Queensland Council of Unions

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

8 September 2017

Introduction

The Queensland Council of Unions opposes the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* (the Bill) in its entirety. The Bill is opposed because it constitutes an unjustifiable intrusion into the democratic operation of unions. As such, our submission is that this type of legislation has no place in a democracy and the Bill should be rejected in its entirety. This submission focuses on two of the major aspects of the Bill. One aspect is to create a range of excluding events for the disqualification of individuals from holding office within a union. The other is intended to make union amalgamation more difficult (if not impossible).

There are several disturbing aspects to the content of the Bill insofar as the democratic operation of unions is concerned. Unions provide a voice for workers within a democracy and several, recent state and federal elections have demonstrated the importance of a strong and independent union movement. Perhaps of the greatest significance was the Your Rights at Work campaign that was launched in response to the WorkChoices legislation. This campaign is widely regarded as having determined the outcome of the 2007 Australian federal election.

WorkChoices was introduced once the Howard Government obtained control of the Senate (Bailey et al 2009; Hall 2005; Muir 2008; Van Gramberg 2013). It proved to be abhorrent to the Australian ideal of a "fair go". WorkChoices was introduced under the guise of flexibility and choice with equal partners in the employment relationship making arrangements that suited their individual circumstances. The reality was considerably different and employers used the enormous power imbalance created by WorkChoices to drive down wages and conditions. WorkChoices was the primary reason for the defeat of the Howard Government in 2007. Not only did the Howard Government lose the election but for the second time in Australia's history a sitting Prime Minister lost his seat. Coincidentally the other occasion on which a sitting Prime Minister lost his seat was also largely determined by industrial relations issues.

Currently the Australian workforce is faced with wage theft and continual breaches of workplace health and safety legislation (Healy 2016). These events and developments demonstrate the need for an independent trade union movement so that excesses of government and rogue employers can be challenged. The union movement and its leadership are best placed to advocate for the protection of workers and this Bill seeks to undermine that capacity by the removal of elected officials for potentially spurious reasons.

Disqualification from Office

The disqualifications provisions of the amendment Bill reflect, in some fashion, the provisions for disqualifications of a person from managing a corporation found in Part 2D.6 of the Corporations Act.

Significantly, however, under Part 2D.6 of the Corporations Act, an application to disqualification from the Court can only be made by Australian Securities and Investment Commission.

Section 222 of this Bill provides:

(1) Any of the following may apply for an order under this section, if the applicant considers that any one or more of the grounds for disqualification set out in section 223 apply in relation to a person:

(a) the Commissioner;

(b) the Minister;

(c) a person with a sufficient interest.

Section 221(c) allows an application to be made by "a person with sufficient interest." It is unclear who the Courts may regard as "a person with sufficient interest" in whether someone should hold office in an organisation. It could include a member of a union, but the Act could easily have specified "a member" of the organisation if that was the intended scope of the expression. Presumably, the drafters of the legislation intend "a person with sufficient interest" to extend beyond members of the organisation. For example, does an employer that operates in the industry covered by a union have "sufficient" interest to ensure that the employee organisation it deals with is run or controlled by "proper" persons? Such an interpretation would have disturbing implications. We remain steadfastly opposed to the Minister having the capacity to interfere in the internal working of a union. This would enable partisan political objectives to be pursued and adversaries of the government of the day to be potentially silenced.

Such a construction would in fact give parties external to the union movement greater power to remove union officials than the collective membership of those organisations. The *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act) provides that unions must have rules which prevent them from removing union officers from office unless the person has been found guilty, under the rules of the organisation, of: misappropriation of the funds of the organisation; or a substantial breach of the rules of the organisation; or gross misbehaviour or gross neglect of duty: s.141(1)(c) of the RO Act. However, the Bill would allow the Minister or the Registered Organisations Commissioner, or perhaps even a "sufficiently interested" employer, to seek the disqualification of a union official from holding office for conduct which is less serious than would be required for the officer's own membership to remove him or her.

The broad discretion given to the Court in these matters combined with the scope of parties potentially entitled to apply for a disqualification order practically invites abuse of process by those who would seek to tie up union resources defending litigation that could otherwise be spent protecting the rights and conditions of Australian workers.

Whether the Registered Organisations Commission, which has been newly created, will function as a responsible, even-handed regulatory body remains to be seen. The record of another body established with a regulatory compliance role in the area of industrial relations – the Australian Building and Construction Commission – does nothing to inspire confidence that the Registered Organisations Commission will play a positive or bipartisan role.

Turning to the legislative bases for disqualification, they are very broad:

A single "designated finding" can provide the basis for an application to disqualify a person from holding an office in a union (or branch): s.223(1).

The definition of "designated finding" in s.9C (1) is very broad, and includes breaches of the civil penalty provisions of various pieces of legislation, including the *Fair Work Act 2009* (Cth) and RO Act. While some contraventions of this legislation may be serious matters, the definition also encompasses a range of lesser administrative breaches. For instance, failing to lodge administrative paperwork on time – such as a union's financial returns [s.268(1) of the RO Act], or particulars of loans, grants and donations [s.237 of the RO Act] – are civil penalty provisions.

Further, s.223(3) of the Bill provides that it is a ground for disqualification if an official has "failed to take reasonable steps" to prevent conduct which results in specified adverse findings against the organisation.

Multiple failures to prevent contraventions etc. by organisation

(3) A ground for disqualification applies in relation to a person if:

(a) 2 of any of the following findings are made against any organisation in relation to conduct engaged in while the person is an officer of the organisation:

(i) a designated finding;

(ii) a wider criminal finding;

(iii) a finding that the organisation is in contempt of court in relation to an order or injunction made under any law of the Commonwealth or a State or Territory; and

(b) the person failed to take reasonable steps to prevent the conduct.

The object of this section is clearly aimed at allowing the removal of union leaders where there are two or more adverse findings made against an organisation – even though the official is not the person responsible for the conduct which results in the adverse finding.

As Section 9D of the Bill provides, "A finding made against a part of an organisation is taken for the purposes of this Act to have been made against the organisation." In other words, findings made against a branch of an organisation may be sufficient to ground an application for the removal of officials from a union's national office. The Court could make orders disqualifying the national leadership of a union if a Court does not consider that the national officials have done "enough" to rein in the activities of a rogue branch, or sub-branch, or even a few rogue officials. There is also a question as to whether an individual union member is "a part" of an organisation for these purposes?

Again, it is noted that these provisions have equivalents of one kind or another under Part 2D.6 of the Corporations Act, but in circumstances where the power to make applications is limited to a regulatory authority.

There are broader issues involved here as to the rights of union members to determine who their representatives and leaders should be. Unions are not-for-profit entities, democratically controlled by their membership. They represent the interests of their members and therefore often operate in a manner which is contrary to the financial interests of major corporate employers (and indeed governments, which are, of course, major employers themselves) that have access to far greater financial resources. There is every reason to believe that the real purpose of this legislation is to allow ideologically-driven governments to use increased compliance burdens, and the cost of defending organisations and officers from litigious, politically-motivated regulatory authorities (let alone employer applicants), to inhibit unions from their lawful and legitimate purposes of advancing the interests of their members. Allowing employers to interfere in union amalgamations would provide

for potential vexatious litigation by any party with an agenda to injure a union or its officials. It would also add an expensive and unnecessary step to an already well-regulated amalgamation process.

The current Coalition Government has not given up its desire to take rights and conditions away from Australian workers; it has only changed its strategy. With the failure of a strategy of a frontal assault on workers' rights and conditions, they have decided to attack those organisations – the trade union movement – which defend them. The aim is to weaken trade unions to the point where people's rights and conditions can be taken with impunity. The scandalous wage theft revelations that have been uncovered (and continue to be uncovered on an almost daily basis by the Fair Work Ombudsman) all point to the conclusion that rights and minimum legal entitlements are meaningless where trade unions are not present to enforce them.

This Bill would enable government to remove duly-elected union officials from office for the contravention of industrial laws. Australia's industrial laws have been criticised for not complying with Australia's international obligations in terms of International Labour Organization (ILO) conventions. It would be truly unjust if union officials were removed from office for non-compliance with laws that are, by international standards, unfair. Moreover, the potential exists under the current wording of the Bill for applications to be made to remove officials from office where such a severe remedy would be disproportionate with quite possibly trivial non-compliance.

Union Amalgamation

The proposal in the Bill is that any amalgamation of unions must be in the public interest. This is an extraordinary onus to place on amalgamating partners as it goes well beyond establishing that the amalgamation is ***not*** in the public interest. This imposition is clearly designed to make amalgamation at least difficult, or more likely, impossible.

Unions amalgamate for a range of reasons. Quite often the industries covered by a particular union will have reduced in size and therefore the potential membership of that union decreases accordingly. In order to maintain a union presence in industries where employment has decreased, amalgamation is necessary step (Hose and Rimmer 2002; Tomkins 1999). In a number of industries, deliberate government policy has caused that reduction in employment.

Unions like other organisations have a range of expenses that are a necessity in a modern era. Rent, information and communication technology and legal expenses have all become significant expenses for most unions in recent years. Legal expenses, it should be noted, have increased dramatically as a result of legislation being passed that has the intention and effect of making unions' business harder to conduct. This Bill is an example of such legislation. This level of expense is less likely to be able to be met by a small union compared to a union with more resources available. Thus, by achieving economies of scale, amalgamated unions are better able to withstand the expenses required of them to operate in a modern environment (Buchanan 2003; Davis 1999; Jerrard and Le Queux 2013)

It follows that the intention of the Turnbull Government by the introduction of this Bill is to deny workers, particularly in industries where employment and union membership levels have fallen, access to union representation. This Bill is a fundamental attack on the democratic operation of a union or unions. If unions choose to amalgamate, this is the business of the members of that union and no one else. This Bill seeks to unreasonably impinge upon the efficient operation of unions for no good reason. In the absence of any justification for such an intrusion, alternative explanations spring

to mind. In this case, however the Minister is on the record as wanting to prevent a particular amalgamation (Workplace Express 2017).

A significant round of union amalgamations resulted in the late 1980s and early 1990s that would not have been as likely to occur without legislative change. In an historical context, it is not unusual for Coalition Governments to hinder the amalgamation process. Union amalgamations were substantially more difficult until the Hawke Government introduced legislative change in 1980s (Hose and Rimmer 2002; Tomkins 1999). The comparative ability of unions to amalgamate can be contrasted between say the period of 1974 to 1981 in which three federal unions amalgamated (Rimmer 1981). In the early- to mid-1990s, the number of federal unions fell from 295 to 132 (Bray et al 2014).

The amalgamation process that many Australian unions went through had broader social and economic objectives. In a time of considerable microeconomic reform, the amalgamation process was also seen as means by which demarcation disputes could be reduced or even eliminated (Jerrard and Le Queux 2013).

Moreover, there is little doubt that union amalgamation played a part in providing some resistance to the continual attacks that would come from hostile government and employers over the following decades. As mentioned above, the union movement played a significant role in the removal of the Howard Government from office and the reversal of the most abhorrent provisions of the WorkChoices. Conservative state and federal governments have made it their top priority to stifle union activity through whatever means are available to them.

Unions in Queensland are very familiar with ideologically-driven anti-worker and anti-union legislation. The recent wave of this type of legislation from the Turnbull Government is reminiscent of the Newman Government in Queensland. Without the checks and balances brought by the Senate, the Newman Government visited wave after wave of legislation aimed at damaging the union movement. This similarity may in some way reflect the desperation of the Turnbull Government as it flounders from political crisis to the next. In the typical coalition fashion, the Turnbull Government attacks its favourite “whipping boy”, the trade union movement.

Conclusion

There is no merit in any aspect of the Bill. In our submission, it is both vindictive and unnecessary. Union governance is already heavily regulated and the ability for a so called “person with sufficient interest” to seek the removal of a duly elected union official highlights the mischief intended by the Bill. Likewise, the process for amalgamation is already well regulated and governed by substantial case law. To introduce a Bill of this nature to prevent one particular amalgamation is an extraordinary intrusion into the democratic operation of those unions. As is usually the case in such ideologically-driven and ill-conceived legislation it would undoubtedly have further unforeseen implications.

Our strong recommendation is to reject the Bill in its entirety.

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