



Electrical Trades Union

Submission to the Senate Education and Employment Legislation Committee on the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

29 August 2019

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Executive Summary

- A. The ETU opposes the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill).
- B. The ETU supports the Australian Council of Trade Unions (ACTU) submission to this inquiry and supports all arguments reasoned in that submission.
- C. In particular, the ETU opposes the Bill due to the **chilling effect** the Bill will have on employees and their representatives exercising lawful workplace rights – resulting in workers out at increased risk through less safe workplaces.
- D. In addition, the Bill seeks to impose a draconian regime for both:
 - a. disqualification of office holders; and
 - b. interference in the internal democracy of civil society organisations.
- E. Stripping members of democratic control of their organisations and imposing double jeopardy on rank and file union members for conduct wholly unrelated to the affairs of running a union will not lead to better union governance and compliance.
- F. The Bill is inconsistent with International Labour Organisation Conventions which the Australian Parliament is bound by.
- G. The Bill should be rejected entirely.

Recommendation

- 1. This Bill is politically motivated, inconsistent with the findings of the Trade Union Royal Commission and unsupported by any sound public policy. There has been no engagement with employees or their representatives, and there are no evidence-based policy objectives supported by a proper policy development process. For every amendment, there is either no evidence of an extant problem that the amendment is addressing, or the claimed evidence has proven to be either overstated or unsubstantiated.
- 2. The effect of the Bill is to target workers with disqualification and deregistration of their union and drive an anti-democratic wedge into union membership.
- 3. The ETU strongly recommends that the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 be rejected in its entirety.

Introduction

1. The Electrical Trades Union of Australia (“the ETU”) is the Electrical, Energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The ETU represents over 60,000 electrical and electronic workers around the country and the CEPU as a whole represents over 100,000 workers nationally.
2. The ETU welcomes the opportunity to make a submission on the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019.
3. This Bill is misguided, deeply undemocratic, unfair and, ultimately, will cause employees to lose confidence in exercising their lawful workplace rights and for workplaces to become less safe.

What the Bill seeks to do – Disqualify, Deregister, Disenfranchise

4. This Bill is structured around the Three D’s – disqualifying office holders, deregistering unions, and disenfranchising workers who are union members.

Disqualification

5. The grounds for disqualifying office holders are dramatically broadened to:
 - **automatically** disqualify from office any person convicted of an offence “punishable” by imprisonment for five years or more¹;
 - permit “disqualification orders” to be made *inter alia*², where a person:
 - has a “designated finding” made against them;
 - is found to have contravened an workplace law;
 - is not involved in any contraventions, but is deemed to have failed to take steps to prevent contraventions; or
 - is convicted of an offence “punishable” by imprisonment for two years or more³.
6. Note that a “**designated finding**” includes against a person in proceedings where they are not named, represented or which they are even aware of⁴.
7. Disqualification orders can be sought by the Minister, the Registered Organisations Commissioner, or “a person with sufficient interest”, which can include employers⁵, including employers with a direct profit motive for interfering with the democratic processes of the union.

¹ Schedule 1, Item 8 - Note that the use of the term “punishable” means that the actual penalty is irrelevant, only that the offence has a maximum term of five years or more

² Schedule 1, Item 11, in particular section 233

³ Again, the use of the term “punishable” means that the actual penalty is irrelevant, only that the offence had a maximum term of two years or more

⁴ Schedule 1, Item 2, section 9C

⁵ Schedule 1, Item 11, section 222

Deregistration

8. The Bill introduces a vastly expanded regime for cancelling the registration of trade unions. Notionally the Bill also applies to employer associations, but a closer inspection reveals that, due to the operation of the underpinning workplace laws, only unions could be subject to deregistration.
9. Under the Bill, a registered organisation can be deregistered for, *inter alia*, engaging in industrial action⁶ or contravening workplace law⁷.

Disenfranchise

10. The Bill introduces an alternative orders regime.
11. Under the regime, the Court is able to:
 - disqualify officers (this is in addition to the disqualification regime);
 - excise whole classes of members from their union;
 - suspend the workplace rights of workers who have chosen to be union members; and
 - direct how union funds are to be spent including contrary to the members democratic decisions as to how they want it spent.
12. In addition, Schedule 3 creates a grossly expanded regime for placing unions into court-ordered administration.

Deregistration and disqualification – a chilling effect in Australian workplaces

13. As noted above, the Bill blows open the scope for deregistering unions. Of greatest concern are the grounds of deregistration for:
 - officers having contravened any workplace law;
 - the union contravening any workplace law; or
 - engaging in industrial action.
14. As *detailed* further below and in the submissions of the ACTU – **no equivalent provisions exist under corporations’ law**.
15. These three grounds are of greatest concern to the ETU due to the *legal grey area* in which unions are forced to operate, most obviously in connection with risks to health and safety and with exercising rights of entry.

Legal grey area – the imminent risk to health and safety

16. A longstanding principle in Australian workplace law is that employees have the right to refuse to perform work when doing so would pose an “imminent risk to health or safety”. This principle is currently enshrined at section 19 of the *Fair Work Act 2009*, providing:

⁶ other than protected industrial action in connection with enterprise bargaining
⁷ Schedule 1,

“(2) However, industrial action does not include the following:

...

(c) action by an employee if:

(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.”

17. This formulation is reflected in the *Building and Construction Industry (Improving Productivity) Act 2016* at section 7.
18. The phrase *“imminent risk to health or safety”* has received precious little judicial consideration. The lead case is *ABCC v CFMEU*⁸
19. What is clear is that, in any prosecution:
 - a. It is incumbent upon the union and/or employees to prove that there was a reasonable belief of imminent risk;
 - b. The severity of the risk is relevant in determining the validity of the action;
 - c. The Court will make its own assessment on reasonableness, imminence of risk, and the severity of the risk.
20. There is no objective standard for determining how imminent a risk must be, nor how severe that risk must be.
21. Virtually all the ETU’s members are employed in high risk industries, such as:
 - a. Electrical contracting in construction;
 - b. Electrical power;
 - c. Mining; and
 - d. Oil and gas.
22. By virtue of its trades and its industries, the ETU and its members take issues of safety with utmost seriousness.
23. In unsafe situations officials of the ETU, and the affected members, must quickly come to a conclusion as to whether these practices constitute a sufficiently imminent risk to health or safety that the work should not be performed. In making this assessment, the ETU and its members know that the consequence of getting it wrong can be serious injury or death. The ETU and its members currently know that they make this assessment with the threat that a court may reach a different conclusion, and that this would lead to significant fines on all those involved⁹.
24. The ETU does not take this responsibility lightly. Ensuring workplace health and safety is fundamental to trade unions.
25. The ETU and its members are routinely placed in situations where unsafe work practices are being proposed as demonstrated in the below case study.

⁸ [2009] FCA 1092

⁹ In the construction industries, up to \$210,000 for a union and \$12,600 for each employee

Case Study 1 – Imminent risk at the M5 WestConnex Project

26. The M5 WestConnex was a significant road infrastructure project in Sydney, involving extensive tunnelling work.
27. A considerable number of ETU members were employed in the fit out of the tunnel. Two such members were Mr Andrew White and Mr Kevin Booth. Both were elected as Health and Safety Representatives (HSR's).
28. In late 2018, there was flooding in the tunnel. Following this flooding, mould started to spread.
29. Mould is a known hazard in tunnel environments, given the propensity for organic material, low ventilation, and water. The degree of the hazard varies from inconsequential to severe, subject to the type and propensity of the mould. Suffice to say, the risk posed to workers in a tunnel by mould is of a wholly different order to that posed in a domestic kitchen – particularly for employees with pre-existing conditions.
30. Throughout the project, workers reported increased instances of respiratory infections.
31. Following the flooding, multiple mould outbreaks bloomed, particularly in underground crib sheds, amenity blocks, and storage containers. Workers would come to work to find their toolboxes covered in mould.
32. The inadequate action taken by the PCBU of having cleaners wipe down some surfaces in an ad-hoc fashion did not mitigate the risk.
33. Finally, months of exposure later, in March 2019 the HSRs, including Mr White and Booth, convinced the PCBU to engage a hygienist to test the site. The hygienist was engaged to test a limited number of sites throughout the tunnel.
34. The hygienist report indicated that there were elevated levels of mould throughout the areas tested, and that in some areas the levels of mould were high or extreme. Indeed, one container was immediately condemned. The PCBU implemented appropriate controls for people working in areas of high or extreme concentrations¹⁰.
35. This testing was of a limited number of sites within the tunnel. Given that the same or similar conditions applied throughout the project, the HSRs requested that all worksites within the tunnel be tested. The PCBU refused.
36. Following this refusal, the HSRs considered:
 - a. a hygienist report had been conducted;
 - b. this report had found high or extreme concentrations of mould in some areas of the tunnel;
 - c. the PCBU had implemented controls in certain tested areas;
 - d. working in such areas without those controls would be harmful to an employee's health;
 - e. that there were analogous sites throughout the project which had not been tested; and

¹⁰ including requiring hazard suits, respirators, and increased ventilation

- f. therefore, there was an imminent risk to health or safety of people working in those areas.
37. On this basis, the HSRs advised the workforce of the circumstances and that they personally would refuse to work in untested areas but remain available to work in other areas of the project. The HSRs made clear that this was their personal decision.
38. The workforce then considered the report, with a majority determining not to enter the tunnel.
39. The PCBU alleged this was unprotected industrial action and commenced proceedings in the Fair Work Commission, seeking a return to work order under section 418 of the *Fair Work Act*.
40. It is important to note that the employer seeking resolution to the issue resulted in the matter being listed within 24 hours which is in stark contrast to the months of disputation workers faced attempting to resolve their safety concerns.
41. In the course of proceedings, it emerged that an employee had attended their doctor, complaining of hearing loss in one ear. His doctor then examined his ear and extracted mould which had been growing within.
42. Shortly after this news emerged, the matter was resolved by a settlement. Consequently, it went untested whether mould, in these circumstances:
- a. constituted a sufficiently “imminent” risk; and
 - b. constituted a sufficiently severe risk.
43. The ETU strongly contends that there was an imminent risk to health or safety. However, it must be acknowledged that a judge *could* reach a different view. Such is the nature of litigation.
44. Consequently, the Union and the workforce were in an invidious situation – refuse to perform the specific work and risk substantial fines *or* work in a fundamentally unsafe environment.
45. This case study is, unfortunately, all too typical of life in the construction industry. Reasonable people disagree on the severity of risk, and this is only worsened when commercial pressures come into play.

Legal grey area – right of entry

46. Under workplace laws, Union officials can obtain “right of entry” permits. These permits entitle them to enter worksites, on certain conditions, to perform specific functions¹¹.
47. Typically, these permits allow an official to “enter”. Recently, the Queensland Police Service has argued that this does not extend to a right to “remain”
48. Right of entry is often refused by employers, either due to not understanding the effect of the permit or a disregard of the law¹². Where it is refused, union officials are placed in yet another grey area – leave site and allow the substantive reasons for their

¹¹ such as around health and safety, investigating breaches of workplace laws, holding discussions with employees

¹² in contravention of applicable workplace law

attendance to go unaddressed; or persist, knowing that a court *may* interpret this to be in excess of their permit and constitute trespass.

Case study 2 – ETU official arrested for exercising RoE

49. On 17 December 2018 Mr Wendel Moloney, an organiser with the ETU in Queensland, attended a site in Brisbane occupied by Enco, a manufacturer of concrete products. Mr Moloney was accompanied by officials from other unions.
50. Upon arriving on site, each of the officials presented their applicable permits and advised the purpose of their visit, being in connection with workplace health and safety.
51. The site occupier refused each of them entry.
52. The officials then contacted Worksafe Qld, the health and safety regulator.
53. Shortly thereafter, an inspector from Worksafe Qld attended the site, reviewed the officials' permits and considered them to be in order.
54. The site occupier at this point contacted the Queensland Police Service. Officers attended and arrested each of the four officials, including Mr Moloney. Each was charged with trespass.
55. On 24 May 2019, the matter was heard by Acting Magistrate Cull. The Magistrate threw out the charges, finding no case to answer. The Magistrate was scathing on the Queensland Police in her judgement, ultimately awarding costs against the QPS.
56. Unfortunately, this behaviour is typical of the abuse facing union officials every day as they seek to exercise their rights.

Ensuring Integrity – the Chilling Effect

57. The above examples are designed to demonstrate the legally vague and conflictual environments in which trade unions operate.
58. The great sin of the Ensuring Integrity Bill is that it not only fails to take these basic realities into account but very deliberately ignores them.
59. The clear intent of the Bill is to seek to curtail employees, and their representatives, from exercising their lawful rights.
60. In the WestConnex case study above, if the Bill were in place and a court were to find that the risk was either insufficiently imminent or insufficiently severe:
 - a. the ETU could face deregistration; and
 - b. all officers involved could be disqualified.
61. This would have been a powerful incentive against the ETU and its members exercising their right to ensure their safety.
62. Similarly, in the right of entry case study, under Ensuring Integrity officials are compelled to simply walk away from the site and not return, leaving the safety issues un-investigated through not wanting to risk their future careers and the future of their respective unions.
63. Such legislation is to be avoided. There are already severe consequences for illegitimate uses of right of entry or unlawful industrial action. The reforms under Ensuring Integrity

utterly destroy what is left of the balance in the workplace, seeking to create timorous unions and blindly obedient workforces.

64. Fundamentally, Ensuring Integrity will make Australian workplaces less safe.

Deregistration and disqualification – Unfair compared to corporations law

65. The Bill's disqualification and deregistration regimes have no comparison in the corporate world¹³. The ETU wholly endorses the analysis contained in the submissions of the ACTU.
66. No solvent company has ever been deregistered for breaching workplace law. Even in the most egregious examples below:
- 7-Eleven, where the Fair Work Ombudsman uncovered a franchise network "with a culture of non-compliance" dating back nearly a decade¹⁴, where the FWO alone has recovered over \$1.8 million in penalties across nine different 7-Eleven franchises¹⁵;
 - George Calombaris's MADE Establishment Group, which stole \$7.83 million in entitlements from low-paid workers¹⁶;
 - John Hollands where unsafe work practices have led to multiple fatalities in the past 10 years.
67. Indeed, the concept of deregistering a company for breaching workplace law is simply not contemplated. Notionally, an application could be brought to wind up such a company under section 461 of the *Corporations Act* on the grounds of "just and equitable". However, the provision is not directed to contraventions of workplace law and neither employees, nor unions, nor the Minister have standing to bring such an application.
68. Similarly with disqualification orders, nowhere in corporations law is a person disqualified from holding office in a company by reason of unrelated criminal proceedings.
69. The disqualification regime recommended by the Hon John Dyson Heydon AC QC's Final Report of the Royal Commission into Trade Union Governance and Corruption (**Heydon Report**) gave standing only to the regulator,¹⁷ which is the case in respect of the equivalent provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**).¹⁸ Yet under the Bill, an application can be brought by the Commissioner, the Minister or a 'person

¹³ The "just and equitable" ground for winding up a solvent company under section 461 of the *Corporations Act 2001* is no true comparator

¹⁴ FWO Inquiry Report, page 7 - <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUK EwiOj9-QyqLkAhU28HMBHSHIBYAOQfjAAegQIAhAC&url=https%3A%2F%2Fwww.fairwork.gov.au%2FArticleDocuments%2F763%2F7-eleven-inquiry-report.pdf.aspx&usg=AOvVaw24ieYQ2jygZMPZFWDMpviv>

¹⁵ FWO Media Release – <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/january-2019/20190118-xia-jing-qi-penalties-media-release>

¹⁶ FWO Media Release – <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/july-2019/20190718-made-establishment-eu-media-release>

¹⁷ Recommendation 38.

¹⁸ Sections 206C-206EEA of the *Corporations Act*. See, also, s 12GLD of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act); s 86E and s 248 of Schedule 2 of the Competition and Consumer Act 2010 (Cth) (CC Act) (s 86E(1A) of the CC Act allows the Director of Public Prosecutions to bring an application for a disqualifying order).

with sufficient interest'.¹⁹ There are no conditions on standing or the bringing of an application that could operate as safeguards against frivolous or vexatious claims.²⁰

70. Under the Bill, the Court may disqualify a person from holding office for the period it considers appropriate, if one of the grounds is made out and the Court does not consider that it would be unjust to disqualify the person.
71. This formulation is different from the disqualification regime for corporations, which empowers the Court (or, in limited circumstances, the regulator) to make a disqualification order if a ground is made out and the order is justified.²¹ The formulation in the Bill has the practical effect of shifting the 'onus' onto the defendant to satisfy the Court why the order is unjust if a ground is made out.
72. The individual members of the Union who volunteer as unpaid office holders will have higher standards of conduct applied to them than a company director who is remunerated well above \$100,000 per annum. The breadth of the "grounds for disqualification" is so wide that individual members could be disqualified for matters that bear no relevance to the functions they perform or the quality of their performance.
73. In effect, a union "office holder" could be disqualified for being involved in an altercation at their local nightclub on the weekend (without being convicted), while a company director is likely to retain their position if convicted of shoplifting.
74. By ways of example, the Bill would:
 - a. automatically disqualify any person found:
 - i. **whistleblowing** in contravention of the *Crimes Act 1900* (Cth);
 - ii. in New South Wales, to have had an **abortion**;
 - iii. to have engaged in commercial surrogacy;
 - iv. bought drugs;
 - v. engaged in affray; or
 - vi. engaged in joyriding.
 - b. allow disqualification for:
 - i. in Tasmania, trespass;
 - ii. nuisance;
 - iii. taking or possessing drugs; or
 - iv. incorrect storage of firearms.
75. The above offences are simply irrelevant to the operation of a union. This aspect of the Bill represents an unjustified intrusion into the personal lives of rank-and-file union members serving on committees of management.

¹⁹ Currently disqualification applications can only be brought by the Registered Organisations Commissioner, the General Manager, or a person authorised in writing by either: s 310(1), RO Act.

²⁰ See, by way of contrast, section 237(2) of the Corporations Act, which deals with derivative actions commenced by a member or former member or officer of former officer of a company on behalf of a company.

²¹ Sections 206C-206F of the Corporations Act; s 12GLD of the ASIC Act; s 86E and s 248 of Schedule 2 of the CC Act.

76. The disqualification provisions may also serve to exclude the democratic participation of union members, and disproportionately impact those, who experience higher levels of contact with the justice system. This could include members from lower socioeconomic backgrounds, Indigenous Australians and many ethnically diverse community members.
77. The impact could be particularly severe on, for example, Indigenous Australians who are disproportionately represented in Australia's justice system. As comprehensively researched and documented by Change the Record²² the rates of incarceration stem from complex intersections such as poverty, socioeconomic factors and systemic discrimination from the justice system. Where fully 2.5% of adult Indigenous population is incarcerated and nearly one in four Indigenous men born in the 1970s have been gaoled²³ these provisions would create yet another barrier to Indigenous Australians participating in democratic processes.
78. The Bill ignores the democratic nature of trade unions vis-à-vis companies. A union's committee of management is typically, and properly, made up of rank-and-file members who volunteer their time and are elected by other union members, free from any interference by incumbent officers. This is in clear distinction to the increasing trend for professional directors in the corporate world, where potential directors are heavily vetted prior to assuming office. Such a model would, under the FW(RO) Act, be unlawful for a union to adopt.
79. Hence, the Bill creates the extraordinary situation where a rank-and-file union member can commit a crime, punishable by up to two years gaol, by standing for office – purely because they were ignorant that a conviction ten years prior disqualified them from standing. Given how out of step the Bill is with both corporations law and community expectations, a person in this situation would have no reasonable basis for knowing their conduct was a crime.
80. Again, this Bill applies a far more onerous standard on Unions than anything *ever* seen in the *Corporations Act*. And to be clear: **no company has even been deregistered for breaching workplace laws.**

Disqualification – breach of procedural fairness

81. As noted above, a person can be disqualified from holding office in the event of a "designated finding" being made.
82. The term "designated finding" is defined at section 9C of Schedule 1 which includes a finding in civil proceedings that a person has been involved in a contravention.
83. Nothing in the Bill requires the person to have been a party to proceedings, nor that they even be first made aware of the proceedings.
84. Thus, a person may find themselves subject to disqualification proceedings on the basis of proceedings which they were wholly unaware and in which they were never granted the opportunity to defend themselves. In such a situation the person would, absent a costly collateral challenge against the underlying proceedings which itself would be at the discretion of the Court, be unable to properly defend the disqualification proceedings.

²² <https://changetherecord.org.au/>

²³ Andrew Leigh, 2019 *The Second Convict Age* - <http://andrewleigh.org/pdf/SecondConvictAge.pdf>

85. The provision is simply in breach of natural justice.

Disenfranchising

Democratic basis of unions

86. Fundamentally, Australian trade unions are democratic organisations. They are run by elected officers who answer directly to their members.
87. In this, the ETU is no different. The ETU is a highly democratic, rank and file member driven organisation with well over 150 members acting as “office holders” in a voluntary capacity to oversee that the running of the Union is occurring in the best interests of the membership.
88. These members represent a broad range of industry subsets within the broad electrotechnology sector. They also come from an extraordinarily broad cross section of both metropolitan and regional Australia representing a rich and diverse range of geographic and socioeconomic backgrounds.
89. The free and democratic functioning of union organisations without regulatory, political or employer interference is recognised in international law.²⁴ Australian research has demonstrated that the isolated cases of corrupt practices within unions are more effectively addressed by member participation and internal democracy than by state regulation.²⁵

The Alternative Orders Regime

90. The Bill allows the Court to make a range of ‘alternative orders’, either as alternatives to cancellation of registration or as distinct orders (with standing granted to the Minister, the regulator or a person with sufficient interest). These orders include:
- a. disqualification of certain officers (in addition to the already broadened disqualification regime);
 - b. exclusion of certain members;
 - c. restriction and control of the organisation’s funds and property;
 - d. excising of membership; and
 - e. suspension of any rights, privileges of members, **including the rates of pay and leave for ordinary workers.**
91. There are no equivalent provisions in the winding up provisions in the Corporations Act.²⁶
92. Further, under the Bill the Court has a broad power to place unions into administration including reports to the Court and the holding of elections.
93. The grounds in the Bill on which a remedial scheme can be ordered are broader than the grounds for the appointment of an administrator under the *Corporations Act* where

²⁴ Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), Article 3.

²⁵ <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8543.2009.00736.x/abstract>.

²⁶ With the possible exception of section 233, but that is on far more limited grounds (per section 232) and standing to apply is more limited (per section 234) than in the Bill.

the grounds for the court-ordered appointment of an administrator are generally limited to insolvency and enforceable security interests.²⁷

94. The grounds under the Bill include:

- a. the organisation or a part has ceased to function effectively, including having regard to contraventions of certain laws, misappropriation of funds and repeated failure of officers to fulfil their duties;
- b. financial misconduct by officers;
- c. officers acting in their own interests; and
- d. the affairs of an organisation or part being conducted in a prejudicial or discriminatory manner.

95. The Explanatory Memorandum to the Bill claims that two of these grounds are adapted from the Corporations Act,²⁸ but those provisions of the Corporations Act ground the winding up of a company, not the appointment of an administrator.²⁹ Under the Bill, they can ground the cancellation of registration of an organisation, the alternative orders discussed above and the imposition of a remedial scheme including the appointment of an administrator.

96. Under the Corporations Act, an administrator can only be appointed by a liquidator, a secured party or the company itself.³⁰ In stark contrast, under the Bill, the Court can order a remedial scheme on application by the organisation, a member, the Commissioner, the Minister or a person with sufficient interest.

Amalgamations

97. The Government has claimed that the competition test applied to companies seeking to merge is like a public interest test, similar to the public interest test that the Bill imposes on organisations seeking to amalgamate. In the Second Reading speech to the previous incarnation of the Bill, the Government complained that:

“Currently, the Fair Work Commission has very limited ability to do anything other than effectively rubber stamp a merger approved by just a bare majority of members.”

98. This claim is simply wrong.

99. First, the free and democratic functioning of unions and employer organisations is enshrined in international law.

100. The ILO Committee on Freedom of Association has said that restrictions on the organisational autonomy of organisations”

²⁷ Sections 436A to 436C. Note that under s 233 the Court can order the appointment of a receiver and manager and make other remedial type orders, but the grounds and standing are narrower than in the Bill.

²⁸ Paragraph [164].

²⁹ Sections 461(1)(e) and (f) of the Corporations Act.

³⁰ See fn 26 above.

“should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations.”

101. Even the Explanatory Memorandum to the Bill does not pretend that these amendments are directed to that purpose, instead relying on economic justifications. That the RO Act currently provides for a procedural process for amalgamations to give effect to the wishes of the respective organisations’ members, as expressed in a ballot conducted by the Australian Electoral Commission, is entirely appropriate and in accordance with international law.
102. Second, the competition test imposed on company mergers only considers whether the merger would have the effect of ‘substantially lessening competition in any market’. The public interest test that the Bill imposes on organisations considers the organisations’ ‘record of complying with the law’ as well as ‘the impact on’ employers and employees in the industry or industries concerned. The latter is far broader than the competition test. The former has no equivalent.
103. Corporations can have an extensive record of not complying with the law, including tax avoidance and wage theft, and not be prevented from merging. It goes without saying that the competition issues that the mergers test for companies addresses, such as consumer choice and price fixing, are irrelevant to the amalgamation of registered organisations.
104. Third, under the Bill, organisations wishing to amalgamate are required to undergo a burdensome two-stage hearing process in which notice of the hearings must be published widely and the Fair Work Commission must have regard to submissions from a wide range of parties given a statutory right to be heard. If the Fair Work Commission finds that the amalgamation is not in the public interest, the organisations have no access to a merit review but are restricted to judicial review, which is expensive, time consuming and only available on limited grounds.
105. Under the *Competition and Consumer Act 2010* (Cth), merger parties can choose from three avenues to have a merger considered and assessed: the Australian Competition and Consumer Commission (ACCC) can assess the merger on an informal basis; the ACCC can assess an application for formal clearance of a merger; or the Australian Competition Tribunal can assess an application for authorisation of a merger. If the merger proposal is likely to contravene the competition test, the merger parties may decide either not to proceed with the merger, to provide a court enforceable undertaking to address the concerns, or to proceed and defend court action.

Abolition of rights

106. Perhaps the most perverse aspect of the Bill is found at section 28P. This section provides:

“(1) The Federal Court may, by order, exercise any of the following powers:

(a) the power to suspend, to the extent specified in the order, any of the rights, privileges or capacities of the organisation or a part of the organisation, or of all or any of its members, as such members, under this Act, the Fair Work Act or any other Act, under modern awards or orders made under this Act, the Fair Work Act or any other Act or under enterprise agreements;

...”

(emphasis added)

107. This provision permits the Court to single out workers who are union members and strip them of **all** industrial rights. Under this section, the Court can switch of union members rights under enterprise agreements, awards, and the National Employment Standards while leaving non-union members entitlements intact.
108. To be clear, under the Bill the Court can **abolish the minimum wage for union members, and only union members.**
109. There is no circumstance where such an order is appropriate, and it is simply unprecedented in workplace law Freedom of association is a central feature of the *Fair Work Act*, meaning that workers should be treated the same irrespective of their union membership. The Bill scraps that principle and creates a mechanism to deliberately punish union members for choosing to be union members.

Disenfranchisement

110. The effect of the alternative orders regime is to take control out of the hands of members and place it in the influence of third parties through court action.
111. Democratic control is currently, and should remain, at the heart of how unions are governed – unions should be run by members for members. If union members wish for their unions to amalgamate, then this should be a matter for the membership. If union members feel insufficiently supported by their union, there are already mechanisms to remedy this. If a union structure is dysfunctional, then union members are best placed to design and implement a structure that works for them – not a court.
112. In particular, the administration provisions of the proposed act are unprecedented in their removal of the rights of an organisation to administer its own affairs.
113. If a corporation moves into administration, they choose their administrator. The proposed laws provide no equivalent for Unions. Instead they provide a regulatory framework that is unnecessarily cumbersome, highly litigious and will lead to significant costs which would be a waste of Union members' money, something the Government purports to be interested in while introducing a bill with the opposite effect.
114. Nothing in the Bill seeks to increase transparency or accountability to the membership. Instead, the Bill puts the fate of unions in the hands of lawyers and the court system. Rather promoting democracy, these changes would instil further bureaucratisation of union governance and seek to create a professional class of union leadership that is disconnected from the rank-and-file membership.

Conclusion

115. At best, this is a poorly constructed bill, devised as an ideological attack on Unions. At worst, it is a backdoor tactic designed to execute the Government's immediate political objective of attacking the Construction, Forestry, Maritime Mining and Energy Union.
116. The Bill jettisons key tenets of Australian law around freedom of association, double jeopardy and fairness, and wilfully breaches established ILO conventions.
117. At its heart, the Bill is unnecessary, undemocratic and unfair, and it will make Australian workplaces less safe.

118. The Bill should be rejected.