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Australian Council of Trade Unions

Submission to Senate Standing Committee on Education, Employment and Workplace Relations

Fair Work (Registered Organisations) Amendment (Toward Transparency Bill) 2012

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8 February 2013

D. No. 7/2013

Introduction

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no national confederation representing unions, other than the ACTU. For over 50 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 workers who are members engaged across a broad spectrum of industries and occupations. All but 7 of the ACTU affiliates are organisations registered as employee organisations under the *Fair Work (Registered Organisations) Act* 2009 ("the Act"). All but 11 of 45 organisations registered as employee organisations under that Act are ACTU affiliates.

The federal industrial relations system was built on a foundational compact between organised labour and government: Organised labour submitted to a level of external regulation of its affairs in exchange for the rights that came with registration under the legislative scheme. Recent decades have seen a shift in the balance of that compact. Whilst registration still carries with it particular rights, such as bringing proceedings on behalf of members and representing them at the workplace, other features of the industrial relations system have either passed into history (such as conciliation and arbitration of industrial disputes and union preference) or have ceased to be exclusive to registered unions (such as the right to make industrial agreements). The paradox of this "labour market deregulation", has been that it has carried with it an increase in the level of regulation of registered unions' internal affairs - the international obligation of non-interference notwithstanding[1].

A trend in the mode of regulation of registered unions in Australia is to attempt to adopt some elements of corporate regulation into the scheme for regulating unions, and the Bill now before the Committee is a further example of this. Corporate regulation of course is directed toward the protection of the economic interests of investors (and, to an extent, consumers), and serves a different purpose than the protection of the interests of union members. Nonetheless, there are some aspects of good governance that are universal (such as honesty, openness and accountability) and some lessons can be learned from corporate regulation on those fronts. We have accordingly assessed the Bill on its merits and we offer a detailed discussion on its specific provisions below.

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[1] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

Our conclusion however is that we do not support the passage of the Bill. This conclusion is reached for four principal reasons:

(1) The matters which the Bill is said to be responsive to were already the subject of a legislative response. The proponents of the Bill must therefore assume that the existing response has been inadequate, yet there is no evidence of this and the recent reforms which are still transitioning into effect.
(2) The Bill increases the regulatory burden on registered organisations, with no corresponding benefit to those organisation's members;
(3) The Bill duplicates existing law;
(4) The Bill is out of step with regulatory trends toward civil enforcement.

We thank the Committee for the opportunity to make this submission to it.

Items 1 and 2

These Items propose amendments to section 268.

Section 268(1) is concerned with the lodging of copies of reports with the Fair Work Commission, and the lodging of declarations to the effect that the documents lodged with the Commission are copies of those presented to members in accordance with the Act.

The amendments proposed to section 268 would deem the section to not be complied with if the copies of the reports so lodged with the Commission do not comply with the requirements of the Act. Despite the commentary in the Explanatory Memorandum to the Bill, the terms of the Bill indicate that subsection (1) will continue to be a civil penalty provision, rather than an offence.

Section 268, either as it stands or as proposed to be amended, does not deal directly with transparency or accountability to members of organisations. It merely places an administrative requirement on organisations to lodge material with the regulator. Whilst the requirement to lodge such reports is long-standing with respect to organisations (and is only one of the three different types of lodgings a typical union must make to the Commission, all on different reporting cycles) it is to be noted that many other community-based not-for-profit organisations are established as companies limited by guarantee, and as such are not required by the *Corporations Act* to prepare or lodge annual reports in the absence of a request by their membership or a direction to do so by ASIC[2] (nor are small proprietary companies)[3].

[2] *Corporations Act 2001* Chapter 2M.
[3] *Ibid.*

The requirement that *is* significant in terms of transparency and accountability to members is the requirement to prepare the required reports and provide and present them to the reporting unit's members. This requirement arises from sections 265 and 266. Those sections are civil penalty provisions. The obligation to include particular content in those reports arises from sections 253(2), 254(2), 257(5)-(11) and 265(1)(a) and (b). With the exception of section 257 (5)-(9), which relate to the content of the auditor's report which must form part of the full report, all of these provisions are civil penalty provisions.

Upon compliance with the existing requirement to lodge copies of the relevant reports, it will be apparent to the regulator whether or not the content requirements referred to above have been complied with. In these circumstances, the only additional regulatory effect of the proposed amendments to section 268 would be to make registered organisations liable for a failure of their auditors to comply with the content requirements set out in the Act for auditors' reports. We accordingly do not support the amendments to section 268.

Item 3

This Item proposes a new section 288A.

The proposed section 288A would introduce offences relating to the duties which currently appear as civil penalty provisions in sections 286-288 of the Act. The proposed amendments are closely modelled on those appearing at section 184(1)-(3) of the *Corporations Act* 2001. The proposed penalties are also in line with those set out in Schedule 3 of the *Corporations Act* 2001 for those analogous offences.

Whilst we recognise that the conduct that would amount to breaches of the proposed duties are sufficiently serious to attract criminal sanctions, we question whether the amendments would add any value to the existing legal framework.

In this regard, the history of the corresponding duties in corporations legislation is instructive. The *Corporations Act* was relevantly amended twice in respect of the duties placed on directors, and the reasons for those amendments bear repeating. The reforms introduced to directors' duties by the *Corporate Law Reform Act* 1992 were largely reactive to the "Company Directors' Duties" report of the Senate Committee on Legal and Constitutional Affairs[4] ("Senate Reform Report") and the Government's response thereto[5] ("Government Reform Response"). At the time of the Senate Reform Report, the relevant duties were cast only as criminal offences in the *Companies Code* and the *Corporations Act,* save that a civil action could be

[4] Commonwealth of Australia, Senate Standing Committee on Legal & Constitutional Affairs, "Company Directors Duties", Australian Government Publishing Service, November 1989, ISBN 0 644 10716 2.
[5] November 1991

brought by the Company itself for breach of those duties in order to recover losses suffered by the Corporation, or profits derived by the director, as a consequence of their non-compliance with the statutory duties[6]. The duties as at that time were:To act honestly in the exercise of powers and the discharge of duties;To exercise a reasonable degree of care and diligence in the exercise of powers and discharge of duties;To not make improper use of information acquired by virtue of their position to gain (directly or indirectly) an advantage for themselves or for any other person or to cause detriment to the corporation; and

- To not make improper use of their position to gain (directly or indirectly) and advantage for themselves or for any other person or to cause detriment to the corporation.

The Senate Reform Report was cast against a background where traditional thinking about corporate power and the capacity of company members (shareholders) to control companies, was under challenge. Put simply, corporations had a lot of power, and were not subject to sufficient control. The report's introduction contained the following:

> "*The corporate culture we know today is not the corporate culture of a century ago. The balance between ownership and control of companies has shifted towards the controllers. Management has great power over the assets which it pursues with vigour through takeovers, mergers and buy-outs…*
>
> *The modern corporate sector has a profound effect on life in Australia. It has achieved a high public profile and, with it, a high level of public scrutiny. The corporate sector is crucial to the creation of the nation's wealth. Society looks to it to produce that wealth in accordance with community values…*
>
> *Directors are the mind and soul of the corporate sector. They are crucial to how it operates and how its great power is exercised. They determine the character of corporate culture. Their actions can have a profound effect on the lives a great number of people, be they shareholders, creditors and consumers, and to the environment..*
>
> *Some say that companies are now so dominated by directors that their owners, the shareholders, are denied any effective say in their control. They advocate a different balance. Some argue the law should move to meet the reality that the corporate sector is now central not only to the economic well being of society, but to most dimensions of community life. They advocate the imposition of wider duties on directors*".

The points of difference to the modern status of unions in Australia should be glaringly obvious.

In terms of control, unions have been subject to increasing levels of regulation – the amendments now proposed being the second tranche of additional regulation in the last 12 months. 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

[6] See generally section 229 of the *Companies Code*, section 232 of the *Corporations Act*, circa 1989.

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[7] 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. Further, notwithstanding the union amalgamations of the 1980s and 1990s, branches, divisions, divisional branches and other units continue to exist within unions which are predominantly self-governed by their respective members. With the exception of comparatively very few staff (who report to elected officers), unions are member-managed and controlled and supervised by the State, from the workplace delegate to the national secretary.

Further, it is self evident that there is no parallel between the nature of the power exercised by corporations and the power exercised by unions. Increasing restrictions have been imposed on unions through amendments to industrial relations regulation in recent decades, most significantly concerning their setting in the award system. Beyond the award safety net, changes to employment conditions must be negotiated on an enterprise-by-enterprise basis and this occurs without resort to industrial action except where the unions members and the Commission so approve in accordance with legislative provisions that stifle whole of industry standards and which the International Labour Organisation has described as "excessive"[8].

The picture of unions today is thus far different to the position of corporations in the hangover of the corporate excesses of the 1980s that were alluded to in the Senate Reform Report. Australia is not confronted with a union movement that is an unbridled force that threatens the nation's economic security. In truth, aside from a handful of matters that have attracted media attention, including for political reasons, union governance has been a non-issue for 30 years.

One of the principal concerns ventilated in the Senate Reform Report about the then current regime of directors' duties was that it imposed too low a standard on those economically powerful actors:

> "*The corporate sector possess most of Australia's assets, employs most of its workers, and is the sector most capable of injuring the environment. Given this it is of vital concern to the community and the community is entitled to impose appropriate restrictions on it.*"[9]

Chief among the concerns was that the courts, on the the rare occasions that they were called upon to rule on whether a director had met his or her statutory and general law duties, had imposed a subjective rather than

[7]Compare to the process of changing company constitutions by special resolution and the scheme of "replaceable rules" under the Corporations Act.
[8]ILO Freedom of Association Case Report No 357, June 2010.
[9]*Senate Reform Report*, p. 17

an objective standard. The courts had not assessed directors' conduct on the basis of a standard that all individuals would be expected to meet, regardless of their capacity or circumstances, but rather had looked to what could be expected of the particular director, in the particular circumstances. The Senate Reform Report adopted the following as a summary of the position as it then was:

> "..the fewer a director's qualifications for office, the less time an attention he devotes to his office, and the greater the reliance he places on others, legally the less responsible he is".[10]

The Senate Reform Report accordingly recommended that an objective duty of care be provided in companies legislation[11]. Tempering this somewhat, it also recommended that a "business judgement rule" be introduced to absolve directors of liability for decisions made in good faith, absent of personal interest, where they are appropriately informed about the subject matter of the decision at issue and rationally believe that it is in the best interests of the company.[12]

Importantly, the Senate Reform Report recommended that a raft of provisions be de-criminalised, along with dual criminal and civil liability in respect of director's duties. In doing so it noted that the criminal law aside from companies law *already dealt with* most offences involving fraud or dishonesty, and cited the Victorian Crimes Act offences of false accounting, obtaining financial advantage or property by deception and falsifying books of account. The Committee reported :

> "Generally the submissions made to the Committee approved of penalties where they had acted fraudulently or dishonestly but not otherwise. The criminal law will deal with most offences involving fraud or dishonesty. An auditor who gave evidence to the Committee said that the criminal penalties helped to 'focus the view of directors', although he also **expressed the view that civil remedies were probably more important.**
>
> Although many sections of the Companies Code and Corporations Act provide for gaol terms, in lieu of or in addition to monetary penalties, it appears that courts are reluctant to impose them. When gaol terms are provided for breach of the law but the courts are disinclined to impose them because they seem too draconian, the law tends to fall into disrepute..." (emphasis added)

Against a backdrop of the regulator's evidence concerning its difficulty of securing convictions, the Committee was attracted to making director's duties enforceable by way of civil penalty where the breach did not involve criminal fault or intent elements:

> "Where a breach of the law does not involve criminality, a civil penalty may be appropriate. Proof of the breach would have to be established on the civil onus (that is, on the balance of probabilities)...In appropriate circumstances, people who suffered a loss as a result of the breach could simultaneously bring a claim for damages in the proceedings taken to recover the penalty."[13]

The *Government Reform Response* also focussed on these factors in accepting the recommendations of a dual

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[10] *Senate Reform Report, p.27-28.*
[11] *Senate Reform Report*, Recommendation 1.
[12] *Senate Reform Report,* Recommendation 2.
[13] *Senate Reform Report*, p. 190-191.

liability regime:

> "The Government agrees with the Committee that a mere failure to comply with a fiduciary duty should not attract a criminal sanction. It notes that a company officer may contravene section 232, and thus be subject to criminal sanction, without having committed any fraud against the company, its members or creditors. Further, because section 232 attracts the criminal law standard of proof, the r**egulatory authorities cannot succeed in any action under the section against a director for breach of duty unless they are able to establish the elements of breach beyond reasonable doubt**. To a certain extent, this could inhibit recovery action where a breach, though not committed with any dishonest intent, has caused significant loss to the company.
>
> In the light of these factors, and in response to Committee's recommendations, the Government proposes to amend section 232 with the intention of confining the criminal liability of directors to conduct involving a dishonest intent. Civil penalties will be introduced into the Corporations Law in relation to breaches of section 232, falling short of dishonest intent." (emphasis added)

Indeed, by the time the Government Reform Response was delivered, the problems associated with securing criminal convictions were becoming glaringly apparent. The use of criminal sanctions had made enforcement problematic: ASIC generally failed to bring or conclude successful criminal cases, including in relation to matters in areas it identified as areas of "national priority" and in its dealings with the corporate excesses of the 1980s.[14]

The resultant *Corporate Law Reform Act* reflected the government's position: Civil penalties became the default enforcement option for directors' duties (with the attendant advantage of being easier to prove), save where criminal elements were present:

> "1317FA.(1) A person is guilty of an offence if the person contravenes a civil penalty provision:
> (a) knowingly, intentionally or recklessly; and
> (b) either:
> (i) dishonestly and intending to gain, whether directly or indirectly, an advantage for that or any other person; or
> (ii) intending to deceive or defraud someone.
> "(2) A person who contravenes a civil penalty provision is not guilty of an offence except as provided by subsection (1)."[15]

The duties themselves became:

> " 232. (1) In this section:
>
> "officer", in relation to a corporation, means:
> (a) a director, secretary or executive officer of the corporation;
> (b) a receiver, or receiver and manager, of property of the corporation, or any other authorised person who enters into possession or assumes control of property of the corporation for the purpose of enforcing any charge;
> (c) an administrator of the corporation;
> (ca) an administrator of a deed of company arrangement executed by the

[14]Comino, V., "Civil or Criminal Penalties for Corporate Misconduct – Which Way Ahead?", University of Queensland Research Paper 09-01, 2009.
[15]*Corporate Law Reform Act* 1992*,* Item 17.

corporation;
(d) a liquidator of the corporation; and
(e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons;
(2) An officer of a corporation shall at all times act honestly in the exercise of his or her powers and the discharge of the duties of his or her office.
(4) In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances.
(4A) A reference in subsection (2) or (4) to the exercise of powers, or the discharge of duties, of an officer of a corporation is a reference to the exercise of those powers, or the discharge of those duties:
(a) in any case - in this jurisdiction; or
(b) if the body is a local corporation - outside this jurisdiction; or
(c) otherwise - outside this jurisdiction but in connection with:
(i) the corporation carrying on business in this jurisdiction; or
(ii) an act that the corporation does, or proposes to do, in this jurisdiction; or
(iii) a decision by the corporation whether or not to do, or to refrain from doing, an act in this jurisdiction.
(5) An officer or employee of a corporation, or a former officer or employee of a corporation, must not, in relevant circumstances, make improper use of information acquired by virtue of his or her position as such an officer or employee to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.
(6) An officer or employee of a corporation must not, in relevant circumstances, make improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation.
(6A) A reference in subsection (5) or (6), in relation to a corporation, to doing an act in relevant circumstances is a reference to doing the act:
(a) if the body is a local corporation - in this jurisdiction or elsewhere; or
(b) otherwise - in this jurisdiction.
(6B) Subsections (2), (4), (5) and (6) are civil penalty provisions as defined by section 1317DA, so Part 9.4B provides for civil and criminal consequences of contravening any of them, or of being involved in a contravention of any of them.
(11) This section has effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person by reason of the person's office or
employment in relation to a corporation and does not prevent the institution of any civil proceedings in respect of a breach of such a duty or in respect of such a liability."

As introduced, the civil penalty regime for directors' duties was criticised for placing criminal and civil enforcement on an equal footing[16]. The legislation was cast such that ASIC needed to make an election between civil and criminal proceedings because criminal proceedings could not be taken after civil proceedings, irrespective of whether the civil prosecution had succeeded. But this was a product of a conscious choice by legislators: civil penalties clearly were seen as the better enforcement option; indeed they were the major component of the reforms. However, internally ASIC investigators were required to liaise with the Director of Public Prosecutions over significant enforcement matters. The need for the DPP to

[16]Comino *Op. Cit.*

satisfy itself that there was no criminal element in a matter was productive of delays and led to a situation where the DPP had an effective veto over the use of civil penalties.[17] ASIC investigators also reported that because the same conduct might breach both the Corporations Law and state-based criminal laws, it was preferable for charges under state law to be pursued because there was more certainty in the law and a perception that courts tended to hand down more severe penalties for the general criminal law than breaches of the Corporations Law.[18] In this environment, ASIC commenced only 14 applications for civil penalties between 1993 and 1999. The interrelationship between civil penalties, specific corporations offences and the general criminal law was leading to a degree of regulatory indecision and paralysis.

Further reforms were achieved by *Corporations Law Economic Reform Program Act ("CLERP Act").* The economic focus of the reform effort was made plain in the government report which precipitated the amending legislation:

> "In light of more recent judicial decisions which appear to increase the responsibility of directors and create a degree of uncertainty regarding their potential liability, concerns have been expressed that directors' attentions are increasingly being focussed on compliance issues rather than on wealth creation for shareholders. In particular, concerns have been expressed that the Corporations Law contributes to risk-averse behaviour on the part of directors.
>
> If this is the case, the losers are not only directors personally, but also shareholders, whose returns on company capital will ultimately be diminished. The nation also loses as behaviour that is unnecessarily risk-averse distracts from behaviour that could expand the enterprise and therefore wealth and employment.
>
> ...
>
> While regulatory requirements are usually placed on directors as a means of protecting investors, or the general public, such protection may well be achieved at the expense of investors themselves. Accordingly, it is vitally important that any measures put in place as a means of promoting investor protection are properly assessed from an economic perspective to ensure that they do not ultimately act to the detriment of shareholders as a whole"[19]

The CLERP Act, which took effect from 2000, removed the bar on Criminal Proceedings after Civil Proceedings[20] - no doubt giving the regulator some comfort in proceeding with civil matters. It further removed the statutory general duty to act honestly in favour of an expanded duty of care and diligence underwritten by a business judgement rule, and a duty to act in good faith in the best interests of the corporation for a proper purpose. These were civil penalty provisions, separate provisions were retained for criminal liability where recklessness or dishonesty were involved (being a long-standing basis of criminal responsibility), however the duty of care and diligence was decriminalised entirely. The report which precipitated those amendments stated that:

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[17]Gilligan, G., Bird, H. & Ramsay, I., "The Efficicay of Civil Penalty Sanctions under the Australia Corporations Law", Trends & Isssues in Crime & Criminal Justice (No. 136), Aust. Institute of Criminology, November 1999.
[18]*Ibid.*
[19]Commonwealth of Australia – Corporate Law Economic Reform Program, "Directors' Duties and Corporate Governance: Facilitiating Innovation and protecting investors", Paper No. 3, 1997, ISBN 0 642 26117 2, page 9-10
[20]*Schedule 1, Item 6, s. 1317P*

> "As a matter of principle, criminal sanctions on directors should only apply in exceptional circumstances and not from a failure to exercise sufficient care and diligence"[21].

While acknowledging that CLERP resulted in a further roll-back of corporation specific criminal offences, a puzzling aspect of the CLERP reforms was the retention of any specific criminal provisions relating to directors duties. It is unclear why recommendations made to the Standing Committee of Attorneys General by its Model Code Officers Committee were seemingly ignored. Specifically, after noting that:

> "...the Corporations Law was prepared under great pressure and the relationship between the Corporations Law offences and the Crimes Act offences is not well worked out."[22]

the Model Code Officers Committee recommended in its final report:

> "Fraud involving corporations should be prosecuted under normal criminal law. The *Corporations Law* should not include a separate fraud offence"[23]

On this view, at the very least the specific provisions concerning the dishonest use of information or position to gain an advantage or to subject the corporation to a detriment ought not have been retained (either in amended form or otherwise).

Outside of government, the *CLERP* process was subject to academic criticism for the lack of attention it paid to the overlap with the existing criminal law:

> "The latest version of the *Corporations Law* offences have come about through the Corporate Law Economic Reform (CLERP) process. But, as appears to have been the history over the last 100 years, such changes are being made without detailed consideration of the civil regulation of companies to the existing provisions Crimes Acts. As an example of this, the 1997 CLERP 3 paper, in outlining the liability of directors, discussed their liability under *Corporations Law* and then concluded:
>
> > *'Legislation other than the Corporations Law may also impose duties on directors. For example, environmental control legislation in a number of States and Territories places obligations on directors as well as companies'*
>
> It is of concern that such a statement suggests that the peak corporate reform committee did not examine the relevant provisions of the Crimes Acts. Despite this, the Crimes Act provisions remain powerful and flexible weapons in enforcing corporate honesty, and it is timely to review their scope and operation"[24]

The learned author of the article referenced above pointed out that at around the time the CLERP reforms took effect, the criminal law outside of Corporations Law was a powerful tool. Not only were offences of general application apt to prosecute directors, such as larceny, obtaining by deception, fraudulent conversion and making false instruments, but there were a series of offences in State and Territory Laws that were specific to officers of a body corporate. Since then, it has also been accepted that the elements of the offence in 184(2)(a) concerning improper use of information are indistinguishable from the offence of fraud at common law[25], and it has been made clear that test for

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[21]Commonwealth of Australia – Corporate Law Economic Reform Program, "Directors' Duties and Corporate Governance: Facilitiating Innovation and protecting investors", Paper No. 3, 1997, ISBN 0 642 26117 2, page 50.
[22]Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, "Model Criminal Code Chapter 3 Report – Theft, Fraud, Bribery and Related Offences", December 1995, ISBN 0 642 208 48 4
[23]*Ibid.*
[24]Steel, A., "From Hard Labour to Spies v. The Queen: Prosecuting Corporate Officers under the Crimes Act", (2001) 75 Australian Law Journal 479.
[25]*Howarth v. ASIC* [2008] AATA 278

dishonesty used in section 184 is no different to that ordinarily applied in criminal cases[26].

Consistent with the above criticisms and indeed the acknowledgement in the Senate Reform Report over 12 years ago concerning the coverage of the criminal law, the trend in corporations law clearly is an increased emphasis on civil penalties as a tool for enforcement. Post the *CLERP* Act, the civil directors' duties have been located in sections 180-183 of the *Corporations Act* and the criminal duties at section 184 thereof. In the first four years of the operation of *CLERP,* ASIC issued 25 Civil Penalty applications and concluded 19 of them, and had been unsuccessful in only one[27]. Based on ASIC annual reports, in the last 10 years it completed 806 Civil Proceedings versus 490 criminal proceedings[28]. A review of Austlii reported sentencing judgements and appeals over that period indicated that only 16 cases so reported involved a sentence for a breach of the criminal directors' duties in section 184 of the *Corporations Act*. It was also evident that charges were routinely pursued under other criminal laws for the same course of conduct alleged in the laid pursuant to the section 184 duties – cases were effectively brought in the alternative and sometimes jointly prosecuted by both State and Commonwealth Directors of Public Prosecutions. Meanwhile many of the corporate misdeeds which in recent years have generated a great deal of public interest and condemnation have resulted in civil penalty proceedings only, such as *Vizard*, *Water Wheel, One.Tel, James Hardie, Citigroup* and *AWB.*

It is in this context that we view the proposed section 288A as a retrograde step. There is no trigger for further regulation. The appropriate response if there were such a trigger now evident would be to do what already has been done – introduce a civil penalty regime that enables the regulator to punish and deter and that provides for losses to be compensated; and let the criminal law continue to do its job. On the issue of general duties, it is the regulation of corporations, not registered organisations, that is out of step.

Finally, it would be remiss to fail to point out that what is now proposed is certainly not new. In 2001, the then government introduced the *Workplace Relations (Registered Organisations) Bill*. It contained at proposed sections 272-275 the civil obligations that now appear at sections 285-288 of the *Fair Work (Registered Organisations) Act*. However, it also went on at proposed section 277 to include criminal duties in almost identical form to those now proposed:

> "**277 Good faith, use of position and use of information--criminal offences**
>
> *Good faith--officers*
>
> (1) An officer of an organisation or a branch commits an offence if he or she intentionally or recklessly fails to exercise his or her powers and discharge his or her duties:

[26] *S A J v. The Queen* [2012] VSCA 243
[27] Comino *Op.Cit*
[28] Based on a review of the ASIC annual reports from 2001/2 to 2011/12

(a) in good faith in what he or she believes to be in the best interests of the organisation; or

(b) for a proper purpose;

and he or she does so dishonestly.

Maximum penalty: 200 penalty units.

Use of position--officers and employees

(2) An officer or employee of an organisation or a branch commits an offence if he or she uses his or her position:

(a) dishonestly with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the organisation or to another person; or

(b) reckless as to whether the use may result in him or her or someone else directly or indirectly gaining an advantage, or in causing detriment to the organisation or to another person.

Maximum penalty: 200 penalty units.

Use of information--officers and employees

(3) A person who obtains information because he or she is, or has been, an officer or employee of an organisation or a branch commits an offence if he or she uses the information:

(a) dishonestly with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the organisation or to another person; or

(b) reckless as to whether the use may result in himself or herself or someone else directly or indirectly gaining an advantage, or in causing detriment to the organisation or to another person.

Maximum penalty: 200 penalty units.

(4) It is a defence to an offence against this section if another provision of this Act or the Workplace Relations Act required the officer or employee to do the act in question."

Section 277 was removed after amendments proposed by the opposition were agreed to by the government. In so accepting those amendments, the then Minister (Mr Abbott) said:

> **"**As has been said on previous occasions in the course of debating the Workplace Relations (Registered Organisations) Bill 2001, the government's intention all along was not to introduce a bill on contentious matters but to introduce a bill which is, as far as is humanly possible, an expression of the consensus of all the people with an interest in the regulation of registered organisations. For that reason, the government has been prepared at every step in this process to consider and, as far as is humanly possible, to take into account all the various concerns that have been put to us by trade unions and others and, most recently, by members opposite".[29]

Ultimately the Bill did not pass, owing to an intervening election. The *Workplace Relations (Registration and Accountability of Organisations) Bill* 2002 relevantly reproduced the *Workplace Relations (Registered Organisations) Bill* 2001 as amended by the previous Parliament. In his second reading speech in support of the 2002 Bill, Minister Abbott said:

> *"*This legislation is perhaps somewhat unusual in that it is a sign that, notwithstanding the differences between the parties, some of which I have just noted, we do have many things in common. I guess two of those great values that we have in common are our commitment to democracy and our commitment to accountability in the great institutions of Australian society. This bill is designed to enshrine those great

[29]Hansard House of Reps 27/08/2001 p 30318

values of democracy and accountability in the registered organisations which comprise our workplace relations system. There is quite a long history to these particular bills. They originated well back in the life of the previous parliament as a discussion paper put out by my distinguished predecessor, Peter Reith. They then became an exposure draft bill. As a result of a constant process of consultation and dialogue between employer organisations, union organisations and members opposite some of the more controversial parts were taken out of the exposure draft of the bill. Eventually a bill did go through the lower house of the parliament just prior to the last election with consent of the opposition, and the bill would have gone through the Senate I am sure but the election intervened and so now we are doing the same thing again. I have to say that there have been further amendments to the bill post-election in part to take account of constructive suggestions made by the shadow minister for workplace relations, the member for Barton, and in part to restore some of the earlier constructive suggestions of the former shadow minister, the member for Brisbane.

This is a genuine exercise in finding common ground. This is a genuine exercise in trying to find those things which unite us rather than dwelling on the things that divide us, which is perhaps an inevitable part of the political process—but we should not be allowed to obscure those fundamental things that we have in common. Given all the changes which have taken place over the last few years in workplace relations, it is appropriate that the technical rules governing registered organisations should be updated. The last significant amendments to those rules took place under the Hawke government in 1988 and, indeed, some of the regulatory provisions have been unchanged for many decades.

Essentially this bill proposes to modernise the financial and reporting requirements and improve the disclosure of financial information to the members of registered organisations and to improve the democratic control of those organisations through ensuring the better integrity of industrial elections. Generally speaking, what the government has sought to do with these bills is to ensure that the same standards of conduct and behaviour which the law imposes on company directors and on corporations should be imposed and expected of registered organisations and the officers of those organisations*"*[30].

The passage of the *Workplace Relations (Registration and Accountability of Organisations) Bill* 2002 led to Schedule 1B of the *Workplace Relations Act,* which was essentially unchanged by the *WorkChoices* or *Fair Work* amendments since, save of those most recent amendments effected by the *Fair Work Amendment (Registered Organisations) Act* 2012. We see no good reason to disrupt the sensible consensus position.

Items 4-6

These Items propose are consequential amendments that would be necessary were the proposed amendment to section 268 and the proposed addition of 288A proceeded with. We make no further comment on them.

Item 7

This Item would increase the level of civil penalty payable by officers of a registered organisation from 60 penalty units (increased from 20 by the *Fair Work Amendment (Registered Organisations) Act* 2012) to 200 penalty units ($22,000). Section 306(1), which the Item proposes to amend, sets the level of penalties for all contraventions other than those associated with non-compliance with a requirement to assist an investigation issued under section 335A(2).

[30]Hansard House of reps 17/9/2002 p6497-8.

By using the expression "officer" to differentiate the penalty levels, the scope of the new increased penalty level extends to any member of the organisation whose role it is to vote in a collective body that determines the policy of the organisation or branch[31]. This extends beyond the full time office bearers within a union and would include rank and file members who are delegates to a National Conference. Whilst most of the specific civil penalties would in most practical situations be applicable only to the organisation itself or its office bearers, an anomaly is section 276. Section 276 creates a civil penalty in situations where a rank and file member, suspecting that an officer of an organisation is (for example) using their position for an improper purpose or private gain, obtains an order from the Fair Work Commission to inspect the union's financial records. Section 276 prevents the member from telling anybody else about any impropriety they might discover, unless that person is a member of the staff of the Fair Work Commission. Far from increasing the penalty already applicable in cases where such members would happen to also be defined as "officers", the penalty should be kept at modest level so as to not unduly penalise "officers" who are compelled by a sense of moral outrage to disclose such matters more broadly.

Aside from that, we question how the proposed amendments are in harmony with the objective cited in the Second Reading speech in support of the Bill of:

> "...aligning the rules for registered organisations more closely with the laws that exist for companies under the Corporations Act 2001"[32]

As alluded to above, most of the civil penalty provisions that section 306(1) deal with are those that apply directly to the organisation or relevant reporting unit Aside from the officer's duty related provisions and section 267 to which we have already referred, the remainder of the civil penalties that apply directly to officers can for the most part be divided in two categories: A failure to produce or lodge a document at all (sections 52(1), 104(1), 192(1)); or making a false or misleading statement in such a document or elsewhere (sections 52(3), 104(3), 175, 176, 192(3), 233(3), 237(3)). The former may be described as administrative requirements and clearly of a lesser order than the latter. Under the Act as it stands and is proposed to be amended, contraventions of both categories would be treated the same.

However, under the *Corporations Act*, the Civil Penalty Regime primarily supports injunctive and compensatory orders but subjects pecuniary penalty orders to a threshold test that contravention concerned:

> (i) materially prejudices the interests of the corporation or scheme, or its members; or
> (ii) materially prejudices the corporation's ability to pay its creditors; or
> (iii) is serious.[33]

No such test or other differentiator is present in the *Fair Work (Registered Organisations) Act* nor is one now proposed.

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[31]See definitions of "collective body", "officer" and "office" at sections 6 and 9 of the *Fair Work (Registered Organisations) Act.*

[32]Senate Hansard 27/11/02 p. 9861

[33]Section 1317G

In the absence of any evidence that the revised penalty levels so recently introduced are or may be ineffective, we do not support this Item.

Item 8

This Item proposes to amend section 306(1A)(b), which was inserted by the *Fair Work Amendment (Registered Organisations) Act* 2012. The purpose of section 306(1A) is to set the level of penalty for a failure to comply with an order to cooperate (by the provision of information or documents or by attendance attendance) with an investigation, being and order under section 335A. The proposed amendment would increase the penalty set, where the notice was directed to an officer. To our knowledge, no orders under section 335A have as yet been issued let alone sought to be enforced. In the absence of any such experience that these orders are or may not be being complied with, we do not support a further amendment.

Furthermore, the interaction between section 335 and 335A is such that it is highly unlikely that any notices issued under section 335A would be directed to officers. Section 335A orders are a secondary investigatory tool only after section 335 orders have been exhausted. Section 335 orders may be directed to auditors, former auditors, employees, former employees and present and former "designated officers". Designated officers are the officers that collectively have the responsibility for ensuring that the provisions of the Act that are capable of being investigated by the use of those powers are complied with[34].

Item 9

This Item proposes to insert a new section 358A of the Act. The purpose of the provisions is to create statutory offences which mimic the existing law on contempt. Specifically:

- Subsection (1) provides for an offence by an organisation for a failure to comply with court orders. In the absence of any fault element specified in the sub-section, intention must be proved.[35] It therefore covers the same field as contempt by wilful disobedience[36]: neither the common law nor the proposed offence require a specific intention to not comply with the order, as distinct from the intentional commission of the physical act of non-compliance.
- Subsection (2) consists of an offence by the involvement of an officer or an employee in the organisation's non-compliance with the order. As the proposed section is to appear in Part 6 of Chapter 11, none of the provisions in the Act which define "involvement" will apply. It is assumed that the intention is to rely on the general complicity provisions in Division 11 of Part 2.4 of the *Criminal Code* and otherwise well known to the Common Law - An intention to aid, abet, counsel or

[34] *Fair Work (Registered Organisations) Act* 2009 s. 243.
[35] *Criminal Code*, Chapter 2, Divsion 5, s. 5.6(1)
[36] *AMIEU v Mudginberri Station Pty Ltd* [1986] HCA 46, *Anderson v Hassett* [2007] NSWSC 1310.

procure would be required and likewise the contempt would be criminal. That being the case, proposed subsection (2) covers the same field as common law contempt and is subsumed within contempt by third party frustration[37].

- Subsection (3) , like subsection (1) provides for a person (an officer or employee) to be convicted of an offence where orders directed toward them are intentionally not complied with. It is similarly already provided for by common law contempt.

The most that can be said of the proposed amendments to differentiate them from the current position is that, at least in so far as the Federal Court is concerned, the proposed amendments place a cap or limit on penalty where none currently exists[38].

Whilst the Attorneys-General may bring criminal contempt proceedings at any time, industrial parties (including regulators) have in recent years been more active in prosecuting contempts as against unions. Against this background it is unclear why additional regulatory tools are required.

Finally, we point out the reasonably self-evident point that these provisions have nothing at all to do with transparency. One does not need to be an expert in industrial relations to realise that in the overwhelming majority of cases when industrial relations laws are breached, unions bring proceedings not against employer associations but against employers; and employers bring proceedings against unions. Thus whilst this amendment is expressed to apply to "organisations" and to officers and employees thereof, for all practical purposes it will apply against unions only. That discloses an assumption and a value judgement that underlies the Bill: Unions will break the law, and employers will not; and an employer or manager who wilfully fails to comply with an order to rectify an underpayment, or an order to reinstate an employee unlawfully dismissed, deserves less regulatory attention than a union or official thereof that disobeys an order to return to work during an industrial dispute.

For the foregoing reasons, we do not support the amendment.

Conclusion

We trust our submission has assisted the Committee in giving some context to our opposition of the Bill. We would of course welcome the opportunity to further discuss the Bill at the hearing stage should the Committee feel this may be of some further benefit.

[37] *Re Ccom Pty Ltd v. Jeiking Pty Ltd & Ors* [1992] FCA 325.
[38] *Federal Court of Australia Act* 1976, s. 31(1), *High Court Rules* 2004 r. 11.04.