Senate Education and Employment Legislation Committee

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

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6 September 2019

The *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill* (Bill) proposes extensive amendments to the *Fair Work (Registered Organisations) Act 2009* (RO Act).

The objectives of the Bill are to ensure the integrity of registered organisations and their officials, given the privileged position that employee and employer organisations occupy in Australia's workplace relations system, for the benefit of their members.[1]

The Government has framed the measures in the Bill as necessary to bring the regulation of registered organisations and their officials into line with the regulation of companies and their directors.[2]

There are two key points to be made about the Bill in this Submission:

1. The assumption that registered employee organisations (unions, the main focus of the Bill) and companies should be subject to the same forms of regulation is flawed.

2. In any case, the Government's application of the corporate model to the regulation of unions, through the provisions of the Bill, is highly selective.

Unsuitability of the Corporate Model

This part of the Submission highlights the key points of my article, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model' (2000) 13 *Australian Journal of Labour Law* 28 (attached). Although published almost 20 years ago, much of the analysis remains apposite today.

The article examined proposed legislation of the Howard Government to impose statutory director-like duties on union officials (provisions now found in Chapter 9, Part 2 of the RO Act). This was the beginning of a gradual process of applying corporate standards of regulation to federally registered unions.[3]

The article noted that there are indeed some similarities between corporations and unions. They can both be large enterprises with significant financial assets and the ability to wield economic and political power (although not all companies and unions fit this description). Unions also have, under section 27 of the RO Act, a form of corporate personality: like

[1] *Explanatory Memorandum for the Bill,* page 1.
[2] *Industrial Relations Minister's Second Reading Speech for the Bill.*
[3] For example, through some of the measures introduced by the *Fair Work (Registered Organisations) Amendment Act 2016* (Cth).

companies, they can engage in various types of property transactions and sue or be sued in the registered name of the union.

However, the differences between corporations and unions far outweigh the similarities:

Different purposes for which companies and unions are formed

Companies are mainly vehicles for carrying on commercial activity, with a view to generating revenue and profit. The main rationale for forming the most common type of company, the company limited by shares, is the obtaining of limited liability: the shareholders are not liable for the company's debts (above what they have paid for their shares).

Unions, on the other hand, are primarily formed in order to improve the working conditions of their members (and workers generally), not to accumulate profit for distribution to their members. The principle of limited liability does not apply to a union or its members.

Different interests of shareholders and union members

Shareholders have what is best described as an ownership or proprietary interest in companies. Primarily, they want to see a return on their investment, and therefore have an interest in management power being exercised legitimately.

In contrast, the primary interest of union members is a democratic one: ensuring that the union fulfils its obligation to improve the position of members, through industrial representation, collective bargaining and (increasingly) the provision of services. Union members have a right to participate in the activities of the union, to see that it is run fairly and to ensure it provides them with industrial protection.

Unique evolution of trade union regulation

In considering the application of a corporate model of regulation to unions, it is very important to keep in mind that the regulatory scheme for registered organisations had its origins in the conciliation and arbitration system adopted in 1904.

This involved unions entering into a compact with the state, under which they would accept a high level of regulation of their internal affairs – in exchange for the substantial benefits obtained through registration (e.g. access to the process for making awards, various types of preference for union members, right of entry).

To enjoy these rights and privileges, unions had to accept regulation in the public interest to ensure they operated democratically, were well-managed and did not abuse their power.

However, over the 115 years since then, the balance inherent in that compact has swung dramatically against unions: while the level of regulation has constantly increased, the benefits of participating in the formal system of industrial relations have dwindled (e.g. registered unions are just one of many possible employee bargaining representatives under the *Fair Work Act 2009* (Cth) (FW Act)) which also include unregistered unions).

In summary

The most that could be said is that there are some similarities between unions and companies which justify considering the regulatory standards applicable to companies and directors, as a

guide to determining the appropriate level and nature of regulation for unions and their officials.

However, the significant differences between the two types of organisations mean that there is no basis for the automatic application of the corporate model of regulation to unions. Many of the provisions of the Bill therefore proceed from a flawed assumption.

Government's Selective Application of the Corporate Model

Despite its claim to align regulatory standards for unions with those applicable to companies through the Bill, the Government has cherry-picked certain aspects of the relevant corporate law provisions and ignored others. For example:

Schedule 1: Disqualification from office

The Bill proposes to expand the grounds for disqualification from office in a registered organisation and the parties with standing to seek such disqualification.

Automatic disqualification would apply in a wider range of circumstances under the Bill, including where an official is the subject of a criminal conviction under federal, state or territory law punishable by imprisonment for life or 5 or more years (even if this does not relate to performance of their role as a union official). Under the Corporations Act, directors are automatically disqualified mainly in respect of convictions for offences relating to decisions affecting the company; or Corporations Act offences punishable by more than 12 months' imprisonment (or at least 3 months' imprisonment for dishonesty-related offences).

Court-ordered disqualification could be sought against a union official on a wide range of new grounds under the Bill, including where:

- 'designated findings' have been made against them under 'designated laws' (e.g. findings of civil/criminal breaches of the RO Act, FW Act, the building industry legislation or federal/state work health and safety laws); or
- they are considered not to be a 'fit and proper person' (e.g. because their FW Act right of entry permit has been refused, suspended or revoked; they have been found in civil/criminal proceedings to have engaged in fraud, dishonesty, etc; in criminal proceedings they have been found to have engaged in violence, etc; they have been convicted of an offence punishable by two or more year's imprisonment).

These are much broader grounds for disqualification than those applicable to company directions under the *Corporations Act 2001* (Cth) (Corporations Act) (those grounds relate mostly to contraventions by directors of civil penalty provisions of the Corporations Act itself). The RO Act is already aligned in that respect, allowing court-ordered disqualification for breaches of its own civil penalty provisions.

There is no Corporations Act equivalent to the proposed fit and proper person test for union officials. In 2015-16, I chaired the Victorian Government Inquiry into the Labour Hire Industry. I recommended, and the state Government has implemented, a fit and proper person

test as part of a licensing scheme for labour hire providers.[4] This fit and proper person test includes consideration of whether the applicant has been convicted of serious criminal offences or found to contravene various laws (e.g. workplace laws, labour hire laws, accommodation regulations) or had past involvement with insolvent companies. These measures and the broader licensing scheme were considered necessary due to the exploitative conduct of illegitimate operators in the labour hire sector, i.e. some barriers to entry were required to eliminate such operators.

In contrast, a broadly framed fit and proper person ground for disqualification of a union official has no rationale of this kind. The corrupt practices of some union officials which were the subject of the Heydon Royal Commission have already been the subject of regulatory measures (see the Conclusion below). However, if the Government wishes to maintain consistency with corporate regulation, then the fit and proper person disqualification ground in the Bill should be matched with a similar provision in the Corporations Act. This would mean that, for example, if proceedings for FW Act breaches had resulted in the imposition of civil penalties on Made Establishment Pty Ltd director George Calombaris (for underpaying workers) then an order could be obtained for his disqualification as a company director.

Standing to bring an application for court-ordered disqualification of a union official under the Bill would be given to the Registered Organisations Commissioner (who has standing now under the RO Act) as well as the Minister and any 'person with a sufficient interest'. This broad concept could include, for example, an employer or employer organisation. In contrast, only regulatory bodies like the Australian Securities and Investments Commission (ASIC) can seek the removal of directors under the Corporations Act. So an employer organisation could seek to have a union official disqualified for involvement in the taking of unlawful industrial action, but a union could not apply to have Mr Calombaris removed as a director for his involvement in systemic underpayments of workers.

Schedule 2: Cancellation of registration

The same concerns about *standing* apply in respect of the wider range of parties who would be able to seek an order from the Federal Court for the cancellation of a union's registration under the terms of the Bill.

Of even greater concern is the drastic widening of the *grounds of deregistration* proposed in the Bill. Deregistration has long been considered a last resort measure to be utilised against a delinquent union that has acted contrary to the norms expected of a participant in the formal system of industrial relations (e.g. repeatedly engaging in unlawful industrial action or failing to comply with court orders). The current grounds of deregistration under the RO Act reflect this.

The proposed new grounds of deregistration include where a union's officers have acted in their own interests instead of the union's, or are conducting the union's affairs oppressively/unfairly prejudicially to the members, or the union (or its officials or members)

[4] Anthony Forsyth and Industrial Relations Victoria, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report*, Victorian Government, Melbourne, 31 August 2016. See *Labour Hire Licensing Act 2018* (Vic); and see *Labour Hire Licensing Act 2017* (Qld) and *Labour Hire Licensing Act 2017* (SA) which also include fit and proper person tests.

are not complying with 'designated laws'; where the union has committed a serious criminal offence; where 'designated findings' have been made against union members or a part of the union; or where the union (or a substantial number of members) have organised or engaged in 'obstructive industrial action'.

These proposed provisions partly seek to mirror some of the grounds for court-ordered winding-up of a company under the Corporations Act (e.g. where the directors have acted in their own interests rather than those of the members as a whole, or are conducting the affairs of the company in a way that is unfairly prejudicial to or discriminatory to member(s)). However, the addition in the Bill of grounds for deregistration relating to a union's (or members') non-compliance with a wide range of laws (e.g. FW Act, health and safety legislation) has no equivalent in the Corporations Act.

Conclusion

The Bill is unnecessary, and should not be passed by the Parliament, for all the reasons outlined above. In addition, I draw the Senate Committee's attention to another of my articles: 'Law, Politics and Ideology: The Regulatory Response to Trade Union Corruption in Australia' (2017) 40:4 *University of New South Wales Law Journal* 1336 (also attached).

This article examined the instances of union corruption investigated by the Heydon Royal Commission, and how the Coalition Government has responded to the Royal Commission's recommendations. In essence, I found that although the extent of union corruption in Australia had been over-stated by Commissioner Heydon, a proportionate regulatory response was justified. This included legislation imposing higher standards of financial management accountability on union officers; higher penalties for serious breaches of the RO Act; criminal penalties for 'corrupting benefits' and requirements for disclosure of benefits passing to a union under an enterprise agreement; clearer governance standards for separate entities or union funds (e.g. election funds); and a specialist regulator for registered organisations (which I argued should not be ASIC, but a registered organisations regulator located within the Fair Work Ombudsman). Almost all of these measures have now been implemented.

I also highlighted several areas where Commissioner Heydon's recommendations went too far, for example the proposal to add FW Act breaches to the grounds for disqualifying union officials; and argued that the Coalition was engaging in over-reach through its 2016 election proposals to allow deregistration of 'dysfunctional' unions and introduce a public interest test for union amalgamations (the latter is now found in Schedule 4 of the Bill).

That over-reach on the Government's part now finds even fuller expression in the Bill. It as an opportunistic attempt, under the guise of protecting union members, to provide employers and the Government itself with new avenues to reduce union power.