

Fair Work (Registered Organisations) Amendment Bill 2013

Portfolio: Employment

Introduced: House of Representatives, 14 November 2013

Status: Before Senate

PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013

Response dated: 5 March 2014

Information sought by the committee

3.24 This bill seeks to establish the Registered Organisations Commission (ROC) (including a Registered Organisations (RO) Commissioner) and provides it with investigation and information gathering powers to monitor and regulate registered organisations (including trade unions).

3.25 The committee sought a range of further information necessary to determine whether the bill is compatible with human rights, including:

- 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;
- whether and how the standard of 'convenient' is consistent with the requirement for limitations on rights to be 'necessary';
- a request that consideration be given to deleting criterion (c) in the proposed definition of a 'serious contravention' (where a 'serious contravention' is defined as a contravention that 'is serious') and/or provision of additional guidance as to the circumstances when a contravention might be considered 'serious';
- whether the reverse burden offence in proposed new section 337AC of the bill is consistent with the presumption of innocence;
- 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 the prohibition against self-incrimination.

3.26 The Minister's response is attached.

Committee's response

3.27 The committee thanks the Minister for his response.

3.28 The committee considers that the information provided has addressed most of its concerns. In particular, the committee welcomes the Minister's indication that amendments will shortly be circulated to narrow the breadth of the proposed disclosure requirements.

Threshold for exercising RO Commissioner's powers

3.29 The bill seeks to confer on the RO Commissioner a broad range of functions, including extensive investigation and information gathering powers and the ability to enforce the new rules and penalties.¹ The bill provides that the RO Commissioner has the power to do all things 'necessary or convenient' (emphasis added) for the purpose of performing his or her functions.²

3.30 In its comments on the bill, the committee noted that human rights standards require limitations on rights to be 'necessary' in order to be justifiable. The proposed standard appears to allow coercive actions by the RO Commissioner which are not necessary, but are convenient.

3.31 The committee notes the Minister's response that such a threshold is commonplace in legislation and that the threshold has been modelled on other like provisions in Commonwealth laws. The committee also notes the Minister's reference to case law on the term 'necessary or convenient'.

3.32 As the committee has previously noted, the fact that a provision or approach is modelled on existing provisions or approaches is not, in and of itself, a sufficient justification for limitations on rights.

3.33 The committee therefore remains concerned that the standard of 'convenient' would not appear to be fully consistent with the requirement under international human rights law that restrictions on rights be 'necessary'.

Right to be presumed innocent

3.34 The bill seeks to create an offence for concealing documents relevant to an investigation and carries a maximum penalty of five years imprisonment.³ The bill imposes a reverse legal burden on the defendant to prove that 'the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation under this Part'. The offence provision is modelled on a comparable provision in the *Australian Securities and Investments Commission Act 2001*.

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

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

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

3.35 In its comments on the bill, the committee noted 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. The committee sought clarification as to whether the reverse burden offence is consistent with the right to be presumed innocent and why the less restrictive alternative of an evidential burden would not be sufficient in these circumstances.

3.36 The committee notes the Minister's response that '[t]his prohibition is very important in terms of the integrity of the investigations framework under the Bill and is central to the Bill's objectives' and that recent investigations have shown the existing framework to be 'spectacularly ineffective in both deterring inappropriate behaviour and holding wrongdoers to account'. Further, that breaches of the law in this field 'should be treated just as seriously as such conduct by company directors'.

3.37 The committee accepts the need to have a strong regulatory framework in this area. However, the response does not address the committee's question as to whether the imposition of an evidential, rather than legal, burden was considered and why an evidential burden would not be sufficient. As set out above, the committee has previously noted that the fact that a provision or approach is modelled on existing provisions or approaches is not, in and of itself, a sufficient justification for limitations on rights. In the current case, the committee considers that the requirement to prove intention in relation to the conduct which constitutes the offence goes to the core of the criminal conduct being addressed. On the basis of this concern, combined with the fact that the offence carries a maximum penalty of five years imprisonment, the committee is not satisfied that sufficient consideration has been given to whether an evidential burden only would be sufficient.

3.38 The committee therefore remains unable to conclude that the proposed offence is consistent with the right to be presumed innocent.



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Senator Dean Smith
Chair
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- 5 MAR 2014

Dear Senator *Dean,*

Thank you for your letter of 10 December 2013, on behalf of the Parliamentary Joint Committee on Human Rights, concerning the Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill). I apologise for the delay in responding.

Breadth of Disclosure Requirements

The Committee has sought clarification on 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.

The Coalition Government submits that the disclosure obligations in the Bill, as drafted, are reasonable and proportionate for the reasons set out in the Statement of Compatibility with Human Rights to the Bill. However, the Government also acknowledges that there is scope to reduce the obligations in the Bill to more closely reflect the obligations on companies and their directors in the *Corporations Act 2001*.

With this in mind, the Government has carefully considered the concerns that have been raised in the report of the Senate Education and Employment Legislation Committee. The Government takes seriously the Committee's review process and respects the legitimate concerns that have been expressed regarding potentially excessive regulation. In response to these concerns, the Government will shortly circulate amendments to the Bill to:

- amend the disclosure requirements for officers of registered organisations to more closely align them with the *Corporations Act 2001* so that the requirement to disclose material personal interests only applies to those officers whose duties relate to the financial management of the organisation
- remove the more invasive disclosure requirements for officers of registered organisations to report family members', income and assets, thereby more closely aligning with the *Corporations Act 2001*
- align the material personal interest disclosure requirements for officers of registered organisations with the *Corporations Act 2001* so that disclosures only need to be made to the governing body and not to the entire membership
- limit disclosures of related party payments to payments made above a certain prescribed threshold and with certain other exceptions, based on the exceptions in the *Corporations Act 2001* for member approval of related party transactions

- provide the Registered Organisations Commissioner with the discretion to waive the training requirements of officers of registered organisations if the Registered Organisations Commissioner is satisfied with their level of qualification (for example if a member is a Certified and Practising Accountant).

I also note that the concerns addressed by the Committee relate solely to obligations introduced by the previous government in the *Fair Work (Registered Organisations) Amendment Act 2012*. As a result of the proposed amendments, the disclosure obligations on registered organisations under the amended Bill will be less onerous than those that are currently imposed by the *Fair Work (Registered Organisations) Act 2009*.

Threshold for exercising Registered Organisations Commissioner's powers

The Committee has sought clarification on whether and how the standard of 'convenient' in proposed new section 329AC, inserted by item 88, Schedule 1 of the Bill, is consistent with the requirement for limitations on rights to be 'necessary'.

The provision of a power to do something 'necessary or convenient' is commonplace in legislation, particularly in the context of the making of delegated legislation and empowering a regulator or other statutory office. New section 329AC mirrors subsection 657(2) of the *Fair Work Act 2009*, which provides that the General Manager of the Fair Work Commission has power to do all things 'necessary or convenient' to be done for the purposes of performing his or her functions.

The term 'necessary or convenient' is one that has a long history in case law and is narrowly construed to confine it to the scope of the power to which it is applied. In *Shanahan v Scott* (1957) 96 CLR 245, the High Court made the following observations about the term 'necessary or convenient' in the context of the power to make delegated legislation:

"Such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying out or to depart from or vary the plan which the legislature has adopted to attain its ends."

In the context of the Bill, where proposed section 329AC would give the Registered Organisations Commissioner the power to do all things necessary or convenient to be done for the purposes of performing his or her functions, the Registered Organisations Commissioner will be constrained to what his or her functions allow and will not be able to broaden the scope of his or her functions. As such, the narrow and orthodox construction of 'convenient' will not result in a lower observance of human rights.

Definition of 'serious contravention'

The Committee has requested that consideration be given to deleting criterion (c) in the definition of 'serious contravention' in proposed new section 6, inserted by item 4, Schedule 2 of the Bill, and/or that additional guidance be provided as to the circumstances when a contravention might be considered 'serious'.

In the Government's view, the test, which makes the seriousness of the relevant conduct a threshold factor for the application of higher penalties, is not open ended or circular. The mechanism of conferring on the courts a discretion to apply higher maximum pecuniary penalties for conduct constituting a 'serious contravention' as defined by the criteria in (a) – (c) of the definition of 'serious contravention' is not unclear or without precedent. Paragraph 146 of the Explanatory Memorandum to the Bill notes that the definition of a serious contravention was 'broadly modelled on subsection 1317G(1) of the *Corporations Act 2001* and it is expected that similar principles would apply.' In this respect, the body of case law developed in respect of subparagraph 1317G(1)(b)(iii) of the *Corporations Act 2001* can be drawn upon in understanding how criterion (c) of the proposed definition will operate and whether a contravention is considered a 'serious contravention' will depend on the facts of each particular matter. The Government

submits that the deletion of criterion (c) would be inconsistent with its policy objective to align obligations of registered organisations with those of corporations.

Right to be presumed innocent

The Committee has sought clarification on whether the reverse burden offence in proposed new section 337AC, inserted by item 230, Schedule 2 of the Bill, is consistent with the right to be presumed innocent. The Committee has also sought clarification on why the less restrictive alternative of an evidentiary burden would not be sufficient in these circumstances.

Although the reverse burden offence in subsection 337AC(2) limits the right to be presumed innocent under article 14(2) of the International Covenant on Civil and Political Rights, this limitation is compatible with the right because it pursues a legitimate aim and is reasonable, necessary and proportionate.

It is the Government's policy that registered organisations should be overseen by an independent regulator with powers and functions modelled on those of the Australian Securities and Investments Commission. The Government considers that this is necessary and appropriate to ensure better governance of registered organisations and to prevent fraud, financial mismanagement and inadequate democratic governance.

Section 337AC, which prohibits the concealing, destroying, mutilating or altering of documents relevant to an investigation, closely follows the offence provision in section 67 of the *Australian Securities and Investments Commission Act 2001*. This prohibition is very important in terms of the integrity of the investigations framework under the Bill and is central to the Bill's objectives. It is appropriate that proposed subsection 337AC(2) is expressed as an offence-specific defence with a legal burden of proof rather than an element of the offence as it relates to matters that are both peculiarly within the knowledge of the defendant and which would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

The recent investigations of the Fair Work Commission into financial misconduct within certain registered organisations have demonstrated that the existing regulatory framework has been spectacularly ineffective in both deterring inappropriate behaviour and holding wrongdoers to account. Having a regulatory body with powers to prevent deliberate frustrations of its investigatory functions is crucial to remedying these shortcomings and providing members of registered organisations the confidence that the governance framework is genuinely robust.

As the Committee is aware, the Government is very strongly of the view that corrupt conduct by officers of registered organisations should be treated just as seriously as such conduct by company directors. The Australian community rightly expects that breaches of the law in either of these two fields should be subject to the same consequences. This requires that the enforcement regime in each case should be largely similar.

In this context, the limitation is compatible with the right as it pursues a legitimate aim (providing for proper investigation of suspected breaches) and is reasonable, necessary and proportionate in achieving that objective.

Right against self-incrimination

The Committee has sought clarification on whether proposed new subsection 337AD(3), inserted by item 230, Schedule 2 of the Bill, does in fact provide for derivative use immunity, as well as a use immunity.

The Government confirms that proposed new subsection 337AD(3) does not provide for derivative use immunity but does provide for use immunity. In this respect, the proposed new subsection 337AD(3) closely follows the privilege against self-incrimination found in section 68 of the *Australian Securities and Investments Commission Act 2001*. As was noted in the Statement of Compatibility with Human Rights to the Bill, the Government has sought to ensure that the Registered Organisations Commissioner can effectively investigate breaches or potential breaches of the *Fair Work (Registered Organisations) Act 2009*. In order to achieve this object it is necessary for the Registered Organisations Commissioner to have information gathering powers sufficient to undertake its task. It is the Government's view that the powers of Australian Securities and Investments Commission provide a reasonable, necessary and proportionate model for the Registered Organisations Commissioner's powers.

The burden placed on investigating authorities in conducting a prosecution before the Courts is the main reason why the powers of the Australian Securities Commission (now Australian Securities and Investments Commission) were amended to remove derivative use immunity. The Explanatory Memorandum to the Corporations Legislation (Evidence) Amendment Bill 1992 provides that derivative use immunity placed:

“...an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity...”¹

Similarly, the Government considers that the absence of derivative use immunity is reasonable and necessary for the effective prosecution of matters under the *Fair Work (Registered Organisations) Act 2009*.

The Committee has also sought clarification on how the requirement for a person to have to ‘claim’ the right against self-incrimination (in proposed new subsection 337AD(3)) in order to have it apply is consistent with article 14(3) of the International Covenant on Civil and Political Rights.

In order to claim the use immunity, new subsection 337AD(2) provides that a person must, prior to giving information, producing a document or signing a record, state that any information that they provide may incriminate them or expose them to a penalty. By making this claim the use immunity in new subsection 337AD(3) is activated. Consistent with section 68 of the *Australian Securities and Investments Commission Act 2001*, this requirement to claim the privilege is procedurally important as it allows the Registered Organisations Commissioner to obtain all information relevant to an investigation while still protecting the claimant against the ‘admissibility’ of the information provided pursuant to the notice in evidence against the person in proceedings of the kind described in proposed subsection 337AD(3).

In terms of compliance with article 14(3) of the International Covenant on Civil and Political Rights, the central concern with the requirement to claim the immunity is generally that failure to claim the privilege (either forgetting or being unaware of the privilege) could result in self-incrimination. While this concern could result in circumstances where the requirement to claim the use immunity in subsection 337AD(2) is inconsistent with the right, there are important safeguards that limit the relevant risk. Proposed new subsection 335(3) provides that a person required to attend before the Registered Organisations Commissioner for questioning must be provided with a notice prior to the giving of information that:

- provides information about the ‘general nature of the matters to which the investigation relates’ (subsection 335(3)(a))
- informs the person that they ‘may be accompanied by another person who may, but does not have to be, a lawyer’ (subsection 335(3)(b))
- sets out the ‘effect of section 337AD’ (subsection 335(3)(c)).

As individuals are informed about the type of questions they will be asked and the effects of section 337AD, they will be aware that they are able, if necessary, to claim the use immunity. Further, the fact that a person can have a lawyer present during questioning provides the person with the additional support needed if they are unsure whether a question presented to them may elicit self-incriminating information.

Given these safeguards, the requirement to claim the privilege is consistent with article 14(3) of the International Covenant on Civil and Political Rights.

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

The Committee has sought clarification on whether the civil penalty provisions for ‘serious contraventions’ should be considered as ‘criminal’ for the purposes of article 14 of the International Covenant on Civil and Political Rights, given that they carry a substantial pecuniary sanction and could be applied to a broad range of individuals, including volunteers.

¹ Corporations Legislation (Evidence) Amendment Bill 1992, Explanatory Memorandum p 1.

The Government reiterates the view expressed in the Statement of Compatibility with Human Rights to the Bill that the civil penalties should not be considered criminal penalties for the purposes of international human rights law. In addition:

- The maximum penalties for serious contraventions are subject to the threshold test in proposed section 6 and in this way will only apply to contraventions of the *Fair Work (Registered Organisations) Act 2009* that a court considers as the most egregious conduct.
- The maximum penalties for serious contraventions are also commensurate with the maximum penalties applicable under the *Corporations Act 2001*, which the Government believes to be an appropriate model for the regulation of organisations (see subsection 1317G(1) of the *Corporations Act 2001*).
- While volunteers may be subject to these penalties when acting in their capacity as officers of an organisation, these volunteers also hold a position of trust and confidence with respect to the organisation and its members and may have substantial power to influence the organisation. Members deserve to know that people who volunteer as officers will not abuse their position of trust and confidence to their benefit and to the detriment of the organisation and its members.
- Section 315 of the *Fair Work (Registered Organisations) Act 2009* provides that a court may relieve a person or organisation either wholly or partly from a liability arising because of a contravention of a civil penalty provision in circumstances where the person or organisation acted honestly and, having regard to all the circumstances of the case, the person or organisation ought fairly to be excused for the contravention. In this way, section 315 operates to counter the apparent severity of the maximum penalty and also indicates that the penalty is not so much punitive as disciplinary or regulatory in nature.

The Committee has drawn a comparison between the penalties in this Bill and those in the Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 (the Carbon Tax Repeal Bill) and noted that the statement of compatibility for that Bill accepted that its civil penalties were 'criminal' for human rights purposes. I am not in a position to analyse in detail the civil penalty provisions of the Carbon Tax Repeal Bill, which is outside my portfolio and rely on my arguments as set out above.

Once again, thank you for taking the time to write to me.

Yours sincerely


ERIC ABETZ