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THE HOUSE OF REPRESENTATIVES

**FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2012**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the  
Honourable Bill Shorten MP)

## **FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT BILL 2012**

### **OUTLINE**

The Fair Work (Registered Organisations) Amendment Bill 2012 (the Bill) will amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to increase the financial and accountability obligations of registered organisations and their office holders, strengthen the investigative powers of Fair Work Australia (FWA) and enhance remedies under the RO Act.

The Bill will:

- require that the rules of all registered organisations deal with disclosure of remuneration, pecuniary and financial interests;
- increase the civil penalties under the RO Act;
- enhance the investigative powers available to FWA under the RO Act; and
- require education and training to be provided to officials of registered organisations about their governance and accounting obligations.

### **Financial Impact Statement**

Nil

## 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 2012

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 2012 (the Bill)*

The Bill amends the *Fair Work (Registered Organisations) Act 2009* (the RO Act) in order to increase the financial and accountability obligations of registered organisations and their office holders, strengthen the investigative powers of Fair Work Australia (FWA) and enhance remedies under the RO Act.

The Bill will:

- require that the rules of all registered organisations deal with disclosure of remuneration, pecuniary and financial interests;
- increase the civil penalties under the RO Act;
- enhance the investigative powers available to FWA under the RO Act; and
- require education and training to be provided to officials of registered organisations about their governance and accounting obligations.

#### Human rights implications

The Bill engages with two human rights:

- The right to freedom of association, including 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 (ICESR) and in the International Labour Organisation (ILO) Convention 87; and
- The prohibition on unlawful and arbitrary interference with privacy (in Article 17 of the ICCPR).

#### The Right to Freedom of Association

All of the amendments which the Bill makes to the RO Act engage the right to freedom of association and the rights of people to form organisations to represent their industrial interests. Despite that the intention of the amendments in the Bill is to strengthen the existing arrangements for the transparent and democratic functioning of organisations, on a broad and beneficial interpretation of such rights, it is arguable that the amendments in the Bill are limiting insofar as they all effectively restrain individuals from forming industrial organisations in any way they wish. In particular the amendments which would enhance the requirements for

disclosure of remuneration, expenditure and pecuniary interests of officials under the rules of registered organisations limit the rights set out in Articles 3 and 8 of ILO Convention 87.

Whilst the Bill will arguably limit the right to freedom of association, the limitations are not incompatible with the right. The purpose of the amendments in the Bill is to enhance the financial and accountability obligations of employee and employer organisations in the RO Act to ensure that the fees paid by members of such organisations are used for the purposes intended and that the officers of such organisations use their positions for proper purposes.

Article 22 of the ICCPR provides for express limitations on the right to freedom of association when such limitations are prescribed by law and are necessary in a democratic society in the interests of public order or the protection of the rights and freedoms of others.

Article 8 of the ICESR provides for express limitations on the right to form and join trade unions and the right of trade unions to function freely subject to no limitations when such limitations are 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.

The general principles relating to the ability of governments to intervene in the internal affairs of employee or employer organisations in relation to freedom of association were set out by the Committee of Experts on the Application of Conventions and Recommendations in the 2012 *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*. With regard to the ability of governments to intervene in employee or employer organisations the Committee stated at paragraph 108 (emphasis added):

*Legislative provisions which regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference which is incompatible with the Convention. Where such provisions are deemed necessary, they should simply establish an overall framework within which the greatest possible autonomy is left to the organizations for their functioning and administration. The Committee considers that **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 against any act of this nature by the authorities<sup>1</sup>.*

The limitations which the Bill place on the right to freedom of association fall within the express permissible limitations in the ICCPR and the ICESR insofar as they are necessary in the interests of public order and the protection of the rights and freedoms of others. Relevantly, parties to decisions made by the General Manager of Fair Work Australia under the Bill's amendments are entitled to review of such decisions by impartial and independent judicial bodies. Further, the amendments in the Bill are permissible insofar as they are prescribed by law, pursue a legitimate objective (protecting the interests of members and guaranteeing the democratic functioning of organizations), are rationally connected to that objective and are no more restrictive than is required to achieve the purpose of the limitation.

#### Prohibition on Unlawful and Arbitrary Interference with Privacy

The amendments in the Bill concerning the broadening of the inquiry and referral powers of FWA limit the right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence in Article 17 of the ICCPR.

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<sup>1</sup> Accessed at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_174846.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf) on 15 May 2012

In particular the Bill provides that:

- Rules of organisations or branches must require that certain officers of organisations or branches of organisations must disclose to the organisation or branch any remuneration paid to them because they are a member of a board or by a related party of the organisation or branch (item 57, new subsections 148A(1) and (2) of the Bill);
- Rules of organisations or branches must require the disclosure of the relevant remuneration and relevant non-cash benefits (as defined in new subsection 148A(9) and (10) the Bill) of certain officers to their members (item 57, new subsections 148A(4) - (7) of the Bill).
- Rules of organisations or branches of organisations must require that officers of organisations or branches disclose to the organisation or branch any material personal interests in a matter that relates to the affairs of the organisation or branch that the officer has or acquires or a relative of the officer has or acquires (item 57, new subsection 148B(1) and (2) of the Bill);
- Rules of organisations or branches must require the disclosure of information received under subsection 148B(1) and (2) of the Bill to their members (item 57, new subsection 148B(4) and (5) of the Bill);
- The General Manager of FWA may delegate his/her inquiry and investigative function to bodies or persons that the General Manager is satisfied has substantial or significant knowledge or experience in one of a number of fields (item 36, new subsection 343A(3A) of the Bill). ;
- A matter, which is the subject of an investigation by FWA, can be referred to the appropriate police (State, Territory or AFP depending on the alleged criminal conduct) in relation to suspected criminal conduct (item 23, amended paragraph 336(2)(c) of the Bill); and
- The General Manager of FWA can disclose information acquired during the course of an investigation by the General Manager or a member of staff of FWA, if (s)he is satisfied that it is necessary or appropriate in the course of exercising powers or performing functions or that it is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory (item 15, new section 335C of the Bill).

Article 17 of the ICCPR provides for an implied permissible limitation on the right to privacy insofar as limitations must not be arbitrary or unlawful. 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<sup>2</sup>.

The limitations which the amendments in the Bill have on the right to privacy are not incompatible with the right. The amendments seek to facilitate the efficient enforcement of Commonwealth law. In this way, the limitation is prescribed by law, pursues a legitimate objective (the enforcement of Commonwealth laws) and is reasonable, necessary and proportionate to that objective.

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<sup>2</sup> *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) at 8.3

## **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.

**NOTES ON CLAUSES**

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

FW Act	<i>Fair Work Act 2009</i>
FWA	Fair Work Australia
GM	General Manager of Fair Work Australia
RO Act	<i>Fair Work (Registered Organisations) Act 2009</i>
the Bill	Fair Work (Registered Organisations) Amendment Bill 2012

**Clause 1 – Short title**

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

**Clause 2 – Commencement**

2. The table in this clause sets out when the provisions of the Bill commence.
3. Item 3 of the table in subclause 2(1) of the Bill states that the provisions of Schedule 1, Part 2 to the Bill commence on a day to be fixed by Proclamation. However, if the provisions do not commence by Proclamation, they will commence after 12 months from the date the Bill receives the Royal Assent. The extended period of 12 months for the commencement of the provisions of Schedule 1, Part 2 to the Bill, rather than the usual 6 months, is to allow the Government to work with stakeholders to ensure they have sufficient time to put in place the necessary administrative arrangements as required by the provisions of Schedule 1, Part 2 to the Bill prior to the Proclamation date.

**Clause 3 – Schedule(s)**

4. Clause 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 operates according to its terms.

## Schedule 1 – Amendments

5. Schedule 1 of the Bill is divided into two parts.
- Part 1 sets out the provisions of the Bill that will commence on Royal Assent. In general, these provisions relate to FWA’s role in approving training, in improving the conduct of investigations and inquiries and in certifying alterations to rules. Part 1 also sets out increased maximum penalties for breaches of the civil penalty provisions.
  - Part 2 sets out the provisions of the Bill that will commence on Proclamation. In general, these provisions relate to new requirements in relation to the rules of organisations.

### Part 1 – Amendments commencing on Royal Assent

#### *Fair Work (Registered Organisations) Act 2009*

#### **Item 1 – At the end of section 5 (before the note)**

6. Item 1 amends section 5 of the RO Act, which sets out Parliament’s intention in enacting the RO Act, to insert new subsection 5(5). New subsection 5(5) states that Parliament recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system.

#### **Item 2 – Section 6**

7. Item 2 amends section 6 of the RO Act to insert the definition of evidential burden. Evidential burden, in relation to a matter, is the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. The inclusion of this definition is necessary because of the new civil penalty provisions inserted by item 27.

#### **Item 3 – After Subdivision BA of Division 4 of Part 2 of Chapter 5**

#### *Subdivision BB – Approved training*

#### *New Section 154C – Approved training*

8. Item 3 inserts new Subdivision BB, which relates to approved training.
9. New subsection 154C(1) provides that the GM 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.
10. It is intended that under new subsection 154C(1), the GM 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 GM 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.



11. New subsection 154C(1) will require the GM 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 GM 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.

12. New subsection 154C(2) provides that if the approval under new subsection 154C(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 GM that is made in writing is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

13. New section 154D provides that the rules of registered organisations are to require officers to undertake approved training (see item 59).

#### **Item 4 – Transitional – approved training**

14. Item 4 is a transitional provision. It provides that the GM must, before the commencement of Part 2 of Schedule 1 to the Bill, approve training under new section 154C that covers all of the duties of officers of organisations and branches of organisations that relate to the financial management of organisations and branches of organisations.

15. This item will ensure that officers required by the rules of their organisation, as amended in accordance with new section 154D, to undertake approved training will be able to do so immediately after the commencement of the relevant provisions.

#### **Item 5 – After paragraph 305(2)(zk)**

16. Item 5 amends section 305 of the RO Act, which deals with civil penalty provisions, to insert new paragraph 305(2)(zka). New paragraph 305(2)(zka) provides that new subsections 337AA(1), (2) and (3), which deal with the GM's power to require information, are civil penalty provisions (see item 27).

#### **Item 6 – Subsection 306(1)**

17. Item 6 makes an amendment to section 306 of the RO Act that is consequential on the insertion of new subsection 306(1A) by item 9.

#### **Item 7 – Paragraph 306(1)(a)**

#### **Item 8 – Paragraph 306(1)(b)**

18. Items 7 and 8 amend subsection 306(1) of the RO Act to increase the pecuniary penalty orders that may be imposed by the Federal Court for contravening a civil penalty provision to:

- 300 penalty units for a body corporate (item 7); and
- 60 penalty units in any other case (item 8).

19. In general, the pecuniary penalty orders that may be made by the Federal Court as a result of the amendments made by items 7 and 8 will mirror those available to the Federal

Court, the Federal Magistrates Court or an eligible State or Territory court in relation to breaches of the civil penalty provisions of the FW Act.

**Item 9 – After subsection 306(1)**

20. Item 9 amends section 306 of the RO Act, which deals with the pecuniary penalty orders that the Federal Court may make, to insert new subsection 306(1A). New subsection 306(1A) provides that the Federal Court may make an order imposing a pecuniary penalty of not more than:

- 150 penalty units for a body corporate; and
- 30 penalty units in any other case,

for contraventions of subsections 337AA(1), (2) or (3) of the RO Act (see item 27). These penalties align with the penalties that are currently available for offences in relation to an investigation by the GM under section 337 of the RO Act.

**Item 10 – Application – pecuniary penalty orders**

21. Item 10 makes clear that amendments made to section 306 of the RO Act by Schedule 1 to the Bill only apply to orders made on or after the commencement of item 10. The broad application of this provision reflects the importance of compliance with the RO Act framework and the subsequent significance that should attach to breaches of these provisions.

**Item 11 – Section 335 (heading)**

22. Item 11 repeals and substitutes a heading to section 335 of the RO Act.

**Item 12 – Paragraphs 335(2)(a) and (b)**

**Item 13 – Paragraph 335(2)(c)**

**Item 14 – Paragraph 335(2)(c)**

23. Items 12 and 13 amend paragraphs 335(2)(a), (b) and (c) to include references to a person or body to whom the GM has delegated conduct of the investigation.

24. Item 14 amends paragraph 335(2)(c) to include a reference to the delegate (as the case may be).

25. These items will ensure that if the GM has delegated responsibility for the conduct of an investigation in accordance with section 343A of the RO Act to a person or body, that person or body has the same power as the GM to receive information or documents or have a person attend before them to answer questions. This amendment will not allow the GM to delegate responsibility for issuing a written notice under subsection 335(2) requiring either production or attendance.

**Item 15 – After section 335**

26. Item 15 inserts new sections 335A – 335C.

*New section 335A – Conduct of investigations – additional power to require information etc.*

27. Broadly, new section 335A provides that, in addition to the existing power of the GM under the RO Act to obtain information or documents or to require attendance to give evidence in relation to current and former officers and employees of registered organisations (as well as auditors of registered organisations), the GM can obtain such information or evidence from third parties (for example, banks and telephone companies). However, this power will only be exercisable where the GM is first unable to obtain the information from an officer, former officer of a registered organisation or from an auditor of a registered organisation.

28. New section 335A will allow the GM to require a person (the first person) to provide information, produce documents or attend before the GM or a delegate, for the purposes of making an investigation in circumstances where:

- the GM has required another person to give information, produce documents or attend before the GM or a delegate; and
- after considering the information provided by that person, the GM reasonably believes that the first person has information or a document or is capable of giving evidence that is relevant to the investigation; and
- the GM has reason to believe that none of the people referred to in paragraphs 335(1)(a), (b) or (c) have the information or documents or are capable of giving evidence, or are likely to give or produce information or documents, or is likely to give evidence if required to do so under subsection 335(2) of the RO Act.

29. New subsection 335A(2) provides that for the purpose of making the investigation, the GM may, by written notice, require the first person:

- to give to the GM, or a person or body conducting the investigation, any information within the knowledge or in the possession of the first person;
- to produce or make available to the GM, or the person or body conducting the investigation, any documents in the custody or under the control of the first person, or to which he or she has access; and
- to attend before the GM, or a person or body conducting the investigation, to answer questions relating to matters relevant to the investigation and to produce all records and other documents in the custody or under control of the first person relating to those matters.

30. New subsection 335A(3) provides that a notice requiring a person to attend must state that the person may be accompanied by another person. The other person may be, but does not have to be, a lawyer.

*New section 335B – Investigations to be completed as soon as practicable*

31. New section 335B provides that the GM must complete an investigation as soon as practicable. This provision is intended to ensure that where the GM suspects non-compliance

with the RO Act, the matter is dealt with as quickly as possible. This obligation would equally apply to the person or body conducting the investigation.

*New section 335C – Disclosure of information acquired during an investigation*

*Information to which this section applies*

32. New subsection 335C(1) provides that new section 335C applies to information acquired by the GM, or a member of the staff of FWA, in the course of an investigation.

*Disclosure that is necessary or appropriate, or likely to assist administration or enforcement*

33. New subsection 335C(2) provides that the GM may disclose, or authorise the disclosure of, the information if the GM reasonably believes:

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

34. The powers of the GM to disclose, or to authorise the disclosure of information is consistent with the powers of the Fair Work Ombudsman to disclose or authorise the disclosure of information under the FW Act.

**Item 16 – Application – conduct of investigations**

35. Item 16 makes clear that the amendments of section 335 of the RO Act (see items 11-14) made by the Bill apply in relation to investigations that began on or after the commencement of item 16.

36. Item 16 also makes clear that new section 335A of the RO Act, as inserted by the Bill (see item 15), applies in relation to investigations that began on or after the commencement of item 16.

**Item 17 – Application – completion of investigations**

37. Item 17 provides that new section 335B of the RO Act, as inserted by the Bill (see item 15), applies to investigations that began on or after the commencement of item 17.

**Item 18 – Application - disclosure of information acquired during an investigation**

38. Item 18 provides that new section 335C of the RO Act, as inserted by the Bill (see item 15), applies to information acquired on or after the commencement of item 18.

**Item 19 – Before subsection 336(1)**

39. Item 19 inserts a new subheading for subsection 336(1).

**Item 20 – After subsection 336(1)**

*General Manager must make inquiries*

40. Section 336 of the RO Act relates to the actions of the GM following an investigation. Subsection 336(1) provides that if the GM is satisfied upon concluding an investigation that a reporting unit has committed a contravention as specified in the subsection, the GM must notify the reporting unit of the fact.

41. Item 20 inserts new subsection 336(1A), which provides that within 12 months of notifying the reporting unit under subsection 336(1), the GM must also make a further inquiry into whether the reporting unit is complying with the provision, reporting guideline or rule of the reporting unit to which the original contravention related.

42. The effect of this provision is to compel the GM to undertake further monitoring of organisations that have been found not to have met the standards of the RO Act.

**Item 21 - Before subsection 336(2)**

43. Item 21 inserts a new subheading for subsection 336(2).

**Item 22 – Subsection 336(2)**

44. Item 22 makes an amendment to subsection 336(2) that is consequential upon the insertion of new subsection 336(1A) by item 20.

**Item 23 – Paragraph 336(2)(c)**

45. Item 23 amends paragraph 336(2)(c) to provide that in addition to having the capacity to refer a matter arising out of an investigation to the Commonwealth Director of Public Prosecutions, the GM may also refer the matter to the Australian Federal Police or a police force of a State or Territory for action in relation to criminal offences.

**Item 24 – Application – action following an investigation**

46. Item 24 provides that amendments of section 336 of the RO Act (see items 19-23) made by Schedule 1 to the Bill, applies to investigations that began before, on or after the commencement of item 24.

47. New subsection 336(1A) (see item 20) is intended to apply to investigations that were underway before the commencement of item 24 to ensure that the GM has the power to monitor the ongoing compliance of any organisation that has been or is currently the subject of an investigation where the organisation is found not to have complied with the provision, reporting guideline or rule of the reporting unit as set out in subsection 336(1).

48. The amendment of paragraph 336(2)(c) of the RO Act made by item 23 applies to investigations that began before, on or after the commencement of item 24 to ensure that the GM is able to refer relevant matters to the Australian Federal Police or a police force of a State or Territory for action in relation to possible criminal offences regardless of when the investigation was commenced.

**Item 25 - Subparagraph 337(1)(a)(i)****Item 26 - Paragraph 337(1)(c)****Item 27 – Subsections 337(4) and (5)**

49. Section 337 of the RO Act relates to offences in relation to investigations by the GM. Items 25 and 26 make amendments to section 337 that are consequential upon the insertion of new section 335A by item 15. Item 27 repeals subsections 337(4) and (5).

50. New subsections 337(4) provides that a person is not excused from complying with a request made by the GM or a delegate (as the case may be) under subsection 335(2) on the ground that the information, the production of a document or the answer to a question might tend to incriminate the person or expose the person to a penalty.

51. New subsection 337(5) provides that in the case of an individual the following matters are not admissible in evidence against the person in criminal proceedings (except for those set out in paragraph 337(1)(b) or (c)) or civil penalty proceedings:

- the information given, document produced or the answer given;
- giving the information, producing the document or answering the question; and
- any information, document or thing obtained as a direct or indirect consequence of giving the information, producing the document or answering the question.

52. This amendment ensures the drafting of the derivate use immunity that applies under section 337 is consistent with that adopted under new item 29.

**Item 28 – Application – subsections 337(4) and (5)**

53. Item 28 provides that subsections 337(4) and (5), as inserted by item 27, apply in relation to notices given under section 335 of the RO Act on or after the commencement item 28.

**Item 29 – At the end of Part 4 of Chapter 11**

*New section 337AA - Additional power to require information etc. – civil penalty provisions*

54. Item 27 inserts new section 337AA. New section 337AA sets out a range of civil penalty provisions in relation to breaches of new section 335A (see item 15).

*Civil penalty provisions*

55. New subsection 337AA(1) provides that a person must comply with a requirement made of the person under new subsection 335A(2).

56. New subsection 337AA(2) provides that a person must not give information or documents to the GM or a delegate (as the case may be) in purported compliance with subsection 335A(2) if the person knows or is reckless as to whether the information or document is false or misleading.

57. New subsection 337AA(3) provides that a person must not, when attending before the GM or a delegate as the case may be, make a statement if the person knows or is reckless as to whether, the statement is false or misleading.

58. Notes to new subsections 337AA(1) – (3) alert readers to the fact that the new subsections are civil penalty provisions under section 305 of the RO Act.

*Reasonable excuse*

59. New subsection 337AA(4) provides that new subsection 337AA(1) does not apply if the person has a reasonable excuse. New subsection 337AA(5) provides that the person bears the evidential burden (see item 2) of showing a reasonable excuse.

*Self-incrimination*

60. New subsection 337AA(6) provides that a person is not excused from complying with a request made by the GM or a delegate (as the case may be) under new subsection 335A(2) on the ground that the information, the production of a document or the answer to a question might tend to incriminate the person or expose the person to a penalty.

61. New subsection 337AA(7) provides that in the case of an individual the following matters are not admissible in evidence against the person in criminal proceedings or civil penalty proceedings (other than those arising out of new subsection 337A(2) or (3)):

- the information given, document produced or the answer given;
- giving the information, producing the document or answering the question; and
- any information, document or thing obtained as a direct or indirect consequence of giving the information, producing the document or answering the question.

**Item 30 – Section 343A (heading)**

62. Item 30 repeals and substitutes a new heading to section 343A of the RO Act.

**Item 31 – Paragraph 343A(2)(b)**

63. Item 31 amends paragraph 343A(2)(b) to insert a reference to new subsection 154C(1). This item ensures that the powers of the GM under that subsection can be delegated to a member of the staff of FWA who is an SES employee or an acting SES employee, or a member of the staff of FWA who is in a class of employees prescribed by the regulations.

**Item 32 – After paragraph 343A(2)(i)**

64. Item 32 amends subsection 343A(2) of the RO Act, to insert new paragraphs 343A(2)(ia) and (ib). This item ensures that the powers of the GM under section 335, new section 335A and new subsection 335C(2) of the RO Act cannot be delegated.

**Item 33 - Paragraph 343A(2)(j)**

65. Item 33 amends paragraph 343A(2)(j) to substitute the reference to subsection 336C(2) with a reference to subsections 336C(1), (2), (3) or (5). This item ensures that the powers of the GM under those subsections cannot be delegated.

**Item 34 - Before paragraph 343A(3)(a)**

66. Item 34 amends section 343A to insert new paragraph 343A(3)(aa). This item ensures that the GM's functions or powers under new subsection 154C(1) may only be delegated to a member of the staff of FWA who is an SES employee or an acting SES employee, or to a member of the staff of FWA who is in a class of employees prescribed by the regulations.

**Item 35 - Paragraph 343A(3)(h)**

67. Item 35 amends paragraph 343A(3)(h) to omit the words "other than section 334 or subsection 336(2) or 337K(4)", and substitutes the words "other than Part 4 of that Chapter or subsection 337K(4)".

68. This item provides for delegation of those provisions to occur in accordance with other subsection of 343A.

**Item 36 – After subsection 343A(3)**

69. Item 36 inserts new subsection 343A(3A). New subsection 343A(3A) provides that despite the GM's general power to delegate functions or powers under 343A(1), functions and powers under section 330, 331, 332 or 333 can only be delegated to:

- a member of the staff of FWA who is an SES employee or an acting SES employee, or to a member of the staff of FWA who is in a class of employees prescribed by the regulations; or
- any other person or body the GM is satisfied has substantial or significant experience or knowledge in at least one of the following fields:
  - accounting;
  - auditing;
  - financial reporting;
  - conducting compliance audits or investigations;
  - a field prescribed by the regulations for the purposes of this subparagraph.

70. This provision will amend the current framework to allow FWA to delegate its inquiry and investigation functions to a third party where the GM is satisfied that the third party has the necessary skills to conduct the investigation or inquiry. A range of safeguards are included in the Bill to ensure accountability where the inquiry or investigation function is delegated e.g. whilst the delegate of the GM will be able to obtain information in the same



way as the GM (see item 14), a notice to produce documents or attend to provide information will only be able to be issued by the GM or an SES Officer.

71. A note to new subsection 343A(3) alerts readers that the expressions *SES employee* and *acting SES employee* are defined in section 2B of the *Acts Interpretation Act 1901*.

### **Item 37 – Application – Delegation by the General Manager**

72. Subitem 37(1) provides that new paragraph 343(2)(ia) of the RO Act (see item 32) applies to investigations that began on or after the commencement of item 37.

73. Subitem 37(2) provides that amendment made to paragraph 343A(2)(j) by Schedule 1 to the Bill (see item 33) applies to investigations concluded on or after the commencement of item 37.

74. Subitem 37(3) provides that new subsection 343A(3A) of the RO Act (see item 36) applies in relation to an inquiry or investigation that began on or after the commencement of item 37.

### **Item 38 – Transitional – alteration of rules (general)**

75. Item 38 sets out transitional arrangements for eligible alterations of the rules of organisations. The transitional arrangements will allow registered organisations to make and FWA to approve, any amendments to their rules that are necessary to comply with amendments in Part 2 of Schedule 1 to the Bill before the commencement of those provisions.

76. Subitem 38(3) provides that for the purposes of the item, an eligible alteration of the rules of an organisation is an alteration the only purpose of which is to comply with:

- new paragraphs 141(1)(ca) (see item 55);
- new Division 3A of Part 2 of Chapter 5 (see item 57); and
- new Subdivision BB of Division 4 of Part 2 of Chapter 5 (see item 3),

as in force immediately after the commencement of Part 2 of Schedule 1 to the Bill.

77. Subitem 38(3) also provides that for the purposes of this item, transition period means the period beginning on the commencement of the Part and ending immediately before the commencement of Part 2 of Schedule 1 to the Bill.

78. Subitem 38(1) provides that subsection 159(1) of the RO Act, which requires particulars of an alteration of the rules of a registered organisation to be lodged with FWA for the alteration to take effect, applies during the transition period to an eligible alteration as if Part 2 of Schedule 1 to the Bill had commenced on Royal Assent.

79. Subitem 38(2) provides that subsection 159(3) of the RO Act, which provides that an alteration of rules that has been certified takes effect on the day of certification, applies during the transition period, to the certification of an eligible alteration as if all the words

after “subsection (1)” in subsection 159(3) of the RO Act were omitted and the following was substituted:

- takes effect on the later of:
  - the day of certification; and
  - the commencement of Part 2 of Schedule 1 to the Bill.

**Item 39 – Transitional – alteration of rules (exemption from section 148C)**

80. Item 39 sets out transitional arrangements for exemptions from new section 148C. The transitional arrangements will allow registered organisations to lodge an application with FWA for the purposes of new section 148D before the commencement of that provision.

81. Subitem 39(2) provides an organisation will be able to make an early application if it considers that from the time new section 148D commences special circumstances will exist in relation to the organisation that mean that a rule that complies with new section 148C will be too onerous.

82. Subitem 39(3) requires the specified information to accompany an application.

83. Subitem 39(4) provides that if the GM is satisfied of the matters referred to in new subsection 148D(3) (as if that provision had commenced), the GM may grant to the organisation an exemption from new section 148C, that takes effect from the later of:

- the time the GM grants the exemption; and
- the commencement of Part 2 of Schedule 1 to the Bill

84. Subitem 39(5) provides that an exemption granted in respect of an early application is, from the time the exemption takes effect, taken to be an exemption granted under new section 148D.

85. Subitem 39(6) provides that, for the avoidance of doubt, subsection 604(1) of the FW Act does not apply in relation to a decision of the GM made under item 39.

86. Subitem 39(7) provides that item 39 applies in relation to a branch of an organisation as if references to an organisation were references to a branch of an organisation.

**Part 2 – Amendments commencing on Proclamation**

*Fair Work (Registered Organisations) Act 2009*

**Item 40 – Section 6**

**Item 41 – Section 6**

**Item 42 – Section 6**

**Item 43 – Section 6**

**Item 44 – Section 6**

87. The amendments made by items 40 - 44 are signpost definitions – that is, provisions that point readers to definitions included in the substantive provisions of the RO Act or in other federal legislation.

**Item 45 – Section 6**

88. Item 45 inserts a new definition of non-cash benefit which means property or services in any form other than money, but does not include a computer, mobile phone or other electronic device that is used only or mainly for work purposes.

**Item 46 – Section 6**

89. Item 46 inserts a new definition of parent. Item 46 provides that without limiting who is a parent of a person for the purposes of this Act, someone is the parent of a person if the person is his or her child because of the definition of child in section 6.

**Item 47 – Section 6**

90. Item 47 inserts a signpost definition for the term related party.

**Item 48 – Section 6**

91. Item 48 inserts a new definition of relative, in relation to a person, means a parent, step-parent, child, step-child, grandparent, grandchild, brother or sister of the person or the spouse of the person.

**Item 49 – Section 6**

92. Item 49 inserts a new definition of remuneration, which includes pay, wages, salary, fees, allowances, leave, benefits or other entitlements. This is an inclusive definition meaning that the examples provided are not exhaustive of what may be considered to fall within the definition. However, it does not include a non-cash benefit (see item 45) and is not intended to include the reimbursement or payment of reasonable expenses for the costs incurred in the course of the officer carrying out his or her duties.

**Item 50 – Section 6**

93. Item 50 inserts a new definition of spouse, which includes a de facto partner of a person.

**Item 51 – Section 6**

94. Item 51 inserts a new definition of stepchild. Item 51 provides that without limiting who is a stepchild of a person for the purposes of the RO Act, someone who is a child of a de facto partner of the person is the stepchild of the person if he or she would be the person's stepchild except that the person is not legally married to the partner.

**Item 52 – Section 6**

95. Item 52 inserts a new definition of step-parent. Item 52 provides that without limiting who is a step-parent of a person for the purposes of the RO Act, someone who is a de facto partner of a parent of the person is the step-parent of the person if he or she would be the person's step-parent except that he or she is not legally married to the person's parent.

**Item 53 – After section 6**

*New section 7 - Relationships*

96. Item 53 inserts new section 7. New section 7 provides that for the purposes of the RO Act, if one person is the child of another person as defined in section 6, relationships traced to or through that person are to be determined on the basis that the person is the child of the other person.

**Item 54 – After section 9A**

*New section 9B – Meaning of related party*

97. Item 54 inserts new section 9B. New section 9B sets out the meaning of related party. The meaning of related party has been adapted for the purposes of the RO Act from the definition of related party in the *Corporations Act 2001*.

*Control*

98. New subsection 9B(1) provides that an entity that is controlled by an organisation is a related party of the organisation, unless the entity is:

- a branch, sub-branch, division or subdivision of an organisation; or
- an association of employers or employees registered under a State or Territory industrial law, and the organisation is a federal counterpart (see section 9A of the RO Act) of the organisation.

*Officers and their spouses*

99. New subsection 9B(2) provides that an officer of the organisation and the spouse of an officer of the organisation are related parties of an organisation.

*Relatives of officers and spouses*

100. New subsection 9B(3) provides that relatives of an officer of the organisation or the relatives of the spouse of an officer are related parties of the organisation.

*Entities controlled by other related parties*

101. New subsection 9B(4) provides that an entity that is controlled by a related party referred to in new subsections 9B(1), (2) or (3) is a related party of the organisation unless the entity is also controlled by the organisation.

*Related party in previous 6 months*

102. New subsection 9B(5) provides that an entity is a related party of an organisation at a particular time if the entity was a related party of the organisation of a kind referred to in new subsections 9B(1), (2), (3) or (4) at any time within the previous 6 months.

*Entity has reasonable grounds to believe it will become related party in future*

103. New subsection 9B(6) provides that an entity is a related party of an organisation at a particular time if the entity believes or has reasonable grounds to believe that it is likely to become a related party of the organisation of a kind referred to in new subsections 9B(1), (2), (3) or (4) at any time in the future.

*Acting in concert with related party*

104. New subsection 9B(7) provides that an entity is a related party of an organisation if the entity acts in concert with a related party of the organisation on the understanding that the related party will receive a financial benefit if the organisation gives the entity a financial benefit.

*Application to branches of organisations*

105. New subsection 9B(8) provides that new section 9B applies in relation to a branch of an organisation as if references to an organisation were references to a branch of an organisation.

**Item 55- After paragraph 141(1)(c)**

106. Item 55 amends section 141, which relates to the rules of organisations, to insert new paragraph 141(1)(ca). New paragraph 141(1)(ca) provides that the rules of an organisation must require the organisation and each of its branches to develop and implement policies relating to the expenditure of the organisation or branch (as the case may be).

**Item 56 – At the end of Division 1 of Part 2 of Chapter 5***New Section 142A - Model rules for policies relating to expenditure*

107. Item 56 inserts new section 142A, which relates to model rules for policies relating to expenditure. New section 142A provides that the Minister may, by notice published in the *Gazette*, issue guidelines containing one or more sets of model rules dealing with the matters referred to in new paragraph 141(1)(ca) of the RO Act (see item 55). An organisation or a branch of an organisation may adopt model rules in whole or in part, and with or without modification.

108. New subsection 142A(2) provides that a notice under new subsection 142A(1) is not a legislative instrument. The new subsection has been included to assist readers by making clear that a notice published in the *Gazette* is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

**Item 57 – After Division 3 of Part 2 of Chapter 5**

*New Division 3A – Rules relating to disclosure*

109. Item 57 inserts new Division 3A of Part 2 of Chapter 5 of the RO Act, which deals with rules relating to disclosure.

110. Division 3A establishes a new disclosure regime that requires organisations and branches of organisations to have rules that promote financial accountability and transparency by requiring the disclosure of:

- remuneration paid to officers (new section 148A);
- material personal interests of officers and relatives (new section 148B); and
- certain payments made by the organisation or any of its branches (new section 148C).

111. These provisions will require all members of a particular organisation to be provided with disclosed information relating to the organisation as a whole and that members of each branch will also be provided with disclosed information relating to the particular branch of which they are a member.

*New Section 148A - Rules to require disclosure of remuneration paid to officers*

*Disclosure by officers*

112. New subsections 148A(1) and 148A(2) provide that the rules of an organisation or of a branch must 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.

113. New subsection 148A(3) provides that rules made under new subsections 148A(1) or (2) must require that such disclosure is made as soon as practicable after the remuneration is paid to the officer and provide for the manner of such disclosure.

*Disclosure by organisation or branch*

114. New subsection 148A(4) provides that the rules of an organisation must require the disclosure of the relevant remuneration for the disclosure period to the members of the organisation and its branches of the five highest remunerated officers of the organisation. The subsection specifies that, for each of the five officers, the rules must require the disclosure of the identity of each officer as well as the information in relation to the officer's relevant remuneration and non-cash benefits that is authorised under new subsections 148A(6) and (7).

115. New subsection 148A(5) provides that the rules of a branch of an organisation must require the disclosure of the relevant remuneration for the disclosure period to the members of the branch of the two highest remunerated officers of the branch. The subsection specifies that, for each of the two officers, the rules must require the disclosure of the identity of each officer as well as the information in relation to the officer's relevant remuneration and non-cash benefits that is authorised under new subsections 148A(6) and (7).

*Information in relation to relevant remuneration*

116. New subsection 148A(6) provides that for the purposes of subparagraphs (4)(b)(i) and (5)(b)(i), the rules of an organisation or branch must authorise the disclosure of the officers' relevant remuneration either by providing for the actual amount of each officer's remuneration to be disclosed, or in any other manner that the organisation or branch consider to be appropriate to satisfy the requirement to disclose relevant remuneration.

117. Similarly, new subsection 148A(7) provides that for the purposes of subparagraphs (4)(b)(ii) and (5)(b)(ii), the rules of an organisation or branch must authorise the disclosure of the officers' non-cash benefits either by providing for the value of each officer's non-cash benefits to be disclosed, or in any other manner that the organisation or branch consider to be appropriate to satisfy the requirement to disclose relevant non-cash benefits.

*Frequency and manner of disclosure*

118. New subsection 148A(8) provides that rules made under new subsections 148A(4) or (5) must require that such disclosure is made:

- in relation to each financial year, or such shorter period as specified by the rules;
- no more than 6 months after the end of the disclosure period or such longer period as is allowed by the GM; and
- in a manner specified in the rules.

*Relevant remuneration*

119. New subsection 148A(9) provides that for the purposes of new section 148A, the relevant remuneration of an officer of an organisation or a branch of an organisation for a disclosure period includes:

- any remuneration disclosed to the organisation or the branch (as the case may be) by the officer, under rules made under new subsections 148A(1) or (2), during the disclosure period;
- any remuneration paid, during the disclosure period, to the officer by the organisation or the branch (as the case may be).

*Relevant non-cash benefits*

120. New subsection 148A(10) provides that the relevant non-cash benefits of an officer of an organisation or branch of an organisation for a disclosure period 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 disclosure period, in connection with the performance of the officer's duties as an officer.

*New section 148B – Rules to require disclosure of material personal interests of officers and relatives*

*Disclosure by officers*

121. New subsection 148B(1) provides that the rules of an organisation must require officers to 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.

122. New subsection 148B(2) provides that rules of an organisation must require officers of a branch to disclose to the branch of 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.

123. New subsection 148B(3) provides that rules made under new subsections 148C(1) or (2) must require that the disclosure is made as soon as practicable after the interest is acquired and provide for the manner of the disclosure.

*Disclosure by organisation or branch*

124. New subsection 148B(4) provides that the rules of an organisation must require the disclosure, to the members of the organisation and its branches, of any interests disclosed to the organisation, under rules made under new subsection 148C(1), during the disclosure period.

125. New subsection 148B(5) provides that the rules of an organisation must require the disclosure, to the members of the branch, of any interests disclosed to the branch, under rules made under new subsection 148B(2), during the disclosure period.

*Frequency and manner of disclosure*

126. New subsection 148B(6) provides that rules made under new subsections 148C(4) or (5) must require that such disclosure is made:

- in relation to each financial year, or such shorter period as specified by the rules;
- no more than 6 months after the end of the disclosure period or such longer period as is allowed by the GM; and
- in a manner specified in the rules.

*New section 148C - Rules to require disclosure of payments made by an organisation or a branch*

127. New subsection 148C(1) provides that the rules of an organisation must require the disclosure, to the members of the organisation and its branches, of either or both of:

- each payment that has been made by the organisation during the disclosure period:
  - to a related party of the organisation or of a branch of the organisation; or



- to a declared person or body of the organisation, and
- the total of the payments made by the organisation during the disclosure period to:
  - each related party of the organisation or of a branch of the organisation; and
  - each declared person or body of the organisation.

128. New subsection 148C(2) provides that the rules of branch of an organisation must require the disclosure, to the members of the branch, of each payment that has been made by the branch during the disclosure period of either or both of:

- each payment that has been made by the branch of the organisation during the disclosure period:
  - to a related party of the branch of the organisation; or
  - to a declared person or body of the branch; and
- the total of the payments made by the branch of the organisation during the disclosure period to:
  - each related party of the branch of the organisation; and
  - each declared person or body of the branch.

129. New subsection 148C(3) provides that the rules relating to disclosure made in accordance with new paragraphs 148C(1)(a)(i) and (2)(a)(ii) do not apply to payments that consist of permitted deductions from the remuneration of the employees or officers of the organisation or branch as the case may be.

130. New subsection 148C(4) provides that rules made under new subsections 148C(1) or (2) must require that such disclosure is made:

- in relation to each financial year, or such shorter period as specified by the rules;
- no more than 6 months after the end of the disclosure period or such longer period as is allowed by the GM; and
- in a manner specified in the rules.

131. New subsection 148C(5) sets out the meaning of declared person or body. For the purposes of new section 148C a person or body is a declared person or body of an organisation or a branch of an organisation if:

- an officer of the organisation or the branch (as the case may be) has disclosed a material personal interest under rules made under new subsections 148B(1) or (2); and
- the interest relates to, or is in, the person or body; and
- the officer has not notified the organisation or the branch (as the case may be) that the officer no longer has the interest.

*New Section 148D– Section 148C – exemption for rules*

132. New section 148D provides for the GM to grant an organisation an exemption from complying with the requirements of new section 148C in certain circumstances.

133. New subsection 148D(1) provides that an application for an exemption can be lodged by an organisation where the organisation has a rule that complies with section 148C but considers that there are special circumstances that exist that mean that the rule is too onerous.

134. New subsection 148D(2) provides that an application to FWA must be accompanied by:

- a statement of the special circumstances that exist in relation to the organisation; and
- particulars of proposed alterations of the rules of the organisation 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.

135. New subsection 148D(3) provides that the GM can grant an exemption from section 148C if he or she is satisfied that:

- special circumstances exist in relation to the organisation; and
- taking into account the evidence provided, the proposed alterations of the rules of the organisation 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 alterations of the rules:
  - comply with and are not contrary to this Act (other than section 148C); and
  - are not otherwise contrary to law; and
  - have been decided on under the rules of the organisation.

136. New subsections 148D(4) and (5) provides that the proposed alterations of the organisation's rules that were submitted to the GM with the application under new section 148D take effect if and when the GM grants to the organisation an exemption from new section 148C and are taken to be a rule made under new section 148C for the purposes of the RO Act.

137. New subsection 148D(6) provides that an exemption remains in force until the earlier of the day it is revoked, or 5 years after it was granted.

138. New subsection 148D(7) provides that the GM may revoke an exemption either on application by the organisation, (if the GM is satisfied that the rules of the organisation comply with section 148C) or if the GM is no longer satisfied of at least one of the matters

that he or she had to be satisfied of before granting the exemption exist and the GM has given the organisation an opportunity, as prescribed, to show cause why the exemption should not be revoked.

139. New subsection 148D(8) provides that if the GM revokes an exemption because the GM is no longer satisfied of at least one of the matters that he or she had to be satisfied of before granting the exemption exist, the GM may, after giving the organisation an opportunity to be heard, determine any alterations of the rules of the organisation as are, in the GM's opinion, necessary to bring them into conformity with section 148C. This alteration will occur by instrument.

140. New subsection 148D(9) provides that an alteration determined under new subsection (8) takes effect on the date of the instrument.

141. New subsection 148D(10) makes clear that subsection 604(1) of the FW Act does not apply in relation to a decision of the GM under new subsection 148D(3).

142. New subsection 148D(11) provides that new section 148D applies in relation to a branch of an organisation as if references to an organisation were references to a branch of an organisation.

#### *New section 148E – Disclosure period*

143. New section 148E sets out the meaning of disclosure period, which for a disclosure required under rules made under new Division 3A is:

- if the rules require the disclosure to be made in relation to a financial year—the financial year; or
- if the rules require the disclosure to be made in relation to a shorter period specified in the rules—the shorter period.

#### *New section 148F – Model rules relating to disclosure*

144. New subsection 148F(1) provides that the Minister may, by notice published in the *Gazette*, issue guidelines containing one or more sets of model rules dealing with the matters referred to in new sections 148A, 148B and 148C. An organisation or a branch of an organisation may adopt model rules in whole or in part, and with or without modification.

145. New subsection 148F(2) provides that a notice under new subsection 148F(1) is not a legislative instrument. The new subsection has been included to assist readers by making clear that a notice published in the *Gazette* is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

### **Item 58 – Transitional – disclosure period**

146. Item 58 is a transitional provision that applies to a disclosure if the disclosure is by:

- an organisation that is, immediately before the commencement of this item, registered as an organisation under the RO Act or a branch of such an organisation; and
- the disclosure is the first disclosure made under a rules made under new Division 3A.

147. In these circumstances, the disclosure period will be the period starting on commencement of the item and ending on:

- if the rules require the disclosure to be made in relation to a financial year—the financial year; or
- if the rules require the disclosure to be made in relation to a shorter period specified in the rules—the end of the first shorter period.

**Item 59 – At the end of Subdivision BB of Division 4 of Part 2 of Chapter 5**

*New section 154D – Rules to require officers to undertake approved training*

148. Item 59 inserts new section 154D of the RO Act.

149. New subsection 154D(1) provides that the rules of an organisation or a branch of an organisation must require each officer whose duties relate to the financial management of the organisation or the branch as the case may be to undertake training:

- approved by the GM under new section 154C; and
- that covers each of the officer’s financial duties.

150. New subsection 154D(2) provides that the rules must require the person to complete the course within 6 months after the person begins to hold the office.

**Item 60 – Transitional – approved training**

151. Item 60 is a transitional provision that applies to a person who, immediately before the commencement of item 60, holds an office in an organisation or a branch of an organisation and is required to undertake approved training under a rule made under new subsection 154D of the RO Act.

152. Subitem 60(2) provides that rules made under new subsection 154D(2) of the RO Act, as inserted by Schedule 1 to the Bill, apply to the person as if the requirement to complete the training within 6 months after the person begins to hold the office were instead a requirement to complete the training within 6 months after the commencement of this item.

**Item 61 – Paragraph 159(4)(a)**

153. Item 61 amends paragraph 159(4)(a) of the RO Act to enable the GM to alter rules under new section 148D in accordance with the terms of that provision, rather than under section 159.