In Whose Interests? Fiduciary Obligations of Union Officials in Bargaining

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Abstract

This article examines the proposition that trade union officials owe fiduciary obligations to those they represent in enterprise bargaining under the *Fair Work Act 2009* (Cth), as held by the Royal Commission into Trade Union Governance and Corruption. It is argued that there are several formidable hurdles to such a conclusion, including the character of the bargaining regime under the Act, and the potential clash between the contention of the Royal Commission and the existing view of union officials as owing fiduciary obligations to the union as a continuing organisational entity. The importation of individualistic private law norms, if the fiduciary view of union bargaining were to be adopted by the courts, would challenge some fundamental conceptions of collective bargaining and the role of unions. While 'sweetheart deals' of the kind exposed by the Royal Commission may call for new legal responses, this article concludes that fiduciary law is not an appropriate legal tool for regulating union behaviour during bargaining.

I Introduction

Does a union official owe fiduciary obligations and, if so, to whom and under what circumstances? These questions have taken on contemporary significance because of the findings of the Royal Commission into Trade Union Governance and Corruption ('the Royal Commission'). As well as recommending statutory changes in relation to 'corrupting payments',[1] the Royal Commission found that a number of union officials may have breached a fiduciary obligation to members at an individual workplace by overseeing sub-standard industrial agreements while the union received secret payments from the employer.[2]

The finding that union officials owe a fiduciary obligation to members during enterprise bargaining is novel: the existing case law on the fiduciary obligations of union officials in Australia largely focuses on officials' management roles and, in summary, holds that union officials owe a fiduciary obligation to the union as a

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1 Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) vol 5, 266 (Recommendation 40).

2 Ibid vol 4, 765–6 (where the Royal Commission held that the union and its officials owed a fiduciary obligation to members at an individual workplace, and that this obligation may have been breached where the union received payment while negotiating an agreement which disadvantaged members).

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continuing organisational entity.[3] The extant cases liken union officials to company directors, whereas the Royal Commission argued that union officials bargain in the statutory context as agents for their members, or in a role sufficiently agent-like to give rise to fiduciary obligations to members.[4]

Of course, it is technically possible that an official may owe fiduciary obligations to different entities or people in relation to different aspects of their role. However, this article argues that the Royal Commission's contention is problematic in two respects: the statutory context within which union officials participate in enterprise bargaining is largely incompatible with the view that union officials bargain as agents, and there are inherent conflicts between the traditional conception of the union official's fiduciary duty and the Royal Commission's view.

Before turning to these arguments, an example of the impugned bargaining behaviour and the rationale for the Royal Commission's ascription of fiduciary obligations is discussed in Part II. In Part III, the existing law on the fiduciary obligations of union officials is examined. Part IV sets out the argument that it is difficult to view union bargaining representatives under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') as fiduciaries for the purpose of that role. Part V highlights the potential conflicts between the Royal Commission's view and the traditional notion of union officials' fiduciary obligations as discussed in Part III. Finally, in Part VI, the conceptual, practical and political ramifications of the Royal Commission's fiduciary contention, should it be successfully argued in court or replicated in statutory terms, are analysed.

II Anatomy of a Sweetheart Deal

A *The AWU–Chiquita Mushrooms Enterprise Agreement 2004*

The Royal Commission's findings that union officials may have breached a fiduciary obligation to individual members were made following a number of case studies into instances of enterprise bargaining. One of these involved negotiations between the Australian Workers' Union Victorian Branch ('AWU') and Chiquita Mushrooms ('CM'), leading to an enterprise agreement in 2004.[5] The Royal Commission held that the AWU Assistant Secretary and the union itself should be regarded as agents for their members at CM, and that by reaching a 'bad' agreement with management at the same time as the union received payments from CM, they had breached their fiduciary obligation to those workers.[6]

CM was a commercial mushroom cultivation business, with two sites in Victoria employing over 500 workers to harvest the crops. The company had an extraordinarily poor health and safety record, caused in part by the system of bonus payments that encouraged workers to work excessively hard. According to the

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3 *Allen v Townsend* (1977) 31 FLR 431 ('*Allen*').

4 Michael Christie, 'Legal Duties and Liabilities of Federal Union Officials' (1986) 15(4) *Melbourne University Law Review* 591.

5 Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, ch 10.6.

6 Ibid vol 4, 766.

company, by 2004 CM's WorkCover insurance premiums spiked at $6.2 million per annum, an unsustainable 47% of the total labour costs of the company, threatening the viability of the business.[7] Instead of addressing the safety issue directly by improving work practices, CM decided on a strategy to terminate the employment of a significant proportion of its 'permanent' workforce and to engage workers through a labour hire firm.[8] This tactic would remove CM's WorkCover liabilities with the stroke of a pen: as the Royal Commission put it, '[i]ncreased labour hire would assist in solving this problem because injuries to labour hire workers would affect the premiums of the labour hire company in question, and not Chiquita.'[9] The shift to labour hire employment also created an opportunity to reduce labour costs because the terms and conditions of the labour hire firm were lower than those of the CM workers.

Standing in the way of this strategy was the existing enterprise agreement between the AWU and CM, which mandated a minimum number of permanent workers, thus limiting the number of jobs that could be outsourced from direct employment by CM. This agreement also required that any labour hire staff engaged to work at CM would be paid the same amount as the permanent CM workers, and created the system of bonus pay based on the number of boxes of mushrooms picked per day.

Negotiations between the AWU and CM in 2004 led to a new enterprise agreement that: lowered the minimum number of permanent workers from 270 to 120; permitted labour hire workers to earn less than permanent staff; capped the bonus system that encouraged dangerous overwork; and limited the number of consecutive days staff could work to six. CM management also agreed to an AWU claim, made through the enterprise bargaining process, for 'paid education leave': the business agreed to pay the AWU $4000 per month for six months.[10] The paid education agreement was a so-called 'side deal' settled in correspondence with the union, rather than appearing in the terms of the enterprise agreement itself.

As a result of the 2004 enterprise agreement, a significant number of the permanent mushroom pickers lost their jobs at CM, most through a voluntary redundancy scheme. Some were subsequently engaged to work at CM via a labour hire firm on the lower terms and conditions lawfully set for employees of the labour hire firm.

Evidence to the Royal Commission about the six $4000 payments to the union by CM was contested.[11] The AWU had made the claim for such payments in the previous enterprise bargaining round and was pursuing the same claim throughout all its enterprise bargaining negotiations in Victoria.[12] However, one CM manager gave evidence that suggested the money was 'a small price to pay' to keep the union 'at bay' over the proposal for mass sackings and outsourcing of the

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7 Ibid vol 4, 725.
8 The term 'permanent' is used to indicate the CM workers employed on ongoing contracts.
9 Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 725.
10 Ibid vol 4, 729.
11 Ibid vol 4, 730ff.
12 Ibid vol 4, 734.

mushroom pickers' jobs.[13] It was suggested that the amount of $4000 was suspiciously similar to the membership dues lost to the AWU through the outsourcing of the permanent workers' jobs, suggesting that the payments were 'designed to compensate the AWU for a loss of membership revenue'.[14]

The Royal Commission found that there was no evidence of any services provided by the AWU to CM in exchange for the $24 000 for paid education leave. It reasoned that a firm in such financial trouble as CM would not have given $24 000 to the union for any 'altruistic concern about improving training'.[15] The payments must have been for the benefit of CM, and the Royal Commission did not accept that the benefit would have been reductions in worker injury as 'this would be a long game'.[16] Instead, the Royal Commission characterised the payments as having a tendency to corrupt the AWU and hinder it from acting solely in the interests of its members during the bargaining process, possibly breaching a fiduciary obligation to those members.[17]

As required by the federal statute at the time,[18] the 2004 enterprise agreement was put to a vote of the workers affected and a majority approved it, and the Australian Industrial Relations Commission certified that the agreement passed the relevant statutory hurdles.

B *The Royal Commission's Rationale for Breach of Fiduciary Obligation*

The Royal Commission arrived at its conclusion of possible breach of fiduciary obligation through a number of steps. The first step was a finding that the union official in question, the Assistant Secretary of the AWU, owed a fiduciary obligation to the members at CM in respect of his role as a senior negotiator for the 2004 enterprise agreement.

The initial characterisation of the union official as fiduciary during bargaining is critical to all the contentions that follow because, as Finn points out:

> The payment of money … to a person to secure influence or the showing of favour is not necessarily improper per se. Where, however, the recipient of the payment has undertaken to act for another and the payment is made to him in that capacity, it can create an interest antagonistic to the proper performance of the undertaking.[19]

In other words, in the Royal Commission's rationale, it is *because* the union official stood in a fiduciary relation to their principals that the payments to the union

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13 Ibid vol 4, 735.
14 Ibid vol 4, 737.
15 Ibid vol 4, 736–7, 746–7.
16 Ibid vol 4, 737.
17 The Royal Commission recommended that its Report and all relevant materials be provided to the Victorian Commissioner of Police so that consideration could be given to prosecution of the official and CM for breach of *Crimes Act 1958* (Vic) s 176 in relation to possible corrupt commission offences: ibid vol 4, 771.
18 *Workplace Relations Act 1996* (Cth).
19 P D Finn, *Fiduciary Obligations* (Law Book Co, 1977) 218.

necessarily gave rise to a relevant conflict of interest, which amounted to a breach of the fiduciary obligation.

The Royal Commission based its findings of a fiduciary obligation in bargaining on the definition of the fiduciary given by Mason J in the *Hospital Products Ltd v United State Surgical Corporation*.[20] Particular emphasis was put on the fiduciary acting on behalf of another in ways that would affect that other person 'in a legal or practical sense'.[21] The Royal Commission's application of these principles to enterprise bargaining is as follows:

> workers asked to vote on an agreement will not know any or all of the complexities of the bargaining process that preceded it. They will not ordinarily be in a position to judge to what extent that process has been undertaken in their interests. They are in a position where they are asked to trust that it has been. … they must assume that the agreement they are asked to approve is the best that the union has been able to achieve on their behalf. All of these matters point strongly to the conclusion that the bargaining representative is a fiduciary.[22]

In its second step, the Royal Commission formed a normative judgement about the substance of the 2004 enterprise agreement. It stated that the agreement was 'not a good result for workers in any sense'.[23] The Royal Commission held that the 2004 agreement 'left most Chiquita employees worse off' because 'it permitted Chiquita to decrease the number of workers employed by it and increase the number of workers employed by labour hire companies', and it permitted CM to pay less to the labour hire workers than those employed directly by CM.[24]

The third step was to draw a connection between the 'sub-standard' nature of the agreement and the payments made by CM to the AWU ostensibly for 'paid education'. The agreement was 'a bad result that was arrived at in circumstances where Chiquita and the AWU had entered into a secret side agreement for the payments of $24,000'.[25] The six monthly payments of $4000 were found to confer 'a direct benefit on the AWU. They were contrary to the interests of Chiquita employees because they weakened the AWU's bargaining position in [the enterprise bargaining] negotiations.'[26] By entering into the agreement in relation to paid education leave, the AWU official and the union itself 'may have been acting in a position of actual conflict or a position where there was a substantial possibility of such conflict'.[27]

Finally, the Royal Commission found that the officials had not cured their breach of fiduciary obligations by obtaining the fully informed consent of their principals: '[t]he payments were not disclosed to Chiquita employees.'[28]

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20 (1984) 156 CLR 41, 96–7 ('*Hospital Products*').
21 Ibid 97.
22 Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 478.
23 Ibid vol 4, 764.
24 Ibid vol 4, 747–8.
25 Ibid vol 4, 764.
26 Ibid vol 4, 765.
27 Ibid.
28 Ibid. This was disputed by the AWU, but it provided no evidence to the contrary.

A strong narrative emerges from the Royal Commission's findings: union officials bargain as agents, or in a role sufficiently akin to that of agent, and therefore owe fiduciary obligations to members in respect of the negotiation process. It should be noted that under fiduciary law, there is no need to show that the fiduciary did a bad deal in exchange for an illicit payment: any benefit to the fiduciary arising from their fiduciary role amounts to a breach of duty unless it has the fully informed consent of the principal.[29] However, there is no doubting the political power of the story, as is discussed in Part VI.

III Trade Union Officials and Fiduciary Law in Australia

The notion of a fiduciary obligation originally evolved to control the potential for self-interested misbehaviour by people who were entrusted with the management of property for the benefit of another person.[30] It exceeds a duty to act in good faith, because a duty of good faith can be exercised while having some regard to one's own interests. Fiduciaries must place the interests of their beneficiaries ahead of their own, or any other party, within the scope of their obligation.[31] The courts have avoided reducing the fiduciary concept to a simple formula of words, but the following famous statement, relied upon by the Royal Commission in finding that the union officials were fiduciaries, is widely regarded as presenting the key elements:

> The critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or a practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.[32]

Prosecution of union officials for breach of a fiduciary obligation has been relatively rare in Australia, and the settled cases deal with misuse of union resources, and intra-union disputes about behaviour during union elections.[33] In one of the most recent decisions, a former Member of Parliament, Craig Thomson, was held to account for breaching his fiduciary and statutory duties when he was a union official, by directing an employee of the union to work on his election campaign.[34] Generally, the courts have held that trade union officials owe fiduciary obligations *to the union itself*.[35] Christie states that the idea that a fiduciary obligation may be

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29 Ibid vol 4, 490.

30 Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010); Sarah Worthington, *Equity* (Oxford University Press, 2nd ed, 2006) 63.

31 *Breen v Williams* (1996) 186 CLR 71.

32 *Hospital Products* (1984) 156 CLR 41, 96–7; Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 475–6.

33 *Carling v Platt* (1955) 80 CAR 283, 292–3; *Re Australian Postal and Telecommunications Union (NSW), ex parte Wilson* (1979) 28 ALR 330; Christie, above n 4, 593–4.

34 *General Manager of the Fair Work Commission v Thomson (No 3)* [2015] FCA 1001 (11 September 2015) [76].

35 *Scott v Jess* (1984) 3 FCR 263, 287.

owed to a union's members is 'misconceived' and 'no authority has ever been cited to support it.'[36]

This view of the union official as fiduciary is based on an analogy between their role and that of the company director, one of the established categories of fiduciary. The company director must not exercise their powers otherwise than in good faith and for the purpose for which the power was granted.[37] The most detailed discussion of the analogy between union official and company director is found in *Allen*:

> There are many similarities between [trade unions registered under the *Conciliation and Arbitration Act*] and legal persons incorporated under the *Companies Act*. Each is a creature of statute. Their essential similarity is that each has a legal personality separate and distinct from its members. Each has an independent existence as a legal person. … Each has perpetual succession. … The property of each does not belong to its members from time to time.[38]

The fact that the union official's fiduciary obligation is owed to the organisation itself, rather than individual members or groups of members, is of critical importance. For example, it means that a union official may be duty bound *not* to act in the best interests of a particular group of members if this would be detrimental to the interests of the union as a whole, including the union's future interests.

This point is made explicitly in *Allen*, which envisages the union official overriding the wishes of a group of members when necessary:

> In the conditions of the [vehicle building] industry in which the members of this union work it is necessary that the federal secretary be a capable negotiator and have sufficient personality to press for advantage for his members when appropriate and to *quench the tide of militancy when appropriate*.[39]

There is no duty to treat the members equally, nor to distribute resources equally for the benefit of all members at all times, mirroring the principle that company directors might 'necessarily affect adversely the interests of one class of shareholders and benefit the interests of another class' when circumstances demand:[40]

> There are many situations in which the governing body of [a trade union] will quite properly expend the funds of an organisation in a way which will benefit only some members, or will benefit some members more than others. Some organisations find it necessary to subsidise the expense of running small branches by payment out of funds collected from members of larger branches. In some cases, the pursuit of a claim for industrial conditions on behalf of one member or a group of members may involve a disproportionate expenditure of the organisation's funds, without any real possibility of a flow on of any conditions won to other members. Depending upon the circumstances of each case, these unequal applications of funds may be perfectly proper.[41]

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36 Christie, above n 4, 601, 611.
37 (1977) 31 FLR 431, 483.
38 Ibid 484.
39 Ibid 457 (emphasis added).
40 *Mills v Mills* (1938) 60 CLR 150, 164.
41 *Scott v Jess* (1984) 3 FCR 263, 288.

The settled cases deal with unions in their statutory context. In order to examine whether or not the union official bargains as agent or in an agent-like role (and therefore owes a fiduciary obligation to their members during enterprise bargaining), it is necessary now to turn to an examination of the statutory rules shaping unions' role in bargaining under the statutory scheme. The behaviour of the AWU impugned by the Royal Commission arose in the context of bargaining under the *Workplace Relations Act 1996* (Cth). As the Royal Commission explicitly extends its analysis of union actions to include actions taken under the *Fair Work Act*, the following discussion will focus on bargaining under the current statutory provisions.

IV The Fiduciary Contention and Statutory Enterprise Bargaining

As we have seen, the Royal Commission found that union officials may owe fiduciary obligations to those on whose behalf they engage in enterprise bargaining. At places in its findings, the Royal Commission associates the role of the union in bargaining with the role of agent, and its general description of the union's activities in enterprise bargaining is strongly suggestive that the union official plays at least an agent-like role. This section critically analyses the contention that a useful analogy can be drawn between agency and collective bargaining by union officials in the context of the *Fair Work Act*.

The legal concept of the agent is well-known: '[a]gency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties.'[42] There is no definitive ruling about whether or not union officials in Australia are, in fact, legal agents when bargaining. The question has arisen here and in the United Kingdom in relation to the legal status of unregistered agreements made between unions and employers.[43]

In *Ryan v Textile Clothing and Footwear Union*, Brooking JA in the Victorian Court of Appeal stated that '[t]here is no reason in theory why a union could not, in making an agreement with an employer … do so as agent for some or all of its members.'[44] However, the Court unanimously concluded that, as Brooking JA stated '[i]t will usually be found, however, that there are great if not insuperable difficulties, in a given case, in treating a trade union as acting as agent in entering into a collective agreement.'[45] That case concerned an unregistered agreement made outside the statutory system and the union invoked its status as agent in an unsuccessful attempt to argue that the agreement had contractual effect. Reviewing British cases on this topic, Mitchell and Naughton state that: 'courts have

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42 *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644, 652.

43 W B Creighton, W J Ford and R J Mitchell, *Labour Law: Materials and Commentary* (Law Book Co, 1983) 58; R J Mitchell and R B Naughton, 'Collective Agreements, Industrial Awards and the Contract of Employment' (1989) 2(3) *Australian Journal of Labour Law* 252.

44 [1996] 2 VR 235, 238.

45 Ibid 238.

shied away from an acceptance of the general proposition that a union acts as agent for the individual worker by virtue of the fact of union membership'.[46]

Unions registered in the federal system are also bound by the terms of the *Fair Work (Registered Organisations) Act 2009* (Cth). With some exceptions, the duties placed on union officials largely mirror the obligations of company directors imposed by the *Corporations Act 2001* (Cth), including a duty to act in good faith in the best interests of the organisation and for a proper purpose,[47] in addition to equitable and common law duties. The Royal Commission found that the AWU had made inappropriate use of its powers during the CM enterprise bargaining negotiations. Whether or not this was the case will be discussed in the context of the analysis below of the *Fair Work Act* bargaining provisions and the actual conduct of the parties.

A *Mapping the Agency Contention onto the Statutory Enterprise Bargaining Regime*

The *Fair Work Act* creates a system for making enterprise agreements through an interconnected web of provisions.[48] Before turning to some of the important individual elements, several general features of this system should be noted. The Act privileges the making of agreements at the level of the single enterprise over those made with multi-employer bargaining units. Although it is common to refer to the *Fair Work Act* as creating a scheme of enterprise bargaining, the Act permits the creation of an agreement without any actual bargaining at all. Because the employer is permitted to put their preferred agreement to a vote of the relevant employees at any time, whether or not the workers' representatives agree, it is axiomatic that the 'agreement' need not represent any final outcome negotiated to the satisfaction of the bargaining representatives.[49] Nor is it necessary for all the affected workers to agree to the final terms: all that is required for a proposed enterprise agreement to proceed to the Fair Work Commission for approval is that a simple majority of the affected employees vote in favour of the agreement.[50] Once approved, an enterprise agreement made under the Act sets legally binding minimum conditions of employment for all the workers covered by it, whether they voted for it or not, and for any future employees engaged during the life of the agreement.[51]

At the heart of the system for making Fair Work agreements is the right of each individual employee subject to any proposed agreement to appoint a bargaining representative. The process for making agreements begins when an employer wishing to commence bargaining with a group of employees issues a notice informing every worker to be covered by the agreement that they have the right to

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46 Mitchell and Naughton, above n 43, 255.

47 *Fair Work (Registered Organisations) Act 2009* (Cth) s 286.

48 *Fair Work Act* pt 2-4 (enterprise agreements); Andreas Pekarek et al, 'Old Game, New Rules? The Dynamics of Enterprise Bargaining under the *Fair Work Act*' (2017) 59(1) *Journal of Industrial Relations* 44.

49 *Fair Work Act* s 181.

50 Ibid s 182.

51 Ibid ss 50–53. Breach of a provision of an enterprise agreement gives right to apply for an order under the Act's civil remedy provision regime: s 539.

nominate a bargaining representative.[52] If union members do not nominate a bargaining representative, the union is the default bargaining representative.[53]

The default assignment of a union official as the bargaining representative suggests that the formal conditions of an express agency agreement between the official and each of the members covered during bargaining have not been met, as the Act allows unions to become the bargaining representative for employees without the workers' explicit agreement and without workers issuing any instructions whatsoever about the task at hand. Further, the *Fair Work Act* process is such that the exact identity of the agent may not be clear, even to the purported principals, as it is left up to the union to determine which individual or individuals will actually be involved in the negotiation process.

At the level of broad concept, the agent–principal relationship is essentially binary and personal in nature: generally, an agent represents a principal. By contrast, in industrial relations the task of negotiating an enterprise agreement on behalf of union members is not infrequently undertaken by more than one person. This may be because a number of workers nominate bargaining representatives other than the union,[54] or because the sole union involved decides to select a team of people to participate in the bargaining process. It is common for these teams to include: officers of the union (as was the case with the participation of the AWU Assistant Secretary in the CM–AWU negotiations in 2004); union employees such as organisers or industrial officers from the head office or the local branch or both; union delegates from the workplace itself; ordinary rank and file members from the shop floor; or some combination of these actors.[55] This feature of collective bargaining, as Hepple notes, 'introduces extremely difficult problems of agency to which the common law provides no clear answers'.[56] If it is accepted that each member of the union negotiating team owes a fiduciary obligation to the workers (even if it is accepted that they are not common law agents), this would represent a significant extension of fiduciary law to persons to whom it does not currently apply. As Christie argued, '[i]f an official is merely an employee, it will be more difficult to argue that he owes fiduciary duties in many situations.'[57] That is, it is very unlikely that a court would find that one of the CM mushroom pickers who participated in the 2004 enterprise bargaining process owed a fiduciary duty to their fellow workers.[58]

Generally, union officials bargain for more than one principal: where the union is the default bargaining representative, it commonly negotiates on behalf of all its members at that enterprise. Fiduciary law has adapted to ensure that a fiduciary may owe duties to more than one principal, and to different classes of principal,

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52 Ibid s 173.

53 Ibid s 176(1)(b).

54 Joellen Riley, 'Bargaining Fair Work Style: Fault-lines in the Australian Model' (2012) 37(1) *New Zealand Journal of Employment Relations* 22.

55 For example, the union team negotiating the 2017 enterprise agreement with La Trobe University includes an official from the union's central office, staff from the union's local office, local shop stewards and other rank and file members employed in various roles across the University.

56 B A Hepple, 'Intention to Create Legal Relations' (1970) 28(1) *Cambridge Law Journal* 122, 136.

57 Christie, above n 4, 597.

58 In *Micallef v Donnelly*, the Court held that a union organiser did not owe a fiduciary obligation to the union: [2002] FCA 221 (12 March 2002).

notably in the case of the trustee's obligation to deal fairly as between the beneficiaries of income and capital.[59] However, it is arguable that the labour relations context presents a qualitatively different set of problems. Union officials may find that there is an extremely complex set of interests at play in enterprise bargaining.

Acting in the best interests of the members during enterprise bargaining may not be as simple as trying to achieve the biggest possible pay increase for each member. Workers may expect the union to further a range of potentially conflicting goals, such as seeking provisions designed to improve the gender balance of staff at the enterprise, or to assist casual workers to gain permanency. Some workers may reject such goals in favour of higher pay outcomes, or want the union to put all its advocacy towards improving the job security of existing non-casual members. Even among workers focused solely on their own interests, there is likely to be a myriad of private agendas as to what the preferable outcome would be: one worker may hope for the biggest pay increase possible, while another wants to union to bargain for lower parking fees, or better work/family provisions or more leave and so on. Workers may have multiple identities for the purposes of the setting of a bargaining agenda: a woman whose main goal is lower parking fees might equally care about improving the position of casual workers or improving gender equality or both.

These examples could be multiplied hundreds of times in large workplaces, and these are matters that a court would find it difficult to adjudicate in the context of an alleged breach of fiduciary obligation. It is not clear what equity's standard of fairness and impartiality in the treatment of multiple beneficiaries means in this complicated context of myriad interests and agendas.

A further difficulty for the Royal Commission's agency focus is that *Fair Work Act* bargaining representatives are participating in a process that creates legal rights for future employees. Thus, even if a particular classification covered by a proposed agreement has no current employees, the union must consider the interests of those workers — future members — when making the deal. This undercuts the legal view of the union official as agent: it is not legally possible for an agency relationship to exist between an unidentified principal who may materialise in the future:[60] 'a person cannot make an agreement as an agent for a principal who does not exist at the time the agreement is made'.[61]

Of course, ideas of authority and instruction are complex, and agency arrangements may emerge in the absence of any express agreement. Fridman says it is 'necessary to analyse the agent's power to affect his principal's legal position vis-à-vis third parties when determining the nature of the relationship in the absence of an express authority'.[62] But here, too, the *Fair Work Act* diverges from a pure agency model. Under the Act, a bargaining representative does not have the power to conclude an agreement with the employer:

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59 *Nestle v National Westminster Bank Plc* [1994] 1 All ER 118.

60 Patrick Elias, Brian Napier and Peter Wallington, *Labour Law Cases and Materials* (Butterworths, 1980) 406.

61 Andrew Stewart and Joellen Riley, 'Working around Work Choices: Collective Bargaining and the Common Law' (2007) 31(3) *Melbourne University Law Review* 903, 924.

62 G H L Fridman, *Fridman's Law of Agency* (Butterworths 1983) 15.

> it is not bargaining representatives who 'made the agreement' … The proposed enterprise agreement is 'made' when a majority of employees cast a valid vote to approve the agreement pursuant to s 182 of the [*Fair Work*] *Act*.[63]

The Royal Commission addressed this contention by arguing that while union officials may not technically change the legal interests of the workers, they affect the interests of a principal in a 'practical sense'.[64] This conception still retains, at its heart, the idea that it is the union official or the union itself that makes the deal, largely in isolation from the members affected. The majoritarian process of approval, however, undermines the Royal Commission's view. The Act permits the creation of an agreement *despite* the wishes of a substantial number of workers covered by it. Those disgruntled workers may want their bargaining representative to continue negotiations in order to achieve a better deal. But even if this wish becomes a direct instruction, the bargaining representative does not have sufficient control over the process to even ensure that the negotiations continue, much less that they will conclude on better terms. A valid vote of 50% plus one ends the process whether the bargaining representatives agree or not. Even after this stage, the agreement does not take effect until it is approved by the Fair Work Commission according to its statutory criteria.

A final feature of the *Fair Work Act* that does not sit comfortably with the agency approach is the fact that the Act permits and encourages concessional bargaining. Flexibility is one of the objects of the Act, which permits otherwise legally binding minimum employment standards to be reduced or abolished in certain circumstances through the creation of an enterprise agreement. The Act establishes a normative floor below which these trade-offs must not fall: enterprise agreements will only be approved if they pass the 'better-off-overall test', which occurs when the Fair Work Commission is satisfied that each current employee and each prospective employee are better off overall when the agreement is compared with the underpinning award.[65]

What the Act does not require is that all employees are better off to the same extent: lawful agreements may legitimately create winners and losers. For example, an employer may wish to abolish penalty rates for working at night, and offer an increase in the basic rate of pay just enough to provide a narrow benefit to the night workers covered by the deal. Of course, those employees who do not work on night duty lose none of their pre-existing entitlements, and so get the full benefit of the pay increase. The night staff, by contrast, would suffer a major loss only just compensated for in the pay increase. Each worker may be 'better off overall', as required by the Act, but the day workers are comparative winners and the night workers comparative losers.

Because differential outcomes such as this are permitted under the Act, there are conflicting interests among the employees depending on their current entitlements and management's negotiating goals. A fiduciary bargaining for workers with conflicting interests is in a position of a duty–duty conflict in breach

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63 *Application by MMA Offshore Logistics Pty Ltd* [2016] FWC 3789 (8 July 2016), [61].

64 Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 478, citing Mason J in *Hospital Products* (1984) 156 CLR 41, 96–7.

65 *Fair Work Act* ss 186(2)(d), 193.

of their obligation to each worker, another sign that the statutory context is largely inimical to the conceptualisation of union officials as fiduciaries to their members in bargaining. The essence of bargaining under such statutory rules necessarily involves compromise, trade-off and concession in relation to the overall bargaining agenda and the workers among themselves, to an extent and in ways that are foreign to fiduciaries such as trustees.

The Royal Commission's response to this argument does not seem compelling:

> The particular duty in question is a duty during the bargaining process. It is not a duty to obtain any particular outcome for members at the end of that process. And, in any event, if there is a significant risk of conflict [of interest between groups of members impacted differently by the bargained outcomes] during that process, the union and its officials can declare it and seek consent to proceed, or withdraw.[66]

If a union official had to withdraw from bargaining whenever members are impacted differentially during enterprise bargaining, they would be effectively excluded from any bargaining role under the Act.

For all the above reasons, it is difficult to conclude that the *Fair Work Act* provides a legal context within which union officials as a general rule owe fiduciary obligations when operating as bargaining representatives.[67]

B *Fiduciary Obligations and the Statutory Requirements for the Independence of the Bargaining Parties*

The other legal context relevant to this discussion is the statutory system governing the independence of union bargaining representatives from the employer. If a fiduciary obligation is to be found as a matter of course in relation to statutory bargaining by union officials, then we would expect the statute to express a need for absolute independence of the union bargaining representative from the employer: anything less would amount to a breach of the fiduciary obligation unless the principal had given their fully informed consent to the potential conflict of interest. However, the *Fair Work Act* does not require such absolute independence, in line with international jurisprudence on freedom of association.[68]

The *Fair Work Regulations 2009* (Cth) state that an employee bargaining representative must be 'free from control by' and 'free from improper influence from' the employer or another bargaining representative.[69] These are less demanding obligations than would be expected of a fiduciary: the regulation permits a relationship between a representative and their principal's employer provided it falls short of control, and allows some influence by the employer provided it is not 'improper'. Implicit in the wording of reg 2.06 is that representatives may look to their own interests in respect of their dealings with the employer, provided that after a certain (ill-defined) point, their behaviour may breach the required standard of

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66 Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 485.
67 *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606.
68 See, eg, *Mounted Police Association of Ontario v Canada (Attorney General)* [2015] 1 SCR 3.
69 *Fair Work Regulations 2009* (Cth) reg 2.06.

independence. For example, a union bargaining representative may have an ongoing relationship with the employer that involves a degree of cooperation on certain matters. The fiduciary standard would prohibit *any* mutually beneficial relationship or any influence that could be seen as fettering the representative's independence in their role in the absence of fully informed consent of the principal, even where the principal benefits from the relationship or arrangement between the employer and the bargaining representative.[70]

Not only does the Regulation not create a requirement of total separation and complete independence from the employer, Parliament chose not to require the Fair Work Commission to ensure the independence of the bargaining representatives in the process for making agreements: 'there are no provisions [in the *Fair Work Act*] that empower the Commission to determine whether a bargaining representative is independent'.[71] This stands in stark contrast to the positive obligation placed on the Fair Work Commission to investigate whether nor not a union official is a fit and proper person for the purposes of right of entry certificates.[72]

Despite the lack of a power in relation to the independence of bargaining representatives, the Fair Work Commission has utilised the standard in reg 2.06 as an aid to assessing whether or not 'genuine agreement' over a proposed enterprise agreement has, in fact, been reached. This small body of case law shows that the Fair Work Commission interprets reg 2.06 in a way that is not consistent with the view of union officials as fiduciaries in relation to their members during enterprise bargaining.

For example, a Full Bench of the Commission accepted that an agreement was 'genuinely agreed' despite the fact that one of the worker bargaining representatives was employed by the employer as a senior manager, owned shares in the employing company and at times during the negotiations acted in his role as manager (including when explaining the terms of the agreement on behalf of management to the staff).[73]

The Commission reasoned that, despite the manifest lack of independence of that bargaining representative from the employer, because union bargaining representatives were also involved in the negotiation, the interests of the workers had been sufficiently represented and no different outcomes were likely if the manager had not acted as a representative during negotiations.[74]

A strict fiduciary approach to bargaining representatives, however, would disqualify the manager from undertaking the bargaining representative role, and it is unlikely that even the informed consent of the principals would be sufficient to

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70 *Boardman v Phipps* [1967] 2 AC 46, 88.

71 *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd* [2016] FWC 7839 (28 October 2016) [164] quoting *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd* [2016] FWC 4364 (1 July 2016) [78] (Clancy DP).

72 The Fair Work Commission may only authorise an official for the purposes of right of entry if they meet the standards set out in s 513 of the *Fair Work Act*.

73 *Maritime Union of Australia v Sea Swift Pty Ltd* [2016] FWCFB 651 (8 February 2016).

74 Ibid.

overcome the conflict of interest inherent in the dual roles of manager and worker representative.

The proposed imposition of the fiduciary standard upon the current statutory regulation of the independence of the bargaining parties represents a very significant extension of both the substantive rules relating to independence and the procedural options in relation to contesting the issue under the *Fair Work Act*.

V Reassessing the AWU–CM Agreement

As we have seen, Australian courts have decided union officials owe a fiduciary obligation to the union as an incorporated continuing entity: this will be referred to as 'the *Allen* approach'. The Royal Commission argued that it was not 'possible to see, at least in the particular situation of the enterprise bargaining process, how there could be any conflict between duties owed by officials to their union and duties owed to the members on behalf of whom they are bargaining.'[75] This Part re-examines the factual matrix of the AWU–CM case study and argues that there are fundamental tensions between the *Allen* approach and the contentions of the Royal Commission.

What does it mean for a senior union official when management in a large, unionised workplace decides to terminate the employment of many of its employees and replace them with labour hire workers on different, less advantageous conditions? In addition to the concerns about the fate of the current members, the union official is faced with an organisational crisis: the potential loss of members and influence at a previously unionised site is a serious problem for the financial and strategic interests of any union. The two sets of interests largely coincide, because a strong continuing union presence at CM is in the interests of the union members (the remaining permanent mushroom pickers and arguably also the labour hire workers sent to CM). However, it is clear from the *Allen* approach that the interests of the members at CM must not completely trump the broader strategic interests of the union *qua* union. It must therefore be lawful for the union to have at least some regard to its own ongoing organisational goals while trying to do the best it can for the workers, a position that is not permitted if the union officials owe a fiduciary obligation to the members at that workplace during bargaining.

Once they had heard CM management's plans for change, the AWU officials had to make a set of strategic decisions based on their assessment of all the circumstances, including the attitude of members to the proposed changes. They had to assess: the seriousness of management's intention to implement its plan; the legality of what was proposed and therefore the possible options for a legal defence strategy; the costs and risks of opposing the plan; the likelihood that the union's determined opposition would have any effect on the plan; the prospects for signing up the labour hire workers as AWU members in the future; and many other strategic, practical questions. In sum, given all the circumstances and variables, known and unknown, what was the best outcome the union as a whole could achieve in these particular circumstances?

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[75] Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 484.

It is not suggested that the union officials are at large to favour the union's organisational interests over an individual group of members' interests. The AWU rules, for example, required the union to act in the interests of members and failure to do so would have been a breach of contract between the members and the union. Union officials are required to exercise their powers in good faith and with due skill and care, matters which the common law would determine in cases of alleged breach.[76] The statutory scheme provides union members with the opportunity to vote out a leadership if it is seen as too close to management.[77] And, as we have seen, under the *Fair Work Act* only an agreement that has been voted for by the majority of workers covered by it, and which also passes the better-off-overall test, will be approved.

Central to the Royal Commission's view of enterprise bargaining is that it is a task performed by union officials independently of the members, thus creating the necessary vulnerability–power relationship supporting the ascription of fiduciary obligations. This does not capture the character of bargaining between the AWU and CM: the team of AWU negotiators included not just the AWU Assistant Secretary, but also ordinary members from among the CM staff.[78] The Royal Commission's central contention that CM members simply had to trust the union in relation to the outcome of the enterprise bargaining because they would be unaware of the negotiations is further undermined by the fact that at least one CM AWU member was on the Branch Committee of Management of the AWU, organisationally the body to which the Assistant Secretary reported.[79] The AWU State Secretary, Bill Shorten, held separate discussions with senior management of CM, but the purport of these discussions were relayed to the CM members on the enterprise bargaining negotiating committee by the Assistant Secretary.

In other words, the CM–AWU bargaining process presents a richer set of more complex relationships and interactions between the union and the people it was representing during the bargaining than that suggested by the Royal Commission. In the grave circumstances that confronted the union after CM's drastic plans were revealed, it is only to be expected that senior officials from the union office would take an active role in seeking to protect the members and the interests of the union as a whole. If this picture of union leadership and participation in the CM matter is accurate, it shows a union operating as the law would expect in accordance with the *Allen* approach — indeed, anything less than this level of engagement by the union would arguably demonstrate a failure to engage with a serious threat to the union's future.

The legal context also plays an important role in shaping the options open to the union during negotiations such as these. As we have seen, the statutory context

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[76] *Buckley v National Union of General & Municipal Workers* [1967] 3 ALL ER 767. In this case, a union member was given incorrect advice and successfully sued the union for negligence.

[77] R R S Tracey, 'The Legal Approach to Democratic Control of Trade Unions' (1985) 15(2) *Melbourne University Law Review* 177.

[78] Minutes of the AWU–CM enterprise bargaining negotiation tendered to the Royal Commission: AWU, *Chiquita Mushrooms: Log of Claims for Renewal of EBA from 2003* (9 July 2015) Royal Commission into Trade Union Governance and Corruption <https://www.tradeunionroyalcommission.gov.au/Hearings/Documents/2015/Evidence9July2015/MFI-13-Tab-01.pdf>.

[79] Royal Commission into Trade Union Governance and Corruption, *Transcript of Public Hearing*, 9 July 2015, 176.

of bargaining does not provide much assistance to unions seeking to influence management, and such was the case when the AWU–CM enterprise agreement discussed in this article was negotiated. For example, the union was not permitted to marshal all its available industrial muscle by calling on its membership at all Victorian worksites to support the CM workers, as this would expose the union officials, employees and members to significant fines and expenses in terms of a legal defence. Under single enterprise bargaining, the union's only lawful source of workplace industrial power was what it could muster from among its CM membership.[80]

Would the CM workers take strike action in the face of the employer's plans and, if they did, would this alter the company's position? It cannot be assumed that union officials can conjure up a strike of their own volition: members will not automatically agree to walk off the job. Low paid workers whose jobs security is vulnerable may be particularly reluctant to lose an indefinite amount of pay on the gamble that this will secure their ongoing employment. It will be recalled that even after the impugned agreement was made in 2004, there were still 150 permanent jobs protected into the future by its terms. It is possible that the chance of retaining some secure employment for a significant minority of workers would have muted any industrial response from the CM members. No doubt a hard-headed assessment of just how successful any industrial action might be in the face of management determination to cut its WorkCover costs would have been made, not just by the union officials, but by the rank and file members themselves.

If financial support was the key issue inhibiting members from taking industrial action, the union was then faced with the question of whether or not to expend union funds on strike pay from the union's general revenue. This would involve a transfer of general funds to a single branch, effectively depleting resources available to all the other AWU workplaces and the union centrally. It is by no means clear that paying strike pay to the CM workers would have been in the best interests of the AWU as a whole. As the Court noted in *Allen*, the duty of a union official in such circumstances is to act fairly as between the different groups of members and, if necessary, to refuse to carry out the wishes of a group of members where the broader interests of the organisation demand it.[81] And even if extensive strike action had been taken, there was no guarantee that CM would have altered its plans in response.

As noted above, Finn described payments in breach of fiduciary obligation arising where 'the recipient of the payment has undertaken to act for another *and the payment is made to him in that capacity*'.[82] The decisions taken by the union, its members and the CM management did not arise *solely* in relation to this particular instance of bargaining leading to the 2004 agreement. This round of bargaining was part of a historical relationship between the union and the company stretching back

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[80] The *Fair Work Act*'s protected industrial regime provides some legal protections for industrial action taken in support of the making of enterprise agreements, and explicitly excludes industrial action taken by employees in relation to a multi-employer agreement: s 413. AWU members who were not employed at CM would receive no protection under the Act for industrial action in support of the making of an enterprise agreement at that workplace. See generally Shae McCrystal, 'The *Fair Work Act 2009* (Cth) and the Right to Strike' (2010) 23(1) *Australian Journal of Labour Law* 3.

[81] *Allen* (1977) 31 FLR 431, 483.

[82] Finn, above n 19, 218 (emphasis added).

years. Unions and employers are 'repeat players' in the process of enterprise bargaining, a process that has much in common with parties engaged in relational contracting.[83] An agreement by management to provide material assistance to a union is not unusual in industrial relations and, viewed through a labour relations lens, is rarely seen as giving rise to the complete subjugation of the union to the employer's wishes. Stepping away from the Royal Commission's fiduciary approach to bargaining, the fact that CM agreed to the paid education leave payments is a common example of how industrial relations bargaining works: the union makes a claim for a provision that will be good for the members and also entrench the union's role in training provision into the future, and management agrees to it because, on balance, its own strategic interests are served by making this concession.

It seems clear that in the process of making the 2004 enterprise agreement, the AWU was able to parlay its longstanding relationship with CM into a complex set of deals to meet its strategic and organisational priorities at the time. In addition to the paid education leave side deal, the union secured an informal agreement that CM would pay higher redundancy payouts to the departing staff than were required by law.[84] CM had no legal obligation to adhere to this side deal: the fact that the payouts were made at this higher level is a testament to the culture of bargaining and the historical 'continuing relationship'[85] between the parties.[86] The union and its members agreed to cooperate in the outsourcing and in relation to changes to the existing binding rules in order to make the workplace safer for the remaining CM employees (capped bonuses and limits on consecutive days).[87] And the union extracted a payment from CM to help the union conduct health and safety training, and/or to cover the cost of the lost membership fees.[88] Finally, the union negotiated itself a platform of continuing relevance and control within the workplace, as management was required by the new enterprise agreement to consult with the AWU on any further outsourcing.[89]

Using the *Allen* approach, the AWU's behaviour during bargaining can be seen as reasonable. The Royal Commission's view that the $24 000 payment should be seen as a quid pro quo for the 2004 enterprise agreement was not the only possible interpretation of the exchanges made by the parties at that time.[90] As we have seen, this view ignores the fact that the payment was made in the course of a longstanding and continuing relationship between the management of CM and the AWU. The Royal Commission rejects the thesis that CM was playing 'a long game' in agreeing

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83 Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 95.

84 This is confirmed by the Australian Industrial Relations Commission in a decision on unfair dismissal claims brought by four former CM workers under the *Workplace Relations Act 1996* (Cth) s 170CE: *Hodgson v Chiquita Mushrooms* [2005] Australian Industrial Relations Commission 515 (9 June 2005).

85 Allan Flanders with Alan Fox, 'Collective Bargaining: From Donovan to Durkheim' in Allan Flanders, *Management and Unions: The Theory and Reform of Industrial Relations* (Faber, 1970) 248, 252.

86 Ian Turner, *In Union is Strength: A History of Trade Unions in Australia 1788–1974* (Nelson Books, 1976) 133.

87 Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 761, 763.

88 That is, in the form of the paid education leave payments.

89 Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 750.

90 Ibid vol 4, 765.

to the paid education leave claim, but it is arguable that aspects of the final agreement and side deals were directed at this longer bargaining horizon.

The normative view that the agreement was 'bad' misses the point of both the regulatory structures of the federal statute and the strategic, practical difficulties faced by the AWU. There is no platonic 'good' agreement by which the 2004 enterprise agreement at CM can be judged. And this section has shown that the union arguably acted in the best interests of the members at CM, while having regard to its overarching fiduciary obligation to the union itself. All the statute requires is that every worker covered by the agreement is better off when compared with the underpinning award.

The Royal Commission's focus on the 'bad' outcome for workers highlights the question of what remedy would be available to any individual member represented by the AWU during enterprise bargaining. The AWU Assistant Secretary received no money personally, and there is no objective means by which it can be proved that the content of the agreement fell short of what a faithful fiduciary would have achieved in the circumstances. It is also unclear how the court would deal with a complainant who argued breach of fiduciary obligation, yet voted in support of the enterprise agreement.

These difficulties suggest that the fiduciary standard is simply inappropriate in the context of bargaining. It makes more sense to consider something akin to the public law standard in American law, which places a duty of 'fair representation' on union officials in bargaining.[91] The United States Supreme Court has held that this means that the union bargaining representative must 'serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct'.[92] The Court permits a range of responses in any given circumstance: 'a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness" as to be irrational'.[93]

VI Ramifications of the Fiduciary Contention

The Royal Commission's fiduciary contention, if upheld in equity or enacted through legislation, is likely to have far-reaching ramifications. This part of the article discusses the conceptual, practical and political import of the Royal Commission's findings.

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91 Graeme Orr, 'Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)security and the Rights of Free-Riders' (2001) 14(1) *Australian Journal of Labour Law* 1, 18.

92 *Vaca v Sipes*, 386 US 171, 177 (1967); Louise Floyd and Michael Evan Gold, 'Jimmy Hoffa: Alive, Well and Living in Australia: The Kennedy Legacy and Australian Labor Law Reform' (2015) 49(1) *The International Lawyer* 21.

93 *Air Line Pilots Association, International v O'Neill*, 499 US 65, 67 (1991) citing *Ford Motor Co v Huffman*, 345 US 330, 338 (1953).

Waves of legislative change since the 1980s have constrained and undercut the traditional conception of unions as it was under conciliation and arbitration.[94] The Royal Commission's findings take a further decisive step towards final unmooring of unions from many of the assumptions, norms and expectations of Australian labour law traditions. For much of the 20th century, trade unions were regarded as integral actors in the statutory conciliation and arbitration system. They were parties principal as of right, and were seen as having a legitimate role in representing the interests of their current and future members in an industry or profession.[95] As the Full Court of the Victorian Supreme Court has expressed it: 'In arbitration …the [union] organization is not a mere agent of its members but stands in their place and acts on their account'.[96]

In society more broadly, unions were 'major instruments of social reform'.[97] The Royal Commission's fiduciary contention, if adopted, suggests that collective bargaining as a process and institution would be stripped back to a focus on an atomistic one-off transaction in which the union is merely a bargaining agent for those workers on whose behalf it is bargaining in that instance.

The Royal Commission presents an individualistic vision of bargaining, and encourages assumptions that each principal should ensure that their own personal outcomes are placed ahead of the rest. This is a subtle but powerful assault on the very idea of collectivity, and the common theoretical assumptions underlying its utility. For example, much scholarly writing on labour law starts from the premise that collective bargaining corrects a power imbalance between workers and employers for the benefit of those workers.[98] Under the fiduciary contention, much of this supposed countervailing power of the continuing organisation of the union is effectively neutralised.

The Royal Commission construes the union official as autonomous in bargaining, and the individual union member as someone in a state of disengaged passivity. The fiduciary relationship proposed by the Royal Commission is built on the idea of the union official acting independently from the members, effectively making the deal which the vulnerable, ill-informed member must accept from a position of ignorance. This narrative captures the individualistic dynamics of the agency-like relationship, as in the case of a person who engages an agent to buy them a car. The person purchasing the car is out of the loop, vulnerable to their agent's autonomy in respect of the purchase. It is this autonomy to act in a matter affecting the principal that Finn holds up as the defining feature of the fiduciary.[99]

By focusing the fiduciary obligation on a single instance of bargaining, the Royal Commission tears at the fabric of the potential ongoing relationship between

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94 Jill Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35(4) *Industrial Law Journal* 343.

95 *Federated Ironworkers' Association of Australia v Commonwealth* (1951) 84 CLR 265, 280.

96 *R v Gallagher* [1986] VR 219, 225 (citation omitted).

97 D W Rawson, *Unions and Unionists in Australia* (George Allen & Unwin, 1978) 9.

98 Shae McCrystal, 'Regulating Collective Rights in Bargaining: Employees, Self-Employed Persons and Small Businesses' in Christopher Arup, et al (eds) *Labour Law and Labour Market Regulation* (Federation Press, 2006) 597, 601.

99 Finn, above n 19, 13.

the parties, which has been central to unionised collective bargaining since first analysed by the Webbs over 100 years ago.[100] The duality of the union role envisioned by Flanders, 'a pressure group representing members and a co-legislator with the employer',[101] becomes a singularity based on wringing the best for members out of an isolated deal. Could it be any longer said, as Flanders and Fox have, that

> [c]ollective bargaining is not an unrestrained power struggle in which union leaders act like army commanders, urging the troops into total war, intent only on maximising gains and imposing the greatest possible defeat upon the employers. They are in the main cautious men keenly aware that collective bargaining is a continuing relationship within which the parties have to live together.[102]

The fiduciary model is likely to constrain cooperative partnership arrangements between employers and unions. Pluralistic approaches to labour relations may bring with them the provision of benefits by employers to unions (for example, provision of office space, collection of union dues, direct support for organising and union bargaining representatives) as a gesture toward sustaining the relationship.[103] The Royal Commission's fiduciary finding would interpret any such gesture as a breach of fiduciary obligation unless fully informed consent could be obtained. The issue of 'fully informed consent' as it exists in fiduciary law sits uneasily in the practical context of labour relations. Employers may be reluctant to publicly reveal information about their dealings with the union. And in a workplace where union officials may bargain for hundreds, perhaps thousands of workers, the withholding of consent by a single member to a benefit awarded to the union would have the effect of derailing the entire union strategy. It is not just possible, but likely, that different members could object to different parts of any proposed agreement given the context of concessional bargaining imposed by the statute.

The Royal Commission's fiduciary conception, if adopted, may also limit the capacity of unions to adapt to the rapidly changing world of work. Unions held to a fiduciary standard when bargaining in relation to members at an individual workplace may find themselves tied to archaic and dying work forms and industries. Imagine, for example, if the Teamsters Union had been limited to acting selflessly only in the interests of people whose job it was to drive teams of horses.[104] The logic of the Royal Commission clashes with the obligation to protect the interests of the union organisation, because it privileges the interests of the current individual members during bargaining. It is unlikely that people working as teamsters would give their fully informed consent to any action by the union designed to preserve its influence in times of motorised transport if this also led to the alteration of their existing conditions or loss of their jobs driving horses.

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100 Sidney Webb and Beatrice Webb, *Industrial Democracy* (Longmans, Green and Co, 1902).

101 Allan D Flanders, *Trade Unions* (Hutchinson University Library, 7th revised ed, 1968) 14.

102 Flanders and Fox, above n 85, 246.

103 H A Clegg, *The Changing System of Industrial Relations in Great Britain* (Basil Blackwell, 1979) 240.

104 The International Brotherhood of Teamsters originally covered drivers of horse drawn carriages, but as technology changed it expanded its membership to truck drivers, then to a broad range of workers in a variety of industries: <https://teamster.org/>.

Finally, the Royal Commission has already had a tangible impact on political discourse in Australia.[105] The narrative about selling out workers in return for corrupt payments has provided political opponents with a clear and powerful critique of the broader labour movement, including the Australian Labor Party and its leader Bill Shorten, who was the national and State Secretary of the AWU at the time the CM enterprise agreement of 2004 was made.

The fact that Australian labour law has reached this point is, in part, indicative of the paradoxical state of political attitudes to statutory labour regulation. Both major parties at the federal level have endorsed the embedding of concessional bargaining within the statutory enterprise bargaining system subject only to minimalist standards such as the better-off-overall test. Both parties have championed limiting union power and influence by focusing statutory bargaining on a single enterprise and effectively limiting the matters over which formal agreements are made to narrow 'bread and butter' issues. A Labor Government drafted the *Fair Work Act* in such a way as to invite the agency conception adopted by the Royal Commission, for example by placing the bargaining representative concept at the heart of the enterprise bargaining regime as discussed above. The Australian Labor Party has thus played a role in bringing about the diabolical rhetoric to which it is now subject.[106]

At the same time, the Liberal and National Parties have championed greater employer power over workplace matters. In 2002, the Workplace Relations Minister Tony Abbott addressed the Institute of Public Affairs and urged employers to take robust action against restrictive work rules, and nominated the CM–AWU enterprise agreement as one of the worst.[107] Now, the fact that the AWU participated in the removal of these restrictions is held up as a matter of public shame for 'selling out' the workers.[108]

VII Conclusion

The first step in the Royal Commission's ascription of fiduciary obligation to union officials in bargaining is that they are, in fact, fiduciaries, loosely based on an analogy with agents or agent-like roles. It has been argued here that there are significant barriers to sustaining this view of the union official: both the enterprise bargaining scheme itself, and the existence of the *Allen* view of fiduciary obligation of union officials tend not support this characterisation. From a labour relations perspective, the collaboration of union and employer, even to the point at which an employer gives the union money to assist it during a period of radical restructuring, is not necessarily the kind of absolute breach of trust regulated by the fiduciary standard.

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105 Matthew Benns, 'Long Story Shorten', *The Courier Mail* (Brisbane), 11 July 2015, 38; Dennis Shanahan, 'On the Witness Stand, Shorten Comes up Short', *The Australian* (Sydney), 11 July 2015, 16.

106 For example, Editorial, 'With Friends like Shorten, Workers Don't Need Enemies', *The Canberra Times* (Canberra), 20 June 2015, 6.

107 'Markets Must Get Up to Speed on IR: IPA', *Workplace Express*, 16 December 2002.

108 Editorial, 'Labor's Bad Union Bosses Sell Out the Membership', *The Australian* (Sydney), 6 January 2016, 11.

The application of fiduciary law, imposing the highest individual private law standard on a union official engaged in a single instance of bargaining, is not appropriate in the context of industrial bargaining. It has the potential to disrupt the current statutory regime by imposing individualistic obligations at odds with the majoritarian, concessional bargaining scheme envisaged by the statute and, if adopted, is likely to promote an even narrower construction of the role of unions in collective bargaining in Australia than is permitted under the present law.