Fair Work (Registered Organisations) Amendment Bill 2014

Submission to the Senate Education and Employment Legislation Committee

30 June 2015

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Abbreviations

2012 Act	*Fair Work (Registered Organisations) Amendment Act* 2012
The Act	*Fair Work (Registered Organisations) Act* 2009
ASIC Act	*Australian Securities and Investment Commission Act* 2001
the Bill	*Fair Work (Registered Organisations) Amendment Bill* 2014
Corporations Act	*Corporations Act* 2001
FW Act	*Fair Work Act* 2009

Introduction

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For over 86 years the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector. All but 7 of the ACTU affiliates are organisations registered as employee organisations under the *RO Act*. When account is taken of federated structures adopted by unions, all but 6 small unions of the 45 organisations registered as employee organisations under that Act are ACTU affiliates.

The ACTU supports a legislative regime that promotes the operation of accountable, democratic and effective trade unions that are member-governed. Consistent with those objectives, the ACTU and its affiliates supported the passage of the *2012 Act*.[1]

The Bill now before the Senate is relevantly identical to its prior incarnation at its third reading stage. The ACTU has, in relation to the past iteration of the Bill, provided detailed submissions opposing the Bill in its entirety. We continue to hold the views previously expressed in those submissions. The purpose of this further submission is not to re-iterate those views but to supplement them with further material. We remain of the view, based on this further material and what we have put forward before, that this Bill is poorly conceived and ought not proceed.

[1] https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=e19156de-bf73-4b7f-9089-170fec521f01

1. The case put for the Bill is unconvincing

The Explanatory Memorandum for the Bill fails to appreciate the extent to which other laws already currently regulate the officers of Registered Organisations. These other laws include the criminal law, officers' equitable duties as fiduciaries and the State laws administered under State industrial relations systems. This is a fatal flaw that results in there being no proper or relevant contextual policy analysis of whether any reform is necessary or appropriate.

Nonetheless, the Explanatory Memorandum for the Bill commences with some reasonably bold claims:

> "Recent examples of financial misconduct within registered organisations have demonstrated that the existing regulatory framework is not sufficient to provide members of registered organisations with confidence that the management of registered organisations is accountable and transparent and that their membership contributions are being used for proper purposes.
>
> In addressing these issues, the amendments will improve the governance and financial transparency of registered organisations and provide an appropriately empowered and independent regulator that will ensure compliance with the RO Act by registered organisations, branches of registered organisations and their officers."

The extent that the Explanatory Memorandum descends into detail concerning those "Recent examples of financial misconduct" is limited to:

- a reference to matters concerning the HSU; and
- reference to some evidence given to a previous inquiry about regulatory compliance trends.

Both of these are contained under the heading in the Explanatory Memorandum "Description and Scope of the Problem", which runs to a grand total of 781 words. These are the only matters upon which the following conclusion is based:

> "The level of non-compliance with the reporting obligations, combined with the findings of the FWC investigations into the HSU, demonstrate that *the existing regulation of registered organisations* is not sufficiently strong to protect members' interests, particularly in relation to financial management" (emphasis added).

Both of those matters (the level of non-compliance with reporting obligations and the matters concerning the HSU) therefore warrant some scrutiny, beyond the obvious defect in the italicised statement that the *existing* regulation is not the same as it was when the matters concerning the HSU occurred.

(a) Level of non-compliance with reporting obligations

The Explanatory Memorandum's sole attributed source of evidence concerning poor compliance is evidence from the Fair Work Commission that, in 2011 and 2012, approximately 20% of Registered Organisations did not file their financial reports[2] on time. The Explanatory Memorandum does not refer to the more recent publicly available information from the Fair Work Commission[3] that shows that:

- voluntary compliance in lodging financial reports increased by 29% between the 2009–10 and 2013–14 financial years;
- 89% of financial reports were lodged in time in 2013-14
- taking into account the Commission's intervention, in the 2013–14 financial year compliance rose to 98%.

In addition, we understand that in the 2014/15 year to date, 98% of financial reports had already been lodged on time as at April of this year. The improved compliance with these timeliness requirements is also reflected in relation to the other major reporting cycle affecting Registered Organisations, which is that concerning Annual Returns[4]. 100% compliance has been achieved this year (the due date is 31 March), on the back of 94% in 2012/13 and 95% in 2013/14.

The analogous obligation to the financial reporting obligations in the Act, with respect to corporations, is the requirement in relation to annual reports. That obligation generally does not apply at all to small proprietary companies, or small companies limited by guarantee (the latter being a legal personality of choice for not for profit entities). The level of compliance by the corporate sector with these obligations is not reported upon as far as we can ascertain.

To the extent that the non-compliance with the timeliness requirements around financial reporting to the regulator was a concern, that concern has clearly abated. The only remaining limb to the "Description and Scope of the Problem" as articulated in the Explanatory Memorandum is the HSU matters.

[2] Fair Work Commission submission to the Senate Education Employment and Workplace Relations Committee, *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill* 2012, at page 2. These reports are required with a set time as per section 268 of the Act.
[3] https://www.fwc.gov.au/registered-organisations/compliance-governance/compliance-trends

[4] Section 233 of the Act.

(b) The HSU

The Fair Work Commission report referenced in the Explanatory Memorandum related predominantly to the conduct of Mr Williamson and Mr Thomson.

Both have been found guilty of criminal offences. Mr Williamson has been imprisoned for 7.5 years for fraud and other charges. He has also been sued by his former Union and ordered to pay $5 million in compensation to it.

Civil Proceedings against Mr Thomson were initiated by the Fair Work Commission (VID798/2012, Federal Court) seeking that penalties be paid to the Commonwealth and that compensation be paid to the union (his former union intervened in support of those proceedings). The case has concluded and is pending judgement. Mr Thompson also paid compensation to the union as part of the criminal proceedings in which he was also ultimately fined $25,000 (following an Appeal).

Other matters involving the HSU, not referred to in the Explanatory Memorandum, include:

- Civil proceedings whereby the HSU East Branch was effectively abolished (NSD 621 and 735 of 2012, Federal Court);
- Civil proceedings on foot against Kathy Jackson seeking that compensation be paid to the union (VID1042/2013, Federal Court);
- Civil Proceedings against Elizabeth Jensen (concluded) and Peter Mylan (on foot) (2012/347167, NSW Supreme Court);
- Civil Proceedings concluded against Cheryl McMillan and Alfred Downing (2013/371161, NSW Supreme Court);
- Civil Proceedings concluded against the HSU (VID 1128/2012, Federal Court);
- A Police investigation into Kathy Jackson;
- Civil Proceedings against the Union, Jeff Jackson, Pauline Fegan and Sean Hudson (VID 380/2012, Federal Court).

The civil proceedings referred to above were not and are not limited to claims made under the Act. In some cases no causes of action under the Act are or were pursued whereas in others the claims were exclusively based on the Act. For example:

- The officers of the union obtained an order that the HSU East Branch (and its State registered counterpart), be placed in the hands of an external independent administrator, de-merged and that all of its officeholders be removed. This proceeding (NSD 621 and 735 of 2012, Federal Court) relied on the Act and corresponding NSW legislation;
- The claims against Mylan and Jensen both involved claims for negligence and, in the case of Mylan, breach of statutory and contractual duties;

- The claims made against McMillan and Downing were based on bribes, secret commissions and breaches of trust and fiduciary duty. The proceedings sought compensation and other remedies. The Union recovered $4,327,492.70 from Mr Downing and $3,775,806.13 from Ms McMillan;
- The claims made against Williamson were made under NSW law, common law negligence and for breach of fiduciary duty. Mr Williamson was ordered to pay $5 million in compensation to the Union;
- The claims against Kathy Jackson by the Union allege breaches of the Act as well as breaches of fiduciary duties;
- The claims against Thomson by the Regulator and supported by the HSU are made under the Act, and seek civil penalties and compensation to the union in respect of breach of the General Duties set out in Act. However, the content of the breaches of the General Duties is in part particularised in the proceedings by reference to the Union Rules;
- The claims against the HSU by the regulator (VID 1128/2012) were made under the Act and resulted in the Union being required to pay $22,500 in penalties. They related to the late lodgement of reports which, when they were lodged, were unsigned and undated;
- The claims against Jeff Jackson, Fegan and the Union were based on the Act. They resulted in Jeff Jackson being ordered to pay $16,549.88 compensation to the Union plus $10,229.52 in interest. Further, the proceedings resulted in the Union being required to pay penalties of $38,500, Fegan being required to pay penalties of $4,505, Jeff Jackson being required to pay penalties of $18.262.50 and Hudson being required to pay penalties of $6,270. The Union's contraventions related to late lodgement of reports and non-compliance with Australian Accounting Standards;

Against this background of comprehensive enforcement and recovery action using all available avenues of criminal and civil law, it is difficult to sustain an argument that the HSU is a case study (or, as the Explanatory Memorandum asserts, *the* case study) which justifies need to re-write the law regulating Registered Organisations.

In particular, it is relevant to ask what is it that the Bill would do that would prevent the matters in the HSU occurring again or provide better recovery to the union of the member's funds it had lost through either the alleged, admitted or proven inappropriate conduct with which the members of the union were faced. Sadly and perplexingly, this is not a question that Explanatory Memorandum addresses. We now turn to that question by reference to the central features of the Bill: Revised disclosure arrangements, training exemptions, higher penalties, criminal liability, new investigative framework and the establishment of a new regulator.

(i) Revised Disclosure Arrangements

The revised disclosure arrangements under the Bill do not require Officers or Unions to do much differently to that which they are currently required to do.

In relation to remuneration and related party transactions, the obligations in the Act and the Bill are relevantly identical save that the actual amounts of remuneration received by five highest paid officers both of the organisation and each Branch will be required to be disclosed under the Bill, whereas the current position is that disclosure of the actual amounts is optional and, for Branches, only the remuneration of the two highest paid officers is required. This information will now be formally required to be disclosed to the Regulator in a distinct "officer and related party disclosure statement"[5]. Under the current law this information is already supplied to the Regulator (and members) as part of the routine reporting obligations. In fact, it is supplied twice.

Firstly, sections 148A and 148C of the Act require the union's rules to prescribe that these disclosures be made, and as a matter of convenience many unions include these disclosures as part of their routine reports to members which are required to be lodged with the regulator. These are relatively new provisions (contained in the *2012 Act*), which did not exist at the time the HSU matters arose. What did however exist, and what has existed in its present form since December of 2009 is Australian Accounting Standard AASB 124. It requires disclosure of remuneration and related party transactions (among other things). Unions are required to comply with it in the preparation of their financial reports[6]. The HSU admitted that it did not so in Federal Court proceedings 380 of 2012 and that, as a consequence, it contravened section 253 of the Act. It was ordered to pay $22,400 in penalties – well under the maximum "to take account of the cooperation, contrition, and willingness to facilitate the course of justice of the HSU"[7].

Disclosure of material personal interests is also dealt with in the Act as it stands (at section 148B). This provision did not exist at the time the HSU matters arose. The existing provision is more onerous than the provisions put forward in the Bill. It is clear that a union cannot comply with its obligations to disclose the material personal interests of its officers to members if the officers themselves do not provide that information as required by the union rules. Therefore, such a non-disclosure can and should be pursued under the existing law as breach of the relevant officer's care and diligence obligations under section 285 of the Act. As noted above, a central argument by the regulator in the case against Thomson is that his alleged non-compliance with the union's rules is sufficient to establish a breach of his officer's duties.

[5] Schedule 2, Part 1, Division 3.
[6] S. 253 of the Act.
[7] [2014] FCA 970 at [64]

Further, it ought not be forgotten that the present provisions empower both the members of the organisation and the regulator to take action to rectify non-compliance with union rules. The Explanatory Memorandum however makes a demonstrably incorrect claim about this:

> "For example, registered organisations are currently required to provide for certain financial disclosures in their rules, such as related party payments, officer remuneration and material personal interests of officers and their relatives (see section 1.1.2)). As these obligations are contained in rules, alleged breaches can only be dealt with by a relevant court (for example, the Federal Court) on application for a remedy made by a member of the registered organisation. The General Manager of the FWC does not have standing to bring these matters to court and lacks the power required to hold a registered organisation and its officers to account."[8]

The Regulator's existing power's in respect of non-compliance with rules concerning financial administration (including the disclosure requirements) are set out in section 336 of the Act and permit the regulator to direct the union to rectify non-compliance with those rules. Non-compliance with a such a binding direction may be enforced by the Regulator in the Federal Court. The powers of members to compel performance of union rules are contained in section 164-164B of the Act. The Bill proposes that these provisions be retained.

The present regime in respect of disclosure obligations is, in our submission, comprehensive. We deal with the issue of the penalty structure accompanying those obligations below.

(ii) Training exemptions

Presently, all officers of unions who will have financial obligations are required to undergo approved training. This obligation was introduced by *2012 Act* as a rules requirement after the matters concerning the HSU arose. We have previously put on record our contribution to this training. The Bill will permit some persons to be exempt from the requirement to undergo this training. In our view, it is undesirable to create the possibility for differing standards of training as it may dilute the content of the care and diligence duty in section 285. There is a lot to be said for having robust evidence available of a uniform minimum standard of knowledge when trying to establish, as a matter of law, that a person has not acted with the requisite level of care and diligence. To that extent, the amendments in the Bill will put the regulator in a comparatively worse position than is presently the case when seeking to prove some contraventions.

[8] Page viii

(iii) Higher Penalties

The penalties contained in the Bill do not differ from those in the predecessor Bill. What has changed is that the Government has announced in the Budget that it will increase the value of each penalty unit from $170 to $180[9]. The Explanatory Memorandum does not deal with why it is that the Government has seemingly reached the view that, as a practical matter, the maximum penalties should be higher than when this Bill was last introduced 12 months ago. Further, the higher penalties exacerbate the divergence in penalties between the Bill and the *Corporations Act* discussed in our prior submissions.

Moreover, a concerning side effect is that in some hypothetical cases of abuse – particularly those at the most serious end of the scale – the revised penalty structure and the new structure of the disclosure requirements will operate to hit union members with a double whammy. Consider for example a hypothetical officer of a union who is tasked by the Committee of Management to arrange for some goods or services to be purchased by the union. The officer presents to the Committee three quotes for the goods or services, and the Committee approves a quote on his recommendation. Unbeknown to the Committee, the officer has established an entity with 3 registered business names (one for each quote) and *each* quote is exaggerated. He does not disclose his interest to the union, notwithstanding that he is required to do so. The payments are made. The officer profits from them. The union is not in a position to disclose in its financial reports under section 253 that the payments for goods or services were payments to related parties, because the officer has dishonestly concealed this information from the union. The union has been the victim of a fraud, but it has breached section 253 as a consequence of the fraud perpetrated upon it. Quite apart from any regulatory action which may be visited upon the officer, the union's breach of section 253 will now leave it open to being fined up to $85,000 (up from $51,000 and not taking into account the increase in penalty unit value foreshadowed in the budget). The fine to the union is paid from members funds. In addition, because of the officer's concealment of his interest, the Officer and Related Party Disclosure Statement which the union lodges (a new requirement under this Bill) is also deficient. This leaves the Union liable to a further penalty of up to $1,020,000 (not taking into account the increase in penalty unit value foreshadowed in the budget). Again, this fine must be paid from members funds. It is not clear why it is that this Bill intends to so punish the victims that it outwardly purports to be seeking to protect. Because the Bill makes the financial performance of the regulator in part

[9] Budget Paper No. 2 at page 8.

dependent on the amount it recovers by way of penalties[10], it incentivises the Regulator to act in this perverse way to extract the maximum possible funds from union members.

There are also some rather questionable judgements of culpability made in the adjustment of civil penalties in the Bill. For example, *lateness* by a union or a branch in providing documents to members or the regulator (section 169, 268) is judged as 66% more serious than an employer unlawfully sacking a worker because of their union membership; and the penalty for lodging a non-compliant Officer and Related Party Disclosure statement is more than double the highest fine payable for a level 3 criminal breach of the *Work Health and Safety Act*[11] and on par with the maximum fine to a corporation for knowingly dealing with the proceeds of crime[12]. We suspect these anomalous outcomes are due to the confused policy underpinnings of the Bill, a matter which we address in section 2 below.

(iii) Criminal Liability

We have made the case in previous submissions that specialised statutory offences for conduct that is already punishable by the criminal law is an entirely unnecessary addition to the Act, that the corresponding provisions in the *Corporations Act* have been likewise been criticised and indeed the Governments own technical advisory committee has recommended that they be repealed. The matters concerning the HSU provide concrete evidence that that such criminal matters are capable of being pursued using the criminal law. It is true that the penalty of $25,000 plus a compensation order of $5,650 ultimately imposed upon Thomson after his appeal was less than that which might have been expected by some observers. This is because only theft charges survived the appeal. The findings on the charges of obtaining a financial advantage by deception were set aside on the appeal essentially because the Police had incorrectly particularised the "financial advantage" so obtained as the evasion of a debt owed by Thomson *to the bank or credit provider* supplying the cash advance facilities, rather than the evasion of a debt owed by him to the HSU[13]. Had the charge been framed differently, a different result may have ensued. Such technical defects were not present in the Williamson matter and he has been sentenced to a period of imprisonment in excess of the maximum prescribed in the Bill.

[10] Refer clauses 329EA – 329EC.
[11] Section 33(c)
[12] Section 400.4 of the *Commonwealth Criminal Code,* section 4B(3) of the *Crimes Act* 1914 (Cth).
[13] Ruling of Judge Douglas 15/12/14 at pages 85-87.

(iv) Investigative framework

The existing investigative framework is one which provides compulsory examination on oath in all but name and has proven results. We are unaware of any instance in which the Regulator has seen fit to rely on the extended powers it was granted under the *2012 Act* in order carry out its investigations. The case for the revised investigative framework in the Bill simply has not been made out because there has been no detailed analysis of how it is the existing framework can be said to be in any way deficient. The sole justifications advanced in support of the new model are its broad equivalence with that which applies to corporations under the *ASIC Act*; a generalised assertion that it is "stronger"; and misplaced references to submissions made by the Institute of Public Affairs and the NSW Minister for Industrial Relations[14].

The existing investigative framework enables the regulator to compel, under the threat of criminal prosecution for non-compliance, the persons most likely to know about the operations of a union (its current and former officers, employees and auditors) to attend for an examination and/or provide information or documents[15]. Giving false documents, misleading information or telling lies during an examination is likewise an offence[16]. There is no derivative use immunity. These powers were available to the regulator in connection with the HSU investigation and were used extensively[17] in the course of it. What the public and the Parliament knows about the HSU events is largely the product of the use of those investigative powers. There is an inherent flaw in the logic of a proposition that uses the findings of non-compliance made through using an investigative framework to make an argument that the investigative framework is therefore ineffective. Yet, perplexingly, this very proposition underlies the push for the revised investigative framework contained in the Bill.

In any event, the investigative framework which now exists contains *more* powers than were available to the regulator at the time it conduct its investigation of the HSU. These additional powers allow the regulator to cast a wider and unlimited net in terms of the persons it is able to subject to its coercive powers. These expanded powers are in substance the same as those that apply to current and former officers, auditors and employees save for two matters:

- Firstly, the regulator needs to have first attempted to obtain the information it seeks from the current or former officers, employees or auditors before resorting to these powers[18]. This is to protect against the use of these powers for inappropriate purposes: coercive

[14] Explanatory Memorandum at page ix.
[15] Sections 335, 337 of the Act
[16] Section 337 of the Act
[17] Report of the Delegate to the General Manager of Fair Work Australia "Investigation into the National Office of the Health Services Union under section 331 of the *Fair Work (Registered Organisations) Act* 2009, pages 44-57
[18] Section 335A(1) of the Act.

powers should only be exercised to obtain information not otherwise available. The first line of investigation should therefore be the persons who are most likely to have the information the regulator seeks. In the context of the matters which the regulator may investigate, those persons clearly are the officers, employees and auditors that are or were or are involved in the financial management of the union or branch. Rank and file union members or ordinary members of the public would rarely have the information, or access thereto, that would assist the regulator. There might be some perceived tactical or partisan political advantage in issuing rank and file members with Notices to Produce and Attend merely to "spook" them, but that would not be an appropriate use of those powers. As we noted above, to the best of our knowledge those powers have not as yet needed to be exercised at all.

- Secondly, whilst the requirements that may be made of this wider group, including the prohibitions on giving false or misleading information are the same in substance as those which exist in relation to the current and former officers, employees and auditors, the penalties for non compliance are civil rather than criminal. There is no evidence, and it is counter intuitive to suggest, that members of the public will be uncooperative with Notices to Produce and Attend when threatened with a civil prosecution and penalty for non-compliance.

Connected to the question of whether the investigate framework *needs* to change, the assertion that the new equivalence with the ASIC scheme the proposed framework brings makes it "stronger" in any practical or utilitarian sense is questionable. The investigative framework already contains wide powers to compel the production of information and penalise non co-operation and the giving of false or misleading information or answers. It also contains something that the ASIC framework does not: a power by the regulator to require current and former officers, auditors, employees and any other persons to access documents on the regulator's behalf and supply them to the regulator[19]. It is proposed that this power retained in the Bill (providing yet further evidence that the claims of equivalence with the ASIC regime are exaggerated at best and intentionally misleading at worst). If this power is retained as is foreshadowed, it is difficult to conceive of any circumstance in which it would be necessary to utilise the power, proposed in the Bill, to issue a warrant[20]. Issuing such a warrant would be disruptive and no doubt the staff of a union office subjected to a warrant would find it intimidating, but neither of those consequences are legitimate policy objectives.

The remainder of the investigative provisions in the Bill are largely formal matters dealing with obstruction, destruction/concealment of documents, legal professional privilege and self

[19] Sections 335(2)(b) and 335A(2)(b) of the Act.
[20] Proposed clauses 335K-335M.

incrimination. The impact that these may have on the manner in which investigations are pursued is varied.

We have only found 2 instances where the destruction/concealment provision (*ASIC Act* s. 27, Bill clause 337AC) has been used by ASIC. In one case the accused were acquitted[21] and in the other the charge was admitted[22]. In any event, it is unclear how the provision extends the existing law relating to attempts to pervert the course of justice[23]. We have found only one matter in which a charge under the obstruction provision (*ASIC Act* s. 65, Bill clause 337AB) has proceeded[24]. It is unclear what the obstruction offence adds to the very broad matters in section 337 and 337AA of the Act. Obstruction offences are generally only relevant where officers are being given a power to enter onto premises. This would only arise in connection with the issue of warrants, which, as we have observed above, need not be issued give the other powers available.

The proposed investigative framework does permit state sanctioned harassment and the undermining of fundamental rights, so if that is what is meant be a "stronger" investigative framework, then the claim is accurate to that extent.

In some cases, it is not clear that these abuses of authority would actually assist the regulator performing its role. For example:

- The capacity to coerce persons to answer questions that are *not* relevant to an investigation[25] might succeed in making people feel intimidated, but it cannot lead to any enforcement outcomes; and
- The capacity to require lawyers to "dob in" who their clients are might be a good tactic for making both the lawyer and the client feel uncomfortable, but in substance nothing in the Bill or the ASIC framework upon which it based is legally effective to set aside legal professional privilege (nor should it be) and it merely elevates the risk that an enforcement proceeding following an investigation will become compromised by poisoned fruit.[26]

In other cases, the overreach of powers will clearly prejudice people in practice. For example:

- The provisions in relation to claiming the self incrimination privilege are facially neutral in that they provide a mechanism for people to assert their objection and benefit from it in

[21] *Corp v. Robinson* [2012] WASC 490, also referred to in *Smith v. the Queen* [2008] WASCA 128, [2007] WASCA 163.
[22] *Banovec v. R* [2012] NSWCCA 137
[23] See R v. Rogerson [1992] HCA 25.
[24] *Smith v. the Queen* [2007] WASCA 163.
[25] Compare section 21(3) of the *ASIC* Act and clause 335D(3) of the Bill.
[26] See clause 337AF(1)(d) of the Bill, *AWB v. Australian Securities and Investments Commission* [2008] FCA 1877 at [21]-[40]

activating the direct use immunity[27]. However, they introduce a procedural hurdle in that the failure to take an objection *at the relevant time* during the interview permanently deprives the examinee of the privilege in any future proceeding. If the Commonwealth is content to provide a direct use immunity, it should not make it subject to such an obscure technicality;

- The complete abolition of the direct use immunity in relation to documents is an extreme step. Based on the summary provided on page 50 of the Explanatory Memorandum, the drafters of the Explanatory Memorandum either were unaware of or chose not to highlight this "stronger" aspect of the investigative framework. The legal position in relation the analogous provision in the *ASIC Act* is that it *does* abrogate the privilege against self incrimination in relation to documents[28] and was intended to[29]. Those provisions were introduced into the *ASIC Act* because of the then ASC's complaints in the late 80s and early 90s about being unable to match the sophisticated legal defences of the corporate "characters" of the 1980s when investigating *criminal offences*[30]. As is clear from the historical account provided in our previous submissions, most of those offences were ultimately repealed and the ASC / ASIC re-focussed on civil penalty matters. The abrogation of the use immunity in relation to documents in these circumstances may be seen as just as much an anomaly as the continued presence of criminal duties in section 184 of the *Corporations Act*. In any event, such provisions simply have no place in the investigation of internal matters such compliance with union rules (and they are not available in the *ASIC Act* to investigate compliance with company constitutions either[31]).

Once again, it ought not be forgotten that none of these extreme measures were required to successfully investigate the criminal matters that were pursued against Williamson and Thomson. With respect to the latter, the learned appeal judge in fact said:

> "The investigation in my view was comprehensive, and the investigators carried it out in an impressive manner with an eye to detail, which is warranted in a case such as this."[32]

The Explanatory Memorandum refers to submissions made by the Institute of Public Affairs and the NSW Minister for Industrial Relations as examples in support of the proposition that:

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[27] See clauses 337AF(1)(a) and 337AD(2)(a) of the Bill
[28] *Smith v. The Queen* [2007] WASCA 163 at [59].
[29] Explanatory Memorandum to the *Corporations Legislation (Evidence) Amendment Bill* 1992 at page 1-2, Joint Statutory Committee on Corporations and Securities, Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law, November 1991 at page 25-29.
[30] Joint Statutory Committee on Corporations and Securities, Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law, November 1991 at Chapter 3.
[31] *Corporations Act* s. 135(3), *ASIC Act* s. 13(1)(a)
[32] *DPP v. Thompson* [2014] VCC at [23].

> "While recent changes to the RO Act have increased civil penalties and improved the FWC's investigative functions, further measures are required to allow the regulator to pursue breaches of the RO Act via investigation and litigation."[33]

However, those submissions were made to an inquiry concerning a Bill moved by the then Shadow Workplace Relations Minister: The *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill* 2009. The Explanatory Memorandum to that Bill indicated that it was responsive to the matters concerning the HSU[34]. That proposed response included *no* modification to the investigative framework. Unsurprisingly then, the Institute of Public Affairs (a fierce opponent of the abolition of the right to silence) made no mention of the investigative framework in the submission referred to. The NSW Industrial Relations Minister did make a gratuitous reference to investigative powers in his submission. His suggestions were not adopted in the Bill then under consideration, nor have they been adopted in this Bill or any previous iterations of it. Clearly the existing provisions are preferable, more flexible and less resources intensive upon the regulator than what the NSW Minister proposed, but it is puzzling that his suggestions attract no comment given the context in which his submission is relied on in the Explanatory Memorandum.

There is no deficiency in the investigative framework in the Act. The only two notable shortcomings in the investigation concerning the HSU were delay and the General Manager's Advice concerning whether the investigation report could be provided to the Police. Any uncertainty about this latter matter was clarified by the *2012 Amendments*. As to the first matter, the timeliness of concluding the HSU investigation had nothing to do with the terms of the legislation itself (although the *2012 Act* did insert some timeliness aspirations). The real problems, according to the KPMG Review, boiled down to issues of inexperience, process and resourcing. The Fair Work Commission has responded to these issues:

> "FWC has made several changes including establishing the new Regulatory Compliance Branch which is headed by a newly created SES position. Staffing of the Branch has been increased by three APS 4-6 staff and one Executive Level financial reporting specialist."[35]

The Government is apparently satisfied that no further work needs to be done on the resourcing front, as the Explanatory Memorandum asserts that the Bill will have no financial impact.[36] The FWC has also responded to process issues by developing policies concerning:

- Regulatory compliance (including inquiries and investigations);

[33] At page ix
[34] At page 2
[35] Fair Work Commission submission to the Senate Education Employment and Workplace Relations Committee, *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill* 2012, at page 2. Our previous submissions refer to additional action that the FWC has taken in response to the KPMG report.
[36] At page ii.

- Litigation (in respect of breaches of the *RO Act*);
- Media concerning inquiries and investigations; and
- Offences (including referring matters to police).

(v) New Regulator

There is absolutely no basis for suggesting that there is any institutional limitation inherent in the present regulatory structures. The General Manager, as the investigative authority, is functionally distinct from the remainder of the Fair Work Commission. Neither the fact that the General Manager's appointment is made by government on the nomination of the President of the Commission, nor the fact that the General Manager has administrative as well as investigative functions, is remarkable or objectionable. For example, similar provisions apply to the appointment and role of the CEO of the Australian Crime Commission[37]. A bare assertion that the formal institutional arrangements impacted the efficacy of the HSU investigations is insufficient to justify the evisceration of the General Managers regulatory powers and, moreover, is simply incorrect.

[37] Sections 37 and 46A of the *Australian Crime Commission Act* 2002.

2. Complex, confused and lacking coherence

The policy objective of regulating Registered Organisations like corporations becomes increasingly problematic the further the analogy is pressed.

Most corporations are formed for the purpose of generating profit. The members of such a corporation are its shareholders – persons or indeed other corporations that invest their finances in the hope and expectation of a financial return. The obligation upon company directors to act in the best interests of the corporation and its members is an obligation directed to prudent financial management and commercial risk assessment so as to guard against members funds or return on investment being compromised through careless business decisions or, in an extreme case, fraud. The reasons corporations are regulated the way they are regulated is because they have significant economic power in financial markets, in asset holdings and in the labour market – they directly determine citizens financial fortunes.

It is right and fair to expect that the officers of a union (or of any other association) will be prudent, careful and not fraudulent with members money. However this does not automatically mean that one should attempt to emulate the regulatory arrangements from corporations laws as a means of oversight. As part of the political settlements that led to Australia's Industrial Relations system, unions submitted to a measure of regulation in turn for recognition and exclusive rights in that system. Those regulations were initially directed to the proper functioning of the union, and predominantly what types of rules the union should have[38].

A common thread throughout the various regulatory changes has been the requirement that unions (as a condition of their registration) be formed for the furthering or protecting of their member's interests, that they function democratically and that they be free from employer control. Likewise, the State has had the long-standing power to intervene in and/or cancel a union's registration if the union no longer effectively represents its members, has become subject to employer control or has ceased to function effectively. Officers of unions must be elected by and represent their members' interests, and have no power to refuse membership to persons eligible to become members under union Rules. The Rules of organisations cannot be changed without external approval[39] and must provide for management committees (including at branch level) to be controlled by members, failing which the State may ultimately re-write union Rules to give effect to that requirement.

The industrial relations system of today still provides rights to unions, but only two of them are exclusive: the right to be a "bargaining representative" for union members involved in bargaining

[38] *Conciliation and Arbitration Act* 1904, Schedule B.

[39] Compare to the process of changing company constitutions by special resolution and the scheme of "replaceable rules" under the Corporations Act.

in the absence of a written appointment (but subject to the member's revocation), and the right to apply for and use entry permits. The entry permit system has a dedicated code of regulation applying to it. The regulation necessary to ensure the bargaining system operates fairly to union members is regulation that ensures that every member has a voice (and a vote) in union democracy. The present scheme of regulation achieves this.

The limits to the logic of treating unions like corporations was reached through a bipartisan consensus in the early 2000s. The scheme of regulation now in place is one which adopts some of the higher level and generic common sense governance requirements from the *Corporations Act* (and accounting standards) but which also recognises that unions are often comprised of self governing units of varying size and complexity. The smallest such units (referred to as *reporting units* in the Act) are subject to lesser reporting requirements. With some exceptions, the scheme of regulation presently in place adapts concepts from corporations regulation in a meaningful and appropriate way to the regulation of unions. The Bill however disturbs this by proposing one size fits all provisions for all unions and all officers thereof, even sections of unions that might only have one officer who is actually paid to perform their role. The Explanatory Memorandum explicitly recognises that the one-size fits all approach might be detrimental to democratic participation in unions in two ways:

> "..Some individuals may find the reporting and accountability obligations associated with holding office and new criminal sanctions too burdensome, which may deter them from nominating for office. The deterrence effect is likely to be more pronounced for small organisations because senior officials in small organisations are more likely to be volunteers with fewer resources to help them meet their obligations.
>
> The deterrence effect is expected to be less pronounced on large organisations, which have significant financial and staffing resources to assist officials to meet their obligations. There is, however, a risk that large organisations may seek to reduce exposure to criminal and civil penalties by restructuring their organisation to significantly reduce the number of officers. Restructuring in this way could centralise decision-making and reduce the ability for members to participate in the affairs of the organisations, such as policy development."[40]

We agree. We also make the obvious point that, to the extent that current the Government is concerned about rising inequality, it ought to be exceedingly cautious about adopting reforms that act as a disincentive to participation in unions. With recent research from the OECD[41],

[40] At page xviii
[41] OECD (2011), *Divided We Stand: Why Inequality Keeps* Rising, OECD Publishing. Http://dx.doi.org/10.1787/9789264119536-en at p102.

IMF[42] and the World Bank[43] all supporting the association between lower unionisation and higher income inequality, the Government must accept that it is the orthodox view that weakening participation in unions is bad policy.

Further, we emphasise as we previously have, that the *Corporations Act* is not a one size fits all scheme of regulation. Many of the requirements that sound in penalties under the Bill and indeed the present scheme don't apply at all to many types of corporations, particularly smaller corporations or corporate forms that are generally adopted for entities that are not profit driven.

Finally, we add that that Explanatory Memorandum makes unconvincing and in some instances inaccurate statements about deterrence and how the higher penalties will operate in the Bill and how they operate in the legislation from which they have been borrowed. To suggest that the present level of penalties are not capable of acting as a deterrent carries with it an acceptance that the penalties fixed by the *FW Act*[44] are similarly inadequate. This is simply not sustainable. To suggest that the new penalties for "serious contraventions" are in any way a replication of the position in the *Corporations Act* is wrong for two reasons. Firstly, the *Corporations Act* fixes a dollar figure, not a penalty unit, for the maximum civil penalty[45] - that figure is less than the value of penalty units contained in the Bill and far less than what the position will be post July when penalty units increase. Secondly, the *Corporations Act* provides that no penalty is payable at all for many contraventions (including officers duties) *unless* the contravention meets criteria which form the definition of "serious contravention" in the Bill[46]. That being the case, the current law in fact provides greater deterrence than the *Corporations Act* in relation to these matters because it ensures that all breaches can result in punishment, not just those at the most severe end of the scale.

[42] *Dabla-Norris, Kochhar, Suphaphiphat, Ricka & Tsounta* (2015), *Causes and Consequences of Income Inequality: A global perspective,* International Monetary Fund (Strategy, Policy and Review Department), at p21; Jaumotte & Buitron (2015)*, Power from the People*, Finance & Development 52:1, IMF, 29-31 at p 30.
[43] *World Bank* (2013), *World Development Report 2013: Jobs*, World Bank, at p263.
[44] Sections 539 and 546.
[45] Section 1317G
[46] *Ibid.*

3. Premature and pre-emptive

The government has spent and is continuing to spend inordinate amounts of money on a Royal Commission that is presently investigating options for law reform in this area. That Royal Commission is due to deliver its final report within 6 months of the proposed commencement date in the Bill.

It is tolerably clear that the Royal Commission is intent on making reform recommendations without any evidence of the impact of the reforms introduced in the *2012 Act*. None of the 80 questions in its recent discussion paper invite any comment about that matter. Rather, the very limited discussion of those reforms proceeds on the basis of an assertion, rather than a finding on evidence, that those reforms are "potentially problematic"[47].

Should the Government decide to pursue further amendments based on the Royal Commission's final report, there will have been three changes to the regulation of Registered Organisations in as many years. Such a transition would expose Registered Organisations to further costs and inconvenience. It might also involve institutional reforms, such as further restructure of the regulatory agency, the creation of a different agency, or the abolition of a separate agency altogether in favour of referring the regulation of Registered Organisations entirety to ASIC. The point is that, at this stage, it is simply impossible to tell. It is wasteful in the extreme to pursue both this Bill and the Royal Commission's policy processes in parallel.

We remain of the view, expressed in previous submissions, that the *2012 Act* strikes an appropriate balance. A post-implementation review after a period of some years of operation may be appropriate, however neither the demonstrably undercooked policy argument mounted in the Explanatory Memorandum or the Royal Commission's reform options process are substitutes for that task.

[47] Royal Commission into Trade Union Governance and Corruption, Discussion Paper: Options for Law Reform, 19/5/2015, at paragraph 135.

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