

Senate Education and Employment Legislation Committee

Victorian Government Submission:

Inquiry into the Fair Work (Registered Organisations)
Amendment (Ensuring Integrity) Bill 2019

28 August 2019

Industrial Relations Victoria
Department of Premier and Cabinet
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Executive Summary

1. Consistent with its commitment to the rights of working people, the Victorian Government supports the right of employers, workers, and their representatives to freely associate and for registered organisations to democratically elect their own officials and make decisions about the governance of the organisation for the benefit of its members. These rights are enshrined in the *Fair Work Act 2009* (the FW Act) and in International Labour Organisation (ILO) Conventions, to which Australia is a signatory.
2. The Victorian Government welcomes the opportunity to comment on the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill).
3. The Victorian Government does not support the passage of the Bill, as:
 - the Bill contravenes a number of ILO conventions, including the freedom of association; and
 - the Bill unjustifiably interferes with union democracy and the right to self-determination, which in turn, adversely affects the rights of their members – Victorian workers.

Background to the Bill

4. The Bill seeks to amend the *Fair Work (Registered Organisations) Act 2009* to:
 - include certain ‘serious criminal offences’ as a new category of ‘prescribed offence’ for the purposes of automatic disqualification of officials of registered organisations;
 - make it an offence for a disqualified person to continue to act as an official of a registered organisation;
 - allow the Federal Court to disqualify officials from holding office in certain circumstances or if they are otherwise not a fit and proper person;
 - allow the Federal Court to cancel the registration of an organisation on a range of grounds;
 - expand the grounds on which the Federal Court may order remedial action to deal with governance issues in an organisation;
 - provide that the Federal Court may appoint an administrator to an organisation as part of a remedial scheme; and
 - introduce a public interest test for amalgamations of registered organisations.
5. The Committee is asked to note that the Victorian Government recently submitted its Article 22 report to the Commonwealth. Under Article 22 of the ILO Constitution, Australia must report annually as to how we have given effect, in law and practice to Conventions that Australia has ratified. Victorian legislation is compliant with Convention 87 (Freedom of Association and Protection of the Right to Organise) and with Convention 98 (Right to Organise and Collective Bargaining). The Commonwealth consolidates all jurisdictional reports and adds its own responses before finalising the Australian report to the ILO. The final report for the year including how the Commonwealth reports on its own compliance is not yet available.

Public interest test for amalgamations

6. Schedule 4 of the Bill introduces a ‘public interest test’ for the amalgamation of registered organisations. The test requires relevant matters to be considered, including each organisation’s record of compliance with industrial laws as well as other matters of public interest, such as the impact on employers and employees in the industry concerned. In circumstances where the public interest test is not satisfied, the Fair Work Commission (FWC) can refuse to approve an amalgamation.
7. The Victorian Government is concerned that the public interest test is incompatible with Australia’s commitments under two key conventions of the International Labour Organisation, namely ILO Convention No.87 (Freedom of Association and Protection of the Right to Organise, 1948) and No.98 (Right to Organise and Collective Bargaining, 1949).
8. The public interest test limits the freedom of associations to amalgamate their organisations and the right to organise which are protected by the above two international instruments. Such limitations are only permissible where they are

reasonable, necessary and proportionate to achieve the objective sought. In these circumstances, the Victorian Government submits that the limitation is neither justifiable nor proportionate to achieve the legitimate objective of improving union governance.

9. Registered organisations should be entitled to function freely so long as they are acting lawfully and in the interest of their members. This allows them to make governance decisions which support their members and benefit the workers they represent.
10. The Victorian Government endorses the finding of the Federal Parliamentary Joint Committee on Human Rights on the provisions in the previous 2017 Bill, (which are broadly the same as the provisions in the current Bill with respect to the public interest test) indicating that the measures are likely to be incompatible with the right to freedom of association.¹ As well as being protected by ILO Conventions, freedom of association is enshrined for the benefit of workers in the Victorian *Charter of Human Rights and Responsibilities Act 2006*.

Applications for cancellation of registration

11. The Bill enables the Federal Court to cancel the registration of an organisation and/or make alternative orders on a range of grounds including unlawful or otherwise improper conduct of the affairs of the organisation, serious criminal offences committed by the organisation, repeated breaches of a range of industrial laws by members, and the taking of obstructive unprotected industrial action by a substantial number of members.
12. Any of the following persons may apply to the Federal Court for such an order:
 - the Commissioner
 - the Minister
 - a person with a sufficient interest.
13. The Victorian Government submits that allowing any person with sufficient interest to seek the cancellation of a union's registration is problematic, particularly as there is no equivalent ability to do so under the *Corporations Act 2001* (Cth). This differential treatment is not explained or justified and 'sufficient interest' is not adequately defined and potentially broad in its reach.
14. The provision may be open to abuse as it would potentially enable a well-resourced employer or lobby group to commence protracted legal proceedings to cancel the registration of a registered organisation, motivated by union disruption rather than genuine governance issues. Prolonged litigation will divert resources from the core functions of registered organisations – supporting its members and advocating for the rights of working people.
15. An additional ground for cancellation of registration includes obstructive industrial action taken by a substantial number of members of the organisation. The Victorian Government is concerned about the lack of clarity around what

¹ Human Rights Scrutiny Report. Report Number 12 of 2017. Page 136

will amount to a 'substantial number' of members and the possibility of an organisation, and a majority of members of that organisation, being penalised for the actions of a smaller group of members who may be acting in their own interests, without the support of the organisation more broadly. This may lead to registered organisations being penalised for the industrial action of members, even in circumstances where the action may not have been supported by the organisation.

Disqualification provisions

16. The Bill allows the Federal Court to disqualify officials from holding office on a range of grounds, including contravention of industrial and other relevant laws, where they repeatedly fail to stop their organisation from breaking the law or where they are otherwise not a fit and proper person to hold office. There is also provision for automatic disqualification of officials in circumstances where they are found to have committed a 'prescribed offence'. A 'prescribed offence' is any criminal offence punishable by five or more years imprisonment.
17. Under the proposed disqualification provisions, a person can be deemed not 'fit and proper' where there has been a 'designated finding' made against them. 'Designated finding' is a defined term in the Bill and is broad enough to see registered organisation officials disqualified for relatively minor or technical contraventions.
18. Similar to the cancellation of registration, the disqualification provisions also allow any person with a sufficient interest to seek the disqualification of a registered organisation official.
19. The Victorian Government submits that the proposed disqualification regime for registered organisation officials goes beyond the regime which is applicable to company directors who can only be disqualified for dishonest offending, bankruptcy and in relation to foreign court orders. There is also no general 'fit and proper person test' for company directors under the *Corporations Act 2001* (Cth). The proposed disqualification provisions create an unjustifiable inequality of standards for registered officials compared to company directors.
20. The Victorian Government further submits that the grounds for disqualification based on a 'designated finding' are too broad and could include technical breaches such as late lodgement of financial reports and other routine aspects of industrial law. Such minor cases of non-compliance appear to be disproportionate and unjustifiable as grounds for disqualification.
21. Enabling the cancellation of an official's registration for contraventions of a minor or technical nature requires consideration of factors which may have no bearing or relevance on an official's ability to perform their role and serve the organisation's members, including Victorian workers. Union members should be free to elect the best candidates to serve them, free of unnecessary external interference.
22. The disqualification provisions allow any person with a sufficient interest to bring an application seeking disqualification. This is not moderated with appropriate safeguards and is open to abuse.