

# CHAPTER 5

## The Registered Organisations Commissioner

### Duplication of regulator

5.1 The committee heard evidence from numerous submitters, who criticised the proposed separation of the functions of the General Manager of the Fair Work Commission (FWC) and the Registered Organisations Commission (the Commission). Many submitters, including the Australian Council of Trade Unions (ACTU), suggested it contradicted government policy to reduce regulation.

5.2 The Department submitted that the functions of a separate Commissioner would include the promotion of efficient management of organisations and high standards of accountability of organisations and their office holders to the membership.<sup>1</sup> These roles would be in addition to the role of the FWC as set out in the Act.<sup>2</sup>

5.3 The Department provided a description of the current regulatory arrangements, including the oversight of registered organisations by the FWC:

In relation to registered organisations, the administrative arm of the FWC deals with overseeing the compliance of registered organisations, processing right of entry permit applications and providing information about the rights and obligations of registered organisations. It also conducts inquiries and investigations (Chapter 11 of the *RO Act*) into registered organisations' accounting and auditing obligations, rules regarding finances and financial administration, as well as any breaches of the civil penalty provisions of the *RO Act* (Chapters 7,8 and 9 of the *RO Act*). The General Manager is able to commence proceedings in relation to breaches of civil penalty provisions, or refer matters to the Director of Public Prosecutions or the police regarding possible criminal offences.<sup>3</sup>

5.4 The Department's submission argues that items 214-223 of Schedule 2 of the bill would provide stronger investigation and information gathering powers than under the current regulatory framework:<sup>4</sup>

The increased role envisaged for the regulator in ensuring transparency and accountability necessitated a revision of the powers available. The new powers have been closely modelled on powers available to ASIC under the *Australian Securities and Investments Commission Act 2001*. (These new powers will support and assist members who wish to remedy a breach of an

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1 Department of Employment, *Submission 1*, p. 6.

2 Department of Employment, *Submission 1*, p. 6.

3 Department of Employment, *Submission 1*, p. 5.

4 Department of Employment, *Submission 1*, p. 6.

officer's or organisations' failure to comply with the RO Act, in particular with their financial disclosure and accountability obligations.)<sup>5</sup>

5.5 In contrast, the ACTU suggested that the bill creates both a new regulator where one already exists and requires substantial amounts of regulation, without demonstrating the necessity of either.<sup>6</sup> The ACTU argued that there were subtle differences between the investigative powers proposed in the bill and those that exist under the *ASIC Act* that is mentioned as the source of the provisions.<sup>7</sup>

5.6 The Australian Nursing and Midwifery Federation (ANMF) criticised the establishment of a separate regulator, rejecting the need for any additional regulation in the sector:

The ANMF sees no good reason to establish a second regulator. It is an inefficient way to administer the Registered Organisations Act and will lead to uncertainty, increased regulation and an increased likelihood of breaches of reporting requirements.<sup>8</sup>

### ***Committee view***

5.7 The committee is not persuaded by the evidence that further regulation, including by a separate regulator is required to ensure accountability and transparency of registered organisations.

### **Proposed investigative powers of the Commission**

5.8 The committee heard extensive evidence from submitters relating to the proposed powers and structure of the Registered Organisations Commission. Apart from criticising the division of oversight between the Fair Work Commission and the proposed Commission, numerous submitters questioned whether the proposed Commission required the extensive information and investigative powers proposed by the bill.

5.9 Some submitters did support, in principle, the purpose of the Commission, but many disagreed with the Department that it was necessitated by misconduct in some registered organisations.

5.10 The Department argued that the powers of the Commissioner may only be exercised when it is reasonable to do so and that this would insure proper use of powers and oversight to undertake a regulatory task.<sup>9</sup> The Department also argued that:

Broadly, the Commissioner will have new powers to question people on oath or affirmation and new powers in relation to documents. However, the

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5 Department of Employment, *Submission 1*, p. 6.

6 Australian Council of Trade Unions, *Submission 16*, p. 4.

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

8 Australian Nursing and Midwifery Federation, *Submission 14*, p. 3.

9 Department of Employment, *Submission 1*, p. 7.

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use of these powers is not permitted unless a notice has been issued notifying a person of the requirement to take the oath or affirmation.<sup>10</sup>

5.11 The Department argued that the increased role of the Commissioner in ensuring accountability and transparency required greater powers than those currently available to the General Manager of the Fair Work Commission. The government, having modelled the Registered Organisations Commission on ASIC, submitted that the proposed powers could be:

...exercised when on reasonable grounds he or she believes that a person has: information or a document that is relevant to an investigation; or is capable of giving evidence that the Commissioner has reason to believe is relevant to an investigation.<sup>11</sup>

5.12 The Department explained that the bill sets out specific requirements that may be made by the Commissioner of a person being interviewed. It also specifies that:

- Questions may only deal with matters relevant to the investigation;
- That the person's lawyer has a right to attend the interview;
- That a record of the interview must be provided by the Commissioner to the person if the person so requests.<sup>12</sup>

5.13 Numerous submitters criticised the proposed Commission as unnecessary and draconian and suggested that rather than exercising its powers when 'reasonable to do so', the bill promotes the active interference by the Commissioner in the operation of registered organisations. The Queensland Nurses Union's (QNU) and Maritime Union of Australia (MUA), among others contend that the investigative powers proposed by the bill represent a significant threat to the future operation of registered organisations in Australia.

5.14 The QNU submitted that the proposed Registered Organisations Commission would have greater investigative powers than those of the General Manager of the Fair Work Commission.<sup>13</sup>

5.15 These powers were strongly criticised by other contributors, including the MUA, who suggested that the powers of the Commissioner were unnecessary, draconian and therefore, should not be included in Australia's industrial relations framework. The MUA argued that:

The proposed higher penalties and increased investigative powers will act as a deterrent to those who might otherwise seek Office in a registered organisation, and will unnecessarily and adversely interfere with the ongoing operation of registered organisations in Australia.<sup>14</sup>

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10 Department of Employment, *Submission 1*, p. 7.

11 Department of Employment, *Submission 1*, pp 6-7.

12 Department of Employment, *Submission 1*, p. 7.

13 Queensland Nurses Union, *Submission 3*, p. 3.

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

5.16 The Pirate Party recommended that the bill should be amended to impose limits on the powers of the Commission and questioned whether the surveillance powers of the Commissioner would include access to telecommunications data, whether a warrant would be required for telecommunication interception and finally whether the data collected would be limited to the individuals named in the warrant.<sup>15</sup> The Pirate Party also questioned whether the proposed search and seizure provisions presented a risk to privacy. The Pirate Party stressed that warrants should only be used (and therefore executed) when the required documents could not be obtained by other means:

There must also be protections for privacy with regard to irrelevant personal information that might be inadvertently collected during a search.<sup>16</sup>

5.17 The ANMF noted that while it supported the capacity of the Commissioner to undertake legitimate investigations, it was concerned with the scope of the powers, and the capacity by which legal rights are reduced under the bill as strict liability offence.<sup>17</sup> The ANMF was specifically concerned with the powers relating to the ability of the Commission to compel a person to attend or cooperate in an investigation, whether legal representation will be accessible by individuals under investigation, and the proposed powers relating to documents.<sup>18</sup>

***Failure to comply with investigations:***

5.18 The ANMF criticised clause 335G(2)(a) that compels an individual to sign a written record of an interview if requested to do so by an investigator. The ANMF noted that failure to comply (i.e. to sign the written record) is an offence, and that subclause 337AF(3) provides, 'that a signed statement is prima facie evidence of the statements it records (see also Explanatory Memorandum at paragraph [318]).'<sup>19</sup> The ANMF raised concerns as to whether an individual would be able to object to being forced to sign a statement that they believed contained inaccurate or erroneous statement, arguing that the construction of the provision is unclear.<sup>20</sup>

5.19 The ACTU criticised the inclusion by the Government of provisions that ensure that there is no requirement in the bill that the questions a person may be required under oath be relevant to the investigation.<sup>21</sup>

5.20 Further, the ACTU rejected the practicability of the requirement of copies of records being provided to legal representatives:

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15 Pirate Party of Australia, *Submission 15*, p. 3.

16 Pirate Party of Australia, *Submission 15*, p. 4.

17 Australian Nursing and Midwifery Federation, *Submission 14*, p. 5.

18 Australian Nursing and Midwifery Foundation, *Submission 14*, p. 5.

19 Australian Nursing and Midwifery Foundation, *Submission 14*, p. 5.

20 Australian Nursing and Midwifery Foundation, *Submission 14*, p. 5.

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

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There is no power in the Bill for the Investigator to provide copies of record of examination to a lawyer or other person. 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.<sup>22</sup>

5.21 The ACTU questioned the proposed powers in the bill for warrants to be issued, noting that the bill is not clear especially compared to the construction of the *ASIC Act*. The ACTU argued that under the *ASIC Act*, 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 production of books relate[d] to the affairs of a company relevant to a suspected contravention. Under the Bill, the proposed power to issue warrants covers "particular documents whose production could be required under section 335." Accordingly, documents could be required for the purposes of an investigation aimed [at] securing better practices or, authorised under the broad delegated power, will be within scope.<sup>23</sup>

5.22 The ACTU argued that such the power to potentially include documents not directly relevant to the investigation is an extraordinary measure, and would be extremely unjust, unless amended.<sup>24</sup>

### ***Committee View***

5.23 The committee shares the concerns of submitters with respect to proposed structure and powers of the Commissioner. The committee agrees with the evidence presented that the investigative powers are too extreme, and go far beyond what is appropriate to ensure adequate regulation of registered organisations.

5.24 The committee does not agree with the evidence provided by the Department that a separate regulator is required and notes that the powers of the Commissioner go far beyond those of the General Manager of the Fair Work Commission.

5.25 The committee is of the view that the enhanced regulatory framework enacted in 2012 is sufficient in empowering the current regulator in carrying out its duties of ensuring the compliance and transparency of registered organisations.

### **Division of responsibilities between the Fair Work Commission and the Commissioner**

5.26 Some submitters questioned whether the Commission could be biased or subject to improper influence in its investigations. While the Department argued that the bill would require the Commission to complete his or her investigations efficiently

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

23 Australian Council of Trade Unions, *Submission 16*, pp 31-32.

24 Australian Council of Trade Unions, *Submission 16*, pp 31-32.

and quickly,<sup>25</sup> there were questions as to whether the ability of the GM of FWC and the Commission to consult on investigations would blur the jurisdiction of the two regulators.<sup>26</sup>

### ***Financial independence of the Commissioner***

5.27 The Department's submission noted that the Commissioner will be independent in the exercise of his or her duties, and would be able to direct Commission staff in relation to the performance of those functions.<sup>27</sup>

5.28 The Department submitted that the financial independence of the Commissioner would support its independence in investigating improper behaviour.<sup>28</sup> In addition:

The Commission will also have a Special Account to ensure financial independence from the Office of the Fair Work Ombudsman.<sup>29</sup>

5.29 The ACTU criticised the arrangements that would require consultation between the General Manager and the Commission 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.<sup>30</sup> The ACTU noted that with respect to financial management of the Commission, there are no comparable legislative provisions applying to either the Fair Work Commission or to ASIC.<sup>31</sup>

5.30 The ACTU submitted it was concerned with clauses 329EA to 329EC, that appear to tie assessments of the financial performance of the Commission to the money it is able to recover from prosecuting individuals or bodies corporate operating as officers or employees of registered organisations. The ACTU went so far as to argue that it, '[is] concerned that this creates incentives for the Commission and the Commission to act otherwise than as a model litigant.'<sup>32</sup>

### ***Directions of a 'general nature'***

5.31 Submitters criticised the proposed provision for the Minister to give 'directions of a general nature' as either unclear or inappropriate. Submitters suggested the power may result in interference in registered organisations by the executive government.

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25 Department of Employment, *Submission 1*, p.5.

26 Australian Council of Trade Unions, *Submission 16*, p. 39.

27 Department of Employment, *Submission 1*, p. 5.

28 Department of Employment, *Submission 1*, p. 5.

29 Department of Employment, *Submission 1*, p. 6.

30 Australian Council of Trade Unions, *Submission 16*, p. 39.

31 Australian Council of Trade Unions, *Submission 16*, pp 38-39.

32 Australian Council of Trade Unions, *Submission 16*, pp 38-39.

5.32 The MUA is concerned with proposed subclause 329FA that proposes to allow the Minister to give directions of a general nature to the Commissioner, but not directions relating to a specific matter or investigation.<sup>33</sup>

5.33 The MUA also raised concerns about the lack of a qualifier for the power created by proposed subclause 328FB, that permits a Minister to direct the Commissioner to produce reports in relation to the functions of the Commissioner:

...this raises a concern that the Minister may direct the Registered Organisations Commissioner to produce a report about a specific matter, for example, an independent investigation or inquiry by the Registered Organisations Commissioner in accordance with part 4, Chapter 11 of the RO Act.<sup>34</sup>

5.34 The ANMF raised specific concerns in relation to the proposed power of the Minister to give directions in relation to investigations:

Given the repeated assurances by government of the independence of the Registered Organisations Commissioner, it is not clear why there is a need to include in the Bill sections 329FA and 329FB which provide the Minister with wide powers and control of the activities of the Commissioner. Given the antipathy shown by conservative governments to unions in Australia, the potential for political interference in the role and operations of this new agency is a significant concern to the ANMF.<sup>35</sup>

5.35 The Department's submission states that the Ministerial directions power would only apply to directions of a general nature, rather than to directions relating to particular matters or investigations,<sup>36</sup> and that this implies the Commission cannot be directed by the Minister in an improper manner. The Commissioner would be required to produce an annual report about the operations of the Commission to Parliament and that the Minister may direct the Commissioner to produce additional reports about its functions, as well as being required to appear at Senate Estimates.<sup>37</sup>

### ***Committee view***

5.36 The committee shares the concerns of witnesses that the financial independence of the Commissioner is not entirely clear, notwithstanding the assurances provided by the Government in the explanatory memorandum. The committee is particularly concerned that clauses 329EA to 329EC may provide an incentive for the Commissioner to pursue investigations for financial reasons. The committee is concerned that this arrangement could undermine the capacity of registered organisations to operate for their membership due to the diversion of significant financial and personnel resources.

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33 Maritime Union of Australia, *Submission 4*, p. 4.

34 Maritime Union of Australia, *Submission 4*, p. 4.

35 Australian Nursing and Midwifery Federation, *Submission 14*, p. 3.

36 Department of Employment, *Submission 1*, p. 6.

37 Department of Employment, *Submission 1*, p. 6.

5.37 The committee accepts the evidence presented by submitters that the 'general directions' power undermines evidence presented by the Department that the Commissioner will be truly independent from the executive government and from interference by the Minister.

5.38 The committee also accepts evidence presented that the bill, as drafted, would cause significant confusion for registered organisations in attempting to comply with directions from two regulators, with significant regulatory overlap.

### **Legal Professional Privilege**

5.39 The committee heard evidence from numerous submitters that the bill improperly engages the common law right relating to legal professional privilege. Submitters specifically questioned whether the bill would prevent the ability of officers to consult with their legal advisers, given the possibility of the disclosure of that advice during an investigation by the Commission.

5.40 The Department submitted that the bill makes clear that while legal practitioners are permitted to withhold information under legal professional privilege; practitioners are subject to new requirements, as set out in clause 337AE. The explanatory memorandum also states that:

While the Bill places additional obligations on lawyers claiming privilege, it is not intended to otherwise abrogate common law principles of legal professional privilege.<sup>38</sup>

5.41 The explanatory memorandum notes that clause 337AE would allow a legal practitioner to withhold privileged communications made to that practitioner, unless the person involved in the investigation agrees to the information being provided to the Commissioner. Further:

Where a privileged communication is withheld, the lawyer will be required to provide details of the identity of the person to whom the communication was made and the identity of the document containing the communication.<sup>39</sup>

5.42 The MUA raised concerns with respect to the possible engagement of the law of privileges, specifically legal professional privilege. They noted that while a lawyer cannot be required to disclose material subject to legal professional privilege, they must, under clause 337AE provide particulars of 'any document containing the material the subject of the privilege.'<sup>40</sup> The MUA pointed out that failure to comply exposes the legal practitioner to a proposed strict liability offence in the bill, with a maximum penalty of either 10 penalty units or three months imprisonment, or both.<sup>41</sup> The MUA noted that the explanatory memorandum states that it is not the intent of the

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38 Department of Employment, *Submission 1*, p. 7.

39 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p. 31.

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

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

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bill 'to abrogate the common law principles of legal professional privilege, the MUA holds serious concerns about how it might be used.'<sup>42</sup>

5.43 The MUA, in evidence provided at the public hearing expanded on their concerns, namely:

**Mr Neal:** The real nature of the concern is the strict liability nature of the so-called offence—that is, that there is no explanation, there is no what they call in criminal law the mens rea, it is not required that a mental element be established. If the lawyer does not comply, they have committed an offence.

**Senator WRIGHT:** There is no requirement for intention.

**Mr Neal:** Correct. No particular intention is ascribed to the offence, and that is our concern with that particular provision in the bill which, so far as industrial law in this country is concerned, is unparalleled.<sup>43</sup>

5.44 The Pirate Party also criticised clause 335F, submitting that it provided excessive investigative powers to the Commissioner. The Pirate Party also submitted that it was inappropriate to:

...limit the ability for an attendee and their lawyers to confer, reducing the attendee's access to adequate legal advice. Although the investigator must, under the proposed section, be of the opinion that the attendee's lawyer is trying to obstruct questioning by intervening, the Party is not satisfied that this is an appropriate or necessary provision, and is concerned that it has a wide scope for abuse.<sup>44</sup>

### *Committee view*

5.45 The committee is concerned by the potential infringement of legal professional privilege, notwithstanding the assurances provided by the Government in the bill's explanatory memorandum. The committee is also concerned with the strict liability offence created by clause 337AE.

5.46 The committee notes the evidence provided by the MUA, and is concerned about the strict liability offences proposed by the bill. The committee agrees that the proposed offences are concerning, and are an unnecessary infringement on the rights of officers and their legal representatives.

5.47 The committee believes that clause 337AE as drafted, represents an inappropriate engagement of the common law principles of legal professional privilege, designed to ensure fairness in legal proceedings and protecting the rights of individuals under investigations.

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

43 Mr Aaron Neal, Senior Legal Officer, Maritime Union of Australia, *Proof Committee Hansard*, p. 5.

44 Pirate Party of Australia, *Submission 15*, pp 3-4.

***Rights against self-incrimination and the presumption of innocence***

5.48 The committee heard evidence from numerous submitters relating to the bill's engagement of human rights law, namely the rights against self-incrimination and the presumption of innocence.

5.49 The Pirate Party were concerned with the proposed powers of the Commission because it has too much authority to gather evidence and compel officials to incriminate themselves or provide documents to the Commission.<sup>45</sup>

5.50 The Pirate Party questioned the engagement of the right against self-incrimination and recommended:

...extreme caution when placing limits on the right against self-incrimination, particularly imposing criminal penalties for failure to provide information that may be used to prosecute the attendee. The provisions of the proposed sections 335D and 337AA–337AE and the proposed amendments to section 337 severely limit this right beyond reasonable limits.

It is illogical to provide such an extreme power to a regulatory body, when not even the Australian Federal Police have the power to compel suspects to incriminate themselves.

***Committee view***

5.51 The committee is concerned that the provisions relating to providing evidence are extreme, and infringe on the right to protection from self-incrimination. The committee shares the concerns of submitters that the proposed powers of the Commissioner could infringe on legal rights and lead to improper investigations of individuals and registered organisations for political purposes.

5.52 The committee agrees that, on balance, the proposed powers of the Commission are excessive, draconian and completely unnecessary.

**Recommendation 1**

**5.53 The committee recommends that the Senate reject the bill.**

**Senator Sue Lines  
Chair**

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45 Australian Nursing and Midwifery Federation, *Submission 15*, p. 2.