Ai GROUP SUBMISSION

Senate Education and Employment Legislation Committee

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

15 September 2017

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.

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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 2017* (**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.

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 or more 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.

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.

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.

Ai Group has not identified any problems with the provisions of Schedule 3.

Schedule 4 – Public interest test for amalgamations

Schedule 3 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.

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 in 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 implementation of a public interest test for amalgamations of registered organisations would be a logical and fair change to the RO Act.

Schedule 5 – Minor and technical amendments

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

Conclusion

The Bill contains fair and sensible reforms. We urge the Committee to recommend that the Bill is passed without delay.