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**Registered Organisations Commission**

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## **Guidance Note**

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Disclosures required by Organisations and Branches under the *Fair Work (Registered Organisations) Act 2009*

# Guidance Note: Disclosures required by Organisations and Branches under the *Fair Work (Registered Organisations) Act 2009*

## Disclosure Schemes

The *Fair Work (Registered Organisations) Act 2009* (the **RO Act**) requires organisations, and the officers and branches of organisations, to make disclosures concerning remuneration, non-cash benefits, and payments to related parties and declared persons or bodies.

This Guidance Note explains the disclosures that organisations and branches of organisations are required to make as set out in Chapter 9, Part 2A of the RO Act. The RO Act mandates when these disclosures must occur, how they are made and to whom.

Compliance with this disclosure framework will ensure high levels of transparency in the transactions entered into by officers, and their remuneration, for the benefit of members of registered organisations and the broader community.

A number of the key concepts in these provisions are based on those found in relevant provisions of the *Corporations Act 2001* (the **Corporations Act**). This Guidance Note explains those concepts, where relevant, to assist in understanding the equivalent RO Act provisions.

This Guidance Note draws on the experience and understanding of the Registered Organisations Commission (**ROC**) to promote compliance by registered organisations through step-by-step instructions and practical examples. This Guidance Note will be updated following case law developments or in light of the outcomes of ongoing engagement with relevant stakeholders. This Guidance Note is not legal advice.

These disclosure requirements are separate and in addition to any disclosure scheme contained in the rules of an organisation.

For information about disclosure and training requirements of holders of office, see GN 013: Disclosures and training required by Holders of Office under the *Fair Work (Registered Organisations) Act 2009*.

## Organisation and Branch Disclosures

### Disclosure of remuneration of most highly remunerated officers (s. 293BC)

Each organisation and branch must rank all of its officers from highest to lowest by relevant remuneration and, for each officer ranked no lower than fifth, disclose in relation to the financial year:

- their identity<sup>1</sup>
- the actual amount of each officer's relevant remuneration<sup>2</sup>
- the value and type of the officer's relevant non-cash benefits.<sup>3</sup>

The disclosure must occur within the *Officer and Related Party Disclosure Statement* (the **ORP statement**). Specific civil penalties apply to a failure to provide this statement (see below).<sup>4</sup>

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An **officer** of an organisation or branch is defined in the RO Act (sections 6 and 9). It includes a person who, under the organisation or branch rules, is entitled to participate directly in the management of the affairs, or the determination of policy, of the organisation or branch, and will usually be a person who has been elected to their position.

The President, Vice President, Secretary, Assistant Secretary, Treasurer and members of the Committee of Management of the organisation or a branch of the organisation are normally officers.

It is possible that an organisation or branch will need to disclose the identity, relevant remuneration and non-cash benefits of more than five officers. This will occur where two or more officers have received the same relevant remuneration which ranks them equal first, second, third, fourth or fifth.

**Example:** Sanjeev, Fran and Olaf all receive the same relevant remuneration in their role on the board of XYZ organisation. This ranks them equal fifth amongst the officers of XYZ for that financial year. Their identity along with their relevant remuneration and relevant non-cash benefits should be disclosed for each of Sanjeev, Fran and Olaf. This means that XYZ organisation will disclose the identity and remuneration of 7 officers, all of whom are ranked no lower than fifth by relevant remuneration.

<sup>1</sup> Subsections 293BC(1)(a) and (2)(a), RO Act.

<sup>2</sup> Subsections 293BC(1)(b)(i) and (2)(b)(i), RO Act.

<sup>3</sup> Subsections 293BC(1)(b)(ii) and (2)(b)(ii), RO Act.

<sup>4</sup> Subsection 293BC(3) and section 293J, RO Act.

**Example:** JKL union's two Assistant Secretaries, Oleg and YeLing, receive the same relevant remuneration, as do five officers on the Committee of Management. JKL union ranks its officers by relevant remuneration as follows:

1. Maria: Secretary
2. Oleg and YeLing: Assistant Secretaries
3. Bella: President
4. Viktoria: Vice President
5. Eduardo, Kai, Anita, Adam and Judy: Committee of Management

The identity, relevant remuneration and relevant non-cash benefits should be disclosed for all 10 of these officers, because all of them are ranked no lower than fifth by relevant remuneration.

The disclosure is based on the remuneration paid to officers in the previous financial year. Accordingly, the identity of each officer ranked no lower than fifth over that financial year should be disclosed, even if one or more officers are no longer with the organisation or branch.

**Example:** Jessie was the President of EFG employer organisation until 15 May 2018. Jessie's remuneration from 1 July 2017 to 15 May 2018 places her second for the 2017/18 financial year. Jessie's identity and her relevant remuneration will need to be disclosed in the report for the 2017/18 financial year.

**'Relevant remuneration' includes the following received from the organisation or branch:<sup>5</sup>**

- pay, wages or salary (including superannuation)
- fees
- allowances
- leave entitlements
- benefits
- other entitlements.

'Relevant remuneration' also includes remuneration from Board positions or related parties disclosed by an officer<sup>6</sup> (see GN 013: Disclosures required by Holders of Office under the *Fair Work (Registered Organisations) Act 2009*). Relevant remuneration received by an officer from a Board position ought to be disclosed in the ORP statement even where it is passed on to or ultimately received, in part or in full, by the organisation or branch.

**Example:** June is an honorary officer of XYZ union and does not receive remuneration from boards and related parties as described above. June is employed full-time by a company that is unrelated to the union. June's wages from her job are not 'relevant remuneration' and do not need to be disclosed.

<sup>5</sup> Section 6 and subsection 293BC(4), RO Act.

<sup>6</sup> Subsections 293B(1), (2) and 293BC(4), RO Act.

Relevant remuneration should be disclosed on a gross basis, i.e. the ORP statement should set out the pre-tax amounts.

**‘Relevant non-cash benefits’** are non-cash benefits provided to an officer in connection with performance of their duties, by the organisation or branch or a related party, such as:<sup>7</sup>

- property or services in any form other than money
- a motor vehicle and associated running expenses
- access to services such as health insurance or financial advice
- the provision of free childcare.

However, ‘non-cash benefits’ do not include a computer, mobile phone or other electronic device that is used only or mainly for work purposes.<sup>8</sup>

The disclosure must occur within the ORP statement. Specific civil penalties apply to a failure to provide this statement (see below).<sup>9</sup>

**Example:** Lisa is the Vice-President of the Victorian Branch of BCD Union, for which she receives a salary of \$100 000 and a travel allowance of \$10 000. She also receives free childcare from BCD Union. Lisa is given a mobile phone and a tablet for BCD Union purposes only. In addition, Lisa receives \$5000 a year from sitting on the board of XYZ Super, a position to which she was nominated by BCD Union and is also the director of KLM Pty Ltd, for which she receives \$8000 per year. Lisa’s role at KLM Pty Ltd is not connected to her role at BCD Union.

Relevant remuneration	Relevant non-cash benefits	Not disclosable
Salary - \$100 000 Travel allowance - \$10 000 Board fees from XYZ Super - \$5 000	Free childcare, as this is a personal financial benefit provided to Lisa by BCD Union because she is an officer of BCD Union	Free mobile phone and tablet, as Lisa uses these for BCD Union purposes only, and not for personal use.  Directors’ fees from KLM Pty Ltd, as they do not relate to her position at the organisation or branch.

<sup>7</sup> Section 6 and subsection 293BC(5), RO Act.

<sup>8</sup> Section 6, RO Act.

<sup>9</sup> Subsection 293BC(3) and section 293J, RO Act.

**Example:** Frank is the President of an employer association. Frank receives a salary of \$150 000, a motor vehicle and a laptop. Frank also receives income protection insurance paid for by the employer association.

In addition, Frank receives \$15 000 a year from being a director of AAZ Pty Ltd, a company that is connected to his role at the employer association.

Relevant remuneration	Relevant non-cash benefits	Not disclosable
<ul style="list-style-type: none"> <li>• Salary - \$150 000</li> <li>• Director's fees from AAZ Pty Ltd - \$15 000</li> </ul>	<ul style="list-style-type: none"> <li>• Motor vehicle</li> <li>• Income protection insurance</li> </ul>	<ul style="list-style-type: none"> <li>• Laptop, as Frank uses this mainly for his work performed for the employer association.</li> </ul>

Unlike the position in relation to 'relevant non-cash benefits', 'relevant remuneration' is not limited to remuneration received by an officer in their capacity as an officer.<sup>10</sup> This means that 'relevant remuneration' will include remuneration paid to an officer by the organisation or branch for another role they perform – for example, as an employee. 'Relevant non-cash benefits' only includes non-cash benefits provided to the officer in connection with their duties as an officer.

**Example:** Meera is employed as an industrial officer of XYZ Union. In February 2018, Meera is elected to the Committee of Management of XYZ Union, for which she receives additional remuneration. For the 2017/18 financial year, Meera's relevant remuneration will include the remuneration she receives for sitting on the Committee of Management as well as her remuneration received as an industrial officer. Relevant remuneration does not include non-cash benefits that she received as an industrial officer, such as a car provided for the purpose of visiting members. Non-cash benefits are a separate category.

The value of relevant non-cash benefits should be disclosed in the ORP statement inclusive of GST.

### **Disclosure of payments to related parties and declared persons or bodies (s. 293G)**

For each financial year, an organisation or branch must disclose each payment it has made during the financial year to:

- a related party of the organisation or branch
- a declared person or body of the organisation or branch.<sup>11</sup>

The disclosure must occur within the ORP statement. Specific civil penalties apply to the obligation to provide this statement (see below).<sup>12</sup>

<sup>10</sup> Subsection 293BC(4)(b), RO Act.

<sup>11</sup> Subsections 293G(1) & (2), RO Act.

<sup>12</sup> Subsection 293G(3) and section 293J, RO Act.

The ORP statement should set out **each** payment made to **each** related party or declared person or body, not the total value of multiple payments made.

**A ‘related party’ to an organisation includes:**

- an entity controlled by an organisation, other than:<sup>13</sup>
  - a branch, sub-branch, division or subdivision of the organisation
  - the federal counterpart of a State/Territory-registered association of employees or employers
- officers of an organisation, and spouses of officers (including de facto partners)<sup>14</sup>
- relatives of officers (a parent, step-parent, child, stepchild, grandparent, grandchild, brother or sister of the officer)<sup>15</sup>
- relatives of an officer’s spouse<sup>16</sup>
- an entity controlled by any of the above related parties (unless the entity is also controlled by the organisation).<sup>17</sup>

**When is an entity ‘controlled’ by a person or another entity?**

‘Control’, for purposes of the RO Act, has the same meaning as it has under the Corporations Act.<sup>18</sup>

An entity controls another entity if it has the capacity to determine the outcome of decisions about that other entity’s financial and operating policies.<sup>19</sup>

In order to determine whether an entity or person controls another entity, you should ask the following questions:

- Does or can the person or entity exert practical influence over the other entity? The right of the person or entity to enforce contractual or other rights against the other entity would generally not be considered to be exerting practical influence over that entity. An example of where practical influence might arise is where an entity does not have a significant shareholding in the other entity, but is nevertheless able to control decisions due to an arrangement which allows it to effectively determine the composition of the board of directors.

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<sup>13</sup> Section 9B(1), RO Act.

<sup>14</sup> Section 6 and subsection 9B(2), RO Act.

<sup>15</sup> Section 6 and subsection 9B(3), RO Act.

<sup>16</sup> Section 6 and subsection 9B(3), RO Act.

<sup>17</sup> Subsection 9B(4), RO Act.

<sup>18</sup> Section 6, RO Act, and section 50AA, *Corporations Act 2001*

<sup>19</sup> Section 6, RO Act.

- Is there any practice or pattern of behaviour by the person or entity affecting the other entity's financial/operating policies?<sup>20</sup>

**Examples:**

Related party	Non-related party
<p>WXY Pty Ltd is a registered training organisation. BCD Union is able to appoint two-thirds of the directors to WXY Pty Ltd. WXY Pty Ltd is likely to be a related party of BCD Union.</p> <p><b>Related Party: YES</b></p>	<p>UXY is an employer organisation that is a member of an umbrella industry organisation, GHI. GHI is made up of six employer organisations, each of which is able to appoint one director each to the board of GHI. On these facts alone, GHI is unlikely to be considered a related party of UXY, as with only one out of six board positions, it is not likely that UXY can control GHI.</p> <p><b>Related Party: NO</b></p> <p>The position may be different if for any other reason, UXY has the practical ability to control GHI.</p> <p><b>Related Party: Possibly YES</b></p>
<p>MNO is an employer organisation which owns a separate entity, MNO Legal. MNO purchases legal services on a commercial fee-paying basis from MNO legal. MNO Legal is a related party of MNO.</p> <p><b>Related Party: YES</b></p> <p>However payments made to MNO Legal do not need to be disclosed if they are at 'arm's length' (see below).</p>	

An entity is a related party of an organisation at a particular time if:

- the entity was a related party of one of the above kinds at any time within the previous six months,<sup>21</sup> or

<sup>20</sup> Ford, Austin and Ramsay's Principles of Corporations Law (17<sup>th</sup> edition, 2018), at [9.510].

<sup>21</sup> Subsection 9B(5), RO Act.



- the entity believes, or has reasonable grounds to believe, that it is likely to become a related party of the organisation at any time in the future.<sup>22</sup>

As noted above, a related party relevantly includes officers and their spouses, and relatives of officers and spouses.

**Example:** Tomas is an officer of XYZ employer organisation. Tomas was the owner of LMN Pty Ltd until May 2018, when he sold the business. LMN Pty Ltd remains a related party of XYZ employer organisation for six months from May 2018 until November 2018.

**Example:** Miguel was the President of XYZ Union until he lost at the election in March 2018. After the election, Miguel becomes an employee of XYZ Union. Miguel is a former officer and therefore remains a related party for a period of six months from March 2018.

An entity is also a related party of an organisation, if the entity acts in concert with another 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.<sup>23</sup>

These definitions of 'related party' also apply in respect of a branch of an organisation, as if references to an 'organisation' were references to a 'branch'.<sup>24</sup>

**A 'declared person or body' is:**

- a person or body in respect of whom/which an officer has disclosed a material personal interest (see GN 013: Disclosures required by Holders of Office under the *Fair Work (Registered Organisations) Act 2009*) – and the officer has not notified the organisation or branch that the officer no longer has the interest.<sup>25</sup>

**Example:** Chloe is the President of IJK employer organisation. Chloe also owns a catering company. Chloe has disclosed a material personal interest in respect of her catering company in relation to IJK employer organisation deciding which catering company to engage.

Chloe's catering company is a declared person or body.

Payments that do not need to be disclosed

A payment does not need to be disclosed by an organisation or branch if:

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<sup>22</sup> Subsection 9B(6), RO Act.

<sup>23</sup> Subsection 9B(7), RO Act.

<sup>24</sup> Subsection 9B(8), RO Act.

<sup>25</sup> Subsection 293G(6), RO Act.

- the related party is an officer of the organisation or branch and the payment relates to remuneration or reimbursement for expenses reasonably incurred in performing their duties,<sup>26</sup>
- the payment arises from a deduction from remuneration paid to officers or employees,<sup>27</sup> or
- the payment would be a reasonable arm's length transaction – that is, the payment would be reasonable if the organisation/branch and the related party were dealing at arm's length, or the payment is less favourable to the related party than an arm's length payment.<sup>28</sup>

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The concept of dealings at '**arm's length**', under the Corporations Act, assumes (among other things) that the relevant transaction does not involve any undue influence or pressure and that the entity making the payment is concerned only to achieve the best commercial result for itself.<sup>29</sup>

**Example:** Malia is an officer of EFG, an employer organisation. Malia's husband is the part owner of an office supplies company LMN Pty Ltd. After reviewing the price of office supplies from three companies, EFG decides to purchase its office supplies from LMN Pty Ltd, because they have the lowest publicly advertised prices. Assuming that Malia or her husband have not sought to improperly influence this decision, the purchase of the office supplies at publicly available commercially competitive rates is likely to be considered an arm's length transaction.

**Example:** Emily is an officer of UVW, an employer organisation. She is in a personal relationship with an administrator employed by the organisation, Alice. Alice receives a salary which is set out in UVW's enterprise agreement. The payment of Alice's salary is paid in accordance with an impartial industrial agreement. Therefore, this payment does not need to be disclosed.

This situation would be different if, for example, Emily decides to pay a bonus or other discretionary payment to Alice, and Emily is responsible for, or participates in, the determination of the amount of the payment. In that case, Emily and Alice's relationship may no longer be at 'arm's length' and, at the very least, involves a conflict of interest for Emily.

<sup>26</sup> Subsection 293G(4), RO Act.

<sup>27</sup> Subsection 293G(5), RO Act.

<sup>28</sup> Subsection 293G(5A), RO Act.

<sup>29</sup> *Ford, Austin and Ramsay's Principles of Corporations Law* (17<sup>th</sup> edition, 2018), at [9.530].

**Example:** James is an officer of QRS Union. James' parents own a commercial property which QRS Union would like to lease to use as its new offices. After investigating some other less expensive options, QRS Union and James' parents agree that QRS Union can lease the property at a discounted rate, well below market rent.

QRS Union does not need to disclose the monthly rental payments to James' parents (as related parties), because they are less favourable to James' parents than the terms they would have received at an arm's length rental agreement for the property.

As an officer of QRS Union it is likely that James holds duties that relate to the financial management of QRS Union. Therefore, it is likely that he will hold a material personal interest in the matter and will need to make an officer's disclosure.

- when added to other payments made to the related party in a financial year, the total amount of all payments is less than the amount prescribed by the regulations (\$5000)<sup>30</sup>
- the payment is made to a related party in their capacity as a member of the organisation or branch and does not discriminate unfairly against other members.<sup>31</sup>

**Example:** Mark is an officer of DEF Union. Mark is reimbursed by DEF Union for the costs he incurs in travelling to different sites to meet members. These payments do not need to be disclosed as they are reimbursements for expenses reasonably incurred in performing his duties.

**Example:** Angela is an officer of MNO, an employer organisation. Angela has entered a salary sacrifice arrangement with MNO whereby she is able to have some of her salary deducted and paid towards the novated lease of her car. Such a payment does not need to be disclosed as it is a deduction from the remuneration paid to Angela by MNO.

#### Alternative disclosure arrangements (s. 293H)

Organisations and branches can apply for an order permitting alternative disclosure arrangements, if they believe the above requirements to disclosure payments to related parties and declared persons or bodies (in s 293G) are too onerous and that special circumstances exist in relation to the organisation or branch.<sup>32</sup>

To obtain an order permitting an alternative disclosure arrangement, an organisation or branch will also need to show:<sup>33</sup>

<sup>30</sup> Subsection 293G(5B), RO Act and regulation 167A, *Fair Work (Registered Organisations) Regulations 2009*.

<sup>31</sup> Subsection 293G(5D), RO Act.

<sup>32</sup> Subsections 293H(1) and (8), RO Act.

<sup>33</sup> Subsection 293H(2), RO Act.

- evidence of its past and current high standards of financial accountability and control, and
- that the proposed alternative arrangement will provide for appropriate transparency.

## **The officer and related party disclosure statement (s. 293J)**

Each organisation and branch must prepare an ORP statement as soon as practicable after the end of the financial year<sup>34</sup> showing:

- the identity of those officers for the financial year ranked no lower than fifth when ranked by relevant remuneration
- the amount of relevant remuneration and details of non-cash benefits for each of those officers
- each payment made to related parties and declared persons or bodies.

The statement must be provided to members and a copy lodged with the Commissioner within 6 months following the end of the financial year.<sup>35</sup>

A template officer and related party disclosure statement is available from the ROC's website, at: <http://www.roc.gov.au/resources-and-decisions/fact-sheets-templates-and-webinars>.

**Penalties:** Organisations are liable for civil penalties of up to a maximum of \$105 000, or a maximum of \$1 260 000 for a serious contravention, for breaches of this obligation by an organisation or branch.<sup>36</sup>

## **Disclosure of material personal interests: actions required by the organisation or branch (s. 293C)**

Once an organisation or branch receives a disclosure of a material personal interest from an officer it must record it in the minutes of the meeting of the Committee of Management at which the disclosure was made (or the first meeting after a disclosure made between meetings).<sup>37</sup>

The organisation or branch must provide any member of the organisation or branch details of disclosures within 28 days of receiving a written request from the member.<sup>38</sup>

<sup>34</sup> Subsections 293J(1)(a) and (2)(a), RO Act.

<sup>35</sup> Subsections 293J(1)(b) and (2)(b), RO Act.

<sup>36</sup> Subsections 293J(1) & (2), RO Act. NOTE: all maximum penalties in this Guidance Notes are current as at the date of publication

<sup>37</sup> Subsection 293C(6), RO Act.

<sup>38</sup> Subsection 293C(7), RO Act.

**Penalties:** Organisations are liable for civil penalties of up to a maximum of \$105 000 for breaches of this obligation by an organisation or branch.<sup>39</sup>

## Training (ss. 293K & 293L)

Each officer of an organisation or branch who has duties which includes duties that relate to the financial management of the organisation, must undertake training approved by the Commissioner that covers each of their financial duties within 6 months of beginning to hold office.<sup>40</sup>

The obligation to ensure that the officer completes the training within that time period falls on the organisation/branch.<sup>41</sup>

**Penalties:** Organisations are liable for civil penalties of up to a maximum of \$105,000 for breaches of this obligation by an organisation or branch.<sup>42</sup>

### Exemptions from financial training (s. 293M)

An organisation or a branch of an organisation may apply, in writing, to have an officer exempted from the requirement to undertake training.<sup>43</sup> The Commissioner may grant the exemption – subject to any conditions considered appropriate<sup>44</sup> – if satisfied the officer has a proper understanding of the officer’s financial duties within the organisation or branch because of their:<sup>45</sup>

- experience as a company director,
- experience as an officer of a registered organisation, or
- other professional qualifications and experience.

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<sup>39</sup> Subsections 293C(6) & (7), RO Act.

<sup>40</sup> Subsection 293K(1), RO Act.

<sup>41</sup> Subsection 293K(2), RO Act.

<sup>42</sup> Subsection 293K(2), RO Act.

<sup>43</sup> Subsection 293M(1), RO Act.

<sup>44</sup> Subsection 293M(3), RO Act.

<sup>45</sup> Subsection 293M(2), RO Act.

## Further information

For further information please contact the Registered Organisations Commission at [regorgs@roc.gov.au](mailto:regorgs@roc.gov.au).

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This guidance note is not intended to be comprehensive. It is designed to assist in gaining an understanding of the Registered Organisations Commission and its work. The Registered Organisations Commission does not provide legal advice.

<b>Version</b>	<b>Date published</b>	<b>Changes</b>
1.1	23 July 2018	
1.2	20 December 2018	Updates following stakeholder feedback, including additional examples and clarification of the meaning of 'ranked no lower than fifth' for the purpose of disclosing the most highly remunerated officers in the ORP statement.