



Australian Government

Registered Organisations Commission

Submission to the Senate Committee on Education and Employment

***Fair Work Laws Amendment
(Proper Use of Worker Benefits) Bill 2019***



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Introduction

1. The Registered Organisations Commission (**ROC**) welcomes the opportunity to make a written submission to the Senate Committee on Education and Employment inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (**the Bill**).
2. The predominant legislation which governs the operation of the ROC and which (among other Acts) is sought to be amended by the Bill is the *Fair Work (Registered Organisations) Act 2009* (the **RO Act**). The objects and purposes of the RO Act are non-controversial and generally well accepted. The specific measures that the Parliament might enact to promote and secure those objects and purposes are a matter of policy.
3. The ROC does not envisage its role as formulating a view as to what is necessary or conducive to promoting the objects and purposes of the RO Act, or advocating or supporting legislative change to give effect to that view.
4. Rather, the ROC envisages that its primary function is to discharge the particular duties conferred on it by the Parliament. To that end, the main focus of this submission is to identify those duties and indicate how the ROC would perform various of them if the Parliament was minded to confer additional functions on the ROC by enacting this Bill.
5. This submission makes a number of observations about practical issues that have arisen, or may arise, in relation to the discharge of the ROC's specific functions that could be considered by the Committee with a view to enhancing the administration of those functions.



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Statutory context

6. Parliament has set out its intention in enacting the RO Act as recorded in section 5 of the RO Act which, in brief, is:

- to enhance relations within federal workplaces to reduce the adverse effects of industrial disputation
- to require associations of employers and employees to meet the standards set out in the RO Act in order to gain the rights and privileges accorded by registration
- to identify those standards: that is to ensure organisations are representative of and accountable to their members and are able to operate effectively; to encourage member participation in their affairs; to encourage efficient management and high standards of accountability to those members; to provide for democratic functioning and control; and to facilitate registration of a diverse range of employer and employee organisations
- to assist employers and employees to promote and protect their economic and social interests through the formation of registered organisations, and according rights and privileges to the registered entities
- to recognise and respect the role organisations play in facilitating the operation of the workplace relations system.

7. The RO Act provides in section 329AB for the functions of the Registered Organisations Commissioner (**Commissioner**) as follows:

a) to promote:

- (i) efficient management of organisations and high standards of accountability of organisations and their office holders to their members; and
- (ii) compliance with financial reporting and accountability requirements of this Act;

including by providing education, assistance and advice to organisations and their members;

b) to monitor acts and practices to ensure they comply with the provisions of this Act providing for the democratic functioning and control of organisations;

c) such other functions as are conferred on the Commissioner by this Act or by another Act;

d) to do anything incidental to or conducive to the performance of any of the above functions.



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The ROC's operating environment

8. A federal system for the registration and regulation of employee and employer organisations has been in operation in Australia since the implementation of the *Commonwealth Conciliation and Arbitration Act 1904*. The regulation of federally registered organisations was vested in various iterations of an industrial registrar, including the General Manager of the FWC, until the commencement of the ROC on 1 May 2017.
9. After that date many of the functions of the General Manager of the FWC relating to organisations were transferred to the ROC (such as elections, financial reporting, inquiries and investigations) but certain functions remained with the FWC (such as the registration and amalgamation of organisations and the alteration of the rules of organisations).¹
10. The ROC and the FWC are now the independent regulators of 106 federally registered employee and employer associations who cumulatively report to the ROC that they have more than two million members, control more than \$3.13 billion in assets and collect annual revenue in the order of \$1.7 billion. By any measure, this is a substantial sector.
11. A summary of the respective statutory functions relating to the regulation of registered organisations as between the ROC and FWC is set out in the following table.

¹ Note: some of the relevant FWC powers may only be exercised by a senior member of the FWC Tribunal.



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Registered Organisations Commission	Fair Work Commission
 Financial reports of reporting units	 Registration, deregistration and amalgamations
 Annual reports	 Rule changes (including eligibility rules)
 Notification of changes to records	 Determination of reporting units
 Officer and organisation disclosure statements	 Approval of right of entry training
 Loans, grants and donations statements	 Work, health and safety permits
 Arranging elections	 Right of entry permits
 Approval of governance and compliance training	 Disputes and appeals
 Education, assistance and advice	 Advice and assistance on how to become a registered organisation
 Compliance, inquiries and investigations	 Recognised State associations
 Registration of auditors	

12. There are currently 61 employer organisations and 45 employee organisations which, including those entities, are comprised of 354 individual financial reporting units², each with its own reporting obligations and managed by a total of more than 11,500 elected office holders³.

² Section 242 provides that each branch of a registered organisation is, in normal circumstances, a separate financial reporting unit that is required to prepare and lodge financial reports each year.

³ The ROC is currently auditing office holder numbers in each organisation and early indications are that this number may increase.



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13. A key operational objective of the ROC is to drive behaviours in registered organisations that see them consistently focussed on acting in the best interests of their members, ensuring members' money is spent in a way that is transparent, properly authorised and accounted for and which complies with their obligations under the RO Act.
14. A significant component of the work of the ROC is in the provision of education to registered organisations. Apart from conducting frequent, Australia wide, face to face, information workshops, the ROC also provides multiple guidance notes, templates, fact sheets, expansive tool kits, an array of web based resources (in all close to 200 education resources) and the ready availability, and personal engagement, of ROC staff.
15. As at August 2019, there are 27.3 staff members at the ROC assisting the Commissioner. The ROC is structured to deliver its functions through three (3) main streams: Education and Reporting, Financial Reporting and Analysis and Compliance and Investigations.



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The Bill

16. In general terms proposed amendments in the Bill, to the extent that they affect the operation of the RO Act and the functions of the Commissioner, appear in:

- Schedule 1, relating to the financial management and accountability of employee and employer organisations
- Schedule 2, relating to the regulation of worker entitlement funds (**WEF**)
- Schedule 5, as they relate to disclosable arrangements by employee and employer organisations to employers and to the Commissioner

17. More particularly, in so far as the ROC is concerned, the Bill amends the RO Act to:

- a) enhance the reporting requirements by organisations of loans, grants and donations received by, or made by, an organisation⁴
- b) introduce a civil penalty provision for the failure by an organisation or a reporting unit to keep proper financial records⁵
- c) require organisations to have written policies dealing with expenditure, the contravention of which is a civil penalty, and to enable the Commissioner to publish model policies⁶
- d) require WEFs to be registered with the ROC⁷
- e) require registered WEFs to have officers who perform duties in relation to the funds to be of good fame or character and for the Commissioner to make assessments of the same⁸
- f) require WEFs to have written financial policies approved by the Committee of Management and enables the ROC to publish model financial policies
- g) enable the Commissioner to give an operator of a WEF a written notice for the fund to comply with an ongoing condition⁹ or issue an Infringement Notice¹⁰
- h) enable the Commissioner to deregister a WEF if satisfied that an ongoing condition has not been met or is not being complied with¹¹
- i) enable the Commissioner to reinstate registration of a WEF¹²

⁴ See Schedule 1, items 1 to 10

⁵ See Schedule 1, items 11 and 12

⁶ See Schedule 1, items 14 and 15

⁷ See Schedule 2, item 13, inserting Division 3. See also Conditions in Division 4.

⁸ See Condition 8, section 329LE.

⁹ See section 329MA.

¹⁰ See section 329MB.

¹¹ See sections 329MG, 329MI, 329NA and 329NB.

¹² See sections 329ND and 329E.



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- j) make additional provision for the Commissioner to gather information¹³
- k) require the Commissioner to publish the annual report of a WEF¹⁴
- l) enable the Commissioner to share information with the Commissioner of Taxation¹⁵
- m) enable the Commissioner to make inquiries or investigations regarding compliance with the ongoing conditions applicable to a WEF¹⁶
- n) require organisations to make specific disclosures to the ROC of the financial benefits obtained by them and persons linked to them in connection with employee insurance products, welfare fund arrangements and training fund arrangements¹⁷
- o) require a notice of disclosure to be given to the Commissioner.¹⁸

¹³ See section 329NF.

¹⁴ See section 329NG.

¹⁵ See section 329NH.

¹⁶ See Schedule 2, items 14 and 15.

¹⁷ See section 237(6)(c) and 237(6)(d)

¹⁸ See section 329SA.



Submissions on the provisions

Schedule 1 – Financial management & accountability

Section 237 - reportable loans, grants and donations

18. The ROC notes that the Bill, as presently drafted, proposes amendments that will expand the categories of loans, grants and donations that need to be disclosed by organisations to:

- require disclosure of loans, grants and donations **made to** an organisation and
- require notification of loans, grants and donations made during the financial year that cumulatively exceed \$1,000.

19. The ROC has been aware of, and is concerned about, the possible non-disclosure by organisations of multiple loans, grants and donations made within a financial year which individually do not by themselves exceed \$1,000, but cumulatively do exceed the disclosure threshold. The proposed amendment to the RO Act in relation to the disclosure of cumulative multiple loans, grants and donations which cumulatively exceed the threshold clarifies the existing obligation and may improve accountability and transparency of organisations and their officers to their members.

Section 252(1) – reporting unit to keep proper financial records

20. The ROC notes that the Bill, as presently drafted, introduces a civil penalty provision relating to the failure of an organisation to keep proper financial records for the period of 7 years to enable the preparation of financial reports.

21. Under the RO Act, the Commissioner can at present only take steps in relation to the failure to keep proper financial records to the extent that the absence of proper records results in consequential civil penalty contraventions. These could include, for example, a contravention of s 253(3) of the RO Act by failing to prepare financial statements that give a true and fair view of the financial position and performance of the reporting unit. Similarly, a failure to keep proper records amounting to a breach of the organisation's rules could be relevant to whether an officer has discharged their duties in accordance with the requisite degree of care and diligence.

22. The absence of proper records can tend to prevent the proper completion of an accurate audit report by a registered auditor and affect the making of inquiries or investigations by the regulator into financial misconduct. The ROC is aware of circumstances where the systemic failure by a reporting unit to keep proper financial records has limited the ability of the regulator to determine to the requisite standard whether financial misconduct has occurred. The proposed amendment to the RO



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Act may improve accountability and transparency of organisations and their officers to their members.

Section 293N – organisations and branches must have written policies dealing with expenditure

23. Section 141(1)(ca) of the RO Act, as presently enacted, requires that the rules of an organisation must require the organisation, and each of its branches, to develop and implement policies relating to the expenditure of the organisation or the branch.
24. The section is not a civil penalty provision. The Commissioner does not have standing to enforce the rules of an organisation or branch. As a consequence, the steps that the Commissioner can take in relation to a failure by an organisation or a branch to have or comply with a policy relating to expenditure is limited to the extent that the breach of the rule or policy may be relevant to some other contravention of the RO Act. This could arise, for example, where the breach of a rule or policy of the organisation or branch may be a material factor relevant to whether an officer has engaged in a contravention of the officer's duties in sections 285 to 287 of the RO Act.
25. The ROC notes that the Bill, as presently drafted, will convert the obligation to a statutory requirement on organisations and branches the contravention of which will be a civil penalty. The proposed amendment to the RO Act may improve accountability and transparency of organisations and their officers to their members.



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Schedule 2 – Regulation of worker entitlement funds

26. The ROC notes that under the Bill, as presently drafted, it is proposed to expand the functions of the ROC to include the regulation of WEFs. Currently, the regulation of WEFs is managed in part by a number of different Commonwealth agencies including the Australian Taxation Office and the Australian Securities and Investments Commission.
27. The ROC is aware that a number of employer and employee organisations have interests in and receive income from WEFs. The ROC receives lodgements of general purpose financial reports (**GPFR**) from reporting units of organisations which contain information regarding the income streams received by the reporting unit. That will include income from entities in which the reporting unit has an interest, including entities that may be a WEF. It is not necessary for the GPFR to disclose that the entity from which income is derived is a WEF.
28. Where those entities are controlled by the organisation, the organisation is required to prepare a consolidated financial statement which requires additional information about that controlled relationship to be disclosed, including any equity held by the organisation in the WEF. The RO Act and its Regulations, and the Australian Accounting Standards¹⁹ do not otherwise require a GPFR to disclose detailed information about transactions with the controlled entity or the nature or reason for any such payment to the organisation.
29. A GPFR prepared by a reporting unit is required to be provided to the members of the reporting unit, with a copy lodged with the ROC. It is noted that the members of the reporting unit, who may therefore receive some information about the nature of the financial interest of the reporting unit in a WEF, will not necessarily comprise the employees on whose behalf contributions may have been made to the WEF, and will not contain relevant information about how the WEF has utilised member's funds.
30. If the Bill is passed and the Commissioner is called upon to regulate WEFs, the Commissioner would discharge those functions conscientiously by taking a forensic, evidence-based approach to determining whether to register, deregister or reinstate a WEF, or whether to take compliance action against a WEF, having regard to the criteria set out in the Bill. The ROC's approach is outlined further in the ROC Compliance Policy and involves:
- reviewing the best available evidence
 - considering the nature and circumstances of the conduct constituting the ground

¹⁹ AASB 12 *Disclosure of Interest in Other Entities* requires an entity to disclose information that enables users of its financial statements to evaluate the nature of and risks associated with its interests in another entity and the effect of those interests on its financial position, financial performance and cash flows.



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- acting impartially, without bias and avoiding conflicts of interest
- considering whether the evidence discloses reasonable prospects of success
- taking into account the legal rights of the parties and any relevant risks
- taking into account public interest considerations.



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Schedule 5 – Disclosable arrangements

31. The ROC notes that under the Bill, as presently drafted, it is proposed to introduce new disclosure obligations by employee and employer organisations to employers, and to the Commissioner, relating to the interests an organisation has in a range of arrangements as set out in the Bill.
32. Disclosures made by an organisation to an employer under the proposed amendments are required to be provided by the employer to its employees who are or will be covered by the arrangements.
33. The relevant arrangements that would need to be disclosed relate to employee insurance products, managed investment schemes for the purposes of, or purposes that include, managing financial risk, welfare fund arrangements and training fund arrangements. The disclosure will need to be made if the disclosable arrangement will, or can reasonably be expected to, receive or obtain (directly or indirectly) a financial benefit in connection with the arrangement and to disclose as far as reasonably practical details of the nature of the financial benefit.
34. An organisation will be required to give a copy of the disclosure document to the Commissioner, who will be required to publish the document on the ROC's website.

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Action officer

Mr C Enright, Executive Director