



FAIR WORK
COMMISSION

8 February 2013

Mr Tim Watling
Secretary
Senate Standing Committee on Education, Employment and Workplace Relations
PO Box 6100
CANBERRA ACT 2600

Dear Mr Watling

Inquiry into the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012

I refer to your email dated 4 December 2012 and attach a submission to the Inquiry into the *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012*

Yours sincerely

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**Senate Standing Committee on
Education Employment and Workplace Relations**

Inquiry into the Fair Work (Registered Organisations)

Amendment (Towards Transparency) Bill 2012

The General Manager of the Fair Work Commission welcomes the opportunity to make a submission in this matter. The submission provides an overview of the current approach of FWC to its regulatory compliance role in order to inform the Committee's consideration of the *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012* (the Bill) and provides information on the operation of proposed section 288A.

Regulatory and compliance role of FWC

Overview

The key aim of FWC's regulatory and compliance activities is to ensure compliance by registered organisations, their officers, employees and auditors with their legislative obligations as set out in the *Fair Work (Registered Organisations) Act 2009* (the RO Act). Consistent with the objects of the RO Act, FWC seeks to promote efficient management and effective operation of registered organisations and high standards of accountability of registered organisations to their members.

Part 3 of Chapter 8 of the RO Act regulates the financial administration of reporting units of registered organisations. The financial administration of registered organisations is also regulated by the Rules of the registered organisation, the Reporting Guidelines¹ (the Reporting Guidelines) and the *Fair Work (Registered Organisations) Regulations 2009* (RO Regulations). A number of the provisions of the RO Act are civil penalty provisions, the contravention of which can result in the imposition of pecuniary penalties upon order of the Federal Court of Australia.

The RO Act also places general duties upon officers and employees of registered organisations in relation to the financial management of organisations. These general duties concern acting with care and diligence² and in good faith³ and the improper use of position⁴ and information.⁵ These general duties are civil penalty provisions of the RO Act.

Compliance is monitored by the Regulatory Compliance Branch of FWC through means including:

- a. Examination of lodged documents to determine compliance with legislative requirements, including (in the case of financial reports) Australian Accounting Standards;
- b. Regular routine audits of lodgement by all registered organisations/branches and reporting units of documents in accordance with specified legislative timeframes;
- c. Examination of complaints by members of registered organisations and from the general public; and
- d. Examination of referrals from other government agencies or departments;
- e. Monitoring media reports.

¹ The first Industrial Registrar's Reporting Guidelines were made by the Industrial Registrar on 20 June 2003 under section 255 of the RAO Schedule and commenced on 1 July 2003. Subsequent Guidelines were made on 12 October 2004 and applied to each financial year of an organisation that started on or after 1 November 2004.

² See section 285.

³ See section 286.

⁴ See section 287.

⁵ See section 288.

FWC uses a range of compliance tools up to and including the commencement of civil court proceedings to help ensure that registered organisations and their officers, employees and auditors satisfy their obligations under the RO Act.

An important compliance tool of FWC is its capacity to make inquiries and to conduct investigations under Part 4 of Chapter 11 of the RO Act. In broad terms, FWC is empowered to make inquiries and conduct investigations concerning compliance with civil penalty provisions of the RO Act, Part 3 of Chapter 8 of the RO Act, the Reporting Guidelines and an organisation's Rules regarding finances and financial administration. FWC undertakes inquiries and investigations in accordance with applicable provisions of the RO Act and the principles of procedural fairness. The process includes providing notice of proposed adverse findings to the relevant parties and giving them an opportunity to respond before finalisation of any findings.

Inquiries and investigations are conducted in addition to the FWC's routine examination of registered organisations' financial reports for compliance with the RO Act at the time of lodgement with FWC.

Recent improvements

The two investigations into the Health Services Union (HSU) that were undertaken by Fair Work Australia (FWA), as it was then known, and which concluded in 2012, highlighted past inadequacies in the way in which FWA discharged parts of its regulatory role. In light of that experience and the subsequent process review undertaken by KPMG, FWC has made several changes including establishing the new Regulatory Compliance Branch which is headed by a newly created SES position. Staffing of the Branch has been increased by three APS 4-6 staff and one Executive Level financial reporting specialist.

Audits that were conducted in 2012 concerning lodgement by registered organisations over the past decade, indicate that the majority comply with their obligations to lodge documents with FWC. Approximately 80% of organisations lodged their financial reports in both 2011 and 2012 on time.⁶⁷ Conversely, on average approximately 20% of financial reports are lodged outside the prescribed timeframe and it is acknowledged that there has been inadequate action in the past in following up outstanding financial reports. The Regulatory Compliance Branch is currently focussing on these "legacy" matters by seeking to ensure that all registered organisations have lodged all outstanding financial and other reporting documents and have held elections as required by their Rules, over the past decade. Where organisations appear effectively to be defunct, they will be referred to the tribunal for consideration of cancellation of registration.

In August 2012 FWA published its *Regulatory Compliance Policy* and *Litigation Policy* and an *Offences Policy* will shortly be published. In addition, FWC is currently reviewing the Reporting Guidelines to identify any appropriate additional disclosure requirements which could be required by

⁶ The average figure for both 2009 and 2010 was 72%.

⁷ The submission by the Institute of Public Affairs to this Inquiry refers to FWA's Annual Reports for 2009/10 and 2010/2011 to conclude at paragraph 13ff that "many of the financial reports lodged with FWA do not comply with statutory requirements". However the Annual Report statistics referred to in that submission relate to internal organisational performance indicators relating to the processing by FWA of lodged financial reports, and not with the level of compliance by reporting units.

the General Manager to further the object of ensuring the accountability of financial reporting units to their members.

Inquiries, investigations and litigation

FWC has also recently commenced a number of inquiries, investigations and court proceedings. Whilst a complaint will be the trigger for some inquiries and investigations, the majority of the current inquiries were commenced on FWC's own initiative in dealing with "legacy" matters concerning outstanding lodgements.

FWC is currently conducting the following inquiries:

- Tasmanian Branch of United Voice (formerly known as the Liquor, Hospitality and Miscellaneous Union)—commenced 23 July 2012;
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia—commenced 4 September 2012; and
- National Office of the Australian Salaried Medical Officers Federation—commenced 28 January 2013.

FWC is currently conducting the following investigations:

- Australian Childcare Centres Association—commenced 23 November 2012;
- Musicians' Union of Australia (separate investigations concerning each of the Federal Office, the Sydney Branch, the Melbourne Branch and the Hobart Branch)—commenced 23 November 2012;
- Australian Salaried Medical Officers Federation, Queensland Branch—commenced 23 November 2012;
- CPSU, the Community and Public Sector Union, SPSF Group, Queensland Branch—became an investigation 7 December 2012 (commenced as an inquiry on 21 September 2012); and
- Australian Nursing Federation, Western Australian Branch—commenced 3 January 2013.

FWC is currently conducting the following Federal Court proceedings arising from its inquiries and investigations into the HSU:

- General Manager of Fair Work Australia v Health Services Union & Ors [VID 380/2012]—commenced 23 May 2012;
- General Manager of Fair Work Australia v Craig Thomson [VID 798/2012]—commenced 15 October 2012; and
- General Manager of Fair Work Australia v Health Services Union [VID1128/2012]—commenced 21 December 2012.

New section 288A

Proposed section 288A provides:

288A Good faith, use of position and use of information—criminal offences

Good faith—officers

(1) *An officer of an organisation or a branch commits an offence if he or she:*

- (a) *is reckless; or*
- (b) *is intentionally dishonest;*

and fails to exercise his or her powers and discharge his or her duties:

- (c) *in good faith in the best interests of the organisation; or*
- (d) *for a proper purpose.*

Maximum penalty: Imprisonment for 5 years or 2,000 penalty units, or both.

Use of position—officers and employees

(2) *An officer or employee of an organisation or a branch commits an offence if he or she uses his or her position dishonestly:*

- (a) *with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the organisation; or*
- (b) *reckless as to whether the use may result in himself or herself, or someone else, directly or indirectly gaining an advantage, or in causing detriment to the organisation.*

Maximum penalty: Imprisonment for 5 years or 2,000 penalty units, or both.

Use of information—officers and employees

(3) *A person who obtains information because he or she is, or has been, an officer or employee of an organisation or a branch commits an offence if he or she uses the information dishonestly:*

- (a) *with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the organisation; or*
- (b) *reckless as to whether the use may result in himself or herself, or someone else, directly or indirectly gaining an advantage, or in causing detriment to the organisation.*

Maximum penalty: Imprisonment for 5 years or 2,000 penalty units, or both.

Operation as a criminal offence

Proposed section 288A adds to the civil obligations applying to officers and employees or organisations under sections 285 to 288 of the RO Act, all of which are civil penalty provisions.

The General Manager of FWC would have a limited role in relation to the proposed new offences, as the General Manager's powers to investigate contraventions of the RO Act are limited to the provisions in Part 3 of Chapter 8⁸ and to civil penalty provisions. The General Manager would be empowered to refer possible contraventions of section 288A to the Australian Federal Police, as the appropriate investigating agency (including providing any relevant documents under section 335C of the RO Act). Prosecution of an offence under section 288A would be a matter for the Australian Federal Police.

Bernadette ONeill
General Manager
Fair Work Commission

8 February 2013

⁸ Proposed section 288A is in Part 2 of Chapter 9 of the RO Act.