Australian Chamber of Commerce and Industry
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4 October 2019

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

Dear Committee Secretariat

Please see below the Australian Chamber of Commerce and Industry's (ACCI) response to questions on notice arising from our appearance in Melbourne on 20 September 2019 in relation to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019.

Question

Senator O'NEILL: Your submission regarding the bill matches some of the rhetoric and, I think, the incorrect information that was in your opening statement. You say that it increases the powers of the Federal Court to disqualify officials of a registered organisation for repeated breaches of workplace laws. Which of the grounds in schedule 1 require repeated breaches?

Senator O'NEILL: Are there 'repeated' breaches in schedule 1?

CHAIR: Perhaps you could take that on notice, just looking at the time

Senator O'NEILL: Can you take that on notice for schedule 2, because you continue to say 'repeated law breaking', whereas the law actually states single events? So that is at odds with the facts that are in the bill, and I think it discredits you opening statement today.

Response from ACCI:

ACCI's opening statement made the following reference to "repeated":

> *Australians have shown incredible patience in the face of repeated failures by registered organisations and their officials to adhere to our industrial and criminal laws. Repeat offenders have for a large part repeatedly outsmarted numerous attempts to clamp down on behaviour that is illegal, damaging and reprehensible.*

ACCI's submission made the following references to "repeated":

> *Provide a discretionary regime that allows the Federal Court to disqualify officials from holding office in certain prescribed circumstances, including for contraventions of a range of 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 (page 1)*

> *There should be no room in our workplace relations system for industrial organisations and individuals associated with them who repeatedly flout the law,*

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> *misappropriate member funds, or put their own interests ahead of their members. (Page 2)*
> *Accept that officials of registered organisations can hold office despite deliberately / knowingly contravening 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. (Page 3)*
>
> *These are sensible amendments that respond to circumstances brought before the Royal Commission which give rise to anomalous outcomes, including for example circumstances where officials: repeatedly act in contravention of the Fair Work Act, particularly the provisions that relate to right of entry. (Page 13)*
>
> *The ability to make an application for disqualification for multiple findings also responds to the Royal Commission's concerns regarding officers of organisations who repeatedly contravene civil remedy provisions of the Fair Work Act, Registered Organisations Act and court orders in relation to such provisions as per the examples from the building and construction industry detailed in Chapter 8 of Volume 5 of its Final Report. (Page 14)*
>
> *As noted earlier in this submission, we do not aspire for these powers to be widely used. However there needs to be a stronger ultimate response available to address circumstances where a registered organisation repeatedly and wilfully breaches the law or fails to put their interests of their members first. (Page 25)*
>
> *Proposed new s.323(4) seeks to clarify the circumstances in which an organisation or a part of an organisation may be found by the Federal Court to have ceased to function effectively, including where the Court is satisfied that officers of the organisation have: a. On multiple occasions, contravened designated laws. b. Misappropriated funds of the organisation or part. c. Otherwise repeatedly failed to fulfil their duties as officers or the organisation of part of the organisation. (Page 27)*

These references in both ACCI's open statement and its submission to "repeated law breaking" were made in order to evidence the need for the Ensuring Integrity Bill, due in part to repeated contravention of the law, as evidenced in numerous royal commissions and in numerous judgements handed down against officials and organisations for breaches of industrial laws, rather than as any kind of assessment of the operation of a particular section or Schedule of the Ensuring Integrity Bill.

ACCI argued that the policy justification for these amendments is a clear pattern of repeated unlawful conduct. We did not argue as Senator O'Neill seems to have concluded that the operation of the legislation as amended would require any particular pattern of repeated conduct. ACCI did not argue that the rationale for legislative amendments and the operation of amended legislation should be blurred or converge, as seems to be the premise of the question.

In particular the use of term “repeated failures” in ACCI’s opening statement was a reference to the record of repeated non-compliance with our industrial laws by the CFMMEU.

Schedule 2 of the Bill does in fact have the benefit of introducing a meaningful consequence for organisations who have engaged in repeated conduct.

In this respect, we also wish to draw the Committee’s attention to comments from the judiciary which demonstrate and reinforce the submissions of ACCI in both our opening statement and submission in respect of “repeated” conduct/behaviour/breaches etc.

- Justice Bromberg in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCA 957 stated:

  > "*An organisation faced with a litany of contraventions over an extended period of time, which repeatedly incurs not only significant financial penalties but also pointed judicial criticism, would necessarily put in place measures to change the cultural or normative conduct and the contravening behaviours of its officers and employees. Unless, of course, the senior leadership of the organisation, or the relevant branch or division thereof, condones such behaviour. I am satisfied that that is the position of the senior leadership responsible for the in Victoria*."

- Justice Bromberg in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Laverton North and Cheltenham Premises Case) (No 2)* [2019] FCA 973 stated:

  > “*The CFMMEU, and in particular the Divisional Branch, has an appallingly long history of prior contraventions of industrial laws. The Commissioner relied on a document setting out that prior history, the accuracy of which was not challenged by the CFMMEU. The Commissioner’s analysis shows that the CFMMEU has regularly been involved in the contravention of provisions of the FW Act or the BCCII Act which have attracted pecuniary penalties. The document shows that the CFMMEU has been ordered to pay very significant penalties in relation to those contraventions including many very close to (or at) the maximum available penalty. The document and the updating of it, records over 140 proceedings in which penalties for contraventions of industrial laws dating back to 1999 were imposed. Many if not most of those cases involve multiple contraventions. Over 100 of those cases deal with contraventions that occurred prior to the contraventions here being dealt with. It appears that around 65 of the cases involved the Divisional Branch and around 55 of those cases concerned multiple prior contraventions which occurred prior to the instant contraventions. There can be no doubt that the CFMMEU, through the Divisional Branch, has a significant antecedent history of prior contravening conduct which supports the need for deterrence, particularly specific deterrence. That consideration must loom large in the fixation of appropriate penalties. The CFMMEU’s history of prior contraventions demonstrates a compelling need for specific deterrence. General deterrence is also a matter of significance.*

> *….. there is no evidence before me of the CFMMEU taking any compliance action to counsel, educate or inform MacDonald or Long in order to prevent the reoccurrence of contravening conduct by them in the future. Nor is there any evidence before me of any compliance regime ever put in place by the CFMMEU to address its long history of prior contraventions*.

- Justice Bromberg in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union ("Cardigan St Case")* [2018] FCA 957 stated:

> *[a]n organisation faced with a litany of contraventions over an extended period of time, which repeatedly incurs not only significant financial penalties but also pointed judicial criticism, would necessarily put in place measures to change the cultural or normative conduct of the contravening behaviours of its officers and employees. Unless, of course, the senior leadership of the [CFMMEU] …condones such behaviour. I have satisfied that that is the position of the senior leadership …in Victoria."*

- Justice Vasta in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 1269 stated:

> *"If a Court has dealt with an employer who has contravened the FW Act in an appropriate manner, the use of the pecuniary penalty has deterred that employer from breaching the FW Act again. Very rarely has the FWO, or a union, had to bring a recalcitrant employer back to the Court for breaching the FW Act a second time. But this cannot be said of the CFMEU. The deterrent aspect of the pecuniary penalty system is not having the desired effect. The CFMEU has not changed its attitude in any meaningful way. The Court can only impose the maximum penalty in an attempt to fulfil its duty and deter the CFMEU from acting in the nefarious way in which it does. If I could have imposed a greater penalty for these contraventions, I most certainly would have done so."*

- Justice Rangiah in *Australian Building and Construction Commissioner v Pauls* [2017] FCA 843 stated:

> *"The CFMEU has a very extensive history of contraventions of industrial laws"*
>
> *"The Courts have repeatedly emphasised the need for not only general deterrence, but specific deterrence of the CFMEU's conduct. The previous contraventions justify higher penalties than might otherwise have been imposed."*

- Justice Jarrett in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Anor* [2016] FCCA 3265 stated:

> *"The CFMEU does have an egregious record of repeated and wilful contraventions of all manner of industrial laws, and I accept that the penalty to be imposed in this case should reflect that record and be more severe*

> *than it would have been if it had no or limited adverse record. The penalty, nonetheless must be proportionate to the gravity of the contravention.*

- Justice Logan in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126 stated:

> *To view the conduct of the CFMEU on 10 February 2015 in isolation from the past and to penalise on the basis that there have been worse cases is to fail to recognise that the conduct is but a further manifestation of a lengthy and repeated pattern of unrepentant, outlaw behaviour by the CFMEU.*

Additional Questions on Notice

We thank the Committee for the additional "questions on notice from Senator Sheldon" sent via email on 27 September 2019.

(a) Can the witness please provide a complete list of their State and Territory and any other member organisations, and a complete list of the affiliates to those State/Territory and member organisations.

ACCI refers to page 48 of its submission. ACCI member organisations are listed here.

ACCI has no affiliates[1]. We do not understand individual Australian businesses "affiliate" to the Chambers of Commerce and Industry Associations that are ACCI members.

(b) Can the witness please provide an update from their State and Territory member organisations of any and all breeches of the Fair Work Act by their affiliated organisations and any and all contraventions of laws related to Occupational Health and Safety laws, sham contracting laws, security of payment laws – for the past 2 years to August 2019.

ACCI refers to the answer provided during the Melbourne hearing on 20 September 2019, the status of this answer to the best of our knowledge has not changed since this evidence was provided.

(c) Can the witness please provide a list of all affiliates to member organisations who have participated in the construction of buildings that have flammable cladding and/or were constructed with asbestos or a building that contains prohibited imports.

ACCI has no affiliates and we do not understand individual Australian businesses "affiliate" to the Chambers of Commerce and Industry Associations that are ACCI members.

In addition and with respect, the matters queried are not relevant to the Bill under review by the Committee and such information would not be maintained by representative organisations.

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[1] *Income Tax Assessment Act* 1997, 328.130

(d) Can the witness please provide a list of all organisations affiliated to members organisations who have engaged in underpayment of wages and/or superannuation, or theft of wages and/or superannuation in the past two years to August 2019.

ACCI has no affiliates and we do not understand individual Australian businesses "affiliate" to the Chambers of Commerce and Industry Associations that are ACCI members.

(e) Can the witness inform the Inquiry if Gerry Hanssen has worked, at any time, for any members or affiliated to members, or if a business or subsidiary managed by him is an affiliate of any member of the witness. If this is the case can the witness inform the inquiry of the name of this organisation or organisations.

ACCI has no affiliates[2] and we do not understand individual Australian businesses "affiliate" to the Chambers of Commerce and Industry Associations that are ACCI members.

ACCI is not aware of which Gerry Hanssen the question refers to. However, if the question relates to the same person regarding whom questions were directed to Master Builders Australia and Housing Industry Association on 12 September 2019, then we refer to their responses already provided.

Yours sincerely

Scott Barklamb
Director, Workplace Relations

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[2] *Income Tax Assessment Act 1997*, 328.130