THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment, Senator the Hon. Eric Abetz)
FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2013

OUTLINE

The Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill) will amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) and the *Fair Work Act 2009* to ensure better governance of registered organisations.

Recent examples of financial misconduct within registered organisations have demonstrated that the existing regulatory framework is not sufficient to provide members of registered organisations with confidence that the management of registered organisations is accountable and transparent and that their membership contributions are being used for proper purposes.

In addressing these issues, the amendments will improve the governance and financial transparency of registered organisations and provide an appropriately empowered and independent regulator that will ensure compliance with the RO Act by registered organisations, branches of registered organisations and their officers.

Broadly, the Bill will:

- establish an independent watchdog, the Registered Organisations Commission (the Commission), to monitor and regulate registered organisations with enhanced investigation and information gathering powers;
- amend the requirements on officers’ disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;
- strengthen existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain rule obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and
- increase civil penalties and introduce criminal offences for serious breaches of officers’ duties as well as new offences in relation to the conduct of investigations under the RO Act.

The Commission will be headed by the Registered Organisations Commissioner (the Commissioner), who will assume the investigations, enforcement advice and assistance responsibilities of the General Manager of the Fair Work Commission in relation to registered organisations. While the Commission will be established in the Office of the Fair Work Ombudsman, it will have a high degree of independence. The Commissioner will have independence in the exercise of his or her functions and powers and in his or her ability to direct staff in relation to the performance of those functions.

In order to ensure that the Commissioner has sufficient power to monitor compliance with the RO Act, the Commissioner’s investigation and information gathering powers have been modelled on those in the *Australian Securities and Investments Commission Act 2001*. These powers will enable to Commissioner to efficiently and effectively undertake its compliance functions.
The amendments that provide for the disclosure of material personal interests, increased accounting and disclosure obligations, criminal offences for serious breaches of officers’ duties and increased civil penalties broadly mirror those that apply to companies and their directors under the *Corporations Act 2001* and have been adapted to align with the RO Act framework.

- **Financial Impact Statement**

  Nil
NOTES ON SECTIONS

In these notes on sections, the following abbreviations are used:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASIC</td>
<td>Australian Securities and Investments Commission</td>
</tr>
<tr>
<td>ASIC Act</td>
<td><em>Australian Securities and Investments Commission Act 2001</em></td>
</tr>
<tr>
<td>Commission</td>
<td>Registered Organisations Commission</td>
</tr>
<tr>
<td>Commissioner</td>
<td>Registered Organisations Commissioner</td>
</tr>
<tr>
<td>Corporations Act</td>
<td><em>Corporations Act 2001</em></td>
</tr>
<tr>
<td>FMA Act</td>
<td><em>Financial Management and Accountability Act 1997</em></td>
</tr>
<tr>
<td>FW Act</td>
<td><em>Fair Work Act 2009</em></td>
</tr>
<tr>
<td>FWC</td>
<td>Fair Work Commission</td>
</tr>
<tr>
<td>GM</td>
<td>General Manager of the Fair Work Commission</td>
</tr>
<tr>
<td>LI Act</td>
<td><em>Legislative Instruments Act 2003</em></td>
</tr>
<tr>
<td>PS Act</td>
<td><em>Public Service Act 1999</em></td>
</tr>
<tr>
<td>RO Act</td>
<td><em>Fair Work (Registered Organisations) Act 2009</em></td>
</tr>
<tr>
<td>ROA Act</td>
<td><em>Fair Work (Registered Organisations) Amendment Act 2012</em></td>
</tr>
<tr>
<td>the Bill</td>
<td>Fair Work (Registered Organisations) Amendment Bill 2013</td>
</tr>
</tbody>
</table>

**Section 1 – Short title**

1. This is a formal provision specifying the short title.

**Section 2 – Commencement**

2. The table in this section sets out when the provisions of the Bill commence.

**Section 3 – Schedule(s)**

3. Section 3 of the Bill provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule has effect according to its terms.
Schedule 1 – The Registered Organisations Commissioner

4. Schedule 1 of the Bill is divided into two parts.

5. Part 1 sets out the provisions which establish the Commission and the Commissioner. The functions and powers of the Commissioner and the Commission reflect those of the GM. The enhanced investigation powers of the Commissioner, the increased civil penalties for non-compliance and the increased obligations on organisations and their officers will commence with the commencement of Schedule 2.

6. Part 1 also sets out the terms and conditions of the Commissioner’s appointment, provides for staff from the Office of the Fair Work Ombudsman to assist the Commissioner and to be under the Commissioner’s direction while doing so and establishes the Registered Organisations Commission Special Account.

7. Part 2 sets out the consequential, transitional and savings provisions which arise from the amendments made in Part 1.

Part 1 – Amendments

Fair Work Act 2009

Item 1 – Subsection 576(2) (note)

8. Item 1 is a consequential amendment to the note in subsection 576(2) to reflect item 10, which has the effect that the RO Act will no longer confer on the FWC the function of providing advice and assistance to organisations in relation to their rights and obligations under the RO Act. Instead new section 329AB of the RO Act (inserted by item 88), confers this function on the Commissioner.

Item 2 – Paragraph 604(1)(b)

9. Section 604 of the FW Act provides for an appeal to the Full Bench of the FWC in relation to certain decisions of the FWC. New paragraph 604(1)(b) will allow decisions of the Commissioner (or a delegate) to also be appealed to the Full Bench.

Item 3 – Subsection 607(1)

10. Section 607 of the FW Act sets out the process of appealing or reviewing decisions. This item has the effect that decisions of the Commissioner, in addition to those of the FWC or the GM, may be heard or conducted without holding a hearing only in the circumstances stated in that section.

Item 4 – Subparagraph 613(2)(a)(ii)

Item 5 – At the end of paragraph 613(2)(a)

11. Section 613 of the FW Act provides for the manner in which appeal decisions are made by the FWC. These items amend subsection 613(2) to allow the President of the FWC, a Vice President or a Deputy President (with the permission of the President) to hear an
application for permission to appeal against a decision of the Commissioner (or a delegate) and where permission is granted, decide the appeal.

*Fair Work (Registered Organisations) Act 2009*

**Item 6 – Section 6**

12. This item inserts the definitions of *Commission* and *Commissioner*.

**Item 7 – Section 6**

13. This item includes the definition for *directions contravention*.

**Item 8 – Section 6 (definition of FWA Member)**

14. This item repeals the definition of *FWA Member* which became obsolete when Fair Work Australia (FWA) was renamed the FWC by the *Fair Work Amendment Act 2012*.

**Item 9 – Section 13 (heading)**

**Item 10 – Subsection 13(1)**

15. Section 13 describes the functions of the FWC under the RO Act.

16. Item 10 amends section 13 to reflect that the FWC’s functions under the RO Act are limited to keeping a register of organisations. Its previous function of providing advice and assistance to organisations in relation to their rights and obligations under the RO Act is now the responsibility of the Commissioner. Item 9 is a consequential amendment to reflect the change made by item 10.

**Item 11 – Subsection 26(1)**

**Item 14 – Section 31**

**Item 15 – Subsection 38(4)**

**Item 16 – Paragraph 73(3)(a)**

**Item 17 – Subsection 77(2)**

**Item 21 – Paragraph 110(a)**

**Item 22 – Subsection 114(2)**

**Item 23 – Subsection 151(3)**

**Item 24 – Paragraph 151(10)(b)**

**Item 25 – Subsections 152(4) and 154(4)**

**Item 26 – Paragraph 160(a)**
17. These items are consequential to item 10. They replace references to paragraph 13(1)(a) in the relevant provisions with references to subsection 13(1).

18. These provisions deal with matters that must be recorded by the GM on the register of organisations, including registration and cancellation of registration of organisations, amalgamations and withdrawal from amalgamations of organisations into federations, membership agreements under section 151, assets and liabilities agreements under section 152 and alterations to names of organisations or their eligibility rules.

**Item 12 – Subsection 28(1A)**

**Item 13 – Subsection 28(1A) (note)**

19. Subsection 28(1A) enables the GM to apply to the Federal Court for an order cancelling the registration of an organisation in certain circumstances. These items replace references to the GM with references to the Commissioner.

**Item 18 – Subsection 95(3A)**

**Item 19 – Paragraph 95(3A)(a)**

**Item 20 – Subsections 95(3B) and (3C)**

20. Section 95 requires that an application to the FWC for a ballot to decide whether a constituent part of an amalgamated organisation should withdraw from the organisation must be accompanied by a written proposal for the withdrawal.

21. Subsection 95(3A) allows the applicant to request the GM to either give or direct the amalgamated organisation to provide, certain information. Subsections 95(3B) and (3C) permit the GM to provide the information and require an amalgamated organisation to comply with the GM’s direction respectively.

22. These items amend subsections 95(3A), (3B) and (3C) to also confer these powers and obligations on and in respect of the Commissioner.

**Item 27 – Subsection 183(1)**

**Item 28 – Subsection 183(4)**

**Item 29 – Subsection 184(2)**

23. These provisions deal with applications for ballots for withdrawal from amalgamated organisations. Subsection 183(1) allows a committee of management of an organisation or branch of an organisation to apply to the FWC for an exemption from the requirements of subsection 182(1) in relation to elections for offices. Subsection 183(4) requires the GM to give notice of this application to the members of the organisation or branch concerned.

24. Subsection 184(2) requires the GM to hear these applications and any objections made by relevant members.
25. These items amend subsections 183(1) and (4) and subsection 184(2) by replacing references to the FWC and the GM with references to the Commissioner to reflect that this is now a function of the Commissioner.

Item 30 – Section 186 (heading)
Item 33 – Section 189 (heading)
Item 42 – Section 202 (heading)
Item 53 – Section 207 (heading)
Item 57 – Section 233 (heading)
Item 60 – Section 235 (heading)
Item 62 – Section 236 (heading)
Item 74 – Section 268 (heading)
Item 83 – Section 272 (heading)
Item 89 – Section 330 (heading)
Item 91 – Section 331 (heading)
Item 105 – Subsection 336(1) (heading)
Item 109 – Subsection 336(1A) (heading)
Item 111 – Subsection 336(2) (heading)
Item 114 – Section 337 (heading)

26. These items replace references to the GM in the relevant section and subsection headings with references to the Commissioner to reflect that the functions described are now functions of the Commissioner.

Item 31 – Section 186
Item 32 – Subsection 187(3)
Item 34– Subsection 189(1)
Item 35 – Subsection 189(2)
Item 36 – Paragraph 189(3)(a)
Item 37 – Paragraphs 189(3)(a) and (b)
Item 38 – Subsection 189(3)
Item 39 – Paragraph 192(2)(b)
Item 40 – Paragraph 197(1)(a)
Item 41 – Subparagraph 198(6)(b)(i)
Item 43 – Subsections 202(1) and (2)
Item 44 – Paragraph 202(5)(b)
Item 45 – Subsection 203(1)
Item 49 – paragraph 203(6)(b)
Item 51 – paragraph 203(6)(c)
Item 52 – Paragraph 206(4)(c)
Item 54 – Section 207
Item 55 – Subsection 215(5)

27. These items replace references to the GM and the FWC with references to the Commissioner to reflect that the functions described in relation to the conduct of elections for office and other positions are now functions of the Commissioner.

Item 46 – Subsection 203(1)
Item 48 – Paragraph 203(6)(b)

28. These items replace references to the staff of the FWC with references to the staff assisting the Commissioner.

Item 47 – Subsection 203(1)
Item 50 – Paragraph 203(6)(b)

29. These items replace references to section 343A, which deals with delegation by the GM, with references to new section 343B (inserted by item 124), which deals with delegation by the Commissioner.

Item 56 – Section 229
Item 58 – Subsections 233(1) and (2)
Item 59 – Subsections 234(3) and (4)
Item 61 – Subsection 235(1)
Item 63 – Section 236
Item 64 – Subsection 237(1)
Item 65 – Subsections 237(1), (2) and (4)
30. These items replace references to the GM and the FWC with references to the Commissioner to reflect that membership records and lists of office-holders, along with details of some types of loans, grants and donations made by the organisation, are now required to be lodged by organisations with the Commissioner.

**Item 66 – Subsections 241(1) and (2)**

**Item 71 – Subsections 255(1) and (4) and 257(11)**

**Item 72 – Subsection 261(2)**

**Item 73 – Subsections 265(5) and 266(1)**

**Item 75 – Section 268**

**Item 76 – Section 268**

**Item 77 – Paragraph 269(2)(a)**

**Item 78 – Paragraph 269(2)(c)**

**Item 79 – Subsection 270(1)**

**Item 80 – Paragraph 270(3)(c)**

**Item 81 – Subsection 270(7)**

**Item 82 – Section 271**

**Item 84 – Subsection 272(1) and (4) and 278(2)**

31. These items replace references to the GM and the FWC with references to the Commissioner to reflect that the functions described in relation to the requirements that are placed on organisations in relation to financial records, accounting and auditing are now functions of the Commissioner.

**Item 67 – At the end of section 246**

**Item 68 – After subsection 247(1)**

**Item 69 – After subsection 249(5)**

**Item 70 – After subsection 249(6)**

32. These items require the GM to consult with the Commissioner in satisfying him or herself of matters relating to:

- The determination of reporting units within an organisation for the purposes of issuing a certificate under section 245 (items 67 and 68);
- The determination of reporting units within an organisation for the purposes of revoking a certificate issued under section 245 (items 69 and 70).
Item 85 – Subsections 310(1) and (2)

33. Section 310 sets out who may apply for an order in relation to contraventions of civil penalty provisions.

34. This item allows either the Commissioner or the GM (or a person authorised by them) to apply for a civil penalty or other order under Part 2 of Chapter 10 of the RO Act, but does not otherwise affect standing in relation to the relevant provisions.

Item 86 – Section 317

35. This item inserts a description of new Part 3A in the simplified outline of Chapter 11 of the RO Act. New Part 3A establishes the Commission and the Commissioner, provides for terms and conditions of appointment and makes provision for staff to assist the Commissioner. Part 3A also establishes the Registered Organisations Commission Special Account.

Item 87 – Section 317

36. This item replaces references to the GM with references to the Commissioner in the simplified outline of Chapter 11 of the RO Act to reflect that the functions described are now functions of the Commissioner. Chapter 11 deals with miscellaneous matters including compliance matters, inquiries and investigations and whistleblower protections.

Item 88 – After Part 3 of Chapter 11


38. The Commissioner is an independent statutory office holder that will operate within the Office of the Fair Work Ombudsman. While specific statutory functions will be conferred on the Commissioner, the Commission will not be a separate agency for the purposes of the PS Act or a prescribed agency for the purposes of the FMA Act.

39. The staff assisting the Commissioner will be persons made available to the Commissioner by the Fair Work Ombudsman. For the purposes of the PS Act, staff assisting the Commissioner will form part of the Office of the Fair Work Ombudsman and the Fair Work Ombudsman will be the Agency Head. However, the Fair Work Ombudsman is able to delegate his or her powers under the PS Act to the Commissioner and to staff assisting the Commissioner.

40. The Commissioner and staff assisting the Commissioner will form part of the Office of the Fair Work Ombudsman for the purposes of the FMA Act. This will be achieved by an amendment to Schedule 1 of the Financial Management and Accountability Regulations 1997. Doing so will allow the Fair Work Ombudsman to delegate his or her powers under the FMA Act to the Commissioner and those staff, including in respect of the day to day management of the Special Account (discussed below).

41. Although the Commission will not be a prescribed agency in its own right for the purposes of the FMA Act, it will operate under a Special Account established under section 21 of the FMA Act. This will ensure its financial independence from the Office
of the Fair Work Ombudsman. For Budget purposes, the Special Account will be allocated to the Employment Portfolio. As a matter of financial administration, for the purposes of the FMA Act, the Fair Work Ombudsman will be the Chief Executive responsible for the Special Account.

42. It is envisaged that there will be a Memorandum of Understanding developed between the Fair Work Ombudsman and the Commissioner that will address and clarify responsibility for staffing and financial matters.

43. The Commissioner will have responsibility, independent from the Office of the Fair Work Ombudsman, for the performance of functions under the RO Act including the commencement of legal proceedings to enforce the RO Act. In respect of the procurement of legal services and the conduct of litigation, the Commissioner will be subject to the Legal Services Directions 2005. The Legal Services Directions 2005 are a legislative instrument issued by the Attorney-General under section 55ZF of the Judiciary Act 1903.

44. Part 3A also contains provisions about the institutional framework of the Commission and the terms and conditions of the Commissioner, as well as outlining the functions of the Commission and Commissioner.

*Part 3A- Registered Organisations Commissioner and Registered Organisations Commission*

*Division 1- Establishment, functions and powers of Commissioner*

*Section 329AA – Establishment*

45. New section 329AA establishes the office of the Commissioner by providing that there is to be a Registered Organisations Commissioner.

*Section 329AB – Functions of the Commissioner*

46. New section 329AB sets out the functions of the Commissioner.

47. The broad functions of the Commissioner are to promote the efficient management of organisations and high standards of accountability of organisations and their office holders to their members and to promote compliance with financial reporting and accountability requirements of the RO Act, including by providing education, assistance and advice to organisations and their members.

48. The Commissioner will also have the function of monitoring acts and practices of registered organisations and their office holders to ensure they comply with the provisions of the RO Act, including as amended by this Bill.

49. The RO Act also confers specific functions on the Commissioner. For example, Part 4 of Chapter 11 of the RO Act will enable the Commissioner to conduct inquiries and investigations, commence legal proceedings in respect of contraventions of civil penalty provisions and refer possible criminal offences to the Director of Public Prosecutions or law enforcement agencies.

50. Other functions may also be conferred on the Commissioner by this Act (including the regulations) or another Act.
51. The Commissioner’s functions include doing anything incidental to or conducive to the performance of any of the above functions.

Section 329AC – Powers of Commissioner

52. New section 329AC provides that the Commissioner has the power to do all things necessary or convenient to be done for the purposes of performing his or her functions.

53. This section mirrors subsection 657(2) of the FW Act, which provides that the GM has power to do all things necessary or convenient to be done for the purpose of performing his or her functions.

54. The note to new section 329AC states that the expenditure of public money must comply with the requirements in the FMA Act. The note is included for the information of the reader. The Fair Work Ombudsman may delegate his or her powers under the FMA Act to the Commissioner or the staff assisting the Commissioner and where these powers have been delegated, the delegate must comply with the requirements under the FMA Act.

Division 2 – Terms and conditions of appointment of Commissioner

Section 329BA – Appointment

55. New section 329BA provides for the appointment of the Commissioner on a full time basis.

56. Subsection 329BA(1) provides that the Commissioner is to be appointed by the Minister by written instrument.

57. Subsection 329BA(2) provides that before the Minister appoints a person as the Commissioner, the Minister must be satisfied that the person has suitable qualifications or experience and is of good character.

Section 329BB – Term of appointment

58. New section 329BB provides that the Commissioner holds office for a term specified in the instrument of appointment not exceeding 5 years.

Section 329BC – Acting Commissioner

59. New section 329BC enables the Minister to appoint an acting Commissioner during any periods when the Commissioner is absent or is otherwise unable to perform the duties of the office.

60. Section 33A of the Acts Interpretation Act 1901 provides that acting appointments are made on the same basis as appointments, but may only be made for a maximum term of 12 months.
Section 329BD – Remuneration

61. New subsection 329BD(1) provides that the Remuneration Tribunal will determine the remuneration of the Commissioner. When no such determination is in operation, the Commissioner is to be paid the remuneration that is prescribed by the regulations.

62. New subsection 329BD(2) provides that the Commissioner will be paid any allowances that are prescribed by the regulations.

63. New subsection 329BD(3) also ensures the application of provisions of the Remuneration Tribunal Act 1973 that have the effect, in certain circumstances, of debarring the office-holder from receiving remuneration (for instance, if she or he is at the same time a full-time public servant).

Section 329BE – Leave of absence

64. New section 329BE provides that the Commissioner’s recreation leave entitlements will be determined by the Remuneration Tribunal and that additional leave of absence may be granted by the Minister on such terms and conditions as the Minister determines.

Section 329BF – Outside employment

65. New section 329BF prohibits the Commissioner from engaging in paid employment outside the duties of his or her office without the Minister’s approval.

Section 329BG – Disclosure of interests to the Minister

66. New section 329BG requires the Commissioner to give written notice to the Minister of all interests the Commissioner has or acquires that conflict or could conflict with the proper performance of his or her duties. Failure to do so will result in termination of the Commissioner’s appointment (see paragraph 329BJ(2)(d)).

67. This is to ensure impartiality and avoid any actual or perceived conflicts of interests.

Section 329BH – Other terms and conditions

68. New section 329BH provides for the Minister to determine the terms and conditions of the Commissioner’s appointment that are not otherwise provided for in the RO Act (including the regulations).

Section 329BI – Resignation

69. New section 329BI provides that the Commissioner may resign his or her appointment by giving written notice to the Minister. This section also specifies when the resignation takes effect.

Section 329BJ – Termination of appointment

70. New section 329BJ specifies the circumstances in which the Minister may or must terminate the Commissioner’s appointment.
71. Subsection 329BJ(1) provides that the Minister may terminate the Commissioner’s appointment for misbehaviour, or where the Commissioner is unable to perform the duties of the office because of his or her physical or mental incapacity.

72. Subsection 329BJ(2) sets out the circumstances in which the Minister is required to terminate the appointment of the Commissioner. These circumstances include bankruptcy, unapproved absenteeism in excess of the specified period, engaging in paid employment outside the duties of his or her office without the Minister’s consent (see new section 329BF) and failure to disclose interests (pecuniary or otherwise) to the Minister that conflict or could conflict with the proper performance of functions, in accordance with new section 329BG.

73. These provisions reflect the standard grounds for termination of appointments of statutory officeholders.

74. In addition, subsection 33(4) of the Acts Interpretation Act 1901 provides that the power to appoint a person includes a power to remove or suspend that person.

Division 3 – Staff and consultants

Section 329CA – Staff

75. The staff assisting the Commissioner will be persons engaged under the PS Act and employed within the Office of the Fair Work Ombudsman. They will be made available by the Fair Work Ombudsman to assist the Commissioner in the performance of his or her functions.

76. When performing services for the Commissioner, the staff will be subject to the direction of the Commissioner and will not be subject to the direction of the Fair Work Ombudsman. This is intended to ensure the independence of the Commissioner and the staff assisting him or her when performing statutory functions under the RO Act.

77. The staff will remain subject to the direction of the Fair Work Ombudsman in relation to their employment and conditions. However, under subsection 78(7) of the PS Act, the Fair Work Ombudsman (as the Agency Head of the Office of the Fair Work Ombudsman) may delegate his or her powers under that Act to the Commissioner or an APS employee.

Section 329CB – Other persons assisting the Commissioner

78. New section 329CB provides that the Commissioner may be assisted by:

- employees of Commonwealth Departments, Executive Agencies or Statutory Agencies (see the PS Act);
- officers and employees of a State or Territory;
- officers and employees of authorities of the Commonwealth, a State or a Territory.

79. The services of these persons can be made available to the Commissioner in connection with the performance of any of his or her functions.
80. This ensures that the Commissioner has the ability to draw upon the skills, expertise and experience of these employees or officers to assist in the performance of the Commissioner’s functions.

Section 329CC – Consultants

81. New subsection 329CC(1) permits the Commissioner to engage persons having suitable qualifications and experience as consultants.

82. New subsection 329CC(2) provides that the consultants are to be engaged on terms and conditions that the Commissioner determines in writing.

Division 4 – Establishment and function of the Registered Organisations Commission

Section 329DA – Establishment

Section 329DB – Constitution of the Commission

83. New section 329DA establishes the Registered Organisations Commission.

84. New section 329DB provides that the Commission consists of the Commissioner and any staff assisting the Commissioner as mentioned in subsection 329CA(1).

85. The Commission (that is, the Commissioner and staff assisting the Commissioner) will form part of the Office of the Fair Work Ombudsman for the purposes of the FMA Act. This will be achieved by an amendment to Schedule 1 of the Financial Management and Accountability Regulations. Schedule 1 identifies prescribed agencies for the purposes of the FMA Act and the Chief Executive in respect of each agency. The effect of including the Commission as part of the Office of the Fair Work Ombudsman is to make the Fair Work Ombudsman the relevant Chief Executive for the Commission for the purposes of the FMA Act.

Section 329DC – Function of this Commission

86. The function of the Commission is to assist the Commissioner in the performance of the Commissioner’s functions.

Section 329DD – Commission has privileges and immunities of the Crown

87. As the Commission is part of the Commonwealth, it has the privileges and immunities of the Crown.

Division 5 – Registered Organisations Commission Special Account

Section 329EA – Registered Organisations Commission Special Account

88. A Special Account for the purposes of section 21 of the FMA Act is established by the Bill. This will be the ‘Registered Organisations Commission Special Account’ (Special Account) (new section 329EA).

89. The Special Account is an appropriation mechanism that sets aside amounts within the Consolidated Revenue Fund for expenditure for special purposes which, in this case,
relates to expenditure for the special purposes of funding the operations of the Commissioner and Commission.

90. Although the Commission will not be a prescribed agency in its own right for the purposes of the FMA Act, the Special Account will ensure its financial independence from the Office of the Fair Work Ombudsman. For Budget purposes, the Special Account will be allocated to the Employment Portfolio. As a matter of financial administration, for the purposes of the FMA Act, the Fair Work Ombudsman will be the Chief Executive responsible for the Special Account.

91. By virtue of the Commission being part of the Office of the Fair Work Ombudsman, as outlined above, the Fair Work Ombudsman will be able to delegate financial powers to the Commissioner under the FMA Act. Section 53 of the FMA Act enables the Chief Executive to delegate powers under that Act to an official in any Agency. ‘Official’ is defined as a person who is in an Agency or part of an Agency.

Section 329EB – Credits to the Account

92. The Special Account may be credited by amounts equal to the following:

- Amounts received by the Commonwealth in connection with the performance of the Commissioner’s functions under the Bill;
- Interest received by the Commonwealth from the investment of amounts debited from the Special Account;
- Amounts of any gifts or bequests made for the purposes of the Special Account; and
- Amounts received by the Commonwealth in relation to property paid for with amounts debited from the Special Account.

93. It is envisaged that the Special Account will be funded totally from appropriations.

Section 329EC – Purposes of the Account

94. The Special Account is used to pay or discharge costs, expenses and other obligations incurred by the Commonwealth in relation to the performance of the Commissioner’s functions; to pay for remuneration and allowances to persons in accordance with the Bill (including staff mentioned in clause 329CA); and to meet any expenses associated with administering the Special Account.

Division 6 – Reporting requirements

Section 329FA – Directions from the Minister

95. New section 329FA permits the Minister to give directions of a general nature to the Commissioner, but not directions as to a particular matter or investigation. The Commissioner would be required to comply with these directions.

96. In this respect, the Commissioner is subject to the same degree of Ministerial oversight as the Fair Work Ombudsman.

97. New subsection 329FA(1) provides that written directions given by the Minister are legislative instruments for the purposes of the LI Act. This provision has substantive
operation as such directions would not ordinarily be legislative instruments. This provision gives greater oversight by Parliament in relation to directions by the Minister and ensures transparency. The effect of this provision is that any such directions will be required to be lodged with the Federal Register of Legislative Instruments and tabled in Parliament. However, as explained in the note to this provision, the directions will not be subject to disallowance or the sunsetting provisions of the LI Act. This mirrors section 684 of the FW Act, which applies to directions from the Minister to the FWO.

Section 329FB – Minister may require reports

98. New section 329FB permits the Minister to direct the Commissioner to produce reports in relation to a function or the functions of the Commissioner. The Commissioner must comply with the direction.

99. In this respect, the Commissioner is subject to the same degree of Ministerial oversight as the Fair Work Ombudsman (see section 685 of the FW Act).

100. New subsection 329FB(3) provides that directions and reports under this section are not legislative instruments within the meaning of section 5 of the LI Act. This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the LI Act.

Section 329FC – Annual report

101. New section 329FC requires the Commissioner to produce an annual report about the operations of the Commission to be presented to the Parliament. The annual report must include:

- details of the number and types of investigations conducted by the Commissioner under Part 4 of Chapter 11;
- details of:
  - when each investigation was started; and
  - if the investigation has been completed—when it was completed; and
  - if the investigation has not been completed—when it is expected to be completed;
- details of any orders applied for under paragraph 310(1)(a);
- details of the types of education activities undertaken by the Commissioner and whether the education activities were provided to a registered employer organisation, a registered employee organisation or members of these organisations;
- any other matter prescribed by the regulations.

102. A note alerts the reader to the operation of section 34C of the Acts Interpretation Act 1901 which contains rules about annual reports.

Item 90 – Subsections 330(1) and (2)

Item 92 – Section 331

Item 93 – Subsection 332(1)

Item 94 – Paragraph 332(1)(a)
Item 95 – Paragraph 332(1)(b)
Item 96 – Subsections 332(2) and (3)
Item 97 – Subsection 333(1)
Item 98 – Subsection 333(1)
Item 99 – Subsections 333(2) and (3)
Item 100 – Sections 334 to 335A
Item 101 – Section 335B
Item 102 – Subsection 335C(1)
Item 103 Subsection 335C(1)
Item 104 – Subsection 335C(2)
Item 106 – Subsection 336(1)
Item 108 – Subsection 336(1)
Item 110 – Subsection 336(1A)
Item 112 – Subsection 336(2)
Item 113 – Subsections 336(3) and (5)
Item 115 – Subsection 337(1)

103. These items replace references to the GM and the FWC with references to the Commissioner to reflect that the functions described in relation to inquiries and investigations into compliance with financial reporting are now functions of the Commissioner.

Item 107 – Subsection 336(1)

104. This item replaces the reference to ‘the reporting unit concerned’ with ‘a reporting unit’. This is a technical correction to clarify the effect of subsection 336(1).

Item 116 – Before subparagraph 337A(b)(i)

105. Section 337A deals with disclosures that qualify for whistleblower protection under Part 4A of Chapter 11 of the RO Act.

106. This item inserts new subparagraph 337A(b)(ia) which adds the Commissioner or a member of the staff assisting the Commissioner to the list of those to whom a disclosure may be made to be eligible for protection.
Item 117 – Paragraph 337K(3)(a)

107. Paragraph 337K(3)(a) requires the GM to promptly provide a copy of any order made under the RO Act, along with any reasons received by the GM for the order, to each party who appeared at the hearing of the proceeding concerned.

108. This item requires the GM to also provide this information to the Commissioner.

Item 118 – Paragraphs 337K(5)(a) and (b)

109. This item corrects out-dated references to ‘FWA member’ to ‘FWC member’. Fair Work Australia was renamed the FWC by the Fair Work Amendment Act 2012.

Item 119 – Paragraphs 343A(2)(c) to (g)

Item 120 – Paragraphs 343A(2)(i) to (j)

Item 121 – Paragraphs 343A(3)(d) to (g)

Item 122 – Subsection 343A(3A)

110. These items repeal provisions which prohibit or restrict the delegation of certain powers by the GM. As these functions and powers of the GM are being transferred to the Commissioner, these provisions are no longer necessary.

Item 122 – Paragraph 343A(3)(h)

111. Subsection 343A(3) sets out the powers of the GM that can only be delegated to SES employees, acting SES employees or employees prescribed by the regulations.

112. This item deletes the reference to Part 4 of Chapter 11, which deals with inquiries and investigations, as this is no longer a function of the GM.

Item 124 – After section 343A

113. This item inserts new section 343B which deals with delegation by the Commissioner of his or her functions under the RO Act.

Item 125 – Paragraph 347(1)(c)

114. This item replaces the reference to the FWC with a reference to the Commissioner to reflect that the relevant documents are now required to be lodged with the Commissioner.

Item 126 – Section 348

115. Section 348 provides that a certificate given by the GM stating that a person was a member or officer of an organisation at a particular time is, in all courts and proceedings, evidence that the facts are as stated.

116. This item extends this stipulation to a certificate given by the Commissioner.
Item 127 – Section 349

Item 128 – Section 349

117. These items replace the references to the FWC and the GM with references to the Commissioner to reflect that the relevant documents are now required to be lodged with the Commissioner.
Part 2 – Transitional provisions

Item 129 – Definitions

118. This item provides for definitions for the purpose of this Part, including commencement time, which means the time when Schedule 1 commences.

Item 130 – Commissioner to complete certain processes

119. This item provides for the Commissioner to be able to complete processes that had been commenced by the GM but were incomplete when this Schedule commenced.

Item 131 – Permission to keep records at premises

120. This item provides that where the GM has given permission for an organisation to keep the whole or a specified part of a record at specified premises instead of at the office of the organisation or branch of the organisation (section 234 of the RO Act) prior to this Schedule commencing, the permission continues to apply as if it had been given by the Commissioner.

Item 132 – Certain references to include documents dealt with before the commencement time

121. This item provides that certain references are to include documents dealt with before the commencement time.

122. These references include the reference in:

- subsection 236(5) of the RO Act to a copy of a document received by the Commissioner includes a reference to a copy of a document received by the GM under section 236 of the RO Act before that time; and
- subsection 237(4) of the RO Act to a statement lodged with the Commissioner under subsection (1) includes a reference to a statement lodged with the FWC under subsection (1) of section 237 of the RO Act before that time; and
- paragraph 347(1)(c) of the Act to a copy of a list lodged with the Commissioner under subsection 233(1) includes a reference to a copy of a list lodged with the FWC under subsection 233(1) of the Act before that time; and
- section 348 of the RO Act to a certificate of the Commissioner includes a reference to a certificate of the GM covered by that section before the commencement time; and
- section 349 of the RO Act to a list of the officers of an organisation or a branch of an organisation lodged with the Commissioner on behalf of the organisation or a copy of any such list certified by the Commissioner includes a reference to a list of the officers of an organisation or a branch of an organisation lodged with the FWC on behalf of the organisation or a copy of any such list certified by the GM before that time.
Item 133 – Proceedings in relation to civil penalty provisions

123. This item provides for transitional arrangements where an application made under Part 2 of Chapter 10 (which deals with civil consequences of contravening civil penalty provisions) has not been finally determined before the commencement time.

124. Where the GM and the Commissioner agree by signed writing that the Commissioner be substituted as a party to proceedings arising from the application then the agreement has effect accordingly and the GM’s rights and obligations in relation to the proceedings become the rights and obligations of the Commissioner.

Item 134 – Other proceedings

125. This item applies if an application is made under the RO Act, other than an application under Part 2 of Chapter 10 of the RO Act (which is addressed in item 133), has not been finally determined before the commencement time and because of the amendments made by this Schedule, the power to make applications of that kind has become a power of the Commissioner.

126. In such circumstances, the Commissioner is substituted for the GM as a party to any proceeding arising from the application, and the rights and obligations of the GM in relation to such a proceeding become rights and obligations of the Commissioner.

Item 135 – Information sharing

127. This item provides that the Commissioner may, for the purposes of fulfilling his or her functions or powers, request the GM to disclose to them information acquired by the GM or a member of the staff of the FWC under the RO Act before the commencement time.

128. This reflects the intention that all information acquired by the GM or a member of the staff of the FWC in the performance or exercise of functions or powers under the RO Act before the commencement time should be able to be disclosed to the Commissioner.

Item 136 – Commissioner’s first annual report

129. This item provides that if this Schedule commences before the end of the financial year ending on 30 June 2014, the Commissioner’s report required by section 329FC of the RO Act for that year must be included with the Fair Work Ombudsman’s report required by section 686 of the FW Act.

Item 137 – Minister may make rules about transitional matters

130. This item provides that the Minister may, by legislative instrument, make rules in relation to transitional matters arising out of the amendments and repeals made by Part 1 of this Schedule.
Schedule 2 – Increased disclosure requirements, investigation powers and penalties

131. Schedule 2 of the Bill is divided into two parts.

132. Part 1 contains provisions that increase obligations on organisations and their officers, increase civil penalties for non-compliance and introduce criminal offences. This Part also gives the Commissioner, which was established in Part 1 of Schedule 1, enhanced investigation powers.

133. Part 2 contains transitional provisions. The Commissioner, whose office and functions will be established by Part 1 of Schedule 1, will commence on proclamation of that Part, with the powers and functions of the GM of the FWC in relation to organisations. Part 2 of Schedule 2 of the Bill sets out transitional provisions required as a result of the new scheme of increased obligations on organisations and increased powers of the Commissioner in Part 1 of Schedule 2.

Part 1 – Amendments

Fair Work (Registered Organisations) Act 2009

Item 1 – Section 6 (definition of disclosure period)

Item 2 – Section 6

Item 3 – Section 6

Item 4 – Section 6

134. These items repeal the definition of ‘disclosure period’ which is no longer required because of the amendments in the Bill and includes definitions for new terms used in the Bill. In particular, item 3 introduces the definition of a ‘proceeding’ which includes a proceeding in a court or a proceeding or hearing before, or an examination by or before, a tribunal. For the purposes of this definition such a proceeding, hearing or examination may be civil, administrative, criminal, disciplinary or other nature.

135. The concept of ‘serious contravention’ is also introduced. This definition is relevant to the increased civil penalties.

Item 5 – Section 16

Item 6 – Subsection 51(2) (penalty)

Item 11 – Subsections 72(1) to (3) (penalty)

Item 13 – Subsection 103(4) (penalty)

Item 18 – Subsections 105(1) to (3) (penalty)

Item 36 – Subsections 185(1) and (2) (penalty)
Item 39 – Section 190 (penalty)
Item 40 – Subsection 191(2) (penalty)
Item 45 – Subsection 193(2) (penalty)
Item 46 – Section 194 (penalty)
Item 47 – Subsections 195(2) to (6) (penalty)
Item 56 – Subsections 199(3) and (5) (penalty)
Item 57 – Subsection 202(5) (penalty)
Item 58 – Subsection 203(6) (penalty)
Item 68 – Subsection 232(1) (penalty)
Item 104 – Subsection 258(1) (penalty)
Item 107 – Subsections 260(3) and (4) (penalty)
Item 228 – Subsection 337(1) (penalty)
Item 231 – Subsection 337C(6) (penalty)
Item 240 – Subsections 350(1) and (2) (penalty)
Item 241 – Subsection 356(6) (penalty)

136. Occurrences of ‘Maximum penalty’ throughout the RO Act have been amended to read ‘Penalty’, and section 16 of the RO Act has been repealed. The use of ‘Penalty’ (rather than ‘Maximum penalty’) will attract the operation of section 4D of the Crimes Act 1914 (section 16 replicated the operation of that section in relation to ‘Maximum penalty’). These amendments are technical changes to bring the RO Act into line with current drafting practices and do not affect the operation of offence provisions set out in the RO Act.

Item 21 – Subsection 151(2) (note)
Item 22 – At the end of subsection 151(2)
Item 24 – Subsection 152(3) (note)
Item 25 – At the end of subsection 152(3)
Item 30 – Subsection 172(1) (note)
Item 31 – At the end of subsection 172(1)
Item 37 – Subsection 189(2) (note)
Item 38 – At the end of subsection 189(2)
Item 60 – Subsection 230(1) (note)
Item 61 – At the end of subsection 230(1)
Item 62 – Subsection 230(2) (note 1)
Item 63 – Subsection 230(2) (note 2)
Item 64 – At the end of subsection 230(2) (after note 2)
Item 65 – At the end of subsection 231(1)
Item 66 – Subsection 231(2) (note)
Item 67 – At the end of subsection 231(2)
Item 69 – At the end of subsection 233(1)
Item 70 – At the end of subsection 233(2)
Item 73 – Subsection 235(2) (note)
Item 74 – At the end of subsection 235(2)
Item 75 – Subsection 236(1) (note)
Item 76 – At the end of subsection 236(1)
Item 77 – Subsection 236(2) (note)
Item 78 – At the end of subsection 236(2)
Item 92 – Subsection 256(3) (note)
Item 93 – At the end of subsection 256(3)
Item 94 – Subsection 256(4) (note)
Item 95 – At the end of subsection 256(4)
Item 96 – Subsection 256(5) (note)
Item 97 – At the end of subsection 256(5)
Item 98 – Subsection 256(6) (note)
Item 99 – At the end of subsection 256(6)
Item 108 – Subsection 263(2) (note)
Item 109 – At the end of subsection 263(2)
Item 110 – Subsection 263(3) (note)
Item 111 – At the end of subsection 263(3)

Item 112 – Subsection 263(5) (note)

Item 113 – At the end of subsection 263(5)

Item 114 – Subsection 264(3) (note)

Item 115 – At the end of subsection 264(3)

Item 122 – Subsection 266(1) (note)

Item 123 – At the end of subsection 266(1)

Item 138 – Subsection 272(3) (note)

Item 139 – At the end of subsection 272(3)

Item 140 – Subsection 272(5) (note)

Item 141 – At the end of subsection 272(5)

Item 142 – Subsection 274(1) (note)

Item 143 – At the end of subsection 274(1)

Item 144 – At the end of subsection 276(1)

Item 145 – Subsection 276(2) (note)

Item 146 – At the end of subsection 276(2)

Item 238 – Subsection 347(1) (note)

Item 239 – At the end of subsection 347(1)

137. These items specify that the civil penalty for non-compliance with the specified provisions for an individual is 60 penalty units. The civil penalty for a body corporate is five times that of an individual (i.e. the penalty is increased from 150 penalty units to 300 penalty units) by the operation of paragraph 306(1)(a) as amended by item 203.

138. The items that refer to amendments to notes to a provision are consequential amendments required as a result of the amendments to the civil penalty provisions described above.

**Item 23 – Subsection 151(11)**

139. This item repeals subsection 151(11) and inserts new subsections 151(11) and 151(11A). The new subsections are in substantially the same form as paragraphs 151(11)(a) and (b), which set out obligations of organisations and the GM in relation to the term of a membership agreement.
140. This item also specifies that the civil penalty for non-compliance with subsection 151(11) is increased from 30 penalty units for an individual to 60 penalty units. The civil penalty for a body corporate is five times that of an individual (i.e. the penalty is increased from 150 penalty units to 300 penalty units) by the operation of paragraph 306(1)(a) as amended by item 203.

Item 7 – Subsection 52(1) (note)

Item 8 – At the end of subsection 52(1)

Item 9 – Subsection 52(3) (note)

Item 10 – At the end of subsection 52(3)

Item 12 – At the end of subsection 95(3C)

Item 14 – Subsection 104(1) (note)

Item 15 – At the end of subsection 104(1)

Item 16 – Subsection 104(3) (note)

Item 17 – At the end of subsection 104(3)

Item 28 – Section 169 (note)

Item 29 – At the end of section 169

Item 32 – Section 175 (note)

Item 33 – At the end of section 175

Item 34 – Section 176 (note)

Item 35 – At the end of section 176

Item 41 – Subsection 192(1) (note)

Item 42 – At the end of subsection 192(1)

Item 43 – Subsection 192(3) (note)

Item 44 – At the end of subsection 192(3)

Item 48 – Subsection 198(1) (note)

Item 49 – At the end of subsection 198(1)

Item 50 – Subsection 198(4) (note)

Item 51 – At the end of subsection 198(4)

Item 52 – Subsection 198(5) (note)
Item 53 – At the end of subsection 198(5)

Item 54 – Subsection 198(8) (note)

Item 55 – At the end of subsection 198(8)

Item 71 – Subsection 233(3) (note)

Item 72 – At the end of subsection 233(3)

Item 79 – Subsection 237(1) (note)

Item 80 – At the end of subsection 237(1)

Item 81 – Subsection 237(3) (note)

Item 82 – At the end of subsection 237(3)

Item 83 – Subsection 253(3) (note 1)

Item 84 – Subsection 253(3) (note 2)

Item 85 – Subsection 253(3) (note 3)

Item 87 – Subsection 254(3) (note)

Item 90 – Subsection 256(1) (note)

Item 91 – At the end of subsection 256(1)

Item 100 – Subsection 257(10) (note)

Item 101 – At the end of subsection 257(10)

Item 102 – Subsection 257(11) (note)

Item 103 – At the end of subsection 257(11)

Item 105 – Section 259 (note)

Item 106 – At the end of section 259

Item 116 – Subsection 265(1) (note)

Item 117 – At the end of subsection 265(1)

Item 118 – Subsection 265(4) (note)

Item 119 – At the end of subsection 265(4)

Item 120 – Subsection 265(5) (note)

Item 121 – At the end of subsection 265(5)
Item 124 – Section 267 (note)

Item 125 – At the end of section 267

Item 128 – Section 268 (note)

Item 129 – At the end of section 268

Item 130 – Subsection 270(4) (note)

Item 131 – At the end of subsection 270(4)

Item 132 – Subsection 270(5) (note)

Item 133 – At the end of subsection 270(5)

Item 134 – Subsection 270(6) (note)

Item 135 – At the end of subsection 270(6)

Item 136 – Subsection 270(7) (note)

Item 137 – Subsection 270(7)

141. These items increase the civil penalties for non-compliance with the specified provisions from 60 penalty units for an individual to 100 penalty units. The civil penalty for a body corporate is five times that of an individual (i.e. the penalty is increased from 300 penalty units to 500 penalty units) by the operation of paragraph 306(1)(a) as amended by item 203.

142. The items that refer to amendments to notes to a provision are consequential amendments required as a result of the amendments to the civil penalty provisions described above.

143. Item 86 – At the end of section 253 (after note 3)

Item 88 – At the end of section 254

144. These items insert a new subsection (4) in both sections 253 and 254 to make clear that there is an obligation not to contravene these sections. The items also increase the civil penalties for non-compliance from 60 penalty units for an individual to 100 penalty units. The civil penalty for a body corporate is five times that of an individual (i.e. the penalty is increased from 300 penalty units to 500 penalty units) by the operation of paragraph 306(1)(a) as amended by item 203.

Item 148 – Subsection 285(1) (note)

Item 149 – At the end of subsection 285(1)

Item 150 – Subsection 286(1) (note)

Item 151 – At the end of subsection 286(1)
Item 152 – Subsection 286(2) (note)
Item 153 – At the end of subsection 286(2)
Item 154 – Subsection 287(1) (note)
Item 155 – At the end of subsection 287(1)
Item 156 – Subsection 287(2) (note)
Item 157 – At the end of subsection 287(2)
Item 158 – Subsection 288(1) (note 1)
Item 159 – Subsection 288(1) (note 2)
Item 160 – At the end of subsection 288(1) (after note 2)
Item 161 – Subsection 288(2) (note)
Item 162 – At the end of subsection 288(2)
Item 168 – Subsection 297(2) (note)
Item 169 – At the end of subsection 297(2)
Item 170 – Subsection 297(3) (note)
Item 171 – At the end of subsection 297(3)
Item 173 – Subsection 298(2) (note)
Item 174 – At the end of subsection 298(2)
Item 175– Subsection 298(3) (note)
Item 176 – At the end of subsection 298(3)
Item 178 – Subsection 299(2) (note)
Item 179 – At the end of subsection 299(2)
Item 180 – Subsection 299(3) (note)
Item 181 – At the end of subsection 299(3)
Item 183 – Subsection 300(2) (note)
Item 184 – At the end of subsection 300(2)
Item 185 – Subsection 300(3) (note)
Item 186 – At the end of subsection 300(3)
Item 188 – Subsection 301(2) (note)

Item 189 – At the end of subsection 301(2)

Item 190 – Subsection 301(3) (note)

Item 191 – At the end of subsection 301(3)

Item 193 – Subsection 302(2) (note)

Item 194 – At the end of subsection 302(2)

Item 195 – Subsection 302(3) (note)

Item 196 – At the end of subsection 302(3)

Item 198 – Subsection 303(2) (note)

Item 199 – At the end of subsection 303(2)

145. These items increase the civil penalties for non-compliance with the specified provisions from 60 penalty units for an individual to 100 penalty units. The civil penalty for a body corporate is five times that of an individual (i.e. the penalty is increased from 150 penalty units to 300 penalty units) by the operation of paragraph 306(1)(a) as amended by item 203.

146. These items also include a civil penalty of 1200 penalty units for a serious contravention of the specified provisions (6000 penalty units for a body corporate). Item 4 of this Schedule inserts the definition of serious contravention, which is a contravention of a provision that:

- materially prejudices the interests of the organisation or branch, or the members of the organisation or branch; or
- materially prejudices the ability of the organisation or branch to pay its creditors; or
- is serious.

147. The ‘serious contravention’ concept was broadly modelled on subsection 1317G(1) of the Corporations Act and it is expected that similar principles would apply.

148. The items that refer to amendments to notes to a provision are consequential amendments required as a result of the amendments to the civil penalty provisions described above.

Item 19 – After subparagraph 141(1)(b)(ii)

149. This item inserts new subparagraph 141(1)(b)(iia), which provides that rules of registered organisations and their branches must provide for the keeping of minute books recording proceedings and resolutions of committees of management.

150. This amendment is intended to ensure that disclosures of material personal interest of officers of registered organisations under new section 293D and resolutions passed by
committees of management in accordance with new subsection 293F(4) are appropriately recorded.

151. The new subparagraph is broad so as to ensure that registered organisations are free to create rules that are relevant to how meetings are conducted in a particular case and to avoid as much as possible the need to amend existing rules that provide for the taking of minutes.

**Item 20 – Division 3A of Part 2 of Chapter 5**

152. This item repeals Division 3A of Part 2 of Chapter 5. This Division (as amended by the ROA Act) sets out content requirements for the rules of registered organisations dealing with certain disclosures and related matters. Division 3A is no longer required as a result of the legislative disclosure requirements set out in new Part 2A of Chapter 9.

**Item 26 – Sections 154C and 154D**

153. Item 26 repeals sections 154C and 154D (which were inserted by the ROA Act). Sections 154C and 154D set out requirements for rules to require officers to undertake approved training and related matters.

**Item 27 – Paragraph 159(4)(a)**

154. Item 27 is a consequential amendment required as a result of repealing Division 3A of Part 2 of Chapter 5 (as amended by the ROA Act).

**Item 59 – Paragraph 212(b)**

155. Item 59 inserts a reference to new section 290A, which establishes offences in relation to breaches of good faith, use of position and use of information (see item 163), in the definition of prescribed offence. The effect of this item is that a person convicted of an offence under section 290A will not generally be eligible to be an officer of an organisation or to stand for election to office (see section 215 of the RO Act).

**Item 89 – After subsection 255(2)**

156. This item inserts new subsection 255(2A), which provides that the reporting guidelines issued by the Commissioner for the purposes of sections 253 and 270 of the RO Act must require a report that shows the total expenditure of the reporting unit in relation to the matters specified in new paragraphs 255(2A)(a) – (e).

157. A note to the new subsection, informs the reader that the information to be set out in the report may be expressed in diagrammatic form, such as a pie chart. The intention is that members of registered organisations be provided with an easy to understand summary of how the financial resources of their organisation are expended.
Item 126 – Section 268

Item 127 – Paragraph 268(c)

158. These items make technical amendments to clarify that a full report must be lodged with the Commission after being presented to a committee of management meeting, if that has occurred in accordance with section 266 of the RO Act.

Item 147– Section 281

159. This item amends the simplified outline of Chapter 9 of the RO Act to include information about new Part 2A of the RO Act, which relates to disclosure obligations of officers, registered organisations and their branches (see item 166).

Item 163 – After section 290

Section 290A – Good faith, use of position and use of information – criminal offences

160. This item introduces new section 290A. Section 290A creates offences for a range of conduct related to existing duties of officers of registered organisations. Broadly, these offences relate to officers and employees of organisations and branches:

- 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.

161. The penalty for contravening new section 290A is 2000 penalty units or imprisonment for 5 years, or both.

162. These offences are broadly modelled on section 184 of the Corporations Act, which prohibits similar behaviour in relation to the conduct of company directors. The Corporations Act provisions were adapted as necessary to align with the RO Act framework.

Item 164 – Section 291 (heading)

Item 165 – Section 291

163. These items make consequential amendments to reflect the inclusion of new section 290A.

Item 166 – After Part 2 of Chapter 9

164. This item inserts a new Part 2A to Chapter 9 of the RO Act. New Part 2A deals with disclosure obligations.
Part 2A – Disclosure obligations

Division 1 – Preliminary

Section 293A – Simplified outline

165. New section 239A provides a simplified outline for the new Part 2A.

Division 2 – Disclosure obligations and restrictions on taking part in making decisions

Section 293B – Disclosure of remuneration paid to officers

166. New section 293B sets out the disclosure requirements for remuneration paid to officers of organisations. New subsections 293B(1) and 293B(2) require the disclosure by each officer, to the organisation or branch, of any remuneration paid to the officer:

- because the officer is a member of a Board and they hold that position only because of their position as an officer of the organisation or branch or because they were nominated for the position on the Board by the organisation, a branch, or by a peak council; or
- by a related party of the organisation or branch in connection with the performance of the officer’s duties.

167. New subsections 293B(1) and 293B(2) are civil penalty provisions.

Section 293BA – Immediate disclosure

168. New section 293BA requires that disclosure is made as soon as practicable after the remuneration is paid to the officer.

Section 293BB – Standing disclosure of remuneration

169. New section 293BB provides for a standing disclosure of remuneration.

170. New subsections 293BB(1) and 293BB(2) provide that where an officer’s remuneration is to be paid on a regular basis, he or she may make a standing disclosure to the committee of management of the amounts the officer expects to be paid.

171. New subsections 293BB(2) and 293BB(5) provide when the written disclosure must be given.

172. New subsections 293BB(3) and 293BB(4) provide for the action that must be taken where the actual amount paid differs from that disclosed in the standing disclosure.

Section 293BC – Disclosure of certain remuneration and benefits by organisations and branches

173. New subsection 293BC(1) provides that the organisation must, for a financial year, disclose the relevant remuneration of the five highest remunerated officers of the organisation. The subsection specifies that the identity of each officer must be disclosed as well as the amount of the officer’s relevant remuneration and the value and form of
the officer’s relevant non-cash benefits. This information must be disclosed to the members of the organisation and its branches.

174. New subsection 293BC(2) provides that the branch of an organisation must, for a financial year, disclose the relevant remuneration of the five highest remunerated officers of the branch of the organisation. The subsection specifies that the identity of each officer must be disclosed as well as the amount of the officer’s relevant remuneration and the value and form of the officer’s relevant non-cash benefits. This information must be disclosed to the members of the branch of the organisation.

175. New subsection 293BC(3) provides that disclosures made under subsections (1) or (2) must be made as part of the officer and related party disclosure statement required under Division 3. A note to this section states that a failure to prepare an officer and related party disclosure statement is a civil penalty provision.

176. New subsection 293BC(4) provides that for the purposes of new section 293BC, the relevant remuneration of an officer of an organisation or a branch of an organisation for a financial year includes:

- any remuneration disclosed to the organisation or the branch by the officer, under rules made under new subsections 293BC(1) or (2), during the financial year;
- any remuneration paid, during the financial year, to the officer by the organisation or the branch.

Relevant non-cash benefits

177. New subsection 293BC(5) provides that the relevant non-cash benefits of an officer of an organisation or branch of an organisation for a financial year are the non-cash benefits provided to the officer by the organisation or branch (as the case may be) or by a related party of the organisation or branch (as the case may be), at any time during the financial year, in connection with the performance of the officer’s duties as an officer.

Section 293C – Disclosure of material personal interests of officers and relatives

Disclosure by officers

178. New subsection 293C(1) provides that each officer of an organisation must disclose to the organisation, any material personal interest in a matter that relates to the affairs of the organisation that the officer, or a relative of the officer, has or acquires.

179. New subsection 293C(1) is a civil penalty provision.

180. New subsection 293C(2) provides that each officer of a branch of an organisation must disclose to the branch, any material personal interest in a matter that relates to the affairs of the branch that the officer, or a relative of the officer, has or acquires.

181. New subsection 293C(2) is a civil penalty provision.

182. New subsection 293C(3) provides that the disclosure must be made as soon as practicable after the interest is acquired and provide details of the nature and extent of
the interest as well as the relation of the interest to the affairs of the organisation or branch.

**Disclosure by organisation or branch**

183. New subsection 293C(4) provides that an organisation must, for a financial year, disclose to the members of the organisation and its branches, details of any interests disclosed to the organisation, under 293C(1), during the financial year.

184. New subsection 293C(5) provides that an organisation must, for a financial year, disclose to the members of the organisation and its branches, details of any interests disclosed to the organisation, under 293C(2), during the financial year.

**Manner of disclosure**

185. New subsection 293C(6) provides that disclosure must be made as part of the officer and related party disclosure statement. A note to this subsection states that the failure to prepare an officer and related party disclosure statement is a contravention of a civil penalty provision.

**Section 293D – Officer may give members of committee of management standing notice about an interest**

186. New subsections 293D(1) and 293D(8) provide that an officer of an organisation or a branch of an organisation may give standing notice to the committee of management of a material personal interest in a matter, whether or not the matter relates to the affairs of the organisation at the time that the notice is given by the officer.

187. New subsection 293D(2) provides that the notice must give details of the nature and extent of the interest and that it must be given either at a meeting of the committee of management or to the members of that committee in writing.

188. New subsection 293D(3) provides that where the notice is given to members of the committee of management individually in writing, it must also be tabled at the next meeting of that committee.

189. New subsection 293D(4) provides that the committee of management must ensure that the nature and extent of the disclosed interest is recorded in the minutes of the committee of management meeting at which the standing notice is given or tabled.

190. New subsections 293D(5) and 293D(6) provide that a standing notice takes effect as soon as it is given and ceases to have effect when a new person is appointed to the committee of management or if the nature or extent of the interest materially increases above the disclosed level. In situations where a new person is appointed to the committee of management, the standing disclosure will have effect again when the notice is given to that new person.

191. New subsection 293D(7) provides that a contravention of the section does not affect the validity of any other act, transaction, agreement, instrument, resolution or other thing.
**Section 293E – Interaction of section 293C and 293D with other laws**

192. New section 293E provides that new sections 293C and 293D have effect in addition to any general law rule about conflict of interest and any provision in the organisation or branch’s rules that otherwise restrict an officer from having a material personal interest in a matter that conflicts with their role as an officer of the organisation. New section 293E is modelled on section 193 of the Corporations Act and follows it closely.

**Section 293F – Restrictions on taking part in making decisions**

193. New subsections 293F(1) and 293F(2) provide that an officer of an organisation or branch of an organisation, who has a material personal interest in a matter, must not be present during any deliberation on the matter by the organisation or branch. The officer must also not take part in any decision of the organisation or branch with respect to the matter.

194. These subsections are civil penalty provisions.

195. New subsections 293F(3) and 293F(4) provide that the officer may be present and take part in a decision with respect to the matter if the members of the committee of management of the organisation or branch, who do not have a material personal interest in the matter, pass a resolution identifying the officer, the nature and extent of the interest and its relation to the affairs of the organisation or branch and stating that those members of the committee are satisfied that the interest should not disqualify the officer.

196. New subsection 293F(5) provides that a contravention of the section does not affect the validity of any other act, transaction, agreement, instrument, resolution or other thing.

**Section 293G – Disclosure of payments made by an organisation or a branch**

197. New subsections 293G(1) provides that an organisation must disclose to the members of the organisation and its branches each payment that has been made by the organisation during the financial year:

- to a related party of the organisation or of a branch of the organisation; or
- to a declared person or body of the organisation.

198. New subsection 293G(6) defines a declared person or body as an officer who has disclosed a material personal interest under new subsections 293C(1), 293C(2) or 293D(1) and the interest relates to or is in the person or body and the officer has not notified the organisation or the branch that the officer no longer has the interest.

199. New subsection 293G(2) provides that a branch of an organisation must disclose, to the members of the branch, each payment that has been made by the branch of the organisation during the financial year:

- to a related party of the branch of the organisation; or
- to a declared person or body of the branch.
200. New subsection 293G(3) provides that the disclosure must be made as part of the officer and related party disclosure statement. A note under this subsection states that a failure to prepare an officer and related party disclosure statement is a contravention of a civil penalty provision.

201. New subsection 293G(4) provides that new subsections 293G(1) and 293G(2) do not apply to payments made to a related party where the related party is an officer of the organisation or branch and the payment consists of remuneration paid to the officer or is reimbursement for expenses reasonably incurred by the officer in performing his or her duties.

202. A note to this subsection states that new section 293B deals with disclosure in relation to remuneration.

203. New subsection 293G(5) provides that subsections 293G(1) and 293G(2) do not apply to payments made to a related party where the payment consists of deductions from the remuneration of the employees or officers of the organisation or branch as the case may be.

Section 293H – Section 293G – order for alternative disclosure arrangement

204. New section 293H provides for the Commissioner to grant an organisation an alternative disclosure arrangement to that specified under new section 293G.

205. New subsection 293H(1) provides that an application for an order can be lodged by an organisation where it considers special circumstances exist that make new section 293G too onerous.

206. New subsection 293H(2) provides that an application to the Commissioner must be accompanied by:

- a statement of the special circumstances that exist in relation to the organisation;
- particulars of a proposed alternative arrangement to provide for disclosures of payments made by the organisation that are appropriate for the organisation’s special circumstances and are appropriately transparent; and
- evidence of past and current high standards of financial accountability and control that are appropriate for the organisation’s special circumstances and provide appropriate transparency.

207. New subsection 293H(3) provides that the Commissioner may make an order granting an alternative disclosure arrangement if he or she is satisfied that:

- special circumstances exist in relation to the organisation; and
- taking into account the evidence provided, the proposed alternative disclosure arrangement provide for disclosures, of payments made by the organisation, that are appropriate for the organisation’s special circumstances and are appropriately transparent; and
- that the proposed alternative disclosure arrangement:
  - complies with and is not contrary to this Act (other than section 293G); and
  - is not otherwise contrary to law.
208. New subsection 293H(5) provides that an order remains in force until the earlier of the day it is revoked, or 5 years after it was made.

209. New subsection 293H(6) provides that the Commissioner may revoke an order if either he or she is no longer satisfied of at least one of the matters that he or she had to be satisfied of before granting the order or he or she is satisfied that the organisation has contravened the alternative disclosure arrangement and the organisation has been given an opportunity, as prescribed, to show cause why the order should not be revoked.

210. New subsection 293H(7) makes clear that subsection 604(1) of the FW Act does not apply in relation to a decision of the Commissioner under new subsection 293H(3).

211. New subsection 293H(8) provides that new section 293H applies in relation to a branch of an organisation as if references to an organisation were references to a branch of an organisation.

212. New subsection 293H(9) provides that an order under subsection 293H(3) is not a legislative instrument. This new subsection has been included to assist readers by making clear that such an order made by the Commissioner in writing is not a legislative instrument within the meaning of section 5 of the LI Act.

213. Item 245 provides for transitional rules in relation to what must be considered by the Commissioner in satisfying himself or herself of the matters in new subsection 293H(3).

Division 3 – Officer and related party disclosure statements

Section 293J – Officer and related party disclosure statements

214. New subsections 293J(1) and 293J(2) require an organisation, or branch of an organisation, to prepare an officer and related party disclosure statement in relation to the financial year. The officer and related party disclosure statement must be prepared as soon as practicable after the end of the financial year and be provided to members and lodged with the Commissioner within 6 months from the end of the financial year.

215. New subsections 293J(1) and 293J(2) are civil penalty provisions.

216. New subsection 293J(3) provides that an officer and related party disclosure statement must include the details of the disclosures provided under Division 2 for the financial year.

Division 4 – Training in relation to financial duties

Section 293K – Officers to undertake approved training

217. New section 293K provides that each officer of an organisation or a branch of an organisation whose duties relate to the financial management of the organisation or the branch as the case may be must undertake training:

- approved by the Commissioner under new section 293L; and
- that covers each of the officer’s financial duties.
218. New subsection 293K(2) provides that the organisation or branch must ensure the person completes the course within 6 months after the person begins to hold the office.

Section 293L – Approved training

219. New section 293L provides that the Commissioner may approve training if he or she is satisfied that the training covers one or more of the duties of officers of organisations and branches of organisations that relate to the financial management of organisations and branches of organisations.

220. It is intended that under new subsection 293L(1), the Commissioner will be able to approve a range of training of different formats, styles and lengths in recognition of the different significance that financial management duties have to the roles of different officials as well as the backgrounds, experience and qualifications of those officials. Similarly, it is intended that the Commissioner will be able to approve general training that covers a range of financial management duties as well as more specific training that is tailored to a particular area or areas of financial management.

221. New subsection 293L(1) will require the Commissioner to be satisfied that the training being approved will be provided by an organisation or peak council (as usually defined within the RO Act) or a body or person that the Commissioner is satisfied has appropriate skills and expertise to provide the training, for example, a peak body for a particular industry or a recognised education provider.

222. New subsection 293L(2) provides that if the approval under new subsection 293L(1) is made in writing, the approval is not a legislative instrument. This new subsection has been included to assist readers by making clear that an approval of training by the Commissioner that is made in writing is not a legislative instrument within the meaning of section 5 of the LI Act.

223. Item 244 provides for transitional rules in relation to approved training.

Item 167 – Paragraph 297(1)(a)

Item 172 – Paragraph 298(1)(a)

Item 177 – Paragraph 299(1)(a)

Item 182 – Paragraph 300(1)(a)

Item 187 – Paragraph 301(1)(a)

Item 192 – Paragraph 302(1)(a)

Item 197 – Paragraph 303(1)(a)

224. These items omit references to the FW Act from sections 297 – 303 of the RO Act. These provisions relate to general duties of officers and employees of organisations and their branches in relation to orders and directions of the Federal Court and the FWC under the FW Act and the RO Act.
225. The effect of these amendments is that certain conduct in relation to orders or directions of the Federal Court or the FWC under the FW Act will no longer be punishable by a civil penalty under the FW Act.

226. Despite these amendments, the FW Act continues to provide for penalties in relation to conduct that contravenes an order of the FWC (see section 675 of the FW Act). The Federal Court, 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) will continue to be able to punish or discipline an individual or organisation where the disobedience the subject of the civil contempt (i.e. disobedience of the judgments, orders or other processes of the court) is wilful and not casual, accidental or unintentional.

**Item 200 – Subsection 305(2)**

227. Item 200 repeals and replaces subsection 305(2), which provides a list of civil penalty provisions in the RO Act. New subsection 305(2), defines a civil penalty provision for the purposes of the RO Act.

228. The insertion of new subsection 305(2) is a consequential change that is necessary due to the new approach to civil penalty provisions taken throughout the RO Act.

**Item 201 – At the end of section 305**

229. Item 201 inserts a new subsection 305(4), which is an avoidance of doubt provision that provides that the Federal Court must apply the rules of evidence and procedure for civil matters when hearing and determining an application for an order under Part 2 of Chapter 10 of the RO Act.

**Item 202 – Subsection 306(1)**

**Item 203 – Paragraph 306(1)(a)**

**Item 204 – Paragraph 306(1)(b)**

230. These items make amendments to section 306 that are consequential to the new approach to civil penalty provisions taken throughout the RO Act.

**Item 205 – Subsection 306(1A)**

231. This item is necessary as a consequence of the amendments to section 337AA made by item 230 of the Bill.

**Item 206– Subsection 306(2)**

**Item 207 – Subsection 306(2)**

**Item 208 – At the end of section 306**

232. These items make technical amendments that reflect the effect of subsection 305(3), which provides that contraventions of a civil penalty provision by a branch or reporting unit of an organisation is taken to be a contravention by the organisation.
233. Item 208 inserts a new subsection that makes clear that a person is not liable for more than one pecuniary penalty in relation to the same conduct.

**Item 209 – After section 307**

**Section 307A – Disqualification orders**

234. Item 209 inserts new section 307A, which allows the Federal Court to make an order disqualifying a person who has contravened a civil penalty provision from holding office in an organisation for a period if the court is satisfied the disqualification is justified.

235. The powers of the Federal Court under new section 307A have been broadly modelled on those available to it under section 206C of the Corporations Act, including the factors that it may be taken into account when determining if a disqualification is justified.

236. It is not anticipated that this power would be exercised in relation to relatively minor breaches of the RO Act civil penalty provisions.

**Item 210 – Section 311**

237. This item makes a technical amendment to insert a missing reference to an ‘organisation’ in section 311.

**Item 211 – Section 317**

238. This item amends the simplified outline of Chapter 11 of the RO Act to include information about new Part 3B, which deals with disclosure of information acquired by the Commissioner and the GM.

**Item 212 – After Part 3A of Chapter 11**

239. Item 212 inserts a new Part 3B of Chapter 11, which deals with information sharing.

**Part 3B – Information sharing**

**Section 329G – When information may be disclosed**

240. New section 329G sets out when specified information may be disclosed. This section is broadly modelled on the Fair Work Ombudsman’s power under section 718 of the FW Act and will replace the existing section 335C (see item 223).

241. New section 329G deals with the circumstances in which information that has been acquired by persons in the course of performing their work within the Commission or the FWC. This will include information acquired by the Commissioner or member of staff assisting the Commission and the GM or member of staff of the FWC.

242. New subsection 329G(2) provides that the Commissioner or the GM may disclose or authorise the disclosure of information to which new subsection 329G(1) applies if the he or she reasonably believes that it is:
Amendments – Schedule 2

- necessary or appropriate to do so in the course of performing functions, or exercising powers, under the RO Act or FW Act; or
- that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

243. New section 329G is intended to operate in conjunction with relevant provisions in the Privacy Act 1988 and the PS Act and Public Service Regulations 1999 (including the APS Code of Conduct).

Item 213 – Before section 330

Item 214 – Before section 331

244. Items 213 and 214 create new ‘Division 1 – Inquiries’ and ‘Division 2 – Investigations’ in Part 4 of Chapter 11 of the RO Act.

Item 215 – Section 335 (heading)

245. This item is a consequential amendment to the heading of section 335 to reflect amendments to the investigation powers of the Commissioner in items 216 – 221.

Item 216 – Subsection 335(1)

246. This item amends section 335 to ensure that the Commissioner can require information from a person the Commissioner believes on reasonable grounds can assist with an investigation.

247. The amendments to section 335 more closely align the investigation and information gathering powers of the Commissioner with those of ASIC under the ASIC Act.

248. While the Commissioner has broad powers to require information under section 335, the powers must be exercised in accordance with the limits on Commissioner’s power to commence an investigation in section 331 of the RO Act.

Item 217 – Subsection 335(2)

Item 218 – Paragraph 335(2)(a)

Item 219 – Paragraph 335(2)(b)

249. These items make technical amendments to subsection 335(2) to clarify the operation of the subsection.

Item 220 – At the end of subsection 335(2)

250. Item 220 inserts new paragraph 335(2)(d), which allows the Commissioner for the purpose of an investigation to issue a written notice to a person requiring the person to give the Commissioner such reasonable assistance as is specified in the notice. This is in addition to the existing powers to require a person by written notice to provide information under subsection 335(2).
251. A note to subsection 335(2) refers to section 337, which makes it an offence to fail to comply with a requirement in a notice issued by the Commissioner.

**Item 221 – Subsection 335(3)**

252. Item 221 amends subsection 335(3) to specify a range of content that must be included in a notice issued by the Commissioner under section 335.

253. Paragraph 335(3)(c) provides that the notice must explain the effect of new section 337AD, which relates to claims against self-incrimination (see item 230).

254. Paragraph 335(3)(d) provides that the notice must indicate whether the person will be required to answer questions on oath or affirmation (see item 223). A notice issued by the Commissioner can require a person to appear to answer questions or provide information not on oath or affirmation. However, where an oath or affirmation will be required this must be specified.

255. If a person will be required to answer questions on oath or affirmation, the notice must also set out the effect of new section 335F (see item 223), which relates to the attendance of the lawyer of a person subject to a notice issued by the Commissioner. Broadly, the attendee’s lawyer may always attend with the attendee. The lawyer will be able to address the investigator and question the attendee, provided that in doing so the examination is not obstructed.

**Item 222 – Section 335A**

256. Item 222 repeals section 335A, which is a consequential change as a result of the expanded scope for issuing notices under section 335.

**Item 223 – Section 335C**

257. Item 223 repeals existing section 335C and inserts new Divisions 3 and 4, which provide for questioning on oath or affirmation and powers in relation to documents. Existing section 335C is no longer necessary as the power to share information is dealt with generally in new section 329G (see item 212).

258. The amendments in item 223 have been broadly modelled on similar provisions in Part 3 of the ASIC Act. Similar offences to those in Division 7 of Part 3 of the ASIC Act have also been created in relation to investigations of the Commissioner (see items 226 – 230).

**Division 3 – Questioning on oath or affirmation**

**Section 335C – When this division applies**

259. New section 335C makes clear that new Division 3 only applies if a person has been issued a notice by the Commissioner under section 331 requiring the person to attend to answer questions on oath or affirmation.

260. Division 3 does not apply to a person that is given written notice requiring him or her to attend to provide information to the Commissioner other than on oath or affirmation.
261. Functions and powers of the Commissioner under this Division can only be delegated to a member of staff assisting the Commissioner (see item 237).

Section 335D – Requirements made of attendee

262. New section 335D sets out the requirements that may be made of the attendee. The section also gives the investigator the power to administer an oath or affirmation to the attendee that the statements that the attendee will make will be true.

263. By virtue of paragraph 335(2)(c), the person may only be required to attend before the Commissioner to answer questions that relate to matters relevant to the investigation.

264. The note to subsection 335D(3) makes clear that failure to comply with a requirement made under this subsection is an offence.

Section 335E – Questioning to take place in private

265. New section 335E provides that the questioning in accordance with the Division must take place in private and that the investigator may give directions about who may attend. The provisions also makes clear that only the investigator, the Commissioner or a member of staff assisting the Commissioner or person approved by the investigator, the attendee and the attendee’s lawyer is entitled to be present.

Section 335F – Attendee’s lawyer

266. As detailed above, an attendee’s lawyer is entitled to be present at the questioning by an investigator. New section 335F provides that the lawyer will be able to address the investigator and question the attendee, provided that in doing so the examination is not obstructed.

267. If the examination is being obstructed by the attendee’s lawyer, the investigator may require the lawyer to stop addressing the investigator or questioning the attendee.

268. Failure to comply with a requirement under the subsection is an offence.

Section 335G – Record of statements

Section 335H – Copies given subject to conditions

269. New section 335G makes clear that a record may be made of the statements made during questioning and must be made at the request of the attendee. The investigator must require the attendee to read and sign the record.

270. If requested, the investigator must give a copy of the record to the attendee free of charge subject to any conditions imposed by the investigator.

271. A note to this provision makes clear that failure to comply with a requirement under paragraph 335G(2)(a) is an offence.

272. New section 335H provides that the conditions imposed by the investigator on a copy of a record provided under 335G(2) also applies to any person that has possession, custody or control of the record or any copy of the record.
273. Failure to comply with this section is an offence.

Division 4 – Powers in relation to documents

Section 335K – Application for warrant to seize documents

274. New section 335K permits the Commissioner to apply to a magistrate for the issue of a warrant to search premises where the Commissioner has reasonable grounds to suspect there are documents whose production could be required under section 335.

275. If appropriate, the magistrate can require further information in connection with the application. Only where there are reasonable grounds to suspect that there are, or will soon to be, on particular premises, documents that have not been produced as required, may an application be granted to search those premises for the documents.

276. The power to apply for the issue of a warrant is a non-delegable function of the Commissioner (see item 236).

Section 335L – Grant of warrant

277. A magistrate will be empowered to issue a warrant if satisfied of the matters required under section 335L. The warrant may authorise a member of the Australian Federal Police and any other named person, to use such force as is necessary and reasonable:

- to enter the premises;
- to search the premises;
- to break open and search anything on the premises; and
- to take possession of the documents.

278. The information to be laid before the magistrate will also state which of the grounds set out in the information and particulars of any other grounds that are relied upon to justify the issue of the warrant.

279. These features are closely based on relevant provisions of the ASIC Act and are designed to provide safeguards in the issue of warrants.

Section 335M – Execution of warrant

280. New section 335M sets out a range of rights and obligations in relation to the execution of a warrant under new section 335L.

281. Importantly, if the occupier of the premises is present the member of the Australian Federal Police must present the occupier with a copy of the warrant and permit the occupier to be present during the search.

282. Further, if documents are seized under the warrant the member of the Australian Federal Police or the person assisting the member must provide a receipt for the documents.
Section 335N – Powers in relation to documents produced or seized

283. New section 335N sets out certain powers in relation to documents produced or seized either under section 335, under a warrant issued under new section 335L or under new subsection 335N(8).

284. Under new section 335N, relevant documents may be:
   - inspected, copied or have extracts taken from them;
   - used for the purposes of a proceeding (defined in section 6); and
   - retained for as long as necessary for the purposes set out in new paragraphs 335N(5)(a) – (d).

285. Liens cannot be claimed against a person retaining any of the documents, but liens are not otherwise prejudiced.

286. Inspections of retained documents will be permitted and if appropriate, retained documents may be delivered to the Commissioner or a person authorised by the Commissioner to receive them.

287. In certain circumstances, the person who has taken possession of a document can require a person who produced the document or took part in its compilation to make such further explanation as can be made.

288. Failure to comply with this subsection is an offence.

Section 335P – Powers if documents not produced

289. New section 335P provides that if a person fails to produce documents required under section 335, a person may be required to explain where the documents may be found and the whereabouts of the person who last had possession of the documents.

290. Failure to comply with this section is an offence.

Section 335Q – Power to require person to identify property of an organisation

291. New section 335Q provides that if documents are not produced, a person may be required to identify property of the relevant organisation and explain how that organisation has kept account of that property.

292. Failure to comply with this section is an offence.

Item 224– Section 336 (heading)

293. This item amends the heading of section 336 to create Division 5, which deals with action following investigations. It also changes the title of section 336.

Item 225– Before section 337

294. Item 225 inserts new Division 6 in Part 4 of Chapter 11. Division 6 deals with offences.
Item 226 – Paragraph 337(1)(a)

Item 227 – At the end of subsection 337(1) (before the penalty)
295. Items 226 and 227 amend subsection 337(1) to list all the offences in relation to an investigation by the Commissioner. The amendments are consequential to the amended investigation powers in items 215 - 223 above.

Item 228 – Subsection 337(1) (penalty)
296. Item 228 increases the maximum penalty available for a contravention of subsection 337(1) to 100 penalty units or imprisonment for 2 years, or both.

Item 229 – Subsections 337(2) to (5)
297. This item repeals subsections 337(2) - (5) and inserts new subsections that set out a number of defences for offences in section 337.
298. A note to the new subsections makes clear that in accordance with the Criminal Code, a defendant bears the evidential burden in relation to proving the matters in new subsections 337(2) - (4).

Item 230 – Section 337AA
299. Item 230 repeals section 337AA (which dealt with offences in relation to investigations by the GM) and replaces it with a series of provisions detailing new offences in relation to the conduct of investigations by the Commissioner.

Section 337AA – Strict liability offences
300. New section 337AA provides for a number of strict liability offences, which are generally ancillary to the investigative powers of the Commissioner. The penalty for committing an offence under this section is 60 penalty units.
301. New subsection 337AA(3) provides that a person will not commit an offence under the section if he or she has a reasonable excuse.
302. A note to this subsection provides that in accordance with the Criminal Code the defendant bears the evidential burden in proving a reasonable excuse.

Section 337AB – Obstructing person acting under this Part
303. New subsections 337AB(1) and 337AB(2) provide that a person commits an offence if he or she hinders or obstructs a person exercising a power under the Part or executing a warrant under new section 335L.
304. The penalty for committing an offence under this provision is 100 penalty units or 2 years imprisonment, or both.
305. New subsection 337AB(2) provides that a person will not commit an offence under the section if he or she has a reasonable excuse.
306. A note to this subsection provides that in accordance with the *Criminal Code* the defendant bears the evidential burden in proving a reasonable excuse.

307. New subsection 337AB(3) makes it an offence for a person to fail to provide reasonable facilities and assistance to a person exercising powers under a warrant issued under new section 335L.

308. The penalty for committing an offence under this provision is 25 penalty units or imprisonment for 6 months, or both.

*Section 337AC – Concealing documents relevant to investigation*

309. New section 337AC provides that where the Commissioner (or delegate) is investigating or is about to investigate a matter, it will be an offence to conceal, destroy, mutilate or alter a document relating to the matter, or to take or send the document out of the particular State or Territory or out of Australia unless it was not intended to defeat the purposes of the investigation or to delay or obstruct an investigation.

310. In light of the definition of ‘proceeding’ (see item 3), the limitation on use of certain evidence in a criminal proceeding or a proceeding for the imposition of a penalty will apply broadly. Further, Courts have given the term ‘penalty’ a wide meaning, which adds to the scope of the protection in subsection 337AD(3) (see for example *Chief Executive, Queensland Health v Jattan* [2010] QCA 359).

311. The penalty for committing an offence under this provision is 200 penalty units or imprisonment for 5 years, or both.

312. A note to this subsection provides that in accordance with the *Criminal Code* the defendant bears the evidential burden in proving that his or her actions were not intended to defeat the purposes of the investigation or to delay or obstruct an investigation.

*Section 337AD – Self-incrimination*

313. New section 337AD provides that if before giving information, producing a document or signing a record, a person claims that the information, document or record might tend to incriminate him or her or make him or her liable to a penalty, neither the information or the fact the person produced the document or signed the record is admissible in evidence against the person in a criminal proceeding or proceeding for the imposition of a penalty, other than a proceeding in respect of the falsity of the information, document or record.

*Section 337AE – Legal professional privilege*

314. New section 337AE provides that a lawyer will be permitted to withhold a privileged communication made to that lawyer in that capacity unless the person involved agrees to the furnishing of that information. Where a privileged communication is withheld, the lawyer will be required to provide details of the identity of the person to whom the communication was made and the identity of the document containing the communication.
315. The penalty for committing an offence under this provision is 10 penalty units or 3 months imprisonment, or both.

316. This provision places additional statutory obligations on lawyers claiming privilege in the context of an investigation by the Commissioner (or delegate). It is not intended to otherwise abrogate common law principles of legal professional privilege.

Division 7 – Evidentiary use of certain material

Section 337AF – Statements made on oath or affirmation during an investigation – proceedings against attendee

317. New section 337AF sets out certain rules in relation to the admissibility in evidence of statements made by a person under oath or affirmation in proceedings against the person. A statement by a person is admissible unless:

- it is subject to a claim against self-incrimination under new subsection 337AD(3);
- the statement is not relevant to the proceedings;
- the statement is qualified or explained by another statement made by the person on oath or affirmation; or
- the statement would disclose matters in respect of which the person could claim legal professional privilege in the proceeding.

318. New subsection 337AF(3) makes clear that if a record of statements is signed in accordance with new subsection 335G(2) the record will be taken to be evidence of the statements. However, nothing in the Part limits the admissibility of other evidence of statements made during the questioning.

Section 337AG – Statements made on oath or affirmation during an investigation – other proceedings

319. New section 337AG provides that if direct evidence by a person not at a proceeding would be admissible, a statement made on oath or affirmation that establishes the matter is admissible in the matter on the grounds set out in new paragraphs 337AG(a) and (b).

Section 337AH – Weight of evidence admitted under section 337AG

320. New section 337AH sets out special rules in relation to the weight to be given to statements as evidence that are admitted under section 337AG in a proceeding.

321. In deciding the weight that must be given to a matter regard must be had to:

- how long after the matters to which it relates the statement was made;
- any reason the person may have for concealing or misrepresenting a matter; or
- any other circumstances that may indicate how accurate the statement is.
322. In cases where the person is not called as a witness:

- evidence that would have been admissible in relation to the credibility of the person is admissible; and
- evidence in relation to the consistency of the relevant statements is also admissible.

323. Evidence of a matter is not admissible if, had the person been present to deny the matter, evidence of the matter would not have been admissible in cross examination.

Section 337AJ – Objection to admission of statements made on oath or affirmation during an investigation

324. Under new section 337AJ a party that intends to introduce statements made on oath or affirmation as evidence in the proceeding must notify the other party to the proceedings in writing.

325. The other party has an opportunity to respond in writing stating whether the other party objects to the introduction of the statements as evidence.

326. The adducing party must notify the court or tribunal of their intention to introduce statements as evidence and of any objections raised by the other party to the proceedings. The court or tribunal may determine the objections prior to or during the proceedings. The other party is not entitled to raise further objections to statements being introduced on evidence unless their object relates to an earlier objection or if the court or tribunal gives the other party leave to raise further objections.

Section 337AK – Copies of, or extracts from, certain documents

327. New section 337AK provides that in certain circumstances, a copy or extract from a document is admissible in evidence as if it was the original document or was the relevant part of the original document.

Section 337AL – Material otherwise admissible

328. New section 337AL provides that nothing in new Division 7 renders evidence inadmissible in a proceeding in circumstances where it would have been admissible in that proceeding if Division 7 had not been enacted.

Division 8 – Miscellaneous

Section 337AM – Evidence of Authority

329. New section 337AM makes clear that a person may request evidence of an investigator’s authority to make a requirement under Part 4 of Chapter 11. Upon request the investigator must produce a written authorisation issued by the Commissioner and any other evidence to make the requirement under the Part as the Commissioner determines.
Section 337AN – Application of the Evidence Act

330. New section 337AN sets out the application of the Evidence Act 1995 to questioning on oath or affirmation.

Section 337AP – Allowances and expenses

331. New section 337AP provides for certain reimbursements to be paid to people subject to a requirement made under section 335 or incurred in complying with a requirement made under the Part.

Section 337AQ – Compliance with Part

332. New section 337AQ broadly provides that a person is neither liable to a proceeding, nor subject to a liability, merely because the person has complied with a requirement made under Part 4 of Chapter 11.

Item 232 – Section 337G

333. This item amends section 337G to provide that the FWC may direct that parties be joined or struck out as parties to proceedings before the FWC under the RO Act. This is a consequential amendment required to reflect that a proceeding can also be brought before other courts or tribunals.

Item 233– After paragraph 343B(2)(h)

334. This item inserts subsection 329G(2) as a power that the Commissioner may delegate. This item is a consequential amendment to reflect new Part 3B of Chapter 11 in item 212.

Item 234 – Paragraph 343B(2)(k)

335. This item removes a reference to section 335A in paragraph 343B(2)(k) as a power that the Commissioner may delegate. This item is a consequential amendment required as a result of item 224 which repeals section 335A.

Item 235 – Paragraph 343B(2)(ka)

336. This item repeals paragraph 343B(2)(ka) which provided for the delegation of the Commissioner power under subsection 335C(2). This is a consequential amendment required as a result of item 225 which repeals section 335C.

Item 236 – Before paragraph 343B(2)(m)

337. This item inserts new paragraph 343B(2)(l) which provides that the Commissioner may delegate his power under section 335K. This is a consequential amendment required as a result of item 223 which inserts new section 335K.
Item 237 – After subsection 343B(3)

338. New subsection 343B(4) provides that the Commissioner’s functions and powers to question an attendee on oath and affirmation under Division 3 of Part 3B can only be delegated to a member of staff assisting the Commissioner.
Part 2 – Transitional provisions

Item 242 – Definitions

339. Item 242 provides for definitions for the purpose of this Part.

Item 243 – Application of Division 3A of Part 2 of Chapter 5 in relation to the 2013-14 financial year

340. This item provides that Division 3A of Part 2 of Chapter 5 has effect in relation to the financial year ending 30 June 2014 as if it had not been repealed by this Schedule.

Item 244 – Approved training

341. This item relates to training approvals issued prior to the commencement time.

342. A person who has undertaken training approved by the GM under section 154C of the RO Act, immediately before the commencement time, is taken for the purpose of section 293L to have undertaken that training as approved by the Commissioner. In addition, training approvals issued prior to the commencement time by the GM continue to have effect as if they had been issued by the Commissioner.

Item 245 – Alternative disclosure arrangements

343. This item provides that in satisfying himself or herself as mentioned in subsection 293H(3) of the RO Act during the period of 12 months immediately after the commencement time, the Commissioner must take into account exemptions granted to the organisation under section 148D of the RO Act and the statement, particulars and evidence provided in relation to any such exemption as required by subsection 148D(2) of the RO Act.

Item 246 – Minister may make rules about transitional matters

344. Item 246 provides that the Minister may make rules about transitional matters.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work (Registered Organisations) Amendment Bill 2013

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Fair Work (Registered Organisations) Amendment Bill 2013 (the Bill)

The Bill will amend the RO Act to ensure better governance of registered organisations.

The Bill will:

- establish an independent watchdog, the Commission, to monitor and regulate registered organisations, and educate their members with enhanced investigation and information gathering powers;

- amend the requirements on officers’ disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;

- strengthen existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain rule obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and

- increase civil penalties and introduce criminal offences for serious breaches of officers’ duties as well as new offences in relation to the conduct of investigations under the RO Act.

Human rights implications

The Bill engages with 3 human rights:

- The right to freedom of association:
  - The right to form and join trade unions and the right of trade unions to function freely in Article 22 of the International Covenant on Civil and Political Rights (ICCPR),
  - Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
  - in the International Labour Organisation (ILO) Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) (Convention 87); and

- The right to the presumption of innocence and the minimum guarantees contained in Article 14 of the ICCPR; and
The prohibition on unlawful and arbitrary interference with privacy and reputation in Article 17 of the ICCPR.

The Right to Freedom of Association

Article 22(1) of the ICCPR protects the right to freedom of association, including the right to form and join trade unions.

Relevantly, Article 8(1)(a) of the ICESCR also provides for:

*The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.*

Article 8(3) of the ICESCR also provides that:

*Nothing in this article [Article 8] shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

ILO Convention 87 provides employer and employee organisations with protection for their organisational autonomy. Article 3 of Convention 87 provides:

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 8 of Convention 87 provides that:

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.*

The Bill will make several amendments to the RO Act which engage the right to freedom of association:

- Increasing maximum penalties for breaches of civil penalty provisions across the RO Act;
• Increasing financial disclosure requirements on officers and organisations and their branches;
• Placing restrictions on officers from taking part in decision making in limited circumstances;
• Increasing the circumstances in which an officer may be disqualified from holding office in an organisation;
• Increasing the information gathering powers of the independent regulator, the roc, including the introduction of new offences in relation to non-compliance and obstruction of requests made by the roc under its information gathering power; and
• Requiring organisations to ensure that officers undertake approved financial management training.

These provisions of the Bill limit the right to freedom of association. However, the limitations on the right are permissible limitations as they pursue a legitimate objective, are prescribed by law and are reasonable, necessary and proportionate.

Legitimate objective

As noted in the outline above, the object of the amendments is to ensure better governance of registered organisations. This object arises out of Government and community concerns that in light of recent investigations and prosecutions of officials of registered organisations relating to misuse of position and member funds, the current regulation of registered organisations is not satisfactory in preventing fraud, financial mismanagement and adequate democratic governance in the interests of members.¹

As the Parliamentary Joint Committee on Human Rights (the Joint Committee) has previously noted:

_The ILO Committee on Freedom of Association has considered the question of the permissibility of regulating the operations of unions and external scrutiny of their finances. While expressing concern about the possibility of government interference in the operations of trade unions, it has also recognised the legitimacy of external scrutiny in order to prevent or detect fraud or embezzlement._²

Following the Joint Committee’s comments above, it is important to note that the ILO Committee on Freedom of Association has made the following observations on the rights of organisations to organise their administration:

• “Legislative provisions which regulate in detail the internal functioning of workers’ and employers’ organizations pose a serious risk of interference by the public authorities. Where such provisions are deemed necessary by the public authorities,


they should simply establish an overall framework in which the greatest possible autonomy is left to the organizations in their functioning and administration. *Restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body so as to avoid any risk of excessive or arbitrary interference in the free functioning of organizations*.3 (emphasis added)

- “Measures of supervision over the administration of trade unions may be useful if they are employed only to *prevent abuses and to protect the members of the trade union themselves against mismanagement of their funds*. However, it would seem that measures of this kind may, in certain cases, entail a danger of interference by the public authorities in the administration of trade unions and that this interference may be of such a nature as to restrict the rights of organizations or impede the lawful exercise thereof, contrary to Article 3 of Convention No. 87. It may be considered, however, to some extent, that a *guarantee exists against such interference where the official appointed to exercise supervision enjoys some degree of independence of the administrative authorities and where that official is subject to the control of the judicial authorities*.4 (emphasis added)

On the basis of these observations, the amendments in the Bill which limit the right to freedom of association pursue a legitimate object because they:

- have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations; and
- seek to prevent abuses and protect the members of trade unions and employer associations against mismanagement of their funds.

The amendments in the Bill are also necessary and proportionate to achieve the objective of increased financial transparency and improved democratic governance of registered organisations.

**Registration under the RO Act is not mandatory**

The system of registration of employer and employee associations in the Federal industrial relations system is not mandatory and associations freely choose to seek registration with the rights and obligations which registration confers. While the RO Act does impose limitations on the right of organisations to organise themselves as they see fit, consequent upon registration an organisation is entitled to significant rights and privileges under the FW Act including:

- entitlement to initiate proceedings or appear before the FWC on behalf of a member;5 and
- exercising rights of entry to workplaces under Part 3-4 of the FW Act.

---


4 Ibid, para 489.

5 Fair Work Act 2009 ss 540(2), 596(4).
Companies’ regulation is an appropriate model for achieving the legitimate objectives of the Bill

In seeking appropriate and reasonable measures to achieve the objectives of the Bill, many of the measures in the Bill have been drawn from regulation of companies.

The measures in the Bill, which increase the obligations on officers, are modelled on the established mechanisms of corporate governance used for the regulation of companies in Australia. These regulations are intended to prevent breaches of the fiduciary duties owed by company directors. In particular, disclosure of material personal interests and restrictions on voting at meetings protect against the risk that a related party may influence the decision-making of directors to the detriment of the interests of members of the company as a whole when a company is considering whether to enter into a transaction with a related party.

Judicial consideration of the role of officers of industrial organisations has made clear that officers of industrial organisations hold a position of trust which involves the maintenance and advancement of interests of their members and that there are strong fiduciary elements involved in the discharge of the duties of such office. The amendments in the Bill with regards to the material personal interests of officers seek only to prevent breaches of the obligations on officers at common law to act in the interests of members.

Similarly, the introduction of criminal offences regarding good faith, use of position and use of information for officers and employees are aimed at reducing reckless and dishonest conduct which would prejudice the interests of members. This provision mirrors the offences under the Corporations Act 2001 (Corporations Act). The amendments in the Bill requiring the disclosure of the identity and remuneration of officers is also modelled on similar requirements under the Corporations Act and builds on the existing obligations of officers and organisations.

The application of the powers of the ROC is subject to judicial, parliamentary and administrative oversight

Finally, it is important to highlight that the Bill ensures adequate oversight of the exercise of the functions and powers of the ROC and the Commissioner:

- Decisions of the Commissioner (including a delegate of the Commissioner) will be reviewable by appeal to the FWC under subsection 604(1) of the FW Act;
- The Commonwealth Ombudsman will have oversight of the actions of the Commission and the Commissioner similar to its oversight of the actions of the Australian Securities and Investments Commission (ASIC) under its corresponding functions and powers; and
- The ROC is required to report annually to the Commonwealth Parliament.

---

6 Diane Margaret Robertson v the State Public Services Federation [1993] FCA 336 at [17] per French J
7 Corporations Act 2001 s 184.
8 Corporations Act s 300A(1)(c) and Corporations Regulations 2001 r 2M.3.03, see also RO Act ss 148A – 148E (amendments commencing on 1 January 2014).
Increasing civil penalties – human rights implications

In addition to the introduction of new criminal offence provisions, as noted above, the Bill increases the maximum penalty for a range of civil penalties across the RO Act and also introduces some new civil penalties. The Government notes that, given that civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR, the Joint Committee has highlighted that when a provision imposes a civil penalty, an assessment is required as to whether it amounts to a ‘criminal’ penalty for the purposes of the ICCPR.\(^9\)

The Government has relied on the Joint Committee’s guidance in *Practice Note 2 (interim)* as to the relevant criteria for determining whether the civil penalty provisions amended or introduced by the Bill are ‘criminal’ for the purposes of human rights law.

The Bill will amend the penalties that may be imposed by the Federal Court for breaches of the civil penalty provisions of the RO Act to provide for three tiers of maximum penalties depending on the relative seriousness of the conduct the subject of the penalty provision:

- **Tier one** – 100 penalty units for an individual ($17,000) or 500 for a body corporate ($85,000) or for where a contravention is deemed a ‘serious’ contravention, 1200 penalty units for an individual ($204,000) or 6000 for body corporate ($1,020,000). This penalty applies to breaches of officer’s civil financial management duties under sections 285 – 288, the new obligations introduced by the Bill to disclose officer’s material personal interests and remuneration, payments made by an organisation or branch, general duties in relation to orders and directions of the FWC and Federal Court and restrictions on officers voting on certain matters. The Bill amends section 6 of the RO Act to provide that a ‘serious contravention’ in relation to a contravention of a civil penalty provision by an organisation, a branch of an organisation or a person who is, or was, an officer or employee of an organisation or a branch of an organisation, means a contravention that:
  - materially prejudices the interests of the organisation or branch, or the members of the organisation or branch; or
  - materially prejudices the ability of the organisation or branch to pay creditors; or
  - is serious.

- **Tier two** – 100 penalty units for an individual ($17,000) or 500 for a body corporate ($85,000). Broadly, this penalty applies to breaches of provisions requiring the lodgement of financial or other information with the ROC and the making of declarations.

- **Tier three** – 60 penalty units for an individual ($10,200) or 300 penalty units for body corporate ($51,000). Broadly, this penalty applies to breaches of the least serious civil penalty provisions including lodging certain documents with the FWC and other administrative tasks such as removing non-financial members from the organisations register.

---

Following Practice Note 2 (interim), the Joint Committee will have regard to three criteria for assessing whether a penalty is criminal:

- The classification of the penalty in domestic law;
- The nature of the penalty; and
- The severity of the penalty.\(^\text{10}\)

**Classification of the penalty**

The penalties under the Bill’s amendments are described as civil penalties and will be enforceable in the Federal Court subject to the rules of evidence and procedure applicable to civil proceedings in that court. In this way, the classification of the penalty favours classification of the penalty as civil in international law.

**Nature of the penalty**

Applying the criteria listed in *Practice Note Two (interim)* with regards to the nature of the penalty, the new and increased penalties contained in the Bill appear to have the characteristics of both civil and criminal penalties. On balance, for the reasons below, the penalties are more likely to be considered civil in nature.

Firstly, many of the increased penalties in the Bill, particularly in the middle tier of penalties are administrative in nature and are intended to reduce non-compliance with obligations, particularly financial obligations, under the RO Act. Secondly, for the highest tier of offences it is relevant to highlight that in examining the nature of civil penalties in Australia, the Australian Law Reform Commission (ALRC) noted that:

> *In criminal law, wrongful acts are punished because they violate some kind of collective interest, and will apply even if no individual suffered a direct injury. Civil remedies, on the other hand, apply to conduct that has directly harmed an individual’s interest.*\(^\text{11}\)

The application of higher penalties to provisions directly relating to the financial management of organisations is intended to protect the individual interests of the members of organisations.

Considering the nature of the penalties as a whole it becomes clear that the amendments in the Bill are preventative, disciplinary and regulatory in nature.

**Severity of the penalty**

The severity of the increased penalties indicates that the penalties are more likely to be considered civil rather than criminal. In support of this conclusion it is relevant to note:

- The maximum penalty is equivalent to that applicable under the Corporations Act and many organisations have command of considerable resources similar to that of many companies;
- The application of the maximum penalty is subject to a threshold test which mirrors the protection in subsection 1317G(1) of the Corporations Act;

\(^{10}\) Ibid, at 1.7  
\(^{11}\) ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, para 2.19
Statement of Compatibility with Human Rights

- There is no provision under the RO Act for imprisonment for non-payment of a penalty; and
- Any increases in penalties reflect the seriousness of the provisions by reference to the objective of ensuring better financial management of organisations.

Having regard to the criteria set out by the Joint Committee, the civil penalties introduced or amended by the Bill are civil penalties for the purposes of international law. The discussion below of the rights guaranteed by Article 14 of the ICCPR proceeds on this basis.

Right to the presumption of innocence and other guarantees

Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and tribunals, and that in the determination of any criminal charge against a person, that person is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 14(2) provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law.

Article 14(3) set out a range of guarantees that everyone shall be entitled to in the determination of any criminal charge against them. This includes the right not to be compelled to testify against himself or herself or to confess guilt (Article 14(3)(g)).

The Bill contains a number of amendments to insert new offence provisions in the RO Act:

- Offences in relation to good faith, use of position and use of information;
- Offences in relation to attendance before the Commissioner or a delegate (including for questioning on oath or affirmation);
- Offences in relation to production of documents;
- Failure to provide reasonable assistance to the Commissioner;
- Obstruction of a person exercising powers under Part 4 of Chapter 11;
- Concealing documents relevant to an investigation; and
- Refusal to comply with a request made to a lawyer under Part 4 of Chapter 11.

**Article 14(2) ICCPR**

The Bill will insert new section 337AA which provides that certain offences in relation to the conduct of an investigation are strict liability offences. These offences may limit the presumption of innocence guaranteed in Article 14(2) of the ICCPR. However, if these offences are considered to be limiting the right, the limitation is within the permissible limitations to the right because of the objective of ensuring compliance with the requirements under Part 4 of Chapter 11 which is necessary for the effective functioning of the Commission.

The limitation is also reasonable insofar as each of the offences relates to a person’s failure to comply with a requirement made of them relating to the conduct of an investigation (under Part 4 of Chapter 11 of the RO Act as amended). However, each of these offences will not apply insofar as the person has a reasonable excuse, a matter that is peculiarly in the knowledge of the defendant. As such, it is more practical for the accused to prove that they
are not in breach of the requirement than for the prosecution to disprove that the person does not have a reasonable excuse.

Also in favour of the limitation being considered permissible is that the offences of strict liability could also be characterised as regulatory in nature and are not punishable by a term of imprisonment.

Article 14(3)(g) ICCPR

Article 14(3)(g) of the ICCPR provides the right to be free from self-incrimination, in that a person may not be compelled to testify against him or herself or to confess guilt. The Bill will insert new subsection 337AD(1) which provides that for the purposes of Part 4, Chapter 11 (as amended) it is not a reasonable excuse for a person to refuse or fail to give information, produce a document or sign a record in accordance with a requirement made of the person because doing so might tend to incriminate the person or make the person liable to a penalty. As such, subsection 337AD(1) limits the right to be free from self-incrimination.

The limitation is however, within the permissible limitations to the right as it is for a legitimate objective, and is reasonable, necessary and proportionate to that objective. The objective of the limitation is to ensure that offences under the RO Act can be properly investigated which is necessary to ensuring compliance with the RO Act. The limitation is also reasonable and proportionate. New subsections 337AD(2) and (3) contain a derivative use immunity which provides that if a person claims the information, document or record might tend to incriminate them or make them liable to pay a penalty, and this might in fact be the case, then the information document or record, or the fact that the person has produced the document or signed the record, will not be admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty. This immunity does not apply with respect to proceedings in respect of false or misleading information, documents or records (paragraphs 337AD(3)(c) and (d)).

Article 14(7) ICCPR

Article 14(7) provides a guarantee that no person who has been convicted or finally acquitted of a criminal charge shall be tried or punished again. The Bill inserts new section 290A which creates offences for conduct similar to that concerned in sections 285 – 288 for which the Bill will increase the maximum penalty. Whilst the Government believes that this increase does not mean that the offences under new section 290A would be considered ‘criminal’ in international law (and therefore limiting the guarantee in Article 14(7)), it is relevant to note that section 311 of the RO Act restricts the Federal Court from ordering a pecuniary penalty against a person or organisation if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

In this respect the ALRC has found that:

*The ALRC finds value in maintaining provisions in legislation which allow for a choice of criminal or civil proceedings for the same conduct. Such flexibility is an*
important feature of regulation and allows a regulator the ability to tailor appropriate penalties to breaches.\textsuperscript{12}

Right to Privacy and Reputation

The right to privacy in Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation.

The \textit{UN Human Rights Committee, General Comment 16} makes the following comments in relation to the right to privacy and reputation:

\begin{quote}
\textit{The term "home" in English...as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation...Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment.}\textsuperscript{13}
\end{quote}

In order for an interference with the right to privacy not to be ‘arbitrary’, the interference must be for a reason consistent with the ICCPR and reasonable in the particular circumstances. Reasonableness, in this context, involves notions of proportionality, appropriateness and necessity.\textsuperscript{14}

\textit{Investigation and information gathering powers}

Under the amendments in the Bill, the existing investigation and information gathering powers of the GM will be transferred to the Commissioner. These powers will also be significantly amended to empower the Commissioner to require any person he or she believes on reasonable grounds:

\begin{itemize}
\item has information or a document; or
\item is capable of giving evidence
\end{itemize}

which the Commissioner has reason to believe is relevant to an investigation, (new subsection 335(1)) to produce documents, give evidence or provide information or reasonable assistance (new subsection 335(2)). These powers can only be applied in the course of an investigation (under sections 331 – 334 of the RO Act).

The Commissioner’s powers under section 335 (as amended) are supplemented with offence provisions:

\begin{itemize}
\item If a person fails to produce documents they can be required to explain where to find the documents or whose possession they were last in (new section 335P).
\item A person can also be required to identify property of an organisation and explain how the organisation kept account of that property (new section 335Q).
\end{itemize}

\textsuperscript{12} ALRC, \textit{Principled Regulation: Federal Civil and Administrative Penalties in Australia (Report 95)} at 11.65.
The Commissioner’s powers are also enforceable as offence provisions (which are set out in full above).

These expanded investigation and information gathering powers limit the right to privacy, however this limitation is permissible insofar as it is for a legitimate objective and is necessary, reasonable and proportionate.

The objective of the amendments is to ensure that the Commission can effectively investigate breaches of the RO Act. In order to achieve this object it is necessary for the Commission to have information gathering powers sufficient to undertake this task. The amendments have drawn from the information gathering powers of ASIC under the Australian Securities and Investments Commission Act 2001 (ASIC Act) (Part 3, Divisions 1 – 10) which provides a suitable comparator for the functions of the Commissioner.

There are also important safeguards on the application of these new powers which further indicates that the amendments are reasonable and proportionate:

- As amended by the Bill, subsection 335(3) provides that the notice requiring a person to appear to give evidence or provide information must include certain matters:
  - the general nature of the matters to which the investigation relates;
  - state the person can be accompanied by a lawyer or another person;
  - set out the effect of new section 337AD (discussed above);
  - state whether the person will be required to answer questions on oath or affirmation; and
  - the rights of an attendee’s lawyer (under new section 335F).
- Questioning must take place in private (section 335E).
- Whilst the Commissioner’s powers are enforceable as offence provisions (amended paragraphs 337(1)(a) – (c) and new paragraph 337(1)(d)), the offences in amended paragraph 337(1)(a) and new paragraph 337(1)(d) allow a defence of reasonable excuse. Also, the new offences in subparagraphs 337(1)(d)(ii) and (iii) do not apply to the extent that the person has explained the matter to the best of his or her knowledge and the offence in subparagraph 337(1)(d)(iv) does not apply to the extent that the person has, as far as they are capable, performed the acts referred to in new paragraphs 335Q(a) and (b).

Search and seizure powers

The Bill includes the ability for the Australian Federal Police to enter premises and search and seize documents (new section 335M). This power limits the right to privacy, however, this limitation is permissible insofar as it pursues a legitimate objective and is reasonable, necessary, proportionate, authorised by law and is not arbitrary. The object of the new search and seizure powers in the RO Act is intended to ensure that the ROC is adequately empowered to obtain information necessary to perform its investigatory functions. The search and seizure powers introduced in the Bill are modeled on those of ASIC under the ASIC Act, which as noted above, is an appropriate comparator for the powers necessary for the ROC.

There are a number of factors which indicate that the limitation is permissible:

- The powers of the Commissioner, the Australian Federal Police and an eligible magistrate are clearly prescribed in domestic law meaning there are detailed rules
governing the scope and application of the powers in the Bill. Also, the application of the provisions should be clear insofar as the provisions are nearly identical to those of the ASIC Act.

- The powers include adequate safeguards against arbitrariness and abuse, including limits on the duration of the power. In this regard, the power is only available conditional upon prior authorization by a magistrate (new section 335L). Also, the warrant must specify the premises and documents to which it applies, state whether entry is authorised to be made at any time of the day or night or in specified hours and also state that the warrant ceases to have effect on a specified day that is not more than 7 days after the day of issue of the warrant (new subsection 335L(4)).

- The ROC’s other information gathering powers under paragraph 335(2)(b) mean that the application for a warrant to search and seize documents will only be required to be used when this less intrusive method of obtaining the information is not sufficient for the ROC to obtain the documents it seeks in the course of an investigation. Further, new section 335M will place important safeguards on the execution of the warrant.

- There are limitations around the use of documents seized in new section 335N with the intention that such documents are used only for purposes related to the investigation for which they were seized.

- The Commission will also be subject to independent oversight by the Commonwealth Ombudsman.

Disclosure obligations on officers of organisations

Amendments in the Bill relating to the disclosure of officer’s remuneration and material personal interests limit the right to privacy. The Bill provides that:

- Officers of organisations and branches of organisations must disclose to their organisation or branch certain board payments made to them (new section 293B and 293BB);
- Organisations and branches must disclose to their members the remuneration and non-cash benefits and identity of the 5 highest paid officials (new section 293BC);
- Officers must disclose certain material personal interests to their organisation or branch (new section 293C); and
- Organisations and branches must disclose to their members the material personal interests disclosed by officers (new section 293C).

These limitations on the right to privacy are permissible insofar as they are necessary in order to ensure adequate financial transparency in registered organisations. The limitations are also reasonable and proportionate insofar as they are based on the existing obligations on officers and organisations under the RO Act (sections 148A – 148E (to commence on 1 January 2014)) and have a basis in the regulation of companies under the Corporations Act.

Information Sharing

The Bill allows the Commissioner or GM to share information acquired by them in the performance of functions or exercise of powers under the RO Act in circumstances where they reasonably believe that:

- it is necessary or appropriate to do so in the course of performing or exercising his or her functions or powers (including under the FW Act); or
• the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

This broad information sharing power may limit the right to privacy. However any limitation is permissible insofar as it pursues the legitimate objective of efficient enforcement of domestic law and the exercise of statutory powers. The power is also modelled on the information sharing powers of similar bodies like the Fair Work Ombudsman.\(^\text{15}\)

In this way, the limitation is prescribed by law, pursues a legitimate objective and is reasonable, necessary and proportionate to that objective.

**General power of the Commissioner**

Proposed new section 329AC gives the Commissioner the power to do all things necessary or convenient to be done for the purposes of performing his or her functions. This is a standard provision for a regulator. For example, subsection 657(2) of the FW Act confers upon the GM ‘power to do all things necessary or convenient to be done for the purpose of performing his or her functions’. While the power of the Commissioner may be delegated under proposed new section 343B, in exercising powers or functions under a delegation, the delegate must comply with any directions of the Commissioner. Furthermore, the Commissioner’s power to do all things necessary or convenient for the purposes of performing his or her functions is limited by the scope of those functions.

In this way, to the extent that this provision may be perceived to be limiting any human rights, particularly those outlined above, this limitation pursues the legitimate objective of enabling the Commissioner to undertake his or her functions and powers under the RO Act and is necessary, reasonable and proportionate.

**Conclusion**

The Bill is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

*Minister for Employment, Senator the Hon. Eric Abetz*

\(^{15}\) FW Act s 718(2)