Australian Government

Department of Education, Employment and Workplace Relations

Submission to the

Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012

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INTRODUCTION

1. The Department of Education, Employment and Workplace Relations (the Department) notes the introduction of the Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012 (the Bill) to the Senate on 27 November 2012 by Senator Kroger on behalf of Senator Abetz.

Key Amendments

2. The key amendments proposed in the Bill would amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to:

    - provide that pecuniary penalties that the Federal Court may order for contraventions of the civil penalty provisions of the RO Act (section 305(2)) by an officer of an organisation are 200 penalty units ($34,000) (item 7) increased from 60 penalty units;

    - introduce new criminal offence provisions that would apply where:

        - An officer of an organisation or branch fails to exercise his or her powers and discharge his or her duties in good faith or for a proper purpose;

        - An officer or employee of an organisation or branch uses his position to gain an advantage for himself or herself or to cause detriment to the organisation;

        - A person uses information obtained because he or she is, or has been, an officer or employee of an organisation or branch to gain advantage for himself or herself to cause detriment to the organisation (item 3); and

    - introduce new offence provisions for breaches of court orders by organisations, branches, officers or employees (item 9).

3. The maximum penalties for the new offences would be imprisonment for 5 years or 2,000 penalty units ($340,000), or both (items 3 and 9).

4. The Bill will also provide that a reporting unit is taken not to have complied with the obligation under section 268 of the RO Act (to lodge copies of financial reports with the Fair Work Commission (FWC)) unless any report lodged complies with the statutory requirements in the RO Act (item 2).

5. The Department notes that the stated policy objectives of the Bill are to ensure that registered organisations are transparent and accountable and to deter misconduct by officers and employees (Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012, Explanatory Memorandum). Certain obligations and penalties would be aligned with those that apply to entities provided for by the *Corporations Act 2001* (Cth) (the Corporations Act).

6. The Department's submission highlights a number of areas that it considers the Committee should have regard to in considering the Bill

SUMMARY OF EXISTING ARRANGEMENTS

7. Employer and employee organisations are central to the workplace relations system. Under the *Fair Work Act 2009* (FW Act), organisations participate in the system, including by:

    - engaging in the modernisation, variation and review of awards;
    - representing members in enterprise bargaining;
    - representing members in matters before the FWC;
    - participating in the process of setting the national minimum wage;
    - advocating for the interests of members and providing training in relation to industrial matters, including occupational health and safety; and
    - assisting members in the course of dispute resolution.

8. The RO Act regulates the formation and internal management of employer and employee organisations. It contains detailed rules about the financial management as well as rules about the conduct of officials of registered organisations.

Financial Reporting

9. Part 3 of Chapter 8 of the RO Act contains a range of obligations that apply to organisations in relation to financial records, accounting and auditing.

10. Financial reports are required to be prepared by 'reporting units'. A reporting unit may be the whole of an organisation or one or more branches of an organisation (section 242 of the RO Act).

11. Obligations on a reporting unit under the RO Act that are relevant in relation to the Department's submissions on the amendments proposed by the Bill include:

    - preparing a general purpose financial report consisting of specified information (section 253);
    - preparing an operating report consisting of specified information (section 254);
    - appointing an auditor to audit the general purpose financial report to ensure compliance with the Australian Accounting Standards and any other requirements of Part 2 (section 256 and 257);
    - providing free of charge to its members either a full report or a concise report consisting of specified information (section 265);
    - presenting the full report to a general meeting of its members or to the committee of management subject to certain requirements (section 266); and

- lodging with the FWC copies of the full report and any concise report as well certification that such reports are copies of the documents provided to members in accordance with section 266 (section 268).

12. Paragraph 265(1)(a) provides that a full report must consist of:

- a copy of the report of the auditor in relation to the inspection and audit of the financial records of the reporting unit in relation to a financial year;

- a copy of the general purpose financial report to which the report relates; and

- a copy of the operating report to which the report relates.

13. Subsection 265(3) provides that a concise report must consist of:

- a concise financial report for the year drawn up in accordance with the Fair Work (Registered Organisations) Regulations 2009;

- the operating report for the year;

- certain information provided by auditor; and

- a statement that the report is a concise report and that a full report and auditor's report will be sent to a member free of charge on request.

Conduct of officials – Civil obligations

14. Division 2 of Part 2 of Chapter 9 of the RO Act sets out general duties in relation to the financial management of organisations. It includes duties to act with care and diligence and in good faith, as well as rules prohibiting the improper use of a position or information.

15. An officer of an organisation or a branch must exercise his or her powers and discharge his or her duties with the degree of care and diligence of a reasonable person (subsection 285(1)). This requirement will be met if the officer makes a judgment in good faith for a proper purpose, does not have a material or personal interest in the subject matter of the judgment, is appropriately informed, and if he or she rationally believes that the judgment is in the best interests of the organisation (subsection 285(2)).

16. An officer of an organisation or branch must exercise his or her powers and discharge his or her duties in good faith and for a proper purpose (section 286).

17. An officer or employee of an organisation or branch must not improperly use his or her position to gain advantage for himself or herself or someone else or cause detriment to the organisation or to another person (section 287).

18. A person who obtains information because he or she is, or has been, an officer or employee of an organisation or a branch must not improperly use the information to gain an advantage for himself or herself or someone else or cause detriment to the organisation or to another person (section 288).

19. Sections 285 to 288 are civil penalty provisions as provided for in section 305 of the RO Act.

20. In addition to the civil obligations on officers of organisations, the RO Act also requires the rules of registered organisations to include certain obligations on officers including in relation to the disclosure of remuneration paid to officers and the disclosure of material personal interests of officers and their relatives.

Enforcement arrangements

21. The General Manager is empowered to make inquiries or to conduct investigations in relation to specified contraventions of provisions of the RO Act that relate to the financial records and audits of registered organisations (sections 330 and 331). The General Manager can also investigate contraventions of civil penalty provisions in relation to officers improperly using their position to gain advantage for themselves or causing detriment to the organisation or another person, failing to act with a requisite degree of care and diligence or failing to act in good faith and for a proper purpose in the discharge of his or her duties.

22. If the General Manager is satisfied that a contravention of Part 3 of Chapter 8 has occurred, he or she may issue notice to the organisation requesting specific action be taken or refer the matter to the Commonwealth Office of the Director of Public Prosecutions, the Australian Federal Police or a police force of a State or Territory in relation to any possible criminal offences (section 337).

23. The General Manager also has a general power to apply to the Federal Court for a civil penalty to be issued against the organisation or an official for contravention of the civil penalty provisions of the RO Act (section 310).

    - The penalties that may be imposed by the Federal Court for breaches of the civil penalty provisions of the RO Act are 300 penalty units ($51,000) for a body corporate and 60 penalty units ($10,200) for others for each contravention.

24. The range of remedies available under the RO Act are consistent with FWC's key function of ensuring the financial accountability of registered organisations and their officers to their membership.

Compliance with orders – civil obligations

25. Division 2 of Part 3, Chapter 9 of the RO Act (sections 297 – 303A) places civil obligations on officers, employees and members of registered organisations in relation to orders and directions of the Federal Court or the FWC. Breaches of these provisions could result in the imposition of a civil penalty (section 305).

Recent amendments

26. The *Fair Work (Registered Organisations) Amendment Act 2012* (RO Amendment Act) received Royal Assent on 29 June 2012. Part 1 of Schedule 1 to the RO Amendment Act commenced on the Royal Assent.
    - In general, the provisions of Part 1 relate to FWC's role in approving training, in improving the conduct of investigations and inquiries and in certifying alterations to

rules. It also includes increased maximum penalties for breaches of the civil penalty provisions of the RO Act.

27. Part 2 of Schedule 1 to the RO Amendment Act will commence after a period of 12 months from the day of the Royal Assent, or an earlier day set by proclamation.
    - In general, the provisions of Part 2 relate to the new requirements for the rules of registered organisations.

28. The RO Amendment Act made a number of significant amendments to the RO Act in relation to the financial and accountability obligations of registered organisations and their office holders following the investigations of FWA into the Victorian No. 1 Branch and the National Office of the Health Services Union.

29. Part 1 of Schedule 1 to the RO Amendment Act amended the RO Act to:

    - insert a new object into the RO Act, to recognise and respect the role of employer and employee organisations in facilitating the workplace relations system;

    - require officials to undertake training about their governance and accounting obligations;

    - enhance the investigative powers available to the FWC, including:

        - the power for the General Manager to provide information to bodies such as federal or state police and regulatory agencies;
        - the power to interview, obtain information or documents from third parties in relation to investigations into the finances and financial administration of organisations;
        - the power to make further inquiries in relation to an organisation's ongoing compliance with the RO Act after being notified of a contravention; and
        - the power to delegate investigative functions to third parties with substantial or significant experience or knowledge where the third party has relevant skills and experience.

    - require all investigations to be concluded as soon as practicable; and

    - tripled the maximum penalties that may be imposed for breaches of the civil penalty provisions of the RO Act (from 100 penalty units ($17,000) for a body corporate and 20 penalty units ($3,400) for others to 300 penalty units ($51,000) for body corporates and 60 penalty units ($10,200) for others).

30. Part 2 of Schedule 1 to the RO Amendment Act amended to RO Act to require:

    - rules of all registered organisations to include policies about financial expenditure and accountability within organisations;

    - rules to deal with the disclosure of remuneration paid to the highest paid officials in the organisation and in the branches of an organisation;

- rules to deal with the disclosure to the organisation of other pecuniary and financial interests that an official has or acquires in a matter that relates to the affairs of the organisation ;

- rules to deal with the disclosure of information about transactions with related parties; and

- rules to require certain officers to undertake relevant training in their financial management duties.

31. The RO Act regulates registered organisations in a manner that gives appropriate recognition to their role in the workplace relations system.

TECHNICAL AND POLICY ISSUES

Recent amendments have yet to commence

32. Following the publication of Fair Work Australia's report on the investigation into the Victorian No. 1 Branch and the National Office of the HSU, the Government identified a number of areas of the RO Act that could be clarified and strengthened, including;

    - rules relating to the financial accountability and transparency of registered organisations,

    - the range of penalties that can be applied where an organisation breaches their obligations under the RO Act, and

    - improving the FWC's investigative function.

    Issues in relation to these key areas were addressed by the RO Amendment Act (discussed above).

33. The amendments in the RO Amendment Act were the subject of consultation with stakeholders at a meeting of the National Workplace Relations Consultative Council (NWRCC). The NWRCC gave in principle agreement noting that the proposed amendments would significantly improve the financial reporting framework, governance and accountability for registered organisations (NWRCC Communique 114, 25 May 2012).

34. As noted above, key parts of the RO Amendment Act are yet to commence, including in relation to the requirements on registered organisations to have rules in place dealing with disclosure of financial matters. Further, the Government, in consultation with an NWRCC drafting committee, is currently preparing model rules in accordance with sections 142A and 148F in relation to expenditure and financial disclosure.

35. Given that the amendments increased standards and penalties, were put in place in close consultation with key stakeholders, many of the amendments are not yet operative, that model rules are being drafted and that registered organisations in conjunction with the FWC are currently in the process of making changes to their governance arrangements to reflect their new obligations, the Department considers that it would be premature to undertake further amendments before the existing arrangements can be implemented and their effectiveness assessed.

Regulating registered organisations like corporations

36. The policy rationale underpinning the amendments in the Bill is that registered organisations should be regulated in the same manner as corporations. This fails to recognise the differences between registered organisations and corporations.

37. While there are some similarities, registered organisations are not, for the most part, comparable to corporations. Corporations are designed to generate wealth and protect the financial interests of shareholders. In contrast, registered organisations are established to represent their members in the industrial relation system with special rights under the FW Act, including in relation to collective bargaining and right of entry, and are an important element in ensuring the right to freedom of association.

38. Further, the officers of registered organisations are often individuals who do not perform the role on a full time basis or for remuneration; as opposed to directors of corporations who in most cases are remunerated for their work.

39. The Department believes that while the key concepts, principles and structures of corporate governance overlap with and provide a useful starting point for regulating registered organisations, rules that account for the unique constitution of registered organisations, including their central purpose and the context in which they operate, is required.

Exposure to criminal penalties – effect on participation in registered organisations

40. To introduce criminal sanctions for breaches of the RO Act would be a significant change in the regulation of registered organisations.

41. Officers and employees of registered organisations are subject to general criminal laws, for example in relation to theft or fraudulent conduct. However, the RO Act does not generally provide for imprisonment for breaches of their obligations. The only circumstance in which the RO Act provides for imprisonment is in relation to the victimisation of whistleblowers (section 337C).

42. Given that officers of registered organisations often perform their role in a voluntary or part time capacity, there is a significant risk that introducing more severe penalties could negatively impact on registered organisations in relation to their ability to attract appropriately qualified individuals to become officers. This risk was highlighted by Mr Stephen Smith (Director, National Workplace Relations) of the Australian Industry Group (AIG), who has indicated to the Committee that the introduction of criminal liability would act as a “deterrent” to people giving up their time to sit on committees of employer groups (Senate Education, Employment and Workplace Relations Legislation Committee, Inquiry into the Fair Work (Registered Organisations) Amendment Bill 2012, 22 June 2012, Committee Hansard, p.5).

43. This has the potential to diminish the ability of registered organisations to adequately represent their members.

Non-compliance with court orders

44. Item 9 of the Bill proposes criminal offence provisions that punish organisations and branches and their officers and employees for failing to comply with orders of a court by imposing fines of up to 2,000 penalty units and or up to 5 years imprisonment.

45. This would be a significant alteration of the existing arrangements for the enforcement of orders made by the Courts generally.

46. Currently, Australian courts of record have the power to punish contempts of their power and authority. The Federal Court and High Court's power in this regard arises by virtue of the operation of section 24 of the *Judiciary Act 1903* (Cth) and section 31 of the *Federal Court of Australia Act 1976* (Cth). State and Territory Courts also have similar powers. Section 24 of the Judiciary Act provides:

    > *The High Court shall have the same power to punish contempts of its power and authority as is possessed at the commencement of this Act by the Supreme Court of Judicature in England.*

47. The Judiciary Act commenced on 25 August 1903. On that date the Supreme Court of Judicature in England had power to punish for contempt, whether civil or criminal.

48. *Halsbury's Laws of Australia* provides the following definitions of criminal and civil contempt (LexisNexis Butterworths, *Halsbury's Laws of Australia*, Vol 5 (at 24 January 2013), 105 Contempt, 'Criminal and Civil Contempt' [105-5]):

    > *Criminal contempt* involves acts or words which interfere with or tend to interfere with the administration of justice, and which amount to a public wrong. Sanctions imposed are punitive in nature.
    >
    > *Civil contempt*, also known as contempt in procedure, involves disobedience of the judgments, orders or other processes of the court, and amounts to a private wrong. As the purpose of civil contempt is to assist enforcement for the private benefit of a party to proceedings, sanctions imposed are primarily coercive or remedial rather than punitive.

49. Despite this distinction, the High Court has scrutinised the traditional division of contempt and has noted that it overlooks the underlying rationale of every exercise of the contempt power, namely that it is necessary to uphold and protect the effective administration of justice (*Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* 66 ALR 577 at 583-584 per Gibbs CJ, Mason, Wilson and Deane JJ.)

50. In the Department's view the established remedies for non-compliance with court orders, which are both remedial and coercive in nature, operate effectively to uphold and protect the effective administration of justice.

51. There is nothing peculiar to registered organisations that warrants a departure from the current position, which allows the courts to punish or discipline an individual or organisation where the disobedience the subject of the civil contempt is wilful and not casual, accidental

or unintentional (*Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* 66 ALR 577 at 588 per Gibbs CJ, Mason, Wilson and Deane JJ).

Financial reports lodged with the FWC must be compliant with the requirements of the RO Act

52. Item 2 of the Bill would provide that a reporting unit is taken not to have complied with the section 268 requirement to lodge copies of relevant financial reports with the FWC unless any report lodged complies with the relevant requirements of the RO Act.

53. The current obligations on reporting units in the RO Act to prepare a general purpose financial report, an operating report and a full or concise report that meet the requirements of the RO Act are civil penalty provisions (see sections 253, 254 and 265). The Department notes that despite the obligations in relation to providing a full report or a concise report being subject to civil penalties, there is no civil penalty for an auditor failing to prepare a report under section 257 (which is included in the full or concise report) that fails to comply with the requirements of the RO Act.

54. The full or concise report that must be given to members must also be the same report that is lodged with the FWC as certified by a prescribed designated officer. This obligation is also subject to a civil penalty provision (section 268).

55. It is clear from these provisions that, apart from the report of the independent auditor, all reports lodged with the FWC must comply with the standards set out in the RO Act and that failure to comply is subject to a civil penalty. On this basis it would appear that item 2 would only result in a change to the current reporting obligations in relation to the requirements placed on auditors.

56. Further, the Department would highlight that the current reporting requirements in Part 3, Division 5 of Chapter 8 of the RO Act are already modelled on the requirements in the Corporations Act. The Explanatory Memorandum to the Workplace Relations Amendment (Registration and Accountability of Organisations) Bill 2002, which inserted the requirements, notes the provisions "align financial accounting and reporting requirements of organisations with those applicable under the Corporations Act" (Explanatory Memorandum Workplace Relations Amendment (Registration and Accountability of Organisations) Bill 2002 p.2).

57. The Department is not aware of a similar provision in the Corporations Act to that proposed in the amendment to section 268 in item 2 of the Bill, which appears to take the amendments beyond what is required by the Corporations Act.

Other issues

58. The Department also draws the Committee's attention to the following issues with the provisions of Item 9:

    i. The provisions of Division 2 of Part 3, Chapter 9 of the RO Act already provide for statutory civil penalties where an organisation, officer or employee knowingly or recklessly contravenes an order or direction (or is involved in such a contravention) of the Federal Court or the Fair Work Commission made under the RO Act or the FW Act.

The provisions of item 9 of the Bill overlap with the civil penalty provisions in Division 2 which could result in concurrent criminal and civil prosecution for substantially the same conduct. While sections 311 – 314 of the RO Act regulate circumstances where criminal and civil proceedings have been brought in relation to substantially the same conduct, there are no other circumstances under the RO Act where civil and criminal offences could be brought in relation to the same conduct (sections 311 – 314 are concerned with the interaction of civil penalty proceedings under the RO Act and criminal prosecutions under other legislation).

ii. Civil contempts are normally left to the offended party to enforce. The offences proposed in the provisions of item 9 would most likely be enforced by the Commonwealth Office of the Director of Public Prosecutions (CDPP). Generally, the standing to investigate and enforce these provisions is not clear on their face.

iii. The offence proposed in subsection 358A(3) is of very broad application. As drafted, if an officer or employee of an organisation does not comply with an order of a court, irrespective of the nature of the order or whether the order was related to their role as an officer or employee, they could still be punished under the proposed provision.

iv. The omission of any reference to officers and employees in subsection 358(4) could have the practical effect of overriding the power of a court to deal with contempts by these people under its inherent or statutory powers.

International standards

59. Australia has ratified both ILO Convention 87 (Freedom of Association and Protection of the Right to Collectively Organise) and 98 (Right to Organise), and closely monitors its compliance with the standards contained in those instruments. The standards in these conventions can also be used to inform the meaning of the right to freedom of association in Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

60. The autonomy of registered organisations is a central tenet of the principles of freedom of association enshrined in the ILO conventions which Australia has ratified. A key consideration therefore should be the need to maintain an appropriate balance between ensuring that registered organisations are governed in a transparent and accountable manner, and the need to avoid implementing unnecessary limitations on the right to freedom of association.