VACC Submission to the Senate Education and Employment Legislation Committee Concerning the Fair Work (Registered Organisations) Bill 2013

Dated 17 January 2014

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Introduction

The Victorian Automobile Chamber of Commerce established in 1918, and federally registered in 1940, pursuant to the then Conciliation and Arbitration Act 1934 (Clth), represents the interests of almost 5,500 mainly small businesses in the automotive industry (excluding tier 1 motor vehicle manufacture- Holden, Toyota and Ford).

VACC members are businesses that engage in aftermarket manufacture, retail, distribution, services and repair of vehicles of all kinds (passenger, recreational, off-road, heavy, commercial, farm machinery, motor cycles, cranes and non-motorised e.g. trailers and caravans), new and used parts, components, engines and the running service requirements of vehicles such as fuel, oil and gas, storage, car washing/ maintenance, vehicle rental/ leasing, towing and roadside service. The typical small member includes a specialist automotive, electrical or crash repairer.

While VACC membership includes large businesses e.g. multi-site new car dealer franchises, fuel outlets and parts retail outlets and some manufacturers of aftermarket product (e.g. specialist truck body production), the majority of members have less than 10 employees.

VACC has a collegiate electoral/representational structure, which means members from our 16 Divisions are elected to our various Committees, the Board of Management, the Executive Board and to the office of President.

Our Board of Management consists of 32 elected office holders from Divisions, the President and Past Presidents, all of which have a voting capacity except the Past Presidents. The Executive Board of eight, including the President is elected from the Board of Management. The office holders, like our membership are mainly small business operators and are from metro and regional areas of Victoria and Tasmania. Despite the size of the business, the majority of members have corporate business structures, and all members new to a position of office holder understand their legal obligations as a director, even before undergoing our training program for office holders following our elections every two years.

Office holders are expected to attend regular Committee and Board meetings, working groups and industry events. Office holders are unpaid, although regional members are reimbursed for out of pocket travel expenses, and our Executive Board receives an allowance to cover their out of pocket expenses. The driver for member engagement as office holders is to influence VACC policy direction and contribute to an industry body that assists business to comply with legislation, promote and protect the industry, oppose public policy or legislation that prevents or interferes with the viability of the industry, and provide business support programs that meet minimum expected industry operational and education standards.

Changes proposed to the Fair Work (Registered Organisations) Act 2009 ["the Act"] directly affect VACC elected office holders and the Organisation's administration of obligations imposed on associations.

Summary

The Statement of Compatibility with Human Rights attached to the Fair Work (Registered Organisations) Amendment Bill 2013, states that the system of registration of associations is not mandatory, and with registration, there are both imposed limitations on organisations and rights and privileges afforded to associations registered under the Act. It is fair to say, that the rights and privileges afforded to registered organisations have reduced significantly (particularly for employer organisations), while obligations imposed by the Act have increased. This change has occurred at the same time as competition in the market place to deliver business services has strengthened. To maintain a competitive advantage and to retain members, employer organisations have had no option but to be more transparent and compliant with corporate financial and Australian accounting standards, while at the same time ensuring their services remain relevant to the business community they support.

Equally important to employer organisations, is the question whether registered organisations are perhaps disadvantaged in the competitive market, as bodies not federally registered are free to represent their clients or members, but without the additional obligations contained in the Act. It is now common place that unregistered associations, law firms, agencies, consultants, accounting firms and federal government departments purport to provide the same, if not a better range and level of industrial relations services. In our experience, representation by bodies not federally registered is rarely refused by the Commission (a right or privilege of a registered organisation).

VACC is not, in principle opposed to improving and imposing standards that reflect the standards of transparency and accountability expected by the regulator and our members. However, we are concerned that the current Bill, like the most recent amendments to the Act has been rushed, without proper consideration of the impact, and whether the changes will remove the scope for financial abuse by organisations, like those reported in recent times.

VACC is concerned that many of the increased penalties are unbalanced and unfair, the reporting obligations and other changes, in a practical sense, will be costly and complex to administer, while also raising equity issues between office holders and members not in an elected position.

It was only in December 2013, after well over 12 months of work, that VACC was finally in a position to file an application to vary its Constitution to reflect the former federal

government's amendments, to financial management and financial disclosure obligations on registered organisations. The process to draft and file the amendments was onerous, complex and costly. While the Fair Work Commission Regulatory Compliance Branch was helpful, given the complexity of our Constitution, the process required to alter our Constitution and the time constraints faced by both the Commission and ourselves, significant time and direct legal cost was incurred to draft changes and have them approved by members, which we now expect (and hope) to be acceptable to the General Manager or her Delegate. Much of our difficulty related to the application of the model rules in a way that made sense in the Constitution and was acceptable to the Regulatory compliance Branch. Despite these efforts, VACC is still mindful that some provisions, particularly the application and interpretation of material personal interests over time, will create substantial administrative burdens. It is also our concern that office holders will consider the obligations and determine that they potentially harm their business and them personally, by nominating for an unpaid position of elected officer.

Following are our major concerns with the proposed amendments to the Fair Work (Registered Organisations) Act 2009.

Key Comments on the Fair Work (Registered Organisations) Amendment Bill 2013, relating to Schedule 2

1. **Item 19, Sub section 141 (1)(b)(ii) – Rule Specifying Certain Records of Meetings**
   It is proposed to insert a new subparagraph requiring organisations to specify in their rules the obligation to keep records of proceedings and resolutions of meetings. While in principle VACC is not opposed to this requirement, VACC found during the process of drafting rule changes to satisfy the Labor Government's amendments, many of our rules, because they were drafted decades ago, required multiple rewrites. VACC's Constitution already has a rule addressing this matter, and if further change is required, it will be a further time consuming and costly process. Our rules require an extraordinary meeting of members (EGM) to endorse rule changes, notification and postage alone to all members is costly and having had two EGM's in 2013, members are now fatigued with the process and somewhat suspicious of ongoing changes to the Constitution.

   The purpose of this amendment is presumably to require organisations to record in minutes, conflicts of interest and identification of material personal interests. Such a requirement can be surely satisfied without requiring an organisation to further implement changes to their Constitution.

   VACC recommends that this amendment be given further consideration.

2. Item 26 – Financial Training

Item 26 proposes the removal of section 154C and 154D, which relates to the requirement that organisations have within their Constitution reference to the obligation to deliver financial training to all new office holders. While VACC supports the point that the two sections should never have been drafted in such a fashion, the same result could have been achieved as proposed in the current Bill, the removal of the sections disadvantages organisations that have already amended their Constitution. To again amend our Constitution, is not a simple process and our comments in the paragraph above concerning member fatigue are very real.

Our members operate businesses and are actively engaged in their operation, and if for any reason following an election the office holder could not for any reason complete the training within the six month required period, the Organisation is faced with a breach of its own Constitution and the Act, if the proposed amendment is introduced. The risk of penalties faced by the organisation is excessive, even if the office holder has a valid reason for not completing the training within the six month period.

It is understood from the current Bill, that the new Commissioner would approve financial training programs. From a transitional perspective, if the General Manager has already approved training or is in the process of approving a training program prior to implementation of the Bill, it is appropriate that the new Commissioner accept the approved training, without having to undergo a further approval process.

VACC recommends that this amendment be given further consideration.

3. Item 59, S290A – Penalties for Breach of Good Faith or Position

VACC does not consider the amendment appropriately addresses the penalty relevant to a breach of good faith or position. The Act already deals with civil obligations and penalties in such circumstances, VACC considers the current provisions appropriate. The alleged abuse by individuals in the HSU matter should not be addressed by the proposed amendment. Criminal activity should be duly dealt with subject to criminal law. Assuming all action by office holders is criminal in nature is inappropriate.

VACC would however, recommend a review of provisions relating to penalties associated with assisting one candidate over another during an election. Section 190 of the Act, currently limits penalties to the organisation; the provision does not deter individuals from breaching this provision and leaves the organisation exposed to a penalty.

4. Item 89, Ss 255(2) (2A) – Specific Financial Reporting to Members

This new item inserts into legislation specific expenditure to be reported by organisations in their annual report to members. The Executive Board and particularly the Finance and Audit Committee closely scrutinise all expenses and income streams, and detailed reports are provided to the Board of Management and an annual

Consolidated Financial Report is provided to members. All of the expenses referred to in the proposed sub section are contained within the Consolidated Report, however, some of the items will need to be individually identified and excluded from related expenses. Changing the format of the current Consolidated Report to reflect the categories reflected in the proposed sub section, assumes organisations conduct simplistic and limited activities, and that identification of these expenses will provide information to avert abuse of an organisation's expenses. VACC is not opposed to the reporting of specific expenses to the regulator, however, the expenses need to be in context to assess whether they are reasonable or not. For example, legal costs would include legal advice concerning a range of operating contracts, advice to ensure accuracy of information provided to members and advice concerning potential risks or liabilities faced by the organisation and due to the activities of its officers or employees. Grouping together the expenses as identified in the proposed amendment is not telling of any potential abuse of the organisation's funds.

If the purpose of the proposed sub section is to identify areas of financial abuse, VACC is not confident that the proposed sub section will achieve its objective.

5. Items 166 – 175, S 293B – 293BC – Reporting of Disclosed Remuneration and Standing Disclosure

These proposed provisions are complex and unworkable in VACC. VACC's Constitutional amendments already provide for a process to disclose remuneration by an officer and to report to the Board of Management. To expect compliance with additional unworkable provisions, exposes VACC to severe penalties under the Act.

While the Labor Government's amendments required detailed disclosure to all members of remuneration and non-cash benefits received by the five highest paid officers, and VACC has made provision for the obligation in its Constitution, the practical effect is nevertheless problematic. All eight officers receive an equal allowance, but five individual officers will be listed in the member report. Historically, VACC has reported a band and identified the number of officers in receipt of remuneration within the band. VACC considers our historical approach fairer and is less likely to create confusion over the purpose of the remuneration and its application to individual officers.

6. Items 176 – 202, S 293C – 293G – Disclosure of Material Personal Interest

Disclosure of material personal interests of officers and their relatives is problematic, as there is no definition and the threshold is low. If the interpretation of material personal interest is considered any interest an officer or their relative may have, that is the same benefit accessible by any member of the organisation, the reporting and disclosure obligations will be unworkable. Already, our advice to officers is to disclose any benefit or interest received through any VACC activity.

In practical terms, a member that is an officer would be required to disclose fuel purchases from their site by staff, other officers or relatives of officers. Evidence of such purchases is impossible for an officer to account for, to enable compliance with their disclosure obligations. Other examples where this requirement is impractical and has the effect of producing suspicion among members is the practice of purchasing a company vehicle. Currently, VACC policy provides for the production of a specified number of quotes. If the vehicle is purchased from an officer, the purchase would be considered an interest to be disclosed. However, any vehicle purchased from a member that is not an officer will not be disclosed. The reporting in effect suggests preferential treatment of office holders, when in fact it is not. In addition, in the case of vehicle purchases, those member businesses, that provided a quote for the sale of a vehicle but were not successful, will be in a position to identify the actual price quoted for a vehicle by a competitor who happens to be an officer. Not only will this create problems between members, but may also create complications among the broader dealer group.

Similar issues and concerns arise among our member repairers and those that service the vehicles. The reporting obligations among these groups of members will be much greater in number, as all fleet vehicles are regularly serviced and VACC operates a large fleet of vehicles. However, the obligation as contained in the Act extends to the repair of VACC staff vehicles and other office holder vehicles by an office holder's business. In larger business establishments, the director of the business that is also an office holder may not even be aware that a VACC vehicle was repaired or serviced in his/ her business, let alone a VACC employee's privately owned vehicle.

The price of goods or services in the automotive industry is considered confidential and sensitive business information. Disclosure on such a broad scale disadvantages members directly in business as a VACC officer.

The provisions require the disclosure of all reported material personal interest to all members (i.e. almost 5500). The disclosures may if all disclosures are captured be a longer report than the Organisation's annual report. This will be an additional cost burden in so far as time taken to collate the material, print and distribute the report.

Working through this compliance minefield is a disadvantage to organisations that are federally registered. The administrative burden to comply with the obligations, together with the risk of severe penalties is a disincentive to federal registration as an organisation. The provisions do not deter or disclose financial abuse of the organisation's resources (member resources). The Bill and previous amendments introduced by the previous government do not in our view address the objectives of the legislation, instead the practical effect is greater red tape with little benefit for the members of registered organisations.

Section 293D provides for officers to give in VACC's case the Board of Management standing notice of interest. This practice will be unworkable, at every Board Meeting officers are already required to disclose any conflicts of interest, those conflicts are recorded and practices are in place to exclude where required those members with a conflict on any agenda item of business.

The provisions also require that the Registered Organisations Commission (or currently the Fair Work Commission) receive a report of all disclosures. VACC is concerned that these disclosures will be publicly reported.

The penalties for breaching the disclosure provisions are excessive and unreasonable. VACC has no confidence in obtaining orders for reasonable alternative disclosure arrangements.