NTEU Submission

Senate Standing Committee on Education and Employment

Inquiry into

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

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Recommendation Introduction

The National Tertiary Education Union (NTEU) is opposed to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 and is asking that the Senate Standing Committee on Education and Employment recommend that it not be passed. In this regard we support the position taken by the ACTU in its submission to this inquiry.

National Tertiary Education Union (NTEU)

NTEU represents the industrial and professional interest of some 28,000 people working in tertiary education and research, including at universities, vocational education and training, adult education, with private providers and at research institutions.

NTEU is organised across three levels:

- National;
- State and Territory-based Divisions; and
- Workplace-based Branches, including
    - 38 university branches
    - Adult and Community Education – ACE (Vic)
    - TAFE (Vic)
    - Research Institutes
    - Navitas

- Royal Australian College of General Practitioners (RACGP)
- College of Law

NTEU is a highly democratic member driven union with elected officers at each level of the union. Currently there are some 801 elected NTEU positions across Australia, the vast majority of which are filled by people doing so on a purely voluntary and unpaid basis. Elections are held every two or four years depending upon the position. This highly decentralised model not only allows the NTEU to build and maintain a visible and organised presence at each workplace able to produce a rapid response to local industrial and organisational issues, but also guarantees maximum accountability and ensures members interests are to the forefront of all the union's decision making.

While we address some the specific issues associated with the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the Bill) below, it is important to understand what the impact of the provisions that expand the grounds on which union officials might be disqualified, or unions deregistered, could have on a relatively small, highly democratic union such as the NTEU.

Expanding the grounds on which a union official can be disqualified, is likely to make it more difficult for a small highly democratic union like the NTEU to fill all of its elected positions. As discussed below in relation to the NTEU's recent experience at an Australian university, we would ask the Committee to consider whether the Bill could unintentionally provide employers with an incentive to formally prosecute technical breaches of the Fair Work Act as a pathway to disqualification of union officials that they consider difficult to deal with.

The threat of deregistration for non-compliance with reporting rules also presents as an important issue for a small highly democratic union like the NTEU. Having a large number of elected positions and frequent movement of people in and out of elected positions increases the risk of non-compliance with reporting requirements which include failing to provide the AEC with a declaration that the membership register has been maintained properly, and notifications of changes to officers or failure to complete the financial training within six months. While NTEU currently devotes extensive resources to compliance activities, the prospect is that if passed, this Bill will require the Union to further divert member resources away from protecting their interests in the workplace into bureaucratic red-tape activity.

We do not believe that it can be the intention of the Bill to provide a strong regulatory incentive for a small union, such as the NTEU, to restructure in such a way as to reduce the number of elected positions and thereby reduce democratic control of the Union.

The other issue that is perhaps unique to the NTEU is the fact that the bulk of our members, and therefore officials, are employees of Australian universities. One of the defining characteristics of our universities is academic freedom or free intellectual inquiry, which includes a right of employees to make controversial public statements including those critical of their own institutions. We are concerned that the expansion of grounds on which an individual might be disqualified as a union official might act to shackle their exercise of free intellectual inquiry if it is thought this might trigger potential offences in the Bill.

Provisions of the Bill

The Bill essentially covers four areas, namely:

- disqualification from office,
- cancellation of registration,
- administration of dysfunctional organisations, and
- a public interest test for amalgamations.

While the government claims these changes have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations, they in effect do the opposite by allowing external parties to directly interfere in the operation of democratically elected unions.

The government is also trying to sell these Bills to the public with the impression that there is currently no or little regulation of trade unions and other registered organisations activities. This is not the case. The *Fair Work (Registered Organisations) Act* already contains extensive provisions dealing with the disqualification of officials and registration of unions. The current Bill simply seeks to expand these provisions including allowing the Minister or person with sufficient interest to interfere with the internal working of unions. While the government claims these provisions are not targeted at unions and apply to other registered organisations, the provisions are much harsher on unions and union officials than they are on corporations or their director.

Disqualification

The Bill broadens the grounds on which an officer of a union could be disqualified and includes:

- expanding the definition of a prescribed offence which would result in automatic disqualification, and
- expanding the regime for disqualification by court order.

Automatic disqualification

The Bill expands the grounds for disqualification for unions and makes them much broader than those that apply to company directors. As well as conduct directly related to their duties as a union officer, the Bill would allow a court to disqualify a union officer for conduct entirely unrelated to their union role.

Disqualification by court order

The Bill allows the Commissioner, the Minister or any 'person with sufficient interest' to apply for a disqualifying order, where 'sufficient interest' includes those whose rights, interests or legitimate expectations would be affected by the decision.

The grounds on which someone can apply for a disqualification order include a 'fit and proper person test'. Therefore, someone who doesn't meet a specific standard can be disqualified from holding an elected position in a union. The fit and proper person test can take into account a variety of factors including technical breaches such as an official not giving the correct notice when inspecting a dangerous worksite or investigating underpayment of workers as well as other offences such as being caught twice driving while their licence is disqualified.

Therefore, and troublingly, the Bill allows the Minister or others with a 'sufficient interest', which could include business lobby groups or employers, to seek a disqualification order against a union official.

No such equivalent provisions exist for corporations. Directors of companies whose workers are exposed to risk of serious illness or injury or death, or that engage in wage theft, are not exposed to a similar application for disqualification.

Case Study

NTEU submits that the following case is an example that demonstrates the potential for a person to be disqualified from a union leadership position – with personal, financial and career implications – following a technical contravention of a civil law, is excessive, and grossly disproportionate.

In April 2016 bargaining commenced between NTEU and an Australian university. In September 2016 the university filed an application in the Federal Court against the union, an officer and an employee official, who were leading the bargaining[1]. The application alleged misrepresentation via posters that outlined the Union's interpretation of the management's bargaining position.

The University also sought an injunction. The injunction was not granted because NTEU elected to remove the impugned statements. The matter was sent to trial.

In December the university became the first University to apply to have the collective agreement that covered its employees terminated. The effect of termination of an agreement is to reduce employee wages and conditions to the underlying Award or the minimum safety net, the National Employment Standards. The purpose is often to put pressure on a Union to agree to reductions in employee wages and conditions.

NTEU campaigned against this decision and in December 2016 held a public rally on campus, started an email campaign and a letter writing campaign and shared social media posts from others who expressed support for the nearly 3000 workers who would be affected. The university expanded their application and claimed that the Union and the individuals had engaged in coercion under S343 of the Fair Work Act, including the email and letter writing campaign, the public meeting and the social media posts as alleged acts of coercion. The Union denied the allegations.

NTEU believes that this was a tactic engaged in by the university in order to put pressure on the Union, and its lead negotiators, to agree to reductions in terms and conditions for our members.

The collective agreement was terminated in August 2017. In February 2018 near the end of negotiations the University proposed that withdrawal of their Court action could form part of the settlement of the enterprise bargaining negotiations. In effect it was proposed as a bargaining chip. The Union and the two individuals refused, and the parties agreed a new collective agreement.

The agreement was lodged in the Fair Work Commission for approval in April and the court action was eventually dismissed in June.

Under the expanded scope for disqualification in the Bill before this Committee, if the university had been successful in its Court actions, they, any employee, any disgruntled union member who did not agree with the Union's bargaining position, and any member of the public with an interest could apply for disqualification of the officer and employee for what appears to have been a tactic used by an employer to stifle robust enterprise agreement negotiation. The threat of disqualification of the Union's elected leaders in this way will have a chilling effect on their capacity to represent members.

[1] See WAD 416/2016

This case shows the use of litigious behavior by an employer to gain a tactical advantage in bargaining in a sector that is not known for problematic or aggressive industrial relations. When the incentive to use such tactics is added via the measures in the Ensuring Integrity Bill, this type of action will likely escalate at a cost to ordinary workers, their Unions and the court systems.

Cancellation of registration / deregistration

The *Fair Work (Registered Organisations) Act* already has extensive provisions to deal with the deregistration of unions, including for:

- continued breaches of a modern award, an order of the Fair Work Commission (FWC) or an enterprise agreement by the union or its members;
- unlawful industrial action by the union or its members that prevents, hinders or interferes with the activities of an employer or provision of a public service;
- failure by the union or its members to comply with orders to stop unprotected industrial action, or other orders under the Fair Work Act; or
- a failure by the union to comply with legislation, guidelines or rules relating to financial matters.

The Bill significantly expands these grounds. Most of the grounds in the Bill have no ready equivalent to the grounds for winding up a company in the Corporations Act. If the same provisions applied to companies, the Minister, an employee or any other person 'with a sufficient interest' could apply to the Court to wind up a company or impose other orders. For example, a union does not have the capacity to apply to wind up a company which is involved in wage theft or dangerous work practices, yet the Bill before the Committee gives employers standing to apply to deregister a union that they may be in dispute with.

There are no provisions in the Corporations Act that specifically and directly allow for companies to be wound up due to a history of non-compliance with the law by them or their shareholders. If similar provisions that are included in the Bill applied to companies, then it would be possible for Courts to order:

- the disqualification of a director for a period the Court thinks fit;
- the exclusion of certain shareholders from the company;
- the suspension for a period the Court thinks fit, the rights, privileges or capacity of a company to control its funds and/or property.

Administration of unions

Under the Bill, the Minister or any person with 'sufficient interest' can apply to the court to place a union under administration.

As with other aspects of the Bill, *the Fair Work (Registered Organisations) Act* already provides for the Court to make remedial orders to reconstitute a union or branch that has ceased to exist or to function effectively. The Bill seeks to broaden the range of circumstances in which a union can be placed under administration and relate to the conduct of union officers and if it is deemed that a union has 'ceased to function effectively'.

There is no equivalent means by which the conduct of a company director can lead to the company being placed under administration. If this were the case then a company could be placed under administration, if:

- directors acted in their own interests rather than in the interests of the members as a whole;
- affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole;
- directors engaged in financial misconduct, for reasons including but not limited to:
    - breach of general duties in relation to the financial management of companies;
    - misuse of funds;
    - false accounting;
    - failure to fulfil duties in relation to financial reporting (but only if duties to provide financial reports to the regulator were imposed on all companies – currently only some companies have financial reporting requirements);
- the Court has declared that the company 'has ceased to function effectively', which it could be for reasons including, but not limited to:
    - history of non-compliance with corporate by directors;
    - directors having misappropriated company funds;
    - directors repeatedly failing to fulfil their duties as directors.

Mergers / Amalgamations

Under current laws, if two or more unions wanted to amalgamate, the Fair Work Commission (FWC) only needs to satisfy itself that:

- there has been a valid ballot on the question of the amalgamation,
- there are no proceedings (other than civil proceedings) against one of the existing organisations seeking to amalgamate, and
- that the newly amalgamated organisation will assume all legal responsibilities and liabilities that arise from an existing organisation

The Bill proposes to introduce a new 'public interest test' related to amalgamations or mergers. Therefore, before approving any proposed amalgamation or merger between unions, the FWC must decide whether the amalgamation is in the public interest with reference to:

- the record of the organisations' and their officials' compliance with the law,
- the likely impact of the amalgamation on the industry or industries concerned, and
- the Australian economy and any important part of it.

FWC must also identify a broad list of relevant persons who are allowed to make submissions on whether an amalgamation is in the public interest and conduct hearings to give consideration to these submissions.

In other words, the new provisions effectively remove the right of the members of existing organisations to determine whether an amalgamation or merger is in their best interests and allows a broad list of persons including governments, lobby groups and businesses to argue against such a merger.

The anti-competitive provisions that apply to company mergers or take-overs are far narrower and concentrate solely on market impacts. They do not consider a company or its director's legal compliance.

These provisions highlight the extent to which the government is prepared to allow itself and employers to directly interfere in the right of freedom of association and the democratic wishes of union members.

Summary and Conclusions

The proposed Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill is nothing more than a politically motivated attack on workers' ability to democratically elect and run their own unions. It imposes harsher, higher and more burdensome regulations on unions than it does on any other organisation in society, including corporations.

Contrary to the Government's claims, and as outlined above, the requirements imposed by this Bill go much further than any requirements on corporations or companies.

Most industrial organisations, including the NTEU, unlike corporations, are small not-for-profit organisations overseen by an elected committee of management many of whom are volunteers.

By allowing for significant political, corporate and judicial interference in what otherwise would be the free and democratic internal functioning of organisations, especially unions, the Bill further tilts the imbalance of power in the workplace toward employers and the government and away from workers.

We oppose the Bill because it is unnecessary and undemocratic and we are asking the Committee to reject it in its entirety.

Contacts

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