NATIONAL UNION OF WORKERS

SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE ON THE FAIR WORK (REGISTERED ORGANISATIONS) AMENDMENT (ENSURING INTEGRITY) BILL 2017

Background

The National Union of Workers (**NUW**) is a registered employee organisation under the *Fair Work (Registered Organisations) Act 2009* (**the Act**).

The NUW represents over 60,000 workers in range of industries including warehousing & distribution, cold storage, fresh food, poultry, dairy, food manufacturing, general manufacturing, food services, market research & call centres, pharmaceuticals and defence support & logistics.

Summary

The *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* (**the Bill**) seeks to introduce new provisions that would apply to registered organisations and officers of organisations in four key respects:

- Disqualification from office (Schedule 1);
- Cancellation of registration and alternative orders (Schedule 2);
- Administration of dysfunctional organisations (Schedule 3);
- Public interest test for amalgamations (Schedule 4).

The NUW holds concerns as to each aspect of the proposed legislation.

In making this submission the NUW has elected, albeit briefly, to focus on that part of the legislation that seeks to introduce new tests and processes for determining whether or not an amalgamation of two or more registered organisations should be allowed to proceed. (Schedule 4).

The NUW understands that the Australian Council of Trade Unions (**ACTU**) has made submissions on the totality of the Bill – the NUW supports those submissions.

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Submissions – Schedule 4 – Public Interest Test for Amalgamations

The Second Reading speech for the 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 Bill imposes on organisations seeking to amalgamate.

The Second Reading speech complains that, '*Currently, the Fair 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.

The *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)* (**ILO Convention 87**) affords 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 organisations. 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] (emphasis added)

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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*.

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Even the Explanatory Memorandum to the Bill does not pretend that these amendments are directed to that purpose, but instead cites economic justifications. At paragraph 232 it states:

> *'Subsection 72D (4) makes it clear that the FWC may have regard to other matters it considers relevant when determining whether the amalgamation is in the public interest. Other relevant matters could include the likely impact upon the industry or industries concerned or the economy or an important part of it.'*

That the Act currently provides for a simple procedural process for amalgamations to give effect to the wishes of the respective organisations' members, as expressed in a ballot conducted by the Australian Electoral Commission, is entirely appropriate and in accordance with international law. Change is unnecessary and no objective case for change has been made out.

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'*.[2]

The public interest test that the 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.

Corporations can have a record of not complying with the law and not be prevented from merging. It goes without saying that the competition issues that the mergers test for corporations addresses, such as consumer choice and price fixing, are irrelevant to the amalgamation of registered organisations.

Third, under the Bill, organisations wishing to amalgamate are required to undergo a burdensome two-stage hearing process in which notice of the hearings must be published and the Fair Work Commission (**FWC**) must have regard to submissions from a wide range of parties given a statutory right to be heard.

If the FWC 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, which is expensive, time consuming and only available on limited grounds.

Under the *Competition and Consumer Act 2010* (Cth), merger parties can choose from three avenues to have a merger considered and assessed:

- the Australian Competition and Consumer Commission (**ACCC**) can assess the merger on an informal basis;

[2] Section 50 of the CC Act

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- the ACCC can assess an application for formal clearance of a merger; or:

- the Australian Competition Tribunal can assess an application for authorisation of a merger.

The Bill represents an excessive interference in the proposed amalgamation of organisations.

The Bill requires the FWC to impose a '*public interest test*' on applications for amalgamation of organisations and forbids the FWC from allowing an amalgamation if the test is not met.

Under the proposed legislation the tribunal 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 FWC 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 tribunal's overall decision about the whole of the organisation. No discretion is afforded to the tribunal in this regard.

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The FWC 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 focused 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 properly conducted and independent ballot.

Critically, the 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 including persons and organisations who are not within the relevant industry but '*that might otherwise be affected*'.

For example, this could conceivably include another registered organisation that represents the industrial interests of employees or employers in an industry or calling separate from those of the entities seeking to amalgamate.

Further, the two-stage hearing process for the public interest test, in which it is a requirement to have regard to submissions from a potentially 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.

These amendments are not based on any findings or recommendations of the Heydon Report and are self-evidently targeted at the political purpose of preventing amalgamations such as the current amalgamation between the CFMEU, MUA and TCFUA.

Being the only amendments in the Bill that apply retrospectively, is further evidence of the narrow and immediate political motivation of these amendments to frustrate and prevent amalgamations presently underway.

Conclusion

Having regard to the above the NUW submits that it would be improper and inappropriate for the legislature to impose upon registered organisations a test that is at odds with our international obligations.

Further any procedure associated with public hearings where two or more registered organisations seek to amalgamate should not be burdensome and should limit its enquiry to those directly and properly effected by any proposed amalgamation. It should not be open to all and sundry to seek to be heard, let alone object to two organisations seeking to restructure themselves.

Such processes are open to vexatious and abusive interventions that may well be motivated by illegitimate or scurrilous agendas rather than a general advancement of the objects of the Act.