



Submission to the Senate Education & Employment
Committees Inquiry into the *Fair Work (Registered
Organisations) Amendment Bill 2013*

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Introduction

1. While Unions NSW welcomed the opportunity to make comments on this Bill, we would like to voice our frustration regarding the short time period provided to review the Bill and its implications.
2. Unions NSW would like to comment on a number of points of concern with the *Fair Work (Registered Organisations) Amendment Bill 2013*. These concerns focus on the operation of the Commission and the powers conferred to the Commissioner.

Unions NSW

3. Unions NSW is a State Peak Body as defined by section 215 of the *Industrial Relations Act 1996 (NSW)*. Unions NSW has over 60 affiliated unions representing members employed across a wide range of public and private sector industries including teaching, local government, retail, distribution, childcare, manufacturing, electrical, health, emergency services, agriculture, engineering, construction, administrative, the public sector and transport. Collectively Unions NSW and its affiliates represent over 600,000 workers employed across NSW.

Support for Australian Council of Trade Unions Submission

4. Unions NSW has had the opportunity to read the Australian Council of Trade Unions (ACTU) submission on the Fair Work (Registered Organisations) Amendment Bill 2013 and supports its content.

Union accountability

5. Overwhelmingly unions ensure they are accountable, democratic and represent the best interests of its members. Union governance has been regulated by:
- their democratic structures which ensures direct accountability to members;
 - internal union rules;
 - corporate governance policies; and
 - the *Fair Work (Registered Organisations) Amendment Act 2012*.
6. Unions have always had rules and policies in place that ensure the regulation and appropriate use of member's money. Hence, Unions NSW does not oppose reporting and corporate governance requirements and where breaches occur they should be dealt with by the law.

Limited oversight of the Commissioner

7. Unions NSW is concerned at the limited oversight of the Registered Organisation Commission given the breadth of the coercive investigation powers provided by clauses 329AB and 329AC which has the power to do all things necessary or convenient to be done for the purposes of “monitoring acts and practices to ensure they comply with the provisions of this Act providing for the democratic functioning and control of organisations”.

8. *The Australian Securities and Investment Commission Act 2001 (ASIC Act)* a similar regulatory organisations and from which many of the provisions for the ROC are drawn does not have the same breadth of powers. Unions NSW is concerned these provisions, without appropriate oversight, might be to authorised for covert surveillance of union meetings, and union members. Unions New South Wales believes the Committee must review these provisions and at a minimum bring them into line with those exercised by ASIC.

Undermining of democratic structures

9. Unions NSW believes the Committee must be aware that the burden of this regulation will not only affect full-time officers of unions, but also union members elected to the governing bodies within unions.

10. Unions NSW is concerned the *Fair Work (Registered Organisations) Amendment Bill 2013* in its current form will undermine the democratic structures within unions which contribute to the transparency of their operation and provide an internal regulatory framework. That is, the unregulated powers in conjunction with risk of being penalised for holding office will have the undesired effect of concentrating rather than expanding the size of unions' governing bodies charged with oversight of these organisations.

Process of beginning a formal investigation

11. ASIC's approach to enforcement provides a series of questions ASIC officials have to consider before deciding to undertake a formal investigation. These questions are:

- What is the extent of harm or loss
- What are benefits of pursuing the misconduct, relative to the expense?
- How do other issues, like the type and seriousness of the misconduct and the evidence available, affect the matter?
- Is there an alternative course of action?¹

12. The *Fair Work (Registered Organisations) Amendment Bill 2013* does not stipulate any specific process or requirement to justify the initiation of action of

¹ ASIC, "ASIC's approach to enforcement", Information Sheet 151, September 2013

enforcement prior to a formal investigation of a registered organisation is undertaken.

13. Unions NSW believes the Committee should include the same requirements on the ROC before initiating formal investigations.

Penalties

14. Unions NSW believes issues which arise as a result of investigations may actually be associated with the need for an organisation to improve its administrative operations rather than as a result of illegal activity.

15. Unions NSW notes that when an ASIC formal investigation finds misconduct has occurred, a number of questions are assessed prior to a “remedy” being applied. These questions include:

- (a) What is the nature and seriousness of the misconduct?
- (b) What was the post-misconduct behaviour of the offender?
- (c) What impact will the remedy have on:
 - The person or entity?
 - The regulated population?
 - The public?
- (d) Are there any mitigating factors?

16. After considering this, there is a range of remedies available including:

- Punitive
- Protective
- Preservative
- Corrective
- Compensation
- Negotiated resolution²

17. The *Fair Work (Registered Organisations) Amendment Bill 2013* does not appear to include such considerations in the application of penalties. The Committee should review the Bill and consider amending it to enable a remedial as well as punitive approach to breaches.

18. Unions NSW believes that in the early stages of any new legislation, the *Commissioner* has an important role to play as an educator, ensuring unions are aware of the requirements and how to ensure they are compliant. It is likely non-compliance of the new legislation will not be intentional, and the Commissioner should consider corrective approaches, as opposed to punitive remedies when dealing with these matters.

² ASIC, "ASIC's approach to enforcement", Information Sheet 151, September 2013

19. ASIC investigations are required to consider the implications that remedies will have on the public and the regulated population. This should also be the case for investigations of Registered Organisations. The *Commissioner* needs to consider the impact of the penalties they impose. Acknowledging the significant increases to financial penalties that the *Bill* will introduce, penalties applied to unions need to consider the impact that fines will have on the continued representation and rights of the union membership.

20. The *Bill* stipulates that in the case of a “serious” contravention, civil penalties at the 1200 unit limit will be available, with a multiplier of 5 for body corporates. Where a contravention is found to not be “serious” 60 penalty units are available, with a multiplier of five for body corporates. The quantity of penalty is expressed as penalty units, thus is subject to review every three years pursuant to *section 4AA of the Crimes Act 1914*. On current figures this translates to a maximum penalty of \$204,000 for an individual and \$1,020,000 for a registered organisation. Conversely, under the Corporations Act, the quantity of civil penalty is fixed at \$200,000 and that limit applies equally to persons and bodies corporate.

21. The Committee should review the proposed penalties for registered organisations as they are excessive and do not correspond with the penalties applied to the private sector.

Funding of the Commission

22. Unions NSW is concerned the financial performance of a regulatory organisation will be linked to the number of prosecutions undertaken and penalties collected as a result of those prosecutions. This structure potentially establishes a perverse incentive which may result in the ROC acting outside what is expected of an independent regulatory body. Unions NSW notes neither *the Fair Work Ombudsman* nor *the Australian Securities and Investment Commission* have comparable legislative provisions.

23. Unions NSW believes the Committee should review and remove the nexus between prosecutions and operating income of the ROC in order to remove any incentives which could lead to the inappropriate exercise of regulatory power.

24. Unions NSW is concerned by the crediting of the *Special Account* by “amounts of any gifts or bequests made for the purpose of the Special Account”. We are unsure as to why such a funding model has been included in the Bill and also concerned about how the potential for private contributions might undermine the independence of the ROC.

Resourcing of the Fair Work Ombudsman

25. *Unions NSW believes the establishment of the ROC is unnecessary duplication of existing structures while also removing resources from existing organisations.*

For example, the Office of the Fair Work Ombudsman is currently under resourced and unions have expressed frustrations with the lack of inspectors visiting workplaces and the current backlog in approving training. The creation of a new statutory office which will require the Ombudsman to “make staff available” to the *Commissioner* will only exacerbate the issue of staff shortages.

26. Unions NSW understands that many of the tasks of the Commissioner and assisting staff mirror those previously delegated to the General Manager whose staff were employed in the Office of the Ombudsman. However, we are unconvinced that it is necessary for a new and separate statutory office to be established for the ROC. Splitting the existing functions of the Ombudsman is not an efficient use of staff and Unions NSW believes that this will lead to further shortages in other areas of the Ombudsman’s responsibilities.

Reporting

27. The Commissioners annual reports are not required to address the use of the coercive powers set out in Schedule 2 nor is it clear that the Commissioner is



required to report on the type of organisation who has undergone investigations (employer organisations, employee organisation or members of these organisations).

28. Reporting on these matters is crucial in ensuring that the ROC is transparent and accountable. It should be noted that under Regulations 8AAA of the Australian Securities and Investments Commission Regulations 2001, ASIC is required to report on the number of times they have used their coercive information gathering powers.