INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

POLICY: INDUSTRIAL ORGANISATIONS SEEKING EXEMPTIONS PURSUANT TO SECTION 281 IR ACT

Purpose

1. The purpose of this policy is to set out the obligations of registered organisations pursuant to the *Industrial Relations Act 1996 (NSW)* (**IR Act**) and to provide transparency about what the Industrial Registrar (**the Registrar**) will consider when a registered organisation makes an application for an exemption pursuant to s 281 of the IR Act.

Background and objectives

2. State registered industrial organisations are subject to reporting requirements and lodging records under the IR Act which support transparency, accountability, and good governance. These obligations enable the Registrar to monitor compliance within state registered organisations, maintain regulatory oversight of their operations, investigate irregularities, and take corrective action where necessary. They also safeguard members' interests and uphold public confidence by ensuring that organisations maintain accurate financial and administrative records, subject to inspection by members and the Registrar.

3. Organisations may be dual registered where a federal organisation has a state branch that is registered pursuant to s 217(1)(b) of the IR Act or when a federally registered organisation was created by an amalgamation of pre-existing state registered organisations. Federal organisations which have state branches must satisfy the Registrar when seeking registration that they have a reasonable degree of control and autonomy over the assets and members in the state.[1]

4. The *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) requires federally registered organisations to maintain records, including those of their state branches under s 230 which overlaps with requirements set out in Chapter 5 of the IR Act. Accordingly, a state registered organisation may apply to the Registrar for an

[1] IR Act s 218 (k)

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exemption pursuant to s 281 of the IR Act which removes the requirement for dual registered organisations to report the same information to both the Industrial Registrar and the Fair Work Commission.

5. The Registrar may grant an exemption if satisfied that the state registered organisation operates as the state branch of a federal organisation, which reports to the Fair Work Commission in respect of the operations of the state branch, by providing records to the Fair Work Commission that are the same in all relevant respects as those required to be provided by ss 278, 280, 282 of the IR Act and 518 of the *Industrial Relations Act 1991*(NSW) (**1991 Act**). The Registrar will need to be satisfied of the following:
    a. The rules of the state branch are substantially the same as the federal organisation;
    b. The office holders of the federal organisation are the same for the state branch; and
    c. The organisation annually reports to the Fair Work Commission the information that is required to be provided by ss 278, 280, 282 of the IR Act and 518 of the 1991 Act.
6. This policy aims to ensure that organisations remain aware of, and compliant with, their obligations under s 281 of the IR Act, even where they are already complying with the RO Act.

Records required to be maintained and lodged pursuant to Chapter 7 of the IR Act

7. There are three main categories of records which are required to be maintained and lodged with the Registrar pursuant to Chapter 5 of the IR Act. Failure to provide these records without an exemption is a civil penalty offence. Each failure can give rise to a maximum penalty of 100 penalty units, which at the time of writing is $11,000.

<u>Office Holders and Members – section 278 of the IR Act</u>

8. Under s 278 of the IR Act, State organisations are required to maintain comprehensive records, including a register of members (including names and postal addresses), a list of the offices in the organisation, and a list of office holders with their names, postal addresses, and occupations. These records must be updated within 28 days of any changes (such as new memberships, resignations from roles, or updates to member details) and lodged with the Registrar.[2]

[2] IR Act s 278(2)

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9. The Organisation's Secretary must also lodge an annual statutory declaration with the Registrar certifying that the records outlined in s 278(1)(b)-(d) namely, a list of the offices, a list of the names, postal addresses and occupations of the people holding office and any other records prescribed by the regulation have been properly maintained, along with certified copies.[3]

Loans, Grants and Donations – section 280 of the IR Act

10. Under s 280 of the IR Act, State organisations must lodge a statement with the Registrar as soon as practicable after the end of each financial or reporting year, detailing all loans, grants, or donations exceeding $1,000.4

11. To ensure transparency in the organisation's financial dealings, the statement must include specific details including:

    a. For loans - the amount, purpose, security provided, recipient's name and address, and repayment arrangements.5

    b. For grants or donations - the amount, purpose, and recipient's name and address.6

Annual audited financial records – section 282 of the IR Act and s518 of the Industrial Relations Act 1991

12. Section 282 of the IR Act allows regulations to be made concerning the accounts and audits of industrial organisations. These regulations may adopt, with or without modification, the provisions of Chapter 8 of the RO Act. Until such regulations are made, the relevant provisions from the Industrial Relations Act 1991 (NSW) and its associated regulations continue to apply to State organisations as if they were made under the current Act.

13. Section 518 of the 1991 Act outlines the obligations of Organisations to lodge financial documents yearly with the Registrar. In particular an Organisation is to lodge a copy of the auditor's report of the accounting records for that year, accounts and other statements which have been presented to a general meeting of members or alternatively a meeting of the management committee pursuant to s 517(5). The Secretary or another officer as prescribed by the regulations must provide a certificate confirming that the documents lodged are the same copies that were provided in the aforementioned meeting.

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[3] IR Act s 278(3)
[4] IR Act s 280(1)
[5] IR Act s 280(4)
[6] IR Act s 280(5)

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14. Section 518 of the 1991 Act also empowers the Registrar to investigate financial irregularities identified in lodged documents or raised by members. The Registrar may require officers to provide information or documents and, if a contravention is found, may request rectification or refer the matter to the Industrial Court. Non-compliance can result in penalties or cancellation of registration, with investigations triggered by either the Registrar or a specified number of members.

The process to seek an exemption

15. Where an Organisation is required to comply with both the RO Act and the IR Act, the Organisation may seek an exemption pursuant to s 281 of the IR Act.

16. Applications for an exemption should be submitted at the end of the financial or reporting year to which the requested exemption relates.

17. When an application is submitted it will be recorded on a register and assigned a reference number.

18. The application must be made in the following way:

    a. By email to industrial.registrar@courts.nsw.gov.au attaching a completed statutory declaration, under the hand of the Secretary. The statutory declaration can be in the form attached and must address the following:

        i. Whether the Organisation was granted an exemption for the previous year.

        ii. Whether the Organisation was in compliance with its obligations under the RO Act in the relevant financial or reporting year.

        iii. Whether the office holders of the Organisation are the same as those of the Organisation's NSW Branch in the relevant financial or reporting year.

        iv. Whether the Organisation owns assets (being assets owned by the State Organisation, rather than owned by the NSW Branch of the federal organisation) and what they are; or in the case of an Organisation that was granted an exemption for the previous year if there has been any substantive change in its ownership of assets.

        v. Whether the rules of the Organisation are substantially the same as those of the Organisation's NSW Branch, and whether any differences exist or existed during the financial or reporting year; or in the case of an Organisation that was granted an exemption for the previous year if

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there has been any change to the rules of the Organisation since that exemption was granted.

vi. Whether the Organisation maintained records separately to the NSW Branch of its Federal Branch. If so, what records are maintained and by whom; or in the case of an Organisation that was granted an exemption for the previous year whether there has been any change to the way records are maintained and if so the nature of that change.

vii. Confirming that the specific requirements of sections 278, 280 and 282 of the IR Act have all been met by the submission of records to the Fair Work Commission, particularly in circumstances where individual states and branches do not prepare separate reports or keep separate records.

viii. If the requirements of those sections under the IR Act are not met, how the Registrar can be satisfied that the Organisation is complying with its obligations under the IR Act such that it should be exempt from reporting on its records, changes and financial circumstances; or in the case of an Organisation that was granted an exemption for the previous year whether there has been any relevant change to the matters that were put forward as the basis of the previous exemption.

ix. Any other matters the Organisation consider may be relevant to the Registrar's determination of whether to grant an exemption.

b. Applications must also clearly mark and annex or if publicly available, include the relevant link(s) to:

x. Any registered rules, as referred to at 18(a)(v).

xi. A statutory declaration by the Secretary of the Organisation that they have complied with their obligations under the RO Act.

xii. Anything else the Organisation considers relevant to the Registrar's determination of whether to grant an exemption.

19. Where an Organisation has obtained an exemption, a subsequent application for another exemption need only provide the more limited information set out above.

Duration of exemption and timing of applications

20. Applications for exemption should be submitted following the conclusion of the financial or reporting year to which the exemption applies.

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21. Unless a longer or shorter period is specifically requested and justified, exemptions will ordinarily be granted for a period of one year, corresponding to the financial or reporting year that has just ended.

The process to seek a retrospective exemption

22. Where an Organisation has failed to meet its obligations under the IR Act in any preceding financial or reporting year/s, it may apply for an exemption that applies to some or all of those earlier years.

23. Applications for such a retrospective exemption must address the criteria outlined in paragraph 18 for the first year of non-compliance.

24. The application must then additionally set out the changes in reference to paragraph 18 that occurred for each additional year of non-compliance with evidence.

25. The application must also include a clear explanation of the reasons for the non-compliance. The mere fact that the Organisation could have obtained an exemption if it had applied for one in advance for any given year may not of itself be sufficient to obtain a retrospective exemption.

26. An application for a retrospective exemption may be made at the same time as an application for a future exemption. Where this is the case, the future exemption must be clearly identified and justified separately, with supporting reasons provided for both the retrospective and prospective components of the application.

What the Registrar will consider when assessing an application for future or retrospective exemption

27. The Registrar will consider all the circumstances when determining an application for exemption including the following matters.

    a. whether the application provides all the information required by this policy;

    b. the objects of the IR Act which include:

        xiii. to provide a framework for the conduct of industrial relations that is fair and just,

        xiv. to promote efficiency and productivity in the economy of the State,

        xv. to promote participation in industrial relations by employees and employers at an enterprise or workplace level,

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xvi. to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies, and

xvii. to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments.

c. the importance of ensuring that key information is being transparently reported to a regulator each year, including the membership, elected officers and financial records of an Organisation;

d. the importance of ensuring Organisations meet their obligations under the IR Act, even where they may be compliant with the RO Act. This is particularly relevant where the structure or records of the State Organisation differ from those of the Federal Organisation;

e. whether the granting of an exemption would affect the Registrar's capacity to monitor compliance, investigate irregularities, and take corrective action where necessary;

f. whether the Organisation has a history of unsatisfactory compliance or non-compliance with its statutory obligations in this jurisdiction;

g. the importance of ensuring that Organisations act ethically and in the best interests of their members, with transparency, accountability, and responsible governance;

h. whether granting the exemption would reduce unnecessary duplication or administrative burden without compromising oversight or accountability; and

i. anything else the Registrar considers relevant to the determination of the application.

Outcome

28. Once an application has been lodged it will be considered by the Registrar or their delegate.

29. Applications will be reviewed within ten days of receipt, subject to the availability and other commitments of the Registrar.

30. If the Registrar requires additional information to assess an application, the Organisation will be contacted via email. The correspondence will outline the specific details or documents required to enable further consideration of the application.

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31. Where the application is granted, the Registrar will issue a certificate to the Organisation specifying the duration of the exemption and identifying the records the Organisation is not required to lodge.

32. Where an application for an exemption is refused, the Organisation may:

    a. re-apply upon obtaining further information and/or evidence; or

    b. apply to the Commission for a review of the Registrar's decision.

33. Where an application for a retrospective exemption is refused the Registrar will inform the Organisation of that decision and may take further steps including asking the Organisation to show cause as to why the Registrar should not proceed to commence proceedings for failure to comply with sections 278, 280 and 282 of the *Industrial Relations Act 1996* (NSW) and/or to deregister the Organisation.

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Statutory Declaration

OATHS ACT 1900, NSW, NINTH SCHEDULE

I, ..., of ……
[name of declarant] *[name of organisation and address]*

do hereby solemnly declare and affirm that:

1. In the previous financial or reporting year, the [name of State Organisation] (**Organisation)** [was] / [was not] granted an exemption under s 281 of the *Industrial Relations Act 1996* (NSW).

2. As at today's date the [name of the NSW Branch of the Federal Organisation] (**NSW Branch**) [is] / [is not] in compliance with its obligations under the *Fair Work (Registered Organisations) Act 2009* (Cth).

3. The Organisation's office holders [are] / [are not] the same as the office holders of the NSW Branch.

4. The Organisation [does] / [does not] own assets.

    a. If the Organisation owns assets, those assets are outlined below:

    [insert assets] OR

    b. If the Organisation received an exemption in the previous financial or reporting year, indicate whether there has been any substantive change in asset ownership since receiving that exemption.

    [identify substantive changes]

5. The Organisation's rules are substantially the [same] / [different] from those of the NSW Branch.

    a. If the rules are different, those differences are outlined below:

    [insert rule differences]

    b. If the Organisation was granted an exemption in the previous financial or reporting year, indicate whether there have been any substantive changes to the NSW Branch rules or Organisation rules since receiving that exemption.

    [insert rule changes]

6. The Organisation [does] / [does not] maintain separate records from the NSW Branch.

a. If the Organisation maintained separate records, those records and who maintained them are identified below:

[insert records and identify person who maintained records]

b. If the Organisation received an exemption in the previous financial or reporting year, indicate whether there has been any substantive change in record keeping processes.

[insert changes to record keeping processes]

7. In the last 12 months the NSW Branch [did] / [did not] provide records to the Fair Work Commission of the sort that the Organisation would otherwise be required by section 278 of the *Industrial Relations Act 1996* (NSW).

8. In the last 12 months the NSW Branch [did] / [did not] provide records to the Fair Work Commission of the sort that the Organisation would otherwise be required by section 280 of the *Industrial Relations Act 1996* (NSW).

9. In the last 12 months the NSW Branch [did] / [did not] provide records to the Fair Work Commission of the sort that the Organisation would otherwise be required by section 282 of the *Industrial Relations Act 1996* (NSW).

10. If any such records were not provided to the Fair Work Commission, the Registrar can nevertheless be satisfied that an exemption ought to be given because:

[insert reasoning]

a. If the Organisation received an exemption in the previous financial or reporting year, indicate whether there have been any changes to the matters raised on the previous occasion.

[insert justification]

11. There [are] / [are not] other relevant matters that the Registrar should take into consideration when determining whether to grant an exemption.

a. If there are other matters to be considered by the Registrar, they are outlined below:

[insert additional reasons]

And I make this solemn declaration, as to the matter (or matters) aforesaid, according to the law in this behalf made – and subject to the punishment by law provided for any wilfully false statement in any such declaration.

Declared at: ..... on .....

[place] *[date]*

.....
[signature of declarant]

in the presence of an authorised witness, who states:

I, ..., a .....,
[name of authorised witness] *[qualification of authorised witness]*

certify the following matters concerning the making of this statutory declaration by the person who made it: *[* please cross out any text that does not apply]*

1. *I saw the face of the person *OR* *I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification[1] for not removing the covering, and
2. *I have known the person for at least 12 months *OR* *I have confirmed the person's identity using an identification document and the document I relied on was ……...……..
[*describe identification document relied on]*

....
[signature of authorised witness] *[date]*

[1] The only "special justification" for not removing a face covering is a legitimate medical reason (at September 2018)