



Fair Work (Registered Organisations) Amendment Bill 2013

22 November 2013

Submission to the Senate Education and Employment Legislation Committee

Summary of Ai Group's position

Registered organisations of employers and employees play an essential role in Australia, both in representing their Members' interests and in contributing to vital community objectives such as the need to maintain a productive, flexible and fair workplace relations system. As stated in section 5 of the *Fair Work (Registered Organisations) Act 2009*:

"Parliament recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system".

Ai Group's predecessor organisations were first registered in the NSW industrial relations system in 1902 and federally in 1926. We have maintained continuous registration ever since.

Overwhelmingly the officials and staff of registered organisations of employers and employees are dedicated and ethical people who work very hard for the benefit of their Members, their industries and the broader community. Many union and employer association representatives who sit on various councils and committees within the structures of registered organisations are unpaid. The roles of these employer and worker representatives cannot be readily aligned with those of directors of listed public companies. For example, typically, the directors of listed public companies:

- Are well-remunerated for their role in returning a value on the shareholders' investment; and
- Sit on Boards comprising 5-9 directors each of whom is drawn from corporate backgrounds.

Most importantly, listed companies are commercial profit making entities designed to increase the capital value of the company to enhance shareholder investment – they are constructed by law (the *Corporations Act 2001*) as such, and not as not-for-profit (NFP) entities. This fundamental difference between a commercial operation existing to return value on investment and an organisation that is designed to accept membership subscriptions to provide a service to the same membership is critical in assessing the type of regulation and the type of control necessary. For example, none of the members of an NFP entity are entitled by law to receive income or assets of the NFP.¹

¹ Note also the Incorporated Associations Acts of each State and Territory, the various Co-operatives legislation, the new definition of NFP issued under the *Income Tax Assessment Act 1997* and the recent guidelines on governance established by the Australian Charities and Not for Profit Commission.

The vast majority of Boards of Top 100 companies have between 7 and 9 directors, and the Boards of Top 101-200 companies typically have between 5-7 members.² The average pay of a non-executive director in 2012 was \$218,434 for a Top 100 company and \$134,981 for a Top 101-200 company.³

Ai Group has 78 volunteer Councillors (deemed Officers under the *Fair Work (Registered Organisations) Act 2009*) who are elected by incorporated Members (those Members being overwhelmingly companies) in New South Wales, Victoria, Queensland and South Australia. Our Officers are chief executives and senior executives of large and small Ai Group Members. They (and their employer companies) give up a great deal of time and receive no payment for the vital role they play in determining the policies of Ai Group and in ensuring that high standards of financial management and accountability are maintained. Similarly, the governing structures of unions often involve councils and committees comprising many unpaid representatives of workers.

It is important that legislation governing registered organisations remains balanced and appropriate. Unlawful conduct within one organisation must not be used as an excuse to impose unfair laws or an excessive compliance burden upon all registered organisations.

Australia is a signatory to the ILO's *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*. In accordance with the Convention, laws regulating registered organisations must not inhibit the ability of workers and employers to join unions and employer organisations, nor restrict their right to elect representatives and organise the administration of their organisations. The following extracts from the Convention are relevant:

ILO'S FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948 (NO. 87)

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

² *Australian Council of Superannuation Investors, Board Composition and Non-Executive Director Pay in Top 200 Companies: 2012*, Research Paper, September 2013, pp.7-8.

³ *Ibid*, p.21.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.
2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term **organisation** means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

Amendments to the *Fair Work (Registered Organisations) Act 2009* were passed by Parliament in 2012 via the *Fair Work (Registered Organisations) Amendment Act 2012*. Further amendments to the registered organisations legislation were passed earlier this year through the *Fair Work Amendment Bill 2013*. The 2012 and 2013 amendments:

- Increased the investigation and prosecution powers of the General Manager of the Fair Work Commission (FWC);
- Tripled the previous maximum penalties for breaches of the *Fair Work (Registered Organisations) Act 2009* (up to \$51,000) and
- Imposed new reporting obligations on registered organisations and their officers.

The 2012 and 2013 legislative amendments have imposed an onerous regulatory burden on registered organisations. The legislation, as it now stands, imposes the following new requirements:

1. A requirement that all officers of registered organisations whose duties relate to the financial management of the organisation must complete a training program approved by the FWC by 30 June 2014 or within 6 months of when the person begins to hold the office.
2. A requirement that officers of registered organisations disclose to the organisation the remuneration paid to them by the organisation, a related party of the organisation, or because the officer is a member of a Board due to him or her being an officer of the organisation. Disclosures are to be made as soon as practicable after the remuneration is paid. The initial disclosure is to be made for the period from 1 July 2013 and be made as soon as practicable after 31 December 2013 but no later than 31 January 2014.
3. A requirement that officers of registered organisations disclose to the organisation the material personal interests that they and their relatives (spouse, parent, child, grandchild, grandparent, brother and sister) have or acquire that relates to the affairs of the organisation. Disclosures are to be made as soon as practicable after the interest is acquired. The initial disclosure is to be made for the period from 1 July 2013 and be made as soon as practicable after 31 December 2013 but no later than 31 January 2014.
4. A requirement that registered organisations disclose to the members of the organisation and to the FWC by 31 December 2014, the remuneration which the 5 highest paid organisational officers and the 2 highest paid branch officers have been paid by the organisation between 1 July 2013 and 30 June 2014 (and each year thereafter).

5. A requirement that registered organisations disclose to the members of the organisation and to the FWC by 31 December 2014, the material personal interests which the officers have disclosed to the organisation between 1 July 2013 and 30 June 2014 (and each year thereafter).
6. A requirement that registered organisations disclose to the members of the organisation and to the FWC by 31 December 2014, all payments to related parties of the organisation between 1 July 2013 and 30 June 2014, including payments to entities controlled by officers of the organisation or relatives of an officer of the organisation.
7. A requirement that each registered organisation amend its rules by 31 December 2013 to require that its officers complete the training program identified in point 1 above and make the disclosures set out in points 2, 3, 4, 5 and 6 above.

Ai Group has been working diligently for the past 15 months to achieve compliance with the new laws and has devoted substantial resources to the task. Very significant hurdles have been encountered due to the lack of resources within the FWC and consequent delays in receiving approval from the FWC for rule changes and other arrangements. Ai Group's training program for officers was approved by the FWC on 15 November 2013 (one of only three approved programs so far) but a great deal of work still needs to be done to achieve compliance by the deadlines imposed under the legislation. It has also become evident that some aspects of the 2012 Amendments are problematic and the details of the disclosure regime were not adequately analysed when the Amendment Bill was drafted, given the haste with which the amendments were introduced into and passed by Parliament. Little regard appears to have been had when drafting the 2012 Amendment Act to the important objectives and purposes of the *Corporations Act 2001* and how those fundamentally different purposes could be appropriately translated into the governance arrangements for not-for-profit registered organisations.

Ai Group supports the broad objectives of the Bill to make officers accountable but the disclosure regime is a significant regulatory burden that must have a clear and unequivocal objective and purpose. The *Corporations Act 2001* is couched in commercial terms that enable businesses to manage their daily transactions where there is no financial benefit likely to endanger the interests of the company and provides a mechanism to allow for member approval if there is a likelihood of such endangerment.

It is essential that some significant amendments are made to the Bill to preserve fairness and balance for registered organisations and their officers. The necessary amendments include:

- Implementing substantial but more balanced civil penalties for officers of registered organisations;
- Removing the criminal penalties from the Bill, given that any criminal behaviour of officers of registered organisations is comprehensively covered by the criminal law;

- Implementing material **personal** interest arrangements modelled on those in Chapter 2D of the *Corporations Act 2001* (conflict of interest primarily), rather than the far more onerous provisions in the Bill;
- Implementing related party payment disclosure provisions modelled on those applicable to companies which are not listed, including appropriate exemptions and exclusions found in the *Corporations Act 2001*, rather than the far more onerous provisions included in the Bill;
- Implementing appropriate transitional arrangements to ensure that registered organisations like Ai Group which have devoted very significant resources to complying with the 2012 Amendment Act and having obtained approval from the FWC for an officer training program and having sought approval from the FWC for alternative related party payment disclosure arrangements, are not disadvantaged by the transfer of the regulatory role to the new Registered Organisations Commission.

Ai Group's views on the specific amendments proposed in the Bill are set out in the following table.

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
Schedule 1 – The Registered Organisations Commissioner		
Items 1-87 Amendments to the <i>Fair Work Act 2009</i> (FW Act) and the <i>Fair Work (Registered Organisations) Act 2009</i> (RO Act).	No concerns identified	These provisions are largely consequential in nature reflecting the transfer of certain functions from the General Manager of the FWC to the Registered Organisations Commissioner (ROC).

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Item 88 Part 3A – Registered Organisations Commissioner and Registered Organisations Commission	Amendments need to be made	Section 329AB sets out the functions of the ROC. The following additional functions should be included: <i>To promote the democratic functioning and control of organisations.</i> The above proposed function would be consistent with s.5(3)(d) of the RO Act. In performing functions under the Act, it is important that the ROC not perform functions in a manner which would discourage democratic functioning and control of organisations. For example, it is important that the ROC's functions not be performed in a way that would deter appropriate persons from becoming officers of registered organisations.
Items 89-128 Amendments to the RO Act.	No concerns identified	These provisions are largely consequential in nature reflecting the transfer of certain functions from the General Manager of the FWC to the ROC.
Items 129-137 Part 2 – Transitional Provisions	No concerns identified	These transitional provisions are sensible to facilitate the transition of functions from the General Manager of the FWC to the ROC.
Schedule 2 – Increased disclosure requirements, investigation powers and penalties		
Items 1-3 Definitions of “disclosure period”, “officer and related party disclosure statement” and “proceeding”.	No concerns identified	

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
Item 4 Definition of “serious contravention”.	Amendments need to be made	The definition of “serious contravention” is very important because much higher penalties apply to such contraventions. Defining a “serious contravention” as a contravention that “is serious” does nothing to clarify the meaning of the term despite the fact that a similar definition exists in s.1317G of the <i>Corporations Act 2001</i> (Corporations Act). Accordingly, paragraph (c) in the definition should be deleted.
Items 5, 6, 11, 13, 18, 36, 39, 40, 45, 46, 47, 56, 57, 58, 68, 104, 107, 231, 240 and 241 Substitute “Penalty” for “Maximum Penalty” and related amendments.	No concerns identified	Technical changes to bring the RO Act in line with current legislative drafting practices regarding references to penalties.
Items 7, 8, 9, 10, 14, 15, 16, 17, 28, 29, 32, 33, 34, 35, 41, 42, 43, 44, 48, 49, 50, 51, 52, 53, 54, 55, 71, 72, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 100, 101, 102, 103, 105, 106, 116, 117, 118, 119, 120, 121, 124, 125, 128, 129, 130, 131, 132, 133, 134, 135, 136 and 137 Penalty for breach of: <ul style="list-style-type: none"> • s.52: Declaration by Secretary re. amalgamation ballot • s.104: Statement re. amalgamation ballot • s.169: Request by member for statement of membership • s.175: False representation as to membership 	Amendments need to be made	Until 29 June 2012, the penalty for a breach of these provisions was: <ul style="list-style-type: none"> • 100 penalty units for a body corporate; and • 20 penalty units for an individual. These penalties were tripled through the <i>Fair Work (Registered Organisations) Amendment Act 2012</i> to: <ul style="list-style-type: none"> • 300 penalty units for a body corporate (i.e. \$51,000); and • 60 penalty units for an individual (i.e. \$10,200). The Bill would further substantially increase the penalties to: <ul style="list-style-type: none"> • 500 penalty units for a body corporate (i.e. \$85,000); • 100 penalty units for an individual (i.e. \$17,000) The existing level of penalty for these provisions is appropriate. The level of penalty in the Bill is excessive. For example, an \$85,000 maximum penalty for failing to

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
<ul style="list-style-type: none"> • s.176: False representation about resignation • s.192: Declaration about register • s.198: Response to post-election report • s.233(3): Statement about records • s.237: Particulars of loans, grants and donations • s.253: Preparation of general purpose financial report • s.254: Preparation of operating report • s.256(1): Appointment of auditors • s.257: Auditor's report • s.259: Forwarding notices to auditors • s.265: Copies of report to be provided to members • s.267: Comments by Committee Members • s.268: Reports etc to be lodged • s.270: Accounts of low income organisations 		<p>respond within 28 days to a member request for a statement of membership (s.169) is much higher than the penalty under the FW Act for breaching an FWC stop order relating to unlawful industrial action. This is not balanced. The level of penalty for a breach of s.169 should be no higher than \$51,000 – the same as for a breach of s.347 (see Items 238 and 239 in the Bill)</p>
<p>Item 19</p> <p>Rules of organisation to require the keeping of minute books in which are recorded proceedings and resolutions of meetings of committees of management of the organisation and its branches.</p>	No concerns identified	

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Item 20 Division 3A – Rules relating to disclosure s.148F – Model rules relating to disclosure	Qualified support	The approach taken in the Bill of setting out the disclosure obligations in the Act rather than providing for the publication of model rules which organisations may adopt (with or without modification), provides less flexibility to registered organisations, however, provided that the disclosure obligations are appropriate this approach should reduce the compliance burden on organisations. Some important changes need to be made (as set out in the submission) in order for the disclosure obligations to be appropriate.
Items 21, 22, 23, 24, 25, 30, 31, 37, 38, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 73, 74, 75, 76, 77, 78, 92, 93, 94, 95, 96, 97, 98, 99, 108, 109, 110, 111, 112, 113, 114, 115, 122, 123, 138, 139, 140, 141, 142, 143, 144, 145 and 146 Penalty for breach of: <ul style="list-style-type: none"> • ss.151 and 152 – Requirement to lodge copy of membership agreements, assets and liabilities agreements etc • s.172: Non-financial members to be removed from register • s.189: Lodging election information • s.230: Records to be kept and lodged • s.231: Records to be held for 7 years • s.233(2): Lodging of information • s.235: Access to records • s.236: Delivery of records • s.256(3)-(6): Persons not to be auditors 	No concerns identified	The existing level of penalty (maximum of \$51,000) has been maintained under these provisions.

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
<ul style="list-style-type: none"> • s.263: Removal of auditor • s.264: Distribution of auditor's reasons • s.266: Report to be presented to meetings • s.272: Providing information to members • s.274: Frivolous applications • s.276: Disclosure of information 		
<p>Items 26 and 27</p> <p>Section 154C – Approved training</p> <p>154D - Rules to require officers to undertake approved training</p>	<p>Amendments need to be made</p>	<p>Section 154C enables the FWC to approve training for officers of registered organisations. Section 154D requires that the rules of registered organisations be varied (by 1 January 2014) to require all officers whose duties relate to the financial management of the organisation to complete a training program approved by the FWC within 6 months of when the person begins to hold the office.</p> <p>Over the past 12 months Ai Group has devoted substantial resources to developing a detailed training program for its officers to meet the requirements of s.154C. The training program was approved by the FWC on 15 November 2013. It would be very unfair to require Ai Group and the small number of other organisations which have had training courses approved by the FWC, to submit those training courses to the ROC for further approval. Item 244 (page 87 of the Bill) is very inadequate because it only exempts individual officers who have undertaken training from the requirement to undertake another training course. It does not exempt organisations like Ai Group from the requirement to have their currently approved officer training course, approved again by the ROC. A further transitional provision needs to be included in the Bill along the lines of the following:</p> <p><i>“Training courses approved by the General Manager under section 154C of the Act, as in force immediately before the commencement time, have effect as if they were approved by the Commissioner under section 293L of the Act.”</i></p>

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
Item 89 Disclosure of total expenditure incurred each financial year on: Remuneration of employees; Advertising; Operating costs; Donations to political parties; and Legal costs	No concerns identified	
Items 126 and 127 s.268 – Reports etc to be lodged	No concerns identified	Technical amendments
Item 147 Simplified outline of Chapter 10 – Conduct of officers and employees	No concerns identified	
Items 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161 and 162 Division 2 – General duties in relation to the financial management of organisations s.285 – Care and diligence – civil obligation only s.286 – Good faith – civil obligations s.287 – Use of position – civil obligations s.288 – Use of information – civil obligations	Amendments need to be made	Until 29 June 2012, the penalty for a breach of ss.285, 286, 287 and 288 was: <ul style="list-style-type: none"> • 100 penalty units for a body corporate; and • 20 penalty units for an individual. These penalties were tripled through the <i>Fair Work (Registered Organisations) Amendment Act 2012</i> to: <ul style="list-style-type: none"> • 300 penalty units for a body corporate (i.e. \$51,000); and • 60 penalty units for an individual (i.e. \$10,200). The Bill would further substantially increase the penalties to: <ul style="list-style-type: none"> • For a serious contravention: <ul style="list-style-type: none"> ○ 6,000 penalty units for a body corporate (i.e. \$1,020,000)

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
		<ul style="list-style-type: none"> ○ 1,200 penalty units for an individual (i.e. \$204,000) • For other than for a serious contravention: <ul style="list-style-type: none"> ○ 500 penalty units for a body corporate (i.e. \$85,000) ○ 100 penalty units for an individual (i.e. \$17,000) <p>The duties in ss.285, 286, 287 and 288 of the RO Act are based upon ss.180, 181, 182 and 183 of the Corporations Act. The maximum penalty for a “serious contravention” of ss.180, 181, 182 and 183 of the Corporations Act is \$200,000 for an individual and \$1,000,000 for a body corporate. This is less than the amount in the Bill, and unlike the Corporations Act, the penalties in the Bill will automatically increase when the value of a penalty unit increases. The penalties in the Bill are excessive. Overwhelmingly the officials and staff of registered organisations of employers and employees are dedicated and ethical people who work very hard for the benefit of their Members, their industries and the broader community. The officers of Ai Group and a large proportion of the officers of other registered organisations are unpaid. The roles of these employer and worker representatives cannot be readily aligned with those of directors of listed public companies (see pages 2 and 3 above).</p> <p>We propose the following maximum penalties for breaches of these provisions:</p> <ul style="list-style-type: none"> • For a serious contravention: <ul style="list-style-type: none"> ○ 1,000 penalty units for a body corporate (i.e. \$170,000) ○ 200 penalty units for an individual (i.e. \$34,000) • For other than for a serious contravention: <ul style="list-style-type: none"> ○ 500 penalty units for a body corporate (i.e. \$85,000) ○ 100 penalty units for an individual (i.e. \$17,000)

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
<p>Items 59, 163, 164 and 165</p> <p>s.290A – Good faith, use of position and use of information – criminal offences</p> <p>Penalty:</p> <ul style="list-style-type: none"> • 10,000 penalty units for a body corporate (\$1,700,000) • 2,000 penalty units (\$340,000) or imprisonment for 5 years, or both, for an individual 	<p>This Item needs to be removed from the Bill</p>	<p>Section 290A is based on s.184 of the Corporations Act. However, as outlined above, the officers of Ai Group and a large proportion of the officers of other registered organisations are unpaid. The roles of these employer and worker representatives cannot be readily aligned with those of directors of listed public companies (see pages 2 and 3 above).</p> <p>The offence of ‘reckless’ use of their position that may result in another person indirectly gaining an advantage or causing detriment to the registered organisation is far too great a burden to place on officers, given the massive penalty of \$340,000 or 5 years gaol, or both. Many unpaid officers of registered organisations have no direct engagement in the financial affairs of the organisation.</p> <p>Criminal penalties are not appropriately included in the RO Act. The criminal law applies to officers of registered organisations like other citizens, including a wide range of offences such as fraud, theft etc. It is not necessary to include criminal offences in the RO Act.</p> <p>If the proposed criminal penalties and proposed massive financial penalties for breaches of duties are included in the RO Act, this would operate as a major disincentive to existing voluntary officers of registered organisations continuing in their roles, and would deter other people from holding office. Such an outcome would be inconsistent with the objects of the RO Act and inconsistent with Australia’s obligations under ILO Convention No. 87 (see pages 3, 4 and 7 above).</p>

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
<p>Item 166 – Disclosure of remuneration</p> <p>s.293B – Disclosure of remuneration paid to officers</p> <p>s.293BA – Immediate disclosure</p> <p>s.293BB – Standing disclosure of remuneration</p> <p>s.293BC – Disclosure of certain remuneration and benefits by organisations and branches</p> <p>s.293J – Officer and related party disclosure statements</p>	<p>Amendments need to be made</p>	<p>The provisions of ss.293B, 293BA, 293BB and 293BC are broadly similar to s.148A of the <i>Fair Work (Registered Organisations) Amendment Act 2012</i>, except the Bill:</p> <ul style="list-style-type: none"> • Includes a massive civil penalty for serious breaches of the disclosure obligations; • Sets out the disclosure obligations within the legislation with no ability to modify those obligations within organisational rules; • Provides for a standing disclosure of remuneration to be made; • Requires that the remuneration paid to the five highest paid organisational officers and five highest paid branch officers be disclosed to members and the ROC. (The 2012 Amendment Act only required that the remuneration of the two highest paid branch officers be disclosed). <p>The penalties for breaching the remuneration disclosure provisions in the Bill are:</p> <ul style="list-style-type: none"> • For a serious contravention: <ul style="list-style-type: none"> ○ 6,000 penalty units for a body corporate (i.e. \$1,020,000) ○ 1,200 penalty units for an individual (i.e. \$204,000) • For other than for a serious contravention: <ul style="list-style-type: none"> ○ 500 penalty units for a body corporate (i.e. \$85,000) ○ 100 penalty units for an individual (i.e. \$17,000) <p>The penalties in the Bill are excessive. An appropriate penalty for intentionally breaching the remuneration disclosure provisions would be:</p> <ul style="list-style-type: none"> • 300 penalty units for a body corporate (i.e. \$51,000); and • 60 penalty units for an individual (i.e. \$10,200).

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
<p>Item 166 – Disclosure of material personal interests of officers and relatives</p> <p>s.293C – Disclosure of material personal interests of officers and relatives</p> <p>s.293D – Officer may give members of committee of management standing notice about an interest</p> <p>s.293E – Interaction of section 293C and 293D with other laws</p> <p>s.293F – Restrictions on taking part in making decisions</p> <p>s.293J – Officer and related party disclosure statements</p>	<p>Amendments need to be made</p>	<p>The provisions of the Bill in this area will operate very unfairly on registered employer organisations and their officers, and it is essential that the Bill is amended. The Bill would impose a far more onerous regime for officers of registered organisations than what applies to directors of public companies. The regime, if enacted, would undoubtedly deter persons from standing for office in employer organisations. In practice the provisions of the Bill would seriously impede many organisations from carrying on their daily business operations.</p> <p>Under s.191(1) of the Corporations Act a director is required to disclose <u>to the other directors</u> (i.e. typically 4-8 other people – see pages 2 and 3 above) any material personal interests in a matter that relates to the affairs of the organisation, that the director or specified relatives have or acquire. Subsection 191(2) of the Corporations Act includes a list of interests which the director is not required to disclose. Most importantly, the purpose of disclosure under the Corporations Act is to provide a mechanism for the director to exit from proceedings involving the interest (conflicts).</p> <p>In contrast, ss.293C and 293J would require the material personal interests of directors and their relatives to be distributed to all members of the organisations (many thousands of companies in Ai Group's case) as well as to the ROC. If the ROC adopts the same practice as the FWC then the reports sent to the ROC will be published on its website. The interests covered by s.293C are <u>personal</u> interests and in most cases officers will not be comfortable with their personal financial interests (and those of numerous relatives) being widely published.</p> <p>Unless the Bill is amended, the provisions will operate as a major disincentive to existing officers of registered organisations continuing in their roles, and would deter other people from holding office. Such an outcome would be inconsistent with the objects of the RO Act and inconsistent with Australia's obligations under ILO Convention No. 87 (see pages 3, 4 and 5 above).</p>

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
		<p>A requirement to circulate officers' material personal interest disclosures to members is included in the <i>Fair Work (Registered Organisations) Amendment Act 2012</i>, but this requirement is not yet operative (disclosures must be circulated to members by 31 December 2014) , and it is only recently that the implications of this ill-conceived idea has become apparent. The 2012 Amendments were rushed through Parliament without adequate analysis and it is essential that the same mistake is not repeated with this Bill.</p> <p>The following essential amendments need to be made to the Bill:</p> <ul style="list-style-type: none"> • The officer and related party disclosure statement (s.293J) must not be required to include details of material personal interest disclosures. It is not appropriate that the material personal interests of officers be distributed to all members of the organisations as well as to the ROC. Other provisions of the Bill ensure an appropriate level of disclosure, including s.293C of the Bill which requires that material personal interests be disclosed to other officers and s.141(1)(b)(ii) of the Bill which requires that material personal interests disclosures be recorded in the minutes. Paragraph 150 in the Explanatory Memorandum explains the importance of the minutes for material personal interest disclosures. • A list of exclusions from the material personal interest notice requirements needs to be included in the Act, modelled on relevant interests in s.191(2) of the Corporations Act, including interests that: <ul style="list-style-type: none"> ○ Arise in relation to the officer's remuneration as an officer (s.191(2)(i)); ○ Arise in relation to a contract the organisation is proposing to enter into that is subject to approval by the members and will not impose any obligation on the organisation if it is not approved by the members (s.191(2)(iii));

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
		<ul style="list-style-type: none"> ○ Relates to a contract that insures, or would insure, the officer against liabilities incurred as an officer of the organisation (s.191(2)(vi)); ○ Is in a contract, or proposed contract, with, or for the benefit of, or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate (s.191(2)(viii)). • The penalties in the Bill for breaching the material personal interest disclosure requirements (up to \$1,020,000) are excessive. An appropriate maximum penalty for breaching the provisions would be: <ul style="list-style-type: none"> ○ 300 penalty units for a body corporate (i.e. \$51,000); and ○ 60 penalty units for an individual (i.e. \$10,200).
<p>Item 166 – Disclosure of related party payments</p> <p>s.293G – Disclosure of payments made by an organisation or a branch</p> <p>s.293H – Section 293G – order for alternative disclosure arrangement</p> <p>s.293J – Officer and related party disclosure statements</p>	<p>Amendments need to be made</p>	<p>Sections 293G and 293H are broadly similar to ss.148C and 148D of the <i>Fair Work (Registered Organisations) Amendment Act 2012</i>, except that the Bill:</p> <ul style="list-style-type: none"> • Includes a massive civil penalty (up to \$1,020,000) for serious breaches of the disclosure obligations; and • Sets out the disclosure obligations within the legislation with no ability to modify those obligations within organisational rules. <p>The provisions in the Bill draw upon concepts in the Corporations Act, but important provisions in the Corporations Act which make the provisions workable have not been included in s.293G of the RO Act (nor in s.148C of the <i>Fair Work (Registered Organisations) Amendment Act 2012</i>). Ai Group has 78 officers, all of who are chief executives or senior executives of a diverse range of companies. Ai Group has rigorous procurement and contract protocols in place. In a year, we have approximately 3,000 suppliers. The administrative burden associated with determining the links between all suppliers and all officers (and their relatives, and their spouse's relatives) would be extreme and unworkable.</p>

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
		<p>Ai Group's submissions about the unworkability of s.148C of the <i>Fair Work (Registered Organisations) Amendment Act 2012</i> led to s.148D being included in the Act. However, after 15 months of hard work in liaising with the FWC regarding an exemption and the provision of extensive documentation and other evidence, an exemption still has not been granted. We have not yet abandoned our application and have convened a Special General Meeting of Ai Group Members on 26 November 2013 to vote upon an alternative disclosure rule. If the alternative disclosure rule is approved at the Meeting a formal application will be made to the FWC straight away to approve the exemption under s.148D and the alternative disclosure rule. It is unclear at this stage whether the FWC will approve the exemption and alternative rule.</p> <p>The related party payment provisions are extreme and unworkable in their current form. There is no minimum payment set out in the legislation. For example, if the Managing Director of a company that manufactures biscuits or milk is an officer of Ai Group, the purchase of a packet of biscuits or a carton of milk would apparently need to be disclosed to all members of Ai Group and the ROC.</p> <p>The following essential amendments need to be made to the Bill:</p> <ul style="list-style-type: none"> The following provisions, based upon ss.210, 212, 213, 214 and 215 of the Corporations Act, needs to be included in the Bill: <i>"Subsections 293G(1) and (2) do not apply to a payment if:</i> <ul style="list-style-type: none"> <i>(a) the payment is made on terms that would be reasonable in the circumstances if the entity and the related party were dealing at arm's length, or on terms that are less favourable to the related party than these terms;</i> <i>(b) the payment is for an indemnity, exemption or insurance premium in respect of a liability incurred as an officer of an organisation or for legal</i>

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
		<p><i>costs incurred by the officer in defending an action incurred as an officer, and the payment would be reasonable in the circumstances of the organisation giving the benefit;</i></p> <p>(c) <i>the total of the following amounts or values is less than or equal to \$5,000 or such higher amount prescribed by the Regulations for the purpose of this section⁴:</i></p> <p>(i) <i>The amount or value of the financial benefit;</i></p> <p>(ii) <i>The total of all other amounts or values of financial benefits given to the related party, in the financial year;</i></p> <p><i>(Note: Regulation 2E.1.01 prescribes the amount of \$5,000 for the purposes of s.213 of the Corporations Act)</i></p> <p>(d) <i>the payment is to a closely held subsidiary;</i></p> <p>(e) <i>the payment is in the form of a benefit given to the related party in their capacity as a member of the organisation and the benefit does not discriminate unfairly against the other members of the organisation.</i></p> <ul style="list-style-type: none"> • A further transitional provision needs to be included in the Bill along the lines of the following: <i>“Exemptions and alternative disclosure arrangements approved by the General Manager under section 154C of the Act, as in force immediately before the commencement time, have effect as if they were an order made by the Commissioner under section 293H of the Act.”</i> • The penalties in the Bill for breaching the related party payment disclosure requirements (up to \$1,020,000) are excessive. An appropriate maximum

⁴ Note that the current Amendment Act has no limit for the value of payments. The FWC has also suggested that if an exemption were granted under section 148D then amounts would need to be cumulative for each payee; thus the suggestion that this be altered to make the threshold payment more reasonable before aggregation.

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
		<p>penalty for breaching the provisions would be:</p> <ul style="list-style-type: none"> ○ 300 penalty units for a body corporate (i.e. \$51,000); and ○ 60 penalty units for an individual (i.e. \$10,200) for reckless or dishonest failure to disclose.
<p>Item 166 – Training in relation to financial duties</p> <p>s.293K – Officers to undertake approved training</p> <p>s.293L – Approved training</p>	<p>Amendments need to be made</p>	<p>Sections 293K and 293L enable the ROC to approve training for officers of registered organisations.</p> <p>Over the past 12 months Ai Group has devoted substantial resources to developing a detailed training program for its officers to meet the requirements of s.154C of the <i>Fair Work (Registered Organisations) Amendment Act 2012</i>. The training program was approved by the FWC on 15 November 2013. It would be very unfair to require Ai Group and the small number of other organisations which have had training courses approved by the FWC, to submit those training courses to the ROC for further approval. Item 244 (page 87 of the Bill) is very inadequate because it only exempts individual officers who have undertaken training from the requirement to undertake another training course. It does not exempt organisations like Ai Group from the requirement to have their currently approved training courses, approved again by the ROC.</p> <p>The following amendments need to be made to the Bill:</p> <ul style="list-style-type: none"> • A further transitional provision needs to be included in the Bill along the lines of the following: <i>“Training courses approved by the General Manager under section 154C of the Act, as in force immediately before the commencement time, have effect as if they were approved by the Commissioner under section 293L of the Act.”</i> • The penalties in the Bill for breaching the training requirements (up to \$85,000) are excessive. An appropriate maximum penalty for deliberately breaching the

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
		<p>provisions would be:</p> <ul style="list-style-type: none"> ○ 300 penalty units for a body corporate (i.e. \$51,000); and ○ 60 penalty units for an individual (i.e. \$10,200).
<p>Items 167, 172, 177, 182, 187, 192 and 197</p> <p>s.297 – Order or direction applying to organisation – civil obligation</p> <p>s.298 – Prohibition order or direction applying to organisation – civil obligation</p> <p>s.299 - Order or direction applying to officer – civil obligation</p> <p>s.300 – Prohibition order or direction applying to officer – civil obligation</p> <p>s.301 – Order or direction applying to employee – civil obligation</p> <p>s.302 – Prohibition order or direction applying to employee – civil obligation</p> <p>s.303 – Order or direction applying to member of organisation – civil obligation</p>	Not supported	<p>Ai Group regards these amendments as a retrograde step as they would remove existing provisions in the RO Act which assist in ensuring that union officials comply with orders of the Federal Court and the FWC made under the FW Act</p> <p>Even though union officials can be penalised under the FW Act, the existing provision in the RO Act reinforces the fact that unions derive many benefits from registration under the RO Act, and accordingly have obligations to comply with orders made by the Federal Court and the FWC under the main workplace relations statute, the FW Act.</p>

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
<p>Items 168, 169, 170, 171, 173, 174, 175, 176, 178, 179, 180, 181, 183, 184, 185, 186, 188, 189, 190, 191, 193, 194, 195, 196, 198 and 199</p> <p>Penalty for breach of:</p> <ul style="list-style-type: none"> • s.297 – Order or direction applying to organisation – civil obligation • s.298 – Prohibition order or direction applying to organisation – civil obligation • s.299 - Order or direction applying to officer – civil obligation • s.300 – Prohibition order or direction applying to officer – civil obligation • s.301 – Order or direction applying to employee – civil obligation • s.302 – Prohibition order or direction applying to employee – civil obligation • s.303 – Order or direction applying to member of organisation – civil obligation 	<p>Amendments needs to be made</p>	<p>To ensure that a balanced approach is taken across all penalty provisions in the RO Act, we propose the following penalties for breaches of ss.297, 298, 299, 300, 301, 302 and 303 of the RO Act:</p> <ul style="list-style-type: none"> • For a serious contravention: <ul style="list-style-type: none"> ○ 1,000 penalty units for a body corporate (i.e. \$170,000) ○ 200 penalty units for an individual (i.e. \$34,000) • For other than for a serious contravention: <ul style="list-style-type: none"> ○ 500 penalty units for a body corporate (i.e. \$85,000) ○ 100 penalty units for an individual (i.e. \$17,000)
<p>Items 200, 201, 202, 203, 204, 205, 206, 207, 208 and 210</p> <p>Various amendments concerning penalties and related matters</p>	<p>No concerns identified</p>	<p>These provisions are largely consequential and/or relatively minor in nature.</p>

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
Item 209 307A – Disqualification orders	No concerns identified	
Items 211-241 Part 3B – Information sharing Part 4 – Inquiries and investigations Division 1 – Inquiries Division 2 – Investigations Division 3 – Questioning on oath or affirmation Division 4 – Powers in relation to documents Division 5 – Action following investigations Division 6 – Offences Division 7 – Evidentiary use of certain materials Division 8 – Miscellaneous	Amendments needs to be made	Ai Group does not support the proposed criminal penalties in these sections of the Bill. The civil penalties are adequate, together with the enforcement mechanisms and penalties available under the criminal law.

<i>Provisions of the Bill</i>	<i>Ai Group's position</i>	<i>Comments</i>
Items 242, 243, 244, 245, 246 Part 2 – Transitional provisions	Amendments needs to be made	<p>In addition to the transitional provision in s.244 (Approved training), the following provision is needed (see explanation above for Items 26 and 27 and Item 166 - Training):</p> <p><i>“Training courses approved by the General Manager under section 154C of the Act, as in force immediately before the commencement time, have effect as if they were approved by the Commissioner under section 293L of the Act.”</i></p> <p>The following provision relating to section 293H of the Bill is needed (see discussion above regarding Item 166 (Disclosure of related party payments):</p> <p><i>“Exemptions and alternative disclosure arrangements approved by the General Manager under section 154C of the Act, as in force immediately before the commencement time, have effect as if they were an order made by the Commissioner under section 293H of the Act.”</i></p>

SYDNEY

51 Walker Street
North Sydney NSW 2060
PO Box 289
North Sydney NSW 2059
Tel: 02 9466 5566
Fax: 02 9466 5599

MELBOURNE

20 Queens Road
Melbourne VIC 3004
PO Box 7622
Melbourne VIC 8004
Tel: 03 9867 0111
Fax: 03 9867 0199

BRISBANE

202 Boundary Street
Spring Hill QLD 4004
PO Box 128
Spring Hill QLD 4004
Tel: 07 3244 1777
Fax: 07 3244 1799

CANBERRA

L2, 44 Sydney Avenue
Forrest ACT 2603
PO Box 4986
Kingston ACT 2604
Tel: 02 6233 0700
Fax: 02 6233 0799

ADELAIDE

L1, 45 Greenhill Road
Wayville SA 5034
Tel: 08 8394 0000
Fax: 08 8394 0099

ALBURY/WODONGA

560 David Street
Albury NSW 2640
PO Box 1183
Albury NSW 2640
Tel: 02 6041 0600
Fax: 02 6021 5117

BALLARAT

1021 Sturt Street
Ballarat VIC 3350
PO Box 640
Ballarat VIC 3353
Tel: 03 5331 7688
Fax: 03 5332 3858

BENDIGO

87 Wills Street
Bendigo VIC 3550
Tel: 03 5440 3900
Fax: 03 5444 5940

NEWCASTLE

Suite 1, "Nautilus"
265 Wharf Road
Newcastle NSW 2300
PO Box 811
Newcastle NSW 2300
Tel: 02 4925 8300
Fax: 02 4929 3429

WOLLONGONG

L1, 166 Keira Street
Wollongong NSW 2500
PO Box 891
Wollongong East NSW 2520
Tel: 02 4228 7266
Fax: 02 4228 1898

AFFILIATE PERTH

Chamber of Commerce
& Industry
Western Australia
180 Hay Street
East Perth WA 6004
PO Box 6209
East Perth WA 6892
Tel: 08 9365 7555
Fax: 08 9365 7550

www.aigroup.com.au

