

# COALITION SENATORS' ADDITIONAL COMMENTS

## Introduction

1.1 Coalition Senators note from the outset their extreme disappointment that the Senate Education, Employment and Workplace Relations Legislation Committee was not allowed the time to fully investigate provisions of the Fair Work (Registered Organisations) Amendment Bill 2012.

1.2 The bill was introduced into the House of Representatives on 31 May 2012. At the next available opportunity, the Coalition sought referral of the bill to the committee. While the bill was referred, the committee was expected to review the bill in just five working days.

1.3 A number of submissions expressed concerns with the committee's truncated ability to have a proper review. For example, the Australian Chamber of Commerce and Industry observed:

It is regrettable that the timetable does not provide a more fulsome opportunity to consider submissions of ROs who will be affected by the Bill.<sup>1</sup>

1.4 Master Builders expressed similar concern, noting in its submission that: Master Builders reiterates its concerns about a truncated timetable for the Committee's processes in considering the Bills.<sup>2</sup>

1.5 The reason for the expedited inquiry and the bill being subject to a Senate guillotine motion is because it is 'a budget bill or a key appropriation', according to correspondence from the Leader of the Government in the Senate, Senator the Hon. Chris Evans to Senator the Hon. Eric Abetz dated 13 June 2012. The Department of Education, Employment and Workplace Relations submitted that the bill is not a budget measure during the hearing on 22 June 2012:

**Senator ABETZ:** I would have thought you would give that answer and that is, if I might say, the correct answer. We were provided by the leader of the government in the Senate with a letter saying the government has a number of key appropriation and budget related bills which require passage before 1 July 2012, attached are attached a list of these bills for consideration. One of those bills is the Fair Work (Registered Organisations) Amendment Bill 2012. Reading through it as I did last night, I found there is nothing that actually requires passage before 1 July 2012,

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1 Australian Chamber of Commerce and Industry, *Submission 6*, p. 2

2 Master Builders Australia, *Submission 8*, p. 5.

albeit it might be nice for certain people's timetables. But it is not a budget related matter that requires passage by 1 July, is it?

**Mr Kovacic:** It is certainly not a budget related bill.<sup>3</sup>

1.6 The Coalition Senators note that Senate guillotine motions should only be used in extreme circumstances. However, in this Parliament debate has been guillotined 125 times, whereas under the Coalition, it was only exercised 36 times over a full three year period.

1.7 This rushed inquiry does not allow for good public policy making. Indeed Labor Senators have recognised this in the past, previously rallying against the rushing through of bills. For example, the now Leader of the Government in the Senate, Senator the Hon Chris Evans, observed that:

We got better legislation when Bills were thoroughly scrutinised by committees, the public had their input and governments were forced to listen and respond.<sup>4</sup>

The Senate has both a right and a responsibility to debate and review legislation – this legislation and all other legislation that comes before the parliament. That is what Australians expect from this chamber.<sup>5</sup>

1.8 Unfortunately as a result of the Labor's party's tight time frame, a number of people who were approached with expertise in this area were unable to appear or prepare a submission in the short period of time that was available to do so. Coalition Senators are disappointed not to have received the opportunity to understand their concerns.

## **Recommendation 1**

**1.9 That the Fair Work (Registered Organisations) Amendment Bill 2012 be removed from the Senate guillotine motion to allow for full and proper consideration of the bill by the Senate through the Education, Employment and Workplace Relations Legislation Committee.**

1.10 Given the substantive impact that the proposed amendments will have, this bill should be subject to a Regulatory Impact Statement in line with the Office of Best Practice Regulation's guidelines. It appears that neither a Regulatory Impact Statement nor an exemption from the Prime Minister have been undertaken or sought.

## **Recommendation 2**

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3 Mr John Kovacic, Deputy Secretary, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 22 June 2012, p. 30.

4 Senator the Hon Chris Evans, Speech to the Australian Labor Party Subiaco Branch, 29 June 2007.

5 Senator the Hon Chris Evans, *Senate Hansard*, 14 June 2005.

**1.11 That the bill be subject to a Regulatory Impact Statement in line with the Office of Best Practice Regulation guidelines.**

1.12 Coalition Senators agree that the seemingly never-ending saga of the Fair Work Australia investigations into the Health Services Union (HSU) have made it absolutely clear that major reform is needed in this area. However, the reform is needed in the management rather than the legislation. Coalition Senators firmly believe that this bill is nothing more than a hasty attempt by the Minister for Employment and Workplace Relations and the Australian Labor Party to give the appearance that the problems with the HSU investigation lies in the legislation.

1.13 Coalition Senators agree with the assessment of the former Attorney-General, the Hon. Robert McClelland MP, that there are areas of this bill that can be strengthened.<sup>6</sup> However, Coalition Senators agree with the statement in the Institute of Public Affairs submission:

The Bill is a step in the right direction. However, its reforms are modest and do not go far enough.<sup>7</sup>

1.14 Coalition Senators also agree with the Department of Education, Employment and Workplace Relations' submission:

[That] recent events have demonstrated the need for stronger penalties for any registered organisations and their office holders that do the wrong thing.

...

Questions have been raised about the ability of FWA as the regulator to effectively investigate and take action against organisations that are alleged to have breached those obligations.<sup>8</sup>

1.15 Nevertheless, while Coalition Senators agree with the justification, we firmly believe that this is a limp bill that will not achieve the intended goals it seeks to address. Coalition Senators will explore the concerns in more detail through these additional comments.

## **The Problem**

1.16 Fair Work Australia's investigations into the HSU Victoria Number 1 Branch and the HSU National Office, by Fair Work Australia's own admission took 'an unreasonably long time'.<sup>9</sup>

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6 The Hon Robert McClelland MP, *House of Representatives Hansard*, 21 June 2012.

7 Institute of Public Affairs, *Submission 1*, p. 2.

8 Department of Education, Employment and Workplace Relations, *Submission 7*, p. 2.

9 Ms Bernadette O'Neill, General Manager, Fair Work Australia, *Proof Committee Hansard*, 15 February 2012, Opening Statement.

1.17 Further, the Coalition have expressed real concerns over the conduct of the investigation in a number of key areas:

- A long and protracted investigation;
- Failure to cooperate with police;
- Alleged inability to prepare a brief of evidence for the Commonwealth Director of Public Prosecutions; and
- The key personnel in Fair Work Australia and their background as former union bosses.

1.18 While the process raises serious questions, the final reports were substantive and detailed bodies of work.

1.19 The report into the HSU National Office contained a litany of findings against former Labor MP, Mr Craig Thomson. Chapter after chapter deals with unauthorised expenditure of union funds for Mr Thomson's personal benefit and on his campaign to be a Member of Parliament for the New South Wales Central Coast seat of Dobell, as well as contraventions by him in managing the HSU's National Office. The findings detail lavish expenditure of low-paid union members' funds on escort agencies, travel, restaurants and cash withdrawals. Indeed, Fair Work Australia has gone as far as to suggest that substantive parts of Mr Thomson's evidence to it may have been 'false and misleading'.

1.20 What compounds this outrageous expenditure are the pages of the Fair Work Australia report devoted to rejecting the stories put up by Mr Thomson in an effort to deny his involvement.

## **The Straw Men**

1.21 Fair Work Australia's refusal to cooperate with police was reprehensible. This is especially so, as the predecessor body believed the issues should have been referred to police as early as 30 June 2009.

1.22 In correspondence obtained by the Coalition under the *Freedom of Information Act 1982*, Fair Work Australia responded to a request for information from Victoria Police in the following terms:

Naturally I wish to cooperate with your request to the extent that would be appropriate, consistent with the powers and functions conferred upon the General Manager of FWA by the RO Act.<sup>10</sup>

1.23 However, later in the same piece of correspondence, the General Manager stated that:

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10 Correspondence between Ms Bernadette O'Neill and Detective Sergeant Tyquin, 14 October 2011, Attachment 1, p. 1.

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...neither I, nor FWA, have power to inquire into or investigate, nor reach conclusions about whether a reporting unit (or anybody) may have contravened a Victorian criminal law...Accordingly, I regret to advise that I do not consider it would be appropriate for me or for any of my staff, to respond to the questions set out in your email...<sup>11</sup>

1.24 This bizarre argument was debunked by a Detective Sergeant Tyquin of the Victorian Fraud and Extortion Squad, who responded in the following terms:

Your above-mentioned decision appears to have been based on the mistaken belief that the Victoria Police were seeking to have the FWA inquiry extended to include a consideration of whether or not Victorian criminal law may have been contravened or to inquire into or investigate such matters.

...

The determination as to whether or not that material advances the investigation by Victoria Police into possible breaches of the criminal law is a matter for Victoria Police.<sup>12</sup>

1.25 Further, advice obtained by the Coalition from eminent lawyer, Mr Stuart Wood SC, states clearly that the refusals to cooperate with police 'appear to be based on an erroneous analysis of the statute' and 'are inconsistent with the intention of the Parliament' in enacting the *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act).

1.26 Coalition Senators believe that amendments should not be required to the Registered Organisations Act to allow for the cooperation with police, as the power to co-operate already exists under the current legislation and should have happened in the first place.

1.27 Coalition Senators also note that an email sent from Mr Doug Williams, the former Industrial Registrar to the lead investigator, Mr Terry Nassios, on the day prior to Fair Work Australia coming into existence. In this email Mr Williams stated that the investigation should be referred to police.<sup>13</sup> The question begs, if Mr Williams was not constrained, why were Mr Lee and Ms Bernadette O'Neill?

1.28 Nonetheless, as Fair Work Australia have placed themselves in this absurd straight jacket, Coalition Senators believe the Government's amendment does not go far enough to make it expressly clear, how, when and on what basis Fair Work Australia should cooperate with police and other law enforcement bodies.

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11 Correspondence between Ms Bernadette O'Neill and Detective Sergeant Tyquin, 14 October 2011, Attachment 1, p. 4.

12 Correspondence between Detective Sergeant Tyquin and Ms Bernadette O'Neill, 22 March 2011, Attachment 2, p. 2.

13 See Attachment 3.

### Recommendation 3

**1.29 That the bill be amended to ensure absolute clarity in clause 335C relating to cooperation with police and law enforcement agencies.**

1.30 On 4 April 2012, Fair Work Australia provided the Commonwealth Director of Public Prosecutions (CDPP) with a copy of its report into the Health Services Union National Office. However, the CDPP made it clear in a press release that 'the material forwarded is not a brief of evidence.'<sup>14</sup>

1.31 Former Chairman of the National Crime Authority, Peter Faris QC described the report that was forwarded to the CDPP as 'just a report like a report from a commission and yes, I'm sure it's useless.'<sup>15</sup>

1.32 The Commonwealth Director of Public Prosecutions appeared to reach a similar conclusion:

The report and related material forwarded is not a brief of evidence and as a consequence could not be assessed against the tests for prosecution that are contained in the Prosecution Policy of the Commonwealth.<sup>16</sup>

1.33 Fair Work Australia then concluded that they could not prepare a brief of evidence. Ms O'Neill, General Manager, announced:

I have further considered whether I am able to provide a brief of prosecution and concluded that I am unable to do so.<sup>17</sup>

1.34 The committee received evidence from Mr John Lloyd, Director, Institute of Public Affairs. Mr Lloyd is a former Australian Building and Construction Commissioner (ABCC), and observed that in his time at the ABCC, while not having express powers to prepare a brief of evidence, there were no impediments to doing so. The following exchange occurred during the hearing on 22 June 2012:

**Senator ABETZ:** So in preparing that brief of evidence would you liaise with the Commonwealth Director of Public Prosecutions to ensure that that which you provided the director of prosecutions was in fact in a format that could be used and employed by the Director of Public Prosecutions?

**Mr Lloyd:** Certainly. It was a fundamental requirement that there be a brief of evidence prepared. It was quite explicit in any electronic or written material that comes from the DPP. So, on the occasions when we prepared a brief of evidence, my lawyers would liaise with the lawyers of the DPP about what form and that type of thing was required. We would go ahead and prepare the brief of evidence. I recall reading those very carefully before I signed off on them and sent them to the DPP.

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14 Commonwealth Director of Public Prosecutions, Press Release, 4 April 2012.

15 Peter Faris QC, Radio National Interview, 5 April 2012.

16 Commonwealth Director of Public Prosecutions, Press Release, 3 May 2012.

17 Fair Work Australia, Press Release, 7 May 2012.

**Senator ABETZ:** As you read the Fair Work (Registered Organisations) Act as it currently stands, there is nothing stopping the general manager from doing exactly what you did in the Building and Construction Commission.

**Mr Lloyd:** No. I was surprised that they did not prepare a brief of evidence, and I suspect the quick response by the DPP shows he was surprised as well.<sup>18</sup>

1.35 Coalition Senators contend that the Registered Organisations Act offers no impediment in this regard, and could not need be clearer. Section 336 relevantly provides:

336 Action following an investigation

...

(c) refer the matter to the Director of Public Prosecutions for action in relation to possible criminal offences.<sup>19</sup>

1.36 Coalition Senators note that other Commonwealth agencies do not have an express power in their governing Acts to prepare briefs of evidence. While Coalition Senators do not believe amendments are required in this regard as Fair Work Australia was able to prepare a brief of evidence all along, Coalition Senators believe Fair Work Australia should be expressly given the power to prepare a brief of evidence to prevent Fair Work Australia placing themselves in an absurd straight jacket again in the future.

#### **Recommendation 4**

**1.37 The bill should be amended to ensure that Fair Work Australia is provided with the express power to prepare a brief of evidence.**

1.38 Coalition Senators note the statement issued by the General Manager of Fair Work Australia:

It is unfortunate that the legislative scheme that has been in place for many years and that I am required to act within, does not permit me to conduct an investigation into whether criminal offences have been committed, whilst at the same time it does not permit me to disclose information concerning potential criminal offences to the appropriate investigatory agency, namely state and federal police.<sup>20</sup>

1.39 Coalition Senators contend that Fair Work Australia's statement was a face-saving measure designed to deflect attention from the poor administration of Fair Work Australia.

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18 Mr John Lloyd and Senator the Hon. Eric Abetz, *Proof Committee Hansard*, 22 June 2012, p. 9.

19 *Fair Work (Registered Organisations) Act 2009*.

20 Fair Work Australia, Press Release, 7 May 2012.

## **The Government's proposed solution**

1.40 The bill before the Parliament is a weak bill designed by a former union boss to govern union bosses and will have the 'cop on the beat' as a former union boss.

1.41 The bill will:

- require that the rules of all registered organisations deal with disclosure of remuneration, pecuniary and financial interests;
- increase the civil penalties under the Registered Organisations Act;
- enhance the investigative powers available to FWA under the Registered Organisations Act; and
- require education and training to be provided to officials of registered organisations about their governance and accounting obligations.

1.42 While it is a step in the right direction, it does not go far enough, explained in these additional comments.

1.43 Coalition Senators fear that this bill has been rushed together to meet a political end rather than dealing with the substantive problems. Further, the Government have flagged that further changes to the Act may be required. The Minister in response to a Question on Notice said:

...the Government will consider the findings of the KPMG review before deciding to comment publicly on this matter.<sup>21</sup>

1.44 The Department confirmed that more changes may come as a result of the KPMG review during the hearing on 22 June 2012:

Senator ABETZ: Are we able to shed any light on whether or not the government might consider further amendments to the Fair Work (Registered Organisations) Act in light of recommendations that might come out of the KPMG review?

...

Mr Kovacic: What I can say is that we will have a look at the KPMG report once it is released or finalised and made available. I suppose those judgments will be made by government in the light of having seen it.

Senator ABETZ: Yes, I know all that, but have the government indicated to you at this stage ...

Mr Kovacic: My sense would be that, if there were issues in there that were not addressed in the context of this bill and required further response by the

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21 Answer to Parliamentary Question on Notice 1570, tabled 20 April 2012.



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government, the government would be open to considering those sorts of responses.<sup>22</sup>

1.45 Noting that Fair Work Australia have indicated that the HSU investigations are the only investigations, Coalition Senators believe that the bill should be delayed from further debate until the August 2012 sittings. This would allow the Minister and the Parliament to benefit from the KPMG review which is scheduled to be concluded by the end of July before making changes to the Act. Coalition Senators believe that a one month delay, after three and a half years of investigation will not negatively impact the membership of registered organisations or Fair Work Australia.

### **Recommendation 5**

**1.46 Further debate on the bill be suspended until the August 2012 Parliamentary Sittings.**

### **The Opposition's Better Plan**

1.47 The Leader of the Opposition announced a Better Plan for the Accountability and Transparency of Registered Organisations on 28 April 2012. It is notable that this announcement preceded Minister Shorten's rushed announcement by ten days.

1.48 Coalition Senators believe that Australians who join trade unions or employer associations deserve to have confidence in the conduct and administration of those organisations. Registered organisations are a central part of the Fair Work regime and they must operate to the highest of standards.

1.49 The worst aspect of the ongoing HSU scandal is that 70,000 low paid workers have had their hard-earned money misspent by union officials on political campaigns and escort services.

1.50 For example, the Fair Work Australia's investigation into the HSU found that officials had used union members' money for personal advantage, failed to act in the best interest of members, and breached financial management rules. Had these offences occurred in a company with directors, the officials would have been subject to criminal penalties including personal fines of up to \$200,000 and up to five years imprisonment.<sup>23</sup>

1.51 However, under the Registered Organisations Act, registered organisations and their officers are only exposed to civil penalties with the potential for comparatively modest fines of up to \$2,200.

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22 Mr John Kovacic, Deputy Secretary and Senator the Hon. Eric Abetz, *Proof Committee Hansard*, 22 June 2012, p. 30.

23 *Corporations Act 2001*, s. 1311 and Schedule 3.

1.52 The overwhelming majority of registered organisations already do the right thing. But there is clear evidence that the money paid by members to some registered organisations is being used for personal gain and inappropriate purposes.

1.53 The Hon. Tony Abbott MP announced that, if elected, a Coalition Government will:

- amend the laws to ensure that registered organisations and their officials have to play by the same rules as companies and their directors;
- 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;
- reform financial disclosure and reporting guidelines under the Registered Organisations laws so that they align more closely with those applicable to companies; and
- establish a separate Registered Organisations Commission.

1.54 It is also clear that Fair Work Australia, which is responsible for enforcing the laws governing registered organisations, has failed to do its job. The three year FWA investigation into the Health Services Union is a model of incompetence.

1.55 There needs to be a watchdog that works, to ensure that the members of trade unions and other organisations are protected from malfeasance.

1.56 If elected, the Coalition will establish a new body, the Registered Organisations Commission, that will:

- take on the role of registered organisations enforcer and investigator, currently held by the General Manager of Fair Work Australia.
- provide information to members of registered organisations about their rights and act as the body to receive complaints from their members; and
- educate registered organisations about the obligations that apply to them.

1.57 The Registered Organisations Commission will be independent and will operate within the office of the Fair Work Ombudsman. The Registered Organisations Commission will also be required to cooperate with other law enforcement bodies.

1.58 Coalition Senators believe that the members of registered organisations deserve transparent and accountable representation. Australian workers who join trade unions deserve to know that their membership fees are being used for proper purposes.

1.59 The Coalition will consult with registered organisations on how best to implement these reforms.

1.60 Coalition Senators note that a number of submissions suggest that registered organisations should be covered by the Corporations Act 2001 and governed by the Australian Securities Investment Commission.<sup>24</sup> While Coalition Senators agree that the rules and disclosure requirements should be essentially harmonised between the Fair Work (Registered Organisations) Act 2009 and the Corporations Act 2001, the Coalition recognises the importance of having industrial organisations governed by a specialist agency focused on industrial organisations.

1.61 Further, Coalition Senators note the evidence provided by Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions (ACTU), in relation to the Coalition's policy:

The more substantive point about the proposed bill that was foreshadowed by Mr Abbott is: the core of it is to pick up union regulation and to dump it into the corporations system. I have already dealt with a range of aspects that. I might make one additional point—and, really, this is the reason we oppose it.<sup>25</sup>

1.62 The ACTU's new found basis for opposition to the Coalition's policy is false. The Coalition's policy would have similar rules and penalties for Registered Organisations. The Coalition believes that this would allow for transparency for members and a sufficient deterrent for poor conduct.

1.63 It is of concern to the Coalition that a Member of a Trade Union who is also a shareholder in a corporation cannot expect the same accountability and transparency in both organisations.

1.64 Coalition Senators note that a number of provisions similar to the Corporations Act, in relation to conduct, already exist in the Registered Organisations Act, however the penalty provisions do not. The following table outlines the contracts between the two legislative regimes:

<b>Corporations Act 2001</b>	<b>Fair Work (Registered Organisations) Act 2009</b>
180 Care and diligence—civil obligation only  Care and diligence—directors and other officers  (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would	285 Care and diligence—civil obligation only  (1) An officer of an organisation or a branch must exercise his or her powers and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if he or she:  (a) were an officer of an organisation

24 See for example, Australian Mines and Metals Association, *Submission 9*, p. 3 and Institute of Public Affairs, *Submission 1*, p. 1.

25 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 22 June 2012, p. 23.

exercise if they:

(a) were a director or officer of a corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.

(3) In this section:

**business judgment** means any decision to take

or a branch in the organisation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the organisation or a branch as, the officer.

Note: This subsection is a civil penalty provision (see section 305).

(2) An officer of an organisation or a branch who makes a judgment to take or not take action in respect of a matter relevant to the operations of the organisation or branch is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if he or she:

(a) makes the judgment in good faith for a proper purpose; and

(b) does not have a material personal interest in the subject matter of the judgment; and

(c) informs himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and

(d) rationally believes that the judgment is in the best interests of the organisation.

The officer's belief that the judgment is in the best interests of the organisation is a rational one unless the belief is one that no reasonable person in his or her position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalents at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.

<p>or not take action in respect of a matter relevant to the business operations of the corporation.</p>	
<p>181 Good faith—civil obligations</p> <p>Good faith—directors and other officers</p> <p>(1) A director or other officer of a corporation must exercise their powers and discharge their duties:</p> <p>(a) in good faith in the best interests of the corporation; and</p> <p>(b) for a proper purpose.</p> <p>Note 1: This subsection is a civil penalty provision (see section 1317E).</p> <p>Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.</p> <p>(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.</p> <p>Note 1: Section 79 defines <i>involved</i>.</p> <p>Note 2: This subsection is a civil penalty provision (see section 1317E).</p>	<p>286 Good faith—civil obligations</p> <p>(1) An officer of an organisation or a branch must exercise his or her powers and discharge his or her duties:</p> <p>(a) in good faith in what he or she believes to be the best interests of the organisation; and</p> <p>(b) for a proper purpose.</p> <p>Note: This subsection is a civil penalty provision (see section 305).</p> <p>(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.</p> <p>Note: This subsection is a civil penalty provision (see section 305).</p>
<p>182 Use of position—civil obligations</p> <p>Use of position—directors, other officers and employees</p> <p>(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:</p> <p>(a) gain an advantage for themselves or someone else; or</p> <p>(b) cause detriment to the corporation.</p> <p>Note: This subsection is a civil penalty provision (see section 1317E).</p> <p>(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.</p>	<p>287 Use of position—civil obligations</p> <p>(1) An officer or employee of an organisation or a branch must not improperly use his or her position to:</p> <p>(a) gain an advantage for himself or herself or someone else; or</p> <p>(b) cause detriment to the organisation or to another person.</p> <p>Note: This subsection is a civil penalty provision (see section 305).</p> <p>(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.</p> <p>Note: This subsection is a civil penalty provision (see section 305).</p>

<p>Note 1: Section 79 defines <i>involved</i>.</p> <p>Note 2: This subsection is a civil penalty provision (see section 1317E).</p>	
<p>183 Use of information—civil obligations</p> <p>Use of information—directors, other officers and employees</p> <p>(1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:</p> <p>(a) gain an advantage for themselves or someone else; or</p> <p>(b) cause detriment to the corporation.</p> <p>Note 1: This duty continues after the person stops being an officer or employee of the corporation.</p> <p>Note 2: This subsection is a civil penalty provision (see section 1317E).</p> <p>(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.</p> <p>Note 1: Section 79 defines <i>involved</i>.</p> <p>Note 2: This subsection is a civil penalty provision (see section 1317E).</p>	<p>288 Use of information—civil obligations</p> <p>(1) A person who obtains information because he or she is, or has been, an officer or employee of an organisation or a branch must not improperly use the information to:</p> <p>(a) gain an advantage for himself or herself or someone else; or</p> <p>(b) cause detriment to the organisation or to another person.</p> <p>Note 1: This duty continues after the person stops being an officer or employee of the organisation or branch.</p> <p>Note 2: This subsection is a civil penalty provision (see section 305).</p> <p>(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.</p> <p>Note: This subsection is a civil penalty provision (see section 305).</p>
<p>184 Good faith, use of position and use of information—criminal offences</p> <p>Good faith—directors and other officers</p> <p>(1) A director or other officer of a corporation commits an offence if they:</p> <p>(a) are reckless; or</p> <p>(b) are intentionally dishonest;</p> <p>and fail to exercise their powers and discharge their duties:</p>	<p style="text-align: center;"><b>PROPOSED COALITION AMENDMENT</b></p> <p><b>343B Disclosure of information</b></p> <p>(1) This section applies to information acquired in the performance of functions or exercise of powers under this Act.</p> <p style="text-align: center;"><i>Disclosure that is necessary or appropriate, or likely to assist</i></p>

<p>(c) in good faith in the best interests of the corporation; or</p> <p>(d) for a proper purpose.</p> <p>Note: Section 187 deals with the situation of directors of wholly-owned subsidiaries.</p> <p>Use of position—directors, other officers and employees</p> <p>(2) A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:</p> <p>(a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or</p> <p>(b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.</p> <p>Use of information—directors, other officers and employees</p> <p>(3) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly:</p> <p>(a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or</p> <p>(b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.</p>	<p><i>administration or enforcement</i></p> <p>(2) The General Manager may disclose, or authorise the disclosure of, the information if the General Manager reasonably believes:</p> <p>(a) that it is necessary or appropriate to do so in the course of performing functions, or exercising powers, under this Act; or</p> <p>(b) that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.</p> <p><i>Obligation to disclose information relevant to commission of offence</i></p> <p>(3) If a member of the staff of FWA reasonably believes that the information is relevant to the commission, or possible commission, of an offence against a law of the Commonwealth, a State or a Territory, the member of staff must disclose the information to the General Manager.</p> <p>(4) If the General Manager reasonably believes that the information is relevant to the commission, or possible commission, of an offence against a law of the Commonwealth, a State or a Territory, the General Manager must disclose, or authorise the disclosure of, the information:</p> <p>(a) for an offence against a law of the Commonwealth—to the Australian Federal Police; or</p> <p>(b) for an offence against a law of a State or Territory—to the police force of the State or Territory.</p> <p><i>Information may be disclosed despite inquiry or investigation under this Act</i></p> <p>(5) To avoid doubt, if the information relates to a matter that is the subject of an inquiry or investigation under Part 4 of Chapter 11, a person need not wait until the conclusion of the inquiry or investigation before disclosing, or authorising the disclosure of, the information under subsection (2), (3) or (4) of this section.</p>
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1.65 As noted in the above table, the Coalition has circulated amendments in the House of Representatives to add the penalty provision to the bill.

1.66 While Coalition Senators note some concerns about enhanced penalties, only those who have done the wrong thing need fear additional penalties.

1.67 Further, Coalition Senators note the contribution by the Member for Chifley, Mr Ed Husic MP, in the House of Representatives:

When those opposite argue that the easiest thing to do in this case in relation to legislation before the House is just to mirror corporations law or the Corporations Act and basically ensure that the penalties and approaches that are used in that law be mirrored entirely for registered organisations, it flies against common sense and reality. I explained the simple reason: look at any measure of the wealth of those corporations—I am not talking generally; I am talking about the funds at hand and the breadth of those organisations—or even at the pay differential between those who are either directors or senior managers in those corporations and the management committees of unions, made up of shop floor delegates who are probably hundreds of times less remunerated and who have less control over the shape, form and direction of an organisation than someone who is a director or senior manager directing some of the biggest firms in this country, whose operations may be based either here or internationally. This compares the types of provisions that govern those individuals—directors or senior managers—and looks at the pay differentials that exist there and the responsibilities they have, and seeks to have the penalties and regime that apply to them then apply to workplace delegates who sit on management committees of unions. This is totally disproportionate and is prejudice masked by policy. This is more about those opposite trying to make it difficult for anyone to even contemplate sitting on the management committee of a union or an organisation that seeks to represent working Australians.<sup>26</sup>

1.68 Evidence given by the ACTU during the hearing on 22 June 2012 further adds to this myth:

**Senator ABETZ:** Do you accept that some of your members have holdings of tens of millions of dollars worth of assets?

**Mr Lyons:** Some unions are quite large and are very old and certainly do have assets. Those assets are held in property and other investments.

**Senator ABETZ:** So why would you say that an officeholder in a company that might hold less assets than some of your member organisations who do not act in good faith should have a higher penalty regime applied against them than officeholders in registered organisations that have a bigger property and cash base to them?

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26 Mr Ed Husic MP, *House of Representatives Hansard*, 21 June 2012.



**Mr Lyons:** I would say that even the largest union—or employer association, for that matter—in terms of its turnover and assets, would pale into insignificance and into even a modestly sized business which is regulated by the Corporations Law which has to extend to the extent of being able to regulate what are giant multinational companies. While you are correct in suggesting that assets run into the millions of dollars, I do not think a suggestion that that scale implies some parallel with large businesses is an accurate one. The point is that, to have a specialist regulatory regime which recognises that the accountability required in this case is to members and not shareholders is a fundamentally different relationship.<sup>27</sup>

1.69 Both Mr Ed Husic MP and the Mr Lyons are mistaken. The Institute of Public Affairs submission to this inquiry makes it clear that:

Unions are large financial entities. For example, the 2010 financial report of the Victorian Branch of the CFMEU Construction and General Division reported net assets of \$42 million. In 2011 the ANF Victorian Branch held \$22 million in net assets. The NSW division of United Voice reported \$25 million in net assets in 2011. If these unions were classed as proprietary companies they would be considered large corporations.<sup>28</sup>

1.70 Further, it is worth noting that the so-called ‘tax cuts for small businesses’ as a part of the Government’s mining tax, required small businesses to be corporations. On both counts, Mr Husic and Mr Lyons are seriously mistaken.

## **Recommendation 6**

**1.71 The bill should be amended to implement the Coalition’s Better Plan for Accountability and Transparency of Registered Organisations in full.**

## **Recommendation 7**

**1.72 The bill should be amended to establish a Registered Organisations Commission within the office of the Fair Work Ombudsman.**

## **Recommendation 8**

**1.73 The bill should be amended to ensure that accountability and transparency provisions as well as penalty provisions are brought in line with the Corporations Act 2001.**

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27 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions and Senator the Hon. Mr Eric Abetz, *Proof Committee Hansard*, 22 June 2012, p. 21.

28 Institute of Public Affairs, *Submission 1*, p. 3.

## **The Member for Barton's Intervention**

1.74 Coalition Senators note the speech made by the Member for Barton, the Hon. Mr Robert McClelland MP, in the House of Representatives, where it was argued that the bill could be strengthened.

1.75 The former Attorney General also referred to the Prime Minister's involvement in a situation of union funds being misapplied some time ago.

1.76 The Australian Financial Review explored this on Friday, 22 June 2012:

Mr McClelland repeatedly referred to allegations made against Mr Wilson that have been made several times in the Victorian Parliament, most recently in 2001 when he was accused of misappropriating about \$500,000 of union funds, including \$102,000 spent on a house in Kerr Street, Fitzroy.

The Prime Minister had no comment yesterday and has repeatedly denied allegations she was linked to union corruption. Mr McClelland made pointed references to the Prime Minister's involvement.

[From page 1]"Indeed, I know the Prime Minister is quite familiar with this area of the law, as lawyers in the mid-1990s, [we] were involved in a matter representing opposing clients," Mr McClelland said in Parliament.

"Indeed, my involvement in that matter has coloured much of my thinking in this area and resulted in me moving amendments on 17 September 2002 to actually strengthen the powers of the Federal Court of Australia." Ms Gillard, who was then a lawyer at Slater & Gordon, is alleged to have given Mr Wilson legal advice.

Mr McClelland worked at law firm Turner Freeman before entering Parliament.

He gave legal advice to another former union official, Ian Cambridge, who pursued Mr Wilson.

The vast majority of trade unions were professionally managed by highly competent and dedicated people, Mr McClelland said.

"But, regrettably, there have been exceptions to that.

"Officers have sought to obtain personal benefit or benefit on behalf of others at the expense of members of their union. Reported instances include not only misapplying funds and resources of the union but also using the privileges of their office to attract and obtain services and benefits from third parties." Mr McClelland highlighted that union governance laws in the mid-1990s did not extend to union officials who had retired, meaning Mr Wilson could not be pursued because he retired soon after the allegations were made.<sup>29</sup>

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29 Australian Financial Review, 22 June 2012, p. 1.

## **Conclusion**

1.77 Coalition Senators believe this is a poor bill that will not deal with the substantive issues borne out of Fair Work Australia's investigation.

1.78 Coalition Senators agree with the Master Plumbers and Mechanical Services Association of Australia submission that in terms of the:

...objectives of Fair Work Australia in relation to compliance and education, the Bill will not achieve the objectives sought.<sup>30</sup>

1.79 Further, with an independent review presently being conducted by KPMG this exercise could be superseded.

## **Recommendation 9**

**1.80 The bill be considered after the conclusion of the KPMG review and further improved with substantive amendments.**

**Senator Bridget McKenzie**  
**Senator for Victoria**

**Senator the Hon. Eric Abetz**  
**Leader of the Opposition in the Senate**

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30 Master Plumbers and Mechanical Services Association of Australia, *Submission 5*, p. 1.

