

Master Builders Australia

Submission to the Senate Standing Education and
Employment Legislation Committee

*Fair Work (Registered Organisations) Amendment
Bill 2013*

22 November 2013



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CONTENTS

Recommendations	ii
1 Introduction	1
2 Purpose of Submission	1
3 Master Builders' Policy	2
4 The Registered Organisations Commission	3
5 New section 290A – A Step Towards Fit and Proper Person.....	4
6 Definition of Officer	4
7 Financial Impact of the Bill	6
8 Conclusion	7

Recommendations

Recommendation 1:	The Bill be reframed to accommodate a new fit and proper person test which is also introduced into the Fair Work Act 2009 (FW Act).
Recommendation 2:	Proposed subsection 293BC(2) of the Bill be amended so that only the remuneration of elected office bearers be reported and not that of appointed office bearers.
Recommendation 3:	That consideration of a debate on the Bill be postponed in order that its impact may be better assessed.

1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 122 years the movement has grown to 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

- 2.1 The purpose of this submission is to provide comment on the Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill) which was referred to the Senate Education and Employment Legislation Committee on 14 November 2013. The Bill seeks to amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) and the *Fair Work Act 2009* (FW Act) to ensure better governance of registered organisations.¹
- 2.2 Master Builders supports initiatives which deliver improved governance and financial transparency in the management and conduct of registered organisations. Registered organisations should be properly accountable to members and should not be operated for particular individual's interests.
- 2.3 As set out in section 1 of this submission, Master Builders is the peak body representing the interests of its members made up of the Master Builders' Association of New South Wales ('MBANSW'); Master Builders Association of the Northern Territory trading as Master Builders Northern Territory ('MBANT'); Master Builders Association of South Australia Incorporated (MBASAI); Master Builders' Association of Tasmania Inc. ('MBAT'); Master Builders' Association of Victoria ('MBAV'); Master Builders' Construction and

¹ Explanatory Memorandum, Fair Work (Registered Organisations) Amendment Bill 2013 (Cth).

Housing Association of the Australian Capital Territory ('MBCHAACT'); and, Queensland Master Builders Association, Industrial Organisation of Employers ('QMBA') (collectively 'the Associations'). The Associations are established as federally registered organisations, recognised by the Fair Work Commission under the RO Act (see FWC codes: 070N, 251V, 006S, 004T, 243V and 241V). QMBA is an established and transitionally recognised association under Schedule 1 of the RO Act (see FWC code: 1035_TRQ). Master Builders Association of Western Australia is a state registered industrial organisation.

- 2.4 The interests of the Associations are advanced where the relevant legislation requires transparency and accountability but without adding unnecessarily to administrative and other costs.

3 Master Builders' Policy

- 3.1 Registered organisations are a central part of the fair work system. Consequently, Master Builders' policy is that the members of registered organisations are entitled to transparent and accountable representation from suitably qualified personnel of good character.
- 3.2 The Master Builders' policy supports amendments to the RO Act which would:
- Ensure persons who hold an office and persons involved in the management or control of registered organisations must be fit and proper persons.
 - Ensure that financial reports are lodged on time and in compliance with the provisions of the RO Act by clarifying circumstances where a report is non-compliant, and therefore increasing the penalty for late filing and non-compliance will assist.
 - Deter malfeasance by creating new penalties for registered organisations, their officers and employees who do not act in good faith, or use their position or information, to directly or indirectly create a financial gain for themselves or someone else to the detriment of the registered organisation.

- Deter non-compliance with court orders by creating new penalties for registered organisations, their officers and employees who do not comply with an order of a court.
- 3.3 The current reforms should take the opportunity to ensure that, in line with Master Builders' policy, a fit and proper person test is appropriately legislated. Master Builders proposes that a 'fit and proper' person test be incorporated into the Bill.
- 3.4 The Master Builders' policy position is that a 'fit and proper' person test be a two-stage threshold test. First, persons who hold an office and persons with management or control would need to prove that they are of good fame and character and, secondly, they must not have been the subject of, or convicted of certain offences that would impinge on their role. This test would be similar to the *Fit and Proper Person Requirements 2011* (Requirements) under the *Vocational Education Training Regulator Act 2011* which ensure that people with a degree of control or influence over the operation of a registered training organisation (RTO) are fit and proper persons. As these personnel are often the same (that is they run RTOs as well as unions, for example) consistency between the two sets of laws makes sense.
- 3.5 Master Builders believes that these policy initiatives would provide a genuine deterrent against the misuse of power and position by registered organisations, their officers and employees; a key rationale for the introduction of the Bill. A full submission previously prepared by Master Builders on this matter dated 26 August 2013 is at Attachment A.

Recommendation 1:	The Bill be reframed to accommodate a new fit and proper person test which is also introduced into the <i>Fair Work Act 2009</i> (FW Act)
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4 The Registered Organisations Commission

- 4.1 Master Builders supports, in principle, the establishment of an independent Registered Organisations Commission (the Commission) to be headed by a Registered Organisations Commissioner (the Commissioner). The enhanced investigation and information gathering powers of the Commission modelled on those of the Australian Securities and Investments Commission (ASIC) are commended. The current system whereby the Fair Work Commission is the

responsible agency for the RO Act is not working, as is evident from the 'laboured and protracted investigation of Health Services Union officials'.²

- 4.2 The Bill establishes the Commissioner as an independent statutory office holder within the Office of the Fair Work Ombudsman and the Commission will not be a separate agency for the purposes of the *Public Service Act 1999* or the *Financial Management and Accountability Act 1997*. Therefore the staff assisting the Commissioner will be assigned by the Fair Work Ombudsman and be staff of the Office of the Fair Work Ombudsman. These arrangements may present challenges in practice.

5 New section 290A – A Step Towards Fit and Proper Person

- 5.1 The proposed section 290A to be inserted into the RO Act per item 163 of Schedule 2 of the Bill will create a number of new prescribed offences in the RO Act. These offences relate to 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.³ These new offences align with Master Builders' policy and are supported.
- 5.2 As these offences will be prescribed offences pursuant to section 212(b) of the RO Act, any person who has been convicted of these offences is not eligible to be a candidate for an election, or to be elected or appointed to an office in an organisation. Where a person already holds an office in an organisation, that person will cease to hold office after 28 days unless that person makes an application to the Federal Court under section 216 or 217 of the RO Act⁴ for leave to hold office.

6 Definition of Officer

- 6.1 The term 'officer' is defined in the RO Act as, 'in relation to an organisation, or a branch of an organisation, means a person who holds an office in the

² 'Clear need for union regulator', *The Australian Financial Review* (Sydney), 18 November 2013, 50.

³ Above n1.

⁴ *Fair Work (Registered Organisations) Act 2009* (Cth), s 215.

organisation or branch'.⁵ 'Office' is defined by section 9 of the RO Act which reads:

(1) In this Act, office, in relation to an organisation or a branch of an organisation means:

(a) an office of president, vice president, secretary or assistant secretary of the organisation or branch; or

(b) the office of a voting member of a collective body of the organisation or branch, being a collective body that has power in relation to any of the following functions:

(i) the management of the affairs of the organisation or branch;

(ii) the determination of policy for the organisation or branch;

(iii) the making, alteration or rescission of rules of the organisation or branch;

(iv) the enforcement of rules of the organisation or branch, or the performance of functions in relation to the enforcement of such rules; or

(c) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(i) and (iv), other than an office the holder of which participates only in accordance with directions given by a collective body or another person for the purpose of implementing:

(i) existing policy of the organisation or branch; or

(ii) decisions concerning the organisation or branch; or

(d) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(ii) and (iii); or

(e) the office of a person holding (whether as trustee or otherwise) property:

(i) of the organisation or branch; or

(ii) in which the organisation or branch has a beneficial interest.

(2) In this Act, a reference to an office in an association or organisation includes a reference to an office in a branch of the association or organisation.⁶

6.2 The current meaning of 'office' in the RO Act creates a situation where employees of registered organisations may, in some circumstances and

⁵ Fair Work (Registered Organisations) Act 2009 (Cth), s 6.

⁶ Fair Work (Registered Organisations) Act 2009 (Cth), s 9.

dependent on the terms of the relevant organisation's rules, be considered to be officers of the organisation. For example, persons who are employed by employer associations that would ordinarily be considered employees, are often captured as office holders under section 9(1)(c) or 9(1)(d) of the RO Act. This is because under the relevant rules these employees are entitled to participate directly in the determination of policy for the organisation. However, these employees are not elected to hold an office by members of the organisation.

- 6.3 The proposed new subsection 293BC(2) to be inserted into the RO Act per item 166 of Schedule 2 of the Bill will require that the branch of an organisation must disclose the remuneration of the five highest remunerated officers of the branch each financial year. As highlighted above in paragraph 6.2, persons who would ordinarily be considered as employees of an organisation will be considered an officer of the organisation if the relevant rules of the organisation authorises that person to determine policy for the organisation. As such, the organisation will be required to publically disclose their remuneration if they are among the five highest remunerated persons within the organisation. Where elected office bearers are paid a salary, this should be reported. However, where personnel are engaged under a normal employer and employee relationship, consideration should be given for the salary not to be reported.

Recommendation 2:	Proposed subsection 293BC(2) of the Bill be amended so that only the remuneration of elected office bearers be reported and not that of appointed office bearers.
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7 Financial Impact of the Bill

- 7.1 At the time of writing, no final regulation impact statement (RIS) has been released by the Senate Standing Education and Employment Legislation Committee for the Bill. Master Builders has been made aware that an options stage RIS has been developed by the Office of Best Practice Regulation (now within the Department of Prime Minister and Cabinet). However, that RIS does not consider the financial impacts of the Bill as introduced. Master Builders is concerned that the full financial impact of the Bill on the Associations is not yet known. For instance, the Bill creates new obligations

on organisations such as additional reporting obligations,⁷ disclosure requirements for remuneration paid to officers,⁸ creating officer and related party disclosure statements,⁹ and requiring each officer whose duties relate to financial management to undertake training.¹⁰

- 7.2 Master Builders submits that a full RIS should be published to show the impact the Bill will have on registered organisations and that the RIS should guide the final assessment of stakeholders concerning its terms. Of particular concern is the impact the Bill may have on smaller employer organisations as the relative cost associated with complying with the new obligations imposed by the Bill may have a much more drastic impact on these smaller organisations than it would on larger organisations. Master Builders therefore strongly submits that the passage of the Bill be postponed until such impacts are properly assessed

Recommendation 3:	That consideration of a debate on the Bill be postponed in order that its impact may be better assessed.
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8 Conclusion

- 8.1 Master Builders supports the foundations on which the Bill is built and supports, in principle, the establishment of the Commission and the Commissioner. Master Builders submits that the Bill be reframed to accommodate a new fit and proper person test which is also introduced into the FW Act and that the remuneration of staff members appointed in the ordinary course of business be exempt from the reporting obligations of registered organisations.
- 8.2 Given the absence of a final RIS relating to the Bill, Master Builders respectfully requests that the Government provide stakeholders with further time to consider the financial impact of the Bill.

⁷ Fair Work (Registered Organisations) Amendment Bill 2013, Item 89 of Schedule 2.

⁸ Fair Work (Registered Organisations) Amendment Bill 2013, Item 166 of Schedule 2.

⁹ Fair Work (Registered Organisations) Amendment Bill 2013, Item 166 of Schedule 2.

¹⁰ Fair Work (Registered Organisations) Amendment Bill 2013, Item 166 of Schedule 2.

Master Builders Australia

Submission

on

Strengthening Corporate Governance of Industrially Registered Organisations – Introducing a New Fit and Proper Person Test

26 August 2013



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CONTENTS

Recommendations	2
1 Introduction	3
2 Purpose of this submission	3
3 Fair Work Act	4
4 Fair Work (Registered Organisations) Act	7
5 Fit and Proper Person Requirements	11
6 Fit and Proper Person Test	13
7 Conclusion	16

Recommendations

Master Builders proposes a two-stage threshold test which seeks to strengthen the regulation of registered organisations under the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act). First, persons who wish to hold an office or persons who wish to be involved in the management and control of registered organisations would need to prove, before being appointed, that they have not been convicted of certain criminal offences. These offences would be against the law of the Commonwealth, State, Territory or foreign country involving:

- occupational health and safety;
- entry onto premises;
- fraud or dishonesty;
- intentional use of violence against another person; or
- intentional damage or destruction of property.

These offence provisions should as a matter of course be applied to exclude persons unless 5 years has elapsed from the relevant conviction. This five year exclusion period mirrors s215(1) of the RO Act.

Secondly, persons who wish to hold an office and persons with management and control of a registered organisation would need to prove that they are of good fame and character. This would involve providing a declaration that:

- they have not been the subject of any criminal or civil proceedings involving fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty;
- they have not been refused membership of, or had their membership suspended or cancelled by a registered organisation, because they had engaged in fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty;
- they have received appropriate training about their rights and responsibilities as an official or person with management and control; and
- the public would have confidence in the person's suitability to be involved in the registered organisation.

This test should also be transposed into the *Fair Work Act 2009* (Cth) (FW Act) and the *Fit and Proper Person Requirements 2011* (Cth) to ensure consistency in the fit and proper person laws which regulate the same personnel; for example, union officials or personnel of employer associations who run registered training organisations.

1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 122 years the movement has grown to 31,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of this submission

- 2.1 This submission sets out Master Builders' proposal to strengthen the corporate governance of industrially registered organisations under the *Fair Work (Registered Organisations) Act 2009* (RO Act). Because a 'fit and proper person' test is not included in the RO Act, its use is proposed and considered against the fit and proper person tests in the *Fair Work Act 2009* (Cth) (FW Act) and the *Fit and Proper Person Requirements 2011* (Cth) which apply to registered organisations. These tests are also recommended to be remediated.
- 2.2 Currently, the Fair Work Commission (FWC) has far too much discretion to decide who is a fit and proper person under s512 and 513 of the FW Act. This has resulted in the FWC finding, on numerous occasions that union officials who have committed criminal offences are still fit and proper persons to hold a right of entry permit. Therefore, a tighter fit and proper test needs to be introduced contemporaneously in the FW Act at the least to ensure that those who have committed serious criminal offences do not hold a permit and for the other reasons outlined in this submission.
- 2.3 Master Builders proposes that persons who intend to hold an office and persons who intend to exercise management or control of registered

organisations should satisfy a two-stage threshold test. First, these persons would need to prove that they have not been convicted of certain offences that would impinge on their role. Secondly, these persons would need to prove that they are of good fame and character, a test applied in other areas of corporate governance, especially the training sector. The introduction of this test combined with a change in the tests under the FW Act and the Requirements would assist with infusing needed confidence about the governance of industrially registered organisations into the system.

3 Fair Work Act

- 3.1 As stated in paragraph 2.1 above, s512 and 513 of the FW Act regulate the issuing of a right of entry permit to a 'fit and proper person'. Section 512 provides that:

The FWC may, on application by an organisation, issue a permit (an entry permit) to an official of the organisation if the FWC is satisfied that the official is a fit and proper person to hold the entry permit.

- 3.2 In deciding whether the official is a fit and proper person, the FWC must take into account the following permit qualification matters, as outlined in s513(1):

- (a) whether the official has received appropriate training about the rights and responsibilities of a permit holder;*
- (b) whether the official has ever been convicted of an offence against an industrial law;*
- (c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:*
 - (i) entry onto premises; or*
 - (ii) fraud or dishonesty; or*
 - (iii) intentional use of violence against another person or intentional damage or destruction of property;*
- (d) whether the official, or another person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official;*
- (e) whether a permit issued to the official under this Part, or under a similar law of the Commonwealth (no matter when in force), has been revoked or suspended or made subject to conditions;*
- (f) whether a court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law, has:*

- (i) *cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; or*
- (ii) *disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;*

(g) any other matters that the FWC considers relevant.

3.3 The breadth of these matters is intended to ensure that only appropriate persons are conferred with the right to access premises but in reality the provision has not had that effect as discussed below.

3.4 Section 514 of the FW Act further expands who is ineligible to be issued a right of entry permit. This section provides that:

The FWC must not issue an entry permit to an official at a time when a suspension or disqualification, imposed by a court or other person or body:

(a) applies to the official's exercise of; or

(b) prevents the official from exercising or applying for;

a right of entry for industrial or occupational health and safety purposes under a State or Territory industrial law or a State or Territory OHS law.

3.5 This provision recognises that an official of an organisation will not be issued an entry permit under the FW Act if they have been suspended or disqualified from applying or exercising right of entry under relevant State or Territory law.

3.6 Whilst Master Builders supports the intent of these provisions, that is elected officials of union and employer organisations must be fit and proper persons, we do not support the wide discretion given to the FWC to decide who is a fit and proper person, because of the practical effect its breath has unfortunately delivered as is evident in the cases next discussed.

3.7 In *The Office of the Australian Building and Construction Commissioner v Mr Brett Harrison*,¹ Mr Harrison had been convicted of making fraudulent expense claims whilst employed at a construction company. As his

¹ [2010] FWA 1528.

conviction related to dishonesty, the Australian Building and Construction Commissioner (ABCC) under s507 of the FW Act sought to have his entry permit revoked, arguing that Mr Harrison was not a fit and proper person to hold an entry permit. However, the tribunal member found that as Mr Harrison's convictions did not affect his ability to appropriately exercise his right of entry, a cancellation of his permit was not appropriate. Commissioner Cargill held that Mr Harrison was a fit and proper person as he entered into an early guilty plea, was remorseful and had held the entry permit for two years without incident.

- 3.8 Recently, the FWC also renewed the entry permit of a CFMEU organiser, despite his criminal record. In these cases,² the union lodged a renewal application for Mr Joshua, which revealed that he had two prior convictions for intentional damage or destruction of property. The first offence occurred in 2002, with Mr Joshua receiving a \$2,000 fine. The second offence occurred two years later, and the court ordered him to complete 120 hours of community service and an anger management course.
- 3.9 In granting Mr Joshua's latest permit, FWC Delegate Furlong took into account the time that had elapsed since his convictions, and the fact that Delegate Nassios issued the permits to the organiser in 2010, in full knowledge of his prior criminal history. The organiser also provided Delegate Furlong with a statement which was held to have showed that his attitude to rights and responsibilities had changed since his earlier offences. Consequently, Delegate Furlong was "not of the view that a criminal conviction should immediately lead to a finding that a proposed permit holder is not a 'fit and proper person'".³
- 3.10 In March 2013, the FWC also renewed the entry permit of a CFMEU official who had unlawfully entered a construction site.⁴ In 2009, Mr Beattie was fined \$1,000 for contravening s503(1) of the FW Act when he and another organiser entered a construction site without giving notice and against the objections of a security guard engaged by the relevant employer. Mr Beattie

² *Construction, Forestry, Mining and Energy Union of Workers* [2013] FWCD 2887 RE2013/760 (14 June 2013) and *Construction Forestry, Mining and Energy Union* [2013] FWCD 2307 RE2013.759 (14 June 2013) – The union applied for two permits to cover two union entities.

³ [2013] FWCD 2887, paragraph 28 and [2013] FWCD 2307, paragraph 28.

⁴ *Construction, Forestry, Mining and Energy Union* [2013] FWCD 1826 RE2012/1397 (25 March 2013).

and his colleague also falsely advised police who attended the site that they had a right to be on site.

3.11 As Mr Beattie had been a permit holder under the FW Act and the *Workplace Relations Act 1996* (Cth) since March 2009, and had been an official of the CFMEU for over 3 years and undertaken appropriate training about his right of entry, he was found 'on balance' to be a fit and proper person.⁵ Although Mr Beattie's permit was renewed, Delegate Furlong said that the FWC was required to take action against Mr Beattie under s510⁶ for a breach of s503(1), and as this had not occurred he would refer the matter to a Member of the FWC for consideration.

3.12 As Mr Harrison, Mr Joshua and Mr Beattie were all convicted of serious offences, but still found to be a fit and proper person in the relevant context, the test, we submit, requires reform. Rather than giving the FWC a mere discretion to take these offences into account when issuing a permit, Master Builders proposes a stronger test which would ensure that key personnel from registered organisations will only qualify as fit and proper persons if they have not been convicted of certain offences or that five years had elapsed from their relevant conviction. Therefore, we next consider the RO Act as it currently recognises some of the requirements of the proposed two-stage threshold test which, we submit, should flow into the requirements under the FW Act and the Requirements, as later discussed.

4 Fair Work (Registered Organisations) Act

4.1 Section 166 of the RO Act states that persons of general 'bad character' are unable to become and remain a member of an employee or employer organisation. Section 166(1) and s166(5) respectively deal with these organisations as follows:

(1) Subject to any modern award or order of the FWC, a person who is eligible to become a member of an organisation of employees under the eligibility rules of the organisation that relate to the occupations in which, or the industry or enterprise in relation to which, members are to be employed is, unless of

⁵ Paragraph 36.

⁶ Section 510 requires the FWC to revoke or suspend a permit if the holder has breached s503(1).

*general **bad character**, entitled, subject to payment of any amount properly payable in relation to membership:*

- (a) to be admitted as a member of the organisation; and;*
- (b) to remain a member so long as the person complies with the rules of the organisation.*

(5) Subsection (4) does not entitle an employer:

- (a) to become a member of an organisation if the employer is:
 - (i) a natural person who is of general **bad character**; or*
 - (ii) a body corporate whose constituent documents make provisions inconsistent with the purposes for which the organisation was formed; or**
- (b) to remain a member of an organisation if the employer ceases to be eligible to become a member and the rules of the organisation do not permit the employer to remain a member. (emphasis added)*

4.2 As the term 'bad character' is not defined within the RO Act, its ordinary meaning is assumed. Although ss166(1) and ss166(5)(a)(i) should ensure that all members in registered organisations are not of 'bad character', the RO Act does not contain any further requirements on the standing of persons who are union and employer officials, despite the requirements in s215, which are next discussed. Therefore, Master Builders considers that there should be greater linkage between the requirements of s166 and the requirements that should be established as a precursor to holding office in an industrially registered organisation.

4.3 Section 215 of the RO Act regulates the basis on which certain persons may be disqualified from holding office in registered organisations. The main criteria are set out in s215(1) and s215(2):

(1) A person who has been convicted of a prescribed offence is not eligible to be a candidate for an election, or to be elected or appointed, to an office in an organisation unless:

(a) on an application made under section 216 or 217 in relation to the conviction of the person for the prescribed offence:

(i) the person was granted leave to hold office in organisations; or

(ii) the person was refused leave to hold office in organisations but, under paragraph 216(2)(b) or 217(2)(b), the Federal Court specified a reduced exclusion period, and that period has elapsed; or

(b) in any other case—the exclusion period has elapsed.

(2) Where a person who holds an office in an organisation is convicted of a prescribed offence, the person ceases to hold the office at the end of the period of 28 days after the conviction unless, within the period, the person makes an application to the Federal Court under section 216 or 217.

4.4 Subsection 215(1) states that a person who has been convicted of a certain offence⁷ is not eligible to be a candidate for an election, or to be elected or appointed to an office, unless:

- five years have elapsed since that person's conviction or release from imprisonment;
- the Federal Court has reduced a persons exclusion period (time that they are unable to hold an office) and that has elapsed; or
- the Federal Court has allowed them to hold an office.

4.5 Section 215(2) also provides that where a person who holds an office is convicted of a prescribed offence, they cease to hold their office 28 days after the conviction, unless they personally apply to the Federal Court within that time period.

4.6 The term 'office' within the RO Act is broad. Section 9(1) states that:

In this Act, office, in relation to an organisation or a branch of an organisation means:

- (a) an office of president, vice president, secretary or assistant secretary of the organisation or branch; or*
- (b) the office of a voting member of a collective body of the organisation or branch, being a collective body that has power in relation to any of the following functions:*
 - (i) the management of the affairs of the organisation or branch;*

⁷ Section 212:

- (a) an offence under a law of the Commonwealth, a State or Territory, or another country, involving fraud or dishonesty and punishable on conviction by imprisonment for a period of 3 months or more; or
- (b) an offence against section 51, 72, 105, 185, 191, subsection 193(2), section 194, 195, 199 or subsection 202(5); or
- (c) any other offence in relation to the formation, registration or management of an association or organisation; or
- (d) any other offence under a law of the Commonwealth, a State or Territory, or another country, involving the intentional use of violence towards another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property.

- (ii) the determination of policy for the organisation or branch;*
- (iii) the making, alteration or rescission of rules of the organisation or branch;*
- (iv) the enforcement of rules of the organisation or branch, or the performance of functions in relation to the enforcement of such rules; or*
- (c) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(i) and (iv), other than an office the holder of which participates only in accordance with directions given by a collective body or another person for the purpose of implementing:*
 - (i) existing policy of the organisation or branch; or*
 - (ii) decisions concerning the organisation or branch; or*
- (d) an office the holder of which is, under the rules of the organisation or branch, entitled to participate directly in any of the functions referred to in subparagraphs (b)(ii) and (iii); or*
- (e) the office of a person holding (whether as trustee or otherwise) property:*
 - (i) of the organisation or branch; or*
 - (ii) in which the organisation or branch has a beneficial interest.*

4.7 This definition provides that an organisation's board members, voting members or trustees hold an office for the purposes of the RO Act. However, the further scope of persons who are eligible to hold an office is contingent upon the manner in which the rules of an organisation are expressed. For example, appointed staff who determine policy will only hold an office in the statutory sense if the rules of the organisation expressly provide that they are entitled to exercise that function. Consequently, if an organisation's rules do not cover these persons in the sense set out in s9(1)(c) or s9(1)(d) they would not hold an office, and may be able to manage or control a registered organisation even if they have been convicted of certain offences.

4.8 The RO Act needs to be strengthened to effectively regulate who is able to manage and control registered organisations and to clarify the meaning of the holding of an office. Master Builders' proposed test would require that all persons who intend to hold office or are involved in the management or control of a registered organisation must not have been convicted of certain

offences. These persons must also be of good fame and character. We propose the terms 'persons who hold an office', because it is already adopted in the RO Act and 'person with management or control', per the intent of the Requirements, which are a new set of obligations introduced by the Government in the vocational education and training (VET) sector and which stand as a useful model already endorsed by Government albeit in another context. The Requirements are next discussed.

5 Fit and Proper Person Requirements

- 5.1 The Requirements formally identify the fit and proper person conditions for persons who exercise a degree of control or influence over the operation of a registered training organisation (RTO).⁸ Subsection 186(1) of the *National Vocational Education and Training Regulator Act 2011* permits the Minister to make requirements for assessing whether a person is a fit and proper person.⁹ The Requirements are part of the VET Quality Framework which also includes the Standards for National VET Regulator (NVR) Registered Training Organisations, the Australian Qualifications Framework, the Financial Viability Risk Assessment Requirements and the Data Provision Requirements.¹⁰
- 5.2 The objective of the Requirements is to ensure that persons who exercise a degree of control or influence over the management of an RTO are persons in whom the public are likely to have confidence relating to their suitability to manage, or be involved with an organisation that provides or assesses national qualifications.¹¹
- 5.3 Fit and Proper Person Requirement (FPPR) 4 sets out the criteria which the National VET Regulator must have regard to when making a decision about whether a person meets the fit and proper person requirements for registration of an RTO:

⁸ *Explanatory Statement – Fit and Proper Person Requirements made under the National Vocational Education Training Regulator Act 2011*, p 1.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

- (a) *whether the person has been convicted of an offence against a law of the Commonwealth or of a State or Territory and if so, the seriousness of the offence;*
- (b) *whether the person has ever had his, her or its registration on the National Register cancelled or suspended;*
- (c) *whether the person has ever had a condition imposed on his, her or its registration on the National Register;*
- (d) *whether the person has ever breached a condition of registration in Subdivision B of Division 1 of Part 2 of the Act;*
- (e) *whether the person has ever become bankrupt, applied to take the benefit of a law for the benefit of bankrupt or insolvent debtors, compounded with his or her creditors or assigned his or her remuneration for the benefit of creditors;*
- (f) *whether the person has ever been disqualified from managing corporations under Part 2D.6 of the Corporations Act 2001;*
- (g) *whether the person was involved in the business of the provision of courses by another provider who is covered by any of the above paragraphs at the time of any of the events that gave rise to the relevant prosecution or other action;*
- (h) *whether the person has ever provided a State or Territory registering body and/or the National VET Regulator with false or misleading information or made a false or misleading statement to a State or Territory registering body or the National VET Regulator, and whether the person knew that the statement made or information provided to the State or Territory registering body or VET Regulator was false or misleading;*
- (i) *whether the person has ever been found not to be a fit and proper person for the purposes of the Education Services for Overseas Students Act 2000;*
- (j) *whether the public is likely to have confidence in the person's suitability to be involved in an organisation that provides or assesses national qualifications; and*
- (k) *any other relevant matter.*

5.4 FPPR 5 also provides that:

A person mentioned in FPPR 4 does not meet the Fit and Proper Person Requirements if the National VET Regulator is satisfied that, having regard to the matters provided in paragraph FPPR 4 (a) to (k), one or more of the following people do not meet the Fit and Proper Person Requirements:

- (a) *an executive officer of the person referred to in FPPR 4;*
- (b) *a high managerial agent of the person referred to in FPPR 4; or*
- (c) *any person or entity that exercises a degree of control or influence over the management or direction of the registered training organisation.*

5.5 This multi-faceted test is in place to ensure that persons who exercise a degree of control or influence over the management of the RTO are people in whom the public are likely to have confidence in their ability to manage, or be involved with, an organisation that provides or assesses national qualifications.¹² Therefore, the introduction into the RO Act of a similar test would ensure that all persons who hold an office and persons with management and control of the organisation are fit and proper persons. As these personnel are often the same (that is they run RTOs as well as unions or employer associations) consistency between the two sets of laws makes sense and contemporaneously elevates the level of corporate governance required to be applied by industrially registered organisations.

6 Fit and Proper Person Test

6.1 As stated earlier, Master Builders proposes a two-stage threshold test which would strengthen the regulation of registered organisations under the RO Act. First, persons who wish to hold an office or persons who wish to be involved in the management and control of registered organisations would need to prove before being appointed that they have not been convicted of certain criminal offences. These offences would be against the law of the Commonwealth, State, Territory or foreign country involving:

- OHS;
- entry onto premises;
- fraud or dishonesty;
- intentional use of violence against another person; or
- intentional damage or destruction of property.

6.2 This provision would ensure that relevant persons who have been convicted of certain offences which would fundamentally impinge on their role. Whilst the RO Act currently regulates the basis on which certain people may not be eligible or disqualified from office, persons who commit fraud, engage in violence or the destruction of property are able to hold office if:

- five years has elapsed since their conviction or release from imprisonment;

¹² Ibid.

- the Federal Court has reduce their exclusion period and that time has elapsed; or
- the Federal Court has allowed them to hold office.

6.3 The fit and proper person tests in the FW Act and as set out in the Requirements only direct the FWC and the National VET Regulator respectively to have consideration for whether the person has been convicted of an offence. Consequently, these tests give the FWC and the National VET Regulator on the abundance of discretion to decide who is a fit and proper person.

6.4 Master Builders' proposed test would strengthen the regulation of registered organisations and further protect the interests of members by ensuring that persons who commit the offences listed in paragraph 6.1 are excluded from holding office or are unable to be involved in the management and control of registered organisations. These offence provisions should as a matter of course be applied to exclude persons unless 5 years has elapsed from the relevant conviction. This five year exclusion period mirrors s215(1) of the RO Act.

6.5 Secondly, the purpose of introducing a good fame and character requirement into the RO Act would be to ensure that persons who wish to hold an office and persons who are involved in the management or control of a registered organisation are people in whom members and the general public have confidence to effectively govern the organisation. There is no doubt that confidence in registered organisations has suffered a blow in recent times, especially as a result of the Health Services Union scandal.¹³

6.6 Currently, whilst members of registered organisations must not be of 'bad character', the notion of proving 'good character' would be more stringent. This test would require persons who hold an office and persons with management and control to prove that they are of a higher standing than members who must be inherently 'not bad', a test out of kilter with, for example, the FW Act.

¹³ See for example "HSU; \$20m of dubious spending, report finds". SMH/National Times Kate McClymont <http://www.smh.com.au/federal-politics/political-news/hsu-20-million-of-dubious-spending-report-finds-20120723-22kmi.html>

- 6.7 We recommend that persons who hold an office and persons who exercise a degree of control or influence over the management of an organisation provide a declaration which proves that they are of 'good fame and character'. As highlighted by the High Court in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, character is an important indicator of whether a person is fit and proper:

*The expression 'fit and proper person' standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concepts of 'fit and proper person' cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that in certain contexts, character (because it provides an indication of likely future conduct) or reputation (because it provides an indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.*¹⁴

- 6.8 Master Builders contends that character is highly pertinent in the context of registered organisations. Members must have confidence in the persons who act on their behalf in these organisations. However, following the wrongdoing and malfeasance found by the then Fair Work Australia in relation to the Health Services Union, discussed above, it is evident that safeguards need to be put in place to ensure other misuses of power do not occur.

- 6.9 Therefore, in order to relevantly assess the notion 'good fame and character' in context, we propose that persons who intend to hold an office or persons who intend to have management or control of a registered organisation must provide a declaration stating that:

- they have not been the subject of any criminal or civil proceedings involving fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty;
- they have not been refused membership of, or had their membership suspended or cancelled by a registered organisation, because they

¹⁴ Toohey and Gaudron JJ at 65.

had engaged in fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty;

- they have received appropriate training about their rights and responsibilities as an official or person with management and control; and
- the public would have confidence in the person's suitability to be involved in the registered organisation.

6.10 This declaration would provide a means to assess an individual's good fame and character as it highlights their involvement in both criminal and civil proceedings, whether or not they are convicted. The declaration could be assessed by the FWC as a necessary prerequisite to the appointment of the relevant person. These elements would substantially elevate the current tests in the RO Act and ensure consistency with some of the elements of the current fit and proper person test in the Requirements.

6.11 It is recommended that this two-stage test also be transposed into the FW Act and the Requirements to ensure consistency in the laws which regulate the same personnel; for example, union officials or personnel of employer associations who run RTOs.

7 Conclusion

Master Builders supports measures which protect members of employee and employer organisations from acts of wrongdoing and malfeasance by persons who hold an office and persons with management and control of the organisation. Therefore, we propose that the fit and proper person test, outlined in section 6, be incorporated into the RO Act and that the FW Act and the Requirements be remediated having regard to the same considerations. This test would require persons who seek to hold an office and persons who seek to exercise management and control of a registered organisation to be subject to new, more appropriate obligations.
