



Australian Government

Department of Employment

**SENATE STANDING COMMITTEE ON
EDUCATION AND EMPLOYMENT**

**Fair Work (Registered Organisations)
Amendment Bill 2013**

INTRODUCTION

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Standing Committee on Education and Employment Inquiry into the Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill).

2. The Bill was introduced into the House of Representatives on 14 November 2013 and implements the Government's election commitment to achieve greater accountability and transparency for registered organisations.

3. Registered organisations play a critical role in Australian workplaces and the economy and their members invest a great deal of trust in them. Recent examples of financial misconduct within certain registered organisations have demonstrated that the existing regulatory framework is not sufficient to provide members of registered organisations with confidence that the management of registered organisations is sufficiently accountable and transparent and that their membership contributions are being used for proper purposes.

4. More effective regulation of registered organisations and increased penalties are an appropriate way to ensure that the interests of members are protected in the same way as the interests of shareholders of companies. This will ensure that members can have confidence that officers of those organisations take their obligations seriously and can be held to account.

5. The Bill will amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to ensure registered organisations and their officers will have similar fiduciary and statutory responsibilities to those of companies and directors, as set out in the *Corporations Act 2001* (Corporations Act). Building on the existing framework of registered organisations regulation, these amendments will ensure that organisations and officers are held to higher standards of accountability in relation to their conduct and use of members' funds.

6. The Bill will make amendments to:

- establish an independent regulator, the Registered Organisations Commission (the Commission), to monitor and regulate registered organisations with enhanced investigation and information gathering powers;
- strengthen existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain rule obligations on the face of the RO Act and making them enforceable as civil remedy provisions;
- amend the requirements on officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

7. In line with normal Committee on Industrial Legislation processes, exposure drafts of the Bill were circulated to and discussed with employer organisations, unions and peak bodies during confidential consultation sessions facilitated by the Department on 30 and 31 October 2013.

8. This submission provides:

- a description of the role of registered organisations in the Australian workplace relations system;
- a summary of the existing registered organisations framework; and
- details of the key provisions in the proposed Bill.

ROLE AND SIGNIFICANCE OF REGISTERED ORGANISATIONS IN THE WORKPLACE RELATIONS SYSTEM

9. Employee associations and employer associations play a significant role in Australia's economy through their involvement in the workplace relations system, by advocating on behalf of their members and by supporting the interests of their members in industrial matters.

10. Formal registration as an organisation under the RO Act allows registered organisations to access a range of privileges and rights under the RO Act and *Fair Work Act 2009* (FW Act). This allows organisations to play a key role in the facilitation of the national workplace relations system, including by:

- engaging in the modernisation, variation and review of awards;
- representing members in matters before the Fair Work Commission (FWC);
- participating in the process of setting the national minimum wage;
- representing the interests of their members in relation to work health safety and other industrial legislation; and
- assisting members in the course of dispute resolution.

EXISTING FRAMEWORK

11. Under the RO Act, the General Manager of FWC is empowered to carry out various functions. The General Manager provides advice and assistance to registered organisations in relation to their rights and obligations under the RO Act. The General Manager is also responsible for keeping a register of organisations.

12. The General Manager can make inquiries or conduct investigations concerning compliance by organisations with:

- Part 3 of Chapter 8 of the RO Act regarding financial records and audits including reporting guidelines and regulations;
- the rules of the reporting unit relating to its financials or financial administration; or
- a breach of civil penalty provisions.

13. In conducting an investigation, the General Manager may currently make use of a number of compliance tools including issuing a rectification notice to an organisation, commencing proceedings or referring a matter on for possible criminal prosecution.

14. Under the amendments made by the *Fair Work (Registered Organisations) Amendment Act 2012* (the ROA Act, which will commence on 1 January 2014) the rules of all registered organisations must require an officer to disclose:

- any remuneration and relevant non-cash benefits paid to them;
- any material personal interests in a matter that relates to the affairs of the organisation or branch; and
- certain payments made by the organisation or any of its branches.

15. An organisation is required to inform members of the disclosures made to it by officers in accordance with its rules. The Minister may issue guidelines containing one or more sets of model rules dealing with disclosure by officers.

16. Under the RO Act, the penalty that may be imposed by the Federal Court for contravening a civil penalty provision is 60 penalty units (or 300 penalty units for a body corporate).

KEY MEASURES IN THE BILL

17. As noted above, this Bill will amend the RO Act to ensure better governance of registered organisations. While the Bill further aligns the regulations of registered organisations with the regulation of corporations, it does so within the existing RO Act framework, meaning that existing features of the framework have generally been preserved.

18. The amendments will provide an appropriately empowered and independent regulator that will ensure compliance with the RO Act. The amendments will also improve the governance and financial transparency of registered organisations for the benefit of their members.

19. The key measures in the Bill are outlined below. They are set out in three broad categories:

- establishment of the Commission with enhanced investigation and information gathering powers based on those of Australian Securities and Investments Commission (ASIC);
- measures to promote transparency and accountability, including financial disclosure requirements, disclosure of material personal interests and reporting requirements; and
- increasing civil penalties and introduction of a range of additional criminal offences.

20. The greater alignment of regulation of registered organisations with that of companies, a dedicated and independent regulator and increased penalties will ensure that members of registered organisations can have the same confidence in the regulatory framework and oversight of their organisations that is enjoyed by shareholders of companies. Members can also be confident that officers of registered organisations must take their obligations seriously and will be held to account.

Registered Organisations Commissioner and the Registered Organisations Commission

The current regulator

21. The FWC (established by s 575 of the FW Act) is comprised of a tribunal and an administrative arm. The head of the tribunal is the President. The General Manager, who oversees the administrative work performed by the staff of the FWC, assists the President.

22. In relation to registered organisations, the tribunal deals with registration of new organisations, cancellation of registration in limited circumstances (Chapter 2 of the RO Act), approval of amalgamation and withdrawal from amalgamation ballots (Chapter 3 of the RO Act), representation orders in demarcation disputes or for workplace groups (Chapter 4 of the RO Act), approval of alterations to the name or eligibility rules of organisations (Chapter 5 of the RO Act), orders for a member of an organisation to inspect the organisation's financial records, and approval of membership agreements between organisations and state registered unions.

23. In relation to registered organisations, the administrative arm of the FWC deals with overseeing the compliance of registered organisations, processing right of entry permit applications and providing information about the rights and obligations of registered organisations. It also conducts inquiries and investigations (Chapter 11 of the RO Act) into registered organisations' accounting and auditing obligations, rules regarding finances and financial administration, as well as any breaches of the civil penalty provisions of the RO Act (Chapters 7, 8 and 9 of the RO Act). The General Manager is able to commence proceedings in relation to breaches of civil penalty provisions, or refer matters to the Director of Public Prosecutions or the police regarding possible criminal offences.

The Registered Organisations Commissioner and Commission

24. New Part 3A of Chapter 11 of the RO Act will establish the Commission as a dedicated independent regulator. The Commission will be constituted by a Registered Organisations Commissioner (the Commissioner) and staff assisting the Commissioner. The Commissioner will assume the investigations, enforcement, advice and assistance responsibilities of the General Manager in relation to registered organisations.

25. The Commissioner will be required to ensure that investigations are completed quickly and efficiently. The Commissioner will have the independence and powers to regulate registered organisations effectively, efficiently and transparently.

26. The staff assisting the Commissioner will be persons engaged under the *Public Service Act 1999* (PS Act) and employed within the Office of the Fair Work Ombudsman. The effect of including the Commission as part of the Office of the Fair Work Ombudsman is to make the Fair Work Ombudsman the relevant Chief Executive for the Commission for the purposes of the *Financial Management and Accountability Act 1997* (FMA Act).

27. While the Commission will be part of the Office of the Fair Work Ombudsman for the purposes of the PS Act and the FMA Act, it will have a high degree of independence. The Commissioner will have independence in the exercise of his or her functions and powers and in his or her ability to direct staff in relation to the performance of those functions. The Commission will also have a Special Account to ensure financial independence from the Office of the Fair Work Ombudsman.

Registered Organisations Commissioner

28. The Minister will appoint the Commissioner for a period of up to 5 years. The Remuneration Tribunal will determine the remuneration of the Commissioner.

29. The broad functions of the Commissioner will be to promote the efficient management of organisations and high standards of accountability of organisations and their office holders to their members and to promote compliance with financial reporting and accountability requirements of the RO Act, including by providing education, assistance and advice to organisations and their members. The Commissioner will have the function of monitoring registered organisations and their office holders to ensure they comply with the provisions of the RO Act.

30. The Bill also confers specific functions on the Commissioner. For example, under Part 4 of Chapter 11 of the RO Act the Commissioner will be able to conduct inquiries and investigations, commence legal proceedings in respect of contraventions of civil penalty provisions and refer possible criminal offences to the Director of Public Prosecutions or law enforcement agencies.

31. The Commissioner will be subject to a degree of Ministerial oversight equivalent to comparable regulators. The Minister will be able to give directions of a general nature to the Commissioner, but not directions as to a particular matter or investigation. The Commissioner will be required to produce an annual report about the operations of the Commission to be presented to the Parliament and the Minister may direct the Commissioner to produce reports in relation to a function or the functions of the Commissioner. As a statutory office holder the Commissioner will be required to appear before Senate Estimates.

The Commissioner's investigation and information gathering powers

32. The Commissioner has been given stronger investigation and information-gathering powers than those that currently apply (items 214 – 223 of Schedule 2 of the Bill). The increased role envisaged for the regulator in ensuring transparency and accountability necessitated a revision of the powers available. The new powers have been closely modelled on powers available to ASIC under the *Australian Securities and Investments Commission Act 2001* (ASIC Act). These new powers will support and assist members who wish to remedy a breach of an officer's or organisation's failure to comply with the RO Act, in particular with their financial disclosure or accountability obligations.

33. In line with the powers exercised by ASIC, the new powers of the Commissioner may be exercised when on reasonable grounds he or she believes that a person has:

- information or a document that is relevant to an investigation; or

- is capable of giving evidence that the Commissioner has reason to believe is relevant to an investigation.

34. It is important to note that the powers of the Commissioner may only be exercised when it is reasonable to do so and in cases where the information or documents sought are relevant to an investigation. This ensures that there are appropriate limitations on the powers of the Commissioner, while ensuring that the Commissioner has a range of tools at his or her disposal to effectively undertake the task of monitoring and regulating registered organisations.

35. Broadly, the Commissioner will have new powers to question people on oath or affirmation and new powers in relation to documents. However, the use of these powers is not permitted unless a notice has been issued notifying a person of the requirement to take the oath or affirmation.

36. The Bill sets out a number of requirements that may be made of a person to be questioned by the Commissioner and for the conduct of the interview. However, it also makes clear that:

- questions may only deal with matters relevant to the investigation;
- that the person's lawyer has a right to attend the interview; and
- that a record of the interview must be provided by the Commissioner to the person if the person so requests.

37. The General Manager currently has broad powers to require documents from certain people in relation to an investigation. These powers will be maintained, but a number will be expanded. In particular, the Bill will amend the RO Act to allow the Commissioner to apply to a magistrate for the issue of a warrant. Again, an application may only be made where the Commissioner has reasonable grounds to suspect that there are documents being kept at the premises.

38. The Bill sets out a framework for the issuing and execution of a warrant and the use of documents obtained through use of the warrant. These rules are closely based on relevant provisions of the ASIC Act and are designed to provide safeguards around the use of warrants.

39. The Bill also introduces a number of evidentiary requirements that broadly deal with how material obtained during an investigation may be handled and the use to which it may be put (item 230 of Schedule 2 to the Bill).

40. Importantly, the Bill provides that a person may make a claim that information that they may be required to produce as part of an investigation may incriminate the person (new section 337AD). Such information is generally not admissible in evidence against the person in a criminal proceeding or proceedings for the imposition of a penalty.

41. The Bill also makes clear that lawyers are permitted to withhold information under legal professional privilege subject to certain requirements (new section 337AE). While the Bill places additional statutory obligations on lawyers claiming privilege, it is not intended to otherwise abrogate common law principles of legal professional privilege.

Accountability to membership: financial disclosure requirements, disclosure of material personal interests and reporting requirements

42. As stated above, the RO Act imposes a range of accountability requirements on organisations and their officers. Part 3 of Chapter 8 of the RO Act imposes record keeping and accounting obligations on organisations and branches. The ROA Act amended an organisation's accountability to members by requiring the disclosure of remuneration, expenditure and material interests of officials under the rules of organisations. These requirements will commence on 1 January 2014.

Statute based disclosure requirements

43. New Part 2A of Chapter 9 introduced by the Bill, amends the RO Act to extend and strengthen the rule based disclosure of certain financial matters by:

- placing the existing disclosure requirements on the face of the legislation to become statutory requirements that can be enforced as civil penalty provisions; and
- requiring organisations to illustrate to members their total expenditure for the financial year.

44. The new accountability measures in the Bill are intended to foster greater transparency and empower members in the governance of the organisation. Members will be provided with greater access to information on the operation and internal governance of their organisation. The provision of information to members will also encourage organisations to be proactive in engaging with members about their administration and to create more open and effective governance processes.

45. The Bill will replace the rule based obligations introduced by the ROA Act with statutory requirements of a higher standard. Each officer must disclose to the organisation or branch any relevant remuneration that has been paid to them. An officer must make the disclosure as soon as practicable but may make a standing disclosure to the Committee of Management where the remuneration is paid regularly.

46. Organisations must then provide a comprehensive disclosure of their top five highest remunerated officers to members, including branch members. This will include:

- the identity of each officer;
- the value and form of the remuneration; and
- relevant non-cash benefits during the financial year.

47. Branches must also disclose the same information to members to ensure an equivalent level of transparency at all levels of an organisation. The requirement on branches to make disclosures for their top five officers is an increase from the requirements introduced by the ROA Act, which only required disclosures to be made in relation to the two highest paid officers of the branch.

48. Organisations and branches will also be required to disclose to members each payment made during the financial year to a related party of the organisation or its branch. Organisations

must also disclose each payment made to a declared person or body of the organisation or branch, which includes officers who have disclosed a material personal interest.

49. An organisation and branch can apply to the Commissioner for alternative arrangements for disclosure in circumstances where compliance with the obligation would be unduly onerous. An organisation or branch must provide particulars on the special circumstances that exist, the proposed alternative arrangement and evidence that it has achieved high standards of financial accountability. A transitional rule has been included in the Bill that will require the Commissioner, when considering applications for alternative disclosure arrangements, to take into account any exemptions allowed by FWC under s 148D of the RO Act (as amendment by the ROA Act).

50. To ensure that members can easily access the information required to be disclosed, an organisation and branch must place all information in a prepared 'officer and related party disclosure statement' each financial year. This statement must be provided to members and the Commission within six months of the end of the financial year.

51. The replacement of existing disclosure requirements with statutory obligations will enable penalties to be imposed on organisations and officers who breach their disclosure duties. Currently, the rule based disclosure requirements are not subject to civil penalties. The fact that the Bill enables penalties to be imposed for a breach of disclosure duties will provide members with the confidence to approach the Commission to enforce the disclosure obligations and thus increase their access to information. The penalties will also provide a strong disincentive for organisations and officers that may be considering breaching their disclosure obligations. Penalties are discussed in more detail below.

Material Personal Interest

52. Similar to the material personal interest regime under the Corporations Act, the new Part 2A of Chapter 9 as introduced by the Bill will require that an officer must disclose, to the organisation or branch, any material personal interest in a matter that relates to the affairs of the organisation or branch that the officer or their relative has acquired.

53. An officer must disclose the nature and extent of the interest as soon as practicable but may give standing notice to the committee of management of a material personal interest in a matter even before the interest materialises and relates to the affairs of the organisation.

54. In keeping with an officer's fiduciary obligations and broadly consistent with the Corporations Act, an officer who has declared a material personal interest will not be permitted to participate in the decision making process that relates to his or her interest. Restricting an officer's ability to partake in the decision making process is intended to prevent an officer from using their position to steer an organisation or branch into a transaction from which the officer will gain a personal benefit or financial advantage but which may not be in the best interests of the organisation.

55. An officer can take part in the decision making process only when the majority of the Committee of Management who do not have the same interest in the matter pass a resolution stating that it is satisfied that the interest should not disqualify the officer from taking part in the decision making process.

56. Organisations and branches must disclose all material personal interests that have been disclosed to it by officers during the financial year. The disclosure must be included in the officer and related party disclosure statement.

Accountability standards

57. Item 89 of Schedule 2 to the Bill will amend reporting guidelines to require a clear and concise summary of the expenditure of an organisation to its members. The provision of this information will make it easier for members to understand the sometimes complicated reporting of financial information.

58. To ensure that officers of an organisation or branch fully comprehend their reporting and accounting obligations, item 166 of Schedule 2 to the Bill will place a statutory requirement on the organisation or branch to require that an officer undertake approved financial management training. Each officer of an organisation and branch is required to undertake training that has been approved by the Commissioner and covers each of the officer's financial duties.

59. Placing the responsibility on the organisation or branch to ensure that officers undertake training will facilitate the transition in organisations and branches to a more transparent internal governance and administration process.

Increases to civil penalties and introduction of new offences

60. In its *Policy Towards Better Accountability and Transparency of Registered Organisations*, the Coalition Government emphasised that the penalties imposed on organisations were not sufficient when compared to those faced by companies and committed to ensuring that 'the penalties for breaking the rules are the same as that applying to companies and their directors, as set out in the Corporations Act.'

61. In accordance with the policy, the Bill sets out a range of amendments to increase the quantum of certain civil penalties and to introduce a criminal offence in relation to certain intentional or reckless breaches of officers' duties. These changes reflect the seriousness with which the Government considers breaches of the obligations set out in those provisions. The amendments also reflect the broader policy concern to increase transparency and accountability of registered organisations and to provide members with confidence that their organisations are being run properly and in their best interests.

62. Finally, the Bill will also create a number of criminal offences in relation to investigations conducted by the Commissioner that bolster existing provisions in relation to investigations by the General Manager in the RO Act (discussed above).

Increasing civil penalties

63. As noted above, certain civil penalties have been increased to address the comparatively low level of penalties that currently exist under the RO Act. These increases are broadly in line with the quantum of penalties that apply under the Corporations Act. Whereas some stakeholders pointed out that the higher range of penalties under the Corporations Act only applied to larger corporations, the approach taken with these reforms was to align with the existing registered organisations framework, which does not (and never has) distinguished between organisations on the basis of membership or revenue or other considerations. However, as explained below, specific differences in the two penalty regimes have required the penalties to be modified.

64. In reconciling the differences in the two penalty regimes, the Bill has preserved the RO Act's existing civil penalty regime but increased the penalties to broadly mirror those provided for in the Corporations Act.

- Certain civil penalty provisions under the RO Act have not been amended and retain the existing penalties, namely 60 penalty units for an individual (\$10,200) or 300 penalty units for body corporate (\$51,000). These civil penalties apply to provisions dealing with less serious contraventions.
- Civil penalties for breaches of provisions requiring the lodgement of financial or other information with the ROC are raised to a maximum penalty of 100 penalty units for an individual (\$17,000) or 500 penalty units for a body corporate (\$85,000). In light of similar provisions under the Corporations Act, the penalty reflects the serious nature of the offences and reinforces the importance of transparency and good governance.
- A breach of an officer's financial management duties and new disclosure obligations will also carry the maximum penalty of 100 penalty units for an individual (\$17,000) or 500 penalty units for a body corporate (\$85,000) but where such a breach constitutes a 'serious contravention' a maximum penalty of 1200 penalty units for an individual (\$204,000) or 6000 for body corporate (\$1,020,000) may be imposed.

65. Section 6 of the RO Act will be amended by item 4 of Schedule 2 to the Bill to provide that a 'serious contravention' in relation to a contravention of a specified civil penalty provision is a contravention that:

- materially prejudices the interests of the organisation or branch, or the members of the organisations or branch; or
- materially prejudices the ability of the organisation or branch to pay creditors; or
- is serious.

66. The concept of a serious contravention was introduced to reflect the approach to penalties that apply to a director's duties under sections 180 - 183 of the Corporations Act. The serious contravention concept is modelled on s 1317G of the Corporations Act.

67. The serious contravention test also applies to breaches of the new disclosure obligations including material personal interest disclosures and in relation to a directions contravention (see item 7 of Schedule 1 to the Bill).

68. In addition to the increase in civil penalties, the Bill will also allow the Federal Court to disqualify a person who has contravened a civil penalty provision from holding office in an organisation (item 209 of Schedule 2 to the Bill). This power has been modelled on similar powers available to the Federal Court under the Corporations Act, including the factors that may be taken into account when considering an application for disqualification.

Criminal offences

69. In addition to the increases to the civil penalties available under the RO Act, the Bill will also introduce, in relation to an officer's financial management duties, criminal offences regarding good faith, use of position and use of information for officers (item 163 of Schedule 2 to the Bill). These offences have been modelled on s 184 of the Corporations Act.

70. New section 290A of the RO Act, will introduce a number of offences that relate to officers and employees of organisations and branches:

- failing to exercise powers or discharge duties in good faith and for a proper purpose;
- using their position to gain advantage for themselves or someone else; and
- using information obtained while an officer or employee to gain an advantage for them or someone else.

71. The Bill provides that a conviction under the new criminal offences in relation to breaches of good faith, use of position and use of information will be considered a prescribed offence. The effect of this amendment is to ensure that officers convicted of the new offences will not generally be eligible to be an officer of an organisation or to stand for election to office (see section 215 of the RO Act).

72. Finally, the Bill introduces new offences in relation to the conduct of investigations under the RO Act (items 225 – 230 of Schedule 2 to the Bill). As discussed above, a range of new powers of investigation and information gathering will be available to the Commissioner. Similarly, a number of new offences have been introduced that reflect similar offences under the ASIC Act in relation to the conduct of investigations.

73. A penalty of 100 penalty units or two years imprisonment, or both, may be imposed upon a person who intentionally or recklessly fails to comply with a notice issued by the Commissioner in relation to an investigation, who provides a false statement or information to the Commissioner, or who fails in accordance with the new investigation and information gathering powers, to:

- answer a question;
- explain a matter about the content of a document or to which a document relates;
- explain where documents may be found, and who last had possession, custody or control of the documents and where that person may be found; or

- identify property of an organisation and explain how the person has kept account of the document.

74. The Bill introduces a number of specific defences in relation to the above offences in cases where a person:

- provides a reasonable excuse for their conduct,
- has explained the matter to the best of their abilities; or
- the person complied with the requirements of an investigation to the extent that he or she is capable.

75. The Bill also introduces a number of strict liability offences that are generally ancillary to the investigative powers of the Commissioner. These offences are set out in new section 337AA and mirror similar offences under the ASIC Act. The penalty for breaching these penalties is 60 penalty units.

76. A person will commit an offence and face a penalty of 100 penalty units or two years imprisonment or both if a person hinders or obstructs the exercise of a power including the execution of a warrant in relation to an investigation (new section 337AB of the RO Act). If a person, who is in charge of a property that is entered in execution of a warrant, fails to provide all reasonably facilities intentionally or recklessly, he or she will face a penalty of 25 penalty units or six months imprisonment or both (new section 337AB of the RO Act). A person will not commit the above offences if they have a reasonable excuse.

77. An offence also attaches to a person who conceals, destroys, mutilates, alters documents or sends documents interstate or out of Australia that are relevant to an investigation. A penalty of 200 penalty units or five years imprisonment or both will apply unless a person proves that they did not intend to defeat the purposes of the investigation or delay or obstruct the investigation.

78. As noted above, it is not intended that the RO Act will impose on the principles of legal professional privilege. However, a legal representative will face an offence of 10 penalty units or three months imprisonment or both if he or she fails to comply with certain requirements in relation to withheld communication including providing details of the identity of the person to whom the communication was made and the identity of the document containing the communication.