

Fair Work (Registered Organisations) Amendment Bill 2013

Portfolio: Employment

Introduced: House of Representatives, 14 November 2013

Summary of committee concerns

1.87 The committee seeks further information to determine if the bill is compatible with human rights.

Overview

1.88 This bill proposes to establish the Registered Organisations Commission (ROC) and provide it with investigation and information gathering powers to monitor and regulate registered organisations (including trade unions).⁴³

1.89 The bill provides for the appointment, functions and powers of the Registered Organisations Commissioner (RO Commissioner), who will assume the responsibilities of the General Manager of the Fair Work Commission in relation to registered organisations. The RO Commissioner will act as an enforcer of the new rules and penalties.

1.90 The bill also proposes amendments to:

- amend the requirements on officers' disclosure of material personal interests and change grounds for disqualification and ineligibility for office;
- increase financial accounting, disclosure and transparency obligations for registered organisations and their officers and make them enforceable as civil penalties; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties and new offences in relation to the conduct of investigations.

1.91 The explanatory memorandum states that the proposed investigation and information gathering powers are modelled on those found in the *Australian Securities Investments Commission Act 2001*.⁴⁴ Personal interest disclosure provisions and civil penalties are said to be modelled on those provisions imposed on companies and their directors under the *Corporations Act 2001*.⁴⁵

43 The bill makes amendments to the *Fair Work (Registered Organisations) Act 2009* and the *Fair Work Act 2009*.

44 Explanatory memorandum, p 1.

45 Explanatory memorandum, p 2.

Compatibility with human rights

Statement of compatibility

1.92 The bill is accompanied by a statement of compatibility that states that the bill engages the right to freedom of association, including the right to form and join trade unions;⁴⁶ the right to a fair trial, including the right to be presumed innocent;⁴⁷ and the right to privacy.⁴⁸ The statement of compatibility notes that the right to freedom of association is also guaranteed in the International Labour Organisation (ILO) *Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87)*, to which Australia is a party.

1.93 The statement contains a detailed discussion of the rights implications of the amendments and concludes 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.

Committee view on compatibility

Right to freedom of association

1.94 The committee notes that the right to freedom of association in article 22 of the ICCPR and the right of trade unions in article 8 of the ICESCR are not absolute rights and may be subject to permissible limitations, provided that those limitations are adopted in pursuit of a legitimate objective and are a reasonable, necessary and proportionate means to achievement of that objective.

1.95 The committee notes that the purpose of the amendments is to ensure better governance of registered organisations to prevent fraud, financial mismanagement and inadequate democratic governance in the interests of members.⁴⁹ The committee considers these to be legitimate objectives. As the statement of compatibility noted, the committee's predecessor (former committee) accepted that limiting these rights for such purposes to be legitimate:

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.⁵⁰

46 Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

47 Article 14 of the ICCPR.

48 Article 17 of the ICCPR.

49 Statement of compatibility, p 3.

50 Parliamentary Joint Committee on Human Rights, *First Report of 2013*, p 77.

1.96 However, even if the limitations pursue a legitimate objective, they must still be shown to be reasonable, necessary and proportionate to that objective. The statement of compatibility argues that the measures satisfy these requirements because:

- the system of registration of employer and employee associations in the federal industrial relations system is not mandatory and associations freely choose to seek registration with the rights and obligations which registration confers;
- the measures are modelled on established mechanisms of corporate governance, which are comparable to the position of trust officers of industrial organisations hold in relation to the maintenance and advancement of members' interests, including the strong fiduciary elements involved in the discharge of such duties;
- the exercise of the functions and powers of the ROC and the RO Commissioner are subject to judicial, administrative and parliamentary oversight:
 - decisions of the RO Commissioner will be reviewable by appeal to the Fair Work Commission;⁵¹
 - the Commonwealth Ombudsman will have oversight of the actions of the ROC and the RO Commissioner similar to its oversight of the actions of the Australian Securities and Investments Commission (ASIC) under its corresponding functions and powers; and
 - the ROC will be required to report annually to the Commonwealth Parliament.

1.97 The committee accepts that these are important safeguards. However, the committee notes that some of the provisions in the bill raise concerns with regard to their necessity and proportionality, and, in particular, whether less restrictive options could be adopted. These concerns relate to the (i) breadth of the proposed disclosure requirements, (ii) the threshold for the exercise of the RO Commissioner's powers, and (iii) the open-ended definition of a 'serious contravention' in relation to the new and increased civil penalty provisions.

(i) Breadth of the disclosure requirements

1.98 The bill will require officers of registered organisations to disclose any remuneration and benefits paid to them.⁵² Officers will also be required to disclose any material personal interests that the officer or a relative has or acquires.⁵³

51 Under section 604(1) of the *Fair Work Act 2009*.

52 Proposed new section 293B, inserted by item 166, Schedule 2.

53 Proposed new section 293C, inserted by item 166, Schedule 2.

1.99 The committee notes that the Senate Education and Employment Legislation Committee, which conducted an inquiry into the bill, was ‘persuaded by the evidence provided by submitters that the disclosure regime in relation to material personal interests proposed by the bill may create unnecessary administrative burdens for officers, some of whom are volunteers.’⁵⁴ The Senate Committee recommended restricting the requirement to disclose material personal interests to those officers whose duties relate to the financial management of the organisation; to narrow the disclosure obligations with regard to an officer’s relatives to ensure consistency with the *Corporations Act 2001*; and to limit disclosures to payments made above a certain threshold.⁵⁵

1.100 The committee intends to write to the Minister for Employment to seek clarification as to the whether the breadth of the proposed disclosure regime in the bill is necessary and proportionate to the objective of achieving better governance of registered organisations.

(ii) *Threshold for exercising RO Commissioner’s powers*

1.101 The bill provides that the RO Commissioner has the power to do all things ‘necessary or convenient’ (emphasis added) for the purposes of performing his or her functions.⁵⁶ The RO Commissioner will be conferred with broad functions under the bill, including extensive investigation and information gathering powers (modelled on powers in the *Australian Securities Investments Commission Act 2001*), and the ability to enforce the new rules and penalties.⁵⁷ The statement of compatibility states that this power is a ‘standard provision for a regulator’.⁵⁸

1.102 The committee notes that human rights standards require limitations of rights to be ‘necessary’ in order to be justifiable. The threshold of ‘convenient’ would appear to be a significantly lower standard than the usual international human rights law requirement of demonstrating that a limitation on a right is ‘necessary’.

1.103 The committee intends to write to the Minister for Employment to seek clarification as to whether and how the standard of ‘convenient’ is consistent with the requirement for limitations on rights to be ‘necessary’.

54 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, 2 December 2013, para 2.16.

55 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, 2 December 2013, paras 2.17-2.19.

56 Proposed new section 329AC, inserted by item 88, Schedule 1.

57 Proposed new section 329AB, inserted by item 88, Schedule 1.

58 Statement of compatibility, p 13.

(iii) *Definition of 'serious contravention'*

1.104 The bill provides for a definition of a 'serious contravention' in relation to a contravention of a civil penalty provision by a current or former officer or employee of an organisation. A 'serious contravention' is defined as a contravention that:⁵⁹

- a) materially prejudices the interests of the organisation or branch, or the members of the organisation or branch; or
- b) materially prejudices the ability of the organisation or branch to pay its creditors; or
- c) is serious.

1.105 The definition is relevant to the increased civil penalties introduced by the bill. Serious contraventions will be subject to maximum penalties of up to 1200 penalty units (\$204, 000) for an individual or 6000 for a body corporate (\$1, 020, 000). These penalties will apply to breaches of the new obligations to disclose the officer's material personal interests and remuneration, among other things.

1.106 The committee is concerned by the vague nature of criterion (c), which simply requires a serious contravention to be 'serious'. The open-ended and circular nature of the definition would appear to create considerable uncertainty as to when a contravention might be considered 'serious'. In human rights terms the provision may not satisfy the 'quality of law' test, which requires not only that the measure limiting the right be set out in legislation, but it must also be precise enough so that people know what they need to comply with.

1.107 The committee intends to write to the Minister for Employment to request that consideration be given to deleting criterion (c) and/or providing additional guidance as to the circumstances when a contravention might be considered 'serious'.

Right to be presumed innocent

1.108 Article 14(2) of the ICCPR protects the right to be presumed innocent until proved guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Similarly, strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.109 Reverse burden and strict liability offences, however, will not necessarily be inconsistent with the presumption of innocence provided that they are within

59 Proposed new section 6, inserted by item 4, Schedule 2.

reasonable limits which take into account the importance of objective being sought and maintain the defendant's right to a defence. In other words, such offences must pursue a legitimate aim and be reasonable, necessary and proportionate to that aim.

1.110 The bill creates various strict liability and reverse burden offences. The committee considers that the majority of these are likely to be compatible with the presumption of innocence as they carry penalties at the lower end of the scale, involve matters that are peculiarly within the defendant's knowledge or impose only an evidential burden.

1.111 The committee, however, notes that the bill creates an offence for concealing documents relevant to an investigation which imposes a reverse legal burden on the defendant and carries a maximum penalty of 5 years imprisonment.⁶⁰ The provision states that it is a defence if 'it is proved that the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation...'. The statement of compatibility does not identify or justify this provision. The committee notes that reverse legal burden offences that impose imprisonment as a penalty involve a significant limitation on the right to be presumed innocent and require a high threshold of justification.

1.112 The committee intends to write to the Minister for Employment to seek clarification as to whether the reverse burden offence in proposed new section 337AC is consistent with the right to be presumed innocent. The committee also seeks clarification as to why the less restrictive alternative of an evidentiary burden would not be sufficient in these circumstances. This would still require the defendant to provide some evidence (for example a statement under oath) regarding intention, but would not require the defendant to prove lack of intent on the balance of probabilities.

Right against self-incrimination

1.113 Article 14(3)(g) of the ICCPR guarantees the right to be free from self-incrimination, in that a person may not be compelled to testify against him or herself or to confess guilt.

1.114 The bill provides that it is not a reasonable excuse for a person to fail or refuse to give information or produce a document or sign a record in accordance with a requirement made of the person because doing so might tend to incriminate a person or make them liable to a penalty.⁶¹

1.115 The statement of compatibility explains that the limitation is necessary to ensure that offences under the Fair Work (Registered Organisations) Act can be properly investigated which is necessary for ensuring compliance with the Act. The

60 Proposed new section 337AC, inserted by item 230, Schedule 2.

61 Proposed new section 337AD(1), inserted by item 230, Schedule 2.

statement further claims that the limitation is reasonable and proportionate because the bill provides for both use and derivative use immunity so that the information, document or record may not be used in evidence against the person in a criminal or civil penalty proceeding.

1.116 The committee is concerned that these immunities will only be available if (i) the person claims that the information or material might tend to incriminate them or make them liable to pay a penalty; and (ii) if this is in fact the case. The statement of compatibility does not explain why a person would need to 'claim' the right before it would be considered to be applicable. In addition, the committee's reading of the provision is that only use immunity would appear to be provided and not derivative use immunity.

1.117 The committee intends to write to the Minister for Employment to seek clarification as to

- **whether proposed new section 337AD(3) does in fact provide for derivative use immunity, as well as use immunity; and**
- **how the requirement for a person to have to 'claim' the right against self-incrimination in order to have it apply is consistent with article 14(3) of the ICCPR.**

Right to a fair trial – increased penalty for civil penalty provisions

1.118 In addition to the introduction of new criminal offence provisions, the bill will also increase the maximum penalty for a range of civil penalties across the Fair Work (Registered Organisations) Act. The new penalties range from 60 penalty units for an individual (\$17,000) or 300 penalty units for a body corporate (\$51,000) for the least serious civil penalty provisions,⁶² up to 1200 penalty units (\$204, 000) for an individual or 6000 for a body corporate (\$1, 020, 000) for 'serious contraventions'.⁶³

1.119 As our predecessor committee has noted on many occasions, where a penalty is described as 'civil' under national or domestic law, it may nonetheless be classified as 'criminal' for the purposes of Australia's human rights obligations because of its purpose, character or severity. As a consequence, the specific criminal process guarantees set out in article 14 of the ICCPR may apply to such penalties and proceedings to enforce them.

62 This penalty will apply to breaches of obligations to lodge certain documents with the Fair Work Commission and other administrative tasks such as removing non-financial members from the organisations register.

63 This penalty will apply to breaches of officer's civil financial management duties under sections 285 – 288, the new obligations introduced by the bill to disclose officer's material personal interests and remuneration, payments made by an organisation or branch, general duties in relation to orders and directions of the Fair Work Commission and Federal Court and restrictions on officers voting on certain matters.

1.120 The committee set out in its Interim Practice Note 2 the expectation that statements of compatibility should provide an assessment as to whether civil penalty provisions in bills are likely to be 'criminal' for the purposes of article 14 of the ICCPR, and if so, whether sufficient provision has been made to guarantee their compliance with the relevant criminal process rights provided for under the ICCPR.

1.121 The statement of compatibility provides a discussion of these issues, which follows the three criteria set out in the committee's Interim Practice Note 2 for assessing whether a penalty is 'criminal' for the purposes of human rights law. These relate to (i) the domestic classification; the nature; and (iii) the severity of the penalty. The statement argues that the penalties are, on balance, more likely to be considered 'civil' for the purposes of human rights law because:

- *Classification*: The penalties are classified as 'civil' in domestic law;
- *Nature of the penalty*: Many of the middle tier penalties are administrative in nature and the highest tier penalties relate to the financial management of organisations; and
- *Severity of the penalty*: The maximum penalty is equivalent to that applicable under the Corporations Act and many organisations have command of considerable resources similar to that of many companies. In addition, there is no provision for imprisonment for non-payment of a penalty.

1.122 The committee, however, notes that the penalties will apply to individuals and, given the breadth of the disclosure regime, these may include volunteers in the organisation as well. The severity of the maximum penalty ((\$204, 000 for an individual) may also, in and of itself, result in these provisions being considered as 'criminal' for the purposes of human rights law. The committee notes that similar provisions in the Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 were accepted to be 'criminal' for human rights purposes.⁶⁴

1.123 The committee intends to write to the Minister for Employment to seek clarification as to whether the civil penalty provisions for 'serious contraventions', should be considered as 'criminal' for the purposes of article 14 of the ICCPR, given that they carry a substantial pecuniary sanction and could be applied to a broad range of individuals, including volunteers.

64 Clean Energy Legislation (Carbon Tax Repeal) Bill 2013, Statement of compatibility, p 16.