# FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2013

## SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE

29 January 2014

ACTU
australian council of trade unions

Australian Unions
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# Abbreviations

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|---|---|
| 2012 Act | *Fair Work (Registered Organisations) Amendment Act* 2012 |
| ASIC Act | *Australian Securities and Investment Commission Act* 2001 |
| the Bill | *Fair Work (Registered Organisations) Amendment Bill* 2013 |
| CLERP Act | *Corporate Law Economic Reform Program Act* 1999 |
| Corporations Act | *Corporations Act* 2001 |
| FW Act | *Fair Work Act* 2009 |
| RO Act | *Fair Work (Registered Organisations) Act* 2009 |
| ROC | Registered Organisations Commissioner |

# Summary

The current model of regulating unions has its origins in bi partisan legislation introduced by the Prime Minister when he was Minister for Workplace Relations in the Howard Government.

The ACTU supports a legislative regime that promotes the operation of accountable, democratic and effective trade unions that are member-governed. Consistent with those objectives, the ACTU and its affiliates supported the passage of the *2012 Act*. The *2012 Act* dealt, in a precise and effective way, with the issues of substance. There is no case for further reform.

The Bill creates a large volume of new regulation (without evidence of its necessity), and a new Commonwealth regulator (where one already exists). Statements by the Minister in support of this Bill and in the materials upon which he relies are based on false equivalence, are demonstrably incorrect in material ways and serve to demonstrate how ill considered this Bill is.

The burden of this new regulation will fall on unions and rank and file union members. It is a politically motivated Bill which aims to tie unions in red tape and discourage workers from participating in a union.

There are credible concerns that the Bill violates international obligations and is beyond the constitutional power of the Commonwealth.

Unions are different to corporations (and to charities and clubs) and Australia rightly regulates each type of entity differently. Despite the Government's objectionable insistence that unions should be regulated like corporations, this Bill does not achieve this. Rather:

- Some of the elements that have been adopted from corporations legislation are outdated offences which have been criticised in government reviews and by academic commentators and are rarely used;
- Other adopted elements would simply not apply, if registered organisations were instead registered as companies.

# 1. Introduction

## About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For over 86 years the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector. All but 7 of the ACTU affiliates are organisations registered as employee organisations under the *RO Act*. When account is taken of federated structures adopted by unions, all but 6 small unions of the 45 organisations registered as employee organisations under that Act are ACTU affiliates.

The ACTU supports a legislative regime that promotes the operation of accountable, democratic and effective trade unions that are member-governed. Consistent with those objectives, the ACTU and its affiliates supported the passage of the *2012 Act*.[1]

The ACTU has also contributed to the adoption of improved governance standards in unions including by commissioning an Independent Panel on Best Practice for Union Governance[2], and by developing a Best Practice Governance Handbook. To implement a key provision of the *2012 Act* (which requires all union officers with financial decision-making responsibilities to undertake Fair Work Commission approved training) the ACTU developed an approved training course and has resourced a national roll-out.

[1] https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=e19156de-bf73-4b7f-9089-170fec521f01

[2] http://www.actu.org.au/Publications/Other/GovernancePanelReportIndependentPanelonBestPracticeforUnionGovernance.aspx

## General View of the Bill

The Bill is poorly conceived, badly motivated, and entirely unnecessary.

The Senate should reject the Bill in its entirety. It is a transparently political Bill in an area where there is no extant public policy problem.

We note that the 43rd Parliament, in mid-2012, considered and adopted a Bill that traverses much of the same ground. The ACTU supported the *2012 Act* which dealt with, in a precise and effective way, the issues of substance.

The *2012 Act* tripled the penalties that apply for breaches, introduced new standards in relation to financial management and mandates formal training for officers with financial responsibilities. We also note that the *2012 Act* dealt with all of the issues which were raised by the matters which have come to light in relation to the HSU (including limitations on the power of the regulators).

The *2012 Act* strikes an appropriate balance. While a post-implementation review after a period of some years of operation may be appropriate, re-visiting these matters now, when no substantive issue with their operation has been identified is inappropriate and unnecessary. It is important to recall that when the law in this area was last amended, Coalition Senators were circumspect about the need for immediate reform. In their additional comments to the report of the Education, Employment and Workplace Relations Committee Legislation Committee regarding the *2012 Act*, they were critical of the then government, asserting that "..this bill has been rushed together to meet a political end rather dealing with the substantive problems"[3] and they were very critical of the short time frame provided for the Committee process. Coalition Senators suggested that:

> ".. the bill should be delayed from further debate until the August 2012 sittings. This would allow the Minister and the Parliament to benefit form the KPMG review which is scheduled to be concluded by the end of July before making changes to the Act"[4].

[3] The Senate Education, Employment and Workplace Relations Legislation Committee, "Fair Work (Registered Organisations) Amendment Bill 2012 [Provisions]", page 22
[4] *Ibid.* page 23.

The deficiencies ceased on in KPMG report focussed almost entirely on investigation standards, process and procedure. The report, marked "confidential" but widely available on line, contained the following in its executive summary:

> "The key opportunity for improvement is for FWA to develop a formal set of procedures under which it conducts inquiries and investigations. The Australian Government Investigation Standards 2011 would be an appropriate and minimum 'standard' from which these procedures could be developed. These procedures should also take into consideration the specific legislative framework under which FWA conducts its inquiries and investigations."[5]

Following the KMPG report, the Fair Work Commission did in fact develop and publish policies concerning:

- Regulatory compliance (including inquiries and investigations);
- Litigation (in respect of breaches of the *RO Act*);
- Media concerning inquiries and investigations; and
- Offences (including referring matters to police).

It is unclear whether these developments, clearly envisaged and considered of some import at the time of the relevant Senate inquiry, have informed the process of developing the Bill.

The current Government is said to be committed to a reduction in unnecessary regulation and duplication of Government responsibility. This commitment is, on the evidence of this Bill, to be honoured in the breach. The Bill creates a large volume of new regulation (without evidence of its necessity), and a new Commonwealth regulator (where one already exists).

Nevertheless, we have assessed the Bill on its merits and we offer as detailed a discussion on its provisions as time has permitted.

[5] KMPG, "Process review of Fair Work Australia's investigations into the Health Services Union", page 5.

# 2. The Regulation of Unions

The federal industrial relations system was built on a foundational compact between organised labour and government: Organised labour submitted to a level of external regulation of its affairs in exchange for the rights that came with registration under the legislative scheme.

Recent decades have seen a shift in the balance of that compact. Whilst registration still carries with it particular rights, such as bringing proceedings on behalf of members and entering workplaces, other features of the industrial relations system have either passed into history (such as conciliation and arbitration of industrial disputes and union preference) or have ceased to be exclusive to registered unions. The paradox of this "labour market deregulation", has been that it has carried with it an increase in the level of regulation of registered unions' internal affairs – Australia's international obligation of non-interference with industrial organisations notwithstanding[6].

It is important when reviewing this history to recall that the domestic constitutionality of the laws regulating registered organisations rests on the premise that such law is akin to a licensing regime in respect of the particular (and ever diminishing) special rights that such organisations have in the federal system[7]. In this regard, it is important to note that since the High Court last declared the mode of regulation of registered organisations as valid, registered organisations rights have diminished in important ways, for example:

- The right of a worker's collective to organise industrial action now attaches to "bargaining representatives", who need only be legal persons. The previous limitation was that only registered organisations or employees could act in a representative capacity regarding industrial action;
- Registered organisations no longer have any capacity to make a collective agreement;
- Registered organisations are no longer party to any awards; and
- Registered organisations no longer have a legislative right to file applications in respect of termination of employment on behalf of their members.

[6] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

[7] *NSW v. Commonwealth* [2006] HCA 52 at [309]-[323]

Further, the government has announced policy changes which would further limit the rights of registered organisations that are unions, including in relation to enterprise bargaining, greenfield agreements and right of entry. The import of those provisions to the current inquiry may be better assessed when further detail becomes available.

A trend in the mode of regulation of registered unions in Australia is to attempt to adopt some elements of corporate regulation into the scheme for regulating unions, and the Bill now before the Committee is a further example of this. Corporate regulation of course is directed toward the protection of the economic interests of investors and creditors (and, to an extent, consumers), and serves a different purpose than the protection of the interests of union members.

There are some aspects of good governance that are universal (such as honesty, openness and accountability) and some lessons have been learned from regulation (including self-regulation) of other types of entity.

While the rhetoric of "regulate unions like corporations" has some superficial appeal, in reality it is based on a false-equivalence. Unions are different to corporations (and to charities and clubs) and Australia rightly regulates each type of entity differently.

Unions do not believe that it is appropriate that unions be regulated in the same way as corporations because the nature of the rights and interests that union members have in their union and its activities are not the same as the economic interests that shareholders have in companies.

We also not that in corporate regulation, the regulatory regime, investigatory powers and maximum penalties need to be sufficient to cover all types of corporations, including the largest multi-billion businesses and largest and most complicated corporate structures and transactions. In contrast, registered organisations and in particular the reporting units that are individually regulated by this Bill are relatively small, simple organisations with non-commercial purposes.

The provisions of Schedule 2 of the Bill are the substantive content apparently intended to give effect to the commitments that a coalition government will:

- amend the law to ensure that registered organisations and their officials have to play by the same rules as companies and their directors; and

- ensure that the penalties for breaking the rules are the same that apply to companies and their directors, as set out in the Corporations Act 2001[8].

Whilst on closer examination the provisions achieve neither of these objectives (as explained in Chapter 4), we believe that those objectives are fundamentally flawed.

The push to introduce greater harmony between the regulation of registered organisations and the regulation of companies has its origin in reform process instigated in 1998 when the then Minister for Workplace Relations Peter Reith, commissioned law firm Blake Dawson Waldron to conduct a review of the regulation of registered organisations, rather than relying on the expertise of the Commonwealth Public Service in policy development. This ultimately lead in 2001 and 2002 to Bills being introduced which shared some features with that now advanced. Those Bills were substantially amended to reach what Mr Reith's successor as Minister (now the Prime Minster) described as a sensible consensus. That consensus is the basis of the current laws.

The Bill also shares features with a Bill recently advanced in the prior Parliament on behalf of Senator Abetz[9]. In its submission to a Senate Committee Inquiry concerning that Bill, the Department of Education, Employment and Workplace Relations said as follows:

> "The policy rationale underpinning the amendments in the Bill is that registered organisations should be regulated in the same manner as corporations. This fails to recognise the differences between registered organisations and corporations.
>
> While there are some similarities, registered organisations are not, for the most part, comparable to corporations. Corporations are designed to generate wealth and protect the financial interests of shareholders. In contrast, registered organisations are established to represent their members in the industrial relation system with special rights under the FW Act, including in relation to collective bargaining and right of entry, and are an important element in ensuring the right to freedom of association.
>
> Further, the officers of registered organisations are often individuals who do not perform the role on a full time basis or for remuneration; as opposed to directors of corporations who in most cases are remunerated for their work.

[8] The Coalition's Policy for Better Transparency and Accountability of Registered Organisations, page 2.
[9] *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill* 2012

> The Department believes that while the key concepts, principles and structures of corporate governance overlap with and provide a useful starting point for regulating registered organisations, rules that account for the unique constitution of registered organisations, including their central purpose and the context in which they operate, is required."[10]

We respectfully concur with the views then expressed by the Department.

[10] Department of Education, Employment and Workplace Relations, "Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012," at paras 36-39.

# 3. The Regulation of Corporations

## Directors Duties

The very purpose of Corporations is to profit, for the benefit their members. Directors of Corporations that fail to faithfully pursue that objective risk breaching the law. The duties of directors are of central importance in ensuring Corporations are focussed on these foundational financial interests.

The proposed section 290A (Item 163 of Schedule 2 of the Bill) would introduce offences relating to the duties which currently appear as civil penalty provisions in sections 286-288 of the *RO Act*. The existing statutory civil duties in sections 295- 288 of the *RO Act* mimic the Director's duties in sections 180-183 of the *Corporations Act*. The proposed amendments are closely modelled on the criminal directors duties at section 184(1)-(3) of the *Corporations Act.* The penalties for breaching those criminal duties proposed in the Bill are in line with those set out in Schedule 3 of the *Corporations Act* for those analogous offences.

Whilst we recognise that the conduct that would amount to breaches of the proposed duties are sufficiently serious to attract criminal sanctions, we question whether the amendments would add any value to the existing legal framework. Those few elements of the *Corporations Act* regime of Directors' duties that are not already replicated in the *RO Act* (i.e. the criminal duties provisions that the Bill proposes to adopt) are at best of limited utility (and at worst entirely vestigial) in the sphere of Corporate regulation, and have been recognised as such by government reviews, academic commentary, and in regulatory practice.

In this regard, the history of the corresponding duties in corporations legislation is instructive. The *Corporations Act* was relevantly amended twice in respect of the duties placed on directors, and the reasons for those amendments bear repeating. The reforms introduced to directors' duties by the *Corporate Law Reform Act* 1992 were largely reactive to the "Company Directors' Duties" report of the Senate Committee on Legal and

Constitutional Affairs[11] ("Senate Reform Report") and the Government's response thereto[12] ("Government Reform Response").

At the time of the Senate Reform Report, the relevant duties were cast only as criminal offences in the *Companies Code* and the *Corporations Act,* save that a civil action could be brought by the company itself for breach of those duties in order to recover losses suffered by the corporation, or profits derived by the director, as a consequence of their non-compliance with the statutory duties[13]. The duties as at that time were:

- To act honestly in the exercise of powers and the discharge of duties;
- To exercise a reasonable degree of care and diligence in the exercise of powers and discharge of duties;
- To not make improper use of information acquired by virtue of their position to gain (directly or indirectly) an advantage for themselves or for any other person or to cause detriment to the corporation; and
- To not make improper use of their position to gain (directly or indirectly) and advantage for themselves or for any other person or to cause detriment to the corporation.

The Senate Reform Report was cast against a background where traditional thinking about corporate power and the capacity of company members (shareholders) to control companies, was under challenge. Put simply, corporations had a lot of power, and were not subject to sufficient control. The report's introduction contained the following:

> "*The corporate culture we know today is not the corporate culture of a century ago. The balance between ownership and control of companies has shifted towards the controllers. Management has great power over the assets which it pursues with vigour through takeovers, mergers and buy-outs…*
>
> *The modern corporate sector has a profound effect on life in Australia. It has achieved a high public profile and, with it, a high level of public scrutiny. The*

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11 Commonwealth of Australia, Senate Standing Committee on Legal & Constitutional Affairs, "Company Directors Duties", Australian Government Publishing Service, November 1989, ISBN 0 644 10716 2.

12 November 1991

13 See generally section 229 of the *Companies Code*, section 232 of the *Corporations Act*, circa 1989.

> *corporate sector is crucial to the creation of the nation's wealth. Society looks to it to produce that wealth in accordance with community values…*
>
> *Directors are the mind and soul of the corporate sector. They are crucial to how it operates and how its great power is exercised. They determine the character of corporate culture. Their actions can have a profound effect on the lives a great number of people, be they shareholders, creditors and consumers, and to the environment..*
>
> *Some say that companies are now so dominated by directors that their owners, the shareholders, are denied any effective say in their control. They advocate a different balance. Some argue the law should move to meet the reality that the corporate sector is now central not only to the economic well being of society, but to most dimensions of community life. They advocate the imposition of wider duties on directors*".

The points of difference to the modern status of unions in Australia should be glaringly obvious.

In terms of control, unions have been subject to increasing levels of regulation – the amendments now proposed being the third tranche of additional regulation in the last 18 months. A common thread throughout the various regulatory changes has been the requirement that unions (as a condition of their registration) be formed for the furthering or protecting of their member's interests, that they function democratically and that they be free from employer control. Likewise, the State has had the long-standing power to intervene in and/or cancel a union's registration if the union no longer effectively represents its members, has become subject to employer control or has ceased to function effectively. Officers of unions must be elected by and represent their members' interests, and have no power to refuse membership to persons eligible to become members under union Rules. The Rules of organisations cannot be changed without external approval[14] and must provide for management committees (including at branch level) to be controlled by members, failing which the State may ultimately re-write union Rules to give effect to that requirement. Further, notwithstanding the union amalgamations of the 1980s and 1990s, branches, divisions, divisional branches and other units continue to exist within unions which are predominantly self-governed by their respective members. The ratio of "officers" to "staff" within in any union or branch is vastly different to that in corporations, and with the exception of those comparatively very few staff (who in any event report to elected officers and whose work largely involves assisting members), unions are member-managed and controlled and supervised by the State, from the workplace delegate to the national secretary.

[14] Compare to the process of changing company constitutions by special resolution and the scheme of "replaceable rules" under the Corporations Act.

Further, it is self evident that there is no parallel between the nature of the power exercised by corporations and the power exercised by unions. Increasing restrictions have been imposed on unions through amendments to industrial relations regulation in recent decades, most significantly concerning their setting in the award system. Beyond the award safety net, changes to employment conditions must be negotiated on an enterprise-by-enterprise basis, which stifles the development of whole of industry standards. Bargaining at the enterprise level occurs without resort to industrial action except where the unions members and the Commission so approve in accordance with legislative secret ballot provisions which the International Labour Organisation has described as "excessive"[15].

The picture of unions today is thus far different to the position of corporations in the hangover of the corporate excesses of the 1980s that were alluded to in the Senate Reform Report. Australia is not confronted with a union movement that is an unbridled force that threatens the nation's economic security or the proper functioning of its capital markets. In truth, aside from a handful of matters that have attracted media attention, including for political reasons, union governance has been a non-issue for 30 years.

One of the principal concerns ventilated in the Senate Reform Report about the then current regime of directors' duties was that it imposed too low a standard on those economically powerful actors:

> "*The corporate sector possesses most of Australia's assets, employs most of its workers, and is the sector most capable of injuring the environment. Given this it is of vital concern to the community and the community is entitled to impose appropriate restrictions on it.*"[16]

Chief among the concerns was that the courts, on the rare occasions that they were called upon to rule on whether a director had met his or her statutory and general law duties, had imposed a subjective rather than an objective standard. The courts had not assessed directors' conduct on the basis of a standard that all individuals would be expected to meet, regardless of their capacity or circumstances, but rather had looked to what could be expected of the particular director, in the particular circumstances. The Senate Reform Report adopted the following as a summary of the position as it then was:

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15 ILO Freedom of Association Case Report No 357, June 2010.

16 *Senate Reform Report*, p. 17

> "..*the fewer a director's qualifications for office, the less time an attention he devotes to his office, and the greater the reliance he places on others, legally the less responsible he is*".[17]

The Senate Reform Report accordingly recommended that an objective duty of care be provided in companies legislation[18]. Tempering this somewhat, it also recommended that a "business judgement rule" be introduced to absolve directors of liability for decisions made in good faith, absent of personal interest, where they are appropriately informed about the subject matter of the decision at issue and rationally believe that it is in the best interests of the company.[19]

Importantly, the Senate Reform Report recommended that a raft of provisions be de-criminalised, along with dual criminal and civil liability in respect of director's duties. In doing so it noted that the criminal law aside from companies law *already dealt with* most offences involving fraud or dishonesty, and cited the Victorian Crimes Act offences of false accounting, obtaining financial advantage or property by deception and falsifying books of account. The Committee reported:

> "*Generally the submissions made to the Committee approved of penalties where they had acted fraudulently or dishonestly but not otherwise. The criminal law will deal with most offences involving fraud or dishonesty. An auditor who gave evidence to the Committee said that the criminal penalties helped to 'focus the view of directors', although he also expressed the view that civil remedies were probably more important.*
>
> *Although many sections of the Companies Code and Corporations Act provide for gaol terms, in lieu of or in addition to monetary penalties, it appears that courts are reluctant to impose them. When gaol terms are provided for breach of the law but the courts are disinclined to impose them because they seem too draconian, the law tends to fall into disrepute...*" (emphasis added)

Against a backdrop of the regulator's evidence concerning its difficulty of securing convictions, the Committee was attracted to making director's duties enforceable by way of civil penalty where the breach did not involve criminal fault or intent elements:

> "*Where a breach of the law does not involve criminality, a civil penalty may be appropriate. Proof of the breach would have to be established on the civil onus (that is, on the balance of probabilities)...In appropriate circumstances, people who suffered a loss as a result of the breach could simultaneously*

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17 *Senate Reform Report, p.27-28.*

18 *Senate Reform Report*, Recommendation 1.

19 *Senate Reform Report,* Recommendation 2.

> *bring a claim for damages in the proceedings taken to recover the penalty."*[20]

The *Government Reform Response* also focussed on these factors in accepting the recommendations of a dual liability regime:

> "*The Government agrees with the Committee that a mere failure to comply with a fiduciary duty should not attract a criminal sanction. It notes that a company officer may contravene section 232, and thus be subject to criminal sanction, without having committed any fraud against the company, its members or creditors. Further, because section 232 attracts the criminal law standard of proof, the regulatory authorities cannot succeed in any action under the section against a director for breach of duty unless they are able to establish the elements of breach beyond reasonable doubt. To a certain extent, this could inhibit recovery action where a breach, though not committed with any dishonest intent, has caused significant loss to the company.*
>
> *In the light of these factors, and in response to Committee's recommendations, the Government proposes to amend section 232 with the intention of confining the criminal liability of directors to conduct involving a dishonest intent. Civil penalties will be introduced into the Corporations Law in relation to breaches of section 232, falling short of dishonest intent.*" (emphasis added).

Indeed, by the time the Government Reform Response was delivered, the problems associated with securing criminal convictions were becoming glaringly apparent. The use of criminal sanctions had made enforcement problematic: ASIC generally failed to bring or conclude successful criminal cases, including in relation to matters in areas it identified as areas of "national priority" and in its dealings with the corporate excesses of the 1980s.[21]

The resultant *Corporate Law Reform Act* reflected the government's position: Civil penalties became the default enforcement option for directors' duties (with the attendant advantage of being easier to prove), save where criminal elements were present:

> "1317FA.(1) A person is guilty of an offence if the person contravenes a civil penalty provision:
> (a) knowingly, intentionally or recklessly; and
> (b) either:
> (i) dishonestly and intending to gain, whether directly or indirectly, an advantage for that or any other person; or
> (ii) intending to deceive or defraud someone.

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[20] *Senate Reform Report*, p. 190-191.

[21] Comino, V., "Civil or Criminal Penalties for Corporate Misconduct – Which Way Ahead?", University of Queensland Research Paper 09-01, 2009.

"(2) A person who contravenes a civil penalty provision is not guilty of an offence except as provided by subsection (1)."[22]

The duties themselves became:

" 232. (1) In this section:

"officer", in relation to a corporation, means:
(a) a director, secretary or executive officer of the corporation;
(b) a receiver, or receiver and manager, of property of the corporation, or any other authorised person who enters into possession or assumes control of property of the corporation for the purpose of enforcing any charge;
(c) an administrator of the corporation;
(ca) an administrator of a deed of company arrangement executed by the corporation;
(d) a liquidator of the corporation; and
(e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons;
(2) An officer of a corporation shall at all times act honestly in the exercise of his or her powers and the discharge of the duties of his or her office.
(4) In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances.
(4A) A reference in subsection (2) or (4) to the exercise of powers, or the discharge of duties, of an officer of a corporation is a reference to the exercise of those powers, or the discharge of those duties:
(a) in any case - in this jurisdiction; or
(b) if the body is a local corporation - outside this jurisdiction; or
(c) otherwise - outside this jurisdiction but in connection with:
(i) the corporation carrying on business in this jurisdiction; or
(ii) an act that the corporation does, or proposes to do, in this jurisdiction; or
(iii) a decision by the corporation whether or not to do, or to refrain from doing, an act in this jurisdiction.
(5) An officer or employee of a corporation, or a former officer or employee of a corporation, must not, in relevant circumstances, make improper use of information acquired by virtue of his or her position as such an officer or employee to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.
(6) An officer or employee of a corporation must not, in relevant circumstances, make improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.
(6A) A reference in subsection (5) or (6), in relation to a corporation, to doing an act in relevant circumstances is a reference to doing the act:
(a) if the body is a local corporation - in this jurisdiction or elsewhere; or
(b) otherwise - in this jurisdiction.
(6B) Subsections (2), (4), (5) and (6) are civil penalty provisions as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening any of them, or of being involved in a contravention of any of them.
(11) This section has effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person by reason of the person's office or

[22] *Corporate Law Reform Act* 1992, Item 17.

> employment in relation to a corporation and does not prevent the institution of any civil proceedings in respect of a breach of such a duty or in respect of such a liability."

As introduced, the civil penalty regime for directors' duties was criticised for placing criminal and civil enforcement on an equal footing[23]. The legislation was cast such that ASIC needed to make an election between civil and criminal proceedings because criminal proceedings could not be taken after civil proceedings, irrespective of whether the civil prosecution had succeeded. But this was a product of a conscious choice by legislators: civil penalties clearly were seen as the better enforcement option; indeed they were the major component of the reforms. However, internally ASIC investigators were required to liaise with the Director of Public Prosecutions over significant enforcement matters. The need for the DPP to satisfy itself that there was no criminal element in a matter was productive of delays and led to a situation where the DPP had an effective veto over the use of civil penalties.[24] ASIC investigators also reported that because the same conduct might breach both the Corporations Law and state-based criminal laws, it was preferable for charges under state law to be pursued because there was more certainty in the law and a perception that courts tended to hand down more severe penalties for the general criminal law than breaches of the Corporations Law.[25] In this environment, ASIC commenced only 14 applications for civil penalties between 1993 and 1999. The interrelationship between civil penalties, specific corporations offences and the general criminal law was leading to a degree of regulatory indecision and paralysis.

Further reforms were achieved by the *CLERP Act).* The economic focus of the reform effort was made plain in the government report which precipitated the amending legislation:

> "*In light of more recent judicial decisions which appear to increase the responsibility of directors and create a degree of uncertainty regarding their potential liability, concerns have been expressed that directors' attentions are increasingly being focussed on compliance issues rather than on wealth creation for shareholders. In particular, concerns have been expressed that the Corporations Law contributes to risk-averse behaviour on the part of directors.*
>
> *If this is the case, the losers are not only directors personally, but also shareholders, whose returns on company capital will ultimately be*

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23 Comino *Op. Cit.*

24 Gilligan, G., Bird, H. & Ramsay, I., "The Efficacy of Civil Penalty Sanctions under the Australia Corporations Law", Trends & Isssues in Crime & Criminal Justice (No. 136), Aust. Institute of Criminology, November 1999.

25 *Ibid.*

> *diminished. The nation also loses as behaviour that is unnecessarily risk-averse distracts from behaviour that could expand the enterprise and therefore wealth and employment.*
> *...*
> *While regulatory requirements are usually placed on directors as a means of protecting investors, or the general public, such protection may well be achieved at the expense of investors themselves. Accordingly, it is vitally important that any measures put in place as a means of promoting investor protection are properly assessed from an economic perspective to ensure that they do not ultimately act to the detriment of shareholders as a whole"*[26]

The *CLERP Act*, which took effect from 2000, removed the bar on Criminal Proceedings after Civil Proceedings[27] - no doubt giving the regulator some comfort in proceeding with civil matters. It further removed the statutory general duty to act honestly in favour of an expanded duty of care and diligence underwritten by a business judgement rule, and a duty to act in good faith in the best interests of the corporation for a proper purpose. These were civil penalty provisions, separate provisions were retained for criminal liability where recklessness or dishonesty were involved (being a long-standing basis of criminal responsibility), however the duty of care and diligence was decriminalised entirely. The report which precipitated those amendments stated that:

> "As a matter of principle, criminal sanctions on directors should only apply in exceptional circumstances and not from a failure to exercise sufficient care and diligence"[28].

While acknowledging that CLERP resulted in a further roll-back of corporation specific criminal offences, a puzzling aspect of the CLERP reforms was the retention of *any* specific criminal provisions relating to directors duties. It is unclear why recommendations made to the Standing Committee of Attorneys General by its Model Code Officers Committee were seemingly ignored. Specifically, after noting that:

> *"...the Corporations Law was prepared under great pressure and the relationship between the Corporations Law offences and the Crimes Act offences is not well worked out."*[29]

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[26] Commonwealth of Australia – Corporate Law Economic Reform Program, "Directors' Duties and Corporate Governance: Facilitating Innovation and protecting investors", Paper No. 3, 1997, ISBN 0 642 26117 2, page 9-10

[27] *Schedule 1, Item 6, s. 1317P*

[28] Commonwealth of Australia – Corporate Law Economic Reform Program, "Directors' Duties and Corporate Governance: Facilitating Innovation and protecting investors", Paper No. 3, 1997, ISBN 0 642 26117 2, page 50.

[29] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, "Model Criminal Code Chapter 3 Report – Theft, Fraud, Bribery and Related Offences", December 1995, ISBN 0 642 208 48 4

the Model Code Officers Committee recommended in its final report:

> "*Fraud involving corporations should be prosecuted under normal criminal law. The Corporations Law should not include a separate fraud offence*"[30]

On this view, at the very least the specific provisions concerning the dishonest use of information or position to gain an advantage or to subject the corporation to a detriment ought not have been retained (either in amended form or otherwise).

Outside of government, the *CLERP* process was subject to academic criticism for the lack of attention it paid to the overlap with the existing criminal law:

> "The latest version of the *Corporations Law* offences have come about through the Corporate Law Economic Reform (CLERP) process. But, as appears to have been the history over the last 100 years, such changes are being made without detailed consideration of the civil regulation of companies to the existing provisions Crimes Acts. As an example of this, the 1997 CLERP 3 paper, in outlining the liability of directors, discussed their liability under *Corporations Law* and then concluded:
>
> > *'Legislation other than the Corporations Law may also impose duties on directors. For example, environmental control legislation in a number of States and Territories places obligations on directors as well as companies'*
>
> It is of concern that such a statement suggests that the peak corporate reform committee did not examine the relevant provisions of the Crimes Acts. Despite this, the Crimes Act provisions remain powerful and flexible weapons in enforcing corporate honesty, and it is timely to review their scope and operation"[31]

The learned author of the article referenced above pointed out that at around the time the CLERP reforms took effect, the criminal law outside of Corporations Law was a powerful tool. Not only were offences of general application apt to prosecute directors, such as larceny, obtaining by deception, fraudulent conversion and making false instruments, but there were a series of offences in State and Territory Laws that were specific to officers of a body corporate. Since then, it has also been accepted that the elements of the offence in 184(2)(a) concerning improper use of information are indistinguishable from the offence of fraud at common law[32], and it has been made clear that test for dishonesty used in section 184 is no different to that ordinarily applied in criminal cases[33].

Consistent with the above criticisms and indeed the acknowledgement in the Senate Reform Report over 12 years ago concerning the coverage of the criminal law, the trend in

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30 *Ibid.*

31 Steel, A., "From Hard Labour to Spies v. The Queen: Prosecuting Corporate Officers under the Crimes Act", (2001) 75 Australian Law Journal 479.

32 *Howarth v. ASIC* [2008] AATA 278

33 *S A J v. The Queen* [2012] VSCA 243

corporations law clearly is an increased emphasis on *civil* penalties as a tool for enforcement. Post the *CLERP Act*, the civil directors' duties have been located in sections 180-183 of the *Corporations Act* and the criminal duties at section 184 thereof. In the first four years of the operation of the *CLERP Act,* ASIC issued 25 Civil Penalty applications and concluded 19 of them, and had been unsuccessful in only one[34]. Based on ASIC annual reports, in the last 10 years it completed 806 Civil Proceedings versus 490 criminal proceedings[35]. A review of Austlii reported sentencing judgements and appeals over that period indicated that only 16 cases so reported involved a sentence for a breach of the criminal directors' duties in section 184 of the *Corporations Act*. It was also evident that charges were routinely pursued under other criminal laws for the same course of conduct alleged in the laid pursuant to the section 184 duties – cases were effectively brought in the alternative and sometimes jointly prosecuted by both State and Commonwealth Directors of Public Prosecutions. Meanwhile many of the corporate misdeeds which in recent years have generated a great deal of public interest and condemnation have resulted in civil penalty proceedings only, such as *Vizard*, *Water Wheel, One.Tel, James Hardie, Citigroup* and *AWB.* Further, the allegations concerning former officials of the Health Services Union which in large measure have fanned the media and political interest in union governance in recent times have been (and are being) addressed in least in part by the application of State based criminal law[36].

It is in this context that we view the proposed section 290A as a retrograde step. There is no trigger for further regulation. The appropriate response if there were such a trigger now evident would be to do what already has been done – introduce a civil penalty regime that enables the regulator to punish and deter and that provides for losses to be compensated; and let the criminal law continue to do its job. On the issue of general duties, it is the regulation of corporations, not registered organisations, that is out of step.

Further, we wish to remind the Committee of what was said to the Senate Standing Committee on Education, Employment and Workplace Relations by the Department of Education, Employment and Workplace Relations when, similar provisions were proposed (on behalf of Senator Abetz) in November of 2012:

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[34] Comino *Op.Cit*

[35] Based on a review of the ASIC annual reports from 2001/2 to 2011/12

[36] See *General Manager of the Fair Work Commission v Thomson* [2013] FCA 380, http://www.hsu.asn.au/message-from-secretary-gerard-hayes-in-relation-to-michael-williamson-2/

> "To introduce criminal sanctions for breaches of the RO Act would be a significant change in the regulation of registered organisations.
>
> Officers and employees of registered organisations are subject to general criminal laws, for example in relation to theft or fraudulent conduct. However, the RO Act does not generally provide for imprisonment for breaches of their obligations. The only circumstance in which the RO Act provides for imprisonment is in relation to the victimisation of whistleblowers (section 337C).
>
> Given that officers of registered organisations often perform their role in a voluntary or part time capacity, there is a significant risk that introducing more severe penalties could negatively impact on registered organisations in relation to their ability to attract appropriately qualified individuals to become officers. This risk was highlighted by Mr Stephen Smith (Director, National Workplace Relations) of the Australian Industry Group (AIG), who has indicated to the Committee that the introduction of criminal liability would act as a "deterrent" to people giving up their time to sit on committees of employer groups (Senate Education, Employment and Workplace Relations Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment Bill 2012, 22 June 2012, Committee Hansard, p.5).
>
> This has the potential to diminish the ability of registered organisations to adequately represent their members."[37]

Finally, it would be remiss to fail to point out that what is now proposed is certainly not new. In 2001, the then government introduced the *Workplace Relations (Registered Organisations) Bill*. It contained at proposed sections 272-275 the civil obligations that now appear at sections 285-288 of the *RO Act*. However, it also went on at proposed section 277 to include criminal duties in almost identical form to those now proposed (save for the ten fold increase in penalties now sought):

> "277 Good faith, use of position and use of information--criminal offences
>
> *Good faith--officers*
>
> (1) An officer of an organisation or a branch commits an offence if he or she intentionally or recklessly fails to exercise his or her powers and discharge his or her duties:
>
> (a) in good faith in what he or she believes to be in the best interests of the organisation; or
>
> (b) for a proper purpose;
>
> and he or she does so dishonestly.
>
> Maximum penalty: 200 penalty units.
>
> *Use of position--officers and employees*
>
> (2) An officer or employee of an organisation or a branch commits an offence if he or she uses his or her position:

[37] Department of Education, Employment and Workplace Relations, "Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012", para 40-43.

> (a) dishonestly with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the organisation or to another person; or
>
> (b) reckless as to whether the use may result in him or her or someone else directly or indirectly gaining an advantage, or in causing detriment to the organisation or to another person.
>
> Maximum penalty: 200 penalty units.
>
> *Use of information--officers and employees*
>
> (3) A person who obtains information because he or she is, or has been, an officer or employee of an organisation or a branch commits an offence if he or she uses the information:
>
> (a) dishonestly with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the organisation or to another person; or
>
> (b) reckless as to whether the use may result in himself or herself or someone else directly or indirectly gaining an advantage, or in causing detriment to the organisation or to another person.
>
> Maximum penalty: 200 penalty units.
>
> (4) It is a defence to an offence against this section if another provision of this Act or the Workplace Relations Act required the officer or employee to do the act in question."

Proposed section 277 was removed after amendments proposed by the opposition were agreed to by the government. In so accepting those amendments, the then Minister (now Prime Minister) said:

> "As has been said on previous occasions in the course of debating the Workplace Relations (Registered Organisations) Bill 2001, the government's intention all along was not to introduce a bill on contentious matters but to introduce a bill which is, as far as is humanly possible, an expression of the consensus of all the people with an interest in the regulation of registered organisations. For that reason, the government has been prepared at every step in this process to consider and, as far as is humanly possible, to take into account all the various concerns that have been put to us by trade unions and others and, most recently, by members opposite".[38]

Ultimately the Bill did not pass, owing to an intervening election. The *Workplace Relations (Registration and Accountability of Organisations) Bill* 2002 relevantly reproduced the *Workplace Relations (Registered Organisations) Bill* 2001 as amended by the previous Parliament. In his second reading speech in support of the 2002 Bill, the Prime Minister (then Minister for Workplace Relations) said:

> "This legislation is perhaps somewhat unusual in that it is a sign that, notwithstanding the differences between the parties, some of which I have just noted, we do have many things in common. I guess two of those great values that we

[38] Hansard House of Reps 27/08/2001 p 30318

> have in common are our commitment to democracy and our commitment to accountability in the great institutions of Australian society. This bill is designed to enshrine those great values of democracy and accountability in the registered organisations which comprise our workplace relations system. There is quite a long history to these particular bills. They originated well back in the life of the previous parliament as a discussion paper put out by my distinguished predecessor, Peter Reith. They then became an exposure draft bill. As a result of a constant process of consultation and dialogue between employer organisations, union organisations and members opposite some of the more controversial parts were taken out of the exposure draft of the bill. Eventually a bill did go through the lower house of the parliament just prior to the last election with consent of the opposition, and the bill would have gone through the Senate I am sure but the election intervened and so now we are doing the same thing again. I have to say that there have been further amendments to the bill post-election in part to take account of constructive suggestions made by the shadow minister for workplace relations, the member for Barton, and in part to restore some of the earlier constructive suggestions of the former shadow minister, the member for Brisbane.
>
> This is a genuine exercise in finding common ground. This is a genuine exercise in trying to find those things which unite us rather than dwelling on the things that divide us, which is perhaps an inevitable part of the political process—but we should not be allowed to obscure those fundamental things that we have in common. Given all the changes which have taken place over the last few years in workplace relations, it is appropriate that the technical rules governing registered organisations should be updated. The last significant amendments to those rules took place under the Hawke government in 1988 and, indeed, some of the regulatory provisions have been unchanged for many decades.
>
> Essentially this bill proposes to modernise the financial and reporting requirements and improve the disclosure of financial information to the members of registered organisations and to improve the democratic control of those organisations through ensuring the better integrity of industrial elections. Generally speaking, what the government has sought to do with these bills is to ensure that the same standards of conduct and behaviour which the law imposes on company directors and on corporations should be imposed and expected of registered organisations and the officers of those organisations"[39].

The passage of the *Workplace Relations (Registration and Accountability of Organisations) Bill* 2002 led to Schedule 1B of the *Workplace Relations Act,* which was essentially unchanged by the *WorkChoices* or *Fair Work* amendments since, save for those most recent amendments effected by the *2012 Act*. We see no good reason to disrupt the sensible consensus position.

## Investigate framework

As previously identified, the Corporate sector is uniquely placed to have a substantial impact not only on the personal wealth of investors but on the nation's economic security and the functioning of its capital markets. As a corporate regulator, ASIC challenged with regulating a sector that is exponentially better resourced and more sophisticated in its

[39] Hansard House of reps 17/9/2002 p6497-8.

operations than ASIC itself. Conversely, many of the reporting units that are to be overseen by the *ROC* lack the capacity even to engage more than handful (if any) of full time office staff.

Items 215-230 of Schedule 2 the Bill seek to adopt, with some modification, the investigative framework under the *ASIC* Act. The impetus for that framework was the *Rae Report*[40] of 1974, a report prompted by (and detailing) substantial manipulation of and misconduct in securities markets, particularly in the mining industry. The report recommended the creation of a national statutory authority, with strong investigative powers, in response to those identified problems. Early versions of the scheme were evident in the *National Companies and Securities Commission Act* 1979 and were built upon through amendments to uniform schemes and the transition to the Australian Securities Commission and ultimately the Australian Securities and Investment Commission in the late 1980s, such reforms also responsive to the corporate conduct and regulatory failures evident in that period. Perhaps as a reflection of the severity of such conduct and the resource disparity between the regulator and the regulated, the investigative powers have evolved to become expansive and are characterised by shortcuts that would likely attract the ire of civil libertarians were they focused on any other sphere of regulated conduct: such as compulsory interrogation, compulsory powers to require production of documents without the issue of a warrant and the curtailment of legal professional privilege and the privilege against self incrimination or self exposure to a penalty.

The investigative framework in the *ASIC Act* is focussed on the regulator's power to prosecute contraventions of the law, including offences[41]. The investigative framework under the *RO Act* is not intended for the investigation of offences. Whilst it does apply to the investigation of contravention of civil penalties, it also serves other purposes, such as:

- Internal management according to the Rules of organisations[42];
- Irregularities evident from Auditors reports[43]; and
- General finances and financial administration[44].

Moreover, there is a broad enabling power to that permits investigations to be conducted "in the circumstances set out in the regulations"[45] .

[40] Senate Select Committee on Securities and Exchange, "Australian Securities Markets and their Regulation".
[41] See generally Division 1 and Division 5 of Part 3 of the *ASIC Act.*
[42] Section 331(1)(d) of the *RO Act.*
[43] Section 332 of the *RO Act.*
[44] Section 333 of the *RO Act.*

Accordingly, unlike the case with ASIC, many investigations that are or could in future be conducted under the *RO Act* may not be prompted by any suspicion (reasonable or otherwise) that the law has been contravened. Some investigations initiated under the *RO* Act may reveal a need for an organisation or a reporting unit thereof to improve its practices in some way, without revealing any conduct amounting to a contravention. The outcome of an investigation therefore may be a requirement to improve those practices[46], or a re-definition of reporting units[47], rather than a prosecution. Alternately, an investigation may result in no adverse finding at all, and given the breadth of the terms of enabling provisions referred to above, may be commenced without any intent to make an adverse finding. An investigative framework that is focussed solely on prosecution and enforcement is ill suited to these aims and is likely to discourage reporting units from seeking compliance advice from the regulator.

[45] Section 331(3) of the *RO Act.*
[46] Section 336(2) of the *RO Act.*
[47] Section 247 of the *RO Act.*

# 4. Selective application of Standards

As already observed, the stated policy aims for this Bill are to:

- amend the law to ensure that registered organisations and their officials have to play by the same rules as companies and their directors; and

- ensure that the penalties for breaking the rules are the same that apply to companies and their directors, as set out in the Corporations Act 2001[48].

Whilst, for the foregoing reasons, we regard these objectives as misguided, it is clear the Bill will not achieve them.

## Playing by the same rules

The level of oversight of the operations of registered organisations is unparalleled when like for like is compared in the *Corporations Act*.

The reporting scheme under the *RO Act* requires reporting at branch and "reporting unit" level, not at the level of the Registered Organisations as a whole. In most circumstances this requires financial reporting and the associated obligations to be complied with at Branch level.

Whilst the *Options Stage Regulatory Impact Statement* attempts (through an undisclosed methodology) to provide total net asset values for "Registered Organisations", this is a pointless aggregation given that it is not Registered Organisations, but rather reporting units thereof, that are separately required to prepare and lodge financial reports. It is incorrect to attribute the combined assets of the respective reporting units to the "registered organisation" as a whole without recognising that in most federated structures the reporting units a highly independent and the assets of one reporting unit are not available to the others.

[48] The Coalition's Policy for Better Transparency and Accountability of Registered Organisations, page 2.

The overwhelming majority of most branches of most unions would meet the "small proprietary company" test in section 45A(2) of the *Corporations Act* and/or the "small company limited by guarantee definition" at section 45B thereof such that they would not be required even to prepare annual reports or directors reports. Accordingly the granular level of reporting maintained in the Bill would not be demanded were those branches instead established as small proprietary companies or small companies limited by guarantee (as many non-profit organisations are).

Further, the officer disclosure regime set out in the Bill (which applies to all officers in the Registered Organisation and constituent Branches, Divisions etc) far exceeds those applicable to Corporations, for example:

- Director's disclosure obligations under the *Corporations Act* regarding material personal interests do not clearly extend to the interests held separately by relatives[49];

- Director's disclosure obligations under the *Corporations Act* regarding material personal interests are required to be made to other directors only[50]; and

- Director's are not obliged by the *Corporations Act* to disclose material personal interests relating to dealings that are subject to member approval[51].

In addition, it is misnomer to assume (as the Bill does), that officers of registered organisations or their branches are in all cases the functional equivalents of company directors or indeed *officers* as defined in the *Corporations Act*. Some undoubtedly are, however others (such as persons who are voting members of councils have powers in relation to the determination of branch policy) clearly are not. Such persons include rank and file members in voting positions that meet once or twice a year to determine broad policy matters (e.g. whether to pursue better parental leave provisions when bargaining in a given industry sector).

Finally, Item 19 of Schedule 2 of the Bill would require registered organisations rules to require that minutes of all meetings of committees of management be kept. Whilst registered organisations clearly already do so, we merely point out that there is no comparable provision in the replaceable rules contained in the *Corporations Act*.

[49] Section 191
[50] Section 191(1)
[51] Section 191(2)(a)(iii)

## Penalties for breaking the rules.

The Bill sets penalties of up to 500 penalty units[52], or $85,000, for not lodging financial reports within the required time. Late lodgement by corporations of annual financial reports is subject to an ASIC late fee of $72, or $299 if it is more than a month late[53]. The $85,000 penalty is also available if a reporting unit does not disclose the directorships or board positions of its employees[54], an obligation that does not exist at all under the *Corporations Act*. These are but two examples of the increased level of penalties available under the Bill.

On the question of increased penalties in the Bill generally, the Department of Employment (in an attachment to the submission of the Minister to this inquiry), says as follows:

> "Whereas some stakeholders pointed our that the higher range of penalties under the Corporations Act only applied to larger corporations, the approach taken with these reforms was to align with the existing registered organisations framework, which does not (and never has) distinguished between organisations on the basis of membership or revenue or other considerations."[55]

Even a cursory examination of sections 270 and 271 of the *RO Act* reveals this to be incorrect. Such a fundamental misunderstanding of the operation of the regulatory regime should sound yet further warning alarms as to how ill considered this Bill is.

The expansive reporting requirements of "reporting units" as compared to corporations of the same size and purpose also means that penalties become available notwithstanding that the obligation which attracts the penalty would not exist if it the reporting unit were instead such a corporation. The disjuncture between reporting units, registered organisations and companies also has the consequence that the scope of investigations

[52] See amendments to sections 286 and 306.
[53] *Corporations (Fees) Regulations* 2001, Reg 3 and Item 28 of Schedule 1; see also http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Fees_for_commonly_lodged_documents.pdf/$file/Fees_for_commonly_lodged_documents.pdf
[54] See amendments to section 253 and 306 and the General Manager's Reporting Guidelines http://www.fwc.gov.au/documents/organisations/reporting_guidelines/fr_guidelines_253.pdf at [37]
[55] at paragraph 63.

for civil penalty matters under the *RO Act* is broader than would exist if reporting units were established as (for example) companies limited by guarantee. The heavy handed investigative powers will therefore be now targeted at matters they were not developed to address.

There are a number of subtle but concerning differences between the investigative scheme proposed in the Bill and that which exists under the *ASIC Act*, which as previously recounted is the source of those provisions:

- There is no requirement in the Bill that an examination notice be in a prescribed form[56];

- Notwithstanding the assertions by the Department of Employment in its submission to the previous inquiry and attached to the Minister's submission to this inquiry[57], there is no requirement in the Bill that the questions which a person may be required to answer on oath (on pain of criminal prosecution), be relevant to an investigation[58];

- There is no power in the Bill for the Investigator to provide copies of record of examination to a lawyer or other person[59]. As there is also no requirement to inform a person of their right to request a copy themselves, it is likely that the majority of unrepresented persons will not receive such copies and will accordingly be prejudiced in the preparation of any defence to any allegations ultimately brought. This is particularly the case given that unrepresented persons will be unaware that they need to assert the privilege against self exposure to a penalty prior to any disclosure in order to rely on it at any later stage[60];

- The interplay between section 335 of the *RO Act* and clauses 335K and 335L of the Bill creates a broader power for the issue of search warrants than exists under the *ASIC Act*. Under the latter, warrants may only be sought for books whose production could be required under Division 3 of Part 3 of the *ASIC Act*. In the context of investigations, this effectively limits the power to require

[56] Compare section 19 of the *ASIC* act and Item 217 of the Bill.
[57] See paragraphs 34 and 36 of the Attachment to the Minister's submission.
[58] Compare section 21(3) of the *ASIC* Act and clause 335D(3) of the Bill.
[59] There is no provision in the Bill comparable to section 25 of the *ASIC Act*.
[60] See clause 387AD(2)(a) of the Bill.

production of books relate to the affairs of a company relevant to a suspected contravention[61]. Under the Bill, the proposed power to issue warrants covers "particular documents whose production could be required under section 335"[62]. Accordingly, documents could be required for the purposes of an investigation aimed securing better practices or, authorised under the broad delegated power, will be within scope. It is extraordinary to authorise the issue of a warrant where no unlawful (let alone criminal) conduct is suspected. This unjustness also consequentially infects clauses 335P, 335Q, 337AB, 337AC and 337AE of the Bill.

- Item 209 of Schedule 2 of the Bill would permit the Court to order disqualification from office on account of a contravention of a civil penalty provision. Whilst the text of the provision is a reasonably faithful adaptation of section 206C of the *Corporations Act*, its practical effect is significantly different and ill suited to regulation of registered organisations. Firstly, much of the conduct which is capable of attracting a disqualification order under section 206C has no counterpart in the activities of registered organisations, for example:
    - Failing to disclose proposed demutualisation[63];
    - Contraventions by the Company Secretary[64];
    - Contraventions in dealing with redeemable preference shares[65];
    - Insolvent trading[66];
    - Contravention of duties and responsibilities applicable to the management of a registered managed investment scheme[67]; and
    - A responsible entity for a management investment scheme acquiring an interest in the scheme on uncommercial terms[68].

Secondly, the *RO Act* (including as now proposed to be amended) subjects officers to civil penalties for conduct that has no counterpart in the activities of Corporations or within the scope of section 206C of the *Corporations Act*, for example:

- False or misleading statements about membership or resignation[69];

[61] Sections 13, ,28(d) ,30, 35 of the *ASIC Act.*
[62] Clause 335L(1) of the Bill.
[63] *Corporations Act* subclause 29(6) of Schedule 4
[64] *Corporations Act,* section 188
[65] *Corporations Act,* sections 254L(2), 265D(3), 259F(2), 260D(2).
[66] *Corporations Act,* section 588G(2)
[67] *Corporations Act*, section 601FC, 601FD
[68] *Corporations Act*, section 601FG(2)

- Causing a contravention of an order or direction[70]; and
- Failure to disclose material personal interest of relatives, or relating to dealings that are subject to member approval[71]

Thirdly, and as previously identified, the reporting scheme under the *RO Act* requires reporting at branch and "reporting unit" level and therefore demands reporting at a level which would not be demanded were those branches instead established as small proprietary companies or small companies limited by guarantee. Accordingly, were the current branch officials instead directors of such companies of the same scale, they would not be subject to particular requirements (partially traversed in accounting standards), the non-compliance with which would leave them amendable to disqualification orders[72].

We are also concerned about the provision which conditions the available extent of any civil penalty at Item 4 of Schedule 2 – the definition of "serious contravention". This provision draws on section 1317G of the *Corporations Act*. A notable distinction is that, in the *Corporations Act*, the provision conditions whether any pecuniary penalty may be awarded *at all*. In the Bill, it is proposed that penalties be available irrespective of whether the conduct concerned meets the definition of a "serious contravention" – the function of the definition in the Bill is to make a *higher level* of penalty available.

Where the definition of "serious contravention" is met, penalties of up to 1200 penalty units will be available. Where it is not met, penalties of up to 100 penalty units will remain available. Further, under section 1317G the *Corporations Act*, the quantity of civil penalty is fixed at $200,000 and that limit applies equally to persons and bodies corporate. Under the proposed amendments, the quantity of penalty is expressed as penalty units, thus is subject to review every three years pursuant to section 4AA of the *Crimes Act* 1914.

Further, under the proposed amendments, the penalty units applicable to these contraventions is five fold for bodies corporate (including registered organisations). On current figures this translates to a maximum penalty of $204,000 for an individual and $1,020,000 for a registered organisation. The penalties are in our view excessive and clearly inconsistent with the expressed policy.

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[69] *RO Act*, section 175, 176
[70] *RO Act*, sections 297-303.
[71] Proposed section 293C
[72] For example section 267 of the *RO Act*, proposed sections 293B and 293C.

In addition, the definition of a "serious contravention" does not translate well into the sphere of regulating registered organisations. The first limb ("a serious contravention is …a contravention that materially prejudices the interests of the organisation or branch, or the members of the organisation or branch") is problematic because its function in the *Corporations Act* is to address conduct which impinges on the capacity of the company to achieve profit for the company and deliver a financial return to shareholders (i.e. "members" of the Company). These are not the bases of association that underpin unionism. The second limb ("a serious contravention is …a contravention that materially prejudices the ability of the organisation or branch to pay its creditors") has little relevance where registered organisations are under no general obligation to generate profit or indeed remain solvent. The third limb is ("a serious contravention is …a contravention that is serious") is circular in this context given the result and function the definition serves – is the necessary implication the legislature intends to impose penalties of 100 or 500 penalty units for contraventions that a Court would not regard as serious and for which an officeholder in an corporation engaging in the same conduct could not be penalised?

In addition, the enforcement framework in the *RO Act* permits registered organisations to commence proceedings for compensation for losses suffered by breaches of civil penalty provisions[73], and permits (with the regulator's permission), union members to prosecute civil penalty matters as against their union[74]. These provisions operate in an overall framework designed to ensure democratic control. The framework in the *Corporations Act* provides no rights to shareholders or any person other than the Regulator to seek penalties for breaches of civil penalty provisions[75]. To the extent that stronger investigative powers in the corporations sphere might be justified by concerns about the disempowerment of company members or shareholders (as alluded to in the Senate Reform Report), those concerns are not applicable here.

## Other differential impacts

We note that whilst on its face this Bill applies to Registered Organisations without any overt distinction between unions and employer organisations, the burden of this regulation will in practice fall on unions and is likely to be avoided by employer organisations. An important historical consequence of registration as a union is the

[73] Section 310(3) of the *RO Act.*
[74] Section 3010(1) of the *RO Act.*
[75] Section 1317J of the *Corporations Act.*

ability to access the very limited immunities form civil liability for the organisation of industrial action (where that action is "protected") under the *FW Act*[76]. This immunity is important to unions and their members. No equivalent need exists for employer organisations, as the equivalent immunity (for "protected" lockouts) is vested in the individual employer.

The passage of this Bill is likely to see many employer organisations de-register and adopt a corporate structure (for example by forming a company limited by guarantee) that avoids the disclosure, training, rules and oversight provisions of this Bill. We note that several prominent employer organisations (including for example AMMA) are not registered organisations. Although we are unaware of their reasons for doing so, a number of employer associations registered under the Queensland State Industrial Relations system have de-registered in advance of the application of amendments to that system which impose greater regulation on industrial organisations: The Restaurant and Caterers Employers Association of Queensland[77], The Queensland Private Childcare Centres Employers Organisation of Queensland and Consulting Surveyors Queensland. We are also aware, from media reports[78], that the Victorian Employers Chamber of Commerce and Industry (currently a Registered Organisation) is pursuing litigation in the Supreme Court of Victoria seeking to achieve non-profit status under State payroll and land tax law. We make no criticism for it adopting this course. We observe that some of the definitions relevant to tax exempt status under some of the provisions in question bear similarity to those under Commonwealth law, and thus the decision in the matter might pave the way for employer organisations to de-register while retaining the tax-free status they currently enjoy by virtue of their status as Registered Organisation.

Finally, there is somewhat of an uncomfortable paradox in dividing the existing functions of the General Manager between the proposed ROC and the General Manager (which many provisions in Schedule 1 of the Bill are directed to), while publicly maintaining that this measure introduces greater consistency with the regulation of Corporations. ASIC, the Corporate Regulator, fulfils the functions as registrar, investigator and enforcement agency, under the one roof. Moreover it seems counter intuitive to split the existing functions of a regulator into two and re-allocate staff across different agencies to achieve

[76] This immunity now applies to a "person" as well, meaning new unions could participate in the system through a corporate structure, but possibly not an unincorporated one.
[77] A constituent association of the extant *Restaurant and Catering Australia*, a National Federation registered as an unincorporated association under NSW State law.
[78] Bessant, J., "Business lobby VECCI is deluded and deceitful in its charity claim", theage.com.au 16/1/2014; Vedelago, C., "Victorian Employers' Chamber of Commerce and Industry seeks charity status", theage.com.au, 12/1/2014.

reform in this area. This is clearly is not an efficient structure and one suspects that it will (perhaps by design) constitute low hanging fruit for the recently announced Commission of Audit[79]. A more thorough enquiry along these lines would look also to the substantial duplication of ASIC's investigative powers in Schedule 2 of the Bill and query why two agencies should been tasked with administering them.

[79] Consider in particular the items on page two of the terms of reference: http://www.financeminister.gov.au/docs/NCA_TERMS_OF_REFERENCE.pdf

# 5. The potential impact of the amendments to interfere with the ongoing operation of registered organisations in Australia.

The principal of non-interference in employee and employer organisations is central to International Labour Organisation Convention 87 Freedom of Association and the Protection of the Right to Organise. Among other requirements that Convention provides that:

- Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.
- Workers' and employers organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their activities and to formulate their programmes. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.
- Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Although Australia is a signatory to this convention, over time our domestic law has sailed closer to the line of what might be regarded as legitimate. Ultimately this will lead to non compliance issues with our international obligations.

The obvious new incursions that the Bill makes into the internationally protected sphere are Item 209 of Schedule 2 (which provides for disqualification from office/re-election to office as a consequence of a breach of a civil penalty provision) and clauses 329FA and 329FB of Item 88 of Schedule 1 (which subject the Commissioner to Ministerial direction). These latter provisions are of particular concern in circumstances where some of the highest rates of union membership are in the public sector. It is highly questionable to permit the Regulatory hand of government to selectively assist the Government of the day in its industrial disputes. In addition to these provisions there are many other features of the Bill which have the potential to interfere with the ongoing operation of registered organisations.

In a general sense, continual (and unnecessary) increase in the regulatory burden is likely to have perverse consequences in the context of the internal structures of registered organisations. The Committee should be cognisant of the fact that the burden of this regulation falls not just on the full-time salaried leadership of unions, but on many rank and file members who are elected as unremunerated delegates to governing bodies, which may meet as infrequently as once a year or once every two years. The ACTU is already aware of anecdotal evidence of a reluctance of rank and file members to participate in governing bodies where they are (notionally) exposed to large fines. Many ACTU affiliates (at a branch or national level) have large democratic governing bodies to direct the business of the union, where the delegates are rank and file members of the union. Factors such as risk-management and cost in an environment of increased regulation seem to mitigate in favour of an organisation reducing the size and / or limiting the remit of some or all governing bodies. The possible anti-democratic and anti-participation effects of this Bill are a powerful reason for its rejection. We note also that that the AiGroup has previously raised its concerns regarding the impact of the increased disclosure requirements on its capacity to continue to attract officers or retain those presently serving.

At a more specific level, the following provisions (in addition to those mentioned above) have particular potential to impact upon the functioning of Registered Organisations:

## Schedule 1, Item 88, clauses 329AB-329AC

The combined effect of these clause is such that the ROC has the power to "do all things necessary or convenient" to be done for the purposes of "monitoring acts and practices to ensure they comply with the provisions of this Act providing for the democratic functioning and control of organisations".

There is no parallel to this combination of provisions in, for example, the *ASIC Act*, from which many of the provisions in Schedule 2 appear to be drawn. We are concerned that the combined effect of these provisions might be to authorise, for example, covert surveillance of union meetings. This potential would of course act as a disincentive to participate in unions, or join unions. Should this not be the intention, we would invite the Committee to revisit the breadth of these provisions and their combined impact.

## Schedule 1, Item 88, clause 329EA-329EC

These provisions seem to tie assessments of the financial performance of the Registered Organisations Commission to the amount of money it is able to recover as penalties from prosecuting Registered Organisations. We are concerned that this creates incentives for the Commission and the ROC to act otherwise than as a model litigant. There are no comparable legislative provisions applying either to the Fair Work Ombudsman or the Australian Securities and Investment Commission. However, in the available time we have not been able to ascertain whether the same position prevails in practice by virtue of any instruments issued by the Finance Minister under the *Financial Management and Accountability Act* 1997.

## Schedule 2, Item 216

It is unclear why the first level of recourse to investigative powers now includes the public at large, rather than being limited to the current and former officers, employees and auditors of the organisation. Given that the civil penalty provisions relate almost exclusively to internal governance requirements, it is almost inconceivable that any person outside this group (such as a rank and file union member) could provide any information of value to investigators. However, informing a union member that the very fact of their association with the union might subject them to coercive investigative powers might (and is presumably intended to) cause them to think twice about whether to associate with a union at all. The current separation (as of June 2012) as between the first level of investigation (internal management, non compliance an offence) and the second level of investigation (any person, non-compliance a civil penalty) provides a sufficient investigative framework without the potentially stigmatising effects.

## Schedule 1, Items 67-70

These items provide an example of the inefficiency in establishing a second regulator for Registered Organisations. They will require consultation between the General Manager and the ROC as a jurisdictional pre-requisite for the exercise of powers to divide organisations into reporting units on an alternative basis, or revoke such certified divisions. This seems to do no more than create risk for the invalid exercise of the power, exposing registered organisations concerned to legal uncertainty concerning whether they have or have not complied with reporting requirements since the certification of reporting units was made or revoked (as the case may be).

## Schedule 2 Item 166

These provisions largely overlap with the provisions which came into force on 1 January 2014 as Division 3A of Part 2 of Chapter 5 of the *RO Act*. A new procedural requirement, attracting significant penalties, is that the relevant disclosures be lodged with the ROC. The requirement to lodge such disclosures is (aside from being unprecedented in the regulation of Corporations), is nothing more than an administrative trap to invite the capricious exercise of investigative authority (including the issue of search warrants) and provides no added information to union members.

In accordance with transitional provisions and in the lead up to the commencement of the anticipated requirements in Division 3A of Part 2 of Chapter 5, the ACTU has developed a training package on financial management and had that package approved by the General Manager. The roll-out of the training is well under way. Further, our affiliates have being going through the internal governance processes necessary to give effect to Rule changes which will comply with the anticipated requirements, and applications have been made to the FWC for approval of those Rule changes. Because the requirements of Division 3A of Part 2 of Chapter 5 were designed to align with the timing of reporting requirements in Division 5 of Part 3 of Chapter 8 of the *RO Act*, and because the definition of "reporting unit", other than exceptional cases, aligns with the definition of branches, unions are intending to comply with those provisions by including the required disclosures in the reports which must be prepared, presented, made available to members and lodged with the General Manager. Accordingly, little will be achieved in practice by the reforms now proposed, save for frustration and complexity in relation to the matters of detail (such as the number of branch officers for which disclosure may be made) where the Rules adopted by unions in accordance with the anticipated requirements differ from the proposed legislative requirements. There will be additional uncertainty in the "limbo period" where unions have submitted their applications for Rule changes and are awaiting determination thereof, particularly in the absence of any transitional rules (foreshadowed by Item 246) being made.

We also point out that there is an existing interaction between the requirements of union rules[80], the content of the general duties in sections 285-288 of the *RO Act* and the investigative powers at section 331(1)(d) thereof, which tells against the necessity of

[80] Including the compulsory requirements effective from 1 January 2013 under sections 141(1)(ca) and Division 3A of Part 2 of Chapter 5.

many of the requirements proposed to be introduced by the Bill and particularly the revised officer disclosure regime. This interaction facilitates investigation and the bringing of proceedings for poor financial management based on the notion that non-compliance with relevant rules, in a given set of circumstances, evidences a lack of care and diligence or good faith or an improper use of an officer's position. Indeed this is the basis upon which some allegations against a former HSU official are being pursued by the General Manager.

## Schedule 2 Items 243 (and clause 2)

We are concerned the insufficient time is permitted for transition to the new disclosure requirements. Unions may well need to revisit the existing provisions in their rules to ensure they are in harmony with the new scheme in this respect. Internal procedures for the changing of Rules are, by virtue of union's democratic control requirements, very time consuming. There is significant uncertainty surrounding the details of transition to the new scheme which require detailed attention and a sufficient lead time to facilitate compliance.

# 6. The potential of the amendments to impede the ability of employees of registered organisations to carry out their duties.

Whilst Registered Organisations do have employees, many branches thereof (i.e. reporting units) do not. This, if nothing else should give some clue as to the size and scale of their operations.

Where a branch does have employees, certain of the regulatory burden associated with the Bill (as discussed in the preceding chapters) will likely fall on those employees (i.e. ensuring administratively that officer's disclosure obligations are kept, lodged and revised as required). Where a branch does not have employees, that burden will fall on the officers themselves. In any case it is important to appreciate that union branches are generally small, self governing, not centrally managed and do not rely on central departments or a "head office" for administrative support.

Both the officers and employees of Registered Organisations are principally concerned with work representing the Organisation's members, such as dispute resolution, agreement negotiations and maintaining the award system. The greater emphasis on administrative process to ensure compliance with the new regime may be expected to divert some resources away from the core business of Organisations and their Branches. This would principally occur during the transition phase (on top of the existing transition phase) with peaks occurring during the ordinary reporting cycle (as filings become due). Peaks may also be associated with the capricious use of the new investigative framework. As already highlighted this framework:

- is immeasurably more draconian framework than that which it replaces;
- may be activated in the absence of any suspicion by an investigator that any officer or employee has contravened the law;
- Compels persons to answer questions (on pain of imprisonment) even where they are irrelevant to the subject matter of an investigation.

Ultimately, unions and branches of unions, including those that have traditionally not done so, might be expected to employ specialist employees to assist with regulatory

compliance. Such specialisation would represent a further departure from the historical model of a union operated solely by rank and file members. Alternately the need created by the Bill might be met by increased reliance on external advice, which also increases operating costs.

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