Business Council of Australia

SUBMISSION

Submission on the provisions of the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

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Overview

The Business Council of Australia strongly supports the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (**the Bill**) and the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019*, which are currently before the Committee. The Bills reflect unfinished business arising from recommendations of the Heydon Royal Commission as well as other amendments necessary to strengthen the integrity of Australia's workplace relations system.

The Business Council has recently released a report on the state of enterprise bargaining in Australia showing that the system is in decline and that this is having adverse consequences for both businesses and workers.[1] A healthy enterprise bargaining system is crucial in lifting productivity and wage growth. However, the number of 'active' enterprise agreements within their nominal expiry date is at its lowest level in 20 years and the proportion of employees covered by 'expired' agreements reached 40% of all employees covered by national system agreements in 2018.

There are a range of reasons for this decline, one of which is a decline of confidence in the integrity of the system. The system is based on good faith bargaining obligations. It relies on both parties having confidence that the other will act in good faith. Two key reforms are necessary to restore such confidence:

1. Individuals entrusted with important responsibilities in the system should be fit and proper persons. Businesses are deterred from engaging in bargaining when they are concerned that the other party is not abiding by the rules; and

2. Money that is paid by businesses under the terms of enterprise agreements should be subject to rules that ensure transparency and accountability. Where businesses contribute to funds for the benefit of their workers, such funds should be used for this purpose and no other.

The two Bills currently before the Committee will help achieve these goals and ensure that strong rules apply to both businesses and unions.

Registered organisations have significant responsibilities in Australia's workplace relations system and are provided with unique rights and privileges in recognition of this. These include rights to appear before the Fair Work Commission and courts to represent members, rights to enter a workplace, rights to commence legal proceedings, and a key role in negotiating enterprise agreements.

However, with such rights and privileges come responsibilities and public expectations about the standards of conduct that these bodies should be required to meet. Unfortunately, there have been numerous publicly reported cases of serious misconduct involving certain registered organisations and their officers and small pockets in which a systemic culture of lawlessness exists, particularly in the construction sector, as confirmed in numerous judicial findings.

A registered organisation and its officials, regardless of whether the organisation represents employers or employees, should not be permitted to break the law or act in a manner

[1] "*The state of enterprise bargaining in Australia*", Business Council of Australia, August 2019: https://www.bca.com.au/the_state_of_enterprise_bargaining_in_australia

contrary to the interests of its members. There needs to be a clear consequence in these circumstance that serves as an effective deterrent to such behaviour.

The integrity of the workplace relations system is integral to its ability to deliver shared benefits for employers and employees. The Business Counsil supports the Bill as it will raise standards of conduct in the system. It will help ensure that organisations are better able to represent their members. It will provide that individuals who hold office cannot continue to hold office if they repeatedly act unlawfully.

Benefits of the Bill

The Bill proposes to make a series of measured and necessary amendments to the *Fair Work (Registered Organisations) Act 2009* (**RO Act**). The Bill will bring the law governing registered organisations into closer alignment with the law governing corporations. This is fair and reasonable, given the significant responsibilities that registered organisations are entrusted with.

If company directors deliberately and repeatedly breach Corporations Law they can be banned by a court from being company directors. If other professionals, such as doctors, nurses, psychologists, or lawyers, breach the laws that apply to them they can be stripped of their right to practice their profession.

It should be no different to office holders of registered organisations, who perform equally important roles.

The Bill goes no further than aligning the rules governing registered organisations and their officials more closely with those governing corporations and their directors. As such, it is a measured and incremental reform.

The issues

Current laws are not acting as an effective deterrent for law-breaking

It is very clear that the law has not been effective in addressing the problems of persistent law-breaking by certain registered organisations and their officers, including contempt of court orders imposed when there have been breaches of the law. This has led to observations being made by numerous judges that the penalties imposed for breaches have been inadequate to provide the specific deterrence that is conspicuously required.

It is clear that measures beyond financial penalties are needed to address recidivism, including the threat of officer disqualification or cancellation of an organisation's registration where there is a clear pattern or culture of unlawful behaviour. In the Business Council's view, the Bill reflects an appropriate response by the Parliament to the problem of systemic law-breaking.

The Bill's Explanatory Memorandum points out that the new grounds for cancellation of an organisation's registration are focused on dealing with circumstances where an organisation, its officials or members have a record of law breaking.[2] Critically, before deciding whether to cancel an organisation's registration the Federal Court would need to be satisfied that this

[2] Explanatory Memorandum, *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019*, p. ix.

would not be unjust, taking into account the interests of its members, the nature of the conduct, action taken to address the conduct and any other relevant matters.

The vast bulk of registered organisations that operate within the law should have no cause for concern. A strengthened regulatory framework that drives improved compliance will also help ensure that the recidivist behaviour undertaken by certain registered organisations does not detract from the good standing of those who are doing the right thing.

The need for effective sanctions when officers of organisations fail to act appropriately

As noted, special rights and privileges are conferred on registered organisations. They also play a role in influencing workplace culture and the policy framework regulating our workplaces. The role of unions has been likened to a public good which provides broader benefits for the community as a whole.

Given the role and influence that registered organisations have, the community is entitled to expect that they maintain standards of propriety that are higher than general community standards. It is also reasonable to expect that registered organisations are accountable for their actions, and that there is a consequence when they do not adhere to the standards reasonably expected of them.

The amendments proposed by the Bill seek to address conduct that does not meet acceptable standards, including by remediating a number of regulatory gaps under the current statutory framework:

- There is currently no consequence for acting as an officer while disqualified or if certain serious criminal offences have been committed. In contrast, the *Corporations Act 2001* (Cth)(**Corporations Act**)[3] sets out a strict liability offence for a person from acting as a 'shadow director' whilst disqualified. It is reasonable for there to be a similar offence for acting as an officer of a registered organisation while disqualified.

- Whilst the RO Act currently provides for mandatory disqualification for certain criminal offences, if a person has contravened their duties as an officer and has been subject to a civil penalty they cannot be disqualified from office – even if the conduct clearly demonstrates that the person was not fit and proper to hold the office.

The absence of strong sanctions in these circumstances means that there is currently nothing to deter further breaches of the law in cases of recidivism.

The need for appropriate remedial action where organisations do not function in a way that serves the interests of their members

In circumstances where organisations are not functioning in a way that serves the interests of their members (e.g. because there are serious breaches of duties by officers) there is a need for more effective and better-targeted mechanisms to be available to deal with this.

Expanding the grounds on which the Federal Court can make orders to appoint an administrator to ensure an organisation is operating lawfully is an appropriate policy solution. It builds incrementally on the existing power that the Court already has under the RO Act.

[3] Section 206A

Before appointing an administrator, the Court would need to consider the best interests of the organisation's members and be satisfied that this course of action would not cause a substantial injustice or impact the rights of workers to be represented by a registered organisation.

It is also reasonable to require officers and employees of registered organisations to assist appointed administrators so they can effectively carry out their role in remediation. The provisions of the Bill that create offences for a failure to do so replicate equivalent provisions in the Corporations Act, including s.438B, which requires directors to assist administrators and s.438C, which compels the delivery of an administrator's books.

The need to reinstate a public interest test for amalgamations

A public interest test for amalgamations previously applied prior to 2009. The previous *Workplace Relations Act 1996* included a general requirement for the Industrial Relations Commission to consider the public interest in making any decision regarding registered organisations.[4]

The reinstatement of the public interest test will help mitigate the risk of adverse effects arising from amalgamations of organisations. This includes the risk that an organisation's culture of lawlessness may spread to the organisation with which it is seeking to amalgamate. Enabling this to happen would only worsen a potentially serious problem if a large, law-breaking organisation was permitted to absorb smaller organisations into its operating model, building its asset base and capacity to pay penalties associated with wrongdoing.

A business model based on lawlessness is already contrary to the public interest and the interests of members. Extending the reach of such a model would clearly be contrary to the interests of the members of any other organisation that would merge with an organisation operating in this way.

Comparisons to equivalent laws

The provisions of the Bill draw on precedents in both corporations and industrial law. They reflect the objective of providing parity of regulation by applying established principles that already exist under comparable regimes, for example:

- **Disqualification** – the *Corporations Act* provides that company officials can be disqualified for breaching the *Corporations Act* and failing to prevent breaches by their company, and also makes it an offence to act while disqualified. Aspects of the *Corporations Act*, the *Fair Work Act* right of entry regime and *RO Act* disqualification regime also contain requirements for a person to be 'fit and proper'. New South Wales[5] and Queensland[6] IR laws allow disqualification for serious criminal offences, with a broader range of offences than under the current RO Act.

- **De-registration** – the *Corporations Act* regime for winding up companies includes broad grounds such as not acting in member's interests, and forms of corrupt conduct. South

[4] Section 103(2) of the *Workplace Relations Act 1996*

[5] Section 273 of the *Industrial Relations Act 1996* (NSW)

[6] Sections 704-705 of the Industrial Relations Act 2016 (Qld)

Australian industrial laws allow de-registration of state-registered organisations on the broad ground of where there is 'substantial reason'.[7]

- **Administration** – the administration regime in the Bill is based on the *Corporations Act* scheme for administration of companies and aspects of the comparable regime in the NSW *Industrial Relations Act* that applies to state-registered organisations.[8]
- **Mergers** – the *Competition and Consumer Act* test for merging companies provides that a merger that substantially lessens competition can only be approved if it is in the public interest. There are also already over 16 existing public interest test considerations applied by the Fair Work Commission under the current *Fair Work Act*, for example termination of enterprise agreements.[9]

Response to criticisms of the bill

Freedom of Association issues

Certain submissions to this inquiry and the Committee's previous inquiry into the 2017 version of the Bill have alleged that the Bill unduly interferes in the internal operations of registered organisations and inhibits democratic control by members.[10] The Business Council believes these concerns are misplaced.

The Bill contains no restrictions on the ability of an organisation to conduct its own elections and act in accordance with its own rules. There are already precedents for the various provisions of the Bill:

- The Court can already place an organisation in administration if it is dysfunctional;
- The Court can already de-register an organisation on the grounds of non-compliance with industrial laws;
- Officials of organisations can already be automatically disqualified if they are convicted of certain criminal offences;
- Officials can already be disqualified by courts for other forms of misconduct; and
- A public interest test for amalgamations previously applied.

For over a century, registered organisations have been regulated by Commonwealth laws that have placed limits on their operations. The registration of these organisations, their own internal rules and their continued existence are all already subject to the oversight of the Fair Work Commission and Federal Court under the RO Act. The rules of registered organisations must be approved by the Fair Work Commission. Organisations are not free to set their own rules as they please.

[7] Section 130(1)(e) of the *Fair Work Act 1994* (SA)

[8] Part 4, Division 11 of the *Industrial Relations Act 1996* (NSW)

[9] Section 226

[10] See, for example, the submission to this inquiry by the International Centre for Trade Union Rights

In particular, the areas of oversight amended by the Bill – disqualification of officials, de-registration, administration and mergers – are already regulated under the RO Act. The proposed amendments are incremental changes to these existing schemes.

When regulation is proposed that deals with registered organisations, reference is typically made to the International Labour Organisation's *Freedom of Association and Protection of the Right to Organise Convention 1948* (No. 87)(**Convention 87**).

Convention 87 provides that in exercising the rights to freedom of association '*workers and employers and their respective organisations, like other persons or organised collectives, shall respect the law of the land*'.

As the Explanatory Memorandum notes, if organisations and/or their officers deliberately breach the law, there must be an effective sanction.[11] An organisation that complies with its rules and applicable laws is not at risk of remedial action under the Bill.

The measures proposed within the Bill seek to address lawlessness and protect the integrity of registered organisations, including by requiring that the Court take into account the interests of members of an organisation in considering whether it would be unjust to de-register an organisation. The Bill cannot be reasonably said to infringe principles of freedom of association or Convention 87.

Application of sanctions to 'minor' breaches

In the course of the Parliamentary debate on the Bill, it has been argued that its provisions could be used to de-register a nurses union for taking unprotected industrial action over nurse-patient ratios.

The Business Council rejects this argument. In simple terms, it is analogous to arguing that a court would automatically disqualify an individual from holding a driver's licence because they once exceeded the speed limit.

The Bill creates a graduated penalty regime where administration or de-registration is a 'last resort' option where an organisation has systemic problems of dysfunction or law-breaking. The court would invariably take into account the fact that the Parliament has created a penalty regime in which breaches of industrial laws are subject to the relevant sanctions that apply to such breaches, with the more serious sanction regime reserved only for situations where the usual sanctions or remedies have proven to be ineffective.

Those unions that comply with the law and their own rules (which is virtually all of them) will not and cannot be affected by these provisions of the Bill.

Powers could be abused by those with standing to apply to the Court

A further argument that has been advanced against the Bill has been in relation to the provisions which give standing to the Minister and affected employers or employer organisations to make applications to the Court for disqualification, administration or de-registration. It has been claimed that this will 'weaponise' the law and enable it to be misused by parties which such standing.

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[11] Explanatory Memorandum, *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019*, p. xi.

The Business Council rejects this critique on several grounds.

First, the Federal Court already has the power under the RO Act to de-register registered organisations for certain breaches of workplace laws, and can do so on the application of any 'interested person'. The Bill does nothing more than codify the existing 'interested person' test.

Second, the Minister already has standing under the RO Act in relation to a range of matters dealing with registered organisations. The most recent exercise of this power was in 2012 when the Federal Court appointed an administrator to the Health Services Union on the grounds of its ongoing dysfunction.

Finally, and most importantly. the Bill does not hand power to any business or Minister to interfere in registered organisations. Only the Court has the power to impose the various remedies, and only when very clear criteria have been met.

Conclusion

Multiple court decisions have found that the statutory framework regulating registered organisations and penalties for non-compliance is not effectively deterring wrongdoing by some organisations and some officers. As a result, the Bill necessarily expands upon the remedies available to courts where a registered organisation or its officers repeatedly and wilfully breach the law, or fail to act in the best interests of their members.

The *Corporations Act* gives ASIC the power to apply to the Supreme or Federal Court to seek orders to disqualify a person from managing a corporation where a person has failed to take reasonable steps to prevent the corporation from breaking the law where there is a history of such failure.[12]

It is therefore reasonable for disqualification to be an option available to the court where there are multiple findings of wrongdoing by an organisation while a person is an officer, or if they have engaged in wrongdoing themselves.

In circumstances where there is an ingrained culture of lawlessness that significant penalties and other measures are failing to shift, the threat of de-registration is necessary as an effective deterrent. This is not an order that the Court would make regularly or approach lightly. However, a stronger regulatory response is needed to address recidivist cultures where breaking the law, paying the penalties or defying the orders of the Court has become a part of an organisation's business model.

Registered organisations play a significant role in our society and have special rights and privileges conferred on them. The integrity of the workplace relations system relies on all of its participants, particularly businesses and registered organisations, abiding by its rules. Measures to drive enhanced governance and compliance with the law are necessary to ensure its continued integrity. There is a clear need for stronger measures to ensure that registered organisations and those entrusted with their governance discharge their roles in a

[12] 206C-206EEA of the *Corporations Act 2001* (Cth)(Corporations Act) enables ASIC to apply to a State Supreme Court or the Federal Court for orders disqualifying a person from managing a corporation for a period the Court thinks fit. These powers provide that a person can be disqualified for breaches of the *Corporations Act* by the body corporate where they are have failed to take reasonable steps to prevent a contravention where the person has been an officer of two or more corporations where these circumstances arise.

manner that meets the reasonable expectations of their members and the broader community.

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