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Office of the President

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Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Our ref: KS-IL&CrLC

By email: eec.sen@aph.gov.au

Dear Committee Secretary

**Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019
[provisions]**

Thank you for the opportunity to provide comments on the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (**the bill**). Queensland Law Society appreciates being consulted on this proposed legislation.

This response has been compiled with the assistance of the Criminal Law and Industrial Law Committee who have substantial expertise in this area.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Background

We understand from the Explanatory Memorandum that the background to the bill is in response to recommendations 36, 37 and 38 of the Royal Commission into Trade Union Governance and Corruption (**the Royal Commission report**) which was delivered in December 2015. In particular, it proposes various amendments to the *Fair Work (Registered Organisations) Act 2009* (**the Act**), which currently provides for registration of employee and employer organisations in Australia.

We make the following comments in respect of the bill.

1. Schedule 1 and Section 223 Grounds for disqualification

We are concerned about the proposed grounds for disqualification, which are extremely broad. That is, the scope of grounds seems to include seemingly minor infractions with more serious criminal conduct.

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For example, 'Designated findings' in proposed section 9C includes a finding:

- (a) *in any criminal proceedings against a person—that the person has committed an offence against a designated law; or*
- (b) *in any civil proceedings against a person—that the person has contravened, or been involved in a contravention of:*
 - (i) *a civil penalty provision of this Act; or*
 - (ii) *a civil remedy provision of the Fair Work Act; or*
 - (iii) *a civil remedy provision of the Building and Construction Industry (Improving Productivity) Act 2016; or*
 - (iv) *a WHS civil penalty provision of the Work Health and Safety Act 2011; or*
 - (v) *a provision of a State or Territory OHS law (within the meaning of the Fair Work Act), other than an offence.*

Under proposed section 223 The Grounds for disqualification include:

Designated finding or contempt in relation to designated law

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

- (a) *a designated finding is made against the person;*

...

Not fit and proper

(6)

(e) *in any criminal proceedings against the person, the person is found to have:*

- (i) *engaged in conduct involving the intentional use of violence towards another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property; ...*

We are concerned that the current drafting of these provisions leaves it open to the possibility that a person could be acquitted, or have a hung jury yet still fall within the language of "found to have engaged in". For instance, a judge might make a finding of fact that an accused person committed an act of violence, but acquits them because they have raised a defence or because the proceeding ends for another reason. It would seem more appropriate that there should be a conviction before the disqualification provisions can be invoked.

Further, Recommendation 38 of the Royal Commission was that the Act be amended by inserting a new provision giving the Federal Court jurisdiction to disqualify a person from holding any office in a registered organisation for a period of time the court considers appropriate and that the court should be permitted to make such an order if the conditions set out in paragraph 190 (of the Royal Commission Report) are satisfied. We note in particular that the conditions recommended include:

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- where the person has been *at least twice* an officer of a registered organisation that has, or has been found to have, contravened a provision of the *Fair Work Act* (FW Act) or the Act;
- has, or has been found to have, *at least twice* contravened a provision of the FW Act or the FW (RO) Act.

The scope of behaviour captured by the proposed grounds for disqualification under the bill are wider than that recommended by the Royal Commission report. They may also overlap with existing disqualification provisions under the *Fair Work Act* and create uncertainty about the interaction between the relevant laws.

2. Cancellation of registration

Our concerns with respect to the broad scope of disqualification provisions are further compounded by:

- the extension of the class of persons who can make an application to the Federal Court to cancel the registration of an organisation to the Commissioner; and
- in this regard, the proposed change from a 'person interested' (Section 28(1) of the Act) to 'a person with a sufficient interest'.

Further, under the current Act, in considering an application for cancellation of registration, the Court must have regard to '*the degree of gravity of the matters constituting the ground and the action (if any) that has been taken by or against the organisation in relation to the matters*' (Section 28(3)(b)).

Proposed section 28J of the bill shifts the onus of proof to the organisation in this respect in stating:

(1) If an application is made under section 28 for cancellation of the registration of an organisation, the Federal Court must cancel the registration if:

- (a) the Court finds that a ground set out in the application is established; and*
- (b) the organisation does not satisfy the Court that it would be unjust to cancel its registration,..*

As there are significant implications for an organisation in cancelling registration, we submit that standing to make such applications should not be changed and that the court's discretion in these matters should remain as provided for in the Act. That said, we do not have any specific concerns with extending standing to the Commissioner. However, we do query whether the proposed change is in line with the subject recommendations of the Royal Commission report.

3. Section 226 Offences

Recommendation 37 of the Royal Commission was that the Act should be amended to make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold office and that it should be a strict liability with a maximum penalty of 100 penalty units or imprisonment for two years, or both.

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The scope of the proposed offences in section 226 are however, much wider. Proposed subsection (3) for example, extends to where the person “*exercises the capacity to significantly affect the financial standing or other affairs of an organisation or a part of an organisation*” or “*gives directions (not including advice given by the person in the proper performance of functions that relate to the person’s professional capacity) to the committee of management of an organisation or a part of an organisation*”.

We note the Explanatory Memorandum refers to a comparable offence in section 206A of the *Corporations Act 2001* and states that strict liability is “*appropriate in circumstances where the Federal Court has made an order disqualifying a person from holding office*” to provide a sufficient deterrent effect. In justifying the strict liability, the Memorandum asserts the fault element would “*unnecessarily weaken the deterrent effect of new sections 28M or 222*”.

Having regard to the ‘Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers’ (**Guide to Framing Commonwealth Offences**),¹ strict liability is “only appropriate in limited circumstances”.² This is to preserve proof of fault, a fundamental protection in criminal law.³

QLS does not agree with the proposed strict liability offences which are beyond the scope recommended by the Royal Commission and contrary to the right to the presumption of innocence. The proposed offences are punishable by imprisonment and therefore, in our view, require that proof of fault be preserved.

4. Section 323G Officers etc. to help administrator

With respect to ‘Part 2A – Dysfunctional organisations etc’, an administrator may be appointed by the Federal Court under proposed section 323 for an organisation or part of organisation as part of a remedial scheme.

We note in particular proposed section 323G(3) provides a strict liability penalty of 120 penalty units (\$16,026.00) for persons (including an officer or employee of an organisation under administration) who fails to comply with subsection (2) as follows:

(2) *The person must:*

- (a) *attend on the administrator at such times; and*
- (b) *give the administrator such information about the organisation’s or the part of the organisation’s business, property, affairs and financial circumstances; as the administrator reasonably requires.*

The Guide to Framing Commonwealth Offences provides some circumstances where application of strict or absolute liability are appropriate but that strict liability offences should not be applied where the penalty unit for an individual exceeds 60 penalty units.⁴ From the Explanatory Memorandum the justification for the offence is the “*similarities between the*

¹<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

² Note 1 at 22.

³ https://www.alrc.gov.au/publications/common-law-presumption#_ftn2

⁴ Note 1 at 24.

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regulation of the corporate governance of companies and registered organisations” noting the provision is modelled on existing section 438B of the *Corporations Act*. However, we note that existing section 438B applies only to company directors. The scope of proposed section 323G(3) is again, much wider, extending to officers or employees of an organisation.

QLS is of the view that while section 323G provides the defence of reasonable excuse the strict liability offence is not justified nor was it recommended by the Royal Commission. The Society notes that in the Scrutiny Digest, the Standing Committee for the Scrutiny of Bills also requested “*the minister’s more detailed justification for the application of strict liability*”⁵

QLS is of the view that strict liability offences undermine the protection afforded by the proof of fault and the proposed provision risks unfairness to the party (including an officer or employee of an organisation) who may become liable for a significant financial penalty.

5. 323H Rights to organisation’s books

We hold similar concerns with the strict liability provision proposed in section 323H(5) where a person commits an offence of strict liability if the person does not comply with a notice requiring the person to deliver to the administrator specified books that are in the person’s possession. We note the provision applies a higher penalty of 120 penalty units.

We repeat the concerns outlined at point 2 above that the proposed provision is not sufficiently justified and risks unfairness to the party who may become liable for the penalty.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team by phone on _____ or by email to _____.

Yours faithfully

Bill Potts
President

⁵ The Senate, 24 July 2019, Standing Committee for the Scrutiny of Bills, Scrutiny Digest 3 of 2019 at p 22.