CHAPTER 1
Background and issues

Reference

1.1 On 29 November 2012 the Senate referred the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012 (the bill) to the Senate Standing Legislation Committee on Education, Employment and Workplace Relations for inquiry and report by 12 March 2013.[1]

Conduct of inquiry

1.2 Details of the inquiry were placed on the committee's website. The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from seven individuals and organisations, as listed in Appendix 1.

Purpose of the bill

1.3 The bill purports to amend the *Fair Work (Registered Organisations) Act 2009* (the RO Act) to strengthen the financial accountability of registered organisations and their office holders, aligning obligations more closely with the laws applicable to entities covered by the *Corporations Act 2001*.

Background

1.4 The *Fair Work (Registered Organisations) Amendment Bill 2012* (the RO Amendment Act) was passed on 26 June 2012. It amended the RO Act to increase the financial and accountability obligations of registered organisations and their office holders, strengthen the investigative powers of Fair Work Australia (FWA) and enhance remedies under the RO Act.

1.5 Coalition Senators argued that while the RO Amendment Act was a 'step in the right direction, it does not go far enough'.[2]

1.6 The bill seeks to add new penalties for registered organisations and their officials 'to provide a genuine deterrent against misuse of position and power'.[3]

Key provisions of the bill

1.7 The bill proposes to make it an offence for a registered organisation not to lodge a compliant full or concise report with Fair Work Australia.[4]

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1 *Journals of the Senate*, 2012, p. 3480.

2 Coalition Senators' Additional Comments, in Senate Education, Employment and Workplace Relations Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2012 [Provisions]*, June 2012, p. 22.

3 Senator the Hon. Eric Abetz, Second Reading Speech, *Senate Hansard*, 27 November 2012, p. 9861.

1.8 Proposed section 288A would impose penalties on officers of registered organisations who do not act in good faith, or misuse their position or information obtained. The maximum penalties would be imprisonment for 5 years or 2,000 penalty units ($340,000) or both.[5]

1.9 The bill also proposes to specify penalties for officers of an organisation up to 200 penalty units ($34,000), for offences such as false statements and withholding information from the General Manager of Fair Work Australia.[6]

1.10 Proposed section 358A would make it a criminal offence for a registered organisation or its officers to not comply with applicable orders of a court.[7]

Human rights implications

1.11 The Explanatory Memorandum states that the bill is compatible with human rights as it does not raise any human rights issues.[8] The Parliamentary Joint Committee on Human Rights observed that the bill does engage two human rights relating to trade unions: Article 8 of the International Covenant on Economic, Social and Cultural Rights and Article 3 of the International Labour Organisation Convention of 1948.[9]

Scrutiny of Bills Committee

1.12 The Senate Standing Committee for the Scrutiny of Bills considered the bill, particularly the proposed penalties in Schedule 1, Item 2, and concluded that 'a further explanation of the severity of the penalties would be welcome'. [10] The Committee drew Senators' attention to the penalty provisions, noting that they 'may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference'.[11]

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4 Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012, proposed new subsection 268(2).

5 Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012, proposed new section 288A. Penalty units are defined in the *Crimes Act 1914*, ss. 4AA(1) and recently increased from $110 to $170.

6 Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012, proposed new subparagraph 306(1)(b) and 306(1A)(b).

7 Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012, proposed new section 358A.

8 Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012, p. 5.

9 Parliamentary Joint Committee on Human Rights, *First Report for 2013*, 18 February 2013, pp 76–77.

10 Senate Standing Committee for the Scrutiny of Bills, *No. 2 of 2013*, 27 February 2013, p. 21.

11 Senate Standing Committee for the Scrutiny of Bills, *No. 2 of 2013*, 27 February 2013, p. 22.

Issues

1.13 Only two of the seven submissions supported the bill: the Institute of Public Affairs (IPA) and the NSW Government.[12]

1.14 The IPA argued that the standards which apply to corporations should also apply to registered organisations, because they manage substantial assets and money on behalf of members. The IPA considered the current legislation does not provide a sufficient deterrent against the misuse of funds, although it does not comment on the effectiveness of recent amendments.[13] The Committee notes that the IPA is not a registered organisation, nor does it claim to represent registered organisations.

1.15 The NSW Government argued the need for 'stronger deterrence' in light of recent allegations of the misuse of union members' funds. The submission outlines recent amendments made to the NSW *Industrial Relations Act 1996* (IR Act) but notes that the relevant penalties under the IR Act 'are considerably lower than those proposed in the Bill'.[14]

Recent changes are yet to be evaluated

1.16 A number of submitters considered it premature to make further changes to the RO Act when the effectiveness of recent amendments (in June 2012) has not yet been assessed.[15] Employer groups noted they would be supportive of further changes if it became apparent the existing regulatory regime was deficient, but this was not the case at this stage.[16] The Australian Council of Trade Unions (ACTU) argued there is no evidence to suggest the recent amendments were inadequate, or that further changes are necessary.[17]

The RO Amendment Act is still being implemented

1.17 Submitters highlighted the fact that key aspects of the recent amendments have yet to come into effect. The new requirements to have rules in place around the disclosure of financial matters (Part 2 of Schedule 1) are scheduled to commence on 29 June 2013, unless set by proclamation for an earlier date.[18]

1.18 The Government is currently working with registered organisations and key stakeholders to draft 'model rules' which organisations can adopt, wholly or in part, to

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12 Institute of Public Affairs (IPA), *Submission 1* and NSW Industrial Relations, *Submission 2*.

13 IPA, *Submission 1*, p. 2.

14 NSW Government, *Submission 2*, p. 1.

15 See, for example Department of Education, Employment and Workplace Relations (DEEWR), *Submission 6*, p. 7; Australian Chamber of Commerce and Industry (ACCI), *Submission 5*, p. 2; Australian Industry Group (AIG), *Submission 7*, p. 5.

16 AIG, *Submission* 7, p. 5; ACCI, *Submission 5*, p. 2.

17 Australian Council of Trade Unions (ACTU), *Submission 3*, p. 3.

18 Department of Education, Employment and Workplace Relations (DEEWR), *Submission 6*, p. 6.

meet the new rules requirements.[19] Employee organisations noted they are currently devoting time and resources to this drafting process, and to ensuring they comply with all the recent amendments.[20]

1.19 The Australian Chamber of Commerce and Industry noted that the Fair Work Commission (FWC) has initiated 'new procedures for investigating and enforcing relevant laws…' as a result of the recent changes.[21] The FWC is also reviewing its Reporting Guidelines to:

> ...identify any appropriate additional disclosure requirements which could be required by the General Manager to further the object of ensuring the accountability of financial reporting units to their members.[22]

1.20 Until the RO Amendment Act has been fully implemented, its impact cannot be properly assessed.

Penalties have recently increased

1.21 The bill proposes to increase maximum civil penalties for officers of registered organisations from 60 to 200 penalty units.[23] Submitters noted that civil penalties were increased significantly by the RO Amendment Act. This amendment tripled the maximum penalties that may be imposed on body corporates and individuals.[24]

Registered organisations are different to corporations

1.22 The bill seeks to align the financial rules for registered organisations with those applicable to entities under the *Corporations Act 2001*.[25] Submitters noted there are key differences between registered organisations and corporations which justify them being regulated differently. The Department of Education, Employment and Workplace Relations (DEEWR) summarised the differences as follows:

> Corporations are designed to generate wealth and protect the financial interests of shareholders. In contrast, registered organisations are established to represent their members in the industrial relation system with special rights under the FW [Fair Work] Act, including in relation to collective bargaining and right of entry, and are an important element in ensuring the right to freedom of association.[26]

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19 ACCI, *Submission 5*, p.1 and DEEWR, *Submission 6*, p. 7.

20 ACCI, *Submission 5*, p.1 and AIG, *Submission 7*, p. 5.

21 ACCI, *Submission 5*, p. 2.

22 Fair Work Commission, *Submission 3*, pp 2–3.

23 Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012, proposed new subparagraph 306(1)(b).

24 DEEWR, *Submission 6*, p. 6; ACCI, *Submission 5*, p. 1; ACTU, *Submission 4*, p. 14.

25 Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Towards transparency) Bill 2012, p. 2.

26 DEEWR, *Submission 6*, p. 8.

1.23 The ACTU similarly argued there is 'no parallel between the nature of the power exercised by corporations and the power exercised by unions'.[27]

1.24 Officers of registered organisations often give up their time for no remuneration, in contrast to directors of corporations who usually receive remuneration for their role.[28]

Conclusion

1.25 The Committee has considered all the submissions before it, and noted submitters generally do not support the bill. Further changes for registered organisations are premature given the recent passage of the RO Amendment Act, which has yet to be fully implemented and assessed.

Recommendation 1

1.26 The committee recommends that the bill not proceed.

Senator Gavin Marshall
Chair, Legislation Committee

27 ACTU, *Submission 4*, p. 6.

28 AIG, *Submission 7*, p. 2 and DEEWR, *Submission 6*, p. 8.