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Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003

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Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003

Date Introduced: 13 February 2003

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: the later of: 28 days after Royal Assent and immediately after the commencement of Schedule 1B to the *Workplace Relations Act 1996.*

Purpose

The Bill amends the *Workplace Relations Act 1996* (WR Act) in order to:

- provide a mechanism for the Minister to seek financial penalties for non-compliance with orders of the Australian Industrial Relations Commission and the Federal Court
- provide for the default disqualification of officers and employees of registered organisations who are so fined

Background

This Bill reintroduces provisions which were withdrawn by Government amendments prior to the passage of the *Workplace Relations (Registration and Accountability of Organisations) Act 2002* (the WR (RAO) Act).[1] The Bills Digest to the then Bill had the following comment on the proposals:

> It would appear that the conduct that has inspired these proposals is the refusal of some high profile union officials to comply with Commission orders issued under section 127 of the WR Act to cease industrial action… such orders are already enforceable by the Federal Court under section 127(6) of the WR Act but it would appear that some employers are reluctant to press their rights under this provision. Contravention of the proposed provisions would expose union officials to not just the relevant pecuniary penalty but also prevent them holding office…[2]

Policy positions of parties

The Minister for Employment and Workplace Relations has recently been reported as saying:

> People of a mind to defy the Commission or the court, people who say, as one union official boasted not so long ago, he collected section 127 orders in his top drawer, people of that mind are now on notice that they will face heavy fines and possible disqualification from office, if this government gets its way.[3]

In his Second Reading Speech for the present Bill, the Minister outlines his rationale for this Bill as ensuring that Australian Industrial Relations Commission (the Commission) and Federal Court orders are enforced. This is particularly with respect to rulings which order industrial action to cease or not occur which, he notes, 'in a number of cases… have gone entirely unpunished for their failure to comply.'[4]

In his Second Reading Speech for another Bill presently before the Parliament, the Minister has stated:

> *Whilst section 127 has generally proved to be an effective mechanism*, delays in making or enforcing section 127 orders have sometimes extended the period during which enterprises and their workers are exposed to unprotected industrial action.[5]

The present Bill develops further options for the enforcement of such orders without restricting options already available. However, it should also be noted that the proposed provisions of this Bill apply to any order or direction of the Commission or Court, and not just orders for the enforcement of injunctions to prevent strike action. Registered organisations include both employer and employee organisations. In his Second Reading Speech, the Minister expressly acknowledges that the provisions of this Bill could apply to non-compliance by employer organisations and their officials and employees. This would mean that, technically, the orders or directions against an industry group, for example, to uphold the provisions of an award, could also give rise to an application by the Minister if there is non-compliance.

The contents of this Bill were not in the original Workplace Relations (Registered Organisations) Bill 2001 (the earlier Bill). That Bill only contained provisions for the disqualification of those convicted of a prescribed offence, which are now in Part 4 of Chapter 7 of Schedule 1B of the WR Act.[6] Nevertheless, it is perhaps worth noting the Labor Opposition's general comment on the earlier Bill in which they queried certain aspects for the further regulation of unions. In their comments about the regulatory provisions, the Labor Senators Carr and Collins in their Senate Committee Report made the general observations:

> …there are also a number of provisions which clearly indicate this Government's ideological obsession with unions. The evidence has not demonstrated any compelling reason that current prescriptive regulation of registered organisations is in need of improvement…[7]

Contempt penalty examples

As it stands, the way in which non-compliance with a court order would be addressed would be to bring an action for contempt of court. An action for contempt is unaffected by the present Bill. Contempt may occur where a person disobeys an order of a court or interferes with the process of the administration of justice.[8]

Traditionally, for contempt in civil matters as in these cases, punitive orders (eg. the imposition of fines as opposed to directions) were not considered to be appropriate. However, in 1986, the High Court permitted financial penalties to be imposed in an action for civil contempt. However, in *AMIEU & Ors v Mudginberri Station Pty Ltd*, the Court held that punitive sanctions could be available for the 'wilful' disobedience of Federal Court orders, rather than for disobedience that was 'casual, accidental or unintentional.' In that case, fines for a failure to follow a Court order to lift bans under the *Trade Practices Act 1974* were imposed.[9] This was closely followed by the case of *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees Union of Australia & Ors* in which fines were imposed for persisting with a union work ban on the provision of goods and services in breach of a mandatory interlocutory injunction. [10]

In another case, Justice Merkel, on 29 May 2000, found the Secretaries of the Victorian Australian Manufacturing Worker's Union and Electrical Trades Union both guilty of contempt of court.[11] His Honour found that they had wilfully breached the orders and exacerbated the breach by telling journalists of their intention to defy the orders. The Australian Industry Group, which brought the original action, did not seek to enforce the failure to pay the fine by the AMWU Secretary as the fine of $20,000 would be going into consolidated revenue. The Attorney-General also did not consider it his duty to enforce the fine as it was considered the enforcement of a private right. Justice Merkel noted that a refusal of a duty to enforce could raise the issue of obstructing the course of justice and that if such refusals to enforce continued, then the Courts should make provisions for the enforcement of its own penalty orders for contempt.

In a recent significant recent decision in this area, Justice Kiefel found senior officials of the Construction, Forestry, Mining and Energy Union in contempt of an order to return to work. In the first instance on 30 March 2001, her Honour stated:

> Knowing full well the seriousness of non-compliance with an order, there followed calculated and devious attempts to disguise any knowledge of the order's existence until it could be said to be too late for it to be able to effectively comply with it. Even then, they persisted with a deliberate disregard of the order…. The penalty to be imposed must then make plain that these approaches are to be condemned and have sufficient impact to be effective as deterrent in the future. [12]

The penalty imposed on the CFMEU in the first instance was $200,000 plus BHP Steel's full costs for the entire proceedings. However, the Full Court found that there was no basis for the finding that the union's conduct went beyond a failure to notify members of the order to immediately cease strike action (as opposed to actively authorising further

strike action) and remitted the assessment of the penalty. The penalty was reduced to $120,000 plus BHP's costs on an indemnity basis. [13]

Comparison with Corporations Law

Questions may be raised about how the present Bill compares to corporate governance disqualification provisions. There does not appear to be a direct comparison between Corporations Law provisions and the power of the Minister to seek the orders proposed by this Bill. The *Corporations Act 2001* contains general rules about individuals being disqualified from managing corporations.[14] These can be found in Part 2D.6 of the Corporations Act. For example, section 206C of that Part states that, on application from ASIC, the Court can disqualify managers for a period if a civil penalty declaration under section 1317E has been made *and* the Court is satisfied that the disqualification is justified. The civil penalty provisions have their equivalent in the WR Act. Following the passage of the WR (RAO) Act the civil penalty provisions are listed in section 305 of Schedule 1B to the WR Act inserted by that Act.

In the sphere of corporate governance generally, the Court can also make pecuniary penalty orders under section 1317G of the Corporations Law for breaches of a civil penalty provision under section 1317E. These penalties are up to $200,000 for a breach that is serious, or materially prejudices the interest of the corporations, or its capacity to pay its members. By way of comparison, subsection 306(1) of Schedule 1B of the WR Act provides for a penalty of up to $110,000 for an organisation and $2200 for an individual. The penalties are civil debts payable to the Commonwealth.

In the present Bill, contrary to the corporate governance disqualification provisions, applications are brought by the Minister rather than a body equivalent to ASIC, and there is no additional requirement that a court be satisfied that the disqualification is justified. As noted in the Main Provisions section below, the disqualification in the present Bill is automatic but then subject to appeal.

Main Provisions

Overview

As noted above, the proposed provisions undo the effect of Government Amendments passed during the passage of the WR (RAO) Act 2002. The proposed amendments to Schedule 1B reinsert items which had been withdrawn, namely, **sections 221-228** (the disqualification provisions) and **sections 294-303** (civil obligation provisions). The provisions use the concept of prescribed orders. A prescribed order is a financial penalty that the Federal Court has ordered for failing to comply with a civil penalty provision (existing sections 305 and 306 of Schedule 1B). Importantly, new paragraph 305(2)(zk) adds the civil obligation provisions (officers' duties to comply with Court and Tribunal

orders) to the list of civil penalty provisions. Once a prescribed order has been made, the subject of that order is automatically disqualified from being an office holder for 5 years unless an application for leave to hold office is successful (proposed section 225).

Disqualification provisions

Items 1 and 2 add a proposed **Division 3** into existing Chapter 7, Part 4 of Schedule 1B of the Act to do with democratic control. It adds similar provisions to the existing disqualification from office provisions except rather than the disqualification occurring for an offence, it is for the contravention of a prescribed order.

Details of the disqualification scheme include that:

- a certificate from the Federal Court is evidence that a prescribed order was in fact made, or that a person was found not have contravened Part 3 of Chapter 9 (the new civil obligation provisions, see below) (**proposed section 223**)
- disqualification begins 28 days after the prescribed order unless an application for leave to hold office is made (**proposed subsection 224(2)**)
- if the application for leave to hold office takes longer than 3 months to decide, and has not been extended, then disqualification begins after 3 months (**proposed subsection 224(3)**)
- an organisation or its members, or the Industrial Registrar can seek a declaration from the Federal Court as to the eligibility of a person to be a candidate for election to office or whether a person has ceased to hold office in the organisation (irrespective of the rules of the organisation) (**proposed subsections 224(5) and 228(1)**)
- the subject of a prescribed order can only apply for leave to hold office once (**proposed subsections 225(4) and 226(4)**)
- in deciding an application for leave to hold office, the Federal Court must have regard to:
    - the nature of the contravention
    - the circumstances of the persons involvement
    - the general character of the person
    - the fitness of the person to be involved in the management of organisations with regard to the contravention[15]
    - any other relevant matter (**proposed section 227**)

Comment: The current disqualification provisions are limited to prescribed offences. These include any convictions for fraud or dishonesty with penalties of imprisonment for more than 3 months, violence toward another person, intentional damage to property and a series of offences within Schedule 1B. That series includes matters such as failing to comply with electoral official requests for information, interfering with ballots so as to commit electoral fraud, or threatening or discriminating against anyone seeking the conduct of an election for office. It is fair to suggest that these offences are all criminal, or at least relatively serious in nature. It is arguable that to add failure to comply with civil obligation orders such as return to work orders, lowers the threshold for the list of acts which merit disqualification. Where such breaches are sufficiently serious, as noted above, it is possible for significant penalties to be imposed.

Civil obligation provisions

Items 3 and 4 add **proposed Part 3 of Chapter 9** of Schedule 1B to the WR Act. It sets out general duties for officers and employees in relation to directions or orders of the Commission or Federal Court.

Item 4 contains **proposed sections 294-303.** These sections contain mirror provisions placing civil obligations on organisations, officers, employees and members of organisations to not contravene Commission or Federal Court orders. Those subject to orders cannot, either knowingly or recklessly do anything that would contravene an order. Nor can they be 'involved' in such a contravention. Involved is broadly defined to include aiding, inducing, conspiring with others to effect, or being in any way, by act or omission, directly or indirectly concerned in or party to, the contravention (**proposed section 295**).

Item 5 inserts **proposed paragraph 305(2)(zk)** which adds the civil obligation provisions to the list of civil penalty provisions.

Item 6 inserts **proposed subsection 307(1A)** which provides for the Federal Court to order a specified amount of compensation to an organisation that suffers damage for a breach of a civil obligation which it had taken reasonable steps to prevent.

Items 7 and 8 insert **proposed subsection 310(2)**. Currently, applications for the enforcement of civil penalty provisions can be made by the Industrial Registrar or their nominee. However, the proposed subsection states that it is the Minister or his or her nominee who must apply for an order to enforce the proposed new civil obligations, ie. applications under **proposed paragraph 305(2)(zk).** Presumably, the Minister could nominate the Employment Advocate as a nominee.[16]

Concluding Comments

As noted above, it is perhaps arguable that people and organisations who wilfully defy court orders are already subject to substantial penalties for contempt, possibly even greater

than available under the proposed Bill. However, past logistical difficulties with enforcement in particular circumstances have also been noted. It may also be considered harsh to automatically disqualify all individuals who breach a civil obligation to comply with a Court direction or order in light of certain corporations provisions.

Endnotes

1 The Main Committee amendments were introduced by the Minister on 17 September 2002 and reported and agreed to by the House of Representatives on 18 September 2002. See amendments 141 and 155. *House Debates,* 18 September 2002, p. 6627.

2 For further information about the accountability provisions introduced by the WR (RAO) Act, see the *Bills Digest*, No. 171, 2001-02, 24 June 2002.

3 'Government ups the unfair dismissal stakes,' *Human Resources Monthly,* March 2003, p. 9.

4 The Hon. Tony Abbott MP, Second Reading Speech, Workplace Relations Amendment (Compliance with Court and Tribunal Orders) Bill 2003.

5 The Hon. Tony Abbott MP, Second Reading Speech, Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002, emphasis added.

6 It is worth noting these provisions were eventually part of Schedule 1B inserted by the WR (RAO) Act, passed on 14 November 2002. So despite the comments noted below, a version of new accountability measures was passed. The issues at stake in the registered organisations Bills are discussed more broadly in the Digest to that Act.

7 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee report into the Workplace Relations Amendment (Transmission of Business) Bill 2001 and the Workplace Relations (Registered Organisations) Bill 2001, ¶1.91, p. 21. http://www.aph.gov.au/senate/committee/eet_ctte/wr_tranbus_bill/report/report.pdf

8 CCH *Australian Labour Law Reporter (ALLR)*, para. 4-800. The background to the examples noted in this section is discussed in further detail in that paragraph. See also, 'On Union Fines, Lack of Enforceability and Government 'Intent'' *Industrial Relations and Management Letter (IRML),* Vol. 18, No. 6, July 2001, pp. 2–4. The procedure for contempt is set out in the Federal Court rules.

9 *AMIEU & Ors v Mudginberri Station Pty Ltd* (1986) 66 ALR 577.

10 *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees Union of Australia & Ors (1987) AILR ¶200*

11 The following comments are based on the *IRML* article, op. cit. 8.

12 *BHP Steel (AIS) Ply Ltd v CFMEU* (2001) 49 AILR ¶4-381

13 *BHP Steel (AIS) Ply Ltd v CFMEU* (2002) 52 AILR ¶4-618, see *ALLR* op. cit. 7.

14 For a general discussion of the application of corporate accountability standards to industrial organisations see Mark Mourell, 'Industrial Organisations and Corporate Accountability,' *Australian Journal of Labour Law,* Vol. 12, 1999, p. 136. That author considers that,

conceptually, it may invite problems to automatically transfer detailed corporate accountability obligations on to office holders in industrial organisations.

15 See less prescription in subsection 206C(2) of the *Corporations Act 2001* and Mourell, op. cit.

16 Bills Digest, op. cit. 6.