

## Department of Employment

### Submission to the Senate Education and Employment Legislation Committee inquiry into the Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2]

#### Introduction and background

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee (the Committee) inquiry into the Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2] (the 2015 Bill).
2. The 2015 Bill implements the Government's election commitment outlined in the *'Policy for Better Transparency and Accountability of Registered Organisations'*. The Bill recognises the critical role that registered organisations play in Australian workplaces and the economy, and provides for measures to ensure that officers of registered organisations fulfil their duties to the organisation. 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.
3. More effective regulation of registered organisations and increased penalties are an appropriate way to ensure that the interests of members of registered organisations are protected in a similar way as the interests of shareholders of companies. This will help to ensure that members can have confidence that officers of those organisations take their obligations seriously and can be held to account.
4. The Government introduced the Fair Work (Registered Organisations) Amendment Bill 2013 (the 2013 Bill) into the House of Representatives on 14 November 2013. The 2013 Bill was negatived in the Senate on 14 May 2014. On 19 June 2014, the Fair Work (Registered Organisations) Amendment Bill 2014 (the 2014 Bill) was introduced into the House of Representatives in the same form as the 2013 Bill.
5. Government amendments to the 2014 Bill were introduced and agreed to in the House of Representatives on 15 July 2014. The amendments reflected recommendations made by the

Committee in its report on the 2013 Bill (the Committee Report).<sup>1</sup> The 2014 Bill was negated in the Senate on 2 March 2015.

6. On 19 March 2015, the 2015 Bill was introduced into the House of Representatives. The 2015 Bill is identical to the 2014 Bill that was negated in the Senate, which included the Government amendments addressing the Committee Report's recommendations.
7. This submission focuses on the government amendments that now form part of the 2015 Bill and that were not before the Committee in its previous inquiries. As the remainder of the 2015 Bill is unchanged from the 2013 Bill and 2014 Bill, the Department relies on its submission to the Committee on the 2013 Bill in relation to the rest of the Bill.

### **Overview of the amendments in the Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2]**

8. The government amendments contained in the 2015 Bill reflect the recommendations of the Committee's inquiry into the 2013 Bill.<sup>2</sup> The Committee recommended that the 2013 Bill be passed, subject to the following recommendations:

#### Recommendation 1

*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 2

*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 3

*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.*

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<sup>1</sup> Senate Education and Employment Legislation Committee, Parliament of Australia, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]* (2013), p. vii.

<sup>2</sup> Senate Education and Employment Legislation Committee, Parliament of Australia, *Fair Work (Registered Organisations) Amendment Bill 2013 [Provisions]* (2013).

Recommendation 4

*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.*

9. The provisions in the 2015 Bill respond to these recommendations and reflect the Government's election commitment. They will reduce the regulatory burden of the provisions on registered organisations and their officers flowing from the 2012 amendments to the *Fair Work (Registered Organisations) Act 2009*.
10. 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. It is important to note that 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.
11. The result of these amendments is that voluntary participants in registered organisations, such as shop stewards, will no longer be subject to the more onerous reporting provisions that currently apply.
12. A summary of the provisions and how they ease the regulatory burden is set out below.

Disclosure of material personal interests of officers

13. In accordance with recommendation 1 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.
14. 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 2 of the Committee Report.
15. Under the current 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 1 of the Committee Report.
16. In response to recommendation 2 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
- if the interest is in a contract with a related party and arises merely because the officer is on the Board of the related party, or
- if the officer has given standing notice of their interest.

17. These provisions require fewer disclosures, while ensuring appropriate disclosures for people who have responsibility for the financial affairs of the organisation. 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

18. The 2013 Bill contained only one exception to the requirement that an organisation or branch disclose payments to related parties: that disclosures 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.
19. The new, additional exceptions reflect recommendation 3 of the Committee Report and are modelled on similar exceptions in the Corporations Act. These exceptions relate to payments:
- made to related parties on 'arm's length terms' or terms less favourable to the related party
  - which are less than an amount prescribed in the regulations, and
  - made to members which do not discriminate unfairly against other members of the organisation.
20. 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

21. In response to recommendation 4 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 Registered Organisations Commissioner for an exemption from approved governance training. This will amend the provisions of the current Act that do not allow for any such exemptions.

22. 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.
23. 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.

### **Consultation**

24. In line with normal Committee on Industrial Legislation processes, exposure drafts of the 2013 Bill were discussed with employer organisations, unions and peak bodies during confidential consultation sessions facilitated by the Department in October 2013.
25. Prior to introduction of the government amendments in 2014, the Government conducted targeted consultations with stakeholders on the detail of the amendments.
26. The Minister for Employment also consulted with National Workplace Relations Consultative Committee members on the measures to reduce red tape for registered organisations in February 2015.

### **The Royal Commission into Trade Union Governance and Corruption**

27. Since the introduction of the 2013 Bill, the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) has been established. The Royal Commission is, amongst other areas, inquiring 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.
28. In its Interim Report<sup>3</sup> the Royal Commission made findings in relation to the conduct of officers of registered organisations, including that the maximum penalties for breaches of general duties in relation to financial management and orders and direction are too small,<sup>4</sup>

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<sup>3</sup> Royal Commission into Trade Union Governance and Corruption Interim Report. Volumes 1 and 2, 15 December 2014.

<sup>4</sup> Royal Commission into Trade Union Governance and Corruption Interim Report, Volume 1, p. 56.

that breaches of officers' duties are significant<sup>5</sup> and widespread<sup>6</sup> and that, in some instances, there is a deliberate disregard for the law.<sup>7</sup>

29. The Federal Court has also considered the question of the adequacy of penalties under registered organisations legislation. In the course of hearing *General Manager of Fair Work Australia v Health Services Union* [2014] FCA 970, Justice North commented that "*The penalties are rather beneficially low . . . beneficial to wrongdoers.*"<sup>8</sup>
30. The interim findings of the Royal Commission and the comments of the Federal Court add support for the measures proposed in the 2015 Bill.

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<sup>5</sup> Royal Commission into Trade Union Governance and Corruption Interim Report, Volume 1, pp. 377; 475.

<sup>6</sup> Royal Commission into Trade Union Governance and Corruption Interim Report, Volume 1, pp. 75–76.

<sup>7</sup> Royal Commission into Trade Union Governance and Corruption Interim Report, Volume 2, p. 1008.

<sup>8</sup> Mathew Dunckley, 'Judge slams penalties in union case', *The Australian Financial Review*, 13 July 2013.