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

About Professionals Australia

The Association of Professional Engineers, Scientists and Managers, Australia is a Registered Organisation pursuant to the Fair Work (Registered Organisations) Act 2009 (Cth) and trades as Professionals Australia.

The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (***'The EI Bill'***) has a direct impact upon Professionals Australia, its governance and its ability to democratically conduct its affairs.

Professionals Australia represents technical professionals in Australia. Professionals Australia represents approximately 24,000 members including professional engineers, scientists, managers, architects, contractors, consultants, translators and interpreters and more. Our members are employed throughout all levels of government and across the private sector. These members perform design, scoping and project management roles across essential industries and services in Australia, including road, rail, local government, information technology, water, power, construction and more.

Australian Council of Trade Unions Submissions

Professionals Australia fully supports the submissions made by the Australian Council of Trade Union to this committee in relation to the EI Bill.

Key Points

The key points of this submission are:

1. The EI Bill is undemocratic, inconsistent with ILO Conventions and allows undue political and industry interference in Registered Organisations;

2. The EI Bill is excessively expansive;

3. The EI Bill permits excessive interference in the administration of and amalgamation of organisations;

4. The EI Bill imposes a regime that is not of equivalence to that for corporations;

The EI Bill is undemocratic, inconsistent with ILO Conventions and allows undue political and industry interference in Registered Organisations

The EI Bill interferes with the right to freedom of association, the right to form and join trade unions and the right of trade unions to function freely. Article 23(4) of the UN Universal Declaration of Human Rights sets out the underlying principles for international law on fundamental rights in the workplace, and states that, 'Everyone has the right to form and to join trade unions for the protection of his interests.'

Article 22(1) of the *International Covenant on Civil and Political Rights* (**ICCPR**) protects the right to freedom of association, including the right to form and join trade unions. Article 8(1)(a) of the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**) also provides for:

> *The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of these rights other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.*

Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) (**ILO Convention 87**) also provides employer and employee organisations with protection for their organisational autonomy. Article 3 of ILO Convention 87 provides:

> 1. *Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*
>
> 2. *The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

The ILO Committee on Freedom of Association has made the following observations on the rights of organisations to organise their administration:

> *Legislative provisions which regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference by the public authorities.*
>
> *Where such provisions are deemed necessary by the public authorities, they should simply establish an overall framework in which the greatest possible autonomy is left to the organizations in their functioning and administration. Restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body so as to avoid any risk of excessive or arbitrary interference in the free functioning of organizations*[1].

The amendments proposed by the EI Bill, including in respect of disqualification of officers, cancellation of registration of organisations, allowing the imposition of an administrative scheme by the Federal Court (**Court**) and introducing a 'public interest' test for amalgamations of organisations, unduly interfere with the free and democratic functioning of organisations. These amendments are proposed despite ongoing criticism of Australia for failing to comply with its international obligations in respect of non-interference in industrial organisations[2]. The amendments are also contrary to Australian research which demonstrates that corrupt practices within unions are more effectively addressed by member participation and internal democracy than by state regulation[3].

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[1] *ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, Fifth (revised) Edition, 2006, para 369, as quoted in the Explanatory Memorandum to the Bill, p vii-viii.*

[2] *See, for eg, Professor Andrew Stewart's comments in* http://www.abc.net.au/news/2017-03-21/have-the-right-to-strike-laws-gone-too-far/8370980 .

[3] http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8543.2009.00736.x/abstract.

The EI Bill is excessively expansive

Disqualification regime

The EI Bill expands the regime for the disqualification of persons from holding office in a registered organisation. The Court may disqualify a person from holding office for the period it considers appropriate, if one of a specified list of grounds is made out and the Court does not consider that it would be unjust to disqualify the person. This formulation is different from the current regime[4], the *Corporations Act* 2001 (Cth) (**Corporations Act**) regime[5] and the regime recommended by the Hon John Dyson Heydon AC QC's Final Report of the Royal Commission into Trade Union Governance and Corruption (**Heydon Report**)[6], which empower the Court to make a disqualification order if a ground is made out and the order *is* justified. The formulation in the EI Bill has the practical effect of effectively shifting the onus onto the defendant to satisfy the Court why the order is unjust if a ground is made out.

The grounds on which the Court can make a disqualification order are more extensive than those proposed by the Heydon Report[7]. The 'fit and proper person' test in particular takes into account not only civil or criminal findings against the person but *any* event the Court considers relevant. Further, although the EI Bill does not permit the Court to have regard to events and conduct that occurred prior to the commencement of the Act in determining whether a ground is made out, because one of the grounds is the refusal of an entry permit, a refusal occurring after commencement but based on events and conduct occurring prior to commencement could effectively allow retrospectivity in certain cases.

An application for a disqualifying order can be brought by the Commissioner, the Minister or a 'person with sufficient interest'[8]. The latter could conceivably include an employer, employer organisation or even a business within the supply chain that is not in the relevant industry[9]. The disqualification regime recommended by the Heydon Report only gave standing to bring an application to the registered organisations regulator, which is the case in respect of the equivalent provisions of the Corporations Act[10]. There are no conditions on standing or the bringing of an application that could operate as safeguards against frivolous or vexatious claims[11]. Persons holding office could therefore be subject to significant burdensome litigation, which is a disincentive for members to participate in an organisation's democratic processes and stand for office[12].

In addition, the EI Bill creates a ground for automatic disqualification from holding office and makes it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold office or to act in a manner that influences the conduct of the organisation. In

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*[4] Section 307A, Fair Work (Registered Organisations) Act 2009 (Cth) (**RO Act**).*
[5] Sections 206C-206EEA, Corporations Act.
[6] Paragraph [190] of the Heydon Report.
[7] Recommendation 38 and paragraph [190] of the Heydon Report.
[8] Currently disqualification applications can only be brought by the Registered Organisations Commissioner, the General Manager, or a person authorised in writing by either: s 310(1), RO Act.
[9] However, the usual legal principles regarding 'sufficient interest' will likely apply. The Explanatory Memorandum notes at paragraph [33] that '"Sufficient interest" has been 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'.
[10] Sections 206C-206EEA, Corporations Act.
[11] See, for eg, s 237(2) of the Corporations Act, which deals with derivative actions commenced by a member or former member or officer of former officer of a company on behalf of a company. The Heydon Report recommended that derivative actions subject to such conditions be introduced into the Fair Work regime: Recommendation 33, paragraphs [157]-[161].
[12] Note that the Heydon Report suggested that the inability to recover costs to be a barrier to a member taking action in respect of an organisation: paragraphs [144]-[155].

accordance with the Heydon Report[13], the maximum penalty for that offence is 100 penalty units or two years imprisonment, or both – double the penalty in the equivalent provision of the Corporations Act[14].

The Explanatory Memorandum to the EI Bill claims that the 'limitations on the capacity of registered organisations to regulate their affairs as they see fit' contained in these amendments are necessary and proportionate because they have the objective of 'protecting the interests of members and guaranteeing public order by ensuring the leadership of registered organisations act lawfully'[15]. However, the interests of members are best protected by ensuring member-centred, democratic functioning of organisations[16]. 'Guaranteeing public order' is not a legitimate objective of legislative provisions which regulate in detail the internal functioning of workers' and employers' organisations[17] and is a legislative objective best achieved via policy and regulatory means better suited to that purpose than industrial law.

Regime for cancellation of registration and other intrusive orders

The EI Bill expands the grounds and regime for the cancellation of registered organisations. These amendments are not based on any recommendations of the Heydon Report. The Court must cancel registration if a ground is established and the organisation does not satisfy the Court that deregistration is unjust, having regard to various matters including the 'best interests' of the members. It is contrary to the free and democratic functioning of organisations that a Court – not even a specialist industrial court – determines what is in the best interests of the organisation's membership, with no requirement to hear from or take into consideration the views of the membership. Further, the Court can make alternative orders with far-reaching intrusion into the free functioning of an organisation, including: disqualification of certain officers; exclusion of certain members; restriction and control of the organisation's funds and property; and suspension of any rights, privileges and capacities of the organisation or members or part thereof, including the right to take protected industrial action and despite the organisation's own rules. The grounds for cancellation of registration or alternative orders include provisions which impose on officials of registered organisations, which may include workers holding a voluntary position in the governance structure of a union, standards of conduct that are imposed on staff members of law enforcement agencies such as the Australian Federal Police[18]. Standing to bring an application for cancellation of registration or alternative orders has been expanded to include the Commissioner and any other person with sufficient interest, which could conceivably include an employer organisation. These amendments impact significantly on the right of organisations and their members to self-determination and to manage their own affairs without political or industry interference. They potentially contravene Article 3 of ILO Convention 87.

The EI Bill permits excessive interference in the administration of and amalgamation of organisations

Imposition of administration on Registered Organisations

The EB Bill allows the Court to impose an administrative scheme on an organisation, including the appointment of an administrator and the holding of elections, and despite anything in the organisation's own rules. Again, these amendments are not based on any findings or recommendations of the Heydon Report. These amendments empower a Court to determine the interests of members rather than the members themselves, without regard to the views of the members. Again, an application for such orders

[13] *Recommendation 37 of the Heydon Report.*
[14] *Section 206A(1), Corporations Act.*
[15] *Explanatory Memorandum, p viii.*
[16] *See fn 3 above.*
[17] *See fn 1 above.*
[18] *Sections 28C(1)(a) to (c) are adapted from the definition of 'engages in corrupt conduct' in s 6(1) of the Law Enforcement Integrity Commissioner Act 2006 (Cth): Explanatory Memorandum, paragraph [98].*

can be brought by the Minister, the Commissioner, or any other person with sufficient interest. Again, the amendments potentially contravene Article 3 of ILO Convention 87, as discussed above.

Interference in amalgamation of Registered Organisations

The EI Bill requires the Fair Work Commission to impose a 'public interest test' on applications for amalgamation of organisations and forbids the FW Commission from allowing an amalgamation if the test is not met. The FW Commission is afforded little discretion in determining whether an organisation has a record of not complying with the law, which is an automatic 'fail' on the test. In so determining, the FW Commission must have regard to any 'compliance record events' involving the organisation, members or officers, including if the organisation or part or class of members thereof has engaged in certain types of unprotected industrial action – even if there has been no judicial finding to that effect. A finding that an officer or particular branch of an organisation or class of members engaged in 'obstructive industrial action' is relevant to the FW Commission's overall decision about the whole of the organisation[19]. The FW Commission must also determine whether the amalgamation is in the public interest having regard to the impact it is likely to have on employees or employers in the industry or industries concerned and any other matters it considers relevant. The Bill therefore imposes an external 'merit' requirement focussed on economic considerations and the commercial interests of industry and employers onto what is currently, and rightly, a simple procedural process to give effect to the wishes of the respective organisations' members as expressed in a democratic ballot conducted by the Australian Electoral Commission. The decision on the public interest must be made by the Full Bench of the FW Commission, which means that an aggrieved organisation cannot access a merits review of the tribunal's decision. Challenge of the decision is restricted to judicial review, which is only available on limited grounds and is costly and time consuming.

Critically, the EI Bill confers a statutory right to be heard in respect of the public interest test on a range of parties who may not otherwise meet the 'sufficient interest' test ordinarily applied in a tribunal (and in the balance of the EI Bill), including the Commissioner, various Ministers and organisations who are not within the relevant industry but 'that might otherwise be affected'. Further, the two-stage hearing process for the public interest test, in which the FW Commission is required to have regard to submissions from potentially a broad range of parties, is burdensome and time consuming. The amendments therefore allow significant regulatory, political and industry interference in the free and democratic functioning of organisations.

As noted above, the ILO Committee on Freedom of Association has said that restrictions on the organisational autonomy of organisations 'should have the *sole* objective of protecting the interests of members and guaranteeing the democratic functioning of organizations'[20]. Even the Explanatory Memorandum to the EI Bill does not pretend that these amendments are directed to that purpose, but instead cites economic justifications[21].

The EI Bill imposes a regime that is not of equivalence to that for corporations

The EI Bill describes the expanded disqualification regime as 'consistent with community standards', saying, 'If a company director breaks the law they can be disqualified by a court from running a corporation'. However, the laws are not equivalent.

The disqualification regime recommended by the Hon John Dyson Heydon AC QC's Final Report of the Royal Commission into Trade Union Governance and Corruption (**Heydon Report**) only gave

[19] *Explanatory Memorandum, paragraph [236]*.
[20] ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, Fifth (revised) Edition, 2006, para 369, as quoted in the Explanatory Memorandum to the Bill, p vii-viii, (emphasis added).
[21] Explanatory Memorandum, p *x*.

standing to bring an application for a disqualifying order to the registered organisations regulator[22], which is the case in respect of the equivalent provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**)[23]. Yet under the EI Bill, an application can be brought by the Commissioner, the Minister or a 'person with sufficient interest'[24]. There are no conditions on standing or the bringing of an application that could operate as safeguards against frivolous or vexatious claims[25].

The grounds for disqualification from holding office in a registered organisation in the EI Bill are arguably broader than the grounds for disqualification of company directors[26], including because of the 'fit and proper person' test which allows the Federal Court (**Court**) to take into account 'any event' the Court considers relevant. The formulation in the EI Bill has the practical effect of effectively shifting the 'onus' onto the defendant to satisfy the Court why the order is unjust if a ground is made out.

The penalty for the offence of a disqualified person continuing to hold office or influence a registered organisation is *double* that in the equivalent provision of the Corporations Act[27]. There is no evidence of an extant problem that the amendment or increased penalty seeks to address. Under the Corporations Act, the regulator or the Court may give a disqualified person permission or leave to continue to manage a company, subject to conditions or exceptions[28]. The equivalent provisions in the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) are narrower[29].

Cancellation of registration not equivalent to winding up of companies

The Second Reading speech for the EI Bill says that the new cancellation regime 'applies a consistent standard. The new grounds for cancellation are modelled on similar power relating to the winding up of companies'. However, the regime for the cancellation of registration of an organisation contained in the EI Bill is far more expansive than the regime for the winding up of companies in the Corporations Act. Further, the amendments regarding cancellation of registration were not recommended by the Heydon Report. There is no policy explanation for why they are appropriate or evidence of any extant policy issue that they address.

The EI Bill introduces new grounds for cancellation of registration pertaining to conduct of officers that are based on conduct grounds contained in the Corporations Act, but which go far beyond the Corporations Act[30]. In fact, only the grounds in new sections 28C(1)(d) and (e) are equivalent[31]. The grounds in new sections 28C(1)(a) to (c) impose on officers of organisations, which may include workers holding a voluntary position in the governance structure of a union, standards of conduct that adapted from standards imposed on staff members of law enforcement agencies such as the Australian Federal Police[32]. These standards are not imposed on company directors.

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[22] *Recommendation 38.*
[23] *Sections 206C-206EEA of the Corporations Act. See, also, s 12GLD of the Australian Securities and Investments Commission Act 2001 (Cth) (**ASIC Act**); s 86E and s 248 of Schedule 2 of the Competition and Consumer Act 2010 (Cth) (**CC Act**) (s 86E(1A) of the CC Act allows the Director of Public Prosecutions to bring an application for a disqualifying order).*
[24] *Currently disqualification applications can only be brought by the Registered Organisations Commissioner, the General Manager, or a person authorised in writing by either: s 310(1), RO Act.*
[25] *See, for eg, s 237(2) of the Corporations Act, which deals with derivative actions commenced by a member or former member or officer of former officer of a company on behalf of a company.*
[26] *Sections 206C-206F of the Corporations Act; s 12GLD of the ASIC Act; s 86E and s 248 of Schedule 2 of the CC Act.*
[27] *Section 206A of the Corporations Act; s 226 of the Bill.*
[28] *Sections 206F(5) and 206G.*
[29] *Sections 216 and 217.*
[30] *New section 28C.*
[31] *To s 461(1)(e) and (f) of the Corporations Act.*

[32] *Section 6(1) of the Law Enforcement Integrity Commissioner Act 2006 (Cth).*

Standing to apply for the winding up of a company is generally limited to the company, a creditor, a contributory, a director, a liquidator or the regulator[33]. In contrast, the EI Bill gives standing to apply for cancellation of an organisation's registration not only to the regulator but also to the Minister or any person with sufficient interest, which conceivably could include another union or an employer organisation.

Imposed administration of organisations not equivalent to administration of companies

The EI Bill significantly expands the existing regime for administration of 'dysfunctional' organisations. According to the Explanatory Memorandum, these amendments are 'modelled and adapted from broadly equivalent provisions of the Corporations Act'[34]. However, organisations and corporations are not equivalent organisations. Further, the provisions are not true to the Corporations Act in any event.

First, the free and democratic functioning of unions and employer organisations without regulatory, political or industry interference is recognised in international law[35]. Australian research has demonstrated that corrupt practices within unions are more effectively addressed by member participation and internal democracy than by state regulation[36].

Second, under the EI Bill the Court has a broad power as to the remedial scheme that can be imposed on an organisation, which can include reports to be given to the Court and the holding of elections.

Third, the grounds in the EI Bill on which a remedial scheme can be ordered are broader than the grounds for the appointment of an administrator under the Corporations Act. The grounds for the appointment of an administrator under the Corporations Act are limited to insolvency and enforceable security interests[37]. The grounds under the EI Bill include: the organisation or a part has ceased to function effectively, including having regard to contraventions of certain laws, misappropriation of funds and repeated failure of officers to fulfil their duties; financial misconduct by officers; officers acting in their own interests; and the affairs of an organisation or part being conducted in a prejudicial or discriminatory manner. The Explanatory Memorandum to the EI Bill claims that two of these grounds are adapted from the Corporations Act[38], but those provisions of the Corporations Act ground the winding up of a company, not the appointment of an administrator[39]. Under the EI Bill, they can ground the cancellation of registration of an organisation, the alternative orders discussed above and the imposition of a remedial scheme including the appointment of an administrator.

Fourth, under the Corporations Act, an administrator can only be appointed by a liquidator, a secured party or the company itself[40]. Under the EI Bill, the Court can order a remedial scheme on application by the organisation, a member, the Commissioner, the Minister or a person with sufficient interest.

Public interest test for amalgamations not equivalent to competition test for company mergers

The Second Reading speech for the EI Bill claims that the competition test applied to companies seeking to merge is like a public interest test, similar to the public interest test that the EI Bill imposes on organisations seeking to amalgamate. The Second Reading speech complains that, 'Currently, the Fair

[33] *Sections 459P, 462 and 464 of the Corporations Act.*
[34] *Paragraph [155].*
[35] *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), Article 3, discussed further below.*
[36] http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8543.2009.00736.x/abstract
[37] *Sections 436A to 436C.*
[38] *Paragraph [164].*
[39] *Sections 461(1)(e) and (f) of the Corporations Act.*
[40] *Sections 436A to 436C.*

Work Commission has very limited ability to do anything other than effectively rubber stamp a merger approved by just a bare majority of members'. These claims are problematic for several reasons.

First, the free and democratic functioning of unions and employer organisations is enshrined in international law[41].

Second, the competition test imposed on company mergers only takes into account whether the merger would have the effect of 'substantially lessening competition in any market'[42]. The public interest test that the EI Bill imposes on organisations takes into account the organisations' 'record of complying with the law' as well as 'the impact on' employers and employees in the industry or industries concerned. The latter is far broader than the competition test. The former has no equivalent.

Third, under the EI Bill, organisations wishing to amalgamate are required to undergo a burdensome two-stage hearing process in which notice of the hearings must be published widely and the Fair Work Commission must have regard to submissions from a wide range of parties given a statutory right to be heard. If the Fair Work Commission finds that the amalgamation is not in the public interest, the organisations have no access to a merit review but are restricted to judicial review.

Yours sincerely

Chris Walton, CEO
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[41] *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), Article 3.*
[42] *Section 50 of the CC Act.*