FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2013

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Employment, Senator the Hon. Eric Abetz)
AMENDMENTS TO THE FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2013

OUTLINE

The Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill) will amend the Fair Work (Registered Organisations) Act 2009 (RO Act) and the Fair Work Act 2009 to ensure better governance of registered organisations.

Recent examples of financial misconduct within 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 accountable and transparent and that their membership contributions are being used for proper purposes.

In addressing these issues, the Bill will improve the governance and financial transparency of registered organisations and provide an appropriately empowered and independent regulator that will ensure compliance with the RO Act by registered organisations, branches of registered organisations and their officers.

The Bill was introduced into the House of Representatives on 14 November 2013 and was subsequently referred to the Senate Standing Committee on Education and Employment (the Senate Committee). The Senate Committee’s report was tabled on 2 December 2013.

These amendments to the Bill respond to the Senate Committee’s recommendations in its report. In general, the amendments resolve issues identified with the existing obligations on officers and organisations under the RO Act that came into effect on 1 January 2014 (sections 148A – 148E, introduced by the Fair Work (Registered Organisations) Amendment Act 2012). The amendments:

- limit the obligation to disclose material personal interests to officers whose duties include duties that relate to the financial management of the organisation or branch;
- remove the express obligation on officers and organisations to disclose details of any material personal interests in a matter that relates to the affairs of an organisation or branch that an officer’s relative has or acquires;
- require officers to make disclosures of material personal interests to the committee of management, and for such disclosures to be recorded in the minutes of the meeting of the committee and be available upon request to members;
- provide for a civil penalty for an organisation or branch’s failure to provide minutes of meetings of the committee of management to members;
- align the obligation on officers to disclose material personal interests with subsection 191(2) of the Corporations Act 2001 by inserting into the Bill similar exclusions to the obligation to disclose material personal interests applicable to directors of companies;
- provide that an officer is not restricted from taking part in a decision in a matter in which they have a material personal interest (under proposed new section 293F) if that interest does not need to be disclosed under proposed new section 293C;
• expand the exclusions that apply to the disclosure of payments made by an organisation or branch to related parties, including the exclusion of payments that are less than a prescribed amount, based on exclusions from the requirement to seek member approval of related party transactions in Chapter 2E of the Corporations Act; and

• enable the Registered Organisations Commissioner to grant exemptions from the training requirements if an organisation can demonstrate that an officer has a proper understanding of their financial duties within the organisation or the branch.

Financial Impact Statement

Nil
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Amendments to the Fair Work (Registered Organisations) Amendment Bill 2013

The amendments to the Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of amendments to the Fair Work (Registered Organisations) Amendment Bill 2013

The amendments will amend the Bill to ensure better governance of registered organisations by implementing recommendations of the Senate Standing Committee on Education and Employment (the Senate Committee) in its report on the Bill tabled on 2 December 2013.

The amendments to the Bill will:

- limit the obligation to disclose material personal interests to officers whose duties include duties that relate to the financial management of the organisation or branch;
- remove the obligation on officers and organisations to disclose details of any material personal interests in a matter that relates to the affairs of an organisation or branch that an officer’s relative has or acquires;
- require officers to make disclosures of material personal interests to the committee of management, and for such disclosures to be recorded in the minutes of the meeting of the committee and be available upon request to members;
- provide for a civil penalty for an organisation or branch’s failure to provide minutes of meetings of the committee of management to members;
- align the obligation on officers to disclose material personal interests with subsection 191(2) of the Corporations Act 2001 by inserting into the Bill similar exclusions to the obligation to disclose material personal interests applicable to directors of companies;
- provide that an officer is not restricted from taking part in a decision in a matter in which they have a material personal interest (under proposed new section 293F) if that interest does not need to be disclosed under proposed new section 293C;
- expand the exclusions that apply to the disclosure of payments made by an organisation or branch to related parties, including the exclusion of payments that are less than a prescribed amount, based on exclusions from the requirement to seek member approval of related party transactions in Chapter 2E of the Corporations Act; and
- enable the Registered Organisations Commissioner to grant exemptions from the training requirements if an individual can demonstrate a proper understanding of their financial duties within the organisation or the branch.
Human rights implications

The amendments engage with 2 human rights:

- the right to freedom of association:
  - the right to form and join trade unions and the right of trade unions to function freely in Article 22 of the International Covenant on Civil and Political Rights (ICCPR),
  - Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
  - the International Labour Organisation (ILO) Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) (Convention 87); and

- the prohibition on unlawful and arbitrary interference with privacy and reputation in Article 17 of the ICCPR.

The Right to Freedom of Association

Article 22(1) of the ICCPR protects the right to freedom of association, including the right to form and join trade unions.

Relevantly, Article 8(1)(a) of the ICESCR also provides for:

*The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.*

Article 8(3) of the ICESCR also provides that:

*Nothing in this article [Article 8] shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

ILO Convention 87 provides employer and employee organisations with protection for their organisational autonomy. Article 3 of Convention 87 provides:

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.
Article 8 of Convention 87 provides that:

1. *In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.*

2. *The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.*

The amendments will make several amendments to the Bill that engage the right to freedom of association. In this respect the amendments will:

- limit the obligation to disclose material personal interests to officers whose duties include duties that relate to the financial management of the organisation or branch;
- remove the obligation on officers and organisations to disclose details of any material personal interests in a matter that relates to the affairs of an organisation or branch that an officer’s relative has or acquires;
- require officers to make disclosures of material personal interests to the committee of management, and for such disclosures to be recorded in the minutes of the meeting of the committee and be available upon request to members;
- provide for a civil penalty for an organisation or branch’s failure to provide minutes of meetings of the committee of management to members;
- align the obligation on officers to disclose material personal interests with section 191(2) of the Corporations Act by inserting into the Bill similar exclusions to the obligation to disclose material personal interests applicable to directors of companies;
- provide that an officer is not restricted from taking part in a decision in a matter in which they have a material personal interest (under proposed new section 293F) if that interest does not need to be disclosed under proposed new section 293C; and
- expand the exclusions that apply to the disclosure of payments made by an organisation or branch to related parties, including the exclusion of payments that are less than a prescribed amount, based on exclusions from the requirement to seek member approval of related party transactions in Chapter 2E of the Corporations Act.

These amendments to the Bill limit the right to freedom of association. However, for the reasons set out in the Statement of Compatibility with Human Rights to the Bill, the amendments are compatible with the right to freedom of association because they pursue a legitimate objective and to the extent that they may limit human rights those limitations are reasonable, necessary and proportionate. These amendments also directly address the concerns raised by the Parliamentary Joint Committee on Human Rights as to whether the breadth of the proposed disclosure regime in the Bill is necessary and proportionate to the objective of achieving better governance of registered organisations.1

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New civil penalty provision – human rights implications

The amendments to the Bill introduce two new civil penalty provisions for failing to record details of a disclosure of material personal interests (proposed subsection 293C(6)) and failing to respond to a member’s request for copies of minutes of a committee of management meeting (proposed subsection 293C(7)). The amendments also include other civil penalty provisions for a failure by disclosing officers to disclose relevant material personal interests (proposed subsections 293C(1) and (2)). These two new civil penalty provisions reflect existing proposed subsections 293C(1) and (2) of item 166, Schedule 2 of the Bill.

The Government notes that given that the new civil penalty provision may engage the criminal process rights under articles 14 and 15 of the ICCPR, the Joint Committee has highlighted that when a provision imposes a civil penalty, an assessment is required as to whether it amounts to a ‘criminal’ penalty for the purposes of the ICCPR.2

For the reasons set out in the Statement of Compatibility with Human Rights to the Bill, the new civil penalty provisions inserted into the Bill by the amendments are civil penalties for the purposes of international law.

Right to Privacy and Reputation

The right to privacy in Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation.

The UN Human Rights Committee, General Comment 16 makes the following comments in relation to the right to privacy and reputation:

> The term "home" in English...as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation...Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment.3

In order for an interference with the right to privacy not to be ‘arbitrary’, the interference must be for a reason consistent with the ICCPR and reasonable in the particular circumstances. Reasonableness, in this context, involves notions of proportionality, appropriateness and necessity.4

Disclosure obligations on officers of organisations

While the amendments to the Bill relating to the disclosure of officer’s remuneration and material personal interests lessen the limitations to the right to privacy in the Bill, some limitations will still exist. In this respect the amendments to the Bill:

- only place an obligation to disclose material personal interests on officers whose duties include duties that relate to the financial management of the organisation or branch;

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

require officers to make disclosures of material personal interests to the committee of management, and for such disclosures to be recorded in the minutes of the meeting of the committee and be available upon request to members;

align the obligation on officers to disclose material personal interests with section 191(2) of the Corporations Act by inserting into the Bill similar exclusions to the obligation to disclose material personal interests applicable to directors of companies; and

expand the exclusions that apply to the disclosure of payments made by an organisation or branch to related parties, including the exclusion of payments that are less than a prescribed amount, based on exclusions from the requirement to seek member approval of related party transactions in Chapter 2E of the Corporations Act 2001.

These limitations on the right to privacy are permissible insofar as they are necessary in order to ensure adequate financial transparency in registered organisations. The limitations are also reasonable and proportionate insofar as they will resolve issues identified with the existing obligations on officers and organisations under the RO Act (sections 148A – 148E, introduced by the Fair Work (Registered Organisations) Amendment Act 2012) and have a basis in the regulation of companies under the Corporations Act.

Conclusion

The amendments to the Bill are compatible with human rights because, to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

Minister for Employment, Senator the Hon. Eric Abetz
NOTES ON AMENDMENTS

In these notes on amendments, the following abbreviations are used:

<table>
<thead>
<tr>
<th>Commissioner</th>
<th>Registered Organisations Commissioner</th>
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<td>Corporations Act</td>
<td>Corporations Act 2001</td>
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<td>the Bill</td>
<td>Fair Work (Registered Organisations) Amendment Bill 2013</td>
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Amendment No. 1 – Schedule 2, item 166, page 48 (line 7)

Amendment No. 2 – Schedule 2, item 166, page 48 (line 8), before “officers”

1. These amendments amend the simplified outline in section 293A of item 166 of the Bill consequential to the amendments to new section 293C in amendment 3 (see below).

Amendment No. 3 – Schedule 2, item 166, page 51 (line 24) to page 52 (line 32)

Disclosure of material personal interests of officers

Disclosure by officers

2. This amendment omits section 293C at item 166 of the Bill and substitutes it with a new section 293C.

3. New subsection 293C(1) provides that new section 293C applies to each officer, defined as a disclosing officer, of an organisation or a branch of an organisation whose duties include duties that relate to the financial management of the organisation or branch.

4. New subsection 293C(2) provides that a disclosing officer of an organisation must disclose to the committee of management of the organisation details of any material personal interest that the officer has or acquires in a matter that relates to the affairs of the organisation.

5. New subsection 293C(2) is a civil penalty provision.

6. New subsection 293C(3) provides that a disclosing officer of a branch must disclose to the committee of management of the branch details of any material personal interest that the officer has or acquires in a matter that relates to the affairs of the branch. Committee of Management is defined in section 6.

7. New subsection 293C(3) is a civil penalty provision.

8. New subsection 293C(4) is based on exclusions from the disclosure of material personal interests in subsection 191(2) of the Corporations Act.

9. New paragraph 293C(4)(a) provides that a disclosing officer does not need to disclose an interest under new subsections 293C(2) or 293C(3) 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; or

   • arises in relation to the officer’s remuneration as an officer of the organisation or branch; or

   • relates to a contract the branch or organisation 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; or
• is in a contract, or a 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.

10. New paragraph 293C(4)(b) also provides that an officer does not need to disclose an interest under new subsections 293C(2) or 293C(3) where the officer has given standing notice of the interest under subsection 293D and the notice is still effective.

11. New paragraphs 293C(5)(a) and (b) provide that a disclosure made under new subsections 293C(2) or 293C(3) must be made as soon as practicable after the interest is acquired and must provide details of the nature and extent of the interest as well as the relation of the interest to the affairs of the organisation or branch. New paragraph 293C(5)(c) also provides that such disclosure must be made either at a meeting of the committee of management (either orally or in writing) or to the members of the committee of management individually in writing. A disclosure to members of the committee individually in writing is made when it has been given to every member of the committee.

Committee of management must record details of disclosure in minutes of meeting

12. New subsection 293C(6) provides that an organisation or branch contravenes this subsection if a committee of management of an organisation or branch (as the case may be) fails to record details of a disclosure made under new subsections 293C(2) or 293C(3):

• if a disclosure is made at a meeting of the committee of management of the organisation or branch, then the details of the disclosure must be recorded in the minutes of the meeting of the committee at which the disclosure is made (new paragraph 293C(6)(a)); or

• if a disclosure is not made in a meeting of the committee of management of the organisation or branch, then the details of the disclosure must be recorded in the minutes of the first meeting of the committee after the disclosure is made (new paragraph 293C(6)(b)).

13. New subsection 293C(6) is a civil penalty provision.

14. New subsection 293C(7) provides that a member of an organisation or branch can make a request, in writing, to be provided the details of disclosures made to the committee of management under new subsections 293C(2) or 293C(3).

15. An organisation or a branch contravenes subsection 293C(7) if a committee of management of an organisation or branch (as the case may be) fails, within 28 days of the written request, to provide to the member details of the disclosures made to the committee under new subsections 293C(2) or 293C(3).

16. New subsection 293C(7) is a civil penalty provision.

Amendment No. 4 – Schedule 2, item 166, page 55 (line 13 to 15)

17. This amendment omits proposed subsection 293F(3) at item 166 of the Bill and substitutes a new subsection 293F(3). New subsection 293F(3) provides that for an officer of an organisation or branch of an organisation, who has a material personal interest in a matter that relates to the affairs of the organisation, new subsections 293F(1) and (2) do not apply if:
• new subsection 293F(4) allows the officer to be present and take part in a discussion with respect to the matter (new paragraph 293F(3)(a)); or

• the interest does not need to be disclosed under new section 293C (new paragraph 293F(3)(b)).

Amendment No. 5 – Schedule 2, item 166, page 56 (after line 32), after subsection 293G(5)

18. This amendment inserts new subsections 293G(5A), 293G(5B), 293G(5C) and 293G(5D). These new subsections set out additional exceptions to the obligation on branches and organisations to disclose each payment made to a related party under subsections 293G(1) and 293G(2) at item 166 of the Bill.

Arm’s length terms

19. New subsection 293G(5A) provides an exception to payments at arm’s length terms and is modelled on section 210 of the Corporations Act.

20. Paragraph 293G(5A)(a) provides that subsections 293G(1) and 293G(2) do not apply to a payment made to a related party if the payment was made on terms that would be reasonable in the circumstances if the organisation, or the branch, and the related party were dealing at arm’s length.

21. Paragraph 293G(5A)(b) provides that subsections 293G(1) and 293G(2) do not apply to a payment made to a related party if the payment was made on terms that are less favourable to the related party than the terms referred to in paragraph 293G(5A)(a).

Small amounts given to related party

22. New subsection 293G(5B) provides an exception to payments that are small amounts given to a related party.

23. New subsection 293G(5B) provides that subsections 293G(1) and 293G(2) do not apply to a payment made to a related party if the total of the following amounts is less than or equal to the amount prescribed by the regulations for the purposes of this subsection:

• the amount of the payment (paragraph 293G(5B)(a)); and

• the total of all other payments given to the related party, in the financial year, in relation to which subsections 293G(1) and (2) do not apply to the payment because of subsection 293G(5B) (paragraph 293G(5B)(b)).

24. New subsection 293G(5C) provides that in working out the total of the payments referred to in paragraphs 293G(5B)(a) and 293G(5B)(b), amounts that have been repaid and amounts that fall under any other exception in this section should be disregarded.

25. New subsections 293G(5B) and 293G(5C) are modelled on section 213 of the Corporations Act.

Payments to members that do not discriminate unfairly

26. New subsection 293G(5D) provides an exception for payments to members that do not discriminate unfairly and is modelled on section 215 of the Corporations Act.
27. Subsections 293G(1) and 293G(2) do not apply to a payment made to a related party if:
   - the payment is given to the related party in their capacity as a member of the organisation or branch; and
   - making the payment does not discriminate unfairly against the other members of the organisation or the branch.

Amendment No. 6 – Schedule 2, item 166, page 57 (line 2)

28. This amendment amends paragraph 293G(6)(a) of item 166 of the Bill consequential to the amendments to new section 293C by Amendment No. 3.

Amendment No. 7 – Schedule 2, item 166, page 59 (line 34) to page 60 (line 1)

29. This amendment amends subsection 293J(3) of item 166 of the Bill consequential to the amendments to new section 293C by Amendment No. 3.

Amendment No. 8 – Schedule 2, item 166, page 60 (line 5)

30. This amendment amends subsection 293K(1) of item 166 of the Bill consequential to the insertion of new section 293M by Amendment No. 9.

Amendment No. 9 – Schedule 2, item 166, page 60 (after line 27), after section 293L

31. This amendment inserts new section 293M, which provides that the Commissioner may grant an exemption to an officer from the requirement to undertake financial training under section 293K at item 166 of the Bill.

32. New subsection 293M(1) provides that an organisation or branch of an organisation may apply in writing to the Commissioner for an officer of the organisation or the branch to be exempt from the financial training requirement.

33. New subsection 293M(2) provides that the Commissioner may grant the exemption if the Commissioner is satisfied that the officer has a proper understanding of the officer’s financial duties within the organisation or the branch on the basis of the officer’s:
   - experience as a company director;
   - experience as an officer of a registered organisation; or
   - other professional qualifications or experience.

34. New subsection 293M(3) provides that the Commissioner may grant the exemption subject to any conditions that the Commissioner considers appropriate in the circumstances.

35. Exemptions granted by the Commissioner under new section 293M are subject to subsection 33(3) of the Acts Interpretation Act 1901.