU you get to enjoy ‘heaps of other benefits’. The membership benefits identified include those funded out of BERT’s resources. After identifying benefits of this kind the website contains the catch cry **‘It Pays to Belong!’**.⁹⁴
151. It is necessary to record the regrettable fact that Mr Ravbar gave false evidence in relation to this matter.
152. It was put to Mr Ravbar that the ‘union member only’ benefits funded by BERT were used by the CFMEU to try and persuade people to join the union. He denied that proposition.⁹⁵ The CFMEU’s own website shows that answer to be incorrect. This is yet another example of Mr Ravbar’s unreliability as a witness. During the course of his evidence he chose to say things that he knew were untrue because he thought (incorrectly) that it would help the union to defend its position. The CFMEU submitted that Mr Ravbar’s answer was not a denial,⁹⁶ but it plainly was.
153. Mr Ravbar’s evidence was that ‘[at] the end of the day the union’s members should enjoy those benefits’, that unions were the ones that fought for these schemes and that ‘[w]ith our allocation we provide

⁹⁴ BERT Examination Book, Vol 4, p 1411.

⁹⁵ Michael Ravbar, 7/8/14, T:453.43-453.4.

⁹⁶ CFMEU submissions in reply to other affected parties, 21/11/14, Part 5.2, para 15.

welfare benefits for our members and I'm not going to give any freeloader who is a non-unionist those benefits'.⁹⁷

154. It is not true to say, as Mr Ravbar did, that the unions were the only ones that fought for the schemes and put the funds together. It was a co-operative exercise between the unions and the Queensland Major Contractors' Association.
155. It is not true to say, as Mr Ravbar did, that the welfare payments made to the welfare programs in question somehow represent the 'union's allocation' of BERT Funds. They are not payments made by or to the unions at all. They are payments that have been made by BERT to welfare providers.
156. It is not true to say, as Mr Ravbar did, that non-union members of BERT would be 'freeloaders' if they came to enjoy the welfare programs in question. Their own money funds the programs. The 'freeloaders' are union members who are not members of BERT, because they enjoy programs without contributing in any way to the funding of them.
157. No reasonably minded person could regard the current preferential arrangements as fair or appropriate. The arrangements should be immediately varied so that all BERT members may participate equally in the programs funded by moneys held by BERT on behalf of its members.

⁹⁷ Michael Ravbar, 7/8/14, T:453.7-14.

E – PARTICULAR ISSUES OF CONCERN: GOVERNANCE/MANAGEMENT STRUCTURES

158. A striking feature of the management structure of BERT is that the board is comprised of equal numbers of employer representatives and union representatives, each of whom would often be expected to have diametrically opposed views, yet there is no independent director or other mechanism in place to deal with deadlocks when they arise. Counsel assisting correctly described it as dysfunctional and poorly composed. The BERT submissions attacked this:⁹⁸

Whilst the A class and B Class [sic] shareholders may possibly hold diametrically opposed views in respect to some matters ... it is submitted that those matters are not ordinarily relevant to the functioning of BERT.

By their involvement and continuing participation in BERT, and by reference to how BERT has functioned in the past, it is submitted that the employer representatives and union representatives hold a common view in respect of the payment of redundancy entitlements to workers and that this common view has allowed the BERT Board to function and perform its duties.

The text then refers to the following in a footnote:

Whilst recognizing that there was a deadlock in respect of the hardship payments to striking workers matter and that since then the Board has introduced measure [sic] to avoid any similar disputes.

The submissions continue:

One of the several benefits of having equal number employer representatives and union representatives is that decisions are made with the support of the majority of the Board. If there is no agreement about a matter then the status quo is maintained until agreement can be reached.

⁹⁸ The BERT submissions, 13/11/14, paras 43-45.

159. That last passage turns two blind eyes to the problem. Both it and the other passages skate over the hardship payments matter. That was an instance where the union directors, and Mr Wallace, defied the wishes of the other directors, resulting in an extraordinary departure from the terms which the trust deed laid down as preconditions to the payment of ‘redundancy entitlements – the very issue on which the BERT submissions claim that employer representatives and union representatives have a common view. And it was an instance where Mr Wallace had breached a promise he made to Mr Hackett not to make the payments without giving further notice.

160. The BERT submissions also said:⁹⁹

Counsel assisting is relying solely on evidence in respect of the hardship payments to striking workers matter to support a submission that the BERT board is generally dysfunctional and poorly composed.

In terms of the Board’s functionality it is BERT’s submission that the hardship payments to striking workers matter is an example of an exception making the rule. There is no evidence before the Commission that on any other occasion the BERT Board has acted in a manner that could be described as the Board being unable to function or to perform its duties.

Since the hardship payments to striking workers matter, the Board has introduced measures to ensure the payment of hardship monies accords with the terms of the Deed.

In terms of the Board’s composition, the Board is properly composed of A class directors and B class directors in accordance with the terms of the company’s constitution.

161. These submissions simply ignore the egregious aspects of what happened in connection with the hardship payments. They also ignore the deadlock over the Queensland Major Contractors’ Association

⁹⁹ The BERT submissions, 13/11/14, paras 17-20.

initiatives in relation to discrimination in benefits against non-CFMEU/CEPU members.¹⁰⁰ And they ignore the powerful resignation letter of Mr Abson.¹⁰¹ The ‘measures to ensure [that] the payment of hardship monies accords with the Deed’ in fact do nothing of the kind. In any event, the BERT submissions elsewhere say:¹⁰²

Whilst the board of BERT has approved these changes in principle and the ATO has confirmed in writing that the changes are acceptable to the Commissioner of Taxation, the changes are yet to be finalised and have not yet been formally approved by the Sponsors.

162. The solicitors for BERT said that the BERT submissions had been approved by every director of BERT. That such extraordinary conduct can be defended by all directors, including the employer directors, indicates that apart from being dysfunctional because of the deadlock issues the board has become dysfunctional by reason of all members adopting quite untenable views.
163. Within the course of the last year there have been board deadlocks on two critical issues – hardship payments to the strikers and the preferential treatment of union members. In neither case was a mechanism available to BERT to resolve the impasse. The BERT submissions¹⁰³ state:

The BERT Board has now taken steps to ensure that cl 29 of the Deed is complied with in respect of hardship payments.

¹⁰⁰ See paragraphs 144-148 above.

¹⁰¹ See paragraphs 167-170 below.

¹⁰² The BERT submissions, 13/11/14, para 34.

¹⁰³ The BERT submissions, 13/11/14, paras 48-49, 51.

The BERT Board was not involved in the disagreement in respect of the “preferential treatment of union members”. This was a disagreement between the Sponsors.

...

The only relevant issue in respect of BERT was the hardship payments. At the time of the dispute in respect of the hardship payment there was no mechanism available to BERT to resolve the impasse. Since that time the Board have taken several steps to ensure that such an impasse does not occur again in the future. These steps include:

- (a) proposing to amend the terms of the deed; and
- (b) establishing a sub-committee to determine whether the hardship payment is being made in accordance with the Deed.

164. The distinction between a deadlock on the Board and a deadlock among the sponsors is a distinction without a difference. The steps described, even if they were actually in force, do not resolve any risk of a future impasse or ensure compliance with the deed: they are so vague as to make it more likely that there will be either an impasse or non-compliance or both.
165. This deficiency has been recognised by the Queensland Major Contractors’ Association, and attempts have been made by it to effect change. This is appropriate given the fact that BERT is a trustee and holds tens of millions of dollars on trust for a large number of individuals.
166. For their part, the union appointed directors of BERT have resisted any change. They may not see the need for change. When confronted with a stalemate that did not suit their interests, they take action to work around it, as they did in relation to hardship payments to strikers.

167. The frustration experienced by the Queensland Major Contractors' Association in seeking to effect structural change is apparent from Mr Abson's letter of resignation from the board, and the written reasons given by him for that resignation.¹⁰⁴ On the first page of that letter he identified governance issues that needed to be resolved, and said that the appointment of an independent chairman would better facilitate reform. He also said that a change to the constitution and composition of the board would allow a better functioning board of directors.
168. Mr Ravbar was examined about this letter and the need for reform. He chose to argue that Mr Abson 'took the easy option just to give a spray and walk away' rather than staying on the board and working to address the issues.¹⁰⁵ He also endeavoured to create the impression that Mr Abson had not raised the issues set out in his letter whilst he was on the board. He described Mr Abson as someone who was 'a bit bitter after the event'.¹⁰⁶
169. Again, Mr Ravbar's evidence in relation to these matters was not correct. In fact, Mr Abson had sat on the board of BERT and participated in a series of directors' meetings prior to his resignation at which governance and other issues were squarely raised. He was present at a board strategic planning meeting held on 25 March 2013 at which point the question of board conflict was frankly and openly discussed. Indeed at that meeting it was resolved to consider

¹⁰⁴ BERT Examination Book, Vol 5, p 1868-1870.

¹⁰⁵ Michael Ravbar, 7/8/14, T:449.1-3.

¹⁰⁶ Michael Ravbar, 7/8/14, T:449.20-21.

constitutional change and expanding board sponsors and requesting a sponsor meeting to discuss the board conflict.¹⁰⁷

170. Mr Abson's resignation letter of 20 July 2013 did, therefore, set out matters that had been agitated and pursued by Mr Abson and the Queensland Major Contractors' Association appointed directors in the preceding months. When these and other inconvenient truths were placed before Mr Ravbar in the witness box, he refused to acknowledge them.¹⁰⁸

171. Mr Hackett, for his part, gave evidence that the Queensland Major Contractors' Association has continued to agitate for the appointment of an independent director or the introduction of some other mechanism that would assist BERT to be able to move forward when the board became deadlocked. The union has refused at every turn. This must be because the union appointed directors appreciate that an independent mind would detect the weakness in the unions' position on matters such as the preferential treatment of union members of the BERT Fund.

172. An attempt was made to raise the issue with Mr Ravbar during his examination. It is apparent from a review of the transcript of that examination that Mr Ravbar had little or no understanding of the concept of an independent director. He appeared to think that an

¹⁰⁷ BERT Examination Book, Vol 5, p 1853.

¹⁰⁸ Michael Ravbar, 7/8/14, T:448.19-449.26.

independent director was a director appointed by the Queensland Major Contractors' Association.¹⁰⁹

'Compliance fees'

173. One of the ways in which the CFMEU generates revenue through BERT is the payment to it of 'compliance fees'. Approximately \$120,000 was received by the CFMEU in the 2012-2013 financial year alone from the BERT Fund No.2, BEWT and CIPQ for 'compliance fees'.¹¹⁰

174. It would appear that these fees are paid to the CFMEU in return for the CFMEU taking action against defaulting employees to ensure that they pay the amounts they are obliged to pay into BERT, BEWT and CIPQ.¹¹¹

175. Mr Abson had something to say about this in his letter of resignation¹¹². Under the heading '*BERT Brand Reputation*' he said:

the appearance of "sending in the heavies" to collect alleged overdue amounts from some non-compliant employers should be reviewed. Whilst probably effective, this practice does little to advance the Funds [sic] reputation in the eyes of third parties (and prospective member companies) whom have indicated to me that they find it hard to distinguish this activity from some of the more legally questionably forms of industrial activity.

176. The evidence demonstrates that officers of the CFMEU do undertake activities designed to encourage employers who are behind in their

¹⁰⁹ Michael Ravbar, 7/8/14, T:449.28-450.24.

¹¹⁰ BERT Examination Book, Vol 5, p 1908.

¹¹¹ Christopher Robert Stanley, 5/8/14, T:167.34-168.37.

¹¹² BERT Examination Book, Vol 5, p 1869.

payments to BERT, BEWT and CIPQ to pay those outstanding amounts.

177. Mr Stanley testified that the CFMEU's role was the most advantageous for BERT.¹¹³ The BERT submissions relied on that evidence.¹¹⁴ But it does not explain why the CFMEU should be paid for these activities. These are routine activities of the CFMEU, undertaken for union members in return for the union dues paid by those members to the union. It seems, in effect, CFMEU is being paid twice for performing the same obligation. It thereby receives a windfall of over \$100,000 per year out of BERT, BEWT and CIPQ.

Treatment of income on BERT members' funds

178. As has been noted on several occasions:
- (a) interest earned on the redundancy money does not accrue for the benefit of the members of the BERT Fund. The members' redundancy accounts are not credited with their respective share of the income generated from the investment of those monies. Instead, the value of each member's redundancy account is left to erode overtime with the effects of inflation; and
 - (b) the income that is earned, and the profits that are generated, are paid out to Sponsors and leant back to BERT, and thereafter dealt with by BERT in accordance with the

¹¹³ Christopher Robert Stanley, 5/8/14, T:168.5-17.

¹¹⁴ The BERT submissions, 13/11/14, para 24.

Sponsors' directions. Those directions include the funding of various welfare programs badged as union programs. In turn, the existence of those welfare programs, and their availability to union members, is used to attract new members to the unions.

179. There is a real problem with this. Union members are led to believe that it is the union which makes welfare programs available to them. The union members who are also members of the BERT Fund are not told that, far from it being the union who is providing those welfare programs, the welfare programs are actually funded by the members themselves. It is the workers' own money that is being used to fund programs that are then being sold to workers by the union as union programs available to union members.
180. Members are not informed of these realities. It is likely that a large number of workers would prefer to have interest accruing on their redundancy monies, rather than having their monies used to generate the funding of welfare programs in which they may never participate.
181. If the union wishes to establish and operate welfare schemes for the benefit of its members, then it can do so using its own financial resources. It should not be using workers' monies to establish these programs without the fully informed consent of the workers, and certainly should not be passing the programs off as union schemes.
182. There is an absence of proper disclosure of these and other matters to prospective members of the BERT funds and contributing employers in conjunction with the general lack of transparency concerning the

operation of the BERT Funds. The BERT Funds are in the nature of managed investments schemes. Yet they operate under the cloak of ASIC Class Order CO 02/314 and are exempt from the requirement to issue a Product Disclosure Statement. It is recommended that the Australian Securities and Investments Commission reconsider that exemption.

The Training Fund: another scheme funded by workers

183. The points just made in relation to the various welfare programs are of equal application in respect of the BERT Training Fund operated by QCTF.
184. As earlier described, QCTF is almost entirely dependent upon receiving a share of the profits of BERT in order to be able to make grants for training schemes, including in particular general grants made to the CFMEU, BLF and CEPU each year.
185. Given that the net profits of BERT represent, in large part, the income earned on redundancy monies of workers held in the hands of BERT, the workers' monies are used to generate the funding for QCTF and the union training grant scheme.
186. How, then, is this income generated from the workers' own money actually being spent?

187. In the 2012-2013 financial year, the vast majority of these funds were paid out to the CFMEU, BLF and CEPU. The CFMEU alone received \$2.235 million.¹¹⁵
188. The whole of that sum was paid to the CFMEU for the purpose of administering and carrying out ‘CFMEU apprenticeship trainee schemes’.
189. This means that the millions of dollars in training funds given to the CFMEU, funded by income earned on BERT members’ accounts, is not being spent on the training of those workers.
190. To the contrary, it is spent on training new entrants to the industry, who as of the date of the grants, are not members of the BERT Fund, and for that matter not even members of the CFMEU. They are new people being introduced into the industry, who will, in due course, compete with the existing members of BERT and the CFMEU for jobs.
191. If the income earned on the redundancy monies of existing BERT members is not to be paid by them but instead applied to a training grant paid to the CFMEU, there can be no doubt that many (if not all) of those members would have a strong preference for seeing a good portion of those grant monies applied toward their own training and advancement.
192. The CFMEU makes much of the need for health and safety training, and there is no doubt that is a matter of fundamental importance. Yet none of the millions of dollars of QCTF general grant money paid to

¹¹⁵ BERT Examination Book, Vol 5, p 1908, (Rounded to the nearest \$1000).

the CFMEU each year is applied by QCTF towards the health and safety training of the workers whose own redundancy monies finance the grants.

193. Why is the CFMEU receiving grant monies of this kind? Why is it seeking and providing funding for training of new entrants to the industry, rather than paying the sums directly to persons who could provide training for existing members?
194. There appear to be a number of explanations.
195. One is that the apprenticeship trainee schemes are a valuable means by which the CFMEU seeks to recruit new members.
196. The applications that the CFMEU lodge with the QCTF all contain the CFMEU logo, are headed 'Apprenticeship Scholarships', and then state 'Building our future'. The 'our' in that logo could well be taken to be a reference to the CFMEU, as the apprentice scholarships appear to be a significant means by which the CFMEU seeks to build its future through the recruitment of young and new members.
197. The application forms go on to refer to the 'CFMEU Apprentice Scholarship' and to 'CFMEU apprentices'. They identify one of the course outcomes as being the development of tradespersons with a 'commitment to union principles'. The CFMEU scholarship application form, issued to young men and women wishing to participate in the program, contains a question 'Are you prepared to join the union?'

198. QCTF's general manager, Mr Stein, accepted what is obvious from the documentation, namely that apprentices who join the CFMEU Apprenticeship Scholarship program either are, or are likely to become, CFMEU members.¹¹⁶
199. Although the CFMEU enjoys this very substantial benefit from its own apprenticeship program, including the increase in its revenue base as a result of increasing its membership each year, it appears that no consideration is given to this matter by QCTF in the course of deciding whether it will provide the CFMEU with grants which, in effect, cover the entire cost of the programs.¹¹⁷
200. A second reason why the CFMEU appears willing to use the income earned on BERT members' redundancy funds for the purposes of training new entrants is that, under the training schemes devised by it, and pursuant to the financial grants made to it by QCTF, the CFMEU is able to take charge of the administration of the scheme and receive substantial monies for doing so, including monies that cover the entire salary costs of a number of its own employees, as well as items such as 'administration' and 'promotion, advertising and travel'.
201. In relation to promotion, advertising, travel and administration, under the general grants approved by the QCTF in favour of the CFMEU in the 2012-2013 year alone, the CFMEU was paid a total of \$344,225.¹¹⁸

¹¹⁶ Jason Stein, 5/8/14, T:187.8-11.

¹¹⁷ Jason Stein, 5/8/14, T:187.35-42.

¹¹⁸ BERT Examination Book, Vol 2, pp 563-583, at pp 567, 571, 575,579 and 583.

202. Mr Stein had responsibility within QCTF for obtaining a detailed understanding of the applications for general grants. But he was not able to provide the Commission with much information about how such a substantial sum of money is actually spent by the CFMEU. He referred to some advertisements being placed in the union journal for the scheme, but said he was not aware how applications for the scheme were distributed other than the mailing out of some application forms.¹¹⁹ He also said that he had not turned his mind to each cost that would make up the administration costs, and whether the sum paid to the CFMEU in respect of administration actually represented the costs incurred by the CFMEU in administering the scheme.¹²⁰
203. It is to be borne in mind that ‘administration’ and ‘advertising and promotion’ costs, totaling a sum of \$344,225 paid in the 2012-2013 financial year, do not include the portion of the training grants paid to the CFMEU that are intended to cover the total employment costs of training coordinators. They are a separate item applied for and granted. That separate item of cost that was in the grants to the CFMEU for 2012-2013 financial year, \$1,040,516.¹²¹
204. As a result, of the total figure of \$2.235 million paid by way of general training grants to the CFMEU in the 2012-2013 financial year, almost \$1.4 million of that went directly to, and remained with, the CFMEU. Only the balance was ear marked to leave the CFMEU and be spent on the new apprentices. And of that sum, a substantial portion was not spent on training, but instead on the purchase of new tools and clothing

¹¹⁹ Jason Stein, 5/8/14, T:191.9-12.

¹²⁰ Jason Stein, 5/8/14, T:192.13-25.

¹²¹ BERT Examination Book, Vol 2, pp 563-583, at pp 567, 571, 575,579 and 583.

items. The only amount actually specified in the CFMEU training grant applications to be spent on meeting the fees of professional training providers was \$91,250.¹²²

205. Questions arise as to whether it is appropriate for such a large proportion of the income earned on the BERT members' funds to be directed towards the CFMEU to pursue a form of training scheme which is administered by the CFMEU at very substantial cost, and in respect of which, ultimately, only a modest sum is spent on the actual training of workers, none of whom were members of the BERT Fund whose monies were used to generate the training grant to begin with.
206. There is, of course, nothing wrong with training. The opposite is the case. Both health and safety training and the training of new apprentices is very desirable. But why should it be funded out of existing workers' redundancy accounts? If the CFMEU wants to establish and run a training scheme for persons who are not existing members, it can do so out of its own funds. If the CFMEU is really interested in maximising health and safety training of its existing members, why is it not directing QCTF to pay the millions of dollars of general grant monies directly to OH&S training providers for the provision of training to current BERT and CFMEU members? The QCTF submitted that it was unfair to criticize it for not understanding how each grant it made was spent.¹²³ That was not counsel assisting's point. Nor was counsel assisting criticising the value of the training which QCTF administered. Counsel assisting instead was questioning

¹²² BERT Examination Book, Vol 2, pp 563-583, at pp 567, 571, 575,579 and 583.

¹²³ QCTF submissions, 14/11/14, paras 4-18.

whether the BERT members whose redundancy funds were used to generate the money spent were aware of that fact, and whether, if they were aware, they would wish their employer to enter an enterprise agreement on terms which included a 'BERT' clause. These are matters largely outside QCTF's knowledge.

F – CONCLUSIONS

207. The following general conclusions are drawn from the above analysis:

- (a) in various significant respects BERT has not been well directed by its board and its general manager. Payments may have been made in breach of trust. Certain members are unfairly deprived of access to programs that their own funds support;
- (b) one reason this state of affairs exists is because Mr Ravbar and other union appointed directors are able to take advantage of a state of deadlock on the board on key issues. The result is that appropriate changes to existing unfair practices cannot be remedied. On an occasion where the deadlock did not suit those directors (payment to striking workers), the deadlock was not an obstacle because the union appointed directors were able to apply pressure to management to get the result they wanted in any event;
- (c) there is an urgent need to reform the BERT governance structure in order to address these matters, whether by way of the appointment of an independent director, or some other

mechanism whereby a suitably neutral person can be introduced to resolve impasses at board level;

(d) union and BERT members and their employers do not appear to be aware of significant financial aspects of the BERT fund operations and benefit programs, including the facts that:

(i) they earn no interest on their redundancy monies;

(ii) the interest earned on their redundancy monies is used to fund the benefit programs offered to CFMEU members, and to fund apprenticeship programs;

(e) BERT and the CFMEU need to assume responsibility for ensuring that, before an employer is asked to execute an EBA which provides for BERT and BEWT, and before an employer and its employees join those funds, they are made aware of the way in which the BERT and related funds operate, including in the particular respects described in these submissions;

208. In light of the above matters it is recommended, following counsel assisting's submission, that this Interim Report and any other relevant materials be referred, pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, to the Australian Securities and Investments Commission in order that consideration may be given to whether the exemptions granted to employee redundancy funds by ASIC Class Order CO 02/314 remain appropriate.

209. The BERT submissions oppose this recommendation.¹²⁴

Counsel assisting does not provide any indication as to how or why any removal by ASIC of its class order relief would assist or ameliorate in respect of any of the matters raised in Counsel Assisting's submissions ... Contributions by employers to the fund are not in the form of an investment. The Commission did not hear any evidence as to the likely increased administrative costs to which the fund would be exposed in the event that such a recommendation was implemented. The recommendation also exceeds the terms of reference of the Commission.

210. The recommendation falls within at least paras (a)(i), (ii), (iv)(A) and (e) of the Terms of Reference. Removal of the relief would inform members of unions, BERT members and their employers of the actual operations of BERT and related funds. Any reasonable increase in administrative costs would be a price worth paying for that benefit. In substance employer contributions have created an investment.

G – A LATE SUBMISSION

211. The transcript of a telephone conversation between various persons, including counsel assisting and Mr Shenfield, the finance manager of BERT, contains the following:

Counsel assisting: What about claims for financial hardship of a member's account?

Mr Shenfield: Well, the procedure is this. The claim is made and we ask for evidence that you have financial hardship. Typically that would be at least three or four substantial overdue notices – not in respect of TVs or anything like that – rent overdue, and it's considered on those merits.

¹²⁴ The BERT submissions, 13/11/14, para 55.

And the fact that he's on strike does not come into it, as far as I'm aware.

212. That transcript was received into evidence at a late stage, namely 8 December 2014. Counsel for the CFMEU and Mr Ravbar provided a supplementary written submission on 9 December 2014.
213. The CFMEU and Mr Ravbar submit that this information bears on an assessment of Mr Ravbar's evidence. They also say that it is relevant to an assessment of the questions asked of Mr Ravbar by counsel assisting during his examination, and the submissions of counsel assisting, which did not refer to this information.
214. The CFMEU and Mr Ravbar submitted that the late disclosure of the transcript and the failure of counsel assisting to have any regard to it in the examination of Mr Ravbar and others when dealing with the hardship payments is further evidence of 'a palpable lack of balance' in the approach of those assisting the Royal Commission.¹²⁵
215. The particular argument advanced by the CFMEU and Mr Ravbar is as follows:¹²⁶
10. The transcript makes plain that the issue of whether workers were on strike and whether a strike related to the claimed hardship was not a relevant consideration when hardship claims were considered. It was recognised that money standing to the individual worker's credit was regarded as in principle that worker's money and that was how hardship claims were dealt with. This is consistent with the attitude taken in respect of the hardship payments eventually made in the matter under consideration. On its face it is clear that not taking into account that a worker's hardship was or may have been attributable to

¹²⁵ CFMEU submissions, 10/12/14, para 9.

¹²⁶ CFMEU submissions, 10/12/14, para 10.

strike was the practice before and at the time of the strike at the Children's Hospital site. Rather the issue was whether there was hardship and its nature. It was not the union representatives in BERT who were seeking a new approach to assessing hardship claims but the employer representatives.

11. There is no reason to reject Mr Ravbar's evidence as to why he believed that the hardship payment issue should be decided by the general manager Mr Wallace. There is no reason to reject as disingenuous Mr Ravbar's stated belief that the legal advice obtained permitted the hardship payments to be made. There is every reason to accept that the decision to make hardship payments as a matter of practice and precedent never had regard to whether the worker making the claim was on strike.

216. These submissions are not accepted.

217. To begin with, it is to be borne in mind that Mr Shenfield is the finance manager of BERT. He is not a board member, and it was not his function to process hardship claims. Indeed in a later part of the transcript of the telephone conversation, not quoted by the CFMEU or Mr Ravbar, Mr Shenfield made this clear, expressly stating 'I don't process them', identifying those who did and adding 'I'm giving you very qualified information. Take it that way please.'¹²⁷

218. For these reasons alone his understanding on the subject would be expected to be of limited interest to the Commission. As a point of preliminary contact between the Commission and BERT a number of general questions were put on him on a variety of topics. That does not mean his answers were, or were expected to be, of great probative value on all issues. On a number of issues he identified who the people

¹²⁷ At T26.24 The fact that Mr Shenfield was right to put such a qualification on the information he provided due to his lack of knowledge is apparent from the fact that he did not refer, during his interview, to the fact that BERT had actually received legal advice to the effect that the hardship payments could not be made to striking workers – a critical fact central to the matter in question.

of central importance were. On the hardship claim issue, his answers and documents subsequently reviewed by counsel assisting revealed that Mr Shenfield was not a person who was well placed to assist, compared with Mr Ravbar, Mr Stanley, Mr Wallace and others.

219. Further, the propositions advanced by the CFMEU and Mr Ravbar that the issue of whether workers were on strike was not a relevant consideration, and that there was a practice not to take into account whether a worker was on strike, run counter to the evidence before the Commission. An assessment of that evidence does not change by reference to what Mr Shenfield had to say during his transcribed conversation with counsel assisting and others.
220. To the extent that the CFMEU's submission relates to the hardship claims under consideration in August 2013, the evidence described above makes it clear that the fact the workers were on strike was a relevant consideration. Indeed it was so central to the consideration that it resulted in a deadlock at board level and it resulted in BERT and the CFMEU seeking legal advice on the question. Many of the criticisms of Mr Ravbar relate to his conduct undertaken in circumstances where BERT's solicitors had advised that the payments could not have been made and the board was deadlocked. The further submissions of the CFMEU and Mr Ravbar overlook these matters, and focus only on the question of whether the workers were on strike.
221. To the extent their submissions relate to hardship claims considered before August 2013, Mr Shenfield did not say that there had ever been a previous occasion on which strikers had made a hardship claim. As such, what he had to say on the topic was quite neutral. He was not

saying that there was any practice relating to the processing of claims by strikers – he was not even saying that there was a practice of strikers making claims to begin with. In the ordinary course, when no strike was involved, the matters he described in relation to the processing of a claim are not at all surprising.

222. It was Mr Ravbar, Mr Wallace and others who were well placed to deal with the question of whether there existed any practice that had application in the circumstances that confronted them in August 2013 – that is, if situations of that kind had arisen in the past (that is, striker claims followed by a board deadlock, legal advice from BERT’s own lawyers to the effect that the payments were not permitted, and so on), and if so, whether they were handled in the same way. For the reasons given earlier, the evidence revealed that no such practice existed. Indeed there was only one prior occasion, in the relatively distant past, that even involved a striker making a claim.

223. Given that Mr Shenfield had not suggested that BERT had been confronted with a set of circumstances of the kind that confronted it in August 2013, let alone developed a practice for dealing with such a situation; given that Mr Shenfield was not in a position to provide details and expressly indicated he could only give ‘very qualified information’ which was itself of a general kind; and given that by the time Mr Ravbar came to be examined counsel assisting had received the materials in the hearing bundles which shed considerable further light on the circumstances surrounding the handling of the controversial hardship claims (including, indeed, the legal advice that BERT’s solicitors had received – a fact not revealed during Mr Shenfield’s transcribed interview) counsel assisting cannot be criticised

for examining Mr Ravbar, or making submissions, without reference to what Mr Shenfield had to say.

224. The submission concerning the conduct of counsel assisting generally was only one of a number of submissions in which the CFMEU and its officers contended that counsel assisting displayed a lack of balance. Careful consideration has been given to this contention on each occasion it was made, both in relation to this Chapter and all other Chapters in relation to which it was made. In each case, the submission is erroneous.

2 Building Employees Redundancy Trust

Introduction

- 1 This investigation concerned the operation of the Building Employees Redundancy Trust (BERT) and, in particular:
 - (a) the extent to which claims are made for payment from BERT in circumstances where the claimant has not genuinely been made redundant;
 - (b) whether the way in which the Sponsors of BERT (see below) account for income from BERT that is distributed to them is lawful;
 - (c) whether emergency ambulance cover, funeral benefits and trauma and counselling services are denied to BERT members who are not financial union members; and
 - (d) whether BERT has provided information about arrears in employer contributions to union representatives, in breach of its privacy obligations.
- 2 BERT was established in 1989 to provide redundancy benefits for employees in the Queensland building and construction industry. It was intended to provide funds to assist workers during periods of unemployment between projects.¹ BERT is currently constituted pursuant to a trust deed dated 16 May 1996 (the Trust Deed).
- 3 As at 30 June 2001, BERT had assets of \$39.2 million. It had 39 523 employee members, and 4197 employers were registered contributors to the fund. In the financial year ended 30 June 2001, BERT paid out benefits of \$17.6 million, of which approximately \$15.1 million represented payments of redundancy benefits.²
- 4 The Trustee of BERT is B.E.R.T. Pty Ltd. That company is jointly controlled by one employer organisation and three employee organisations (the Sponsors). The Sponsors are the Construction, Forestry, Mining and Energy Union, Construction and General Division, Queensland Workers' Divisional Branch, the Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees (BLF Q) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Plumbing Division, Queensland Branch (CEPU Plumbing Division, Qld Branch). B.E.R.T. Pty Ltd has class A and class B shares, and four shares of each class have been issued. The class B shares are held by the Queensland Major Contractors

Association (QMCA).³ Two of the class A shares are held by the Construction, Forestry, Mining and Energy Union (CFMEU), and one each by the BLF Q and CEPU Plumbing Division, Qld Branch.

- 5 B.E.R.T Pty Ltd. has a Board of Directors (the Board) which is composed of equal numbers of representatives of the employer and employee sponsors. The QMCA nominates three directors, and the CFMEU, BLF Q and CEPU Plumbing Division, Qld Branch each nominate one director. The Board is essentially a policy and overview body. Meetings of the Board are held quarterly, with additional special purpose meetings as needed.⁴
- 6 The day-to-day operations of BERT are managed by Super Partners, a fund administrator formerly known as Jacques Martin Industry Funds Administration.⁵ BERT has outsourced most of its functions to Super Partners.
- 7 The functions that BERT has not outsourced are carried out by the BERT Co-ordinator, Mr William Perrett. Perrett was seconded to BERT from the CFMEU on the establishment of BERT in 1989, and he has been the BERT Co-ordinator ever since. His responsibilities are to liaise with employers and employees, to follow up arrears in contributions from employers, and to respond to queries from both employers and employees. Prior to joining BERT, Perrett was a CFMEU Delegate and Organiser.⁶

Self-initiated redundancies

- 8 Under the Trust Deed, a member of BERT who resigns from his or her employment is not entitled to a payment from BERT unless he or she leaves the construction industry permanently, or retires after the age of 55 years.⁷
- 9 Benefits are, however, payable by BERT to a member if the member is made 'redundant', provided that the member makes a claim within 56 days of termination of employment. Clause 1.1(32) of the Trust Deed provides that:

*'Redundancy' means that termination of employment of a Member in circumstances where the work the Member has been performing is no longer required to be done by anyone and 'Redundant' has a corresponding meaning.*⁸

- 10 The Commission investigated the extent to which a practice exists among employee members of BERT of initiating the termination of their own employment for the purpose of gaining access to redundancy entitlements held by BERT. One indication of the existence of this practice is employees ceasing work with their employer and claiming a redundancy payment, before recommencing work with the same employer within a short period of time.
- 11 If an employee claims to be redundant in circumstances in which the work that that employee was performing is still required to be done, an employee seeks a benefit in circumstances in which he or she is not entitled to that benefit. Such a claim is not in accordance with the Trust Deed. Employers have contributed to BERT on the basis that the scheme will be administered according to the Trust Deed.
- 12 During early 1999 Perrett identified a trend which showed that claims on BERT for payment increased markedly around the Christmas period. He brought that trend to the attention of the Board. A Board meeting was held on 10 June 1999 at which a list was tabled of employers

whose workers had made redundancy claims in December, and who had then made payments in respect of those same workers in January.⁹

- 13 On 30 June 1999 Perrett wrote to the companies on the list that had been tabled on 10 June 1999. He wrote, in part:

It has come to attention of the B.E.R.T. Trustees that a situation is arising whereby worker members of the B.E.R.T. Fund are making claims on their B.E.R.T. account in December and then having contributions made by the same employer in the month of January.

A position that the B.E.R.T. Trustees believe should not occur.

Both employers and employees who are supporting this practice are looking at the B.E.R.T. Fund as being nothing more than a Christmas Club, something which we at the B.E.R.T. Fund find unacceptable and certainly not being in the category of redundancy.¹⁰

- 14 When a claim is made for payment on the basis that an employee is redundant, the claim must be accompanied by a 'separation certificate'.¹¹ The separation certificate requires the employer to indicate the reason employment has terminated. One of the available options is redundancy.¹² It should, therefore, be difficult for an employee to obtain payment from BERT when not genuinely redundant, unless the employer is prepared to assist by providing a false separation certificate.
- 15 At a Board meeting on 8 June 2000, Perrett proposed that in order to reduce the increase in benefit payments around the Christmas period, all claims for payments by BERT should be required to be accompanied by a statutory declaration signed by the employer verifying that the worker has been terminated due to lack of work. Following discussion of that suggestion, the Board resolved that this proposal would not be implemented, however the education program to employers and members would be continued.¹³
- 16 Mr Leigh Ashman, the Chairman of the Board, said that the suggestion that a statutory declaration be required to verify claims was rejected by the Board because it considered a signed separation certificate to be sufficient. He said that BERT has enough trouble obtaining separation certificates from employers.¹⁴
- 17 Ashman said that, notwithstanding the consideration of this topic outlined above, the Board did not believe that the practice of making redundancy claims that were not bona fide was widespread among BERT members.¹⁵
- 18 In response to a notice to produce issued by the Commission,¹⁶ BERT provided the Commission with a spreadsheet that listed the employees who had ceased employment and received a payment from BERT, and for whom further contributions were then made to BERT within the next six months (indicating that they had recommenced work in the industry).
- 19 BERT also provided a second spreadsheet that listed the employees who had ceased employment and received a payment from BERT, and for whom further contributions were then made to BERT from their immediate previous employer within the next six months (indicating that they had recommenced work with their former employer during that time period).

- 20 The information provided in these spreadsheets included the date at which the employee had ceased employment with his or her previous employer, and the date of the first payment made by an employer to BERT following the payment by BERT of a benefit to that employee.¹⁷
- 21 The results of an analysis of these spreadsheets are set out in a statement of Mr Jamie Lowe, a Commission analyst. The analysis indicated that in the period between 1 December 2000 and 1 June 2002:
- (a) 2440 employees received a payment from BERT and then received a contribution to BERT within a six month period (indicating that they had recommenced work within six months of being made redundant);¹⁸
 - (b) Of that total, 1291 employees, or 53 per cent, recommenced work with their previous employer;¹⁹
 - (c) 599 employees recommenced work with their previous employer within 20 days or less. That equates to 46.4 per cent of all employees who returned to work with their previous employer within six months, and 24.6 per cent of all employees who had recommenced work with any employer within six months;²⁰
 - (d) Of the 599 employees identified above, 381 returned to work with their previous employer within ten days or less. That equates to 29.4 per cent of all employees who returned to work with their previous employer within six months, and 15.6 per cent of all employees who had recommenced work with any employer within six months;²¹
 - (e) Of the 599 employees identified above, 226 returned to work with their previous employer within five days or less. That equates to 17.5 per cent of all employees who returned to work with their previous employer within six months, and 9.3 per cent of all employees who had recommenced work with any employer within six months.²²
- 22 Of the 599 employees who recommenced with their previous employer within 20 days or less of ceasing employment, 139 employees recommenced employment between 26 December and 31 December. That equates to 10.8 per cent of all employees who were made redundant and recommenced employment with their previous employer, and 23.2 per cent of those who recommenced with the same employer within 20 days.²³ In other words, almost a quarter of the payments made to workers who were terminated, and who recommenced work with their previous employer within 20 days, were made to workers who recommenced during the five day period after Christmas. It is highly unlikely that these workers were terminated because the work that they were doing no longer needed to be done, given that work was required again immediately after Christmas. It is much more likely that employers laid their workers off in order to avoid paying holiday pay and other entitlements during the holiday period, or that workers sought to be laid off in order to gain access to the funds in their BERT account. In neither case is the payment from BERT appropriate, as there has not been a 'redundancy' within the meaning of the Trust Deed.
- 23 Ashman said that he did not consider it unusual that a considerable percentage of people who received redundancy payments from BERT returned to work with their previous employer within a six month period. He said that there tends to be a loyalty of employers towards employees they know, and the employers seek to re-hire those employees once a new project

starts up.²⁴ That loyalty is reflected in the figures, with 53 per cent of the workers who received a payment from BERT recommencing work with their immediate previous employer within 6 months of receiving the payment.

- 24 Loyalty does not, however, account for the very short periods between workers being laid off and then being rehired by their former employer. The figures outlined above show that 17.5 per cent of workers who received a payment from BERT and then recommenced with their previous employer did so within five days or less. It is improbable that any of these payments were made in situations of genuine 'redundancy', as that term is defined in the Trust Deed, for it cannot be said that the work a worker was doing was no longer required to be done by anyone if the same worker's skills were needed again in less than five days.
- 25 The figures show that 29 per cent of workers who received a payment from BERT and then recommenced with their previous employer did so within ten days, and 46 per cent within 20 days. While some of these payments may have been made as a result of genuine redundancies, the time periods are so short as to raise a real question as to whether the work that the employees were doing was no longer required to be done by anyone.
- 26 Although it did not suggest this in evidence, BERT contended in a submission that the statistical analysis might not be accurate because payment to BERT subsequent to an employee claiming redundancy and being paid by BERT might be arrears.²⁵ This is theoretically so. No material was advanced to suggest the extent to which these further payments were in fact arrears. This possibility may affect the precision of the analysis but it does not deny the strong possibility of the making of payments not in accordance with the Trust Deed.
- 27 On the evidence before me, I am satisfied that a substantial number of payments are made by BERT to employees who are not genuinely redundant. Such payments are not authorised by the Trust Deed and, in accordance with its terms, should not have been made.
- 28 I acknowledge that BERT does require employers to provide a separation certificate to support redundancy claims, and the correspondence from Perrett set out above demonstrates that BERT is opposed to making payments as a result of self-initiated redundancies. It is therefore likely that in most, if not all, of the cases in which BERT makes payments to employees who are not in fact redundant, it does so because it is misled by the workers who have submitted the claims, assisted by false separation certificates from employers.

Distribution of surplus income

The Trust Deed

- 29 Clause 29.1 of the Trust Deed provides:

The Trustee may in respect of all or any part of the Net Income for an Accounting Period:

- (1) pay, apply or set it aside to or for any one or more of the Income Beneficiaries to the exclusion of the others and in such proportions as the Trustee thinks fit; or*
- (2) accumulate it by paying into the Reserve Account;*

provided that any distribution of Net Income pursuant to this clause 29.1:

- (3) *to the Sponsors, must be made:*
- (a) *as to one half for the Unions and if more than one equally between them; and*
 - (b) *as to the other half for the Employer Organisations and if more than one equally between them; and*
- (4) *to the legal representatives or Dependants of a deceased Member, must be limited to the payment of a funeral benefit where the Trustee is satisfied that there is financial hardship. No distribution is to be made if in the opinion of the Trustee, it would affect the taxation treatment of the Fund or its Participating Employers.*²⁶
- 30 The Trust Deed defines 'Income Beneficiaries' to mean:
- (a) *the Sponsors;*
 - (b) *the legal personal representative or the Dependants of any deceased Member; and*
 - (c) *any Approved Institution.*²⁷
- 31 At present, the only Approved Institution is the Queensland Construction Training Fund (QCTF).²⁸
- 32 BERT does not accumulate net income in the Reserve Account. It distributes the whole of its net income each year to the Income Beneficiaries in order to avoid the adverse tax consequences of retaining income.²⁹

The Welfare Fund

- 33 On 3 September 1998, following a request from the Board for legal advice about the 'Welfare Fund', the legal firm Deacons Graham & James wrote to the Board:
- It may be that the description welfare fund is somewhat misleading. There was a time prior to the execution of the current deed for the BERT Fund that the directors of B.E.R.T Pty Ltd. proposed the establishment of a genuine welfare fund. This proposed welfare fund would have been a separate charitable trust...*
- The establishment of this proposed welfare fund was ultimately abandoned in favour of an arrangement whereby the BERT Fund would be able to make distributions of income to the various sponsors.*³⁰
- 34 Notwithstanding this letter, the term 'welfare fund' continues to be used by BERT.³¹ The term is apparently used to refer to distributions made by BERT to the Sponsors in accordance with clause 29 of the Trust Deed. The reason for this description may be found in recital D to the Sponsors' Deed entered into by the Sponsors on 20 May 1996 (Sponsors' Deed),³² by which:
- The Sponsors acknowledge that the distributions from the Fund to them are intended to be applied for the provision of welfare or related assistance for workers in the Construction Industry or their dependants and for other initiatives agreed upon by the Sponsors for the benefit of the Construction Industry.*³³

The Sponsors' Deed

- 35 In accordance with clause 29 of the Trust Deed, distributions made by BERT to the Sponsors must be divided one half for the employer sponsor and one half between the employee sponsors.
- 36 The detail of the use to which funds so distributed may be put is found in the Sponsors' Deed. Clause 2.1 of that Deed provides that 'Distributions paid, applied or set aside in favour of the Sponsors from the Fund must be dealt with in a manner jointly agreed upon by the Employer Organisation and the Unions'. Clause 2.2 provides that, to facilitate agreement about the use of such funds, an Advisory Committee should be created composed of three representatives of the QMCA and three representatives from the employee sponsors. The Advisory Committee is required to meet to advise and recommend to the Sponsors the uses to which each of the distributions made to the Sponsors are to be applied.³⁴ Until the Advisory Committee unanimously agrees on the recommendations to be made to the Sponsors, and all Sponsors accept those recommendations, any distributions from BERT made in favour of the Sponsors must be deposited by way of non-interest bearing loans to BERT, repayable at call.³⁵
- 37 The legal structures created by the Sponsors' Deed have not been well understood or implemented by BERT or the Sponsors.
- 38 Meetings of the Advisory Committee have been infrequent. Such meetings were held on 10 June 1999, 9 September 1999 and 16 December 1999,³⁶ but there were no meetings of the Advisory Committee between 16 December 1999 and June 2002.³⁷ Ashman gave evidence that Advisory Committee meetings were held as part of ordinary Board meetings, and that no separate minutes of the meetings were kept.³⁸ That is not consistent with the requirement that decisions of the Advisory Committee be unanimous. The fact that the Advisory Committee has recently recommenced meeting is an implied acknowledgment of that fact.
- 39 In a letter to the Commission dated 3 October 2002, Ashman explained the processes adopted by BERT in relation to its net income as follows:

In June of each year the Board of BERT resolves to distribute all of the net income of the BERT Fund pursuant to Clause 29 of the Trust Deed. At this stage the BERT Board is not able to make decisions as to the quantity of the distributions to be made until B.E.R.T Pty Ltd. receives its audited accounts detailing the net income of the Fund which is usually in about September or October of each year.

The net income is then distributed equally to the Sponsors and this amount flows through the Sponsors to the Welfare Fund, which is managed by the Advisory Board of the Sponsors.

The Sponsor's representatives on the Advisory Board are the same as those on the BERT Board.

Following the release of the audited accounts the Advisory Board then allocates actual amounts from the Welfare Fund.³⁹

- 40 That letter suggests that all of BERT's net income each year is distributed to the Sponsors, and that later in the year, after BERT receives its audited accounts, it decides how to distribute or use that money.
- 41 The way in which funds were granted to the QCTF during 2001 illustrates this process. On 9 October 2001 a meeting was held that purported to be a meeting of the 'Welfare Fund'. No such fund exists, but it appears that this meeting was intended to be a meeting of the Advisory Committee. The minutes of that meeting record that:

It was resolved to recommend to the Sponsors and, on behalf of the Sponsors, to accept the recommendations that the following disbursement be made from the Welfare Fund Account:

1. *\$850,000 to the Queensland Construction Training Fund, with a strong recommendation that a minimum amount of \$150,000 be directed to the Construction Skills Training Centre Pty Ltd as they continue to provide essential services of training to the construction and building industry...⁴⁰*
- 42 The amount distributed to the QCTF is largely dependent on the investment returns made on BERT's assets, so it is subject to fluctuation.⁴¹ BERT's surplus income is allocated first to providing the welfare benefits discussed below, and the balance is distributed to the QCTF.⁴² There may not be any distribution this year, due to the poor investment returns achieved on the BERT fund.⁴³

Accounting for distributions to the Sponsors

- 43 In September 1998 BERT sought legal advice from Deacons Graham & James regarding the accounting, taxation and audit requirements for the 'welfare fund'. In a letter to BERT dated 3 September 1998, Deacons Graham & James advised that 'there is no separate trust fund which could be described as a *welfare fund* as such' (emphasis original). The letter stated that the appropriate process for distributions to the Sponsors is as follows:

- (a) *the trustee of the BERT Fund should notify each of the sponsors of any distribution of income which is to be made to that sponsor for any financial year;*
- (b) *each sponsor will have a present and indefeasible entitlement to that income. However, until the advisory committee and sponsors have unanimously agreed on the way in which to apply those funds, the funds will be 'reinvested' by way of interest-free loan to the fund;*
- (c) *accordingly, until an income entitlement of the sponsor has been expended in accordance with the process described in the sponsors' deed, each sponsor should:-*
 - (i) *include as part of its income for the relevant year the amount of its respective entitlement from the BERT Fund; and*
 - (ii) *record as an asset in its accounts an amount equal to the interest-free loan to the BERT Fund.⁴⁴*

- 44 BERT does advise the Sponsors of the amounts distributed by BERT, but Ashman did not know how the distributions were treated in the accounts of the Sponsors.⁴⁵
- 45 It appears that BERT did advise the Sponsors of the advice it had received concerning proper accounting for distributions. On 4 November 1998 Ashman wrote a letter to Mr Greg Simcoe, the State Secretary of the BLF Q, in relation to the distribution of income by BERT to the Sponsors for the year ended 30 June 1998. The letter stated, in part, that:

As agreed with sponsors, and in accordance with the Sponsors Deed, these funds have been re-invested with the B.E.R.T. Fund by way of an interest free loan.

With regard to the financial treatment of such disbursements, the Fund's solicitor has suggested that each sponsor record the amount of it's [sic] respective entitlement as part of its income for the relevant year and also record as an asset in its Accounts an amount equal to the interest free loan made to the B.E.R.T. Fund.

It is also recommended that where further distribution of these monies is made for the provision of welfare or related assistance by the Advisory Committee, that each sponsor record an expense for it's [sic] relevant share of the transaction and as a result a corresponding reduction in the amount of the sponsor's loan to the B.E.R.T. Fund.⁴⁶

- 46 In fact, the Sponsors have each recorded BERT distributions differently in their audited accounts. The CEPU Plumbing Division, Qld Branch has in the past recorded BERT distributions in its accounts as income equating to one sixth of the total BERT distribution (which reflects its share as one of the three employee sponsors).⁴⁷ More recently, however, it has adopted the same approach as the BLF Q, which is to acknowledge distributions from BERT in a note in its accounts, but to state that the amount is not to be included as income and expenditure of the BLF Q.⁴⁸ By contrast, the CFMEU accounts report an amount in the Profit and Loss Statement under the category 'Sundry Income and Reimbursement', but no breakdown of the amount is provided, so it may or may not relate to BERT distributions.⁴⁹ The QMCA does not make any reference at all in its accounts to its half-share entitlement to each BERT distribution.⁵⁰
- 47 The advice given to BERT by Deacons Graham & James seems to me to be correct. Each of the Sponsors should account for distributions from BERT as income, and payments of welfare benefits should be recorded as an expense in the accounts of each Sponsor. The CEPU Plumbing Division, Qld Branch and BLF Q's accounts do reveal BERT distributions, if not exactly in the way Deacons Graham & James advised.
- 48 There is no material before the Commission to explain why the CFMEU has failed to disclose or adequately account for the distributions made by BERT to it. In a submission, QMCA stated that it has not received any formal notification from BERT of any distribution, nor received any funds and, accordingly, has not addressed any distribution in its account.⁵¹ It stated it had no record of receiving the advice of Deacons Graham & James. If that be so, the CFMEU may be in a similar position. This matter should be further investigated by the appropriate regulator.

Access to welfare benefits provided by BERT

- 49 During 1996 BERT decided to provide various benefits, including funeral benefits, emergency ambulance transport, and trauma and critical incident counselling services to members

(Welfare Benefits).⁵² Since that decision was made, the total Welfare Benefits paid by BERT were, as at 30 June 2001:

- (a) \$480 000 in funeral benefits;
- (b) \$362 000 in emergency transport claims; and
- (c) More than 100 hours of trauma counselling.⁵³

50 When outlining the benefits of participating in BERT, BERT's Annual Report for 2001 states that:

For financial members of sponsoring unions

Funeral benefits

- *Up to age 65*

Emergency ambulance transport

- *For you and your family*

The Fund takes out insurance to cover both of the above benefits

Trauma and critical incident counselling

This assistance is provided through a fund set up with a professional counselling organisation.⁵⁴

The above benefits are listed on the same page of the Annual Report as that which lists 'BERT MEMBER BENEFITS', but in a separate box. The Welfare Benefits therefore appear to have been deliberately separated from the general benefits of BERT membership, which is consistent with the indication that they are available only to financial union members.

51 BERT, as agent for the Sponsors, has taken out insurance policies in relation to the Welfare Benefits. Those insurance policies relate to the funeral and emergency transport benefits provided by BERT. The insurance policy in respect of the emergency transport benefit defines the 'Insured Persons' as:

All financial members & staff of the:

- (a) *Construction Forestry Mining & Energy Union (Queensland Construction & General Divisional Branch)*
- (b) *Australian Building Construction Employees & Builders Labourers Federation Union of Employees (Queensland Branch)*
- (c) *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia, Plumbing Division, Queensland Branch.⁵⁵*

52 'Insured Persons' are defined in the same way in the life insurance policy that BERT has taken out in relation to the provision of funeral benefits.⁵⁶

53 Finally, the service agreement between BERT and Woods Styles Australia Pty Ltd for the provision of trauma counselling services relates to:

... crisis counselling for all financial ABCE and BLF (Qld Branch) Union of Employees, CEPU Plumbing Division (Qld Branch) and CFMEU Qld Construction and General Division.⁵⁷

- 54 Notwithstanding the above, Ashman denied that Welfare Benefits were provided by BERT only to financial union members.
- 55 Ashman said he did not know that the insurance policies provided only for the provision of cover for financial union members,⁵⁸ and said that he could not recall seeing any of the insurance policies that BERT had taken out for funeral and emergency transport benefits.⁵⁹ He suggested that the provision of Welfare Benefits was largely handled by the unions,⁶⁰ who were the first point of call in the provision of Welfare Benefits because they volunteered to take on that role.⁶¹
- 56 In fact, in or about August 1999, Ashman himself signed a proposal for Group Life Insurance with MLC Limited that was expressed to provide benefits only for financial union members.⁶² In light of that fact, and the fact that the Annual Report expressly indicates that Welfare Benefits are restricted to financial union members, it is unlikely that Ashman was unaware of that restriction.
- 57 When giving evidence, Ashman accepted that the existing insurance policies will need to be changed to allow any BERT member to claim Welfare Benefits.⁶³ It appears, therefore, that he accepted that BERT should not discriminate against non-union members in the provision of Welfare Benefits. That plainly is so because the funds are contributed by employers for the benefit of all workers, not just union members.
- 58 It appears that not only were some BERT members denied Welfare Benefits, but at least for a period Welfare Benefits were provided to financial union members who were not members of BERT. On 28 May 1997 Windsor Management Group sent a letter to Mr Terrence McIntyre, the BLF Q representative on the Board, stating that:
- When these [insurance] covers were initially commenced, it was agreed that only those members which were both members of the union and the B.E.R.T. Fund would be covered and this equated to 10,000 members.*
- It would appear that all financial members of the unions are being covered, with no consideration as to whether they are part of B.E.R.T. or not.⁶⁴*
- 59 Ashman said that he asked the sponsor unions, approximately two Board meetings prior to his giving evidence to the Commission on 8 October 2002, whether Welfare Benefits were limited to financial union members, and he was told that all BERT members were entitled to claim these benefits.⁶⁵ However, he was told it was necessary to present a claim at one of the sponsor union offices, so BERT members who are not financial union members may be reluctant to make a claim in this way.⁶⁶ Ashman could not explain what had prompted him to ask whether Welfare Benefits were limited to financial union members.⁶⁷
- 60 Ashman said that the union sponsors told him that there were examples of non-union members of BERT being paid Welfare Benefits. If that is so, BERT has committed a fraud on the relevant insurers if it has submitted claims in relation to persons who are not in fact covered

by the relevant insurance policies. There is not, however, adequate evidence to establish that any payments have been made outside the terms of the insurance policies.⁶⁸

- 61 Notwithstanding Ashman's evidence, the Annual Report and the insurance policies compel the conclusion that BERT in fact provides Welfare Benefits only to financial members of the sponsor unions. The definition of 'Insured Person' in the relevant insurance policies could easily have been 'BERT member'. The fact that the scope of cover was defined by reference to financial union membership must have been a deliberate decision to exclude BERT members who were not union members. That is consistent with the letter from Windsor Management Group on 28 May 1997 quoted above.
- 62 The availability of Welfare Benefits should not be so restricted. Not only is the initial source of funds the employers, who contribute for all employees not just financial unionists, but Welfare Benefits are provided as a result of the funds distributed to the Sponsors.⁶⁹ That means that half of the funds used to provide these benefits are funds to which the QMCA has a 'present and indefeasible entitlement'.⁷⁰ In those circumstances, there is no justification for providing the Welfare Benefits only to financial union members. The Sponsors at present refuse to provide valuable Welfare Benefits to some BERT members on the sole basis that they are not financial union members. That is discrimination on the basis of union membership.
- 63 Real questions arise as to whether that discrimination contravenes the *Anti-Discrimination Act 1991 (Qld)*, which prohibits direct or indirect discrimination on the basis of a range of attributes, including 'trade union activity', in the provision of, among other things, goods and services. The Commission did not explore the precise manner in which specific claims for Welfare Benefits are administered by BERT. In those circumstances, I make no findings in relation to the operation of that Act.
- 64 The QMCA members of the Board and the Advisory Committee have acquiesced in discrimination against BERT members who have chosen not to join a union. This is despite their obvious power to prevent it, given that the Sponsors' Deed operates so that no Welfare Benefits could be provided at all without their agreement. The representatives of the QMCA on the Advisory Committee have, in effect, agreed to spend the QMCA's money in providing Welfare Benefits not to BERT members, but to union members. Their reasons for so agreeing are not clear. Ultimately all of the members of the Advisory Committee are responsible for the discrimination, as all of them could, having regard to the Sponsors' Deed, have vetoed the proposal. As the Advisory Committee has been in practice effectively indistinguishable from the Board, BERT must be held responsible for this conduct.
- 65 In a submission in response to that of Counsel Assisting, the solicitors for BERT on 11 November 2002 advised the Commission that:

In light of Counsel Assisting's concerns modifications to the Welfare Fund insurance policies and procedures for access to insurance coverage by BERT members will be dealt with at the next BERT board meeting.

And that:

Administration and payment of welfare claims are now being conducted by Windsor Management Group and not the sponsoring Unions.⁷¹

These are welcome and appropriate changes.

Privacy and collection of arrears

- 66 The Commission heard evidence, in the context of the MarGra and Battaglia investigations in Brisbane (see volumes of the report dealing with Queensland hearings), concerning BERT's approach to the collection of arrears from employers who have fallen behind in their payments to BERT.
- 67 BERT's approach to the collection of arrears was set out in its submissions in relation to MarGra.⁷² That approach involves, in substance, a number of letters from Super Partners to the employer that is in arrears, followed after 45 days by the referral of the matter to Perrett. Perrett estimates that there are about 100 participating employers in arrears at any one time. He chases up the arrears. In the course of doing so, he may ask the union sponsors for information about the defaulting company (to see whether it has, for example, gone into liquidation).⁷³
- 68 In the past, Perrett has on occasions followed up defaulting employers while in the company of union organisers. Ashman said, however, that as a result of the MarGra incident, Perrett is now required by BERT to do this by himself, with no union involvement.⁷⁴
- 69 A report on employers who are in arrears is prepared by BERT and provided to the Sponsors, to see if they can assist in the collection of arrears.⁷⁵ Ashman said that he did not know what the union sponsors did with this report, and, in particular, whether it was given to organisers or delegates.⁷⁶
- 70 BERT is able to print out a contribution advice in respect of a particular employer that has the names of all the employees who receive contributions from that employer listed on it. Ashman stated, however, that such a contribution advice would not be provided by the Board, or by Super Partners, to union organisers or delegates. He said that he believed that Super Partners had been instructed not to do this, at least since the commencement of the amendments which extended the operation of the *Privacy Act 1988 (C'wth)*.⁷⁷ In those circumstances, little would be achieved by examining incidents prior to the commencement of that Act. Ashman said that the only time that a union organiser or delegate is able to obtain information from BERT about whether an employer is behind in contributions is when one of their members asks them to follow this up, and the organiser or delegate makes an inquiry on behalf of that member.⁷⁸

Conclusions

- 71 On the material before me, I am satisfied that the Building Employees Redundancy Trust has in the past discriminated against members of Building Employees Redundancy Trust who are not financial union members in the provision of Welfare Benefits. It was wrong to do so. It appears the situation is being rectified.
- 72 The Building Employees Redundancy Trust has regularly made payments to employees in circumstances where those employees are not entitled to receive a payment under the Trust Deed. Those payments are most likely made as a result of a deception of the Building Employees Redundancy Trust by employers and employees who are participants in the Building Employees Redundancy Trust scheme, the deception being designed to obtain funds

from the Building Employees Redundancy Trust in circumstances in which payments are not contemplated by the trust deed.

- 73 Although the Building Employees Redundancy Trust apparently disapproves of this practice, it has done very little to prevent or discourage it. It would be possible for the Building Employees Redundancy Trust to put in place a procedure to check whether employees have recommenced work with their previous employer within a very short period of time after claiming payment from the Building Employees Redundancy Trust. While the Building Employees Redundancy Trust may well have made a payment to the relevant employee before this practice is detected, the Building Employees Redundancy Trust could nevertheless investigate that payment and, if appropriate, seek the return of the funds. That would go some distance towards discouraging the abuse of the Building Employees Redundancy Trust scheme. It is the responsibility of the Building Employees Redundancy Trust to ensure that it makes payments only in accordance with the Trust Deed.
- 74 This case study illustrates:
- (a) The making of payments by an industry redundancy fund to members in circumstances not authorised by the trust deed;
 - (b) The need for a regulatory authority to ensure that employee and employer associations in receipt of surplus income from industry funds properly account for those funds; and
 - (c) The provision of welfare benefits by an industry fund exclusively for those of its members who were financial members of a union, thereby discriminating against members of the fund who were not union members.

Persons involved

Name	Position/Title
Ashman, Leigh	Chairman of the Board, Building Employees Redundancy Trust.
Lowe, Jamie	Analyst, Royal Commission into the Building and Construction Industry.
McIntyre, Terrence	Representative for the Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees, on the Board, Building Employees Redundancy Trust.
Perrett, William	Co-ordinator, Building Employees Redundancy Trust; Former Delegate and Organiser, Construction, Forestry, Mining and Energy Union.
Simcoe, Greg	State Secretary, Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees.

Notes to Building Employees Redundancy Trust

- ¹ Ashman Statement, exhibit 1663, document 046.0716.0349.0002 at 0002.
- ² BERT Tender Bundle, exhibit 1664, document 084.0494.0771.0092 at 0092, 0101.
- ³ The QMCA was previously called the Australian Federation of Civil Engineering Contractors, Queensland Branch, Industrial Union of Employers - Ashman Statement, exhibit 1663, document 046.0716.0349.0002.
- ⁴ Ashman Statement, exhibit 1663, document 046.0716.0349.0002 at 0002-0003.
- ⁵ BERT Tender Bundle, exhibit 1664, document 084.0494.0771.0090 at 0105; Ashman Statement, exhibit 1663, p.2, document 046.0716.0349.0002.
- ⁶ Ashman Statement, exhibit 1663, document 046.0716.0349.0002 at 0003; BERT Tender Bundle, exhibit 1664, document 084.0494.0771.0090 at 0096.
- ⁷ BERT Tender Bundle, exhibit 1664, document 035.0493.0091.0060 at 0084 – cl. 31.
- ⁸ BERT Tender Bundle, exhibit 1664, document 035.0493.0091.0060 at 0068.
- ⁹ BERT Bona Fide Redundancy Documents Tender Bundle, exhibit 1667, document 067.0698.0539.0340 at 0343.
- ¹⁰ BERT Bona Fide Redundancy Documents Tender Bundle, exhibit 1667, document 041.0246.0267.0009.
- ¹¹ Ashman, T15365/44-45, T15369/1-6.
- ¹² See, for example, Le Statutory Declaration, exhibit 1665, document 034.0887.0284.0001, paragraph 11, annexure A, document 034.0887.0284.0009.
- ¹³ BERT Bona Fide Redundancy Documents Tender Bundle, exhibit 1667, document 098.0876.0645.0052 at 0057.
- ¹⁴ Ashman, T15369/1-5.
- ¹⁵ Ashman, T15365/4-9.
- ¹⁶ This was Notice NBF1728: BERT Bona Fide Redundancy Documents Tender Bundle, exhibit 1667, document 005.0235.0375.0001.
- ¹⁷ Lowe Statement, exhibit 1751, paragraph 5, document 067.0860.0853.0002.
- ¹⁸ Lowe Statement, exhibit 1751, paragraph 9, document 067.0860.0853.0002.
- ¹⁹ Lowe Statement, exhibit 1751, paragraph 10, document 067.0860.0853.0002.
- ²⁰ Lowe Statement, exhibit 1751, paragraph 12, document 067.0860.0853.0002.
- ²¹ Lowe Statement, exhibit 1751, paragraph 13, document 067.0860.0853.0002.
- ²² Lowe Statement, exhibit 1751, paragraph 14, document 067.0860.0853.0002.
- ²³ Lowe Statement, exhibit 1751, paragraph 15, document 067.0860.0853.0002.
- ²⁴ Ashman, T15369/31-36.
- ²⁵ Submission by Ebsworth and Ebsworth Lawyers on behalf of B.E.R.T Pty Ltd., dated 11 November 2002, paragraphs 6 and 20.
- ²⁶ BERT Tender Bundle, exhibit 1664, document 035.0493.0091.0060 at 0083.
- ²⁷ BERT Tender Bundle, exhibit 1664, document 035.0493.0091.0060 at 0067 – clause 1.1 (23).
- ²⁸ BERT Tender Bundle, exhibit 1664, document 032.0650.0916.0169 at 0169.
- ²⁹ Ashman, T15376/40-43.
- ³⁰ BERT Tender Bundle, exhibit 1664, document 043.0206.0094.0150 at 0150.
- ³¹ See, for example, Ashman, T15374/31-43.
- ³² BERT Tender Bundle, exhibit 1664, document 035.0493.0091.0102.
- ³³ BERT Tender Bundle, exhibit 1664, document 035.0493.0091.0102 at 0103.
- ³⁴ BERT Tender Bundle, exhibit 1664, document 035.0493.0091.0102 at 0105 – cl. 2.3.

- 35 BERT Tender Bundle, exhibit 1664, document 035.0493.0091.0102 at 0105 – cl. 5.1.
- 36 BERT Tender Bundle, exhibit 1664, documents 032.0650.0916.0171–0173.
- 37 BERT Tender Bundle, exhibit 1664, document 032.0650.0916.0168.
- 38 Ashman T15379/21–23; BERT Tender Bundle, exhibit 1664, document 032.0650.0916.0168.
- 39 BERT Tender Bundle, exhibit 1664, document 039.0938.0261.0001 at 0002; cf Ashman, T15375/15–29, T15376/21–35, suggesting this may have been an abnormal approach. Ashman's written view is more likely to have been carefully considered and should, therefore, be preferred, particularly as his oral evidence was somewhat inconsistent.
- 40 QCTF CSTC Tender Bundle, exhibit 1668, document 049.0441.0040.0234 at 0234.
- 41 Ashman, T15374/2–7.
- 42 Ashman, T15374/2–7.
- 43 Ashman, T15374/8–10.
- 44 BERT Tender Bundle, exhibit 1664, document 043.0206.0094.0150 at 0151.
- 45 Ashman, T15378/26–29.
- 46 BERT Tender Bundle, exhibit 1664, document 054.0791.0921.0043 at 0043.
- 47 See, for example, Extracts from the Financial Statements for the year ended 31 March 1999 of the CEPU Plumbing Division, Qld Branch, which relate to the way it has accounted for distributions from BERT: exhibit 2093, document 006.0156.0587.0001 at 0004.
- 48 See, for example, Extracts from the Financial Statements for the years ended 31 December 1999 and 2000 of the BLF Q, which relate to the way it has accounted for distributions from BERT: exhibit 1800, documents 085.0236.0371.0063, 085.0236.0371.0049. See how the CEPU Plumbing Division, Qld Branch has accounted for distributions from BERT in its Financial Statements for the year ended 31 March 2000, exhibit 2092, document 057.0246.0335.0001 at 0008.
- 49 See, for example, Extracts from the Financial Statements for the year ended 31 December 2000 of the Construction, Forestry, Mining and Energy Union, Construction and General Division, Queensland Construction Workers Divisional Branch, which relate to the way it has accounted for distributions from BERT: exhibit 2091, document 032.0775.0588.0122 at 0128, 0130 and 0134.
- 50 See, for example, Extracts from the Accounts of the QMCA, which relate to the way it has accounted for distributions from BERT: exhibit 1800, documents 031.0519.0319.0035, 031.0519.0319.0148.
- 51 Submission by the Queensland Major Contractors Association in response to the Submissions of Counsel Assisting re the Building Employees Redundancy Trust, dated 7 November 2002, paragraph 6.
- 52 BERT Tender Bundle, exhibit 1664, document 084.0494.0771.0090 at 0102.
- 53 BERT Tender Bundle, exhibit 1664, document 084.0494.0771.0090 at 0102. For details of the exact payments made out of the 'welfare fund' see BERT Tender Bundle, exhibit 1664, document 039.0938.0261.0001 at 0003–0005.
- 54 BERT Tender Bundle, exhibit 1664, document 084.0494.0771.0090 at 0094.
- 55 BERT Tender Bundle, exhibit 1664, document 035.0976.0936.0271 at 0271.
- 56 BERT Tender Bundle, exhibit 1664, document 035.0976.0936.0009 at 0012; BERT Tender Bundle, exhibit 1664, document 035.0976.0936.0061 at 0062.
- 57 BERT Tender Bundle, exhibit 1664, document 097.0109.0236.0111 at 0116.
- 58 Ashman, T15381/40–42.
- 59 Ashman, T15381/6–13. Ashman said that he had not seen the IMG policy that he was shown while giving evidence, and he said that he believed that this was the only policy, implying that he could not recall seeing any other policies.
- 60 Ashman, T15381/24–31.
- 61 Ashman, T15381/36–38.

- ⁶² BERT Tender Bundle, exhibit 1664, document 035.0976.0936.0072 at 0077.
- ⁶³ Ashman, T15382/26–34.
- ⁶⁴ BERT Tender Bundle, exhibit 1664, document 035.0976.0936.0280 at 0280.
- ⁶⁵ Ashman, T15380/10–20. He could not remember which of the employee sponsor representatives told him this.
- ⁶⁶ Ashman, T15380/8–15.
- ⁶⁷ Ashman, T15383/33–15384/7.
- ⁶⁸ Ashman, T15383/3–6.
- ⁶⁹ Ashman, T15382/18–21.
- ⁷⁰ BERT Tender Bundle, exhibit 1664, document 043.0206.0094.0150 at 0151.
- ⁷¹ Submission by Ebsworth and Ebsworth Lawyers on behalf of B.E.R.T Pty Ltd., dated 11 November 2002, paragraphs 27 and 28.
- ⁷² Tender Bundle entitled “Privacy and Collection of Arrears”, exhibit 1648, document 051.0228.0393.0001.
- ⁷³ Tender Bundle entitled “Privacy and Collection of Arrears”, exhibit 1648, document 051.0228.0393.0001 at 0001–0003; Ashman, T15370/42–45.
- ⁷⁴ Ashman, T15371/18–25.
- ⁷⁵ Ashman, T15371/37–45.
- ⁷⁶ Ashman, T15371/45–15372/5.
- ⁷⁷ Ashman, T15373/14–28.
- ⁷⁸ Ashman, T15373/2–7.