



# **Australian Trade Unions: An Alternate Regulatory Approach**

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## Introduction

In recent months, the lax regulation of Australian trade unions has been prominent in the public discourse. The investigation into the internal operations of the Health Services Union has highlighted the lenient regulations surrounding internal union management. In a political environment where transparency and accountability is mandated by law for organisations, both public and private, unions and employer associations are conspicuous in their absence.

Organisations administered under the *Fair Work (Registered Organisations) Act 2009 (FW(RO) Act)*, unions and employer associations, are subject to loosely regulated, leniently interpreted internal management and financial reporting obligations. The penalties for a breach of the Act are minimal and often not pursued. Many unions have not yet lodged their financial returns for the year ending 30 June 2011 and they are unlikely to face legal ramifications.

The current regulatory scheme is deficient. Unions should be subject to the same obligations as other organisations under the *Corporations Act 2001*. Regulation under the *Corporations Act* would involve stricter internal governance and financial requirements. The result would be greater transparency and accountability within the union movement. This is of particular importance given the large asset portfolios and hefty sums of money retained by many of the larger unions.

This report will argue that unions can and should be regulated under the *Corporations Act 2001* rather than the *Fair Work (Registered Organisations) Act 2009*. The two legislative frameworks will be compared and contrasted to demonstrate the suitability for integrating trade unions into corporate regulation.

## Part I: Comparing the *Fair Work (Registered Organisations) Act 2009* and the *Corporations Act 2001*

### Registration requirements

Under the *FW(RO) Act* unions wishing to be registered must prove that:

- a. They are genuine associations with the aim of furthering their members' interests,
- b. They are free from improper influence by an employer or employer association, and,
- c. A majority of members must have passed a resolution in favour of registration.<sup>1</sup>

The *Corporations Act*, on the other hand, has no such requirements. Persons seeking to register a company must merely provide the necessary information as to its composition. This includes the company's type, name, member information, director and secretary information, and the proposed registered office and principal place of business.<sup>2</sup>

On registration under the *FW(RO) Act*, the association becomes an organisation, defined by the Act as a body corporate. This body corporate has perpetual succession, the "power to purchase, take on lease, hold, sell, lease, mortgage, exchange and otherwise own, possess and deal with, any real or personal property", the ability to sue or be sued in its own name, as well as a common seal.<sup>3</sup> Under the *Corporations Act*, upon registration an organisation becomes a body corporate.<sup>4</sup> This body corporate can have a variety of forms, including public or proprietary, each one with a different structure, and with different obligations and requirements under the *Corporations Act*.

A company under the *Corporations Act* also has the explicit legal capacity of an individual, and its members' liability may be restricted.<sup>5</sup>

### Internal governance structures

The *FW(RO) Act* sets out broadly applicable guidelines as to the rules for the internal governance of unions. It requires that a union's internal rules specify the powers and duties of office holders, the manner in which they may be removed, and the process for calling a meeting of members. It does, however, leave the exact specifications for the union to decide for itself.<sup>6</sup> The *FW(RO) Act* also leaves it to the union to decide the manner in which it may alter its internal governance rules.

In contrast, the *Corporations Act* lays out strict rules for the internal management of companies. It states that a company must be governed either by a constitution or by the replaceable rules found in the Act itself, or by a combination of both, that sets out the rules for internal governance.<sup>7</sup> The replaceable rules set out the procedures for the removal of directors and officers of the company by

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<sup>1</sup> *Fair Work (Registered Organisations) Act 2009* (Cth). s.19

<sup>2</sup> *Corporations Act 2001* (Cth). S.117(2)

<sup>3</sup> *Fair Work (Registered Organisations) Act 2009* (Cth). S.27

<sup>4</sup> *Corporations Act 2001* (Cth). S.119

<sup>5</sup> *Corporations Act 2001* (Cth). S.124

<sup>6</sup> *FW(RO) Act 2009* (Cth). S.141

<sup>7</sup> *Corporations Act 2001* (Cth). S.134

members, the exact process that must occur for a meeting of the members to be called and so on. The constitution of a company has the effect of a contract between ‘the company, each director and each member’.<sup>8</sup> It also states that a company may only modify or repeal its constitution by a special resolution, passed by at least 75 per cent of members.<sup>9</sup>

Both Acts provide guidelines for the election of officers of the union or company however again they differ. The *FW(RO) Act* merely provides that the process for the election be set out in the union’s internal governance rules and that it must be conducted by the Australian Electoral Commission.<sup>10</sup> The *Corporations Act* sets out in more detail the process for electing company directors, stating that they may be elected by an ordinary resolution – more than 50 per cent – of the company in general meeting, or that they may be appointed by the other directors.<sup>11</sup> Both of these processes are replaceable rules and may be modified by the company’s constitution.

### Financial reporting guidelines

The *FW(RO) Act* and the *Corporations Act* set out quite different financial reporting and disclosure obligations.

The *FW(RO) Act* provides that ‘as soon as practicable’ after the end of the financial year a union must prepare and lodge a general purpose financial report containing financial statements. The report must be made up of a profit and loss statement, a balance sheet, and a statement of cash flow, as well as notes to the financial statement.<sup>12</sup>

The *Corporations Act* contains lengthy and detailed financial reporting obligations for companies. A company must prepare financial reports, either annually or biannually, excluding small proprietary companies.<sup>13</sup> The annual reports must be composed of the company’s financial statements for the year, notes to the financial statements, as well as a director’s declaration. This declaration will state that the company will be able to pay its debts as and when they come due; that the company has complied with the international financial reporting standards of the International Accounting Standards Board; and that the financial statement and notes are in accordance with the *Corporations Act*. This statement must have been made in accordance with a resolution of the company’s directors.<sup>14</sup>

Additionally, the *Corporations Act* states that a company must also lodge an annual director’s report, except in the case of a company limited by guarantee or a small proprietary company. This report must include a review of the company’s operations for the year, the results of its operations, and any significant changes in the company’s state of affairs during the year. It must state the company’s principal activities for the year and any changes that occurred to them, as well as any changes that

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<sup>8</sup> Ibid. s.140

<sup>9</sup> Ibid. s.136

<sup>10</sup> *FW(RO) Act 2009* (Cth). S.182

<sup>11</sup> *Corporations Act 2001* (Cth). S.201

<sup>12</sup> *FW(RO) Act 2009* (Cth). S.253

<sup>13</sup> *Corporations Act 2001* (Cth). S.285

<sup>14</sup> Ibid. s.295

may affect the company's operations in future financial years. The director's report must also contain detailed information on the company's dividend and share activity throughout the financial year.<sup>15</sup>

The two Acts have fairly similar provisions in relation to the auditing of accounts, however again the *Corporations Act 2001* imposes more stringent obligations than the *FW(RO) Act*.

Both Acts state that the company or union's financial report must be audited. The *FW(RO) Act* provides that the auditor's report must assert whether there is any defect or irregularity in the financial report prepared by the union and whether there is any deficiency or shortcoming in the report. The Act also provides that if the auditor suspects on reasonable grounds that there has been a breach of the reporting guidelines that cannot be adequately dealt with by the union, then that must be reported to Fair Work Australia.<sup>16</sup>

The *Corporations Act* provides that the auditor's report must contain a statement as to whether the financial report is in compliance with the *Corporations Act*. The report must also state whether the auditor has been given all the information and assistance necessary to the audit, whether the company has kept adequate financial records to enable the audit and whether the company has kept all other records and registers that are required by the Act.<sup>17</sup> The *Corporations Act* also sets out the auditor's power to obtain information, stating that the auditor must be allowed access to all necessary information and that they are to receive all the assistance necessary to the compilation of the auditor's report.<sup>18</sup> The auditor's report must also describe any defect or irregularity, deficiency or shortcoming of the company's financial report.<sup>19</sup>

Both Acts require financial records and company registers to be kept for a period of seven years.<sup>20</sup>

The *FW(RO) Act* provides that a union must lodge with Fair Work Australia annually a declaration by a prescribed officer that the register of members has been kept in accordance with the Act, a copy of required records, and notification of any change made to the records.<sup>21</sup>

Furthermore, the Act requires that, within 90 days of the end of the financial year, the organisation must lodge with Fair Work Australia the particulars of each loan, grant, or donation exceeding \$1000 made by the organisation. This must include its purpose, the amount and, excluding certain cases, the name and address of the person to whom it was made.<sup>22</sup> Finally, the Act requires that within 14 days after the organisation's general meeting, the financial reports tabled at the meeting and a certificate stating that the copies are those of the reports provided at the meeting are lodged with Fair Work Australia.<sup>23</sup>

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<sup>15</sup> Ibid. s.299

<sup>16</sup> *FW(RO) Act 2009* (Cth). S.256.

<sup>17</sup> *Corporations Act 2001* (Cth). S.307

<sup>18</sup> Ibid. s.310

<sup>19</sup> Ibid. s.307

<sup>20</sup> *FW(RO) Act 2009* (Cth). S.231 and *Corporations Act 2001* (Cth). S.286

<sup>21</sup> *FW(RO) Act 2009* (Cth). S.233

<sup>22</sup> Ibid. s.237

<sup>23</sup> Ibid. s.268

The *FW(RO) Act* requires the organisation to provide members with a full report consisting of a copy of the auditor's report, a copy of the general purpose financial report and a copy of the operating report, or a copy of the concise financial report.<sup>24</sup> These copies must be provided within five months of the end of the financial year or at a general meeting of the members if the meeting occurs within six months of the end of the financial year.<sup>25</sup>

The *Corporations Act* requires that a company lodge all information put to the members in general meeting with ASIC at least 14 days before the notice convening the meeting is given.<sup>26</sup> The company must also lodge their annual financial report and the concise financial report given to members with ASIC within three months of the end of the financial year.<sup>27</sup> Lodgement of half-yearly reports must occur within 75 days of the end of the half year.<sup>28</sup> ASIC may also direct a company to lodge reports at another time, within at least 14 days after the direction is given.<sup>29</sup> Finally, if ASIC believes a company's financial report does not comply with any of the financial reporting regulations, it may refer the report to the Financial Reporting Panel which will consider and report upon the suspected contravention.<sup>30</sup>

The *Corporations Act* makes similar provisions to the *FW(RO) Act* for the dissemination of financial reports in that a company must provide to members a copy of the financial report, the director's report, the auditor's report and the concise financial report 21 days before the next Annual General Meeting or within four months of the end of the financial year, whichever arrives first.<sup>31</sup> However, the *Corporations Act* also provides that members may elect to receive a hard copy, an electronic copy or no copy at all.<sup>32</sup>

### **Comparing the functions and powers of Fair Work Australia (FWA) and the Australian Securities and Investments Commission (ASIC)**

Fair Work Australia was established as the successor to the Australian Industrial Relations Commission (AIRC) and the Australian Industrial Registrar. The Fair Work Australia body encompasses a workplace relations tribunal as well as a regulatory body under the General Manager that administers the obligations imposed on unions under the *FW(RO) Act*.

FWA inspectors have the power to enter any prescribed premises and inspect work, documents, machinery or anything else on the premises and to conduct interviews with employees on the premises in connection with the performance of a function conferred upon the FWA by the *FW(RO) Act*.<sup>33</sup>

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<sup>24</sup> Ibid. s.265

<sup>25</sup> Ibid. s.266

<sup>26</sup> *Corporations Act 2001* (Cth). S.218

<sup>27</sup> Ibid. s.319

<sup>28</sup> Ibid. s.320

<sup>29</sup> Ibid. s.321

<sup>30</sup> Ibid. s.323E

<sup>31</sup> Ibid. s.314

<sup>32</sup> Ibid. s.316

<sup>33</sup> *FW(RO) Act 2009* (Cth). S.337F

FWA may grant orders on application of the FWA's General Manager, the relevant Minister, or the organisation. Appeals can then be heard in the Federal Court's Fair Work Division. It is the General Manager of the FWA who exercises most of the body's regulatory powers.

The General Manager of FWA can undertake an inquiry or investigation if there are reasonable grounds to believe that the financial reporting obligations contained in the Act or guidelines have been contravened.<sup>34</sup> The General Manager may also initiate an investigation into matters arising from an auditor's report or in response to an application by union members.<sup>35</sup> In addition, the General Manager must conduct investigations into a matter referred by FWA.<sup>36</sup>

The General Manager also has the power to require a person to produce evidence or to attend before the General Manager in relation to an investigation.<sup>37</sup>

FWA may grant orders allowing the inspection of the financial records of a registered organisation in good faith, where there are reasonable grounds to suspect a breach of the *FW(RO) Act*.<sup>38</sup> FWA may make any orders to which the parties of a specified proceeding consent; these orders may be provisional or interim orders, or ancillary orders limiting the use of financial information obtained during an inspection or limiting the right of the person making the inspection to make copies of the records.<sup>39</sup>

The Australian Securities and Investments Commission was established by the *Australian Securities and Investments Commission Act 2001*. It functions to monitor and promote market integrity and consumer protection in the Australian market system.

ASIC has greater discretion than the FWA and may conduct any investigations that it believes are expedient to the administration of the *Corporations Act* if it has reason to suspect a contravention of the legislation.<sup>40</sup> In the conduct of an investigation ASIC has the power to require a person to give ASIC the relevant information or to appear in front of ASIC for cross-examination if ASIC reasonably believes that the person can give information relevant to the investigation.<sup>41</sup> ASIC may also require the production of books relating to the affairs of a body corporate or a registered scheme.<sup>42</sup>

In holding hearings ASIC may issue a summons to require a person to appear before it and may take an oath or affirmation from that person in relation to the evidence they will give. The presiding member may also require a person to answer a question put to them or to produce a specified document.<sup>43</sup>

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<sup>34</sup> *FW(RO) Act 2009* (Cth). Chapter 11 – Part 4

<sup>35</sup> *Ibid.* s.332, 333

<sup>36</sup> *Ibid.* s.334

<sup>37</sup> *Ibid.* s.335

<sup>38</sup> *Ibid.* s.273

<sup>39</sup> *Ibid.* ss.337H, 275

<sup>40</sup> *Australian Securities and Investments Commission Act 2001* (Cth). S.13

<sup>41</sup> *Ibid.* s.19

<sup>42</sup> *Ibid.* s.30

<sup>43</sup> *Ibid.* s.58

ASIC also has the power to inspect the financial records of a company in relation to an investigation or hearing and can require a company's auditor to produce specific information or specified records.<sup>44</sup> Moreover, ASIC has the power to apply for a warrant to seize specified books or accounts.<sup>45</sup>

ASIC may apply to the Court for orders on the application of a person or company who has suffered, or is likely to suffer, loss or damage through the conduct of another person engaging in a breach of the *Corporations Act*, or on its own volition on behalf of such a person.<sup>46</sup> Appeals can be heard by the Federal Court.<sup>47</sup>

ASIC may apply to the Court for orders such as injunctions, non-punitive orders including community services orders and disclosure orders, orders to disqualify a person from managing a corporation, orders varying a contract or declaring it, or part of it, void, and orders for the payment of damages.<sup>48</sup>

### **Penalties for breaches**

Breaches of the *FW(RO) Act* can result in civil penalties instituted by the Federal Court on application from FWA. The maximum penalty for a breach by a union, or a branch of a union, is \$11,000.<sup>49</sup> The maximum penalty available for a breach by person of a majority of the Act's provisions is \$2,200.<sup>50</sup> Damages may be ordered for contraventions of a limited number of parts of the Act.<sup>51</sup>

Penalties for a breach of the *Corporations Act* include pecuniary penalties, the imposition or enforcement of fines, and the payment of damages. A breach of the Act by a director can attract fines of up to \$200,000 or a five year prison sentence.<sup>52</sup>

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<sup>44</sup> Ibid. ss.29, 30A

<sup>45</sup> Ibid. s.35

<sup>46</sup> Ibid. s.12GM

<sup>47</sup> Ibid. s.12GJ

<sup>48</sup> Ibid. Subdivision G

<sup>49</sup> *Fair Work (Registered Organisations) Act 2009* (cth). Ss.190, 199, 305

<sup>50</sup> Ibid. ss.51, 72, 103, 105, 191, 202, 258, 260, 337

<sup>51</sup> Ibid. s.307

<sup>52</sup> *Corporations Act 2001* (Cth). S.588G

## Part II: Apparent Deficiencies in the Current Framework of Union Regulation

The Fair Work system has been criticised in recent months. The conduct of the recent investigation into allegations of corruption in the Health Services Union Victoria Number 1 and National branches has brought the operation of Fair Work Australia and the *FW(RO) Act* into serious question.

### Inadequate financial regulation

The investigation of the Health Services Union points to deficiencies and limitations in the rules governing the financial regulation of unions. The union has been the subject of allegations of corrupt financial practices, and its financial reporting record has been found to be less than perfect. Also, it appears that other unions may not be complying with all their financial reporting obligations pursuant to the regulations.

The financial reporting provisions of the *FW(RO) Act* appear incapable of ensuring prompt and accurate lodgement of union financial records. The legislative phrasing ‘as soon as practicable after the end of the financial year’ allows a union the flexibility to lodge financial documents at a time convenient for them.<sup>53</sup> This has the capacity to compromise obligations of accountability and transparency to members. It also points to the concern regarding the prevalence of late and/or incomplete lodgement of financial records by several unions, including the embattled Health Services Union.

FWA has issued guidelines about the timelines for lodgement, but its ability to compel compliance is questionable. Whilst the *FW(RO) Act* makes provision for the imposition of civil penalties for the late lodgement of financial reports, it is rarely the case that they are actually pursued. The lodgement and processing of financial reports is continually below acceptable standards. That only 54 per cent of documents lodged with FWA in 2010-11 were dealt with within the recommended 28-day period points to difficulties in understanding legislative obligations as well as less than optimum administration by FWA.<sup>54</sup> It seems that reports are frequently lodged in an incomplete manner that requires FWA to request additional documentation from the unions in order to finalise the reports for processing.

This difficulty in adjusting to the reporting requirements is puzzling as they are not particularly onerous. An organisation registered under the *FW(RO) Act* is merely required to provide a general purpose financial report. Even when this report is lodged incomplete the organisation is not subject to penalties, but is merely required to provide the missing information. This is in stark contrast to the stringent reporting and disclosure obligations imposed on companies by the *Corporations Act 2001*. Nevertheless, despite the greater number of documents required and more stringent standards applied, 95 per cent of company data for 2010-2011 was lodged on time.<sup>55</sup>

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<sup>53</sup> *FW(RO) Act 2009* (Cth). S.253

<sup>54</sup> Fair Work Australia, 2011. *Annual Report of Fair Work Australia 1 July 2010-30 June 2011*. [online] Available at: [http://www.fwa.gov.au/documents/annual\\_reports/ar2011/FWA\\_annual\\_report\\_2010-11.pdf](http://www.fwa.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf). P.84

<sup>55</sup> Australian Securities and Investments Commission, 2011. *Annual Report 2010-2011*. [online] Available at: [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/annual-report-2010-11.pdf/\\$file/annual-report-2010-11.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/annual-report-2010-11.pdf/$file/annual-report-2010-11.pdf).

The lenient rules of the *FW(RO) Act* regarding the financial regulation of unions suggests a misapprehension of the realities of union financial activity. In the past there may have been a tendency to regard unions as benevolent institutions devoted only to their members' best interests. This view, if held today, would misconstrue their modern structure and role. Unions are substantial organisations, many with hefty asset portfolios that often encompass property ownership, investment activity and a large staff.

For example, in 2010 the CFMEU's Construction and General Branch Victorian Division held net assets worth \$42 million, including \$4.5 million worth of investment properties and \$25 million worth of property, plant and equipment. Additionally, the branch earned \$7.3 million from matured investments. The branch employed 89 people.<sup>56</sup>

Not only do Australian trade unions command large asset portfolios, they also earn significant annual revenue that is, in some cases, larger than that of corporations. For instance, in 2011 the Victorian Branch of the Australian Nursing Federation earned \$6.047 million in net revenue whilst holding \$21.768 million in net assets. Furthermore, the ANF employed 93 full time employees in 2011, and a further 19 part time employees.<sup>57</sup>

A further example is the United Voice New South Wales Division, which reported \$24.5 million in net assets for the year ended 30 June 2011. United Voice New South Wales employed 95 people whilst receiving \$9.8 million in member contributions in the same period.<sup>58</sup>

These statistics show that many unions have large asset portfolios and revenue streams. If these larger unions were classed as proprietary companies they would be considered large corporations: they have both consolidated assets worth more than \$12.5 million and they employ more than 50 people. In consequence they would be subject to more stringent reporting obligations than small proprietary companies.

Finally, the penalties imposed by the *FW(RO) Act* are so minimal as to fail to act as a deterrent. Under the *FW(RO) Act* breaches can draw fines of up to \$3,300 payable by the person who committed the breach. This amount is clearly inadequate as demonstrated by the widespread failure to comply with financial reporting requirements and, more specifically, the alleged contraventions by senior Health Services Union officials. Furthermore, whilst this penalty may exist it rarely appears to have been applied.

In contrast, a contravention of the *Corporations Act* by a director attracts a fine of up to \$200,000 as well as a possible five year prison sentence, a penalty that is large enough to act as a deterrent and

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<sup>56</sup> Construction, Forestry, Mining, and Electrical Union – Construction and General Division Victoria, 2010. *Financial Report for the year ended 31 December 2010*. [online] Available at: <http://www.e-airc.gov.au/files/105nvc/FR20102836CGVICBranch1207201.pdf>. Pp1, 4, 6

<sup>57</sup> Australian Nursing Federation – Victoria, 2011. *Financial Report for year ended 30 June 2011*. [online] Available at: <http://www.e-airc.gov.au/files/145vvc/anf1.pdf>. Pp3, 5, 10

<sup>58</sup> United Voice – New South Wales, 2011. *Financial Report for year ended 30 June 2011*. [online] Available at: <http://www.e-airc.gov.au/files/108vnsw/108VNSWFR20112564.pdf>. Pp1, 8, 10

one that is successfully pursued by the regulator. In 2010-11, ASIC successfully prosecuted 26 criminal and 34 civil proceedings. ASIC also achieved 14 enforceable undertakings and 24 negotiated outcomes in the same year.<sup>59</sup>

### **Poor governance structures**

In addition to the limited financial obligations imposed upon unions, the *FW(RO) Act* fails to adequately regulate the internal governance of unions. In allowing a union to effectively set its own internal rules, with little to no prescribed regulations, the Act fails to impose sufficient rigour of accountability and transparency on those managing an organisation. In turn member participation in the affairs of the union can be readily bypassed or downgraded.

The ramifications of limited accountability are evident both in the alleged contraventions of the Health Services Union as well as the regular disputes about union elections and coverage. Disputes over union elections and coverage rights are frequently litigated in the FWA tribunal and the courts. The notion of protecting one's turf from opposing factions or other unions seems ingrained in Australian trade union ethos. However, such exercises are costly and can divert attention from furthering member interests. The regularity of such contests suggests that the legislative scheme is deficient. An effective regulatory approach would restrict the incidence of contested litigation.

### **Shortcomings in investigation and compliance**

The HSU debacle suggests the shortcomings in the current investigation and compliance scheme. The inability of Fair Work Australia to complete a complex investigation in a timely manner is evident in the HSU case. All the parties involved, including the Government and Fair Work Australia itself, recognise this fact. Not only did the investigation take several years to complete, but despite FWA's referral of the resulting report to the Director of Public Prosecutions, criminal or civil charges have yet to be laid. The protracted nature of FWA's investigation into the internal affairs of the HSU may largely be attributed to the ancillary nature of the body's investigative function and its lack of expertise in the conduct of investigations of this type.

The necessity for the government to apply to have the union placed under administration further exposes the inability of FWA and the legislative regime to effectively regulate the activities of those organisations that are inclined to not play by the rules.

Fair Work Australia's reputation has been damaged. The public does not discern the difference between the well regarded tribunal role and the administrative entity responsible for regulating unions. A consequent loss of confidence in the institution is apparent. This could result in some organisations being inclined to disregard rulings, orders or legislative obligations.

### **The consequences of deficient regulation**

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<sup>59</sup> ASIC, 2011. *Annual Report 2010-2011*. [online]. P75

The deficiencies associated with the regulation of internal union governance are not new. In fact, many of the alleged breaches of the legislation by the HSU actually occurred under the Workplace Relations framework, indicating the ongoing need for a complete review of the frameworks for the effective regulation of union activity.

Australian trade unions traditionally hold a privileged position which has resulted in special and separate laws and regulations. However, the reality is that trade unions represent only 18 per cent of the Australian workforce and 13 per cent of the private sector, yet the regulatory regime treats them as a unique class of organisation.<sup>60</sup> Due to the emergence of large, financially strong, unions through amalgamation, and the level of attention they seek in the public domain, there is no compelling argument for continuing to treat them as different from corporations.

The most serious consequence of the deficiencies and limitations in the Fair Work regime's ability to adequately regulate trade union internal affairs is the lack of protection it affords to union members. Member contributions to their unions can run to the tens of thousands with members of the CPSU – PSU Group contributing \$27.32 million to the union in 2011.<sup>61</sup> In spite of the large financial contributions of members the lax regulations of the *FW(RO) Act* mean they are in no position to influence, or even know, how the union uses their money. This is most clear in the HSU case in which the contributions of 56,000 members of the HSU East Branch were allegedly misused by union officials and spent on activities unrelated to union purposes without members' knowledge.

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<sup>60</sup> Australian Bureau of Statistics, 2012. Trade union membership remains steady. Media release. [online] Available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6310.0Media%20Release1August%202011?opendocument&tabname=Summary&prodno=6310.0&issue=August%202011&num=&view=>.

<sup>61</sup> Community and Public Sector Union – Public Sector Union Group, 2011. Financial Report for year ended 30 June 2011. [online] Available at: <http://www.e-airc.gov.au/files/090vpsu/finreport.pdf>. P.5

### **Part III: The *Corporations Act* and ASIC – A Better Model of Union Regulation**

The deficiencies of the current legislative framework for the regulation of the internal affairs of Australian trade unions clearly necessitate an overhaul of the system. Due to the prevalence of parallel provisions in the *FW(RO) Act* and the *Corporations Act*, as well as the significant financial size of registered organisations the logical next step is to bring their regulation under the *Corporations Act 2001*.

FWA has issued guidelines which apply financial obligations to unions that are almost identical to the financial reporting provisions of the *Corporations Act*. The existence of these provisions again demonstrates the need to, and suitability of, regulating trade union financial governance under the *Corporations Act*. Whilst the guidelines issued by FWA appear to impose stricter reporting guidelines on a union, no proceedings to enforce these guidelines have come to attention.

Under the *Corporations Act* unions would have to adhere to stricter regulations in relation to how and when they lodge their financial documents. There would also be a tightening of the documents they are required to keep, and a greater responsibility for keeping members informed. The provisions regarding financial lodgement under the *Corporations Act* are fairly similar to those imposed under the *FW(RO) Act*, and merely apply stricter controls. These controls would not only create greater transparency and accountability of union financial practices to members, they would allow financial irregularities to be identified earlier by either auditors or by ASIC.

Under the *Corporations Act* there is greater emphasis on the notion of auditor independence as well as the provision of greater powers for auditors than under the *FW(RO) Act*. In entering under the *Corporations Act* unions would be obligated to provide all necessary information and assistance for the completion of the auditor's report, provisions which are not evident under the *FW(RO) Act*.

Furthermore, if a financial irregularity was discovered in a union's records, ASIC has greater discretion to pursue it, as well as a specialised sub-committee, the Financial Reporting Panel, to investigate financial irregularities. The existence of a panel specifically devoted to financial reporting obligations gives ASIC greater experience in this area and also allows it to settle any matters with greater efficiency and expediency that the FWA has shown thus far.

Under the *Corporations Act* unions would be subject to more stringent requirements in relation to financial lodgement, both to ASIC and to the members of the union. The *Corporations Act* requires lodgement with ASIC of all financial documents being provided to members at least 14 days in advance. The annual report and director's report must be lodged with ASIC within three months of the end of the financial year. The *Corporations Act* also requires that members receive a copy of these reports within four months of the end of the financial year.

In subjecting unions to these more stringent controls, the legislative regime would be ensuring greater accountability and transparency of union financial practices. This is particularly important in the context of the ongoing HSU investigation that has exposed the misuse of millions of dollars of members' contributions without their knowledge. The greater obligations imposed on unions under the *Corporations Act* would thus ensure the protection of union members from any financial

malpractice by union officials in the same way that shareholders are protected from the financial mismanagement of the company's directors.

Additionally, modern unions often have the financial capabilities of a large company with hefty asset portfolios and substantial revenue streams. Many union and employer associations meet the criteria of a large proprietary company under the *Corporations Act*. As such, the financial scope of unions is more than sufficient to enable them to be readily integrated into corporate regulation.

Further demonstrating the suitability of the corporate regulation of trade unions are the very similar definitions of a corporation and a body corporate in the two Acts. Under Chapter 2 of the *FW(RO) Act* an organisation is a body corporate that may hold property and may sue, or be sued, in its own name. These provisions imply that the organisation registered under the Act has a separate legal identity from its members, a feature characteristic of companies registered under the *Corporations Act*. Similarly, an organisation registered under the *Corporations Act* becomes a body corporate. Furthermore, s.57A of the *Corporations Act* states that a corporation includes "any body corporate". As such, it is a logical that unions may come under the jurisdiction of corporations' law. Section 116 of the *Corporations Act* states that trade unions cannot be registered under the legislation. This would need to be deleted.

### **Could the *Corporations Act* prove unsuitable as a regulatory model?**

There are a few potential issues of divergence between the two regulatory regimes that would need to be resolved in order to regulate the internal affairs of unions under the *Corporations Act*.

Firstly, the *Corporations Act* is predicated on a competitive marketplace driven by profit-maximising firms. Unions, on the other hand, are, under the current regime, non-competitive with defined coverage rights. Furthermore, they are driven not by profit motives but by their members' best interests. As such, it could be argued that they are unsuited to corporate regulation.

However, a further legislative change could be made to allow the existence of competitive unions. Competitive unionism would operate within the boundaries of shared and common interests required to form an effective organisation. Possible benefits of a more competitive union atmosphere include a better environment for members. If unions have to compete with each other for members they will need to provide the best benefits and demonstrate a full understanding of workers' needs in order to gain members. This would lead to better union practices, better representation and thus greater satisfaction for members.

Additionally, the modern workplace is characterised by greater levels of flexibility in the way people work and union regulation needs to reflect this. Therefore, employees should have the ability to decide which union they wish to belong to without restriction. A key argument for this is the situation of the Health Services Union members who must either remain a member of a union which allegedly misused their money or not be part of a union at all.

Another potential complication in the regulation of unions under the *Corporations Act* is the different command structure of a corporation. The *Corporations Act* mandates a certain general

structure of companies, assigning different duties and roles to a set of defined offices. This is in marked contrast to the *FW(RO) Act* which largely leaves it to the union to decide what command structure would best suit. A mandated structure, at least in the upper levels of union management, may serve to further enhance the accountability and transparency of union governance. In the current situation there is little to no clear definition, in a legislative sense, of the key roles, responsibilities and duties of union officials. In such an environment union leaders can easily declaim responsibility for any mismanagement as there is no official policy on who bears ultimate responsibility.

In addition, the *Corporations Act* retains elements of flexibility through the use of the replaceable rules and the option of a constitution. These allow organisations registered under the *Corporations Act* to tailor their internal governance rules to their organisation. As such, once a union had come under the *Corporations Act* it would be able to select and modify those rules to suit its needs. This flexibility would be counterbalanced by the other provisions of the *Corporations Act*, ensuring the effective regulation of union internal governance whilst retaining a level of flexibility.

A final issue between the two legislative regimes is that of registration. Under the *FW(RO) Act* a union's registration is definitively linked to its coverage rights. In contrast, the *Corporations Act* has very general criteria requirements for the registration of an organisation. As such, the registration requirements of the *Corporations Act* may not be sufficient for the registration of representative bodies such as unions. Nevertheless, if the legislation was adjusted to allow for competitive unions this would help to reduce any legislative complications. Furthermore, those registration criteria unique to a union could be imported into the *Corporations Act* from the *FW(RO) Act* to provide for an appropriate level of criteria.

## Conclusions

The current legislative framework for the regulation of unions' internal affairs is inadequate. The Fair Work regime clearly has shortcomings in regulating the financial management and administration of registered organisations. The HSU case has revealed the limitations and deficiencies of the legislation.

The registration, financial management and reporting, and internal governance of registered organisations should be transferred to the *Corporations Act 2001*. ASIC would become the regulator. The penalties and sanctions for contravention of the legislation would be those applying to corporations.

The transparency and accountability of unions would be improved through stricter controls and a greater amount of scrutiny. The Australian workplace relations system would be enhanced as members gain greater confidence in the management and regulation of their organisations.

## Bibliography

### Annual reports

Australian Securities and Investments Commission, 2011. *Annual Report 2010-2011*. [online] Available at: [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/annual-report-2010-11.pdf/\\$file/annual-report-2010-11.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/annual-report-2010-11.pdf/$file/annual-report-2010-11.pdf).

Fair Work Australia, 2011. *Annual Report of Fair Work Australia 1 July 2010-30 June 2011*. [online] Available at: [http://www.fwa.gov.au/documents/annual\\_reports/ar2011/FWA\\_annual\\_report\\_2010-11.pdf](http://www.fwa.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf).

### Financial reports

Australian Nursing Federation – Victoria, 2011. *Financial Report for year ended 30 June 2011*. [online] Available at: <http://www.e-airc.gov.au/files/145vvic/anf1.pdf>.

Community and Public Sector Union – Public Sector Union Group, 2011. *Financial Report for year ended 30 June 2011*. [online] Available at: <http://www.e-airc.gov.au/files/090vpsu/finreport.pdf>.

Construction, Forestry, Mining, and Electrical Union – Construction and General Division Victoria, 2010. *Financial Report for the year ended 31 December 2010*. [online] Available at: <http://www.e-airc.gov.au/files/105nvc/FR20102836CGVICBranch1207201.pdf>.

United Voice – New South Wales, 2011. *Financial Report for year ended 30 June 2011*. [online] Available at: <http://www.e-airc.gov.au/files/108vnsw/108VNSWFR20112564.pdf>.

### Legislation

*Australian Securities and Investments Commission Act 2001* (Cth).

*Corporations Act 2001* (Cth).

*Fair Work (Registered Organisations) Act 2009* (Cth).

### Media releases

Australian Bureau of Statistics, 2012. *Trade union membership remains steady*. Media release. [online] Available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6310.0Media%20Release1August%202011?opendocument&tabname=Summary&prodno=6310.0&issue=August%202011&num=&view=>.