Fair Work (Registered Organisations) Amendment Bill 2014

Jaan Murphy
Law and Bills Digest Section
Anne Holmes
Economics Section

This is a revised version of Bills Digest No. 98, which in turn was a revised and shortened version of Bills Digest 24, 2013–14, prepared for an earlier version of this Bill. Since the previous version of Digest No. 98 was published, Government amendments have been tabled. Hence the Digest has been republished, incorporating commentary on those amendments. For completeness the reader should consult both Bills Digests.

Contents

History of the Bill................................................................. 3
The Bill at a glance.............................................................. 3
What the current Bill does .................................................... 4
Background ............................................................................ 4
Stakeholder concerns ............................................................. 4
Key issues.............................................................................. 4
Committee consideration of the previous Bill ......................... 5
Senate Education and Employment Legislation Committee .......... 5
Senate Standing Committee for the Scrutiny of Bills ............... 5
Minister’s response to the concerns raised by the Committee ........ 6
Committee reactions to the Minister’s responses ...................... 7
Increased disclosure requirements – proposed amendments ........ 7
Duty of officers to disclose material personal interests.......... 7
Exceptions to the duty to disclose material personal interests ....... 8
Restrictions on officers taking part in decisions related to a material personal interest ......................................................... 9

Date introduced: 19 June 2014
House: House of Representatives
Portfolio: Employment
Commencement: Schedule 1 commences on a day to be fixed by Proclamation, or immediately before Schedule 2 commences; Schedule 2 commences 1 July 2014.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
History of the Bill

The Fair Work (Registered Organisations) Amendment Bill 2014 (current Bill) is identical to the Fair Work (Registered Organisations) Amendment Bill 2013 (previous Bill). The previous Bill was introduced into the House of Representatives on 14 November 2013 and subsequently passed without amendment on 12 December 2013.

The previous Bill was then considered by three Senate committees.

It was referred to the Senate Education and Employment Legislation Committee. The Committee’s report made a number of recommendations including changes to the material interest disclosure requirements (as detailed below). Labor Senators, in a dissenting report, recommended that the Bill not be passed.

Since the Digest to the previous Bill was published, the Senate Standing Committee for the Scrutiny of Bills also reported on the previous Bill. The Committee’s comments are detailed below.

The Senate Education and Employment References Committee also inquired into the previous Bill and reported on 27 March 2014. It recommended that the previous Bill not be passed. Coalition Senators, in a dissenting report, rejected the need for that inquiry, and stood by the recommendations of the Legislation Committee report—that the previous Bill be amended and passed.

The Government tabled a series of amendments and a supplementary Explanatory Memorandum to the previous Bill giving effect to the Senate Education and Employment Legislation Committee recommendations on 12 December 2013. Viewed as a whole, the Government amendments were significant and sought, amongst other things, to introduce limitations and exceptions to the material disclosure regime proposed by the previous Bill which were modelled on those provided by the Corporations Act 2001 that apply to directors.

The previous Bill and the proposed amendments were negatived by the Senate on 14 May 2014.

It is not clear why the Government, having accepted the recommendations for amendments recommended by the Senate Education and Employment Legislation Committee with regard to the previous Bill, has now introduced the current Bill in its original form, and has re-introduced the amendments, instead of re-drafting the current Bill to incorporate the amendments.

As the current Bill is identical to the previous Bill, and the amendments identical to those negatived by the Senate in May 2014, this Bills Digest is a revised and shortened version of a Bills Digest prepared for the previous Bill, updated to reflect the Senate Standing Committee for the Scrutiny of Bills comments and the Minister’s response (in relation to the previous Bill), and examining the amendments in detail.

The Bill at a glance

As set out above, the current Bill and the proposed amendments are replicas of the previous Bill and amendments moved by the Government in the Senate in response to the recommendations of the Senate Education and Employment Legislation Committee. Somewhat unusually, instead of the amendments being incorporated into the body of the current Bill itself, the amendments have been tabled separately.

---


Readers are advised to refer to Bills Digest No. 24, 2013–14, which contains a detailed analysis of the previous Bill without the amendments. However, for ease of reference a brief outline of the current Bill is provided below, along with an examination of the amendments. Given that the current Bill replicates the previous Bill, references to the previous Bill are equally applicable to the current Bill.

**What the current Bill does**

The current Bill (like the previous Bill) creates a Registered Organisations Commissioner, and a Registered Organisations Commission, within (but independent of) the Office of the Fair Work Ombudsman. The Commissioner will supervise the conduct of employer and employee organisations registered under the *Fair Work Act 2009*. It also provides for:

- increased disclosure requirements for both registered organisations and their officers (including new related party disclosure requirements)
- stronger coercive investigatory powers for the Commissioner (with fewer limitations on their use) and
- increased penalties, including criminal penalties.

**Background**

The current Bill has been introduced partly in response to widely publicised misconduct by officers of the Health Services Union. That misconduct has been prosecuted in civil and criminal courts. In 2012, the *Fair Work (Registered Organisations) Act 2009* (RO Act) was amended by the *Fair Work (Registered Organisations) Amendment Act 2012* to improve the Fair Work Commission’s investigative function and to increase penalties for various offences. Notwithstanding this, the current Bill seeks to provide for ‘...a suite of legislative measures designed to see governance of registered organisations lifted to a consistently high standard across the board.’

**Stakeholder concerns**

Employer and employee organisations expressed concerns that the previous Bill had been introduced too soon after the last amendments and would create an undue regulatory burden. Organisations feared that the provisions of the previous Bill would be a disincentive to members’ putting themselves forward for election as officers.

There are also concerns that the powers of the Commissioner are not sufficiently constrained, and the penalties in the previous Bill were criticised as too harsh.

**Key issues**

The current Bill is intended to impose on registered organisations a similar standard of accountability and disclosure to that for corporations. The disclosure requirements as altered by the proposed amendments are discussed in detail below under the heading *Increased disclosure requirements – proposed amendments*.

A threshold issue is whether it is appropriate to have similar regulation for the two types of bodies. There is great diversity among the organisations: many (mainly employer) registered organisations are very small, whilst other (mainly employee) organisations are large. All are not-for-profit organisations with democratically elected officials, many of whom are unpaid.

A further issue is whether the proposed introduction of criminal penalties is appropriate, given that criminal behaviour is already subject to the criminal law.

---

9. Explanatory Memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, accessed 4 December 2013. See p. 8: ‘...overall, registered organisations are most likely to be small employer organisations or large employee organisations’.
Committee consideration of the previous Bill

**Senate Education and Employment Legislation Committee**

The previous Bill was referred to the Senate Education and Employment Legislation Committee for inquiry and report by 2 December 2013. Details of the inquiry are at the [inquiry’s web page](http://example.com/inquiry). The Committee’s report recommended changes to the material interest disclosure requirements so that only interests related to the financial management of the organisation need be disclosed; that exclusions from the requirements be included, along the lines of the exclusions in the *Corporations Act*; that there be a threshold for disclosure of payments; and that the Commissioner be able to grant exemptions from the training requirements where officers could demonstrate that they had the required knowledge. These recommendations respond to some of the issues raised in submissions to the inquiry, which are discussed in Bills Digest 24, 2013–14.

Labor Senators, in a dissenting report, recommended that the previous Bill not be passed, essentially because it had been put together in haste and because the 2012 amendments had not yet been tested. They suggested that ‘the legislation seeks to diminish rank and file participation within the unions, and discourage union activity.’

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills reported twice on the previous Bill in 2013 and 2014. In Alert Digest No. 9 of 2013, the Committee raised a number of concerns. In relation to the proposed penalties the Committee sought clarification as to:

- the extent of similarities between the proposed offences and offences under the *Corporations Act 2001*
- whether the proposed penalties are in any instance higher than in relation to offences under the *Corporations Act 2001* and
- particularly whether the increase proposed by item 228 (proposed subsection 337(1)) for the offence of failing to comply with a notice to attend or produce to 100 penalty units or imprisonment for two years (or both) is higher than other similar offences, and the justification for the proposed approach.

The Committee stated that:

In the *Guide to Framing Commonwealth Offences* it is suggested that the maximum penalty for non-compliance with attend or produce notices should ‘generally be 6 months imprisonment and/or a fine of 30 penalty units’. As further noted in the *Guide* this is the penalty imposed by, for example, subsection 167(3) [of] the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* and section 211 of the *Proceeds of Crime Act 2002*. In this context the term of imprisonment in the current bill is proposed to be increased to four times the recommended level. [Emphasis added].

The Committee noted that the provisions mentioned above may be considered to trespass unduly on personal rights and liberties. In addition the Committee also raised concerns relating to the imposition of strict liability offences, the reversal of the onus of proof, abrogation of the privilege against self-incrimination and broadening the scope of admissible evidence against defendants.

---

13. Ibid., p. 25.
15. Ibid., pp. 21–22.
16. Ibid., p. 22.
Minister’s response to the concerns raised by the Committee

The Minister’s response to the concerns raised by the Committee was included in the Committee’s Fourth Report of 2014. On the concerns raised by the Committee in relation to proposed penalties, the Minister noted that with regard to the extent of similarities between offences introduced by the previous Bill and offences under the Corporations Act 2001, ‘the table at Appendix A [of the Minister’s response to the Committee] sets out the proposed new offence provisions and their corresponding provisions in the Corporations Act or the ASIC Act.’

In relation to whether the penalties are in any instance higher than in relation to offences under the Corporations Act 2001, the Minister provided a table (at Appendix B in his letter to the Committee) which compares the penalties proposed by the previous Bill and their corresponding offences under the Corporations Act 2001 and the Australian Securities and Investment Commission Act 2001. The Minister stated that:

- The table makes clear that the penalties are largely the same for the corresponding offences under the Corporations Act or ASIC Act. However, the penalties for strict liability offences under item 223 (relating to the conduct of investigations) have not replicated imprisonment terms but have instead increased the maximum pecuniary penalty to 60 penalty units. The penalty in relation to item 223 (proposed subsection 335F(2)) and item 230 (proposed subsection 337AA(2)) are greater than the equivalent ASIC Act penalty (5 penalty units) to ensure consistency with other similar offences under the Bill.

- In relation to whether the increased penalty proposed by item 228 is higher than for other similar offences (and the justification for the proposed approach) the Minister stated that it is:

  ... the same as those for almost identical offences under subsection 63(1) of the ASIC Act. This approach is consistent with the Government’s policy for the regulation of registered organisations, namely that the penalties and offences under the ASIC Act are appropriate to enforce obligations arising from the RO Commissioner’s proposed information gathering powers.

In relation to the other issues raised relating to the imposition of strict liability offences, the reversal of the onus of proof, abrogation of the privilege against self-incrimination and broadening the scope of admissible evidence against defendants the Minister noted:

- that the proposed strict liability offences ‘replicate offences relating to enforcement of identical obligations under the ASIC Act’ and that ‘I expect that the RO Commission will develop materials, such as guidelines, standard forms and educational material to deal with its approach to investigations, similar to the approach currently taken by ASIC’

- that the reversal of the onus of proof provisions are justified as they relate to matters that are ‘peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters’

- that the abrogation of the privilege against self-incrimination is justified on the basis that:

  - it pursues the objective of ensuring that offences under the RO Act can be properly investigated and
  - the limitation on the privilege is proportionate and reasonable to this objective because a use immunity is provided for (and the absence of a derivative use immunity is reasonable and necessary for the effective prosecution of matters under the RO Act) and

- in relation to broadening the scope of admissible evidence against defendants, that the relevant provisions ‘replicate sections 76 to 80 of the ASIC Act, which have a long history in corporations legislation.’

---

19. Ibid., p. 130.
20. Ibid.
22. Ibid., pp. 131–132, 137–138 and 140 respectively.
Committee reactions to the Minister’s responses

In relation to most of the matters raised, the Committee requested that the key information provided by the Minister be included in the Explanatory Memorandum, and left the question of whether the relevant parts of the previous Bill were appropriate to the Senate as a whole. The Explanatory Memorandum to the current Bill does not materially differ from the Explanatory Memorandum to the previous Bill, and does not contain any of the additional information provided by the Minister in relation to the matters raised by the Committee. However, in relation to the abrogation of the privilege against self-incrimination the Committee also noted ‘the safeguards outlined by the Minster, but remains concerned about the requirement to claim the privilege or lose the ability to rely on it.’

Increased disclosure requirements – proposed amendments

Schedule 2 of the Bill contains a number of provisions that increase the disclosure requirements of registered organisations and their officers. The Coalition’s ‘Policy for Better Transparency and Accountability of Registered Organisations’ foreshadowed that these would be modelled on existing provisions in the Corporations Act. As noted earlier above, the Senate Education and Employment Legislation Committee recommended that the previous Bill be amended to:

• provide that the disclosure of material only be required by officers whose duties relate to the financial management of the organisation

• include a list of exclusions from the requirement to disclose material personal interests, along the lines of the exclusions in the Corporations Act

• provide a threshold amount that triggers the disclosure of payments and

• provide that the Commissioner be able to grant exemptions from the training requirements where officers could demonstrate that they have the required knowledge.

The new disclosure obligations imposed on registered organisations and their officers are created by item 166 of Schedule 2 of the current Bill, which inserts a new Part 2A into Chapter 9 of the Registered Organisations Act. Division 2 of Part 2A (proposed sections 293B to 293H) contains provisions about new disclosure obligations regarding:

• remuneration paid to officers

• material personal interests of officers and their relatives and

• payments made by an organisation or branch.

These requirements, as modified by the proposed amendments, are discussed below. Readers should consult Bills Digest 24, 2013–14 for an analysis of the disclosure obligations that are not modified by the proposed amendments.

Duty of officers to disclose material personal interests

Under the Corporations Act, the default position is that directors must disclose material personal interests in a matter that relates to the company’s affairs. The term ‘personal interest’ has been interpreted by the courts as any situation where the director can derive a financial or other benefit.

23. Ibid., p. 139. See the earlier Bills Digest in relation to: similarities of offences to those under the Corporations Act 2001 (items 223, 226–228) see pp. 18, 34–37; proposed strict liability offences, see item 230 (proposed section 337AA) and p. 18; reversal of onus of proof, see proposed section 337AC and p. 19; abrogation of the privilege against self-incrimination, see item 230 (proposed section 337AD) and pp. 19–24; broadening the scope of admissible evidence against defendants see proposed section 337AF–337AK (item 230) and pp. 31–32. All page number references are to Bills Digest No. 24, 2013–14, Fair Work (Registered Organisations) Amendment Bill 2013, op. cit.


27. See for example Bell Group Ltd (in liq) v Westpac Banking Corp (No 9) (2008) 225 FLR 1, (2008) 39 WAR 1 at [4509]: ‘...I think it is common ground that the phrase is not confined to pecuniary interests. It extends to non-pecuniary and indirect interests...’.
However, in the case of directors of public companies, the *Corporations Act* imposes additional disclosure requirements, requiring member approval *before* giving a ‘financial benefit’ to a ‘related party’ (which will often also constitute a material personal interest, as ‘related parties’ is defined as including the relatives and spouses of directors).²⁸

In the case of incorporated associations, the level of disclosure required by officer holders varies depending on the jurisdiction. The table in Appendix A to Bills Digest 24, 2013–14 outlines the disclosure requirements of officer holders of incorporated associations, as a comparator to those proposed by the Bill for officers of registered organisations and provided for by the *Corporations Act* in relation to directors.

The comparison would suggest that whilst this type and level of disclosure is not new, it has previously been confined to public companies, which, generally speaking, are the companies listed on the Australian Stock Exchange. The previous Bill (as drafted) extended the disclosure requirements to where a relative of an officer has or acquires a material interest in a matter that relates to the affairs of the organisation or branch.²⁹

**Proposed section 293C** (as amended) will impose new disclosure requirements on ‘disclosing officers’ of organisations akin to those imposed on directors of public companies. The amendments define a disclosing officer as each officer of an organisation or branch ‘whose duties include duties that relate to the financial management of the organisation or branch’.³⁰

Disclosing officers of registered organisations (and branches) will be required to disclose to the organisation any material personal interest that they have or acquire or in a matter that relates to the affairs of the organisation or branch.³¹ However, as noted in the Supplementary Explanatory Memorandum to the previous Bill, the amendments will also:

> … remove the express obligation on officers and organisations to disclose details of any material personal interests in a manner that relates to the affairs of an organisation or branch that an officer’s relative has or acquires.³²

**Proposed subsection 293C(5)** (as amended) provides that such disclosure must be made as soon as practicable after the interest is acquired and must provide details of the nature and extent of the interest and how it relates to the affairs of the organisation (or branch).³³ **Proposed section 293D** of the Bill allows officers to provide standing notice of ‘an interest’, as is also provided for under the *Corporations Act*,³⁴ and is discussed in detail in Bills Digest 24, 2013–14 at pages 14–15.

**Exceptions to the duty to disclose material personal interests**

**Proposed subsection 293C(4)** (as amended) provides a list of exceptions to the duty to disclose material personal interests, which largely (but not entirely) replicate those found in subsection 191(2) of the *Corporations Act*. A disclosing officer of an organisation or branch does not need to disclose a material interest if the interest:

- arises because the disclosing officer is a member, or a representative of a member, of an organisation or a branch and the interest is held in common with the other members of the organisation or branch (replicates paragraph 191(2)(a)(i) of the *Corporations Act*),
- arises in relation to the officer’s remuneration as an officer of the organisation or branch (replicates paragraph 191(2)(a)(ii) of the *Corporations Act*).

---

²⁸ *Corporations Act* 2001, sections 207, 208, 209 210, subsections 228(2) and (3). For a detailed analysis of disclosure requirements related to executive remuneration under the *Corporations Act* 2001 see: J Corkery and S Medarevic, *Executive remuneration under scrutiny: the cutting edge of the “shareholder spring”*, Corporate Governance *eJournal*, 2013, pp. 1–6, accessed 26 June 2014.

²⁹ Proposed subsections 293C(1), (2).

³⁰ Fair Work (Registered Organisations) Amendment Bill 2014, *Government Amendments* [sheet BT 278], proposed subsection 293C(1).

³¹ Ibid., proposed subsections 293C(2), (3).

³² Supplementary Explanatory Memorandum, *Fair Work (Registered Organisations) Amendment Bill 2013*, pp. 1, 3, accessed 26 June 2014. As of the time of writing, the amendments to the 2014 Bill appear to have been introduced without a Supplementary Explanatory Memorandum.

³³ Fair Work (Registered Organisations) Amendment Bill 2014, *Government Amendments* [sheet BT 278], proposed subsection 293C(5).

³⁴ *Corporations Act* 2001, section 192.
• relates to a contract the organisation or branch is proposing to enter into that is subject to approval by the members of the organisation or branch and will not impose any obligation on the organisation or branch if it is not approved by the members (replicates paragraph 191(2)(a)(iii) of the Corporations Act)

• is in a contract, or proposed contract, with, or for the benefit of, or on behalf of, a related party of the organisation or branch that is a body corporate and arises merely because the officer is on the Board of the related party (replicates paragraph 191(2)(a)(viii) of the Corporations Act) or

• the officer has given a standing notice of the nature and extent of the interest under section 293D and the notice is still effective in relation to the interest (replicates subsection 191(2)(d) of the Corporations Act).

However, subsection 191(2) of the Corporations Act also provides additional exceptions including where the interest arises merely because a director is a guarantor (or has given an indemnity or security) for all or part of a loan (or proposed loan) to the company, or where an interest relates to a director’s liability insurance contract. Those exceptions are not replicated in the amendments.

**Restrictions on officers taking part in decisions related to a material personal interest**

The Bill as drafted would have prevented any officer with a material personal interest in a matter from being present during deliberations or taking part in any decision related to a matter in which they had a material personal interest. As such, as drafted the provisions largely replicated section 195 of the Corporations Act, which prevents directors of public companies from taking part in discussions about (and voting on) matters in which they have a material personal interest.

The amendments will allow a disclosing officer to take part in discussions and decisions related to matters in which they have a material personal interest if:

• the interest falls within one of the exceptions provided by proposed section 293C (as amended) or

• where the members of the management committee of the organisation or branch without a material personal interest in the matter pass a resolution providing certain information about the matter and allowing the officer to participate in the decision.

As a matter of practicality, the amended provisions will impose on officers of registered organisations similar disclosure requirements to those that directors of proprietary companies are subject to under section 194 of the Corporations Act 2001.

**Certain payments made by an organisation**

Proposed section 293G provides that an organisation or branch must, through the mandatory annual Officer and Related Party Disclosure Statement (ORPDS), disclose to its membership details of each payment made in the last financial year to a related party of the organisation, branch of the organisation, or to a declared person or body. Proposed section 293G is examined in detail on pages 15–16 of Bills Digest 24, 2013–14.

The amendments will expand the exceptions that apply to the disclosure of payments made by an organisation or branch to related parties, in a manner consistent with the approach taken by the Corporations Act. Proposed subsections 293G(5A)-(5D) (as proposed by the amendments) will exclude:

• payments made on ‘arm’s length terms’ (replicates section 210 of the Corporations Act 2001)\(^{39}\)

• payments less than or equal to an amount prescribed by the regulations (replicates section 213 of the Corporations Act 2001 (currently the amount prescribed by the Corporations Regulations 2001 is $5,000))\(^{40}\) and

---

36. Proposed subsections 293F(1), (2).
37. Fair Work (Registered Organisations) Amendment Bill 2014, Government Amendments [sheet BT 278], proposed subsection 293F(3).
38. Proposed subsections 293G(1), (2) and (3).
40. Fair Work (Registered Organisations) Amendment Bill 2014, Government Amendments [sheet BT 278], proposed subsection 293G(5B), (5C).
• payments given to a related party in their capacity as a member of the organisation or branch, where making
the payment does not unfairly discriminate against other members of the organisation or branch (replicates
section 215 of the Corporations Act 2001).\(^\text{41}\)

In effect, the amendments will impose disclosure requirement similar to that imposed on public companies, with
some differences, the most notable being that public companies must not only report related party benefits,
they must also seek shareholder approval before giving a financial benefit to a related party.\(^\text{42}\)

As such, whilst the related party disclosure and reporting requirements proposed by the Bill are broadly similar
to those imposed on public companies, the level of member scrutiny and accountability arguably remains lower
that that imposed by the Corporations Act on public companies for the reasons discussed on pages 15–16 of Bills

**Financial training requirements for officers**

Proposed sections 293K and 293L (item 166, Schedule 2) provide that officers whose duties include duties
relating to financial management of the organisation or branch must undertake approved training that relates to
and covers the officer’s financial duties. That training can be provided by the organisation, a peak council or
other body or person approved by the Commissioner.

Proposed section 293M (as proposed by the amendments) provides that the Commissioner may, on application,
grant an exemption from the requirements to undertake training under section 293K, provided the relevant
officer has sufficient experience as a company director, officer of a registered organisation or other professional
qualifications and experience.\(^\text{43}\)

**Concluding comments**

Readers are directed to Bills Digest No. 24, 2013–14\(^\text{44}\) for a detailed analysis of the unamended provisions of the
2013 Bill (which are replicated in the current Bill) and the issues they raise.

---

\(^\text{41}\). Fair Work (Registered Organisations) Amendment Bill 2014, Government Amendments [sheet BT 278], proposed subsection 293G(5D).

\(^\text{42}\). Corporations Act 2001, subsection 208(1).

\(^\text{43}\). Fair Work (Registered Organisations) Amendment Bill 2014, Government Amendments [sheet BT 278], proposed subsection 293M(2).
