

**SUBMISSION TO THE FAIR WORK (REGISTERED
ORGANISATIONS) AMENDMENT BILL 2013 INQUIRY
BY THE MARITIME UNION OF AUSTRALIA**

INTRODUCTION

1. This submission to the Fair Work (Registered Organisations) Amendment Bill 2013 Inquiry is provided by the Maritime Union of Australia (MUA).
2. The principal submission of the MUA is that the changes to the regulatory regime effected by the *Fair Work (Registered Organisations) Amendment Act 2012* (Cth), as amended by the *Fair Work Amendment Act 2013* (Cth), are sufficient to strengthen provisions concerning disclosure and transparency of decision making by registered organisations.
3. Further, it is the MUA's primary submission that the changes to operating structure of the Fair Work Commission under the guidance of the current President are sufficient to ensure that appropriate standards of good governance are maintained and adhered to within registered organisations, and that the Regulator is able to effectively enforce them.
4. Accordingly, in the MUA's submission, the amendments to the *Registered Organisations Act 2009* (Cth) (RO Act) and *Fair Work Act 2009* (Cth) (FW Act) proposed by the Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill) are unnecessary.
5. Finally, note that the MUA also supports and adopts the submissions of the Australian Council of Trade Unions.

FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2013

SCHEDULE 1 – THE REGISTERD ORGANISATIONS COMMISSIONER

6. Broadly, Schedule 1 to the Bill proposes the establishment of the Registered Organisations Commission to monitor and regulate registered organisations with increased investigation and information gathering powers modelled on those in the *Australian Securities and Investment Commission Act 2001* (Cth).
7. Whilst the role of General Manager of the Fair Work Commission will remain, the General Manager's functions in relation to registered organisations are reduced to the determination of reporting units for the purposes of Division 2 of Part 3, Chapter 8 of the RO Act, which must now be done in consultation with the Registered Organisations Commissioner, and the maintenance of the register of organisations.
8. Most of the functions of the General Manager under the RO Act are to be allocated to the Commissioner including:
 - Determining applications for exemption from the requirement that the AEC conduct elections, arranging for the AEC to conduct elections, and receiving declarations and reports in respect of elections (Part 2, Chapter 7);
 - Assisting the Court in election inquiries (Part 3, Chapter 7);
 - Making applications for declarations as to whether a person is disqualified from holding office in an organisation (section 215(5), Division 2, Part 4, Chapter 7);
 - Receiving lodgement of and applications in respect of annual returns and particulars of loans, grants and donations (Part 2, Chapter 8);
 - Determination of reporting guidelines (Sections 255, 253 & 270, Division 3, Part 3, Chapter 8);

- Receiving auditor's reports of suspected non compliance (section 257, Division 4, Part 3, Chapter 8);
 - Determining extensions of time for reporting requirements (sections 265 & 266, Division 5, Part 3, Chapter 8);
 - Receiving General Purpose financial reporting, operating report, auditor's report etc (section 268, Division 5, Part 3, Chapter 8);
 - Applications for information from reporting units (section 272, Division 7, Part 3, Chapter 8);
 - Receipt of notice from FWC regarding suspected contraventions (section 278, Division 7, Part 3, Chapter 8);
 - Determination of reduced reporting requirements (Division 6, Part 3, Chapter 8);
 - All inquiries and investigations dealt with in Part 4 of Chapter 11, including those into compliance with financial reporting requirements; and
 - Issue of certificates as to membership and lists of officeholders (sections 348 & 349, Part 6, Chapter 11).
9. It is proposed that the Commission will be headed by the Registered Organisations Commissioner who will assume the investigations, enforcement advice and assistance responsibilities of the General Manager in relation to registered organisations.
10. It is also proposed that the Commission will be established in the Office of the Fair Work Ombudsman and will be subject to the same degree of Ministerial oversight as the Fair Work Ombudsman.
11. In this regard, the Explanatory Memorandum states (at [95]) that proposed new subsection 329FA permits the Minister to give directions of a "*general nature*" to the Commissioner, but not directions "*as to a particular matter or investigation*".

12. Further, the Explanatory Memorandum states (at [98]) that proposed new section 329FB permits the Minister to direct the Commissioner to produce reports “*in relation to a function or the functions of the Commissioner*” but there is no apparent qualifier that such reports directed to be produced must not be “*as to a particular matter or investigation*”. In the MUA’s submission, this raises a concern that the Minister may direct the Registered Organisations Commissioner to produce a report about a specific matter, for example, an independent investigation or inquiry by the Registered Organisations Commissioner in accordance with Part 4, Chapter 11.
13. In the MUA’s submission, the proposed amendments outlined above are wholly unnecessary because the current regulatory framework, including the identity and responsibilities of the regulator, is not in need of change.
14. Following recent amendments to the RO Act and FW Act concerning the regulator’s functions and powers, and the large amount of work carried about by the current President of the Fair Work Commission concerning the separation between the quasi judicial and regulatory arms of the Fair Work Commission, the MUA cannot see how a further reorganisation and creation of a new regulator is either necessary, or justified.
15. Furthermore, the establishment of a new regulator adds to the confusion only recently overcome by Officials and employees of registered organisations, and practitioners alike, over the amendments introduced by the *Fair Work (Registered Organisations) Amendment Act 2012* (Cth), as amended by the *Fair Work Amendment Act 2013* (Cth) at five minutes to midnight on about 29 June 2013.
16. The constantly changing and increasingly burdensome regulatory regime significantly adds to the significant financial burden already placed upon registered organisations which are increasingly required to devote scarce resources to compliance and detracts from their ability to better serve their members.
17. Registered organisations are now not only being asked to again review registered Rules, internal protocols and practices to ensure compliance with the third tranche of amending legislation in less than eighteen months, but also that they consult and

engage with a new regulator who is no longer located within the ever present and familiar tribunal, regardless of which iteration of name be currently ascribed to it. In this regard, in the MUA's submission, the placement of the Registered Organisation Commission within the Fair Work Ombudsman will lead to uncertainty and confusion regarding the functions and powers of the Registered Organisation Commission and Commissioner, and will also give rise to concerns regarding the independence of both from the Government of the day.

SCHEDULE 2 – INCREASED DISCLOSURE REQUIREMENTS, INVESTIGATION POWERS AND PENALTIES

18. Broadly, Schedule 2 contains provisions that increase obligations on registered organisations and their Officers, increase civil penalties for non compliance, and introduce criminal offences. In addition, this Schedule gives the Registered Organisations Commissioner enhanced investigation powers. Finally, the Schedule also contains transitional provisions.

Disclosure Requirements

19. It is proposed that the disclosure requirements introduced by the *Fair Work (Registered Organisations) Amendment Act 2012* (Cth), as amended by the *Fair Work Amendment Act 2013* (Cth) in Division 3A of Part 2 of Chapter 5 of the RO Act and due to commence on 1 January 2014, be removed and replaced and set out in proposed new Part 2A of Chapter 9.
20. Whilst the disclosures required by the Bill are largely similar to those set out in Rules of registered organisations in accordance with the *Fair Work (Registered Organisations) Amendment Act 2012* (Cth), as amended by the *Fair Work Amendment Act 2013* (Cth), they will be legislative reporting requirements, and non compliance will be subject to civil penalties.
21. The substantive differences between the disclosure requirements in the Rules of registered organisations in accordance with Division 3A, Part 2, Chapter 5 of the RO

Act due to commence on 1 January 2014, and the legislative disclosure requirements set out in proposed new Part 2A of Chapter 9 of the RO Act include:

- Standing or advance disclosure of remuneration paid to an Officer as a member of a board where the Officer holds that position only because of their position as an Officer, or where nominated for the position by an organisation, branch, or peak council (proposed section 293BB);
- Standing or advance disclosure of remuneration paid to an Officer by a related party (proposed section 293BB);
- Officers remuneration in cash and non cash benefits, including value and form, must be on a top five basis for both the organisation and branches (proposed section 293BC);
- Disclosures of material personal interests must describe the nature and extent of the interest and the relation of the interest to the affairs of the organisation or branch (proposed section 293C). This proposed section is a civil penalty provision; and
- Standing or advance disclosure of material personal interests may be made to committees of management provided that they must be minuted, and as stated in the Explanatory Memorandum, such disclosure may be made whether or not the matter relates to the affairs of the organisation at the time the disclosure is made (proposed section 293D).

22. In the MUA's submission, the disclosure requirements should not be legislative requirements subject to civil penalties, and are better placed where they currently sit in the Rules of registered organisations.

23. In cases of non compliance with the disclosure requirements in Rules of registered organisations, under the current RO Act, the General Manager may conduct an inquiry (section 330), followed by an investigation (section 336), and take any of the

remedial action set out in section 336, including referring matters to the public prosecutor, or applying to the Federal Court for civil penalties.

24. In the MUA's submission, these provisions adequately reinforce the provisions in Rules of registered organisations requiring compliance with the Rules, including Rules relating to disclosure. The proposed amendments in the Bill which would undo all the work that has been done not only by the Commonwealth, but the Fair Work Commission and registered organisations to adopt disclosure requirements in their registered Rules is unproductive in the extreme.
25. Under the proposed amendments, and in accordance with proposed new subsection 141(1)(b)(ia), registered organisations, including branches, will also be required to keep minute books recording proceedings and resolutions of committees of management.
26. Furthermore, in accordance with proposed new subsections 255(2A)(a) to (e), reporting guidelines issued under the RO Act will require disclosure of the total expenditure of a reporting unit in relation to the matters specified in new subsections 255(2A)(a) to (e), namely:
- Remuneration and other employment related costs of employees;
 - Advertising;
 - Operating costs;
 - Donations to political parties;
 - Legal Costs.
27. Whilst the MUA has always prided itself on transparency and accountability as cornerstones of good governance, in the MUA's submissions, the proposed requirements of subsection 255(2A) are unnecessary.
28. All costs required to be disclosed in accordance with proposed 293BC are already disclosed by registered organisations in their annual General Purpose Financial Report, Operational Report and Concise Financial Report in accordance with sections 253, 254 and 265 of the RO Act.

29. Further, registered organisations are also already required to declare donations to political parties to the Australian Electoral Commission.

Higher Penalties

30. The Bill proposes the introduction of a three level penalty system to replace the existing tiers of 60 penalty units (individual) and 300 penalty units (body corporate) that currently apply to most contraventions.
31. Tier one maximum penalties for individuals have been increased to 100 (\$17,000) and a multiplier of five will apply where the contravener is a body corporate, 500 penalty units or (\$85,000). The Statement of Compatibility with Human Rights to the Explanatory Memorandum states that this tier applies to breaches of Officer's civil financial management duties under sections 285 to 288; the new legislative obligations proposed by the Bill to disclose Officer's material personal interests and remuneration, and certain payments made by an organisation or a branch; general duties in relation to orders and directions of the Fair Work Commission and Federal Court; and restrictions on Officers voting on certain matters.
32. Tier two maximum penalties of 100 penalty units for an individual and 500 penalty units for a body corporate. This tier applies to breaches of proposed provisions requiring the lodgement of financial or other information with the Registered Organisations Commission and the making of declarations.
33. Tier three maximum penalties of 60 penalty units for an individual and 300 penalty units for a body corporate. This tier 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 a registered organisation's register.
34. In accordance with proposed new section 307A, it will also be open to the Court to order disqualification from Office in any prosecution for contravention of a civil penalty provision under the RO Act. Whilst the Explanatory Memorandum states that

“it is not anticipated that this power would be exercised in relation to relatively minor breaches of the RO Act civil penalty provisions” there is no such limitation in the proposed section 307A, and this is of serious concern to the MUA who oppose the introduction of such a provision.

35. In addition, the Bill proposes a new category of 1200 penalty units for a serious contravention of specified provisions by an individual (6000 penalty units for a body corporate) with the term “*serious*” to be defined (in section 6) as a contravention of a provision that:

“(a) materially prejudices the interests of the organisation or branch, or the members of the organisation or branch; or

(b) materially prejudices the ability of the organisation or branch to pay its creditors; or

(c) is serious”.

36. In the MUA’s submission, the increase in penalties is manifestly unfair and given the disclosure requirements in the registered Rules of the Organisation which are currently scheduled to take effect from 1 January 2014, there is no need for the category of “*serious*” offence. In this regard, the MUA also notes that the definition is somewhat circular and whilst based on similar provisions in the *Corporations Act 2001* (Cth), the definition acts as a threshold and not as a guide to setting a higher penalty than would otherwise apply.

37. Finally, the penalty for contravention of new criminal offences (see below) are to a maximum of 2000 penalty units or five years in prison.

Criminal Offences and Investigative Powers

38. The new investigative powers of the proposed Registered Organisations Commission are modelled on those available to the Australian Securities and Investment Commission and include:

- Power to issue notices requiring examination on oath and to give assistance to an investigation (proposed section 335, 335C & 335D);
- Power to apply for search warrants in respect of any premises (executed by Federal Police authorised to enter by force) (proposed sections 335K, 335L & 335M);
- Power to require a person to give information about the property and accounting of a property of an organisation (proposed section 335Q); and
- Power to require a person who does not produce documents in compliance with a notice to explain where the documents are, who last had them and where that person may be found (section 335P).

39. Under proposed section 335, persons outside of the present or former union management can be required to assist the Registered Organisations Commissioner with an investigation including by way of examination on oath. It is an offence not to comply with a requirement in a notice issued by the Registered Organisations Commissioner.

40. Records of examinations are to be kept and made available to examinees who may be required to sign the record, with failure to sign as directed exposing them to criminal prosecution for a strict liability offence ((proposed section 335G, 335H, 337AA and 337AB).

41. Lawyers are entitled to attend examinations, but their role is limited, and they cannot obstruct the investigator conducting the examination (proposed section 335F). Failure to comply with the restrictions imposed by an investigator is an offence that would

expose the lawyer to criminal prosecution for strict liability offence (proposed section 337AA and 337AB).

42. Lawyers are also subjected to stringent requirements. Whilst a lawyer cannot be required to disclose material subject to legal professional privilege, they must when required to do so, provide particulars of any document containing the material the subject of the privilege, and the name and address of the person who is the beneficiary of the privilege (proposed section 337AE). Failure to do so exposes the lawyer to criminal prosecution for a strict liability offence with a maximum penalty of 10 penalty units, or 3 months imprisonment, or both. Whilst the Explanatory Memorandum states that this is not intended to abrogate the common law principles of legal professional privilege, the MUA holds serious concerns about how it might be used.
43. New offences of obstruction (proposed 337AB) and concealment (proposed section 337AC) are created.
44. In the MUA's submission, these powers are unnecessary, draconian and have no place in Australian industrial law.

CONCLUSION

45. Further to the MUA's submission at the outset, we do not see any need for further changes to the regulatory regime now in place under the current RO Act and the FW Act.
46. The changes to the regulatory regime effected by the *Fair Work (Registered Organisations) Amendment Act 2012* (Cth), as amended by the *Fair Work Amendment Act 2013* (Cth), are sufficient to strengthen provisions concerning disclosure and transparency of decision making by registered organisations. To undo all the work that has been carried out by registered organisations, practitioners and the Fair Work Commission in order to comply with these legislated amendments seems futile.

47. Additionally, in the MUA's submission, the introduction of higher civil penalties and new investigative powers of the proposed Registered Organisations Commission, located as it is in the Office of the Fair Work Ombudsman, will only serve to raise suspicion amongst registered organisations as to the motives behind the establishment of yet another regulator.
48. Finally, the increased financial costs associated with ensuring compliance with new legislative requirements and a new regulator further detracts from the already scarce resources available to registered organisations to use to serve the best interests of their members.

MARITIME UNION OF AUSTRALIA

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