A•S•U
Australian Services Union

ASU Submission

Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

THE SENATE
STANDING COMMITTEE ON EDUCATION AND EMPLOYMENT

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1. The ASU

The Australian Services Union (ASU) is one of Australia's largest unions, representing approximately 135,000 members.

The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

Currently ASU members work in a wide variety of industries and occupations because the Union's rules traditionally and primarily cover workers in the following industries and occupations:

- Disability support
- Social and community services
- Local government
- State government
- Transport, including passenger air and rail transport, road, rail and air freight transport
- Clerical and administrative employees in commerce and industry generally
- Call centres
- Electricity generation, transmission and distribution
- Water industry
- Higher education (Queensland and South Australia)

The ASU has members in every State and Territory of Australia, as well as in most regional centres. Around 50% of ASU members are women, the exact percentage varies between industries, e.g. in social and community services around 70% of our members are women. ASU members carry a high level of personal, family and work responsibilities.

2. Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

The ASU contends that the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* (Cth) (Bill) is undemocratic, inconsistent with ILO Conventions and allows undue political and industry interference on how unions conduct themselves. The proposed amendments are being asserted despite ongoing criticism of Australia for failing to comply with international obligations in respect of non-interference in industrial organisations[1]

The Bill interferes with the right to freedom of association, the right to form and join trade unions and right of trade unions to function freely. It goes even further than the recommendations of the politicised Heydon Royal Commission.

[1] *Andrew Stewart's comments in* http://www.abc.net.au/news/2017-03-21/have-the-right-to-strike-laws-gone-too-far/8370980

Article 23(4) of the UN Universal Declaration of Human Rights sets out the underlying principles for international law on fundamental rights in the workplace, and states that, 'Everyone has the right to form and to join trade unions for the protection of his interests.'

Article 22(1) of the *International Covenant on Civil and Political Rights* (**ICCPR**) protects the right to freedom of association, including the right to form and join trade unions. Article 8(1) (a) of the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**) also provides for:

The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of these rights other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) (**ILO Convention 87**) also provides employer and employee organisations with protection for their organisational autonomy. Article 3 of ILO Convention 87 provides:

1. *Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*

2. *The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

The ILO Committee on Freedom of Association has made the following observations on the rights of organisations to organise their administration:

Legislative provisions which regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference by the public authorities.

Where such provisions are deemed necessary by the public authorities, they should simply establish an overall framework in which the greatest possible autonomy is left to the organizations in their functioning and administration. Restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body so as to avoid any risk of excessive or arbitrary interference in the free functioning of organizations.[2]

[2] *ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, Fifth (revised) Edition, 2006, para 369, as quoted in the Explanatory Memorandum to the Bill, p vii-viii*

The proposed amendments in short have scant regard for ILO Conventions and the fundamental rights of trade unions and are based on a premise that individual workers can survive on trickle-down economics and bargain individual contracts on their own without effective collective representation.

Trade unions in Australia are now the most scrutinised public organisations in the country. This comes at a time when Australians are fed up, not with trade unions, but rather with the total lack of scrutiny of corporations with corruption, wage theft and corporate excesses increasingly becoming a common business model rather than the exception. If the Federal Government was genuine about 'Ensuring Integrity' in all public organisations they would establish a National Anti-Corruption Commission. To argue otherwise is to only demand that registered organisations act under burdening regulation, while corporations and other public organisations can self-regulate their own integrity.

The ASU like other trade unions already have earned their integrity. The ASU has endeavoured to continually improve on its administrative and governance rules and adopt policies that promote best practice union governance. The ASU has continually reviewed its financial management and accountability policies and moved to adopt policies and vary financial management rules concerning financial decision making nationally and at branch level. In particular this includes credit card usage and authorisation of union payments. Every branch of the ASU has appointed compliance staff that meet regularly to ensure all reporting and disclosure obligations are met at all levels of the union. Extra external regulatory red tape will hamper the traditional work of union officers the majority of whom are honorary.

Further unnecessary regulation will discourage individuals from holding union office particularly those elected on an honorary basis and the many volunteers who believe workers should always have a strong collective voice. The aim of any heavy handed regulation will be to silence this voice so as trade unions become no more than community bystanders rather than at the forefront of setting minimum working conditions and social reform such as Medicare and compulsory superannuation to name a few.

3. Schedule 1 - Disqualification from Office

The Bill proposes to replace and expand the existing grounds for disqualification from holding office. The ASU's concern with this legislative overreach is as simple as the vested interests that would prefer to see the positive influence of trade unions marginalised. Once a ground for disqualification is established the Court may have regard to matters that occurred before the commencement of Schedule 1. An application for a disqualifying order can be brought by the Commissioner, the Minister or a 'person of sufficient interest'[3]

[3] *Currently disqualification applications can only be brought by the Commissioner, the General Manager, or a person authorised in writing by either: s 310(1). The Explanatory Memorandum notes that 'sufficient interest' has been interpreted as an interest beyond that of an*

A person of sufficient interest could potentially include an employer who was seeking a tactical advantage over a union in bargaining. The balance in power in the workplace would tip even further to employers, particularly large corporations who are free of any such level of scrutiny.

4. Schedule 2 – Cancellation of Registration and Alternative Orders

The Bill's expansion of the regime for the cancellation of registration of registered organisation interferes with the right to freedom of association, the right to form and join trade unions and the right of trade unions to function freely.

i. Interference with the right to form trade unions

The Bill strips the members of a union of their right to decide what is in their best interests and places it in the hands of the Court. Section 28K requires the Court to cancel registration if a ground is established and the organisation does not satisfy the Court that deregistration is unjust, having regard to various matters including the 'best interests' of the members. It is offensive that a Court should determine the best interests of the members of an organisation, rather than the members themselves.

In the case where a ground is established, the Court must cancel the registration of a union if the union does not satisfy the court that the cancellation of registration would be unjust. If the union satisfies the Court that cancellation of registration would be unjust, the Court may make alternative orders. These orders would allow the Court to decide that a properly elected person could not run the union, as well as who could be members of the union and how the organisation would carry on its activities and exercise its rights under the *Fair Work Act 2009* (Cth).

The Bill also invites the intervention of external bodies in the affairs of the union. The Bill may permit an employer or employer association to seek the deregistration of a union. Aside from the violation of the right to freedom of association, there is a risk that this standing could potentially be used by employers tactically during disputes and bargaining.

ii. Interference with the union's management of its affairs

The Bill may also prevent a union from strategically applying its resources in the best interests of its members. Under s 28C (1) (e), a ground will exist where the officers of an organisation have conducted the affairs of the organisation, or a part of an organisation, in a manner that is 'oppressive or unfairly prejudicial, or unfairly discriminatory against a member or a class of members' or is 'contrary to the interests of the members of the organisation or part as a whole'. Unions routinely focus their activities and the allocate resources to ensure that they can best advance the interests of their membership as a whole. This may mean a greater

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ordinary person and includes those whose rights, interests or legitimate expectations would be affected by the decision (Explanatory Memorandum, paragraph [33]).

focus on one section of the membership than another from time to time. So long as these decisions are made according to the democratic processes described in the organisations rules, they are an appropriate part of the organisation's self-management.

iii. Collective punishment

Section 28C establishes a system of collective punishment for individual actions by permitting the cancellation of an organisation's registration for the 'corrupt conduct of officers'. The section describes a number of situations in which this ground exists, covering a broad but vaguely defined range of acts committed by either a 'substantial number of the officers of the organisation' or two or more senior officers. In part this is because s 28C incorporates concepts from corporations law that cannot be applied in the industrial context. Subsections 28C (1) (e) and (d) mirror the ss 461 (e) and (f) of the *Corporations Act 2001* (Cth) ('Corporations Act'), which deals with the winding up of a company by a court. These provisions protect the property interests of shareholders, who will receive their share of the assets of the company after creditors have been paid. In the industrial context, where member rights are democratic and moral, the deregistration of a union will see the destruction of whatever rights they may have. Members, who may have been entirely divorced of the activities of the corrupt individuals, could then be denied industrial representation and the other benefits of trade unionism. Deregistration is not the appropriate remedy to deal with the corrupt conduct of individual union leaders.

5. Schedule 3 – Administration of Dysfunctional Organisations

Schedule 3 allows courts to force registered organisations or divisions or branches into administration or deregister them if they become 'dysfunctional' or are no longer serving the interests of their members. The Schedule expands the grounds on which the Federal Court may order remedial action to deal with governance issues in an organisation and expressly provide that the Federal Court may appoint an administrator to an organisation or part of an organisation as part of a remedial scheme.

The ASU is most concerned with the Minister, Commissioner and indeed "*any other person having a sufficient interest in the organisation*" having standing for an application to permit the appointment of an administrator to registered organisations as part of a remedial scheme for dysfunctional organisations. There are Federal Governments like the current Turnbull Government and previously the Howard Government; who have treated most if not all unions as dysfunctional with little or no role in a modern deregulated economy.

The Bill significantly expands the existing regime for administration of 'dysfunctional' organisations. According to the Explanatory Memorandum, these amendments are 'modelled and adapted from broadly equivalent provisions of the Corporations Act'[4] . However registered

[4] *Paragraph [155]*

organisations are not corporations and in any case the provisions are not consistent with the Corporations Act.

The free and democratic functioning of unions and employer organisations without regulatory, political or industry interference is recognised in international law[5].Australian research has demonstrated that corrupt practices within unions are more effectively addressed by member participation and internal democracy than by state regulation[6].

The Court has a broad power as to the remedial scheme that can be imposed on an organisation, which can include reports to be given to the Court and the holding of elections. The grounds under Schedule 3 include: 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; financial misconduct by officers; officers acting in their own interests; and the affairs of an organisation or part being conducted in a prejudicial or discriminatory manner. The ASU contends that this is an overreach as the ASU has operated within all considered boundaries of being an appropriate democratic industrial organisation, in contrast a court could in isolation; make a ruling that is inappropriate and labelled in the "best interests" of the members.

Under the Bill, they court can decide 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. As per the Corporations Act, an administrator can only be appointed by a liquidator, a secured party or the company itself. Whereas 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. The granting of standing to 'a person with sufficient interest' once again provides a tactical advantage for employers and corporations seeking every opportunity to attack unions and thereby reduce labour costs and further embed inequality in the workplace.

6. Schedule 4 – Public Interest Test for Amalgamations

The new public interest test for union amalgamations of two or more unions is specifically designed to stop the proposed amalgamation of the CFMEU, MUA and TCFUA regardless of the will of the members' vote in each and all of these unions. A range of persons can make submissions about 'compliance record events' where clerical and administrative oversights will be held against amalgamating unions while those having engaged in 'obstructive industrial action', regardless of the circumstances e.g. extremely unsafe workplaces; is relevant to the Fair Work

[5] *Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), Article 3*
[6] *http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8543.2009.00736.x/abstract*

Commission's decision[7]. The amendments enable significant regulatory, political and industry interference in the free and democratic functioning of unions.

7. Conclusion

The ASU is opposed to the Bill because the Federal Government has not made the case for why trade unions should be the most heavily scrutinised public organisations. The ASU contends that the Australian public would prefer to see a National Anti-Corruption Commission established so that the level of integrity expected of unions is also required from all corporations.

This Bill allows the Government, employers and business lobbyists to have a say over who can run a union. It violates ILO conventions on Freedom of Association. It gives even more power to corporations over their workers by direct interference with who leads the union and how they should lead it. Attacking unions just further raises inequality in Australian workplaces.

[7] *Explanatory Memorandum, paragraph [236]*