

## Fair Work (Registered Organisations) Amendment Bill 2014

*Portfolio: Employment*

*Introduced: House of Representatives, 19 June 2014*

### Purpose

1.94 The Fair Work (Registered Organisations) Amendment Bill 2014 (the 2014 bill) seeks to amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to:

- establish an independent body, the Registered Organisations Commission, to monitor and regulate registered organisations with amended investigation and information gathering powers;
- amend the requirements for officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;
- amend existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

1.95 The bill is accompanied by a statement of compatibility which outlines how the bill engages the right to freedom of association (including the right to form trade unions)<sup>1</sup>, the right to fair trial (including the presumption of innocence)<sup>2</sup> and the right to privacy.<sup>3</sup> The statement 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.'<sup>4</sup>

### Background

1.96 This bill is a re-introduction of the Fair Work (Registered Organisations) Amendment Bill 2013 (the 2013 bill) which the committee considered in its *First Report of the 44th Parliament* and *Fifth Report of the 44th Parliament*.<sup>5</sup>

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1 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).

2 Article 14 of the ICCPR.

3 Article 17 of the ICCPR.

4 Statement of compatibility, p.14 (see explanatory memorandum).

5 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, p. 21 and *Fifth Report of the 44th Parliament*, 13 May 2014, p. 63.

1.97 The committee raised a number of issues in relation to the right to freedom of association and the right to fair trial and fair hearing rights in its *First Report of the 44th Parliament*.

1.98 The committee considered the Minister for Employment's response in its *Fifth Report of the 44th Parliament* and noted that the information provided had addressed most of the committee's concerns.

1.99 The committee expects that where it has raised concerns in relation to a measure in a bill, any subsequent re-introduction of the measure is accompanied by a statement of compatibility addressing the committee's previously identified concerns.

1.100 The committee also expects that where the minister has agreed to amend a bill in relation to a committee's concerns, the re-introduction of the bill would include these amendments.

1.101 The committee notes that the 2014 bill and explanatory memorandum (including the statement of compatibility) are virtually identical to the 2013 bill and its accompanying explanatory materials. The committee therefore reiterates its concerns below.

### **Committee view on compatibility**

#### ***Right to freedom of association***

1.102 The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association. Examples are political parties, professional or sporting clubs, non-governmental organisations and trade unions. The right to form and join trade unions is specifically protected in article 8 of the ICESCR. It is also protected in International Labour Organization (ILO) Convention No 87 (referred to in article 22(3) of the ICCPR and article 8(3) of ICESCR). Australia is a party to ILO Convention No 87.

#### ***Breadth of disclosure requirements***

1.103 The bill would introduce a new provision, section 293B, which would require officers of registered organisations to disclose any remuneration and benefits paid to them. Proposed new section 293C will also require the officer to disclose any material personal interests that the officer or a relative has or acquires.

1.104 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.'<sup>6</sup> The Senate Committee recommended

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

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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.<sup>7</sup>

1.105 In its *First Report of the 44th Parliament* the committee sought clarification from the Minister for Employment as to whether the breadth of the proposed disclosure regime in the 2013 bill was necessary and proportionate to the objective of achieving better governance of registered organisations.

1.106 In his response to the committee, the Minister for Employment stated that:

The government takes seriously the [Senate Education and Employment Legislation] 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 Practicing Accountant).<sup>8</sup>

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

8 Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 5 March 2014, pp 1-2, see Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, pp 66-67.

1.107 In its *Fifth Report of the 44th Parliament* the committee welcomed the proposed amendments to narrow the breadth of the disclosure requirements and noted that these addressed the committee's previous concerns.<sup>9</sup> The committee notes that these amendments have not been incorporated into the 2014 bill.

**1.108 The committee therefore retains its concerns and recommends that the bill be amended to include the amendments previously proposed by the Minister for Employment.**

*Threshold for exercising RO Commissioner's powers*

1.109 The bill would introduce a new provision, section 329AC, that provides the RO Commissioner with the power to do all things 'necessary or convenient' for the purposes of performing his or her functions. The RO Commissioner will be given 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.<sup>10</sup> The statement of compatibility notes that this power is a 'standard provision for a regulator'.<sup>11</sup>

1.110 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 lower standard than the usual international human rights law requirement of demonstrating that a limitation on a right is 'necessary'.

1.111 In its *First Report of the 44th Parliament* the committee sought clarification from the Minister for Employment as to whether and how the standard of 'convenient' is consistent with the requirement for limitations on rights to be 'necessary'.

1.112 The minister's response stated that the provision of a power to do something 'necessary or convenient' is commonplace in other Commonwealth legislation.<sup>12</sup> The committee noted its view that the fact that a provision is modelled on existing legislation is not in and of itself a sufficient justification for limitations on human rights.

1.113 The committee notes that the statement of compatibility to the 2014 bill does not contain further justification or information as to whether and how the

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9 Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, p. 64.

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

11 Statement of compatibility, p. 14.

12 Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 5 March 2014, p. 2. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, pp 64, 67.

standard of 'convenient' is consistent with the requirement for limitations on rights to be 'necessary'.

**1.114 The committee therefore reiterates its concern that the standard of 'convenient' contained in proposed new section 329AC is not fully consistent with the requirement under international human rights law that restrictions on rights be 'necessary'.**

***Right to a fair trial and fair hearing rights***

1.115 The right to a fair trial and fair hearing is contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.116 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right to not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

***Presumption of innocence***

1.117 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. Such offences must pursue a legitimate aim and be reasonable, necessary and proportionate to that aim.

1.118 Proposed new section 337AC, 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. Subsection 337AC(2) 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...'.

1.119 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.

1.120 In its *First Report of the 44th Parliament* the committee sought clarification from the Minister for Employment as to whether the reverse burden offence in proposed new section 337AC was consistent with the right to be presumed innocent. The committee also sought clarification as to why the less restrictive alternative of an evidentiary burden would not be sufficient in these circumstances. The committee noted that 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.

1.121 In its *Fifth Report of the 44th Parliament* the committee noted the Minister for Employment's response stated 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'.<sup>13</sup>

1.122 The committee accepts the need for strong regulatory framework in this area. However, the minister's response did 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.

1.123 The committee notes that the statement of compatibility to the 2014 bill does not provide any further information or justification as to why the imposition of a legal burden is necessary.

**1.124 The committee therefore remains unable to conclude that the offence in proposed new section 337AC is compatible with the right to be presumed innocent.**

*Right against self-incrimination*

1.125 Proposed new subsection 337AD states 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.

1.126 In its *First Report of the 44th Parliament* the committee sought clarification from the Minister for Employment as to whether proposed new subsection 337AD(3) of the 2013 bill provided 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 was consistent with article 14(3) of the ICCPR.

1.127 In his response to the committee, the minister clarified that the bill does not provide for derivative use immunity but does provide for use immunity. The minister

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13 Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 5 March 2014, p. 3. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, p. 68.

outlined 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 minister also outlined that proposed new subsection 335(3) provides important safeguards which limit the risk that a person would fail to claim privilege from self-incrimination.<sup>14</sup>

**1.128 The committee notes that the information previously provided by the minister has assisted the committee in concluding that this measure is compatible with human rights.**

*Civil penalty provisions*

1.129 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 RO 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,<sup>15</sup> up to 1200 penalty units (\$204 000) for an individual or 6000 for a body corporate (\$1 020 000) for 'serious contraventions'.<sup>16</sup>

1.130 The committee is of the view that 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.

1.131 The committee set out in its Practice Note 2 (interim) 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.

1.132 The statement of compatibility discusses these issues with regard to the domestic classification, the nature, and the severity of the penalties. The statement

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14 Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 5 March 2014, p. 4. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, p. 69.

15 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.

16 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.

of compatibility concludes that the penalties are, on balance, more likely to be considered 'civil' for the purposes of human rights law.<sup>17</sup>

1.133 In its *First Report of the 44th Parliament* the committee noted 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.

1.134 The committee sought clarification from the Minister for Employment 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.

1.135 In his response to the committee, the minister reiterated the view expressed in the statement of compatibility to the 2013 bill, that the civil penalty provisions should not be considered criminal penalties for the purposes of international human rights law.<sup>18</sup>

1.136 The committee notes that as the minister's response proposed amendments to narrow the breadth of the disclosure requirements, this largely addressed the committee's concerns regarding the application of civil penalties to individuals.

**1.137 The committee considers that unless amendments are made to narrow the disclosure requirements of the 2014 bill, the civil penalty provisions may be considered 'criminal' for the purposes of human rights law and require the rights guaranteed by article 14 of the ICCPR.**

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17 Statement of compatibility, p. 9 (see explanatory memorandum).

18 Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith, 5 March 2014, p. 5. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, p. 70.