



Senate Standing Committee on Education Employment and Workplace Relations

Inquiry into Fair Work (Registered organisations) Amendment (Towards Transparency) Bill 2012

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Introduction

1. The Bill is a timely and welcome initiative.
2. The Institute of Public Affairs (IPA) has for some time called for registered organisations to be subject to the compliance obligations and remedies that apply to corporations.
3. Trade unions and employer associations are trusted to manage substantial funds on behalf of their members.
4. Recent events give rise to reasonable doubt about the utility of the current regulations, particularly their deterrent effect.
5. The highest standards of financial management and accountability should apply to registered organisations. Organisations cannot afford to lose sight of their underlying purpose, to service the interests of their members. The control of organisations can be usurped by small groupings focussed by power and their own narrow interests. This can result in immense damage to the financial viability and reputation of the organisations and the system of workplace relations representation.
6. Recent events about the management of trade unions are the cause of great concern. No one should be confident that transgressions have not occurred in organisations, other than those that have come to light.
7. A strong deterrent against such conduct is required. The current *Fair Work (Registered Organisations) Act 2009* (the Act) manifestly fails because the penalties are so low. The Bill makes amendments to the Act that would rectify the existing deficiency in the regulatory scheme. The IPA supports the Bill.

Registration Central to System

8. Trade unions and employer associations are important workplace relations institutions. Australian workplace relations legislation has entrenched a system of registering and not simply recognising these representative bodies. It has developed a distinctly formal system of representation rights based on the registration of the bodies.
9. Registration confers a role that affords the organisations privileges in representing their members' interests. The ALP policy to refocus the system on collective representation has augmented the central role of trade unions. Registration confers appearance and representation privileges that can displace individual rights. Also, taxation benefits are granted to registered organisations and it is very difficult for new bodies to achieve registration. In many respects the result is a closed enclave of privileged organisations that resist reforms to advance accountability and competition.
10. The considerable privileges of registration are enjoyed notwithstanding declining representation. A continuing fall in trade union representation is irrefutable. Trade union members now account for only 13 per cent of the private sector workforce. A continuation of the falling membership trend will inevitably raise questions about the legitimacy of the system.
11. Recent events pointing to the mismanagement of trade union affairs reveal a disconnection between some in leadership roles and members they are supposed to represent. It is apparent accountability and governance standards are inadequate and improvements are required.

Lodgement of Financial Reports

12. The workplace relations system, like any that is based on privileged registration, imposes concomitant obligations. Unsurprisingly, registered organisations are obliged to furnish a full financial report with the General Manager of Fair Work Australia (FWA) within 14 days of the organisation's general meeting.
13. Item 2 of the Bill is a most important amendment. It is clear from the Annual Reports of FWA that many of the financial reports lodged with FWA do not comply with statutory requirements. This indicates that a lax system is in operation.
14. In the FWA 2009/10 Annual Report the following statement highlights this problem:

“Outcomes in relation to processing financial returns also fell short of their target, with 43 per cent of lodged financial returns being processed within 28 days of receipt (the target is 85 per cent processed). With the emphasis on an increased level of compliance and improved disclosure to members, reporting units have been asked to provide documentation not previously required, which has attracted some resistance and

contributed to the time elapsed between lodgement and filing.”¹

15. It is of concern that 57 per cent of reports could not be filed within the target time. What is most disturbing is that some organisations were resisting the obligation to comply with proper standards mandated by the Act. This suggests that the right of members to expect compliance with all legal financial reporting obligations was opposed by some organisations. Also, it follows that the right of members to be properly informed about their organisations finances is treated with disdain by some officials.
16. The FWA Annual Report of 2010/11 recorded a marginal improvement, with 54 per cent of lodged financial returns being processed within 28 days. The commentary was in almost identical terms. However, the previous years’ reference to resistance by some did not appear.²
17. The latest FWA Annual Report for 2011/12 records another marginal improvement to 63 per cent satisfying the 28 day target. No commentary appears in the latest report.³
18. The latest figure of 63 per cent is cause for concern. This means that 37 per cent of reports are not filed within the target timeline. We are not given a reason for this poor performance. However, the comments in earlier reports lead to a conclusion that a proportion of reports are still not satisfying the legislative requirements for filing.
19. Section 5 of the Act is headed “Parliament’s intention in enacting this Act.” Section 5(3) enunciates the standards set out in the Act. They include at S5(3)(c):

“(c) encourage the efficient management of organisations and high standards of accountability of organisations to their members;”
20. It is not surprising that cases involving the mismanagement of trade union funds have come to light. An effective regulatory regime requires all facets and obligations to be taken seriously and enforced with rigour. A lax approach in one section of oversight will lead to deficient outcomes in other aspects of a regulatory scheme. Accurate and fully compliant reporting is a basic requirement. The current approach is clearly failing in this regard.
21. The amendment to S268 is appropriate and timely as it spells out the obligation to lodge complying reports. If passed it is to be hoped the clause would be enforced with rigour. The protection of union members rights demand no less.

¹ Annual Report of Fair Work Australia 1 July 2009 – 30 June 2010, P 21

² Annual Report of Fair Work Australia 1 July 2010 – 30 June 2011, P20

³ Fair Work Australia Annual Report 2011 – 2012, Table H6, P 92

Conduct of Officers and Employee

22. The community has exhibited widespread concern and disgust at cases involving the alleged misuse of union members' funds. The system regulating the conduct of union officials is seen as being ineffective and indulgent.
23. The IPA has called for a more rigorous system that reflects the responsibilities and penalties applying to corporations.
24. Item 3 of the Bill adopts this position. It introduces the reasonable obligation that the officials of registered organisations act in good faith. It is clear that dishonest conduct to benefit an official or an associate is unacceptable and constitutes a serious offence. Penalties equivalent to the *Corporations Act 2001* are introduced and are commensurate with the breaches of trust that such offences would involve.

Compliance with Court Orders

25. Compliance with court orders is fundamental to sustain a respected and effective legal system.
26. A most detrimental feature of the Australian workplace relations system is the propensity of some union officials to act as if they are above the law. The defiance of court orders regrettably has occurred too often. This is compounded when many of the orders are made against industrial conduct that is itself unlawful.
27. Defiance of the rule of law in this way cannot be tolerated. Organisations that enjoy many statutory protections and privileges should face severe penalties when they choose to ignore the law by defying orders of the courts.
28. Those who observe workplace relations have noticed a gap in the attitude to legal rights and obligations by a number of practitioners. The registered organisations' rights to the protections of the law are strongly defended. A commitment to respecting unfavourable court orders is less evident.
29. Item 9 of the Bill seeks to address this gap through enunciating the necessary obligations to respect court orders and by imposing appropriate penalties for failing to comply with such orders.

Conclusion

30. The regulation of economic activity presents many challenges. It can be difficult to find the right balance between protecting the rights of parties while allowing, freedom, innovation and the pursuit of personal and corporate goals to flourish.
31. The regulation of workplace relations has become unbalanced in recent years. Collective interests have been promoted and protected. This has engendered in some a culture that they are above the rule of law and that disregarding lawful obligations does not matter. The consequences of disregarding the law are seen by some as inconsequential to the pursuit of other goals.
32. The Bill introduces commendable amendments to correct these deficiencies in the current legislation. The Institute of Public Affairs supports its passage into law.