

The Senate

Education and Employment
Legislation Committee

Fair Work (Registered Organisations)
Amendment Bill 2014 [No.2] [Provisions]

August 2015

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Senator the Hon David Johnston, LP, WA (from 15 June, 2015)

Senator Deborah O'Neill, ALP, NSW

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RECOMMENDATIONS

Recommendation 1

2.20 The committee recommends that the Senate pass the bill.

CHAPTER 1

Introduction and background

Referral

1.1 On 19 March 2015, the Hon. Christopher Pyne, MP, Minister for Education and Training, introduced the Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2] (the bill) in the House of Representatives.¹

1.2 On 14 May 2015, pursuant to a report of the Senate Standing Committee for Selection of Bills, the Senate referred the provisions of the Bill to the Education and Employment Legislation Committee (the committee) for inquiry and report by 11 August 2015.²

History of the bill

1.3 On 14 November 2013, the Fair Work (Registered Organisations) Amendment Bill 2013 (the first bill) was referred to the committee for inquiry and report.³ The report, tabled in December 2013, was supportive of the first bill and recommended its passage subject to four other recommendations in relation to certain provisions.⁴ The government subsequently tabled amendments giving effect to those recommendations; however, the bill and the proposed amendments were negatived in the Senate.

1.4 On 19 June 2014, the first bill was re-introduced as the Fair Work (Registered Organisations) Amendment Bill 2014 (the second bill). The second bill was not re-drafted to incorporate the proposed amendments, but they were tabled alongside it. The second bill passed the House of Representatives but was again negatived in the Senate.

1.5 The current bill has been re-drafted to incorporate the proposed amendments, but is otherwise identical to the first and second bills.

Scope and conduct of the inquiry

1.6 Details of the inquiry were made available on the committee's website. The committee also advertised the inquiry in *The Australian* and wrote to key stakeholder groups, organisations and individuals to invite submissions. The committee received 11 submissions as detailed in Appendix 1. No public hearings were held.

1 *Votes and Proceedings*, No. 107, 19 March 2015, p. 1211.

2 *Journals of the Senate*, No. 94, 14 May 2015, pp 2598–2599.

3 *Journals of the Senate*, No. 94, 14 May 2015, pp 2598–2599.

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

1.7 The substance of the bill was examined in detail in the committee's report on the first bill. This report focuses only on the subsequent amendments to that bill and should be read concurrently with the previous report.

Overview of the bill

1.8 The bill, which is comprised of two schedules, seeks to amend the *Fair Work Act 2009* (Fair Work Act) and the *Fair Work (Registered Organisations) Act 2009* (RO Act) to improve the governance and oversight of registered organisations following widely publicised misconduct by Health Services Union officials.⁵

1.9 A registered organisation is an employee or employer association registered by the Fair Work Commission under the RO Act. Registration grants an association certain rights and privileges in representing its members' interests; in exchange, the organisation must comply with various conditions and obligations. There are currently 112 registered organisations in Australia, of which 66 represent employers and 46 represent employees.

Schedule 1

1.10 Part 1 of Schedule 1 establishes the Registered Organisations Commission (the Commission), an independent statutory authority to monitor and regulate registered organisations. The Commission is to be headed by the Registered Organisations Commissioner (the Commissioner), whose functions and powers are based on those of the General Manager of the Fair Work Commission as well as those set out in the *Australian Securities and Investments Commission Act 2001*.⁶ Part 1 sets out the terms and conditions of the Commissioner's appointment and provides for staff from the Office of the Fair Work Ombudsman to assist the Commissioner as directed.

1.11 Part 2 of Schedule 1 consists of the necessary consequential, transitional and savings provisions.

Schedule 2

1.12 Part 1 of Schedule 2 alters the reporting and disclosure obligations of registered organisations and their officers, increases the civil penalties for non-compliance and introduces new criminal offences for the most serious contraventions. The obligations and penalties are largely analogous to what is imposed on companies and their directors under the *Corporations Act 2001* (the Corporations Act).⁷

1.13 Part 2 of Schedule 2 consists of the necessary consequential, transitional and savings provisions.

5 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2014* [No. 2], p. i.

6 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2014* [No. 2], pp. i, 2 and 11.

7 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2014* [No. 2], p. ii.

Financial impact statement

1.14 There is no budgetary cost to the government.⁸

1.15 The Regulatory Impact Statement estimates the compliance cost for each registered organisation to be about \$1 275 per year on average.⁹

Consideration of the bill by other committees

1.16 The Committee notes that the provisions of this Bill and its predecessor have previously been referred to the Senate Standing Committee on the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights. The Committee sees no need to revisit the deliberations of those two committees in this report, but notes those reports and the government's previous responses.

Acknowledgement

1.17 The committee thanks the organisations that contributed to the inquiry by preparing written submissions.

8 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2014* [No. 2], p. xviii.

9 Explanatory memorandum, *Fair Work (Registered Organisations) Amendment Bill 2014* [No. 2], p. xxvi.

CHAPTER 2

Key issues

Amendments since the previous report

2.1 The bill is largely identical to its predecessors and its underlying purpose remains unchanged. However, there have been four notable changes to the bill since the committee's previous report, each of which was made in response to the recommendations in that report.

Recommendation 1

2.2 The committee recommended that the requirement to disclose material personal interests under proposed new section 293C of the RO Act apply only to officers whose duties are financial in nature.¹ The application of proposed section 293C is now restricted to an officer of an organisation or branch 'whose duties include duties that relate to the financial management of the organisation or branch'.²

2.3 The committee further recommended that such disclosures be recorded in the minutes of relevant meetings and be made available to members on request. This replaces the requirement that disclosures be made to all members of an organisation.³

Recommendation 2

2.4 The committee recommended that a list of exclusions from the obligation to disclose material personal interests, based on subsection 191(2) of the Corporations Act, be inserted into the bill.⁴ Proposed new paragraph 293C(4)(a) of the RO Act provides that disclosures need not be made in respect of certain categories of interest, such as those held in common with the other members of an organisation or branch and those arising in relation to an officer's remuneration.⁵ In addition, the bill no longer imposes an express obligation on officers to disclose any material personal interest in relation to that officer's relatives.⁶

Recommendation 3

2.5 The committee recommended that the obligation to disclose payments made by a registered organisation be subject to certain exclusions and limitations, including

1 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, December 2013, pp 10-11.

2 Proposed subsection 293C(1).

3 Department of Employment, *Submission 2*, p. 3.

4 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, December 2013, p. 11.

5 Proposed subparagraphs 293C(4)(a)(i) and (ii).

6 Department of Employment, *Submission 2*, p. 3.

a minimum payment threshold.⁷ Proposed new section 293G of the RO Act now includes additional exceptions to the obligation to disclose these payments. These exceptions, modelled on similar exceptions in the Corporations Act, include payments made to related parties on 'arm's length' terms or that are less than an amount to be specified in regulations.⁸

Recommendation 4

2.6 The committee recommended that the Commissioner be given authority to grant exemptions from training requirements.⁹ Proposed new section 293M of the RO Act provides for an exemption to mandatory financial management training where the Commissioner is satisfied that an officer has 'a proper understanding' of their financial duties based on relevant experience or qualifications.¹⁰

Responses to the bill

2.7 The majority of submitters reiterated or expanded on their submissions to the previous inquiry. Responses to the bill remain mixed, with supporters and opponents of the bill divided on the necessity for greater oversight of registered organisations, and in particular, oversight of trade unions.

Support for the bill

2.8 Supporters of the bill accept the need for greater oversight and improved governance of registered organisations to provide members with similar protections to those enjoyed by company shareholders.

2.9 The Australian Mines and Metals Association stated that 'more effective regulation of registered organisations and increased penalties are warranted to ensure members' interests are protected to the same extent as are those of shareholders of companies'.¹¹

2.10 The Chamber of Commerce and Industry of Western Australia (CCIWA) emphasised the importance of enshrining the requirement for organisations to act in their members' best interests, noting 'this is especially important given the level of trust members place in these organisations, particularly in the case of trade unions where members are limited in their ability to choose the organisation that suits them'.¹²

2.11 In relation to increased penalties, the Department of Employment noted that the Interim Report of the Royal Commission into Trade Union Governance and

7 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, December 2013, p. 11.

8 Proposed subsections 293G(5A) and (5B).

9 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, December 2013, p. 13.

10 Proposed subsection 293M(2).

11 Australian Mines and Metals Association, *Submission 10*, p. 1.

12 Chamber of Commerce and Industry of Western Australia, *Submission 3*, p. 1.

Corruption (the Royal Commission) found that the current maximum penalties for breaches of financial management duties are too low.¹³ This finding was echoed in Justice North's comment, while hearing *General Manager of Fair Work Australia v Health Services Union*,¹⁴ that the penalties are so low as to be 'beneficial to wrongdoers'.¹⁵ By increasing penalties, 'the interests of members of registered organisations are protected in a similar way as the interest of shareholders of companies'.¹⁶

Criticism of the bill

2.12 Opponents of the bill generally reject the underlying premise that mismanagement and poor governance are widespread amongst registered organisations.

2.13 The Australian Council of Trade Unions (ACTU) contended that the current RO Act provides appropriate regulatory oversight of registered organisations and need not be amended. Similarly, Unions NSW found no evidence to justify changes to the RO Act.¹⁷

2.14 The Victorian Automobile Chamber of Commerce (VACC) was not opposed to increased oversight of registered organisations, but expressed concern that the bill was 'financially costly and administratively unworkable without achieving [its] purported aim'.¹⁸

Responses to the amendments

2.15 Not all submissions directly addressed the amendments, but those that did were generally positive. The CCIWA welcomed the government's willingness to respond to stakeholder concerns,¹⁹ while the Australian Industry Group was pleased that many of its own suggestions had been taken up.²⁰ The Australian Chamber of Commerce and Industry was encouraged that the amendments showed 'a commitment to reducing red tape while strengthening governance and transparency'.²¹

2.16 The Master Plumbers Association of NSW noted that aligning requirements under the RO Act with those in the Corporations Act would succeed in '[creating]

13 Interim Report of the Royal Commission into Trade Union Governance and Corruption, p. 56.

14 [2014] FCA 970.

15 Department of Employment, *Submission 2*, p. 6.

16 Department of Employment, *Submission 2*, p. 1.

17 Unions NSW, *Submission 7*.

18 Victorian Automobile Chamber of Commerce, *Submission 5*, p. 4.

19 Chamber of Commerce and Industry of Western Australia, *Submission 3*.

20 Australian Industry Group, *Submission 4*, p. 4.

21 Australian Chamber of Commerce and Industry, *Submission 8*, p. 8.

transparency and reducing red tape without introducing additional and potentially overlapping requirements'.²²

2.17 However, some submitters expressed reservations about the nature and extent of the changes. The VACC was 'concerned that the current Bill has failed to account for concerns previously raised by VACC and others'.²³ The ACTU, noting the value of 'a uniform minimum standard of knowledge', suggested that exemptions from training requirements 'may dilute the content of the care and diligence duty'.²⁴

Committee view

2.18 Based on the weight of evidence in this and the previous inquiry, the committee is of the view that current arrangements are manifestly inadequate to ensure proper governance of registered organisations and deter improper behaviour by officials. The committee is persuaded that the bill is both necessary and appropriate to ensure the fair representation and protection of members' rights by the organisations to which they belong.

2.19 The committee is pleased to note that its recommendations have been acted upon. The committee is particularly reassured by the closer alignment of the reporting and disclosure obligations with those in the Corporations Act, fulfilling the committee's desire to see 'consistent language and jurisprudence be applied to new legislation'.²⁵ The committee is satisfied that the amendments to the bill have addressed its previous concerns.

Recommendation 1

2.20 The committee recommends that the Senate pass the bill.

Senator Bridget McKenzie
Chair

22 Master Plumbers Association of NSW, *Submission 6*, p. 3.

23 Victorian Automobile Chamber of Commerce, *Submission 5*, p. 4.

24 Australian Council of Trade Unions, *Submission 1*, p. 10.

25 Senate Education and Employment Legislation Committee, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]*, December 2013, p. 15.

LABOR SENATORS' DISSENTING REPORT

Key Issues

1.1 As the current bill is identical to the Fair Work (Registered Organisations) Amendment Bill 2013 (the previous bill), and the amendments identical to those negated by the Senate in May 2014, Labor Senators again argue that the Fair Work (Registered Organisations) Amendment Bill 2014 should not be passed.

1.2 The Explanatory Memorandum to the current Bill does not materially differ from the Explanatory Memorandum to the previous Bill, and does not contain any of the additional information provided by the Minister in relation to the matters raised by the Labor Senators of the committee.

1.3 Like the Senate Standing Committee on Education and Employment, the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills committee) reported twice on the previous Bill in 2013 and 2014. The Committee raised a number of concerns, particularly with regard to whether the increase proposed by item 228 (proposed subsection 337(1)) for the offence of failing to comply with a notice to attend or produce to 100 penalty units or imprisonment for two years (or both) is higher than other similar offences, and the justification for the proposed approach.¹ The Committee noted that the provisions mentioned above may be considered to trespass unduly on personal rights and liberties.² Labor Senators support this view and note that changes have not been made to address these concerns.

1.4 The Labor Senators of the committee remind the Government that unlike corporations, many rank and file members of trade unions are elected as delegates to governing bodies. These members are not full-time salaried leadership of unions, but everyday members who undertake other roles in the community and the industry, and volunteer their time to their union. The bill would result in many dedicated and ethical people refusing to participate in registered organisations due to the onerous unbalanced obligations on them as individuals.

Evaluation of the current bill by other committees

1.5 The Scrutiny of Bills committee reported on the bill in its Fifth Report of 2015, drawing attention to a number of issues it believed were insufficiently dealt with in the explanatory memorandum.³ In particular, the Scrutiny of Bills committee noted its 'disappointment' with the minister's failure to address these issues for a third time.⁴

¹ Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 9 of 2013

² Ibid., p. 22

³ Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, pp 343–354.

⁴ Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, p. 343.

1.6 The Parliamentary Joint Committee on Human Rights (the Human Rights committee) also reviewed the bill in its Twenty-second report of the 44th Parliament.⁵ The Human Rights committee highlighted the proposed new offence of concealing documents relevant to an investigation as being potentially incompatible with the right to a fair trial and fair hearing. The relevant defence imposes a reverse legal burden of proof on the defendant,⁶ engaging with – and possibly limiting – the defendant's right to the presumption of innocence.⁷

Labor Senators' summary view

1.7 As the bill stands unchanged, the view of the Labor Senators of the Committee remains unchanged. We argue that there is no merit in the Fair Work (Registered Organisations) Amendment Bill 2014 and oppose it in its entirety without amendment.

1.8 We retain the opinion that this legislation seeks to diminish rank and file participation within the unions, and discourage union activity, which is a solely political act in opposition to the rights of working Australians.

Recommendation 1

1.9 The Labor Senators recommend that the Senate reject the bill.

Senator Sue Lines
Deputy Chair

5 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament: Human rights scrutiny report*, 13 May 2015, pp 47–52.

6 Proposed new section 337AC(2) provides a defence '*if it is proved* that the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation' (emphasis added); the onus is placed on the defendant to prove that they did not possess the requisite intention, rather than on the prosecution to prove that they did.

7 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament: Human rights scrutiny report*, 13 May 2015, pp 50–52.

AUSTRALIAN GREENS SENATORS'

DISSENTING REPORT

1.1 The Australian Greens oppose the Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2] (the bill) in its entirety.

Registered organisations are not corporations

1.2 The Minister for Employment and other supporters of the bill claim that it puts corporations and registered organisations on even footing, implying that unions and other registered organisations ought to be treated in the same way as corporations because they are fundamentally the same. This is not the case. Unions are required under the Fair Work (Registered Organisations) Act 2009 and other legislation to be democratic organisations, while corporations are not. Unions are required to publish their accounts and financial returns every year online, but proprietary limited companies are not.

1.3 The government fails – or refuses – to understand that employee organisations do not exist for the same reason as businesses. Businesses exist to make profit: that is their sole purpose and the measure of their success. Company directors are legally required to act in the best interests of their shareholders and continue to make a profit.

1.4 Unions exist to advance the interests of their members, and in doing so, help all workers. Unions advise people of their rights and entitlements at work and ensure those entitlements are honoured. Unions ensure that the lowest paid workers enjoy something approaching what others take for granted: a decent income and quality of life. Unions fought for shorter working weeks. Unions are responsible for the existence of the weekend. It is thanks to unions that workers are entitled to annual leave and penalty rates. These things were not granted to workers by benevolent corporations; unions fought for every single one.

1.5 Unions drive changes to our workplace laws not for their own benefit, but for the benefit of their members and all Australian workers. Unions receive no direct financial advantage from their work. Registered organisations are fundamentally different to profit-making corporations and they must be treated differently.

The bill is unnecessary and unfair

1.6 The bill is unnecessary: current laws prevent officers of registered organisations from using their positions for their own personal benefit and those that do are prosecuted. Rather than extending the current requirements demanded of unions to corporations, the bill allows the government to micromanage unions in a way that would be unthinkable of private companies, while still imposing the same penalties on unions as apply to publicly listed companies.

1.7 The bill is simply another stage of the government's attack on workers' rights. Just as successive budgets have revealed the true callousness of this government, the bill reveals the government's hidden anti-worker agenda.

1.8 The government may insist that WorkChoices is dead, buried and cremated, but it has simply learned that such blatant attacks have real electoral consequences. With this bill, the government is undermining Australians' rights at work in a far more subtle and underhanded fashion.

Conclusion

1.9 The bill works on one simple principle: 'we will come for the unions first so that there is no-one left to protect the workers when we come for them'. It is a transparent attempt to burden workers and their unions with unnecessary red tape in order to prevent them from advancing the interests of the people they exist to protect.

Recommendation 1

1.10 The Australian Greens recommend that the Senate reject the bill.

**Senator Janet Rice
Australian Greens**

APPENDIX 1

Submissions received

1. Australian Council of Trade Unions
2. Department of Employment
3. Chamber of Commerce and Industry of Western Australia
4. Australian Industry Group
5. Victorian Automobile Chamber of Commerce
6. Master Plumbers Association of NSW
7. Unions NSW
8. Australian Chamber of Commerce & Industry
9. Australian Business Industrial and the NSW Business Chamber
10. Australian Mines and Metal Association
11. United Services Union