

The Senate

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Education and Employment  
References Committee

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Fair Work (Registered Organisations)  
Amendment Bill 2013 [Provisions]

March 2014

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Senator Chris Back, Deputy Chair, LP, WA (Deputy Chair from 6 March 2014)

Senator Bridget McKenzie, Nats, VIC, (Deputy Chair to 6 March 2014)

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Senator Mehmet Tillem, ALP, VIC

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Senator Penny Wright, Greens, SA

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# **RECOMMENDATION**

## **Recommendation 1**

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





# CHAPTER 1

## Background

### Reference

1.1 On 9 December 2013, the Senate referred the following matter for inquiry and report by 27 March 2014:

The provisions of the Fair Work (Registered Organisations) Amendment Bill 2013, with particular reference to:

- (a) the potential impact of the amendments to interfere with the ongoing operation of registered organisations in Australia; and
- (b) the potential of the amendments to impede the ability of employees of registered organisations to carry out their duties.

### Previous inquiry

1.2 On 14 November 2013, the provisions of the Fair Work (Registered Organisations) Amendment Bill 2013 were referred to the Education and Employment Legislation Committee for inquiry and report on 2 December 2013.<sup>1</sup> That committee held one public hearing in Melbourne on 26 November 2013.<sup>2</sup>

1.3 The bill was introduced into the House of Representatives by the Hon Christopher Pyne MP, on 14 November 2013,<sup>3</sup> and proposes to amend the *Fair Work Act 2009* and the *Fair Work (Registered Organisations) Act 2009* in order to implement various commitments made by the Government before the federal election on 7 September 2013.

1.4 Broadly, the bill proposes to:

- Establish an independent Registered Organisations Commission to monitor and regulate registered organisations with enhanced investigative and information gathering powers;
- Amend requirements on officers' disclosure of material personal interests and change grounds for disqualification and ineligibility for office;

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1 *Journals of the Senate*, 14 November 2013, p. 123.

2 Education and Employment Legislation Committee Report, *Fair Work (Registered Organisations) Amendment Bill 2013*, December 2013, p. 1.

3 *Votes and Proceedings*, 14 November 2013, p. 80.

- Strengthen existing financial accounting, disclosure and transparency obligations under the *Fair Work (Registered Organisations) Act 2009* and making them enforceable as civil remedy provisions;
- Increase civil penalties and introduce criminal offences for serious breaches of officer's duties as well as new offences in relation to the conduct of investigations under the *Fair Work (Registered Organisations) Act 2009*.<sup>4</sup>

## **Structure of the bill**

1.5 The bill is composed of two schedules, each divided into two parts.<sup>5</sup> Part one of each schedule contains the substantive provisions with part two containing the transitional provisions.

### ***Schedule 1: Establishment of the Registered Organisations Commission***

1.6 Schedule 1 proposes the establishment of the Registered Organisations Commissioner (the Commissioner) and the Registered Organisations Commission (the Commission). The Commissioner's functions and powers reflect those previously held by the Fair Work General Manager and the enhanced investigation skills of the Commissioner to increase civil penalties that will operate on the commencement of Schedule 2 of the bill.<sup>6</sup>

1.7 The schedule sets out the terms and conditions of appointment of the Commissioner, and includes the provision of staff from the Fair Work Commission. The bill also proposes to establish the Special Account that would ensure that the Commission is independently funded.<sup>7</sup>

1.8 Schedule 1 also sets out consequential, transitional and savings provisions relating to the substantive provisions establishing the office of the Commissioner.

### ***Schedule 2: Disclosure requirements, investigation powers and penalties***

1.9 Schedule 2 proposes to increase the obligations on registered organisations and their officers, as well as increasing the civil penalties for non-compliance;<sup>8</sup> and sets out further transitional provisions required by the increased obligations on

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4 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p. i.

5 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph nos 4 and 131

6 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph no. 5.

7 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph no. 90.

8 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph no. 132.

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organisations and the increased powers of the Commissioner, under Part 1 of Schedule 2.<sup>9</sup>

## **Compatibility with human rights**

1.10 The bill engages the following human rights:

- The right to freedom of association:
  - the right to form and join trade unions and the right of trade unions to function freely in Article 22 of the International Covenant on Civil and Political Rights (ICCPR);<sup>10</sup>
  - Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESR); and<sup>11</sup>
  - International Labour Organisation (ILO) Freedom of Association and Protection of the Right to Organise Convention 1848 (No. 87); and<sup>12</sup>
- The right to the presumption of innocence and the minimum guarantees contained in Article 14 of the ICCPR; and<sup>13</sup>
- The prohibition on unlawful and arbitrary interference with privacy and reputation in Article 17 of the ICCPR.<sup>14</sup>

### ***The right to freedom of association***

1.11 The bill proposes to make amendments to the *Fair Work (Registered Organisations) Act 2009* that engage the right to freedom of association, including:

- Placing restrictions on officers from taking part in decision making in limited circumstances; and
- Increasing circumstances in which an officer may be disqualified from holding office in an organisation.

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9 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph no. 133.

10 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at Human Rights implications

11 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at Human Rights implications

12 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at Human Rights implications

13 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at Human Rights implications

14 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at Human Rights implications

1.12 The explanatory memorandum states that, 'the limitations on the right are permissible limitations as they pursue a legitimate objective, are prescribed by law and are reasonable, necessary and appropriate.'<sup>15</sup>

1.13 Further, the bill is intended to address:

Government and community concerns that in light of recent investigations and prosecutions of officials of registered organisation relating to misuse of position and member funds, the current regulation of registered organisations is not satisfactory in preventing fraud, financial mismanagement and adequate democratic governance in the interests of members.<sup>16</sup>

1.14 The explanatory memorandum suggests that while the bill does engage the right to freedom of association, it does so with the objective of protecting the interests of members and democratic functioning of organisations.<sup>17</sup>

### ***The right to the presumption of innocence***

1.15 The explanatory memorandum details the engagement of the right to the presumption of innocence, noting that the proposed provision 337AA provides for certain offences to be strict liability offences.<sup>18</sup> It suggests that this limitation is 'reasonable insofar as each of the offences relates to a person's failure to comply with a requirement made of them relating to the conduct of an investigation...'<sup>19</sup> The explanatory memorandum also notes that '...the offences of strict liability could be characterised as regulatory in nature and not punishable by a term of imprisonment.'<sup>20</sup>

### ***The right to privacy and reputation***

1.16 The bill proposes the transfer of investigative and information gathering powers of the General Manager of Fair Work Australia to the Commissioner. The

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15 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *the Right to Freedom of Association*

16 Report of the Delegate to the Acting General Manager of Fair Work Australia Investigation into the Victoria No. 1 Branch of the Health Services Union under section 331 of the *Fair Work (Registered Organisations) Act 2009*, as cited in Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Legitimate objective*

17 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Legitimate objective*

18 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Article 14(2) ICCPR*

19 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Article 14(2) ICCPR*

20 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Article 14(2) ICCPR*

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explanatory memorandum states that these powers will be expanded to include, under subsection 335(1), the provision of information, documents and other evidence to the Commission on reasonable grounds.<sup>21</sup>

1.17 The explanatory memorandum suggests that the bill is compatible with human rights because, 'to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.'<sup>22</sup>

### **Financial impact statement**

1.18 The Regulatory Impact Statement (RIS) recommended that the Government implement option two, that would ensure that:

Registered organisations and their officers will have fiduciary and statutory responsibilities that are more closely aligned with those of company directors, provided under the *Corporations Act*. Option Two reflects the Government's election commitment.<sup>23</sup>

1.19 Consequentially, the RIS suggests that 'the overall budgetary impact for the Government is nil.'<sup>24</sup> The RIS states the compliance cost for each registered organisation to be about \$3,000 per year on average,<sup>25</sup> and that the large majority of organisations will be able to absorb these costs by either passing the costs on to members or examining the cost with respect to other financial assets and staffing resources.<sup>26</sup>

1.20 The Senate Standing Committee for the Scrutiny of Bills noted in its 8th Alert Digest of 2013 that the bill contained a standing appropriation<sup>27</sup> and that this could question the financial impact statement contained in the explanatory memorandum.

### **Consideration by human rights committee**

#### ***Parliamentary Joint Committee on Human Rights***

1.21 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered the bill in its report tabled in the Senate on 10 December

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21 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Investigation and information gathering powers*

22 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Conclusion*

23 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p.10.

24 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p. 21.

25 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p. 21.

26 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p. 21.

27 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2013*, p. 60.

2013.<sup>28</sup> The Committee undertook to write to the Minister to request clarification on numerous aspects of the bill, including the proposed disclosure regime and its engagement of human rights law in Australia.

1.22 The Human Rights Committee also stated that it would seek several undertakings from the minister in relation to:

- the necessity and proportionality of the proposed disclosure regime;<sup>29</sup>
- whether the standard of 'convenient' is consistent with the requirement for limitations on rights to be 'necessary';<sup>30</sup>
- providing consideration or guidance for contraventions that may be considered 'serious';<sup>31</sup>
- section 337AC's effect on the right to the presumption of innocence through the 'reverse burden';<sup>32</sup>
- section 337AD(3) and its engagement of the presumption of the right against self-incrimination;<sup>33</sup> and
- the potential application of civil penalty provisions for 'serious contraventions' and their potential engagement of article 14 of the ICCPR.<sup>34</sup>

### **Progress of the bill through the Parliament**

1.23 Resumption on the debate of the second reading of the bill commenced on 3 December 2013,<sup>35</sup> and concluded on 12 December 2013,<sup>36</sup> where-after the bill was transmitted to the Senate for concurrence in the usual practice. A second reading amendment moved by the Hon Brendan O'Connor MP was not agreed to.<sup>37</sup>

1.24 The Minister representing the Minister for Employment in the House of Representatives, the Hon Christopher Pyne MP, stated that the government will 'actively consider' the recommendations in the Legislation Committee's report.<sup>38</sup>

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28 Journals of the Senate, 10 December 2013, p. 314.

29 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 24.

30 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 24.

31 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 25.

32 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 26.

33 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 27.

34 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 28.

35 House of Representatives, Votes and Proceedings, *3 December 2013*, p. 156.

36 House of Representatives, Votes and Proceedings, *12 December 2013*, p. 234.

37 House of Representatives, Votes and Proceedings, *12 December 2013*, p. 234.

38 House of Representatives Hansard, *12 December 2013*, p. 2505.

## **Acknowledgement**

1.25 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions and giving evidence at the hearing.

## **Notes on references**

1.26 References in this report to the Hansard for the public hearing are to the Proof Hansard. Please note that page numbers may vary between the proof and the official transcripts.

1.27 References in the report to the submission of the Department of Employment (the Department) refer to the submission made by the Department to the Legislation Committee's inquiry into the provisions of the Fair Work (Registered Organisations) Amendment Bill 2013. That submission was attached by the Minister for Employment, Senator the Hon Eric Abetz, to his own submission to the current inquiry.





## CHAPTER 2

### Coalition policy before the 2013 election

2.1 The committee heard evidence from the Minister and Department that the Coalition's registered organisations policy was released far in advance of the 2013 election, and should not have come as a surprise to officers, employees and volunteers of registered organisations.

2.2 The Minister for Employment, Senator the Hon Eric Abetz, submitted that the Coalition had released its Policy for Greater Accountability and Transparency of Registered Organisations on 30 April 2012, noting that, 'This policy has been well ventilated for some time and the Government has a very clear mandate to implement it as a matter of extreme urgency.'<sup>1</sup>

2.3 The Minister contended that the purpose behind the legislation was straightforward, and that while the Government supports the role unions play, it believes that accountability and transparency of registered organisations will be enhanced by the measures in the bill.

### Legislation Committee inquiry and recommendations

2.4 The Senate Education and Employment Legislation Committee made numerous recommendations with respect to the bill, as introduced in the House of Representatives on 14 November 2013. The committee specifically recommended that:

- Consistent with the *Corporations Act 2001*, material personal interest disclosures should only be required to be made to those officers whose duties relate to the financial management of the organisation. Such disclosures should be recorded in the minutes of the meetings of those officers and should be made available to members on request;<sup>2</sup>
- A list of exclusions from the obligations to disclose material personal interests based on section 191(2) of the *Corporations Act 2001* be inserted into the bill. This would narrow the obligation to disclose material personal interests of an officer's relatives, so as to be consistent with the *Corporations Act 2001*;<sup>3</sup>
- The obligation placed on officers to disclose every payment should be reduced with certain exclusions, including limiting disclosures to payments made above a certain threshold;<sup>4</sup>

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

2 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, p. vii.

3 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, p. vii.

4 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, p. vii.

- The bill be amended to allow the Commissioner to grant exemption from the training requirements if an individual can demonstrate significant knowledge of the financial obligations specified in the bill; and<sup>5</sup>
- That the bill be passed subject to foregoing recommendations.<sup>6</sup>

### ***Responses to the bill***

2.5 The committee heard evidence from submitters and witnesses in relation to the recommendations of the Education and Employment Legislation Committee's (Legislation Committee) report. Some submitters argued that the recommendations did not go far enough to address their concerns. The committee notes that numerous submitters have reused, in whole or in part, the submissions they made to the previous inquiry.

2.6 Recommendations one, two and three seek to ensure that only officers whose duties relate to the financial management of the registered organisation are subject to the material personal interest disclosure requirements. The Legislation Committee recommended the addition of exemption arrangements as per section 191(2) of the *Corporations Act 2001 (Cth)* (the Corporations Act) and the exclusion of some payments from disclosure requirements completely.<sup>7</sup>

2.7 Recommendation four seeks to address criticisms relating to compulsory training for officers with significant experience in financial management. The recommendation would provide the Commissioner with the power to exempt officers with extensive training or experience in financial management from the training requirements proposed in the bill.<sup>8</sup>

2.8 The Minister for Employment, Senator the Hon Eric Abetz, in his submission together with the earlier submission from the Department, notes that while the bill was drafted in such a way as to build on the existing regulatory regime:

The Government is giving active consideration to the issues that have been raised by the Senate Education and Employment Legislation Committee and stakeholders.<sup>9</sup>

2.9 Master Builders Australia (MBA) endorsed the recommendations made by the Legislation Committee in the report tabled on 2 December 2013,<sup>10</sup> expressing its support for any initiatives that deliver improved governance and financial

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5 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, p. vii.

6 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, p. vii.

7 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, p. vii.

8 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, p. vii.

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

10 Master Builders Australia, *Submission 2*, p. 1.

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transparency with respect to the conduct and management of registered organisations.<sup>11</sup> MBA restated its view that the interests of those involved in the building and construction sector are advanced where the industrial relations legislation requires transparency and accountability of registered organisations, without adding unnecessary burdens or costs.<sup>12</sup>

2.10 The National Electrical and Communication Association (NECA) submitted that it also endorsed the recommendations of the Legislation Committee, specifically the establishment of the Commissioner:<sup>13</sup>

For the avoidance of doubt, it should be stated that NECA has no objection to the establishment of the Registered Organisations Commissioner, and the conferral of such powers on that office as proposed by the Bill.<sup>14</sup>

2.11 Australian Industry Group (Ai Group) suggested that the Education and Employment References Committee should endorse the Legislation Committee's recommendations, but also suggested that the recommendations do not go far enough to address their other concerns with the bill.<sup>15</sup> Mr Stephen Smith, Director, Ai Group, stated at the public hearing in Sydney that, 'we are here today very much urging this committee to adopt those four recommendations.'<sup>16</sup>

2.12 The Master Plumbers & Mechanical Contractors Association of NSW (MPMCANSW) submitted that it needed additional clarification before it could support the recommendations made in the Legislation Committee's report. It suggested that the previous inquiry needed to emphasise the structural and other differences between employer and employee organisations, operating as registered organisations; referring to its submissions to the previous inquiry, the organisation was concerned about:

...equal representative rights afforded to Recognised Organisations, when they are not the subject of the provisions of the amendments to the Act. The recommendations of the Legislation Committee Report embrace the implementation of requirements to bring operational and reporting requirements of Registered Organisations in line with the *Corporations Act 2001*, but the situation still remains that there are two distinctly different organisational structures for organisations who have representation rights before the Fair Work Commission.<sup>17</sup>

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11 Master Builders Australia, *Submission 2*, Attachment, p. 1.

12 Master Builders Australia, *Submission 2*, Attachment, p. 1.

13 National Electrical and Communications Association, *Submission 10*, p. 6.

14 National Electrical and Communications Association, *Submission 10*, p. 7.

15 Mr Stephen Smith, Director, Ai Group, *Proof Committee Hansard*, p. 10.

16 Mr Stephen Smith, Director, Ai Group, *Proof Committee Hansard*, p. 12.

17 Master Plumbers and Mechanical Contractors Association of New South Wales, *Submission 7*, p.2.

### ***Committee view***

2.13 The committee is persuaded by evidence from submitters that the recommendations made by the Legislation Committee are inadequate in addressing the concerns of submitters in relation to the proposed changes to the *Fair Work (Registered Organisations) Act 2009*. The committee believes that even if the recommendations were accepted by the Government, the bill would still cause great disruption and harm to the operations and effectiveness of the administration of registered organisations in Australia. This is due to the significant unintended consequences of the bill and the training and financial burdens proposed by the bill.

### **General criticism of the Bill**

2.14 The Maritime Union of Australia (MUA) criticised the proposed regulatory framework in its submission, stating that:

The principle submission of the MUA is that the changes to the regulatory regime effected by the *Fair Work (Registered Organisations) Amendment Act 2012* (Cth), as amended by the *Fair Work Amendment Act 2013* (Cth), are sufficient to strengthen legislative provisions and Rules of organisations concerning disclosure and transparency of decision making.<sup>18</sup>

2.15 The MUA noted the Government's intention to cut \$1 billion in red and green tape each year in a statement made on 13 January 2014 by the Hon Christopher Pyne MP and the Hon Josh Frydenberg MP.<sup>19</sup> The MUA submitted that the provisions of the bill are in direct contravention of the announced objective, and undermine the argument for a separate regulator.<sup>20</sup>

2.16 NECA submitted that in its view the bill would establish a more onerous regulatory regime than presently operates under the Corporations Act.<sup>21</sup>

2.17 The MPMCANSW also objected to the increased regulation proposed in the bill, submitting that:

...the issues set out above will add significantly to the red tape requirements of Registered Organisations and will add significant cost pressures to the organisation related to such compliance. The inequity here is that this is not necessarily an impediment to the ability of employees of Registered Organisations to carry out their duties, but more than ever highlights the inequity in the status of Registered Organisations as compared to Recognised Organisations.

2.18 The Motor Trade Association of South Australia (MTA) and NECA both criticised the 'one size fits all' approach proposed by the bill.<sup>22</sup> NECA submitted that

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18 Maritime Union of Australia, *Submission 4*, p. 2.

19 Maritime Union of Australia, *Submission 4*, p. 2.

20 Maritime Union of Australia, *Submission 4*, p. 2.

21 National Electrical and Communications Association, *Submission 10*, p. 6.

22 Motor Trade Association of South Australia, *Submission 8*, p. 3; National Electrical and Communications Association, *Submission 10*, p. 10.

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employees of registered organisations with specialist knowledge are no longer commonly found or recruited and as a consequence registered organisations have become reliant on external legal advisors and consultants:<sup>23</sup>

When this factor is combined with the shift to further and stricter regulation of registered organisations, the compliance costs to registered organisations, the compliance costs to registered organisations have increased markedly over the last few years...<sup>24</sup>

2.19 The South Australian Wine Industry Association (SAWIA) submitted:

SAWIA acknowledges that review and reform of the law governing registered organisations is both necessary and justified from time to time to ensure good governance and accountability. However the unlawful conduct of some officers within one registered organisation does not justify imposing excessive compliance and disproportionate monetary penalties on all registered organisations in a manner contemplated by some of the provisions in the Fair Work (Registered Organisations) Amendment Bill 2013.<sup>25</sup>

2.20 SAWIA stated that for its purposes, many of its board members were the equivalent of 'officers' for the purposes of the bill, who volunteer their time to attend to the duties required of having been elected to the board:<sup>26</sup>

Board members provide a great amount of time each year of office to attend to just the basic activities entailed in holding a board position: reading, considering board papers and attending (travelling) regular board meetings held across regional South Australia. This is not to mention the additional work required like key meetings or activities with government bodies or industry stakeholders, consultation.<sup>27</sup>

2.21 The Australian Council of Trade Unions (ACTU) submitted that officers and employees of registered organisations are principally concerned with work representing that organisation's members, notwithstanding:

The greater emphasis on administrative process to ensure compliance with the new regime may be expected to divert some resources away from the core business of organisations and their branches. This would principally occur during the transition phase (on top of the existing transition phase) with peaks occurring during the ordinary reporting cycle (as filings become due).<sup>28</sup>

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

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

25 South Australian Wine Industry Association, *Submission 13*, p. 1.

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

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

28 Australian Council of Trade Unions, *Submission 16*, p. 42.



## CHAPTER 3

### Compliance burden and alignment of registered organisations as corporations

#### Fair Work (Registered Organisations) Amendment Act 2012

3.1 Numerous submitters suggested that the *Fair Work (Registered Organisations) Act 2009* (Cth) (the Act) as amended by the *Fair Work (Registered Organisations) Amendment Act 2012* (Cth) (*2012 Act*) was sufficient in addressing any deficiencies with respect to the financial administration of registered organisations, and that the changes made pursuant to the *2012 Act* ought to be given time to be implemented. Some also suggested that the bill would interfere and impede the abilities of registered organisations to carry out their duties on behalf of their membership in a manner unintended by the legislation.

3.2 The Minister submitted that the recent scandals in registered organisations, including the Health Services Union and the Australian Workers Union demonstrates the 'absolutely necessary' need for a stronger compliance regime and a more powerful regulator.<sup>1</sup>

3.3 The Department of Employment (the Department) contends that the bill will address several deficiencies in the *2012 Act*, including:

- Providing greater accountability and transparency with respect to the governance of registered organisations and that the enhanced regulation of the sector;<sup>2</sup>
- Guaranteeing, through greater regulation, that members of registered organisations can enjoy the same confidence as that enjoyed by shareholders of trading corporations;<sup>3</sup> and
- Ensuring officers of registered organisations comply with the regulatory framework, resulting in the best outcome for the organisations' membership.<sup>4</sup>

3.4 The Government's position was broadly supported by a number of organisations and state governments.

3.5 The New South Wales Government submitted that, as a partner in the national workplace relations system it welcomes and supports the reforms proposed in the bill:

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

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

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

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

NSW also supports the specified recommendations of the [Legislation] Committee...

The NSW Government is strongly committed to actions that ensure accountability and transparency in the governance of registered organisations and thereby help safeguard the interests of their members.<sup>5</sup>

3.6 The Queensland Government submitted that it supports the Abbott Government's policy with respect to the regulation of registered organisations, noting that:

The measures included in the Bill are similar to measures introduced in Queensland last year by the Queensland Government in relation to Queensland registered industrial organisations.<sup>6</sup>

3.7 The committee heard evidence from submitters that the changes to the Act made by the *Fair Work (Registered Organisations) Amendment Act 2012* were sufficient in addressing many of the issues raised by the Minister in the second reading speeches.

3.8 The Australian Council of Trade Unions (ACTU) argued that it supported the *2012 Act* because it focused on the issues in an appropriate and balanced manner:

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

The *2012 Act* strikes an appropriate balance. While a post-implementation review after a period of some years of operation may be appropriate, re-visiting these matters now, when no substantive issue with their operation has been identified is inappropriate and unnecessary.<sup>7</sup>

3.9 The Industrial Staff Union (ISU) submitted:

The compliance costs and red tape associated with the *Fair Work (Registered Organisations) Act 2009* is significant. The proposal to increase compliance costs by the *Fair Work (Registered Organisations) Amendment [Bill] 2013* increases the compliance costs, increases the red tape and increases the time required to be spent on compliance.<sup>8</sup>

3.10 The Victorian Automobile Chamber of Commerce, (VACC) submitted that it had reservations as an employer association about any further changes to the *RO Act*:

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5 New South Wales Government, *Submission 21*, p. 2.

6 Queensland Government, *Submission 17*, p. 3.

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

8 Industrial Staff Union, *Submission 19*, p. 1.



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It is fair to say, that the rights and privileges afforded to registered organisations have reduced significantly (particularly for employer organisations), while obligations imposed by the Act have increased.<sup>9</sup>

3.11 The MUA (Maritime Union of Australia) gave evidence that the bill represents unnecessary reform of registered organisations, and that they have already taken significant steps to meet the increased accountability and transparency measures enacted in 2012:

**Mr Neal:** ...But this is what strikes me about this legislation: most, if not all, practitioners in the field—from industrial officers through to solicitors, trade union officials and barristers—are slightly dumbfounded as to why this legislation has been introduced. The requirements are already there. They were put through in the *Fair Work (Registered Organisations) Amendment Act 2012*. We all took steps to comply with that. That was amended at the last minute on 29 June last year by the *Fair Work Amendment Act 2013*. We subsequently complied with the requirements of that Act, the deadline for which was 1 January. Now that we have all complied with that and there has been a change of government, it seems that the Commonwealth is now asking us to do a 360 and go through it all again.<sup>10</sup>

3.12 The MUA also gave evidence that the amount of effort required in checking internal Rules, protocols and guidelines against the *2012 Act*, as well as the necessity to obtain outside legal advice clearly affected the ability of the MUA to serve the interests of its membership.<sup>11</sup> The MUA criticised the placement of the Registered Organisations Commission within the Fair Work Ombudsman for administrative and oversight purposes, submitting that:

[it] will lead to uncertainty and confusion amongst employees and Officials of registered organisations regarding the functions and powers of the Registered Organisations Commission and Commissioner, and will also give rise to concerns regarding the independence of both from the Government of the day.<sup>12</sup>

3.13 The Australian Nursing and Midwifery Federation (ANMF) submitted that the Senate should reject the bill, and that it is 'unnecessary, poorly structured and excessive.'<sup>13</sup> ANMF particularly criticised further regulation noting:

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9 Victorian Automobile Chamber of Commerce, *Submission 12*, p. 3.

10 Mr Aaron Neal, Senior Legal Officer, Maritime Union of Australia, *Proof Committee Hansard*, p. 7.

11 Mr Aaron Neal, Senior Legal Officer, Maritime Union of Australia, *Proof Committee Hansard*, p. 2.

12 Maritime Union of Australia, *Submission 4*, p. 5.

13 Australian Nursing and Midwifery Federation, *Submission 14*, p. 2.

...the Parliament in 2012 enacted the *Fair Work (Registered Organisations) Amendment Act 2012* that largely and adequately dealt with the same issues by introducing enhanced reporting and financial management standards.<sup>14</sup>

3.14 The Australian Air Traffic Control Association suggested that the establishment of the Commission effectively disregards all of the processes that they have undertaken to comply with the changes required under the *2012 Act*:

This is actually onerous and can only negatively impact upon the amount of time that we have available to actually undertake the objects of our registered organisation which is, principally, to promote the interests of our members.<sup>15</sup>

### ***Committee view***

3.15 The Committee is persuaded by evidence that suggest that the penalties, having recently been tripled together with the new disclosure requirements, are adequate in addressing the deficiencies noted by submitters, including the Minister.

3.16 On the balance of evidence presented, the committee accepts that the changes brought about by the *2012 Act* should be fully implemented before any attempt is made to interfere with the governance of registered organisations.

### **Compliance burden**

3.17 The committee heard extensive evidence with respect to the proposed reporting and regulatory framework in the bill, specifically the bill's material personal interest disclosure requirements. The bill proposes to amend the Act to restrict:

officers from taking part in making decisions in relation to matters in which they have a material personal interest, requires the preparation of officer and related party disclosure statements and requires officers to undertake approved training in relation to their financial duties.<sup>16</sup>

3.18 Ai Group restated their opposition generally to the proposed material personal interest requirements of the bill:

The provisions of the Bill in this area will operate very unfairly on registered employer organisations and their officer, and it is essential that the Bill is amended. The Bill would impose a far more onerous regime for officers of registered organisations than what applies to directors of public companies. The regime, if enacted, would undoubtedly deter persons from standing for office in employer organisations. In practice the provisions of

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14 Australian Nursing and Midwifery Federation, *Submission 14*, p. 2.

15 The Australian Air Traffic Control Association, *Submission 11*, p. 2.

16 Fair Work (Registered Organisations) Bill 2013, clause 239A.

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the Bill would seriously impede many organisations from carrying on their daily business operations.<sup>17</sup>

3.19 The Australian Privacy Foundation (APF) criticised the proposed disclosure regime, submitting that the provisions of the bill are unnecessary, that they erode privacy protection and are inconsistent with the Government's commitment to respecting traditional freedoms.<sup>18</sup> The APF also submit that the attempts by the Government to justify the erosion of privacy in the bill as either legal or legitimate fail, due to the unnecessary nature of the legislation:

There has been no demonstration that existing law and state/territory levels is inadequate, e.g. that there is serious and pervasive corruption that is not being addressed because investigators and prosecutors lack authority.<sup>19</sup>

3.20 Victorian Automobile Chamber of Commerce (VACC) also suggested that to amend their Constitution again, as required by the proposed bill could create member fatigue due to the onerous and drawn out compliance process and therefore could discourage further participation in the management of their organisation.<sup>20</sup>

3.21 The ACTU also criticised the general effect of the proposed regulatory burden, submitting that:

The Committee should be cognisant of the fact that the burden of this regulation falls not just on the full-time salaried leadership of unions, but on many rank and file members who are elected as unremunerated delegates to governing bodies, which may meet as infrequently as once a year or once every two years.<sup>21</sup>

3.22 ANMF submitted that it:

...prides itself as a union which engages with our membership and nurses generally. We actively seek their involvement in the activities of the union but we are fearful that regulation intended to punish unions for undertaking legitimate activities will dissuade members from participating.

It will be ironic and sad if once enacted the new regulations result in a decrease in the democratic involvement of registered organisations which in turn become more inward looking and secretive.<sup>22</sup>

3.23 The Industrial Services Union (ISU) submitted that as an independent association with no employees, its elected officials receive no income for their work done on behalf of ISU membership.<sup>23</sup> The ISU also contended that:

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

18 Australian Privacy Foundation, *Submission 18*, p. 1.

19 Australian Privacy Foundation, *Submission 18*, p. 1.

20 Victorian Automobile Chamber of Commerce, *Submission 12*, p. 5.

21 Australian Council of Trade Unions, *Submission 16*, p. 37.

22 Australian Nurses and Midwifery Federation, *Submission 14*, p. 6.

In no way should any reduced regulatory burden result in less accountability or less transparency for registered organisations. However, parliament needs to recognise that small registered organisations have a much higher level of inherent transparency and the impact of regulatory compliance is much higher than for large, well-resourced organisations.<sup>24</sup>

### ***Minute keeping requirements***

3.24 The ANMF specifically argued that the minute keeping requirement was too onerous, was not consistent with good organisational practice and would discourage transparency:

While organisations do keep extensive records of their meetings, it is often the case that they deal with sensitive and confidential issues and do so under an agreement that such matters remain “in house”. Examples of this are in dealing with an organisation’s employees, industrial strategy and commercial issues.

A blanket requirement to record minutes, and for such records to be made public, will only foster and encourage a lack of transparency as organisations respond to this requirement with more “off the record” discussions and more informality and consequently reduced accountability when dealing with issues that are considered sensitive or confidential.<sup>25</sup>

3.25 The Department submitted that the new accountability measures are meant to increase transparency and accountability, for the betterment of registered organisations and their memberships:

Members will be provided with greater access to information on the operation and internal governance of their organisation. The provision of information to members will also encourage organisations to be proactive in engaging with members about their administration and to create more open and effective governance processes.

### ***Compliance costs and training***

3.26 The committee heard evidence from submitters that the compliance burden proposed by the bill, including requirements of officers and/or employees to undertake financial training were significantly onerous. Submitters also argued that the consultation of the compliance regime was rushed, and suggested that the changes made in 2012 should be allowed to be implemented before any further changes are made. Submitters did not generally agree with the Government that the new compliance regime proposed by the bill would be beneficial to registered organisations or their officers, employees and membership.

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23 Industrial Services Union, *Submission 19*, p. 1.

24 Industrial Services Union, *Submission 19*, p. 2.

25 Australian Nursing and Midwifery Federation, *Submission 14*, p. 4.

3.27 Ai Group expressed reservations as to how the proposed regime would manage the requirements placed on registered organisations. Specifically, Ai Group raised the development and adoption of training rules required under the 2012 changes, and its associated challenges, submitting that:

For example, there are four organisations—us, the ACTU, the AWU and one other organisation which I cannot recall—that put huge resources into having their officer training programs developed and approved. There is nothing in this legislation that grants automatic approval for those training courses. We have got to again run the gauntlet with the Registered Organisations Commission. So there are some practical things like that that need to be dealt with.<sup>26</sup>

3.28 Similarly, VACC suggested that the reporting and training requirements in the *2012 Act* were rushed,<sup>27</sup> and that it is wary of further regulation given the twelve month lag in complying with the changes. VACC also detailed the difficulties it faces in changing its constitution to comply with the *2012 Act*, stating that:

The process to draft and file the amendments was onerous, complex and costly. While the Fair Work Commission Regulatory Compliance Branch was helpful, given the complexity of our Constitution, the process required to alter our Constitution, the process required to alter our Constitution and the time constraints faced by both the Commission and ourselves, significant time and direct legal costs was (sic) incurred to draft changes and have them approved by members, which we now expect (and hope) to be acceptable to the General Manager or her delegate.<sup>28</sup>

3.29 Motor Trade Association of South Australia submitted that it had already made substantial investments in board management training for its officers:<sup>29</sup>

Accordingly, there needs to be an amendment to the Bill or regulatory capacity for the General Manager of the Registered Organisations Commission (under s 154c) to accredit appropriate prior training of elected officers of registered organisations.<sup>30</sup>

3.30 The ACTU suggested that unions and their subsidiary branches may be compelled, due to the excessive compliance regime, to employ consultants or experts to ensure their compliance with the proposed changes:

Such specialisation would represent a further departure from the historical model of a union operate solely by rank and file members. Alternately the

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26 Mr Stephen Smith, Director, Ai Group, *Proof Committee Hansard*, p. 10.

27 Victorian Automobile Chamber of Commerce, *Submission 12*, p. 3.

28 Victorian Automobile Chamber of Commerce, *Submission 12*, p. 4.

29 Motor Trade Association of South Australia, *Submission 8*, p. 9.

30 Motor Trade Association of South Australia, *Submission 8*, p. 9.

need created by the Bill might be met by increased reliance on external advice, which also increases operating costs.<sup>31</sup>

### *Committee view*

3.31 The committee is persuaded by the evidence presented by submitters and witnesses that the regulatory burden proposed by the bill is excessive and inappropriate. It shares concerns with submitters that the proposed regulatory burden in the bill will necessitate the diversion of significant financial and personnel assets from core member services to compliance and change management.

3.32 The committee believes that the issues raised by the Minister relating to the conduct of officers of one registered organisation have been addressed by the 2012 changes. The committee believes that it is therefore unnecessary to undertake any further regulation of the sector at this time, given the difficulties faced by registered officers implementing those changes.

### **Alignment of responsibilities of officers of registered organisations to trading corporations**

3.33 The issue of the proposed alignment of responsibilities of officers of registered organisations and trading corporations was not generally supported by submitters. The criticism related mostly to the substantial differences between the purposes of corporations, to generate profit for shareholders; and registered organisations, providing services and advice to their membership. Submitters criticised the proposed alignment, suggesting that many smaller registered organisations would be particularly disadvantaged, as they would not meet the equivalent criteria of a medium business enterprise.

3.34 Significant criticism was also made by submitters in relation to the proposed material interest disclosure regime that would require the disclosure of significant material personal interests of officers and their immediate family members. Submitters noted that these disclosures exist in the Corporations Act primarily to provide an opportunity for officers to comply with conflict of interest requirements, and to allow them to absent themselves from decisions of the board of which they may have a significant personal interest. Submitters criticised the proposed regime's application to registered organisations, arguing that it would act as a deterrent to participation, due to the unpaid nature of many roles within registered organisations.

3.35 The Department submitted that the alignment of responsibilities of directors of registered organisations with corporations is appropriate to restore confidence in the management of registered organisations:

The greater alignment of regulation of registered organisations with that of companies, a dedicated and independent regulator and increased penalties

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31 Australian Council of Trade Unions, *Submission 16*, pp 42-43.

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will ensure that members of registered organisations can have the same confidence in the regulatory framework and oversight of their organisations that is enjoyed by shareholders of companies. Members can also be confident that officers of registered organisations must take their obligations seriously and will be held to account.<sup>32</sup>

3.36 The ACTU submitted that given the purpose of corporations is to profit, the duties of directors are of critical importance in ensuring corporations focus on their financial interests and the financial interests of shareholders.<sup>33</sup> The ACTU noted in its submission the discrepancies between the current regulation of corporations and that proposed by the bill:

...the officer disclosure regime set out in the Bill (which applies to all officers in the Registered Organisation and constituent Branches, Divisions etc) far exceeds those applicable to Corporations...<sup>34</sup>

3.37 The ACTU contended that the majority of branches of registered organisations would meet the 'small proprietary company' test set out in section 45A(2) of the *Corporations Act*. Their evidence suggests that the level of reporting required by the bill would not be required if those registered organisations operated as small proprietary companies,<sup>35</sup> undermining the Government's arguments for alignment of responsibilities, given that smaller registered organisations may be exclusively by voluntary officers.

3.38 The MTA also criticised the alignment of directors' duties of corporations with officials in registered organisations, submitting that while many board members of registered organisations elected to voluntary positions have no engagement in the financial affairs of their organisation. However, they noted that:

...there is always a risk that such persons will be implicated in investigation of any potential breaches – and their innocence can only be proven after tortious investigation and assessment.<sup>36</sup>

3.39 SAWIA criticised the alignment of directors responsibilities, submitting that:

...SAWIA is a not for profit incorporated association and the role of SAWIA's board members cannot be directly compared to listed public companies who are commercial operations with well remunerated directors. Yet in many cases the proposed amendments under the Fair Work (Registered Organisations) Amendment Bill 2013 will result in far greater penalties and requirements being imposed.<sup>37</sup>

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

33 Australian Council of Trade Unions, *Submission 16*, p. 12.

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

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

36 MTA, *Submission 8*, p. 5.

37 SAWIA, *Submission 13*, p. 2.

3.40 The QNU specifically opposed any additional regulation of registered organisations in a manner similar to trading corporations, suggesting that:

To put this in context, public companies are able to raise billions of dollars every day in international capital markets facilitated by the level of investor and regulator confidence in these standards. It is completely excessive for a federal government to regulate small, not-for-profit entities under disclosure principles similar to public companies.<sup>38</sup>

3.41 Ai Group suggested that the alignment of disclosure requirements of registered organisations with company directors under the *Corporations Act* was inappropriate.<sup>39</sup> Ai Group noted that while clause 290A is based on s184 of the *Corporations Act*, the officers of Ai Group (and many other registered organisations) are unpaid officials. It submitted that many officers have no engagement with the financial management of the registered organisation:<sup>40</sup>

The roles of these employer and worker representatives cannot be readily aligned with those of directors of listed public companies.<sup>41</sup>

3.42 Ai Group argued that unless the bill is amended, 'the provisions will operate as a major disincentive to existing officers of registered organisations continuing in their roles, and would deter other people from holding office.'<sup>42</sup>

### ***Material personal interest disclosure***

3.43 Many submitters specifically criticised the proposed material personal interest disclosure provisions of the bill, suggesting that the provisions that have been appropriated from the *Corporations Act* were not an appropriate model for registered organisations, due to the innate differences between corporations and registered organisations. The committee heard extensive evidence that criticised the proposed disclosure regime as unfair, unnecessary and misguided, especially given the purpose of registered organisations is to provide advocacy and support services for their membership.

3.44 The ACTU provided three examples demonstrating reasons for their criticism of the alignment of directors duties, namely:

- Directors' disclosure obligations under the *Corporations Act* regarding material personal interests do not appear to extend to interests held separately by relatives;<sup>43</sup>

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38 Queensland Nurses Union, *Submission 3*, p. 4.

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

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

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

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

43 *Corporations Act 2001 (Cth)*, s.191, as cited in ACTU, *Submission 16*, p. 29.



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- Disclosures are only required to be made to other directors<sup>44</sup> (as a mechanism for management of conflicts of interest);<sup>45</sup> and;
  - Directors are not obliged by the *Corporations Act* to disclose material personal interests relating to dealings that are subject to member approval.<sup>46</sup>

3.45 Ai Group submitted that s191(1) of the *Corporations Act* requires a director to disclose to other directors any material personal interests in a matter that relates to the affairs of the organisation, that the director or specified relatives have or acquire.<sup>47</sup>

Most importantly, the purpose of disclosure under the *Corporations Act* is to provide a mechanism for the director to exit from proceedings involving the interest (conflicts).<sup>48</sup>

3.46 Ai Group was critical because the interests covered by clause 293C are personal interests and that many officers would not be comfortable with their personal financial interests, as well as those of their relatives being provided publicly.<sup>49</sup> Ai Group noted that:

In contrast, ss. 293 and 293J I would require the material personal interests of directors and their relatives to be distributed to all members of the organisations (many thousands of companies in Ai Group's case) as well as to the ROC.<sup>50</sup>

3.47 VACC also opposed the material personal interest disclosure provisions set out in the bill, suggesting that:

If the interpretation of material personal interest is considered any interest an officer or their relative may have, that is the same benefit accessible by any member of the organisation, the reporting and disclosure obligations will be unworkable.<sup>51</sup>

3.48 The Australian Privacy Foundation (APF) submitted that while the bill is redundant and inappropriate, it suggested that the bill may result in people being regarded as suspects and losing their privacy merely because they are immediate family members of officers of registered organisations.<sup>52</sup>

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

45 Ai Group, *Submission 5*, p. 7.

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

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

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

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

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

51 Victorian Automobile Chamber of Commerce, *Submission 12*, p. 6.

52 Australian Privacy Foundation, *Submission 18*, p. 2.

**Committee view**

3.49 The committee is persuaded by the evidence presented by submitters and witnesses that the proposed material personal interest disclosure regime is inappropriate and wholly unworkable because of the significant obligations that it would place on registered organisations. The committee agrees that the effect of the alignment would be to further dissuade and discourage members of registered organisations from nominating or participating as officers.

3.50 The committee does not accept the evidence presented by the Department, that greater alignment will allow members to have greater faith in their organisation's management. The committee believes that alignment would be detrimental to registered organisations members and management.

3.51 The committee recognises the fundamental differences in responsibilities and goals of trading corporations and registered organisations, in being run for shareholders' profits and for the benefits of membership respectively. However, the committee does not agree with the evidence provided by the Department that officers of registered organisations should be subject to similar or more stringent material personal interest disclosure requirement than those of directors of trading corporations.

**Consequences for registered organisations**

3.52 The committee heard extensive evidence relating to the potential impact of the amendments to interfere with the operation of registered organisations in Australia, due to the onerous compliance burden proposed by the bill. The committee also heard evidence that the bill could significantly impede the ability of employees or officers (paid or voluntary) of registered organisations to carry out their duties for their members.

3.53 The ACTU submitted that the passage of the bill could result in many employer organisations deregistering as registered organisations and instead, adopting corporate structures. By forming companies limited by guarantees, the organisations could then avoid the disclosure, training and oversight provisions of the bill.<sup>53</sup>

3.54 The ACTU submitted that the principle of non-interference in employee and employer organisations is central to International Labour Convention 87 (Freedom of Association and the Protection of the Right to Organise).<sup>54</sup>

3.55 Ai Group contended that any laws regulating registered organisations engage the Convention, and that those laws must not inhibit the abilities of workers and employers to join employee and employer groups, nor restrict their right to organise

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53 Australian Council of Trade Unions, *Submission 16*, p. 35.

54 Australian Council of Trade Unions, *Submission 16*, p. 37.

the administration of their organisation as they see fit.<sup>55</sup> Ai Group also submitted that articles one to ten are particularly relevant to the consideration of the bill.<sup>56</sup>

3.56 The Parliamentary Joint Committee on Human Rights found in its inquiry into the *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012*, that:

The ILO Committee on Freedom of Association has considered the question of the permissibility of regulating the operations of unions and external scrutiny of their finances. While expressing concern about the possibility of government interference in the operations of trade unions, it has also recognised the legitimacy of external scrutiny in order to prevent or detect fraud or embezzlement.<sup>57</sup>

3.57 The ACTU submitted that the inclusion in the bill of the general directions power (clauses 329FA and 329FB of Item 88 in Schedule 1)<sup>58</sup>, is inappropriate, and argued that it could allow the regulatory arm of government to assist the executive government in industrial disputes.<sup>59</sup>

3.58 The Australian Air Traffic Control Association submitted that it was particularly concerned with the effect of the bill on the classification of officers. Specifically, they raised the potential impact of subsection 293BC(2) and whether it would result in the reclassification of employees of organisations as officers. The Association suggested that the intent of the section needs to be further clarified,<sup>60</sup> given the potential adverse effects for employees in registered organisations.

3.59 The MUA submitted that the alignment of directors duties with those found in the *Corporations Act* would discourage individuals from participating not only as directors but as members of trade unions generally.<sup>61</sup> The ACTU agreed, suggesting that, anecdotally, there already exists a reluctance of rank and file members to participate in governing bodies where they are exposed to large fines:

Many ACTU affiliates (at a branch or national level) have large democratic governing bodies to direct the business of the union, where the delegates are rank and file members of the union.<sup>62</sup>

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55 Australian Industry Group, *Submission 7*, p. 3.

56 Ai Group, *Submission 5*, pp 4–5.

57 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights.

58 Australian Council of Trade Unions, *Submission 16*, p. 37.

59 Australian Council of Trade Unions, *Submission 16*, p. 37.

60 The Australian Air Traffic Control Association, *Submission 11*, p. 2.

61 Mr Aaron Neal, Senior Legal Officer, Maritime Union of Australia, *Proof Committee Hansard*, p. 6.

62 Australian Council of Trade Unions, *Submission 16*, p. 38.

3.59 Ai Group also submitted that the requirements would be a significant disincentive to officers of registered organisations to continue in their roles, and would deter others from participating.<sup>63</sup>

***Committee view***

3.60 The committee agrees that on balance, the bill poses a great threat to the ability of registered organisations to provide services for the advancement of their membership if they are occupied with increasing regulation. The committee is particularly persuaded by evidence from submitters that the cost in personnel and consultancies, together with the administrative requirements would result in the diversion of significant resources away from members services to compliance measures.

3.61 The committee accepts the evidence presented by submitters that the bill has the potential to greatly interfere with and impede the abilities of employees of registered organisations, due to the disincentives proposed by the bill namely, the onerous disclosure regime, and the invasive nature of the material personal interest disclosures.

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

# 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.<sup>1</sup> 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.<sup>2</sup>

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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*.<sup>3</sup> 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.<sup>4</sup>

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,<sup>5</sup> 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.<sup>6</sup>

### ***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.<sup>7</sup>

### ***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.<sup>8</sup>

### ***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.'<sup>9</sup>

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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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

### ***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.<sup>13</sup> 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

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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.<sup>14</sup>

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.'<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup> The National Electrical and Communications Association also opposes the proposed penalties, submitting that the penalties would be excessive to medium sized employer organisations.<sup>18</sup>

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".<sup>19</sup>

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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).<sup>20</sup>

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.<sup>21</sup>

### ***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:<sup>22</sup>

	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.<sup>23</sup>

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.<sup>24</sup>

***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.<sup>25</sup>

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.<sup>26</sup>

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.

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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.<sup>27</sup>

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.<sup>28</sup> Further, the penalty applicable to serious contraventions ranges from \$204,000 to \$1,020,000 for individuals and bodies corporate respectively.<sup>29</sup> These amounts were criticised by the ACTU as excessive and 'clearly inconsistent with the expressed policy.'<sup>30</sup> 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.<sup>31</sup>

### *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.

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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.<sup>32</sup> These offences have been modelled on s 184 of the *Corporations Act*.<sup>33</sup> 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.<sup>34</sup> 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.'<sup>35</sup>

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.<sup>36</sup>

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

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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.

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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.'<sup>37</sup>

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.<sup>38</sup>

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.<sup>39</sup> The MUA also said that these factors would seriously interfere with the operation of registered organisations in Australia,<sup>40</sup> 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.

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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.



# 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.

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.



# COALITION SENATORS' DISSENTING REPORT

## **Introduction**

1.1 Coalition Senators reject the need for this inquiry particularly given the Senate Education and Employment Legislation Committee's recent inquiry into this very legislation. The Green Labor Alliance's decision to re-refer this legislation appears politically motivated and diminishes the standing of the Senate committee process.

1.2 Indeed, contrary to the national roadshow that was being suggested as the need for this Committee to consider the legislation, there was just one hearing which heard from 3 unions and 1 employer organisation.

1.3 Coalition Senators also note that the Senate Committee charged with looking at Labor's amendments to the Registered Organisations regime in 2012 only had 5 days to examine the Bill – that's compared to the almost four weeks that the Committee took to consider this Bill. There was no need for another Committee hearing to consider this question.

1.4 Coalition Senators stand by the findings and recommendations of the Senate Education and Employment Legislation Committee's report following the Inquiry into this legislation.

## **The Legislation**

1.5 Coalition Senators strongly support the Government taking strong action to ensure registered organisations are more transparent and accountable.

1.6 There can no longer be any doubt that serious governance issues now exist in certain unions, especially in the construction industry. In recent weeks we have seen very serious allegations of bribery, intimidation and shady financial practices.

1.7 It is a pity that the Opposition senators, in their petulant desire to re-prosecute old arguments rather than adding new evidence to the debate, did not take up the opportunity to examine these issues more fully in the inquiry process. This simply highlights their obstructionist strategy to legislation for which there is a clear mandate from the Australian people.

1.8 Existing regulation does not sufficiently protect members' interests. Members of registered organisations, mainly workers and small businesses, deserve better. They are entitled to the same protections as shareholders of companies.

1.9 Many officials do the right thing. This Bill specifically targets those who do the wrong thing and will restore confidence in the system for honest members.

1.10 Coalition Senators firmly agree with Australian Workers Union National Secretary Paul Howes who recently said, in relation to union corruption: 'If we ignore any pocket of dishonesty – it will grow like a cancer'. He spoke further about the need for 'developing corruption resistance at every level'.

1.11 Contrary to the views put by the Majority in its report, this legislation is not just in response to the Health Services Union saga.

1.12 The Fair Work Commission has recently launched proceedings against the Musicians Union of Australia and currently has inquiries or investigations into the Australian Rail, Tram and Bus Industry Union, Australian Salaried Medical Officers Federation, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Flight Attendants' Association of Australia, Textile, Clothing and Footwear Union of Australia, Australian Nursing Federation and the Australian Childcare Centres Association.

1.13 Further, the need for a separate Registered Organisations Commission was demonstrated by Fair Work Australia's investigation into the Health Services Union which took four years.

### **Concerns raised by the Majority**

1.14 The Majority in its report expressed a number of key concerns about this Bill, specifically:

- The disclosure requirements for officers of registered organisations are too invasive and go further than the Corporations Act;
- The disclosure requirements for officers of registered organisations include the reporting of family members' income and assets;
- The disclosure requirements for officers of registered organisations capture the whole governing body and need to be reported to the entire membership; and
- That there is no discretion in relation to the requirements for financial accountability training for officers.

1.15 Coalition Senators note that each of these issues arise courtesy of the Fair Work (Registered Organisations) Amendment Bill 2012 introduced by the now Leader of the Opposition, the Hon. Bill Shorten MP.

1.16 Coalition Senators point to the following from the previous government's Minister for Employment's submission:

An analysis of Labor's concerns and Mr Shorten's comments is presented below:

Having voted for the legislation, Opposition Members' are now expressing concern that: Disclosure goes above and beyond the Corporations Act

Then-Minister Shorten said in 2012 when introducing the Bill:

"This bill will require the rules of registered organisations to provide for the disclosure of remuneration, including board fees, of the five highest paid officials of the organisation as well as the two highest paid in each branch, to the members of the organisation. Determining the five highest paid officials will be based upon monetary remuneration rather than non-cash benefits. However, where an official's remuneration is required to be disclosed, that disclosure will require non-cash benefits paid to the official to be identified."

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Having voted for the legislation, Opposition Members' are now expressing concern that: Disclosure is too invasive and covers family members

1.17 Then-Minister Shorten said in 2012 when introducing the Bill:

“Under the amendments proposed by the government, registered organisations will be required to amend their rules to provide for the disclosure of transactions between the organisation and related parties, which may include the family members of officials.”

Having voted for the legislation, Opposition Members' are now expressing concern that: Even those with substantial experience will require the training

Then-Minister Shorten said in 2012 when introducing the Bill:

“To improve financial literacy within registered organisations, the rules of organisations will require each officer whose duties relate to the financial management of the organisation or the branch as the case may be to undertake approved training relating to the officials' financial management obligations.”

1.18 Coalition Senators note that the Fair Work (Registered Organisations) Amendment Bill 2013 was drafted in such a way as to build on the existing framework and that the Minister is giving active consideration to the issues that have been raised by the Senate Education and Employment Legislation Committee and stakeholders.

## **Conclusion**

1.19 Coalition Senators are not surprised that union and employer organisation bosses aren't emphatically in support of this legislation. That said, it is very clear that this reform is in the national interest and in the interests of honest union members who want to ensure that their money is being spent properly.

1.20 The only people that have anything to fear from this legislation are dodgy union bosses who do the wrong thing.

## **Recommendation 1**

**1.21 Recommendation: that the Majority Report be ignored and the Senate Legislation Committee's recommendations be adopted.**

**Senator Chris Back**  
**Deputy Chair**

**Senator Bridget McKenzie**



# **APPENDIX 1**

## **Submissions received**

- 1 Senator the Hon. Eric Abetz, Minister for Employment
- 2 Master Builders Australia
- 3 Queensland Nurses' Union
- 4 Maritime Union of Australia
- 5 Australian Industry Group
- 6 The Australian Manufacturing Workers' Union
- 7 Master Plumbers and Mechanical Contractors Association of New South Wales
- 8 The Motor Trade Association of South Australia Inc
- 9 United Services Union
- 10 National Electrical and Communications Association
- 11 Civil Air - The Australian Air Traffic Control Association
- 12 Victorian Automobile Chamber of Commerce
- 13 South Australian Wine Industry Association
- 14 Australian Nursing and Midwifery Federation
- 15 Pirate Party Australia
- 16 Australian Council of Trade Unions
- 17 Queensland Government
- 18 Australian Privacy Foundation
- 19 Industrial Staff Union
- 20 Mr Andrew Oliver
- 21 New South Wales Government

## **Answer to Questions on Notice**

- 1 Answers to Questions on Notice from Ai Group resulting from the committee hearing on 6 February 2014.



## **APPENDIX 2**

### **Witnesses who appeared before the committee**

**Sydney, 6 February 2014**

BOOTH, Ms Lorin, Industrial Officer, Queensland Nurses' Union

CRANK, Mr Kevin, Industrial Officer, Queensland Nurses' Union

DOLEMAN, Mr Michael, Deputy National Secretary, Maritime Union of Australia

DUNSTAN, Mr Mark, Legal Special Projects Officer, United Services Union

NEAL, Mr Aaron, Senior National Legal Officer, Maritime Union of Australia

SMITH, Mr Stephen, Director, National Workplace Relations, Australian Industry Group

TODHUNTER, Dr Liz, Research and Policy Officer, Queensland Nurses' Union