

*Department of the
Parliamentary Library*



INFORMATION AND RESEARCH SERVICES

Bills Digest

No. 171 2001–02

Workplace Relations (Registration and
Accountability of Organisations) Bill 2002

ISSN 1328-8091

© Copyright Commonwealth of Australia 2002

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database. On the Internet the Department of the Parliamentary Library can be found at:
<http://www.aph.gov.au/library/>

Published by the Department of the Parliamentary Library, 2002

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 171 2001-02

Workplace Relations (Registration and Accountability of
Organisations) Bill 2002

Steve O'Neill
Economics, Commerce and Industrial Relations Group
24 June 2002

Contents

Purpose	1
Background	2
Historical context	2
Legislative genesis	4
Accountability: Royal Commissions and the Hancock Report	5
Financial Accounts: Ernst and Whinney Review	6
Policy: Better Pay for Better Work	7
WROLA and registered organisations	8
Internal administration: the existing provisions	9
Policy: More Jobs Better Pay	11
Discussion Papers, JSCEM and the Exposure Registered Organisations Bill	13
Main Provisions	16
Chapter 1 – Preliminary	16
Chapter 2 – Registration and Cancellation of Registration	17

Chapter 3 – Amalgamation and withdrawal from amalgamation	17
Amalgamation	17
Withdrawal from amalgamations.	18
Chapter 4 – Representation orders	20
Chapter 5 – Rules of organisations.	20
Chapter 6 – Membership of organisations.	21
Chapter 7 – Democratic control	21
Chapter 8 – Records and accounts	22
Chapter 9 – Conduct of officers and employees	23
Chapter 10 – Civil penalties.	24
Chapter 11 Miscellaneous	25
Concluding Comments	26
Endnotes.	26

Workplace Relations (Registration and Accountability of Organisations) Bill 2002

Date Introduced: 21 March 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: Substantive provisions come into effect on a date to be set by proclamation but no later than 6 months after Royal Assent.

Purpose

This Bill and the Workplace Relations (Registration and Accountability of Organisations) (Consequential Provisions) Bill 2002 (the Consequential Provisions Bill 2002) provide for:

- the transfer of most of the machinery for regulating registered federal industrial organisations from Parts IX and X of the *Workplace Relations Act 1996* (WR Act) to a new free-standing Act
- the reform of the current legislative provisions to modernise accounting and auditing practices applicable to all federally registered organisations to bring them more closely into line with those applying under the Corporations Law
- the improvement of the record keeping practices of registered organisations generally, but with particular emphasis on improving access to and the quality of membership records, and
- the registration of new enterprise based organisations and the dismantling or de-registration of existing federally registered bodies.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Background

As noted in the Minister for Employment and Workplace Relations' Second Reading Speech, this Bill and the accompanying measure to a considerable degree replicate the proposed laws considered by the Parliament in 2001 but which were not enacted into law prior to the last General Election.¹

It is also the case, as Minister Abbott suggests, that the Bills are largely technical in nature.²

The changes made are consistent with the policies of the current government. Similar measures have at times been used at the State level.

That being the case, the current package might be seen as more than seven tenths 'relocation', about two tenths 'renovation' and less than one tenth 'innovation'.

As substantially similar measures have been recently before the Parliament, and before that were subject to a public consultation process, much has already been written on this matter. Material is also drawn from *Bills Digest 130, 2001-01* which reviewed the Workplace Relations (Registered Organisations) Bill 2001

The attention of readers is drawn, however, to the following documents which are readily available on-line to assist with their consideration of these Bills:

- Joint Standing Committee on Electoral Matters, *Report*, 'Inquiry into the Role of the Australian Electoral Commission in conducting industrial elections, October 1997.'³
- Former Minister for Workplace Relations, Hon Peter Reith, *Ministerial Discussion Paper*, 'Accountability and democratic control of registered industrial organisations', October 1999, and.⁴
- Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Report*, Consideration of Provisions, Workplace Relations (Registered Organisations) Bill 2001, June 2001.⁵

Historical context

In the 1950s about 60 percent of the Australian workforce was unionised.⁶ In 1992, this figure had fallen to 40 percent and by August 2001 only 24.5 percent of employees belonged to a union.⁷

Unions themselves have also undergone marked structural changes in recent years with the number of unions declining from over 300 in the mid 1980s to just on 130 in the late 1990s.⁸ Of the total number of unions, only 44 are federally registered.⁹ These account for in the vicinity of 1.9 million members.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The Australian tradition has been for government to enact prescriptive rules regulating in considerable detail the internal affairs of industrial organisations that choose to take advantage of the institutions established by government for settling industrial disputes and dealing with broader industrial matters.

Unions have been in the main prepared to tolerate the controls imposed on them in exchange for these not inconsiderable benefits. However, other factors such as membership size, the relative attractions of any competing State industrial system, craft-related sensitivities, partisan and industrial politics, employer attitudes and geography also exerted an influence.

From a legislative perspective, and as two leading commentators have noted, the regulation of internal and inter-union affairs by the state largely reflects two competing interests:

...the public interest in accountability, and the democratic right of members to decide upon their own form of governance.¹⁰

In more than a nominal sense, these rules apply both to representative employer bodies as well as to trade unions.

The Australian approach has been for registered organisations to be treated as party principals in their own right rather than as mere agents for their members. Hence an industrial award binds not only the registered organisation itself but also its present and future members.¹¹

Although registration confers certain rights and obligations on registered bodies, including employer associations, the principal focus of public attention and that of legislators invariably has been on unions.

The rights and benefits enjoyed by unions that chose to become registered organisations for the purposes of the Workplace Relations Act include:

- corporate status including the capacity to sue and hold property in their own right
- the capacity to become party to federal industrial awards
- unilateral access to industrial tribunals and recognition as a bona fide bargaining agent
- legally recognised and largely exclusive industrial ‘coverage’ of those workers who come within the unions eligibility rules and protection from poaching by other unions
- statutory anti-victimisation safeguards for union officials, members and those promoting union interests within the law, and
- limited rights of entry onto employer premises for union officials performing their official duties.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Registered employer associations enjoy a similar status but not directly analogous benefits.

Historically, those who have argued for more detailed and direct control of trade union affairs have tended to:

- Argue that unions derive considerable benefits from registration and the institutional arrangements that go with it
- Stress that such controls enjoy popular support including inside the labour movement and amongst union members
- Point to similar legislative controls on business, particularly corporations, and
- Note that unions exercise considerable power within the body politic and in community life, sometimes arguing that they ought to be subject to the same controls as various other species of monopoly or economic actor enjoying monopoly power.

Those taking a contrary position have said that:

- The degree of government regulation of union affairs is out of step with comparable international practice
- Unions are in essence non profit voluntary associations – the corporations law analogy ought to be rejected, with a better basis of comparison being, for instance, other essentially non profit bodies such as political parties
- Union influence has diminished in recent years and is generally no greater than that of many other interest groups in society which are not subject to comparable controls
- Recent changes to industrial relations law and practice have not only diminished the benefits of registration but also abrogated the quasi monopoly power formerly enjoyed by many unions. The decline in union power has been marked by the removal of various union security devices like ‘union preference’ and ‘the closed shop’ which were either encouraged or tolerated, and
- The enactment of laws promoting the registration of enterprise associations and the growth of agreement making and contractual arrangements such as those embodied in Australian Workplace Agreements (AWAs) it is said also has shifted the balance between union rights and responsibilities towards the latter.

Legislative genesis

Although grouped together under the single banner of registration and accountability, the matters contemplated by the current Bill have often been tackled individually rather than as part of some larger design.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Accountability: Royal Commissions and the Hancock Report

Chapter 8 of the present Bill deals with financial accounts and records which organisations are required to maintain and the form that these will take, and introduces new accounting standards. It therefore helps to recount the steady tightening of the financial responsibilities of registered organisations that occurred during the 1970s and 1980s.

Additional requirements of financial reporting and other procedures followed in the wake of inquiries, an important inquiry being the Royal Commission into Alleged Payments to Maritime Unions.¹² The Royal Commission's report had significant consequences, leading to amendments to the financial reporting provisions of the (then) *Conciliation and Arbitration Act 1904* (Cwth) (C&A Act):

The Royal Commissioner (Sweeney J.) considered that the provisions of the Conciliation and Arbitration Act as it then stood failed to achieve this (public accountability) result. The Act, he said, was deficient in that it did not specify in sufficient detail the records to be kept and filed by organisations in order to ensure that financial records present a full and accurate picture of the financial activities of an organisation. He further concluded that the Act neither specified the activities of auditors in any detail nor required the filing of auditors' reports, nor did it specifically direct the Industrial Registrar to examine and evaluate any records filed.¹³

The Royal Commissioner's concerns and recommendations were picked up in legislation in 1977 and 1980 forming an expanded Part VIII A of the C&A Act dealing with accounts, audit and reporting, and the standard of detail to which these accounts needed to be presented.

These accounting standards are currently not the same as the Australian Accounting Standards applicable to companies but they are quite detailed. That detail appears not in the body of the Act itself but is stipulated in regulations to the WR Act.¹⁴ Broadly, the provisions require that organisations keep proper accounting records; ensure that these are audited every financial year; that members have access to certain prescribed information regarding the accounts; that copies of the auditor's report and the audited accounts are presented to the annual general meeting of the organisation or committee of management or supplied to members or published in the journal and that accounts and auditor's reports be filed with the Registrar.

Further amendments concerning donations, including donations to political parties, were enacted in 1982 arising from the Royal Commission into the Builders Labourers Federation (the Winneke Royal Commission).¹⁵ These recommendations proposed that such donations be authorised by the organisation's membership. The view of the Winneke Royal Commission that such donations be authorised from a ballot of the membership was considered too unwieldy by the (former) Department of Employment and Industrial Relations. Rather, it considered such expenditures could be authorised by a resolution of the Committee of Management, which is the current arrangement under the WR Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Organisations at the time considered the combined weight of this new package of financial obligations onerous (for example committee approval was required for donations greater than \$1000). These sentiments were reflected subsequently in the section of the report inquiring into Australia's industrial relations system (the Hancock Report)¹⁶ which dealt with registered organisations. The Hancock Report observed:

9.111 The (financial administration) requirements were criticised in submissions as being too detailed, unnecessary, complex and intrusive. There was, however, a general recognition that some form of legislative prescriptions relating to financial accounting and reporting was justified. The question is one of degree ... It was put to us that we should recommend a review of the accounting and financial reporting provisions of the legislation. The ACTU would see any review being made in full consultation with the union movement.¹⁷

The Hancock Report identified three areas that needed to be considered in any review of financial reporting. These were:

- the 'appropriateness' of imposing on industrial organisations requirements that are essentially transposed from corporate law
- the complexity of the reporting procedures and the difficulties met by organisations complying precisely with the detailed requirements, and
- the time involved and the expense incurred in organisations properly meeting the requirements.¹⁸

Financial Accounts: Ernst and Whinney Review

In due course, the Hawke Government commissioned the accounting firm Ernst and Whinney to advise on any legislative responses to the Hancock Report's concern about financial administration suitable for incorporation into the *Industrial Relations Act 1988*. Ernst and Whinney agreed with the three principles outlined above to govern the review but added four of their own relating financial management:

- Let the management manage: *In line with current trends it is appropriate that an organisation should be permitted to manage its own affairs ... The extent of external regulation should only be of a level to ensure the ability of the organisation to adhere to the principles*
- Sufficient and relevant financial information: *... members have to be provided with sufficient and relevant financial data. This should be provided regularly on an annual basis, direct to each member*
- Opportunity to question management: *the membership need to be given an opportunity to question the management on the organisation's financial affairs*

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- Reduction of administrative burden: *Most organisations have competing priorities for their time and funds and it is recognised that such a provision of membership service should be their primary aim. Regulation and procedures which impede this objective and do not add to overall accountability should be reduced.*¹⁹

The Ernst and Whinney report made eleven recommendations most of which were not directly incorporated in the subsequent legislation. Thus the level above which donations had to be formally authorised remained at \$1000. It has been fixed at this level now for almost 20 years. Ernst and Whinney recommended it be raised to \$2000²⁰, but the recommendation was ignored. A higher cap, say \$2500, would restore the early 1980s relativity while conforming with the Ernst and Whinney principle of 'letting the managers manage'. However, it may well be the consensus of the officials of organisations that the current cap provides a reasonable authorisation and reporting discipline.

A key finding of the Ernst and Whinney report was that organisations which had initially found the financial reporting obligations of 1977-82 onerous had by now (1989) made adjustments. Secondly, there was no longer the level of antagonism to the more onerous financial administration procedures highlighted in the Hancock Committee report. As noted in the Ministerial Discussion Paper²¹ the Ernst and Whinney report was the last legislative review into financial administration of organisations until the Blake Dawson Waldron report discussed below.

To some degree these earlier reports reflected the structure of the trade union movement prior to the major changes fashioned by the ALP Governments and the Australian Council of Trade Unions (ACTU) in the 1980s and early 1990s. Those changes saw many small unions disappear from the system and a series of union amalgamations that produced a number of larger bodies. Arguably, these larger and better-resourced unions should find corporate law style governance requirements less burdensome than the smaller and less well-resourced organisations that they either replaced or swallowed. Supporters of the present Bill would also say that large unions are responsible for significant amounts of money in the form of members funds, and that that is reason enough for imposing strict accountability controls on them while they choose to take the benefits available by way of registration.

Policy: Better Pay for Better Work

The proposals contained in this Bill may in part be traced to the industrial relations policy *Better Pay for Better Work* released for the 1996 Federal Election.²² Some key policy commitments and principles included:

- ... employees should be free to join a union, so they should be free not to join a union. Employees should also have the choice of which union they join (p.3)

The Coalition will:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- encourage the establishment of enterprise unions. The program of union amalgamation has failed, producing top heavy unresponsive union bureaucracies.(p.4)
- repeal the “conveniently belong” rule and ensure that super unions may, at the request of their members, provide for autonomous branches at the enterprise level or be disamalgamated in an equitable manner for all members.(p.4)
- take steps to prevent monies collected on a tax deductible basis from being channelled in whole or in part through a union or employer organisation to a political party (p.13)
- conduct a thorough examination of the operation of those sections of the Industrial Relations Act which deal with the accounts and auditing practices of registered organisations and will amend them if necessary to ensure that organisations keep proper and audited accounts which are readily available to members (p.13)
- amend the Industrial Relations Act to ensure that the accounting, auditing and other financial obligations are as nearly as practicable the same as those of companies (p.13).

WROLA and registered organisations

While a number of the *Better Pay for Better Work* policy commitments were implemented through the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA), compromise on some points was needed to gain passage of the Bill through the Senate. For example, the commitment to require unions to have autonomous enterprise branches was dropped in the agreement with the Australian Democrats.²³ Other commitments were not followed up in the first piece of legislation, such as the commitment to a thorough review of auditing and accounting practices. (This issue is now picked up in Chapter 8 of this Bill).

Important amendments which were agreed to in the WROLA included new provisions (Division 7A of Part 1X) to disamalgamate organisations which had been formed through amalgamation since 1991, but disamalgamations were subject to a sunset clause (initially 31 December 1999: WR Act s.253ZJ).

The Explanatory Memorandum to the Workplace Relations (Registered Organisations) Bill 2001 (RO Bill) reported on two (only) successful disamalgamations involving employee organisations. On 31 May 2001, the Federal Court held that a ballot for disamalgamation of a part of the Western Australian branch of the Australian Services Union could proceed. This is only the second successful application for a disamalgamation ballot (the first was made by the Professional Officers’ Association (Victoria), which later disamalgamated from the CPSU).²⁴ The disamalgamation provisions were amended in 1997 to ‘correct an unintended limitation on the circumstances in which a constituent unit of a registered organisation can apply to withdraw from an amalgamation’ and clarify how such applications can be made.²⁵ The disamalgamation proposals in the present Bill therefore make up the Government’s third attempt to facilitate the disamalgamation of so-

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

called 'super unions'. While these unions have been subject to criticism for the alleged size of their bureaucracies²⁶ one study of the unions and their respective official structures has suggested no lessening of internal democratic procedures as a result of amalgamation.²⁷

Enterprise unions could be formed and registered as a result of the WROLA. However, there have been a few applications lodged to register such bodies, with the only successful application coming from the Ansett Pilots Association (APA). As one early critic, Anthony Forsyth, has said of the registration of enterprise unions: the results had been 'hardly overwhelming'.²⁸ Presumably following the Ansett Airlines demise there will be grounds for reviewing the ongoing registration of the APA. On the other hand a new registered (industry) organisation of employees has appeared, this being the Striptease Artists Australia Incorporated Association. It applied to the Commission on 14 March 2001 to register as a union to cover striptease artists and nude/semi-nude waiting and bar staff.

Internal administration: the existing provisions

WROLA did not extensively restructure the existing administrative and reporting requirements. However, it did amend certain key provisions, most notably those dealing with increased powers for the Australian Industrial Registrar to conduct investigations into alleged financial maladministration of organisations (section 280 of the WR Act). The CCH *Australian Labour Law Reporter* refers to these current powers in the following account:

The powers of the Registrar when conducting an investigation under sec. 280, 280A or 280B(1) are quite extensive. These powers certainly reflect a policy which perceives organisations' financial administration as of public, as well as private, concern. The powers of the Registrar include the following:

- the Registrar may, by notice in writing, require an officer or employee of an organisation to supply him with such information relevant to his investigation as the Registrar may require; and
- the Registrar may, by notice in writing, require an officer or employee of an organisation to attend before him so that (i) questions (relevant to the Registrar's investigation) may be put to that employee or officer, and (ii) books, documents and papers in the custody of that officer or employee (being relevant to the Registrar's investigation) may be produced.

Section 329 provides that a failure to attend or produce documents carries a penalty of \$500. The making of a statement or the provision of information to the Registrar that is false or misleading in a material particular also carries a penalty of \$500, if the false or misleading statement or information was knowingly made or provided. (Note: Refusal or failure to answer a question does not, of itself, constitute an offence under the section.)²⁹

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Financial reporting provisions under the WR Act now impose certain obligations on registered organisations in respect of their financial administration, which are not imposed on corporations under the Corporations Law. For example, the duty to disclose donations or gifts including donations to political parties in financial returns, where the donation is more than \$1000 (WR Act s.269) has no comparable provision in the corporations legislation. There is also a requirement that rules of an organisation specify a procedure and authorisation for the making of gifts, donations and loans (WR Act s.201), again without parallel for companies.

Other key provisions of the WR Act covering registered organisations include:

- Rules must conform to the requirements of the WR Act for an organisation to be registered (s.189).
- An organisation must have rules (s.194).
- Rules cannot be contrary to law, nor oppressive or unjust (s.196).
- A registered organisation must have an eligibility rule under s.195 (ie specifying who can become a member). This provision also specifies a number of rule requirements including (but not limited to):
 - the conditions for spending funds,
 - the audit of those accounts
 - the maintenance of the membership list, and
 - the organisation of branches and other matters.
- Elections for office are specified (s.197).
- Where rules provide for direct elections, they must be conducted by secret ballot (s.198).
- Terms of office must be specified (s.199).
- The rules must authorise the making of grants, donations and loans (s.201).
- The Industrial Registrar may alter rules of organisations to bring them into conformity with the requirements of the WR Act. (s.203).
- A member of an organisation may make an application to the Federal Court for the performance of the rules (s.209).
- Elections must be conducted by the Australian Electoral Commission unless an exemption has been granted (s.210).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- An allegation of an election irregularity may be pursued by a member (s.218).
- The Federal Court may declare a finding of an irregularity in the conduct of an election after conducting a hearing (s.222).
- The membership register can be inspected by a person authorised by the Industrial Registrar and details of the membership must be forwarded in an annual return to the Registrar (s.268).
- Details of any loans (including the beneficiary), grants or donations must be recorded annually with the Industrial Registrar (s.269).
- Entitlement to membership of an organisation is provided for under s.261 subject to the person paying membership fees and that the person is eligible to become a member under the organisation's eligibility rules.
- Rules addressing an organisation's accounts and related requirements are found in s.272 (note Regulations 107 and 108 re presentation of accounts).
- The role of the auditor is outlined in ss.282–284, and
- Disputes within organisations must be resolved through the organisation's rules (s.290).

Policy: More Jobs Better Pay

The Coalition's 1998 workplace relations policy *More Jobs Better Pay* made further commitments on reforms to the legislation governing registered organisations.

A Coalition Government will:

Maintain the principles of freedom of association (voluntary unionism) and strengthen their operation in the *Workplace Relations Act 1996*, particularly to avoid loopholes where the laws may not fully protect independent contractors or their employees from coercion;

Legislate to make it unlawful for any person or group of persons (whether employers, union bosses or workers) to plan to establish or maintain, directly or indirectly, a closed union shop;

Legislate to remove all forms of preference to unionists against non-unionists, whether by employees, employers or contractors, including the removal of provisions granting indirect preference in awards or agreements (such as existing requirements that employers actively encourage unionisation of their workforce);

Amend the *Workplace Relations Act 1996* to increase the accountability of unions to their members in financial and other matters, and foster the creation of greater democratic control of union decision making;

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Support (by further legislation, if necessary) the formation of enterprise unions, the disamalgamation of super unions and the creation of formal or informal workplace consultation structures;

Amend the right of entry provisions of the *Workplace Relations Act 1996* to ensure that the proper role of unions is as a service provider to its members, not as an uninvited quasi-inspector at the workplace;

Amend the existing registration provisions of the *Workplace Relations Act 1996* to make them more workable and overcome technical and procedural impediments never rectified by Labor governments.³⁰

The *More Jobs Better Pay* policy on registered organisations was given impetus by a report on the financial administration of the Australian Workers Union (AWU) by the (then) Australian Industrial Registrar, Mr Michael Kelly. The report was delivered to the Minister, the AWU and the Director of Public Prosecutions (DPP) during Christmas 1998. The Hon. Peter Reith MP made reference to the Registrar's report and signalled reforms to provisions governing internal administration of registered organisations.³¹ The report highlighted an alleged shortfall of operational finances for the AWU's Head Office of \$11 million from 1995-1997. Mr Kelly found that the union failed to keep proper accounting records during 1995-96 and failed to retain records for a number of its branches. Auditors (Coopers and Lybrand) raised concerns over:

- writs for \$70 million for industrial action in 1993
- disputes over ownership of property
- double counting of union assets between the branches, and
- back taxes owed by the NSW Branch.

In its defence, the former National Secretary of the AWU, Mr Terry Muscat, said that the Registrar's report had only found a failure to report on time and 'had praised the union for taking the advice of the auditors'.³² The DPP has not prosecuted this matter but has advised the AWU of his concerns.³³ The financial difficulties of the AWU have been well reported since the AWU's amalgamation with the Federation of Industrial, Manufacturing and Engineering Employees in 1994 and have been the source of questions about its ongoing viability. However the former Secretary of the ACTU, Mr Kelty, gave strong support for an ongoing role of the AWU in the labour movement in 1998.³⁴ This support seems to have been borne out as has been recently noted: 'Now the AWU is again a force, industrially and politically'. An article recently appearing in the *Australian Financial Review* attributes the AWU's rebirth in part to the business acumen of the current AWU National Secretary, Bill Shorten.³⁵

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Discussion Papers, JSCEM and the Exposure Registered Organisations Bill

The Government commissioned the legal firm, Blake Dawson and Waldron (BDW), to review the financial and administrative requirements of registered organisations in 1997-98. Submissions were invited from interested parties. The report was published in August 1998.³⁶ This report is important because the Government subsequently announced that it would introduce separate legislation to implement the BDW recommendations, based in part on the notion that provisions dealing with registration, industrial elections and financial reporting had no relevance to many users of the workplace relations system.³⁷

Few if any of the registered organisations which made submissions to the BDW review agreed with the suggestion, couched in the review's terms of reference, that there was a need to align accounting and reporting standards to those of companies.³⁸ In his critique of the BDW report, one academic, Mark Mourell³⁹ commented:

It appears that none of the organisations which made submissions to the review (including the Metal Trades Industry Association, the Australian Council of Trade Unions and the Finance Sector Union) considered it appropriate to adopt business standards in accounting, auditing and reporting to members of their organisations. They also submitted that for the purposes of the WR Act they should not have to rely on external professional accounting advice to make judgments about administration or their own financial stability. Despite these submissions the authors of the report fundamentally followed Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants and urged that financial and auditing provisions be tightened but modelled on those of non-profit organisations.⁴⁰

Also according to Mourell, the key question not answered in the BDW report was: what is the appropriate level of accountability for industrial organisations? As he put it:

... the fact remains that unions do not raise money from the public in order to make a profit; do not enjoy the benefits of limited liability and 'it may be argued' are not in contractual relationship with their members. Consequently, they ought to be spared the detailed accounting requirements of businesses particularly as their officers are accountable to their members through periodic elections.⁴¹

The over-riding reason for organisations supporting the current regulatory regime was that they viewed the current provisions as already adequate, if not onerous. The former Workplace Relations Minister, the Hon. Peter Reith MP released an Implementation Discussion Paper for the *More Jobs Better Pay* policy in May 1999.⁴² This was followed by a Ministerial Discussion Paper released in October 1999⁴³, which in addition to addressing financial practices and accountability issues included the Government's response to a report of the Joint Standing Committee on Electoral Matters (JSCEM) concerning industrial elections.⁴⁴

The JSCEM report was generally satisfied with the current arrangements for industrial elections including the current public funding arrangements of industrial elections at about \$3.6 million or \$6000 per election (\$1997). It nevertheless made a number of

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

recommendations for amendment to the provisions governing elections for example in respect of: ballot returns, cut-off rolls, applications for inquiries into election outcomes by the Electoral Commissioner and model rules. The JSCEM report also provides a concise history of industrial election provisions from the C&A Act onwards. The Ministerial Discussion Paper picked up most of the election issues proposed for reform and some others.

Another important proposal of the Ministerial Discussion Paper was the proposition to impose fiduciary standards of conduct ('directors' duties') on officials of registered organisations (borrowed from company law).

In his review of trade union regulation, Anthony Forsyth has observed that the federal proposal concerning fiduciary duties on union officials has followed similar legislation regulating trade unions introduced by conservative State governments. In certain cases, following a change of government, ALP administrations have been reluctant to reverse these (higher) standards.⁴⁵ There thus arises the assumption according to Forsyth that the community may regard such standards as a reasonable imposition on union office holders.

A draft Registered Organisations Bill incorporating these and other principles was released for discussion and comment in December 1999. However the RO Bill tabled on 4 April 2001 differed from the exposure draft in a number of areas. Gone was the proposal in the earlier Bill for registered organisations to seek approval from the membership for setting up 'political funds', from which donations to political parties would (only) be made. The proposal to reduce the minimum membership number to 20 was also abandoned. On the other hand, the proposal placing fiduciary duties on office holders was retained.

Forsyth concluded that the combined weight of the administrative burdens proposed in the Ministerial Discussion Paper and incorporated in the RO Bill seem designed to keep unions in 'ever increasing layers of bureaucratic red tape'.⁴⁶ A contrary view, that the proposed reforms meet the higher educational standards of the modern workforce, was reported in *Industrial Relations and Management Newsletter*:

With employees becoming more independent, better educated and more individual in their approach, both unions and employer associations are discovering that they need to find new ways to maintain their relevance with their membership.

The government says that the proposed legislation will assist organisations in this, because the new Bill is all about ensuring that members will have an enhanced scope to know how the organisation works, where its money goes, how they can get involved in its policy decisions and what value they get for their subscription.

... The policy changes will primarily be aimed at modernising financial accounting and reporting requirements. It will also establish new statutory duties for officers and employees of organisations – modelled in part on those in the Corporations Law.

Improved disclosure to members regarding expenditure of fundings (sic), including political donations and professional (legal) fees will be required. The government is

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

concerned that some organisations are spending huge amounts of members money in internal disputes between officials, potential officials and in feuds between branches.⁴⁷

On 5 April 2001 the Senate referred to its Employment, Workplace Relations, Small Business and Education Legislation Committee the substance of the Workplace Relations (Registered Organisations) Bill 2001. The ensuing report was tabled on 18 June 2001. The Committee was split on party lines with ALP Senators indicating that they thought the Bill went beyond the making of purely mechanical or technical changes to the law. Australian Democrat, Senator Andrew Murray (WA) commented that although he did not oppose the Bill, it was something of a pity that the Committee had not been able to look at the rationale for such heavy levels of government regulation in this area.⁴⁸

The RO Bill was passed by the House of Representatives on 27 August 2001 after incorporating 13 Government and 14 Opposition amendments.⁴⁹ It was introduced into the Senate on 30 August 2001 but was not considered beyond the Second Reading prior to the Parliament being prorogued for the November 2001 General Election.

The Coalition's 2001 workplace relations policy, *Choice and Reward in A Changing Workplace*, indicated its intention to persist with the measures presented in the 2001 package, committing a re-elected Howard Government to:

- restrict trade union right of entry, especially into small business
- expand the period of notice trade union officials have to give before demanding entry onto premises, and limit legal entry rights if the purpose is purely membership recruitment
- tackle corruption in the commercial construction industry by supporting and resourcing the Building and Construction Industry Royal Commission industry (sic), and give immediate consideration to any recommendations it makes for reform
- provide mechanisms (which currently do not exist) for workers to democratically vote to disamalgamate from super unions, and for the simpler registration of *bona fides* of enterprise unions' and
- legislate to increase disclosure, accountability and democratic control by trade unions and employer associations in the expenditure of member funds for political purposes.⁵⁰

On 29 May 2002, the *Australian Financial Review* reported that the Australian Labor Party would support the present Bill 'following an agreement by the Government to remove two controversial elements' in the package.

The Government appears to have dropped its plan to establish a separate Act and will instead re-incorporate the provisions of the present Bill as a schedule or schedules to the WR Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The Financial Review further reports that a proposal that would have allowed the Minister to pursue civil penalties against trade union officials found to have defied orders of the Australian Industrial Relations Commission has also been agreed to be dropped.⁵¹

Main Provisions

This very large and quite technical Bill cannot be dealt with here comprehensively.

As already noted, a further complication is that the Bill as introduced will be subject to a number of Government amendments.

Accordingly, the following analysis therefore attempts by reference to the RO Bill to highlight some of the matters that were regarded as potentially contentious when the substance of what the Government is (again) proposing was last before the Parliament less than 12 months ago.

The Bill is presently divided into 11 Chapters – the RO Bill contained 10. The difference arises on account of the decision to divide what was Chapter 8 in the RO Bill on ‘Records, accounts and conduct of officers’ into two Chapters. These are Chapters 8 and 9 of the present Bill, which deal respectively with ‘Records and accounts’ and ‘Conduct of officers and employees’.

Chapter 1 – Preliminary

Chapter 1 contains the principal objects and definitions and is very similar to the comparable Chapter in the RO Bill.

Clause 5 dealing with the objects of the proposed Act reflects amendments moved by the ALP during the debate on the RO bill to delete reference to the Act promoting a diversity of employer and employee organisations registered under the Act. The clause also incorporates another ALP amendment that makes it an object of the Act to encourage members to participate in the affairs of their respective organisations.

Clause 6 also reflects an ALP sponsored amendment to the RO Bill as introduced, by providing that the form of ‘declaration envelope’ shall be prescribed by way of regulation.

Clause 12 relating to the membership of organisations is intended to reflect the operation of section 4(5) of the WR Act.

Clause 15 is new and is designed to exclude the operation of Part 2.5 of the Criminal Code. Part 2.5 sets out principles of corporate criminal responsibility. The exclusion of Part 2.5 means that the Bill’s own corporate criminal responsibility regime (**clause 344**) will apply instead.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Chapter 2 – Registration and Cancellation of Registration

Clause 18 identifies the types of organisations that may apply for registration and includes the three current categories: employer associations, industrial unions that are capable of engaging in an interstate industrial dispute and enterprise unions. **Clauses 19 and 20** set out the criteria for registration and replicate the current s.189 of the WR Act. The minimum membership number for a union is retained at 50.

Clauses 21 and 22 prohibit discriminatory conduct by either employers, e.g. through dismissal of an employee or the termination of a contractor's services, or unions through industrial action against an individual where the individual's action (or omission) is in relation to forming an association seeking registration under the Bill. **Clause 23** details the power of the Federal Court to make orders in relation to conduct that contravenes **clauses 21 and 22**.

Clauses 26 and 27 respectively provide for the registration of organisations and confer corporate status on registered bodies.

Part 3 of Chapter 2 deals with the cancellation of registration of an organisation. Cancellation of registration is currently dealt with under Part X of the WR Act. Grounds for deregistration include a continued breach of an award or certified agreement; interference with interstate trade or international trade; endangering the safety, health or welfare of the Australian community (WR Act, s.294).

Part 3 of Chapter 2 of the present Bill incorporates an ALP amendment to the RO Bill as first introduced. That amendment provided for the retention of the current cancellation of registration provisions under the WR Act. The intended effect of retaining the current provisions is to prevent the grounds for cancellation of registration being extended to include non-compliance with *any* court order.⁵²

Chapter 3 – Amalgamation and withdrawal from amalgamation

Amalgamation

Until 1972, the rules governing the merger of registered organisations were relatively simple. One body would voluntarily deregister and the other would expand its eligibility rule to allow it to represent the interests of the former organisation's membership. From then on, a minimum turnout of members was required as well as a majority support being required in each of the amalgamating bodies.

Under the present law – largely as a result of amendments made in 1983 and 1991 – for an amalgamation to take effect, 25 percent of the membership of each of the balloting bodies must vote unless there is a 'community of interest' between the merging parties. An exemption may also be granted from the balloting requirement where a small organisation is being taken over by a much larger body.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

After the significant upheavals in the union movement in the 1980s and early to mid 1990s, there has for some years been comparatively little change in the pattern of union representation in the federal system.

As noted in **Clause 34**, Part 2 of Chapter 3 deals with the main elements of the amalgamation procedure and with the consequences of an amalgamation.

Part 2 encompassing **clauses 35 to 91** of the present Bill, largely reflects the existing position under Division 7 of Part IX of the WR Act.

Changes to the RO Bill are also minor or technical. **Clause 72** of the present Bill dealing with offences in relation to a ballot includes two new paragraphs ('j' and 'k') that create separate offences for being unlawfully in possession of a ballot paper and destroying ballot boxes. **Clause 86** is a new provision and creates a specific regulation making power in respect of amalgamations.

Withdrawal from amalgamations

These provisions in many respects reflect the ongoing commitment of the present Government to facilitate the break up of the super unions created in the late 1980s and 1990s at the behest of the ACTU and underpinned by legislation enacted by the previous Labor Government. The Howard Government's position has been that as many unions and their members were forced into mergers, they should have a fast-track method of dissolving such marriages of convenience.

As noted in the Explanatory Memorandum⁵³, Part 3 provides largely for the consolidation of Division 7A of Part IX of the WR Act and matters currently dealt with under the *Workplace Regulations 1996*.

Clause 93 contains a list of definitions, substantially expanded from the equivalent list in the RO Bill.

Clause 94 deals with the requirements for obtaining a Federal Court ordered 'disamalgamation' ballot in the case of former organisations that now form part of another registered body. These provisions relate to amalgamations that occurred after 1 February 1991 when the Principal Act was amended to encourage amalgamations. The application of the proposed provisions varies in accordance with how long the amalgamation has been operative and whether the amalgamation in question occurred before or after 31 December 1996. The constituent parts of existing registered bodies that will be able to take advantage of these disamalgamation provisions are those that:

- amalgamated between 1 February 1991 and 31 December 1996 and subsequently apply to disamalgamate within three years of the commencement of this Act, and
- amalgamated after 31 December 1996 but have been amalgamated for less than 5 years.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Clause 105 of the RO Bill as introduced provided for the amendment of applications in certain circumstances does not reappear in the present Bill. This reflects the Government's agreement to an ALP amendment to the earlier Bill.

Clause 103 dealing with the provision of information to electoral officials has been expanded from the equivalent in the RO Bill, largely to bring it into line with current Commonwealth policy dealing with the admissibility of evidence and self-incrimination in criminal proceedings.

Clause 105 differs from the equivalent in the RO Bill (clause 115) in form but not significantly in intention.

Clause 106 sets out the means for reporting the outcome of a ballot – previously this was to be dealt with by way of regulation. **Clause 107** reflects similar considerations but also details matters that must be included in the Australian Electoral Commission's ballot report. **Clause 108** deals with Federal Court inquiries into alleged ballot irregularities.

Clause 111 deals with the means by which after a disamalgamation, members of the new bodies individually decide which organisation to join. This clause is a recast version of clause 120 of the RO Bill.

Clauses 113 and 114 vary from the equivalent provisions in the RO Bill (clauses 122 and 123) to reflect the Government's acceptance of ALP amendments to the 2001 Bill. **Clause 113** also provides for the continuity of all existing awards, agreements etc in respect of the newly registered organisation and its members. **Clause 114** provides that a newly registered body that was once part of a registered organisation is bound by any agreement with a State union that would have applied to it if it had remained part of the organisation from which it has disamalgamated. **Clause 115** seeks to provide for the continued operation of various instruments (as defined in **clauses 35 and 93**) with respect to the newly created organisation and to the ongoing body and its members. New **clause 116** similarly seeks to ensure the continuity of legal and tribunal proceedings.

Clauses 117 to 122 deal with the mechanics of transferring and dealing with the assets of the new organisation. **Clause 123** is another transitional provision, and provides that constituent office-holders in the former amalgamated body may serve out their current term in the newly formed organisation.

Clause 125 outlining the powers of the Federal Court to resolve problems arising out of the disamalgamation is broader than the equivalent clause in the RO Bill and is not specifically limited by the rules of any other organisation or association seeking registration. Validation provisions in the present Bill are more explicit and detailed than those of the RO Bill.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Chapter 4 – Representation orders

Like section 118A of the WR Act, this Chapter will allow the AIRC to issue orders, in the context of demarcation disputes, about the representation rights of unions.

Clause 133 replicates the current subsection 118A(1) (WR Act) allowing the AIRC to: (a) grant exclusive coverage to a union which has constitutional coverage of the relevant employees; (b) give rights of coverage to a union which has no present constitutional coverage of the relevant employees; and/or (c) exclude a union from representing employees over whom it has constitutional coverage.

Sub-clause 133(2) is a new provision allowing the Minister, an organisation or an employer to apply for a variation of a demarcation order. Under **clause 135**, an order made under clause 133 does not prevent a newly registered organisation that covers 'relevant' employees from representing their industrial interests.

Clauses 133 to 137 are in substance the same as the equivalents in the RO Bill. Clause 135 of the RO Bill allowing newly registered organisations to represent workers, notwithstanding existing AIRC exclusive representation orders, is not replicated. This reflects the Government's agreement to an ALP amendment to the earlier Bill.

Chapter 5 – Rules of organisations

The WR Act is part of a long tradition of state regulation of the internal affairs of registered organisations.

Regulation takes three forms, the:

- principal statute prescribes an extensive list of matters that registered organisations must include in their rules (see sections 195 to 200 of the WR Act and **clauses 141 to 146** of the present Bill)
- principal statute also requires all registered organisations to adopt certain specific rules – ie it not only makes it a requirement that certain matters be covered by the rules but the Act also fixes the content of the rules or limits the scope for rule-making on particular matters, and
- courts have also added certain common and administrative law requirements to those imposed by statute – for example, the insistence that the principles of due process/natural justice be applied and that officials exercise their powers under the rules in 'good faith'.

Clause 141 of the present Bill largely replicates the provision of the WR Act and the RO Bill. As with other parts of the proposed legislation, ALP amendments to the RO Bill are reflected in this clause. The requirement in the RO Bill that membership rules must

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

provide that no membership dues are payable by a person where they are not eligible to be a member or are an inactive member has been dropped from the current Bill.

Clause 142 also reflects an ALP amendment to the RO Bill (clause 140). New **sub-clause 142(2)** allows organisations to continue to charge differential membership fees according to the rates of pay of members (even where those rates of pay are based on a person's age).

Clause 147 provides for the Minister to publish guidelines containing sets of 'model rules' for organisations. This is an interesting and potentially worthwhile innovation that could form the basis for the winding back or possible simplification of regulatory requirements in the future.

Chapter 6 – Membership of organisations

This Chapter, which largely replicates Division 9 of Part IX of the WR Act, covers such matters as: entitlement to membership, resignation from membership, recovery of money from members of organisations (dues owing), and legal objections to membership.

The provisions in this Chapter are substantially the same as the equivalents in the RO Bill. (A small explanatory note has been omitted at the end of **sub-clause 166(2)**).

Clause 166 details the right of a person to become a member of an organisation providing he or she meets the criteria listed in the organisation's relevant eligibility rules. **Clause 172** provides that members who have been non financial for a period of 2 years must have their name removed from the membership register before a further 12 months has elapsed. **Clause 174** provides for resignation from membership where the member ceases to be eligible or after two weeks from notice of resignation.

Clause 180 provides for conscientious objection to membership of an organisation (currently section 267 of the WR Act). The clause applies to both registered employer associations and registered unions. However, with the outlawing of compulsory unionism and the removal of union preference from the legislation, it is not entirely clear why it is necessary for the position of conscientious objectors to be regulated by law.

Chapter 7 – Democratic control

This Chapter sets the rules for the conduct of elections for offices in registered organisations. These elections must generally be conducted by the Australian Electoral Commission (section 210 of the WR Act and **clause 182**) and are publicly funded. Part 3 deals with Federal Court inquiries into elections and Part 4 with the circumstances in which persons may be barred from election to office in a registered organisation.

The equivalent provisions may be found in Divisions 4, 5 and 6 of Part IX of the WR Act.

Only minor technical changes have been made to the equivalent provisions in the RO Bill.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

As noted in the Bills Digest for the RO Bill, the Bill reflects a recommendation of the Joint Standing Committee on Electoral Matters (Report, 1997), that votes in elections not be counted unless the approved form of declaration envelope is used (**clause 188**).

Clause 190 prohibits the use of organisation resources to favour one candidate over another in elections for office.

Clause 191 makes it a strict liability offence for an officer or employee of an organisation to fail to respond to a request from a returning officer in respect of an organisation's membership register.

Clauses 193, 199 and 202 reflect changes to the RO Bill regarding the wording of offences and defences in the case of prosecutions for: failing to act on the valid direction of an electoral official in connection with an election for office; the preservation of ballot papers; and hindering the Industrial Registrar in connection with the performance of a Federal Court sponsored inquiry into an election for office. Additionally, offences against **clauses 193 and 199** become strict liability offences and an element of strict liability is added to the offence against **clause 202**.

Clause 215 (the equivalent of clause 212 in the RO Bill) provides that a person may not hold office where they have been convicted of a prescribed offence as defined in **clause 212**. The main forms of prescription relate to offences involving fraud or dishonesty punishable by imprisonment for a period of three months or more and offences in relation to the formation and management of organisations. The Federal Court may, however, grant leave for a person to hold office notwithstanding **clauses 212 and 215** (refer: **clauses 216 and 217**).

The present Bill departs from the RO Bill by adding a new Division to Part 4 of Chapter 7 – **clauses 221 to 228**. This Division deals with persons who have been disqualified from office by virtue of incurring a penalty order imposed under **subclause 306(1)** of the Bill. That subclause relevantly refers to imposition of a civil penalty imposed by the Federal court on an individual of 20 penalty units (currently a single penalty unit is \$110.00).

Chapter 8 – Records and accounts

This chapter is about the recording keeping and accounting practices of organisations. Organisations must keep lists of members and office-holders and details of loans, donations and grants must be lodged with the Industrial Registrar.

As provided by Part 2 of Chapter 8, basic record keeping requirements are the same as under the RO Bill (**clauses 230 and 231**). However, **clause 232** makes changes to the fault elements of the offence of interfering with or destroying a register of members or an official copy of such a register where either forms part of the organisation's official records kept in accordance with **clauses 230 and 231**. Amongst other things, **clause 232** inserts a strict liability element into the offence. The equivalent offence under the RO Bill

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

(clause 221) required proof of intention. It may be noted that unlike the strict liability offences in the Bill – for example, **clause 199** dealing with ballots - **clause 232** does not explicitly provide for possible defences. The standard defences, including that of mistake of fact in relation to the strict liability element, are nonetheless available under the *Criminal Code Act 1995*.

Part 3 of Chapter 8 sets out the requirements that must be met by organisations in relation to their financial affairs and Part 4 is a new provision dealing extensively with access to organisations' financial records.

Divisions 1 to 3 of Part 3 are the same as the equivalent provisions in the RO Bill. **Clause 258** in Division 4 of Part 3 dealing with the obstruction of auditors has been redrafted to insert a strict liability element into the offence. Statutory defences, as well as Criminal Code defences are available.

Divisions 5 to 6 of Part 3 are the same as the equivalent provisions in the RO Bill.

Division 7 of Part 3 deals with members' access to financial records. **Sub-clause 272(6)** has been widened (from clause 261(6) of the RO Bill) to include requests for information made by a member of an organisation *or on behalf of such a member*. **Clause 273** deals with orders for the inspection of financial records. A new **sub-clause 273(3)** has been added to empower the AIRC to make orders authorising the inspection of financial records that relate to reasonably suspected breaches of the Act and the Regulations and various reporting standards and guidelines in respect of the financial administration of a 'reporting unit' (organisation or part thereof).

Part 4 of Chapter 8 of the RO Bill dealt with the Conduct of officers and employees. That Part does not appear in that form in the present Bill but constitutes part of a new Chapter 9. Part 4 of Chapter 8 in the present Bill deals with rights of access of officers and former officers to an organisation's books.

Chapter 9 – Conduct of officers and employees

This Chapter lists some of the more significant duties of officers and employees of organisations.

It is a new Chapter although it picks up elements of Chapter 8 of the RO Bill. For instance, **clauses 281 to 289** and **291 to 293** replicate respectively clauses 269 to 276 and 278 to 281 of the RO Bill.

Clause 277 of the RO Bill that dealt with the use of position and information in ways that may give rise to a criminal offence was deleted at the instigation of the Opposition and is not reproduced in the present Bill.

Part 3 of Chapter 9 is new to this Bill and concerns the general duties officers and employees in respect of orders or directions issued by the Federal Court.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

These provisions – **clauses 294 to 303** – represent a significant departure from the RO Bill and are potentially quite contentious.

No rationale for these new provisions appears in the Explanatory Memorandum but the proposed changes are flagged in Minister Abbott's Second Reading Speech where he notes that:

The Bill establishes duties on (sic) officers and employees of organizations to comply with orders and directions of the Australian Industrial Relations Commission and the Federal Court. Breach of these duties would result in financial penalties, and in the case of officers of organizations, disqualification from holding or seeking office. These provisions which did not form part of the 2001 Bill, have been included in recognition of the fact that such breaches pose a threat to the integrity of the federal workplace relations system.⁵⁴

It would appear that the conduct that has inspired these proposals is the refusal of some high profile union officials to comply with Commission orders issued under section 127 of the WR Act to cease industrial action. As such orders are already enforceable by the Federal Court under section 127(6) of the WR Act but it would appear that some employers are reluctant to press their rights under this provision. Contravention of the proposed provisions would expose union officials not just the relevant pecuniary penalty but also prevent them holding office by virtue of new Division to Part 4 of Chapter 7 – **clauses 221 to 228** of the present Bill.

Chapter 10 – Civil penalties

This Chapter is the equivalent of Chapter 9 in the RO Bill. It also reflects in part an ALP amendment to clause 289 of the RO Bill. The relevant provision is now located at **clause 310**, and deletes the reference to the Employment Advocate. However, new **sub-clause 310(2)** provides that applications for orders may now be made by the Minister or their nominee – presumably this could be the Employment Advocate – in respect of matters covered by **clause 305(2)(zk)** of the Bill. The relevant matters in this instance are those arising under **clauses 297 to 303** of the Bill regarding the enforcement of Commission and Court orders.

Clause 305 lists the civil penalty provisions contained in the Act and provides that application may be made to the Federal Court for orders regarding contraventions. **Clause 306** sets out the pecuniary penalties that the Court may order (up to \$11 000 for bodies corporate and \$2200 for natural persons). **Clause 307** enables the Federal Court to order a person who has contravened a provision to make compensation to the organisation and the Court is to calculate the value of any profits made by the person in assessing the compensation payable. **Clause 309** preserves the operation of other laws concerning the duties of officers and employees. **Clause 310** allows the Registrar or person authorised by the Registrar amongst others to apply for an order about a contravention other than a contravention of provisions relating to officers' duties. **Clause 311** prevents civil

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

proceedings following criminal proceedings for the same conduct. **Clause 313** allows criminal proceedings to follow civil proceedings for the same contravention. **Clause 314** prevents the admission of evidence in criminal proceedings where the evidence was given previously in civil proceedings in relation to the same conduct.

Chapter 11 Miscellaneous

This Chapter is the equivalent of Chapter 10 in the RO Bill.

An ALP amendment to clause 303 of the RO Bill in respect of the authorisation of financial assistance to members appears as **clause 324** of the present Bill.

Otherwise there appear to be no changes of great significance to the RO Bill. Former clause 316 dealing with offences in relation to the Registrar's investigations now appears in a slightly altered form as **clause 337**. The changes to this provision appear to reflect matters of drafting technique rather than differences of substance.

The Chapter also includes provisions validating certain invalidities in relation to registered organisations. **Clause 318** defines 'invalidity'. **Clause 319** provides that all acts done in good faith by a collective body of an organisation or an official are valid despite any later finding of an invalidity concerning the election or appointment of a collective body or a person to the collective body, or the making of rules. **Clause 320** validates certain acts after four years have elapsed. **Clause 321** allows the Federal Court to order that **clauses 319 or 320** may not apply in relation to certain acts. **Clause 322** allows an organisation, its members or an interested person to apply to the Court for a ruling on an alleged invalidity. The Court may make orders to correct the invalidity. This includes the reconstruction of a defunct branch (**clause 323**).

Part 3 allows financial assistance from the Commonwealth to meet the costs of legal proceedings to be granted. **Clause 324** authorises the Minister to grant legal assistance in respect of proceedings for suspected contravention of defined provisions. **Clause 325** enables the Federal Court to certify that an unsuccessful applicant for assistance had acted reasonably seeking the assistance. **Clause 326** allows the Minister to refuse assistance in relation to proceedings concerning certain matters (eg relating to rules) where the order sought is substantially the same as that sought in other proceedings. **Clause 327** provides financial assistance is not normally payable for two or more counsel.

Part 4 gives the Registrar powers to make inquiries into the affairs of organisations. **Clause 330** enables the Registrar or registry staff to make inquiries regarding compliance with Part 3 of Chapter 8 (accounts and audit) reporting guidelines, relevant rules governing reporting and finances. **Clause 331** enables the Registrar to compulsorily conduct an investigation to determine whether there has been a contravention of Chapter 8 Part 3, where satisfied that there are reasonable grounds for doing so. **Clause 332** allows the Registrar to investigate an irregularity or deficiency of an organisation's accounts arising the auditor's report. **Clause 333** allows that a prescribed number of members of a

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

reporting unit may request its finances to be investigated by the Registrar. **Clause 335** prescribes the assistance to be afforded in the conduct of an investigation. **Sub-clause 336(4)** requires a reporting unit to remedy the contravention. **Clause 337** makes it an offence to refuse to cooperate with an investigation, if requested to do so by the Registrar.

Part 5 deals with the jurisdiction of the Federal Court. **Clause 338** vests the Federal Court with jurisdiction in relation to matters arising under this Bill or the WR Act. **Clause 339** sets out certain matters in which the Federal Court has exclusive jurisdiction (eg an act for which an organisation is to be sued). **Clause 340** requires the Federal Court's jurisdiction to be exercised by a Full Court in relation to certain matters (eg cancellation of registration).

Part 6 reproduces provisions currently found in Division 12 of Part 1X of the WR Act. A member's right to participate in organisation ballots is provided in **clause 345**. A member's request for information concerning elections and/or ballots is provided for in **clause 346**. A copy of the organisation's rules must be supplied to a member where the request has been put in writing (**clause 347**).

Concluding Comments

The general aim of this Bill is to remove administration of registered organisations to a separate statute. Thus, the *Workplace Relations Act 1996* would deal primarily with awards, certified agreements and Australian Workplace Agreements. However, as a result of the report in the Financial Review (29 May 2002, cited earlier) which notes that agreement seems to be available to pass the current Bill as a schedule to the *Workplace Relations Act 1996* and not as it is currently proposed to be a new statute, it would be prudent to reserve comments about the new arrangements until amendments to the Bill (or indeed a new Bill) are presented.

One ongoing query may however remain. This concerns the more onerous duties of officials of organisations under the proposed arrangements and whether these duties may dissuade persons from nomination to elected positions.

Endnotes

- 1 House of Representatives, *Debates*, 21 March 2002, p. 1835.
- 2 *ibid.*
- 3 <http://www.aph.gov.au/house/committee/em/ie/ieindex.htm>
- 4 This also brings together as attachments a number of other useful documents including: The Recommendations of the *Review of the current arrangements for Governance of Industrial*

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Organisations, prepared by Blake Dawson and Waldron (June 1998) and the *Government Response*, tabled in the House of Representatives on 15 July 1998, to the Report of the Joint Standing Committee on Electoral Matters: *Inquiry into the role of the Australian Electoral Commission in Conducting Industrial Elections* :

http://www.dewrsb.gov.au/ministers/reith/disc_info/disc/accountability.pdf

- 5 See: http://www.aph.gov.au/senate/committee/EET_CTTE/WR%20tranbus_bill/WR%20Bills%202001.pdf
- 6 Braham Dabscheck and John Niland, *Industrial Relations in Australia*, George Allen and Unwin, 1981, pp. 133–134.
- 7 ABS, *Employee Earnings, Benefits and Trade Union Membership August 2001*, Cat No. 6310.0, 28 February 2002.
- 8 ABS and other figures cited in Creighton and Stewart, *op cit*, pp. 352–354.
- 9 According to Australian Industrial Registry data, presently there are also 69 federally registered employer associations.
- 10 Breen Creighton and Andrew Stewart, *Labour Law: an introduction*, third edition, Federation Press, 2000, p. 338.
- 11 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309. *Burwood Cinema Ltd v Australian Theatrical Employees' Association* (1925) 35 CLR 528.
- 12 Report of Mr Justice Sweeney: *Royal Commission into Alleged Payments to Maritime Unions* (AGPS, 1976).
- 13 Department of Industrial Relations *Accounting Practices and Financial Reporting Requirements: Guidelines for Organisations Registered under the Commonwealth Conciliation and Arbitration Act 1904*, (AGPS, 1980).
- 14 See Regulations 107 and 108 of the Workplace Regulations 1996.
- 15 Report of Commissioner J. Winneke: *Royal Commission into the Activities of the Australian Building Construction Employees and Builders Labourers' Federation* (AGPS, 1982).
- 16 *Report of the Committee of Review into Australia's Industrial Relations Law and Systems* (AGPS, 1985) p. 483.
- 17 *ibid.*, p. 482.
- 18 Ernst and Whinney (Chartered Accountants) *Review of Financial Accounting and reporting Requirements*, (April 1998), p. 6.
- 19 *ibid.*, p. 7.
- 20 *ibid.*, p. 25.
- 21 The Hon Peter Reith, *Accountability and Democratic Control of Registered Industrial Organisations*, October 1999, p. 1.
- 22 The Hon Peter Reith MP, *Better Pay for Better Work: the Federal Coalition's Industrial Relations Policy* (February 1996).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- 23 *Agreement between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill* (October 1996).
- 24 See *Workplace Relations Act Monitor* (June 2001). This site is maintained by the Department of Employment and Workplace Relations
<http://www.dewrsb.gov.au/workplaceRelations/default.asp>
- 25 See Schedule 7 of the *Workplace Relations and Other Legislation Amendment Act 1997* and subsections of s.253ZJ of the *Workplace Relations Act*.
- 26 Tom Bramble, 'Deterring Democracy; Australia's New Generation of Trade Union Officials' *Journal of Industrial Relations* v.37(3) 1995. See also Braham Dabscheck, *The Struggle for Australian Industrial Relations* (OUP, 1995) p. 134.
- 27 Richard Hall, Bill Harley and Matthew Tomkins 'The bureaucratisation of Australian unions? Evidence from a national survey', *Journal of Sociology*, v. 36, no. 3, November 2000.
- 28 Anthony Forsyth, 'Ministerial Discussion Paper – Accountability and Democratic Control of Registered Industrial Organisations', *Australian Journal of Labour Law*, v.12 (1999) p. 196.
- 29 CCH *Australian Labour Law Reporter* [¶7-817].
- 30 *More Jobs, Better Pay* The Federal Coalition's Workplace Relations Policy, September 1998, p. 28:
<http://www.liberal.org.au/archive/1998%20election%20policies/workplace/workplace.html>
- 31 See address to the Australian Institute of Management by the Hon. Peter Reith (Melbourne 22 February 1999).
- 32 'Union finances reviewed by DPP', *The Australian*, (6 January 1999).
- 33 Personal communication with officers of the Australian Industrial Registry.
- 34 'Kelty comes out for AWU life-line', *The Australian*, 27 August 1998.
- 35 'Is this man the future of the ALP?' *Australian Financial Review* 8 June 2002.
- 36 Blake, Dawson and Waldron, *Review of Current Arrangements for Governance of Industrial Organisations: Report and Recommendations* (June 1998)
<http://www.dewrsb.gov.au/workplacerelements/policy/governance/finalrep.htm>.
- 37 See *The Continuing Reform of Workplace Relations: Implementation of 'More Jobs Better Pay'* Implementation Discussion Paper issued by the Hon. Peter Reith MP, May 1999: 'These provisions – which govern matters such as the financial accounting and auditing and reporting obligations of organisations and regulation of industrial elections – are detailed and complex. They have no relevance to many users of the workplace relations systems' p. 28.
- 38 *Inter alia*, the terms of reference commissioning Blake Dawson Waldron required any recommended changes on standards to be 'consistent with the statutory obligations to be met by corporations and other comparable organisations'.
- 39 Faculty of Commerce, Griffith University.
- 40 Mark Mourell, 'Industrial Organisations and Corporate Accountability', *Australian Journal of Labour Law*, v.12, 1999, p. 137.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- 41 *ibid.*
- 42 *The Continuing Reform of Workplace Relations: Implementation of 'More Jobs Better Pay'* Implementation Discussion Paper issued by the Hon. Peter Reith MP, May 1999.
- 43 The Hon. Peter Reith, *Accountability and Democratic Control of Registered Industrial Organisations*, October 1999.
- 44 Joint Standing Committee on Electoral Matters (Parliament of Australia), *Industrial Elections; report of the inquiry into the role of the Australian Electoral Commission (AEC) in conducting industrial elections*, (AGPS, October 1997).
- 45 Anthony Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model' *Australian Journal of Labour Law*, v.13, 2000, p. 36–37.
- 46 Anthony Forsyth, 'Ministerial Discussion Paper – Accountability and Democratic Control of Registered Industrial Organisations', *Australian Journal of Labour Law*, v.12, 1999, p. 197.
- 47 'Beyond the Second Wave – the Government is seeking new ways to develop a 'sensible framework' for workplace relations', *Industrial Relations and Management Newsletter*, May 2000.
- 48 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, Consideration of Provisions: Workplace Relations (Registered Organisations) Bill 2001, *Report*, June 2001, pp. 34 and 36 respectively.
- 49 House of Representatives, *Debates*, 27 August 2001, pp. 30308–30323.
- 50 Policy issued by the Prime Minister 12 October 2001. See parts 10 and 15.
- 51 'Labor gives union bill the green light', 29 May 2002, p. 7.
- 52 House of Representatives, *Debates*, 27 August 2001, p. 30308.
- 53 Explanatory Memorandum, p. 37.
- 54 *ibid.*, 21 March 2002, p. 1835.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.