AUSTRALIAN BUSINESS INDUSTRIAL

FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014 [No.2]

SUBMISSIONS TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE INQUIRY

Australian
Business
Industrial

About ABI and the NSW Business Chamber Ltd

Australian Business Industrial (**ABI**) is registered under the *Fair Work (Registered Organisations) Act 2009* and has some 4,200 members and the NSW Business Chamber Ltd (**NSWBC**) is registered under the (NSW) *Industrial Relations Act 1996* and is a State registered association recognised pursuant to Schedule 2 of the *Fair Work (Registered Organisations) Act 2009.*

The NSWBC has some 18,000 members.

ABI comprises those NSWBC Ltd members who specifically seek membership of a federally registered organisation. The elected councillors of ABI also constitute and sit as the Workplace Policy Committee of the Council of the NSWBC.

Contact:

Dick Grozier

Director of Industrial Relations, Australian Business Industrial

Submissions

These are the submissions of Australian Business Industrial (**ABI**) and the NSW Business Chamber Ltd (**NSWBC**) to the Senate Education and Employment Legislation Committee (**Committee**) about the *Fair Work Registered Organisations Bill 2014 [No. 2]* (**Bill**).

ABI and the NSWBC thank the Committee for the opportunity to comment.

ABI and NSWBC welcome reforms to regulation which reduce existing levels of unwarranted red tape and are thoughtfully directed towards facilitating compliance. Well directed regulation should seek to focus on what is important and seek to avoid the creation of technical breaches. Consistency of approach to related activities assists with this.

ABI's and NSWBC's interest in the Bill

ABI is a federally registered organisation and is directly regulated by the *Fair Work (Registered Organisations) Act 2009* (**FW(RO) Act**) and, if enacted, by the Bill's amendments. Its interest in the legislation is direct.

NSWBC is a trading corporation regulated by the *Corporations Act 2001* and is registered under the (NSW) *Industrial Relations Act 1996* (**IR Act**). The IR Act provides for the registration of a "separate organisation". A separate organisation is an organisation of employers which is incorporated under the *Corporations Act 2001.* The registration of a state organisation under the IR gives rise to incorporation, but it does not do so in the case of a separate organisation.

Records keeping, governance and reporting obligations of a separate organisation which is registered under the IR Act are shaped by the fact of the Corporations Act obligations the separate organisation is subject to, and the NSW Industrial Registrar's supervision of registered separate organisations is in this sense light touch. NSWBC is subject to a transparency and penalty regime of the kind proposed in the Bill.

Background

On 19 March 2015 the government re-introduced the *Fair Work (Registered Organisations) Amendment Bill 2014* (now No. 2) to amend training and disclosure provisions of the FW(RO) Act the bulk of which were inserted by the *Fair Work (Registered Organisations) Amendment Act 2012.*

The bill for the 2012 amending act was introduced in the context of the activities of a small number of officers in part of the Health Services Union (**HSU**) which had come to light. These kinds of activities are not typical of the actions of officers in registered organisations generally, but they cast doubt on all. The events at the HSU also drew attention to the relative inability of the regulator to discover and investigate

such improper activity. The 2012 amending bill was directed at improving governance by increasing transparency and also raising officer capacity. It also increased penalties for offences, and extended the investigative powers of the General Manager Fair Work Commission.

In his second reading speech for the 2012 bill, the Minister said:

> Registered organisations play a fundamentally important role in the operation of Australia's workplace relations system. These are organisations created and registered for the purposes of representing Australian employers and employees. They have particular recognition under Australian workplace relations law by virtue of their representative status and it is because of that registration they have particular statutory obligations in relation to their operation, conduct and disclosure.
>
> In recent weeks and months conduct by a small number of officials in some parts of one organisation has dented public confidence in all registered organisations in this country.
>
> Therefore I wish to place on the record, again, that it is my view and the government's view that registered organisations in Australia—whether employer organisations or unions—are overwhelmingly democratic, representative, highly professional and member focused.
>
> And today, we are improving the laws which govern registered organisations covered by this act.[1]

ABI's rules have been amended to conform with the 2012 FW(RO) Amendment Act amendments.

The Bill before the Committee is the reintroduction of an earlier bill, the *Fair Work (Registered Organisations) Amendment Bill 2014* which was introduced on 19 June 2014, but eventually negatived on 2 March 2015. The Bill and its predecessors were intended to implement the government's 2013 election policy[2].

Prior to the 2014 bill the government had introduced the *Fair Work (Registered Organisations) Amendment Bill 2013* on 14 November 2013 which was negatived by the Senate on 14 May 2014. In response to the Committee's findings released in December 2013 the tabled draft of the 2013 bill was amended, primarily to

- narrow the application of the obligation to disclose a material personal interest by reducing its scope to officers whose duties more directly relate to the financial management of the organisation;
- require disclosure to the committee of management, its minuting and member access, and aligning disclosure obligations with those under the *Corporations Act 2001*;
- allow the regulator to grant exemptions from "approved training" on the basis of demonstrated experience or qualifications.

[1] Taken from parliament web site 30-06-15
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F10837263-363d-4f9e-9020-2bdf266fb589%2F0012%22

[2] *Better Transparency and Accountability of Registered Organisations*, July 2013

These amendments were continued into the 2014 amendment bill. This was also slightly further amended from this amended 2013 version and these amendments continue into the Bill now before the Committee.

The Bill

The Bill's amendments to the FW(RO) Act have a number of objectives:

- establishing a Registered Organisations Commission (**ROC**) which is separate from the Fair Work Commission, with powers more like those of the ASIC;
- altering the current FW(RO) Act disclosure of personal material interests obligations and grounds for disqualification and ineligibility for office;
- making the current accounting, disclosure, transparency and training obligations more enforceable by requiring them of registered organisations, rather than requirements on the rules of registered organisations;
- introducing new penalties and stronger penalties, including criminal penalties for serious offences.

The 2012 amendments to the FW(RO) Act were made within a relatively short time frame and with the understandable desire to address the loss of confidence and to raise officer capacity to recognise problems in financial governance and management before they give rise to losses and the growth of an inappropriate culture. The role of poor culture was perhaps insufficiently recognised at the time of the *Fair Work (Registered Organisations) Amendment Act 2012* but as the HSU fall out continues it seems more obvious today.

Registration of employer and employee associations is not required but registration conveys a number of privileges to organisations. Both employer and employee organisations have statutory rights under the *Fair Work Act 2009* (FW Act) but the benefits of registration are not equally distributed. These include:

- the individual protection of incorporation;
- capacity to apply for the making, variation or revocation of a modern award outside the system of 4 yearly reviews,
- capacity to apply for variations to remove ambiguity or uncertainty of operation of an award term (which is at times used as a form of dispute resolution);
- in the case of enterprise agreements and their making (employee organisations only)
    - the right to negotiate and agree to/withhold agreement to a greenfields enterprise agreement in advance of member employment;
    - the default right to represent members in bargaining for an agreement unless all members decline;
    - the right to initiate low paid authorisations;
    - the right to seek terms in enterprise agreement which relate to and benefit the organisation and its capacity to organise; and
    - the capacity to be covered by an enterprise agreement;

    - the right to have its views considered, independently of employee views, when agreements are proposed to be terminated;
- the right to make second stage submissions in four yearly reviews of default fund terms;
- capacity to apply for an equal remuneration order (employee organisations only);
- capacity to apply for various dispute/bargaining orders
- capacity to apply for entry permits and to enter premises in suspension of occupier property rights with the right to hold discussions and investigate alleged breaches of workplace relations and work health and safety laws (employee organisations only).

The exercise of a number of these rights means that the rights of others are suspended or suppressed. This in itself can create challenges for the avoidance of improper financial dealings the establishment of appropriate transparent financial management.
A strong culture of transparency and disclosure cannot prevent individuals acting improperly but it is a pervasive force for both reducing the likelihood of improper behaviour and more readily uncovering instances of it.

Establishing a Registered Organisations Commission

A penalty structure which is supportive of its objectives and reflects the relative seriousness of different levels of non-compliance supports the establishment of an appropriate culture. For this reason and because approaching like issues by requiring similar conformity is to be preferred, moving to a disclosure regime which is similar to that under the Corporations Act which deals with similar duties and responsibilities is supported.

As a matter of principle ABI and NSWBC do not favour the establishment of additional statutory bodies, nor a proliferation of regulators.

The Explanatory Memorandum makes the following relevant points in favour of the proposed ROC

> Having a body which is independent and stand-alone will raise awareness among the public and registered organisations of the importance of ensuring strong governance and accountability. It will assist in regaining the confidence of members and the public in registered organisations and the importance of their role in workplace relations.[3]

It is also the case that the Fair Work Commission is not in any general sense a regulator and its oversight of registered organisations is something of an exception. Under the FW Act the general regulator's role is vested in the Fair Work Ombudsman. Perhaps also significant, the regulation of registered organisations is not a part of, nor schedule of, the FW Act.

[3] P xv, *Explanatory Memorandum*

The role of regulator and the exercise of its investigatory powers sit uncomfortably with the Commission's major activities and this seems more true the more comprehensive the regulator's investigatory powers are. It is noted that the establishment of the ROC does not impose additional expenditure on the government.

Transferring disclosure and training rules to the FW(RO)Act

Chapter 5 of the FW(RO) Act requires registered organisations to have mandated disclosure requirements and officer training obligations in their rules and the relatively delayed commencement of the FW(RO) Amendment Act 2012 was to allow this to happen. However these rules are not directly enforceable by the regulator, these rules are enforced by member complaint to the Court. Member complaint requires the member to be aware of the likely breach and to be able to produce at least some evidence of it. For a variety of reasons this mechanism is unlikely to produce sufficient sustained pressure to encourage an appropriate culture.

The Bill rescinds these Chapter 5 rules obligations and inserts new modified obligations into Chapter 9, which makes them enforceable by the regulator. However the Bill does not deal with the consequences of inserting the disclosure and training requirements into Chapter 9 for the retained rules, inserted in compliance with Chapter 5 dealing with these matters. It seems likely that many organisations would not wish to retain rules which deal with the same subject matter as the FW(RO) Act directly requires and it may be appropriate for there to be a fast track mechanism for those organisations to excise these rules.

Apart from providing for the recognition of prior training or relevant experience as a basis for exemption from the necessity to complete a course of approved training, which is supported, the Bill also recognises completed approved training undertaken before the Bill's amendments commence. This is supported.