SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

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

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Biography

I am a professor of employment relations in the University of Sydney Business School. For more than twenty years I have researched in the fields of historical and contemporary unionism and industrial relations. I am the author of several books. My work has also been published in international refereed journals as well as in trade papers and other media.

Introduction

My concerns about the Bill stem chiefly from the fact that the proposed amendments are animated by a fundamental misreading of the nature and purpose of unions.

The origins of this problem with the Bill lie in the orientation of the Royal Commission into Trade Union Governance and Corruption which seems to define unions as little more than bargaining agents. This is complicated by the fact that the Bill's EM shares this view but at the same time also seeks to equate unions with corporations. That is problematical in itself and it contradicts the equally problematical argument that unions are merely servicing bodies.

There are, then, several underlying flaws arising from these approaches:

i. So narrow a definition of unionism completely misses the breadth of union activities. In other words, the definition does not match the realities of unionism.
ii. The Bill then seeks to subordinate even this narrow view of union purpose to a so-called 'public interest', most notably in relation to the proposed amalgamation of the CFMEU, MUA and TCFUA.
iii. The analogies drawn between unions and corporations are simply not tenable.

Any policy – and particular legislative amendments – built on these foundations must necessarily be imperfect.

I therefore suggest that the amendments be rejected in their entirety.

Union purpose

I begin by comparing the broad spirit of the proposed amendments and their particular attempt to corral the would-be merger unions under the 'public interest' with a well-regarded scholarly statement about unions:

> The first and over-riding responsibility of all trade unions is to the welfare of their own members. That is their primary commitment; not to a firm, not to an industry, not to the nation. A union collects its members' contributions and demands their loyalty specifically for the purpose of protecting their interests *as they see them*, not their alleged 'true' or 'best' interests as defined by others.[1]

The author of this assessment was Professor Allan Flanders, a leading British researcher during the hey-day of unionism in the English-speaking world, the three decades after World War Two. He was also an active policy-maker, engaged in the reconstitution of German industrial relations after 1945 and in inquiries into British industrial relations from the 1960s.

His position was 'classic pluralism': based on the assumption that representative bodies compete and combine with each other to pursue their interests and in, so doing, help to sustain democratic societies. To be clear: he was no militant. He went on to state that just as businesses should not seek to define union members' interests, neither should political radicals.

To build on this, then: it is not for parliaments, far less employers or employer associations, to decide how union members' organisations should be structured. Employers have their own capacities and organisations to address these matters in the field of industrial relations itself. The 'public interest' therefore emerges from these exchanges: it is not imposed on parties by governments.

Flanders' view of union purpose and, with that, of the nature of industrial relations regulation may be fairly taken as the mainstream view for most of 20th century Australia, one commensurate with relatively high and equal living standards.

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[1] A. Flanders, *Management and Unions: The Theory and Reform of Industrial Relations*, Faber, London, 1975, p. 40. My emphasis.

To this analysis must be added a consideration of the international regulatory bodies and charters which today seek to give effect to these kinds of understandings of unionism. The International Labour Organization (ILO) sees *effective* (that is, not merely notional) freedom of association as a human right. Its Convention 87, *Freedom of Association and Protection of the Right to Organise* (1948) sets out employees' rights to form and join *independent* union organisations and argues that national governments have a responsibility to facilitate this process. This convention was ratified by the Australian government in 1973 along with Convention 98, the *Right to Organise and Collective Bargaining* (1949) which sets out the rights of employees to collective bargaining and encourages countries to establish mechanisms to ensure that employees are protected against anti-union activities. In Australia, a number of judicial decisions, as well as recent legislative interventions, have arguably undermined these rights in practice, as have restrictions on the right to strike.

It can be readily understood that the ILO does not see unions as akin to corporations. Nor do decades of labour law in dozens of countries support this way of seeing unions. Nor indeed does the best part of two centuries of union history. I might add that there is a further inconsistency here: the amendments appear to propose constraints on unions which are not in fact imposed on corporations.

My central concern, however, is with the erroneous thinking around unions as corporations and unions as mere service providers. The two problems can, as it happens, be addressed as one. Researchers have characterised unions as, variously, political bodies, as agents of labour market regulation, or as 'social partners', or combinations thereof.[2] Other typologies have characterised unions as chiefly regulatory or representative bodies.[3] At various times, union members themselves have engaged in profound debates over, for example, what role unions could play in the struggles against apartheid or in support of independence movements or anti-war campaigns. Closer to home, many unions have played important roles in struggles for women's rights, Indigenous empowerment and the like. In all these arguments, there was often little common ground, except one: it never occurred to any of the participants that they were acting as members of a corporation.

[2] Most thoroughly in R. Hyman, *Understanding European Trade Unionism: Between Market, Class & Society*, Sage Publications, London, 2001.

[3] See among many, K. Ewing, 'The Function of Trade Unions', 34 *Industrial Law Journal* 1 (2005), p. 13.

To state what should be obvious: unions do not exist without members; they are of and from the members; they are associations whose purpose is in various ways to define and defend the interest of those members and, at times, other people. Union members are not shareholders; the measures of union success are not dividends and profits.

The proposed amendments

I do not wish to comment on the full range of proposed changes but, instead, I offer some observations about how the flaws underpinning the Bill play out in some of the amendments.

Schedule One deals with 'disqualification from office' and – apart from leaving the reader wondering what is the genuine problem to which this is an answer – is worrying in two ways. First, it makes the operations of a union both inefficient and *less* democratic (and holding office less attractive) by opening the door for vexatious claims against office-holders and allowing the Minister direct intervention in such matters. To say that no such process occurs in the regulation of corporations is perhaps too obvious a point to make. The more important matter is that this scope for *political* intervention is a threat to the independence of unions.

In Schedule Two, it is proposed, in effect, that deregistration of unions or their branches be made easier. This is couched in terms of the member's interests' and so takes us directly back to Flanders and, with that, most international understandings of how unions operate. That a court would decide upon those interests is antithetical to the logic and processes of the voluntary, democratic organisations which, at base, unions are.

Among the stated causes for concern in framing these amendments is the claim that the taking of unlawful industrial action gives cause for consideration of deregistration. This matter cannot be considered in isolation from the provisions in the *Fair Work Act* for protected industrial action. Like its immediate predecessor Acts, this legislation imposes such constraints on industrial action that the right to strike is seriously diminished. The processes for taking such action are cumbersome in form, labyrinthine in detail and extremely difficult to to work through in practice. These concerns are well documented, not least in the ILO which has consistently criticised both of Australia's major political parties for being at odds, to put it mildly, with our international obligations around the right to strike.

For the purposes of assessing the ‘Ensuring Integrity’ Bill, my concern about industrial action is that the scope for unions to be charged with taking unlawful action is so wide that the seemingly bland formulations that allow for deregistration assume much more importance. In short, poor policy in one field, covering industrial action, begets poor policy proposals in another, covering registered organisations themselves.

Likewise, amendments that would make it easier for the claims of disgruntled members to be taken into account by regulatory bodies have a veneer of reasonableness but are unworldly and unworkable, allowing for mischief-making within organisations while misreading how unions actually operate. Unions are constantly engaged not just in external negotiations but in internal ones as they seek to balance the interests of members. This very democracy will at times disappoint some members: but this is because unions are doing their job, not because they are ‘dysfunctional’. These are not grounds upon which to encourage litigation.

Finally, Schedule Four: this goes beyond the initial concerns in these policy debates to focus, it seems, on the amalgamation of the CFMEU, MUA and TCFUA. A number of assertions which are not valid have been made, notably that the Fair Work Commission is merely a rubber stamp (Second Reading Speech). At the same time, the ILO’s insistence on the autonomy of unions is simply ignored. Contemplating that the amalgamation be reversed after it has been approved by a ballot of the organisations’ membership is quite extraordinary.

Concluding remarks

In examining the *Ensuring Integrity Bill*, it is clear that its foundational rationales about the nature of unions are misplaced; they also open Australia up to scrutiny from international regulatory bodies. Further, they are contradictory – seeing unions as merely bargaining agents and yet also as analogous to corporations – and likely self-defeating. If better governance is the aim, there are any number of measures here that are likely to have the reverse impact.

The apparent obsession with preventing one particular union merger brings many of these concerns together. So confused are the arguments for interfering with this amalgamation that one can really only attribute the proposals to an obsession with these ‘militant’ unions rather than balanced policy. The two major unions involved, it should be remembered, operate in industries which, around the world are recognised as intensely competitive and dangerous. Demonising unions does not make for good policy.