Senate Education and Employment Legislation Committee

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

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

September 2017

CFMEU

Executive Summary

A. The Bill being considered by the Committee was introduced by the Government - at the request of major employers - to prevent the amalgamation between the CFMEU, the MUA and TCFUA.

B. The Bill affects all unions and union members. It deprives them of the most basic right to determine for themselves, through democratic processes, what form of organisation best suits their industrial interests. It is contrary to the principle of freedom of association which is enshrined in international instruments that Australia has voluntarily adopted and committed itself to adhere to in law and practice.

C. The so-called 'public interest' test for amalgamations is in substance a process that will deny union members their right to self-determination and organisational autonomy on the basis of past industrial contraventions. It operates retrospectively. It imposes another sanction on union members for breaches that have already been dealt with according to the law as it stood at the time.

D. The proposed amalgamation process opens up the prospect of employer and political interference in matters that should properly be left to the members of amalgamating organisations themselves.

E. The current law gives appropriate recognition to the importance of union members deciding the direction and leadership of their organisations for themselves through the ballot box. The amendments undermine that concept. They impose standards, such as a 'fit and proper' person test, that do not apply to others in public office, including our elected political representatives.

F. There are retrospective elements to the 'disqualification of officer' amendments. Events that occurred before the proposed laws would take effect can result in automatic disqualification or provide a basis for a conclusion that disqualification can be justified. The amendments also give employers a direct route to interfere in the leadership of trade unions.

G. The new de-registration provisions allows the court to take into account events that occurred before the laws take effect in deciding whether de-registration orders would be unjust. They also allow employers to use the de-registration process to target individual officials whom they might be dealing with. That is not an appropriate use of de-registration laws especially given the large number of legal options already open to employers during industrial disputes.

H. The 'union administration' amendments convert remedial provisions for the benefit of members of organisations to yet another means to target individual office holders. The introduction of concepts such as 'oppressive' and 'unfairly prejudicial' conduct by officers vis-à-vis individual members or sub-groups of members is ill-suited to the realities of the way trade unions function and is likely to result in politically motivated interference rather than improved trade union governance and administration.

Introduction

1. On 16th August 2017, the Turnbull Government introduced the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill* 2017 (EI Bill) into Parliament. The EI Bill seeks to amend the *Fair Work (Registered Organisations) Act* 2009 (RO Act).

2. The substance of the EI Bill can be divided into four parts and briefly summarised as follows:

(i) New provisions requiring the Fair Work Commission (FWC) to consider whether a proposed amalgamation is in the **'public interest'** before fixing an amalgamation day.

(ii) New provisions relating to **disqualification from office**, including an extension of the 'automatic disqualification' regime.

(iii) Expanded grounds for **cancellation of registration**, including alternative orders where a ground is made out because of the conduct of officers or members of a part of an organisation.

(iv) A scheme for applications to be made to the Court for the appointment of an administrator to **'dysfunctional organisations'.**

3. The proposed changes in the Bill represent a radical and far-reaching overhaul of the internal regulation of registered organisations.

Background

4. The immediate and underlying reason for the introduction of the EI Bill is to obstruct the proposed amalgamation between the Construction, Forestry, Mining and Energy union (CFMEU), Maritime Union of Australia (MUA) and the Textile Clothing and Footwear Union of Australia (TCFUA). So much is clear from the public statements of the Government and the text of the Bill.

5. The application for approval of the CFMEU/MUA/TCFUA amalgamation was filed on 20 June 2017, well before the introduction of the EI Bill. It has been progressing in the FWC under the current laws. On 31 August 2017 the FWC approved the application to submit the proposed amalgamation to a ballot of members.[1]

6. The RO Act already contains comprehensive provisions regulating the amalgamation process for registered organisations. Those provisions, and their equivalent in predecessor legislation, have governed the amalgamation process for many decades. Until now, there has never been any suggestion that the laws are undemocratic or that there is a lack of 'integrity' in the amalgamation process under the RO Act.

7. One of the premises on which the current legislation is based is that trade unions, as registered organisations, are voluntary and democratic associations of members and that it is the members of those organisations themselves who are best placed to determine their own interests and internal arrangements. That includes whether or not to approve, through a democratic ballot, a merger or amalgamation with other employee organisations.

8. There is no doubt that the impetus for the sweeping changes contained in the EI Bill has come from employers, not workers or union members. The Bill was introduced shortly after a group of major corporations asked the Government to take steps to prevent the CFMEU/MUA/TCFUA amalgamation from taking place.

1. [2017] FWC 4353

9. According to News Ltd media reports on 11 August 2017, about 30 mining, oil and gas chief executives met with senior cabinet members in Canberra on 9 August to urge the Government to block a 'CFMEU takeover.'[2] The same reports also accurately predicted the exact date on which the EI Bill would be tabled in Parliament.
10. These reports quoted the chief executive of the Australian Mines and Metals Association (AMMA) as saying that the proposed amalgamation was 'alarming' given 'the influence the unions already held over the Labor Party.' Not content with interfering in the internal processes of trade unions, this statement exposes an employer push for legislation that would also undermine the capacity of unions to participate in political processes through affiliation with a political party. This is an extraordinary intervention. It is hard to imagine the outrage from AMMA and the board rooms around the country if trade unions pressed a Labor Government to legislate away corporate influence over the Coalition.
11. Nonetheless, the Turnbull Government has accommodated the employer requests and delivered a corporate 'commercial interest' anti-amalgamation package and given it a crude 'public interest' label.
12. The Government has said the EI Bill is also in response to Recommendations 36, 37 and 38 of the Trade Union Royal Commission (TURC) and that it reflects 'the Government's commitment to fairness and transparency in workplaces'.[3] The three TURC recommendations referred to deal only with disqualification from office. There were no TURC recommendations about changing the law in relation to union amalgamations, de-registration or the administration of 'dysfunctional' organisations.
13. The TURC Final Report did canvass the possibility of a CFMEU/MUA amalgamation in a limited way. It reached the (legally incorrect) conclusion that *'Amalgamation would forestall cancellation of registration under the FW(RO) Act because the effect of amalgamation is that the CFMEU would cease to exist as a registered organisation'*[4] and went on to say that *'even if the CFMEU did not amalgamate with the MUA, deregistration would not prevent its current officials from organising a new and equally dangerous union, just as the CFMEU rose up out of the ashes of the BLF.'*[5]
14. In fact, TURC concluded that in relation to the CFMEU, wider reform measures were not necessary or desirable and that any reform in the area *'should focus on the officials of the union.'*[6]
15. Little if any justification can therefore be drawn from the TURC report for most of the measures now contained in the EI Bill. Even the measures relating to disqualification of officers go well beyond the TURC recommendations.
16. There is also a half-hearted attempt to justify a number of features of the EI Bill by referring to the so-called corresponding regulation of companies by the *Corporations Act* 2001 (Cth). This comparison does not survive closer analysis.
17. In reality, the EI Bill is a Coalition shopping list of repressive anti-union measures designed to appease the Government's corporate constituency, unduly interfere in the internal functioning of trade unions (including by facilitating employer interference in union affairs) and to impose further excessive sanctions on unions already heavily burdened by the existing legal framework.
18. Although the immediate reason for the introduction of the EI Bill is the CFMEU amalgamation, this Bill has effects far beyond that process.
19. It is one thing to legislate as to how unions are to conduct themselves in the industrial system. It is another thing entirely to impose prescriptive rules around the terms on which citizens can voluntarily associate.
20. If this Bill passes, all trade unions will be subjected to an unprecedented level of external interference by government authorities and employers as to how they are to arrange their internal and inter-union affairs. This comes at a cost to the most basic rights of association that are not only enshrined in international legal instruments but recognised as a precondition for a free-functioning and democratic society.

2. www.theaustralian.com.au/national-affairs/industrial-relations/turnbull-bid-to-block-formation-of-super-union/news-story/769afa2c00771dc5542680112b41cdb7?csp=cc25b076acccd29246be84762b731af2 and http://www.heraldsun.com.au/news malcolm-turnbull-bid-to-block-super-union-merger-of-cfmeu-and-mua/news-story/583582076d2d99687765748d5f3ee0d8?csp=059982396c95ec8b4e9563d4f69cd423|
3. Explanatory Memorandum page i.
4. Volume 5 page 405, paragraph 36.
5. Ibid page 406, paragraph 37.
6. Ibid page 406, paragraph 38.

Discussion

PART 1 - Incompatibility with International Law

International Context

21. It is important to have regard to the international context within which industrial law operates.[7] Although the point is often glossed-over by domestic law-makers, it is beyond dispute that workplace relations law is the subject of international regulation. There are international standards which regulate the way in which national governments are to approach the question of workplace relations. Many of these international obligations have been voluntarily accepted by Australia, which as a result, is under an obligation to ensure that these standards are met in domestic law and practice.

22. There are a number of sources for these international obligations. One of the most important of these is the conventions of the International Labour Organisation (ILO). Another is the seven core United Nations human rights treaties referred to in the *Human Rights (Parliamentary Scrutiny)* Act 2011 (Cth). These instruments, which are binding on Australia, ground a number of fundamental rights. These are rights which the Statement of Compatibility with Human Rights (attached to the Explanatory Memorandum and endorsed by the Minister) readily concedes, are impacted upon by the EI Bill. They include:

- The right to form and join trade unions
- The right to freedom of association
- The right of trade unions to function freely
- The right to take part in public affairs and elections; and
- The right to the presumption of innocence.

Freedom of Association

23. The key documents enshrining the universal right to freedom of association are well known. Article 23(4) of the United Nations Declaration of Human Rights of 1948 provides that:

    Everyone has the right to form and join trade unions for the protection of his interests.

24. The International Covenant on Economic, Social and Cultural Rights (ICESCR) similarly provides in Article 8(1) for:

    The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests.

    This Convention also provides in standard form:

    No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

25. Article 22 of the International Covenant on Civil and Political Rights (ICCPR) makes similar (but not identical) provision:

    1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

    2. No restrictions are to be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the right and freedoms of others…

    Sub-clause 3 of the Article emphasizes the significance of observance of the ILO's *Freedom of Association and the Right to Organise Convention* No. 87.

    3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

ILO Convention 87

26. ILO conventions and recommendations constitute a comprehensive international labour code. Australia became a member of the ILO in 1919. It has ratified most of the key human rights Conventions, including the *Freedom of Association and the Right to Organise Convention* No 87 which was ratified in 1973.

27. Respect for the principle of freedom of association is considered so important to the operation of the ILO that the obligation to observe that principle is regarded as inherent in the mere fact of membership of the ILO. The ILO *Declaration on Fundamental Principles and Rights at Work* which was adopted at the International Labour Conference in 1998 declares, forcefully, that:

    … all Members [of the ILO], even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith, the principles which are the subject of those Conventions, namely:

    (a) freedom of association and the effective recognition of the right to collective bargaining;

28. It is difficult to exaggerate the importance of *Convention No 87* or the reasons why it should be fully observed by Australia. *Convention No 87* and the principles which it embraces are regarded as one of the most important of all the ILO human rights instruments. Freedom of association (and the right to collective bargaining) are regarded internationally as among a select cluster of "core" labour standards that are prior to all other standards.

29. The principle of freedom of association is derived from the *ILO Constitution* (and the *Declaration of Philadelphia* annexed to the *Constitution*), from *Convention No 87* itself and from the *Declaration on Fundamental Principles and Rights at Work* of 1998. Australia has - **voluntarily** - accepted all three of these obligations, and may be regarded as bound, three times over, to accept these principles.

30. Article 2 of Convention 87 gives workers (and employers) the right to establish (and join) organisations of their own choosing without previous authorisation. The ILO's Freedom of Association Committee (CFA) has observed that *'the free exercise of the right to establish and join unions implies the free determination of the **structure and composition** of unions.'*[8] Whether unions merge their organisations into amalgamated bodies is therefore properly a matter for the members themselves. External impediments to that process is an interference with the most basic right guaranteed by the Convention.

31. The CFA has also confirmed that under Convention 87, workers must be free to determine the **nature** of their unions and the **level** at which they operate. For example, it is for the members to determine whether their interests are best advanced through unions organised along craft or industry lines.[9]

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7. The CFMEU gratefully acknowledges an earlier analysis of Australian compliance with international instruments in another context by the International Centre for Trade Union Rights (ICTUR) which is included in the discussion of that topic which follows.
8. 241st Report Case no. 1326, para 818.
9. 200th Report Case no. 763, paragraph 18.

Organisational Autonomy

32. Article 3 provides for the organisational autonomy of employee (and employer) organisations. It says:

    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.

33. The CFA has determined that organisational autonomy is an integral part of observance of Convention 87 by ILO member states.

    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 autonomyis 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 organizations. 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.*[10]

34. Organisational autonomy includes the right of workers' organisations to function without interference from employers. That right is also guaranteed by Article 2 of Convention 98 *Right to Organise and Collective Bargaining Convention, 1949* which provides that:

    'Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.'

35. A central feature of the amalgamation amendments in the EI Bill is the introduction of a so-called 'public interest' test which must be satisfied as a precondition to union amalgamations. This fundamentally changes the scheme of the amalgamation provisions.

36. At present, the RO Act sets out a procedural mechanism for determining, through democratic processes, the views of the members of the unions to a proposed amalgamation. Under the amendments, it is the tribunal, the FWC, which must be satisfied that a proposed amalgamation is in the 'public interest', as defined, before an amalgamation can proceed. In doing so, the FWC must have regard to specified statutory criteria including the impact of the amalgamation on employers in the industry or industries concerned. A range of third parties such as employers, employer organisations and the Minister are permitted to make submissions to the FWC as to whether the 'public interest' test for a trade union amalgamation has been satisfied and the FWC is required to take those submissions into account. This is a serious erosion of the principle of organisational autonomy guaranteed by both Conventions 87 and 98.

Right to Elect in Full Freedom

37. The right of workers to elect their representatives in full freedom is a further important element of the right to freedom of association. The CFA has emphasized the significance of that right in the following terms:

    The right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves.[11]

38. The EI Bill clearly restricts the capacity of certain individuals to hold office and limits the freedom of workers to determine for themselves who is to represent them. Again, the international jurisprudence makes it clear that automatic and widely cast disqualification rules can infringe these rights.

    A conviction for an act which is not, by its nature, such as to constitute a real risk for the proper exercise of trade union functions should not constitute grounds for disqualification for trade union office, and any legislation providing for such disqualification for any type of criminal offence may be regarded as inconsistent with the principles of freedom of association.[12]

PART 2 - Anti-Amalgamation Measures

39. If passed, Schedule 4 of the EI Bill would make the following important changes to the laws relating to amalgamations:

    (i) The requirement to satisfy a 'public interest' test before a Full Bench of the FWC before an amalgamation can take effect.

    (ii) The new 'public interest' test gives pre-eminence to the amalgamating organisations' record of compliance with laws, but may also include 'other matters' such as an assessment of the impact of a trade union amalgamation on employers in the relevant industries.

    (iii) The introduction of a right for a wide range of persons, other than the amalgamating unions themselves, to make submissions about whether the 'public interest' test has been met, including potentially employers, the Minister, the Registered Organisations Commissioner and any other person with a 'sufficient interest' in the amalgamation.

10. ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva Fourth (Revised) Edition 1996 para 331.
11. Ibid Chapter 6 para 353.
12. Ibid para 386.

'Public Interest'

40. The 'public interest' test set out in the Bill is not a public interest test in any real sense.

41. Ordinarily a reference to the public interest in legislation will call up the need to consider and balance those factors which best promote a broader social or national interest as opposed to private, individual or proprietary interests.

42. The authorities recognise that *'the range of matters relevant to the public interest is very wide*[13] and that there will *'often be competing facets of the public interest that call for consideration when making a final determination as to where the public interest lies.'*[14]

43. The Federal Court has also observed the range of circumstances in which recourse is had to the 'public interest' in legislation. In McKinnon the Court said;

> *'It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination.'*[15]

44. However the 'public interest' test in the EI Bill falls into neither category. It does not confer a broad discretion to determine a matters with the singular public interest criterion in mind. If that were so then no doubt a court or tribunal would consider such factors as the public interest in permitting freedom of association. Nor does it set out a range of factors of which public interest is but one. Instead the Bill provides that the FWC must have regard to the compliance record events of amalgamating unions and must, if it considers that the organisation has a record of not complying with the law, decide that the amalgamation is not in the public interest. In no other area of the law is 'public interest' equated so narrowly and directly, if not exclusively, with a record of legal compliance.

The 'Unions and Corporations' Comparison

45. In the Second Reading speech for the Bill the Leader of the House said:

> *When companies seek to merge they must satisfy a regulator – the ACCC – such a merger won't substantially lessen competition. This competition test is like a public interest test for companies seeking to merge. By comparison, unions and employer groups face no similar test.*

46. This is a false and misleading comparison. Unions are not commercial enterprises. They are membership-based, not-for-profit, mutual interest associations. Moreover, the test for corporate mergers/acquisitions is an economic one; would it substantially lessen competition (SLC) in the market place? There is no requirement that a corporation or its office holders establish their credentials based on their history of compliance with laws for a merger to be approved. Further, an assessment is undertaken by the regulator, the ACCC, usually informally, to determine whether in its view, the test has been met. There is no compulsory pre-merger notification scheme either to the regulator or the public. The bar for failing the SLC test is regarded as a high one. Most of the mergers that come before the ACCC are not opposed. There have only been a handful of corporate mergers that have been contested.

Application of 'Public Interest' Test

47. Under s. 72A of the EI Bill the FWC must decide whether the proposed amalgamation is in the 'public interest' before an amalgamation day is fixed. This can occur at any time after an application for approval of submission to ballot is lodged.

48. In the case of the CFMEU/MUA/TCFUA amalgamation, the FWC has now approved the application to submit the amalgamation to a ballot of members. However if the Bill is passed before the amalgamation takes place, the 'public interest' test must still be satisfied. Even if the ballot of members approves the amalgamation, unless the 'public interest' test is met, no amalgamation day can be fixed, the amalgamation would not take effect and the democratically expressed will of the members would be thwarted. This shows that the Bill is designed with the CFMEU/MUA/TCFUA amalgamation squarely in mind.

49. In most cases of future amalgamations, the likely effect of these provisions is that the 'public interest' test will be applied *before* union members get any chance at all to express their views about the merits of an amalgamation and, unless the test is met, they never will get that chance.[16]

50. There is an unfair element of retrospectivity to the 'public interest' test. Item 13(3) of the Bill provides that 'compliance record events' include events that occurred before the commencement of the Bill. This means that any of the full range of specified contraventions that occurred at any time before the public interest test even came into existence will be taken into account. Of course neither a union nor its officers or members had any way of knowing at the time of the occurrence that these types of events would count against a possible amalgamation at some future time.

51. Moreover, the definition of 'compliance record events' is extraordinarily wide. It is not limited to contraventions that have attracted a court imposed penalty. It can include a substantial number of a small class of members of one branch *organising* some minor form of industrial action, short of a stoppage of work, that interferes with the activities of an employer.[17]

52. 'Wider criminal findings'[18] against officers can also count against the 'public interest'. There is no real effort in the Bill to link the contraventions to any impact they may have on the merits of a proposed amalgamation. It is only the 'incidence and age'[19] of compliance events that is relevant rather than the nature of the contravention or its seriousness. An organiser who unsuccessfully contested a minor but technically criminal contravention in the course of his/her duties would have inadvertently committed a compliance record event and thereby potentially affected an amalgamation process.

53. In effect, unions and their members are punished twice over for contraventions by these provisions; once for the contravention itself and again by prejudicing amalgamation prospects.

54. The second stage of satisfying the 'public interest' test is only reached if the FWC is unable to dispose of the application by reaching an adverse conclusion about the compliance record of the amalgamating unions. In this second stage, the FWC must have regard to the impact of the amalgamation on employees *and employers*.

55. Section 72C gives the right to make submissions about both phases of the 'public interest' test to employer organisations in the industries concerned or who 'may otherwise be affected by' the amalgamation. Unregistered bodies representing employers in the relevant industries have the same right.

13. Duncan v. ICAC [2016] NSWCA 143
14. McKinnon v. Secretary, Department of Treasury [2005] FCAFC 142
15. Ibid per Tamberlin J at para 10.
16. s. 72F
17. S. 72E(1)(c).
18. S 72(2)(b) and 9C (3).
19. S 72(D)(2).

56. The combined effect of these provisions is to ensure that *employers* have a statutory right to speculate about and directly interfere in, how *employees* might choose to associate. It is difficult to conceive of a clearer case of an infringement of freedom of association rights.

Further Obstacle to Amalgamation

57. Although the Explanatory Memorandum describes the amendment made by the proposed section 73(2A) as merely a correction and clarification,[20] the subsection in fact introduces another major change to the current amalgamation process.

58. At present, if the members approve an amalgamation through the ballot process, the FWC must satisfy itself of a number of matters before it fixes a day on which the amalgamation is to take effect. One of those matters is that there are no outstanding proceedings (other than civil proceedings) pending against the amalgamating organisations. The predecessor section to section 73 was s 253Q of the *Industrial Relations Act* 1988 (Cth). When that section was introduced, the effect of it was described as requiring that the Presidential Member be satisfied that 'there are no unresolved **criminal proceedings** against any organisation concerned in the amalgamation.'[21] That continues to be the effect of the section. The new s. 73(2A) is a dramatic departure from that. Any outstanding **civil** proceedings as defined by s. 9(C)(1)(b), including for minor and technical contraventions of the RO Act or FW Act, would operate as a bar to the fixing of an amalgamation day.

PART 3 - Disqualification of Officers

Current Law

59. Chapter 7 of the *Fair Work (Registered Organisations) Act* 2009 (RO Act) contains measures to ensure the democratic control of trade unions. Foremost among those measures is the requirement that union leaders be regularly and democratically elected by the membership. Just like our elected political representatives, union officers who are incompetent, out of touch or engage in some form of wrongdoing are regularly removed from office through the democratic election process.

60. Industrial elections must be free and fair. Where questions arise, the RO Act provides a mechanism for member-initiated inquiries into any suspected union election irregularity. It also restricts the use of union resources to support individual candidates and prohibits improper interference in the election process.

61. The RO Act has requirements for union rules to make provision for the removal from office of office holders who have misappropriated union funds or are found to have engaged in a substantial breach of union rules, gross misbehaviour or gross neglect of duty. Unions have rules that allow for individual officers (and members) who are accused of some form of misconduct to be judged by a collective body of their peers and if necessary, disciplined, including by removal from office.

62. Chapter 9 of the RO Act also imposes an array of duties and obligations on union office holders and set out serious penalties for non-compliance. Part 4 of Chapter 7 makes provision for the automatic disqualification of union officers.

63. Taken together, these provisions give some recognition to the importance of ensuring that it is the members of unions themselves, through democratic processes, who control the direction and leadership of their own organisations whilst, also recognising the importance of the positions that union officers hold.

Automatic Disqualification

64. The EI Bill extends the grounds on which a union officer is automatically disqualified from holding office to include a conviction for an offence punishable on conviction by imprisonment for five years or more.[22] A conviction for any offence which carries a *maximum* term of five years automatically leads to disqualification even though the officer may have had no custodial sentence imposed at all.

65. Where the events giving rise to a conviction occurred *before* the commencement of these laws, the effect of the conviction is still automatic disqualification.

20. EM para 246.
21. Industrial Relations Legislation Amendment Bill 1990 Explanatory Memorandum, page 28.
22. S 212(aa)

66. A union officer who is automatically disqualified is unable to hold or stand for office again during the exclusion period without leave of the court. A federal politician who is disqualified because of a criminal conviction under s 44 of the Constitution is only ineligible to sit or be a candidate whilst actually serving or awaiting sentence. Thus a number of federal politicians have been convicted and some imprisoned, before being elected or re-elected into federal parliament. These include:-

- Tom Uren (ALP – Vietnam war moratorium rally offences),
- E. J. Holloway (ALP – encouraging a strike),
- Derryn Hinch (Derryn Hinch's Justice Party – contempt of court)
- John Curtin (ALP Prime Minister – failing to comply with compulsory medical examination for conscription)
- George Georges (ALP – failing to pay fines arising out of protest action) and
- William Groom (Protectionist – the only member of federal Parliament to have been a transported convict and mover of the address in reply at the opening session of the Commonwealth Parliament).[23]

Disqualification Orders

67. Under the EI Bill, disqualification orders can also be made against officers for a wide range of contraventions unless the court considers that the making of such orders would be unjust. In practice, this approach effectively shifts the evidentiary burden to the individual officer to convince the court that disqualification in the circumstances would be an unjust outcome.

68. At least two grounds for disqualification either have no direct equivalent under the Corporations Act or do not properly translate into a trade union context. The first is where findings are made against the union in relation to certain specified conduct and the individual officer 'failed to take reasonable steps to prevent the conduct.'[24] The second is that the person is not a 'fit and proper person' to hold office. The suspension of an entry permit can form the basis for a conclusion that a person is not 'fit and proper'. There are no such requirements for company directors and there is certainly no basis for voters to challenge the term of federal politicians on the basis that they are not 'fit and proper' persons.

69. In some cases, it is not even necessary for a conviction to be recorded for a person to be considered not 'fit and proper'. Adverse findings against individuals in proceedings for certain offences involving violence or damage to property and even civil matters involving dishonesty, may be sufficient.[25]

70. Although there are provisions for disqualification of company directors under the Corporations Act, the reality is they are barely used.

71. The responsibility for monitoring company director behaviour rests with the Australian Securities and Investments Commission (ASIC). Under ss 206C – 206EEA of the Corporations Act 2001, only ASIC has standing to bring proceedings and impose disqualifications. According to the most recent ASIC report (2015-16), for the 2.37 million companies registered there were a mere 39 people disqualified or removed from directing companies in the reporting year.[26]

Standing to Apply for Disqualification

72. The range of people who can agitate to have union officials disqualified is far greater than is the case for company directors. Not only does the regulator have standing to make an application but so does the Minister (opening up the prospect of politically motivated applications), and any other person with 'a sufficient interest'. This latter category means that employers and employer organisations could potentially make applications to have individual union officers disqualified.

73. The idea that people other than union members should be given the right to apply to remove union leaders from office reflects the misguided and offensive notion that members are either perpetually in the dark as to the nature of their office holders, or somehow just incapable of working out what is good for them. There is also an element of fear that members might be swept up in enthusiasm for a union miscreant and so need protection from themselves – 'mistrust of the *hoi polloi*' as one writer has put it.[27] Another explanation is simply to protect the economic interests of employers troubled by union activism – or at least to provide another weapon in an employer's arsenal.

74. The fact that there are far fewer trade unions and union officials than there are corporations and directors, and having regard to the media and political attention that unions attract, means it is much more likely that every potential disqualification-type infringement will draw an application for disqualification.

75. There is a further retrospective aspect to this part of the EI Bill. Although only events that occur after the laws take effect can ground an application, once a ground has been established the court can consider all matters that occurred before commencement in determining whether a disqualification order would be unjust.[28]

PART 4 - De-registration

76. Schedule 2 of the EI Bill introduces expanded grounds for cancellation of registration and a range of alternative sanctions short of full de-registration where one or more of those grounds is made out because of the conduct of the organisation or its officers or members.

Grounds

77. A ground for the new de-registration provisions can only be established by conduct that occurs after the new laws commence. However, if an application for de-registration is made and a ground established, the Court must de-register the organisation unless the union can satisfy it that de-registration would be unjust.[29] In determining whether it would be unjust, the Court can have regard to matters that occurred *before* the commencement of the Bill.[30]

78. The new de-registration grounds are very broad. They include, for example, that as few as two senior officers of part of the organisation have conducted the affairs of that part of the organisation in a manner that is unfairly prejudicial to *a single member* of the union, or contrary to the interests of members of part of the union.[31]

79. De-registration grounds would also include a substantial number of a small class of members being found to have contravened a civil penalty provision of the FW Act, such as taking some mild form of industrial action[32] during the currency of an enterprise agreement.[33] The organising of any form of unprotected industrial action that 'interferes with the activities of' an employer by a small sub-class of membership can also ground de-registration.[34]

23. Ian Holland 'Crime and Candidacy' Current Issues Brief No 22 – 2002-03. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03CIB22#tale
24. Section 223(3)
25. S 223(6)(d) and (e).
26. Annual Report 2015-16 Chapter 2 http://download.asic.gov.au/media/4058644/asic-annual-report-2015-2016-section-2.pdf
27. Holland loc cit
28. Schedule 1, Item 15(3).
29. S 28K.
30. Item 11, Schedule 2.
31. S 28C(1).
32. Australia's legal restrictions on industrial action have themselves been found to be inconsistent with binding international Conventions.
33. S 28F and s 417 of the FW Act 2009.
34. S 28H.

80. Conduct by unions that form part of an amalgamated body but which have subsequently been de-registered (and their officers) can also be taken into account in determining whether a de-registration ground has been made out.[35]

Alternative Orders

81. The EI Bill empowers the Federal Court to make alternative orders to deregistration including disqualifying certain officers, reducing the eligibility rules of the union and suspending the rights, privileges or capacities of the union or its members. These provisions are directed at providing remedies as against particular parts of the union, such as a Division or Branch, or individual office holders.

82. The power to make orders in relation to disqualification of certain office holders in the de-registration context has no equivalent in the current RO Act. Although the Court must take account of the nature and circumstances of the officer's involvement in the matter giving rise to the de-registration ground,[36] there is nothing to stop an applicant with a 'sufficient interest' – potentially including an employer – from making these applications as a *first resort* in response to an officer organising industrial action against that employer.

83. There are already numerous statutory remedies available to employers who are subject to unprotected industrial action. However, these amendments strike at the heart of the representative capacity of unions by allowing employers to target individual officials with whom they have direct industrial dealings with disqualification applications.

PART 5 - Administration of 'Dysfunctional' Organisations

84. Section 323 of the RO Act gives the Federal Court power to make declarations in two circumstances:-

    (i) where a part of an organisation has ceased to function effectively and there are no effective means under the rules to reconstitute that part or have it function effectively; and

    (ii) where an office or position is vacant and there is no effective means under the rules to fill the office/position.

    Where these declarations are made, the Court may, by further order, approve a scheme to address these deficiencies. This is a remedial provision designed to allow members to take steps to regularise the functioning of their union through a court sanctioned scheme.

85. The amendments alter the nature of the section by making provision for court intervention in very different circumstances. This includes where officers have engaged in financial misconduct, acted in their own interests rather than those of members, or conducted union affairs in an oppressive/unfairly prejudicial way or in a way that is contrary to the interests of members.[37]

86. In addition, there is a new (non-exhaustive) definition of the circumstances in which an organisation is taken to have ceased to function effectively. This includes where individual officers have breached designated laws on multiple occasions, misappropriated union funds or repeatedly failed to fulfil their duties as officers. Each of these new categories in the Bill involve some form of alleged wrongdoing on the part of individual union officers. That is a major departure from the substance of the current provisions.

87. For the first time, standing to make these types of applications is explicitly extended to the Registered Organisations Commissioner and the Minister. The effect of these changes would be to convert remedial provisions for the benefit of members to yet another option for punitive measures and intervention in union affairs. Ministerial access to the provisions, including in relation to subjective concepts such as 'oppressive' or 'unfairly prejudicial' conduct, makes them susceptible to use for the purpose of political interference.

88. The amendments also introduce the concept that it is necessarily impermissible for officers to conduct the affairs of a union or branch in a way that might be, for example, unfairly prejudicial against 'a member' or 'class of members' or contrary to the interests of members of 'part' of an organisation. These sections are similar to the 'corrupt conduct of officers' grounds contained in s 28C.

89. Although these notions, or something approaching them, may arise in a company law context, they are ill-suited to the industrial realities of trade unions. The idea that it is necessarily 'corrupt' or improper for a union or official to elevate the interests of one group of members over another is a nonsense. Trade union affairs involve balancing what are often complex and competing needs and interests of a diverse membership group. Officials are called on to make decisions about pursuing certain claims on behalf of members, including unmeritorious ones, about prioritising scarce union resources and about general policy positions. Not all decisions will satisfy every member or group of members. That does not make those decisions 'corrupt' or even 'oppressive' or 'unfairly prejudicial'. By joining a union, most members accept that the merit of union decision-making is best judged at the ballot box, not through complex and costly court processes.

Conclusions

90. For all the reasons set out above, the Committee should recommend that the Bill not be approved.

35. S 28J.
36. S 28M(2)
37. See s 323(3)(b) to (d).