

2016

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment, Senator the Hon. Michaelia Cash)

FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2014

OUTLINE

The Fair Work (Registered Organisations) Amendment Bill 2014 (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 amendments 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.

Broadly, the Bill will:

- establish an independent watchdog, the Registered Organisations Commission (the Commission), to monitor and regulate registered organisations with enhanced investigation and information gathering powers;
- amend the requirements on officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;
- strengthen existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain rule obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

The Commission will be headed by the Registered Organisations Commissioner (the Commissioner), who will assume the investigations, enforcement advice and assistance responsibilities of the General Manager of the Fair Work Commission in relation to registered organisations. While the Commission will be established in the Office of the Fair Work Ombudsman, it will have a high degree of independence. The Commissioner will have independence in the exercise of his or her functions and powers and in his or her ability to direct staff in relation to the performance of those functions.

In order to ensure that the Commissioner has sufficient power to monitor compliance with the RO Act, the Commissioner's investigation and information gathering powers have been modelled on those in the *Australian Securities and Investments Commission Act 2001*. These powers will enable the Commissioner to efficiently and effectively undertake its compliance functions.

The amendments that provide for the disclosure of material personal interests, increased accounting and disclosure obligations, criminal offences for serious breaches of officers' duties and increased civil penalties broadly mirror those that apply to companies and their directors under the *Corporations Act 2001* and have been adapted to align with the RO Act framework.

- **Financial Impact Statement**

Nil

AUSTRALIAN GOVERNMENT

Regulation of Registered Organisations

Regulation Impact Statement

Department of Employment

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1. Context

Employee associations and employer associations are formed to represent their members' broad interests and provide advice on workplace matters. Employee associations (including enterprise based associations) and employer associations can apply to the Fair Work Commission (FWC) for registration under the *Fair Work (Registered Organisations) Act 2009* (RO Act). As at 3 March 2015, there were 112 registered organisations listed with the FWC of which 66 were employer organisations and 46 were employee organisations.

Section 5 of the RO Act sets out Parliament's intention in enacting the RO Act, which is:

- to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation, and
- to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered.

Section 5 of the RO Act also states that the Parliament "...recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system". Associations that become registered organisations can access privileges and rights under the RO Act and *Fair Work Act 2009* (FW Act) that allow them to represent the interests of their members more effectively in workplace matters, for example by:

- in the case of employee organisations, having a right to enter workplaces providing they meet a number of statutory requirements,
- assisting or representing their members during FWC proceedings, such as unfair dismissal hearings, and
- making an application to vary a modern award outside of the four-yearly modern award review process.

To access these rights and privileges, registered organisations must comply with detailed regulations in relation to registration, rules, financial reporting, elections, conduct of officers and other matters.

The FWC is responsible for administering the provisions of the RO Act that relate to registered organisations. Under Chapter 11, Part 4 of the RO Act, the General Manager of the FWC may make inquiries and conduct investigations into registered organisations, in addition to the examination of registered organisations' financial reports lodged with the FWC each year. As at 3 March 2015, there were four inquiries and five investigations underway at the FWC.

The conduct and regulation of registered organisations and their officers have recently been of significant public interest. The most prominent example was the lengthy investigation into the Health Services Union (HSU) that arose due to allegations of misuse of members' funds and inappropriate conduct of officers.

The previous government's response to the findings of the FWC investigation into the HSU was the *Fair Work (Registered Organisations) Amendment Act 2012* (RO Amendment), which provided for increased financial accountability of registered organisations, strengthened investigative powers of the FWC and increased penalties under the RO Act in line with the FW Act. The FWC also made some improvements to its investigative processes.

While the RO Amendment was broadly supported, there was concern among some stakeholders that the RO Amendment did not go far enough. In a submission to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the RO Amendment, the Australian Mines and Metals Association wrote that "the changes the government has proposed are not tough enough to deliver

accountability that members of those organisations are seeking.” Similarly, the Institute of Public Affairs asserted that “[f]urther measures should be taken to strengthen the financial management and regulation of registered organisations, commensurate with their considerable financial resources.”

The Government, as an election commitment, announced its *Policy for Better Transparency and Accountability of Registered Organisations* in July 2013. This policy outlines measures to further strengthen regulatory oversight of registered organisations and their officers. Registered organisations and their officers will have fiduciary and statutory responsibilities that are more closely aligned with those of companies and directors, provided under the *Corporations Act 2001* (Corporations Act). This is to ensure that they are held to higher standards of accountability in relation to their conduct and use of members’ funds. This will be achieved by:

- increasing civil penalties and introducing criminal offences for serious breaches of officers’ duties similar to those applicable under the Corporations Act - imprisonment for up to 5 years or 2,000 penalty units (currently \$360,000),
- amending the requirements surrounding officers’ disclosure of material personal interests (and related voting and decision making rights) and changes to grounds for disqualification and ineligibility for office,
- strengthening financial accounting and disclosure obligations under the RO Act by aligning these obligations with the higher standards that apply to companies, putting these obligations on the face of the Act (rather than a requirement in the registered organisation’s rules) and making them enforceable as civil remedy provisions, and
- creating a Registered Organisations Commission to enforce the regulations.

1.1 Current regulation of registered organisations

In addition to an overview of the current regulatory framework, the discussion below outlines two elements of the current framework: requirements for organisations’ rules as a result of the RO amendment and the distinct responsibilities of the FWC.

1.1.2 Registration and registered organisations’ rules

Chapter 2 of the RO Act, sets out the criteria for registration and procedural matters. There are a number of steps involved in this process. The FWC cannot register an employee or employer association unless the rules of the association make provision for matters as required by the RO Act. For example, organisations must have rules for:

- eligibility of members,
- power and duties of the committees of the organisation and its branches,
- the manner in which the property of the organisation is to be controlled and its funds invested, and
- elections for offices, such as the office of president or secretary.

The RO Amendment introduced disclosure and reporting requirements that registered organisations are required to include in their rules. The new rules require organisations to:

- disclose remuneration paid to officers of an organisation or branch (section 148A),
- disclose material personal interests of officers and their relatives (section 148B),
- disclose payments to related parties made by an organisation or branch (section 148C), and
- provide training to officials in their governance and accounting obligations (section 154D).

Associations seeking registration are required to include these provisions in their rules while all registered organisations were required to alter their rules accordingly by 1 January 2014. The procedure for altering rules varies from organisation to organisation and must be conducted in accordance with the specific procedures contained in each organisation's own rules.

The FWC provides the following advice to registered organisations regarding rule changes not involving a change to the name or eligibility rules of the organisation. Once the alteration to the rules has been transacted, the organisation must lodge an application to the FWC for the General Manager or delegate to certify the changes. An application to the FWC must include:

- a notice setting out the particulars of the alterations, for instance a document stating what the rules looked like before the alteration and what they will look like if certified, and
- a declaration signed by the secretary (or if relevant, another authorised officer under the rules) stating:
 - that the alteration was made in accordance with the rules of the organisation,
 - all the steps the organisation took to comply with their rules when making the alteration, and
 - that the particulars set out in the notice are true and correct to the best of the secretary's knowledge and belief.

Finally, once the application has been lodged with the FWC, a notice must be put on the registered organisation's website informing members that the notification has been lodged.

1.1.3 Role of the Fair Work Commission

As noted above, the FWC is responsible for administering the provisions of the RO Act that relate to registered organisations. These functions are split between responsibilities conferred on the General Manager (the administrative arm) and the Tribunal (the tribunal arm).

The tribunal arm deals with:

- registration of new organisations,
- cancellation of registration,
- approval of amalgamation,
- representation orders in demarcation disputes,
- approval of alterations to the name or member eligibility rules of organisations,
- orders for a member of an organisation to inspect financial records, and
- approval of membership agreements between organisations and state registered unions.

These functions are conducted by the tribunal arm via hearings and submissions from interested or affected parties.

The administrative arm is responsible for:

- overseeing the compliance of registered organisations,
- processing right of entry permit applications, and
- providing information about the rights and obligations of registered organisations.

It also conducts inquiries and investigations into organisations' accounting and auditing obligations as well as any breaches of the civil penalty provisions of the RO Act.

The General Manager is able to commence proceedings in relation to breaches of civil penalty provisions, or refer matters to the Director of Public Prosecutions, or the police, regarding possible criminal offences.

2. Description and scope of the problem

Registered organisations play a significant role in Australia's economy both through their involvement in the workplace relations system and by advocating on behalf of their members and supporting the interests of their members in industrial matters and more broadly.

Registered organisations protect their members' interests by representing members in industrial matters and campaigning on policies that affect them, such as taxation, workplace relations regulation, government policies and assistance in relation to specific sectors or the social safety net. To achieve their aims, registered organisations require funds to cover direct operating costs and other monies used for advertising, campaigns and legal matters. These funds are derived from membership fees, donations and other investments, including property.

As can be seen from [Table 1](#) in section 2.1.1, some registered organisations and their branches command significant financial resources. Therefore it is important that the RO Act requires a high level of financial oversight by officers to ensure that funds are used to benefit members. Moreover, member and community expectations regarding conduct of officers are high and dictate that they must act in the interests of their membership at all times and conduct their business in a transparent manner.

There is evidence that some registered organisations do not meet their obligations. For example, during a Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012, the FWC stated that each year an average of approximately 20 per cent of registered organisations do not submit financial reports on time.

Recent reports and inquiries have revealed the extent to which some registered organisations are failing to meet their statutory obligations and the expectations of their members. An inquiry conducted in 2012 by Ian Temby QC and Dennis Robertson into the NSW registered entity, HSUeast, commissioned by that union's governing council, found that it did not have sufficient processes in place to ensure that members were getting value for their funds.

The level of non-compliance with the reporting obligations, combined with the findings of the FWC investigations into the HSU, demonstrate that the existing regulation of registered organisations is not sufficiently strong to protect members' interests, particularly in relation to financial management. The financial accountability and transparency provisions of the RO Act require amendments to ensure more adequate oversight and enforcement to effectively prevent the malfeasance at which they are directed. The RO Amendment addressed some of these problems, however, it did not provide a strong deterrent for wrongdoing, in the form of criminal sanctions, or give the regulator adequate powers to thoroughly investigate and pursue litigation of contraventions of the RO Act and FW Act in a timely and responsive manner.

For example, registered organisations are currently required to provide for certain financial disclosures in their rules, such as related party payments, officer remuneration and material personal interests of officers and their relatives (see section 1.1.2)). As these obligations are contained in rules, alleged breaches can only be dealt with by a relevant court (for example, the Federal Court) on application for a remedy made by a member of the registered organisation. The General Manager of the FWC does not have standing to bring these matters to court and lacks the power required to hold a registered organisation and its officers to account.

KPMG Forensic's *Process review of Fair Work Australia's investigations into the Health Services Union* (the KPMG Review) conducted in 2012 made a number of recommendations to improve administration of enforcement of registered organisations, all of which are currently being implemented by the FWC. However, the KPMG Review was not tasked with considering, and did not make recommendations as to whether the General Manager had sufficient powers to regulate registered organisations effectively.

While recent changes to the RO Act have increased civil penalties and improved the FWC's investigative functions, further measures are required to allow the regulator to pursue breaches of the RO Act via investigation and litigation. For example, during a Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012, the Institute of Public Affairs highlighted concerns in relation to the RO Amendment and added that recent "events give rise to reasonable doubt about the utility of the current regulations, particularly their deterrent effect." The New South Wales Government provided evidence on its own jurisdiction where stronger regulation of employee and employer associations has been implemented.

The findings in relation to the HSU demonstrate a need for reform to meet the expectations of members, and the community more broadly, in relation to the standards of financial management and fiduciary duties observed by officers of registered organisations.

2.1 Affected parties

The parties likely to be directly affected by the options to address the problem described above are:

- registered organisations and their officials,
- members of registered organisations:
 - For employee organisations: broadly *workers*
 - For employer organisations: broadly *businesses*, including small businesses, and
- the Australian community.

2.1.1 Registered organisations

As at 3 March 2015, there were 112 registered organisations listed with the FWC of which 66 were employer organisations and 46 were employee organisations. The majority of registered organisations are not-for-profit and operate to serve the interests of their members. Some have additional arms or subsidiaries to the organisation that are not related to their status as a registered organisation, such as a for-profit training arm.

To develop a profile of registered organisations, the financial reports and annual returns lodged by registered organisations to the FWC as of October 2013 have been analysed. These reports are made available on the FWC website.

Based on the available reports, information on the net assets, number of members and number of employees has been considered to create a profile of registered organisations and their members. This information is set out in [Table 1](#).

Table 1 - profile of registered organisations¹

Value of net assets	Percentage of Employer organisations	Percentage of Employee organisations
Less than \$2m	54%	27%
Between \$2m - \$5m	10%	9%
Between \$5m and \$20m	22%	25%
Between \$20m and \$50m	1%	24%
More than \$50m	6%	11%
Not available	6%	4%
Number of employees	Percentage of Employer organisations	Percentage of Employee organisations
Less than 15	64%	35%
15 or more	30%	58%
Not available	6%	7%

Based on the information in [Table 1](#), and for the purposes of this regulation impact statement, registered organisations have been grouped into small and large organisations. Small organisations are defined as those with less than 15 employees and less than \$2 million in net assets, while large organisations are all other organisations. Just over a half of all organisations are large organisations, and just under a half are small.

Based on the information available in financial and annual reports lodged with the FWC, the percentage of registered organisation members have been estimated by organisation size. These are set out in [Table 2](#) below.

Table 2 – distribution of members across organisations²

Type of organisations	Percentage of total members
large employee organisations	90%
small employee organisations	5%
large employer organisations	4%
small employer organisations	1%

As can be seen from [Table 1 and 2](#), overall, registered organisations are most likely to be small employer organisations or large employee organisations. Furthermore, members of registered organisations are

¹ Registered Organisations' financial reports and annual returns can be accessed from the FWC website - <http://www.fwc.gov.au/index.cfm?pagename=regorgslist>

² As above

concentrated in large employee organisations, with small employer organisations representing the smallest number of members.

It is expected that these differing characteristics will see registered organisations impacted differently by regulatory change. These differences have been accounted for in estimates of likely compliance costs and impact analysis.

2.1.2 Officials of registered organisations

Registered organisations vary considerably in terms of their branch structures and rules for appointing individuals in offices. For example, the number of offices in some organisations is fixed, while in others it is dependent on the number of members. Furthermore, in many cases individuals hold multiple offices within one organisation or across its branches.

To estimate how many individuals hold office, a sample of registered organisations' financial reports and annual returns have been analysed. Based on this, there are approximately:

- **4700** individuals who hold office in an employee organisation, and
- **1600** individuals who hold office in an employer organisation.

In order to estimate the number of officers whose duties relate to the financial management of an organisation it was assumed that each organisation's committee of management would have financial duties. Based on an analysis of a sample of registered organisations' financial reports and annual returns there are approximately 8 officers with financial duties per organisation.

2.1.3 Members of employee organisations

Based on financial reports and annual returns of registered organisations lodged with FWC there are around 1.9 million people who are members of employee organisations in Australia.

This figure is broadly supported by the Australian Bureau of Statistics' (ABS) data on trade union membership (cat. no. 6310.0). According to the ABS, in August 2012, 1.8 million people were members of trade unions in their main job. Despite a slight increase since 2008, trade union membership has decreased, overall, since 1990. It is expected that the number of members of employee organisations will remain steady or decrease over time if current trends hold.

2.1.4 Members of employer organisations

Based on financial reports and annual returns of registered organisations there are over 90,000 members of employer organisations. While the financial reports compiled by organisations generally do not provide information on the type of members, it is assumed that members are usually businesses or in some cases, not-for-profit bodies or individuals in their capacity as employers. Anecdotal evidence suggests that the majority of members are small or medium-sized businesses.

2.1.5. Other affected parties

The Australian community

Due to the large number of businesses and workers that are members of registered organisations, and the role that registered organisations play in the workplace relations system, the Australian community is also a stakeholder broadly affected by the regulation.

3. Objectives of the regulation

The proposed amendments will give effect to election commitments made by the Government in its *Policy for Better Transparency and Accountability of Registered Organisations* (July 2013) (the Policy).

In line with the Policy, the Government introduced the Fair Work (Registered Organisations) Amendment Bill 2013, which was later voted down in the Senate.

The Fair Work (Registered Organisations) Amendment Bill 2014 was introduced into Parliament in the same form. Government amendments to the Bill were introduced and agreed to in the House of Representatives on 15 July 2014. The amendments reflected recommendations made by the Senate Education and Employment Legislation Committee in its report on the Fair Work (Registered Organisations) Amendment Bill 2013, tabled on 2 December 2013. These amendments:

- further aligned the material personal interest disclosure provisions of the Bill with the *Corporations Act 2001*,
- included exemptions for disclosure of payments based on those under the *Corporations Act 2001*, and
- provided an exemption for training requirements where an individual has significant knowledge of relevant financial obligations.

The Fair Work (Registered Organisations) Amendment Bill 2014 was voted down in the Senate. The Fair Work Registered Organisations Amendment Bill 2014 [No. 2], was introduced in the same form to Parliament in 2015. This Bill was voted down in the Senate in August 2015.

The new Bill similarly gives effect to the Policy. The Bill aims to amend the RO Act to ensure as far as possible, that registered organisations are regulated in the same way as companies and directors. Currently, registered organisations and their officers are required to comply with requirements and obligations under the RO Act that are similar to those placed on companies and directors under the Corporations Act. However, registered organisations and their officers do not face the same penalties as companies and their officers for breaching these requirements.

The objective of the Policy is to increase financial transparency and accountability of registered organisations to rebuild member and community confidence through stronger governance and increased penalties.

Transparency and accountability is critical to ensuring that members' interests are protected and that funds are not used for personal gain or inappropriate purposes. Registered organisations have an important role in the workplace relations system, and members and the public must have confidence in them or the system itself will be undermined.

The Policy outlines a commitment to establish a new independent regulator called the Registered Organisations Commission (ROC). The establishment of this body is to ensure higher standards are effectively monitored and enforced.

3.1 Options for addressing the problem

3.1.1 Option One – the status quo

If the status quo is maintained, registered organisations will continue to be subject to the RO Act and all functions related to registered organisations will remain the responsibility of the FWC. In addition to enhancing workplace relations in the federal system, the objects of the RO Act are to:

- provide for the registration of associations and accord rights and privileges to them once registered,
- provide for the democratic function and control of organisations,
- ensure that registered organisations are representative of and accountable to their members, and
- ensure that registered organisations operate efficiently.

Recent amendments to the RO Act which took effect on 29 June 2013 provided for increased penalties to align with the FW Act, a more comprehensive disclosure regime, and enhanced investigative powers for the FWC, after the previous Government identified areas of the RO Act that could be clarified and strengthened. The maximum penalties that can currently be imposed are 300 penalty units for a body corporate (equivalent to \$54,000) and 60 penalty units for an individual (equivalent to \$10,800).

These changes will continue to operate under Option One. However, these penalties may not be sufficient to deter non-compliance. The Australian Mines and Metals Association (AMMA) submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the Fair Work (Registered Organisations) Amendment Bill 2012 noted that all registered organisations should be subject to “the same high standards as organisations operating under the present-day legislation for corporate entities – the Corporations Act 2001.” The AMMA submission also notes that “the more immediate problem is the fact there is not a dedicated body or sufficient resources to properly police those requirements.”

Further, Option One does not include measures to reduce red tape for registered organisations that is imposed by the current RO Act. The changes proposed in Option Two remove unnecessary disclosure requirements on officers and organisations that were first included by the previous Government’s 2012 amendments to the RO Act. In addition, the Registered Organisations Commissioner is able to grant exemptions from the financial duties training requirements of officers of registered organisations, if the Commissioner is satisfied that the officers fully understand their financial duties because of their level of qualification.

3.1.2 Option Two – applying corporate standards of regulation to registered organisations, reducing red tape for registered organisations, and establishing the Registered Organisation Commission

Option Two reflects the Government’s election commitment. Under this option, registered organisations and their officers will have fiduciary and statutory responsibilities that are more closely aligned with those of companies and directors, provided under the Corporations Act. These increased responsibilities are accompanied by a reduction in the red tape for registered organisations resulting from the additional requirements which were introduced in the 2012 amendments to the RO Act.

Higher civil penalties and criminal offences

To deter non-compliance, registered organisations and their officials will be subject to similar penalties as company directors. Maximum civil penalties under the RO Act will be increased to align more closely with those in the Corporations Act. A three tier penalty system will be introduced:

- The top tier will impose the maximum civil penalty in line with the existing Corporations Act penalties. Civil penalty provisions under this tier would generally be limited to offences that relate to an officer’s fiduciary duties.

- The middle tier includes provisions relating to the provision of information about the operation and internal governance of registered organisations, including making false statements and provisions relating to financial disclosure obligations.
- The low tier relates to either the lodging of documents with the FWC or simple administrative tasks such as removing non-financial members from the organisations register. Breaches of these obligations do not have a direct effect on any person or organisation.

Criminal offences will be introduced to reinforce the importance to officers of complying with their financial management duties under the RO Act. These provisions will operate in the same way as the Corporations Act, which imposes criminal sanctions in similar situations. The criminal offences will apply where:

- an officer of an organisation or branch is reckless or intentionally dishonest and fails to exercise his or her powers and discharge his or her duties in good faith in the best interests of the organisation or for a proper purpose,
- an officer or employee of an organisation or branch uses his or her position dishonestly:
 - with an intention of directly or indirectly gaining an advantage for himself or herself (or someone else) or to cause detriment to the organisation, or
 - is reckless as to whether the use of their position may result in themselves (or someone else) directly or indirectly gaining an advantage, or in causing detriment to the organisation, and
- a person dishonestly uses information obtained because he or she is, or has been, an officer or employee of an organisation or branch:
 - with the intention to gain advantage for him or herself or to cause detriment to the organisation, or
 - is reckless as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the organisation.

Criminal offences will also be introduced in relation to breaches of new investigation powers of the Registered Organisations Commissioner that will align with those currently exercised by the ASIC in accordance with the *Australian Securities and Investments Commission Act 2001*.

Moving financial reporting and disclosure obligations to the legislation

Under Option Two, new disclosure and reporting requirements for rules of registered organisations introduced by the RO Amendment will become obligations on the face of the legislation. This means that disclosure and reporting obligations will be in the legislation itself, rather than the legislation requiring organisations to provide for these obligations in their rules, as is the case under Option One. These obligations will require organisations to:

- disclose remuneration paid to officers of an organisation or branch,
- disclose material personal interests of officers
- disclose payments to related parties made by an organisation or branch, and
- provide training to officials in their governance and accounting obligations.

A new obligation will be included on the face of the legislation that requires organisations or branches to prepare a separate 'officer and related party disclosure statement' (ORPDS), which will set out some of the matters required to be disclosed by the proposed amendments outlined above, as well as the remuneration of the five highest paid officers of the organisation. The rules relating to the preparation and

lodgement of the ORPDS will be built into the general purpose financial report framework to ensure that compliance is straightforward and the standards required are already well understood by registered organisations.

While there are significant similarities in the obligations on registered organisations for both Option Two and Option One, higher penalties (including criminal penalties) will apply for breaches and the regulator will have standing to bring alleged breaches to a court under Option Two. This will ensure that a more effective compliance regime is in place to prevent misconduct without significantly increasing the overall compliance burden for registered organisations.

Reducing red tape for registered organisations

Under Option Two unnecessary disclosure requirements on officers and organisations that were first included by the 2012 amendments to the RO Act are removed. These amendments align disclosure requirements more closely with long standing governance and accountability provisions under the *Corporations Act 2001*.

The specific reductions in disclosure requirements are to:

- limit the obligation to disclose material personal interests to officers whose duties relate to the financial management of the organisation or branch and remove the express material personal interest disclosure obligations relating to an officer's relatives,
- provide that officers must make disclosures of material personal interests to the committee of management, and for such disclosures to be recorded in the meeting minutes and available to members upon request, and
- further align the obligation of officers to disclose material personal interests with disclosure of payment requirements under the *Corporations Act 2001* by inserting similar exclusions.

Further, under Option Two, the Registered Organisations Commissioner is able to grant exemptions from the financial duties training requirements of officers of registered organisations, if the Commissioner is satisfied that the officers fully understand their financial duties because of their level of qualification.

Establishing a Registered Organisations Commission (ROC)

Under Option Two, an independent ROC will be created. The ROC will assume functions and powers of the General Manager of the FWC under the RO Act outlined above, and will be given stronger investigative and information gathering powers that align with those available to the ASIC.

The Minister for Employment will appoint an independent Registered Organisations Commissioner who will manage the affairs of the ROC and be responsible for the performance of its functions. The ROC will:

- enforce the RO Act, including the amended reporting and compliance requirements,
- educate registered organisations about the new obligations and provide information to members of registered organisations about their rights, as well as acting as the body to receive complaints from members, and
- cooperate with law enforcement bodies where it is in the public interest to do so.

Option Two will create a stronger regulator and a real deterrence for non-compliance. Having a body which is independent and stand-alone will raise awareness among the public and registered organisations of the importance of ensuring strong governance and accountability. It will assist in regaining the confidence of members and the public in registered organisations and the importance of their role in workplace relations.

4. Impact analysis

The approach taken in this section is to use Option One, the current situation, as the benchmark for estimating the benefits that the enhanced financial transparency and accountability of registered organisations described in Option Two, will have for members of registered organisations, registered organisations themselves, and the Australian community. This is balanced against estimated compliance costs registered organisations may incur to adopt the changes outlined in Option Two.

The methodology takes account of the characteristics of the affected parties described in section 2.1.

4.1 Option One

Option One maintains the status quo. It has been used as the benchmark for considering the costs and benefits of the two options.

Prevalence of non-compliance

It is expected that the majority of registered organisations operate with acceptable governance arrangements and for the benefit of their members. However, there is little information available to confirm how prevalent non-compliance and maladministration is among officials of registered organisations.

The analysis of registered organisations' financial statements and annual reports lodged with the FWC indicates that many registered organisations provide timely and detailed financial information to their members. The recent FWC investigations into the HSU provide evidence that serious non-compliance has occurred in the past.

Benefits

The main benefit of retaining the existing arrangements is that any costs to registered organisations associated with the regulatory change are avoided. This benefit would be most pronounced for small employer and employee organisations that are often solely volunteer-run and for their members.

Option One would allow for an assessment of the effectiveness of the RO Amendments after they became mandatory on 1 January 2014, noting that the RO Amendment changes do not establish an effective framework for investigating or discouraging non-compliance.

Members of organisations will not be deterred from taking up office, voluntarily or in a paid role, by criminal offences or high civil penalties.

Costs

The FWC investigations suggest that the current approach to regulation of registered organisations may not be an effective way of ensuring that registered organisations comply with the RO Act or operate at the standard expected by their members, and the Australian community.

The current obligations on registered organisations are significant. However, the FWC investigations suggest that the regulator lacks the powers necessary to rigorously enforce these provisions and the subsequent penalties available are not sufficient to deter non-compliance. This has a number of impacts. Most directly, it will still be difficult for non-compliance to be identified, investigated or penalised.

Registered organisations play a specific role in the operation of the federal workplace relations system, as discussed in section 1. The rights and responsibilities are balanced to enhance relations between employers and employees, reduce the adverse effects of industrial disputation and allow all parties to promote and protect their economic and social interests. The nature of this representative role is such that non-members are also indirectly or directly affected by the work of registered organisations. For example, non-members may be affected by the outcome of Enterprise Agreement negotiations led on behalf of staff by the relevant registered organisation at the workplace.

Registered organisations also play a larger role by advocating publicly for their members on other issues that are important to them. If registered organisations cannot be held to account by their members or an effective regulator, maladministration may continue and the community may lose further confidence in registered organisations. This will have an adverse social cost by diminishing the credibility of registered organisations in the view of members and the community more broadly. This will reduce their ability to be involved meaningfully in public discourse and advocate on social and economic issues.

Specifically for registered organisations, Option One represents a higher red tape impact as the exemptions to disclosure requirements and training are not applied.

4.2 Option Two

To quantify the cost and benefits of Option Two, it is necessary to understand how highly members value the principal of “value for money” and higher accountability standards.

Based on ABS statistics, workers in three out of the five industries with the highest number of union members earned below the Average Full Time Adult Total Earnings in May 2013 (cat. no. 6102.0.55.001). Employee organisations generally apply a progressive fee structure where higher wage earners pay higher fees.

The relatively low earnings of a large number of employee organisation members and the prevalence of progressive fee structures supports the conclusion that “value for money” with regards to membership fees, would be valued highly by members of employee organisations. Following from this, it is assumed that higher accountability standards would also be valued highly.

There is no definitive data on the profile of members of employer organisations. Knowing that employer organisations are formed to further the interests of their members, it can be assumed that businesses or not-for-profits pay fees to join employer organisations in order to maximise their competitive position, via advocacy or influence on the part of the organisation. Based on this, it can be assumed that “value for money” and accountability is also valued highly by members of employer organisations.

Benefits

It is expected that the level of non-compliance by officials in registered organisations will decrease and that general standards of governance within registered organisations will increase as a result of the changes proposed in Option Two.

Even if the current level of non-compliance is low, a small increase in accountability which leads to better oversight and management of members’ funds will be valued highly by members. This will benefit all members of registered organisations, regardless of whether serious non-compliance exists in their organisation, through better oversight of expenditure.

An indirect benefit of the changes will be increased confidence in registered organisations by members and the Australian community. This is important given the role that registered organisations play in the

workplace relations framework and the findings in relation to the HSU which have undermined member and community confidence.

An additional benefit is a reduction in red tape for registered organisations compared to Option One through the introduction of exemptions to disclosure requirements, as well as a decrease in the number of officers required to make material personal interest disclosures. Further, the Registered Organisations Commissioner is able to grant exemptions from the financial duties training requirements of officers of registered organisations, if the Commissioner is satisfied that the officers fully understand their financial duties because of their level of qualification.

Costs

The costs associated with Option Two have been estimated at an average of around \$1,900 per year for small organisations and \$2,800 per year for large organisations. Overall, the average cost is \$2,450 per year for each registered organisation. The assumptions to arrive at this figure are discussed in section 5. However these costs are reduced by the introduction of the mechanism allowing officers of registered organisations to apply for an exemption from financial training. With the saving in compliance costs from the potential exemption from training the average cost is \$750 per year for small organisations and \$1,650 for large organisations. Overall the average compliance cost per year for each registered organisation is \$1,275.

Broadly, it is assumed that large organisations have the capacity to absorb these additional compliance costs without charging additional fees from members. This is based on a consideration of financial resources and number of employees. Large organisations are likely to incorporate new reporting obligations into standing administrative practices to minimise overall compliance costs because of their higher staff levels which would be more adaptive to new work arrangements and tasks.

Small organisations, on the other hand, with fewer financial resources and employees are assumed to have less capacity to absorb new compliance costs than large organisations. They also have fewer members on which to pass on the new costs. Nevertheless, in the case that small organisations were required to pass costs onto members, overall, the cost increase per member would not be significant.

Other non-monetary costs relate to members nominating for office within organisations. Some individuals may find the reporting and accountability obligations associated with holding office and new criminal sanctions too burdensome, which may deter them from nominating for office. The deterrence effect is likely to be more pronounced for small organisations because senior officials in small organisations are more likely to be volunteers with fewer resources to help them meet their obligations.

The deterrence effect is expected to be less pronounced on large organisations, which have significant financial and staffing resources to assist officials to meet their obligations. There is, however, a risk that large organisations may seek to reduce exposure to criminal and civil penalties by restructuring their organisation to significantly reduce the number of officers. Restructuring in this way could centralise decision-making and reduce the ability for members to participate in the affairs of the organisations, such as policy development.

The budgetary cost to the Government is nil.

5. Compliance costs and offsets

5.1 Compliance costs

This section estimates the compliance costs associated with the Option Two when compared with Option One, which represents business as usual. Option Two will only marginally increase the overall reporting and accountability requirements when compared with business as usual. Registered organisations already have reporting obligations under Option One, as required by the RO Act. Under Option Two, these obligations are being transferred from the rules of registered organisations to the face of the legislation and exemptions are being introduced. There will be a small number of new obligations that will increase compliance costs for registered organisations.

For the purposes of calculating the costs, registered organisations have been divided into two groups – large organisations and small organisations. Based on the registered organisations financial data, the compliance costs have been calculated on the assumption that just over one half of all registered organisations are large organisations and just under one half are small organisations.

In assessing the cost increase associated with Option Two, the Department has compared the detail of the new requirements under Option Two to business as usual. New obligations are summarised in Table 3 along with their effects on compliance costs for registered organisations.

Table 3 – Option Two amendments

	Amendment	Increased obligations	Decreased obligations
1.	Officer and related party disclosure statement (ORPDS)		
	Require organisations and branches to prepare a separate ‘officer and related party disclosure statement’ that outlines much of the disclosure information for the organisation	Organisations required to produce a new report (report is based on information previously required to be collected by organisations)	N/A
2.	Disclosure of officers’ remuneration		
	Rules to provide certain matters, with statutory requirements for those matters to be disclosed: - identity, remuneration and non-cash benefits of the top 5 highest paid officers in the organisation and branches - disclosure must be made as part of the ‘officer and related party disclosure statement’ - the actual amount of each officer’s remuneration - the actual value and form of each officer’s non-cash benefits	Increases reporting requirements for branches	N/A
3.	Disclosure of material personal interests		
	Replace rule obligations with statutory requirement to disclose material personal interests a) of an officer or relative of an officer b) as soon as practicable after the interest is acquired c) provide particulars on nature and extent of interest and how it related to the affairs of the organisation or branch	Disclosures must be made available to members upon request	Only officers whose duties include financial duties to make disclosures. No requirement to disclose interests of relatives. Currently the obligation is on all officers and material personal interests of relatives must also be disclosed. This along with a number of new exemptions will limit the number of disclosures made. Disclosures are made to the committee of management not the whole organisation and do not need to be included in the ORPDS.
4.	Exemptions from financial training		
	Introduce mechanism to allow officers to apply to the RO Commissioner to be granted an exemption on the basis of: a) the officer’s experience as a company director b) the officer’s experience as an officer of a registered organisation; or c) other professional qualifications of experience.	N/A	Some officers will be granted exemptions from financial training.

5.1.1 New obligations and their compliance costs

Obligation 1 - Officer and related party disclosure statement

This is a new obligation that requires organisations to prepare a separate ‘officer and related party disclosure statement’. The statement compiles information disclosed as per requirements that will be moved from organisations’ rules to the face of the legislation under Option Two. Therefore, while the obligation to create the statement is new, organisations are already required to keep a record of most of its content. This obligation will affect all registered organisations.

The steps involved in preparing the report are the same as the general financial report. These are:

1. Keep proper financial records to create the statement
2. Draft statement (or engage third party to draft the report)
3. Submit the statement to an auditor
4. Distribute the statement to members and present it at a General Meeting or Committee of Management meeting
5. Lodge the statement with the regulator.

It is assumed that the drafting of the statement is completed by a clerical officer, with clearance by a high ranking official, such as a Secretary or President, of the organisation. A higher number of labour hours are allocated to each step for large organisations because their reports are likely to be more complex. It is also assumed that half of all organisations will engage a third party, such as an accountancy firm, to draft their report.

Obligation 2 - Disclosure of officers’ remuneration

This obligation previously existed in Option One, however, Option Two applies it to more officers. The new obligation requires the remuneration of an additional three of the highest paid branch officials to be disclosed. The new obligation only applies to organisations with branches and has only been costed for large organisations which are assumed to be more likely to have branches. The obligation introduces new administrative costs to draft documentation and have these cleared by senior officials.

Obligation 3 - Disclosure of material personal interests

This obligation exists under Option One; however Option Two applies it to fewer officers.

Under Option One this obligation applies to all officers of registered organisations and requires officers to disclose not only their own material personal interests but those of their relatives. Under Option Two the obligation to disclose material personal interests will only apply to ‘disclosing officers’, that is, those officers whose duties relate to the financial management of an organisation, and will not include disclosure of interests of relatives. This will result in fewer people making disclosures.

Under Option One there are no interests exempted from disclosure. Under Option Two a number of exemptions have been introduced. It has been assumed that this will lead to a slight reduction in the time officers spend preparing their disclosures. Under Option Two disclosures will also no longer need to be made to an organisation as a whole, only to an organisation’s committee of management. As disclosures must be made as soon as practicable it has been assumed that each officer will inform the committee of management separately. Each disclosure will require time spent by the officer, a clerical officer to prepare any material for the committee of management, time of the committee members, and record keeping by a clerical officer. It has been assumed that not all officers will have a personal interest to disclose every year.

Under Option Two organisations must still make the content of disclosures available to members upon request. It has been assumed that this will therefore take the time of a member to prepare a request and the time of a clerical officer to respond.

Obligation 4 – Exemptions from financial training

This potential exemption was not available under Option One. This new mechanism allows officers who are required to undertake training to apply for an exemption from financial training. It has been assumed that a reasonable percentage of officers required to undertake financial training will apply for an exemption and that all of these exemptions will be granted. The reduction in compliance costs associated with financial training has been calculated against the baseline of an officer having to spend eight hours at training. The compliance costs associated with an exemption being applied for and granted include an officer seeking approval from a senior officer to apply and a clerical officer preparing the application.

5.1.2 Standard costs applied

The compliance costs associated with the proposal are administrative costs, in the form of labour costs. There are no substantive compliance costs or delay costs. A number of assumptions have been made regarding the labour costs used in the analysis. These are based on an assessment of indicative salary range data derived from jobs and recruitment websites for the selected occupations and, in the case of officials, including and high-ranking officials, information contained in registered organisations' financial reports. Fortnightly wages have been calculated by multiplying annual salaries by 12 and dividing by 313. This calculation averages annual pay out over four years to account for an irregular number of fortnights per year and a leap year. Assuming 76 working hours in a fortnight, the hourly rates are as follows:

Role	Annual salary	Hourly rate
Clerical officer	\$55,000	\$27.75
Official	\$65,000	\$32.79
Financial Accountant	\$90,000	\$45.40
Secretary/President	\$100,000	\$50.45
Registered Organisations Commissioner	\$280,000	\$141.70
Member	N/A	\$27

In order to estimate costs associated with amendments made to the Bill, additional hourly rates were calculated for the Registered Organisations Commissioner and for members of registered organisations. The Regulatory Burden Measurement Framework from the Department of Prime Minister and Cabinet estimates an average hour of leisure time to cost \$27. This figure has been used for costs associated with members' time. The hourly rate for the Registered Organisations Commissioner has been calculated based on an annual salary of \$280,000 which is roughly commensurate with the salaries of similar Commonwealth officer holders.

5.2 Regulatory Burden Estimate

The compliance costs discussed above are summarised in [Table 4](#).

Table 4 – Regulatory Burden Estimate

Average annual regulatory costs (from business as usual)				
Change in costs (\$ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	\$	\$137,942	\$	\$137,942
Cost offset (\$ million)	Business	Community organisations	Individuals	Total, by source
Workplace Gender Equality Agency (OBPR ID number 16810141121)	-\$6,900,000	\$	\$	-\$6,900,000
Are all new costs offset?				
<input checked="" type="checkbox"/> Yes, costs are offset <input type="checkbox"/> No, costs are not offset <input type="checkbox"/> Deregulatory—no offsets required				
Total (Change in costs – Cost offset) (\$ million) = -\$6,762,058				

6. Stakeholder Consultation

6.1 Consultation with relevant stakeholders

Relevant stakeholders are:

- State and Territory Governments
- Registered organisations and their officials
- Members of registered organisations:
 - For employee organisations: broadly *workers*
 - For employer organisations: broadly *businesses*, including small businesses.

The following groups have been consulted formally in relation to the changes outlined in Option Two:

- state and territory ministers were consulted through the Council of Australian Governments' Select Council on Workplace Relations (SCWR). Officials from states and territories were also consulted through a High Level Officials meeting, and
- Employer and employee organisations were consulted through the National Workplace Relations Consultative Council and the Council's Committee on Industrial Legislation.

The Department also considered public comments made by stakeholders regarding the regulation of registered organisations following the release of the Government's *Better Transparency and Accountability of Registered Organisations* policy in July 2013. Stakeholder feedback on related proposed regulation of registered organisations was also considered, including:

- consideration of submissions to a Senate Committee Inquiry into the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012 moved as a Private Members Bill in November 2012, which sought to give effect to parts of the Government's policy, and
- submissions received on 25 June 2013 by the Senate Committee Inquiry into the RO Amendment which include opinions on compliance with increased regulation of registered organisations.

Further, an options-stage RIS and details-stage RIS were published in 2013, for use throughout the consultation process.

6.2 Outcome of formal consultations

Prior to introduction of the Fair Work (Registered Organisations) Amendment Bill 2013

SCWR is a consultative forum for relevant state and territory ministers to discuss workplace relations, workers' compensation and occupational health and safety issues of mutual interest. Consultation with state and territory ministers is required under the Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector when changes are proposed to the FW Act, including the RO Act.

The Committee on Industrial Legislation (CoIL), a subcommittee of National Workplace Relations Consultative Council (NWRCC) meets when required to provide technical input on draft or existing workplace relations legislation.

SCWR was held on 1 November 2013 and the proposal to apply corporate standards of regulation to registered organisations and establish the Registered Organisation Commission was considered. State and territory officials were consulted on the draft legislation through a High Level Officials meeting.

The NWRCC includes seven representatives from the Australian Council of Trade Unions and seven representatives selected from the Australian Chamber of Commerce and Industry, Australian Industry Group, National Farmers' Federation, Master Builders Australia and Business Council of Australia.

These organisations are peak industrial relations bodies and, as such, are representatives of employer and employee associations more broadly. They were consulted on the draft legislation through the CoIL.

6.2.1 Committee on Industrial Legislation

The CoIL was provided with confidential draft legislation for consideration, followed by discussion of their questions and feedback with Department of Employment officials on 30 and 31 October 2013.

CoIL members acknowledged that the draft legislation broadly reflected the Government's policy for *Better Transparency and Accountability of Registered Organisations* (the Policy).

Members expressed some concern in relation to the inclusion of criminal penalties for non-compliance with the RO Act and increased disclosure requirements for officers of registered organisations. Members also provided feedback in relation to technical elements of the draft legislation, particularly in relation to alignment of the RO Act with the Corporations Act. Consideration of this feedback resulted in various minor and technical amendments to the draft legislation.

6.2.2 High Level Officials meeting

High level state and territory officials were provided with confidential draft legislation for consideration and discussion with Department of Employment officials on 31 October 2013. State and territory officials provided general high level comments on technical elements of the draft legislation, which have been considered by the Department.

6.2.3 Select Council on Workplace Relations

The Select Council on Workplace Relations was held in Melbourne on 1 November 2013. The SCWR noted the Government's commitment to strengthen the transparency and accountability of registered organisations by giving effect to legislation and establishing a Registered Organisations Commission.

Consultation in 2014 and 2015

The 2013 Bill was reviewed by the Senate Education and Employment Legislation Committee and its report was tabled on 2 December 2013. The Senate Legislation Committee recommended that the Bill be passed, subject to amendments being made to:

- further align the material personal interest disclosure provisions of the Bill with the *Corporations Act 2001*,
- include exemptions for disclosure of payments based on those under the *Corporations Act 2001*, and
- provide an exemption for training requirements where an individual has significant knowledge of relevant financial obligations.

Amendments reflecting the recommendations by the Senate Education and Employment Legislation Committee were introduced and passed by the House of Representatives on 15 July 2014. These amendments represent the measures to reduce red tape for registered organisations, described in Option Two.

Prior to introduction of the amendments, the Government conducted targeted consultations with stakeholders on the detail of the amendments. Some minor changes to the amendments were made as a result of these consultations.

In February 2015 the Minister for Employment consulted with NWRCC members on the measures to reduce red tape for registered organisations, outlined in Option Two. As a result of this consultation, the Department provided a document for the information of members, to explain the amendments.

In May 2015 the 2014 [No. 2] Bill was referred to the Senate Education and Employment Legislation Committee and its report was tabled on 11 August 2015. The Committee recommended that the Bill be passed. Separate dissenting reports were provided by participating Labor and Greens Senators opposing the Bill and recommending that it not be passed.

7 Conclusion

The Department recommends implementing Option Two for the following reasons:

- Option Two provides a benefit to members of registered organisations that they value highly.
- Option Two will restore member and community confidence in registered organisations as it will show that the Government is determined to protect their interests through strong regulation, compliance and appropriate penalties.
- Option Two also considers the regulatory impact on registered organisations. It reduces the amount of disclosures that are required to be made, while still ensuring appropriate disclosures and obligations for people who have some role in the financial affairs of the organisation. It will also mean that the details of personal interests are not unduly publicised, while still ensuring that members can access these details if they wish.
- The number of organisations affected is low, with only 112 registered organisations as at 3 March 2015.
- The compliance cost for each registered organisation is comparatively low at around \$1,275 per year on average. It is likely that the large majority of registered organisations will be able to absorb these costs.
 - If these costs were passed onto individual members via an increase in fees, the cost increase per member would be negligible.
 - Furthermore, the majority of members are part of registered organisations that have significant financial assets and staffing resources.
- The overall budgetary impact for the Government is nil.

8 Implementation and Review

8.1 Implementation

Once the legislation has received Royal Assent, the FWO, FWC and the Department will commence consultation and negotiations in order to establish the ROC and see it commence operations. In particular, staffing arrangements will need to be finalised early in the implementation phase, including the commencement of the appointment process for a Registered Organisations Commissioner and transfer of relevant positions from the FWC to the ROC. Appropriate governance arrangements will need to be established for the ROC's operation within the FWO. A detailed implementation plan which covers ongoing administration of the ROC is being prepared to operationalise the legislative changes proposed in Option Two.

8.2 Review

Review of the implementation phase will assess whether government and Parliamentary processes have been adhered to and whether the legislation has been fully and successfully developed and implemented. The key milestone to be achieved is the passage of legislation implementing the measures outlined in Option Two, and the corresponding commencement of the ROC.

The operation and effectiveness of the new body will be areas for review by FWC, FWO and once established, the ROC. It will be recommended as part of the ROC implementation plan, that the ROC undertake a review after 18 months of operation to consider:

- whether the legislation has assisted in achieving better transparency and accountability standards,
- whether the ROC is able to effectively regulate registered organisations, and
- any changes to operations or legislation that may be necessary.

NOTES ON CLAUSES

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

ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Commission	Registered Organisations Commission
Commissioner	Registered Organisations Commissioner
Corporations Act	<i>Corporations Act 2001</i>
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FW Act	<i>Fair Work Act 2009</i>
FWC	Fair Work Commission
GM	General Manager of the Fair Work Commission
LI Act	<i>Legislative Instruments Act 2003</i>
PS Act	<i>Public Service Act 1999</i>
RO Act	<i>Fair Work (Registered Organisations) Act 2009</i>
ROA Act	<i>Fair Work (Registered Organisations) Amendment Act 2012</i>
the Bill	Fair Work (Registered Organisations) Amendment Bill 2014

Clause 1 – Short title

1. This is a formal provision specifying the short title.

Clause 2 – Commencement

2. The table in this clause sets out when the provisions of the Bill commence.

Clause 3 – Schedule(s)

3. Clause 3 of the Bill provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule has effect according to its terms.

Schedule 1 – The Registered Organisations Commissioner

4. Schedule 1 of the Bill is divided into two parts.
5. Part 1 sets out the provisions which establish the Commission and the Commissioner. The functions and powers of the Commissioner and the Commission reflect those of the GM. The enhanced investigation powers of the Commissioner, the increased civil penalties for non-compliance and the increased obligations on organisations and their officers will commence with the commencement of Schedule 2.
6. Part 1 also sets out the terms and conditions of the Commissioner's appointment, provides for staff from the Office of the Fair Work Ombudsman to assist the Commissioner and to be under the Commissioner's direction while doing so and establishes the Registered Organisations Commission Special Account.
7. Part 2 sets out the consequential, transitional and savings provisions which arise from the amendments made in Part 1.

Part 1 – Amendments

Fair Work Act 2009

Item 1 – Subsection 576(2) (note)

8. Item 1 is a consequential amendment to the note in subsection 576(2) to reflect item 10, which has the effect that the RO Act will no longer confer on the FWC the function of providing advice and assistance to organisations in relation to their rights and obligations under the RO Act. Instead new section 329AB of the RO Act (inserted by item 88), confers this function on the Commissioner.

Item 2 – Paragraph 604(1)(b)

9. Section 604 of the FW Act provides for an appeal to the Full Bench of the FWC in relation to certain decisions of the FWC. New paragraph 604(1)(b) will allow decisions of the Commissioner (or a delegate) to also be appealed to the Full Bench.

Item 3 – Subsection 607(1)

10. Section 607 of the FW Act sets out the process of appealing or reviewing decisions. This item has the effect that decisions of the Commissioner, in addition to those of the FWC or the GM, may be heard or conducted without holding a hearing only in the circumstances stated in that section.

Item 4 – Subparagraph 613(2)(a)(ii)

Item 5 – At the end of paragraph 613(2)(a)

11. Section 613 of the FW Act provides for the manner in which appeal decisions are made by the FWC. These items amend subsection 613(2) to allow the President of the FWC, a Vice President or a Deputy President (with the permission of the President) to hear an

application for permission to appeal against a decision of the Commissioner (or a delegate) and where permission is granted, decide the appeal.

Fair Work (Registered Organisations) Act 2009

Item 6 – Section 6

12. This item inserts the definitions of *Commission* and *Commissioner*.

Item 7 – Section 6

13. This item includes the definition for *directions contravention*.

Item 8 – Section 6 (definition of *FWA Member*)

14. This item repeals the definition of *FWA Member* which became obsolete when Fair Work Australia (FWA) was renamed the FWC by the *Fair Work Amendment Act 2012*.

Item 9 – Section 13 (heading)

Item 10 – Subsection 13(1)

15. Section 13 describes the functions of the FWC under the RO Act.

16. Item 10 amends section 13 to reflect that the FWC's functions under the RO Act are limited to keeping a register of organisations. Its previous function of providing advice and assistance to organisations in relation to their rights and obligations under the RO Act is now the responsibility of the Commissioner. Item 9 is a consequential amendment to reflect the change made by item 10.

Item 11 – Subsection 26(1)

Item 14 – Section 31

Item 15 – Subsection 38(4)

Item 16 – Paragraph 73(3)(a)

Item 17 – Subsection 77(2)

Item 21 – Paragraph 110(a)

Item 22 – Subsection 114(2)

Item 23 – Subsection 151(3)

Item 24 – Paragraph 151(10)(b)

Item 25 – Subsections 152(4) and 154(4)

Item 26 – Paragraph 160(a)

17. These items are consequential to item 10. They replace references to paragraph 13(1)(a) in the relevant provisions with references to subsection 13(1).
18. These provisions deal with matters that must be recorded by the GM on the register of organisations, including registration and cancellation of registration of organisations, amalgamations and withdrawal from amalgamations of organisations into federations, membership agreements under section 151, assets and liabilities agreements under section 152 and alterations to names of organisations or their eligibility rules.

Item 12 – Subsection 28(1A)

Item 13 – Subsection 28(1A) (note)

19. Subsection 28(1A) enables the GM to apply to the Federal Court for an order cancelling the registration of an organisation in certain circumstances. These items replace references to the GM with references to the Commissioner.

Item 18 – Subsection 95(3A)

Item 19 – Paragraph 95(3A)(a)

Item 20 – Subsections 95(3B) and (3C)

20. Section 95 requires that an application to the FWC for a ballot to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation, must be accompanied by a written proposal for the withdrawal.
21. Subsection 95(3A) allows the applicant to request the GM to either give or direct the amalgamated organisation to provide, certain information. Subsections 95(3B) and (3C) permit the GM to provide the information and require an amalgamated organisation to comply with the GM's direction respectively.
22. These items amend subsections 95(3A), (3B) and (3C) to also confer these powers and obligations on and in respect of the Commissioner.

Item 27 – Subsection 183(1)

Item 28 – Subsection 183(4)

Item 29 – Subsection 184(2)

23. Subsection 183(1) allows a committee of management of an organisation or branch of an organisation to apply to the FWC for an exemption from the requirements of subsection 182(1) in relation to elections for offices. Subsection 183(4) requires the GM to give notice of this application to the members of the organisation or branch concerned.
24. Subsection 184(2) requires the GM to hear these applications and any objections made by relevant members.

25. These items amend subsections 183(1) and (4) and subsection 184(2) by replacing references to the FWC and the GM with references to the Commissioner to reflect that this is now a function of the Commissioner.

Item 30 – Section 186 (heading)

Item 33 – Section 189 (heading)

Item 42 – Section 202 (heading)

Item 53 – Section 207 (heading)

Item 57 – Section 233 (heading)

Item 60 – Section 235 (heading)

Item 62 – Section 236 (heading)

Item 74 – Section 268 (heading)

Item 83 – Section 272 (heading)

Item 89 – Section 330 (heading)

Item 91 – Section 331 (heading)

Item 105 – Subsection 336(1) (heading)

Item 109 – Subsection 336(1A) (heading)

Item 111 – Subsection 336(2) (heading)

Item 114 – Section 337 (heading)

26. These items replace references to the GM in the relevant section and subsection headings with references to the Commissioner to reflect that the functions described are now functions of the Commissioner.

Item 31 – Section 186

Item 32 – Subsection 187(3)

Item 34– Subsection 189(1)

Item 35 – Subsection 189(2)

Item 36 – Paragraph 189(3)(a)

Item 37 – Paragraphs 189(3)(a) and (b)

Item 38 – Subsection 189(3)

Item 39 – Paragraph 192(2)(b)

Item 40 – Paragraph 197(1)(a)

Item 41 – Subparagraph 198(6)(b)(i)

Item 43 – Subsections 202(1) and (2)

Item 44 – Paragraph 202(5)(b)

Item 45 – Subsection 203(1)

Item 49 – paragraph 203(6)(b)

Item 51 – paragraph 203(6)(c)

Item 52 – Paragraph 206(4)(c)

Item 54 – Section 207

Item 55 – Subsection 215(5)

27. These items replace references to the GM and the FWC with references to the Commissioner to reflect that the functions described in relation to the conduct of elections for office and other positions are now functions of the Commissioner.

Item 46 – Subsection 203(1)

Item 48 – Paragraph 203(6)(b)

28. These items replace references to the staff of the FWC with references to the staff assisting the Commissioner.

Item 47 – Subsection 203(1)

Item 50 – Paragraph 203(6)(b)

29. These items replace references to section 343A, which deals with delegation by the GM, with references to new section 343B (inserted by item 124), which deals with delegation by the Commissioner.

Item 56 – Section 229

Item 58 – Subsections 233(1) and (2)

Item 59– Subsections 234(3) and (4)

Item 61 – Subsection 235(1)

Item 63 – Section 236

Item 64 – Subsection 237(1)

Item 65 – Subsections 237(1), (2) and (4)

30. These items replace references to the GM and the FWC with references to the Commissioner to reflect that membership records and lists of office-holders, along with details of some types of loans, grants and donations made by the organisation, are now required to be lodged by organisations with the Commissioner.

Item 66 – Subsections 241(1) and (2)

Item 71 – Subsections 255(1) and (4) and 257(11)

Item 72 – Subsection 261(2)

Item 73 – Subsections 265(5) and 266(1)

Item 75 – Section 268

Item 76 – Section 268

Item 77 – Paragraph 269(2)(a)

Item 78 – Paragraph 269(2)(c)

Item 79 – Subsection 270(1)

Item 80 – Paragraph 270(3)(c)

Item 81 – Subsection 270(7)

Item 82 – Section 271

Item 84 – Subsection 272(1) and (4) and 278(2)

31. These items replace references to the GM and the FWC with references to the Commissioner to reflect that the functions described in relation to the requirements that are placed on organisations in relation to financial records, accounting and auditing are now functions of the Commissioner.

Item 67 – At the end of section 246

Item 68 – After subsection 247(1)

Item 69 – After subsection 249(5)

Item 70 – After subsection 249(6)

32. These items require the GM to consult with the Commissioner in satisfying him or herself of matters relating to:

- The determination of reporting units within an organisation for the purposes of issuing a certificate under section 245 (items 67 and 68);
- The determination of reporting units within an organisation for the purposes of revoking a certificate issued under section 245 (items 69 and 70).

Item 85 – Subsections 310(1) and (2)

33. Section 310 sets out who may apply for an order in relation to contraventions of civil penalty provisions.
34. This item allows either the Commissioner or the GM (or a person authorised by them) to apply for a civil penalty or other order under Part 2 of Chapter 10 of the RO Act, but does not otherwise affect standing in relation to the relevant provisions.

Item 86 – Section 317

35. This item inserts a description of new Part 3A in the simplified outline of Chapter 11 of the RO Act. New Part 3A establishes the Commission and the Commissioner, provides for terms and conditions of appointment and makes provision for staff to assist the Commissioner. Part 3A also establishes the Registered Organisations Commission Special Account.

Item 87 – Section 317

36. This item replaces references to the GM with references to the Commissioner in the simplified outline of Chapter 11 of the RO Act to reflect that the functions described are now functions of the Commissioner. Chapter 11 deals with miscellaneous matters including compliance matters, inquiries and investigations and whistleblower protections.

Item 88 – After Part 3 of Chapter 11

37. Item 88 inserts new Part 3A into Chapter 11. Part 3A establishes the Commission and the Commissioner.
38. The Commissioner is an independent statutory office holder that will operate within the Office of the Fair Work Ombudsman. While specific statutory functions will be conferred on the Commissioner, the Commission will not be a separate agency for the purposes of the PS Act or a prescribed agency for the purposes of the FMA Act.
39. The staff assisting the Commissioner will be persons made available to the Commissioner by the Fair Work Ombudsman. For the purposes of the PS Act, staff assisting the Commissioner will form part of the Office of the Fair Work Ombudsman and the Fair Work Ombudsman will be the Agency Head. However, the Fair Work Ombudsman is able to delegate his or her powers under the PS Act to the Commissioner and to staff assisting the Commissioner.
40. The Commissioner and staff assisting the Commissioner will form part of the Office of the Fair Work Ombudsman for the purposes of the FMA Act. This will be achieved by an amendment to Schedule 1 of the *Financial Management and Accountability Regulations 1997*. Doing so will allow the Fair Work Ombudsman to delegate his or her powers under the FMA Act to the Commissioner and those staff, including in respect of the day to day management of the Special Account (discussed below).
41. Although the Commission will not be a prescribed agency in its own right for the purposes of the FMA Act, it will operate under a Special Account established under section 21 of the FMA Act. This will ensure its financial independence from the Office

of the Fair Work Ombudsman. For Budget purposes, the Special Account will be allocated to the Employment Portfolio. As a matter of financial administration, for the purposes of the FMA Act, the Fair Work Ombudsman will be the Chief Executive responsible for the Special Account.

42. It is envisaged that there will be a Memorandum of Understanding developed between the Fair Work Ombudsman and the Commissioner that will address and clarify responsibility for staffing and financial matters.
43. The Commissioner will have responsibility, independent from the Office of the Fair Work Ombudsman, for the performance of functions under the RO Act including the commencement of legal proceedings to enforce the RO Act. In respect of the procurement of legal services and the conduct of litigation, the Commissioner will be subject to the *Legal Services Directions 2005*. The *Legal Services Directions 2005* are a legislative instrument issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*.
44. Part 3A also contains provisions about the institutional framework of the Commission and the terms and conditions of the Commissioner, as well as outlining the functions of the Commission and Commissioner.

Part 3A- Registered Organisations Commissioner and Registered Organisations Commission

Division 1- Establishment, functions and powers of Commissioner

Section 329AA – Establishment

45. New section 329AA establishes the office of the Commissioner by providing that there is to be a Registered Organisations Commissioner.

Section 329AB – Functions of the Commissioner

46. New section 329AB sets out the functions of the Commissioner.
47. The broad functions of the Commissioner are to promote the efficient management of organisations and high standards of accountability of organisations and their office holders to their members and to promote compliance with financial reporting and accountability requirements of the RO Act, including by providing education, assistance and advice to organisations and their members.
48. The Commissioner will also have the function of monitoring acts and practices of registered organisations and their office holders to ensure they comply with the provisions of the RO Act, including as amended by this Bill.
49. The RO Act also confers specific functions on the Commissioner. For example, Part 4 of Chapter 11 of the RO Act will enable the Commissioner to conduct inquiries and investigations, commence legal proceedings in respect of contraventions of civil penalty provisions and refer possible criminal offences to the Director of Public Prosecutions or law enforcement agencies.
50. Other functions may also be conferred on the Commissioner by this Act (including the regulations) or another Act.

51. The Commissioner's functions include doing anything incidental to or conducive to the performance of any of the above functions.

Section 329AC – Powers of Commissioner

52. New section 329AC provides that the Commissioner has the power to do all things necessary or convenient to be done for the purposes of performing his or her functions.
53. This section mirrors subsection 657(2) of the FW Act, which provides that the GM has power to do all things necessary or convenient to be done for the purpose of performing his or her functions.
54. The note to new section 329AC states that the expenditure of public money must comply with the requirements in the FMA Act. The note is included for the information of the reader. The Fair Work Ombudsman may delegate his or her powers under the FMA Act to the Commissioner or the staff assisting the Commissioner and where these powers have been delegated, the delegate must comply with the requirements under the FMA Act.

Division 2 – Terms and conditions of appointment of Commissioner

Section 329BA – Appointment

55. New section 329BA provides for the appointment of the Commissioner on a full time basis.
56. Subsection 329BA(1) provides that the Commissioner is to be appointed by the Minister by written instrument.
57. Subsection 329BA(2) provides that before the Minister appoints a person as the Commissioner, the Minister must be satisfied that the person has suitable qualifications or experience and is of good character.

Section 329BB – Term of appointment

58. New section 329BB provides that the Commissioner holds office for a term specified in the instrument of appointment not exceeding 5 years.

Section 329BC – Acting Commissioner

59. New section 329BC enables the Minister to appoint an acting Commissioner during any periods when the Commissioner is absent or is otherwise unable to perform the duties of the office.
60. Section 33A of the *Acts Interpretation Act 1901* provides that acting appointments are made on the same basis as appointments, but may only be made for a maximum term of 12 months.

Section 329BD – Remuneration

61. New subsection 329BD(1) provides that the Remuneration Tribunal will determine the remuneration of the Commissioner. When no such determination is in operation, the Commissioner is to be paid the remuneration that is prescribed by the regulations.
62. New subsection 329BD(2) provides that the Commissioner will be paid any allowances that are prescribed by the regulations.
63. New subsection 329BD(3) also ensures the application of provisions of the *Remuneration Tribunal Act 1973* that have the effect, in certain circumstances, of debarring the office-holder from receiving remuneration (for instance, if she or he is at the same time a full-time public servant).

Section 329BE – Leave of absence

64. New section 329BE provides that the Commissioner's recreation leave entitlements will be determined by the Remuneration Tribunal and that additional leave of absence may be granted by the Minister on such terms and conditions as the Minister determines.

Section 329BF – Outside employment

65. New section 329BF prohibits the Commissioner from engaging in paid employment outside the duties of his or her office without the Minister's approval.

Section 329BG – Disclosure of interests to the Minister

66. New section 329BG requires the Commissioner to give written notice to the Minister of all interests the Commissioner has or acquires that conflict or could conflict with the proper performance of his or her duties. Failure to do so will result in termination of the Commissioner's appointment (see paragraph 329BJ(2)(d)).
67. This is to ensure impartiality and avoid any actual or perceived conflicts of interests.

Section 329BH – Other terms and conditions

68. New section 329BH provides for the Minister to determine the terms and conditions of the Commissioner's appointment that are not otherwise provided for in the RO Act (including the regulations).

Section 329BI – Resignation

69. New section 329BI provides that the Commissioner may resign his or her appointment by giving written notice to the Minister. This section also specifies when the resignation takes effect.

Section 329BJ – Termination of appointment

70. New section 329BJ specifies the circumstances in which the Minister may or must terminate the Commissioner's appointment.

71. Subsection 329BJ(1) provides that the Minister may terminate the Commissioner's appointment for misbehaviour, or where the Commissioner is unable to perform the duties of the office because of his or her physical or mental incapacity.
72. Subsection 329BJ(2) sets out the circumstances in which the Minister is required to terminate the appointment of the Commissioner. These circumstances include bankruptcy, unapproved absenteeism in excess of the specified period, engaging in paid employment outside the duties of his or her office without the Minister's consent (see new section 329BF) and failure to disclose interests (pecuniary or otherwise) to the Minister that conflict or could conflict with the proper performance of functions, in accordance with new section 329BG.
73. These provisions reflect the standard grounds for termination of appointments of statutory officeholders.
74. In addition, subsection 33(4) of the *Acts Interpretation Act 1901* provides that the power to appoint a person includes a power to remove or suspend that person.

Division 3 – Staff and consultants

Section 329CA – Staff

75. The staff assisting the Commissioner will be persons engaged under the PS Act and employed within the Office of the Fair Work Ombudsman. They will be made available by the Fair Work Ombudsman to assist the Commissioner in the performance of his or her functions.
76. When performing services for the Commissioner, the staff will be subject to the direction of the Commissioner and will not be subject to the direction of the Fair Work Ombudsman. This is intended to ensure the independence of the Commissioner and the staff assisting him or her when performing statutory functions under the RO Act.
77. The staff will remain subject to the direction of the Fair Work Ombudsman in relation to their employment and conditions. However, under subsection 78(7) of the PS Act, the Fair Work Ombudsman (as the Agency Head of the Office of the Fair Work Ombudsman) may delegate his or her powers under that Act to the Commissioner or an APS employee.

Section 329CB – Other persons assisting the Commissioner

78. New section 329CB provides that the Commissioner may be assisted by:
 - employees of Commonwealth Departments, Executive Agencies or Statutory Agencies (see the PS Act);
 - officers and employees of a State or Territory;
 - officers and employees of authorities of the Commonwealth, a State or a Territory.
79. The services of these persons can be made available to the Commissioner in connection with the performance of any of his or her functions.

80. This ensures that the Commissioner has the ability to draw upon the skills, expertise and experience of these employees or officers to assist in the performance of the Commissioner's functions.

Section 329CC – Consultants

81. New subsection 329CC(1) permits the Commissioner to engage persons having suitable qualifications and experience as consultants.
82. New subsection 329CC(2) provides that the consultants are to be engaged on terms and conditions that the Commissioner determines in writing.

Division 4 – Establishment and function of the Registered Organisations Commission

Section 329DA – Establishment

Section 329DB – Constitution of the Commission

83. New section 329DA establishes the Registered Organisations Commission.
84. New section 329DB provides that the Commission consists of the Commissioner and any staff assisting the Commissioner as mentioned in subsection 329CA(1).
85. The Commission (that is, the Commissioner and staff assisting the Commissioner) will form part of the Office of the Fair Work Ombudsman for the purposes of the FMA Act. This will be achieved by an amendment to Schedule 1 of the Financial Management and Accountability Regulations. Schedule 1 identifies prescribed agencies for the purposes of the FMA Act and the Chief Executive in respect of each agency. The effect of including the Commission as part of the Office of the Fair Work Ombudsman is to make the Fair Work Ombudsman the relevant Chief Executive for the Commission for the purposes of the FMA Act.

Section 329DC – Function of this Commission

86. The function of the Commission is to assist the Commissioner in the performance of the Commissioner's functions.

Section 329DD – Commission has privileges and immunities of the Crown

87. As the Commission is part of the Commonwealth, it has the privileges and immunities of the Crown.

Division 5 – Registered Organisations Commission Special Account

Section 329EA – Registered Organisations Commission Special Account

88. A Special Account for the purposes of section 21 of the FMA Act is established by the Bill. This will be the 'Registered Organisations Commission Special Account' (Special Account) (new section 329EA).
89. The Special Account is an appropriation mechanism that sets aside amounts within the Consolidated Revenue Fund for expenditure for special purposes which, in this case,

relates to expenditure for the special purposes of funding the operations of the Commissioner and Commission.

90. Although the Commission will not be a prescribed agency in its own right for the purposes of the FMA Act, the Special Account will ensure its financial independence from the Office of the Fair Work Ombudsman. For Budget purposes, the Special Account will be allocated to the Employment Portfolio. As a matter of financial administration, for the purposes of the FMA Act, the Fair Work Ombudsman will be the Chief Executive responsible for the Special Account.
91. By virtue of the Commission being part of the Office of the Fair Work Ombudsman, as outlined above, the Fair Work Ombudsman will be able to delegate financial powers to the Commissioner under the FMA Act. Section 53 of the FMA Act enables the Chief Executive to delegate powers under that Act to an official in any Agency. ‘Official’ is defined as a person who is in an Agency or part of an Agency.

Section 329EB – Credits to the Account

92. The Special Account may be credited by amounts equal to the following:
 - Amounts received by the Commonwealth in connection with the performance of the Commissioner’s functions under the Bill;
 - Interest received by the Commonwealth from the investment of amounts debited from the Special Account;
 - Amounts of any gifts or bequests made for the purposes of the Special Account; and
 - Amounts received by the Commonwealth in relation to property paid for with amounts debited from the Special Account.

93. It is envisaged that the Special Account will be funded totally from appropriations.

Section 329EC – Purposes of the Account

94. The Special Account is used to pay or discharge costs, expenses and other obligations incurred by the Commonwealth in relation to the performance of the Commissioner’s functions; to pay for remuneration and allowances to persons in accordance with the Bill (including staff mentioned in clause 329CA); and to meet any expenses associated with administering the Special Account.

Division 6 – Reporting requirements

Section 329FA – Directions from the Minister

95. New section 329FA permits the Minister to give directions of a general nature to the Commissioner, but not directions as to a particular matter or investigation. The Commissioner would be required to comply with these directions.
96. In this respect, the Commissioner is subject to the same degree of Ministerial oversight as the Fair Work Ombudsman.

97. New subsection 329FA(1) provides that written directions given by the Minister are legislative instruments for the purposes of the LI Act. This provision has substantive operation as such directions would not ordinarily be legislative instruments. This provision gives greater oversight by Parliament in relation to directions by the Minister and ensures transparency. The effect of this provision is that any such directions will be required to be lodged with the Federal Register of Legislative Instruments and tabled in Parliament. However, as explained in the note to this provision, the directions will not be subject to disallowance or the sunset provisions of the LI Act. This mirrors section 684 of the FW Act, which applies to directions from the Minister to the FWO.

Section 329FB – Minister may require reports

98. New section 329FB permits the Minister to direct the Commissioner to produce reports in relation to a function or the functions of the Commissioner. The Commissioner must comply with the direction.
99. In this respect, the Commissioner is subject to the same degree of Ministerial oversight as the Fair Work Ombudsman (see section 685 of the FW Act).
100. New subsection 329FB(3) provides that directions and reports under this section are not legislative instruments within the meaning of section 5 of the LI Act. This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the LI Act.

Section 329FC – Annual report

101. New section 329FC requires the Commissioner to produce an annual report about the operations of the Commission to be presented to the Parliament. The annual report must include:
- details of the number and types of investigations conducted by the Commissioner under Part 4 of Chapter 11;
 - details of:
 - when each investigation was started; and
 - if the investigation has been completed—when it was completed; and
 - if the investigation has not been completed—when it is expected to be completed;
 - details of any orders applied for under paragraph 310(1)(a);
 - details of the types of education activities undertaken by the Commissioner and whether the education activities were provided to a registered employer organisation, a registered employee organisation or members of these organisations;
 - any other matter prescribed by the regulations.
102. A note alerts the reader to the operation of section 34C of the *Acts Interpretation Act 1901* which contains rules about annual reports.

Item 90 – Subsections 330(1) and (2)

Item 92 – Section 331

Item 93 – Subsection 332(1)

Item 94 – Paragraph 332(1)(a)

Item 95 – Paragraph 332(1)(b)

Item 96 – Subsections 332(2) and (3)

Item 97 – Subsection 333(1)

Item 98 – Subsection 333(1)

Item 99 – Subsections 333(2) and (3)

Item 100 – Sections 334 to 335A

Item 101 – Section 335B

Item 102 – Subsection 335C(1)

Item 103 Subsection 335C(1)

Item 104 – Subsection 335C(2)

Item 106 – Subsection 336(1)

Item 108 – Subsection 336(1)

Item 110 – Subsection 336(1A)

Item 112 – Subsection 336(2)

Item 113 – Subsections 336(3) and (5)

Item 115 – Subsection 337(1)

103. These items replace references to the GM and the FWC with references to the Commissioner to reflect that the functions described in relation to inquiries and investigations into compliance with financial reporting are now functions of the Commissioner.

Item 107 – Subsection 336(1)

104. This item replaces the reference to ‘the reporting unit concerned’ with ‘a reporting unit’. This is a technical correction to clarify the effect of subsection 336(1).

Item 116 – Before subparagraph 337A(b)(i)

105. Section 337A deals with disclosures that qualify for whistleblower protection under Part 4A of Chapter 11 of the RO Act.

106. This item inserts new subparagraph 337A(b)(ia) which adds the Commissioner or a member of the staff assisting the Commissioner to the list of those to whom a disclosure may be made to be eligible for protection.

Item 117 – Paragraph 337K(3)(a)

107. Paragraph 337K(3)(a) requires the GM to promptly provide a copy of any order made under the RO Act, along with any reasons received by the GM for the order, to each party who appeared at the hearing of the proceeding concerned.
108. This item requires the GM to also provide this information to the Commissioner.

Item 118 – Paragraphs 337K(5)(a) and (b)

109. This item corrects out-dated references to ‘FWA member’ to ‘FWC member’. Fair Work Australia was renamed the FWC by the *Fair Work Amendment Act 2012*.

Item 119 – Paragraphs 343A(2)(c) to (g)

Item 120 – Paragraphs 343A(2)(i) to (j)

Item 121 – Paragraphs 343A(3)(d) to (g)

Item 123 – Subsection 343A(3A)

110. These items repeal provisions which prohibit or restrict the delegation of certain powers by the GM. As these functions and powers of the GM are being transferred to the Commissioner, these provisions are no longer necessary.

Item 122 – Paragraph 343A(3)(h)

111. Subsection 343A(3) sets out the powers of the GM that can only be delegated to SES employees, acting SES employees or employees prescribed by the regulations.
112. This item deletes the reference to Part 4 of Chapter 11, which deals with inquiries and investigations, as this is no longer a function of the GM.

Item 124 – After section 343A

113. This item inserts new section 343B which deals with delegation by the Commissioner of his or her functions under the RO Act.

Item 125 – Paragraph 347(1)(c)

114. This item replaces the reference to the FWC with a reference to the Commissioner to reflect that the relevant documents are now required to be lodged with the Commissioner.

Item 126 – Section 348

115. Section 348 provides that a certificate given by the GM stating that a person was a member or officer of an organisation at a particular time is, in all courts and proceedings, evidence that the facts are as stated.
116. This item extends this stipulation to a certificate given by the Commissioner.

Item 127 – Section 349

Item 128 – Section 349

117. These items replace the references to the FWC and the GM with references to the Commissioner to reflect that the relevant documents are now required to be lodged with the Commissioner.

Part 2 – Transitional provisions

Item 129 – Definitions

118. This item provides for definitions for the purpose of this Part, including *commencement time*, which means the time when Schedule 1 commences.

Item 130 – Commissioner to complete certain processes

119. This item provides for the Commissioner to be able to complete processes that had been commenced by the GM but were incomplete when this Schedule commenced.

Item 131 – Permission to keep records at premises

120. This item provides that where the GM has given permission for an organisation to keep the whole or a specified part of a record at specified premises instead of at the office of the organisation or branch of the organisation (section 234 of the RO Act) prior to this Schedule commencing, the permission continues to apply as if it had been given by the Commissioner.

Item 132 – Certain references to include documents dealt with before the commencement time

121. This item provides that certain references are to include documents dealt with before the commencement time.
122. These references include the reference in:
- subsection 236(5) of the RO Act to a copy of a document received by the Commissioner includes a reference to a copy of a document received by the GM under section 236 of the RO Act before that time; and
 - subsection 237(4) of the RO Act to a statement lodged with the Commissioner under subsection (1) includes a reference to a statement lodged with the FWC under subsection (1) of section 237 of the RO Act before that time; and
 - paragraph 347(1)(c) of the RO Act to a copy of a list lodged with the Commissioner under subsection 233(1) includes a reference to a copy of a list lodged with the FWC under subsection 233(1) of the Act before that time; and
 - section 348 of the RO Act to a certificate of the Commissioner includes a reference to a certificate of the GM covered by that section before the commencement time; and
 - section 349 of the RO Act to a list of the officers of an organisation or a branch of an organisation lodged with the Commissioner on behalf of the organisation or a copy of any such list certified by the Commissioner includes a reference to a list of the officers of an organisation or a branch of an organisation lodged with the FWC on behalf of the organisation or a copy of any such list certified by the GM before that time.

Item 133 – Proceedings in relation to civil penalty provisions

123. This item provides for transitional arrangements where an application made under Part 2 of Chapter 10 (which deals with civil consequences of contravening civil penalty provisions) has not been finally determined before the commencement time.
124. Where the GM and the Commissioner agree by signed writing that the Commissioner be substituted as a party to proceedings arising from the application then the agreement has effect accordingly and the GM's rights and obligations in relation to the proceedings become the rights and obligations of the Commissioner.

Item 134 – Other proceedings

125. This item applies if an application is made under the RO Act, other than an application under Part 2 of Chapter 10 of the RO Act (which is addressed in item 133), has not been finally determined before the commencement time and because of the amendments made by this Schedule, the power to make applications of that kind has become a power of the Commissioner.
126. In such circumstances, the Commissioner is substituted for the GM as a party to any proceeding arising from the application, and the rights and obligations of the GM in relation to such a proceeding become rights and obligations of the Commissioner.

Item 135 – Information sharing

127. This item provides that the Commissioner may, for the purposes of fulfilling his or her functions or powers, request the GM to disclose to them information acquired by the GM or a member of the staff of the FWC under the RO Act before the commencement time.
128. This reflects the intention that all information acquired by the GM or a member of the staff of the FWC in the performance or exercise of functions or powers under the RO Act before the commencement time should be able to be disclosed to the Commissioner.

Item 136 – Commissioner's first annual report

129. This item provides that if this Schedule commences before the end of the financial year ending on 30 June 2014, the Commissioner's report required by section 329FC of the RO Act for that year must be included with the Fair Work Ombudsman's report required by section 686 of the FW Act.

Item 137 – Minister may make rules about transitional matters

130. This item provides that the Minister may, by legislative instrument, make rules in relation to transitional matters arising out of the amendments and repeals made by Part 1 of this Schedule.

Schedule 2 – Increased disclosure requirements, investigation powers and penalties

131. Schedule 2 of the Bill is divided into two parts.
132. Part 1 contains provisions that increase obligations on organisations and their officers, increase civil penalties for non-compliance and introduce criminal offences. This Part also gives the Commissioner, which was established in Part 1 of Schedule 1, enhanced investigation powers.
133. Part 2 contains transitional provisions. The Commissioner, whose office and functions will be established by Part 1 of Schedule 1, will commence on proclamation of that Part, with the powers and functions of the GM of the FWC in relation to organisations. Part 2 of Schedule 2 of the Bill sets out transitional provisions required as a result of the new scheme of increased obligations on organisations and increased powers of the Commissioner in Part 1 of Schedule 2.

Part 1 – Amendments

Fair Work (Registered Organisations) Act 2009

Item 1 – Section 6 (definition of *disclosure period*)

Item 2 – Section 6

Item 3 – Section 6

Item 4 – Section 6

134. These items repeal the definition of ‘disclosure period’ which is no longer required because of the amendments in the Bill and includes definitions for new terms used in the Bill. In particular, item 3 introduces the definition of a ‘proceeding’ which includes a proceeding in a court or a proceeding or hearing before, or an examination by or before, a tribunal. For the purposes of this definition such a proceeding, hearing or examination may be civil, administrative, criminal, disciplinary or other nature.

135. The concept of ‘serious contravention’ is also introduced. This definition is relevant to the increased civil penalties.

Item 5 – Section 16

Item 6 – Subsection 51(2) (penalty)

Item 11 – Subsections 72(1) to (3) (penalty)

Item 13 – Subsection 103(4) (penalty)

Item 18 – Subsections 105(1) to (3) (penalty)

Item 36 – Subsections 185(1) and (2) (penalty)

Item 39 – Section 190 (penalty)

Item 40 – Subsection 191(2) (penalty)

Item 45 – Subsection 193(2) (penalty)

Item 46 – Section 194 (penalty)

Item 47 – Subsections 195(2) to (6) (penalty)

Item 56 – Subsections 199(3) and (5) (penalty)

Item 57 – Subsection 202(5) (penalty)

Item 58 – Subsection 203(6) (penalty)

Item 68 – Subsection 232(1) (penalty)

Item 104 – Subsection 258(1) (penalty)

Item 107 – Subsections 260(3) and (4) (penalty)

Item 228 – Subsection 337(1) (penalty)

Item 231 – Subsection 337C(6) (penalty)

Item 240 – Subsections 350(1) and (2) (penalty)

Item 241 – Subsection 356(6) (penalty)

136. Occurrences of ‘Maximum penalty’ throughout the RO Act have been amended to read ‘Penalty’, and section 16 of the RO Act has been repealed. The use of ‘Penalty’ (rather than ‘Maximum penalty’) will attract the operation of section 4D of the *Crimes Act 1914* (section 16 replicated the operation of that section in relation to ‘Maximum penalty’). These amendments are technical changes to bring the RO Act into line with current drafting practices and do not affect the operation of offence provisions set out in the RO Act.

Item 21 – Subsection 151(2) (note)

Item 22 – At the end of subsection 151(2)

Item 24 – Subsection 152(3) (note)

Item 25 – At the end of subsection 152(3)

Item 30 – Subsection 172(1) (note)

Item 31 – At the end of subsection 172(1)

Item 37 – Subsection 189(2) (note)

Item 38 – At the end of subsection 189(2)

Item 60 – Subsection 230(1) (note)

Item 61 – At the end of subsection 230(1)

Item 62 – Subsection 230(2) (note 1)

Item 63 – Subsection 230(2) (note 2)

Item 64 – At the end of subsection 230(2) (after note 2)

Item 65 – At the end of subsection 231(1)

Item 66 – Subsection 231(2) (note)

Item 67 – At the end of subsection 231(2)

Item 69 – At the end of subsection 233(1)

Item 70 – At the end of subsection 233(2)

Item 73 – Subsection 235(2) (note)

Item 74 – At the end of subsection 235(2)

Item 75 – Subsection 236(1) (note)

Item 76 – At the end of subsection 236(1)

Item 77 – Subsection 236(2) (note)

Item 78 – At the end of subsection 236(2)

Item 92 – Subsection 256(3) (note)

Item 93 – At the end of subsection 256(3)

Item 94 – Subsection 256(4) (note)

Item 95 – At the end of subsection 256(4)

Item 96 – Subsection 256(5) (note)

Item 97 – At the end of subsection 256(5)

Item 98 – Subsection 256(6) (note)

Item 99 – At the end of subsection 256(6)

Item 108 – Subsection 263(2) (note)

Item 109 – At the end of subsection 263(2)

Item 110 – Subsection 263(3) (note)

Item 111 – At the end of subsection 263(3)

Item 112 – Subsection 263(5) (note)

Item 113 – At the end of subsection 263(5)

Item 114 – Subsection 264(3) (note)

Item 115 – At the end of subsection 264(3)

Item 122 – Subsection 266(1) (note)

Item 123 – At the end of subsection 266(1)

Item 138 – Subsection 272(3) (note)

Item 139 – At the end of subsection 272(3)

Item 140 – Subsection 272(5) (note)

Item 141 – At the end of subsection 272(5)

Item 142 – Subsection 274(1) (note)

Item 143 – At the end of subsection 274(1)

Item 144 – At the end of subsection 276(1)

Item 145 – Subsection 276(2) (note)

Item 146 – At the end of subsection 276(2)

Item 238 – Subsection 347(1) (note)

Item 239 – At the end of subsection 347(1)

137. These items specify that the civil penalty for non-compliance with the specified provisions for an individual is 60 penalty units. The civil penalty for a body corporate is five times that of an individual (i.e. the penalty is increased from 150 penalty units to 300 penalty units) by the operation of paragraph 306(1)(a) as amended by item 203.

138. The items that refer to amendments to notes to a provision are consequential amendments required as a result of the amendments to the civil penalty provisions described above.

Item 23 – Subsection 151(11)

139. This item repeals subsection 151(11) and inserts new subsections 151(11) and 151(11A). The new subsections are in substantially the same form as paragraphs 151(11)(a) and (b), which set out obligations of organisations and the GM in relation to the term of a membership agreement.

140. This item also specifies that the civil penalty for non-compliance with subsection 151(11) is increased from 30 penalty units for an individual to 60 penalty units. The civil penalty for a body corporate is five times that of an individual (i.e. the penalty is increased from 150 penalty units to 300 penalty units) by the operation of paragraph 306(1)(a) as amended by item 203.

Item 7 – Subsection 52(1) (note)

Item 8 – At the end of subsection 52(1)

Item 9 – Subsection 52(3) (note)

Item 10 – At the end of subsection 52(3)

Item 12 – At the end of subsection 95(3C)

Item 14 – Subsection 104(1) (note)

Item 15 – At the end of subsection 104(1)

Item 16 – Subsection 104(3) (note)

Item 17 – At the end of subsection 104(3)

Item 28 – Section 169 (note)

Item 29 – At the end of section 169

Item 32 – Section 175 (note)

Item 33 – At the end of section 175

Item 34 – Section 176 (note)

Item 35 – At the end of section 176

Item 41 – Subsection 192(1) (note)

Item 42 – At the end of subsection 192(1)

Item 43 – Subsection 192(3) (note)

Item 44 – At the end of subsection 192(3)

Item 48 – Subsection 198(1) (note)

Item 49 – At the end of subsection 198(1)

Item 50 – Subsection 198(4) (note)

Item 51 – At the end of subsection 198(4)

Item 52 – Subsection 198(5) (note)

- Item 53 – At the end of subsection 198(5)**
- Item 54 – Subsection 198(8) (note)**
- Item 55 – At the end of subsection 198(8)**
- Item 71 – Subsection 233(3) (note)**
- Item 72 – At the end of subsection 233(3)**
- Item 79 – Subsection 237(1) (note)**
- Item 80 – At the end of subsection 237(1)**
- Item 81 – Subsection 237(3) (note)**
- Item 82 – At the end of subsection 237(3)**
- Item 83 – Subsection 253(3) (note 1)**
- Item 84 – Subsection 253(3) (note 2)**
- Item 85 – Subsection 253(3) (note 3)**
- Item 87 – Subsection 254(3) (note)**
- Item 90 – Subsection 256(1) (note)**
- Item 91 – At the end of subsection 256(1)**
- Item 100 – Subsection 257(10) (note)**
- Item 101 – At the end of subsection 257(10)**
- Item 102 – Subsection 257(11) (note)**
- Item 103 – At the end of subsection 257(11)**
- Item 105 – Section 259 (note)**
- Item 106 – At the end of section 259**
- Item 116 – Subsection 265(1) (note)**
- Item 117 – At the end of subsection 265(1)**
- Item 118 – Subsection 265(4) (note)**
- Item 119 – At the end of subsection 265(4)**
- Item 120 – Subsection 265(5) (note)**
- Item 121 – At the end of subsection 265(5)**

Item 124 – Section 267 (note)

Item 125 – At the end of section 267

Item 128 – Section 268 (note)

Item 129 – At the end of section 268

Item 130 – Subsection 270(4) (note)

Item 131 – At the end of subsection 270(4)

Item 132 – Subsection 270(5) (note)

Item 133 – At the end of subsection 270(5)

Item 134 – Subsection 270(6) (note)

Item 135 – At the end of subsection 270(6)

Item 136 – Subsection 270(7) (note)

Item 137 – Subsection 270(7)

141. These items increase the civil penalties for non-compliance with the specified provisions from 60 penalty units for an individual to 100 penalty units. The civil penalty for a body corporate is five times that of an individual (i.e. the penalty is increased from 300 penalty units to 500 penalty units) by the operation of paragraph 306(1)(a) as amended by item 203.

142. The items that refer to amendments to notes to a provision are consequential amendments required as a result of the amendments to the civil penalty provisions described above.

Item 86 – At the end of section 253 (after note 3)

Item 88 – At the end of section 254

143. These items insert a new subsection (4) in both sections 253 and 254 to make clear that there is an obligation not to contravene these sections. The items also increase the civil penalties for non-compliance from 60 penalty units for an individual to 100 penalty units. The civil penalty for a body corporate is five times that of an individual (i.e. the penalty is increased from 300 penalty units to 500 penalty units) by the operation of paragraph 306(1)(a) as amended by item 203.

Item 148– Subsection 285(1) (note)

Item 149 – At the end of subsection 285(1)

Item 150 – Subsection 286(1) (note)

Item 151 – At the end of subsection 286(1)

Item 152 – Subsection 286(2) (note)

Item 153 – At the end of subsection 286(2)

Item 154 – Subsection 287(1) (note)

Item 155 – At the end of subsection 287(1)

Item 156 – Subsection 287(2) (note)

Item 157 – At the end of subsection 287(2)

Item 158 – Subsection 288(1) (note 1)

Item 159 – Subsection 288(1) (note 2)

Item 160 – At the end of subsection 288(1) (after note 2)

Item 161 – Subsection 288(2) (note)

Item 162 – At the end of subsection 288(2)

Item 168 – Subsection 297(2) (note)

Item 169 – At the end of subsection 297(2)

Item 170 – Subsection 297(3) (note)

Item 171 – At the end of subsection 297(3)

Item 173 – Subsection 298(2) (note)

Item 174 – At the end of subsection 298(2)

Item 175– Subsection 298(3) (note)

Item 176 – At the end of subsection 298(3)

Item 178 – Subsection 299(2) (note)

Item 179 – At the end of subsection 299(2)

Item 180 – Subsection 299(3) (note)

Item 181 – At the end of subsection 299(3)

Item 183 – Subsection 300(2) (note)

Item 184 – At the end of subsection 300(2)

Item 185 – Subsection 300(3) (note)

Item 186 – At the end of subsection 300(3)

Item 188 – Subsection 301(2) (note)**Item 189 – At the end of subsection 301(2)****Item 190 – Subsection 301(3) (note)****Item 191 – At the end of subsection 301(3)****Item 193 – Subsection 302(2) (note)****Item 194 – At the end of subsection 302(2)****Item 195 – Subsection 302(3) (note)****Item 196 – At the end of subsection 302(3)****Item 198 – Subsection 303(2) (note)****Item 199 – At the end of subsection 303(2)**

144. These items increase the civil penalties for non-compliance with the specified provisions from 60 penalty units for an individual to 100 penalty units. The civil penalty for a body corporate is five times that of an individual (i.e. the penalty is increased from 150 penalty units to 300 penalty units) by the operation of paragraph 306(1)(a) as amended by item 203.

145. These items also include a civil penalty of 1200 penalty units for a serious contravention of the specified provisions (6000 penalty units for a body corporate). Item 4 of this Schedule inserts the definition of serious contravention, which is a contravention of a provision that:

- materially prejudices the interests of the organisation or branch, or the members of the organisation or branch; or
- materially prejudices the ability of the organisation or branch to pay its creditors; or
- is serious.

146. The ‘serious contravention’ concept was broadly modelled on subsection 1317G(1) of the Corporations Act and it is expected that similar principles would apply.

147. The items that refer to amendments to notes to a provision are consequential amendments required as a result of the amendments to the civil penalty provisions described above.

Item 19 – After subparagraph 141(1)(b)(ii)

148. This item inserts new subparagraph 141(1)(b)(iia), which provides that rules of registered organisations and their branches must provide for the keeping of minute books recording proceedings and resolutions of committees of management.

149. This amendment is intended to ensure that disclosures of material personal interest of officers of registered organisations under new section 293D and resolutions passed by

committees of management in accordance with new subsection 293F(4) are appropriately recorded.

150. The new subparagraph is broad so as to ensure that registered organisations are free to create rules that are relevant to how meetings are conducted in a particular case and to avoid as much as possible the need to amend existing rules that provide for the taking of minutes.

Item 20 – Division 3A of Part 2 of Chapter 5

151. This item repeals Division 3A of Part 2 of Chapter 5. This Division (as amended by the ROA Act) sets out content requirements for the rules of registered organisations dealing with certain disclosures and related matters. Division 3A is no longer required as a result of the legislative disclosure requirements set out in new Part 2A of Chapter 9.

Item 26 – Sections 154C and 154D

152. Item 26 repeals sections 154C and 154D (which were inserted by the ROA Act). Sections 154C and 154D set out requirements for rules to require officers to undertake approved training and related matters.

Item 27 – Paragraph 159(4)(a)

153. Item 27 is a consequential amendment required as a result of repealing Division 3A of Part 2 of Chapter 5 (as amended by the ROA Act).

Item 59 – Paragraph 212(b)

154. Item 59 inserts a reference to new section 290A, which establishes offences in relation to breaches of good faith, use of position and use of information (see item 163), in the definition of prescribed offence. The effect of this item is that a person convicted of an offence under section 290A will not generally be eligible to be an officer of an organisation or to stand for election to office (see section 215 of the RO Act).

Item 89 – After subsection 255(2)

155. This item inserts new subsection 255(2A), which provides that the reporting guidelines issued by the Commissioner for the purposes of sections 253 and 270 of the RO Act must require a report that shows the total expenditure of the reporting unit in relation to the matters specified in new paragraphs 255(2A)(a) – (e).
156. A note to the new subsection, informs the reader that the information to be set out in the report may be expressed in diagrammatic form, such as a pie chart. The intention is that members of registered organisations be provided with an easy to understand summary of how the financial resources of their organisation are expended.

Item 126 – Section 268**Item 127 – Paragraph 268(c)**

157. These items make technical amendments to clarify that a full report must be lodged with the Commission after being presented to a committee of management meeting, if that has occurred in accordance with section 266 of the RO Act.

Item 147– Section 281

158. This item amends the simplified outline of Chapter 9 of the RO Act to include information about new Part 2A of the RO Act, which relates to disclosure obligations of officers, registered organisations and their branches (see item 166).

Item 163 – After section 290*Section 290A – Good faith, use of position and use of information – criminal offences*

159. This item introduces new section 290A. Section 290A creates offences for a range of conduct related to existing duties of officers of registered organisations. Broadly, these offences relate to officers and employees of organisations and branches:

- failing to exercise powers or discharge duties in good faith and for a proper purpose;
- using their position to gain an advantage for themselves or someone else; and
- using information obtained while an officer or employee to gain an advantage for themselves or someone else.

160. The penalty for contravening new section 290A is 2000 penalty units or imprisonment for 5 years, or both.

161. These offences are broadly modelled on section 184 of the Corporations Act, which prohibits similar behaviour in relation to the conduct of company directors. The Corporations Act provisions were adapted as necessary to align with the RO Act framework.

Item 164 – Section 291 (heading)**Item 165 – Section 291**

162. These items make consequential amendments to reflect the inclusion of new section 290A.

Item 166 – After Part 2 of Chapter 9

163. This item inserts a new Part 2A to Chapter 9 of the RO Act. New Part 2A deals with disclosure obligations.

Part 2A – Disclosure obligations

Division 1 – Preliminary

Section 293A – Simplified outline

164. New section 239A provides a simplified outline for the new Part 2A.

Division 2 – Disclosure obligations and restrictions on taking part in making decisions

Section 293B – Disclosure of remuneration paid to officers

165. New section 293B sets out the disclosure requirements for remuneration paid to officers of organisations. New subsections 293B(1) and 293B(2) 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 as an officer of the organisation or branch or because they were nominated for the position on the Board by the organisation, a branch, or by a peak council; or
- by a related party of the organisation or branch in connection with the performance of the officer's duties.

166. New subsections 293B(1) and 293B(2) are civil penalty provisions.

Section 293BA – Immediate disclosure

167. New section 293BA requires that disclosure is made as soon as practicable after the remuneration is paid to the officer.

Section 293BB – Standing disclosure of remuneration

168. New section 293BB provides for a standing disclosure of remuneration.

169. New subsections 293BB(1) and 293BB(2) provide that where an officer's remuneration is to be paid on a regular basis, he or she may make a standing disclosure to the committee of management of the amounts the officer expects to be paid.

170. New subsections 293BB(2) and 293BB(5) provide when the written disclosure must be given.

171. New subsections 293BB(3) and 293BB(4) provide for the action that must be taken where the actual amount paid differs from that disclosed in the standing disclosure.

Section 293BC – Disclosure of certain remuneration and benefits by organisations and branches

172. New subsection 293BC(1) provides that the organisation must, for a financial year, disclose the relevant remuneration of the five highest remunerated officers of the organisation. The subsection specifies that the identity of each officer must be disclosed as well as the amount of the officer's relevant remuneration and the value and form of

the officer's relevant non-cash benefits. This information must be disclosed to the members of the organisation and its branches.

173. New subsection 293BC(2) provides that the branch of an organisation must, for a financial year, disclose the relevant remuneration of the five highest remunerated officers of the branch of the organisation. The subsection specifies that the identity of each officer must be disclosed as well as the amount of the officer's relevant remuneration and the value and form of the officer's relevant non-cash benefits. This information must be disclosed to the members of the branch of the organisation.
174. New subsection 293BC(3) provides that disclosures made under subsections (1) or (2) must be made as part of the officer and related party disclosure statement required under Division 3. A note to this section states that a failure to prepare an officer and related party disclosure statement is a civil penalty provision.
175. New subsection 293BC(4) provides that for the purposes of new section 293BC, the relevant remuneration of an officer of an organisation or a branch of an organisation for a financial year includes:
 - any remuneration disclosed to the organisation or the branch by the officer, under rules made under new subsections 293BC(1) or (2), during the financial year;
 - any remuneration paid, during the financial year, to the officer by the organisation or the branch.

Relevant non-cash benefits

176. New subsection 293BC(5) provides that the relevant non-cash benefits of an officer of an organisation or branch of an organisation for a financial year are the non-cash benefits provided to the officer by the organisation or branch (as the case may be) or by a related party of the organisation or branch (as the case may be), at any time during the financial year, in connection with the performance of the officer's duties as an officer.

Section 293C – Disclosure of material personal interests of officers

Disclosure by officers

177. 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.
178. 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.
179. New subsection 293C(2) is a civil penalty provision.
180. 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.

181. New subsection 293C(3) is a civil penalty provision.
182. New subsection 293C(4) is based on exclusions from the disclosure of material personal interests in subsection 191(2) of the Corporations Act.
183. 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.
184. 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.
185. 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) 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

186. 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)).

187. New subsection 293C(6) is a civil penalty provision.
188. 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).
189. An organisation or a branch contravenes subsection 293C(7) if a committee of management of the 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).
190. New subsection 293C(7) is a civil penalty provision.

Section 293D – Officer may give members of committee of management standing notice about an interest

191. New subsections 293D(1) and 293D(8) provide that an officer of an organisation or a branch of an organisation may give standing notice to the committee of management of a material personal interest in a matter, whether or not the matter relates to the affairs of the organisation at the time that the notice is given by the officer.
192. New subsection 293D(2) provides that the notice must give details of the nature and extent of the interest and that it must be given either at a meeting of the committee of management or to the members of that committee in writing.
193. New subsection 293D(3) provides that where the notice is given to members of the committee of management individually in writing, it must also be tabled at the next meeting of that committee.
194. New subsection 293D(4) provides that the committee of management must ensure that the nature and extent of the disclosed interest is recorded in the minutes of the committee of management meeting at which the standing notice is given or tabled.
195. New subsections 293D(5) and 293D(6) provide that a standing notice takes effect as soon as it is given and ceases to have effect when a new person is appointed to the committee of management or if the nature or extent of the interest materially increases above the disclosed level. In situations where a new person is appointed to the committee of management, the standing disclosure will have effect again when the notice is given to that new person.
196. New subsection 293D(7) provides that a contravention of the section does not affect the validity of any other act, transaction, agreement, instrument, resolution or other thing.

Section 293E – Interaction of section 293C and 293D with other laws

197. New section 293E provides that new sections 293C and 293D have effect in addition to any general law rule about conflict of interest and any provision in the organisation or branch's rules that otherwise restrict an officer from having a material personal interest in a matter that conflicts with their role as an officer of the organisation. New section 293E is modelled on section 193 of the Corporations Act and follows it closely.

Section 293F – Restrictions on taking part in making decisions

198. New subsections 293F(1) and 293F(2) provide that an officer of an organisation or branch of an organisation, who has a material personal interest in a matter, must not be present during any deliberation on the matter by the organisation or branch. The officer must also not take part in any decision of the organisation or branch with respect to the matter.
199. These subsections are civil penalty provisions.
200. 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 or branch, 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)).
201. New subsection 293F(4) provides that the officer may be present and take part in a decision with respect to the matter if the members of the committee of management of the organisation or branch, who do not have a material personal interest in the matter, pass a resolution identifying the officer, the nature and extent of the interest and its relation to the affairs of the organisation or branch and stating that those members of the committee are satisfied that the interest should not disqualify the officer.
202. New subsection 293F(5) provides that a contravention of the section does not affect the validity of any other act, transaction, agreement, instrument, resolution or other thing.

Section 293G – Disclosure of payments made by an organisation or a branch

203. New subsections 293G(1) provides that an organisation must disclose to the members of the organisation and its branches each payment that has been made by the organisation during the financial year:
- to a related party of the organisation or of a branch of the organisation; or
 - to a declared person or body of the organisation.
204. New subsection 293G(6) defines a declared person or body as an officer who has disclosed a material personal interest under new subsections 293C(2), 293C(3) or 293D(1) and the interest relates to or is in the person or body and the officer has not notified the organisation or the branch that the officer no longer has the interest.

205. New subsection 293G(2) provides that a branch of an organisation must disclose, to the members of the branch, each payment that has been made by the branch of the organisation during the financial year:
- to a related party of the branch of the organisation; or
 - to a declared person or body of the branch.
206. New subsection 293G(3) provides that the disclosure must be made as part of the officer and related party disclosure statement. A note under this subsection states that a failure to prepare an officer and related party disclosure statement is a contravention of a civil penalty provision.
207. New subsection 293G(4) provides that new subsections 293G(1) and 293G(2) do not apply to payments made to a related party where the related party is an officer of the organisation or branch and the payment consists of remuneration paid to the officer or is reimbursement for expenses reasonably incurred by the officer in performing his or her duties.
208. A note to this subsection states that new section 293B deals with disclosure in relation to remuneration.
209. New subsection 293G(5) provides that subsections 293G(1) and 293G(2) do not apply to payments made to a related party where the payment consists of deductions from the remuneration of the employees or officers of the organisation or branch as the case may be.

Arm's length terms

210. New subsection 293G(5A) provides an exception to payments at arm's length terms and is modelled on section 210 of the Corporations Act.
211. 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.
212. 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

213. New subsection 293G(5B) provides an exception to payments that are small amounts given to a related party.
214. 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)).

215. 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.

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

Payments to members that do not discriminate unfairly

217. 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.

218. 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.

Section 293H – Section 293G – order for alternative disclosure arrangement

219. New section 293H provides for the Commissioner to grant an organisation an alternative disclosure arrangement to that specified under new section 293G.

220. New subsection 293H(1) provides that an application for an order can be lodged by an organisation where it considers special circumstances exist that make new section 293G too onerous.

221. New subsection 293H(2) provides that an application to the Commissioner must be accompanied by:

- a statement of the special circumstances that exist in relation to the organisation;
- particulars of a proposed alternative arrangement to provide for disclosures of payments made by the organisation that are appropriate for the organisation's special circumstances and are appropriately transparent; and
- evidence of past and current high standards of financial accountability and control that are appropriate for the organisation's special circumstances and provide appropriate transparency.

222. New subsection 293H(3) provides that the Commissioner may make an order granting an alternative disclosure arrangement if he or she is satisfied that:

- special circumstances exist in relation to the organisation; and
- taking into account the evidence provided, the proposed alternative disclosure arrangement provide for disclosures, of payments made by the organisation, that are appropriate for the organisation's special circumstances and are appropriately transparent; and

- that the proposed alternative disclosure arrangement:
 - complies with and is not contrary to this Act (other than section 293G);
 - and
 - is not otherwise contrary to law.
223. New subsection 293H(5) provides that an order remains in force until the earlier of the day it is revoked, or 5 years after it was made.
224. New subsection 293H(6) provides that the Commissioner may revoke an order if either he or she is no longer satisfied of at least one of the matters that he or she had to be satisfied of before granting the order or he or she is satisfied that the organisation has contravened the alternative disclosure arrangement and the organisation has been given an opportunity, as prescribed, to show cause why the order should not be revoked.
225. New subsection 293H(7) makes clear that subsection 604(1) of the FW Act does not apply in relation to a decision of the Commissioner under new subsection 293H(3).
226. New subsection 293H(8) provides that new section 293H applies in relation to a branch of an organisation as if references to an organisation were references to a branch of an organisation.
227. New subsection 293H(9) provides that an order under subsection 293H(3) is not a legislative instrument. This new subsection has been included to assist readers by making clear that such an order made by the Commissioner in writing is not a legislative instrument within the meaning of section 5 of the LI Act.
228. Item 245 provides for transitional rules in relation to what must be considered by the Commissioner in satisfying himself or herself of the matters in new subsection 293H(3).

Division 3 – Officer and related party disclosure statements

Section 293J – Officer and related party disclosure statements

229. New subsections 293J(1) and 293J(2) require an organisation, or branch of an organisation, to prepare an officer and related party disclosure statement in relation to the financial year. The officer and related party disclosure statement must be prepared as soon as practicable after the end of the financial year and be provided to members and lodged with the Commissioner within 6 months from the end of the financial year.
230. New subsections 293J(1) and 293J(2) are civil penalty provisions.
231. New subsection 293J(3) provides that an officer and related party disclosure statement must include the details of the disclosures provided under sections 293BC, 293G and 293H for the financial year.

Division 4 – Training in relation to financial duties

Section 293K – Officers to undertake approved training

232. New section 293K provides that unless exempted under section 293M, each officer of an organisation or a branch of an organisation whose duties relate to the financial

management of the organisation or the branch as the case may be must undertake training:

- approved by the Commissioner under new section 293L; and
- that covers each of the officer's financial duties.

233. New subsection 293K(2) provides that the organisation or branch must ensure the person completes the course within 6 months after the person begins to hold the office.

234. This subsection is a civil penalty provision.

Section 293L – Approved training

235. New section 293L provides that the Commissioner may approve training if he or she is satisfied that the training covers one or more of the duties of officers of organisations and branches of organisations that relate to the financial management of organisations and branches of organisations.

236. It is intended that under new subsection 293L(1), the Commissioner will be able to approve a range of training of different formats, styles and lengths in recognition of the different significance that financial management duties have to the roles of different officials as well as the backgrounds, experience and qualifications of those officials. Similarly, it is intended that the Commissioner will be able to approve general training that covers a range of financial management duties as well as more specific training that is tailored to a particular area or areas of financial management.

237. New subsection 293L(1) will require the Commissioner to be satisfied that the training being approved will be provided by an organisation or peak council (as usually defined within the RO Act) or a body or person that the Commissioner is satisfied has appropriate skills and expertise to provide the training, for example, a peak body for a particular industry or a recognised education provider.

238. New subsection 293L(2) provides that if the approval under new subsection 293L(1) is made in writing, the approval is not a legislative instrument. This new subsection has been included to assist readers by making clear that an approval of training by the Commissioner that is made in writing is not a legislative instrument within the meaning of section 5 of the LI Act.

239. Item 244 provides for transitional rules in relation to approved training.

Section 293M – Commissioner may grant exemption from financial training

240. New section 293M provides that the Commissioner may grant an exemption to an officer from the requirement to undertake financial training under new section 293K.

241. 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.

242. 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.

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

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

Item 167 – Paragraph 297(1)(a)

Item 172 – Paragraph 298(1)(a)

Item 177 – Paragraph 299(1)(a)

Item 182 – Paragraph 300(1)(a)

Item 187- Paragraph 301(1)(a)

Item 192 – Paragraph 302(1)(a)

Item 197 – Paragraph 303(1)(a)

245. These items omit references to the FW Act from sections 297 – 303 of the RO Act. These provisions relate to general duties of officers and employees of organisations and their branches in relation to orders and directions of the Federal Court and the FWC under the FW Act and the RO Act.

246. The effect of these amendments is that certain conduct in relation to orders or directions of the Federal Court or the FWC under the FW Act will no longer be punishable by a civil penalty under the FW Act.

247. Despite these amendments, the FW Act continues to provide for penalties in relation to conduct that contravenes an order of the FWC (see section 675 of the FW Act). The Federal Court, by virtue of the operation of section 24 of the *Judiciary Act 1903* (Cth) and section 31 of the *Federal Court of Australia Act 1976* (Cth) will continue to be able to punish or discipline an individual or organisation where the disobedience the subject of the civil contempt (i.e. disobedience of the judgments, orders or other processes of the court) is wilful and not casual, accidental or unintentional.

Item 200 – Subsection 305(2)

248. Item 200 repeals and replaces subsection 305(2), which provides a list of civil penalty provisions in the RO Act. New subsection 305(2), defines a civil penalty provision for the purposes of the RO Act.

249. The insertion of new subsection 305(2) is a consequential change that is necessary due to the new approach to civil penalty provisions taken throughout the RO Act.

Item 201 – At the end of section 305

250. Item 201 inserts a new subsection 305(4), which is an avoidance of doubt provision that provides that the Federal Court must apply the rules of evidence and procedure for civil matters when hearing and determining an application for an order under Part 2 of Chapter 10 of the RO Act.

Item 202 – Subsection 306(1)

Item 203 – Paragraph 306(1)(a)

Item 204 – Paragraph 306(1)(b)

251. These items make amendments to section 306 that are consequential to the new approach to civil penalty provisions taken throughout the RO Act.

Item 205 – Subsection 306(1A)

252. This item is necessary as a consequence of the amendments to section 337AA made by item 230 of the Bill.

Item 206– Subsection 306(2)

Item 207 – Subsection 306(2)

Item 208 – At the end of section 306

253. These items make technical amendments that reflect the effect of subsection 305(3), which provides that contraventions of a civil penalty provision by a branch or reporting unit of an organisation is taken to be a contravention by the organisation.
254. Item 208 inserts a new subsection that makes clear that a person is not liable for more than one pecuniary penalty in relation to the same conduct.

Item 209 – After section 307

Section 307A – Disqualification orders

255. Item 209 inserts new section 307A, which allows the Federal Court to make an order disqualifying a person who has contravened a civil penalty provision from holding office in an organisation for a period if the court is satisfied the disqualification is justified.
256. The powers of the Federal Court under new section 307A have been broadly modelled on those available to it under section 206C of the Corporations Act, including the factors that it may be taken into account when determining if a disqualification is justified.
257. It is not anticipated that this power would be exercised in relation to relatively minor breaches of the RO Act civil penalty provisions.

Item 210 – Section 311

258. This item makes a technical amendment to insert a missing reference to an ‘organisation’ in section 311.

Item 211 – Section 317

259. This item amends the simplified outline of Chapter 11 of the RO Act to include information about new Part 3B, which deals with disclosure of information acquired by the Commissioner and the GM.

Item 212 – After Part 3A of Chapter 11

260. Item 212 inserts a new Part 3B of Chapter 11, which deals with information sharing.

Part 3B – Information sharing

Section 329G – When information may be disclosed

261. New section 329G sets out when specified information may be disclosed. This section is broadly modelled on the Fair Work Ombudsman’s power under section 718 of the FW Act and will replace the existing section 335C (see item 223).
262. New section 329G deals with the circumstances in which information that has been acquired by persons in the course of performing their work within the Commission or the FWC. This will include information acquired by the Commissioner or member of staff assisting the Commission and the GM or member of staff of the FWC.
263. New subsection 329G(2) provides that the Commissioner or the GM may disclose or authorise the disclosure of information to which new subsection 329G(1) applies if the he or she reasonably believes that it is:
- necessary or appropriate to do so in the course of performing functions, or exercising powers, under the RO Act or FW Act; or
 - that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.
264. New section 329G is intended to operate in conjunction with relevant provisions in the *Privacy Act 1988* and the PS Act and *Public Service Regulations 1999* (including the APS Code of Conduct).

Item 213 – Before section 330

Item 214 – Before section 331

265. Items 213 and 214 create new ‘Division 1 – Inquiries’ and ‘Division 2 – Investigations’ in Part 4 of Chapter 11 of the RO Act.

Item 215 – Section 335 (heading)

266. This item is a consequential amendment to the heading of section 335 to reflect amendments to the investigation powers of the Commissioner in items 216 – 221.

Item 216 – Subsection 335(1)

267. This item amends section 335 to ensure that the Commissioner can require information from a person the Commissioner believes on reasonable grounds can assist with an investigation.
268. The amendments to section 335 more closely align the investigation and information gathering powers of the Commissioner with those of ASIC under the ASIC Act.
269. While the Commissioner has broad powers to require information under section 335, the powers must be exercised in accordance with the limits on Commissioner's power to commence an investigation in section 331 of the RO Act.

Item 217 – Subsection 335(2)

Item 218 – Paragraph 335(2)(a)

Item 219 – Paragraph 335(2)(b)

270. These items make technical amendments to subsection 335(2) to clarify the operation of the subsection.

Item 220 – At the end of subsection 335(2)

271. Item 220 inserts new paragraph 335(2)(d), which allows the Commissioner for the purpose of an investigation to issue a written notice to a person requiring the person to give the Commissioner such reasonable assistance as is specified in the notice. This is in addition to the existing powers to require a person by written notice to provide information under subsection 335(2).
272. A note to subsection 335(2) refers to section 337, which makes it an offence to fail to comply with a requirement in a notice issued by the Commissioner.

Item 221 – Subsection 335(3)

273. Item 221 amends subsection 335(3) to specify a range of content that must be included in a notice issued by the Commissioner under section 335.
274. Paragraph 335(3)(c) provides that the notice must explain the effect of new section 337AD, which relates to claims against self-incrimination (see item 230).
275. Paragraph 335(3)(d) provides that the notice must indicate whether the person will be required to answer questions on oath or affirmation (see item 223). A notice issued by the Commissioner can require a person to appear to answer questions or provide information not on oath or affirmation. However, where an oath or affirmation will be required this must be specified.
276. If a person will be required to answer questions on oath or affirmation, the notice must also set out the effect of new section 335F (see item 223), which relates to the attendance of the lawyer of a person subject to a notice issued by the Commissioner. Broadly, the attendee's lawyer may always attend with the attendee. The lawyer will be able to address the investigator and question the attendee, provided that in doing so the examination is not obstructed.

Item 222 – Section 335A

277. Item 222 repeals section 335A, which is a consequential change as a result of the expanded scope for issuing notices under section 335.

Item 223 – Section 335C

278. Item 223 repeals existing section 335C and inserts new Divisions 3 and 4, which provide for questioning on oath or affirmation and powers in relation to documents. Existing section 335C is no longer necessary as the power to share information is dealt with generally in new section 329G (see item 212).
279. The amendments in item 223 have been broadly modelled on similar provisions in Part 3 of the ASIC Act. Similar offences to those in Division 7 of Part 3 of the ASIC Act have also been created in relation to investigations of the Commissioner (see items 226 – 230).

*Division 3 – Questioning on oath or affirmation**Section 335C – When this division applies*

280. New section 335C makes clear that new Division 3 only applies if a person has been issued a notice by the Commissioner under section 331 requiring the person to attend to answer questions on oath or affirmation.
281. Division 3 does not apply to a person that is given written notice requiring him or her to attend to provide information to the Commissioner other than on oath or affirmation.
282. Functions and powers of the Commissioner under this Division can only be delegated to a member of staff assisting the Commissioner (see item 237).

Section 335D – Requirements made of attendee

283. New section 335D sets out the requirements that may be made of the attendee. The section also gives the investigator the power to administer an oath or affirmation to the attendee that the statements that the attendee will make will be true.
284. By virtue of paragraph 335(2)(c), the person may only be required to attend before the Commissioner to answer questions that relate to matters relevant to the investigation.
285. The note to subsection 335D(3) makes clear that failure to comply with a requirement made under this subsection is an offence.

Section 335E – Questioning to take place in private

286. New section 335E provides that the questioning in accordance with the Division must take place in private and that the investigator may give directions about who may attend. The provisions also makes clear that only the investigator, the Commissioner or a member of staff assisting the Commissioner or person approved by the investigator, the attendee and the attendee's lawyer is entitled to be present.

Section 335F – Attendee's lawyer

287. As detailed above, an attendee's lawyer is entitled to be present at the questioning by an investigator. New section 335F provides that the lawyer will be able to address the investigator and question the attendee, provided that in doing so the examination is not obstructed.
288. If the examination is being obstructed by the attendee's lawyer, the investigator may require the lawyer to stop addressing the investigator or questioning the attendee.
289. Failure to comply with a requirement under the subsection is an offence.

Section 335G – Record of statements

Section 335H – Copies given subject to conditions

290. New section 335G makes clear that a record may be made of the statements made during questioning and must be made at the request of the attendee. The investigator must require the attendee to read and sign the record.
291. If requested, the investigator must give a copy of the record to the attendee free of charge subject to any conditions imposed by the investigator.
292. A note to this provision makes clear that failure to comply with a requirement under paragraph 335G(2)(a) is an offence.
293. New section 335H provides that the conditions imposed by the investigator on a copy of a record provided under 335G(2) also applies to any person that has possession, custody or control of the record or any copy of the record.
294. Failure to comply with this section is an offence.

Division 4 – Powers in relation to documents

Section 335K – Application for warrant to seize documents

295. New section 335K permits the Commissioner to apply to a magistrate for the issue of a warrant to search premises where the Commissioner has reasonable grounds to suspect there are documents whose production could be required under section 335.
296. If appropriate, the magistrate can require further information in connection with the application. Only where there are reasonable grounds to suspect that there are, or will soon to be, on particular premises, documents that have not been produced as required, may an application be granted to search those premises for the documents.
297. The power to apply for the issue of a warrant is a non-delegable function of the Commissioner (see item 236).

Section 335L – Grant of warrant

298. A magistrate will be empowered to issue a warrant if satisfied of the matters required under section 335L. The warrant may authorise a member of the Australian Federal Police and any other named person, to use such force as is necessary and reasonable:

- to enter the premises;
- to search the premises;
- to break open and search anything on the premises; and
- to take possession of the documents.

299. The information to be laid before the magistrate will also state which of the grounds set out in the information and particulars of any other grounds that are relied upon to justify the issue of the warrant.
300. These features are closely based on relevant provisions of the ASIC Act and are designed to provide safeguards in the issue of warrants.

Section 335M – Execution of warrant

301. New section 335M sets out a range of rights and obligations in relation to the execution of a warrant under new section 335L.
302. Importantly, if the occupier of the premises is present the member of the Australian Federal Police must present the occupier with a copy of the warrant and permit the occupier to be present during the search.
303. Further, if documents are seized under the warrant the member of the Australian Federal Police or the person assisting the member must provide a receipt for the documents.

Section 335N – Powers in relation to documents produced or seized

304. New section 335N sets out certain powers in relation to documents produced or seized either under section 335, under a warrant issued under new section 335L or under new subsection 335N(8).
305. Under new section 335N, relevant documents may be:
- inspected, copied or have extracts taken from them;
 - used for the purposes of a proceeding (defined in section 6); and
 - retained for as long as necessary for the purposes set out in new paragraphs 335N(5)(a) – (d).
306. Liens cannot be claimed against a person retaining any of the documents, but liens are not otherwise prejudiced.
307. Inspections of retained documents will be permitted and if appropriate, retained documents may be delivered to the Commissioner or a person authorised by the Commissioner to receive them.
308. In certain circumstances, the person who has taken possession of a document can require a person who produced the document or took part in its compilation to make such further explanation as can be made.
309. Failure to comply with this subsection is an offence.

Section 335P – Powers if documents not produced

310. New section 335P provides that if a person fails to produce documents required under section 335, a person may be required to explain where the documents may be found and the whereabouts of the person who last had possession of the documents.

311. Failure to comply with this section is an offence.

Section 335Q – Power to require person to identify property of an organisation

312. New section 335Q provides that if documents are not produced, a person may be required to identify property of the relevant organisation and explain how that organisation has kept account of that property.

313. Failure to comply with this section is an offence.

Item 224– Section 336 (heading)

314. This item amends the heading of section 336 to create Division 5, which deals with action following investigations. It also changes the title of section 336.

Item 225– Before section 337

315. Item 225 inserts new Division 6 in Part 4 of Chapter 11. Division 6 deals with offences.

Item 226 – Paragraph 337(1)(a)

Item 227 – At the end of subsection 337(1) (before the penalty)

316. Items 226 and 227 amend subsection 337(1) to list all the offences in relation to an investigation by the Commissioner. The amendments are consequential to the amended investigation powers in items 215 - 223 above.

Item 228 – Subsection 337(1) (penalty)

317. Item 228 increases the maximum penalty available for a contravention of subsection 337(1) to 100 penalty units or imprisonment for 2 years, or both.

Item 229 – Subsections 337(2) to (5)

318. This item repeals subsections 337(2) - (5) and inserts new subsections that set out a number of defences for offences in section 337.

319. A note to the new subsections makes clear that in accordance with the *Criminal Code*, a defendant bears the evidential burden in relation to proving the matters in new subsections 337(2) - (4).

Item 230 – Section 337AA

320. Item 230 repeals section 337AA (which dealt with offences in relation to investigations by the GM) and replaces it with a series of provisions detailing new offences in relation to the conduct of investigations by the Commissioner.

Section 337AA – Strict liability offences

- 321. New section 337AA provides for a number of strict liability offences, which are generally ancillary to the investigative powers of the Commissioner. The penalty for committing an offence under this section is 60 penalty units.
- 322. New subsection 337AA(3) provides that a person will not commit an offence under the section if he or she has a reasonable excuse.
- 323. A note to this subsection provides that in accordance with the *Criminal Code* the defendant bears the evidential burden in proving a reasonable excuse.

Section 337AB – Obstructing person acting under this Part

- 324. New subsections 337AB(1) and 337AB(2) provide that a person commits an offence if he or she hinders or obstructs a person exercising a power under the Part or executing a warrant under new section 335L.
- 325. The penalty for committing an offence under this provision is 100 penalty units or 2 years imprisonment, or both.
- 326. New subsection 337AB(2) provides that a person will not commit an offence under the section if he or she has a reasonable excuse.
- 327. A note to this subsection provides that in accordance with the *Criminal Code* the defendant bears the evidential burden in proving a reasonable excuse.
- 328. New subsection 337AB(3) makes it an offence for a person to fail to provide reasonable facilities and assistance to a person exercising powers under a warrant issued under new section 335L.
- 329. The penalty for committing an offence under this provision is 25 penalty units or imprisonment for 6 months, or both.

Section 337AC – Concealing documents relevant to investigation

- 330. New section 337AC provides that where the Commissioner (or delegate) is investigating or is about to investigate a matter, it will be an offence to conceal, destroy, mutilate or alter a document relating to the matter, or to take or send the document out of the particular State or Territory or out of Australia unless it was not intended to defeat the purposes of the investigation or to delay or obstruct an investigation.
- 331. In light of the definition of ‘proceeding’ (see item 3), the limitation on use of certain evidence in a criminal proceeding or a proceeding for the imposition of a penalty will apply broadly. Further, Courts have given the term ‘penalty’ a wide meaning, which adds to the scope of the protection in subsection 337AD(3) (see for example *Chief Executive, Queensland Health v Jattan* [2010] QCA 359).
- 332. The penalty for committing an offence under this provision is 200 penalty units or imprisonment for 5 years, or both.

333. A note to this subsection provides that in accordance with the *Criminal Code* the defendant bears the evidential burden in proving that his or her actions were not intended to defeat the purposes of the investigation or to delay or obstruct an investigation.

Section 337AD – Self-incrimination

334. New section 337AD provides that if before giving information, producing a document or signing a record, a person claims that the information, document or record might tend to incriminate him or her or make him or her liable to a penalty, neither the information or the fact the person produced the document or signed the record is admissible in evidence against the person in a criminal proceeding or proceeding for the imposition of a penalty, other than a proceeding in respect of the falsity of the information, document or record.

Section 337AE – Legal professional privilege

335. New section 337AE provides that a lawyer will be permitted to withhold a privileged communication made to that lawyer in that capacity unless the person involved agrees to the furnishing of that information. Where a privileged communication is withheld, the lawyer will be required to provide details of the identity of the person to whom the communication was made and the identity of the document containing the communication.
336. The penalty for committing an offence under this provision is 10 penalty units or 3 months imprisonment, or both.
337. This provision places additional statutory obligations on lawyers claiming privilege in the context of an investigation by the Commissioner (or delegate). It is not intended to otherwise abrogate common law principles of legal professional privilege.

Division 7 – Evidentiary use of certain material

Section 337AF – Statements made on oath or affirmation during an investigation – proceedings against attendee

338. New section 337AF sets out certain rules in relation to the admissibility in evidence of statements made by a person under oath or affirmation in proceedings against the person. A statement by a person is admissible unless:
- it is subject to a claim against self-incrimination under new subsection 337AD(3);
 - the statement is not relevant to the proceedings;
 - the statement is qualified or explained by another statement made by the person on oath or affirmation; or
 - the statement would disclose matters in respect of which the person could claim legal professional privilege in the proceeding.
339. New subsection 337AF(3) makes clear that if a record of statements is signed in accordance with new subsection 335G(2) the record will be taken to be evidence of the

statements. However, nothing in the Part limits the admissibility of other evidence of statements made during the questioning.

Section 337AG – Statements made on oath or affirmation during an investigation – other proceedings

340. New section 337AG provides that if direct evidence by a person not at a proceeding would be admissible, a statement made on oath or affirmation that establishes the matter is admissible in the matter on the grounds set out in new paragraphs 337AG(a) and (b).

Section 337AH – Weight of evidence admitted under section 337AG

341. New section 337AH sets out special rules in relation to the weight to be given to statements as evidence that are admitted under section 337AG in a proceeding.
342. In deciding the weight that must be given to a matter regard must be had to:
- how long after the matters to which it relates the statement was made;
 - any reason the person may have for concealing or misrepresenting a matter; or
 - any other circumstances that may indicate how accurate the statement is.
343. In cases where the person is not called as a witness:
- evidence that would have been admissible in relation to the credibility of the person is admissible; and
 - evidence in relation to the consistency of the relevant statements is also admissible.
344. Evidence of a matter is not admissible if, had the person been present to deny the matter, evidence of the matter would not have been admissible in cross examination.

Section 337AJ – Objection to admission of statements made on oath or affirmation during an investigation

345. Under new section 337AJ a party that intends to introduce statements made on oath or affirmation as evidence in the proceeding must notify the other party to the proceedings in writing.
346. The other party has an opportunity to respond in writing stating whether the other party objects to the introduction of the statements as evidence.
347. The adducing party must notify the court or tribunal of their intention to introduce statements as evidence and of any objections raised by the other party to the proceedings. The court or tribunal may determine the objections prior to or during the proceedings. The other party is not entitled to raise further objections to statements being introduced on evidence unless their object relates to an earlier objection or if the court or tribunal gives the other party leave to raise further objections.

Section 337AK – Copies of, or extracts from, certain documents

348. New section 337AK provides that in certain circumstances, a copy or extract from a document is admissible in evidence as if it was the original document or was the relevant part of the original document.

Section 337AL – Material otherwise admissible

349. New section 337AL provides that nothing in new Division 7 renders evidence inadmissible in a proceeding in circumstances where it would have been admissible in that proceeding if Division 7 had not been enacted.

Division 8 – Miscellaneous

Section 337AM – Evidence of Authority

350. New section 337AM makes clear that a person may request evidence of an investigator's authority to make a requirement under Part 4 of Chapter 11. Upon request the investigator must produce a written authorisation issued by the Commissioner and any other evidence to make the requirement under the Part as the Commissioner determines.

Section 337AN – Application of the Evidence Act

351. New section 337AN sets out the application of the *Evidence Act 1995* to questioning on oath or affirmation.

Section 337AP – Allowances and expenses

352. New section 337AP provides for certain reimbursements to be paid to people subject to a requirement made under section 335 or incurred in complying with a requirement made under the Part.

Section 337AQ – Compliance with Part

353. New section 337AQ broadly provides that a person is neither liable to a proceeding, nor subject to a liability, merely because the person has complied with a requirement made under Part 4 of Chapter 11.

Item 232 – Section 337G

354. This item amends section 337G to provide that the FWC may direct that parties be joined or struck out as parties to proceedings before the FWC under the RO Act. This is a consequential amendment required to reflect that a proceeding can also be brought before other courts or tribunals.

Item 233– After paragraph 343B(2)(h)

355. This item inserts subsection 329G(2) as a power that the Commissioner may delegate. This item is a consequential amendment to reflect new Part 3B of Chapter 11 in item 212.

Item 234 – Paragraph 343B(2)(k)

356. This item removes a reference to section 335A in paragraph 343B(2)(k) as a power that the Commissioner may delegate. This item is a consequential amendment required as a result of item 224 which repeals section 335A.

Item 235 – Paragraph 343B(2)(ka)

357. This item repeals paragraph 343B(2)(ka) which provided for the delegation of the Commissioner power under subsection 335C(2). This is a consequential amendment required as a result of item 225 which repeals section 335C.

Item 236 – Before paragraph 343B(2)(m)

358. This item inserts new paragraph 343B(2)(l) which provides that the Commissioner may delegate his power under section 335K. This is a consequential amendment required as a result of item 223 which inserts new section 335K.

Item 237 – After subsection 343B(3)

359. New subsection 343B(4) provides that the Commissioner's functions and powers to question an attendee on oath and affirmation under Division 3 of Part 3B can only be delegated to a member of staff assisting the Commissioner.

Part 2 – Transitional provisions

Item 242 – Definitions

360. Item 242 provides for definitions for the purpose of this Part.

Item 243 – Application of Division 3A of Part 2 of Chapter 5 in relation to the 2013-14 financial year

361. This item provides that Division 3A of Part 2 of Chapter 5 has effect in relation to the financial year ending 30 June 2014 as if it had not been repealed by this Schedule.

Item 244– Approved training

362. This item relates to training approvals issued prior to the commencement time.

363. A person who has undertaken training approved by the GM under section 154C of the RO Act, immediately before the commencement time, is taken for the purpose of section 293L to have undertaken that training as approved by the Commissioner. In addition, training approvals issued prior to the commencement time by the GM continue to have effect as if they had been issued by the Commissioner.

Item 245– Alternative disclosure arrangements

364. This item provides that in satisfying himself or herself as mentioned in subsection 293H(3) of the RO Act during the period of 12 months immediately after the commencement time, the Commissioner must take into account exemptions granted to the organisation under section 148D of the RO Act and the statement, particulars and evidence provided in relation to any such exemption as required by subsection 148D(2) of the RO Act.

Item 246 – Minister may make rules about transitional matters

365. Item 246 provides that the Minister may make rules about transitional matters.

Statement of Compatibility with Human Rights

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

Fair Work (Registered Organisations) Amendment Bill 2014

This Bill is 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 the Fair Work (Registered Organisations) Amendment Bill 2014 (the Bill)

The Bill will amend the RO Act to ensure better governance of registered organisations.

The Bill will:

- establish an independent watchdog, the Registered Organisations Commission (ROC), to monitor and regulate registered organisations, and educate their members with enhanced investigation and information gathering powers;
- amend the requirements on officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;
- strengthen existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain rule obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

The Bill is in the same terms as two previous Bills:

- the Fair Work (Registered Organisations) Amendment Bill 2014 that was negated by the Senate on 2 March 2015 (the 2014 Bill)
- the Fair Work (Registered Organisations) Amendment Bill 2014 [No 2] (the 2015 Bill) that was negated by the Senate on 17 August 2015.

The three bills are also in largely the same terms as the Fair Work (Registered Organisations) Amendment Bill 2013 that was negated by the Senate on 14 May 2014. The 2013 and 2014 Bills were scrutinised by the Parliamentary Joint Committee on Human Rights (the Joint Committee).³

Human rights implications

³ The Fair Work (Registered Organisations) Amendment Bill 2013 was reported on by the Parliamentary Joint Committee on Human Rights in its First Report of the 44th Parliament. A response to information sought by the Committee in relation to the 2013 Bill was provided by Minister Abetz on 5 March 2014. The Joint Committee considered Minister Abetz's response in its Fifth Report of the 44th Parliament. The 2014 Bill was also reported on by the Parliamentary Joint Committee on Human Rights in its Ninth Report of the 44th Parliament.

The Bill engages with 3 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
 - in the International Labour Organisation (ILO) *Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87)* (Convention 87); and
- The right to the presumption of innocence and the minimum guarantees contained in Article 14 of the ICCPR; 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 Bill will make several amendments to the RO Act which engage the right to freedom of association:

- Increasing maximum penalties for breaches of civil penalty provisions across the RO Act;
- Amending financial disclosure requirements on officers and organisations and their branches;
- Placing restrictions on officers from taking part in decision making in limited circumstances;
- Increasing the circumstances in which an officer may be disqualified from holding office in an organisation;
- Increasing the information gathering powers of the independent regulator, the ROC, including the introduction of new offences in relation to non-compliance and obstruction of requests made by the ROC under its information gathering power; and
- Requiring organisations to ensure that officers undertake approved financial management training.

These provisions of the Bill limit the right to freedom of association. However, the limitations on the right are permissible limitations as they pursue a legitimate objective, are prescribed by law and are reasonable, necessary and proportionate.

Legitimate objective

As noted in the outline above, the object of the amendments is to ensure better governance of registered organisations. This object arises out of Government and community concerns that in light of recent investigations and prosecutions of officials of registered organisations relating to misuse of position and member funds, the current regulation of registered organisations is not satisfactory in preventing fraud, financial mismanagement and adequate democratic governance in the interests of members.⁴

As the Joint Committee has previously noted:

The ILO Committee on Freedom of Association has considered the question of the permissibility of regulating the operations of unions and external scrutiny of their finances. While expressing concern about the possibility of government interference in

⁴ See *Report of the Delegate to the General Manager of Fair Work Australia Investigation into the National Office of the Health Services Union under section 331 of the Fair Work (Registered Organisations) Act 2009*, Terry Nassios, 28 March 2012 and *Report of the Delegate to the Acting General Manager of Fair Work Australia Investigation into the Victoria No. 1 Branch of the Health Services Union under section 331 of the Fair Work (Registered Organisations) Act 2009*, Terry Nassios, 23 December 2012.

*the operations of trade unions, it has also recognised the legitimacy of external scrutiny in order to prevent or detect fraud or embezzlement.*⁵

Following the Joint Committee's comments above, it is important to note that the ILO Committee on Freedom of Association has made the following observations on the rights of organisations to organise their administration:

- “Legislative provisions which regulate in detail the internal functioning of workers’ and employers’ organizations pose a serious risk of interference by the public authorities. Where such provisions are deemed necessary by the public authorities, they should simply establish an overall framework in which the greatest possible autonomy is left to the organizations in their functioning and administration. *Restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations.* Furthermore, *there should be a procedure for appeal to an impartial and independent judicial body* so as to avoid any risk of excessive or arbitrary interference in the free functioning of organizations”.⁶ (emphasis added)
- “Measures of supervision over the administration of trade unions may be useful if they are employed only *to prevent abuses and to protect the members of the trade union themselves against mismanagement of their funds.* However, it would seem that measures of this kind may, in certain cases, entail a danger of interference by the public authorities in the administration of trade unions and that this interference may be of such a nature as to restrict the rights of organizations or impede the lawful exercise thereof, contrary to Article 3 of Convention No. 87. It may be considered, however, to some extent, that a *guarantee exists against such interference where the official appointed to exercise supervision enjoys some degree of independence of the administrative authorities and where that official is subject to the control of the judicial authorities*”.⁷ (emphasis added)

On the basis of these observations, the amendments in the Bill which limit the right to freedom of association pursue a legitimate object because they:

- have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations; and
- seek to prevent abuses and protect the members of trade unions and employer associations against mismanagement of their funds.

The amendments in the Bill are also necessary and proportionate to achieve the objective of increased financial transparency and improved democratic governance of registered organisations. The Bill makes appropriate reductions in the scope of disclosure obligations on organisations and officers to reflect the *Corporations Act 2001* (Corporations Act) and to respond to concerns with the disclosure regime introduced by the *Fair Work (Registered*

⁵ Parliamentary Joint Committee on Human Rights 2012, *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012*, Commonwealth Parliament, Canberra at 1.6 accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/12/013/c18 (footnotes omitted).

⁶ ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* Geneva, International Labour Office (International Labour Office, Geneva, Fifth (revised) edition, 2006), para 369.

⁷ Ibid, para 489.

Organisations) Amendment Act 2012 identified by the Senate Standing Committee on Education and Employment (discussed below). These amendments also directly address the concerns raised by the Joint Committee as to whether the breadth of the proposed disclosure regime in the previous Bills is necessary and proportionate to the objective of achieving better governance of registered organisations.⁸

Registration under the RO Act is not mandatory

The system of registration of employer and employee associations in the Federal industrial relations system is not mandatory and associations freely choose to seek registration with the rights and obligations which registration confers. While the RO Act does impose limitations on the right of organisations to organise themselves as they see fit, consequent upon registration an organisation is entitled to significant rights and privileges under the *Fair Work Act 2009* (FW Act) including:

- entitlement to initiate proceedings or appear before the Fair Work Commission (FWC) on behalf of a member;⁹ and
- exercising rights of entry to workplaces under Part 3-4 of the FW Act.

Companies' regulation is an appropriate model for achieving the legitimate objectives of the Bill

In seeking appropriate and reasonable measures to achieve the objectives of the Bill, many of the measures in the Bill have been drawn from the regulation of companies.

The measures in the Bill, which increase the obligations on officers, are modelled on the established mechanisms of corporate governance used for the regulation of companies in Australia. These regulations are intended to prevent breaches of the fiduciary duties owed by company directors. In particular, disclosure of material personal interests and restrictions on voting at meetings protect against the risk that a related party may influence the decision-making of directors to the detriment of the interests of members of the company as a whole when a company is considering whether to enter into a transaction with a related party.

Judicial consideration of the role of officers of industrial organisations has made clear that officers of industrial organisations hold a position of trust which involves the maintenance and advancement of interests of their members and that there are strong fiduciary elements involved in the discharge of the duties of such office.¹⁰ The amendments in the Bill with regards to the material personal interests of officers seek only to prevent breaches of the obligations on officers at common law to act in the interests of members.

Similarly, the introduction of criminal offences regarding good faith, use of position and use of information for officers and employees are aimed at reducing reckless and dishonest

⁸ Parliamentary Joint Committee on Human Rights 2014, Fifth Report of the 44th Parliament: Bills introduced 12 – 20 March 2014 Legislative Instruments received 1– 7 March 2014, Commonwealth Parliament, Canberra, p. 25. See also Letter from the Minister for Employment, Senator the Hon. Eric Abetz to Senator Dean Smith, Chair of the Parliamentary Committee on Human Rights, dated 5 March 2014 and Parliamentary Joint Committee on Human Rights 2014, Ninth Report of the 44th Parliament: Bills introduced 23 – 26 June 2014; Legislative Instruments received 7 – 20 June 2014, Commonwealth Parliament, Canberra, p. 24 at 1.108.

⁹ Fair Work Act 2009 ss 540(2), 596(4).

¹⁰ *Diane Margaret Robertson v the State Public Services Federation* [1993] FCA 336 at [17] per French J

conduct which would prejudice the interests of members. This provision mirrors the offences under the Corporations Act.¹¹ The amendments in the Bill requiring the disclosure of the identity and remuneration of officers is also modelled on similar requirements under the Corporations Act and builds on the existing obligations of officers and organisations.¹²

The application of the powers of the ROC is subject to judicial, parliamentary and administrative oversight

Finally, it is important to highlight that the Bill ensures adequate oversight of the exercise of the functions and powers of the ROC and the Commissioner:

- Decisions of the Commissioner (including a delegate of the Commissioner) will be reviewable by appeal to the FWC under subsection 604(1) of the FW Act;
- The Commonwealth Ombudsman will have oversight of the actions of the Commission and the Commissioner similar to its oversight of the actions of the Australian Securities and Investments Commission (ASIC) under its corresponding functions and powers; and
- The ROC is required to report annually to the Commonwealth Parliament.

Increasing civil penalties – human rights implications

In addition to the introduction of new criminal offence provisions, as noted above, the Bill increases the maximum penalty for a range of civil penalties across the RO Act and also introduces some new civil penalties. The Government notes that, given that civil penalty provisions 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.¹³ The Government has relied on the Joint Committee’s guidance in *Guidance Note 2* as to the relevant criteria for determining whether the civil penalty provisions amended or introduced by the Bill are ‘criminal’ for the purposes of human rights law.

The Bill will amend the penalties that may be imposed by the Federal Court for breaches of the civil penalty provisions of the RO Act to provide for three tiers of maximum penalties depending on the relative seriousness of the conduct the subject of the penalty provision:

- Tier one - 100 penalty units for an individual (\$18,000) or 500 for a body corporate (\$90,000) or for where a contravention is deemed a ‘serious’ contravention, 1200 penalty units for an individual (\$216,000) or 6000 for body corporate (\$1,080,000). This penalty applies to breaches of officer’s civil financial management duties under sections 285–288, the new obligations introduced by the Bill to disclose officer’s material personal interests and remuneration, payments made by an organisation or branch, general duties in relation to orders and directions of the FWC and Federal Court and restrictions on officers voting on certain matters. The Bill

¹¹ Corporations Act 2001 s 184.

¹² Corporations Act s 300A(1)(c) and Corporations Regulations 2001 r 2M.3.03, see also RO Act ss 148A – 148E.

¹³ Parliamentary Joint Committee on Human Rights 2012, *Guidance Note 2: Offence provisions, civil penalties and human rights*, Commonwealth Parliament, Canberra at p. 3 accessed at http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf.

amends section 6 of the RO Act to provide that a ‘serious contravention’ in relation to a contravention of a civil penalty provision by an organisation, a branch of an organisation or a person who is, or was, an officer or employee of an organisation or a branch of an organisation, means a contravention that:

- materially prejudices the interests of the organisation or branch, or the members of the organisation or branch; or
- materially prejudices the ability of the organisation or branch to pay creditors; or
- is serious.
- Tier two – 100 penalty units for an individual (\$18,000) or 500 for a body corporate (\$90,000). Broadly, this penalty applies to breaches of provisions requiring the lodgement of financial or other information with the ROC and the making of declarations.
- Tier three – 60 penalty units for an individual (\$10,800) or 300 penalty units for body corporate (\$54,000). Broadly, this penalty applies to breaches of the least serious civil penalty provisions including lodging certain documents with the FWC and other administrative tasks such as removing non-financial members from the organisations register.

Following *Guidance Note 2*, the Joint Committee will have regard to three criteria for assessing whether a penalty is criminal:

- The classification of the penalty in domestic law;
- The nature of the penalty; and
- The severity of the penalty.¹⁴

Classification of the penalty

The penalties under the Bill’s amendments are described as civil penalties and will be enforceable in the Federal Court subject to the rules of evidence and procedure applicable to civil proceedings in that court. In this way, the classification of the penalty favours classification of the penalty as civil in international law.

Nature of the penalty

Applying the criteria listed in *Guidance Note 2* with regard to the nature of the penalty, the new and increased penalties contained in the Bill appear to have the characteristics of both civil and criminal penalties. On balance, for the reasons below, the penalties are more likely to be considered civil in nature.

Firstly, many of the increased penalties in the Bill, particularly in the middle tier of penalties are administrative in nature and are intended to reduce non-compliance with obligations, particularly financial obligations, under the RO Act. Secondly, for the highest tier of offences it is relevant to highlight that in examining the nature of civil penalties in Australia, the Australian Law Reform Commission (ALRC) noted that:

¹⁴ Ibid.

*In criminal law, wrongful acts are punished because they violate some kind of collective interest, and will apply even if no individual suffered a direct injury. Civil remedies, on the other hand, apply to conduct that has directly harmed an individual's interest.*¹⁵

The application of higher penalties to provisions directly relating to the financial management of organisations is intended to protect the individual interests of the members of organisations.

Considering the nature of the penalties as a whole it becomes clear that the amendments in the Bill are preventative, disciplinary and regulatory in nature.

Severity of the penalty

The severity of the increased penalties indicates that the penalties are more likely to be considered civil rather than criminal. In support of this conclusion it is relevant to note:

- The maximum penalty is equivalent to that applicable under the Corporations Act and many organisations have command of considerable resources similar to that of many companies;
- The application of the maximum penalty is subject to a threshold test which mirrors the protection in subsection 1317G(1) of the Corporations Act;
- There is no provision under the RO Act for imprisonment for non-payment of a penalty; and
- Any increases in penalties reflect the seriousness of the provisions by reference to the objective of ensuring better financial management of organisations.

Having regard to the criteria set out by the Joint Committee, the civil penalties introduced or amended by the Bill are civil penalties for the purposes of international law. The discussion below of the rights guaranteed by Article 14 of the ICCPR proceeds on this basis.

It is also relevant to note that the Joint Committee has previously considered that amendments in the Bill that narrow existing disclosure requirements are likely to mean that the civil penalty provisions will not be criminal for the purposes of human rights law.¹⁶

Right to the presumption of innocence and other guarantees

Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and tribunals, and that in the determination of any criminal charge against a person, that person is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 14(2) provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law.

¹⁵ ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, para 2.19

¹⁶ Parliamentary Joint Committee on Human Rights 2014, Ninth Report of the 44th Parliament: Bills introduced 23 – 26 June 2014; Legislative Instruments received 7 – 20 June 2014, Commonwealth Parliament, Canberra, p.28 at 1.137.

Article 14(3) set out a range of guarantees that everyone shall be entitled to in the determination of any criminal charge against them. This includes the right not to be compelled to testify against himself or herself or to confess guilt (Article 14(3)(g)).

The Bill contains a number of amendments to insert new offence provisions in the RO Act:

- Offences in relation to good faith, use of position and use of information;
- Offences in relation to attendance before the Commissioner or a delegate (including for questioning on oath or affirmation);
- Offences in relation to production of documents;
- Failure to provide reasonable assistance to the Commissioner;
- Obstruction of a person exercising powers under Part 4 of Chapter 11;
- Concealing documents relevant to an investigation; and
- Refusal to comply with a request made to a lawyer under Part 4 of Chapter 11.

Article 14(2) ICCPR

The Bill will insert new section 337AA which provides that certain offences in relation to the conduct of an investigation are strict liability offences. These offences may limit the presumption of innocence guaranteed in Article 14(2) of the ICCPR. However, if these offences are considered to be limiting the right, the limitation is within the permissible limitations to the right because of the objective of ensuring compliance with the requirements under Part 4 of Chapter 11 which is necessary for the effective functioning of the Commission.

The limitation is also reasonable insofar as each of the offences relates to a person's failure to comply with a requirement made of them relating to the conduct of an investigation (under Part 4 of Chapter 11 of the RO Act as amended). However, each of these offences will not apply insofar as the person has a reasonable excuse, a matter that is peculiarly in the knowledge of the defendant. As such, it is more practical for the accused to prove that they are not in breach of the requirement than for the prosecution to disprove that the person does not have a reasonable excuse.

Also in favour of the limitation being considered permissible is that the offences of strict liability could also be characterised as regulatory in nature and are not punishable by a term of imprisonment.

Article 14(3)(g) ICCPR

Article 14(3)(g) of the ICCPR provides the right to be free from self-incrimination, in that a person may not be compelled to testify against him or herself or to confess guilt. The Bill will insert new subsection 337AD(1) which provides that for the purposes of Part 4, Chapter 11 (as amended) it is not a reasonable excuse for a person to refuse or fail to give information, produce a document or sign a record in accordance with a requirement made of the person because doing so might tend to incriminate the person or make the person liable to a penalty. As such, subsection 337AD(1) limits the right to be free from self-incrimination.

The limitation is however, within the permissible limitations to the right as it is for a legitimate objective, and is reasonable, necessary and proportionate to that objective. The objective of the limitation is to ensure that offences under the RO Act can be properly

investigated which is necessary to ensuring compliance with the RO Act. The limitation is also reasonable and proportionate. New subsections 337AD(2) and (3) contain a use immunity which provides that if a person claims the information, document or record might tend to incriminate them or make them liable to pay a penalty, and this might in fact be the case, then the information document or record, or the fact that the person has produced the document or signed the record, will not be admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty. This immunity does not apply with respect to proceedings in respect of false or misleading information, documents or records (paragraphs 337AD(3)(c) and (d)).

The Joint Committee has previously concluded that this measure is compatible with human rights.¹⁷

Article 14(7) ICCPR

Article 14(7) provides a guarantee that no person who has been convicted or finally acquitted of a criminal charge shall be tried or punished again. The Bill inserts new section 290A which creates offences for conduct similar to that concerned in sections 285 – 288 for which the Bill will increase the maximum penalty. Whilst the Government believes that this increase does not mean that the offences under new section 290A would be considered ‘criminal’ in international law (and therefore limiting the guarantee in Article 14(7)), it is relevant to note that section 311 of the RO Act restricts the Federal Court from ordering a pecuniary penalty against a person or organisation if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

In this respect the ALRC has found that:

*The ALRC finds value in maintaining provisions in legislation which allow for a choice of criminal or civil proceedings for the same conduct. Such flexibility is an important feature of regulation and allows a regulator the ability to tailor appropriate penalties to breaches.*¹⁸

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

¹⁷ Parliamentary Joint Committee on Human Rights 2014, Ninth Report of the 44th Parliament: Bills introduced 23 – 26 June 2014; Legislative Instruments received 7 – 20 June 2014, Commonwealth Parliament, Canberra, p. 27 at 1.128.

¹⁸ ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia (Report 95)* at 11.65.

*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.*¹⁹

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.²⁰

Investigation and information gathering powers

Under the amendments in the Bill, the existing investigation and information gathering powers of the General Manager of the Fair Work Commission (GM) will be transferred to the Commissioner. These powers will also be significantly amended to empower the Commissioner to require any person he or she believes on reasonable grounds:

- has information or a document; or
- is capable of giving evidence

which the Commissioner has reason to believe is relevant to an investigation, (new subsection 335(1)) to produce documents, give evidence or provide information or reasonable assistance (new subsection 335(2)). These powers can only be applied in the course of an investigation (under sections 331 – 334 of the RO Act).

The Commissioner's powers under section 335 (as amended) are supplemented with offence provisions:

- If a person fails to produce documents they can be required to explain where to find the documents or whose possession they were last in (new section 335P).
- A person can also be required to identify property of an organisation and explain how the organisation kept account of that property (new section 335Q).

The Commissioner's powers are also enforceable as offence provisions (which are set out in full above).

These expanded investigation and information gathering powers limit the right to privacy, however this limitation is permissible insofar as it is for a legitimate objective and is necessary, reasonable and proportionate.

The objective of the amendments is to ensure that the Commission can effectively investigate breaches of the RO Act. In order to achieve this object it is necessary for the Commission to have information gathering powers sufficient to undertake this task. The amendments have drawn from the information gathering powers of ASIC under the *Australian Securities and Investments Commission Act 2001* (ASIC Act) (Part 3, Divisions 1 – 10) which provides a suitable comparator for the functions of the Commissioner.

¹⁹ Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994).

²⁰ *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) at 8.3

There are also important safeguards on the application of these new powers which further indicates that the amendments are reasonable and proportionate:

- As amended by the Bill, subsection 335(3) provides that the notice requiring a person to appear to give evidence or provide information must include certain matters:
 - the general nature of the matters to which the investigation relates;
 - state the person can be accompanied by a lawyer or another person;
 - set out the effect of new section 337AD (discussed above);
 - state whether the person will be required to answer questions on oath or affirmation; and
 - the rights of an attendee's lawyer (under new section 335F).
- Questioning must take place in private (section 335E).
- Whilst the Commissioner's powers are enforceable as offence provisions (amended paragraphs 337(1)(a) – (c) and new paragraph 337(1)(d)), the offences in amended paragraph 337(1)(a) and new paragraph 337(1)(d) allow a defence of reasonable excuse. Also, the new offences in subparagraphs 337(1)(d)(ii) and (iii) do not apply to the extent that the person has explained the matter to the best of his or her knowledge and the offence in subparagraph 337(1)(d)(iv) does not apply to the extent that the person has, as far as they are capable, performed the acts referred to in new paragraphs 335Q(a) and (b).

Search and seizure powers

The Bill includes the ability for the Australian Federal Police to enter premises and search and seize documents (new section 335M). This power limits the right to privacy, however, this limitation is permissible insofar as it pursues a legitimate objective and is reasonable, necessary, proportionate, authorised by law and is not arbitrary. The object of the new search and seizure powers in the RO Act is intended to ensure that the ROC is adequately empowered to obtain information necessary to perform its investigatory functions. The search and seizure powers introduced in the Bill are modeled on those of ASIC under the ASIC Act, which as noted above, is an appropriate comparator for the powers necessary for the ROC.

There are a number of factors which indicate that the limitation is permissible:

- The powers of the Commissioner, the Australian Federal Police and an eligible magistrate are clearly prescribed in domestic law meaning there are detailed rules governing the scope and application of the powers in the Bill. Also, the application of the provisions should be clear insofar as the provisions are nearly identical to those of the ASIC Act.
- The powers include adequate safeguards against arbitrariness and abuse, including limits on the duration of the power. In this regard, the power is only available conditional upon prior authorization by a magistrate (new section 335L). Also, the warrant must specify the premises and documents to which it applies, state whether entry is authorised to be made at any time of the day or night or in specified hours and also state that the warrant ceases to have effect on a specified day that is not more than 7 days after the day of issue of the warrant (new subsection 335L(4)).
- The ROC's other information gathering powers under paragraph 335(2)(b) mean that the application for a warrant to search and seize documents will only be required to be used when this less intrusive method of obtaining the information is not sufficient for

the ROC to obtain the documents it seeks in the course of an investigation. Further, new section 335M will place important safeguards on the execution of the warrant.

- There are limitations around the use of documents seized in new section 335N with the intention that such documents are used only for purposes related to the investigation for which they were seized.
- The Commission will also be subject to independent oversight by the Commonwealth Ombudsman.

Disclosure obligations on officers of organisations

Amendments in the Bill relating to the disclosure of officer's remuneration and material personal interests limit the right to privacy. The Bill provides that:

- Officers of organisations and branches of organisations must disclose to their organisation or branch certain board payments made to them (new section 293B and 293BB);
- Organisations and branches must disclose to their members the remuneration and non-cash benefits and identity of the 5 highest paid officials (new section 293BC);
- Officers whose duties relate to the financial management of the organisation or branch must disclose to the committee of management of the organisation certain material personal interests (subject to a number of exceptions) (new section 293C); and
- Organisations and branches must disclose to a member the material personal interests disclosed by officers within 28 days if the member requests the information in writing (new section 293C).

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.

Information Sharing

The Bill allows the Commissioner or GM to share information acquired by them in the performance of functions or exercise of powers under the RO Act in circumstances where they reasonably believe that:

- it is necessary or appropriate to do so in the course of performing or exercising his or her functions or powers (including under the FW Act); or
- the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

This broad information sharing power may limit the right to privacy. However any limitation is permissible insofar as it pursues the legitimate objective of efficient enforcement of domestic law and the exercise of statutory powers. The power is also modelled on the information sharing powers of similar bodies like the Fair Work Ombudsman.²¹

²¹ FW Act s 718(2)

In this way, the limitation is prescribed by law, pursues a legitimate objective and is reasonable, necessary and proportionate to that objective.

General power of the Commissioner

Proposed new section 329AC gives the Commissioner the power to do all things necessary or convenient to be done for the purposes of performing his or her functions. This is a standard provision for a regulator. For example, subsection 657(2) of the FW Act confers upon the GM ‘power to do all things necessary or convenient to be done for the purpose of performing his or her functions’. While the power of the Commissioner may be delegated under proposed new section 343B, in exercising powers or functions under a delegation, the delegate must comply with any directions of the Commissioner. Furthermore, the Commissioner’s power to do all things necessary or convenient for the purposes of performing his or her functions is limited by the scope of those functions.

In this way, to the extent that this provision may be perceived to be limiting any human rights, particularly those outlined above, this limitation pursues the legitimate objective of enabling the Commissioner to undertake his or her functions and powers under the RO Act and is necessary, reasonable and proportionate.

Conclusion

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

Minister for Employment, Senator the Hon. Michaelia Cash