



25 November 2013

Ms. Bonnie Allan
Acting Secretary
Senate Standing Committees on
Education and Employment
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via email: ewr.sen@aph.gov.au

Dear Ms. Allan

Fair Work (Registered Organisations) Amendment Bill 2013

I refer to your email dated 18 November 2013 in relation to the above.

Thank you for the opportunity to provide a submission to the Senate Education and Employment Legislation Committee inquiry into the Fair Work (Registered Organisations) Amendment Bill 2013 ('the Bill').

The Committee's consideration of the Bill may be assisted by understanding the current administration of the *Fair Work (Registered Organisations) Act 2009* at the Fair Work Commission.

The functions related to administering the regulation and compliance of registered employer and employee organisations (RO's) have vested within the FWC and its predecessors since 1904. Rather than refer to each of its various predecessors by name, this submission will generally refer to the FWC as impliedly including them.

Currently there are 112 RO's registered under the *Fair Work (Registered Organisations) Act 2009* ('the RO Act') comprising 67 employer and 44 employee RO's and one enterprise association. There are 387 reporting entities for financial reporting purposes and 503 election entities for election reporting purposes.

In August 2012 the functions related to regulating RO's were allocated to a new, stand-alone branch - the Regulatory Compliance Branch, headed by a new SES-level director. The establishment of a separate branch with responsibility solely for undertaking functions related to ROs was one of a number of initiatives designed to transform the administration of ROs from a largely, reactive approach to a proactive and more effective approach to the regulation of ROs. Following the conclusion of the investigations into the Health Services Union Victoria No. 1 Branch and the National Office of the Health Services Union I formed a strong view that significant change was needed to increase focus, capability, resources and develop a proactive regulatory culture to effectively discharge the range of regulatory functions in relation to ROs.

The intense public profile of the HSU matters provided both an impetus and an opportunity to critically analyse its capacity and capability to effectively and efficiently regulate RO's. The General Manager commissioned a process review by KPMG of the investigations conducted into the HSU which was made publicly available in August 2012. The KPMG process review included 38 findings relevant to the effectiveness and efficiency of FWC inquiries and investigations including the absence of relevant investigation standards and procedures, lack of adequate documentation, an inadequate case management system and a dearth of sufficiently qualified and experienced staff. The KPMG review also identified 31 opportunities for improvement to investigation processes (31 recommendations).

At the same time, the FWC conducted an internal efficiency and effectiveness analysis of its regulatory capacity and capability.

As a result of the 38 KPMG findings, implementation of 31 KPMG recommendations and the FWC internal review, fundamental change occurred to the approach taken by the FWC to its regulatory role. The FWC has fundamentally shifted both in terms of culture and practice from a reactive to a proactive model of regulation evidenced by a range of change processes and approaches, including:

- The establishment in 2012 of a discreet Regulatory Compliance Branch (RCB) of the FWC under an SES Band 1 focusing on the proactive regulation of RO's;
- Commencement in the 2012-13 financial year seventeen 17 investigations and inquiries into RO's for potential regulatory breaches; (16 investigations and inquiries remain current at the time of this submission).
- The deregistration of four previously registered organisations on the FWC's own motion (representing a 100% increase from the previous FY);
- Conducting a comprehensive proactive audit of compliance levels by registered organisations over the previous 10 years;
- Delivery of education and compliance strategies resulting in a 96.2 per cent lodgement rate of annual returns;
- Development and subsequent national launching of both a Regulatory Compliance Policy and Litigation Policy;
- A transition to enhanced transparency by the publication on the FWC's website of information regarding current inquiries, investigations and current litigation;
- Development and publication of the FWC Offences Policy;
- Development and publication of a Protection for Whistleblowers fact sheet;

- Publication and gazettal of updated Financial Reporting Guidelines which supplement the financial reporting provisions of the RO Act together with a new Model Set of Accounts to help RO's understand and comply with financial reporting requirements;
- Publication of information about amendments to the RO Act, including fact sheets, frequently asked questions, model rules and links to published decisions;
- Publication on approved governance training packages; and
- Developing staff investigative capability by training all RCB staff in Certificate IV in Government (Investigations).

The FWC's new and proactive approach to regulation has delivered in a marked increase in the compliance levels by RO's. For example, the compliance rate of the lodgement of financial reports has increased from 93% to 96% between the 2011 and 2012 reporting periods. As indicated above, the new approach resulted in lodgement rate of 96.2% of annual returns in the 2012-13 FY (which by May of 2013 had increased to 99.5%) while a recent proactive election audit conducted across all RO's required to lodge election information with the FWC has provided for the first time, a comprehensive compliance picture across 503 election entities.

To achieve greater voluntary compliance levels, staff have recently delivered the organisation's first two webinars to RO's on Updated Reporting Guidelines and Right of Entry Permits. Through this technology, the RCB engaged with hundreds of members of RO's and developed key learnings including that 99% of participants considered the methodology as an effective method of communication and regarded the information they received as useful.

Branch staff have extended engagement with Commonwealth and State agencies to enhance its regulatory reach and overall effectiveness. Members of the RCB have developed valuable networking partnerships by participating in an Investigations forum hosted by the Australian Federal Police and separately engaged in and coordinated an RCB investigation with a State based law enforcement agency while exercising the disclosure of information powers provided in s 335 of the Act.

The RCB is further developing its investigative capability by ensuring each member is qualified in Certificate IV in Government (Investigations) while extending those capabilities by facilitating training to its staff from investigative experts in cognitive interviewing, behavioural psychology and forensic IT.

Specific Comments on the Bill

- The broader functions of the Registered Organisations Commissioner together with more extensive powers to aid the discharge of the regulatory functions will equip the proposed new regulator with more effective tools than are currently available to the General Manager.

- The proposed requirement in clause 141(1)(iia) that Rules must provide the “keeping of minute books ...” may be enhanced if such records were required to be kept for a minimum period of time. The requirement in section 231 to retain a copy of an organisation’s register for 7 years may be a useful comparator.
- Noting that the Commissioner may permit organisations or branches to conduct their own elections for office, compliance with such elections may be aided by a commensurate obligation to notify the Commissioner when elections have been undertaken.
- Noting that the Bill has little impact, if any, in relation to entities registered under state legislation, our experience is that it is sometimes complex to identify whether action is undertaken by a state-registered entity or an organisation registered under *the Fair Work (Registered Organisations) Act 2009*.

We would be pleased to provide further clarification or assistance on any aspect of the submission.

Yours sincerely

Bernadette O’Neill
General Manager