VACC Submission to the Senate Education and Employment Legislation Committee concerning the Fair Work (Registered Organisations) Amendment Bill 2014 [No 2]

Dated 30 June 2015

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Introduction

The Victorian Automobile Chamber of Commerce established in 1918 and federally registered in 1940, pursuant to the then Conciliation and Arbitration Act 1934 (Cth), represents the interests of almost 5,500 mainly small businesses in the automotive industry.

VACC members are businesses that engage in aftermarket manufacturing, retail, distribution, services and repair of vehicles of all kinds (passenger, recreational, off-road, heavy, commercial, farm machinery, motor cycles, cranes and non-motorised e.g. trailers and caravans), new and used parts, components, engines, and the running service requirements of vehicles such as fuel, oil and gas, storage, car washing/maintenance, vehicle rental/leasing, towing and roadside service. The typical small member includes a specialist automotive, electrical or crash repairer.

While VACC membership includes large businesses, e.g. multi-site new car dealer franchises, fuel outlets and parts retail outlets and some manufacturers of aftermarket product (e.g. specialist truck body production), almost 90% of members have 10 or fewer employees.

VACC has a collegiate electoral/representational structure, which means members from our 16 Divisions are elected to our various Committees, the Board of Management, the Executive Board and to the office of the President.

VACC's Board of Management consists of 32 elected office holders from Divisions, the President and Past Presidents, all of whom have a voting capacity except the Past Presidents. The Executive Board of seven, is elected from the Board of Management and, in addition to the President, is responsible for day to day management of the organisation. The office holders, like our wider membership, are mainly small business operators and are from metro and regional areas of Victoria and Tasmania. Despite the average size of members' businesses, the majority of members have corporate business structures and, all members new to a position of office holder, understand their legal obligations as a director, even before undergoing our training program for office holders following our elections every two years.

Office holders are expected to attend regular Committee and Board meetings, working groups and industry events. Office holders are unpaid, although regional members are reimbursed for out of pocket travel expenses, and our Executive Board receives an allowance to cover their out of pocket expenses. The driver for member engagement as office holders, is to influence VACC policy direction and contribute to an industry body that assists business to comply with legislation, promote and protect the industry, and provide business support programs that meet minimum expected industry operational and education standards.

Changes proposed to the *Fair Work (Registered Organisations) Act 2009* (the Act) in the *Fair Work (Registered Organisations) Amendment Bill 2014 [No 2]* (the Bill) directly affect VACC elected office holders and the Organisation's administration of obligations imposed on associations.

Summary

The Bill incorporates most of the proposed amendments from the previous editions in 2013 and 2014. Many of VACC's concerns regarding those previous Bills have not been addressed in this latest iteration. As such, this submission is an updated version of our previous submission into the Senate inquiry into the 2013 Bill.

The Statement of Compatibility with Human Rights, attached to the Bill, states that the system of registration of associations is not mandatory and, with registration, there are both imposed limitation on organisations and rights and privileges afforded to associations registered under the Act. It is fair to say that the rights and privileges afforded to registered organisations have reduced significantly (particularly for employer organisations), while obligations imposed by the Act have increased. This change has occurred at the same time as competition in the market place to deliver business services has strengthened. To maintain a competitive advantage and to retain members, employer organisations have had no option but to be more transparent and compliant with corporate financial and Australian accounting standards, while at the same time, ensuring their services remain relevant to the business community they support.

Equally important to employer organisations is the question of whether registered organisations are perhaps disadvantaged in the competitive market, as bodies not federally registered are free to represent their clients or members without the additional obligations contained in the Act. It is now common place that unregistered associations, law firms, agencies, consultants, accounting firms and federal government departments purport to provide the same, if not a better, range and level of industrial relations services. In our experience, representation by bodies not federally registered is rarely refused by the Commission (a right or privilege of a registered organisation).

VACC is not, in principle, opposed to improving and imposing standards that reflect the standards of transparency and accountability expected by the regulator and our members. However, we are concerned that the current Bill has failed to account for concerns previously raised by VACC and others during the last Senate inquiry. We are also concerned that the reforms as proposed will be both financially costly and administratively unworkable without achieving the Bill's purported aim to remove the scope for financial abuse by organisations, like those reported in recent times.

VACC is concerned that many of the increased penalties are unbalanced and unfair; the reporting obligations and other changes, in a practical sense, will be costly and complex to administer, while also raising equity issues between office holders and members not in an elected position.

It was only in December 2013, after well over 12 months of work, that VACC was finally in a position to file an application to vary its Constitution and Rules to reflect the former federal government's amendments to financial management and financial disclosure obligations on registered organisations. The process to draft and file the amendments was onerous, complex and costly. While the Fair Work Commission Regulatory Compliance Branch was helpful, the complexity of our Constitution and Rules, the process required to

alter our Constitution and Rules and the time constraints faced by both the Commission and ourselves, meant that significant time and funds were expended to draft changes and have them approved by members. Much of our difficulty related to the application of the model rules in a way that made sense in the Constitution and Rules and was acceptable to the Regulatory Compliance Branch. Despite these efforts, VACC is still mindful that some provisions, particularly the application and interpretation of material personal interests over time, will create substantial administrative burdens. It is also our concern that office holders will consider their legal obligations and determine that, by nominating for an unpaid position of elected officer, they could potentially harm both their business and themselves personally.

Following are our major concerns with the proposed amendments to the Act.

Section 141(1)(b)(ii) – Rule Specifying Certain Records of Meetings

It is proposed to insert a new subparagraph requiring organisations to specify in their rules the obligation to keep records of proceedings and resolutions of meetings. While in principle VACC is not opposed to this requirement, VACC found during the process of drafting rule changes to satisfy the former government's amendments, many of our rules required multiple rewrites because they were drafted decades ago. VACC's Constitution and Rules already address this matter and, if further change is required, it will be a further time consuming and costly process. Our rules require an extraordinary meeting of members (EGM) to endorse rule changes. Notification and postage alone to all members is costly and, having had two EGMs in 2013, members are fatigued with the process and somewhat suspicious of ongoing changes to the Constitution and Rules.

The purpose of this amendment is presumably to require organisations to record in minutes any conflicts of interest and identification of material personal interests. Such a requirement can be surely satisfied without requiring an organisation to further implement changes to their Constitution and Rules.

VACC recommends that this amendment be given further consideration.

Sections 154C – 154D and 293K – 293M – Financial Training

Sections 154C – 154D – Consequences to organisational constitutions

The Bill removes sections 154C and 154D of the Act, which relates to the requirement that organisations have within their Constitution and Rules reference to the obligation to deliver financial training to all new office holders. While VACC supports the point that the two sections should never have been drafted in such a fashion, the same result could have been achieved as proposed in the current Bill. The removal of the sections disadvantages organisations that have already amended their Constitution and Rules. To again amend our Constitution and Rules, it is not a simple process and our above comments concerning member fatigue are very real.

Completion of training within six months

Our members operate businesses and are actively engaged in their operation and, if for any reason following an election the office holder could not for any reason complete the training within the six month required period, the Organisation would be faced with a breach of its own Constitution and Rules and the Act. The risk of penalties faced by the organisation is excessive, even if the office holder has a valid reason for not completing the training within the six month period.

Approval process of training program

It is understood from the current Bill, that the new Commissioner would approve financial training programs. From a transitional perspective, if the General Manager has already approved training or is in the process of approving a training program prior to implementation of the Bill, it is appropriate that the new Commissioner accept the approved training, without having to undergo a further approval process.

Exemption from training – due consideration of cost

Section 293M of the Bill provides a constructive exemption to the new officer training requirements. However, this exemption places the onus on organisations and branches to apply for an exemption from the Commissioner. VACC submits that exemptions should be provided for individual officers where that officer has previously received the training or completed formal director training.

VACC recently conducted training through an external agency recommended by the Fair Work Commission for its officers. The cost for conducting this training amounted to over $30,000 of members' funds. As elections for VACC officers are conducted every two years, VACC would currently stand to expend a similar amount after every election cycle. This is a significant financial burden and another disincentive for organisations to register under the federal system.

VACC recommends that this amendment be given further consideration.

Section 290A – Penalties for Breach of Good Faith or Position

VACC does not consider the amendment appropriately addresses the penalty relevant to a breach of good faith or position. As the Act already deals with civil obligations and penalties in such circumstances, VACC considers the current provision appropriate. The alleged abuse by individuals in the Health Services Union matter should not be addressed by the proposed amendment. Criminal activity should be duly dealt with subject to criminal law.

VACC recommends a review of provisions relating to penalties associated with assisting one candidate over another during an election. Section 190 of the Act currently limits penalties to the organisation; the provision does not deter individuals from breaching this provision and leaves the organisation exposed to a penalty.

Sections 255(2) and 255(2A) – Specific Financial Reporting to Members

Sections 255(2) and 255(2A) of the Bill insert into legislation specific expenditure to be reported by organisations in their annual report to members. The Executive Board, and particularly the Finance and Audit Committee, closely scrutinises all expenses and income streams. Detailed reports are provided to the Board of Management and an annual Consolidated Financial Report is provided to members. All expenses referred to in the proposed subsection are contained within the Consolidated Report, however some of the items will need to be individually identified and excluded from related expenses. Changing the format of the current Consolidated Report to reflect the categories reflected in the proposed sub section assumes organisations conduct simplistic and limited activities and that identification of these expenses will provide information to avert abuse of an organisation's expenses.

VACC is not opposed to the reporting of specific expenses to the regulator, however the expenses need to be seen and understood in context to assess whether they are reasonable or not. For example, legal costs would include legal advice concerning a range of operating contracts, advice to ensure accuracy of information provided to members and advice concerning potential risks or liabilities faced by the organisation and due to the activities of its officers or employees. Grouping together the expenses as identified in the proposed amendment is not telling of any potential abuse of the organisation's funds.

If the purpose of the proposed sub section is to identify areas of financial abuse, VACC is not confident that the proposed sub section will achieve its objective.

Sections 175 and 293B – 293BC – Reporting of Disclosed Remuneration and Standing Disclosure

These proposed provisions are complex and unworkable in VACC. VACC's constitutional amendments already provide for a process to disclose remuneration by an officer and to report to the Board of Management. To expect compliance with additional unworkable provisions exposes VACC to severe penalties under the Act.

While the former government's amendments required detailed disclosure to all members of remuneration and non-cash benefits received by the five highest paid officers, and VACC has made provision for the obligation in its Constitution, the practical effect is nevertheless problematic. All eight officers of the Executive Board receive an equal allowance, but five individual officers will be listed in the member report. Historically, VACC has reported a band and identified the number of officers in recept of remuneration within the band. VACC considers our historical approach fairer and is less likely to create confusion over the purpose of the remuneration and its application to individual officers.

Part 2A – Disclosure of Material Personal Interest

Disclosing officers has no practical effect for VACC

VACC welcomes overall the modifications to Part 2A in the Bill, however these changes do not go far enough in satisfying the serious concerns previously raised regarding disclosure obligations.

The revised Bill limits the application of the disclosure rules to 'disclosing officers', rather than all officers of an organisation or branch. Disclosing officers are defined as officers "whose duties include duties that relate to the financial management of the organisation or branch."[1] VACC supports the intention behind limiting the disclosure rules to a class of officer as a means of reducing the administrative burden.

While the intention is positive, unfortunately the new definition of 'disclosing officer' is so broad as to render the distinction meaningless in practice. VACC's financial decisions are made by the Executive Board, which has been delegated the management of the day to day operations of the organisation, and the Finance Subcommittee of the Executive Board. The Subcommittee is responsible for internal auditing of VACC transactions and negotiates and nominates external auditors for the Board of Management's appointment of the Auditor. However, ultimate responsibility for financial management of the organisation rests with the Board of Management. Therefore there is no difference in practice between officers and disclosing officers of VACC.

Proposed additional exemption

Members of VACC's Executive Board are sometimes called upon to represent the organisation as part of state and federal governments' engagement with industry. As part of this engagement, some government agencies will occasionally provide representatives with a small stipend to cover the costs or a portion of the costs of this work. VACC supports the inclusion of an additional declaration exemption to section 293C(4) of the Bill to cover allowances from government advisory bodies.

Definition of material personal interest

Without a proper definition of 'material personal interest', section 293C of the Bill would appear to require disclosing officers to declare interests relating to the affairs of the organisation, even if those affairs are conducted at arm's length. If the interpretation of material personal interest is considered any interest an officer or their relative may have, which is the same benefit accessible by any member of the organisation, the reporting and disclosure obligations will be unworkable.

[1] Section 293C(1) of the *Fair Work (Registered Organisations) Amendment Bill 2014 [No 2]*.

Material personal interest – proposed exemption

A VACC member who is a disclosing officer would have to declare whenever VACC pays for his or her business' goods or services. VACC operates a large fleet of vehicles, which must first be purchased and then require regular refuelling, repairs and servicing. Should VACC use a disclosing officer's business for any of these purposes, that member would have to declare it as a material personal interest, even if the engagement was at arm's length. This is particularly difficult without a high threshold. In larger business establishments, the director of the business that is also a disclosing officer may not even be aware that a VACC vehicle or a VACC employee's privately owned vehicle was repaired or serviced, let alone refuelled, in his or her business.

Even if it were possible for a declaring officer to declare such material personal interests, doing so would damage cooperation within industry and raise suspicion amongst members. The quoted or tendered price of goods and services in the automotive industry is considered confidential and sensitive business information. Members who provided a quote to VACC to deliver a motor vehicle but were unsuccessful would be in a position to identify the actual price quoted by a competitor who happens to be a disclosing officer. Disclosure on such a broad scale would disadvantage VACC disclosing officers, which discourages engagement in voluntary membership organisations.

The 'arm's length' exemption in section 293G(5A) of the Bill provides that an organisation or branch does not have to disclose payments made to a related party if the payment is made on terms reasonable in the circumstances if the organisation or branch and the related party was dealing at arm's length. This exemption should be extended to apply to the disclosure obligations of disclosing officers under section 293C of the Bill.