To:
Committee Secretary
Senate Standing Committee On
Education and Employment.
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Stakeholder Comment Fair Work (Registered Organisations) Amendment Bills 2012 and 2013

The Motor Trade Association of South Australia Inc.

19th December 2013

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On behalf of
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Summary

1. MTA SA Inc. MTA GTS Inc. - Role Function and Overview

The MTA is both a federally registered Employer Organisation and a Group Training Organisation, which along with other intrastate Motor trade organisations (VACC, MTANSW/QLD/NT/WA) is a foundation member of the peak motoring body, AMIF (Australian Motor Industry Federation).

At the Wayville premises MTA SA represents employers from all sectors of the motor industry in SA (excluding Vehicle Manufacturers only) and has approximately 500 apprentices hosted to employers in Heavy Vehicle, Farm and Industrial Machinery, Passenger Vehicle and Collision Repair and Specialist Repairers across the state. It also has a closely allied registered training organisation and its group training scheme at Royal Park. This second organisation, as will be outlined below, has some significance for this submission as some elected officers of the MTA SA Board and Executive, also serve on the MTAGTS and, if amendments are read in strict terms, could have secondary obligations under these amendments.

2. *Summary view of the Fair Work (Registered Organisations) Amendment Bills 2012 and 2013.*

MTA SA holds the view that:-

- the majority of registered organisations are committed to representation of their constituents, whether employer or employee members
- their appointed representatives who sit on various committees and executive boards are practically, if not all, unpaid volunteers (within our knowledge some associations reimburse for travel related expenses)
- they are not for profit associations usually incorporated under the relevant state Incorporated Associations legislation
- where elected officials are paid, given the circumstances of the much publicised case leading to this Bill, MTA SA sees merit in imposing accountability on elected officials
- accountability should not impose unnecessary regulatory burden on such associations but, given the role, functions and control exercised by such officials, action does need to be taken to minimise the risk of repeated offences and capacity to impose appropriate remedial action by way of penalties.
- by contrast, listed companies falling within the Corporations Act 2001, have shareholders, specific commercial objectives including a return on capital and, in practically all cases a paid board of directors and/or direct or indirect financial benefits to shareholders
- Such punitive measures prescribed by that legislation do not relate to small medium and large registered organisations operating in a different business environment underpinned by not for profit objectives, with highly regulated costs and administrative structures with limited capacity to pass on costs and reasonably defined market activities.

Our summary recommendations underpinning these views are:-

- Any existing legislation controlling the activities and operations of elected officials of registered organisations, including compliance and enforcement, should not be duplicated in the current Bills – to the extent that this has happened, criminal penalties in the bill should be removed;
- Civil penalties for elected officials (officers) of registered organisations should be increased to a reasonable level (but not trebled) as outlined in the next section;
- Amendment should be made to reduce the criminal and civil burden imposed on elected, non paid officers of registered organisations so any penalties / liability apply only to the extent that they have full knowledge and capacity to directly influence or control association activities – in a similar manner to onus of voluntary board directors under the provisions of the Work Health Safety Act 2012 (SA version)
- As a consequence there should be a lower category of sanctions on elected board members who are volunteers as set out in the Work Health Safety Act 2012
- The Bills be amended to impose reasonable penalty levels for breaches of the Fair Work (Registered Organisations) Act 2009 – albeit at significantly lower levels than currently proposed – which trebles previous maximum penalties. The actions which lead to the introduction of this amendment were presumably confined to one association where the penalties were in place but the level of penalty should have been a sufficient deterrent with appropriate training, reporting, investigative and procedural measures to support early detection and enforcement.
- Provision of Conflict of Interest provisions for registered organisations should be consistent with the requirements for non-listed companies under the Corporations Act 2001 including both listed exemptions and exclusions stated there in and declaration of relevant personal interests (which may impinge on the role of elected officers) – MTAs perception is that the present Bill imposes far greater scrutiny on officers than the Corporations Act 2001
- Clearly there should be guidelines for registered organisations to apply for an extension of time in relation to meeting the new compliance arrangements or transitional arrangements to assist in ensuring the Registered Organisations Commission requirements will be met.

3. The Anticipated Impacts of the 2012 and 2013 amendments

In our view the degree of severity of requirements in these amendments will have a significant financial, intrusive and compliance impact on larger but more significantly, less financially stable (usually) smaller registered organisations.

Our concern is that the balance is right in the proposed changes whilst recognising the vital need to address the issues which precipitated these amendments.

The principle changes as a result of the 2012 and 2013 amendments have been stated by many stakeholders:-

- New reporting obligations on registered organisations and their officers
- Tripling the previous maximum penalties for breaches of the existing legislation

- Broader and more intrusive investigative powers with increased capacity to prosecute by the General Manager of the Fair Work Commission.

Some of these changes should, in our view, be modified to ensure reasonable capacity to comply whilst addressing the need for change.

Accordingly MTA SA sets out specific changes which are of serious concern or where the balance is not right.

In terms of the 2012 amendments, the following provisions in the Bill need alteration as per our recommendations:-

- Schedule 1 The Registered Organisations Commissioner – both the consequential amendments and transitional arrangements are acceptable

- Schedule 2 Increased Disclosure Requirements, Investigative Powers and Penalties. Items of concern are:-

1) *Item 4 "Serious Contravention".*
   There is no clarity or guide as to what is serious – Is this to be left to regulation or case law? The listed penalties are significantly higher for serious breaches – so this must be addressed by definition and penalty review referred to below. Does serious refer to the gravity of action or the repeated nature of a breach or the impact of the breach on the organisation? By contrast Category 1 fines under the Work Health Safety Laws are clearly defined and based on reckless endangerment or indifference.

2) *Items 7 and subsequent items up to item 137 addressing penalties for breach of :*
   - *declaration of ballot for amalgamation (s. 52) or ballot statement (s104);*
   - *request for membership statement (s. 169) or false representation as to membership* (*s. 175) or about resignation (s. 176) ;*
   - *declaration about the organisation's register (s. 192) or response to post election reports (s. 198) or statement about the organisations records (s. 233(3));*
   - *financial details of the organisation in relation to: loans /grants/donations (s.237); preparation of general financial report (s.253) or operating report (s.254) or Auditor's Report (s.257) or Auditor Appointment (s.256 (1)) or Auditor notification (s.259) or provision of report to members (s.265); comments by committee members (s.267), lodgement of reports (S268); accounts of low income organisations(s270).*

   Our concern as foreshadowed in the above summary is the trebling of penalties for both body corporate and for individual breaches to $51,000 and $10,200 respectively; the massive increase ($85,000) for failing to respond to a

member request for statement of membership (within 28 days). The latter penalty is, superficially, a minor potential breach compared with more serious offences under the Fair Work Act 2009 which give rise to lower penalties. In this context the previous and significant breaches by one registered organisation, should not target all activities of other organisations in an extreme way. The measures should deter repeat offenders and if necessary, provide punitive measures for repeat offences.

3) *Items 59,163,164 and 165 relate to s.290A making it a criminal offence for officers:*
   - *who fail to exercise powers or discharge duties in good faith or in the best interests of the organisation or for proper purpose (where action is reckless or intentionally dishonest)*
   - *use their position dishonestly (includes officers and employees as defined)*
   - *or obtains information because he/she is an officer or employee of an organisation (or branch) and commits an offence by using the information dishonestly.*
   - *The maximum level of such penalty for a body corporate is $1.7 million, for an individual, $340,000 or 5 years gaol or both.*

Clearly this amendment imports provisions from the Corporations Act 2001 but the roles of public company directors, their knowledge, resources and capacity to defend are generally far in excess of the registered organisations targeted by this amendment.

By comparison with Company Directors, many unpaid Board members of registered organisations elected to voluntary positions, have no direct engagement in the financial and other listed affairs of their organisation - and limited prior knowledge. However there is always a risk that such persons will be implicated in investigation of any potential breaches – and their innocence can only be proven after tortious investigation and assessment.

In the extreme case, one impact of these provisions on registered organisations who are required to inform, educate and train their elected officials in their roles and responsibilities (in MTA's case 22 elected board members who are all volunteers), could be a failure to fill vacancies. The timing and resources required to fulfil these legislative requirements are quite substantial given these elected officials are from small medium and larger businesses located in country and metro zones from the south east of SA through to the NT and WA border regions. Such persons vary from those with some corporate knowledge through to one person businesses which is significantly different from the status of (and payments to) company directors referred to above.

This provision should be revamped to take into account the different standing and liability of elected officers in voluntary capacities who may or may not receive travel allowances and/or honorariums as distinct from salaried officers. Accordingly any civil or criminal provisions in relation to such volunteer elected officials (officers) should either be removed or significantly reduced. The precedent for this strong recommendation is in the Work Health Safety Act which reduces penalties for volunteer board members to the level of employee liability and their liability extends to the extent of their ability to influence or control workplace safety within the limits of reasonable knowledge and capacity.

4) *Item 166 imposes increased disclosure requirements, investigative powers and penalties in relation to "Disclosure of Remuneration" under s.293 B,BA,BB,BC and J. These provisions are broadly similar to the current Fair Work (Registered Organisations) Amendment Act 2012 with the following additions: - substantial increases in civil penalties for serious breaches of Remuneration Disclosure ($1.2 million – body corporate, $204,000 – individuals whilst for non-serious offences the penalties are $85,000 and $17,000 respectively. In addition, disclosure (in the 2013 amendment) relates to the five highest paid individuals compared with only two under the 2012 amendment.*

MTAs serious concerns with this amendment are reflective of similar comments in the preceding section. They again relate to questioning the maximum penalty at one level and the extent of their application to non-paid officials (officers) who serve the registered organisation in a voluntary capacity. Key issues are:-

- The level of penalty does not fit the nature of the potential breach – lower level penalties for breaches would achieve the same deterrent value. For example, for serious breaches, 300 penalty units on a corporation should be reasonable but not the proposed 6,000 units ($1.02 million). Equally measures such as media "name and shame" reporting provides the best deterrent to any potential breaches by any individual or organisation - irrespective of the level of penalty. Clearly the nature of a penalty by way of criminal enforcement and media reporting has a serious impact within and outside membership of a registered organisation.
- Second, there appears to be little benefit in increasing the number of highest paid officers to five, with the exception of registered organisations with branches. If this is not changed, one option, open to an organisation, is to seek member acceptance for reducing the number of elected officials and changes its rules. This is not in the best interest of the intended amendment but the impact would reduce the risk of penalties and dilute the number of disclosures required.

- Third the disclosure obligations are definitive with no discretion to seek a variation based on special/other circumstances – an amendment needs to be made to provide limited discretion as there are always unforeseen circumstances which may give rise to questions on disclosure.
- Fourth it appears on present drafting, non-paid officers could again be faced with imputed liability if they did not ask the right questions at the Board/Finance Committee level or in fact pursue answers satisfactorily. The qualification that their roles and responsibilities are subject to acting in good faith within their sphere of knowledge and skill should be a means of minimising liability. Alternately the preferred option is excluding non-paid officers whilst accepting the duty to disclose falls on the registered organisation.

5) *Item 166 Disclosure of material personal interests of officers and relatives (S 293 C, D, EF and J) which generally impose higher levels of membership reporting than required of public company directors.*

In a registered organisation of say 1200 member businesses, mandatory reporting the personal interests of an officer, including that of relatives, may have little or no direct benefit to the wider membership. However this form of disclosure can create unnecessary distrust, innuendo etc. if it is required to be broad cast to the wider membership. For example, in a number of organisations, volunteer elected officers have discovered one or possibly more of their relatives engaged by their registered organisation in a professional capacity (legal/IR/OHSE/clerical). Similar situations occur with Parliamentarians and others. These proposals do however go significantly further and may have a negative impact and may reduce an effective work culture with competitor members of the organisation. Such employed staff openly declares their family associations as a matter of course - why should it be a requirement?

Similarly this disclosure may deter willing volunteers to stand for elected positions on Boards/Divisions. Such roles are not always easy to fill as it requires them to stand as regional (zone) representatives, divisional representatives (representing a trade or professional group) or honorary positions on the Executive Committee/Board (in MTAs case, one day per month plus travel of up to 500km each way to consider a full range of motor industry interests). Accordingly amendments need to be made to address these concerns.

6) *Item 166 Disclosure of related party payments (s 293G,H,J) excluding remuneration to the (elected) officer or expense*

reimbursement, sets out mandatory obligations and again a $1.02 million civil penalty for serious breaches of disclosure.

In its present form, based on our view of this provision, it is unworkable and would add to the enormity of red tape in the following ways:-

- First, at the registered organisation level, MTA has a number of preferred suppliers who provide direct benefit to all members, including elected officers, by way of free health (cancer/checks), free /subsidised catering at meetings/events, prizes to employees or member businesses for attending relevant information sessions, subsidies for attending specific Work Health Safety training or for production of relevant materials. It is to be noted that many other non-registered employer organisations operating in the industrial relations field have similar arrangements in place for member benefit.

- Second MTAGTS, our affiliate which is part of our group (500 apprentices, plus lecturers, placement officers and managerial staff) receive even greater donations of engines, technical information, equipment and consumables and or subsidies/donations for the benefit of delivering high quality training for either member businesses or their employees or MTA apprentices. Elected members who serve on the MTA Executive / Board can also serve in some elected capacity on the GTS Board which again may impute disclosure responsibilities because of the structure.

- Clearly there would be some potential for confusion over disclosure requirements as elected officers serving in such capacities also gain benefits which are available to members at large.

Having read the Ai Group's "essential amendments (that) need to be made to the bill" as set out on pages 20 -22 of their published submissions, they provide a solution which would address our immediate and future anticipated concerns including the level of civil penalty.

7) *Item 166 Training in relation to financial duties requires officers to undertake approved training (S293 K) and the Commissioner has discretion to approve such training by one of two providers or a form of training that meets the financial management and other duties of officers of organisations or branches (S.293L).*

MTA SA and presumably like-minded organisations have, already invested heavily over an extended period of time in board of management training (governance workshops) for existing and

newly elected officials (officers). That training has been continuous, together with ongoing financial management training for those non paid officers involved in the financial affairs of the MTA SA (and the allied body MTA GTS). Accordingly there needs to be an amendment to the Bill or regulatory capacity for the General Manager of the Registered Organisations Commission (under section 154C) to accredit appropriate prior training of elected officers of registered organisations. The process should be simple, requiring evidence of the competencies delivered, dates, attendees and the authoritative credentials of the trainer (which in our case included a specialist organisational practitioner).

In conclusion, the major issues of concern for MTA relate to the broad application of civil and criminal penalties as outlined, the excessive level of penalties for breaches as outlined, the requirements imposed on disclosure of personal interests and related payments in the context specified, mechanisms for recognition of prior training and alterations as to compliance requirements.