Senate Education and Employment Legislation Committee

WEDNESDAY 25 SEPTEMBER 2019

Attorney General's Department

Question No. 1

Senators asked the following question by email on Thursday 26 September 2019:
A key criticism of the Bill is that the penalties are not proportionate to the offences. That is, an official can be disqualified, an organisation deregistered or placed under administration, or an amalgamation refused, on the basis of serious unlawful events, or on the basis of a single minor infringement.

1) What is the justification for including single minor infringements to be grounds for disqualification, deregistration etc.

The response to the honourable Senator's question is as follows:

While there are grounds in the existing *Fair Work (Registered Organisations) Act 2009* (RO Act) that allow, depending on the circumstances, for disqualification or cancellation of an organisation's registration as a result of a single infringement, Commissioner Heydon also recommended that the Federal Court should be permitted to make an order disqualifying a person from holding office within a registered organisation or branch if the person has or has been found to have contravened a civil remedy provision of the *Fair Work Act 2009*, or a civil penalty provision of the RO Act or the *Work Health and Safety Act 2011* and the Court is satisfied that the disqualification is justified. Schedule 1 to the Bill gives effect to this recommendation.

The Federal Court must be satisfied that a ground for cancellation exists. The grounds have been broadly formulated by reference to the existing cancellation grounds in the RO Act as well as additional grounds relating to:

- the conduct of the organisation or a part – adapted from s 461 of the *Corporations Act 2001* which provides grounds on which a company may be wound up by the Federal Court; and
- a serious criminal offence committed by the organisation – being an offence against a law of the Commonwealth, or a State or a Territory and punishable on conviction by a penalty for a body corporate of or equivalent to at least 1,500 penalty units.

Where a ground for disqualification or cancellation of registration exists, under the Bill the Federal Court has the discretion not to order disqualification or deregistration where it would be unjust to do so. In addition, the availability of alternative orders to cancellation also provides the Federal Court with the means to determine the appropriate remedy in any particular case where it is found to be more appropriate for sanctions to be applied to only a part of an organisation.

Similarly for the administration provisions, it is the Federal Court that must be satisfied that one or more of the circumstances in s 323(3) exist in relation to the organisation. In addition, the Federal Court can only make an order where it is satisfied that the order would not do substantial injustice to the organisation or any member of the organisation.

The Explanatory Memorandum at paragraph 158 states that the administration amendments are remedial in nature, to ensure that governance issues within an organisation, or individual branches or divisions, can be addressed promptly and transparently to ensure that the interests of members are protected.

The formulation of the public interest test for amalgamations requires a Full Bench of the Fair Work Commission to assess whether each of the organisations wishing to amalgamate has a record of not complying with the law.

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Question No. 2

Senators asked the following question by email on Thursday 26 September 2019:
The Parliamentary Joint Committee on Human Rights (PJCHR) recommended that the court's powers of cancellation (schedule 2), and the power to place an organisation into administration (schedule 3) be amended so that it can only be exercised by the court as a matter of last resort and where the court is satisfied that it is in the best interest of the members.

2) Has the department considered these recommendations and why has the 2019 Bill not been amended as suggested by the PJCHR?

The response to the honourable Senator's question is as follows:

The formulation of the cancellation power in s 28J of the Fair Work (Registered Organiations) Amendment (Ensuring Integrity) Bill 2019 (the Bill) is in substantively similar terms to the existing cancellation power in s 28(3) of the *Fair Work (Registered Organisations) Act 2009* (RO Act).

The Federal Court's assessment of *unjustness* permits an enquiry into matters such as the gravity of the offending conduct and the oppressive consequences of deregistration for an organisation's members. The Bill provides that the Federal Court must take into account the best interests of the members of the organisation as a whole in determining whether the cancellation of registration would be unjust (s28J(1)(b)(iii)).

The Explanatory Memorandum to the Bill at page xi provides:

> *'Where a ground for cancellation exists, the Federal Court still has a discretion not to cancel the registration of an organisation in circumstances where that cancellation would be unjust. This ensures that cancellation remains a measure of last resort.'*

The availability of alternative orders to cancellation also provides the Federal Court with the means to limit the effect on members who have not been involved in activity that would otherwise be grounds for an order for cancellation.

With regard to the administration provisions, the RO Act currently permits the Federal Court to issue declarations when satisfied of organisational dusyfunction (s 323 of the RO Act). The orders that will be available to the Federal Court are set out in s 323A of the Bill and s 323A(3) makes it clear that an order can only be made where the court is satisfied that the order would not do substantial injustice to the organisation or any member of the organisation.

The Explanatory Memorandum at paragraph 158 states that the administration amendments are remedial in nature, to ensure that governance issues within an organisation, or individual branches or divisions, can be addressed promptly and transparently to ensure that the interests of members are protected.

SENATE STANDING COMMITTEE ON EDUCATION AND EMPLOYMENT COMMITTEE

25 SEPTEMBER 2019

Attorney General's Department

Question No. 3

Senators asked the following question by email on Thursday 26 September 2019:

The bill would introduce a fit and proper person test as a grounds for disqualification of an official, while no similar test is applied to directors of corporations.

3) What is the rationale for introducing a fit and proper person test as a grounds for disqualification?

The response to the honourable Senators' question is as follows:

This ground was recommended by the Royal Commission into Trade Union Governance and Corruption. The Final Report from the Royal Commission recommended that the *Fair Work (Registered Organisations) Act 2009* be amended to permit the Federal Court to make an order disqualifying a person from holding an office within a registered organisation if the person is not a fit and proper person to hold office (Recommendation 38).[1] Schedule 1 of the Bill gives effect to this recommendation.

Examples of fit and proper tests in the corporate sphere include:

- to gain a license to engage in credit activities under the *National Consumer Credit Protection Act 2009* (Cth);
- to perform the functions of an auditor for the purposes of the *Corporations Act 2001* (Cth) to gain an Australian financial services license from ASIC; and
- to obtain a license to operate as a labour hire provider in Queensland under the *Labour Hire Licensing Act 2017* (Qld).

[1] Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015), Vol 5, pp 235-236

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Question No. 4

Senators asked the following question by email on Thursday 26 September 2019:
The Royal Commission acknowledged that the deregistration of a registered organisation would have a disproportionate effect on its members.

4) In light of the comments made by the Royal Commission, what is the basis for broadening the powers relating to the deregistration of organisations?

The response to the honourable Senators' question is as follows:

Evidence was presented to the Royal Commission into Trade Union Governance and Corruption (Royal Commission) of some organisations, branches or parts of organisations where a culture of little or no regard for workplace law, and even criminal law, persists.[2]

The Bill improves the effectiveness of the provisions in the *Fair Work (Registered Organisations) Act 2009* (RO Act) concerning cancellation of registration. The statutory framework will:

- confirm that the Federal Court must take into account the best interests of the members of the organisation as a whole in determining whether the cancellation of registration would be unjust;
- ensure that a ground for cancellation can arise in circumstances where an organisation, or a relevant part thereof, continuously breaches core workplace laws, pays the relevant fine, but sees this as the cost of doing business;
- ensure that a ground for cancellation can arise in circumstances where an organisation or a relevant part thereof commits a serious breach of criminal laws;
- streamline the existing grounds for cancellation in the RO Act; and
- facilitate the continued existence and functioning of an organisation or some of its component parts in circumstances in which only a part of the organisation is affected by systemic unlawful behaviour but others are not by allowing for more targeted sanctions.

[2] See, for example, Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015), Vol 5, pp 44, 152 (referring to Chapter 5.2 of Volume 2), 245, 395-396, 460.

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Question No. 5

Senators asked the following question by email on Thursday 26 September 2019:
5) What safeguards are in place to ensure that members are not disproportionately affected?

The response to the honourable Senators' question is as follows:

The Royal Commission noted that cancelling the registration of a whole union may have a disproportionate effect on union members who have not been involved in illegal activity.[3]

A limitation of the existing cancellation regime in the *Fair Work (Registered Organisations) Act 2009* is that cancellation of the whole organisation (as opposed to a discrete division or part) is required, since it is the organisation as a whole that is the legal entity.

The Bill addresses this shortcoming by providing for the availability of alternative orders (Division 5 of Schedule 2 to the Bill) where a ground for cancellation is established because of the behavior of officers or members in a particular part of an organisation. In addition, applications for alternative orders may be made to the Federal Court directly without the need for there to be a concurrent application for the cancellation of an organisation's registration as a whole.

Where a ground for cancellation exists, under the Bill the Federal Court has a discretion not to cancel the registration of an organisation in circumstances where the cancellation would be unjust. The Bill also provides that the Federal Court must take into account the best interests of the members of the organisation as a whole in determining whether the cancellation of registration would be unjust (s28J(1)(b)(iii)).

[3] Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015), Vol 5, p 405

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Question No. 6

Senators asked the following question by email on Thursday 26 September 2019:
Proponents of the bill argue that the public interest test as proposed by the bill is more broad than the test applied by the Takeover Panel, and the 'competition test' applied by the ACCC. Additionally, the public interest test would automatically be applied to all proposed amalgamations, while the tests applied by the Takeover Panel and the ACCC is only applied if one of the parties disputes the merger or if the merger raises competition issues.

6) What is the justification of making the test more broad than the tests applied to company mergers?

The response to the honourable Senators' question is as follows:
Section 50 of the *Competition and Consumer Act 2010* (CC Act) provides that a merger cannot go ahead if it would substantially lessen competition in any market, unless the Australian Competition and Consumer Commission (ACCC) authorises it. Parties to a merger can obtain statutory protection from legal action under section 50 of the CC Act by lodging an application for a merger authorisation. Subsection 90(7) provides that the ACCC can only authorise a merger if either the merger would not substantially lessen competition, or the merger would benefit the public and this benefit would outweigh any detriment to the public. The ACCC can take into account a range of factors including making extensive market inquiries from competitors, customers, and major users in order to ascertain whether the merger would be in the public interest.

The Takeovers Panel is a body that is tasked with resolving disputes about a takeover bid. The Panel is a peer review body that is not concerned with the approval of mergers or amalgamations.

Currently, the *Fair Work (Registered Organisations) Act 2009* only requires that the FWC to ensure:

- that a valid ballot of members has been conducted – noting that not all mergers go to a ballot of members and those that do only require 25 per cent of members on the organisations' roll of voters to vote in order for a ballot to be valid;
- that there are no proceedings (other than civil proceedings) pending against the organisations seeking to merge; and
- that the newly amalgamated organisation will assume all legal responsibilities that arise from an existing organisation.

Applying a public interest test to the mergers of registered organisations is not a new concept. Under predecessor legislation, the former Australian Industrial Relations Commission was required to take into account the public interest when performing its functions in relation to registered organisations.[4]

[4] The last iteration of this requirement was subsection 103(2) of the now repealed *Workplace Relations Act 1996*.