Senate Standing Committee on Education and Employment

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

Submissions of the Flight Attendants' Association of Australia, International Division

Organisation: Flight Attendants' Association of Australia, International Division

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Introduction

The Flight Attendants' Association of Australia – International Division represents members in the aviation industry. As a boutique union, the FAAA understands the constraints placed on all registered organsiations, particularly those with limited resources. The goal of every union to serve and represents its membership is consistently and increasingly hampered by onerous compliance requirements. Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (**'the Bill'**) threatens the livelihood of Australia's unions under the guise of creating accountability.

The FAAA has grave concerns about the many radical proposals and strongly opposes the Bill in its entirety. There is a marked difference between accountability and creating pathways sanctioned by legislation for unions, and in turn the union movement, to grind to a halt. Ostensibly, the Bill seeks to undermine the very functions of trade unions. When union officeholders have to dedicate even more time to the onerous registered organisations regime and potential litigation, it is invariably to the detriment of its membership. Our concerns with each of the Bill's schedules are outlined below.

Schedule 1: **Disqualification from Office**

The introduction of designated finding, designated laws and wider criminal finding in s 9C constitute a dramatic expansion upon the current grounds for disqualification. The FAAA has particular concerns with the broad discretion bestowed upon the Federal Court to make a disqualification order, specifically with reference to the disqualification periods and the considerations in making the order.

Section 222

We note that under s 222(2), the Federal Court can make a disqualification order 'for any period the Court considers appropriate'. Further, under s 222(b)(iii), the Court may have regard to 'any other matters the Court considers relevant.' The combined effect of the Federal Court's unfettered discretion will undoubtedly be to the detriment of registered organisations' ability to properly function as both the grounds for disqualification and the period of disqualification are seemingly limitless.

Section 223(3)

Section 223(3)(b) potentially impugns officers that 'failed to take reasonable steps' to prevent conduct. 'Reasonableness' is a slippery legal concept and it is unclear how this standard will be

applied. It is clear, however, that the Federal Court has again been given further unfettered discretion to disqualify officers.

Section 223(6)

Section 223(6) deals with the concept of a fit and proper person. Of particular concern is that the Federal Court again has recourse to 'any other event the Court considers relevant.' This seemingly would include criminal or civil findings regardless of whether or not a conviction was recorded.

Standing

The broadening of persons who can bring a disqualifying order to include a 'person with sufficient interest' has the potential to tie up union resources in expensive litigation. In the FAAA's opinion, union resources should be dedicated to the representation of members and the efficient functioning of the union. As such, money used other than to benefit members is not appropriately expended. However the inclusion of a 'person with sufficient interest' into s 222(1)(c) exposes registered organisations to a broad class of potentially vexatious litigants. The likely result is that union funds will invariably be directed away from members for the purposes of contesting disqualification orders.

Paragraph [33] of the Explanatory Memorandum stipulates that 'sufficient interest' is 'beyond that of an ordinary person and includes those whose rights, interests or legitimate expectations would be affected by the decision.' Should the Bill be approved, a union member could be considered a 'person with sufficient interest'. It is unclear why the current protections of s 310 of the *Fair Work (Registered Organisations) Act 2009* should be expanded to directly empower a 'person of sufficient interest'.

Section 226

The FAAA considers the maximum penalty of 100 penalty units, two years imprisonment, or both for the offences contained in s 226 to be disproportionate and punitive.

Schedule 2: **Cancellation of Registration and Alternative Orders**

The broadening of the Federal Court's powers continues in schedule 2 of the bill. However, unlike schedule 1 which is aimed at disqualifying orders, schedule 2 directly targets a union's ability to function by expanding the grounds for cancellation of registration and enabling a large range of alternative orders to be made.

We note that, where the prescribed grounds are established, s 28K compels the Federal Court to cancel registration rather than allowing an exercise of discretion that would result in an alternative outcome. It appears that, where the Bill empowers the Federal Court to exercise discretion in schedule 1 for the purposes of disqualifying officers, there is no discretion to make a finding other than cancellation of registration in schedule 2. The Bill is clearly constructed in a way that steers the Federal Court by giving it unfettered power to target unions and stripping its discretion if the potential result would favour unions. Arguably, the Federal Court is merely a mechanism to bring about the Bill's poorly concealed aim of undermining unions' ability to function.

Multiple Actions

The FAAA notes with particular interest that, under s 28B, a person may make an application for cancellation of registration, alternative orders or both at the same time. By allowing multiple actions, the Bill seemingly encourages litigants to 'double dip' and seek the maximum penalties against unions. By way of contrast, the *Fair Work Act 2009* requires an employee to choose one out of the three options of unfair dismissal, general protections or unlawful termination and expressly prohibits multiple actions in relation to the same dismissal. This effectively limits the number of potential remedies available to an applicant.

By permitting multiple applications, the Bill arguably creates further impediments for unions to function. Once again, there is potential for significant cost to the union at the hands of vexatious litigants. This is further evidence of the Bill's motivation to target and undermine unions.

Evidentiary Provisions

Under ss 28C, 28G and 28H a finding of fact in proceedings in any court is admissible as prima facie evidence of the fact for the purposes of an application on those grounds. This suspension of the ordinary rules of evidence is patently aimed at expediting applications for cancellation of registration or alternative orders or both. We note that paragraphs [99], [108] and [112] of the Explanatory Memorandum attest to the Bill's thinly veiled aim of removing the hurdles that applicants ordinarily face in the interest of expediting applications. This, when coupled with the obligation for Federal Court to deal with multiple actions at once and the expansion of the penalties available, is once again proof of the Bill's aim to target and undermine unions.

Schedule 3: Administration of Dysfunctional Organisations

Schedule 3 continues the trend of empowering the Federal Court to do even more to enfeeble unions. We also note that standing is expanded to include the Commissioner and the Minister. Schedule 3 cannot be said to align registered organisations and corporations as the Bill far exceeds the equivalent provisions in the *Corporations Act 2001* (Cth).

Declarations

Of particular concern is the number of declarations available under s 323. Section 323(4) is drafted in such a way that subsections (a) and (c) are predicated on 'multiple occasions' and 'repeatedly failed' respectively. However, subsection (b) simply lists 'misappropriated funds of the organisation or part' without any reference to frequency. Presumably, there is no requirement for the misappropriation of funds to occur any more than once to satisfy s 323(4)(b). We note that the list in s 323(4) is non-exhaustive.

Schedule 3 is constructed in such a way so as to potentially punish and immobilise an entire union, and its members, due to the singular indiscretion of one of its officers. It also means that newly elected officials will be burdened by prior officeholders' record. Unions are political entities and its committee of management is elected by rank and file members. A registered organisation does not cease to function effectively because of one its officer's misconduct, just in the same way as a political party does not cease to function effectively on account of one of its member's misconduct. Schedule 3 creates a standard aimed at unions that does not seem to apply equally to corporations or political parties, in whom members of the Australian community place their trust.

Section 323(3)(d)

Section 323(3)(d) is of particular concern as it is vague in its wording and boundless in its potential application. Every union has to juggle competing interests, particularly when representing diverse work groups with the same employer. From the perspective of the FAAA, this clause is particularly pertinent in the context of Qantas long haul cabin crew. There are two distinct work groups that operate aircraft together and are governed by the same Enterprise Agreement. These two groups have drastic differences in their terms and conditions of employment and base salaries. The Association is acutely aware of the competing priorities of these two work groups as, having recently completed enterprise agreement negotiations; we had to balance the interests of both groups. Section 323(3)(d) sets an impossible standard for unions to represent their diverse work groups and opens up unnecessary scrutiny for the fine balancing act that unions must undertake every day.

Similarly, s 323(3)(d) could also be read in the context of balancing collective and individual interests. Unions must simultaneously represent individual members whilst consistently striving for collective gains. The inclusion of 'a member' as well as a 'class of member' punitively exposes union decision-making.

Schedule 4: Public Interest Test for Amalgamations

In the second reading speech for the Bill, Christopher Pyne MP drew a parallel between the test applied by the ACCC when two companies seek to merge and the public interest test to be applied to the amalgamations of two or more organisations. However the proposed public interest test for registered organisations is far more stringent in its considerations than the test for companies seeking to merge.

Under schedule 4, the Federal Court will consider the registered organisation's record of complying with the law. Once again, ex-officers who never had any dealings with current office holders may prohibit any possible amalgamation for the new committee of management. A large number of changes can result from union elections and it is unacceptable that new elected officials will inherit a tarnished record to the point of completely immobilising a union trying to rebuild.

Conclusion

The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 is a politically-motivated, indiscreet weapon that seeks to destroy unions' ability to function. The Bill uses every opportunity to empower the Federal Court to make determinations to disqualify officers, cancel registration and impose criminal and civil sanctions. When unions are weighed down with regulatory hurdles and have to direct their resources towards litigation, their members suffers. In turn, working Australians who place their trust in their union to address the inherent power imbalance in their workplace will be left unrepresented. An attack on unions is also attack on union members.

The Flight Attendants' Association of Australia – International Division opposes the Bill in its entirety.