

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE

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

Department of Employment Question No. 1

Senator Reynolds asked on 28 September 2017 on proof Hansard page 68

Question

Do concepts of broader public interest, however described, currently exist elsewhere in industrial legislation? - Can I ask you, then, to take it on notice, because I don't expect you to have an encyclopaedic knowledge of all of these, for ones that are in the Fair Work Act and, then, as comprehensively as you can, in any other industrial legislation, because obviously there are many.

Answer

Yes. The table below outlines how the public interest is relevant to the exercise of functions and powers under the *Fair Work Act 2009* (Cth). A non-comprehensive list of how the public interest is relevant under State industrial relations legislation is also included.

Federal Legislation

Legislation	Where public interest is relevant
<i>Fair Work Act 2009</i> (Cth)	<p>The Fair Work Commission has reference to the public interest:</p> <ul style="list-style-type: none">• before approving a greenfields enterprise agreement (s 187);• before approving an enterprise agreement that does not pass the better off test (s 189);• before approving a variation in an enterprise agreement (s 211);• before approving the termination of an enterprise agreement (s 226);• in considering whether to grant a low-paid bargaining authorisation (s 243);• before varying a low-paid authorisation (s 244);• before making a special low-paid workplace determination (s 262);• before deciding the terms of a workplace determination (s 275);• in a transfer of business before making an order relating to instruments covering new employer and transferring employees (s 318);• before varying a transferable instrument (s 320);• before granting permission to appeal the arbitration of a dismissal dispute (s 375A);• before granting permission to appeal an unfair dismissal decision (s 400);• before making an interim order that industrial action stop, not occur or not be organised (s 420);• before suspending protected industrial action for a cooling off period (s 425);• before suspending protected industrial action due to significant harm to a third party (s 426); and,• before making orders in relation to failure to notify or consult registered employee associations about dismissals of 15 or more employees for or including reasons of an economic, technological, structural or similar nature (s 532).

State Legislation

Legislation	Where public interest is relevant
<i>Industrial Relations Act 2016</i> (Qld)	<p>The Queensland Industrial Relations Commission must consider the public interest in a number of contexts including:</p> <ul style="list-style-type: none"> • in considering whether a reduction in conditions in a proposed bargaining instrument passes the no-disadvantage test (s 210); • in terminating a certified agreement or arbitration determination that does not provide for the way it may be terminated (s 228); • before taking action on an industrial dispute (s 262);
<i>Industrial Relations Act 1996</i> (NSW)	<p>The NSW Industrial Relations Commission must consider the public interest in a number of contexts including:</p> <ul style="list-style-type: none"> • when the Full Bench sets principles to be followed by the Commission in determining whether to approve enterprise agreements (s 33); • in varying or rescinding an award during its nominal term or after its nominal term (s 17); and, • when considering the cancellation of registration of an organisation where the organisation has engaged in any industrial action that has a major and substantial adverse effect on the provision of any public service by the State (s 226).
Fair Work Act 1994 (SA)	<p>The Act provides that:</p> <ul style="list-style-type: none"> • an application to the South Australian Employment Tribunal may be made by the Minister if, in the Minister's opinion, it is in the public interest (s 17); • the Minister may grant a charitable organisation an exemption from the operation of awards if it is in the public interest to do so (s 114); and, • the Employment Tribunal may allow an applicant to bring an action in tort in relation to industrial action if it is in the public interest to allow the action (s 138).
Industrial Relations Act 1979 (WA)	<p>The Act provides that:</p> <ul style="list-style-type: none"> • the Industrial Relations Commission may refrain from further hearing or determining a matter if satisfied that further proceedings are not necessary or desirable in the public interest (s 27); • a party opposing the making of a new award that extends to employees to whom no award currently exists has the onus of showing that it would not be in the public interest (s 36A).

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Department of Employment Question No. 2

Senator Reynolds asked on 28 September 2017 on proof Hansard page 70

Question

Was the government of the day involved in the process of placing the HSU into administration? - And there was some question as to whether he had standing to apply and intervene in that matter. - Can you please take it on notice and get some more information about that situation back in 2012.

Answer

In 2012, then Minister Shorten made an application to the Federal Court seeking a declaration under subsection 323(1) of the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act) that “*the HSU East Branch has ceased to function effectively and there are no effective means under the rules of the organisation by which it can be enabled to function effectively*”. The Minister also sought a similar declaration in respect of the NSW State Registered HSU East.

This application was discontinued, which resolved the open question of whether the then Minister had standing to make the application - see [Brown v Health Services Union \[2012\] FCA 644](#) at paragraph [51]-[52]:

‘Reservation was initially expressed during the course of several directions hearings held prior to the commencement of the hearing on 5 June 2012 as to whether or not the Federal Minister had a “sufficient interest” to seek the relief sought in his Originating Application. That reservation was expressed notwithstanding the fact that the Minister was the Minister responsible for the administration of the Commonwealth Registered Organisations Act. Cause to question such a conclusion, however, sprang from the fact that the Commonwealth Registered Organisations Act expressly recognises the role of the Minister in two ways, namely by conferring:

- *express power to make an application (eg, ss 28 and 310(2)); and*
- *general power to intervene in an existing proceeding (s 351A).*

In the absence of an express grant of standing in s 323(1), the conclusion is potentially open that the Minister does not fall within the expression “other person having a sufficient interest”. Where the legislature contemplates that the Minister may make an application, upon this approach, it expressly so provides. Thus, for example, s 28(1) provides that an “organisation or person interested, or the Minister, may apply to the Federal Court for an order...”. Albeit in the context of an application being made to Fair Work Australia, s 30(1)(a) provides that Fair Work Australia “may cancel the registration of an organisation ... on application by an organisation or person interest or by the Minister ...”.

No comparable problem arises in respect to the State [Industrial Relations Act – s 290B](#) expressly provides that the “Minister, a State organisation or any other person having a sufficient interest ... may apply”.’

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Department of Employment Question No. 3

Senator Ketter asked on 28 September 2017 on proof Hansard page 71

Question

When it comes to the regulation impact statement, there is no regulation impact statement. What it says instead is that the interim and final reports of the royal commission into trade union governance and corruption have been certified by the Department of Employment as being informed by a process and analysis equivalent to a regulation impact statement. My understanding is that it's generally mandatory for a regulation impact statement to be made. Perhaps you could explain to us why a RIS wasn't done in this situation.

Answer

On 14 July 2017, the Office of Best Practice Regulation (OBPR) advised that as the measures contained in the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (the Bill) were consistent with the relevant TURC Report recommendations and specific commitments in [*The Coalition's commitment to fairness and transparency in workplaces*](#), which was announced prior to the 2016 election, a Regulation Impact Statement was not required.

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

Department of Employment Question No. 4

Senator Ketter asked on 28 September 2017 on proof Hansard page 71

Question

I understand that the office of the shadow minister provided the minister's office—and you may not be in a position to answer this—with a list of questions in relation to the bill on 11 September. Are you familiar with that? - Have you provided responses to those questions to the minister's office?

Answer

The responses to the Questions on Notice were provided to the office of the Hon Brendan O'Connor MP on 5 October 2017.

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

Department of Employment Question No. 5

Senator Ketter asked on 28 September 2017 on proof Hansard page 72

Question

Can you tell me the difference between the fit and proper person test that applies to company directors as opposed to the test under the bill?

Answer

'Fit and Proper person' tests are a feature of a range of legislative regulatory schemes where a person seeks to be placed in a position of trust and particular responsibility. The content of the tests varies depending on the nature of the right that the person seeks to be granted. In the industrial sphere, a fit and proper person test applies to individuals who seek a right of entry permit.¹ In the corporate sphere, fit and proper person tests apply to applications to gain a licence to engage in credit activities² or to be able to perform the functions of an auditor for the purposes of the Corporations Act.³ Similarly, a 'good fame and character test' applies in order for a person to be granted an Australian financial services licence by ASIC.⁴

In respect of registered organisations, Recommendation 38 of the Final Report of the Heydon Royal Commission was that the Federal Court be provided with jurisdiction to disqualify a person from holding office in certain circumstances, including where the person is not a fit and proper person to hold office within a registered organisation or branch. This recommendation was made in light of the various case studies provided throughout the Final Report of continuing and unabated mismanagement by officers.

The matters set out in proposed subsection 223(6) of the Bill give content to the term 'fit and proper' by highlighting the types of conduct and behaviour that may indicate that a person is neither fit nor proper to hold office in an organisation.

- The Final Report of the Trade Union Royal Commission raised specific concerns about whether a person who has been denied an entry permit, or had such a permit suspended or revoked, is an appropriate person to hold office (proposed subsections 223(6)(a), (b) and (c)).
- The factor of a person who has been found to have engaged in conduct involving fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty is similar to one of the indicators used to determine whether the directors of companies seeking admission to the official list of the Australian Stock Exchange are of 'good fame and character'.⁵ (proposed subsection 223(6)(d)).

¹ *Fair Work Act* (Cth) s 512.

² *National Consumer Credit Protection Act* (Cth) s 37.

³ *Corporations Act* (Cth) s 1280.

⁴ *Corporations Act* (Cth) s 913B

⁵ Per Australian Stock Exchange Listing Rule Guidance Note 1, companies seeking listing must provide a statutory declaration to the effect that the person has not been the subject of any criminal or civil penalty proceedings or other enforcement action by any government agency in which he or she

- A finding in criminal proceedings that a person has engaged in the intentional use of violence toward another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property may be indicative that the person is not a suitable person to hold office in an organisation due to the significant and important functions and powers that are exercisable by officers (proposed subsection 223(6)(e)). It is also already a ground for automatic disqualification of an official (section 212 RO Act).

was found to have engaged in behaviour involving fraud, dishonesty, misrepresentation, concealment of material facts or breach of duty.

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Department of Employment Question No. 6

Senator Ketter asked on 28 September 2017 on proof Hansard page 73

Question

In what way is a corporation's record of compliance with the law relevant, or taken into account, in relation to a merger involving that corporation?

Answer

The proposed public interest test for union mergers is similar to the public interest test that applies to mergers of companies.

Under the Competition Act, the Australian Competition Tribunal may only grant a merger authorisation where it would result, or be likely to result, in such a benefit to the public that it should be allowed to occur (section 95AZH). In the specific context of mergers that would have an adverse impact on the relevant markets (a factor in the proposed public interest test in the Bill), the Competition Act also provides that a merger cannot go ahead if it would substantially lessen competition in any market.

The general public interest test in section 95AZH allows the Tribunal to consider all relevant factors, which may include the record of companies in complying with the law.

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Department of Employment Question No. 7

Senator Ketter asked on 28 September 2017 on proof Hansard page 74

Question

Can I ask: generally, were any union views taken into account? That doesn't breach any confidence. - There were some amendments made to the bill as a result of our meeting with COIL. - I'm asking about the union representatives.

Answer

The process of consultation with members of the Committee on Industrial Legislation (COIL) is confidential and specifics of such consultations cannot be disclosed. The Department confirms its general advice that a number of amendments were made to the Bill following feedback from COIL participants.

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

Department of Employment Question No. 8

Senator Ketter asked on 28 September 2017 on proof Hansard page 74

Question

Which ones are the amendments that are not based on findings or recommendations of the royal commission?

Answer

The disqualification amendments in the Bill respond to Royal Commission recommendations 36, 37 and 38.

The measures in the Bill relating to cancellation of registration, administration and amalgamations were specific commitments in [*The Coalition's commitment to fairness and transparency in workplaces*](#), which was announced prior to the 2016 election.