

CHAPTER 4

Penalties and Offences

Introduction

4.1 The committee received evidence about the proposed penalties and offences contained in the bill. While the Department submitted that the new penalties and offences were required to discourage inappropriate conduct, some submitters, like the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA), suggested that the penalty increases contained in the 2012 Act were appropriate. Submitters argued that the criminal law already deals with the issues raised by the Department and that the new offences were overly harsh.

4.2 The bill proposes to both increase the quantum of civil penalties and to introduce criminal offences in relation to certain intentional or reckless breaches of officers' duties.¹ These penalties would apply to existing and proposed offences. The bill also specifies that where a 'serious contravention' is proven; a significantly higher penalty amount applies.

Civil penalties

4.3 The Department's submission details the proposed amounts for the civil penalties, and the division of the offences into three tiers:

Certain civil penalty provisions under the *RO Act* have not been amended and retain the existing penalties, namely 60 penalty units for an individual (\$10,200) or 300 penalty units for body corporate (\$51,000). These civil penalties apply to provisions dealing with less serious contraventions.

Civil penalties for breaches of provisions requiring the lodgement of financial or other information with the ROC are raised to a maximum penalty of 100 penalty units for an individual (\$17,000) or 500 penalty units for a body corporate (\$85,000). In light of similar provisions under the Corporations Act, the penalty reflects the serious nature of the offences and reinforces the importance of transparency and good governance.

A breach of officer's financial management duties and new disclosure obligations will also carry the maximum penalty of 100 penalty units for an individual (\$17,000) or 500 penalty units for a body corporate (\$85,000) but where such a breach constitutes a 'serious contravention' a maximum penalty of 1200 penalty units for an individual (\$204,000) or 6000 for body corporate (\$1,020,000) may be imposed.²

1 Department of Employment, *Submission 1*, p. 10.

2 Department of Employment, *Submission 1*, p. 11.

4.4 The Department suggested that the civil penalties under the current legislation were comparatively low, and were being increased to match those contained in the *Corporations Act*.³ The Department noted the concerns of some stakeholders with respect to the proposed civil penalties:

Whereas some stakeholders pointed out 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.⁴

4.5 The Minister also contended that the Government has a 'very clear mandate' to implement the *Policy for Greater Accountability and Transparency of Registered Organisations* as a matter of extreme urgency,⁵ also arguing that:

The core principle behind the legislation is straightforward: as far as practicable there should be no difference in penalty between a company director who rips off shareholders and a union boss who rips off union members.⁶

Tier one offences

4.6 These penalties apply to breaches of officers' civil and financial management duties under clauses 285 to 288, the obligations introduced to disclose material personal interests and remuneration, payments made by organisations or branches of organisations, general duties and restrictions on voting on certain matters.⁷

Tier two offences

4.7 These penalties apply to breaches of provisions relating to the lodgement of financial or other reporting information with the Commissioner, as well as the making of declarations.⁸

Tier three offences

4.8 These penalties apply to breaches of the 'least serious' civil penalty provisions including, 'lodging certain documents with the FWC and other administrative tasks such as removing non-financial members from the organisations register.'⁹

3 Department of Employment, *Submission 1*, p. 11.

4 Department of Employment, *Submission 1*, p. 11.

5 Minister for Employment, *Submission 1*, p. 1.

6 Minister for Employment, *Submission 1*, p. 2.

7 Explanatory Memorandum, *Statement of Compatibility with Human Rights*, at increasing civil penalties – human rights implications.

8 Explanatory Memorandum, *Statement of Compatibility with Human Rights*, at increasing civil penalties – human rights implications.

4.9 The Minister argued that while penalties were tripled under the 2012 changes, the inappropriate conduct of officers of registered organisations, together with their financial responsibilities necessitate harsher penalties to act as a deterrent for inappropriate behaviour.¹⁰

4.10 In its original submission to the Legislation Committee inquiry, the MBA stated its support for amendments to the RO Act that would ensure reporting requirements are met and increasing penalties for late filing and non-compliance, suggesting that the increased penalties would act as an effective deterrent for inappropriate or illegal conduct.¹¹ They MBA also supported the government's attempt to:

...deter malfeasance by creating new penalties for registered organisations, their officers and employees who do not act in good faith, or use their position or information, to directly or indirectly create a financial gain for themselves or someone else to the detriment of the registered organisation.¹²

Criticism of the increased penalties

4.11 Ai Group, the ACTU, MUA and the South Australian Wine Industry Association (SAWIA), among others, criticised the proposed increased penalties, on the basis that the penalties were too extreme for officers who were in many cases volunteers, and whose responsibilities to the organisation's membership are completely different to those of a trading corporation. The aforementioned argued that corporations and registered organisations serve completely different purposes, and that to align penalties for inappropriate use of shareholders (or members' funds) was unnecessary.

4.12 Ai Group, in its submission argued that unlike company directors who are paid a salary, many union and employee association representatives are volunteers in their capacity as officers of registered organisations.¹³ They further argued that while directors are well remunerated on the expectation of returning value on shareholder investments, officers of registered organisations are volunteers, and that this is a significant distinction when examining whether Corporations Act penalties are appropriate:

This fundamental difference between a commercial operation existing to return value on investment and an organisation that is designed to accept

9 Explanatory Memorandum, *Statement of Compatibility with Human Rights*, at increasing civil penalties – human rights implications

10 Minister for Employment, *Submission 1*, pp 4-5.

11 Master Builders Australia, *Submission 2*, p. 2.

12 Master Builders Australia, *Submission 2*, p. 2.

13 Ai Group, *Submission 5*, p. 2.

membership subscriptions to provide a service to the members is critical in assessing the type of regulation and the type of control necessary.¹⁴

4.13 The MUA were of the view that the proposed increase in penalties was inappropriate, given the increases in penalties that took effect from 1 January 2014 (under the *2012 Act*). The MUA criticised the inclusion in the bill of the 'serious' contravention, noting its circular definition and that while it was based on a provision in the *Corporations Act*: '(that) the definition in the other Acts provides a threshold for setting penalty amounts, not as a guide to setting the highest possible penalty that would otherwise apply.'¹⁵

4.14 Motor Trade Association of South Australia (MTA) was critical of the proposed penalties, submitting that it had significant concerns about the new penalty amounts proposed in the Bill, including large fines for relatively minor non-compliance offences.

Our concern... [is] the massive increase (\$85,000) for failing to respond to a member request for statement of membership (within 29 days). The latter penalty is, superficially, a minor potential breach compared with more serious offences under the *Fair Work Act 2009* which gave rise to lower penalties. In this context the previous and significant breaches by one registered organisation, should not target all activities of other organisations in an extreme way. The measures should deter repeat offenders and if necessary, provide punitive measures for repeat offences.¹⁶

4.15 SAWIA acknowledged that review of the registered organisations framework is necessary (and justified), it argued that the unlawful conduct of some officers of an organisation does not justify the imposition of disproportionate monetary penalties proposed by the bill.¹⁷ The National Electrical and Communications Association also opposes the proposed penalties, submitting that the penalties would be excessive to medium sized employer organisations.¹⁸

4.16 In criticising the proposed penalties, the ANMF submitted:

The proposal to substantially increase financial penalties (sometimes tenfold) is short-sighted and hairy-chested and can only be intended to present the government as a "tough cop on the beat".¹⁹

14 Ai Group, *Submission 5*, p. 18.

15 Maritime Union of Australia, *Submission 4*, p. 10.

16 Motor Trade Association of South Australia, *Submission 8*, pp 4-5.

17 South Australian Wine Industry Association, *Submission 13*, p. 2.

18 National Electrical and Communications Association, *Submission 10*, p. 3.

19 Australian Nursing and Midwifery Federation, *Submission 14*, p. 6.

Serious contravention

4.17 The Department submitted that the concept of a 'serious contravention' was introduced to align the responsibilities of officers of registered organisations to those found in the *Corporations Act*:

The concept of a serious contravention was introduced to reflect the approach to penalties that apply to a director's duties under sections 180 – 183 of the Corporations Act. The serious contravention concept is modelled on s 1317G of the Corporations Act.

The serious contravention test also applies to breaches of the new disclosure obligations including material personal interest disclosures and in relation to a directions contravention (see item 7 of Schedule 1 to the Bill).²⁰

4.18 The Department's submission defines the term 'serious contravention', as relating to a contravention that:

- Materially prejudices the interests of a branch, or the members of the organisations or branch, or
- Materially prejudices the ability of the organisation or branch to pay creditors; or
- Is serious.²¹

Penalty amounts without a 'serious contravention'

4.19 Offences would increase to the following amounts when no 'serious contravention', as set out in clause 6 of the bill, is applicable:²²

	Individual	Body corporate
Tier one	100 penalty units (\$17,000)	500 penalty units (\$85,000)
Tier two	100 penalty units (\$17,000)	500 penalty units (\$85,000)
Tier three	60 penalty units (\$10,200)	300 penalty units (\$51,000)

4.20 The Explanatory Memorandum explains that serious contravention penalty amounts only apply to tier one offences.²³

20 Department of Employment, *Submission 1*, pp 11 – 12.

21 Department of Employment, *Submission 1*, p. 11.

22 Explanatory Memorandum, *Statement of Compatibility with Human Rights*, at increasing civil penalties – human rights implications.

Penalty amounts with a 'serious contravention'

	Individual	Body corporate
Tier one	1200 penalty units (\$204,000)	6000 penalty units (\$1,020,000)
Tier two	N/A	N/A
Tier three	N/A	N/A

Support for the inclusion of 'serious contravention'

4.21 The Minister agreed that the alignment of the maximum penalties of company directors and registered organisation officers was appropriate.²⁴

Criticism of the inclusion of 'serious contravention'

4.22 The MUA criticising the inclusion of the 'serious contravention' definition' suggesting that it would be used to dramatically increase the penalties that could be imposed on organisations and individuals. The MUA noted that:

...the definition is somewhat circular and whilst based on similar provisions in the *Corporations Act 2001* (Cth) the definition in that legislation acts as a threshold not as a guide to setting a higher penalty that would otherwise apply.²⁵

4.23 The criticism of the circular definition of a serious contravention was also a prominent theme in the Legislation Committee's inquiry. Mr Stephen Smith, Director, Ai Group, gave evidence the public hearing in Melbourne on 26 November 2013 that the use of the serious contravention in the bill was not appropriate:

Mr Smith: It is a direct lift out of the Corporations Act. But despite that, we think, again, it is not very sensible to define a serious contravention as a contravention that is serious. It adds nothing to the definition, so we would prefer that that aspect be removed. The other two elements of the definition are much clearer.²⁶

4.24 Numerous submitters criticised the inclusion of the serious contravention definition from the *Corporations Act*, suggesting that it was only included to provide the Commissioner with the issue of higher fines. Submitters suggested that the penalty

23 Explanatory Memorandum, *Statement of Compatibility with Human Rights*, at increasing civil penalties – human rights implications.

24 Minister for Employment, *Submission 1*, p. 2.

25 Maritime Union of Australia, *Submission 4*, p. 10.

26 Mr Stephen Smith, Director, Ai Group, *Proof Committee Hansard*, p. 3.

amounts could have the effect of encouraging fines (within the Commission) and the application of the serious contravention provision for financial reasons.

4.25 The ACTU was critical of the inclusion of the provision, submitting:

...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.²⁷

4.26 The ACTU noted that where the definition is met, penalties of up to 1200 penalty units will be available, in contrast to 100 penalty units when it is not met.²⁸ Further, the penalty applicable to serious contraventions ranges from \$204,000 to \$1,020,000 for individuals and bodies corporate respectively.²⁹ These amounts were criticised by the ACTU as excessive and 'clearly inconsistent with the expressed policy.'³⁰ The ACTU submitted that:

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, and permits (with the regulator's permission), union members to prosecute civil penalty matters against their union. These provisions operate in an overall framework designed to ensure democratic control.³¹

Committee view

4.27 The committee shares the concerns that the serious contravention provision is only included for the purpose of increasing the penalty that could be levied against an individual or body corporate. The committee is satisfied that the changes, made by the previous government in the *2012 Act*, were sufficient in addressing the issues raised in the Minister's submission.

4.28 The committee is not persuaded by the Department's evidence that the 'serious contravention' definition is needed in the RO Act, noting the circular nature of the definition, that does little to clarify what a serious contravention under the bill is.

4.29 The committee is persuaded by evidence from submitters, that the attempt to copy powers under the *Corporations Act*, specifically the 'serious contravention' provision, is inappropriate given the different functions of corporations and registered organisations.

27 Australian Council of Trade Unions, *Submission 16*, p. 33.

28 Australian Council of Trade Unions, *Submission 16*, p. 33.

29 Australian Council of Trade Unions, *Submission 16*, p. 33.

30 Australian Council of Trade Unions, *Submission 16*, p. 33.

31 Australian Council of Trade Unions, *Submission 16*, p. 34.

New criminal offences

4.30 The bill proposes to insert new criminal offences relating to the execution of an officer's financial management duties, criminal offences regarding good faith, use of position and use of information for officers.³² These offences have been modelled on s 184 of the *Corporations Act*.³³ Numerous submitters criticised these clauses, submitting that the Criminal Law already provides for protection of registered organisations from malfeasance of senior officers with financial responsibilities.

4.31 Clause 290A proposes the introduction of numerous offences relating to officers and employees of organisations and branches, and that failure to exercise powers or discharge duties in good faith, and for a proper purpose.³⁴ The clauses would also prevent an officer or employee, 'using their position to gain advantage for themselves or someone else; and using information obtained while an offer or employee to gain an advantage for them or someone else.'³⁵

4.32 The Department explained that the effect of the clause would be to ensure that any officer convicted of a new offence will not be eligible to be an officer of an organisation or to stand for election to office of a registered organisation. Specifically, with respect to providing false statements or information:

A penalty of 100 penalty units or two years imprisonment, or both, may be imposed upon a person who intentionally or recklessly fails to comply with a notice issued by the Commissioner in relation to an investigation, who provides a false statement or information to the Commissioner, or who fails in accordance with the new investigation and information gathering powers, to:

- Answer a question;
- Explain a matter about the content of document or to which a document relates;
- Explain where documents may be found , and who last had possession, custody or control of the documents and where that person may be found; or
- Identify property of an organisation and explain how the person has kept account of the document.³⁶

4.33 Numerous submitters argued that the criminal offences were inappropriate given the coverage in Commonwealth, State and Territory criminal laws that already make the most serious offences in the bill a crime, and can already be dealt with. Ai

32 Department of Employment, *Submission*, p. 12.

33 Department of Employment, *Submission*, p. 12.

34 Department of Employment, *Submission*, p. 12.

35 Department of Employment, *Submission*, p. 12.

36 Department of Employment, *Submission*, pp 11-12.

Group that in the inclusion of criminal offences in the bill is inappropriate, noting that, 'The criminal law applies to officers of registered organisations like other citizens, including a wide range of offences such as fraud, theft etc.'³⁷

4.34 Ai Group reiterated its concerns with respect to the proposed offences and penalties in the bill, that:

If the proposed criminal penalties and proposed massive financial penalties for breaches of duties are included in the RO Act, this would operate as a major disincentive to existing voluntary officers of registered organisations continuing in their roles, and would deter other people from holding office.³⁸

4.35 The addition of criminal offences in the bill was strongly criticised by other submitters, including the MUA, who suggested that the higher penalty amounts and investigative powers would together act as a deterrent to individuals who may seek office in a registered organisation.³⁹ The MUA also said that these factors would seriously interfere with the operation of registered organisations in Australia,⁴⁰ as they would discourage participation in registered organisations.

Committee view

4.36 The committee does not agree with the Department's view that new offences are required in the bill, or the contention that the Criminal Law is unable to prosecute wrongdoing. The committee agrees with submitters, that the inclusion of criminal offences in the bill constitutes unnecessary duplication of existing crimes legislation. The committee also agrees that the actions of the few should not be used as an excuse to enact draconian measures on registered organisations and their membership.

37 Ai Group, *Submission 5*, p. 16.

38 Ai Group, *Submission 5*, p. 16.

39 Maritime Union of Australia, *Submission 4*, p. 12.

40 Maritime Union of Australia, *Submission 4*, p. 12.