

# CHAPTER 1

## Background

### Reference

1.1 On 9 December 2013, the Senate referred the following matter for inquiry and report by 27 March 2014:

The provisions of the Fair Work (Registered Organisations) Amendment Bill 2013, with particular reference to:

- (a) the potential impact of the amendments to interfere with the ongoing operation of registered organisations in Australia; and
- (b) the potential of the amendments to impede the ability of employees of registered organisations to carry out their duties.

### Previous inquiry

1.2 On 14 November 2013, the provisions of the Fair Work (Registered Organisations) Amendment Bill 2013 were referred to the Education and Employment Legislation Committee for inquiry and report on 2 December 2013.<sup>1</sup> That committee held one public hearing in Melbourne on 26 November 2013.<sup>2</sup>

1.3 The bill was introduced into the House of Representatives by the Hon Christopher Pyne MP, on 14 November 2013,<sup>3</sup> and proposes to amend the *Fair Work Act 2009* and the *Fair Work (Registered Organisations) Act 2009* in order to implement various commitments made by the Government before the federal election on 7 September 2013.

1.4 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 officers' 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 Education and Employment Legislation Committee Report, *Fair Work (Registered Organisations) Amendment Bill 2013*, December 2013, p. 1.

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

- 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**

1.5 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***

1.6 Schedule 1 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>

1.7 The schedule sets out the terms and conditions of appointment of the Commissioner, and includes the provision of staff from the Fair Work Commission. The bill also proposes to establish the Special Account that would ensure that the Commission is independently funded.<sup>7</sup>

1.8 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***

1.9 Schedule 2 proposes to increase the obligations on registered organisations and their officers, as well as increasing the civil penalties for non-compliance;<sup>8</sup> and sets out further transitional provisions required by the increased obligations on

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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. 90.

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

organisations and the increased powers of the Commissioner, under Part 1 of Schedule 2.<sup>9</sup>

## **Compatibility with human rights**

1.10 The bill engages the following human rights:

- The right to freedom of association:
  - the right to form and join trade unions and the right of trade unions to function freely in Article 22 of the International Covenant on Civil and Political Rights (ICCPR);<sup>10</sup>
  - Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESR); and<sup>11</sup>
  - International Labour Organisation (ILO) Freedom of Association and Protection of the Right to Organise Convention 1848 (No. 87); and<sup>12</sup>
- The right to the presumption of innocence and the minimum guarantees contained in Article 14 of the ICCPR; and<sup>13</sup>
- The prohibition on unlawful and arbitrary interference with privacy and reputation in Article 17 of the ICCPR.<sup>14</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.

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

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

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

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

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

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

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>15</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>16</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>17</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>18</sup> It suggests 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>19</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>20</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 to the Commissioner. The

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

16 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, at *Legitimate objective*

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

18 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Article 14(2) ICCPR*

19 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Article 14(2) ICCPR*

20 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Article 14(2) ICCPR*

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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>21</sup>

1.17 The explanatory memorandum suggests 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>22</sup>

## **Financial impact statement**

1.18 The Regulatory Impact Statement (RIS) recommended that the Government implement option two, that would ensure that:

Registered organisations and their officers will have fiduciary and statutory responsibilities that are more closely aligned with those of company directors, provided under the *Corporations Act*. Option Two reflects the Government's election commitment.<sup>23</sup>

1.19 Consequentially, the RIS suggests that 'the overall budgetary impact for the Government is nil.'<sup>24</sup> The RIS states the compliance cost for each registered organisation to be about \$3,000 per year on average,<sup>25</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>26</sup>

1.20 The Senate Standing Committee for the Scrutiny of Bills noted in its 8th Alert Digest of 2013 that the bill contained a standing appropriation<sup>27</sup> and that this could question the financial impact statement contained in the explanatory memorandum.

## **Consideration by human rights committee**

### ***Parliamentary Joint Committee on Human Rights***

1.21 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered the bill in its report tabled in the Senate on 10 December

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21 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, at Statement of Compatibility with Human Rights, at *Investigation and information gathering powers*

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

23 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, p.10.

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

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

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

27 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2013*, p. 60.

2013.<sup>28</sup> The Committee undertook to write to the Minister to request clarification on numerous aspects of the bill, including the proposed disclosure regime and its engagement of human rights law in Australia.

1.22 The Human Rights Committee also stated that it would seek several undertakings from the minister in relation to:

- the necessity and proportionality of the proposed disclosure regime;<sup>29</sup>
- whether the standard of 'convenient' is consistent with the requirement for limitations on rights to be 'necessary';<sup>30</sup>
- providing consideration or guidance for contraventions that may be considered 'serious';<sup>31</sup>
- section 337AC's effect on the right to the presumption of innocence through the 'reverse burden';<sup>32</sup>
- section 337AD(3) and its engagement of the presumption of the right against self-incrimination;<sup>33</sup> and
- the potential application of civil penalty provisions for 'serious contraventions' and their potential engagement of article 14 of the ICCPR.<sup>34</sup>

### **Progress of the bill through the Parliament**

1.23 Resumption on the debate of the second reading of the bill commenced on 3 December 2013,<sup>35</sup> and concluded on 12 December 2013,<sup>36</sup> where-after the bill was transmitted to the Senate for concurrence in the usual practice. A second reading amendment moved by the Hon Brendan O'Connor MP was not agreed to.<sup>37</sup>

1.24 The Minister representing the Minister for Employment in the House of Representatives, the Hon Christopher Pyne MP, stated that the government will 'actively consider' the recommendations in the Legislation Committee's report.<sup>38</sup>

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28 Journals of the Senate, 10 December 2013, p. 314.

29 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 24.

30 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 24.

31 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 25.

32 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 26.

33 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 27.

34 Parliamentary Joint Committee on Human Rights, *First report of the 44<sup>th</sup> Parliament*, p. 28.

35 House of Representatives, Votes and Proceedings, *3 December 2013*, p. 156.

36 House of Representatives, Votes and Proceedings, *12 December 2013*, p. 234.

37 House of Representatives, Votes and Proceedings, *12 December 2013*, p. 234.

38 House of Representatives Hansard, *12 December 2013*, p. 2505.

## **Acknowledgement**

1.25 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**

1.26 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.

1.27 References in the report to the submission of the Department of Employment (the Department) refer to the submission made by the Department to the Legislation Committee's inquiry into the provisions of the Fair Work (Registered Organisations) Amendment Bill 2013. That submission was attached by the Minister for Employment, Senator the Hon Eric Abetz, to his own submission to the current inquiry.