Australian Nursing & Midwifery Federation

The Senate Education and Employment Legislation Committee

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

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A. Introduction

1. The Australian Nursing and Midwifery Federation (ANMF) thanks the Senate Education and Employment Legislation Committee (the Committee) for providing this opportunity to comment on the provisions of the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (the Bill).

2. The ANMF is the national union for nurses, midwives and assistants in nursing with branches in each state and territory of Australia. The ANMF is also the largest professional nursing organisation in Australia. The ANMF's core business is the industrial and professional representation of its members.

3. As members of the union, the ANMF represents over 260,000 registered nurses, midwives and assistants in nursing nationally. They are employed in a wide range of enterprises in urban, rural and remote locations, in the public, private and aged care sectors including nursing homes, hospitals, health services, schools, universities, the armed forces, statutory authorities, local government, and off-shore territories and industries.

4. We ask the Committee to read our submission in conjunction with that of our peak body, the Australian Council of Trade Unions.

General comments on the Bill

5. In the second reading speech on the Bill the Leader of the House Christopher Pyne sought to justify the changes by stating:

> *"The Royal Commission into Trade Union Governance and Corruption identified countless examples of officials breaching their duties, engaging in blackmail, extortion, coercion and secondary boycott conduct, abusing their rights of entry, acting in contempt of court or failing to stop their organisations from repeatedly breaking the law."*
>
> *"All of these changes will help ensure that unions and employer groups focus on doing the right thing by their members and the industries they represent and ensure that when the law is broken, the court can take action.*

The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 will help improve, and in some cases restore, a culture of integrity to registered organisations—for the benefit of members and also the wider community." (Parliamentary Hansard 16/8/2017 at page 7)

6. The ANMF and its members have serious concerns about the politicisation of the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) and remain unconvinced about the value of the report and the recommendations of the Royal Commission given that its focus was on a small number of union officers within a small number of unions.

7. Many now view the Royal Commission as a lopsided fishing expedition for mainly partisan political purposes and, while a number of criminal allegations have been referred to the relevant authorities, many of the referrals have subsequently been found to be particularly weak as they fell short of the evidentiary test in a court of law.

8. Accordingly, reliance by government on the unproven findings of the Royal Commission is, in our view, very poor public policy. Further the Government's ongoing public rhetoric of alleged misconduct of registered organisations as justification of the need to make wholesale changes to the existing regulatory framework as contained in the Bill, is spurious, mischievous and intended to paint unions, in particular, as organisations that require enhanced scrutiny.

9. Despite what is actually a proud history by unions of sound governance, transparency and grass roots democracy, the Government looks to be attempting to use the unsubstantiated findings of the Royal Commission to demonise all unions and is seeking to do so in the absence of any real justification beyond a diminishing number of isolated events.

10. We note that extensive regulation to police registered organisations already exists in the Fair Work Act 2009 (FW Act) and the Fair Work (Registered Organisations) Act 2009 (RO Act). In particular the RO Act provides for regulation including:

    - Prescribing and regulating the rules of organisations;

- Determining membership of organisations;
- Regulating for the democratic control of organisations through elections;
- Imposing numerous and extensive reporting and accounting requirements on organisations; and
- Regulating the conduct of officers and employees of organisations and branches of organisations.

11. Apart from the discredited report by the Royal Commission there appears to be little to suggest the current regulatory framework is not working effectively for the vast bulk of trade unions and employer associations.

12. While the ANMF supports clear and effective regulation of registered organisations, the Bill appears to be little more than a vehicle for more prescription, regulation and procedural complexity intended to restrict the role and capacity of trade unions, in particular, to represent their members.

B. Specific comments on the Bill

Deregistration Measures

Introduction

13. Section 28 and section 29 of the RO Act in their present form provide a wide ranging discretion on the Federal Court to deregister organisations. The Court may also make orders adapted to address a variety of circumstances that may confront the Court in the context of a deregistration application.

14. The rationale advanced for the repeal of the current regime and its replacement is fourfold:

    a) Because it is said that it is "virtually impossible" to deregister an organisation (Second Reading Speech).

    b) Because deregistration is presently a costly and lengthy process (Explanatory Memorandum).

c) Because deregistration of organisations should be treated in a similar way to the winding up of companies under the Corporations law (Second Reading Speech) :and

d) Because it addresses concerns identified in the Royal Commission Final Report.

None of these reasons survive scrutiny particularly when the Bill is itself examined.

Virtually impossible to deregister

15. The claim in the Second Reading Speech that it is "virtually impossible' to deregister organisations is not based on any evidence or analysis.

16. There has been no attempt to use or test section 28 in its present form. On any view, the provisions are widely drawn investing a substantial discretion in the Court. No example of the current regime failing or attracting criticism from the Court is identified.

17. In any event the last deregistration (other than for technical reasons) was as a result of the Builders Labourers' Federation (Cancellation of Registration) Act 1996. This was a separate Act of the Parliament and was found to be valid (see ABCC v Commonwealth) (1986) 161CLR 88).

Costly and lengthy process

18. The claim that deregistration is a costly and lengthy process justifying changes is advanced in the Explanatory Memorandum. (See Compatibility Statement page ix). This proposition is supported by a single comment in the Final Report of the Trade Union Royal Commission. The Royal Commission's analysis quoted in full was as follows:

> ".....deregistration under the FW (RO) Act is a costly and lengthy process".

Again, there is simply no analysis or evidence advanced to support the claim as a basis for change.

19. It is hardly surprising that an application to deregister an organisation might become a costly and lengthy exercise. One might ask why should it not. The process involves depriving an organisations members of their right to belong to the registered organisation of their choice. Further, winding up proceedings involving companies are not infrequently long and costly exercises when opposed. The proposition seems to be that it should be cheap and quick to deregister organisations, or, as the Explanatory Memorandum describes it to "streamline" the process. ANMF rejects such an approach.

Corporations law winding up

20. The comparison of registered organisations with companies pervades the rationale for this Bill and many of its provisions. This approach is expressly advanced in saying that there should be a consistent standard as between the winding up of companies and the deregistration of registered organisations (See Second Reading Speech).

21. There are three objections to this approach:

    a. The similarities between the duties of officers of organisations and the duties of directors of companies do not mean that the character of companies and registered organisations are the same. Indeed, they are manifestly different. Companies are formed, generally, in the interests of shareholders and profit. Registered organisations are not for profit associations of employee members formed to advance the industrial interests of their membership.

       There is no call or policy rationale for the winding up provisions applying to corporations to be applied to registered organisations. An appeal to consistency for consistency's sake is not a substitute for coherent policy.

    b. The rationale of consistency in approach is in any event not applied to the deregistration measures proposed. The grounds for deregistration orders under proposed Section 28C extend far beyond the relevant provisions of the Corporations Law. For example while some of the winding up grounds in the Corporations Law have been adapted (see for example section 461 (1) (e); section 461 (1) (f) and section 232), other entirely new elements are introduced. For example:

i. Reliance is placed on the Law Enforcement Integrity Commission Act 2006, a law directed to corruption in, among others, the Australian Federal Police and the Australian Crime Commission; and

ii. Proposed sections 28D to section 28H have no analogue in the Corporations Law.

c. The evidence provisions such that a finding of fact in any Court in any proceedings is prima facie evidence in deregistration proceedings also has no equivalent provision. (See proposed sections 28C (2); section 28G (2) and proposed section 28H (3)). These are extraordinary provisions.

In stark contrast is section 1317E of the Corporations Law which requires express declarations to be made by a Court thereby requiring the Court and the parties to directly address the question of a finding appropriately framed and identified. (See section 1317E (2) of the Corporations Law).

Reliance on Trade Union Royal Commission

22. The Trade Union Royal Commission's focus was on the conduct of officials. It expressly rejected an approach of deregistration. It noted that the conduct of concern it had identified was that of officers not members and that deregistration may have a disproportionate effect on members. Significantly the Royal Commission made no recommendations for the amendments as now proposed. (See Royal Commission Final Report Volume 5 chapter 8)

No Rationale for Change

23. It is submitted that none of the four broad bases upon which the deregistration measures are supported can be made out. On the contrary, there is no good reason for change.

The practical onus

24. The quick and easy deregistration scheme proposed is achieved by the adoption of four controversial mechanisms.

a. The prima facie finding provisions under which a finding of fact in any Court in any proceeding may be used as prima facie evidence in any deregistration proceeding;

b. The form and industrial character of the grounds for deregistration. For example proposed section 28H provides as a ground for deregistration conduct by a substantial number of members of a class of members organising industrial action that is likely to have a substantial impact on the welfare of a part of the community. Because of the complexities surrounding what is or is not "protected" industrial action and the uncertainty about the nature of industrial action, it is inevitable that grounds for deregistration will arise in the normal ebb and flow of industrial negotiations and bargaining; and

c. With a number of potentially open ended basis for deregistration an obligation then shifts to the registered organisation to establish to the Court that it would be unjust for the deregistration to proceed (see section 28K).

d. The establishment of the quick and easy means of establishing grounds for deregistration will impose significant litigation burdens on registered organisations. This is particularly the cases in circumstances where the standing to bring such applications has been expanded to include any person with a sufficient interest. This issue is referred to below.

Standing

25. Proposed section 28 and 28A confer standing on "a person with a sufficient interest" to apply for the deregistration of a registered organisation or for alternative orders.

26. The inclusion of persons with "sufficient interest" is flawed for a number of reasons:

a. The current provision of section 128 refers to "person interested". This expression has an established meaning and has been considered by the Courts on a number of occasions. (See Builders Labourers' Federation v Master Builders Association of NSW(1986) 69 ALR 515; Re Dobison and the Master Builders Association of Victoria (1996) 18 IR302 and Grubb v FSPU (1972) 20FLR 356). There is no good reason to depart from the established jurisprudence in relation to the persons having appropriate standing.

b. The person with a sufficient interest formulation extends to a wide range of persons including no doubt disgruntled employers, disgruntled employees and opponents of registered organisations. Indeed the expansion of the class of person

able to bring proceedings combined with the quick and easy process for the establishment of grounds for deregistration (or the alternative orders) will cement deregistration measures as an avenue for demarcation disputes, bargaining disputes and industrial payback.

c. The Corporations Law accords standing in respect of winding up relevantly to regulators (and creditors) (see section 462(2) and section 232). However, proposed section 28 and section 28A of the measures abandon the focus on regulators and extend it to the political arena (i.e. the Minister) and anyone with "sufficient interest" wishing to attack or bring pressure to bear on a registered organisation.

d. The Royal Commission limited its proposals for regulation to the regulator and not to all comers.

e. The extension to all comers with a sufficient interest invites multiple applications by opponents of particular registered organisations expressed as applications for deregistration but made in the hope of securing alternative orders. This will be facilitated by the breadth of the grounds for an application. This in turn will impose an obligation on the registered organisation to participate in Court proceedings in order to establish that it would be unjust to make the orders sought.

Visiting the sins of Officers

27. The inclusion of grounds for deregistration of misconduct by as few as two officers of an organisations is, it is submitted, wrong in principle. It is wrong for a breach of the provisions of the Act by an organisation or its members for which a specific penalty is provided to be a ground for deregistration of a union. (See Re Australian Workers Union: Ex parte Killen (1915) 9 CAR333 at 345 per Powers J)

28. Further, by introducing a ground for deregistration of contempt it confuses quite different considerations, as the Federal Court pointed out in Mudginberri Station Pty Ltd v AMIEU (1985) 61 ALR 291. The question of whether deregistration should be ordered will, in general depend upon quite different considerations from those which apply in contempt proceedings.

29. The inclusion of officer conduct as a basis for deregistration, on the basis of claimed similar Corporations Law provisions, ignores the fact that registered organisations frequently have many hundreds of officers and many tens of senior officers (whatever that term means). The prospect of an officer contravening a civil remedy provision under the Fair Work Act and that being visited upon the organisation (e.g. section 344) however minor the breach, and thus constituting a ground for deregistration for an entire organisation, illustrates the over reach involved in these measures.

Freedom of association

30. The question of freedom of association cannot be ignored in respect of the specific measures proposed in relation to deregistration. Registration under the Act is the primary mechanism for trade union activity in Australia. In significant ways these measures unreasonably intrude upon the internal governance and affairs of registered organisations in a way inconsistent with relevant ILO conventions. For example, the deregistration of an organisation on the ground in proposed section 28C (e) has nothing to do with the activities of the organisation in so far as it impacts on others.

31. The repeated incantation of references to the interests of "public order" and the interests of others (See Explanatory Memorandum: Statement of Compatibility) cannot disguise what are intrusions inconsistent with ILO convention 87. (See also ICSER article 6(1) and 8(1) and ICCPR article 22).

32. The proposition that the proposed new deregistration scheme applies "where an organisation and its officers or members have broken the law."(Explanatory Memorandum page ix) invites analysis:

    a. The freedom of members to join a registered organisation of their choice is denied by deregistration;

    b. That freedom is proposed to be curtailed by the deregistration of the organisation because of the conduct of officers as few as 2 officers in one part of an organisation; and

c. The grounds are not confined to a breach of the law in any event. (E.g. proposed section 28C (1) (e)). Further, the grounds extend to potential inadvertent or technical breaches (e.g. section 28H (2) (a) (1).

d. The claim that the proposals:

> "...do not impact on the rights of workers to continue to be represented by a registered organisation." (Explanatory Memorandum)

simply invites ridicule.

Impact on Corporations law

33. The misconceived proposal to equate registered organisations with companies has the potential to destabilise corporate governance arrangements. The approach adopted invites the jurisprudence applying to registered organisations over very many years to be applied to the conduct and affairs of companies. Such an outcome would lead to significant uncertainty.

Disqualification of Officials

34. ANMF does not support the proposals in the Bill that are intended to provide the Registered Organisations Commissioner and the Courts with wide latitude to prevent members of unions from standing for, or holding an elected office in their union. The ANMF is strongly of the view that only union members should determine who and who does not represent them and accordingly the democratic functioning of registered organisations must, where possible, be free of interference by public authorities be they tribunals, courts or the bureaucracy.

35. The proposed restrictions to the democratic rights of members contravenes 'Article 3 of the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) (ILO Convention 87):

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:

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. 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.

36. Section 215 of the RO Act now provides that a person convicted of certain 'prescribed offences' is ineligible to be a candidate, or to be elected, or to hold an 'office' in an organization, unless the conviction and any term of imprisonment was more than 5 years ago. These provisions are obviously intended to ensure persons with relatively recent serious criminal convictions not be able to participate in the activities of trade unions. On its face such standards appear appropriate.

37. However, the Bill seeks to expand the definition of a prescribed offence to now include an offence against a designated law. The Bill defines a designated law to include:

    (a) The RO Act;

    (b) The FW Act;

(c) The Building and Construction Industry (Improving Productivity) Act 2016

(d) The Fair Work (Building Industry) Act 2012 as in force at any time before its repeal;

(e) Part IV of the Competition and Consumer Act 2010 (and any other provisions of the Act so far as it applies in relation to Part IV) and the Competition Code of each State and Territory;

(f) The Work Health and Safety Act 2011;

(g) Each State or Territory OHS law (within the meaning of the Fair Work Act);

(h) Part 7.8 of the Criminal Code (causing harm to, and impersonation and obstruction of, Commonwealth public officials) and any other provision of the Code so far as it applies in relation to that Part.

38. ANMF does not support an expansion of offences that are intended to prevent a member of a union from seeking or holding an elected office in a trade union. Members should not be disqualified from holding office for minor breaches of industrial or other laws. Such a measure, if enacted, would in effect impose a higher standard individual responsibility than that which is applied to corporate directors and executives.

Union Amalgamations

39. Part 2 of Chapter 3 of the RO Act currently provides for the procedures for the amalgamation of two or more registered organisations. These procedures include an application to the FWC by the affected organisations seeking approval for a secret ballot of members to be held on the proposed amalgamation. Under the present scheme, and subject to the Act, it is the committees of management of the registered organisations and their members who decide whether the amalgamation should or should not proceed. This is the way it should be.

40. Despite the relative ease of coming together, there have been few amalgamations of unions since 64 amalgamated/merged during the rationalisation process instituted by the ACTU between 1991 and 1996. It is worth noting that the union amalgamations of this era had the strong support of employer groups and government.

41. In 2010 a number of state based trade unions formalized their arrangements with counterpart federal unions in response to the consolidation and expansion of federal industrial laws. Once again this process was broadly endorsed by employers and the government of the day.

42. To the best of our knowledge there has been little or any dissatisfaction expressed by members, union officers or by relevant employers about the impact of amalgamations.

43. Despite this the government now seeks to make changes intended to stymie or prevent members of organisations determining their own representative and organisational structures.

44. New s72 D lists the matters the FWC must have regard to in determining whether a proposed amalgamation is in the public interest. s.72D principally requires the tribunal to consider the compliance history of the organisations seeking to amalgamate. s.72D(2) requires the tribunal to decide the amalgamation is not in the public interest if one of the applicant organisations has a record of noncompliance. There is no latitude for the tribunal to have regard to other relevant matters which may include improved compliance.

45. Our view that these changes are intended to prevent, frustrate and delay union amalgamations is supported by paragraph 206 of the Explanatory Memorandum which states that the changes will *"include a broad list of relevant persons who are allowed to make submissions to the FWC on whether an amalgamation is in the public interest;"*

46. Under the present arrangements submissions at amalgamation hearings may only be made by a person's (other than the applicants) only with the leave of the FWC and only in relation to a prescribed matter (s.54(3)). By deliberately seeking to expand the list to include those who would otherwise not be able to be heard is simply an attempt to frustrate and delay an application.

C. Concluding comments

47. The ANMF recommends the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 be rejected in its entirety.