Australian Government
Attorney-General's Department

Senate Education and Employment Legislation Committee Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

Submission of the Attorney-General's Department

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Introduction

The Attorney-General's Department welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee (the Committee) Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill).

The Bill amends the *Fair Work (Registered Organisations) Act 2009* (the Act) to respond to recommendations of the Final Report of the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) and community concerns more broadly to ensure the integrity of registered organisations and their officers, for the benefit of their members.

Registered employee and employer organisations have a privileged position in Australia's workplace relations system and their members place a great deal of trust in them.

The Royal Commission, however, uncovered numerous examples of some registered organisations and officers repeatedly flouting the law, misappropriating union funds, putting their own interests before members, and generally failing to meet the basic standards of accountability and governance that members and the community more broadly should be able to expect from them. The misconduct uncovered was described by Commissioner Heydon as 'widespread', 'deep-seated' and exhibiting 'great variety'.[1]

In response, the Royal Commission made a number of observations and recommendations. These included highlighting the insufficiency of the current regulatory framework in relation to the disqualification of registered organisations' officers from office[2] and the regime for cancellation of registration of registered organisations, and the potential to use the amalgamation procedure to avoid cancellation of registration[3].

The Bill responds to Royal Commission recommendations 36, 37 and 38, and the Government's commitment to a productive and harmonious industrial relations system where the rule of law is complied with, including by ensuring fairness and integrity of registered organisations and their officers.

The Bill will amend the Act to:

- include serious criminal offences punishable by five or more years' imprisonment as a new category of 'prescribed offence' for the purposes of the automatic disqualification regime which prohibits a person from acting as an officer of a registered organisation;

- amend the current discretionary regime that allows the Federal Court to disqualify officers from holding office in certain circumstances, to include grounds such as contraventions of a range of designated industrial laws, repeatedly failing to take reasonable steps to stop their organisation from breaking the law, or where they are otherwise not a fit and proper person to hold office in a registered organisation;

- make it an offence for a person to continue to act as an officer or in a way that influences the affairs of an organisation once they have been disqualified;

- amend the Federal Court's power to cancel the registration of an organisation to include making alternative orders on a range of amended grounds including in relation to unlawful or improper conduct of the affairs

[1] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 1*, pp 8,12
[2] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 3
[3] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 8

of the organisation, serious criminal offences committed by the organisation, repeated breaches of a range of industrial laws by its members, non-compliance with orders or injunctions and the taking of obstructive unprotected industrial action by a substantial number of members;

- expand the grounds on which the Federal Court may order remedial action to deal with governance issues in an organisation and expressly provide that the Federal Court may appoint an administrator to an organisation or part of an organisation;

- introduce a public interest test for amalgamations of registered organisations, which will allow relevant matters to be taken into account such as each organisation's record of compliance with industrial laws;

- make minor and technical amendments following the passage of the *Building and Construction Industry (Improving Productivity) Act 2016* and *the Fair Work (Registered Organisations) Amendment Act 2016*.

All of the provisions in the Bill apply equally to all registered organisations. That is, the provisions in the Bill apply to both employer organisations and trade unions.

Legislative history

An earlier iteration of the Bill was introduced in the House of Representatives on 16 August 2017 and was passed by that chamber on 16 October 2017. The Bill was then introduced into the Senate and had its second reading moved on 17 October 2017. The Bill lapsed when the Parliament was prorogued.

On 4 July 2019, an amended Bill was re-introduced in the House of Representatives, reflecting the continued need to ensure the proper management, integrity and accountability of registered organisations and their officers. The amendments respond to concerns raised during Parliamentary Committee consideration of the previous Bill and generally more closely align various provisions in the Bill with their *Corporations Act 2001* (Corporations Act) equivalents. Most significantly, the amendments modify core definitions in the Bill, which flow through the various schedules, to limit 'designated laws' and 'designated findings' to core industrial laws and remove the concept of 'wider criminal finding' entirely.

The Bill was debated in the House of Representatives on 29 and 31 July 2019, and passed the House on 31 July 2019. The Bill was introduced into the Senate on that same day.

Discussion

Schedule 1 – Disqualification from office

Schedule 1 to the Bill inserts provisions dealing with disqualification from holding office as well as acting as an officer while disqualified.

Automatic disqualification

Under the current Act, people can be automatically disqualified from holding office if they are convicted of categories of offences involving fraud, dishonesty, intentional violence or property damage, or particular offences relating to the administration of registered organisations. However, an individual can continue to be an officer of an organisation despite being convicted of a range of other serious offences such as blackmail, extortion, threatening to cause serious harm to public officers, handling stolen goods, certain corrupting benefits offences or intentionally destroying documents relevant to an investigation.

During the Royal Commission, Commissioner Heydon recommended a general category of serious offences be added to the list of offences leading to automatic disqualification from holding office in a registered organisation. Commissioner Heydon recommended serious offences be those punishable on conviction by a maximum penalty of imprisonment for life or 5 years or more. [4]

To give effect to this recommendation, the Bill introduces a new category of offence for automatic disqualification from holding office for persons who have been convicted of a criminal offence punishable on conviction by five years' imprisonment or more (a serious criminal offence). This is comparable to the Corporations Act which provides for or automatic disqualification for persons who have been convicted of certain offences, including Corporations Act offences or contraventions of overseas laws with penalties of over 12 months' imprisonment.

It is important to note that even where an automatic disqualification offence applies, the Act still includes a mechanism whereby a disqualified person can apply to the Federal Court for leave to continue to hold office.[5]

Discretionary disqualification

Under the current Act, there are limited grounds relating to certain civil penalty contraventions, upon which the Federal Court can make an order disqualifying a person from holding office.

Commission Heydon said 'Officers who deliberately flout the law should not be in charge of registered organisations'[6] and the Bill will amend the Act to respond to this finding, by expanding the grounds upon which the Federal Court can disqualify a person from holding office.

The Federal Court will be able to disqualify officers for corporate impropriety, contraventions of core industrial laws (where there has been a finding in a civil or criminal proceeding), contempt of court in relation

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[4] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 3, pp 236
[5] Part 4 of the Act
[6] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 3, pp 234

to orders or injunctions, repeatedly failing to take reasonable steps to stop their organisation from breaking the law, or where they are otherwise not a fit and proper person to hold office.

Similarly, the Corporations Act provides that a court can disqualify a person from managing corporations on a range of grounds including for contraventions of relevant civil penalty provisions, insolvency and non-payment of debts, repeatedly failing to take reasonable steps to stop their corporation from breaking the law and disqualification under a law of a foreign jurisdiction.

Additionally, under the Bill, the Federal Court may make an order disqualifying a person from holding office only if: (1) a ground for disqualification applies, and (2) the Court does not consider that it would be unjust to disqualify the person. There are two steps, and both must be satisfied, before a person can be disqualified. In deciding whether disqualification would be unjust, the Court will consider the nature of the matters constituting the grounds, the circumstances and nature of the person's involvement, and any other matters the Court considers relevant.

The Bill provides that the Registered Organisations Commissioner (Commissioner), the Minister or another person with a sufficient interest may apply to the Federal Court for a disqualification order.

The Commissioner already has standing to disqualify an officer for contraventions of civil penalty provisions. Providing standing to the Commissioner for the expanded discretionary disqualification regime facilitates them to appropriately perform their statutory role as regulator of registered organisations.

The current Act also already provides standing to the Minister to apply for a court order to disqualify a person for holding office in an organisation in certain circumstances.[7]

Providing standing to apply for discretionary disqualification to those with a 'sufficient interest' is similar to the existing wording used in the existing cancellation of registration and administration provisions. 'Person with sufficient interest' is a standard term used in legislation and has been judicially interpreted as an interest beyond that of an ordinary person and includes those whose rights, interests or legitimate expectations would be affected by the decision. It is appropriate that a person with a sufficient interest is entitled to be heard on the operation of a registered organisation as it affects them.

It is also important to note that as a threshold issue, an applicant seeking an order for disqualification bears the legal onus of establishing that a relevant ground has been made out before the Federal Court can consider making an order. An unsubstantiated allegation will not suffice. The Federal Court must also be satisfied that making the disqualification order would not be unjust in all the circumstances. There are also protections against frivolous and vexatious claims, including the Federal Court's existing powers to dismiss vexatious claims and order costs.

Acting while disqualified

The Royal Commission noted several cases where disqualified officers remained heavily involved in an organisation behind the scenes, acting as 'shadow officers', despite no longer officially holding the position of 'officer' within the organisation. For example, despite resigning as National President of the Health Services Union following fraud allegations, Michael Williamson continued to exert significant influence and control over the union through its acting General Manager.[8]

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[7] Sections 307A and 310 of the Act.

[8] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 2*, Chapter 5.2

Currently there is no consequence for a person who continues to act as an officer in a registered organisation once they have been disqualified. Commissioner Heydon recommended there be a specific criminal offence for continuing to hold office while disqualified.

The Bill makes it an offence for a person to act as an officer or act as a 'shadow officer' if they have been automatically disqualified from office or have been disqualified from holding office by the Federal Court. A similar restriction applies under the Corporations Act to company directors who are disqualified.

A person acts as a 'shadow officer' by exercising the capacity to significantly affect the financial standing or other affairs of an organisation or branch, or by giving instructions to an organisation's or branch's committee of management knowing that the committee of management usually acts in accordance with their wishes or intending that the committee of management will do so. Advice provided in a person's capacity as a professional such as a lawyer or accountant is not included.

The penalties for acting while disqualified are based on recommendations by Commissioner Heydon, and carry a maximum penalty of $21,000 (100 penalty units), 2 years' imprisonment, or both.[9]

Amendments incorporated into the Bill

A number of amendments have been incorporated into Schedule 1 of the Bill compared to its 2017 iteration, outlined below.

Core definitional terms

Changes have been made to the core definitional terms of 'designated laws' and 'designated finding' to confine them to core industrial laws. The term 'wider criminal finding' has also been removed. These core definitions are used throughout the various schedules of the Bill in relation to grounds for disqualification from office, cancellation of registration of an organisation, placing an organisation into administration and determining whether or not an amalgamation of organisations is in the public interest.

Automatic disqualification

The automatic disqualification ground of a 'serious criminal offence' has been amended to clarify that the new ground only applies where the conduct resulting in a criminal conviction occurs after the commencement of the Bill. This change makes it clear that the provision can only have prospective operation since the conduct (and any associated conviction) giving rise to the ground must occur after commencement of the Bill.

Discretionary disqualification

Changes have been made to the events the Federal Court must consider for the 'fit and proper person' disqualification ground. Firstly, the discretion of the Federal Court to consider 'any other relevant events' as part of the fit and proper person test has been removed. This means the Federal Court is limited to considering the listed events that will be most relevant to a determination of a person's fitness or propriety to hold office in a registered organisation. In addition, while the concept of 'wider criminal findings' has been

[9] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 3, pp 236

removed from the Bill, an additional event has been included for the purpose of the 'fit and proper person' ground, where an individual has committed a serious criminal offence, being an offence punishable by two years' imprisonment. The two-year threshold is drawn from the definition of 'serious offence' in the *Crimes Act 1914* (Cth).

Schedule 2 – Cancellation of registration and alternative orders

The Royal Commission heard extensive evidence of organisations, and sometimes branches within organisations, where there was a culture of contempt for the rule of law.[10]

The Bill addresses these concerns by amending the Act to expand the grounds for, and streamline the regime in relation to, the cancellation of registration of organisations by the Federal Court. Provision is also made for the availability of alternative orders where a ground for cancellation has been made out because of the conduct of the officers or members of a particular part of an organisation.

Under the Bill, the prima facie grounds upon which registration can be cancelled (or alternative orders can be made) relate to:

- officers of the organisation or part of the organisation conducting the affairs of the organisation or part in their own interests;
- the affairs of the organisation being conducted:
    - in an oppressive, prejudicial or discriminatory manner, or contrary to the interests of members;
    - in a manner resulting in the organisation, its officers or its members having a record of not complying with designated laws;
- the organisation committing a serious criminal offence punishable by at least 1,500 penalty units (currently $315,000);
- the organisation's members repeatedly breaching core industrial laws;
- the organisation or its members failing to comply with an order or injunction made under a designated law; or
- a substantial number of members taking obstructive unprotected industrial action.

A number of these grounds already exist under the Act as it was introduced in 2009, including a substantial number of members taking obstructive unprotected industrial action, and the organisation or its members failing to comply with orders or injunctions.

The Minister, Commissioner, or a person with sufficient interest will have standing to apply to the Federal Court for a cancellation and/or alternative order. The Minister and persons with sufficient interest already have standing to apply under the existing cancellation provisions in the Act, with the Commissioner as the relevant regulator also to be given standing under the Bill.

The standing of the Minister to make an application to cancel the registration of an organisation, is a longstanding feature of industrial relations law, having been introduced in 1977 into the *Conciliation and Arbitration Act 1904* and maintained in the Fair Work package of legislation introduced into Parliament in 2009.

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[10] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 8

Similarly to the discretionary disqualification regime, an applicant seeking an order for cancellation bears the legal onus of establishing that a relevant ground has been made out before the Federal Court can consider making an order. An unsubstantiated allegation will not suffice. Where the Federal Court is satisfied that a ground for cancellation exists, the Federal Court has the discretion not to deregister an organisation in circumstances where that deregistration would be unjust. This ensures cancellation remains a measure of last resort. In considering whether deregistration would be just, the Court is expressly required to take into account the nature of the matters constituting the ground, any action taken by or against the organisation or its members, and the best interest of the members. There are also protections against frivolous and vexatious claims, including the Federal Court's existing powers to dismiss vexatious claims and order costs.

The Bill also allows the Federal Court to make alternative orders in relation to the organisation or part of the organisation. The alternative orders that the Federal Court can make are:

- disqualification of certain officers;
- exclusion of certain members; and
- suspension of rights, privilege and capacity of an organisation, or an individual branch or division.

The availability of alternative orders limits the effect on members who have not been involved in activity that would otherwise be grounds for an order for deregistration. Under the Bill, unlike the current Act, it will be possible for an application for alternative orders to be made directly to the Federal Court, rather than having to first apply for cancellation of registration of an organisation. This will facilitate a more targeted compliance approach which does not impact upon law-abiding parts of a registered organisation.

Amendments incorporated into the Bill

A number of amendments have been incorporated into Schedule 2 of the Bill compared to its 2017 iteration, including:

- removal of the ground for cancellation due to multiple designated findings against an organisation; and
- modification of the grounds concerning 'conduct of affairs of an organisation or part of an organisation' to more closely align them with comparable Corporations Act provisions for winding up corporations.

The changes to the core definitions in the Bill described above have also made consequential changes to this schedule.

Schedule 3 – Administration of dysfunctional organisations

The current framework for placing an organisation into administration under section 323 of the Act is difficult to administer. This was demonstrated in the case of the Health Services Union (*Brown v Health Services Union* [2012] FCA 644). The case was ultimately resolved because the parties largely agreed about the facts in issue. However, there were numerous court applications, which resulted in a confusing process that could have been extremely lengthy had the facts been contested.

The Bill introduces three key measures to address the current limitations. Firstly, in this Schedule, the Bill amends the Act to expand the grounds upon which the Federal Court may make a declaration and order remedial action to address governance issues in an organisation or part of an organisation. This Schedule also makes clear that the circumstances in which an organisation can be placed into administration include where officers have repeatedly broken the law, breached their duties or misappropriated funds.

Secondly, the Federal Court's power to approve a scheme consequent to the making of a declaration will be amended to expressly permit the appointment of an administrator, and the functions of an administrator will be clearly set out.

Finally, standing to apply for a declaration that an organisation has ceased to function effectively will also be extended to the Registered Organisations Commissioner and the Minister. Both parties may be able to bring a case under the existing provisions by showing they are parties with a sufficient interest. However, it can be a difficult and lengthy process to argue standing even where there is a clear public interest in the regulator or Minister bringing a matter before the Court. Ensuring that the Minister and Registered Organisations Commissioner have standing provides clarity and avoids any doubt.

In addition, if the Federal Court makes a declaration to place an organisation into administration, it may appoint an administrator. Officers of the organisation will need to co-operate with the administrator as the Bill introduces new offences for failing to help an administrator and failing to comply with a notice to provide an organisation's books. These offences are modelled on comparable Corporations Act equivalents.

Amendments incorporated into the Bill

Amendments have been incorporated into Schedule 3 of the Bill compared to its 2017 iteration to align the penalties for failing to help an administrator, and failing to comply with a notice to provide an organisations' books to an administrator of an organisation with the equivalent Corporations Act offences. The penalty has been updated from 50 penalty units or 1 year imprisonment or both, to 120 penalty units (currently $25,200) with no term of imprisonment. This amendment reflects changes that were made to the Corporations Act by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

Schedule 4 – Public interest test for amalgamations

The existing framework for approving an amalgamation of registered organisations under the Act is narrow, simply requiring a vote of only a small portion of the members of each registered organisation endorsing the matter. In some instances, there will not be a vote of the members of an organisation that is being joined.

However, some amalgamations will affect more than just the members of the relevant organisations, and may have significant broader implications. Where there has been a history of non-compliance with the law by one of the amalgamating organisations, there is currently no capacity for the Fair Work Commission (the Commission) to consider the impact of the amalgamation on the public interest. For example, when an organisation with a poor compliance record amalgamates with another organisation, it expands the potential to negatively influence the behaviour in the other organisation. The current framework does not consider the interest of all those affected by the potential amalgamation. There is also very limited scope for any person with a sufficient interest to raise concerns about a proposed amalgamation.

The Bill therefore amends the Act to introduce a public interest test to be administered by the Commission for amalgamations of registered organisations. This must apply before an amalgamation can take effect. If the Commission determines that an amalgamation is not in the public interest, it cannot proceed.

In determining whether an amalgamation is in the public interest, the Commission must first have regard to the organisations' history of compliance with the law and the impact on employees and employers in the relevant industries. The Commission may then also have regard to other matters it considers relevant, such as the impact of the amalgamation on employees and employers in the industries concerned and the impact on the broader Australian economy.

The Bill provides that amalgamating organisations, other organisations or bodies that represent the industrial interests of employers or employees in the relevant industries, the Registered Organisations Commissioner, the Minister or the Minister of a State or Territory, or a person with a sufficient interest may make submissions in regard to the public interest matter.

This is not dissimilar to company mergers. In some instances, companies have to satisfy a competition test applied by the regulator, the Australian Competition and Consumer Commission, when they merge to ensure that the merger would not substantially lessen competition, or that the merger would benefit the public and this benefit would outweigh any detriment to the public.

Amendments incorporated into the Bill

A number of amendments have been incorporated into Schedule 4 of the Bill compared to its 2017 iteration, including limiting the compliance record events to which the Commission must have regard, consequential to the changes to the core definitions of 'designated law', 'designated finding', and the removal of 'wider criminal finding'.

Human rights

The Bill engages with the rights contained in Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR) and Articles 6 and 8(1)(a) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) including the right to freedom of association, the right to form and join trade unions and the right of trade unions to function freely.

The content of these rights is informed by treaties of the International Labour Organisation (ILO), such as the *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)* (ILO Convention 87), which provides employer and employee organisations with protection for their organisational autonomy.

The Bill also engages with other rights outside of the ILO conventions, including:

- the right to take part in public affairs and elections in Article 25 of the ICCPR;
- the right to the presumption of innocence and the minimum guarantees in Article 14 of the ICCPR; and
- the right to privacy and not to be subject to unlawful attacks on a person's reputation in Article 17 of the ICCPR.

The Bill does not diminish workers' rights to form, be represented by, or become members of unions, and does not limit the right to take protected industrial action or the right to organise. The Bill imposes no restrictions on law-abiding organisations existing, forming or running their affairs in order to represent members.

Article 8 of the ICESCR and ILO Convention 87 (concerning freedom of association) both provide that trade unions should be free to operate subject to requirements to comply with the law of the land. This includes laws in the interests of national security or public safety, public order, the protection of public health or the protection of the rights and freedoms of others.

The Bill requires compliance with the law of the land – it does not restrict the ability for trade unions to function. The Bill does not alter the rules of organisations nor how organisations choose to run their internal democratic structures.

Where the provisions of the Bill engage human rights, including the right to freedom of association, any limitations are permissible as they pursue a legitimate objective, are prescribed by law, and are reasonable, necessary and proportionate.

The Bill clarifies or extends the existing provisions of the Act in relation to disqualification from office, cancellation of registration, administration, and mergers to ensure they capture wrongdoing such as repeated law-breaking, breaches of duty and misappropriation of funds. The amendments in the Bill have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations.

Importantly, the procedures in the Bill for disqualification, cancellation of registration and administration will also be administered and supervised by the Federal Court, an impartial and independent judicial body from which appeals to a Full Federal Court and to the High Court are available. The procedure in the Bill in relation to amalgamations will also be administered and supervised by the independent Fair Work Commission.

The Bill is compatible with human rights because any restriction is for a purpose that falls within one of the permitted grounds for restriction under the relevant article. The measures in the Bill are a proportionate means of ensuring greater compliance with the standards of conduct reasonably expected of officers and organisations, and achieving better governance of registered organisations. To the extent that the Bill may limit human rights, the amendments are reasonable, necessary and proportionate.

Conclusion

The Department appreciates the opportunity to provide a submission to this inquiry and is available to discuss the submission at a hearing of the Committee.