



**Australian Government**  

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**Department of Employment**

**Senate Education and Employment Legislation Committee**  
**Inquiry into the**  
**Fair Work (Registered Organisations) Amendment Bill 2014**

**Submission of the**  
**Department of Employment**

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## Introduction

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee inquiry into the Fair Work (Registered Organisations) Amendment Bill 2014 (the Bill).
2. The Bill was originally introduced to the House of Representatives on 19 June 2014 in the same form as the Fair Work (Registered Organisations) Amendment Bill 2013 (the 2013 Bill). Government amendments to the Bill were agreed in the House of Representatives on 15 July 2014 to reflect recommendations made by the Senate Education and Employment Legislation Committee in its report on the 2013 Bill. The Bill (incorporating the Government amendments) has been re-introduced to the parliament on three subsequent occasions. Most recently, the Bill was introduced to the House of Representatives on 31 August 2016.
3. The Bill implements the Government's 2013 election commitment to improve the governance and accountability of registered organisations, in recognition of the fact that registered organisations play a critical role in Australian workplaces and the economy. The recent findings of the Royal Commission into Trade Union Governance and Corruption demonstrate the shortcomings of the existing regulatory framework and highlight that reform is necessary. Commissioner John Dyson Heydon AC QC made 79 recommendations for law reform, some of which are addressed by the Bill.
4. 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 registered organisations and officers are held to higher standards of accountability in relation to their conduct and use of members' funds. 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.
5. The Bill will make amendments to:
  - establish a dedicated regulator, the Registered Organisations Commission (the Commission), to monitor and regulate registered organisations with enhanced investigation and information gathering powers;
  - strengthen existing financial accounting and disclosure 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.
6. This submission provides:
  - details of the key measures contained in the Bill;
  - details of the Government amendments to the Bill; and
  - additional material on the case for reform outlined by the final report of the Royal Commission into Trade Union Governance and Corruption.

## Key measures in the Fair Work (Registered Organisations) Amendment Bill 2014

7. The key measures in the Bill are outlined below. They fall into three broad categories:
  - establishment of the Commission with enhanced investigation and information gathering powers based on those of the 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
  - increased civil penalties and the introduction of a range of additional criminal offences.

### **The Registered Organisations Commission**

#### *The current regulator*

8. The Fair Work Commission (FWC) 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.
9. 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.
10. 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 Commission*

11. 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 of the FWC in relation to registered organisations.
12. 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). The FMA Act was repealed and replaced with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) in 2013. This arrangement will also reduce set up costs and ongoing operational costs associated with the Commission.
13. While the Commission will be a 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.

14. The Commission will also have a Special Account to guarantee financial independence from the Office of the Fair Work Ombudsman and ensure the Commission's funds are directed towards improving the transparency and accountability of registered organisations. A Special Account is an appropriation mechanism that sets aside amounts within the Consolidated Revenue Fund for expenditure for special purposes. In this case the Special Account is for the special purposes of funding the operations of the Commissioner and the Commission. A Special Account cannot be used to raise revenue through collection of monies related to penalties applied to registered organisations and their office holders.

#### *Registered Organisations Commissioner*

15. The Minister will appoint the Commissioner for a period of up to five years. The Remuneration Tribunal will determine the remuneration of the Commissioner.
16. 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.
17. The Bill also confers specific functions on the Commissioner. For example, under proposed 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.
18. As is common with statutory office holders, the Minister for Employment will be able to give directions of a general nature to the Commissioner. These directions must be in writing and will need to be tabled in parliament. The Minister will not have any powers to give directions as to a particular matter or investigation.
19. 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 for Employment 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*

20. The Commissioner has been given stronger investigation and information-gathering powers than those that are currently available to the General Manager, in order to ensure that potential unlawful activities of registered organisations are swiftly and effectively investigated. The new powers have been closely modelled on powers available to ASIC under the *Australian Securities and Investments Commission Act 2001* (ASIC Act).
21. 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.
22. 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.

23. 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.
24. 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;
  - the person's lawyer has a right to attend the interview; and
  - a record of the interview must be provided by the Commissioner to the person if the person so requests.
25. The General Manager currently has broad powers to require documents from certain people in relation to an investigation. These powers will be extended to the Commissioner, 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.
26. 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.
27. 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).
28. 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.
29. 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**

30. The RO Act currently 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 and Part 2 of Chapter 5 deals with the disclosure of officers' remuneration, material personal interests of officers and their relatives and payments made by an organisation or branch under the rules of organisations and branches.

*Statute based disclosure requirements*

31. 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.
32. 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.

33. The Bill will replace the rule based obligations introduced by the *Fair Work (Registered Organisations) Amendment Act 2012* (2012 Amendment 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.
34. 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.
35. Branches must also disclose the same information related to their top five highest remunerated officers 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 2012 Amendment Act, which only required disclosures to be made in relation to the two highest paid officers of the branch.
36. 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. Government amendments to the original Bill expanded the exclusions that apply to this disclosure obligation to include:
  - Payments made to related parties on 'arm's length terms' or terms less favourable to the related party;
  - Payments which are less than or equal to an amount prescribed in the regulations; and
  - Payments made to members which do not discriminate unfairly against other members of the organisation.
37. 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 amended by the 2012 Amendment Act).
38. 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.
39. 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.

#### *Disclosure of material personal interests*

40. Similar to the material personal interest regime under the Corporations Act, the new Part 2A of Chapter 9 as introduced by the Bill originally required 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. Government amendments to the original Bill have limited this obligation to 'disclosing officers' whose duties relate to the financial management of the organisation or branch, and have also removed the express obligation on officers to disclose details of any material personal interests in relation to their relatives. Government amendments to the original Bill also introduced exceptions to the obligation to disclose material personal interests. To this end, a disclosing officer does not need to disclose their material personal interests if, for example, they:

- arise because they are a member of a registered organisation and the interest is held in common with other members;
  - arise in relation to their remuneration as an officer;
  - relate to a contract the organisation is proposing to enter into that needs to be approved by members and will only impose obligations if approved by members;
  - arise merely because the officer is on the Board of the related party and the interest is in a contract with a related party; or
  - have given standing notice of their interest.
41. 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.
  42. 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.
  43. An officer can take part in the decision making process when the majority of the committee of management who do not have a material personal 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. Government amendments to the original Bill also provide that a disclosing officer is not restricted from taking part in a decision in relation to a matter in which they have a material personal interest if that interest does not need to be disclosed under the new regime.
  44. 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*

45. 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.
46. 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 whose duties relate to the financial management of the organisation to undertake approved financial management training. Each of those officers is required to undertake training that has been approved by the Commissioner and covers each of the officer's financial duties. Government amendments to the original Bill allow officers with a proper understanding of their financial duties to apply to the Commissioner for an exemption from approved training.



47. 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**

48. In its *Policy Towards Better Accountability and Transparency of Registered Organisations*, the 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.’
49. 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 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 members’ best interests.
50. 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 under the RO Act (discussed above).

#### *Increasing civil penalties*

51. 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, which vary according to the severity of the breach. As explained below, specific differences in the two legislative regimes have required the penalties to be adjusted in some cases to suit the RO Act framework.
52. 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.
53. Certain civil penalty provisions under the RO Act have not been amended and retain the existing penalties, namely 60 penalty units for an individual (currently \$10,800) or 300 penalty units for body corporate (currently \$54,000). 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 Commission are raised to a maximum penalty of 100 penalty units for an individual (currently \$18,000) or 500 penalty units for a body corporate (currently \$90,000). As with similar provisions under the Corporations Act, the increased penalties reflect the serious nature of the offences and reinforce 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 (currently \$18,000) or 500 penalty units for a body corporate (currently \$90,000) but where such a breach constitutes a ‘serious contravention’ a maximum penalty of 1200 penalty units for an individual (currently \$216,000) or 6000 for body corporate (currently \$1,080,000) may be imposed.
54. Section 6 of the RO Act will be amended 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 organisation or branch; or
  - materially prejudices the ability of the organisation or branch to pay creditors; or
  - is serious.

55. 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.
56. 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).
57. 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*

58. In addition to the increases to the civil penalties available under the RO Act, the Bill will also introduce criminal offences for officers who fail to act in good faith for the best interests of their members or misuse their position or information gained through their position. These offences have been modelled on s 184 of the Corporations Act.
59. New section 290A of the RO Act will introduce a number of offences :
  - failing to exercise powers or discharge duties in good faith and for a proper purpose (for officers of an organisation or branch);
  - using their position to gain advantage for themselves or someone else (for officers and employees of an organisation or branch); and
  - using information obtained while an officer or employee to gain an advantage for themselves or someone else.
60. The Bill provides that a conviction under the new criminal offences in relation to breaches of good faith, use of position or 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 and item 59 of Schedule 2 to the Bill).
61. 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 for investigation and information gathering will be available to the Commissioner. Also, a number of new offences have been introduced that reflect similar offences under the ASIC Act in relation to the conduct of investigations.
62. 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 property.
63. 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, where required, the matter to the best of their knowledge or belief; or
  - the person complied with the requirements to identify and explain the accounting of property to the extent that he or she is capable.

64. 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.
65. 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). A person will not commit this offence if they have a reasonable excuse. If an occupier or a person who is in charge of a property that is entered in execution of a warrant fails to provide all reasonable 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).
66. 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 the person proves that they did not intend to defeat the purposes of the investigation, and did not intend to delay or obstruct the investigation, or any proposed investigation.
67. As noted above, the Bill will not alter the principles of legal professional privilege. 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. This will not alter existing principles of legal professional privilege (which apply in relation to legal proceedings).

## **Government amendments to the Fair Work (Registered Organisations) Amendment Bill 2014**

68. Government amendments made to the original Bill reflect the recommendations of the Senate Education and Employment Legislation Committee's inquiry into the 2013 Bill. The Committee recommended that the 2013 Bill be passed, subject to the following recommendations:

### Recommendation One

*The Committee recommends that, consistent with the Corporations Act 2001 (the Corporations Act), material personal interest disclosures should only be required to be made to those officers whose duties relate to the financial management of the organisation. Such disclosures should be recorded in the minutes of the meetings of those officers and should be made available to members on request.*

### Recommendation Two

*The Committee recommends that a list of exclusions from the obligations to disclose material personal interests based on section 191(2) of the Corporations Act be inserted into the bill. This would narrow the obligation to disclose material personal interests of an officer's relatives, so as to be consistent with the Corporations Act.*

### Recommendation Three

*The Committee recommends that the obligation placed on officers to disclose every payment should be reduced with certain exclusions, including limiting disclosures to payments made above a certain threshold.*

### Recommendation Four

*The Committee recommends the bill be amended to allow the Commissioner to grant exemptions from the training requirements if an individual can demonstrate significant knowledge of the financial obligations specified in the bill.*

69. The provisions in the Bill respond to these recommendations. They will reduce the regulatory burden of the provisions on registered organisations and their officers flowing from the 2012 Amendment Act.
70. These amendments will ensure that registered organisations and their officers will have fiduciary and statutory responsibilities that are closely aligned with those of companies and directors under the Corporations Act. These obligations will only apply to those officers of the organisation who exercise control over the financial management of the organisation, i.e. those whose responsibilities within the organisation reflect those of directors within companies.
71. The result of these amendments is that low-level officers whose duties do not include the financial management of an organisation, such as shop stewards, will no longer be subject to the more onerous reporting provisions that currently apply.
72. A summary of the provisions and how they ease the regulatory burden is set out below.

#### *Disclosure of material personal interests of officers*

73. In accordance with recommendation one of the Committee Report, the amendments align requirements for disclosures of material personal interests with the Corporations Act by limiting the obligation to disclose material personal interests to officers whose duties include duties that relate to the financial management of the organisation or branch.
74. The amendments also remove the express obligation on officers and organisations to disclose details of any material personal interests in relation to an officer's relatives, as per recommendation two of the Committee Report.
75. Under the current RO Act and the 2013 Bill, disclosures of material personal interests must be made to all members of an organisation or branch at least annually. Under the amendments, officers are required to make disclosures of material personal interests to the committee of management. Such disclosures are required to be recorded in the minutes of the meeting of the committee and be available upon request to members. This amendment further responds to recommendation one of the Committee Report.
76. The amendments also provide that an officer is not restricted from taking part in a decision in relation to a matter in which they have a material personal interest if that interest does not need to be disclosed under the new regime.
77. In response to recommendation two of the Committee Report, a number of exceptions have also been included in relation to disclosures of material personal interests modelled on those in the Corporations Act. A disclosing officer does not need to disclose their interests if, for example, they:
  - arise because they are a member of a registered organisation and the interest is held in common with other members;
  - arise in relation to their remuneration as an officer;
  - relate to a contract the organisation is proposing to enter into that needs to be approved by members and will only impose obligations if approved by members;
  - are in a contract with a related party and arise merely because the officer is on the Board of the related party; or
  - relate to a standing notice of an interest provided by the officer.
78. These provisions require fewer disclosures, while ensuring appropriate disclosures for people who have responsibility for the financial affairs of an organisation or branch. The amendments also mean that the details of personal interests are not unduly publicised while still ensuring that members can access these details if they wish.

#### *Disclosure of payments*

79. The 2013 Bill contained only one exception to the requirement that an organisation or branch disclose payments to related parties: that disclosure did not need to be made regarding

payments made to related parties that consist of amounts deducted by the organisation from remuneration payable to officers or employees of the organisation.

80. The new, additional exceptions reflect recommendation three of the Committee Report and are modelled on similar exceptions in the Corporations Act. These exceptions relate to payments:
- that are reasonable and are made to related parties on 'arm's length terms', or made on terms less favourable to the related party
  - which are less than an amount prescribed in the regulations, and
  - which are made to members and do not discriminate unfairly against other members of the organisation.
81. These provisions will ease the regulatory burden on registered organisations by reducing the time taken to prepare a disclosure statement, while ensuring appropriate disclosures of payments are made.

#### *Exemption from governance training*

82. In response to recommendation four of the Committee Report, the Bill allows officers whose duties include duties that relate to the financial management of the organisation or branch, with relevant experience, to apply to the Commissioner for an exemption from approved governance training. This will amend the provisions of the current RO Act that do not allow for any such exemptions.
83. Relevant experience that may be considered by the Commissioner includes experience as a company director, experience as an officer of a registered organisation or other professional qualifications or experience. In all instances, the Commissioner must be satisfied that the officer fully understands their financial duties within the organisation or branch.
84. This provision will support a reduction in regulatory costs for registered organisations by reducing the number of officers who are required to attend training, while ensuring officers whose duties include duties that relate to the financial management of the organisation or branch understand their financial duties within the organisation or branch.

## **The case for reform outlined by the Royal Commission into Trade Union Governance and Corruption**

85. The Royal Commission into Trade Union Governance and Corruption (Royal Commission) was established on 13 March 2014 to inquire into the governance arrangements of separate entities established by employee associations or their officers, as well as conduct that may amount to a breach of any law, regulation or professional standard by an officer or employee association. The Royal Commission publicly investigated 75 case studies and conducted 189 days of hearings across Australia, with more than 500 witnesses giving evidence in public hearings. The final report was tabled in parliament on 30 December 2015.
86. The final report identified evidence of 'widespread' and 'deep-seated' misconduct that has taken place across Australia among a variety of unions and industries (Final Report, Volume One, p 12). In response to these findings, the Royal Commission made 79 recommendations for law reform and 93 referrals to police agencies, law enforcement agencies and civil regulators for proceedings relating to possible breaches of the law by unions, union officials and employers.
87. The findings and recommendations made by the Royal Commission demonstrate the need for reform of the laws that govern registered organisations. Commissioner Heydon noted in his final report that the Commission had 'identified or exposed serious failures in the governance and financial management of a number of unions'. Misconduct identified by the Royal Commission occurred as recently as 2015, at a time when the Bill was before the Parliament.

88. The Bill implements or partially implements 14 of the 42 recommendations contained in the final report that relate to reform of the RO Act. Passage of the Bill through the parliament is an important first step in responding to the Royal Commission's recommendations.

#### **The Registered Organisations Commission**

89. The 2012 Amendment Act sought to strengthen the investigative powers of the FWC (then Fair Work Australia). The case studies examined by the Royal Commission demonstrate that the provisions of the 2012 Amendment Act related to the FWC's investigative powers have not effectively deterred wrongdoing.
90. The Royal Commission recommended the establishment of an independent regulator separate from the FWC (recommendation three) that is properly resourced (recommendation four) and equipped with information-gathering and investigative powers similar to those conferred on ASIC (recommendation six). The Bill will address these recommendations by establishing an independent Registered Organisations Commission that operates under a Special Account with new powers modelled on those available to ASIC (discussed above at page 2).
91. The Royal Commission stated that there are 'no apparent reasons' why the General Manager of the FWC should have responsibility for regulating registered organisations and investigating breaches of the RO Act, and that the current regime may confuse the public as to the role of the FWC (Final Report, Volume Five, pp 57-58). The Royal Commission identified that the General Manager's broad role may lead to the regulation of registered organisations, and related investigations and inquiries, being given a 'lower priority', as evidenced by the matters involving the Health Services Union (Final Report, Volume Five, p 58). Additionally, the Royal Commission considered that an organisation with a specific budgetary allocation and dedicated staff would be the most effective regulatory model (Final Report, Volume Five, p 59).
92. The Royal Commission's analysis demonstrates the importance of establishing an independent regulator.

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

93. The 2012 Amendment Act provided that the rules of an organisation or branch must require the disclosure of officers' remuneration, officers' and relatives' material personal interests, and payments made by an organisation or branch to related parties. The 2012 Amendment Act also provided that the rules of an organisation or branch must require officers whose duties relate to financial management of the organisation or branch, as the case may be, to undertake approved training.
94. The Royal Commission noted that the enforcement powers of the General Manager of the FWC are limited in relation to a breach of an organisation's rules or branch's rules. Contravention of a rule is not a civil penalty provision, and as such the only way to address a person's breach of a rule is for a member of an organisation to apply to the Federal Court to obtain an order directing that person's performance. The General Manager can only take action in response to an alleged breach of a rule if he or she is satisfied that a 'reporting unit' has contravened a rule. If satisfied of this, the General Manager may issue a notice requesting that the reporting unit take specified action, and the Federal Court can make orders to ensure the reporting unit complies with this request. However, where a rule requires a particular officer to do something (for example, disclose a material personal interest or undertake financial management training), the General Manager has no power to act if the rule is breached. The General Manager could seek a declaration that a breach has occurred, but the Royal Commission noted that 'there would rarely be any public interest in doing so given the time and expense involved' (Final Report, Volume Five, p 71).
95. The ability to enforce the obligations introduced by the 2012 Amendment Act would be strengthened significantly if they were included on the face of the RO Act and made enforceable

as civil penalty provisions. The Bill achieves this by introducing statutory requirements regarding financial training and financial disclosure obligations that can be enforced as civil penalty provisions (discussed above at page 4).

#### **Increases to civil penalties and introduction of criminal offences**

96. While the 2012 Amendment Act increased the pecuniary penalty orders that the Federal Court can make in respect of conduct in contravention of a civil penalty provision, the Royal Commission found increased civil penalties have not been an adequate deterrent for wrongdoing.
97. The increased penalties under the 2012 Amendment Act did not dissuade officials of the Construction Forestry Mining and Energy Union (CFMEU) from organising unprotected industrial action at a Hindmarsh construction site in Brisbane. The unprotected action continued despite orders from the Fair Work Commission and the Federal Circuit Court requiring the action to stop, and that the CFMEU officials had potentially breached sections 297, 300 and 302 of the RO Act. This behaviour led the Royal Commission to comment that the penalties for contravention of sections 297, 300 and 302 of the RO Act are 'too low' (Final Report, Volume 4, Chapter 8.3, p 297) and to recommend that the maximum penalty for breach of the provisions in Part 3 of Chapter 9 of the RO Act be increased (recommendation 35). The Bill responds to this recommendation by increasing the penalties associated with breaches of these sections of the RO Act (discussed above at page 7).
98. Furthermore, the Royal Commission found increased penalties under the 2012 Amendment Act did not dissuade two former State Secretaries of the Transport Workers' Union Western Australia Branch from using union funds to purchase expensive cars and arranging for an unauthorised redundancy, depriving the union of over \$600,000. The Royal Commission found the officials may have breached their obligations to act with care and diligence and in good faith, and to not use their position improperly, under sections 285, 286 and 287 of the RO Act. In relation to the civil penalties applicable to breaches of sections 285 to 288 of the RO Act, the Royal Commission noted that 'it is difficult to see, objectively, how a maximum penalty of \$10,800 imposes much of a deterrent to officers who breach their duties, or is much of a punishment', especially considering courts 'rarely' impose the maximum penalty (Final Report, Volume Five, p 192). The Royal Commission recommended that the civil penalties for sections 285 to 288 of the RO Act be substantially increased (recommendation 28) and also recommended that officers who dishonestly or recklessly breach sections 286 to 288 of the RO Act be exposed to criminal liability (recommendation 29). The Bill responds to these recommendations by increasing the penalties associated with breaches of sections 285 to 288 of the RO Act and introducing corresponding criminal offences (discussed above at page 7).
99. Importantly, the Royal Commission noted that the imposition of substantial penalties on officers of registered organisations will not deter individuals from taking up office in such organisations, as the penalties are only available for wrongdoing (meaning that honest and diligent officers have nothing to fear) and the penalties are the maximum penalties available. Additionally, not-for-profit and charitable corporations can also be run by volunteers who are subject to obligations under the *Corporations Act 2001* (Cth) and this does not appear to have affected that sector (Final Report, Volume 5, p 195).