national electrical and communications association

Submission to the Senate Education and Employment Reference Committee

Re Fair Work (Registered Organisations) Amendment Bill 2013

Prepared by: James Tinslay

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NATIONAL OFFICE
Level 4,
30 Atchison Street,
St Leonards NSW 2065
Locked Bag 1818,
St Leonards NSW 1590

T +61 2 9439 8523
F +61 2 9439 8525
E necanat@neca.asn.au
W www.neca.asn.au
ABN 78 319 016 742

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Introduction

In this submission, the following abbreviations are used

Bill	***Fair Work (Registered Organisations) Amendment Bill 2013***
Ex Mem	***Explanatory Memorandum to Bill***
FWC	***Fair Work Commission***
FW Act	***Fair Work Act 2009***
FW Amendment Act	***Fair Work Amendment Act 2013***
RO Act	***Fair Work (Registered Organisations) Act 2009***
RO Amendment Act	***Fair Work (Registered Organisations) Amendment Act 2012***
RIS	***Regulation Impact Statement***

1. This submission is made by The National Electrical Contractors Association (NECA), trading as The National Electrical and Communications Association. NECA is the peak industry body representing electrical and communications contracting businesses across Australia, the vast majority of which are small and medium sized enterprises (SMEs).

2. NECA has a national office and Chapter (branch) offices in each State and the ACT, employing a total of 50 employees. The aggregate number of NECA's office holders (including Branch officers) is around 70.

3. NECA represents contractors responsible for the delivery of electrical, voice and data communications systems across Australia. NECA has almost 5000 businesses as members. NECA members combined employ a total of 50,000 workers, with NECA employing directly more than 2,000 apprentices in Group Training Companies. The NECA owned Registered Training Organisations (RTOs) train a further 2000 electrical apprentices nationwide. NECA has representation on all the State Training Boards, Apprenticeship Boards and Building Commissions, and is a member of the Australian Chamber of Commerce and Industry (ACCI).

4. At the core level of workplace relations, and consistent with its objects, NECA has been party to FWC Test Cases, and represents its members in enterprise bargaining negotiations, unfair dismissal proceedings, and in matters arising under the jurisdiction of the Fair Work Ombudsman.

5. More recently, in relation to major reform of the workplace relations system, NECA has been an active party before the FWC in the award modernisation program (concluded 2010) and the

recently concluded two yearly review of modern awards - particularly concerning the terms and conditions of the *Electrical, Electronic and Communications Contracting Award 2010*.

6. As a registered organisation of employers whose origins as a registered organisation date back to 1958, NECA has a long and continuous experience in meeting its governance obligations required by the RO Act, and its antecedent legislation.

<u>One-size-fits-all is inappropriate</u>

7. While NECA has no in-principle objection to a statutory regime of higher standards of accountability and transparency of registered organisations and their officials, it is NECA's contention that the Bill does not take sufficient account of the innate differences between employer and employee organisations on the one hand, and smaller and larger organisations on the other hand. Further, the proposed penalty regime is excessive in the context of its application to small to medium sized organisations, particularly on the employer side.

8. In this respect, NECA shares and endorses the concerns made by a number of parties in submissions to the recently concluded Senate Education and Employment Committee Inquiry and Report into the Bill to the effect that the 2012 and 2013 legislative amendments presently create confusion and impose an onerous regulatory burden on registered organisations and that the proposed Bill will operate as a significant disincentive for members of organisations to hold office in an honorary capacity to perform important policy and governance roles within the committees of organisations. This result would be antithetical to one of the (unremarked in the RIS) principal objects of the RO Act which at subpara 5(b) states that the standards set out in this Act:

> *"(b) encourage members to participate in the affairs of organisations to which they belong;".*

9. The main reservation with the proposed legislation is the "one-size-fits-all" approach, which, in NECA's experience, translates to a disproportionate cost burden upon small to medium sized employer organisations in meeting the more stringent regulatory regime.

10. It is unarguably the case that the membership of employer organisations (unlike unions) comprise, overwhelmingly, employers that are corporations that axiomatically are required to prepare and file audited financial statements. In this sense it should be understood that the general membership of employer organisations are not unfamiliar with the function and purpose of audited financial statements, and are not unfamiliar with corporate governance, yet employer organisations are regulated in the same way under a legislative construct that in NECA's view is designed primarily to regulate union governance shortcomings.

11. The RIS indicates that a sizable majority of employer organisations have net assets less than $2 mill, and much lower membership base than unions. Consistent with this commentary, it is NECA's observation, and an obvious conclusion from the RIS[1], that "a sizable majority of employer organisations" operate on a leaner administrative and governance budget (by comparison to unions), yet there is no evidence of instances of serious non-compliance by employer organisations.

12. Where the RIS draws on information from the administrative arm of the FWC[2], the incidence of non-compliance in lodging returns on time (said to be an average of approximately 20%) fails to distinguish between serious and non-serious. In other words, there is no information to what percentage of late lodgements are a less than a week late, less than a month late, seriously late or not lodged at all. The information similarly fails to distinguish between the incidence of non-compliance as between unions and employer organisations. Apart from the HSU matter there is no evidence of malfeasance by officials of organisations, or of adverse affects upon the general membership of organisations, resulting from the 20% of late lodgements.

13. It is NECA's further submission that the penalty for late lodgements of financial returns (without reasonable explanation) should be set on a cumulative scale according to the degree of lateness of lodging. This is not a novel approach as the equivalent offence provisions under the former *Industrial Relations Act 1988* were expressed to be a fine not exceeding a certain amount plus a specified amount for each completed week overdue[3].

Compliance costs for majority of employer organisations not conveniently absorbed

14. It is NECA's observation that the law (statutory and case law) relating to registered organisations is relatively unique and distinct from the more general industrial relations/employment law (for example in relation to awards, bargaining, disputes and termination of employment) such that it has developed its own body of law and precedence that does not these days commonly fit the skill set of general industrial/employee relations and legal practitioners.

15. It follows then, in our submission, that employees of registered organisations with the specialist knowledge and background in the law and procedures relating to the regulation of registered organisations are no longer commonly found and recruited, with the consequence that reliance on legal advice and consultants has become more frequent over the last decade. When this factor is combined with the shift to further and stricter regulation of registered organisations, the compliance costs to registered organisations have increased markedly over the last few years,

[1] conclusions by reference to Tables 1 and 2 and related commentary at pages 7 to 9 of RIS.
[2] at page 6 of RIS.
[3] see for example s.328 of (former) *Industrial Relations Act 1988*

and can be expected to rise substantially for the majority of employer organisations that do not have the capacity to retain in-house resources such that costs can be absorbed.

16. Compliance costs can be expected to rise further. This has been accentuated by the requirements of the 2012 and 2013 amendments to the RO Act that have yet to be fully played out, but are expected to result in significantly higher accounting and audit expenses, not least due to the recently revised and expanded financial reporting guidelines issued on 23 June 2013 by the General Manager of the FWC under section 255 of the RO Act, for which non-compliance attracts a civil penalty by reference to subs. 253(2)(c). Under the Bill, the penalty for non-compliance with s. 253 is proposed to be increased 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)[4].

17. Bearing in mind the increased sanctions in the Bill, the Committee should note that new Item 37 of the General Manger's Reporting Guidelines state:

> "37. Unless already disclosed under paragraph 36, a reporting unit must disclose in its operating report the name of each officer and/or employee of the reporting unit who is a director of a company or a member of a board and, with respect to each such officer and/or employee:
>
> (a) the name of the company or board;
>
> (b) the principal activities of the company or board; and
>
> (c) whether the officer or employee holds the position because they are an officer or employee of the reporting unit or were nominated for the position by the reporting unit or by a peak council."

NECA also understands that this disclosure applies to directors of superannuation funds including SMSFs.

18. It is NECA's view that the terms of Item 37 are expressed in a way that require every officer and every employee of an organisation (including branches) that holds a company directorship or Board position to disclose such information (to its general membership) regardless of whether such company or board position is or could be regarded as a material personal interest.

19. It is NECA's view that this form of delegated legislation is in effect a Disclosure of Interests, normally reserved for CEO's and senior executives of public companies, Members of Parliaments and Statutory Heads of Government and quasi-Government Agencies and Departments. By reference to "employee", and because it is unqualified, Item 37 of the Reporting Guidelines drill down to include the clerical and reception staff of an organisation or branch.

[4] para 141 of Ex Mem.

20. While the terms of Item 37 is a matter to be taken up with the General Manager of the FWC, it is cited to provide the Committee with an example of how the regulation of registered organisations can quickly become excessive and onerous, with a consequential increase in the costs of compliance.

21. Moreover, new compliance costs will soon be expended on the mandatory requirement imposed by the RO Amendment Act 2012[5] that officers whose duties include financial duties are required to undertake approved financial training. In effect, such training will be largely undertaken by 30 June 2014.

22. In relation to the Bill, although Item 244 of its Transitional Provisions recognises prior training undertaken in accordance with the RO Act as currently constituted, it is NECA's position that neither the RO Amendment Act, nor the Bill, gives due weight to recognised prior learning. This is particularly relevant for office holders of employer organisations, many of whom have completed relevant courses such as those run by the Australian Institute of Company Directors.

<u>Bill arguably more onerous in some respects than the Corporations Act</u>

23. Having regard to the Bill as a whole, it is NECA's view that in some respects it will establish a more onerous regulatory regime than presently operates under the Corporations Act.

24. In this respect, NECA endorses the recommendations of the recently concluded Senate Education and Employment Committee Inquiry and Report on the Bill, which stated as follows -

> "*Recommendation 1*
> *2.17*
> *The Committee recommends that, consistent with the Corporations Act 2001, material personal interest disclosures should only be required to be made to those officers whose duties relate to the financial management of the organisation. Such disclosures should be recorded in the minutes of the meetings of those officers and should be made available to members on request.*
>
> *Recommendation 2*
> *2.18*
> *The Committee recommends that a list of exclusions from the obligations to disclose material personal interests based on section 191(2) of the Corporations Act 2001be inserted into the bill. This would narrow the obligation to disclose material personal interests of an officer's relatives, so as to be consistent with the Corporations Act 2001.*
>
> *Recommendation 3*
> *2.19*
> *The Committee recommends that the obligation placed on officers to disclose every payment should be reduced with certain exclusions, including limiting disclosures to payments made above a certain threshold.*
>
> *Recommendation 4*

[5] s154D of the RO Act.

2.26
The Committee recommends the bill be amended to allow the Commissioner to grant exemptions from the training requirements if an individual can demonstrate significant knowledge of the financial obligations specified in the bill."

25. For the avoidance of doubt, it should be stated that NECA has no objection to the establishment of the Registered Organisations Commissioner, and the conferral of such powers on that office as proposed by the Bill.

-end of submission-