Accounting and accountability for Australian Federal Unions[1]

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Abstract

The amendments to Schedule 1B of the Workplace Relations Act have given the government substantially new means of controlling the internal affairs of industrial organisations. At the government's behest, the Review of Current Arrangements for Governance of Industrial Organisation (the review),[2] used concepts borrowed from the Corporations Act as a basis for recommendations regarding union accounts, accounting procedures, fiduciary obligations of office-holders and organisational rules. This study is a critique of the review and the consequent amendments. It argues that notions borrowed from the Corporations Act are inappropriate for unions and will cause problems for them. The amendments also contradict the government's avowed policy of deregulation of labour market institutions.

Introduction

Accounting and accountability as a means of controlling corporations is not new.[3] The government's *Registration and Accountability of Organisations* amendments to the *Workplace Relations Act 1996* (Cth), however, inflict this accountability regime on federally registered unions

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with renewed force. This regime, which was enacted in 2002 and came into operation in 2003, imposes the strictest controls upon unions since the establishment of conciliation and arbitration. At the same time and in keeping with the government's policy of minimising the role of unions in employment relations, these amendments are added to Schedule 1B of the *Workplace Relations Act*. Schedule 1B is a de facto industrial organisations Act containing some 368 sections pertaining to the establishment and operation of unions. It has provisions relating to the registration and de-registration of organisations; amalgamations and withdrawal from them; the representation rights of unions; the conduct of elections; the rules of organisations; members' rights; accounting and reporting requirements; duties of officers; and penalties for breaches.[4] It is beyond the scope of this study to analyse the entire Schedule. Rather, what I aim to do is critique some of its provisions.

I begin by defining "accountability" and review the background to the amendments, the submissions to the review, and the impact of the recommendations on Schedule 1B. I then critically analyse four key areas of the Schedule – reporting structures; the accounting, auditing and reporting requirements; compliance; and the fiduciary obligation of officers. I argue that the government has a poor understanding of the role and functioning of unions and this explains its reliance on the corporate model as a vehicle for regulating them. Corporate control mechanisms, however, have been developed to deal with business problems and are both deficient and inappropriate for unions. Consequently the corporate amendments to the Schedule are, I maintain, unlikely to improve the efficient running of unions or to increase the accountability of union officers. Moreover, I consider that there is a contradiction between the government's policy of de-regulating labour market institutions[5] and the increased regulation and inefficiency that will result from these impositions on industrial organisations. I conclude with some general criticisms of the Schedule and the possible consequences for unions.

Background to the amendments

Accountability is a somewhat nebulous concept to define. The *Shorter Oxford English Dictionary* defines "accountable" as "liable to be called to account"; "explicable for"; "responsible to and for", "attributable to". Thynne and Goldring in their classic legal study of government accountability in Australia show that these definitions imply control – control by someone, or something over another legal person. In the present instance, this control is exerted by the government or the members of industrial organisations over those organisations and their officers. They then point out that the

degree and process of accountability depends on the nature of the organisation or office-holder to be held accountable.[6] This is the critical missing element in the government's approach – namely an understanding of unions and the means by which they and their officers have always been accountable.

Essentially, unions are private mutual societies, predominantly of employees, established by the consent and for the benefit of their members. Their principal purpose is the improvement of their members' lives through economic, social, educational or political means.[7] Since their inception they and their officers have been accountable to governments through the industrial registrar, the courts and personally. Moreover, their officers have been answerable to the members through both elections and the courts. Prima facie, therefore, the additional corporate controls imposed upon them at this time seem heavy-handed and unsuitable. This is all the more so, when one considers the government's avowed purpose of deregulation of labour market institutions; the sharp decline in union membership in Australia over recent years; the fact that unions are severely controlled in terms of accessing both existing and potential members; the fact that compulsory unionism is illegal; and the severe limitations on any form of industrial action.

Nevertheless, in its review of *Current Arrangements for Governance of Industrial Organisation*[8] (the review), the government failed to evaluate the suitability of the extensive controls, both past and present, that exist over internal union operations. It failed to do so, largely because it chose to narrow the terms of reference of the review and to pre-empt its findings by allusions to the *Corporations Act*.[9] The resulting report[10] was in many respects disappointing because it neither gave due weight of the submissions presented by the unions and employer organisations, nor provided convincing arguments for the proposed changes. It also did not take into account the fundamental differences between the nature and functions of unions and business corporations. Nonetheless, it was used to justify the further legislative imposition of accounting procedures and public law values of accountability on such organisations.[11] This will have significant ramifications for unions in the long run as they are forced to re-think their objectives and strategies.[12]

Apart from the accounting societies, none of the organisations that made submissions to the review thought it apt to adopt business standards in accounting, auditing and reporting to members.[13] For instance the Metal Trades Industry Association pointed out some of its affiliates are non-profit organisations, governed by democratically elected committees of management, which include honorary office bearers.[14] They enjoy tax-

exempt status but still provide audited accounts to members at the annual general meeting. The Australian Council of Trade Unions submitted that many organisations provide more detailed information to members than do many companies, incorporated associations and political parties.[15] The detailed submission from the Finance Sector Union of Australian pointed out that membership of industrial organisations is different to shareholding.[16] Shareholders have a vested interest in obtaining adequate financial returns and will often be motivated to remain within a corporation by the type of financial information they acquire. Members, on the other hand, are concerned with the protection of employment rights and pay subscriptions to organisations for which they receive no direct financial gain. Their satisfaction is often based upon the level of service they get from the organisation in workplace negotiations and the provision of other services.

Despite the submissions above, the conclusions of the review were based on two implicit and controversial premises: first that "business unionism" is the norm for Australian unions; and second that controls that were largely developed for business enterprises could be adapted for all incorporated organisations, regardless of whether they were profit-making or not. This ahistorical view of Australian industrial organisations neglects two important facts. First, that Australian unions have never espoused the business union model of their American counterparts.[17] Second, for over 40 years Australian legislatures and the courts, not to mention researchers, have acknowledged deficiencies in various standards and duties imposed on business corporations and their officers and constantly sought to revise them.[18] The review also assumed that now was the most appropriate time to impose such business standards and duties on industrial organisations. Again, this is surprising given that there was no evidence of problems being experienced under the *Workplace Relations Act 1996*, which had been in operation for several years, whilst the *Corporations Act* was and still is undergoing further revision because of its inadequacies.

The review also appeared to be based on a Thatcherite view of industrial organisations and "their place" in the labour market, with greater control of unions, in particular, being necessary for market efficiency.[19] This unsophisticated view of industrial organisations based on an even more unsophisticated understanding of labour economics is contradicted not only by a substantial body of scholarly research[20] but also by the submissions of the trade union movement and the knowledgeable employer associations. Nevertheless, had all the recommendations of this report been enacted, controls similar to those imposed on British unions in the early 1990s would have resulted.[21]

As a final point, the review adopted the old *concessionist* notion of

corporate entities – the notion that incorporation is a concession of the State to groups of individuals who in turn promise to operate in accordance with their constitutions and within the law. It argued that differences between business corporations and industrial organisations were matters of degree and simply reflected the different purposes for which the two were organised.[22] As I have argued earlier, though, purpose is crucial because it delineates the nature of the entity. In addition, as the industrial relations literature shows industrial organisations have always espoused both industrial and political purposes, whereas companies have always maintained they are apolitical.[23] Admittedly, the report referred to the corporate entity principles enunciated in cases like *Jumbunna Coal Mine v. Victorian Coal Miners' Association* (1908) 6 CLR 309 and *Williams v. Hursey* (1959) 103 CLR 30.[24] It pointed-out that corporate character is extended only to organisations registered under the *Workplace Relations Act*, and not their branches.[25] But nowhere did it question whether the corporate nature of organisations as envisaged in *Jumbunna* and *Hursey* was the same as *Salomon v. Salomon* [1897] AC 22 and *Macaura v. Northern Assurance Ltd* [1925] AC 619, the leading cases in company law. Herein lies the central failure of the report on a jurisprudential level. It ignored the voluntaristic, democratic and benevolent nature of unions, and associated it with the contractual, proprietary and financial nature of companies. This is the difference between the entities as analysed in cases like *Jumbunna* as compared with *Salomon*. And this was also despite the submissions that industrial organisations were more akin to mutual associations than companies. By blurring the distinction between the two, the review did a disservice to both notions and their respective natures.

In effect, the review advocated the increased micro-regulation and regimentation of industrial organisations as businesses. This implicitly contradicts the government's objective of de-regulating labour market institutions and probably a term of reference of the review itself, namely, decreasing the accounting and administrative costs of industrial organisations. After all, given the increase in regulation and the compliance measures involved, it is highly unlikely that there will be a decline in administrative costs for organisations. The review also overlooked the fact that the two major accounting bodies which advised it stood to gain substantial business for their members if the company accounting and auditing requirements were imposed on unions. Furthermore, these bodies, imbued as they are with notions of the profit-making organisation, were probably the most inappropriate advisers on the practices of industrial organisations.[26] After all, as I have argued, unions are mutual benefit, quasi-political societies, whose predominant interest is the industrial welfare of

their members, not profit making firms interested in developing within a product market.

There is, however, another argument for regulating unions. It is said that as State governments have in recent years imposed corporate controls on incorporated not for profit organisations, like clubs and societies, unions should be similarly controlled. This argument overlooks two important facts. First, many incorporated not for profit organisations are involved in business activities but are not political. Unions are inherently political and their collective bargaining and service functions cannot be separated from their political functions. Second, the degree of detailed micro-regulation of unions under Schedule 1B contrasts sharply with the more flexible and generally less detailed requirements imposed by State Associations Incorporations legislation on incorporated not for profit organisations. One only has to look at the respective lengths of the various State Acts, as compared to Schedule 1B, to determine this; all the State Acts have less than half the number of sections in the Schedule and they are far less detailed.[27]

However, given the tenor of the review and the government's adoption of most of its recommendations[28] in Schedule 1B, in the remainder of this study I analyse the efficacy of these provisions.

The aims of Schedule 1B and their impact

Essentially, Schedule 1B aims to regulate the rules of organisations, provide for improved democratic control, improve the accountability of registered organisations, and regulate the conduct of officers and employees (s. 5). Of course what is missing here is an explanation of "democratic control" and "accountability". But even if one overlooks this, another important question left unanswered is – what is an appropriate level of accountability for unions and their officers. This in turn depends upon the view taken of the nature of industrial organisations and their role in industrial relations – the earlier questions left unanswered in the report.

Section 5 of the Schedule, however, raises two further matters for consideration. First, to suggest that accountability to the membership is nowadays a matter of concern for public policy seems somewhat paradoxical. Given the current retreat by the Commonwealth from regulating the employment relationship one would have thought that less regulation and interference with the internal affairs of industrial organisations would have been more consistent.[29] Secondly, a potential consequence of the imposition of Section 5 is that it may alter the nature of unions themselves – union officers might feel the need to re-model unions into entities which more closely comply with the governments' accountability prescriptions.

This could involve curtailing "risky" activities like collective action and political involvement in order to provide more "acceptable" services to members and hence be viewed as more accountable.[30]

But leaving aside these general concerns, what exactly are some of the specific problems relating to Schedule 1B?

The problem of reporting structures - small organisations and dual registered entities

Under Schedule 1B the accounts of large and small organisations are treated differently. The schedule empowers the registrar to totally exempt an organisation from the accounting requirements (s. 241) where it has no financial transactions in a given year (s. 271). In so doing, he must consider the costs that would have been incurred by the organisation and the information needs of the members (s. 241). Prima facie this is a welcome development. It acknowledges that the imposition of full accounting requirements is inappropriate and costly to small organisations – those receiving less than $100,000 in income – but implicitly treats them like small proprietary companies (s. 270). Small organisations therefore must keep such accounting records as explain their transactions and enable their financial accounts to be prepared, examined and where necessary audited, in accordance with the auditing standards.[31] This means that truncated versions of the full accounts must still be kept and small organisations still have to comply with substantial accounting requirements under the Schedule (s. 270 and reg. 164).

The review had also maintained, somewhat incongruously, that section 271 of the *Workplace Relations Act* be amended and that branches within organisations should be recognised as reporting bodies.[32] This has now been done in the definition of "reporting unit" – s. 242 – and in the reporting requirements relating to different types of units – sections 245-271.[33] It was also suggested that the registrar investigate and if necessary issue directions on the appropriate reporting structures for organisations divided into branches – now sections 242-247.[34] I would argue that in view of the amendments to section 271 of the *Workplace Relations Act* a further review by the registrar is unwarranted and to my knowledge this aspect of report was not taken up by the government.

In relation to dual registered entities – entities registered at both federal and state levels – the Schedule is particularly confusing. Under s. 269 reporting units with a common membership and substantially the same officers to State registered organisations will be taken to have satisfied the accounting and auditing provisions if the Registrar certifies that the reporting unit's affairs are encompassed by the State organisation's affairs; their

accounts have been audited and lodged with State authorities and meet the requirements of both State and federal legislation; and all members have been supplied with audited accounts. This provision is aimed at reducing unnecessary duplication of records and providing greater consistency between federal organisations and duplicate state associations. However it does pose a problem, as under the doctrine in *Moore v. Doyle*, State and Federal organisations are expected to keep their administrations and their accounts separate, they being separate legal entities.

The accounting, auditing and reporting requirements

All of the above provisions are preliminary to the main aim of Chapter 8 of the Schedule, which sets out the accounting, auditing and reporting requirements for the financial administration of organisations. It states what registers are to be maintained (for members and office holders), for how long records must be kept (7 years), and that it is an offence to interfere with records (s. 230-234). These obligations are reinforced by section 347 that empowers members to request in writing a copy of the rules, any amendments to them and a list of officeholders. Members are also given statutory rights to copies of the annual accounts (s. 265) and to inspect the financial records or alternatively to apply for an order to have the books inspected by an auditor or legal practitioner (s. 272-273). Such applications to the Commission must be made in good faith, there must be reasonable grounds for suspecting a breach of the Act and a belief that an inspection will assist in determining such a breach (s. 273(2)). Provided the application is not vexatious or made without reasonable cause, the Commission might then order the investigation of the accounts (s. 274).

This power of inspection is similar to s. 247A of the *Corporations Act*. There it has led to considerable litigation because of the vague wording of the section, namely what is a "proper purpose" for an inspection and what constitutes "good faith" on the part of the applicant.[35] Moreover, these sections disregard the cost of such activities to the organisation. They ignore the several submissions to the review which argued that the *Workplace Relations Act* made adequate provision for the lodgement, maintenance, and auditing of accounts as well as the disclosure of accounting records to members.[36] And they overlook the possible impact on the capacity of the commission to enforce effectively such provisions, without additional financial supplementation.

Chapter 8 of the Schedule also lays down extensive procedures and statutory time limits for the presentation of accounts by organisations. These originated in the requirements imposed on companies under Chapters 2M and 2N of the *Corporations Act*. For instance section 272 of the *Workplace*

Relations Act 1996 was amended so that accounting records must now be kept on an accruals basis with the exception of membership subscriptions, which may be kept on a cash or accruals basis (s. 252).[37]

Depending on the size of the organisation, the Schedule then lays down two types of accounting reports – full reports and concise reports. Full reports consist of a general purpose financial report, operating report and auditor's report of the financial records (s. 265(1)). It must be presented to a general meeting of members or to the Committee of management within 6 months of end of the financial year to which it refers. If it is presented to the committee of management only, there must be provision under the rules for 5% of the membership to be able to call a general meeting to consider a full report – s. 266. Concise reports, as set out in section 265(2), are truncated versions of full reports and must be approved by the committee of management.

The registrar has now prepared elaborate guidelines for these reports and these were enacted in section 255 of the Schedule and regulation 161. They became operational as of the 1st July 2003. They are fairly prescriptive, setting out the requirements of the general purpose financial report, the profit and loss statement, the balance sheet, and the committee of management statement. In particular, these reports must disclose the nature and activities of the organisation and any change, details pertaining to officers of the organisation who are also board members or trustees of superannuation funds, amounts paid to employers in consideration of them making pay roll deductions, and the legal costs and expenses relating to litigation. Whether anyone, apart from a trained accountant, will be able to understand them is questionable. However, they do provide an additional means of surveillance of union activities.

The report also recommended that consolidated accounts be kept by centralised organisations, those with minimal delegation of responsibility for financial matters to branches or divisions but not for organisations where financial matters are vested in branches.[38] This is in response to organisations arguing that members generally preferred to be informed about the work of a branch and that the preparation of consolidated accounts would only impose significant costs without many additional benefits. However, what has been missed here is that if consolidated accounts are not kept this may result in inconsistencies between the accounts filed by various parts of the organisation, not to mention double counting and measurement problems if accrual accounting is used. Nevertheless, the government does not seem to have paid much attention to these potential difficulties.

As to the timing of reports, the review had originally argued that copies

of reports must be provided 6 months after the end of the financial year if a general meeting is to be held, or 4 months after the end of the financial year if there is no meeting.[39] The government finally imposed less stringent requirements than those recommended – reports are now required "as soon as practicable" after each financial year (s. 253(1)) and they have to be filed with the registry 14 days of being presented to meetings of the members (s.268). Reports may be posted to members or published within the journal of the organization (s.265).

What has been overlooked here is that members are unlikely to understand sophisticated accounts and may in turn need the advice of experts to interpret the information. For instance, Australian Accounting Standard AASB 1034 on which the reporting requirements are based is a complex and voluminous accounting standard which was originally developed from standards applicable to profit making organisations. Its extensive provisions govern disclosure of such things as share valuations, executive remuneration and parent subsidiary entities, which are largely irrelevant for the workings of industrial organisations. It also makes frequent references to the *Corporations Act* and its regulations. Moreover the Industrial Registry has indicated that it considers Accounting Standards AASB 1031- Materiality; AASB 1001- Accounting Policies; AASB 1018 - Statement of Financial Performance and AASB 1040 - Statement of Financial Position, as also relevant in the preparation of the accounts. Given these facts, I maintain that there needs to be a comprehensive overhaul by accountants of all these standards for them to be really useful in the preparation of the accounts of industrial organisations.

Nor has the government shown much concern with how the imposition of the accounting and auditing standards might hinder union operations. The time, effort and money that will need to be expended for the preparation of the annual accounts was largely overlooked. Rather, the concern was with standardization in financial reporting, even if this meant Parliament de facto delegated its power to make regulations to the Australian Accounting Standards Board[40] and organisations and their members gained little out of it. This framework was inflicted on companies under the companies legislation several years ago and shareholders now need to attend classes in order to be able to understand company accounts.

Overall, therefore the government has introduced a complex and cumbersome scheme of reporting on the assumption that for the purposes of accountability more accounting reports mean better information. Nothing could be further from the truth. More information is just that – more! Unless information is presented in a manner that may be readily understood by ordinary people it will serve little purpose apart from surveillance by the

government's army of accountants – those it will need to employ to ensure that the accounting requirements are properly policed by the Registry.

Auditing requirements

The auditing requirements under the *Workplace Relations Act 1996* have been considerably toughened following representations by the National Institute of Auditors to the review.[41] Auditors now have to be approved. This means they have to be members of firms of certified practising accountants, members of the institute of chartered accountants, members of the National Institute of Accountants and hold a current practising certificate. The requirement for a practising certificate may be waived if they are auditing an organisation with income of less than $100,000 and to which a section 270 certificate has been issued and the Registrar has approved their appointment. These requirements are bewildering given that the Working Party of the Ministerial Council for Corporations is reviewing appropriate levels of qualifications for auditors.

The powers of individual auditors too have been enhanced under the Schedule. They are broadly consistent with sections 10 to 13 and 16 to 19 of the *Model Sections for Financial Reporting and Auditing legislation.*[42] These model sections were developed by the Legislative Review Board of the Australian Accounting Research Foundation for insertion into legislation. They cover the appointment of auditors and their removal, their powers, the duty incumbent on organisations to assist them, and the qualified privilege attached to auditors' reports. But once again they are premised on the notion that auditors provide a service to business corporations.

Under Schedule 1B auditors are now also guaranteed reasonable fees and expenses and are protected from arbitrary dismissal. They have the right to full and free access to records in the custody of the organisation and the right against self–incrimination does not protect officers for failing to produce relevant books (s. 258(4)) to the auditors. Furthermore, committee members of the union must not misinform the membership as to material particulars, in the accounts, or an auditors report (s. 267) and auditors are given the right to be heard at both general meetings and special committee meetings when a report is to be considered (s. 260(4)). What constitutes misinformation and what amounts to a hearing will ultimately have to be determined by the courts. Finally, auditors may refer possible breaches of the *Workplace Relations Act 1996* to the Industrial Registrar if they believe that the committee of management cannot adequately deal with them (s. 257 (11)).

Most of the sections analysed above once again reflect the view of

industrial organisations as "non-profit businesses" and largely neglect two points – first, that larger organisations probably already comply with the Australian Auditing Standards in relation to their accounts; and secondly, that smaller industrial organisations could probably audit their accounts in a far less formal and costly way than they must now do under the legislation. The government's refusal to accept this last point means that the auditing process will no doubt change in the future for small organisations.

Compliance

The Australian Council of Trade Unions submitted to the review that most organisations comply with the legislative requirements regarding financial records and that the registrar had not greatly utilised the provisions available for breaches of the old Divisions 10 and 11 of the *Workplace Relations Act*.[43] Nevertheless, the registrar's functions have been overhauled in Schedule 1B and the enforcement provisions expanded. The registrar's functions are now limited to those of investigation and the issuing of compliance notices to organisations. Failures to comply are referred to the Director of Public Prosecutions for prosecution and then the Federal Court for enforcement, with breaches of the old divisions 10 and 11 being treated in the same manner as breaches of awards of the commission. This bifurcation of the registrar's functions from those of the courts has been justified as a necessary consequence of the separation of powers doctrine enunciated in the *Boilermakers'* case.[44]

One example of how the registrar's powers were enhanced is in relation to compliance with the accounting requirements. The registrar may investigate the accounts, the auditing standards and any possible financial maladministration (s.330). Thus, where a person, auditor or members identify a defect in the accounts the matter may be referred to a presidential member of the AIRC who if he has reasonable grounds for believing that a breach has occurred, may refer the matter to the Registrar for investigation under section 278. The Act then imposes a heavy onus on officers, employees and former officers to fully co-operate with the Registrar in the investigation and significantly, removes the common law protection against self-incrimination for those officers or former officers. This may prove to be a serious burden on officers as they may be forced to reveal documents and information that leave them open to possible prosecution. If the registrar finds that there is some defect he may request the reporting unit to take specified action, he may refer the matter to the Commonwealth Director of Public Prosecutions, or apply to the Federal Court for imposition of civil penalty provisions. Again this overlooks the significant additional time, effort and cost that may be incurred by organisations and individuals when under

investigation.

The review urged, also an expansion of the commission's powers in relation to organisations that failed to comply with technical matters fundamental to their ongoing registration, including Part 9 Divisions 10 or 11.[45] These included that the organisation ceased to be effectively representative of its members; that it was not free from the control or influence of an employer; or that its financial viability was questionable.[46] In these circumstances, it was proposed that the Commission or a presidential member could, after giving the organisation a hearing, convene proceedings to determine whether the organisation be deregistered.[47] The greater part of these recommendations have now been enacted in section 30 of the Schedule.

Once again, these proposals and sections are as severe as the corresponding company provisions. Currently, a company's directors are liable to civil penalty provisions for failure to comply with accounting and auditing requirements (s.344). Similarly directors are liable for insolvent trading under s.588G of the *Corporations Act*. However, protection against self-incrimination is afforded all officers under s.1317 of the *Corporations Act*. This now stands in sharp contrast to what has been enacted in Schedule 1B.

Fiduciary obligations of officers

It was noted in the review that both the Finance Sector Union and the Australian Council of Trade Unions argued that office holders of industrial organisations are at present under the constant scrutiny of members through periodic elections and also under fiduciary obligations at Common law to act with due care and diligence.[48] In addition, section 209 (now section 164 of Schedule 1B) of the *Workplace Relations Act* enabled members to seek an order from the Federal Court for the observance and performance of the rules. Despite these safeguards, it was proposed that provisions similar to s. 206 of the *Corporations Act*, regarding the disqualification of defaulting officers, be introduced.[49] In addition, the disqualification provisions in sections 227 and 228 of the *Workplace Relations Act* were to be amended so that certain persons were barred, without leave of the court, from holding office in an organisation for a period of three years. These included insolvent persons and persons convicted of indictable offences concerning the management of organisations (serious fraud or breaches of fiduciary duties).[50]

These recommendations are now embodied in Chapter 7 Part 4 of the Schedule (sections 211-220). These divisions disqualify candidates for election and office-holders from holding office for 5 years within

organisations if they have been convicted of prescribed offences or have had pecuniary penalty orders made against them. These persons may apply to the Federal Court for leave to stand for office or to hold office. In considering such applications the Court may have regard to the nature of the offence, the manner in which it was committed, the character and fitness of the person and any other relevant matter. This wide discretion conferred on the Court gives it ample scope for controlling applicants for office in unions. It could be used as a device to exclude radical unionists from managing organisations. For instance, unionists who had in the past engaged in political strikes, or even sympathetic industrial action involving damage to property (a "prescribed offence")[51] could be barred from standing for office.

Part 2 of Chapter 9 of the amended Schedule outlines duties of office-holders similar to those in sections 180 to 185 of the *Corporations Act*. These include duties to exercise due care and diligence (s. 285 (1)), duties to act in good faith and for a proper purpose (s. 286(1)), and duties not to make improper use of information to gain an advantage or cause detriment to the organization (sections 287 and 288). It was proposed that where action was taken against an office-holder for breach of these duties a court could relieve her of liability if she acted honestly and having regard to all circumstances of the case (now section 316).[52] However, where the court was satisfied that the office holder was guilty of fraud, negligence, or breach of trust and the organisation was likely to suffer damage, it could direct the person to pay damages or transfer property to the organization (s. 307). Equally though, where necessary, it had power to grant relief for such breaches (s. 316).

The only criminal liability that was proposed in the review was against an office holder who knowingly, or recklessly either dishonestly intended to gain an advantage for herself or another person, or defrauded the organisation.[53] To avoid double jeopardy, however, and in order to be consistent with the corporations model it was recommended that a provision similar to section 1317 M and N of the *Corporations Act* be included. These two sections preclude the imposition of pecuniary penalties after an officer has been convicted of a criminal offence, or alternatively stay civil proceedings, if criminal proceedings have been brought.

In relation to Schedule 1B, the provisions relating to criminal liability do not appear to have been enacted except in relation to electoral offences (ss. 185, 194 and 195). In these circumstances provisions similar to 1317 M and N have been enacted in sections 311 and 312 of the Schedule. However, this does not preclude the Federal Court from making pecuniary penalty orders *prior* to criminal proceedings commencing (s. 313) or if

criminal proceedings *fail* (s. 312). And once again, this is similar to the situation under the *Corporations Act*, although as the court explained in *Adler v Director of Public Prosecutions (Cth)*,[54] this is not considered to involve double-jeopardy.

Lastly, recommendation 42 of the review proposed that the registrar establish a working party to consider whether model guidelines should be developed for the conduct of office holders within organisations.[55] Once developed these rules could then be included by the Minister as regulations under the *Workplace Relations Act 1996* and be deemed incorporated into an organisation's rules, thereby overriding any inconsistent rules. This proposal was meant to standardise the rules of conduct across organisations and protect both the public interest and the interest of members. It is now embodied in section 148 of Schedule 1B. Whether it will do this remains to be seen, as the government does not appear to have taken any action to implement it. Moreover, it should be noted that the corresponding model articles in the *Corporations Act* – now summarised as the Replaceable Rules in section 141- do not seem to have improved the ethical behaviour of directors or officers. Both Australian and oversees research has shown that accounts and stories can be easily concocted to comply with statutory and other requirements as set down in the model rules.[56] This of course was highlighted by the HIH and Enron collapses.[57] It is hoped, therefore, that office holders in industrial organisations do not end up emulating such examples.

Overall, I would argue that corporate law fiduciary standards upon which the above-mentioned proposals and amendments are based are inadequate. This is obvious from the history of corporate collapses and legislative developments over the last three decades.[58] Those developments illustrate that not only are fiduciary standards difficult to define but that suits against corporate officers are difficult to prove.[59] In my opinion, therefore, these amendments to the *Workplace Relations Act* reflect ephemeral standards and have only introduced a new area of uncertainty and potential litigation in the affairs of industrial organisations.

Critique

The report and consequent amendments adopted in Schedule 1B appear to have been strongly influenced by notions of the profit-making corporation and the standardisation agenda of the major accounting professional bodies. This is totally inappropriate for organisations that were established primarily to protect the interests of their members by obtaining a more equitable distribution of income. Furthermore, the report assumed that following the

accounting standards would increase accountability and performance on the part of officeholders and officers of industrial organisations. This is contestable.

An examination of the accounting literature shows that following the standards does not necessarily produce accounts that display a "true and fair view" of an entities financial affairs or its performance.[60] This was graphically portrayed in the company collapses of the 1980s when companies became insolvent shortly after they had reported profits and received unqualified audit reports.[61] Even if the objection is raised that some of the present accounting standards were not in operation at the time, it may still be argued that the present standards would have made little difference. The accounting literature also shows that compliance with the standards does not stop what is euphemistically known within the profession as "creative accounting" – dubious or misleading processes that portray a company's position in favourable terms.[62]

Consequently, even if the authors of the report and the government believed that the accounts of industrial organisations were inaccurate, and they produced little or no evidence to substantiate this, it may still be argued that their responses did nothing to improve the situation.[63] It is more likely that industrial organisations will become more bureaucratic, cumbersome and inefficient and their officers will learn to display the same "creativity" as their corporate counterparts.

The other disturbing feature of the provisions is that accounting induced changes could shift the emphasis of industrial organisations towards using quantitative rather than qualitative performance indicators. This could be of detriment to the membership in the long run, as industrial organisations become more obsessed with following correct procedures; meeting deadlines; and providing quantitative data in financial statements; rather than looking after the day to day interests of their members.

The final regrettable feature of the changes is that they probably breach the International Labour Organisation Convention concerned with Freedom of Association and Protection of the Right to Organise (ILO No.87), in particular by restricting the constitution, rules, organising activities and programmes of industrial organisations they may have violated Article 3 of the Convention. This guarantees unions organisational autonomy from external interference.[64]

Conclusion

For more than twenty-five years, governments have sought to control the accounting practices and internal affairs of industrial organisations by

subjecting them to various reviews and then to legislation. They have failed. In the seventies, the Sweeney Committee[65] recommended a tightening-up of accounting practices based on the little evidence that it gathered on the maritime unions.[66] In the eighties, the Hancock Committee was more circumspect. It recommended a wide-ranging tripartite review of the requirements on industrial organisations that were "essentially transposed from corporate law". To no avail. In the nineties the Cooke inquiry in Queensland, on the basis of evidence about the practices of five state unions, recommended the imposition of what were recently described as "stringent requirements" on industrial organisations.[67] To these efforts can now be added the *Review of Current Arrangements* and the ensuing response by the Howard government, namely the amendments to Schedule 1B.

What should be reiterated, however, is that accounting systems and corporate standards are not value free – they are part of a managerial culture of command and obedience. If governments continue to try to impose them on essentially democratic quasi-political organisations it can only be concluded that they aim to induce changes that transform not only the internal administrative aspects of these organisations but also their functions within society. This is disturbing. Of course, the present federal government has made no secret of the fact that it would welcome a silent and more docile trade union movement, wedded to a culture of service provision. Whether unions, however, will adopt such a fundamental philosophical change remains to be seen.

Notes

1 The title was inspired by Michel Foucault's analysis of control in *Discipline and Punish*, Penguin Books, London, 1991.

2 The review was conducted by Blake Dawson and Waldron for the Department of Workplace Relations and Small Business, see Department of Workplace Relations Small Business/ Blake Dawson and Waldron, *Review of Current Arrangements for Governance of Industrial Organisations – Report and Recommendations*, June 1998.

3 In a valuable collection of readings entitled *Foucault, Management and Organisation theory*, A Mc Kinlay and K Starkey (Ed) Sage Publications, Great Britain, 1998 show how historically accounting has been used to control business organisations and the individuals within them. In particular, I would commend Chapter 8, 'Management Accounting Numbers: Freedom or Prison' by Trevor Hopper and Norman Macintosh (pp.126-150) and Chapter 3, 'Foucault, Power and Organisations' by Stewart Clegg.

4 For a comprehensive analysis of Schedule 1B see the Department of Workplace Relations and Small Business web site at

http://www.workplace.gov.au/workplace/Category/Legislation/WRActOutlineandKeyDifferencesoftheRegisteredOrganisationsLegislation.htm.

5 The most comprehensive collection of ministerial speeches and announcements concerning the government's policy of de-regulating labour market institutions may be found at http://www.mcdonald-assocs.com/irreforms/recon.htm.

6 Thynne I, and Goldring J, *Accountability and Control: Government Officials and the Exercise of Power,* Law Book Co Ltd., Sydney, 1987 especially Ch. 1.

7 This definition is a based on that of Webb, S and B, *The history of Trade Unionism 1666-1920,* R&R Clark, Edinburgh, United Kingdom p.1; the *Shorter Oxford English Dictionary* ; and Smith RC and Rawson D, *Trade Union Law – the legal status of Australian Trade Unions*, 2nd Ed (1985) Butterworths, Sydney, 1985, pp.7-9.

8 The review had to examine both the "financial accounting auditing and reporting requirements of the *Workplace Relations Act*" and "their practical operation". It was also asked where appropriate "to recommend changes" to ensure that industrial organisations were "accountable to their members".

9 The reviews' terms of reference included an examination of whether "proper accounting records were maintained and audited"; that reporting requirements "were consistent with statutory obligations to be met by **corporations** and comparable organisations"; that there were "effective means of compliance"; and that the obligations did not "impose unnecessary costs or administrative burdens on small organisations". The review was also asked to appraise the "fiduciary duties" of office holders and "to consider the extent if any to which model rules should be developed to address the issues identified".

10 For a summary of the review's findings see Mourell M, 'Industrial Organisations and Corporate Accountability', (1999) 12 *Australian Journal of Labour Law*, pp.136-141.

11 The government indicated its intention to implement the report's findings in separate legislation governing industrial organisations and their internal operations – see http ://www.dewrsb.gov.au/ministersAndMediaCentre/reith/discussionPapers/accountability.

12 See Hooper and Macintosh, *op.cit.* (particularly pp.144-149) as to the consequences of such controls on organisations and Professors Ron Ma and Russell Mathews Financial Reporting by Government Departments, 1993, pp.67-88 as to the inappropriateness and specific impact of accounting standards on non-profit-making organisations.

13 To the authors knowledge submissions were not made available to the public. References to the submissions are only as summarised in the report – see pp.13-17 of the report.

14 See pp.13-14 of the report.

15 See p.15 of the report.

16 See pp.15-16 of the report

17 See W A Howard, "Australian trade unions in the context of union theory", 19 *Journal of Industrial Relations*, Sept 1977, pp 255.

18 This is apparent from a consultation of the standard texts with specific references to the need for reform – R Tomasic, J Jackson, R Woellner, *Corporations Law: Principles policies and process* (4th Ed.), Butterworths, Australia, 2002 , particularly Chapter 1 at pp.7 and 15; and S. Berns and P. Baron, *Company Law and Corporate Governance: An Australian Perspective*, OUP Australia, 1998, particularly Chapters 1 and 2; Wishart D, *Company Law in context*, OUP, 1994 p.77; Farrar J, *Corporate Governance* (2nd ed.) OUP, Australia, at p.17; M J Whincop, *An Economic and Jurisprudential Genealogy of Corporate Law*, Ashgate, England, 2001, at p.17.

19 See Lord Wedderburn, *Labour Law and Freedom*, Lawrence & Wishart Ltd, London, 1995 for the contradictions associated with this view, p.200.

20 For the classic rebuttal see Alfred Marshall's *Principles of Economics*, (8th Edition), Macmillan & Co. London, 1936 particularly pp.702-710. For more recent analyses L G Reynolds, S H Masters and C H Moser, *Labor Economics and Labor Relations* (11th Edition), Prentice Hall New Jersey, 1998, especially Chapter 17.

21 See *Employment Act 1990* (UK) and *Trade Union Reform and Employment Rights Act 1993* (UK) and Lord Wedderburn's penetrating analysis in *Labour Law and Freedom*, op. cit.

22 See p.18 of the report.

23 See C B Fox , W A Howard and M J Pittard, *Industrial Relations in Australia*, Longman Australia, 1995, especially Chapter 6; M Gardner and G. Palmer, *Employment Relations* (2nd Ed.), Macmillan Australia, 1997, especially Chapter 4; and N F Dufty and R E Fells, *Dynamics of Industrial Relations in Australia*, Prentice Hall Australia, 1990, especially Chapter 5.

24 See pp.3-4 of the report.

25 Reference is made also to dual registration of organisations under the principle in *Moore v. Doyle* (1969) 15 FLR 59.

26 Perhaps the government might consider giving an organisation's accountant the right to veto industrial action: "Sorry comrades but your cash flow statement does not allow you to go on strike this year".

27 For a detailed discussion of incorporated not for profit associations and the impact of the *Corporations Act* on respective State *Associations Incorporations Acts*, see Sievers A S, (1996) *Associations and Clubs Law in Australia and New Zealand* , (2nd Ed) Federation Press, Annandale, NSW, especially chapter 4.

28 See the government's discussion paper and response endorsing the review's recommendations in www.dewrsb.gov.au/ministersAndMediaCentre/reith/discussionPapers/account_democrat.asp (accessed 20th November 1999).

29 What are also overlooked are the wider ramifications of organisational disunity, namely an increase in litigation between individuals and their organisation's and the possibility of increased factionalism and wildcat strikes.

30 See Bramble T, 'Deterring Democracy; Australia's New Generation of Trade Union Officials', *Journal of Industrial Relations*, vol. 37 (3), 1995, pp.401-26.

31 Because of this recommendation, it is suggested later in the report that

section 285 of the Workplace Relations Act be repealed.

32 At the time of the review there were 122 organisations and 563 reporting bodies. It was proposed that the number of reporting entities be reduced wherever possible and that only in exceptional circumstances branches with less than 250 members be recognised as reporting bodies, see recommendations 6 and 7 at p.28 of the report.

33 The inquiry felt that the definition of reporting entity as advocated by the accountants was suitable to corporations where structures are more readily defined and ascertained and branches do not enjoy a degree of autonomy with respect to management and finances as in industrial organisations. It recommended that the definition of reporting entity as adopted by the public sector accounting Standards Board apply.

34 See recommendations 7 and 8 at p.28 of the report.

35 See for instance *Re Humes Ltd* (1987) 5 ACLC 64; *Garina Pty Ltd v Action Holdings Ltd* (1987) 7 ACLC 962; *Intercapital Holdings Ltd v MEH Ltd* (1988) 6 ACLC 1068; *Tinios v French Caledonian Travel Service Pty Ltd* (1994) 12 ACLC 622.

36 See p.18 of the report.

37 See recommendation 4 of the review, p.22 of the report.

38 See recommendation 5 at p. 28 of the report.

39 See recommendation 9 at p. 29 of the report.

40 The Australian Accounting Standards Board has this power in relation to companies under the *Australian Securities and Investment Commission Act 1989*. The only limitation placed upon it is that standards developed must be consistent with both the *Corporations Act* and regulations -s.334 of the *Corporations Act*.

41 See p.39 of the report.

42 See recommendation 28 at p.45 of the report.

43 See p.46 of the report.

44 *R v. Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.

45 See pp.46-48 of the report.

46 Recommendation 37 so far as it concerned the issue of financial viability was not enacted. However a similar effect could be produced under s. 30 of the Schedule which has been enacted.

47 See pp.49-50 of the report.

48 See p.51 of the report.

49 The relevant provisions are 206A, B, C, D, E and G.

50 See recommendation 34 at p.53 of the report.

51 Section 212 of Schedule 1B.

52 See recommendation 37 at p.57 of the report.

53 See recommendation 41 at p.59 of the report.

54 *Adler v. Director of Public Prosecutions (Cth.)* (2004) 51 ACSR 1.

55 See p.60 of the report.

56 The difficulties of getting compliance with such statutory rules was demonstrated by McBarnet D, and Whelan C, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control', *The Modern Law Review*, (November 1991), p.848. The most recent international study of

such practices is Stlowy H and Breton G, 'Accounts Manipulation: A literature review and proposed conceptual framework' in *Review of Accounting and Finance*, Partington, 2004, Vol 3, No 1 p.5. The best Australian study is Clarke F, Dean G and Oliver K, *Corporate Collapse: Accounting, regulatory and ethical failure*, CUP, 2003.

57 As to the HIH and other Australian company collapses see *Collapse Incorporated: Tales, Safeguards & Responsibilities of Corporate Australia* CCH Australia Ltd, 2001. As to the Enron collapse, see How Companies Lie: Why Enron Is Just the Tip of the Iceberg, A L Elliott, R Joseph, H Schroth, Random House, 2002.

58 S Berns and P Baron, *Company Law and Corporate Governance: An Australian Perspective*, OUP Australia, 1998, particularly Chapter 2, and Redmond P, *Companies and Securities Law – Commentary and Materials*, (3rd Ed.), LBC Information Services, Sydney 2000, Ch 2.

59 See *ASC v. Gallagher* (1993) 11 ACLC 286 and *Vrisakis v. ASC* (1993) 11 ASCR 162. More recently when substantial financial collapses have occurred, ASIC has had a greater measure of success, see *ASIC v. Adler* (2002) NSWC 171.

60 This time-honored legal mantra borrowed from the *Corporations Act* adds little substance to the legislation. The interesting implication from s. 295(3) and s. 297 of the *Corporations Act* is that accounts which comply with Australian Accounting Standards may still not give a true and fair view, whatever that means.

61 See also Lockhart J's comments in *QBE Insurance Group Ltd. & Ors v. ASC & Ors* (1992) 10 ACLC 1,490 at p.1507.

62 See for instance G W Dean and F L Clarke, 'Creative Accounting, Compliance and Financial Commonsense', (1997), 7, *Australian Journal of Corporate Law*, pp.366-386.

63 For the consequences that befell British unions following the imposition of Mr. Major's controls, see P Willman and T Morris, 'Financial Management and Financial Performance in British Trade Unions', (1995), *British Journal of Industrial Relations*, 33, pp.227-236 and their earlier work, *Union Business*, P Willman, T Morris, B Aston, CUP, 1993.

64 In this regard, Professor Breen Creighton argued that the previous provisions of the Workplace Relations Act "sailed close to the wind", see Creighton B, 'The Workplace Relations Act in International Perspective', (1997), 10, *Australian Journal of Labour Law*, 31-49, at p. 48. I would argue that the Schedule is even closer now.

65 Final report of the *Royal Commission into Alleged Payments to Maritime Unions*, Australian Government Publishing Service, Canberra, 1976.

66 For a critical and insightful appraisal of the report, see Anne Riches "Union accounts - A three ringed circus", (1984), *Australian Law Journal*, 96.

67 See Industrial Relations Taskforce Report, *Review of Industrial Relations Legislation in Queensland,* Department of Employment Training and Industrial Relations, December 1998, p.84.