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TRADE UNION FINANCE: LACUNAE IN REGULATION

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Abstract

There is a pressing case for reform in the public regulation of union finances given the scale of such finances in the post-merger environment, unions' imprecise goals, the absence of effective competition and the survival of pressure to join in some areas. The case is strengthened by deficiencies in current regulation. This limits members' information rights, contains loopholes enabling malfeasance and fails to enforce reporting requirements. In 2001, union finance is a public policy issue as it was in the late 1970s. An evaluation of reforms advocated by the Howard Liberal-National government in 2000 shows retention of the bias in the regulation to inform third parties rather than union members and a failure to address lacunae concerning financial aspects of union mergers, union de-registration and the cessation of business. There is also no apparent commitment to increase resources for the all important compliance function and no mandating of 'plain English' explanations. The proposed raising of the income threshold for exemption from a stringent regulatory regime is a positive feature but the reform agenda is further weakened by the failure to extend the exemption criteria to include evidence of rank and file participation and control.

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INTRODUCTION

The 1980s and 1990s were an era of evaluating and of questioning financial regulation of corporations, of concern for the rights of shareholders and of critical examination of the performance of company directors, yet until recently an analogous process appeared to have completely by-passed the trade union sector. A crucial difference, of course, is that companies are registered and regulated under the Corporations Law, whereas trade unions are subject only to the controls specified in the *Workplace Relations Act* (WRA). In relation to financial accountability to members, this regulation differs from that applied to corporations. Provisions regulating union finances were extended in 1977 and strengthened in 1980, and a need for further reform in this area has recently been advocated. In 1998, the Howard Liberal-National government commissioned a review of current arrangements (Blake, Dawson, Waldron, hereafter Zeitz Review)[1], the first for over a decade. In October 1999, a Ministerial Discussion Paper, outlined proposed changes to, *inter alia,* organisations' financial, accounting and auditing reporting obligations.[2] In December 1999, the Government released an exposure draft of a Registered Organisations Bill (RO Bill). The proposed reforms sought to "enhance the accountability of registered organisations to .... their members" (Reith, 1999, para.1). Thus in 2001, the matter of union finances is once again a public policy issue. This paper begins by presenting the case for public regulation of union financial affairs, followed by an explanation of the current regulation under the *Workplace Relations Act.* Weaknesses and lacunae in that regulation are then analysed followed by an evaluation of the statutory reforms advocated by the government in the above Bill. Finally, possible grounds for exemption from more stringent regulation are discussed.

THE CASE FOR REGULATION

Union Financial Resources: Evolutionary Change

It may be easy to justify the absence of formal scrutiny of union affairs that applied to the infant unions of the early twentieth century: these were poor and non-complex organisations of working people, they were largely voluntary in nature, and many were organised in branch structures which ensured that members and office-holders were in frequent contact. Their finances were meagre, and the education levels and regular working duties of officials justified the design of simple and straightforward financial rules tailored to their particular circumstances.

Modern unions, like other organisations removed from the commercial mainstream, do little to bring their financial affairs to public attention. In the first major academic study of federal union finance, (Wielgosz 1974) the author found the data difficult to compile and to interpret. There was, however, ample evidence to suggest that, when the *Industrial Relations Act* was passed in 1988 to replace the *Conciliation and Arbitration Act* which originated in 1904, unions were no longer the small, impoverished and locally based organisations they may have been at the beginning of the century. On the contrary, there was much to suggest that they had multi-million dollar revenues, an expert and sophisticated bureaucracy, and an officialdom potentially insulated (via, inter alia, collegiate voting systems) from the rank and file.

That the financial rules governing trade unions have received little public attention until recently may be partly explained by the fact that there has been so little discussion in the past of the financial dimension of unionism. In his major study of 1974, Wielgosz relied on data submitted to the Industrial Registrar of the then Commonwealth Conciliation and Arbitration Commission, as required by the then *Conciliation and Arbitration Act.* Wielgosz found the data less than precise, and not ideal for providing an estimate of the wealth of unions. His conclusion was that there was not much evidence to support a view that unions were wealthy (Wielgosz,330). The assumption that unions are poor, that they have accumulated little wealth is widespread, and anecdotal evidence suggests that their assumed penury is one reason for the traditional lack of external interest in their finances.

An assumption of poverty may seem to be an unusual reason for waiving the need for financial scrutiny: some may argue that an institution may be poor because lack of close examination encourages financial profligacy or carelessness. However, even if the assumption of small cash flows and reserves was valid in the early 1970s when Wielgosz wrote, there is every reason to expect different circumstances to apply now, at least in terms of dues income, and the work of Griffin and De Rozario (1993) suggests that this is the case. In the 1950s, the common method of recruitment was that a union member, usually a delegate or a steward, approached each new employee and sought that employee's membership. The method of persuasion could vary from reasoned argument to forceful means. During the 1960s and 1970s, there was gradual and pervasive change. The recruitment method became one of personnel officers requiring recruits to tick a box signifying that union dues were to be deducted from wages and the same officer distributed union membership application forms. It was often suggested apocryphally that personnel officers looked unkindly on those who refused to agree to the deduction of dues and union membership. Refusals of this kind were interpreted as early warnings of potential trouble-makers. Through the 1970s the 'check-off' was a commonly negotiated item in collective agreements, whether or not union security provisions were included in awards (Plowman, Deery and Fisher, 1981:206). It was obviously a far more efficient system than reliance on employee delegates and members' timely periodic payments. The proliferation of the 'check-off' delivered guaranteed cash flows to the union at low cost and ensured the demise of rank and file activists who actually collected the dues. This development transformed the financial status of unions, enhancing the stability and certainty of dues income during the period between the work of Wielgosz and that of Griffin and De Rozario (1993). Consequently, union incomes might be expected to have increased relative to the findings of Wielgosz.

Wielgosz (1974:324) found ownership of real estate, often inner city real estate, to comprise an important asset for many unions, frequently carried at a historical valuation. The value of these assets have usually risen many times over the past two decades, and many of the gains have been realised as unions have moved premises. In the Melbourne *Sunday Age*, (Parkinson 1992:10) Huntley, editor of the Industrial Relations Newsletter, was cited as suggesting that the combined "resources" (presumably assets) of the largest 20 Australian unions exceeded $600 million. Huntley's methods of calculation were not disclosed, and the $600 million figure is little more than an estimate, but it is an estimate of an informed and long term observer. The Australian Tax Office reported that for the year 1986/87, the last for which these data were made available, taxpayers claimed $377,021,000 in union dues (Commissioner of Taxation 1989: 105). This suggests, given the value of property assets, income from investments, income from levies on members and other sources, that Huntley's is at least a `ballpark' estimate. Her estimates did not, apparently, include the assets of the ACTU to which virtually all Australian unions pay substantial affiliation fees. Obviously, there is nothing wrong or sinister about the accumulation of wealth by unions. If there were 2.5 million unionists, Huntley suggests that unions' worth is probably only something in the order of $250 per member, something which may, inter alia, cause one to concur with her suggestion that her estimate is conservative.

In recent decades, changes in union structure have transformed the financial resource base of the typical union. While some unions may be in control of funds that are of insignificant size, 21 of the 44 federal unions registered in 1998 had more than 20,000 members. Following the promotion of union mergers, the structural form to which most unionists belong is a conglomerate or multi-occupational union with more than 50,000 members; 86 per cent of unionists belong to such unions (Australian Industrial Registry, 1999a). Subscriptions income for such unions will be considerable. Thus, for example, one might expect in 1998, the Shop, Distributive and Allied Employees' Association, with a membership of 210,974, to have had an annual dues income in the vicinity of $54 million and the National Union of Workers, with a membership of 92,627, to have had an annual dues income in the vicinity of $21 million. These estimates are based on average dues of $260 and $234 respectively (Bachelard and Ellicott, 1999:26) and the 1998 membership figures are drawn from the annual membership returns filed with the Australian Industrial Registry. The statute (WRA, reg. 109) requires only that the number of members, as distinct from financial members, be lodged with the Registry, so income would be reduced to the extent of unfinancial membership.

Whatever the amount of union income or assets may be, a society which gives unions the right to collect regular membership dues also incurs a duty to ensure that the interests of the unionists are protected. A number of other characteristics of trade unions that support the case for review of regulation are now discussed.

The Characteristics of Unions

Initially it may be noted that, as membership is not always entirely voluntary, the unionist cannot be equated precisely with a small shareholder who may choose to invest or otherwise. In some cases the working person's right to work, their ability to obtain or retain a job, is directly dependent on union membership. "No Ticket, No Job" still applies at many work sites even though they do not display the sign. Where it applies, it does so despite the statutory prohibition on coercion into membership introduced in 1996 (WRA, ss 298A-298Z). Coercion of various forms has a long history in unionism, and it survives because Australian industrial relations law has always tended to focus on organisations rather than on individual working people. The current *Workplace Relations Act* is not free of this tendency. The legislation may prevent unions and their officials from forcing membership on the unwilling, but it has probably done little to restrain the enthusiastic rank and file members who can make life unpleasant for those who refuse to join. Over the history of unionism, peer pressure of various kinds has probably been more effective in recruiting the recalcitrant than more cumbersome administrative remedies. This kind of pressure almost certainly remains and is likely to do so despite legal restrictions on such devices as union security. Evidence of the survival of pressure to join, both employer enforced and union or union member driven, is detailed in a recent report to the office of the Employment Advocate (Wallis Report 1999: 20-25).

Secondly, unlike a commercial corporation limited by share capital, the purpose of unionism is not always entirely clear in that it does not maximize a single objective function. The shareholder that invests in a competitive firm can be assured that the company's efforts will, at some time, be directed to making profits or other tangible gains. If at any time it appears to be focussed on, for example, market share, in the longer term, it must return to concern with, if not profits, at least to increasing shareholder wealth. This is the function of the competitive firm in the long run, which must be concerned to maximise a single objective function, the pursuit of profit or gain[3]. Even when it can be expressly recognised in law that "a principal purpose [of trade unions] ... is the protection and promotion of the employees' interests in matters concerning their employment" (WRA, s.3), the situation is not so simple in practice. This was recognised when legislation for financial accountability was first introduced: "A certain common purpose must be shared by the members of a union, but as the objectives of unions broaden this becomes less and less likely" (Street,1977:2172). Unions, unlike the commercial sector, are not maximisers of any single function. It could not, for example, be suggested that they are concerned to maximise the wages of members, for many show as much concern with the wages of the working class as with those of members. For every union concerned to maximise the wage differentials of their members, there are as many concerned to increase the aggregate wage share. A single, or dominant function cannot be ascribed to the union, even in a field so restricted as wages of members. Those who, forsaking precision, suggest that the union is concerned to maximise wages in some form, would do well to consider the activity of Australian unions through 1983 to 1990, where they laboured assiduously to prevent wages rising above certain levels, or to prevent their increase by processes other than the arbitral system.

Given that the nature of unionism does not mandate pursuit of a dominant and unambiguous goal, union leaders consequently have a far wider range of discretion in the use of organisational resources than a corporate executive can ever have. The executive of a corporation is constrained by the fact that the use of resources for purposes not ultimately concerned with profits is misuse of those resources. As union purpose defies clear and unambiguous definition, it is difficult indeed to determine, other than a few specified prohibitions in the *Workplace Relations Act,* what constitutes a misuse of its resources.

In the United States, there seems to be reason to believe that union members have been tolerant of officials whose treatment of union funds would, in the corporate world, have been regarded as, at least, misuse. The International Brotherhood of Teamsters, over nearly two decades, re-elected key officials Dave Beck and later Jimmy Hoffa, despite strong evidence of their having misused funds. Raskin observes: "--- the important thing about the Teamsters is not Hoffa's web of underworld associations or his contempt for conventional standards of union ethics, but the extent to which his code is accepted uncomplainingly, even enthusiastically, by the members of his union ----" (Raskin 1969: 234-235; see also Cartter and Marshall 1967:143; Bloom and Northrup 1969:103).

In Australia in the early 1970s, the then Hospital Employees Federation (Victorian No.1 Branch), under the very competent leadership of its secretary Keith Mitchell, had been one of the more successful in securing wage increases. Mitchell had succeeded in increasing the effectiveness of hospital based bargaining groups, something new to the industry, and presided over an era of success for the union. At the same time, he managed to increase substantially his own salary and supplementary benefits. This is a very different situation from that of Beck and Hoffa, for Mitchell, who had a major role in developing the rules under which the union then operated, was able to demonstrate that whatever he had done had been within the rules of the union. Mitchell's proof of this was offered in the course of an Industrial Court hearing of a case (*McLure v Mitchell, 1974*) alleging dishonesty and malpractice which a union member brought against Mitchell. Inevitably the case involved full revelation of the extent to which Mitchell had enjoyed increased benefits, and as inevitably, the case was accompanied by sensational and exaggerated rumours.

The events were timed, no doubt fortuitously, so that the allegations of Mitchell's conduct and the publicity surrounding the legal action took place shortly before the union election for officers. At that election, Mitchell, opposed by the member who had taken the legal action, won, notwithstanding the adverse publicity. Doubtless there were other factors at work in the context of union elections of the 1970s, and doubtless the status of incumbent candidate provided a great advantage, but it seems clear the union membership was not concerned about the accusations levelled at Mitchell. Presumably members preferred to concentrate on his record in achieving gains for them.

Another relevant distinguishing characteristic of unions has been the lack of a competitive environment. Until 1997, the legislative regime, via the 'conveniently belong' provision, effectively limited closely inter-union competition and unions were the only voice for employees. In 1996, the Howard government sought to legislate for both inter-union competition and for competition between unions and alternative service providers. In respect of inter-union competition, it managed to lower barriers to entry (Senate, Explanatory Memorandum, 1996: 146-149) even though it was unable to achieve the competitive regime it had planned, due to Democrat objections. In addition, there is now express provision for enterprise unions and these face less onerous registration requirements (Senate, Supplementary Explanatory Memorandum, 1996: 71-74). In practice, there has been little increase in competition, with only five new registrations since January 1997 (Lee and Peetz, 1998: 12). Alternative service providers include employee committees, industrial lawyers and consultants who may act as agents in respect of non-union agreements. Their relative significance is not yet documented. The traditional picture however, has been one of protection from market forces. While the extent of protection provided by legislation may have declined since 1997, it would nevertheless be difficult to judge that the market for union membership is sufficiently competitive to ensure that all information is available to members as a consequence of those competitive forces.

Financial Malfeasance: Perennial but Isolated?

There is no evidence to suggest that misuse of funds by union officials is widespread. It is not however, a recent phenomenon. An early instance of financial misappropriation is recorded in an anecdote concerning the socialist pioneer William Lane. No source is ascribed to the event, but it was probably in the late 1880s or early 1890s. St. Ledger writes: "....One of the organizers of a powerful branch of the Shearers' Union had dipped his hands deeply into the Union's funds. It was a plain case of embezzlement. His salary was a fairly liberal one, and he was stealing from the coffers of a body of men by no means rich, and from a fund contributed by wage-earners forming a special reserve fund for defence to which Lane himself attached the greatest importance" (St. Ledger, 1909:63-64). When the union committee decided to prosecute, Lane, perhaps typically, came to the organiser's defence.

In 1973, evidence of misappropriation of funds became a ground for removal from union office (Conciliation and Arbitration Act, 1973, s.52). Specification of grounds for removal was one of a number of reforms introduced by the Whitlam government to close loopholes in the federal statute which enabled undemocratic practices. The architect and promoter of the 1973 reforms was the Minister for Labour, Clyde Cameron. His commitment to the cause of union democracy was forged in his conflicts with the federal secretary of the Australian Workers' Union, Tom Dougherty. These began in the 1940s when Cameron was secretary of the union in South Australia. In 1957, Alan Reid, writing in the Daily Telegraph, alleged that Dougherty had obtained a 6,650 pound loan from Labour Papers Ltd., a company controlled by the AWU, at 1 per cent

interest to purchase a two-storey home in Sydney. Dougherty accused Cameron of providing this information, but alleged subsequent moves by sections of the union's federal executive to consider expelling Cameron, by then a member of parliament, from the union were aborted (Howe, 1960). To reiterate, the argument is not that financial malfeasance is widespread in unions and, obviously, it is not confined to unions. The 1997 case of the chief executive of Coles Myer Ltd provides a recent example of such behaviour in the case of corporations (*R v Quinn, 1997*). Nonetheless, these examples show that, in devising regulation, transparency of financial decisions is at a premium.

Given the scale of union finances, unions' imprecise goals, the very limited market or competitive discipline, the dubious voluntary character of membership in some areas, and indications that financial malfeasance is always with us, there is a pressing case for adequate financial disclosure. These are the reasons which suggest unions should, as they do currently under the *Workplace Relations Act*, face requirements to disclose specific information, particularly in respect of salaries, superannuation costs and benefits, loans and fees. The nature of the current regulation is now explained.

CURRENT REGULATION

The current legislative provisions for the management and auditing of accounts and financial records of trade unions ("union finances")[4] are contained in the *Workplace Relations Act* (ss 268-285; regs. 106-116). The regulatory body is the Industrial Registrar (hereafter Registrar)[5] and the requirements apply to the organisation and all branches (WRA, s.271). Much of the current regulation is a product of 1980 amendments[6] designed to support "the government's policy of ensuring ... the full and active participation of members of those organisations in their affairs" (Street, 1980:770). This was in response to a Royal Commission Report (Sweeney, 1976) which questioned the adequacy of the (then) existing provisions, reported a low level of compliance and concluded the regulation was " ... not adequate to ensure that individual members of organisations, and the public, were able to establish the uses to which funds were appropriated and the financial state of the organisation" (Sweeney cited in Street, 1980: 770).

Of the nineteen sections in Division 11, only two deal with the rights of members[7]. The Act (s. 279) entitles a member to obtain a copy of the accounts and the auditor's annual report free of charge. This is satisfied if a summary of these is published in a union or branch journal, as the case may be, which is free of charge to members, provided a number of conditions are met. These are: (1) under the union's rules the committee of management resolves to provide a summary; (2) a copy is lodged in the Industrial Registry; (3) the auditor certifies the summary as fair and accurate; (4) the summary contains (a) a statement that the full report etc. is available free of charge to any member who requests it and (b) particulars of any deficiency, failure or shortcoming set out in the auditor's report. The detailed report and statements must be presented to either a general meeting of union members or a meeting of the committee of management, within a specified period.

Additionally, the Act (s.274), provides that a union is required to make available specified 'prescribed information' to a member, or to the Registrar acting on behalf of a member, on request. The prepared accounts must draw attention to this entitlement. The regulations itemise this information which includes, for example, details concerning donations, grants, levies, loans, remuneration of the holder of any office, and sale/revaluation of assets. An illustration of the exercise of this power was made public in 1998 in the context of internal dispute in the Health Services Union of Australia (Victorian No. 1 Branch). A national official had obtained a court order to examine financial documents amid allegations that the state secretary had misused a union credit card (Kermond, 1998: 3).

There is a general requirement to keep accounts in the manner prescribed in the regulations (WRA s.273). These also itemise the matters that must appear in the income/expenditure and asset/liabilities accounts. All the matters here are aggregations, such as 'the total amount paid as remuneration to holders of offices'; 'the total amount of donations or grants made'; and 'the total amount of loans receivable'. These data would surely provide little information which would interest curious or disgruntled members. Union members (250 where membership exceeds 5,000 or otherwise, 5 per cent of the membership) may request the Registrar to investigate the finances and financial administration of the union. The Registrar is then obliged to investigate (WR Act, s. 280(5),(6)&(10)). There is also a general requirement that records be kept by unions and lodged

with the Registry (WRA, Part 9, Division 10, s.268). A union is required to notify the Registry, but not the union members, in writing, of the particulars of any loan, grant or donation exceeding $1000 during the financial year[8] (WRA, s. 269). In April 1999, an example of a breach of this regulation was revealed. The Victorian secretary of the General Branch of the National Union of Workers (NUW), Dennis Lennen, had received loans totalling just over $4000 between 1992 and 1996. The loans were not disclosed to the members or to the committee of management. They had been discovered by the office manager who had then been dismissed. Subsequently, union rules were altered to require disclosure of distress fund loans. The union's national secretary, Greg Sword, said about $23,000 had been lent to officials from the distress fund. All had been in dire financial circumstances and had repaid the loans (Forbes, 1999:3). In the absence of detailed remuneration details, it is improbable that the explanation would satisfy the critical.

Finally, there is an exemption from some of the above requirements, including the preparation and filing of accounts, for unions with an annual income of less than $20,000, or such higher amount as is prescribed (WRA s.285, reg. 109). Total exemption applies if a union can prove to the Registrar that it did not have any financial affairs in any given financial year (WRA s.271A).

CURRENT REGULATION : AN EVALUATION

The current regulation appears to be a comprehensive and detailed code, but a number of weaknesses are evident.

Transparency, Member Access and Complexity

Despite the importance of transparency of financial decisions to members, most statutory obligations are to lodge information with the Registrar. Similarly, grants and loans are to be reported to the Registrar rather than to the members, despite expectations that they may be keenly interested in this. The NUW case cited above provides a specific example of detail concealed from members. A similar lack of transparency is represented by the failure to require notification of political donations.

The reporting requirements for unions can be satisfied by publication of a summary of audited accounts in the relevant union journal. No standards are imposed to ensure that the summary is comprehensible to a membership of varying degrees of sophistication. In contrast, in many areas of no greater import to working people, considerable efforts are made, including translation into non-English languages to ensure the information is widely understood. Within the *Workplace Relations Act* itself, there is a special duty of care on the Commission in respect of employees who may be disadvantaged, for example women, persons from a non-English speaking background or young persons. Before certifying a collective agreement, the Commission must be satisfied that the explanation of the terms of the agreement has taken place in ways that were appropriate, having regard to the persons' particular circumstances and needs (WRA, s.170LT(7)). No such provisions apply in respect of financial information. The *Workplace Relations Act,* like its predecessors, seems to attach at least as much importance to the provision of financial information to the Registrar as it does to the members of the union. The current provisions aim to "encourage" participation by members in their trade union's affairs and "the efficient management of organisations" (WRA s.187A) without actually ensuring that members are fully informed and able to control their unions' financial management.

Accountability of Union Officials to Members

Under the WRA there is no express fiduciary duty on officials. Such duty derives only from common law. At common law, office holders who deal with other people's money have always had a duty imposed on them to act in the best interests of the organisation. However if this duty is breached, it is cumbersome and costly to launch a court case to establish whether such duties have been breached. The Zeitz Report stated that "the status and rights attaching to the registration of an organisation bring with it obligations and accountabilities as a matter of public policy ... and that such accountability extends to officers and executives within organisations" (Zeitz:4). We endorse the Report's recommendation for an express statutory duty.

Compliance

Breach of the existing requirements for financial reporting are enforced currently by way of criminal sanctions (see Reith, 1999: paras. 171-172), but it appears that they are not adequately enforced, raising a problem with compliance. This is suggested for example in correspondence between the Community and Public Sector Union and the Australian Industrial Registry. On 29 April 1999, after a good deal of correspondence, initiated by the Registrar's office, the union submitted the required accounts for the year 1995/96, which had just been finalised (Australian Industrial Registry, 1999b). It is understood that, in fact, fines have never been imposed in relation to non-compliance with financial reporting requirements. In the above instance, lags in supplying information were not confined to financial data. In March 1999, a number of branches and sections had failed to lodge membership and office holder details for recent years, in some cases as long ago as 1995 (Australian Industrial Registry 1999c). It is acknowledged of course that this is limited evidence and further empirical research is needed. Understandably, Australian unions have a history of opposition to statutory sanctions seeking to restrict and penalise unions' capacity to take industrial action against employers. Sanctions in relation to financial reporting can be distinguished. Non-compliance with the law is likely to disadvantage their own members. The few unions who made submissions to the 1998 Review argued that there was no evidence of a failure in the existing system of reporting (Zeitz Review:15). The problem is that there is an omission in the regulation namely, no statistical reporting to parliament on the extent of compliance.

Cessation of Business

Another deficiency which needs to be addressed is that the statute makes no provision for the liquidation and disposal of a union whose effective business has ceased. That is, should a union lose all of its members, and only an executive committee remain, only the union's rules at the time determine the disposition of its assets. Not every union which has gone out of existence has done so via merger with another. Wielgosz (1974: 321) noted that the Felt Hatters, at the time of his study, were one of the unions with the highest per capita financial assets. At the time, the union recorded a nominal membership of 500, but in practice it had virtually ceased trading. The union experienced a situation in which assets per member increased progressively as members left the union through retirement or death, but none joined. However its resources were eventually distributed, the then *Conciliation and Arbitration Act* provided no guidelines. The *Workplace Relations Act* provides no advance on this.

Union Mergers: the Financial Dimension

In 1991, it became part of the chief object of the Act to encourage and facilitate union mergers (IR Legislation Amendment Act 1990, s.4). The impetus for the mushrooming of union mergers since the late 1980s has not come from the rank and file of membership, nor from union leaders accountable to that membership. It was initiated, in 1987, within the ACTU, the body to which independent unions affiliate, by an official without a mandate from the membership of unions (ACTU 1987; Gardner,1988:147–148). It appears nonetheless that, in the main, the union mergers that have taken place have done so with the compliance of the chief executives of the unions concerned.

The causes of union mergers have been grouped by Tomkins as organisational; politico-institutional; and economic (Tomkins, 1999: 62-63). A politico-institutional factor, in the form of federal legislation with an important coercive element, was introduced in 1990 with effect from February 1991. Unions, initially those with less than 1000 members, and subsequently those with less than 10,000 members, faced the prospect of a threat to their survival. The Commission was required to review their registration to consider whether special circumstances existed to justify their continued registration (IR Legislation Amendment Act 1990, s. 14). While these provisions were later repealed following an adverse report from the International Labour Organisation, they operated for over two and a half years. The legal pressure to merge coincided with an intensification of ACTU advocacy of mergers in the form of its union rationalisation policy (ACTU, 1991: 118-125). Indeed, the influence of the ACTU may be the critical factor here. Tomkins' survey of union officials, which seeks to explain union mergers, finds ACTU policy to be the most significant independent variable. Surprisingly, government policy (ALP policy) and legislation (Industrial Commission) were not

found to be significant (Tomkins, 1999:68-69). The results appear testimony to the *de facto* power of the ACTU *vis-a`-vis* affiliates. Government policy and legislation were of course at the time in harmony with the ACTU position. In 1996, the encouragement to mergers was removed from the objects of the statute. The extensive merger provisions remain in the statute however and, at the time of writing, there has been only one union disamalgamation (Lee and Peetz 1998:13).

In the absence of a coercive element, it is difficult to understand why the chief executive of an autonomous organisation, facing no competitive threat, and not exposed to a market test, would accept the merger of a hitherto independent organisation and, presumably, accept a subordinate position in the new and larger body. While it is true that not every person does value independence and autonomy, it is surely unusual that so many union officials have, apparently, relegated these matters to a lower order of revealed preference. A gossip columnist suggested (Sunday Age, 1993:16) in one case that technical termination payments were a powerful inducement. Whether this had any merit is not pursued here, but it does point up the fact that union members are not given information on the way in which their assets are used as unions amalgamate. The campaigns for amalgamation have rarely involved detailed explanation of the financial consequences. While union members may acquiesce in merger proposals, it is a matter for speculation whether they would have done so had they been aware that their officials supporting the merger were to receive financial compensation.

The purported objectives of mergers give some cause for concern. A rationale for union mergers put forward by the ACTU (ACTU 1987) rests on untested assertions about the efficiency of large organisations. The history of unionism has not suggested that large unions are always the most effective in securing gains for members: the very large Shop, Distributive and Allied Employees Association did not seem to be more effective than the very small Seamens' Union of Australia. Judgements about the efficiency of unions are, of course, difficult, since efficiency must be construed as ability to achieve the central purpose of an organisation.[9] If there is room for considerable argument about the purpose of a union, there are no cost data on which efficiency in attaining the fuzzy objectives can be calculated.

The de-registration of the de-registering organisations takes place on the day of the amalgamation (WRA, s.253Q(3)(c)). In other words, the cessation of union A is simultaneous with its merger with union B. The WRA contains only one section regulating financial matters upon the merger of two or more unions. Essentially, on the day of amalgamation the union which merges with the other gives the new (merged) entity all its assets and liabilities (s. 253R). These two provisions, introduced in 1991 (Industrial Relations Legislation Amendment Act 1990 s.15), have gone some way to closing opportunity for misuse of funds which existed in the period between the deregistration of one union and its absorption by another. However, it should not be overlooked that some parties do have prior knowledge of the date of amalgamation day. Thus, in the absence of further provisions, the system remains vulnerable to malfeasance. A 'due diligence'[10] process analogous to that applied in corporate takeovers or mergers before amalgamation, including externally audited accounts, would provide some safeguards. The process should go beyond the issues of finance and assets. Such a process should specify not only the resources and memberships to be combined, but the objectives to be attained. One could reasonably require that an independent expert's report on the feasibility of obtaining those objectives be a part of the process. It may be necessary to add a further step in the process, for unionists need to be informed how the specified objectives will translate into specific benefits for them. In the past, aspirations, rather than firm objectives have been provided, and their relationship to the terms and conditions of employment for members have not been clear.

Union Deregistration: the Financial Dimension

The deregistration process also has a worrisome aspect. Once deregistration takes effect, the assets of the organisation are subject only to the rules covering the finances of an unincorporated body. Indeed the Victorian government, in introducing special legislation to deregister the Victorian Branch of the Builders Labourers Federation (BLF De-recognition Act 1985) found it necessary to amend the Act to incorporate section 7A which empowered the Parliament to appoint a "custodian" to take control of the organisation's funds (BLF De-recognition Amendment Act 1987). The reason for this was that its assets remained, apparently, at the disposition of the officials of the former union. While the reports of the Custodian make

fascinating reading, with accounts of funds shifting mysteriously from place to place, of bank accounts in false names and of corporations controlled by the union, they also raise a question.

The Victorian government was remarkably eager to prevent the union officials from retaining access to the funds, presumably to protect other sectors of unionism from the effects of a public relations campaign which the deregistered organisation might have mounted, but it gave no indication of the proper disposition of the funds. To what end were the assets, which the Custodian suggested had a net value of about $2.5 million,[11] (Report of Custodian, 1987:13) being conserved? There seems to have been no suggestion that they should be returned to former members. There are even suggestions that the union's records were not sufficient to record accurately the members to whom the funds might have been returned, if that possibility were ever to be considered. In 1998, the money was still with the Custodian (Report of Custodian, 1999). The matter has been the subject of legal action since 1994, in the first instance by the Construction, Forestry, Mining and Energy Union (CFMEU) seeking transfer of BLF assets and real estate to the CFMEU. In October 1995, assets, but not real estate, were transferred following a decision by the Supreme Court of Victoria. This decision has been appealed by the Victorian government, the Custodian and a group of former BLF members, with subsequent appeals by the CFMEU (*see for example The State of Victoria v Sutton [1998] HCA 56 (2 September 1998)*. At the time of writing, the matter is still before the courts (Shaw, 2001:9). Fifteen years after union assets were seized by the state the issue remains unresolved.

PROPOSED REFORMS 2000

Notable proposed changes to the regulation of union finances in the Howard government's exposure draft concern member access to financial information; financial accounting and reporting standards; express fiduciary duties for officials; compliance; and exemptions. Should the Bill become law, financial regulation will be expanded significantly from the current 19 sections to some 70 sections. The undesirable result here would be an increase in complexity.

Member Access to Financial Information

The Bill makes only one substantial change in this area, a proposal concerning political donations. In order for a political expenditure fund to be established, a secret ballot of members with a majority voting in favour is required. A union must then lodge a statement with the Registry showing details for each payment made for political purposes (RO Bill, clauses 145-147 & 231).[12] This includes the amount and purpose of each payment, as well as the name of the person or party to whom the payment was made. This proposal increases transparency of financial decision making for the benefit of the regulators but there is no intent to mandate that such statements accompany the financial statements distributed to members. The members would have a say in the establishment of a political fund but the proposal maintains the current regulation's bias toward disclosure to a third party, rather than disclosure to the members who have provided the funds. Given the objects of the Act concerning democratic control (WRA, ss 3&187A), this omission seems indefensible.

Financial Accounting and Reporting Standards

The accounting provisions have been rewritten to reflect the standards set in the Corporations Law. The proposed changes are more detailed but the substance of most of the current provisions are retained. The concept of "reporting unit" is introduced, applicable to the union as a whole and to its branches (RO Bill, clause 237)[13], on which all statutory obligations are placed. The terminology has changed: the general duty of "keeping accounts, etc" is now a duty to keep "financial records", consisting of a "general purpose financial report" and an "operating report" (RO Bill, clause 246). The Registrar may issue reporting guidelines for this purpose (RO Bill, clause 249). Auditor matters have been expanded with reference to an explicit benchmark – Australian Accounting Standards (RO Bill, clause 247). Obstruction of an auditor in carrying out his or her duties is now an offence (RO Bill, clause 252). The proposed reforms may regularise the accounts by standardising the format, and provide clearer time frames for the provision of data. A change of standards *per se* will not, however, remedy the identified weaknesses such as accessibility and user-friendliness of data.

Fiduciary Duties

Another major proposed innovation is a statutory framework of fiduciary duties for office holders (RO Bill, clause 282–293; see also Reith, 1999, para.189). 'Fiduciary duties' apply to officers of unions because they are dealing with the members' money, not their own. In this context, a duty is placed on officials to act in good faith in relation to that money. As noted above, they owe this general duty at common law and it is now proposed by statute. This means that a statutory duty is to be placed on officials to act in the best interests of the members when handling the financial affairs of the union. This central legal concept constrains the range of actions an officer of a body can take with finances they hold on behalf of others and makes them accountable directly to members for acting in bad faith. The proposal gives members the statutory right "to seek redress from officials [of trade unions] who fail to meet their obligations ... (with civil penalties for breach)" (Reith 1999, para. 180) and therefore increases officials' accountability. Breach of these duties, such as to act in good faith, not to improperly use their position or any information obtained by virtue of their position and to exercise a duty of care and diligence (RO Bill, clauses 284- 287), are modelled on the Corporations Law and breach of such a duty could result in a civil or criminal offence, or result in suspension from office (RO Bill, clause 295). There is a defence to these duties for reliance on professional or expert advice from others, although if duties are delegated to another, the officer who delegated the duty is still responsible (RO Bill, clauses 291 & 292).

Compliance

The imperative to comply has been strengthened. For example, in relation to each and every reporting obligation, a civil penalty is imposed if a false or misleading statement is made.[14] In terms of enhancing compliance, the government takes a two-fold approach. It recognises that "[t]he current regime of criminal offences has not been utilised" and also that the level of the penalty is not an adequate deterrent (Reith 1999, para 173). It adopts an alternative approach, proposed by the Zeitz Review, of utilising civil penalties as well as increasing the level of penalties, retaining criminal penalties only in the most serious cases. The criminal offences would be extended to cover not only offences committed by the union (see, for example, WRA s.323) but individual union officers as well. The Registrar remains the official empowered to investigate breaches, and can issue a notice to an organisation to rectify the situation, or apply to the Federal Court for a civil penalty order or refer the matter to the Director of Public Prosecutions if the offence is possibly criminal (RO Bill, clause 269; see also Reith 1999, paras. 181-184 & 186). If the union has failed to comply with a Federal Court order to comply with the records, accounts and conduct of officers provisions, the union or a person interested or the Minister may be able to apply for de-registration (RO Bill, clause 125).[15] Notably, concerns about compliance motivated the 1980 statutory amendments and two decades later the same concerns are raised. If the compliance problem has prevailed, and a comprehensive answer here requires detailed empirical investigation, it is not likely to be eradicated without adequate resources directed to enforcement.

Exemptions

In terms of the method of preparing accounts, there is to be a significant discretion given to the Registrar to exempt a union from certain accounting standards (RO Bill, clause 236). The decision criteria relate to the cost of compliance, as well as the needs of the members of the union. This is one instance where it is proposed to take members' needs expressly into account. Secondly, the income threshold for reduced reporting requirements has been raised from $20,000 to $100,000 or such other amount as is prescribed (RO Bill, clause 272). The positive correlation between union size and the stringency of regulation, which underlines the exemption provisions, is sound. A weakness of the proposed reform, however, is the failure to extend the exemption criteria to include the presence of democratic features *(see below).*

Other Desirable Reforms

Any revision to the legislation should also seek to remedy a number of weaknesses identified above by the authors. Regulation needs to mandate direct disclosure to members of the union's financial affairs as well as 'plain English' explanations. At the very least, a statement that all relevant information can be obtained

from the Registrar is required in order to ameliorate the complexity and the lack of direct access by members. In the case of cessation of the business of a union, the Act should require stipulation of how assets are to be distributed. The regulation should also have clear disclosure requirements of the financial dimension of union mergers and require a 'due diligence' process which includes audited accounts and details of all payments to officials associated with the merger. Finally, the financial dimension of union deregistration requires uniform regulation to prevent ad hoc 'solutions' to problems such as that presented by the BLF case.

EXEMPTION FROM STRINGENT REGULATION

As noted above, the government proposes to lift the income threshold for exemption from reporting requirements. Incidentally, there is a parallel here in Corporations Law where the regulatory requirements differ according to the size of the company. The smallest companies must keep sufficient financial information to give a "true and fair view" of the company's accounts (Corporations Law s.286) but have less mandatory disclosure to the corporate regulator, so that less information is available to the public.

We endorse the income threshold change but in our view there are additional grounds for exemption which are worthy of consideration. If application of Corporations Law standards to the financial regulation of unions were introduced, it would be retrograde to require that every union should be covered by the most onerous disclosure and reporting rules. In addition to the income threshold exemption, unions of particular types, and those at certain developmental stages, could be exempted from the general rules. Clearly, standards would need to be developed so that applications for exemption from regulation could be evaluated.

Rank and File Sovereignty

In the case of unions, unlike corporations, there is a widespread expectation among unionists, union leaders and the community that they should be governed democratically. This expectation is reflected in the current legislation (WRA ss 3(g)&187A) and has been a feature of the federal industrial relations statute since the Whitlam government introduced express participatory democracy objectives in 1973 (Conciliation and Arbitration Act (No. 2) 1973). Thus in accord with the object of leadership accountability and encouragement to members' participation in the affairs of the union, one ground for exemption might be where a union is sufficiently small or restricted in coverage to ensure that members are in daily contact with their officials, and provided those officials are directly elected to their positions by members. A union whose membership was confined to employees of any organisation or firm of less than 1000 employees would therefore qualify, provided it met the electoral standard of a direct voting system *(see below).* Enterprise unions of these characteristics might be the most obvious group to qualify. Others which might also qualify would be multi-enterprise bodies in specific situations, such as a union covering employees of several employers where the employees were geographically or occupationally isolated. A union might lose its exempt status should more than 10 per cent of its income be spent in affiliation fees or donations to bodies whose officials were not directly elected by all members of all affiliates. It would follow logically that any organisation receiving from unions gifts, loans or fees amounting to 10 per cent of dues income, should also be covered by the more stringent regulatory reporting requirement. Thus a localised focus would not be a sufficient condition for exemption. Independence from forces other than the resolutions of the membership might be a further condition.

Exempt organisations would, of course, be required to provide financial reports to members, perhaps half-yearly income and expenditure statements. The Registrar could develop model rules for these cases. A desirable departure from the existing situation would be to emphasise the need to inform members rather than informing the Registrar.

Another desirable ground for exemption would be that all offices in the exempt union were filled by election using a direct voting system. Such systems have been identified as a necessary structural feature for representative democracy (Edelstein and Warner, 1975:82). This would be in line with the principal object of the statute, which seeks, inter alia, to make unions accountable to their members. At present, collegiate voting systems may be used (WRA, ss 4&197(1)) [16] and they are reportedly widespread (Cook, 1988:1241).

McCallum (1980) has shown that, under the collegiate system, even with smaller, more specific unions than the conglomerates which now account for a majority of union members, it was possible for the union secretary, effectively its chief executive officer, to evade elections for periods exceeding ten years. One might expect that large and nondescript unions resulting from contemporary union mergers would be even less responsive to their whole memberships than were those of the kind McCallum described.

Union Representation Rights

Yet another ground for exemption might be that the union's representation rights were based on the votes of employees. To facilitate this, it would be necessary to develop a mechanism under the statute to enable workers to determine for themselves the form of union representation they require. This could provide for example, that at any workplace, on the application of a minimum number of employees, an election be held to determine the majority view on the preferred form of representation. In the earliest stages it would be desirable to restrict employees' choices to either the current representation (typically a national union), an enterprise union or no registered union. As more experience was developed in workplace elections, it may be possible to extend the candidatures to include national unions other than the current or traditional representative. Before that could be done, unions would need to demonstrate that they could conduct such campaigns without disrupting the normal business of the workplace. The legislation should also protect against any interference from employers during the campaign period. This would mean that employers would not be granted audience rights to express their views to employees on the choices before them. Notably, at present the Registrar, employers and unions may be heard on the subject of who should represent employees, but the employees themselves have no direct voice in a matter that is likely to be of some importance to them.

CONCLUSION

This paper has made out the case for strengthened regulation of union finances, highlighting structural changes in unions, and other perennial characteristics of unions and unionism such as imprecise objectives and the absence of a competitive environment. Today, the dominant structural form of unions in the federal jurisdiction, in terms of coverage of unionists, is an organisation with more than 50,000 members and, on a conservative estimate, an annual dues income of at least $10 million. Most unionists now belong to a union whose organising base is multi-occupational or conglomerate in nature. In the case of day to day operations of Australian unions, there is little to ensure that the members are fully informed on financial matters. Obviously, some unions will always be assiduous in providing financial information to members, but these do so of their own volition. The financial information that unions are required to make public is far from exhaustive. The deficiencies identified in the current regulation include the failure to mandate user-friendly and timely financial information and significant loopholes relating to mergers, deregistration and to situations where unions have virtually ceased trading. In this matter, as elsewhere, the Act shows a commendable zeal for the protection of unions, but less for the protection of unionists. To presume that the interests of the two are always identical is to be innocent of the facts of organisational life (Ross, 1956).

An analysis of reforms to union financial regulation proposed by the Howard government in 2000 shows them to be modelled closely on financial and reporting requirements under Corporations Law but to be placed within a separate industrial relations statute covering all aspects of union regulation. If implemented, the proposals have the potential to remove some deficiencies in the current law, but they do not go far enough. There is negligible advance on the *status quo* in terms of member access to user-friendly information and the proposals provide no remedy for the above-mentioned loopholes. The role of the Registrar is crucial given the discretionary powers proposed for this office and given that this office is the repository of all financial data. At this stage there is no evidence of a commitment to ensuring that the proposed measures for compliance will be adequately funded. Further, as an adjunct to effective enforcement, there is also a need for a statistical reportage system, similar to the obligations imposed on corporations under the Corporations Law. Such a system would, *inter alia*, ensure public access to the extent of compliance in practice.

All forms of business organisation must be financially accountable to members. In advocating greater stringency in the regulation of union finances, this paper does not seek to disadvantage unions. Workers need strong unions as a countervailing power to the power of capital. Part of that strength derives from their financial resources. An equally important source of strength is membership commitment to the organisation. Unionism will only be strengthened if regulation ensures transparent decision-making by leaders entrusted with management of the union's finances. Consistent with that view, it has been argued here that exemption from more stringent regulation should be granted when a union satisfies specified democratic conditions which ensure rank and file participation and control.

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ENDNOTES

[1] Blake Dawson Waldron *Review of Current Arrangements for Governance of Industrial Organisations – Report and Recommendations* (June 1998), (Zeitz Review) prepared by a partner, and former President of the Employee Relations Commission (Victoria), Susan Zeitz.

[2] The other proposed changes relate to: regulation of access to, and participation in, the workplace relations system by organisations; and democratic control.

[3] For an academic critique of this view, entailing argument that broader community interests need also to be served, see B.R.Cheffins, *Company law: theory,structure and operation*, OUP, 1997.

[4] The statute in fact regulates 'registered organisations' which include employer associations. This paper is concerned only with trade unions and the term 'unions' refers to those unions which are registered under the Act.

[5] There is one section where a function is specified for the Federal Court (Industrial Division) (s. 280B).

[6] *Conciliation and Arbitration Act Amendment Act* 1980 which supplemented provisions introduced via *Conciliation and Arbitration Amendment Act (No. 3)* 1977.

[7] Seven sections are concerned with auditors (ss275-278); 3 with information to the Registrar and the investigatory powers of the Registrar ss280-280B); 1 with interpretation of 'financial year' (s.270); 2 with the keeping of financial records and the preparation of accounts and statements (ss272-273); 2 with unions' branch structure when preparing and lodging accounts (ss271&281); 1 with exemptions (s.271A); and 1 with reduced requirements for unions below a specified income threshold (s.285).

[8] This provision was legislated by the Fraser government in 1982 following the Report of the Royal Commission into the Activities of the Australian Building Construction Employees and Builders Labourers' Federation, *Conciliation and Arbitration (Management of Organisations) Amendment Act 1982*. The Labor Party supported the Bill but claimed it went beyond the Report by regulating loans to anyone, rather than just to officials or union members, R. Hawke, House of Representatives, *Debates*, 9 November 1982, 2876.

[9] This point has been made by Hyman in the context of a critique of the presumed conflict between efficiency and democracy in unions, R. Hyman, *Industrial Relations: A Marxist Introduction*, Macmillan, London, 1975, pp.83-84.

[10] There are a number of interpretations of this concept, see for example, R.Baxt, H.Ford and A.Black, *Securities Industry Law*, (5th ed.), Butterworths, 1996, pp.117-118; W.Duncan and S.Traves, *Due Diligence*, LBC Information Services, 1995, pp. v-viii. The concept is usually raised in the context of sale of shares or purchase of property. Adapting the concept to union mergers would mean that each union considering a merger would conduct a thorough investigation of the other union's claimed and actual financial and operational performance.

[11] It may be noted that the figure of $2.5 million refers only to those assets which the Custodian was able to locate in Victoria. Some had been removed to other States.

[12] See Reith, 1999, para. 112 – 122 where the issue of whether members should have a greater say in the expenditure of membership funds for political purposes is discussed and various regulatory options raised.

[13] The Registrar has a role in certifying branches and organisations into reporting units [See clauses 240 – 245].

[14] In relation to: a person [clause 227(3)], an organisation [clause 232(4)], an auditor [clause 251(9)], the committee of management [clause 261], complying with an investigation by the Registrar [clause 270)].

[15] This clause makes it a ground for de-registration that an organisation has failed to comply with a s.269 order: "Section 269 provides that the Registrar can seek an order from the Federal Court where the Registrar has conducted an investigation and is satisfied that a reporting unit of an organisation has contravened Part 3 of Chapter 5 or guidelines or rules relating to financial matters" [Explanatory note 2].

[16] In 1976, the Fraser government set aside 1973 Whitlam government legislation outlawing collegiate elections for full-time officials one day before it was scheduled to come into operation *(Conciliation and Arbitration Amendment Act (No.2) 1976)*. The then Labor Opposition opposed this. In 1988 however, both the Hawke Labor government and the Liberal-National Opposition opposed an attempt by the Australian Democrats to restore the 1973 Cameron provision requiring a direct voting system for full-time positions (Senate, *Debates*, 12 October 1988, 1239-1242).

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