

The Senate

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Education and Employment  
Legislation Committee

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Fair Work (Registered Organisations)  
Amendment Bill 2013 [Provisions]

December 2013

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# **MEMBERSHIP OF THE COMMITTEE**

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to replace Senator Chris Back (from 15 November 2013)

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# **RECOMMENDATIONS**

## **Recommendation 1**

**2.17** The Committee recommends that, consistent with the *Corporations Act 2001*, material personal interest disclosures should only be required to be made to those officers whose duties relate to the financial management of the organisation. Such disclosures should be recorded in the minutes of the meetings of those officers and should be made available to members on request.

## **Recommendation 2**

**2.18** The Committee recommends that a list of exclusions from the obligations to disclose material personal interests based on section 191(2) of the *Corporations Act 2001* be inserted into the bill. This would narrow the obligation to disclose material personal interests of an officer's relatives, so as to be consistent with the *Corporations Act 2001*.

## **Recommendation 3**

**2.19** The Committee recommends that the obligation placed on officers to disclose every payment should be reduced with certain exclusions, including limiting disclosures to payments made above a certain threshold.

## **Recommendation 4**

**2.26** The Committee recommends the bill be amended to allow the Commissioner to grant exemptions from the training requirements if an individual can demonstrate significant knowledge of the financial obligations specified in the bill.

## **Recommendation 5**

**2.54** Subject to the foregoing recommendations, the committee recommends that the bill be passed





# CHAPTER 1

## Reference

1.1 On 14 November 2013, the Senate referred the provisions of the Fair Work (Registered Organisations) Amendment Bill 2013 to the Senate Education and Employment Committee (the committee) for inquiry and report by 2 December 2013.<sup>1</sup>

## Conduct of inquiry

1.2 Details of the inquiry were made available on the committee's website. The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 20 individuals and organisations, as detailed in Appendix 1. A public hearing was held in Melbourne on 26 November 2013. The witness list for that hearing is available in Appendix 2.

## Background

1.3 The Fair Work (Registered Organisations) Amendment Bill 2012 was referred to this committee for inquiry and report by 19 June 2012. The *Fair Work (Registered Organisations) Amendment Act 2012* received Royal Assent on 29 June 2012. Schedule 1 Part 1 commenced on 29 June 2012 and Schedule 1 Part 2 will commence on 1 January 2014. Registered Organisations have been working with the Fair Work Commission to prepare for the commencement of the Act early next year. The bill proposes to amend this Act.

## Overview of the bill

1.4 The bill was introduced in the House of Representatives by the Hon Christopher Pyne MP, on 14 November 2013,<sup>2</sup> and proposes to amend both the *Fair Work Act 2009* and the *Fair Work (Registered Organisations) Act 2009*<sup>3</sup> in order to implement the Government's workplace relations policy following the election on 7 September 2013.

1.5 Broadly, the bill proposes to:

- Establish an independent Registered Organisations Commission to monitor and regulate registered organisations with enhanced investigative and information gathering powers;
- Amend requirements on officer's disclosure of material personal interests and change grounds for disqualification and ineligibility for office;

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1 *Journals of the Senate*, 14 November 2013, p. 123.

2 *Votes and Proceedings*, 14 November 2013, p. 80.

3 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p. i.

- Strengthen existing financial accounting, disclosure and transparency obligations under the *Fair Work (Registered Organisations) Act 2009* and making them enforceable as civil remedy provisions;
- Increase civil penalties and introduce criminal offences for serious breaches of officer's duties as well as new offences in relation to the conduct of investigations under the *Fair Work (Registered Organisations) Act 2009*.<sup>4</sup>

## Structure of the bill

1.6 The bill is composed of two schedules, each divided into two parts.<sup>5</sup> Part one of each schedule contains the substantive provisions with part two containing the transitional provisions.

### *Schedule 1: Establishment of the Registered Organisations Commission*

1.7 Schedule one proposes the establishment of the Registered Organisations Commissioner (the Commissioner) and the Registered Organisations Commission (the Commission). The Commissioner's functions and powers reflect those previously held by the Fair Work General Manager and the enhanced investigation skills of the Commissioner to increase civil penalties that will operate on the commencement of Schedule 2 of the bill.<sup>6</sup>

1.8 The schedule sets out the terms and conditions of appointment of the Registered Organisations Commissioner, and includes the provision of staff from the Fair Work Commission. The bill also proposes to establish the Registered Organisations Commission Special Account – this would ensure that the Commission is independently funded.

1.9 Schedule 1 also sets out consequential, transitional and savings provisions relating to the substantive provisions establishing the office of the Commissioner.

### *Schedule 2: Disclosure requirements, investigation powers and penalties*

Schedule 2 proposes to increase the obligations on registered organisations and their officers, as well as increasing the civil penalties for non-compliance;<sup>7</sup> and sets out further transitional provisions required by the increased obligations on organisations and the increased powers of the Commissioner, as detailed in Part 1 of Schedule 2.<sup>8</sup>

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4 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p. i.

5 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph nos 4 and 131

6 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph no. 5.

7 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph no. 132.

8 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph no. 133.

## Compatibility with human rights

1.10 The bill engages the following human rights:

- The right to freedom of association;
- The right to the presumption of innocence and the minimum guarantees; and
- The prohibition on unlawful and arbitrary interference with privacy and reputation.<sup>9</sup>

### *The right to freedom of association*

1.11 The bill proposes to make amendments to the *Fair Work (Registered Organisations) Act 2009* that engage the right to freedom of association, including:

- Placing restrictions on officers from taking part in decision making in limited circumstances; and
- Increasing circumstances in which an officer may be disqualified from holding office in an organisation.

1.12 The explanatory memorandum states that, 'the limitations on the right are permissible limitations as they pursue a legitimate objective, are prescribed by law and are reasonable, necessary and appropriate.'<sup>10</sup>

1.13 Further, the bill is intended to address:

Government and community concerns that in light of recent investigations and prosecutions of officials of registered organisation relating to misuse of position and member funds, the current regulation of registered organisations is not satisfactory in preventing fraud, financial mismanagement and adequate democratic governance in the interests of members.<sup>11</sup>

1.14 The explanatory memorandum suggests that while the bill does engage the right to freedom of association, it does so with the objective of protecting the interests of members and democratic functioning of organisations.<sup>12</sup> The International Labor

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9 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

10 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

11 Report of the Delegate to the Acting General Manager of Fair Work Australia Investigation into the Victoria No. 1 Branch of the Health Services Union under section 331 of the *Fair Work (Registered Organisations) Act 2009*, as cited in Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

12 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

Organisation (ILO) has previously held that such engagement of the right is appropriate in that specific context.<sup>13</sup>

### ***The right to the presumption of innocence***

1.15 The explanatory memorandum details the engagement of the right to the presumption of innocence, noting that the proposed provision 337AA provides for certain offences to be strict liability offences.<sup>14</sup> It is suggested that this limitation is 'reasonable insofar as each of the offences relates to a person's failure to comply with a requirement made of them relating to the conduct of an investigation...'<sup>15</sup> The explanatory memorandum also notes that '...the offences of strict liability could be characterised as regulatory in nature and not punishable by a term of imprisonment.'<sup>16</sup>

### ***The right to privacy and reputation***

1.16 The bill proposes the transfer of investigative and information gathering powers of the General Manager of Fair Work Australia be transferred to the Registered Organisations Commissioner. The explanatory memorandum states that these powers will be expanded to include, under subsection 335(1), the provision of information, documents and other evidence to the Commission on reasonable grounds.<sup>17</sup>

1.17 The explanatory memorandum states that 'these expanded investigation and information gathering powers limit the right to privacy, however this limitation is permissible insofar as it is for a legitimate objective and is necessary, reasonable and proportionate.'<sup>18</sup> The explanatory memorandum maintains 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>19</sup>

### **Financial impact statement**

1.18 There appears to be no overall financial or budgetary impact for the Government for this bill.<sup>20</sup>

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13 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

14 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

15 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

16 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

17 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

18 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

19 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

20 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p. 21.

1.19 The Regulatory Impact Statement states the compliance cost for each registered organisation to be about \$3,000 per year on average,<sup>21</sup> and that the 'large majority' of organisations will be able to absorb these costs by either passing the costs on to members or examining the cost with respect to other financial assets and staffing resources.<sup>22</sup>

### **Consideration by legislative scrutiny and human rights committees**

1.20 This bill has not yet been considered by the Parliamentary Joint Committee on Human Rights. The Senate Standing Committee for the Scrutiny of Bills is currently examining the bill.

### **Acknowledgement**

1.21 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions and giving evidence at the hearing.

### **Notes on references**

1.22 References in this report to the Hansard for the public hearing are to the Proof Hansard. Please note that page numbers may vary between the proof and the official transcripts.

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21 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p. 21.

22 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p. 21.



## CHAPTER 2

### Key issues

2.1 The bill has received a mixed response from submitters and witnesses. All submitters were generally supportive of the concept of increased transparency and accountability in registered organisations. The responsibility of officers of registered organisations to comply with the regulatory framework imposed by the *Fair Work (Registered Organisations) Act 2009 (Cth)* was well understood by all submitters and witnesses.

2.2 The bill would provide greater accountability and transparency with respect to the governance of registered organisations. The enhanced regulation of the sector will ensure that members of registered organisations can enjoy the same confidence as that enjoyed by shareholders of trading corporations.<sup>1</sup> The bill would also ensure that officers of registered organisations comply with a regulatory framework that emphasises disclosure and accountability, ensuring the best outcome for the membership.<sup>2</sup>

2.3 Employee groups strongly objected to the bill, submitting it would impose an inappropriate regulatory burden, be too costly to implement and could result in interference in their processes by Government. Many witnesses expressed concern that the proposed reporting requirements would be invasive and could be difficult for registered organisations to meet. They also questioned the extent to which assistance would be provided by the office of the Registered Organisations Commissioner, once established.

2.4 These key issues were discussed in submissions and in the hearing in Melbourne on Tuesday, 26 November 2013.

#### **Disclosure requirements, regulation and increased accountability**

2.5 The committee heard extensive evidence relating to the regulatory and reporting framework proposed by the bill and the implications for registered organisations. The bill proposes to amend the *Fair Work (Registered Organisations) Act 2013* to restrict:

...officers from taking part in making decisions in relation to matters in which they have a material personal interest, requires the preparation of officer and related party disclosure statements and requires officers to undertake approved training in relation to their financial duties.<sup>3</sup>

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1 Department of Employment, Submission 5, p. 4.

2 Department of Employment, Submission 5, p.4.

3 Fair Work (Registered Organisations) Bill 2013, clause 239A

2.6 The proposed disclosure regime includes disclosure of remuneration and benefits paid to officers of registered organisations,<sup>4</sup> its branches and material interests acquired by officers or their relatives.<sup>5</sup>

2.7 Australian Industry Group (AIG) submitted that the proposed changes would operate unfairly with respect to officers of registered organisations, due to the 'onerous'<sup>6</sup> disclosure regime required of officers and their relatives to the extent that the acquired material interest relates to the affairs of the organisation.<sup>7</sup> AIG expressed concern that the bill would impede the ability of officers to carry out administration of their organisation,<sup>8</sup> and suggested that the proposed regulation could seriously affect their mostly volunteer membership, to the extent that it could act as a deterrent for participating in the management of a registered organisation.<sup>9</sup>

2.8 The ACTU disagreed with the intent of the bill, suggesting that regulation of employee organisations to the standards imposed on company directors under *Corporations Act 2001 (Cth)* is not appropriate, given the different purposes of employee organisations.<sup>10</sup> The ACTU submission was generally supported by its membership.<sup>11</sup>

2.9 The following organisations submitted that they generally support the policy of increasing accountability and transparency within the management of registered organisations for the benefit of members, notwithstanding various technical or other amendments that they have advocated for in their submissions. These organisations include:

- Master Plumbers' and Mechanical Services Association of Australia;<sup>12</sup>
- Master Builders Australia;<sup>13</sup>
- Pharmacy Guild of Australia;<sup>14</sup>

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4 Fair Work (Registered Organisations) Bill 2013, clause 239B

5 Fair Work (Registered Organisations) Bill 2013, clauses 293BC, 239BC

6 Mr Stephen Smith, Director, AIG, *Proof Committee Hansard*, 26 November 2013, p. 1.

7 Fair Work (Registered Organisations) Bill 2013, clauses 293C(1)-(2)

8 Australian Industry Group, *Submission 7*, p. 17.

9 Mr Stephen Smith, Director, AIG, *Proof Committee Hansard*, 26 November 2013, pp 2 – 3.

10 Australian Council of Trade Unions, *Submission 9*, p. 7.

11 Queensland Nurses Union, *Submission 1*, p. 2; Maritime Union of Australia, *Submission 3*, p. 1; Australian Nursing and Midwifery Federation, *Submission 12*, p. 2; Unions NSW, *Submission 13*, p. 3; Financial Sector Union of Australia, *Submission 16*, p. 1; Australian Manufacturing Workers' Union, *Submission 19*, p. 3; National Union of Workers, *Submission 20*, p. 1.

12 Master Plumbers' and Mechanical Services Association of Australia, *Submission 6*, p. 1.

13 Master Builders Australia, *Submission 4*, p. 1.

14 Pharmacy Guild of Australia, *Submission 8*, p. 2.



- Australian Public Transport Industrial Association;<sup>15</sup>
- Australian Community Services Employers Association;<sup>16</sup>
- Victorian Automobile Chamber of Commerce;<sup>17</sup> and
- Timber Trade Industrial Organisation.<sup>18</sup>

2.10 The Australian Chamber of Commerce and Industry (ACCI) suggested that the conduct of certain registered organisations has resulted in the need for higher regulatory burdens and increased penalties as a deterrence for future misconduct.<sup>19</sup> ACCI also submitted that it supports:

...the policy principles which underpin the measures contained in the bill in so far as it attempts to strengthen the existing regulatory, compliance and accountability framework.<sup>20</sup>

2.11 The Fair Work Commission's (FWC) submission detailed the review conducted by KPMG on an investigation it made into a registered organisation, noting that:

The KPMG process review included 38 findings relevant to the effectiveness and efficiency of FWC inquiries and investigations including the absence of relevant investigation standards and procedures, lack of adequate documentation, an inadequate case management system and a dearth of sufficiently qualified and experienced staff. The KPMG review also identified 31 opportunities for improvement to investigation processes (31 recommendations).<sup>21</sup>

2.12 The Department of Employment (the Department) submitted that the regulatory requirements for disclosure of officers' interests were necessary to give effect to the Government's policy with respect to registered organisations and contended that the regulation of registered organisations proposed was an appropriate response, given the assets they manage and their responsibility to properly manage member's funds.<sup>22</sup>

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15 Australian Public Transport Industrial Association, *Submission 14*, p. 1.

16 Australian Community Services Employers Association, *Submission 15*, p. 1.

17 Victorian Automobile Chamber of Commerce, *Submission 17*, p. 1.

18 Timber Trade Industrial Organisation, *Submission 18*, p. 1.

19 Mr Daniel Mammone, Director, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 26 November 2013, p. 6.

20 Mr Daniel Mammone, Director, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 26 November 2013, p. 6.

21 Fair Work Commission, *Submission 11*, p. 2.

22 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 26 November 2013, pp 23 – 24.

2.13 With respect to the proposed transitional arrangements, the Department submitted that:

An organisation and branch can apply to the Commissioner for alternative arrangements for disclosure in circumstances where compliance with the obligation would be unduly onerous. An organisation or branch must provide particulars on the special circumstances that exist, the proposed alternative arrangement and evidence that it has achieved high standards of financial accountability. A transitional rule has been included in the Bill that will require the Commissioner, when considering applications for alternative disclosure arrangements, to take into account any exemptions allowed by FWC under section 148D of the *Fair Work (Registered Organisations) Act*, as amended.<sup>23</sup>

### ***Committee View***

2.14 Given the extent of Government and community concerns with respect to recent investigations and prosecutions for misuse of member funds and position by officers,<sup>24</sup> the proposed disclosure regime with respect to officer's interests is critical to the accountable and transparent operation of registered organisations and to ensure appropriate management of members' assets. The committee is also encouraged by the FWC's awareness of the improvements in investigation processes recommended by the KPMG process review.

2.15 The committee also accepts the evidence provided by the Department that transitional arrangements will be provided for in the bill to assist registered organisations meet the proposed requirements, as exists currently. The committee accepts that regulation is required; and notes that assistance will be provided by the Commission for registered organisations, where appropriate.

2.16 The committee is 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. The bill should be amended to ensure that the disclosure regime in the bill is consistent with the requirements in the *Corporations Act 2001*.

### **Recommendation 1**

**2.17 The Committee recommends that, consistent with the *Corporations Act 2001*, material personal interest disclosures should only be required to be made to those officers whose duties relate to the financial management of the**

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23 Department of Employment, *Submission 5*, p. 9.

24 Report of the Delegate to the Acting General Manager of Fair Work Australia Investigation into the Victoria No. 1 Branch of the Health Services Union under section 331 of the *Fair Work (Registered Organisations) Act 2009*, as cited in Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights.

organisation. Such disclosures should be recorded in the minutes of the meetings of those officers and should be made available to members on request.

## Recommendation 2

**2.18** The Committee recommends that a list of exclusions from the obligations to disclose material personal interests based on section 191(2) of the *Corporations Act 2001* be inserted into the bill. This would narrow the obligation to disclose material personal interests of an officer's relatives, so as to be consistent with the *Corporations Act 2001*.

## Recommendation 3

**2.19** The Committee recommends that the obligation placed on officers to disclose every payment should be reduced with certain exclusions, including limiting disclosures to payments made above a certain threshold.

## Training of officers

**2.20** ACCI provided evidence to the committee that it was important to recognise that, with respect to officers of registered organisations that many are volunteers or hold dual roles for the purposes of the *Fair Work Registered Organisations Act 2009*.<sup>25</sup> ACCI also submitted that some of its members were still waiting on guidance from the FWC as they implement changes to reporting requirements as enacted by the *Fair Work (Registered Organisations) Amendment Act 2012*.<sup>26</sup> Specifically, ACCI explained that:

There is a related issue, which we expressed in our previous submissions to the Senate committee, in that there should be some sensitivity to trying to assist organisations to get in place the training that is required.<sup>27</sup>

**2.21** The Timber Merchants Association (Victoria) expressed the view that they support strong financial accounting disclosure and transparency obligations they were concerned by the delay of the release of compliance guidelines by the FWC.<sup>28</sup> However, the Registered Organisations Commissioner will be required to 'provide education, assistance and advice to organisations and their members to assist with compliance'.<sup>29</sup>

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<sup>25</sup> ACCI, *Submission 10*, p. 15.

<sup>26</sup> Mr Daniel Mammone, Director, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 26 November 2013, p. 8.

<sup>27</sup> Mr Daniel Mammone, Director, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 26 November 2013, p. 8.

<sup>28</sup> Timber Merchant's Association (Victoria), *Submission 2*, p. 1.

<sup>29</sup> Timber Trade Industrial Organisation, *Submission 18*, p. 1.

2.22 Some concerns were expressed with respect to the delays experienced in gaining approval of their compliance training program by the FWC and the current deadline for training programs to meet the requirements imposed by the *Fair Work (Registered Organisations) Amendment Act 2013*.<sup>30</sup>

2.23 The FWC detailed in its submission to the committee the extensive regulation and compliance training it has undertaken with registered organisations. The Commission noted that compliance rate of lodgement of financial reports had increased from 93 per cent to 96 per cent between 2011-12<sup>31</sup> and that the new training modules had further increased compliance with respect to financial reports to 99.5 per cent.<sup>32</sup> The Commission has also provided 'webinar' training to registered organisation officers, including recently on updated reporting guidelines and right of entry permits.<sup>33</sup>

### ***Committee View***

2.24 The committee notes that the Department is aware of the time constraints and the proposed new requirements on registered organisations, submitting that:

Subject to passage of the legislation, the commission will begin operation in early 2014 by proclamation, and the new disclosure and reporting obligations, higher civil penalties and the new criminal sanctions will come into effect from 1 July 2014. The timing is designed to align with the new financial year and to allow registered organisations sufficient time to become familiar with the new obligations.<sup>34</sup>

2.25 The committee is persuaded by the evidence presented by the FWC detailing the results of the compliance and regulation training provided to registered organisations in the previous two financial years. The committee notes the effectiveness of these training sessions and the high satisfaction rate of participants.<sup>35</sup> The Committee appreciates the FWC's ongoing work to develop training and education materials to provide to registered organisations, in order to assist their compliance with their legal obligations, and accepts the staggered implementation proposed by the Government as appropriate. The committee also notes that in addition to the ability of the Commissioner to extend deadlines, it is also appropriate to provide the Commissioner with the ability to grant exemptions, where appropriate.

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30 Australian Industry Group, *Submission 7*, p. 5. See also, Mr Stephen Smith, Director, AIG, *Proof Committee Hansard*, 26 November 2013, p. 1.

31 Fair Work Commission, *Submission 11*, p. 3.

32 Fair Work Commission, *Submission 11*, p. 3.

33 Fair Work Commission, *Submission 11*, p. 3.

34 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 21.

35 Fair Work Commission, *Submission 11*, p. 3.

## Recommendation 4

**2.26 The Committee recommends the bill be amended to allow the Commissioner to grant exemptions from the training requirements if an individual can demonstrate significant knowledge of the financial obligations specified in the bill.**

### **Alignment of the responsibilities of officers of registered organisations to trading corporations under the *Corporations Act 2001***

2.27 Submitters generally did not support the alignment of the responsibilities of officers of registered organisations to those of trading corporations under the *Corporations Act 2001* (Corporations Law), arguing that corporate regulation has a different scope and purpose to that of voluntary industrial organisations.

2.28 Specifically, AIG proffered the view that the officers of registered organisations cannot be readily aligned with directors of listed public companies, and that the penalties imposed on registered organisations will be far more onerous than those in the Corporations Law provisions.<sup>36</sup> Mr Stephen Smith, Director, indicated support for the broad objectives, to make officers accountable, but argued for a balanced approach.<sup>37</sup>

2.29 The ACTU broadly agreed with AIG, submitting that although regulating registered organisations in the same way as corporations has some superficial appeal,<sup>38</sup> this view cannot be sustained when it is considered what these organisations are for and do in comparison to corporations.<sup>39</sup>

2.30 The committee sought clarification of these issues from the Department who indicated that it was appropriate to compare registered organisations with corporations, due to the significant financial resources managed by registered organisations on behalf of their membership.<sup>40</sup> The Department also indicated that there was a high community expectation that management of financial assets by registered organisations would be undertaken in a transparent and accountable

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36 Mr Stephen Smith, Director, AIG, *Proof Committee Hansard*, 26 November 2013, p. 1.

37 Mr Stephen Smith, Director, AIG, *Proof Committee Hansard*, 26 November 2013, p. 3.

38 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 26 November 2013, p. 15

39 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 26 November 2013, pp 16-17.

40 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 20.

manner, similar to the legal obligations of accountability imposed on company directors to their shareholders.<sup>41</sup> The Department also submitted that:

[Unions] and employer organisations also collect money and represent funds of their members. And some of them are very significant amounts of money.<sup>42</sup>

2.31 The Department provided clarification on the issue of the increased penalties, indicating that under the current regime, no member of a registered organisation has been subject increased penalties.<sup>43</sup> Further, Mr Jeremy O'Sullivan, Chief Counsel, submitted that the increased penalties would be subject to judicial review in the Federal Court of Australia.<sup>44</sup>

2.32 The committee heard evidence relating to the definition of a serious contravention that was taken from the Corporations Law.<sup>45</sup> The decision to use the 'serious contravention' clause was a specific policy commitment.<sup>46</sup> Due to its origin in the Corporations Law, there exists a practical benefit of activating the jurisprudence that already applies to the term.<sup>47</sup>

2.33 Mr O'Sullivan further clarified that:

It is a tenet of statutory interpretation that when the parliament adopts similar language when using a different piece of legislation it is a guidance to the court to apply that jurisprudence to the new provision.<sup>48</sup>

### ***Committee View***

2.34 The committee believes it is appropriate that parts of the Corporations Law are reflected in the bill. This is due to the public expectation that registered organisations, who are often managing significant resources, do so in an appropriate

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41 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 20.

42 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 25.

43 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 25.

44 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 27.

45 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 27.

46 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 27.

47 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 27.

48 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 26.

manner and that officers are accountable. It is appropriate that consistent language and jurisprudence be applied to new legislation, noting that judicial review will ensure a fair and balanced approach to the application of penalties.

## **Engagement of the Right to Freedom of Association and Protection of the Right to Organise**

2.35 The committee received evidence relating to the bill's engagement of the International Labour Organisation's Freedom of Association and Protection of the Right to Organise Convention (1848) (No.87) (the Convention).

2.36 AIG suggested that the bill should be amended to the extent that it engages with the Convention, to 'get the balance right'.<sup>49</sup> AIG also submitted that:

In accordance with the Convention, laws regulating registered organisations must not inhibit the ability of workers and employers to join unions and employer organisations, nor restrict their right to elect representatives and organise the administration of their organisations.<sup>50</sup>

### ***Committee view***

2.37 The committee was not persuaded by the evidence provided by AIG that the bill, to the extent that it engages the Convention, is inappropriate. The Committee notes that the engagement of human rights is mentioned in the Statement of Compatibility contained within the explanatory memorandum. The Statement specifically submits with respect to the right to freedom of association:

[that] the limitations on the right are permissible limitations as they pursue a legitimate objective, are prescribed by law and are reasonable, necessary and appropriate.<sup>51</sup>

2.38 The Parliamentary Joint Committee on Human Rights found in its inquiry into the *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012*, that:

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.<sup>52</sup>

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49 Mr Stephen Smith, Director, AIG, *Proof Committee Hansard*, 26 November 2013, p. 2.

50 Australian Industry Group, *Submission 7*, p. 3.

51 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

52 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights

2.39 The committee is of the view that the bill, while engaging the right to freedom of association and freedom to organise, pursues a legitimate objective. In this case the objective is the prevention of fraud or embezzlement through external scrutiny and regulation provided by the independent Registered Organisations Commission. The Committee is persuaded by the view that engagement of those rights is appropriate, given the policy goals of the bill, to increase accountability and transparency in the management of registered organisations, for the benefit of members and the general public.

### **Registered Organisations Commissioner and the Special Account**

2.40 The General Manager of the FWC currently undertakes regulatory oversight of registered organisations under the current Acts and the bill proposes to transfer these functions to the proposed office of the Registered Organisation Commission.<sup>53</sup>

2.41 The Timber Trade Industrial Association acknowledged in their submission the need for an independent Registered Organisations Commission, for the purpose of monitoring and regulating registered organisations and ensuring the compliance of those organisations with the registered organisations legislation.<sup>54</sup>

2.42 The bill also provides for the establishment of the Registered Organisations Commission Special Account.<sup>55</sup> The establishment of the Account would give effect to the Government's policy to establish the financial independence of the Registered Organisations Commission from FWC. This was detailed in evidence provided to the Committee that the Registered Organisations Commissioner would be independent, and have powers to regulate registered organisations effectively, efficiently and transparently, for the benefit of members.<sup>56</sup>

### ***Committee view***

2.43 The committee supports the proposed establishment of an independent Registered Organisations Commission as this measure would greatly assist registered organisations meet the new reporting and compliance requirements proposed by the bill. An independent regulator is the most effective compliance and deterrent to ensure the appropriate behaviour of officers of registered organisations.

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53 Regulation of Registered Organisations, Regulation Impact Statement, Department of Employment, p. 2.

54 Timber Trade Industrial Association, *Submission 18*, p. 1.

55 *Fair Work (Registered Organisations) Amendment Bill 2013*, clause 329EA

56 Ms Sandra Parker, Deputy Secretary, Department of Employment, Proof Committee Hansard, p. 21.



## Financial penalties for non-compliance

2.44 Some submitters suggested that the proposed penalties for breaches of disclosure requirements were satisfactory, as they had been tripled by the *Fair Work (Registered Organisations) Amendment Act 2012*.<sup>57</sup> AIG submitted that the proposed penalties for breaches contained in the bill were inappropriately high:

For example, an \$85,000 maximum penalty for failing to respond within 28 days to a member request for a statement of membership (s.169) is much higher than the penalty under the FW Act for breaching an FWC stop order relating to unlawful industrial action.<sup>58</sup>

2.45 The committee notes in evidence provided by Mr Jeremy O'Sullivan from the Department of Employment, that that specific penalty amount was an example of a maximum penalty.<sup>59</sup> He also submitted that:

A court might consider that where the failure to meet that time commitment was motivated by a desire to fraudulently conceal a misappropriation or a heinous act, then that penalty would be reserved for that kind of sentence.<sup>60</sup>

2.46 Mr O'Sullivan advised that penalty amounts would be at the discretion of a Federal Court judge, who may determine that a more serious sanction is required, depending on the particular circumstances.<sup>61</sup>

2.47 The committee notes the inclusion in clause 290A of new criminal offences relating to officers of registered organisations and their affiliate branches.<sup>62</sup> The proposed offences are modelled on those found in section 184 of the Corporations Act.<sup>63</sup>

### *Committee view*

2.48 The committee was not persuaded by the evidence provided by AIG that the proposed penalties were excessive, due to the seriousness of concealing information from the Commissioner. The committee supports the proposed penalties, as they will

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57 Mr Stephen Smith, Director, AIG, *Proof Committee Hansard*, 26 November 2013, p. 1.

58 Australian Industry Group, *Submission 7*, pp 9-10.

59 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 26.

60 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 26.

61 Mr Jeremy O'Sullivan, Chief Counsel, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 27.

62 Explanatory Memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph 160-162

63 Explanatory Memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at paragraph 162

assist the Commissioner to ensure compliance of registered organisations with the bill for the benefit of its membership. The committee recognises the critical role performed by an independent judiciary and the committee agrees with evidence provided by the department that the usual judicial processes will be followed in relation to the imposition of penalties.

### **Consultation process**

2.49 The Department provided evidence to the committee of extensive consultations, including the publication of the Regulation Impact Statement on the Office of Best Practice Regulation's website on Monday, 11 November 2013,<sup>64</sup> and the confidential consultation sessions with stakeholders facilitated by the Department on Wednesday and Thursday, 30 and 31 October 2013, respectively.<sup>65</sup>

2.50 While the consultation process occurred over a relatively short period, the committee notes that the policy intent behind the bill was a commitment contained in the Government's employment policy, *Better Transparency and Accountability of Registered Organisations*, and that this document was published in July 2013.<sup>66</sup>

### **Conclusion**

2.51 The committee regards improper activity undertaken by officers of registered organisations to be a serious risk to the interests of members of registered organisations and the general public. The committee accepts the evidence presented that higher penalties and stronger regulation are the key mechanism by which the membership's confidence and trust in the management of registered organisations may be restored. The committee notes that with respect to employee registered organisations, some of these members are among the lowest paid workers in Australia and that the interests of all members will be protected by strong and effective regulation.

2.52 While offering general support for the policy intent of the bill, employee and employer groups have, in some cases, made recommendations to amend the bill. The committee notes that many officers of registered organisations are volunteers, and that an undue regulatory burden could provide a disincentive for individuals considering personal involvement as an officer of a registered organisation. The committee has made a number of recommendations with respect to disclosure obligations and training. These recommendations seek to address those concerns raised by submitters.

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64 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, p. 21.

65 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, p. 21.

66 Regulation of Registered Organisations, *Regulation Impact Statement*, Department of Employment, p. 3.

2.53 Having carefully considered the evidence provided, in submissions and at the public hearing, the committee is supportive of the bill.

**Recommendation 5**

**2.54 Subject to the foregoing recommendations, the committee recommends that the bill be passed**

**Senator Bridget McKenzie**

**Chair, Legislation**



# LABOR SENATORS' DISSENTING REPORT

## Introduction

1.1 Labor Senators do not see merit in this bill and oppose in its entirety without amendment.

1.2 The short period of time given around submissions to this particular inquiry of the committee, which proposes significant changes to the law and to the rights of workers in Australia, was not appropriate and did not allow reasonable time for submissions or appropriate consideration by the committee.

1.3 It is important to recall that when the law in this area was last amended, Coalition Senators were circumspect about the need for immediate reform. In their additional comments to the report of the Education, Employment and Workplace Relations Committee Legislation Committee regarding the Fair Work (Registered Organisations) Amendment Bill 2012, they were critical of the then government, asserting that 'this bill has been rushed together to meet a political end rather dealing with the substantive problems', and they were very critical of the short time frame provided for the Committee process. Coalition Senators suggested that:

...the bill should be delayed from further debate until the August 2012 sittings. This would allow the Minister and the Parliament to benefit from the KPMG review which is scheduled to be concluded by the end of July before making changes to the Act.<sup>1</sup>

## The bill is unnecessary and political in nature

1.4 The 43rd Parliament considered and adopted a Bill that addresses much of the same ground as the bill in question. The *Fair Work (Registered Organisations) Amendment Act 2012* allowed for a legislative regime that promotes the operation of accountable, democratic and effective trade unions that are member-governed.

1.5 The bill is in opposition to the supposed direction of the 44th Parliament, in that this regulation is unnecessary, duplicates Government responsibility and increases legislative 'red-tape', where the previous changes are still being implemented, adding to further compliance issues. During the hearing, the committee heard:

Senator TILLEM: With the red tape in compliance that you are talking about for small organisations, is that what you are referring to?

Mr Mammone: Indeed, I think some of the most recent changes have caused some issues, with members having to get some external advice as to how to comply. Obviously, rule changes are not that easy, so the previous government's changes are still being implemented. So, before this is enacted, there will still be requirements on those organisations to change their rules. Yes, it is an issue.

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1 Senate Education, Employment and Workplace Relations Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2012 [Provisions] Report*, June 2012, p. 23.

Senator TILLEM: Would you agree with the statement that, further, the requirements of this bill add another layer of red tape for those organisations that you deal with and got feedback from? Is that a fair statement?

Mr Mammone: There are elements that compound the existing problems, yes.<sup>2</sup>

1.6 Labor Senators note that the current Registered Organisations Act already addresses the proposals of the bill to the appropriate extent, as the Act:

- Prohibits money from being used to favour particular candidates in internal elections or campaigns;<sup>3</sup>
- Gives priority to the determination of criminal proceedings (for example where it is alleged that funds have been stolen or are obtained by fraud);<sup>4</sup> and
- Ensured that the Fair Work Commission can share information with the police as appropriate.<sup>5</sup>

### **Trade unions are not corporations and should not be regulated as such**

1.7 The bill aims to regulate unions in a similar way to which Australian Corporations are currently regulated. Corporate regulation directed toward the protection of the economic interests of investors and creditors (and, to an extent, consumers), serves an entirely different purpose than the protection of the interests of union members. Trusts, Charities and so on are regulated differently to Corporations, and the regulation that Corporations are subject to differs depending on their size, structure and other factors (such as whether they are publicly listed). Unions should similarly be regulated in a manner that recognises their nature and purpose.

1.8 Unlike corporations, many rank and file members of trade unions are elected as delegates to governing bodies. These members are not full-time salaried leadership of unions, but everyday members who undertake other roles in the community and the industry, and volunteer their time to their union. The Committee should be cognisant of the fact that the burden of this regulation falls not just on the management of the union, but these rank and file members. The bill would result in many dedicated and ethical people refusing to participate in registered organisations due to the onerous unbalanced obligations on them as individuals.

1.9 Labor Senators note the anecdotal evidence provided to the committee that suggests there can be a reluctance of rank and file members to participate in governing bodies where they are (notionally) exposed to extensive public scrutiny and large fines:<sup>6</sup>

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2 Mr Daniel Mammone, Director, ACCI, *Proof Committee Hansard*, 26 November 2013, p. 7.

3 *Fair Work (Registered Organisations) Act 2009*, s 190.

4 *Fair Work (Registered Organisations) Act 2009*, s 312.

5 *Fair Work (Registered Organisations) Act 2009*, s 336(2).

6 Mr Stephen Smith, Director, AIG, *Proof Committee Hansard*, 26 November 2013, p. 1.

Senator CAMERON: I want you to expand on the argument about why you should not align the registered organisations accountability with that of the Corporations Act.

Mr Smith: There are two aspects that we are concerned about—the regulatory burden for the organisation and the fairness of the regime for the officers, who in our case are all volunteers. The registered organisation disclosure regime is all about ensuring that the directors on a board disclose their interests to other directors on that small board so that they can exclude themselves from decision making. We have no difficulties with those processes but to publish interests on a public website we think is far beyond the corporations law provisions. We think there are differences but this legislation cannot be looked at as just an implementation of the corporations law provisions, because it is far more onerous than that.<sup>7</sup>

1.10 The bill also shares similarity to the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012 advanced in the 43rd Parliament on behalf of Senator Abetz. In its submission to a Senate Committee Inquiry concerning that Bill, the Department of Education, Employment and Workplace Relations said:

The policy rationale underpinning the amendments in the Bill is that registered organisations should be regulated in the same manner as corporations. This fails to recognise the differences between registered organisations and corporations.

While there are some similarities, registered organisations are not, for the most part, comparable to corporations. 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 [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.

Further, the officers of registered organisations are often individuals who do not perform the role on a full time basis or for remuneration; as opposed to directors of corporations who in most cases are remunerated for their work.

The Department believes that while the key concepts, principles and structures of corporate governance overlap with and provide a useful starting point for regulating registered organisations, rules that account for the unique constitution of registered organisations, including their central purpose and the context in which they operate, is required.<sup>8</sup>

1.11 We respectfully concur with the views then expressed by the (former) Department and note that it is unfortunate that since the election this is no longer the stance of the Department. Labor Senators also note that in evidence provided to the

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7 Mr Stephen Smith, Director, AIG, *Proof Committee Hansard*, 26 November 2013, p. 2.

8 Department of Education, Employment and Workplace Relations, *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012*, ss 36—39.

committee at the hearing that the following point was made with respect to the former Department of Education, Employment and Workplace Relations:

Ms Parker: I would also say that we are now in a different department. That previous department does not exist, and we now have a new government with a stated policy. I think it is a difficult thing to be asking us to answer questions about a previous department, a different bill that is not the same as this bill—and we have a new government. So I am not really in a position—

Senator LINES: Is the department now saying that unions are in fact like corporations?

Ms Parker: I would like to discuss this bill, if that is okay.

Senator LINES: Are you now saying that trade unions are similar to corporations?

Ms Parker: Yes, we are. I am saying that in the context of the issues that are in this particular bill. This bill is designed to do certain things, and we are saying that registered organisations, of which some are unions and some are employer associations, need to be covered by this bill, so in that context it is appropriate for them to be regulated.<sup>9</sup>

1.12 This further demonstrates the political nature of the bill. It is the opinion of the Labor Senators of this committee that this legislation seeks to diminish rank and file participation within the unions, and discourage union activity, which is a solely political act in opposition to the rights of working Australians.

1.13 Increasing restrictions have been imposed on unions through amendments to industrial relations regulation in recent decades, most significantly concerning their setting in the award system. Beyond the award safety net, changes to employment conditions must be negotiated on an enterprise-by-enterprise basis and this occurs without resort to industrial action except where the unions members and the Commission so approve in accordance with legislative provisions that stifle whole of industry standards.

### **Potential for bias within the Registered Organisations Commission**

1.14 Item 88, clause 329EA-329EC of the bill would tie the financial performance of the Registered Organisations Commission to the amount of money it is able to recover as penalties from prosecuting Registered Organisations, creating incentives for the Commission and the Commissioner to act with a particular bias to improve performance.

1.15 Item 88, clause 329FB in effect permits Ministerial interference in the operations of the Registered Organisations Commission, taking away from any true independence the Commission would have, and allowing for political bias to be put

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9 Ms Sandra Parker, Deputy Secretary, Department of Employment, *Proof Committee Hansard*, 26 November 2013, p. 22.



upon the decisions of the organisation, resulting in unfair outcomes for alternately politicised Registered Organisations.

### **Conclusion**

1.16 The Labor Senators of the Education and Employment Legislation Committee do not see merit in the Fair Work (Registered Organisations) Amendment Bill 2013 and oppose it in its entirety without amendment.

1.17 It is the opinion of the Labor Senators of this committee that this legislation seeks to diminish rank and file participation within the unions, and discourage union activity, which is a solely political act in opposition to the rights of working Australians.

1.18 The bill is fundamentally misconceived. Any appropriate parallels from the regulation of Corporations have already been adopted, in the main through bi-partisan support.

### **Recommendation 1**

**1.19 Labor Senators recommend that the Senate reject the bill.**

**Senator Sue Lines**

**Deputy Chair**



# **APPENDIX 1**

## **Submissions received**

- 1 Qld Nurses' Union
- 2 Timber Merchants Association of Victoria
- 3 Maritime Union of Australia
- 4 Master Builders Australia
- 5 Department of Employment
- 6 Master Plumbers' and Mechanical Services Association of Australia
- 7 Australian Industry Group
- 8 The Pharmacy Guild of Australia
- 9 Australian Council of Trade Unions
- 10 Australian Chamber of Commerce and Industry
- 11 The Fair Work Commission
- 12 Australian Nursing and Midwifery Federation
- 13 Unions NSW
- 14 Australian Public Transport Industrial Association
- 15 Australian Community Services Employers Association
- 16 Finance Sector Union of Australia
- 17 Victorian Automobile Chamber of Commerce
- 18 Timber Trade Industrial Association
- 19 Australian Manufacturing Workers' Union
- 20 National Union of Workers

## **Answers to questions on notice**

- 1      Answer to question on notice received from the Department of Employment on 28 November, 2013.

## **APPENDIX 2**

### **Witnesses who appeared before the committee**

*Melbourne, Tuesday, 26 November 2013.*

BREEN, Mr Adrian, Senior Executive Lawyer, Workplace Relations Legal Group, Department of Employment

CH'NG, Mr Adam, Adviser, Workplace Relations and Legal Affairs, Australian Chamber of Commerce and Industry

CULLY, Mr Peter, Branch Manager, Workplace Relations Policy Group, Department of Employment

LEUBA, Ms Jenifer, General Counsel and Group Risk Executive, Australian Industry Group

LYONS, Mr Tim, Assistant Secretary, Australian Council of Trade Unions

MAMMONE, Mr Daniel, Director, Workplace Policy and Legal Affairs, Australian Chamber of Commerce and Industry

MOREHEAD, Dr Alison, Group Manager, Workplace Relations Policy Group, Department of Employment

O'SULLIVAN, Mr Jeremy, Chief Counsel, Workplace Relations Legal Group, Department of Employment

PARKER, Ms Sandra, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment

ROSS, Ms Justine, Senior Executive Lawyer, Workplace Relations Legal Group, Department of Employment

SMITH, Mr Stephen, Director, National Industrial Relations, Australian Industry Group