

**SENATE EDUCATION, EMPLOYMENT AND
WORKPLACE RELATIONS COMMITTEE**

**INQUIRY INTO THE FAIR WORK
(REGISTERED ORGANISATIONS)
AMENDMENT BILL 2012**

**DEPARTMENT OF EDUCATION,
EMPLOYMENT AND WORKPLACE
RELATIONS**

Section 1. Introduction

OVERVIEW

1. The Department of Education, Employment and Workplace Relations welcomes the opportunity to make a submission to the Senate Committee Inquiry into the *Fair Work (Registered Organisations) Amendment Bill 2012* (the Bill) which was introduced into the House of Representatives on 31 May 2012.
2. The Bill will amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to provide for:
 - a greater degree of disclosure of remuneration, expenditure and pecuniary interests of officials under the rules of registered organisations;
 - enhanced powers of Fair Work Australia (FWA) to make inquiries and investigate suspected breaches of the RO Act;
 - measures to increase awareness of financial management obligations of officials of registered organisations ; and
 - increased maximum civil penalties under the RO Act.

BACKGROUND

3. The overwhelming majority of Australian registered organisations are professional, democratic and highly effective organisations. However, recent events have demonstrated the need for stronger penalties for any registered organisations and their office holders that do the wrong thing.
4. The dysfunction within certain parts of the Health Services Union (HSU) has prompted concern amongst members of registered organisations and the public more broadly about whether the current statutory obligations placed upon registered organisations are effective in ensuring their financial accountability. Questions have also been raised about the ability of FWA as the regulator to effectively investigate and take action against organisations that are alleged to have breached those obligations.
5. The maintenance of public confidence in both the integrity of registered organisations and the ability of the regulator to ensure compliance with the regulatory framework is of great importance to the continued success and productivity of Australia's workplace relations system.
6. Following the publication of FWA's report on the investigations into the Victorian No. 1 Branch and the National Office of the HSU, the Government identified a number of areas of the RO Act that could be clarified and strengthened. These included: the rules relating to the financial accountability of registered organisations; the range of penalties that can be

applied where an organisation breaches their obligations under the RO Act; and improving FWA's investigative function. These key areas have been addressed in the Bill.

7. In light of the need to move quickly to maintain public confidence in registered organisations, the Government prioritised consultation with stakeholders and a meeting of the National Workplace Relations Consultative Council (NWRCC) was held on Friday, 25 May 2012. NWRCC participants were provided with the draft Bill for consideration and discussion at the meeting, and invited to provide comments and feedback. The NWRCC considered the range of draft amendments set out in the Bill, and stated their agreement in principle to those amendments and acknowledged that registered organisations play an important part in facilitating the workplace relations system, but expressed the clear view that the draft amendments will significantly improve the financial reporting framework, governance and accountability for registered organisations. The Government invited further correspondence following the meeting and received a number of written submissions from stakeholders, which were considered and incorporated in the drafting process.

PURPOSE OF THE SUBMISSION

8. This Department's submission:
 - provides an overview of role of registered organisations in Australian workplaces;
 - outlines the existing statutory framework; and
 - provides an overview of the key amendments contained in the Bill.

Section 2. Role of registered organisations in Australian Workplaces

9. The participation of both employer and employee organisations has been a key feature of the federal workplace relations system since the introduction of the *Conciliation and Arbitration Act 1904*. While the regulation of Australian workplaces is no longer underpinned by the conciliation and arbitration power, registered organisations maintain an important role in ensuring that the interests of employers and employees are represented.
10. Today, employer and employee organisations continue to play a key role in the facilitation of the national workplace relations system, including by:
 - engaging in the modernisation, variation and review of awards;
 - representing members in matters before FWA;
 - participating in the process of setting the national minimum wage;
 - advocating for the interests of members and providing training in relation to industrial matters, including occupational health and safety; and
 - assisting members in the course of dispute resolution.
11. The Australian Government recognises the right of employers and workers to form and join organisations of their choice. Amendments in the Bill reflect this commitment by inserting a new object into the RO Act, stating that Parliament recognises and respects the role of employer and employee organisations in facilitating the workplace relations system (see Item 1 of the Bill).
12. Australia has ratified both ILO Conventions 87 (Freedom of Association and Protection of the Right to Collectively Organise) and 98 (Right to Organise), and closely monitors its compliance with the standards contained in those instruments. The autonomy of registered organisations is an integral tenet of the principles of freedom of association enshrined in these conventions. The Department is conscious of the need to strike an appropriate balance between ensuring that registered organisations are governed in a transparent and accountable manner, and the need to avoid implementing inappropriate impediments to the autonomy of registered organisations, and is of the view that this aim is achieved in the Bill.

Section 3. Existing statutory framework

13. The RO Act contains detailed rules about the financial management of organisations as well as rules about the conduct of officials of registered organisations. These provisions were first introduced in the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002*. The current provisions have not been amended since their introduction in 2002.
14. Under the RO Act, the General Manager of FWA is empowered to make inquiries or conduct investigations in relation to specified contraventions of provisions of the RO Act that relate to the financial records and audits of registered organisations. The General Manager can also investigate contraventions of civil penalty provisions in relation to officers improperly using their position to gain advantage for themselves or cause detriment to the organisation or another person, failing to act with a requisite degree of care and diligence or failing to act in good faith and for a proper purpose in the discharge of his or her duties.
15. The RO Act also provides that the General Manager of FWA may, in writing, delegate to an SES employee of FWA their investigative functions and powers under Chapter 11 of the Act. In exercising powers or functions under a delegation, the delegate must comply with any directions of the General Manager.
16. Section 336 of the RO Act provides that, if the General Manager is satisfied that contraventions have occurred, he or she may:
 - issue a notice to the organisation requesting specific action be taken;
 - apply to the Federal Court for a civil penalty to be issued against the organisation or an official;
 - refer the matter to the Commonwealth Office of the Director of Public Prosecutions in relation to any possible criminal offences; or
 - make an application to the Federal Court to enforce a civil remedy provision in relation to conduct by an official under ss 285 - 288.
17. FWA's powers do not extend to broader criminal or civil matters, and the range of remedies available under the RO Act is consistent with FWA's key function of ensuring the financial accountability of registered organisations and their officers to their membership.

Section 4. PROPOSED AMENDMENTS

OVERVIEW

18. The Bill amends the RO Act to enhance the financial and accountability obligations of registered organisations and their office holders. It will require:
- rules of all registered organisations to provide for policies about financial expenditure and accountability within organisations;
 - rules to deal with the disclosure of remuneration paid to the highest paid officials in the organisation or in the branches of an organisation;
 - rules to deal with the disclosure to the organisation of other pecuniary and financial interests including board fees obtained by an official;
 - rules to deal with the disclosure of information about transactions with related parties; and
 - officials to undertake training about their governance and accounting obligations.
19. The Bill will also enhance the investigative powers available to FWA, including the express power for the General Manager to provide information to bodies such as federal or state police and regulatory agencies, and will require all investigations to be concluded as soon as practicable.
20. Finally, the Bill will triple the maximum civil penalties that may be imposed for breaches of the RO Act.
21. Improved financial disclosure and transparency rules for registered organisation as well as targeted training in financial management is designed to improve the operation and accountability of registered organisations and raise and restore public confidence in the role of registered organisations in the workplace relations system.
22. Importantly, the amendments provide substantial scope, by requiring registered organisations to make changes to their rules, for registered organisations to go further and set the standard for best practice measures.
23. These measures will be underpinned by measures to improve the way investigations of breaches of the RO Act are conducted by the General Manager of FWA and the commensurate increases in the civil penalties for contraventions of the RO Act.

AMENDMENTS – ALTERATION OF RULES

24. The RO Act sets out a range of requirements for the form and content of the rules of registered organisations. Section 141 of the RO Act lists a range of matters that must be covered including the objects of the organisation and the eligibility criteria for membership. Additional provisions expand on this list or clarify their operation.

25. The Bill will amend the RO Act to require registered organisations to create rules about the expenditure of the organisation's funds.
26. The Bill will also amend the RO Act to insert new Division 3A which deals with rules relating to disclosure. The new division establishes a new disclosure regime that requires organisations and branches of organisations to have rules that promote financial accountability and transparency by requiring the disclosure of:
- remuneration paid to officers;
 - material personal interests of officers and their relatives; and
 - certain payments made by organisations or any of its branches.
27. These provisions will require members of registered organisations to be provided with a range of important information that relates to their organisation and its officers. These amendments are designed to ensure that organisations and their officials are and remain accountable to their members.
28. Improved financial management, disclosure and transparency rules for registered organisations is intended to improve the operation and accountability of registered organisations and raise and restore public confidence in their operation and internal governance.

Rules relating to expenditure

29. The Bill amends the RO Act to provide that the rules of a registered organisation and each of its branches must require the development and implementation of policies relating to their expenditure (see Item 55 of the Bill).
30. A new provision will give the Minister the power to issue guidelines containing one or more sets of model rules dealing with expenditure (see Item 56 of the Bill). Registered organisations will still have the freedom to adopt the model rules in whole or in part as they see fit.
31. These amendments ensure that what is a permissible use of organisation funds will be clear to members and officials of registered organisations. The new power of the Minister to issue model rules will also be important in establishing best practice among registered organisations in terms of financial accountability and disclosure.

Rules relating to disclosure of remuneration paid to officers

32. New section 148A of the Bill amends the RO Act to require the disclosure of remuneration, including board fees, paid to officers of organisations. Amendments would also change the rules relating to disclosure of the remuneration of officers of branches of registered organisations.

33. The amendments provide that rules of an organisation or of a branch must require the disclosure by each officer to the organisation or branch of any remuneration paid to the officer:

- because the officer is a member of a board and they hold that position only because of their position in the organisation or branch or because they were nominated for a position on a board by the organisation, a branch or a peak council; or
- by a related party of the organisation or branch in connection with the performance of the officer's duties.

34. Disclosures made under the rules must be made as soon as practicable.

35. New section 148A of the Bill also provides that the rules of registered organisation must require the disclosure to members the identities and the relevant remuneration and non-cash benefits of each of the five highest remunerated officers of the organisation. Similar rules will apply in relation to the two highest paid officials of each branch of an organisation.

- Remuneration includes pay, wages, salary, fees, allowances, leave, benefits, or other entitlements
- Non-cash benefits means property or services in any form other than money, but does not include a computer, mobile phone or other electronic device that is used only or mainly for work purposes.

36. It is important to note that determining the five highest paid officials will be based upon monetary remuneration rather than non-cash benefits. However, as explained above, where an official's remuneration is required to be disclosed, that disclosure will require non-cash benefits paid to the official to be identified.

37. The rules of registered organisations can provide for the disclosure of the relevant remuneration either by providing for the actual amount of each officer's remuneration or in any other manner that is considered to be appropriate to satisfy the disclosure requirements under the RO Act as amended. In relation to non-cash benefits, the rules may authorise the disclosure of each officer's non-cash benefits by providing the value of the non-cash benefits or in any other manner that is considered appropriate to satisfy the rules relating to disclosure.

Rules to require the disclosure of material personal interests of officers and relatives

38. New section 148B of the Bill will also make amendments to require officers of an organisation or branch to disclose to the organisation or branch any material personal interest they have in a matter that relates to the affairs of the organisation or branch that the officer or their relative has or acquires.

- Relative will be defined as a parent, step-parent, child, step-child, grand-parent, grand-child, brother or sister of the official or the spouse of the official (meanings of these concepts are consistent with other Commonwealth laws).

39. The rules must of an organisation or branch will also be required provide for the disclosure to members any interests disclosed by officers in relation to their material personal interests described above.

Rules to require the disclosure of payments made by an organisation or a branch

40. New section 148C of the Bill will amend the RO Act to require the rules of registered organisations to provide for disclosure of payments made by an organisation or a branch of an organisation.

41. Subject to certain exceptions (see new subsection 148C(3)), organisations will be required to have rules that require the disclosure to the members of the organisation and its branches either or both of:

- each payment that has been made by the organisation during the disclosure period to a related party of the organisation or its branches or to a declared person or body of the organisation; and
- the total of the payments made by the organisation during the disclosure period to each related part of the organisation or one of its branches and each declared person or body of the organisation.

42. The amendments will require similar rules to be made for the disclosure of payments made by branches to their members.

43. The Bill will insert a new definition of 'related party', the meaning of which has been adapted for the purposes of the RO Act from the definition in the *Corporations Act 2001*. In general, a related party in relation to an organisation (or a branch of an organisation as the case may be) is:

- an entity that is controlled by the organisation;
- officers of the organisation and their spouses;
- relatives of the officers of the organisation and the officers' spouses;
- entities controlled by a related party to the organisation (that is not also controlled by the organisation);
- any party that was a related party of the organisation any time within the previous six months;
- an entity that believes or has a reasonable belief that it is likely to become a related party or an organisation at any time in the future; or
- an entity that acts in concert with another related party of the organisation on the understanding that the other related party will receive a financial benefit if the organisation gives the entity a financial benefit (see Item 54 of the Bill).

44. As noted above, the General Manager of FWA will have the power to grant an organisation or a branch an exemption from complying with the requirements to establish rules for the disclosure of payments made by an organisation or a branch of an organisation.
45. Organisations may apply to the General Manager in cases where they have a rule that meets the requirements of s 148C of the RO Act but considers that there are special circumstances that mean that compliance with the rule is too onerous. Applications must be accompanied by:
- a statement setting out the alleged special circumstances;
 - particulars of the proposed amendments to the existing rules that are appropriate in light of the special circumstances while still being appropriately transparent; and
 - evidence of past and current high standards of financial accountability and control that are appropriate in light of the organisation's special circumstances.
46. If the General Manager grants an exemption it will remain in force until the earlier of either the day it is revoked or 5 years after it was granted. However, the General Manager may revoke an exemption if the General Manager is satisfied that the circumstances have changed such that permitting the exemption to remain in operation is no longer warranted. An affected organisation must be given an opportunity to be heard before the General Manager revokes an exemption.
47. Giving the General Manager the power to consider applications for an exemption is a balanced approach that recognises that a one size fits all approach will not always be appropriate for particular organisations.

ENHANCED INVESTIGATIVE POWERS OF FWA

48. The Bill contains a range of amendments that are intended to ensure that FWA is able to efficiently and effectively inquire into and, if necessary, investigate an organisation's compliance with a range of provisions in the RO Act.

Disclosure

49. The Bill gives General Manager of FWA the express power to disclose information obtained during the course of an investigation where he or she reasonably believes it is necessary or appropriate to do so in the course of performing functions or exercising powers of the General Manager, or it is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory. These provisions are necessary as FWA is not equipped or expected to conduct criminal investigations.
50. The provisions are drafted to include safeguards that are intended to ensure that information obtained in the course of an FWA investigation can only be disclosed in certain circumstances, and require the General Manager to form a reasonable belief that disclosure is necessary. This power cannot be delegated.

Delegation

51. The Bill amends the current framework to allow FWA to delegate its inquiry and investigation functions to a third party where the General Manager is satisfied that the third party has the necessary skills to conduct the investigation or inquiry (see Item 36 of the Bill).
52. This is intended to enable FWA to draw upon particular expertise for investigations from appropriately qualified third parties, such as accounting, auditing, financial reporting and compliance auditing specialists. Allowing specialists to undertake this kind of role will enhance the public's confidence in FWA's ability to conduct full and well informed investigations into complex subject matters.
53. A range of safeguards have been developed to ensure accountability where the inquiry or investigation function is delegated. While the delegate of the General Manager will be able to obtain information in the same way as the General Manager, the Bill provides that a notice to produce documents or attend to provide information will only be able to be issued by the General Manager or an SES Officer of FWA. Similarly, only the General Manager will be able to disclose, or authorise the disclosure of, information that is acquired during the course of an investigation in the specified circumstances. Finally, it will still be necessary for the General Manager to personally determine whether a contravention has occurred and to take action in relation to that contravention. The General Manager retains the final decision-making power provided for in s 336 of the RO Act.

Conducting investigations

54. The Bill also amends the RO Act to expand the range of persons to whom a notice to produce documents or attend and give evidence can be issued. Currently, such notices can only be issued to designated officers and former officers of the organisation, or the auditor of the reporting unit.
55. The Bill provides that, in addition to the General Manager's existing powers to obtain information or documents or require attendance to give evidence, the General Manager can obtain such information or evidence from third parties. As drafted, the expanded power can only be exercised where the General Manager has been unable to obtain the information from an officer, former officer or auditor.

Concluding investigations

56. The Bill includes a provision requiring FWA to conclude investigations as soon as practicable.
57. This is intended to ensure that, where FWA suspects non-compliance with the Act, it is dealt with as quickly as possible (see Item 15 of the Bill). The Department is conscious of the need to ensure that the public can have the fullest confidence in FWA investigations. It is clear that concerns about timely investigations were a significant issue arising out of FWA's recent investigation into the Health Services Union. It is intended that the new provision

will restore and reinforce the public's confidence in FWA's professionalism in all of its functions.

58. The Bill also includes an amendment allowing FWA to refer any matter to the Australian Federal Police or relevant State or Territory police for action in relation to possible criminal offences that have been identified (see Item 23 of the Bill). This is in addition to the current power to refer to the Commonwealth Director of Public Prosecutions.

59. Finally, a new provision will require FWA to conduct inquiries within 12 months of concluding an investigation that has determined a contravention has occurred. The subsequent inquiry must investigate whether the provisions that were previously breached is now being complied with (see Item 20 of the Bill).

APPROVED TRAINING

60. The Bill contains provisions requiring that the rules of an organisation or branch of an organisation must require each officer whose duties relate to the financial management of the organisation to undertake training related to those duties. The training must be completed within 6 months of the date that the person takes office in the organisation.

61. This new requirement is intended to address the potential for mismanagement of organisational funds and ensure that office holders are aware of, and equipped to adhere to, all duties and obligations required of them by the RO Act. It is also intended to ensure that the organisation's membership and the wider public have confidence of the ability of office holders to perform such duties.

INCREASED PENALTIES

62. The Bill will make amendments to increase the available penalties that may be imposed for breaches of the civil penalty provisions of the RO Act. The amendments will triple the civil penalties available under the RO Act bringing them in line with penalties available under the FW Act.

63. Items 7 and 8 will amend subsection 306(1) of the RO Act, which deals with pecuniary penalty orders available to the Federal Court, to increase the current penalties to:

- 300 penalty units for a body corporate; and
- 60 penalty units in any other case.

64. As noted above, the increase in penalties available to the Federal Court is commensurate with those available to the Federal Court under the FW Act.

65. The Bill will also insert new subsection 306(1A), which specifies that for offences in relation to investigations by the General Manager, the Federal Court may impose a pecuniary penalty of:

- 150 penalty units for a body corporate; and
- 30 penalty units in any other case.