Ai GROUP SUBMISSION

Senate Education and Employment Legislation Committee

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

27 August 2019

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

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Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee's (**Committee**) inquiry into the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (**Bill** and **2019 Bill**).

The Bill would make important amendments to the *Fair Work (Registered Organisations) Act 2009* (**RO Act**).

As a registered organisation under the RO Act, Ai Group is well-placed to express its views on the Bill. Ai Group's predecessor organisations were first registered in the NSW industrial relations system in 1902 and in the federal system in 1926. We have maintained continuous registration ever since.

We refer to Ai Group's earlier submission of 15 September 2017 (**2017 Submission**) in support of the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* (**2017 Bill**). In this submission, a number of differences between the 2017 Bill and the current Bill are identified. On examination, we have concluded that the amendments would not significantly detract from the effectiveness of the Bill in achieving its purpose.

Ai Group supports the Bill and urges the Committee to recommend that the Bill be passed without delay. Our views on the proposed legislative amendments are outlined below.

Schedule 1 – Disqualification from office

Schedule 1 of the Bill would implement recommendations 36, 37 and 38 of the Royal Commission into Trade Union Governance and Corruption (**Heydon Royal Commission**). The amendments would vary the RO Act to:

- Include serious criminal offences punishable by five or more years' imprisonment as a new category of 'prescribed offence' for the purposes of the automatic disqualification regime which prohibits a person from acting as an official of a registered organisation;

- Allow the Federal Court of Australia to prohibit officials from holding office who contravene a range of industrial and other relevant laws, are found in contempt of court, repeatedly fail to stop their organisation from breaking the law, or are otherwise not a fit and proper person to hold office in a registered organisation;

- Make it an offence for a person to continue to act as an official or in a way that influences the affairs of an organisation once they have been disqualified.

The reasons why the provisions have merit are set out very persuasively in the Final Report of the Heydon Royal Commission.

The following extract from Volume 5, Chapter 3 of the Final Report, identifies the following deficiencies in the current provisions:

Defects in the current regime

171. One obvious lacuna in the current provisions in the FW(RO) Act is that there is no prescribed consequence for a person who continues in an office after disqualification. In contrast, s 206A(1) of the *Corporations Act* 2001 (Cth) specifies that a person who is disqualified from managing corporations and continues so to act commits a criminal offence of strict liability. The maximum penalty is 50 penalty units or imprisonment for one year, or both. Given the gravity of the conduct this is surprisingly low. An equivalent provision should be introduced into the FW(RO) Act. The maximum penalty should be increased to 100 penalty units or imprisonment for two years, or both.

172. The Commission received a range of submissions identifying a number of defects, apart from this lacuna, with the current disqualification regime under the FW(RO) Act.

173. One defect is that the list of prescribed offences is relatively narrow, with the result that officers of registered organisations who have committed significant criminal offences can still continue to hold office. For example, the definition of 'prescribed offence' does not include:

    (a) contempt of court or other administration of justice offences;

    (b) the offence of trespass to land or any other offences relating to entry onto premises;

    (c) indictable offences not involving dishonesty, for example the cartel provisions in the *Competition and Consumer Act* (2010) (Cth) or obstructing a Commonwealth public official under s 149.1 of the *Criminal Code* (Cth); or

    (d) blackmail or extortion offences under State law, which do not necessarily involve fraud or dishonesty.

174. It is anomalous that the definition of prescribed offence does not include a general category of serious offence. It is recommended that the definition of prescribed offence should be amended to include any offence under a law of the Commonwealth, State or Territory punishable on conviction by a maximum penalty of imprisonment for life or a period of 5 years or more.

175. ***Secondly*****,** at present, para (c) of the definition of 'prescribed offence' is largely redundant. The current FW(RO) Act creates few, if any, offences that would fall within that paragraph. An officer of a registered organisation found to have breached his or her statutory duties under ss 285-288 of the FW(RO) Act and who has been required to pay a civil penalty would still be entitled to hold office within the organisation, because there is currently no criminal offence for breaching any of these provisions.

176. ***Thirdly***, a number of submissions to the Commission raised concerns that trade union officials who have had their right of entry permits revoked or denied on the basis that they are not fit and proper persons for the purposes of s 512 of the FW Act nevertheless continue to be involved in a management or decision-making or other official role for a trade union.

177. ***Fourthly***, there is no mechanism under the current provisions of the FW(RO) Act to disqualify officials who repeatedly act in contravention of the FW Act, particularly the provisions that relate to right of entry privileges conferred upon trade union officials.

178. Overall, a key defect of the current regime is that the FW(RO) Act only provides for *automatic* disqualification. Naturally enough for an automatic disqualification regime, it is confined to circumstances where an officer is convicted of certain offences. The consequence, amongst other things, is that officers of organisations who repeatedly contravene civil penalty provisions of the FW Act, the FW(RO) Act and court orders made in relation to such provisions, are still entitled to hold office within a registered organisation. Examples of repeated contraventions of

the law in the building and construction industry, particularly by officers of the CFMEU, are considered in Chapter 8 of this Volume.

Registered organisation officers have very important duties to the members of the organisation. A registered organisation exists to represent the collective interests of its members, who have paid membership subscriptions to the organisation for representation of their interests. These days many registered organisations have large financial and other resources, and it is essential that the officers are fit and proper persons to hold office.

Persons who are convicted of serious criminal offences are not fit and proper persons to be officers of registered organisations, and should be automatically disqualified.

Also, registered organisation officers who repeatedly contravene industrial and/or other relevant laws are not fit and proper persons to remain officers of registered organisations, and the Federal Court should have the power to disqualify them from holding office.

Registered organisations enjoy many rights and privileges under the RO Act and the *Fair Work Act 2009* (**FW Act**). Along with these rights and privileges, comes the responsibility for registered organisations and their officers to comply with the law.

The provisions in Schedule 1 are fair, balanced and appropriate. The provisions would apply equally to officers of unions and employer organisations.

Designated findings, designated laws and wider criminal findings

The strengthened disqualification regime in the Bill is underpinned by the introduction of the key concepts of 'designated findings' and 'designated laws'. These two concepts are used in determining the grounds for:

- an order by the Federal Court disqualifying a person from holding office in a registered organisation,
- an order for cancellation of a registered organisation or a part of a registered organisation,
- an order altering the eligibility rules of an organisation;
- an order suspending the rights, privileges or capacities of the organisation or a part of the organisation, or of all or any of its members;
- an order for a declaration in relation to an organisation or any part of it that is not functioning effectively, potentially leading to approval of a scheme for administration of the organisation or part of it; or
- A finding that an amalgamation of registered organisations is not in the public interest.

Unlike the 2017 Bill, the 2019 Bill does not include the following in the definition of a 'designated finding' in proposed s.9C(1):

- in any civil proceedings against a person—that the person has contravened, or been involved in a contravention of:
    - a civil penalty provision of the *Fair Work (Building Industry) Act 2012* as in force at any time before its repeal; or
    - a provision of Part IV of the *Competition and Consumer Act 2010*, or a provision of the Competition Code of a State or Territory, other than an offence

Also, unlike the 2017 Bill, the 2019 Bill does not include the following in the definition of 'designated laws', a breach of which may justify the orders referred to above:

- the *Fair Work (Building Industry) Act 2012* as in force at any time before its repeal;
- Part IV of the *Competition and Consumer Act 2010* (and any other provision of the Act so far as it applies in relation to Part IV) and the Competition Code of each State and Territory;
- Part 7.8 of the Criminal Code (causing harm to, and impersonation and obstruction of, Commonwealth public officials) and any other provision of the Code so far as it applies in relation to that Part.

The concept of a 'wider criminal finding' which was included in the 2017 Bill has been removed entirely from the 2019 Bill.

The amendments made to the 2017 Bill would narrow the circumstances under which the abovementioned orders may be made. Despite this, Ai Group is of the view that the amendments would not significantly detract from the effectiveness of the Bill in achieving its purpose.

Grounds for disqualification

Proposed s.223 of the 2019 Bill, like the provision in the 2017 Bill, includes a number of grounds for disqualification of a person from holding office in a registered organisation. Proposed s.223(5) provides that a ground for disqualification applies in relation to a person if, having regard to the events mentioned in proposed s.223(6), the person is not a 'fit and proper' person to hold office in a registered organisation.

The 2017 Bill included proposed s.226(6)(f) which allowed for any event that the Federal Court considered relevant to be taken into account in determining whether a person is 'fit and proper' to hold such office. This has been replaced with proposed s.226(6)(e)(ii) which allows for the Court to have regard to, in any criminal proceedings against the person, whether the person is found to have, committed an offence against a law of the Commonwealth or a State or Territory that is punishable by imprisonment for 2 years or more.

The amendments made to the 2017 Bill would reduce the flexibility afforded to the Federal Court in determining whether a person is 'fit and proper'. Despite this, Ai Group is of the view that the amendments would not significantly detract from the effectiveness of the Bill in achieving its purpose.

Application of amendments to past conduct in relation to 'prescribed offences'

The RO Act currently contains a regime of automatic disqualification from holding office in a registered organisation where a person has been convicted of a 'prescribed offence'.[1] The meaning of a 'prescribed offence' is in s.212 of the RO Act which relevantly provides:

> In this Division, a prescribed offence is:
>
> (a) an offence under a law of the Commonwealth, a State or Territory, or another country, involving fraud or dishonesty and punishable on conviction by imprisonment for a period of 3 months or more; or
>
> (b) an offence against section 51, 72, 105, 185, 191, subsection 193(2), section 194, 195, 199, subsection 202(5) or section 290A or 337BE; or
>
> (c) any other offence in relation to the formation, registration or management of an association or organisation; or
>
> (d) any other offence under a law of the Commonwealth, a State or Territory, or another country, 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.

The Bill would insert s.212(aa) into the RO Act which would include within the definition of 'prescribed offence' an offence under a law of the Commonwealth, a State or Territory, or another country, punishable on conviction by imprisonment for life or a period of 5 years or more.

Section 213 of the RO Act limits the circumstances under which a conviction will provide a basis for disqualification from holding office.

Item 15(1)(b) of the 2017 Bill provides that despite s.213(a) of the RO Act, Part 4 of Chapter 7 of the Act does not apply in relation to a conviction for a prescribed offence within the meaning of s.212(aa) of the RO Act if the **conviction occurred** before the commencement of the amendment. Item 17(1)(b) of the 2019 Bill restricts automatic disqualification from applying to a conviction described in proposed s.212(aa) if the conviction **is in relation to conduct engaged in** before commencement of the amendment.

Ai Group is of the view that the amendments made to the 2017 Bill would not significantly detract from the effectiveness of the Bill in achieving its purpose.

[1] *Fair Work (Registered Organisations) Act 2009* (Cth) Part 4, Division 1.

Schedule 2 – Cancellation of registration and alternative orders

Schedule 2 of the Bill would vary the RO Act to:

- Allow the Federal Court to cancel the registration of an organisation on a range of grounds including corrupt conduct by officials, repeated breaches of a range of industrial and other laws by the organisation or its members and the taking of obstructive unprotected industrial action by a substantial number of members; and

- Allow applications to be made to the Federal Court for other orders, including suspending the rights and privileges of an organisation or an individual branch or division of an organisation where its officers or members are acting in a manner that is inconsistent with the rights and privileges of registration.

As highlighted in the following extract of the Heydon Royal Commission's Final Report (Volume 5, Chapter 3, paragraph 19), registered organisations enjoy many rights and privileges under industrial laws:

> "….the statutory rights and privileges conferred on registered employee organisations and their officials under the FW Act justifies stringent statutory regulation. As one commentator has put it: '[U]nions have traditionally accepted this level of regulation as the price to be paid for the substantial benefits that they have obtained from participation in the formal industrial relations framework.'

Along with rights and privileges that they enjoy under industrial laws, comes the responsibility for registered organisations to comply with the law.

Many (but not all) rights and privileges under industrial laws are derived from a union or employer organisation's status as a registered organisation under the RO Act.

Where a registered organisation repeatedly breaches industrial laws, it is appropriate that the organisation is exposed to the potential loss of the rights and privileges that it enjoys under the industrial laws. Otherwise there is little incentive to comply with the laws, particularly if the registered organisation has sufficient revenue to readily pay fines that are imposed by Courts for unlawful conduct. The main mechanism for removing the rights and privileges of a registered organisation under industrial laws (either for a period of time or permanently) is the suspension or cancellation of registration under the RO Act.

Giving the Federal Court the powers contained within Schedule 2 of the Bill, would give those unions that are currently regularly breaking the law a strong incentive to stop their law-breaking.

Each registered organisation is readily able to implement the necessary systems to ensure that the organisation, its officers and staff comply with the law. Therefore, each registered organisation is able to readily remove the risk of having its registration suspended or cancelled. All that is required is that the registered organisation comply with the law, as every Australian citizen and organisation is rightly expected to do.

The provisions in the Bill would give the Federal Court considerable flexibility in determining what orders are appropriate in any particular case. For example, the Court is able to make orders relating to particular divisions and branches of unions.

The provisions in Schedule 2 are fair and balanced. The provisions would apply equally to unions and employer organisations.

Grounds for Federal Court Orders

Proposed s.28C in the Bill introduces grounds for cancellation of registration of an organisation under proposed s.28 or 'alternative orders' under proposed s.28A. A number of the grounds that would have justified such orders being made by the Federal Court under the 2017 Bill have been removed in the 2019 Bill. These include the following grounds that were referred to in proposed section 28C of the 2017 Bill:

- engaging in conduct that involved, or was engaged in for the purposes of, abusing an officers' position;
- engaging in conduct that perverted, or was engaged in for the purposes of perverting, the course of justice; and
- engaging in conduct that, having regard to their duties and powers as officers, involved, or was engaged in for the purposes of, corruption of any other kind.

Proposed section 28D of the 2017 Bill provided that for the purposes of an application under section 28 or 28A, a ground would exist in relation to an organisation if 2 of any of the following findings had been made against the organisation

- a designated finding
- a wider criminal finding

Proposed s.28D of the 2017 Bill is not present in the current Bill. As mentioned above, 'wider criminal findings' have been removed as a concept under the current Bill. Owing to this change, a designated finding against an officer of a registered organisation will only be relevant for an order under proposed ss.28 or 28A if designated findings have been made against a 'substantial number' of the members of the organisation or the part of the organisation or a class of members of the organisation.

Proposed s.28F of the 2017 Bill would have provided grounds for the purposes of an application under proposed ss.28 or 28A if the organisation had failed to comply with an order or injunction made under **any law of the Commonwealth or a State or Territory**. The 2019 Bill has amended proposed s.28F to restrict the relevant ground for such orders to failure to comply with an order or injunction made under a 'designated law'.

Ai Group is of the view that the amendments made to Schedule 2 in the 2017 Bill would not significantly detract from the effectiveness of the Bill in achieving its purpose.

Schedule 3 – Administration of dysfunctional organisations etc.

Schedule 3 of the Bill would vary the RO Act to expand the grounds on which the Federal Court may order remedial action to deal with governance issues in an organisation. The provisions expressly provide that the Federal Court may appoint an administrator to an organisation or part of an organisation as part of a remedial scheme.

The Bill introduces offences for failing to provide reasonably required financial information about the organisation to the administrator, with a maximum penalty of 120 penalty units. (Proposed s.323G and 323H).

The 2017 Bill included a penalty of imprisonment for the above offences. This has been removed in the current version of the Bill. Ai Group is of the view that this amendment would not significantly detract from the effectiveness of the Bill in achieving its purpose.

The provisions in Schedule 3 are balanced and reasonable.

Schedule 4 – Public interest test for amalgamations

Schedule 4 of the Bill would vary the RO Act to introduce a public interest test for amalgamations of registered organisations.

The provisions would allow the Fair Work Commission (**FWC**) to take the public interest into account when an application is received from two or more registered organisations to amalgamate, including each organisation's record of compliance with industrial laws.

The Bill introduces the concept of a 'compliance record event', defined at proposed s.73E. The Bill would require the FWC to have regard to any 'compliance record events' that have occurred for each of the existing organisations seeking to amalgamate in determining whether the proposed amalgamation is in the public interest.

A registered organisation's record of compliance with industrial laws, is a relevant factor that the FWC should be able to take into account in assessing whether or not it would be in the public interest for the organisation to amalgamate with another registered organisation. For example, depending upon the circumstances in a particular case, the FWC could decide that:

- It is the public interest for an amalgamation to occur because the two applicant organisations both have a record of compliance with industrial laws;

- It is not in the public interest for an amalgamation of two unions to occur because both organisations have a record of non-compliance with industrial laws and the amalgamated organisation would be likely to cause more harm and damage to businesses in the relevant industries, the economy and the community, than the two separate unions.

- It is in the public interest for an amalgamation to occur because the larger organisation has a record of compliance with industrial laws (even though the smaller organisation does not), and the larger organisation's approach is likely to be the approach of the amalgamated organisation.

- It is not in the public interest for an amalgamation to occur because the larger organisation has a record of non-compliance with industrial laws (even though the smaller organisation has a record of compliance), and the larger organisation's non-compliant approach is likely to be the approach of the amalgamated organisation.

The FWC and its predecessors have a great deal of experience in weighing up relevant considerations and determining where the public interest lies.

Since its inception over 100 years ago, the public interest has been a central consideration of the Commission and its predecessors.

The public interest is still a very important consideration under the FW Act. For example:

- In deciding whether to grant leave to appeal a decision made by an individual Member of the FWC to a Full Bench, the FWC must determine whether it is in the public interest for leave to appeal to be granted (ss. 400 and 604 of the FW Act);

- In deciding whether to approve an agreement that does not pass the Better Off Overall Test, the FWC must decide whether it is in the public interest to approve the agreement (s.189);

- Before approving an application for a greenfields agreement, the FWC must be satisfied that it is in the public interest to approve the agreement (s.187);

- In deciding whether to approve an application to vary an enterprise agreement, the FWC must consider whether it is in the public interest to approve the variation (s.211);

- In deciding whether to approve an application to terminate an enterprise agreement, the FWC must consider whether it is in the public interest to terminate the agreement (s.226);

- In deciding whether to make a low paid authorisation, the FWC must be satisfied that it is in the public interest to do so (s.243);

- In deciding whether to make a workplace determination, the FWC must decide whether it is in the public interest to make the determination (s.275);

- In deciding whether to make an order regarding a transferrable instrument in circumstances where a transfer of business has occurred, the FWC must decide whether it is in the public interest to make the order (ss.318, 319 and 320);

- In deciding whether to issue an interim stop order where unlawful industrial action is happening, threatened, impending or probable, the FWC must decide whether it is in the public interest to issue the interim order (s.420);

- In deciding whether to suspend industrial action to allow for cooling-off or due to significant harm to third parties, the FWC must decide whether suspension would be in the public interest (ss.425 and 426);

- In deciding what order to make when an employer has failed to notify or consult relevant unions about certain dismissals, the FWC must consider what orders would be in the public interest (s.532).

The concept of a 'compliance record event' has been amended in the 2019 Bill from the provisions in the 2017 Bill. A 'compliance record event' would have occurred under proposed s.73E(1)(b) of the 2017 Bill if the organisation was found to be in contempt of court in relation to an order or injunction made under **any law of the Commonwealth or a State or Territory**. Proposed s.73E(1)(b) of the 2019 Bill provides that a 'compliance record event' will occur if the organisation is found to be in contempt of court in relation to an order or injunction made under **a designated law**.

Ai Group is of the view that the amendments made to Schedule 4 of the 2017 Bill would not significantly detract from the effectiveness of the Bill in achieving its purpose.

Schedule 5 – Minor and technical amendments

Ai Group has not identified any problems with the provisions of Schedule 5.

Case study – the conduct of the CFMMEU

The Bill has obvious merit and appropriately applies to all registered organisations. Those that comply with the law have nothing to fear from the provisions of the Bill.

The Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) provides a very obvious and relevant example of why the legislative amendments in the Bill are necessary.

The CFMMEU's repeated law-breaking is unacceptable and cannot be allowed to continue. Numerous respected judges have expressed dismay at the blatant disregard that the CFMMEU has for the rule of law. For example:

- On 14 August 2018, the Full Federal Court handed down a decision upholding an earlier decision of the Federal Circuit Court to impose maximum penalties on the CFMEU for unlawful conduct. In the earlier Federal Circuit Court decision, Judge Vasta described the

CFMEU as *"the most recidivist corporate offender in Australian history".* The decision cited around 120 previous occasions over the past 10 years that the courts had sanctioned the CFMEU for contraventions of industrial laws.

- In a separate decision handed down on 14 August 2018, Justice Tracey of the Federal Court stated:

> "The contravening conduct has continued unabated to a point where there is an irresistible inference that the CFMEU has determined that its officials will not comply with the requirements of the FW Act with which it disagrees. If this results in civil penalties being imposed they will be paid and treated as the cost of the union pursuing its industrial ends. The union simply regards itself as free to disobey the law."

The numerous fines and cost orders imposed on the CFMMEU over the past decade have had no noticeable impact on the unions' financial strength or its unlawful conduct.

The CFMMEU's unlawful conduct has been very well-documented, including in the December 2015 Final Report of the Royal Commission into Trade Union Governance and Corruption.

In a civilised society, no-one and no organisation can be allowed to act as though they are above the law. To allow the CFMMEU to continue its law-breaking would seriously undermine the critical role of the Commonwealth Parliament. It is important that Parliament acts to protect the integrity of Parliament and the Courts by passing the Bill.

Conclusion

The Bill contains fair and sensible reforms that would apply equally to unions and registered employer associations like Ai Group.

We urge the Committee to recommend that the Bill is passed by Parliament.