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Registered Organisations Commission

Submission to the Senate Committee on Education and Employment

***Fair Work (Registered Organisations)
Amendment (Ensuring Integrity) Bill 2019***



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Introduction

1. The Registered Organisations Commission (**ROC**) welcomes the opportunity to make a written submission to the Senate Committee on Education and Employment inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (**the Bill**).
2. The predominant legislation which governs the operation of the ROC and which is sought to be amended by this Bill is the *Fair Work (Registered Organisations) Act* 2009 (the **RO Act**). The objects and purposes of the RO Act are non-controversial and generally well accepted. The specific measures that the Parliament might enact to promote and secure those objects and purposes are a matter of policy.
3. The ROC does not envisage its role as formulating a view as to what is necessary or conducive to promoting the objects and purposes of the RO Act, or advocating or supporting legislative change to give effect to that view.
4. Rather, the ROC envisages that its primary function is to discharge the particular duties conferred on it by the Parliament. To that end, the main focus of this submission is to identify those duties and indicate how the ROC might perform various of them if the Parliament was minded to confer additional functions on the ROC by enacting this Bill.
5. This submission makes several observations about practical issues that have arisen, or may arise, in relation to the discharge of the ROC's specific functions that could be considered by the Committee with a view to enhancing the administration of those functions.



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Statutory context

6. Parliament has set out its intention in enacting the current act – the RO Act. In brief, Parliament’s intention, as recorded in section 5 of the RO Act, is:

- to enhance relations within federal workplaces to reduce the adverse effects of industrial disputation
- to require associations of employers and employees to meet the standards set out in the RO Act in order to gain the rights and privileges accorded by registration
- to identify those standards: that is to ensure organisations are representative of and accountable to their members and are able to operate effectively; to encourage member participation in their affairs; to encourage efficient management and high standards of accountability to those members; to provide for democratic functioning and control; and to facilitate registration of a diverse range of employer and employee organisations
- to assist employers and employees to promote and protect their economic and social interests through the formation of registered organisations, and according rights and privileges to the registered entities
- to recognise and respect the role organisations play in facilitating the operation of the workplace relations system.

7. As reflected in Parliament’s stated intention, registered organisations enjoy various rights and privileges under the RO Act and the *Fair Work Act 2009* (**FW Act**) accorded by registration. These include:

- registration as a body corporate
- perpetual succession
- the right to sue, or be sued, in its registered name
- rights to represent members in industrial matters, including before the Fair Work Commission (**FWC**) and during industrial bargaining
- access to elections of officers conducted by the Australian Electoral Commission (**AEC**) at the Commonwealth’s expense
- the power to purchase, take on lease, hold, sell, lease, mortgage, exchange and otherwise own, possess and deal with, any real or personal property
- the power to apply for the grant of an entry permit to an official of the organisation to permit entry to premises operated by an employer to represent their members and to investigate suspected contraventions of the FW Act and instruments and State and Territory OHS laws



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- income tax exemption where the registered organisation meets the relevant requirements of section 50.15 of the *Income Tax Assessment Act 1997*.
8. The RO Act provides in section 329AB for the functions of the Registered Organisations Commissioner (**Commissioner**) as follows:
- a) to promote:
 - (i) efficient management of organisations and high standards of accountability of organisations and their office holders to their members; and
 - (ii) compliance with financial reporting and accountability requirements of this Act;including by providing education, assistance and advice to organisations and their members;
 - b) to monitor acts and practices to ensure they comply with the provisions of this Act providing for the democratic functioning and control of organisations;
 - c) such other functions as are conferred on the Commissioner by this Act or by another Act;
 - d) to do anything incidental to or conducive to the performance of any of the above functions.



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The ROC's operating environment

9. A federal system for the registration and regulation of employee and employer organisations has been in operation in Australia since the implementation of the *Commonwealth Conciliation and Arbitration Act 1904*. The regulation of federally registered organisations was vested in various iterations of an industrial registrar, including the General Manager of the FWC, until the commencement of the ROC on 1 May 2017.
10. After that date many of the functions of the General Manager of the FWC relating to organisations were transferred to the ROC (such as elections, financial reporting, inquiries and investigations) but certain functions remained with the FWC (such as the registration and amalgamation of organisations and the alteration of the rules of organisations).¹ In this submission, where reference is made to 'the regulator', the reference relates either to the General Manager of the FWC or the ROC as the current regulators.
11. The ROC and the FWC are now the independent regulators of 106 federally registered employee and employer associations who cumulatively report to the ROC that they have more than two million members, control more than \$3.13 billion in assets and collect annual revenue in the order of \$1.7 billion. By any measure this is a substantial sector.
12. A summary of the respective statutory functions relating to the regulation of registered organisations as between the ROC and FWC is set out in the following table.

¹ Note: some of the relevant FWC powers may only be exercised by a senior member of the FWC Tribunal.



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Registered Organisations Commission	Fair Work Commission
 Financial reports of reporting units	 Registration, deregistration and amalgamations
 Annual reports	 Rule changes (including eligibility rules)
 Notification of changes to records	 Determination of reporting units
 Officer and organisation disclosure statements	 Approval of right of entry training
 Loans, grants and donations statements	 Work, health and safety permits
 Arranging elections	 Right of entry permits
 Approval of governance and compliance training	 Disputes and appeals
 Education, assistance and advice	 Advice and assistance on how to become a registered organisation
 Compliance, inquiries and investigations	 Recognised State associations
 Registration of auditors	

13. There are currently 61 employer organisations and 45 employee organisations which, including these entities, are comprised of 354 individual financial reporting units², each with its own reporting obligations and cumulatively managed by more than 11,500 elected office holders.³

² Section 242 provides that each branch of a registered organisation is, in normal circumstances, a separate financial reporting unit that is required to prepare and lodge financial reports each year.

³ The ROC is currently auditing office holder numbers in each organisation and early indications are that this number may increase.



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14. A key operational objective of the ROC is to drive behaviours in registered organisations that see them consistently focussed on acting in the best interests of their members, ensuring members' money is spent in a way that is transparent, properly authorised and accounted for and which complies with their obligations under the RO Act.
15. A significant component of the work of the ROC is in the provision of education to registered organisations. Apart from conducting frequent, Australia wide, face to face, information workshops, the ROC also provides multiple guidance notes, templates, fact sheets, expansive tool kits, an array of web based resources (in all close to 200 education resources) and the ready availability, and personal engagement, of ROC staff.
16. As at August 2019, there are 27.3 staff members at the ROC assisting the Commissioner. The ROC is structured to deliver its functions through three (3) main streams: Education and Reporting, Financial Reporting and Analysis and Compliance and Investigations.



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The Bill

Proposed powers for the Federal Court and FWC

17. The Bill proposes that the Federal Court and the Fair Work Commission be given powers to:

- disqualify officials of registered organisations who break certain laws, fail to take reasonable steps to prevent the organisation from repeatedly breaking those laws or are otherwise not fit and proper persons to hold office in a registered organisation
- cancel the registration of an organisation, or remove rights and privileges of part of an organisation, where officials have acted corruptly, failed to comply with court orders or injunctions, or have a record of law-breaking (including by its members)
- place an organisation into administration where its officers have misappropriated funds, repeatedly broken the law, breached their duties or the organisation has otherwise ceased to function effectively
- consider the public interest when determining whether to approve an amalgamation of organisations, having regard to an organisation's history of compliance with the law and the effect of the merger on the economy, employees and employers.

Proposed role for the ROC

18. The ROC notes that the Bill proposes to grant the Registered Organisations Commissioner (**Commissioner**) express standing to apply to the Federal Court for:

- an order to disqualify an officer of a registered organisation if the Commissioner is satisfied that one of the disqualification grounds listed in section 223 exists
- an order to cancel the registration of a registered organisation (or to seek 'alternative orders') if the Commissioner is satisfied that one of the cancellation grounds listed in sections 28C – 28H exists
- a declaration which states, among other things, that an organisation is dysfunctional, if the Commissioner is satisfied that one of the circumstances set out in section 323(3) exists in relation to the registered organisation.

19. It is also noted that it is proposed that the Commissioner will have express standing to make submissions to the Fair Work Commission in relation to whether a proposed amalgamation of registered organisations is in the public interest.



Submissions on the provisions

Schedule 1 – Disqualification from office

20. The ROC notes that under the Bill, as presently drafted, it is proposed that the Commissioner (amongst others) will have standing to apply to the Federal Court for an order disqualifying a person from holding office in a registered organisation. The ROC notes that the Bill sets out express grounds of which the Commissioner must be satisfied before making an application of this kind.
21. Under the current provisions of the RO Act, the Commissioner may apply to the Federal Court under section 215(5) for a declaration that a person is not, or was not, eligible to be a candidate for election, or to be elected or appointed to an office in an organisation because that person has been convicted of a prescribed offence. Section 223 of the Bill proposes to extend the circumstances in which a person may be disqualified from holding office, for a period the Court considers appropriate, beyond the circumstances set out in Part 4 of Chapter 7 of the RO Act as presently enacted.
22. The Commissioner takes and would continue to take a forensic, evidence-based approach to determining whether one or more of the disqualification grounds existed. The ROC's approach is outlined further in the ROC Compliance Policy and involves:
- reviewing the best available evidence
 - considering the nature and circumstances of the conduct constituting the ground
 - acting impartially, without bias and avoiding conflicts of interest
 - considering whether the evidence discloses reasonable prospects of success
 - taking into account the legal rights of the parties and any relevant risks
 - taking into account public interest considerations.

Monitoring the circumstances constituting a disqualification ground

23. The ROC monitors and receives information through a variety of sources including media reports and disclosures made under the whistleblower scheme in Chapter 11, Part 4A of the RO Act.
24. The proposed criteria for disqualification are set out in the Bill. Monitoring all of the circumstances constituting the proposed disqualification grounds, might include the ROC also monitoring whether:



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- a 'designated finding' is made against the person
- the person is found to be in contempt of court in relation to an order or injunction
- the person is found to have contravened a provision relating to the general duties of officers of corporations or the person becomes disqualified from managing a corporation
- a person, while they were an officer of the organisation, failed to take reasonable steps to prevent the organisation engaging in conduct that results in:
 - a designated finding or
 - a finding that the organisation is in contempt of court in relation to an order or injunction made under a designated law.
- the officer is or is not a 'fit a proper person', having regard to identified events including that the person is refused a right of entry or Work Health and Safety (WHS) permit or the person is found to have engaged in certain conduct in a civil or criminal proceeding.

Application to the Court

25. The disqualification grounds specify the criteria that the ROC would need to consider and address both before making such an application and, if made, in making such an application.
26. The proposed power would in the case of the ROC require the presentation of evidence of the ground or grounds of disqualification, to the requisite standard⁴, in order for the Federal Court to make a disqualification order and further that the Court would not consider it unjust to do so.

Election of officers

27. Regular elections for more than 11,500 office holders in registered organisations are primarily conducted by the AEC in accordance with the rules of organisations through arrangements made by the Commissioner. Section 145(1) of the RO Act provides that the rules of an organisation must provide terms of office for office holders generally for a maximum period of 4 years. An organisation or branch is required to lodge prescribed information with the Commissioner which identifies the *offices* in respect of which an election is sought, but not the *persons* nominating for office (who at that time are not known).

⁴ Section 140 of the *Evidence Act 1995* prescribes the civil standard as being proof on the 'balance of probabilities', and requires the Court to take into account the gravity of the matters alleged.



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28. The ROC does not have any role in relation to the persons who are able to nominate for election to office within an organisation. The ROC receives information about who has nominated for or been elected to office only after the election has been conducted through receipt of declarations of electoral results from the AEC and notifications of change of officer holder(s) from organisations.
29. The ROC is aware of an example in which the regulator became aware that a person who appeared to be disqualified from holding office under section 215 of the RO Act had been nominated as a candidate for an upcoming election in a registered organisation. In that case, the regulator advised both the candidate and the organisation in writing that unless the candidate withdrew the nomination, the regulator proposed to make application to the Federal Court for a declaration under section 215(5) of the RO Act that the candidate was not eligible to stand for election. The candidate withdrew their candidacy prior to the election.
30. Further, an organisation or branch of an organisation may apply to the Commissioner under section 183 for an exemption to enable the organisation or branch to conduct its own elections without the involvement of the Commissioner or the AEC. There are currently 23 exemptions being utilised by registered organisations and their branches to conduct their own elections in which neither the AEC nor the Commissioner has any role. The ROC will only become aware if such elections have been conducted and their results if a notification of change of office holder(s) is lodged with the ROC consequent on the election outcome.⁵ This illustrates a potential difficulty for a regulator to monitor whether a disqualified person has been nominated for, or elected to, an office.
31. Section 183 of the RO Act does allow for the revocation of exemptions issued under that provision either upon the application of the relevant organisation or branch or alternatively by the Commissioner's own motion in certain circumstances which requires a show cause process and a hearing. The ROC is aware of an example in which an exemption issued to a branch of an organisation was revoked on the regulator's own motion following a detailed review into allegations of improper conduct relating to the conduct of an election. Subsequent to the issue of a show cause notice and the conduct of a contested hearing, the regulator revoked the exemption which had allowed the branch to conduct its own elections. The regulator's decision to revoke the exemption was upheld on appeal.

Validity of acts by a disqualified officer

32. The ROC does not comment on these provisions as they are outside of our jurisdiction.

⁵ As required by section 233 of the RO Act.



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Schedule 2 – Cancellation of registration and alternative orders

33. The ROC notes that under the Bill, as presently drafted, it is proposed that the Commissioner (amongst others) will have standing to apply to the Federal Court for an order cancelling the registration of a registered organisation (or to seek one of the alternative orders). The Bill sets out express grounds of which the Commissioner must be satisfied before making an application of this kind.
34. In the case of applying to cancel the registration of a registered organisation, as outlined above in relation to an application to disqualify an officer, the Commissioner would, consistent with his approach elsewhere, take a forensic, evidence-based approach to determining whether one or more of the cancellation grounds exist. The Commissioner would in doing so have regard to the matters outlined further in the ROC Compliance Policy.⁶

Monitoring the circumstances constituting a cancellation ground

35. To fulfil the role envisaged for it under the Bill, the ROC would need to receive information or otherwise monitor the circumstances constituting the cancellation grounds set out in sections 28C-28H of the Bill.
36. The proposed grounds include:
- corrupt conduct by a substantial number of officers in an organisation
 - a serious criminal offence is committed by an organisation (carrying a penalty of 1500+ penalty units)⁷
 - multiple findings against an organisation
 - multiple findings against members of an organisation
 - non-compliance by an organisation or members with orders or injunctions
 - an organisation or members engage in obstructive industrial action.
37. The application by the Court of the proposed cancellation grounds set out in the Bill would require the presentation to the Court of evidence of the ground or grounds for cancellation, to the requisite standard, in order for the Federal Court to cancel the registration of a registered organisation (or make one of the alternative orders) and further that the Court would not consider it unjust to do so.

⁶ See paragraph 22 above.

⁷ 1500 penalty units is presently the equivalent of \$315,000.



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Schedule 3 – Administration of dysfunctional organisations

38. The ROC notes that under the Bill, as presently drafted, it is proposed that the Commissioner (amongst others) will have standing to apply to the Federal Court for a declaration in relation to, among other things, dysfunctional organisations. The ROC notes that the Bill sets out the circumstances of which the Commissioner must be satisfied before seeking a declaration on a dysfunction ground. They include:

- that the organisation or a part of it has ceased to exist or to function effectively
- that one or more officers have engaged in financial misconduct
- that a substantial number of officers have acted in their own interests rather than in the interests of the members of the organisation
- that the affairs of the organisation are being conducted in a manner that is oppressive or unfairly prejudicial or discriminatory to a member or class of members, or contrary to the interests of the members as a whole
- that an office or position in the organisation is vacant and that there is no effective means under the rules of the organisation to fill the office or position.

39. As outlined above in relation to applications under Schedule 1 and Schedule 2, the Commissioner would take a forensic, evidence-based approach to determining whether the circumstances for making a declaration existed under section 323(3). The Commissioner would in doing so also have regard to the matters outlined in the ROC Compliance Policy.

40. The criteria for the making of a declaration on the basis of a dysfunction ground is set out in the Bill. Their application by the Federal Court would require the presentation to it of evidence of the ground or grounds of the dysfunction, to the requisite standard, in order for the Court to make a declaration under section 323(3) and to approve a scheme under section 323A to resolve the circumstances set out in the declaration.

41. It is noted that proposed section 323A(4) contemplates that the scheme would either provide for its own end or alternatively provide that it may be ended if the Court is satisfied that the circumstances set out in the declaration have been resolved or no longer exist. Proposed section 323A(6) also provides the Court with power to make ancillary or consequential orders during the currency of the scheme.

42. The ROC is aware of a range of examples in which the regulator has become aware of an organisation that was dysfunctional, in circumstances where the regulator has had limited options available to seek to remedy the dysfunction. In one case, an organisation was unable to conduct elections to fill offices for an extended period, which prevented it from resolving to pass necessary rule changes to simplify future election processes. In another, an organisation wishing voluntarily to deregister was unable to hold a special general meeting of members in order to resolve to apply for



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deregistration. In another, the rules of the organisation provided for the existence of branches which had ceased to exist.



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Schedule 4 – Public interest test for amalgamations

43. The ROC notes that under the Bill, as presently drafted, it is proposed that the Commissioner may make submissions to the FWC as to the public interest of a proposed amalgamation. Specifically, the Commissioner may make submissions as to each organisation's record of compliance with the law and whether the proposed amalgamation is otherwise in the public interest.
44. While the term "public interest" has not been defined in the Bill, it is generally understood to refer to considerations which affect the interests and wellbeing of the community and its citizens. It is a concept of broad meaning and is not limited by precise boundaries.⁸ Ultimately, the public interest test imports a value judgment and requires the decision maker to consider and balance the factors which may affect the interests of the community.
45. Currently, the ROC does not have a formal role in relation to amalgamations or rule changes of registered organisations. The ROC notes that Schedule 4 of the Bill provides a mechanism for the ROC to provide feedback on the practical implications of a proposed amalgamation, including in relation to its effect on the amalgamated organisation's financial reporting structure.

The ROC's previous involvement in amalgamations

46. The ROC recently provided advice and assistance to two organisations regarding one completed amalgamation and one proposed amalgamation. The advice and assistance concerned whether the post-amalgamation rules and financial reporting structures of the amalgamated organisations were consistent with the requirements of the RO Act.

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29 August 2019

⁸ *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238 per Lockhart J.