



Australian Government

Department of Employment

Senate Education and Employment Legislation Committee
Inquiry into the
Fair Work (Registered Organisations) Amendment (Ensuring
Integrity) Bill 2017

Submission of the
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Introduction

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee (the Committee) inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (the Bill).
2. During the 2016 election campaign the Australian Government committed to implement recommendations 36, 37 and 38 made by the Royal Commission into Trade Union Governance and Corruption (Royal Commission) and other complementary election commitments relating to the amalgamation, cancellation and administration of registered organisations.
3. The Bill gives the Federal Court and Fair Work Commission appropriate powers to:
 - Disqualify officials of registered organisations who break certain laws, fail to take reasonable steps to prevent the organisation from repeatedly breaking those laws or are otherwise not fit and proper persons to hold office in a registered organisation (with automatic disqualification for serious criminal offences),
 - Cancel the registration of an organisation, or remove rights or privileges of part of the organisation, where officials have acted corruptly, failed to comply with court orders or injunctions, or have a record of law-breaking (including by its members),
 - Place an organisation into administration where its officers have misappropriated funds, repeatedly broken the law, breached their duties or the organisation has otherwise ceased to function effectively, and
 - Consider the public interest when determining whether to approve an amalgamation of organisations, having regard to an organisation's history of compliance with the law and the effect of the merger on the economy, employees and employers.
4. This submission outlines the key measures in the Bill and the Bill's compatibility with Australia's human rights obligations.

Disqualification from office

5. Currently, people can be automatically disqualified from holding office if they are convicted of offences involving fraud, dishonesty, violence or property damage or offences relating to the administration of registered organisations. But people convicted of other serious offences such as blackmail, extortion, threatening to cause serious harm to public officials, handling stolen goods or intentionally destroying documents relevant to an investigation can still hold office in registered organisations.
6. Commissioner Heydon recommended that a general category of serious offences should be added to the list of offences leading to automatic disqualification. The Bill implements this recommendation by ensuring that any offence that is serious enough to carry a penalty of 5 years' imprisonment or more should lead to automatic disqualification.
7. The Bill implements Commissioner Heydon's recommendation to include new grounds for disqualification relevant to a person's ability to properly perform their duties as an officer of a registered organisation.
8. The Federal Court will be able to make an order disqualifying a person from acting as an officer of a registered organisation for a period of time it determines if the person:
 - contravened a provision of or committed an offence against certain industrial laws (including the *Fair Work (Registered Organisations Act) 2009* (Registered Organisations Act), the *Fair*

Work Act 2009 (Fair Work Act), work health and safety laws, the Building Industry legislation or the restrictive trade practices part of the *Competition and Consumer Act 2010*)

- committed an offence of harming, impersonating or obstructing a public official
 - committed any other offence in the course of performing their functions as an official of the organisation
 - acted in contempt of court (in relation to an industrial law or in the course of performing their functions as an official)
 - repeatedly failed to take reasonable steps to stop their organisation from breaking an industrial law or being in contempt of court
 - is disqualified from managing a corporation or has otherwise contravened parts of the *Corporations Act 2009* (Corporations Act)
 - is otherwise not a fit and proper person to hold office.
9. If the Court finds that a person has met one of these criteria it may disqualify them, provided that it would not be unjust to do so.

Disqualification from office – offence of acting as an officer after disqualification

10. It is a deficiency of the existing law that there is no consequence for a person who continues to act as an officer once they have been disqualified. That is why Commissioner Heydon recommended there be a specific criminal offence for continuing to hold office while disqualified.
11. The Royal Commission noted several cases where disqualified officers remained heavily involved in an organisation behind the scenes, acting as ‘shadow officers’, despite no longer officially holding the position of ‘officer’ within the organisation. For example, despite resigning as National President of the Health Services Union following fraud allegations, Michael Williamson continued to exert significant influence and control over the union through its acting General Manager (Final Report, Volume 2, Chapter 5.2).
12. The Corporations Act makes it a criminal offence for a person to continue to manage a corporation once that person has been disqualified. The Bill takes a similar approach to officers of registered organisations.
13. The Bill makes it an offence for a person to act as an officer or act as a ‘shadow officer’ if they have been automatically disqualified from office or have been disqualified from holding office by the Federal Court.
14. A person acts as a ‘shadow officer’ by exercising the capacity to significantly affect the financial standing or other affairs of an organisation or branch, or by giving instructions to an organisation’s or branch’s committee of management while knowing that the committee of management usually acts in accordance with their wishes or intending that the committee of management will do so. Advice provided in a person’s capacity as a professional such as a lawyer or accountant will be excluded.
15. The penalties for acting as an officer or ‘shadow officer’ once disqualified are based on recommendations by Commissioner Heydon. Anyone found to have stood as a candidate for election to office, to have been an officer, or to have acted as a ‘shadow officer’, while

disqualified, will face a maximum penalty of \$21,000 (100 penalty units), 2 years' imprisonment, or both.

Cancellation of registration and alternative orders

16. This Bill introduces new and streamlined grounds for cancellation of registration by the Federal Court. The expanded grounds include a range of behaviours that are inconsistent with the rights and privileges of registration, including corrupt conduct by a number of an organisation's officers, multiple breaches of a wider range of relevant laws by the organisation or by a substantial number of its members, and serious breaches of criminal law by the organisation.
17. The Bill also simplifies some of the existing grounds for cancellation, including failing to comply with a court order or injunction by the organisation or a substantial number of its members and the organisation or a substantial number of members taking obstructive, unprotected industrial action.
18. The Federal Court will only be able to cancel the registration of an organisation where satisfied that it would not be unjust to do so. In deciding whether it would be unjust to cancel an organisation's registration, the Court will need to consider the best interests of the organisation's members, the nature of the conduct that constitutes a cancellation ground, whether other action has been taken to address the conduct and any other relevant matters. The Court will also be provided with the power to make alternative orders, such as an order disqualifying certain people from holding office, if it considers cancellation is not an appropriate solution.
19. Where the conduct forming a ground for cancelling the registration of an organisation is contained to one part of an organisation, the Court will be able to make alternative orders specific to that particular part.
20. The parties with standing to apply for the cancellation of the registration of an organisation or an alternative order under the new provisions are the relevant Minister, the Registered Organisations Commissioner and a person with sufficient interest. These are substantially the same parties with standing under the existing provisions, with the addition of the Registered Organisations Commissioner as the relevant regulator.

Administration

21. The current framework for placing an organisation into administration, section 323 of the Registered Organisations Act, is difficult to administer, as demonstrated in the case of the Health Services Union (*Brown v Health Services Union* [2012] FCA 644). The case was ultimately resolved because the parties largely agreed about the facts in issue. However, there were numerous court applications which resulted in a confusing process that could have been extremely lengthy had the facts been contested.
22. The Bill introduces three key measures to address the current limitations. Firstly, the Bill makes clear that the circumstances in which an organisation can be placed into administration include where officers have repeatedly broken the law, breached their duties or misappropriated funds.

23. Secondly, the Federal Court's power to approve a scheme consequent to the making of a declaration will be amended to expressly permit the appointment of an administrator, and the functions of an administrator will be clearly set out.
24. Finally, standing to apply for a declaration that an organisation has ceased to function effectively will also be extended to the Registered Organisations Commissioner and the Minister. Both parties may be able to bring a case under the existing provisions, by showing they are parties with a sufficient interest. However, it can be a difficult and lengthy process to argue standing even where there is a clear public interest in the regulator or Minister bringing a matter before the Court. Ensuring that the Minister and Registered Organisations Commissioner have standing provides clarity and avoids any doubt.

Public interest test for amalgamations

25. The existing framework for approving an amalgamation of registered organisations is narrow, simply requiring a vote of only a small portion of the members of each registered organisation endorsing the matter. In some instances, there will not even be a vote of the members of an organisation that is being joined.
26. Currently there is no capacity for the Fair Work Commission to consider the impact of the amalgamation of organisations where one may have a history of non-compliance with the law. For example, when an organisation with a poor compliance record amalgamates with another organisation, it expands the potential to influence behaviour in the other organisation. The current framework does not ensure the approval process considers all those affected by the outcome of a potential amalgamation. There is also very limited scope for any person with a sufficient interest to raise concerns about a proposed amalgamation.
27. Companies have to satisfy a competition test applied by the regulator, the Australian Competition and Consumer Commission, when they merge. The Bill would ensure that registered organisations likewise have to satisfy a public interest test applied by the Fair Work Commission before they amalgamate.
28. This Bill introduces a new public interest test to be applied by the Fair Work Commission when registered organisations seek to merge. It will mean that a merger cannot be approved where it would not be in the public interest.
29. The Commission must have regard to public interest matters, including the impact on employees and employers in the relevant industries and the history of compliance with the law of the relevant organisation, and may have regard to other relevant matters which could include the impact of a merger on the Australian economy.
30. The Bill makes it clear that the existing organisations, other affected organisations and bodies, the Registered Organisations Commissioner, relevant Ministers and any other person with sufficient interest have standing to make a submission about the public interest. Currently submissions on amalgamations may be made by any other person with the leave of the Fair Work Commission. Leave will generally be granted where the Commission is satisfied that the person has a sufficient interest.
31. Codifying standing in this way is not novel and reflects similar provisions in the Fair Work laws under which the public interest or other broader interests and considerations are considered. Such provisions typically provide standing to affected third parties. For example, under Part 2 of

Chapter 4 of the Registered Organisations Act ‘an organisation, an employer or the Minister’ may make an application to the Fair Work Commission in relation to a demarcation dispute. Any person or organisation interested in a proposed amalgamation may make an objection to a proposed amalgamation where an extension of eligibility rules is proposed. In section 424(2) of the Fair Work Act an application for an order suspending or terminating protected industrial action where the action threatens to endanger life or cause significant economic damage may be made by a bargaining representative for the agreement, the Minister or a relevant Minister of a State or Territory. In section 426(6) of the Fair Work Act an application for an order suspending industrial action may be made by a third party that is not a party to the industrial dispute but is adversely affected by the industrial action.

32. Under section 590 of the Fair Work Act the Fair Work Commission may inform itself in an appropriate manner, including by taking submissions. Where parties can demonstrate a sufficient interest in the matter the Fair Work Commission would generally be expected to accept submissions from that party in relation to the matter. The provisions in the Bill seek to clarify who may make submissions as of right.
33. Various standing provisions under the existing Registered Organisations Act include standing for parties which the Bill gives standing under the public interest test. For example, standing is granted to any interested person, any organisation and the Minister in the current cancellation of registration provisions (section 28), to a person interested in the existing amalgamation provision (section 53), and to any organisation member, organisation or person with a sufficient interest in the current administration provision (section 323).
34. In deciding whether the amalgamation is in the public interest, the Fair Work Commission must have regard to the existing organisations’ records of compliance with the law, taking into account the incidence and age of any instances of non-compliance. The Fair Work Commission will consider if the organisation or its officers have broken the law or been in contempt of court, if the organisation or part of it has engaged in ‘obstructive industrial action’, and if officers have been disqualified from holding office. Submissions about the public interest may include matters relevant to an organisation’s record of non-compliance.
35. The Fair Work Commission must also have regard to the impact the amalgamation is likely to have on employees and employers in the industries concerned. The Commission may also have regard to other relevant matters which could include the impact of a merger on the Australian economy. If a merger is found not to be in the public interest it will not take effect and, if before submission to ballot, a ballot will not be approved by the Commission.

Human rights

36. The Bill is consistent with Australia’s human rights obligations, including the specific obligations in the International Labour Organization *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87)*.
37. The provisions of the Bill engage the same human rights as existing provisions of the Fair Work laws. Where the provisions engage the right to freedom of association, they pursue a legitimate objective, are prescribed by law and are reasonable, necessary and proportionate.
38. The provisions have the objective of protecting the interests of members and guaranteeing the democratic functioning of organisations and do so by ensuring the leadership of registered organisations acts lawfully and with integrity.

39. The Bill is reasonable and proportionate in that the provisions are supervised by the Federal Court or the Full Bench of the Fair Work Commission and appropriate limitations on discretion are put in place. Disqualification must not be unjust in all the circumstances.

Conclusion

40. The Department appreciates the opportunity to provide a submission to this inquiry and is available to discuss the submission at a hearing of the Committee.