

EXPLANATORY STATEMENT

Select Legislative Instrument No.

Issued by the authority of the Minister for Employment

Subject – *Fair Work (Registered Organisations) Act 2009*

Fair Work (Registered Organisations) Regulations 2009

Authority

Section 359 of the *Fair Work (Registered Organisations) Act 2009* (the Act) provides that regulations may be made prescribing all matters required or permitted by the Act or that are necessary or convenient for carrying out or giving effect to the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (AIA), where an Act confers a power to make, grant or issue any instrument of a legislative character (including regulations), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Under section 4 of the AIA, where an Act has been enacted but is yet to commence, the power to make an instrument of a legislative nature under the Act (including regulations) may be exercised before the commencement time as if the relevant commencement time had occurred.

The *Fair Work (Registered Organisations) Amendment Act 2016* (the Amendment Act) received Royal Assent on 24 November 2016. Schedule 1 of the Amendment Act commenced by Proclamation on 1 May 2017 and Schedule 2 commenced by Proclamation on 2 May 2017.

Purpose

The *Fair Work (Registered Organisations) Amendment Regulations 2017* (the Amending Regulations) have the objective of amending the *Fair Work (Registered Organisations) Regulations 2009* (the Regulations) to deal with a number of consequential matters relating to the amendment of the Act by the Amendment Act. In particular, these matters relate to the creation of the Act as stand-alone legislation to deal with organisations.

These matters include:

- changing references from the General Manager of the Fair Work Commission (the General Manager) or the Fair Work Commission (FWC) to the Registered Organisation Commission or Registered Organisations Commissioner (the Commissioner) where the Commissioner takes over functions from the FWC;
- including the Commissioner in addition to the General Manager where the Commissioner shares functions with the FWC;
- including the Commissioner in groups where the Commissioner shares functions with those groups;

- providing for the service, lodgement, inspection and publication of documents, including the content of notices and objections;
- providing for proceedings before the Commissioner and the Commission;
- providing for an organisation to be given an opportunity to show cause why an order for an alternative disclosure arrangement should not be revoked;
- providing for allowances and expenses for persons attending before the Commissioner or delegate as a witness in an investigation;
- providing for a definition of ‘small amounts’ in relation to a related party;
- changing the reference to ‘amalgamation’ to a reference to ‘exemption’ in relation to notices to be published in respect of exemptions from certain Australian Accounting Standards;
- reflecting a technical change in the name of the relevant South Australian legislation from ‘Industrial and Employee Relations Act 1994’ to ‘Fair Work Act 1994’;
- deleting or replacing superseded references to the ‘RAO Schedule’ (Registration and Accountability of Organisations Schedule) and ‘Fair Work Australia’;
- providing or making further provision for, in relation to the registration of auditors of registered organisations: matters to be included in applications for registration; a definition of ‘practical experience in auditing’; the suspension or cancellation of registration; the keeping of a register of auditors; and, fees in respect of applications for registration; and
- providing for, in relation to whistle-blowers: discretion not to investigate a protected disclosure in certain defined circumstances; the allocation and investigation of protected disclosures; reporting of investigations; and, adoption of findings of other investigations.

Background

The Amendment Act would amend the Act to ensure better governance of registered organisations and provide an appropriately empowered and independent regulator that would ensure compliance with the Act by registered organisations, branches of registered organisations and their officers.

Broadly, the Amendment Act would:

- establish an independent regulator, the Commission, to monitor and regulate registered organisations with enhanced investigation and information gathering powers;
- amend the requirements regarding officers’ disclosure of material personal interests (and related voting and decision making rights);
- strengthen provisions concerning grounds for disqualification and ineligibility for office;
- strengthen existing financial accounting, disclosure and transparency obligations under the Act by including certain rule obligations in the Act and making them enforceable as civil remedy provisions;
- 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 Act;
- ensure that employees of organisations whose work relates to an organisation’s finances are held accountable and ensure that officers and employees responsible for organisations’ finances undertake appropriate financial training;
- establish a system of registration of auditors; and
- strengthen whistle-blower protections and provide for the investigation of protected disclosures by authorised officials within prescribed timeframes.

The Commission would be headed by the Commissioner, who would assume some of the duties previously allocated to the General Manager under the Act.

Details of the proposed Amending Regulations are found at [Attachment A](#).

Consultation

The Government consulted with the States and Territories under the Intergovernmental Agreement for a National Workplace Relations System for the Private Sector on 17 January 2017. The Government also consulted with the Committee on Industrial Legislation (COIL) on the measures contained in the proposed Regulations on 17 January 2017. COIL is a body made up of representatives from registered employee and employer organisations as well as peak associations. No objections were raised.

The Government also consulted with the Fair Work Commission and the Fair Work Ombudsman. A range of possible amendments, particularly dealing with the protections provided to whistleblowers under Part 4A of the Amendment Act, were identified by the regulators and where possible, incorporated into the final drafting.

Regulation Impact Statement

The Office of Best Practice Regulation has advised that a Regulation Impact Statement was not required (reference OBPR ID: 21719).

Statement of Compatibility with Human Rights

A statement of compatibility with human rights has been prepared for the proposed Amending Regulations at [Attachment B](#).

The proposed Amending Regulations would be a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act).

The relevant provisions of the Act and the Amendment Act do not impose any conditions that need to be satisfied before the power to make the proposed Amending Regulations may be exercised.

The proposed Regulations would commence on the day after registration on the Federal Register of Legislative Instruments except Schedule 1 and 3 which would commence at the same time as Schedule 1 to the Amendment Act and Schedule 2 which would commence at the same time as Schedule 2 to the Amendment Act.

Details of the Fair Work (Registered Organisations) Amendment Regulations 2017

Section 1 – Name

Section 1 provides that the title of the Regulations is the *Fair Work (Registered Organisations) Amendment Regulations 2017* (the Amending Regulations).

Section 2 – Commencement

Section 2 provides a table outlining when Sections 1 – 4 and each of the Schedules 1 – 3 of the Amending Regulation commence.

Sections 1 – 4 commence the day after the Amending Regulations are registered. Schedules 1 and 3 of the Amending Regulations commence at the same time as Schedule 1 of the *Fair Work (Registered Organisations) Amendment Act 2016* (the Amendment Act). Schedule 2 of the Amending Regulations commence at the same time as Schedule 2 of the Amendment Act.

Section 3 – Authority

Section 3 provides the legislative authority for the Amending Regulations. The amendments are made under the *Fair Work (Registered Organisations) Act 2009* (the Act).

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to the Amending Regulations sets out amendments and repeals (as applicable) to the *Fair Work (Registered Organisations) Regulations 2009* (the Regulations).

Schedule 1 – Amendments relating to the Registered Organisations Commissioner

Item 1 – subregulation 3(1) (definition of *authorised*)

This item amends the definition of ‘authorised’ to reflect that documents lodged with the Registered Organisations Commissioner (the Commissioner) must be lodged by an officer authorised in accordance with regulation 12.

Item 2 – Subparagraph 4(1)(b)(ii)

This item substitutes ‘Commissioner’ for ‘General Manager’ in relation to the definition of ‘approved auditor’, prescribing that it is the Commissioner rather than the General Manager of the Fair Work Commission (the General Manager) who approves a person to be an approved auditor in relation to a reporting unit that has been issued with a certificate under subsection 270(1) of the Act pertaining to organisations with income of less than a certain amount.

Item 3 – Before regulation 12

This item inserts the Divisional title ‘Division 1—Preliminary’ to this Division of Part 2.

Item 4 – After regulation 12

This item inserts new Division 2 of Part 2 of the Regulations titled ‘Division 2 – Lodgement of documents with the FWC etc.’ This separates the processes for lodging documents with the Fair Work Commission (FWC) from those for lodging documents with the Commissioner that are provided for in new Division 3 of Part 2.

Item 5 – After regulation 16

This item inserts new Division 3 of Part 2, ‘Division 3 – Lodgement of documents with the Commissioner etc.’, including new regulations 16A – 16D.

New regulation 16A provides requirements for the lodgement of documents with the Commissioner.

New subregulation 16A(1) provides for the method of lodgement of a document with the Commissioner. The lodgement of a document may be effected by: leaving it with the Commissioner; properly addressing, prepaying and posting the document; or by any electronic or means authorised in writing by the Commissioner.

New subregulation 16A(2) prescribes the use of a common seal or a signature where an application or notice is lodged with the Commissioner. References to ‘a person authorised to sign’ should be read in conjunction with Regulation 12 – ‘—Authorisation to make, sign or lodge documents’.

New paragraph 16A(2)(a) provides that an application or notice lodged with the Commissioner by an organisation must be under the common seal of the organisation or signed by a person authorised to sign the application or notice.

New paragraph 16A(2)(b) provides that an application or notice lodged by an association or branch must be signed by a person authorised to sign the application or notice.

New paragraph 16A(2)(c) provides that an application or notice lodged by a committee of management must be signed by a member of the committee of management.

New paragraph 16A(2)(d) provides that an application or notice that is jointly lodged must be signed in accordance with subregulation 16A(2) by each party to the lodgement.

New paragraph 16A(2)(e) provides that an application or notice that is lodged by an individual must be signed by the individual.

New regulation 16B prescribes the content of notices of objections lodged with the Commissioner. It provides that such a notice must state the name and address of the objector, the grounds of the objection, and particulars of each ground of objection and briefly state the facts the objector relies on for each ground of objection.

New regulation 16C prescribes the service content of documents and the method of service of documents lodged with the Commissioner. It provides that every document lodged with the Commissioner must be endorsed by the name of the party lodging the document and an address that may be used as an address for service, which may be an electronic address. It provides that a document may be served electronically on an association, organisation or person with an electronic address for service.

New regulation 16D makes provision for the publication of documents.

New subregulation 16D(1) provides that a person required under the Act or Regulations to publish notice of a matter in a specified manner may publish an additional notice of the matter by other reasonable means.

New subregulation 16D(2) provides that where the Commissioner is required to publish an application or notice in the *Gazette* or a newspaper, the application or notice must also be published on the Commissioner's website.

New subregulation 16D(3) provides that a notice published by the Commissioner must include the postal address and electronic mailing address of the Commissioner for lodgement and service of documents.

New subregulation 16D(4) provides that an application published by the Commissioner must be accompanied by a note advising that a copy of the application, and copies of any documents relating to the application, can be obtained from the Commissioner on the request of: any organisation, association, branch, constituent part or reporting unit; or a member of one of those bodies.

New subregulation 16D(5) provides that where a request under subregulation 16D(4) is made for a copy of an application, the Commissioner must supply a copy of the application as soon as practicable after receiving the request.

New subregulation 16D(6) provides that, unless the Act or Regulations provide otherwise, a document that is required by subregulation 16D(2) to be published on the Commissioner's website must be published on the website no later than the day the document is required to be published by other means.

Item 5 also inserts a new Division to Part 2 of the Regulations: 'Division 4 – Other matters relating to documents'.

Item 6 – Regulation 17

This item adds the Commissioner to the General Manager and Australian Electoral Commission (AEC) as a person allowed to send a document by giving an electronic copy of the document or sending an electronic copy to an electronic mailing address, where permitted to do so.

Item 7 – Subregulations 18(1) and (2)

This item adds the Commissioner to those covered by regulation 18 in relation to the supply of copies of documents and adds the Commissioner to those who may charge a person an amount to cover the reasonable cost of supplying a copy of documents.

Item 8 – Paragraph 20(1)(a)

This item deletes ‘(other than a document lodged under section 236, 237 or 272 of the Act)’ from paragraph 20(1)(a) in relation to inspection of documents at the FWC as these exclusions are now included in subregulation 20(1A) in relation to inspection of documents at the Commissioner’s premises.

Item 9 – After subregulation 20(1)

This item inserts subregulation 20(1A) to provide for the inspection of documents at the Commissioner’s premises. It allows a person, after giving reasonable notice, to inspect documents lodged under the Act or Regulations, other than excluded documents. The excluded documents are: the register required by section 230 of the Act (section 236); particulars of loans, grants and donations (section 237); financial information to be provided to members or the Commissioner (section 272); documents relating to a whistle-blower protections provided for under Part 4A of Chapter 11 of the Act; and any document lodged under the Regulations.

Item 10 – Before paragraph 26(a)

This item adds the Commissioner to those persons prescribed as applicants for a Federal Court order in relation to prohibited conduct in the formation or registration of an association as an organisation.

Item 11 – Subregulations 32(1) and 38(5)

This item substitutes ‘subsection 13(1)’ for ‘paragraph 13(1)(a)’ when referring to the register of organisations in subregulation 32(1) ‘Extract from register’ and subregulation 38(5) ‘Federations’. It reflects the amendment of the Act by section 10 of the Amendment Act to omit all the words after ‘FWC’ in subsection 13(1) and substitute ‘include keeping a register of organisations’.

Item 12 – Subregulation 68(9), 87(3) and 97(11)

This item adds the Commissioner to the General Manager as a person to be advised by the AEC of: a possible contravention of subregulation 68(8) in relation to non-compliance with a direction to leave a place where a scrutiny is being conducted; a possible contravention of subregulation 87(2) in relation to the conduct of a ballot; and a possible contravention of subregulation 97(10) in relation to the scrutiny of a ballot.

Item 13 – Before paragraph 111(a)

This item adds the Commissioner to those persons prescribed as applicants for Federal Court orders in relation to amalgamated organisations penalising members in contravention of section 131 of the Act.

Item 14 – Subregulations 112(3) and 113(2)

This item adds the Commissioner to the General Manager as a person to be advised by the AEC of possible contraventions in relation to the conduct by the AEC of a ballot.

Item 15 – Paragraph 125H(3)(a)

This item substitutes ‘subsection 13(1)’ for ‘paragraph 13(1)(a)’ when referring to the register of organisations in subregulation 125H(3) in relation to the correction of typographical, clerical or formal errors in eligibility rules. It reflects the amendment of the Act by section 10 of the Amendment Act to omit all the words after ‘FWC’ in subsection 13(1) and substitute ‘include keeping a register of organisations’.

Item 16 – Subregulation 131(1)

This item substitutes ‘Commissioner’ for ‘General Manager’ to reflect that it will now be the Commissioner who grants exemptions under section 186 from section 182(1) of the Act that requires the AEC to conduct elections for offices in an organisation or branch.

Item 17 – Paragraph 133(1)(d)

This item substitutes ‘Commissioner’ for ‘FWC’, reflecting that applications for organisations or branches to conduct elections for office will now be lodged with the Commissioner.

Item 18 – Subregulation 134(1)

This item substitutes ‘Commissioner’ for ‘General Manager’, reflecting that the publication of notices of applications for organisations or branches to conduct elections for office will now be done by the Commissioner.

Item 19 – Paragraph 134(1)(b)

This item substitutes ‘Commissioner’ for ‘FWC’, also reflecting the changes to the Act outlined in above at Item 18.

Item 20 – Subregulation 134(2)

This item substitutes ‘Commissioner’ for ‘General Manager’, also reflecting the changes to the Act outlined in above at Item 18.

Item 21 – Paragraph 135(4)(a)

This item substitutes ‘Commissioner’ for ‘FWC’ reflecting that it would now be the Commissioner who receives objections to an application to conduct elections for office in organisations or branches.

Item 22 – Subregulation 136(1)

This item substitutes ‘Commissioner’ for ‘General Manager’ reflecting that it will now be the Commissioner who hears applications to conduct elections for office in organisations or branches.

Item 23 – Subregulations 136(2) and (3)

These items substitute ‘Commissioner’ for ‘General Manager’ reflecting the changes to the Act outlined above at item 22.

Item 24 – Paragraph 137(1)(c)

This item substitutes ‘Commissioner’ for ‘FWC’ reflecting that applications for revocation of an exemption allowing an organisation or branch to conduct its elections for office must now be lodged with the Commissioner.

Item 25 – Subregulation 137(2)

Item 26 – Paragraph 140(3)(a)

Item 27 – Subregulations 142(1), 145(2) and 152(2)

These items substitute ‘Commissioner’ for ‘General Manager’ reflecting the move of functions to the Commissioner.

Subregulation 137(2) refers to giving a branch or organisation an opportunity to show cause why an exemption granted allowing an organisation or branch to conduct its elections for office should not be revoked.

Paragraph 140(3)(a) provides that the AEC must give a copy of the declaration of an election result to the Commissioner immediately after issuing the declaration under subregulation 140(1).

Subregulation 142(1) refers to advice from the AEC to the Commissioner of a possible contravention of the requirement in section 198 of the Act to give a written response within 30 days to a post-election report identifying a rule that was difficult to interpret or apply.

Subregulation 145(2) provides that the AEC must advise the Commissioner of any possible contravention of subregulation 145(1) within 21 days of becoming aware of the possible contravention.

Subregulation 152(2) refers to the publication by the Commissioner of notices of determinations of exemptions from certain Australian Accounting Standards under section 241 of the Act.

Item 28 – Subregulation 166(5)

Item 29 – Regulation 167

These items substitute ‘Commissioner’ for ‘General Manager’ reflecting the move of functions to the Commissioner.

Subregulation 166(5) refers to the making available of specified prescribed information from a reporting unit.

Regulation 167 refers to the receipt of evidence of membership of a reporting unit in relation to applications for specified prescribed information in relation to a reporting unit.

Item 30 – Subregulation 171(1)

This item replaces the existing subregulation 171(1). It provides for the persons eligible to apply for an order under Part 9—‘Civil consequences of contravening civil penalty provisions’. They are: the General Manager or the Commissioner under subregulation 171(1). This reflects the increased role of the Commissioner in monitoring and regulating registered organisations and ensuring compliance with the Act.

Item 31 – Regulation 177

This item adds the Commissioner to the General Manager with reference to the authorisation to act in relation to any application or proceedings dealt with by those officers.

Item 32 – After regulation 178

This item inserts new regulations 178A ‘Proceedings before the Commissioner’. These regulations are in the same terms as regulation 178 ‘Proceedings before General Manager’ and provide that, in proceedings before the Commissioner, a person may be exempted from compliance with a procedural requirement under the Act or the Regulations if the Commissioner is satisfied of special circumstances.

Subregulation 178A(2) provides that such an exemption may be granted absolutely or subject to conditions.

Subregulation 178A(3) provides that failure to comply with a procedural requirement for proceedings does not render the proceedings void, but the proceedings may be set aside (in whole or in part) as irregular, amended or otherwise dealt with as and how the Commissioner thinks fit.

Item 33 – Subregulation 180(1)

This item repeals existing subregulation 180(1) in relation to the use of evidence given in earlier proceedings under the Act or the Regulations and replaces it with a subregulation to take account of the possibility for proceedings before the Commissioner as well as the General Manager. It replicates the discretionary ability for evidence given in earlier proceedings to be used in subsequent proceedings, either before the General Manager or the

Commissioner, if those officers permit, on any terms and conditions determined by those officers.

Item 34 – Subregulation 180(3)

This item adds the Commissioner to the General Manager in relation to the requirement for those officers to have regard to any objection made to the use of previous evidence in proceedings before giving permission for the use of evidence in earlier proceedings.

Item 35 – Subregulation 180(4)

This item repeals existing subregulation 180(4) in relation to the use of oral evidence given in earlier proceedings under the Act or the Regulations and replaces it with a subregulation to take account of the possibility of proceedings before the Commissioner as well as the General Manager. It replicates the discretionary ability for oral evidence given in earlier proceedings to be used in subsequent proceedings, either before the General Manager or the Commissioner, if there is a written record of the evidence available for the use of the officer and the officer is satisfied the written record is a true record of the oral evidence.

Item 36 – Regulation 181 (heading)

This item repeals the heading of regulation 181 and replaces it with the new heading ‘General powers of General Manager and Commissioner’.

Item 37 – Paragraph 181(1)(b)

This item amends the general powers of the General Manager so that the General Manager can take evidence on ‘affirmation’ or ‘oath’ under paragraph 181(1)(b).

Item 38 – After subregulation 181(1)

This item inserts new subregulation 181(1A) that replicates, with respect to the Commissioner, the general powers of the General Manager provided for in subregulation 181(1). It provides that the Commissioner, by summons, may require a person to appear before the Commissioner to: give evidence and produce materials; take evidence on oath or affirmation; adjourn a matter or hearing; amend or give leave to amend a document; extend the time for lodging a document or doing an act; give directions in relation to the service of documents; and order a party to pay another party’s costs. This new subregulation operates in the same way as existing subregulation 181(1) and is not intended to remove the privilege against self-incrimination or abrogate legal professional privilege.

Item 39 – At the end of subregulation 181(2)

This item amends regulation 181 to provide that a person must not refuse or fail to comply with a summons served on him or her by the Commissioner.

Item 40 – At the end of regulation 181

This item amends regulation 181 to insert new subregulation (6) to provide that if the Commissioner exercises a power under new subregulation 181(1A), the Commissioner may make any order, he or she thinks just, for payment of fees or costs relating to the exercise of that power.

Item 41 – Schedule 3 (Form 8)

This item repeals Form 8 of schedule 3 of the Regulation and replaces it with a new Form 8 reflecting that the Commissioner, rather than General Manager, now issues identity cards under regulation 144 for the purposes of section 203 of the Act. Section 203 of the Act provides that the Commissioner must issue an identity card to each member of the Commission's staff to whom the powers of the Commissioner have been delegated.

Schedule 2 – Other Amendments relating to the Fair Work (Registered Organisations) Amendment Act 2016

Item 1 – Subregulation (3)(1)

This new item inserts the defined terms 'designated civil penalty provision' and 'designated offence'. These definitions are required as a result of the amendments made to the auditor provisions of the Act and the requirement that organisations and branches only appoint 'registered auditors'. 'Designated civil penalty provisions' and 'designated offences' are relevant both to applications for registration as an auditor under new regulation 159A and possible suspensions of registration as an auditor under new regulation 159C.

This item also inserts the term 'government authority' and a cross-reference provides that the term is defined in new subregulation 176M(3) which relates to the investigation of protected disclosures under new 'Division 2 – Investigation of Protected disclosures' in Part 10.

References in these new defined terms to acts other than the Act are references to those acts as in force from time to time as permitted under section 14(1)(a) of the *Legislation Act 2003*.

Item 2 – Regulation 4

This item repeals Regulation 4 which is no longer needed as the requirement that organisations and branches appoint 'approved auditors' has been replaced with a requirement that they appoint 'registered auditors'.

Item 3 – After regulation 159

This item inserts new regulations 159A – 159D concerning auditors.

New regulation 159A provides what information a person, who is not a registered company auditor, applying for registration as an auditor under paragraph 255A(2)(c) of the Act, must include in their application.

Under 159A(a) – (e), an application must include details about how the person meets the requirements in subsections 255C(1) or 255C(2) and subparagraphs 255B(3)(b)(i) or 255B(3)(b)(ii) of the Act. If the person claims to meet the requirements of subparagraph 255B(3)(b)(ii) of the Act through practical experience, the application must include details of the nature of any audit work the person has done in the past 5 years, the extent of the person’s involvement in that audit work and the person’s level or responsibility for that audit work.

Under paragraphs 159A(f) – (h), persons applying for registration must provide details of any contraventions of designated civil penalty provisions; any applications that have been made for an order in respect of a contravention of a designated civil penalty provision by the person; and details of any charges or convictions relating to designated offences.

Under paragraph 159A(i) an application would need to be accompanied, where applicable by any order made under section 307A of the Act.

Paragraph 159A(j) requires that the details be provided of any other matter that may be relevant to the Commissioner’s assessment of whether the person is capable of performing the duties of an auditor and is a fit and proper person to be registered as an auditor.

Paragraph 159A(k) requires that the applicant provide details of their place of residence.

New regulation 159B sets out the prescribed practical experience a person will need to demonstrate in an application for registration that relies upon the person’s practical experience in auditing per subparagraph 255B(3)(b)(ii) of the Act. The person will have to either:

- (in the 5 years immediately prior to the application) have undertaken at least 3000 hours work in auditing companies or organisations, including at least 750 hours supervising audits of companies or organisations; or
- have practical experience that the Commissioner considers equivalent to the experience referred to in the above.

New regulation 159C makes further provision for the suspension or cancellation of a person’s registration as an auditor in accordance with subsections 255G(5) and 255N(2)(d) of the Act.

Subregulation 159C(2) provides that the Commissioner may suspend, for a specified period, a person’s registration as an auditor if the Commissioner becomes aware that an investigation has begun into whether the person has committed a designated offence of contravened a designated civil penalty provision. The Commissioner may also suspend the person’s registration if the Commissioner becomes aware that the person has been charged with a designated offence or an application has been made for an order in respect of a contravention of designated civil penalty provision by the person where these matters have not been finally dealt with.

Subregulation 159C(3) provides the Commissioner with the power to suspend or cancel the registration of an auditor where that person has ceased to be resident in Australia.

Subregulation 159C(4) provides that the Commissioner may request further information from any person for the purpose of making a decision under subregulations 159C(2) or (3). Subregulation 159C(5) provides that the Commissioner must give the person registered as an auditor the opportunity to appear at a hearing, make submissions and give evidence before the Commissioner makes a decision under subregulations 159C(2) or (3).

A decision by the Commissioner to cancel or suspend a person's registration as an auditor may be reviewable by the FWC per section 604 of the *Fair Work Act 2009* (FW Act). Paragraph 604(1)(b) of the FW Act provides that a person aggrieved by a decision made by the Commissioner under the Act may appeal the decision, with the permission of the FWC.

New regulation 159D provides that the Commissioner must establish and keep a register of auditors which includes for each auditor:

- the name;
- their allocated registration number;
- their date of registration;
- their principal place of practice as an auditor;
- the name and Australian Company Number of any audit company, firm, other name or style that the person works for or under;
- the details of any current suspension of registration; and
- any other details the Commissioner considers appropriate in relation to registered auditors.

Under subregulation 159D(4), the Commissioner must remove from the register the details of any person whose registration as an auditor has been cancelled.

Subregulation 159D(5) provides that the Commissioner must publish the register on the Commissioner's website and may publish the register, or make it publically available, in any other way the Commissioner considers appropriate.

Item 4 – After Part 8

This item inserts new 'Part 8A—'Conduct of officers and employees (Ch 9)', containing new regulation 167A – 'Payments made to a related party' and new regulation 167B – 'Revocation of order for alternative disclosure arrangement'.

New regulation 167A prescribes \$5,000 as the amount of the total of a payment to a related party and all other payments given to the related party in the financial year, for which disclosures of payments to a related party of an organisation or branch of an organisation need not be made under section 293G.

New regulation 167B provides for the process by which the Commissioner must give an organisation an opportunity to show cause why an order for an alternate disclosure arrangement of payments made by an organisation should not be revoked. The regulation provides that the Commissioner must fix a time and place for the organisation to appear

before the Commissioner to make oral submissions and must give the organisation a written notice, not less than seven days before the time fixed for appearances, containing: particulars of the time and place fixed for appearances; a statement of the reasons for the proposed revocation; and a notification to the organisation of its entitlement to an opportunity to show cause why the order should not be revoked.

Item 5 – Before regulation 177

This item inserts new Divisions 1, 2 and 3 of Part 10 of the Regulations and new regulations 176A – 176H and 176J – 176K.

New Division 1 is entitled ‘Division 1 – Expenses incurred in complying with a notice to attend’ and contains new regulations 176A – 176F.

New regulation 176A ‘Application’ notes that the Division is made for section 337AP of Chapter 11 of the Act, which provides that a witness required to attend before the Commissioner, or delegate, in relation to an investigation is entitled to the prescribed allowances and expenses, if any.

New regulation 176B ‘Definitions’ provides definitions of the terms ‘public transport’, ‘specified place’ and ‘Taxation Office Determination’.

New regulation 176C ‘Travelling allowance’ provides an entitlement to a travelling allowance payment for a witness travelling between the witness’s work or residence and the place of attendance. Subregulation 176C(2) prescribes the quantum of travelling allowance depending on whether travel would be by way of air, public transport or private motor vehicle. Subregulation 176C(3) provides that the maximum amount payable for the travelling allowance is \$2,000. Subregulation 176C(4) provides the circumstances where public transport is deemed available and reasonable in the circumstances.

New regulation 176D ‘Accommodation allowance’ provides an entitlement to accommodation allowance when the witness is necessarily absent overnight from the witness’s residence in order to attend at a specified place. Subregulation 176D(2) provides that the amount of the travelling allowance is the amount calculated at the accommodation rate that is payable under the Taxation Office Determination for the lowest salary range. Subregulation 176D(3) provides that the amount of accommodation allowance must be calculated by reference to the availability of public transport to ensure travel to and from the specified place is within a reasonable time.

New regulation 176E ‘Attendance allowance’ provides an entitlement to a payment towards meeting any loss of earnings that a witness incurs when the witness is necessarily absent from the witness’s work to comply with a notice to attend as a witness in an investigation. Subregulation 176E(2) provides that this payment is the usual pay that the witness would otherwise have been entitled to receive for performing his or her normal duties. Subregulation 176E(3) provides that when claiming attendance allowance, the witness must provide evidence of his or her usual pay and evidence that he or she did not receive the usual pay for the time the witness was necessarily absent from work to attend the specified place.

New regulation 176F ‘Legal allowance’ provides an entitlement to a payment towards meeting the legal costs and disbursements that the witness reasonably incurs for a lawyer to represent the witness at the specified place. Subregulation 176F(2) provides that the amount of the legal allowance is an amount calculated using the costs set out in the *Federal Circuit Court Rules 2001*.

Division 2 – Investigation of protected disclosures

New Division 2 is entitled ‘Division 2 – Investigation of Protected disclosures’ and contains new regulations 176G – 176M.

New regulation 176G provides in what circumstances an authorised official (as defined in section 6 of the Amendment Act) may decide under subsection 337CA(2) of the Act not to investigate, or not to investigate further, a protected disclosure made under under Division 3 of Part 4A of Chapter 11 of the Act (Part 4A investigation) This discretion is intended to minimise the potential for duplication of investigations so that the disclosure is dealt with by the most appropriate persons or bodies and in an expedient manner.

Subregulations 176G(1)(a) to 176G(1)(e) provide when an authorised official (the investigator) may decide not to investigate, or not investigate further, a protected disclosure and are broadly modelled on subsection 48 of the *Public Interest Disclosure Act 2013* (PID Act). These are:

- where the information disclosed does not concern serious disclosable conduct;
- the disclosure is frivolous or vexatious;
- where the person who made the disclosure has informed the investigator that they do not want the investigation to be pursued and the investigator is reasonably satisfied that there are no matters concerning the disclosure that warrant investigation; or
- it is impractical for the disclosure to be investigated because the discloser’s contact details have not been disclosed; the discloser refuses, fails or is unable to provide necessary information or assistance; or because of the age of the information.

Subregulation 176G(1)(e) contains a table of additional circumstances, substantially drawn from the PID Act in which an investigator may decide not to investigate, or not investigate further, a protected disclosure. These are:

- Item 1: where the information or disclosable conduct contained in the disclosure is the same, or substantially the same, as information or disclosable conduct that is being, or has already been investigated under a Part 4A investigation.
- Item 2: where the information or disclosable conduct contained in the disclosure is the same or substantially the same as information or disclosable conduct that:
 - is or has been investigated under a law or executive power of the Commonwealth; or
 - is the subject of a court or tribunal proceeding or the information has been included in evidence that has been admitted in such a proceeding; or
 - is being dealt with by an authorised official under another process.

Importantly, for the discretion to be exercisable in the circumstances listed in Item 2, the investigator must be satisfied that it would be inappropriate to conduct a Part 4A

investigation at the same time as the other investigation, proceeding or process, or be reasonably satisfied that a Part 4A investigation is not warranted as a result of the other investigation, proceeding or process. This item is intended to ensure that investigators are not unduly replicating investigations, proceedings or processes that may be or already have been undertaken under another investigatory framework. For example, this item would ensure that an investigator from the Fair Work Ombudsman would not be required to undertake a Part 4A investigation into a disclosure where the information or disclosable conduct is already the subject of an investigation by the Registered Organisations Commission under Part 4 of Chapter 11 of the Act.

- Item 3: where the investigator has disclosed some or all of the information in a protected disclosure to a member of an Australian police force or the Australian Competition and Consumer Commission (the ACCC) in accordance with section 337CD of the Act. However, for the discretion to not pursue a Part 4A investigation to be available, the investigator must be reasonably satisfied that there are no residual matters contained in the disclosure that warrant further investigation under Part 4A.
- Item 4: where the investigator has disclosed the information to another person or body and the investigator is reasonably satisfied that the person or body to whom the information was disclosed would deal with the information in such a way that no further Part 4A investigation is warranted.

Subregulation 176G(2) makes clear that if the authorised official decides not to investigate, or further investigate a disclosure under a Part 4A investigation, this does not, by implication, prevent the information being investigated under another investigation process, either within the Act or otherwise.

New regulation 176H provides the procedures that must be followed when allocating the handling of the investigation of a protected disclosure under section 377CC of the Act.

New subregulation 176H(2) provides that the person to whom disclosure is made (the recipient) cannot allocate the handling of the disclosure to an authorised official (other than the recipient), without first gaining that authorised official's consent.

Under subregulation 176H(3), unless the handling of the disclosure is allocated to the Commissioner, the recipient must inform the Commissioner of:

- the allocation of the disclosure to the authorised official;
- the information that was disclosed;
- the suspected disclosable conduct (if any);
- the name of the discloser (only if the discloser consents to the disclosure of their name); and
- the discloser's contact details (if known to the recipient and the discloser consents to the disclosure of the contact details).

The recipient must inform the discloser of the allocation of their protected disclosure where reasonably practicable under subregulations 176H(4) and (5).

Subregulation 176H(6) provides that of subregulations 176H(2) – (5) apply to any subsequent allocation of the handling of a disclosure.

New regulation 176J provides for the procedures to be followed in relation to a Part 4A investigation. The procedures are that an authorised official who has been allocated the handling of a protected disclosure must, as soon as reasonably practicable, inform the discloser that the authorised official:

- is investigating the disclosure and provide an estimated length of the investigation; or
- has chosen not to investigate the disclosure in accordance with section 337CA(2) of the Act and regulation 176G.
 - The authorised official must provide the reasons for their decision and inform the discloser of other courses of action that might be available. However, the authorised official may delete from the reasons, information that would, if contained in a document, cause the document to be exempt for the purposes of Part IV of the *Freedom of Information Act 1982* (Subregulation 176J(5)).

If the authorised official is not the Commissioner, the Commissioner must be informed of the decision and the reasons for it (Subregulation 176J(7)). Subregulation 176J(6) provides that the authorised official does not have to inform the discloser in accordance with subregulation 175J(2) where contacting the discloser is not reasonable practicable.

New regulation 176K provides the procedures to be followed in relation to the allocation and investigation of disclosable conduct. The regulation provides that an authorised official conducting a Part 4A investigation must suspend that investigation for any period during which the authorised official reasonably believes that any authorised official is conducting an investigation under:

- a law of the Commonwealth (other than Part 4A investigation); or
- the executive power of the Commonwealth

into disclosable conduct that is the same, or substantially the same, as the that being investigated in under Part 4A investigation.

The investigative powers available to an authorised official under a Part 4A investigation may be more limited than investigatory powers available under other regulatory frameworks – for example, the powers available to the Fair Work Ombudsman under Subdivision D of Division 3 of Part 5-2 of the FW Act are more comprehensive than the powers available to authorised officials under subsection 337CA(5). Regulation 176K is the mechanism intended to ensure that should the full suite of investigative powers be required to adequately investigate disclosable conduct, such powers can be utilised by the appropriate body and that the Part 4A investigation is suspended during this time. This is consistent with section 337DD of the Amendment Act which provides that other investigative powers are not limited by the Part 4A investigation powers. This approach would ensure the integrity of each investigation process is maintained and that disclosable conduct is investigated as decisively and efficiently as possible.

New regulation 176L provides that an authorised official conducting a Part 4A investigation may, for the purpose of the investigation, adopt a finding from a report of:

- an investigation or inquiry under either another law of the Commonwealth (other than a current Part 4A investigation);
- an investigation or inquiry under the executive power of the Commonwealth; or
- another investigation conducted under Part 4A

that was conducted by the authorised official or any other person.

New regulation 176M sets out the procedures to be followed at the completion of the Part 4A investigation.

Notice to discloser

Subregulation 176M(2) provides that, upon completing a Part 4A investigation, an authorised official must, as soon as is reasonably practicable and subject of subregulation 176M(4), inform the discloser that the investigation has been completed and any of the following if applicable:

- that the authorised official will be taking further action as a result of the investigation;
- that the authorised official has or will be recommending that a government authority take action as a result of the investigation;
- that the authorised official will not be taking further action and has not and will not be recommending that any government authority take action as a result of the investigation.

For the purposes of this regulation, government authorities will include the Commonwealth, a State or Territory and an authority of the Commonwealth, a State or Territory (subregulation 176M(3)).

The requirements will not apply if contacting the person who made the disclosure is not reasonable practicable (176M(4)).

Report

Subregulation 176M(5) provides that, upon completion of the Part4A investigation, an authorised official must prepare a report of the investigation. Subregulation 176M(6) provides that the report must set out:

- the matters considered in the course of the investigation;
- the duration of the investigation;
- the authorised official's findings (if any);
- the action (if any) that has been, is being, or is recommended to be, taken; and
- any claims made about, and any evidence of, detrimental action taken against the discloser, and any response to these claims and that evidence.

Subregulation 176M(7) requires the authorised official, within 30 days of preparing the report, to give a copy of the report to another person or body if the report recommends that action be taken by the other person or body.

Subregulation 176M(8) would allow the authorised official to delete from the reasons:

- material that is likely to enable the discloser or another person to be identified;
- information that would, if contained in a document, cause the document to be exempt for the purposes of Part IV of the *Freedom of Information Act 1982*; or
- information that would, if contained in a document contravene a designated publication restriction.

The authorised official must exercise this discretion having regard to all the circumstances and their obligations under other Commonwealth laws.

The new title of Division 3, ‘Division 3 – Other matters’ is inserted by the item after regulation 176L.

Schedule 3 – Minor technical amendments

Item 1 – Regulation 10 (heading)

This item deletes a reference to the RAO Schedule.

Item 2 – Regulation 11

This item updates the name of the relevant South Australian legislation.

Item 3 – Paragraph 17(a)

This item provides that where a document is sent by the General Manager, Commissioner or AEC by giving an electronic copy where permitted to do so, in addition to a disk it may be given by another storage device.

Item 4 – Subregulation 18(1) (at the end of example 2)

This item provides that where the supply of copies of documents is effected by giving an electronic copy of the document, it may be given by another storage device as well as a disk.

Item 5 – Subregulation 23(1)

Item 6 – Paragraph 23(2)(b)

Item 7 – Subregulation 23(4)

Item 8 – Paragraph 23(5)(a)

These items amend regulation 23 in relation to objections to registration and relate to the change of name to the ‘Fair Work Commission’ from ‘Fair Work Australia’ that was made by the *Fair Work (Amendment) Act 2012*.

Item 9 – Regulation 42 (heading)

This item deletes a reference to the RAO Schedule.

Item 10 – Paragraphs 69(1)(c) and (i)

Item 11 – Subregulation 69(4)

These items substitute ‘Act’ for references to ‘RAO Schedule’ when referring to matters prescribed for inclusion in a post-ballot report by the AEC.

Item 12 – Regulation 114A (heading)

This item repeals and replaces the heading so that ‘Act’ may be substituted for a reference to the RAO Schedule.

Item 13 – Subregulations 114E(2), (3) and (4) and 114F(2), (3) and (4)

This item replaces mentions of ‘FWA’ with ‘the FWC’ in relation to representation orders under Chapter 4 of the Act for former State-registered associations.

Item 14 – Subregulation 133(1) and 135(1)

This item substitutes ‘Act’ for ‘RAO Schedule’ when referring to the requirements of applications for organisations or branches to conduct elections for office.

Item 15 – Subregulation 152(2)

This item amends subregulation 152(2) by replacing ‘amalgamation’ with ‘exemption’. The word ‘amalgamation’ was an error; this regulation concerns a notice exempting an organisation from certain accounting standards.

Item 16 – Paragraph 163(1)(a)

This item omits ‘*Industrial and Employee Relations Act 1994 (SA)*’ from paragraph 163(1)(a) and substitutes in its place ‘*Fair Work Act 1994 (SA)*’ reflecting the change in the name of the relevant South Australian legislation.

Item 17 – Paragraph 1.7(1)(b) of Schedule 1

Item 18 – Subclause 1.7A(1) of Schedule 1

Item 19 – Subclause 1.7A(2) of Schedule 1

Item 20 – Subclause 1.7A(3) of Schedule 1

Item 21 – Paragraph 1.7A(4) of Schedule 1

Item 22 – Clauses 1.8, 1.9 and 1.10 of Schedule 1

Item 23 – Clause 2.1 of Schedule 2

Item 24 – Clause 2.2 of Schedule 2

These items substitute mentions of ‘FWA’ with ‘the FWC’ as a consequence of the change of name to the ‘Fair Work Commission’ from ‘Fair Work Australia’ that was made by *the Fair Work (Amendment) Act 2012*.

Statement of Compatibility with Human Rights

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

Fair Work (Registered Organisations) re 2017

This instrument 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 instrument

The *Fair Work (Registered Organisations) Amendment Regulations 2017* (the Amending Regulations) has the objective of amending the *Fair Work (Registered Organisations) Regulations 2009* (the Regulations) to deal with a number of consequential matters relating to the amendment of the *Fair Work (Registered Organisation) Act 2009* (the Act) by the *Fair Work (Registered Organisations) Amendment Act 2016* (the Amendment Act) as well as to further deal with a number of transitional and consequential matters relating to the commencement of the Fair Work system and the creation of the Act as stand-alone legislation to deal with organisations registered under the *Fair Work Act 2009* (FW Act).

Human rights implications

Right to privacy

Article 17 of the ICCPR contains a prohibition on interference with privacy and attacks on reputation. Permissible limitations on the right to privacy include where the interference with the right is authorised by law for reasons consistent with the ICCPR. Such interference must be reasonable in the particular circumstances. Reasonableness, in this context, incorporates notions of proportionality, appropriateness and necessity.

Australia accepted the principles stated in Article 17 without prejudice to the right to enact and administer laws which, insofar as they authorise action which impinges on a person's privacy, family, home or correspondence, are necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the protection of public health or morals, or the protection of the rights and freedoms of others.

The disclosure regime modified by the Amendment Act provides for alternative disclosure arrangements and for the non-disclosure of small amounts paid to related parties. The Amending Regulations protects the right to privacy by providing for an organisation to be given an opportunity to show cause why an order for an alternative disclosure arrangement should not be revoked and by setting \$5000 as the limit of a 'small amount'.

The Amending Regulations also goes to ensuring the privacy of people who make protected disclosures and other persons involved in the investigation of a protected disclosure. New subregulation 176M(8) provides that where an authorised official distributes a report concerning

an investigation into a protected disclosure, the official may delete from the report any material that is likely to enable the identification of the person who made the disclosure or another person.

Subregulation 186M(8) also allows an authorised official to delete from a copy of the report any material that would make the document an exempt document under the *Freedom of Information Act 1982* (FoI Act). This goes to ensuring privacy as: section 37 of the FoI Act exempts documents containing material that could reasonably be expected to enable a person to ascertain the existence or identity of a confidential source of information; section 45 of the FoI Act exempts documents containing material obtained in confidence; and, the personal privacy public interest conditional exemption provided by section 47F of the FoI Act makes a document exempt if disclosure of the document would involve the unreasonable disclosure of personal information about any person, including a deceased person, and the disclosure would be contrary to the public interest. The public interest test in relation to the conditional exemption provided by section 47F, to be administered by the independent and impartial authorised official having regard to the Freedom of Information Guidelines of the Office of the Australian Information Commissioner, will result in any disclosure of third party personal information in a report pertaining to the investigation of a protected disclosure being reasonable, necessary and proportionate.

This requirement is also included in Subregulation 176J(5) which provides that material that would make the document an exempt document under FoI Act may also be deleted from the notice of investigation of disclosure that is provided to the discloser under subregulation 176J(2).

The Right to Freedom of Association

Article 22 of the ICCPR protects the right to freedom of association with others, including the right to form and join trade unions. Article 8(1)(a) of the ICESCR similarly ensures the right of everyone to form trade unions and to join the trade union of his or her choice. In addition, Australia is a party to a range of International Labour Organisation Conventions, including Convention 87 which deals with freedom of association and protection of the right to organise.

The Amending Regulations protects the right to freedom of association by ensuring better governance of registered organisations including by establishing the Commission; providing for the service, lodgement, inspection and publication of documents, including the content of notices and objections, to, with, at and by the Commissioner; providing for proceedings before the Commissioner and the Commission; and providing for allowances and expenses for persons attending before the Commissioner or delegate as a witness in an investigation.

Conclusion

These regulations are compatible with human rights because they advance the protection of human rights. To the extent that the amendments may limit human rights, those limitations are reasonable, necessary and proportionate.

Senator the Hon. Michaelia Cash, Minister for Employment